

HANDBOOK  
OF  
COMMON LAW PLEADING

By

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and

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**XII**

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To

LYNNE KOFFLER

and

VIRGINIA REPPY RUSSACK

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4th Reprint 1986

**xv**  
**PREFACE**

Almost half a century has elapsed since the publication of the third, and final, edition of Shipman's standard text on Common Law Pleading. The late Dean Alison Reppy, with whom I was associated in teaching the subject of Common Law Pleading, and who devoted much of his life to study in the field, commenced this work in an effort to meet the need for a new comprehensive work on the subject, but an untimely death cut his efforts short. I was at the time in a position to assume this undertaking, and have worked over the many succeeding years upon the preparation of this work. The responsibility for that appears in these pages is therefore mine.

It is my hope that this work will be of assistance to members of the bench, bar, and students of the law, in their professional and scholarly pursuits, I will briefly describe some of the principal features of this work, which are directed towards this end.

First: Substantial new materials have been introduced into this work, in addition to the retention of the basic materials included in the Shipman text. This results in the presentation of a wider area of coverage in terms of topics dealt with than is generally found in previous works on Common Law Pleading. A reference to the detailed table of contents will indicate the topics covered with some particularity.

Second: In discussions of many of the topics, more has been included in the way of historical background and development than generally appears in previous comprehensive works on Common Law Pleading.

Third: Many of the topics have been more extensively treated than is generally the case in comprehensive works on Common Law Pleading. It has always been my view that significant emphasis should be placed upon materials dealing with the forms of action. Certainly most members of the bench, bar, and students of the law, carry with them the memory of Professor F. W. Maitland's incisive and perceptive observation that, "The forms of action we have buried, but they still rule us from their graves." This fact has remained too clearly in focus to be blurred from vision by the Codes, and it is considered at some length in the pages of this work.

The apportionment of additional space and emphasis is not limited to the forms of action, but is found in the treatment of many of the other topics throughout this work. This is done with a recognition of the validity of Justice Oliver Wendell Holmes' statement that, "whenever we trace a leading doctrine of substantive law far enough back, we are very likely to find some forgotten circumstance of procedure at its source." And to this we may add that whenever we deal with a modern procedural rule, we are likely to gain a better understanding of it, and a utility for its application, by virtue of a knowledge of Common Law Pleading.

Fourth: The status under Modern Codes, Practice Acts and Rules of Court of most of the principal procedural

devices, including all of the forms of action, is considered in the discussion of each of these topics. The vi-

**xvii**  
PREFACE

tality and usefulness of a knowledge of Common Law Pleading may be readily appreciated when we find that its concepts are still present, and underlie the various aspects of Modern Pleading and Practice.

Fifth: Extensive bibliographies of treatises and articles appear at substantially all of the points where the principal topics are discussed. Citations of treatises generally include edition and place and date of publication, so as to make the sources more readily available. Such extensive bibliographies have not been included in the earlier comprehensive works on Common Law Pleading, and it is hoped that this may have the effect of making research considerably less taxing, and substantially more productive.

Sixth: For the English cases, in addition to citations in the original reports, parallel citations in the English Reports, a reprint series, are also generally included. Previous comprehensive works on Common Law Pleadings do not contain these citations, as indeed the English Reports were not yet published when most of them were written. Since law libraries frequently do not contain the original reports, but do contain the English Reports, research may be pursued with these citations without the use of conversion tables and digests, which might otherwise be necessary. This, too, should make research easier and more productive for members of the bench, bar, and students of the law.

The decisions, both English and American, have been extensively cited in order to convey an understanding of Common Law Pleading in its early, middle, and later stages, its development, and its effect in Modern Pleading and Practice.

I can, of course, do no more than to record my indebtedness to the late Dean Alison Reppy, who commenced this work with such enthusiasm and dedication during his lifetime. I am also indebted to Shipman's work, and to the works of the many other outstanding authors who have contributed so much in the field of Common Law Pleading. Any attempt to recite all of their names at this point would result in the inevitable risk of omission, and I will therefore ask the reader to take notice of their respective contributions as he makes use of this work. I also wish to express my appreciation to my colleague, Professor John It. Dugan, for generously giving of his time to discuss with me certain of the topics included in this work. And for the secretarial services so faithfully performed by Mrs. Amy Smith in working upon the manuscript, I express my appreciation.

I have attempted to set out some of the characteristics of this work in the succinct form required of prefatory remarks, and sincerely hope that this work will serve the purposes for which it is intended.

**JOSEPH H. KOFFLER**

New York, New York  
October, 1069

**xvi"**  
**SUMMARY OF CONTENTS**

**PART ONE—DEVELOPMENT OF COMMON LAW PLEADING AND  
ITS IMPORTANCE IN MODERN PRACTICE**

<b>Chapter</b>	<b>Page</b>
1. Common-Law Pleading and Practice—Still Survives as the Basis of Modern Remedial Law	1

2.	The Development of the Common-Law Forms of Action	31
----	---	----

**PART TWO—OFFENSIVE PLEADINGS—GENERAL CONSIDERATIONS**

<b>3.</b>	<b>The Commencement of an Action</b>	<b>68</b>
4.	The Declaration—Form and General Requisites	82
5.	The Declaration—General Rules as to Alleging Place, Time, Title and Other Common Matters	102
6.	The Declaration—General Rules as to Manner of Pleading	130

**PART THREE—OFFENSIVE PLEADINGS—THE COMMON-LAW ACTIONS**

<b>7.</b>	<b>The Action of Trespass</b>	<b>151</b>
<b>8.</b>	<b>The Action of Trespass on the Case</b>	<b>173</b>
<b>9.</b>	<b>The Action of Trover</b>	<b>206</b>
<b>10.</b>	<b>The Action of Ejectment</b>	<b>225</b>
11.	The Action of Detinue	244
12.	The Action of Replevin	253
13.	The Action of Debt	273
14.	The Action of Covenant	303
15.	The Action of Account	310
16.	The Action of Special Assumpsit	318
17.	The Action of Indebitatus Assumpsit	337

**PART FOUR—DEFENSIVE PLEADINGS**

	18. Motions of Defendant After the Declaration and Before the Plea	368
19.	Considerations Preliminary to the Classification of Defenses	378
20.	The Demurrer	384
21.	Pleas—Dilatory	410
22.	Pleas—Peremptory or in Arrears	433
23.	The Replication	513
24.	The Production, Tender, and Joinder of Issue	532
		IIK

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**SUMMARY OF CONTENTS**

**PART FIVE—LITIGATING THE CONTROVERSY**

<b>Chapter</b>	<b>Page</b>	
25.	Trial by Court or by Jury	<b>536</b>
26.	Aider and Amendment	553
27.	Retrospective Motions	565

**PART SIX—JUDGMENT, EXECUTION AND APPELLATE REVIEW**

28.	The Judgment	584
29.	The Execution	589
30.	Appellate Review	596
	<b>Table of Cases</b>	<b>605</b>
	<b>Index</b>	<b>647</b>

n  
**TABLE OF CONTENTS**

**PART ONE. DEVELOPMENT OF COMMON LAW  
PLEADING AND ITS IMPORTANCE IN  
MODERN PRACTICE**

CHAPTER 1. COMMON-LAW PLEADING AND PRACTICE—  
STILL SURVIVES AS THE BASIS OF MODERN  
REMEDIAL LAW

See.		Page
1.	The Place of Common-Law Pleading in the Law	5
2.	<b>The</b> Importance of Common-Law Pleading	<b>10</b>
3.	<b>The</b> Functions of Pleading at Common Law	13
4.	The Development of Substantive Law out of Procedure	17
5.	Relation of Common-Law Pleading to Other Systems	19
6.	The Status of Common-Law Pleading Under the Codes	24
7.	Modern Procedure Under Codes, Practice Acts and Rules of Court— Merely Another Step in the Evolutionary Development of the Com mon <i>Law</i>	27

CHAPTER 2. THE DEVELOPMENT OF THE COMMON-LAW  
FORMS OF ACTION

8.	Origin of the Common-Law Forms of Action	32
----	--	----

9.	Classification of the Common-Law Actions	46
10.	The Ancient Real Actions First in Order of Development	47
11.	The Modern Real Actions	53
12.	The Modern Personal Actions	56
13.	The Effect of the Development of the Forms of Action	58

**PART TWO. OFFENSIVE PLEADING—  
GENERAL CONSIDERATIONS**

**CHAPTER 3. THE COMMENCEMENT OF AN ACTION**

14.	The Court	69
15.	Jurisdiction of Courts	70
16.	Process—The Original Writ	71
17.	Service—Personal and Constructive	75
18.	The Appearance	78
19.	The Pleadings	So

**CHAPTER 4. THE DECLARATION—FORM AND  
GENERAL REQUISITES**

20.	Formal Parts of the Declaration	82
21.	The Actual Statement of the Cause of Action	86
22.	Ultimate and Evidentiary Facts	90
28.	Ultimate Facts and Conclusions of Law	<b>92</b>
<b>24.</b>	Several Counts in the Same Declaration	94
<b>25.</b>	Joinder of Different Causes of Action	96

Koffler & Reppy Can.Law Pida. HO **XXI**

**TABLE OF CONTENTS**

Sec.		Page
26.	Different Versions of the Same Cause of Action	98
27.	Conformance to Process	100

**CHAPTER 5. THE DECLARATION—GENERAL RULES AS TO  
ALLEGING PLACE, TIME, TITLE AND OTHER  
COMMON MATTERS**

28.	Laying the Venue	102
29.	Local and Transitory Actions	103
30.	Local Facts—Venue in Pleadings Subsequent to the Declaration	107
31.	Consequences of Mistake or Omission	107
32.	Time	108
33.	When Time Must be Truly Stated	108
34.	When Time Need Not be Truly Stated	109
35.	Time of Continuing Acts	110
36.	Description of Property	lii
37.	Names of Persons	113
38.	Parties to the Action	114
39.	Showing Title	115
40.	Title in the Party or in One Whose Authority He Pleads	116
41.	Alleging Derivation of Title—Estates in Fee Simple	118
42.	Alleging Derivation of Title—Particular Estates	119
43.	Title by Inheritance	120
44.	Title by Alienation or Conveyance	120
45.	Manner of Pleading Conveyance	120
46.	The Written Conveyance and the Statute of Frauds	121
47.	Where a Party Alleges Title in His Adversary	122
48.	What is a Sufficient Allegation of Liability	122



49.	Proof of Title as Alleged	123
50.	Estoppel of Adverse Party	124
51.	Showing as to Authority	124
52.	Profert of Deeds	125
53.	Writings Pleaded According to Legal Effect	126
54.	Damages—General and Special	128

CHAPTER 6. THE DECLARATION—GENERAL RULES AS  
TO MANNER OF PLEADING

55.	Statements to be Positive	130
56.	Certainty in General	131
57.	When a General Mode of Pleading is Proper	134
58.	When General Pleading is Sufficient	135
59.	What Particularity is Generally Required	135
60.	Facts in Knowledge of Adversary	136
61.	Inducement or Aggravation	136
62.	Acts Regulated by Statute	138
63.	What May Be Omitted—Matters Judicially Noticed	139
64.	Matters in Anticipation	140
65.	Matters Implied	141
66.	Matters Presumed	142
67.	Surplusage	142
68.	Descriptive Averments	144
69.	Repugnancy	145
70.	Ambiguity or Doubt	146

XXII

TABLE OF CONTENTS

See.		Page
71.	Pleadings in the Alternative	14G
72.	Duplicity in General	147
73.	Inducement	148
74.	Consequences of Duplicity	148
75.	Pleadings to be True	149
76.	Conformance to Customary Forms	150

**PART THREE. OFFENSIVE PLEADINGS—THE  
COMMON-LAW ACTIONS**

CHAPTER 7. THE ACTION OF TRESPASS

77.	Scope of the Action	152
78.	Forms of the Declaration	154
79.	Declaration in Trespass—Essential Allegations:	
	(1) In General	156
80.	Declaration in Trespass—Essential Allegations:	
	(2) The <i>Plaintiff's</i> Right, Title, Interest or Possession	156
81.	Declaration in Trespass—Essential Allegations:	
	(3) The Defendant's Wrongful Act	164
82.	Declaration in Trespass—Essential Allegations:	
	(4) The Damages	170
83.	Status Under Modern Codes, Practice Acts and Rules of Court	170

CHAPTER 8. THE ACTION OF TRESPASS ON THE CASE

84.	Scope of the Action	173
85.	Case Distinguished From Trespass	176
86.	Election Between Trespass and Case	181
87.	Form of the Declaration in Trespass on the Case	182
88.	Declaration in Trespass on the Case—Essential Allegations:	

(1) In General	183
89. Declaration in Trespass on the Case—Essential Allegations:	
(2) The Plaintiff’s Right, Title, Interest or Possession	183
90. Declaration in Trespass on the Case—Essential Allegations:	
(3) The Facts Showing the Existence of a Legal Duty on the Part of the Defendant	183
91. Declaration in Trespass on the Case—Essential Allegations:	
(4) The Defendant’s Wrongful Act in Breach of His Duty	184
92. Declaration in Trespass on the Case—Essential Allegations:	
(5) The Damages	186
93. Particular Applications of Case as the Great Residuary Common-Law Remedy for Various Wrongs	187
94. Anticipating Defenses in Case	202
95. The Expansionistic Character of Case	203
96. Status Under Modern Codes, Practice Acts and Rules of Court	203

**CHAPTER 9. THE ACTION OF TROVER**

97. Scope of the Action	206
98. Property Which May be Converted	207
99. Trover—Distinguished from and Concurrent with Other Actions	209
100. Form of the Declaration in Trover	211

nIH

**TABLE OF CONTENTS**

<b>Sec.</b>	<b>Page</b>
101. Declaration in Trover—Essential Allegations:	
(1) In General	211
102. Declaration in Trover—Essential Allegations:	
(2) The Plaintiff’s Right, Title, Interest or Possession	212
103. Declaration in Trover—Essential Allegations:	
(3) The Defendant’s Wrongful Act of Conversion	217
104. Declaration in Trover—Essential Allegations:	
(4) The Damages	223
105. Status Under Modern Codes, Practice Acts and Rules of Court	223

**CHAPTER 10. THE ACTION OF EJECTMENT**

106. Scope of the Action	225
107. Ejectment—Distinguished From and Concurrent with Other Actions	236
108. Forms of Declaration and Common Consent Rule	236
109. Declaration in Ejectment—Essential Allegations:	
(1) In General	237
110. Declaration in Ejectment—Essential Allegations:	
(2) The Plaintiff’s Right, Title, Interest or Possession	238
111. Declaration in Ejectment—Essential Allegations:	
(3) The Wrongful Ouster or Dispossession	288
112. Declaration in Ejectment—Essential Allegations:	
(4) The Damages	238
113. The Judgment in Ejectment	239
114. Declaration in Trespass for Mesne Profits—Essential Allegations:	
(1) In General	239
115. Declaration in Trespass for Mesne Profits—Essential Allegations:	
(2) The Plaintiff’s Right, Title, Interest or Possession	240
116. Declaration in Trespass for Mesne Profits—Essential Allegations:	
(3) The Ouster or Ejectment	241
117. Declaration in Trespass for Mesne Profits—Essential Allegations:	
(4) The Damages	241

118.	Status of Ejectment and Trespass for Mesne Profits Under Modern Codes, Practice Acts and Rules of Court	241
------	---	-----

**CHAPTER 11. THE ACTION OF DETINUE**

119.	Scope of the Action	244
120.	Detinue—Distinguished From and Concurrent with Other Actions	247
121.	Forms of Declaration and Judgment in Detinue	248
122.	Declaration in Detinue—Essential Allegations:	
(1)	In General	249
123.	Declaration in Detinue—Essential Allegations:	
(2)	The Plaintiff's Right, Title, Interest or Possession	249
124.	Declaration in Detinue—Essential Allegations:	
(3)	The Unlawful Detention	250
125.	Declaration in Detinue—Essential Allegations:	
(4)	The Damages	251
126.	Status Under Modern Codes, Practice Acts and Rules of Court	251

**CHAPTER 12. THE ACTION OF REPLEVIN**

121.	Scope of the Action	<b>253</b>
128.	Beplevin—Distinguished From and Concurrent with Other Actions	257

**TABLE OF CONTENTS**

<b>See.</b>		<b>Page</b>
	129. Forms of Original Writ, Complaint, Declaration and Bond in Replevin	258
130.	Declaration in Replevin—Essential Allegations:	
(1)	In General	262
131.	Declaration in Replevin—Essential Allegations:	
(2)	The plaintiff's Right, Title, Interest or Possession	262
132.	Declaration in Replevin—Essential Allegations:	
(3)	The Wrongful Act of Taking and Detention by the Defendant	266
133.	Declaration in Replevin—Essential Allegations:	
(4)	The Damages	268
184.	Status Under Modern Codes, Practice Acts and Rules of Court	270

**CHAPTER 13. THE ACTION OF DEBT**

185.	Scope of the Action	274
136.	Debt—Distinguished From and Concurrent with Other Actions	<b>278</b>
137.	Forms of Declarations	279
188.	Declaration in Debt—Essential Allegations:	
(1)	In General	282
139.	Declaration in Debt—Essential Allegations:	
(2)	In Debt on Simple (Executed) Contract	285
140.	Declaration in Debt—Essential Allegations:	
(3)	In Debt on a Specialty	292
141.	Declaration in Debt—Essential Allegations:	
(4)	In Debt on a Statute	295
142.	Declaration in Debt—Essential Allegations:	
(5)	In Debt on a Judgment	297
143.	Status Under Modern Codes, Practice Acts and Rules of Court	299

**CHAPTER 14. THE ACTION OF COVENANT**

144.	Scope of the Action	303
145.	Covenant—Distinguished From and Concurrent With Other Actions	805
146.	Form of Declaration in Covenant	306

147. Declaration in Covenant—Essential Allegations:		
(1) In General		306
148. Declaration in Covenant—Essential Allegations:		
(2) The Execution of the Covenant		306
149. Declaration in Covenant—Essential Allegations:		
(3) The Promise		307
150. Declaration in Covenant—Essential Allegations:		
(4) The Performance of Conditions Precedent		307
151. Declaration in Covenant—Essential Allegations:		
(5) The Breach		307
152. Declaration in Covenant—Essential Allegations:		
(6) The Damages		808
153. Status Under Modern Codes, Practice Acts and Rules of Court		308

#### CHAPTER 15. THE ACTION OF ACCOUNT

154. Scope of the Action		310
155. Account—Distinguished From and Concurrent with Other Actions ..		813
156. Form of Declaration in Account		314

fly

#### TABLE OF CONTENTS

Sec.		Page
157. Declaration in Account or Account Render—Essential Allegations:		
(1) In General		815
158. Declaration in Account or Account Render—Essential Allegations:		
(2) A Statement of the Facts Showing a Legal Relation Between Plaintiff and Defendant Which Gives Rise to the Right to an Accounting		315
159. Declaration in Account or Account Render—Essential Allegations:		
(3) The Refusal to Account or the Breach		316
160. Declaration in Account or Account Render—Essential Allegations:		
(4) The Damages		316
161. Status Under Modern Codes, Practice Acts and Rules of Court		316

#### CHAPTER .16. THE ACTION OF SPECIAL ASSUMPSIT

162. Scope of the Action		318
163. Special Assumpsit—Distinguished From and Concurrent With Other Actions		821
164. Form of Declaration in Special Assumpsit		322
165. Declaration in Special Assumpsit—Essential Allegations:		
(1) In General		323.
166. Declaration in Special Assumpsit—Essential Allegations:		
(2) The Statement of the Making of the Contract and the Terms of Promise on which the Action is Founded		323
167. Declaration in Special Assumpsit—Essential Allegations:		
(3) The Consideration		325
168. Declaration in Special Assumpsit—Essential Allegations:		
(4) The Performance by Plaintiff of All Conditions Precedent ..		328
169. Declaration in Special Assumpsit—Essential Allegations:		
(5) The Breach		332
170. Declaration in Special Assumpsit—Essential Allegations:		
(6) The Damages		333
171. Status Under Modern Codes, Practice Acts and Rules of Court		334

CHAPTER 17. THE ACTION OF INDEBITATUS ASSUMPSIT	
172. Scope of the Action	337
173. Express Contracts Which Do Not Exclude Indebitatus Assumpsit ...	338
174. Indebitatus Assumpsit Distinguished From and Concurrent With Other Actions	343
175. Forms of Declarations in Indebitatus Assumpsit	344
176. The Common Counts	347
177. Contracts of Record and Statutory Liabilities	360
178. Declaration in Indebitatus Assumpsit—Essential Allegations:	
(1) In General	362
179. Declaration in Indebitatus Assumpsit—Essential Allegations:	
(2) Statement of an Executed Consideration	362
180. Declaration in Indebitatus Assumpsit—Essential Allegations:	
(3) The Promise	364
<b>181. Declaration in Indebitatus Assumpsit—Essential Allegations:</b>	
<b>(4) The Breach</b>	<b>364</b>
<b>182. Declaration in Indebitatus Assumpsit—Essential Allegations;</b>	
<b>(6) The Damages</b>	<b>865</b>
183. Status Under Modern Codes, Practice Acts and Rules of Court	365

xrvrI  
**TABLE OF CONTENTS**

**PART FOUR. DEFENSIVE PLEADINGS**

CHAPTER 18. MOTIONS OF DEFENDANT AFTER THE  
DECLARATION AND BEFORE THE PLEA

See.	Page
184. Demand of Oyer	368
185. Views, Aid-Prayer and Voucher to Warranty	370
186. Impar lance	371
187. Motion for a Eill of Particulars	372
188. Status Under Modern Codes, Practice Acts and Rules of Court	375

CHAPTER 19. CONSIDERATIONS PRELIMINARY TO THE  
CLASSIFICATION OF DEFENSES

189. Parties Must Demur or Plead	378
190. Pleas: Dilatory or Peremptory	379
191. Other Stages of Pleading Beyond the Declaration and Plea	380
192. Ejection to Demur or Plead—Factors to be Considered	
193. Forced Issues Tinder the Codes	382

CHAPTER 20. THE DEMURRER

194. The Nature and Office of the Demurrer	384
195. The Speaking Demurrer	387
196. The Demurrer and Other Pleadings Distinguished	388
197. The Scope of a Demurrer	388
198. General and Special Demurrers and Defects Available Thereunder	~89
199. Effect of Demurrer—By Way of Admission	396
200. Effect of Demurrer—Tn Opening the Record	400
201. Judgment on Demurrer	405
202. Status of the Demurrer—Under Modern Codes, Practice Acts and Rules of Court	406

CHAPTER 21. PLEAS--DILATORY

203. The Nature of Dilatory Pleas	410
204. The Order of Dilatory Pleas	411
205. Pleas to the Jurisdiction	412

206. Pleas in Abatement	416
207. Nonjoinder or Misjoinder of Parties Plaintiff in Contract	423
208. Nonjoinder or Misjoinder of Parties Defendant in Contract	424
209. Nonjoinder or Misjoinder of Parties in Actions Ex Delicto	426
210. Requisites of Pleas in Abatement	428
211. Pleas in Suspension	429
212. Judgment on Dilatory Pleas	430
213. Formal Commencement and Conclusion	430
214. Status Under Modern Codes, Practice Acts and Rules of Court	432

CHAPTER 22. PLEAS—PEREMPTORY OR IN BAR

215. The General Nature of Pleas in Bar	434
216. The Various Forms of Traverse or Denial	435
217. The General Requisites of Traverse	436

XXVII

TABLE OF CONTENTS

Sec.		Page
218.	Materiality of the Traverse	439
219.	Selection of Issuable Proposition	441
220.	Denial of the Essentials Only	441
221.	Negatives and Affirmatives Pregnant	444
222.	The Specific or Common Traverse	446
223.	The Special Traverse	447
224.	The General Issue—Its Nature and Use	457
225.	Pleas in Confession and Avoidance—The Nature and Form	460
226.	Giving Color	462
227.	Pleadings in Estoppel	465
228.	Admission by Failure to Deny	465
229.	Protestation	466
230.	Argumentative Pleas	467
231.	Pleas Amounting to the General Issue	469
232.	Partial Defenses	472
233.	A Pleading Bad in Part is Bad Altogether	473
234.	Several Defenses	475
235.	Duplicity in Pleas—In General	480
236.	Duplicity—Immaterial Matter	480
237.	Duplicity—Matter III Pleaded	481
238.	Duplicity—Matters Forming a Connected Proposition	482
239.	Duplicity—Protestation	484
240.	What Defenses May be Shown Under the General Issue and What May or Must be Pleaded Specially	484
241.	The General Issue in Trespass	485
242.	Pleas in Confession and Avoidance in Trespass	486
243.	The Hilary Rules—Their Effect Upon Negative and Affirmative Defenses in Trespass	488
244.	The General Issue in Trespass on the Case	488
245.	Pleas in Confession and Avoidance in Trespass on the Case	490
246.	The Hilary Rules—Their Effect Upon Affirmative and Negative Defenses in Trespass on the Case	492
247.	The General Issue in Trover	493
248.	Pleas in Confession and Avoidance in Trover	493
249.	The Hilary Rules—Their Effect Upon Negative and Affirmative Defenses in Trover	493
250.	The General Issue in Ejectment	494
251.	Pleas in Confession and Avoidance in Ejectment	495
252.	The General Issue in Detinue	496

253.	Pleas in Confession and Avoidance in Detinue	497	
254.	The Hilary Rules—Their Effect Upon Negative and Affirmative Defenses in Detinue		497
255.	The General Issue in Replevin	497	
256.	The Special Traverse in Replevin	499	
257.	Pleas in Confession and Avoidance in Replevin	500	
258.	The General Issue in Debt on Simple Contracts and Statutes	500	
259.	Pleas in Confession and Avoidance in Debt on Simple Contracts and Statutes		502
260.	The Hilary Rules—Their Effect Upon the Scope of the General Issue in Debt on Simple Contracts and Statutes	502	
261.	The General Issue in Debt on a Specialty	503	
262.	Pleas in Confession and Avoidance in Debt on a Specialty	503	
263.	The Hilary Rules—Their Effect Upon the General Issue in Debt on a Specialty		504

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### TABLE OF CONTENTS

Sec.		Page
264.	The General Issue in Debt on Judgments	504
265.	Pleas in Confession and Avoidance in Debt on Judgments	505
260.	The General Issue in Covenant	505
267.	Pleas in Confession and Avoidance in Covenant	507
268.	The Hilary Rules—Their Effect Upon the General Issue in Covenant	507
269.	The General Issue in Special Assumpsit	508
270.	Pleas in Confession and Avoidance in Special Assumpait	510
271.	The Hilary Rules—Their Effect on the Scope of the General Issue in Special Assumpsit	510
272.	The General issue in General or Indebitatus Assumpsit	511
273.	Pleas in Confession and Avoidance in General or Indebitatus Assumpsit	512
274.	The Hilary Rules—Their Effect Upon the Scope of the General Issue in General or Indebitatus Assumpait	512
275.	Comparison of Scope of Different General Issues	512
276.	Notice of Defenses Under the General Issue	513
277.	Plea Puis Darrein Continuance	513
278.	Recoupment and Set-Off	515

### CHAPTER 23. THE REPLICATION

279.	The Various Kinds of Replication	518	
280.	The Replication De Injuria—Definition, Scope and Availability	519	
281.	Forms of Plea and Replication De Injuria Thereto	521	
282.	Formal Parts of Replication	522	
283.	Status of the Republican De Injuria Under Modern Codes, Practice Acts and Rules of Court	522	
284.	Departure Defined and the Reason for the Rule Against Departure	525	
285.	The Kinds of Departures and the Stage of Pleading at Which They May Occur		526
286.	The Mode of Taking Advantage of a Departure	528	
287.	Status of Departure Under Modern Codes, Practice Acts and Rules of Court		529
288.	New Assignment—Definition, Necessity and Application	529	
289.	Form of New Assignment	530	
290.	New Assignment as in the Nature of a New Declaration	530	
291.	Status of New Assignment Under Modern Codes. Practice Acts and Rules of Court		531

CHAPTER 24. THE PRODUCTION, TENDER, AND  
JOINDER OF ISSUE

292. Production of Issue	582
293. Tender of Issue	532
294. Joinder of Issue	535

**PART FIVE. LITIGATING THE CONTROVERSY**

CHAPTER 25. TRIAL BY COURT OR BY JURY

295. Trial by Court	536
<b>296. Trial by Jury</b>	<b>538</b>

KoTher & Reppy CornLaw Pldg. \*1.5—2

XXIX

**HANDBOOK**

ON

**COMMON-LAW PLEADING**

PART ONE

DEVELOPMENT OF COMMON LAW PLEADING  
AND ITS IMPORTANCE IN MODERN  
PRACTICE

See.

1. The Place of Common-Law Pleading in the Law.
2. The Importance of Common-Law Pleading.
3. The Functions of Pleading at Common *Law*.
4. The Development of Substantive Law out of Procedure.
5. Relation of Common-Law Pleading to Other Systems.
6. The Status of Common-Law Pleading Under the Codes.
7. Modern Procedure Under Codes, Practice Acts and Rules of Court— Merely Another Step in the Evolutionary Development of the Common Law.

**COMMON-LAW PLEADING**, the ancient Reign of Edward I (1272~1307)<sup>1</sup> and further **methodology used for bringing legal issues** perfected during the Reign of Edward **III** before the Courts of England, is as old as **the**

I. See comment in Stephen, *A Treatise on the Principles of Pleading in Civil Actions*, c. II, Of the Principal Rules of Pleading, 147 (3d Am. Ed. by Tyler, Washington, B. C. 1892). Cf. The Statement of Sir Mathew Rain, in *The History of the Common Law*, c. VIII, 173 (4th Ed., Dublin, 1792).

**CHAPTER 1**

**COMMON-LAW PLEADING AND PRACTICE—STILL  
SURVIVES AS THE BASIS OF MODERN  
REMEDIAL LAW**

Anglo-Saxon Legal *System* and as new as yesterday's cases before the Trial and Appellate Courts of the United States. First formed and cultivated as a science in the

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In general on the subject of *Common-Law* Pleading, see the following:

**Treatises:** Glanvill, *Tractatus de Legibus et Consuetudinibus Angliae* (1187—1189) [New edition edited by George B. Woodhine, 4 vols. (New Haven, 1932)]; Bracton, *Do Legibus et Consuetudinibus Angliae* (1250-4258) (London, 1640); *Casus Placitorum*, a collection of decisions of Judges, all of whom lived before 1260, according to Holdsworth, and which in style and subject matter anticipated the Year Books; *Yet Assayer* (before 1267), a tract on Procedure probably by Ilengham, and reported in Woodbine, *Pour Thui'teenth Century Law Tracts* (New Haven, 1910); *Cadit Assisa* (1267 or after), a summary of that part of Bracton's Treatise dealing with the Assise of Mort d'Ancestor (new edition by Sir Travers Twiss, London, 1878—1883); Hengham, *Magna* (1270—1275), based on Bracton, and containing information on the rules of Pleading and Procedure in the Real Actions; Hengham, *Pana* (1285 or after), containing Instruction as to Pleading and Procedure in certain Real Actions; Britton, *Ancient Pleas of the Crown* (Trans. by F. M. Nichols, 1270); Fleta, *An Epitome of Britton* (1290); *Articuli ad Novas Narrationes* (1326—1340), consisting for most part of Precedents of Pleading; *Register of Writs* (1326—1377); Pynson's *Book of Entries* (1510); Fitzherbert, *Natura Brevium* (1534), a selection of Writs together with a commentary; Rastell's *Entries* (1564); Theloau, *Digest of Original Writs and Things Concerning Them* (1579), a most orderly treatise on Procedure grounded on the Year Books and printed at the end of the 1687 edition of the *Register of Writs*; Coke, *Book of Entries* (1614); Powell, *Attorney's Academy* (1623); Buer, *Doctrina Placitandi, or The Art and Science of Pleading* (1640); Coke, *Declarations and Pleadings* contained in his eleven *Books of Reports* (1650); Aston, *Placita Latine Rediviva: A Book of Entries* (1601—1878); Browne, *Formulae beie Pledtandi: A Bool of Entries* (1671, 1675); *Liber Placitandi* (London, 1674), a book of Special Pleadings containing Precedents; Vivian, *The Exact Pleader: A Book of Entries* (1684); Clift, *A New Book of Declarations, Pleadings, Verdicts, Judgments, and Judicial Writs, with the Entries Thereupon* (1703, 1719); Lilly, *A Collection of Modern Entries* (1723, an English edition appeared in 1741); Euer, *A System of Pleading, including translation of the Doctrina Placitandi, or the Art and Science of Pleading* (Dublin 1701); *American Precedents and Declarations* (Boston, 1802); Wentworth, *A Complete System of Pleadings* (London 1797-49); Story, *Selection of Pleadings in Civil Actions Subsequent to the Declaration* (Salem 1805); Lawes, *Elementary Treatise on Pleading* (London 1806) list Am. from 1st London Cd. (Portsmouth, N. N. 1808)]; Booth, *The Nature and Practice of Real Actions* (1st Am. ed. New York 1808); Lawes, *Practical Treatise on Pleading* (Boston 1811); Hening, *The American Pleader and Lawyer's Guide*, 2 vols. (New York 1811); Chitty, *Treatise on Pleading with Precedents*, 3 vols. (~pringfield 1833); Harris, *Modern Entries*, 2 vols. (Edited by Evans, Baltimore 1821); Jackson, *Treatise on the Pleadings and Practice of Real Actions* (Boston 1828); Saunders, *The Law of Pleading and Evidence in Civil Actions* (2d Am. ed., Philadelphia 1831); Gould, *Treatise on the Principles of pleadings In Civil Actions* (1832); Tyrwhitt, *Pleading* (London 1846); Williams, *Introduction to Pleading and Practice* (London 1857); Stephen, *Principles of Pleading in Civil Actions, a View of the Whole Proceedings in a Suit at Law* (3rd Am. ed. from 2d London cd, by Tyler, Washington, D. C. 1892); Evans, *Pleading in Civil Actions* (2d ed. by William Miller, Chicago 1879); Heard, *Principles of Civil Pleading* (Boston 1880); Maitland and Baildon, *The Court Baron* (London 1891); Chitty, *Treatise on Pleading and Parties to Actions, with Precedents and Forms* (London 1808; 16th Am. ed. by J. C. Perkins, Springfield 1879); Shinn, *Treatise on Pleading and Practice* (Chicago 1892); McElvey, *Principles of Common-Law Pleading* (1st ed. New York 1894); Stephen, *Principles of Pleading in Civil Actions* (Am. ed. from 5th English ed., by Wihiston, Cambridge, 1895); Shinn, *Treatise on Pleading and Practice*. 2 vols. (Chicago 1890); Poe, *Pleading and Practice in Courts of Common Law* (Baltimore 1897); Perry, *Common-Law Pleading* (Boston 1897); Martin, *Civil Procedure at Common Law* (St. Paul 1905); Maitland, *Equity, The Forms of Action at Common Law* (Cambridge 1909); Woodbine, *Pour ThIrteenth Century Law Tracts [on Pleading]* (New Raven 1910), containing: *Judicium Essoniorum* (1267—1275), a tract on Essoing probably by Hong-ham; *Eceptienes ad Cassandum Brevia* (7285 or after), [tract on the Writs]; *Modus Componendi Brevia or Cum Sit Necessarium* (1285 or after), (a tract on the Writs); Millar, *Common-Law Pleading* (Chicago 1914); Puterbaugh, *Common Law Pleading and Practice In Illinois* (6th ed. by L. D. Puterbaugh, Chicago 1916); Scott, *Fundamentals of Procedure in Actions at Law* (New York 1922); Shipman, *Handbook of Common Law Pleading* (3d ed. by Ballantine, St. Paul 1923); Winfield, *History of Conspiracy and Abuse of Legal Procedure* (Cambridge 1925); Buhlen and Leake's *Precedents of Pleadings in Actions in the King's Bench Division of the Nigh Court of Justice* (8th ed. by W. Wyatt-Paine, London 1924; 9th ed., London 1935); O'Donnell, *Procedure and Form~ of Common Law Pleading* (Washington, B. C. 1934); Plucknett, *Concise History of the Common Law* (3d ed, London 1940; 4th ed., London 1948); Fifoot, *History and Sources of the Common Law* (London 1949); Odgers, *Principles of Pleading and Practice In Civil Actions In the nigh Court of Justice* (1st ed., London 1891; 3d e,L, London 1897; 4th ed., London 1900; 5th ed., London 1903; 6th ed.,

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## COMMON-LAW PLEADING

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(1327—1377) - it has served each succeeding generation as an effective instrument in the Administration of Justice, and today is still very much alive, both as an Operating System and as a guiding force in the recurring Waves of Reform designed to correct its abuses.

For more than Six Centuries, it was the only Method of Pleading in the Common-Law Courts of England—King's Bench, ExcheqLondon 1906; 7th ed., London 1912; 14th ed., London 1952).

**casebooks~ Ames, A** Selection of Cases on Pleading (1st ed., Cambridge 1875; 2d ed., Cambridge 1905); Shipp and Daish, Cases Illustrating Common-Law Pleading (Chicago 1903); Keen, Cases on Pleading (Boston 1905); Sunderland, Cases on Common-Law Pleading (Chicago 1913); Lloyd, Cases on Civil Procedure (Indianapolis 1915); Scott, Cases and Other Authorities on Civil Procedure (Cambridge 1915); Whittier and Morgan, Cases on Common-Law Pleading (St Paul 1916); Cook and Hinton, Cases on Pleading at Common Law (Chicago 1923); Reppy, Cases on Pleaffing at Common **Law (New York 1928)**; Magfl, Cases on Clvii Procedure (St. Paul 1927); Lloyd, Cases on Pleading jn Actions at Law (Indianapolis 1927); Clark, Cases on Common-Law Pleading (Cincinnati 1931); Keigwin, Cases on Common-Law Pleading (1st ed., Rochester 1926; 2d ed., Rochester 1934); Cook and Hinton, Cases on Pleading at Common Law (revision of Part I, Common Law Actions) (Chicago 1940); Atkinson, Introduction to Pleading and Procedure (Columbia 1940); Scott and Simpson, Cases and other Materials on Judicial Remedies (Cambridge 1946); Scott and Simpson, Cases and Other Materials on Civil Procedure (Boston 1950); Reppy, Introduction to Civil Procedure (Buffalo 1954).

5- In referring to the Improvement In the Science of Pleading, Sir Edward Coke declared: 'In the Reign of Edward III (1327—i277) Pleadings grew to Perfection, both without lameness and curiosity; for then the Judges and Professors of Law were excellently learned, and then Knowledge of the Law flourished; the Serleants of the Law, &c. drew their own pleadings, and therefore [it was] truly said by Justice Thirning, in the Reign of Henry IV (1399— 1413) that *in the time of Edward III* the Law was in a higher degree than it had been any time before; for before that time the Manner of Pleading w~s but feeble, In comparison of that It was afterward In the Reign of the same KIng." 2 Coke, Lit. tieton, 304b, Lib. 3, Cap. 0, ~ 534 (1st Am. from the 16th European ed. by Francis Hargrave and Charles Butler, Philadelphia, 1812).

uer and Common Pleas—and for two hundred years it was the exclusive procedural device leading to the Trial of Legal Issues in the United StatesIt was, however, subject to many defects, due largely to the fact that the entire English Procedural System had grown up in a patchwork fashion,<sup>3</sup> while the constantly expanding Substantive Law was outgrowing the Forms of Action which gave it birth. In the latter part of the Eighteenth and early part of the Nineteenth Centuries, under the impetus of Bentham's searing criticism of the existing System of Law in England, with its Courts, its Special Pleading, and its general atmosphere of Delay and Administrative Inefficiency, these restrictive influences be-caine clear to the people, a demand for Reform sprang up and the movement for the improvement of procedure slowly got under way,

The impact of this development, strangely enough, first bore fruit in America in the State of Louisiana, with the framing of Livingston's Code of Practice ~ and the Penal Code in 1824, which latter was never adopted.~ This was followed in England by the adoption of the Rillary Rules in 1834,6 and

3. "The Remedial Part of the Law resembled a mass of patchwork, made up at intervals and by piecemeal, withoutany preconceived plan or system, for the purpose of meeting the exigencies of the times by temporary expedient" Walker's Introduction to American Law, Pt, VI, Lecture **xxxv**, 569 (11th Cd., Boston, 1905).

4. Enacted by Louisiana in 1805.

5. Livingston's Penal Code, which was a product of Intensive preparation, and was published in 1824, was never enacted Into Lair as such by the Legislature of Louisiana.

Edward Livingston was born in 1764 and died In 1836, or about six years after Field began his Professional Career. A native of New York, and a brother of Chancellor Robert It. Livingston, his Penal Code of Louisiana, which was published in 1824, attracted great attention in England and on the Continent. David *Dudley Field* Centenary Essays, 19 (Edlited by Reppy, New York, 1949).

t The Hilary Rules, designed to restore the ancient strict Common-Law theory as to the Scope of the

#### BASIS OF MODERN REMEDIAL LAW

in the United States by the New York Code of Procedure in 1848.~ Thereafter, in relatively quick succession, the English Parliament enacted the Common-Law Procedure Acts of 1852,8 1854,<sup>o</sup> and 1860,10 and the Supreme Court of Judicature Acts of 187311 and 1875,12 now for the most part replaced by the Supreme Court of Judicature (Consolidation) Act of 1925.13 And in 1938 the Supreme Court of the United States made effective the New Federal Rules of Civil Procedure.<sup>14</sup> In conseGeneral Issue, were promulgated pursuant to the Law Amendment Act, 3 & 4 Wm. IV, c. 42, ~ 1 (1833).

For the history and effect of the Hilary Rules in England, see article by Holdsworth, *The New Rules of Pleading of the Hilary Term*, 1 *Cam.L.J.* 261 (1923); for the history and effect of the Hilary Rules in the Several States of the United States, see, Reppy, *The Hilary Rules and Their Effect on Negative and Affirmative Pleas under Modern Codes and Practice Acts*, 6 *N.Y.U.L.Q.Rev.* 95 (1929),

7- "After careful consideration and amendment by the New York Legislature, the draft [of a proposed code] was enacted into Law on April 12, 1848, N. Y.Laws 1848, c. 379, to become effective on July 1 of the same year. Written in the form of a Code Containing 391 Sections, it became known at once as the Code of Procedure or as the Field Code. This title was far too broad in scope as the Act related only to a small portion of the Adjective Law, and expressly retained the Old Common Law or Statutory Rule where not expressly abolished by the Code." Reppy, *The Field Codification Concept*, in the *David Dudley Field Centenary Essays*, 17, 33— 34 (Edited by Reppy, New York, 1949).

8. 15 & 10 Vict. c. 76 (1852).

9. 17 & 18 Vict. c. 125 (1854).

10. 23 & 24 Vict. c. 120 (1860).

11. 36 & 37 Vict. c. 06 (1873).

12. 38 & 39 Viet, c- 77 (1875).

13. 15 & 10 Geo. V. e. 49 (1925).

14. The Federal Rules were drafted by an Advisory Committee appointed by the Supreme Court under the authority of a Federal Statute enacted in 1934. Act of June 19, 1934, § 651, ~ 1, 2; 48 Stat. 1064, 28 U.S.C.A. ~ 723b, f13c. See, on the earlier phases of the struggle for Federal Procedural Reform, article by Shelton, *The Reform of Judicial Procedure*, 1 *Va.flRev.* 89 (1913).

For detailed information concerning the adoption, background and drafting of the Federal Rules of Civil Procedure, see Clark, *Handbook of the Law*

sequence thereof, both at home and abroad, the System of Pleading as developed at Common Law, has been Modified by Judicial Decision, Changed by Statute, or by Rule of Court, and in some Jurisdictions ostensibly swept away in its entirety—so the Reformers thought—but subsequent events have cast grave doubts on this conclusion, as the solemn and stubborn fact is that Common-Law Pleading still survives as the basis of our Modern Remedial Law.'~

Select any individual and you will find that he is what he is today because **of what** his father and mother were yesterday; he cannot escape his ancestry, but must make his way through life with the physical, mental, moral and spiritual assets with which he was naturally endowed by the union of his parents. It is true that within certain limits he may seem to change with his environment,

of code Pleading, e. I, *History, Systems and Function of Pleading*, 31—39 (2d Ed., St. Paul 1947).

In this connection it should be recalled that progress in the Reform of Criminal Procedure has followed up and to some extent paralleled the Reform of the Civil Procedure which has been under way since 1848. In 1930 the American Law Institute issued its Code of Criminal Procedure, which has subsequently substantially influenced State Criminal Procedural Developments In the Several States, In 1941, pursuant to the rule-making authority granted to the Supreme Court by Congress, the Advisory Committee on Rules of Criminal Procedure was appointed by the Court, which published two Preliminary Drafts, with notes, and its Final Report to the Court in July, 1944. The rules suggested therein were adopted, with certain modifications, by the Court on December 26, 1944, to become effective on March 21, 1946. The Court also gave directions that the Rules be reported to Congress in accordance with the terms of the Enabling Act, 323 U.S. 821, 65 S.Ct. CLXXIV (1944).

See, also, Editorial, "To Form a More Perfect Union", 32 *A.B.A.J.* 90 (1940); Dession, *The New Federal Rules of Criminal Procedure*, Part I, 55 *Yale L.J.* 694—714 (1946); Part II, 58 *Yale L.J.* 197—257 (1947).

15. "While the New Rules have abolished the distinctive Common-Law Forms, the essential and differentiating rules applicable to Pleading as established at Common Law still survive as a basis of Remedial Law." *Michigan, S.*, In *Ward v. Huff*, 94 *N.J.L.* 81, 84, 109 *A.* 287, 288 (1920).

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## COMMON-LAW PLEADING

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acquire a better training, and contribute more to the community than did his forbears, but any advance or improvement he may make must be done within the limits of his ancestral background. And so it is with institutions such as the Law which, after all, are merely the product of joint individual effort. The Law is what It is today because of what the

Law was yesterday; it cannot escape its ancestry, and it, too, must progress against the background of its history. Like the individual, so with the Common-Law System of Procedure, which we all proudly claim as a priceless part of our Anglo-Saxon heritage, **we** may change, we may add to or take away those Parts of the System which have outgrown their usefulness, just as the Modern Common-Law Actions superseded the Old Real Actions<sup>16</sup> when they became archaic, but it is no more possible, in any realistic sense, to abolish the System in its entirety, with all its implications for both the past and the future, than it is for an individual to destroy his ancestry, or for mankind to abolish history or civilization.

- Infinite damage has been done to the cause **of legitimate** Legal Reform, to the cause of

16. The old Real Actions fell under one of the heads of Blackstone's famous classification of Actions as Real, Personal and Mixed. The Real Actions were by far the most important during the early developmental period of the Common Law. Included therein were Writs of Right Proper and Writs in the Nature of Writs of Right—such Writs, among others, as the Writ of Right de rationabili parte, the Writ of Advowson, the Writ of Dower, the Writ of Dower wide nihil Rabet, and the Writ of quare impedit. These actions were feudal in character and were concerned with disputes over land. Because of the technicalities required in their control and the length of time involved in carrying *their* process through, these actions, along with those which fell under the other two heads, were gradually superseded by what are now known as the Eleven Modern Common-Law Personal Actions, as a result of evolutionary steps in the development of the Common Law. What had,

in effect, long before occurred as a matter of practice, was officially recognized by the Real Property Limitation Act of 1883, 3 & 4 Wm. IV, c. 27, § 36, which swept aside the Real and Mixed Actions, with certain exceptions, effective December 31, 1834.

Legal Education, at the expense of litigants, students of law, and the public welfare generally, by proclaiming the concept that all that has gone before in our procedural ancestry should be regarded as obsolete and worthless,<sup>17</sup> and is not to be considered *in terms of* Modern Pleading and Practice, and in terms of Modern Legal Education. Those who take this limited view have clearly confused the real merits of the Common-Law System with those portions of the System which were needlessly technical, thus overlooking the salient fact that it had developed many sound and enduring principles of legal procedure. They have also overlooked the fact that there is greater similarity in the essential principles underlying *Pleading* at Common Law, in Equity, under Modern Codes and Practice Acts, and even under the New Federal Rules of Civil Procedure now in effect in the Federal Courts, than is generally realized.<sup>18</sup>

17. Sir Montague Crackeathorpe, O.C., in an address to the American Bar Association, in reference to the utility of the study of Common-Law Pleading stated: "In the hands of those who understood it, the System of Common-Law Pleading was infallible in attaining the purpose for which it existed. If all who brought Causes to Trial had possessed a proper acquaintance with this Branch of Law and a reasonable mental alertness, it would never have been hinted that Pleading was a means of turning the decision of a question from 'the very Right of the Matter' to immaterial points. But pleaders of inferior and slovenly mental disposition suffered themselves to be misled, deliberately it is to be feared, by theft—more acute brethren; and the popular mind came to consider the whole system a mere series of traps and pitfalls for the unwary,—an impediment to Justice that must be abolished. In truth, even these evils might well have been remedied by allowing free liberty of amendment, and reducing to a moderate sum the costs payable on the grant of such privilege. Those concerned in reform movements, however, often lose sight of their real object in a feverish anxiety to 'cut deep' and at once; and this explains why the system for bringing a cause to trial in convenient and exact form was discarded." Note, Common Law Pleading, 10 Harv.L.Rcv. 238, 239 (1896).

18. "There is no rule regulating the substance of Pleadings under the Codes which is not **either** taken directly from the older system, or framed by analogy in the application of the same principles. The

#### BASIS OF MODERN REMEDIAL LAW

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Moreover, the essential elements of causes of action which must be Pleaded have not been abolished by the Reformed Procedure, nor

experience of the past thirty years has demonstrated that the Codes have by no means brought about that perfect completeness and simplicity in all Forms of Legal Procedure hoped for and predicted by their supporters, and expected, perhaps, during the earlier years of their adoption." Shipman, Code Pleading: The Aid of the Earlier Systems, 7 Yale L.J. 197 (1898).

"The Problems and Functions and Principles of Pleading are essentially the same in all systems, whether at Common Law, under the Code, in Equity, or by **Rule of Court.**" Shipman, *Handbook of Common-Law Pleading*, Introduction, 7, 8 (3d ed. by Ballantine, St. Paul, 1923).

Thus, in Minnesota, in the case of *Solomon v. Vinson*, 51 Minn., 205, 17 NW. 340 (1883), a Code Complaint which alleged, among other things, that the defendant was indebted to the plaintiff on an Account Past Due, for Goods Sold and Delivered, was held to contain all the Allegations necessary to constitute a good Indebtedness count in an Action of Debt at Common Law, the Court remarking that "under **that System of Pleading It was just as necessary to allege the Facts as it is under the Code.**" in *Crump v. Mims*, 104 NC. 707, 771 (1870), Rodman, J., declared: "We take occasion here to suggest to pleaders that the Rules of the

Common Law as to **Pleading**, which are only the rules of logic, have **not been abolished** by The Code. *Pleas* should **not** state the Evidence, but the Facts, which are the Conclusions from the Evidence, according to their **legal effect**; and complaints should especially avoid wandering Into matter which **if traversed would** not lend to a decisive Issue. It is the Object of all Pleading to arrive at some Single, Simple and Material Issue.”

In accord: *Parsley & Co. v. Nicholson*, 85 NC. 207, 210 (1871).

*Campbell*, 3., In *Henry mv. Co. v. Semonian*, 40 Cola. 269, 90 P. 682 (1907), stated: “A Count In *Indebitatus Assumpsit*, framed substantially as required at Common Law, Is now held to be a sufficient compliance *with* the Code mandate as to Allegations of Fact”

Rules of the Common-Law Pleading, as to Materiality, Certainty, Prolixity, and Obscurity, are rules of logic not abolished by the North Carolina Code. *Crump v. Mims*, 64 N.C. 707, 771 (1870).

The Rules of Pleading at Common Law have act been abrogated by the Code of Civil Procedure. The essential principles still remain. *Henry mv. Co. v. Semonian*, 40 CoIn. 269, 90 P. 682 (1907); *Hughes, Procedure, Its Theory and Practice*, 488 (Chicago, 1905).

have the Fundamental Conceptions common to all Systems of Procedure as to the manner of making Allegations which reveal the contentions of the rival Parties, been changed. As Lord Mansfield so well said:

“The Substantial Rules of Pleading are founded in strong sense, and in the soundest and closest logic; and so appear, when well understood and explained; though, by being misunderstood and misapplied, they are made use of as instruments of chicanery.”<sup>1</sup> - fi~ a result of such misapplication and chicanery by men who resorted to the technicalities of Special Pleading to serve their own selfish ends, as a result of the portrayal by its **enemies** of the System as a mere game of skill, in which the helpless litigant became a pawn in a wilderness of arbitrary technicality and confusion; in which it was pictured as the master and not the servant of the courts, or as an end in itself, instead of an instrument for the fair and equitable adjustments of substantive human rights, the System of Pleading and Procedure as developed at Common Law, was gradually brought into popular disrepute by the efforts of well-meaning Reformers, who emphasized *its* admitted Defects, but failed to point out to the people of England and the United States the matchless precision of the Old System as a vehicle for reducing human controversies into distinct Issues of Fact or of Law, which could be satisfactorily adjusted, thus achieving the principal end of all government, to wit, the preservation of Law and Order. Entirely too much time and effort have been expended in criticising<sup>25</sup> or eulogizing<sup>27</sup> the Common-

10-***Robinson v. RaIn-*, 1 Burr 317 319, 97 Eng.Rep. 330, 331 (1757).**

20. Thus, the famous historian, Beeves, in referring to the times of Henry VI (1422—1461) and Edward **XV** (1461—1483), stated “**Such was the humor of the age** that this captiousness was not discountenanced by the Beach. ... The calamity has been that after other branches of knowledge took a more liberal turn, the minutiae of Pleading continued still to be respected with a sort of religious deference.”<sup>3</sup>

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## COMMON-LAW PLEADING

Law System of Pleading, It now seems appropriate that its function as a workable and expanding Instrument of Justice for genHistory of English Law, e. XXIII, 621 (Finlason ed. Philadelphia, 1880).

In *Allen v. Scott*, 13 Ill. 80, 84 (1851), *Caton*, 3., said:

“It must be admitted that many of these distinctions are more artillelal than substantial, and do not contribute very essentially to the promotion of the Ends of Justice. So long, however, as we look to the Rules of the Common Law to govern us in Pleading, we are not at liberty to disregard them.”

*Wisconsin Cent. H. Co. v. Wizeorelc*, 151 Ill. 579, 580, 38 N.E. 078, 680 (1894).

“By the wooden manner in which It came to be administered, many of its artificial distinctions and rules became an obstacle to the very purposes which they were intended to serve, and diverted the attention of the Court to side issues, so that the suitor was perhaps unable to get through the vestibule of Justice to have the Merits of his Case considered.” *Shipman, Handbook of Common Law Pleading, Introduction*, 6, ii. 11 (2d ed, by Ballantine, St. Paul, 1923).

21. Among the eulogies by Judges, Lawyers and Writers, may be listed the following:

Littleton, during the Reign of Edward IV [1461—1483], In referring to the Art of Common-Law Pleading, declared: “And know, my son, that it is one of the most Honourable, Laudable, and Profitable Things in our Law, to have the science of well pleading In Actions Real and Personal; and therefore I counsel thee especially to imploy thy courage and care to learn It.” 2 Coke, Littleton (Institutes of the Laws of England) Lib. 3, Cap. 9, § 534 (1st Am. from the 10th European ed., Philadelphia, 1812).

Professor Samuel Tyler stated: “It (the Common-Law System of Pleading) must be admitted to be the greatest of all judicial inventions.” First Report of the Maryland Commissioners on Rules of Practice in the Courts 80, 91 (1855).

“This [the Common-Law] System, matured by the wisdom of ages, founded on Principles of Truth and Sound Reason, has been ruthlessly abolished in many of our States, who have rashly substituted in Its place the suggestions of sciolists, who invent new Codes and Systems of Pleading to order. But this attempt to abolish all species, and establish a single genus, is found to be beyond the power of legislative omnipotence. They cannot compel the human mind not to distinguish between things that differ. The distinction between the different Forms of Actions for different wrongs, requiring different remedies, lies In the nature of things; it IS absolutely Inseparable from the Correct Administration of Justice In Common-Law Courts.” Grier, 3., in

erations, in both England and America, should be pointed up and emphasized as well as its long-term significance as the fountain-source of our Modern Substantive and Remedial Rights, if not our very liberties,<sup>22</sup> and

finally, its value as **an influence which continues** and must inevitably continue to mould future Anglo-Saxon Conceptions of Law and

McFaul v. Ramsey, 61 U.S. (20 How.) 523, 525, 15 LEd. 1010, 1011 (1857).

According to Professor Keigwin, Cases in Code Pleading, 16 (Rochester, N. Y. 1926), the Code has been of doubtful value In simplifying procedure: “One who will read the Reports of New York or of any other Code State will observe that before the Reform comparatively few Cases turned upon points of pleading, and that most of such cases involved questions of Substantive Law which were presented in technical guise by reasons of their Development upon the Record; it will also be observed that the adoption of the Code was at once followed by a large Increase of litigation concerning procedural matters, which kind of litigation shows no present signs of abatement. Indeed, the current digests disclose an immensely greater number of cases deciding pure Matters of Pleading in the Code States than cases of that kind coming from Common Law Jurisdictions. One reason, of course, is that the Common Law system is so thoroughly settled that few novel questions can arise.”

This problem under the Codes is also discussed in Sunderland, Cases on Procedure Annotated, Code Pleading, Preface viii (Chicago, 1913).

“The love of innovation induced the State of New York some years ago, to abrogate Common-Law Pleading, and introduce a Code of Procedure for the regulation of litigation in her courts; and notwithstanding the lamentable confusion and uncertainty, and the greatly increased expense which has thereby been brought into the Administration of Justice in that State, other States have followed in her track of barbaric empiricism. Mr. Justice Grier has, from the bench of the Supreme Court of the United States, rebuked the folly of abolishing Common-Law Pleading, and substituting the Common-Sense Practice, as it may be called, in its stead.” Stephen, A. Treatise on the Principles of Pleading, Preface, vii (3d Am. ed. by Tyler, Washington, D. C. 1892).

22. Stephen, A Treatise on the Principles of Pleading, Introduction, 23 (3d Am. ed. by Tyler, Washington, B. C. 1893). See, also Hemingway, History of Common Law Pleading as Evidence of the Growth of Individual Liberty and Power of the Courts, 5 Ala.L.J, 1 (1929).

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## BASIS OF MODERN REMEDIAL LAW

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Justice in a free society, if we are to preserve our ideal of Government by Law as opposed to Government by Men.<sup>23</sup>

What, then, is the place of Common-Law Pleading in the Law and what is its real significance to Modern Procedure?

### THE PLACE OF COMMON-LAW PLEADING IN THE LAW

1. Anglo-American Law is divided into Public Law and Private Law. Private Law is separated into Substantive Law and Adjective Law, with Common-Law Pleading constituting the first procedural topic thereunder,

ANGLO-AMERICAN law has been separated into two main divisions—Public Law— which has to do with the regulation of relations between independent states and between a state and its citizens, and—Private Law— which regulates the relations between the citizens of the state. Private law, in turn, is divided into two branches, to wit, Substantive Law, which defines rights and liabilities, and Adjective or Procedural Law, which furnishes the ways

and means of enforcing these rights and liabilities. And Adjective Law, in its broadest aspects and prior to 1848, included (1) Common-Law Pleading; (2) Equity Pleading; (3) Evidence, and (4) Trial Practice. The position of Common-Law Pleading in the Law will, therefore, appear clearly from the chart on the next page.

**As a result of** the impact of the New York Code of Procedure in 1848,<sup>24</sup> our Modern Sys<sup>23</sup> Apparently the earliest use In America of the phrase, Government by Law as opposed to Government by Men, is found in Part I, Art. 30, of the Massachusetts Constitution of 1780.

24. KY.Laws 1848, c. aia term of Code Pleading,<sup>25</sup> which is a combination of the better elements of the Common Law and Equity Systems of Pleading, came into existence.

The influence of this development under the Codes finally led, in 1938, to the New Federal Rules of Civil Procedure for the regulation of Practice in the Federal Courts.

Following the example of the nation some of the states subsequently abandoned their Codes in favor of a System of Procedural Regulation by Rule of Court. This treatise, however, is concerned primarily with the fundamental principles of Civil Pleading and Practice as developed at Common Law. And Civil Procedure is “the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right.”<sup>26</sup>

25. “Code Pleading is the term applied to the Reformed System of Pleading initiated by the New York Code of 1848 and now in force in . . . American jurisdictions. It is this latter system which concerns us in this book. But since it developed from the former systems and in many respects continues various details and parts of them, it is necessary to consider the antecedents of Code pleading in the other systems.” Clark, Handbook of the Law of Code Pleading, c. 1, History, Systems, and Functions of Pleading, 4 (2d ed., St. Paul 1947).

26. Poyser v. Minors, 7 Q.B.Div. 329, 333 (1881), Lush, U.

For a definition of Procedure, compare the following:

“Procedure may be defined as a Series of Symbolic Actions, generally accompanied by words, and, in developed societies, by the Exhibition of Written Documents, by means of which Rights or Liberties guaranteed by a society are reasserted by its individual members. Reassertion is the Essence of Procedure; for in the sense in which we shall use the term—the sense of regaining before a competent court a status that has been lost or questioned—it assumes an already violated right.” Greenidge, The Legal Procedure of Cicero’s Time, Introduction, 1 (Oxford 1901).

See. 1 THE PLACE OF COMMON-LAW PLEADING

## CHART SHOWING POSITION OF COMMON-LAW PLEADING IN THE LAW

9

AMERICAN  
LAW



PUBLIC  
LAW



Private LAW



ADJECTIVE

**LAW**  
**II**

SUBSTANTIVE <b>LAW</b>	ADJECTIVE <b>LAW</b>	SUBSTANTIVE <b>LAW</b>
CRIMINAL		

PROCEDURE

**I**

**T**

ANALYTICAL  
**LAW**  
**PROCEDURE**

COMMON

**I**  
CODE

LEADING

INTERNATIONAL  
**LAW**  
PROCEDURE

EVIDENCE

TRIAL  
PRACTICE  
10

BASIS OF MODERN REMEDIAL LAW

Ch. 1

THE IMPORTANCE OF COMMON-LAW PLEADING<sup>27</sup>

2. A knowledge of Common Law Pleading is important because

- (I) Through its study the student acquires a working appreciation of the Historical Development of the **Law**;
- (II) It is essential as an aid in understanding the early English and American decisions in which Rulings on the Law are only comprehensible **to** the modern student In the light of a working knowledge of Pleading at Common Law;
- (III) It Is an essential ingredient of the process by which the Law Student acquires the technique of analyzing Causes of Action;
- (IV) It is essential to a full and comprehensive understanding of Modern Pleading and Practice.

To the beginning student or prospective lawyer, an understanding of the fundamental principles of Common-Law Pleading and Procedure is highly essential. While the greater portion of our Modern Law School Curriculum is devoted to a consideration of Substantive Law, the student should constantly bear in mind that a litigant's Substantive Rights ordinarily cannot be effectively sustained ex

27. "The importance of a study of Common-Law Pleading rests, first, on the relationship between the Modern Substantive and Ancient Remedial Law in the scheme of Forms of Action; second, the relationship between Modern Remedial and Ancient Remedial Law; and,



third, the fact that the Older Cases are expressed in Terms of Pleading, so that they cannot be studied understandingly without it. The Statutes which seek to abrogate or simplify Common-Law Pleading use its terms. In order to understand the progress of the law, the well-educated Lawyer must live through its evolution. Further, in Modern Codes the foundation ideas of pleading have not changed." Shipnian, *Elendbook of Common-Law* heading, 4, 5 (3d ed. by Ballantine, St. Paul 1023).

See, also, Vanderbilt, *Cases and Materials on Modern Procedure and Judicial Administration*, c. I, Intro-

duction: 1. The Importance of Procedure in the Work of the Practicing Lawyer and in the Study of Law (New York 1952).

cept by one adequately trained in the Art and Science of Procedure, who appreciates the technical steps and maneuvers necessary to present properly his client's case in Court, and how to conduct it to a successful conclusion. A mere Mechanic of the Law may get in and out of the court, but often to the detriment of the client's interest, and in a manner destructive of the standards of the legal profession. If, however, he desires to become an Artisan of the Law, to fully appreciate the significance of the Reformed Procedure and the procedural tools used for the protection of his client's interest, he must understand the fabric of the Common Law out of which they have been constructed. In order to do this he must be conversant with the evolutionary steps which led up to our Modern System of Procedure. In short, unless a lawyer is sufficiently expert in handling the procedural devices available under the Law, any knowledge which he acquires concerning the Substantive Law goes for naught. It thus appears that a mastery of Adjective Law is a prerequisite to a mastery of the Law as a whole if a person hopes to become a successful lawyer. For as Justice Story so truly said: "No man ever mastered it, (Special Pleading) who was not by that very means made a profound lawyer." ~ It is necessary, therefore, that every individual who desires to become a serious Student of the Law should have a full appreciation of the importance of Common-Law Pleading.

In the *first* place the study of Common-Law Pleading is important because through

28. This statement by Justice Story was made in "An Address Delivered Before the Members of the Suffolk Bar, at their Anniversary, on the Fourth of September, 1821, at Boston," and is reported in 1 *Am. Jur.* 1, 28 (1829).

Special pleading, in popular language, refers to the adroit and plausible advocacy of a client's case in court. But, from the viewpoint of the Common Law, it refers to pleading by Specific Allegations as opposed to General Allegations. tuesday, *The Development of Code Pleading*, c. II, 66 (Cincinnati, 1897); Clark, *Handbook of the Law of Code Pleading*, c. I, 13, n. 24 (2d ed., St. Paul 1947)].

Sec. 2

## IMPORTANCE OF COMMON-LAW PLEADING

11

its study- the student acquires a working appreciation of the Historical Development of the Law. He comes to realize the relationship between Procedural and Substantive Law, that Right and Remedy are bound together,<sup>20</sup> that Substantive Rights are expressed in terms of Remedial Rights and Forms of Action. In short, it is essential to realize that the Forms of Action are, in fact, the categories of legal liability, and that most of our Modern Substantive Contract, Tort and Property Law, had its origin in and developed out of Procedure. It was in this very connection that Sir Henry Maine observed that the rules of Substantive Law had the appearance of being "secreted in the interstices of Procedure."<sup>30</sup> What Maine was saying was that the study of the Forms of Action is one of the richest sources of information for the student of legal *development* and theory, that there can be no true understanding of the Law except as against its Historical Background and that this history can only be fully and intelligently interpreted in the light of the Origin and Growth of Procedure.<sup>3-</sup>

29. Maitland clearly had this in mind when, in referring to the dependence of Right upon Remedy, as illustrated by the Common Law Forms of Action, he declared: "The Forms of Action we have buried, but they still rule us from their graves." *The Forms of Action at Common Law*, Lecture 1, 2 (Cambridge, 1945).

30. Maine, *Early Law and Custom*, c. XI, 359 (New York, 1880).

But compare the statement of Street, who declared:

"To the modern mind no line of cleavage is more marked than between Substantive and Adjective law. It was not always so. The very term 'Adjective Law' was first used by Bentham. In early stages of legal growth the two elements are inseparable." 3 *Foundations of Legal Liability*, e. I, I (Northport, 1000).

31. Sir Montague Craekenthorp, Q.C., in an address to the American Bar Association, in reference to the utility of the study of Common-Law Pleading, stated: "And, so long as Written Pleadings remain, the best masters of the art will be they who can inform the apparent licence of the new system with that spirit of exactness and self-restraint which

In the second place a knowledge of Common-Law Procedure is essential as an aid in understanding the early English and American decisions in which Rulings on the Law are only comprehensible to the Modern Student in the light of a working knowledge of Pleading at Common Law. The Issues in these early cases, framed at a period of

time when it was not yet certain whether the Pleadings should be English, French, or Latin, and while they were still in their developmental Stage,<sup>32</sup> were necessarily formulated on the basis of the Older System. In consequence, the opinions rendered in these cases are sometimes in language and phraseology understandable only by one versed in the Common-Law System of Procedure. Thus, the phrase “the lessor of the plaintiff” is understandable only in the light of the Fiction of Ejectment; the doctrine of *quid pro quo* has meaning only to one who has studied the early cases involving Debt; and an “executed consideration” is meaningful only against the historical development of Assumpsit out of the Tort action of Trespass on the Case *Super So Assumpsit*. Moreover, one called upon to consider a decision in the Year Books ~ might be struck by the inclusion of much material or discussion which had no apparent bearing upon the final result.<sup>33</sup> But such inclusion would be clear to one acquainted with the History of Pleading, particularly that Stage of it in which the Pleadings were settled in the heat of battle, in the presence of one’s adversary, and by a process of Oral Altercation in which the Litigants, the Enilows from a knowledge of the old.”

Note, Common Law Pleading, 10 *Earv.L,iles-*. 238 (1896).

22. For the story of the Language of the Pleadings, see 2 Holdsworth, *History of English Law* 397—402 (London, 1909).

33. Winfield, *The Chief Sources of English Legal History*, e. I, 11—12 (Cambridge, 1925).

34. Winfield, *The Chief Sources of English Legal History*, c. VII, 153—154 (Cambridge, 1925).

12

rolling Clerks, the Lawyers and the Judges played leading roles.<sup>35</sup>

In the *third* place, a knowledge of Procedural Law is an essential ingredient of the process by which the beginning Law Student acquires the technique of analyzing Causes of Action.<sup>36</sup> *Pint*, it has value as an exercise in legal logic, and it serves “to fix the attention, give a habit of reasoning closely, quicken the apprehension, and invigorate the understanding.” ~ These qualities constitute the foundation of all legal *investigation*. *Second*, the shadings between the Common-Law Forms of Action afford the student excellent practice in distinguishing one decision from another. *Third*, *no* educational device is comparable to a course on Common-Law Pleading for the purpose of teaching the beginner how to brief a case, reduce the controversy to a single, clear-cut, well-defined Issue of Fact or of Law, determine the holding of the Court and formulate the Rule and Principle of the decision. In short, it is an excellent device for extracting, like the roots of an equation, the true points in dispute; it is a time-tested scheme of matchless precision for separating the Issues of Fact from the Issues of Law, for the purpose of referring the case to the Court or the Jury. Finally, it gives the Student a valuable insight into the problem of what constitutes a Cause of Action, which is a necessary technique under any System of Procedure.

In the *fourth* place, a knowledge of Common-Law Pleading is essential to a full and comprehensive understanding of Modern

—Odgers, *Principles of Pleading and Practice*, e. 6, 08 (14th ed., by Lewis Struge, London, 1952).

38. Reppy, *Introduction to Civil Procedure*, c. I, 2  
—(Buffalo, 19M).

37. Sir William Zoules, *Prefatory Discourses to the Speeches of Isaeus*, works, vol. IV, p. 34 (London 1784). See, also, Warren, *Law Studies*, 1058 (3d ed., London 1863).

## Ch. 1

Pleading and Practice. In making a study of Pleading at Common Law the student is not dealing with Rules which are obsolete and without intimate relation to the Existing Law. The fundamental principles of Common-Law Procedure still prevail; only its technical and archaic characteristics have been abolished by Modern Codes, Practice Acts and Rules of Court. This is true because Code Pleading springs from a Common-Law Ancestry; because Codification at best is only partial in scope, hence the principles of Common-Law Pleading necessarily remain as the great Residuary Law from which the gaps in the Code System of Procedure have been and will continue to be filled,<sup>18</sup> and against the background of which its every provision must be construed and understood. Thus, to give but one example, the Code states that “the Complaint must be stated in plain and concise language,” which calls for

explanation or interpretation. Does it actually mean what it says or does it mean something else? After full consideration the *Courts have found that* at Common Law the Declaration, in order to state a good Cause of Action, was required to state Ultimate Facts, and not Evidentiary Facts and not Conclusions of Law, and that the Rule under the Statutory Provision in question is the same as at Common Law.<sup>39</sup> The provision therefore, has no meaning except as construed against its Common-Law Background.

With a statement in mind of the reasons why a knowledge of Common-Law Pleading is important, it may next be helpful to consider the Functions of Pleading.

38. "All those preexisting Rules [of Pleading, at Common Law or in Equity~ which are not expressly abrogated, and which can properly be made applicable under the new system [the Code) remain in force." Selden, *J.*, in *Rochester City Bank & Lester v. Snydam*, 5 N.Y. (How.Pr.) 216, 219 (1851).

39. *Allen v. Patterson*, 7 N.Y. (8 Seld.) 476 (1852).

BASIS OF MODERN REMEDIAL LAW

### Sec. 3

#### FUNCTIONS OF PLEADING

13

##### THE FUNCTIONS OF PLEADING AT COMMON LAW<sup>40</sup>

3. The Functions of Pleading at Common Law are six in number and may be listed as follows:

(I) The first or Primary Function of Pleading is to reduce the controversy between the Parties to a single, clear-cut, well-defined Issue of Fact or of Law;

(ii) To reduce Questions of Fact to clear-cut **Issues** by eliminating immaterial and incidental matter, thus narrowing the case to one or more specific propositions on which the controversy turns, thus **operating** as an aid to the Court in admitting or rejecting offers of evidence;

(III) To notify the Parties and the Court of the respective Claims, Defenses, and Counter-Demands of the **adversaries**;

(IV) To serve as an index to the respective Counsel as to the Points to be Proved at the Trial and as a Guide to the Court in Apportioning the Burden of Proof and Rebuttal as between the plaintiff and defendant;

(V) To serve as a Formal Basis for the

#### **Judgment;**

(VI) To preserve a Record of the Controversy Litigated and to create a **foundation for** the Plea of Res Judicata, thus preventing a relitigation of the same controversy between the same Parties at a later date.

THE principal reason why many ordinary controversies are utterly fruitless and inconclusive is that prior to the discussion there is **no ascertainment** by the contending parties of the Issues at stake. If every discussion were preceded by a clear-cut settlement of

40. "The Function of Pleadings then is to ascertain with precision the matters on which the parties differ and the points on which they agree; and thus to arrive at certain clear Issues on which both parties desire a judicial decision," Odgers, *Principles of Pleading and Practice*, e. 6, 67 (14th ed., by Lewis Sturge, London 1952).

the questions in dispute, it would not prove difficult to settle the actual differences between the disputants, and in many instances it would develop that there was in reality no difference of opinion.<sup>41</sup> Pleading, which is a Statement in a Logical, Legal Form of the Facts which constitute the Plaintiff's Cause of Action or the Defendant's Ground of Defense,<sup>42</sup> is designed to prevent the presentation of such fruitless and immaterial controversies in Courts of Law. The Functions of Pleading, therefore, have been developed with this end in mind.

The *first* or Primary Function of Pleading is to reduce the controversy between the Parties to a single, clear-cut, well-defined Issue ~ of Fact or of Law, or, stated in another way, to Separate Issues of Law from Issues of Fact<sup>43</sup> so that the Issues of Law might be

41. Shipman, Handbook of Common law Pleading, Editor's Introduction, S (3d ed. by Ballantine, St. Paul 1923).
42. Boeock vt Leet, 210 Ill.App. 402 (1917). For other definitions of the term "Pleadings," see Brumleve 'c Cronan, 176 Ky. 818, 197 SW. 498, 503 13917), In which Hurt, J., stated: "Pleadings are the statements which set out the Causes of Action and Grounds of Defence and make Issues in the Action which is to be Tried"; and Smith v. Jacksonville Oil Mill Co., 21 Ga.App. 679, 94 SE. 900 (1918), in which Luke, J., declared: "Pleadings are the Written Aflegations of what is affirmed on the one side or denied on the other, disclosing to the Court or the Jury trying the Cause the Matter in Dispute between the Parties." See, also, the early English ease of Read c. Brookman, 3 T.R. 159, 100 Eng.Rep. 509 (1789).

43. "The term, itself, of 'Issue' appears as early as the Commencement of the Year Books, that is, in the first year of Edward II (Year Book, 1 Edw. II, 14), and from the same period, at least, if not an earlier one, the Production of the Issue has been not only the constant effort, but the professed aim and object of pleading." Stephen, A Treatise on the Principles of Pleading in Civil Actions, c. II, Of the Principles of Pleading, 151 (3d Am. ed. by Tyler, Washington, D. C. 1593). Shipman, Handbook of Common Law Pleading, Editor's Introduction, 8, in 11 (3d ed. by Ballantine, St Paul 1923).

44. Shipman, Handbook of Common Law Pleading, Editors Introduction, 9 (3d ed. by Ballantine, St. Paul 1923).

14

## BASIS OF MODERN REMEDIAL LAW

### Ch. 1

decided as far as possible prior to the Trial of the Facts. This was made necessary by the dual character of the Common-Law Tribunal, that is, of the Court, which generally decides Questions of Law, and the Jury, which generally determines Issues of Fact. By this process the Matters on which the Parties differ and the Points on which they agree, are ascertained with precision, and thus the Issues over which the Parties are contending are presented for judicial determination. The Pleadings are not, as frequently assumed in popular estimation, an advocate's address to the Judge or Jury. On the contrary they are the Formal Statements, drawn up by the Counsel of the Respective Parties, of the plaintiff's Cause of Action or the Defendant's Defenses, From the clash of assertions are disclosed the points in controversy, the propositions affirmed on one side and denied on the other, on which the decision of the case will turn. Thus, the Primary Function of Pleading, that is, of defining the Issues over which the Parties are contending, is achieved. "The points admitted by either side are thus extracted and distinguished from those in controversy; other matters, though disputed, may prove to be immaterial; and thus the litigation is narrowed down to two or three matters which are the real questions in dispute," ~ on which the case may be judicially tried in the most expeditious manner.

It is a great benefit to the Parties to know exactly what are the Facts remaining in dispute, and what Facts the plaintiff must Prove to sustain his Cause of Action or the defendant to establish his Defense. The question involved may be reduced to an Issue of Law, in which case it may be decided by the Judge upon Argument, or it may involve a Question of Fact, in which case, it may involve a lengthy Trial by Jury. By separation of Questions of Law from Questions of Fact, the Parties may be saved great trouble and ex's. Odgers, Principles of Pleading and Practice In

Civil Actions in the High Court of Justice, e. 6, 66  
(14th ed., London 1952).

pense in procuring evidence of Facts which the opponent does not dispute, and the State may escape the burden and cost of supervising the litigation of Immaterial Issues.

The secotul Objective of Pleading is to reduce Questions of Fact to clear-cut Issues, by eliminating immaterial and incidental matters, and narrowing the case to one or more definite propositions on which the controversy really turns, thus serving as a guide to the Court in Rulings upon Offers of Evidence. As the Pleadings define and *limit* the Proof, so also do they have a bearing upon the Admission or Rejection of Evidence. Thus, if A brings Trespass for Assault and Battery, B Pleads Self-Defense, and A denies the striking in Self-Defense, the issue presented is: Did B strike in Self-Defense? Now, if B offers Evidence that he did not strike A, the Court is in a position to Rule out the Offer of Proof, as such offer has no logical tendency to support the defendant's Plea that he struck in Self-Defense.

The *third* Objective of Pleading is to notify the Parties themselves and the Tribunal which is to decide between them of the itspective Claims, Defenses, arid Cross-Demands of the adversaries. Some Advocates of Reform, irritated by the mischiefs incident to the abuse of technical Rules of Pleading, have suggested that the Parties to an Action should come into court without any Notice as to the Complaint or Answer. It is evident, however, that such a

System would lead to fraud, oppression and expense in a civilized state where commercial transactions are both numerous and complicated. If, then, Notice is essential, does a mere General Notice of the Plaintiff's Cause of Action

4. Issue Pleading, as opposed to Notice Pleading, prevailed at Common Law, as the chief Objective of Pleading was to reduce the controversy to an issue of fact or of law. Fact Pleading came in with Code Pleading, which emphasizes the need for an accurate statement of the facts, while in recent years there has developed what is known as Notice Pleading.

### FUNCTIONS OF PLEADING

15

tion and the Defendant's Ground of Defense, serve every purpose? Thus, suppose the Plaintiff's Declaration reads as follows:

"The Plaintiff Alleges that the defendant did not pay a bill of exchange for \$50.00." to which the defendant interposes the following

Plea:

"The defendant states that he is not liable on the bill."

From the Plaintiff's Statement it could not be determined on the Pleadings whether he had a sufficient Cause of Action or not, and from the Defendant's Plea, it could not be determined whether the defendant denied the acceptance of the bill, or the other legal requisites essential to liability; or, assuming their existence, whether the defendant intended to set up New Matter such as fraud by Way of Answer; nor whether the Issue was One of Law or of Fact. In such a situation every case would have to be considered by a Jury in order to ascertain that there was no Fact in dispute. It thus appears that the evils of giving no Notice would exist nevertheless, expense would be incurred as the Parties would have to come to Trial prepared to Offer Proof on anything relating to the case, although only one matter was in reality in dispute. It seems evident, therefore, that

ing, or merely giving notice to an opponent of the claim which is being asserted.

On Issue and Fact pleading, see Clark, Handbook of the Law of Code Pleading, c. I, History, Systems, and Functions of Pleading, § 11, pp. 56-57 (Cd ed., St. Paul 1047); Mifflin, Notabilia of American Civil Procedure 1887—1937, 50 Harv.L.Rev. 1017, 1034 (1937).

For a detailed discussion of Notice Pleading, see article by Whittier, Notice Pleading, 31 Harv.L.Rev. 501 (1918).

And for a suggestion as to how to resolve the conflict between the various views, see article by Simpson, A Possible Solution of the Pleading Problem, 53 Harv.L.Rev. 169, 187—189 (1939).

See, also, on Notice Pleading, the First Report of her Majesty's Commissioners for Inquiring Into the Process, Practice and System of Pleading in the superior Courts of Common Law (IBM), 11—14, reported in Reppy, Introduction to Civil Procedure, c. I, § 3, p. 29 (Buffalo 1954).

"the defendant is entitled to know what it is that the Plaintiff Alleges against him; the plaintiff, in his turn, is entitled to know what Defense will be raised in Answer." ~ In support of this view is the statement of Thomas, 3., in the Illinois case of *Cook v. Scott*,<sup>48</sup> who declared: "The province of the Declaration is to exhibit, upon the Records, the grounds of the Plaintiff's Cause of Action, as well for the purpose of Notifying the Defendant of the precise character of those Grounds, as of regulating his own Proofs."

The *fourth* Function of Pleading is to serve as an index to the respective Counsel as to the points to be proved at the Trial in support of the contentions of their respective clients and in Apportioning the Burden of Proof and Rebuttal as between the plaintiff and the defendant.<sup>49</sup> Thus, if *A* alleges that *B* stole his horse, and *B* denies the Allegation, *A* knows that he may support his Gen

<sup>47</sup> Odgers, Principles of Pleading and Practice, c. 0, 65 (14th ed. by Lewis Sturge, London, 1952).

<sup>48</sup> 6 Ill. (1 Oilman) 333 (1844). See, also, *Ohio & N. Ry. Co. v. People*, 149 Xli. 663, 36 NE. 989 (1894).

<sup>49</sup> Ballantine, The Need of Pleading Reform in Illinois, 1 U. of Ill. L.J. 1, 15 (1917).

The Massachusetts Commissioners of 1851 state the purposes of Civil Pleading as follows: "(1) that each party may be under the most effectual influence, which the Nature of the Case admits of, so far as he admits or denies anything, to tell the truth, (2) That

each party may have notice of what is to be tried, so that he may come prepared with the necessary proof, and may save the expense and trouble of what is not necessary, (3) That the Court may know what the Subject Matter of the dispute is, and what is asserted or denied concerning it, so that it may restrict the debate within just limits and discern what Rules of Law are applicable. (4) That it may ever after appear what Subject Matter was then adjudicated, so that no further or other dispute should be permitted to arise concerning it." 6 Mass.L.Q. 104 (1921); flail's Massachusetts Practice (Boston 1851).  
 As to Functions of Criminal Pleading and the certainty and precision required, see United States v. Crulkshank, 02 U.S. 542, 23 L.Ed. 538 (1875); 3111-lar, The Reform of Criminal Pleading In Illinois, S J.Aminst.Crim.L. & Criminology, 337—361 (1917); Millar, The Modernization of Criminal Procedure, 11 J.Am.Inst.Crim.L. & Criminology, 344—367 (1920).

**16 BASIS OF MODERN REMEDIAL LAW Ch. I**

eral Allegation by Proof that B took any and Subject Matter, it was held by the Court horse, whereas if A had named a black horse, that the Judgment in the First Suit was a with a white fore-front foot, he would have Bar to the Plaintiff's Second Action. And been limited to Proof of that Particular this same rule applies under the Reformed horse, while B's Defense would be simplified Procedure in the same manner as at Common by being limited to Defense against taking Law.<sup>57</sup>  
 one Specific horse, whereas before he was

The claim of the Law of Pleading to be a  
 under necessity of being prepared to defend Science must, therefore, be measured by the a charge of taking any horse. And it follows  
 logically that the Burden of Proof would si. In Secor v. Sturgis, 16 N.Y. 548, 554 (1858), defall on A as he has affirmed that B took his cided under the Code, Strong, 3., Bays: "The Prin  
 horse. ciple is settled beyond dispute that a Judgment con  
 cludes the Rights of the Parties in respect to the

The *fifth* Purpose of Pleading is to serve Cause of Action stated in the Pleadings on which it as a Formal Basis for the Judgment. Begin- is rendered, whether the suit embraces the whole  
 or only part of the demand constituting the cause  
 ning with the Original Writ, let us suppose of action. It results from this Principle, and the

there is a Charge therein that B is indebted Rule is fully established, that an entire claim, aristo A in the sum of five hundred dollars. The lug either upon a Contract or from a Wrong, can-  
 Declaration must contain the same Chargenot be divided and made the subject of several  
 suits; and If several suits be brought for different

in elaborated and Consistent Form, the Proof parts of such a claim, the pendency of the first may at the Trial must correspond to the Charge be Pleaded in Abatement of the others, and a Judgin the Original Writ and Declaration, the ment upon the merits In either wif be available as

a Bar In the other suits, (Farrington & Smith v. Verdict must find in accord with the same Payne, 15 Johns. 432 L481] (1818); Philips v. Eerick, Charge, and finally the Judgment on the Ver- 16 Id. 137 [136] (1819); Guernsey v. Carver, 8 Wen diet must be made subject to the same limita-dell 492 (1832); Stevens v. Lockwood, 13 Id. 64-1 (1835).) But it is entire claims only which camiot

tions, in order to be free from attack as go- be divided within this rule, those which are single ing beyond the Scope of the Pleadings. By and indivisible ia their nature. The Cause of Ac' this requirement of correspondence between tion in the different suits must he the same. The

the Various Pleadings at each Stage of theRule does not prevent, nor is there any Principle  
 which precludes, the Prosecution of Several Actions  
 Proceedings the Common Law secured in upon Several Causes of Action. The holder of sevPleadings what we refer to in English com- eral Promissory Notes may maintain an action on position as unity, coherence and emphasis. each; a party upon whose person or property suc  
 cessive distinct Trespasses have been committed

The *sixth* and Final Function of Pleadingmay bring a separate suit for every trespass; and  
 is to preserve a Record of the Controversy all demands, of whatever nature, arising out of separate and distinct transactions, may  
 be sued upon

Litigated, which serves as a foundation for

separately. It makes no difference that the Causes  
a plea of Res Judicata, which, if sustained, of Action might be united in a Single Suit; the  
operates to prevent the relitigation of the Right of the Party In whose favor they exist to same controversy, provided it  
involves the separate suits is not affected by that circumstance,

except that in proper cases, for the prevention of  
Same Parties and the Same Subject Matter, vexation and oppression, the Court will enforce a Thus, in the early New  
York case of *Farring-* consolidation of the Actions.”

*ton v. Payne*,<sup>50</sup> where A sued B for the con- In general, on the Splitting of Causes of Action see:

version of three bed quilts,—a bed and three Articles: Clineburg, Splitting Cause of Action, 10 Neb. bed quilts having  
been taken away—and re- I, Bu1L 156 (1940); McNish, Joinder and Splitting

of Causes of Action In Nebraska, 26 Neb.L.Rev. 42

covered, after which he brought a second ac-(1946); Colvin, Injury to Persons and Property—

tion for conversion of the bed, to which B One Action or Two, 2 Ala,t.Rev. 75 (1949).

Pleaded, Former Recovery for the Same Act Note: Pleading—Splitting Causes of Action—Counter

claim In Court of Limited Jurisdiction, 36 Yale L.J.

50. 15 Johns. (N.Y.) 431 (1818).

883 (1927).

See. 4

#### DEVELOPMENT OF SUBSTANTIVE LAW

17

extent of its adaptation of its Rules to the accomplishment of its Main Functions, that is, Fair Notice to the Parties  
and the accurate, practical and systematic presentation of the precise Questions of Law and Fact involved to the  
Tribunal which is to decide them. The various and possible Functions of Pleading may, therefore, be enumerated as  
follows:

(1) To reduce the controversy between the Parties to a single, clear-cut well-defined Issue of Fact or of Law, and  
to separate Issues of Law from Issues of Fact, so that the Issues of Law may be determined as far as possible in  
advance of the Trial of the Facts;

(2) To reduce Questions of Fact to clear-cut Issues by eliminating immaterial and incidental matters, and  
narrowing the case to one or more specific propositions on which the controversy really turns, thus operating as an  
aid to the Court in Admitting or Rejecting Offers of Evidence;

(3) To notify the Parties themselves and the Deciding Tribunal of the respective Claims, Defenses and Counter-  
Demands of the Adversaries;

(4) To serve as an index to the respective Counsel as to the Points to be Proved at the Trial and as a Guide to the  
Court in Apportioning the Burden of Proof and Rebuttal as between the plaintiff and defendant;

(5) To serve as a Formal Basis for the Judgment;

(6) To preserve a Record of the Controversy Litigated and to create a foundation for a Plea of Res Judicata, thus  
preventing a relitigation of the same controversy between the same parties at a later date.

It thus becomes clear that historically, the principal purpose of the Rules of Pleading has been to compel each  
person to state the essential elements of his Claim or Defense in order to arrive at an Issue. It has not always been  
true **that** Common-Law Pleading has accomplished the objective of reducing all cas  
es to definite Issues, this end being defeated on occasion by resort to technical procedural devices which had  
outgrown their days of usefulness.<sup>52</sup> But in both Common-Law and Code Pleading, the Issue-Raising Function far  
overshadows the Notice-Giving One, and is the source of the Principal Rules of Pleading. It is so under the Modern  
English Pleading. The case must be analyzed and reduced to Issues at the Trial, if not before, and it is inexpedient to  
postpone this essential preliminary to the day of Trial.

## THE DEVELOPMENT OF SUBSTANTIVE LAW OUT OF PROCEDURE

4. The Beginning Student, if authorized to create an entirely New System of Law, would normally first define Rights and Liabilities and thereafter set up a System of Courts to enforce those Rights and Liabilities, whereas, as a matter of historical knowledge, the Law grew up in exactly the opposite way; the great Body of our Modern Contract, Property and Tort Substantive Law having had its Origin in and Developed out of Procedure.

UNDER Anglo-American law, the Substantive Law Defines rights and liabilities **and the Procedural Law** furnishes the ways

and means of enforcing those rights and liabilities. But in what order did this development take place? Were rights and liabilities first defined and thereafter Courts established to enforce those rights and liabilities, or were Courts first set up and thereafter rights and liabilities defined? This question, if asked of a Beginning Student of the Law, will invariably be answered by a statement that rights and liabilities would first be defined, with the Courts to enforce them to be established thereafter.<sup>53</sup>

52. Whittier, Judge Gilbert and Illiioi- Pleading lie-form, 4 Il.L.Rcv. 174, 176—178 (1909).

53. "A System of Laws promulgated by a Lawgiver undoubtedly commence with a definition of rights, and thence proceed to prescribe duties, thence to prohibit wrongs, and finally to provide legal remedies." Robinson, Elements of American Jurisprudence, e. V, § 5, 155 (Boston, 1000).

18

## BASIS OF MODERN REMEDIAL LAW

### Ch. 1

In fact the Law grew up in exactly the opposite way, Courts being organized to handle a series of specific cases, the decisions of which gradually developed theories of rights and liabilities. In short, our rights and liabilities as defined by Substantive Law, had their origin in and developed out of Procedural Law. If this be true, how did it come about? Let us assume that *A* and *B* are shipwrecked and land on the proverbial uninhabited, deserted island. *A*, quickly recovering from the shock, shakes the water off, works his way up to a nearby knoll, where the ground is level and the view good, and says:

"I like this place; I think I shall take possession," Who owns that knoll? *A* owns it by reason of having first acquired possession, by reason of his strong right arm. As a result he may also be said to have acquired a moral but not a legal right to retain possession. Some time later, *B* pulls himself together, and discovers *A* on the knoll. Antying there, he surveys the prospect with satisfaction equal to that of *A*, and then, after pondering over the situation, declares: "I like this knoll too; I think I shall take it." "Oh, no you won't," exclaims *A*; "This knoll belongs to me." "Oh, yes I will," retorts *B*. "Oh, no you won't," bristles *A*; whereupon *B*, abandoning further argument, strikes *A* over the head with a club, and takes possession. Now, who owns the knoll? *B*. By what right? Not by a moral right, as *A* preceded him in possession in point of time; not by a legal right, because in the absence of a Court in which a remedy could be sought, no such right yet existed. In reality *B* now owns the knoll by right of the strong arm; by right of might, that being at the moment the only Law in effect on the island.

Without going into the evolutionary developments involved, let us say that time moves on, and later we find that other members have joined the society of *A* and *B*—men, women, and children, After this development, *C* hits *D* over the head with a club; **the blow glances off** *D*'s head and strikes *E*, the child of a third party, Immediately there is great excitement in the community, The people crowd together, and someone is heard to say: "As long as *A* and *B* were the only inhabitants on this island, this business of their hitting one another over the head was their own affair; but now that there are others here, we must do something to control such actions." But "What can we do" exclaimed the others! At this point someone suggested that the group should select a leader, hail the individuals before that leader, who would then hear both sides of the controversy and render a decision. Accordingly, the group chose its fastest runner, its wisest counselor, its best medicine man, its most esteemed religious adviser, or its greatest military leader, escorted him to the edge of the forest, and set him up on a stump to decide the controversy, Thus, was the Court or Tribunal created; thus, did the group take its first step in the Development of the Law; thus, did it prepare the way for transforming moral into legal rights. Then the group took *C*, *D*, and *E* before the newly created tribunal, In turn *D* and *E* were required to tell their story, and *C* was permitted



to present his side, Before any decision was rendered the most that could be said in favor of *D* and *F* was that in the view of the group, their moral right not to be interfered with had been violated; as yet they had no legal rights as they were still without a remedy. After hearing both sides of the controversy, let us assume that the Court, presided over by the chosen leader, who has now become a Judge, fines *C* twenty hides, ten hides to go to the injured Parties, ten hides to go to the Community. At the moment of decision, *I*) and *F* for the first time had acquired a legal right not to be struck, the moral right having been changed into a legal right through the acquisition of a legal remedy.

Let us **now as-**

## Sec. 5

sume further **that after** two or three similar episodes of this kind, in which the *B*'s and *C*'s were fined for having struck someone, the wiser members of the group, while wending their way home from the Court, began to reason somewhat as follows: If, when *B* strikes *A* over the head with a club, he is hailed before a Court and punished, it must be because *A* had a right not to be struck; if *A* has such a right, then *B* must be under a duty not to violate it; if *B* does violate *A*'s right not to be struck and his own duty not to strike, *B* commits a wrong for which he may be held liable, Thus, the concepts of right and duty, of wrong and liability, are merely different sides of the same shield. If the rights violated involved a breach of duty to the community or state, the accused was said to be guilty of a criminal wrong whereas if the rights violated were concerned with breaches of duties as between individuals of the group or society, the accused were said to be guilty of a civil wrong. But at this stage of the discussion, the important point to be observed in the foregoing account is that these primitive legal concepts of right, duty, wrong and liability, had their Origin in and Developed out of Procedure, that is, out of the process by which a myriad of single instances, of specific factual situations, were presented to and decided by a Court; that the Substantive Law right of *A*, *D*, and *E* not to be struck, came into existence only upon the pronouncement of Judgement by the Tribunal.

This process not only produced a body of Substantive Contract, Property and Tort Law, but it also exercised, as we shall see, a profound effect upon the Form of our Judicial Organization, which in turn developed the five great Systems of Administrative, Admiralty, Common, Equity and Probate Law.

19

## RELATION OF COMMON-LAW PLEADING TO OTHER SYSTEMS

5. The Nature and Function of Pleading at Common Law may be better understood when viewed in its relationship to the Other Systems of Procedure which developed prior to, **contemporaneous** *with*, or even subsequent to it, **including Equity and Code Pleading, as well as Pleading under** the New Federal Rules of Civil Procedure.

IN order to give a better perspective of the Nature and Function of Common-Law Pleading as a factor in Anglo-Saxon Law, it may be well to consider its relation to the other Systems of Procedure which developed prior to, contemporaneous with, or even subsequent to it. These include Equity and Code Pleading, as well as Pleading under the New Federal Rules of Civil Procedure, the relationship of which to Common-Law Pleading will now be considered.

### *Relation to Equity Pleading*

EQUITY Pleading was the System of Pleading which was developed by the Courts of Equity in England, through the King's exercise of a portion of his Judicial Prerogative in cases involving matters of conscience. The King's authority was in the beginning handled through his Chancellor who was a Churchman trained in the Canon or Ecclesiastical Law, which had its roots in the Roman Law, hence it is not surprising to find that Both Systems failed to provide a Jury for the Trial of Facts. As a result of this characteristic, certain differences between the Common Law and Equity Systems of Procedure developed.

In the first place, at Law, the Pleadings at Common Law were required to reduce the controversy to a single, clear-cut, well-defined Issue of Fact or of Law, whereas in Equity, there could be as many Issues of Law or of

Fact as the Pleaders desired. This was due to the dual character of the Common-Law Court, which consisted of **the Judge**, who normally decided Questions of Law, and

## **RELATION OF PLEADING TO OTHER SYSTEMS**

<sup>54</sup> See Langdell, A Brief Survey of Equity Jurisdiction, 1 Harv.Lj3ev. 55 (1837).

20

### **BASIS OF MODERN REMEDIAL LAW**

#### **Ch. 1**

the Jury, which decided Questions of Fact, as opposed to the Equity Court, consisting of the Chancellor only, who was a trained Lawyer, capable of handling Complicated Issues of Both Law and Fact.

*Secondly*, and largely as a result of the first difference between the Two Systems, at Law, a plaintiff, in order to state a cause of action was required to state Ultimate Facts, and not Evidentiary Facts or Conclusions of Law, whereas, in Equity, he might plead Ultimate Facts, Evidentiary Facts, and even Conclusions of Law, as the Chancellor could unravel the Issues in spite of the resulting confusion.

*Thirdly*, at Common Law only those Parties who had an interest in the right being litigated could be joined as plaintiffs and only those Parties who were subject to a joint liability could be joined as defendants, whereas, in Equity, the procedure for the joinder of parties plaintiff and defendant was much more flexible.

*Fourthly*, at Common Law, a Party was frequently entitled to Trial by Jury as a matter of right, and if the Jury returned a Verdict in favor of such Party, its finding on the Facts was binding on the Court, whereas, in Equity, a Party was entitled to Trial by Jury only in the discretion of the Chancellor, and if, perchance, the Jury found in favor of a Party on the Facts, such finding was not binding on the Court, was only advisory in its effect, the Chancellor being free to disregard it in his discretion.

*Fifthly*, at Common Law, a Judgment had to be rendered in favor of or against all the defendants; it could not be split, so as to apportion the liability among the defendants; whereas, in Equity the Decree could be split up and given against one or all of the defendants, thus allowing for a much more flexible apportionment of liability, without the necessity of further action.

*Sixthly*, at Common Law, a Judgment merely determined the matter of right between the Parties; it did not order the defendant to do anything, and if the defendant was not goaded into action by the mere moral suasion of the Judgment, the plaintiff was compelled to sue out an Execution on the Judgment, whereas, in Equity, the Decree not only determined the matter of right between the Parties, but it actually ordered the defendant to do something in recognition of that established right on peril of being punished for failure so to do.

*Seventhly*, at Common Law, only Questions of Law were ordinarily open to Appellate Review; if the Error of Law was Apparent on the Face of the Record, it was Reviewable by Writ of Error; if it was Not Apparent on the Face of the Record, but was one which occurred at the Trial, prior to the Statute of Westminster II (1285) - the only Method of Review was after Verdict and before Judgment, by a Motion for a New Trial, but, after the Statute, such Errors could be reached by a Bifi of Exceptions, whereas, in Equity, both Questions of Law and Questions of Fact were Reviewable on Equitable Appeal.

With these distinctions between Common Law and Equity Procedure in mind, it becomes readily apparent that when the Court of Equity undertook to settle matters of conscience in dispute between private Parties, influenced by the Civil Law background of the Chancellor, it naturally adopted the Civil Law Mode of Procedure, avoiding the Technical Rules of Pleading as they existed at Common Law. In theory, however, in Equity, as at Common Law, the forensic Altercations between the Parties might be carried to an unlimited extent, thus permitting the plaintiff and defendant through Alternate Allegations to frame Issues of Law or of Fact upon which the Court could base a Decree. In framing his statement of a cause of action in what was called a "Bill in Equity" as op

5- 13 Ethv. I.

#### **Sec. 5**

### **RELATION OF PLEADING TO OTHER SYSTEMS**

posed to a “Declaration at Law”, the plaintiff followed no set Form of Action, as at Common Law, but proceeded upon the board equities involved in the controversy, and stated the Facts at *large*, mingling both Questions of Féct and of Law, there being no need to separate them on the Record as at Law, since they were both to be decided by the Chancellor, who was trained in the art of sifting from the complicated statements the determinative Issues; whereas, at Law, Issues of Fact were to be decided by a Jury, while Issues of Law were to be passed on by the

**Court, and Both Types of Issues were framed**

by the Parties, and not as in Equity, extract-ed from the Pleadings by the Court. In practice, however, the Pleadings in Equity did not ordinarily go beyond the Replication Stage, and frequently not beyond the Answer. What really happened was that each Party stated all the Facts in One Pleading,

- though properly belonging to a Subsequent Stage of Pleading, and then these were dealt with as if stated in a regular series of Affirmative Pleadings in proper order. After Answer filed, the plaintiff might Amend his Bill to anticipate Defenses, upon the new light given him by the defendant, and the defendant, in turn, was permitted to make a New Answer to the Amended Bill. Thus, the Replication was actually sometimes incorporated in the Bill, along with the Issuable Facts

- which constituted the Equity of the Eill, and which the plaintiff must prove to obtain the Relief Prayed for; and the defendant thereupon Rejoined with New Matter of Defense or Excuse along with his Answer. Thereafter, the plaintiff filed a Replication as a mere Matter of Form to place the Answer in Issue. The Bill in Equity therefore consisted of three parts, the *Narrative*, which **contained a Statement of the Plaintiff’s Case for**

Relief; the *Charge*, which anticipated and attempted to refute the Defenses of the defendant; and the *Interrogative*, which was

to extract from him Admissions Under Oath in his Answer. It will be observed, therefore, that the Bill and Answer were generally framed so as to include the evidence by which each Party sought to sustain his position or to defeat that of his Adversary, as well as the legal arguments and conclusions, which properly should have been presented in the Briefs of Counsel.<sup>5o</sup>

On this very point of the theory of Law and Evidence, Common-Law Pleading and Procedure was vastly superior to the Civil Law and to the Procedure in Equity. However clearly substantive obligations and rights may be defined in any System of Law, there can be no security or freedom for the individual when judicially investigated, if competent evidence is rejected and incompetent evidence is admitted. Under the Common-Law System of reducing controversies to a single Issue of Fact, the Court could Rule accurately upon Offers of Evidence, admitting that which was proper, and rejecting that which was improper, whereas, in Equity, which adopted the Civil Law System of Pleadings, permitting loose, detailed Statements of Both Law and Fact, as well as Conclusions, the Issue in dispute was placed in such doubt that the Scope of the Evidence was so broadened as frequently to permit the introduction of matter wholly foreign to the real controversy. Common Law Pleading, which was designed to frame a certain Issue of Fact for Trial by twelve men, avoided this pitfall by indicating the character of and the limitations upon the evidence to be admitted.

*Relation to Code Pleading*

THE relationship between the Common Law and Code Systems as to the Structure of Pleadings has been largely obscured on the one hand by the Procedural Reformers who, as an incident of their objectives, have played

sc. Pomeroy, Code Remedies; Remedies and Remedial Rights by the Civil Action, c. IH, Section Third, The General Principles

o~ Pleading, 525 (4th ed. by

used to probe the defendant’s conscience and

Bogle, Boston, 1004).

22

**BASIS OF MODERN REMEDIAL LAW**

**Ch. I**

down the Advantages of Adjective Common Law and played up the alleged Superior Qualities of Code Procedure; and on the other, by the members of the Teaching Profession, who have not had the ability, or who have not taken the time and patience required to understand and appreciate Pleading at Common Law. But speaking of the point of relationship, it is clear that there are few Rules Regulating the Substance of Pleading under Modern Codes and Practice Acts which have not been directly borrowed from the Common Law, or framed by analogy in the appli-

cation of the same principle.<sup>57</sup> In fact, the Century following the Adoption of the Code of Procedure of New York in 1848,~ has been one in which the Common-Law Rules have been read back into the apparently clear and simple provisions of the Reformed Procedure, the unadulterated truth being that such provisions had no legal content except as expounded against the appropriate Common Law Procedural Background. Code Pleading is not, as many have assumed, a System having no relation to existing law. Common-Law Pleading has not been abolished; it still survives as the basis of all legal investigation; it is in fact the direct Lineal Ancestor or Parent of Code Pleading, which literally springs from its Join. At best the Codification of Pleading is only partial, leaving wide gaps in the System of Remedial Law to be filled in by Common-Law Pleading,

-t See 1 Standard Encyclopedia of Procedure, Introduction, ~ 11 (Los Angeles and Chicago, 1911).

See, also, *Solomon v. Vinson*, 31 Minn. 205, 17 NW.

340 (1883); *Dunnel*, Minnesota Pleading. c. I, § 9

(1st ed. Minneapolis 1899).

Rules of the Common-Law Pleading, as to Materiality, Certainty, Proximity, and Obscurity, are rules of logic not abolished by the North Carolina Code. *Crump v. Mims*, 64 NC. 707, 771 (1870). The rules of pleading at Common Law have not been abrogated by the Code of Civil Procedure. The essential principles still remain. *Henry mv. Co. v. Semonian*, 40 Cob. 269, 90 P. 682 (1907); *Hughes*, Procedure, Its Theory and Practice 488 (Chicago 1905).

with its actual provisions interpretable only against the Older System. It becomes clear, therefore, that one can only come to full apprehension of Code Pleading through the study of Common-Law Pleading.

To illustrate this point, let us take the Common Code provision that the Complaint must state facts in "plain and concise" language.<sup>59</sup> To one not trained in the Common Law this means a statement of "facts," as Charles O'Connor, the distinguished New York Lawyer and Pleader, observed, "just as any old woman, in trouble for the first time, would narrate her grievances,~'SC and whipped into some semblance of order by use of a Form Book; to one trained in the Common Law, it would mean that the plaintiff, in order to state a Cause of Action, or the defendant, in order to state a Defense, should state the Ultimate Facts, and not the Evidence of Facts and not Conclusions of Law, as pointed out in the leading New York case of *Allen v. Patterson*.<sup>61</sup>

Bliss, in his famous work on Code Pleading,<sup>62</sup> stated Rules covering presumptions of Fact, Matters Judicially Noticed, Anticipating Defenses, and Pleading Evidence, Conclusions of Law, or Immaterial or Irrelevant Matters. But in each instance the source of such Rule under the Code is Common-Law Pleading; each Rule is in effect merely a restatement, in slightly different phraseology, of the Rule as developed at Common Law. So, likewise, as to the Rules governing such matters as Duplicity, Certainty, Consistency, Directness, Argumentativeness, Allegations by way of Recital, and Alternative or Hypothetical Pleading. In

<sup>59</sup> N.Y. code of Civil Procedure, 1894, § 451.

<sup>60</sup> *Shipman*, Code Pleading: The Aid of the Earlier Systems, 7 Yale Li. 197, 199 (1808).

ci. 7 N.Y. 476 (1852); *Muser v. Robertson*, 17 F. 500 (1883).

<sup>61</sup> Bliss, *A Treatise Upon the Law of Pleading Under the Codes of Civil Procedure*, c. XIII, Rules Governing the Statement, ~ 174—215 (3d ed. by Johnson, St. Paul, 1894).

<sup>62</sup> N.Y. Laws 1848, c. 379, effective on July 1.

Sec. 5

## RELATION OF PLEADING TO OTHER SYSTEMS

23

fact, express statutory provisions aside, it may be said that if a Lawyer, in a Complaint under the Code, frames his Allegations of Fact in a manner to meet with the requirements of Stating a Cause of Action or Defense at Common Law, he need have no fear of being thrown out of Court on Demurrer because of some Formal or Substantive Defect in his Pleadings.<sup>63</sup> Indeed, the prophetic words of Professor Thomas M. Cooley seem as true today as when originally written, when, in referring to the relation of the New to the Older System, he declared:

"The works of Common Law Pleading have not been superseded by the New Codes which have been introduced.  
...A

-careful study of these works is the very best preparation for the Pleader, as well where a Code is in force as where the old Common-Law Forms are still adhered to. Any expectation which may have existed that the Code was to banish technicality, and substitute such simplicity that any man of common un~erstanding was to be competent,

without legal training, to present his case in due Form

-of Law, has not been realized. After a trial of the Code System for many years, its friends must confess that there is something more than Form in the Old System of Pleading, **and that the** Lawyer who has learned to state his case in a logical manner after **the** Rules laid down by Stephen and Gould, is better prepared to draw a Pleading that will stand the test on Demurrer than the man who, without that training, undertakes to tell his story to the Court as he might tell it to a neighbor, but who, never having accustomed himself to a strict and logical presentation of the precise Facts which constitute the Legal Cause of Action or the Legal Defense, is in danger of stating so much or so little, or

-of presenting the Facts so inaccurately, as to leave his rights in doubt on his own showing. Let the Common-Law Rules be mastered, and

**the work** under the Codes will prove easy and simple, and it will speedily be seen that no time has been lost or labor wasted, in coming to the New Practice by the Old Road.”<sup>64</sup>

#### *Relation to the New Federal Rules of Civil Procedure*

TOWARD the close of the Nineteenth Century, the American Bar Association concluded that Legislative Control of Practice was highly inefficient and that the Federal Conformity Act had produced no Real Conformity between State and Federal Practice. In this situation the Association placed its influence behind a bill in Congress which provided for turning the Federal Rule-Making Power over to the Supreme Court of the United States. After much agitation and much backing and filling, by the Act of June 19, 1934, Congress gave the Supreme Court power “to prescribe, by General Rules, for the District Courts of the United States and for the Courts of the District of Columbia, the Forms of Process, Writs, Pleadings, and Motions, and the Practice and Procedure in Civil Actions at Law.”<sup>65</sup> The Rules as formulated under this Act did not modify in any way the substantive rights of litigants. The Act further provided that the Court might “unite the General Rules prescribed by it for Cases in Equity with those in Actions at Law so as to secure One Form of Civil Action and Procedure for both.”<sup>67</sup> The right of Trial by Jury as at Common Law and declared by the Seventh Amendment to the Constitution was preserved.

From the nature and character of the provisions **of** the Act of 1934, and **the Rules of Civil** Procedure as promulgated thereunder by the Supreme Court in 1938, it is clear that

<sup>64</sup> Shipman, Code Pleading: The Aid of the Earlier Systems, 7 Yale Li. 197, 200 (1898), Quoting Professor Cooley.

<sup>65</sup> c. 851, § 1, 2, 48 Stat. 1064, 28 U.S.C.A. § 723b,

723e.

<sup>66</sup> \*1, 48 Stat 1064, 28 U.S.O.A. { 723b.

<sup>67</sup> \*2, 48 Stat 1064, 28 U.S.C.A. { 723e.

<sup>68</sup> Shipman, Code Pleading: The Aid of the Earlier Systems, 7 Yale Li. 197, 205 (1898).

## **BASIS OF MODERN REMEDIAL LAW**

### **Ch. 1**

in scope and content they were patterned after the provisions of our various State Codes and Practice Acts, which, as previously indicated, were founded on the fundamental principles of Common-Law Procedure. There are, however, two chief differences. *First*, under the New System in the Federal Courts and as adopted in Several States, the control of Pleading and Practice by Rule of Court gives a flexibility in the application of the Procedural Law and in its adaptation to any need for change growing out of new or unforeseen conditions, as opposed to the Older System of Code Pleading, which more or less placed procedure in a legislative strait-jacket, leaving little room for development to meet changing social conditions. *Second*, under the Codes, attempts to simplify and reduce the number of provisions regulating Pleading did not meet with success. For example, the New York Civil Practice Act contained some 1578 Sections, Supplemented by 301 Rules of Civil Practice. In 1938, when a comparison was made between the New Federal Rules of Civil Procedure and the New York Code, it appeared that it took only 86 Federal Rules to cover substantially the area occupied by 1100 of the 1578 sections of the Civil Practice Act and 133 of the 301 New York Rules of Civil Practice. And finally, it may be added that the spirit and tendency of the New System of Procedure as represented by the Federal Rules of Civil Procedure, and as regulated by the Judges, is

in the direction of the Common Law, as is evidenced, to give but a single example, by the provision that all Actions must be instituted through a Clerk of a Court and by Authority of a Court, as at Common Law, as opposed to the Code Method of Commencing an Action by an Individual or an Attorney serving a Summons and Complaint upon the defendant.

#### THE STATUS OF COMMON-LAW PLEADING UNDER THE CODES

**Acts and Federal Rules of Civil Procedure.** But even after a Century of Development **under the Codes we still find that Common-Law Pleading survives in fact or in** theory. On the basis of the degree of Common-Law Pleading which still prevails, the states fall into five **groups:**

- The Common-Law States;
- The Quasi Common-Law States;
- The Code States;
- The Rules of Court States;

#### **Civil Law States,**

**IN the early part of the Nineteenth Century** the influence of Bentham began to be felt in America. By the New York Constitution of 1846, the Court of Chancery was abolished,<sup>68</sup> and a New Court having General Jurisdiction over Law and Equity was created and the Legislature was directed to provide for the appointment of Three Commissioners “to revise, reform, simplify, and abridge” the Practice and Pleadings of the Courts of Record of the State.<sup>69</sup> In response to this direction, in the following year the State Legislature instructed the Commissioners “to provide for the abolition of the present Forms of Actions and Pleadings in cases at Common Law; for a Uniform Course of Proceeding in all Cases whether of Legal or Equitable Cognizance, and for the abandonment of all Latin and other foreign tongues, so far as the same shall by them be deemed practicable, and of any Form and Proceeding not necessary to ascertain or preserve the Rights of the Parties.”<sup>70</sup> **Under the directing genius of David Dudley Field, the Commission formulated and reported a Code which was passed on April 12, 1848, and became operative on July 1, 1848, as the Code of Procedure,<sup>71</sup> which has served as the source of most of our Modern Procedural Reform. The greatest single achievement of the Code, according to Professor Pomeroy, was the sub-**

68. Art XIV, § 5.

69. Art. vi, 24.

70. N.Y.Laws 1847, c. 50, § 5.

71. N.Y.Laws 1848, c. 370.

6. **In theory at least Common-Law Pleading was abolished by our Modern Codes, Practice Sec. 6**

#### STATUS UNDER THE CODES

25

stitution of One Form of Action in place of the Eleven Common-Law Forms of Action.<sup>72</sup> In addition, Separate Courts of Law and Equity were established, in favor of what was hoped would turn out to be a Blended System of Procedure, operating under a Formless Action to be known as a Civil Action, which was in the nature of an Action on the Case. The Code also provided the Pleadings should state the Facts in plain and concise language,<sup>73</sup> and that the more liberal provisions of Equity Procedure should govern Joinder of Parties, and provided for the rendition of Judgments against one or more Parties according to the particular interest of the Parties involved.

Within a quarter of a century after the adoption of the New York Code of Procedure in 1848, the Code was adopted in twenty-four States, and, according to Clark,<sup>74</sup> some Form of Code Procedure was, in 1947, then in force in twenty-nine states, two territories, the District of Columbia, and in the Federal Courts. So, even at this late date, it still remains true that the Movement for Reform, which took definite shape In 1848, has been only

partially effective. Prior to the adoption of the New Federal Rules of Civil Procedure in 1938, the States were roughly lined up in Four Groups, being classified as Common Law, Quasi-Common-Law, Code and Civil Law States. After 1938, there may be added another Group, the Rules of Court States. Perhaps a brief word concerning each type of Jurisdiction may be helpful.

#### *The Common-Law States*

BY the phrase "Common-Law States," is meant those States in which the Pleading is

19. Code Remedies, -i, Abolition of the Distinctions Between Actions at Law and Suits In Equity, and of all the Common Law Forms of Action, 10, 15 (4th ed. by Bogle, Boston, 1904).

13. Carried into New York Civil Practice Law and Rules, Rule 3014 (1968).

71. Handbook of the Law of code Pleading, c. I, 5 5, 25 (2d ed., St. Paul, 1947).

primarily according to the Common-Law Rules, as Unwritten Law or in the Form of Statutory Enactment of the Common Law. Characteristic of the Procedure of the States which fall into this Group is the retention of the Forms of Actions and the Rules of Common-Law Pleading under a Court System that still calls for Separate Actions at Law and Suits in Equity. Even so, the Practice in these Separate Courts has from time to time been modified by Local Practice Acts.

#### *The Quasi Common-Law States*

IN these States the Formal Distinction between Law and Equity has been continued at least in theory, although in practice it has been weakened by Statutes abolishing the distinctions between Trespass and Trespass *on* the Case, or combining the Forms of Actions in the two divisions of Tort and Contract. Usually in Jurisdictions of this character Equitable Defenses are permitted in Law Actions.

#### *The Code States*

IN the Code States, originally largely patterned 'after the New York Code of Procedure, the Systems of Pleading and Practice are Statutory, but based on a combination of the better features of the Common-Law and Equity Procedural Systems. The same Rules apply to both Law and Equity Cases. But it should be remembered that there is a far greater similarity in the essential principles of Pleading at Common Law, in Equity, and under the Reformed Code of Procedure than is generally realized. The Essential Elements of Causes of Action which must be Pleaded are not changed by the Codes. And the Rules as to the manner of making Allegations of the respective contentions of the Parties still have much in common.

#### *Rules of Court States*

THESE states are distinguished from the Code States, whose Pleading and Practice is generally, if not entirely, Regulated by the Legislature, in that their Procedure is Reg

26

## **BASIS OF MODERN REMEDIAL LAW**

### **Ch. I**

ulated by Rules of Court, usually framed by or under the authority of the Court of Highest Jurisdiction---the Supreme Court. The advantage of Regulating Procedure by Rule of Court as opposed to Legislative Enactment is that of greater flexibility in making changes as the social need therefor arises, without the necessity of each time referring the matter to a Legislative Body, which may be dilatory in taking action, and is oftentimes influenced by political considerations. Since the promulgation of the New Federal Rules of **Civil Procedure**, a number of states have adopted the substance of the New Rules in revising their procedure.

#### *Civil Law States*

In this group the Systems of Pleading were originally based upon the Civil as opposed to the Common Law. Louisiana is a **remaining** State which began with a Civil Law background, from which it has never fully escaped.

## Conclusion

ASIDE from the fact that after the lapse of over a Century, almost a third of the Several States of the United States were yet to accept the Reform represented by the adoption of a Code of Civil Procedure, how have the codes been received? The object was to blend Law and Equity into a Uniform Mode of Procedure. This was to be accomplished by abolition of the Forms of Action and the Distinction between Law and Equity. A single Form of Action in the nature of an Action on the Case was to be substituted in place of the Common-Law Forms of Actions and Suits in Equity. In some Codes there were also provisions liberalizing the law controlling Joinder of Parties and Joinder of Causes of Action, but unfortunately many of the early Codes omitted the latter type of provision.

In some States, notably New York, the Reforms under the Code of Procedure, met with a cold reception.<sup>75</sup> Thus in *Reubens v. Joel*,<sup>76</sup> Selden, in referring to the possibility of abolishing the distinctions between Law and Equity, declared: "By what process can these two Modes of Relief be made indetical? It is possible to abolish one or the other, or both, but it certainly is not possible to abolish the distinction between them.

Another leading distinction between Common-Law Actions and Suits in Equity consists in their different Modes of Trial. The former are to be tried by a Jury, the latter by the Court. Can the Legislature abolish this distinction? They might, but for the restraints of the Constitution, abolish either kind of Trial, or reclassify the classes to which they apply; but they cannot make Trial by Jury and Trial by the Court the same thing."<sup>77</sup>

What such an attitude has meant in practical terms is that a large part of the Century following the adoption of the First Codes has been spent by the Judges in reading back into the Code, provision by provision, the Rules of the Common Law.

According to Clark,<sup>75</sup> the objections of the Courts which have taken an unfriendly attitude chief Justice Winslow of Wisconsin, said: "The

cold, not to say inhuman, treatment which the infant code received from the New York Judges is matter of history. They had been bred under the Common-Law Rules of Pleading and taught to regard that System as the perfection of logic, and they viewed with suspicion a system which was heralded as so simple that every man would be able to draw his own Pleadings. They proceeded by construction to import into the Code Rules and distinctions from the Common-Law System to such an extent that in a few years they had practically so changed it that it could hardly be recognized by its creators." *McArthur v. Moffet*, 143 Wis. 564, 567, 128 N.W. 445, 446 (1910).

<sup>75</sup> 15 N.Y. 488, 493, 494 (1866).

<sup>76</sup> See, *Goulet v. Asseler*, 22 N.Y. 225, 78 Am.Dec. 186 (1860); *Caddell v. Allen*, 99 N.C. 542, 548, 6 SE. 399, 402 (1888). *CL Warren v. Flail*, 170 N.e. 406, 87 S. E. 126 (1915).

<sup>77</sup> Clark, *Handbook of the Law of Code Pleading*, e.

2, *The Code Action*, 1 15, p. 88 (St. Paul 1947).

## Sec. 7

### MODERN PROCEDURE UNDER CODES, ETC.

27

tude toward the Code Reforms, are five in number:

(1) The necessity of forming clear and exact issues, both for the Trial and also to support the Judgment and thus make the Plea of Res Judicata thereafter available to the Parties.

(2) Inherent differences as to Jurisdiction and Venue, referring to the fact that Certain Actions must be brought in Certain Courts or at Certain Places.

(3) Inherent differences as to the application of Certain Statutes, such as Statutes of Limitations which were drawn along the lines of the old Procedural Divisions.

(4) Inherent differences in Manner or Amount of Relief to be granted, referring to the Specific Relief of Equity as distinguished from the Money Damages ordinarily given at Law; or to a possible Variance in the Amount of Money Damages recoverable, depending on the Form of Action chosen; or to Particular Remedies granted only in Certain Forms of Actions, such as Execution on the defendant's body.

(5) Inherent differences in Manner of Trial and of Appellate Review, referring to the Constitutional



Right of Trial by Jury in “Law Cases” and to the different Methods of Appellate Review in “Law” and “Equity” cases.

All these problems have, with a more liberal point of view on the part of the Judges, been satisfactorily solved in other Code States, according to Judge Clark, and it was his belief that in time the Courts in New York would come around to the same view. But the very existence of the objections enumerated by Judge Clark ninety-nine years after the adoption of the New York Code of Procedure in 1848, plus the fact that numerous States are still without the Code of Reform, is some slight indication of the tenacity of the Common Law. And when you add to this the fact that the great bulk of the decisions under the Codes have necessarily been made against the background of the Common Law, it becomes clear why many distinguished Judges cling to the thesis that the inherent and fundamental difference between Actions at Law and Suits in Equity cannot be ignored—a view which has found the support, at least, of one distinguished teacher,<sup>79</sup> who stated, in referring to the Abolition of the Forms, that they “are **not** archaic, accidental, artificial or arbitrary, but in the nature of things reasonable, if not indeed in their essence necessary.” -·

MODERN PROCEDURE UNDER CODES,  
PRACTICE ACTS AND RULES OF  
COURT—MERELY ANOTHER STEP IN  
THE EVOLUTIONARY DEVELOPMENT  
OF THE COMMON LAW

7. Viewed in **its proper Historical Perspective**, any unbiased and well-informed Student of Legal History, Generally, and of Legal Procedure, Specifically, must observe **that each** new advance in our System of Procedure was **and** is but another Evolutionary Step in the **Development of the Common Law**, and must **acknowledge the fact that Common-Law Pleading**, after the passage of some Seven or Eight **Centuries**, **still** survives as the basis of our **Modern Legal Procedural Systems as they exist in both the State and Federal Courts**.

HAVE the developments which have taken place since 1848, under the various Codes of **Civil** Procedure, and the Practice Acts of the Several States, together with the Federal Rules of Civil Procedure, been Revolutionary in Character, wiping **out the Ancient Landmarks** of the Common Law and **the** procedural experience of the Anglo-Saxon **race**, extending over a period of over eight hundred years, or rather, have they been merely gradual steps in the Evolutionary Development of Common-Law Pleading and Practice?

In the first, or Flexible Stage, of the Development of the Common Law, Original Writs

<sup>79</sup> Keigwln. Cases In Common Law PleadIng, 259 (2d ed. Rochester, N. 1. 1934).

<sup>80</sup> See Note, Law and Equity In New York—Still Unmerged, 55 Yale Li. 826 (1946).

## BASIS OF MODERN REMEDIAL LAW

### Ch. I

issued out of Chancery in great profusion, creating New Rights and New Law. It was during this period that the Ancient Proprietary **and** Possessory Real Actions developed in great number.

Alter the Provisions o Oxford in 1258, the power of the Clerks in Chancery was restricted, the Real and Mixed Actions became **so highly technical, difficult to manage and** lengthy in process, that they became inflexible and in consequence the Common Law lost some of its inherent power of expansion. During this period of inflexibility, an effort *to* restore the Authority of the Clerks in Chancery was made so that they might again Create New Rights by Issuing New Writs under Chapter 24 of the Statute of Westminster **II (1285)**. **But the effort was too** little and came too late, so that the Residuary Power of the King’s Council, operating through Chancery, was invoked to supplement the Common Law, not necessarily because of the Defects in the Common Law, but rather for reasons of State Policy.

As a result of the Statute perhaps, but more as a result of the growing social, economic and mercantile needs of England, the Modern Personal Common-Law Actions, which to some extent ran parallel to the Ancient

Proprietary and Possessory Actions, **and which were gradually emerging into greater prominence with the decline of these actions, were substituted in lieu of the old Real Actions which had predominated during the early Developmental Period of the Common Law. In the course of time, these Modern Forms of Action, latest in point of growth, in the Third State of Development, were abolished in favor of a Single, Formless, Form of Action, under which remedies could be provided for the violation of private rights of most any character.**

**With this in mind, let us swiftly glance back over the territory covered, and with almost a thousand years perspective in mind, view the Present Status of Common-Law Pleading and Practice as it stands in the light of Modern Reforms.**

From the Reign of Edward I (1272-4307) to 1848, a Period of five hundred and seventy-six years elapsed, during which Period, in both England and the United States, Legal Procedure was governed by the Common Law. When, in England, the Modern Common-Law Actions were substituted in the place of the Old Real Actions, as is later observed,<sup>85</sup> it was assumed that such an occurrence was merely a Normal Evolutionary Development of the Common Law, based upon the change in the English social structure from One of a Feudal to One of a Commercial or Industrial Character. This change became official or was Procedurally recognized by the Real Property Limitations Act of 1833, which abolished the Real and Mixed Actions.

When, therefore, in 1848, the New York Code of Procedure attempted to obliterate the distinctions between Law and Equity, to abolish the Common-Law Actions and to substitute in lieu thereof the Modern Single Formless Form of Action, the World was witnessing, not a Revolutionary Reform which swept the Common-Law System from its Ancient Moorings, but merely a Third Step in the Evolutionary Development of Common-Law Procedure, like that which took place in the Roman System.

Between 1848 and 1947, according to Clark,<sup>83</sup> **only twenty-eight out of the forty-eight States followed New York in establishing Code Systems of Procedure. And in those States which did follow New York's example, the intervening one hundred years have been spent largely in reading back into**

si. No specific date on which this occurred may be assigned but the process was completed by the Real Property Limitations Act of 1833. 3 & 4 Wm. IV, c. 27, \* 36 (1833).

fl. 3&4Wm.IV,c.27,~S6(1833).

83. Clark, Handbook of the Law of Code Pleading, cI, \* 8, 25 (Zd ed. St. Paul, 1947).

Sec. 7

MODERN PROCEDURE UNDER CODES, ETC.

29

the various Code provisions the appropriate intent of the Common Law, and to acknowledge the Rule of the Common Law, despite the stubborn fact that Common-Law

By the Supreme Court of Judicature Act Pleading and Practice, despite the passage of 1873, now largely replaced by the Supreme Court of Judicature (Consolidation) Act of 1925, still survives as the basis of our Modern Legal Procedural System. England followed New York, both State and Federal.<sup>87</sup>

in the abolition of the Common-Law Actions

87. In *Grobart v. Society For Establishing*

in favor of a Single Form of Action.<sup>86</sup> Yet *Manufactures*, 2 NJ. 136, 65 A.2d 833, 839 (1949), in no one suggested that this Development in referring to the present status of Common-Law England was anything other than an Evolutionary Change in the Common Law, albeit the same principles are applicable to them as to the simplest case. The flexibility and seeming informality of Pleading, Chief Justice Arthur Vanderbilt declared:

“The Pleadings in the case at Bar are lengthy, but the

tionary Change in the Common Law, albeit the same principles are applicable to them as to the simplest case. The flexibility and seeming informality of Pleading, Chief Justice Arthur Vanderbilt declared:

Finally, in 1938, came the long awaited reform of Pleadings under the *New Rules* should not deceive one into believing that the essentials of

New Federal Rules of Civil Procedure, which sound Pleading at Law or in Equity have been sought to and did place the

Regulation of abandoned. Quite the contrary; the objective of Pleading and Practice in the Federal Courts reaching an issue of law or of fact in two or at the most three simple Pleadings has been attained, but and in the District of Columbia in the hands not at the sacrifice of stating the elements of a of the Supreme Court of the United States, Claim or of a Defense. They remain the same as **as opposed to** Congress. Some States, at Common Law as a matter to Substantive Law

as well as of Good Pleading.”

in whole or partially have emulated the Fed-

And William Wirt Blume, a distinguished authority

eral Courts in Regulating Procedure by Rule~ Ancient and Modern Procedure, after a of Court as opposed to Legislative Fiat, long and thorough survey of Reform Movements in both England and America, in an article, Theory of

So, whether we stand in the Period of the pleading: A Survey Including the Federal Rules, Common Law when the Real Actions were 47 Mich.L.Rev. 297, 339—340 (1949), in summarizing gradually being replaced by the Modern

the Common-Law principles of Pleading still in effect, declared:

Common-Law Actions; whether we start .1 A Judgment of a Court of Record is a conclusion with the abolition of the **Common-Law** drawn from premises appearing on the face of the Forms of Action by the New York Code of Jg't Record.

“2. A Judgment Record contains Statements of Claim

Procedure in 1848, In favor of **the Single**, and Defense, Verdicts, and Findings of Fact, but

Formless Form of Action, in the nature of not Evidence introduced at Trial, an Action of Trespass **on the** Case, or wheth- “8. In rendering Judgment on a Claim or Defense **er we look at the** situation today in the **light** the Court must determine the legal sufficiency of the Claim or Defense.

**of our most recent** Procedural Reform under “4. In determining the legal sufficiency of a Claim **the New Federal Rules of Civil Procedure**,— or Defense the Court looks only to the pleadings viewed in its proper Historical Perspective, which form a part of the Record.

“5. For the Court to be able to determine the legal

any unbiased and well-informed Student **of** sufficiency of a Claim or Defense it must be legally Legal History Generally, and **of Legal Proce-**

complete.

cedure, Specifically, will be forced to admit “6~ A. question of legal sufficiency may be raised before Judgment by Demurrer or Motion, or after Judgment by Writ of Error.

that Each **New change in Our System of Procedure, by Way of Reform, has been but** “T, If before Trial a Claim or Defense is found to another Evolutionary Step **in the Develop-** be legally insufficient Judgment Is for opposite party be legally insufficient Judgment is for opposite party

4. 36 & 37 Vie., c. 66 (1878).

•~8, If before Trial & Claim or Defense is found to

1~ 15 & 16 Gee. V, c. 49(1923).

be legally sufficient Judgment Is for pleader unless opposite party Is allowed to raise **an issue of fact**

SI. See article by Hepburn, In the Hope of a New “9. If after trial a Claim or Defense is found to be Birth of One Form of Action. Pan II, The Statutory legally insufficient judgment Is for opposite party One Form of ActIon, 13 Va.L.Rev. 09, 78—80 (1920). even though Verdict Is for the pleader.

**30**

## **BASIS OF MODERN REMEDIAL LAW**

**Cit 1**

“10 If after trial a Claim or Defense Is found to be “16. For the Record to be true, matters proved may legally sufficient Judgment is for pleader If the not ‘vary’ from matters pleaded.

facts pleaded are found to be true.

“17. Having pleaded one material matter, a party

“11. In determining the truth of a legally sufficient may not surprise his opponent by proving a differclaim or defense the court looks only to the plead- ent matter. ings and Verdict or Findings.

“18. To prevent surprise at the trial the plaintiff

“12. Material facts pleaded by one party and not de- must Plead Items of Special Damage. nied by the other party are deemed to be true.

“13. Material facts pleaded by one party and denied “19. To prevent surprise at the b-lal the plaintiff may by the other party are deemed true or false in ac- be required to furnish a Bill of Particulars. cordance with the Verdict or Findings. “20. To prevent

surprise and future re litigation a

“14. Pleadings serve as a Record of matters admitted- Claim or Defense should be identified by details ted by failure to deny, and of matters found by a such as time and place.  
 General Verdict. “Except to the extent that parties are permitted to “15. The Record of a Court of Record, which In- form new issues by evidence introduced at the trial,  
 chides the pleadings, is an indisputable ltecord of the above principles are as valid today as they were matters adjudicated, at Common Law.”  
 Sec.

## CHAPTER 2

### THE DEVELOPMENT OF THE COMMON-LAW FORMS OF ACTION'

8. Origin of the Common-Law Forms of Action.
9. Classification of the Common-Law Actions.
10. The Ancient Real Actions First in Order of Development.
11. The Modern Real Actions.
12. The Modern Personal Actions.
13. The Effect of the Development of the Forms of Action.

MOST authorities 2 who have undertaken to discuss the Development of the Forms of

i. Ia general, on the Forms of Action, Ancient and Modern, as developed at Common Law, see:

Treatises: Booth, Real Actions (1st Am. ed., New York 1808); Palgrave, The Parliamentary Writs and Writs of Military Summons (London 1827—1834); 1 Roscoc, Law of Actions Relating to Real Property (Philadelphia 1840); Jackson, Real Actions (Boston 1828); Browne, Actions at Law (Law Library, Philadelphia 184-1) Chitty, On Pleading, e II, 67—101, Of the Forms of Action (3d Am. ed., Philadelphia 1849); Bigelow, History of Procedure in England, c. IX (Boston 1880); Waite, Actions and Defences (Albany, 1877—1879); 1 Thorpe, Anglo-saxon Laws, 181—3 (London, 1840); Prentice, Actions at Law (2d ed. London 1880); 2 Polloek and Maitland, History of English Law, Bk. II, c. IX, Procedure, 556— 571 (Cambridge 1895); Alderson, A Practical Treatise upon the Law of Judicial Writs and Process In Civil and Criminal Cases (New York 1895); Stephen, A Treatise on the Principles of Pleading in Civil Actions (3d Am. ed. by Tyler, Washington, D. C. 1892); Warren, Law Studies, Pleadings in Particular Actions, Appendix (New York 1896); 3 Street~ Foundations of Legal Liability (Northport 1906); Gould, A Treatise on the Priaciples of Pleading, Pt. I, Forms of Actions, 1—67 (4th ed. by Will, Albany 1909); Ames, Lectures on Legai History, cc. IV— XIV (Cambridge 1913); Barbour, The History of Contract in Early English Equity, c. II, The Common Law ActIons, 13—54, In Oxford Studies in Social and Legal History (Oxford 1914); Scott, Fundamental Procedure in Actions at Law (New York 1922); Shipman, Handbook on Common Law Pleading, - II, The DeveIopment of the Forms of Action, if 27—34 (3d ed. by Ballantine, St Paul 1923); 1 Holdsworth, History of English Law, c 7, Chancery, 194—263 (London, 1903); Morgan, The Study of the Law, c. V, 56—83, Forms of Action (Chicago 1926); Klunnane, Anglo-American Law, a. XX, The Common Action as they existed at Common Law have usually begun by attempting to give some

Law Actions and Remedies, §~ 210—215 (Indianapolis 1932); Keig~vin, Cases in Common-Law Pleading, Introductory, 10—32 (Rochester 1934); Benson & Fryer, Readings on the Study of Law and the Anglo-Americaa Legal System, e- VIII, § 3, The Writ Systems (Washington, O. C. 1931); Lawler & Lawler, A Short Introduction to the Law of Real Property, e. III, The Real Actions, §~ 218—225 (Chicago 1940); Plueknett, A Concise History of the Common Law, The Forms of Action, Bk. II, Pt. I, c. 1, 336—357 (4th ed., London 1948); Maitland, The Forms of Action at Common Law (Cambridge 1948); Fifoot, History and Sources of the Common Law (London 1949).

Articles: Maitland, The History of the Register of Original Writs, 3 Uarvt.Rev. 97, 167, 212 (1889); Wilson, “Writs v, Rights”, 18 MichtRev. 255 (1920); Holland, Writ and Bills, S Cambridge L.J. 15 (1942); Schulz, Writ ‘Praeipce Quod Reddat’ and Its Continental Models, 54 Jurid.Rev~ 1 (1942); McIntire, The History and Use of Writs: A List of Selected Books and Periodicals, 37 L.Lib.J. 14 (1944). On the early Prerogative Writs in the Common Law see article by Jenks, The Prerogative Writs in Eng11th Law, 32 Yale L.J. 523 (1923); Humphreys, Formedon en Remainder at Common Law, 7 Camb.L.J. 238 (1941).

Comments: The Writ in Legal History, 164 L.T. 333 (1927); Some Legal History and Its Bearing on the Forms of Massachusetts Writs, 20 Mass.L.Q. 37 (1935); Form of the Original Writ in West Virginia, 42 W.Ve.L.Q. 273 (1936).

2. See, for example, Maitland, *The Forms of Action at Common Law*, Lecture I, 1—4 (Cambridge 1948), where he begins by pointing out that the choice of a Form of Action is a choice between the different Methods of Procedure adapted to different kinds of cases. This observation is doubtless true, but it

Kottler & Reppy *Com.Law Pldp.* HB—i

31

32

## FORMS OF ACTION

### Ch. 2

definition thereof. It has always seemed that this was to put the cart before the horse, that no understandable effort to define what is meant by the phrase “Forms of Action” could be made except as against a somewhat detailed survey of the History of the Common-Law Forms of Action, both Ancient and Modern. To present a definition to the student at a time when he has no apprehensive background or conception of how the Forms of Action developed, *would* appear to be an almost fruitless effort. In any event, it is respectfully submitted that the viewpoint of one *who* is seeking an understanding of the Forms of Action should be one of realization that the “Common-Law Scheme of Actions *was* not framed; it grew.” ~

### ORIGIN OF THE COMMON-LAW FORMS OF ACTION

**& The Common-Law Forms of Action had their Origin in the Action and Inter-action which took place between the Chancellor and**

the Three Royal Courts, King’s Bench, Exchequer **and Common Pleas, whereby individual litigants applied to the Chancery for Original Writs authorizing one of the three Courts to try a Specific Action.** The Multiplication of **this Process first produced the Ancient Real, Mixed and Personal Common-Law Actions, which** later were superseded **by the Modern Common-Law** Actions.

HOW, then, did the Formulary System of the Common Law develop the Ancient and Modern Common-Law Forms of Action? And why is a knowledge of what was meant by the phrase “Forms of Action” essential to one who *seeks to understand the Law*?

comes at a time when the beginning student is not qualified to fully comprehend its meaning. See, also, Martin, *Civil Procedure at Common Law*, e. 1, Introductory, **ft** 7, 8 (St. Paul 1905); Stephen, *A Treatise on the Principles of Pleading in Civil Actions*, c. **X, or** the Proceedings in an Action from Its Commencement to Its Termination, 39 (3d Am. ed. by Tyler, Washington, P. O. 1592).

~ a Street, *Foundations of Legal Liability*, a. IV, Classification of Actions in the Common-Law System, 37 (Northport, 1906).

The answer to these inquiries can only be discovered and understood against the background of the Norman Conquest and the statesmanship of William the Conqueror, who operating through the *King’s Council* or Curia Regis, the King’s writ, the King’s Inquest and the doctrine of the King’s peace, did three things which left an indelible imprint upon English Legal History. In the *first* place, he organized the System of Feudal Tenure under which, in legal theory at least, land was held in some form under the King, which explained why the King’s Courts were always keenly interested in any litigation, public or private, which affected land. In the *second* place, he issued in 1072 what is now known as **the Ordinance of William the Conqueror**,<sup>4</sup> which separated the Ecclesiastical and Common-Law Courts. This development not only exercised a profound influence upon the Procedural and Substantive Law of Descent and Distribution, Wills and Testaments and Probate and Administration, but by reason of the fact that it left Jurisdiction over Freehold Estates in the Common-Law Courts, it was largely responsible for the subsequent necessity of classifying the Common-Law Actions as Real, Mixed and Personal. In the *third* place, he established Law and Order through the creation of a Centralized **System of justice, as an** incident of which the Common-Law Forms of Action were developed.

**The agencies by or through which** these things were done were, in **the beginning, the King’s private property, and they** were not **at first National Institutions, nor were they a part of the Regular Machinery of Administration.** The Nation was governed by the

4. See Reppy, *The Ordinance of William the Conqueror (1072)—Its Implications in the Modern Law of Succession* (New York 1954), which originally appeared as a contribution to the Symposium on the Law of Wills and Administration of Estates in honor of the distinguished authority on that subject, Dean Alvin Evans of the University of Kentucky Law School, 42 Ky.L.J. 523 (1954).

## Sec. 5

### ORIGIN OF FORMS OF ACTION

33

Customary Local Law, which was administered in the local hundred, shire and county courts. There the best brand of justice was not always available. Perceiving this condition William, in the process of political reorganization of the whole country, began creating a system of royal, superior courts, to which those not satisfied with the local courts, might repair. And it was through the operation of these *New Courts* under William the Conqueror [1066—1087], Henry I [1100—1135], Henry's grandson, Henry II [1154—1189], and Edward I [1272—1307], that the centralization of justice was achieved.

#### *The Courts in Which, the Forms of Action Developed*

An action could be instituted in each of the three superior royal courts, King's Bench, Exchequer, and Common Pleas, each presided over by four judges. Jurisdiction was distributed as follows; the Court of King's Bench exercised control over crimes, torts akin to crimes, and other business pertaining to the crown, matters of revenue excepted; the Court of Exchequer handled cases relating to taxation and revenue; while the Court of Common Pleas dealt with ordinary civil suits between subject and subject, known as *communia placita*. In the three-cornered struggle for jurisdiction,

6. "For most matters affecting the mass of the nation the ancient system of customary law and local courts was continued in effect. Modification was for the most part not sudden or revolutionary, but the result of a long process of growth. Speaking very generally, it may be said that there was a time of political reorganization under William the Conqueror (1066—1087) and his son Henry I (1100—1135), of legal innovation and creation under Henry's able grandson Henry II (1154—1189), of rapid legal growth during the long reign of Henry III (1216—1272), and of legal consolidation and construction under Edward I, the "English Justinian" (1272—1307). The account which follows will be materially aided by keeping in mind the names of these kings and the dates of their reigns." *Bowring*, *Handbook of Elementary Law*, c. 10, 80, 152 (St. Paul 1929).

King's Bench, by resort to a fictitious allegation of trespass wider which control of the defendant could be secured by an arrest, expanded its jurisdiction at the expense of the other two courts in a manner so as to include all personal actions. By a similar process of usurpation the Court of Exchequer also came to exercise jurisdiction over personal actions, but the jurisdiction of neither court extended to the cognizance of real and mixed actions. In the meantime the Court of Common Pleas continued to exercise its original jurisdiction, which included the authority to entertain all actions between the subjects of the king, real, mixed, or personal, such as the ancient proprietary writs of right, the possessory assizes, writs of entry and writs of entry and forcible detainer, or such modern actions as account, covenant, debt and detinue, then in existence, and in time, over those personal actions of later vintage,

In King's Bench and Common Pleas an action could be commenced either by an original writ or by bill; in Exchequer, by bill only. The former method of commencing an action, according to Stephen, "is the regular and ancient one, and the latter is in the nature of an exception to it. The proceeding by *original writ* consequently claims first notice." ~

#### *The Original Writ*

(I) *The Historical Background.*—When the Conqueror first took over in England, in the process of establishing law and order, he followed the Norman system of having his secretary, the chancellor, write out and dispatch various administrative orders concerned with the execution of the business of the crown. The king summoned his army by writ, instructed his ambassadors by writ, and it was under an order or orders of this

c. Stephen, *A Treatise on the Principles of Pleading in Civil Actions*, c. I, Of the Proceedings in an Action from Its Commencement to Its Termination, 40 (3d Am. ed. by Tyler, Washington, D. C. 1802).

34

## FORMS OF ACTION

### Ch. 2

character that the facts were gathered for **the Domesday Book**.<sup>7</sup> As the Authority of the King was more frequently exercised, it gradually and naturally fell into regular Administrative Channels, and there was a distinct tendency to develop standards or Common Forms for handling the King's business. When, therefore, in pursuance of the Conqueror's announced policy of non-interference with the Local Courts, an effort was made to aid the Administration of Justice by creating a System of Royal Courts to which Litigants, who Failed to Secure Justice in the Local Courts, might repair, it was only normal and natural that the existing System of Administrative Controls should be applied to the conduct of the King's business in the Courts. It is not surprising to find, therefore, that as each of the Superior Common Law Courts split off from the Curia Regis or King's Council, its activities were strictly limited to only those cases which *were* delegated to it by means of an Administrative Order, which, when applied to Judicial Affairs, became a Judicial Administrative Order, now familiarly known as **an Original Writ** (*breve originale*). Under Henry II (1154—1189), the use of such Writs, which had been occasional and extraordinary, perhaps a royal favor, became usual and regular.

(U) *The Depends-we of Right upon Remedy*.—In the beginning these Judicial Orders, representing the King, were issued only occasionally, perhaps in aid of some great tenant of the King. But later, when it became necessary or desirable to expand the activities of the King's Courts, all that needed to be done was to expand and develop New Forms of what were, in the beginning, merely thought of as new routines in the Process of Judicial Administration. In Glanvill's

For a group of comprehensive essays, see Maitland, *Domesday Book and Beyond: Three Essays In the Early History of England* (Cambridge 1901)

**time [1178—1189]** the tendency of the Royal Courts, King's Bench, Exchequer and Common Pleas, to enlarge their Jurisdictions was not great. In Bracton's day [1245—1267] however, the period of growth was definitely under way, and the Procedural Mechanism by which this was to be realized was to be through the Invention of New Forms of Actions, to be, as he suggested, as numerous as there were Causes of Actions, under which the King was to Administer a System of Law as broad in its scope and variety as the Roman Law. The Common-Law theory that wherever there is a wrong there is a Remedy<sup>9</sup> was in effect given expression even at this early date when it was declared that there ought to be a remedy for every wrong; if some new wrong be perpetrated then a New Writ may be invented to meet it.

The Forms of Action, therefore, constitute a vivid illustration of the dependence of right upon remedy. The question of whether a man could bring this or that Action, such

8. During the latter part of the Reign of Henry II (1154—1189), the first systematic treatise of *English Law* appeared. The exact date of its appearance is *not* known, but it is generally *thought* to have been somewhere around 1187—1180. And it has been attributed to Banulf de Glanvill, Henry's great Chief Justiciar. According to Pollock and Maitland, *History of English Law*, Bk. I, c. v, 143 (Cambridge 1893), the author may have been his nephew, Hubert Walter, who may have written under *Glanvill's* direction. In any event, he produced the first authoritative story of the Development of Procedural and Substantive Common Law, as evolved by the

Lawyers and Judges, under the reforming energy of Henry II, Maitland and Montague, *A Sketch of English Legal History*, c. I, 43 (New York 1915), in commenting on this book, declared: "We look back from it to a law book written in the reign of Henry I (1100—1135), [the *Leges Henrici Primi*, written about 1115J, and we can hardly believe that only some seventy years divide the two. The one can, at this moment, be read and understood by anyone who knows a little of Medieval Latin and a little of English Law; the other will always be dark to the most Learned Scholars. The gulf between them looks like that between Logic and Caprice, between Reason and Unreason."

9. 1 *Bacon*, *Abridgment of the Law*, "Actions in General", B. 28, 29 (Dublin, 1786).

## ORIGIN OF FORMS OF ACTION

### Sec. 8

as Trespass, Trover, Assumpsit, and so on, was a question of Substantive Right and of Liability. In theory, as has been suggested, there ought to be a remedy for every wrong (*ubi jus, ibi remedium*), yet the Right of Action at

Common Law was dependent upon whether the litigants' facts fell within the scope of a limited and arbitrary list of Writs. There were at any given moment of development—a development which stretched over Centuries—only the same number of Rights of Action as there were Forms of Action. These Forms of Action, Ancient and Modern, persisted in actual use in English Procedure for Six Centuries, from the time of Henry II [1154—1189] and Edward I [1272—1307], until the Judicature Acts in the Nineteenth Century. And these Forms were issued, and from time to time, found their way into and were permanently recorded in the Chancery in a book known as the Register of Writs”

10. 36 & 37 Vict. c. 66 (ISI); as & ~a Viet. c. 77 (1875).  
35

(*Regisirurn Brevium*) which was first printed and published in the Reign of Henry VIII [1509—1547]. This book thus became an authoritative source for the purpose of determining, at any given moment in English Legal History, what Forms of Writs were then available to litigants. A variation, however, from the transcript of the Form as it appeared in the Register, was not conclusive against the propriety of the Form, if it appeared correct from other sufficient authority adduced.

Thus, the King's Court was even then in the throes of developing a Formulary System through which it was ultimately destined to establish a Broad, General, National Jurisdiction and approximate the Common-Law ideal of affording a litigant a remedy for every wrong. This type of activity applied mostly to Civil Pleas or Common Pleas, whereas Pleas to the Crown, criminal for most part, depended upon a System of Procedure controlled by the Local Authorities. These Civil Pleas originally were Pleas dealing with the land, as under the Feudal System the crown was concerned with maintaining strict control over the land, as a result of which the Common Law Regulating the Land was ultimately to be converted into the Common Law of the Land. While in general these disputes might also have been handled by the Local Courts, where the Feudal Court was either weak, partial or actually corrupt, a Writ might issue from the King, through the Chancellor, ordering the Feudal Lord to do immediate Justice or appear in the King's Court on a certain day and explain why not. In the beginning such intervention was largely administrative in character, and such threats, for the purpose of setting the Local Lord's Judicial Machinery in motion, were not without both Anglo-Saxon and Anglo-Norman precedent.

were wide differences. 2 Pollock and Maitland, History of English Law, Bk. II, c. IX, procedure, § I, 562, 568 (Cambridge 1895).

11. In general, on the subject of Writs, see Maitland, The History of Original Writs, 3 Harv.L.Rev. 97 (1889), reprinted in 2 Maitland, Collected Papers, 110 (Edited by H. A. Fisher, Cambridge 1911).

The purpose of the Register of Writs was to provide the Clerics in Chancery with an authoritative collection of Forms for all the existing Writs. It also served as a guide to Lawyers as to what Writs were available in the Chancellor's office. Maitland, in his article on The History of the Original Writs, 3 Harv.L.Rev. 97, 107 (1889), reprinted in 2 Select Essays in Anglo-American Legal History, e. 36, 549 (Boston 1908), declared that the Register grew and expanded over a period of some Three Centuries, during which time its *size constantly* increased. Long after the period of its greatest development had passed it appeared in print for the first time in what is known as A Collection of Rastell's Entries, first published in 1596. 4 Reel-es, History of English Law, e. XXX, Henry VIII, 566 (Am. ed. by Finlason, Philadelphia 1880). For some Two Centuries thereafter this book and others based upon it were among the commonplace books used by the Practicing Lawyers. Such books took the Form of Commentaries by Judges and text-writers upon the character and use of the Writs available in the Register. These Writs, if the variations in each one were noted, reached into the hundreds; if, however, we omit the variations, the number may be estimated at thirty or forty *between* which there

36

## FORMS OF ACTION

Cit 2

(III) *The Creation of the First Original Writ and Its Three Purposes*—However this may be, if for a moment we retrace our steps, there must have been a time, immediately after the First Superior Common-Law Court was differentiated from the King's Council, when the first litigant petitioned the Chancellor for Relief, let us say, based upon a claim that his title or possession to certain property was in jeopardy. Where title or a proprietary interest was involved, the Remedy required was some Form of the Writ of Right, but where a mere possessory interest was in question the Remedy consisted of a Possessory Writ, which later was followed by the Writ of Trespass (*quare cunctum fregit*) and the Writ of Ejectment. Now, for the first time, the



Chancellor was confronted with the problem of just how he would delegate to the then single existing Court the required Authority of the King which was essential for the Court to function **or to** hear the Complaint contained in the Petition to the Chancellor. At this point the Chancellor, faced with the Concrete problem of framing a Judicial Order for the first time, doubtless looked over the Forms of some of his Non-Judicial Administrative Orders, observed that they usually began with greetings from the King and were directed to the individual whose action was sought. Adopting such Nonjudicial Order as a pattern, but phrasing it in Judicial Language, and directing it to the Sheriff of the County where the Cause of Action arose, or to the defendant, he thus created the First Original

### **Writ, the Beginning and Foundation of the**

Suit, the exact date of which is buried in the mists of history.

After the first Original Writ of Trespass *quare clausum Ire git* (Trespass to Land), as referred to above, had been issued several times to cover that Specific Factual Situation, **it gradually acquired a Fixed Form and** a Fixed Theory of Liability. If, however, **the petitioner** appeared in Chancery with a Complaint that his cattle had been taken

and carried away, the First Writ did not fit the Factual Situation, hence the Chancellor *or* his Clerks had to Frame a New Writ to cover a Trespass to personal property. Looking over the Form of the Writ of Trespass *quare c7ausun'~ fregit*, the Chancellor doubtless discovered that by changing the description of the property involved from realty to personally, he could accomplish the desired end of authorizing the proper Court to *try* the case. Thus was created the Writ of Trespass to Personality (*Trespass tie bonis asportatis*). And so with another slight variation in the language of the Two Preceding Writs, he was able to bring forth the Writ of Trespass for Assault and Battery. Pursuing the same thought, if the Complaint was that the defendant had failed to pay the plaintiff a sum certain due and owing, a Writ of Debt was framed; if the Complaint was that the defendant had breached the terms of a Sealed Contract, a Writ of Covenant was the plaintiff's only remedy. And so on, until by a similar process, the whole gamut of human activity was in a manner covered, and there developed in the Common Law a great multiplicity of Types of Actions, as almost all types of injury, whether involving Breach of a Contract, Injury to Person or Injury to Property, occurred under slightly different combinations of Facts or Events, making with each variation a New Writ, the issuance of which created a New Right.

An Original Writ, according to Blackstone, was a mandatory letter on parchment, **issuing out of** Chancery, under the Great Seal, in the King's name, directed to the Sheriff of the County where the injury was **alleged to have occurred, containing a** Summary Statement of the Cause of Action, and requiring the defendant to satisfy the claim, **or upon the defendant's failure to do so, then to** Summon him to appear in the designated **Superior Common-Law Court on the day** named in **the Writ, It was a kind of Judicial** ~xecutive **Order to show cause why he had** not redressed the wrong complained of. In  
Sec. S

### **ORIGIN OF FORMS OF ACTION**

37

some cases it omitted the former alternative, and required the Sheriff simply to enforce an Appearance. Examples of the Form of such a Writ, in one of the Ancient Real Actions and in one of the Modern Personal Actions, the relationship of which will be developed later, appear below:

#### **FORM OF THE WRIT OF PEACIPE IN CAPITE'<sup>5</sup>**

EDWARD THE FIRST, King of England, **To the Sheriff of County,**  
GREETING:

COMMAND William Johnson that justly and without delay he render to Arthur Brown one message with the appurtenances in Trumpington which he claims to be his right and inheritance, and to hold of us in chief and whereof he complains that the aforesaid William Johnson unjustly deforceth him. And unless he will do this, and (if) the aforesaid Arthur Brown shall give you security to prosecute his claim, then summon by good summoners the aforesaid William Johnson that he be before our justices at Westminster, on \_\_\_\_\_ to

show wherefore he hath not done it. And have there the summoners and this writ.

WITNESS, ourself at Westminster,

FITZ-HERBERT, *Natura Brevium*, (English ed. 1794)-

**FORM OF ORIGINAL WRIT IN DEBT** EDWARD THE FIRST, King of England,  
To the Sheriff of \_\_\_\_\_ County,

GREETING:

COMMAND William Johnson, late~ of County, that justly and without delay  
he render lã Arthur Brown the sum of £10

12. Fitz-Herbert, *Natura Brevium* (Dublin 1553)- The translation of the Writ of Praeceptum *In Capite* as set out above was taken from the English edition.

Maitland, *The Forms of Action at Common Law* 82, it 2 (Cambridge 1945).

of good and lawful money of Great Britain, which he owes to and unjustly detains from him, as it is said; and unless he shall do so, and if the said Arthur Brown shall make you secure of prosecuting his claim, then *summon*, by good summoners, the said William Johnson that he be before us on the \_\_\_ day of \_\_\_ wheresoever we shall be in England, (or, in Common Pleas before our Justices at Westminster, on ), to shew wherefore he hath not done it, and have there the names of the summoners, and this writ.

WITNESS, ourself at Westminster,

TIDD'S APPENDIX, 20, as set out in Martin, *Civil Procedure at Common Law*, Appendix, 365 (St. Paul 1905).

In other words, the Writs were not transformed into Actions until, in pursuance of the authority granted therein, the defendant Appeared in Court. At that time the plaintiff, elaborating upon the Charge Stated in the Original Writ, filed his Declaration stating for the first time his Cause of Action, in the course of which he not only repeated the Charge in the Original Writ, but expanded it into a full-fledged Statement of his Cause of Action. The issuance of each New Writ with each new variation in the Combination of Facts or Events presented amounted, therefore, to the creation of a New Cause or Right of Action.<sup>3</sup>

At this point, therefore, it should be observed, that the Original Writ as finally

It was this very practice, as we shall see, which led the Barons in 1258 to draw up what are now known as the Provisions of Oxford, which had a restrictive effect upon the practice of the Clerks in Chancery in issuing New Writs. It was this restriction upon the Clerks which ultimately led to the *Enactment of the Statute of Westminster 11* (1285), 13 Edw. I, c. 24, 1 Pickering's *Statutes at Large* 196, under which the Clerks were authorized to issue *New Writs* in all cases *similar to but not identical with* Trespasses, provided they fell within the scope of some existing Writ; otherwise the matter was to be referred to Parliament

38

## FORMS OF ACTION

### Ch. 2

developed, served three distinct and material purposes:

(1) It authorized a specific Superior Common-Law Court to acquire control over the specific individuals involved in the controversy, or to put the matter in more technical phraseology, it gave the Court Jurisdiction over the Parties to the Action.

(2) it authorized the same Court to assume control over the controversy, or to put the matter in more technical language, it gave the court Jurisdiction over the Subject Matter of the Action and served as the Institution of the Action.

(3) It determined the Character of the Action to be tried, for if the plaintiff sued out of Chancery an Original Writ in Debt, he could not declare in Account, Covenant, or any other Form of Action but Debt. The Character of the Writ definitely defined and limited the Character of the Action.

In short, except in the case of the *Practice* of Proceeding by Bill, no Action could be begun in any Superior Court without the express sanction of an Original Writ, the general effect of which was to confer Jurisdiction on the Specific Court in which it directed the defendant to Appear. This suing out of an Original Writ, the first step in the Commencement of an Action was, as we have seen, taken by the plaintiff, to whom it was available as a matter of course, upon the payment of a fee <sup>14</sup> to the King, the size of the fee being in proportion to the amount demanded by way of Damages in the action. The cost of these fees, therefore, became a continuing and ever-increasing source of the King's revenue, and constitutes one explanation of the Crown's unflinching interest in the Administration of Justice. The net effect

x. For the fines payable on Original Writs, see *Tidd*, *Practice of the Court of King's Bench in Personal Actions* 97 (1st Am. S., Philadelphia 1801), and for a full explanation of the subject of Pines, consult Bellon, *Practice In the Courts of King's Bench*, Introduction, xl-xliv (London 1798).

of all this was to make the King "the fountain of justice," and his Writ the Foundation of the Jurisdiction of the Court.<sup>5</sup>

(IV) *The Relation of the Charge in the Original Writ to the Charge in the Declaration* —In considering the Early *Developmental* Stages of the Writ System, it is well to keep in mind three things:

The *first* is the significance of the Writ Process as a device for "making a pathway for the Jurisdiction of the King's Court." <sup>6</sup>

The *second* is that the Earlier Writs of course (Writs "*de cursu*"), which existed long prior to the time when the Actions of Trespass on the Case came into being and operation, "were not," as Bigelow observes,<sup>7</sup> "created by a stroke of the pen, or imported into perfect form from Normandy," but though of Continental origin, "they were gradually developed on English soil, out of rough and even shapeless material." If this fact be well understood, it will clearly appear that the Common-Law Forms of Action antecedent to and therefore necessarily not founded upon the Statute of Westminster II (1285), did not arise out of the Writ; that originally it was "entirely foreign to any purpose of the Writ to set forth the Formal Language of an Action."<sup>8</sup>

This brings us to the *third* thing which must be kept in mind, to wit, the relation of the Charge in the Original Writ to the Charge in the Declaration, at the Various Stages in the Development of the Writ Process. In the beginning apparently there was no connection between the Original Writ and the Declaration. According to Bigelow, as pointed out above, originally it was not the Function of the Original Writ to set

15. Philadelphia, B. & V. It. Co. v. Ootta, 4 Boyce (Del.) 38, 85 A. 721 (1013); Parsons v. Bill, 15 App. D.C. 532 (1900).

16. Bigelow, *History of Procedure in England*, c. IV, The Writ Froceas, 147 (Boston 1580).

11. Ibid.

18. Ibid.

Sec. 8

## ORIGIN OF FORMS OF ACTION

:39

forth the Charge contained therein in the technical form or language of a full-fledged Cause of Action; it was required to include a definite statement of the subject matter or Cause of Action, as the defendant was entitled to be apprised of the plaintiff's demand, in order that he might prepare himself to meet it intelligently. And when the summons *was* thus accomplished by virtue of the authority of the Writ, the actual service was made by the "good summoners" referred to in the Forms of the Old Writs, and their knowledge of the Cause of Action necessarily must have been obtained from the Original Writ. It has been suggested that the oldest Common Law Forms of Action are a direct lineal descendent of the (3cr-manic *formulae* of Pre-Norman and Norman England; and that the Writ, which is of ancient origin, and the Count, which has a long record reaching back to the Anglo-Saxon time of

Alfred, were originally two separate forces operating independently of each other, but which, nevertheless, were gradually converging, until by the time of Glanvill (1178—1189) they were approaching a point of contact, which however, was not completed until the next, or Thirteenth Century. Once this convergence *was* completed, it is clear that in time the Writ came to control both the Form of the Action as well as the Statement of the Cause of Action contained therein.

(V) *Necessity of Selecting the Correct Form of Writ.*—When the plaintiff petitioned the Chancellor for an Original Writ, he was under great pressure to select the right Writ for the facts of his case. He chose at his own persona! peril. If he selected a Form of Writ which did not fit his case, however just his grievance might be, he could not succeed. Thus, if he sued out a Writ of Debt and his Complaint was that he had *been evicted from Blackacre, for which he should have sought a* Writ of Ejectment, the case would be dismissed, If he sued out a Writ

of Replevin for a wrongful taking of Personal Property, he could not recover in Special Assumpsit for Breach of a Contract. In each instance where he selected the Wrong Form of Writ, his only recourse would be to retrace his steps and start over, selecting a Writ appropriate to the character of his Complaint. Referring to this characteristic of the Common-Law Forms of Action, Pollock and Maitland compared the System to an Armory, declaring: “It contains every species of medieval weapon from a two handed sword to the poinard. The man who has a quarrel with his neighbor comes hither to choose his weapon. The choice is large; but he must remember that he will not be able to change weapons in the middle of the combat and also that every weapon has its proper use and may be put to none other. If he selects a sword, he must observe the rules of sword-play; he must not try to use his cross-bow as a mace.””

<sup>9.</sup> 2 Pollock and Maitland, History of English Law, Bk. II, c. IX, Procedure, ~ 1, 559 (Cambridge 1895).

And Professor Hepburn, in his work, The Historical Development of Code Pleading c. Ii, § 46, 47—48 (Cincinnati, 1897), declared: “If a wrong Actiou was adopted, the Error was fatal to the whole proceeding, however clearly the Facts of the Controversy might have been brought before the proper Court. The plaintiff may have served his Adversary in due time, and *may* have given as full Information as to the Material Facts of the Case as could be *given* in any other Action; he *may* hare proceeded openly and fairly in all *matters*; *there may* have been no question as to the substantial Justice of his *claim*; but all this would not avail if *his Action* was *not* technically the proper one. Be must pay the costs *and* go out of Court. If he chose, he could begin again, but under like conditions. At his peril he must select the appropriate formula. It was not enough that he stood within the Temple of Justice, he must have entered through a particular door. Or, to change the ñgure, Chancery, the so-called *offiebu, justitiac*, was like an armory. To It every man who would contend with another in the Courts comes to choose his weapon. The choice is large. All the weapons of Juridical Warfare are here. But every weapon has Its proper use, and can be put to no other. Moreover, only one weapon can be chosen at a time; and once chosen It cannot be exchanged for a different weapon In the progress of the combat. It the ~ght Is to go on, It must be with

40

## FORMS OF ACTION

Cli. 2

(VI) *The Power to Issue New Varieties of Original Writs.*—*The* Chancellor was the King’s Secretary of State, and as such was long the most powerful Officer of the Government, having his hand in most of the business of the Kingdom. This resulted from the fact that he was the Keeper of the Great

Seal which had to be impressed upon **Official Documents**, and from the fact that any Administrative Orders of the King were usually prepared under his personal supervision. And, in this connection, it should be remembered that the Conquest introduced into England the Norman principle that no individual or institution could act for the King or his Council unless authority to do so had been delegated to him. When, therefore, the Superior Common Law Courts were differentiated from the King’s Council, and the problem arose of delegating to them the authority to act in each case, naturally the Chancellor and his Clerks, skilled in drafting Executive Orders for the King, became responsible for the preparation of Writs authorizing the Royal Courts to try Specific Cases which fell within their Jurisdiction. At first the Writs were probably awarded according to Abstract Conceptions of Justice and the needs of the case, but later only according to Precedent. And these Original Writs almost from the beginning differed from each other according to the nature of the Plaintiff’s Complaint and the ground of the Defendant’s Liability. Unless the plaintiff’s Complaint

such a weapon as was first chosen, and according to Its special rules. A sword being selected, the rules of sword-play must be strictly

followed. A crossbow *may not be* used as a mace. The issue of the combat must not be determined by mere brute force—not even by the brute force of indisputable facts arrayed before the Court. It is a contest of skill; success depends upon observing the formal rules of the combat.”

In this connection, Blackstone referred to the Chancery as “the oil *icing fustitiae*, the shop or mint of Justice, wherein all *the King’s writs are framed*.” Blackstone’s Commentaries on the Laws of England, 3book III, c. XIV, Of the Pursuit of Remedies by Action, 756 (Chase’s Am. ed., New York, 1517).

fell within the scope of an Existing Form of Action, or unless the Chancellor saw fit to Issue a New Writ, the plaintiff could not maintain any Action at Law.

For approximately a hundred years from the institution of the Writ System to the early part of the Thirteenth Century, the King’s general power to formulate and issue New Writs through the Chancellor seems to have been unquestioned. In consequence the Law, as developed in the King’s Courts, between 1154—1250, underwent a tremendous growth. The power to make New Writs was a power to create New Rights, and hence New Law. Thus the Chancery became the principal instrument by which Justice was gradually Centralized in the Crown. It became not only the “Shop of Justice,” but also the “Mother of Actions.” To the Chancery must apply all those seeking relief, to which the language of some known Writ was applicable, or for some New Writ, framed on the analogy of those already in existence. Writs thus issued as a matter of routine were known as “writs of course.”

And as *new* social needs arose and as the political status of the country permitted, *New Writs* were hammered out on the anvil of Justice in the Shop of the Chancellor, New Rights and New Laws were created, which taken together, came to be known as the Common Law, as opposed to the Customary Law enforced in the Local Courts, and which emerged during the latter part of the Thirteenth Century as a distinct System of National Law. The System, as thus developed, was the joint product of the Common-Law Courts. But it should be remembered that these Courts were powerless to act without the authority of the King’s Writs, and that this New System was faced with a Struggle for Jurisdiction and Power stretching over several hundred years against powerful rivals, chief among which were the Chancery and Ecclesiastical Courts, before it could achieve the position of first rank in the

Sec. 8

## ORIGIN OF FORMS OF ACTION

41

**field of Anglo-American law. The credit** for the creation of a Centralized Judicial System belongs therefore not only to the Common-Law Courts, but to the King and the Royal Officials, who made effective the Judgments of the Royal Judges, and who, by the King’s Writs, made Remedies available which were not ordinarily available under the Customary Law of the land. The Original Writ System was the fundamental basis of the New System of Centralized Justice.

Toward the Middle of the Thirteenth Century, the second great treatise in English law, Bracton’s *De Legibus et Consuetudinibus Angliae*, described by Pollock and Maitland as “the Crown and flower of English Medieval Jurisprudence,”<sup>20</sup> appeared. It served as a summary of the Writ System as it stood between 1250 and 1258 and assured that the story of the development would be passed on to subsequent generations. Bracton took as his Model the Treatise of Mo of Bologna, the Great Civilian.<sup>21</sup> Maitland and Montague, in speaking of Bracton’s debt to Azo, said:

“Thence he had obtained his idea of what a Law Book should be, and of how Law should be arranged and stated; thence also he borrowed Maxims and some Concrete Rules; with these he could fill up the Gaps in our English System,”<sup>22</sup> The core of this Treatise, however, was distinctly English and not Roman, and represented the Law as laid down by the Judgments of the King’s courts. If Bracton’s book be compared with that of Glanvilli, it will be seen that the Period be-

20. 1 Pollock and Maitland, *History of English Law*, e. VI, The Age of Bracton, 185 (Cambridge 1895).

21. “fig fBracton’s name was not Bracton, but Bratton, or perhaps gretton. Entries of his name in various rolls make this clear, but for the Lawyer be and his works are, and *always will be*, sita~ ply Bracton.” 2 Holdsworth; *History of English Law*, c. III, The Progress of the Common Law, 232 (3d ed. London 1923).

22. A Sketch of *English Legal History*, c. 1, 44 (New York 1915).

tween 1154 and 1250, approximately a Century, had been one in which there had been a rapid development of both

Procedural and Substantive Law, largely as a direct result of New Original Writs formulated in Chancery and approved by the “virile and progressive Judges who then manned the *King’s Court*.” ~

The Golden Age of the Forms of Action occurred during the last years of the Reign of Henry III [1216—12723, when the Old Ancient Real Common-Law Forms of Action were still in the running, while at the same time certain of the Modern Personal Actions had put in an appearance. It was during this Period, therefore, that the number of living Forms of Action reached its maximum. Shortly thereafter, the Real Actions revealed a tendency toward obsolescence, while the Common-Law power to create New Forms of Action was nearing its close. Under the influence of the Provisions of Oxford in 1258 only slight power of varying the Writs, Ancient or Modern, was left in the Chancellor; beyond this, relief lay by way of Parliament and Statute, and with the death of Edward I [1307], the first great Epoch of English Legislation ended. Thereafter, the greatest development of the Forms of Action was to be found in the development of the Common Law Actions of Case, Ejectment, Trover, Special and General Assumpsit—a distinguished array—which ousted many of the

**Older Actions and made heavy contributions** to both Contract, Property and Tort *Law*. From one point of view this may be regarded as evidence of the vigor of the Forms of Action and as evidence of their capacity to forward the Development of Substantive Law; but from another viewpoint, it may be regarded as the “decline and fall of the **Formulary System, for** Writs are being made to do work for which they were

13. Bowman, *Handbook of Elementary Law*, e. IV,

§ 54, 162 (St. Paul 1929).

42

## FORMS OF ACTION

### Ch. 2

not originally intended, and that work they can only do by means of Fiction.” 24

The great expansion of the Royal Authority by use of the Writ System, as thus recorded by Bracton, did not depend entirely upon the work of the Common-Law Courts. Thus, out of the Residuary Power which remained in the King’s Council after the Common-Law Courts were differentiated therefrom, the Court of Chancery was created. The Ecclesiastical Courts, which assumed a separate existence after the Ordinance of LWIUI~ the Conqueror in 1072, governed matters of spiritual conduct, and certain aspects of the Law of Succession while much litigation was cared for in the Local Courts and in the Private Baronial Courts. Fewer Courts, less Jurisdictions, would appear to have been the demand of the day. Nevertheless, the Development of the Court of Chancery steadily proceeded. Why? 25

11. 2 Pollock and Maitland, *History of English Law*, Bk. II, c. IX, Procedure, 562 (Cambridge 1895).

‘The typical pitfall which a Pleader might meet with in selecting a Form of Action is well illustrated by

one of David Dudley Field’s reminiscences concerning the period immediately preceding the Enactment of the New York Code of Procedure of 1848, when he said: “I came near losing a case on a Policy of Insurance by declaring in *Assumpsit*. When the Policy was produced at the Trial, the defendflat’s Counsel insisted that it *had a Seal* and so the Action should have been *Covenant*. There was, indeed, a mark on the paper as if it had been stamped with a Seal or something like it, but the impression was faint, and the Judge, ?oolthtg at U *without his glasses*, said he could see no seal, and denied the Motion for Nonsuit.” Field, *Law Reform in the United States and Its Influence Abroad*, 25 *Am.L. Rev.* 515, 518 (1891).

15. With reference to the Development of Equity as an incident of the reluctance of the Clerks in Chancery to grant New Writs, Blackstone, in speaking of Chapter 24 of the Statute of Westminster II, 13 Edw. I (1285), which authorized the Clerks to Issue New Writs In Cases similar to but not quite Identical with Cases in which Writs were previously Issued, stated: “Which provision (with a little accuracy in the Clerks of the Chancery, and a little liberality In the Judges, by extending rather than narrowing the remedial effects of the Writ) might have effectually answered all the purposes of a

**The answer seems to be connected with** the Power of the Chancellor **to** issue Original Writs. As long as this power was unrestricted and broad enough to encompass what we now describe as Equitable Relief, there was little reason for the development of the Equity Courts. But this condition was not destined to continue.

Among the Third Class of Writs set forth by Bigelow, there were a number which never became Writs of Course and which were of a character which in Modern Times would be regarded as Equitable. According to Bigelow,<sup>20</sup> these were Writs of Protection, being the forerunners of our Modern Writs of Injunction, and of the protective process generally as exercised by Chancery in its Early Stages of Development. The fact that these Writs never became *de oursu*, accounts in no small measure, for the development of Exclusive Jurisdiction Over

such Forms of Remedial Relief by Chancery. If these Writs had achieved the status of Writs of Course, they would have fallen outside the purview of the Provisions of Oxford in 1258, and hence the Jurisdiction of the Royal courts would have remained unlimited and unimpaired as to this Type of Writ. The result might well have been to eliminate Equity or at least to prevent the vast expansion which thereafter took place. Or to put it in another way, the result of this development was **to deprive the Common-Law courts of the** power to compel obedience to their Specific Orders, that is, of coercing obedience by orders *in personam*—a power, which we now know, as a result of research that has been done in the early cases, was exercised by the Superior Courts of the Norman Period. When the practice of issuing New Writs thus came **to an end, the development of the Common**

court of Equity; except that of obtaining a Discovery by the Oath of the defendant.” 3 Commentaries on the Laws of England, c. 4, Of the Public Courts of Common Law and Equity 51 (7th oil. Oxford 1775k).

-o. Bigelow, History of Procedure in England, e. IV, ‘The Writ Process, 192, 194 (Boston 1880).  
Sec. S

### ORIGIN OF FORMS OF ACTION

43

Law was necessarily retarded at a time when it had not yet fully flowered, at a time when it had not fully emerged from its Primitive Stage, and its great qualities appeared as such only when viewed against the background of the earlier and existing situations, and not in the light of later developments. This untimely restriction upon the Power to Issue New Writs under which the Common Law had gone far in the direction of furnishing England a Complete and Adequate System of National Law, resulted in the Common Law falling short of its full fruition. Several reasons for this unfortunate development may retrospectively be assigned; they are:

(A) *Impairment of the Lards! Jurisdiction Over Their Private Courts*—One of the Methods by which the *Crown* drew unto itself control over the Administration of Justice was by depriving the Barons of their Jurisdiction over disputes with their tenants. The theory was that the King intervened to assist a helpless tenant, or other litigant, as against a powerful landlord, but the net result was to give the King’s Court Jurisdiction over the case. It is not surprising, therefore, to find that when the Barons revolted against King John in 1215, they “exacted from him the first important concessions as the beginning of a long period of resistance to the absolute and centralized power of the English Kings.”<sup>27</sup> And they took advantage of the situation to make official their resentment of the encroachment upon their Baronial Jurisdiction by placing a provision in Magna Carta, Section 34 of which declared: “The Writ which is called Praeceptum for the future shall not be made out to anyone of any tenement whereby a freeman may lose his Court.” Such provision clearly indicates the opposition of the Barons to the constant and increasing infringement upon their Jurisdiction, although it remains doubtful whether it had any permanent effect in restricting the Chancery from issuing Writs, or the King from continuing to impair the Jurisdiction of the Local as well as the Private Courts.

(B) *The Provisions of Oxford (1258)*.— The issue involving the impairment of the Jurisdictions of the Barons was again raised in 1258 at Oxford. At this time and place the power of devising New Writs and thereby creating New Rights of Action—a powerful and dangerous weapon in unscrupulous hands—received a severe check. The Barons, headed by Simon de Montfort, forced upon Henry III [1216—1272] the Provisions of Oxford, under which an Oath was imposed upon the Chancellor that he would issue no Writs “excepting Writs of Course without the Commandment of the King and of his Council who shall be present.” ~ This provision, more effective than Section 34 of Magna Carta in 1215, placed in Parliament and not the King, the broad authority to create New Rights by granting New Remedies, with only a fraction of his former power left to the King. But, the effect of the Provisions was practically annulled some five years later by the decision of Louis IX, who was appointed as an arbitrator between Henry and the Barons, though the former power of the Chancellor does not seem to have been renewed. And, as so often happened in English History, Parliament made but scant use of this New Power. In consequence, the Provisions of Oxford soon became inoperative under the changing political conditions, so that to all practical intents and purposes, the right to Legal Relief was

28. For a discussion of the Origin and Development of the Provisions of Oxford, see 2 Stubbs, Constitutional History of England, Its Origin and Development, c XIV, 80—98 (Oxford 1874—78).

By "Writs of course," as opposed to Judicial Writs, "were meant Writs for which Precedents might be found in the form book or Register of Writs kept in Chancery." Milla; Common-Law Pleading, Pt. I, c. U, ~ 18 (Chicago 1935).

27. Kinnane, Anglo-American Law, c. XI, ~ 205, p. 222

(Indianapolis 1932).

44

## FORMS OF ACTION

### Ch. 2

restricted to the Actions then in existence, the Clerks in Chancery being doubtful of their Authority to continue the Policy of Issuing New Writs.

(C) *The Statute of Westminster ii (1285).*

—By this time, however, the Ancient Real Actions and certain of the later Common-Law Actions, such as Trespass, Debt, Detinue and Replevin, appear to have developed as a result of the action and interaction which took place over a long period of time between the Clerks in Chancery and the Common-Law Courts and Judges, without the aid of statutory enactments.

While these Actions met the needs of their day fairly well, and through them, litigants were able to secure a rough and ready sort of Justice, they, nevertheless, fell far short of the Common Law ideal of providing a Remedy for every wrong. This was due in part to Defects in the Procedural Law and in part to Defects in the Substantive Law. On the Procedural Side, the Action of Detinue had been rendered practically useless because subject to Wager of Law—a handicap from which it never fully recovered, even after Wager of Law was abolished; and the Action of Debt was subject, in addition to Wager of Law, to the requirement of extreme particularity in setting out the various items of the demand sued on. On the Substantive Law Side, there were also wide Gaps in the Remedial Law in both the Contract and Tort **Field. In the Contract Field, Covenant was** still the only form of Contract known, unless a situation out of which a Common-Law duty to pay a debt could be regarded as Contractual, and No Remedy had been developed **for the** Breach of a Parol Promise. In the Tort Field, *while* Trespass served as a fairly Adequate Remedy where the injury complained of was accompanied by force, it took no cognizance of those injuries which were (1) unaccompanied by force, such as *in* the mere detention of goods where there had been no unlawful taking; (2) accompanied by force, consequential and not immediate in its nature, such as an injury resulting from falling over a log, placed in the road at a time prior to the injury; (3) accompanied by force, and resulting in injury to property not then in possession of the owner, such as an injury to a reversionary interest in realty. These Defects, which we are now able to point out retrospectively, were not definitely recognized at that time.

At this point, however, It should be remembered that the Writ of Trespass on the Case, which authorized the plaintiff to bring **an action on the Particular** Facts of his own case, in situations where none of the approved Writs in the Register *fit*, had already been recognized.<sup>29</sup> But before it had developed into a well-recognized and fully approved Writ, the power of devising New Writs and thereby creating New Rights of Action received a severe check by the Provisions of Oxford.

Nevertheless, the presence of the Defects outlined above, coupled with the commercial growth and development of the country, were, perhaps, an unconscious factor which led to the enactment in 1285 of the Statute of Westminster II,<sup>30</sup> which authorized the Clerks in Chancery to issue New Writs in all cases similar to but not quite identical with cases in which Writs had been previously issued, thus giving rise to the question

29. *Kinlystle v. Thornton*, W.Bl. 1111, 1113, 96 Eng. Rep. 657 (1776).

30. The Statute, 13 Ethv. I, c. 24, 1 Pickering's Statutes at Large, 196, provided: "And whensoever from henceforth it *shall* fortune In the Chancery, that in one case a Writ Is found, and in like Case

[in consimili casu, falling under like Law, and requiring like Remedy, is found Done, the Clerks of the *Chancery shall* agree in making the Writ; or the Plaintiffs may adjourn It until the next Parliament, and let the Cases be written In which they cannot agree, and let them refer themselves until

the next Parliament, by Consent of Men learned in



the Law, a Writ shall be made, lest it might happen after that the Court should long time tail to minister Justice unto coMplainants.” (Translation of Canbridge Edition, 2762).

## Sec. S

as to whether the Action of Trespass on the Case originated out of the Statute, or is to be more satisfactorily explained on some other theory. The issue thus presented has long been the subject of a learned controversy which has developed a considerable literature. The participants in this controversy, *among* whom are some of the most distinguished Anglo-American Legal Historians, Scholars and Teachers, have developed Three Schools of Thought. These include:

(1) Those who believe that the Action of Trespass on the Case developed as a result of the impact of the Statute of Westminster II, taking its very name from the word *casu* as used in the famous and familiar phrase “*consimili casu*,” which appeared in Chapter 24 of the Statute. This group, known as the “Modernists,” is represented by Ames,<sup>32</sup> Jenks and Sutton.<sup>34</sup>

(2) Those who think that the Statute of Westminster II had nothing to do with the Origin of the Action on the Case. This group, known as the “Revolutionists,” includes Plucknett<sup>30</sup> and Dix.<sup>31</sup>

21. 13 Edw. I, c. 24, 1 Pickering’s Statutes at Large

196. This Statute contained fifty chapters dealing with a great variety of problems, and is not to be regarded as a Statute in the modern sense, but

rather as a series of Statutes enacted at one session of Parliament. Pifoot, History and Sources of the Common Law, Development of Actions on the Case, c- 4, 60, n. 19 (London 1949).

32. Ames, a distinguished legal scholar and Dean of Harvard Law School, presented his views in Lectures on Legal History, Law and Morals, 435, 442 (Cambridge 1913).

23. For the view of Jenks, see History of English Law, e. X, Contract and Tort, 136 (Boston 1912).

24. See Sutton, Personal Actions at Common Law, e. 11, 24, 25 (Toronto 1929).

35. 13 Edw. I, a 24 (1285), 1 Pickering’s Statutes at Large 196.

31. See articles by Plucknett, Case and the Statute of Westminster II, 31 CoLL.Rev. 778 (1931); The Action on the Case and Westminster II, 52 L.Q.Rev. 220 (1936).

45

(3) Those who adopt the Middle View **that while the Action on the Case** existed prior to 1285, the date on which the Statute was enacted, its development into the Modern Action of Trespass on the Case would not have occurred without the influence and **action on the** part of the Clerks in Chancery as authorized by Parliament in Chapter 24 of the Statute of Westminster II ~ in 1285. This group, known as the “Traditionalists,” includes Holdsworth<sup>30</sup> and Landon<sup>40</sup>

(0) *The Growing intervention of Ultrancery.*—Perhaps the real responsibility for the Arrested Development of the Common Law should be laid at the door of Chancery. Clearly the Inventive genius of the Clerks in Chancery had not come to an end as in that **event there** would have been no need for Section 34 of Magna Carta in 1215 or the Provisions of Oxford in 1258. As a matter of policy the King’s Council evidently felt that there were certain Areas of Jurisdiction over which it desired to retain a closer supervision, and the argument seized upon for such a course of action was that there were certain defects in the Common-Law Remedial Scheme, as a result of which Meritorious Litigants were left Without Remedy at Law, hence the intervention of Chancery became necessary. But such was not always the case, as where the captain of a ship came into an English port, and being there but a few days, demanded payment of a debt due from an Englishman. Thus, the King, desiring to advance the mercantile interests of the country, and in the face of the established fact that the plaintiff had an Adequate Remedy at Law in the Action of *Debt*, permitted the Chancellor to hail the defendant into Court,

38. 13 Edw. I, c. 24 (1285), 1 Pickering’s Statutes at Large 196.

30. See Comment by Holdsworth on Plucknett's new *suggestion* that the Statute of *Westminster H* (1285) was not the source of the Action of Trespass in the Case, 47 L.Q.Rev. 334 (1931).

## ORIGIN OF FORMS OF ACTION

37. See article by Miss Dix, The Origins of the Action of Trespass in the Case, 46 Yale L.J. 1142 (1937).

40. See article by Landon, Case and Westminster II, 52 L.Q.Rev. 68 (1956).

46

## FORMS OF ACTION

### Oh. 2

examine him under Oath as to the debt, and if found to be owing, Order its payment on peril of being jailed for Contempt for failure **to obey the Order.**<sup>41</sup> **Or the King may have** intervened through the Chancellor, not because **there was no** Common-Law Remedy, but because the State of Law and Order in the country was in such a condition that an Ordinary Litigant in a Contest with a Powerful Overlord, could not take advantage of his Common-Law Remedy.<sup>42</sup> Thus, the Common Law's development was arrested when it was beginning to get a good start, and at a time when the social and economic needs **of the** country demanded expansion instead **of restriction of the Common Law Remedial**

System.

## CLASSIFICATION OF THE COMMON-LAW ACTIONS

### 9. Actions at Common Law, are divided into

**Real, Mixed and Personal. Real Actions included those brought for the Specific Recovery of Lands, Tenements, or Hereditaments. Personal Actions consisted of those brought for the Specific Recovery of Goods and Chattels, or for Damages for Breach of Contract, or for Damages for some Injury to the Person, or to one's Relative Rights, or to Personal or Real Property. Mixed Actions partook, in some degree, of both Real and Personal Actions, wherein some Real Property was awarded, and also Personal damages for a Wrong sustained, and hence they were not properly reducible to either of them. they were brought both for the**

Specific Recovery **of** Lands, Tenements, or Hereditaments, **and** for Damages for injury sustained **in respect of such property.**

**ACCORDING to the Relief sought, Actions have been Divided into:**

- (A) Real
- (B) Mixed, and

### (C) Personal

41. **Barbour, The History of Contract in Early English Equity, 4 Oxford Studies in social and Legal History, Pt. II, c. II, § 3, 98** (Edited by Vinogradoff, **Oxford 1914**).

**REAL ACTIONS.**—*Real* Actions were those brought for the Specific Recovery of "Seisin," the possession of a freehold estate in Real Property. They included:

- The Writs of Right
- The Possessory Assizes
- Writs of Entry
- Forcible Entry and Detainer

**MIXED ACTIONS.**—*Mixed* Actions are such as are brought both for the Recovery of Real Property, and for Damages for injury in respect to it. Waste was an example of this Type of Action and it lay to recover land wasted by a tenant with Treble Damages,

**PERSONAL ACTION, S.**—*Personal* Actions are those brought for the Recovery of a Debt or Possession of Specific Personal Property, or of Damages for the Breach of **a Contract, or of Damages for some Injury to the Person, or to one's Relative Rights, or to Personal or Real Property.**

The remedy which a given Writ afforded a Litigant was called an Action. And as these Actions grew in number and scope, as a result of the action and interaction which took place between the Chancery and the **Three Superior Common-Law Courts, they were**

often differentiated by very slight shadings of meanings, and it was only natural that an effort should be made to classify the various Actions. And in connection with this effort, **it should always be borne in mind** that the term “classification” may and almost inevitably is bound to have different implications in Different Periods of a Nation’s Development. Thus, if, in English Legal History, we go back as far as Glanvill and Bracton, we find that they regarded some Actions Personal which Blackstone,<sup>43</sup> writing about 1765, treated as Real or Mixed. But for general purposes, we may nevertheless now use as

43. Blackstone’s **Commentaries on the Laws of England**, Book III, c. VI, Of Wrongs, and their Remedies, Respecting the Rights of Persons, 672, 673 (4th ed by Chase, New York 1938).

- (I)
- (II)
- (~)
- (IV)

**a Id. at § ‘(a), 79.**  
**Sec. 10**

### ANCIENT REAL ACTIONS

47

our starting point the Classification which Blackstone published to the world with the appearance of the first edition of his Commentaries on the Laws of England. He declared: “With us in England the several Suits or Remedial Instruments of Justice, are from the subject of them distinguished into three kinds, *Real, Mixed and Personal*.”<sup>44</sup>

“*Real* Actions (or as they are called in the Mirror, *Feudal* Actions), which concern Real Property only, are such whereby the plaintiff, here called the Demandant, claims title to have any lands or tenements, rents, commons, or other hereditaments, in fee-simple, fee-tail, or for term of life. By these Actions formerly all disputes concerning Real Estates were decided; but they are now pretty generally laid aside in practice, on account of the great nicety required in their management, and the inconvenient length of their process; a much more expeditious method of trying titles being since introduced, by other Actions Personal and Mixed.

“*Mixed* Actions are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained. As for instance an Action of Waste.

“*Personal* Actions are such whereby a man claims a Debt, or Personal Duty, or Damages in lieu thereof; and, likewise, whereby a man claims a satisfaction in Damages for some injury done to his person or property. The former are said to be founded on Contracts, the latter upon Torts or Wrongs; and they are the same which the Civil Law calls ‘*actiones in personam, quae adversus eum intenduntur, qui ex contractu vel delicto obligatus est aliquid dare vel concedere*’. Of the former nature are all actions upon Debt or Promises; of the latter all actions for Trespasses, Nuisances, Assaults, Defamatory Words, and the like.

44. The original arrangement of the three types of Actions reads Personal, Mixed and Real, which order has been changed for purposes of presenta

“Under these three heads may every species of remedy by Suit or Action in the Courts of Common Law be comprised.” ~

#### TILE ANCIENT REAL ACTIONS FIRST IN ORDER OF DEVELOPMENT

10. **There were Two Divisions of the Real** Actions—those founded on Seizin or Possession, **and those founded on the Property or Right.**

JACKSON defines a Real Action as “one that is brought to recover the freehold in lands, tenements or hereditaments, claimed either in fee simple, fee tail, or for life, by one who is deforced, against him who is a tenant thereof.”<sup>45</sup> They were known as Real Actions because the Judgments rendered therein were *in rem*

and awarded seizin or possession.<sup>47</sup> In these Actions the Party bringing **the Action was known as the Demandant**, while the Party against whom it was brought was the Tenant. And the First Pleading on the part of the Demandant was called a Count. Over a Period of Several Centuries running as far as the reign of Elizabeth [1558~1603], the existence of these Remedies, available only in favor of owners of freehold estates, made possible the settlement of all disputes concerning real estate on a reasonably satisfactory basis. These Writs to determine the rights of property and the rights of possession in a freehold, varied according to the title or seizin of the Demandant, and the circumstances of ouster or deforcement; they were feudal in origin and were in number about sixty, the distinction between them being highly technical and refined, and the trial long and costly, all of which facts were factors in their ultimate

45. Blackstone's Commentaries on the Laws of England, Book III, a vi, Of Wrongs, and their Remedies, Respecting the Rights of Persons, 672, 073 (4th ed. by Chase, New York 1938).

46. **Real Actions, c. I, 1 (Boston 1828).**

47. 3 Street, **Foundations of Legal Liability, C. IV, Classification of Actions In Common-Law system, 39 (Northport 1906).**

48. Alden's Case, 6 Co. Rep. 10~ 77 Eng. Rep. 21T (1601).

tion.

48

## FORMS OF ACTION

abolishment.<sup>49</sup> These Writs were arranged according to the character of interest involved, in an heirarchical scale, with the more important actions at the top and the less important at the bottom, as appears from the listing of certain of these Writs in the chart below:

### CLASSIFICATION OF ANCIENT REAL ACTIONS

#### PROPRIETARY REAL ACTIONS:

- (I) Writs of Right Proper
  - (A) The Writ of Right Patent
  - (B) The Writ of Right Quia Do-minus Remisit Curiam
- (U) Writs in the Nature of Writs of Right
  - (A) The Writ of Right de Rationabili Parte
  - (B) The Writ of Right of Advows on
  - (C) The writ of the Right of Dower
  - (D) The Writ of Dower Unde Ni-hil Habet
  - (E) The Writ of Formedon

#### POSSESSORY REAL ACTIONS:

- (I) Writs of Assize
  - (A) The Assize of Novel Disselsin
  - (B) The Assize of Darrein Presentment

Cl. 2

#### POSSESSORY REAL ACTIONS:—Cont'd

- (U) Writs of Entry—Continued
- (C) The Writ of Entry sur In-trusion
  - (1) The Writ of Entry sur Abatement
  - (II) Writs Ancestral Possessory
  - (IV) Writ of Quare Ejecit Infra Terminum
  - (V) Writ of De Ejectione Firmae (VI) Writ of Quare Impedit (VII) Writ of Waste
  - (VIII) Writ of Deceit
  - (IX) Writ of Partition

#### *The Basis of Classification*

ACCORDING to the nature of the thing recovered, the Ancient Real Actions fell into Two Groups: in One Group only lands, tenements, or hereditaments were recovered, and these Actions were treated as Real. In the Other Group, Damages, as well as lands, tenements, or hereditaments were recoverable, and these Actions were called Mixed. However, as all of them were classed and

treated with the Real Actions, as their leading characteristic was the recovery of a freehold, and as recovery of Damages was incidental, both the Real and Mixed are generally treated as Real Actions.

Classifying the Real Actions on the basis of the

- (C) The Assize of Jung Utrum
- (D) The Assize of Mort d'Ancestion
- (II) Writs of Entry
  - (A) The Writ of Entry sun Dig-seisin
  - (B) The Writ of Entry sun Alien-ation

40. Real Property Limitations Act, 3 & 4 Win. IV, a 27, ~ SO (1833).

Sec. 10

### ANCIENT REAL ACTIONS

nature of the Demandant's Title, Real Actions were either *Proprietary*, in which The demandant sued on *his right of property*, having lost his right of possession; or *Possessory*, in which he sued to recover his right of possession, which might belong to him in addition to his right of property or independent thereof.

*The Distinction Between Proprietary and Possessory Actions*

AT early Common Law a Complete Title to Real Estate included the ultimate right of property, the right of possession, and the actual present possession. As the right of

49,

property and the right of possession might be in different persons while the actual possession was *in* a third person, actual possession was regarded as a right distinct from the right of property and the right of possession.<sup>50</sup>

If one having the Complete Title to land was dispossessed, he lost one of the constituent elements of his Title, that is, actual possession. This left remaining in him the right of possession and the right of property. As to all other persons except the person ousted, the disseisor became the owner of the Complete Title; as to the person ousted, he was the owner of the Complete Title, subject to be defeated by enforcement of the disseisee's superior right of property or right of possession. If such rights were not enforced within certain periods of time fixed by the Common Law or by Statute, the disseisor's Title became indefeasible as to all failing to show a superior right of property or right of possession.

50. "The *treatment* of Actual Possession as a Right, or as implying a right distinct from the right of possession, has been misleading. Actual possession is a *Fact* or *Status*. As a *Fact* it is *prima facie* Evidence of the *Right* of possession, because It is the natural manifestation of that right As a *Fact* or *Status* it is protected by Law for reasons of public policy against displacement, except by Judicial Process at the *instance* of *someone* having a Superior Right to possess. Peaceable Possession therefore is not a *Right*, but it is a *Fact* or *Status* which implies the *Right* in the possessor to continue *his* possession until it is displaced by Judicial Process. This Right of Possession is provisional, and subject to determination at the suit of any one having an older and therefore Superior Right of Possession. In imputing to the peaceable possessor a Right in the Fact of his Possession, nothing more could have been Intended than to recognize In him a *Peculiar Right of Possession*, which springs from and is implied from the *Present Fact of Possession*. This Right of Possession might co-exist with a Right of Possession In some one else springing from a *Previous Fact* or *Status* of peaceable possession. Thus we have two persons Invested *with* rights of possession. One founds his right on a present peaceable possession, the other founds it on a previous peaceable possession, or a Right of property which resolves itself ultimately Into an older possession or seisin." Martin, Civil Procedure at Common Law, c. IV, Ancient Real Actions, 100, n. 1 (St. Paul, 1905).

session. The same rule applied in case of an abatement where upon the death of a person seized of an inheritance a stranger acquired possession of the freehold before actual entry of the heir or devisee; also in case of an intrusion where a stranger, after termination of a particular estate of freehold, acquired possession before entry of the remainderman or reversioner. The effect of a disseisin, abatement or intrusion was to convert the estate of the disseisee, heir, devisee, remainderman, or reversioner, as the case might be, into rights of possession and rights of property. Such rights were descendible, but neither devisable nor assignable. Conversely, the interest of the disseisor, abator, or intruder, was alienable, divisible and descendible, being an estate in possession.

These rights of property and rights of possession were remediable under the Ancient Law by the Extra-Judicial Process of Self-Help, or by the Judicial Process represented in the Scheme of Real Actions. Upon disseisin, abatement or intrusion, the person ousted—the disseisee, heir, devisee, remainderman, or reversioner—was permitted to make a peaceable entry, making his Title again complete. If peaceable entry was not possible, his only course was to resort to legal redress, as force could not be used without falling under penal restrictions. Entry by force was not only a punishable offense, but the former occupant could by a Writ of Forcible Entry immediately be restored to possession, irrespective of any right of possession or right of property of the original disseisee. Failure

on the part of the disseisee to make a peaceable entry in the lifetime of the disseisor, abator or intruder, resulted in ending the right of peaceable entry without process. Extra-Judicial Entry was ended by the fact of a descent cast. Thereafter the disseisor's heir could not be ousted except by an Action asserting the disseisee's superior right of possession or of

SO

## FORMS OF ACTION

Ch. 2

property. But the descent of incorporeal hereditaments lying in grant did not take away the right of entry.<sup>51</sup> The disseisee, however, by making claim at any time before the death of the disseisor, might evade the effect of the descent cast, and save his right of entry for a year and a day after such claim made. Thus, the continuance of the disseisor in possession after claim made was regarded as a new disseisin. By the Statute of 32 Henry VIII, c. 33, 5 Statutes at Large 48, ~1540], the Right of Entry was extended so that a descent from a disseisor could not have the effect of taking away the Right of Entry, except where the disseisor had peaceable possession five years next after the disseisin, The Statute was construed as not being applicable to a descent from the heir of a disseisor, or from his feoffee, so that such descents barred the Right of Extra-Judicial Entry, notwithstanding a want of five years' possession. It may be added that in cases in which the wrongdoer had acquired possession lawfully and then unlawfully detained it, the party entitled had neither a Possessory Action, nor Remedy by Self-Help; he could only invoke a Proprietary Action to establish his rights.

For reasons of public policy, the Common Law protected a person in peaceable possession of land, irrespective of the method of acquisition.<sup>52</sup> Actual seisin or possession, however acquired and however wrongful, created a presumptive right of possession, or a species of property based on the fact of

51. Co.Litt. 28Th (London, 179t).

55. "It accomplished this in three ways: 1st, by refusing to enforce in the Courts any one's Claim to Possession which was not Superior to the flight of the actual possessor; 2d, by summarily restoring to the ousted possessor his possession, when it was forcibly taken from him, Irrespective of any Right of Possession, in the party who had interrupted the possession; 3d, by punishing any one who attempted to enforce his Rights of Possession, without Process of the Courts' Martin, **Civil Procedure at Common Law**, c. IV, Ancient Real Actions, 109 (St. Paul, 1905).

his possession~ In case of being dispossessed, the disseisee could vindicate his right of possession by resort to some Possessory Proceeding, basing his action on his actual seisin and the wrongful act of the disseisor in ousting him. At hand were the Possessory Remedies in the Form of the various Writs of Assize or a Writ of Entry, depending upon the character of his case. Also available was Self-Help if resorted to before descent cast, and if not barred by the Common Law or Statute. If such Remedy failed or was lost, he still might regain possession by some form of Possessory Action, provided he acted within the period of time in force at the time the action was brought. In general, limitation of Possessory Actions was fixed at twenty years. If the Possessory Action was not brought within the time limit, or if, when brought, it resulted in defeat, the disseisee might still resort to a Proprietary Action, if brought within the period of time limiting such actions, which was sixty years. In such actions the plaintiff alleged seisin or possession of a fee, and added that he claimed "as of right," thus raising the Issue of ultimate dominion, or *right of ownership*, which either included or implied the *superior right of possession* as incident to it or constituted the right itself. Generally, this *dominion or ownership* is referred to as something very different in its nature from the *right of possession*. It becomes apparent, however, when ownership in land is resolved into its essential elements, that the fundamental one is the right of possession. It would seem, therefore, that the right of property enforced in the Proprietary Actions is nothing more than an older and *superior right of possession*.<sup>54</sup>

In its strictest sense property is the right to possess and *use* a determinate thing, in-3. Ibid.

54' 2 Pollock and Maitland, History of English Law, C. IV, **Ownership and Possession**, 77, 78 (Cambridge 1895).

Sec. 10

## ANCIENT REAL ACTIONS

definitely in point of user, unlimitedly in point of duration, and unrestricted in point of alienation or disposition.<sup>57</sup> In England there was probably no property in land which measured up to this ideal of absolute property. But from Bracton on, the rights of proprietorship have been ascribed to the tenant in demesne, notwithstanding the rights of seigniorship remaining in the lord and ultimately in the sovereign. The right of the tenant in fee has in point of fact been treated as property in the highest sense, even though it falls short of the ideal of absolute property. And the philosophy or logic of property rights has been done no violence by ascribing them without limitation to the rights of a tenant in English law, much less to a purchaser in fee under the Laws of the Several States of the United States.

As the foundation of the right of ownership is the right of possession to which the other rights are primarily incidental, it follows that one cannot use or dispose of a thing which is in the adverse possession of another. When the right to possession is once vindicated, these other rights are restored along with the possession. Williams, the distinguished authority on English Property Law, has stated that there is “*no action in the Law of England by which property either in goods or land is alone decided,*” ~ as distinguished from the right to possession either immediate or future. The explanation of this is found in the fact that the right of property in land or goods is only another name for the right of possession, and the other rights incidental to it. Thus, in all of the Real Actions, whether Proprietary or Possessory, the Material Issue was the *right of possession*. As Pollock and Maitland so

57. 2 Blackstone's commentaries on the Laws of England, c. I, 207—215 {4th ed. by Chase, New York 1914).

truly observed, “every Title to Land has its root in Seisin; the Title which has its root in the Oldest Seisin is the Best Title.” ~ The superior right of possession, being the older one, was called the right of property, but only in comparing it with the right of possession, which came from subsequent adverse enjoyment, and which was to be protected by Law for reasons of public policy. If the technical distinction between Proprietary and Possessory actions had never developed, and if our English ancestors had only known Possessory Actions, it is extremely probable that the Scheme of Ancient Real Actions would have been better understood and enforced. We shall see later how this failure was instrumental in bringing about the abolition of the Real Actions.

A form of the Writ of Right and a form of the Assize of Novel Disseisin appear below:

#### FORM OF THE WRIT OF RIGHT

GEORGE THE FOURTH, *by the grace of God, of the United Kingdom of Great Britain and Ireland King, Defender of the Faith and so forth,*

To the sheriff of \_\_\_\_\_ County,

GREETING:

COMMAND *C.D.*, that justly and without delay he render unto *AS*. four messuages, four gardens, and four acres of land, with the appurtenances, in the parish of \_\_\_ in the County of \_\_\_ which he claims to be his right and inheritance, and whereof he complains that the aforesaid *C.D.* unjustly deforces him. And unless he shall so do, and if the said *AS*. shall give you security of prosecuting his claim, then summon, by good summoners, the said *C.D.*, that he be before our justices at Westminster, in eight days of Saint Hilary, to show where-

57. 2 Pollock and Maitland, History of English Law, e. IV, Ownership and Possession, 46 (Cambridge 1895).  
St Williams, Personal Property, 26 (7th ed London 1570).

fore he hath not done it; and have you there the summoners and this writ.

WITNESS, ourself at Westminster,

STEPHEN, Principles of Pleading, c. I, 44 (3d Am. ed., Washington, D.C. 1900).

#### FORM OF THE ASSIZE OF NOVEL DISSEISIN

EDWARD THE FIRST, King of England, To the Sheriff of County,

#### GREETING:

A. hath complained unto us that B. unjustly and without judgment hath disseised him of his freehold in C. within thirty years last past, and therefore we command you that if the aforesaid A. shall make you secure to prosecute his claim, then cause that tenement to be re seized, and the chattels which were taken in it, and the same tenement with the chattels to be in peace until the first assize, when our justices shall come into those parts, and in the meantime cause twelve free and lawful men of that visne to view that tenement, and their names to be put into the writ, and summon them by good summoners, that they be before the justices aforesaid, at the assize aforesaid, ready to make recognizance thereupon, and put by gages and safe pledges the aforesaid B., or, if he shall not be found, his bailiff, that he may be then there to hear that recognizance, &c. And have there the summoners, the names of the pledges, and this writ, &c.

BOOTH, Real Actions, c. XIX, 211 (1st Am. ed., New York 1808).

#### *Forcible Entry and Detainer*

AT Common Law the Remedy for a Forcible Entry or a Forcible Detainer was not recognized as a Civil Action. When authorized by Statute,<sup>58</sup> it originated as an incident

53. See Statute of 5 RIch. II, c. 7, 2 Statutes at Large 240 (1381).

to a criminal prosecution of a Party who had used superior force in making entry upon land.<sup>59</sup> The Remedy as thus developed took the form of a summary restitution of the land in question by the Justices of the <sup>oo</sup> or by Action Of the Court of King's Bench. This proceeding, under which the disseisee might be restored to his Jand, was early used as a substitute for the more cumbersome and highly technical Real Actions, thus aiding in their gradual deterioration.<sup>60</sup>

According to Blackstone <sup>62</sup> a Forcible En-try consisted of violently taking possession of lands or tenements with force and arms and without authority of Law. And a Forcible Detainer consisted of keeping possession of lands and tenements in the same lawless manner. Both offenses were not only against the person turned out or kept out of possession, but were wrongs against the King.

As enacted and construed these English Statutes on Forcible Entry and Detainer furnished a Popular Remedy for a period of five hundred years. In 1879, the Statute of 8 Hen. VI, c. 9, 3 Statutes at Large 121 (1429) was repealed except as to its criminal provisions.<sup>63</sup> And the Ancient English statutes regulating Forcible Entries and Detainers, in large measure, have been recognized or reenacted in most American States, with such modifications as might be necessary to meet local conditions, and as such have exerted an important influence on our Modern Procedure.

59. Bex v. Faweet, rely. 99, 80 EngLtep. 67 (1007).

90. See Statutes Of 15 RIch. II, c. 2, 2 Statutes at Large 339 (1391); 8 Hen. VI, c. 9, 3 Statutes at large 121 (1429); 31 Ella. c. 11, 6 Statutes at Large 418 (1589); and 21 Jae. I, c. 15, 7 Statutes at Large 272 (1623).



*ca.* Hale, History of the Common Law, e. VIII, 296—301 (5th ed. London 1794).

05. 4 Blackstone, Commentaries on the Laws of England, e. 11, 148 (7th ed. Oxford 1775).  
03. 42 & 43 Vict. c. 59 (1879),  
Sec. 11

## MODERN REAL ACTIONS

53

### *The Decline of the Real and Mixed Actions*

**BY** reason of the large number of Writs in the Real Actions, by reason of the long, dilatory and highly technical character of the proceedings thereunder, together with the burdensome cost incidental to their prosecution; and finally, by reason of the almost imperceptible distinctions between many of them, with the passage of time, their Inadequacy as Remedies for the redress of alleged wrongs involving Title or Possession of Real Estate became evident. The Defects in the Proceedings involved in the various Real Actions and the abuses which grew up around them had originated in the Courts and for years had gone on uninterrupted by any attempt at Parliamentary Reform.

In the first quarter of the Nineteenth Century, as an incident of the general wave of Governmental Reform which swept over England, a Movement for Procedural Law Reform got under way. It is therefore not surprising to find that in 1833, by the Real Property Limitations Act,<sup>65</sup> the Real and Mixed Actions, with few exceptions, were swept aside. The Statute provided that some *sixty actions*, specifically named,<sup>65</sup> should not be brought after December 31, 1834.

64. 3 & 4 Wm. IV, c. 27, § 36 (1833).

65. The Statute of 3 & 4 Wm. IV, c. 27, § 36 provides that: "No writ of right patent, writ of right *quia dominus remisit curiam*, *wi-it of right in capite*, writ of right *In London*, writ of right *close*, writ of right *do rationabit parte*, writ of right of advowson, writ *Of right upon disclaimer*, writ *de rationabilibus divisis*, writ of right of ward, writ *de consuetudinibus et servitiis*, writ of *eessavit*, writ of *escheat*, writ of *quo jure*, writ of *seeta ad molendinum*, writ *de essendo quietum de thelonio*, writ of *no injuste vexes*, writ of *mesne*, writ of *quod permittat*, writ of *formedon in descender*, in remainder, or *In reverter*, writ of *o.ssL—e of novel disseisin*, nuisance, *darrein presentment*, *June tztum*, or *ntort d'ancestor*, writ of entry *stir disseisin in the quibus*, in the *per*, in the *per and ciii*, or in the *post*, writ of entry *ear intrusion*, writ of entry *sur alienation dum fuit non compos menus, dum fuit infra aeta*" *tam, dum fi4t in prisona, ad oomunem legent, in oaeit proviso, in consimili caRs, ciii in vita, ear Ciii in Dita, ciii ante divortuum, or Sur ciii ante divor*

Exceptions were made Writ of Right of Dower, or *undo nihil h-abet*, and *Impedit*, the latter being preserved to try disputes about Advowsons, as Ejectment, which now came to be used in lieu of the abolished Real Actions, was inapplicable for such purposes. As a widow claiming dower could not institute an Action of Ejectment until after her dower had been set out,<sup>66</sup> the two Writs of Dower were temporarily preserved. In 1860, with the establishment of a New Statutory Form of Action to serve as a substitute, the Old Writs of Dower were abolished by the Common Law Procedure Act.<sup>67</sup> Also abolished by the same act was the Writ of *Quczre Impedit*.

## TUE MODERN REAL ACTIONS

11. The Modern Real Actions included Ejectment, Trespass to Try Title, Writs of Entry, Disseisin, Dower and Partition, and Forcible Entry and Detainer.

### *The Action of Ejectment*

WHEN it finally became clear that the so-called distinction between the Proprietary and Possessory Actions was largely illusory, that you could not Try Title without also trying possession, and that these Actions were needlessly technical and very expensive,

*tium, writ of entry ear abatement, writ of entry quare ejecit infra terminum, or ad terminum qui praeterit, or eauea matri,nonii praelocuti, writ of aid, besaiei, tresaiel, cosinage, or nuper obiit, writ of waste, writ of partition, writ of disceit, writ of quad ci deforceat, writ of covenant real, writ of warfl rantia chartae, writ of curia elaudenda, or writ per quae seri,itia, and 'zo other action, real or mixed, (except a writ of right of dower, or writ of dower unde nihU habet, or a quare impedit, or an cject, nent,) and no plaint in the nature of any such writ or action (except a plaint for free bench or dower), shall be brought after the 81st day of December, 1884."*

06. For an explanation of the intricacies involved in claims for dower at Common Law, see Maitland, *The Forms of Action at Common Law*, Lecture III, 36, 37 (Cambridge 1948).  
01.23 & 24 Vict, c. 126, § 26, 100 Statutes at Large

800 (1860).  
in the case of a  
a Writ of Dow-  
a Writ of *Quare*  
54

## FORMS OF ACTION

### Ch. 2

the slate was cleared for the entry of a far simpler, yet more Adequate Remedy for the redress of Wrongs to Title or Possession— the Action of Ejectment. This move by the Common-Law Courts was hastened by the threatened intervention of Chancery. And the change came about not by developing a New Remedy, but “by adapting the well known Process and Proceedings of Personal Actions to the Trial of Issues relating to ouster and disseisin from real estate.” ~ More specifically, the Action of Ejectment was developed out of the Writs of *Quare Ejecit In Ira Terinimum* and *Dc Ejectione Firmae* in favor of the owners of non-freehold estates. Through the use of the famous Fiction in Ejectment it ultimately became available to the holders of freehold estates as well, without violating the Common-Law theory that it could be used only to protect the possession of non-freehold estates. The details of this development will be set forth fully in the Chapter on the Action of Ejectment.°°

The Action, as thus developed by the Common Law, was excepted from the sweeping effect of the Statute of 3 & 4 Wm. IV, c.

27, § 36, 73 Statutes at Large 149 (1833), and continued unchanged until 1852. Under the Common-Law Procedure Acts of 1852, ~° 1854 ~ and 1860 ~ the Procedure in the Action was simplified, the Fiction in Ejectment was abolished, so that the Action was directed to the person actually in possession of the property in dispute, or to any other person entitled to defend the Action, and it was provided that in the Default of Appearance such person would be dispossessed. If the

08. Martin, *Civil Procedure at Common Law*, c. V, Modern Real Actions, § 166 141 (St. Paul 1905).

69. See Chapter 10.

70. 15 & 16 Vict. c. 76, 92 Statutes at Large 285 (1852).

71. 17 & 18 Vict. c. 125, 94 Statutes at Large 794 (1854).

defendant appeared, the Court made up an Issue, and the Case was tried according to the Principles of Ejectment as developed at Common Law. And so the Action continued until the Supreme Court of Judicature Act of 1873, ~ under which the Action was “commenced by a Judicial Writ of Summons upon which the plaintiff indorses a Statement of his Claim with the Relief asked for, to which the defendant makes a Statement of his Defense. The Pleadings are governed by Rules of Court under General Orders made in 1883, ~” Although the Remedy under this Act has lost its Earlier Form, it is still governed by the principles underlying the Action as Developed at Common Law. And this same Common-Law Action has been generally adopted, subject to modification in its Form and Procedure, as the generally recognized mode of Trying Title or possession in the Several States of the United States.

### *The Action of Trespass to Try Title*

THE Action of Trespass to Try Title has been used in three states, Alabama, South Carolina and Texas.

Derived from the Action of Trespass *Quai-e Clausem Fregit*, it was first introduced by Statute in South Carolina in 1791, ~ being substituted in the place of Ejectment. Mere possession was sufficient to support the Action as against a wrong-doer, but it was not sufficient as against one with a Superior Title. And, as in Trespass, the defendant might enter a Plea of *liberuni tenementwnt*, that is, that the land he entered upon was owned by

himself, or by some one under whose authority he acted, the defendant claimed that he had an immediate Right of Entry. Thus the Right of Entry came to be the Controlling Issue in the Action of Trespass, but recovery resulted only in a

73.36 & 37 Viet. c. 68 (1873).

74. Martin, Civil Procedure at Common Law, c. V.  
Modern Real Actions, § 170, 143 (St. Paul 1905).

75. S.C. Stat. at Large 170.

76. 23 & 24 Vict. c. 154, 100 stat., at Large 860 (1860).

Sec. 11

## MODERN REAL ACTIONS

55

Judgment for Damages. This use of Trespass to Try Title was brought about by indorsing on the Writ of the Action for Trespass a notice that the Action was brought to Try Title, as well as for Damages. And if the entry had ousted the plaintiff, the plaintiff if successful, was entitled to a *Writ of *ilabere Facias Possessionem** and Damages Abolished in South Carolina in 1873, ~ it appeared in Alabama in 1821, ~ where it continued to 1852, ~ at which time it was superseded by an Action in the Nature of an Action of Ejectment.

In Texas, Trespass to Try Title was long the accepted and exclusive Mode for Trial of disputed Titles. As developed there it was broader than Ejectment, being maintainable even on an Equitable Title, and available to Try Title irrespective of occupancy. In general, the Trial was governed by the principles of Trial by Ejectment, except where the Statute provided otherwise.<sup>79</sup>

### *Writs of Entry*

IN a modified Form, the Possessory Writ under this name, was adopted in Maine, Massachusetts and New Hampshire.<sup>80</sup> In the two latter States at least a life estate was necessary to support the action.<sup>81</sup> Generally, the Action was directed against the actual tenant of the land, but if the defendant ousted the demandant, the latter might treat the defendant as a disseisor, in order to try the right, although claiming an estate of less than a freehold.<sup>82</sup> Damages for Mesne Prof

70. Bev. Stat. S.C. 1873, 586.

71. Clays Digest of the Laws of Alabama, 320—340 ~ Tuscaloosa 1843).

72. Ala. code, 1852, 2209.

73. Rev. Stat. Tex. 1879, art. 4784. See, also, *Thurber v. Conners*, 57 Tex. 96 (1882).

74. Jackson, A Treatise on the Pleadings and Practice in Real Actions, C. I, 11 (Boston 1828).

75. *lay -v. Taft*, 66 Mass. (12 Cush.) 448 (1853); *Johnson v. Elliot*, 26 N.H. 67 (1857).

76. Gen. Stat. Mass. 1860, c. 134, 5 ~ 3, 4, 5, 6. See, also,

*Wyman v. Brown*, 50 Me. 139 (1863).

its finally became recoverable in the Action in Massachusetts.<sup>83</sup> Of course the Pleadings in the Action were greatly simplified over those which prevailed in England prior to the Era of Reform.

### *Writ of Disseisin*

THE Writ of Disseisin long served in Connecticut as a substitute for the Common-Law Actions of the Writ of Right, the Writ of Entry and the Writ of Ejectment.<sup>84</sup> It was commenced and prosecuted like a Personal Action, and was available only on the basis of a Legal Title. According to Martin, it resembled Ejectment closely and was frequently called by that name.<sup>85</sup> But in 1888, the Action was superseded by a Statutory Form of Procedure.<sup>86</sup>

### *Dower*

UNDER the Statute of 3 & 4 Wm. IV, c. 27, § 36, 73 Statutes at Large 149 (1833), a Dower was one of the

Actions excepted from abolition. But resort to the Action became constantly less frequent because Chancery had long since intervened to exercise Concurrent Jurisdiction with the Law Court in protecting dower rights.<sup>87</sup> And the flexibility of the Procedure in Equity gave it an increasing preference over the Remedy at Law. While in general the right to dower is governed by Statute which has superseded the Common Law, in the enforcement of such Statute, resort may still be had to Common Law and Equity for Remedial Relief, where, for any reason, the Statutes fail to cover the Point in Issue. In many States a Bill in Equity is had for Dower under which dower is admeasured, Damages are Assessed

83. *Raymond v. Andrews*, 60 Mass. (6 Cush.) 265 (1850).

84. *Tyler, Ejectment and Adverse Enjoyment*, c. 37, 654 (Albany 1870).

85. Martin, *Civil Procedure at Common Law*, e. V, *Modern Real Actions*, § 175, 147 (St. Paul 1905).

86. *Gen.Stat.1858*, 872.

87. *Scribner, Dower*, c. 7, 145 (2d ed. Philadelphia 1883). See, also, *Mundy v. Mundy*, 2 *Ves.Jirn.* 122, 30 *Eng.Rep.* 554 (1793).

56

## FORMS OF ACTION

Cit 2

as.  
89.  
(1789).

- (A)
- (B)
- (C)
- (CD)
- (E)

Debt  
Covenant  
Account  
Special Assumpsit  
General Assumpsit

and Possession Awarded. M By Judicial Decision or by Statute in a few States, where the Right of Dower is disputed in an Equitable or Statutory Proceeding, the Parties involved are entitled to have the Right of Trial by Jury, which is in accord with the early Eq-

uity Practice of accepting a Verdict at Law on such an Issue.<sup>89</sup>

### *Partition*

WITH the abolition of the Writ of Partition by the Statute of 3 & 4 Win. IV, c. 27 § 36, 73 Statutes at Large 149 (1833), Exclusive Jurisdiction over Partition Proceedings fell to the Court of Chancery, a Jurisdiction which it had exercised concurrently with the Law Courts since the days of Elizabeth (1558—1603) Y° In the Several States of the United States the Action of Partition at Common Law was never recognized in its Ancient Form. It was superseded by the Bill in Equity or some Form of Statutory Proceeding.” There were, of course, no Actions at Common Law for the Partition of

### THE MODERN PERSONAL ACTIONS

12. From the close of the Reign of Queen Elizabeth in 1603, the Ancient Real Actions suffered a decline with the consequence that the Modern Personal Actions emerged as a

New System of Actions, eleven in number. FROM the middle of the Thirteenth Century to the Reign of Elizabeth (1558—1603), the Ancient Real and Mixed Actions, Proprietary and Possessory in Character, and what

we now speak of as the Modern Personal Common-Law Actions, were developing along parallel lines. But from the close of Elizabeth’s Reign [1603] the Ancient Real Actions fell into a decline, with the Modern Common-Law Actions emerging as the principal System of Actions. These Personal

Personal Property, Equity assuming Jurisdiction in such case.

### *Forcible Entry and Detainer*

THE Ancient Summary Proceeding of

Forcible Entry and Detainer, as developed at Common Law and by Statute, in England, found its way into the Colonies with the main body of the Common Law. In some States the English Statutes have been adopted with some modification. But in some Form or Other the Remedy still prevails in most States.<sup>92</sup>

See 7 Eneyel.Plead. & Prac. 183 (Northport 1897).

Curtis v. Curtis, 2 Bro.C.C. 631, 29 Engitep. Me

90. Eispnanj Principles of Equity, Part III, c. IV,

I 487 (5th ed. Philadelphia 1893).

91. See 21 Am. & Eng.Encycl.Law, 1144, 1145 (2d ed. 1902).

92. For the characteristic features of the remedy as used In the United States, see Martin, Civil Procedure at Common Law, c. V. Modern Real ActIons, ~ 179. 151—iSS (St. Pau) 1905).

Actions were those brought for the Recoveiy of a Debt, the possession of specific per-sonal property, Damages for the Breach of a Contract, or Damages for some injury to the person, or to one's relative rights, or to personal or real property.

### *Classification*

ACCORDING to the Nature of the Lia

bility the Personal Actions are classified as:

(I) Actions Dc Contractu: The actions are based upon a contract or obli-  
gation:

(II) Actions Ex Delicto: These actions.

are brought for the redress of

wrongs, and include also actions for the recovery of real and per-

sonal property:

(A) Trespass

(B) Trespass on the Case

(C) Trover

(D) Ejectment

(E) Detinue

(F) Replevin

Sec. 12

## MODERN PERSONAL ACTIONS

57

Personal Actions, as indicated in the Chart above, include Actions that are brought for the Recovery of a Debt, or for Damages for the Breach of a Contract, or for Tort, for some Injury to the Person, or to Relative Rights or to Personal or Real Property. The most common of these Actions are Debt, Covenant, Assumpsit, Detinue, Trespass, Trespass on the Case, Trover and Replevin.

Personal Actions are divided, according to their nature, into Actions *Ex Contractu* and Actions *Ex Delicto*. The former are Actions based upon a Contract, Express or Implied; while the latter are for injuries, the right to recover for which is not based upon Contract, but upon Tort. This attempt to distribute our Personal Forms under the two heads of Contract and Tort, as Maitland points out, has never been very successful or very important.<sup>93</sup>

Of the Forms of Action which have been enumerated above, the Action of Ejectment has been classified as a Real Action, as well as a Personal Action, as is indicated in the preceding section. In the classification of actions as *Ex Contractu* and *Ex Delicto*, some writers put Detinue on one side of the line and some on the other.

The above Classification of all Personal Actions as *Ex Contractu* or *Ex Delicto* cannot be supported on principle, for there are many duties imposed by Law, a Breach of which constitutes neither a Tort nor the violation of a Genuine Contract, as, for instance, the failure to pay a Debt imposed by Custom, Judgment or Statute. In some of these cases the Classification has been maintained by

93. Ma-tJan-l, Equity and the Forms of Action at Common Law 369 (Cambridge 1910); Pollock, Torts, Appendix A, 571 (11th ed. London 1920).

Actions at Law or in Equity may be classified, according to the nature of the Cause of Action, as (1)

Actions of Tort; (2) Actions of Contract; (3) Actions on Non-Contractual Obligations; (4) Proprietary Actions; (5) Actions of Status; and

(6) Public Actions. See, also, 1 Standard Encyclopedia of Procedure, Introduction, ~ 14, on Classifications of Actions. (Los Angeles & Chicago 1911).

treating the Action as if arising on Contract, although clearly not so arising. In others, the duty imposed by Law so resembles the duty assumed by Contract that they have for convenience been included in Actions *Ex Contractu*.

### *The Decline of the Modern Personal Actions*

THE Personal Actions, which, in general were of later development than the Real Actions,—developed out of the Action and Interaction which, over a Period of Several Centuries, took place between the Chancery and the Three Royal Superior Courts without the aid of any Legislative Enactment, and included the Actions of Debt, Covenant, Account, Detinue, Replevin, Trespass and Ejection; also Trespass on the Case, Trover, Special Assumpsit and General Assumpsit, the development of which, according to one view, was given considerable impetus, directly or indirectly, by the power granted to the Chancery Clerks by the Statute of Westminster II (1285) while others have either minimized or discounted the effect of this Statute on this development. As the Old Real and Mixed Actions declined these Personal Common-Law Actions naturally came into wider use. Their Supremacy and the Procedures connected therewith long stood unchallenged. But in 1834, as an Incident of a demand for improvement in Legal Procedure, the Hilary Rules were promulgated. They were designed to limit the Scope of the Various General Issues in the Actions, and to restore the Ancient Strict Common-Law Theory that under a Plea of the General

94. 13 Edw. I, c. 24, 1 Statutes at Large 190 (1285).

95. Promulgated pursuant to 4 & 4 Wm. IV, c. 42, § 1, 73 Statutes at Large 272 (1833).

For the history and effect of the Hilary Rules in England, see article by Holdsworth, *The New Rules of Pleading of the Hilary Term*, 1 Cambridge L.J. 261 (1923); for the history and effect of the Hilary Rules in the Several States of the United States, see Reppy, *The Hilary Rules and Their Effect on Negative and Affirmative Pleas under Modern Codes and Practice Acts*, 6 N.Y.U.L.Q.Rev. 95 (1929).

58

## FORMS OF ACTION

### Ch. 2

Issue a defendant was restricted in his Proof to offers of Evidence having a logical tendency to deny the Material Allegations in the Declaration, and he could not offer Evidence of Defenses going to dispute liability. But the effort did not stay the Movement for Reform. Under the Uniformity of Process Act,<sup>96</sup> enacted in 1832, the Process in the Personal Actions was made uniform. The Old Form of Writ was abolished in favor of a New, Statutory Form, which, as a parting tribute to the Old Form, was characterized by the requirement that the Pleadings should include by name one of the Recognized Forms of Actions. A second assault upon the Status of the Personal Actions came in 1852 when the Common-Law Procedure Act<sup>97</sup> eliminated the requirements that the plaintiff should mention in any Summons any Form or Cause of Action. Even so the Personal Forms of Action as developed at Common Law remained substantially intact,

It was thus left for the final blow to be delivered by the Supreme Court of Judicature Act of 1873,<sup>98</sup> and the Rules promulgated under its authority, which was extended in 1875.<sup>99</sup> This Statute not only abolished the Common-Law Forms of Action; but, following the lead of the Code Reforms in the United States, undertook to wipe out the distinctions between Law and Equity, by establishing a Single Court with both Law and Equity Jurisdiction, so that the question in England ceased to be whether a plaintiff had a Cause of Action at Law or a Suit in Equity, and came to be one of whether he had a Cause of Action under the Law of England.'

96. 2 Wm. IV, c. 39, 72 Statutes at Large 115 (1832).

97. 15 & 16 Vict., c. 76, 92 Statutes at Large 255 (1852).

98. 36 & 37 Vict., c. 66 (1873).

99. 38 & 39 Yhet., c. 77 (1875).

1. Maitland, *The Forms of Action at Common Law*, Lecture 1, 8, 9, 10 (Cambridge 1948).

### THE EFFECT OF THE DEVELOPMENT OF THE FORMS OF ACTION

**13.** The Development of the Forms of Action, both Ancient and Modern, resulted in the Creation of a Formulary System of Procedure, under which each Form of Action came to stand for a more or less Specific Theory of **Liability**.

WITH a view of the Historical Development of the Common-Law Actions, Ancient and Modern in mind, it immediately becomes evident why any attempt to define what constitutes a "Form of Action," in advance of such a survey, is practically meaningless. Thus, it now appears that the student, before attempting a definition, should realize that the Forms of Action were not created at one stroke out of pre-existing raw materials; that they grew over a period of Several Centuries; that there was more than One Set of Common-Law Actions—the Ancient Real and Mixed, and the Modern Personal Actions—the latter being almost completely substituted in lieu of the former after the Reformatory Legislation of 1833. It appears further that the student, as a condition precedent to an understanding of the Forms of Action, should first have some appreciation of the effect of the Norman Conquest in Centralizing Justice in the Crown; the organization and Development of the Superior-Common-Law Courts and their relation to the Local Courts and Franchises; the story of the Original Writ and its creation and effect; the dependence of Right upon Remedy; the connection between the Charge in the Original Writ and the Charge in the Declaration; the Power of Chancery to issue New Varieties of Original Writs; the effect of the Provisions of Oxford in 1258 in destroying Equitable Remedies based on earlier Common-Law Writs not of course, thus depriving the Common-Law Courts of the power to coerce obedience by orders *in personam*, and preparing the way for a vast expansion of Equity Jurisdiction; the various theories concern-

Sec. 13

#### EFFECT OF DEVELOPMENT

59

ing the effect of the Statute of Westminster II (1283) upon the Writ System; the Classification of the Ancient Real Actions as Proprietary and Possessory; the ascendancy and decline of the Ancient Real Actions; the Development of the Modern Real Actions; and finally, the emergence of the Modern Personal Common-Law Actions. Against this background only is it practicable for the student to draw any clear-cut conclusions as to what constitutes a "Form of Action." The first step in this direction ought to be that of drawing the student's attention to the distinctions between a "Form of Action" and a "Cause of Action".

#### *A Cause of Action and a Form of Action Distinguished*

TO fully understand the Common-Law Forms of Action, the student must clearly distinguish between a Cause of Action and a Form of Action. At the very moment the first application was made to the Chancellor for the First Original Writ, it might be urged that there was no distinction, for until a sufficient number of Writs had been issued to develop a body of Substantive Law, no Cause of Action could exist except as an incident of the issuance of some Form of Writ. Once a given Writ had been used enough to find a secure place on the Register of Writs, it became one of a class known as the Writs of Course (*brevia de cursu*). Such Writs were issued as of course to any applicant upon the payment of the appropriate fee. Writs which were issued upon application to the Chancellor, and which required an exercise of discretion, were known as Magisterial Writs (*brevia magistralia*). This latter type of Writ in the beginning was often varied to meet the varying circumstances of the Cases disclosed in the plaintiff's Petition for Relief. Bracton, in speaking of the early Common-Law Scheme of Remedial Action, observed, *Tot erunt formulae brevium quod sint genera actionum*. There may be as many Forms of Action as there are Causes of Action. As he conceived the matter the Remedy (*remedium*) was in exact equilibrium with *jus*, or, as of then, where there was a Right of Action there was a Form of Action to vindicate an Alleged Wrong. Bracton's view was justified, for as yet, Form was the servant and had not become the master; Form had only served as a procedural device for securing conciseness in the statement of the Grounds of Action. However this may be, the net result of the issuance of Writs of Course and Magisterial Writs was to develop a well-defined body of Substantive Law.

And once such a body of Substantive Law had been developed, the distinction between a Cause of Action and a Form of Action became vitally important if the plaintiff was to be successful in the statement of his Cause of Action. Thus, conceivably, it might be possible for a plaintiff to select the correct Form of Action to fit the particular combination of facts or events presented in his Case and yet, by failure to include in his Declaration one of the Allegations required by the Substantive Law as essential to the statement of his Cause of Action, he might utterly fail in the enforcement of his right. To illustrate, if *A* ousted *B* from Blackacre, the proper Form of Action for *B* to institute would be Ejectment. Since, however, under the Substantive Law of Real Property *B* was required to allege Title, Ouster and Damages in order to state a good Cause of Action in Ejectment, failure on *B*'s part to allege Title would result in a failure to state a good Cause of Action. And the fact that *B* has selected the Correct Form of Action—Ejectment—would not save his Cause. If, however, the plaintiff had stated all the Allegations required by the Substantive Law of Real Property as essential to the Statement of a Cause of Action in Ejectment, but had selected as his Form of Action Trespass to

2. 3 Street, Foundations of Legal Liability, C. III,  
29 (Northport 1900).

60

## FORMS OF ACTION

### Ch. 2

Real Estate, he still would have met with defeat. The phrase "Cause of Action," therefore, depends upon and is prescribed by the Substantive Law applicable to the Specific Facts of the Particular Case, whereas the phrase "Form of Action" goes to the Theory of Liability, that is, the plaintiff must state the Combination of Facts or Events on which he relies in such a manner as to invoke one of the categories of liability represented by what we call a "Form of Action." In other words it is descriptive of the technical Mode of Framing the Writ and Pleadings appropriate to the injury and to the theory of liability. Failure on the part of the plaintiff to achieve this end meant that his Action was dismissed. The plaintiff may therefore have failed for either of two reasons, *first*, because he had omitted from the Statement of his Cause of Action an Allegation required by the Substantive Law as essential to his Cause of Action; or second, because he has not presented his Cause of Action in the category of liability as called for by a Specific Form of Action. Selecting a "Form of Action," then had to do with a theory of liability, it merely involved a selection of those Allegations required by the Substantive Law as essential to the Statement of a Specific Cause of Action.<sup>3</sup>

### *The Practical Importance of Distinguishing Between the Different Forms of Action*

IN Maitland's famous book on the Forms of Action at Common-Law,<sup>4</sup> he attempts, at the inception of his treatment, to explain or define the Forms of Action by pointing out that the choice between the various Forms of Action—Novel Disseisin, Mort d'Ancestor, Writ of Entry, Quare Impedit, Covenant, **Debt**, Detinue, Replevin, Trespass, Ejectment, Case and Assumpsit—"is a choice between Methods of Procedure adapted to Cases of different kinds", With the greatest defer-

3. *Id.* at 8, 9, 10.

4. The Forms of Action at Common Law, Lecture 1,  
2, 3, 4 (Cambridge 1948).

ence to such a distinguished scholar, exception must be taken to this statement. It is rather, as previously observed above, a choice between different theories of liability as represented by the various Forms of Action, Pursuing his thought, Professor Maitland suggests, quite properly, that there were incidental differences between the different Forms of Action with respect to:

(I) *Jurisdiction of the Courts.*—Under this heading Professor Maitland observes that in most Civil Cases each of the Three Royal Courts was equally competent as to Jurisdiction, an end made possible by the use of a Fiction previously explained.~

(II) *Process.*—Here it is pointed out that sometimes the defendant's Appearance is compelled by a Summons and sometimes he may be Attached; or he may be forced to find gage and pledge for his Appearance. In at least one action, the Assize of Novel Disseisin, his bailiff might be Attached.



In the event the defendant proves contumacious may one have his body seized, or, if he cannot be found, may he be outlawed? This barbaric Mode of Procedure was not applicable in all Forms of Action, although the tendency was in that direction. And the seizure of the thing in dispute varied with the Form of Action chosen.

(III) Pleading.—With respect to this topic, it is suggested that each Form of Action has some Rules which are peculiar to it; that is that the General Issue in each Form is different, as for example, Nil Debet in Debt, Non Assumpsit in Special Assumpsit, Not Guilty in Trespass to Realty, and in others Nul Tort or Nul Disseisin.

(IV) *Judgment by Default.*—Here the question is raised as to whether a Judgment may be obtained against an Adversary who is persistent in his contumacy, to which the

For expansion on the Jurisdiction of the Three Common Law courts see Stephen, A Treatise on the Principles of Pleading in Civil Actions, c. I, 40 (3d ed. by Tyler, Washington, B. C. 1892).

Sec. 13

#### EFFECT OF DEVELOPMENT

61

answer seems Yes in some Forms of Action and No in others.

(V) *Mode of Trial.*—By the time the Forms of Action had reached a Status of Maturity, the chief Mode of Trial was by Jury. But there might be a Trial by a Grand or Petty Assize, and, of course, in an earlier time it was still possible that the issue could be determined by Trial by Battle. And finally, observes Professor Maitland, a few Issues were treated by the Judges who heard Witnesses.

(VI) *Judgment.*—If the plaintiff secures a Judgment how may it be enforced? On Execution may the plaintiff be placed in possession of the property in dispute? May the defendant be imprisoned or outlawed, or may he only be distrained? In addition to satisfying the plaintiff's demand, may he also be punished for his violation of the Law, and if so, what shall be the nature of such punishment—an Amercement, a Fine or Imprisonment? These may differ with the Form of Action.

(VII) *Dilatory Character of Some Actions.*—Some actions were susceptible to greater delay than others. Thus, in the Oldest Forms personal appearance of the parties was required, Attorneys being appointable by the King's permission. Such Actions were subject to great delay, every type of excuse being allowed for the non-appearance, a short or a long *Essoin* being granted, as of course, there being no discretion. Again, in the Older Forms, an *Essoin* might be granted under which a party might betake himself to his bed for a year and a day, during which period of time the Action was Suspended.

(VIII) *Measure of Damages and the Period of Limitations.*—To the above we may add that the Measure of Damages differed, depending upon what choice of Action was made, and, of course, the Statutes of Limitations varied according as the Form of Action fell in the Contract, Property or Tort Field.

Having concluded his story of the incidental differences between the different Forms of Action, Professor Maitland declares that "a Form of Action" implies "a particular Original Process, a particular Mesne Process, a particular Final Process, a particular Mode of Pleading, of Trial, of Judgment. But further to a very considerable degree the Substantive Law administered in a given Form of Action has grown up independently of the Law administered in other Forms. Each procedural pigeon-hole contains its own Rules of Substantive Law, and it is with great caution that we may argue from what is found in one to what will probably be found in another; each has its own Precedents. It is quite possible that a litigant will find that his Case will fit some two or three of these pigeon-holes. If that be so, he will have a choice, which will often be a choice between the old, cumbrous, costly, on the one hand, the modem, rapid, cheap, on the other. Or again he may make a bad choice, fail in his Action, and take such comfort as he can from the hints of the Judges that another Form of Action might have been more successful. The plaintiff's choice is irrevocable; he must play the rules of the game that he has chosen. Lastly he may find that, plausible as his Case may seem, it just will not fit any one of the receptacles provided by the Courts and he may take to himself the lesson that where there is no Remedy there is no Wrong." G

It may be admitted, as Professor Maitland says, that the *Formulae* of Pleading the Cause of Action and

Defense, and even the Methods of Trial, Judgment and Execution, varied with the different Forms of Action. But this was not so in the beginning; it was not and could not be so until enough Writs had been issued to create the Forms of Action and a body of Substantive Law; these Forms of Action were not the product of a

*z. Maitlanci, The Forms of Action at Common Law,.*

Lecture J, 4, 5 (Cambridge 1948).

62

## FORMS OF ACTION

### Ch. 2

classificatory process that was or could be applied to pre-existing materials. Drawing up a description of the incidental differences between the different Forms of Action or setting up a Classification of the Forms of Action after the fact may serve the purpose of assisting in the identification of the Actions as finally developed or it might have aided the Lawyer as a guide in the selection of a Form of Action, but neither of these steps seems calculated to define a Form of Action, or to aid a beginning student in understanding what constitutes a Form of Action prior to the time he has traced the step-by-step process by which these Forms of Action finally assumed Definitive Form. A list of the incidents of the Forms of Action and an effort at classification both necessarily come after the fact of Development became a reality. And all this merely emphasizes that a choice between the Various Forms of Action was a choice between different theories of liability, and not a choice between different Methods of Procedure or relief. It was the theory of liability which was the keynote in Selecting a Form of Action and not the Incidental Differences in Procedure. The proof of that is that when, under our Modern Codes, these incidental differences in Procedure were removed and, under the Single, Formless Form of Action, all the Procedure in all Actions was reduced to uniformity, the Forms of Action remained. Thus, if *B* converted *A*'s watch, *A* was no longer to sue in the Form of Action formerly known as Trover, but in order to State a Good Cause of Action in the Nature of an Action on the Case, he was required to allege Possession or Right to Possession, Act of Conversion, and Damages. The essential differences in the Forms of Action were therefore in the Allegations necessary to show the Right of Action, in each Form, or to invoke the correct theory of liability represented in the selection of a Specific Form of Action; the incidents of Procedural Difference probably developed in point of time long after the theory of liability had assumed its full play, in each Form of Action. The Law of the Forms of Action, therefore, is not the Law of Pleading and Practice, although the two are so intimately associated that it is easy to miss the distinction.

### *The Misconception of the Forms of Action*

AS an incident of the development of the Forms of Action, Two Inflexible Rules of Pleading grew up, *first* that the Charge in the Declaration must conform to the Charge in the Original Writ; *second*, that the Charge proved at the Trial must conform to the Charge in the Declaration.<sup>7</sup> Such Rules originated out of the fact that the Jurisdiction of a Specific Court was limited to the identical case as authorized by the Original Writ and developed by the Declaration. The same conformity was required in respect of the legal principle invoked, and not only in respect of the Facts alleged. Thus, as to Matters of Fact, the Proof must correspond with the Facts alleged; if the plaintiff Charges in his Declaration that the defendant took a black horse, and at the Trial offers evidence that the defendant took a white horse, he cannot succeed as he is guilty of a Variance between the Charge in the Declaration and the Proof at the Trial, which could be taken advantage of by a Motion For a Nonsuit. For a Variance between the Declaration and the Original Writ, a Plea in Abatement was the proper procedural device. A Variance between the Declaration and the Proof occurs when the plaintiff has misunderstood the actual state of Facts or has over-estimated his ability to prove what he alleged.

But a plaintiff may still lose although he knows the Facts of his case and is able to sustain the Burden of Proof; he may lose because of a mistake as to the legal effect of his Facts and as to the Legal Doctrine applicable thereto. Thus, suppose *A* charges

*z. See floppy, Introduction to Civil Procedure, c. U,*

**1, 89, it. 43** (Buffalo 1954).

Sec. 13

## EFFECT OF DEVELOPMENT

63

*B* with conduct which he supposes amounts to a trespass when, as a matter of Substantive Law, the wrong in

question actually creates a debt or amounts to no more than a conversion without a Trespass. If A in error sues B in Trespass, stating a case within the Law applicable to Trespass, it would constitute a glaring departure from true procedural principle to allow the plaintiff to recover for the debt or the proved conversion.<sup>8</sup> In such a situation the plaintiff failed, because the Pleader, by the Form of Action in which he stated his case invoked a theory of liability or principle of Law relating to trespasses, whereas his right to recover was referable to an entirely distinct Doctrine of Law as represented by the Action of Trover. It follows therefore that the case proved is in legal implication entirely different from that Stated in the Declaration.<sup>9</sup> The same principle operates where, in an Action of Trover, the plaintiff fails in his Proof of a conversion but succeeds in establishing a trespass, and hence plaintiff fails to recover, as he is relying upon a theory of liability for conversion which has no application to Trespass; <sup>10</sup> likewise, where the plaintiff alleges Trover, but merely shows that the defendant permitted the goods to spoil; <sup>11</sup> under the Form of the Action of Trover, the theory is one of liability for a conversion, but the true theory of liability is one for negligence which invokes another doctrine of law entirely different in origin and in theory from that invoked by the Action of Trover. So, if the plaintiff brings Debt against the defendant

B. *Ellenwood v. Marietta Chair Co.*, 158 U.S. 105, 15 S.Ct. 771, 39 LEd. 913 (1895).

9. Even In the Code States where the Ponits of Ac. tion have been abolished, it is not possible to declare in Tort and recover for a Breach of Contract. Pomeroy, *Code Remedies*, c. Jlr, 452, 623 (4th ed. by Bogle, Boston 1904).

10. *Pouldes v. Willoughby*, 8 M. & W. 540, 151 Bug. Rep. 1153 (1841).

11. *Mulgrave v. Ogden*, Oro.Eliz. 219, 78 Eng.Rep. 475,

for goods sold and delivered, whereas in fact the defendant undertook to purchase the goods, and then refused to accept the goods upon Tender, the Action is misconceived,<sup>12</sup> as it assumes a liability for debt when there is no debt, but only a liability based upon a Breach of Contract, a liability created by a Rule of the Law of Contracts. Moreover, if in Debt, the Pleadings and Proof show that the defendant, not being indebted to the plaintiff, proftrised to pay to the plaintiff a debt owed by a third person, the plaintiff cannot recover, there being no obligation imposed by the Law upon the defendant to pay the debt; the defendant, if liable, was liable under a legal doctrine based upon a Breach of Promise.

The mistake made by suing in a Form of Action which expresses a theory of liability not available in the case which the plaintiff has stated and proved is known as a Misconception of the Form of Action. Such a Defect is one of Substance, and has been insisted upon as a Fatal Defect, as it has been the policy of the Courts to preserve the Distinctions Between the Actions,<sup>13</sup> which in fact merely amounts to the observance of the differences between the distinct theories of liability or principles of Law.<sup>14</sup>

*The History of the Forms of Action is the History of Substantive Law* :-

THE Rules of the Substantive Law of Contract, Property and Tort have been evolved by inquiring in a myriad of specific instances whether the Combination of Facts or

12. For a similar Rule in New York under the Code.  
*Henry Glass & Co. v. Misroch*, 210 App.Div. 783, 206 N.Y.S. 373 (1st Dep't 1924), modified 239 N.Y. 475, 147 N.E. 71 (1925).

13. *Reynolds v. Clarke*, 8 Mod, 272, 88 Bug-Rep. 193 (1725).

14. *Mitchell v. McNabb*, 58 Me. 506 (1870).

15. It was In this very connectlon that Sir Henry Maine observed that the Boles of Substantive Law had the appearance of being "secreted In the Interstices of Procedure." Maine, *Early Law and*

*Custom*, 3S9 (New York, 1886).

(1591).

*Koffler & ReppycomLaw Pldg. H.B.—4*

Events of the plaintiff's case were covered by any recognized theory of liability, as represented by a Particular Form of Action. The primary question before the Courts was not one of whether the plaintiff in the statement of his case had alleged a right in him, a violation of that right by the defendant, and Damages. It has been rather,

whether the Operative Facts presented constituted a Cause of Action which fit into the theory of liability as represented by some Specific Form of Action, such as Assumpsit, or Trespass. This was neither a Matter of Pleading nor of Procedure generally; it was a question of Remedial Right, the existence of the Right being dependent upon the existence of a Remedy.

From this it may be inferred that the list -of Original Writs not only determined the Jurisdiction of the Royal Superior Common-Law Courts, but it determined the existence of Remedial Rights and Liabilities. Long after the Original Writs ceased to be essential to authorize the Courts to act in a specific case, the Judges felt impelled to consider the case exactly as if it had been begun by an Original Writ and to govern the exercise of their Jurisdiction according to the recognized occasions of Remedy. Even though the Writs became in time a mere formality, and were superseded as the Method of Commencing the Action, the Principle of Jurisdiction remained as if still actually governed by the Original Writ, and the theories of liability, as if represented by the various Forms of Action, were still observed as being the sole occasion of remedial intervention.<sup>10</sup>

The list of Original Writs as recorded in Chancery or as they appeared in the Regis

16. "The Writs were like doors to the King's Courts; there was one for big dogs and a smaller one for little dogs; there were doors for yellow dogs and black dogs, and the door of Case for mongrel curs of no particular breed, but lust plain dogs." Ship. man, Handbook of Common-Law Pleading, 60, a 11 (St. Paul 1923).

## Ch. 2

Imm Brevum<sup>7</sup> was not a reasoned or well-rounded Scheme of Remedial Justice; it was not the product of a skilled Legislator selected by providence to calmly devise theorems of Remedial Rights for all conceivable wrongs. Nor was this list the result of a rational Classification of Theories of Liability or of Causes of Action according to the character of the Rights and claims to be presented; the Forms of Action, representing Theories of Liability, were relatively few and arbitrary, when measured by the myriads of human situations in which human beings were bound to be seeking some Form of Remedial Relief. Nor were the Theories of Liability as seen in the Forms of Action comprehensive and logical; they just grew; yet the stream of rights flowed down these channels, with the well recognized result that the history of these Theories of Liability is the History of the Development of English Substantive Law. Thus when Glanvill and Bracton wrote concerning the Law of England they were compelled to write about the Writs, as the Law could only be found in their interstices. In their thy this involved the Forms of Action known as **the** Ancient Proprietary and Possessory Real Actions; in a later or more modern day a discussion of Debt, Covenant, Account or Assumpsit, is necessarily a discussion of the development of the Law of Contracts; that of Trespass and Case is a discussion of the Law of Torts; that of Detinue, Replevin, Ejectment and Trover is usually a discussion of Property; in short, a History of the Forms of Action, both Ancient and Modern, would fall little short of a Complete History of the Common Law. Had the authority of the Clerks in Chancery been less restricted in their practice of issuing New Writs and had the Judges been more liberal in extending the Remedial Scope of the various Forms of Action,

17. See Maitland, History of the Register of Original Writs, 3 Harv.L.Rev. 97, 167, 212 (1889), it-printed In 2 Select Essays In Anglo-American Legal History, 549 (Cambridge 1908).

64

## FORMS OF ACTION

Sec. 13

### EFFECT OF DEVELOPMENT

65

and particularly the Great Residuary Remedy of the Common Law—the Action of Trespass on the Case—their Remedies might have effectually answered many of the purposes of a Court of Equity and thus made its creation unnecessary.

The Law was required to express itself through the Limited System of Writs and Forms of Action sanctioned by precedent, and little discretion was left to the Judge. The Common Law, thus hampered and restricted was found insufficient to meet certain demands for Justice; a distinct Tribunal arose, so it is said, to supply the

deficiencies of the Common Law and to give Justice where the Common Law Remedies were inadequate, namely, the Court of Chancery, which in legal theory gave a Remedy where there was a right, on principles of natural justice, to meet the exigencies as they arose, so that no wrong should exist without a remedy. Aside from the soundness of these last observations concerning the Supplementary Functions of Equity, it is clear that the Classification and Definition of the Different Species of Contracts and Torts, even at the present day, are based on the historic distinction between the different theories of liability as represented by the Forms of Action and the Remedies available thereunder. The test of the existence of liability and of **the** amount of Damages due may depend upon whether one Form or another is applicable. It follows, therefore, that in order to understand the intricacies of the Law, it is necessary to approach it by the study of the various theories of Remedial Right available under the Forms of Action at Common Law which have been recognized by the Courts. Or, to put the matter in a broader way, practically all of our Modern Substantive Contract, Property and Torts Law, had its origin in and developed out of the Theories of *Liability* represented by the Forms of Action and the Procedural Incidents thereto.

*The Phrase~ "Form of Action" Defined*

**WITH** the distinction between a Cause of Action and a Form of Action in mind, with some understanding of the different Doctrines of the Different Actions, with some comprehension of what constitutes a Misconception of a Form of Action, as well as the knowledge that the History of the Forms of Action is the History of Substantive Law, we are at last ready to attempt to define a "Form of Action."

The phrase "Form of Action" has been defined as the "technical Mode of Framing the Writ, and Pleadings appropriate to the particular injury";<sup>18</sup> as the Method of Procedure adapted to a specific kind of case. Nothing could be farther from the truth. The law governing Forms of Action is not the Law of Pleading or Procedure, though it is closely associated therewith. The choice of One Form of Action over Another is primarily a choice between different Theories of Substantive Liability, and the Scope of the Various Actions measures the existence and extent of liability at Common Law. In other words the Cause of Action had to fit the Theory of Liability as represented by a Specific Form of Action. And this remained true even when the incidental differences in procedure were removed, and the Procedure in All Actions was reduced to uniformity. Thus, after England and most states abolished the necessity of choosing one of these specified theories in Commencing an Action, the Forms of Action remained in substance. "The Forms of Action we have buried." Yet, though we have buried them, observes Professor Maitland, "... they still rule us from their graves."<sup>19</sup> The names and theories of the Forms of Action as they existed at Common Law still indicate the Recognized

18. 2 Warren, *Law Studies*, 759 (3d ed. London 3883); First Report, Common-Law Commissioners of 1851, 32; 1 Standard Encyclopedia of Procedure, Introduction, S (Los Angeles & Chicago 1911).

19. Maitland, *The Forms of Action at Common Law*, Lecture 1, 2 (Cambridge 1948).

66

## FORMS OF ACTION

### Ch. 2

Causes of Action, the occasions of liability, and the starting point of legal doctrine. The essential differences were in the Allegations of Fact necessary to show the Right of Action in each Form; in other words, in their respective grounds and theories of liability. And this is true even under the Code. Some cases may fall under two or three of these theories of liability, and a litigant will have a choice or Election between them.

By way of summary then, it may be asserted that a "Form of Action" is not a choice between Methods of Procedure or Relief; it is not to be confused with a Cause of Action; it is not a General Demand for Relief based on a Specific Wrong as might be made under a Non-Formulary system of procedure. Rather a "Form of Action" may be defined as a Procedural Device whereby the primitive mind gave concrete expression to a theory of liability; it is a mechanism through which the doctrine or principle of Law applicable to the Statement of a Plaintiff's Cause of Action may be enforced; it provides a scheme whereby it may be determined whether the plaintiff's alleged Cause of Action fits into any judicially recognized Theory of Liability; it is a device, an incidence of the existence of which determines the Formulae of Pleading the Cause of Action and Defence, the Method of Proof and Trial, and the Judgment and Execution, these varying with each Form of Action; it is the Frame within which a

plaintiff could suggest the facts constituting his Claim for Relief in accordance with the appropriate Rule of Substantive Law applicable thereto; and finally, it is the mechanism through which an unnamed short, but not unidentifiable Charge in the Original Writ—the keynote of the Form of Action—is, through the Statement of the

so. “While the New Rules have abolished the distinctive Common-Law Forms, the essential and differentiating Rules applicable to Pleading as established at Common Law survive as a Basis of Remedial Law.” Minturn, S, In *Ward v. Huff*, 94 N.J.L. 81, 84, 109 A. 287, 288 (1\*20).

Substantive Facts in the Declaration, converted into an enforceable liability, the Declaration as finally developed being but an amplification of the Original Writ, “with the additional circumstances of time and place” set forth in a more narrative and spacious form.

### *The Mode of Pleading Under Modern Codes and Practice Acts*

THE Forms of Action as finally developed are usually associated and discussed with Common Law Pleading, but they relate to the Substantive Law of Contract, Property and Tort rather than to Procedure. Forms of Action are the recognized Theories of Liability through which the Common Law Rights of Action have been evolved, classified and formulated. As such they are much more important than any mere Rules of Pleading. The abolition of the requirement of selecting a particular one of these theories of liability has emancipated Pleading from arbitrary Variations of Procedure in different kinds of Actions. While necessarily the Rights and Liabilities and Defenses depend on Substantive Law, only the manner in which the Claim or Defense shall be set forth depends upon Rules of Pleading, which are made the same for All Actions in Modern Procedure. But there are still many Code States which insist that the Pleader shall select and adhere to some Theory of Liability in stating his Cause of Action.

The Forms of Action, and the necessity of choosing between them, have been abolished by the Codes in the Several States, following the pattern set by the New York Code of Procedure of 1848.<sup>23</sup> Thus, in New York,

21. 3 Blackstone’s Commentaries on the Laws of England, 293 (7th ed. Oxford 1775); *Duyckinck v. Clinton Mutual Ins. Co.*, 23 N.J.L. 279 (1852).

St. *Shipman*, *Handbook of Common Law Pleading*, 56, ii. 5 (St. Paul 1923); Albertsworth, *The Theory of the Pleadings in Code States*, 10 Calif.L.Rev. 202 (1922), reprinted in 94 Cent.L.J. 389, 400 (1922).

23. N.Y.Laws 1845, c. 379.  
Sec. 13

### EFFECT OF DEVELOPMENT

67

“there is only one Form of Civil Action. The distinctions between Actions at Law and Suits in Equity, and the Forms of those Actions and Suits, have been abolished.”<sup>24</sup> In the famous New York case of *Goulet v. Asseler*,<sup>25</sup> in reference to this type of Statute Abolishing the Forms of Action, Selden, J., observed: “Although the Code [of Procedure] has abolished<sup>26</sup> all distinction between the mere Forms of Action, and every Action is now in Form a Special Action on the Case, yet Actions vary in their Nature, and there are intrinsic differences between them which No Law can abolish. It is impossible to make an Action for a direct aggression upon the plaintiff’s rights, by taking and disposing of his property, the same thing, in Substance

24. New York Civil Practice Law and Rules, § 103 (a) (1968), contains this provision.

25. 22 N.Y. 225 (1860).

or in Principle, as an Action to recover for the consequential injury resulting from an improper interference with the property of another, in which he has a contingent or prospective interest. The mere Formal Differences between such Actions are abolished; the Substantial Differences remain as before. The same Proof, therefore, is required in each of these Two Kinds of Actions, as before the Code, and the same Rule of Damages applies.”<sup>27</sup>

In many of the States which retain the Forms of Action, the Common Law Forms have been combined or modified by Statute. In Massachusetts, actions were Classified as either in Contract or Tort, while in

Michigan, at one time at least, Contract Actions were all called Assumpsit, and Tort Actions for Damages were called Trespass on the Case.

27. See, also In this connection the New Jersey case of *ward v. Huff*, 94 N.J.L. 81 at 84, 109 A. 287 at 288 (1920).

26. *Goulet v. Asseler*, at al., 22 N.Y. 225 at 228.

Sec.

## PART TWO

### OFFENSIVE PLEADING—GENERAL

### CONSIDERATIONS

#### CHAPTER 3

#### THE COMMENCEMENT OF AN ACTION<sup>1</sup>

14. The Court.
15. Jurisdiction of Courts.
16. Process—The Original Writ.
17. Service—Personal and Constructive.
18. The Appearance.
19. The Pleadings.

HAVING developed the view that Common-Law Pleading still survives as the basis of Modern Remedial Law, and having traced the Development of the Forms of Action, both Ancient and Modern, we may now turn our attention to the system of Offensive Pleadings as developed by Common-Law Procedure.

In its broadest scope, Procedure has to do with Pleading, Practice and Evidence; the steps by which proceedings are conducted in

1. In general, on the Commencement of an Action at Common Law, see:

**Treatises:** **Stephen**, A Treatise on the Principles of Pleading in Civil Actions, c. I, Of the Proceedings In an Action. From Its Commencement to Its Termination, 40-42 (3rd Am. ed. by Tyler, Washington, D. C. 1892); Perry, Common Law Pleading: Its History and Principles, c. VI, Of the Original Writ, 140 (Boston, 1897); Martin, Civil Procedure at Common Law, c. I, Introductory, Art. 1~, Appearance, 10—12 (St. Paul, 1005); Gould, A Treatise on the Principles of Pleading, Pt. II, Procedure, c. I & II, The Pleadings, 69 (Sixth Ed. by Will, Albany, 1909); Shlpman, Handbook of Common Law Pleading, c. I, Outline of Proceedings In an Action, § 3 Process— The *Original Writ*, 17—20 (3rd Ed. by Ballantine, St. Paul, 1023).

**Decision:** **West v. Ratledge**, 15 itO. 31 (1835).

the several Courts. It deals with: (1) The Courts; (2) The Jurisdiction of the Courts— in which Court an Action must be brought, and the Authority of the Court over the subject-matter; (3) The Process or Summons to acquire Jurisdiction of the Cause and to compel the Defendant's Appearance; (4) The Pleadings, the formal Statements of Claim on one side and of Defense or Replies thereto on the other; (5) The Examination of the Issues of Law after argument upon Demurrer; (6) The Trial of Issues of Fact joined in the Pleadings; (7) The Judgment or Award of the Cause with respect to the nature and amount of relief to be *given*, the great object of which all prior proceedings have led up to; (8) The Final Process of Execution, which enforces the Award or Relief by intervention of ministerial or executive officers; and lastly (9) The Review on Motion

for a New Trial, a Writ of Error, a Bill of Exceptions, or on a Modern Statutory Appeal, to correct errors which may have arisen. First, then, a word about the Courts, which administered the Common-Law.

68

Sec. 14

## THE COURT

69

### THE COURT

14. A Court is a tribunal duly constituted, and present at the time and place fixed by Law for Judicial Investigation and Determination of Controversies. And there are Courts of General and Special Jurisdiction, Courts of Original and Appellate Jurisdiction and Courts of Record and Not of Record. The procedure under which these Courts operate may be governed by Legislative Rules or Rules of Court, the modern tendency being in the direction of the latter method.

#### *In General*

WHEN a client consults a lawyer concerning some controversy in which he is involved, what he wishes to know is whether he has a civil action against his adversary. "A civil action at Common Law is a proceeding in a Court of Justice for the purpose of obtaining redress for the violation of a legal right." ~ If, after an analysis of the Facts of the client's case, the lawyer decides that he has a Cause of Action, then he must determine what Court has Jurisdiction over the supposed action. Therefore, before considering the Problem of Jurisdiction, it may be well to inquire as to what is a Court? According to Anderson's Law Dictionary the word "Court"

originally could signify only a yard or palace, and according to Cowel it meant the house where the King remained with his retinue; also the place where Justice was administered.<sup>4</sup> In early Anglo-Saxon and Anglo-Norman times it referred to the place of the King's domicile as the King was the fountain-head and Dispenser of Justice. During this primitive period of development

S. Martin, *Civil Procedure at Common Law*, e. I, Introductory, Art II, Civil Actions, 7, Defined (St Paul, 1905).

'An Action Is nothing else but a lawful demand of right.' Borne, *The Mirror of Justices*, c. II, Of Actions, 74 (With an Introduction by William O. Robinson, Washington, D. O., 1003). See, also, *Cohens 'cc Virginia*, 19 U.S. (6 Wheat.) 264 at 407, 408 (1821).

2. *Dictionary of Law* (Chicago, 1889).

the Courts were popular assemblages held in the courtyard of the baron or of the King himself by those whose duty it was to appear at stated times or upon Summons. With this idea in mind Blackstone defined a Court as "a place where Justice is Judicially Administered," and at least one American Court accepted his definition.<sup>6</sup> But it has been regarded as too narrow, it being concluded that a Court is a tribunal duly constituted and present at the time and place fixed by law for Judicial Investigation and Determination of Controversies.<sup>7</sup> And it has sometimes been regarded as an incorporeal thing requiring for its existence the presence of a Judge. It should, however, be understood that the Court does not consist of the Judge or Judges as individuals, but only when at the proper time and place they are exercising their Judicial powers.<sup>8</sup> And there are different kinds of Courts, as, for example, when viewed from the standpoint of Jurisdiction,

#### *Different Kinds of Courts*

THUS, Courts may be either one or two descriptions—of General Jurisdiction or of Special Jurisdiction. As classified in this manner, it is observed that a Court with General Jurisdiction is one which has all the power which a Superior Court of the Common Law had, and it may hear a wide variety of cases. A Court of Special Jurisdiction is one whose Jurisdiction is limited by Constitution or Statute and hence may only hear and decide specific cases. When the Court is one of General Jurisdiction, its Jurisdiction is presumed and need not be expressly asserted by the plaintiff; but when the Jurisdiction is



5. 3 Commentaries on the Laws of England, c. III, Of

Courts in General, 23 (7th S. Oxford, 1775).

1. *Ex Parte* Branch & Co., 63 Ala. 383 (187P~).

7. 8 Am. & Eng. Ency. of Law, 22 (Northport, 1808).

4. Law Dictionary (Cambridge, 1727).

5. *In re Steele*. 156 F. 853 (D.C. Ala. 1907).

70

### COMMENCEMENT OF AN ACTION

CE 3

limited, the plaintiff has the burden of establishing the Court's Jurisdiction.<sup>9</sup>

A Court may also be either of *Original* or of *Appellate* Jurisdiction. Original Jurisdiction consists of a Court's authority to decide a case in the first *instance*; and Appellate Jurisdiction consists of the Court's authority to review and correct the errors alleged to have been committed by a lower or Subordinate Court. To put the matter another way, the Court of Original Jurisdiction is a Trial Court, readily accessible to the people in such locality where the witnesses are heard and a Judgment is rendered, whereas a Court of Appellate Jurisdiction acts upon the Record made in the lower Court; it is farther removed from the people and among its purposes is not only that of reviewing the errors of inferior Courts, but also that of bringing uniformity in the law throughout the territory over which it exercises Appellate Jurisdiction.

Courts may also be either *of record* or *not of record*.<sup>10</sup> The former includes Courts in which the proceedings therein are recorded on parchment for a perpetual memorial and testimony, the Records of which may be offered in other Courts as conclusive evidence of the facts stated, whereas the latter refers to a Court whose Records are not so regarded in other Courts, or at most are regarded only as prima facie evidence of the facts stated therein. By Statute in some states the Statute of Limitations on a Judgment of Record is twenty years; on a Judgment of a Court not of Record six years.<sup>11</sup>

### JURISDICTION OF COURTS

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

IN general, Jurisdiction is the power of a Court to hear cases and decide them by pro.

9. See Repp~, Introduction to Civil Procedure, e. II, *The Commencement of an Action*, ~ 1, Preliminary Matters, Note 2 (Buffalo, 1954).

10. *Id.*

11. *Ibid.*

nouncing Judgment. And the power to render Judgment depends: (1) upon Jurisdiction over the subject-matter of the action or of the class of cases; and (2) upon Jurisdiction over the parties.<sup>12</sup>

#### *Derivation of Jurisdiction*

THE Judicial Powers and the Jurisdiction of the Courts of the States and of the United States are in general derived from their respective Constitutions and are further defined and fixed by Statutes enacted thereunder. Such Written Law prescribes the Nature of the Causes that may be brought within the cognizance of the respective Courts. In England, however, and by way of contrast, the source of the power and authority of the Common Law Courts to afford the relief asked was anciently the Original Writ, a delegation from the King in each instance. Such a Writ was the warrant of authority under which a particular Common Law Court took cognizance of the cause,<sup>13</sup> In course of time the Jurisdiction of the Law Courts became fixed and established as to those matters in which Writs were demandable of common right. In time, however, Original Writs fell out of use as a regular means of Commencing an Action. Nonetheless they left behind them a clearly defined Jurisdiction and the limited system of remedies under the Forms of Action, each of which will be considered *in detail*.

#### *The Problem of Jurisdiction in England and America Distinguished*

IN approaching the Problem of Jurisdiction of American Courts, the student is faced with

complications not present under the English System. In England a precedent once established on a particular subject became the Law of the land, whereas in the United States, each State had an independ

12. Courts. 7 R.C.L. 1030 (1915).

13. Blackstone's Commentaries on the Laws of England, Book 111, c. XIV, Of the Pursuit of Remedies by Action, 756 (Chase's Am. ed., New York, 1877).

Sec. 16

#### PROCESS—THE ORIGINAL WRIT

71

ent Judiciary, except as limited by the Federal Constitution or by Federal Statute.<sup>14</sup> Superimposed above the states, whose Judiciaries were not only substantially independent of the Federal Government, but were also independent of each other, was the Federal System of Courts, consisting of a Supreme Court, and "such inferior Courts as the Congress may from time to time ordain and establish,"<sup>15</sup> While the Judicial Powers of the State Courts were general and undefined, limited only by those reserved to the Federal Courts,<sup>16</sup> the powers which could be exercised by the National Courts were confined within limits strictly defined by the Federal Constitution. Thus, under the Constitution, the Supreme Court had Original Jurisdiction only "in all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party."<sup>17</sup> In all other cases, the Supreme Court had Appellate Jurisdiction over certain decisions of the State Supreme Courts, and the Inferior Federal Courts, "with such Exceptions, and under such Regulations as Congress shall make."<sup>18</sup>

#### *Duality of Jurisdiction*

IN England, even after some elasticity was afforded by the flexible nature of the Action on the Case, a large Jurisdiction was still unprovided for. To meet this lack of remedy, it is said that the Court of Chancery was created, in which the Chancellor

14. See Baldwin, The American Judiciary, 125, 174 (New York 1905).

15. U.S. Const., art. III, § 1.

16. The Laws enacted by the Congress of the United States are Law in the Several States. Accordingly, the right of a State Court to protect rights granted by a Federal Statute cannot be questioned. Congress may, however, where a right is created by a Federal Enactment, give the Federal Courts Exclusive Jurisdiction. See article by Reppy, Civil Remedies and Procedure, In 1942, Annual Surv. Am. L. 791, 512 (New York, 1942).

17. Art. III, § 2, ci. 2.

gave Equitable Relief and dispensed complete Justice where it was urged, for one reason or another, that there was no adequate remedy at Common Law. The Jurisdiction of Equity was residuary and supplemental to the Law, based on a delegation by the Council of Judicial Authority not previously delegated to the older Courts. Such is the source of the great division of Jurisdiction into Legal and Equitable, allotting certain kinds of actions and relief to one set of Courts and the remainder to another. The line of demarkation between Legal and Equitable Jurisdiction is thus historical in origin and arbitrary in fact. Nevertheless, the duality of Courts and Jurisdiction has to be kept constantly in mind, as it had a direct bearing upon how Jurisdiction in a given case was to be secured by the Common Law Courts and the Court of Chancery, and the powers which they exercised.

#### PROCESS—THE ORIGINAL WRIT<sup>19</sup>

It Original 'Process' is any Writ or notice by which a defendant is called upon to

19. In general, on the history and development of the Original Writ, see:

Treatises: Retorus Brevium (London, 1519); Matura Brevium (London, 1584); Itegrum Crevium (London, 1595); 3loylo, An Exact Book of Entries of the Most Select Judicial Writs Used in the common Law (London, 1658); Hughes, Comments Upon Original Writs (London,

1662); Brownlow, *Brevia JutEclaim*, or Collection of Approved Forms of All Sorts of Judicial Writs in the Common Bench (London, 1662); Townsend, *Tables to Most of the Printed Precedents of Pleadings, Writs and Return of Writs*, at the Common Law (London, 1667). Autrobus & Impey, *Brevia Selecta*, or Choice Writs (London, 1675); Offleina *Brevium*, Select and Approved Forms of Judicial Writs and Other Process, with their Returns and Entries in the Court of Common Pleas (London, 1679); Jus Filizrii, or The Filacer's Office in the Court of King's Bench, Setting Forth the Practice by Original Writ (London, 1684); Theobald, *Los Digest des Briefs Originals et des Choses Concernnrrts Eur* (London, 1687); Cornwall, *Tables of Precedents of Pleadings, Writs, dcc.*, at the Common Law: being a Continuation from Mr. Townsend's Tables (London, 1705); Spottiswood, *An Introduction to the Knowledge of Stile of Writs, Simple and Compound, Made Use of in Scotland* (Edin

18. Ibid.

72

## COMMENCEMENT OF AN ACTION

Ch. 8

**appear and answer the plaintiff's Declaration. The Commencement of an Action at Common Law was formerly by Original Writ. Judicial Process was by Summons, Attachment, Arrest or Outlawry.**

*tn General*

**ACCORDING to Miller,<sup>20</sup> in practically all**

Systems of Procedure, the Parties to an Action are entitled to be heard or to have an opportunity to be heard, before the Judicial Machinery of a State becomes operative. In the United States, under both State and Federal Constitutions, due process of law requires due notice and an opportunity to be heard.<sup>21</sup> It follows, therefore, that in order to Commence an Action, it is highly essential that the defendant shall have due notice and an opportunity to present his version of the controversy. This was the primary function of Judicial Process in its various forms.

*Original Writ*

**AT Common Law, as previously observed**, an action was begun by suing an **Original Writ out of Chancery, in the King's name**, which served the purpose of ordering the Sheriff to give the defendant notice, determined the character of the action, and auburgh 1727); Bohure, *The English Lawyer*, Showing the Nature and Forms of Original Writs (London, 1732). Mallory, *Modern Entries in English*, being a Select Collection of Pleadings in the Courts of King's Bench, Common Pleas and Exchequer, and also All Kinds of Writs, 2 Vols. (London, 1734—5); Thesarius *Brevium*, or a Collection of Approved Forms of Writs, and Entries to those Writs and Pleadings, &c. (London, 1787).

**Articles:** Maitland, 'The Ristory of the Register of

Original Wi-its, 3 Harv.L.Rcv. 96, 167, 212 (1889);

Wilson, *Writs v. Rights*, IS Mich.L.Rev. 255 (1920);

Shattuck, *Gratuitous Promises*, A New Writ, 35

Mich.L.Rev. 008, 935—9 (1037); Wurzel, *The Origin*

and Development of Quo Minus, 49 Yale Li. 39

(1939); Schulz, *Writ 'Praecepte Quod Beddat' and*

*Its Continental Models*, 54 Jurid.Rev. 1 (1942).

to. *The Formative Principles of Civil Procedure*, 18 Ili.L.Rev. 1—36, 94—117, 150—168 (1928).

*St Pennoyer v. Neff*, 95 U.S. 714, 733, 24 L.Ed. 565 (1877).

thorized a specific Court to hear the cause. Substituted in lieu of the Original Writ, the Modern Summons is also issued in the name of the Sovereign, and is directed against the **defendant**. **Although the Summons** does not have all of the attributes of the Original Writ, it does serve as an effective instrument for **Commencing an Action**. **With these** comments in mind, we may now consider the varieties of Judicial Process by which Jurisdiction over the parties to an action may be **acquired**.

*Commencement of an Action in Modern Practice*

IN Modern Practice the Original Writ is **no longer used either as authority for instituting an action, or for the purpose of compelling appearance by the defendant**,<sup>2</sup> though in some of our states the term is retained to designate the process that has talc-en its place. **No Writ at all is necessary for instituting actions**, and the Writ of Summons is used as a **means of notifying the defendant of the suit and ordering him to appear in Court**. **The practice is very generally**, if not entirely, regulated by Statutes, varying somewhat from State to

State.

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 a Summons**. This order is called a *praccipe*. It is not 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~

22. In this country since the Jurisdiction of the Courts is conferred by Constitution and Statutes, there is no need of any Original Writ to authorize the Institution of an actmon, President, etc., of Bank of New Brunswick v. Arrowsmith, 9 N.J.L. 284 (1527). Cf. Pressey v. Snow, 81 Me. 288, 17 A. 71 (1889).  
23. Potter v. John Hutcliffson Mfg. Co., 87 Mich. 59~

49 N.W. 517 (1891).

## PROCESS—THE ORIGINAL WRIT

### *Summons and Arrest*<sup>24</sup>

#### **THE first Process upon the Original Writ**

in contract actions and for civil injuries unaccompanied by force was a Summons, or warning to appear according to the command of the Writ itself, made out by the plaintiff's attorney for the Sheriff, and delivered by one of his deputies to the defendant. But by early Statutes a Capias was

24. In general, on the Service of Process in Actions at Law, see:

Articles: Amram, The Summons, 68 U.Pa.L.Rev. 50 (1919); Scott, Jurisdiction over Non-Residents, 20 *flatv.L.Rev.* 871 (1919); Burdick, Service in Actions in Personam, 20 *Mich.L.Rev.* 422 (1925); Warren, Federal Process and State Legislation, 10 *Va. L.Rev.* 421, 546 (1930); Keefe & Roscia, Immunity and Sentimentality, 32 *Corn.L.Q.* 471 (1947).

**Comments:** Arrest of Defendant of Mesne Process on a Civil Proceeding, 26 *Col.L.Rev.* 1007 (1920) The Judicial Process—Ultramares Corp. v. Touche, 26 *Ill.L.Rev.* 49 (1931); Federal Practice: Attachment Without Personal Service of Summons, 31 *Corn.L.Q.* 103 (1948); Service Of Process in Civil Actions in California, 37 *Col.L.Rev.* 8 (1949); The Requirement of Seizure in the Exercise of Quasi-in-Rem Jurisdiction and *Pennoyer v. Neff*, 63 *Harv.L.Rev.* 657 (1950); Immunity from Service of Process in Civil and Criminal Cases, 1951 *Wash.U.L.Q.* 427; Immunity of Non-Resident Participants in Judicial Proceedings from Service of Process—A Proposal for Renovation, 26 *Ind.L.J.* 459 (1951); Process-Immunity from Service—Person Entering State to File an Action, 49 *Mich.L.Rev.* 907 (1951); Substituted Service and Waiver of Federal Venue Under “Neirbo”, 26 *Ind.L.J.* 285 (1951).

**Annotations:** Immunity of Non-Resident Suitor or Witness from Service of Process as Affected by the Nature or Subject Matter of the Action or Proceeding in Which the Process Issues, 19 *A.L.E.* 828 (1922); Immunity from Service of Process of Non-Resident Requested or Required to Remain in the State Pending Investigation of Accident, 50 *A.L.R.* 51 (1929); Immunity of Non-Resident from Service Of Process While in State for Purpose of Settling or Compromising Controversy, 93 *A.L.R.* 872 (1934); Process—Service—Usual Place of Abode, 127 *A.L.R.* 1267 (1940); Immunity of Non-Resident Litigant or Witness from Service of Process as Affected by Transactions or Activities Unrelated to Action, 162 *A.L.* 11. 280 (1940); Immunity of Non-Resident Defendant in Criminal Case from Service of Process, 20 *A.L.R.* (2d) 163 (1951); Immunity from Service of Process of Non-Resident Witness Appearing in Other Than Strictly Judicial Proceedings, 35 *A.L.R.* (2d) 1353 (1954).

allowed in all ordinary cases, and was generally issued in the first instance.<sup>25</sup>

#### **A ttachrnat”**

**THE Writ of Attachment is a Writ commanding the seizure of the property of the**

25. Martin, *Civil Procedure at Common Law*, e. I, Introductory, Art. I, Primordial Conceptions, § 13, Changes in The Law, 11 (St. Paul, 1905).

Civil arrest by *capias ad respondeadun* in Actions of Debt was settled procedure at Common Law from the reign of Edward III [1327—1377]. *TiÜd, Practice of Court of King's Bench in Personal Actions*, e. VII, Of the Cnpias by Original and Process of Outlawry, 122 (1st Am. ed., Philadelphia, 1807).

Wherever the defendant could be arrested he could be held to bail and could appear only by giving special bail as contrasted with common bail or nominal bail. The defendant could not plead inailable actions until he had appeared by giving bail. The Process by Attachment and Distringas or Distress Infinite was availed of wherever the defendant avoided arrest. Pidd, *Practice of Courts of King's Bench*, e. V, Of the Original Writ and Process Thereon, Previous to the Capias, 107 (1st Am. ed.,

Philadelphia, 1807).

26. In general, on the subject of Attachment, see:

Treatises: Ashley, *The Doctrine and Practice of Attachment in the Mayor's Court*, London, &-c, (London, 1819); Cushing, *A Practical Treatise on the Trustee Process or Foreign Attachment of Massachusetts and Maine, &c.* (Cambridge, 1833) Hiakley, *Acts of the Assembly of Maryland, on the Subject of Attachment* (Baltimore, 1830); Sergeant, *A Treatise Upon the Law of Pennsylvania, Relative to the Proceedings by Foreign Attachment &c.* (Philadelphia, 1840); Locke, *Law and Practice of Foreign Attachment in the Lord Mayor's Court* (Philadelphia, 1854); Temple, *Law and Practice of Attachment of Debts* (London, 1855); Brandon, *Treatise Upon the Customary Law of Foreign Attachment* (London, 1861); Daniel, *Law and Practice of Attachment Under the Code of Virginia* (Lynchburg, 1869); Cowen, *Treatise on the Law and Practice Relating to Warrants and Attachments* (Albany, 1864); Cababe, *Interpleader and Attachment of Debts* (London, 1881); Kneeland, *Treatise on the Law of Attachments in Civil Cases* (New York, 1884); Drake, *Treatise on the Law of Suits by Attachment in the United States* (6th ed, Boston, 1855); Waples, *Treatise on Attachment and Garnishment* (Chicago, 1885); Wade, *Treatise on the Law of Attachment and Garnishment*, 2 Vols. (San Francisco, 1886),

**Articles:** Maupin, *Right of a Creditor to Sue and Attach*(Before Expiration of the Credit, 44 Cent.L.J.

## Sec. 16

73

### COMMENCEMENT OF AN ACTION

defendant, to be held as security for the satisfaction of the plaintiff's claim.

Such a Writ always issued before Judgment, and thus differs from an Execution, which is the Process issued after Judgment, In some States it can be issued only against absconding debtors or persons concealing themselves, or nonresidents; in others, it is issued, in the first instance, to obtain control over the property of the defendant with which to satisfy the Judgment.

At Common Law, the Attachment was used to compel the appearance of the defendant, and, when he has appeared, the Attachment was dissolved. There was no lien upon the goods to secure the debt. The Writ is now issued to attach personal property and real estate to respond to the Judgment. The defendant may appear or not, after having been served with the Summons; if not, he is defaulted, and the Attachment constitutes a lien on the goods for the payment of the claim sued on, which may be enforced by Execution. The defendant may, however, generally appear at any time before Judgment, and dissolve the Attachment by giving a bond, in which case the attached property is released, the bond standing in its place.<sup>27</sup>

380 (1897); Johnson, *Attachment of Choses in Action in New York*, 13 N.Y.U.L.Q.Rev. 37 (1930); Wolf & Michael, *Property Interests Subject to Attachment for Constructive Service in Ohio*, 21 U. CinrnLdtev. 125 (1952).

**Comments:** Publication of Process In Attachment Proceedings, 46 W.Va.L.Q. 223 (1940).

27. See 1 Scion, *Practice*, 137 (London, 1798); 3 Blackstone, *Commentaries on the Laws of England*, e. 19, Of Process 290, 291 (2nd American ed. Boston, 1799).

On Special Bail as a condition of Appearance by nonresident whose goods have been seized, see *Ownbey v. Morgan*, 256 U.S. 94, 41 S.Ct. 433, 65 LEd. 837, 17 A.L.R. 873 (1920); *Id.*, 30 Del. (7 Boyce) 297, 323, 105 A. 838, 849 (1919).

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 "garnisbee," and who is required to hold the property in his hands until the Attachment or "Garnishment," as It is called, Is dissolved or be is 'otherwise discharged. As to this process, see Drake,

The giving of a bond is sometimes compelled by Arrest on Civil Process, which is another provisional remedy.<sup>28</sup>

As a general rule the Action is deemed to be Commenced when the Writ is issued, although to stop the running of the Statute of Limitations some Courts hold that the Writ must be delivered to the officer for service. But others hold that this is not necessary.<sup>29</sup>

Attachment, c. XX, You may be Garnished, Sec. 481, 428, (7th Ed. Boston, 1891).

28. In general, on the subject of Arrest on Civil process, see:

Treatises: Dawes, Commentaries on the Laws of Arrests in Civil Cases, in which they are Deduced from their Origin to the Present Form (London, 1787) Pamphlet. Macdonald, Thomas, A Treatise on Civil Imprisonment, In England, with the History of its Progress, and Objections to its Policy. (London, 1701); Pearce, A Treatise on the Abuse of the Laws, Particularly in Actions by Arrest (London, 1814); Crowther, The History of the Law of Arrest in Personal Actions, (London, 1828); Wordsworth, W., Observations on the Law of Arrest, showing its impolicy, and how it may be and is abused. (London, 1832); Theobald, The Law for Abolishing Imprisonment for Debt on Mesne Process, &c. (London, 1838); Lush, 11., An Act for the Abolition of Arrest on Mesne Process, &c., 1 & 2 Vict. c. 10, with copious notes, explanatory of the Alterations in Law and Practice, and an Index. (London, 1838); Ings, E., The Act for the Abolition of Arrest on Mesne Process in Civil Actions, and also, the Acts 2 & 3 vict. c. 39, and 3 & 4 Viet. a. 82, relating to or amending the same, with the Rules, Orders, and Cases, as Decided in all the Courts, arranged according to their Applicability to the various Sections, together with an Appendix of Forms, &c. (London, 1840); Smythe, The New Practice of the Law in Ireland, Under the 3 & 4 Viet., c. 105, being the Act for the Abolition of Arrest on Mesne Process, &c., with a Practical Comment (Dublin, 1842).

Articles: Bohlen and Shulman, Arrest With and Without a Warrant, 75 U.Pa.L.Rev. 485, 492 (1927); Bohlen and Shulman, Effect of Subsequent Misconduct upon a Lawful Arrest, 28 Col.L.Rev. 841 (1928); Pearson, The Right to Kill In Making Arrests, 28 Mich.L.Rev. 957 (1930); Perkins, The Law of Arrest, 25 Iowa L.Rev. 201 (1940).

29. *SuIt* Is commenced by the issue of Summons. *Schroeder v. Merchants' & Mechanics' Ins. Co.*, 104 Ill. 71 (1882).

See *Mason v. Cheney*, 47 N.H. 24 (1860); *County v. Pacific Coast Borax Co.*, 67 N.J.L. 48, 50 A. 906 (1902), *amrmed* 60 N.J.L. 273, 53 A. 386.

74

### Ch. 3

See. 17

## SERVICE—PERSONAL & CONSTRUCTIVE

75

### SERVICE—PERSONAL AND CONSTRUCTIVE

17. **Jurisdiction to render a Personal Judgment is based on Personal Service of a Summons, or** sometimes on Substituted Service. Jurisdiction in Rem, and Quasi in Rem is based on Constructive Service by Publication and Control of some rea.

#### *In General*

PERSONAL Judgment must be based upon Personal Service of Summons upon the defendant, or in case of residents upon Substituted Service. Constructive Service of Process by Publication is by Statute authorized where the Court has Jurisdiction in Rem or Quasi in Rem. For the latter case seizure of some property by Attachment or otherwise is necessary.<sup>30</sup>

#### **PERSONAL Judgments must be based upon *Defendant Personally***

THERE is a most important distinction between the Jurisdiction which is based on personal service,<sup>31</sup> and Jurisdiction which is based upon control over some res or subject matter, which is under the power of the Court. Only by virtue of Personal Jurisdiction can the Court render a personal Judgment and create a personal obligation which will bind all the defendant's property everywhere.

The ordinary method by which a Court gets authority to adjudicate upon the rights and liabilities of the defendant is by Service of Summons upon him personally within the state. There are statutory provisions as to the officer or agent upon whom the Summons shall be served in actions against corporations. The service, when personal, may be made at any time after the Writ comes into the hands of the officer, but not later than the time fixed by Statute, which may be the Return Day or a certain time before. The officer is bound to use due diligence in serving

<sup>30</sup>. *Pennoyer v. Neff*, 05 U.S. 714, 24 LEd. 565 (1877).

<sup>31</sup>. *Supra*, *tote* 24.

it, and is liable for neglect or a false Return. Having made the service, it is his duty to Return the Writ to the Court from which it issued, with his report of service, or that the defendant cannot be found <sup>32</sup> within his Jurisdiction

indorsed thereon, which is called his "Return".

The act of notifying him of the Commencement of the Action 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.<sup>33</sup>

### *Substituted Service*

SUBSTITUTED Service, by leaving a copy of the Summons at the defendant's residence or usual place of abode, may by Statute be made equivalent to Personal Service as to a resident defendant, and it will support a Personal Judgment. "Substituted Service in actions *in personam* is a departure from the Common Law Rule requiring Personal Service, and the Statute authorizing such service must be followed strictly. But when the Statute is complied with, the general rule is that Substituted Service on a resident defendant is equivalent to Personal Service and warrants a Personal Judgment." ~

32. In general on Personal Service, see: Article:

Burdick, Service in Actions in Personam, 20 Mich. L.Rev. 422, 425 (1925); and that Substituted Service of Process, by posting of Writ on the front door is due process, see, Substituted Service of Process by Posting on the Front Door—Due Process of Law, 7 Va.L.Rev. 070 (1021).

33. See England: Heath v. White, 2 Dowl.L. 40 (1841); Illinois: Bimeler y. Dawson, 5 Ill. (4 Scam.) 536, 39 Am.Dec. 430 (1843); Law v. Grommes, 158 Ill. 492, 41 N.E. 1080 (1%5); Vermont: Hophinson v. Sears, 14 Vt. 494, 39 Am.Dec. 236 (1842), in which there was a Service of a Summons by delivering a copy without reading the Writ to the defendant and in which it was held that such service was insufficient.

34. 5e~ Loyd, Cases on Clvii Procedure, c. III Actions, 288, ii. 93 (Indianapolis, 1910).

See, also Cassidy v. Leitch, 2 Abb.N.C. (N.Y.) 315 (1875); Missouri, K. & T. Trust Co. v. Norris, 61 76

## COMMENCEMENT OF AN ACTION

### Cl. 3

Courts have no general power to Summon non-residents ~ and persons resident in one state are not subject to the exercise of Personal Jurisdiction over them by Courts in another.<sup>30</sup> If they hold property there, however, they are subject to have their property rights adjudicated by a Judgment *in Rem*. Mere temporary presence in the state is sufficient to subject the non-resident individual to its power if Personal Service of Summons is secured therein, even if the defendant is merely passing through on a train. But foreign corporations cannot be served, unless doing business in the state. When once obtained, Jurisdiction continues through all subsequent proceedings in the same litigation without further notice.

### *Constructive Service: Jurisdiction in Rem*

**IN certain exceptional cases a Court may** acquire a limited Jurisdiction *in Rem* by notice sent to a non-resident outside the state or published within it, which is regarded as sufficient to give him a reasonable opportunity. 256, 63 NW. 634 (1895); Nelson v. Chicago, II. & Q. B. Co., 225 Ill. 107, 80 N.E. 100, 8 LEA., N.S., 1186, 116 Am.St.Rep. 133 (1907); 32 Cyc. C. 461 (1900); McDonald v. Mabee, 243 U.S. 00, 37 5. Ct. 343, 61 LEd. 608, L.B.A.1917F, 458 (1917).

35. In Iowa, the Supreme Court has held that Statutes authorizing Service of Notice on residents of the State while outside its territorial limits and the rendition of Personal Judgment on such service are unconstitutional. Itaher v. Rajor, 150 Iowa 51, 120 N.W. 494 (1912), annotated in Ann.Ons.1912D, 680, 35 L.It.A.,N.S., 292. See, also, in this connection, McDonald v. Mabee, 243 U.S. 00, 37 S.Ct. 348, 61 L. Ed. 608 (1917), annotated in L.R.A.1917F, 458; and article by Eurdick, Service in Actions In personam, 20 Mich.L.Rev. 429, 430 (1922).

35. For an excellent discussion of the fundamental principles governing Jurisdiction over non-residents, see Scott, Jurisdiction Over Non-Residents, 32 Harv. L.Rev. 871 (1919).

36. "Process from Tribunals in One State cannot run Into Another State, and summon parties there domiciled to leave Its territory and respond to proceedings against them," far from their homes and business. Pennoyer v. Neff, 95 U.S. 714, 716, 24 LEd. 565, 566 (1877); Plexner v. Farson, 248 U.S. 289, 39 S.Ct. 97, 63 LEd. 250 (1919); Scott, Jurisdiction Over Non-Residents, 32 Harv.L.Rev. 871, 875 (1919).

tunity to appear and defend. But a Court cannot acquire Jurisdiction to pronounce a Personal Judgment against one who has no residence within the state, except by actual service of notice upon him within the state, or by his voluntary appearance.

Jurisdiction *in Rem* is Jurisdiction in a cause acquired by virtue of control over the subject-matter. All proceedings are really directed against persons and their rights, even though, as in admiralty, a *res* or ship be impleaded as defendant. Some notification of the proceedings is therefore essential, either by publication in newspapers, or by posting up notices, or by mailing notices to the last known address, or by service of Summons outside of the state. A Court order must in general be obtained to make service of the Summons by Publication or other substituted method, upon a showing by affidavit that Personal Service within the state cannot be had.<sup>37</sup>

#### *Constructive Service: Jurisdiction Quasi-in-Rem*

THERE has been a wide extension of the Doctrine of Jurisdiction *in Rem* to cases where there is no direct claim to a tangible *res*. Thus, where a suit is brought upon an obligation against a non-resident debtor, the

37. The Process of the Court is said to "run" only within the Limits of its own Jurisdiction, and only by service within those limits is Jurisdiction to pronounce Personal Judgment against a defendant without his voluntary appearance acquired. *Penfoyer v. Neff*, 90 U.S. 714, 24 LEd. 565 (1877); *Coldey v. Morning News of New Haven*, 156 U.S. 518, 15 S.Ct. 559, 39 LEd. 517 (1895); *International Harvester Co. v. Commonwealth of Kentucky*, 234 U.S. 579, 34 S.Ct. 944, 58 L.Ed. 1479 (1914).

According to some authorities, no Personal Judgments can be rendered, even against a resident, merely on the basis of an Attachment of the property and Publication of Summons. *De Arman v. Massey*, 151 Ala. 639, 44 So. 688 (1907).

On the acquisition of *In Pe, 'sonam* Jurisdiction by Service of Summons without the state upon a domiciliary of the state, see *Milliken v. Meyer*, 311 U.S. 457, 81 S.Ct. 339, 85 LEd. 278 (1940), rehearing denied 312 U.S. 712, 61 S.Ct. 548, 85 L.Ed. 1143.

#### Sec. 17

### SERVICE—PERSONAL & CONSTRUCTIVE

77

Court may subject the property of the debtor within the state to the payment of the debt, even though no Personal Jurisdiction over him can be acquired. No claim is made to the property as such, the plaintiff is not seeking to cut off the defendant's right, title or interest in the property as against the whole world; he does have an interest in the property, but it is purely incidental to the satisfaction of his claim for the redress of a wrong, any surplus remaining thereafter going to the defendant, and not to the plaintiff. It is held that where a claim is made to property indirectly to thus satisfy an obligation of a non-resident debtor, an Attachment or Garnishment or Receivership is necessary. Since the action is not so framed as to set up any direct claim to the *res* in the sense of seeking to cut off the defendant's interest as against the whole world, a claim to specific property, as an incidental method of obtaining redress for a wrong, must be asserted in some manner, since Jurisdiction is based upon that. And the defendant must have notice of that claim in order to satisfy the requirements of due process of law. And the method of giving such notice is by seizure of the property by the Court prior to service by publication.<sup>38</sup> Such seizure will give the Court Jurisdiction Quasi in Rem. A Judgment based on such Jurisdiction is not *in personam*, and in this regard it is to be observed that the only effect of the Judgment is to enable the plaintiff to satisfy his claim out of the attached property; any part of the property after the payment of the plaintiff's demand remains the property of the defendant, although the

38. The leading case on the necessity of seizure by the court in order to properly ground Service by Publication in suits *Quasi in Rem*, is *Pennoyer v. Neff*, 95 U.S. 714, 24 LEd. 565 (1877).

See, also, the following cases: *Baillie v. Columbia Gold Mm. Co.*, 86 Or. 1, 22, 42, 168 P. 965, rehearing denied 86 Or. 1, 161 F. 1167 (1917).

See, *Hohfeld, Fundamental Legal Conceptions*, 26 Yale L.J. 710, 781 (1917); *ShIPLEY v. SHIPLEY*, 187 Iowa 1293, 175 NW. 51 (1919). character of said property may have been changed, as when real estate is sold on Execution for more than the amount of the demand, in which case the defendant receives the balance as personal property.

The Operation of the Doctrine of Quasi in Rem Jurisdiction is best illustrated by the case of *Pennoyer v. Neff*—in which appeared that A, in the state of Oregon, was sued in Debt for service rendered by an attorney; that at the time the action began and the Judgment was rendered, A, the then defendant, was a non-resident of the state; that he was not personally served with Process, and did not appear therein; and that the Judgment was entered upon his default in not answering the complaint, upon a Constructive Service of Summons by Publication. Such service when an action is brought against a non-resident and absent defendant, who has property within the state, was pro-



vided for by the Code of Oregon. The Code also provided, where the action was for the recovery of money or damages, for the Attachment of the property of the non-resident. It also declared that no natural person was subject to the Jurisdiction of a Court of the State “unless he appear in the Court, or be found within the State, or be a resident thereof, or have property therein; and, in the last case, only to the extent of such property at the time the Jurisdiction attached.”

The plaintiff, B, in the original action having secured a Default Judgment for less than \$300 including costs, sued out an Execution on the Judgment, and C acquired the premises in question under a Sheriff’s deed, made upon a sale of the property on Execution issued upon the Judgment. Thereafter, A, the defendant in the original action, sued O in Ejectment to recover the land, of the alleged value of \$15,000, situated in the State of Oregon. The issue thus presented was whether the Judgment in the State Court

38. 95 U.S. 714, 24 LEd. 565 (1877).

a. Id. at 719, 568,  
78

### COMMENCEMENT OF AN ACTION

against A, the then defendant, but in this action, the plaintiff, was void for want of Personal Service of Process upon him, or of his appearance in the action in which it was rendered, and whether the premises in controversy could be subjected to the payment of the demand of a resident creditor, The Court discussed the requirement of due process of law under the United States Constitution when applied to a judicial proceeding, and in particular as related to the question of a Court obtaining jurisdiction over a defendant. Mr. Justice Field, speaking for the United States Supreme Court, held that the Judgment in favor of the plaintiff in the Circuit Court should be affirmed, because the only question was as to the validity of the original money Judgment rendered in Oregon, in an Action of Debt on a Simple Contract, against the resident of another state, without his voluntary appearance, or personal service of process upon him, by Attachment of the property subsequent to the commencement of the Action. Prior Attachment was and is necessary in order to give notice to the defendant that his property was involved in litigation. Without such notice the defendant’s property might be taken without a hearing or an opportunity to be heard, which would be violative of the due process clause of the Fourteenth Amendment. Finally, it is interesting to observe that in the principal case, even the Supreme Court failed to distinguish clearly between Jurisdiction in Rem as opposed to Jurisdiction Quasi in Rem.<sup>41</sup>

### THE APPEARANCE<sup>2</sup>

18. The appearance of the defendant is any act or proceeding by which he places himself

41. For a reevaluation of the doctrine of the Pennoyer ease, see Note: The Requirement of Seizure in the ~xercise of Quasi in Rem Jurisdiction:

Fennoyer v. Neff Re-Examined, 63 Rarv.L.Rcv. 657 (1950).

42. In general, on the ~ubjoet of Appearance see:

Article: Blair, Constructive General Appearances and Due Process, 28 Ill.L.Rev. 119 (1928).

Comments: Pleading: What Constitutes an Appearance In New York, 3 Corn.L.Q. 148 (1918); Practice

### Ch. 3

before the Court in order to participate in the

action.

An appearance may be either

(I) General, or

(II) Special

IN discussing the subject of Appearance, it is important to distinguish between the plaintiff and defendant. In beginning the action by either an Original or Judicial Writ returnable to a Specific Court, the plaintiff automatically submitted himself to its Jurisdiction. He was, therefore, not required to appear for any purpose prior to the appearance of the defendant,” If he failed to file his Declaration and prosecute his action upon the defendant’s appearance, he was subject to a Nonsuit upon the defendant’s Motion after a demand in writing that the plaintiff

should plead. Such a Nonsuit carried costs enforceable against him and his pledges. Under the Hilary Rules of 1834 and under the Common Law Procedure Act of 1852'~ the plaintiff was regarded as out of Court

and P,0c7cL,rc—Speeial Appearance—Waiver of Objections to Service of Process, 31 Mich.L.Rev. 862 (1933); Pleading—Motion to vacate Service of Process a General Appearance, 20 Va.L.Rev. 475 (1934); Judgment.—Default Judgments Rendered Without Jurisdiction—Validating Effect of a *Subsequent* General Appearance, 36 Mich.L.Rev. 455 (1938); Federal Courts—Rules of Civil Procedure—Motion for Bill of Particulars Filed Contemporaneously with Motion to Dismiss for Want of Service Held to Waive Objection to Jurisdiction Over the Per. son, 53 Harv.L.Rev. 493 (1940); Practice and Procedure—Appeals from Refusals of Motions to Dismiss—Special Appearance, 18 N.C.L.Rev. 354 (1940); Procedure—General and Special Appearance—Waiver of Objection to Jurisdiction Under the Federal Rules of Civil Procedure, 40 Col.L.Rev. 153 (1940); Special Appearance In New York, 34 Corn.L.Q. 230 (1048); Special Appearance to Contest the Merits in Attachment Suits, 95 U.Pa.L.Rev. 403 (1049).

**Annotation: Effect of Time of** Execution of Written Appearance or Waiver of Service, 159 ALE. 111 (1945).

43. Martin, Civil Procedure at Common Law, c. I, Introductory, 11 (St. Paul, 11)05),

44. Promulgated pursuant to 3 & 4 Will. IV, C. 42 (1833).

45. 15 & 18 Wet. e. 76, 58 (1852).

Sec. 18

## THE APPEARANCE

79

upon failure to appear and plead within one year after the Return of the Writ.

The Doctrine of Appearance properly relates to the defendant, as his actual presence in person or through his attorney was a condition precedent to any Form of Pleading, to any Trial, or to any Judgment in the case. An Appearance is any unequivocal act by which a defendant submits to the Jurisdiction of the Court in a Cause of Action.” This is, in effect, a definition of a General Appearance. A Special Appearance is one made for the purpose of objecting to the Court’s Jurisdiction over the subject matter of the action or over the person of the defendant. If the Court has not previously acquired Jurisdiction of the defendant, such an appearance enables the defendant to object to the control, without submitting himself to its jurisdiction.<sup>47</sup>

Under Modern Law a Court can acquire Jurisdiction to render a Judgment *in person-ant* either by a General Appearance on the part of the defendant or by the Personal Service of a Summons. If, however, the defendant or his attorney does any act with reference to the Defense of the action, he will be held to have submitted himself to the authority of the Court, or to have made a General Appearance, the effect of which is to cure all prior defects in the service.<sup>48</sup> Since Jurisdiction over subject matter is defined by Constitution or Statute in America, consent of the parties cannot confer such Jurisdiction upon the Court, and therefore an Appearance

It Ridgway v. Homer, 55 NiL. 84, 85, 25 A. 386, 387 (1892).

It Supra, note 42.

IS. California: Hayes v. Shattuck, 21 Cal. 51 (1862);

Indiana: Scott v. Hull, 14 Ind. 136 (1860); Iowa:

Stockdale v. Buckingham, 11 Iowa 45 (1860); Minnesota: Spencer v. Court of Honor, 120 Minn. 422, 139 N.W. 815 (1013) (Special Appearance); Federal:

York v. Texas, 137 U.S. 15, 11 S.Ct. 9, 34 LEd. 604 (1890) (No Special Appearance In Texas); Western Loan & Say. Co. v. Hutte & B. Consol. Mm. Co., 210 13.5. 368, 28 S.Ct. 720, 52 L.Ed. 1101 (1908) (Demurt-er Is Appearance).

by the defendant constitutes no waiver of the objection that the Court has no Jurisdiction over the subject matter.’° A defendant may, however, waive Jurisdiction over his person, which he in effect does when he makes a Voluntary or General Appearance.

The English Courts did not, until modern times, claim Jurisdiction over the person of the defendant merely by service of Summons upon him. If he failed to appear in response to the Summons, it was deemed necessary to resort to further Process by Attachment of his Property and Arrest of his Person to compel an “appearance”, which was not mere presence in the Court, but which consisted of some act by which a person submitted himself to the authority and Jurisdiction of the Court. If he still failed to appear, no Judgment could be rendered against him, except in Real Actions where the defendant was proceeding against the Jand within the Jurisdiction. Any steps in the action, such as giving bail so upon arrest, operated as an appearance or submission.

Under later English law, by Statute, the plaintiff was authorized upon affidavit of Personal Service of a Summons or a Writ of Distringas, to enter the appearance of the defendant, and proceed to Judgment, if he failed to appear within a certain prescribed time. The effect of this practice was to

49. "Consent of the parties cannot confer jurisdiction upon a court in which the law has not vested it." *Wetzel v. Hancock County*, 143 Ill.App. 178, 181 (1908).

50. In general, on the subject of Bail in an Action at Common Law, see:

Treatises: Coke, *Law Tracts*: III, A Treatise of flail and Mainprise, &c. (London, 1764); Flihmorc, A Digest of the Doctrine of Bail, in Cvii and Criminal Cases, &c. (London, 1783); Shroder, A Treatise of the Law of Bail in an Action at Common Law (London, 1824); Petersdorf, A Practical Treatise on the Law of Bail in Civil and Criminal Actions (Philadelphia, 1835); Beeley, The Bail System in Chicago (Chicago, 1921); De Haas, Antiquities of Bail, Origin and Historical Development in Criminal Cases to the year 1275 (New York, 1940).

80

## COMMENCEMENT OF AN ACTION

### Ch. 3

eliminate the Process of Attachment and Arrest as a means of compelling the defendant's appearance, except where Personal Service was unobtainable, in which instance the Ancient Mesne Process to Outlawry remained operative.<sup>51</sup> But the Common Law Procedure Act of 1852<sup>52</sup> abolished the Writ of Distringas, together with the practice of plaintiff entering the appearance of the defendant.

Under Modern Law there is no effort to compel the appearance of the defendant. But if he be properly served and then neglects to Appear and Plead, the Court will render Judgment against him for Default of Appearance. Inasmuch as the Default constitutes an admission of the Cause of Action set forth in the Declaration, assuming of course that the plaintiff has stated a Cause of Action, all that the plaintiff would have to prove is his damages.

## THE PLEADINGS

19. On the Appearance of the Parties, the Pleadings Commence. The Various Pleadings and their order are as follows:

(I) The Declaration of the plaintiff.

The Dilatory Pleas of the defendant.

The Demurrer or Plea of the defendant.

(IV) The Demurrer or Replication of the plaintiff.

(V) The Demurrer or Rejoinder of the defendant.

(VI) The Demurrer or Surrejoinder of the plaintiff.

(VII) The Demurrer or Rebutter of the defendant.

(VIII) The Demurrer or Surrebutter of the plaintiff.

51. Martin, *Civil Procedure at Common Law* c. 1, Introductory, Art. IV, Appearance, ~ 13, Change In the Law, 11 (St. Paul, 190~).  
*Mode Of Pleading*

STEPHEN thus describes how the Pleadings were once orally delivered: ~ "As the appearance was an actual one, so the Plead~ ing was an Oral Altercation in Open Court, in presence of the Judges. ... These Oral Pleadings were delivered either by the Party himself or his Pleader, called 'narrator' and 'advocatus'; and it seems that the Rule was then already established that none but a regular advocate (or, according to the more modern term, 'barrister') could be a Pleader in a cause not his own.

"It was the office of the Judges to superintend, or, according to the allusion of a learned writer, moderate the oral contention thus conducted before them. In doing this, their general aim was to compel the Pleaders so to manage their Alternate Allegations as at length to arrive at some specific point or

matter affirmed on the one side and denied on the other. When this matter was attained, if it proved to be a Point of Law, it fell, of course, to the decision of the Judges themselves, to whom alone the adjudication of all legal questions belonged; but, if a Point of Fact, the parties then, by mutual agreement, referred it to one of the various Methods of Trial then practiced, or to such Trial as the Court should think proper. This result being attained, the parties were said to be at issue (ad exitum; that is, at the end of their pleading). The question, so set apart for decision was itself called ‘the issue’, and was designated, according to its nature, either as an ‘issue in fact’ or an ‘issue in law’. The whole proceeding then closed, in case of an 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;

55. Stephen, A Treatise on the Principles of Pleading In Civil Actions, c. I, Of The Proceedings In An Action, from Its Commencement To Its Termination, 50, 60 (3rd ed. by Tyler, **washington**, D. C. 1803).

(II)

(III)

52. Common *Law Procedure* Act, 15 & 16 V<sup>ict</sup> c. 76, **fl** 24, 26 (1852).

**Sec. 19**  
**THE PLEADINGS**

**81**

or, in case of an Issue in Law, by an adjournment of the parties to a given day, when the Judges should be prepared to pronounce their decision.”

The practice of oral pleading has long since ceased. The Modern Practice is to draw up Written Pleadings in typewritten form, and file them in the office of the proper officer of the Court, usually the Clerk’s office. Here the opposite party may examine a pleading, or he may procure a copy from the officer; or it may be that under the statutes of the particular state, or a Rule of the Court, a copy may be required to be delivered to him. When the Pleadings are thus filed they become a part of the Record of the cause. They are not, as formerly, transcribed, but are themselves properly indorsed and kept on file as part of the Record.

The first of the various pleadings enumerated above is the Declaration, the general aspects of which will now be considered.

Sec.

**CHAPTER 4**

**THE DECLARATION—FORM AND GENERAL REQUISITES’**

- 20. Formal Parts of the Declaration.
- 21. The Actual Statement of the Cause of Action.
- 22. Ultimate and Evidentiary Facts.
- 28. Ultimate Facts and Conclusions of Law.
- 24. Several Counts in the Same Declaration.
- 25. Joinder of Different Causes of Action.
- 26. Different Versions of the Same Cause of Action.
- 27. Conformance to Process.

**The Commencement**

**(V) The Conclusion**

*In General*

**FORMAL PARTS OF THE DECLARATION**

20. **The first pleading in an Action is the plaintiff’s Declaration, which is a statement in legal and methodical form, of all the material facts constituting the plaintiff’s cause of action. It consists of the following parts:**

(I) Caption or Title of Court

(II) The Venue

(III)

(IV) The Body, or Statement of the Cause

**of Action**

THE parties having been brought into Court as a result of the service of some Form of Process, the next step is to show, by Pleadings duly recorded, the nature of their dispute, and the first step in this direction in Personal Actions is for the plaintiff to file his Declaration, which is a statement in Legal Form of the plaintiff's Cause of Action. In the Ancient Real Actions the first Pleading was a Count The Declaration was, according to Coke, but an amplification of the General Charge contained in the Original Writ, setting forth in greater detail the circumstances involved in the plaintiff's Cause of Action. According to the custom and practice of the Court in which it was filed, and depending upon the Form of the Action in each Case, the substantive requisites of the Declaration differed. But all Declarations were alike in that they contained five formal parts, to wit, the Title of the Court, the Venue, the Commencement, the Body, or Statement of the Cause of Action, and the Conclusion, the character and relative posi

1. In general, for Forms of Declaration in the various common-Law Actions, see: Tidd, Practice of the Court of King's Bench (1st Am. ed., Philadelphia 1807); Warren, A Popular and Practical Introhjection to Law Studies (3d ed., New York 1837); 1 Chitty, Pleading and Parties to Actions, with Precedents (16th Am. ed. by Perkins, Springfield 1885); Martin, Civil Procedure at Common Law, Forms of Pleadiag, 366—392 (St. Paul 1005); Gregory, Forms of Common Law Declarations for Use in State and Federal Courts (Albany 1906); Whittier and r'riorgall, Cases on Common-Law Pleading (St. Paul 1916); Shipman, Common-Law Pleading (3d ed. by Ballantine, St Paul 1923); Cook and Hinton, Cases on Pleadings at Common Law (Chicago 1923); Reppy, Cases on Pleading at Common Law (New York, 1928) Beppy, Introduction to Civil Procedure (Buffalo~ 1954).

82

Sec. 20

**FORMAL PARTS OF DECLARATION**

**tion of which** will appear from a typical BODY:

Form of Declaration set out below:

FORM OF DECLARATION IN TRESPASS ON  
THE CASE **nc** ASSUMPSIT<sup>2</sup>

*CAPTION OR  
TITLE:*

Court:IN THE CIRCUIT COURT OF  
COOK COUNTY

Term: To the October Terra, A.D. 1926

VENUE:COUNTYOF COOK. 1

STATE OF ILLINOIS, ~

BODY:

Arthur Brown, plaintiff, by William Jbhnson, his Attorney, complains of Clarence Dowell, defendant, who has been summoned to answer the said plaintiff in a plea of trespass on the case in assuiupsit.

Inducement: For that whereas, on the 16th day of January, S.D. ~926, at Chicago, 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.

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, be, the said defendant, on the day first aforesaid, in the county aforesaid, promised the said plaintiff to deliver the said corn to him as aforesaid.

2. 1 Shinn, Pleading and Practice in the Courts of Record of Illinois at Common Law In Civil Causes, with Forms, c. Ifl, 442 (Chicago 1896). See, also, Legg, A. Suit at Law in Illinois, e. 28, 459, 463 (Chicago, 3916).

For a short succinct statement on the Formal Parts Of a Declaration, see the case of Smith sc Fowle & Dunham, 12 Wend. (N.Y.) 9 (1834).

A'vment of Readiness  
to Per-

And although the said time for the delivery of the said corn has long since elapsed, and the said plaintiff has always been ready and willing to accept and receive the said corn, and to pay for the same, at the price aforesaid, and has offered so to do.

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;

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;

To the damage of the said plaintiff of five hundred dollars, and therefore he brings his suit  
WILLIAM JONSON

Attorney for Plaintiff

BATR. FIRMES, SHIPMAN ON COMMON LAW PLEADING. c. 10, 76, p. 193 (St Paul, 3d ed. 1923).

With the Form of a Specific Declaration in Assumpsit before us, the Declaration may now be examined, *first*, with reference to its formal parts and general compositional and physical structure, and *secondly*, with reference to the usual factors and rules which govern the statement of a cause of action in any form; the problem of stating a cause of action in terms of each of the eleven specific Common Law Actions will follow in later chapters.

#### *The Caption or Title 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 Entitlement of Term, it is either General, thus, "October Term, 1955," or Special, that is where a particular day of the term is stated. Such Title refers to the time when

83

COMMENCE

MENT:

*form:*

Breach:

Damage:

CONCLU

SION:

Consideration or

Promise:

84

### DECLARATION—FORM

#### Ch. 4

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 when this takes place in vacation, 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 the 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 is used, it will sometime occasion an apparent objection. Thus, in the case of a Declaration so Entitled, it may appear in the Declaration or in evidence on the Trial that the Cause of Action arose after the first day of the Term of which the Declaration is Entitled; 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.<sup>3</sup> The means of avoiding this difficulty is to Entitle Specially of the particular day in the Term when the pleading was actually filed or delivered.

#### *The Venue*<sup>4</sup>

THE laying of Venue was inextricably connected with the various stages of the devel

3. See English: Pugh v. Robinson, 1 T.R. 116, 99 Eug. Rep. 1004 (1786); New York: Paul v. Graves, 5 Wend. (N.Y.) 16 (1830).

4. In general, on the subject of Venue in Common Law and Modern Actions, see:

Treatises: flayer, Preliminary Treatise on Evidence at the Common Law, c. II, Trial by Jury and Its Development, 65, 90—93 (Boston 1898); Scott, Fundamental Principles of Procedure In Actions at

opment of the Jury. In the *first* stage the Jury was not a Jury, but in reality a group of witnesses who came into Court, and on the basis of their own knowledge of the facts of the specific case, told the Judge what happened. In order, therefore, that the juror or jurors with knowledge of the facts might be selected, it was necessary for the sheriff to know where they could be located. The rule at Common Law, therefore, was that every material and traversable allegation of fact **in the Body of the Declaration, if affirmative** in form, should be laid with a Venue. Besides this Venue, which, by the ancient practice, included the parish, town or hamlet, as well as the county, there was another laid on the margin of the Declaration, at its Commencement, stating merely the name of the county.

In the *second* stage of the development the Jury went partly on its own knowledge, and partly on knowledge gained from evidence presented in the Court. In consequence, the reasons upon which the original rule was founded gradually ceased to have any meaning. And as a result of the two statutes of 16 and 17 Car. U, c. 8 (1664) and of 4 Anne, c. 16, § 6 (1705), the rule requiring the laying of Venue in the Body of the Pleading became an unmeaning form, the practice of alleging the Venue in the margin hay-

Common Law, c. I, Venue and Jurisdiction, 1 (New York, 1922).

Articles: Starke, The Venue of Actions of Trespass to Land, 27 *W.Va.L.Q.* 301 (1921); Warner, Venue of Civil Causes in Oregon, 1 *Ore.Litev.* 142 (1922); Dobie, Venue in Civil Cases in the United States District Court, 35 *Yale L.J.* 129 (1925); Blume, The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue, in *Civil Cases*, 48 *Mich.L.Rev.* 1 (1949); Crumpacher, The Change of Venue Problem, 20 *Fed.L.J.* 253 (1045); Blame, Actions Quasi in Rem Under Section 1055, Title 25, U.S.C., 50 *Mich.L.Rev.* 1, 7 (1951); Stevens, Venue statutes: Diagnosis and Proposed Cure, 49 *Mich.L.Rev.* 804 (1931).

5. 16 & 17 Car. II, c. 8(1664); 4 Anne, c. 16, § 6 (1705).

Sec. 20

#### FORMAL PARTS OF DECLARATION

85

ing been found sufficient for all practical purposes.<sup>6</sup> But the practice continued to be observed nonetheless.

In the meantime the Jury had reached its *third*. state of development in which jurors ceased to be witnesses and became triers of facts, going on knowledge furnished by the evidence heard in open Court.

With this development, an end was brought to the former practice by the Rule of Hilary Term, 4 Wm. IV, (1834), which provided that in the future “the name of a county shall in all cases be stated in the margin of a Declaration

and no Venue shall be stated in the Body of the Declaration.”<sup>7</sup> And presently, under the more recent practice, but in accordance with the spirit and intent of this Rule, the Venue is usually set out at the Commencement of the Declaration, as appears in the form above.

However, in cases which required local description, the Venue was still to be laid in **the** Body of the Declaration.<sup>8</sup> But the **enforcement of this** rule did not call for the statement of a correct Venue except when the Action was Local, and in Transitory Actions the Venue could be laid in any county, **subject to objection by the adverse party.**<sup>9</sup>

#### *The Commencement*

**WHAT is termed the Commencement of the Declaration precedes the Statement of the Cause of Action or Body of the Declaration.**

4 Stephen, A Treatise on the Principles of Pleading, e. II, Of the Principal Rules of Pleading, 272, 273 (3d ed. by Tyler, Washington, D. C. 1892).

7. Rule 8, Reported in Reppy, Introduction to Civil Procedure, Appendix B, 787, 792 (Buffalo 1954).

See, also, Harris v. Coconut Grove Development Co.,

63 Fla. 175, 59 So. 11 (1912); Henry v. Spltler, 67

Fla. 146, 64 So. 745 (1914), annotated in Ann.Cas.

1916E, 1267.

8. 1 Chitty, Pleading and Parties to Actions, with Precedents, c. II, Of the Declaration, 276 (16th Am. ed. by Perkins, Springfield 1885).

9- Stephen, A Treatise on the Principles of Pleading, -II, Of the Principal Rules of Pleading, 274 (3d ed. by Tyler, Washington, D. C. 1892).

#### **It comprises the Parties, correctly named;**

the Mode in which the defendant has been brought into Court, Arrested, Served with Process, Attached or Summoned; the Capacity in which the parties sue and are sued, whether as an individual, as a corporation, or in a representative character as executor or receiver, or if an infant, by a guardian, or next friend; and the Form of Action, as, for example, Trespass on the Case in Assumpsit)

#### *The Body or Statement of the Cause of Action*

**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. But what is a cause of action? Gould defined a cause of action as a set of “facts which entitles the plaintiff to the relief claimed.”<sup>10</sup> Of course the essential elements of any claim of relief or remedial right will vary from action to action. But, on analysis, the pleader will find that the facts prescribed by the substantive law as necessary to constitute a cause of action in a given case, may be classified under three heads: (1) The plaintiff’s right or title; (2) The defendant’s wrongful act violating that right or title; (3) The consequent damage, whether nominal or substantial. And, of course, the facts constituting the cause of action should be stated with certainty and precision, and in their natural order, so as to disclose the three elements essential to every cause of action, to wit, the right, the wrongful act and the damages)

#### *The Conclusion*

**THE Conclusion of a Declaration is the Formal Statement at the end, following the**

10. See Beppy, Introduction to Civil Procedure, c. II, § 2, 92 (Buffalo 1954).

11. Gould, A Treatise on the Principles of Pleading, e. 1, Forms of Actions, 3 (6th ed. by Will, Albany 1909).

12. 1 Saunders, Pleading and Evidence in Civil Actions, Declaration, ‘416 (Philadelphia 1837).



## DECLARATION\_FORM

Ch, 4

Body, or Statement of the Cause of Action.

**It is, “to the plaintiff’s damage of ~**

**and therefore he brings his suit,” etc. This “ad damnum” clause is properly a part of the conclusion in all Personal and Mixed Actions. By the Common Law Procedure Act of 1852,<sup>13</sup> a Specific Form of Conclusion was prescribed.**

### *The Production of Suit*

THE Production of the plaintiff’s suit (*secta*), by which the plaintiff was required to present proof of his Declaration at once, and even before it was called into question upon the pleading, is an example of one of those instances, not infrequently noticeable in Common Law Pleading, where the form of an old procedure is retained, long after the reason for its existence has been swept away. Anciently, in the primitive period of Common Law Procedure when Pleadings were still made Orally, and Trial by Battle and Ordeal was still in vogue, the plaintiff was required to produce his proof, or his *secta*— that is, a suite or train of followers prepared to confirm his Allegations. Although the practice has long been discontinued, the original formula there used to announce the plaintiff’s readiness still remains with us. In consequence, in all Common Law Actions it is still customary to conclude the Declaration with the phrase “and therefore he brings his suit.”<sup>14</sup>

13. Section 59, which provided: “and the plaintiff claims £ or [if the action was brought to recover specific goods) the plaintiff claims a return of the said goods or their value, and £ for their detention.”

14. 3 Blackstone, Commentaries on the Laws of England, c. 20, 295 (7th ed. Oxford, 1775); Walter v. Laughton, 10 Mod. 253, 88 Eng.Rep. 715 (1714),

It should be observed that the plaintiff brings, not this suit, but his suit, a following of witnesses. 2 Pollock & Maitland, History of English Law, Bk. II, 603, 604 (Cambridge, 1895); flayer, Preliminary Treatise on Evidence at the common Law, c. I, 12 (Boston 1898).

At Common Law, according to Martin,” the signature of counsel was not required, and this rule was enacted into statutory form by the Common Law Procedure Act of 1852.”

### THE ACTUAL STATEMENT OF THE CAUSE OF ACTION

21. The Declaration must state distinctly and with certainty every fact that is essential to the plaintiff’s prima facie case. No Essential Allegations can be imported into the Declaration by inference or intendment. The principal points to be shown in the statement of a cause of action are:

(I) The plaintiff’s right;

(II) The defendant’s wrongful act violating that right;

(III) **The consequent damages.**

### *In General*

THE term “cause of action”<sup>17</sup> is much used in pleading and procedure, but it eludes

15. Civil Procedure at Common Law, c. I, Introductory, Art. VIII, Declaration, ~ 33, p. 29 (St. Paul, 1905).

16. Section 85.

<sup>17</sup>- In general, on what constitutes a Cause of Action at Common Law, under Modern Codes and Practice Acts, and under the New Federal Rules of Civil Procedure, see:

**Articles:** Howe, Misjoinder of Causes of Action in Illinois, 14 Ill.L.Rev. 581 (1920); Clark, The Code Cause of Action, 33 Yale U. 817 (1924) McCaskill, Actions and Causes of Action, 34 Yale L.J. 614 (1925); Clark, Ancient Writs and Modern Causes of Action, 34 Yale L.J. 879 (1925); Clark, Trial of Actions Under the Code, 11 Cornell L.Q. 482 (1928); Blume. A Rational Theory for Joinder of Causes, etc., 243 Mich.L.Rev. 1, 41 (1927); Harris, What is a Cause of Action, IC Calif .L.Rev. 459 (1928); Gavitt, The Code Cause of Action; Joinder and

Counterclaim, 30 Col.L.Rev. 502 (1931); Id., 6 Irid.L.J. 203, 205 (1931); Arnold, The Code Cause of Action Clarified by United States Supreme Court, 10 A.11. A.J. 215 (1933); Gavitt, A Pragmatic Definition” of the Cause of Action, 82 U. of Pa.L.Rev. 129 (1933); Clark, The Causes of Action, 82 U. of Pa.L.Eev. 354 (1934); Gavltt, The Cause of Action—A Reply. 82 U. of Pa.L.Rev. 095 (1934); Wheaton, Manner of Stating a Cause of Action, 20 Cornell L.Q. 185 (1935); Wheaton, The Code “Cause of Action”; Its

## Sec. 21

### STATEMENT OF CAUSE OF ACTION

87

exact definition.<sup>18</sup> Probably it is unsafe to define it more specifically than to say that the cause of *is* consists of some combination of facts or events, or some transaction from which a right to remedial relief arises. The typical elements or operative facts underlying these rights and which entitle the plaintiff to some form of remedy differ with the various kinds of actions, whether of contract, property or tort. At Common Law, therefore, the question as to whether a plaintiff had stated a good cause of action did not turn on the facts of a particular transaction, but on whether the plaintiff or his attorney had properly diagnosed **the legal effect of the facts, or, to put the matter in another way, whether the Declaration stated a cause of action which fell within the theory of liability represented by the**

Definition, 22 Cornell L.Q. 1 (1936); McCaskill, The Elusive Cause of Action, 4 U. of ChLL.Rev. 281 (1937); Wheaton, Causes of Action Blended, 22 Minn.U.Rev. 498 (1938); IsicCaskill, Easy Pleading, 35 Ill.L.Rev. 28 (1940); Clineburg, Splitting Cause of Action, 19 Neb.LBull. 156 (1940); McCask’dl, Jury Demands in the New Federal Procedure, 88 U. of Pa.L.Rev. 315 (1940); Clark, Simplified Pleading, 29 Iowa U.Rev. 272 (1942); illume, The Scope of a Civil Action, 42 Mich.L.Rev. 257 (1943); McNish, Joinder and Splitting of Causes of Action in Nebraska, 26 Neb.U.Bev. 42 (194W).

**Comments: The** Harlan Fiske Stone Moot Court Competition, 25 CoLL.Rev. 630 (1925); Pleading: Equities Affecting Legal Causes of Action as Defenses or Counterclaims: Mode of Trial of Such Issues, 11 Cornell U.Q. 3943 (1926); Pleading—Splitting Causes of Action—Counterclaim in Court of Limited Jurisdiction, 36 Yale U.J. 883 (1927).

On the subject of the Action under the Code, see article by Wheaton, A Study of the Statutes which Contain the Term “Subject of Action,” 18 Cornell L.

*Q.* 20 (1932); Id., 18 Cornell L.Q. 232 (1933).

18. Sec Read v. Brown, 22 Q.B.Div. 128 (1888).

And that “The Cause of Action is the thing done or omitted to be done, which confers the flight to Sue; that is, the wrong against the plaintiff, which caused a grievance for which the Law gives a Remedy,” see, Greene v. Fish Furniture Co., 272 Ill. 148, 156, 111 ItE. 725 (1916). See, also, Pomeroy, Code Remedies, 4~ 340, 412 (4th ed. by Bogle, Boston 1904);

Eote: The Meaning of the Words “Cause of Action” as Used in the New York Codes, 22 Col.L.Rev. ‘61 (1922).

Form of Action selected to vindicate an alleged legal right.

#### *The Declaration; A Legal Syllogism*

WITH this working definition in mind, we are now in a position to undertake the Framing of a Declaration in which a cause of action will be alleged. In this connection it should be remembered that a Declaration is a **Syllogism** with the Major Premise left out. What is meant by this? 20 It is this: since every liability consist of two elements—a given combination of facts and events, plus a rule of substantive law attaching legal consequences—it follows that a complete statement of the entire right of action would include both the combination of facts and the rule of substantive Jaw relied upon. If these two elements are established, Judgment for the plaintiff will be entered. Such Judgment naturally follows from certain premises of fact and of law, which may be stated as follows:

(1) *2’~fajor Premise:* The rule of law relied upon by the plaintiff—by rule of the Substantive Law of real property, damages may be recovered against one who rides over my corn, or trespasses on my property:

(2) *Minor Premise:* The combination of facts relied upon by the plaintiff—that the defendant has ridden over my corn;

*Conclusion:* Therefore, the plaintiff right of action against defendant in he may recover damages against the

10- "Every action is brought in order to obtain some particular result which is termed the remedy. This final result is not the 'Cause of the Action:' it is rather the 'Object of the Action,' -Wildman v. Wildman, 70 Conn. 700, 707, 41 A. 1, 2 (1898).

And a "Cause of Action" should be distinguished from an "Action", the former consisting of the Facts which give rise to the Action, the latter being a Proceeding in Court. Ponaeroy, Code Remedies, e. III, ~ 347 (4th ed. by logic, Boston, 1904).

80. See Lamphear v. Buckingham, 33 Conn. 237 (1868).

(3)  
has a  
which  
defendant.

88

**DECLARATION—FORM**

**Cli. 4**

**If the defendant seeks to defeat the defend-** or in tort. The plaintiff must allege that he ant's alleged liability by disputing the Major had a right, as that he was in the actual or Premise or Rule of Substantive Law relied constructive possession of the land **in an Aeon by the plaintiff**, he may do so by demur- tion of Trespass *quare clausum fregit*, or **ring, which, in effect, says there is no such that he** had a General or Special property in-Rule of Law as that relied on by the plain- terest therein,<sup>2</sup>' and was entitled to the postiff~ if the defendant seeks to defeat the

plaintiff by disputing the combination of 21. In the past Quarter century there have been re peated efforts on the part of legal scholars to clar facts or events relied upon by the plaintiff,ify legal thinking by promoting a better under-

he may do so by pleading some Form of standing of legal terminology used In the process of Traverse, such as the General Issue, which analyzing a legal problem. One of the earliest ef forts was Professor Wesley Neweomb Eohfeld's denies all the material allegations in thework on Fundamental Legal Conceptions as Applied

plaintiff's Declaration. If both 'the Rule of in Judicial Reasoning and Other Legal Essays (New Law and the Facts relied upon by the plain- Haven, 1923). In an article by Professor Arthur L. Clorbin, Legal Analysis and Terminology, 29 tale L. tiff turn out to be true, the conclusion orJ. 183 (1919), following the suggestions of Hohfeld,

the Judgment of the Court inevitably and an attempt was made to define legal relations in logically follows, unless the defendant seeks terms of Right, Duty, Privilege, No-Right, Power, Liability, Immunity, and Disability, More recently, **to avoid the alleged liability by pleading** IRProfessor George Goble, in an article entitled, A

Confession and Avoidance, If, **however**, the Redefinition or Basic Legal Terms, 35 CoLLitey. plaintiff fails to establish the Major or Minor 535 (1935), takes the view that our basic legal Premise, his right of action fails, lationships are embraced within the term, Power- Liability, that is, that all significant legal facts

It should now be observed, however, that necessarily Involve power. The term powers covers **since the Court takes Judicial Notice of the** those legal relations as viewed by the controllint

Rules of Substantive Law of the jurisdiction party and the term Liability Includes the same re lationship as viewed by the party controlled.

over which it presides, the Rule of Law or The Editors of the Restatement of the Law of Prop-Major Premise is not stated lxi the Declara- erty, under the auspices of the American Law Intion; only the Facts, or Minor Premise, and stitute, were confronted with this same problem of

terminology. The general rule Is that an action of the Conclusion. **And hence the reason why**Trespass may be maintained by any person bavindr

a Declaration is said to be a Syllogism with a general or special property interest In the proper-the Major Premise left out.

And now, with ty In dispute. This has been construed to include actual physical possession, constructive possession, the syllogistic character of a Declaration in or a right to immediate possession at the time the

**view, we may consider the statement of the** action began. But as used In Section 5 of the Re-plaintiff's right, the defendant's wrongful **act**, statement of the Law of Property, the word "inter-est," except for the Restatement of Torts, has been used "generally to Include varying aggregates of

### *The Plaintiff's Right*

rights, privileges, powers and immunities and dis-tributively to mean any one of them." As applied IT is of the essence of a cause of action to Trespass, however, the term "interest," although that some right of the plaintiff should have having several other meanings, usually refers to a legal relation or relations; as applied to the gen-• been violated, and it is therefore necessary end field of Torts, it denotes any human desire.

**for the plaintiff to show a right.** Thus, in In the field of intentional Torts, Section 216 of the **an action of Special Assumpsit for the breach** Restatement of the Law of Torts, Second Series, *of a contract, as* in the Form of Declaration defines a person in possession of a chattel as one

who has physical control with the intent to exer set out above, the plaintiff must allege a val-else such control on his own behalf, or on behalf

id agreement between himself and the clé- of another. The original Restatement of Torts fendant giving him the legal right to require also Included one who has been In physical con

trol of a chattel with intent to exercise anch some act or forbearance of the defendant. control, although he is no longer In physical

And the same is true of an **action** CX (ICiCiO control, If he has not abandoned It, and no other Sec. 21

## STATEMENT OF CAUSE OF ACTION

89

session of the property, in an action of Tro— ver.

### *The Defendant's Wrongful Act Violating That Right*

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 alleged in the Declaration. Thus, in an Action for the Breach of a 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 also necessary to show that the defendant has violated some duty arising from the contract; that is, that the performance of the contract became due, and that he failed to perform it. This appears from the Declaration given above. And, so likewise, in an Action of Trespass quare *clauswn fregU* the trespass by the defendant must be shown; and in an Action of Trover a showing of conversion by the defendant is essential.

### *The Consequent Damages*

IT is not only necessary to show that the defendant has violated some right of the plaintiff, but it is also necessary to go further and show that the plaintiff has been damaged thereby, for *injury* without damage ("*injurkz sine dantno*") does not give rise to a cause of action.<sup>22</sup> In most cases,

person has obtained possession; or has the right as against all persons to the immediate physical Control of a chattel, if no other person is in possession.

Section 157 defines a person in possession of land as Including one who Is in occupancy of land with intent to control It; or has been but no longer is In occupancy of land with intent to control It, if, after he has ceased his occupancy without abandoning the land, no other person has obtained possession; or has the right as against all persons, to immediate occupancy of land, If no other person is In possession.

The quoted matter in this note is printed by pennission of the American Law Institute.

21. That In Case for Slander damages is the gist of **the** action, see Pollard v. Lyon, 91 U.S. 225, 236, 23 where a wrong 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 of an averment of damage in the Declaration.

#### *What is a Fact*

BUT when you have found that you must allege a right, a violation of that right and damages, as an incident of stating a cause of action, you have not as yet touched the problem as to what particular kind of facts must be alleged in order to properly plead these so-called essentials of a good cause of action, a matter to which we may now address ourselves.

In order to frame a good declaration in which a good cause of action is stated, a pleader must consider *first*, what facts must be stated, and *second*, in what manner and form should such facts, whatever their character, be stated?

And these inquiries raise the question as to what, then, is a fact. A fact may be said to be anything of which a past or present existence may be asserted. And, for purposes of legal analysis, there are ordinary facts and extraordinary facts of law, Ordinary facts may be separated into two groups, ultimate and evidentiary facts,

#### *Ultimate Fact Defined*

AN ultimate fact is any fact to which the substantive law attaches legal consequences. 305 (1876); so also in a private action for a public nuisance, Swain & Son v. Chicago 13. & O. It. Co., 252 Ill. 622, 97 N.E. 247 (1911). And in Treusch v. Kamka, 83 Md. 274 (1885), where the Declaration alleged no Damages from negligence, it was held fatal on Demurrer.

23- In general, on what facts must be alleged in Common Law and under modern codes and Practice Acts, see

Articles: Cook, Statement of Fact in Pleading Under the Codes, 21 Col.Lit.Rev. 418 (1921); Dowdall, Pleading "Material Facts," 77 U. of Pa.L.Rev. 945 (1929); Wheaton, Manner of Stating Cause of Action, 20 Cornell L.Q. 185 (1935); Oavitt, Legal Conclusions, 16 Minn.L.Rev. 378 (1932); Cook, "Facts" and

90

### DECLARATION—FORM

Cl. 4

quences. It sometimes may be inferred from **the** statement of a sufficiently large number of **evidentiary facts**. **Thus, for example, if** a plaintiff wants to institute an Action of Ejectment against a defendant, he must look to the Substantive Common Law governing real property to discover what Allegations he must allege in his Declaration to state a good cause of action. There he discovers that he must allege Right or Title, Wrongful Act of Ejectment, and Damages. If, in drafting his Declaration, the plaintiff omits an Allegation required by the Substantive Law, the defect is available on Demurrer at the Pleading Stage, on Motion in Arrest of **Judgment**, after Verdict and before Judgment, **and on Writ of Error**, after Final Judgment, under the general principle that ordinarily a Substantive Defect, or a failure to state a material, or ultimate fact is always available at any stage of the proceedings.

#### *Evidentiary Fact Defined*

AN **evidentiary** fact is a fact to which the Substantive Law does not attach legal consequences, but from which, if stated in sufficient detail, an ultimate fact may sometimes be inferred. Thus, to illustrate, in the Action of Ejectment referred to above, let us suppose that the plaintiff alleged, by way of **title, that he had a "grant deed" of Black-acre**. The Substantive Law of real property requires that in order for the plaintiff to state a good cause of action, **he must allege** that he owned, possessed, had an immediate right to possession, or was seized of Black-acre. As a "grant deed" of Blackacre is not title, but only evidence of title, the plaintiff's Declaration is defective in having stated an evidentiary fact, whereas he should have **alleged the ultimate fact that he was "seized"**

"Statements of Fact", 4 U.Chi.L.Rev. (1937); Morris, Law and Feet, 55 Harv.L.Rev. 1303 (1942).

Annotation: Pleading Duress as a Conclusion, 119 A. Lii. 997 (1939).

of Blackacre.<sup>24</sup> Stating an evidentiary fact violates the Rule of Pleading that Ultimate Facts must be stated, and such violation creates a Defect in Form, which may be reached by Special Demurrer.<sup>25</sup>

## ULTIMATE AND EVIDENTIARY FACTS

22. The Ultimate and Operative Facts should be pleaded, not Evidentiary Facts and not Conclusions of Law.

WITH these distinctions in mind, we are for the first time in a position to state the General Rule as to what facts must be stated in order to state a good cause of action. The General Common Law Rule is that the plaintiff, in order to state a good cause of action in his Declaration, must allege ultimate facts, and not evidentiary facts, and not Conclusions of Law)<sup>o</sup>

24. See *McCaughy v. Schutte*, 117 Cal. 223, 46 P. 666, 59 Am.St.Rep. 176 (1896).

25. See *Camp & Bros. v. Hall*, \$9 Pla. 535, 568, 22 So.

792, 796 (1897), where it was contended that the Declaration alleged Evidentiary as opposed to Ultimate Facts, the Courts in discussing the question as to whether stating Evidentiary Facts was a defect in form or in substance, declared: "This latter contention is no doubt true, but as the Evidentiary Facts alleged are sufficient, if true, to establish conclusively the Ultimate Facts, the defect in this respect is one of form, and not one of substance. If the Evidentiary Facts alleged were insufficient in Law to Establish the Ultimate Facts, the defect would be one of substance, proper to be reached by General Demurrer; but if the objection be simply to this manner of Pleading the Ultimate Facts, the defect is one of form, and could formerly be reached by Special Demurrer Only."

See, also, on Evidentiary Facts, *DeCordova v. Sanville*, 165 App.Div. 128, 150 N.Y.Supp. 709 (1914), reversed in 214 N.Y. 662, 108 N.E. 1092 (1915).

20. "The only question, then, is whether the Complaints, all of which are in substance as above stated, contain what is technically a Sufficient Statement of a Cause of Action. The Sufficiency of the Pleadings is to be determined by the New York Code of Procedure. This requires a 'plain and concise Statement of the Facts constituting a Cause of Action,' Section 43t But the Rule of Pleading at Common Law was the same, viz., that Facts, not mere Conclusions of Law, were to be stated. 1 Chit P1, 214; *Allen v. Patterson*, 7 N.Y. 478." *Brown*, 3.. In *Muser v. Robertson*, 17 F. 500, 502 (1883).

Decision: *New York News Pub. Co. v. National Steam-*

*ship Co., Ltd.*, 148 N.Y. 39, 42 N.E. 514 (1895).

See. 22

## ULTIMATE AND EVIDENTIARY FACTS

91

The process of differentiating, in the confused history of a case, the Ultimate or Operative Facts from the probative and collateral circumstances involved, is the first step in the diagnosis of the case, to discover whether the plaintiff has a right of action, and also for the intelligent statement of the cause of action in the Declaration. Only the essential facts should be alleged which form the basis of the claim for relief. This excludes the details and particulars of evidence by which these fundamental points are to be established. Some observance of this distinction is necessary if the pleadings are to make the issues clear, simple and certain. The subordinate facts, which make up the probative matter, the casual details and dramatic circumstances, may vary indefinitely, but the "Ultimate", the "Material" or "Issuable" Facts cannot be omitted without destroying the plaintiff's cause of action or the defendant's Defense, as the case may be.

As observed earlier, it is a well-settled Rule of Pleading that it is never necessary to set forth mere Matters of Evidence.<sup>27</sup> In other

27. English: *Rowman's Case*. 9 Coke Ia, Tb, 77 Eng. Rep. 735, 743 k1583—84); *Jenny v. Jenny*, T. Itaym. 8, 83 Eng. Rep. 4 (1660); *Groenvelt v. Burnell*, Carth.

491, 90 Eng. Rep. 1000, 1017 (1700-01); *Eaton v. Southby*, Willes 131, 125 Eng. Rep. 1094 (1738); *Wilhams v. Wilcox*, S Ad. & ID. 314, 831, 112 Eng. Rep. 856, 863 (1838); *Bayaes v. Brewster*, 1 Gale & D. 674 (1842); Indiana: *State ex rel. Anderson v. Leonard*, 6 Blac'kf. (Iad.) 173 (1842); New Hampshire: *Watriss v. Pierce*, 36 N.H. 232 (1858); *Smith v. Wiggin*, Si Nil. 156 (1871); New York: *Church*

v. Gil-man, 15 Wend. (N.Y.) 656 (1836); Fidler v. Delevan, 20 Wend. (N.Y.) 57 (1838); Pennsylvania: Hartman v. Keystone Ins. Co., 21 Pa. 466 (1853). But see, Croft v. Rains, 10 Tex. 520 (1853), as to a declaratio otherwise good.

The rule under consideration is not noticed *in* Equity Pleading strictly, It being there often essential that the Facts which are the Subject of the Action, be stated in detail. Story, Commentaries on Equity Pleading, c. V ~ 265a, n. 1 (9th S. by Gould, Boston, 1879).

But in Code Pleading the Rule is fully recognized. though not expressly prescribed; and, as the Codes retain but one form of action for both legal and non-legal remedies, the application of the Rule is

words, although a particular fact may be of **the essence of a party's cause of Action or Defense, so that a statement of it is indispensable**, it still is not necessary, in alleging it, to state such circumstances as merely tend to prove the truth of the fact.

The reason of the 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, are not **required to be alleged**, and hence may be **brought** forward for the first time at the Trial, when the issue comes to be decided.

**The Ultimate or Operative Facts are the Facts required by the Substantive Law; it is these Facts which the party needs to establish to win his case)**<sup>8</sup> They must be facts, **definite** and concrete enough to direct attention **to the basis or ground of the plaintiff's legal contentions**. But at the same time, they must reduce the case to its essentials. For instance, if the pleader wishes to **allege** that the railroad contracted to carry the plaintiff as a passenger on its train with his

sometimes difficult. See Bliss, Law of Pleading Under the Codes of Civil Procedure, e. XIII, Rules Governing the Statement, Rule V, Evidence Should Not be Pleaded, 323, 324 (34 ed. St. Paul 1894).

25. "For the Purpose of Pleading only the 'Ultimate Fact to be proved need be stated. The circumstances which tend to prove the Ultimate Fact can be used for Purposes of Evidence, but they have no place in the Pleadings.'" McAllister v. Kuhn, 90 U. S. 87, 24 L.Ed. 615 (1877). See also, Steuben County Bank v. Mathewson, 5 Hill (N.Y.) 249 (1843),

It is the office of a pleading to allege the ultimate facts. Hence, a Declaration that defendant negligently allowed a fire to start on his own premises need not describe the start of the fire or other circumstance of its origin. Mabaffey v. 3. Ia. RumS barger Lumber Co., 71 W.Va. 175, 76 S.E. 182 (1912).

baggage, he should not go into an historical narrative of how the defendant went to the window and the agent sold the plaintiff a ticket and who checked his trunk, If the pleader wishes to allege that a certain deed was not recorded he should not allege that he searched in the proper office in vain and failed to find the record, as this would create an immaterial issue. And if the plaintiff wishes to set up that he is the owner of certain land, he should not set forth the links in his chain of title, for, as we have seen, this is evidentiary matter; he should allege that he is seized of the land in question, as seisin is the Ultimate or Material Fact to which the law of real property attaches the legal consequences of ownership, which the plaintiff is seeking to establish against the defendant.

## ULTIMATE FACTS AND CONCLUSIONS OF LAW

23. The Averments in the plaintiff's Declaration or the defendant's Defense should be of the Operative Facts, and not of mere Conclusions of Law from such Facts Often the distinction is one of the degree of particularity required in describing the particular matter or transaction involved.

THE Averment of the Operative Facts, essential to constitute a *prima facie* Cause of Action, must be Specific and set forth the Concrete Facts from which the Conclusions follow. A Declaration which merely states Legal Conclusions is insufficient.<sup>29</sup> General

29. It is the Duty of the Courts to declare the conclusions, and of the parties to state the premises, Little York Gold-washing & Water Co. v.

Keyes, 90 U.S. 199, 24 LEd. 656; 21 R.C.L. 441 (1577).

A Plea alleging mere Conclusions of Law, without alleging facts from which those conclusions are

sought to be drawn, with sufficient detail and certainty to apprise plaintiff of the nature **of the defense and** to enable the Court upon Facts admitted or found to decide whether the matter relied on constituted a valid claim to the relief sought, was properly rejected. Cot v. Hagan, 125 Va. 656, 100 S.E. 666 (1919).

#### Cl. 4

Allegations of Fraud, without setting forth the Specific Acts which constitute Fraud, are insufficient<sup>10</sup> The Allegations should be Specific, and the facts stated with particularity and certainty. The defendant is entitled to know the ground specified on which the Charge is made.

Statements as to the validity or invalidity of certain transactions, the characterization of acts or conduct as negligent or wrongi Boyce (Del.) 580, 76 A. 475 (1910); Helmiek v. Carter, 171 Ill.App. 23 (1912); Heinman v. Felder, 175

Iowa 740, 100 NW. 234 (1016); Stonegap Colliery

Co. v. Hamilton, 119 Va. 271, 80 SE. 305 (1916);

Boston & M. B. 11. v. County Com'rs of Middlesex

Co., 239 Mass. 127, 131 N.E. 283 (1921).

And an Allegation of "Valuable Consideration" is a conclusion in Common-Law Pleading. Kean v. Mitchell, 13 Mich. 207 (1565). Cf. California Packing Corporation v. Keiley Storage and Distributing Co., 228 N.Y. 40, 126 N.E. 269 (1920); Pomeroy, Code Remedies, e. III, General Principles of Pleading, 562 (4th ed. by Bogle, Boston, 1904).

An Allegation that a certain act was within the scope of employment is a Conclusion of Law. Freidlander v. Rapler, 38 App.D.C. 208 (1912); Sharp v. State, for Use of Brown, 135 MU. 551, 109 A 43-1 (1020); Boston & M. H. It. v. County Com'rs of Wddlescv County, 230 Mass. 127, 131 N.E. 283 (1921); People v. Ryder, 12 N.Y. 433 (1855).

An Allegation that a municipal corporation "became entitled" to divert water from a river is a Conclusion of Law. It depends for its soundness upon undisclosed or unstated facts, and the Court cannot read into the Pleading the Facts necessary to raise the issue intended to be raised. Legal Conclusions, 21 R.C.L. 440 (1918),

For many illustrations of Allegations held to be Conclusions of Law, see Pomeroy, Code Remedies, c. III, General Principles of Pleading, 564, 565, 566 (4th ed. by Bogle, Boston, 1904); 31 Cyc. 52—05.

30. Forbes v. Ft. Lauderdale Mercantile Co., 90 So.

821 (Fla.1922) (Facts constituting the Fraud should be Specifically Pleaded). See, also, on Fraud, Florida Life Ins. Co. v. Dillon, 63 Fla. 140, 58 So. 0-13 (1912).

31. That tile Act must be shown to be negligent see

Wright v. Atlantic Coast Line It. Co., 110 Va. 670,

66 SM. 848 (1910), annotated in 25 LEA. (N.5.) 072

(1910). 19 Ann.Cas. 439 (1910); Wilson v. Guyn'idotte Timber Co., 70 W.Va. 602, 74 SE. 870 (1912~.

See, also, Illinois Steel Co. v. Ostrowakl, 194 Ill.

376, 384, 62 N.E. 822 (1902).

92

### DECLARATION—FORM

That the best Pleading Is that which states Facts and

not Conclusions of Law, see: Campbell v. Walker,

A Declaration alleging the operative facts specifically.

Instead of generically charging negligence was cor

Sec. 23

### ULTIMATE FACTS AND CONCLUSIONS

93

and the existence of a legal duty or **obligation are often mere Conclusions. A statement that the defendant is indebted to the**

plaintiff in a certain sum gives no facts to charge the defendant. In Common-Law Pleading, it is permitted under the Common Counts to state this Conclusion of Indebtedness, but it is accompanied **by some general** statement of the ground of the debt. In **referring** to this tendency toward generality in **Pleading, David Dudley Field** said of the **Common Counts: "They (the Courts and the Lawyers) made the rules and they defend them, as a means of eliciting the precise point of fact in dispute between the parties; and they contrive every means in their power to conceal it, under forms the most general and unmeaning that can be imagined."** **a Instead of stating the concrete facts of the claim, a Common Count states only Conclusions Of Law, the mere Averment that the defendant is indebted for this or that. This does not disclose the real nature of the liability, or**



assist in analyzing and presenting **the Issues of Law and Fact upon which the indebtedness depends.**

The General Issues at Common Law are usually denials of Legal Conclusions instead of **Denials of the Facts** from which **the liability** is inferred; e.g. nil debet, or Not Indebted.

It is not always easy to distinguish the details of evidence, on the one hand, and **Conclusions of Law, on the other, from the Operative or Issuable Facts**, upon which the right to relief depends. It is often a matter

recently sustained. *Camp & Bros. v. Hall*, 39 Ill. 533, 568, 22 So. 792, 796 (1897). See, also, *Wilmhelm v. Field*, 107 Ill. App. 145, 161 (1903).

32. In *Lefkowitz v. City of Chicago*, 238 Ill. 23, 87 N. B. 58 (1909), it was held that Averments by **the** plaintiff that obstructions were “wrongfully” placed in a street, and permitted **to** remain there an “unreasonable” time, were **Conclusions of Law**.

33. David Dudley Field: *What shall be done with the Practice of the Courts?* 1 Speeches, Arguments and Miscellaneous Papers 236 (New York, 1884).

of degree.<sup>35</sup> While the pleading must have certainty and particularity in the **Averment of Facts, a General Mode of Pleading** is often sufficient as to certain matters, and no greater particularity is required than the nature of the sort of thing described will conveniently admit of. “The Rules of Pleading determining whether Allegations must be Generic or Specific—and, if the latter, to what degree—are, like other Rules of Law, based on considerations of policy and convenience. Thus, the facts constituting fraud, are frequently required to be alleged in comparatively detailed form,” ~

In many situations a single convenient term is employed to designate (generically) **certain miscellaneous Operative Facts, such**

as ownership or possession, which is a **method of stating their net force and effect in law, without** alleging the specific circumstances. It is sufficient to allege that the plaintiff is the owner of certain land or that he was possessed of certain chattels.<sup>36</sup> **On the other hand, it would be a Conclusion of**

31. See article by Cook, *Statements of Fact in Pleading Under the Codes*, 21 Col. L. Rev. 410 (1902); Itohfeld, *Fundamental Legal Conceptions*, 23 Yale L.J. 16, 25 (1913).

A Statement of an Ultimate Fact In Pleading is not objectionable as a Conclusion of Law, as an “Ultimate Fact” is necessarily a conclusion from inter’ mediate and evidentiary facts. *Williams v. Peninsula Grocery Co.*, 73 Fla. 937, 75 So. 517 (1917).

And Averments must be sufficiently specific, so as to disclose not the minute particulars, but the real substance of the facts making up the case. *Mair v. Rio Grande Rubber Estates, Ltd.*, [1913] A.C. 853, 883, 864.

35. Rohfeld, *Fundamental Legal Conceptions*, 23 IaC Li. 16, 27 Note (1918), where operative facts are contrasted with evidential facts.

39. That a general Allegation of seisin or of ownership is an Averment of an ultimate fact, and not a Conclusion of Law, see *Sheffield v. Bank v. Corinth Bank & Trust Co.*, 196 Ala. 275, 72 So. 127 (1916); *nail v. Folinar*, 199 Ala. 590, 75 So. 172 (1917); *Payne v. Treadwell*, 16 Cal. 220 (18\*30); *Cheda v. Sodkio*, 173 Cal. 7, 158 P. 1025 (1916); *Fuller v. Fuller*, ITS Cal. 637, 169 P. 869 (1917); *Gartlan v. C. A. Hooper & Co.*, 177 Cal. 414, 170 F. 1115 (1918).

Law to allege that the plaintiff not entitled to the possession.<sup>37</sup>

**would be a Conclusion of Law** to allege that it was the defendant’s duty to erect guards about a certain excavation, the facts from which that duty might be inferred by the Court being absent.<sup>38</sup> And an Allegation that a deed was “procured by fraud,” or that a certain sum is now “due,” would constitute a legal Conclusion.<sup>39</sup> There is a conflict of authority as to whether it is proper to Plead Generally that defendant “negligently” collided with the plaintiff,<sup>49</sup> or whether the Special Circumstances from which neg

37. An Allegation ‘that said plaintiff has no right, claim or title to the said painting or picture, and is not entitled to the ownership or possession of the same,’ is a Conclusion of Law. *Allen Clark Co. v. Francovich*, 42 Nev. 321, 176 P. 259 (1918).

38. An Allegation that it was the defendant’s duty to do certain things was an Averment of a Conclusion, it being necessary in pleading Duty to allege Facts from which the Law will raise the Duty. *New Staunton Coal Co. v. Fromm*, 286 Ill. 254, 121 N. B. 594 (1918); *Bolt v. City of*

Molino, 196 Ill.App. 235 (1915); Jacobson v. Barney, 200 Ill.App. 96 (1915); Sanboeuf v. Murphy Const. Co., 202 Ill.App. 548 (1915); Greinke v. Chicago City fly. Co., 234 Ill. 564, 567, 85 N.E. 327 (1908); MeAndrews v. Chicago, L. S. & E. B. Co., 222 Ill. 232, 230, 78 N.E. 603 (1900).

On facts which raise a duty, see Schueler v. Mueller, 193 Ill. 402, 61 N.E. 1044, (1901); 31 Cyc. 52.

The existence of a duty must be shown by Facts alleged in the Declaration, and though the Breach of the Duty may be Averred by way of Conclusion, the existence of the duty may not be so alleged. Birmingham Ry, Light & Power Co. v. Littleton, 201 Ala. 141, 77 So. 565 (1917); Alabama Fuel & Iron Co. v. flush, 204 Ala. 658, 86 So. 541 (1920).

<sup>39</sup> Doose v. Dooso, 300 Ill. 134, 133 N.E. 49 (1921); Loomis v. Jackson, C W.Va. 613 (1873); First Nat. Bank of Sutton v. Grosshans, 61 Neb. 575, 85 N.W. 542 (1901) (Fraud); Creeey v. Jay, 40 Or. 28, 66 P.

295 (1901) (money duc).

“The only real question is Whether is it desirable to have a more specific description of the facts upon which the plaintiff relies.” Cook, Statements of Fact in Pleading Under the Codes, 21 Col.L.Rev. 420 (1921).

40. It is necessary only to allege negligence by General Averment that the defendant did the Particular Act damaging the plaintiff, Grossetti v. Sweasey,

### Ch. 4

ligence might be inferred should be set out concretely and in detail.<sup>45</sup>

### SEVERAL COUNTS IN THE SAME DECLARATION

24. A **Count** is a separate and independent **statement of the material facts constituting a Cause of Action**. A Declaration may include **several Counts, each Count, in such a case, being regarded as a Separate Declaration**. **Several Counts** may be either of one or two **descriptions**:

or

(1) **Statements of distinct causes of action,**

(2) **Different statements of the same cause**

**of action.**

ACCORDING to Keigwin, “Duplicity, or Double Pleading, is the stating in support of

176 Cal. 793, 169 P. 687, (1917); Clark v. Chicago, M. & St. P. By. Co., 28 Minn. 69, 9 N.W. 75 (1881).

The term “facts”, “must include many Allegations which are Mixed Conclusions of Law and Statements of Fact; otherwise Pleadings would become intolerably prolix.” Mitchell, 1, in C., C. & St. L. By. Co. v. Nichols, (Ind.App.) 130 N.E. 546 (1921)-

In an action for negligent Injury, negligence being the Ultimate Pact to be Plead, and not mere Conclusions of Law, a declaration or petition charging defendants with an act injurious to plaintiff, with a General Allegation of Negligence, is sufficient, as against a General Demurrer, without setting forth the details of the acts causing the injury, unless they could not be negligent under any circumstances. Tatum v- Louisville & N. II. (Jo., 253 F. 898, 165 C.C.A. 378 (1918); Freidman v. Denhalter Bottling Co., 54 Utah 513, 182 P. 843 (1919); Louis v. Smith-McCormick Coast. Co., 80 W.Va. 159, 92 5E. 249 (1917). Savage v, Public Service By. Co., 95 N.J.L. 432, 113 A. 252 (1921); Bobbins v. Baltimore & Ohio H. Co., 62 WNa. 535, 59 SE. 512 (1907); 4 Standard Eney.Proe. 833. See, also, Negligence, General and Particular Averments, 21 *B.C.L.*, “Plehdng.”

499—501.

41. A plea of contributory noglignce is not sufficient if it merely states a Conclusion of Law, but must Aver the Facts constituting the negligence, which must be such that the Conclusion of Negligence follows as Matter of Law, Dwight Mfg. Co. v, Holmes, 198 Ala. 590, 73 so. 933 (1917); ICilgore cc Birmingham By. Light & Power Co., 200 Ala. 238, 75 So, 996 (1917); Southern Cotton Oil Co. v. Woods, 201 Ala. 553, 78 So. 907 (1918); Fusselman v. Yellowstone Valley Land & Irrigation Co., 58 Mont, 254, 163 F. 473 (1915), annotated In .&nn.Cas.1915B, 420; Valerli v. Breakwater Co., 3 Boyce (DeL) 196, 84 A. 222 (1912), (unsafe cars and tracks, too general).

94

### DECLARATION—FORM

was or was  
So, also it

Sec. 24

### SEVERAL COUNTS IN SAME DECLARATION

the same Demand or the same Defence two or more grounds of which either is sufficient for the purpose.

“Thus, for a single piece of work the person liable may at one time promise to pay a certain price and on another occasion promise to pay whatever the work is worth. Since either promise is sufficient to sustain a demand of payment, to allege both would be Double Pleading. So one sued for money may have several Defenses, such a Payment, Want or Failure of Consideration, the Statute of Limitations, a Discharge in Bankruptcy; and one who is sued for nonperformance of something to be done upon request might defend by showing that he was never requested and never refused to perform. In either of these cases, to set up in Defence more than one of the facts available to defeat the suit would constitute Duplicity.”<sup>42</sup>

As the Common Law scheme of remedial ruling was designed to produce a single issue, the determination of which would settle the litigation, Duplicity was regarded as a vice as it conduced to the Multiplication of Issues. Each cause of action and each Defence was required to be placed on one ground, which on Traverse or Plea in Confession and Avoidance would leave only a single point in issue at any one stage of the pleading, and then ultimately develop a single clear-cut Issue of Fact. Double Pleading was therefore prohibited to prevent a party arguing two or more matters from which a plurality of issues might develop. With this preliminary statement in mind, we may now **consider the problem presented when Several Counts** are placed in the same Declaration, a form of which appears below:

42. Keigwln, Cases in Common Law Pleading, Bk. II, The Rules of Pleadings, c. IV, Duplicity, 523 (2d ed. Rochester 1884), citing as authority Hunter v. WilkInson, 44 MAss. 728 (18Th), People’s Bank v. Nickerson, 106 Me. 502, 76 A. 937 (1910).

Koftier & Peppy ComLaw Pldg. HR—S

A FORM OF DECLARATION CONTAINING SEVERAL COUNTS:

In the KING’S BENCH Term, in the year of the reign of King George the Fourth.

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.R.**, 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.

SHIPMAN, Handbook of Common Law Pleading, c. X, 206 (3rd ed. by Ballantine, St. Paul, 1923).

Where a party had several distinct causes of action, at Common Law, he was allowed to pursue them cumulatively in the same action, subject to several rules, to be presently explained, as to joining such demands only as were of similar character or quality. Thus, he might join a claim of Debt on a Bond with a claim of Debt on a Simple Contract, and pursue his remedy for both in the same Action of Debt.<sup>43</sup> So, if several distinct trespasses were committed, these might all form the subject of one Action in Trespass.<sup>44</sup>

43. **Trth,** Cotton Manufactory v. Lobdell, 13 Johns, (N.Y.) 482 (1810), in which the Court introduced the foliowlag test: “The Rule is

invariable, that Causes of Action, which admit of the Same Plea and the Same Judgment, may be Joined; but the reverse of this proposition is not invariably true.”

44- That different Acts of Negligence may be charged In different Counts as the Cause of Injury, see Scott

1

Where the plaintiff thus makes several demands in the same action, he should set them out separately in his Declaration in what are called “Separate Counts.” Each Count is a separate, independent statement **of a cause of action.**

Moreover, a plaintiff is permitted 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 was for the purpose of preventing the defeat of a just cause of action through an incidental Variance between the evidence produced at the Trial and the Allegations contained in the various Counts. In an effort to avoid such an occurrence, **the** same cause of action was stated in different Counts so as to meet any variation **in the evidence which might develop at the Trial.**

**The use of Several Counts was 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 was determined on its own Averments, without regard to the other Counts.’<sup>5</sup> One Count, however, might make reference to another for relevant matter without the necessity of repeating it.

The use of Several Counts when applied to distinct causes of action was entirely consistent with the Rule Against Duplicity, as the object of that rule was to prevent several issues in respect to the same demand only, **there being no objection** to having several issues **where the demands were several.**

v. **Parlen & Orcendorff Co.**, 245 Ill. 460, 92 N.E. 318

(1910).

And Several Acts of Negligence causing the Injury  
**may be alleged in One Count of a Declaration as**  
**One Cause of Action.** Flynn v. Staples, 34 App.D.C.  
92, 27 L.R.A.,N.s., 792 (1909); **Gartin ‘cc Draper**  
**Coal & Coke Co.**, 72 **w.va.** 405, 78 S.E. 673 (1913).

4<sup>th</sup> L’orter y. **Drennan**, 13 Ill.App. 862 (1888); Lake  
Shore & If. S. By. Co. v. Hessiona, 150 Ill. 546, 37  
**N.E. 905 (1894); Smith v. Philadelphia B. & W. B.**  
Co., 155 A. (DeLSuper.) 418 (1931).

Cli. 4

Where Several Counts were thus used, the **defendant might, according to the nature of his Defense, Demur to the entire Declaration, or plead a single Plea to the entire** Declaration, or he might follow the course of Demurring to one Count and pleading to another, or he might plead a Separate Plea to each Count; and in the two latter cases the action may cause a corresponding severance in the subsequent pleading, and the production of several issues. But, whether one or more issues be produced, if the decision, whether on Law or Fact, was in the plaintiff’s favor, as to any one or more Counts, he was entitled to **Judgment pro tanto**, even though he failed **as to the remainder.”**

#### **JOINDER OF DIFFERENT CAUSES OF ACTION**<sup>47</sup>

**25.** 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 Declaration.

THE Joinder Of distinct causes of action was permissible under the conditions stated

46. Olson v. Kelly Coal Co., 236 Ill. 502, 86 N.E. 88 (1908). See, also, The Illinois Practice Act, 78 (1910).

47. **In general, on the subject of Joinder and Misjoinder of Causes of Action at Common Law, under Modern Codes, Practice Acts and Rules of Court,**

See:

S6

### DECLARATION—FORM

Articles: Sunderland, Joinder of Actions, 18 Mich.L.

Rev. 571 (1920); flume, A Rational Theory for Joinder of Causes, etc., 26 Mich.L.Rev. 1 (1927); **Toelle, Joinder of Actions—with Special Reference** to Montana and California Practice, 18 Calif.L.Rev. 459 (1930); Gavitt, The Joinder of Causes of Action for Injuries Sustained by Those Standing in Familial Relationship, 41 DickInson L.Rev. 48 (1938); Wheaton, Causes of Action Blended, 22 Minn. L.Rev. 43 (1938); flume, Free Joinder of Parties, Claims and Counterclaims, 2 P. ILLD. 250 (1943); **Dutcher, Joinder of Parties and Actions**, 29 Iowa L.Rev. 3 (1943); Blmne, Required Joinder of Claims, 45 Mich.L.Rev. 797 (1947); Lugar, Common Law Pleading Modified Versus the Federal Rules, 52 W. Va.L.Rev. 137 at 145 (1950); Wright, Joinder of

### Sec. 25 JOINDER OF CAUSES OF ACTION

above, though it seems that the first, or nature of the cause of action, was the best criterion,<sup>48</sup> as instances existed permitting the uniting of Debt and Detinue, or Debt on a Specialty with the same action on a Judgment or Simple Contract, where the Pleas were different, and the Judgment in Detinue was also in a different form.<sup>49</sup> In actions in form *cx contractu*, the plaintiff might join as many Counts as he had causes of action of the

Claims and Parties Under Modern Pleading Rules, 36 Minn.L.Rev. 580 (1952).

Notes: Recent Trends in Joinder of Parties, Causes and Counterclaims, 37 Col.L.Rev. 462 (1937); Civil Procedure—Code Pleading—Joinder of Actions on Two **Several Contracts** of Insurance, 85 U. of Pa. L.Rev. 843 (1941); **Parties and Joinder of Actions** Under the Illinois Civil Practice Act, 43 Ill.L.Rev. 41 (1948); Civil Procedure—Joinder of Causes of Action in Michigan, 51 Mich.L.Rev. 1068 (1951).

**Annotations: Joinder or Representation of Several Claimants in Action Against Carrier or Utility to Recover Overcharge**, 1 ILLJt.2d 160 (1948); Joinder In Defamation Action, of Denial and Plea of Truth of Statement, 21 A.L.R.2d 813 (1952); Joinder of Cause of Action for Pain and Suffering of Decedent with Cause of Action for Wrongful Death, 35 A. L.R.2d 1377 (1954).

48. Tidd, Practice of the Court of King's Bench, c. I, Of Actions, and the Time Limited for their commencement, 12 (9th ed. London, 1828); 1 **Chitty, Pleading and Parties to Actions with Precedents, e.** II, Of Forms of Action, 229 (16th Am. ed. by Perkins, Springfield, 1876). See, also, Whipple v. Fuller, 11 Coan. 582, 29 Am.Dec. 330 (1836); Chicago, W. D. By. v. Ingraham, 131 Ill. 659, 23 N.E. 350 (1890); Brady v. Spurek, 27 Ill. 478 (1861); Union Cotton Manufacturing Co. v. Lobdell, 13 Johns (N.Y.) 462 (1816).

According to Professor Edson 11. **Sunderland, Misjoinder of Causes of Action** was at Common Law, **without good reason, regarded as a most serious error.** See article, Joinder of Actions, 18 Mich.L.Rev. 571, 574 (1920).

But some actions of different forms, such as Debt and Detinue, Case and Trover, could be joined. Misjoinder might result from the diversity of capacities in which the parties sued or were sued.

49. The general issue in Debt on a Specialty was *nil satisfaction*, in Debt on a Judgment, *nil debet* or *nil tuel* record. The Judgment in Detinue was in the **alternative, for the goods or their value.** See article by Howe, **Misjoinder of Causes of Action** in Illinois, 14 Ill.L.Rev. 581 (1920).

same nature in Assumpsit, and, as above observed, **in the different Actions of Debt, or Debt with Detinue**.<sup>30</sup> So, several distinct trespasses, both to the person and property, might be joined in the same Declaration in Trespass,<sup>31</sup> and several takings at different days and places in Replevin,<sup>52</sup> and several causes of action in Case might

be joined with Trover.<sup>53</sup> But when the causes of action were of a different nature, and tile same Judgment could not be rendered, they could not be joined!" Actions *cx contractu* could not be joined with those in form *cx delicto*,<sup>55</sup> though the case of Debt and Detinue seems

30. Union Cotton Manufactory v. Lobdell, 13 Johns. (N.Y.) 402 (1816) ; Smith v. Proprietors of First Congregational Meetinghouse in Lowell, S Pick. (Mass.) 178 (1820); Farnham v. hay, 3 Blackf. (md.) 167 (1833); Gray v. Johnson, 14 N.H. 414 (1843); Tillotson v. Stipp, 1 Blackf. (lad.) 77 (1820)

5<sup>1</sup>. Illinois: Chicago, W. D. fly. Co. v. Ingraham, 131 Ill. 659, 23 N.E. 350 (1800); Massachusetts: Parker -v. Parker, 17 Pick. (Mass.) 236 (1835); Bishop v. Baker, 19 Pick. (Mass.) 517 (1837); New York: Baker v. Dumbolton, 10 Johns. (N.Y.) 240 (1813).

5<sup>2</sup>. Fitzherbert, Natura Brevinm, 68, note a (London, 1566); Buller, Nisi Prius, c. IV, 54 (Dublin, 1791).

51 Brown v. Dixon, 1 T.R. 277, 09 Eng.Bep. 1091 (1786); Smith v. Goodwin, 4 Barn. & Adol. 413, 110 Eug-Rcp. Sn (1833).

But a Count in Trover could not be joined with one in Trespass. Crenshaw v. Moore, 10 Ga. 3.84 (1851). And ns to Joinder of Slander and Malicious Prosecution, see Miles v. Oldueld, 4 Ycates (Pa.) 423, 2 Am. Dee. 412 (1807).

54. Selby v. llutchinson, 4 Oilman (In.) 319 (1847); Toledo, W. & W. B. Co. v. Jacksonville Depot Building Co., 63 111. 308 (1872).

55. Alabama: Copeland v. Flowers, 21 Ala. 472(1852); Connecticut: Stoyel v. Weseott, 2 Day (Conn.) 418, **2 Am.Dec. 109** (1807); **Indiana: Bodley v. Roop, 6 Btaekf. (Ind.i 158 (1814); New York: Church v. Mumford, 11 Johns. (N.Y.) 479 (1814); Cf. Rallock v. Powell, 2 Caines (N.Y.) 216 (1804); Crooker v. Willard, 28 N.H. 134, note (1853).**

It was Improper to unite in the Same Declaration a Cause of Action sounding in Contract with one sounding in Tort. Shafer v. Security Trust Co., 82 W.Va. 818, 97 S.E. 290 (1918); Wells v. Kanawha & I.I. Ry. Co., IS W.Va. 762, 90 St. 337 ¶1916); See

Note: **Pleading and Practice—Inconsistent Causes of Action in Same Complaint—Contract and Tort**, 20 Col.L, Bcv. 712, 800 (1920).

97

98

## DECLARATION—FORM

Ch. 4

**to constitute an exception,<sup>50</sup> and Assumpsit cannot be joined with Account, or Covenant or Debt," or Trespass with Case,<sup>58</sup> as they**

Were actions of different natures; and, for the same reason, it was not possible to join Trespass or Case with Detinue or Replevin.

Neither can Causes of action due in different rights be joined.<sup>59</sup> In referring to this very point, Professor Edam R. Sunderland said: "Thus a Count on behalf of two plaintiffs jointly could not be joined with a Count on behalf of one of them severally; Counts could not be joined each of which set up a several right in a different plaintiff against the same defendant; Counts setting up different causes of action in favor of the same plaintiff against different defendants could not be joined; and Counts alleging the joint liability of two or more defendants could not be joined with Counts alleging the several liability of any or all of them." 00

50. See Tidd, Practice of the Court of King's Bench, C. I, Of Actions, and the Time Limited for Their Commencement, 11 note b (9th ed., London 1828). **It has been shown above that Debt and Detinue were closely related in origin, and that Detinue first lay to enforce the obligation of a bailee to deliver.**

ft. Pell v. Lovett, 19 Wend. (N.Y.) 546 (1838); Canton National Bldg. Ass'n v. Weber, 34 Md. 669 (1871); Cruikshank v. Brown, 5 Oilman (Ill.) 75 (1848); **McOianity V. Laguerenne, 5 Oilman (Ill) 101 (1848); Guinnip v. Carter, 58 Ill. 296 (1871). See also, Mayer v. Lawrence, 58 ILLApp. 105 (1894),**

58. *Cooper v. Bissell*, 16 Johns, (N.Y.) 146 (1819); *Sheppard v. Furniss*, 19 Ala. 760 (1851); *Dalson v. Bradberry*, 50 Ill. 82 (1869).

89. *Kennedy v. Stalworth*, 18 Ala. 263 (1850); *Patrick v. Buckner*, 19 Ill. 428 (1858); *Albin v. Talbot*, 46 Ill. 424 (1868); *Safford v. Miller*, 59 Ill. 205; *Sleeper v. World's Fair Banquet Hall Co.*, 166 Ul. 57, 46 N.E. 782 (1897); *McMullin v. Church*, 82 Va. 501 (1886).

60. See Article by Sunderland, Joinder of Actions, 18 MlehLRev. 571, 582 (1920).

On the Joinder of Causes of Action under Modern Codes, see Clark, Handbook of the Law of Code Pleadings, c, VII, Joinder and Splitting of Causes of Action, ~ 67—77, 434-408 (2d ed. St. Paul 1947).

#### **DIFFERENT VERSIONS OF THE SAME CAUSE OF ACTION**

**26. Facts constituting but a single cause of action may be differently stated in Separate Counts, in the same Declaration, without flu. plicity.**

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 fall 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 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

Sec. 26

#### **DIFFERENT VERSIONS**

99

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.<sup>97</sup>

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 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,**

St Stephen, *A Treatise on the Principles of Pleading in Civil Actions*, c, H, Of the Principal Rules of Pleading, § 3, 258 (3d Am. ed. by Tyler, Washington, D. C. 1892); *Ward v. Bell*, 2 Dowl. 76 (1833) (The Judge in the Trial Court compared different counts to safety valves); *Newby v. Mason*, 1 Dowl. & Ryland 508 (1822). See, also, Keigwin, *Precedents in Pleading*, Case XVII, 425—428 (Washington,

1910); **Jackson v. Baker**, 24 App.D.C. 100 (1904). “The **Multiplication of Counts has long been considered one of the chief abuses in the System of pleading.** . . . To allow the plaintiff or defendant to state his case in ten or fifteen different ways is a custom the reasonableness of which is not readily perceived.” The principal reason is the Strictness of the Rules as to Varlane. Report of the **Common Law Commissioners. On the “Licensed Duplicity of**

Plural counts” to meet (1) the uncertainties of evidence in support of the plaintiff’s case; (2) to meet doubt as to the Law; (3) to obtain for the plaintiff the greatest possible latitude of proof. Note in Keigwin, Precedents of Pleading, 424, 426ff. A Count not varying substantially from a preceding Count is objectionable for redundancy. *Sowter v. seekonk Lace Ce.*, 34 Ri. 304, 83 A. 437 (1912).

**though it may be certain that there was at**

least one default; and if, under these circumstances, the plaintiff should set forth one of the defaults, and the defendant should take issue upon it, he might defeat the action **by proving payment on the day alleged, though he would have been unable to prove the other payment. To meet this difficulty, the pleader might resort to two Counts. The first of these would set forth the penal bond, alleging a default of payment on the 11th of June; the second would again set forth the same bond, describing it as “a certain other bond,” etc., and would allege a default on the 10th of July. The effect of this would be that the plaintiff, at the Trial, might rely on either default, as he might then find convenient. In this instance, the Several Counts are each founded on a different State of Facts, that is, a different default in payment, though in support of the same demand.**

But it more frequently happens that it is the same State of Facts differently represented which forms the subject of different Counts. Thus, where a man has ordered goods of another, and an action is brought against him for the price, the circumstances may be conceived to be such as to raise a doubt whether the transaction ought to be described as one of goods sold and delivered, or of work and labor done, and, in this case, there would be two Counts, setting forth the claim both ways, in order to secure a Verdict, at all events, upon one of them. The best illustration of the practice of thus restating a Cause of Action in the same Declaration is found in the use of the Common Counts in General Assumpsit, which appear in the chapter on the Action of Indebitatus Assumpsit. They embrace not only what are called the “Money Counts,” or those for money transactions, but also include Counts for almost any State of Facts upon which a debt may be founded. The Money Counts are those generally for money lent to the defendant, had and received by him for the plaintiff,

100

#### DECLARATION—FORM

Ch, 4

or paid out for him by the latter, for interest due, and for an account “stated” or agreed upon. **The others may be,** among other things, for work and labor, goods sold and delivered, use and occupation, etc. And first of all, **preceding the Common Counts, there may be a Special Count** declaring on an express contract. This is done because it often happens that, when the Special Counts are found incapable of proof at the Trial, the Cause of Action will resolve itself into one of these general pecuniary forms of demand, and thus **the plaintiff may obtain a Verdict on one of these Money Counts, though he fail as to all the rest.**

**Again, the same State of Facts may be**

varied by omitting in one Count some matter stated in another. In such a case the **More Special Count is used, lest the omission of this matter should render the other Insufficient in Point of Law.** The More General *Count* is adopted, because, if good in Point of Law, **it will relieve the plaintiff from the necessity of proving** such omitted matter in Point of Fact. If the defendant Demurs to the latter Count as insufficient, and takes **Issue in Fact** on the former, the plaintiff has **the chance of proving the matter alleged, and also the chance of succeeding on the Demurrer.**

**It is to be observed that, whether the**

subjects of Several Counts be really distinct **or identical, they must** always purport to be **founded on distinct Causes of Action, and not to refer to the same matter; and this is effected by the insertion of such words as “other,” “the further sum”, etc.** This is evidently rendered necessary **by The Rule** against Duplicity, which, though evaded, as to The Declaration, by The use of Several Counts, **in the manner here described, is not to be directly violated.**~



St. Stephen, *A Treatise on the Principles of Pleading* in *Civil Actions*, c. IX, Of the Principal *Rules of Pleading*, § 3, p. 201 (3d Am. ed. by Tyler. Washington, D. O. 1802); **Hart v.** Longfield, 7 Mod. 148, 87 Eng.Rep. 1156 (1702); *West v. Troles*, 1 Salk. 213, 91

### CONFORMANCE TO PROCESS

27. The Declaration must correspond with **the Writ or Process**. The formal statement of **the Cause of Action must correspond with all** the material statements in the Process by which **the action is commenced, or the deviation will constitute a Variance**.

It was a rule of great antiquity that the Declaration must Conform to the Original Writ, and, though the Original Writ is no longer in use, 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,<sup>63</sup> 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) 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) As to the character in which the parties sue or are sued. **If the action is brought by the plaintiff in a representative capacity,**

Engitep. 100 (1697); *Hltcheocli v. Munger*, 15 N.E. 97 (1844).

93. *Willard v. Missant*, 1 Cow. (N.Y.) 37 (1823); *Fitch v. Heise*, Cheves (8.0.) 185 (1840).  
Sm. **Willard v. Missant**, 1 Cow. (N.Y.) 37 (1823); *Donnelly v. Foote*, 19 Wend. (N.Y.) 148 (1838).

IS. *Rogers v. Jenkins*, 1 Ros. & Pul. 383, 126 Eng.ileP~ 966 (1799).  
Sec. 27

### CONFORMANCE TO PROCESS

101

as an executor, the plaintiff cannot declare in his own right, though, if he styles himself executor simply, without showing that he sues as such, he may declare in his own right, the demand being still the same.<sup>66</sup> (4) As to the Cause of Action, both as to its form and the extent of the demand.<sup>67</sup> (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,<sup>68</sup> which is generally considered as the time of the Commencement of the Action.<sup>69</sup>

06. *Rogers v. Jenkins*, 1 Ros. & Pul. 383, and n. (la, 126 Engitep. 966 (1799); *Lashlie v. Wily*, 8 **Hrnnppli**. (nun.) 659 (1848).

67. Illinois: *Weld v. Hubbard*, 11 Ill. 573 (1850); New

Jersey: *Coyle v. Coyle*, 20 N.J.L. 132 (1856); North  
Carolina: **Stamps v. Graves**, 11 NC. 102 (1825);  
rhoae Island: *Slater v. Fehlberg*, 24 11.1. 574, 54 A.

383 (1908).

06. *Semis v. Faxon*, 4 Mass. 263 (1808).

19. Alabama: *Oox v. Cooper*, 3 Ala. 256 (1841); Kentucky: *Thompson v. Bell*, 6 T.B.Mon. (Ky.) 559

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,<sup>7~</sup> except where modified rules have been adopted in different states, though a Variance a~ to the Cause of Action is ground for setting aside the Proceedings as irregular.

(1828); Massachusetts: Bunker v. Shed, 8 Metcalf (Mass.) 150 (1844); New York: Carpenter v. Butterfield, 3 Johns.Cas. (N.Y.) 145 (1802); Pennsylvania: Caldwell v. Heitshu, 9 Watts & S. (Pa.) 51 (1845); Vermont: Day v. Lamb, 7 Vt. 426 (1885).

And it is only prima facie evidence of the fact and not conclusive. Burdick v. Green, 18 Johns. (N.Y.) 14 (1820).

Illinois: Prince v. Lamb, 1 Breese (Ill.) 878 (1830);

South Carolina: Bradley v. Jenkins, 3 Brev. (S.C.) 42 (1812). And see, contra, Stamps v. Graves, 11 N.

C. 102 (1825).

## CHAPTER 5

Sec.

### THE DECLARATION—GENERAL RULES AS TO ALLEGING PLACE, TIME, TITLE AND OTHER COMMON MATTERS

28. Laying the Venue.
29. Local and Transitory Actions.
30. Local Facts—Venue in Pleadings Subsequent to the Declaration.
31. Consequences of Mistake or Omission.
32. Time.
- 33. When Time Must be Truly Stated,**
34. When Time Need Not be Truly Stated.
35. Time of Continuing Acts.
36. Description of Property.
37. Names of Persons.
38. Parties to the Action.
39. Showing Title.
40. Title in the Party or in One Whose Authority He Pleads.
41. Alleging Derivation of Title—Estates in Fee Simple.
42. Alleging Derivation of Title—Particular Estates.
43. Title by Inheritance.
44. Title by Alienation or Conveyance.
45. Manner of Pleading Conveyance.
46. The Written Conveyance and the Statute of Frauds.
47. Where a Party Alleges Title in His Adversary.
48. What is a Sufficient Allegation of Liability.
49. Proof of Title as Alleged.
50. Estoppel of Adverse Party.
51. Showing as to Authority.
52. Proof of Deeds.
53. Writings Pleaded According to Legal Effect.
54. Damages—General and Special.

#### LAYING THE VENUE

28. In all Pleadings, some certain place must be alleged for every affirmative Traversable Fact, which place is called the 'Venue' of the action. The Venue in all actions is to be laid truly, or at the option of the pleader, according as the same are respectively:

- (I) Local, or
- (II) Transitory

WITH each stage in the development of

the Jury, the manner of laying Venue underwent a change. During the first or earliest stage, the general rule was that each affirmative Traversable Allegation in the Original Writ, 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 the specific place in the county in which the fact

occurred. 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 Venue to  
102

### Sec. 29

each affirmative Traversable Allegation.<sup>1</sup> This laying of the Venue in connection with each Traversable Allegation in the Body of the Declaration or other pleading is designated as the Fact Venue.

In the second stage of the Jury's growth, and after the statute of 1705,<sup>2</sup> the Jury was summoned from the county in which the action was triable, whether or not the fact in issue occurred there. The statute of 16 **& 17 Car. II, enacted in 1664,~ provided that** a Judgment after Verdict should not be stayed or reversed on account of the Venue, if the cause were tried by a Jury of the county where the action was laid. According to Stephen, the practice of laying a Venue in **the Body of the Pleadings** became "**an unmeaning form,**<sup>4</sup> the Venue in the margin having been long found sufficient for all practical purposes." ~ And by the Hilary Rules of 1834,<sup>o</sup> it was provided that "The name of a county shall in all cases be stated in the margin of a Declaration; and shall be taken to be the Venue intended by the plaintiff, and no Venue shall be stated in the Body of the Declaration, or in any Subsequent Pleading. Provided, that in cases where local description is now required, such local description shall be given."

A Venue should be laid in the Declaration, but failure to lay any Venue in a Transitory Action is regarded merely as a formal defect, which can only be taken advantage of by

1. Duyckinek v. Clinton Mut. Ins. Co., 23 N.J.L. 279 (1852); Mehrlaof Bros. Brick Mfg. Co. v. Delaware, L. & W. It. Co., 51 NIL. 56, 16 Ati. 12 (1888). See, also, Platz v. Meltean Twp., 178 Pa. 601, 36 Ati. 139 (1897); Read v. Walker, 52 ILL 333 (1869).

2. Statute 4 Anne, c. 16, § 6, 11 Statutes at Large 156 (1705).

3. Chapter 8.

4. Ilderton v. Ilderton, 2 FBI, 145, 126 Eng.Rep. 476 (1793).

~ Stephen, A Treatise on the Principles of Pleading, C. F, Of the Principal Rules of Pleading, § IV, 259 (Williston edition, Cambridge, 1895).

6. Reg.Gen.lhhl.Term, 4 Wm. xv, reg. S.

### 103

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.<sup>7</sup> 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.<sup>3</sup>

#### LOCAL AND TRANSITORY ACTIONS<sup>9</sup>

29. A Local Action is one where the **transaction upon which** it is founded could only **occur** in a particular place, and may be either **for:**

(I) The recovery of land; or

(II) **The establishment or maintenance of a right arising out of land, or the recovery of damages for its injury.**

**Transitory Actions are those founded on transactions which might have taken place anywhere.**

THE law distinguishes between transactions which might occur at any place and

7. Briggs v. Presideat, etc. of Nantucket Bank, 5 Mass. 94 (1809). And, see, to the same effect, Pullea v. Chase! 4 Ark. 210; Mehrhof Bros. Brick Mfg. Co. v. Delaware, L. & W. B. Co., 51 N.J.L. 56, 16 Ati. 12

(1888); *Blackstoae Nat. Bank v. Lane*, **80 Me. 165**, 13 AU. 683 (1888).

8. *Slate 'cc Post*, 9 Johns. (N.Y.) 81 (1812). And see *County Com'rs of Hartford County v. Wise*, 71 Md. 43, 18 AU. 31 (1889); *Capp v. Oilman*, 2 Blackf. (md.) 45 (1827); *Puffen v. Chase*, **4 Ark. 210 (1841)**; *Benton v. Brown*, **1 Mo. 393 (1823)**; *Thorwarth v. Blanchard*, 86 Vt. 296, 85 Atl. 6 (1912).

9. In general, on Local and Transitory Actions, see:

Articles: Kuhn, Local and Transitory Actions in Private International Law, 66 U. of Pa.L.Rev. 301 (1918); Starke, The Venue of Actions of Trespass to Land, 27 W.Va.L.Q. 301 (1920—21); Wheaton, Nature of Actions—Local and Transitory, 18 Ill.L.Ev. **456 (1922)**.

**Statutes: 28 U.S.C.A. 1392** (1068); Section 082a of the **New York Code of Civil Procedure**, adopted as 536 of the New York Real Property Law, construed

### LOCAL AND TRANSITORY ACTIONS

104

### THE DECLARATION—PLACE, TIME, TITLE

#### Ch. 5

those which must occur at some certain **place. Causes of action which do not necessarily arise in any specific place are Transitory, and may be brought in any jurisdiction in which the plaintiff succeeds in serving the defendant personally.**<sup>90</sup> Causes of action which necessarily involve a certain locality, such, for example, as an Action of Ejectment, are Local, and must be tried in the place where property involved is located. The distinction between Actions which are Local and **hence must** be brought in the jurisdiction where the property concerned is located, and Actions which are Transitory, and hence may be brought in any place where jurisdiction of the defendant may be obtained, is one which exerts an influence upon the laying of the Venue.

Local Actions, therefore, embrace all those **brought for the recovery of the seisin or possession of lands and tenements, which are purely** local subjects, as an Action of Ejectment. **An Action for Injury to real estate as by negligence,**<sup>11</sup> nuisance,<sup>12</sup> or trespass,<sup>13</sup> are examples of Local Actions. An

in *Jacobus v. Colgate*, 217 N.Y. 235, 111 N.E. 837

(1916).

Annotations: **26 L.R.A. (N.S.) 933 (1910)**; **44 L.R.A. (N.S.) 267 (1913)**.

**Decisions: Livingston v. Jefferson, 1 Brock. 203, Fed.**

Cas.No.8411 (1811); *Ackerson v. The Erie By. Co.*, **31 K.J.L. 309 (1865)**; *Jacobus v. Colgate*, 217 N.Y. 235, 111 N.E. 837 (1916). Cf. *Ellenwood v. Marietta Chair Co.*, 158 U.S. 105, 15 Ct. 771, 39 L.Ed. 013

(1895).

10. *Hill v. Nelson*, **70 N.J.L. 376, 57 Atl. 411** (1904), in which the leading cases on this point are discussed.

11. *Brisbane v. Penn. It. B. Co.*, 205 N.Y. 431, 95 N. B. 752, 44 L.R.A. (N.S.) 279 (1912).

12. *Warren v. Webb*, 1 Taunt. 379, 127 Eng.Rep. 880 (1808); *Van Ommen v. Hageman*, 100 N.J.L. 224, 126 Atl. 468 (1924).

ii. *Livingston v. Jefferson, 1 Brock. 203, Fed.Cas.No.*

8411 (1811); *McKenna v. Fisk*, **1 How. (U.S.) 241**, 11 L.Ed. 117 (1843); *Dodge v. Colby*, 108 N.Y. 445 (1888); *Brereton v. Canadian Pac. By. Co.*, 29 Ont. ~7 (1898); *Montesano Lumber Co. v. Portland Iron Works*, **78 Ore. 53, 152 Ore. 244** (1915).

**action for obstructing a highway, is Local.** In some states, however, Trespass may be maintained for injury

to land located in a foreign jurisdiction.<sup>14</sup> Thus, in New York, an express statutory enactment “**authorized** Actions for Trespass to realty lying outside the State, and this Statute was subsequently construed in *Jacobus v. Colgate*.<sup>16</sup>

In the famous case of *Mostyn v. Fabrigas*,<sup>17</sup> Lord Mansfield, by way of dictum, took the view that Actions in Personam, including such actions as Trespass to the land, should be declared Transitory and not Local. The same view had been expressed by the same Judge in two earlier cases at Nisi Prius, but they were subsequently repudiated in *Shelling v. Farmer*<sup>15</sup> and *Doulson v. Matthews*.<sup>19</sup>

However this may be, where the Action is admittedly Local, 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 properly describing the subject matter of the action. The reason of the rule as to all Local Actions is that, as no Court has Jurisdiction over

14. *Little v. C. S. P. M. & O. By. Co.*, 65 Minn. 48, 67 N.W. 846 (1896); *Holmes v. Barclay*, 4 La. Ann. 63 (1849).

15. Section 982a of the New York Code of Civil Procedure, adopted as Section 536 of the New York Real Property Law, provides: “An action may be maintained in the Courts of this State to recover damages for injuries to real estate situate without the state, or for Breach of Contracts or of Cove’ nants relating thereto, whenever **such an action could be maintained in relation to personal property** without the state. The action must be tried in the county In which the parties or some one thereof reside, or If no party resides within the state, In any county.”

16. 217 N.Y. 235, 111 N.E. 837 (1916). Cf. *Ellenwood v. Marietta Chair Co.*, 158 U.S. 105, 15 S.Ct. 771, 39 L.Ed. 913 (1895).

17. *Mostyn v. Fabrigas*, Cowp. Rcp. 181, 98 Eng. Bep.

1021 (1774).

18. 1 Str. 646, 03 Eng. Rep. 756 (1725).

19. 4 T.R. 503, 100 Eng. Rep. 1143 (1792).

#### LOCAL AND TRANSITORY ACTIONS

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.<sup>20</sup>

20. *Mostyn v. Fabrigas*, Cowp. 161, 176, 98 Eng. Rep. 1021 (1774); *Doulson v. Matthews*, 4 TB. 503, 100 Eng. Rep. 1143 (1792); *Thomson v. Locke*, 60 Tex. 383, 1 SW. 112 (1886); *St. Louis A. & P. Ry. Co. v. Whitney*, 77 Tex. 126, 13 SW. 853 (1890).

And, as to the difference between Local and Transitory Actions, see *Mason v. Warner*, 31 Mo. 508 (1862); *Ellenwood v. Cheeseman, S. Serg. & B.* (Pa.)

503 (1817).

The following Actions are Local, and within this rule:

Ejectment, *Doulson v. Matthews*, 4 T.R. 503, 100 Eng. Rep. 1143 (1792); Trespass or Trespass on the Case for injuries to real property, as for Trespass to Realty, Nuisance, Waste, etc., *Warren v. Webb*, 1 Taunt. 379, 127 Eng. Rep. 880 (1808); *Jefferies v. Duncombe*, 11 East 226, 103 Eng. Bep. 991 (1800); *Graves v. McKeon*, 2 Denio (N.Y.) 639 (1846); *Brisbane v. Pennsylvania B. Co.*, 205 N.Y. 431, 08 N.E. 752, 44 L.R.A. (N.S.) 279, Ann. Cas. 1913E, 593 (1916). Cf. Comment: Itight to Sue in a Foreign Jurisdiction for an Injury to Real Estate, 5 Minn. Ljtev. 63 (1920). And see, also, *Roach v. Damron*, 2 Humph. (Teun.) 425 (1841); *Putnam v. Bond*, 102 Mass. 370 (1869); *Sumner v. Finegan*, 15 Mass. 284 (1818); *Arizona Commercial Mining Co. v. Iron Cap Copper Co.*, 236 Mass. 185, 128 N.E. 4 (1920); unless in these cases there was some contract between the parties on which the action is grounded. *Warren v. Webb*, 1 Taunt, 379, 127 Eng. Rep. 880 (1808).

In an Action of Debt on a Judgment of a Court of Record, the Venue must be laid in the county where the Record is located. *I Chitty*, on Pleading, c. IV, Of the Declaration, 281 (Philadelphia 1819); *Barnes v. Kenyon*, 2 Johns. Cas. (N.Y.) 381 (1801); *Smith v. Clark*, 1 Ark. 63 (1838); but this is not the general rule under the Codes.

At Common Law Replevin was purely a Local Action, as Non Cepit denied the taking at the place mentioned in the Declaration, to wit, on the land of the tenant, but the Action has been made Transitory by Statute In some states.

Trespass to Realty is Local, not Transitory, and cannot be brought in another state than where the land is situated, unless authorized by Statute. *Taylor v. Sommers Bros. Match Co.*, 204 Pac. 472 (Idaho, 1922).

See, also, Note: Right to Sue in a Foreign Jurisdiction for an Injury to Real Estate, 5 Minn. L. Rev. 03 (1920); Recent Cases: Actions—Local or Transitory—Courts—Jurisdiction—Negligence—Right to Sue In a Foreign Jurisdiction for Injury to Real Estate, 6 Minn. L. Rev. 516 (1922); Nature of Ac-

Generally speaking, all actions which are called “personal,” whether they sound in Tort,<sup>21</sup> or Contract,<sup>22</sup> 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.<sup>23</sup>

In some cases the Venue must be laid truly; in others this is not necessary, but

tions—local and Transitory, 16 Ill.L.Rev. 456 (1921); *Huntington v. Altrill*, 146 U.S. 657, 13 8Cr. 224, 36 Led. 1123 (1892).

21. *Mostyn v. Fabrigas*, Cowp. 161, 05 Eng.Rep. 102] (1774); *Jefferies v. Duncomhc*, 11 East 220, 103 Lug. Rep. 991 (1800); *Smith v. Butler*, 1 Daly (N.Y.) SOS (1865); *Gardner v. Thomas*, 14 Johns. (N.Y.) 134, 7 AnLDec. 445 (1817); *Shaver v. White*, C Munf. (Va.) 112, 8 Am.Dec. 730 (1818); *Watts v. Thomas*, 2 liihh (Ky.) 458 (1811); *Smith v. Bull*, 17 Wend. (N.Y.)

323 (1837).

22. As in Account, Assumpsit and Covenant I,etwcn the original parties to the deed, and generally in Debt and Detinuc. In actions upon lences 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 the action 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 (1833); *Clarkson v. Gifford*, 1 Caines (N.Y.) 5 (1803). Cf. *New York Corporation v. Dawson*, 2 Johns.Cas, 335 (1801).

Trespass or injury to land is a Local Action. *Hill v. Nelson*, 70 N.J.L. 376, 57 Atl. 411 (1004); *British South Africa Co. v. Companbia de Mocambique*, [1893] AC, 602, 633; 1 Chitty, on Pleading, e. IV’, Of the Declaration 279~ (Springfield, 1876); Gould, A Treatise on the Principles of Pleading, c. I, The Major Requisites of Plending, 271 (6th ed. by Will, Albany, 1000); 3 Street, Foundations of Legal Liability, c. VIII, Natural History of Remedial Law 90~ 94 (Northport, 1000); Note: Right to Sue in a Foreign Jurisdiction for Injury to Real Estate, 5 Minn. L.Rev. 63 (1920).

23. See *Hale v. Lawrence*, 21 N.J.L. 714, 47 Am.Dec. 190 (1848); *McDuffee v. Portland & R. H. B.*, 52 N. H. 430, 13 Am.Rep, 72 (1873); *Read v. Walker*, 52 Ill. 333 (1809); *Brady v. Brady*, 161 N.C. 324, 77 sE. 235, 4-4 L.R.A. (N.S.) 279 (1912); *Crook v. Pitcher*, 61 Md. 510 (1884).

## Sec. 29 105

106

### THE DECLARATION—PLACE, TIME, TITLE

Ch. 5

i  
p.

**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. And in this connection two situations will be considered:**

(1) Where the facts are of a Transitory character, that is, not associated with any partkular locality, the facts may be stated as having occurred at one place and proved as occurring at any other. In other words the Venue does not have to be stated truly, as was the case where the jurors were selected because of their own peculiar knowledge of the facts in issue. In practice, however, **it was always the better part of wisdom to Jay the Venue truly.** But a Variance in respect to a Transitory Fact, unless it involved a matter of *description*,<sup>24</sup> would not prove fatal. Thus, if A alleged that B assaulted him at a certain place, he *might* support his Allegation by Proof that the assault took place at any other place. And the defendant, in his Plea, was ordinarily **required to follow the Venue** of the Declaration and could not specify another place for his Defense, even if that other place accorded with the truth.<sup>25</sup> But when the Defense depended for its validity upon its locality, and the place where it arose was not in accord with the place laid in the Declaration, the defendant might state the actual place, where he could justify by way of a plea of special traverse.<sup>26</sup>

(2) Where the cause of action was of a local nature, that is, where it concerned land, an action could not be supported *in a jurisdiction* which did not include the subject matter—the land. Thus, for example, if A **brought an Action of Ejectment in county X**

24. Robert v. Ramage, 6 Mod. 228, 87 Eng.Rep. 979 (1704).

25. Wright v. Ramseot, 1 Saund. 84, 85 Eng.Rep. 93 (1667); Bldgwater v. Bythway, 3 Lev. 113, 83 Eng. Itep. 604 (1083).

SI. Peacock v. Peacock, Cro,Eliz. 705, 79 Eng.Rep. 040 (1599).

against *B* for land described as located in county F, the action *would* fail; in other words the defect would be available on Demurrer to the Declaration. And if the land were untruly described as being in county X, when the fact appeared in Proof at the Trial that the land was located in another county, the action would *be* dismissed. And the same was true where the action was brought for a trespass upon land which was in fact located in a foreign state.<sup>2~</sup>

### *Laying the Venue Under a Vidilicet*

Since place was not material in Transitory Actions, and the Venue could be laid in any county, even though the cause of action arose within a foreign jurisdiction, a remedy was 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, anti even where relating to land.<sup>2~</sup> When the Cause of Action and the Action itself were thus Transitory in their character, the plaintiff, in laying the Venue, was permitted to depart as widely from the fact as he thought fit and as was necessary to give the court in which he sued jurisdiction, without causing a discrepancy between the Allegations in the Declaration and the proof at the trial. The usual way of accomplishing this was by stating truly the facts constituting the cause of action as occurring at the place where it really happened, and then laying the Venue under a *videlicet*, as within the jurisdiction of the court; thus it might be alleged that the deed was dated “at Fort St. George in the East Indies, to wit, at Westminster in the County of Middlesex,”<sup>29</sup> or that the

27. Ellenwood v. Marietta Choir Co., 158 U.S. 105, 39 L.Ed. 913 (1895).

28. flenscood v. Cheeseman, S Serg. & II. (Pa.) 500 (1817). Cf. University of Vermont v. Joslyn, 21 Vt. 52 (1848).

29. Mostyn y. Fabrigas, Cowp. 161, 98 Eng.Rep. 1021 (1774).

### Sec. 31

### MISTAKE OR OMISSION

107

trespass was committed in “Allegheny County in Maryland, to wit (*scilicet*) in the county of Washington in the District of Columbia.” This fictitious device was still in use in England in the early part of the Nineteenth Century, and was used in the United States as late as 189S.~° But, according to Keigwin,<sup>3</sup> it “is now used only by exceptionally careful pleaders.”

### LOCAL FACTS—VENUE IN PLEADINGS SUBSEQUENT TO TEE DECLARATION

30. Local Facts must always be truly laid, both in the Declaration and Subsequent Pleadings, whether the Action be Local or Transitory. And in Transitory Actions, where the defendant pleads Transitory matters, the Venue must follow the Declaration, unless his Defense requfres 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 ailege 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.<sup>32</sup> 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; for, 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

30. Holder v. Aultman, 169 U.s. 81, 18 S.Ct. 269, 42 LEd. 669 (1898).

31. Keigwth, Cases in Common Law PiSding, e. XVII, Local and Transitory Actions 748 (2d ed., Rochester, 1934).

32. 5 Comyn's Digest, 'Pleader' E, 4 (Dublin, 1793).

**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 Declaration would be obviated by this rule, and it has been so held; ~ but in practice it is still usual to lay a Venue in these as well as in the Declaration, and, in point of form, is the proper course.

## CONSEQUENCES OF MISTAKE

### OR OMISSION

31. A mistake or **omission** in laying the **Venue may be taken advantage of—**

(I) By Demurrer, where the defect is **apparent on the Face of the Declaration**

(II) By Plea in Bar or Motion for Non-suit, 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,<sup>34</sup> and its omission, when necessary, an incurable defect,<sup>35</sup> 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; ~ 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.<sup>36</sup> 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 prop-

33. See Ilderton v. Ilderton, 2 11111. 145, 1213 Eug.Itep.

476 (1703), per Lyre, C.J.

34. Sandler v. Heard, 2 Will. 1031, 96 Eng.Rep.

605; Bruckshaw v. Hopkins, Cowp. 4013, 95 Eng. Rep. 1157 (1776).

35. 3 Comyn's Digest, 'Action' N, 6 (Dublin, 1793); .

7 Bacon's Abridgment, "Venue" 48 (London 1798).

36. Domont v. Lockwood, 7 Blackf. Clod.) 676 (1845).

37. See Haskefl v. Inhabitants of Woolwich 58 Me.

535 (1870).

**108**

## THE DECLARATION—PLACE, TIME, TITLE

### Ch. 5

*er* Venue should have been laid,<sup>33</sup> or by a **Judgment by Default**,<sup>39</sup> or by **verdict**; ~ but even in Transitory Actions, as it is necessary that some Venue be laid, the omission remains fatal on Demurrer.

### TIME<sup>41</sup>

32. **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 the necessity of laying a time, like that of laying a Venue, extends to every Traversable Fact and must be stated as having taken place on some particular day.<sup>42</sup> The rule seems on the surface 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.<sup>43</sup> It has been laid



38. Anonymous, 3 Salk. 381, 91 Eng.Rep. 885 (1705). And see Mellor v. Barber, 3 TB. 387, 100 Eng.Rep. 635 (1780).

39. Remington v. Taylor, 1 Lut. 235, 125 Eng.Rep.

123, (1701).

<sup>41</sup>By the express provisions of the Statute of 16 & 17 Car. II, e. 5 (1664—1665).

43. See Perry, Common-Law Pleading, e. XII, Of The Rules Which Tend to Produce Certainty or Particularity in the Issue, 334, 335 (Boston, 1897).

42. 5 Comyn's Digest, "Pleader" C. 19 (Dublin, 1793):

Halsey v. Carpenter, Cro.Jac. 359, 79 Eng.Lep. 308 (1615); Denison v. Richardson, 14 East 291, 104 Eng.Rep. 612 (1811); Ring v. Roxbrough, 2 Tn. 468 ~7832; Andrews v. Thayer, 40 Conn. 157 (1873); Wellington v. Milliken, 82 Me. 58, 19 Atl. 90 (1889); Cordon v. Journal Publishing Co., 81 -Vt. 237, 69 A-tl. 742 (1908).

43. Swift v. Crocker, 21 Pick. (Mass.) 241 (1838); Maynard v. Talcott, 11 Barb. (N.Y.) 569 (1852); Cheetbam v. Lewis, 3 Johns. (Nt) 42 (1808); Lan-

down as a general principle, that whenever it is necessary to lay a Venue, it is also necessary to mention time.<sup>44</sup>

WI-IEN TIME MUST BE TRULY STATED

33. **Whenever time forms a material point involving the merits of the case, it is of the substance of the issue, and hence must be correctly alleged.**

WI-IEN 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 the Proof.<sup>43</sup> Thus, where the Declaration stated a usurious contract made on December 21, 1774, with payment due on December 23, 1776, and the proof was that the contract was executed on December 23, 1774, with payment due in two years, it was held that the Verdict must be for the defendant; the principle of this decision was that since the time given for the payment being of the substance of an usuriger v. Parish, 8 Serg. & B. (Pa.) 134 (1822), and cases cited.

It is equally essential 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. Bemis v. Faxon, 4 Mass. 263 (1808); Waring v. Yates, 10 Johns. (N.Y.) 119 (1813); Bronson v. Earl, 17 Johns. (N.Y.) 63 (1819).

But, in some states, the service of the Writ is regarded as the Commencement of the Action. Jeneks v. Phelps, 4 Conn. 149 (1822); Downer v. Garland, 21 Vt. 362 (1840); Graves v. Ticknor, 6 N.H. 537 (1834).

44. ICing v. Hollond, 5 T.R. 620, 101 Eng.Bep. 346

(1794); Denison v. Richardson, 14 East 291, 104 Eng.Rep. 612 (1811). See, also, Pharr v. Bachelor, 3 Ala. 236 (1831); Opdyke v. Easton & A. B. Go., 68 N.J.L. 12, 52 Atl. 243 (1002); 1 Chitty, Pleading, c. IV, Of the Declaration 272 (springfield, 1876).

45. Pope v. Foster, 4 TB. 590, 100 Eng.Rep. 1192

(1792); Carlisle v. Trears, 2 Cowp. 671, 98 Eng.Rep. 1300 (1777); Stafford v. Forcer, 10 Mod. 311, 88 Eng. Rep. 742 (1715); Tate v. Wellings, 3 T.R. 531, 100 Eng.Rep. 1158 (1792); Hardy v. Cathcart, 5 Taunt. 2, 128 Eng.Llep. 585 (1813).

On the rule where the instrument sued upon has no date, see Grannis v. Clark, S Cow. (N.Y.) 36 (1827); Streeter v. Streeter, 43 Ill. 155 (1867).

Sec. 34

#### WHEN TIME NEED NOT BE TRULY STATED

109

ous contract, such time had to be proved as laid.<sup>46</sup>

So, where the Declaration alleged an 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 until the 16th, the plaintiff was Nonsuited, it being held by Lord Mansfield at the Trial, and afterwards by the Court *en banc*, that the day from whence the forbearance took place was material, though laid under a *Videlicet*.<sup>47</sup>

In pleading any written document, therefore, such a bill of exchange, promissory note, a record or a specialty, the

day on which it is alleged to bear date, must be correctly alleged. Otherwise there will be a Variance between the writing itself when offered in evidence and the description of it in the pleading.<sup>43</sup>

The same rule applies whenever the time stated in the pleadings on either side is to be proved by Record or by a written instrument referred to in the pleadings. This 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 having been one of the objects of the rule as to certainty, so far as the Declaration was concerned, that the Judgment rendered in the case should operate as a bar to any subsequent action involving the same cause.

#### WHEN TIME NEED NOT BE TRULY STATED

34. Whenever the time to be alleged does not **constitute a** material point in the case, and is **not** of the substance of the issue or matter of

46. Carlisle v. Trears, 2 Cowp. 671, 98 Eng.Rep. 1300 (1777).

47. Johnson v. Picket, cited in Grimwood v. Barret, 6 LB. 463, 101 Eng.Rep. 650 (1795).

48. Little v. Blunt, 16 Pick, 365 (Mass., 1835); Rowland v. Davis, 40 Mich. 545 (1870).

**description, any time may be assigned to a given fact.**

On 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.<sup>49</sup> The reason of the rule is that as a *thy* 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,<sup>50</sup> or a parol contract made,<sup>51</sup> on a particular day, the plaintiff is in neither case confined in his Proof to the day as laid,

49. English: Mathews v. Spicer, 2 Str. 506, 93 Eng. Rep. 861 (1729); Stafford v. Forcer, 10 Mod. 311, 88 Eng.Rep. 742 (1715); Illinois: Searing v. Butler, 69 Ill. 575 (1873); Maryland: Spencer v. Trafford, 42 Md. 1 (1875); Michigan: Rowland v. Davis, 40 Mich, 545 (1879); Mississippi: Hill v. Robeson, 2 Sin. & M, (Miss.) 541 (1844); New Hampshire: National Lancers v. Levering, 30 N.H. 511 (1855); Pennsylvania: Stout v. Rassel, 2 Yeates (Pa.) 334 (1798); Vermont: Kidder v. Bacon, 74 Vt. 263, 52 A.U. 322 (1902); Gordon v. Journal Publishing Co., 51 Vt. 237, 69 Atl. 742 (1908).

The words or phrase, "on or about" has been construed as taking away all certainty, then leaving the time indefinite.

The pleader, however, "is subject to certain restrictions: 1, He should lay the Time under a *videlicet*, if he does not wish to be held to prove it strictly;

2. He should not lay a Time that is intrinsically Impossible, or inconsistent with the fact to which It relates." Stephen, A Treatise on the Principles of Pleading in Civil Actions, c. XI, Of the Principal Rules of Pleading, § IV, Rule II, 279 (3d Am. ed. by Tyler, Washington, D. C. 1893).

50. Time is not material in trespass. Co.Litt. 283a (Philadelphia, 1812). And see, also, Pierce v. Pick-ens, 16 Mass. 472 (1520); Folger v. Fields, 12 Gush. (Mass.) 93 (1853).

51. The Lady of Shandois v. Simson, Cro.Ellz. 880, 78 Eng.Rep. 1104 (1602).

110

#### THE DECLARATION—PLACE. TIME, TITLE

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.<sup>52</sup> As the plaintiff is not generally confined in

evidence to the time stated in the Declaration, so the defendant is not restricted to that laid in the Plea; and so on through the Subsequent Pleadings. Obviously, 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. However, there is no ground for demurrer if the time is unnecessarily laid as a Fact not Traversable, for an unnecessary statement of time, though impossible or inconsistent, will do no harm.

#### *Time to be alleged in the Plea*

WHERE time is not material to the Defense, and the matter of Complaint and Defense, from the nature of the case, must have occurred at one and the same time, the defendant in pleading 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

s2. English: Ring v. Roxbrough, 2 Tyr. 468 (1532);  
Cf. International & O. N. B. Co. v. Pape, 73 Tex. 501,  
11 SW. 526 (1889); Holmes v. Newlands, 3 Perry  
& D. 128; Maine: Wellington v. Milliken, 82 Me.  
58, 19 MI. 90 (1889).

As to the statement of time under Code Pleading, see Backus v. Clark, 1 Kan. 303, 83 Am. Dec. 437 (1863). The rule still applies, and Time, when material, must be strictly laid and proved.

#### Ch. S

his Defense on a different day from that mentioned in the Declaration. The rule applies, however, only when time is immaterial, and therefore, if the Defense is such as to render it necessary that the true time be stated in the Plea, the Law allows the defendant to vary from the time mentioned in the Declaration. In all such cases the formal objection arising from the apparent discrepancy in time between the Declaration and the Plea yields to the more important principle that each party must be permitted to frame his Allegations according to the exigencies of his case. The principle is the same as laying the true Venue by the defendant in Transitory Actions when the nature of his defense requires it.

Again, the defendant is never required to follow the time named in the Declaration in pleading Matter of Discharge, whether it be material or not, since all Matter of Discharge must, from its nature, have 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.

#### TIME OF CONTINUING ACTS

35. When there is occasion to allege a continuing 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 day or the time of the commencement of the suit, and the plain-

Sec. 36

#### DESCRIPTION OF PROPERTY

111

tiff will be allowed to offer evidence only in proof of acts committed during the whole or some part of the period covered.<sup>53</sup>

## DESCRIPTION OF PROPERTY

36. When the Declaration alleges an injury to goods or chattels, or a contract relating to them, their quantity, quality and value or price should be stated; and in actions for the recovery of, or for injuries to, real property, quantity and quality should be shown.

It is, in general, necessary, where the Declaration alleges any injury to goods and chattels, or any contract relating to them, that their quality, quantity, and value or price should be stated. And in any action brought for recovery of real property, its quality should be shown, as whether it consists of houses, lands, or other hereditaments; and in general it should be stated whether the lands be meadow, pasture, or arable, etc. And the quantity of the lands or other real estate must also be specified. So, in an action brought for injuries to real property, the quality should be shown, as whether it consists of houses, lands, or other hereditaments. 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

-3. Johnson v. Long, 5 Ld. Raym. 260, 92  
676; Monkton v. Pashley, 2 Salk. 638,  
Rep. 539; Earl of Manchester v. Vale,  
24, n. 1, 85 Eng. Rep. 25.

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.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup> So, in Ejectment, the plaintiff declared for five closes of land, arable and pasture, called “Long Furlongs,” containing ten acres. Upon “Not Guilty” pleaded, the plaintiff had a Verdict, and it was moved in Arrest of Judgment that the Declaration was ill, because the quantity and quality of the lands were not distinguished and ascertained, so as to show how many acres of arable there were and how many of pasture. And for this reason the Declaration was held ill, and the Judgment Arrested.<sup>40</sup>

55. Playter's Case, 5 Co. 34b, 77 Eng. Rep. 105.

56. Dale v. Phillipson, 2 Lut. 1374, 125 Eng. Rep. 758.

57. Bertie v. Pickering, 4 Bur. 2455, 105 Eng. Rep. 287 (1769); Wiatt v. Essington, 2 Ld. Raym. 1430, 102 Eng. Rep. 418 (1701).

58. Pope v. Tillman, 7 Taunt. 642, 129 Eng. Rep. 256 (1817).

59. Lawly v. Gattacre, Cro. Jac. 498, 79 Eng. Rep. 425.

Eng. Rep.  
91 Fog.  
1 Saund.

Stephen, A Treatise on the Principles of Pleading in Civil Actions, e. II, of the Principal Rules of Pleading, Rule III, 281 (3d Am. ed. by Tyler, Washington, D. C. 1893); Bracton, Roman Law, 431a (London, 1640); flarpur's Case, 11 Co. 25b, 77 Eng. Rep. 1176; Knight v. Symms, Carth. 204, 90 Eng. Rep. 722; Doe ex dem. Bradshaw v. Plowman, 1 East 441, 102 Eng. Rep. 171 (1501); Coodtite ex dem. Wright v. Otway, 5 East 357, 103 Eng. Rep. 370 (1806); Andrews v. Whitehead, 13 East 102, 104 Eng. Rep. 306 (1810); Haneocke v. Prowd, 1 Saund. 333, n. 7, 85 Eng. Rep. 479; Taylor v. Wells, 2 Saund. 74, n. 1, 85 Eng. Rep. 74 & GO. Knight v. Symms, Carth. 204, 90 Eng. Rep. 722.

112

## THE DECLARATION—PLACE, TIME, TITLE

Ch. 5

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.<sup>61</sup> 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<sup>62</sup> 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.<sup>63</sup> The degree of certainty requisite in stating matters of the kind mentioned seems to be such as the facts in

61. Hesketh v. Lee et al., 2 Saund. 94b, n. 1, 85 Eng. Rep. 706.

62 Layton v. Grindall, 2 Salk. 643, 91 Eng.Rep. 542.

63. Chamberlain v. Greenfield, 3 Wils. 292, 95 Eng. Rep. 1061 (1772).

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,<sup>64</sup> and minuteness of description being required where a complete identification might be essential to a recovery.<sup>65</sup>

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.<sup>65</sup> 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 £10 4s., and other sums, the defendant pleaded, as to all but £4 *is.* 6d., the General Issue, and, as to the £4 7s. 6d., a tender. The plaintiff replied that, after the cause of action accrued, and before the tender, the plaintiff demanded the said sum of £4 7s. 6d., which the defendant refused to pay; and on issue joined it was proved that the plaintiff had demanded not £4 7s. 6d., but the whole £10 4s. This proof was held not to support the is-

64. English: Layton v. Griadall, 2 Salk. 643, 91 Eng.

Rep. 54j; Cryps v. Baynton, 3 Bulst. 31, 81 Eng.

Rep. 26; Shum v. Farrington, 1 Bog. & P. 640, 126

Eng.Rep. 1108 (1797).

And, as to the description of property, in the different actions, see: Alabama; Haynes v. Crutchfield, 7 Ala. 189 (1544); New Hampshire: Smith v. Boston, C. & hi. It. It., 36 N.H. 458 (1858); New York: Hughes v. Smith, 5 Johns. (N.Y.) 173 (1800).

65. Dale v. Phillipson, 2 Lut. 440, 125 Eng.Eep. 758;

Bertie v. Pickering, 4 Burr. 2455, 98 Eng.Rep. 287

(1769); Pope v. Tillman, 7 Taunt, 642, 129 Eng.Rep.

256 (1817).

66. Orispin v. Williamson, S Taunt. 107, 129 Eng.Rep.

323 (1517). And see, also, Rubery v. StevenS, 4 Barn. & Adol. 241, 110 Eng.Rep. 448 (1532).

Sec. 37

## NAMES OF PERSONS

113

sue.<sup>67</sup> 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.<sup>62</sup> 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.<sup>69</sup>

## NAMES OF PERSONS

37. The pleadings must specify the names of persons. This rule includes the names of persons necessarily mentioned in the pleadings, although they are not parties to the suit, and their names must be correctly stated; it also includes parties to the action.

### *Persons Other than Parties*

TIITS 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.”

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.

67. Rivers v. Griffiths, 5 Eam. & Ald. 630, 106 Eng. Rep. 1321 (1822).

68. Foster v. Pennington, 32 Me. 178 (1850).

69. Knight v. Symms, Carth. 204, 90 Eng. Rep. 722.

70. English: Harvey v. Stokes, Willes 5, 125 Eng. Rep. 1026 (1737); Acerro v. Petrone, 1 Starkie 200, 171 Eng. Rep. 414 (1815); Mayclstone v. Lord Palmorston, hi. & hi. 6, 173 Eng. Rep. 1061 (1826); Pinch v. Cocken, 2 C.M. & B. 197, 150 Eng. Rep. 85 (1835); Illinois: Becker v. German Mut. Fire Ins. Co. of North Chicago, 68 Ill. 412 (1873); New Jersey: Elberson v. Richards, 42 N.J.L. 09 (1880). Cf. Forman v. Jacobs, 1 Starkie, 46, 171 Eng. Rep. 307 (1815).

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.<sup>7</sup> 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.<sup>2</sup> 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.<sup>3</sup> Where the name of a person is misspelled, this will not constitute a Variance, nor a Misnomer, if the name as given and the name as proved are *idem sonans*,<sup>51</sup> Whether names are *idem sonans* or

71. Connecticut: Tweedy v. Janis, 27 Cone. 42 (1858); Minnesota: Kenyon v. Semen, 43 Minn. 10, 45 N.W. 10 (1890); Montana: Kemp v. McCormick, 1 Mont. 420 (1872); Pennsylvania: In re Jones' Estate, 27 Pa. 336 (1856); South Carolina: City Council of Charleston v. King, 4 McCord (S.C.) 487 (1828).

72. Commissioner v. Perkins, 1 Pick. (Mass.) 388 (1823); Commissioner v. Shoarman, 11 Cush. (Mass.) 546 (1853); Parker v. Parker, 146 Mass. 320, 15 N.E.

902 (1888).

-3. English: Ahithol v. Beniditto, 2 Taunt. 401, 127 Eng. Rep. 1133 (1811); Williams v. Ogle, 2 Str. 889, 93 Eng. Rep. 919; Illinois: Thompson v. Lee, 21 Ill. 242 (1850); Ersicino v. Davis, 25 Ill. 251 (1861); Illetch v. Johnson, 40 Ill. 116 (1864); New Hampshire: Wood v. Fletcher, 3 N.H. 61 (1824); Hart v. Lindsey, 17 N.H. 235, 43 AmPec. 597 (1845); New Jersey: Dilts v. Kinney, 15 N.J.L. 130 (1835); New York: Franklin v. Talmadge, 5 Johns. (N.Y.) 84 (1809); Roosevelt v. Gardinier, 2 Cow. (N.Y.) 463 (1824); Pennsylvania: Bratton v. Seymour, 4 Watts (Pa.) 329 (1835); Vermont: Thaaacs v. Wiley, 12 Vt. 674 (1839); Allen v. Taylor, 26 Vt. 599 (1854); Texas: McKay v. Speak, 5 Ter. 376 (1876); Federal:

Keene v. Ijeade, 3 Pet. 1, 7 L.Ed. 581 (1828).

-t The following names have been held Idem sonans: "Segrave" for "Seagrav," Williams v. Ogle,

THE DECLARATION—PLACE, TIME, TITLE

114

not depends, of course, on the pronunciation. The worth "junior," "senior," etc., are no part of the name, and need not be stated, nor, if stated, proved.<sup>75</sup>

PARTIES TO THE ACTION

38. 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.

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.<sup>76</sup> An error in this respect,

supra; "Benedetto" for "Beneditto," Ahitbol v. Benneditto, supra; "tisrey" for "Usury," Gresham v. Walker, 10 Ala. 370 (1846); "Petris" for "Petrie," Petrie v. Woodworth, 3 Caines (N.Y.) 219 (1805).

The following names have been held not to be idem sonans: "Tarbart" for "Tabart," Bingham v. Diekie, 5 Taunt. 814, 128 Eng.Rep. 913 (1814);<sup>4</sup> "Comyns" for "Cummins," Cruikshank v. Comyns, 24 Ill. 602 (1860). For further illustrations, see Clark, Criminal Procedure, c. X, Pleading and Proof—Variance  
—Conviction of Minor Offense, 341 (St. Paul, 1895).

78. Connecticut: *IdE Rentland v. Somers*, 2 Root (Conn.) 437 (1796); Illinois: *Hendley v. Shnw*, 39 Ill. 354 (1866); Massachusetts: *Kincaid v. I-lowe*, 10 Mass. 203 (1813); *Cobb v. Lucas*, 15 Pick. (Mass.) 7 (1833); New York: *Padgett v. Lawrence*, 10 Palge (N.Y.) 170, 40 Am.Dec. 232 (1843); Vermont: *Brainard v. Stilphin*, 6 Vt. 9, 27 Ani.Dec. 532 (1834); *Jameson v. Isaacs*, 12 Vt. 611 (1829); Clark, *Odm-that Procedure, in VI, Pleading—The Accusation* (Continued) 235 (St. Paul, 1895).

But, see, *State v. Vittum*, 9 N.H. 519 (1838); *Jackson ex 4cm. Pelt v. Prevost*, 2 Caines (N.Y.) 164 (1804).

76. Illinois: *Brent v. Shook*, 36 Ill. 125 (1864); New Hampshire: *Lebanon v. Griffin*, 45 N.H. 558 (1864); *flanders v. Stewartstown*, 47 N.H. 549 (1867); Ohio: *Herft Shulze*, 10 OhIo 263 (1840).

Ck5

however, can now generally be cured by amending the defective pleading. A liberal construction of the rule allows, as we have seen, the use of the names by which such parties are generally known," though not strictly correct, and though the designation thus habitually used includes the person's initials only.<sup>78</sup> 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.<sup>79</sup>

The effect of a mistake in the name of a person •not a party win, 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.<sup>80</sup>

### *Descriptive Words*

IF a person sues or is sued in a representative capacity, as receiver, executor, trustee, etc., while the representative character in which he appears may be gathered from

And the names of all parties should be disclosed. *Wolf v. Binder* (Pa.Com.Pl.) 10 Pa.Co.Ct.R. 108 (1907).

77. In re Jones Estate, 27 Pa. 336 (1856).

78. Connecticut: *Tweedy v. Jarvis*, 27 Conn. 42 (1858); Minnesota: *Kenyon v. Semon*, 43 Miss. 180, 45 NW. 10 (1890); Montana: *Kemp v. McCormick*, 1 Mont 420 (1872); South Carolina: *City Council of Charleston v. King*, 4 McCord (3.0.) 487 (1828).

79. *City of Lowell v. Morse*, 1 Mete. (Mass.) 473 (1840); *President, etc. of Commercial Bank v. French*, 21 Pick. (Mass.) 486, 32 Am.Dec. 280 (1839).

80. English: *Mayor & Burgesses of Stafford v. Bet-ton*, 1 Bos. & P. 40, 126 Eng.Rep. 766 (1797); Massachusetts: *Medway Cotton Manufactory v. Adams*, 10 Mass. 360 (1813); New York: *Reald v. Lord*, 4 Johns (N.Y.) 118 (1809).

Sec. 39

## SHOWING TITLE

115

the body of the pleadings,<sup>81</sup> 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.<sup>82</sup> It is not generally sufficient to state simply, "A.B., executor," without the use of the word, "as," since the omission will cause the word to be disregarded as merely descriptive, and the party will be treated as an individual only for the purpose of the particular action.<sup>83</sup> 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.<sup>84</sup> 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 mdi

81. *Knox v. Metropolitan Elev. By. Co.*, 58 Hun 517, 12 N.Y.Snpp. 848 (1890).

82. *Llenshall v. Roberts*, 5 East 150, 102 Eng.Rep. 1020 (1804); *Stillweff v. Carpenter*, 62 N.Y. 639 (1875); and cases hereafter cited.

83. English: *Henshall -v. Roberts*, 5 East 150, 102 Eng.flep. 1026 (1804); Alabama: *Castleberry v. Fennell*, 4 Ala. 642 (1843); Illinois: *Brent v. Shook*, 36 IU. 125 (1864); Massachusetts: *Buffum v. Chadwick*, S Mass. 103 (1811); New York: *Barley v. Roosa*, 59 Hun 617, 13 N.Y.Supp. 209 (1891); *Beers v. Shannon*, 73 N.Y. 292 (1878).

Where one sues, describing himself as executor, ii the justice of the ease requires It, the *Court wiU* consider it as merely descriptio personae. *George v. English*, 30 Ala. 582 (1857); *Higgins v. Halligan*, 46 Ill. 173 (1867); *Grew v. Burdett*, 9 Pick. (Mass.)

265 (1880).

84. *Bentley y. Smith*, 3 Calves (N.Y.) 170 (1805); *Brubaker v. Poage*, 1 T.B.Mon. (Ky.) 123 (1824).

*victual* members *where thefr* 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.<sup>5</sup>

#### SHOWING TITLE

39. The Pleadings must show Title, where it is material. More specifically:

(1) A person asserting any right to or authority over real or personal property must allege a Title to such property in himself *or in* some person from whom he derives his authority.

(*li*) 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.

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.<sup>80</sup> So, if a party be charged with any liability, in respect of property, personal

85. *Pollard v. Lock*, Cro.Eliz. 267, 75 Eng.Rep. 522 (1Th3). And see *Uildrith vi Harvey*, cited in *Given ‘cc Driggs*, 3 Calnes (N.Y.) 150 (1805).

88. 5 Comyn’s Digest, “Pleader,” C. 34, C. 36 (Dublin, 1793); *Braeton*, Roman Law, 372l–, 373b (London,

1640).

116

#### THE DECLARATION—PLACE, TIME, TITLE

Ch. 5

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.

#### TITLE IN THE PARTY OR IN ONE WHOSE AUTHORITY HE PLEADS

40. ‘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. To this rule there are two exceptions:

(I) 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.

(II) In some cases, where a Title of Possession is inapplicable, a general Freehold Title may be alleged in lieu of stating Title in its full and precise extent.

#### *Alleging Title of Possession*

IT is often sufficient to allege a Title of Possession only. The form of laying a Title of Possession, in respect of goods and chattels, is either to allege that they were the “goods and chattels of the plaintiff,” or that he was “lawfully possessed of them as of his own property.” With respect to corporeal hereditaments, the form is either to allege that the close, etc., was the “close of” the plaintiff, or that he was “lawfully possessed of a certain close,” etc. With respect to incorporeal hereditaments, a Title of Possession is generally laid by alleging that the plaintiff was possessed of the corporeal thing appurtenant to which is the right claimed, and by reason thereof was entitled to the right at the time in question; for example, that he “was possessed of a certain messuage,” etc., “and by reason thereof, during all the time aforesaid, of right ought to have had common of pasture,” etc.

A Title of Possession is applicable—that is, will be sufficiently sustained by the proof—in all cases where the interest is of a present and immediate kind. Thus, when a Title of Possession is alleged with respect to goods and chattels, the statement will be supported by proof of any kind of present interest in them, whether that interest be temporary and special, or absolute, in its nature; as, for example, whether it be that of a carrier or finder, only, or that of an owner and proprietor.<sup>7</sup> So, where a Title in Possession is alleged in respect to corporeal or incorporeal hereditaments, it will be sufficiently maintained by proving any kind of estate in possession, whether fee simple, fee tail, for life, for term of years, or otherwise. On the other hand, with respect to any kind of property, a Title of Possession would not be sustained in evidence by proof of an interest in remainder or reversion only; and therefore, when the interest is of that description, the preceding forms are inapplicable, and Title must be laid in remainder or reversion, according to the fact, and upon the 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,” or in

87. Wilbraham v. Snow, 2 Sound. 4Th, ii. 1, 85 Eng. Rep. 624; Clay v. City of St. Albans, 43 Wxa. 539, 27 S.E. 368, 04 Am.St.Rep. 883 (1897).

88. Comyn's Digest, "Pleader," C. 39, C. 41 (Dublin, 1798); Taylor v. Eastwood, 1 East 212, 102 Eng. Rep. 83 (1801); Grimstead v. Marlowe, 4 T.R. 717, 100 Eng.Rep. 1268 (1792); Greenhow v. Ilsley, Willes 619, 125 Eng.Rep. 1351 (1746); Waring v. Griffiths, 1 Burr. 440, 97 Eng.Bep. 391 (1758); Langford v. Webber, 3 Mod. 132, 87 Eng.Rep. 84; Carnaby v. Sec. 42

## PARTICULAR ESTATES

119

stance, in modern practice, of the Allegation of a Title of this character.

Under the head of "Allegation of Title," In its full and precise extent, we shall consider the statement of the Derivation of the Title, and then certain general rules as to the Allegation of the Titles themselves.

In general it is sufficient to state a seisin In fee simple *per se*; that is, simply to state, according to the usual form of alleging that Title, that the party was "seized in his demesne as of fee of and in a certain message," etc., without showing the derivation, or, as it is expressed in pleading, the commencement of the estate; <sup>98</sup> 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.<sup>99</sup>

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 altho. Scavnge v. Rnwkins, Cro.Car. 572, 79 Bog-Rep. 1091; Co.Litt. 303b (Philadelphia, 1812).

A general allegation of ownership is sufficient. Bragg v. City of Chicago, 73 Ill, 152 (1874); Bucki v. Cone, 25 Fia. 1. 6 So. 160 (1889).

39. Stephen, A Treatise on the Principles of Pleading in Civil Actions, e. II, Of the Principal Rules of Pleading, Rule V, 291 (3d Am. ed. by Tyler, WasIF ington, D. C. 1893), Doct.Pl. 287 (Dublin, 1791).

leged that his ancestor was seized in fee and made the lease, must proceed to show how the fee passed to himself, viz, by descent.<sup>1</sup> So, if in trespass, the defendant plead that *EJ~'*, being seised in fee, demised to G.M., under whose command the defendant Justifies the trespass on the land, Giving Color, and the plaintiff, in his Replication, admits *E.ff.'s* seisin, but sets up a Subsequent Title in himself to the same land, in fee simple, prior to the alleged demise, he must show the derivation of the fee from *FE'* to himself, by conveyance antecedent to the lease under which *OH*, claims.<sup>2</sup>

## ALLEGING DERIVATION OF TITLE— PARTICULAR ESTATES

42. In pleading a Particular Estate, its commencement must be shown, except 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.<sup>3</sup> 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

1. Stephen, A Treatise on the Principles of Pleading in Civil Actions, - II, Of the Principal Rules of Pleading, Rule V, 291 (3d Am. ed. by Tyler, Washington, O. C. 1893); 21 Eriey.Pl. & Prac. 728.
2. As to this exception, see *Cuthbertson v. Irving*, 4 hurl. & N. 742, 157 Eng.Rep. 1034 (1859).
3. *Co.Litt.* 303b (Philadelphia, 1812); *Scilly v. Dally*, 2 Salk. 562 91 Eng.Rep. 474; *Searl -c. Bunion*, 2 Mod. 70, 86 Eng.Rep. 947; *Johns v. Whitley*, 3 Wils. 72, 95 Eng.Rep. 939 (1770); *Hendy v. Ste. phenson*, 10 East. 00, 103 Eng.Rep. 698 (1808); *P3'-ster « Hemling*, *Cro.Jac.* 103, 79 Eng.Rep. 83; *Shepherd's Case*, *Cro.Car.* 190, 79 Eng.Rep. 767; *Robinson v. Smith*, 4 Mod. 346, 87 Eng.Rep. 435.

120

## THE DECLARATION—PLACE, TIME, TITLE

Cl. 5

and often is acquired by means consisting solely of matter of fact, a General Allegation of seisin in fee simple is Traversable; whereas particular estates, being always derived out of the fee simple, can regularly be created only by conveyance or by operation of law, and a General Allegation of such an estate is not Traversable, since it improperly blends law and fact. Hence, where title to particular estates is thus alleged, the time and manner of the derivation must be shown, in order that a Traverse may be taken upon any particular point in the Title.

To the rule that the Commencement of a Particular Estate must be shown there is this exception, namely, that it need not be shown where Title is alleged by way of Inducement only. Thus, in an Action of Debt or Covenant, brought on an indenture of lease by the executor or assignee of a lessor for a term of years, it is necessary, in the Declaration, to state the Title of the lessor in order to show the plaintiff's right to sue as assignee or executor; but, as the Title is thus alleged only by way of Inducement, the Particular Estate for years may be alleged in the lessor, without showing its commencement.<sup>4</sup>

## TITLE BY INHERITANCE

43. Where a party claims by inheritance, he must, in general, show how he is the heir; and if he claims by mediate, and not immediate, descent, he must show the pedigree.

THUS, in pleading his Title by inheritance, a party must in general show how he became the heir, that is, by showing the seisin and death of the ancestor, after whose decease the title descended to the plaintiff as son and heir; and if he claim by mediate descent

4. 5 *Comyn's Digest*, 'Pleader,' E. 19, C. 43 (Dublin 1793); *Blockley v. Slater*, 1 Lut. 120, 125 Eng.Rep. 63; *Sean v. Bunion*, 2 Mod. 70, 86 Eng.Rep. 947; *Scilly v. Daily*, 2 Salk. 562, 91 Eng.Rep. 474 (1607); *Skevill v. Avery*, *Cro.Car.* 138, 79 Eng.Rep. 721; *Lodge v. Frye*, *Croiac.* 52, 79 Eng.Rep. 43.

he must allege and prove the pedigree.~ Thus, in *Heard v. Baskerville*,<sup>o</sup> where the plaintiff brought Replevin, it was pleaded that the rent descended to a cousin and heir, etc., without showing how the cousin became heir, and the plaintiff Demurred Generally, thus raising an issue of law as to whether the failure to set down the matter of cousenage constituted a Defect of Substance, or of Form, such as by the Statute of Demurrers, 27 Eliz. c. 5, § 1

(1285), ought to be particularly set down, or else no advantage be taken of it. It was held that the descent, being mediate, should have been set forth, but that the failure to do so constituted a Defect in Form, and hence was waived by the General Demurrer, as provided by the Statute; the defect, in other words, would have been available upon Special Demurrer.

#### • TITLE BY ALIENATION OR CONVEYANCE

44. When a party claims title by conveyance or alienation, the nature of the conveyance or alienation must, in general, be stated.

WHERE a party relies upon title by conveyance or alienation, he must allege or set forth the nature of the conveyance or alienation in his pleading, as whether it be devise, feoffment, or some other form of transfer.<sup>7</sup>

#### MANNER OF PLEADING CONVEYANCE

45. The nature of the conveyance or alienation should be stated according to its Legal Effect, rather than its form of words.

THIS rule involves a specific application of the general rule that in suing upon written contracts or documents they are to be alleged or set forth according to their Legal Effect or Operation, and not *Verbatim*. As applied to~

..Dumsday -c', Hughes, 3 Bbs. & P. 453, 127 Eng.Rep. 246 (1803); Blackborough v. Davis, 12 Mod. 619, 88. Eng.Rep. 1560; Day v. Chlsm, 10 Wheat (U. S.) 449, 6 LEd. 363 (1825).

6. Nob. 232, 80 Eng.Rep. 378 (1614).

7. 5 Comyn's Digest, 'Pleader,' E. 23, E. 24 (Dublin 1793).

Sec. 46

#### STATUTE OF FRAUDS

121

the manner of pleading conveyances this doctrine means that in their pleading they must be alleged according to the extent of the Title which they actually pass. Thus, in pleading a conveyance for life, it must be alleged as a "demise" for life; or a conveyance in tail, with a livery of seizin, as a gift in tail; ° and a conveyance of the fee, with livery, is described by the term "enfeoffed." 10 And the form of pleading must still be the same, whatever might be the words of donation used in the instrument of conveyance, if the effect of the latter remains unchanged."

#### THE WRITTEN CONVEYANCE AND THE STATUTE OF FRAUDS

46. In pleading Title by Conveyance, if the nature of the conveyance is such that it would, at Common Law, be valid without a deed or other written instrument, then no deed or writing need be alleged in the pleading, even though such document may in fact exist. But where the nature of the conveyance requires, at Common Law, a deed or other written instrument, such instrument must be alleged. There are two exceptions to this rule:

(I) Where Title is pleaded under a written lease for years; and

(II) Where a Demise by husband and wife is pleaded.

#### *The Rule Where the Conveyance was Valid at Common Law*

AT Common Law, a conveyance in fee, in tall, 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, whether such instrument in fact accompanied the conveyance or not, as such a conveyance might,

s. Rastell's Entries, 647a, lid (London 1596).

S. Coke's Entries, tit. Formedon, &c. (London 1614).

10. With respect to livery and feofment It has been stated that 'without livery it is no feofment, gift, or demise'. *vyniar's Case*, S Co.Ep. Sib, 82b, 77 Eng.Rep. 597, 600 (1609).  
at Common Law, be made by parol only." And though, by the Statute of Frauds,<sup>3</sup> such a conveyance will not now be valid unless made in writing, the form of the pleading nevertheless remains the same as before the enactment of the Statute in 1676. The reason for this is that the Statute of Frauds merely introduces a new rule of evidence but does not alter or affect the rule of pleading.

### *The Rule Where the Conveyance was Only Authorized by Statute*

CONTRARY to the Common-Law Rule where the conveyance was valid even though by parol, where a devise of land was involved, which, at Common Law, was not valid, and which was authorized by the first Statute of Wills, in 1540,<sup>7</sup> and the second Statute of Wills in 1542,<sup>8</sup> it was required to be alleged to have been made in writing, as that was the only form in which the Statute authorized it to be made.<sup>9</sup> And so, if a conveyance by way of grant be pleaded, a deed must be alleged,<sup>17</sup> for matters that "lie in grant" can pass by deed only.<sup>18</sup>

### *Two Exceptions to the Common-Law Rule*

THE *first* exception to the rule that if the nature of a conveyance is such that it would,

12. The rule is the same as applied to ordinary contracts. Thus, in *Whitehead v. Burgess*, 61 N.J.L. 75, 38 Atl. 802 (1897), Van Syckel, J., declared: "Where an action is founded upon a contract which at Common Law is valid without writing, but which the Statute requires to be in writing, the Declaration need not Count upon or take notice of the writing. If an action is brought upon a promise to pay the debt of another, the Declaration need not aver that the promise is in writing, even if such be the fact."

See, also, *Elting v. Vanderlyn*, 4 Johns. (N.Y.) 237 (1809).

13. 20 Car. II, e. 3, 1 (1676).

14. 32 Hen. VIII, c. 1.

15. 34 Hen. VIII, e. 5.

16. 1 Saund. 276a, n. 2, 85 Eng.Rep. 336.

17. *Porter v. Gray*, Cro.EIJ.z. 245, 78 Eng.Rep. 500; *Lathbury v. Arnold*, 1 Sing. 217, 150 Eng.Rep. 88 (1823).

18. Co.Litt. Oa (Philadelphia, 1812).

19. Vin.Abr. tit. Grants ((La.).

122

## THE DECLARATION—PLACE, TIME, TITLE

Ch. 5

at Common Law, be valid without a deed or other written instrument, it need not be alleged in the pleading, is one which exists in practice, at least. Thus, in making title under a lease for years, by indenture, it is mis-ternary 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?<sup>9</sup>

The *second* exception involves a case in which it is not necessary to allege a deed, though the Common Law requires one. Thus, 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 could be by deed only.<sup>29</sup>

## WHERE A PARTY ALLEGES TITLE IN HIS ADVERSARY

47. 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 for the difference is that a party must be presumed to be ignorant of the particulars

19. See the example, 2 Chitty, on Pleading, c. Xi, 540 (5th ed., London, 1831).

so. *Wiseot's Case*, 2 Co. 61b, 76 Eng.Rep. 558 (1590);

*Turney v. Sturges*, 1 Dyer 91b, 73 Eng.Rep. 198;

*Bateman v. Allen*, Cro.Eliz. 435, 78 Eng.Rep. 678;

*ChiMes v. Wescot*, Cro.Eliz, 482, 78 Eng.Rep. 733.

of his adversary's Title, though he is bound to know his own.<sup>25</sup>

## WHAT IS A SUFFICIENT ALLEGATION OF LIABILITY

48. To show a liability in the party charged, it is generally sufficient to allege a Title of Possession.

AS in the case where a party pleads his own Title or that of another through whom he claims, and that Title need not be fully and precisely stated, it is also generally sufficient, where the opposite party is to be charged with liability, to allege merely a Title of Possession in such party. The same distinctions as to the nature of the interest or right, however, are still to be observed; and therefore, if the interest is by way of reversion or remainder, and cannot be sustained by proof of some present interest in chattels or the actual possession of land, this form of pleading Title is inapplicable. There are cases in which, to charge a party with mere possession, would not be sufficient to show his liability. Thus, in declaring against a person in Debt for Rent, as assignee of a term of years, it would not be sufficient to show that he was possessed, but it must be shown that he was 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,<sup>22</sup> 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

21. *Rider v. Smith*, 3 T.R. 760, 100 Eng.Bep. 847

(1790); *Derisley v. Custance*, 4 Plt. 77, 100 Eng.

Rep. 903 (1790); *Attorney General v. Meller*, 13adr.

459, 145 F[ng.Rep. 547 (1792). And see, also, *Blake v.*

*Foster*, S P.R. 487, 101 Eng.Rep. 1~05 (1399); *Den*

*ham v. Stephenson*, 1 Salk. 355, 91 Eng.Rep. 510

(1795).

22. 5 Cornyn's Digest, "Pleader," C. 42 (Dublin~ 1793).

Sec. 49

## PROOF OF TITLE AS ALLEGED

123

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.<sup>23</sup> 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.<sup>24</sup> 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

dayof \_\_\_\_\_, intheyear \_\_\_\_\_, at \_\_\_\_\_,

— all the estate and interest of the said E.F. [the original lessee] of and in the said demised premises, by assignment, came to and vested in the said C.D."; without further showing the nature of the mesne assignments.<sup>26</sup>

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 alleg

23. *Blake v. Foster*, S P.R. 487, 101 Eng. Itep. 1505 (1709).

24. *Attorney General v. Mefler, Bardr.* 459, 145 Eng. Rep. 347; *Duke of Newcastle v. Wright*, 1 Lev. 100, 83 Eng. Rep. 363 (1665); *Derisley v. Custanee*, 4 P.R. 77, 100 Eng. Rep. 903 (1790); *Cornyn's Digest* "Pleader" B. 23, E. 24 (Dublin, 1793); *Ce.Lltt.* 121a (Philadelphia, 1812); *Bristol v. Guyse*, 1 Saund. 112, n. 3, 85 Eng. Rep. 122,

25. *Bristol v. Guyse*, 1 Saund. 112, p. 1, 85 Eng. Rep. 322; *Attorney General v: Meller, Hardr.* 459, 143 Eng. Rep. 547.

ing, all the mesne assignments.~ 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,<sup>27</sup> but if a party entitle himself by inheritance, we have seen that the mode of descent must be alleged.

#### PROOF OF TITLE AS ALLEGED

49. 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, required 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 *ncm denzisit modo et forma*, it appeared in evidence that the plaintiff had demised to the defendant several tenements, of which the house in question \*as one; but that, with respect to this house, it was, by an exception in the

20. *BrIstol v. Guyse*, 1 Saund. 112, n. 1, 85 Eng. Rep. 122; *Pitt v. Russell*, 3 Lee. 19, 83 Eng. Rep. 555.

27. *Denbam v. Stephenson*, 1 Salk. 355, 91 Eng. Rep.

310 (1703).

124

#### THE DECLARATION—PLACE, TIME, TITLE

Cli. 5

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.<sup>28</sup>

#### ESTOPPEL OP ADVERSE PARTY

50. 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;

U. Ciudlip v. Bundle, Carth. 202, 90 Eng.Rep. 721. See, also, Bristow v. Wright, 2 Doug. 665, 99 Eng. Rep. 421 (1781). and, unless he was so, the plaintiff cannot claim as heir.<sup>29</sup>

#### SHOWING AS TO AUTHORITY

51. *In general, where a defendant justifies under a writ, warrant, precept, or other authority, it must be particular set forth in his pleading; and in such case he should also show that such authority had 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.<sup>30</sup> 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,<sup>31</sup> 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 re

29. Cuthbertson v. Irving, 4 Hurl. & tC. 742, 157 Eng. Rep. 1034 (1859); Smith v. Scott, 6 O.11. (ItS.) 771, 141 Eng.Rep. 654 (1SSO).

30. Lamb v. Mills, 4 Mod. 377, 87 Eng.Rep. 453;  
Collet v. Lord Kelth, 2 East 260, 102 Eng.Rep. 368  
(1802); Rich v. Woolley, 7 RIng. 651, 131 Eng.Rep.  
251 (1831); Co.Litt. 283a, 303b (Philadelphia. 1812);  
Comyn's Digest "Pleader" E. 17 (Dublin, 1703).

31. Lamb v. Mills, 4 Mod. 377, 87 Eng.Rep. 45a  
Sec. 52

#### PROFERT OF DEEDS

125

quired 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.<sup>32</sup> (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; ~ but if such Justification is by any one except such officer, even a party to the action, the Judgment must be set forth as well.<sup>34</sup> (3) Where an officer thus justifies, he must show that the Writ was duly returned, if a return is legally necessary.<sup>35</sup> (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.<sup>30</sup> (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 ~ In general, in pleading the Judgments of Inferior Courts, the previous proceedings are stated to some extent, though they may be set forth in a concise and summary manner.

32. Rowland v. Veale, 1 Cowp. 18, 98 Eng.Rep. 944 (1774); Belle V. Broadbent, 3 T.R. 183, 100 Eng.Rep. 522 (1789).

33. Andrews v. Morriss, 1 Q.B. 3 (1841).

34. Britton v. Cole, Garth. 443, 90 Eng.Rep. 856;  
Turner v. Felgate, 1 Lev. 95, 83 Eng.Rep. 315;  
See, also, Morse v. James, Willes 122, 125 Eng.Rep.

1093 (1738).



35. **Middleton v. Price, 2 Str.** 1184, 93 Eng.Rep. 1115; **Cheasley v. Barnes**, 10 East 73, 103 Eng.Rep. 703 (1808); **Shortland v. Govett**, 5 Barn. & Ci. 485, 108 Eng.Rep. 860 (1826).

39 **Wentworth**, *A Complete System of Pleadings*, 22, 53, 120, 351 (London, 1797—99).

31. It is otherwise if the Justification is founded upon the Process of a Court of Record. **Collett v. Lord Keith**, 2 East 280, 102 Eng.Rep. 388 (1802); **Moravia v. Sloper**, Willes 30, 125 Eng.Rep. 1039 (1737).

*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.<sup>38</sup>

PROFERT OF DEEDS

52. 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. But the rule is not applicable unless the deed is the foundation of the Action or Defense.

IF either plaintiff or defendant alleges an instrument under seal,<sup>39</sup> unless in the case of letters testamentary or of administration,<sup>40</sup> and founds his Claim or Defense di

38. **Mathews v. Cary**, 3 Mod. 138, 87 Eng.Rep. 88 (1703).

39. Gould, *A Treatise on the Principles of Pleading, Pt II, c. I, Procedure*, 75 (6th ed. by Will, Albany, 1909).

Alabama: **Magee v. Fisher**, 8 Ala. 320 (1845); Illinois:

**Mason v. Buekmaster, I Ill. (Breese) 27** (1820) ; **Cat-ton v. Dimmitt**, 27 Ill. 400 (1862); Georgia: **Chicago Bldg. & 311g. Co. v. Talbotton Creamery & Mig. Co.**, 106 Ga. 84, 31 8.11. 800 (1896); Vermont: **Lee v. Follensby**, 80 Vt. 182, 67 A. 197 (1907).

**There is no right to have Oyer of a deed referred to**

in the plaintiff's Declaration merely by way of Inducement **Lsnghorne v. Richmond Ry. Co.**, 01 Va. 369, 22 SE. 150 (1895).

40. Maryland: **Brown v. Jones**, 10 Gill. & 3. (Md.) 334 (1839); Massachusetts: **Thatcher v. Lyman**, 5 Mass. 260 (1809); New Hampshire: **Judge of Probate v. Merrill**, 8 N.H. 256 (1838).

**In actions by administrators and dxecutors the rule**

requiring profert was extended to letters testamentary and of administration. 1 **Chitty, on Pleading, e. IV, Of the Declaration**, aSS (Phila.1828); **Gould, A Treatise on the Principles of Pleading, Pt. II, c. I, Procedure**, 79 (6th ed. by Will, Albany, 1909).

The effect of profert was to enable the opposite party to demand Oyer, or hearing of the Instrument, before he was required to plead.

126

THE DECLARATION—PLACE, TIME, TITLE

rectly upon it, he must generally make a Statement or Profert in his pleading that he brings it into Court to be shown to the Court and his adversary. The import of the statement is that the party has the deed ready to give the opponent Oyer, or an inspection of it, if required.<sup>41</sup> 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.<sup>42</sup>

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.<sup>43</sup> This in ancient times

41. Illinois: **Lester v. People**, 150 Ill. 408, 23 N.E. 387, 37 N.E. 1004, 41 Am.St.Rep. 375 (1894); Massachusetts: **Powers v. Ware**, 2 Pick. (Mass.) 451 (1824); Vermont: **Austin v. Inns**, 1 Tyler (Vt.) 308 (1802); Svest Virginia: **Brooke County Court v. United States Fidelity & Guaranty Co.**, 87 W.Va. 504, 105 3.11. 787 (1921). See, also, *Pleading*, 31 Cyc, 553.

42. Gould, *A Treatise on the Principles of Pleading, Pt. II, c. 1, Procedure*, 81 (6th ed. by Will, Albany, 1900). Connecticut: **Paddock v. Higgins**, 2 Root (Conn.) 316 (1795); Kentucky: **Barbour's Adm's v. Arclmr**, 3 Bibb. (Ky.) 8 (1813);

Massachusetts: Powers v. Ware, 2 Pick. (Mass.) 451 (1824).  
And so if pleaded by a stranger to the deed. Birney v. Haim, 2 Litt. (Ky.) 262 (1822).  
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. Judge of Probate v. Merrill, 6 N.H. 256 (1833).

43. "For it is to be observed that the Forms of Pleading (10 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, of which the example last cited will also serve for illustration. The other party, however, may reasonably desire to hear the whole, and this either for the purpose of enabling him to ascertain the genuineness of the alleged deed, or of founding on some part of its contents, not set forth by the adverse pleader, some matter of answer. He is therefore allowed this privilege of hearing the deed read verbatim." Stephen, A Treatise on the Principles of Pleading in Civil Actions, c. I, Of the  
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.<sup>44</sup> A failure to comply with this rule renders the Declaration or Plea demurrable.

#### WRITINGS PLEADED ACCORDING TO LEGAL EFFECT

53. Contracts and conveyances are to be pleaded according to their legal effect or operation. As an instrument or other matter alleged in pleading must principally and ultimately be considered with reference to its effect in law, it should therefore be stated according to its Legal Effect or operation and not according to its terms.

The pleader is ordinarily allowed to set up the instrument in its very words, if he prefers not to construe its Legal Effect.

CONTRACTS and conveyances are to be pleaded according to their legal effect or operation.<sup>45</sup> The meaning of the rule is that,

Proceedings in an Action, From Its Commencement to Its Termination, 100 (3d Am. ed. by Tyler, Wash' ington, D. C. 1805).

44. That setting out an instrument in full is a sufficient Profert, see Regents of the University of Michigan v. Detroit Young Men's Soc., 12 Mich. 138 (1863).

45. Bacon, Abridgment of the Law "Pleas" 1. 7 (London, 1798); Comyn's Digest "Pleader" C. 37 (Dublin, 1793); Chester v. Willon, 2 Saund. 97, 07b, n. 2, 85 Eng.Rep. 770. English: Barker v. Lade, 4 Mod. 150, 87 Eng.liep. 316 (1693); Moore v. Earl of Plymouth, 3 Barn.&Aid. 66, 106 Eng.Rep. 587 (1810); Stroud v. Lady Gerrard, 1 Salk. 8, 91 Eng.Rep. 7; Howell v. Richards, 11 East 633, 103 Eng.Rep. 1150 (1809); Connecticut: Andrews v. Williams, 11 Coun. 326 (1886); Illinois: Crittenden v. French, 21 Ill. 598 (1859); Archer v. Clafflin, 31 Ill. 317 (1863); Curry v. People, 54 Ill. 263 (1873); Massachusetts: Lent v. Padelford, 10 Mass. 230, 6 Am.Dec. 119 (1813); President, etc. of Commercial Eaak v. French, 21 Pick (Mass.) 489, 32 AmDec. 280 (1839); New Hampshire: Keyes v. Dearborn, 12 N.H. 52 (1841); New York: Hosley v. Black, 28 N.Y. 438 (1863); West Virginia: Riley v. Yost. 58 W.Va. 213, 52 S.11. 40, 1 LBS. (N.S.) 777 (1905); Brown V.

Ch. 5

Sec. 53

#### WRITINGS PLEADED

127

in stating an instrument or other matter in pleading, it should be set forth, not according to its terms or its form, but according to its effect in law; and the reason seems to be that it is under the latter aspect that it must principally and ultimately be considered, and therefore to plead it in terms or form only is an indirect and circuitous method of Allegation. Thus, if a joint tenant conveys to his companion by the Words "gives," "grants," etc, his estate in the lands holden in jointure, this, though in its terms a "grant," is not properly such in operation of law, but amounts to that species of conveyance called a "release." It should therefore be pleaded, not that he "granted," etc., but that he

“released,” etc.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup>

Cook, 77 WVa. 356, 87 3.11. 454, LB.A.1916D, 220  
(1910); Wisconsin: Grannis v. Hooker, 20 Wis. 65

(1871).

46. Chester v. Willon, 2 Saunders 07, 85 Eng.Rep. 770 (1670); Barker v. Lade, 4 Mod, 150, 151, 87 Eng. Rep. 316 (1694).

47- Barker v. Lade, 4 Mod. 151, 87 Eng.Rep. 316 (1694).

ii. Moore v. Earl of Plymouth, 3 Earn. & Aid. 60, 100 Eng.Rep. 587 (1819).

While the party must state correctly the contract or instrument on which he relies) and, if the evidence differ from the statement, the whole foundation of his action will fail, he is not compelled to follow the precise form of words in either, and it suffices if he alleges their true legal effect or operation. The rule is thus one of utility, since it enables a party to state his matter briefly and With precision, without setting out the terms of contracts or instruments which often, even in modern conveyancing, reach an *interminable* length, and to support his allegations by the offer of the contract or instrument itself at the trial. A deed may often be thus pleaded Without using a word which ft contains, except the names of the parties, the dates, and the sums.<sup>49</sup> 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.M Where, however, a written instrument is set out in hacc *verbcz*) it will be sufficient, and the pleader need not dedare further its Legal Effect, as the Court will construe it for him. If he does aver its

49. Waugh v. Russell, I Marsh. 311, 5 Taunt. 707, 328 Eng.Eep. 868 (1814).

5°. Stroud v. Lady Gerrard, *I Salk.* 6, 91 Eng.Rep. 7,

Pleading facts according to their legal effect is sufficient. Dobbins v. Delaware, L. & W. B. Co., 177

App.Div. 132, 163 N.Y.Supp. 849; United States

Printing & Lithograph Co. v. Powers, 183 AppjDiv.

513, 170 N.Y.supp. 814 (1918).

KaiSer & Reppy Com.Law Pldp. H.B.\_6

128

## THE DECLARATION—PLACE, TIME, TITLE

Ch. 5

Legal Effect erroneously, the Averment will be rejected as surplusage.<sup>51</sup>

It is a technical rule that Common-Law Pleading cannot be done by exhibits. In the case of *Pcarsons v. Lee*,<sup>52</sup> the Illinois Court said: “To the Declaration is annexed a copy of the agreement, and if the Court were permitted to look to that copy, which it cannot see with legal eyes, because it has been constantly decided by this Court to form no part of the Declaration, it might perceive that the agreement is signed by the defendant only.” The rule that a separate writing cannot be made a part of the pleading, by attaching it thereto and referring to it therein, is changed in Code Pleading.

## DAMAGES—GENERAL AND SPECIAL

54. When the object of an action is to recover damages, an Essential Allegation of the Declaration is that the injury is to the Damage of the plaintiff, and the amount of that Damage must be specified. The recovery cannot, in general, exceed the amount thus stated, though it may be less.

General Damages are such as may be regarded as the direct, natural, or probable result of the wrong complained of, and may be stated in a general manner.

And Special Damages are those which the law does not regard as the necessary conse

51. Illinois: *Continental Life Ins. Co. v. Rogers*, 119 Ill. 474, 10 N.E. 242, 59 Am.Rep. 810 (1887); *North v. Kizer*, 72 Ill. 172 (1850); *Binx v. Tyler*, 79 Ill. 248 (1859); *Smith v. Webb*, 10 Ill. 105 (1819); *Wailer v. Village of River Forest*, 259 Ill. 223, 230, 102 N.E. 290 (1913); Maine: *Bean v. Ayres*, 67 Me. 482 (1878). The legal off cot of writings attached to the pleadings is for the Court, and cannot be controlled by the Averments of the party. *Robert Grace Contracting Co. v. Norfolk & W. By. Co.*, 259 Pa. 241, 102 Atl. 956 (1918).

57. *Pearsoos V. Lee*, 1 Scam. (111.) 193 (1835). An Instrument attached to, but riot set out in, a Declaration Is no part thereof. *Charles H. Thompson Co. v. Buns*, 199 Ill.App. 418 (1916). Copy of note not part of Declaration. *McFadden v. Deck*, 193 111. App. 178 (1015); *Sterenber v. Beach*, 219 Ill.App. es (1021); *Milligan v. Keyser*, 52 Flit. 331, 42 South. 367 (1900); *Gulf C. & S. F. By. Co. v. Cities Service Co. (D.C.)* 270 Fed. 994 (1923).

quences of the wrongful act, and must be set forth specially and circumstantially, or evidence of them will not be received on the Trial.

IN those cases where damages are the principal object of the action, the amount laid in the Declaration should be sufficient to cover the real demand, as the plaintiff cannot generally recover a greater amount than he has declared for and laid in the conclusion of his Declaration<sup>53</sup> If a Verdict should be for a greater amount, the surplus must be remitted before Judgment entered, M 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.<sup>55</sup> If the Declaration, however, expressly avers that the plaintiff has sustained Damages from a cause occurring subsequent to the Commencement of the Action, or previous to the plaintiff having any right of action, and the Jury gives entire Damages, judgment will be arrested)<sup>1o</sup>

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 instanc

53. 2 Tidd, *The Practice of the Court of Kings Bench, in Personal Actions, e. XXXVII, Of Damages*, 806 (Philadelphia 1807); Alabama: *McWhorter v. Sayre*, 2 Stew. (Ala.) 225 (1829); Connecticut: *Treat v. Barber*, 7 Conn. 274 (1828); Illinois: *Morton v. McClure*, 22 flI. 257 (1804); New York: *Fish v. Dodge*, 4 Denio (N.Y.) 311, 47 Am.Dec~ 254 (1847); Pennsylvania: *Dennison v. Leech*, 9 Pa. 164 (1848).

54. Maryland: *Harris v. Jaffray*, 3 Bar. & J. (Md.) 546 (1819); New Hampshire: *Bolt v. Molony*, 2 N.H. 322 (1821); North Carolina: *Grist v. Hodges*, 14 N. C. 203 (1831); Virginia: *Tennant's Ex'r v. Gray*, 5 MuM. (Vs.) 494 (1817).

55. *Van Rensselaer's Ex'rs v. Piatner's Ex'rs*, 2 Johns.Cas. (N.Y.) 18 (1800).

56. See, Kentucky: *Wilson's Adm'r v. Bowens*, 2 TB. Mon. (Ky.) 87 (1825); Massachusetts: *Warner v. Bacon*, S Gray (Mass.) 406, 69 Am.Dec. 258 (1857); *Pieree v. Woodward*, 6 Pick. (Mass.) 206 (1878); Pennsylvania: *Gordon v. Kennedy*, 2 BIn. (Pa.) 287 (1810).

Sec. 54

#### DAMAGES—GENERAL AND SPECIAL

129

cs where thc 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.

The force and effect of the ancient rules of pleading in modern times is nowhere better illustrated than by this very rule as to damages and the manner of stating them, and perhaps no better commentary upon the importance of a thorough understanding of those rules can be found. We have above seen that in every Personal or Mixed Action the Declaration should allege some damage, and this rule has never been changed, though its force in cases where damages are merely nominal seems rather doubtful. The method of applying the rule is as applicable today as at any former time, and the establishment of Code Practice has made no difference; the distinction above noted being always observed, as the pleader will find to his cost if it be disregarded. This distinction is an important one, as it arbitrarily controls the manner in which the claim for Damages must be stated.

When the damage claimed is the necessary and proximate consequence of the act complained of, the law presumes it to have resulted from that act, and it is sufficient to describe it in general terms, for the reason that the opposite party will not be unduly taken by surprise.<sup>57</sup> But, when the plaintiff suffers some peculiar or unusual loss it is essential that the resulting Damage, called "Special Damages," be shown with particularity.~~ Such Damages are either super-added 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.<sup>59</sup>

57. Thus, when a person is slandered in his trade, the Law infers that an injury resulted to him, without its being particularly alleged. See *Hutebinson*

v. *Granger*, 13 Vt. 380 (1841); *West Chicago St. B. Co. v. Levy*, 182 Ill. 525, 55 N.E. 554 (1899) (general damages from injury to the back, spine, nrl brain include atrophy of the optic nerve).

54. See *Jacksonville Electric Co. 'c. Batehis*, 54 Fla.

192, 44 South. 933 (1907). *Whittier*, *Cases in Common Law Pleading*, 410 (London, 1876). Illinois: *Miles v. Weston*, 60 Ill. 361 (1871); *Adams v. Gardner*, 78 Ill. 568 (1875); *Woodwortb v. Woodburn*, 20 Ill. 184 (1858); *blattingly v. Darwin*, 23 Ill. 618 (1860); Massachusetts: *Adams v. Barry*, 10 Gray (Mass.) 301 (1858); Maine: *Hunter v. Stun-art*, 47 Me. 419 (1859); Michigan: *Gilbert v. Kennedy*, 22 Mich. 117 (1871); New Hampsi~re: *Willey v. Paul*, 49 N.H. 397 (1870).

59. English: *Westwood v. Cowne*, 1 Starkie, 172, 171 Eng.Rep. 436 (1816); Illinois: *Swain & Son v. Chi' cago, B. & Q. H. Co.*, 252 Ill. 022, 97 N.E. 247, 38 L. HA. (N'.S.) 763 (1912) (gist of private action for public nuisance is special damage different in kind from that of general public). Massachusetts: *Count Joannes v. Burt*, 6 Allen (Mass.) 236, 83 Am.De. 625 (1863); *Cook v. Cook*, 100 Mass. 194 (1868); New

York: *Beach v. Ranney*, 2 Hill (N.Y.) 309 (1842).

Sec.

## CHAPTER 6

### THE DECLARATION—GENERAL RULES AS TO MANNER OF PLEADINGL

55. Statements to be Positive.
56. Certainty in General.
57. When a Genera] Mode of Pleading is Proper.
58. When General Pleading is Sufficient.
59. What Particularity is Generally Required.  
Facts in Knowledge of Adversary.  
inducement or *Aggravation*. Acts Regulated by Statute.  
What May Be Omitted—Matters Judicially Noticed.
64. Matters in Anticipation.
65. Matters Implied.
66. Matters Presumed.
67. Surplusage.
68. Descriptive Averments.

- 69. Repugnancy.
- 70. Ambiguity or Doubt.
- 71. Pleadings in the Alternative.
- 72. Duplicity in General.
- 73. Inducement.
- 74. Consequences of Duplicity.
- 75. Pleadings to be True.
- 76. Conformance to Customary Forms.

STATEMENTS TO BE POSITIVE

55. Pleadings must be positive in their Form and not by way of Recital. The matter of Claim or Defense must be stated in direct and positive terms, in order that it may be directly and distinctly traversed.

THE meaning and reason of this Rule would seem sufficiently apparent from its mere statement. Its province is to restrict

1. In general, on the requirement of Certainty in Pleadings, see:

*Treatises:* Stephen, A Treatise on the Principles of Pleading In Civil Actions, c. II, Of the Principal Rules of Pleading, ~ IV, Of Rules Which Tend to Produce Certainty or Particularity In the Issue, 267—344 (3rd ed. by Tyler, Washington, 1). C. 1893); Perry, Common-Law Pleading: Its History and Principles, c. XII, Of Rules Which Tend to Produce Certainty or Particularity in the Issue, 323—381

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 by Way of Recital, that *is*, under a “whereas” or a “wherefore,” but the Pleading should allege its commission directly and positively.<sup>2</sup> If, for instance, a Dec-

(Boston, 1897); Gould, A Treatise on the Principles of Pleading, Pt. III, Of Pleading, Division II, Rules Applicable to Pleadings in General, e. I, The Major Requisites of Pleading, 234—263 (6th ed. by Will, Albany, 1909). Odgers, Principles of Pleading and Practice in Civil Actions in the High Court of Justice, e. VIII, Certainty 99—113 (14th ed. by Sturge, London, 1952).

S. Battrel v. Ohio River By. Co., 34 W.Va. 232, 12 8. B. 699, 11 Lila. 290 (1890); Spiker v. Bohrer, 37

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130

CERTAINTY IN GENERAL

laration 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., it is bad, for nothing is positively affirmed. As such an Allegation violates a Rule of Pleading, it creates a Defect in Form, which is fatal only on Special Demurrer,<sup>3</sup> and, further than this, it may now generally be remedied by Amendment. Originally, such a Defect was regarded as one in Substance.<sup>4</sup>

The Rules of Pleading may be considered under three main heads: *First*, the Facts

W.Va. 258, 16 SE. 575 (1892); Gould v. Coal & Coke B. Co., 74 WNa. 8, 81 SE. 529 (1914); Brown v. Thurlow, 16 Mees. & W 36, 153 Eng.Bep. 1055; Sherland v. Heaton, 2 Bulst. 214, 80 Eng.Bep. 1077

(1614); Bacon, Abr. 'Pleas,' B 4 (London, 1778); Weltenhall v. Sherwin, 2 Lev. 206, 83 Eng.Rep. 520; Hore v. Chapman, 2 Salk. 636, 91 Eng.Rep. 536; Dunstall -v. Dunstall, 2 Show. 27, 89 Eng.Rep. 771; Gourney v. Fletcher, 2 Show. 295, 89 Eng.Rep. 949 (1684); Dobbs v. Edmunds, 2 Ld.Ray. 1413, 92 Eng.Rep. 419 (1725); Wilder v. Handy, 2 Strange 1151, 93 Eng.Rep. 1094 (1740); Marshall v. Riggs, 2 Strange 1162, 93 Eng.Rep. 1101 (1741).

But Matter of Inducement may be so alleged. And in Assumpsit, the promise is usually stated by Way of Recital, though the gist of the action. Burton v. Hansford, 10 W.Va. 470, 27 Am.Rep. 571 (1877); Sheppard v. Peabody Ins. Co., 21 W.Va. aCS, 377. An Allegation that the plaintiff "claimed" that the organizer of the corporation made a present of the stock to one of the subscribers is not an Allegation of Fact. Ritwoller v. Lurie, 176 App.Div. 100, 162 N.Y.S. 475 (1916).

In Common-Law Pleading, the Allegation must be positive, not on information and belief. State ex rd. Ballard v. Greene, 87 Vt. 94, 88 A. 515 (1913).

3. English: Hore v. Chapman, 2 Salk. 683, 91 Eng. Rep. 536; Brown v. Thurlow, 16 Mees. & W. 36, 153 Eng.Rep. 1088 (1846). Cf. Massachusetts: Coffin v. Coffin, 2 Mass. 358 (1821); West Virginia: Gould v. Coal & Coke, It. Co. 74 W.Va. 8. 81 S.E. 521)

(1914).

~ Shipman, Handbook of Common-Law Pleading, e. XIX, General Rules as to the Manner of Pleading, ~ 294, Statements to be Positive, 491 (3rd ed. St.

necessary to be Stated; *second*, by what Kind of Pleading to be Stated; and *third*, the Form and Manner of Statement.

#### CERTAINTY IN GENERALS

56. In general, whatever is alleged in Plead-Mg must be alleged with Certainty, Definiteness and Precision. A clear, distinct, and complete Statement of the Facts which constitute the plaintiff's Cause of Action or the defendant's Ground of Defense must be made in all Pleadings, in order that due notice may be given to the Adverse Party, and that a Definite and Certain Issue may be produced for decision. Where, however, the Facts lay within the knowledge of the defendant, and where no other method was possible, General Allegations were permitted.

THE Concept of Certainty in Pleading includes both particularity and precision. It consists in alleging the Facts necessary so distinctly and explicitly as to show the legal basis of the Right or Defense asserted, give notice to the Adverse Party of what he is called upon to answer, and produce single, clear-cut, well-defined Issues of Fact or of Law for decision.<sup>6</sup> The varying amount of particularity required has given rise to attempts to define the different Degrees of Certainty. The classic division proclaimed by Lord Coke, however, does not convey any intelligible idea of the distinctions recognized by the law.

Under Coke's Classification, there are three Degrees of Certainty, namely: (1)

5. Supra, note 1.

0. English: Wiatt v. Esington, 2 Ld.Lavm. 1411, 92 Eng.Rep. 418 (1725); Bertie v. Pickering, 4 Burr. 2456, 98 Eng.Rep. 287; Connecticut: Phelps v. Sill, 1 Day, (Conn.) 315 (1804); West Virginia: White v. Romans, 29 W.Va. 57, 3 S.E. 14 (1887).

Ogders, In his Principles of Pleading and Practice in Civil Actions in the High Court of Justice, c. VIII, 118 (7th Ed. by Ogders, London, 1912), states the Rule as follows: "The amount of detail necessary to ensure precision naturally varies with the nature of each case . . . There must be particularity sufficient to apprise the Court and the other Party of the exact nature of the question to be tried."

Sec. 56

131

Paul, 1923).

t Dovastoa v. Payne, 2 RB.: 520, 126 Eng.Rep. 302 (1790).

Certainty to a Common Intent; (2) Certainty to a Certain Intent in General; and (3) Certainty to a Certain Intent in Every Particular.

*The First Degree of Certainty in Coke's Thinflation*

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.<sup>8</sup> 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 or 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.<sup>9</sup>

*The Second Degree of Certainty*

CERTAINTY to a Certain Intent in General is a higher degree than Certainty to a Common Intent, and means what, upon a fair and reasonable construction, may be called Certain, without referring to possible facts,<sup>10</sup> which do not appear except by inference or argument,<sup>11</sup> and is what is required in Declarations,<sup>12</sup> Replications and Indictments (in the charge or accusation), and In Returns to Writs of Mandamus.<sup>13</sup>

S. English: *Dovaston v. Payne*, 2 H.Bi. 526, 126 Eng. Rep. 302 (1790); *Vennont: Town of Boyalton v. Royalton & W. Turnpike Co.*, 14 Vt. 311 (1842).

9. English: *Rex v. Home*, Cowp. 072, 98 Eng. Itep. 1300 (1777); *The King v. Mayor & Burgesses of Lyme Regis*, 1 Doug. 158, 99 Eng. Rep. 103 (1779); Illinois: *Morehouse v. Fowler*, 69 Ill. App. 50 (1896); Massachusetts: *Oystead v. Shed*, 12 Mass. 509 (1815); Maine: *Washburn v. Mosely*, 22 Me. 160 (1842); 4 Standard Eney. Proc. 835 (1902).

10. *Dovaston v. Payne*, 2 H.Bi. 526, 126 Eng. Itep. 302 (1790); *Spencer v. Southwick*, 9 Johns. (N.Y.) 817.

11. *Fuller v. Town of Hampton*, 5 Conn. 423 (1824).

12. See *Hiidreth v. Becker*, 2 Johns. Cas. (N.Y.) 339 (1501'); *Coffin v. Coffin*, 2 Mass. 363 (1807).

*Zi King v. Mayor & Burgesses of Lyme Regis*, 1 Doug. 158, 99 Eng. Rep. 103 (1779); *Andrews v.*

*The Third Degree of Certainty—to a Certain Intent in Every Particular*

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.<sup>14</sup> 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 case of Dilatory Pleas and Pleas in Estoppel.<sup>15</sup>

With respect to Coke's tests or Degrees of Certainty, it may be remarked that this is a matter of relative particularity which does not admit of measurement.<sup>16</sup> Modern cases take as the standard reasonable Certainty without an attempt to define the Degrees for particular Pleadings.<sup>17</sup> Excessive Certainty

*Whitehend*, 13 East. 107, 104 Eng. Rep. 307 (1810)

*Dovaston v. Payne*, 2 H.Bi. 526, 126 Eng. Rep. 302

(1790).

14. Lawes, On Pleading, c. III, Of the General Rules Applicable to the General Divisions of Pleading, 54, 55 (Portsmouth, 1808).

15. Lawes~ On Pleading, c. III, Of the General Rules Applicable to the General Divisions of Pleading, 56, 107, 134 (portsmouth, 1808). *Dovaston v. Payne*, 2 H.Bi. 526, 126 Eng. Rep. 302 (1790); *KIng v. Mayor & Burgesses of Lyme Regis*, 1 Doug. 158, 99 Eng. Rep. 103 (1779); *Casseres v. Bell*, 8 Term. Itep. 167,



- 101 Eng.Rep. 1326 (1799).  
 The highest degree of certainty is required only in Pleas which do not go to the merits of the Action and are therefore not favorably regarded; namely, Dilatory Pleas, which must anticipate possible Replies, and Pleas in Estoppel. *National Parlor Furniture Co. v. Strauss*, 75 Ill.App. 276 (1897); *Harvey v. Parkersburg Ins. Co.*, 37 W.Va. 272, 16 SE. 580 (1892).
16. 4 *Standards Ency.Proc.* 836, 837 (1912).
17. *David v. David's AUnt*, 06 Ala. 139, 147 (1872); *Campbell v. Walker*, 1 Boyce (Del.) 580, 76 A. 475 (1910); *Weller & Co. v. Camp*, 169 Ala. 275, 52 So. 929, 25 L.R.A.(N.S.) 1106 (1910); *Coughlin v. Blumenthal* (0.0.) 90 Fed. 920 (1899). See, *also*, *Rains v. Parkersburgs*, 31. & I. By. Co., 71 W.Va- 453, 76

## Sec. 56

is not required, especially if too great prolixity would result therefrom, unless the Law is hostile to the Action or Defense.

In Modern Times, it comes down to little more than this, that in Certain Disfavored Actions, such as Actions for Defamation; and in Certain Disfavored Defenses, such as Dilatory Pleas, more Facts must be alleged to make out a *prima facie* case or to repel hostile construction than in ordinary cases.

### *Illustrations*

IN Pleading the Performance of a Condition or Covenant, it is a Rule, though open to exceptions that will be presently noticed, that the Party must not Plead Generally that he performed the Covenant or Condition; but must show specially the Time, Place, and Manner of Performance; and, even though the subject to be performed should consist of several different acts, yet he must show in this special way the Performance of each.<sup>5</sup>

Yet this Rule, requiring Performance to be specially shown, admits of relaxation where the subject comprehends such multiplicity of matter as would lead to great prolixity; and a More General Mode of Allegation is in such cases allowable.

When in any of these excepted cases, however, a General Plea of Performance is Pleaded, the Rule under discussion still requires the plaintiff to show Particularly in his Repse, 843 (1912~ *Taylor v. New Jersey Title Guarantee & Trust Co.*, 70 N.J.L. 24, 56 A. 152 (1903) in which it was held that circumstantial details were NOT necessary. Allegation 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.<sup>10</sup>

In an Action of Debt on a 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.<sup>20</sup>

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, is required 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.

10. *Plomer v. Iloss*, 5 Taunt. 386, 128 Eng.Rep. 739 (1814); *Sayre v. Minns*, Cowp. 577, 98 Eng.Rep. 1248 (1777); *Comyn's Digest*, "Pleader," F. 14 (1822).

See also, *I Chitty*, On Pleading, c. VIII, Of Replications, 1311 (16th Am. ed. by Perkins, 1882), on Replication In Actions on bonds, which deny the Effect of Performance, State the Breach with Particularity and Conclude with a Verification.

20. *Lewis v. Preston*, 1 *Show. KB*, 290, 89 Eng. Bejx 580 (1691); *Ibid*, *Skin.* 303, 90 Eng. Rep., 136.

## CERTAINTY IN GENERAL

133

10. Comyn's Digest, "Pleader," E. 25, 26 (London, 1822); *Ontler v. Southern*, 1 *Saunders* 116, Note 1; *Halsey v. Carpenter*, *Croiac.* 359, 79 Eng. Eep. 307; *Wimbledon v. Noldrip*, 1 *Lev.* 303, 83 Eng. Rep. 418; *Woodcock v. Cole*, 1 *Sid.* 215, 82 Eng. Bep. 1065 (1666); *Stone v. Bliss*, 1 *Bulst.* 43, 80 Eng. Rep. 747 (1610); *Fitzpatrick v. Robinson*, 1 *Show.* 1, 89 Eng. Rep. 407; *Austin v. Jervoyse*, *Bob.* 69, 80 Eng. Rep. 219 (1615); *Austen v. Cervas*, *Bob.* 77, 80 Eng. Rep. 226 (1615); *Brown v. Bands*, 2 *Vent.* 156, 80 Eng. Rep. 365; *Braben v. Bacon*, *Cro. Ellz.* 916, 78 Eng. Rep. 1137 (1602); *Codner v. Dalby*, *Cro. Jne.* 363, 70 *En~Rep.* 311; *Léneret v. Rivet*, *Cro. Jac.* 503, 79

Eng. Rep. 429.

134

## DECLARATION—MANNER OF PLEADING

Ch. 6

### WHEN A GENERAL MODE OF PLEADING IS PROPER

57. A General Mode of Pleading is allowed when great prolixity is thereby avoided. And 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 arid application may be collected with some degree of precision from the decided cases,<sup>21</sup> 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.

21~ *Coryton v. Lithebyc*, 2 *Saund.* 110 b; *Lord Arlington v. Merricke*, 2 *Saund.* 411, Notes 3 & 4.

English: *Jermy & Jenny*, *T. Raym.* 5, 83 Eng. Itep. 4 (1060); *J'Anson v. Stuart*, 1 *Term. It.* 753, 99 Eng. Rep. 1359 (1787); *Cornwahis v. Savery*, 2 *Burr.* 772, 97 Eng. Rep. 555 (1759); *Braban v. Bacon*, *Cro. Eliz.* 916, 78 Eng. Rep. 1137 (1602); *Cryps v. Baynton*, 3 *Bulst.* 31, 81 Eng. Rep. 26 (1614); *Barton v. Webb*, 8 *T. B.* 459, 101 Eng. Rep. 1458 (1800); *Hill v. Montague*, 2 *N. & S.* 378, 105 Eng. Bep. 422 (1814); *Friar 'cc Grey*, 15 *4B.* 891; *New Hampshire: Smith 'cc Boston, C. & M. B. Co.*, 36 *N. H.* 458 (1858); *New York: Hughes v. Smith*, 5 *Johns. (N. Y.)* 173 (1809).

In *Assumpsit*, on a promise by the defendant to pay for all such necessaries as his friend should be provided with by the plaintiff, the plaintiff alleged that he provided necessaries amounting to such a sum. It was moved, in Arrest of Judgment, that the Declaration was not good, because he had not shown what necessaries in particular he had provided. But Coke, C. 3., 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.<sup>22</sup> 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.<sup>23</sup> 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. lit *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.<sup>2</sup>

22. *Cryps v. Baynton*, 3 Bulst. 31, 81 Eng.Re~, 26 (1614).

23. *Huggins v. Wiseman*, Carth. 110, 90 Eng.Bep. 668.

24. *Church v. Brownswlck*, 1 SkI. 334, 82 Eng.ROp. 1140 (1667).

Sec. 59

## WHAT PARTICULARITY IS REQUIRED

135

### WHEN GENERAL PLEADING IS SUFFICIENT

28. A General Mode of Pleading is often sufficient when the Allegations on the other side must reduce the matter to Certainty. And 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 seine of them, in **General Terms**.

THIS Rule comes into most frequent illustration in Pleading Performance in Actions of Debt on Bond. Bonds may be conditioned either for the Performance of certain matters set forth in the Condition, or of the Covenants or other matters contained in an indenture or other instrument collateral to the Bond, and not set forth in the Condition. In either case, if the defendant has to Plead Performance of such matters, the Law often allows him to do so, in General Terms, without setting forth the manner of Performance. For by the usual course of Pleading, the plaintiff declares upon the Bond as single, without noticing the Condition, and therefore without alleging any Breach of the Condition. It follows, therefore, of course, that if the defendant Pleads Performance, the plaintiff will have to show a Breach in his Replication; and as this will, in all events, lead to a sufficient Certainty of Issue, it becomes unnecessary for the defendant to be Specific on his Part in his Plea, or to do more than allege Performance in General Terms, according to the words of the Condition, leaving the plaintiff in his Replication to Specify the Breach that is supposed to have been committed.

### WHAT PARTICULARITY IS GENERALLY REQUIRED

~9. No greater Particularity *is* required than the nature of the thing Pleaded will conveniently admit. And 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.<sup>25</sup> Thus, though generally, in an Action for injury to goods, the quantity of the goods must be stated, yet if they cannot, under the circumstances of the case, be conveniently ascertained by number, weight, or measure, such Certainty will not be required. Accordingly, in Trespass for breaking the plaintiff’s close, with beasts, and eating his peas, a Declaration not showing the quantity of peas has been held sufficient, “because *nobody* can measure the peas that beasts can eat.” ~ So, In an Action on the Case for setting a house on fire, *per quod* the plaintiff, among *divers other goods, ornatus pro equis aSs-it*, 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, 3., 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,<sup>27</sup>

In Actions on Contracts, if the case is one where it is held necessary to Declare Specially on the Contract, great Strictness and

25. *Wirnbish v. Tailbois*, 1 Plow. 54, 75 Eng.Ilep. SO;

Buckley v. Thomas, 1 Plow, 118, 75 Eng.Rep. 182;  
Hartley v. Herring, 5 P.R. 130, 101 Eng.Rep. 1308  
(1799); Elliott v. Hardy, 3 Bing. 61, 130 Eng.Rep.  
436 (1825); Partridge v. Strange, 1 Plow. 85, 75 Eng.  
Rep. 130; Bacon, Abr. 'Picas,' etc. B, 5 (London,

1798).

The above Rule is one of necessity, applicable to all Pleadings. See Bliss, The Law of Pleading Under the Codes of Civil Procedure, ~ 309 (2d ed. Boston, 1887).

26. Bacon, Mr. "Pleas," etc. B, S (London, 1728).

27. Bacon, Mr. "Pleas," etc. 409 (London, 1708).

136

## DECLARATION—MANNER OF PLEADING

Ch. 6

Particularity are enforced, and the simplest case involves imminent danger of Variance; but if the case admits of the use of General Assumpsit or the Common Counts, which are generally applicable wherever money is due for value received, no particulars or Facts are required, and the most complicated cases may be tried on a bare Claim of Indebtedness.~

### FACTS IN KNOWLEDGE OF ADVERSARY

60. Less Particularity is required when the **Facts** lie **more** in the knowledge of the Adverse **Party than of the Party Pleading.**

THIS Rule is exemplified in the case of alleging Title in an Adversary, where a more General Statement is allowed than when it is set up in the Party himself<sup>20</sup>

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

25. Pomeroy, Code Remedies, Section Third, The General Principles of Pleading, 533—535 (4th ed. by Bogl, Boston, 1904). See, also, Pleading, Sufficiency of the Common Counts, 4 Cal.L.Rev. 352 (1916).

20. Mereeron v. Dowson, 5 Barn. & C. 482, 108 Eng. Rep. 180 (1826); Andrews v. whitehead, 13 East. 112, 104 Eng.Rep. 310 (1810); Rider v. Smith, 3 TB. 766, 100 Eng.Rep. 847 (1790); Denham v. Stephenson, 1 Salk 355, 91 Eng.Rep. 310; Bradshaw's Case, .Co. Gob, 77 Eng,Rep. 823 (1612); Gale v. Reed, S East. 80, 103 Eng.Rep. 274 (1800); People v. Dunlap, 13 Johns. (N.Y.) 437 (1916).

**This rule is** also one of general application. See Bliss, The Law of Pleading Under the Codes of civil Procedure, § 310 (2d ed. St. Louis, 1887).

lands demised, by which it might appear to the Court that the defendant had not full power and lawful authority to demise." But, "upon conference and debate amongst the Justices, it was resolved that the Assignment of the Breach of Covenant was good; for he had followed the words of the Covenant negatively, and it lies more properly in the knowledge of the lessor what estate he himself has in the land which he demises than the lessee, who is a stranger to it." 30 So, where the defendant had covenanted that he would not carry on the business of a rope maker, or make cordage for any person, except under Contracts for Government, and the plaintiff, in an Action of Covenant, Assigned for Breach that, after the making of the indenture, the defendant carried on the business of a rope maker, and made cordage for divers and very many persons, other than by virtue of any Contract for Government, etc., the defendant Demurred Specially, on the ground that the plaintiff "had not disclosed any and what particular person or persons for whom the defendant made cordage, nor any and what particular quantities or kinds of cordage the defendant did so make for them, nor in what manner nor by what acts he carried on the said business of a rope

maker, as is alleged in the said Breach of Covenant.” But the Court held “that, as the Facts alleged in these Breaches lie more properly in the knowledge of the defendant, who must be presumed conusant of his own dealings, than of the plaintiff’s, there was no occasion to state them with more particularity,” and gave Judgment accordingly.<sup>31</sup>

## INDUCEMENT OR AGGRAVATION

61. Less Particularity is necessary in the  
**Statement of Matter of Inducement or Aggravation than In the Main Allegations. As matters**

**30. Bradshaw’s Cass, 9 Co. Gob, 77 Eng.Rep. 823. (1612).**

31. Gale v. Reed, S East. 80, 103 Eng.Rep. 274 (1806).

Sec. 61

## INDUCEMENT OR AGGRAVATION

137

**alleged merely by way of explanation or introduction to the Claim or Defense, or set forth only to increase the Damages asked for, are not of the Gist of the Action, and therefore require no Distinct Answer, they may be alleged in General Terms.**

### *inducement and Gravamen*

WHENEVER a bare statement of the Facts constituting the Cause of Action does not show the Right of Action with sufficient Certainty, the Facts necessary to explain them must be shown. This preliminary statement is called the “Inducement”. It does not enter into the statement of the Cause of Action proper, but is merely explanatory of such statement, and it does not require the same Certainty.<sup>32</sup>

The term “Inducement” is sometimes applied to those Allegations showing the existence of a Right on the part of the plaintiff and a Duty on the part of defendant. The Allegations showing the wrongful acts of the defendant in violation of the Right and Duty are known as the Gist or Gravamen of the Action.

As “Matter of Inducement,” as the term is generally used, is that 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;

32. “Inducement,” In Pleading, is the Statement of Matter which is Introductory to the Principal *Subject* of the Declaration or Plea and which is necessary **to elucidate or explain it.** Varnes v. Seaboard **Air Line Railway Co., SO Flu, 624, 86 So. 433 (1920).**

The “Inducement” of a Pleading is **but an Explanatory** Introduction to the Main Allegation In which the Cause of Action Is alleged. McDonald v. **Hall**, 203 Mich. 431, 170 N.W. 68 (1918).

and, as they require no distinct Answer, a General Mode of Stating them is sufficient.<sup>33</sup> This Rule is exemplified in the case of the Derivation of Title, where, though it is a General Rule that the Commencement of a Particular Estate must be shown, yet an exception is allowed if the title be alleged **by Way of Inducement only.** So, in Assumpsit, the plaintiff declared that in consideration that, at the defendant’s request, he had given and granted to him, by deed, the next avoidance of a certain Church, the defendant promised to pay £100, but the Declaration did not set forth any Time or Place at which such grant was made. Upon this being objected in Arrest of Judgment after Verdict the Court resolved that “it was but an Inducement to the Action, and therefore needed not to be so precisely alleged,” and gave Judgment for the plaintiff.<sup>34</sup> 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

33. Witheren v. Clrkson, 12 Mod. 597, 88 Eng.Rep.

1543; Bishop v. Salisbury's Osse, 20 Coke 5Db, 77 Eng.Rep. 1014; Riggs v. Builingham, Cro.Eliz. 715, 78 Eng.)tep. 1005 (1601); Chnmherlatn v. Greenfield, S Wils. 292, 95 EngRep. 1061 (1772); Alsope v. Sytwell, **Tel. 18, 80 Eng.Bep. 13; Woolaston v. Webb, Rob. ISb, 80 Eng.Rep. 165; Co,Litt, 3<sup>03</sup>a (Philadelphia, 1812); Comyn, Digest "Pleader," C. 43 (Dublin, 1793); Doct.Plac. 281, 283 (Dublin, 179d)~**

34. Riggs v. Buningham, Cro.Eliz. 715, 78 Eng.Re~

**949 (1595).**

**139**

## DECLARATION—MANNER OF PLEADiNG

**Ch. 6**

was the Whole Court, and Judgment was given for the plaintiff.<sup>35</sup>

### ACTS REGULATED BY STATUTE

**CL With respect to Acts Valid at Common Law, hut regulated as to the Mode of Performance, by Statute, it is sufficient to use such Certainty of Allegation as was sufficient before the Statute. Thus, 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 Plead 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 Plead as at Common Law without alleging writing.<sup>38</sup> 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**

35. Chamberlain v. Greenfield, 3 Wils. 292, 95 Eng. Rep. 1061 (1772).

31. English: Anonymous, 2 Salk. 519, 91 Eng.Rep.

442; Birch v. Bellamy, 12 Mod. 540, 88 Eng.Rep.

1504; Chalie v. Belshaw, 6 Bing. 529, 130 Rng.Rep.

1385 (1830); Illinois Speyer v. Desjardins,

144 Ill. 641, 32 N.E. 283, 36 Am.St.Rep. 473 (1892);

3Iaryland: Ecker v. Bohn, 45 Md. 278 (1876); Massachusetts: Mullaly v. Ilolden, 123 Mass. 583 (1878);

Michigan: Harris Photographic Supply Co. v. Fisher, **SI 1~f1cb. 136, 45 NW. 681 (1800).**

Bliss, Code Pleading, c. XV, Of the Statement, **Continued** § 312 (3d ed. St. Paul, 1894).

showing it to have been in writing3~ So, in the ease of a Promise to Answer for the Debt, Default, or Miscarriage of another person, which was good by paro], 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.<sup>38</sup>

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 Plead 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." ~

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 Indebtitatus Assumpsit, for necessaries provided for the defendant's wife, the defendant Plead that before the Action was brought the plaintiff and defendant and one J. B., the defendant's son, entered into a certain agreement, by which the plaintiff, in discharge of the Debt mentioned in the Declaration, was to accept the said 3. B. as her Debtor for £9, to be paid when he should receive his pay as a lieutenant, and that the

3-. Duppa v. Mayo, 1 Saunders 276, note 1, 85 Eng. Rep. 337 (1669).

3& 1 Saunders 211, note 2, 85 Eng.Rep. 220; Anonymious, 2 Salk. 519, 91 Eng.Bvp. 442 (1701).

30. Duppa v. Mayo, 1 Saunders 276d, 276e, note 2, 85 Eng.Rep. 342 (1669).

Sec. 63

## MATFERS JUDICIALLY NOTICED

139

plaintiff accepted the said 3. 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; *secoiully*, 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 wilt tie upon it, for *he* shall not take away the plaintiff’s present Action, and not give her another, upon the agreement Pleased.” ~°

### WhAT MAY BE OMITTED—MATTERS JUDICIALLY NOTICED

63. **It is not necessary to state matters of which the Court takes Judicial Notice. Matters Judicially Noticed may be either of Law or Facts of a Public or General Nature.**

CERTAIN matters may be omitted. Thus it is not necessary to state in the Pleading Matters of which the Court will take Judicial Notice.<sup>41</sup> 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 aileged. 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, unies given by some charter, by-law, or other authority, to a select part only.<sup>42</sup> The Rule is not limited to the principles of the Common Law. Public Statutes fall within

<sup>41</sup>. Case v. Barber, T.Raym. 450, 83 Eng.Bep. 235 (1803).

IL. **To this** effect, see Comyn’s Digest, Pleader,” C, 78 (1822).

<sup>42</sup>. King v. Mayor & Burgesses of Lyme RegIs, 1 Doug. 148, 99 Eng.Rep. 07 (1779).

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; ~ and it is only necessary to allege Facts which will appear to the Court to be affected by the Statute,<sup>44</sup> 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 in~ sufficient without an express reference to the Statute, showing the intention to being the case within it.<sup>45</sup> 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,<sup>46</sup> and Foreign Statutes, as those of other States, must also be Pleased.<sup>47</sup>

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;

<sup>43</sup>. **1 Blackstone**, Commentaries on the Law of England, 85 (2nd Amed. Boston, 1799). Boyce v. \Whitaker, 1 Doug. 97, note 12, 99 EngRep. 67 (1779); dare v. State, 5 Ia, 509 (1858).

<sup>44</sup>. Spieres v. Parker, I T.R. 145, 99 Eng.Bep. 1021 (1786); Bogardus v. Trinity Church, 4 Paige (NS.) 178 (1833). See, also, Miller v. Roessier, 4 ED. Smith (N.Y.) 234 (1858).

45. Wells v. Iggulden, 3 Barn. & C. 186, 107 Eng. Rep.

703 (1824).

46. Platt v. Bin, 1 Ld. Raym. 381, 91 Eng. Rep. 1152 (1698); Boyce v. Whitaker, 1 Doug. 97, note i2, 99 Eng. Rep. 67 (1779).

47. The Federal Courts, however, have taken notice of all the laws of all the States of the Union, as well as of the territories. See Owings v. Bull, 9 Pet. (U.S.) 807, 9 LEd. 246 (1835).

140

## DECLARATION—MANNER OF PLEADING

### Ch. 6

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 of Law, as we have heretofore shown, must at length arise.

Besides Points of Law, there are many other matters of a public kind, of which the Court takes Official Notice, and with respect to which it is, for the same reason, unnecessary to make Allegation in Pleading, such as matters antecedently alleged in the same Record, IS 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.**<sup>40</sup>

## MATTERS IN ANTICIPATION

**64. It is not necessary to State Matter which would come more properly from the other side.** As it is sufficient for each Party to make out his own Case or Defense, **he** adequately sup-

ports his Charge or Answer, for the purpose of Pleading, **if such Pleading establish a prima facie case in his favor, and is not bound to anticipate matter which his Adversary may be at liberty to Plead against him.** EXCEPTION—Pleadings in Estoppel and Dilatory Pleas must meet *and* remove, by anticipation, every possible Answer.

THE ordinary Form of this Rule, namely, that it is not necessary to State Matters 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. M This, ac

<sup>40</sup> On the classification of matters judicially noticed, see I Greenleaf, On Evidence, c. II, Judicial Notice ~14—C (Boston, 1892); Wlarton, On Evidence, c. V Judicial Notice, General Rules II 276—286 (Philadelphia, 1877); Stephen, On Evidence, c. VII, On Proof, Arts. 58, 59 (Hartford, 1902).

And, as to the application of the Rule in Code Pleading, see Bliss, Code Pleading, c. XIII, Rules Governing the Statement, §~ 187-199 (3d ed. St. Paul, 18043, and cases cited).

<sup>50</sup> English: Stowel v. Lord Zouch, 1 Plow. 376, 75 Eng. Rep. 571; Walsingham's Case, 2 Plow. 564, 75 Eng. Rep. 830; St. John v. St. John, Bob. 78, 80 Eng. Rep. 227; Botham v. East India Co., 1 P.R. 638, 99 Eng. Rep. 1293 (1787); Weeding v. Aldrich, 9 Adol.



& E, 801, 112 Eng.Rep. 1440 (1839); Connecticut: Goshen & Sharon Turnpike Co. v. Sears, 7 Conn, 92 (1828); Illinois: Rockford Ins. Co. v. Nelson, 65 Ill. 415 (1872); Michigan: Smalley v. Bristol, 1 Mich, 153 (1848); New York: Hughes v. Smith, 5 Johns. (N.Y.) 168 (1809); Wolfe v. Howes, 20 N.Y. 197, 75 Am.Dec. 388 (1851); Sands v. St. John, 36 Barb. (N. Y.) 628 (1862).

Stephen, A Treatise on the Principles of Pleading in Civil Actions, Section IV, 314 (3rd Am. ed. by Tyler, Washington, D. C. 1893); Comyn's Digest, "Pleader," C, 81 (Dublin, 1798).

15. Rex v. Knollys, 1 Ld. Itaym. 13, 01 Eng. Rcp. 005 (1894).

## Sec. 65

### MATTERS IMPLIED

141

According to Hale, C. 3., is "like leaping before one comes to the stile." ~ 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 *fernes 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. ~ 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. ~ 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." ~ So, where there was a Covenant in a charter party "that no claim should be admitted, or al-*i*. Sir Ralph Bevy's Case, 1 Vent. 217, 86 Eng.Rep.

146 (1672); Walker v. President, etc. of Michigan state Bank, 5 Doug. (Mith.) 359 (1847); 31 Cyc. 109.

12. stowel v. Lord Zouch, 1 Plow. 376, 75 Eng.Rep. 571 (1569).

13. Walsingham's Case, 2 Plow. 504, 75 Eng.Rop. 830 (1582); Sir Ralph Bovy's Case, 1 Vent. 217, 86 Eng. Rep. 146 (1672).

lowanee 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, 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. ~

But where the Matter is Such that its Affirmation or Denial is essential to the apparent or *prima facie* right of the Party Pleading, then it ought to be Affirmed or Denied by him in the first instance, though it may be such as would otherwise properly form the subject of objection on the other side.

### MATTERS IMPLIED

65. **It is not necessary to allege Circumstances Necessarily Implied. Necessary Circumstances implied by Law from Facts alleged are Traversable without being Pleaded, and need not therefore be alleged.**

A FOURTH subordinate Rule is that it is not necessary to allege Circumstances Necessarily Implied from Facts that are alleged.<sup>56</sup> 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

5. Hotham v. East India Co., 1 TB. 638, 99 Eng.

Rep. 1294 (1787).

56. English: Vynior's Case, 8 Co. Sib, 77 Eng.Rep. 597; Sneers v, Brooks, 2 fl.~l. 120, 126 Eng,Rep. 463 (1792); Marsh v. Bulteel, 5 Earn. & Aid. 507, 106 Eng.Rep. 1276; New York: Dubois Ex'r v. Van Orden, 6 Johns. (N.Y.) 105 (1810).

ii. St. John v. St John, Hob. 78, 80 Eng.Rep. 227.

142

## DECLARATION—MANNER OF PLEADING

### Cli. 6

of Debt on a Bond, conditioned to stand to and perform the Award of W.R., the defendant Pleaded that Wit, 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." *M So*, if a feoffment be Pleaded, it is not necessary to allege livery of seisin, for **it is implied** in the word "enfeoffed." ~ So, if a man Plead that he is heir to A., he need not allege that A. is dead, for it is implied.<sup>50</sup>

## MATTERS PRESUMED

**66. It is not necessary to allege what the Law will presume. As legality in the transactions or conduct of persons is always presumed, everything is regarded as legally done until the contrary is shown.**

**TFIUS**, 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.<sup>60</sup> 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.<sup>61</sup> Thus, in

*&I.* Vynior's Case, S Co. Sib, 77 Eng.Rep. 597; Marsh v. Bulteel, 5 Barn. & Aid. 507, 106 Eng.Rep. 1276.

*58.* Co.Lltt. 303b (Philadelphia 1812); Doct.Plac. 48,

49; Comyn's Digest, "Pleader" 1, 9 (Dublin, 1798).

*55.* 2 Sa.md. 305a, *ii.* 33, 85 Eng.Bep, 3101.

*68.* Stephen, Pleading, 318 (Washington, 1893).

*U.* Williams v. last India Co., 3 East 192, 102 Eng. **Rep.** 571 (1802).

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.<sup>62</sup> 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.<sup>63</sup>

## SURPLUSAGE

**67. 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:**

**(I) When the matter is wholly foreign and irrelevant to the Merits of the Case; and**

(II) 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

62. *Wilson v. Hobday*, 4 T.4. & 5. 325, 105 Eng. Rep. 782 (1815).

63. *Chapman v. Pickersgill*, 2 Wils., 147, 95 Eng. Rep. 734 (1762).

Sec. 67

### SURPLUSAGE-J

143

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; <sup>64</sup> 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.<sup>65</sup>

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 vitatur*” nor does it require proof, but it will be entirely rejected.<sup>66</sup> If,

64. *Dundas v. Lord Weymouth*, 2 Cowp. 665, 08 Eng.

Rep. 1296 (1777); *Price v. Fletcher*, 2 Cowp. 727, 98 Eng. Rep. 1330 (1778); *Phillips v. Fielding*, 2 Wils. 131, 126 Eng. Rep. 469 (1792).

65. *Eristow v. Wright*, 2 Doug. 667, 90 Eng. Rep. 422 (1781); *Yates v. Carlisle*, 1 W. Bl. 270, 96 Eng. Rep. 150 (1761); *Thursdy v. Plant*, 85 Eng. Rep. 256, 1 Saund. 233, note 2 (1669).

66. English: *Eristow v. Wright*, 2 Doug. 667, 99 Eng. Rep. 422 (1781); *Dukes v. Costillos*, 1 W. Bl. 588, 131 Eng. Rep. 1243 (1835); *Edwards v. Hammond*, 3 Lev. 132, 83 Eng. Rep. 614 (1682); Alabama: *Perry v. Marsh*, 25 Ala. 659 (1854); Illinois: *Eurnap v.*

however, a Party take it upon himself to state the Particular Facts of a Claim where a General Allegation only is sufficient, he is often bound to prove all items as stated, under penalty of a Variance; the Rule being well established that matter, though unnecessarily alleged, must be proved if it is descriptive of that which is essential.<sup>67</sup> Again, if Material Matter is alleged with an unnecessary detail of circumstances, the essential and non-essential 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.<sup>68</sup> 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.<sup>69</sup>

When the surplus matter is wholly irrelevant, it may be Stricken Out on Motion; <sup>70</sup> but it is no Ground for Demurrer, since, as

Wife, 14 UI. 301 (1853); Enoebel v. Kirchner, 33 UI. 308 (1864); Shepherd v. Field, 70 UI. 438 (1873); Indiana: Bequette v. Lasselle, 5 Blackf. (md.) 443 (1846); Massachusetts: Buddington v. Shearer, 20 Pick. (Mass.) 477 (1838); Michigan: Murphy v. McCraw, 74 Mich. 318, 41 NW. 917 (1889); New York: Thomas v. Roosa, 7 Johns. (N.Y.) 462 (1811); **Russell v. Rogers**, 15 Wend. (N.Y.) 351 (3836). See, also, Broom, Legal Maxims, **581** (London, 1884).

OL Thus, for example, where, in an action on a non-*negotiable* note, expressed to be for value received, the plaintiff, if he sets out the facts showing of what 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 (1811).

And, as to this danger and the necessity to prove matter unnecessarily alleged, see Turner v. Eylca, 3 Bbs. & P. 45(3, 127 Eng. Rep. 247 (1803); Sir Francis Leke's Case, Dyer 365, 73 Eng. Rep. 810 (1578); Gridley v. City of Bloomington, 68 Ill. 47 (1873).

OS Commissioners of Treasury v. Brevard, 1 Brev. (S.C.) 11 (1794).

69. Dome v. Cashford, 1 Salk. 363, 91 Eng. Rep. 315. And see, also, Wall v. Chesapeake & O. R. Co., 200 Ill. 66, 65 N.E. 632 (1902).  
70. Wyatt v. Aland, 1 Salk. 324, 91 Eng. Rep. 287 (1701).

144

## DECLARATION—MANNER OF PLEADING

### Ch. 6

we have just seen, it does not vitiate the Pleading. Where, however, inconsistency or discrepancy on the Face of the Record is created by Surplus Allegations, this fault is to be taken advantage of by Special Demurrer)

### DESCRIPTIVE AVERMENTS

**68. Every Descriptive Averment, though made with Unnecessary Particularity, must be proved as laid, or it will be a fatal Variance.**

THE harsh Rule by which the Courts punish a Party who Pleads Immaterial Facts by compelling him to prove them literally as alleged, although they need never have been set out to state the Cause of Action is shockingly illustrated in negligence cases. New Trials have frequently been granted for Want of Proof of wholly Unnecessary allegations. The Pleader has to steer his course between Scylla and Charybdis, and is driven to state his case in a confusing variety of Counts, which multiply and complicate the Issues. He has to learn just how General he may make his Allegations, avoiding all unnecessary detail, on the one hand, and the danger of stating mere Conclusions of Law or Fact, on the other. By Unnecessary Particularity in a descriptive statement, he binds himself to prove this Surplusage in addition to the essential Facts of the case. Yet it is recognized that Averments of Mere Surplusage, which are not "matter of description," are immaterial and need not be proved.<sup>72</sup> Thus, where a plaintiff, in Action for

71. Gilbert, chancery Practice, e. XXI, 131—132 (London, 1792).

72. Barnes v. Northern Trust Co., 169 Ill. 112, 4S N.E. 31 (1897); Carterville Coal Co. v. Abbott, 181 Ill. 495, 55 N.E. 131 (1899).

The Pleader should ascertain what are the vital elements of his Action or Defense, and then examine the decisions of his own state to lean just how general he may make his Allegations; for he is above all to avoid unnecessary detail. As we have already seen, by unnecessarily particularizing in a descriptive Allegation he binds himself to prove these unnecessary particulars in addition to the essential Facts of the description. Thus, in an Action on the

Personal Injuries against the railroad, alleged that at the time of the injury she was standing at the intersection of a street and the main tracks of the defendant's railroad, the Court expressed the opinion that it would be a material Variance if the Proof showed that she was then standing twenty-five or thirty feet from this point.<sup>73</sup> But the precise place where the personal injury occurs is not ordinarily an element in the Cause of Action, and it is sufficient to state the County in which the injury took place.<sup>74</sup> It is not necessary for a passenger, who is suing a railroad for injuries, to state the termini between which he was being carried; but, if he does state them, the Allegations *will* require strict

Proof.<sup>75</sup> These decisions are placed on the ground that the great object of a Declaration is to notify the defendant of the nature and character of the plaintiff's demand, so that he may be able to prepare for a Defense.

If, however, the Pleader make his Allegations of particulars under a *videlicet*, that the injury occurred on a certain day, *v4z.*, on March 1, 1916, then the Count will not limit the plaintiff to the precise day alleged, but admits Proof that the injury occurred at any time within the period of the Statute of Limitations.<sup>76</sup> There is equal notice in either event, whether the "*Viz*" is used or *not*.

Cage, where the defendant might have been liable as owner of certain premises, and the Declaration Averred that be was the "owner and occupier" of certain premises, Proof tending to show liability as owner alone was held inadmissible.

-3. Lake Shore & 11. S. fly. Co. v. Ward, 135 Ill. 511, 26 N.E. 520 (1891).

74. CarlIn v. City of Chicago, 262 Ill. 564, 104 N.E. 905, Ann.Cas.1915B, 213 (1915).

7-. Wabash Western By. Co. v. Friedman, 146 Ill. 583, 30 N.E. 353, 34 N.E. 1111 (1893).

See, also, Ohio & Iv! fly. Co. v. People, 149 Ill. 663, 36 N.E. 989 (1894); Wabash B. Co. v. allings, 212 ill. **37**, 72 N.E. 2 (1904).

#Collins v. Sanitary District of Chicago, 270 Ill. 108, 110 N.E. 318 (1915).

**Sec. 69**

## REPUGNANCY

14~

In *Span gler v. Pugh*," where a note was received in Evidence, and the amount of the note was a half cent larger than the amount alleged in the Declaration, this was held a fatal error in Matter of Substance. The Illinois Supreme Court, although regretting that such a trifling slip should delay a Party in the Administration of Justice, sent the plaintiff back for a New Trial, in order that the Science of Common-Law Pleading might not be impaired. In another case, the difference between the instrument described and that offered in Evidence of a dollar mark after the amount of the *subscription* was held a fatal Variance, although the body of the contract showed what was intended.<sup>78</sup>

If the plaintiff had declared on the Indebitatus Counts, he might have proved the execution of the instrument and established the indebtedness without any details at all. In an Action of Assumpsit upon a note alleged in the Declaration to have been executed by "Wiffiam" Becker, the plaintiff offered at the Trial a note signed by "Wilhelm" Becker. This was admitted in Evidence over Objection and the Judgment for plaintiff was Reversed for Variance.<sup>79</sup>

## REPUGNANCY

69. A Pleading is bad for Repugnancy when it contains Contradictory or Inconsistent Allegations, which destroy or neutralize each other. There is an Exception to this Rule when the Allegation creating the fault is Superfluous.

REPUGNANCY is a fault in all Pleading, and the reason of the rule is clearly apparent,

On the office and effect oof the Videlleet or Seiiiieet to separate non-essential details, see Obicago Terminal Transfer B. Co. v. Young, 118 Ill.App. 226 (1905); Commonwealth v. Hart, 70 Mass. (10 Gray) 465 (1858); Gould, A Treatise on the Principles of Pleading, Pt. III, Div. II, c. I, The Major Requisites of Pleading, 221 (6th ed. by Gould, Albany, 1909).

-7. Spangler v. Pugh, 21 Ill. 55, 74 Am,Dcc. 77 (1859).

78. Jacksonville, N. W. & S. E. By. Co. v. Brown, 67 Ill. 201 (1873).

70. Becker v. German Mut. Fire Ins. Co. of North Chicago, 68 Ill. 412 (1873).

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 a Defense.<sup>50</sup> Thus, where, in an Action of Trespass, the plaintiff declared for taking and carrying away certain timber, lying in a certain place, for the completion of a house then lately built, this declaration was considered as bad for Repugnancy, for the timber could not be for the building of a house already built.<sup>8'</sup> 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 seized in his demesne,

as of freehold, for the term of his life, the Plea was held bad for Repugnancy.<sup>82</sup> Where the Repugnancy is in a material point, it Vitiates the Pleading, which is ill on Special Demurrer.<sup>83</sup> 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

50. English: Nevil v. Sopor, 1 Salk. 213, 91 Eng.Rep.

190 (3697); Butt's Case, 7 Co. 25a, 77 Eng.Bep, 511; Hart v. Longfield, 7 Mod. 148, 87 Eng.Bep. 1150 (1102); Alabama: Merrill v. Sheffield Cc., 160 Ala. 242, 53 So. 219 (1910); Florida: Florida Cent. & P. B. Co. v. Ashmoro, 43 Fla. 272, 32 So. 832 (1902); Illinois: Raymond v. People, U Ill.App. 344 (18011; Kolslian v. Elgin, Aurora & S. Traction CC., 132 Ill. App. 416 (1907); Indiana: Barber v. Summers, 5 Blackf. (Iad.) 339 (1840); Tennessee: Bynum v. Ewart, 90 Tenn. 053, 18 SW. 304 (1891); Vermont: Hcrsey v. Northern Assurance Co., 75 Vt. 4-11, 50 A.

95 (1903).

81. Nevil v. Soper, 1 Salk. 213, 91 Eng.Rep. 190 (10071.

82. Butt's Case, 7 Co. 25a, 77 Eng.Bep. 511.

81. English: \Vyat v. Aland, 1 Salk. 324, 91 iC~e. Rep. 287 (1701); Butts Case, 7 Co. 25a, 77 Eng.Rup. 511; Hart v. Longfield, 7 Mod. 148, 87 Eng.Rep. 1156 (1702); Illinois: Priest v. Dodsworth, 235 Ul. 613, 85 N.E. 940, 14 Ami.Cas. 340 (1908); Indiana: BarS ber v. Summers, 5 Blackf. (Lad.) 339 (1840); Massachusetts: Sibley v. Brown, 4 Pick. (Mass.) 337 {1~2W. See, also, Comyn's Digest, 'Pleader' C. 23 (Dublin, 1793).

#### DECLARATION—MANNER OF PLEADING

Out on Motion, and will not Vitiate the Pleading; for the maxim is "*Utile, per mutile, non vitiatur.*"<sup>84</sup>,

#### AMBIGUITY OR DOUBT

70. **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 Pleader. Ambiguity in Pleading occurs where 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.<sup>85</sup> Thus, if, in Trespass *quare clausuni fregit*, the defendant Pleads that the *locus in quo* was his freehold, he must allege that it was his freehold at the time of the Trespass; otherwise, the Plea is insufficient.<sup>86</sup> 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.<sup>87</sup>

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

84. Rex v. Stevens, 5 East 244, 102 Eng.Rep. 1063 (1804); Wyatt v. Aland, 1 Salk. 324, 91 Eng.Rep. 287 (1701); Co.Litt, 303b (Philadelphia, 1812).

85. Purcell v. Bradley, tel. 30, 80 Eng.Rep. 26; Dovaston v. Payne, 2 Hill. 530, 120 Eng.Rep. 686 (1795); Thornton v. Adams, 5 M. & S. 38, 105 Eng. Rep. 965 (1816). Manser's Case, 2 Co. 3, 76 Eng.Rep. 392 (1608); Comyn's Digest, "Pleader;" E. 5 (Dublin, 1793).

86. Comyn's Digest, "Pleader" E. 5 (Dublin, 1793).

87. Manser's Case, 2 Co. 3, **76 Eng.Rep.**, 392 (1608); Comyn's Digest, "Pleader" B. 5 (Dublin, 1793).  
as favorably as possible for himself.<sup>88</sup> 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.<sup>89</sup>

#### PLEADINGS IN THE ALTERNATIVE DO

**71. Pleadings must not be in the Alternative. Where a legal Duty imposes the due performance of one thing or another, the Pleading must state that one was performed, and specify which one.**

**HYPOTHETICAL or Alternative Pleading is always bad.**<sup>91</sup> While it is competent for a

8-. Alabama: *wam v. Dudley*, 10 Ala. 742 (1849);  
California: *Green v. Covillaud*, 10 Cal. 317, 70 Am. Dec. 725 (1858); Connecticut: *Fuller v. Town of Hampton*, 5 Conn. 422 (1824);  
Illinois: *Halligan v. Chicago & B. I. H. Co.*, 15 Ill. 558 (1854); *Henkel v. Heyman*, 91 Ill. 96 (1878); Michigan: *flush v. Dun' ham*, 4 Mich. 339 (1856); Mississippi: *President, etc. of City of Natches v. Minor*, 9 Sinecles & l'l. (Miss.) 544,48 Am.Dec. 727 (1848); New York: *Per-riss v. North American Fire Ins. Co.*, 1 Hill (N.Y.) 71 (1841); *Slocum v. Clark*, 2 Hill (N.Y.) 475 (1842).  
The Rule of Strict Construction at Common Law has been superseded by the Rule of Liberal Construction under the Code. *Emerson v. Nash* 124 Wis. 369, 102 N.W. 921, 70 L.R.A. 320, 109 Ana.St.Rep. 944 (1904); *Jones v. Monson*, 137 Wis. 478, 119 NW. 179, 129 Am.St.Rep. 1082 (1909).

See, also, Pomeroy, Code Remedies, Section ThIrd, The General Principles of Pleading, 440, p. 590—592 (4th ed. by Bogle, Boston, 1904).

89. *Rex v. Stevens*, 5 East 244, 102 Eng.Bep. 1063 (1804); *Amhurst v. Slcynncr*, **12 East** 263, 104 Eng. **Rep. 103** (1810); *Foster v. Elliott*, 33 **Iowa** 216 (1871).

90. In general, on Pleadings in the Alternative, see:

Articles: *Hawkins, Alternative and Hypothetical Pleading*, 33 Yale L.a. 365 (1924); *Bennett, Alternative Parties and the Common Law Hangover*, 32 Mich.L.Rev. 30, 60 (1933); *McDonald, Alternative Pleadings*, 48 Mich.L.Rev. 311, 425 (1950); *McDonald, Alternative Pleading in the United States*, 52 Col.L.Rev. 443 (1952); *Id.*, 52 Col.L.Rev. 603 (1952).

Comments: *Pleading—Alternative Pleading—New Rule 48*, 19 Tex.L.Rev. 487 (1941).

DI. English: *Griffiths v. Eyles*, 1 Bos. & P. **413, 126** Eng.Rep. 983 (1799); *King v. Brcreton*, 8 Mod. 330, 88 Eng.Rep. 236 (1721); *Lord Arlington v. Merrieke*, 2 Saund. 410, **note 3, 85 Eng.Rep.** 1219; **Cook**

146  
Cli. 6

Sec. 72

#### DUPLICITY IN GENERAL

147

defendant, in a case where he is required to perform Several Affirmative Acts, to Plead Generally the due performance of all 92, if the acts imposed are in the Alternative or Disjunctive, such a General Plea will be Ambiguous and improper, since it would riot 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., ~o 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." ~. 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.**M

**v. Cox**, 3 l.l. & S. 114, 105 Eng.Rcp. 553 (1814); Ex parte *Pain*, 5 B. & C. 251, 108 Eng.Rep. 94 (1826):

Alabama: Anniston Electric & Gas Co. v. Rosen.  
159 Ala. 195, 48 So. 798, 15 Am.StRep. 32 (1909);  
Birmingham, By. Light & Power Co. v. Nicholas, 181  
Ala. 491, 61 So. 361 (1913); Illinois: Parsons v.  
Smlth, 164 Ill.App. 509 (1903); Maine: Mauerda v.  
Lewiston Journal Co., 104 Me. 554, 72 A, 494 (1908);  
Minnesota: Casey Pure Milk Co. v. Booth Fisheries  
Co., 124 Minn. 117, 144 N.W. 450, 51 **L.R.A. (N.S.) 640**  
(1913); Wisconsin: Zeidler v. Johnson, 38 Wis. 335

(1875).

02. Earl of Kerry v. Baxter, 4 East 340, 102 Eng.Rep.

801 (1803).

93. Griffiths v. Eyles, 1 Bce. & P. **413, 126 Eng.Rep.**

083 (1790),

§4. King v. Norton, 5 Mod. 171, 88 Eng.Rep. 236 (1721).

Alternative or Hypothetical pleading is a Defect in Form, objectionable on Special Demurrer only.<sup>o5</sup>

## DUPLICITY IN GENERAL

**72. 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. The fault may exist in, and the Rule therefore applies to**

- (I) The Declaration; and
- (II) 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.<sup>o6</sup> The Rule in its terms points to

- Oglethorp v. Hyde, Cro.Eliz. 233, 78 Eng.Rep. 488 (1594); Hodgeon v. East India Co., 5 TB. 280, 101 Eng.Rep. 1389 (1799); Taylor v. Needham, 2 Taunt, 278, 127 Eng.Rep. 1084 (1810).

Cases arise where the plaintiff is uncertain against which of several persons he is entitled to relief, as where several corporations operate a line of track, or where a defendant may have been acting either as an agent or as a principal. In such cases some Modern Rules of Procedure allow the plaintiff to join any or all of them as defendants in the alternative. It is also deemed convenient under Modern Rules to allow a Party to include in his Pleading two or more alternative sets of Material Facts. even though inconsistent, and to claim Belief thereunder in the alternative, upon an alternative construction or ascertainment of his Cause of Action, without the necessity of making an election.

96. English: Rumphreys v. Bethily, 2 Vent, 198, 80  
Eng.Rep. 391; Gaile v. Eetts, 3 Salk. 141, 911 Eng.  
Rep. 740; Butcher v. Stenart, 9 M. & W. 404, 152  
Eng.Rep. 171 (1842); Illinois: Calhoun v. Wright,  
3 Scam. (Ill.) 74 (1841); Burrass v. Hewitt, 3 Scam.  
(Ill.) ¶224 (1841); Chicago W~ D. By. (Jo. v. Ingraham,  
131 Ill. **659, 23 N.E.** 350 (1890); Maine: Scott v.  
Whipple, 6 Greenl. (Me.) 425 (1830); Massachusetts:

**148**

## DECLARATION—MANNER OF PLEADING

Cli. 6

Doubleness only, as if it prohibited only the use of Two Allegations or Answers; but its meaning, of course, extends equally to the case of more than two, the term “Doubleness” or “Duplicity” being applied, though with some inaccuracy, to either case. The effect of the Rule is thus to avoid confusion and a multiplication of Issues in the Action, and it is in all cases founded on the principle that it would be unnecessary and vexatious to cause the Adverse Party to litigate and prove two or more Facts or Propositions, when one alone would sufficiently establish the Matter in dispute,



Duplicity in a Declaration consists in joining, in one and the same Count, different Grounds of Action to enforce a single Right of Recovery.<sup>97</sup> This is a Fault in Form, because it tends to prolixity and confusion and a Multiplicity of Issues.

Parker v. Parker, 17 Pick. (Mass.) 236 (1835); New Hampshire: Tebbets v. Tilton, 24 N.H. 120 (1851); New York: Connelly v. Pierce, 7 Wend. (N.Y.) 129 (1851); Ohio: Rumbarger v. Stiver, 6 OhIo 99 (1833).

The Rule as to Duplicity finds its analogy in Equity in the prohibition against Multifariousness, or the improper Joinder of two Causes of Action in one statement And the fault is also recognized and condemned in Code Pleading. Pierce v. Carey, 37 IVis. 232 (1875); Brown v. Nichols, Shepard & Co., 123 ImI. 492, 24 N.E. 339 (1890).

<sup>97</sup> As to Duplicity in the Declaration, see also, Cornwallis v. Savery, 2 Burr. 773, 07 Eng.Rep. 555 (1759); Manser's Case, 2 Co. 4, 76 Eng.Rep. 395 (1608); Little v. Perkins, 3 N.H. 469 (1608).

For a Count seeking to recover Damages as in an Action on the Case for Deceit, and also for a Breach of Contract, see Noctling v. Wright, 72 Ill. 390 (1874); People's Nat. Bank v. Nickerson, 106 Me. 502, 76 A. 937 (1910).

On negligent Damages to person and *property from* the same act, see Chicago W. D. By. Co. v. Ingraham, 131 Dl. 059, 23 N.E. 350 (1890). See, also, Kinney v. Turner, 15 Ill. 182 (1853); Wilson v. Gilbert, 161 Ill. 49, 43 N.E. 792 (1896).

*On Duplicity*, see *Schwindt v. Lane-Petter Lumber Co.*, 40 Mont 537, 107 P. 818 (1910); *Gore v. Condon*, 87 Md. 308, 39 A. 1042 (1898); *Creen v. Michigan Cent. B. Co.*, 168 Mich. 104, 133 NW. 956 (1011); *Ferguson v. National Shoemakers*, 108 Me. 189, 79 A. 469 (1911), involving several independent breaches of duty. *Laporte v. Cook*, 20 RI. 261, 38 A. 700 (1897).

#### INDUCEMENT

73. No Matter will operate to make a Pleading flouble 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.<sup>98</sup> This Exception to the General Rule is **prescribed by** an evident principle of Justice; for the Party has a Right to Rely on any single matter that he pleases, in preference to another, as, in this instance, on the release in preference to the coverture. But if a Necessary Inducement to the matter on which he relies, when itself amounting to a Defense, were held to make his Pleading Double, the effect would be to exclude him from this right, and compel him to rely on the Inducement only.

#### CONSEQUENCES OF DUPLICITY

**74. 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 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

<sup>93</sup> Bacon's Abr., "Pleas" etc. K,2 (London, 1778); Comyn's Dig., "Pleader" E.2 (Dublin, 1793).

A. Plea by an Executrix in Abatement was not subject to the charge of Duplicity In Alleging the Facts showing that the Action did not survive against defendant as Executor; where, if the Action survived, those Facts were necessary under the Illinois Abatement Act, § 25, to make the plea good. *Genmill v. Smith*, 274 Ii]. 87, 113 N.E. 27 (1910).

clearly pointed out.<sup>99</sup> 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.<sup>1</sup> In such case, an Answer to each Matter, single in itself, does not constitute Duplicity; but it must still be remembered that each Separate Answer, as to its own Allegations, is subject to the

full operation of the Rule.

The Rule requiring the Demurrer for Duplicity to be Special, finds no application in the case of Misjoinder of Causes of Action, since a plaintiff who joins in the same Declaration different Counts, containing separate and incongruous Causes of Action, as distinct Grounds of Recovery, commits a radical Fault, and his Declaration is bad, either on General Demurrer or in Arrest of Judgment or on Writ of Error.<sup>2</sup>

2. **Alabama:** Pharr v. Bachelor, S Ala. 237 (1841);  
Illinois: McGinnity v. Laguerenne, 5 Gil. (Ill.) 101  
(1845); Mayer v. Lawrence, 58 Ill.App. 194 (1894);  
Indiana: Bodley v. Roop, 6 Blackl. (md.) 158 (1842);  
**New York:** Cooper v. Bissell, 10 Johns. (N.Y.) 140

(1819).

But a Demurrer for Misjoinder must be to the Whole Declaration, and not merely to the Defective Count **or Breach.** Ungdoin v. Nottle, 1 Maine & S. 355, 105 Englep. 133 (1818); Fernald v. Garvin, 511 Me.

**414** (1867). And the plaintiff cannot, if a Demurrer is **Interposed, Aid his** Mistake by entering a Nolls Prosequi, so as to prevent the operation of the Be.

#### PLEADINGS TO BE TRUE

75. Every Pleading should state only such **Facts as are True and Capable of Proof, avoiding False and Frivolous Allegations tending to deceive the Court and the Adversary, and to delay the progress of the Trial.**

**AT Common Law**, while it is a principle that Pleadings ought to be true, yet there are no means of enforcing the Rule. Thus the Common-Law Pleadings fail to uncover the **Real Issues** in dispute. The Illinois Practice Act (Section 52) made provision that the Denial of the Execution or Assignment of an Instrument in Writing, when a copy is filed with the Pleading, must be Verified by Affidavit. The Illinois Practice Act (Section 55) gave the plaintiff the option in Actions on Contract for the payment of money to file an Affidavit as to the amount due, and thereby require the defendant to file with his Plea an Affidavit of Merits which must specify the Nature of the Defense. The **purpose of this** is to give the plaintiff notice of the Real Defense to be presented and to limit the Issues to be tried.

It is usually provided in Reformed Systems of Pleading that the plaintiff may Verify his Complaint, and then the Denials of the Answer must be Specific, and must also be made Under Oath with the Penalties of Perjury for Falsehood. This requires the defendant to put in Issue only the Points on which he means to Rely. Thus, in a Suit on a **Fire Insurance Policy, there may be no** dispute as to the Execution of the Contract sued on; but the company may expect to avoid liability by showing in Defense some Excuse, such as Breach of Warranty by the insured. Accordingly, if the Complaint be Verified, the company cannot deny the signature or due execution of the policy, of

murrer. Bose v. Bowler, 1 nfl. 110, 120 Eng.Bcp. 60 (1789); though an Amendment by striking out the objectionable Counts may be allowed, Jennings v. Newman, 4 Tn. 348, 100 Eng.Rep. 1057, (1791); Feinald v. Garvln, 55 Me. 417 (1567); Noble's Adm'r. v. Laley, 50 Pa. 281 (1865).

Sec. 75

#### PLEADINGS TO BE TRUE

149

99. Humphreys v. Bethily, 2 Vent. 108, 86 Eng.Rep.

39i; Saunders v. Crawley, 1 Bolle, 112, 81 Eng. Rep. 366; Seymour v. Mitehel, 2 Root (Conn.) 145, (1714); Onion v. Clark, 18 Vt. 363 (1546); flriggs v. Grand Trunk By. Co., 54 Me. 375 (1880); Carpenter v. McClure, 40 Vt. 108 (1868); Franey v. True, 26 Ill. 154 (1861); Armstrong v. Webster, 30 Ill. 333 (1803); Kipp v. Bell, 86 Ill. 577 (1877); flare! v. Harber Bros., 106 fli.App. 410 (1902).

1. See, Bolton v. Cannon, 1 Vent. 272, 86 Eng.Rep. 182; Eeynolds v. Blackburn, 7 **Adol. & F. 161**, 112 Eng.Bep. 432 (1837). And see Gould v. Bay, 13 Wend. (N.Y.) 633 (1885); Blome v. Wah-J-lenius Institute of Fermentology, 150 Ill.App. 164, 168 (1909).

150

## DECLARATION—MANNER OF PLEADING

Ch. 6

which the proof might be difficult for the plaintiff to obtain and produce.<sup>3</sup>

### CONFORMANCE TO CUSTOMARY FORMS

**76. Pleadings should observe the known and ancient expressions as contained in approved precedents. When there has been a long estab.**

**lished Form of Pleading, containing Allegations of Frequent and Ordinary Occurrence applicable to the Facts of a Particular Case, it should in general be adopted for the sake of Uniformity and Certainty.**

THIS Rule is not to be taken as an imperative one, except in certain cases where precise technical expressions or terms are required to be used. At the same time it is safer to follow approved precedents, otherwise there is danger of omitting an Averment which might, on account of precedent, be considered essential to the particular Pleading.

#### The General Issues are examples of forms

of expression, fixed by ancient usage, from which it is improper to depart. And another illustration of this Rule occurs in the following English case: To an Action on the Case, the defendants Pleaded the Statute of Limitations, namely, “that they were Not Guilty within six years,” etc. The Court decided, upon Special Demurrer, that this Form of Pleading was bad, upon the ground that “from the passing of the Statute to the present case the invariable Form of Pleading the Statute to an Action on the Case for a wrong has been to allege that the Cause of Action

3. Bliss, Code Pleadings §~ 135, 422. See *Higgins Carpet Co. v. Latimer*, 165 Pa. 617, 30 At! 1050 (1895); English order 21, rule 9. By the rules 33 of the Supreme Court of New Jersey, Allegations and Denials, made without reasonable cause and found untrue, subjected the Party Pleading them to the payment of such reasonable expenses caused TO the Other Party by such Untrue Pleading. did not accrue within six years,” etc.; and that “it was important to the Administra~ tion of Justice that the usual and established Forms of Pleading should be observed.”

The Rule stated is of rather uncertain application, for it must be often doubtful whether a given form of expression has been so fixed by the course of precedent as to admit of no variation. In a New York case the Lower Court held a Declaration in Case for Deceit in the sale of property bad, even after Verdict, because it failed to allege the scienter on the part of the defendant in making the sale, which was in accordance with precedent, and was deemed essential. “To dispense with the Rule,” said Kent, C. J., “would be a dangerous relaxation, and might lead to the loss of Certainty and Precision in Pleading. General Rules will sometimes appear harsh and rigorous in their application to particular cases; but I entertain a decided opinion that the established principles of pleading, which compose what is called its science, are rational, concise, luminous, and admirably adapted to the investigation of truth, and ought, consequently, to be very cautiously touched by the hand of innovation.” ~ On Writ of Error, this decision was reversed on the ground that the Defect was Aided or Cured by Verdict.°

4. *Oyster v. Battye*, 3 Barn. & Ald. 443, 106 Eng.Rep. 725 (1820). And see *slade v. Dowland*, 2 Bbs. & P. 570, 126 Eng.Rep. 1444 (1801); *Dally v. King*, 1 H. B]. 1, 126 Eng.Rep. 11; *Dowland v. Slade*, 5 East 272, 102 Eng.Rep. 1074 (1804). See 11 Ill.L.Rev. 56 (1016). Note: ‘pleading—Statute of Limitations— Permanent or Temporary Injury—Plea of Non-Accrevit.”

5. *Bayard v. Malcolm*, 1 Johns. (N.Y.) 453, 471 (180W).

c. *Bayard v. Malcolm*, 2 Johns. (N.Y.) 550, 3 Am.Dec. 450 (1807). And see, to the same effect, *Beebe v. Knapp*, 28 Mich. 53 (1873).

## PART THREE

### OFFENSIVE PLEADINGS—THE COMMON-LAW

#### ACTIONS

#### CHAPTER 7

#### THE ACTION OF TRESPASS<sup>1</sup>

Scope of the Action.  
Forms of the Declaration,

79. *Declaration* in Trespass—Essential Allegations:  
(1) **In General.**

- 80. Declaration in Trespass—Essential Allegations:
  - (2) The Plaintiff's Right, Title, Interest or Possession.
- 81. Declaration in Trespass—Essential Allegations:
  - (8) The Defendant's Wrongful Act.
- 82. Declaration in Trespass—Essential Allegations:
  - (4) The Damages.
- 83. Status Under Modern Codes, Practice Acts and Rules of Court.

NOW that we have considered in general what facts must be stated in a Declaration **in order** to make out a good cause of action, we come to the problem of stating a cause *of* Action in terms of the Ordinary, Specific

1. In general, on the history and development of the Action of Trespass at Common Law, under Modern Codes, Practice Acts and Bules of Court, see;

Treatises: Waterman, *Trespass, the Wrong and the Remedy* (2 vols. New York 1875); Holmes, *The Common Law*, Lecture I, Early Forms of Liability (Boston, 1881); Id., Lecture III, Trespass and Negligence 74, 100—101; Street, *The Foundations of Legal Liability*, c. XVII, 223, Action of Trespass (Northport 1906); **Id.**, c. **XX, 278, The Remedy of** Distress; Jenks, *Short History of English Law*, c. IV, 39, 52, Improved Legal Procedure (Boston 1913); Itt, c X, 238, Contract and Tort; Ames, *Lectures on Legal History*, Lecture IV, 56, Trespass De flonis Asportatis (Cambridge 1913); Id., Lecture XIX, 219, Injuries to Realty pueltnett, Statutes and Their Interpretation in the First Half of the Fourteenth Century, **Pt. II, c. XI, 1, 128**, The Relation of

Common Law Actions, eleven in number.

First we shall discuss the Allegations essential to establish liability in the Tort Actions, Trespass, Trespass on the Case, Trover, Ejeetment, Detinue and Replevin, after

Trespass to *Rep/evin* (Cambridge 1922); 2 Holds-worth, *History of English Law*, c. IV, 358—305 (4th ed. Boston 1931); 3 Id. c. II, 316—320; Maitland, *Equity and the Forms of Action*, Lecture VI. 65, Trespass (Cambridge 1948); Morgan, *The Study of Law*, c. V. 102, Trespass (Chicago 1948); Fifoot, *History and Sources of the Common Law*, c. III, 44 Trespass (London, 1949); **Id.**, e. **VIII, 165**, Negligence; Id. c. IX, 184, Trespass and Case.

Articles: Stance, *The Venue of the Action of Trespass to Land*, 27 W.Va.L.Q. 301 (1921); Woodbine, *The Origin of the Action of Trespass*, 33 Yale L.J. 798 (1924); 34 Id., 343 (1925); Winfield and Goodheart, *Trespass and Negligence*, 40 L.Q.Rev. 359 (1932); williams, A Strange Offspring of Trespass Ab Inith, 52 L.Q.Rev. 106 (1936).

Comment: Injunetlons—Contiuuing Trebpass—Trial by Jury. 23 CoLL.Rev. 590 (1923).  
Sec.

77.

78.

151

152

## OFFENSIVE PLEADINGS

### Ch. 7

which we shall consider the allegations necessary to show liability in the Contract Actions, Debt, Covenant, Account, Special Assumpsit and General (Indebitatus) Assumpsit.

The typical elements or grounds constituting a cause of action differ with the different Forms of Action, whether in Tort, Contract or Property. And in Common Law Pleading the Declaration must state a cause of action in the particular form or theory of action selected. And, in order to do this, the plaintiff must state facts in his declaration that will (1) meet the test of a General Demurrer; and (2) which he can Prove at the Trial; for it will do the pleader no good to get by the Shoal of Demurrer **if he is going** to wreck on the Rock of Variance.

#### *In Tort Actions*

IN Tort Actions the plaintiff is, in general, to allege and prove merely the nature of the harm and defendant's share in causing it. Matters of Justification and Excuse, as self-defense, leave and license, contributory negligence, consent or privilege, are put on the defendant to plead and prove, since it is unfair to assume that any of them are present or to require the plaintiff to disprove the existence of each. But in Malicious Prosecution the plaintiff must negative defendant's good faith and reasonableness by showing malice and **lack** of probable cause as part of his *prima facie* case, though in the nature of excuse for the defendant, who is relieved on **grounds of public policy**, to protect prose-

cutors from the burden of attack, which might hamper public justice. In Slander and Libel, on the other hand, the plaintiff is relieved from the burden of showing the falsity of the defamatory words, and the defendant must prove the truth of his slanderous **utterance in** defense—a rule well calculated to give a man pause in **making** slanderous statements about his neighbors.

As the first of the Tort Actions, let us now consider the Action of Trespass, keeping in mind that one of our principal considerations is always, what facts must be alleged in order to state a good cause of action?

#### SCOPE OF THE ACTION

77. The Action of Trespass lies for the recovery of **Damages for an injury to the person~ property, or relative rights of another:**

**(I) Where the injury was committed with force, actual or implied;**

**(II) Where the injury was immediate, and not merely consequential;**

**(III) In case of injury to property, where  
the property was in the actual or  
constructive possession of the plain— tiff at the time of the injury.**

THE term “Trespass”, in its broadest sense, includes any offense or voluntary transgression against the law of nature, of society, or of the country in which we live, whether such act relates to a person or to his property. In a more restricted sense, it signifies an injury committed with violence, either actual or implied; and the law will imply violence though none is actually used, when the injury is of a direct and immediate character, and committed on the person or on the corporeal and tangible property, real or personal, of the plaintiff. Of actual violence, an assault and battery is an example; of implied violence, a peaceable but wrong-ful entry upon another’s land.<sup>2</sup>

Where, however, the injury was indirect and **consequential, the remedy** was Trespass on the Case, and here it should be observed that the two delictual remedies of Trespass and Trespass on **the Case have divided between them the entire field** of tort; they supplement each other in this respect. In consequence, if Damage occurs as a result of a wrongful act or omission other than a breach

2. **3 Blackstone, Commentaries on the Laws of England, c. XII, Of Trespass, 208—209 (7th e& Oxford 1775).  
Sec. 77**

#### ACTLON OF TRESPASS

**‘53**

of contract, Trespass or Case become the accepted remedy,-if the act was of such character as to constitute a wrong for which a civil action was available. There were other tort remedies such as Detinue, Replevin and Trover, but, broadly speaking, an act was not regarded as a tort except where it was remediable in Trespass or some Form of Trespass on the Case.<sup>3</sup>

The early history on the Writ of Trespass is of great significance to the legal scholar as the fountain source of our law of torts. **It was long the only Common Law remedy based on the conception of giving compensation for Damage resulting from wrongful acts.** And prior to its emergence the law of torts was in a primitive and confused state. As yet there was no distinction between public and private wrongs, and the rules applicable to crime were yet to be formulated into a separate body of law. And this explains why, in its origin, Trespass was dual in character, being Part Criminal and Part Civil. Enforcement of such law of torts as existed was left to the Local Courts, of which the Written Records are few. When, however, the Writ found its way into the Royal Courts, the Common Law theory of tort liability gradually began to take definite form.<sup>4</sup>

According to Pollock and Maitland, the Action of Trespass was descended from the old Writ of *breve de traits gressione*; ~ and although in its settled form it was quite uncommon in 1250, it had become common by 1272.6 By the reign of Edward I (1272— 3- 3 Street, Foundations of Legal Liability; c. **XVII**,

The Action of Trespass, 223 (Northport 1906).

<sup>4</sup> **Id. at 225.**

<sup>5</sup> **2 Polkek and Maitlarni, History of English Law, c. VIII, Crime and Tort, 3, The Trespassers, 523— 529 (Cambridge**

1805).

6. 'The recorded Instances of Trespass in the Royal Courts prior to 1252 are very few. In the 'Abbreviatlo Placitorum' some twenty-five cases of appeals of different kinds are mentioned, belonging to the period 1104—1252, but not a single case of Trespass. In the year 37 Henry III (1252—1253) no fewer than 1307) the Writ of Trespass had found its Way into the Register of Writs.<sup>7</sup> But the authorities have not been in agreement as to the origin of the action. Ames, Holmes and Maitland tell us that Trespass originated from the Appeal of Felony, which lay for such crimes as homicide, mayhem, rape, wounding and battery, or for property injuries, such as arson and larceny, or for robbery.<sup>8</sup>

Naturally, the earliest wrongs to call for remedy were those committed with force and violence, such as Trespass to real estate, accompanied by Damage to the defendant's goods and chattels,<sup>9</sup> assault and battery, false imprisonment, or abduction of the plaintiff's wife. By authority of the Writ of Trespass a plaintiff was able to secure redress for Damage done to his person, his possession of goods or land, or his domestic relations, by direct physical interference.

A trespass may be committed either upon the person of another, as in the case of assault, assault and battery, or false arrest or imprisonment; or upon his real or personal property, as where a person enters upon another's land, or takes or merely injures his

twenty-five cases of Trespass are recorded, and from this time on the action is frequent, while appeals are rarely brought." Ames, Lectures on Legal History, Lecture IV, Trespass De Bonis Asportatis, 56 (Cambridge 1913).

7. See article by Maitland, Register of Original Writs,

3 Harv.L.Ev. 212, 217—220 (1889).

Ames, Lectures on Legal History, Lecture IV, Trespass De Bonis Asportatis, 56 (Cambridge 1913); Holmes, The Common Law, Lecture I, Early Forms of Liability, 3—4; Lecture III, Trespass and Negligence, 74, 100—101 (Boston 1951); Maitland, Equity and the Forms of Action, Lecture V, 48—50 (Cambridge 1948).

9. Many of the early cases involved a trespass to both real and personal property. In such cases the plaintiff alleged the trespass for, let us say, the breaking and entering of the dwelling house, as the principal trespass, and then added the injury to the personal property incidental thereto, as was said, by way of aggravation of damages. For a case involving this point, see Chamberlain v. Greenfield, 2 WmML 810, 06 Eng.Rep. 476 (1772).

154

## OFFENSIVE PLEADINGS

### Ch. 7

goods; or upon his relative rights, as where a person beats or debauches another's daughter or servant. All trespasses, whether to person, property or relative rights, whether committed with actual or implied force, were and are called "*trespass vi et armis*."

As we have seen, a trespass is an injury committed with violence, and this violence may be either actual or implied; and the law will imply violence, even though none was actually used, where the injury is of a direct and immediate kind, and committed on the person or the tangible and corporeal property of the plaintiff; that is, if the injury is direct, and not consequential, the proper remedy to recover damages is by the Action of Trespass."

U, however, 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 right or interest was only in reversion at the time of the injury, Trespass will not lie, and the remedy, as will be seen, must be by an Action on the Case or Trover<sup>2</sup>

10. Stephen, A Treatise on the Principles of Pleading In Civil Actions, c. 1, Of the Proceedings In an Action From Its Commencement to Its Termination, 13 (Williston ed., Cambridge, 1895).

11. English: Scott v. Shepherd, 2 W.BI. 892, 96 Eng.

Rep. 525 (1773), Leame v. Bray, 3 East 802, 102 Eng.

Rep. 724 (1803); Gregory v. Piper, 9 Barn. & C. 591,

109 Eng.Rep. 220 (1829); Reynolds v. Clerk, 8 Mod.

272, 88 Eng.Rep. 193 (1725); Illinois: Painter v.

flaker, 16 Ill. 103 (1854); Michigan: Smith v. Webster, 23 Mich. 298 (1871); Barry v. Peterson, 48

Mich. 263, 12 N.W. 181 (1882); New Hampshire:

Ricker v. Freeman, 50 N.H. 420, 9 Mn.Bep. 267  
(1870); Virginia: Winslow v. Beal, 6, Call. (Va.) 44  
(1806); Vermont: Claffin v. Wilcox, 18 Vt. 605

(1846).

12. In addition to the cases cited just above, see the following: English: Ward v. Macauley, 4 T.R. 489, 100 Eng.Rep. 1135 (1791); **Gordon v. Harper**, 7 P.R. 9, 101 Eng.Rep. 828 (1796); **Illinois: Frankenthal v. Camp**, 55 Ill. 169 (1870); Massachusetts: Adams v. Liezmenway, 1 Mass. 145 (1804); Michigan: Eaton v. Winnie, 20 Mich. 156, 4 Ani,Rep. 377 (1870); Barry v. Peterson, 48 Mich. 263, 12 NW. 181 (1882); Pennsylvania: Smith v. Rntherford, 2 Serg. & H.

### FORMS OF THE DECLARATION

78. The **Forms of the Declaration in Trespass** included in this section are Trespass for Assault and Battery, a Form of Trespass to Personal Property, known as Trespass de honis **asportatis**, and **Trespass to Real Property, known as Trespass quare clausum fregit**.

#### DECLARATION IN TRESPASS

(For an Assault and Battery)

IN THE KING'S BENCH,

Term, in the year of the reign of King George the Fourth.

\_\_\_ to wit, C. D. was attached to answer A. B. of a **plea, wherefore he, the said C. D.** with force and arms, at in the eomity of . made an assault upon the said A. B., and beat, wounded, and ill-treated him, so that his life was despaired of, and other wrongs to him there did, to the damage of the said A. B., and against the peace of our lard the now king. And thereupon the said A. B., by his attorney, complains: For that the said C. D. heretofore, to wit, on the \_\_\_\_\_ dayof \_\_\_\_\_ intheyearofour Lord .**with** force and arms, at aforesaid, in the county aforesaid, made an assault upon the said A. B., and then and

(Pa.) 358 (1816); Clotteral v. Cummins, 6 Serg. & B. (Pa.) 343 (1821).

In some of the states In which the Common-Law Forms of Actions were formerly or are now is Use, the distinction, as to the Form of Action, between Trespass and Trespass on the Case, has been abetished. Thus, prior to recent changes, Hard's Rev.St. 1111921, c. 110, ~ 36 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.**"

See, in this connection, Elajoek v. Randall, 76 Ill. 221 (1875); Galt v. Chicago & N. W. R. Co., 157 Ill. 125, 41 N.E. 643 (1845); George v. Illinois Cent It. Co., **197 Ill.App. 152 (1915); Kaplscbkl v. Koch**, 180 Ill 44, **54 N.E. 179 (1899)**; Chicago Title & Trust Co. v. Core, 223 Ill. 58, 79 N.E. 108 (1906).

See, also, the case of Lawry v. Lawry, 88 Me. 482, 34 Atl. 273 (1896).  
Sec. 78

#### ACTION OF TRESPASS

155

there beat, wounded and ill-treated him, so that his life was despaired of, and other wrongs to the said A. B. then and there did, against the peace of our said lord the king, and to the damage of the said A. B. of £ ; and therefore **he brings his suit, &c.**

STEPHEN, A Treatise on the Principles of Pleading in Civil Actions, p. 70 (3rd Am. ed., Washington, D.C. 1892).  
DECLARATION IN TRESPASS  
(*DC Bonis Asportatis*)

IN THE KING'S BENCH,

Term, in the year of the reign of King George the Fourth.

\_\_\_ to wit, C. D. was attached to answer A. B. of a plea, wherefore he, the said defendant, on, &c., with force and arms, &c., to wit, at, &c. (*Venue*) seized and took a certain barge or vessel of the said plaintiff, of great value, to wit, of the value of

and in which said barge or vessel, the said plaintiff then and there intended, and was about to carry and convey certain goods, chattels, and merchandise, for certain freight and reward, to be therefore paid to the said plaintiff, and then and there carried away the said barge or vessel, and kept and detained the same from the said plaintiff for a long space of time, to wit, hitherto, and converted and disposed thereof to his own use, **and thereby the said plaintiff was hindered and prevented from carrying and conveying the said goods, chattels and merchandise as aforesaid, and thereby lost and was deprived of all the profits, benefit and advantage which might and would otherwise have arisen and accrued to him therefrom, to wit, at &c. (*venue*) aforesaid, and other wrongs to the said plaintiff then and there did, against the peace of our said lord the king, and to the damage of the plaintiff of £ ; and therefore he brings his suit, &c.**

**2 CHITTY, Pleading, 861 (Springfield, 1859)**

**DECLARATION IN TRESPASS  
(*Quare Clausum Fregit*)**

IN THE KING'S BENCH,

Term, in the year of the reign of George the Fourth.

to wit, C. D. was attached to answer A. B. of a plea, wherefore he, the said C. D., with force and arms broke and entered the close of the said A. B., situate and being in the parish of \_\_\_\_\_ in the county of \_\_\_\_\_

\_\_\_ and with his feet, in walking, trod **down, trampled upon, consumed, and spoiled** the grass and herbage of the said A. B., there growing, and being of great value) and other wrongs to the said A. B. there did, to the damage of said A. B. and against the peace of our lord the now *king*. And thereupon, the said A. B., by his attorney, complains: For that The said C. D. heretofore, to wit, on the day of \_\_\_\_\_ in the year of our Lord, with force and arms, broke and entered the close of the said

A. B., that is to say, a certain close called situate and being In the parish aforesaid, in the county aforesaid, and with his feet, in walking, trod down, trampled upon, consumed, and spoiled the grass and herbage of the said A. B., then and there growing, and being of great value, to wit, of the value of £\_\_\_ **of lawful money of Great Britain, and other wrongs to the said A. B., then and there did, against the peace of our said lord the king, and to the damage of the said A. B. of £ \_\_\_\_\_ ; and therefore he brings his suit, &c.**

STEPHEN, A Treatise on the Principles of Pleading in Civil Action, p. 70 (3rd Am. ed., Washington, D.C., 1892).

156

**OFFENSIVE PLEADINGS**

Ch. 7

**DECLARATION IN TRESPASS—ESSENTIAL**

**ALLEGATIONS: (1) IN GENERAL**

**79. The Essential Allegations of the Declaration in Trespass are:**

**(I) For Injuries to the person:**

**(A) The application of force by direct act of defendant.**

**(B) The Damages.**

**(II) For injuries to real or personal property, or to relative rights:**

**(A) The Title or Right of plaintiff**

**(B) The Wrongful Act of defendant, causing direct injury.**



(C) **The Damages.**

**DECLARATION IN TRESPASS—ESSENTIAL  
ALLEGATIONS: (2) THE PLAINTIFF’S  
RIGHT, TITLE, INTEREST OR POSSESSION<sup>13</sup>**

80. In alleging plaintiff’s Right, Title, Interest or Possession in the various Actions of  
**Trespass:**

- (I) For injuries to the **person no statement of the right is required.**
- (0) For injuries to real or personal property, or to relative rights:
  - (A) **In General:**
    - (1) **The technical limits of Trespass to the party in possession, or with the immediate right of possession, are probably due to its origin as a semi-criminal action, covering a wrongful application of force which might lead to violence and a breach of the peace;**
    - (2) **Possession is to be distinguished from the custody of a servant; and a bailee at will is given the rights of a possessor, though for most purposes his possession is that of the bailor;**
    - (3)

**In some states both a tenant at will and the landlord may sue in Trespass;**

(II) For injuries to real or personal property, or to relative rights— Cont’d

- (A) **In General—Cont’d**
  - (4) **The family of the owner are licensees and do not have possession by reason of their occupancy alone;**
  - (5) **The owner of land not in the actual possession of another is said to be in constructive possession; that is, he is given the remedies of a possessor**
  - (6) **Naked possession is sufficient as against a wrongdoer.**
- (B) **Specifically, the Declaration in Actions of Trespass to Property, Real or Personal, or to Relative Rights should:**
  - (I) **State the property or thing affected and the Title or Right of the plaintiff in relation thereto;**
  - (2) **Show such possession, actual or constructive, as is sufficient to sustain the action;**
  - (3) **Describe the property sufficiently for identification, but the plaintiff’s Title or Interest may be generally stated.**

*Trespass for Personal Injury*

IN Trespass for injury to the person, the Declaration need only contain a statement of the wrongful act- This appears to be an exception to the rule that the Declaration in all Forms of Action should contain a Statement of the Right of the plaintiff as well as the Violation of that Right by Act of the defendant. But since the right of personal security and liberty belong to all, there is no necessity of alleging their existence in the pleading; the court takes judicial notice thereof. All that is necessary, therefore, is the statement of The wrongful act of the defendant, such as an assault and battery, or

13. See Chapter 4, note 21, for a discussion of legal

concepts of **right, Interest,** and possession.

Sec. 80  
**ACTION OF TRESPASS**

1 ~7

false imprisonment, and the damages caused thereby.

*Trespass to Property—Including Real and Personal*

IN order to maintain an Action of Trespass for injury to either real” or personal property,<sup>15</sup> the plaintiff must allege, by Way of Title, that he was in actual or constructive possession, at the time the injury occurred. He must have actual possession, or the right to immediate possession. If his right was

14. Illinois: Topping v. Evans, 58 Ill. 209 (1871);

Florida: Bucki v. Gone, 25 Fla. 1, 0 So. 160 (1889);

Maine: United Copper Mining & Smelting Co. v. Franks, 85 Me. 321, 27 Me. 185 (1893); Massachusetts: Lienow v. flitchie, 8 Pick. (Mass.) 235 (1828); Bascom v. Dempsey, 143 Mass. 409, 0 N.E. 744(1887); Michigan; Goetchins v. Sanborn, 46 Mich. 330, 9 N. W. 437 (1881); Stout v. Keyes, 2 Doug. (MiCh.) 184, 43 Am.Dec. 465 (1845); Minnesota: Moon v. **Avery**, 42 Minn. 405, 44 N.W. 257 (1890); New York: Campbell v. Arnold, 1 Johns. (N.Y.) \$11 (1806); Tobey v. **Webster**, 3 Johns. (N.Y.) 468 (1808); Pennsylvania: Schnable v. Koebler, 28 Pa. 181 (1857); Wilkinson v. Connell, 158 Pa. 126, 27 Me. 870 (1893); Yocum v. Zahner, 162 Pa. 468, 29 AU. 778 (1894); Ripka v. Sergeant, 7 Watts & S. (Pa.) 9, 42 **Am.flec. 214** (1844); Wisconsin: Gunsolus v. Lormer, **54 Wis.** 630, 12 N.W. 62 (1882).

-s. English: Ward v. Macauley, 4 P.R. 480, 100 Eng. Rep. 1135 (1791); Gordon v. Harper, 7 P.R. 9, 101 Eng.Rep. 828 (1796); Hall v. Pickard, 3 Camp. 187, **170 Rng.Rep. 1350 (1812)**; Florida: Bucki v. Cone, 25 Fla. 1, 6 So. 160 (1889); Kentucky: Daniel v. Holland, 4 iJ.Marsh (Ky.) 18 (1830); Massachusetts: Ayor v. Bartlett, 9 Pick. (Mass.) 156 (1829); Winship v. Neale, 10 Gray (Mass.) 382 (**1858**); Parsons v. Dickinson, 11 Plck. (Mass.) 352 (1831);

Maine: **Lunt** v. Brown, **13** Me. 236 (1836); Michigan: Finch v. Brlan, 44 Mich. 517,7 N.W. 81(1880);

Minnesota: Moon ‘cc Avery, 42 Minn. 405, 44 **N.W. 257** (1890); New York: Carter v. SImpson, 7 John-. (N.Y.) 535 (1811); Putnam v. Wyley, S Johns. (N.Y.) 432, **5** Am.Dec. 346 (1811); Van Brunt v. Schenek, 11 Johns. (N.Y.) **377 (1814)**; **Pennsylvania: Fidler** v. Shotwell, 7 Watts. & S. (Pa.) 14 (1844).

In Pinch v. Brian, supra, the plaintiff had left meat at the 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, on Appeal the Judgment was reversed.

merely in reversion, his remedy was in Trespass on the Case, not Trespass.’°

#### *A General and Special Property interest*

IT is frequently said that an Allegation of a **General or Special Property Interest** is sufficient to support an Action of Trespass. This is true if properly understood.

Thus, the general owner of personal property, who parts with custody thereof, does not necessarily part with his possession so as to prevent his maintaining Trespass against a stranger. The person who has the absolute or general property interest ~ may maintain the action, though, when the injury occurred, he had parted with the custody to a carrier, servant, or other agent, where it appears that he gave the latter only a bare authority to carry or keep, not coupled with any special interest in the property. And generally, if the owner of personal property merely permits another gratuitously to use it, having a 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.’~ The rule applies equally to an Action of Trespass by a bailee who had an authority, coupled with an interest, and a right to irnme

16. Illinois: Halligan v. Chicago & H. I. R. Co., 15 Ill.

553 (1854); Colorado: Naehtrieb v. Stoner, 1 Cole.

423 (1872).

7’ English: Gordon y. Harper, 7 ‘LB. 9, 101 Eng.ltep.

828 (1796); Bertie v. Beaumont, 16 East, 33, 10-1

Eng.Bep. 1001 (1812); Alabama: White v. Brantley,

37 Ala. 430 (1861); Connecticut: Williams v. Lewis,

3 Day (Conn.) 498 (1807); Bird v. Henipstead, 3

flay (Gonn.) 272, 3 Am.Dec. 269, (1808); Buckley v.

Dolbeare, 7 Conn. 235 (1828); Maine: Staples v.

Smith, 48 Me. 470 (1861); New Hampshire: Lane v.

Thompson, 43 N.H. 320 (1861); New York: Putnam

v. Wyley, S Johns. (N.Y.) 432, 5 .Am.Dec. 346 (1811);

Thorp ‘cc Burling, 11 Johns. (N.Y.) 285 (1814); Pennsylvania: Glllett ‘cc Ball, 9 Pa. 13 (1848); Becker v.

SmIth, 59 Pa. 469 (1868); Vermont: Strong v.

Adams, 30 Vt. 221. 73 Am.Dec. 305 (1858).

It English: Lotan ‘cc Cross, 2 Camp. 464, 170 Lag.

**Rep. 1219** (1810); Hall 'cc Plekard, S **Camp. 187, 170**  
**Bug-Rep.** 1350 (1812); Bertle v. Beaumont, 16 East,  
33, 104 Eng.Rep. 1001 (1812); Vermont: Edwards 'cc  
Edwards, 11 Vt. 587, **24** Axn.Dec. 711 (1839).

158

## OFFENSIVE PLEADINGS

### Ch. 7

diate possession, although he did not have the actual possession at the time of the injury.<sup>19</sup> These cases involve a constructive possession, which, as we have seen in the very beginning, was a sufficient Allegation of Title to support the action.<sup>20</sup> If, however, the owner of personal property parts with possession of it, and the bailee, at the time when it is injured by a stranger, has the exclusive right to its use, the owner's right is merely in reversion, and his remedy is by an Action on the Case, and not Trespass.<sup>21</sup>

#### *The Agent or Servant Acting in Behalf of His Principal or Employer*

A MERE servant, acting in behalf of his employer, and having the bare custody of the goods at the time they are injured, cannot maintain Trespass, or any other possessory action, for, in contemplation of law, he

19- 1 Chitty, Treatise on Pleading and Parties to Actions, with Precedents and Forms, e. II, Of the Forms of Action, 190 (16th Am. ccl. by Perkins, Springfield 1870); 2 Saunders, Law of Pleading and Evidence in Civil Actions, 1115 (5th Am. ccl. Philadelphia 1851).

See, also, the following cases: English: Fowler v. Down, 1 Bos. & Pu. 45, 126 Eng.Rep. 760 (1797); Gordon v. Harper, 7 P.R. 9, 101 Eng.Rep. 828 (1796); Ilackliam v. Jesup, 3 Wils. 332, 95 Eng.Rep. 1084 (1772); Massachusetts: Parsons v. Dickinson, 11 Pick. (Mass.) 352 (1831); New York: Hoyt v. Gelston, 13 Johns. (N.Y.) 141 (1816).

20. Dailam v. Fitler, 6 Watts & S. (Pa.) 323 (1843); Talinndge v. Seudder, 38 Pa. 517 (1861); North v. Turner, 9 Scrg. & B. (Pa.) 244 (1823).

21. English: Ward v. Maeauley, 4 T.R. 489, 100 Eng. Rep. 1135 (1791); Gordon v. Harper, 7 TB. 9, 101 EngJtep. 878 (1796); Hall -cc Pickard, 3 Camp. 187, 170 Eng.rtep. 1350 (1812); Smith v. Plomer, 1~ East 607, 104 Eng.ltep. 972 (1812); Connecticut: Bulkley v. Dolbeare, 7 Conu. 235 (1828); Illinois: Cannon v. Kinney, 3 Scam. Ill. 10 (13413); Maine: Lunt v. Brown, 13 Me. 236 (1836); Massachusetts: Muggridge v. Eveleth, 9 Mete. (Mass.) 233 (1845); New Hampshire: Wilson v. Martin, 40 N.H. 88 (1860); New York: Putnam v. Wyley, 8 Johns. (N.Y.) 432 (1811); Pennsylvania: Fitler v. Shotwell, 7 Watts & S. (Pa.) 14 (1844); Vermont: Sopor v. Sumner, 5 Vt., 274 (1833); Hammond v. Plimpton, 30 Vt. 333 (1858),

has no possession, actual or constructive.<sup>22</sup> While there appears to be no very substantial distinction between the custody of a servant and the possession of a depositary at will, nevertheless, the bailee is allowed the p05-sessory remedies, but the servant is not. A servant or agent is denied the rights and remedies of a possessor, because his acts are the acts of his employer, and hence the rights which he represents are those of his employer.<sup>23</sup> By an anomaly of the Common Law, a subservient bailee, like a depositary for storage, who holds, like a servant, entirely at the orders of the bailor, is yet regarded as having legal possession rather than mere custody and hence may sue a trespasser.

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

#### *Trespass to Real Propefly—Quare Clau.sum Fregit*

WITH a few exceptions what has been said with reference to alleging Title in Trespass to Personal Property applies equally in alleging Title 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 the plaintiff, in order to maintain the action, must allege that he was in actual or constructive possession - of the realty at

22. English: Bloss v. Holman, Owen 52, 74 Eng.Rep. 893 (1551); Illinois: Pease v. Ditto, 189 Ill. 456, 59 N.E. 983 (1901),

23. Illinois: Pease v. Ditto, 189 Ill. 456, 59 N.E. 983 (1901); New York: Russell v. Scott, 9 Cow. (N.Y.) 279 (1828).

24. In general, on the subject of possession, see:

**Treatises: Martin, Civil Procedure at Common Law, e. XIII, Rules of Pleading, \* 268 (St. Paul, 1905); Stephen, A Treatise on the**

**ACTION OF TRESPASS**

**159**

the time the injury was committed.<sup>25</sup> As in the case of personal property, if the plaintiff's right was merely in reversion, his remedy is by an Action on the Case, not Trespass.

Where the land is in the exclusive possession of a lessee, other than a tenant at will, and in some states even if 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.<sup>28</sup> 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; <sup>-7</sup>but in New York the contrary was held on the ground that, in the opinion of the court, possession

ing, § 4, 256 (3d Am. ed. by Tyler, Washington, B. C. 1893); Shipman, Handbook of Common-Law Pleading, e. III, The Action of Trespass, § 37, The Plaintiff's Right or Title In Trespass, 75—82 (3d ed. by Ballantine, St. Paul 1923),

Articles: Terry, Possession, 13 Ill.L.Rev. 314 (1918); Eingham, The *Nature* and Importance of Legal Peasession, 13 Mich.L.Rev. 535, Id. at 623 (1915); Ballantine, Claim of Title In Adverse Possession, 28 Yale L.J. 219 (1919).

25. Indiana: Bucker 'cc McNeely, 4 macId. (md.) 179 (1836); Maine: Bartlett 'cc Perkins, 13 Me. 87 (1830); Moore v. Moore, 21 Me. 350 (1342); Maryland: Dorsey v. Eagle, 7 Gill. & J. (Md.) 321 (1835)  
Massachusetts: SDarhawk v. Bagg, 16 Gray (Mass.) 583(1860); Michigan: Carpenter v. Smlth, 40 Mich, 839 (mOD); Pfistner v. Rh-a, 43 Mich. 14, 4 N.W. 625 (1880); New York: Stuyvesant v. Tompkins, 9 Johns. (N.Y.) 61 (1812); Wickhalm v. Freeman, 12 Johns. (N.Y.) 183 (1815); Pennsylvania: Alderman cc Way, 4 teates (Pa.) 218 (1805); Matber v. Trinity Church, 3 Berg. & B. (Pa.) 509, 8 Am,Dec. 603 (1516); Vermont: Ripley v. Yale, 16 Vt. 257 (1844); Oatmarz v. Fowier, 43 'Vt. 484 (1871).

25. Massachusetts: Lienow v. Ritchie, S Pick. (Mass.) 235 (1829); Missouri: Roussin v. Benton, 6 Mo. 592 (1840); New York: Campbell v. Arnold, I Johns. (MS.) SU (1806); Pennsylvania: Torrence v. Irwin, 2 Yeatea (Pt) 210, 1 Ain.IJea 340 (1798).

17. Starr v. Jackson, 21 Mass. 520 (1814); Daniels v. Pond, 21 Pick, (Mass.) 367, 32 Am.Dec. 269 (1838).  
in fact was necessary,<sup>28</sup> and the same ruling has been made in other states.<sup>2o</sup>

The mere occupancy of land by a hired servant of the owner, without paying rent, is not possession. In such case the possession is said to be constructively or actually in the owner, and he may maintain Trespass as if he had been in actual possession himself?<sup>o</sup> Likewise, the family or servants, the guests or lodgers, of a householder, do not have possession, even during the absence of the owner, as there is no claim of title or interest on their part even at the time. Their occupation is regarded as entirely subordinate to and in the name of the owner. Possession implies some claim of title or independent holding.<sup>3o</sup> A Wisconsin case <sup>32</sup>illustrates a questionable failure to apply this doctrine. It appeared that *B*, the defendant, had committed a trespass during the absence of *C*, the husband of the plaintiff, *A*. In an action by *A*, the wife, it was held that she had sufficient possession to maintain Trespass, on the theory that she was in the exclusive occupation of the premises in the absence of her husband. It is submitted that the court overlooked the point that occupancy and residence are not possession, unless under a Claim of Title of some sort. The situation of the wife would appear to be like that of

28. Campbell v. Arnold, I Johns. (N.Y.) 511 (1806); Tobey v. *Webster*, 3 Johns. (N.Y.) 468 (1808).

29. Illinois: Kankakee & S. B. Co. v. Bonn, 131 Ill. 288, 23 N.E. 621 (1890); Pennsylvania: Clark v. Smith, 25 Pa. 137 (1855).

3o English: Bertie v. Beaumont, 16 East 33, 104 Eng.Bep. 1001 (1812); South Carolina: Davis v. Clancy, 3 McCord (S.C.) 422 (1826).

3o See Ft. Dearborn Lodge v. Klein, 115 Ill. 177, 3 N. B. 272, 56 Am.Rep. 133 (1885). Compare, however, the articles by Terry, Possession, 13 Ill.L.Rev. 314, 320 (1918); Bingham, The Nature and Importance of Legal Possession, 13 Mlch,L.Rev. 549, 631, 633 (1915); Ballnntlne, Claim of Title in Adverse Possession, 28 Yale L.J. 219 (1919),

32' Bieri v. Fonger, 139 Wis, 150, 120 NW. 863 (1909). See, also, Ford cc Schuiesman, 107 win. 477, 83 N. W. 761 (1900), and note; Property: Statute of Limitations—Title to Land, 14 Harv.L.Rev. 389 (1901).  
Kottler & Reppy comLaw Pldg. 11,5—7

## OFFENSIVE PLEADINGS

### 160

a servant or licensee or guest. The presumption is that the joint occupancy of husband and wife is the possession of the husband, although this may be rebutted.<sup>33</sup>

In England and in some of our states, New York in particular, it was held that the rule that the 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 hence unless the plaintiff had the actual possession by himself or his servant at the time of the injury, he cannot maintain Trespass.<sup>34</sup> In most of our states the rule is otherwise, and the owner of Land not in the actual possession of another is given the remedies of a possessor.<sup>35</sup> If no one has actual possession, the owner of the Legal Title has constructive possession; but there

33. Collins v. Lynch, 157 Pa. 246, 27 LU. 721, 37 Am. **St.Rep.** 723 (1893).

34. 1 Chitty, A Treatise on Pleading and Parties to Actions, with Precedents and Forms, c. II, Of the Forms of Action, 197 (16th Am. ed. by Perkins, Springfield 1876); 0 Bacon, New Abridgment of tile Law, 554 at 566, Trespass (C) 3, (5th ed. by Gwilliin, London, 1798).

See, also, the following eases: English: King v. Watson, 5 East 485, 102 Eng.Rep. 1156 (1504); Kentncky: Fish v. Brnnamon, 2 tMon. (Ky.) 379 (1842) Walton v. Clarke, 4 Bibb. (Ky.) 218 (1815); llfassaehusetts: Spathawk v. Bagg, 16 Cray (Mass.) 583 (1860); Allen v. Thayer, 17 Mass, 299 (1821); New York: Campbell v. Arnold, **1 Johns.** (N.Y.) 511

(1800).

35. .AJat,ama: Gillespie v. Dew, 1 Stew. (Ala.) 229, **18** .&m.Dec. 42 (1827); Arkansas: Ledbetter 'cc Fitzgerald, 1 Ark. 448 (1839); Connecticut: Bulkley v. Dolbeare, 7 Conn. 232 (1828); Wheeler v. BotchkIss, 10 Cona. 225 (1834); Illinois: Dean v. Comstock, 32 Ill. 173 (1863); Cairo & St. Le. B. Co. v. Woosley, 85 Ill. 370 (1877); Wilcox v. Kinzle, 3 Seam. (ILL) 218 (1841); Missonrl: Davis v. Wood, 7 Mo. 162 (1841); New York: Van Brunt v. Schenek, 11 *Johns.* (N.Y.) 385 (1814); Wiekbam v. Freeman, 12 Johns. (N.Y.) 183 (1815); North Carolina: Dobbs t Gullidge, 20 *N.e.* 197 (1535); Cohoon 'cc Simmons, 29 N.C. 189 (1847); Pennsylvania: Baker v. ~Ing, 18 Pa. 138 (1851); South Carolina: Davis 'cc Clancy.

**3** McOord (8.0.) 422 (1826); **Skinner v, McDowell, 2 14oft & MeC. (8.0.) 68** (1819).

Cli. 7 cannot be constructive possession of land by the holder of the Legal Title where third persons are in actual adverse possession.<sup>3-</sup>

### *Where Land is in the Actual and Lawful Possession of the Wrongdoer—Spec~ficatly the Tenant at Will*

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*?<sup>7</sup> Thus, for example, it has been held that if a tenant at will commits waste, his wrongful act terminates the tenancy, possession is restored, and Trespass *quare clausuni fregit* may be maintained against him by the landlord or reversioner.<sup>38</sup>

This is what some of the English and American Courts have held, but *is* submitted that it is not a realistic explanation of what actually happened. At Common Law the Action of Waste was not available against a tenant at willY° When, therefore, a tenant at will committed waste—let us say be chopped down the century old shade trees in front of the mansion—the landlord demanded a remedy. There was none at the time as the Action on the Case was not yet in being. What happened? They took the Action of Trespass, which in legal theory, was avail

38. Safford v. Barso, 4 Mien. 400 (1857); Buggles v. Sands, 40 Mien, 559 (1879); O'Brien v. Cavanaugh, 61 Mich. 368, 28 N.W. 127 (1886).

**37.** 'taylor v. Jones, 42 N.Th. 25 (1860); Drew v. Spaulding, 45 N.H. 472 (1864).

38. **1 Chlty, A Treatise** on Pleading and Parties to Actions, with Precedents and Forms, e. **II, Of** the Forms of Action, 200 (16th .&m. ed. by Perkins, Springfield 1876).

See, also, the following cases: English: Countess of Salop ‘cc Crompton, Cro.Eliz. 784, 78 Eng.Rep. 1014 (1602); Massachusetts: Daniels v. Pond, 21 Pick. (Mass.) 367, 32 .Am.Dec. 269 (1838); New York: PlüUips v, Covert, 7 Johns. (N.Y.) 1 (1810); Suffern v. Townsend, 9 Johns. (N.Y.) 35 (1812).

30. West v. Treucle, **Cro.Car. 187, 79** Eng.ltep. 764-

## Sec. 80

### ACTION OF TRESPASS

161

able only for the protection of an actual possessory interest, and stretched it to fill a temporary remedial gap. By his wrongful act of destroying the trees, the authorities argued, the tenant terminated the lease at will, restored the possession to the landlord, who then proceeded with his Action of Trespass. In reality, even after the wrongful act, the tenant at will remained in actual physical possession, and to say that the act restored possession to the landlord was a pure fiction—a fiction which continued in operation until the Action of Trespass on the Case came into operation as a Remedy for injury to reversionary interests. Somewhat the same sort of development took place when Trespass was originally permitted as a remedy in the seduction cases on the theory that the wrongdoer has interfered with the master’s possessory interest in his servant, to wit, his daughter. In this instance, as in the tenancy at will, a fiction was coupled with the Action of Trespass to bridge a remedial gap, until Case came in as a remedy for the indirect consequential injury to the father resulting from the seduction of his daughter.<sup>40</sup>

#### *A Mere Naked Possession as Sufficient Title Against a Wrongdoer*

SINCE the days of the Ancient Real Possessory Actions, or more specifically, since the appearance of the Assize of Novel Disseisin, one forcibly ousted from his possession could be summarily restored to his possession. The law protected one in possession of real property in order to prevent breaches of the peace. It is not surprising then to find that Trespass, being an interference with

<sup>40.</sup> See the following cases: English: Woodward v. Walton, 2 Bbs. & Pul. (NS.) 476, 127 Eng.Rep. 715 (2807); *Ditcham v. Bond*, 2 Msule & 8. 436, 105 Eng Rep. 443 (1814); New York: Akerley ‘cc flames, 2 Caines (N.Y.) 292 (1805), **in which Trespass was held** to be the proper remedy for seduction of a daughter; and Moran v. Dawes, 4 Cow. (N.Y.) 412 (1825), dec14-ed Just twenty years later, In which the Court held that Trespass on the Case was the proper action.

the possession, the de facto exercise of dominion over property, does not require a Legal Title to support it. Under the early Common Law, if the so-called Title, which was only an older possession, was involved, the remedy was by Writ of Right.<sup>41</sup>

In consequence of this development, it became e~tablished law that a mere naked possession, without any other Title, is sufficient as against a wrongdoer. In the case of *Graham v. Peat*,<sup>42</sup> The Court declared: “Any possession is a legal possession against a wrongdoer.” 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.<sup>43</sup>

A bailee may maintain Trespass against a stranger, or even the general owner, for an injury to the property which is in his possession,<sup>44</sup> and, as we have seen, even where

<sup>41.</sup> See Chapter 2,- The Development of the *Common*-Law Forms of Action.

<sup>42.</sup> *Graham ‘cc Peat*, 1 East 244, 102 Eng.Eep. 95 (1801).

<sup>43.</sup> English: *Rackham v. Jesup*, 3 Wils 332, 0~ Rug. Rep. 1054 (1772); *Wilbraham v. Snow*, 2 Saund, 47d, 85 Eng.Rep. 626 (1070); Iowa: *Welch v. Jenks*, 58 Iowa 694, 12 N.W. 727 (1882); Illinois: *Illinois & St. L. Railroad & Coal Co. v. Cobb*, 04 Iii. 55 (1879); Maine: *Barker v. Chase*, 24 Me. 230 (1844); Massachusetts: *Hubbard v. Lyman*, S Allen (Massj 520 (1864); *Burke v. Savage*, 13 Allen (Mass.) 408 (1866); *Adams v. O’Connor*, 100 Mass. 515, 1 Am. Rep. 137 (1868); Minnesota: *Laing v Nelson*, 41 Minn. 521, 43 N.W. 476 (1539); North Carolina: *Horton v. Hensley*, 23 N.C. 163 (3540); New York: *Hoyt v. Gelston*, 13 Johns. (N.Y.) 141 (1816); *Cook v. Howard*, 18 Johns. (N.Y.) 276 (1816); *Hammer v. Wilsey*, 17 Wend. (N.Y.) 01 (1837); *Hendricks v. Decker*, 35 Barb. (N.Y.) 298 (1861); *Butts v. Collins*, 13 Wend. (N.Y.) 139 (1834); South Carolina:

Jones v. McNeil, 2 Bailey (S.C.) 466 (1831); Tennessee: Carson v. Prater, 6 Cold. (Tenn.) 565 (1869); Vermont: Fisher v. Cobb, 6 Vt. 622 (1834); Potter v. Washburn, 13 Vt. 558, 37 Ani. Dec. 815 (1841).

44. Heydon & Smith's Case, 18 Coke 67, 69, 77 Eng. Rep. 1345, 1347; Brerly v. Kendall, 117 Eng.

#### OFFENSIVE PLEADINGS

he had not the actual possession, if he had the right to take immediate possession, since he had the constructive possession. The quantity or certainty of the bailor's interest is immaterial.<sup>45</sup> Even a mere gratuitous bailee may maintain the action against a stranger.<sup>46</sup> As we have seen, a person professedly in possession as a mere servant cannot maintain Trespass.

In general, what has been said as to mere naked possession with reference to Trespass to Personal Property applies 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.<sup>47</sup> Actual and exclusive possession without a Legal Title is sufficient against a wrongdoer or a person who cannot show any right or authority from the real Owner.<sup>48</sup> Trespass,

Rep. 1541, 17 Q.B. 037 (1852). See, also, Ames, Lectures on Legal History, Lecture No. IV, Trespass De Bonis Asportatis, 59 (Cambridge 1913).

45. 1 Chitty, A Treatise on Pleading and Parties to Actions, with Precedents and Forms, e. II, Of the Forms of Action 190 (16th Am. ed. by Perkins, Springfield 1876). See, also, Coiwill v. Reeves, 2 Camp. 575, 170 Eng. Rep. 1257 (1511); Booth v. Wilson, 1 Barn. & Ald. 59, 106 Eng. Rep. 22 (1817).

46. English: Booth v. Wilson, 1 Barn. & Ald. 59, 106 Eng. Rep. 22 (1817); Minnesota: Laing v. Nelson, 41 Minn. 521, 43 N.W. 476 (1889).

47. 1 Chitty, A Treatise on Pleading and Parties to Actions, with Precedents and Forms, c. II, Of the Forms of Action 195 (16th Am. ed. by Perkins, Springfield 1876). See, also, Lambert v. Stroother, Willes 221, 125 Eng. Rep. 1141 (1740); Graham v. Peat, 1 East 244, 102 Eng. Rep. 95 (1801); Cheasley v. Barnes, 10 East 73, 103 Eng. Rep. 703 (1808).

48. English: Graham v. Peat, 2 East 244, 102 Eng. Rep. 95 (1801); Chatteris v. Cowper, 4 Taunt. 547, 128 Eng. Rep. 444 (1812); Dyson v. Collick, 5 Barn. & Ald. 600, 106 Eng. Rep. 1310 (1822); Chambers v. Donaldson, 11 East 65, 103 Eng. Rep. 928 (1809); Illinois: Shoup v. Shields, 116 Ill. 488, 6 N.E. 502 (1886); Webb v. Sturtevant, 1 Scam. (Ill.) 182 (1835); Iowa: Welch v. Jenks, 58 Iowa 694, 12 N.W. 727 (1898); Maine: Moore v. Moore, 21 Me. 350 (1842); Massachusetts: Inhabitants of Barnstable v. Thatcher, 3 Mete. (Mass.) 239 (1841); Littlefield v. Ferguson, 141 Mass. 97, 6 N.E. 721 (1886); Nickerson v. Thacher, 146 Mass. 609, 16 N.E. 581 (1888); Michigan: Fox v. Folcomb, 32 Mich. 494 (1875); Hoff-

for example, has been sustained by a tenant

**in** possession under an illegal lease; ~

by

an intruder on public land, who had not been treated as such by the government.<sup>55</sup> And a tenant for years,<sup>51</sup> at will,<sup>52</sup> or, according to *some* of the authorities, at sufferance,<sup>53</sup> may maintain an action against a stranger, or even against his landlord, where a right of entry was not expressly or impliedly reserved to the latter.<sup>M</sup>

man v. Harrington, 44 Mich. 183, 6 N.W. 225 (1880); Newcomb v. Irwin, 55 Mich. 620, 22 N.W. 66 (1885); Minnesota: Witt v. St. Paul & N. P. Ry., 38 Minn. 122, 35 N.W. 862 (1888); Missouri: Richardson v. Murrill, 7 Mo. 333 (1842); North Carolina: Myrick v. Bishop, 8 NC. 485 (1821); Vermont: Ralph v. Bayley, 11 Vt. 521 (1839); Hall v. Chaffee, 13 Vt. 150 (1841); Langdon v. Templeton, 66 Vt. 173, 28 Atl. 866 (1894); Wisconsin: Newton v. Marshall, 62 Wis. 8, 21 N.W. 803 (1884); Stahl v. Grover, 80 Wis. 650, 50 N.W. 589 (1891).

49. **Graham** v. Peat, 1 East 244, 102 Eng. Rep. 95 (1801).

- English: Harper v. Charlesworth, 4 Barn. & C. 574, 107 Eng.Rep. 1174 (1825); Illinois: Wincher v. Shrewsbury, 2 Scam. (Ill.) 283, 35 Am.Dec. 108 (1840); Nebraska: Keith v. Tilford, 12 Neb. 271

(1882).

- 2 Rolle, Abridgment 551 (London 1668). See, also, the following cases: English: Geary v. Barecroft, Sid. 347, 82 Eng.Rep. 1148 (1666); Maryland: Dorsey v. Eagle, 7 Gill & J. (Md.) 321 (1835); Michigan: Lorman v. Benson, 8 Mich. 18, 77 Am.Dec. 435 (1860); New Jersey: Van Doren cc Everitt, 5 N.J.L. 460, 8 Am.Dec. 615 (1819); Pennsylvania: Stulta v. Dickey, 5 Bin. (Pa.) 285, 6 Am.Dec. 411 (1812).

52. 2 bile, Abridgment 551 (London 1668). 8cc, also, the following cases: English; Geary v. Barecroft, Sid. 347, 82 Eng.Rep. 1148 (1866); Michigan: O'Brien v. Cavannugh, 61 Mich. 368, 28 N.W. 127 (1886); Wisconsin: Gunsolus v. Dormer, 54 Wis. 630, 12 N.W. 62 (1882).

53. 2 Rolle, Abridgment 551 (London 1668); Geary v. Barecroft, Sid. 347, 82 Eng.Rep. 1148 (1660); Graham v. Peat, 1 East 245, note a, 102 Eng.Rep. 95 (1501); Heydon & Smith's Case, 23 Coke 69, 77 Bag. Rep. 1476 (1610).

54. English: *Anonymous*, ii Mod. 209, 88 Zng.Rep. 994 (1709); Lifford's Case, 11 Coke 48, 77 Eng.Rep. 1208 (1614); Maine: Bryant v. Sparrow, 62 Me. 546 (1873); Massachusetts: Dickinson v. Goodspeed. S. Cush. (Mass.) 119 (1851); Virginia: Faulkner v. Al-demon, Gilmer (Va.) 221 (1821).

## 162 Ch. 7

### Sec. SO

## ACTION OF TRESPASS

### 163

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 must allege such a Title as thaws to it the constructive possession.

**He must at least show a right to immediate possession and the absence of adverse possession}~**

### *Where the Property or Right injured is intangible*

WHERE the property or right injured is intangible, that is, not involving possession, the injury can never be considered as Trespass, but the remedy must be by an Action on the Case.<sup>56</sup> 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.<sup>57</sup> Nor will it lie for obstructing a public highway,<sup>58</sup> or a navigable

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. Meader v. Stone, 7 Mete (Mass.) 147 (1843); Curl v. Lowell, 19 Pick. (Mass.) 25 (1837).

It has generally been held that a tenant at sufferance cannot maintain the action against his landlord. Massachusetts: Sampson v. Henry, 13 Pick. (Mass.) 36 (1832); Meader v. Stone, 7 Mete. (Mass.) 147 (1843); New York: Wilde v. Cantillon, 1 Johns. (N. Y.) 123 (1800); Hyatt v. Wood, 4 Johns. (N.Y.) 150, 4 Am.Dec. 258 (1809); Pennsylvania: Overdeer v. Lewis, I Watts & S. (Pa.) 90, 37 Am.Dec. 440 (1841).

55. Alabama: Gillespie v. Dew, 1 Stew. (Ala.) 229, 18 Am.Dec. 42 (1827); Illinois: Cairo & St. L. H. Co. 'cc Woosley, 85 Ill. 370 (1872).

56. Union Petroleum Co. v. Bliven Petroleum Co., 72 Pa. 173 (1872).

57. New York: Lansing v. Wiswall, 5 Denio (N.Y.) 213 (1848); Lambert -cc Hoke, 14 Johns. (N.Y.) 383



(1817); Pennsylvania: Dietrich cc Berk, 24 Pa. 470 (1855); Jones v. Park, 10 Phila. (Pa.) 165, 31 Leg. Tnt. 372 (2874); *Okeson v. Patterson*, 29 Pa. 22

(1857).

*SB* English: *Greasley v. Codling*, 2 Blng 263, 130 Eng. Rep. 307 (1824); Illinois: *City of Pekin v. Breretori*, 67 111. 477, 16 Am.St.Rep. 629 (1873); New York:

*Lansing v. Wiswall*, 5 Denlo (N.Y.) 213 (1848).

river,<sup>59</sup> 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 the adjoining land.<sup>60</sup> Case and not Trespass is the remedy for diversion of or other injury to a water course, or body of water, where the plaintiff is not the owner of the soil, but is merely entitled to the use of water.<sup>61</sup>

Where the injury is to corporeal property, an Action of Trespass is the proper remedy, notwithstanding the fact that the property was the means by which an incorporeal right was enjoyed. Thus, destruction of a dam is a trespass, although the dam is the means by which a franchise granted by the legislature is exercised.~

### *Stating the Right of the Plaintiff*

IN Trespass to Lands or Goods, it is necessary to describe the property affected, whether real or personal, and to show the plaintiff's Right, Title, Interest or Possession, Thus, the Declaration must allege the property to be the plaintiff's, or at least in the plaintiff's possession. It is sufficient to plead ownership, and under that pleading any evidence showing sufficient right and interest to maintain Trespass is enough. Possession alone is all that needs to be proved. It will be sufficient to prove Actual Possession without any Title, or Actual Possession Coupled with Title, or Title Coupled with

<sup>89</sup> English: *Bose v. Miles*, 4 Maule & - 101, 105 Lag. Rep. 773 (1815); Michigan: *Bellant v. Brown*, 78 Mich. 294, 44 NW. 329 (1880).

<sup>60</sup> English: *Shacicrell v. JuteJiin\$on*, 2 Barn. & Ado].

97, 109 Eng.llep. 1079 (1831); New York: *Blunt v. McCormick*, 3 Denfo (N.Y.) 283 (1846). But compare *Traugei- v. Sassaman*, 14 Pa. 514 (1850); *Hart v. Hill*, 1 Whart. (Pa.) 124 (1835).

<sup>61</sup> English: *Williams v. Morland*, 2 Barn. & C. 910,

107 Eng.Rep. 620 (1824); Illinois: *Ottawa Gaslight*

& Coke Co. v. **Thompson**, 39 RI. 598 (1864); Pennsylvania: *Lindeman v. Lindsey*, 69 Pa. 93, 8 Am.Rep. 219 (1571).

<sup>62</sup> **Wilson v. Smith**, 10 Wend. (N.Y.) 324 (1833).

164

## OFFENSIVE PLEADINGS

Ch. 7

a Right of Immediate Possession. It is sufficient to 'say that the goods were the goods "of the plaintiff" or "that he was lawfully possessed of them as of his own property." <sup>63</sup> It is sometimes said that constructive possession is sufficient. By constructive possession is meant that a person entitled to possession is treated as if he had actual possession, and is given the rights and remedies of a possessor.

### DECLARATION IN TRESPASS—ESSENTIAL

#### ALLEGATIONS~ (3) THE DEFENDANT'S

##### WRONGFUL ACT

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

Trespass will not lie for Malicious Prosecution, nor for acts done under Authority of Process Regularly Issued.

Trespass will lie for Abuse of Authority of Law, making the wrongdoer a Trespasser Ab Initio.

**The Declaration must state the wrong or injury violating the plaintiff's right, and must on the face of it show a Trespass; that is, an injury committed with Force, Actual or Implied, and an injury that was Direct and Immediate upon the defendant's Act, and not merely Consequential.**

### *The Elements of Force*

**FORCE** is either actual or implied. An Assault and Battery,<sup>64</sup> tearing down a fence and entering upon land, or breaking into a house,<sup>65</sup> or carrying away goods,<sup>66</sup> are exam-

63. **Rocker v. Perkins**, 6 Mackey (D.C.) 379 (1888), in which it was held sufficient to allege ownership in trespass for injury to a colt.  
64. English: *Scott v. Shepherd*, 3 Wils. 403, 95 Eng. Rep. 1124 (1773); New Hampshire: *Ucker v. Freeman*, 50 N.H. 420, 9 Am. Rep. 267 (1870); Pennsylvania: *Hurst v. Carlisle*, 3 Pen. & W. (Pa.) 176 (1831).  
65. *Guille v. Swan*, 13 Johns. (N.Y.) 381, 10 Am. Dec. 234 (1822).

66. English: *Fouldes v. Willoughby*, 8 Mees. & W. 544, 151 Eng. Rep. 1170 (1841); Pennsylvania: *Brown v. ...*  
... of actual force; and in these cases there is no difficulty in determining that Trespass is the proper remedy for the immediate injury resulting from the wrong, if, of course, in the case of the injury to property, real or personal, the plaintiff was in actual or constructive possession.

Force is implied in every Trespass *quare clausum fregit*. If a man goes upon another's land without right, however peaceably or thoughtlessly, the law will imply force, and trespass will lie.<sup>67</sup> And the same is true if a man's cattle are driven or stray upon another's land and cause injury,~

Force is also implied in every false imprisonment, and Trespass will lie therefor, though there may have been no actual violation.  
*Stackhouse*, 155 Pa. 582, 26 Atl. 660, 35 Am. St. Rep. 908 (1893).

In order 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, 151 Eng. Rep. 1170 (1841); *Connah v. Hale*, 23 Wend. (N.Y.) 462 (1840).

67. English: *Green v. Goddard*, 2 Salk. 641, 91 Eng. Rep. 540 (1702); *Weaver v. Bush*, 5 T.R. 78, 101 Eng. Rep. 1278 (1798); *Mason v. Keeling*, 12 Mod. 335, 88 Eng. Rep. 1361 (1099); Massachusetts: *Daniels v. Pond*, 21 Pick. (Mass.) 369, 32 Am. Dec. 269 (1838); New York: *Guille v. Swan*, 19 Johns. (N.Y.) 381, 10 Am. Dec. 234 (1822).

68. *Dolph v. Penis*, 7 Watts & S. (Pa.) 307, 42 Am. Dec. 246 (1844).

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. Or, he may, instead of suing in case, treat the trespass as his cause of action, and maintain trespass. See the following cases: English: *Star v. Rookesby*, 1 Salk. 335, 91 Eng. Rep. 295 (1711); *Mason v. Keeling*, 12 Mod. 335, 88 Eng. Rep. 1361 (1699); Iowa: *Erbes v. Wehmeyer*, 61 Iowa 85, 28 NW. 447 (1886); Maine: *Decker v. Gammon*, 44 Me. 322, 61 Am. Dec. 99 (1857); New York: *Wells v. Howell*, 19 Johns. (N.Y.) 385 (1822).

## Sec. 81 ACTION OF TRESPASS

165

knee, nor even a touching of the person imprisoned.<sup>69</sup>

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.<sup>70</sup> Where a wife, daughter, or servant is enticed away, or seduced or debauched, even with her or his consent, the law implies force, and the husband, father, or master may maintain Trespass against the wrongdoer.<sup>71</sup>

Generally, a mere nonfeasance cannot support an action of Trespass, for in the absence of an act there can be no force.<sup>72</sup> Trespass, therefore, will not lie for the mere detention of goods, where there has been no unlawful taking; nor for neglect to repair the bank of a stream, whereby another's land was overflowed; nor for neglect to repair

69. *Emmett v. Lyne*, 1 Bos. & P. (N.R.) 255, 127 Eng. Rep. 459 (1805).

70. On the right of a master to sue another in case for causing the death of his servant, and on the history of trespass and case, see *Admiralty Com'rs v. The Amerika*, 119171 A.C. 38, 44, 56.

71. English: *Chamberlain v. Hazlewood*, 5 Mees. & W.

515, 131 Bng.Rep. 218 (1839); *Titcham v. Bond*, 2 Maule & S. 436, 105 Eng.Rep. 443 (1814); *Macfad-Zen v. Olivant*, 6 East 387, 102 Eng.Rep. 1335 (1805); *Weedon v. Tlmbrell*, 5 TS. 361, 101 Eng.Rep. 201 (1793); *Tullidge v. Wade*, 3 Wils. 18, 95 Eng.ltep. 909 (1769); New York: *.&kerley v. Raines*, 2 Caines (N.Y.) 292 (1805); Vermont: *Hubbell v. Wheeler*, 2 Aikens (Vt.) 359 (1827).

As we shall see under Chapter 8, Trespass on the Case, he may regard the Injury (loss of comfort or services) as consequential, and sue in case, at his election.

IZ. 1 Chitty, A Treatise on Pleading and Parties to Actions, with Precedents and Forms. e. II, Of the Forms of Action 141 (16th Am. ed. by Perkins, Springfield 1876); *Six Carpenters' Case*, S Coke 146a, 77 Eng.Rep. 695 (1610); *Turner v. Hawkins*, 1 Bos. & P. 470, 126 Eng.Rep. 1018 (1796).

3. *Wilbrahnni v. Snow*, 2 Wms.Saund. 47, notes (Is) (1), 85 Eng.Rep. '624, at 628 (1670).

11. 1 Chitty, A treatise on Pleading and Parties to Actions, with Precedents and Forms, c. II, Of the Forms Of Action 141 (16th Am. ed. by Perkins, Springfield 1876); *Rinks v. Rinks*, **46 Me. 423**

(1859).

a fence, whereby another's animal escaped onto the land of the person so negligent or elsewhere, and was injured.<sup>5</sup>

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.<sup>6</sup> 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,"

### *The In jury as Immediate*

TO sustain Trespass the injury must have been immediate, and not merely consequen

75. English: *Star v. Itookesby*, 1 Salk. 335, 91 tag. Rep. 295 (1711); *Booth v. Wilson*, 1 Earn. & Aid. 59, 106 Eng.Rep. 22 (1817); *Powell v. Salisbury*, 2 Young & J. 391, 148 Eng.Rep. 970 (1828); Illinois: *Burke v. flaky*, 32 Ill.App. 326 (1889); Vermont: *Saxton v. Bacon*, 31 Vt. 540 (1859).

76. English: *3leManus v. Crickett*, 1 East 108, 102 Eng.Rep. 44 (1800) . *Moreton v. Hardern*, 4 Barn. & C. 223, 107 Eng.Rep. 1042 (1825); Connecticut: *Havens v. Hartford & N. H: II. Co.*, 28 Con". 69 (1859): Kentucky: *Johnson v. Castleman*, 2 Dana (Ky.) 373 (1834); Massachusetts: *Barnes v. Hurd*, 11 Mass. 57 (1814); New York: *Broughton v. Whallon*, S Wend. (N.Y.) 474 (1832); *Wright -cc Wilcox*, 19 Wend. (N.Y.) 343, 32 Am.De. 507 (1838).

77. English: *Gregory v. Piper*, 9 Barn. & C. 591, 109 Bng.ltep. 220 (1829); Illinois: *Arasmith v. Temple*, 11 Ill.App. 39 (1882); Massachusetts: *Grinnell v. Phillips*, 1 Mass. 530 (1805); *Howe v. Newmarch*, 12 Alien (Mass.) 49 (1866); *Campbell v. Phelps*, 1? Mass. 244 (1821); Mississippi: *Me~oy v. MeKowen*, 28 Miss. 487, 59 Am,Dee. 264 (1853); Pennsylvanial *Yerger v. Warren*, 31 Pa. 319 (1858).

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 fell against the waf, and It was held **that trespass could be maintained against the master.**

iii Stroll v. Levan, 39 Pa. 177, It was held that trespass lies against an owner of a Vehicle, for a collision, who is riding in it at the time, though driven by a servant, if the injury was the result of negligence.

166

## OFFENSIVE PLEADINGS

Cl. 7

tial. For consequential injuries, even though there may have been force, the remedy is by Action on the Case, and not Trespass's

If a person, in the act of throwing a log into the highway hits and injures a passerby, 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. So if a steam roller were driven over a person this would be a clear Trespass, but if it were negligently left in the highway and a collision with a team or automobile resulted in the darkness, this would be a consequential injury.

To constitute an immediate injury committed with force, it is not necessary that the wrongdoer shall have intended to apply the force in the manner in which it caused the injury. If a man puts in motion a force, the natural and probable tendency of which is to cause an injury, he is regarded in law as having forcible and directly caused that injury.<sup>80</sup> 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.<sup>81</sup> And where the defendant had ascended in a balloon, which descended a short distance from the place of ascent into the plaintiff's garden, and the defendant, being entangled and in a

78. Massachusetts: Adams v. Hemmenwry, 1 Mass. 145 (1804); Michigan: Barry v. Peterson, 48 Mich. 283, 12 N.W. 181 (1882).

79. Lenine v. Bray, 3 East 593, 102 Eng.Rep. 724 (1808).

Case, not trespass, is the remedy to recover for injury to a vehicle from stone deposited in the highway. Green v. Belts, 34 Mich. 512 (1876).

80. Leame v. Bray, 3 East 593, 102 Eng.Rep. 724 (1803).

On negligently setting a fire and burning another's property, see Jordan v. Wyatt, 4 Unt. (Vs.) iii, 47 Am.Dec. 721 (1847),

81. Gregory v. Piper, 9 Bam. & C. 591, 109 Eng.Rep.

220 (1829).

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. 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.<sup>83</sup> 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.<sup>84</sup>

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.<sup>85</sup>

82. Curie v. Swan, 19 Johns. (N.Y.) 381, 10 Am.Dec.

234 (1822).

83. Buttrick v. Strickland, 47 Inch. 389, 11 N.W. 210 (1882). But trespass on the ease will also lie, City of Pekin v. Brereton, 67 Ill. 477, 16 Am.Rep. 629 (1873).

84. Brooks v. Olmstead, 17 Pa. 24 (1851),

85. English: Learns v. Bray, 3 East 593, 102 Eng.Rep. 724 (1803); Turner v. Hawkins, 1 Bos. & P. 472, 126 Eng.Rep. 1016 (1796); Williams v. Holland, 6 Car. &

P. 23, 172 Eng. Rep. 11129 (1833); Indiana: Sebuet v. Veeder, 7 Blackf. (md.) 342 (1845); Kentucky: Payne v. Smith, 4 Dana (Ky.) 497 (1836); Maine: Kennard v. Burton, 25 Me. 39, 43 Am. Dec. 249 (1845); Michigan: Daniels v. Clegg, 28 Mich. 32 (1873); Bradford v. Bail, 38 Mich. 673 (1878); New Jersey: Post v. Munn, 4 N.J.L. 61, 7 Am. Dec. 570 (1810); New York: Wilson v. Smith, 10 Wend. (N.Y.) 324 (1833); McAllister v. Hammond, 6 Cow. (N.Y.) 342 (1826); Pennsylvania: Strohl v. Levan, 39 Pa. 277 (2861); Vermont: Claflin v. Wilcox, 18 Vt.

605 (1846).

For wilful Injury so caused, trespass is the only remedy.

## Sec. 81

### ACTION OF TRESPASS

167

The same is true where a collision between vessels is caused by carelessness or unskillfulness in navigation.<sup>80</sup> 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.” Some of the Courts, however, hold that where the injury from a negligent act is both forcible and immediate, Case will not lie, and that Trespass is the only remedy.~

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.<sup>89</sup>

#### *The Squib Case*

AN illustration of the barren debates as to the distinction between Trespass and Case is found in the oft-cited Squib Case of *Scott*

86. Connecticut: New Haven Steamboat & Transportation Co. v. Vanderbilt, 16 Conn. 420 (1844) New York: Percival v. Hiekey, 18 Johns. (N.Y.) 257, 9 Am. Dec. 210 (1820); Pennsylvania: Simpson v. Hand, 6 Whart. (Pa.) 311, 30 Am. Dec. 231 (1840).

87. Connecticut: New Haven Steamboat & Transportation Co. v. Vanderbilt, 16 Conn. 420 (1844); Maine: Kennard v. Burton, 25 Me. 39, 43 Am. Dec. 249 (1845); New Hampshire: Dalton v. Favour, 3 N.H. 465 (1826); New York: Percival v. Hiekey, 15 Johns. (N.Y.) 257, 9 Am. Dec. 210 (1820); North Carolina: Baidridge v. Allen, 24 N.C. 206 (1842); Pennsylvania: Simpson v. Hand, 6 Whart. (Pa.) 311, 38 Mich. Dec. 231 (1840); Vermont: Claflin v. Wilcox, 18 Vt. 805 (1846).

88. Connecticut: Gates v. Miles, 3 Conn. 64 (1819); Ohio: Case v. Mark, 2 Ohio 169 (1819), criticized in Claflin v. Wilcox, 18 Vt. 605 (1846). See, also, Daniels v. Clegg, 28 Mich. 32 (1873).

See Leame v. Bray, 8 East 503, 102 Eng. Rep. 724 (1803); Mason v. Keeling, 12 Mod. 333, 58 Eng. Rep. 1360 (1699); Beckwith v. Shordike, 4 Burr. 2092, 98 Eng. Rep. 91 (1767).

**V. *Shepherd***, decided in 1773.<sup>90</sup> A lighted squib or bomb had been tossed by the defendant into a market house. A bystander, in order to avert the threatened injury from himself, took **up the squib and tossed it** across the market house. Another person near whom it fell likewise threw it in another direction, Thereupon the squib exploded and put out the plaintiff's eye. An Action of Trespass was brought against the defendant who first threw the bomb, and the action was sustained. Sir William Blackstone, who happened to be a Member of the Court, dissented, being of the opinion that Case only would lie, as the harm was not the immediate and direct result of the defendant's act. In this famous case there was no question of liability, but merely of the historical distinction between Forms of Action.

#### *Other Illustrations*

IN another case, in which the distinction between immediate and consequential injury is considered, the

defendant had seized the plaintiff by the arm and swung him violently around and let him go, and the plaintiff, becoming dizzy, had involuntarily passed rapidly in the direction of a third person and 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 was the proper remedy.<sup>97</sup>

Where a person beats a drum in the highway, the natural or probable consequence of which is to frighten the horse of another and cause it to run away, and such a consequence results, he is liable in Trespass for the injury. It is immaterial whether the in

<sup>90.</sup> Scott v. Shepherd, 2 W.B.L. 892, 96 Eng.Rep. 525 (1773), reported in 1 Smith, Leading Cases, 797 (8th Am. ed. by Collins and Arbuthnot, London 1879). See, also, 3 Street, Foundations of Legal Liability, c. XVIII, The Action of Trespass on the Case 257 (Northport 11900).

<sup>91.</sup> Richer v. Freeman, 50 N.H. 420, **9 Am.Rep. 267** (1870).

168

## OFFENSIVE PLEADINGS

**Cb. 7**

jury be willful or negligent, if his act is the immediate cause of it.<sup>92</sup>

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

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.<sup>95</sup> But if a person stops a water course on his own land, whereby it is prevented from flowing as usual, or if he place a spout on his own building, and in consequence thereof the water afterwards runs therefrom upon another's land or house or person, the injury is consequential, and Trespass will not lie.

### *injuries under Color of Legal Proceedings*

NICE questions have arisen as to whether Trespass will lie for injuries done to the person or property under Color of Legal Process or Proceedings, as in case of wrongful prosecution of a criminal charge, wrongful arrest, or wrongful attachment of goods.

Generally no action at all will lie for an act done under the Judgment or Order of a

<sup>92.</sup> *Loubz v. Halner*, 12 N.C. 182 (1827). See, also, *Cole v. Fisher*, 11 Mass. 137 (1814).

That trespass only lies for an act which is or tends to a breach of the peace, see 3 Street, Foundations of Legal Liability, c. XVII, The Action of Trespass **235** (Northport 1906).

<sup>93.</sup> *Jordan v. Wyatt*, **4 Orat. (Va.) 151, 47** Am.Dcc. 720 (1847).

<sup>94.</sup> Illinois: *Painter v. Baker*, 16 Ill. 103 (1854); Tennessee: *James v. Caldwell*, **7 Yerg.** (Tenn.) 35 (1834).

<sup>95.</sup> *Reynolds v. Clerk*, 8 Mod. 272, 88 Eng.Rep. 193 (1725), Court or Magistrate having jurisdiction over the subject matter.<sup>96</sup>

When the Court had no Jurisdiction at all over the subject matter, or exceeded its Jurisdiction, Trespass is the proper form of action against all the parties for any act which, independently of the process, would sustain such an action.<sup>99</sup> If goods have been taken, Trover also will lie.

If the Court had Jurisdiction, but the proceeding or process was irregular and void, Trespass is the proper form of action, and generally Case *will* not lie.<sup>98</sup>

00. 1 Chitty. A Treatise on Pleading and Parties to Actions, with Precedents and Forms, c. II, Of the Forms of Action 203 (16th Am. ed. by Perkins, Springfield 1876); Case of the Marshalsea, 110 Coke 76A, n. (a), 77 Eng.Rep. 1038 (1612). See, also the following cases: English: Perkins v. Proctor, 2 Wils. KB 384, 95 Eng.Rep. 874 (1768); Cave v. Mountain, 1 Man. & G. 257, 133 E.Jng.Rep. 330 (1840); Dicas v. Baron Broughani, 1 Moody & B. 309, 1174 Eng.Eep. 108 (1833); Pennsylvania: Shoemaker v. Nesbit, 2 Rawle (Pa.) 201 (1828).

91. 1 Chitty, A Treatise on Pleading and Parties to Actions, with Precedents and Forms, c. II, Of the Forms of Action 204 (10th **Am. ed. by Perkins**, Springfield 1876); Case of the Marshalsea, 10 Coke 76(a), 77 Eng.Bep. 1038 (1612). See, also, the following decisions: English: Perkins v. Proctor, 2 Wils. 382, 95 Eng.Rep. 874 (1768); Branwell v. Pen-neck, 7 Barn. & C. 536, 108 Eng.llep. 823 (1827); Doswell v. Impey, 1 Barn. & C. 169, 107 Eng.Rep. 63 (1823); Connecticut: Allen v. Cray, 11 Conn. 95 (1836); Illinois: Hull v. Blaisdell, 1 Scam. (Ill.) 334 (1837); New York: Griswold v. Sedgwick, 6 Cow. (N.Y.) 456 (1826); Vail v. Lewis, 4 Johns. (N.Y.) 450, 4 Am.Occ. 300 (1809); Adams v. Freeman, 9 Johns. (N.Y.) 117 (1812); Bigelow 'cc Stearns, 19 Johns. (N. Y.) 39, 10 Am.Dec. 189 (1821); Horton v. Auchmoody, 7 Wend. (N.Y.) 200 (1831); Vermont: Hooker v. Smith, 19 Vt. 151, 47 Am.Dec. 679 (1847).

98. English: Parsons v. Leycl, **3 Wils. KB.** 341, 95 **Eng.Rep.** 1089 (1772); Barker v. Brabam, 3 Wils. 376, 95 Eng.Rep. 1108 (1773); Indiana: Barkeloo v. Randall, 4 Blaekf. (md.) 470, 32 Am.Dec. 46 (1838); Maine: Guptili v. Richardson, 62 Me. 257 (1874); Green cc 3forse, 5 Greenl. (Me.) 291 (1828); Massachusetts: Sullivan v. Jones, 2 Gray (Mass.) 570 (1854); Pennsylvania: Maber v. Ashinead, 39 Pa. 344, 72 Am.Dec. 708 (1858); Milliken v. Brown, 10 Serg. & R. (Pa.) 188 (1823).

Trespass is the proper remedy where a court has jurisdiction **over the subject matter, but Is bound to** Sec. SI.

## ACTION OF TRESPASS

169

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.<sup>99</sup>

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.'

Trespass will not lie for acts done under Legal Process, such as Writs and Warrants regularly issued by a Court having Jurisdiction, however malicious and groundless the institution of the proceedings may have been. Case for Malicious Prosecution is the only remedy for improperly putting in motion the regular Process of the Court.<sup>2</sup>

adopt certain forms in its proceedings, from which it deviates, thereby rendering the proceeding coram non judice. English: Cole's Case, W.Jones 173, 82 Eng.flep. 91; Davison v. Gill, 11 East 64, 102 Eng.Rep. 25 (1800); Illinois: Outlaw v. Davis, 27 Ill. 467 (1801); Kraft v. Porter, 76 Ill.App. 328 (1898).

99. English: Sanderson v. Baker, 2 W.BI. 833, 06 Eng. Rep. 490 (1772); Cole v. Hindson, U T.R. 234, 101 Eng.Rep. 528 (1795); Illinois: Upton v. Craig, 57 Ill. 257 (1870); Maine: Foss v. Stewart, 14 Me. 312 (1837); Baldwin v. Whittier, 1\*3 Me. 33 (1839); Parker v. Hall, 55 Me. 362 (1868); Lothrop v. Arnold, 25 Me. 136, 43 A.ntDec, 256 (1845); New Hampshire:

Melvin v. Fisher, 8 N.H. 400 (1836); New York:  
Griswold v. Sedgwick, 6 Cow. (N.Y.) 450 (1820);  
Mead v. flaws, 7 Cow. (-.Y.) 332 (1827).

1. English: Woodgate v. Knatebull, 2 T.II. 148, 100  
Bng.Rep. 80 (1787); Holroyd v. Breare, 2 Barn. &  
AId. 473, 106 Eng.Rep. 439 (1819); Maine: Guptill  
v. Richardson, 62 Mc. 257 (1874); Massachusetts:  
Melville 'cc Brown, 15 Mass. 82 (1818); New York:  
Vail v. Lewis, 4 Johns. (N.Y.) 450, 4 Am.Dec. 300

(1800).

2. Illinois: Blalock v. Randall, 76 111. 224 (1875);  
Johnson v. Von Kettler, 84 111. 315, 318 (1876); Kentucky: **Owens** v. Starr, 2 LitL (ICy.) 234 (1822);  
Maine: Plummer v. Dennett, 6 Creenl. (Mo.) 421, 20  
Am.Dec. 316 (1830); New York: Beaty v. Perkins,  
6 Wend. (N.Y.) 382 (1831); Savacool v. Boughton, 5  
Wend. (N.Y.) 170, 21 .A1m.Dec. 181 (1830); Rhode

### *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*.~

“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 iniUo*; 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*.”

An officer who enters a house by authority of law, and attaches goods therein, becomes a Trespasser *ab initia* by placing there an unfit person as keeper of the goods, against the remonstrance of the owner of the house.<sup>5</sup> And the same is true where an officer has made a lawful levy on goods, but sells without giving the notice required by law.<sup>6</sup>

Island: I-Jolil,s v. Roy. 18 11.1. 84, 25 AtI. 091 11892);  
South Carolina: Miller v. Once, 1 Rich. (8.0.) 147  
(1844); Vermont: Cliurchili v. Churchill, 12 Vt. 661

(1839).

3. Massachusetts: Malcolm v. Spoor, 12 Mete. (Mass.)  
270, 46 Am.Dec. 673 (1839); Smith v. Gates, 21 Pick.  
(Mass.) 55 (1838); New Hampshire: Taylor v. Jones,  
42 Nil. 25 (1860); Drew v. Spaulding, 45 N.H. 472  
(1864); New York: Van Brunt v. Schenck, 13 Johns.  
(N.Y.) 414 (1810).

4. English: Six Carpenter's Case, S Coke 146  
(a), 77 Eng.Rep. 095 (1610); Alabama: Louisville &  
Nil. Co. v. Bartce, 204 Ala. 539, 88 So, 304, 12 AL.  
U. 254 (1021); Illinois: Page v. DePuy, 40 III. 506

(1866).

8. Malcolm v. Spoor, 12 Mete (Mass.) 279, 46 Am.Dec.

675 (1847).

6. Carrier v. Esbaugli, 70 Pa. 239 (1871).

And an officer who levies under a lawful exeecutiom, 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.lItep. 238 (1857); Freeman v. smith, SO Pa. **St.Rep.** 264 (1858).

Moreover, a landlord who lawfully distrain5 goods. but sells without a previous appraisalment and ad-

**170**

## OFFENSIVE PLEADINGS

### Ch. 7

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



**DECLARATION IN TRESPASS—ESSENTIAL  
ALLEGATIONS: (4) THE DAMAGES**

82. The Declaration must also Allegue the **Damages which are the legal and natural consequences of the injury.**  
**!The form of statement must be according to their nature, as General or Special.**

AS the main object of the Action of *Trespass* is the recovery of damages, the Declaration should contain an Allegation of the Damage sustained, and the amount must be **Jaid high enough to cover the actual demand.** While the **Trespass may, in many instances, be a mere technical infringement of another's right,** it always gives the right to recover at least Nominal Damages, but in order to recover Substantial Damages, they must be pleaded. They will be Generally or Particularly stated, according as they are General or Special. "General Damages are such as the law presumes to have accrued from the wrong complained of. Special Damages are such as the party actually sustained, and are not implied by law. 1 Chitty on Pleadings, 385. Such Damages as may be presumed necessarily to result from the breach of contract, need not be stated in the Declaration. The Jaw always presumes some damages to result from a breach of contract, and therefore Special Damages need not be alleged. But where the plaintiff expects to recover Special Damages, he must state them Specially and Circumstantially in order to apprise the defendant of the facts intended to be proven, or he will not be permitted to give evidence **of such Damages on the Trial.**

vertisement, is also a trespasser *ab initio*. Kerr v. Sharp, 14 Berg. & U. (Pa.) 399 (1826).

1. Connecticut: Pease v. Burt, 5 Day (Conn.) 485 (1800); Kentucky: Boles v. Pinkerton, 7 Dana (Ky.) 453 (1838); Massachusetts: Hannen v. Edes, 15 Mans. 347 (1819); New York: Bennett v. Appleton, 25 Wend. (N.Y.) 371 (1841).

1 Chitty, 332. The general rule is, that it is *sufficient* to assign the Breach in the words of the contract. Id. 326. An omission to set forth *any* Special **Damage may deprive the plaintiff** of the benefit of testimony, to which he would otherwise have been entitled; but it is not a good ground in Arrest of Judgment, except in cases where the special injury is the gist of action; as in Action of Slander for words not in themselves actionable. In such cases, unless the Special Damage is set forth, there appears no cause of action on the face of the Declaration." *M'Daniel, Admr. v. Terrdll*, 1 Nott & McC. (S.C.) 343 (1818).

**STATUS UNDER MODERN CODES, PRACTICE ACTS AND RULES  
OF COURT**

83. **Although the Codes provided for the abolition of the distinctions between the various Common Law Actions, with respect to Trespass, and Case, it has generally been held that such provision merely abolished the Formal differences between the actions, with the Substantive differences remaining.**

AS previously observed, one effect of the *New York Code of Procedure* in 1848 was ostensibly to abolish the Common Law Forms of Action, and the distinctions between the same, But the reform was not as sweeping as the language indicated. There was to be but one form of civil action in the Courts of Common Law, which was to be called an "Action at Law." In plain English, the various statutes of this character, in the various states adopting the *New York Code*, provided for a single, formless form of action, in the nature of a Special Action on the Case. But in *Goulet v. Asseler*,<sup>8</sup> Selden J. flatly declared that the more formal differences between such actions had been abolished, but that the substantive differences remained **as at Common Law**. It was, he said, impossible to make an action for a direct aggression upon *the plaintiff's rights by talc-*

s. 22 N.Y. 225 (1860).

Sec. 83

**ACTION OF TRESPASS**

171

ing and disposing of his property—for which a remedy at Common Law was *Trespass de bonis asportatis*—the same thing as an action to recover for the consequential injury resulting from an improper interference with the property of another, such as an injury to a reversionary interest—and for which the remedy at Common Law was *Trespass on the Case*.<sup>9</sup>

In the period of Reform in the Non-Code States—between 1848 and 1938—several States, like Illinois and Maine, enacted statutes which merely provided for the abolition of the distinctions between the Actions of *Trespass*

and Trespass on the Case. In discussing the effect of such statutes, in *St. Louis, Vandolia and Terre Haute It. It. Co. v. The Town of Summit*)’<sup>o</sup> Baker 3, stated: “‘The statute does away with the technical distinction between the two Forms of Action, but does not affect the substantial rights and liabilities of parties, so as to operate to give any other remedy for acts done than before existed.’ We understand the statute to accomplish these objects and these only; to abolish the technical distinction between the Two Forms of Action so that you may join Counts in Trespass with Counts in

o- **In** accord: *Lawry v. Lawry*, 58 Me. 482, 4S-, ~4 A.

273, 274 (1896), in which the plaintiff brought Trespass *quare clausu,n fre~it* for cutting standing trees **on a** lot of land which the plaintiff owned in renjalnder, the widow **of his father** having a *life* estate therein *as* her dower. Undei- a Maine Statute which abolished the distinction between the Actions of Trespass and Trespass on the Case, the Issue was whether the plaintiff, whose interest was only that of a remainder-man, could maintain Trespass. In holding that the plaintiff cook? not maintab, the Action in the Form of Trespass and could not be allowed to Amend so as to change the Form of Action, Foster J., declared: “The Amendment changing the Declaration to Case ought not to be allowed. True, the Statute has abolished the 11s-tinction between [the] Actions of Trespass and Trespass on the Case, But this relates to the distinctlan in Form only. In cases where the distinction Is really of Substance, rather than of Form, the Statute is inapplicable?”

10. 3 **fil.App.** ~55, 160 (1878).

Case, and may call your Action Trespass or Case—it is wholly immaterial which—and may sue out your Writ in either Form of Action, and may then Count in either Trespass **or** Case, or both, at your option. But your Count, if in Case, must contain the elements of a good Count in Case, or if in Trespass, must contain the elements of a Count in Trespass. The change goes only to the matter of the Form of Action, and does not change Substantial Rights and Liabilities. Nor do we understand that this statute repeals that old and more than well settled principle, that in all Actions the Proofs must correspond with the Allegations. Where a Declaration is filed showing a good cause of action in either Trespass or Case, it is wholly immaterial whether you call your action Trespass or Case, but such facts must be alleged as show a Legal Cause of Action in the one Form or the other, and the facts that are alleged in the pleading must be supported by the proofs. If the Declaration is in Trespass *quare clau.sum fregit*, then there must be a possession in order to support it— either actual, or in case the premises are vacant and unoccupied, a constructive possession that follows Ownership and Title.”

ILLINOIS REV. ST. c. 110, § 22, 36 (1874), 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.”

The position of Trespass under Modern Codes, Practice Acts and Rules of Court is strikingly illustrated by *Avery v. Spicer*,” in which the plaintiff, in an action for cutting trees, alleged ownership and possession of the land, an unlawful entry by the defendants, and acts done thereon to its direct injury by

11. 90 Conn. 576, 98 A. 135 (1916).

172

## OFFENSIVE PLEADINGS

### Ch. 7

force. One defendant justified his acts under authority of Spicer, both defendants claiming that Spicer owned in fee simple the land upon which the cutting was done and was in possession thereof. The Replication denied these allegations.

At the Trial, it appeared that the dispute grew out of a disagreement as to the location of the boundary line between the properties of the contending parties. The plaintiff claimed, as evidenced by title deeds, up to a point beyond which the cutting took place, whereas the defendant Spicer contended that his ownership included the property on which the cutting took place.

The Court instructed the Jury that the plaintiff, in order to be entitled to a Verdict, must prove that he was in actual or constructive possession of the land; that it was not necessary that the plaintiff show actual possession, but that sufficient proof of possession would be produced by proof of Title and the absence of actual and exclusive possession in another.

#### **On an Appeal, the validity of this Charge**

to the Jury was the principal issue. In holding for the defendants and that there was no error, Chief Justice Prentice

observed:

“Passing by Trespass with its requirement of possession as a prerequisite of recovery, **there** was in the Common-Law System a Form of Action providing for the redress of an injury suffered by one having an interest in property, but not having the possession.

**By an Action of Trespass on the Case one**

whose reversionary interest had been invaded by a wrongdoer might have redress. But **the Action could not be resorted to by one** whose interest, instead of being reversionary, was such as the right of possession attached to it. A fee owner, for example, might not avail himself of it to redress a wrong done to his property by direct force, express or implied, His interest is possessory and not reversionary, as is that of a landlord, remainderman, and the like.

Two pertinent facts of present interest and importance thus appear. The *first* is that a person whose interest was not reversionary was not permitted to recover **f** or injury to property unless he could show possession, actual or constructive. The second is but its corollary, to wit, that a title owner disseised could not sue his disseisor, for the latter’s acts of wrongdoing to the property as long as the disseisin continued. The disseisee in such case must either first regain possession by legal action or otherwise, and then bring his Action of Trespass for the injury to the property, or recover for those injuries as an incident of his action to regain possession. He could not sue the disseisor for the tort independently until he had come into possession. ... The substitution of our Practice **Act for the Common-Law System of Pleading** has not changed the situation save as it has abolished certain formal distinctions and employed a new nomenclature. The same facts will entitle one to the same redress as before, and to no other redress.”<sup>12</sup>

It thus appears that although there is a change, in name, substantively the requirements for bringing an Action under Modern Codes, Practice Acts or Rules of Court, which would be the equivalent of the Action of Trespass, under the Common Law, are still the same.

12. 90 coun. 570, 578, VS A. 135, 136 (1916).

Sec.

## CHAPTER 8

### TILE ACTION OF TRESPASS ON THE CASE<sup>1</sup>

84. Scope of the Action.
85. Case Distinguished From Trespass.
86. Election Between Trespass and Case.
87. Form of the Declaration in Trespass on the Case.
88. Declaration in Trespass on the Case—Essential Allegations:
  - (1) In General.
89. Declaration in Trespass on the Case—Essential Allegations:
  - (2) The Plaintiff’s Right, Title, Interest or Possession.
90. Declaration in Trespass on the Case—Essential Allegations:
  - (3) The Facts Showing the Existence of a Legal Duty on the Part of the Defendant.
91. Declaration in Trespass on the Case—Essential Allegations:
  - (4) The Defendant’s Wrongful Act in Breach of His Duty.
92. Declaration in Trespass on the Case—Essential Allegations:
  - (5) The Damages.
93. Particular Applications of Case as the Great Residuary Common-Law Remedy for Various Wrongs.
94. Anticipating Defenses in Case.
95. The Expansionistic Character of Case.
96. Status Under Modern Codes, Practice Acts and Rules of Court.

#### SCOPE OF THE ACTION

84. An Action **ON the Case lies to recover damages:**

**(I) For Torts not committed by force, actual OR implied;**

**(H) For Torts committed by force, actual OR implied, where:**

**(A) The injury was not immediate, but consequen**

tial;

1. In general, on the History and Development of Trespass on the Case, see:

Treatises: Holmes, The Common Law, Lecture I, The Early Forms of Liability (Boston, 1881); Martin, Civil Procedure at Common Law, c. III,

Personal Actions Es Delicto, Art. III, Trespass on the case, 75 (St. Paul, 1905); 3 street, Foundations of Legal Liability, c. XVIII, The Action on the Case, 245

•(Northport, 1906); Id., C. XIX, The Action on the Case, 268; Jenks, Short History of English Law, c. X, contract and Tort, 130 (Boston, 1918); Davies, 'The Baronial Opposition to Edward II (Cambridge,

**(II) For Torts committed by force, actual or implied, where—Cont'd**

**(B) The subject matter affected was not tangible, or**

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

**Case is the Great Residuary Remedy of the Common Law covering in general non-violent wrongs. In the Field of Tort the Actions of**

1918); 2 Holdsworth, History of English Law, c. IV, 365 (4th ed. Boston, 1931); Maitland, The Forms of Action at Common Law, Lecture VI, 68—68 (Cambridge, 1948); Morgan, The study of Law, e. VI, Trespass on the Case, 105 (2d ed. Chicago, 1948); Fifoot, History and Sources of the Common Law, c. XV, The Development of Action on the Case, 66 (London, 1949); Id., c. IX, Trespass and Case, 184; ralfy, The Action on the Case (London, 1951); Williams, Liability for Animals (Cambridge, 1929); Plucknett, A. Concise History of the Common Law,

**IV, Liability, Civil and Criminal, 463—475 (5th ed., Boston, 1056).**

173

174

**Trespass and Trespass on the Case are supplementary to each other; and it may be said that, in general, Case lies where no other theory or Form of Action is available, though it is sometimes concurrent with other forms. The Statute of Westminster 11 (1285) authorized the Clerks in Chancery to issue New Writs in cases similar to, but not identical with, cases in which Writs had been previously issued. Various theories have been advanced as to the effect of this Statute upon the development of the action of Trespass on the Case.**

*Trespass and Case as the Source of Our Tort*

*Law*

• **AT Common Law civil injuries were divided into two kinds**, the one without force or violence, such as deceit, libel and slander, or the detention of goods; the other, coupled with force and violence, such as assault and battery or false imprisonment. This distinction between private wrongs resulting from forcible injuries and those without force arose out of the Forms of Action or Remedies which were available. The two great Remedies which thus divided the Field of

**Articles: Wigmore**, Responsibility for Tortious Acts, 7 Harv.L.Rev. 315, 383, 441 (1894); Boblen, The Moral Duty to Aid Others as a Basis of Tort Liability, 541 ii. of Pa.L.Rev. 217, 316 (1908); Veeder, The History of the Law of Defamation, 3 Select Essays In Anglo-American Legal History, 446 (Boston, 1909); Jenlrs, On Negligence and Deceit in the Law of Torts, 26 *L.QJlev.* 159 (1010); Ames, Lectures on Legal History; Law and Morals, Lecture VII, 442 (Cambridge 1913); Terry, Negligence, 29 Barvt. **Rev. 40(1915)**; Smith, Tort and Absolute Liability, 30 Harv.L.Bev. 241 (1917); Issacs, Fault and Liability, 31 Harv.L.Eev. 954 (1918); Goodrich, Perniatent Structures and Continuing Injuries—The Iowa Rule, 4 Iowa L.Bul. 65 (1918); Smith, Liability for Substantial Physical Damage to Land by Blasting, 33 Harv.L.Rev. 442 (1920); Albertsworth, Recognition of New Interest in the Law of Torts, 10 Calif. LEer. 461 (1922); McConniclr, Damages for Anticipated Injury to Land, 37 Harv.L.Rev. 574, 593 (1924); Winfield, The Myth of Absolute Liability, 42 L.Q.ltev. 87 (1926); Winfield, History of Negligence In the Law of Torts, 42 LQ.Rev. 184 (1920); Asterburn, The Origin and First Test of Public CallIngs, 75 Di of Pat.Rev. 411 (1927); Fluckuett, Case and the Statute of Westminster II, 31 Col.L.Rev. 778 (1931); Winfield and Qoodhart, Trespass and

Tort are Trespass and Trespass on the Case. **And it** may be added that the modern theory of Tart Liability is the joint product of these two Actions.

From the nucleus of violent wrongs, originally remediable alone by the Action of Trespass, remedies were extended to cover non-violent injuries under the great residuary **Action of Trespass on the Case, popularly referred to merely as "Case."** The Action was not based **ON** any distinct theory of wrong except the supplementary and excludory one, covering all non-violent injuries, that is, those not falling within the theory of trespass. Case proceeded either by analogy to Trespass, where there was an indirect application of force, or on the general Common-Law principle of affording a remedy for every wrong, even though without violence, direct or indirect. There was and there is still no strict limit to this action and it is the vehicle which the Judges in England and America have used

## in constantly expanding the Scope of Tort Liability<sup>5</sup> and in giving

Negligence, 49 L.Q.Rev. 359 (1933); Landon, Case and Westminster II, 52 L.Q.Rev. 68 (1954); Phacknett, The Action on the Case and Westminster II, 52 L.Q.Rev. 220 (1936); Landon, The Action on the Case and the Statute of Westminster II, 52 L.Q.Rev. 68 (1954); Dix, The Origins of the Action of Trespass on the Case, 441 Yale U. 1142 (1937); Harper, Malicious Prosecution, False Imprisonment and Defamation, 15 Tex.L.Rev. 157 (1937); Icarlyfy, The Humber Ferryman and the Action on the Case, 11 Camb.L.J. 421 (1953).

2. For a comparatively recent example of this process, see the case of *Sims v. Sims*, 79 N.J.L. 577, 76 AU. IOGS (11110) in which a case of novel impression was considered involving the Issue as to whether a wife could maintain an Action under New Jersey Law against the defendants for “maliciously enticing away the plaintiff’s husband, and thereby alienating from her his affections.” In sustaining the wife’s action, Minturn, 3., declared: “That the Common-Law Courts failed to find a remedy is, under the decisions, rather a recognition of the right, than the denial of its existence. Per it may be said that the history of Common-Law Procedure is largely the history of Substantive Rights, remediless at first for lads of a suitable Writ or Precedent in the Begistrum Brevium, until the persistence of

### OFFENSIVE PLEADINGS

### Ch. 8

### Sec. 84

### TRESPASS ON THE CASE

175

redress for such wrongs as deceit, detention of goods, libel and slander, malicious prosecution, negligent injuries and nuisance.<sup>3</sup>

#### *Development of Trespass on the Case*

It should be observed that in the beginning the only remedy for Torts was the Action of **Trespass**, and that in order to maintain it, actual or implied violence must be shown. It was formerly thought, that up until the Enactment of the Statute of Westminster II in 1285, there was no Form of Action or Original Writ which could be invoked to recover Damages for other or nonviolent injuries; that under this Statute the Action of Trespass on the Case arose under which any aggrieved party could sue for damages for any wrong to which Trespass would not apply; that the Action originated in the power given by the Statute to the Clerks in Chancery to frame New Writs *in consimili casu*— that is, in cases similar to, but not identical with, cases in which Writs had been previously issued.

This view of the Action of Trespass on the Case, as being the product of the Statute of Westminster II (1285), has been placed in grave doubt by the latest research on the subject. Fifoot flatly declares that “The Actions on the Case derived, not from the statutory powers of Chancery Clerks, but from the Fiat of Judges.” ~ And those authorities who agree with Fifoot, point out that when Case underwent its initial development

the demand for a remedy developed the Action of Trespass on the Case as a General Specific in *consimili casu* under the provisions of the Statute of Westminster II.”

The learned judge simply was not conversant with the latest research in the field concerning the alleged relationship of the Statute and the Action of Trespass on the Case.

<sup>3</sup> See 3 Street, Foundations of Legal Liability, c. xvIII, The Action of Trespass on the Case, 245 (Northport 1906).

<sup>4</sup> Fifoot, History and Sources of the Common Law, c. IV, The Development of the Actions on the Case, 74 (London 1949).

in the last third of the Fourteenth Century, it was founded, not upon Writs issued by the Clerks in Chancery, but upon Writs issued by the Judges under the broad authority of the Common Law, using the Action of Trespass as the stock for grafting, as illustrated in *The Miller’s Case* ~ and *The Innkeeper’s Case*.<sup>6</sup>

However this may be, the New Writs invented by the Judges to cover the cases were supposed to bear an analogy to Trespass and hence received the appellation of Trespass on the Case (*bi-evi.a de ti-ansgressionem super casu*), as being grounded upon the particular circumstances of the case requiring a remedy, and in order to distinguish them from the older and parent Action of Trespass; and likewise, for further differentiation, the injuries themselves, which were the subject of such Writs, were not called “Trespases,” but “Torts,” “Wrongs,” or “Grievances.”

The Writs of Trespass on the Case, though invented *pro re nata*, in various forms, according to the nature of the different wrongs which called them forth, began, nevertheless, to be viewed as constituting collectively a New Individual Form of Action. Accordingly, this new genus took its place, under the name of “Trespass on the Case,” alongside of the more ancient actions of Debt, *Covenant*, Trespass and the like.

In view of the Origin and Nature of this Action, it is important to note that it is comprised of several different species, two of which, however, are of more frequent use **and of greater significance than any other**, to wit, the Action of Trover and the Action of Assumpsit, both of which developed out of Case, and were originally known as Trespass on the Case in Assumpsit and Trespass on the Case in Trover, but now referred to respectively simply as “Assumpsit” and

5. Y. B. Mich. 41 Edw. III, f. 24, p1. 17 (1367).

1. V. B. Easter, 42 Edw. III, f. 11, p1. 13 (1369).

176

## OFFENSIVE PLEADINGS

Cli. 8

“Trover.” Other Forms of the Action of Trespass on the Case are generally known and designated as “Case” or as an “Action on the Case.”

### CASE DISTINGUISHED FROM TRESPASS

85. **The distinctions between wrongs which are included under Trespass and those under Case relate:**

- (I) **To the element of Force, Express or Implied,**
- (II) **Whether the injury is immediate or consequential on defendant’s act,**
- (III) **Whether the liability is for Trespasses of defendant’s agents,**
- (IV) **Whether possession is interfered with.**

**ALTHOUGH Case was complementary to Trespass, the two actions were to a certain extent mutually exclusive,<sup>7</sup> and in theory distinctly differentiated. Where the factual situation essential to constitute a trespass exists, as, for example, where the act was direct and wilful, the Action must be in Trespass. If, however, there was something else in the factual situation, such as negligence, the plaintiff might have an option as to Case or Trespass. And, of course, where any one of the elements required to constitute a trespass is wanting, the Remedy is in Case, assuming the facts make out a Torts**

### *Distinction Between Trespass and Case—In General*

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

7. Day v. Edwards, 5 P.R. 648, 101 Eng.Rep. 361

(1794).

complaining, the proper remedy to recover damages for the injury is the Action of Trespass.<sup>o</sup> If, on the other hand, a Tort is committed without force, actual or implied, or if, though the Act was committed with force, the matter affected was not tangible, or the injury was not immediate, but consequential, or, in the case of injury to property, the plaintiff’s interest in the property was only in reversion, Trespass will not lie, and the proper remedy is Action on the Case.”

### *The Element of Force*

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

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

In many cases where there is no actual force, the Law will imply force, and the ef

9. English: *Scott v. Shepherd*, 2 WEJ. 892, 96 Eng. Rep. 525 (1778); *Leame v. Bray*, 3 East 593, 602, 102 Eng. Rep. 724 (1803); *Gregory v. Piper*, 9 B. & C. 591, 109 E.R. 220 (1829); *Reynolds v. Clark-c*, 2 Ld. Raym. 1399, 92 Eng. Rep. 410 (1725); Illinois: *Painter v. Bal-er*, 16 Ill. 103 (1854); Michigan: *Barry v. Peterson*, 48 Mich. 263, 12 N.W. 181 (1882); New Hampshire: *Bicker v. Freeman*, 50 N.H. 420, (1870); Vermont: *Claim v. Wilcox*, 18 Vt. 605 (1846); Virginia: *Winslow v. Beal*, 6 Call. (Va.) 41

(1806).

10. English: *Ward v. Macauley*, 4 TB. 489, 100 Eng. Rep. 1135 (1791); *Gordon v. Harper*, 7 TB. 0, 101 Eng. Rep. 829 (1796); Illinois: *Frankenthal v. Camp*, 55 Ill. 169 (1870); Massachusetts: *Adams v. Hemmenway*, 1 Mass. 145 (1894); Michigan: *Eaton v. Winnie*, 20 Mich. 156 (1870); *Barry v. Peterson*, 48 Mich. 263, 12 N.W. 181 (1882); Pennsylvania: *Cotteral v. Cummlns*, 6 Serg. & B. (Pa.) 343 (1871). S. *Sharrod v. London & North Western Railway Co.*, 4 Exch. 580, 154 Eng. Rep. 1345 (1849).

Sec. 85

### TRESPASS ON THE CASE

177

fect will be the same as **if there had** been actual force, so far as regards the Form of Action. Force, as we have seen, is implied in every Trespass Quare Clausum Fregit. If a man, without right, goes upon another's land, however quietly and peaceably, the Law will imply force, and Trespass is the remedy, not Case; and the same is true where a man's cattle stray upon another's land. Force is also implied in every false imprisonment, and the proper remedy is Trespass, and not Case. And where a wife, daughter, or servant is debauched, or enticed away, the Law implies force, notwithstanding their consent, and the husband, parent, or master may declare in Trespass.<sup>1</sup> And where a fire is started, and, as an immediate consequence, another's property is destroyed, there is constructive force ...

Generally, as we have seen, a mere nonfeasance cannot be regarded as forcible; for where there has been no act there can be no force. There is no force, for instance, in a mere detention of goods without an unlawful taking; or in neglect to repair the bank of a stream, whereby another's land is overflowed; 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; and in these instances Case, and not Trespass, must be the remedy.

11. *Chamberlain v. Hazlewood*, 5 Mees. & W. 515, 151 Eng. Rep. 218 (1839). As we shall see, he may waive Trespass and declare in Case for the consequential injury—loss of services or society.

12- *Jordan v. Wyatt*, 4 Grat. (Va.) 151 (1847).

13. *Rinks v. Hicks*, 46 Me. 423 (1859). See, also, 1 Chitty, On Pleading! c. II, Of the Forms of Action, 141 (7th ed. Springfield, Mass. 1882).

14. English: *Star v. Rookeshy*, 1 Salk. 335, 91 Fag. Rep. 295 (1710); *Booth v. Wilson*, 1 B. & A. 59, 100 Eng. Rep. 22 (1817); *Powell v. Salisbury*, 2 Younge, & J. 391, 148 Eng. Rep. 970 (1828); Illinois: *Burke v. Daley*, 32 Ill. App. 326 (1890); Vermont: *Saxton*

*Bacon*, 31 Vt. 540 (1850).

For the failure of a railroad company to fence its track, see: Illinois: *Kankakee & S. W. B. Co. v. Fitzgerald*, 17 Ill. App. 525 (1885); Massachusetts:

#### *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.<sup>5</sup>

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.<sup>6</sup>

If a person forcibly takes another's goods, the Action must generally be Trespass. An Action on the Case, however, will also lie at the suit of a seller of goods against a person who, after the sale and before delivery, forcibly and wrongfully takes the goods, and so

Fames v. Salem & L. B. Co., 98 Mass. 560 (1868):  
Vermont: Ildolen v. Rutland & B. B. Ce., 30 Vt. 297

(1858).

And for the negligent failure to close the gates on a private right of way, see: Pennsylvania: Nirdlinger v. American Dist. Tel. Co., 240 Pa. 571, 88 A. 0 (1913); Vermont: Gregoir v. Leonard, 71 Vt. 410 45 A. 748 (1899).

15. Michigan: Barry v. Peterson, 48 Mich. 263, 12 N. W. 181 (1882); Massachusetts: Adams v. flenunenway, I Mass, 145 (1804).

16. Leame v. Bray, 3 East 593, 602, 102 Eng.Rep. 724 (1803).

That Case is the remedy to recover for an injury to one's vehicle from a stone deposited **in the highway**, see Green v. Belitx, 34 Mieh. 512 (1876).

In Actions where the injury is occasioned by the forcible **act of** the defendant, If the injury is direct and Immediate, the Action is Trespass, while if consequential or mediate, the Action is Case. Reed v. Guessford, 7 Boyce (Del.) 228, 105 A. 428 (1018).

178

### OFFENSIVE PLEADINGS

Cit. S

puts it out of the seller's power to perform his contract, so that the buyer avoids it; for the injury by the loss of the sale is consequential. Trespass would lie for the forcible and wrongful taking; Case will also lie for the consequential injury, so that here the two actions are concurrent remedies.<sup>7</sup>

If a person lays rubbish so near another's wall that, as a necessary or natural consequence, some of it rolls against the wall, the injury is immediate, and the remedy Is in Trespass.<sup>18</sup>

If a blow be given to the person or property of another, the Action must be Trespass, and not Case.<sup>15</sup> And if a person willfully drives his horse or carriage against another's person or property, Trespass and not Case is the remedy. But where, through negligent and careless driving, and not willfully, one vehicle is caused forcibly to strike another, it is held that an action on the Case is sustainable for the injury, either to the vehicle or the occupant, though in such a case the injury is immediate upon the violence.<sup>20</sup> Trespass would also lie in such a

11. Frankeathal v. tjump, 55 Ill. 169 (1870), in which the only ground for reversal was the selection of the wrong Form of Action—Case Instead of Trespass. **The explanation of the** result probably lies in the fact that the Court was willing to stretch a point in order to avoid a reversal on this barren technicality.

18. Gregory v. Piper, 9 B. & O. 591, 109 Eng.Rep. 220 (1829).

19. In Bicker v. Freeman, 50 N.H. 420 (1870), it appeared that the defendant had seized the plaintiff **by the arm and swung him violently around, and let hini 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 caine in contact with a hook and was injured. It was held that Trespass, not Case, was the Remedy. See, also, Lowery v. Manhattan R. Co., 99 N.Y. 158, 1 N.E. 608 (1885); Tuttle v. Atlantic City B. Co., 66 N.J.L. 327, 49 A. 450 (1901).

20. English: Williams y. Holland, 10 BIng. 112, 131

**Eng.Rep.** 848 (1833); Indiana: Sehuer v. Veeder, 7

Elackf. (**Did.**) 342 (1845); Kentucky: Payne v.

Smith, 4 Dana (Icy.) 497 (1838); MichIgan: Brad-

case<sup>21</sup> 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.**<sup>22</sup> In these cases the negligence or unskillfulness of the defendant is treated as the Cause of Action when Case is brought, while in Trespass the act itself is the Cause of Action. By the weight of authority, the rule is not confined to these particular cases, but is general, that where there is an immediate injury to person or property attributable to negligence, the party injured has an election either to treat the negligence of the wrongdoer as the Cause of Action, and to declare in Case, or to consider the act itself as the injury, and to declare in Trespass.<sup>23</sup>

ford v. Ball, 38 Mieb. 673 (1875); Wyant v. Crouse, 127 Mich. 158,86 N.W. 527 (1901); New Hampshire:

Bicker v. Freeman, 50 N.H. 420 (1870); New York:

wilson v. Smith, 10 Wend. (N.Y.) 324 (1838); McAllister v. Hammond, 8 Cow. (N.Y.) 342 (1526);

Vermont: Claffin v. Wilcox, 18 Vt 605 (1846).



21. English: *Turner v. Hawkins*, 1 Bos. & F. 472, 126 Eng.Rep. 1016 (1796); New York: *Wilson v. Smith*, 10 Wend. (N.Y.) 324 (1833); *McAllister v. Hammond*, 6 Cow. (N.Y.) 342 (1826); *Peansylvaffla*: *Strohl v. Levan*, 89 Pa. 177 (1861); Vermont: *Clafin v. Wilcox*, 18 Vt. 605 (1846).

<sup>4</sup>Where an injury is attributable to negligence, although it wore the immediate effect of the defendant's act, the party injured has an election, either to treat the negligence of the defendant as the Cause of Action and declare In Case; or to consider the Act Itself, as the cause of the injury, and declare in Trespass." *Richardson, Ci*, in *Dalton v. Favour*, 3 N.H. 465, 466 (1826). See, also, *Mullan v. Belbin*, 130 Md. 313, 326, 100 A. 384 (1917).

22. English: *Rogers v. Imbleton*, 2 Bos. & P. (N.E.) 117, 127 EugRep. 568 (1808); *Ogle v. Barnes*, 5 I.E. 188, 101 Erig.Bep. 1338 (1799); *Turner v. Hawkins*, 1 Boa. & P. 472, 126 Eag.Rep. 1016 (1796); *Moreton v. Hardern*, 4 Barn. & C. 226, 107 Eng.Rep. 1043 (1825); New York: *Percival v. Hickey*, 18 Johns. (N.Y.) 257 (1820); *Rathbun v. Payne*, 19 Wend. (N.Y.) 399 (1838); *Barnes v. Cole & Fitzbugb*, 21 Wend. (N.Y.) 188 (1839),

23. New York: *Ella v. Campbell*, 14 Johns. (N.Y.) 432 (1817); Vermont: *Howard v. Tyler*, 46 Vt 083 (1874). See, also, *Wells v. Knight*, 32 B.!. 432, 80 A.

### TRESPASS ON THE CASE

If a person pours water directly upon another's person or land, the injury is immediate and trespass is the proper remedy.<sup>24</sup> 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.<sup>25</sup> 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<sup>26</sup> And it lies for injury to person or property communicated by infection.<sup>27</sup>

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

**16 (1911), In which the Declaration was** in Trespass rather than Case, and alleged that a stone thrown by the defendant's blast struck the deceased while **he was** traveling on a highway, but did not aver **whether the act was due** to the defendant's negligence.

- 24' *Reynolds v. Clarke*, 2 Ld.Baym. 1399, 92 Eng.Rep.

410 (1725). And where water is discharged on A's property, and from there finds its way on to the property of **B**, **B's** remedy is in Case. *Nichols v. Ely Beet Sugar Factory* (1931) 2 Ch. 84.

25. 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 Chitty, On Pleading, c. II, **Of the Forms of Action**, 142 (17th ed. Springfield, Mass. 1882). See, also, following cases: English:

*Reynolds v. Clarke*, 1 Str. 635, 93 Eng.Rep. 747 (1788); **2 Ld.Eaym. 1399**, 92 Eng.Rep. 410 (1725); **Howard v. Bankes**, 2 Burr. 1114, 97 Eng.Rep. 740 (1760); Illinois: *Winkler v. Meister*, 40 Ill. 349 (1869); *Nevins v. Peorla*, 41 IU. 502 (1860); Michigan: *Hamilton v. Plainwell Water-Power Co.*, 8] **Mich. 21, 45 NW. 648** (1890); New York: *Arnold v. Foot*, 12 Wend. (N.Y.) 330 (1834).

in trespass for the injury.<sup>26</sup> 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.<sup>26</sup>

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.<sup>30</sup> But if a vicious animal is kept with knowledge of its propensities, or a dangerous substance, like explosives or poison, is negli

28. *Chamberlain v. Hazlewood*, 5 M. & W. 515, 151

Eng.flep. 218 (1830); *Tullidge v. Wade*, 3 Wils. IS,

95 Eng.Rep. 909 (1769). See, also, I Street, *Foundations of Legal Liability*, c. XVIII, *Interference ~s-iUi Domestic Relations*, 265, 271 (Northport, 1000); 3

Street, *Foundations of Legal Liability*, c. xviii,

*Trespass on the Case*, 266 (Northport, 1906).

29. English: Chamberlain v- Hazlewood, 5 M. & W. 515, 151 Eng.Rep. 218 (1839); Weedon v. Timbrell, 5 P.R. 861, 101 Eng.Rep. 202 (1793); Indiana: Van Vacter v. McKillip, 7 Blackf. (md.) 578 (1845); Kentucky: Jones v. Tevis, 4 Litt. (Ky.) 25 (1823); Maine: Clough v. Tenney, 5 Greenl. (Me.) 446 (1828); New Jersey: Van Born v. Freeman, 6 N.J. L. 322 (1196); New York: Martin v. Payne, 9 Johns. (N.Y.) 387 (1812); Moran v. Dawes, 4 Cow. (N.Y.) 412 (1825); North Carolina: McClure's firs v. Miller, 11 NC. 133 (1825); Pennsylvania: Beam v. Bank, 3 Serg. & B. (Pa.) 215 (1817); Wilt v. Vickers, S Watts (Pa.) 227 (1839); Legaux v. Feasor, I Yeates (Pa.) 586 (1795); South Carolina: Haney v. Townsend, 1 McCord (S.C.) 206 (1821); Virginia: Farker v. Elliott, 6 Munf. (Va.) 587 (1820).
30. English: Leame v. Bray, 3 East 593, 596, 102 Eng.Bep. 724 (1803); Mason v. Keeling, 12 Mod. 333, 88 Eng.Bep. 1360 (1699); Beckwith v. Shardike, 4 Burr. 2002, 98 Eng.Rep. 91 (1767); Maine: Decker v. Gammon, 44 Mo. 322 (1857). Thus, where a lighted squib was thrown into 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 the new force given it by the intermediate persons not being a New Trespass, but merely a continuance of the original force, Scott v. Shepherd, 2 Wm.Bl. 892, 96 Eng.Bep. 525 (1773). See, also, flicker v. Freeman, 50 N.H. 420 (1870). Cf. Russo v. Dinerstein, 138 Conn. 220, 83 A.2d 222 (1951).

## Sec. 85

179

- 26-**City of** Pekin v. Brereton, 67 Ill. 477 the party may elect to bring Trespass. Strickland, 47 Mieh. 389, 11 N.W. 210 (1873). Or  
Buskirk v.  
(1882).
27. Eaton v. Winble, 20 Mich. 156 (1870).

**180**

## OFFENSIVE PLEADINGS

Cit. 8

gently left exposed, and a person is thereby injured, the remedy is in Case.<sup>3\*</sup>

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?<sup>2</sup>

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.<sup>33</sup> 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; ~ or he may sue in Trespass as in other cases, treating the Trespass as his Cause of Action.<sup>35</sup>

### *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,

31. English: Mason v. Keeling, 12 Mod. 333, 88 Eng. Rep. 1360 (1699); Sarch v. Blackburn, 4 Car. & P. 297, 172 Eng.Rep. (1830); Alabama: Burden v. Barnett, 7 Ala. 169 (1844); Illinois: Stumps v. Kelley, 22 Ill. 140 (1859).
32. Illinois: Burton v. McClellan~ 2 Scam. (Ill.) 434 (1840); Massachusetts: Barnard v. Poor, 21 Pick. 318 (1838); Illinois: Armstrong v. Cooley, 5 Gil. (Ill.) 509 (1849); Virginia: Jordan v. Wyatt, 4 Grat. (Va.) 151 (1847).
33. Wells v. Howell, 19 Johns. (N.Y.) 385 (1822).
34. Star v. flookesby, 1 Salk. 335, 91 Eng.Rep. 295 (1710). See, also, Mason v. Keeling, 12 Mod. 333, 88 iing.Rep. 1360 (1609); Decker v. **Gammon**, 44 Me. 322 (1857).
35. English: **Star** v. Rookesby, I Salk. 335, 91 Eng. Rep. 295 (1710); New York: Wells v. Howell, 19 Johns. (N.Y.) 385 (1822). must be the remedy.<sup>36</sup> An Action on the Case is the remedy for libel or slander; ~ for injury to health or comfort from a nuisance; 38 for obstructing a private right of way,<sup>30</sup> or a public highway,<sup>4o</sup> or navigable river,<sup>4,</sup> 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.<sup>42</sup> 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.<sup>3</sup> And it will lie for infringing a copyright, patent, or trade-mark,<sup>44</sup> though a bill in Equity for an

<sup>36</sup> Union Petroleum Co. v. Blive,, Petroleum Co., 72 Pa. 173 (1833).

<sup>37</sup> Pollard v. Lyon, 01 13.8. 225, 23 LEd, 308 (18Th).

<sup>38</sup> Nevins v. Peoria, 41 111. 502 (1866).

<sup>39</sup> Maryland: Wright v. Freeman, 3 Bar. & J. (Md.) 487 (1823); New Jersey: Osborne v. Butcher, 26 N. J.L. 308 (1857); New York: Lansing v. Wiswall, S Denlo (N.Y.) 213 (1818); Lasnbert v. Roke, 14 Johns. (N.Y.) 383 (1817); Pennsylvania: Jones v. Park, 10 Philadelphia (Pa.) 165 (1874); Okcson v. Patterson, 29 Pa.Sta.Rep. 22 (1857); Vermont: Wilson v. Wilson, 2 Vt. 08 (1829).

<sup>40</sup> English: Grensley v. Codling, 2 lling. 261, 130 Eng.Eep. 307 (1824); Illinois: City of Pekin v. Brereton, 67 XI. 477 (1873); New York: Lansing v. Wiswall, 5 Denjo (N.Y.) 213 (1818); Vermont: Wilson v. Wilson, 2 Vt. 68 (1829).

<sup>41</sup> English: Rose v. Miles, 4 M. & 8. 101, 105 Eng. Rep. 773 (1815); Michigan: Bellant v. Brown, 78 Mich. 294, 44 NW. 326 (1889).

<sup>42</sup> Shadwell v. Hutchinson, 2 Barn. & Adol. 97, 109 Eng.Bep. 1079 (1831). See, also, Blunt v. McCormick, 3 Denjo (N.Y.) 283 (1846).

<sup>43</sup> English: Williams v. Morland, 2 Barn. & C. 910. 107 Eng.Rep. 620 (1824); Illinois: Ottawa Gaslight & Coke Co. v. Thompson, 39 111. 598 (1864); Maryland: Shafer v. Smith, 7 Ilar. & J. (Md.) 67 (1826); Pennsylvania: Lindeman v. Lindsey, 09 Pa. 93 (1871); Strickler v. Todd, 10 Serg. & II. (Pa.) 63 (1823).

<sup>44</sup> Clementi v. clouding, 11 East 244, 103 Eng.Rep.

998 (1809); Itoworth v. Wilkes, 1 Camp. 98, 170 Eng.Rep. 880 (1807); Minter v. Mower, C .Adol. & El, 7&9, 112 Eng.Itep. 282 (1837); Perry v. Skinner, 2 Mees, & W. 471, 150 Eng.Rep. 873 (1837).

**Sec. 86**

## TRESPASS ON THE CASE

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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 tvill 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 is 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." ~

### ELECTION BETWEEN TRESPASS

### AND CASE

**86. When an injury results directly from a Negligent Act, the injured party has an Election of Remedies. The injured party may main-**  
tam an Action in Trespass, relying upon the fact that the injury resulted directly **from** the act; or he may maintain an

**Action of Tres. pass on the Case relying upon the negligence** as the basis for the action.

WHILE Trespass and Case were designed to apply to different factual situations, as we have seen, there came a time in their development, when the effort to distinguish the two actions on the basis of proximity, broke down, and it was realized that a single tortious act might be at one and the same time a direct trespass and an injury resulting from negligence, actionable on the basis of a legal principle other than that effectuated by the Action of Trespass. Thus, in *Dalton v. Favour*,<sup>46</sup> where the plaintiff was wounded by the accidental discharge of a gun held by the defendant, the wrong contained all the elements of Trespass. But looked at from another viewpoint, or with a fuller understanding of the facts, the act may be the foundation of another tort. In such a situation the injured person sues in Trespass on the basis of a direct and forcible injury, or he may elect to treat the tort as the result of negligence in maneuvering the gun, and hence declare in Case.<sup>47</sup> When, therefore, in *Leame v. Bray*,<sup>48</sup> there was a collision, which was caused by negligence which combined facts of force, direct injury, as well as infringement of possession there was clearly a Trespass. But the same factual situation might be treated as the consequences of an anterior tort, to wit, the guilty party's negligent driving, which might be regarded as a wrong of another species for which the remedy might be Case and not Trespass. It thus appears that the injured party has a choice of remedies, as was held in *Williams*

<sup>46</sup>. 3 N.H. 465 (1826).

<sup>47</sup>. New York: *Buns v. Campbell*, 14 Johns. (N.Y.) 432 (1817); New Hampshire: *Dalton v. Favour*, 3 N.H. 465 (1826); Vermont: *Waterman v. Hall*, 12 Vt. 128

(1843).

<sup>48</sup>. **Wilson v. Smith, 10 Wend. (N.Y.) 324** (1833).

<sup>49</sup>. 3 East. 593, 102 Eng.Hep. 724 (1803).

182

## OFFENSIVE PLEADINGS

### Ch. 8

*v. Holland*,<sup>49</sup> according to the view he takes of the wrongdoer's conduct; he may sue in Trespass for the forcible wrong, or make the negligence of the defendant the ground of his action and declare in Case. Other acts trespassatory in their character may be injurious because of their indirect results, as in the case of the seduction of a man's wife, or daughter, in which instance Case would be the proper remedy, the plaintiff making the consequences of the act—the loss of services—the gist of his Complaint.<sup>50</sup> But clearly, the plaintiff-husband may elect to treat the direct injury to his wife or daughter as the basis of the action, in which case Trespass is the proper remedy.<sup>51</sup>

### FORM OF THE DECLARATION IN TRESPASS ON TUE CASE

87. As the action of **Trespass on the Case** was the Great Residuary Remedy of the **Common Law**, the forms in **which it** has found expression are as varied as the wrongs for **which** it has afforded a remedy.

**A Form of a Declaration in Trespass on the Case** as a remedy for a personal injury is set forth in this section.

DECLARATION IN ThEspAss ON TUE CASE FOR PERSONAL INJURY

iN THE QUEEN'S BENCH the 15th day of June, in the year of our Lord 1845.

LANCASHIRE (Southern Division), to wit,—Thomas Moody (the plaintiff in this suit), by Frederick Jones, his attorney, complains of William White (the defendant in

<sup>49</sup>. English: 10 fling- 112, 131 Eng.Rep. 848 (1833); New York: *Percival v. Hiekey*, 15 Johns. (N.Y.) 257 (1820); Vermont: *Clallin v. Wilcox*, 18 Vt. 605

(1846).

<sup>50</sup>. *Moran v. Dawes*, 4 Cow. (N.Y.) 412 (1825).

Si. English: Woodward v. Walton, 2 Bos. & P. (*NB.*)  
476, 127 Eng.Rep. 715 (1807); Diteharn v. Bond, 2  
M. & S. 426, 105 Eng.Rep. 443 (1814); Chamberlain  
v. Hazlewood, 5 M. & W. 515, 151 Eng.Rep. 218  
(1839); Illinois: Yundt v. Rartrunft, 41 Ill. 111.9 (1866);  
Massachusetts: Bigaoutt v. Paulet, 134 Mass. 123

(1883).

this suit), who has been summoned to answer the said Plaintiff in an action of Trespass on the Case. For that whereas the defendant before, and at the time of the commencement of this suit, and of the injury and damage occurring, as hereinafter mentioned, was the possessor and occupier of a certain messuage, vault, cellar, and premises, with appurtenances, situated in the town of Liverpool, in the County of Lancaster, and near to a certain common and public footway there, and in which vault and cellar there was a certain hole or aperture opening into the said public footway. Yet the defendant, well knowing the premises, whilst he was so the possessor and occupier of the said messuage, vault, cellar, and premises, with the appurtenances, and whilst there was such hole as aforesaid, heretofore, to wit, on the first day of May, in the year of our Lord 1845, wrongfully and unjustly, and contrary to his duty in that behalf, permitted the said hole to be, and continue, and the same was then so badly, insufficiently, and defectively covered, that, by means of the premises, and for want of a proper and sufficient covering to the said hole, the plaintiff, who was then lawfully passing in and along the said footway, then slipped and fell into the said hole, and thereby the left leg of the plaintiff was then fractured and broken, and greatly damaged; and the plaintiff became and was sick, sore, lame, and disordered, and so remained and continued for a long time, to wit, thence hitherto, during all which time the plaintiff thereby suffered and underwent great pain, and was prevented from attending to and transacting his lawful affairs and business, by him during that time to be performed and transacted; and was also, by means of the premises, forced and obliged to pay, lay out, and expend, and did pay, lay out and expend a large sum of money, to wit, the sum of £60 in and about the endeavoring to be healed and cured or the wounds, lameness, sickness, and disorder so occasioned as aforesaid, to

Sec. 90

#### TRESPASS ON THE CASE

153

the plaintiff's damage of £200, and thereupon he bring suit, &c.

MARTIN, Civil Procedure at Common Law, 372 (St. Paul, 1905).

#### DECLARATION IN TRESPASS ON THE CASE

—ESSENTIAL ALLEGATIONS: (1) IN GENERAL

88. The Essential Allegations in Actions

**of** Trespass on the Case **are:**

(I) The plaintiff's Right, Title or Possession;

(II) The Facts showing the existence of a Legal Duty on the part of the defendant;

(III) A Wrongful Act by the defendant in Breach of his Duty;

(IV) Damages proximately caused by the **Wrongful Act.**

#### DECLARATION IN TRESPASS ON THE

CASE—ESSENTIAL ALLEGATIONS: (2)

**THE PLAINTIFF'S RIGHT, TITLE, INTEREST OR POSSESSION**

89. In the case of injury to chattels, plaintiff's right or interest in them is usually sufficiently described by an averment that they are his goods and chattels, or that he was lawfully possessed of them as his own property.

IN actions for injury to property, the plaintiff's right or interest in the thing affected must be clearly stated. In the case of injury to chattels, the plaintiff's right or interest in them will be ordinarily sufficiently described by an averment that they are his goods and chattels, or that he was lawfully possessed of them as his own property; but 'if the plaintiff sues as a reversioner, he must either state an injury of such a permanent nature, as to be necessarily injurious to his reversion; or if the wrongful acts complained of are not of such a nature as necessarily to result in an

injury to the reversionary estate, but only of an equivocal character, the plaintiff must aver that they were done to the damage, or prejudice of his reversion; and in the latter case, the want of such an averment, will be fatal on demurrer; or good cause for arresting the judgment.”<sup>52</sup>

Where the injury is to intangible personal rights such as reputation or incorporeal property rights, such as an easement and reversion, Case and not Trespass is the proper remedy.

### *Reversionary Right of Bailor*

UNDER the Common-Law Forms of Action, a bailor could not ordinarily bring an Action of Trespass, Trover or Detinue, these actions being founded upon a violation of possession or upon an immediate right of possession.<sup>53</sup> Where any permanent injury is done to a chattel, the bailor may maintain an Action on the Case against a third party for an injury to his reversionary interest.<sup>37</sup> The bailor also has concurrent possessory remedies with the bailee, if the bailment is revocable by him at his pleasure as in the case of a gratuitous loan of a chaise.<sup>55</sup>

### DECLARATION IN TRESPASS ON THE CASE—ESSENTIAL ALLEGATIONS; (3) THE FACTS SHOWING THE EXISTENCE OF A LEGAL DUTY ON THE PART OF THE DEFENDANT

90. In many cases it is necessary to State

**Facts showing the existence of a duty owing from the defendant to the plaintiff, as where**

52. Hornblower C. J., in *Potts v. Clarke*, 20 N.J.L.

536, 541 (1845), citing *Jackson v. Pesked*, 1 Man. & Sd. 234, 105 Eng.Rep. 88 (1813). See, also, the following cases: Illinois: *City of Chicago v. McDonough*, 119 Ill. 85, 1 N.E. 331 (1854); New Hampshire: *George v. Fisk & Norcross*, 32 N.H. 32 (1855).

53. English: *Withy v. Flower* [N.P.1649], 1 Grays Cases on the Law of Property, 241 (2d ed. Cambridge, 1005—00).

54. English: *Ward v. Macauley*, 4 T.R. 489, 100 Eng. Rep. 1135 (1791); *Go'don v. Harper*, 7 T.R. 9, 101 Eng.Rep. 829 (1706); *Hall v. Pickard*, 5 Camp. 157, 170 Eng.Rep. 1350 (1812); Florida: *Bueki v. Cone*, 25 Fla. 1, 6 So. 160 (1878); Massachusetts: *Ayer v. Bartlett*, 9 Pick. (Mass.) 156 (1820); New Jersey: *New York, L. E. & W. H. Co. v. New Jersey Electric Co.*, 60 N.J.L. 338, 35 AU. 828, 43 LILA. 849

(1859).

55. *Lotan v. Cross*, 2 Camp. 464, 170 Eng.Rep. 1219 (1810).

### OFFENSIVE PLEADINGS

it arises from the relation of passenger and carrier or master and servant, or where the defendant was in control of some dangerous machinery or a vicious animal.

THE Declaration in Trespass on the Case must not only allege a right or interest in the plaintiff but it must also set forth a duty existing on the part of the defendant, and a violation of that duty. If, however, the right which is violated is that of personal security, this need not be stated.<sup>56</sup> It is usually necessary to state somewhat fully the facts and circumstances showing the existence of a duty toward the plaintiff on the part of the defendant, the neglect or breach of which would be an injury to the plaintiff.<sup>57</sup>

Thus, in an action for negligent injury, it must appear that the plaintiff was in a situation where the defendant owed him a duty to exercise due care for his safety, as that the defendant was in control of machinery or other agency causing danger to the plaintiff, for which the defendant was responsible. A bare allegation that the defendant owed a legal duty to the plaintiff is a mere conclusion of law and hence worthless; the facts creating the duty must be alleged, as that the relation of carrier and passenger existed.<sup>55</sup> The existence of the defendant's duty

50. In such a case, as in *Trespass ni armis* for injuries to persons, the plaintiff's Allegations commence with a statement of the injury committed, and no Inducement or statement of his right is necessary.

57. In an Action on the Case, all the facts upon which the plaintiff relies, must be stated in the Declaration. *Wadleigh v. Katahdin Pulp & Paper*

Co., 116 Me. 107, 100 AtL 150 (1917).

See, also, on this point, the case of 5. J. & W. M. Bayard v. Smith, 17 Wend. 88 (1837), in which Nelson, C. I., said: "All the circumstances essential to support the Action must be alleged, or in substance appear on the face of the Declaration."

58. English: Seymour 'v. Maddox, 16 Q.B. 326, 117 Eng.Rep, 904 (1851); Alabama: Ensley Ry. Co. v. Chewning, 03 Ala. 24, 9 Se. 458 (1891); Illinois: City of Chiengo v. Sels, Schwab & Co., 202 Ill. 545, 67 N.E. 388 (1904); Mackey v. Northern Mill Co., 210 Ill. 115, 71 N.E. 448 (1904); Maryland; Macn-

toward the plaintiff must appear from facts or circumstances from which the law infers such duty, as where the defendant's liability is based upon his ownership or control of the premises upon which the injury occurred and his duty to furnish employees a safe place to work<sup>59</sup>

**DECLARATION IN TRESPASS ON THE  
CASE—ESSENTIAL ALLEGATIONS / (4)  
TUE DEFENDANT'S WRONGFUL ACT  
ZN BREACH OF MIS DUTY**

**91. To show a Breach of Duty, the defendant's Wrongful Act and the mental conditions**

ner v. Carroll, 4G Md. 193 (1877). See, also, 14 Cyc. 331, 332; 29 Cye. 566.

In Gillman v. Chicago Rys. Co., 268 Ill. 305, 109 N.E. 181 (1915), it was held that in an Action of Tort in a fourth class case in the Municipal Court of Chicago the statement of claim must show a Cause of Action based on a Breach of Legal Duty by the defendant, such, for example, as facts showing the relation of carrier and passenger, a duty owed by the defendant to the plaintiff, and neglect of that duty by the defendant or its servants in the scope of their employment, and damage to the plaintiff as the result of that neglect. The Court emphasizes the function of the Statement of Claim, which is the substitute for a Declaration, as the basis of a Judgment, and the insufficiency of the statement of claim may be availed of on a Writ of Error even in the absence of a Demurrer.

50. A Declaration by an employee against a corporation, his employer, for injury by a grindstone bursting should allege; (1) the relation, that plaintiff was in the employ of the defendant and was its servant, **and** was subject to its orders and directions in his work; (2) the duty of **the** defendant to furnish safe appliances and place to work; (3) the negligent acts of defendant hs permitting the rindstone to be and remain in a dangerous condition, showing how it was defective and why dangerous, and that defendant knew or ought to **have known of the defects;** (4) **the causal connection** between the negligence and the injury; (5) the due care of the plaintiff (in some Jurisdictions) and the fact that plaintiff did not know of the danger and was not chargeable with knowledge of It; (6) the damages. What Allegations show a Breach of the master's **duty to furnish servant a safe** place to work, see Sargent Co. v. Baublis, 215 Xli. 429, 74 N.E. 455 (1905); Raxworthy v. Heisen, 274 XII. 398, 407, 113 N.E. 699 (1918); Vogrin v. American Steel & Wire Cc., 268 Ill. 474, 105 N.E. 332 (1914); Roniani v. Shoal Creek Coal (Jo., 271 III. 366, 111 N.E. 88 (1916).

**184  
Ch. 8**

Sec. 91

**TRESPASS ON THE CASE**

185

of responsibility, such as intent or negligence **or malice or fraud, must be alleged.**

IN Declarations in Trespass, the injury is stated without any averment of the defendant's motive or intent or of the circumstances under which it was committed. In general, in actions on the case, it is necessary to state, not only the wrongful act complained of, but also the wrongful intent, fraud, or negligence with which it was done and the circumstances showing that it was wrongful. In some actions the scienter (knowledge) must be alleged and proved, as of the vicious propensity of the dog in an action for keeping a dog accustomed to bite people or sheep. But in an action for debauching a wife or servant it is not necessary to allege or prove that the defendant knew that the female was the wife or servant of the plaintiff.

In actions for negligence there is some conflict whether a general charge of negligence, as that defendant so negligently and carelessly operated a car that plaintiff was thrown from the car and injured, is **sufficient, or whether the facts and** circumstances -showing negligence must be stated specifically.<sup>60</sup> When it is said that it is sufficient to

-o. **That a** General Allegation of Negligence is insufficient, see the following cases:

Delaware: King v. Wilmington & N. C. Electric U’.

Co., 1 Penn. (Del.) 452, 41 Atl. 075 (1895); Illinois:

East St. Louis Connecting fly. v. Wabash, St. L. &

P. fly. Co., 123 Ill. 504, 15 NE. 43 (1858); New Jersey: Race v. Easton & A, It. Co., 62 N.J.L. 536, 41

A. 710 (1898).

That a General Allegation may be permitted, see:

Illinois: Chicago City fly. Co. v. Jennings, 157 Ill.

274, 41 N.E. 629 (1895); City of Chicago v. Selz,

Schwab & Co., 202 Ill. 540, 67 N.E. 386 (1903);

Greinke v. Chicago City fly. Co., 234 Ill. 564, 85 N.E.

327 (1908).

That a general charge of negligence is sufficient After verdict, see: Chicago City fly. Co. v. Shreve, 226 Ill. 536, 80 N.E. 1049 (1907).

And in Illinois, it is sufficient to allege that the defendant negligently and carelessly propelled the engine with great force against certain cars where the plaintiff was working with tile knowledge of the defendant. Illinois Cent. Ry. Co. v. Aland, 192 Ill.

plead negligence generally, it is usually meant that the pleader, having set out the specific facts showing a duty of care and acts causing injury, may state generally that such acts were negligently done. A mere general averment of negligence is insufficient.<sup>61</sup>

### **In the case of a passenger injured in a**

street car collision, it will be sufficient for the declaration to show that the plaintiff was a passenger upon defendant’s car, that defendant was a common carrier, and that defendant failed to perform its duty to carry safely, by permitting the car to collide with another of defendant’s cars. It will not be necessary to plead the facts showing the cause of the collision, as the facts alleged bring the case within the doctrine of *res ipsa loquitur*,<sup>62</sup> **and an allegation of negligence is unnecessary.**<sup>61</sup>

61. Shipman, Handbook of Common-Law Pleading, c.

10, The Declaration in General—Tort Actions, §~ 93,

94, p. 216 (3rd ed. by Ballantine, St. Paul, 1023).

62. In general, on the various aspects of the Doctrine of lies Ipsa Loquitur, see:

Treatises: Sham, lies Ipsa Loquitur. Presumptions and Burden of Proof (Los Angeles, 1045) ; id. (2d ed. Los Angeles, 1947).

**Articles:** Bond, The Use of the Phrase lies Ipsn Loquitur, 66 Cent.L.J. 386 (1908); Berry, The Application of lies Ipsa Le-uitur in Master and Servant Cases, 84 Cent.L.J. 67, 53 caa.L.J. 104 (1917); Beckel and Harper, Effect of the Doctrine of lies Tpsa Loquitur, 22 Ill.L.Rev. 724 (1928); Nibs, Pleading lies Ipsa Loquitur, 7 N.Y.U.L.Q.Rev. 415 (1930); Carpenter, The Doctrine of lies Ipsa Loguitur, I U. ChiLlier. 519 (1934); Prosser, lies Ipsa Loquitur:

Collisions of Carriers with Other Vehicles, 30 JILL. Rev. 980 (1936); Rosenthal, The Procedural Effect of lies Ipsa Loquitur in Now York, 22

Corn.L.Q. 39 (1936); Prosser, The Procedural Effect of lies Ipsa Loquitur, 20 Minn.L.Rev. 241, 271 (1036); Carpenter, The Doctrine of lies

Ipsa Loquitur in California, 10 So.Cal.L.flev. 166 (1937); Presser, lies Ipsa Loquitur: A Reply to Professor Carpenter, 10 So.Cal.L.Rev. 459

(1937); Carpenter, lies Ipsa

Loquitur: A Rejoinder to Professor Presser, 10 SoCal.L.Rev. 467 (1937); Malone, lies Ipsa Loqui i. tur and Proof by Inference, 4 La.L.Rev.

70 (1941); Sham, lies Ipsa Loquitur, 17 So.Cal.L.Rev. 187 (1944); 001dm, The Doctrine of lies Ipsa Loquitur

39, 61 N.E. 450 (1901).

63. See Note 63 on Page 186.

## **OFFENSIVE PLEADINGS**

## **Ch. S**

The causal connection between the negligent act of the defendant and the injury rein Aviation Law, 18 So.Cal.L.Rev. 15, 124 (1944);

Morris, lies Ipsa Loquitur in Texas, 26 Tex.L.tev. 257 (1048); Prosser, Rcs Ipsa Loquitur in California, 37 Cal.L.Rev. 183 (1949), reprinted In Prosscr

Passenger Litigation, 37 Va.L.Rev. 55 (1951).

Comments: Torts-lies Ipsa Loquitür—Injury to Adjacent Nerve In the Course of an Operation, 40 Col.L. Rev. 161 (1940). lies Ipsa Loquitur: Applicability to Airplane Accidents: Haasman v. Pacific Alaska Air Express, 100 F.Supp. 1 (D.C.Alaska 1951), 37 Cornell L.Q. 543 (1952); lies Ipsa Loquitur: Its Nature and Effect, 3 U.Chi.L.Rev. 126 (1935); Application of the rule “lies Ipsa Loquitur” to Actions by Employee Against his Employer. Whitmaker v. Pitenirn, 174 S.W2d 163 (Mo.1943), 9 Mo.L.Rev. 283 (1944); Pood—flies Ipsa Loquitur as Applied to Suits Against the Manufacturer or Preparer of Ar-tides Intended for Human Consumption, 23 Ky.L.J. 534 (1935); lies Ipsa Loquitur as Applied to a Runaway Car—Lewis v. Wolbc, 39 Ky.L.L.J. 328 (1951); Practice and Procedure—The Effect of Plaintiff’s Pleading on the Doctrine of lies Ipsa Loquitur, 31 Mich.L.Rev. 817 (1933); Evidence—Application of lies Ipsa Loquitur to Automobile Accidents—ti) The Doctrine in General, 24 Gco.L.J. 448 (1936); Endenee—Negligence---Res Ipsa Loquitur—The Doctrine Applied in nn Action for



Malpractice to do away with the Need for Expert Testimony, 9 Brook. L.Rev. 335 (1940); Evidence—Presumptions—Plain. tiff's Res Ipsa Loquitur Against Defendant's Presumption of Due Care, 1 Mleh.L.Rev. 205 (1952); Directing a Verdict for Plaintiff in lies Ipsa Loquitur Cases, 22 Wash.V.L.Q. 100 (1936); Negligence—lies Ipsa Loquitur—Justification for a Directed Verdict in Favor of the Plaintiff, 51 Mich.L.Rev. 119 (1952); Arnold, Instructions on lies Ipsa Loquitur, 13 Mo.L.Rev. 217, 221 (1948); Evidence—lies Ipsa Loquitur—Evidence of Specific Negligence as Affecting Reliance upon General Negligence, 50 Mich.L. Rev. 1108 (1952).

Annotations: lies Ipsa Loquitur as Applicable to Injury to passenger in collision where other vehicle was not within carrier's control, 25 A.L.R. 600 (1923); 83 A.L.R. 1163 (1933); 161 ALIt. 1113 (1946); "lies Ipsa Loquitur" as a Presumption or a mere Permissible "Inference", 53 A.L.R. 1494 (1928), 167 ALIt. 658 (1947); lies Ipsa Loquitur distinguished from characterization of a known condition as Imputed; charge that injury resulted from the defendant's act to plaintiff's person or property, and that the negligence was the proximate cause of the injury.<sup>64</sup>

## DECLARATION IN TRESPASS ON THE CASE—ESSENTIAL ALLEGATIONS: (5) THE DAMAGES

92. **It must appear that the Wrongful Act of the defendant was the legal cause of the injury to the plaintiff's right.**

THE Declaration must state the damages resulting as the legal and natural consequences of the injury done. These may be general or special, and special damages should be alleged specifically. In many torts falling within the scope of the action on the case, damage is the gist of the action, and must be alleged in order to show a cause of action.

Whatever damages the plaintiff has suffered from the injury committed by the defendant, and the establishment of negligence by circumstantial evidence, 59 A.L.R. 468 (1929), 78 ALIt. 731 (1932), 141 A.L.R. 1016 (1942); lies Ipsa Loquitur in its relation to the burden of proof and burden of evidence, 59 A.L.R. 485 (1929), 92 A.L.R. 653 (1934); lies Ipsa Loquitur as applicable in ease of injury by X-Ray, 152 A.L.R. 638 (1944); lies Ipsa Loquitur as applied to collision between a moving automobile and a standing automobile or other vehicle, 151 ALIt, 876 (1944); lies Ipsa Loquitur as ground for direction of verdict in favor of plaintiff, 153 A.L.R. 1134 (1944); Pleading particular cause of injury as waiver of right to rely on Des Ipsa Loquitur, 79 A.L.R. 48 (1932), 160 ALIt. 1450 (1946); Physicians and Surgeons: Presumption or Inference of Negligence in Malpractice Cases, lies Ipsa Loquitur, 162 ALIt. 1265 (1946); lies Ipsa Loquitur Doctrine as Affected by Injured Person's Control over or Connection with Instrumentality, 169 ALIt. 953 (1947); lies Ipsa Loquitur as applied to bursting of bottled beverages, food containers, etc., 4 A.L.R. 2d 466 (1949); Res Ipsa Loquitur in Aviation Accidents, 6 A.L.R. 2d 528 (1949).

63. *Ellis v. Waidron*, 19 RI. 369, 33 AtI. 869 (1896) (lies Ipsa Loquitur).

64. *Strain v. Strain*, 14 Ill. 368 (1853); *McGanahan v. East St. Louis & C. Ry. Co.*, 72 Ill. 557 (1874); *Hartnett v. Boston Store of Chicago*, 185 Ill.App. 332 (1914).

186

Selected Topics on tort, 1954; Dewey, Loquitur, 19 U. of Des Ipsa Loquitur:

**LEer.** 643 (1950); Ipsa Loquitur, 35 lies Ipsa Loquitur (1951); McLarty,

the Law of Torts, 302 (Ann Ar-A Tare in the Field of lies Ipsa Loquitur, 415 (1950); Seavey, Tabula in Naufragio, 63 Harv. Slife, The Iowa Doctrine of lies Ipsa Loquitur, 393 (1950); Saffe, Vindicated, 1 Buffalo L.Rev. 1 lies Ipsa Loquitur in Airline

### Sec. 93

## TRESPASS ON THE CASE

187

ant, which follow as the legal and natural consequences of such injury, are recoverable, and should be laid in a sum sufficiently high to cover all the plaintiff expects to prove, as his recovery will be limited by the amount stated.<sup>65</sup> As in all other actions the damages may be either general or special and, if special or peculiar to the case, they must be alleged specifically.<sup>60</sup> Recovery will be confined to the injuries alleged by the declaration to have resulted from the particular negligence charged. In Case, unlike Trespass, damage is usually an essential element of liability.<sup>67</sup>

## PARTICULAR APPLICATIONS OF CASE AS THE GREAT RESIDUARY COMMON-LAW REMEDY FOR VARIOUS WRONGS

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

**THE** history of the Common Law Proceed  
•ure is the history of moral rights, without

65. See *Foreman v. Sawyer*, 73 Ill. 484 (1874), holding that a Judgment cannot exceed the *ad damnum* laid in the Declaration.

66- *City of Chicago v. McLean*, 133 Ill. 148, 24 N.E. 527, 8 LILA. 765 (1866). Special Damages must be pleaded with particularity, such as Mental pain and expenses of cure. Illinois: *Garvey v. Metropolitan ~Vest Side Elevated It. Co.*, 155 Ill.App. 601 (1908), involving mental suffering; New Hampshire: *Corey v. Bath*, 55 NB. 530, 545 (1857), involving General Damage.

67. English: *Howell v. Young*, 5 B. & C. 259, 108 Eng. Rep. 97 (1826); Rhode Island: *Sullivan v. Waterman*, 20 R.I. 372, 39 A. 243, 39 L.R.A. 773 (1825), involving a public nuisance; West Virginia: *Washington v. Baltimore and O. It. Co.*, 17 W.Va. 190 (1850), involving negligence; *McGlamery v. Jackson*, 67 W.Va. 417, 68 SE. 105, 21 Ann.Cas. 239 (1910), holding that a **lack** of an *ad damnum* clause in Trespass on the Case is demurrable. Federal: *Jackson and Sharp Co. v. Pay*, 20 AppD.C. 105 (1902), involving damages in deceit; *Pollard v. Lyon*, 01 U.S. 225, 23 L.Ed. 308 (1875), involving libel and slander.

remedy because of the **lack of an appropriate Writ** or precedent in the Register of Writs, until the persistence of a demand for remedy developed the Action of Trespass on the Case to cover all cases similar to, but not quite identical with Trespass.<sup>66</sup> In the beginning the new action was merely supplementary to **the old**. **But through the continual and constantly expanding application of Case**, the first instance of which appeared in 1369,69 as a remedy for a wide variety of human wrongs, not otherwise remediable, most of our modern **law, contract, quasi-contract, property, and tort**, has been evolved, and by reason thereof, the Common Law has been able to largely make good its proud boast, first uttered **as early as and by Bracton, that where there is a wrong there is a remedy. It is for this reason** that the Action on the Case is frequently referred to as the Great Residuary Remedy of the Common Law.

#### *Torts in Connection with Contract*

MERE breach of Contract, without more, will not sustain an Action on the Case, but the **remedy is Assumpsit, Covenant, or Debt.**” 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**. Thus, 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,<sup>71</sup> though it is

68. *Sims v. Sims*, 79 N.J.L. 577, 76 A. 1063 (1910). See *YB. 43 Edw. III, f. 33*, p. 35(1369).

70. *Michigan: Potter v. Brown*, 35 Mich. 274 (1877); New York: *Masters v. Stratton*, 7 Bill. (N.Y.) 101 (1845).

71. Alabama: *Walker v. Goodman*, 21 Ala. 647 (1852);

**Goodman v. Walker**, 30 Ala. 482, 68 Am.Dec. 134 (1857); Arkansas: *Penningtons Ex'rs. v. Veil*, 11

**Ark.** 212, 52 Am.Dec. 262 (1850). Rhode Island:

*Holmes v. Peck*, 1 El. 242 (1849); Massachusetts:

*Ashley v. Root*, 4 Allen (Mass.) 504 (1862); Gilbert

*v. Williams*, 8 Mass. 51, 5 Am.Dec. 77 (1811); Dearborn **v. Dearborn**, 15 Mass. 316 (1818); Varnum *v.*

*Martin*, 15 Pick. (1-lass.) 440 (1834); Mississippi;

*Coopwood v. Bolton*, 26 Miss. 212 (1853); New

**York; Church v. Murmford**, 11 Johns. (N.Y.) 479

#### **OFFENSIVE PLEADINGS**

#### **Ch. S**

more usual to declare in Assumpsit. Assumpsit is the usual remedy for neglect or breach of duty against bailees, as against carriers, wharfingers, warehousemen, and others having the use or care of personal property, whose liability is founded on the Common Law as well as upon Contract; but they are also liable in case for an injury resulting from their neglect or breach of duty in the course of their employment.<sup>72</sup> For any nonfeasance by a party in a public employment which he professes, an Action on the Case will lie by the party injured, as where a common carrier fails to perform its common law obligation to serve all who apply.<sup>73</sup>

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 of misfeasance**

(1814); Pennsylvania: *Lynch v. Corn*, to Use of

*Barton*, 16 Serg. & It. (Pa.) 868, 16 Am.Dec. 582

(1827); *Shreeve v. Adams*, 6 Phila. (Pa.) 260 (1867);

Vermont: Crooker v. Hutchinson, 1 Vt. 73 (1827).

And Case also lies for negligence by a surgeon in performing **an** operation. Cadwell v. Farrell, 28 Iii. 438 (1862).

72. English: Carbett v. Paclndngton, 6 Barn. & c. 268,

108 Eng.Rep. 451 (1827); Pozzi v. Shipton, 8 Adol. & E. 963, 112 Eng.llep. 1106 (1835); Illinois: Warner **v. Dunnavan**, 23 Ill. 380 (1859); Wabash, St. L. & P. **By. Co.** v. McCasland, 11 Ul.App. 491 (1582); Nevin v~ Pullman Palace Car Co., 106 ill. 222, 46 Am.Rep. 688 (1883); Kentucky: Bell v. Wood, 1 Dana (Ky.)

147 (1833); Massachusetts: School District in Mod-**field v. Boston, H. & B.** It. Co., 102 Mass. 552, 3 Am. **Rep. 502 (1869)**; New York: Bank of Orange Coun~ **ry v. Brown, 3 IVend, (N.Y.) 158 (1830)**; **Lockwood v. Bull**, 1 Cow. (N.Y.) 322, 13 Am.Dec. 539 (1823):

Virginia: Southern Express Co. v. McVeigh, 20 Grat. **(Va.) 264 (1871)**.

And Case Is a proper remedy against one who Las hired **a horse** and has Ill-used it. Botch v. Hawes, 12 Pick. (Mass.) 136, 22 Am.Dec. 414 (1831).

¶3 **Illinois: Mevin** v. Pullman Palace Car Co., 106 111. 222, **40 Am.Rep. 688 (1883)**; Virginia: Southern Express Co. v. Meveigh, 20 Grat, (Va.) 264 (1871).

And where the manufacturer of an article negligently furnishes to a purchaser something different from **what be** purports to furnish, such as a defective rope, **whereby the purchaser Is** Injured, Case will **lie**. Brown v Edgington, ~ Man. & **0. 279, 133 trig. Rep. 751 (1841)**.

in performing it.~ "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 contraci, may often be adopted." ~ Thus, Case will lie f or not accounting for, and for converting,

74. English: Dickson v. Clifton, 2 Wils, 319, 95 Eng..

Rep. 834 (17661); Burnett v. Lynch, 5 Barn. & C. 605,

108 Eng.Rep. 220 (1826); Illinois: Kankakee & S.

W. It. Co. v, Fitzgerald, 17 Ill.App. 525 (18851; Nevin v. Pullman Palace Car Co., 106 Ill. 222, 46 Am.

Rep. 688 (1883).

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 then takes a second mortgage unknown to his principal, whereby the money is lost, his principal is not **limited to an Action of Assurnpsit, for** Breach of the Contract, but may sue in Case. Shipherd v. Field, 70 Ill. 438 (1873).

For the diversion of a stream of water, the use of which is directly granted by Contract under Seal, Case is the Proper Remedy. The party need not bring Covenant on the agreement. Lindeman v. Lindsey, 69 Pa. 93, 8 Am.Rep. 210 (1851). And see, **also, Striekier -v. Todd**, 10 Serg. & It. (Pa.) 63, 13 Am. **Dec. 649 (1823)**.

Where there is a positive duty created by implication **of Law independent of Contract, though arising out**

of a relation or state of facts created by Contract, an Action on the Case as for a Tort will lie for dis~ **regard or violation** of that thEy. Flessner v. Carstens racking Co., 93 Wash. 48, 160 P. 14 (1916). See, also, Indiana: Flint & waning Mfg. Co. x. Beckett, 167 md. 491, 79 N.E. 503, 12 LILA. 924 (1900); Massachusetts: Tuttle v. Gilbert 3,11g. Co., 145 Mass. 169, 13 N.E. 465 (1887); and Comment. Landlord & Tenant; Breach of Agreement to Repair, S CoLL.Itov. 666 (1908),

- 1. Chitty, A Treatise on Pleading Action on the

Case, 152 (Springfield, 1833); Burnett v. Lynch, 5

Barn. & 0. 609, 105 Eng.Rep. 229 (1826); Mast v.

Goodson, 3 Wils. 348, 95 EngR 004 (1772); Cccbett v. Paekington, 6 Barn. & 0. 273, IOS Eng.llep.

451 (1827).

See, generally, as to Actions on the Case as deliefio, where there has been a Contract: Connecticut:

Stoyel v. Westcott, 2 Day ((Joan.) 422, 2 Am.Dec. 100 (1807); Bulckley v. Storer, 2 Day (Conn.) 531 (1807); Eumiston v. Smith, 22 Oonn. 19 (1822); Maryland:

Philadelphia W. & B. N. Co. v. Constable, 39 Md. 155 (1873); Federal: Vasse v. Smith, 6 Crancl.

227, 3 LEd, 207 (1810); Emigh v. Pittsburg, Ft. 'a', & C. B. Co., 4 (Bias.) 114, Fed.Cas.No.4,4-10 (1867).

188

## TRESPASS ON THE CASE

to his own use, bills delivered to a person to **be discounted, or the proceeds of such bills.**~ 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.<sup>77</sup>

Though Covenant or Assumpsit is a concurrent **remedy, Case will lie** for a false **warranty on the** sale of land or goods.<sup>75</sup> 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.<sup>70</sup> It is also the proper **remedy for any other fraud or deceit independently of and without relation to any contract between the parties,**<sup>80</sup> and for **fraudulent representations, not introduced into a written contract between the parties respecting the subject-matter of the representations.**<sup>81</sup>

56. English: Samuel v. 3udin, 6 East 333, 102 Eng. Rep. 1314 (1805); North Carolina: Smith v. White, 6 fling, (N.C.) 21S (1828).

77- Elsee v. Gatward, 5 TB, 143, 101 Eng. Itep. 82 (1793).

7S. English: Stuart v. Wilkins, 1 Doug, 21, 99 Eng.

**Rep.** 15 (1778); Williamson v. Allison, 2 East 446, 102 Eng. Itep. 439 (1802); Michigan; Beebe v. Knapp, 25 Mlch. 53 (1873); Carter v. Glass, 44 Web. 154, 6 N.W. 200, 38 Am. Rep. 240 (1880); New Hampshire: Mahurin v. Harding, 28 N.H. 128, 59 Am. Dec. 401 (1853); New York: Culver v. Avery, 7 Wend. (N.Y.) 380, 22 Am. Dec. 586 (1831); Ward v. Wiman, 17 Wend. (N.Y.) 193 (1837); Evertson's Ex'rs. v. Miles, 8 Johns. (N.Y.) 138 (1810).

79. New York; Upton v. Vail, 6 Johns. (N.Y.) 181, 5 **Am. Dec. 210 (1810)**; Federal: Russell v. Clark's Ex'rs., 7 Craneli (U.S.) 92, 3 **L. Ed. 271 (1812)**.

\$0' English: Pasley v. Freeman, 3 T.B. 51, 100 Eng.

**Rep.** 450 (1789); Adamson v. Jarvis, 4 **RIng. 73**, 130 **Eng. Rep. 693 (1827)**; New York: **Culver v. Avery, 7 Wend. (N.Y.) 380, 22 Am. Dec. 586 (1831)**; **Barney v. Dewey**, 13 Johns. (N.Y.) 226, 7 **Am. Dec. 372 (1816)**; Wardell -v. Fosdlek, 13 Johns. (N.Y.) 325, 7 Am. Dec. 383 (1816); Monell v. Colden, 13 Johns. (N.Y.) 395, 7 Am. Dec. 390 **(1816)**; 1 Street, Foundations of **Legal Liability**, 375 (Northport, 1906).

Si. Illinois: **Applebee v. Rumery**, 28 fl. 280 (1862); **Peck v. Brewer**, 48 Ill, 54 (1868); „**Brumbaeh** t

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 aflirmance of the contract, and it may be successfully met by the **defense that the term of credit has not expired.**<sup>82</sup>

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.**<sup>83</sup>

A reversioner may maintain an Action on the Case against his tenant or against a stranger for commissive or w]Jfui 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.**<sup>84</sup> As to whether the action will lie

Flower, 20 Ill. App. 219 (1889); Massachusetts: Burns v. Dockray, 156 Mass. 135, 30 N.E. 551 (1802); Michigan: Walsh v. Sisson, 49 Mich. 423, 13 NW. 802 (1882); New York: Culver -v. Avery, 7 Wend. (N.Y.) 280, 22 Am. Dec. 586 (1831); Warden v. Fosdick, 13 Johns. (N.Y.) 325, 7 Am. Dec. 280 (1816); Hallock v. Powell, 2 Cal. (N.Y.) 216 (1804).

82. English; Ferguson v. Carrington, 9 Barn. & C. 50, 109 Eng. Bep. 22 (1829); Illinois; Kellogg v. Turpic, **93 Ill.** 265, 34 Am. Itep. 163 (1879).

In some Jurisdictions, however, immediate recovery of the price Is allowed. Heilbronn v. Herzog, 165 N. Y. 98, 58 N.E. 759 (1900).

83. Englsh: Seare v. Prentice, 8 East 348, 103 Eng. **Rep. 376** (1807); North Carolina: Gladwell v. Steggall, 5 thug. (NC.) 733 (1866).

**\$4. 1 Saund. 323b, 85 Eng. Rep. 459 (1069)**; Greene v. Cole, 2 Saund. 252b, 85 Eng. Rep. 1037 (1670); 1 Chitty, **A Treatise on Pleading, c. II, Of the Form of Action**, 142 (3rd Am. from the second London edition by Dunlap) (Philadelphia, 1819); **English:**

Kin~ **lyside v. Thornton**, 2 W.Bl. 1111, 96 Eng.Rep. 657 (1776); **New York: Short v. Wilson**, 13 Johns. (N. Y.) 33 (1814).  
The tenant's remedy against a stranger is Trespass, I Chitty, A Treatise on Pleading, c. II, Of the Form of Action, 107 (3rd Am. from the second London edition by Dunlap, Philadelphia, 1819); **Attersoll v. Stevens, 1 Taunt. 194, 127 Eng.Rep. 807** (1808).

Sec. 93

189

190

OFFENSIVE PLEADINGS

Cli. 8

against a tenant for permissive waste (that is, a neglect to repair), there is a conflict of opinion. It seems that it does not lie, and **that the only remedy is on the covenants in the lease.**<sup>85</sup>

*Injury to a Lien*

IN the New York case of *Yates v. Joyce*,<sup>80</sup> the plaintiff, A, alleged that he, as assignee of a Judgment from one K against J, which was a lien on the property of J, was about to **take out Execution and seize a certain lot of land; that the defendant, B, well knowing the premises and intending to injure the plaintiff, and prevent him having satisfaction,** tore down a barn on the premises worth \$300, leaving the ground of less value than the plaintiff's judgment; and that J, being insolvent, had no other property with which to satisfy the Judgment. The defendant Demurred, and on the argument contended that **the plaintiff, having a mere lien only, and not being in possession could not maintain any action against the defendant, who is answerable only to the person in possession, and that there was no precedent for such an action.**

The Court, in overruling the defendant's Demurrer, declared: "This appears to be an action of the first impression. The books do not furnish a precedent in its favor. It is obvious, however, from the statement of the plaintiff's case, in the Declaration the truth of which is admitted by the Demurrer, that he has sustained damage by the act of the defendant, which he alleges was done fraudulently, and with intent to injure him. It is the pride of the Common Law, that wherever it recognizes or creates a private

85. *Gibson v. Wells*, 1 Bos. & P. (N.H.) 290, 127 Eng. Rep. 473 (1805); *Herne v. Bembow*, 4 Taunt. 764, 128 Eng.Rep. 531 (1813); *Jones v. Hill*, 7 Taunt. 392, 129 Eng.Rep. 156 (1817).

**But Is** seems to lie against an assignee of the lease. *Burnett v. Lynch*, 5 Barn. & O. 580, 108 Eng.Lep. 220 (1826).

right, it also gives a remedy for the wilful violation of it. The facts stated in the Declaration being admitted by the Demurrer, we **are to assume that the plaintiff had acquired a legal lien** on the property, by means of the Judgment in favor of Kane, and the assignment of it to himself; and that the injury to the property was done with a full knowledge of the plaintiff's rights. If, then, there is any remedy for him, it is in this Form of Action only that he can obtain it. Trespass **will not lie; for the plaintiff was not in possession. The principle which governed the decision in the case of Smith v. Tonstall, (Carth. 3; 13 Vin.Abr. 553) is somewhat analogous. It was there ruled that an action will lie against the defendant for confessing**

**a Judgment by fraud, in order to pi'event the**

plaintiff from having the benefit of a Judgment he had obtained against him. It is sound principle, that where the fraudulent misconduct of a party occasions an injury to the private rights of another, he shall be responsible in damages for the same; **and such is the case presented by the pleadings in this cause.**" ~

*Injury to Reversionary interest*

TRESPASS *quase clausum fregit* **may be** maintained by the owner of land for an injury to his freehold where it is in the occupation of a tenant at will.<sup>88</sup> This doctrine was not extended so as to apply to a remainder-man who was not entitled to possession. **And it has been held that such an action will not lie by the reversioner for waste committed by a person acting under the authority of the tenant for life.<sup>88</sup> But the reversioner or re**

87. In *record: Gonlet v. Asseler*, 22 N.Y. 225 (1860), which was decided under the Reformed Procedure.

88. *Bartlett v. Perkins*, 13 Me. 87 (1836); *Kimball v.*

*Sumner*, 62 Me. 305 (1823); *Starr v. Jackson*, 11 Mass. 519 (1810).

As to the true explanation of this result, see the discussion under Injury to Freehold by Tenant at Will, following immediately hereinafter.

89. *Shattuck v. Gragg*, 23 Pick. (Mass.) 88 (1839).

11 Johns. (N.Y.) 136 (1814).

### Sec. 93

## TRESPASS ON THE CASE

191.

mainderman is not without remedy when the injury is of a permanent character affecting the inheritance, for in such case an Action of **Trespass on the Case** would be **heY<sup>0</sup>The Rule** of Pleading, as clearly laid down in the leading case of *Jackson v. Pesked*,<sup>91</sup> is that where the plaintiff sues as a reversioner, he must either state an injury of such a permanent nature as to be necessarily injurious to his reversion; or if the wrongful acts complained of are not of such a character as necessarily to result in an injury to the reversionary estate, but only of an equivocal nature, the plaintiff must allege that they were done to the damage or prejudice of his reversion; and in the latter case, the lack of such an allegation, will be fatal on demurrer; or good cause for arresting the judgment.<sup>92</sup>

### *injury to Freehold by Tenant at Will*

AT Common Law, a landlord, in order to maintain Trespass, must have been in actual possession of the premises at the time the trespass occurred.<sup>93</sup> And he had no Remedy in Waste against a tenant at will.<sup>94</sup> In this situation it has usually been said that the wrongful act of the tenant at will terminated the tenancy, restored the possession to the landlord, who could then maintain an Action of Trespass. Actually there was no direct forcible invasion of the landlord's possession; in fact the tenant had possession by legal means. But in the face of an urgent demand for a remedy, by resort to a fiction, Trespass

90. *Lawry v. La wry*, 88 Me. 482, 34 A. 273 (1806).

91. 1 Maule & 8. 234, 105 Eng.Rep. 88 (1813). See also,

Maine: *Lawry v. Lawry*, 88 Me. 482, 34 A. 273

(1896); New Jersey: *Potts v. Clark*, 20 N.J.L. 536,

541 (1844).

92. Cf. *Ilalignn v. Chicago & Rock Island It. It.*, 15 In. 558 (1854).

93. *Campbell v. Arnold*, 1 Johns. (N.Y.) 511 (1806). Cf. *Shrewsbury's Case*, 5 Co.Rep. 13a, 77 Eng.Rep. 68 (1600); *Starr v. Jackson*, 11 Mass. 510 (1814).

94. *Anonymous*, Saville 64, 123 Eng.Rep. 1021; Cr. *Shrewsbury's Case*, 5 Co.Rep. 13a, 77 Eng.Rep. 68 (1600); *Starr v. Jackson*, 11 Mass. 519 (1814).

**was commandeered** to serve, and to fill in a temporary gap in the remedial law, although its fundamental theory that it lay only for wrongful interference with possession, was clearly violated; the tenant at will in fact remained in possession after his misconduct. Thus Trespass, Case not being in existence **when the problem first arose, was stretched** beyond all semblance of its original theory. to cover what was in fact an indirect, consequential injury to the landlord's interest. And the proof of this is that when Case came in, it was said in *West v. Treude* ~ that the landlord might have either an Action on the Case or Trespass against a tenant at will. In time however Trespass ceased to be used and the accepted remedy became an Action on the Case in the Nature of Waste.

### *Seduction of Another Man's Daughter, Wife or Servant*

WHEN the demand for a remedy arose for the seduction or debauching of another's daughter, wife or servant, the first remedy given by the Common Law was Trespass *vi et armis*, **the law implying force, thus enabling the father, husband or servant to sue**

in that action.<sup>95</sup> Here again the injury was **an indirect consequential one, and here**, again, as in the tenant at will case, Trespass was commandeered to supply a remedy, Case not yet being available. By resort to a fiction, **the courts treated the daughter as the servant of the master**, who thus acquired a possessory interest. Seduction was an interference with such possessory interest, resulting in damage, for which Trespass thus became a remedy, When Case came in, it was utilized as a remedy for what was clearly an indirect consequential injury, not an **injury to the possession of the husband, par-**

95- *CroCar.* 187, 79 Eng.Rep. 764 (1630).

98. ~ v. Hazlewood, 5 Mees. & W. 515, 151 Eng.Rep. 218 (1839); Tu1Jidge v. Wade, 3 Wi1s.K.B. 18, 95 Eng.Itrep. 909 (1769); Woodward v. Walton, 2 B. & P. (N.h.) 476, 127 Eng.Rcp. 715 (1807), in which the Declaration was in Trespass.  
<ollier & Peppy ComLaw Pldg. H.B.—8

192

## OFFENSIVE PLEADINGS

### Ch. 8

ent or master. Accordingly, in *Chamberlain v. Hazlewood*<sup>7</sup> we find the plaintiff bringing Case for the consequential damage. In such case he may now, at his election, treat the loss of society or services, and not the defendant's act of seduction, as the injury, and, as that is merely consequential, sue in Case.<sup>8</sup>

The order of development is illustrated by two New York cases; in the first, *Alcerley v. Haines*,<sup>9</sup> decided in the year 1805, Trespass was held to be the proper remedy for the seduction of a daughter, whereas, in the second, *Moran v. Dawes*,<sup>1</sup> decided just twenty years later, in 1825, the Supreme Court of the State sustained Case, declaring: "It is clear, we think, both upon principle and authority, that Case, is, without exception, a proper remedy. (SeIw. N. P. 1083, note (17) cites 2 T.R. 167, 8, per Euler, 3., and per Holt, C. J., *Ld. Raym.* 1032.) Neither the injury to the person of the child nor the property of the plaintiff are, in truth, ever taken into the account. They are little more than a mere fiction, adopted in order to sustain the Remedy by Trespass. The direct injury may be waived in all cases; and the declaration framed to meet the consequential injury, disregarding entirely every consideration except the loss of service, and the more important one of seduction and disgrace. A very usual case may be supposed, in which, if we are to be governed by the technical rules relating to an Action of Trespass, the father would be remediless for the most aggravated form of the injury, unless he has an election. The seducer is received at the dwelling of the father on the footing of a suitor; he thus having a license to enter the house, of which he avails himself to accomplish the seduction, with the consent of

97. 5 Mees. & W. 515, 151 Eng.Rep. 218 (1839~.

98. English: *Chamberlain v. Hazlewood*, 5 Mees. & W. 515, 151 Eng.Rep. 218 (1839).  
39. 2 Cal. (N.Y.) 292 (1805).

the daughter. It could hardly be said that Trespass and Assault would lie for such an act, The father is then put to his remedy by Trespass *quare domum fregit*, laying the seduction, &c., by way of aggravation. The defendant does not become a trespasser *ab initio*, for license was given by the party. A person who is guilty of abusing an authority in fact, does not thereby become a trespasser *ab initio*; but it is otherwise where a license is given by the law." 2

*Actions Against the Master for Injuries Occasioned by the Wrong of the Servant— Vicarious Liability*

THE relation of master and servant was and is contractual in nature. Once the relationship was established obligations accrued on both sides. The master was under a duty to provide a safe place to work, to provide safe appliances and equipment, to warn the servant of dangerous conditions on the premises, to provide suitable and competent fellow servants, and to make reasonable rules to regulate the conduct of the work. On the other hand the servant was required to exercise reasonable care for his own safety and in the exercise of his duties within the scope of his employment. And it is important to observe that once the master-servant relationship is established, the master may be subjected to vicarious liability for the servant's torts, although the master is free of any wrongful conduct.<sup>3</sup> Such liability has to do with those acts so closely related with what the servant was employed to do, and which were reasonably incidental to it, as they could be viewed as methods, although of questionable validity, of carrying out the master's instructions. As to what acts are authorized, depends upon the time, place and purpose of the act, together with its similarity to the acts authorized. And in 1834, In

2. 4 Cow. (N.Y.) 412, 418 (1825).

~. See article by Powell, Some Phases of the Law of Master and Servant, 10 Col.LRev. 1 (1910).  
L 4 Cow. (N.Y.) 412 (1825).  
Sec. 93

## TRESPASS ON THE CASE

193

the case of *Joel v. Morrison*,<sup>4</sup> Baron Parke, ruled that a master was not liable for the tortious acts of his servant where the servant was not in pursuit of his master's business, but was "on a frolic of his own."

In general, the master is subject to liability for injuries caused by the tortious conduct of the servant where such conduct is within the scope of his employment; and the remedy against the master for injuries resulting from the wrong of his servant is in Case, even though, against the servant, it **might for the same act be Trespass**; **but under some circumstances, the master may also** be liable in Trespass.<sup>o</sup> Where an injury arises **from the want of care or negligence of the servant**, the remedy against the master is in Case; 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

<sup>4</sup> 6 Car. & P. 501, 502, 172 Eng. Rep. 1338 (1534).

<sup>5</sup> English: *M'Manus v. Crickett*, 1 East 106, 102 Eng. Rep. 43 (1800); Connecticut: *Haven v. Hartford & N. H. B. Co.*, 28 Conn. 6.9 (1831); Illinois: *Arasmith v. Tample*, 11 Ill.App. 39 (1882); Illinois Cent. B. Co. v. *Rudy*, 17 Ill. 580 (1856); Toledo v. *W. & W. B. Co. v. Harmon*, 47 Ill. 298, 306, 95 Am. Dec. 489, 490 (1868); New York: *Broughton v. Whallon*, 5 Wend. (N.Y.) 474 (1832). See, also, *Wright v. Wilcox*, 19 Wend. (N.Y.) 343, 32 Am. Dec. 507 (1838); *Mali v. Lord*, 39 N.Y. 381, 100 Am. Dec. 448 (1868).

What the servant does in the course of business without directions is not the master's act, but the latter is nevertheless liable on the principle of respondeat superior, a kind of insurance obligation to answer for the acts of the servant.

<sup>6</sup> *Gregory v. Piper*, 9 Barn. & C. 591, 109 Eng. Rep. 220 (1829). See, also, *Chicago & N. W. v. Peacock*, 48 Ill. 253 (1868), which involved Trespass against a railroad company where the Conductor forcibly expelled a passenger from a car. Cf. *St. Louis A. & C. B. Co. v. Dalby*, 19 Ill. 353, 375 (1857).

<sup>7</sup> English: *Moreton v. Hardern*, 4 Barn. & C. 223, 107 Eng. Rep. 1042 (1825); Kentucky: *Johnson v. Castleman*, 2 Dana (Ky.) 878 (1834); Massachusetts: *Barnes v. Herd*, 11 Mass. 57 (1814); New York: *Wright v. Wilcox*, 19 Wend. (N.Y.) 343, 32 Am. Dec.

507 (1838).

injury immediate, the remedy is Trespass.<sup>8</sup> Under the early decisions such as *M'Manus v. Crickett*~ **the courts refused to hold the master liable for intentional misconduct on the part of the servant, on the theory that the fiction of an implied command of the master was inapplicable. But under modern law, in allocating the risk of the servant's conduct, it has been held that wilful torts may be so connected with the employment as to fall within its scope.**<sup>o</sup>

### *Alienation of Husband's Affection*

IT has long been the law that a husband could maintain an action for the alienation of his wife's affections. Comparatively recently a case of novel impression was considered involving the issue as to whether a wife could maintain an action under New Jersey law against the defendant for "maliciously enticing away the plaintiff's husband, and thereby alienating from her his affections." It appeared that the Common-Law impediment as to remedy had been removed by a statute permitting a married woman to maintain an action in her own name, without joining her husband therein, **for all** torts committed against her or her separate property, in the same manner as if she were a *feme sole*.<sup>12</sup> In sustaining the wife's action, Minturn, J., after alluding **to the earlier, but incorrect view as to the origin of Case out of the Statute of Westminster II (1285),** concluded **that the wife was** entitled to vindicate her right *in personam* for a tort committed against her, and thus remedy the inequality to which she was subjected **by the common law.**

<sup>8</sup> Illinois **Cent. B. Co. v. Reedy**, 17 Ill. 580 (1822).



9. 1 East 108, 102 Eng.Rep. 43 (1800).

10. See article by Seavcy, Speculations as to 'Bespondeat Superior,' Harvard Legal Essays, 433, 453 (Cambridge, 1934).

11' Sims v. Sims, 79 N.J.L. 577, 76 A. 1063 (1910).

12. N.J.'L.'s 525 (1906).

13. 13 Edw. I.

## OFFENSIVE PLEADINGS

### *Deceit*

THE Declaration, in an action in an Action of Trespass on the Case for Deceit, must **show the essential elements in the wrong,<sup>14</sup> to wit:** 1. The specific false representations of material facts; 2. The scienter that the defendant knew his statements to be untrue; 15 3, That they were believed to be true by the plaintiff and were relied upon by him; 4. That the plaintiff acted thereon; and 5. That the plaintiff suffered damages by such action.

It should appear that the damage is the result of the deceit.<sup>16</sup> It is not sufficient to charge fraud generally, but the specific facts constituting the fraud must be set forth in some detail, including the actual misrepresentations. While it is not necessary to charge an intent to defraud, it should appear that the representations were intended or calculated to influence the plaintiff to act upon them.<sup>17</sup>

24. Florida: Watson v. Jones, 41 Fln. 241, 25 so. 678 (1899); Illinois: Cautweli v. harding, 249 Ill. 854, 94 N.E. 488 (1911); New Jersey: Eibel v. Von Fell, 63 N.J.L. 3, 42 A. 754 (1899); Michigaa: Pforzheimer v. Selkirk, 71 Mieb. 600, 40 N.W. 12 (1888); New York: Arthur v. Griswold, 55 N.Y. 410. 8cc, also,

20 Cyc. 102.

15. English: Pasley v. Freeman, 3 TB. 51, 100 Eng. Rep. 450 (1789); New York: Upton v. Vail, 6 Johns. (N.Y.) 181 (181W; Pennsylvania: Lummis v. Stratton, 1 Pa. 243 (1807).

16. "As the plaintiff van recover nothing in this action without proof of material fraud—that is, such as has resulted in actual damage—and can recover for such loss only as he can show to be a direct consequence of that fraud (Seclgwick on Meas. of Dam. 659; 2 Parsons on Contracts, 769; *ib.* 771), it follows that the plaintiff must show, with reasonable certainty, in his Declaration, not only what the fraud was by which he has been injured, but also its connection with the alleged damage, so that it may appear judicially to the Court that the fraud and the damage sustain to each other the relation of cause and effect, or, at least, that the one might have resulted directly from the other." Byard v. Holmes, 34 N.J.L. 296, 297 (1870).

17. "The result of the authorities, so far as I have examined them, whether casco or precedents, is, **that** a mere General Allegation that the matter stat-

### *Malicious Prosecution*

AT Common Law, when an injury is done to another maliciously, by the Process of a Court, as for example, in the case of a malicious arrest, a malicious prosecution of a criminal charge, or a malicious attachment of goods, the Action of Trespass on the Case is the proper remedy, if the Process was regular and the Court had jurisdiction; for there has been no trespass. It is said, however, that either Case or Trespass will lie if the Process was both malicious and unfounded, even though the Court had jurisdiction. Of course, the remedy is in Trespass, and not Case, where the Process or proceeding was irregular and void.

In case for malicious prosecution, the Declaration must show that the original proseed was a pretence, and that the plaintiff was falsely

and fraudulently deceived by It, is not sutcient, either in Criminal or Civil Cases, to fasten upon such matter the character of a *false pretence*, and that this can be done in no other way than by a distinct and specific averment of the falsehood of each separate matter of fact stated by the defendant, and intended to be denied by the plaintiff.

What has been said with reference to the first Count will be found to apply in all respects, to the second and third, and, I think, substantially to the fourth Count also." Byard v. Holmes, 34 N.J.L. 296, 299 (1870),

18. In general, on the subject of Malicious Prosecuti<sup>ers</sup>, see:

Articles: Ormsby, Malice in the Law of Torts, S L. Q.Rev, 140 (1502); Elliott, Malice in Tort, 4 St. Louis L.Bev. 50 (1919); Harper, Malicious prosecution, False Imprisonment and Defamation, 15 Tex. tHey, 157 (1937).

Comments: Malicious Prosecution—Civil Action—Ab. sence of Arrest or Seizure, 16 Mich.L.llev, 653 (1917— 18); The Bight to Recover for Malicious Alienation of a Child's Affections, 40 Harv.L.Rev. 711 (1927); Torts—Action for Malicious Prosecution—Failure

**of Information to State Facts Constituting Crime as**

Defense, 11 Minn.L.Rev. 675 (1027); Malicious Prosecution--Liability of Prosecuting Attorney, 12 Minn. L.Rev. 665 (1928); Malicious Prosecution—Conviction **and Reversal in Criminal Suits as Evidence of Probable Cause, 22 Minn.L.Rev.** 740 (1938); Malicious Prosecution—Juvenile Delinquency Proceedings as a Basis for an Action, 22 Minn.L.Rev. 1060 (1938).

194

**Ch. 8**

Sec. 93

**TRESPASS ON THE CASE**

195

cution of the plaintiff by the defendant was brought in a court at the instance of the defendant; the crime charged must be stated, although it is not necessary that it appear that it was sufficiently charged, and it must appear that the charge was made falsely, maliciously, and without any reasonable and **probable cause**; it must also appear that the accused was innocent, and that the proceedings are at an end, having been terminated in his favor; and the damages must also be alleged, as damage is the gist of the actio<sup>t</sup>

The form of a Declaration for Malicious Prosecution is set out below:

**FORM OF DECLARATION IN TRESPASS ON THE CASE FOR MALICIOUS PROSECUTION**

Court of the County of .to  
wit, Term.  
**complains of** . who has been summoned to answer the said plaintiff of a plea of trespass on the case, for this, to wit, that on the day of .19\_\_\_, at the defendant went before one a United States commissioner for the \_\_\_ district of . and then and there before said . falsely and maliciously and without any reasonable or probable cause whatsoever, charged plaintiff with having feloniously stolen or taken from out of a mail of the United States a certain registered letter received by plaintiff as post master at . on or about the \_\_\_ day of .19, and upon such charge the defendant falsely and maliciously and without any reasonable or probable cause whatever, caused and procured said \_\_\_ United States commissioner as aforesaid, to make and grant his certain warrant under his hand for the apprehending of plaintiff and for having plaintiff before him, the said . or some other United States commissioner, to be dealt with according to the

**19. On the Declaration In Malicious Prosecution, see**

19 Standard Proc. 83—97; Plppet v. Hearn, 5 Barn. & Aid. 634, 106 Eng.Rep. 1322 (1822).

law of said supposed offense, and said defendant, under and by *virtue of* said warrant, afterwards, to wit, .19\_, at \_\_\_ county, . *aforesaid*, wrongfully and unjustly and without any reasonable cause whatsoever, caused plaintiff to be arrested by his body and taken into custody and to be imprisoned and brought by public conveyance from . county, to \_\_\_ in the custody of a deputy marshal of the United States, and before a great many people in the public highway and the streets of . and to be detained in custody **a long space of time, to wit,** hours then next foliowing and defendant afterwards, to wit, .19—, at \_\_\_ falsely and maliciously and without any reasonable or probable cause whatsoever, caused the plaintiff to be carried in custody before said . so being United States commissioner as aforesaid, to be examined before said commissioner of and **concerning** said supposed crime, which said commissioner, having heard and considered all that said defendant could say or allege against the plaintiff touching said supposed offense, then and there, to wit, on the day last aforesaid, at . adjudged and determined that the said plaintiff was not guilty of the said supposed offense, and then and there caused the plaintiff to be discharged out of custody, fully acquitted and discharged of the said supposed offense, and the defendant hath not further prosecuted his said complaint, but bath deserted and abandoned the same, and the said complaint and

prosecution is wholly ended and determined, to wit, at \_\_\_ aforesaid; to the plaintiff's damage dollars. And **therefore he brings** his suit.

ENCYCLOPEDIA OF FORMS No. 13415 and No. 6951.

*Slander and Libel*

(I) *Strictness of Common-Law Pleading in Defamation Cases Explained.*—The requirements of Common-Law Pleading are

OFFENSIVE PLEADINGS

strict and technical in regard to Declarations for Slander and Libel. This was true because the idea of defamation originated in the Civil Law, coming into English law through the Ecclesiastical or Church Courts, and hence the allowance of a remedy at Common Law for such actions invoked the rule of strict construction in pleading such causes. It was for this reason, that in declaring on contracts or other written instruments, the General Common Law Rule that the pleader might set out the instrument or writing verbatim, or according to its legal effect, was inapplicable as to libel and slander cases; the libel or slander had to be set forth *verbatim*.<sup>20</sup> This rule, first adopted in England by the Criminal Court of Appeal was in time assimilated by the Civil Courts, and hence passed on down to modern time. The reason for this rule was that the Appellate Court could not tell whether the Lower Court had ruled correctly that the words spoken or written constituted libel or slander, as a matter of law, without having the very words as used in the Criminal Indictment before it. It was therefore required that the very words complained of be set out "in order that the court may judge whether they constitute a ground of action and also because the defendant is entitled to know the precise charge against him and cannot shape his ease until he knows."<sup>21</sup>

(IT) *The Characteristics and Form of the Declaration in Slander.*—Because the *Common-Law* Courts regarded libel and slander

20. In declaring on Contracts or other Written Instruments the genus Common Law Rule is that the pleader must set out the Instrument sued upon verbatim, or in the words in which they were made, or according to their legal effect 1 Chlty, A Treatise on PleadIng, 229 (Springfield, 1833).

To this General Rule there were two exceptions, to wit, in cases involving Negotiable Instruments and In Libel and Slander cases, the original Common **Law Rule** being that in such cases the words had to be set out *verbatim*. **It has, of** course, been modified.

U. Webster v. Rolmen, 62 N.S.L. 55, 40 A. 719 (1898).

actions as an innovation, and applied the rule of strict construction in pleading such actions, it is no surprise to find that the Declaration in slander at Common Law consists of an elaborate and absurd jargon of recitals and explanations which obscure the real issues to be tried almost as effectually as if the pleadings were still drawn in Latin, as will appear from the form set out below:

DECLARATION IN<sup>22</sup> THE CASE FOR SLANDER

IN THE CIRCUIT COURT OF  
COOK COUNTY  
To the October Term, A.D. 1926

COUNTY OF COOK, ~ s  
STATE OF ILLINOIS,

Arthur Brown, by William Jolmson, his attorney, complains of Clarence flowell, defendant, who has been summoned to answer the plaintiff in a plea of trespass on the case for slander.

BODY:

INDUCEMENT: For that whereas, on the 16th day of **January, 1926, In the County of** Cook, and until the committing of the grievance by the defendant as hereinafter mentioned,

the plaintiff was always reputed, esteemed, and accepted by all his neighbors, and other good and worthy citizens of the State to whom he was in any wise known, to be a person of good name, fame and credit, and he was, is, and always has been a good, true and faithful citizen of **the** State, and has never been guilty of or suspected of being guilty of the crime of perjury or any other crime.

21. The principles of General Application as to Declaration and subsequent pleadings, both as to Form and Substance, are considered In Chapter 5, The Declaration—General Rules as to Alleging Place, Time, title and Other Common Matters; and Chapter & The Declaration—General Rules as to Manner of Pleading.

196  
Ch. 8

FORM OF PLEADING

**CAPTION OR TITLE:**

~ourt~

Term:

**VENUE:**

**COMMENCEMENT:**

Plaintiff's

**Good**

Name:

Sec. 93

TRESPASS ON THE CASE

197

**BODY:**

Preliminary

Extrinsic

Facts: And whereas niso, before the said grievance of the said defendant, a

certain action had been pending be- justice of the peace, Attorney for plaintiff. wherein the State of Illinois was the

plaintiff and one Fred Jones was the defendant, and which action had been tried at the Circuit Court for the

County of Cook, and on such trial

**the plaintiff was examined on oath, bel elaborate averments are required to pro-and had given his evidence as a witness "certainty" in the charge, the formal**

ness on behalf of the State of Illinois, to wit, on June 25, 1925, at Chicago, in the County of Cook as aforesaid.

**CONCLU-** Wherefore the said plaintiff saifli ~ION:he is injured and bath sustained

damage to the amount of five thou' sand dollars, and therefore lie brings his suit.

WILLrAM JoHNsoN fore a certain

2 CHrTY on Pleading, 620-4326 (Springfield, 1833).

(III) *Essential Allegations in Slander and*

*LibeL—In the Declaration for slander or li-*

parts of which are five in number:

(A) *The Inducement, the Preliminary*

GEAVAMEN:

Yet the said defendant, well know- *Statement of Extrinsic Matter; and the* Ing the premises, but contriving, *Gravamen.—'rtiis* part of the Declaration wickedly and maliciously, to injure contained a statement that prior to a certain

**the said plaintiff** in his name, fame

and credit, and to bring him into day the plaintiff had enjoyed a good name public scandal, infamy and disgrace among his neighbors, and if the words utwith and amongst all his neighbors tered were not actionable in themselves, it

and other good citizens of the State, and causc it to be suspected and be- set forth the preliminary extrinsic facts to lieved by those neighbors and citizens which the slander applied, and established a of the State that plaintiff had been basis for showing damage to the plaintiff. guilty of the crime of perjury.

**But** if the words are *prima facie* actionable,

COLLOQUIUM:

In a certain discourse which the no averment of extrinsic facts was necessary, defendant had with the said plaintiff, as, for example, in *Worth v. Butler*,<sup>23</sup> in on the 16th day of January, 1920, in which the defendant charged the plaintiff, an the County of Cook, of and concerning the said plaintiff, in the presence and unmarried woman, of fornication, which was hearing of divers persons, and of and a felony.

concerning the said action, and of  
 and concerning the said evidence **The** gravamen of an action for libel is not **given by the** plaintiff on the trial  
 injury to the plaintiff's feelings, but damage aforesaid, did falsely, wickedly, and to his reputation in the  
 eyes of others. It is  
 maliciously compose, speak and **publish, of** and concerning the plaintiff, not sufficient, therefore, that the  
 plaintiff  
 in the presence of divers persons, cer- should understand himself to be referred to  
 thin false, scandalous, malicious and **in the article.** It is necessary to constitute  
 defamatory words, that is to say, "He" (meaning the plaintiff) "took a libel that others than the plaintiff  
 should be  
 false oath." in a position to understand that the plaintiff is the person  
 referred to<sup>24</sup>

INNUENDO: Thereby meaning and intending  
 that the plaintiff, in the evidence (B) *The (Jolloquium.—Anot* her technical  
 given as a witness at the trial afore- requirement of a Declaration in Slander was  
**said, had** sworn falsely and had been the Colloquium, which was an averment that  
 guilty of the crime known as perjury.

DAMAGES: And by means of the said premisesing the plaintiff. Where the words uttered  
 the said plaintiff is greatly Injured  
 In his credit and reputation, and

25. 7 Blackf. (Intl.) 251 (1844).  
**brought** Into public scandal, infamy  
**and** disgrace with **and amongst his** <sup>24</sup> Divivier v. French, 104 Fed. **278**, 43 C.C.A. 529  
 neighbors, &c, (1900).

198

## OFFENSIVE PLEADINGS

Ch. S

**clearly apply** to the plaintiff, a colloquium is not necessary. In *Milligan v. Thorn*,<sup>25</sup> the plaintiff complained that he  
 had been slandered, but he was not named in the slanderous words, The plaintiff therefore was required to include a  
 colloquium, that a conversation was **had** of and concerning him. Without this nothing was expressed to which the  
 innuendo could refer, when the plaintiff stated that he was intended.<sup>26</sup>

### (C) *The Publication of the Scandal Itself.*

—As the basis of actions for libel and slander is damages for the injury to the character of the plaintiff in the  
 opinion of others, and that can only arise where the words uttered or written are published to third persons, the  
 declaration must allege publication of the slanderous or libelous matter. Thus, for

<sup>25</sup> 6 Wend. (N.Y.) 412 (1581).

<sup>-6</sup> Where Defamatory language Is of a clear import and on its face applies to the plaintiff, no colloquium or setting is necessary in the  
 Declaration. Choctaw Coal & Mining Co. v. Lullch, 204 Ala. 533, 56 South. 383, 11 ALa. 358; 17 R.C.L. 394. "Thus, if the imputation be that  
 the plaintiff was 'foresworn,' this not being of itself actionable, because it does not necessarily impute the offense of perjury, it must be  
 specifically alleged, by way of Inducement, that there had been a Judicial Proceeding, in **which the plaintiff was a** witness and gave  
 evidence, **and that the** defendant when speaking the words, referred to such matter in using the term 'foresworn,' and Intended to Impute  
 that the plaintiff **bad** been guilty of the crime **of perjury."** I Chitty, Pleading, 415. "Where the libelous matter can be collected from the  
 words themselves, there need be no averment as to circumstances." Thus, **if the** Declaration be, "lie perjured himself," the charge of crime  
 appears, and it Is for the defendant to plead its truth if he can. A Declaration was sustained by the King's Beuch in 1661 as against a **Motion**  
**in Arrest** of Judgment which chnrged the defendant with saying of plaintiff, an attorney, "lie has no more Judgment in the Law than Master  
 Cheyny's bull," although it was urged that the Dec' laration was defective In not alleging that Mr. Cheyny bad a bull, **ned, non allocatur.**  
**Baker v** Morphey, 2 Keble, 202, 84 Eng.Rep. 126. A charge, ironically made, that the plaintiff was an 'tonCut lawyer,' would have required  
 more explanation. See Keigwlu, Precedents of **PleadIng**, 285, **295** (WashIngton, D. C. 1928).

example, in *Waistel v. Holman*,<sup>27</sup> where the declaration averred that the defendant composed, wrote and delivered  
 to the plaintiff a certain libel, addressed and directed to the plaintiff, a Demurrer was sustained, as the averment  
 failed to show a publication of the libel; sending a sealed letter to the plaintiff was not a publication.

(D) *The Innuendo.*—This part of the Declaration followed the colloquium, and its object was to explain the

defendant's meaning by reference to the previous statements in the inducement and colloquium; but an innuendo cannot enlarge the meaning shown by the inducement in which the surrounding conditions are set forth.<sup>28</sup> In *Roella v. Follow*,<sup>29</sup> the colloquium stated that "He" (meaning the plaintiff) "took a false oath," but the Court held that the Declaration was inadequate in that the words were not in themselves actionable, and require an "innuendo which is necessary, in such cases, to explain the defendant's meaning by reference to previous matter."

(E) *The Consequent Dantage*—This was **merely a conclusion** of the plaintiff that he had sustained damages to a certain amount, and therefore, he brings his suit.

**Over and above** these technical parts of the Declaration, there were other requirements, *Odgers*,<sup>30</sup> in his famous work on Libel

<sup>27</sup> 2 I-Tall (N.Y.) 103 (1829).

<sup>28</sup> Innuendoes are not sufficient to supply the lack of Inducement and Colloquium or extend the meaning of words beyond their natural import or sense. *MacLaughlin v. Fisher*, 136 Ill. 111, 116, 24 N.E. 60 *Erettun v. Anthony*, 103 Mass. 37 (1869); *Whittier*, Cases on Common Law Pleading, 186, 137 Note:

*Emmett v. Phelps*, 97 Or. 242, 191 Pac. 502, 11 AL.R. 663,

See also, *Triggs vs Sun Printing and Publishing Association*, 179 N.Y. 144, 71 N.E. 739, 66 L.R. & 612, 103

.Am.St.Rep. 841, 1 Ann.Cas. 326 (1904), reversing 91

App.Div. 259, 88 N.tSupp. 486 (1904).

<sup>29</sup> 7 Blackf. (md.) 377 (1845).

<sup>30</sup> c. V, 186, 137 (5th ed. Chicago, 1900). See, also, *Newell, Slander and Libel*, c. VII, 733 (4th ed. Clii'

See. 93

## TRESPASS ON THE CASE

199

and Slander, states: "So, too, many other allegations were required describing the locality, the relationship between the various persons mentioned, and all the surrounding circumstances necessary to fully understand the defendant's words. And these matters could not properly be proved at the trial unless they were set out on the record; if **they were not, and the plaintiff had a verdict**, the court would subsequently arrest judgment on the ground that it did not appear clearly on the face of the record that the words were actionable. And this technicality was carried to an absurd extent. Thus, where the defendant said, 'Thou art a murderer, for thou art the fellow that dklst kill Mr. Sydnam's man,' the court of Exchequer Chamber, on error brought, arrested judgment, because there was no averment that any man of Mr. Sydnam's had in fact been killed.<sup>31</sup> Had the words been '*and thou art*', instead of '*for thou art*,' the plaintiff would probably have been allowed to recover. Again, in *Ball v. Roane* (1598) Cro.Eliz, 308, the words were: 'There was never a robbery committed within forty miles of Wellingborough but thou hadst thy part in it.' After a verdict for the plaintiff, the court arrested judgment, 'because it was not **averred there was any robbery committed** within forty miles, etc., for otherwise it is no slander.' **So in Foster v. Browning** (1625) Cro.Jac. 688, where the words were, 'Thou art as arrant a thief as any is in England,' the court arrested judgment 'because the plaintiff had not averred that there was any thief in England.' **But the climax was reached in a case cited in Dacy v. Clinch (1661) 1 Sid. 53**, where the defendant had said to the plaintiff, 'As sure as God governs the world, or Icing James this kingdom, you are a thief,' After verdict for the plaintiff, the defendant moved in arrest of judgment, on

ago, 1724); *Kcigwin*, Precedents in Pleading, 285 ~Washington, D. C. 1928).

<sup>31</sup> *Earrons v. Ball*, Cro.Jac, 331, 79 Eng.Eep, 282.

**the ground that there was no averment on** the record that God did govern the world, or King James this kingdom. But here the Court drew the line, and held that 'these **things were so apparent**' that **neither of them** need be averred."

(F) *The Defamatory Words Themselves Must be Set Out Verbatim*.—At Common Law, the general rule was that in suing on written instruments, the contract could be set out verbatim or according to its legal effect. As setting forth a writing verbatim often resulted in a motion for nonsuit on the ground of variance between allegation and proof, usually the writing was set out according to its legal effect. But in libel and slander cases the words had to be

alleged verbatim, or in *haec verba*.<sup>32</sup> As we have stated earlier, this was due to the civil law origin of libel and slander, both of which were regarded as innovations upon the Common Law, and to the fact that the criminal and Appellate Courts, on review, could not determine whether the lower courts had properly determined whether the words uttered or written, as a matter of law, were slanderous or libelous. The defendant, of course, was also entitled to know the precise charge against him.<sup>33</sup>

32. Webster 'cc Holmes, 82 N.J.L. 55, 40 A. 778 (1895). See, also, Wormouth v. Cramer, S. Wend. (N.Y.) 394 (1829), where the words uttered were in the German language, but were set forth in the Declaration in the English language, with the result that the plaintiff was nonsuited.

Proof of similar or equivalent words is not admissible. Wallace 'cc Dixon, 82 D.L. 202 (1876); Schultz 'cc Short, 201 Ill. App. 74 (19Th). But a slight variance is not fatal; i. e., "You are a liar" is supported by proof that "You are a damned liar." 25 Cyc. 472.

33. "The gravamen of an action for libel is not injury to the plaintiff's feelings, but damage to his reputation in the eyes of others. It is not sufficient, therefore, that the plaintiff should understand himself to be referred to in the article. It is necessary to constitute libel that others than the plaintiff should be in a position to understand that the plaintiff is the person referred to." Duvivier v. French, 104 Fed. 278, 43 C.C.A. 529 (1900).

200

## OFFENSIVE PLEADINGS

Ch. 8

*(G) The Technical Common-Law rules of Pleading in Libel and Slander Modified.*— Under modern practice the technicalities governing pleading in libel and slander cases

**have been largely abandoned. This tendency**

first took on substantial form in England when the Common Law Procedure Act of 1852 provided:

"In Actions of libel and slander, the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense without any prefatory averment to show how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged **meaning, show a cause of action, the Declaration shall be sufficient.**"

This section was adopted into the New Jersey statutes in 1855.~

The purpose of the above provision, as expounded by the courts of England and New Jersey, was to afford the plaintiff the right to set out in his Declaration the words complained of, and to place upon those words, by innuendo or specified defamatory sense, **any construction he may see fit to attribute to them**, without showing, by means of a colloquium, or other explanatory matter, how the words contained a defamatory charge.<sup>35</sup> "The effect of this change," according to Lanning, 3., in *Allen v. Oppenheimer*,<sup>37</sup> "in the law of pleading, as to this class of cases, is that if the words complained of are actionable *per se*, and the plaintiff by innuendo puts a construction upon them different from what **they** would mean without the innuendo

34. 15 and 10 Wet. c. 76, § 61, 02 Statutes at Large

208 (1852).

35. Act of March 17, 1855 p.L. § 26, 295, later § 106 New Jersey Practice Act (P1.1903, 568).

37. English: Hemmings v. Lasson, 4 Sur. (N.S.) 834 (1858); New Jersey: Rand 'cc Whiten, 38 N.J.L. 122 (1875); Andrew v. Deshler, 43 N.J.L. 16 (1881).

31. 166 Fed. 826(00., D.N.~, 1909).

**the count containing them should be read**

as two counts, one with the innuendo, and **the other without it. Such was the conclusion** reached in *Watkin v. Hall*, L.R. 3 Q.B. 396, and in view of the last clause of the section the conclusion seems to be sound." ~

And in some states, such as New York, in an action for slander brought by a woman imputing unchastity to her, it is not necessary to allege or prove special damages.<sup>30</sup>

*Neglect of Official Duty*

**CASE is a proper remedy against an officer**

for failure to perform his duty, whereby the plaintiff has sustained an injury (though an action ex contractu on his bond may be a concurrent remedy), as, for not Levying an Execution, or for not returning it, or for not taking a Replevin Bond, or for taking an insufficient bond, etc.; <sup>40</sup> and it will lie against an officer for making a False Return; <sup>41</sup> or against an election officer for

33- "At Common Law the pleading of a plaintiff in a slander suit, contained, when necessary, what was **known as an 'Inducement', a 'Colloquium', and an 'Innuendo'**, The peculiar office of these separate divisions of the Pleading was distinctly circumscribed, but in more Modern Tunes, when the Technical Rules of Common-Law Pleading have been superseded by the enactment of Codes of Practice, the extreme Common-Law Technical Rules with respect to Pleadings in Libel and Slander Cases have been largely modified, so that now, if a Pleading contains the necessary Allegations, whether they be found in that part of it appropriately styled the 'Inducement,' the 'Colloquium', or the 'Innuendo', it will be sufficient although not contained In that particular division where the Rules of the Common-Law required it to be." Thomas, **J., in Castineau 'cc Mccoy**, 100 Ky. 463, 465, 227 **SW. 801**, 802 (1921).

39. In general, on Libel and Slander, see Veeder, History and Theory of the Law of Defamation, 3 CoIL. **Rev.** 546 (1903).

40. Sabourin v. Marshall, 3 **Barn. & Adol**, 440, 110 **Ijng,Rep. 158** (1832); Mason 'cc Paynter, **1 Gale & B.** 381, 113 Eng.Rep. 1406 (184~ Billings v. Lafferty, 31 Ill. 318 (1863).

41. Wintle 'cc Freeman, 11 Adol. & El. 539, 113 Eng. **Rep.** 520 (1841).  
Sec. 93

## TRESPASS ON THE CASE

201

refusal to allow a vote; <sup>42</sup> and, generally, against an officer for any neglect of duty,<sup>43</sup>

### *Statutory Liability*

WHENEVER a Statute prohibits an injury to an individual, or enacts that he shall recover a penalty or damages for such injury, **and is silent as to the form** of remedy, an Action on the Case (and in some cases other actions) will lie.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup>

42. Keith 'cc Howard, 24 Pick. (Mass.) 292 (1841); Gates v. Neal, 23 Pick. (Mass.) 308 (1840). Or against taxing officer for maliciously failing to tax a person, causing him to lose his right to vote. Griffin v. Rising, 11 I-lctc. (Mass.) 330 (1846).

43. English: Aireton v. Davis, 9 Bing. 741, 131 Eng. Rep. 792 (1833); Jacobs v. Humphrey, 2 Crompt. & Lii. 413, 149 Eng.ltep. 821 (1884) Massachusetts: Spear v. Cummings, 23 Pick. (Mass.) 224, 34 Am. Dec. 53 (1839); Vermont: Abbott v. Kimball, 19 Vt. 551, 47 Am.Dec. 708 (1847).

44. President & College of Physicians London v. Salmon, 2 Salk. 451, 91 Eng.Rep. 391; Friend v. Dunks, 37 Mich. 25 (1877); Id. 39 Mich. 733 (1878).

44. Maine: Bearcamp River Co. v. Woodman, 2 Greenl. (Me.) 404 (1824); Proprietors of Frychurg Canal Co. v. Frye, 5 Greenl. (Me.) 38 (1827); New Hampshire: Adams cc Richardson, 43 N.H. 212 (1861); New Jersey: Coxe v. Bobbins, 9 N.J.L. 384 (1828); New York: Scidmore v. Smith, 13 Johns. (N.Y.) 322 (1816); Almy 'cc Harris, 5 Johns. (N.Y.) 175 (1809).

40. New Hampshire: Henniker v. Contoocook val. H. B. Co., 29 N.H. 146 (1854); New Jersey: City of Camden v. Allen, 26 N.J.L. 398 (1857); New York: Almy 'cc Harris, 5 Johns. (N.Y.) 175 (1809); Pennsylvania: Weller v. Weyand, 2 Grant, Cas. (Pa.) 103 (1853); Brown V. White Deer Pp., 27 Pa. 109 (1856); Wisconsin: Babb v. Mackey, 10 Wis. 371 (1860).



Thus, where a Statute authorizes the taking or injuring of private property for a public use, under the

### *Liability for Injuries by Animals*

AT Common Law, if a **wild or vicious beast** is turned loose, and mischief immediately ensues to the person or property of another, the injury is immediate, and Trespass<sub>1</sub> not Case is the remedy.<sup>47</sup> But if a vicious animal is kept with knowledge of its dangerous propensities, and a person is thereby injured, the remedy is in Case.<sup>43</sup> Where, however, **damage is done by a domestic animal, kept** for use or convenience, the owner is not **liable to action on the ground of negligence**, without proof that he knew that the animal was accustomed to do mischief.<sup>49</sup>

If the action for injury by an animal is in Trespass, it should contain a concise statement as to the injury complained of, whether to the person, or to the **personal or real** property, and should allege that such injury was committed with force and arms and against the peace.<sup>50</sup>

right of eminent domain, and prescribes the i-remedy by which the owner shall obtain redress, that remedy must be pursued. *Stevens v. Proprietors of Middlesex Canal*, 12 Mass. 466 (1815); *Proprietors of Sudbury Meadows v. Proprietors of Middlesex Canal*, 23 Pick. (Mass.) 36 (1840); *I-Macn v. Essex Co.*, 12 Cush. (Mass.) 475 (1853). 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. Massachusetts:

*Mellen v. Western B. Corp.*, 4 Gray (Mass.) 301 (1855); *Thompson v. Moore*, 2 Allen (Mass.) 350 (1861); Michigan: *Detroit Post Co. v. McArthur*, 16 Mich. 447 (1868); Mississippi: *Thornasson v. Agnew*, 24 Miss. 93 (1852).

47. *Leame v. Bray*, 3 East 593, 590, 102 Eng.Bep. 724,

725 (1803).

43. English: *Mason v. Keeling*, 12 Mod. 333, 1 Ld. Baym. 006, 91 Eng.Bep. 1305 (1699); *Sarch v. Blackburn*, 4 Car. & P. 297, 173 Eng.Rep. 712 (1830); Alabama: *Durden v. Barnett*, 7 Ala. 169 (1844); Illinois: *Stumps v. Kelley*, 22 Ill. 140 (1859).

49. English: *Buxendin v. Sharp*, 2 Salk. 662 91 Eng. Rep. 564 (1690); New York: *Vrooman v. Lawyer*, 13 Johns. (N.Y.) 339 (1810).

30. Perry, *Common-Law Pleading: Its History and Principles of Forms of Action*, - III, Of Forms of ActIon, 73 (Boston, 1801).

202

## OFFENSIVE PLEADINGS

Ch.S

### ANTICIPATING DEFENSES IN CASE

94. In some Jurisdictions the plaintiff must negative the **possible** existence of certain **technical defenses**, viz, contributory negligence, fellow-servant **rule**, and **assumption of risk**.

IN some Jurisdictions it is necessary in a Declaration for negligence by a servant against the employer to negative the defenses of contributory negligence, fellow-servant rule, and assumption of risk. In *Caluinet Iron and Steel Company v. Martin*,<sup>51</sup> the general rule is declared to be that, in

**order to recover for injuries from negligence**, it must be alleged and proved that the plaintiff was, at the time he was injured, observing ordinary care for his personal safety. **After the period of the** statute of limitations, the declaration cannot be amended to supply **this** "substantial fact."<sup>52</sup> In an Action of Trespass on the Case by a servant against **his employer a Declaration was defective in**

Illinois and some other states which did not negative knowledge or assumption of **risk**.<sup>53</sup> It has been held that negating knowledge of the risk is insufficient as it does not appear but that the servant had easy means of knowing.<sup>54</sup>

In an action by a servant against his employer to recover for a personal injury for negligence, the declaration must negative the defense of the fellow-servant rule, if it is alleged that the negligent acts were done by the servants of the defendant without showing to what class they belonged. It is held, however, that if the allegations indicate

51. **115 Ill. 358, 3 N.E. 456** (1885).

52. *Walters v. City of Ottawa*, 240 Ill. 259, 266, **88 N. B. 651** (1909).

- **City of LaSalle** vcc *Kostka*, 190 Ill. 130, 60 N.E. 72 (1901); *Dalton v. Rhode Island Co.*, 25 RI. 574, 57 **Atl. 383** (1904).

that the plaintiff was not a fellow servant, no negative allegation is needed.<sup>55</sup>

What the plaintiff must allege as a matter of pleading to state a cause of action is a more or less arbitrary matter. Since the plaintiff comes into court asking relief, it might seem that logically he should be required to set up and prove all the conditions essential to recovery, and that he should negative all possible defenses, such as contributory negligence, assumption of risk, and fellow-servant rule. In fact, however, the plaintiff is ordinarily only required to make out a prima facie case and need not refer to all the conditions, positive and negative, which are ultimately essential to a recovery. The plaintiff must show an apparent reason for his request and **give fair notice of the facts** relied on as the basis of his claim. This will, in general, indicate as to what matters the plaintiff has the burden of proof, which is a question of fairness, policy and convenience. Matters of justification and excuse are for the defendant to prove, since it is unfair to require the plaintiff to disprove the existence of each and all of them,<sup>56</sup> The defenses of contributory negligence, assumption of risk, and fellow-servant rule are technical at best and should not be favored by the rules of pleading. If they are to be raised at all, they should be set up affirmatively by the defendant.

55. Illinois: Libby, McNeill & Libby v. Seherman, 146 Ill. 540, 34 N.E. 801, 37 Am.St.Rep. 191 (1893); Sehillinger Bros. Co. v. Smith, 225 Ill. 74, 81, 80 N. B. 05 (1907); Melnerney v. Western Packing & Provision Co., 249 ILL 240, 243, 94 N.E. 519 (1911) Richter v. Chicago & B. B. Co., 273 Ill. 625, 113 N. B. 153 (1016); Rhode Island: DiMarcho v. Builders' Iron Foundry, 18 R.L 514, 27 Atl, 328, 28 AU. 661

(1894).

56. in Illinois the burden of proof to negative assumption of risk was on the plaintiff. Swift Co. v. Gaylord, 229 Ill. 389, 840, 82 N.E. 299 (1901).  
II- Gould v. Aurora, B. & C. Ry. Co., 141 Ill.App. 344 (1900).

Sec. 96

## TRESPASS ON TUE CASE

203

### THE EXPANSIONISTIC CHARACTER OF CASE

**95. The Action of Trespass on the Case was adapted to many circumstances and factual situations which characterized the growth of society, and the ability of the law to meet the demands of a constantly advancing civilization largely has been made possible by the expansionistic character of this actzon.**

**IT Is impossible** to enumerate all the factual situations in which an Action of Trespass on the Case can be maintained, hence the particular applications of the action above discussed are merely illustrative of its enormous scope. It is referred to as the Great Residuary Remedy of the Common Law for the reason that the law has never placed a limitation on its continual expansion. As we have seen it was largely through the constant and ever increasing application of this action to a myriad of different factual situations involving a wrong not remediable by any **other** Form of Action which enabled the Judges of England to build up the Common Law of that country as it is known today.

Before modern research revealed that Case did not originate out of the Statute of Westminster *II* (1285),~~ it was often suggested that a liberal construction of that Statute would have eliminated any need for the Chancellor's extraordinary jurisdiction in filling out the alleged deficiencies of the Common Law, This suggestion was predicated upon the view that Equity originated out of the failure of the Common Law Courts to adapt themselves to the changes and needs of a developing society. It is submitted, however, that the view that Equity originated out of a failure of the Common Law Courts to so adapt themselves is wholly untenable and contrary to fact, for, as has been observed, the Common Law Courts could in no

*wz* Fifoot, ~istory and Sources of the Common Law, e. Iv, The Development of Actions on the Case, 66— 78 (London, 1940).  
event have afforded the kind of relief which **Equity was eventually to offer** without completely revolutionizing their procedures and enlarging their jurisdiction.

What is true, however, is that the Action of Trespass on the Case revealed such great potentialities as to permit its adaptability to the many circumstances and factual situations which have characterized the growth of our society. Indeed, the ability of our **law to meet the demands of our constantly** advancing civilization largely has been made possible by the expansionistic character of **this action. And, in this connection, it** should be remembered that the capacity of this action has **not been destroyed by the Reformed Procedure**, under which the Single Action provided is in the Nature of an Action on the Case, and hence the process of expansion and growth continues at full pace.

#### STATUS UNDER MODERN CODES, *PRACTICE ACTS AND RULES* OF COURT

96. The Common *Law* Action of Trespass on the Case **continues to exist under modern Codes, Practice Acts and Rules of Court**, although the label, as such, has been removed.

TI-fE Modern Status of the Action of Trespass on the Case appears plainly from two cases, one decided in 1939,~ the other in

1951.~~

In the first case, *Williamson v. Columbia Gas & Electric Corporation*,<sup>60</sup> in which the plaintiff complained that the acts of The Columbia Gas & Electric Corporation were in violation of Section 7 of the Clayton Act,<sup>61</sup> the section which barred corporations from acquiring, directly or indirectly, any stock **of another corporation** engaged in commerce,

58. *Williamson v. Columbia Gas & Electric Corp.*,  
110F(2d) 15 (3rd Cir. 1939).

59. *Bisener v. Maxwell*, 28 M.P.Rep. 213 (1951).

w. *Supra*, note 58.

61. **15 U.S.C., § 18**, 15 U.S.C.A. ~ 18.  
204

#### OFFENSIVE PLEADINGS

#### Ch. S

where the effect would be to substantially lessen competition, the plaintiff also claimed threefold damages under Section 4 of the Clayton Act.<sup>62</sup> The defendant moved to dismiss the complaint, on the ground that it did not state a cause of action which accrued within a period of three years prior to the Commencement of the Action. It was stipulated that the right of action accrued not later than January 1, 1931. The complaint having been dismissed by the District Court, the plaintiff appealed, thus raising a question as to whether the plaintiff's action was barred under the applicable Delaware Statute of Limitations,<sup>63</sup> Section 5129 of which provided: "No Action of Trespass, no Action of Repleviri, no Action of Detinue, no Action of Debt not found upon a Record or Specialty, no Action of Account, no Action of Assumpsit, and no Action upon the Case shall be brought after the expiration of three years from the accruing of the cause of such action."

In this situation the plaintiff concluded his action was in the nature of an Action of Debt on a Specialty and hence was not barred, having been brought within twenty years, the period prescribed by the Statute. The defendant argued that the complaint set forth a cause in tort for which an Action on the Case **was the only remedy and that** since the suit was brought more than three years after the action had accrued, recovery was barred by the Statute. Thus, in the Appeal, the issue of law was whether an Action in the Nature of Debt on a Specialty at Common Law might be brought to recover Damages for injuries to business resulting from acts **prohibited by Section 7 of the Clayton Act**; or whether an action in the Nature of the Common Law Action of Trespass on the Case was the sole remedy of the aggrieved party.

62. 15 U.S.C. 15, 15 U.S.C.A. § 15.

In affirming the Order of the District Court, the Circuit Court of Appeals held that the action sounded in tort and that the appropriate Form of Action was the Common Law Action of Trespass on the Case. Chief Justice Mans declared:

“In order to apply a statute of limitations, such as that of Delaware, which reads in terms of Common Law Actions, to a Civil Action brought in a District Court, it is necessary for the court through a consideration of the nature of the Cause of Action disclosed in the complaint to determine the Form of Action which would have been brought upon **it at Common Law**. It is evident that the complaint in the case before us discloses a Cause of Action which, under the Common Law of Delaware, would be enforceable in an Action on the Case and not in an Action of **Debt** on a Specialty. The District Court, therefore, properly held that the action was barred by the Delaware Statute of Limitations.”

In the second case, *Ei.sener v. Maxwell*,” a Canadian case decided in 1951, the plaintiff’s Statement of Claim alleged Damages caused by the negligent operation of a motor vehicle on a highway, to which the defendant pleaded **that there** had been no negligence. The Statute of Limitations for batteries was one year, and for causes which formerly would have been brought in the Form of Action Known as Trespass on the Case, six years. At the Trial the defendant urged that an action for personal injury was an Action I or Assault and Battery, and since it was brought after the expiration of one year, was barred by the Statute of Limitations. The plaintiff contended that automobile collisions on the highway should be treated as Actions of Negligence, and hence should be regarded as within the class which formerly would have been brought in the Form of Action called

03. Revised Code of Delaware (1935).

04. 28 ‘!‘Ll’.ttep. 213 (1051).

### TRESPASS ON THE CASE

Trespass on the Case, and, therefore, was **not barred**, as it fell within the purview of that Section of the Statute of Limitations which prescribed a six year period of **limitations**. **The Lower Court** held for the defendant, but on Appeal, it was held that automobile collisions on the highway should be treated as giving rise to a new right of action to be known as an Action of Negligence. **As such, it fell within the class which formerly would have been brought in the Form of Action Known as Trespass on the Case, and hence the six year Statute of Limitations applied.**

Thus, from the standpoint of a Federal case, **decided in 1939, or a Canadian case, decided in 1951**, It clearly appears that the Common Law Action of Trespass on the Case is very much alive under Modern Codes, Practice Acts, and Rules of Court, **even** though the label, as such, has been removed; and, what is more significant, is showing sufficient strength to create new substantive rights of action.

Sec. 96

205

## CHAPTER 9 THE ACTION OF TROVER’

Scope of the Action.

Property Which May be Converted.

Trover—Distinguished from and Concurrent

Form of the Declaration in Trover.

Declaration in Trover—Essential Allegations:

(1) In General.

102. Declaration **in** Trover—Essential Allegations:

(2) The Plaintiff’s Right, Title, Interest or Possession.

103. Declaration in Trover—Essential Allegations:

(3) The Defendant’s Wrongful Act of Conversion.

104. Declaration in Trover—Essential Allegations:

(4) The Damages.

105. Status Under Modern Codes, Practice Acts and Rules of Court.

### SCOPE OF THE ACTION

97. **The Action of Trover, or Trover and Conversion, lies to recover Damages for the conversion by the defendant to his own use of specific personal property, of which the plaintiff was entitled to the immediate possession; the object of the action is the recovery of the ‘value of the property as Damages for its conversion; it is not the object of the action to recover Damages for the taking, nor is it the recovery of the property itself.**

IN its origin, the Action of Trover, or Trover and Conversion, was a Specialized Form of the Action of Trespass on the Case to re

I. In general, on the history and development of the Action of Trover, see:

Treatises: **3 Blackstone**, Commentaries on the **Laws of England**, e. 9, 151, 152 (Philadelphia 1772); Euer, **A System of Pleading**, e. XIV, 08-71 (Dublin 1791); 2 Saunders, **The Law of Pleading and Evidence**, 399—402 (24 Am. ed., Philadelphia 1831); 2 Pollock and Maitland, **History of English Law, The Action of Detinue, Bk. II, c. IV, ~ 7, pp. 171—174** (Cambridge 1805); Martin, **Civil Procedure at Common Law**, e. XXI, Art. XV, ~ 97-404, 85—92 (St. Paul 1905); 3 Street, **Foundations of Legal Liability, c. XIII, The Action of Trover**, 159 (Northport, 1906); Ames, **Lectures on Legal History**, Lecture VU. Troror, SO (Cambrldge 1913); Jenks, **Short History of** cover Damages against a person who had found goods, and refused to deliver them to the owner, but converted them to his own

English **Law**, e. **X**, Detinue, 132—135 (Boston 1913); Barbour, **History of Contract in Early English Equity**, c. II, 25 (Orford 1914), in 4 vinogradoff, **Oxford Studies in Social and Legal History**, Pt. I,

c. II (Osford 1914); Bowers, **A Treatise on the Law of Conversion** (Boston 1917); Shipman, **Handbook of Common-Law Pleading**, c. V, Action of Trover, 95—113 (3d ed, by Ballantine, St. Paul 1923); Morgan, **The Study of Law**, e. V, Forms of Action, 11 (24 ed. Chicago 1045); Maitland, **The Forms of Action at Common Law**, c. VI, Trover, 71—72 (Cambridge 1948); Plueknctt, **A Concise History of the Common Law, Bic. II, Pt. I, c. 1, Trover**, 354 (4th ed London 1048); Flfoot, **History anti Sources of the Common Law**, e. 0, Trover and Conversion, 102 (London 1949).

Articles: Newmark, **Conversion by Purchase**, 15 Am.L. 11ev. 303 (1881); Ames, **History of Trover**, 11 Barr, L.Rev. 277, 374 (1598) reprinted in 3 **Essays on Anglo-American Legal History**, 417, 432 (Boston 1909); Salmond, **Observations on Trover and Conversion**, 21 L.Q.Rev. 43 (1905); Clark, **The Test of ConversIon**, 21 Harv.L.Rev. 408 (11907); Aigler, **Rights of Finders**, 211 Mich.L.Bev. 664, 57 Am.L.Ilev. 511 (1923); Moreland, **Bights of Finders of Lost Property**, 10 Ky.L.J. 1 (1927); McClain, **Unaatis5ed Judgments in Trover**, 78 13. of Pa.L.liev. 490 (1930); Warren, **Qualifying as Plaintiff in an Action of Con-**

See.  
97,  
98.  
99.  
100.  
**1,01,**

with Other Actions.

**206**

## **ACTION OF TROVER**

207

### **Sec. 98**

use.<sup>2</sup> As Detinue was subject to the disacivantages of Wager of Law and great particularity in the description of the chattel sought to be recovered, Trover, by a fiction of law—that is, by alleging a fictitious loss and finding—at length was allowed against any person who obtained possession of the personal property of another by any means whatever, and sold or used it without the consent of the owner, or refused to deliver it when demanded. The injury lies in the conversion or misappropriation of the goods, which is the gist of the action, and the statement of the finding is neither material nor traversable.<sup>3</sup>

The object of the action is not the recovery **of the property** itself—that can be recovered only by Detinue or Replevin—but to recover the value of the property. Lord Mansfield, in *Humbly v. Trott*, said: “Trover is in Form a Tort, but in Substance an Action to Try Property. ... An Action of Trover ...

version, 49 Harv.L.Rev. 1084 (1936); Itiesmas, **Possession and the Law of Finders**, 52 Harv.L.Rev. 1105 (1939); Rubin, **Conversion of Choses in Actlon**, liD Fordham **L.Rev.** 415 (1941).

**Comments:** Trover and Beplevin—Title to Things Severed from Real Estate by Adverse Possession, 5 *Minn.LEev.* 155 (1920); Unsatisfied Judgments in

Trover, 3 Yale L.J. 742 (1921); Conversion—Bailee's Unauthorized Use of a Bailed Chattel, 21 Cornell L.

Q. 112 (1935).

Annotation: Respective Rights of Carrier, or of One in Similar Relation to Owner, and Finder of Property Lost or Mislaid, 9 L.R.A. 1388 (1020).

Decision: Dame v. Dame, 43 N.H. 37 (1801).

2. The action was therefore called "Trover" from the French 'trouver'—meaning to find. See the following cases: Illinois: Harper v. Scott, 63 Ill.App. 401 (1896); New York: Hull v. Southworth, 5 Wend. (N.Y.) 265 (1830).

2. Mills v. Graham, 1 B. & P. (N.R.) 140, 121 Eng.Rep.

413 (1804); See, also, 1 Chitty, Treatise on Pleading and Parties to Actions, with Precedents and Forms, a li, Of the Forms of Action, 104 (16th Am. ed., by Perkins, Springfield 1876); 3 Blackstone, Commentaries on the Laws of England, c. IX, Of Injuries to Personal Property, 152 (7th ed., Oxford 1775); 3 Street, Foundations of Legal Liability, e~ XIII, The **Action of Trover, 164 (Northport 1906).**

is founded on property." ~ It is thus a substitute for a property action to recover the possession~ in short it makes the converter a compulsory purchaser.<sup>5</sup>

In Trespass the plaintiff is compensated by Damages measured by the actual harm done to the goods or chattels or the use lost; in Trover the injured party is compensated by Damages measured by the entire value of the property involved at the time of the conversion.

The manner in which the defendant may have obtained possession of the property is no longer material. The Form of the Action supposes that the possession may have been obtained lawfully, that is, by a bailment or a **finding, but it lies as well where the possession was obtained by a Trespass. In such a case, however, the plaintiff, by bringing Trover, waives the Trespass; and no Damages are recoverable for the act of taking; they are recoverable only for the wrongful act of conversion.**<sup>6</sup>

#### PROPERTY WHICH MAY BE CONVERTED

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

THE Action of Trover is confined to the conversion of personal property. It does not lie, therefore, for the appropriation of fixtures still annexed nor for any injuries to

4. 1 Cowp. 371 at 373, 98 Eng.Rep. 1130 at 1137 (1116).

~. 3 Street, Foundations of Legal Liability, c. XIII, The Action of Trover, 156, 157 (Northport 11906).

6. 1 Chitty, Treatise on Pleading and Parties to Actions, with Precedents and Forms, c. II, Of the Forms of Action, 164, 165 (16th Am. ed., by Perkins, Springfield 1876).

7. Illinois: Lemaa v. Best, 30 Ill.App. 323 (1589);

Massachusetts: Brown v. Wallis, 115 Mass. 156

(1874); Michigan: Creeley -v. Stilson, 27 Mich. 153

(1873); Knowlton v. Johnson, 37 Mich. 47 (1877);

#### OFFENSIVE PLEADINGS

land or other real property, even by a severance of what properly belongs to the freehold, unless there has also been an asportation.<sup>5</sup> 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. It must be

Morrison v. Berry, 42 Mich. 389, 4 N.W. 731, 36 Am.

Rep. 440 (1880); Bracelin v. McLaren, 59 Mich. 327,

26 NW. 533 (1886); Pennsylvania: Overton v. Williston, 31 Pa. 155 (1858); Dana v. Baird, 101 Pa.

270 (1882).

s. English: Boraston v. Green, 16 East, 77, 104 Bug. Rep. 1010 (1812); Pennsylvania: Lehr v. Taylor, 90 Pa. 381 (1879); Cf. Sanderson v. Ilaverstick, 8 Pa. 294 (1848), where It was held that the action would lie for cutting timber without carrying it away,

~ English: Gordon v. Harper, 7 P.R. 13, 101 Eng.

Rep. 828 (170€); Pitt v. Shew, 4 Barn. & Aid. 206, 100 Eng.Rep. 913 (1821); Weeton v. Woodcock, 7 M. & W. 14, 151 Eng.Rep. 659 (1840); Illinois: Altes v. Hinckler, 36 Ill. 275, 85 Am.Dec. 407 (1804); Massachusetts: Nelson v. Burt, 15 Mass. 204 (1818); Michigan: Greeley v. Stilson, 27 Mich. 153 (1873); New Hampshire: Wadleigh v. Jaurrin, 41 N.H. 503, 77 AntDec. 780 (1860).

Where growing corn or any other crop is cut and carried away and converted, Trover will lie. Illinois:

Simicins v. Rogers, 15 Ill. 397 (1854); Altes v. Hinekler, 36 Ill. 275, 85 Am.Dec. 401 (1864); Michigan: Weldon v. Lytle, 53 Mich. 1, 18 N.W. 533 (1884).

So, also, where trees have been cut and carried away and made into charcoal, or otherwise converted.

Alabama: Riddle v. Driver, 12 Ala. 590 (1847);

Maine: Whidden v. Seeiye, 40 Me. 247, 63 Am.Dec. 061 (1855); Michigan: Final v. Back-us, 18 Mich.

218 (1869); Greeley v. Stilson, 27 Mich. 153 (1878);

New York: Mooers v. Wait, 3 Wend. (N.Y.) 104, 20

Am.Dec. 667 (1829).

Or where mineral or earth or manure is dug and taken away. English: Higgon v. Mortimer, 6 Car. & P. 616, 172 Eng.Rep. 1389 (1833);

Massachusetts: Riley

v. Boston Water Power Co., 11 Cush. (Mass.) 11 (1853); Daniels v. Pond, 21 Pick. (Mass.) 367, 32 Am.Dec. 260 (1838); New York: Goodrich

v. Jones, 2 Hill (N.Y.) 142 (1841); Pennsylvania: Forsyth v. Wells, 41 Pa. 291, 80 Am.Dec. 617 (1801).

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 (1870).

And as to manure, see the following cases: Massachusetts: Anderson v. Todesco, 214 Mass. 102, 100 N.E. 1068 (1913); New Hampshire: Pinkham v. Gear, 3

**remembered** that not everything that is fastened to real property thereby becomes real.<sup>10</sup> A building erected under an agreement that it shall remain personal property, remains so, and Trover will lie for its conversion.” 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.”<sup>11</sup>

It may be stated here that the action does not lie for stone or gravel dug from land **or crops or other articles severed, where the**

defendant has the actual adverse possession of the land, and claims title to it,” The owner must resort to his remedy for the recovery **of the land itself** Some cases allow the Personal Actions for things severed after the

N.E. 484 (1826); New York: Middlebrook v. Ccc-win, 15 Wend. (N.Y.) 169 (1856).

10. Where machinery is sold to be set up in a mill, but with a stipulation that title shall not pass until it is paid for, and without the vendor’s knowledge it is so attached to the realty as to make it, under ordinary circumstances, a fixture, and before it is paid for the property is sold to someone with notice of the vendor’s claim, Trover will lie for the conversion of the machinery. Ingersoll v. Barnes, 47 Mich. 104, 10 NW. 127 (1881).

11. Illinois: Davis v. Taylor, 41 Ill. 405 (1866);

Maine: Pullen v. Bell, 40 Me. 314 (1855); Massachusetts: Hinckley v. Baxter, 13 Allen (Mass.) 139 (1866); New York: Smith v. Benson, 1 Hill (N.Y.) 176 (1841).

12. English: Elwes v. Maw, 3 East 38 at 53, 102 Eng. Rep. 510 at 510 (1802); Davis v. Jones, 2 Barn. & Aid. 165, 106 Eng.Rep. 327 (1818).

Where the landlord takes possession before the end of the term, without the tenant’s consent, and prevents him from removing his personal property, the tenant can maintain Trover, though the property is attached to the realty. Watts v. Lehman, 107 Pa. 106 (1884).

13. Arkansas: Bethea v. Jettres, 126 Ark. 194, 189 3.

W. 666, L.R.A.1918A, 549 (1918); Massachusetts:

Arizona Commercial Mining Co. v. Iron Cap Copper

Co., 286 Mass. 185, 128 N.E. 4 (1920); Pennsylvania:

Mather v. Ministers of Trinity Church, 3 Serg. & E.

**(Pa.) 509, 8 Am.Dec. 603 (1817).**

See, also, Note: Trover and Replevin—Title to Things Severed from Real Estate by Adverse Possessor, ~ Minn.L.Rev. 155 (1921).

## ACTION OF TROVER

recovery of possession of the land, but the normal remedy after Ejectment is a claim for Damages by way of Mesne Profits.

It is also necessary, in order to maintain this action, that the plaintiff shall have the right to some specific property. The action will lie for so many pieces of money taken and converted by the defendant,<sup>4</sup> but it will not lie for money had and received general-

The fact that the plaintiff's interest in the property is in common will not defeat the **action. It will lie for an undivided interest** in a specific chattel or in a mass.<sup>5</sup>

The conversion of any specific personal property of any sort whatever will give rise **to an Action of Trover**<sup>7</sup> **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.<sup>8</sup>

14. Jackson v. Anderson, 4 Taunt. 24, 128 Eng.Rep.

235 (1811). See, also, 1 Chitty, Treatise on Pleading and Parties to Actions, with Precedents and Forms, c. II Of the Forms of Action, 166 (16th Am. NL, by Perkins, Springfield 1876); Bowers, A Treatise on the Law of Conversion, c. III, § 16 (Boston 1917).

15. English: Orton v. Butler, 5 Barn. & Aid. 652, 106 Eng.Rep. 1329 (1822); Rhode Island: Royce v. Oakes, 20 Ri. 252, 38 A. 371 (1897).

16. English: Watson v. King, 4 Camp. 272, 171 Eng. Rep. 87 (1815); Illinois: German Nat. Bank of **Chicago v. Meadowcroft**, 4 Ill.App. 630 (1879); German Nat Bank of Chicago v. Meadowcroft, 95 Ill. 124, 35 Am.Rep. 137 (1880).

17. For example, animals *ferae naturae* converted after being tamed or killed. Amory v. Flynn, 10 Johns. (N.Y.) 102, 6 Am.Dec. 316 (1813).

18. 1 Chitty, Treatise on Pleading and Parties to Actions, with Precedents and Forms, c. II Of the Forms of Action, 167 (16th Am. ed., by Perkins, Springfield 1876); Atkinson v. Baker, 4 T.R. 229, 100 Eng.Rep. 989 (1791); Illinois: Chickering v. Baymond, 15 Ill. 362 (1854); Hayes v. Massachusetts Mut. Life Ins. Co., 125 Ill. 626, 18 N.E. 322, 1 L.R.A. 303 (1888); Michigan: Rose v. Lewis, **10 Mich. 483 (1862)**; Morton v. Preston, 18 Mich. 60, **100 Am.Dec. 146 (1869)**; **Barnum v. Stone**, **27 Mich. 332 (1873)**; Hicks v. Lyle, 46 Mich. 488, 9 NW. 529 (1881); Daggett v. Davis, 53 Mich. 35, 18 N.W. 548,

TROVER—DISTINGUISHED FROM AND  
CONCURRENT WITH OTHER  
ACTIONS

99. In the successive extensions over a period of time of the action of Trover, by the close of the Eighteenth Century it had become a **concurrent remedy with Detinue, Replevin and Trespass de Bonis Asportatis. Each of these remedies had their own peculiar characteristics and Trover was not completely coextensive with them.**

THE Action of Detinue, in its broadest scope, and the Action of Trespass failed to adequately protect the rights of owners in their chattels. Thus, if a bailee or other person in possession misused the goods of the bailor in such a way as to impair their value, and thereafter, at the request of the bailor, surrendered them, the only remedy available to the bailor was an Action on the Case, if he desired to recover full Damages.<sup>9</sup> Of course, if, after diminishing the value of the chattels, the bailee still refused to deliver them upon the demand of the owner, Detinue was available, in which the owner might recover the chattels or their value, with Damages for the unlawful detention. But if the defendant saw fit to restore the chattels under the judgment and the owner wished to recover Damages for the injury or diminished value of the chattels, he was forced to bring Case. By bringing Case in the first instance, the owner was able to avoid a multiplicity of actions.<sup>20</sup> Originally, where the **chattel bailed found its way from the bailee**

51 Am.Rep. 91 (1884); Brown v. St. Charles, 66



Mich. 71, 32 NW. 926 (1886); Pennsylvania: Lewis v. Shortledge, 1 Wldy. Notes Cas. (Pa.) 507 (1867). **As** to conversion of records, see *Inhabitants of First Parish in Sudbury v. Stearns*, 21 Pick. (Mass.) 148. Contra, as to shares of bank stock, as contrasted with the certificates of stock. *Sewall v. Lancaster Bank*, 17 Serg. & H. (Pa.) 285 (1828); *Neiler v. Kelley*, 69 Pa. 403 (1871).

10. Such an action was, according to Dean James Barr Ames, taken for granted as early as 1461. Y. B. 33 Hen. VI, f. 44, p1. 7.

20. Ames, Lectures on Legal History, Lecture VII, Trover, 84 (Cambridge 1913).

**210**

## OFFENSIVE PLEADINGS

Ch. 9

into the hands of a third party and was destroyed, the bailor, it was said, could not recover in Detinue, as it was regarded as impossible to show a detention where the goods had been previously destroyed. Whatever doubt prevailed on the point as to whether **Case would lie in favor of the owner in this situation** was ultimately resolved in favor of permitting the action.<sup>21</sup> It having now been held that Case would lie against any possessor for misusing the goods, and any possessor other than a bailee for the destruction of the goods, it was bound to follow that such an action would be permitted against a bailee who destroyed the goods, which occurred in a case decided in 1479.<sup>22</sup> In a case decided in **1510** <sup>23</sup> **it was held that a wrongful sale by a bailee would amount to a conversion, and in *Vancirinic v. Archer*,**<sup>23</sup> the same effect was given to a sale by a finder, as a result of which Trover became established as a concurrent remedy with Detinue in those cases involving a misfeasance.

**The next step was for Trover to become**

concurrent with Trespass. *Basset v. Rlaynard* <sup>25</sup> held in the year 1601 that Trover would lie for a wrongful taking, and in 1604, in the case of *Bishop v. Montague*,<sup>28</sup> **it was held that the plaintiff might elect between**

<sup>21</sup> I.E. 12 Edw. iv, f. 13, p1. 9 (1472).

<sup>22</sup> I.E. 18 Edw. IV, I, 28, p1. 5. Dean Ames states that this "is noteworthy as being the earliest reported case in which a defendant was charged with 'converting to his own use' the plaintiff's goods," Lectures on Legal History, Lecture VII, Trover, 84, 85 (Cambridge 1913).

<sup>23</sup> Keil, 160, p1. 2, 72 Eng.Sep. 334 (1510).

<sup>24</sup> 1 Leo, 221, 74 Eng.flep. 208.

<sup>25</sup> Crotlis. 819, 78 Eng.Bcp. 1046.

<sup>26</sup> Cro.Eliz, 824, 72 Eng.Rep. 1051. For later cases on the same point, see *Leserson v. Kirk*, 1 BoNe, Abridgment, 105 (M) 10 (1610); *Klnaston v. Moore*, Cro.Car. 89, 79 Eng.ltep. 678 (1627). In which the Justices and Barons declared that "although he took it ~ ~ trespass, yet the **other may charge him in Sn** AcUrmi upon the case In Trover If he **will.**"

Trover or Trespass. And in 1596, in the case of *Eason v. I'lewman*, ~ Trover was permitted against a finder, even though the original taking was not adverse, on the ground of refusal to surrender the goods on demand of the owner, it having been earlier held that Trespass could be maintained as the taker was a trespasser *ab initio*. Ames suggests, however, that the action was allowed as a substitute for Trespass, and not as an alternative of **Detinue, a conclusion** based on the fact that for many years thereafter Trover was not permitted against a bailee who refused to deliver the chattel to the bailor upon request. But after various negative holdings, in 1675, it was held that Trover was available against the bailee on mere demand and denial.<sup>28</sup> Under the foregoing decisions, Trover became a concurrent remedy with Detinue, except where the bailee was unable to deliver the goods as they had been negligently lost; in such a case the bailee was liable in Assumpsit. The net result, therefore, was that Trover, not being subject to Wager of Law, was substituted in lieu of Detinue, until after the early part of the Nineteenth Century. One further conquest remained to be made, although Trover had now been extended to cover the Field of Both Detinue and Trespass. After Trespass became concurrent with Replevin, which lay **for a wrongful distress, Prover followed** suit and also became **available on the theory that a wrongful distress constituted a conversion.**<sup>29</sup>

Thus, Trover had finally emerged as a **remedy concurrent with Detinue, Replevin** and Trespass, and supplemented by Case and Assumpsit.

<sup>27</sup> Cro.Eliz. 495, 78 Eng.Eep. 745 (1596).

28. Ames, Lectures on Legal Elstory, Lecture VII, Tro' ver, 85, 88 (Cambridge, 1913); Sykes v. Walls, 3 Keb. 282, 84 Eng.Bep. 722 (1675).

20. Tinkler v Poole, 5 Burr. 2657, 98 Eng.Eep. 396 (1770).  
Sec. 101

## ACTION OF TROVER

211

### FORM OF TUE DECLARATION IN TROVER

100. As the Action of Prover was an offshoot of the Action of Trespass on the Case the Form of the Action in some respects follows the Form of Case. The Form of the Original Writ and so also the Early Forms of the Declaration contained a statement that the defendant had acted to deceive and defraud the plaintiff. The statement as to the Loss and Finding ultimately became immaterial when Trover was extended to cover any wrongful taking, and thereafter was dropped.

DECLARATION IN Trover

(Alleging Loss and Finding)

**EDWARD TUE THIRD, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith To the Sheriff of County,**

GREETING:

COMMENCEMENT. *Recital of Writ.*

Middlesex, to wit [venue] - D. D. was attached to answer P. P. of a plea of trespass on the case;

*Queritur.* and thereupon the said P. P., by J. H. his attorney, complains:

**BODY. INDUCEMENT. Possession. For that, whereas, the said P. P.** heretofore, to wit, on the first day of May in the year 1800, at Westminster in the county aforesaid, was lawfully possessed, as of his own property, of certain goods and chattels, to wit, ten tables and ten chairs, of great value, to wit, of the value of ten pounds of lawful money of Great Britain;

*Loss.* And being so possessed thereof, the said P. P. afterwards, to wit, on the day and year aforesaid, at Westminster aforesaid, casually lost the said goods and chattels out of his possession;

*Finding, and the same* afterwards, to wit, on the day and year aforesaid at the place aforesaid, came to the possession of the said t. I). by finding;

GRAVAMEN. *Conversion. Yet the said li D., well knowing the said goods and chattels* to be the property of the said P. p. [and of right to belong and appertain to him, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said P. P. in his behalf,] hath not as yet delivered the said goods and chattels or any part thereof to the said P. P., although often requested to do so, but so to do hath hitherto wholly refused, and still refuses; and afterward, to wit, on the day and at the place aforesaid, converted and disposed of the said goods and chattels to his, the said D. D.'s, own use;

CONCLUSION. *Ad Damnum.* to the damage of the said P. P. of [in the sum of]  
£10;

*Production of Suit,* and therefore he brings his suit [inde productit sectam.]

STEPHEN, A Treatise on the Principles of Pleading in Civil Actions, 73 (3d Am. ed. by Tyler, Washington, DC.1892); KEIGWIN, *Cases in Common Law Pleading*, 180 (2d ed., Rochester 1934).

DECLARATION IN TROVER—ESSENTIAL

ALLEGATIONS: (1) IN GENERAL

101. The **Essential Allegations of the Declaration in Trover** are:

(I) The plaintiff's **Possession or Right of Immediate Possession of certain goods, with description; the description of the property converted and the plaintiff's right thereto, must be sufficient for purposes of identification, but the plaintiff's property or right may be stated generally;**

(II) **The Conversion, including in some cases Demand and Refusal;**

(III) **The Value of the Goods and Damages**

by their Conversion.

**OFFENSIVE PLEADINGS  
DECLARATION IN TROVER—ESSENTIAL  
ALLEGATIONS— (2) THE PLAINTIFF'S  
RIGHT, TITLE, INTEREST OR POSSESSION**

192. **The plaintiff must have the Right to the Immediate Possession. A defrauded seller may regain his Right of Possession by election to rescind the sale. The Right of Possession may arise from a bailment or from bare possession itself. A mere servant has custody, not possession. The Right of Possession is sometimes spoken of as Constructive Possession.**

*Title and Possession to Support Trover*

IN order to maintain this Form of Action, it is commonly said that the plaintiff must, at the time of the conversion, have had a Property, either General or Special, in the chattel, and also the actual possession, or the right to the immediate possession.<sup>30</sup> "Special Property" may arise from a bailment or even from bare possession. The immediate right of possession as against the wrongdoer is all the property right necessary.

It is sufficient that the plaintiff at the time of the conversion had the right to immediate possession, arising either from the actual possession or from title of any sort.<sup>31</sup>

30. Illinois: *Bisendrath v. Knauer*, 434 Ill. 300 (1872); Michigan: *Warren cc Dwger*, 91 Mich. 414, 51 NW. 1062 (1892); New Hampshire: *Poole v. Symonds*, 1 N.H. 289, 8 Am.Dec. 71 (1818); Vermont: *Swift v. Moseley*, 10 Vt. 208, 33 Am.Dec. 197 (1838).

And see, *Baals v. Stewart*, 101 Ind. 371, 9 N.E. 403 (1831), as to the statement under the Indiana Code. See, also, 21 *Ency.Pl. & Prae.* 1063 (Northport 1895—1902); *Bowers*, A Treatise on the Law of Conversion, c. IX, §1 490—492 (Boston 1917).

In an action for conversion, the plaintiff must allege that he was in possession or entitled to possession of the property at the time of the alleged conversion.

31. English: *Bloxam v. Sanders*, 4 Barn. & Cress. 941, 107 Eng.Rep. 1309 (1825); Alabama: *Glaze v. McMillion*, 7 Port. (Ala.) 270 (1828); Illinois: *Chickerbig v. Raymond*, 15 Ill. 362 (1854); *IMvidson v. Waldron*, 31 Ill. 120, 83 Am.Dec. 200 (1863); *Owens v. Weedinan*, 82 Ill. 409 (1876); Indiana: *Traylor v. Horrall*, 4 Blackf. (Tad.) 317 (1837); *Barton v. Dun-Fling*, 6 Blackf. (In&) 209 (1842); Michigan: *Ste*

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.<sup>11</sup> 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.<sup>33</sup>

*phenson v. Little*, 10 Mich. 433 (1862); *Rubble v. Lawrence*, 51 Mich. 569, 17 NW. 60 (1883); *Hanee v. Tittabawassee Boom Co.*, 70 Mich. 227, 38 NW. 228 (1888); New Jersey: *Debow v. Coil ax*, 10 N.J. L. 128 (1828); New York: *Hotchkiss v. MeVicar*, 12 Johns. (N.Y.) 403 (1815); North Carolina: *Lewis v. Mobley*, 20 Nc. 407, 34 Am.Dec. 379 (1839); Pennsylvania: *Caster v. McShaff cry*, 48 Pa. 437 (1865); Tennessee: *Caldwell v. Cowan*, 9 Yerg. (Team) 262 (1836).

An equitable right will not support the action. *Northern Pac. B. Co. v. Paine*, 119 U.S. 561, 7 S.Ct. 323, 30 LEd. 513 (1887).

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. *Prink v. Pratt*, 130 IU. 327, 22 N.E. 819 (1889).

And that a mere lien without possession is not enough, see the following cases: Alabama: *Street v. Nelson*, 80 Ala. 230 (1885); Delaware: *Stewart v. Bright*, 6 Houst. (Del.) 344 (1881); New York: *Deelcy v. Dwight*, 132 N.Y. 59, 30 N.E. 258, 18 L.R.A. 298 (1892); Rhode Island: *Rexroth v. Coon*, 15 N.J.

35, 23 Atl. 37, 2 Am.St.Bep. 863 (1885). See, also, 38 Cy. 2050.

at English: Ferguson v. Carrington, 0 Barn. & Cress.

59, 109 Eng.Rep. 22 (1829); Noble v. **Adams**, 7 Taunt. 59, 129 Eng.Rep. 24 (1816); Illinois: Eruner v. Dyball, 42 Ill. 34 (1866); Ryan v. Brant, 42 Ill. 78 (1866); Maine: Atlas Shoe Co. v. Bechard, 102 Me. 197, 66 Atl. 890, 10 L.ThA. (N.S.) 245 (1906); Massachusetts: Thurston v. flanchard, 22 Pick. (Mass.) 18, 33 Am.Dec. 700 (1839); Stevens v. Austin, 1 Mete. (Mass.) 557 (1840); Michigan: Beebe vKnapp, 28 Mich. 53 (1873); Heineman v. Steiger, 34 Mich. 232, it) N.W. 965 (1884); New York: Green v. Russell, 5 Hill, (N.Y.) 183 (1843); Woodworth v. Kissam, 15 Johns. (N.Y.) 186 (1817); Hitchcock v. CoviU, 20 Wend. (N.Y.) 167 (1838); Pennsylvania: Pulton v. WJjalley, 8 Wlsly.Notes Cat (Pa.) 106

(1846).

3- Kimball v. Cunningham, 4 Mass. 502, 3 Am.Dec. 230 (1880); Peters v. Ballistier, 3 Pick. (Mass.) 405 (1826).

212  
Cli. 9

Sec. 102

### ACTION OF TROVER

213

A bailee **or any** person in possession of goods may maintain Trover against a stranger who takes them out of his possession)<sup>4</sup> 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**; **~ or by a carrier**,<sup>38</sup> a warehouseman,<sup>37</sup> a consignee,<sup>38</sup> a gratuitous bailee,<sup>3o</sup> or by any agent who is responsible over to his principal.<sup>40</sup>

The finder of goods has a Special Property in them which will enable him to maintain Trover against any one but the true owner.<sup>41</sup>

34- Burk v. Webb, 32 Web. 173 (1875); Grove v. Wise, 39 Mich. 161 (1878).

-35. English: Wilbraham v. Snow, 2 Wms.Saund. 47, 85 Eng.Rep. 624 (1609); Blades v. Arundale, 1 M. & S. 711, 105 Engtep. 265 (1813); Massachusetts: Brownell v. Manchester, 1 Pick. (Mass.) 232 (1822); Caldwell v. Eaton, 5 Mass. 399 (1809); Badlam v. Tucker, 1 rick. (Mass.) 389, 11 Am.Dec. 202 (1823); Michigan: Burk v. Webb, 32 Much. 173 (1875); Witherspoon v. Clegg, 42 Much. 484, 4 N.W. 209 (1880); New Rampsbire: Poole v. Symonds, 1 N. Il. 289, 8 Am.Dec. 71 (1818); New York: Dillenback v. Jerome, 7 Cow. (N.Y.) 297 (1827); Barker v. Miller, 6 Johns. (N.Y.) 195 (1810); Pennsylvania: Weidensaul v. Reynolds, 49 Pa. 73 (1865); Vermont: flayer v. Hutchinson, 13 Vt. 504, 37 Am.Dec. 007 (1841).

36. 1 RoBe, Abridgment, 4 (London 1668). see, also, the following cases: English: Arnold v. Jefferson, 1 Ld.Raym. 276, 91 Eng.Rep. 1080 (1697).

-7- Marthil v. Coles, 1 M. & S. 147, 105 Eng.Rep. 58 (1813).

38. Smith v. James, 7 Cow. (N.Y.) 329 (1827); Everett v. Saltus, 15 Wend. (N.Y.) 474 (1826).

30. English: Booth v. Wilson, 1 Barn. & Aid. 59, 106 Eng.Rep. 22 (1817); New York: Faulkner v. Brown, 13 Wend. (N.Y.) 63 (1834).

40. Wilbraham v. Snow, 2 Wms.Saund. 47(b), 85 Eng. Rep. 624 (1669). See, also, the following cases: English: Stirling v. Vaughan, 11 East 019, 626, 103 Eng.Bep. 1145, 1148 (1809); fllinols: Eisendrath v. Knauer, 64 Ill. 396 (1872); Massachusetts: Eaton v. Lynde, 15 Mass. 242 (1818); Pennsylvania: Trorub v. Tilford, 6 Watts (Pa.) 472, 31 Am.Dec. 484 (1837).

41. Delaware: Clark v. Maloney, 3 Bar. (Del.) 68 (1839); New York: McLaughlin v. Walte, 9 Cow (N.Y) **670 (1827)**.

Bare possession, even though wrongfully obtained, gives the possessor sufficient property to maintain the action

against a mere stranger.<sup>42</sup>

The rule by which a bailee, finder, or wrongful possessor is permitted to sue and recover Damages which he has not sustained, and by such recovery bar a subsequent action by the bailor for an injury to his general property without his consent, **is criticized as unsound** by certain authorities.<sup>43</sup> It is suggested that the General Owner and the one having a special property should each bring an action for the actual loss or damage to his own particular interest. This might well be the rule where the person in possession does not claim complete Title, or where the General Owner does not consent to his recovering the **total loss. Indeed, it is recognized that the mere naked bailee, at the will of the bailor, cannot recover against a third person for the conversion of the bailed property, where the bailor or owner has intervened and asserted his general property. It is otherwise in the case of a bailee with the right of possession for a specific time and purpose, who has the**

42. Indiana: Coffin v. Anderson, 4 Blackf. (md.) 410 (1837); Maine: Vining v. Baker, 53 Mc. 544 (1866); Massachusetts: Allen v. Smith, 10 Mass. 308 (1813); Fairbank v. Phelps, 22 Pick. (Mass.) 535 (1839); Michigan: Cullen v. O'Hara, 4 Mich. 132 (1856); North Carolina: Barwick v. Barwick, 33 N.e. 80 (1850); New York: Duncan v. Spear, 11 Wend. (N.Y.) 54 (1833); Faulkner v. Brown, 13 Wend. (N.Y.) 63 (1834); Pennsylvania: Gunzburg v. Rosenthal, 226 Pa. 300, 75 Atl. 418, 26 LEA. (N.S.) 840, 18 Am. Gas. 572 (1910); Vermont: Knapp v. Winchester, 11

#### Vt. 351 (1839).

43. See Note: Damages for Injury to Chattels Recoverable by Person Having Possessory Interest Only. 25 Han' L.Rev. 655 (1912), criticizing the case of The Winkfield [1902] p. 42 in which the court established the doctrine of Modern Damage Law, **that a bailee may recover the whole damage done to a bailed chattel by a wrongdoer, though the bailee would not be liable to the bailor for such wrongful act. See, also, 2 Beven, Negligence in Law, e. IV, 736, 737, note (3d ed., London 1908); Clerk & Lindsell, Law of Torts, c. VII, 262, 282 (3d ed., London 1904).**

214

### OFFENSIVE PLEADINGS

#### Ch. 9

**right to recover to the extent of the value of his special interest in the property, even where the general owner intervenes.**<sup>44</sup> It does seem strange that a bailee is entitled to recover for the entire Damage done to property by its injury, loss or misappropriation, while a joint owner of personal property, who sues without joining the other co-owners, is entitled to recover only his own Damage. But it is generally recognized that "the peace and order of society require that persons in possession of property, even without Title, should be enabled to protect such possession by appropriate remedies against mere naked wrongdoer<sup>45</sup>." Thus the United States Government, in carrying on the post office, is bailee of the letters and their contents for hire, and has sufficient interest to maintain an Action of Trespass or Trover against a thief or wrongdoer for disturbing that possession, like any other bailee, and may recover the entire value of the property.<sup>46</sup>

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.<sup>41</sup>

44. Engel v. Scott & Hobston Lumber Co., 60 Minn. 39, 61 NW. 825 (1895).

45. Guttner v. Pacific Steam Whaling Co., 06 Fed. 617 (1800); Note: Damages—Gratuitous Bailment—Prover, 13 Barv.L.Rev. 411 (1000).

46. National Surety Co. v. United States, 129 Fed. 70 (1904).

47. English: Roberts v. Wyatt, 2 Taunt. 268, 127 Eng. Rep. 1080 (1810); Illinois: Hutton v. Arnett, 51 Dl. 108 (1869); Indiana: M'Connell v. Maxwell, 3 Blackf. (Ind.) 419 (1839); Massachusetts: Eaton v. Lynde, 15 Mass. 242 (1818); Crocker v. Atwood, 144 Mass. 588, 12 N.E. 421 (1887); New York: Ingersoll v. Van Bokkelen, 7 Cow. (N.Y.) 610 (1827); Moore v. Fritchcock, 4 Wentt (N.Y.) 292 (1830); Duncan v. Spear, 11 % Wend. (N.Y.) 54 (1833); Daniels v. Ball,

A mere servant, however, acting professedly as such, and having only the custody of the goods, cannot maintain

the action, but, if brought at all, it must be brought by the master.<sup>48</sup>

### *Constructive Possession or Right to Possession;*

IN order to maintain Trover, the plaintiff must have had possession, or the right to immediate possession, at the time of the conversion.<sup>49</sup> One is said to have constructive **possession when he is given the same rights** and remedies as if he were In actual possession. This may be the case of an owner when no one is in actual possession, or when some bailee at will is in possession subject to his orders.

Where the property was, at the time of the conversion, in the hands of a bailee at will, Trover may, in most cases, be maintained

11 Wend. (N.Y.) 57, note (1833); Faulkner v. Brown, 13 Wend. (N.Y.) 63 (1834).

48. English: Eloss v. Bolinan, Owen 52, 74 Eng.Rep. 893 (1586); Illinois: Cooper v. Cooper, 132 Ill. 80, 23 N.E. 246 (1800); Pease v. Ditto, 189 Ill. 456, 50 N.E. 953 (1001); Massachusetts: Ludden v. Leavitt, 9 Mass. 104, 6 AnrDec. 45 (1812); New York: Diilenback v. Jerome, 7 Cow. (WY.) 294 (1827); Faulkner v. Brown, 13 Wend. (N.Y.) 63 (1834)

40. English: Gordon v. Harper, 7 T.E. 9, 101 Eng. flop. 828 (1796); Bloxam v. Sanders, 4 Earn. & C. 941, 107 Fng.Rep. 1300 (1825); Ball v. Piekard, 3 Camp. 187, 170 Eng.Rep. 1350 (1812); Benjamin v. Bank of England, 3 Camp. 417, 170 Eng.Rep. 1420 (1813); Illinois: Chiekerung v. Raymond, 15 Ill. 362 (1854); Eisendh-ath v. Knauer, 64 12. 396 (1892); ri-ink v. Pratt, 130 Ill. 327, 22 N.E. 819 (1889); Massachusetts: Winship v. Neale, 10 Gray (Mass.) 382 (1858); Michigan: Axford v. Mathews, 43 Much. 327, 5 N.W. 377, 38 Am.Rep. 185 (1880); Foster v. Lumbermen's Mm. Co., 68 Mich, 188, 36 NW. 171 (1888); New Hampshire: Clark v. Draper, 19 N.H. 419 (1849); New York: Ban v. Daggett, S Cow. (N. 1.) 053 (1527); Bush v. Lyon, 9 Cow. (N.Y.) 52 (1828).

The right to possession must have been inunediate, absolute and unconditional, and not dependent on some act to be done by the plaintiff. It is not enough that the plaintiff had a good right of action, or a right to take possession at some future day. Frink v. Pratt, 130 Ill. 327, 22 N.E. 819 (1889).

## **Sec. 102**

### **ACTION OF TROVER**

21 S

either by the General or the Special Owner—that is, by the bailor or bailee—though a Judgment obtained by one of them will be a Bar to an action by the other—<sup>50</sup> But this is not the case where the bailee has the **exclusive right of possession as against the bafflor**.

Therefore, where goods leased as furniture with a house were taken in Execution against a former owner, and sold by the sheriff, it was held that the landlord could not maintain Trover against the sheriff pending the lease, but should have brought an Action on the Case, as the right of possession was in the tenant<sup>51</sup> A landlord, however, generally has such a right of possession of timber wrongfully cut down during the lease as to enable him to maintain Trover if it is removed.<sup>53</sup>

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.<sup>53</sup> Thus, where a person has de

50. Illinois: Gauche v. Mayer, 27 Ill. 134 (1862), involving trespass; Lantz v. Drum, 44 Ill.App. 607 (1592); New York: Smith v. *James*, 7 Cow. (N.Y.)

328 (1827).

61. English: Gordon v. Harper, 7 TB. 9, 101 Eng.

**Rep. 828 (1796); Hail ‘r. Pickard, 3 Camp. 187, 170 Eng.** 1350 (1812); Alabama: Natioas v. Hawkins’ Adm’rs, 11 Ala. 859 (1847); Illinois: Forth -v. Furs-icy, 82 Iii. 152 (1876); Massachusetts: Wheeler v. Train, 3 Pick. (Mass.) 255 (1825); Fairbank v. Phe]ps, 22 Pick, (Massj 535 (1839); Tennessee:

Caldwell v. Cowan, 9 Yerg. (Tenu.) 262 (1836); vermont: Swift v, 3foseley, 10 Vt. 208, 33 AntDec. 107 (1838).

62. English: Gordon v. Harper, 7 T.R. 13, 101 Eng.

**Rep. 828** (1796); Pennsylvania: Baker v. Howell, C  
Serg. & B. (Pa.) 476 (1821); Shult v. Barker, 12  
Serg. & H. (Pa.) 272 (1824).

53’ Wimraham v. Snow, 2 Win’s Sauad. 47a, Dote (1),

85 EngRep. 625 (1669); Bacon, Abridgment, e.  
“Trover” (Philadelphia 1868); English: Gordon v.  
Harper, 7 TB. 12, 101 Eng.Rep, 828 (1796); Maine:  
MeNear v. Atwood, 17 Me. 484 (1840); New York:  
Smith v. James, 7 Cow. (N.Y.) 329 (1827).

liverS goods to a carrier or other bailee, who has not the right to withhold the possession from the General Owner, he may maintain Trover for conversion by a stranger, for the owner has the constructive possession.M So an executor or administrator has constructive possession of the goods of his testator or intestate from the time of his death; ~ a trustee of goods has constructive possession, though they are **in the actual** possession of the cestui que trust; ~ a consignee of goods, who is also the vendee, may bring Trover for their conversion after their delivery to the carrier, arid before he has acquired actual possession; 5- **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.<sup>58</sup>

If the bailee of goods, having the right to **their possession, as against the bailor**, so that the bailor could not in general maintain Trover 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,

54. English; Gordon v. Harper, 7 T.R. 12, 101 Eng.

Rep. 828 (1796); Dewell v. Moan, I Taunt. 391, 127  
Eng.Rep. 885 (1808); Illinois: Montgomery v.  
Brush, 121 Ill. 513, 13 N.E. 230 (1887); New York:  
Thorp v. Burling, 11 Johns. (N.Y.) 285 (1814).

55- English: Gordon v. Harper, 7 T.R. 13, **101 Fag. Rep. 828 (1796)**; Massachusetts: Towle v. Lovet, 6 Mass. 394 (1810); Michigan: Rogers v.

Windoos, 42 Mich. 628, 12 N.W. 882 (1882); New flampshire:  
Preach v. Merrill, 6 N.H. 465 (1833); South Cai-oilna: Kerby v. Quinn, Rice (S.C.) 264 (1839); Hill v. Brennan, Rice (S.C.) 285 (1839).

sr ‘Wooderman v. Baldoek, 8 Taunt. 676, 129 Eng. Rep. 547 (1819).

6’s. I Chitty, Treatise on Pleading and Parties to Actions, with Precedents and Forms, e. II Of the Forms of Action, 171 (16th Am. ed., by Perkins, Springfield 1876).

88. **Bugg v. Minett, 11 East. 210, 103 Eng.Eep. 085** (1809).

**216**

## OFFENSIVE PLEADINGS

Cli. 9

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 yen-dee**<sup>59</sup>

A bailor may maintain an action of trover against the bailee, if by wrongful use or disposal of the goods the bailee has repudiated his obligations, and thereby enabled the bail-or to **exercise the rights and remedies of a** person entitled to possession. If a bailee misappropriates the property, as by selling or pledging it as his own, the bailor may immediately Elect to treat the bailment as ended and bring trover for its Value, or he may Elect to treat the bailment as continuing and sue for Damages. A bailee, if he has any right of enjoyment or use, must use the thing in moderation, and not exceed the limits of the bailment. If his acts imply an assertion of Title or right of dominion inconsistent with the bailor’s ownership, this is a conversion of the property. Mere misuse, or **unauthorized** use of the thing bailed without adverse claim, or negligent loss, may only amount to a breach of

obligation, or a tort in the Nature of Waste, falling short of conversion.

### *Title in a Third Party as a Defence*

IN Trespass and Trover at Common Law there was some difficulty as to whether Title in a Third Party was a good Defence. As

**Trespass is based on possession, the Defence of Title in a Third Person was obviously not good.** But in Trover the situation may be different where the plaintiff, not being in possession,<sup>59</sup> is relying on his right to posses-

59. Grant v. King, 14 Vt. 367 (1842). See, also, **Turner v. Waldo**, 40 Vt. 51 (1867).

60. If the plaintiff in Trover is relying on possession, title in a third party may not be pleaded successfully. In the latter case, the defendant may sometimes effectively take **issue** as in the case of *Leake v. Loveday*,<sup>61</sup> in which A was the holder of a bill of sale upon furniture belonging to B, the effect of the bill being to leave the possession of the furniture in B, **but to convey the ownership to A**, with a provision that if B failed to pay the money due under the bill, A should have an immediate right to possession. B went into bankruptcy, whereupon the Title to the furniture, being still in his "order and disposition," passed to his assignees in bankruptcy. Before the assignees could liquidate, the furniture was seized on Execution, in satisfaction of a debt which B owed to other creditors. In this situation A, relying on his bill of sale, sued the defendant-sheriff, who took under the Execution, in Trover, only to be met with the Defence that Title was in Third Parties—the assignees in bankruptcy. **In holding the Defence good, it**

was pointed out that since the plaintiff was not in possession he necessarily had to make **out his right to immediate possession, and hence by Way of Defence the sheriff could plead the Superior Title of the assignees in bankruptcy, even though he was not acting under their authority.**

### *Description of Property*

IN actions for injuring or taking away goods or chattels, it is in general necessary that their kind, quantity, number, and value should be stated.<sup>62</sup> It would be insufficient

fully. *Webb v. Fox*, 7 T.R. 391, 101 Eng.Rep. 1037

(1797).

61. 4 Man. & G. 072, 134 Eng.Rep. 399 (1842).

62. *Winchester v. Bounds*, 55 Ill. 451 (1870); *Kerwin v. Bathatchett*, 147 Ill.App. 561 (1909); Maine: *Stinchfield v. Twaddle*, 81 Me. 273, 17 A. 66 (1889); *Hasleton v. Locke*, 104 Me. 164, 71 A. 661, 2 L.R.A. (N.S.) 35, 15 Am-Can. j009 (1908); New Hampshire: *Edgerly v. Emerson*, 23 N.H. 555, 55 Am.Dec. 207 (1851); *Town of Colebrook v. Merrill*, 46 N.H. 160 (1865); Pennsylvania: **Taylor v. Morgan**, 8 Watts (Pa.) 333 (1834); Federal: *Ban v. Patterson*, 1

**Cranch 0.0. 607, Fed.Cas.No.814 (C.C.fl.C.1860); Sec. 103**

## **ACTION OF TROVER**

217

to allege that the defendant injured or took the plaintiff's goods and chattels without showing their number or nature. In Trover, Trespass, and Case less particularity is **required than in Detinue or Replevin, in which** the plaintiff seeks to recover the goods themselves, The price or value should be stated, though it has been held that the omission to do so will not be fatal.<sup>63</sup> The time should also be alleged, though it seems that it is only essential to show a time before suit brought. It is usual to state that the plaintiff, being possessed of such goods as are described, on a certain day, casually lost the same out of his possession, and that afterwards, on the day and year aforesaid, they came into the possession of the defendant by finding, in accordance with the ancient form,

*Henry v. Sowles*, 28 Fed. 521 (C.C.J.C.1809). See, also. Bowers, A Treatise on the Law of Conversion, c. IX, §~ 494—497 (Boston 1917).

It is sufficient to allege the nature and kind of chattels referred to and the quantity or number converted. *Howton v. Mathias*, 197 A. 457, 78 So. 02 (1916).



A complaint for the conversion of money derived from the sale of the plaintiff's cotton was held sufficient to describe the money. *Howton v. Mathias*, 197 Ala. 45?, 73 So. 92 (1016).

6~. *Connoss v. Meir*, 2 E.D.Smith (N.Y.) 314 (1854).

See, also, Massachusetts: **lasigi v. Shea**, 148 Mass. 535, 20 N.E. 110 (1889); Missouri: *Fry v. Baxter*, 10 Mo, 302 (i847); Virginia: *Pearpoint v. Henry*, 2 Wash. (va.) 192 (1796).

In an Allegation for the Conversion of a Note, an Allegation of its Face value is a sufficient Averment of its Value. *Farmers' State Guaranty Bank y. Pierson* 201 SW. 424 (Tex.Civ.App.i&18).

In an action for the Conversion of an automobile, the description of an automobile In the complaint as "one automobile, the property of the plaintiff," was held sufficient In *Robertson v. Hooton*, 17 Ala.App. 258, 85 So. 5~ (1919).

64. **Maryland: Dietus v. Fuss**, 8 Md. 145 (1855); New Jersey: *Glenn v. Garrison*. 17 N.J.L. 1 (1790).

A Count in ¶rrover Is subject to **Demurrer where the time of conversion Is not** averred. *Schlossburg v. Willingham*, 17 Ala.App. 678, 88 So. 191 (1921).

though the statement of the finding is not now material.<sup>65</sup>

#### DECLARATION IN TROVER—ESSENTIAL

ALLEGATIONS: (3) THE DEFENDANT'S WRONGFUL ACT OF CONVERSION

**103. The Declaration should allege a Conversion by the defendant to his own use, contrary to the Rght of the plaintiff, A Conversion may be:**

- (I) By wrongfully taking and carrying away goods, or assuming a dominion over them, or otherwise depriving the owner of them,**
- (II) By wrongfully assuming the control, or dominion over, or right to dispose of goods, of which the actual possession has been lawfully obtained.**
- (III) By merely wrongfully Cetaining goods lawfully obtained. In this case, and in this case only, a demand and refusal to restore the goods are necessary before bringing the Action. A demand and refusal are not necessary to make a Conversion where the defendant has already done an Act of Conversion.**

#### *The Nature of Conversion.*

A CONVERSION of the property is the gist of the Action of Trover, and is always essential to support it. It is for the conversion of the goods by the defendant to his own use, **not** for the act of taking them, that **Damages are recoverable. For the act of taking, the remedy is Trespass.**

To constitute a conversion, it is necessary **that he shall have, in some sense, n,isappropriated or assumed adverse dominion over**

65. **Royce v. Oakes**, 20 R.T. 252, 38 A. 371 (1897).

**A General Demurrer to a Petition** in an Action for **Conversion which avers facts showing that the** plaintiff has a General or Special Property in the **chattels alleged to have** been converted, the right of possession thereof at the time of conversion, and that the defendant lass converted the seine to his own use, **Is properly overruled.** *Wire v. Siocum*, 80 Okla. 111, 104 P. 1061 (1921).

**218**

#### OFFENSIVE PLEADINGS

**Ch. 9**

the goods and deprived the owner of them.<sup>66</sup> A conversion may take place in the following ways:

(I) *By a Wrongful Taking and Carrying Away or Destruction.*—*The* wrongful taking, it folloWed by a removal or carrying away or assumption of dominion, of the goods of another, who has the right of immediate p05-session, 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.<sup>67</sup> 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,<sup>o8</sup>

66. English: Fouldes v. Willoughby, 8 H.L. & W. 540, 151 Eng.Rep. 1153 (1841); Illinois: Forth v. Pursley, 82 Ill. 152 (1895); Clement v. Boone, 5 Ill.App. 100 (1901); New York: Bailey v. Adams, 14 Wend. (N. L.) 201 (1835).

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. Massachusetts:

**Bubin v. Huhn**, 229 Mass. 126, 118 N.E. 290, 4 At. II. 1190 (1018); Pennsylvania: Moorotiend y. Seefield, 111 Pa. 554, 5 A. 732 (1886). See, also, articles by Clark, *The Test of Conversion*, 21 Harv.L. Rev. 408 (1908); 21 L.Q.Rev. 43 (1905); Salmond, **Law of Torts, e. III, 296—308** (London 1907).

67. 2 Saunders, *Law of Pleading and Practice in Civil Actions*, 410 (5th Am. ed., Philadelphia 1851); English: Bishop v. Montague, Cro.Elis. 824, 78 Bug. Rep. 1051 (1604); Massachusetts: Prescott v. Wright, 6 Mass. 20 (1809); Partlaud v. Read, 11 Allen (Mass.) 231 (1865); Edgerly v. Whalan, 106 Mass. 307 (1871); Michigan: Daggett v. Davis, 53 Mich. 35, 18 N.W. 548 (1884); Gibbons v. Psi-well, 63 Mich. 344, 20 N.W. 855, 6 Am.St.ltep. 301 (1886); New Jersey: Glenn v. Garrison, 17 N.J.L. 1 (1833); New York: Farrington v. Payne, 15 Johns. (N.Y.) 431 (1818); South Carolina: Jones v. Dugan, 1 McCord (S.C.) 428 (1821).

The collection of a note by one who has no interest in it is a conversion, Chickering v. Raymond, 15 Ill. 362 (1854).

68. Massachusetts: Prescott v. Wright, 6 Mass. 20 (1802); Pierce v. Benjamin, 14 Pick. (Mass.) 856, 25 Am.Dec. 396 (1833); New Hampshire: Wadleigh v.

**but not otherwise. A conversion is not necessary** to support trespass, but it is necessary to support Trover. A mere seizure of goods by a stranger, who immediately relinquishes possession, even **though there was** some asportation, will support Trespass, but not Trover, for there is no conversion.<sup>69</sup> 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.<sup>70</sup>

Trover lies to recover the value of goods obtained by the defendant from the plaintiff by fraud. Replevin will also lie. This in effect is the specific enforcement of the duty **of the fraudulent buyer to return the goods** and the corresponding right of the seller to immediate possession.<sup>71</sup>

(II) *By a Wrongful User, or Assumption of Title*.—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. *Janvrin*, 41 N.H. 520, 77 Am.Dec. 780 (1800); *Drew v. Spaulding*, 45 N.H. 472 (1864); in other words, Trover is a concurrent remedy with “Trespass do Rents Asportatis.”

69. English: Samuel v. Morris, C Car. & P. 620, 172 Eng.Rep. 1390 (1834); *Fopides v. Willoughby*, 8 M. & W. 540, 151 Eng.Rep. 1153 (1841); Massachusetts: *Loring v. Mulehay*, 3 Allen (Mass.) 575 (1862); **Death v. Walker**, 14 Mass. 500 (1780).

70. English: *Cooper v. Monke*, Willes 50, 125 Eng. Rep. 1051 (1737); New Hampshire: *Drew v. Spaulding*, 45 N.H. 472 (1864).

-I. Maine: *Atlas Shoe Co. v. Rechar*, 102 Me. 107, 66 A. 390, 10 L.L.A. (N.S.) 245 (1907); Michigan: *Beebe v. Knapp*, 28 Mich. 53 (1843); *Reineman v. Steiger*, 54 Mich. 232, 19 N.W. 965 (1884); 3 Willis-ton. A Treatise on the Law of Contracts, c. 42, §

**1370 (New York 1936-1045).**

The seller must, **as a rule, tender to the buyer the return of whatever was paid** for the goods. Willis-ton, *The Law Governing Sales of Goods*, at Common **Law and under the Uniform Sales Act, c. 22, 567** (Rev. ed., New York 1948).

## Sec. 103 ACTION OF TROVER

tamed at all.<sup>72</sup> The mere taking of an assignment of goods from a person who has no right or authority to dispose of them, has

As a rule, Trover will not lie for a mere omission or nonfeasance against a person **been held a conversion.**<sup>73</sup>

Where a person

intituled 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.<sup>74</sup>

72. English: *M'Combie v. Davies*, 6 East 540, 102 Eng.Rep. 1393 (1805); *Jackson v. Anderson*, 4 Taunt. 24, 128 Eng.Rep. 235 (1811); Alabama: *Ainsworth v. Partillo*, 13 Ala. 460 (1848); Illinois: *Pollett v. Edwards*, 30 Ill.App. 386 (1889); Indiana: *Lindley v. Downing*, 2 md. 418 (1850); Maine: *Whipple v. Gilpatrick*, 19 Me. 427 (1847); *Webber v. Davis*, 44 Me. 147, 69 Am.Dec. 87 (1857); Massachusetts: *Gibbs v. Chase*, 10 Mass. 128 (1813); Michigan: *Cook v. Hopper*, 23 Mich. 511 (1871); *Scudder v. Anderson*, 54 Mich. 122, 19 NW. 775 (1884); Minnesota: *Parrind v. Hurlburt*, 7 Minn. 477 (1862); New Hampshire: *Gilmaa v. Hill*, 36 N.H. 311 (1858); *Latbrop v. Blake*, 23 N.H. 46 (1851); New York: *Everett v. Coffin*, 6 Wend. (N.Y.) 603, 22 Am.Dec. 551 (1831); *Reynolds v. Shuler*, S Cow. (N.Y.) 323 (1826); *Bristol v. Burt*, 7 Johns. (N.Y.) 254, 5 Am.Dec. 264 (1811); Vermont: *Rice v. Clark*, 8 Vt. 109 (1836). 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 Mfg. Co.*, 70 Ill. 302 (1873).

**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. *Tripp v. Grouner*, 60 Ill. 474 (1871). It is not essential, to a conversion, that the property be appropriated to the use of the wrongdoer. It is enough that he disposes of it or assumes to dispose of it. *Mead v. Thompson*, 78 Ill. 62 (1875).

73. English: *Baldwin v. Cole*, 6 Mod. 212, 87 Eng. Rep. 964 (1704) *M'Combie v. Davies*, 6 East 540, 102 Eng.Rep. 1393 (1805); New York: *Everett v. Coffin*, 6 Wend. (N.Y.) 603 (1831); Vermont: *Rice v. Clark*, 8 Vt. 109 (1830).
14. English: *M'Combie v. Davies*. 6 East 540, 102 Eng.Rep. 1393 (1805); *Jackson v. Anderson*, 4 Taunt 24, 128 Eng.Rep. 235 (1811); Illinois: *Chickering v. Raymond*, 15 Ill. 362 (1854); *Race v. Chandler*, 15 Ill.App. 532 (1884); Massachusetts: *Gibbs v. Chase*, 10 Mass. 128 (1813); *Bowlin v. Nye*, 10 Cusb. (Mass.) 416 (1852); *Briggs -cc Boston & L. B. Co.*, 6 Allen (Mass.) 246, 83 Am.Dec. 626 (1863); *Hall v. Boston & W. R. Co.*, 14 Allen (Mass.) 443, 92 Am.Dec. 783 (1807); Michigan: *Barnum v. Stone*, 27 Mich. 332 (1873); *Johnston v. Whittermore*, 27 Mich. 463 (1873); *Edwards v. Frank*, 40 Mich. 616 (1879); *Hicks v. Lyle*, 46 Mich. 488, 9 N.W. 529 (1881); *Gibbons v. Farwell*, 63 Mich. 344, 29 NW. 855, 6 Am.St. Rep. 301 (1886); New Hampshire: *Lathrop v. Blake*, 23 N.H. 46 (1851); New York: *Lockwood v. Bull*, 1 Cow. (N.Y.) 322, 13 Am.Dec. 539 (1827); *Bristol v. Burt*, 7 Johns. (N.Y.) 254, 5 Am.Dec. 264 (1810); *Rlightmyer v. Raymond*, 12 Wend. (N.Y.) 51 (1834); *Pierce v. Schenck*, 3 Hill (N.Y.) 28 (1842); Pennsylvania: *Etter v. Bailey*, S Pa. 442 (1848); Vermont: *Grant v. King*, 14 Vt. 367 (1842); *Turner v. Waldo*, 40 Vt. 51 (1867).

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. English: *Stephenson v. Dart*, 4 Bing. 483, 130 Eng.Rep. 851 (1828); *Wyld v. Pickford*, S M. & W. 461, 151 Eng.Rep. 1113 at 1120 (1841); *Devereux v. Barclay*, 2 Barn. & Ald. 702, 106 Eng.Rep. 521 (1819); *Lubbock v. Inglis*, 1 Stark. 104, 171 Eng.Rep. 415 (1815); Alabama: *Bullard v. Young*, 3 Stew. (Ala.) 46 (1830); Illinois: *Illinois Cent. H. Co. v. Parks*, 54 Ill. 294 (1870); Indianapolis & St. L. H. Co. v. Herndon, 81 Ill. 143 (1876); Massachusetts: *Clafin v. Boston, etc. B. Co.*, 7 Allen (Mass.) 341 (1863); *Bowlin v. Nyc*, 10 Cash. (Mass.) 416 (1852); *Lichtenhem v. Boston & P. R. Co.*, 11 Cush. (Mass.) 70 (1853); Michigan: *Gibbons v. Farwell*, 63 Mich. 344, 29 NW. 855, 6 Am.St.Rep. 301 (1886); New

Hampshire: *Moses v. Norris*, 4 N.H. 304 (1828); **New York: Packard v. Getman**, 6 Cow (N.Y.) 757 (1827); **Packard -cc Getman**, 4 Wend. (N.Y.) 613 (1830); *Hawkins v. Hoffman*, 6 Hill (N.Y.) 586, 41 AmJec. 767 (1844).

But not for mere negligent loss by carrier; In this case the action should be Case or Assumpsit *Moses v. Norris*, 4 N.H. 304 (1828).

It lies against a person who Illegally makes use of property of which he has lawfully obtained the actual custody or possession. English: *Mulgrave v. Ogden*, CroEliz. 219, 78 Engitep. 475 (1590); *Nicholson v. Chapman*, 2 El., IL. 254, 126 EngSep. 536 (1793); *Richardson v. Atkinson*, 1 Str. 576, 93 Eng. Rep. 710 (1723); Illinois: *Johnson v. Weedman*, 4 Scam. (IL) 495 (1843); Maine: *Ripley v. Dolbier*, 18 Me. 382 (1841); Massachusetts: *Dench v. Walker*, 14 Mass. 500 (1780); **New York: Lockwood v. Bull**, 1 Cow. (N.Y.) 322, 13 AimDce. 539 (1827); Vermont: *Rice v. Clark*, 8 **Vt.** 109 (1836).

**The action will lie against a warehouseman with whom rain** has been placed merely for storage, and **who has wrongfully mixed** it with his own. Illinois:

**Haddix v. Elnstman**, 14 fl.App. 443 (1888); Michigan; *Erwin v. Clark*, 18 Mlch. 10 (1864).

**It will** also lie against a bank which places a special

deposit with its own funds, and reports **and** treats

## 220 OFFENSIVE PLEADINGS

**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.” There **is** **no** conversion if the bailee sets up no title or claim in defiance of the owner’s right, or has not exercised a dominion inconsistent with his title.

The rule is that one tenant in common of goods cannot maintain Trover against his cotenant if the goods remain in the latter’s possession, although he refuse to permit the former to participate in the use of the article, since, in law, the possession of one is the

it as a part of its own assets, *First Nat. Bank of Monmouth v. Dunbar*, 19 Ill.App. 558 (1886).

**Or against a carrier of liquor or his** servant for an adulteration of it. *flench v. Walker*, 14 Mass. 500 (1780).

**Or against the hirer** or bailee of a horse for driving it a greater distance than is agreed, or in a differcut direction. Massachusetts: *Wheelock v. Wheel-right*, 5 Mass. 104 (1809); *Homer v. Thwing*, 3 Pick. (Mass.) 492 (1826); *notch v. Hawes*, 12 Pick. (Mass.) 186, 22 Am.Dee. 414 (1831); *Lucas v. Trumbull*, 15 Gray (Mass.) 306 (1860); *Hall v. Corcoran*, 107 Mass. 251, 9 Azn.Rep. 30 (1871); *Perham v. Coney*, 117 Mass. 102 (1875); Michigan: *Fisher v. Kyle*, 27 Mieb. 454 (1874); *Euggles v. Pay*, 31 Mich. 141 (1875); West Virginia: *Carney -cc Itease*, 00 W.Va. 676, 55 SE. 729 (1906).

15. English: *Ross v. Johnson*, 5 Burr. 2825, 08 Bug. Rep. 453; *Severin v. Keppel*, 4 Esp. 157, 170 Eng.Eep. 674 (1802); *M’Combie v. Davles*, 6 East 540, 102 Engflep. 1393 (1805); *flevereux v. Barclay*, 2 Earn. & Aid. 704, 106 Eng.Rep. 521 (1819); *Williams v. Geese*, 3 Bing. (N.C.) 849, 132 Eng.Rep. 637 (1837); Alabama: *Davis v. Hurt*, 114 Ala. 146, 21 So. 468 (1897); Illinois: *Sturges v. Keith*, 57 111. 451, 11 Am.Rep. 28 (1870); Maine: *Wing v. Mill!ken*, 91 Me. 857, 40 At!. 138, 64 Am.St.Rep. 238 (1898); Massachusetts: *Brown v. Waterman*, 10 Cash. (Mass.) 117 (1852); *Bowlin v. Nye*, 10 Cush. (Mass.) 416 (1852); *Dorman v. Kane*, 5 Allen (Mass.) 38 (1862); *Robinson v. Austin*, 2 Gray (Mass.) 564 (1854); New Hampshire: *Moses v. NorrIs*, 4 N.H. 304 (1824); New York: *Hawkins v. Hoffman*, a Hill (Nt) 586, 41 Arn.Dec. 767 (3844); *Cairnes t Dleeeker*, 12 Johns. (N.Y.) 300 (1815); *McMorris v. Simpson*, 21 Wend. (N.Y.) 610 (1839).

possession of both.’° **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)<sup>1</sup>

- 7C. 1 Cbitty, *Treatise on Pleading and Parties to Actions, with Precedents and Forms*, c. II, Of the Forms of Action, 175 (16th Am. ed., by Perkins, Springfield 1870); English: *Wilbraham v. Snow*, 2 Wms. Sauml. 41(h), 85 Eng.Bep. 624 at €27 (1609); *Holliday v. Caniscil*, 1 P.R. 658, 99 Eng.Rep. 1305 (1787); *Smith v. Stokes*, 1 East 363, 102 Eng.flep. 143 (1501); Illinois: *Benjamin v. Stremple*, 13 Ill. 456 (1851); New York: *St. John v. Standing*, 2 Johns. (N.Y.) 468 (1807); *Mersereau v. Norton*, 15

Johns. (N.Y.) 179 (1818); Gilbert v. Dickerson, 7 Wend. (N.Y.) 449, 22 Am.Dec. 592 (1831); Parr v. Smith, 9 Wend. (N.Y.) 338, 24 Am.Dec. 162 (1832); North Carolina: Cole v. Terry, 19 NC. 252 (1837); Pennsylvania: Heller v. Eufsmith, 102 Pa. 534 (1883), Contra: by Statute, see Benjamin v. Strcmple, 13 Ill. 466 (1851).

- 7- 1 Chitty, Treatise on Pleading and Parties to Actions, with Precedents and Forms, e. II, Of the Forms of Action, 176 (16th Am. ed., by Perkins, Springfield, 1876); English: Wilbrahani v. Snow, 2 Wins.Saund. 47(h), 85 Eng.Rep. 624 at 627 (1669); Martyn v. Knowllys, 8 T.R. 146, 101 EngRep. 1333 (1799); Massachusetts: Weld v. Oliver, 21 Pick. (Mass.) 559 (1839); Delaney v. Root, 99 Mass. 540, 97 AmUec. 52 (1868); Burbank v. Crooker, 7 Gray (Mass.) 158, 66 Am.Dec. 470 (1856); Michigan: Webb v. Mann, 3 Mich. 139 (1854); Tolan v. Hodgeboom, 38 Mich. 624 (1878); Baylis v. Cronkite, 39 Mich. 413 (1878); New York: Wilson v. Reed, 3 Johns. (N.Y.) 175 (1808); Hyde v. Stone, 9 Cow. (N.Y.) 230, IS Am.Dec. 501 (1828); Hyde v. Stone, 7 Wend. (N.Y.) 354, 22 Am.Dec. 582 (1831); Mumford v. McKay, S Wend. (N.Y.) 442, 24 Am.Dec. 34 (1832); Nowlen v. Colt, C Hill (N.Y.) 401, 41 Am.Dec. 756 (1844); North Carolina: Lowthrop v. Smith, 2 N.C. 255 (1790); Pennsylvania: Browning v. Cover, 108 Pa. 595

(1885),

la Channon v. Lush, 2 Lans. (N.Y.) 211 (1870), 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. Fiquet v. Allison, 12 Mieb. 328, 86 Am.Dec. 54 (1864); McLaughlin -v. Saucy, 46 Mich. 219, 9 N. W. 256 (1881).

And in Needham v. Hill, 127 Mass. 133 (1879), 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

## Ch. 9

### Sec. 103

#### ACTION OF TROVER

221.

(III) By a *Wrongful* Detention.—Again, the mere detention of goods, without right, may constitute a conversion.<sup>8</sup> 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.**<sup>9</sup>

possible, the latter may maintain Trover against **him. See, also, Ripley v. Davis, 15 Mich, 75, 90 Am. Dec. 262 (1866),**

It has also 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 (1874); Grove v. Wise, 39 Mich. **161 (1878).**

78. **As where a carrier or other bailee wrongfully refuses to deliver goods** after a proper demand and payment of any money that may be due. Northern Transp. Co. of Ohio v. Selllck, 52 Ill. 249 (1866). See, also, Massachusetts: Chamberlain v. Shaw, 18 Pick. (Mass.) 278, 29 Am.Dec. 586 (1886); Adams v. Clark, 9 Cush. (Mass.) 215, 57 Am.Dec. 41 (1852); **Richardson v. Rice**, 104 Mass. 150, 6 Am.Rep. 210 (1870); Michigan: Donlin v. MeQuade, 61 Mich. 275, 28 NW. 114 (1888); Monroe v. Whipple, 56 Mich. 516, 23 W. 202 (1885); New York: McLean v. Walker, 10 Johns. (N.Y.) 471 (1818); Marshall v. Davis, 1 Wend. (N.Y.) 109, 19 Am.Dec. 468 (1828); Bryce v. Brooks, 26 Wend. (N.Y.) 367 (1841); Pennsylvania: Wheeler & Wilson Mfg. Co. v. Hell, 115 Pa. 487, 8 Atl. 610, 2 AmSt.Rep. 575 (1887).

<sup>9</sup>- English: Baldwin v. Cole, 6 Mod. 212, 87 Eng. Rep, 964 (1705); Level! v. Martin, 4 Taunt. 801, 128 Eng.Rep. 545 (1813); Forsdick v. Collins, 1 Stark. **173**, 171 Eng.Rep. 437 (1816); Alabama: Kyle v. Gray, 11 Ala. 233 (1847); Illinois: Gibbs v. Jones, 46 Ill. 319 (1868);

Bane v. **Detrick**, 52 Ill. 19 (1869); Howlitt v. Estelle, 92 Xli. 218 (1879); Hayes v. Massachusetts Mut. Life Ins. Co., 125 Ill. 626, 18 N.E. 322, 1 L.R.A. 303 (1888); Unlon Stockyard & Transit Co.

v. **Mallory Son & Zimmerman Co.**, 157 Ill. 554, 41 N. B. 888, 48 Am.St.Rep. 341 (1895); Massachusetts:

Hunt v. Holton, 13 Pick. (Mass.) 216 (1882); Gil-more v. Newton, 9 Allen (Mass.) 171, 85 Am.Dec. 749 (1864); Carter v. Klingman, 103 Mass. 517 (1870); Pierce v. Benjamin, 14 Pick. (Mass.) 356, 25 Am. Dec. 396 (1883); Michigan: Hake v. Buelj, 50 Mich. 89, 14 N.W. 710 (1883); New Hampshire: Hyde v. Noble, 13 N.H. 494, 38 Am.Dec. 508 (1843); New

**York: Tompkins v. Halle, 8 Wend. (N.Y.) 406 (1831); Bates v. Conkling, 10 WeniL (N.Y.) 389 (1837); Con-nab v. Hale, 23 Wend. (N.Y.) 462 (1841); Pennsylvania: Horsefield v. Cost, Add. (Pa) 152 (1798); South Carolina: Davis v, Duncan, 1 McCord (S.C.) 213 (1821); Virginia: Newman r Newsom, 1 Lelgh**

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,

A demand and refusal are necessary in all cases where the defendant became, in the first instance, lawfully possessed of the goods, and the plaintiff cannot show some distinct misuse or misappropriation.<sup>80</sup> 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 conver(Va.) 80, 19 Am.Dec. 739 (1829); Vermont: Riford

v. Montgomery, 7 Vt. 418 (1835); Courtis v. Cane, 32 Vt. 232, 76 Am.Dec. 174 (1859); Grant v. King, 14 Vt, 367 (1842).

A demand, therefore, is not necessary where goods have been obtained by means of a fraudulent purchase, Illinois: Ryan v. Brant, 42 Ill. 78 (1866);

Massachusetts: Thurston v. Blanchard, 22 Pick. (Mass.) 18, 33 Am.Dec. 700 (1839); Stevens v. Austin, I Metc. (Mass.) 557 (1840); Riley v. Boston Water Power Co., 11 Cush- (Mass.) 11 (1853). Nor where possession was taken under a wrongful claim of ownership, Bruncr v. Dyball, 42 Ill. 34 (1866); nor **where the defendant has sold the property and** appropriated the proceeds, Howitt v. Estelle, 02 Ill. 218 (1870). See, also, Daniels v. Foster & Kiciser, 95 Ore. 502, 187 P. 627 (1920),

80. English: Wilbraham v. Snow, 2 Wms.Saund. 47 (e), 85 EngRep. 026 (1669); Edwards v. Ilooper, 11 Mees. & W. 306, 152 Eng.Rep. 844 (1843); Dewell v. Moxon, 1 Taunt. 391, 127 Eng.Rep. 885 (1809); Jones v. Fort, 9 Barn. & C. 764, 109 Eng.Rep. 284 (1829); Connecticut: Thompson v. Rose, 16 Conn. 71, 41 Am. flec. 121 (1844); Illinois: **Bruaer v. Dyball, 42 Ill. 34 (1866);** Kentucky: Kennet v. Robinson, 2 J.J.Marsh. (Kyc) 84(1829); Maine: Carleton v. Lovejoy, 54 Me. 445 (1867); Massachusetts: Vincent v. Cornell, 13 Pick. (Mass.) 294, 23 Am.Dec. 683 (1882); Bond v. Ward, 7 Mass. 123, 5 Am.Dec. 28 (1810); Baker v. Lothrop, 155 Mass, 376, 29 N.E. 643 (1886); Michigan: **Rodgers v. Brittain, 39 Mich. 477 (1878);** Clink

v. **Gina, 90 Mich. 135, 51 N.W. 193 (1892); New**

**Hampshire: Farley v. Lincoln, 51 N.H. 580, 12 Am. Rep. 182 (1872);** Cooper v, **Newman, 45 N.H. 339 (1864)** Pennsylvania~ Yenger v. wallace, 57 P& 365 (1868); South Carolina: Pettigru v. Sanders, 2 **Bailey (S.C.) 549 (1831).**

#### OFFENSIVE PLEADINGS

sian, and a demand and refusal must be shown to support Trover.<sup>81</sup>

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; ~ and it must be made upon the party who, at the time, has the possession of the goods by himself or his agent or servant, or the general controlling power over them.<sup>83</sup> Where a demand is necessary, it must be made before the action is brought.<sup>85</sup> 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.<sup>85</sup> It need not be made on the party

Si. Severin v. Keppe], 4 Esp. 156, 170 Eng.Rep. 674 (1802).

~Vhe,-e a carrier fails to deliver goods, there must be a **demand** and refusal before bringing Trover. English: Dewell v. Moxon, I Taunt. 391, 197 Eng.Rep. 885 (1809); New **York: Brown v, Cook, 9 Johns. (N. V.) 361 (1812).**

82. English: Mills v. Ball, 2 J3os. & P. 457, 126 Eng. Rep, 1382 (1801); May v. Harvey, 13 East 197, 104 Eng.Rep. 345 (1811); Philips v. Robinson, 4 Bing. 106, 130 Eng.flep. 708 (1827); Maine: Hagar v. Randall, 02 Mc. 439 (1873); Massachusetts: Delano v. Curtis, 7 Allen (Mass.) 470 (1863).

83. English: Nieoll v. Glennie, 1 M. & 3. 588, 103 Eng. flop. 220 (1813); Edwards v. Ilooper, 11 M. & W. 366, 152 Eng.Rep. 844 (1843); Illinois: Sturges v. Keith, 57 111. 451, 11 Am-Rep. 28 (1870); Massachusetts: Viocent v. Cornell, 13 Pick. (Mass.) 294, 23 Am.Dec. 083 (1832); Bayley -v. Bryant, 24 Pick. (Mass.) 198 (1839); Griswold v. Plumb, 13 Mass. 298 (1816); New Hampshire: Baker v. Beers, 64 N.H. 102, 6 Atl. 35 (1880); New York: Mitchell v. Witlianis, 4 Hill (N.Y.) 13 (1842); Vermont: Knapp v. Winchester, 11 Vt. 351 (1839).

81. English: *Morris v. Pugh*, 3 Burr. 1242, 97 Eng. Rep. 811 (1701); Maine: *Hagar v. Randall*, 62 Me. 439 (1873); **Michigan**: *Galrin v. Calvin Brass & Iron Works*, 81 Alich. 10, 45 NW. 654 (1890); New Hampshire: *White v. Demary*, 2 N.H. 546 (1828); New York: *Storm v. Livingston*, 6 Johns. (N.Y.) 44 (1810); **Rhode Island**: *Cross v. Barber*, 16 RI, 266, 15 Atl. 09 (1888).

personally. A demand in writing left at his house is sufficient.<sup>85</sup> It must be absolute in its terms, and not qualified with conditions,<sup>83</sup> **and it must not be excessive.**<sup>85</sup>

Where a demand is necessary, there **must**

also be a refusal.<sup>80</sup> 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.**<sup>90</sup>

Forms of Action, 175 (16th Am. ed., by Perkins, Springfield 1876).

8-. *Logan v. Houlditch*, 11 Esp. 22, 170 Eng.Rep. 268 (1793).

87. *Rushworth v. Taylor*, 12 L.J.Q.B. 80, 114 Eng. Rep. 674 (1842).

88- *Abington v. Lpscombe*, 1 Q.B. 776, 113 Eng. Rep. 1328 (1839).

89. *Taylor v. Ilanlon*, 103 Pa. 504 (1883).

90. 1 Chitty, *Treatise on Pleading and Parties to Actions, with Precedents and Forms, c. II, Of the Forms of Action*, 179 (16th Am. ed., by Perkins, Springfield 1876); English: *Smith v. Young*, 1 Camp. 439, 170 Eng.Rep. 1014 (1808); *Green v. Dunn*, 3 Camp. 215, 170 Eng.Rep. 1359 (1811); Connecticut: *Clark v. Hale*, 34 Coan. 398 (1867); 1111-nois: *Race v. Chandler*, 15 Ill.App. 532 (1884); *Hill v. Belasco*, 11 Ill.App. 194 (1885); *Leman v. Best*, 30 Ill.App. 323 (1888); Florida: *Robinson v. Hartridge*, 13 Fla. (Sup.Ct.) 501 (1870); Maine: *Hagar v. Randall*, 62 Me. 439 (1873); Massachusetts: *Johnson v. Couillard*, 4 Allen (Mass.) 446 (1862); *Gilmore v. Newton*, 9 Allen (Mass.) 171, 85 Am.Dec. 749 (1864); Michigan: *Daggett v. Davis*, 53 Mich. 35, 18 N.W. 548, 51 Asn.llep. 91 (1884); New Hampshire: *Sargent v. Gile*, 8 N.H. 325 (1836); New York: *Hallenbake v. Fish*, 5 Wend. (N.Y.) 547, 24 Am.Dec. 58 (1832); Pennsylvania: *Harsefield v. Cost*, Add. (Pa.) 152 (1793); **Blakey v. Douglas**, 6 Atl. (Pa-Sup.) 898 (1886); Vermont: *Yale v. Saunders*, 16 Vt. 243 (1844); *Farrar v. Rollins*, 37 Vt. 295 (1864).

An unconditional refusal to restore goods will amount to a conversion, though, for some particular reason,

222

### Ch. 9

85. 1 Chitty, *Treatise on Pleading and Parties to Actions, -with Precedents and Forms, e. 11, Of the*

### Sec. 105

### ACTION OF TROVER

223

### DECLARATION IN TROVER—ESSENTIAL

#### ALLEGATIONS: (4) THE DAMAGES

104. **The Declaration must state the Damages which are the legal and natural consequence of the Conversion and the amount laid should cover the value of the goods and other actual Damages.**

THE amount of Damages which is recoverable in this action is usually measured by **the value of the goods at the time of conversion**, with interest; **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 therefore should be large enough to cover the actual Damages inflicted.<sup>92</sup>

there may be a right to detain the goods, as where **the** party has a lien on them. The reason for the refusal, in such a case, should be stated. *Kellogg v. Holly*, 29 Ill, 437 (1862).

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. English: *Mills v. Ball*, 2 Bos. & P. 464, 126 Eng.Rep. 1382 (1801);

Clark v. Chamberlain, 2 M. & W. 78, 150 Eng.Rep. 676 (1836); North Carolina: Dowd v. Wadsworth, 13 N.C. 130, 18 Am. Dec. 567 (1829); Texas: Blankenship v. Berry, 28 Tot. 448 (1866),

91. Illinois: Hayes v. Massachusetts Mut. Life Ins. Co., 125 Ill. 632, 18 N.E. 322, 1 LEA, 303 (1888); North Carolina: Waller v. Bowling, 108 NC, 289, 12 S.E. 990, 12 L.R.A. 261 (1891). See, also, Leoncini v. Post, 13 N.Y.S. 825 (1891).

The general rule that the plaintiff cannot recover a larger amount than he alleges to be due in his Declaration is, of course, applicable to Trover. I. H. Pitts & Son Co. v. Bank of Shiloh, 20 Ga.App. 143, 92 SE. 775 (1917).

In Trover, without any specific *ad thm nitm* clause in the Declaration, but with a prayer that the defendant appear and answer, the amount of Damages asked for will be construed to be the alleged value of the property sued for. I. H. Pitts & Son Co. v. Bank of Shiloh, 20 Ga.App. 143, 92 SE, 775 (1917).

92. An Allegation that the Conversion was "to the great Damage" of the plaintiff, has been held sufficient [Mattlingly v. Darwin, 23 Ill. 618 (1860)], though this, It would seem, could only be because the statement had been made elsewhere than in the *ad damnun.* clause, of the value of the goods, as

The defendant may lessen the amount of the recovery by showing, in Mitigation of Damages, that the plaintiff has himself recovered the property, or that it has been restored to him and accepted; but this is matter of Defense, and the Allegation of the Declaration must still be made.<sup>93</sup> As in other actions, the Form of Laying Damages will vary, depending on whether they are General or Special. The plaintiff might recover Special Damages in Trover, if they were laid in the Declaration. And the Jury might, on the Trial or Inquisition of Damages, by authority of a statute,<sup>94</sup> give Damages in the nature of interest over and above the value of the goods at the time of the conversion or seizure, in an actions of Trover or Trespass *de Bonis Asportatis*.

#### STATUS UNDER MODERN CODES, PRACTICE ACTS AND RULES OF COURT

105. While the Codes and Practice Acts have taken the labels from the various Common Law Actions, and thereafter every action became in form a Special Action on the Case, the intrinsic differences between the actions as known to the Common Law were not abolished. Hence, if a plaintiff sues, under the

some averment was certainly necessary as a basis of computation.

In general, as to Damages in this action, see Iowa: Hartley State Bank v. McCorkell, 91 Iowa 660, 6 N.W. 197 (1880); Kansas: Simpson v. Alexander, 35 Kan. 225, 11 Pac. 171 (1886); Massachusetts: Stone v. Codman, 15 Pick, (Mass.) 297 (1834); New Hampshire: Kingsbury-v. Smith, 13 N.H. 109 (1842); Texas: Ramsey v. Burley, 72 Tex. 194, 12 S.W. 5G (1888); Wisconsin: Benjamin Wagon & Car II. R. Co. v. Merchants' Etch. Bank, 63 Wis. 470, 23 N.W. 592 (1885). See, also, Bowers, A Treatise on the Law of Conversion, c. XII, § 693 (Boston 1917).

93. Stirling v. Garritee, 18 Md. 468 (1862). See, also, the following cases: Georgia: Morton v. Fricke Co., 87 Ga. 230, 13 S.E. 463 (1891); Massachusetts: Dahill v. Booker, 140 Mass. 308, 5 N.E. 496, 54 Am.Rep. 465 (1880); Vermont: Hart v. Skinner, 16 Vt. 138, 42 Am.Dec. 500 (1844); Yale v. Saunders, 16 Vt. 243 (1844); Wisconsin: Cernaban v. Chrisler, 107 Wis. 645, 83 NW. 778 (1900).

94. 3 & 4 Win, IV, r. 42, 29; 73 Statutes at Large 280 (1883).

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224

#### OFFENSIVE PLEADINGS

#### Ch. 9

Code, for the conversion of property, when the injury consisted of improper interference with the property of another, for which the remedy was Case, the action will still be dismissed.

THE Status of the Action of Trover under the Modern Law was clearly stated a few years after the adoption of



the New York Code in 1848, in the case of *Goulet v. Asset*? ~ **In that case, the plaintiff, a mortgagee** of chattels which had been sold under an execution against the mortgagor, brought the action, **in the nature** of Trover or Trespass, on the theory that the defendant had taken, sold and converted the goods to his own use, and that plaintiff was entitled to recover the value of the goods. At the Trial, the Court instructed the Jury to assess the value of the goods, and to find a Verdict for the plaintiff **for that value, subject to the opinion of the Court**, with power to dismiss the Complaint. The Jury fixed the value of the property at \$850.00 and the Court at General Term entered **Judgment** for this amount, whereupon the defendant appealed. In reversing the **Judgment and granting a New Trial, SeMen,**

3. declared: "Although the Code [of Procedure] **has abolished** ° all distinction be-

95. 22 N.Y. 225 (1860).

94. The advantage of an Action of Trover as opposed to an Action of Indebitatus Assumpsit for the **collection of a debt, is** clear. It gives or gave a right **to hold** to bait during the pendency of the action; **and a right to imprisonment upon Execution, In** addition to the usual resort to the property of the defendant. *Salt Springs National Bank v. Wheeler*, 43 N.Y. 492, S Am.Rep. 564 (1872).

See, also, Section 6101 of the New York Civil Practice **Law** and Rules (1963), which provides for an order for the arrest of a defendant, other than a woman, as **a** provisional remedy, <sup>1</sup> where there is a cause of

tween the mere Forms of Action, and every Action is now in Form a Special Action on the Case, yet actions vary in their **nature, and there are intrinsic differences** between them which no law can abolish, **It is impossible to make an action for a** direct aggression upon the plaintiff's rights, by taking and disposing of his property, the same thing, in substance or in principle, as an action to recover for **the consequential** injury resulting from an improper interference with the property of another, in which he has a contingent or prospective interest. The mere Formal Differences between such Actions are abolished; the substantial Differences remain as before. The same proof, therefore, is required in **each of these Two Kinds of Actions, as before the Code**, and the same rule of **Damages applies. Hence, in an action** in which the plaintiff establishes a right to recover, upon the ground that the defendant has wrongfully converted property to the possession of which the plaintiff *was* entitled at the time of the conversion, the proper measure of

**Damages still is, the value of the property; while in an action** in which the plaintiff recovers, if at all, upon the ground that the defendant has **so conducted** himself in the **exercise of a legal right** in respect to another's property, as unnecessarily and improperly to reduce the value of a lien, which the plaintiff could only enforce **at** some subsequent day, **the damages must, of course, depend upon** the extent to which that lien has been unpaired."

**action to** recover damages for **the conversion of** personal property".

See.

## CHAPTER 10

### THE ACTION OF EJECTMENT'

106. Scope of the Action.

107. Ejectment—Distinguished From and Concurrent ~with Other Actions.

108. Forms of Declaration and Common Consent Rule.

109. Declaration in Ejectment—Essential Allegations:

(1) **In General.**

110. Declaration in Ejectment—Essential Allegations:

(2) The Plaintiff's Right, Title, Interest or Possession.

111. Declaration in Ejectment—Essential Allegations:

(3) **The Wrongful Ouster or Dispossession.**

112. Declaration in Ejectment—Essential Allegations:

(4) The Damages.

113. The Judgment in Ejectment.

114. Declaration in Trespass for Mesne Profits—Essential Allegations:

(1) **In General.**

115. Declaration in Trespass for Mesne Profits—Essential Allegations:

(2) **The Plaintiff's Right, Title, Interest or Possession,**

116. Declaration in Trespass for Mesne Profits—Essential Allegations:

(2) The Ouster or Ejectment.

117. Declaration in Trespass for Mesne Profits—Essential Allegations:  
 (4) The Damages.
118. Status of Ejectment and Trespass for Mesne Profits Under Modern Codes, Practice Acts and Rules of Court.

#### SCOPE OF THE ACTION

106. **The Action of Ejectment lies to recover possession of Real Property adversely held by the defendant. In order that the Action may be maintained:**

#### (I)

**The Plaintiff must have the right to possession at the time the Action commenced; prior possession is sufficient as against a mere intruder or trespasser.**

**(II) The plaintiff must have been dispossessed or ousted.**

**(III) And the defendant must be in the adverse and illegal possession of the land, actual or constructive, at the time the Action is brought.**

**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, during the defendant's possession, must be recovered at Common Law in a separate Action of Trespass for Mesne Profits, 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.**

1. In general, on the origin, history and development of the Action of Ejectment, see:

Treatises: Malloy, *Quare Impedit*, Containing an Abridgment of the Law Concerning the Patronages of Churches, the Titles of Ecclesiastical Persons, &c., and Precedents of Pleadings, &c. (London 1737); 3 Blencstone, *Commentaries on the Laws of Eng. land*, c. II, Ejectment, 199 (1st Am. ed., Philadelphia 1772); Gilbert, *The Law and Practice of Ejectments* (London 1751); Runnington, *The History, Principles and Practice, Ancient and Modern, of the Legal Remedy by Ejectment, and the Resulting Action for Mesne Profits* (Amer. ed. by Ballantine, New York 1800; London 1820); Wareing, *The Practice of the Court of Common Pleas at Lancaster in Personal*

225

#### OFFENSIVE PLEADINGS

#### Ch. 10

*THE* Action of Ejectment is a Form of the Action of Trespass *Quare Ckru-sum Fregit*, extended to the situation where a trespasser

Actions and Ejectments (London 1837); Dorsey, *Lectures Upon the Principles and Practice of the Action of Ejectment in Maryland* (Annapolis 1841); Yeo and Billing, *The Practice of the Plea Side of the Court of Exchequer, in Ireland, in Personal Actions and Ejectments* (Dublin 1845); Longfield, *A Treatise on the Action of Ejectment, in the Superior Courts, in Ireland*, (2d ed. Dublin 1844); Adams, *Treatise on the Principles and Practice of the Action of Ejectment* (Ed. by Tillinghast, New York 1846); Dyett, *The Law and Practice Relating to Summary Proceedings to Recover Possession of Lands in Certain Cases* (New York 1545); Cole, *The Law and Practice in Ejectment* (London 1557); Tyler, *Ejectment and Adverse Enjoyment* (Albany 1870); Tyler, *S. Treatise on Remedy by Ejectment* (Albany 1876); Sedgwick and Wait, *A Treatise on the Trial of Title to Land, Including Ejectment* (2d ed., New York 1886); Newell, *A Treatise on the Action of Ejectment* (Chicago 1802); Stephen, *Principles of Pleading in Civil Actions*, c. I, Ejectment, 53 (3d Am. ed. by Tyler, Washington, D. C. 1593); 2 Pollock and Maitland, *History of English Law*, c. IV, The Term of Years, [and the Rights of the Tenor] 4, 105—112 (Cambridge 1595); Warvelle, *Ejectment, A Treatise on the Principles and Practices of the Action of Ejectment and Statutory Substitutes* (Olden-go 1905); Martin, *Civil Procedure at Common Law*, Art. 1, c. V, Ejectment, § 165—171, p. 140 (St. Paul 1905); Martin, *Civil Procedure at Common Law*, Note IV, 359 (St. Paul 1905); Jenks, *Short History of English Law*, c. Xf, Ejectio Firznae, 173—178 (Boston 1913); Ames, *Lectures on Legal History*, Lecture XIX, Injuries to Realty, 223 (Cambridge 1913); Shipman, *Handbook on Common Law Pleading*, c. LW, Ejectment and the Real Actions, II 63—75, pp. 170—191 (30 5. by Ballantine, St. Paul 1923); 2 Holdsworth, *History of English Law*, c. V, Ejectment, 581 (4th ed., Boston 1931); 3 Id. c. I, 214—217, 7 Id. c. I, 4; Patton, *Land Titles* (Kansas City 1938); Maitland, *The Forms of Action*, c. II, Ejectment, 57 (Cambridge 1848); Plucknett, *A Concise History of the Common Law*, Bk. II, Pt. I, c. I, The Rise of Ejectment, 354 (4th ed., London 1948); Morgan, *The Study of Law*, e. II, Ejectment, 112 (2d ed. Chicago 1848); Walsh, *A History of Anglo-American Law*, c. VIII, Development of Ejectment from the Writ of Ejectio Firmae, § 76, 155—III (2d ed. Indianapolis 1932).

**Articles; Wire** The Plea of Ius Tertii, in Ejectment, **41 L.Q.Rev.** 139 (1925); Hutchins, *Equitable Ejectment*, **26 Col.L.Rev.** 436 (1926); Pbilbrick, *Seisin and Possession as the Basis of Legal Title*, 24 Iowa L. Rev. 268, 299, note (1939); flargreaves, *Terminology and Title in Ejectment*, 56 L.Q.Rev. 376 (1940);

takes and keeps the land.<sup>2</sup> At Common Law estates in land were of two kinds—freehold and non-freehold estates. A freehold estate was a life estate or any estate above a life estate; a non-freehold estate was any estate less than a life estate. In legal theory, if the owner of a freehold estate was ousted from possession, he was, at the Common Law, afforded a number of remedies in the form of some one of the Ancient Real Actions,<sup>3</sup> such, for example, as the Writ of Novel Disseisin, under which, if carefully selected and patiently pursued, he might recover possession and establish his Right or Title. The lessee of a term, or the holder of a non-freehold estate, however, if ousted, might

recover only Damages for the wrongful ouster, but he could not regain possession of the land, nor could he, in that Form of Action, recover

Hohdsworth, Terminology and Title in Ejectment— A Reply, 56 L.Q.Rev. 479 (1940).  
Comments: Ejectment—Law and Practice of, 20 Leg. Observer, 195, 259, 307, 471 (1840); Ejectment for Encroachment on Land Above the Surface, 19 Flax-v. **L.Rev.** 369 (1906); Encroachment Below Ground or Well Above the Surface—Is Ejectment an Adequate Remedy? 27 Yale L.J. 265 (1918); Pleading—Prayer **for Equitable Belief in Action of** Ejectment, 36 Yale L.J. 279 (1926); May a Tenant Find an Acquired Title in a Suit by a Landlord? 15 Cal.L.Rev. 510 (1927); Ejectment—Title in a Stranger, 28 Mich.L. **Rev.** 184 (1929); Effect of Failure to Plead Statute of Limitations as an Affirmative Defense in an Action of Ejectment, 1949 Ill.L.Forum 170 (1949).  
Annotations: Statutory Remedy of Forcible Entry and Detainer as Exclusive Remedy of Occupant Dispossessed Without Legal Process, 154 A.L.R. 181 (1945); Instructions in Ejectment on Rule that Plaintiff Must Recover on Strength of Own Title, 159 ALit. 646 (1945); Remedy of Tenant Against Stranger Wrongfully Interfering with his Possession, 12 **A.L.R.2d 1192**, at 1197 (1950); Mandatory Injunction to Compel Removal of Encroachments by Adjoining Landowners, 28 A.L.B.2d 679 (1953).

2. *Cunningham v. Macon & B. R. R. Co.*, 100 U.S. 446, 3 S.Ct. 292, 609, 27 L.Ed. 992 (1853), in which Miller, 1, declared: “Ejectment is in its essential character an Action of Trespass, with the power in the Court to restore the possession to the plaintiff as part of the Judgment”

3. See Chapter 2, The Development of the Common Law Forms of Action, for an account of the Ancient **Real Actions**.

226

## Sec. 106

### ACTION OF EJECTMENT

227

Damages for Mesne Profits’—the subsequent rents and profits between the date of the original ouster and the date of the recovery of possession.

To provide an adequate remedy for the holder of a Non-freehold Estate, the Action known as Trespass for Ejectment was developed. But at this point, it should be pointed out that this Newly Developed Remedy was available only to the holder of a Non-freehold Estate, to wit, a tenant for years, who was regarded as having only a mere Chattel interest and not an interest in Real Estate; it was not available to vindicate the right of one who was asserting Title to a freehold interest in land. If the plaintiff desired to try Title to the land in question, he was still required to invoke one of the Ancient Real Actions,<sup>5</sup> which, as we have pointed out in an earlier chapter, were highly dilatory, expensive and unduly technical.<sup>6</sup>

**In the fifty to a hundred years after 1499, the year in which it was held that the tenant could recover the Term as well as Damages, this New Action of Trespass for Ejectment**

& Keigwin, Cases in Common Law Pleading, c. II, The Common Law Actions, The Action of Ejectment, 123 (2d ed., Rochester 1934).

...These Actions, some sixty in number, are discussed in Chapter 2, The Development of the Common Law Forms of Action.

“The Common Law furnished an endless number of Real Writs to determine the rights of property in, or possession of, a freehold estate. The highest technical skill and learning were requisite to comprehend and define the nature and purposes of these various writs, the distinctions between which were refined, abstruse and often scarcely perceptible. In Personal Actions, however, there were never many Writs at Common Law. This very scarcity made personal actions attractive in early times, the pleader being seldom at a loss to know which Writ to choose; while in Real Actions the most experienced practitioner, exercising the utmost care, frequently sued out a Real Writ of the wrong degree, class or nature, thereby rendering the proceeding of no avail, and frequently imperilling the demandant’s right to the proper writ or remedy. Not only were the distinctions between Real Writs very technical, and the selection of the proper writ a delicate task, but

became such an effective instrument for trying the Right of Possession which, in substance, amounted to trying Title, that the landlords, who, in Legal Contemplation, already had an Adequate Remedy, in the Form of the Real Actions,<sup>7</sup> for the recovery of Possession, began to seek ways and means whereby the New Remedy—now known as Ejectment—and open only to the *holders of non-freehold estates*, might be made available to the *holders of freehold estates*, without violating the Common-Law theory that the remedy was available solely for the use of *non-freehold owners*.

This end was to be accomplished by working out a scheme whereby the Action of Trespass *Quare Ejectione Firmæ*—Trespass for Ejectment—could be adapted to the use of the owners of freehold estates without violating the fundamental theory of the action

—that it was available only to the owners of non-freehold interests in land. And it was the ensuing effort which ushered on to the stage of procedural legal history the law’s most famous fiction—the Fictitious Proceeding in Ejectment—which did not reach full fruition except as an incident of passing through three stages of development:

*First, wherein there was no fiction whatever involved; second, where there was a resort to fiction, but wherein the steps upon which the fiction was grounded were actually true in*

the proceedings under them were so inconveniently long, tedious and costly, and the resources for delay so numerous, that the Judgment when obtained was often a tardy and inadequate remedy.” Sedgwick and Wait, Principles and Practice Governing the Trial of Title to Land, c. I, ~ 2, p. 3 (New York, 1882).

7. The Common Law believed in an economy of remedies. Where the Law supplied a remedy to a given group of litigants, like the owners of freehold estates, they were generally limited to that remedy. When, therefore, the New Action of Trespass for Ejectment was created, there naturally followed a period of time during which the new remedy remained unavailable to the holders of freehold estates.

229

## OFFENSIVE PLEADINGS

Cli. 10

(I) *Where the Requisite Conditions to Support Trespass Quare Ejectione Firmae were Actual.*—Where A, a freeholder, actually leased a Blackacre to B, who took actual possession, and was thereafter dispossessed, B, the tenant, might bring an Action of Trespass for Ejectment. C, the disseisor, usually defended by asserting a Title paramount to that of A, the lessor. Thus, the merits of B’s Title under A, and C’s title, were brought into opposition and comparison, as an incident of B’s claim to a right of possession. The Judgment which followed necessarily determined who had the true Title. And by this process the landlord, through the suit of his tenant, B, against C, for interference with B’s possession, in effect avoided the necessity of instituting a Real Action.<sup>9</sup>

(II) *Where the Requisite Conditions to Support Trespass Quare Ejectione Firmae were Fictitious, but Grounded on True Facts,*

—It was soon discovered that the same result could be achieved by resort to a fictitious proceeding which, however, in the beginning, was based on a true state of facts. The scheme devised worked substantially as follows. The Landlord, A, desiring to try Title to land not previously under lease, recruited two friends or collaborators, A and B, who then made an actual Entry upon the land, subsequently to be spoken of as the Entry. Such Entry was required in order to avoid being charged with the common-law crime known as maintenance,<sup>10</sup> or promoting

~ 4 Minor, Institutes of Common and Statute Law, Division 111, 390 (Richmond 1591—1895).

L See Keigwin, *Cases in Common Law Pleading*, e. II, The Common Law Actions, § 52, The Action of Ejectment, note 6 (2d ed., Rochester 1934).

19. “It is a general rule, that no right of entry, or re-entry, can be reserved, or given to any other person, than the feoffee, donor or lessor, Ac, and their heirs; and such right of entry cannot be assigned

lawsuits, as every lease of real estate by an owner not in possession was bound to result in some form of action. A and B, now being on the land in question, L, the real disseisor, then handed an actual lease of the premises to A, hereinafter to be known as the Lessee, and then instructed B, hereinafter to be known as the Casual Ejector, to eject A, the lessee, which he proceeded to do, all of which activity was unknown to the Actual Tenant of the premises, Z. Thereafter, A, the tenant selected by L, the landlord, instituted a suit against B, his disseisor, under the scheme. Thus, the official line-up became A, ex dem. (lessee of) L, the landlord, v. B, the Casual Ejector. As B put up no Defense, Judgment was entered for A, a Writ of Execution issued against Z, the actual tenant, and A was placed in possession, after which he surrendered his lease to the landlord. The student should observe at this point that so far there has been no feigning of the facts. The plaintiff made a bona fide Entry into the land under dispute, thereafter on the land he executed an actual Lease to a real lessee, who immediately took possession, after which he was actually ejected. Thus, every element of the case was of actual occurrence.

And! thus, by this process, the landowner was able to try Title to the land in question, without violating the theory that the Action of Trespass for Ejectment was available only to the owner of a non-freehold estate, as A, the fictitious lessee, and the nominal plaintiff (the landlord was the real plaintiff, al-

fact; and third, where the the fiction were assumed to three situations will now be facts supporting be true.<sup>8</sup> These discussed:

or transferred to another [Litt. f, 341]. This principle had its origin in the policy of the Ancient Law, to guard by all possible means

against *maintenses*, the subversion of justice, and the oppression of the poor, by the rich and powerful. For if me'~ were allowed to grant before they obtain possession, as Lord Coke remarks, pretended titles **might be** granted to great men, whereby right might be trodden down, and the weak oppressed." Stearns, **A Summary of the Law and Practice of Real Actions**, Introduction, § XII, 24 (Boston 1824).

Sec. 106

## ACTION OF EJECTMENT

229

though not a party to the action) was, so far as the Record went, the holder of a non-freehold or leasehold estate.

It is not surprising, therefore, to find that both Court and Counsel eagerly availed themselves of the loophole thus discovered by means of which questions concerning Titles to land which ordinarily could be raised only in some one of the numerous and technical Real Actions, might now be brought and determined in a purely Personal Action, with the same results of a Real Action achieved in a simple Action of Trespass, at least so far as possession was involved.<sup>11</sup> In referring to this very point, Sedgwick and Wait aptly declared: "The history of procedure nowhere presents a more curious fact than that the owners of the soil [freeholders] should have suddenly relinquished a system of remedies [the Ancient Real Actions]; which had been matured by the experience of centuries, and have consented to try Titles to the freehold in a Personal Action, originally devised to protect the precarious estates of the inferior tenantry."<sup>12</sup>

This rapid change in procedure, which began in the reign of Henry VIII (1509—1547) ultimately resulted in the obsolescence of the Real Actions, once it was realized that Ejectment was an efficient instrument for trying the right of possession, and that, in the final analysis, no title could be tried without also trying possession. There was also the additional advantage that Ejectment being a Personal Action, might be instituted in **either** King's Bench or Exchequer, whereas the old **Real Actions for trying** Title could only be brought in the Court of Common Pleas. And, as in Assumpsit and Trover, now also just coming into vogue, the pleading in Ejectment was general, with the result that there was small risk of a disastrous variance.

11. Sedgwick and Wait, *Principles and Practices Governing the Trial of Title to Land*, C. 1, 7, p. 5 (New York 1882).

(III) *Where the Requisite Conditions to Support Trespass Quare Ejectione Fh'mae were all Assumed to be True, but were aU*

### *Fictitious:*

(A) *In General*—After it was discovered that the New Action could be utilized by the freeholders through the use of the Entry, Lease and Ouster, along about the year 1640, or shortly after the close of Queen Elizabeth's Reign (1558—1603), it finally became clear that it was a useless formality to make an actual Entry, Lease and Ouster, so the practice grew up that these steps might be eliminated by merely alleging a Fictitious Entry, Lease, and Ouster by the Casual Ejector. This procedure was made workable by the fact that the Courts, eager to escape from the old Real Actions, overlooked the falsehood involved. As previously observed, the Casual Ejector did not defend, so that Judgment was given in favor of the Fictitious Lessee and plaintiff, who promptly sued out a Writ of Execution, under which the lessee was placed in possession, the actual tenant, Z, being dispossessed by the Sheriff.

(B) *The Common Consent Rule*—It is not difficult to imagine what Z, the Actual **Tenant, who** up to now had heard nothing of this suit, said when thus confronted with the Execution. And what he and other Z's in a similar position said was expressed in such loud, raucous and determined tones that **the** Courts decided to do something about it. What they did was to make a Rule of Court that no Execution should issue where the **Ejector was a stranger, or not the Actual Tenant, until the** adverse actual occupant—the Actual Tenant, Z—was notified of the **pendency of the action, and offered an opportunity, if he so desired, to appear and defend the action in place of the Casual Ejector. This end** was accomplished through the device of a note or letter from the Casual Ejector to the Actual Tenant, notifying him **that he had** been sued, and **that if he desired to defend, he should appear and ask to be**

12. *Id.* c. I, Page 6, § S (New York, 1882).

230

## OFFENSIVE PLEADINGS

Ch. 10

substituted as the defendant in place of the Casual Ejector.

And it was at this moment, and as a sort of condition precedent to such substitution of the Actual Tenant, that the Actual Tenant was advised by the Court that he might be permitted to defend, if he agreed to enter into the Common Consent Rule, which **involved an admission of the Entry, Lease and Ouster**, thus leaving the only remaining issue one of title, which was the objective of the fiction and which thus made available to the owner of a freehold estate a remedy which in legal theory was available only to the holder of a non-freehold estate. Now, the **lineup of the parties** reads as follows: *A ex dem.* (lessee) of *L v. Z*, the Actual Tenant. The whole process is set forth in the chart which appears below:

**CHART OF THE  
FICTITIOUS PROCEDURE IN EJECTMENT**

<p><b>The Fictitious</b> Lessee</p> <p><b>and the</b> Casual Ejector . <b>B</b></p>	<p><b>The Landlord and his Two Collaborators,</b></p>
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<p>is in Issue b'y <i>the Above Chart</i></p>	<p><b>Blackacre, the Tract of Land, Title to Which</b></p>
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**FROM the Chart as set forth above the student may derive an understanding of how** take advantage of a remedy which, in legal Theory, was available only to the **holder of a non-freehold estate**, as previously explained.

**He may also clearly see the meaning of the phrase** "the lessor of the plaintiff," so often *Certain Aspects of Ejectment as Explained* **the holder of a freehold estate** was able to See. 106

**ACTION OF EJECTMENT**

231

met with in the cases on property. Thus, a glance at the Chart will reveal that after the Fiction in Ejectment had been invoked, the lineup of the parties stood as follows: *A, ex dem. L v. Z*. Obviously, under this setup, the lessor of the nominal plaintiff, A, is L, the landlord, who, in reality, is the true plaintiff.

In the third place, from the Chart the student may understand the basis of the Common Law rule that a Judgment in one Action of Ejectment was never a Bar to recovery in another Action. In the case of *Caperton v. Schmidt*, the rule has been explained by Sawyer, 3., who declared: "But we have seen, that the rule in all cases requires that

the matter tried must be directly, and not merely collaterally in issue, in order that the judgment shall be a Bar. And in an Action of Ejectment at Common Law the title is not directly in issue; hence the Judgment under the rule was not a bar, nor could the determination of the title be used as a matter of estoppel.”

### *The Classification of Ejectment*

**THE Action of Ejectment has been variously classified. While it was developed as** and became a substitute for the Ancient Real Actions, it has never assumed the character **of a Real Action. It has sometimes been classified as a Mixed Action, but** it does not possess the characteristics of the Common-Law Mixed Action, **except the single circumstance that it made** it possible for the plaintiff to regain possession of his land. This characteristic, as Professor Keigwin aptly observes was **“an adventitious and almost accidental incident of the action, tacked on long after the invention of Ejectment and resulting from extrinsic causes and an originally unforeseen development.”** <sup>14</sup> **It is no**

13. 26 Calif. 479, 499—501 (1864).

14. Keigwin, Cases **In** Common Law Pleading, Bk. I, The Forms of Action, II, The Common Law Actions, Ejectment, 123 note 1 (2nd ed. Rochester, 1934).  
surprise, therefore, that most modern authorities declare that Ejectment is still a **Personal Action.**<sup>15</sup>

### *Ejectment Asserts Right of Possession ol’ LaS*

SINCE the abolition of the Ancient Real Actions, Ejectment has become the chief means of trying Title to lands or tenements and recovering possession thereof. It is the name now applied to the action by which the plaintiff asserts his right to possession of land, resulting either from absolute ownership or some lesser proprietary right, whereby he is entitled to enter into immediate possession of some interest in land. The action **is, therefore, limited by definition to the recovery of corporeal real property;** <sup>16</sup> but not **things which are not tangible real property.**<sup>17</sup> Ejectment may be brought to recover lands or things attached to the land so as to partake of the nature of realty, such as timber, growing crops and **the like. Personal** property and in general incorporeal hereditaments may not be recovered, as the action is limited to property the possession of which may be delivered by the sheriff.<sup>18</sup>

### *For What Property Will Ejectment Lie to Recover?*

IN consequence, Ejectment will only lie for the recovery of possession of real property, as for lands, or buildings annexed to land,

15. Ibid.

16. On the nature and limits of Ejectment, see 3 Blackstone, Commentaries on the Laws of England, C. XI, Of Dispossession, or Ouster, 199 (7th ed. Oxford, 1775); Den en dem. Johnson v. Morris, 7 N. J.L. 6 (1822); French y. Robb, 67 N.J.L. 260, 51 A. 509, 57 L.R.A. 956 (1902).

17. Pennsylvania: Black’s Lessee v. Hepburne, 2 Yentes (Pa.) 331 (1798); Vermont: Judd v. Leonard, 1 D.Chip. 204 (1814).

18. Connecticut: Nichols v. Lewis, 15 Cons. 137 (1842); florida: Walters v. Sheffield, 75 Fla. 505, 78 so. 539 (1918); New York: Jackson v. Buel, 9 Johns. (N.Y.) 298 (1812); Butler v. Frontier Telephone Co., 150 N.Y. 486, 79 N.E. 716, 11 LEA. (N. 5.) 920 (1006).

## OFFENSIVE PLEADINGS

## Ch. 10

upon which an entry in point of fact might be made, and of which the sheriff could deliver actual possession.’<sup>19</sup> It will not lie, as we have observed, to recover **property which, in legal contemplation, 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 claim-**

19. English: Doe en dem. Butcher v. Musgrave, 1 Man. & O. 635, 639, 133 Eng.Bep. 483, 488 (1840); Connecticut: Nichols v. Lewis, 15 Conn. 137 (1842); New Jersey: Whiter, White, 16 N.J.L. 202, 31 Am. Dec. 232 (1837); New York: Jackson ex 4cm. Sax-

ton v. May, 16 Johns. (N.Y.) 184 (1819); Butler v. Frontier Telephone Co., 156 N.Y. 486, 79 N.E. 716, 11 L.B.A. (N.S.) 920 (1900); Pennsylvania: Black's Lessee v. Hepburne, 2 Yeates (Pa.) 331 (1798).

Whenever a right of entry exists, and the interest is tangible, so that Possession can be delivered, Ejectment will lie. 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. Bud,

**0 Johns. (N.Y.) 298 (1812).**

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.L., 77 (1858).**

The riparian owner may maintain Ejectment for land below the high water mark. **Nichols v. Lewis, 15 Conn. 137 (1842).**

The action lies for a room or chamber without land. **Otis v. Smith, 9 Pick. (Mass.) 297 (1830).**

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 tin ouster. **Hill v. Hill, 43 Pa. 521 (1862).**

And one entitled to the right of mining on land, may maintain Ejectment. New Jersey: **Condit v. Eric It. Co., 50 N.J.Eq. 519, 85 MI, 612 (1912);** Pennsylvania: **Turner v. Reynolds, 23 Pa. 199 (1854);** Federal: **Priddy v. Thompson, 204 Fed. 955, 123 C.C.A. 277 (1913).**

Ejectment lies whenever the right of entry exists and the interest is of such a character that it can be held and enjoyed and possession thereof delivered in execution of judgment for its recovery. **Walters v. Sheffield, 75 Fla. 505, 78 So. 580 (1918).** ant.<sup>21</sup> It will, however, lie for land covered by water, as such land may be owned, but not for tile water.<sup>22</sup>

#### *Title Requisite to Support Ejectment*

IN order to maintain Ejectment, the plaintiff must allege and prove a Legal Title in himself which gives him the right to immediate possession. Thus, 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.<sup>22</sup> The plaintiff must have not only such

20. 1 Chitty, Treatise on Pleading and Parties to Actions with Precedents and Forms, e. II, Of the Forms of Action, 210 (16th Am. ed. by Perkins, Springfield 1876); 3 Blackstone, Commentaries on the Laws of England, e. XX, Of Dispossession, or Ouster of Chattels Real, 206 (7th ed., Oxford 1775); Michigan: **City of Grand Rapids v. Whittlesey, 33 Mich. 109 (1875);** Bay County v. Bradley, 39 Mich. 163, 33 Am.Rep. 307 (1878); Taylor v. Gladwin, 40 Mich. 232 (1879); Pennsylvania: Black's Lessee v. Hepburne, 2 Yeates (Pa.) 331 (1798).

Payment of a ground rent reserved upon a conveyance in fee cannot be enforced by Ejectment. **Kenege v. Elliot, 9 Watts. (Pa.) 258 (1840).** Though lands, for some purposes, have been Impressed with the character of personalty, In accordance with the provisions of a will, Ejectment nevertheless lies to recover them. **Shaw v. Chambers, 45 Mich. 355, 12 NW. 486 (1882).**

21. New York: **People v. Mauran, 5 Denio (N.Y.) 389 (1848);** Federal: **Hardin v. Jordan, 140 U.S. 371, 11 S.Ct. 808, 35 L.Ed. 428 (1891);** citing many ancient authorities.

22. 1 Chitty, Treatise on Pleading and Practice in Actions with Precedents and Forms, e. 11, Of the Forms of Action, 211 (16th Am. ed. by Perkins, Springfield 1876).

A tenant in common may maintain Ejectment against a third person for his share of the land. Connecticut: **Robinson v. Roberts, 31 Conn. 145 (1862);** Kentucky: **Chambers v. Handley's Heirs, 3 J.J.Marsb (Ky) 08 (1829);** North Carolina: **Den ex dem. Carson's Heirs v. Smart, 34 NC. 369 (1851).**

Or tenants in common may sue jointly. California:

**Touchard v. Keyes, 21 Cal. 202 (1862);** Kentucky: **Innis v. Crawford, 4 Bibb (Ky.) 241 (1851);** Federal:

**Flies v. Rogers, 4 Cranch (U.S.) 165, 2 L.Ed. 583 (1807).** And one tenant in common may maintain an action against the other if he can show an ouster.



**Sec. 106**  
**ACTION OF EJECTMENT**

an estate as entitles him to possession,<sup>23</sup> but the right must also be of some duration, and exclusive.<sup>24</sup>

The plaintiff, in all Cases, must recover on the strength of his own Title.<sup>25</sup> He cannot found his claim upon the insufficiency of the defendant's title, for the 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, show a prior possession, or trace his Title back to some one who can be shown to have **had possession, or** else to some acknowledged source of Title, such as a grant from the government.<sup>26</sup>

23. Illinois: *Batterton v. Yoncum*, 17 Ill. 288 (1855);

Pennsylvania: *Beffuer v. Beta*, 82 Pa. 376 (1850).

Suits for land in Ejectment are possessory in their nature, whether based on prior possession or title. *Butler v. Borroum*, 218 SW. 1115 (Tex.Civ.App. 1019).

On the right of a lessee to maintain Ejectment before entry into possession, see Note, Lessees—Right to Possessory Action Before Entry, 2 Minn.L.Rev. 367, 370 (1918); 2 Pollock and Maitland, *History of English Law*, Bk. II, c. IV, Ownership and Possession, § 4, 100 (Cambridge 1895).

24. English: *Rex v. Inhabitants of Mellor*, 2 East 190, 102 Eng.Rep. 341 (1802); *Goodtitle ex dem. Miller v. Wilson*, 11 East 834, 345, 103 Eng.Rep. 1033, 1037

(1809).

The right reserved to a grantor of land to erect a milldam and occupy the land for that purpose, will support Ejectment. *Jackson v. Bud*, 9 Johns. (N.Y.) 298 (1812).

The Action of Ejectment involves both the right of possession and the right of property. *Chance v. Carter*, 81 Or. 229, 158 Pac. 947 (1916).

25. English: *Goodtitle v. Baldwin*, 11 East 488, 103 Eng.Rep. 1092 (1809); Illinois: *Wilton v. Folians. bee*, 131 Ill. 147, 23 N.E. 332 (1890); Maryland: *Doe ex dem. Campbell v. Fletcher*, 37 Md. 430 (1873); Virginia: *Brunswick Land Corp. v. Perkiuson*, 146 Va. 695, 132 S.E. 553 (11126).

**26. English:** *Goodtitle v. Baldwin*, 11 East 488, 103 Eng.Rep. 1093 (1809); Illinois: *Doe ex dem. - Moore v. Hill, Breese (III.) 304* (1820); *Joy v. Berdell*, 25 Ill. 537 (1861); *Stuart v. Dutton*, 39 Ill. 91 (1866); *Walton v. Follansbee*, 131 Ill. 147, 23 N.E. 832 (1890); Indiana: *Stebman v. Crull*, **26 Ind. 436** (1861); Maine: *Webster v. Hill*, 38 Me. 78 (1854); *Douglass v. Libbey*, 59 Me. 200 (1871); Maryland: *Hall v. Gittings' Lessee*, 2 Har. & 3. (Md.) 112 (1807);

The defendant may hold the land without any Title thereto, as his mere possession gives him a right to resist Ejectment until *some* one asserts and shows a *better* right to the property. Thus, 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.<sup>17</sup>

*Doe ex dem. Campbell v. Fletcher*, 37 Md. 430 (1873); New Jersey: *Boylan v. Meeker*, 28 N.J. 274 (1860); New York: *Schauber v. Jackson*, 2 Wend. (N.Y.) 13 (1828); *Adair v. Lott*, 3 Hill (N.Y.) 182 (1842); *Rose-boom v. Mosher*, 2 Denio (N.Y.) 61 (1846); Pennsylvania: *Creigh v. Shatto*, 9 Watts & S. (Pa.) 82 (1845); *Welker's Lessee v. Coulter, Add.* (Pa.) 390 (1709); *Johnston v. Jackson*, 70 Pa. 16-1 (1871); Tennessee: *Huddleston v. Garrott*, 3 Jumph. (Penn.) 629 (1842).

If the defendant shows a paramount outstanding title in some third person, the action must fail. Illinois: *Itupert v. N ark*, 15 Ill. 540 (1854); *Masterson v. Check*, 23 Ill. 72 (1859); *Holbrook v. Brenner*, 31 Ill. 501 (1863); *Enhance v. Flood*, 52 Ill. 40 (1869); *Casey v. Kiminel*, 181 Ill. 154, 54 N.E. 005 (1899); *Burns v. Curran*, 275 Ill. 448, 114 N.E. 160 (1910); New York: *Jackson v. Givin*, 8 Johns. (N.Y.) 137, 5 Am.Dec. 328 (1811); Pennsylvania: *Hunter v. Cochran*, 3 Pa. 105 (1846); Tennessee: *Peek v. Carmichael*, 9 Yerg. (Penn.) 325 (1836); *Siassengill v. Boyles*, 11 Humph. (Penn.) 112 (1850); Virginia: *Atkins v. Lewis*, 14 Graft. (Va.) 30 (1851).

2-. English: *Doe ex dem. Harding v. Cooke*, 7 Bing.

846, 131 Eng.Rep. 134 (1831); Doe v. Dyehall, M. & M. 346, 173 Eng.Rep. 1184 (1829); Alabama: Russell v. *Jrwirfs Adm'r*, 38 Ala. 44 (1861); Illinois: *Wimbony v. Hurst*, 33 Ill. 106, 83 Am.Dec. 295 (1862); New Jersey: *Lepurt v. Todd*, 32 Nil. 124 (1866); New York: *Jackson ex dem. Murray v. Hazen*, 2 Johns. (Nt) 22 (1806); *Jackson en dem. Duncan v. Harder*, 4 Johns. (N.Y.) 202, 4 Am.Dec. 262 (1800); *Smith v. Lorillard*, 10 Johns. (N.Y.) 338 (1813); *Whitney v. Wright*, 15 Wend. (N.Y.) 1fl (1836); Pennsylvania: *Woods v. Lane*, 2 Serg. & II. (Pa.) 53 (1815); *Hocy v. Furman*, 1 Pa. 295, 44 Am.Dec. 129 (1845); *Shumway v. Phillps*, 22 Pa. 151 (1853); Vermont: *Reed v. Shepley*, 6 Vt. 602 (1834); Wisconsin: *Bates v. Campbell*, 25 Win. 613 (1870). But see, *Taylor v. flussell*, 65 W.Va. 632, 64 S.E. 923 (1900); *Marshall v. Stalnaker*, 70 W.Va. 394, 74 SE. 48 (1912).

The plaintiff need not, however, prove a Perfect Title in himself; he need only show a Title which, as against the defendant, is a better Title. When, therefore, it is possible for the plaintiff to show that he was in possession and that the defendant ejected him by a mere trespass, the prior possession of the plaintiff is superior to that of the defendant; and upon a showing to that effect, he may recover upon his better but Imperfect Title.<sup>28</sup>

As Ejectment was strictly a legal action, at Common Law, it required a Legal Title to maintain or to defeat it. The plaintiff must, therefore, have a legal right to possession. The Legal Title, so far as it relates to the right of possession, must prevail in Ejectment. Hence, one who has such a Title will win as against one who has a mere beneficial or equitable interest, enforceable in the Courts of Equity. Such an interest, unaccompanied by the Legal Title, will not suffice to support or defeat the action.<sup>29</sup>

28. Alabama: *Dodge v. Irvington Co.*, 158 Ala. 01, 48 So. 383 (1908); Illinois: *Burns v. Curran*, 275 111. 448, 114 N.E. 166 (1916); New Jersey: *Deport v. Todd*, 32 N.J.L. 124 (1866); Pennsylvania: *Woods v. Lane*, 2 S. & U. (Pa.) 53 (1815); Virginia: *Tapp-cott v. Gibbs*, 11 Gratt. (Va.) 172 (1854); Federal: *Bradshaw v. Ashley*, ISO U.S. 59, 21 Sot. 21)7, 45 L. Ed. 423 (1900); *Steffan -cc Zeust*, 10 App.D.C. 260 (1897).

29. English: *Doe ex dem. Da Costa v. Wharton*, 8 T.

R. 2.101 Eng.Eep. 1233 (1798); Illinois: *Rountree v.*

*Little*, 54111. 323 (1870); *Chiles v. Davis*, 58111.411 (1871); *ivIeFahl v. Kirkpatrick*, 236 Ill. 281, 86 N.E. 139 (1908); Maryland: *Leonard v. Diamond*, 31 Md. 536 (1809); Michigan: *Bueli v. Irwin*, 24 Mich. 145 (1871); *Ryder v. Flanders*, 30 Mich. 336 (1874); *Gelges v. Greiner*, 68 Mich. 153, 36 N.W. 48 (1888); Mississippi: *Cunningham v. Dean*, 83 Miss. 46 (1857); Missouri: *Thompson v. Lyon*, 33 Mo. 219 (1382); New Jersey: *Muhford v. TunIs*, 35 N.J.L. 256 (1871); Ohio: *Eggleston's Lessee v. Bradford*, 10 Ohio 312 (1859); Pennsylvania: *Thompson v. Adams*, 55 Pa. 479 (1867); Virginia: *Hopkins 'cc 'Ward*, 6 Mtmf. (Va.) 38 (1817); West Virginia: *Taybr' v. Russell*, 65 W.Va. 632, 64 S.E. 923 (1909); Wisconsin: *Gillett v. Treganza*, 13 Win. 472 (1801); Vermont: *Cheney v. Chancy*, 26 Vt. 606 (1854);

## Ch. 10

The plaintiff must, of course, have the right of possession at the time the action is

Federal: *Smith v. McCann*, 24 flow. (U.S.) 398, 16 LEd. 714 (1861).

If the defendant has the legal title, though he acquirech \$t 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*, 54 Ill. 323 (1870); *Dyer v. Day*, 61 Ill. 336 (1871); *Union Brewing Co. v. Meier*, 103 Ill. 427, 45 N.E. 264 (1896).

A party cannot recover in Ejectment on the basis of an estoppel *in pals* (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*, 84 Mich. 384, 22 Am.Rep. 533 (1876).

Nor can the defendant set up an equitable estoppel against the plaintiff's legal title. Illinois: *Nichols v. Caldwehl*, 275 111. 520, 114 N.E. 278 (1916); Michigan: *Ryder v. Flanders*, 30 Mich. 836 (1874).

Nor can the defendant interpose the merely equitable defense that the plaintiff's title was fraudulently obtained. *flannel v. Kinney*, 44 Mich. 457, 7 NW. 63 (1880).

Nor that the grantor was incompetent: *Walton v. Malcolm*, 264 Dl, 389, 106 N.E. 211, Ann.Cas.1915fl, 1021 (1915). cr. *Smith v. Ryan*, 191 N.Y. 452, 84 N.E. 402, 123 Arn.St.Rep. 609, 19 L.R.A. (N.S.) 461, 14 Ann.Cas. 505 (1008).

The legal title can be set up by a trustee in an action by the *cestui qua* trust (beneficiary of a trust). Eng' 11th: *Doe en den.*, *Shewen v. Wroot*, 5 East 138, 102 Eng.Rep. 1021 (1804); New York: *Jackson en Ocm. Simmons v. Chase*, 2 Johns. (N.Y.) 84 (1828); *Jackson v. Sisson*, 2 Johns.Cas. (N.Y.) 321 (1829); Pennsylvania: *I3rolaskey v. Meclain*, Oil Pa. 146 (1860). But a trustee may maintain Ejectment against his *cestui qua* trust. Illinois: *Kirkpatrick v. Clark*, 132 Ill. 342, 24 N.E. 71, 22 Am.St.Eep. 531, 8 LiLA.. 511 (1890); Vermont: *Beach v. Beach*, 14 Vt. 28, 39 Am.Dec. 204 (1842).

<sup>4</sup>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 pie-vail in a Court of Law." 1 Chilly, Treatise on Pleading and Parties in Actions with Precedents and Forms, c. II, Of the Forms of Action, 212 (16th Am. ed. by reiang, sprngfield 1876); English: England en 4cm. Syburn v. Sls,lc' A 'T 9

234

## OFFENSIVE PLEADINGS

235

commenced.<sup>30</sup> And a remainderman or reversioner cannot bring the action while the right of possession is in another.<sup>31</sup>

### Against Whom Will the Action Lie?

EJECTMENT will only lie for what, in fact, or in legal consideration, amounted to a dispossession or ouster of the plaintiff's lessor, that is, the landlord of the plaintiff, the Fictitious Lessee, or of the plaintiff; 32

Eng.Bep. 1243 (1792); Illinois: Wales v. Bogur, 31 Ill. 464 (1868); New York: Sinclair v. Jackson en dem. Field, 8 Cow. (NY.) 543 (1820).

But in no case can presumptions drawn from the fact of the 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. U. Ce., 56 Mich. 175, 22 N.W.311 (1885).

If a co-stui qua trust is legally entitled to the possession as against the trustee, he may maintain Ejectment. Kennedy v. Fury, 1 Dall. (Pa.) 72, 1 LEd. 42 (1783); Presbyterian Congregation v. Johnston, 1 Watts & S. (Pa.) 9 (1841); Calthvell v. Lowden, 3 Brewst. (Pa.) 63 (1868).

30. English: Doe ex den. Whatley v. Telling, 2 East

257, 102 Eng.Rep. 367 (1802); Right en dem. Lewis v. Beard, 13 East 210, 104 Eng.Rep. 350 (1811);

Alabama: Carpenter v. Joiner, 151 Ala. 454, 44 So. 424 (1807); Illinois: Wood v. Morton, 11 Ill. 547 (1850); Pitkin v. Yaw, 13 Ill. 251 (1851); Kentucky:

Whitley v. Bramble, 9 B.Mon. (iCy.) 143 (1848); Maryland: Wilson's Lessee v. Inloes, 11 Gill. & J. (Md.) 351 (1840); Michigan: Van Vleet v. Black-wood, 89 Mich. 728 (1878); Mississippi: Laurissini v. Doe en dent Corquette, 25 Miss. 177, 57 Am.Dec. 200 (1852); New York: Jackson ex dem. Hardenbergh v. D. L. Sehoonmaker, 4 Johns. (N.Y.) 300 (1800); Federal: Smith v. McCann, 24 flow. (S.C.) 898, 16 LEd. 714 (1860),

31. On the e~cet of Modern Codes, Practice Acts and Rules of Court on an equitable title as a factor in the Action of Ejectment, see Section 118 of this Chapter.

32. 3 Blackstone, Commentaries on the Laws of England, e. XI, Of Dispossession, or Ouster of Chattels Real, 199 (7th Ed., Oxford 1779); 1 Chilly, Treatise on Pleading and Parties in Actions with Precedents and Forms, e. 11, Of the Forms of Action, 213 (16th Am. ed. by Perkins, Springfield 1876); Louisiana: Deuchatell v. RobInson, 24 La.Ann. 176 (1820); New York: Garnsey v. Pike, 9 Cow. (N.Y.) 69 (1828).

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.

and further than this the defendant must be in the adverse and illegal possession of the land at the time the action is brought.<sup>33</sup>

Michigan: Kinney v. Harrett, 40 Mich. 87, S N.W. 708 (1881); Rhode Island: McCann v. Rathbone, 8 Ill. 207 (1866).

The mere receipt of all profits by one tenant in common of land does not amount to an ouster, entitling Ins cotenant to maintain Ejectment. I Chitty. Treatise on Pleading and Parties in Actions with Precedents and Forms, e. II, Of the Forms of Action, 214 (10th Am. Ed. by Perkins, Springfield 1870).

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 (1879).

But if a tenant in common excludes his cotenant, and refuses to let him occupy the land, it is otherwise. Coke, Upon Littleton 11Db (Philadelphia 1853); 1 Chitty, Treatise on Pleading and Parties in Actions with Precedents and Forms, c. II, 214 (16th Am. Ed. by Perkins, Springfield 1876); California: Lawrence v. Balluu, 37 Cal. 518 (1808); Illinois: Lundy v. Luudy, 131 Ill. 138, 23 N.E. 337 (1893); New York: Valentine v. Northrop, 12 Wend. (N.Y.) 494 (1834); Shaver v. McGraw, 12 Wend. (N.Y.) 558 (1834); Pennsylvania: Cumberland Valley U. Co. v. McLanahan, 59 Pa. 23 (1863); Federal: Ilarnita v. Casey, 7 Cranch (U.S.) 456, 3 LEd. 403 (1813).

3-. English: Right en dem Lewis v. Board, 13 East 210, 104 Eng.Rep. 359 (1811); Goodright cx den., Raleb v. Rich, 7 P.R. 327, 101 Eng.Rep. 1001 (1797); Illinois: Reed v. Tyler, 56 Ill. 288 (1870); Whitford v. Drexel, 118 Ill. 600, 9 N.E. 208 (1886); Michigan: Lockwood v. Drake, 1 Mich. 14 (18-17) ; W'hite v. Hapeman, 43 Mich. 267, 5 N.W. 313, 38 Ani.St.Rep. 178 (1883); Mississippi: Wallis v. Doe cx den., Smith's Heirs, 2 Smedes & hr. (Miss.) 220 (1844) Smith v. Doe en den., Walker, 10 Smedes & M. (Miss.) 584 (1848); New York-', Jacks-on cx dem. Clowcs v. Rakes, 2 Caines (N.Y.) 335 (1805); Pennsylvania: Kribbs v, Downing, 25 Pa. 399 (1855); Corley v. Pentz, 76 Pa, 57 (1874); McIntire v. Wing, 113 Pa. 67, 4 AtL 197 (1886); Vermont; Cooley v. Penfield, 1 Vt. 244 (1828).

It was held, for instance, that a landlord in possessiot could not maintain the action to bar the right of his absconding lessee. Jackson en Oem. Clowes v. flakes, 2 Caines (N.Y.) 335 (1805).

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. Michigan: Anderson v. Court-right, 47 Mich, 161, 10 N.W. 183 (1881); Heinmiller v. Hatheway, 60 Mich. 391, 27 NW. 558 (1888); New

**York: Banyer** v. Empie, 5 Hill. (N.Y.) 48 (18i3); Vermont: McDaniels v. Reed, 17 Vt, 674 (1845).

Sec. 106

## ACTION OF EJECTMENT

236

### OFFENSIVE PLEADINGS

#### Ch. 10

**If there has been no Ouster, or the defendant is not thus in possession when the action commenced, the action must fail. Trespass, not Ejectment, would be the proper remedy in such case.**

#### EJECTMENT.—-DISTINGUISHED FROM AND CONCURRENT WITH OTHER ACTIONS

**107. Strictly speaking, Ejectment is to be distinguished from the Writs of Right to Try Title among the old Real Actions, and from Trespass to Try Title; and it was concurrent with trespass in its early stages of development and with the Writ of Entry.**

THE Action of Ejectment, in theory, was designed to try the right of possession, and is to be distinguished from the Writs of Right, which, in legal theory, were designed to try Property Rights or Title. These Ancient Real Actions, however, were finally abolished, and Ejectment was substituted in lieu thereof, as it was found as a practicable matter that you could not Try Title without trying the Right to Possession. The Action is also to be distinguished from Trespass to Try Title, which prevailed in a few Southern States, and which, in those states, was a substitute for Ejectment, but, unlike Ejectment, could be maintained on an Equitable Title. Ejectment was, of course, concurrent with Trespass, in its early stages of development, as it grew out of Trespass. And, in the sense that it lay wherever the plaintiff had a Right of Entry, it was also concurrent with the Writ of Entry.

#### FORMS OF DECLARATION AND COMMON CONSENT RULE

**105. This section includes Forms of a Declaration in Ejectment, and of the Common Consent Rule in Ejectment.**

DECLARATION IN EJECTMENT ~

IN THE QUEEN'S BENCH, [OR. "COMMON PLEAS"] Term, in the \_\_ year of the reign of Queen Victoria.

**to wit, Richard Roe was attached**

to answer John Doe of a plea of trespass and ejectment &c. and thereupon the said John Doe by his attorney, complains against the said Richard Roe, that whereas one AS., heretofore, to wit, on the \_\_*thy* of \_\_ in the year of our Lord \_\_ in the parish of \_\_ in the county of

**had demised** unto the said John Doe  
messuages, cottages,

barns, stables, coachhouses,  
 outhouses, yards,  
 gardens, orchards, acres of  
 arable land, acres of meadow land, acres of pasture land, acres  
 of woodland, acres of land covered with water, and \_\_\_ acres of other land, with the appurtenances,  
 situate and being in the said parish of . in the ccomty aforesaid, to have and to hold the same to the said John Doe  
 and his assigns thenceforth for the term of fourteen years [a sufficient number of years to extend beyond the  
 time **within** which judgment can be obtained,] thence next ensuing and fully to be completed and ended; by  
 virtue of which said demise, the said John Doe entered into the said tenements with the appurtenances, and  
 became and was possessed thereof for the said term so to him thereof granted; and the said John Doe being so  
 thereof possessed, the said Richard Roe afterwards, to wit, on the day and year aforesaid, [or, on the day of

**in the year aforesaid,]** with force and arms, &c. 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  
 yet **expired**, and ejected the said John Doe from his said farm, and other wrongs to the said John Doe then and  
 there did, to the great damage of the said John Doe and against **the peace of our lady the queen**; Wherefore

Actions, c. I, Of the Proceedings in an Action, from its Commencement to its Termination, 27 (Williston ed, Cambridge, 1805).

ai. For another Form of Declaration, see Stephen, A

Wreatise on **the Principles of Pleading in Civil**

**Sec. 109**

#### ACTION OF EJECTMENT

237

**the said John Doe saith he is injured and hath sustained damage to the value of £100, and therefore he brings his suit, &c.**

2 Chitty, Pleading, p. 875 (Springfield,

1859).

#### FORM OF COMMON CONSENT RULE IN EJECTMENT

##### **Hilary Term, the twenty-ninth year of King George the Second.**

IT is ordered by the court, by the assent of both parties, and their attornies, that *George Saunders*, gentleman, may be made defendant in the place of the now defendant *William Stiles*, and shall immediately appear to the plaintiff's action, and shall receive a **declaration in a plea of trespass and ejectment of the tenements in question, and shall** immediately plead thereto, not guilty: and, upon the trial of the issue, shall confess lease, entry, and ouster, and insist upon his title only. And if, upon trial of the issue, the said *George Saunders* do not confess lease, entry, and ouster, and by reason thereof the plaintiff cannot prosecute his writ, then the taxation of costs upon such *non-pros*, shall cease, and the said *George Saunders* shall **pay such costs to the plaintiff, as by the** court of our lord the kind here shall be taxed and adjudged for such his default in non-performance of this rule; and judgment shall be entered against the said *William Stiles*, **now the casual ejector, by default**. And it is further ordered, that, if **upon trial of the said issue a verdict shall be** given for the defendant, or if the plaintiff shall not prosecute his writ, upon any other **cause than for the not confessing lease, entry and ouster, as aforesaid, then the lessor of the plaintiff shall pay costs**, if the plaintiff himself doth not pay them.

By the court.

RUNNINGTON, The History, Principles and Practice (Ancient and Modern) of the Legal Remedy by Ejectment, Appendix No. V, 475 (New York 1806).

#### DECLARATION IN EJECTMENT—ESSEN.

##### TIAL ALLEGATIONS: (1) IN GENERAL

**109, The Essential Allegations in the Declaration in Ejectment are:**

- (I) The Title of the plaintiff to certain Land
- (II) The wrongful Ouster or Disposses

sion

### (III) The Damages

**The Fiction by which Ejectment was extended from a remedy for Non-Freehold Tenants to Freeholders has in general been abolished. Today, the suit is usually brought by the real plaintiff against a defendant who is the Actual Occupant.**

**All Declarations in Ejectment must describe the premises demanded with certainty and precision.**

**THE fictions by which the Action of Ejectment was extended from a remedy for a lessee to all claimants, involved alleging in the declaration: (1) A Lease from the real plaintiff to the nominal plaintiff, John Doe; (2) The Entry by the nominal plaintiff wider the Lease; and (3) The Ouster of the nominal plaintiff by the nominal defendant (the Casual Ejector, Richard Roe) during the term of the lease. This childish mummery is now generally discarded.**

#### *Description of Premises*

**AS the recovery of a specific tract or**

tracts of land is the main object of this action, the Declaration must describe the premises demanded with certainty and precision, so as to clearly identify them, not only in order that it may be seen that the property demanded is the same as that with reference

**to which evidence is introduced, but also in**

order that possession may be delivered to the plaintiff or demandant **if he succeeds in establishing his right.**<sup>35</sup>

35. Connecticut: *Wooster v. Butler*, 13 Conn. 309

(1830); *Munson v. Munson*, 30 Conn. 425 (1862);

Georgia: *Stringer v. Mitchell*, 141 Ga. 403, 81 SE.

**104 (1914)**; *Michigan I Seeley v. Howard*, 23 Mich.

11 (1871); Mississippi: *Latar v. Canton*, 67 Miss.

275, 7 So. 321 (1890); New Jersey: *Stewart v. Camden & A. It Co.*, 33 N.J.L. 115 (1868); Pennsylvania:

238

## OFFENSIVE PLEADINGS

Ch. 10

### DECLARATION IN EJECTMENT—ESSENTIAL ALLEGATIONS: (2) THE PLAINTIFF'S RIGHT, TITLE, INTEREST OR POSSESSION

**110. The Declaration in Ejectment must describe the premises in question, and state the Title. It should also allege a Right of Entry in the plaintiff at the time the action is brought.**

#### *The Plaintiff's Right*

**AS we have shown above, the plaintiff, to maintain Ejectment, must have a Legal Right to possession at the time the action is commenced, though prior peaceable possession, without further Title, may be sufficient as against a mere intruder or trespasser, The Declaration must, of course, show such a Title and Right, or it will fail to state a good cause of action. It is sufficient under some statutory forms to allege that plaintiff was owner and possessed of the premises sued for, describing them as in a deed of conveyance.**<sup>36</sup>

### DECLARATION IN EJECTMENT—ESSENTIAL ALLEGATIONS: (3) THE WRONG- Flit OUSTER OR DISPOSSESSION

**111. 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**

*finn v. NorrIs*, 4 Binu, (Pa.) 77 (1811); vermont:

*thai-k v. Clark*, 7 Vt. 190 (1835); *Davis v. Judge*, 44 Vt. 500 (1872); *State v. Heaphy*, 88 Vt. 428, 92 A.

813 (1915)~ Federal: *Barclay v. Howell*, C Pet. (U, 8.) 498, 8 **LEd. 477** (1832).

See, also, *Sedgwick & Wait*, A Treatise on the Principles and Practice Governing the Trial of Title to Land, including Ejectment, Trespass to Try Title &c. § 455 (New York, 1882; 2d ed. New York, 1886).

36. Alabama: *flush v. Clover*, 47 Ala. 167 (1872); *Jackson v. Tribble*, 156 Ala. 480, 47 So. 310 (1908); Ala.Code 1907, § 3830; Georgia: *Dugas v. Hammond*, 130 Ga. 87, 60 SE. 268 (1908); Illinois: *Parr v. Van Horn*, 38 Ill. 226 (1865); *Holt v. Bees*, 44 Ill. 30 (1867), holding that the Allegation of Possession will be supported by proof of a Legal Right to Possession; *Almond v. Bonnell*, 76 Ill. 538 (1875); *flick-Orson v.*

flendryx, 88 111, 66 (1878); South Carolina:  
Livingston v. Buff, 65 S.C. 284, 43 S.E. 678 (1892).

**what amounts, in point of fact or in point of law, to an ouster or dispossession of the person having the Right of Entry upon the premises in question. As we have also seen, the**

Ouster need not be by an actual turning out of the plaintiff. It may be, for instance, merely a holding over by a tenant after the expiration of his term. It is also generally essential that the defendant shall be in actual possession when suit is brought, and that such possession shall be adverse. These requirements may not exist in all the states, for the scope of this action has been enlarged in some of them by statute, The Declaration must, in all cases, show such an Ouster or Dispossession, and such adverse possession or claim, as is necessary in the particular jurisdiction to a maintenance of the action.<sup>37</sup>

#### DECLARATION IN EJECTMENT—ESSENTIAL ALLEGATIONS: (4) THE DAMAGES

112. **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 also 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; <sup>38</sup> and in such case the Damages al

37. Rhode Island: Whipple v. McGinn, 18 B.!. 55, 25 A. 652 (1892), holding that detention by the defendant MUST be alleged; South Carolina: Guerard 'cc Jenkins, 80 S.C. 223, 61 St. 258 (1908).

35. Alabama; Scott v. Colson, 156 Ala. 450, 47 So. 60 (1908); Lyons v. Stickney, 170 Ala. 134, 54 So. 496 (1911); Florida: Norman v. Beekman, 58 Fla. 325,

Sec. 114

#### ACTION OF EJECTMENT

239

leged must include a sum sufficient to cover these.<sup>39</sup> 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.<sup>40</sup>

#### THE JUDGMENT IN EJECTMENT

113. At Common Law a Judgment in an Action of Ejectment was never a Bar to another

action, as the real plaintiff, the Landlord, although mentioned in the title of the action, was not, in reality, a party to the action, and hence was not bound thereby. With the abolition of the Fiction in Ejectment, the action is now directed against the Actual Occupant, as opposed to the Fictitious Lessee, hence a Judgment is now binding and may be pleaded under the doctrine of *res judicata*.

AS explained earlier, because the landlord, who was mentioned in the Title of a case in Ejectment, was not in reality a party to the action, the Judgment in Ejectment at Common Law was not conclusive, and hence could not be invoked under the doctrine of *res judicata*. The judgment, for the same reason, was not even conclusive as between the same parties or as to the same land, as the defeated landlord, not being a party to the action, was free to seek two new collaborators, and thus start litigation all over again. This situation created so much dissatisfaction that in the early part of the Eighteenth Century, after the plaintiff had been defeated in several

50 So. 870 (1909); Mississippi Garner v. Jones, 34 Miss. 505 (1857); New York: Danaiger v. Boyd, 54 N.Y. Super. Ct. 365 (1877); Pennsylvania: Alexander v. Shalala, 228 Pa. 297, 77 A. 554, 139 Am. St. Rep. 1004, 31 LEA. (N.5.) 844, 20 Ann. Cas. 1330 (1910);

Rhode Island: Berresboff v. Tripp, 15 11.1, 02, 23 A. 104 (1885); West Virginia: Croston v. McVicker, 76 W.Va. 461, 85 SE. 710 (1915),

~ New Jersey: Sneider cc I. Schwenk, Inc, 115 A. (142.) 527 (1921); Pennsylvania: Bayard V. Inglis, 5 Watts & S. (Pa.) 465 (1843); Federal: Battin v. Bigelow, Pet.C.C. 452, Fed.Cas.No.1,105 (1807).

10~ Illinois: Duncan y. Journey, 137 Ill.App. 568 (1907); Rhode Island: Rinfret & Arruda v. Morrisey, 29 Ri. 223, 69 A. 763 (1908). suits, the Court of Chancery intervened to enjoin the plaintiff from prosecuting further actions. This same early practice was sometimes the cause of what was known as Equitable Bills of Peace.<sup>41</sup> Under modern statutes abolishing **the Fiction in Ejectment**, the action is now directed in the names of the **actual parties, hence the Judgment carries the same conclusiveness** and finality as any **other Judgment and**, of course, may be pleaded under the doctrine of *rca judicata*.<sup>42</sup>

#### DECLARATION IN TRESPASS FOR MESNE PROFITS—ESSENTIAL ALLEGATIONS:

##### (1) IN GENERAL

114. **In the Declaration in Trespass for Mesne Profits, the Essential Allegations are:**

- (I) **The Title of the Plaintiff**
- (II) **The Ouster or Ejectment**
- (III) **The Damages**

EVERY wrongful Ejectment includes a Trespass, as Ejectment was created by extending the Action of Trespass to protect the interests of the non-freeholders or tenants. It follows, therefore, that one who recovers land from which he has been ousted is not **only entitled to recover Damages for the original act of dispossession**, but he is also entitled to recover Damages for the time the disseisor continued in occupation of the premises and for the wrongful withholding thereof. This act of withholding was, however, not a Trespass, though tortious. As Saimond remarks: "To remain wrongfully in possession of land is not, as we have seen, a trespass, although the act of first entering upon the land was a trespass." ~ In consequence, the profits realized from the land by **the wrongdoer during the period of wrongful retention** of the property, were not recover-

41. Story, Commentaries on Equity Jurisprudence as Administered In England and America, c. XXII, Bills of Peace, 853 (Boston, 1836).

42. Miles v. Caldwell, 2 Wall. (U.s.) 35, 17 LEd. 755 (1864).

43. Crary 'cc Goodman, 12 N.Y. 266 (1801); Salmond's Law of Torts, e. 16, 177 (10th ed. London, 1945).

240

## OFFENSIVE PLEADINGS

### Ch. 1&

able in the Action of Ejectment; only **Damages for the wrongful Ouster**, the amount being merely nominal, and not sufficient to compensate the plaintiff for the long period **of occupation by the wrongdoer, extending from the date of the original disseisin until the time of recovery of possession**. In order to place himself in a legal position to recover the profits acquired by the wrongdoer, the plaintiff was required to regain possession by a lawful Re-Entry, or by a Judgment in the Action of Ejectment. Having recovered possession, the owner was, by a Legal Fiction, presumed" to have been in possession throughout the intervening period. Upon this presumed possession, the plaintiff may then bring an Action of Mesne Profits against the person who was the defendant **in the Action of Ejectment. In this action**, the wrongful occupation may be alleged as a continuing Trespass which entitles the owner, **now restored to possession, to all the profits** made during the period of his ouster. These profits included crops, rents, or other assets taken from the land during the period of disseisin, as well as other Damages due for injury to the property.~

#### DECLARATION IN TRESPASS FOR MESNE



**PROFITS—ESSENTIAL ALLEGATIONS:**

**(2) THE PLAINTIFFS RIGHT, TITLE, INTEREST OR POSSESSION**

**115. The Declaration in Trespass for Mesne Profits 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**

44. **3 Blgckstone, Commentaries** on the Law of England, c. 12 Of Trespass Wrongs, 210 (1st Ed. Philadelphia, 1782).

45. Illinois: Smith v. Wenderlich, 70 Ill. 426 (1873);

New York: Dewey v. Osborn, 4 Cow. (N.Y.) 321 (1825); Pennsylvania: King v. Laker, 25 Pa. 186

(1855).

from which the profits arose,<sup>46</sup> as the defendant might otherwise compel him to make **what is called a New Assignment**, or restatement of the grounds of his action, by pleading "*iberwrt tenementum*" or the **common bar**. **As it is a separate action from the prior Action of Ejectment, the plaintiff's title to the premises should also appear, as well as the value of the Mesne Profits accrued, and their receipt by the defendant during the period of the Ejectment. All these facts are stated in a general and summary manner, as in other Forms of Trespass, save that the**

**description of the premises must be such as to identify them, and the value of the Mesne Profits which the defendant is alleged to have received must be correctly alleged.**<sup>47</sup>

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,** the suit may also be for the **recovery of Mesne Profits for an occupancy antecedent to the time for which the plaintiff's Title has been actually established, or the Action may be brought against a precedent occupier, in which cases the Record would not be admissible, and the plaintiff would be compelled to prove his Title as in any action.**<sup>49</sup> **The action, therefore, so far as the pleadings are concerned, must be separate and independent, as if no prior adjudication had been made.**

46. Higgins v. Highfield, 13 East 407, 104 Eng. Rep.

427 (1811).

47. **Ibid.**

48. **New York:** Lion v. Burtis, 5 Cow. (N.Y.) 408

(1826); Virginia: Whittington v. Christian, 2 Rand.

(Va.) 363 (1824); Federal: Chirac v. Reinicker, 11

Wheat (U.S.) 280, 6 L.Ed. 474 (1826).

49. English: Aslin v. Parkin, 2 Burr. 665, 97 Eng. Rep. 245 (1755); Maryland: West v. Hughes, 1 Har. & S. (Md.) 574, 2 An. Dec. 539 (1805);

New York: **Jackson v. Randall, 11 Johns. (N.Y.) 405 (1814).**

**Sec. 118**

**ACTION OF EJECTMENT**

241

**DECLARATION IN TRESPASS FOR MESNE  
PROFITS—ESSENTIAL ALLEGATIONS:**

**(3) THE OUSTER OR EJECTMENT**

**116. The Declaration must also state the Entry and Ouster or 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**; <sup>50</sup> 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.

#### **DECLARATION IN TRESPASS FOR MESNE PROFITS—ESSENTIAL ALLEGATIONS:**

##### **(4) THE DAMAGES**

**117- 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; - but the plaintiff may add to this, if specially alleged **as part of his claim, the Damage resulting from any injury done to the premises in con**

<sup>50</sup> Higgins v. Highfield, 13 East 407, 104 Eng.Rep.

427 (1811).

<sup>51</sup> New Jersey: Den ox dein. Bray v. MoSbane, 13 N.

**IL. 35** (1331); New York: Jackson v. Loomis, **4**

**Cow. (N.Y.)** 168, 15 Am.Deer 347 (1825); Federal:

Green v. Riddle, **8 Wheat. (U.S.)** 1, 5 LEd. 541 (1324).

sequence of any misconduct of the defendant.<sup>52</sup> And this case is also an instance within the general rules that the recovery cannot exceed the Damages laid.

#### **STATUS OF EJECTMENT AND TRESPASS FOR MESNE PROFITS UNDER MODERN CODES, PRACTICE ACTS AND RULES OF COURT**

**118. Under certain Modern Codes and Practice Acts the Plaintiff may recover mesne profits in his action to recover possession of real property, thereby in effect permitting a combination of what at the Common Law were the separate actions of Ejectment and Trespass for mesne profits.**

##### *Ejectment*

**(I) In England.**—In the form and scope, as outlined above, the Action of Ejectment continued down to modern times, superseding practically all the Ancient Real Actions known to the Common Law. By the Statute of 3 & 4 Wm. IV, c. 27, § 36 (1833), the Real Actions were abolished, Ejectment, under Section 36 being one of Four Actions excepted. The Statute provided that no descent **cast, discontinuance, or warranty shall hereafter** defeat any Right of Entry or Action for the recovery of any lands, and this enactment, in effect, converted all Titles into Possessory Titles, and thus made the remedy by Ejectment of universal application, and, in **this Form**, it remained unchanged until 1852.

**(A) The Common Law Procedure Acts of 1852, 1854 and 1860.**—Under the Common Law Procedure Act of 1852 ~ and the Amendatory Acts of 1854” and 1860,~~ the

<sup>52</sup> New Jersey: Stewart v. Camden & A. It. Co., 33 N.J.L. 115 (1868); Pennsylvania: Huston v. Wickersham, 2 Wafts & S. (Pa.) 308 (1841); Federal: New Orleans v. Gaines, 15 Wall. (U.S.) 624, 21 LEd. 215

(1872).

<sup>63</sup> 15 & 16 Viet. e. 76, 92 Statutes at Large 285 (1852).

<sup>54</sup> 17 & 18 Viet. e. 125, 94 Statutes at Large 794 (1854).

## OFFENSIVE PLEADINGS

### Cli. 10

**Common Law Action of Ejectment, as developed by the Courts**, having escaped the abolishing effects of 3 & 4 Was. IV, c 27 (1833), underwent material change, which had the effect of abolishing the fictitious proceeding in Ejectment and of reforming and simplifying its procedure. Pleadings of all kinds were abolished and thereafter the action was commenced by a Judicial Writ directed to the person in possession and to all persons entitled to defend the possession of the property claimed and described in the Writ, commanding **them to appear and defend the possession of the property sued for, or such part thereof as they may deem fit**, and notifying them **that in default of appearance they would be** turned out of possession. If the defendants failed to appear, or appeared for the purpose of defending only a part of the property, the plaintiff was entitled to a Judgment of Recovery of all or part of the land sued *for*, as the case might be. As appearance itself constituted a Defense to the Writ, the Court then made up an issue between the one who **claimed possession in the Writ and the parties appearing** to defend their possession. Such issue, thus formulated, was then tried according to the general principles which the Common Law had developed for the governing of the former Action of Ejectment. It was assumed that these three Reforming Acts authorized the use of Equitable Defenses, but the Courts in construing them held that such Defenses were not available, as the Pleadings had been abolished.

(B) *The Supreme Court of Judicature Act of 1873*,<sup>57</sup>—In this Form the Action continued down to the Supreme Court of Judicature Act of 1873. **Under this Act the Superior Courts of Law and the Courts of Chancery** were consolidated into the High Court of Justice, with five divisions, and thereafter the Action of Ejectment, and all other actions, were commenced by a Judicial Writ of Summons, upon which the plaintiff endorsed a Statement of his Claim, together with the relief asked for, to which the defendant made a Statement of his Defense. The pleadings were governed by Rules of Court under General Orders issued in 1833. By Rule 21 under Order XXI, a defendant in possession was **excused from pleading his Title unless his Defense depended upon an equitable estate or right, or unless he asked for relief on equitable grounds**. Under the influence and effect of the foregoing statutory changes, extending from 1833 until now, in England, Ejectment has lost its name and many of its distinctive features, but even today, the principles underlying the Action of Ejectment still **govern where an Action is brought** for the recovery of land.

(II) *In the United States*.—The Action of Ejectment, as developed at Common Law, and prior to the modern statutory changes in England, was generally adopted in the Several States of the United States. Some idea as to the extent of its acceptance can be seen in Tyler's excellent work on Ejectment,<sup>57</sup> the **particulars of which cannot be included here**, In most states the Fictitious Proceeding in Ejectment has been wholly abolished, and such statutes **usually provide that the action** shall be brought in the name of the Real Claimant out of possession against the **Actual Tenant or occupant of the land**. With the old Fictitious Allegations swept away, the Action has been converted into a simple and direct remedy for the assertion of Title to real property held adversely, and for the recovery of its possession. Thus, for example, **in the State of Illinois**, the Action of Ejectment was expressly retained by the Statute,<sup>M</sup> but Section 8 of the same statute **provided that "The use of fictitious names of**

57. Tyler, A Treatise on the Remedy by Ejectment and the Law of Adverse Enjoyment, c's. XXXVI to XLV, pp. 611—837 (Albany, 1870).

54. Hurd's Bev.St.1921, e. 45, § I-S (1921); Aetna Life Ins. Co. v. Hoppln, 255 ILL 115, 9~ N.E. 375 (1912).

It 36 & 37 Victoria, c. 66, 8 Law Reports 306 (1873).

Sec. 118

## ACTION OF EJECTMENT

243

plaintiffs or defendants, and 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.” And the same was true in Michigan and other states.<sup>59</sup>

In those states where a Statutory Form of Ejectment was adopted, as in Illinois, Michigan and New York, while the name was retained, the Mode of Procedure, and the circumstances under which it would lie, were prescribed.<sup>60</sup> It still remains true, however, that the rules and principles which for centuries were applicable to and developed by the old Common Law Action of Ejectment are, for most part, equally applicable to its Modern Statutory Counterpart, which, after all, is merely an evolutionary development of its ancestor.

The situation was modified in most of the **Code States, in most of which it was provided that a defendant might Plead as many Several Defenses** as he had, whether Consistent or Inconsistent, or whether denominated Legal or Equitable. In such states a defendant may offer Proof of an Equitable Title against a Legal Title shown by a plaintiff in an Action of Ejectment. And the same provision also prevails even in some states which failed to adopt the Code Form of Procedure.

<sup>59</sup> 3 Oomp.Laws Mich.1915, ~ 13168, 13169. fluE see Doe ex dem, Alabama State Land Co. v McCullough, 155 Ala. 240, 46 South 472 (1910); Doe ox dem. Townsend v. floe, 26 DeL 75, 80 Atl. 352 (1911).

<sup>60</sup> Tyler, A Treatise on the Remedy by Ejectment and the Law of Adverse Enjoyment, c's. XXXVI to XLV, pp. 611—837 (Albany, 1870). *Trespass for Mesne Profits*

ORIGINALLY, the Action of Ejectment was an action for the recovery of Damages, **not for** recovery of the premises, and at that time the Mesne Profits were the measure of the Damages. But when it became established **that the premises was recovered in**

an Action of Ejectment, the Damages in the action were limited to Nominal Damages. And this was the development which created the necessity of what came to be known as the Action of Trespass for Mesne Profits.<sup>61</sup>

**In some states this Form of Action is still the proper remedy.** In certain *states*, however, by statute, the plaintiff was required to recover for Mesne Profits in the original action to recover the premises,<sup>62</sup> whereas, in others, the provision *was* not mandatory.<sup>63</sup> An example of this type of statute, changing the **Common Law Rule**, may be found in Section **601 of the New York Real Property Actions and Proceedings Law, 1968, which contains the following provisions: “In an action to recover the possession of real property, the plaintiff may recover damages for withholding the property, including the rents and profits or the value of the use and occupation of the property for a term not exceeding six years; but the damages shall not include the value of the use of any improvements made by the defendant or those under whom he claims.”**

<sup>61</sup> 000dtitle v. Tombs, 3 Wils.K.B, 118, 95 Eng.Rep.

965 (1770).

<sup>62</sup> Provident Inst. for Say. v. Burnhaii, 128 Mass.

458 (1880).

<sup>63</sup> 2 N.J.Comp.5t., 1910, p. 2063, 45; Va.Code, 1919, § 5481.

Sec.

## CHAPTER 11

### THE ACTION OF DETINUE<sup>t</sup>

- 119. Scope of the Action.
- 120. Detinue—Distinguished From and Concurrent with Other Actions.
- 121. Fonns of Declaration and Judgment in Detinue.
- 122. Declaration in Detinue—Bssential Allegations:
  - (1) In General,
- 123. Declaration in Detinue—Essential Allegations:
  - (2) **The Plaintiff's** Right, Title, Interest Or Possession.
- 124. Declaration in Detinue—Essential Allegations:

- (3) The Unlawful Detention.
125. Declaration in Detinue—Essential Allegations:
- (4) The *Damages*.
126. Status Under Modern Codes, Practice Acts and Rules of Court.

#### SCOPE OF THE ACTION

**119.** The **Action of Detinue** lies where **It is sought to recover, not Damages for the taking or detention of a personal chattel, but the chattel itself, with Damages for its detention. The Judgment awards either recovery of the chattel itself, or its value, with Damages for its detention. To maintain the action—**

**(I) The chattel must be specific and capable of identification;**

**(II) The plaintiff must have either a General or Special Property in the chattel, or the Right to Immediate Possession;**

**(III) The defendant must be in the Actual Possession of the chattel at the time of Commencing Suit**

THE action of Detinue is the only remedy  
by suit at common law for the recovery of

*i.* In general on the history of the Action of Detinue, see:

Treatise 2 Pollock and Maitland, History of English

Law, The Action of Detinue, Bk. II, c. IV, 7, 171—174 (Cambridge 1895); *Id.*, Book II, c. V, 204; Martin, Civil Procedure at Common Law, e. III, Detinue,

Art II, §~ 81—85, 74—IS (St. Paul 1905); 3 Street,

Foundations of Legal Liability, c. XII, Action of

Detinue, 144—158 (Northport 1906); Jenks, Short

History of English Law, e. X, Detinue, 132—135

personal property in specie, except in those cases where the party can maintain Replevin.<sup>2</sup> In Trespass or Prover for wrongfully

(Boston 1913); Banbour, History of Contract in Early English Equity, ~ II, 25 (Oxford 1914), In Vinogradoff, Oxford Studies in Social and Legal History, Vol. 4, Pt. 1, C. II (Oxford 1914); Shipman, Handbook of Common Law Pleading, e. XI, The Action of *Detinue*, 46, 114—120 (3d ed. by Ballantine, St. Paul 1923); Morgan, The Study of Law, e. V, Detinue, 9ff—99 (2d ed. Chicago 1948); Plucknett, A Concise History of the Common Law, DeEtune, Bk. II, Pt. I, 345 (4th ed. London 1948); Potter, Historical Introduction to English Law, c. IV, Detinue, 893—397 (3d ed. London 1948); Fifoot, History and Sources of English Law, c. 2, Detinue, 24—43 (London 1949); Walsh, A History of Anglo-American Law, Bk. II, c. VI, § 56, 117—119 (2d

ed. Indianapolis 1932).

**Decision: Darner.** Dame, 43 Nil. 37(1561).

2. Alabama: Southern Hardware & Supply Co. v. Lester, 166 Ala. 86, 52 So. 328 (1910); Illinois: Ilobthson v. Peterson, 40 Ill.App. 132 (1890); New Hampshire: Dame v. Dame, 43 N.E. 37 (1861).

In some states detinue has been abolished, or the scope of replevin has been **extended by statute** so as to include detinue. See the following cases: Michigan:

Corbitt v. **Brong**, 44 Mich. 150, 6 NW. 213 (1850);

Article: Ames, History of 271, 374 (1897), reprinted American Legal history,

Trover, 11 Ears-LSCv. in 3 Essays on Anglo-417, 432 (Boston 1909).

244

#### Sec. 119 ACTION OF DETINUE

245

taking or detaining goods, or in Assumpsit for not delivering them, Damages only, and not the Specific Property, can be recovered. It seems that the action was originally deemed an action *ex contractu*, but now the wrongful detention of the goods is considered the Gist of the Action. The action lies without regard to any bailment or contract, **and even though the defendant may have wrongfully obtained possession in the first instance; and it is therefore more properly** classed with Actions *ex delicto*, or with Proprietary Actions.<sup>3</sup>

West Virginia: Young v. Edwards, 64 W.Va. 67, 60 SE. 992 (1908).

3. Gledstane v. Hewitt, 1 Cromp. & 1 565, 148 Eng. Rep. 1548 (1831); Broadbent v. Ledward, 11 Adol. & E. 209, 113 Eng. Rep. 395 (1839).

The action of Detinue is, as we have seen, proprietary in character, and there has been some difficulty as to whether it should be classified as an

Ca' contraotu or sa' deticto form of action.

The right to join debt with detinue, I Saunders, The Law of Pleading and Evidence in Civil Actions, Detinue, 502 [434] (Philadelphia 1831), and to sue in detinue for not delivering the goods in pursuance of the terms of a bailment to the defendant, it is argued, seem to afford ground for considering it rather as a contract than as a tort action.

On the other hand, since detinue lies, although the defendant wrongfully became the possessor thereof (of goods), in the first instance, without relation to any contract, it has recently been considered as a tort. The gist of the action is the wrongful detainer. and not the breach of the contract. Gledstane v. Hewitt, 1 Cromp~ & 1 565, 148 Eng.Rep. 1548 (1831); Wilkinson v. Verity, LII. C OP. 206 (1871); Bryant v. Herbert, 3 O.P.D. 389, 390, 391 (1878); Gossett v. Morrow, 187 Ala. 387, 65 So. 826 (1914); 2 Pollock and Maitland, History of English Law, Bk. II, c. IV, Ownership and Possession, 175, 170 (Cambridge 1895); MartIn, Civil Procedure at Common Law, a III, Personal Actions, Ex Delicto, Art. II, Detinue, ~ 81—85, p. 75 (St. Paul 1905).

McKelvry, in his short work on Principles of Common-Law Pleading, e. II, § 18, 11 (New York 1804). in discussing the problem of the proper classification of detinue, declares: "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.

The Action of Detinue was for a long period the proper remedy of the bailor and

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 Detinue. [Kettle v. Bromsall, Willes 120, 125 Eng.Rep. 1087 (1738), where the distinction is noticed, and it is held that Trover and Detinue cannot be joined.]

"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, hut 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 defendants possession, he has asserted that right in such a wa3—a g., by demand—as to acquire a special right to the immediate possession of the property, and to put upon the defendant a special obligation to deliver it to him. It has already been seen that the judgment in the action of Detinue is for the recovery of the property or its value in the alternative. The special obligation to deliver the property, similar to an obligation based on a promise and arising because of the special relation of the parties, is thus recognized and enforced. In fact, the action of Detinue has been brought upon a contract to deliver a specific chattel. [Fitaherbert, Natura Breviuni, p. 138]. **It seems clear, therefore, that Detinue** is properly classed with the actions of Debt, Covenant, and Assumpsit. [These forms of action are generally distinguished by the term actions *Cr oontroct'*, as distinguished from the actions known as *Ca delictu*, on the theory that the former are brought upon contract and the latter for a tort or wrong. The terms, however, are not strictly applicable, as the idea of contract in its usually understood sense does not necessarily enter into the action of Debt or that of Detinue, both of said actions many times being founded upon obligations arising from special relations between the parties other than contractual. Further, to say that an action is for a wrong, does not distinguish it, as every action is for a wrong. The writer submits that the true basis of the distinction which undoubtedly does exist, is that the one class of actions is for wrongs which are violations of original or natural rights,—rights which belong to one person as ggainst all others; while the other class is for wrongs which are yb-

"It is conceived that the true theory of the action of detinue is that the detention is the violation of a

246

## OFFENSIVE PLEADINGS

### Ch. 11

was chiefly used in the field of bailment. When an owner bails or delivers a thing to another for any purpose, he has an action against the baflee for the return of the goods; but whether the action was based upon ownership or upon contract was a distinc— tion not clearly drawn or perceived. Gradually the claim for a Specific Chattel was distinguished from a Debt or Claim for a Certain Quantity of Money, or of Corn or the Like. Roughly, this distinction may seem to correspond with that between contractual and proprietary rights.

**Detinue in its modern form (theory) has come to be what we may term a Proprietary Action, a remedy to enforce a right of prop— erty. It carries into effect the right to the immediate possession of a particular thing. The restitution of the goods themselves wrongfully withheld makes it necessary, in this action of Detinue, to ascertain the thing detained, in such manner that it may be specifically known and recovered. Therefore it cannot be brought for money, corn, or the like; for that cannot be known from other money or corn, unless it be in a bag or sack, for then it may be distinguishably marked, and unless the property is specified the duty enforced would be a mere debt or obligation.**

latloas of special or acquired rights,—rightls which one person has against some other particular person or persons who have come into some special relation with him.)"

**It was formerly** urged by such a distinguished scholar as Dean Ames, that detinue originated out of the contract of bailment under which the defendant bailee was forced to deliver up specific chattels. Thereafter, the scope of the action was extended, so that it ceased to be based on a personal obligation and became based on a property right and wrongful detention. The view of Dean Ames has been brought in serious question by Professor F. Foot, in his excellent recent work on *The History and Sources of the Common Law*, c. 2, Detinue, 24-43 (London 1949).

See, also, on this problem, *Whiteliead v. Harrison*, 6 Q.E. (N.S.) 422, 115 Eng.Rep. 162 (1844); *Wlard v. Semken*, 2 App.D.O. 424 (1893).

There was a most serious imperfection in the remedy of Detinue, even where it existed. Its Judgment was Conditional—that the plaintiff should recover from the defendant the said goods, or (if they cannot be had) their Value and the Damages for detaining them. This left to the defendant the choice between delivering up the thing and paying a sum of money, and if he would do neither the one nor the other, then goods of his were seized and sold, and the plaintiff in the end had to take money instead of the thing that he demanded.<sup>4</sup>

In modern times this defect has been cured, so that a plaintiff who recovers in Detinue gets a Judgment for the specific delivery of the chattel detained. The action may now be used concurrently with Replevin, Trover, and Trespass *de bonis asportatis*, in all cases of the wrongful detention of chattels, regardless of whether the defendant originally acquired possession lawfully by bailment or by theft.

### *For What Property*

DETINUE lies for the recovery of a Specific Chattel only, and not for the recovery of fixtures, or other real property.<sup>o</sup> The goods for which it is brought must be distinguishable from other property, and their identity ascertainable by some certain means.<sup>o</sup> It lies to recover any chattel that is

4. *ICirkland v. Pileher*, 174 Ala. 170, 57 So. 46 (1911). This was changed under Section 78 of the Common-Law Procedure Act of 1852, 17 & 18 Vict. c. 125.

5. English: *Coupledike v. Coupledike*, Cro.Jac. 39, 79 Eng.Rep. 31 (1605); West Virginia: *McFadden v. Crawford*, 36 W.Va. 671, 15 SE. 408, 32 Asn.St.Rep.

894 (1892).

But where property which was attached to the realty so as to become a part of it, has been removed, and where timber, crops or minerals have been severed, thus acquiring the character of personal property, detinue will lie. *Cooper v. Watson*, 73 Ala. 252 (1882); *Adler v. Prestwood*, 122 Ala. 307, 24 So. 999 (1899).

1 Chitty, Treatise on Pleading and Parties to Actions with Precedents and Forms 137 (London 1808);

Sec. 120

## ACTION OF DETINUE

247

so identified that it may be recovered in specie.<sup>7</sup> The chattel, of course, must be in existence. The action cannot be maintained in case of its destruction before suit is brought.<sup>8</sup> But if the chattel is destroyed after suit is commenced defendant will not be relieved from liability.<sup>9</sup>

### DETINUE—DISTINGUISHED FROM AND CONCURRENT WITH OTHER ACTIONS

**120. Once Detinue was differentiated from Debt, it was distinguishable from that action as being for the recovery of specific chattels as contrasted to money; it was distinguished from Replevin originally as being available only where the defendant acquired possession lawfully, whereas in Replevin the defendant obtained possession wrongfully; it differed also in respect to the time when possession or its equivalent was to be restored to the plaintiff. In its final state of development Detinue became to a considerable extent a concurrent remedy with the Actions of Trespass de bonis asportatis, Replevin and Trover.**

AS indicated in the hypothetical cases in which A loaned his horse to B to B returned

16th Am. ed. by Perkins, Springfield 1876); Comyn, Digest, "Detinue," B.C. (5th S., Philadelphia 1820); Coke's Litt., 28Gb (Philadelphia 1853); 3 Blackstone, Commentaries on the Law of England, c. IX, Of Injuries to Personal Property 152 (7th S. Oxford 1775). See, also, the following cases; English: *Isaack v. Clark*, 2 Bulst. 307—8, 80 Eng.Rep. 1143—44

(1615); *Banks v. Whetstone*, Moore (KB.) 394, 72 Bag.Rep. 649 (1596); New Hampshire: *Brown v. Ellison*, 55 N.H. 556 (1875); West Virginia: *Fletcher v. Fidler*, 58 W.Va. 159, 52 SE. 513, 3 L.R.A. (X.S.) 138, 112 Am.St.Rep. 961 (1905).

7. *Dome v. Dame*, 43 N.H. 37 (1861). On the recovery of title deeds, see the following cases: English: *Atkinson v. Baker*, 4 T.R. 229, 100 Eng.Rep. 985 (1791); Kentucky: *Lewis v. Hoover*, 1 J.L.Marsh (Ky.) 500, 19 Am.Dec. 120 (1829). To recover an insurance policy, see *Robinson v. Peterson*, 40 Ill. App. 132 (1890).

8. Alabama: *Lindsey v. Perry*, 1 Ala. 203 (1840); Kentucky: *Caldwell v. Fenwick*, 2 Dana (Ky.) 332 (1834), in which a slave was dead when the action was brought.

§ **Alabama:** *Wilkerson v. McDougal*, 48 Ala. 517 (1872). *Contrat MisMaappi*; *Whitfield v. Whitfield*, 44 Miss. 254 (1874); North Carolina: *Betha v. McLennon*, 23 N.C. 523 (1841).

**at the end of thirty days, and also loaned to**

*B* five hundred dollars to be repaid in thirty days, and at the end of the period, if *B*, upon demand, refused to deliver up the horse or to repay the money, Debt, not Detinue, lay to recover the money, as both possession and title passed to the bailee, whereas Detinue, not Debt, lay to recover the horse, as only possession, not Title, was transferred to *B*

**by the loan.<sup>10</sup> Detinue therefore differed**

from Debt in that it was for the recovery of specific chattels, but not chattels in the form of money, which, because of its negotiable character, was treated as creating a debt, Originally Detinue was distinguished from Replevin in that it lay only for goods lawfully obtained, whereas Replevin lay only where the goods were unlawfully taken; ultimately, however, Detinue also became available where the taking was tortious. The two actions were and are still distinguishable in that in Replevin the plaintiff is restored to the possession prior to the determination of the matter of right between the parties, whereas in Detinue the plaintiff does not recover his property until the matter of right between the parties has been determined by a Final Judgment in the Action, and not even then if the defendant prefers to keep the chattel and pay its assessed value.<sup>12</sup> In Trover, as contrasted with Detinue, the Judgment was for the recovery of Money Damages for the wrongful act of conversion, whereas, in Detinue, the Primary Object of the Action was to recover Specific

<sup>10</sup> See, 3 Reeves, History of English Law, c. XV, Edward III 47 (London 1787), who reports a case decided in the year 1313, in which the plaintiff declared in debt in two counts: one for a sum of money which he alleged the defendant *de-et et detinet* and the other for a sack of wool in which it is said the defendant *detinet*.

It *Meanie v. Blake*, 0 Ellis & Black. 843, 119 Eng.Rep. 1078 (1850); *Harwood v. Smethurst*, 29 N.J.L. 195, 80 Am.Dec. 207 (1861); *Pangburn v. Patridge*, 7 Johns. (N.Y.) 140 (181U).

12. *Tierney v. Corbett*, 2 Mackey 264 (S.C.D.C.18s3); *Kirkland v. Filcher*, 174 Ala. 170, 57 So. 40 (1911), 248

## OFFENSIVE PLEADINGS

### Ch. 11

Chattels, although, as just observed, the defendant was permitted to exercise an option of surrendering the goods or paying the Assessed Damages.<sup>13</sup> And so in Trespass *do bonis asportatis*, unlike Detinue, the action is for the recovery of Money Damages as compensation to the plaintiff for the infringement to the right of possession of his property, the value of the property being considered as an important element in the measurement of Damages. Detinue had become, in its final stage of development, to a considerable extent a concurrent remedy with the actions of Trespass *do bonis asportatis* and Trover.

#### FORMS OF DECLARATION AND JUDGMENT IN DETINUE

121. The Forms under the Action of Detinue include not only the Declaration, but also a Form of a Judgment. The latter is included in order to show that the Judgment in Detinue, contrary to Judgments in the other Actions, was Conditional or in the Alternative, that is, for the Specific Chattels sued for, or if they were not available, their Value plus Damages for the wrongful detention.

DECLARATION IN DwnNus 14



## IN THE EXCHEQUER OF PLEAS.

The 15th day of June, in the year of our Lord 1845.

Berkshire, to wit.—Anthony Brown (the plaintiff in this suit), by Peter Black, his

13. “The reason of this may perhaps be found partly **in** the perishable character of medieval movables, **and the consequent feeling that** the court could not accept the task of restoring them to their owners, and partly in the idea that all things had a ‘legal price’ which, if the plaintiff gets, is enough for him.” Maitland, *The Forms of Action at Common Law*, Lecture V, 02 (Cambridge 1948).

14. One of the major defects in the Action of Detinue consisted of the fact that its judgment was conditional or in the alternative. Thus, it provided that **the plaintiff should recover of the defendant the** specific chattels sued for, or if they were not available, their value plus damages for the wrongful detention, See *Kirkland v. Filcher*, 174 Ala. 170, 57 So, 48 (1911). This defect was remedied by Section 78 of **the Common Law Procedure Act of 1854**, which empowered a court or judge, upon applica

attorney, complains of Augustus White (the defendant in this suit), who has been summoned to answer the said plaintiff in an action of Detinue. For that whereas the said plaintiff **heretofore and before the commencement of this** suit, to wit, on the 12th day of February, in the year of our *Lord* 1845, had delivered to the said defendant certain goods and chattels, to wit, twenty pipes of wine of the said plaintiff, of great value, to **wit of the value** of £2,000, to be redelivered by the said defendant to the said plaintiff when the said defendant should be thereunto afterwards requested: yet the said defendant, although he was afterwards, to wit, on the first day of March, in the year aforesaid, **requested by the said plaintiff** so to do, hath not as yet delivered the said goods and chattels, or any of them, or any part thereof, to the said plaintiff, but so to do hath hitherto wholly refused, and still refuses, and still unjustly detains the same from the said plaintiff, to the damage of the said **plaintiff** of £800, and thereupon he brings his suit,~

MARTIN, *Civil Procedure at Law*, 371 (St. Paul, 1905).

JUDGMENT IN DETINUE<sup>5</sup>

Common

THEREFORE it is considered that the plaintiff do recover against the defendant the said goods and chattels (or “deeds and paper” etc. or enumerating them, if enumerated in the postea,) or the said sum of

tion of the plaintiff, to order the return of the specific chattel in question, thus depriving the defend’ ant of his option of retaining the chattel upon **payment of the value** assessed, Cf. *Tierney v. Corbett*, 2 Mackey S.C.D.C. 264 (1883).

15. **An examination of the form of the judgment in detinue will indicate that Itis couched in alterna’ tire language to cover the possibility of the defendant hating disposed of the chattel before the judg’** meat **was** rendered.

Tinder ~ 7108 of the *New York Clvii Practice Law and tiles* (1908), the plaintiff may in certain circumstances have **either the chattel or the value there-**

**of.** See also, *Dame v. Dame*, 43 NJl. 37 (1861).

Sec. 123

## ACTION OF DETINUE

249

£. for the value of the same, if the plaintiff cannot have again his said goods and chattels, (or “deeds” etc.) and also his said damages, costs and **charges to** €\_\_\_ beyond the value, aforesaid, by the jurors aforesaid in form aforesaid assessed, and also €\_\_\_ for his said costs and charges by the court here adjudged of increase to the plaintiff, and with his assent, and the defendant in mercy, etc. And hereupon the sheriff is commanded that he distrain the defendant by all his lands and chattels in his bailiwick, so that neither the defendant, nor any one by him, do lay hands on the same until the said sheriff shall have another command from the court here in that behalf, and that the said sheriff answer for the issues of the same, so that the defendant render to the **plaintiff the goods and chattels (or “deeds” etc.)** aforesaid, or the said sum of ≈

for value of the same; and in what manner, etc., **he is commanded** to make appear, etc.

TIDD, *Forms of Practice*, 340 (London 1828).

DECLARATION IN DETINUE—ESSENTIAL  
ALLEGATIONS: (1) IN GENERAL

122. The Essential Allegations of the Declaration in an Action of Detinue are:

(I) The Right of the plaintiff to Certain Goods and Chattels of a certain value, described;

(II) The Unlawful Detention;

(III) The Damages.

DECLARATION IN DETINUE—ESSENTIAL

ALLEGATIONS: (2) TITLE PLAINTIFF'S

RIGHT, TITLE, INTEREST OF POSSESSION:

123. The Declaration must describe the thing detained sufficiently for purposes of identification and assert the plaintiff's Title and Right of Possession.

The plaintiff's Right may arise from General Ownership, or some Special Interest, or as against a wrongdoer, from Bare Possession.

*Description of the Property*

AS the Action of Detinue lies only to recover specific chattels, known and distinguished from all others, more Certainty is required in the Declaration in their description than in Trespass or Trover; and it must be such as to particularly identify them as the goods in question.<sup>16</sup> 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."

There were anciently Two Modes of Counting in Detinue. The plaintiff must say either, "I bailed the chattel to you," or "I lost the goods and you found them" (*detinue stir tro-ver*). Only in times much later did the lawyers say that these phrases about finding (Trover) and bailment, though one of them must be used, are not "Traversable," and that defendant must not deny them, but must deny the wrongful detention.<sup>18</sup>

*The Plaintiff's Right*

The plaintiff must have either a General or Special Property in the chattels, or he must have a Right to the immediate Possession of them.<sup>19</sup> That he has this right

16. Taylor v. Wells, 2 Saund. 74a, fl4b, 85 Eng.Rep.

743 at 744 (1845); Haynes v. Crutehfield, 7 Ala. 189 (1544).

11. An allegation of the value of the property seems

necessary. Indiana: Hawkins v. Johnson, 3 Blackf. (Ind.) 443 (1832). And see Robinson v. Woodford, 87 W.Va. 377, 10 SE. 602 (1592).

18. 1 Saunders, The Law of Pleading and Evidence In civil Actions, Detinue, 531, 582 [\*434,435] (Philadelphia 1829); 2 Pofflock and Maitland, History of English Law, 0k. II, c. IV, 170 (Cambridge 1895); 1 Chitty, Treatise on Pleading and Parties to Actions with Precedents and Forms, 121, 124 (London 1808; 16th Am. ed. by Perkins, Springfield 1576).

19. See Ames, Lectures on Legal History, c. VI, Detinue, 71 (Cambridge 1913); Whitehead v. Harrison, 0 Q.B. (KS.) 423, 115 Eng.Rep. 102 (1884); Hefner v. Fidler, 58 W.Va. 159, 52 SE. 513, 3 L.R.A.

Sec. 126

ACTION OF DETINUE

251

does it lie against a bailee who has lost the chattel by accident before demand; 25 but if he has wrongfully and elusively sold and delivered, or otherwise disposed of, the chattel to another, he remains liable.<sup>20</sup> 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.<sup>2</sup>

**DECLARATION IN DETINUE—ESSENTIAL  
ALLEGATIONS: (4) THE DAMAGES**

125. 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 de**

85. 1 chitty, Treatise on Pleading and Parties to Actions with Precedents and Forms, 188 (London 1808. 16th Am. ed. by Perkins, Springfield 1876); Broolce, Abridgment, Detinue de Biens, pls. 1, 33, 40 (London 15 13).

26. English: Jones v. Dowle, 9 [t]. & W. 19, 152 Eng. Rep. 9 (1841); Reeve v. Palmer, 5 CE- (N.S-) 84, 141 Eng.Rep. 23 (1858); Wilkinson v. Verity, Lit. 6 CF. 206 (1871); Devereux v. Barclay, 2 Barn. & Ald. 703, 106 Eng.Rep. 521 (1819); Mertens v. Adcock, 4 Esp. 251, 170 Eng.flep. 709 (1804); Bank or New South \Vales v. O'connor, 14 App.Cas. 273 (1889); Alabama: Walk-er y. Penner, 20 Ala. 192 (1852); Ken. tucky: Rueker v. Hamilton, 3 Dana (Ky.) 36 (1835); Mississippi: Lowry v. Houston, 3 How. (Miss.) 394 (1839); New R:ampshire: Dame v. Dame, 43 N.H. 37 (15131); North Carolina: Merrit v. Warmouth, 2 NC. 12 (1896); South Carolina: Kershaws Ext's v. Boykin, 1 Brew. (S.C.) 301 (1803); Tennessee: Haley v. iowan, 5 Yerg. (Tenn.) 301, 26 Am.Dec. 268 (1833); Robb v. Cherry, 98 Toni. 72, 38 SW. 412 (1896); West Virginia: Burns v. Morrison, 36 W. Va. 423, 15 8.E. 62 (1892)

27. Dyer v. Pearson, 3 Barn. & O. 38, 107 Eng.flep. 648 (1824).

28. 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.**<sup>20</sup>

**STATUS UNDER MODERN CODES, PRACTICE ACTS AND RULES  
OF COURT**

126. An action to recover possession of a **chattel, or its value in case delivery cannot be had, may be maintained under many Modem Codes and Practice Acts under the same circumstances as an Action of Detinue would be maintainable at Common Law.**

**IN the California case of *Faulkner v. First National Bank of Santa Barbara*,<sup>30</sup> decided in the year 1900, under the statutory provisions concerning the Claim and Delivery of Personal Property, the plaintiff averred that she had deposited certain promissory notes as collateral security for a promissory note made to plaintiff by another; that she demanded that defendant deliver the notes to her; and that such demand was refused, and that the defendant still unlawfully withholds and detains the same, to the damage of the plaintiff in a certain sum. The prayer was for the recovery of the notes, or for the sum of forty-six hundred dollars, the value there of. After a Verdict and Judgment for the plaintiff, the defendant Appealed, bringing up the Judgment Roll, which included a Bill of Exceptions. In affirming the Judgment, McFarland, J., declared: "The Cause of Action in the Case at Bar is based on a contract of bailment. The original taking was not unlawful, but the detention was. Now, that is just the kind of wrong for which at Common Law the Action of Detinue was**

28. See Arthur v. Ingels, 34 W.Va. 639, 12 sE. 872, 11 L.R.A. 557 (1891).

29. See White v. Sheffield & T. St. fly. Co., 90 Ala. 253, 7 So. 910 (1890); Grand Island Banking Co. v. First Nat. flank of Grand Island, 34 NeIJ 93, 51 N. W. 596 (1892).

30. 130 Cal. 258, 62 P. 463 (1900).

252

**OFFENSIVE PLEADINGS**

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especially appropriate, and the averments in the Complaint in the case at Ear are substantially those required in such

action. 3 El. Comm. 151; the form of declaration on page 38, Steph.Pl., 9th Am.Ed., by I-Turd; Rucker v. Hamilton, 3 Dana, 36. While we have no Forms of Action here, yet when the Averments of facts in a Complaint show the case to be one for which a particular Form of Action would have been a proper one at Common Law, then the general principles of pleading and practice apply to it which apply to the Special Form of Common-law Action, Now, it was no Defense to the Action of Detinue to plead that the defendant, before the Commencement of the Action, had wrongfully disposed of the property, and therefore was not in possession of it. \*\*

[The

court cited several American cases and Reeve v. Palmer, 5 C.B., N.S., 8411. The principles declared in the foregoing authorities are eminently just, and are founded on the maxim that no one can take advantage of his own wrong; and they are as applicable now to an action based on a contract of bailment as they were to such an action when it had to be brought under the Special Form of Detinue. The usual Judgment in such Action is in the Alternative,—that is, that the plaintiff recover possession of the property, or its value in case delivery cannot be had; but where it appears that the property cannot be delivered the defendant is in no way prejudiced by a Judgment for the value only, and the fact that the Judgment is not in the Alternative is no ground for reversal.”

Sec.

## CHAPTER 12

### THE ACTION OF REPLEVIN<sup>1</sup>

- 127. Scope of the Action.
- 128. **Replevin—Distinguished From and Concurrent with Other Actions.**
- 129. Forms of Original Writ, Plaint, Declaration and Bond in Replevin.
- 180. Declaration in Replevin—Essential Allegations:
  - (1) In General.
- 131. Declaration in Replevin—Essential Allegations:
  - (2) The Plaintiff’s Right, Title, Interest or Possession.
- 132. Declaration in Replevin—Essential Allegations:
  - (8) The Wrongful Act of Taking and Detention by the Defendant.
- 133. Declaration in Replevin—Essential Allegations:
  - (4) The Damages.
- 134. Status Under Modern Codes, Practice Acts and Rules of Court.

#### SCOPE OF THE ACTION

127. **The Action of Replevin lies, where Specific Personal Property has been wrongfully taken and is wrongfully detained, to recover Possession of the Property, together with Damages for its detention. To support the Action, it is necessary:**

That the Property shall be Personal;

**That the plaintiff, at the time of the Suit, shall be entitled to the Immediate Possession;**

**(III) That (at Common Law) the defendant**

shall **have wrongfully taken the property (Replevin in the Cedit).** But, by Statute, **in most States, the Action will also Lie where the property is wrongfully detained, though it was lawfully obtained, the first instance (Replevin in the Detinet);**

**(W) That the property shall be wrongfully detained by the defendant at the time of the Suit.**

*The Primary and Secondary Objectives of Replevin*

THE Primary object of Replevin is to enable the plaintiff to obtain possession of the

1. In general, on the historical origin and development of the Action of Replevin, see:

Timmins: Gilbert, *The Law and Practice of Distresses and Replevies* (3d ed. by Hunt, Dublin 1702);

goods at the outset, without waiting until he has established his Right by Action. Like Detinue, the Action is primarily to recover

Wilkinson, *The Practice in the Action of Replevin; With a Collection of Practical Forms* (London 1825); Bradby, *A Treatise on the Law of Distresses* (24 ed. by Adams, London 1828); Longfield, *The Law of Distress and Replevin in Ireland* (Dublin 1841); Morris, *A Treatise on the Law of Replevin in the United States* (3d ed. Philadelphia 1878); Bigelow, *History of Procedure in England*, c. XVI, Summons, 219,

**Distraint (Boston 1880)**; OluThain, *The Law of Distress* (24 ed., London 1889); 2 Pollock and Maitland, *History of English Law*, c. **IX, Procedure**, 2, Self-Eelp, 375 Replevin (Cambridge 1895); C-oljbej, *Law of Replevin as Administered by the Courts of the United States* (2d ed., Chicago 1900); Martin, **Civil Procedure at Common Law**, c. III, Replevin, Art. **V**, ~ 105-115, 92—101 (St. Paul 1005); 3 Street, *Foundations of Legal Liability*, c. XVI, Action of Replevin, 207—222 (Northport 1906); Id. c. XX, *The Remedy of Distress*, 278; Ames, *Lectures on Legal History*, Lecture V, Replevin, 64—71 (Cambridge 1913); Shipman, *Handbook of Common-Law Pleading*, e. VI, The Action of Replevin, ~ 50, 51, 108, 109, 110, 111 (34 ed. by flallantine, St. Paul 1023) 3loi-gas, *The Study of Law*, c. V, Replevin, 88—92 (2d ed., Chicago 194s); Potter, *Historical Introduction to English Law*, c. IV, § 4, Replevin, 391—393 (3d ed., London 1948); Walsh, *A History of Anglo-American Law*, **Bk. LI**, c. VI, § 55, *Trespass de Bonis Asportatis and Replevin*, 113—115 (2d ed., Indianapolis 1932).

Articles: Maitland, *The Selsin of Chattels*, 1 LQ. Rev. 324 (1885); Ames, *The Disseisin of Chattels*, 8 Harv.L.Rev. 23 (1889); Barewen, *Property in Chat-*

(I)  
(II)

253

254

## OFFENSIVE PLEADINGS

Ch. 12

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.**<sup>2</sup>

### *Replevin in the Nature of a Provisional Remedy*

REPLEVIN may be described as an Action for the recovery of possession, in which the

this, 29 Harv.L.Rev. 374 (1910); Squire, *General Denial in Replevin*, 24 Case & Comment 21 (1917—18); Finkelstein, *The Plea of Property in a Stranger in Replevin*, 23 Col.L.Rev. 652 (1923).

Comments: *Replevin of Goods Taken in Execution— Error in the Looks*, 12 Am.Jr. 104 (1834); *Replevin—Property in a Third Party*, 20 Col.L.Rev. 622 (1920); *The Early Development of the Doctrine of Ins Tertii in Replevin*, 34 Yale L.J. 72 (1924); *Replevin—Defenses of Paramount Right to Possession in a Third Person*, 27 Mich.L.Jtev. 936 (1929); *Procedure—Contempt as Sanction to Enforce Delivery in Replevin*, 48 Mich.L.Rev. 377 (1950).

Annotations: *Alternative Judgment in Replevin as Giving Option to Either Party in Regard to Payment of Damages or Return of Property*, 170 ALE. 122 (1947); *Sufficiency of Proof in Replevin of Defendant's Possession at Time of Commencement of Action*, 2 A.L.R2d 1043 (1948).

Le-IsJatlon: *Action of Replevin, Act to Abolish*, 2 N.Y.L.J. 165 (1879).

Replevin, like Debt and its offshoot, Detinue, was subject to Wager of Law. Bracton's Notebook, 477, 741 (London 1887); 2 Pollock and Maitland, *History of English Law*, c. IX, Procedure, § 4, Pleading and Proof, 631, 632, *Wager of Law* (Cambridge 1895).

2. Cobbey, *Law of Replevin As Administered by the Courts of the United States*, c. IT, Scope and Nature of the Action, ii 23, 24 (2nd ed. Chicago 1900); *English*: *Mennie v. Blake*, 6 LI. & DI. 842, 119 Eng. Rep. 1078 (1856); California: *Fredericks v. Tracy*, 98 Cal. 058, 33 Pae. 750 (1893); Delaware: *Atlantic Refining Co. v. Feinberg*, 112 AtI. 685 (Del.Super. 1920); New Jersey: *Pedrick V. Kuemmell*, 14 N.J.L. 379, 65 AtI. 846 (1907); Oklahoma: *Leeper, Graves & Co. v. First Nat. Bank of Hobart*, 26 Okla. 707, 110 Pac. 655, 29 LEA. (N.S.) 747, Ann.Cas.1912B, 302 (1912).

“provisional remedy” of an immediate delivery of the chattel claimed is granted. The Action has to a large extent, as we shall see, displaced Detinue, and is now the common remedy to recover possession of a chattel and Damages for its wrongful detention, or, in case the thing itself cannot be recovered, **Damages** for its value as well as for its detention.

The Action, therefore, is not founded merely upon the right to obtain redress for a tort; in Replevin and

Detinue, recovery of specific property is the end and *aim* of the Action. In present-day Law, the Action of Replevin differs from Detinue chiefly by the circumstance that the plaintiff at once secures possession of the chattels in dispute. This immediate relief is in the nature of a provisional remedy, granting the plaintiff a recovery of the chattels pending the outcome of the action. By this provisional relief the plaintiff really accomplishes his object to get possession of his goods; to retain possession, however, he must prosecute his action and establish his right. Hence, as a condition of securing this relief in advance and having **the Sheriff deliver the property—the horse and plough—over to him**, he was and is required to give security in the form of a bond or undertaking, with sureties, to make out the justice of the claim or return the property to the defendant.

### *Does Replevin Lie for AU Unlawful Takings?*

AT Common Law Replevin lay only for an unlawful taking of goods. But for several **hundred years it was employed chiefly for only one sort of unlawful taking, that of a wrongful distress.**<sup>3</sup> The Writ of Replevin, as shown by the Form in the Register, mere-

3- “A distress is the taking of a personal chattel **without** legal process from the possession of a wrongdoer into the hands of the party aggrieved. as a pledge for the redress of an injury, the performance **of a duty, or the satisfaction of a demand.**” Bradby, on Distress, c. VIII, Of a Distress

ly alleged an unlawful taking and withholding by the defendant—*cepit et injuste detinet*, or taken and unjustly detained—and there is no suggestion in the early Law which **in theory limits Replevin to the field of distress**, and this view is supported by the fact **that the Writ and Pleadings, which is always good evidence of the Law, contains no language restricting the action to a wrongful distress.**<sup>4</sup>

**As thus developed, an Action of Replevin** was the regular way for the plaintiff-tenant to contest the validity, of the extra-judicial seizure by which his landlord had taken his goods upon a distress for rent. It consisted in a redelivery of the pledge, or thing taken **in distress—the horse and plough,—to the owner**, upon his giving security or bond to try the right of distress and to restore it if the right should be adjudged against him.<sup>6</sup>

**The theory of the action**, as we have observed, **was broad enough to cover any case of wrongful taking**, and the statement of Blackstone that it was only available in cases of wrongful distress was soon shown to be incorrect.<sup>6</sup> It is now clearly recognized as

for Fines and Amercements, (1st Am. ed. New

**York, 1808).**

Distress, as here defined, is not to be confused with **the** remedy of distress as used for the enforcement **of Recognizances or** to compel the payment of fines and amerancements, where the right to distrain is derived from the agreement of the parties or from custom. Bradby, on Distress, e. VIII, Of a Distress for Fines and Amercements, (1st Am. ed. New York, 1808).

Apparently, the earliest American ease to extend Replevin to cover a wrongful taking other than a distress, was the New York ease of *Pangburn v. Patridge*, 7 Johns. (N.Y.) 140 (1810),

4. 3 Street, Foundations of Legal Liability, c. XVI, The Action of Replevin, 215, 216 (Northport, 1900).

6- 3 Street, Foundations of Legal Liability, c. XVI, **The Action of Replevin**, 209 (Northport, 1906).

6. 3 **Blackstone, Commentaries on the Laws of England, e. IX, Of Injuries to Personal Property, 145, 146 (7th ed. Oxford 1775).**

**In Pangbura** *v. Patridge*, 7 Johns. (N.Y.) 140, 142 (1810), Ia referring to this very matter, Van Ness, J.,

255

**extending to any unlawful taking from the plaintiff's possession.**<sup>7</sup>

declared: “The passage to that effect [that Replevin lay only for an unlawful distress], in Blackstone's commentaries [first published in 1767], **Is** not warranted by the books. This action is usually brought to try the legality of a distress; but it will **lie for any** unlawful taking of a chattel. Possession by the plaintiff, and an actual wrongful taking by the defendant, are the only points requisite to support the action; and none of the cases, defining the nature of the action, confine it specially to the ease of a chattel, taken under pretence of a *distress*. The old authorities are, that Replevin lies for goods taken *toriously, or by a trespasser*; and that the party injured may have Replevin. or Trespass, at his election. This is so laid down by Gascoigne, J., **in 7 Hen. IV, 25b**, and by Danhy, 3., in 2 Ed-v. IV, 16, and by Brian, J., in 6 Hen. VTI,

9, and these dicta are cited as good law, in Bro. tit. Replevin. p1. 86, 30, and in Roll, Abr. Tit. Replevin, B. The same rule was admitted by the judges in the case of **Mason v. Dixon**, (Jones Rep. 173) and in Bishop

**v. Montague**, Cro.Eliz. 824). Similar language is held, in many of the modern authorities, cited by the plaintiff's counsel, upon the argument; and particularly by Baron Gihert, Baron Comyn, and Lord Redesdale. The opinion of the latter is reported by Schoales and Lefroy, in which he lays down the law, with peculiar accuracy and precision. The provisions in our statute (11 Sess. e. 5). 12 R.8. **522, et seq.**] apply chiefly to cases of illegal distress:

but there is nothing which confines the remedy to that particular injury.

“If this question be considered upon principle, It Is proper this Action should be maintainable, wherever **there is a tortious taking of a chattel out of the possession** of another. A great variety of cases might be stated, in which no Damages which a Jury is legally competent to give, can compensate for the loss of a particular chattel.”

“The Nonsuit must, therefore, be set aside, and a New Trial granted, with costs to abide the event of the suit.”

7. “The Writ of Replevin, as shown by the Register, merely alleged an unlawful taking and withholding by the defendant.” 3 Street, Foundations of Legal Liability, e. xvi, The Action of Replevin, 215 (Northport, 1900); *Mennie v. Blake*, 0 El. & Li. 842, 119 Eng.Rep. 1078 (1856).

**Replevin at Common Law was maintainable in cases where there was an unlawful taking and an unlawful detention of personal property, and in such a proceeding there was a seizure under a Writ of Replevin of the subject-matter of the litigation at the beginning of the proceeding, while Detinue at Common Law was maintainable for the recovery of per-**

Sec. 127

#### ACTION OF REPLEVIN

Coiler & ROOPY Com.Law Pldg. 1,6—10

256

### OFFENSIVE PLEADINGS

Ch. 12

#### *The Extension of Replevin to Include Detinue*

In the leading English case, *Mennie v. Blake*,<sup>9</sup> and in the leading American case of *Harwood v. Smethurst*,<sup>o</sup> on Detinue factual situations, that is, where the defendant came into possession of the chattel lawfully, and thereafter unlawfully detained it, the plaintiff, in both cases, instead of suing in Detinue, brought Replevin, thus in effect requesting the respective Courts to expand the Scope of Replevin so as to include a mere wrongful detention, and by this process of Judicial Legislation bring about the absorption of Detinue by Replevin. This, both Courts, English and American, refused to do, Chief Justice Whelpley, in *Harwood v. Smethurst*,<sup>o</sup> stating in the following striking language: “Although this remedy [Replevin] may be prompt, efficacious, and beneficial, and in many cases the only one giving the necessary relief to a party having a right to the possession of chattels, I do not feel at liberty, entertaining, as I do, a clear conviction that a tortious taking is necessary by the Common Law as the ground of the action, to indulge in judicial legislation for the purpose of enlarging the Scope of the Action.” Thus, **the Court refused, by judicial action, to extend Replevin to include an unlawful detention, and thus bring about a merger of Detinue in Replevin.**

But what the Court refused to do by Judicial Legislation in the *Mennie* and *Harwood* cases, the Legislature of New Jersey did by **express enactment, thus finally extending the scope of Replevin to include a lawful taking and an unlawful detention, which the Court**

sonal property In all cases where there was an unlawful detainer, regardless of the manner of taking, and recovery of the property was had only after Judgment. *Tray Laundry Machinery Co. v. Carbon City Laundry Co.*, 196 rae. 745 (N.M.1921).

L 6 El. & Bl. 842, 119 Englep. 1078 (1850).

9- 29 NIL. 195, 80 Am.Dec. 207 (1861).

it 29 NIL. 195, 197, 80 AnDec. 207, 208 (1861).

had refused to sanction. The end was achieved by a statute which provided “That any unlawful detention of goods and chattels from their lawful owner, or the person entitled by law to the possession of the same, shall be deemed an unlawful taking for the purpose of supporting an Action of Replevin?”

**Prior to this development, if B merely detained goods which he had acquired lawfully, A had to proceed in Detinue and could not replevy the goods on the basis of an unlawful detention. Replevin was in this respect like the statutory Summary Proceedings for Forcible Entry on Land. It contemplated the situation where property, being in the peaceable possession of A, is seized by B. Provisionally, the status quo is at once restored, pending the**

settlement of the controverted right. In Form the Action proceeds for Damages, but, if the plaintiff fails, **the defendant** will be given Judgment for the **return** of the chattels—the horse **and plough**.

After the provisional remedy of immediate delivery is granted both parties, as we have seen, become actors in the suit; the plaintiff to be vindicated in his possession and to recover Damages, while the defendant is like a plaintiff asserting his claim to the chattels. The pleading by which the landlord-defendant prayed for their return was formerly called an Avowry or Cognizance, which was **in the nature of a Cross-Declaration. It followed therefore that the tenant's next pleading, instead of being a Replication, was a Plea, with all other pleadings in consequence being deferred an additional stage, as compared with an ordinary action.**

### *When is the Action Available—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,

11. 3 N.iCompSt, 4368, \* 2 (1910).

### Sec. 128 ACTION OF REPLEVIN

257

or real property; nor does it lie to recover growing crops or timber. 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.<sup>3</sup> Replevin cannot be maintained for money which has no identifying marks or receptacle."

### *Wham is the Action Not Available*

THE Action will not lie to determine the title to land. But the fact that question of

12. English: Hesketh v. Lee & Al! 2 Wms.Saund. 84, 85 Eng.Rep. 756 (1669); Illinois: Chatterton v. Saul, 16 Ill, 149 (1854); Massachusetts: Brown v. Vallis, 115 Mass. 154 (1874); Michigan: McAuliffe v. Mann, 37 311th. 539 (1877); Pennsylvania: foberls v. Dauphin Deposit Bank, 19 Pa. 71 (1852); South Carolina: Vausse v. Russell, 2 MeCord (S.C.) 329 (1823); Wisconsin: Buebsehmmnn v. McHenry, 29 Wis. 655 (1872).

Growing crops are subject to Replevin, without regard to whether they are growing or, having matured, have ceased to derive any nutriment from the soil. Stephens v. Stcckdaub, 202 Mo.App. 392, 217 8.W. 871 (1920).

13. Illinois: Davis v. Easley, 23 Ill. 192 (1854); Chat-tenon v. Saul, 16 Ill. 149 (1854); Ogden v. Stock, 34 Ill. 522, 5 Am.Dec. 332 (1864); Don v. Dudderar, 88 Dl. 107 (1878); Maine: Richardson v. York! 14 Me. 216 (1837); Massachusetts: Nichols v. Dewey, 4 Allen (Mass.) 386 (1862); Michigan: Ortman v. Sovereign, 42 Mich. 1, 3 N.W. 223 (1879); Marquette, B. & O. B. Co. v. Atkinson, 44 Mich. 166, 6 NW. 230 (1880); Wait v. Baldwin, 60 Mich. 622, 27 NW. 697, 1 Am.St.Rep. 551 (1880); New York: Cresson v. Stout, 17 Johns. (N.Y.) 116, 8 Am.Dec~ 373 (1819); Pennsylvania: Coomalt v. Stanley, 8 Clark (Pa.) 389 (1786); Snyder v. Vaugx, 2 Rawle (Pa.) 423, 21 Am. Dec. 466 (1830); Young -v. Rerdic, 55 Pa. 172 (1867); Green v. Ashland Iron Co., 62 Pa. 97 (1869); Lehman v. Kellerman, 65 Pa. 489 (1870); Wisconsin: Stearnes cc Raymond, 26 Wis. 74 (1870).

Where the owner of land and all parties interested treated a warehouse erected *thereon* as personal property, Replevin will lie against one wrongfully taking possession of the same. Burdick t. Thm-ALurn Lumber Co., 91 Or. 417, 179 Pac. 245 (ThLD).

1- Money Is not subject of *an* action of *claim* and delivery unless It Is marked or designed so as to make It specific as regards identification. lliilyer v Eggers, 32 CaLApp. 764, 164 Pac. 27 (1870).

title may incidentally arise will not necessarily defeat the action.<sup>5</sup>

Replevin will not lie for timber, crops, or minerals severed and removed from land by one who is in the adverse possession of the land under a claim of title.<sup>6</sup> It will not lie for property which is in the custody of the Law; that is, in the hands of Court or Executive Officers under Attachment or otherwise.<sup>7</sup>

### REPLEVIN—DISTINGUISRED FROM AND CONCURRENT WITH OTHER ACTIONS



128. Originally Replevin and Detinue were **distinguishable, one lying for a wrongful taking anti an unlawful detention, the other for a lawful taking, followed by a wrongful tie**

15. It was held that Replevin could 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. *Greco v. Ashland Iron Co.*, 62 Pa. 97 (1869); *Cl Christensen v. Banna*, 183 DI.App. 115 (1913).

The title to land cannot be tried in an Action of Replevin. Mississippi: *Hickingbottom v. Lehman*, 124 Mich. 682, 87 So. 149 (1921); New York: *Walden v. Feller*, 99 Misc. 576, 164 N.Y.Supp. 493 (1917).

16. Illinois: *Anderson v. Rapler*, 34 Ill. 436, 85 Am. Dec. 318 (1864); *Ogden v. Stock*, 34 Ill. 522, 85 Am. Dec. 332 (1864); Mississippi: *Miller v. Wesson*, 58 Miss. 831 (1881); Pennsylvania: *Brown v. Caldwell*, 10 Serg. & It. (Pa.) 114, 18 Am.Dec. 660 (1823); *Powell v. Smith*, 2 Watts (Pa.) 128 (1833); *Cromelien*

*v. Brink*, 29 Pa. 522 (1858); Cf. *McKinnon v. Meston*, 104 Mich. 612, 62 NW. 1014 (1895).

17. Illinois: *Kingman & Co. v. Reinemer*, 106 Ill. 208, 40 N.E. 786 (1897); Minnesota: *Kelso v. Toungren*, 86 Minn. 177, 90 NW. 316 (1902).

While Replevin lies to recover personal property unlawfully detained, property in the custody of the Law cannot be so secured. *Azparren v. Ferrel*, 44 Nev. 157, 191 Pac. 571, 11 A.L.R. 678 (1920).

An automobile taken in possession and held by the Board of Police Commissioners of Baltimore City for use as evidence in a criminal prosecution is not subject to Replevin by a claimant. *Good v. Board of Police Com'rs of City of Baltimore*, 137 Md. 192, 112 Ati. 294, 13 ALE. 1164 (1920).

Under the Act of April 3, 1779 (1 Smith's Laws, 470), § 2, a Writ of Replevin to recover property seized by a public official is unauthorized, and where so seized will, on motion, be quashed. *York v. Marshall*, 257 Pa. 503, 101 AU. 820 (1917).

258

## OFFENSIVE PLEADINGS

### Ch. 12

ention; these distinctions were obliterated by modern statutes extending the scope of **Replevin to include Detinue. Replevin and Trespass were to be distinguished, in the sense that Replevin assumed property in the plaintiff, whereas Trespass assumed property in the tortfeasor. Otherwise Replevin became to a considerable extent a concurrent remedy with Detinue and Trespass; and later with Trover.**

IT was early settled that Replevin would lie upon any wrongful taking. In consequence, *Gascoigne, C. 3.*, in a case decided in 1406,<sup>18</sup> said that Replevin was concurrent with Trespass. In theory, therefore, one who *was* disseised of a chattel might elect to sue in Detinue, Replevin and Trespass. If **he sued in Detinue he might recover the chattel**, or if it was not available, then he **might recover its value, but it remained in the defendant's hands until the action was completed. If he sued in Replevin, he reacquired the chattel as his own, plus damages for the wrongful detention. If he sued in Trespass, he could recover damages for the full value of the chattel, as the action proceeded on the theory that the property had vested in the tortfeasor.**<sup>19</sup> Still later, in more modern times, the Action of Trover also became available against a trespasser who took and converted chattels to his own use. But for some reason, not quite clear, Replevin did not become popular as a concurrent remedy with Trespass. Street<sup>20</sup> suggests that the explanation may lie in the circumstance that in Bracton's day Replevin was subject to Wager of Law, or it may have been due to the fact that the defendant-

18- YB. 7 Hen. IV, 28b, p1. 5. It **YE**. C Hen. VII, 8b, p1. &

See, also, Y.B. 19 Hen. VI, 65, p1. 5 (1442), in which Newton, J., declared: "If you have taken my chattels it is my election to sue in Replevin, which supposes the property to be in me, or to sue a Writ of Trespass, which supposes the property to be in you **who took** it. Thus, it is my choice to ~value property or not"

20. 3 Street, *Foundations of Legal Liability*, c. **XVI**, The Action of Replevin, 217 (Northport, 1906).

lord might sidetrack the action by raising an issue as to the ownership of the chattels—the horse and plough.

But while Replevin and Detinue were concurrent in a certain sense, they were to be distinguished with respect to the return of **the chattel** pending a determination of the matter of right between the parties. Of course, this distinction evaporated under modern statutes merging the two actions. And as we have seen, Replevin was to be distinguished from Trespass, the one being available where the property in the chattel remains in the plaintiff, the other being **available where the plaintiff chooses to assume the property to be in the trespasser.**

## FORMS OF THE ORIGINAL WRIT, PLAINT, DECLARATION AND BOND IN REPLEVIN

**129.** This section contains Forms of the Original Writ, Plaintiff, Declaration and Bond in the Action of Replevin,

### *The Original Writ in Replevin*

THE Original Writ in Replevin gave the Action a dual character; it furnished an expeditious method by which the tenant could immediately regain possession of the horse and plough, and it authorized a hearing as an incident thereof to determine the legality of the alleged wrongful taking and detention, and award Damages, and at one stage in the

#### **development of the Action this hearing**

might be held before the Sheriff. Viewed from the standpoint of the first command of the Writ, the Action appears to be a proceeding to regain possession of personal property wrongfully taken and detained, and it has been so viewed by some authors.~' Viewed from the standpoint of the second command of the Writ, the Action appears to be a Proceeding to Recover Damages for the unlawful taking and **detention of personal property,**

21. Bouvler, Law Dictionary, Replevin.

#### **Sec. 129**

### **ACTION OF REPLEVIN**

259

and it has been so defined by Saunders,<sup>22</sup> Stephen<sup>23</sup> and Tidd.<sup>24</sup> Despite statements which have been construed to the contrary,<sup>25</sup> no case of Replevin appears which has not been **commenced with a Writ requiring the Sheriff** to cause the goods to be replevied, or by Plaintiff to the Sheriff, followed by a precept to replevy the goods.<sup>26</sup>

The two proceedings, in reality, were never separate and independent of each other. The recovery of the goods under the first command of the Writ was only provisional, that is, it restored possession of the chattels to the plaintiff, pending proceedings under the second command to do justice; if the plaintiff failed to make out his case, the chattels of necessity were returned to the defendant. The dual character of the Original Writ in replevin will appear in the Form of the Original Writ set out below.

### *Distinction Between Replevin in the Detinue and Replevin in the Detinet*

AT Common Law Replevin in the *detinet* lay for a wrongful detention of goods taken under a lawful distress for rent.<sup>27</sup> But in **practice the action was usually confined to cases of wrongful distress, such as a wrongful distress for rent, damage feasant, sewers' rates, and the like.**<sup>28</sup>

22. Saunders, The Law of Pleading and Evidence in Civil Actions, • 760, Replevin, (Philadelphia 1829).

23. Stephen, A Treatise on the Principles of Pleading in Civil Actions, - I, Of the Proceedings in an Action from Its Commencement to Its Termination, 52 (3d Am. ed. by Tyler, Washington, D. C. 1895).

24. Tidd, The Practice of the Court of King's Bench in Personal Actions, c. I, Of Actions, 5 (2d Am. ed., New York, 1807).

25. Pearson v. Roberts, Wines 668, 125 EngRep. 1376 (1755).

28. Fletcher v. Wilkins, 6 East 286, 102 Eng. Rep., 1295 (1805).

27. Evans v. Elliott, 5 Ad. & IL 142, 111 Eng. Rep.

28. Martin, *Civil Procedure at Common Law*, c. III, Personal Actions Ex Delicto, Art. V. Replevin, 93, 96 (St. Paul, 1905).

The Modern Form of the Action of Replevin is in the *detinuit*, which is so called because, as the word imparts, it is brought when the goods have been delivered by the Sheriff to the plaintiff.<sup>29</sup> Replevin in the *detinet* lay to recover goods which were still detained, but it has long been obsolete. It follows therefore that when Replevin in the *detinet* was available, the plaintiff was entitled to recover the value of the goods as well as Damages for their taking; <sup>30</sup> whereas in Replevin in the *detinuit*, the plaintiff was entitled to recover only Damages for the wrongful taking.

Wilkinson understood that there were two kinds of Replevin—one in the *detinuit* and the other in the *detiuit*. But Martin suggests that this supposition was the direct outgrowth of a reasonable Variation in the Declaration, turning on whether the Sheriff found or failed to find the property. If the property was found and delivered to the plaintiff, the plaintiff then declared in the *detinuit*, describing the wrong for which he claimed Damages as an accomplished act of the past.<sup>32</sup> In this Form of the Declaration, it was alleged that the goods taken “were detained until replevied by the Sheriff” a phrase which came to be abbreviated by alleging that they were “detained until, etc.,” which was called “Declaring in the Detinuit” As the Sheriff was usually successful in delivering the horse and plough, this was the more usual Declaration; it was filed after the result of the Sheriff’s action was known, and Damages were only for the orig

29. 1 Wins. Saunders 347, 85 Eng.Rep. 504 (1669).

30. *Petree v. Duke*, 2 Lutw. 1130, 125 Eng.Bep. 637 (1686).

31. Wilkinson, *The Practice in the Action of Replevin with a Collection of Practical Forms*, c. II, 22, 23 (London, 1525).

32. **Martin, Civil Procedure at Common Law**, e. III, Personal Actions Ex Delicto, Art. V, Replevin, 100 (St. Paul, 1905).

33. Hammond, *Nisi Prius*, c. VI, 460, 461 (London,

1816).

260

## OFFENSIVE PLEADINGS

Ch. 12

in a wrongful taking and past detention by the landlord-defendant.<sup>34</sup> If, however, he was unable to find and return the horse and plough to the tenant, the plaintiff might, at his option, compel the defendant to answer for the wrongful taking and detention, in Damages, in which case he declared in the *detinet*. In such an instance the plaintiff recovered Damages for the continued detention of the chattels, which was inclusive of the full value of the chattels taken and still detained, as well as Damages for the wrongful taking?<sup>35</sup> The same Declaration could be a *detinuit* as to the part returned, and a *definet* as to the residue not found or returned.<sup>36</sup>

Martin suggests that there probably never was a distinct Action of Replevin in the *detinet*, but that there was also probably never a time when, after issue of the Replevin Writ, the plaintiff could not declare in the *detinet* if the Sheriff failed to redeliver the goods, as it was quite clear that unless he did so, he could not recover the value of the chattels.<sup>37</sup>

In any event it seems evident that the Variation in the Form of Declaration had no effect in changing the action; but went only to the Measure of Damages, and this ceased to be necessary, as under the Declaration in the *detinuit*, as finally developed, the Courts permitted the plaintiff to show that the goods were still detained, so as to bring their value into the assessment, and hence to that end the value was alleged in the Declaration

34. Anonymous, 1 Esp. 850, 170 Eng.Rep. 381 (1795).

35. Browne, *A Practical Treatise on Actions at Law*, e. VI, Forms of Action, ~ 10, Replevin, 319, 447 (Philadelphia, 1842).

3-. For a Declaration in which the Two Forms are combined, see Morris, Law of **Replevin in the United States**, c. VIII, **306 (Philadelphia, 1878)**; and for another example, see *McKelvy, Principles of Common Law Pleading*, c. **UI, Actions Eased on Natural Rights, Section IV, Replevin, 69, p. 50 (New York, 1894)**.

87. MartIn, Civil Proce6ure at Common Law, e. UI, **Personal Actions Ex Delicto, Art. V. Beplevln, 99 (St Paul, 1905)**.  
in the *detinuit*?<sup>8</sup> As present detention might be treated as a continuation of the original taking and detention, as it went only to the Measure of Damages, and not to the right of action, it became unnecessary to declare in the *detinet*, and this may explain why this latter Form of Declaration in Replevin became obsolete.

It should be observed, however, that the Writ was always in the *detinet*, and that the Modern Action of Replevin in many American States, being instituted before the issuance of the Writ or Order, is usually in that form.

The Venue in Replevin is Local,<sup>39</sup> but the Venue in an Action on the Bond is transitory.<sup>40</sup> And the goods must be stated with certainty in the Declaration, but certainty to a general intent *is sufficient*.

#### FORM OF ORIGINAL WRIT IN REPLEVIN

GEORGE THE FOURTH, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith,

To the sheriff of            County,

#### GREETING:

We command you, that justly and without **delay you cause to be replevied to AS. his cattle**, goods, and chattels which *C.D.* hath taken and unjustly detaineth, as he saith, and after cause him to be brought to justice for the same; that we hear no more complaint for want of justice. Witness ourself at Westminster, the day of  
in the            year of our reign.

WILKINSON, *The Practice in the Action of Replevin*, 143 (London, 1825).

3-. MeKelvy, *Principles of Common Law Pleading*, c.  
**III, Actions Eased on Natural Rights**, Section IV, Replevin, ~ 69. p. 50 (New York, 1894).

39. Potter v. North, 1 Wms. Saunders, 347, - **1, 55 Eng.Rep. 503 (1689)**.

40. **Rex v. Jones & Palmer**, 1 Leach **366**, 168 Eng.Eep.

**285 (1785)**.

Sec. 129

#### ACTION OF REPLEVIN

261

#### FORM OF PLAINT IN REPLEVIN

To the sheriff of            county.

#### GREETING:

*A.B.* complains against *CD.* in a plea of taking and unjustly detaining his cattle against sureties and pledges, etc. Pledges to Prosecute,

**E.F.**

&

**G.H.**

GILBERT, *The Law and Practice of Distresses and Replevins*, 235 (3d ed. by Hunt, London 1793).

#### FORM OF DECLARATION IN REPLEVIN

State of

County.

}ss

Court of County.

Term, A.D. 19—.

Plaintiff in this suit, by

his attorney, complains of defendant in this suit, of a plea wherefore he wrongfully took the goods and chattels of the said plaintiff and unlawfully detained the same until, etc. For that the said defendant, on

the thy of in the year 19\_,

at No. Street in the city of

in the county aforesaid, wrongfully took the goods and chattels, to wit: [describing them], of the said plaintiff, of the value of dollars, and unjustly de~ tamed the same until, etc.

And also wherefore the defendant unjustly detained the goods and chattels until, etc. For that the said defendant, on the \_\_\_

day of in the year 19\_, at No.

Street in the city of

in the county aforesaid, the goods and chattels of the said plaintiff, to wit, [describing them], of the value of dollars, wrongfully detained, etc.

But that the said defendant, although often requested, bath refused, and yet refuses, to deliver the said goods and chattels above mentioned to the said plaintiff.

Wherefore the said plaintiff says he is injured and hath sustained damage to the amount of dollars, and therefore he brings his suit, etc.

Plaintiff's Attorney

ENCYCLOPEDIA OF FORMS. Forms No. 6,939 and No. 17,730.  
FORM OF BOND IN REPLEVIN  
SUPREME COURT

(New York) County.

(Title of Action.)

WHEREAS, (John Jones), the plaintiff in this action, has made an affidavit that the defendant (John Doe) wrongfully detains certain personal property in said affidavit mentioned, of the value of (eight thousand) dollars (\$8,000), and the plaintiff claims the immediate delivery of the said personal property to him, as provided for by Article 66 of the Civil Practice Act.

NOW, THEREFORE, in consideration of the taking of said property or any part thereof by the sheriff of the County of (New York), by virtue of the said affidavit and the requisition thereupon indorsed, we, the undersigned (John B. Taylor), of (No. 2~ West First Street, Borough of Manhattan, City of New York), and (Charles T. Furman), of (No. 134 East Fourth Street, Borough of Manhattan, City of New York), and (John Jones), of (No. .76 West Seventieth Street, Borough of Manhattan, City of New York), do hereby jointly and severally undertake and become bound to the defendant in the sum of (Sixteen thousand) Dollars (\$16,000) [not less than twice the value of the chatteL or chattels as stated in the affidavit], for the prosecution of the action by the plaintiff, in the (New York Supreme Court), against the defendant, for the return

262

OFFENSIVE PLEADINGS

Ch. 12

to the defendant of the said property if possession thereof is adjudged to him, or if the action abates or is discontinued before the said property is returned to the said defendant, and for the payment to the defendant of any, sum which the judgment

awards to him against the plaintiff.

Dated, (*New York, July 24, 19—*).

(John B. Taylor),  
(Charles T. Furman),  
(John Jones).

MEDINA'S BOSTWICK, Common Practice Forms (Form 564) 838 (5th ed. by Cannon, Davison, Edelman, Grimes and Schneider, Albany, N.Y. 1955).

**DECLARATION IN REPLEVIN—ESSENTIAL ALLEGATIONS; (1) IN GENERAL**

**130. The Essential Allegations of the Declaration are:**

**(I) The plaintiff's Title to Certain Goods at the Commencement of the Action;**

**(II) The Unlawful Taking and Detention; or by Statute in Some States, an Unlawful Detention only;**

**(III) The Demand and refusal in Certain Cases;**

**(W) The Damages**

**The property must be described sufficiently for identification, but the right of the plaintiff may be generally stated.**

AS has been stated before, the property **which is the subject of this action must be personal**, and such as is capable of definite **description and of delivery**; and, in describing it in the Declaration, care and accuracy must be used, since the question of identification is an important one. Where the chattels taken and detained are in their nature distinguishable from an 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.<sup>41</sup> The plaintiff should Count on the identical chattels replevied, and no more or less, as the defendant might be entitled to a Judgment for the return of a larger or the correct number, though not a number less than actually in question; ~ and the Declaration should also state their value correctly, though the strictness formerly necessary is not now required.<sup>43</sup> In brief, here, as in all cases where specific property is in question, the statement must be sufficiently accurate and complete for the Court and Jury to see that the property as to which **evidence is offered is the same as that referred to in the pleadings.**

The practice in bringing Actions of Replevin is now almost universally regulated by statute, and the statutes must therefore be consulted. In some states the Declaration is not used at all, but an Affidavit takes its place. In these cases the Affidavit must comply with the rules above stated, for it must, like a Declaration, show facts constituting a cause of action,

**DECLARATION IN REPLEVIN—ESSENTIAL ALLEGATIONS: (2) THE PLAINTIFF'S RIGHT, TITLE, INTEREST OR POSSESSION**

**131. It is sometimes said that the Jieclaration must allege a General or Special Property Interest in the articles taken and detained, or (by statute) merely detained, and the plaintiff's**

41. Indiana: Magee v. Siggerson, 4 Blackf. (md.) 70 (1835); Ball v. Durham, 117 Ind. 429, 20 N.E. 282 (1889); Wood v. Darnell, 1 Ind.App. 215, 27 N.E. 447 (1891); Maine: Wingate v. Smith, 20 Me. 287 (1841); Massachusetts: Rider v. Robhins, 13 Mass. 285 (1816); Missouri: cnim v. Elliston, 33 Mo.App. 591 (1890); South Carolina: Lockhart v. Little, 30 S.C. 326, 9 SE. 511 (1889).

42. Maryland: Sanderson's Ex'rs v. Marks, 1 Bar. & 0, (Md.) 252 (1827); New York: Root v. Woodruff,

6 Hill. (N.Y.) 418 (1844).

43. Maine: Thomas v. Spofford, 46 Me. 408 (1859); Massachusetts: Pomeroy v. TrAmper, 8 Allen (Mass.) 398, 85 Am.Dec. 714 (1864).

And, as to the effect of the statement, see Bailey, sury. v. Ells, 21 Ark. 488 (1860).

### Sec. 131

## ACTION OF REPLEVIN

263

**right thereto, but in truth the right of immediate possession is necessary.**

TO support Replevin, the plaintiff must have and must allege such a property in the goods, either General or Special, as entitled him to the immediate possession of them, as against the defendant. It is not sufficient to allege that the plaintiff was "entitled to the possession of the goods"; the Declaration should aver that the articles were the "goods and chattels of the plaintiff" at the time of the taking.<sup>44</sup> 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.<sup>45</sup> Even though he may

44. California: Harris v. Smith, 132 Cal. 316, 64 Pac. 409 (1901); Illinois: Warner v. Canton, 22 Ill. 415 (1859); New York: Bond v. Mitchell, 3 Barb. (N.Y.) 304 (1848). See, also, Puterbaugh, Illinois Pleading and Practice, c. IV, 309 (7th ed. Chicago, 1803).

**In Almada v. Vandecar, 94 Ore.** 515, 185 Pac. 907 (1919), a Replevin Complaint, alleging that the plaintiff was the owner of a steer when it was taken from him by the defendant, but not alleging that the plaintiff was entitled to the possession at the time the action was commenced, which was some two years later, was held insufficient to support a Judgment for the plaintiff.

And a Complaint In an Action of Replevin should state facts from which it may be inferred with reasonable certainty that the plaintiff is entitled to the possession of the property at the time of the Commencement **of the Action, an Allegation** of Ownership being insufficient, inasmuch as the owner may not be entitled to possession Bush v. Bush, 55 Utah 237 184 Pac. 823 (1919).

45. Arkansas: Wilson v. floyston, 2 Ark. 315 (1830); Illinois: Holler v. Coleson, 23 Ill.App. 324 (1886); Pease v. Ditto, 189 Ill. 456, 59 N.E. 983 (1901); Indiana: Walpole v. Smith, 4 Blackf. (md.) 304 (1837); Maine: Thomas v. Spofford, 46 Me. 408 (1859); Massachusetts: Waterman v. Robinson, 5 Mass. 303 (1800); Johnson v. Neale, 6 Allen (Mass.) 227 (1863); Hallett v. Fowler, 8 Allen (Mass.) 93 (1864); Stanley v. Neale, 98 Mass. 343 (1807); Tracy v. Warren, **104 Mass. 376** (1870); New York: Pattison v. Adams, 7 Hill (N.Y.) 126, 42 Am.Dec. 59 (1845); Pennsylvania: Lester v. McDowell, 18 Pa. 91 (1851).

**To maintain Replevin, the plaintiff must show title anti a right to possession.** Massachusetts: Doody v. Collins, 223 Mass. 332, 111 N.E. 897 (1916); Okia

have an interest in the property, if, as observed above, he is not entitled to the immediate possession thereof, **he must seek redress in some other form of action,**<sup>46</sup> **for Replevin will not lie.**

Possession in the plaintiff at the time of the caption is not necessary. It is sufficient

homa: First Nat, Bank v. Kreuzberg, 75 Okla. 97, 181 Pac. 717 (1019); Oregon: Bro~vn v. Sheedy, 90 Ore. 74, 175 Pac. 613 (1918).

40. English: Gordon v. Harper, 7 TB. 9, 101 Eng. **Rep.** S29 (1796); Illinois: Haverstick v. Fergus, 71 Ill. 105 (2873); Indiana: Ohinn v. Russell, 2 Blackf. (md.) 174 (1828); Iowa: Kingsbury v. Buchanan, 11 Iowa 387 (1860); Maryland: Smith v. Williamson, 1 Hay. & S. (Md.) 147 (1801); Massachusetts: Wheeler v. Train, 3 Pick. (Mass.) 256 (1625); Collins v. Evans, 15 Pick. (Mass.) 64 (1333); Michigan: Belden v. Laing, 8 Mich. 500 (1860); Hunt v. Strew, 33 Mich. 85 11875); Nevada: Azparren v. FermI, 44 Nev. 157, 191 Pac. 571, 11 A.L.R. 678 (1920); Pennsylvania: Lester v. McDowell, 18 Pa. 01 (185fl: Weed v. FlaII, 101 ~a. 592 (1882),

Though a chattel mortgagee may maintain Replevin against the mortgagor or a third person after condition broken, he cannot maintain the action either before default in *payment*, nor after such default, but before expiration of the time during which the mortgagor may retain possession. Even the General Owner of a chattel cannot maintain the action where another has a Special property interest 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 MAch. 85 (1875).

The lessee of attached property, and not the lessor, is the proper party to bring Replevin. Illinois: Simpson v. Wrenn, 50 Ill. 222, 99 Am.Dec. 511 (1869);

Michigan: Hunt v. Strew, 33 Mich. 85 (1875); Missouri: Moore v. Moore, 4 Mo. 421 (1836).

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 (1874).

But if the sale was for "cash on delivery," the Action lies, if the chattel is not so paid for immediately upon demand therefor. *Dole v. Kennedy*, 38 Ill. 282 (1865).

And a vendor may replevy goods sold by him where the possession was obtained from him by the perpetration of a fraud. Illinois: *Goldsemidt v. Berry*, 18 Ill.App. 276 (1885); *Farwell v. Hanehett*, 19 Ill.App. 620 (1886); *Farwell v. Hanchett*, 120 Ill. 573, 11 N.E. 875 (1887); Michigan: *Carl v. McGonigal*, 58 Mich. 567, 25 N.W. 516 (1885); Pennsylvania: *Bush v. Bender*, 113 Pa. 94, 4 Atl. 213 (1886).

## OFFENSIVE PLEADINGS

**if he has the right to possession at the time of suit.**<sup>47</sup>

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.<sup>45</sup>

<sup>41</sup>- Arkansas: *Bostick v. Brittain*, 25 Ark. 482 (1854);  
Maryland: *Powell v. Bradlea*, 6 Gill & T. (Md.) 220 (1876); Massachusetts: *Baker v. Pales*, 16 Mass. 147 (1819); *Pratt v. Parkman*, 24 Pick. (Mass.) 42 (1834);  
Miller v. Warden, 111 Pa. 300, 2 Atl. 90 (1886); Midvale Steel Works v. Hallgarten & Co., 15 Wkly. Notes Cas. (Pa.) 47 (1791).

One who has the legal right to the possession of property under a Bill of Lading may maintain Replevin therefor, although he has never had possession. *Powell v. Bradlee*, 6 Gill. & 3. (Md.) 220 (1876).

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. Massachusetts: *Esson v. Tarbell*, 4 Cush. (Mass.) 412 (1852); New York: *Fuller v. Acker*, 1 Hill (N.Y.) 473 (1841).

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. *Midvale Steel Works v. Hallgarten*, 15 Wkly. Notes Cas. (Pa.) 47 (1791).

The gist of an Action in Replevin is the right to the immediate possession of the property in controversy. *Bank of Buffalo v. Crouch*, 174 Pac. 764 (Okla. 1918). The Writ of Replevin is a possessory action, and does not necessarily involve title. *Scarborough v. Lucas*, 119 Miss. 128, 80 So. 521 (1919).

<sup>45</sup> Illinois: *Quinn v. Schmidt*, 91 Ill. 84 (1878); Indiana: *Kramer v. Mathews*, 68 Ind. 172 (1879); *Entsminger v. Jackson*, 73 Md. 144 (1880); Massachusetts: *Tyler v. Freeman*, 3 Cush. (Mass.) 261 (1849); *Gordon v. Jenney*, 16 Mass. 465 (1820); Michigan: *Gould v. Jacobson*, 58 Mich. 288, 25 N.W. 194 (1885); New York: *Grosvenor v. Phillips*, 2 Bill. (N.Y.) 147 (1841); Pennsylvania: *Mead v. Kilday*, 2 Watts. (Pa.) 10 (1833); *Woods v. Nixon*, Add. (Pa.) 131, 1 Am. Dec. 364 (1793); *Harris v. Smith*, 3 Serg. & H. (Pa.) 20 (1817); *Young v. Kimball*, 23 Pa. 193 (1854); *Miller v. Warden*, 111 Pa. 300, 2 Atl. 00 (1886).

Replevin may be maintained by a pawnee, pledgee, or other person having a lien, and the right to possession. *Reichenbacli v. McKean*, 95 Pa. 432 (1880); *Bartman v. Ieown*, 101 Pa. 841 (1883).

The action may be supported by the mortgagee of **chattels upon condition broken. Illinois: Cleaves v.**

**Right of Possession is the ground Of the action, rather than General Ownership.**

**In reason, it would seem to be clear that** the right of the plaintiff to possession of the property, as against the defendant, should be the only question to be determined, and **that actual title should only be material in so far as it determines this right.** In some states, however, it is held that mere possession

at the time of the unlawful taking of property by one without any **authority at all** is not enough to support Replevin, though it might be sufficient to support Trover; that either a General or Special ownership must be shown, even as against a mere wrongdoer; and that, for instance, one who has the care of goods merely for safe-keeping, without any interest in them, cannot maintain the action.<sup>49</sup> In some states, on the other hand, no title need be shown, as against

*Herbert*, 61 Ill. 126 (1871); Massachusetts: *Esso*, s-. *Tarbell*, 9 Cush. (Mass.) 412 (1852); Michigan: *Hendrickson v. Walker*, 32 Mich. 68 (1875); *Gould v. Jacobson*, 58 Mich. 288, 25 N.W. 104 (1885); New York: *Fuller v. Acker*, 1 Hill (N.Y.) 473 (1841);



Federal: Wood v. Weimar, 104 U.S. 786, 20 L.Ed. 779 (1881).

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 (1878).

But the action will not lie where the time elapses which it is agreed that the mortgagor may retain **possession has not expired. Maine: Ingraham v.**

Martin, 15 Me. 378 (1839); Massachusetts: Essou v. **Tarbell**, 9 Gush. (Mass.) 412 (1852).

The action may be maintained by an auctioneer who is entitled to possession. Tyler v. Freeman, 3 Gush. (Mass.) 261 (1849); Rich v. Rider, 105 Mass. 310 (1870).

And it may be maintained by an officer having a right to possession under a levy. Massachusetts: Gordon v. Jenney, 16 Mass. 465 (1820); New York: Dezell v. Odell, 3 Hill (KY.) 215, 38 Am.Dec. 628 (1342).

**49. Indiana: Walpole v. Smith, 4 Blackf. (Ind.) 304**

(1837); Massachusetts: Waterman v. Robinson, 5 Mass. 803 (1809); **Ferley** v. Foster, 9 Mass. 112 (1812); Warren v. Leland, 9 Mass. 265 (1812); New York: Dunham v. Wyckoff, 3 Wend. (N.Y.) 280, 20

264

**Ch. 12**

**Sec. 131**

**ACTION OF REPLEVIN**

265

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.<sup>50</sup>

The mere custody of a servant or agent is an insufficient basis to enable him to bring Replevin for a wrongful taking, but suit must be brought by the one for whom he holds.<sup>51</sup>

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."<sup>52</sup>

Am.Dec. 695 (1829); Miller v. Adslt, 16 Wend. (N.Y.) 335 (1836).

Replevin is a possessory action, and lies only in favor **of one entitled to** possession at the time of its commencement, and the right to possession must be coupled with Ownership, either General or Special.

Delaware: Prick v. Miller, 7 Boyce (Del.) 366, 107 AU. 391 (1918), judgment aff'd Miller v. Frick's Admr., 7 Boyce (Del.) 374, 107 Atl. 394 (1919); Pennsylvania: White Co. v. Union Transfer Co., 270 Pa. 514, 113 Atl. 432 (1921).

50. Illinois: Cleaves v. Herbert, 61 Ill. 126 (1871)

**Van Namee v. Bradley**, 69 Ill. 290 (1873); Onnimins v. Holmes, 109 Ill. 15 (1884); Pennsylvania: Harris v. Smith, 3 Berg. & B. (Pa.) 20 (1815).

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. Michigan: Van Baalen v. **Dean**, 27 Mich. 104 (1873); Sandford v. Milliken, 144 Mich. 311, 107 NW. 884 (1906); South Carolina: Hall v. Ligon, 11 S.C. 245, 97 SE. 710 (1918); Federal: Wood v. Weimar, 104 U.S. 786, 26 LEd. 779 (1881), holding that a right of possession suffices.

51. Illinois: Horn v. Zimmer, 180 Ill.App. 323 (1913); Pease v. Ditto, 189 Ill. 456, 59 N.E. 983 (1901);

Massachusetts: Warren v. Leland, 9 Mass. 265

(1812),

52. Cobbe, Law of Replevin as Administered by the Courts of the United States, e. **II, Scope and Nature of the Action, § 25 (2nd ed. Chicago, 1900); See, also**, the following cases: Illinois: Moriarty v. Stofferan,

A Tenant in common cannot maintain Replevin against his co-tenant.<sup>13</sup> 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.<sup>54</sup> "Replevin," said the Massachusetts Court, "is an action founded on the General or Special property of the plaintiff, and it is settled that, when a chattel is

illegally taken and detained, all the part owners must join in Replevin; and it is a good Plea in Abatement that the property is in the plaintiff and another.” ~

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.<sup>56</sup>

89 Ill. 528 (1878); Michigan: Gary v. Hewitt, 26 Mich. 228 (1872).

The right to maintain Replevin must exist at the very moment the Writ is issued. Wattles v. Du Boir, 67 Mieb. 313, 34 NW. 672 (1887).

5- Massachusetts: Willis v. Noyes, 12 Pick. (Mass.) 324 (1832); Barnes v. Bartlett, 15 Pick. (Mass.) 71 (1833); Michigan: Wetherell v. Spencer, 3 Mich. 123 (1854); ICindy v. Grcea, 32 Mich. 310 (1875); Busch v. Nester, 70 Mich. 525, 38 NW. 458 (1888).

54. Hart v. Fitzgerald, 2 Mass. 509, 3 Am.Dec. 75 (1807); Gardner v. Dutch, 9 Mass. 427 (1812); Lndd v. Billings, 15 Mass. 15 (1818); Scudder v. Worster, 11 Gush. (Mass.) 573 (1853).

But when a mass or mixture of similar, specific and fungible articles belong to several parties in different and distinct proportions, each owner may maintain Replevia for his proportion against one who unlawfully takes and detains all the articles, though they have never been separated, and have no distinguishing marks. Massachusetts: Gardner v. Dutch, 9 Mass. 427 (1812); New Mexico: Page v. Jones, 26 NM. 195, 190 Pac. 541, 10 ALIt. 761 (1920); Halsey v. Simmons, 85 Ore. 324, 166 Pac. 944, L.R.A.1918A, 321 (1917).

s-. Hart v. Fitzgerald, 2 Mass. 509, 3 Am.Dec. 75 (1807).

66. In Michigan, for instance, It was 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

266

## OFFENSIVE PLEADINGS

### DECLARATION IN REPLEVIN—ESSENTIAL

#### ALLEGATIONS: (3) TUE WRONGFUL ACT OF TAKING AND DETENTION BY THE DEFENDANT

132. The Declaration must show such an interference by the defendant as subjects him to liability in Replevin under the Jaws of the particular state. At Common Law it was necessary to allege a wrongful taking; but, by statute, in many states an unlawful detention of the chattel at the time of the suit, is sufficient. And the general rule is that the defendant must have possession at the time of Commencing the Suit.

#### In General

THOUGH, as we have seen, Replevin was originally used in cases in which property had been illegally taken in distress, it is not so limited now, but will lie in any case where the goods have been wrongfully taken and wrongfully detained, provided, of course, the plaintiff is entitled to their possession.<sup>57</sup> An unlawful deteption, without an unlawful taking, is not enough.

title. MeArthur v. Oliver, 60 Mich. 605, 27 NW. 689 (1886).

But in order to maintain the action, a tenant in common must show something more than his undivided ownership; he, at least, must show that he was in possession. Hess v. Griggs, 43 Mich. 307, 5 KW. 427 (1850).

One partner can bring Replevin for the whole partnership property, if it is seized on Execution for another's individual debt. Hutehinson v. Dubois, 45 Mich. 143, 7 N.W. 714 (1881).

27. Massachusetts: Isley V. Stubbs, 5 Mass. 283 (1809); New Jersey: Haythorn v. Itushforth, 19 N. J.L. 100, 38 Am.Dec. 540 (1842); New York: Pangburn v. Patridge, 7 Johns. (N.Y.) 140, 5 Am.Dec. 250

(1810).

It lies for goods obtained by false pretenses. Maine:

Ayes v. Hewett, 19 Me. 281 (1841); Massachusetts:

Browning v. Bancroft, 5 Mete. (Mass.) 278 (1844); **New Hampshire**: Farley v. Lincoln, 51 N.H. 577, 12 Am.Bep. 182 (1872). See, also, 1 Chitty, Treatise on Pleading and Parties to Actions with Precedents **and** Forms, c. II, Of the Forms of Action, Section fl, Replevin, 184 (16th Am. ed. by Perkins, Spring. ~eld, 1876); 3 Street, Foundations of Legal Liability, c. XVI, The Action of Replevin, 215 (Northport, 1906).

At Common Law, the Action would only lie where the property was tortiously or unlawfully taken from the actual or constructive possession of the plaintiff, a Trespass in the taking being absolutely essential, and this is still the rule in some of our states.<sup>58</sup> Under such circumstances the action is called “Replevin in the Cepit.”

In many other states, however, the remedy by Replevin has been extended by Statute, that is, so as to embrace these cases in which property has been lawfully obtained, but unlawfully detained, as under a contract. k these it will lie where the property was wrongfully taken, or where, through possession was originally acquired lawfully, the property is wrongfully detained.<sup>59</sup>

58. Illinois: Wright v. Armstrong, Breese (Ill.) 172 (1826); Simmons v. Jenkins, 76 Ifl. 479 (1875); Johnson v. Prussing, 4 Ill.App. 575 (1879); New Hampshire: Dame v. Dame, 43 N.H. 37 (1861); Woodward v. Grand Trunk By. Co., 46 N.H. 524 (186W); Farley v. Lincoln, 51 N.H. 579, 12 Am.Bep,

182 (1872).

It was held in the Woodward case, 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 was available only where Trespass *in bonis asportatis* would lie. Maine: Sawtelle v. Rollins, 23 Me. 196 (1843); New Mexico:

Enfield v. Stewart, 24 N.M. 472, 174 Pac. 428, 2 A. Lit. 196 (1918); New York: Pangburn v. Patridge, 7 Johns, (N.Y.) 140, 5 Am.Dec. 250 (1810); Marshall v. Davis, 1 Wend. (N.Y.) 109, 19 Am.Dec. 463 (1828); Allen v. Crary, 10 Wend. (N.Y.) 349, 25 Am.Dec. 560 (1833).

-9. Massachusetts: Simpson v. M'Farland, 15 Pick. (Mass.) 427, 29 AmDec, 602 (1836); Page v. Crosby, **24 Pick.** (Mass.) 215 (1835); Dugan y. Nichols, 125 Mass. 576 (1878); Michigan: Sexton v. Mcflowd, 38 Mich. 148 (1878); Pennsylvania: Weaver v. Lawrence, 1 Dali. (Pa.) 156, 1 LEd. 79 (1785).

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, Law of **Replevin as** Administered by the Courts of the United States, c. IV, When the Action Lies Generally,

\* 51 (2d ed. Chicago, 1900); Maine: Sawtelle v. Rollins, 23 Me. 196 (1843); Eveleth v. Blossom, 54 Me. 447, 92 Am.Dec. 555 (1867); Massachusetts: Baker

Ch. 12

Sec. 132

## ACTION OF REPLEVIN

267

Some Form of Action for Damages should be brought if the defendant has not the actual possession of the property when the action is commenced, for the remedy is proprietary and enforces the right of possession. While the Action is primarily for the recovery of possession, the same facts which show a wrongful obstruction of the right of property show also a tort, and the plaintiff is entitled to recover Damages which he has suffered by the wrongful taking or detention, and also the value of the goods in case the property itself cannot be 1' ad.

The defendant must In all cases have actual or apparent possession and control of the property at the time the action is commenced. If the property has been lost or destroyed, or disposed of by him to the plaintiff's knowledge, the action will not lie, but the plaintiff must bring Trespass or Trover.<sup>oo</sup> But if the defendant has been in the unlawful possession of the property, and the plaintiff brings Replevin without reason to know of any change in the circumstances, the defendant cannot defeat the action by showing that, unknown to the plaintiff, he had disposed

v. Pales, 16 Mass. 147 (1819); Whitman v. Merrill, 125 Mass. 127 (1878); New Hampshire: Hart v. Boston & M. B. B., 72 N.H. 410, 56 Atl. 920 (1903) New Jersey: Pedrick v. Kuemmel, 74 N.J.L. 379, 65 Atl. 846 (1906); New York: Marshall v. Davis, 1 Wend. (N.Y.) 109, 19 Am.Dec. 463 (1828); Vermont: Wifls v. Barrister, 36 Vt. 220 (1863).

GO. Illinois: Gaff v. Harding, 48 Ill. 148 (1868); Massachusetts: Richardson v. Reed, 4 Gray (Mass.-) 441, 64 Am. Dec. 77 (1855); Hall v. White, 106 Mass. 599 (1871); Michigan: Gildas v. Crosby, 01 Mich. 413, 28 NW. 153 (188W); Montana: Glass v. Basin & Bay State lflu. Co., 31 Mont. 21, 77 Pac. 302 (1904); New Hampshire: Mitchell v. Roberts, 50 N.H. 486 (1871); New York: Sinnott v. Feioek, 165 N.Y. 444, 59 N.E. 265, 53 L.B.A. 565, 80 Ani.St.Rcp. 736 (1901); Nevada: Nielsen v. Rebard, 43 Nev. 274, 183 Pae. 984 (1919); Utah: Nielsen v. Hylancl, 51 Utah 334, 170 Pae. 778 (1918).

Replevin will lie although the property is not in the actual possession of the defendant, if it is under his control, so that he may deliver it if he so desires.

Minnesota: Eurkee v. Great Northern By. Co., 133 Mlan. 200, 158 N.W. 41 (1916); Missouri: Be Wolff v. Morino, 187 SW. 620 (Mo.App.1916).

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.<sup>61</sup>

The Action will not lie to determine 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.<sup>62</sup>

81. Michigan: McBrian v. Morrison, 55 Mich. 351, 21 NW. 368 (1884); New York: Snow v. Boy, 22 Wend. (N.Y.) 002 (1840); Nichols v. Michael, 23 N.Y. 264, 80 Am. Dec. 259 (1861.); Washington: Andrews v. Hoeslich, 47 Wash. 220, 91 Par. 772, 18 LEA. (N.S.) 1265, 125 Am.St.Rep. 896, 14 Ann.Cas. 1118 (1907), in which a diamond ring was pawned by the plaintiff to the defendant and sold without the plaintiff's knowledge or consent. Cf. California: Bieietto v. Clement, 94 Cal. 105, 29 Pae. 414 (1892); Michigan: Andersoa v. Boneman, 199 Mich. 532, 105 NW. 830 (1917); South Dakota: Kierbow v. Young, 20 S.D. 414, 107 NW. 871, 8 L.B.A.(N.S.) 216, 11 Ann.Cas.

1148 (1906).

02. Michigan: Hickey v. Hinsdale, 12 Mieb. 09(1863); Bacon v. Dai-is, 30 Nich. 157 (1874); Aber v. Brat-ton, 60 Mieb. 357, 27 NW. 564 (1880).

One cannot bring Rep)evia for property actually in his own possessioa against an officer who has merely levied on it. Iliekey v. Hinsdalc, 12 Mich. 99 (1863). 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. Michigan: O'connor v. Gidday, 63 Mich. 630, 30 N.W. 313 (1886); Gutsch v. McIlhargey, 69 Mich. 377, 37 NW. 303 (1888); New York: Fonda v. Van home, 15 Wend. (N.Y.) 631, 30 Aatflee. 77 (1836).

Thus, where property was seized on an Attachment, an *inventory made*, and a portion of ttle goods packed up in a trunk, but left in the owner's office, and a portion wag 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

**268**

## OFFENSIVE PLEADINGS

Cl. 12

*The Action, by Statute, Becomes Tran.sitory*

FROM the early use of this action as a remedy for a wrongful distress the place of taking became a material fact, to be truly laid and proved."<sup>3</sup> The strictness of this rule has been much relaxed, however, and in some of the states the action is now made transitory, but it seems still necessary that the Venue should be laid in the county in which the Cause of Action arose. 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 ~eems, aver a taking and detention, or a detention only, at any place where the property has been discovered in the possession of the defendant."<sup>4</sup>

*When a Demand May be Necessary*

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 where the defendant acquired possession by fraud or trespass, or a sale voidable for fraud, so long as the goods are in the hands of the buyer."<sup>3</sup> On the other hand, in those states,

to justify replevin. *Maxon v. Perrott*, 17 Mid., 332, 97 Am. Dec. 191 (1868).

When property levied on has been left in the owners possession, the fact that he became receptor for it to the officer does not entitle him to maintain replevin. *Morrison v. Luinbord*, 48 Mid., 548, 12 N. W. 696 (1882).

§3. *Gardner v. Humphrey*, 10 Johns. (N.Y.) 53 (1813). See *Dyers v. Ferguson*, 41. Or. 77, 05 i'ac. 1067, 08 Rae. 5 (1902).

§4. *Abercrombie v. Parkhurst*, 126 Eng. Rep. 1395, 9 Los. & P. 480 (1801).

CS. Illinois: *Clark v. Lewis*, 35 Ill. 417 (1804); *Tuttle v. Robinson*, 78 Ill. 332 (1875); *Goldsdhmidt v. Berry*, IS fl. App. 276 (1885); Indiana: *Jones v. Smith*, 123 Ind. 585, 24 N.E. 368 (1890); Maine: *Stone v. Verry*, 60 Me. 48 (1872); Michigan: *Trudo v. Anderson*, 10 Mich. 857, 81 Am. Dec. 705 (1862); *LeRoy v. East Saginaw City B. Co.*, 18 Mich. 233, 100 Am. Dec.

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 demand and a refusal to surrender the property; a demand being necessary to render the detention unlawful.””

## DECLARATION IN REPLEVIN—ESSENTIAL

### ALLEGATIONS: (4) TUE DAMAGES

#### 133. The Declaration must state Damages which are the legal and natural consequences of the wrongful act.

The Allegation of value is essential, and such general and special damages as are present should be stated, 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, ~ An allegation of some damage is always essential,”” 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.

102 (1869); *Ballou v. O'Brien*, 20 Mich. 304 (1870); *Bertu-liistle v. Gocidrich*, 53 Mich. 457, 19 NW. 143 (1884); *Dentoe v. Smith*, 61 Mich. 431, 28 N.W. 160 (1856); New Hampshire: *Fancy v. Lincoln*, 51 N. H. 577, 12 Ani. Rep. 182 (1872); New York: *Stiliman v. Squire*, 1 Denio (N.Y.) 327 (1845); Wisconsin: *Appleton v. Barrett*, 29 Wis. 221 (1871).

60. Connecticut: *Lynch v. Eeecher*, 38 Conn. 490 (1871); Illinois: *Hamilton v. Singer Mfg. Co.*, 54 Ill. 370 (1870); *Ohio & M. By. Co. -v. Noe*, 77 Ill. 513 (1875); Kansas: *Chapin v. Jenkins*, 50 Kan. 385, 31 Pac. 1084 (1893); Michigan: *Cadwell v. Pray*, 41 Mich. 307, 2 NW. 52 (1870); *Adams v. Wood*, 51 Mich. 411, 16 NW. 788 (1883); Oklahoma: *Chandler v. Colcord*, 1 Okla. 260, 32 Pac. 380 (1893).

67. See *Washington Tee Co. v. Webster*, 02 Me. 341, 16 Am. Bep. 462 (1873); *tounglove v. Knox*, 44 Fla. 743, 33 South. 427 (1902).

68. *Paget v. Brayton*, 2 Ear. & 3. (Md.) 350 (1808).  
Sec. 133

## ACTION OF REPLEVIN

269

### *The Judgment*

ASSUMING that the Sheriff had found and delivered the distrained chattel to the plaintiff-tenant, in the action which followed the Judgment for the plaintiff was for the recovery of Damages for the taking and detention of the chattels—the horse and plough—together with costs.”” Where the property was not returned to the plaintiff, he recovered in addition the value of

the property still detained.<sup>70</sup>

In the event of a Judgment by default, where the Damages were not confessed, a Writ of Inquiry issued to assess them, the amount of which turned on the result of **the Sheriff's effort to recover the chattels in question.**"

The **nature of the Judgment, when for the defendant**, varied. But under the general **Common Law Rule he was adjudged return** of the property, without Damages or costs,<sup>72</sup> If the defendant proceeded under the Statute of 7 Hen. VIII (1515), which provided that -the recoverer may distrain for the rents and services of the tenant, fermor, etc., and 21 **Hen. VIII** (1529) - **which provided that the avowant shall recover damages and costs of suit, he recovered, after Verdict in his favor, his Damages and costs, in the same manner as the plaintiff might have done, if he had**

69. 1 Chitty, Treatise on Pleading and Parties to Actions with Precedents and Forms, c. II, Of the Forms of Action, 186, Section III, Replevin (16th ed. by Perkins, Springfield, 1876).

70. wilkinson, The Practice in the Action of Replevin, with a Collection of Practical Forms, 43 (London, 1825).

11. 2 Roscoe, Law of Actions Relating to Real Property, 645 (London, 1825),

12 1 Esplanasse, Settling of Evidence for Trial at Nisi Prius and the preparing and Arranging of Necessary Proofs, 375 (Philadelphia, 1822).

13.c. 4, § 3, 4 Statutes at Large 144.

recovered from the defendant.<sup>75</sup> By the Statute of 17 Car. II (1665) <sup>76</sup> when Judgment **was given on Demurrer for the defendant Avowing or making Cognizance for any rent**, he was entitled to a Writ of Inquiry as to the value of the property distrained, and a Judgment for the arrears of rent admitted by the Judgment to the amount of the value of the property distrained, together with Costs." Apparently, it was optional with the defendant whether he would take Judgment under this last Statute alone, or in **addition to the Common-Law, Judgment for a return of the property**. If, however, the Judgment were taken under the Statute along with the Common-Law Judgment for a return, it operated as a stay of the Writ for the Return of the goods. If, under Section 21 of the same Chapter and Statute, the plaintiff was nonsuited before issue joined, the defendant was entitled to an Inquiry as to the amount of rent in arrear, and the value of the property distrained, upon which finding Judgment went in his favor as on Demurrer. In such case he had the option to sue out the Writ of Return, or have Execution for the Damages."

75. 2 Itoseoe, Law of Actions Relating to Real Property, 646 (London, 1825).

76. e. 7, § 3, which provided: "And be it further enacted by the Authority aforesaid, That if Judgment in any of the Courts aforesaid be given upon Demurrer for the Avowant, or him thnt mak-eth Cognizance for any Rent, the Court shall, at the Prayer of the Defeadant, award a Writ to inquire of the Value of such Distress; and upon the Return thereof Judgment shall be given for the Avowant, or him that makes Cognizance as aforesaid, for the Arrears alleged to be behind in such Avowry or Cognizance, if the Goods or Cattle so distrained shall amount to that Value; and in case they shall not amount to that Value, then for so much as the said Goods or Cattle so distrained amount unto, together with his full Costs of Suit, and shall have like Execution as aforesaid."

77. 2 Roscoe, Law of Actions Relating to Beal Property, 046 (L.-ondon, 1825).

78. Martin, Civil Procedure at Common Law, c. III, Personal Actions Ex Delieto, Art. **V, Replevin, 101** (St. Paul, 1905).

14. c. 19, § 3, 4 Statutes at Large 196.

270

## OFFENSIVE PLEADINGS

Cl. 12

### STATUS UNDER MODERN CODES, PRACTICE ACTS AND RULES OF COURT

13t **Under Modern Codes and Practice Acts Replevin is generally Expanded so as to cover all forms of taking, whether lawful or unlawful, and may be maintained in circumstances where either Replevin or Detinue would lie at the Common Law.**

**AS we have previously observed in *Mennic***

v. *Bialce* and *Harwood v. Smethurst*,<sup>80</sup> the English and American Court refused, by

**Judicial Legislation, to extend Replevin so**

as to include a Detinue factual situation. But what the Courts refused to do by Judicial Legislation was subsequently accomplished by legislation which, in general, provided that for the purpose of supporting an Action of Replevin an unlawful taking was not necessary. As a result of this development, and entirely aside from the Codes, Detinue was in effect abolished and Replevin expanded in scope so as to cover all forms of taking, whether lawful or unlawful.

**This was the situation when the Codes**

purported to abolish the Common Law Actions, What effect, then, has the Code had upon the Action? The answer to this question may be found in the 1901 New York case of *Sinnott v. Felock*,<sup>81</sup> in which the plaintiff brought an action to recover certain chattels, which the Court referred to as an Action of Replevin, and in which it was alleged the plaintiff has been induced to sell the chattels to the defendant by fraud on the part of the latter. In his Opening Statement the plaintiff's counsel conceded that prior to a demand for the return of the goods and before the Commencement of the Action, the chattels had been taken from the defendant on an Execution against him and sold, so that at the time of such

<sup>78</sup> B. El. & El. 842, 119 Eng. Rep. 1078 (1856).

<sup>80</sup> 29 N. Jt. 195, 80 Am. Dec. 207 (1801).

<sup>81</sup> 165 N. Y. 444, 50 N. E. 265, 53 L. R. A. 565, 80 Am. St. Rep. 786 (1901).

demand and Commencement of the Action, they were not in the defendant's control, custody or possession. On this concession, the Trial Court dismissed the Complaint and

**the Judgment entered on such dismissal was affirmed by the Appellate Division. The Court of Appeals stated that the issue presented was: whether the defendant was liable in an Action of Replevin for the recovery of chattels after they have been taken from him by process legal as to him and not by any voluntary act on his part?**

The determination of this issue turned, therefore, upon an examination and consideration of the Action of Replevin as it existed under the New York Code and Statutes. In affirming the Judgment for defendant, and in speaking for the Court of Appeals, Cullen, J., declared: <sup>82</sup>

"Originally at Common Law the Action of Replevin lay to recover the possession of goods illegally distrained by a landlord. The primary object of the Action was to recover possession of the specific chattels, The Form of Action was so useful that the action was extended to nearly all cases of unlawful caption or detention of chattels where it was sought to recover the chattels in specie. In many cases where the plaintiff was unable to obtain the return of the chattels he could recover in the action their value. Still, the action remained essentially one to recover the possession of chattels as distinguished from actions in Trespass or Trover to recover Damages for the seizure or for the value of the property. There were many technical rules in force relating to this Form of Action, which at times made proceedings under it difficult, and in 1788 a Statute was passed in this state (1 Rt. 1813, p. 31) to simplify the procedure. It directed the form of plaint before the Sheriff in which the plea was 'of taking and unjustly detaining' beasts, goods or chattels. Afterwards, the Revised

<sup>82</sup> 165 N. Y. 444, 451, 59 N. E. 265, 207, 53 L. R. A. 565,

568, 80 Am. St. Rep. 736, 739 (1901).

Sec. 134

**ACTION OF REPLEVIN**

271

Statutes prescribed the rules governing actions of Replevin and the procedure therein. (Title 12, chap. 8, part 3.) In the original note of the revisers is stated their intention to so extend the Action of Replevin 'as to make it a substitute for Detinue, and a Concurrent Remedy in all cases of the unlawful caption or detention of personal property, with Trespass and Prover.' We do not think the revisers used the term 'Concurrent' as meaning 'Co-extensive,' for by Section 6, title 12, it is provided that the Action shall in all cases be commenced by Writ, the Form of which is prescribed as follows: 'Whereas A. B. complains that C. D. has taken, and does unjustly detain (or, "does unjustly detain," as the case may be).'

“The Execution in the Action required the Sheriff to Replevin the goods if they could be *found* and deliver them to the plaintiff, and in case they could not be obtained to collect their value with the damages and costs **from the property of the defendant. The provisions of chapter 2 of title 7 of the Code of Procedure of 1848, entitled ‘Claim and Delivery of Personal Property,’** operated as a substitute for those of the Revised Statutes. They direct that at the Commencement of the Action the plaintiff may replevy the chattels, but in the Affidavit to obtain the writ **there is required the statement that the defendant ‘unjustly detains’ them.** The provisions of the present Code of Civil Procedure in the article entitled ‘Action to recover a chattel’ (§ 1689 to § 1730), are substantially the same as those of the old Code.

“The question several times arose, under the Code of Procedure whether Replevin could be maintained against a party who was not in possession, either actual or constructive, of The chattels, and was the subject of conflicting decisions in the Supreme Court and in the Superior *Court of New York.* It finally **came to this Court in Nichols v. Michael, (23 N.Y. 264)** This was also a case **of fraudulent purchase of goods** in which the defendant, before the action was brought, had voluntarily transferred the goods to his assignee. It was held that the Action could be maintained. ...

**“It is urged that whatever may have been** originally the nature and character of an Action of Replevin, there is now no longer reason for maintaining a distinction between it and an Action for Conversion, and that it would conduce greatly to the speedy administration of justice to permit the use of the first Form of Action as a substitute for the second. A good deal may be said in favor of this claim, great as would be the innovation resulting in its acceptance. There is, however, a serious objection to adopting this view of an Action of Replevin. If a defendant is arrested in an Action to recover a chattel he can be discharged only upon giving a bond for the return of the chattel or the full payment of any judgment that may be recovered against him; while in an Action for Conversion the bond is conditioned only for his personal surrender to any mandate or final Judgment against him. (Code Civ. Pro. ~ 575.) The Form of the Action, therefore, seriously affects the rights of the defendant against whom it is brought. While this consideration should not induce us to limit the Scope of an Action of Replevin except within the bounds prescribed by Statute and the authorities, it may well restrain us from taking any radical departure in the *Law.*” *sa*

83. Section 1093 of the New York Civil Practice Act, which provided that a defendant, in answer, could defend on the ground that a third person was entitled to the chattel, without connecting himself with a latter’s title, was held not applicable to wrongful taking cases; it was applicable to the wrongful detention cases. *Griffin v. Receiver of the Island By. Co., 101 N.Y. 348, 4 N.E. 740 (1886); Hofferinan v. Simmons, 290 N.Y. 449, 49 N.E.(2d) 523 (1943).* For an extended discussion of the New York decisions and Statutes see Article by *Finkelstein, The Plea of Property in a Stranger in Replevin, 23 Col.L.Rev. 652 (1923).* Section 7101 of the New York Civil Practice Law and Rules, 1968, provides that, “An action under this article may be brought to try the

272

OFFENSIVE PLEADINGS

Cl. 12

right to possession of a chattel.” The intent of **this defendant, contrary to the Common Law Rule,** is **new** section is that the decision should be based upon- permitted to retain **the** property upon posting a **on** the relative possessory rights of **the parties,** bond. **To the same** effect, see Section 514, California Under Modern Statutes, such as Section 7103 **of the** **Civil Procedure Code, West’s Civil Procedure** New York Civil Practice Law and Rules (1968), the **Probate** Codes (1941) 230. Scope of the Action.

CHAPTER 13

THE ACTION OF DEBT<sup>1</sup>

Debt—Distinguished From and Concurrent with Other Actions.

FORMS of Declarations.

188. Declaration in Debt—Essential Allegations:

(1) In General.

139. Declaration in Debt—Essential Allegations:

**(2) In Debt on Simple (Executed) Contract.**

**140. Declaration in Debt—Essential Allegations:**

(3) In Debt on a Specialty.

141. Declaration in Debt—Essential Allegations:

(4) In Debt on a Statute.

142. Declaration in Debt—Essential Allegations:



(5) In Debt on a Judgment.

148. Status Under Modern Codes, Practice Acts and Rules of Court.

i. In general, on the origin, history and development of the Action of Debt, see:

Treatises: **3 Blackstone**, Commentaries on the Laws of England, e. 9, Debt (1st ed., Philadelphia 1772) Pruyzeau, A Treatise of the Laws of England Now **in Force** for the Recovery of Debt (London 1791); Holmes, The Common *Law*, Lecture VII, History of Contract, 267—270 (Boston 1881); 2 Pollock and Maitland, History of English Law, c. Y, The Action of Debt, 203—214 (Cambridge 1895); id., c. iT, Contract—The Doctrine of Quid Pro Quo, 210 (Cambridge 1895); Martin, Civil Procedure at Common Law, c. II, Debt, §1 39—44, 33—42 (St. Paul 1905); **3 Street, Foundations of Legal Liability**, c. **XI, Action of Debt**, 127—143 (Northport 1906); Jenks, Short History of English Law, e. V, Debt, 54—57 (Boston 1913); Ames, Lectures on Legal History, c. VIII, The Action of Debt, 93 (Cambridge 1913); Plucknett, Statutes and Their Interpretation, Pt. II, c. XI, Exigent and the Writ of Debt, 6, 133 (Cambridge 1022); Shipman, Handbook of Common Law, Pleading, e. VII, Action of Debt, ~1 52—54, 132—141 (3d ed. by Ballantine, St. Paul 1923); IGeigwin, Cases on Common Law Pleading, c. II, The Common **Law Actions**, **Bk. I**, The Action of Debt, 33—59 (2d ed. Rochester 1934); Maitland, The Forms of Action at Common *Law*, Lecture V, Debt, 63 (Cambridge 1048); Potter, Historical Introduction to English Law, c. V, Debt, 441—443 (3d ed. London 1948); Plucknett, A Concise History of the Common Law, Bk. II, Pt. I, c. I, Debt, 343—345 (4th ed. London 1948); Morgan, The Study of *Law*, c. I, Debt, 92—96 (2d ed. Chicago 1048); Fifoot, History and Sources of the Common Law, c. X, 217—233 (London 1949); id., c. XVI, Consideration, 395-412 (London 1949); Walsh, A History of Anglo-American Law, c. **XIX**, Debt, § 176, 238—239 (2d ed., Indianapolis

1932).

**Articles:** Saimond, The History of Contract, 3 L.Q. Rev. 166 (1887); Ames, Parol Contract Prior to Assumpsit, S Harv.L.Rev. 252 (1895); Holmes, The Common *Law*, 57 11. of Pa.L.Rev. 611 (1909); Holds-worth, Debt, Assumpsit and Consideration, 11 Mich. L.Rev. 348 (1913); Henry, Consideration in Contracts, 601 A.D. to 1520 AD., 26 Yale L.J. 664 (1917); Stone, Concerning the Action of Debt at the Time of the Year Books, 36 L.Q.Rev. 61 (1920); Neig~vin, The Action of Debt, 11 Geo.L.J. 20 (1923); Bailey, Assignments of Debts in England from the Twelfth to the Twentieth Century, Pt. I, 47 L.Q.Rev. 516 (1931); Pt. II, 48 L.Q.Rev. 248 (1932); Pt. III, 48 L.Q.Rev. 546 (1932); Yntema, The Enforcement of Foreign Judgments in Anglo-American Law, 33 Mich.L.Rev. 1129 (1935); Winfield, Quasi-Contract for Work Done, 63 L.Q.Rev. 35 (1947).

**Comments: Debt: What Constitutes**, 16 Col.L.Rev. 243 (1916); Sum Certain in the Action of Debt, 33 Yale **Li.** 85 (1923).

**Sec.**

135.

136.

137.

HAVING considered the Allegations essen- of Trespass, Trespass on the Case, Trover, hal to establish liability in the Tort actions Ejectment, Detinue and Replevin, we shall

273

274

## OFFENSIVE PLEADINGS

### Ch. 13

in this and succeeding chapters consider the **allegations necessary to show liability in the Contract Actions of Debt, Covenant, Account, Special Assumpsit and General (Indebitatus) Assumpsit.**

#### *Prima Facie Case in Contract Actions*

**IN Contract Actions the plaintiff's prima facie case consists in showing the normal** affirmative elements of a valid contract and the coming into operation of an affirmative contractual duty; on the other hand, negative elements, such as fraud or illegality, which destroy the validity of the contract, and Matters of Excuse and Discharge, as impossibility, performance, or release, must come from the defendant, to prevent plaintiff's recovery. Thus, where the plaintiff has proved the existence of the debt sued on, the burden of proving payment is on the defendant. The plaintiff must allege nonpayment of the money demand to make the Declaration perfect on its face; but payment is an Affirmative Defense, even in many jurisdictions where it may be raised by the defendant under a Denial. Thus negative averments may be necessary to the plaintiff's pleading, though they constitute no part of **his original substantive cause of action which he is called upon** to prove or establish.

**Annotation:** Necessity in Action on Judgment of Sister State Confessed Under Warrant of Attorney, of Alleging and Proving the Law of the Latter State Permitting Such Judgment, 155 ALit, 021 (1945).

In General, on Imprisonment for Debt, see:

**Treatises:** Dawes, Commentaries on the Laws of Arrests in Civil Cases (London 1787); Fancy, Imprisonment for Debt Unconstitutional and Oppressive, Proved from the Fundamental Principles of the **British Constitution and the Rights of Nature** (London 1788); Crowther, The History of the Law of Arrest in Personal Actions (London 1828); Theobald, The Law for Abolishing Imprisonment for Debt on Mesne Process, Extending the Remedies of Judgment Creditors, and Amendment of the Law

**Relating to Insolvent Debtors (London 1838).**

Article: **Ford, Imprisonment for Debt, 25 Mich.L.**

11ev. 24 (1926).

**Comment: To Gaol for Debt In Wisconsin, 1952** Wis. L.Rev. 764.

In Actions upon Contracts for Damages, the plaintiff must assign the breach by the defendant which is relied upon as ground for recovery, and allege the essential facts to apprise the defendant in what particulars he has failed to perform. But when the plaintiff pleads or proves the contract, and the fulfillment of conditions to create an **operative duty of performance by the defendant** as by tender or performance on his own part, it is then incumbent upon the defendant to prove performance, or sufficient excuse for nonperformance as an Affirmative Defense, without proof of breach on behalf of the plaintiff. Even the burden of proving the General Allegation of Performance by the plaintiff as a Condition Precedent is taken off the plaintiff in Modern English Practice, unless the defendant specially pleads nonperformance of some Condition.

As the first of the Contract Actions we shall treat with the Action of Debt, and, as in the case of the Tort Actions, one of our principal considerations is, what facts must be alleged in order to state a good cause of action?

#### SCOPE OF THE ACTION

**135. The Action of Debt lies where a party claims the recovery of a debt; that is, a liquidated or certain sum of money due him. The Action is based upon Contract, but the Contract may be Implied, either in Fact or in Law, as well as being Express; and it may be either a Simple Contract or a Speciality. The most common instances of its use are for debts:**

- (I) Upon Unilateral Contracts Express or Implied in Fact;
  - (II) Upon Quasi Contractual Obligations having the force and effect of Simple Contracts;
  - (III) Upon Bonds and Covenants under Seal;
  - (IV) Upon Judgments or Obligations of Record;
  - (V) Upon Obligations Imposed by Statute.
- Sec. 135

#### ACTION OF DEBT

275

**The Action of Debt will not lie:**

- (I) To recover Unliquidated Damages for Breach of a Promise;
- (II) Nor, generally, to recover an Installment of a Debt, payable in Installments before the Whole is Due;
- (III) Nor on a Promise to pay out of a Particular Fund, or in a Particular Kind of Money, or in Property or Services,

#### *The Nature of the Obligation of a Debt, Causa Debendi*

AS Debt was and, in its nature, is a Real Action, the object of which is to recover a *res* which belongs to the plaintiff, it is proprietary in character,<sup>3</sup> By this we mean

2. The Action of Debt was the Common Law's reinedy for the enforcement of its earliest known obligations. See article by Pollock, Contracts in Early English Law, 6 Harv.L.Rev. 50 (1893).

3. "This Action of Debt was nothing in essence but an action in Detinue for the recovery of money unjustly detained, together with Damages for the said wrongful detention, such Damages being claimed, not in the Writ, but in the plaintiff's first count," See article by Stone, Debt at the Time of the Year Books, 30 L.Q.Rev. 61, 62 (1920). See, also, 3 Holds-worth, **History of English Law**, c. III, Contract and Quasi-Contract, 425 (3d ed. Boston, 1927).

**An Action for the Recovery of a Debt** was thought of as like an action for the recovery of a book lent, or for the recovery of a plot of land

which the defendant unjustly detained from the plaintiff.

This crude and primitive Common-Law Conception of Debt, that the creditor was demanding the return of his own money, and that the action was “proprietary” or “reU,” seems to be somewhat overemphasized by many legal scholars. See article by Henry, Consideration In Contracts, 601 A.D. to 1520 **A.D.**, 26 **Yale L.J.** 664, 690—094 (1017).

Debt was indeed a “proprietary action,” in the sense of being the vindication or enforcement of a right. The Judgment was not for Damages for breach of promise, but for recovery of the debt itself. See Chief Justice vaughan, in Edgeomb v. Dee, Vaughan 89, 124 Eng.Itop. 984 (1670); Ames, Lectures on Legal History, Lecture XIV, Implied Assumpsit, 148, 150—151 (Cambridge 1913).

It is said that the duty to restore the money arose not because the debtor had promised or contracted to pay, but because of some transaction, as that he had borrowed It or received value, known as *quid pro quo*. But the promise or agreement to pay the it does not lie for Damages as reparation for a tort, nor does it proceed upon the theory that the plaintiff’s right to recover, or the defendant’s obligation to surrender the property sued for, is grounded upon a promise. The property sought, whether land, a corporeal chattel, or a sum of money, is demanded because the defendant is withholding something which rightfully belongs to the plaintiff.<sup>4</sup>

**(I) Title as the Basis of the Action of Debt.**—Thus, if the plaintiff is to recover, it must be on the basis of some form of title, clear of any claim grounded in tort and independent of any promise. There are two possibilities as to such title: (1) where the goods or money in issue were originally the property of the plaintiff and his claim to recover is based on a prior vested interest,

price was just as much a part of the debt transaction as the delivery of the ‘-es. See article by Henry, Consideration in Contracts, 601 A.D. to 1520 AD., 26 Yale Li. 664, 694 (1917),

In Debt the word “agreed” must be used instead of “promised,” but this is mere form. MeGinnity v. Laguerenne, 5 Gil. (Ill.) 101 (1848).

4. On Debt for the recovery of a specific amount of unascertained chattels, see Ames, Lectures on Legal History, Lecture VIII, Debt, 89 (Cambridge 1913).

This action gives specific enforcement of the duty to **pay**. It gives the specific thing demanded, namely, the recovery of a debt *eo nomine* and *in numero*, and not merely the recovery of damages. I Chitty, Treatise on Pleading and Parties to Action, with Precedents and Forms, c. II, Of the Forms of Action, 121 (16th Am, ed. by Perkins, Springfield 1876); Tennessee: Thoinpsoa v. French, 18 Tenn. 452 (1837); Virginia: Minnick v. Williams, 77 Va. 758 (1883).

The action does not lie for the breach of a sealed contract to convey land, or to recover purchase money paid. The action being for the breach, and not for a sum of money *Co nomine*, **and in numero**; -o, it should be **Covenant. Haynes** v, Lucas, 50 Ill. 436 (1869).

It would lie to recover the purchase money as a debt arising from the obligation created by law to repay **It as** money had and received. The terms “sum

**certain” and debt** *eo nomine* **and in numero** are used to distinguish a claim for a liquidated debt from a claim for unliquidated damages, which are **not ascertainable** in amount.

276

## OFFENSIVE PLEADINGS

### Ch. 13

as, for example, where *A* bailed a chattel **to B**, or *B* wrongfully took *A*’s chattel; or (2) where originally the property was the property of the defendant, the present possessor, but as a result of the happening of some subsequent event, he ought, *debet*, to deliver it to the plaintiff who has become entitled to recover it, If the plaintiff’s claim is based on a previously vested title, he is demanding the land, chattel or money as a *jus in re*, that is, a right which belongs to a person, absolutely and immediately, in a thing; **if, however, the plaintiff’s claim is** grounded on a right to a thing now in the defendant’s possession, a *res* which as yet has never been in the plaintiff’s possession, but to which the plaintiff, by operation of law is presently entitled, this right of the plaintiff to have the thing is known as a *jus ad rem*, or a right which belongs to a person only mediately and relatively, and has for its foundation an obligation incurred by a particular person.

In the Personal Action of Debt-Detinue, both forms of title were available, that is, the plaintiff in such action might recover because the goods or the money belonged **to him originally or because, by** operation of law, or otherwise, he had acquired a right **to recover** the property which as yet was still in the defendant’s possession. And it was this distinction as to title which ultimately led to the differentiation between Debt in the *Detinet* **and Debt in the Debet et Detinet**; that is, **between the situation** in which *A* bailed his horse, Damascus, to *B*, for thirty days

and where *A* loaned .3 \$500 for thirty days; in the *first* case, *B* acquired possession, but not title, hence when *A* sues *B* at the end of the thirty days, after demand, he is relying on a prior vested title, a *jus in re*; in the *second* case, *B* acquired both possession and title, hence when *A* sued *B* to recover the ~500, he was suing by virtue of an accruing title, a *jus ad rem*.

(II) *Debt in the Detinet, or for Goods not Pecuniary.*—In theory at least that Form of the Action which lay for the recovery of a certain quantity of specified goods and chattels, may still be maintained upon an Executed Contract.<sup>5</sup> Apparently the last case

5. Debt will lie on any Simple Contract to recover money due upon an Executed Consideration, whether the contract is verbal or written, express or unplied. *People v. Dummer*, 274 Ill. 637, 111 N.E. 934 (1916).

Simple Contract Debts, of course, must be founded on a *quid pro quo* or Executed Consideration. See article by Ames, *Parol Contracts Prior to Assumpsit*, 5 Harv.L.Rev. 252 (1895).

It also lies to enforce a quasi contractual obligation to pay a sum certain. *Van Deusen v. 13mm*, 18 Pick. (Mass.) 229, 29 Am.Dec. 582 (1836).

Debt also lies at the suit of a person entitled to costs in an action, either as a party or as an officer, there being an implied contract. *Doyle v. Wilkinson*, 220 Iii. 430, 11 N.E. 590 (1887).

In *Barber v. Chester County*, 1 Chest.Co.Bep. (Pa.) 162 (1796), it was said that Debt would lie wherever *Indebitatus Assumpsit* is maintainable. *District of Columbia -v. Washington & O. B. Co.*, 1 Mackey (12 DC) 361, 382 (1882); 8 Street, *Foundations of Legal Liability*, c. XI, *The Action of Debt*, 133 (Northport, 1906).

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. 1 *Chitty, Treatise on Pleading and Parties to Action, with Precedents and Forms, e. U, Of the Forms of Action*, 122 (16th Am. ed. by Perkins, Springfield, 1876); English: *Speafre v. Richards*, Hob. 207, 80 Eng.Rep. 353 (1617); Tennessee: *Young v. Hawkins*, 4 Yerg. (Penn.) 171 (1838),

Debt will lie to recover interest due on the loan or forbearance of money: English: *Berries v. Jamieson*, 5 T.R. 553, 101 Eng.Rep. 310 (1794); Pennsylvania: *Sparks v. Garrigues*, 1 Bin. (Pa.) 152 (18043); for work and labor, or for work, labor and materials: *Comyn Digest, "Debt" B* (Philadelphia 1824); Maine: *Seretto v. Itockland, S. P. & O. II. By. Co.*, 102 Me. 140, 63 A. 651 (WOO); Massachusetts: *Smith v. Proprietors of First Congregational Meetinghouse in Lowell*, 5 Pick. (Mass.) 178 (1329); Tennessee: *Thompson v. French*, 18 Penn. 452 (1837).

Debt will lie for goods sold and Delivered, or Bargained and Sold. English: *Emery cc FeU*, 2 P.R. 28, 100 Eng.Rep. 16 (1787); Federal: *Dillingham v. Skein*, 1 Hempst. 181, Fed.Cas.No.3,912a (1882).

Sec. 135

## ACTION OF DEBT

277

in which Debt was used to recover specific chattels was that of the *Earl of Faimauth v. George*,<sup>6</sup> decided in 1828, in which the plaintiff sought to recover a certain number of fishes alleged to be due by way of toll for the use by the fishing boats of a capstan which the plaintiff maintained on the shore. The Action was said to be Debt in the *detinet*, the Allegation that the defendant *debet*, being omitted. In 1769 Blackstone observed that this Form of Debt was "neither more nor less than a mere Writ of Detinue,"

and he insisted that nothing but money could

constitute a debt, which view has been approved by certain American courts.<sup>8</sup> Keigwin, however, declares: "As a matter of historical fact, however, Detinue and Debt for goods have always been distinct, the former lying for goods previously the property of the plaintiff, and going upon his *jus in re*, while Debt in the *detinet* went for a body of goods to which, as to a sum of money, the plaintiff was entitled, proceeding upon his

Debt will lie for the Use and Occupation of land.

English: *Egicr v. Marsden*, 5 Taunt. 25, 128 Eng.

Rep. 595 (1813); *Wilkins v. Wingate*, 6 P.R. 62, 101

Eng.ltep. 436 (1794); *King v. Fraser*, 6 East 348, 102

Eng.Rep. 1320 (1805); Arkansas: *Trapnall v. Mccrick*, 21 Ark. 503 (1560); New York: *McKeon v.*

Whitney, **3 Denio (N.Y.)** 452 (1846); Pennsylvania:  
**Davis v. Shoemaker**, 1 Rawle (Pa.) 135 (1829);  
South Carolina: *McEwen v. Joy*, 7 Bich. (S.C.) 33

(185\$).

Thus generally in all cases where the Consideration **has been Executed** and where there is an absolute duty to pay In money **the value of the performance** rendered, there **Debt on Simple Contract or Indebitatus Assumpait is a proper** remedy. **Debt lies in all cases where the Law Courts** can properly give specific performance of a duty to pay money, namely, **where the duty Is an absolute one, not** subject to any conditions.

•S. 5 Bing. 286, 130 Eng.Rep. 1071 (1828). For earlier cases, see: English: *Mayor v. Clarke*, 4 B. & Aid. 268, 106 Eng.Bep. **936** (1821); *Paimouth v. Penrose*, 6 B. & C. **385, 108 Eng.Rep.** 494 (1527).

1. Blackatone, Commentaries on the Laws of England, e. IV, 155 (7th ed. Oxford, 1775).

*jus ad rem.*” ~ **We are, therefore, concerned** only with that Form of the Action of **Debt** which remained after Detinue split off from the main Trunk of the Tree; that is, that Form of Debt used to recover money debts, known as Debt in the *debet et detinet*,<sup>10</sup> which, like its ancestor, the Real Action, seeks the recovery of a certain sum of money to which the plaintiff has a right by reason of the defendant’s legal duty to pay.

**For the plaintiff to recover in Debt, therefore**, he must set forth in his Declaration a right to the thing demanded; that such right arises from something other than a promise or voluntary assumption; it must, in **truth, be independent of what** we now understand as a contractual obligation. Under the ancient law, matter which created in one person a right to something in the possession of another, was called a *cau.sa debendi*, or “a ground of indebtedness, a basis of the duty to deliver, the origin of an obligation to **pay.**”” **As Pollock and Maitland said:** “It enters no one’s head that a promise is the ground of this action. No pleader propounding such an action will think of beginning his Declaration with ‘whereas the **defendant promised to pay,**’ **he will begin** with ‘whereas the plaintiff lent or (as the

o. Kelgwin, The Action of Debt, Pt. II, 12 Ceo.LJ. 25, 29-30 (1923).

10. Where one of the parties to the Action of Debt died, the Form of Declaring was in Debt in the detinet, not in Debt in the dsbet *et detinet*. It was said that these distinctions, which require the Dec~ laratlon **to** be only in the *detinet*, where one of the **original parties died, were** held to be substantive as **late as 1619. Beynell v. Langcastie, Croine. 545, 79 Eng.Rep.** 467. A defect as to wording was, however, only available on Special Demurrer after tile Statute of 4 Anne, e. 16, ~ 1 (1705). *Childress v. Emory, S. Wheat. (U.S.)* 642. But according to **1 Chitty, Treatise on Pleading and Parties to Actions, with Precedents and Forms, e. III, Of Pleading in General, 284, note b** (16th Am. ed. by Perkins, Springfield, **1876**), **an Improper use of the word** “debet” was not even subject to a Special Demurrer, being treated as mere surplusage.

11. Keigwln, The Action of Debt, Pt II, 12 Geo.L.J. 28, 30 (1923).

S. Illinois: *Mix v. Nettieton*, 29 DI. 245 (1862); Kentucky: *Watson v. M’Nalry*, 1 Bibb. (Ky.) 856 (1809). 278

## OFFENSIVE PLEADINGS

### Ch. 13

case may be) sold or leased to the defendant.’ In short, he will mention some *causa debendi*, and the cause will not be a promise.<sup>12</sup>

(III) *A Parol Promise Created No Obligation During the Developmental Stages of Debt.*—Let us, by way of illustration, suppose that *A* undertook to sell his horse, *Damascus*, to *B*, the defendant, in exchange for two steers, that *A* delivered *Damascus* to *B*, and that *B* thereupon refused to deliver the steers, but retains them in his possession. Clearly *A* is entitled to recover the steers. But is this so because *B* has Executed a Contract Obligating himself to make delivery? Certainly not, and, if this were the only basis of *A*’s claim, he could not have recovered; the Court might well have told him that he deserved to lose his horse because of his folly in trusting *B*’s word. In other words, at the time when Debt was reaching maturity, a parol promise, which several Centuries later became enforceable in Special Assuinpsit, created no legal obligation; the obligation, if any, was merely moral, and hence

not justiciable. In such a case, however, *A* would recover, as *B* has received a benefit at his expense, and one who profits by the act of another ought, *debet*, to compensate that other in a manner commensurate with the benefit conferred. Or to put it in technical language, *B*, having received *A*'s horse, ought to render a *quid pro quo*, or the steers, as a balance against the horse, the so-called "Executed Consideration." **Thus, where** a Simple Contract has been executed on one side so as to transfer a *quid pro quo*, or a benefit to the other side, the benefit received creates in the receiver, by operation of Law, a legal duty to render **an equivalent benefit to the plaintiff, that is**, it creates an indebtedness, which may be regarded as an example of *causa debendi*. And these *causa debendi*, vaguely understood

in the early stages of development, gradually took on definite form, and were ultimately clarified as being derived from three sources, Simple Contracts, Specialties and Records, including Statutes.

## DEBT—DISTINGUISHED FROM AND CONCURRENT WITH OTHER ACTIONS

136. **Debt was distinguished from Special Assumpsit in that it lay for the recovery of a Sum Certain;** whereas the latter was for the recovery of Damages; Debt was a concurrent remedy with Indebitatus Assumpsit in the field of Simple (Executed) **Contract, but in being available** upon Specialties, Records and Statutes, it was broader than the latter action. Debt and Covenant **were concurrent remedies** where the Damages upon breach of the Sealed **Instrument were liquidated. And Debt, Special Assumpsit and Indebitatus Assumpsit were concurrent remedies,** where, over and above a Simple (Executed) Contract, there was also an Express Promise which had been breached.

SPECIAL ASSUMPSIT is to be distinguished from Debt, in that it lies for the Breach of a Modern Contract, in which what is recovered is Damages, whereas, when we say that Debt lies on a Simple Contract. we are referring to the early Common-Law Concept of what is termed "a Simple Executed Contract," which term is descriptive not of a contract in the modern sense, but in the sense that the plaintiff has delivered a *quid pro quo* to the defendant, for which the defendant has failed to pay, or has otherwise become indebted to the plaintiff by operation of law. And it is of course settled, as previously observed, that Debt will not lie upon a promise for a promise,<sup>14</sup> as in such

12. On the early attempts at classifying the varieties of debt, see Fifoot, History and Sources of the Common Law, e. 10, Debt, 223 (London 1049), in which he cites a case in which it was said that "each writ of Debt is general and in one form, but the count is Special and makes mention of the Contract, the Obligation or the Record, as the case requires." Anonymous. TM, li lien. IV, f. 73, p<sup>1</sup>. 11 (1410).

14 English: Walker v. Walker, 5 Mod. 13, 87 Eng. Rep. 490 (2694); Smith v. Aii'ey, C Mod. 125, 57 Eng.

12. 2 Pollock and Maitland, History of English Law.

c.v. Contract, 210 (Cambridge 1895).

### Sec. 137

## ACTION OF DEBT

279

case there is no *quid pro quo* passing to the defendant.

Debt is to be distinguished from Indebitatus Assumpsit, being in many respects much broader than the latter action. It is true that Debt and Indebitatus Assumpsit are concurrent remedies in the Field of Simple (Executed) Contract, but Indebitatus Assumpsit will not lie upon a Sealed Contract, a Record, or, *with some exceptions, upon* a Statute. In the sense that Indebitatus Assumpsit came to be the remedy for recovery of Quasi-Contractual Obligations through the use of the Common Counts, it may be said to be broader than Debt. This advantage was later lessened by the fact that in some jurisdictions Debt also came to be recognized as a Quasi-Contractual Remedy, by a process which is not clear. And, of course, Debt was subject to Wager of Law, whereas Indebitatus Assumpsit was not, and it was this fact which led to the obsolescence of Debt some time after *Slade's Case* when the Two Actions were concurrent remedies on a Simple (Executed) Contract.

Generally, Debt and Covenant are exclusive remedies, except where the amount of Damages due upon the breach of a sealed instrument are liquidated. In such instance, Debt and Covenant are concurrent remedies; where, however, the Damages upon Breach of a Specialty *are* unliquidated, Covenant is the only remedy.<sup>o</sup>

Finally, under certain circumstances, Debt, Special Assumpsit and Indebitatus AssumpRep. 883 (1704); Hard's Case, 1 Salk. 23, p1. 3, 01

Eng.Rep. 22 (1690); Rovoy v. castleman, 1 Ld.1taym.

CD, 91 Eng.Rep. 942 (1695); New Jersey: Furman v. Parke, 21 N.J.L. 318 (1848).

15. 4 Co. 92b, 76 Eng. Itep. 1074 (1602).

16. Originally this concurrence did not obtain; Cov~ **enant would not lie for a Debt where evidenced** by a sealed instrument; it must arise from some transaction such as a loan or sale or the like. 2 Pollock and Maitland, History of English Law, c. V, Contract, 217 (Cambridge 1895).

sit, were concurrent remedies. To illustrate, let *us suppose* that A says to B, "I will deliver ten cords of wood to you at five dollars a cord," to which B replies, "Go ahead and deliver it and I will pay for it." A then delivers the wood, but B refuses to pay. Debt will lie, for a *quid pro quo*—a benefit—has passed from A to B and B has failed to give A what, by operation of law, belongs to him. Indebitatus Assumpsit will lie as it is a concurrent remedy with Debt on Simple (Executed) Contract; and Special Assumpsit will also lie, because over and above the benefit received by B—the delivery of the wood—the defendant B has breached his express promise to pay. Thus, Debt, Special Assumpsit, and Indebitatus Assumpsit were concurrent remedies, where, over and above a Simple (Executed) Contract, there was also an Express Promise which had been breached.

#### FORMS OF DECLARATIONS

137. **Included in this section are forms of** Declarations in Debt on a Simple Contract, Debt on a Specialty, Debt on a Statute, and **Debt on a Judgment.**

##### DECLARATION IN DEBT ON SIMPLE

#### CONTRACT

IN THE KING'S BENCH,

Term, in the year of the reign of King George the Fourth.

to wit, C.D. was summoned to answer A.B. of a plea that he render to the said A.B. the sum of £ . of good and lawful money of Great Britain, which he owes to and unjustly detains from him.

**And thereupon the said A.R, by**

his attorney, complains: For that whereas the said C.D. heretofore, to wit, on the

day of . in the year of our Lord \_\_\_ at . in the county of

was indebted to the said LB. in the sum of L . of lawful money of Great Britain, for divers goods, wares, and merchandise by the said AR. before that time

280

#### OFFENSIVE PLEADINGS

Cli. 13

sold and delivered to the said C.D., at his special instance and request, to be paid by the said C.D. to the said A.B. when he, the said C.D. should be thereto afterwards requested; whereby, and by reason of the said last-mentioned sum of money being and remaining wholly unpaid, an action hath accited to the said LB. to demand and have of and from the said **C.D. the said sum of £\_\_\_ above demanded. Yet** the said C.D. (although often requested) hath not as yet paid the said sum of £\_\_\_ above demanded, or any part **thereof, to the said A.R,** but so to do hath hitherto wholly refused, and still refuses, to the damage of the said **A.B. of £ ;** and therefore he brings his suit, &c.

STEPHEN, A Treatise on the Principles of **Pleading in Civil Actions, 67 (3d Am. ed., Washington, D.C. 1892).**

##### DECLARATION IN DEBT ON A SPECIALTY 17 ON A COMMON MONEY BOND

IN THE COURT OF KING'S BENCH (or Common Pleas).

**On the day of . A.D.**

(Venue) to wit. A.B. by E.F. his **attorney (or in his own proper person)** complains of **CD. who has been summoned** to answer the said A.B. (or plaintiff) in an action on debt on a common money bond. For that whereas the defendant, on the

day of . A.D. , by his

certain writing obligatory sealed with his seal, and now shown to the said Court here, acknowledged himself to be held and firmly bound to the plaintiff in the sum of £\_\_\_ above demanded, to be paid to the plaintiff,

17. Debt on a Specialty and Covenant are concurrent remedies where the amount due upon the breach of a sealed instrument is a sum certain or a liquidated amount, **Anonymous**, 3 Leo. 119, 74 Eng.Rep. 570 (1585).

Wager of law had no application **In** Debt on a Specialty. **Morgan, The Study of Law**, c. VI, **Debt**, 02 (2d ed. Chicago 1948).  
yet the **defendant (although often** requested so to do) hath not as yet paid the said sum of t above demanded, or any part thereof, to the plaintiff, but hath hitherto wholly neglected and refused, and still neglects and refuses to do so; to the damage of the plaintiff of c and therefore he brings his suit, &c.

2 CH1'TTY, **Precedents in Pleading**, 43S (Springfield 1859).

#### DECLARATION IN DEBT ON A STATUTE -

**IN THE KING'S BENCH [or Common Pleas]**,  
Term, in the \_\_\_ Year of *the* reign of King

For that whereas the defendant before and at the time of the giving of the notice and making the demand as hereinafter mentioned, and **from thence** until a certain day, to wit, the Day of \_\_\_ held and enjoyed a certain messuage

and premises, with the appurtenances, as tenant **thereof to the plaintiff, to** wit, from year to year, for so long a time as the plaintiff and defendant should respectively please, the reversion of the said premises, with the appurtenances, during all that time belonging to the plaintiff; and thereupon, whilst the defendant so held and **enjoyed the** said tenements, with the appurtenances, as tenant thereof to the plaintiff as aforesaid, and whilst the said reversion thereof belonged to the plaintiff as aforesaid, to wit, on [8cc.] the plaintiff gave notice in writing to the **defendant**, and then and there demanded of and **required the defendant to deliver up the** possession of the said tenements, with the **appurtenances, to the plaintiff, on the said**

day of \_\_\_ A.D. ; and the plaintiff avers that the tenancy aforesaid

is. **This specific form was** used by a landlord *who sought to* recover Debt on the Statute of 2 Oco. II, c. 28, ~ 1 (1728) for double value for holding over after notice to quit, **and** was taken **In** substance from **the** form used in *Wilkinson v. Ball*, 3 Bing.N.O. 508, 132 Eng.Rep. 506 (1837).

**Sec. 137**

#### ACTION OF DEBT

281

ended and was duly determined on the last-mentioned day by the said notice. Nevertheless the 'defendant, not regarding the *statute* in such case made and provided, did not nor would, on the determination of the said term and tenancy as aforesaid, deliver the possession of the said tenements, with the appurtenances, to the plaintiff, according to the said notice so given, and the demand so made as aforesaid, but wholly neglected and refused so to do, and on the contrary thereof, the defendant wilfully held over the said tenements, with the appurtenances, after the determination of the said term and tenancy, and after the said notice had expired, and after the said demand so made as aforesaid, for a long space of time, to wit, for the space of then next following, during all which time the defendant did keep the plaintiff out of the possession of the said tenements, with the appurtenances, (he, the plaintiff, during all that time being entitled to the possession thereof), *contrary to the / orm~ of the statute in such case made and provided*; and the plaintiff avers, that the said tenements, with the appurtenances, during the said time of holding over the same, and keeping the plaintiff out of the possession thereof as aforesaid, were of great value, to wit, the yearly value of £ and by reason of the premises and by force of the statute in such case made and provided, the defendant became liable to pay the plaintiff a large sum of money, to wit, the sum of £ being at the rate of double the yearly value of the said tenements, with the appurtenances, for so long as the same were so detained as aforesaid; and thereby and by force of the said statute, an action hath accrued to the plaintiff, to demand and have of and from the defendant the said sum of £ being the sum above demanded, yet the defendant hath not paid the same or any part thereof, to the damage of the plaintiff of £ **and therefore he brings**

his suit, &c.

2 ChrJTY, **Precedents in Pleading**,

493 (Springfield, 1859).

DECLARATION IN DEBT ON A JUDGMENT<sup>19</sup>



IN **THE KING'S BENCH** [or Common Pleas], Term, in the year of the reign of King

For that whereas the plaintiff heretofore, to wit, in Term, in the year of our Lord [or 'on the day of

AiD. in the Court of our Lord the King at Westminster, in the county of Middlesex, by the consideration and judgment of the said Court, recovered against the defendant in the sum of £\_\_\_ above demanded, which in and by the said Court was then and there adjudged to the plaintiff for his damages, which he had sustained as well by reason of the non-performance by the defendant of certain promises and undertakings, then lately made by the defendant to the plaintiff, as for his costs and charges, by him about his suit in that behalf expended, whereof the defendant was convicted as by the record and proceedings thereof, remaining in the said Court of our said Lord the King, more fully appears; which said judgment still remains in full force and effect, unreversed, and unsatisfied, and not otherwise vacated; and the plaintiff hath not obtained any execution or satisfaction of or upon the said judgment; whereby an action hath **accrued to the plaintiff to demand** and have,

19. The Judgment in Debt on a Record provides that **the** plaintiff "do have and recover of the defendant" a given sum of money or a specific article. This language implies that the plaintiff is entitled not to something new, but to regain property which belongs to him although unlawfully possessed by **the defendant, Likewise with** a Becogozance entered **upon the Records of a Court** declaring **one** person indebted to another. In both cases the Judgment establishes the plaintiff's right to the money **or the chattel and at the same** time imposes upon the defendant a duty to pay the money declared due or to deliver the specific chattel to the complainant. Once the indebtedness is established by a **Record, Debt, by reason of its proprietary nature**, becomes an effective remedy.

282

#### OFFENSIVE PLEADINGS

#### Ch. ia

of and from the defendant the said sum of £\_\_\_ above demanded, yet the defendant hath not paid the same or any part thereof, to the plaintiff's damage of £  
**and thereupon he brings his suit, Sac.**

**2 CHITTY, Precedents in Pleading, 480 (Springfield, 1859).**

#### DECLARATION IN DEBT—ESSENTIAL ALLEGATIONS: (I) IN GENERAL

138. The Essential Allegations of the Declaration are:  
**(I) In Debt on Simple (Executed) Contract:**

(A) A Statement of the Debt and **quid pro quo;**

(B) **The Breach—Nonpayment;**

(C) **The Damages. (II) In Debt on Specialty:**

(A) **A Statement of the Execution of the Specialty;**

(B) **Nonpayment by the defendant**

**ant**

(C) **The Damages (III) In Debt on Statutes:**

(A) **A Statement of the Act or Omission in Violation of the Statute;**

(B) **Nonpayment of the Debt or Penalty;**

(C) **The Damages**

(W) **In Debt on Judgments:**

(A) **A Statement of the Judgment;**

(B) **Nonpayment or Nonsatisfaction;**

(C) **The Damages**

#### *For Sum Certain Only*

**THE Mode of Stating the Cause of Action in Debt varies according to the source or basis of the obligation, which may be either a Simple (Executed) Contract, a Specialty, a Statute, or a Judgment. However, before**

**considering the Essential Allegations applicable to each of the Four Varieties of Debt,**

it may be helpful to discuss in more detail the requirement that the action must be for a sum certain—a requirement which is common in each of the Four Forms of Debt.

The action of Debt lies only for a liquidated sum of money; that is, a pecuniary demand where the amount due is fixed and specific or where it can readily be reduced to certainty by a mathematical computation. Blackstone tells us that in an Action of Debt the plaintiff must prove the whole debt he claims, or recover nothing at all, for the debt is only a single cause of action fixed and determined, and which, therefore, if the proof varies from the claim, cannot be looked upon as the same contract whereof the performance is sued for. “If, therefore, I bring an action for £30, I am not at liberty to prove a debt of £20 and recover a Verdict thereon, any more than, if I bring an Action of Detinue for a horse, I cannot thereby recover an ox.”<sup>20</sup>

In *Rudder v. Price*,<sup>21</sup> however, Lord Loughborough says, that while the demand in an Action of Debt must have been for a sum certain in its nature, yet it was by no means so necessary that the amount be set out precisely that less could not be recovered.<sup>22</sup> A promise to pay so much as certain services or goods were worth would not formerly support a Count in Debt, as the price

20. 3 Blackstone, Commentaries on the Laws of England, e. 9, Of Injuries to Personal Property, 154 (7th ed. Oxford 1775). See, also, the following cases: Arkansas: *Gregory v. Bewly*, 5 Ark. 318 (1843); Illinois: *Mix v. Nettleton*, 29 Ill. 245 (1862); *Roy v. floy*, 44 Ill. 469 (1867); *Raynes v. Lucas*, 50 Ill. 436 (1869); Massachusetts: *Knowles v. Inhabitants of Eastham*, 11 Gush. (Mass.) 429 (1853) Pennsylvania: *Banal v. Tonkin*, 110 Pa. 569, 1 AU. 585 (1885).

21. 1 ELI. 54?, 126 Eng.Rep. 314 (1791).

22. Maine: *Norris cc School Dist. No. 1 in Windsor*, 12 Me. 293, 28 Am.De. 182 (1835); Tennessee: *Thompson v. French*, 10 Yerg. (Tenn.) 452 (1837); Federal: *United States v. Colt*, Fed.Oas.No.14,839 (Uet.C.C.) 145 (1818).

**Sec. 138**

**ACTION OF DEBT**

283

must be fixed.<sup>23</sup> But at the present day either Debt or Indebitatus Assumpsit will lie for the reasonable value of services or goods, though not fixed by the parties. If the claim is for the value of something given as contrasted with unliquidated damages, that is sufficiently certain.

**Debt will not lie, for instance, for a refusal to convey shares in a building according to the terms of a contract under seal. The remedy is by Action of Covenant.**<sup>24</sup> Neither will Debt lie for breach of a promise of indemnity against loss or damage by fire contained in a fire insurance policy, although on principle this may well be questioned as the duty to pay is absolute.<sup>25</sup>

Debt will not lie on a guaranty contract, as on a promise to pay the debt of another in consideration of forbearance, etc.,<sup>26</sup> or in some jurisdictions against the indorser of a **bill** or note, or by an indorsee against the

23. *Young and Ashburnsbam’s Case*, 3 Leo. 161, 74 Eng.Rep. 606 (1578). Cf. *Norris v. School District No. 1 in Windsor*, 12 Me. 293, 28 Am.De. 182 (1835); *Seretto v. Rockland*, S. T. & O. H. fly., 101 Me. 140, 63 Atl. 651 (1906).

24. *Fox River Mfg. Co. v. Reeves*, 68 Ill. 403 (1873).

25. See *Flanagan v. Camden Mut. Ins. Co.*, 25 N.J.L. 506 (1856). See, also, *Heifron v. Rochester Ins. Co.*, 220 Ill. 514, 77 N.E. 262 (1906), in which it was held there could be no recovery on a policy of fire insurance under the Common Counts. Cf. *People’s Ins. Co. v. Spencer*, 58 Pa. 353, 91 Am.Dce. 217 (1866).

26. ~ *Chitty, Treatise on Pleading and Parties to Action, with Precedents and Forms*, e. TI, Of the Forms of Action, 127 (16th Am. ed. by Perkins, Springfield 1876); English: *Bishop v. Young*, 2 Bos. & P. 83, 126 Eng.Rep. 1169 (1800); New Jersey: *Gregory v. Thompson*, 81 N.J.L. 166 (1865); Tennessee: *Tap-pan v. Campbell*, 9 Yerg. (Tenn.) 436 (1836). But see, also, and compare: Illinois: *Potter v. Gronheck*, 174 Ill. 404, 7

N.E. 586 (1886); Tennessee:  
Hall v. Rodgers, 7 Humph. (Tenn.) 536 (1847); Brown v. Bussey, 7 Humph. (Tenn.) 573 (1847);  
Federal: Cubbins v. Mississippi River Comma., 241 U.S. 351, 36 S.Ct. 671, 60 LEd. 1041 (1915). See, also, Ames, Lectures on Legal History, Lecture VII, Debt, 93 (Cambridge 1913); Ames, Parol Contracts Prior to Assumpsit, 8 Harv.L.Rev. 252, 261 (1894)  
acceptor of a bill.<sup>27</sup> But the Action of Debt has been allowed more extensively in America as a remedy on Bills and Notes than in England, even against parties secondarily liable. In general Debt will lie wherever a duty is created to pay a sum certain. If the one primarily liable does not pay, the indorser or drawer comes under a duty to pay the amount of the note or bill.<sup>28</sup>

The action cannot generally be supported for one entire debt, payable in installments, till all are due,<sup>29</sup> 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

27. English: Bishop cc Young, 2 Bos. & P. 78, 126 Eng.Rep. 1166 (1800); Cloves v. Williams, 3 fling. (NC.) 268, 132 Eng.ltep. 645 (1837); Virginia: Smith v. Segar, 3 Hen. & M. (va.) 394 (1800); Stovall's Ear v. Woodson, 2 Mumf. (Va.) 303 (1811); Quare, Hilborn v. Artus, 3 Scam. (Ill.) 344 (1841); Contra:  
Tennessee: Planters' Bank v. Galloway, 11 Humph. (Tenn.) 342 (1850); Federal: Raborg v. Peyton, 15 U.S. 385, 4 LEd. 268 (1811); Home cc Semple, 3 McLean 150, Fed.Cas.No.6,658 (1843).

In Watkins v. Wake, 7 Mees. & W. 488, 151 Eng.Rep. 858 (1841), it was held that the action would lie by the Indorsee against his immediate indorser. See, also, Stratton v. Hill, 3 Price 253, 146 Eng.Rep. 253 (1816).

And it has been held that Debt will lie by the indorsee of a bill or note against the drawer or maker. New York: Willmarth v. Crawford, 10 Wend. (N.Y.) 343 (1833); Pennsylvania: Camp v. Bank of Oswego, 10 Watts (Pa.) 130 (1840).

Anti in Loose v. Loose, 36 Pa. 538 (1860), it was maintained by the indorsee against a remote indorser. See, also, Onondaga County Bank v. Bates, 3 Hill (N.Y.) 53 (1842). Cf. the following: Pennsylvania: Weiss v. Maneh Chunk Iron Co., 58 Pa. 295 (1868);  
Federal: Raborg v. Feyton, 15 U.S. 385, 4 LEd. 268 (1817); 3 Street, Foundations of Legal Liability, c. XI, Action of Debt, 139 (Northport 1906).

23. Raborg v. Feyton, 15 U.S. 385, 4 LEd. 268 (1817).

20. English: Hunt's Case, Owen 42, 74 Eng.Rep. 886 (1588); Rudder v. Price, 1 BIll. 547, 126 Rng.Rep. 314 (1791); Illinois: Boy v. Roy, 44 Ill. 469 (1867);  
Indiana: Parnham v. Hay, 3 Blaekf. (md.) 167 (1833); Pennsylvania: Sparks v. Garrigues, 1 Bin. (Pa.) 152 (1806); Federal: Fontaine v. Aresta, 2 M'Lean 121, Fed.Cas.No.4,905 (1840). See, also, West Virginia: Jamesoa v. Board of Education, 78 W.Va. 612, 8 S.E. 255, L.R.A.1916F, 926 (1916).

284

## OFFENSIVE PLEADINGS

Ch. 13

lies on each default.<sup>30</sup> And even where one sum is payable by installments, if the payment is secured by a penalty, Debt may be maintained for the penalty.<sup>31</sup>

Debt will not lie to recover on a promise to pay a debt out of a particular fund, or in services, or in a particular kind of currency not legal tender.<sup>32</sup> It does not lie, for instance, on a note 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,<sup>33</sup> or in lumber,<sup>34</sup>

30. English: Hunt's Case, Owen 42, 74 Eng.Rep. 886 (1588); Budder v. Price, 1 BIl.H. 547, 126 Eng.Rep. 314 (1701); Illinois: Hoy v. floy, 44 Ill. 460 (1867).

31. English: Coates v. Hewit, 1 Wils. (K.B.) 80, 95 Eng.Rep. 503 (1744); Illinois: Hey v. Roy, 44 Ill. 469 (1867); Federal: Fontaine v. Aresta, 2 M'Lean 127, Fed.Cas.No.4,905 (1840).

32. Alabama: *Young v. Scott*, 5 Ala. 475 (1843); Arkansas: *Hudspeth v. Gray*, 5 Ark. 157 (1842); 1111-nois: *Illinois State Hospital for Insane v. Higgins*, 15 Xli. 185 (1853); *Mix v. Nettleton*, 29 Ill. 245 (1862); Indiana: *Wilson v. Hickson*, 1 Blackf. (md.) 230 (1822); *Osborne v. Fulton*, 1 Blackf. (md.) 234 (1822); Kentucky: *Sinclair v. Piery*, 5 J.J.Marsh. (Ky.) 63 (1830); *January v. Henry*, 3 T.B.Mon. (Ky.) 8 (1825); Missouri: *Snell c. Kirby*, 3 Mo. 21, 22 Am.Dec. 456 (1831); New Jersey: *Scott v. Conover*, 6 N.J.L. 222 (1822); Tennessee: *Deberry v. Darnell*, 5 Yerg. (Tenn.) 451 (1830); Virginia: *Beirme v. Dunlap*, 8 Leigh (Va.) 514 (1837). Cf. *Gift v. Hall*, 1 Humph. (Tenn.) 480 (1840),

Debt will lie on a contract to pay either in property "or" in money. Alabama: *Henry v. Gamble*, Minor (Ala.) 15 (1820); *Bradford v. Stewart*, Minor (Ala.) 44 (1821); Kentucky: *Dorsey v. Lawrence*, Hardin (Ky.) 517 (1808); Tennessee: *Crockett v. Moore*, 3 Sneed (Tenn.) 145 (1855); Virginia: *Minniek v. Williams*, 77 Va. 758 (1883).

33. **Wilson v. Hickson**, 1 Blackf. (Ind.) 230 (1822); *Osborne v. Fulton*, 1 Blackf. (Ind.) 234 (1822). Cf. *Belford v. Woodward*, 158 Ill. 122, 41 N.E. 1007, 29 L.R.A. 593 (1895), involving gold coin.

st **Cassady v. Laughlin**, 3 Blackf. (md.) 134 (1832).

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. Illinois: *Pox River Mfg. Co. v. Reeves*, 68 Iii. 403 (1873); Ohio: *Nelson v. Ford*, 5 Ohio 473 (1832); Tennessee: *Bloomfield v. Hancock*, 1 Yerg. (Term.) 101 (1826); *Young v. Hawking*, 4 Yerg. (Term.) 171 (1833),

**or in county orders.**<sup>35</sup> **But it will lie for a** debt payable in money or goods at the option of either party, or to pay a definite sum in goods.<sup>30</sup>

In the cases mentioned the only remedy is by Special Assuinspit or Covenant to recover Damages for Breach of Promise as contrasted with specific enforcement of the Duty to Pay a Sum Certain.

### *The Breach*

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.<sup>37</sup> 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.<sup>35</sup> If the Action be on a Bond, whether a Common Money Bond or a Special Bond for the Performance of Covenants, within the Statute,<sup>39</sup> the pen-

35. See *Mix v. Nettleton*, 29 Ill. 245 (1862), in which it was held that Debt ~will lie on a Judgment payable In United States gold coin. Cf. *Belford v. Woodward*, 158 Ill. 122, 41 N.E. 1097, 29 L.R.A. 593. (1805).

36. English: *Emery v. Fell*, 2 T.R. 28, 100 Eng.Rep. **16 (1787)**; **Illinois: McKinnie v. Lane**, 230 Ill. 544, 82 N.E. 878, **120 Am.St.Rep.** 338 (1907), Involving Indebitatus Assumpsit; 3 Street, Foundations of Legal Liability, c. XVI, The Action of Indebitatus Assumpsit, 188 (Northport, 1906); Ames, Lectures on Legal History, Lecture XIV, Implied Assumpsit, 153 (Cambridge, 1913).

37. Illinois: *Ilynders cc Cone*, 80 Iil.App. 629 (1898); New York: *Gale v. O'Bryan*, 12 Johns. (N.Y.) 216 (1815).

38. The Allegation of a Demand is necessary, though the omission is cured by a Verdict *Lusk v. Cassell*~ **25 Ill.** 209 (1861),

39. The act referred to is the English Statute of 8 & 9 William III, c. 11 (1096), whIch **has** been substantially adopted into the Common Law of this country. New Jersey: *Morris Canal & Banking Co. v. Von Voorst*, 20 N.J.L. iei (1843); West **Virginia: Reynolds v. Hurst**, **18 W,Va.** **648 (1881)**.

## ACTION OF DEBT

ality is the debt at law, and the Breach **by** Nonpayment should therefore be alleged in the above form; but, if the Bond have a Condition within the Statute, the Breaches **of such Condition** should be Assigned.<sup>40</sup> Real Conditions Subsequent need not be Negatived In the Declaration.<sup>41</sup>

*The Damages*

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.<sup>42</sup> 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 Damages must always be alleged for the **detention** of the debt.

**In an Action on a Penal Bond, the Damages** assessed for Breach of Condition Subsequent are not included in the Judgment, and will be greater than those laid for the detention of the debt,<sup>43</sup>

<sup>40</sup> *Patrick v. Bucker*, 19 III. 428 (1858).

The burden of Assigning and Proving Breaches of the Condition of a Penal Bond Is now thrown on the plaintiff. *Barrett v. Douglas Park Bldg. Ass'n*, 75 Ill.App. 93 (1897); Cf. *Douglas v. Hennessy*, 15 RI. 272, 3 AU. 213, 7 Atl. 1 (1886). See, also, 2 *Williston, A Treatise on the Law of Contracts*, c. XXIV, ~ 067, 1287 (New York, 1936—1945).

<sup>41</sup> *Lesh v. United States Fidelity & Guaranty Co.*, 230 Iii. 502, 88 N.E. 208 (1909); 2 *Williston, A. Treatise on the Law of Contracts*, e. XXIV, 0 867, 1287 (New York, 1936—1945).

<sup>42</sup> *fflnols*: *Russell v. City of Chicago*, 22 III. 283 (1859); *Brown v. SmIth*, 24 IB. 196 (1860); *Under v. Monroe's Ex'rs.*, 83 UI. 388 (1864); *Magulre v. Town of Xenia*, 54 III. 299 (1870); *New Jersey: Al' len v. SmIth*, 12 NJ.L. 159 (1631).

## DECLARATION IN DEBT—ESSENTIAL AL

## LEGATIONS: (2) IN DEBT ON SIMPLE (EXECUTED) CONTRACT

.139. In Debt *on Sinipic* (Executed) Contract, the Declaration must allege facts showing that the defendant received a quid pro quo, that is, **the receipt of value from** which, by operation of law, the debt arises; in addition it must allege, by way of the Breach, **Nonpayment of the Debt, and Damages.**

BEFORE discussing the problem of stating a cause of action in Debt as applied to Simple Contracts, it is essential to consider the distinction between what were called Executed Contracts at Common Law and what **are considered as Contracts Under Modern Law**; also the distinction between Executed and Executory contracts as they originated at Common Law, together with some of the characteristics and peculiarities of each. Thereafter, with an understanding of the source or basis of the obligation sought to be enforced, we may intelligently consider the essential obligations necessary to state a good *cause* of action in Debt.

*Executed Contracts*

BOTH an Executed and an Executory Contract, if broken, will subject the parties who commit a breach, to liability, but upon wholly **different theories**. Thus, if *B* agrees to **buy** certain goods from *A*, and **to pay** for *the* same, if *A* delivers the goods, and *B* fails to pay for the goods, *B* is clearly liable to it, as a matter of morality, but *not* because of his **promise**. His **obligation is entirely** independent of the promise, and would be equally binding if there were no promise. But **if** *B* refused to accept the goods *when* delivered, *A*, the vendor might hold *B* liable *in* damages for any loss sustained *by* reason **of** *B* breaking his promise to accept and pay for the goods. The theory of liability in this **latter** situation is that *B* has breached **his** contract, not **that** *B* has received anything wifich entitled *A* to an equivalent amount.

OFFENSIVE PLEADINGS

Ch. 13

Such Damages will usually be nominal, or at least bear little proportion to the value of the goods which the vendor sold. In other words, as we have seen, prior to the advent of Special Assumpsit *A* would have had no remedy at all where *B* refused to receive the goods, as a parol promise created no legal obligations, nor did it give the promisee a right of action for its breach. But prior to Special Assumpsit, under which the vendor could recover for his loss of a profit resulting from *B*'s breach, a purchaser could not take or receive another's property without compensation therefor. Such acceptance of goods constituted a *cau,sa debendi*, upon which the Action of Debt might be sustained.

(I) *Debt Not in General Available on a Broken Promise.*—*Debt*, then, was applied to such cases on a theory not generally understood by the modern mind. To adapt the Ancient Real Action—the Writ of Right—to the recovery of a loan, sale or other Executed Contract, it was essential to *first*, estimate the amount owed as a specific sum of money, and *second*, to impute to the plaintiff a property in that pecuniary *res*—by treating the sum owed as a specific piece of property in the hands of the debtor and which, by means of the force and effect of the so-called Executed Contract, had been transmitted to the ownership of the creditor, becoming his, by operation of law, the equivalent of the *quid pro quo* which the creditor had transferred to the debtor. And under this theory the law sometimes recognized such reciprocal transfer of title, even where there was no passing of a *quid pro quo*, as in the case where *B* bargained to buy a horse from *A*, the Court held that the property was in *B*, hence *lie* was entitled to bring *Detlime*, where *A*, the seller, was entitled to have a Writ of Debt for the price.<sup>44</sup>

<sup>44</sup> Y.B. 20 Henry VI, 35 (1442). See, also, a statement by Mr. Justice Holmes, in 1916, in the case of

In consequence of the foregoing, then, we may say that Debt lies upon what we now refer to as Simple (Executed) Contracts, upon any parol agreement which has been carried out by the plaintiff in such a manner as to transfer a *quid pro quo*, goods, labor, or money, to the defendant, so as to entitle the plaintiff to recover the corresponding price which is still in the hands of the defendant debtor. Says Professor Keigwin: "The efficient fact is the meritorious performance on the one side which—of itself and apart from the agreement—engenders the duty to make recompense for the benefit thereby imparted to the other side. The obligation enforced results from the facts accomplished by the plaintiff, and is founded upon the emolument inuring to the defendant from the transaction." ~

(II) *Debt Lies on the Simple (Executed) Contract, Assumpsit on the Promise.*—*What*, then, was meant when it was said that Debt lies on the Contract, Assumpsit on the Promise? "The distinction may be dearly perceived if we examine the case of *Sands v. Trevelian*,<sup>47</sup> decided in 1630. In that case .4 re11, 37 So. 3, 4, 61 LEd. 116, 118, in which he said:

"When a man sells a horse, what he does from the point of view of the law is to transfer a right, and a right, being regarded by the law as a thing, even though a *res inoorporalis*, it is not illogical to apply the same rule to a debt that would be applied to a horse."

<sup>45</sup> Keigwin, cases on Common Law Pleading, c. II, The Common Law Actions, 58 (2d ed. Rochester, 1034).

<sup>46</sup> "In Comyn's Digest, written about 1740 and published in 1762 after the author's death, it is laid down that 'Debt lies upon every contract in deed or in law'; and the instance given to illustrate the doctrine is a use of the action to recover a statutory penalty, the unlawful act being the contract. So in 1677, in the Fourth Section of the Statute of Frauds, provision is made concerning, not any contract for the sale of lands, but any contract or sale of lands, apparently distinguishing between an Executed Transaction and an Executory Agreement." Keigwin, The Action of Debt, 11 Geo.L.J. 28, 37 (1923).

Portuguese-American Bank v. Welles, 242 U.S. 7,

<sup>47</sup> Cro.Car., 193.

ACTION OF DEBT

requested *B*, an attorney at law, to defend his friend *C*, who had been sued, and *A* undertook to pay for the service rendered. *B* performed the service requested and *C*, having failed to pay, *B* demanded payment by *A*, and upon his

refusal, sued *A* in Debt upon his undertaking. In the Court of Common Pleas it **was held that Debt by *B* against *A*** would not lie, but that Special Assumpsit would lie on *A*'s promise to *B* to pay the debt of *C*~ **Special Assumpsit is the only remedy**, the theory being that there was no *quid pro quo* passing from *B* to *A*, and hence no debt.

From the result in the *Sands* case, two inferences may be drawn, *first*, that *in the* legal mind of the late Sixteenth and early Seventeenth Centuries, the word "contract" meant only a Simple (Executed) Contract, which covered factual situations, in which there had been an engagement to swap something of material benefit, the effect of which was an emolument moving from one party to the other, as in the instant case, from the attorney *B*, **to his client *C***; *second*, a debt *could not* be created by a promise, where it was made to pay a debt chargeable to another other than the promisee. In the *Sands* case the only debt was that created by *B*'s performance of services to *C*, which *performance*, **by** operation of *law*, imposed a legal duty upon *C* to pay *B*, which was remediable in Debt by *B* against *A*. No debt existed as between *B* mid *A*, **and** *A* had received no *quid pro quo* from *B*. As to *A*, then, no *causa debendi* **in Debt existed**; there was, however, an undertaking which did not involve any benefit to *A*, **the promisor**, but which did involve a breach of promise, **remediable in Special Assumpsit**, and for which the object of the action was the recovery of Damages and not a Specific Sum Certain, as required in Debt.

**It follows from the** foregoing discussion that when there is what we now refer to as a Contract in the early Common-Law sense, **there is a Simple (Executed) Contract which**

involves the performance of meritorious services by one party for the benefit of another. Even if there be a promise in such case, as there often may be, the Action of Debt which lies, is not grounded upon that promise; indeed, if only a promise existed, without the delivery of some benefit from the plaintiff to the defendant, Debt could not be sustained.

(UI) *Debt and Special Assumpsit, While Sometimes Concurrent Remedies, are Grounded on Different Theories.*—*It* was for this very reason that Special Assumpsit was, as we shall see later, developed as a remedy whereby a plaintiff might recover Damages for the breach of an express promise, as in **the sale of** goods, the loan of money, or the rendition of services of value to the defendant. Special Assumpsit may be concurrent with Debt, where over and above the Simple Executed Contract, performed on one side but not on the other, there is also an Express Promise to Pay, but, in general, the action lies in many factual situations wherein no debt exists. Where concurrent, it should be observed, that the theory upon which each action proceeds, is different. Debt lies upon the Contract, as conceived by the Common Law, long prior to the emergence of the Modern Contract as an incident of the development of Special Assumpsit, and under which the plaintiff seeks recovery of the equivalent of the benefit or *quid pro quo* which has passed to the defendant. In such case Debt proceeds independently of any promise to pay, and not upon any promise; Special Assumpsit proceeds upon the theory of the Breach of an Express Promise, and its occasional concurrence with Debt may be attributed to the presence of a Breach of an Express Promise over and above a Simple (Executed) Contract as known under the early Common Law. if a promise is essential to recovery Debt will not lie. This was made clear in *Hersey v. Northern Assurance*

Kofflor & floppy Com.Law Plep. H.5.—11  
288

## OFFENSIVE PLEADINGS

### Ch. 13

*Co.*~<sup>49</sup> **in** which the plaintiff sought to *recover* in two Common Counts in Indebitatus Assumpsit, which became a substitute for Debt, upon a fire insurance policy, under which the Insurance Company undertook to indemnify against loss by fire. The Court held that Debt or Indebitatus Assumpsit would not lie, as the Allegations of Fact, aside from the Express Promise to indemnify in case of loss by fire, were not sufficient to create a Common-Law Debt—a Debt created by a Simple (Executed) Contract. Said the Court: "In the present case the facts aside from the promise, *via.*: the plaintiff's ownership of the property, its destruction by fire without his fault—even the payment of the premiums,—do not raise an implied promise by the defendant to pay; it is only the fact that it promised, upon certain conditions, to pay, that makes it liable. Consequently, at Common Law, the promise, the conditions, and the fulfillment of the conditions, must be set forth—in other words the Count must be special." ~ And the same rule applies in the case of a wager, a breach of warranty, or where the vendor fails to deliver the goods to the vendee.<sup>50</sup>

In all such cases, nothing of value having passed to the defendant, no debt *has* been created, or no *causa det'endi* making it his duty to pay; the remedy in such case is Special Assumpsit for the breach of an express promise.<sup>55</sup>

<sup>48.</sup> 75 V~t. 441, 56 AU. 95 (1903).

<sup>49.</sup> Homey v. Northern Assurance Co. 75 vt. 441, 56 Atl. 95 (1903), citing as authority the leading English case of Cutter v. Powell, 2 Smith's Lending Cases 8 (13th ed. London, 1929).

<sup>10.</sup> Atkinson v. Bell, S B. & C. 277, 108 Eng.Rep. 1046 (1828).

And this rule was applied even after the Abolition of the Common Law Actions under the Codes. See Henry Glass & Co. v. Misrocht, 210 App.Div. 783, 206 N.Y.Supp. 373 (1924) modified in 239 N.Y. 475, 147 N.E. 71 (1925).

si. "But the distinction between Debt and Assumpsit is fundamental. For while Assumpsit might always be brought where Debt would lie upon a Simple Contract, the converse is not true. There were

### *Executory Contracts*

WHERE a person promises to perform a certain act and then fails to perform, there is no basis for supporting an Action of Debt. There is no Simple (Executed) Contract, no Specialty Contract, no Judgment and no Statute. The only operative fact fixing liability of the contractor is his breach of promise. At Common Law, there were two reasons why a mere Breach of Promise would not support an Action of Debt. In the *first* place, at Common Law, the breach of a parol promise, while a lie, and hence *immoral*, was not regarded as a civil wrong, and therefore there was no remedy provided for breach of a parol promise; in short, the wrong was of such a character as to be not justiciable. However, by a long process of development which extended from *Watton v. Brinth* ~ in 1400, up to *Cook and Songate's Case*<sup>53</sup> in

**1588**, the Action of Special Assumpsit, as a remedy for the Breach of Parol Promises, was created by extending the tort Action of Trespass on the Case Super Se Assumpsit into the Modern Field of Contract, thus filling the *lacuna* or gap which has been described as a deficiency in the Common Law Scheme of Remedial Justice.<sup>54</sup> But this development in no way affected the Nature or Scope of Debt. In the *second place*, Special Assumpsit, as the remedy for the Breach of a Promise, was not proprietary in character; the injury to the deceived promisee could not be treated, as in Debt, as a specific *res*, of either chattels or money, in the posmany cases where Assumpsit was the only remedy.

Assumpsit would lie both where the plaintiff had incurred a detriment upon the faith of the defendant's *promise*, and where the defendant had received a benefit. Debt would lie only in the latter class of cases. In other words, Debt could be brought only upon a Real Contract, Assumpsit upon any parol contract" Ames, Parol Contracts Prior to Assumpsit, 8 Harv.L.Rev. 252 (1894).

- Y.B. 2 Henry iv, ta. pl. 9 (1400).

<sup>63.</sup> 4 Leo. 31, 74 Eng.Rep. 708.

<sup>64.</sup> Thorne v. Deas, 4 Johns. (N.Y.) 84 (1809).

**See, 139**

## ACTION OF DEBT

289

session of the wrongdoer. If the promisor-defendant was to pay for his breach by making reparation in Damages, it had to be on some other theory than that which existed in Debt, as Debt could not be used as a remedy to recover Damages for a Breach of Contract, without destroying its character as a Real Action.

(I) *The Common Law Versus the Modern Law Meaning of the Term "Contract"*.—As previously suggested, at Common Law, when it was said that Debt lies on a Simple Contract, it was used to describe transactions not included within the term "Contract" as understood in Modern Law. Originally, it was used in a very narrow sense and to describe a Real Contract, under which the defendant was, by *operation of law*, placed under a duty to recompense the plaintiff in a *sum* equivalent in value to the *quid pro quo* received. The Specialty Contract, by way of contrast, was described as a *Covenant*, Grant or Obligation, but not as a Contract. As Professor James Barr Ames observes: "A Simple Contract Debt, as well as a Debt by Specialty, was originally conceived of, not as a Contract, in the Modern Sense of the Term, that is, as a Promise, but as a Grant. A bargain and sale and a loan were exchanges of



values. The Action of Debt, as several writers have remarked, was a Real rather than a Personal Action. The Judgment was not for Damages, but for the recovery of a Debt, regarded as a *i-es*.” ~°

Such a view of the Common-Law ConceptiOn of Contract excludes those factual situations where the defendant’s obligation is founded on a mere promise to perform, unaccompanied by the receipt of a *quid pro*

-5- According to Bovier, Law Oictionary, p. 660, (3rd Rev. Philadelphia, 1914) Real Contracts are those in which It is necessary that there be something more than mere conseifi, such as a loan of money, deposit or pledge, which from their nature require a delivery or the thing, *v-es*.

50. Ames, Lectures on Legal History, Lecture XIV, Implied Assuznpslt 1.-9, 151 (Cambrldge, 1913).

*quo*. The word “Contract” meant an Executed *Contract*, under which a *res* passed from the plaintiff to the defendant. If the undertaking was executory, or dependent alone upon a promise, with provision for mutual exchange of *benefit*, Debt *would* not lie. Thus, cases involving suretyship or warranty, were not referred to as contract. And this explains why, as late as 1630, in the case of *Sands v. Trevilian*,<sup>5</sup> the Court held that a Contract of Guaranty was unenforceable in an Action of Debt, as the guarantor had received no *quid pro quo* from the promisee. In consequence, even unto this day, Debt will not lie for the mere Breach of a Promise, and this remains true even where the consideration itself creates an obligation to restore it if the promise be not performed, as where there is a payment on account for goods sold, and there is a failure of delivery. In such case the money paid constitutes a debt for which Debt will lie; ~ but any loss resulting from the failure of the sale is remediable only in Special Assumpsit for Damages, as opposed to Debt for a Sum Certain. And, of course, as previously observed, the exchange of Mutual Promises does not create a Contract upon which Debt will lie, as there is no *quid pro quo* passing to the defendant; there is, however, a Contract in the Modern Sense, upon the Breach of which Special Assumpsit will lie.

**(II) Debt Not Available Upon a Collateral Contratt.**—*The Common-Law Rule was that Debt would not lie upon a Collateral Promise to pay the Debt of Another,~°—a principle*

57. Cro.Car. 193, 79 Eng.Itep. 769

58. See *Maylard v. Kister*, Moore K.li. 711, 72 Eng. Rep. 857 (1598), in which the Court of Queen’s Bench held that Special Assumpsit was not available upon a promise to pay for goods sold and delivered, ‘because Debt properly lay, and not an action on the Case [Special Assumpsit], the matter proving a perfect sale and contract.’~

69. “Thus, In one of the oldest eases upon the subject, is Edw-. III, 13 (1344), It is said: ‘If A bought of Inc certain goods for a certain sum, and B at the

290

#### OFFENSIVE PLEADINGS

#### Ch. 13

established at an early period in the English Law. Thus, Reeves, in his *History of English Law*,<sup>oo</sup> commenting on the changes in legal proceedings between the time of William the Conqueror (1066—1087) and that of King John (1199—1216), declared: “When they (the parties) were both in Court, then it was to be considered how the demand arose. This might be of various kinds, as *ex causa mutui*, upon a borrowing; a *causa venditionis*, upon a sale; *cx conimodato*, upon a lending; *cx deposito*, upon a deposit; or by some other cause, by which a debt arose; for at this time all matters of Personal Contract were considered as binding only in the light of debts; and the only means of recovery, in a Court, was by this action of debt.” In each of these cases the common characteristic was that the consideration passed from the creditor to the debtor, so that the contract of the party receiving the *quid pro quo*, or benefit, was to pay his own debt and not that of another. Such transactions were in no way connected with third parties; the debtor was the party securing the benefit, lie alone owed the debt and Debt lay only against him.

In view of this origin of the action, it is not surprising to find that Debt, as a remedy, had no application, in case of a Breach of Promise to pay money which was primarily due from a third party. In an early case, the law was stated as follows:

“If *C* recover £10 against *A*, and *B* shall say to *C* that if he will release the £10 to *A* he will be his debtor, and accordingly the £10 are released to *A*, an Action of Debt will not lie against *B*, as this sounds in covenant.” ~ In

the subtle theory of the thy it was held

same time undertook to pay for them at the day if A did not; if A should not pay for them, debt could not be brought against B, because it would sound in covenant.” Beasley, C. 3., In *Gregory v. Thompson*, 31 N.J.L. 166, 168 (1865).

~O. I Reeves, *History of English Law*, e. IV, 425 (Finlason’s .Ani.EL, Philadelphia 1880).

that such a promise by *B* did not create a debt; the party originally liable, *A*, remained the debtor; *B*, who made himself a Surety did not by that act impose upon himself a debt.

It thus appears that the existence of this ancient rule of law has never been denied, although Chief Justice Beasley, in *Gregory*

*v. Thompson*,<sup>62</sup> suggests that in some instances it has been misapplied. He discusses the *Anonymous*<sup>63</sup> case, in which it was held that an Action of Debt brought by the payee of a Bill of Exchange against the acceptor, could not be supported, on the ground that the engagement was collateral. Chief Justice Beasley observes that while this decision has since been overruled in this country, it in no way affected the principal doctrine, as the reversal did not rest on grounds which involved the doctrine under elucidation. Chitty, a modern English authority, sustains the ancient doctrine, declaring:

“Where a Simple Contract creates a Collateral Liability, as for the payment of the debt of a third person, Debt not being sustainable, Assumpsit is the only Form of Action.” ~ The same *rule*, Chief Justice Beasley observes, has found sanction in America in *Pierce v. Crafts* ~ **and** *Willmarth v. Crawford*<sup>64</sup> and the principle is not affected because the engagement sued upon has been expressed in an instrument under seal. This very issue was presented in 1838 in the case

62. 31 N.J.L. 166 (1805).

83. Hardres 485, 145 Eng.Rep. 560 (1660).

In *Bishop v. Young*, 2 Boa. & P. 78, 126 Eng.Rep. 1166 (1800), Lord Eldon reviewed the *Anonymous* case reported in Hardres, and held that it rested on solid ground; and it was also treated with like respect by Justice Laurence in *Priddy v. Henbray*, 1 B. & C. 074, 107 Eng.Rep. 248 (1823).

57. I Chitty, *treatise on Pleading and Parties to Action, with Precedents and Forms*, c. III, Of the Forms of Action, 176 (16th Am. ed. by Perkins, Springfield 1870).

65. 12 Johns. (N.Y.) 90 (1815).

68. 10 Wend. (N.Y.) 341 (1833).

61. • Henry V. 14~ p1. 23(1421).

Sec. 139

## ACTION OF DEBT

291

of *Randall v. Rigby*,<sup>67</sup> in which Debt was brought upon an indenture whereby *A* had granted to *B* and *C* certain lands in fee simple, reserving to himself and his heirs forever an annual rent, and *B* and *C* had covenanted that they or one of them, or some one of their heirs, would pay the rent. The Declaration alleged that one of the stipulated installments of rent was unpaid. *A* brought Debt against *C*, and a Demurrer to the Declaration was sustained, the Court holding that Covenant under which the defendant *C*, jointly with another, had undertaken to secure the payment of an annuity issuing out of the land, was Collateral, and hence would not, support an Action of Debt.<sup>68</sup> Finally Chief Justice Beasley refused to follow Mr. Justice Story’s suggestion in *Bidlard v. BeIt*,~ that it would not be overstraining the doctrine of Debt to apply it to Collateral Undertakings to pay a sum certain.

(III) *A Single Quid Pro Quo Will Not Create Two Debts.*—As previously observed, Debt was not available against a defendant if a benefit was conferred on a third person even though at the defendant’s request, as there was no *quid pro quo* essential to create a debt. As a result, however, of a case decided during the reign of Henry VI (1422— 1461),~<sup>69</sup> it was established that whatever would constitute a *quid pro quo*, if rendered to the defendant himself, would constitute a *quid pro quo* if delivered to a third person, provided it was delivered at the defendant’s request, and that such third person did not become liable therefor to the plaintiff, as one *quid pro quo* could not give

rise to two debts.<sup>1</sup> This was the principle on which

67, 4 l, & \V. 130, 150 Eng.Rep. 1372 (1835).

68. 8c~, in this connection, Harrison v. Mathews, 10

M. & W.. 767, 152 Eng.Rep. 682 (1842). 69. 1 Mason (U.S.) 202 (1816).

70. Ames, Lectures on Legal History, Lecture VIII, Debt, 93, 94 (Cambridge, 1913).

71. Marriott v. Lister, 2 Wils. (KB.) 144, 95 Eng.Rep.

731 (1762).

*Shandois v. Simson* was decided, a woman being held liable in Debt by a tailor for embroidering a gown for the maid of her daughter.

(IV) *The Statute of Frauds and the Rule that Debt Will Not Lie Upon a Collateral Promise.*—The principle that Debt will not lie on a Collateral Promise to pay money primarily due from another is vital when it comes to the application of the Fourth Section of the Statute of Frauds,<sup>73</sup> which provided that no action shall be brought upon a promise to answer for the debt of another unless the agreement shall be in writing. The Statute would, of course, have no application except where the promise to pay the debt of another was Collateral and was not in Writing.<sup>74</sup>

### *The Mode of Declaring on Simple Contracts*

WHERE the action is brought on a Simple Contract Debt, the Declaration must show the Consideration on which such Contract was founded with exactitude, and it must appear that there is a liability established either by law or by an express agreement of the defendant. The Form of the Statement should be that the defendant agreed to pay the debt, and not that he promised; the

72. CroEliz. 880, 78 Eng.Rep. 1104 (1602).

See, also, *Stonehouse v. Bodvil*, Raym.T. 67 83 Eng. Rep. 37 (1662), in which the action was *Indebitatus Assumpsit* instead of Debt.

73. 29 Car. II (1677). See, also, on this point, article by Ames, *Parol Contract Prior to Assumpsit*, 8 Harv. L.Rev. 252 (1895); Hening, *A New and Old Reading on the Fourth Section of the Statute of Frauds*, 57 U. of Pa.L.Rev. 611 (1909).

The whole Doctrine as to Collateral Promises to Pay exercised a restraining influence on the issue which long divided the Courts as to whether the Actions of Debt and *Indebitatus Assumpsit* should be extended to punit recovery for debts created by Bills of Exchange and Promissory Notes.

74. Hening, *A New, and Old Reading on the Fourth section of the statute of Frauds*, 57 U. of Pa.L.Rev. 011 (1909); Ames, *Lectures on Legal History*, Lecture VIII, Debt, 94, 95 (Cambridge, 1913).

292

## OFFENSIVE PLEADINGS

### Ch. 13

basis of the action being the receipt of value and the duty arising from an Executed Consideration, and not, as in *Special Assumpsit*, from the promise.<sup>5</sup>

The *indebitatus Count in Debt* differs from those in *Indebitatus Assumpsit*; for, although it states that the defendant was indebted to the plaintiff in a named sum of money “for goods sold,” etc., precisely as in *Indebitatus Assumpsit*, and it is not necessary to set forth the nature or particulars of the transaction in detail, yet no promise should be stated, as in *Assumpsit*. The *quantum meruit* and *quantum valebant* Counts were formerly used in Debt, and resembled those in *Assumpsit*, except the words “agreed to pay” were used, instead of “promised to pay.”

### DECLARATION IN DEBT—ESSENTIAL ALLEGATIONS: (3) IN DEBT ON A SPECIALTY

140. In Debt on a Specialty, the deed or instrument relied upon must be stated in the Declaration in precise words, that is, verbatim, or according to its substance and legal effect. The Consideration need not be alleged, unless performance of it is a condition precedent.

THE second variety of Debt was Debt on a Specialty, or upon an instrument under seal, which in the English law was known as a Formal Contract. It fixed an obligation in either one of two forms: (1) such an instrument might declare that an indebtedness is a presently existing fact; or (2) it might assure that a specified sum of money would be paid in the future. Regardless of whether the instrument took on a present or future aspect, if **the obligation created** was to render a specific, certain sum of money to the promisee or obligee, the Action of Debt lay to recover the specific *res* mentioned in the instrument, and as indicated by the instrument to be the property of the obligee to whom payment is thereby assured. As the implications of an instrument creating a Present Obligation under a Seal were different from those created by a Future Obligation under Seal, each will be considered separately.

### *A Sealed Instrument Fixing a Present Obligation*

SEALED instruments creating a Present Obligation might take the form of a bond to pay a specific sum of money, as on a single or common money bond, without any condition, or they may take the form of a bond with a penalty or with a collateral condition. In each case the debt was created by the act of the parties to be charged in executing the instrument under seal which is the basis of the suit. Thus, where a bond *is* drawn in the conventional form and for the purpose of securing the payment of money, it purports and acknowledges that the obligor or the person who signs and seals the instrument is “to be held and firmly bound to the said” obligee, or the said “plaintiff” in a specific and certain sum of money, which is to be paid to the said plaintiff (obligee), or his personal representatives at once or upon demand or at some fixed date or upon the happening of some contingent act or event. The phrase “to be held and firmly bound to the said plaintiff,” as it appears in the Declaration imports an obligation on the part of the obligor to render the specific thing—the indebtedness—to the obligee, and such language executed under seal amounts to a conclusive declaration by the person who thus acknowledges his indebtedness that he has *in* possession money which belongs to the obligee and which he ought to deliver to him. If the obligor fails to perform the duty to pay, as undertaken under seal, an Action of Debt on the bond lies to recover the money specified in the instrument, the theory being that the obligee or plaintiff is the owner of the specific sum designated and hence is

75. *McGinnity v. Laguerenne*, 10 Dl. 101 (1848).

Sec. 140

## ACTION OF DEBT

293

merely seeking that which belongs to him as provided *in* the bond. And such *an* acknowledgment under seal of indebtedness by the obligor is conclusive, even where there was in fact no pre-existing debt, or where the debtor-obligor had no property which belonged to the obligee. The reason for this was that such an acknowledgment of indebtedness, when widened by the solemn act of seal, operated as an estoppel, at least in a Court of Law; and it had the practical effect of barring the obligor from denying what he had previously so solemnly admitted, thus placing the matter beyond dispute and eliminating any necessity of inquiry as to the nature and origin of the debt; and in short, under such an obligation, the issue as to how the debt arose, became immaterial.

By reason of the peculiar characteristics of the sealed instrument creating a present obligation, it became possible for the obligee to use this form of instrument to obtain a benefit from the obligor which was clearly something other than the payment of a debt. Thus, suppose *B*, the obligor, executes a bond agreeing to pay the obligee, *A*, a certain sum of money. In effect the instrument becomes evidence of an absolute indebtedness. Now, suppose there is added to *this* instrument a condition *in* the form of a clause providing that the entire instrument should be void if the debtor-obligor, *B*, performs some other act, such as indemnifying the obligee against certain contingencies, answering for the defaults of some third person, conducting himself in the proper and legal manner in some public office, paying a smaller sum of money, or performing a collateral contract. If the obligor, *B*, performs the condition set forth **in the contract**, the condition is said to have been fulfilled, with the result that there is nothing **due on the bond**; that is, the bond is void. If, however? the obligor, *B*, fails in any manner to meet the conditions as set forth, the **bond is converted to an obligation** as absolute in character as it was upon its original *execution*, with the result that the obligee, *A*, may sue in Debt to recover the sum specified in the bond *as* a conclusively acknowledged debt.

In such an instance, what the bond secured was not the sum certain as a debt, but an agreed penalty or Liquidated Damages for failure to do something other than paying the debt. Thus, it becomes apparent that the obligor's acknowledgment of an obligation to pay a specific sum, was, *in reality* "a cloak to disguise a collateral undertaking; and when the obligee sues on the bond for the amount therein acknowledged to be due, what he actually goes for is not a debt but Damages for the nonperformance of the contract contained in the condition." And under the Common Law, as the Breach of a Condition operated to convert the indebtedness into the absolute obligation it purported to be, the obligee, *A*, recovered the full amount prescribed by the bond, in total disregard as to the circumstances under which or the reason why the obligor failed to perform or the extent of the damage suffered by the obligee *A*, which, in some instances, was outrageously small. Thus, to illustrate, suppose *B*, the obligor, by bond, acknowledges an indebtedness to *A*, the obligee, of \$10,000, with a condition that the bond is to be void upon the payment of \$5,000 on a day certain. If, for any reason whatsoever, *B* failed to pay on the specified date, the larger amount became **absolutely due. And, if thereafter, the obligor** offered to pay the smaller sum, the amount, let us say, actually owed, his tender was of no avail.

### *A Sealed Instrument Fixing a Future Obligation*

WHERE a sealed instrument contains an agreement to perform a certain act at a future time. See Keigwin, Cases in Common-Law Pleading, e.

II, The Common Law Actions, 47 (2d ed., Rochester

1934).

294

## OFFENSIVE PLEADINGS

Ch. 13

time, such as to build a house, the promisee cannot sue the obligor upon any predicate of prior indebtedness; in such a case Covenant to recover Damages for the breach of the sealed instrument is the appropriate remedy, as Debt does not lie for an obligation originating in that manner. If, however, the sealed instrument had provided for the payment in the future of a specified sum of money, there is a suggestion of a pre-existing duty, the money promised presumably being in discharge of a present debt, as for a loan or for goods, which constitute a *causa debendi*.<sup>77</sup> By the mediaeval mind, such a promise was conceived of and treated as a present Grant of the specified sum, or a transfer of the title to the plaintiff obligee, which created a debt in the present, but a debt which was to be paid in the future. In other words, *B's* agreement to pay *A* a specific sum of money next year, makes *A* the owner of that sum at once, even though *A* may make no claim of the property until the day specified. Thus, in the Early Law, it was thought that an Agreement by Specialty for the payment of money on a Future Day, in effect, operated as an immediate transfer of title to the sum mentioned, whereby the plaintiff obligee was authorized, upon the arrival of the date specified, or the event designated, to demand the specified sum as his own. Debt on Specialty, therefore, is the proper remedy to recover a certain and fixed sum of money, made payable by a sealed instrument, and which under the language of the engagement, is not something other than the debt of the obligor. As Professor Keigwin so truly observes: "When, therefore, Action was brought upon a Specialty obligating the defendant to a future payment, the plaintiff did not sue to enforce performance of an Executory Engagement, but to recover a specific sum to which the title had become vest

<sup>77</sup> Keigwin, Cases in Common-Law Pleading, C. II, The Common-Law Actions, 52 (2d ed., Rochester

ed in him; he sought, not Damages for breach of an Executory Promise, but possession of an identical *res*, demanded as the proper object of a Real Action, one which had been made his property by an Antecedent Grant."<sup>78</sup>

### *The Mode of Declaring in Debt on Specialties*

IN Debt on Sealed Instruments the Declaration usually states the Execution of the Specialty, and makes Profert of it,<sup>79</sup> without any mention of the Consideration on which the Contract was founded. It is necessary, however, where performance of the Consideration by the plaintiff is a Condition Precedent to his right to sue, to allege Fulfillment of the Conditions to defendant's liability.<sup>80</sup> 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.<sup>81</sup> If not set out *verbatim*, it must be stated according to its *legal operation and effect*.<sup>82</sup> It must appear that the contract

IS. See article by Keigwin, The Action of Debt, Pt.

IT, The Nature of the Obligation, 12 Geo.L.J. 28, 35 (1923).

79. Kentucky: Scott v. Curd, Hardin (Ky.) 69 (1806);  
Cleveland v. Rodgers, 1 A.ICMarsb. (Ky.) 193 (1818);  
Massachusetts; Bender v. Sampson, 11 Mass. 42

(1814).

80. Florida: United States Fidelity & Guaranty Co.  
v. District Grand Lodge No. 27 of Grand United Order of Odd Fellows, 58 Flin. 373, 50 So. 952 (1909);  
Illinois: Nash v. Nash, 16 In. 79 (1854); Caldwell  
v. Richmond, 64 Ill. 30 (1872); New York: Whitney  
v. Spencer, 4 Cow. (N.Y.) 39 (1825); Virginia: Nottingham v. Ackliss, 110 Va. 810, 67 SE. 351 (1910).

SI. English: Moore v. Jones, 2 Ld.Raym. 1536, 92  
EngRep. 496 (1728); New York: Van Santwood v.  
Sandford, 12 Johns. (N.Y.) 197 (1813); Vermont:  
Barrett v. Cat-den, 65 Vt. 481, 26 Atl. 530, 36 Am.St.  
Rep. 876 (1893); West Virginia: JUdd v. Beckley,  
64 W.Va. 80, 00 St. 1089 (1908), holding that the  
making and signing need not be alleged.

82. Illinois: White v. Thomas, 39 IU. 227 (1866);  
Massachusetts: Lent -v. Padelford, 10 Mass. 285, 6 Am.Dec. 119 (1813); New York: Scott v. Leiber, 2  
1934).

### ACTION OF DEBT

295

#### Sec. 141

was by deed, and it is a general rule, as we shall hereafter see, that *Prof ert of* the deed must be made, unless it is in possession of the adverse party or lost or destroyed.<sup>83</sup>

In an Action upon a Penal Bond, it was formerly the practice for plaintiff to set out only the defendant's obligation to pay the penalty, without mentioning the Condition Subsequent which it was the object of the bond to enforce. The defendant, if he thought **he was able to prove performance of the Condition**, would then crave Oycr of the Conclition and Plead Pert onnance, and the plaintiff would Reply, Assigning Breaches *of* the Condition.<sup>84</sup> Upon a Penal Bond the Real Cause of Action is the Breach of the Condition Subsequent. It is in effect a Covenant to Perform the Condition of the Bond. The Action is only in Form for a Debt, which is recited by way of penalty, and in reality is an Action for Damages for Breach of Contract. Contrary to the situation at Common Law, described above, where the fuJi penal sum was always obtained if the defendant had failed to perform the condition, now only the Actual Damages can be collected.

By statute the plaintiff is usually required to Assign the Breaches Complained of in his Declaration, and the defendant may then meet them in his Pleas. *Although* Judgment may still be entered for the penalty of the bond, this stands merely as security for the Damages caused by the Breach of Condition as found by the Jury.<sup>83</sup>

*Wend. (N.Y.)* 479 (1829); Vermont: Barrett v. Cat-den, 65 Vt. 431, 26 Atl. 530, 30 Am.St.Rep. 876 (1893).

83. Massachusetts: Bender v. *Sampson*, 11 Mass. 42 (1814). See, also, Conwell v. Clifford, 45 md, 392 (1873).

84. New Jersey: Morris Canal & Banking Co. v. Van Voorst, 20 N.J.L. 167 (1843); West Virginia: Reynolds v. Hurst, 18 W.Va. 648 (1881). Whlttier, Cases on Common-Law Pleading, 377, 388, 389, note (St. Paul 1916).

#### DECLARATION IN DEBT—ESSENTIAL AL LEGATIONS: (4) IN DEBT ON A STATUTE

141. In Debt upon a Statute, the statement should embrace all the material facts **to show** that the offence or act charged against the **defendant** was within the provisions of the statute, 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 **was not** within the Exception; but, if the Exception is contained in a **subsequent clause**, it is a **matter of defense only**.

*In Genei-al*

DEBT is the proper remedy to recover a Specific Sum of Money Due by Virtue of a statute, where the statute prescribes no particular Form of Action.<sup>80</sup> Thus, where a statute prohibits the doing of an act under a certain penalty prescribed by the act, to be recovered either by the party aggrieved, or by an informer,<sup>57</sup> and provides no particular mode of recovery, Debt will lie.<sup>85</sup> Such a statute, in effect, provides that a specific sum of money or a specific chattel which now

86. Comyn, Digest of the Laws of England, Action on Statute, E (5th ed. Philadelphia 1824—1826); Bacon, Abridgment of the Law, Debt, A (5th ed. London 1797); English: *Tilson v. Town of Warwick Gaslight Co.*, 4 B. & C. 962, 107 Eng.Rep. 1317 (1825).

81. When a penal statute 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 tuem*. I Chilty, Treatise on Pleading and Parties to Actions with Precedents and Forms, - II, Of the Forms of Action, 126 (16th Am. ed. by Perkins, Springfield 1876); but there must be an express provision enabling an informer to sue. *Rex v. Malland*, 2 Str. 828, 93 Eng.Rep. 877 (1728); *Fleming v. Bailey*, 5 East 313, 102 Eng.Rep. 1090 (1804).

88.1 Rolro, Abridgment, 598, pls. 18, 19 (London)

1668)- See, also, the following cases: English: *Underhill v. Eilieombe*, McCl. & Yo. 457, 148 Eng. Rep. 489 (1825); Alabama: *Rogers v. Brooks*, 99 Ala. 31, 11 So. 753 (1892); Illinois: *Vaughan v. Thompson*, 15 DL 39 (1853); *Ewbanks v. President, etc. of Town of Ashley*, 36 Ill. 177 (1804); *President, etc., of Town of Jacksonville v. Block*, 36 Ill. 507 (1813); Michigan: *Benalseck v. People*, 31 Mich. 200 (1875); Federal: *Cross v. United States*, 1 Gall. 26, Fed.Cas.No.3,434 (1812).

88. **Patrick v. Reeker**, 19 111. 428, 439 (1858), (Condition must be set out and Breaches Assigned).

296

## OFFENSIVE PLEADINGS

### Ch. 13

belongs to a certain person shall become the property of another; or the effect of such a statute is to create in the latter of these two persons a title to the thing transferred, and to cast upon the former of these two persons a legal obligation to surrender it to the other.<sup>80</sup> For example, a statute may provide as a penalty for engaging in prohibited fishing, hunting or smuggling, that the offender shall forfeit the instruments used in committing the wrongful act, such as a boat, fishing equipment, horse, weapon or other materials used in the process of violating the revenue laws. Such statutes customarily provide that the Forfeited Articles shall pass to the informer, to the officer detecting the offence, or to the Government,---the effect of such provision being to transfer to such person the title to the property in question. Upon the violation of this type of statute, the property of the offender is held without any further right in the offender, but as 'the property of the person to whose benefit it accrues under the terms of the statute. The same rule applies where the statute provides for the Forfeiture of a certain sum of money, the pecuniary amount as a penalty being assimilated to a corporeal chattel, the title to which, by force of the statute, has passed from the wrongdoer to the person designated to take under the Statute. The aggrieved person, whether a **Private Informer**, or a Government officer, in suing on such a penalty, acts on the theory that he owes the money or other thing Forfeited, which the offender is obligated to surrender to its new proprietor, the statute constituting a *causa debendi*.<sup>80</sup>

Debt will also lie to recover, under a statute, money lost and paid on a wager, or to recover usury paid, or to recover a delin

89. Kaigwin, Cases in Common Law Pleading, II, The Common Law Actions, 44 (24 ed., Rochester 1934).

guent tax.~ Also, where, by statute, the owners of a bank are obligated to pay all the debts of the business, or a specific portion thereof, Debt will lie.<sup>92</sup> 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.<sup>93</sup>

Where, however, the statute giving the right to sue for a penalty, or other debt created by it, prescribes a specific remedy for its recovery, other than Debt, the Action of Debt will not lie; the form of action provided is then regarded as the exclusive remedy.<sup>94</sup>

91. *Ryan v. Gallatin County*, 14 Ill. 78 (1852); *Town of Geneva v. Cole*, 61 Ill. 397 (1871); *People, to Use of Christian County v. Davis*, 112 Ill. 272 (1884); *People v. Dummer*, 274 Ill. 637, 113 N.E. 934 (1916). A suit in Debt for taxes is not an action upon a contract, express or implied, under the Chicago Municipal Court Act.

92. *Mills v. Scott*, 99 U.S. 29 (1878).

93. 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.” *Bigcloiv v. Cambridge, etc., Turnpike Corp.*, 7 Mass. 202 (1810). See, also, *Alabama: Blackburn v. Baker*, 7 Port. (Ala.) 284 (1838); *Strange v. Powell*, 15 Ala. 452 (1849); *Illinois: Israel v. President, etc., of Towa of Jacksonville*, 1 Seam. (111.) 200 (1886); *Cushing v. Dill*, 2 Seam. (Ill.) 460 (1840); *Vaughan v. Thompson*, 15 Ill. 30 (1853); *Kentucky: Portlaad D~’ Dock & Ins. Co. v. Trustees of Portland*, 12 B. Mon. (Ky.) 77 (1851).

And in *Reed v. Davis*, 8 Pick. (Mass.) 514 (1829), where a statute gave the remedy by an Action of Debt generally to recover penalties and forfeitures prescribed by the statute, it was held that Debt would lie to recover Treble Damages for Waste given by the statute, though it is evident that the amount was neither ascertained nor certain.

94. English: *Stevens v. Evans*, 2 Burr. 1152, 1157, 97 Eng. Rep. 761, 763 (1761); **Underhill v. Elileombe**, McCle. & to. 450, 148 Eng. Rep. 489 (1825); *Illinois: Confrey v. Stark*, 73 Ill. 187 (1874); *Massachusetts: Smith v. Drew*, 5 Mass. 514 (1809); *Gedney v. inhabitants of Tewksbury*, 3 Mass. 307 (1807); *New Hampshire: Smith v. Woodmas~*, 28 NFL. 520 (1854);

50. *Whutneraft v. Vanderver*, 12 Ill. 235 (1850).

## Sec. 142

### ACTION OF DEBT

297

#### *The Mode of Declaring in Debt Upon Statutes*

IN Debt on a Statute at the suit of the party aggrieved, or by a Common Informer, the statement should embrace all the material facts to show that the offence 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.<sup>95</sup> If there is an Exception or Proviso incorporated in the Enacting Clause of the statute and part of it, the plaintiff must show that the defendant is not within the Exception; but, if the Exception is contained in a Subsequent Clause, it is a matter of Defense only.<sup>96</sup> In Framing the Declaration, it is necessary to include the words, “against the form of the statute” or “contrary to 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.<sup>97</sup>

*New York: Almy v. Harris*, 5 Johns. (N.Y.) 173 (1809).

93. A Declaration to Recover Damages given by a Special Statute should embrace nil the material contents of the statute. *Henniker v. Contoocook Valley B. Co.*, 29 N.H. 246 (1854). See, also, the following cases: *Alabama: Gunter v. Dale County*, 44 Ala. 639 (1870); *Rogers v. Brooks*, 90 Ala. 31, 11 So. 753 (1892); *Maine: Berry v. Stinson*, 23 Me. 140 (18-13); *Massachusetts: Hall v. Bumsteal*, 20 Pick. (Mass.) 2 (1838); *New York: Brown v. Harmon*, 21 Barb. (N.Y.) 508 (1856).

00. English: *Jones v. Axen*, 1 Ld. Raym. 120, 01 Rug. Rep. 976 (1096); *Illinois: Whitecraft v. Vanderver*, 12 Ill. 235 (1550); *Maine: Smith v. Moore*, 6 Greenl. (Me.) 278 (1830), and cases there cited; *New York: Hart v. Cleis*, 5 Johns. (N.Y.) 41 (1811); *Federal: Smith v. United States*, 1 Gall. 201, Fedl. Cas. No. 13,122 (1812).

7. English: *Wells v. Iggulden*, 3 B. & C. 180, 107 Eng. Rep. 703 (1824); *Connecticut: Town of Ba-lebamsted, v. Parsons*, 3 Conn. 1 (1807); *Maine: Peabody v. Whitney*, 48 Me. 351 (1861); *Massachusetts: Peabody v. ilayt*, 10 Mass. 30 (1813); *Federal: Cross v. United States*, 1 Gall. 26, Fedl. Cas. No. 3,434

(1812);

#### DECLARATION IN DEBT—ESSENTIAL AL

LEGATIONS: (5) IN DEBT ON A JUDGMENT

142. *In Debt on a Judgment*, where the Action is based on a Judgment obtained in a Court of Record, no statement of the cause of action on which the Record was founded is necessary; 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.

#### *In General*

IN a Court of Record, according to a “formulary of immemorial usage,” a Final Judgment declares that “it is considered that the plaintiff do have and recover of the defendant” a certain sum of money or a specific chattel; that is, the Judgment merely determines the matter of right between the parties, under which the plaintiff is to regain



something which already belongs to him and which is wrongfully possessed by the defendant. What the language of the Judgment imports, and what the Judgment does, is to establish the plaintiff's title to a specific chattel or to a certain sum of money. In like manner, a Recognizance, whereby one person enters upon the records of a court an acknowledgment of his indebtedness to another, is treated as creating a legal obligation on the part of the defendant to pay the debt admitted to be due. And so, in any case where the indebtedness is demonstrated by a Record, the Action of Debt, because of its proprietary Character, was peculiarly appropriate as a remedy whereby the plaintiff could recover money manifested to be his property.

Thus, a Judgment for a sum of money adjudged by the court to be due from the defendant to the plaintiff in any Former Action, is a Debt of Record; that is, a sum *of*

OS. See Keigwin, Cases in Com,non-Law Pleading, Bk. 1, The Forms of Action, c. II, The **Common** Law Actions, Debt Upon Records 45 (2d ed. Rochester,

i934).

298

## OFFENSIVE PLEADINGS

### Ch. 13

money which is adjudged to be due by a Judgment of a Court of Record. This is an obligation **of** the highest nature, being established by the adjudication of a Court of Record. An Action of Debt was the only means for the enforcement of a Judgment after a Year and a Day had elapsed from the time of its recovery. After such time Execution could not issue thereon, as the Judgment was presumed to be satisfied. So that, if one has once obtained a Judgment against another 'for a certain sum, and neglects to take out Execution thereupon, he may afterwards bring an Action of Debt upon this Judgment, 'and shall not be put upon the Proof of the Original Cause of Action; but, upon showing the Judgment once obtained, still in force, and yet unsatisfied, he is entitled to a New Judgment for the debt.

Debt thus lies on any obligation of Record to pay money.<sup>99</sup> 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 is generally regarded as a Specialty.<sup>1</sup> Debt will lie on a Judgment of

<sup>99</sup> Woods v. Pettis, 4 Vt. 556 (1832).

Debt on a Simple Contract or Assumpit will not lie on a Judgment rendered in a Court of Record in a sister state, Illinois: Knickerbocker Life Ins. Co. v. Barker, 55 Ill. 241 (1870); Vermont: Boston India Rubber Factory v. Holt, 14 Vt. 92 (1842).

1. Illinois: Greathouse v. Smith, 3 Seam. (Ill.) 541 (1842) St. Louis, A. & P. 11. It. Co. v. Miller. **43** Ill. 199 (1867); Young v. Cooper, 59 Ill. 121 (1811); Blattner v. Frost, 44 Ill.App. 580 (1892); Kentucky: Williams v. Preston, 3 J.J.Marsfl (Ky.) 000, 20 Am. Dec. 179 (1830). Assumpsit does not lie in these

cases.

Debt does not lie on a Judgment of Foreclosure of a mortgage, directing, in the alternative, the payment of the amount due, or a sale of the land. Burgess v. Souther, 15 RI. 202, 2 Atl. **441** (1885). Cf. Blattner v. Frost, 44 Ill.App. 580 (1892).

It does lie on a Decree in Equity directing absolutely the payment of a sum certain. Illinois: Warren v. McCarthy, 25 Ill. 95 (1800); New York: Post v. Neafie, 3 Cs.i. (N.Y.) 22 (1805). See, also, articles by flobteld, Relations Between Equity and **Law**, **11** Mich.L.Rev. 537, 568 (1913); Cook, The Powers of Equity, 15 Col.L.Rev. 31 at 237 (1915).

a Court Not of Record and on a Judgment of a Foreign Country, but generally not as on a Record or Specialty, but rather as in the nature of a Debt on a Simple Contract,<sup>2</sup> in which action the plaintiff may be required to again prove the Original Cause of Action.<sup>3</sup>

### *Debts Upon Recognizance*

THESE debts involve a sum of money, recognized or acknowledged to be due to the state or to an individual, in the presence of some Court or Magistrate, with a Condition that such acknowledgment shall be void upon the

appearance of the party in a criminal proceeding, his good behavior, or the like; and these, if Forfeited upon Nonperformance of the Condition, are also ranked among this principal class of debts, viz., Debts of Record, since the contract on which they are founded is witnessed by the highest kind of evidence, viz, by Matter of Judicial Record.’

#### *The Mode of Declaring in Debt Upon Judgments*

IF the Action is Based on a Judgment obtained in a Court of Record, no statement of the cause of action on which the Record was

2. Cole v. Driskell, 1 Blackf. (md.) 16 (1818),

3. Keiwin, Cases on Common Law Pleading, e. H, The Common Law Actions, 46 (2d ad. Rochester, 1934); Cole v. Driskell, 1 Blackf. (Ind.) 16 (1818).

4. Illinois: Pate v. People, 15 Ill. 221 (1853); Elmer

-a. Richards, 25 Ill. 260 (1861); Maine: State v. Fob som, 20 Me. 200 (1840); Massachusetts: Commissioner v. **Green**, 12 Mass. 1 (1815); Green v. Dana. 13 Mass. 493 (1815); National Surety Co. v.

zaro, 233 Mass. 74. 123 N.E. 346 (1919), See, also, 1 Williston, A Treatise on the Law of Contracts, c. **VIII**, § 220, 664 (New York, 1930—1931).

The Recognizance Is equivalent to a Judgment; nothing remains to be done but Execution. Within a year from the date feted for payment, a Writ of Execution will issue as a matter of course, on the creditor applying for it, unless the debtor, having discharged his duty, has procured the cancellation of the entry which described the confession. The Recognizance was formerly in more common Use than now, and large sums of money were lent upon its security,

### **Sec. 143**

## **ACTION OF DEBT**

299

founded is necessary.<sup>5</sup> 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.<sup>6</sup> The **particular** form which should be used may be a brief statement, that at a certain time and in a certain Court of a given County and State, an action was duly brought, and that in such action a Judgment was duly rendered in favor of the plaintiff therein for a certain sum; and, while it has been held unnecessary to allege that such Judgment is still in force, it would seem the better practice to do so.<sup>7</sup> If the Judgment sued on is a domestic one, rendered by a Court of the State in which it is sought to be enforced, and by a Court of Record, it is not essential to allege that such Court had jurisdiction, the statement that it was a Court of Record being sufficient; but if rendered by an Inferior Court, as that of a Justice of the Peace, it should be Averred that the Court had Jurisdiction, both of the parties and the subject matter. Where the Judgment is a Foreign One, rendered in a Court of a Foreign Country, the Allegation of such Jurisdiction is always necessary, but not where Judgment is rendered by a Court of General Jurisdiction in a sister state,<sup>8</sup> and, in declaring upon a Justice’s Judgment of a sister state, the stat

-. New York: Green v. Ovington, 16 Johns. (N.Y.) 55 11819); Federal: Piddle v. Wilkins, 1 Pet. (U.S.) 086, 7 LEd. 315 (1828).

C. Dcnison v. Williams, 4 Conn. 402 (1822).

7. A Declaration on a Judgment should describe the Court by which it was rendered, the place where it was held, the names of the parties, the date at **which** it was entered, and the amount of the Judgment. 23 Cyc. 1514, n. 43 (1904).

8. Illinois: Rae v. Hulbert, 17 Ill. 572 (1856), involving a sister state; *Pennsylvania: Mink v. Shaffer*~ 124 Ps. 280, 16 Atl. 805 (1889); Texas: Henry v. Allen, 82 Pox. 35,17 SW. 515 (1891); Federal: Pennington v. Gibson, 16 How. 65, 14 LEd. 847 (1853).

ute conferring jurisdiction upon the justice must also be pleaded.<sup>o</sup>

## **STATUS UNDER MODERN CODES, PRACTICE ACTS AND RULES OF COURT**

143. the basis of the Action of **Debt** generally exists today as it did at the Common Law, but it is now brought under the Single, Formless Form of Action as prescribed by Modern Codes, Practice Acts and Rules of Court.

THE Status of the Action of Debt under Modern Codes, Practice Acts and Rules of Court may be made clear by reference to a few cases. Within *four* years after the Code of Procedure was adopted in 1848, the issue was presented

in *Allen & Carpenter v. Patterson*,<sup>10</sup> in an Action which, under the Code was equivalent to either an Action of Debt or Indebitatus Assumpsit, in which the plaintiff brought suit for goods sold and delivered, under the Code Provision that the Complaint should contain a plain and concise statement of the facts constituting the cause of action, alleging that the defendant was indebted to the plaintiffs in the sum of \$371.01 for goods sold, and that there “is now due them from the defendant” the said sum for which they demand Judgment, &c. The defendant Demurred on the ground that the complaint did not state a cause of action in that the Allegation that “there is now due,” did not amount to a statement that the debt had become payable, or that it meant no more than the statement that the defendant is “indebted.” In affirming the Judgment for the plaintiffs, the Court of Appeals declared that it was required to treat the term “due” as having been **used in the Complaint to express the fact**

9. *Sheldon v. Hopkins*, 7 Wend. (N.Y.) 435 (1831);  
See, also, the following cases: Illinois: *Spooner v. Warner*, 2 Ill.App. 240 (1878); New York: *Stiles v. Stewart*, 12 Wend. (N.Y.) 473, 27 Am.Dec. 142 (1834);  
Vermont: *Hubbard v. Davis*, 1 Aiken (Vt.) 296

(1825).

10. 7 N.Y. 476 (1852).

300

### OFFENSIVE PLEADINGS

Cl. 13

that the money sought to be recovered had become payable. The Court declared:

“The Code requires that a Complaint shall contain a plain and concise statement of the facts constituting the Cause of Action (§ 142). Every fact which the plaintiff must prove to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly averred or stated. This rule of pleading in an action for a legal remedy is the same as formerly in this, that *facts* and not the *evidence* of facts must be pleaded (**1 Chitty Fl.** 215; *Read v. Brookman*, 3 Term, 159, per BULLER, J.; *Eno v. Woodworth*, 4 Com. 249). \*\*

“The counsel for the defendant insisted that the statement that there is “due,” &c., did not amount to a statement that the debt had become payable; that it meant no more than the statement that the defendant is “indebted,” &c., and that if the word “due” had two significations, the pleader could not select between them, and impute to it the one which suits his purpose best; for the maxim was that everything should be taken most strongly against the pleader, or if the meaning of the words be equivocal and two meanings present themselves, that construction shall be adopted which is most unfavorable to the party pleading. In the case of *United States v. State Bank of North Carolina* (6 Pet. 29), Judge Story said that the term “due” was sometimes used to express the mere state of indebtedment, and then it **was an equivalent to owed or owing**, and it was sometimes used to express the fact that the debt had become payable. In the latter sense, I think that the word “due” was used by the pleader in the complaint in this suit, and in that sense it may be deemed to have been used.”

Five years later, in 1857, in the famous case of *McKyring v. Bull*,<sup>11</sup> the status of the

11. *Allen & Carpenter v. Patterson*, 7 N.Y. 470 (1852).

12. 16 New York 297, 69 Am.Dec. 000 (1857).

Action of Debt or its substitute, the Action of Indebitatus Assumpsit, came up again. The plaintiff brought an action under the Code, equivalent at Common Law, to an Action of Debt or **Indebitatus Assumpsit**, in which he alleged that, as an employee of the defendant, he had performed certain labor and service, which were the sum of ~650, and concluded as follows: “There is now due to this plaintiff, over and above all payments and offsets, on account of said work, the sum of one hundred and thirty-four dollars, which said sum defendant refuses to pay; wherefore plaintiff demands Judgment in this action” &c. The defendant pleaded a General Denial. At the Trial the defendant offered evidence of payment as a Defense to the Action, which was objected to and excluded on the ground that it should have been pleaded. The Jury found a Verdict for the plaintiff, upon which Judgment was entered. The defendant, having made out a Bill of Exceptions, the Judgment on Appeal was affirmed by the Superior Court at General Term. In affirming the Judgment, the Court of Appeals, speaking through Selden J., declared:

“Although the Code of Procedure has abrogated the Common-Law System of Pleading, with all of its technical rules, yet, in one respect, the new system which it has introduced bears a close analogy to that for which it has been substituted. The general denial allowed by the Code corresponds very nearly with the General Issue, in actions of

Assumpsit and of Debt on Simple Contract, at Common Law. The decisions upon the subject, therefore, in the English courts, although not obligatory as precedents since the changes introduced by the Code, will nevertheless be found to throw much light upon the question presented here.

“While the General Issue, both in Assumpsit and Debt, was, in theory, what the general denial allowed by the Code is in fact, viz., a simple traverse of the material allegations of **the Declaration** or Complaint, yet,  
Sec. 143

### ACTION OF DEBT

301

from the different phraseology adopted in the Two Forms of Action, a very different result was produced. The Declaration, in Debt, averred an existing indebtedness, and this amount was traversed by the plea of *nil debet*, in the present tense; hence, nothing could be excluded which tended to prove that there was no subsisting debt when the suit was commenced. In Assumpsit, on the contrary, both the averment in the Declaration and the traverse in the plea were in the past, instead of the present tense, and related to a time anterior to the commencement of the suit. Under *non assumpsit*, therefore, so long as the rule of pleading which excludes all proof not strictly within the issue was adhered to, no evidence could be received except such as would tend to show that the defendant never made the promise. That this was the view taken of these pleas, in the earlier cases, is clear.”

Judge Selden observes, however, that contrary to this view in the earlier cases, a practice grew up for centuries under which evidence was received of payment, and other special defences under the plea of *non assumpsit*, as well as *nil debet*. But, he points out, this practice was swept away under the rules of Hilary term, adapted under the authority of **the act of 3d and 4th William IV.**, ch. 42, § 1, under which the plea of *nil debet* was abrogated, and that of *non assumpsit* restored to its earlier status. And, guided by this fact, Judge Selden concludes:

“My conclusion therefore is, that neither payment nor any other defence, which confesses and avoids the Cause of Action, can in any case be given in evidence as a defence, under an answer containing simply a General

**Denial of the Allegations of the Complaint.”**<sup>13</sup>

Finally, we come to the case of *Stinson v. Edgemoor Iron Works*,” a 1944 Federal case

U. McKyring v. Bull, 16 N.Y. 297, 298, 299, 69 Sm.  
Dec. 006, 697, 704 (1857).

<sup>14</sup> 53 F.Supp. 864.

involving diversity of citizenship jurisdiction, and decided under the Delaware Law. The plaintiff alleged that he was employed by the defendant for one year from February 22, 1943, under a contractual arrangement reached on March 12, 1943, but retroactive to February 22, 1943, at an annual salary of \$8,200; that the defendant breached the contract by wrongfully discharging the plaintiff on March 17, 1943, whereby he became entitled to damages in an amount representing the balance of his unpaid salary, the amount of which is \$6,491.65. The defendant Moved to Dismiss the Complaint on the ground that the plaintiff had failed to state a cause of action. In denying the defendant’s Motion to Dismiss, the United States District Court declared:

“The Delaware System of Pleading and Practice is presently that which prevailed in England at the time of the separation of the Colonies. Whatever may have been the changes in the Action of Debt in other states, that *Action in Delaware* remains today as it was at Common Law in England even prior to the adoption of the Hilary Rules in 1834. It is very clear that the Action of Debt as developed *in England* prior to the Hilary Rules of 1834 could not be used to recover Damages for breach of an employment contract. In such suits the amount of Damages—in accordance with the test set forth in the Delaware case of *Ogden-Howard*—is necessarily uncertain and unliquidated. The amount of such Damages can only be ascertained by Judgment of the Court or by Verdict of a Jury after the consideration of many factors. The Delaware authorities reassert the principle that an Action of Debt will not lie, unless the demand is for a sum certain, or for a pecuniary demand which can readily be reduced to certainty by computation. No Delaware case has been found which *even* hints that its Courts are disposed to deviate from the limitations of the Action of Debt as They existed in England at the time of the Revolution. Delaware inherited

302

## OFFENSIVE PLEADINGS

### Ch. 13

from **England the law relative to an Action of Debt**, and that law remains in force until **it is changed by the Delaware Courts or its Legislature**. In fact, there have been no changes in the Delaware law relative to Actions of Debt, except in one instance. In 1933 the Legislature of the State of Delaware, Laws of Del., Vol. 38, Chap. 201, abolished the distinction between an Action of Covenant and one of Debt. But only to this limited extent has the original Action of Debt been changed from its formal status at Common Law and this was apparently found necessary by the enactment of a specific statute for this particular purpose.

“Viewed against the Historical Development of the Action of Debt, it is apparent that Debt would not lie in Delaware to recover Damages or compensation for breach of an employment contract *regardless of the Allegations in the Declaration*. **I consequently** think it clear that *Ogden-Howard Co. v. Brand*, *supra*, merely held that an Action of Debt was not the proper Form of Action, and consequently there is no basis for defendant’s contention that there are additional holdings implicit in that decision. The precise problem before me is, therefore, the simple one of whether the Complaint filed in the instant case is sufficient to satisfy the requirements of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c. I think it sufficient—especially, since the rules are to be construed to ‘secure the just, speedy, and inexpensive determination of every action.’ Here, the plaintiff, after stating the existence of a contract

of employment and a discharge without cause by the defendant-employer, alleges:

‘8. By reason of Defendant’s said breach of its contract with Plaintiff, Plaintiff is entitled to Damages from Defendant in an amount representing the balance of Plaintiff’s unpaid salary under his said contract with Defendant, the amount of which is the sum of \$6,491.65 \* . I think this is a perfectly adequate and clear allegation and one that satisfies the requirement of Rule 8.’ ~s

15. *Stinson v. Edgenloor Iron Works, Inc.*, 53 F.Supp. 864, 867, 868 (1944).

In the case of *Williamson v. Columbia Gas and Electric Corporation*, 110 F (2cl) 15, decided in 1939 the Circuit Court of Appeals took notice of the formal view of Delaware on the Action of Debt, as applied to the Delaware statute of Limitations. Chief Justice Maria declared:

‘In order to apply a statute of Limitations, such as that of Delaware, which reads in terms of Common Law Actions, to a Civil Action brought in a District Court, it is necessary for the COURT through a consideration of the nature of the Cause of Action disclosed in the Complaint to determine the Form of Action which would have been brought upon it at common Law. It is evident that the complaint in the ease before us discloses a Cause of Action which, under the Common Law of Delaware, would be enforceable in an action on the Case and not in an Action of Debt on a Specialty. The District Court, therefore, properly held that the action was barred by the Delaware Statute of Limitations?’

And this was the view taken despite the plaintiff’s contention that since the “Civil Action” provided for by the Federal Rules of Civil Procedure, 28 U.S.C.A. following Section 723c, had abolished all distinctions in the Forms of Action, the State Statutes of Limitations based upon differences in Forms of Action no longer apply.

For a similar unavailing contention under the Supreme Court of Judicature Act of 1783, see *Gibbs v. Guild*. [18821 9 O.B.D. 59, 67.

## CHAPTER 14

### THE ACTION OF COVENANT’

Scope of the Action.

Covenant—Distinguished From and Concurrent With  
Form of Declaration in Covenant.

Declaration in Covenant—Essential Allegations:

(1) In General.

148. Declaration in Covenant—Essential Allegations:

(2) The Execution of the Covenant.

149. Declaration in Covenant—Essential Allegations:

(3) The Promise.

150. Declaration in Covenant—Essential Allegations:

(4) The Performance of Conditions Precedent.

151. Declaration in Covenant—Essential Allegations:

(5) The Breach.

152. Declaration in Covenant—Essential Allegations:

(6) The Damages.

153. Status Under Modern Codes, Practice Acts and Rules of Court.

### SCOPE OF THE ACTION

144. 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

1. In general, on the *Origin*, History and Development of the Action of Covenant, see:

Treatises: Holmes, *The Common Law*, Lecture VII, Covenants, 271—273 (Boston, 1881); Stephen, *A Treatise on the Principles of Pleading In Civil Actions*, e. I, Covenant, 46 (3d Am. ed. by Tyler, Washington, D.C. 1893); 2 rollock and Maitland, *History of English Law*, e. V, Covenant, 214—222 (London, 1895); Warren, *Law Studies*, Pleadings in Particular Actions, II, In Covenant and Debt (New York, 1896); Martin, *Civil Procedure at Common Law*, c. II, Art. r, Covenant, 42—50 (St. Paul, 1905); 8 Street, *Foundations of Legal Liability*, c. X, Action of Covenant, 114—126 (Northport, 1906); Ames, *Lectures on Legal History*, Lecture IX, Covenant, 97—102 (Cambridge, 1913); Shipman, *Handbook of Common Law Pleading*, a VII, *Covenant*, 141—143 (3d ed. by Ballantine, St. Paul, 1923); Morgan, *The Study of Law*, c. V, Covenant, 99—100 (2d ed., Chicago, 1948); Plucknett, *A Concise History of the Common Law*, Bk. II, Pt. I, c. I, **The Action of Covenant**, 346 (4th ed. London, 1948); Potter, *Historical Introduction to English Law*, c. V<sub>1</sub> Covenant, 445—447 (3d ed. London, 1948); Foot, *History and Sources of the Common Law*, c. XI, Covenant, 25f.—259 (London, 1949);

the Damages are unliquidated, it is the only proper Form of Action.

THE Action of Covenant—a Writ for the enforcement of an Agreement or Covenant, and a descendant from the ancient *breve*

Walsh, *A History of Anglo-American Law*, c. XIX, § 177 Covenant—Contracts Under Seal, 330 (2d ed., Indianapolis 1932).

**Articles:** Salmond, *The History of Contract*, 3 L.Q.

Rev. 166, 169 (1887); Ames, *Specialty Contracts and Equitable Defenses*, 9 *Harv.L.Rev.* 49 (1895); Crane, *The Magic of the Private Seal*, 15 *COLL.Rev.* 24 (1915); Loyd, *Consideration and the Seal in New York—An Unsatisfactory Legislative Program*, 46 *Col.L.Rev.* 1 (1946).

Comments: Agency—Undisclosed Principal—Right to Enforce a Contract Under Seal, 31 *Yale L.J.* 94 (1921); Principal and Agent—Suit by Undisclosed Principal—Sealed Instrument, 22 *Col.L.Rev.* 82 (1922); Agency—Right of an Undisclosed Principal to Sue on a Sealed Contract, 7 *Corn.L.Q.* 143 (1922); Contracts—Contracts Under Seal—Suit by Orally Disclosed Principal When Agent Signs and Seals as Party, 35 *Harv.L.Rev.* 339 (1922); Agency—Liability of Third Person to Undisclosed Principal on Sealed Contract, 20 *Mich.L.Rev.* 441 (1921); The Significance of the Seal in New York, 23 *Col.L.Rev.* 663 (1923); The Present Status of the Sealed Obligation, 24 *Illi.Rev.* 457 (1939).

Sec.

144.

145.

146.

147.

Other Actions.

### 303

*tie conventionne*—is a remedy for the recovery of Damages for the Breach of a Sealed Contract, According to Street, “This remedy is the exact analogue of (Special) Assumpsit, the only difference between the two actions, being that the latter lies for the Breach of a Simple Promise, while Covenant is maintainable only upon a Specialty.” ~

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.<sup>3</sup> If the Specialty has been materially varied or modified by a subsequent informal agreement, the remedy is in Assumpsit.<sup>4</sup>

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

2-3 Street, *Foundations of Legal Liability*, c. X, The Action of Covenant, 114 (Northport, 1906).

3. Alabama: Jackson -cc Waddill, 1 *Stew. (Ala.)* 570 (1828); Illinois: Roekford, 11. I. & St. I. R. Co. v. Beckemeier, 72 *Ill.* 267 (1874);

Kentucky: *Tribble v. Oldhajn*, 5 J.J.Marsh (Ky.) 137 (1830); New York: *Gale v. Nixon*, 6 Cow. (N.Y.) 445 (1826); Pennsylvania: *Wilson v. Brechemin*, Brightly, N.P. (Pa.) 445 (1828); *Manic v. Weaver*, 7 Pa. 320 (1847); Federal: *United States v. Brown*, 1 Paine 422, Fed. Cas.No.14,670 (1825); *Simonton v. Winter*, 5 Pet. (U.S.) 141, 8 L.Ed. 75 (1831).

For the Form of the Declaration in Covenant, see Section 146, following hereinafter. In some States, even where Common-Law Procedure still prevails, the distinctions as to Forms in Actions on Sealed Instruments and Actions on Unsealed Instruments has been abolished by Statute. *Adam v. Arnold*, 86 Ill. 185 (1877).

But the Statute does not, by allowing Special Assumpsit, prevent the plaintiff from suing in Covenant.

The Action still lies, *Goodrich v. Leland*, 15 Mich. 110 (1869); *Christy v. Farlin*, 49 Mich. 319, 13 N.W.

607 (1882).

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 (1887).

4 Alabama: *MeVoy v. Wheeler*, 6 Port. (Ala.) 201 (1838); Illinois: *Radzlnski v. Ablswede*, 185 Ill. App. 513 (1914); Federal: *Phillips & C. Construction Co. v. Seymour*, 91 U.S. 646, 23 LEd. 341 (1839).

## Ch. 14

the purchase money, but if the Contract is Signed and Sealed by the Vendor only, and merely delivered to and accepted by the Vendee, the Vendor cannot maintain Covenant against the Vendee on what purports in the instrument to be a Covenant by the latter to pay the purchase money. The Action must be Assumpsit, or perhaps Debt.<sup>5</sup>

The Action of Covenant could not be employed for the recovery of a debt, even though the existence of the debt is attested by a Bond or Sealed Instrument. "The Law is economical; the fact that a man has one action is a reason for not giving him another." - Covenant came, however, to be permitted in the case of a Sealed Debt, where there was an Express Covenant to pay the Debt, or where there were words that could be construed as such.<sup>7</sup>

Whenever the defendant has executed and delivered a Contract under Seal, and has broken it, Covenant is the proper remedy.<sup>8</sup>

5. Illinois: *Schmidt v. Glade*, 126 Ill. 485, 18 N.E. 762 (1888), involving a grantee by deed-poll; New York: *Gale v. Nixon*, 6 Cow. (N.Y.) 445 (1826); Vermont:

*First Congregational Meetinghouse Society v. Town of Rochester*, 66 Vt. 501, 29 A. 810 (1894). As to Debt, see, *Contracts—Damages—Specific Performance at Law*, 5 Mian.L.Rev. 225, note (1920).

6. Covenant will not lie where payments are all due and payable. *Merryman v. Wheeler*, 130 Md. 566, 101 A. 551 (1917). See, also, Ames, *The History of Assumpsit*, 2 Harv.L.Ev. 50 (1888); 2 Pollock and Maitland, *History of English Law*, c. V Contract, 217 (Cambridge, 1895); 3 Street, *Foundations of Legal Liability*, e. X, *The Action of Covenant*, 119, 120 (Northport, 1906); 3 Holdsworth, *History of English Law*, c. II, *Crime and Tort*, 324 (London, 1942).

7. Maryland: *Outtoun v. Duhn*, 72 Md. 536, 20 A. 134 (1889); North Carolina: *Taylor v. Wilson*, 27 NC. 234 (1844).

8. Illinois: *Northwestern Ben. & Mut. Aid Ass's of Illinois v. Wanner*, 24 Ill.App. 357 (1887); *Moore v. Vail*, 17 Ill. 185 (1855); Massachusetts: *Hopkins v. Young*, 11 Mass. 302 (1814); *Morse v. Aldrich*, 1 Mete. (Mass.) 544 (1844); Michigan: *Goodrich v. Leland*, 15 Mich. 110 (1869); Pennsylvania: *New Holland Turnpike Co. v. Lancaster*, 71 Pa. 442 (1872); Rhode Island: *Douglass v. Hennessey*, 15 R.L. 272, 3 A. 213 (1886); 7 A. 1 (1886); 10 A. 583

(1887).

304

## OFFENSIVE PLEADINGS Sec. 145 ACTION OF COVENANT

305

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,<sup>o</sup> and whether it be for something that has been done *in the past*, or something in *praesenti*, or for the performance of something in the future.’<sup>o</sup>

The Damages sought to be recovered need not necessarily be unliquidated. If they are

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. Illinois: *Moore v. Vail*, 17 Ill. 185 (1855); *Harding v. Larkin*, 41 Ill. 413 (1866); *Jones v. Warner*, 81 Ill. 343 (1876); Illinois Land & Loan Co. v. *Banner*, 91 Ill. 114 (1878); Massachusetts: *Barlow cc Thomas*, 15 Pick. (Mass.) 66 (1833); *Donahee v. Emery*, 9 Mete. (Mass.) 63 (1845); Michigan: *Hovey v. Smith*, 22 Mich. 170 (1871); *Peek v. Boughtaling*, 35 Mich. 127 (1876).

The Action lies for the wrongful dissolution of a partnership by articles under seal. *Addams v. Tutton*, 39 Pa. 447 (1861).

Or upon a bond with a penalty. Pennsylvania: *New Holland Turnpike Co. v. Lancaster*, 71 Pa. 442 (1872); Federal: *United States v. Brawn*, 1 Paine 422, Fed.Cas.No.14,670 (1876).

8. Alabama: *Roebuck v. Duprey*, 2 Ala. 535 (1841); Massachusetts: *Dexter v. Manley*, 4 Cush. (Mass.) 14 (1840); *Gates v. Caldwell*, 7 Mass. 68 (1810); New Hampshire: *Crouch v. Powlc*, 9 NII, 219, -32 Am.Dec. 350 (1838); New York: *Grannis v. Clark*, 5 Cow. (N.Y.) 36 (1827); *Frost v. Raymond*, 2 Caines (N.Y.) 118, 2 Am.Dec. 228 (1814); *Kent v. Welch*, 7 *Johns*, (N.Y.) 258, 5 Am.Dec. 266 (1810); *Vandei'karr v. Vanderkarr*, 11 *Johns*. (N.Y.) 122 (1814).

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 (1827),

10. 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 (1876); or Covenants of Seisin, *Brady v. Spurck*, 27 Ill. 478 (1861). These are really Contracts of Indemnity against loss by defects of title.

A Covenant of quiet enjoyment is an illustration of a Covenant for something in the future. *Smydy v. Spurek*, 27 Ill. 478 (1861). 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,

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.” Indeed, since Assumpsit will not lie for Breach of a Contract under Seal, it follows that Covenant is the only remedy to recover unliquidated Damages for the Breach of a Contract under Seal.

## COVENANT--DISTINGUISHED FROM AND CONCURRENT WITH OTHER ACTIONS

145. *Covenant may* be distinguished from Debt, as it lies only on an instrument under Seal, whereas Debt lies upon a Statute, a Record, a Simple Contract and on a Specialty. Where the Damages are liquidated upon Breach of a Sealed instrument, Debt and Covenant are concurrent remedies; but where the Damages are unliquidated only Covenant will lie. Special Assumpsit and Covenant are in no instance concurrent, but Covenant and Case are as against a tenant for years who committed Waste.

THE Action of Covenant is distinguishable from Debt in that it lies only on a sealed instrument, whereas Debt lies upon a Statute, **a Record, and a Simple Contract, as well** as a Specialty. Covenant may be brought for the payment of uncertain as well as certain sums of money, and for the non-performance of Covenants to do or not to do any other *lawful* thing. As we have seen, Covenant and Debt became concurrent remedies on all Sealed Instruments upon the Breach of which the Damages were liquidated.

11. Alabama: *Jackson v. Waddill*, 1 Stew. (Ala.) 579 (1828); Illinois: *Johnston v. Salisbury*, 61 Ill. 3113 (1871); Indiana: *Wilson v. Hickson*, 1 Blaekf. (Ind.) 230 (1822); Missouri: *Byrd v. Knighton*, 7 Mo. 443 (1842); New Jersey: *Scott cc Canover*, 6 *N.J.L.* 222 (1822); North Carolina: *Taylor v. Milson*, 27 NC. 214 (1844).



For Breach of a Contract executed under the seals of both parties thereto only an Action of Debt or Covenant will lie. *Van Huron Light & Power Co. v. Inhabitants of Van Buren*, 118 Me. 458, 109 A. S.

(1920),

306

## OFFENSIVE PLEADINGS

### Ch. [4

Special Assumpsit and Covenant were in no instance concurrent, as the former action was the remedy for the Breach of an Unsealed or Simple, Express Promise, whereas the latter action was the remedy for Breach of a Sealed Promise,<sup>12</sup> along with Debt on a Specialty. In this connection, it should be remembered that Covenant, as a remedy on a Sealed Instrument, gave the plaintiff a remedy of a higher nature than Special Assumpsit.<sup>13</sup>

Covenant and Case in the Nature of Waste were concurrent remedies. Thus, in *Kinlyside v. Thornton*,<sup>14</sup> an Action on the Case in the Nature of Waste was permitted even though it was clear there was a Covenant not to commit waste. Chief Justice De Grey declared: "I have no difficulty upon this question. The tenant for years commits waste and delivers up the place wasted to the landlord. Had there been no deed of Covenant, the Action of Waste or Case in the Nature of Waste would have lain. Because the landlord by the Special Covenant acquires a new remedy, does he therefore lose his old?"<sup>15</sup>

As the sole and exclusive remedy on Sealed Instruments for the payment of an uncertain sum of money, or for the performance or non-performance of other things, according to Browne,<sup>16</sup> it was generally required that the defendant have executed the Covenant under Seal; but it was not usually essential that the plaintiff should have executed it, as a Covenantor, having executed the contract, was chargeable on his Covenant, even

12- 1 Chitty, Treatise on Pleading and Parties to Actions, with Precedents and Forms, c. II. Of the Forms of Action, § 1, Assumpsit 117, 118 (16th Am. ed. by Perkins, Springfield, 1876).

13. Buist v. Gilburn, 2 Str. 1027, 93 Eng.Rep.

1011 (1736).

14. 2 Bl.W 1111, 96 Eng.Rep. 657 (1776).

15. Id. at 1113, 96 Eng.Rep. at 657 (1776).

16. Browne, A. Practical Treatise on Actions at Law, e, v., Forms of Actions, 4, Covenant, 352 (Philadelphia, 1844).

though the Covenantee had not executed, as the assent of the latter to the contract may be implied from other circumstances,<sup>17</sup>

## FORM OF DECLARATION IN COVENANT

### 146. A Form of a Declaration in Covenant

is set out below.

#### DECLARATION IN COVENANT

IN THE *XRING'S* BENCH (or Common Pleas)

London, to wit (venue). C.D. was summoned to answer A.B. of a plea, that he keep with him the covenant made by the said C.D. with the said A.B., according to the form and effect of a certain indenture (or "deedpoll," &c., according to fact) made between them (according to fact); and thereupon the said A.B., by his attorney, complains, for that whereas, &c. (state the deed and breaches, &c., and conclude thus): Wherefore the said *A.B.* saith that he is injured, and hath sustained damage to the amount of £ - and therefore he brings his suit, &c. (no pledges).

1 Saunders, Pleading and Evidence, p. 458 (Philadelphia, 1831).

#### DECLARATION IN COVENANT—ESSENTIAL ALLEGATIONS: (1) IN GENERAL

147. The essential Allegations in the Declaration in the Action of Covenant are:

- (I) The Execution of the Covenant
- (II) The Promise**

**(III)**  
The Performance  
**Precedent**  
**(IV) The Breach**

(IT) The Damages

DECLARATION IN COVENANT—ESSEN  
TIAL ALLEGATIONS: (2) THE EXECU  
TION OF THE COVENANT

148. **The Declaration in Covenant 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. of Conditions**

17. Id. at 353.

**Sec. 151**

ACTION OF COVENANT

307

**DECLARATION IN COVENANT—ESSEN  
TIAL ALLEGATIONS: (3) THE  
PROMISE**

149. The Promise may be Alleged according **to the Express** Words or **according** to their **Legal Operation and Effect.**

DECLARATION IN COVENANT—ESSENTIAL ALLEGATIONS: (4) **THE PERFORMANCE OF  
CONDITIONS PRECEDENT**

**150. 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 Non-performance Excused.**

MOST of the rules to be observed in framing a Declaration in Asswnpsit and Debt equally apply in framing the Declaration in Covenant. As in all cases of written instruments, the deed or contract may be set out in its Express Words, or stated according to its Legal Operation and Effect.<sup>18</sup> Only such portions need be mentioned as are essential to the cause of action <sup>19</sup> 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.<sup>20</sup> The deed or contract should also be stated as being under Seal,<sup>21</sup> and its delivery should be alleged,<sup>22</sup>

18. Delaware: Higgins v. Bogan, 4 liar. (Del.) 330 (1843); Massachusetts: Gates v. Caldwell, 7 Mass. 68 (1810); Lent v. Padletord, 10 Mass. 230, 6 Am. Dec. 119 (1813); New York: Scott v. Leiber, 2 wend. (N.Y.) 479 (1829); Texas: Sslinas v. Wright, 11 Tex. 572 (1854).

19. Sandforrl v. Halsey, 2 Denlo (N.Y.) 235 (1845).

See, also, Eddy v. Chace, 140 Mass. 471, 5 N.E. 306 (1886).

20. Grannis v. Clark, 5 Cow. (N.Y.) 36 (1827).

21. English: Moore v. Jones, 2 Lctflaym. 1536, 92

Eng.Rep. 496 (1728); Maryland: John W. Waldeek

Co. v. Emmart, 127 Md. 470, 96 A. 654 (1916); New

Jersey: Bilderback v. Pouner, 7 N.J.L. 64 (1823). \\There the Declaration did not allege that the Contract stied on was under Seal, the action was one of Special Assumpsit and not Covenant. Kerr, Evans

and profert made, or an excuse shown for the omission.<sup>23</sup> As the seal dispenses with the necessity for a consideration, a statement of the consideration is generally unnecessary; but, when the Performance of the Consideration constitutes a Condition Precedent to the right of the plaintiff to bring the action it should be stated as

in Special Assumpsit, and performance alleged or excused as in that action,<sup>24</sup>

#### DECLARATION IN COVENANT—ESSENTIAL ALLEGATIONS: (5) THE BREACH

151. The Breach of a Covenant may be stated According to its Substance, or in the Express Words of the Covenant. The Declaration must show the **Covenant broken and a right of action in the plaintiff.**

THE Breach in this action is the violation by the defendant of the terms of his Covenant; and the form in which it is to be assigned may be by a general assignment, if enough will thereby appear on the face of the statement to show a violation and a

& Co. v. Cooperative Improvement Co., 120 Md. 469, 90 A. 708 (1916).

22. Perkins v. Reeds, S Mo. 33 (1843)~

23. English: Read v. Erookajan, 3 P.R. 251, 100 Eng. Rep. 564 (1789); Illinois: Dugger v. Oglesby, 99 Ill. 405 (1831).

24. English: Homer v. Ashford 3 Bing. 322, 130 Eng. Rep. 537 (1825); Kentucky: Harrison v. Taybr, S A.K.Marsh. (Ky.) 168 (1820); Massachusetts: Gardiner v. Corson, 15 Mass. 503 (1819); Pennsylvania: Knox v. Rinehart, 9 Serg. & it. (Pa.) 45 (1822); Federal: Goodwin v. Lynn, 4 Wmsb.C.C. 714, Fed.Cas.No.5,553 (1827).

In the case of Dependent Covenants, performance or a readiness to perform must always be averred. Livingston v. Anderson, 30 Ma. 117, 11 So. 270 (1892).

Where the covenant is definite in its terms and the act to be done by the plaintiff is purely a Matter of Fact, it is sufficient to aver performance in general terms, as in the case of payment of money. But where the Covenant is indefinite, or in the alternative, or Involves a Question of Law, the General Averment is Not sufficient. Byrne v. McNulty, 2 Gil. (Ill.) 424 (1822).

308

#### OFFENSIVE PLEADINGS

#### Ch. 14

resulting cause of action in the plaintiff.<sup>25</sup> It may also be assigned According to the Substance,<sup>26</sup> instead of the Letter, of the Covenant; 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.

#### DECLARATION IN COVENANT—ESSENTIAL ALLEGATIONS: (6) THE DAMAGES

152. The Damages, which must be the Legal and Natural Consequences of the Breach, are **the Principal Object of the Action, and must** be laid high enough to cover the actual demand.

THE amount recoverable in this action is the Damage Caused by the Breach, and the Damages may either depend upon the

25. Delaware: Handel v. President, etc. of Chesapeake & D. Canal, 1 Har. (Del.) 151 (1832); Iowa: Camp v. Douglas, 10 Iowa 580 (1850).

Notice must be alleged if the Breach is mainly in the knowledge of the plaintiff. Alabama: Huff v. Campbell, 1 Stew. (Ala.) 543 (1828); Massachusetts: Foster v. Woodward, 141 Mass. 160, 0 N.E. 853

(1886).

If the Action is for a Breach of Covenants of Seisin or Warranty, an eviction must be alleged, though no particular formality is required. Nebraska: Cheney v. Straube. 35 Neb. 521, 53 NW. 470 (1802); Georgia: Hamilton v. Lush, 88 Ga. 520, 15 SE. 10 (1892); New York: Bledsoe's Ex'r v. Wadsworth, 21 Wend. (N.Y.) 120 (1839); Pennsylvania: Knepper v. Kurts, 58 Pa. 480 (1868); Federal: Day v. Chisin, 10 Wheat. (U.S.) 449, 1 L.Ed. 303 (1825).

26. Alabama: Griffin v Reynolds, 17 Ala. 198 (1850)

New York: *Potter v. Bacon*, 2 Wend. (N.Y.) 583 (1829); *Huyek v. Andrews*, 113 N.Y. 51, 20 NE. 581, 3 *L.P.I.A.* 789, 10 Am.St.Rep. 432 (1889).

While, in an Action for Breach of a Covenant, the covenant may be set out in its own words, the Preamble must be assigned in accordance with its meaning. Illinois: *Chicago, Isi. & St. P. Il. Co. v. Hoyt*, 37 Ill.App. 64 (1890); Federal: *Jobbins v. Kendall Mfg. Co.*, 196 Fed. 210 (U.S.D.C.R.I.).

27. Comyn, Digest, "Pleader" 2 V., 2, 3 (*Dublin*, 1793);

Alabama: *Taylor v. Pope*, 4 Ala. 190 (1840); Kentucky: *McCooy v. Hill*, 2 Litt. (Ky.) 374 (1822); *Thome v. flaky*, 1 Dana (Ky.) 268 (1833). 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.<sup>8</sup> 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.

## STATUS UNDER MODERN CODES, PRACTICE ACTS, AND RULES OF COURT

153. In a majority of the states the effectiveness of the seal has been abolished or substantially modified by Statute.

in a jurisdiction where the seal has retained its effectiveness, and the Code has been adopted, there is some authority to the effect that where the action of Covenant was the proper action at Common Law, the allegations in an action under the Code must be such as would have supported the Common Law action of Covenant.

IN a majority of the states, the effectiveness of the private seal has been abolished or substantially modified by Statute.<sup>29</sup> The change in effectiveness of the seal raises questions in pleading which, although not related to the Codes, are nevertheless of considerable importance in Modern Practice, For example, in *Rondot v. Rogers*<sup>50</sup> the Michigan Court held that the purpose of a Michigan Statute which provided that no deed was to be deemed invalid for want of a seal, "was to permit parties intending to make a deed or specialty to have the writing signed by them, though without a seal, treated in law as a deed or specialty; and therefore that covenant might be maintained thereon."

22. Alabama: *Clark v. Zeigler*, 79 Ala. 346 (1885);  
Georgia: *Amos v. Cosby*, 74 Ga. 793 (1885); Pennsylvania: *Provident Life & Trust Co. v. Fiss*, 147 Pa. 232, 23 A. 560 (1892); Texas: *Brown v. Hearon*, 66 Tex. 63, 17 S.W. 395 (1856); *White v. Street*, 67 Tex. 177, 2 SW. 529 (1886).

29. See *Patterson, Goble and Jones*, cases on Contracts, C 3, Formalities in Contracting, 44-I--447 (Brooklyn 1957), for discussion of the Seal and Statutes abolishing or modifying its effectiveness.

30. 39 Mich.CC.A. 462, 99 F. 202 (1900).  
Sec. 153

## ACTION OF COVENANT

On the other hand, in *Allied Amusement*

*v. Glover*,<sup>3</sup> the Hawaii Court) after pointing out that seals had lost their significance in Hawaii, concluded as follows: "In this jurisdiction, therefore, assumpsit rather than covenant lies for recovery of damages in breach of a contract whether it be under or not under seal."

In a jurisdiction where the seal has retained its effectiveness, and the Code has been adopted, there is some authority to the effect that where the action of Covenant was the proper action at Common Law, the allegations in an action under the Code must be such as would have supported the Common Law Action of Covenant. The New Jersey Court addressed itself to this point in *Katin v. Crispe*<sup>7,~2</sup> as follows: "At common law, a defendant having entered into an agreement in writing under seal, a breach thereof and resulting damages gave rise to an action styled 'covenant'. It was the pe

3. 40 Hawaii 92, 95 (1958).

22 N.J.Misc. 394, 39 A.2d 15~, 184 (1944).

cular remedy for the non-performance of a contract under seal, where the damages were unliquidated and depended in amount upon the opinion of the jury. Chitty on Pleading, page 118.

“The plaintiffs contend that the format of their action is proper. Under the formulating system of pleading at common law, their action would be styled ‘covenant’. Prior to the Practice Act of 1912, two principal categories of actions were provided in personal actions, 1, actions upon contract, and 2, actions ex delicto. The act of the Legislature in 1912, Chapter 231, paragraph 3, N.J.S.A. 2:27—7, re-styled the names of actions at law by providing that there should be one form of civil actions in the courts of law, denominated ‘action at law’. The change abrogated the names of the former classifications, but it did not destroy the value of classification nor eliminate the averments requisite to a good count or the facts to be proved in support of them. Ward v. Huff, SupCt.1919, 94 N.J.L. 81, 109 A. 287.”

Sec.

## CHAPTER 15

### THE ACTION OF ACCOUNT<sup>1</sup>

154. Scope of the Action.

155. Account—Distinguished From and Concurrent with Other Actions.

156. Form of Declaration in Account.

157. Declaration in Account or Account Render—Essential Allegations:

(1) In General.

158. Declaration in Account or Account Render—Essential Allegations:

(2) A Statement of the Facts Showing a Legal Relation Between Plaintiff and Defendant Which Gives Rise to the Right to an Accounting.

159. Declaration in Account or Account Render—Essential Allegations:

(3) The Refusal to Account or the Breach.

160. Declaration in Account or Account Render—Essential Allegations:

(4) The Damages.

161. Status Under Modern Codes, Practice Acts and Rules of Court.

#### SCOPE OF THE ACTION

154. The **action** of account lies where one **has received goods or money for another in a fiduciary capacity**, to ascertain and recover the **balance due. It can only be maintained where there is such a relationship between the parties, as to raise an obligation to account, and where the amount due is uncertain and Un-liquidated.**

WHERE one has received property belonging to another, to invest or use on his behalf,

1. In general, on the origin, history and present significance of the Action of Account, see:

*Treatises:* 2 Polk'ck and Maitland, History of English Law, c. V, Action of Account, 219, 345 (Cambridge, 1895); Martin, Civil Procedure at Common Law, e. II, Art. IV, Account, §~ 61—67, 62—65 (St. Paul, 1905); 3 Street, Foundations of Legal Liability, c. IX, Action of Account, 99 (Northport, 1900); Langdell, A Brief Survey of Equity Jurisdiction, e. IV, 75, 83—85 (Cambridge, 1908); Ames, Lectures on Legal History, Lecture XI, 116 (Cambridge, 1913); Bar-hour, History of Contract in Early English Equity, c. II, Account, 16 (4 Oxford Studies in Social and Legal history, Oxford, 1914); Plucknett, Statutes and Their Interpretation In the First Half of the Fourteenth Century, c. II, Peculiarity of Account, 134 (Cambridge, 1932); Shlpman, Handbook of Common-Law Pleading, e. VII, The Action of Account, 134 (Cambridge, 1932); the obligation arises by operation of law to account for what becomes of it to the Owner.<sup>2</sup> It is an obligation like debt arising

count, 14-4 (3rd ed. by Ballantine, St. Paul, 1923); Jackson, The History of Quasi-Contract Law in English Law, Pt. I, § 15, The Nature of the Action of Account, 32 (Cambridge, 1936); Fifoot, History and Sources of the Common Law, c. 12, Account 268 (Lonaon, 1949).

*Articles:* Ames, The History of Parol Contracts Prior to Assumpsit, 5 Harv.L.Bov. 257 (18D5), reprinted in 3 Select Essays in Anglo-American Legal history, Eli. II, Pt. V, No. 60, 320 (Boston 1909); Stein, Liability for Loss of Public Funds, 1 Mich.L.Rev. 557 (1903); Henning, History of the Beneficiary's Action in Assumpsit, 3 Select Essays in Anglo-American Legal History, c. VI, Contracts, 338, 344—360 (Boston, 1909); Belsheim, The Old Action of Account, 45 Harv.L.Bev. 406 (1932).

*Comment:* Hinton, Pleading—An Action of Account In a Code State, 22 Ill.L.Itcv. 660 (1928).

2. *Thouren v. Paul*, 6 Whart. (*Pa.*) 615 (1841).

See, also, Langdell, A Brief Survey of Equity Jurisdiction, 2 Harv.L.Rev. 241, 242—253 (1889); Honing, History of the Beneficiary's Action in Assumpsit, 43 Am.L.Eg. (Ic.S.) 764—779 (1904), reprinted in 3 Select Essays In Anglo-American Legal History 339 (Boston 1909); Id., 56 Am.L.Reg. (ItS-) 73—87 (1908):

1 Am. & Eng.Encyc.Law, title, Account Romlei', 128 (1st Cd. Philadelphia, 1887).

**310**

**Sec. 154**

### ACTION OF ACCOUNT

**311**

from the receipt of something. Agents charged with handling for profit money or goods, or collecting rents and profits from another's land, such as Bailiffs, Partners, Factors, Commission Merchants, Executors, Trustees, and Guardians, come under a legal obligation to render an account of the capital (corpus) and proceeds which they receive on behalf of their principal. The Obligation to Account is thus one which the law imposes independently of contract. It is NOT founded on promise, but on the existence of a relationship of fact, namely, the being intrusted with the handling of property belonging to another.

This obligation was recognized by the Ancient Common Law and was enforced by the Action of Account. Owing to defects of legal procedure, this action was later superseded by the Action for Money Had and Received and by Bill in Equity. In the Action of Account the amount of money claimed is uncertain and unliquidated, but by an accounting before Auditors the balance due is ascertained and declared by the Judgment of the Court as a Debt.

Account is the proper form of action when one has received money or property for the use of another for which he should account to the latter,<sup>3</sup> or where two persons are partners in a mercantile adventure.~ "It is said of this action that it is one of antiquity, and lies at Common Law against Guardians, Bailiffs, Receivers, and Mercantile Copart

3- English: *Harrington v. Deane*, fob. 36, 80 Eng. Rep. 186 (1603—1625); Illinois: *Lee v. Abrams*, 12 Ill. 111 (1850); Pennsylvania: *Bredin v. Dwen*, 2 Watts. (Pa.) 95 (1833); *Bredin v. Kingland*, 4 Watts. (Pa.) 420 (1835); *Shriver V. Nimick*, 41 Pa.

91 (1~61).

4. Connecticut: *Beach v. flotchkiss*, 2 Conn. 425 (1818); Massachusetts: *Fowle v. Kirkland*, 18 Pick. (Mass.) 299 (1836); New York: *Kelly v. Kelly*, 3 Barb. (N.Y.) 419 (1848); *Appleby v. Brown*, 24 N.Y. 143 (1861)~ Pennsylvania: *Griffith v. Willing*, 3 Bin. (Pa.) 317 (1811); *Irvine v. Hanlin*, 10 Serg. & B. (Pa.) 220 (1823); *Leonard v. Leonard*, 1 Watts & S. (Pa.) 342 (1841).

ners, 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*." ~ Clfly the Common Law, the action lay only against a Guardian in Socage, Bailiff, or Receiver, or by one in favor of trade and commerce against another wherein both were named merchants; that is to say, against all who had charge or possession of the lands, goods, chattels, or moneys of another with a liability to render an account thereof, such as Partners, Trustees, Guardians, and all who could be specially described as above." \*At

5. *Appleby v. Brown*, 24 N.Y. 143 (1861); *Coke, Littleton*, 172a (1st Am. from 10th Eng. ed., Philadelphia 1853).

A receiver is a collector, who has received money; a bailiff is a manager of an estate, who has hail charge of property under a duty to account for its proceeds or profits. 3 Street, Foundations of Legal Liability, e. IX, 109—111 (Northport 1906). A factor or commission merchant is one employed to buy or sell goods. Ames, Lectures on Legal History, Lecture XI, Account, 116 (Cambridge 1913).

6. 1 Am. & Eng.Encyc.Law 129 (1st ed. Philadelphia,

1887).

Account lies against an attorney for money received from his client, *Brcdin v. Khighlnnd*, 4 Watts (Pa.) 420 (1835); 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 (1841); *Shriver v. Nimlck*, 41 Pa. 91 (1861).

If a father takes possession of and manages the estate of his deceased son, without administering, he may be held liable to the child of such decedent in account render, as agent or bailiff. *McLean's Ex'rs 'cc Wade*, 53 Pa. 146 (1866).

And the action lies by a landlord against his tenant, who is bound to render a portion of the profits as rent. *Long v. Fitzimmons*, 1 Watts & S. (Pa.) 530 (1841).

It lies by one tenant in common against the other for his share of the rents and profits. Connecticut:  
*Barnum v. Landon*, 25 Conn. 137 (1856); Illinois;  
*Cheney v. Ricks*, 187 Ill. 171, 58 ?S.E. 234 (1900);

312

## OFFENSIVE PLEADINGS

Cli. 15

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.<sup>3</sup> But in most states where the action is in use this has been changed by statutes.<sup>6</sup> Indeed, in many respects the scope of this action has been very much extended by statute, both in England and in this country.<sup>o</sup>

The Action is in Form an Action arising Ex Contractu, and will only lie where there is a relation giving rise to an Obligation to Account between the parties upon which it can be founded. This Obligation, like that of Debt, is specifically enforced. There is an analogy between the Obligation to Account and a Trust, and it has been called a Common-Law Tz-ust.<sup>1o</sup>

*Wolkan v. Wolkau*, 202 Ill.App. 306 (1017); Pennsylvania: *Enterprise Oil & Gas Co. v. National Transit Co.*, 172 Pa. 421, 33 A. 687, 51 A:n.St,Rep.

746 (1806).

And it lies by a cestui que trust (beneficiary) ngaiust a trustee who has received the profits of lands, *Dennison v. Goehring*, 7 Pa. 175, 47 Am.Dec. 505 (1847); or against a testamentary trustee for an account of his receipts and expenditures. *Bretlin v. Dwen*, 2 Watts (Pa.) 95 (1833).

7. Connecticut: *Beach v. Hotchkiss*, 2 Conn. 425 (1818); New York: *Apple'y v. Brown*, 2-1 N.Y. 143 (1861).

-. *Sec Park v. McGowon*, 04 Vt. 173, 23 A. 855 (1802).

9. 1 An. & Eag. Encyc. La~v 130 (1st ed. Philadelphia, 1887). See, also, the following cases: Connecticut:  
*Barnum v. Landon*, 25 Conn. 137 (1856), involving tenants in common; Illinois: *Crow v. Mark*, 52 Ill. 332 (1860), also involving tenants in common; *Lee v. Abrams*, 12 Ill. 111 (1850); North Carolina: *Mcpherson ic McPherson*, 33 NC. 391, 53 Am.Doc. 416 (1850); Rhode Island: *Knowles v. Harris*, 5 11.1. 402, 73 Am.Dec. 77 (1858),

10. *Conklin v. Bush*, S Pa. 514 (1848). See, also, *Scott, Cases on Trusts*, 568, 571 (Cambridge, 1013); *Ames, Lectures on Legal History*, Lecture Xi, Account, 116—121 (Cambridge 1913) *Langdell, A Brief Survey of Equitable Jurisdiction*, 85—89 (Cambridge. 1908); *Id.*, 2 *Harv.L.Rev.* 242, 267 (1889); 3 *Street, Foundations of Legal Liability*, c. IX, *The Action of Account*, 99 (Northeort 1900).

The action will only lie where the amount

**sought to be recovered is uncertain and unliquidated.**<sup>11</sup> If the mutual debits and credits of the parties have been ascertained, or an account has been stated between them, Assumpsit or Debt, and not Account, is the proper remedy to recover the definite balance due.<sup>12</sup> 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.

**The Action** of Account-Render differs from the other Common-Law Actions in the Mode of Procedure. Though it is Commenced like them, the Judgment is first rendered upon the liability to account, *quod computet*, which is an Interlocutory Judgment **only**.<sup>13</sup> The Court thereupon appoints Auditors or Arbitrators, whose business it is to take and report the account between the parties, with the balance due, and upon their report the

Final Judgment is rendered. If the balance was found in favor of the defendant, no Judgment for it could be given him at Common Law. In Pennsylvania the jury might

settle the accounts in the first instance, and **then Final Judgment only was rendered; but**, where this could not be done, the practice was as above indicated. In Illinois and some other states the Jury merely determined the liability to account, and heard no evidence as to the state of the accounts; that being

11. English: *Foster v. Alinsson*, 2 TB, 479, 100 Eng. flop. 258 (1788); Pennsylvania: *Andrew v. Allen*, 9 Serg. & It. (Pa.) 241 (1823); *Crousillat v. McCall*, 5 Bin. (Pa.) 433 (1813); *Grata v. Phillips*, 5 Bin. (Pa.) 568 (1813); Vermont: *Morgan v. Adams*, 37 Vt. 233

(1864).

12. Langillell, *Equitable Jurisdiction*, c. IV, 75—SC (Cambridge, 1008).

13. Illinois: *Leinhart v. Kirkwood*, 130 Ill.App. 308-(1906); North Carolina: *McPherson v. Mcpherson*, 33 N.C. 391, 53 Am.Dcc. 416 (1850), which involved two Judgments—lost, that plaintiff and defendá mit account together; and, *second.*, that plaintiff or deSfeudant recover the balance found to be tine.

313

left to the Auditors appointed to take the account and ascertain the balance due.’<sup>4</sup>

#### ACCOUNT—DISTINGUISHED FROM AND CONCURRENT WITH OTHER ACTIONS

155. The Action of Account should be distinguished from an Action for an Accounting, which was Equitable in character, and from the Action on an Account, which might be in Debt or Indebitatus Assurnpsit. It is concurrent in certain situations with Debt, Detinue, Indebitatus Assumpsit, and a Bill for an Equitable Accounting.

THE Action of Account, at Common Law, was available against a Bailiff, Guardian or Receiver, or any person who received money or other goods to be used for another’s benefit and in due time accounted for.<sup>15</sup> As the Action of Debt finally developed, it became a Concurrent Remedy with Account, and as Indebitatus Assumpsit was a Substitute for Debt in the Field of Debt on Simple Contract, it also became a Con-

- 14- Per a ease in which the procedure in an Action of Account is shown in all its technicality, see *Willson v. Willson*, 5 NIL. 791 (1820), in which Kilpatrick, C. J., observes: “This is a Writ of Error to Gloucester Pleas, In an Action of Account. This Form of Action, is, in itself, very difficult, dilatory, and expensive; it has long since fallen into disuse, in a great measure, in England; amid in New Jersey, I have never known, or heard of, more than two or three eases, either in my own time, or before; and I doubt whether even they were carried through to Finni Judgment. Hence, we have but few precedents to guide us in a suit of this kind, and these few, of pretty ancient date; not very intelligible, and still less applicable, at this day. In most in-stances, therefore, the Action on the Case, which is simple, easy and well understood, has taken the place of this, in the Common Law Courts, and when that did not afford a complete remedy, resort has been had to Equity, where confidential concerns and trusts of this kind, are more properly cognEzable. Still, however, like all other actions, It is open to all; and In some cases, where the expense of a Court of Chancery would be too heavy for the subject-matter, as It must be confessed, under Its present establishment, it frequently wou4 be, It may, also be necessary.”

current Remedy with Account.<sup>16</sup> And in the field of Bailments Detinue and Account became Concurrent Remedies for the Bailor.

To avoid the delay incident to the Action of Account and to keep the business of accounting in mercantile matters within the jurisdiction of the Common Law Courts, where there was an express promise to account, an Action of Trespass on the Case on promises, for the refusal to account, was sanctioned.<sup>17</sup> And, as a matter of principle it was urged that Case would also lie where the obligation to account was raised by operation of law.<sup>18</sup> Martin states that it has been doubted whether the law raises an implied promise on the part of an agent or factor to account,<sup>19</sup> but feels there is no sufficient reason against it.<sup>20</sup>

When the action fell into disuse, its function was largely taken over by the Equitable Bill for an Accounting, the Court of Equity affording a more flexible machinery for the handling of Complicated accounts, in the Form of Discovery before a Master, who possessed power to examine the Witnesses under Oath, to compel the production of books and documents, to pass upon disputed

1-- See article by Langdell, *A Brief Survey of Equity Jurisdiction*, 2 Harv.L.Eev. 75, 57 (18%).

It was not until the Seventeenth Century, that Debt was allowed as an alternative to Account. *Harris v. de Borvoir*, Cro.Jae. 687, 79 Eng.Bep. 596



(1623).

And on the distinction between Account and Indebitatus Assumpsit, see, 3 Street, Foundations of Legal Liability, c. IX, The Action of Account, 105 (North-port 1006).

17. English: Wilkin v. Wilkin, 1 Salk. 9, 91 Eng.Rep. 8 (1689); Spurraway v. Rogers, 12 Mod. 518, 88 Eng.Rep. 1489 (1700), with which compare Owston v. Ogle, IS East. 538, 104 Eng.Itep. 656 (1811); Pennsylvania: Schee v. Hassinger, 2 Bin. (Pa.) 330 (1810),

18. See, Cliitty, Treatise on Plending and Parties to Actions, with Precedents and Forms, c. I, 135 (16th Am. ed. by Perkins, Springfield 1876).

19. Sebec v. Hassinger, 2 Bin. (Pa.) 325 (1810).

20. Martin, Civil Procednre at Common Law, c. II, Art. IV, Account 64 (St Paul, 1905).

**Sec. 155 . ACTION OF ACCOUNT**

3 Street, Foundations of Legal Liability, c. IX, The Action of Account, 100 (Northport, 1906).

**OFFENSIVE PLEADINGS**

**Ch. 15**

items, and to state the account.<sup>21</sup> Such findings were however, subject to revision by the Chancellor. The Equitable Bill for an Accounting, of course, is not to be confused with the Action of Account, which was Legal and not Equitable, and which was the Father of the Common Court in Indebitatus Assuinpsit Known as the Account Stated<sup>22</sup>

21. See Seeley v. Dunlop, 157 Md. 378, 140 A. 271 (1929), which involved a partnership account, and in which Parke, S. said: "In an Action of Account, there was first the preliminary Judgment of *QUo& computet*, a commission of *audita* was issued referring the account to auditors, who would go over the account item by item, and examine the parties, but had no authority to pass upon controverted Items so as to carry on a continuous investigation, but were obliged to refer each disputed item to the Court or a Juvy as a distinct Issue of Law or Fact; and If, after the investigation had been made and the *account taken*, it was found that the balance was against the plaintiff, no Judgment therefor could be entered and no payment could be enforced. 1315-pham's Principles of Equity (8th ed.) § 481; 1 Harris' Entries (1801) pp. 108—111; lb., vol. II, pp. 73— 74, 181—182; 661—062; 301—304; Wisner v. Wilhelm, 48 Md. i. This incomplete and unsatisfactory Common-law Remedy has fallen Into almost complete disuse because of the superiority of the relief afforded in Equity, where discovery may be had and the cause referred to a master, who has power to examine the parties and their witnesses under Oath; to compel the production of books and documents; to pass upon the disputed items, and to state the account, subject, however, in *all* particulars to the revision or other action of the chancellor upon the coming of the report. Bispham's Principles of Equity (8th Ed.) if 482, 484; Adams' Equity, 225; Miller's Equity, § 225 and notes; §~ 228, 311, 535, 555, 550!"

22. "There are three Rinds of actions which are recognized under proper circumstances as remedies for determination of accounts between parties: 'First: Action of Account. This Is a Common-Law Action by means of which persons who are under a legal duty to account for property or money of another were compelled to render such account. 1 C. J. 602, ~ 11. The petition in an Action of Account is required to set out a relationship of the parties and a state of facts that would entitle the claimant to an accounting; allege that no accounting had been made; and pray for a money judgment but need not ask that an account be taken. The Judgments which are Incident to such an action are two Judgment that defendant do account and Judgment after the account for the balance found clue, Hughes

**FORM OF DECLARATION IN ACCOUNT**

156. The Declaration in Account was highly technical and cumbersome in character, as will **appear from the Form of the Declaration as set**

**out below.**

**DECLARATION ON ACCOUNT  
rN THE COMMON PLEAS.**

Term, Will, IV.

London, (to wit). AS. was summoned to

answer W~S. in a plea that she render to the said W.S. a reasonable account for the time during which she was bailiff to the said **WS. in the** parish of [St. Botoiph, Bishopsgate Street,] in the [city of London]. And thereupon the said W,S. by his attorney saith, that whereas, heretofore, to wit, on the day of , in the year of our Lord , and from thence for a long space of time, to wit, hitherto the said plaintiff was lawfully possessed of one undivided moiety or half part, the whole in moieties to be divided [or if the plaintiff

v. Woosley, 15 Mo. 492; Sandwich Mtg. Co. v. Bogie, 317 Mo. 972, 298 S.W. 50.  
 “Second: Action for an Accounting. This is an Action in Equity. The best considered authorities put Equitable Jurisdiction for an Accounting upon three grounds, to wit: The need of a discovery, the complicated character of the accounts, and the existence of a fiduciary or trust relation. The relief which is given in this action is an Accounting and a Judgment for the balance *found due* o,a the account. 1 C.J. 613, § 56. The basis of Equity Jurisdiction in Accounting is the inadequacy of a Legal Remedy. 1 C.J. 615, § 58; Johnston v- Starr Bucket Pump Co., 274 Mo. 414, 202 SW. 1143 (1918); Ray v. Bayer Steam Soot Blower Co. (MoApp.) 282 SW. 176; Palmer v. Marshall (Mo.App.) 24 SW. (2d) 229. It is a remedy particularly applicable to mutual and complicated accounts. 1 CS, 618, § 63. And cases where a confidential or fiduciary relationship exists. 1 C.J. 621, § 68.  
 “Third: Action on Account. This is an Action of Assumpsit or Debt which is for recovery of money only for services performed, property sold and delivered, money loaned, or damages for the nonperformance of Simple Contracts, Express or Implied, when the rights of the parties will be adequately conserved by the payment and receipt of *money*. 1 CL 648, §~ 142 to 146; 5 C.J. 1381, § 6.” Hyde, C. in Dahlberg v. Fisse, 328 Mo. 213, 220, 40 S.W.2d 606, 000 (1931),

Sec. 158

ACTION OF ACCOUNT

was seized in fee, say, “the said plaintiff was seized in his demesne as of fee, of and in one undivided, &c.”) of and in a certain messuage, with the appurtenances, situate, &c., for the rest and residue of a certain term, to wit, the term of six years, commencing, &c. with the said defendant, during all that time held the said tenement, with the appurtenances, together with the said plaintiff, as tenants in common; [or if the seisin was in fee, say, “and the said defendant and divers other persons whose names are to the said plaintiff unknown, during all that time held the said tenements with the appurtenances, together with the said plaintiff, as tenants in common; “1 and the said defendant had also, during all that time, the care and management of the whole of the said premises with the appurtenances, to receive and take the rents, issues, and profits thereof, as bailiff of the said plaintiff, of what she received more than her just share and proportion thereof to render a reasonable account thereof to the said plaintiff and his said share *thereof*, when the said defendant should be thereunto afterwards requested, according to the form of the statute, &c., and although the said defendant during the time aforesaid, at &c., (venue) aforesaid, received more than her just share and proportion of the rents, issues, and profits of the said tenements with the appurtenances, and the said plaintiff’s share thereof, that is to say the whole of the rents, issues and profits of the said tenements with the appurtenances; yet the said defendant, although she was afterwards, to wit, on, &c., at, &c. (venue) aforesaid, requested by the said plaintiff so to do, hath not yet rendered a reasonable account to the said plaintiff of the said rents, issues, and profits so received as aforesaid *or* either of them, or *any* part thereof, or of the said share of the said plaintiff, or any part thereof, but hath hitherto wholly neglected and refused so to do contrary to the form of the statute **In that** case made and provided, to wit, at, &c. (venue), aforesaid; wherefore the said plaintiff says he is injured, and hath sustained damage to the amount of £\_\_\_ and therefore he brings his suit, &c.

MARTIN, Civil Procedure at Common Law, 368 (St. Paul, 1905),

**DECLARATION IN ACCOUNT OR ACCOUNT RENDER—ESSENTIAL ALLEGATIONS:**

**(1) IN GENERAL**

**157. The Essential Allegations of the Declaration in Account or Account Render are:**

- (I) A statement of the facts showing a legal relation between plaintiff and defendant which gives rise to the right to an accounting.**
- (II) The refusal of defendant to account. (III) The Damages.**

**DECLARATION IN ACCOUNT OR ACCOUNT**

**RENDER—ESSENTIAL ALLEGATIONS:**

**(2) A STATEMENT OF THE FACTS**

**SHOWING A LEGAL RELATION BETWEEN PLAINTIFF AND DEFENDANT WHICH GIVES RISE TO THE RIGHT TO AN ACCOUNTING**

**158. The Declaration must allege privity between the plaintiff and defendant, the plaintiff’s property, the manner in which the defendant received it, and the special character in which the defendant is charged. If**

several are made **defendants, the averment** *must* be of a **joint liability only. In some cases it must** be shown from whose hands the defendant **received the money.**

AS the object of the Action of Account or Account-Render is to ascertain the amount of the plaintiff's claim, it is unnecessary that the sum should be accurately stated; and it is sufficient, as to time, that the defendant be charged as receiving the money or property between certain dates. To sustain the action privity or relationship between the parties is essential, and such privity must therefore be alleged.<sup>23</sup> And the particular

23. The meaning of the term "privity" as given in tin, authorities is somewhat confusing, and the division of it into several classes is not much better. Probably the best definition is that it is a fiduciary ac-

316

## OFFENSIVE PLEADINGS

### Cl. 15

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.<sup>24</sup> 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; **and in** Actions Between Tenants in Common, under the Statute of Anne,<sup>25</sup> 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?<sup>7</sup>

DECLARATION IN ACCOUNT OR ACCOUNT  
RENDER—ESSENTIAL ALLEGATIONS:  
(3) THE REFUSAL TO ACCOUNT OR  
THE BREACH

**159. The Declaration must also allege a neglect or refusal of the defendant to account. A demand is unnecessary.**

FROM what has been stated, it is obvious that the breach or infraction of the plaintiff's right here is the neglect or refusal of the defendant to account as to the matters in question, and the Allegation need be only a formal one to that effect. A special demand

relationship or connection growing out of the charge of another's property, as, where A delivers B money to pay C, and C has an Action of Account against B. So, if B collects money as agent of C, he is accountable to him.

The relationship subsisting between the immediate parties to a contract is called "privity of contract."

24. Connecticut: *Barnum v. Landon*, 25 Conn. 187 (1850); Missouri: *Hughes v. Woosley*, 15 Mo. 492 (1852); Pennsylvania: *Wright v. Guy*, 10 5cr. & It. (Pa.) 227 (1823); Vermont: *Qearnes v. Irving*, Si Vt. 604 (1850).

25. *McMurray v. Rawson*, 3 Hill (N.Y.) 59 (1842)

26. See, 4 Anne, c. 16, § 27, 11 Statutes at Large 101, (1705), which has been generally adopted into the common Law of this country, or followed by the Enactment of similar Statutes here. *Cheney v. Ricks*, 187 Ill. 171, 58 N.E. 284 (1900).

27. *Griffith v. Willins*, 3 Bin, (Pa.) 317 (1811).  
before suit brought is not necessary, and therefore need not be averred.<sup>28</sup>

DECLARATION IN ACCOUNT OR ACCOUNT  
RENDER—ESSENTIAL ALLEGATIONS:  
(4) **THE DAMAGES**

160. 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; 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.

#### STATUS UNDER MODERN CODES, PRACTICE ACTS AND RULES OF COURT

161. While the Common-Law Action of Account, in theory at least, has been abolished, the **Common Law Liability to Account has not been abolished. It may, therefore, be enforced, in some states by a legal action to compel an accounting, in which case the Allegations are essentially the same as at Common Law; in others the liability may be enforced by a Bill for an Equitable Accounting. In general, this Mode of Procedure is favored, being more flexible in character.**

WHAT, then, in the light of the foregoing discussion, is the present status of the Action

28. *Sturges v. Bush*, 5 Day (Conn.) 452 (1813). But see, *Kemp v. Merrill*, 92 In.App. 46 (1900).

29. *Gratz v. Phillips*, 5 Bin. (Pa.) 564 (1813).

#### Sec. 161

#### ACTION OF ACCOUNT

317

of Account under Modern Codes, Practice Acts and Rules of Court?

In the Missouri case of *Hughes v. Woosicy*,<sup>30</sup> decided after 1848, the plaintiff took an Appeal from an order sustaining a Demurrer to a Declaration in an Action of Account. In reversing The Judgment the Court remarked: "At the time of the beginning of this suit, this form of remedy was open to the plaintiff, and as he has seen proper to adopt it, we are bound to sustain him."<sup>31</sup>

And in a subsequent case, *Sandwich Mfg. Co. v. Bogie*,<sup>32</sup> decided in 1927, and under the Code, the Missouri Supreme Court held that the original claim was in the nature of an Action of Account, and an additional and different cause of action could not be subsequently commenced, as, under the facts of the case, it would have resulted in a circumvention of the Statute of Limitations. In referring to the Action of Account, the Court declared:

"The relationship disclosed is that of agent and manager of a business—a branch office of the claimant at Kansas City. As such agent and manager Losee not only handled the moneys, notes, and accounts of the claimant, but merchandise which claimant carried

30. 15 Mo. 339 (1852).

31. 15 Mo. 339. 340 (1852).

Zt. 317 Mo. 972, 298 S.W. 56 (1927).

for sale, and which Losee (working on a fixed salary) sold for claimant, and collected on such sales. The facts pleaded in the original claim bring it within the old Common-Law Action of Account. This was, as said, a Common Law Action, so the referee is right in calling it an Action at Law. Our Practice Act has left us a more limited number of actions, and trials are had of each in the same Court, but the distinction between Common-Law and Equitable Actions are recognized as before. In fact, our several Practice Acts have placed accounts (the items of which are legal as distinguished from Equitable) on the law side of our Courts, there to be tried: (1) By the Court without a Jury, under named circumstances, (2) to be tried by a Jury, or (3) to be tried by a Referee." ~

In short, then, despite the fact that the **Code had abolished the Common-Law Action** in favor of a single, formless form of action, the liability to account, as existing at Common Law still remained enforceable under the Code and at Law. It followed, therefore, that the Essential Allegations as required at Common Law, were still required under the Code, perhaps without some of the detail and technicality which prevailed at Common Law.

33. *Sandwich Mfg. Co. v. Bogie*, 317 Mo. 972, 982, 298

S.W. 56, 60 (1927).

## SCOPE OF THE ACTION

The Action of Assumpsit arose as one of the Action on the Case, upon analogy to various Rights of Action *in Tort*.

I. In general, on the Origin, History and Development of the Action of Special Assumpsit, see:

Treatises: Lawes, *A Practical Treatise Ca Pleading*, in Assumpsit (1st Am.Ed. by Joseph Story, Boston 1811); Lee, *Precedents of Declarations in Assumpsit, Fully Adapted to Most Cases Occurring in Promissory Notes, on Bills of Exchange, Inland and Foreign, and also on Bankers' Checks, &c.* (London 1825); Fox, *A Treatise on Simple contracts, and the Action of Assumpsit* (London 1842);

Harty, *Precedents of Declarations in Assumpsit and Debt, in the Superior Courts of Ireland, on Inland and Foreign Bills of Exchange, Promissory Notes, and Brokers' Checks; With Forms of Particulars of Demand; Prepared in Conformity with the General Rules of Hhlyary Term, 1832, With Full Notes and Directions* (Dublin 1842); Hare, *The Law of Contracts*, c. VII, Assumpsit, 117-449; c. VIII, Trespass on the Case, 150, 169; e. X, Consideration, 199-226; c. XII, Antecedent Consideration, 241—261 (Boston 1887); Martin, *Civil Procedure at Common Law*, c. II, Art. III, §~ UI—CO, Assumpsit, 49—CI (St. Paul 1905); 3 Street, *Foundations of Legal Liability*, c. XIV, Action of Special Assumpsit, 172—181

**Consideration became the test of whether there**

was sufficient ground to enforce the promise.

**Special Assumpsit lies for the recovery of Damages for the Breach of a Simple Contract,**

(Northport 1906); Jenks, *A Short History of English Law*, c. X, Simple Contracts, 135—141 (Boston 1912); Shipman, *Handbook of Common Law Pleading*, c. Vhf, ~ 57—58, Special Assumpsit, 148-452 (3d ed. by Ballantine, St. Paul 1923); Morgan, *The Study of Law*, e. V, Assumpsit, 107—111 (2d ed., Chicago, 1948); Plucknett, *A Concise History of the*

*Common Law*, Bk. II, Pt. IV, c. 3, Assumpsit to

*Slade's Case*, 637-446 (5th ed., London 1953); Fifoot, *History and Sources of the Common Law*, c. XIV, Evolution of Assumpsit, 380—340 (London 1949); Id., c. XV, The Subsequent Development of Assumpsit, 359—371 (London 1949).

Articles: Salmond, *The History of Contract*, 3 *L.Q.*,

Rev. 166 (1887); Ames, *History of Assumpsit Pt. I*,

2 *Harv.L.Rev.* 1 (1888); Keasbey, *The Right of a*

*Third Person to Sue Upon a Contract Made for his*

*Benefit*, 8 *Harv.Litev.* 93 (1894); Ames, *Parol Contracts Prior to Assumpsit*, 8 *Harv.L.Rev.* 252 (1895);

Deiser, *The Origin of Assumpsit*, 25 *Harv.L.Ecv.*

428 (1912).

Annotation: Right of Third Person to Enforce Contract Between Others for His Benefit, 81 A.L.R. 1271 (1932).

## CHAPTER 16

### THE ACTION OF SPECIAL ASSUMPSIT<sup>1</sup>

Sec.

162. Scope of the Action.

163. Special Assumpsit—Distinguished From and Concurrent With Other Actions.

164. Form of Declaration in Special Assumpsit.

165. Declaration in Special Assumpsit—Essential Allegations:

(1) In General.

166. Declaration in Special Assumpsit—Essential Allegations:

(2) The Statement of the Making of the Contract and the Terms of Promise on which the Action is Founded,

167. Declaration in Special Assumpsit—Essential Allegations:

(3) The Consideration.

168. Declaration in Special Assumpsit—Essential Allegations:  
(4) The Performance by Plaintiff of All Conditions Precedent.

169. Declaration in Special Assumpsit—Essential Allegations:  
(5) The Breach.

170. Declaration in Special Assumpsit—Essential Allegations:  
(6) The Damages.

171. Status Under Modern Codes, Practice Acts and Rules of Court,  
162.  
Species

318

Sec. 162

### ACTION OF SPECIAL ASSUMPSIT

319

either **Express or Implied in Fact**. The term “Special Contract” is often used to denote an Express or Explicit Contract as contrasted with a Promise Implied in Law.

THE Action of Assumpsit, or Trespass on the Case in Assumpsit, is so called from the word “Assumpsit”, which means that he undertook or promised, which, when the Pleadings were in Latin, was inserted in the Declaration as descriptive of the defendant’s undertaking.<sup>2</sup> It is a proper Remedy for the Breach of any Simple or Unsealed Contract, whether the Contract is Verbal or Written, or 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.<sup>3</sup> In no case will the action lie unless there has been an actual contract or promise, or unless the law will imply one; for a promise either given in fact or implied by law is essential.<sup>4</sup>

The Action of Covenant hardened before it could be extended to unwritten agreements, even when made upon valuable consideration, and until near the end of the Fifteenth Century such pacts found no remedy.

2. 1 Chitty, Treatise on Pleading and Parties to Actions with Precedents and Forms, c. II, Of the Forms of Action lfi (Springfield, 1833); Illinois: Board of Highway Comr’s v. City of Bloomington. 253 Ill. 164, 97 N.E. 280, Am.Cas.1913A, 471, 477 note (1913); New Jersey: Clark v. Van Cleef, 75 N. J.Eq. 152, 71 Aii. 260 (1908).

3. English: Rudder v. Price, 1 Bl.H. 551, 126 Eng. Rep. 316 (1791).

As to the nature of the action, see the following cases:

Michigan: Ward v. Warner, S Mich. 508 (1860);  
Farmers’ -cat. Bank v. Fonda, 65 Mich. 533, 32 NW.

664 (1887).

4. English: Rudder v. Price, 1 Bl.H. 551, 126 Eng. Rep. 316 (1791); Taylor v. Laird, 2~ L.J.Exch. 329 (1856); Michigan: Thornton v. Village of Sturgis, 38 Mich. 630 (1878); New York: Bartholomew v. Jackson, 20 Johns. (N.Y.) 28, 11 Am.Dec. 237 (1522); Tennessee: Stamper v. Temple, 6 Rumph. (Tenn.) 113, 44 Ani.Dcc, 296 (1M5)

Assumpsit lies only when damages are sought for the breach of a contract, express or implied. Casey v. Walker & Mosby, 122 Va. 465, 06 S.E. 434 (1918).

Prior to the Sixteenth Century the Law of Contracts rested on the foundations of Debt, Covenant and Account, but for the development of this branch of the law they proved entirely inadequate, It remained for the Action of Special Assumpsit to supply the Remedy for Breach of Simple Contracts, and its extension is largely the history of the Substantive Law of Contract. The theory was that when a man undertook by promise to do something and then did it improperly, or where he obtained something by a promise and thereafter broke his promise, Writs of Trespass on the Case were allowed for the wrong done.<sup>5</sup>

The Action of Assumpsit, in its broadest sense, was thus developed from the analogies of Actions *Ex Delicto* rather than the analogy of Covenant, Debt, or any Action *Ex Contractu*. What the particular analogies were that the Courts strained to transform a tort remedy into a contract remedy in **the law of obligations hardly** con~rns us here. Whether Special Assumpsit is descended from an Action of Trespass on the Case for Negligent

Misfeasance in doing a thing which the defendant had undertaken to do (which is in one aspect an action on the promise), or whether Assumpsit has descended from an Action on the Case .in the Nature of Deceit for Nonfeasance to Recover Money Paid on the Faith of a Promise, or Damages caused by the deceitful artifice, whether from one or both of these, it concerns us principally to know the result at

5. For Assumpait as Trespass on the Case upon a promise, see the following: Illinois: Carter v. White, 32 Ill. 509 (1863); Rhode Island: Bagaglio v. Paolino, 35 RI. 171, 85 Atl. 1048, 44 LEA. (N.S.) 80 (1913), holding that Trespass on the Case Includes both Assumpsit and Case for torts. Federal: Carrol v. Green, 92 U.s. 509, 23 LEd. 738 (1875); 3 Street, Foundations of Legal Liabilities, c. XIV, The Action of Special Assumpsit, 178 (Northport 1906).

An Action on the Case includes Assumpsit as well as an action in form ex deieto. Wadleigh v. Katalidin Pulp & Paper Co., 116 Me. 107, 100 Atl. 150 (1917).

Miller & Reppy Com.Law P1d, H.B.—12

220

## OFFENSIVE PLEADINGS

### Ch. 16

which the Courts slowly and painfully arrived,<sup>6</sup>—a remedy to enforce contractual duties. It is interesting to compare the evolution of Assumpsit with that of Detinue, which started with a Contractual Theory, and, as it developed, invaded the Field of Tort, although it still retained some of its Contractual characteristics.

The Action of Covenant enforced promises made in writing under Seal simply as promises, expressed in such form as to be binding. The Action of Assumpsit as finally developed enforces promises, not because they are promises, but only when they are based on Consideration. The Action of Debt on Simple Contract enforced a duty to pay for an equivalent already received. But in the Simple Contract the obligation is based on the promise, not upon receipt of the quid pro quo, and it is now immaterial whether or not one side of the Consideration has been executed. This Action of Assumpsit supplied the much-needed remedy for the recovery of unliquidated Damages for the violation of Express Contracts not under Seal. **A great development took place by the extension of this action, by means of an Implied or Fictitious Promise, to debts and to obligations in the nature of debt arising from the receipt of benefits or value. This Form of the Remedy is distinguished as General Assumpsit; the original Form of the Action upon an Actual Promise being called Special Assumpsit.**

4. Miller v. Ambrose, 3~ App.D.C. 75 (1910).

It appears that the Nonperformance of Promises became actionable in the first part of the Sixteenth Century, or to be specific~ in 1505, when money or something of value was obtained by the Promisor on the faith of his Promise. Accordingly, we find the Language of the Declaration in Special Assumpsit to read: "Yet the said defendant, not regarding his said promise, but contriving and fraudulently intending, craftily and subtly, to deceive and defraud the plaintiff," etc. S Street, Foundations of Legal Liability, c. XIV, The Action of Special Assumpsit, 176 (Northport 1006). See, also, article by Holdsworth, The Modern Watery of the Doctrine of Consideration, 2 B.U.L.Ev. 87, 91 (1922).

The Action of Special Assumpsit will never lie at Common Law on a Specialty. In such cases the proper remedy is Debt or Covenant, and not Assumpsit.'

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 Special Assumpsit will not lie. The action must, therefore, be Covenant or Debt on the higher security.<sup>8</sup> 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

- 1- Special Assumpsit Is not sustainable upon a Specialty. Merryinan v. Wheeler, 130 Md. 566, 101 Atl. 551 (1917).

For Breach of a Contract under the Seals of both parties thereto only an Action of Debt or Covenant will ue. Maine: Van Buren Light & Power Co. v. Inhabitants of Van Buren, 118 Me. 458, 109 A. 3 (1920); Massachusetts: Richards v. ICillam, 10 Mass, 239 (1813); Codman v. Jenkins, 14 Mass. 93

(1817); Andrews v. Canender, 13 Pick. (Mass.) 484  
(1833); Pennsylvania: Barley v. Parry, 18 Pa. 44  
(1851); Hamilton v. Hart, 109 Pa. 629 (1885);  
January v. Goodman, 1 Dali. (Pa.) 208, 1 LEd. 103

1787;

Where a Judgment is a Specialty, Debt or Seire Pad-as, and not Assumpsit, is the proper remedy,

In many states, by Statute, the remedy by Assumpsit was extended to contracts under Seal, and other Specialties. Illinois: Martin v. Murphy, 36 Ill.App. 283 (1885); City of Shawneetown v. Baker, 85 Ill. 563 (1877); Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 467 (1883); Michigan: Goodrich v. Leland, 15 Mich. 110 (1809).

8. English: Aeton v. Symon, Cro.Car. 415, 79 Eng. Rep. 900 (1035); Price v. Moulton, 10 CE. 561, 138 Eng.Rep. 222 (1851); Illinois: Wann v. McNulty, 2 Gil. (Ill.) 3-5, 43 Am.Dec. 58 (1845); Maryland: Reefer v. Zimmerman, 22 Md. 274 (1864); Moale v. Rollins, 11 Gin. & J. (Md.) 11, 33 Am.Dec. 684 (1839); Massachusetts: Eanorgee v. flovey, 5 Mass. 11, 4 Am.Dec. 17 (1809); Michigan: Martin v. Hainlin, 18 Mich. 354, 100 Am.Dec. 181 (1860); New Hampshire: Mecriflls v. How, 3 Nil. 348 (1826); New York; Butler v. Miller, 1 DeMo (N.Y.) 407 (1826); Hammond v. HoppIng, 13 Wend. (N.Y.) 505 (1835); Pennsylvania: Jones v. Johnson, 3 Watts & S. (Pa.) 270-38 Am.Dec. 700 (1842).

Sec. 163

### ACTION OF SPECIAL ASSUMPSIT

321

security must be taken in the place of the lower, and not merely as collateral security.<sup>0</sup> 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, the higher security being inoperative.<sup>10</sup>

#### SPECIAL ASSUMPSIT—DISTINGUISHED FROM AND CONCURRENT WITH OTHER ACTIONS

163. Special Assumpsit, which lies for the **breach of an Unsealed Contract, and Covenant**, which lies for the Breach of a Sealed Contract, are Mutually Exclusive Remedies. Debt, which lies on a Simple (Executed) Contract is not to be confused with Special Assumpsit which lies for the Breach of an Express Promise, or of a **Simple Contract in the Modern Sense**. And Special Assumpsit is distinguishable from **Trespass on the Case in that the former lies for the Breach of a Promise**, whereas the latter lies for Tortious Misconduct resulting in an **injury, but they are sometimes concurrent remedies**.

#### *In General*

SPECIAL Assumpsit, having been differentiated from its immediate ancestor, Case for Misfeasance and Case for Nonfeasance, and having in consequence achieved status as an Action *Ex Contractu*, became the recognized Form of Action to recover Damages for the Breach of a Modern Simple Contract. As such, it is clearly distinguished from Coy

s. English: Holmes v. Bell, 8 Man. & G. 213, 133 Bug. Rep. 1120 (1841); Hooper's Case, 2 Leon. 110, 74 Eng.Rep. 399 (1587); Massachusetts: Banorgee v. Bovey, 5 Mass. 11, 4 Am.Dec. 17 (1809); Michigan: Doty v. Martin, 32 Mich. 462 (1875); New York: Butler v. Miller, 1 Denio (N.Y.) 407 (1845); Day v. Leal, 14 Johns. (N.Y.) 404 (1817); Witbeek v. Waine,



16 N.Y. 532 (1858).

10. English: Scurfield v. Gowland, 6 East 241, 102

Eng.Rep. 1279 (1805); Ayliff v. Arehdale, cro.Eliz. 920, 78 Eng.flep. 1142 (1603); New Hampshire: Mc(Jrillis v. How, S N.H. 348 (1826); New York: Hammond v. HoppIng, 13 Wend. (N.Y.) 505 (1835).

enant, which lies only upon a Sealed Contract, whereas Special Assumpsit lies upon an Unsealed Contract. The two actions, therefore, are regarded as mutually exclusive. The action is distinguished from Debt, which lies for the recovery of a Specific Sum of money conceived of as belonging to the plaintiff, whereas Special Assumpsit lies to recover Damages for Breach of a Promise. While the actions are sometimes concurrent, each proceeds upon its own peculiar theory. Assumpsit is grounded upon a right of the plaintiff to be indemnified for some detriment incurred as a result of the defendant's wrongful Breach, whereas Debt is based upon a right of the plaintiff to recover a sum certain to which he is entitled as a result of some *quid pro quo* supplied by him to the defendant.

*Special Assumpsit as a Concurrent Remedy with Trespass on the Case for Tort ious Misconduct*

AND, of course, Special Assumpsit, while differing from its Tort Ancestor, Trespass on the Case, in that it lies for the breach of a duty imposed by the voluntary act of the parties in executing a contract, whereas in Case, the action is to compensate for a wrong independent of any contract obligation, nonetheless sometimes may be concurrent with Case, as, for example, where one purchases a railway ticket from one point to another and then suffers an injury; he may, if he so desires sue in Special Assumpsit for breach o~ the contract, or he may elect" to waive

right under the contract and sue in Trespass on the Case for the violation of a duty caus

11. Although an evicted tenant may sue on the covenant for quiet enjoyment, he may elect to treat the eviction by the landlord as an unlawful invasion of his rights and sue in Tort. Mitsak-os v. Morrill, 237 Mass. 29, 129 N.E. 294 (1924).

An Action in Tort may be maintained for the viol tioa of a duty flowing from relations between par. ties created by Contract Commercial City Bank v. Mitchell, 25 Ga.App. 837, 105 SE. 57 (1020).

32Z

OEPENSIVE PLEADINGS

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ing him injury. The rule applicable to carriers is also applicable to bailees.

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, anal 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.<sup>2</sup>

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 proper. "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 indertaking, 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

it. Maine: *Inhabitants of Milford v. Bangor By. & Electric Co.*, 104 Me, 233, 71 A. 759, 30 LEA. (N.S.~ 531 (1908}), holding that Case for Breach of a Duty arising out of an Express or Implied Contract Is concurrent with Assumpsit. Oklahoma: *Hobbs v. Smith*, 27 Okia. 880, 115 P. 347, 34 LBS. (MS.) 097 (1911); Vermont: *Lawson v. Crane & Hall*, 83 vt. 115. 74 A. 641 (1909).

of them to his own use, he may be proceeded against, at the election of his customer, for the Tort and in an Action *cx delicto*." ~ There are many other cases where a party may at his election sue either in Assumpsit or in Case.<sup>14</sup> Thus Assumpsit and Case are concurrent remedies for Breach of Warranty in a sale of goods.<sup>15</sup>

### FORM OF DECLARATION IN SPECIAL ASSUMPSIT

164. This section contains an example of a Declaration in the Action of Special Assumpsit.

DECLARATION in SPECIAL Assumpsit

FOR that whereas heretofore, to wit, on, &c. at, &c. the said LB. at the special instance and request of the said C.D. bargained with the said C.D. to buy of him the said C.D. and the said CD. then and there sold to the said A.B. a large quantity, to wit, ten loads

13. *Zell v. Dunkle*, 156 Pa. 353, 27 A. 88 (1803). See, also, *B. B. Ford & Co. v. Atlantic Compress Co.*, 13\$ Ca. 406, 75 SE. 609, Ann.Cas.1913D, 226, 229, note (1912), holding that a Tort arising out of a Breach of the Bailec's Duty imposed by relation or by Express Contract may be waived by the Sailor and Assumpsit maintained.

14. While negligence, considered merely as a Tort, is a wrong Independent of Contract, it may also be a Breach of Contract, If the Contract itself calls for care. Alabama: *Western Union Telegraph Co. v. Bowen*, 16 Ala.App. 253, 76 So. 985 (1917); New York: *Lord Electric Co. v. Barber Asphalt Paving Co.*, 226 N.Y. 427, 123 N.E. 75€ (1919), reversing the ~ndgment in 180 App.Div. 887, 166 N.Y.S. 1102 (1917).

When the law imposes a duty arising from the relation rather than the Contract, and there is a Breach of Duty, the aggrieved party may sue in Trespass on the Case, but if there be no legal duty, except that arising from the Contract, there can be no Election, and the party must rely upon the agreement alone. *Walscr v. Moran*, 42 Nev. 111, 173 P. 1149 (1918).

15. North Carolina: *Lassiter v. Ward*, 33 N.e. 443 (1850). Vermont: *Caldbeek v. Simanton*, 82 Vt. 69, 71 A. 881, 20 LEA. (N.S.) 844 (19@). See, also, *Willisten, Contracts, e. XLI, Fraud, 1505 (New York 1020)*; Representation and Warranty in Sales, *Ecubut v. Buckleton*, 27 Llarv.L.Rev. 1 (1913).

Sec. 166

### ACTION OF SPECIAL ASSUMPSIT

323

of wheat at the rate or price of £ for each and every load thereof, to be delivered by the said C.D. to the said A.B. in a week then next following, at .and to be paid for by the said A.B. to the said C. D. on tile delivery thereof as aforesaid; and in consideration thereof, and that the said A. B. at the like special, &c. had then and there undertaken and faithfully promised the said C.D. to accept and receive the said wheat, and to pay him for the same at the rate or price aforesaid; he the said C.D. undertook, &c. to deliver the said wheat to him the said A.B. as aforesaid; and although the said time for the delivery of the said wheat, as aforesaid, hath long since elapsed, and the said A.B. hath always been ready and willing to accept and receive the said wheat, and to pay for the same at the rate or price aforesaid, to wit, at, &c. aforesaid; yet the said C.D. not regarding, &c. but contriving, &c. to deceive and defraud said A.B. in this behalf, did not nor would within the time aforesaid, or at any time afterwards, deliver the said wheat, or any part thereof for the said A.B. at, &c. aforesaid, or elsewhere, but wholly neglected and refused

so to do, whereby the said A.B. hath lost and been deprived of divers great gains and profits, which might and otherwise would have arisen and accrued to him from the delivery of the said wheat to him the said A.B. as aforesaid, to wit, at, &c., aforesaid—[Add one or more special counts, varying the statement—and at least one count like that in 1 East. 203—and an account stated.]

2 CHITTY, Pleading, p. 105 (Phil. 1819).

**DECLARATION IN SPECIAL ASSUMPSIT—  
ESSENTIAL ALLEGATIONS: (1)  
IN GENERAL**

165. The Essential Allegations of the Declaration in Special Assumpsit are:

- (I) The Statement of the making of the **contract and the terms of promise on which the action is founded.**
- (II) The Consideration.
- (III) **The Performance by plaintiff of all conditions precedent.**
- (IV) **The Breach.**
- (V) The Damages.

**DECLARATION IN SPECIAL ASSUMUSIT— ESSENTIAL ALLEGATIONS: (2) THE  
STATEMENT OF THE MAKING OF THE  
CONTRACT AND THE TERMS OF  
PROMISE ON WHICH THE ACTION IS  
FOUNDED**

166. The Statement of the making of the contract may consist **of an Allegation of the Consideration and Promise, and, where necessary, an Inducement, setting forth the Circumstances** under which the Contract was executed.

The Promise may be set forth in the **Declaration Verbatim or according to its Legal Effect,**

THE statement of the making of the contract is the first important requisite in showing the cause of action in Special Assumpsit. It may include either a mere Allegation of the Consideration and Promise, or, where that is not sufficient to render intelligible the Count which follows, an explanatory Allegation or Inducement may be necessary. In any case, it must be a clear and particular statement of every fact which is necessary, in the particular case, both to show what contract was actually made, and to plainly indicate such of its terms, beneficial to the plaintiff, as constitute the part for the failure of which he sues.<sup>1~</sup>

*Explanatory Inducement*

WHERE the mere Allegation of the Consideration and the Promise will not alone

<sup>1~</sup>O. English: Cotterill v. Cuff, 4 Taunt. 285, 128 Eng.Rep. 338 (1812); Bristow v. Wright, 2 Doug. 667, 09 Eng.Rep. 421 (1781); Maryland: Ferguson v. Tucker, 2 Ear. & C. (Md.) 183 (1807); Massachusetts: Stearnes v. Barrett, 1 Pick. (Mass.) 443, 11 Am.Dec. 223 (1823); New Hampshire: Favor v. Philbrick, 7 N.E. 326 (1834); Smith v. Boston, C. & M. B. Co., 36 N.H. 458 (1858); Smith v. Webster, 48 N.H. 142

(1868).

324

**OFFENSIVE PLEADINGS**

**Cl. 16**

show the Contract in an intelligible manner, it has been customary to set forth, in the nature of a preamble, the Circumstances under which the Contract was made.’-’ This explanatory statement is termed an “Inducement.” The extent to which it is carried depends upon the necessity for explanatory matter in the particular case.

Thus, in Special Assumpsit on an award, the existing difficulties between the parties, resulting in the submission to arbitration, are concisely stated by Way of Inducement, as that “certain differences had existed and were depending” ; - 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.<sup>19</sup> So, in a Declaration against an attorney for negligence, or a carrier or innkeeper for loss of goods, it is proper to show By Way of Inducement that the defendant followed the occupation in respect of which the plaintiff employed him. Unless such an Allegation is contained somewhere in the Declaration, the defendant cannot be charged thereon for the breach of a duty which results only from the particular character which he held, and in reference to which he was retained.<sup>20</sup>

### *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.<sup>21</sup>

17. Johnson v. Clark, 5 Blaekf. (XmL) 564 (1834).

12. 1 Cliitty, On Pleading, e. IV, Of the Praccipe and Declaration 318 (Springfield 1833).

19. Ibid.

20. Dartuall v. Howard, 4 *Earn. & C.* 34-5, 107 Bug. Rep. 1088 (1825).

21. 1 Chitty, On Pleading, e. XV, Of the Praeeipe and Declaration, 321 (Springfield 1533); Illinois: North v. Klzer, 72 Ill. 172 (1874); Massachusetts: Cooper v. Landen, 102 Mass. 58 (1860) West Virginia: Waid v. Dixon, 55 W.Va. 191, 46 SE. 918 (1904);

Formal words need not be used if it sufficiently appear from the whole Declaration That a Promise has actually been made.<sup>22</sup> The Promise must be stated with certainty and precision, and any material Variance between Allegations and the Proof will be fatal. It may be set forth in terms or according to its Legal Effect.<sup>23</sup> Only such parts need be set out as show the entire act required to be done by the defendant.<sup>24</sup>

Wheeling Mold & Foundry Co. v. Wheeling Steel & Iron Co., 62 W.Va. 288, 57 S.F. 826 (1907).

An Express Promise ought to be laid in the Declaration. Bannister v. Victoria Coal & Coke Co., 63 W. Va. 502, 61 S.F. 338 (1008).

22. English: Elsee v. Catward, 5 TB. 145, 101 Fag. Rep. 82 (1793); Illinois: McGinnity v. Laguerenne, 5 Gil. (Ill.) 101 (1848); Illassachusetts: Avery v. Inhabitants of Tyringham, 3 Mass. 160, 3 Am.Dec. 105 (1807;; New York:- Booth v. Farmers’ & 31. Natl. Bank of Rochester, 1 Thomp. & C. (N.Y.) 49 (1573); South Carolina: Wingo v. Brown, 12 Rich. (SC.) 279 (1859); Virginia: Sexton v. Holmes, a Munf. (Va.) 569 (1813); Peasley v. Boatwright, 2 Leigh (Va.) 198 (1830); Cooke v. Simms, 2 Call. (Va.) 39 (1799).

Thus, in Assumpsit on a Bill of Exchange, where the Declaration showed the defendant’s liability on the Bin as the drawer, but omitted to add that he had 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, 01 Eng.Xiep. 1259 (1699).

And the same doctrine has been extended to a Promissory Note. English: Wegersloff v. Keene, 1 Str.

224, 08 Eng.Ilep. 480 (1710); Mountforci v. Horton, 2 Bbs. & P. (N.R.) 62, 127 Eng.Rep. 545 (1805); Massachusetts: Dole v. Weeks, 4 Mass. 451 (ISOS).

23. English: Stroud v. Gerrard, 1 Salk. 8, 91 Eng. Ilep. 7 (1707); Illinois: Smith v. Webb, 16 Ill. 105 (1854); Mutual Ace. Ass’n of the Northwest v. Tuggle, 138 Ill. 428, 28 N.E. 1066 (1891); Massachusetts: Lent v. Padelford, 10 Mass. 230, 6 Am.Dec. 119 (1813); Texas: Salinas v. wright, 11 Tex. 572 (1854).

21. English: Cotterill v. Cuff, 4 Taunt, 285, 128 Lag. Rep. 338 (1812); Miles v. Sheward, S East 7, 103 Eng.Itep. 246 (1806); Massachusetts: Couch v. Ingersoll, 2 Pick. (Mass.) 292 (1824); Morse v. *Smi-man*, 106 Mass. 432 (1871); New Hampshire: lienlett y. Moore, 21 NIX. 336 (1850).

## ACTION OF SPECIAL ASSUMPSIT

It is not necessary to state that the Promise was in writing, even when a writing is required by statute,<sup>23</sup> 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,<sup>26</sup> the time when it was made,<sup>27</sup> 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.<sup>28</sup> "All those parts

23. English: *3ioore v. Earl of Plymouth*, 3 Barn. & Aid. 66, 106 Eng.Rep. 587 (1819); Alabama: *Flick v. Brigg*, 6 Ala. 687 (1844); *Brown v. Barnes*, 0 Ala. 694 (1844); Kentucky: *Baker v. Jameson*, 2 J.J.Marsh (ICy.) 547 (1829); New Hampshire: *Walker s., Richards*, 30 N.H. 259 (1850); New York: *Nelson v. Dubois*, 13 Johns. (N.Y.) 17? (1836); Miller v. Drake, 1 Caines (N.Y.) 45 (1803); South Carolina: *Wallis v. Frazier*, 2 Nott & 51cC. (S.C.) 180 (1810).

16. English: *Jones v. Owen*, 5 Adol. & F. 222, 111 Eng.Ilep. 1149 (1836); *Price v. Easton*, 4 Barn. & Adol. 433, 110 Eng.Rep. 518 (1823); Illinois: *Belton v. Fisher*, 44 Ill. 32 (1867).

A misdeseripction of the parties may be fatal. English: *Jell v. Douglas*, 4 Barn. & Aid. 374, 106 Eng. Rep. 074 (1821). Connecticut: *Shepard v. Palmer*, 6 Conn. 05 (1826); Illinois: *Beltoa v. Fisher*, 44 Ill. 32 (1867).

And a failure to state the names of the parties, or a misdescription, may be Aided by Verdict. 1 Chitty, On Pleading, c. IV, Of the Praeeipe and Declaration, 331 (Springfield, 1833); English: *liolte v. Sharp*, Cro.Car. 77, 79 Eng.Rep. 668 (1625); Kentucky: *Elackwell v. Irvia's Adm'rs*, 4 Dana (ICy~) 187 (1836).

27. jCbitty, On Pleading, c. IV Of the rra~dpe and Declaration, 331 (Springfield 1833); English: *Ring v. Roxbrough*, 2 C. & J. 418, 149 Eng.Itep. 177 (1832); Pennsylvania: *Stephens v. Graham*, 7 Serg. & B. (Pa.) 505, 10 Am.Dec. 485 (1822).

But the exact time need not be proved. 1 Chitty, On Pleading, e. IV Of the Praeeipc and Declaration, 331 (Springfield 1833).

-. Connecticut: *Curley v. Dean*, 4 Conn. 265, 10 Am. Dec. 140 (1822); Massachusetts: *Pay v. Goulting*, 10 Pick. (Mass.) 122 (1820); *Bridge v. Austin*, 4 Mass. 115 (1808); New Hampshire: *Smith v. Boston*, C. & 31. 11. Co., 36 N.H. 458 (1858); New York: 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." °°

It is in general sufficient to state those parts of the Contract of which a Breach is alleged, and it is not necessary or proper to set out in the Declaration other parts not qualifying or varying the material parts in question.<sup>30</sup> The statement of additional matter would be confusing prolixity. The perfection of pleading consists in combining brevity with certainty and precision.

It is a general rule that the Contract must be stated correctly, and, if the evidence differs from the statement, the whole foundation of the action fails, because the Contract must be proved as laid.<sup>31</sup>

DECLARATION IN SPECIAL ASSUMPSIT— **ESSENTIAL ALLEGATIONS: (3)**  
**THE CONSIDERATION**

**167. The Declaration in Special Assumpsit should expressly state a Consideration for the**

*Steno v. Knowlton*, 3 Wend. (N.Y.) 374 (1820); *Lower v. Winters*, 7 C~. (N.Y.) 263 (1827); *Butler vTucker*, 24 Wend. (N.Y.) 447 (1840); Pennsylvania:

Ittenyson v. Reifsnnyder, 11 Pa.Co.~t.R. 157 (1837).

29. 1 Chitty, On Pleading, c. IV Of the Praecept and Declaration, 331 (Springfield, 1833).

30. Where the defendant Promises to do two or more things, the plaintiff is only required to set forth that particular part of the Contract which he alleges the defendant to have broken. It is so where there are several covenants in a deed; the plaintiff may sue for the Breach of any one alone. Smith v. Webster, 42 N.H. 142 (1868).

31. The averment of an absolute Contract to deliver

40 bags of wheat is not supported by Proof of an optional one to deliver 40 or 50 bags, as the Contract must be declared upon in the Declaration according to the original terms of it. Penny v. Porter, 2 East 2, 102 Eng.Rep. 268 (1801).

The promise must be accurately alleged to avoid a variance. Illinois: Menfee v. Higgins, 57 Ill. 50 (1870); West Virginia: Davisson v. Ford, 23 W.Va. 617 (1884).

### OFFENSIVE PLEADINGS

**Promise and from such statement it must appear that the Consideration alleged is legally sufficient, for otherwise it will be nudum pactum, and hence void.**

#### *Consideration in General*

EXCEPT in cases of Bills of Exchange and Promissory Notes, and certain other Contracts that import a Consideration,~ it is always necessary for the Declaration expressly to state the Consideration for the Promise, for, if no Consideration is alleged, the Promise will appear, from all that the Declaration shows, to be *nudum pactum*, and therefore void.~ And it is equally essential that the Consideration alleged shall appear **to be** legally sufficient to support the promise.~ 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

12. 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 Chitty, On Pleading, c. IV Of the Praecept and Declaration, 321 (6th Am. ed. Springfield 1833); Martin, Civil Procedure at Common Law, e. II, Personal Actions En Contractu, 1 59, Declaration, 60 (St. Paul, 1905).

-English: Jones s-. Ashburnhnnj, 4 East 455, 102 Eng.Rep. 905 (1864); Dartnafl v. Howard, 4 Barn. & C. 345, 107 Eng.Rep. 1088 (1825); Connecticut: Curley v. Dean, 4 Cona. 265, 10 Am.Dec. 140 (1822); Bailey v. Bussing, 29 Conn. 1 (1860); Illinois: Hulne v. fenwick, 16111.371(1851); Indiana: Potter -v. Earnest, 45 Ind. 410 (1874); Massachusetts: Murdoek v. Calawell, S Allen (Mass.) 309 (1864); New Hampshire: Bendea v. Manning, 2 N.H. 280 (1820); New Market Iron Foundry v. Harvey, 23 N.H. 406 (1851); New York: Bailey v. Freeman, 4 Johns. (KY.) 280 (1809); Jerome v. Whitney, 7 Johns. (N.Y.) 321 (1811); Tennessee: Shelton v. Bruce, 9 Yerg. (Tenu.) 24 (1836); Virginia: Feverley v. Holmes, 4 Muaf. (Va.) 95 (1813~ Moseley v. Jones, 5 MuM. (Va.) 23 (1816); Vermont: Harding v. Craigie, S Vt. 501 (1836).

34. 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; it must not in any case appear that the Consideration was illegal or past. Harding v. Craigie, S Vt. 501 (1836),

appear insufficient, in which case the Declaration would be as defective as if the Consideration were defective in fact. It may not be aided by intentment. Care should therefore be taken, in stating the Consideration, to make it appear sufficient on the face of the Declaration.<sup>3~</sup> 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.<sup>3o</sup>

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; ~ but a de

35. English: Dartnall v. Howard, 4 Barn. & C. 345,

107 Eng.llep. 1058 (1825); Vermont: Raiding v. Cralgie, 8 Vt 501 (1836).

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 anyone was liable to be sued by him, or that he had suspended the enforcement of any right. Jones v. Ashburnham, 4 East 455, 102 Eng.Rep. 905 (1804).

36. 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 a Motion in Arrest of Judgment, no additional Consideration being shown for his assuming personal liability. Raan v. Hughes, 7 TB. 350, note a, 101 Eng. Rep. 1014 (1707); See also, English: Mitehinson v. I-Ie-vson, 7 TIC 348, 101 Eng.Eep. 1013 (1797); Maryland: Berry v. Harper, 4 Gill, & J. (Md.) 470 (1832).

37. English: Laing v. Fidgeon, 6 Taunt. 108, 128 EngRep. 974 (1815); Mitehinson v. Hewson, 7 TB-348, 101 Eng.Rep. 1013 (1797); Dartnall v. Howard, 4 Earn. & C. 345, 107 Eng.flep. 1088 (1523); Mich

326  
Ch. 16

Sec. 167

**ACTION OF SPECIAL ASSIJMPSIT**

327

fective 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.*<sup>38</sup>

In all cases the statement should be accurate, for the Consideration is essential to the Contract, and if it is misdescribed the Contract is misdescribed.<sup>39</sup>

*The Consideration must be shown with certainty and particularity, Nothing that is essential can be left to implication and intendment. The degree of certainty will vary somewhat, according to the particular kind of the Consideration. An averment that the promise was made for a Valuable Consideration, without setting forth what it was, is insufficient upon General Demurrer.*<sup>40</sup>

*Executed Considerations*

CONSIDERATIONS are either Executed or Executory. An Executed Consideration consists of something done before or at the time of the Promise, at the request of the promisor. In these cases it must be shown by the Declaration that the Consideration arose at the Promisor's (defendant's) request.<sup>41</sup> It is said not to be necessary, in

Ksau: Kean v. Mitchell, 13 Mieh. 207 (1865); New  
Hampstare: Benden v- Manning, 2 N.H. 280 (1821);  
Vermont: Harding v- Oraigie, 8 Vt. 501 (1836); Virginia: Winston's Ex'r v. Pranciseo, 2 Wash. (Va.)  
187 (1796).

st English: Ward v. HarrIs, 2 Bos, & P. 265, 126 Eng.flep. 1273 (1800); Pennsylvania: Shaw v. Redmond, 11 Serg. & It. (Pa.) 2T (1824).

35. English: White v. Wilson, 2 Sos. & P. 116,  
120 Eng.flep. 3188 (1800); Connecticut: Eulkley v. Landon, S Conn. 4434 (1820); New York: Lansing v. McKillip, 3 Caines (N.Y.) 286  
(1806); West Virginia: James & Mitchell v. Adams, 18 W.Va. 245 (1880).

-Kentucky: Wickliffe v. Hill, 4 Elbb. (Ky.) 269 (1815); Michigan: Kean v. Mitchell, 13 Mich. 207 (1565).

41. EnglIsh: Osborne v. Rogers, 1 Wms. Saund. 264, note I, 85 Eng.Rep. 318, note 1 (1670); Hayes v. Warren, 2 Str. 933, 93 Eng.Rep. 950  
(1731); California: City o~ Bedding v. Shasta County, 36 Cal.

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.<sup>42</sup> It must, *however*, be shown that the Executed Consideration was furnished at the defendant's request.

*Executory Considerations*

AN Executory Consideration is where the Contract is bilateral; that is, where a Promise is given for a Promise, each Promise being the Consideration for

the other. In these cases a greater degree of certainty is required than in stating an Executed Consideration. The performance of his Promise by the plaintiff may have been, according to the terms of the *Contract*, a condition precedent to the defendant's liability to perform his Promise; or each may have been required to perform concurrently with the other; or the plaintiff may have been required to continue to do or forbear some act.

In the statement of an *Executory* Consideration precedent—that is, a promise by the plaintiff which was required to be performed as a condition precedent to performance by the defendant—a great degree of certainty is required.<sup>43</sup> “The Consideration, and the Promise of the defendant, are two distinct things, and In order to show that the plaintiff

App. 48, 171 P, 806 (1018); Connecticut: *Andrews v. Lies*, 3 Conn. 365 (1820); Indiana: *Cioldsby v. Robertson*, 1 Blackf. (md.) 247 (1823); Massachusetts: *Balcom v. Craggin*, 5 Pick. (Mass.) 205 (1827); *Dodge v. Adams*, 19 Pick. (Mass.) 429 (1837); New York: *Miller v. Crane*, C Wend. (N.Y.) 647 (1854); Pennsylvania: *Stoever v. Stoeror*, 9 Serg. & it. (Pa.) 434 (1823); Vermont: *Harding v. Cragie*, S. Vt. 501 (1886).

42- 1 Chitty, On Pleading, c. IV, Of the Praeipce and Declaration, 323 (Springfield, 1833); English: *Andrews v. Whitehead*, 13 East 105, 104 Eng. lrep. 306 (1810); *Sexton v. Miles*, 1 Salk. 22, 91 Eng. lrep. 21 (1689); *Lampleigh v. Erathwait*, MockS. 887, 72 Eng. Rep. 960 (1815).

43. 1 Chitty, On Pleading, c. IV, Of the Praeipce and Declaration, 324 (Springfield 1833).  
328

## OFFENSIVE PLEADINGS

### Ch. 16

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 and place, 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.”

Concurrent conditions occur in the case of mutual promises which are to be concurrently performed, as in promises to marry, to sell and deliver goods, and to receive and pay for them, etc. In these cases the plaintiff must always allege a performance or an offer to perform on his part.<sup>43</sup> A mere Allega

44- 1 Chitty, On Pleading, c. IV, Of the Praeipce and Declaration, 324 (Springfield, 1833); Connecticut: *Russell v. Slade*, 12 Coan. 455 (1838); Massachusetts: *Read v. Smith*, 1 Allen (Mass.) 519 (1861); New York: *Clover v. Tuck*, 24 Wend. (N.Y.) 153 (1840).

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 lbs. & P. 116, 126 Eng. lrep. 1188 (1809); *Ward v. Harris*, 2 S. & P. 265, 126 Eng. Rep. 1273 (1800).

- English: *Morton v. Lamb*, 7 T.R. 125, 101 Eng. Rep. 890 (1797); Illinois: *Flough v. Rawson*, 17 Ill. 588 (1850); *Metz v. Albrecht*, 52 Ill. 491 (1800); Massachusetts: *Stephenson v. Cady*, 117 Mass. 6 (1875).

In an Action for Breach of a Contract by which the plaintiff had agreed to buy a certain quantity of corn of the defendant at a certain price, and the defendant had promised to deliver the corn within one month, the plaintiff merely alleged that he had always been ready and willing to receive the corn, but that it had not been delivered within the month. The Court held that readiness to receive 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 broken the Contract and discharged the defendant. Readiness and willingness to perform may not be sufficient.<sup>46</sup>

If any error is made in describing the Consideration which forms the basis of the Contract, this may be a fatal Variance, as the whole Contract must be proved as stated, and the plaintiff will fail at the Trial unless permitted to Amend his Declaration. It is necessary that the whole of the Consideration should in general be stated and that it be proved to the extent alleged.<sup>47</sup>



**DECLARATION IN SPECIAL ASSUMPSIT— ESSENTIAL ALLEGATIONS: (4) TUE  
PERFORMANCE BY PLAINTIFF OF ALL  
CONDITIONS PRECEDENT**

168. The Declaration must allege the **Performance or Fulfillment of all Conditions Precedent to the defendant's duty to perform** his Promise. it must allege Due Performance by the plaintiff, or aver a sufficient Excuse for **Nonperformance**. 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**.

**A Condition which merely affords a Defense or Excuse for Failure to Perform a Contract is Matter of Defense, which need not be negated in the Declaration. The border line as to what Conditions should be Negated in the Declaration and what should be set up as a Defense is doubtful and uncertain.**

WHERE the Consideration for the defendant's Promise was past or executed when the Promise was made; or where, though the Contract 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

condition of non-readiness to pay. *Morton v. Lamb*, 7 P.R. 125, 101 Eng.Rep. 890 (1797).

46. *Kane v. Flood*, 13 Rkk. (Mass.) 281 (1832).

47. *James v. Adams*, 16 W.Va. 245 (1880).

The entire consideration must be alleged, such as all the property sold, in each count *Stone v. White*, 8 Cray (Mass.) 589 (1557).

See. 168

time, or upon notice or demand—the Declaration, after alleging the Consideration and the Promise, should proceed at once to allege the Breach.<sup>43</sup>

When, however, the Consideration for the defendant's promise *was a* Promise by the plaintiff which was required to be performed as a Condition Precedent to Performance by the defendant,<sup>40</sup> or if the defendant was not required to perform before the happening of some subsequent event,<sup>50</sup> as the act of

48. 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. *English Boone v. Lyre*, 1 Riff. 273, note, 126 Eng.Rep. 160 (1789) Alabama: *NeGehee v. Hill*, 4 Port. (Ala) 170, 29 Am. Dec. 277 (1830); Kentucky: *Morford v. Mastin*, C P aMon. (Ky.) 609, 17 Am.Dec. 108 (1828) Maine: *Norris v. School Plst. No. 1* in *Windsor*, 12 Mo. 293, 28 Am.Dec. 182 (1528); Massachusetts: *Kane v. Rood*, 13 Pick. (Mass.) 281 (1832); New York: *Bennet v. Pixley's Ex'rs*, 7 Johns. (N.Y.) 249 (1810); *Cunningham v. Merrell*, 10 Johns. (N.Y.) 204, C Am. Dec. 332 (1813); *Rebb v. Montgomery*, 20 Johns. (N.Y.) 15 (1822); *Pepper v. Ilaigit*, 20 Barb. (N.Y.) 429 (1854); Pennsylvania: *Obermyca v. Niche'sa*, 6 Bin. (Pa.) 159, 6 Am.Dec. 430 (1813).

49. California: *Naftzger v. Gregg*, 3 Cal.Unrep. 520,

31 P. 612 (1892); Connecticut: *Loan v. Atwater*, 4 Conn. 3, 10 Am.Dec. 91 (1821); Illinois: *People en tel. Chicago & I. II. Co. v. Glann*, 70 Ill. 232 (1873); Continental Ins. Co. -v. *Rogers*, 110 Ill. 474, 10 N.E. 242, 50 Am.Rep- 810 (1887); Kentucky: *Harrison v. Taylor*, 3 A. IC. Marsh. (Ky.) 108 (1820); Massachusetts: *Couch v. Ingersoll*, 2 Pick. (Mass.) 292 (1824); *New York: McIntire v. Clark*, 7 Wend. (N.Y.) 330 (1831); *Lester v. Jewett*, 11 N.Y. 453 (1854); Pennsylvania: *Zerger v. Sailcr*, C Bin. (Pa.) 24 (1813); South Carolina: *Salmon v. Jenkins*, 4 McCord (S.C.) 288 (1827); Tennessee: *Smith's Heirs v. Christmas*, 7 Yerg. (Penn.) 565 (1835); Virginia: *Bailey v. Clay*, 4 Rand. (Va.) 340 (1820); Federal: *Goodwin v. Lynn*, 4 Wash.C.C. 714, Fed.Cas.No.5,553 (1827).

A Declaration on a promise to pay money in consideration of forbearance, must aver such forbearance. *Comm. Dig. 'Pleader'*, C. 22 (London, 1822).

w. Thus, in an Action on a Promise to pay money, when collected, collection of the money is a condition precedent, and hence must be averred. *Dodge*

a third person, the lapse of a certain time,<sup>51</sup> or notice,<sup>52</sup> or a request or demand by the plaintiff,<sup>53</sup> the Declaration must allege the Fulfillment of such Condition Precedent, or, in case of Nonperformance of a Condition Precedent by the plaintiff, must show an Excuse therefor. Excuse for the Nonperformance of a Condition cannot as a general rule be shown under an Allegation of Due Performance.<sup>14</sup>

v. Coddington, 3 Johns. (N.Y.) 140 (1808). Cf. Withams v. Smith, 3 Scans. (lii.) 52-1 (1842).

51. Worcester v. Wood, 6 TB. 710, 101 Ez'g. llep, 7&i (1706).

52. Illinois: Independent Order of Mut, Aid v. Paine, 17 Ill.App, 572 (1885); Massachusetts Slut, Life Ins. Co. v. Kellogg, 82 Ill, 614 (1870).

In order to sustain an action on a life insurance policy, the Declaration *must* show the Staking of the Policy, the material terms of: the Contract, the Performance of nil Conditions Precedent, such as no—tie and proof of loss, the happening of the contingency in which the defendant becomes liable to pay, and the Failure to Pay. Massachusetts Mut. Life Ins. Co. v. Kellogg, 82 Ill, 614 (1876).

and— Whenever *it* is essential to the Cause of Action that the plaintiff should have actually formally requested or Demanded Performance by the defendant, such Demand or request must be averred. Bach v. Owen, 5 TB. 409, 101 Eng.Rep, 229 (1793); 1 Chitty, On Pleading. c. IV, Of the Praecipe and Declaration 302 (Springfield 3833); Coniyo. Dig, "Pleader," C- 09 (London, 1822).

Such is the case in Assumpsit on a Note. or otherwise for money payable on demand, or a certain time after demand. English: Thorpe & Uxor v. Booth, 1 Ryan & Sl. 388, 171 Eng'lep. 1039 (1820); Carter v. Ring, 3 Camp, 459, 170 Eng. ltep. 1445 (1813); Massachusetts: Greenwood v. Curtis, 6 Mnss. 358, 4 Am,Dec. 145 (1810); New York: Lobdell v. Hopkins, 5 Cow, (N.Y.) 516 (1826); or for failure to deliver goods, or perform any other act, on demand, English: Bach v. Owen, 5 P.R. 400, 101 Eng'lep. 229 (1703) Illinois: Coult v. Watson, 116 Ill. App, 130 (10011; New York: Ernst v. Battle, 1 Johns. (N.Y.) 327 (1807).

§4. 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. English: Collins v. Gibbs, 2 Burr. 509, 9? Eng.Rep. 623 (1759); New York: Parker v. Parmie, 20 Johns (N.Y.) 130, 11 Am,Dec. 253 (1823),

#### **ACTION OF SPECIAL ASSUMPSIT**

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.<sup>55</sup>

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. Maine:

Miller v. Whittier, 32 Me. 203 (1850); Massachusetts: Newcomb s' Brackett, 16 Mass. 161 (1819);

Pennsylvania: Shaw v. Lewistown & K. Turnpike Co., 2 Pen. & W. (Pa.) 454 (1833); Tennessee: Bryan

A Spurgin, 5 Sneed (Penn.) 081 (1558).

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. Indiana: Borne Ins. Co. of New York v. Duke, 43 Md. 418 (1873); Massachusetts: Baker v. Fuller, 21 Pick. (Mass.) 318 (1838); New York: Clarke v. Crandall, 27 Barb. (N.Y.) 73 (1858).

Matter of Excuse must always be alleged where there has been a Failure of Performance of a Condition Precedent. Illinois: Expanded Metal Fire-proofing Co. v. Boyce, 233 Ill. 284, 84 N.E. 275 (1908); Walsh v. North American Cold Storage Co., 260 Ill. 322, 103 N.E. 185 (1913).

An Exception exists in Actions on Bills and Notes and on Insurance Policies. Florida: Spann v. Baltzell, 1 Fla. 301, 46 Am,Dec. 346 (1847); Illinois: Tobey v. Berly, 20 Ill. 420 (1801); German Fire Ins. Co. of Peoria v. Grunert, 112 Ill. 68, 1 N.E. 113 (1884).

55. Connecticut: Smiths' Lewis, 26 Conn. 110 (1857);

Illinois: Allen v. Jartfield, 76 Ill. 358 (1875); Clark v. Weis, 87 Ill. 438, 29 Am,Rep. 60 (1877); Massachusetts: Tinney v. Ashley, 15 Pick. (Mass.) 552, 26 Am,Dec. 620 (1834); Adams v. O'Connor, 100 Mass. 515, 1 Am,Rep. 137 (1868); New York: Leg-lev v. aewett, 11 N.Y. 453 (1828); Ohio: Bodgson v. Barrett, 33 Ohio St. 63, 31 Am,Bep. 527 (1877);

Pennsylvania: Henderson v. Lauck, 21 Pa. 350 (1853); Federal: Bank of Columbia v. Hagner, 1 Pet. 455, 7 LEd. 219 (1828).

Actual performance need not be alleged. Whitall v. Morse, 5 Serg. & B. (Pa.) 357 (1819).

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 English: Morton v. Lamb,

In averring the Excuse for Nonperformance by the plaintiff of a Condition Precedent, the particular circumstances which constitute the EXCUSE must be stated.~

It is sufficient to set out the Performance of a Condition Precedent in the Language of the Condition,<sup>67</sup> 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.<sup>58</sup> All Allegation of performance of all Conditions Precedent in general terms is not ordinarily sufficient.<sup>59</sup>

7 TB. 125, 101 Eng.Rep. 890 (1797); Illinois: Rough v. Rawson, 17 Ill. 588 (1856); Metz v. Alhrecht, 52 Ill. 401 (1869); Osgood v. Skinner, 211 Dl. 229, 71 N.E. 800 (1004). 8cc, also, 2 Williston. Contracts, c. XXVI, Nonperformance of a Counter-Promise as an Eicuse for Breach of Promise, § 533, What Amounts to an Offer to Perform (New York, 1920),

<sup>50</sup> Coppin v. Rurnard, 2 Wms.Snnnd. 120, 132, 55 Eng.Rep. 851, 853 (1670).

<sup>57</sup> Smith's Admr v. Lloyd's Ex'r, 16 Crat. (Va.) 205 (1828).

<sup>53</sup> 1 Chitty, On Pleading, e. IV, Of the Praeipce and Declaration, 357 (Springfield, 1833); Cemyn. Dig. "Pleader" C. 58 (Lendon, 1822); Connecticut: Wright v. Tuttle, 4 Day (Conn.) 313 (1810); New York: Thomas v. Van Ness, 4 Wend. (N.Y.) 553

(1830).

<sup>68</sup> Illinois: Continental Life Ins. Co. v. Rogers, 119 Ill. 474, 10 N.E. 242, 59 Am.Ilep. 810 (1887); Eognrdus v. Phoenix Mfg. Co., 120 Ill.App. 46, 49 (1905); Whelan v. Massachusetts Bonding & Ins. Co., 20.3 Ill.App. 122, 131 (1917).

At Common Law, the General Averment of Performance of Conditions Precedent was bad in form, for net alleging with particularity the Facts of Performance. By Statutes, in many states one may aver the Performance of Conditions Precedent Generally. 4 Encyclopedia of Pleading & Practice, 632, 633 (Northport, 1896).

In the absence of a statute, a General Allegation of Performance of Conditions Precedent by the plainti~ will probably be sustained after Verdict, but prior thereto Is ground of Demurrer. Indiana: Kor~ biy -v. Loomis, 172 md. 852, 88 Nfl 608, 139 Am.St. Rep. 379, 19 Ann.Cas. 904 (1909); Massachusetts:

Newton Rubber Works -v. Graham, 171 Mass. 352, 50

330

## OFFENSIVE PLEADINGS

Ch. 16

Sec. 168

### ACTION OF SPECIAL ASSUMPSIT

331

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; **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.<sup>60</sup>

### *Conditions Subsequent and Provisos*

THE plaintiff need not refer to Conditions Subsequent, but may leave it to the defendant **to plead them, if he so desires, by way of Defense.**<sup>62</sup> The mere Language of a Condition, however, will not indicate with certainty whether it is Precedent or Subsequent. In fact, Professor Williston declares: "What are generally called Conditions Subsequent in Contracts are so called with little propriety. They are in substance Conditions Precedent to the Vesting of Liability and are subsequent only in Form." <sup>63</sup> "Insurance policies always expressly except certain

N.E. 547 (1898). See, also, Note, Contracts—Pleading—Alleging Performance of Conditions Precedent, 5 Minn.L.Rev. 147 (1921).

<sup>60</sup> Collins v. Gibbs, 2 Burr. 890, 97 Engitep, 623 (1759).

<sup>61</sup> English: Perry v. Williams, S Taunt. 62, 129 Eng.Rep. 305 (1817); Massachusetts: Colt v. Root, 17 Mass. 230 (1821); New York: Leffingwell v. White, 1 Johns. (N.Y.) 09, 1 Arn.Dec. 07 (1906); Virginia: Bailey v. CIny, 4 Rand. (Va.) 346 (1826).

<sup>62</sup> Illinois: Aetna Ins. Co. v. Phelps, 27 Iii. 71,

81 Am,Dec. 217 (1862); Rockford Ins. Co. v. Nelson, 65 IU. 415 (1872); Continental Ins. Co. v. Rogers, 119 Iii. 474, 10 N.E. 242, 59 Am.Rep. 810 (1887); Maryland: Ferguson v. Cnppeau, 6 Har. &

J. (Md.) 394 (1825); Federal: *Buckstaff v. Russell & Co.*, 151 U.S. 626, 14 S.Ct. 448, 38 L.Ed. 292 (1893).

Conditions Subsequent, Provisos, or other Matters in Defeat of a right of action, are Matters of Defense to be pleaded and proved by the defendant. *Wilmington & Raleigh B. It. Co. v. Robeson*, 27 NC. 391 (1845).

6~. 2 Williston, *Contracts*, c. XXIII, Express Conditions, 667, Conditions Subsequent (New York, 1920).

risks. The burden of alleging and proving that the loss was caused by one of these excepted matters is generally put on the defendant insurer, though this is often not easy **to justify.**" "

If the defendant's Covenant or Promise be subject to Exceptions which qualify his Liability, the Declaration must notice the Exception, or there will be a fatal mis-statement.<sup>65</sup> The cases draw a distinction between an Exception and a Proviso. An exception in the body of the Covenant or Promise must be set out. "But if A covenants to convey to B a certain farm, with a *separate Proviso*, that on A's performing a certain act, he shall not be bound to convey one particular close,

64. Corbin, *Cases on Contracts*, 700 (St. Paul, 1921); Ames, *A Selection of Cases on Pleading*, e. XIV, *Pleadings in Particular Actions*, § 1, *Specialty and Simple Contracts*, 302, 306 (Cambridge, 1005);

Indiana: *Red Men's Fraternal Ace. Ass'n. v. Rippey*, 181 Ind. 454, 103 N.E. 345, 104 N.E. 64, 50 L.R.A. (MS.) 1006, note (1913); Ohio: *Moody v. Amazon Ins. Co.*, 52 Ohio St. 12, 38 N.E. 1011, 26 LIA. 313, 40 Am.St.Rep. 699 (1894).

'It is well settled that in actions upon insurance policies containing a stipulation that the policy shall be void if any of the representations of the insured are untrue, the defendant must allege and prove the untruth of the particular representation claimed to be untrue." Ames, *A Selection of Cases on Pleading*, e. XIV, *Pleadings in Particular Actions*, § 1, *Specialty and Simple Contracts*, 304, note (Cambridge, 1005).

65. English: *Vavasour v. Ormred*, 6 Barn. & Cress.

430, 108 Eng.Lrep. 500 (1827); *Browne v. Knill*, 2 Brod. & Bitig. 395, 129 Eng.Rop. 1019 (1521); Maryland: *Ferguson v. Cnpeau*, 6 Bar. & J. (Md.) 394 (1825).

A Bill of Lading, containing Exceptions for loss by "the dangers of the seas," has been held to be a qualified undertaking and not a Proviso, and does not support an Allegation of a General Undertaking to transport the goods safely and deliver them. *Brklge v. Austin*, 4 Mass. 115 (1805).

The precise terms of the Contract of Shipment need not be set out, where the action is based on Breach of the Obligation of a common carrier in Case. *Atlanta. & W. P. B. Co. v. Jacobs' Pharmacy Co.*, 135 Ga. 113, 68 SE. 1030 (1910). See, also, Ames, *A Selection of Cases on Pleading*, c. XIV, *Pleadings in Particular Actions*, § 1, *Specialty and Simple Contracts*, 295 (Cambridge, 1905).

Cl. 16

DECLARATION EN SPECIAL ASSUMPSIT—  
ESSENTIAL ALLEGATIONS: (5) THE  
BREACU

**169. 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.<sup>67</sup> The manner of its Allegation must necessarily be governed by the nature of the Promise or stipulation broken.<sup>65</sup> It should be Assigned *in* the words of the Contract, either negatively or affirmatively, or in words which are co-extensive with its import and effect.<sup>69</sup> Though the express words of the

65. Gould, *A Treatise on the Principles of Pleading*,  
Div. Ifl, *The Declaration*, c. 1, *General Rules*,  
365 (6th ed. by Will, Albany, 1009); *Fike v. Stratton*,  
174 Ala. 541, 56 So. 029 (1911); Note, "Pleading an,  
Practice—Negating Exceptions", 10 Col.L.Rev. 527

(1016).

Cl. Georgia: *Garrett v. Hitchcock*, 77 Ca. 427 (1886);  
New Hampshire: *Bender v. Malnjag*, 2 N.H. 289 (1849).

68. Alabama: *Withers v. Knox*, 4 Ala. 138 (1842);  
Arkansas: *Patterson v. Jones*, 13 Ark. 09, 56 Am. hoc, 206 (1852),

The words of the Contract need not necessarily be used; but it is necessary that the words employed shall show clearly that the Contract has been broken. Thus, in Debt on a Bond, conditioned for the payment of an annual sum for "the wile" of the obligee, a Breach assigned in

Nonpayment to the

“obligee”, is insufficient. English: Lunn v. Payne, *O Taunt.* 140, 128 Eng.Rep. 986 (1815); Kentucky:

Moxley’s Adm’rs v. Moxley, 2 Mete. (Ky.) 309 (1859); New Hampshire: Atlantic Met. Fire Ins. Co. v. Young, 38 *N.H.* 451, 75 Am.Dec. 200 (1859).

If the Breach assigned varies from the sense and Substance of the Contract, and is either more innited or larger than the Promise, it will be insntTh dent. Thus, in the case of a Promise to repair a fence, except on the west side thereof, a Broach thnt the defendant did not repair the fence, without showing that the want of repair ~vaS ia other parts of the fence than on the west, is bad on Demurrer, though it may be Aided by Verdict. I Chitty, On Pleading, c. *TV*, Of the Praeicpe and Declaration, 367 (Springfield, 1833); Comyn. Dig. “l’lendei-”, C.

47 (London, 1522). It is unsafe to unnecessarily narrow the Breach. Thus, where the Breach assigned was that the defendant had not used a farm in a husbandlil~e manner, ‘~p~ on the contrary had committed waste,” it was lJeld that the plaintiff could not give evidence of the tie-feudnts using the farm in an unlñsbandlihe manner, if such misconduct did not amount to waste, though on the former words of the assignment such evidence would have been admissible. I Chitty, On Pleading, c. *IV*, Of the Praoicpe and Declaration, 368 (Springfield, 1833); Harris v. Mantle, 3 Term.fl. 307, 100 Eng.Rep. 591 (1789).

The safest course is to state the Breach frst 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 assignliment, 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 nithough he *only* prove a part of the Breach as laid. I Cbitty, Oa Pleading, c. *IV*, Of the Declaration, 346 (Springfield, 1876); Barnard v. Oaths, 5 Taunt. 27, 125 Eng.Rep. 595 (1813).

332

### OFFENSIVE PLEADINGS

Contract will generally be sufficient, they may not always be so. The assignment must not be too general; it must show the subject-matter bf complaint.~° “And therefore

parcel of the farm; B in Declaring on the Covenant, need not take notice of the *Proviso*.” °6 For it is in the nature of a Condition Subsequent, of whjch A may avail himself in Defense, if he has performed the act mentioned in the Proviso, A distinction analogous to that stated prevails in declaring upon penal statutes. Where an Exception is incorporated with the Enacting Clause of a Statute, he who pleads the clause ought to plead the Exception. But it is otherwise of a Proviso; that is a Subsequent and Independent Clause, which provides that in certain cases the statute shall not operate.

535 (1562); New Yoi-k: ~uliand

(N.Y.) 477 (1544); Federal:

Blatehf. 346, Fed.Cas.No.17,040

v. Bui’gott, 11 Johns. Wilcox ‘c. Cohn, 5 (1806).

c- Maryland: I-Carthus v. Owings, 2 Gill. & 3. (Md.)

441 (1830); Missouri: Gardner v. Armstrong, 31 Mo.

70 English: Wara v. Bieliford, 7 Price 550, 146 Erg.

Rep, 1055 (1819); Baxter v. Jackson, 1 SM. 178, 52

### Sec. 170

### ACTION OF SPECIAL ASSUMPSIT

333

it seems that a general averment *quad non per fornav~t*, or that ‘the defendant did not perform the said agreement,’ is insufficient [on Demurrer, though Aided by Verdictj, because ‘did not perform his agreement’ might involve a question of law, and also because the object of pleading is to apprise the defendant of the cause of complaint, so that he may prepare his Plea and Defense and Evidence in answer.” 71 But “where the breach lies more in the defendant’s than the plaintiff’s knowledge, less particularity is required.” 72

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**; ~ and, **if the Contract is** in the Alternative or the Disjunctive, it is oh.. vious that the Assignment should be that the defendant did not do one act or the other.<sup>7-1</sup>

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

Eng.Rep. 1042 (1664); MIssissippi: Williams v. Staten, 5 Sin. & M. (Miss.) 347 (1845).

.I Chitty, On Pleading, a *IV*, Of the Dcciaration, 343 (SprIngfield 1876); Knight v. Keech, 4 Mod. 189, 87 Eng.Rep. 341 (1601).

72. I Chitty, On Pleading, c. *iv*, or the Praccipc and Declaration, 369 (Springfield 1833).

73. English: Serra v. Wright, C taunt. 45. 128 Eng. Rep. 949 (1515); Alabama: Mc-Gehee v. Chihlress, 2 Stew. (Ala) 506 (1830).

74. As on a Promise to deliver a horse by a partiatlar tjay, or pay a sum of money, or on a Promise that the defendant, and his Executors and Assigns, should repair. English: Wright -v. Johnson, 1 Sid. 440, 82 Eng.Bep. 1205 (1870); Aleberry v. Walby, 1 Sty. 229, 93 Eng.Rep. 489 (1719); Colt v. How, Ore. Ella, 348, 78 Eng.flep. 597 (1594).

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, pa~'s. Aleberry v, Walby, 1 Str. 229, 53 Eng.Rep. 489 (1710).

**by Verdict.**<sup>5</sup> **But, if a Breach is Assigned, a defect in Assigning it must be taken advantage of by Demurrer, and will be cured by Verdict.**<sup>76</sup>

## DECLARATION IN SPECIAL ASSUMPSIT— ESSENTIAL ALLEGATIONS: (6) THE DAMAGES

**170. The Declaration in Special Assumpsit should state the Damages which arise as the Direct and Legal, and sometimes the Actual, though not the Direct, Consequences of the Breach. Such Damages may be General or Special, and should be alleged according to their nature.**

WHEREVER there has been a Breach of Contract, the plaintiff is necessarily entitled to *some* compensation in the way of Damages, though it may often be difficult to ascertain the amount)<sup>7</sup> They must always be the direct or proximate result of the facts stated, and it is a general rule of pleading that the declaration must allege them, whether they are the main object of the action or only an incident. The amount recoverable in Special Assumpsit is generally fixed by the terms or nature of the Contract itself, under recognized rules of law, and may be only the contract price with interest, or it may include Special or Consequential Damage in addition. The manner of stating the Damage will depend upon its character, as General or Special; but a sum large enough to cover the whole claim must be alleged, as it is a general

-5. I Chitty, On Pleading, c. Iv, Of the Praeipe and Declaration, 370 (Springfield 1838). Briekhead v, Archbishop of York, Hob. 197, 80 Eng.Bep. 844 (1617); Heard v. Baskerville, Hob. 232, SO Eng.llep.

878 (1614).

76. English: Harmon v. Owden, 1 salk. 140, 91 Eng. Rep. 130 (1691); Knight v. Keeeb, Skin. 344,90 Eng. Rep. 153 (1692); Charnloy v. Winstanley, 5 East 270, 102 Eng. flep, 1072 (1804); New York: Thomas v. Roosa, 7 Johns. (N.Y.) 461 (1811); Pennsylvania: Weigley's Adm'rs. v. Weir, 7 Serg. & U. (Pa.) 310 (1817); Virginia: Rorrel v. Mesixander, 3 Rand. (Va.) 94 (1824).

77. Comyn, Dig. "Pleader," C. 84 (London, 1822).  
334

### OFFENSIVE PLEADINGS

Ch. [6

nile that the recovery cannot exceed the demand,<sup>78</sup> though it may be less.<sup>10</sup>

### STATUS UNDER MODERN CODES, PRACTICE ACTS AND RULES OF COURT

**171. The Action of Special Assumpsit, de~ spite efforts at change, continues to form a basis for liability, not only in the Non-Code States, but also in States operating under Modem Codes, Practice Acts and Rules of Court,**

78. Tidd, Practice Of the Courts of Kings Bench and Common Pleas, 806 (9th S. London, 1825). Arkansas; Jones v. Robinson, S Ark. 484 (1848); Illinois: Morton v. McClure, 22 III. 257 (1859); Maryland: Harris v. Jaffray, 3 Ilar, & 3. (Md.) 546 (1815); Virginia: Tennant's Ex'r. v. Gray, 5 Munf. (Va.) 494 (1817).

The ad *damnum* clause will govern though a less amount be laid, under a *Videlicet*, in the body of the Declaration. *Chicago & A. U. Co. v. O'Brien*, 34 Ill. App. 155 (1880).

When a larger amount is recovered than is claimed, the error may be cured by a *Remittitur* of the Excess, and this will generally be required. *Louisville, B. & St. L. R. Co. v. Harlan*, 31 m.App. 544 (1826).

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 the suit was brought, chiefly on the ground that these subsequent matters would take the defendant by surprise. *Duncan v. Markley*, 1 Harp. (S.C.) 276 (1824); *Comyn, Dig. "Damages," I* (London, 1822).

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. English: *Fetter v. Beal*, 1 Ld.llym. 339, 01 Eng.Itcp. 1122 (1698); Maryland:

*Cooke v. England*, 27 Md. 14, 02 Am.Dec. 618 (1867); Massachusetts: *Pierce v. Woodward*, 6 Pick. (Mass.) 206 (1828); Minnesota: *Chamberlain v. Porter*, 9 Minn. 260 (Gil. 244) (1864). See, also, the following cases; Massachusetts: *Warner v. Bacon*, 5 Gray (Mnss4 307, 60 ArrnDec. 25~ (1857); West Virginia:

*Jameson v. Board of Education*, 78 W.Va. 612, 59 SE. ~55, L.R.A.19113F, 926 (1916).

-o. English: *Gardiner v. Croandale*, 2 Burr. 904, 97 Eng.Rep. 625 (1760); New York: *Van Rensselaer's tx'rs. v. Platner's Ex'rs*, 2 Jolrns.Cas. (N.Y.) 18 (1806); South Carolina: *Covington v. Lide's Ex'rs*, 1 Hay (S.C.) 158 (1791). See, also, *Sayer, Damages*, 45 (London, 1770).

THE Status of Special Assumpsit under Modern Codes, Practice Acts and Rules of Court, clearly appears from a series of cases to which reference will now be made.

Long before the Code of 1848, in the pivotal New York case of *Thoi-ne c~ Thorne v. Deas*,<sup>80</sup> decided in 1809, which involved an Action of Trespass on the Case *Super Se Assumpsit* for a Nonfeasance in not causing insurance to be taken on a certain vessel, Chief Justice Kent, after reviewing the eal'y Common *Law* learning on the development of Special Assumpsit out of Trespass on the Case, from *Watton v. Brinth*,<sup>81</sup> decided in 1400, to the *Anonymous Cae* in 1505,<sup>52</sup> held that the promise to take out insurance was not good, without showing a Consideration. In *Candler c~ Hart v. Rossiter*,<sup>83</sup> decided in 1833, the plaintiff declared in Assumpait for Money Paid, omitting the ordinary *Super Be Assumpsit*—that the defendant undertook and promised—and instead thereof stated the circumstances of his case, to wit, that he bought a quantity of fish for the purpose of shipping it to a foreign port; that defendant, as a joint adventure placed a similar quantity of fish on board the same vessel, the parties to share the profit and loss; that the fish were so damaged at sea, that they were sold at a loss, the whole of which the plaintiff sustained and paid, without having received any part thereof from the defendant, whereby the plaintiff was damaged in the sum of \$500. On Writ of Error, after a Trial and Verdict for the plaintiff, it was held that the Declaration was bad in not alleging a promise by the defendant and hi not setting forth a consideration. In reversing the Judgment below, Sutherland, J., declared:

"It is probable that at this day the defect in those Declarations would be considered a

80. 4 Johns. (N.Y.) 84 (1800).

sl. Y.B. 2 Hen. IV, Sb (1400).

- Kellway, 78, p1. 5, 72 Eng.Rep. 239 (1505).

as. ,~ we , ~t (N.Y.) 487 (1838).

Sec. 171

### ACTION OF SPECIAL ASSUMPSIT

33:

clerical omission, as the sentence in each was obviously imperfect without the words *Undertook and Promised*—*Super Sc Assumpsit*, &c.; but They mark strongly the indispensable importance of the Allegation that the defendant promised, &c. Mr. Lawes, whose treatise on pleading in the Action of Assurnpsit is of the highest authority, seems to *consider the* omission of the Allegati on as fatal, after Verdict. This doctrine, upon the authority of the preceding cases, was also admitted by the Supreme Court of Massachusetts, in 3 Mass.R. 160; opinion of Sedgwick, J., page 176. Judge Gould, in his valuable treatise on pleading, speaking on the

subject of direct and positive averments, says, the rule appears to be, that all those facts which are directly denied by the terms of the general issue, or which may, by the established usage of pleading, be specially traversed, must be averred *in direct and positive terms*. Thus, in *Assumpsit* the *Promise* must be stated in terms direct and positive, because the general issue, *Non Assumpsit*, purports to be a direct denial of the *Promise*. Gould's Treatise on Plead. 73, § 42, 44, 75. Considering therefore, that no contract or agreement whatever is distinctly stated, nor any promise by the defendant, nor any consideration for a promise, I think the Judgment must be arrested. These defects are not cured by the Statute of Jeofails; it is the case of a defective title, and not of a good title defectively set out"~

After the adoption of the Code of 1848, in the case of *Boott v. The Farmers & Mechanics' National Bank of Rochester*,<sup>85</sup> the plaintiff filed a Declaration in Assumpsit containing two Counts. The first Count set forth that the defendant had assigned to the plaintiff a Judgment, that thereafter the defendant discharged the Judgment; that the defendants in the Judgment owned personal property, which, but for the discharge of the

84. 10 Wend. (N.Y.) 487, 491 (1833).

1 Thomp. & C. 45, 65 Barb. 457 (1873).

Judgment would have been liable to execution and sale; and the defendants in the Judgment are now insolvent; and the plaintiff has been injured by the discharge. The second Count alleged that defendant was indebted to the plaintiff for Money Had and Received. The defendant demurred on the ground of a Misjoinder of Actions, viz, one for a Tort, and one on Contract. On an Appeal from an Order overruling the Demurrer, the Order was reversed.

The first Count omitted the Allegation that the defendant undertook and promised to do the act complained of—that is, the Implied Promise by the defendant not to satisfy the Judgment. Without such an Allegation the Count was in Case. And as the second Count was in Contract, there was a violation of the then rule of pleading that Tort and Contract Actions could not be joined. In reversing the Order of the Lower Court, the Court declared;

"The Codifiers, while proposing to abolish the distinction between Forms of Actions, found it impossible or impracticable, in many cases, to effect their object, and this case illustrates the failure in at least one class of cases. When *Case* and *Assumpsit* were, at Common Law, Concurrent Remedies, the Form of Action that the pleader selected was determined, as I have shown, by the insertion or omission from the Declaration of the Allegation, that the defendant "undertook and promised." This right of selection remains, and whether the action is in *Tort* or *Assumpsit* must be determined by the same criterion. If this is not so, then the right of election is taken away. If taken away, which of the two is left? An Action on Contract cannot be joined with one in Tort. How are we to determine whether the action is One on Contract or in Tort, unless the pleader, by averment, alleges the making of the Contract, and demands damages for a Breach in the one case, or by the omission of such an averment makes it an

886

### OFFENSIVE PLEADINGS

cit. 16

Action in Tort? I know of no more certain or convenient criterion by which to determine the class to which a Cause of Action belongs than the one suggested. If some such rule is not established the question of misjoinder will arise in every case in which, at Common Law, *Assumpsit* and *Case* were Concurrent Remedies." ~

In the case of *Glanzer v. Shepard*, decided in 1922,<sup>87</sup> public weighers were requested by the seller to weigh goods sold, and were paid for their services by the seller, and the property was accepted and paid for by the plaintiffs, the buyers, on the faith of the weigher's certificate. Upon discovering that the actual weight was short by 11,854 pounds, the plaintiffs brought suit for \$1,261.26, the amount over paid. In the City Court of New York, the Trial Judge, upon Motion made by each side for the direction of a Verdict, gave Judgment for the plaintiffs. The Appellate Term reversed upon the ground that the plaintiffs had no



contract with the defendants, weighers, and must seek their remedy against the seller, whereupon the Appellate Division reversed the Appellate Term and reinstated the Verdict. On Appeal, the Court of Appeals affirmed the Judgment. Judge Cardozo declared: "We state the defendant's obligation, therefore, in terms, not of contract merely, but of duty. Other forms of statement are possible. They involve, at most, a change of emphasis?"  
88

St. flo~tb v. The Farmers & Mechanics' National Bank of Rochester, I Thonip. & C. 45, 50, 65 Barb. 457 (1873). See, also, Groco v. S. 3. ICresge Co., 277 N.Y. 26, 12 N.E.2d 557 (1938), reviewed in 13 St John's *L.Rey*, 187 (1938) and in 23 Mlnn.L.fley. 92

(1938).

87. Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922).

88. Gianser v. Shepard, 233 N.Y. 236, 135 N.E. 275, 277 (1922).

In the Illinois case of *Banik v. BishopStoddard Cafeteria Co., The.*<sup>89</sup> decided under the Illinois Practice Act, a former employee of a corporation, which had agreed to buy his stock in the corporation upon the termination of his employment, upon refusal of **the corporation to buy the stock**, filed a suit to recover damages equal to the difference between the amount which the corporation **had agreed to pay** and the amount realized from sale thereof on the open market. The Declaration consisted of the Common Counts, to **which the defendant pleaded the** General Issue and two Special Pleas, one of which stated that the alleged promises were not evidenced by any writing, and hence were within the Statute of Frauds, while the other stated that the alleged promises were without consideration. **At the conclusion of** plaintiff's evidence, and at the close of all the evidence, the defendant moved for a Directed Verdict. The Motion having been de&ed, a Verdict was rendered finding the defendant liable and assessing the plaintiff's damages at \$758.00. The defendant moved for Judgment Notwithstanding the Verdict, in Arrest of Judgment and for a New Trial, which Motions were denied, although with a Remittiter of \$350, after which Judgment was rendered in favor of Plaintiff, On Appeal, the Judgment was reversed and remanded, the Court stating that the Common Counts cannot be resorted to where there is a Special Contract and **the Breach thereof is the gray-**amen of the action, but in such case the plaintiff must declare specially.

From the foregoing discussion, it appears that the Action of Special Assumpsit, despite the efforts at reform, is still alive and vigorous, not only in the Non-Code States, but also in States operating under Modern Codes, Practice Acts and Rules of Court.  
89. 288 Ill.App. 174 (1937).

Sec.

## CHAPTER 17

### THE ACTION OF INDEBITATUS ASSUMPSIT<sup>1</sup>

- 172. Scope of the Action.
- 173. Express Contracts Which Do Not Exclude Indebitatus Assumpsit.
- 174. Indebitatus Assumpsit Distinguished From and Concurrent With Other Actions
- 175. Forms of Declarations in Indebitatus Assumpsit.
- 176. The Common Counts.
- 177. Contracts of Record and Statutory Liabilities.
- 178. Declaration in Indebitatus Assumpait—Essential Allegations:
  - (1) In General.
- 179. Declaration in Indebitatus Assumpsit—Essential Allegations:
  - (2) Statement of an Executed Consideration.
- 180. Declaration in Indebitatus Assumpsit—Essential Allegations:
  - (3) The Promise.
- 181. Declaration in Indebitatus Assumpsit—Essential Allegations:
  - (4) The Breach.

182. Declaration in Indebitatus Assumpsit—Essential Allegations:

(5) The Damages.

183. Status Under Modern Codes, Practice Acts and Rules of Court.

#### SCOPE OF THE ACTION

172. Indebitatus or General Assumpsit is brought for the Breach of a Fictitious or Implied Promise raised by Operation of Law from a debt founded upon an Executed Consideration. The basis of the action is the Promise Implied by Law from the Performance of the

1. In general, on the Origin, History and Development of the Action of General (Indebitatus) Assumpsit, see:

Tracts: Evans, Essays on the Action for Money

Had and Received; and on the Law of Insurances

(Liverpool, 1802); Hare, The Law of Contracts, c.

XI, Implied Promises, 227—240 (Boston, 1887);

Keener, A Treatise on the Law of Quasi-Contracts,

c. III, Waiver of Tort, 159—213 (New York, 1893);

Pomeroy, Code Remedies, c. III, § 406, History of the

Action of Assumpsit, 530 (4th ed. by Bogle, Boston,

1904); Martin, Civil Procedure at Common Law, e.

II, Personal Actions Ex Contractu, Article III, 40—61, § 51—GO Assumpsit, (St. Paul, 1905) Martin,

Civil Procedure at Common Law, Appendix, Note 1,

General Assumpsit for Part Performance of Express

Contracts, 341—349 (St. Paul, 1905); 3 Street, Foundations of Legal Liability, c. XV, Action of Indebitatus Assumpsit, 182 (Northport, 1900);

Woodward,

The Law of Quasi-Contract, c. J, Indebitatus As-

Consideration, or from a debt or legal duty resting upon the defendant.

#### Assumpsit—General or Special

THERE finally evolved, from the original Tort Action of Trespass on the Case *Super Sc Assumpsit*, the Actions of Special Assumpsit

umpsit, § 2 (Boston, 1913); 3 Holdsworth, History of English Law, c. III, (4) The Extension of the Action to Remedy the Breach of Implied

Contract, 440—454 (3d ed. Boston, 1927); Anson, Principles of the English Law of Contract, Pt. VII, Contract and Quasi-Contract, 426 (1st

Ed., Oxford, 1937); Jackson, The History of Quasi-Contract in English Law, Pt. I, Before the Rise of Indebitatus Assumpsit in the 17th

Century; Pt. II, From the Rise of Indebitatus Assumpsit to the Settlement of the Main Principles (Cambridge, 1936); Maynard, The Forms of

Action, Lecture VI, Assumpsit, 99 (Cambridge 1902); Fifoot, History and Sources of the Common Law, c. 15, The Subsequent Development

of Assumpsit, Indebitatus Assumpsit, 353-380 (London 1940).

Articles: Holmes, Early English Equity, 1 L.Q.Rev.

162 (1885); Adolphus, The Circuiters, An Elogue,

1 L.Q.Rev. 232 (1885); Ames, History of Assumpsit,

Pt. II, 2 Harv.L.Rev. 53 (1888); Ames, Assumpsit for Use and Occupation, 2 Harv.L.Rev. 317

337

238

### OFFENSIVE PLEADINGS

#### Ch. 17

and Indebitatus or General Assumpsit. As differentiated, Special Assumpsit became the remedy for the Breach of an Actual, Express Promise contained in a Contract entered into by the parties, whereas Indebitatus Assumpsit became the remedy in the field of Simple (Executed) Contract, the action not being grounded upon a Special Contract or Actual Promise, but upon a promise Implied by Law from the existence of a legal duty to pay money for value received.

#### Contracts Implied in Fact and in Law

IN this connection, however, it should at once be observed that the term "Implied Contracts" has been and is used in at least two senses.

As used in one sense it means a Tacit Contract, Implied as a Matter of Fact from the conduct of the parties, because their course of conduct shows agreement, as where one of them has delivered goods to or performed

(1889); Keener, Waiver of Tort, 6 Harv.L.Rev. 223, 269 (1803); Corbin, Waiver of Tort and Suit in Assumpsit, 19 Yale L.J. 221 (1910); Hanbury, The Recovery of Money, 40 L.Q.Rev. 31 (1924); Cohen, Change of position in Quasi-Contracts, 45 Harv.L.Rev. 5333 (1932); Langmaid, Quasi-Contract—Change of Position by Receipt of Money in Satisfaction of a Preexisting Obligation, 21 Calif.L.Rev. 311 (1933); House, Unjust Enrichment: The Applicable Statute of Limitations, 35 Corn.L.Q. 797 (1950); Seavey, Problems in Restitution, 7 UCLA.L.Rev. 257 (1954).

**Comments:** Pleading: Sufficiency of the Common Counts, 4 Calif.L.Rev. 352 (1915—BIG); Pleading: Complaint: Common Counts: Allegation of Promise to Pay Where Services Rendered to Third Party, 21 Calif.L.Rev. 396 (1933); Contracts—Implied Contracts—Implied Warranty in Bailment and Other Non-Sales Contracts, 17 Minn.L.Rev. 210 (1933); Pleading—Complaint—Common Counts in Assumpsit Followed by Allegation of Promise to Pay, 21 Minn.L.Rev. 756 (1937); Eckor, Contract: Sales: Property in Ideas: Ideas as Subject Matter of Express, Implied in Fact and implied in Law Contracts, 31 Corn.L.Q. 382 (1946).

**Annotation:** Previous Debtor and Creditor Relationship a Condition of Account Stated, 6 A.L.B.2cl 113 (1949).  
services for another, at the other's request or with the other's knowledge, and under such circumstances as to raise a presumption that the other, as a reasonable man, must have known that payment for them was expected. Although no Express Promise to pay was made, the Law recognizes that by his conduct he Impliedly Promised to Pay, and to enforce this Implied in Fact Promise, Assumpsit is the proper remedy.<sup>2</sup>

The term "Implied Contract," as used in a second sense, is applied to promises Implied or Created by Operation of Law, without any agreement between the parties, and oftentimes, even when the circumstances actually negative the existence of any agreement whatsoever, as where one 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 thus said to be Implied in Law is a sheer fiction of Law, resorted to for the purpose of allowing a remedy in Assumpsit. Such Obligations are not Contractual, but Quasi-Contractual,<sup>3</sup>

### **EXPRESS CONTRACTS WHICH DO NOT EXCLUDE INDEBITATUS ASSUMPSET**

173, Indebitatus or General Assumpsit will not lie where there has been an Express Contract, except that it may be permitted in instances such as the following:

- (I) Where the facts underlying the Express Contract are equivalent to the legal duty created by the Contract.
- (II) Where the Contract, or some divisible part thereof, has been Fully Executed by the plaintiff, and nothing remains but the payment of **money by the defendant**.

2. Ames, Lectures on Legal History, c. XIV, Implied Assumpsit, 154—150 (Cambridge 1913).

3. Woods v. Ayres, 39 Mich. 345, 33 Am.Rep. 396 (1878).

### **Sec. 173**

### **ACTION OF INDEBITATUS ASSUMPSET**

339

**Contract and the Substantially Per-defendant has re(IV) Where, after part Performance of the Contract, Further Performance is prevented by an act of the defendant, or by some act or**

**event**

which in law operates as a discharge of the Contract, or if the **Contract is abandoned or rescinded.**

**(V) Where the 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. .

(VI) Where Additional Work has been

**done on request in performing a Special Contract.**

THE general rule of law is that if there is an Executory Special Contract, Indebitatus Assumpsit will not lie; for the Law will not imply a Promise to pay, except where the Consideration is Executed on the plaintiff's part and a duty arises to pay the value of what he has done.<sup>4</sup>

The leading English case of *Cutter v. Powell*,<sup>5</sup> is cited in the leading American case of

<sup>4</sup> See *Cutter v. Powell*, reported in 2 Smith, Leading Cases, 1, notes, 9 (13th ed. by Chitty, Denning & Harvey, London, 1929); Illinois: *Theis v. Svoboda*, 166 Ill.App. 20 (1911); Indiana: *Edward Thompson Co. v. Kollmeyer*, 40 Ind.App. 400, 92 N.E. 660 (1910). To recover in Assumpsit for Breach of an Executory Contract of Sale of corporate stock, plaintiff must Declare Specially on the Contract, General Counts alone not being sufficient except where payment is the only unperformed act. *Thomas v. Mott*, 78 W. Va, 113, 88 SE. 651 (1916).

Where a Special Contract remains Executory, the plaintiff must sue upon it. Maryland: *Waddell v. Phillips*, 133 Md. 497, 105 A. 771 (1910); West Virginia: *Standard Fashion Co. v. Loplnsky*, 84 W.Va. 522, 101 S.E. 152 (1910); Federal: *Kinney v. McNabb*, 44 App.D.C. 340 (1910).

A claim for Damages for Breach of Contract to do some act other than pay money must be Specially Plead. *nook v flado*, 191 S.Uch. 561, 158 N.W. 175 (1916).

*Hersey v. Northern Assurance Co.*,<sup>6</sup> in which the Court alluded to the Common Law rule as follows: "In the present case the facts aside from the Promise, viz: the plaintiff's ownership of the property, its destruction by fire without his fault,—even the payment of premiums,—do not raise an Implied Promise by the defendant to pay; it is only the fact that it Promised, upon certain conditions, to pay, that makes it liable. Consequently, at Common Law, the Promise, the Conditions, and the Fulfillment of the Conditions, must be set forth—in other words the Count must be Special."

But an Express Contract, under which a transaction has been Partially or Wholly Executed, does not always exclude an Action of Indebitatus or General Assumpsit for money due on such transaction. The factual situation involved may give rise to an Implied Contract, in which case recovery may be had on a Common Count. The occasions when this may occur may be grouped under the following heads:

<sup>6</sup> 75 Vt. 441, 56 A. 05 (1903).

<sup>7</sup> *Hersey v. Northern Assurance Co.*, 75 Vt. 4-41, 443.

56 A. 03 (1903).

S. *Gibbs v. Bryaut*, 1 Pick. (Mass.) 115 (1822). See, also, English: *Pownal v. Ferrand*, 0 B. & C. 439, 108 Eng.Bep. 513 (1827); Maine: *Davis v. Smith*, 10 Atl. 55 (1887); Federal: *Keene v. Meade*, 3 Pet (U.S.) 1, 7 LEd. 581 (1830).

**(III) Where there is a plaintiff has not formed, but the ceived a benefit.**

(I) *Where the Facts Underlying the Express Contract are Equivalent to the Legal Duty Created by the Contract.*—Where the Express Contract in question creates no other obligation than that which the Law would normally imply from the existing factual situation, a Common Count in Indebitatus Assumpsit will lie; Thus, in *Gibbs v. Bryant*,<sup>8</sup> where the defendant had made a written promise to indemnify the plaintiff for a payment made by the plaintiff, it was held that the action could be supported for the payment of money by the plaintiff for the use

<sup>8</sup> 2 Smith's Leading Cases, 1 (13th ed. by Chitty,

Donning & Harvey, London 1929).

#### OFFENSIVE PLEAINGS

of the defendant, even though there was an Express Promise to pay the debt.<sup>9</sup>

(II) *Where the Express Contract has been Fully Executed or Performed, and nothing remains but the Payment of Money by the Defendant.*—If the Contract has been Fully Executed by the plaintiff and nothing remains to be done 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, or he may join the Common Counts with Special Counts.<sup>10</sup>

<sup>9</sup> 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 action must be in Special Assumpsit. Thus, the Common Counts will not lie where the price is payable partly in cash and partly by the conveyance of land, English: *Harrison v. Luke*, 14 M. & W., 139, 153 Eng. Rep. 423 (1845); Illinois: *Meyers v. Seherup*, 07 Ill. 469 (1873); *Kinne v. Lane*, 230 Ill. 544, 82 N.E. 578, 120 Am.St.Rep. 335 (1917); *Ken v. Tveky*; *Cochran v. Tatiun*, 3 T.B.Mon. (Ky.) 405 (1826); Maine: *Thomas Mfg. Co. v. Watson*, 55 Me. 300, 27 A. 1711 (1893) Massachusetts: *Ernerton v. Andre-vs*, 4 Mass. 653 (1808); *Baylles v. Fettyphace*, 7 Mass. 320 (1811); *Shearer v. Jewett*, 14 Pick. (Mass.) 232 (1833); Michigan: *Pierson v. Spaulding*, 61 Mich. 00, 27 NW. 865 (1886); New Hampshire: *Ranlett v. Moore*, 21 N.H. 336 (1850); New York: *Wilt v. Ogden*, 13 Johns. (N.Y.) 56 (1816); Pennsylvania: *Doebler v. Fisher*, 14 Serg. & It. (Pa.) 179 (1820); Virginia: *Brooks v. Scott's Ex'rs*, 2 Munf. (Va.) 344 (1811).

Indebitatus Assumpsit is not the proper form of action where the agreement sought to be enforced is not for the payment of money for machinery, but for the liquidation of the debt by the obtaining of notes from a third party for whom the defendant is acting. *Power Equipment Co. v. Gale Installation Co.*, 210 Ill.App. 147 (1918).

10. Alabama: *Trammell v. Lee County*, 94 Ala. 104, 10 So. 213 (1891); Illinois: *Lane v. Adams*, 19 Ill. 167 (1857); *Tunnison v. Field*, 21 Ill. 108 (1839); *Combs v. Steele*, 80 Ill. 101 (1875); *Throop v. Sherwood*, 4 Gil. (Ill.) 92 (1847); *McArthur Bros. Co. v. Whitney*, 202 Ill. 527, 07 N.E. 163 (1903); Maryland: *Lidgley v. Crandall*, 4 Md. 441 (1853); Massachusetts: *Everett v. Cray*, 1 Mass. 101 (1804); *Felton v. Dickinson*, 10 Mass. 287 (1813); *Knight v. New England Worsted Co.*, 2 Cush. (Mass.) 271 (1848); *ahcr v. Corey*, 19 Pick. (Mass.) 496 (1887); *Michigall: Nugent v. Teachout*, 67 Mich. 572, 35 NW.

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.

If we assume that the insufficient performance gives a right to recover, the Action would be upon the Common Counts.<sup>11</sup>

254 (1887); New York: *JeweU v. Scliroeppe*, 4 Cow. (N.Y.) 56-1 (1825); *Williams v. Sherman*, 7 Wend. (N.Y.) 109 (1831); *Pettier v. Sewal*, 12 Wend. (N.Y.) 286 (1834); *Dubois v. Delaware & H. Canal Co.*, 4 Wend. (N.Y.) 285 (1830); Pennsylvania: *homeisler v. Dobson*, 5 Whart. (Pa.) 398 (1839); *ICelley v. Foster*, 2 Bin. (Pa.) 4 (1800); *Miles v. Moodle*, 3 Serg. & It. (Pa.) 211 (1817); Virginia: *Baltimore & O. It. Co. v. Polly*, 14 Gratt. (Va.) 477 (1858); Federal: *Dermott v. Jones*, 2 Wall. (U.S.) 1, 17 L.Ed. 762 (1864); *Lank of Columbia v. Patterson*, 7 Cranch (U.S.) 299, 3 LEd. 351 (1813); *Chesapeake & O. Canal Co. v. Knapp*, 9 Pet. (U.S.) 541, 9 LEd. 222 (1835); *Perkins v. Hart*, 11 Wheat. (U.S.) 237, 6 LEd. 463 (1826).

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.

English: *Itobson v. Godfrey*, 1 Stark, 275, 171 Eng. Rep. 225 (1816); Illinois: *Manton v. Gammon*, 7 Ill.App. 201 (1880); Massachusetts: *Hunnemann v. Inhabitants of Orafton*, 10 Mete. (Mass.) 454 (1845); *Loring v. Gurney*, 5 Pick. (Mass.) 16 (1827); Pennsylvania: *Girnrel v. Taggart*, 5 Serg. & It. (Pa.) 19. It Am.Dec. 327 (1818).

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. Alabama: *Montgomery Co. v. New Parley Nat. Bank*, 200 Ala. 170, 75 So. 918 (1917); Illinois: *Brand v. Henderson*, 107 Ill. 141 (1853).

141 (1853).

Where an attorney rendered services under a Contract providing for a contingent fee, and the Contract was wholly Executed, he may recover his fee in Assumpsit on the Common Counts, *Carpenter v. Smithey*, 118 Va. 533, 88 S.E. 321 (1916).

Common Counts may be joined with a Special Count, alleging an Express Written Contract. *Conservation Co. v. Stimpson*, 136 Md. 314, 110 A. 495 (1920); *Alexander v. Capital Paint Co.*, 136 Md. 858, 111 A. 140 (1920).

ix. For an authoritative statement of the law concerning Contracts substantially performed and the

**ACTION OF INEDITATUS ASSUMPSIT**

**(m)** *Where there is an Express Contract and the Plaintiff has not Substantially Performed, but the Defendant has received a benefit.*—Where the plaintiff has, without his wilful default, failed to perform the Special Contract, in some material respect, within the time or in the manner therein stipulated, he cannot maintain Special Assumpsit on the Contract, as he cannot show Substantial Performance on his part?—<sup>2</sup> If he can recover at all, it must be in General Assumpsit, on a Promise by the defendant Implied in Law because of the benefits received by him. As to whether he can recover at all, even in General Assumpsit, the authorities are not in agreement. The question is whether the Law will refuse a party in default any relief or will Imply a Promise by the defendant **to Pay for the benefits received by him. If it will, General Assumpsit will lie; but, if it will not, there can be no recovery at all.** The question must be answered by the Substantive Law of Contract or Quasi-Contract.<sup>3</sup>

remedies therefor, see *Dennott v. Jones*, 2 Wall. (U. S.) 1, 17 LEd. 762 (iSO-i).

12. *Hayward v. Leonard*, 7 Pick. (Mass.) 181, 10 Am. Dec. 268 (1828).

13. See Clark, *Contracts*, c. 32, *Recovery for Benefits Conferred*, § 273. 647 (3d ed. by Throekmorton, St. Paul 1914).

For cases in which recovery in General Assumpsit has been allowed, see: English: *Lucas v. Godwin*, 3 Bing. (N.C.) 737, 132 Eng.Rep. 505 (1837); Connecticut: *Blakeslee v. Holt*, 42 Cone. 226 (1875); *Pinch-cs v. Swedish Evangelical Lutheran Church*, 55 Conn. 183, 10 A. 264 (1887); Iowa: *Corwin t Wallace*, 17 Iowa 374 (1864); Maine: *Norris v. School District No. 1 In Windsor*, 12 Mc. 203, 28 Am.Dec. 182 (1835); *White v. Oliver*, 36 Me. 92 (1853); Massachusetts: *Hayward v. Leonard*, 7 Pick. (Mass.) 181, 10 Am.Dec. 268 (1828); *Blood v. Wilson*, 141 Mass. 25, 6 N.E. 362 (1886); Nebraska: *McMillan v. Malloy*, 10 Neb. 228, 4 N.WT. 1004, 35 Axn.Rep. 471 (1880); New Hampshire: *Wadleigh v. Town of Sutton*, 6 N.H. 15, 23 Am. Doe. 704 (1832); Tennessee: *Parker v. Steed*, 1 Lea (Penn.) 206 (1878); Vermont: *Kelly v. Town of Bradford*, 33 Vt 35 (1860); *Viles t. Barre & M. Traction & Power Co.*, 70 Vt. 311, 65 A. 104 (1906); Wisconsin: *Taylor v. Williams*, 6 Wis.

**(IV)** *Where After Part Performance of the Contract, Further Performance is Prevented by an Act of the Defendant, or by Sonic Act which in Law Operates as a Discharge of the Contract, or if the Contract is Abandoned or Rescinded.*—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; <sup>14</sup> or if he is so prevented by some act or event, not within the control of either party, which in law operates as a Discharge of the Contract, and Excuses Nonperformance by him of the residue; <sup>15</sup> or

363 (1838); *Feilera*]: *Dermott v. Jones*, 23 How. (U.S.) 220, 16 LEd. 442 (1859). See, also, article by Ballantine, *Forfeiture for Breach of Contract*, 5 Minn.L.Ev. 320 (1021).

For cases in which it is held that there can be no recovery at all, see *Cutter v. Powell*, 8 Pit. 320, 101 Eng.Rep. 573 (1705), to which is attached an exhaustive note, in 2 *Smith's Leading Cases*, 0 (13th ed. by Chitty, Denning & Harvey, London

1929).

<sup>4</sup>. Illinois: *Bannister v. Read*, 1 Gil. (Ill.) 99 (18-14); *Selby v. lutehinson*, 4 Cii. (111.) 319 (1847); *Catholic Bishop of Chicago v. Laucr*, 62 In. ISS (1871); *Banger v. City of Chicago*, 65 111. 506 (1872); *Guerdon v. Corbett*, 87 Ill, 272 (1877); *Kipp v. Massin*, 15 111.App. 300 (1884); Indiana: *Hoagland v. Moore*, 2 Blackf. (md.) 167 (1828); Maine: *Wright v. Has]-eli*, 45 Mc. 480 (1858); Massachusetts: *Moulton v. Trask*, 0 Mete. (Mass.) 577 (1845); *Johnson v. Trinity Church See.*, 11 Allen (Mass.) 123 (1803); Michigan: *Mooney v. York Iron Ce.*, 82 Mich. 263, 46 NW. 376 (1800); New York: *Duljois v. Delaware & H. Canal Co.*, 4 Wend. (N.Y.) 285 (1530); *Jones v. Judd*, 4 N.Y. 411 (1550); Pennsylvania: *Hall v. Itupley*, 10 Pa. 231 (1849); *Algeo v. Algeo*, 10 Berg. & It. (Pa.) 235 (1823); Rhode Island: *Greene v. haley*, SRI. 263 (1858); Vermont: *Derby v. Johnson*, 21 Vt. 17 (1848); Federal: *Perkins 's-. Hart*, 11 Wheat. (U.S.) 237, 6 L.Ed. 463 (1820).

15. Connecticut: *Leonard v. Dyer*, 26 Conn. 172, 68 Am.Dec. 382 (1857); Maine: *Lakeman v. Pollard*, 43 Me. 464 (1857); Massachusetts: *Wihlington v. Inhabitants of West Boylston*, 4 Pick. (Mass.) 101 (1826); *Fuller v. Brown*, 11 Mete. (Mass.) 440 (1846); New York: *Wolfe*

v. flowes, 20 N.Y. 197, 75 Am.Dec. 386 (1859); Rhode Isla,id: Yerrington v. Crouno, 7 RI. 589, 84 Am.Dec. 578 (1863); Parker v. McComber, 17 RI. 674, 24 A. 464, 16 L.R.A. 858 (1892); Vermont: Fenton v. Clark, 11 Vt 557 (1839); Wiscon

Sec. 173

341

**OFFENSIVE PLEADINGS**

**Ch. 17**

if, after such Partial Performance, the Contract is abandoned by mutual consent, or waived or rescinded it\_\_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.’<sup>7</sup>

sin: Green v. Gilbert, 21 Wis. 401 (1867); Jennings v. Lyons, 30 Wis. 553, 20 Am.Rep. 57 (1876).

10. Illinois: Bannister v. Read, I Gil. (Ill.) 99 (1844); Catholic Bishop of Chicago v. Baner, 62 Xli. 185 (1871); Indiana: Adams v. Crosby, 48 Iad. 153 (1874); Massachusetts: Goodrich v. Lafflhi, 1 Pick. (Mass.) 57 (1822); hill v. Green, 4 Pick. (Mass.1 114 (1820); Munroe v. Perkins, 9 Pick. (Mass.) 298, 20 Am.Dec. 475 (1530); Michigan: Allen v. MeKibbin, 5 Web. 449 (185S); Wildey v. Fractional School Dist. No. I of Paw Paw and Antwerp, 25 Mich. 419 (1872); New Hampshire: Jenkins v. Thompson, 20 N.H. 457 (1846); New York: Dubois v. Delaware & H. Canal Co., 4 Wend. (N.Y.) 285 (1830); Linningdale v. Li’-ingstorm, 10 Johns. (N.Y.) 36 (1813); Federal: Perkins v. Hart, Ii Wheat. (U.S.) 237, 6 L. Ed. 463 (1826).

it Alabama: Davis v. A~’res, 0 Ala. 292 (1846); Kentucky: Jewell v. Blandford, 7 Dana (Ky.) 473 (1838); Eankin v. Darnel], II B.Mon. (Ky.) 31, 52 Am.Dec. 557 (1850); New York: Jones v. Judd, 4 N.Y. 411 (1850); Pennsylvania: Pedaa i, Hopkins, 13 Serg. & R. (Pa.) 45 (1825); Stewart v. IValicer, 14 Pa, 293 (1853); vermont: Derby v. Johnson, 21 Vt. 17 (1848). See, also, Illinois: Levy & flipple Motor Co. v. City Motor Cab Co., 174 hll.App. 20 (1912); Massachusetts: St. John v. St. John, 223 Mass. 137, Ifl N.E. 719 (1916); ‘Wisconsin: Loehr v. Dickson, 141 Wis. 332, 124 N.W. 293, 30 LIIA. (N.S.) 405

(1010).

It was held in Illinois that a recovery of tIme balance due on a building Contract cannot be had under Common Counts, where the contractor relies on Matter of Excuse for not procuring the final certificate of approval by the architect; but in case of Substantial Performance, where no certificate is called for, recovery may he had under the Common Counts for labor and material in spite of slight variations. Why the plaintiff cannot show excuse for non-production of an architect’s certificate under the Corn-men Counts to show a recoverable indebtedness for value received Is not entirely clear. Expanded

(V) *Where the Contract is Merely Void (Not %llega7), or Merely Unenforceable, or Voidable and has been Avoided, there may be a Recovery in General Assumpsit for Part Performance—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 indicated in the note below, is subject to some qualification.*<sup>15</sup>

Metal Fireproofing Co. v. Boyce, 233 III. 284, 84 NE. 275 (1908). Compare Peterson v. Pusey, 237 III. 204, 86 N.E. 692 (1910). See, also, Catholic Bishop of Chicago v. Bauer, 62 III. 188 (1811); City of Elgia v. Joslyn, 136 III. 525, 26 N.E. 1000 (1891); Parmly v. Farrar, 169 III. 606, 48 N.E. 693 (1897); Concord Apartment House Co. v. O’Brien, 228 III, 360, 309, 81 N.E. 1038 (1007).

It is otherwise in case Full Performance has been prevented by act of the defeadant. Illinois: Catholic Bishop of Chicago v. Bauer, 62 Iii. 188 (1871);

Michigan: Mooney v. tori, Iron Co., 82 Mich. 263, 40 NW. 376 (1890). And on Substantial Performance, see Evans v. Howell, 211 Iii. 85, 71 NE. 85-1 (1904).

18. Thurston v. Percival, I Pick. (Mass.) 415 (1823).

Thus, where an infant performs services under a Contract, which he has a right to avoid because of his infancy, and lie avoids the Contract before he has Fully Performed, he may bring General Assmnpisit for the services rendered. Illinois: Bay v. Italics, 52 III, 485 (1809); Massachusetts: Moses v. Stevens, 2 Pick. (Mass.) 332 (1824); Gaffney v. Hayden, 110 Mass. 137, 14 Am.Rep. 580 (1872); Now York; Mcd-bury v. Watrons, 7 Hill (N.Y.) 110 (1845); Vermont: Price v. Furman, 27 Vt. 268, 65 Am.Dec. 19-1 (1855).

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, Handbook of the Law of Contract, c. 12, Quasi-Contracts, 650 (3d ed. by Throckmorton, St. Paul 1914). See, also, the following cases: English: *Plinche v. Colburn*, 5 Bing. 14, 131 Eng.Rep. 305 (1831); *Ex parte McClure*, LII. 5 CkApp. 737 (1870); *Itjssell v. Bell*, 10 M. & W. 840, 152 Eng. Rep. 500 (1842); Illinois: *Citizens Gaslight & Heating Co. v. Granger*, 118 Ill. 266, 8 N.E. 770 (1886); *T. W. & W. B. Co. v. Chew*, 67 Ill. 378 (1873); Kan

342

Sec. 174

## ACTION OF INDEBITATUS ASSUMPSIT

*(VT) Where Additional Work has been done on Request in Performing a Special*

sas: *Shanc v. Smith*, 37 Ran. 55, 14 P. 477 (1877); Massachusetts: *Caffney v. Hayden*, 110 Mass. 137, 14 Am.Hep. 580 (1872); *Williams v. Bemis*, 108 Mass. 91, 11 Am.Hep. 318 (1871); Michigan: *Aidine Mfg. Co. v. Barnard*, 81 Web. 632, 48 NW. 280 (1891); Minnesota: *Brows v. St. Paul, H. & M. 13-. Co.*, 36 Minn. 236, 31 NW. 041 (1886); Mississippi: *Evaims v. Miller*, 58 Miss. 120, 38 Am.Hep. 313 (1880); New York: *Mcdbury v. Watrous*, 7 Hill (N.Y.) 110 (1845); *Wiljsson v. Force*, 6 Johns. (N.Y.) 110, 5 Am.Dec. 195 (1810); *Goodwin v. Griffis*, 55 N.Y. 629 (1882); Pennsylvania: *Seipel v. International Life Ins. & Trust Co.*, 84 Pa. 47 (1877); Wisconsin: *Walker v. Duncan*, 08 Wis. 624, 32 NW. 689 (1887). As to the qualifications of this rule, see Clark, Handbook of the Law of Contracts, r. 12, Quasi-Contract, 650 (3d ed. by Throckmorton, St. Paul 191-1).

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 part delicto, can recover from the other for a Partial Performance. Clark, *hook oa the Law of Contracts*, e. 12, Quasi-Contracts, 650 (3d ed. by Throckmorton, St. Paul 1914).

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 ~r unenforceable, but not illegal in the sense of being unlawful, he may recover in General Assumpsit the value of the goods or services. Alabama:

*Smith v. Wooding*, 20 Ala. 324 (1852); Arkansas:

*Walker v. Shaekelferd*, 40 Ark. 503, 5 SW. 887, 4 Arn.St.Rep. 01 (1887); ~alifornia: *Patten v. Hicks*, 43 Calif. 509 (1872); *Itebmaa v. San Gabriel Valley Land & Water Co.*, 95 Calif. 390, 30 P. 564 (1894);

Illinois: *McGinnis v. Fernandes*, 126 Ill. 228, 19 N. E. 44 (1888); Indiana: *Sehoonover v. Vachon*, 121 Ind. 3, 22 N.E. 777 (1889); *Miller v. Eldridge*, 126 Ind. 461, 27 N.E. 132 (1891); Kansas: *Wonsettler*

-v. Lee, 40 Kan. 367, 19 P. 862 (1888); Kentucky:

*Montague v. Garnett*, 3 Bush. (Ky.) 297 (1867);

Maryland: *Baker v. Lauterbach*, 68 Md. 64, 11 A. 704 (1887); Massachusetts: *Van Deusen v. Blum*, 18 Pick. (Mass.) 229, 29 Am.Dec. 582 (1836); Michigan:

*Whipple v. Parker*, 29 Mich. 369 (1874); *Nugent v. Teachout*, 67 Mich. 571, 35 NW. 254 (1887); *Cad-man v. Markle*, 76 Mich. 448, 48 NW. 315, 5 LEA. 707 (1889); Nevada: *Lapham v. Osborne*, 20 Nev.

168, 18 P. 881 (1881); New York: *Little v. Martin*, 3 Wend. (N.Y.) 210, 20 Am.Dec. 688 (1829);

*Contract.—TI the Special Contract has been Fully Performed by the plaintiff, and something additional has also been done by him under circumstances entitling him to compensation therefor, the Declaration may be Special, as far as the Express Contract goes, and General as to the extras.’°*

## INDEBITATUS ASSUMPSIT DISTINGUISHED FROM AND CONCURRENT WITH OTHER ACTIONS

174. Indebitatus Assumpsit is in general a substitute for **Debt on Simple (Executed) Contract; it was not, however, as broad as Debt, as it was not available on a Specialty, a Record or a Statute, in general, It was distinguished from Special Assumpsit which lay for Breach of an Express Contract, whereas Indebitatus Assumpsit lay for the recovery of a debt or an obligation akin to a debt. The Action was Concurrent with Debt, Special Assumpsit and Trover, under certain circumstances, and subject to certain necessary qualifications.**

IT is essential that the distinctions between Indebitatus Assumpsit and other actions should be clearly understood. It is frequently said that Indebitatus Assumpsit is a substitute for Debt on Simple (Executed) Contract. For all practical purposes this is true, but in order to be technically correct, the statement requires some qualification, as strictly speaking, Indebitatus Assumpsit differed from Debt in that it might be maintained in situations where the sum alleged to **be due was not susceptible of precise proof,**<sup>20</sup> as required in Debt; it could be used to recover installments of a debt which in its entirety was not yet due; <sup>21</sup> and it lay against

Texas: *Steven’s Ex’rs v. Lee*, 70 Tex. 279, 8 SW. 40 (1888); Wisconsin: *Ellis v. Cary*, 74 Wis. 176, 42 NW. 252, 4 L.B.A. 55, 17 Am.8t.Eep. 125 (1882).



10. New York: *Dubois v. Delaware & H. Canal Co.*, 4 Wend. (N.Y.) 285 (1830); *Id.* 12 Wend. (N.Y.) 334 (1834); South Carolina: *McCerniick v. Connoly*, 2 Bay (S.C.) 401 (1802).

20. *Vaux v. Mainwaring*, Fort. 197, 92 Eng.Rep. 816 (1714).

21. *Rudder v. Price*, 1 Bl.H. 547, 126 Eng.Hep. 814

343

(1791).

I  
an Executor or Administrator, against whom Debt would not lie under the Early Common Law where the testator had the right to demand Trial by Wager of *Law*.<sup>22</sup> However, until Debt was extended to cover obligations which were not certain, but which might be reduced to certainty by averment or proof, Debt was not a remedy for Obligations similar to but not identical with a True Common-Law Debt, and now known as Quasi-Contractual Obligations. And while *Indebitatus Assumpsit* would usually lie where Debt would lie, the converse was not true. As Dean Ames has pointed out, there were many cases where *Assumpsit* was the only remedy, as the benefit received did not constitute a Real Debt or a Real Contract.<sup>23</sup>

In a certain sense, however, Debt was broader than *Indebitatus Assumpsit*, as the latter action would not lie on a Specialty, a Record, or a Statute, generally; *Indebitatus Assumpsit* was a substitute for Debt originally only in the Field of Debt on Simple (Executed) Contract; and in the sense that originally Debt was not available on Quasi-Contractual Obligations, whereas *Indebitatus Assumpsit* would lie, the latter action might be said to be broader than the former.

Special *Assumpsit* was an action to recover Damages for the Breach of an Express Contract, whereas *Indebitatus Assumpsit* was an action to recover a Common-Law debt, and finally, to recover obligations akin to debts, but not quite identical therewith.

But as we have seen, *Indebitatus Assumpsit* and Debt were concurrent in the field of Debt on Simple (Executed) Contract, and *Indebitatus Assumpsit* may and frequently is concurrent with Special *Assumpsit*, where, over and above the Simple, Executed Contract, which supports the former action,

22. On the present validity of this distinction, see *Ohildress v. Emory*, 8 Wheat. (U.S.) 642, 5 L.Ed. 705 (1823).

Cit. 17

there is also an Express Promise, which has been Breached. And in such a case it may be eminently judicious to so frame the Declaration in *Assumpsit* as to permit the plaintiff to avail himself of either basis of liability. This result may be attained by declaring in a Special Count upon the Actual or Express Contract and thereafter adding one or more Common Counts, covering the meritorious services the rendition of which may be proved.

Moreover, under certain circumstances, *Indebitatus Assumpsit* is a concurrent remedy with *Trover*. Thus, where a defendant has taken and converted the chattels of the plaintiff and sold them, at his Election, the plaintiff may sue in *Trover* for the Conversion, or he may Waive the Tort, and sue in *Indebitatus Assumpsit* on a Count for Money Had and Received.

**FORMS OF DECLARATIONS IN INDEBITATUS ASSUMPSIT<sup>4</sup>**  
**COMMON Count FOR GOODS Sold AND**

DELIVERED ~

FOR that, whereas, the said C.D. hereto  
fore, to wit, on **the** day of

24. For the distinctions between the various Common Counts, see Section 176 on the Common Counts.

U. Atwoot v. Lucas, 53 Me. 508, 89 Aia.Dcc. 713 (1808).

In an Action for Goods Sold and Delivered where recovery is based on the Common Counts, the evidence must show a delivery **of the goods alleged** to -

344

#### OFFENSIVE PLEADINGS

175. In this Section will be found the following Forms: Forms of Common Counts in **Indebitatus Assumpsit, including the Common Count for Goods Sold and Delivered, the Common Count for Work and Labor, the Common Count for Money Lent, the Common Count for Money Paid, the Common Count for Money Had and Received, the Quantum Valebant Count, the**

Quantum Meruit Count, and the Count for an **Account Stated. A Form of the Common Breach** is set out after the Common Counts, a Separate Breach being always assigned to each Count, as **each is a separate and complete statement** of a Cause of Action.

23. Ames, *Pare! Contracts Prior to Assumpsit*, 8

Harv.L.Rey, 252 (1894).

See. 175

#### ACTION OF INDEBITATUS ASSUMPSIT

345

A.D. 17\_, 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 CD., should be thereto afterwards requested.

SHIPMAN, *Handbook of Common-Law Pleading*, c. XI, 260 (3d ed. by Ballantine, St. Paul 1923).

#### COMMON COUNT FOR WORK AND LABOR

AND whereas, also, the said C.D. afterwards, to wit, on the day and year aforesaid, at \_\_\_\_\_ aforesaid, in the county aforesaid, was indebted to the said AS. in the farther sum of dollars, for work and labor, care and diligence by the said AS. 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-men-

have been sold. *fleeb v. troiv-on*, 106 Ill.&pp. 518 (1015).

A Count for Goods Bargained and Sold will lie where title has passed to the defendant without delivery.

Illinois: *Seehel y. Scott*, 66 Ill. 106 (1872); West

Virginia: *Acme Food Co. v. Older*, 04 W.Va. 255, 61 S.E. 235, 17 L.R.A. (N.S.) 807 (1908). See, also, 1 Cuiity, *Treatise on Pleading and Parties to Actions with Precedents and Forms*, c. IV, Of the Declaration, 347 (16th Am. ed. by Perkins, Springfield 1876).

tioned sum of money when he, the said CD. should be thereto afterwards requested.

SHIPMAN, *Handbook of Common-Law Pleading*, c. XI, 261 (3d ed. by Ballantine, St. Paul 1923).

#### COMMON COUNT FOR MONEY LENT

AND whereas, also, the said Ci). 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 AS. before that time lent and advanced to the said CD., 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.

SHIPMAN, handbook of Common-Law Pleading, c. XI, 261 (3d ed. by Ballant' mne, St. Paul, 1923).

#### COMMON COUNT FOR MONEY PAID

AND whereas, also, the said C.D. afterwards, to wit, on the day and year aforesaid, at . aforesaid, in the county aforesaid, was indebted to the said AS. in the farther sum of -dollars, for so much money by the said AS. 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 AS. to pay him the said last-mentioned sum

346

### OFFENSIVE PLEADINGS

Ch, 17

of money when he, the said C.D., should be thereto afterwards requested.

SHIPMAN, Handbook of Common-Law Pleading, c. XI, 261 (3d ed. by Ballantine, St. Paul, 1923).

#### COMMON COUNT FOR MONEY HAD AND RECEIVED

AND whereas, also, the said C.D. afterwards, to wit, on the day and year aforesaid, at . aforesaid, In the county aforesaid, was indebted to the said A.B. in the farther sum of dollars, for so much money by the said C.D. before that time had and received to and for the use of the said AS.; 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.

SHIPMAN, Handbook of Common-Law Pleading, c. XI, 261 (3d ed. by Ballantine, St. Paul, 1923).

#### QUANTUM MERUIT AssUMPTORY COUNT

AND whereas, also, on the day last above mentioned, at the county aforesaid, in consideration that the plaintiff, at the request of the defendant, had before that time sold and delivered (or bargained and sold, as the case may be) to the defendant, divers other goods, chattels, and effects, the defendant promised the plaintiff to pay him, when **requested, so much money as the last-mentioned** goods, chattels, and effects, at the time of the sale and delivery (or bargain and sale, as the case may be) thereof were reasonably worth, and the plaintiff avers that the same were then and there reasonably worth the sum of dollars, where-  
of the defendant, on the day last aforesaid, there had notice.

SHIPMAN, Handbook of Common-Law Pleading, c. XI, 263 (3d ed. by Ballantine, St. Paul, 1923).

#### QUANTUM MERUIT AssUMPTORY COUNT

FOR that, whereas, the defendant heretofore, to wit, on the day of \_\_\_ in the year , at the county aforesaid, in consideration that the plaintiff, at the request of the defendant, had done certain labor and services for him, etc. (stating the subject-matter according to the fact, and conclude as follows):

The defendant promised the plaintiff to pay him, on request, so much money as he therefor

reasonably deserved to have, and the plaintiff avers that he then and there reasonably deserved to have thereby the sum of \_ dollars, whereof the defendant **then and there had notice.**

SHIPMAN, Handbook of Common-Law Pleading, c. XI, 262 (3d ed. by Ballantine, St. Paul, 1923).

FORM OF COUNT FOR ACCOUNT

STATED

AND whereas, also, the said C.D. afterwards, *to wit*, on the day and year aforesaid, **at** , aforesaid, in the county aforesaid, accounted with the said AS. 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 AS. 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 \_\_\_\_ af ore-said, in the county aforesaid, undertook and faithfully promised the said **A.B. to pay him**  
Sec. 176

**ACTION OF INDEBITATTJS ASSTJMPSIT**

347

the said last-mentioned sum of money when he, the said CD., should be thereto afterwards requested.

ST-IIPMAN, Handbook of Common-Law Pleading, c. XI, 262 (3d ed. by Ballantine, St. Paul, 1923).

COMMON BREACH

[The Declaration concludes with the Common Breach, which follows each Common Count]

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 AR, although oftentimes afterwards requested; but the said CD. *to pay the same, or any part thereof*, hath hitherto wholly refused, and still refuses, to the damage of the said A.B. of  
dollars; and therefore he brings his suit, etc.

Attorney for  
Plaintiff.

SHIPMAN, Handbook of Common-Law Pleading, c. XI, 262 (3d ed. by Ballantine, St. Paul, 1923).

**THE COMMON COUNTS<sup>26</sup>**

**176. The Common Counts are certain formulae for alleging an indebtedness founded on various transactions, such as a loan of money,**

26. In genera), on the Common Counts in Indebitatus or General Assumpsit, see:

Treatises: Evans, Essays: on the Action for Money Had and Received; and on the *Law of Insurances* (Liverpool 1502); 2 Chitty, A Treatise on Pleading, The Common Counts, 27—83 (3d Am.Ed. by Dunlap, Philadelphia 1810); Pomeroy, Code Remedies, c. III, §1 443-449 (4th Ed. by Bogle, Boston 1904); Martin, Civil Procedure at Common Law Appendix, Note I. General Assumpsit for Part Performance of Express Contracts, 341-349 (St. Paul 1905); Shipman, Handbook of Common-Law Pleading, c. VIII, Action

**the sale of goods, the doing of work and labor, or the stating of an account. They cover both Common Law Debts and Quasi-Contractual Obligations similar to but not quite identical to Common Law Debts.**

**BROWN<sup>27</sup>** states that “**the Common Counts** were not formerly in use, and Lord Holt used to say that he was a bold man who first ventured on them, though they are now every day’s experience.”

*in General*

IN Indebitatus or General Assumpsit the action is based, not on an Express or Special Promise, but on a Promise Implied by Law from the existence of a duty to pay money, arising either from a debt created by a Simple, Executed Contract or from an Obligation raised by Quasi-Contract. Like Debt, for which it was a substitute in certain areas, it specifically enforces the unconditional duty to pay money. Indebitatus or General Assumpsit lies upon a debt arising from the passage of a *quid pro quo* from the plaintiff to the defendant, upon a debt arising from a Contract Implied in Fact, and which has been Executed, leaving nothing to be done

of Assumpsit (Special and General), §~ 59—60, General Assumpsit or the Common Counts, 154 (3d Ed. by Ballantine, St. Paul 1923); Fifoot, History and sources of the Common Law, c. 15, The Subsequent Development of Assumpsit, D. The Common Counts, 368—371 (London 1949).

Articles: Ames, The History of Assumpsit, 3 Select Essays in Anglo-American Legal History, Pt. VI, 259 (Boston 1909); King, The Use of the Common Counts In California, 14 So.Calif.L.Rev. 288 (1941).

Comments: Pleading: Sufficiency of the Common counts, 4 Calif.L.Ev. 352 (1910); Quasi-Contracts— Assumpsit for Use and Occupation Against a Trespasser In Modern Cases, 30 Mich.L.Rev. 1087 (1932); Pleading-Complaint-Common Counts in Assumpsit Followed by Allegations of Promise to Pay, 21 Minn. L.Liter. 756 (1937).

AnnotatTon: Previous Debtor and Creditor Relationship a Condition of Account Stated, 6 A.L.R.2d 113 (1949).

21. Browne, A Practical Treatise on Actions at Law, e. VI, Forms of Action, § I, The Common Counts in General, 345 (Philadelphia, 1844).

348

## OFFENSIVE PLEADINGS

### Ch. 17

but pay the debt, and upon a debt arising from a Contract Implied in Law, and known as Constructive or Quasi-Contract.

And, in setting forth his Declaration, the pleader need not indicate which variety of Implied Contract—in fact or in law—he relies upon. But as the Executed Consideration is an indebtedness, and the Promise alleged to have been broken is one legally resulting from the fact of such indebtedness, the Proof at the Trial must show a debt. It follows, therefore, that the action in reality is one for the recovery of a Money Debt, due upon a Simple (Executed) Contract, such, for example, as upon the sale of goods, or lands,<sup>28</sup> for rendition of services, for work, labor and materials, or on an Account Stated, as well as other similar transactions resulting in the enrichment of the defendant at the plaintiff's expense.

If a person requests another to do work for him under such circumstances that the other has a right to expect pay therefor, and the latter does the work, the Law will, as an Inference of Fact, Imply a Promise by the former to pay what the services were reasonably worth, and the action to recover such compensation is General Assumpsit. So, if a man orders goods from another without an Express Promise to Pay a certain price, and they are delivered, the seller may maintain **General Assumpsit** to recover their value. So, if a person pays money which another should have paid, he may maintain General Assumpsit against the latter to recover it, such a Count being known as a Count for Money Paid by the plaintiff for the use of the defendant. And where a man receives money which in equity and good conscience belongs to another, the latter may sue in General Assumpsit to recover, this Count being known as the Count for Money Re

<sup>28</sup> Michigan: Nugeut v. Teachout, 67 Mich. 571, 35 N.W. 254 (1887); New York: Nelson v. Swan, 13 Johns. (N.Y.) 483 (1816).

ceived by the defendant for the use of the! plaintiff, or for Money Had and Received. And where a man lends money to another without an Express Promise by the latter to repay it, he may recover the debt in **General Assumpsit on a Count for Money Lent**. And if parties state an account between them, General Assumpsit lies for the balance, the Count being known as a Count for a balance due on Account Stated. General Assumpsit is also known as the Common Counts. The Common Counts are riot suited to enforce Collateral Undertakings, Guaranties, and Contracts of Indemnity.

Recovery on a fire insurance policy cannot **be had** on the Common Counts, as payment of the premiums is not sufficient of itself to constitute a *quid pro quo* or raise an Implied Promise. Accordingly the Promise itself and the conditions thereof must be specifically set forth. But in case of adjustment of the loss this makes an Account Stated, and the Implied Promise to Pay the amount due is regarded as a different Contract from the Policy itself, which may be enforced by the Common Counts.<sup>20</sup>

*Varietia of Common Counts*

THE Common Counts in Indebitatus or General Assumpsit have generally been classified as including **(1) The Indebitatus**

29. Beifron v. Rochester German Ins. Co., 220 1]?.  
514, 77 N.E. 202 (1906).

The Common Counts will not lie against a guarantor who receives no direct personal benefit. Florida:

Worley v. Johnson, 60 na. 294, 53 So. 543, 33 LILA. (N.s.) 039 (1006), Involving an Indorser; Illinoisr Potter v. Gronbeek, 1)7 Ili. 404, 7 N.E. 586 (1886). Cf. Abe Lincoln Mut, Life & Accident See. v. Miller, 28 Ill.App. 341 (ISS1), holding that Debt lies by the beneficiaries to recover & death benefit under a mutual benefit insurance certificate; Federal: Cubbi us v. Mississippi Liver Commission, 241 U.S. 861, 3G SIIt 671, 60 IJ~d. 1041 (1915). See, also, Ames, Pa-rot Contract~ Prior to Assumpsit, S Ilarv.L.Rev. 252 at 261 (1894).

**Sec. 176 ACTION OF INDEBITATUS ASSUMPSIT 349**

Counts; and **(2) The Quantum Meruit and Counts**; and **(3) The Account Stated**, as will Quantum Vaiebant Counts—the Value appear from the chart below:

**TUE CLASSIFICATION OF TUE COMMON COUNTS 30**

<p><b>1. INDEBITATUS</b></p>	<p><b>A. MONEY COUNTS:</b></p>	<ol style="list-style-type: none"> <li>1. For money paid to the defendant's use.</li> <li><b>2. For money had and received.</b></li> <li>3. For money lent.</li> <li>4. For interest due.</li> <li>5. <b>For money found to be due on account stated.</b></li> <li><b>6. For use and occupation</b> of land.</li> <li>7. <b>For board</b> and lodging.</li> <li>8. <b>For land sold and conveyed.</b></li> <li>9. <b>For goods sold and delivered.</b></li> <li>10. For goods bargained and sold.</li> <li><b>11. For work, labor</b> and services.</li> <li><b>12. For work, labor and materials.</b></li> <li>13. Any <b>other</b> circumstances on which a debt may be</li> </ol>
<p><b>2. VALUE A. QUANTUM MERUIT COUNTS:</b></p>	<p><b>B. OTHER COUNTS:</b></p>	
<p><b>GENERAL ASSUMPSIT OR THE COMMON COUNTS</b></p>	<p><b>B. QUANTUM</b></p>	

VALEBANT

COUNTS:

**ACCOUNT** This Count, **for money found to be due on an account**  
**STATED:** stated, is also classified as an Indebitatus Count, as set out above in chart.

This chart is adopted from that found in **MOKELVEY, Principles of Common Law Pleading,**

~ § ~ **P. 27 (New York 1894)**, with certain additions and modification..

30. See Note 30 on page 850.

(I) *The Indebitatus Count*—In an Indebitatus Count in Assumpsit, the most comprehensive of all, 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.<sup>32</sup> In general, time and place are immaterial.<sup>33</sup> If the suit is in a Court of In

30. *OrLuim of the Common Counts*: "In declaring in *Debt*, except possibly upon an Account Stated, the plaintiff was required to set forth his cause of action with great particularity. Thus, the Count in Debt must state the quantity and description of goods sold, with the details of the price, all the particulars of a loan, the names of the persons to whom the money was paid with the amounts of each payment, the names of the persons from whom money was received to the use of the plaintiff with the amounts of each receipt, the precise nature and amount of services rendered. In Indebitatus Assumpsit, on the other hand, the debt being laid as an Inducement or Conveyance to the Assumpsit, it was not necessary to set forth all the details of the transaction from which it arose. It was enough to allege the general nature of the indebtedness, as for goods sold, money lent, money paid at the defendant's request, money had and received to the plaintiff's use, work and labor at the defendant's request, or upon an Account Stated, and that the defendant being so indebted Promised to Pay. This was the origin of the Common Counts." Ames, Lectures on Legal History, c. XIV, Implied Assumpsit, 153, 154 (Cambridge, 1913).

31. Shipman, Handbook of Common Law Pleading, c. XI, The Declaration in Contract Actions, § 123, Statement of an Executed Consideration, 255, 256 (3rd ed. by Ballantine, St. Paul, 1922).

32. *Victors v. Davis*, 12 M. & W. 758, 152 Eng.Rep.

1405 (1844).

A Declaration in Indebitatus Assumpsit is good Cause General Demurrer, even though it states neither time, place, nor a request to pay. *Keyser v. Shafer*, 2 Cow. (N.Y.) 437 (1823).

And consequently, in those states where special Demurrers have been 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. Alabama: *McCrary v. Brown*, 157 Ala. 518, 50 So. 402 (1909); Illinois: *McEwen v. Morey*, 60 Ill. 32 (1871).

ZZ, See *Langer v. Parish*, 8 Serg. & It. (Pa.) 134 (1822).

38. *Webber v. Th'fill*, 2 Wms. Saund. 121, 122, n. 3, 86 Engdtep. 840, 541 (1669).

30. *Hibbert v. Courthope*, Carth. 276, 00 Eng.Rep. 764 (1602).

It is not necessary, however, to give a particular description of the work done, or the goods sold, etc. *Lewis v. Culbertson*, 11 Serg. & B. (Pa.) 49, 14 Am. Dec. 607 (1824). See: Michigan: *Crane v. Grassman*, 27 Mich. 443 (1873); Federal: *Edwards v. Nichols*, 3 Day (Conn.) 16, Fed.Cas.No.4,296 (1808).

37- Alabama: *McCrary v. Brown*, 157 Ala. 518, 50 So. 402 (1909); Connecticut: *Canfield v. Morricks*, 11 Conn. 425 (1830); Massachusetts: *Mut Life Ins. Co. v. Green*, 185 Mass. 306, 70 N.E. 202 (1904). Cf. West Virginia: *Somerville v. Grim*, 17 W.Va. 803, 810 (1881).

The statement that money was "lent" implies that it was advanced at the request of the defendant. But this does not apply to money "paid." English: *Victors v. Davis*, 12 M. & W. 758, 152 Eng.Rep. 1405 (1844); West Virginia: *Somerville v. Grim*, 17 W. Va. 803, 810 (1881).

And the same is true of a Count for Goods Sold and Delivered. *McEwen v. Morey*, 60 Ill. 32 (1871).

ferior Jurisdiction, the Declaration should allege that the cause of action arose within such Jurisdiction.<sup>5</sup> The sum stated in the Declaration is generally also immaterial, provided it be laid to cover at least the actual amount due;<sup>35</sup> the cause of the debt, as well as the debt itself, should be included so as to ground a subsequent Flea of Res Judicata.<sup>30</sup> And, of course, it must appear that the consideration for the debt was furnished at the Request of the defendant.” And these Indebitatus Counts were of two descriptions, Money Counts, and Other Counts.

(A) *The Money 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. These Counts, in the order listed in the chart above, will now be separately considered.

-4. This requirement is in addition to the of the County as Venue Massachusetts:

President, etc., of Nantucket Bank, 5 (1S09)~ New York: Wetmore v. Baker, 9 ‘L) 307 (1812); Virginia: Thoraton v. Wash. (%‘a.) 81 (1792).

statement Briggs vMass. 90 3obns. (N. Smith, 1 and cases thete cited.

### Sec. 176

## ACTION OF INDEBITATUS ASSUMPSIT

351

(1) *The Count for Money Paid to the Defendant’s Use.*—The theory underlying this Count is that where one person allows or requests 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 of the former to the latter to make the payment, and a Promise to repay him thus Implied, and the liability thus created may be enforced by an action of Indebitatus Assumpsit. As indicated by the heading such an action is technically called an action for money paid by the plaintiff for the use of the defendant; and in order to maintain a Count for Money thus Paid, it was necessary for the plaintiff to show, *first*, a payment in money, and *secondly*, such payment must have been paid at the defendant’s request. And money must actually have been paid; a security such as a bond, or even stock, is not sufficient,~ This Count will lie where a party has been compelled to pay a debt that another should have paid. Thus, 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.<sup>30</sup> And the same rule applied 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 a Promise to Pay are feigned, in order to entitle him to the remedy by an Action of Indebitatus Assumpsit.<sup>40</sup> The

38. English: Taylor v. Higgins, 3 East. 169, 102 Eng. Rep. 562 (1802); Jones v. Brluley, 1 East. 1, 102 Eng.Rep, 1 (1800).

Cross v. Cheshire, 7 Exeb. 43, 155 Eng.Rep. 848 (1851),

40. English, Kemp v. Fender, 12 M. & W. 421, 152 Eng.Rep. 1262 (1544); Illinois: Harvey v. Drew, 82 Ill. 606 (1876); Massachusetts: Nickerson v. Wheeler, 118 Mass. 295 (1875); New York: Doremus v.

same is also true where a surety pays the debt of his principal.<sup>41</sup> Where the money was illegally paid the Count will not lie.<sup>42</sup>

(2) *The Count for Money Had and Received.*<sup>43</sup>—The theory of this Count is that whenever one person has received money to which another person, in justice and good conscience, is entitled, the Law creates or Implies a Promise by the former to pay it to the latter, and an Action of Assutnpsit will lie to enforce this liability on the basis of the Fictitious Promise.~~ The action is techSelden, 19 Johns. (N.Y.) 213 (1821); Pennsylvania:

Steekel v. Steckel, 28 Pa. 233 (1857).

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 hence may be recovered in Indebitatus Assumpsit. Buck-master v. Grundy, 3 Gil. (Ill.) 626 (1840). Cf. Cram v. Hutehinson, 8 Tll.App. 179 (1880).

41. English: Alexander v. Vane, 1 M. & W. 512, 150 Eng.Itep. 537 (1836); Pownal v. Ferrand, 6 B. & C. 439, 108 Eng.Rep. 513 (1827); Maryland: Crisfielil v. State, to use of Hand, 55 Md. 192 (1880).

42. De Begnis v. Armistead, 10 Ring. 107, 131 Eng. Rep. 846 (1533).



43. See Brosvne, A Practical Treatise on Actions at *Law*, c. VI, Forms of Actions, § 1, The Common Counts in General, 345, 367—385 (Philadelphia 184-4); Clark, Handbook on the Law of Contracts, e. 12, Quasi-Contract, 630 (3d ed. by Throckmorton, St. Paul 1914), for a collection of the cases and discussion of the doctrine.
44. *Moses v. Macferlan*, 2 Burr. 1005, 97 EngRep. 676 (1760). See, also, the following cases: Illinois: *Bradford v. City of Chicago*, 25 Ill. 411 (1861); *Creel v. Kirkham*, 47 Ill. 344 (1868); *Watson v. Woolverton*, 41 Ill. 241 (1866); *Johnston v. Salisbury*, 61 Ill. 316 (1846); *Trumbull v. Campbell*, 3 Gil. (Ill.) 502 (1846); *Devine v. Edwards*, 101 Ill. 138 (1881); *Bennett v. Connelly*, 103 Ill. 50 (1882); *Gloyd v. Hotel La Salle Co.*, 221 Ill.App. 104 (1921); Maryland: *Vroonlan v. McKaig*, 4 Md. 450, 59 Am. Dec. 85 (1853); Massachusetts: *Floyd v. Day*, 3 Mass. 403, 3 Am.Dec. 171 (1807); *Mason v. Waite*, 17 Mass. 560 (1822); *Arms v. Ashley*, 4 Pick. (Mass.) 71 (1826); Michigan: *Catlin v. Birehard*, 13 Mich. 18 (1865); *Atkinson v. Scott*, 36 Mich. 18 (1877); *Brown v. School Dist. No. 9 of Rutland*, 36 Mich. 149 (1877); *Walker v. Conant*, 65 Mich. 194, 31 N.W. 786 (1887); *Wright v. Dickinson*, 67 Mich. 550, 35 N.W. 164, 11 Am.St.Rep. 602 (1887); *Loomis v.*

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### OFFENSIVE PLEADINGS

### Cit 17

nically called an Action for Money Received by the defendant for the use of the plaintiff, or an Action for Money Had and Received.

Thus, where one person by means of duress, fraud, 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.<sup>45</sup> Or as was said:

“Thoughts much too deep for tears pervade the Court, When I AssumpO’Neal, 73 Inch. 582, 41 NW. 701 (1880); New York: *McCrea v. Purmort*, 16 Wend. (N.Y.) 400, 30 Am.Dec. 103 (1835); Pennsylvania: *Miller v. Ord*, 2 Bin. (Pa.) 382 (1810); *Barr v. Craig*, 2 Dall. (Pa) 151, 1 LEd. 327 (1792); Virginia: *Johnson’s Ex’rs v. Jennings’ Adm’r*, 10 Grat. (Va.) 1, 60 Am.Dec. 323 (1853); Federal: *Swift & C. & B. Co. v. United States*, 111 U.S. 22, 4 S.Ct. 244, 28 L.Ed. 341 (1884).

A Count for Money Had and Received will lie only where defendant has received money or other value equivalent to money, as a negotiable note. Thus, it lies against one who has fraudulently procured the surrender of his own note. *Penobscot It. Co. v. Mayo*, 67 Me. 470, 24 Am.Rep. 40 (1878).

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 the claim is disputed, since the title to land cannot be tried in this form of action. Illinois: *King v. Mason*, 42 Ill. 223, 89 Am.Dec. 426 (1866); *Kran v. Case*, 123 Ill.App. 214 (1903); Pennsylvania: *Lewis v. Robinson*, 10 Watts (Pa.) 338 (1840).

The owner of land may waive a Trespass thereon, and, admitting the conversion, sue, in an Action for Money Had and Received, one who severs wood, gravel, or other parts of the realty, and transforms it into money, but only when title to the land is not in dispute. *Arizona Commercial Mining Co. v. Iron Cap Copper Co.*, 236 Mass. 185, 128 NE. 4 (1920).

- <sup>45</sup> Clark, Handbook on the Law of Contracts, e. 12, Quasi-Contracts, 632 (3d ed. by Throckmorton, St. Paul 1914). See, also, the following cases: English: *Atlee v. Backhouse*, 3 14, & \V. 633, 150 Eng.Rep. 1298 (1838); *Shaw v. Woodcock*, 7 B. & O. 73, 108 Eng.Rep. 652 (1827); *Neate v. Harding*, 6 *Exch.* 349,

135 Eng.Rep. 577 (1851); Illinois: McDonald v. Brown, 16 Ill. 32 (1854); Staat v. Evans, 35 Ill. 455 (1864); Anderson v. Ennor, 45 Ill. 128 (1867); Stiles v. Easley, 51 Ill. 275 (1869); Arnold v. Podson, 272 Ill. 377, 112 N.E. 70 (1916); Massachusetts: Jones sit bring, and, Godlike Waive the Tort.” ~°

**The Action will also lie to recover Money**

Paid by Mistake of Fact,<sup>41</sup> as where money is paid as due upon the basis of erroneous accounts, and, upon a true statement of account, **it is found not to be due.**<sup>48</sup>

v. Hoar, 5 Pick. (Mass.) 289 (1827); Gillmore v. Wilbur, 12 Pick. (Mass.) 120, 22 Am.Dec. 410 (1831) Cooper v. Cooper, 147 Mass. 370 17 N.E. 892, 9 Am. StRep. 721 (1888); Michigan: Thompson v. Howard, 31 Web. 809 (1875); Farwell v. Myers, 64 Ill. 234, 31 NW. 128 (1887); Loomis v. O'Neal, 73 Mich. 582, 41 N.W. 701 (1889); New Hampshire: Carleton v. Flaywood, 49 N.H. 314 (1870); New Jersey: Cory v. Hoard of Chosen Freeholders of Somerset County, 47 N.J.L. 151 (1885); New York: People v. Wood, 121 N.Y. 522, 24 N.E. 952 (1890); Pennsylvania: Gray v. Griffith, 10 Watts (Pa.) 431 (1840); Hindmarch v. Hoffman, 127 Pa. 284, 18 A. 14 (1889); Vermont: Stearns v. Dillingham, 22 Vt. 624, 54 Am.Dec. 88(1830); Wisconsin: Kiewert v. Rinds' Kopf, 46 Win. 481, 1 NW. 163, 32 Am.Rep. 731 (1870).

4C- Adolphus, The Circulateers, An Eclogue, I L.Q.

11ev. 232 (1885); Versehures Creameries, Ltd. v. Hull & Netherlands S. S. Co., [1921] 2 KB. 608. It is a question of electing to proceed on alternative theories of liability, where an obligation and a tort liability arise from the same transaction.

47. Clark, Handbook on the Law of Contracts, e. 12, Quasi-Contracts, 637 (3d ed. by Throekmorton, St. Paul 1914). See, also, the following Cases: English: Rue v. Dickason, 1 TB. 285, 99 Eng.Rep. 1097 (1756); Illinois: Stempel v. Thomas, 89 Ill. 146 (1878); Devine v. Edwards, 101 Ill. 138 (1881); Wolf v. Baird, 123 Ill. 585, 15 N.E. 161, 5 Am.St. Rep. 565 (1888); Board of Highway Com'rs v. City of Bloomington, 253 Ill. 164, 97 N.E. 280, Ann.Cas. 1913A, 471 (1913); Maryland: Citizens' Bank of Baltimore v. Grafflin, 31 Md. 507, 1 Am.Rep. 66 (1869); Massachusetts: Stuart v. Sears, 119 Mass. 143 (1875); Michigan: Walker v. Conant, 65 Mich. 194, 81 N.W. 786 (1887); New York: Mayer v. Mayor, etc. of City of New York, 63 N.Y. 455 (1875); Pennsylvania: Thomas v. Brady, 10 Pa. 164 (1848); Chambers v. Union Nat. Bank, 78 Pa. 203 (1875); Rhode Island: Hazard v. Franklin Int. Fire Ins. Co., 7 RI. 429 (1863).

48. English: flails v. Lloyd, 12 Q.B. 531, 116 Eng. Rep. 967 (1845); Townsend v. Crowdy, 8 C.H.N.S. 477, 141 Eng.Rep. 1251 (1860); Massachusetts: Stuart v. Sears, 119 Mass. 143 (1875).

3~2

**Sec. 176**

**ACTION OF INDEBITATUS ASSUMPSIT**

353

The action will also lie to recover Money Paid on a Consideration which has failed,<sup>49</sup> as in a case where the purchaser of goods has paid the price and the seller fails to deliver the goods; or where the purchaser has paid for goods which did not belong to the seller, and which have been reclaimed by the real owner; 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.<sup>59</sup>

(3) *The Count of Money Lent.*—To sustain this Count, the plaintiff must show that there had been a loan, and of money. Thus, a loan of stock would not support the action,<sup>53</sup>

49. English: *Newsome v. Graham*, 10 B. & C. 234, 109 Eng.Rep. 437 (1829); Illinois: *Haney v. Boyd*, 30 Ill. 24 (1865); *Graffenreid v. Kundert*, 31 Ill.App. 394 (1889); *Laflin v. Howe*, 112 IH. 253 (1883) Massachusetts: *Clafin v. Godfrey*, 21 Pick. (Mass.) 1 (1838); *Earle v. Bickford*, 6 Allen (Mass.) 549, 83 Am.Dec. 651 (1863); Michigan: *Wright v. Dickinson*. 67 Mich. 580, 35 NW. 164, 11 Am.St.Rep. 602 (1887); New York: *Schwinger v. Hiekok*, 53 N.Y. 280 (1873); Pennsylvania: *Kauffelt v. Leber, U Watts. & S. (Pa.) 93 (1845)*; virginia: *Johnson's Ex'r v. Jennings' Adm'r*, 10 Oral. (va.) 1, 60 Am. Dec. 323 (1858); Clark, *Handbook on the Law of Contracts*, c. 12, *QuaskContracts*, 640 (3d ed. by Throckmorton, St. Paul 1914).

50 *Giles v. Edwards*, 7 Tn. 181, 101 Eng.liep. 921 (1707).

51. English: *Eicholz v. Bannister*, 144 Eng.R~p. 284, 34 L.J.C.P. 105 (1804); Pennsylvania: *Flook v. Robison, Add. (Pa.) 271 (1793)*.

52. English: *Westropp v. Solomon*, 8 CE. 345, 137 Engilep. 542 (1849); Illinois: *Wilson v. Alexander*, 3 Seam. (Ill.) 302 (1842); *Tyler v. Bailey*, 71 Ill. 34 (1873); *Lunt v. Wrenn*, 113 Ill. 168 (1885); Massachusetts: *Clafin v. Godfrey*, 21 Pick. (Mass.) 1 (1838); Michigan: *Ripley v. Case*, 56 Mich. 261, 49 NW. 46(1591); Pennsylvania: *Kaufe]t v. Leber*, 9 Watts & S. (Pa.) 03 (1845).

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 III. 93 (1870). Cf. *Trinkle v. Reeves*, 25 RI. 214, 76 Am.Dec. 793 (1861); *Laflin v. Howe*, 112 III. 253 (1855).

whereas a loan of foreign money woul&M The Count will lie where money has been delivered to a third party at the defendant's request, provided credit was extended to the defendant, and he is the principal debtor, and not merely collaterally liable.<sup>55</sup>

And to establish a loan requires something more than a mere showing of a payment of money by the plaintiff; this alone raises a presumption of Law that such payment was in discharge of the debt and not by way of a loan.<sup>56</sup> Of course such presumption is rebuttable by showing transactions between the parties from which a loan may be inferred.<sup>57</sup> And naturally a Bill or a Note in the usual form will serve as evidence of money lent between the payee and drawer of the former, and the payee and maker of the latter<sup>58</sup>

(4) *The Count for Interest Due.*—*The Common-Law* rule as to when interest was allowed was stated by Chief Justice Abbott in the case of *Higgins v. Bargent*,~~ decided in 1823, where he declared: "It is now established as a general principle, that interest is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circUmstances." oo There were some instances, however, not within the scope of the statement above, where interest was allowed, as where money was awarded to be paid on a day certain, if the money had been demanded, provided the plaintiff pro-

M- *Harrington v. Macmorris*, 5 Taunt. 228, 128 Rug. Rep. 675 (1813).

55. *Poole v. vabanes*, S TB. 328, 101 Eng,Rep. 1410 (1799).

6-- *Welsh v. Seaborn*, I Stark. 474, 171 Eng.flep. 534 (1816).

57. *Can' v. Gerrish*, 4 Esp. 0, 170 Eng.Rep. 624 (1801),

58. *Morgan v. Jones*, 1 C. & J. 162, 148 Eng.Rep. 1376 (1830).

-9. 2 B. & C. 348, 107 Eng.Rep. 414 (1823).

10. **Higgins v. Sargent**, 2 B. & C. 348, 349, 107 Eng.

Rep. 414, 415 (1823).  
53-Nightingale v. Devisme, 5 Burr. 2580, 98 Eng.Rep.  
361 (1770).  
354

## OFFENSIVE PLEADINGS

### Ch. 17

ceeded by action? and not by attachment!~ In cases not falling within the first statement **above, interest was in general not recoverable**.

By a Series of Statutes, however, the Common-Law rules as to the allowance of interest **have been considerably altered**. This began with the Statute of 3 & 4 Wm. IV, c. 42, 73 Statutes at Large 280, enacted in 1833.

Section 28 provided that upon all debts or sums certain payable at a certain time or otherwise, the Jury (on **the Trial or Inquiry**) may allow interest, at a rate not exceeding the current rate, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment, provided that interest shall be payable in all cases in which it is now payable **by law**.

Section 29 provided that the Jury on the Trial or Inquiry may give Damages in the nature of interest over and above the value of **the goods** at the time of the conversion or seizure in all Actions of Trover or Trespass *De Bonis Asportatis*, and over and above the **money recoverable** in all actions on policies of assurance made after the passing of the act.

**Section 30 provided that if on Writ of Error** the Judgment be for the defendant, the Court shall allow interest for such time as the execution has been delayed by the Writ of

Error.

ii. Pinhorn v. Tuckington, 3 Camp. 488, 170 Eng.Rep. 1448 11813). For other instances, see Browne, A

Practical Treatise on Actions at Law, c. VI, Forms of Actions, ~ 9, Interest, 387 (Philadelphia 1844).

fl~ Churehe~ v. Stringer, 2 B. & Ad. 777, 109 Eng.Rep~  
1834 (1831).

Statute **1 & 2 Viet. c. 110, § 17, 78** Statutes at Large 550 (1838), provided: "That every Judgment Debt shall carry Interest at the Rate of Four Pounds *per Centum per Annum* from the Time of entering up the Judgment, or from the Time of the Commencement of this Act in Cases of Judgments then entered **up and not** carrying Interest, until the same shall be satisfied, and such Interest may be levied under a Writ of Execution on such Judgment"

(5) *The Count For Money Found to be Due on Account Stated*—As **this Count appears as the third major classification in The Classification of the Common Counts**, it will be discussed below at that point, and not as one of the *Indebitatus* Counts, although it meets the requirements of an *Indebitatus* Count in the legal theory.

(B) *Other Counts: (1) The Count for Use and Occupation of Land*—At Common Law the Action of *Indebitatus Assumpsit* was not available for Use and Occupation upon a quasi-contract.~ The reason for this as worked out by Dean James Barr Ames, was connected with the nature of rent. On a lease for years, reserving a rent, as well as on a sale of goods, originally Debt *was* the only remedy. In both cases the Obligation to Pay did not arise out of a Contract in the modern sense, as Debt for goods sold was based on the

43- ~n general, on the Development of *Indebitatus Assumpsit* as a remedy to recover damages for Use and Occupation, see:

Treatises: 3 Street Foundations of Legal Liability, c. XV, *Indebitatus Assumpsit*, 182 (*Northport*, 1906); Ames, Lectures on Legal History, Lecture XV, *Assumpsit for Use and Occupation*, 167 (Cambridge, 1933).

**Comments:** Quasi-Contract-Assumpsit for Use si-d

Occupation Against a Trespasser in Modern Cases,  
30 Mich.L.Rev. 1087 (1922); Quasi-Contracts—Use  
and Occupation—Recovery of Benefits Received by  
a Trespasser, 35 Mich.L.Rev. 1190 (1930).

64. Gibson v. Kirk, 1 Q.B. 850, 113 Eng.Rep. 1357  
(1841).

Sec. 176

### ACTION OF INDEBITATUS ASSUMPSIT

355

theory of a grant,<sup>63</sup> whereas Debt for rent was a reservation. As to the sale of goods, the situation was altered by the development of Assumpsit, under which Assumpsit was extended into the Field of Debt, *first*, by holding that Assumpsit would lie where a Promise to Pay a Debt was made subsequent to the time when the Debt was created, and *second*, by the holding in 1602 in *Blade's Case*,<sup>66</sup> in which it was decided "that the buyer's words of agreement, which had before operated only as a grant, imported also a Promise, so that the seller might, without more, sue in Debt or Assumpsit, at his option."<sup>67</sup>

But the courts refused to take this step in the case of rent, and apparently there was only one case of Indebitatus Assumpsit for rent prior to legislative intervention. In that case, *Black v. Bowsat*,<sup>68</sup> decided in 1623, the reporter observed: "Note, there was not any exception *taken*, that the *assumpsit* is to pay a sum for rent; which is a real and special *duty*, as strong as upon a Specialty; and in such case this action lies not, without some Special Cause of Promise." And Dean Ames cites cases to support the view that thereafter the plaintiff failed to recover in Assumpsit, both where there was a subsequent Express Promise to Pay, as well as where there was no such Promise.<sup>11</sup>

Assumpsit was made concurrent with Debt in order to evade Trial by Wager of Law, but

65. Ames, Lectures on Legal History, Lecture XV, Assumpsit for Use and Occupation, 167 (Cambridge  
1913).

66. 4 Co. 92b, 76 Eng.Rep. 1074 (1602).

67. Ames, Lectures on Legal History, Lecture XV, Assumpsit for Use and Occupation, 107 (Cambridge  
1913).

68. *Slack v. Bowsal*, Cro.Jac. 608, 79 Eng.Rep. 575

(1623).  
66. *Ibid.*

69. *Slack v. Eowson*, Cro.Jac. 668, 79 Eng.Rep. 575, 570 (1623).

this incentive was lacking in the case of rent, as Wager of Law was not available in Debt for Rent. And the Executor of a Lessee was chargeable in Debt, while only Assumpsit was permitted against the Executor of a Buyer or Borrower. Hence, as Dean Ames suggests, the Courts found no reason why they should extend Indebitatus Assumpsit into the Field of Rent. In time, however, the landlord was permitted in certain cases to sue in Special Assumpsit as well as Debt, an innovation brought about by the continuing struggle between the Royal Courts for Jurisdiction. As Special Assumpsit was a branch of Trespass on the Case, over which King's Bench had jurisdiction, this part of its jurisdiction was expanded to cover the situation, as it had no jurisdiction over cases arising by Original Writ in Debt. In its earliest attempt, as in the case of *Synwock v. Payn*,<sup>72</sup> the Court sought to justify its usurpation by construing agreements concerning leases as not creating a rent. In 1635, in the case of *Acton v. Bimonds*,<sup>73</sup> it was held that Assumpsit would lie concurrently with Debt where it appeared that at the time of the lease, the lessee had expressly Promised to Pay the rent. The argument was summarized in a report of the same case in Rolle's Abridgment,<sup>5</sup> where it was said:

"The action lay, because it appeared that it was intended by the parties that a lease should be made and a rent reserved, and for better security of payment thereof that the lessor should have his remedy by Action of **Debt upon the reservation, or Action upon** this Collateral Promise at his Election, and this being the intent at the beginning, the making of the lease though real would not toll this Collateral Promise, as a man may covenant to accept a lease at a certain rent and to pay the rent according to the reservation, for they are two things, and so the

75. Cro.Eliz. 786, 78 Eng.Rep. 1010 (1600).

73. Jones, w. 364, 82 Eng.Rep. 190 (1635).

<sup>74</sup> 1 Rolle, Abridgment, 8, p1. 10, (1834).

-L Ames, Lectures on Legal History, c. XV, Assumpsit for Use and Occupation, 167 (Cambridge 1913).

356

## OFFENSIVE PLEADINGS

### Ch. 17

Promise of Payment is a thing Collateral to the Reservation, which will continue though the lessee assign over.” According to Dean Ames, this doctrine, as recognized by the Court of King’s Bench, was adopted by the Court of Exchequer in the case of *Trever v. Roberts*,<sup>75</sup> decided in 1664, and by the Court of Common Bench in the case of *Johnson v. May*,<sup>50</sup> decided in 1683. In the cases considered to this point the *assumpsit* was for the payment of a sum certain, but *anumpsit* was also admissible in cases where the amount to be recovered was uncertain, that is, where the defendant promised to pay a reasonable compensation for use and occupation of land. And, as Debt originally would not lie upon a *Quantum Meruit* Count,<sup>71</sup> Assumpsit thus filled a gap in the remedial law, as it lay where the sum to be recovered was indefinite or uncertain,~ with the consequence that Debt would not lie.

Against this background, in the year 1737, the Statute of 11 Geo. II, c. 19, was enacted. To remedy the inconvenience of suing for the recovery of rents, where the demises were not by deed, Section 14 provided that it shall be lawful for a landlord, “where *the agreement is not by deed, to recover a reasonable* satisfaction for the lands, tenements, and hereditaments held or occupied by the defendant in an Action on the Case for the Use and Occupation of what was so held or enjoyed; and if, in evidence on the Trial of such action, any parol or demise or agreement, not being by deed, whereon a certain rent was reserved, shall appear, the plaintiff shall not therefore be Non-suited, but may make use thereof as an evidence of the Quantum of Damages to be recovered.” From the language of the Statute, it is evident that it was

-6. I-lardr. 366, 145 EngRep. 500 (1664).

<sup>76</sup> 3 Let. 150, 83 Eng.Rep. 624 (1683).

*IT* Mason v. Welland, Skin. 288, 90 Eng.Rep. 109 (1685).

-8. King v. Stephens, 2 Rollc 435, ~1 EngRep. 900 (1823).

designed to eliminate two earlier difficulties which barred the use of *Indebitatus Assumpsit* for Use and Occupation; *first*, to prevent a plaintiff from being Non-Suited on the ground of a Variance, where the plaintiff had sued upon a *Quantum Meruit* Count, and it appeared from the evidence that the demise was for a sum certain, for which Debt was the proper remedy; and *second*, to escape from the necessity of proving an Express Promise at the time of the demise, where the plaintiff declared for a sum certain, and it was the removal of this second difficulty which gave the Statute its chief significance. Dean Ames summed up the matter, when he declared: “Thereby *Indebitatus Assumpsit* became concurrent with Debt upon all Parol Demises. In other words, the Statute gave to the landlord, in 1738, what *Blade’s Case* gave to the seller of goods, the lender of money, or the employee, in 1602; namely, the right to sue in Assumpsit as well as in Debt, without proof of an Independent Express Promise.”

Although the Statute only mentioned an Action on the Case, which meant Assumpsit, Debt for Use and Occupation still remained available,<sup>60</sup> even where there was an Express Demise, but not by deed.<sup>83</sup> Thus, the action of *Indebitatus Assumpsit* for Use and Occupation became a remedy in all those cases in which the demise or agreement was not by deed, and where the defendant had had an actual or constructive occupation; but where the demise or agreement was by deed, the action would not lie, in which case **the remedy was** in Debt or Covenant on the demise or agreement.<sup>65</sup>

<sup>79</sup> Ames, Lectures on Legal History, c. XV’, Assumpsit for Use and Occupation, 170 (Cambridge 1913).

<sup>80</sup> Wilkins v. Wingate, 6 T.R. 62, 101 Engitep, 436

(1794).

<sup>81</sup> Gibson v. Kirk, 1 Gate 4 P. 252 (1841).

<sup>82</sup> 1 flolle, Abridgment 7, Actfon sur case (London 1668).

Sec. 176

## ACTION OF INDEBITATUS ASSUMPSIT

As the Action for Use and Occupation was based on the landlord-tenant relationship, express or implied, and as the Statute was construed as limited to cases, where by mutual agreement, the person in possession of the land was to pay either a sum certain or a reasonable compensation to the owner, it was not possible to charge a trespasser in Assumpsit for Use and Occupation.

As to pleading, it was not necessary to allege where the premises were located, as the Venue was Transitory.<sup>83</sup> And where a rent had been agreed upon, that was the Measure of Damages, even though the lease was void,<sup>61</sup> otherwise they would be the value of the premises, which should be proved.~ It was not permissible to join a Count on a Demise and a Count for Use and Occupation.<sup>80</sup>

(2) *The Count for Board and Lodging.*— In this Count the plaintiff alleged that the defendant was indebted for certain rooms, apartments and furniture, used and enjoyed at the special request of the said defendant; and for meat, drink, fire and candles, and other necessaries, found and provided by the plaintiff at the defendant's special request; **that the said defendant undertook and faithfully promised the plaintiff to pay him so much money as he reasonably deserved to have of the said defendant; plus an averment as to the amount of money the plaintiff reasonably deserved,**

(3) *The Count for Land Sold and Conveyed.*—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 un

83. King v. Fraser, 6 East 348, 102 Eng.ltep. 1320 (1805).

-Be Medina v. Poison, felt. 47, 171 Eng.Rep. 157 (1815).

§8. Tomlinson v. Day, 2 Brod. & B. 680, 120 Eng.ltep.

1125 (1821).

der a General Indebitatus Count for Land Sold and Conveyed.<sup>67</sup>

(4) *The Count for Goods Sold and Dclivered.*—The Indebitatus Count for Goods Sold and Delivered lies only where there has been a delivery of the goods to the defendant, or something equivalent to a delivery, as for instance, putting it within the defendant's power to take them himself.<sup>88</sup> And whenever goods are sold and delivered under a Special Contract fixing the price to be paid, the action to recover the price is either Special Assumpsit on the Contract or the price of the goods, which the Law Implies to be their Value, may be recovered in General Assumpsit. But where the debt is not due from the defendant immediately, a Count for Goods Sold and Delivered will not lie and the action must be Special Assumpsit. But where there has been a delivery, the action may be either in Indebitatus Assumpsit, on the Count for Goods Sold and Delivered, or on a *Quantum Valebant* Count.<sup>89</sup>

We have previously seen that where goods are wrongfully obtained and converted into

87. Illinois: Elder v. flood, 38 III. 533 (1865); Mnssa~ eliusetts: Goodwin v. Gilbert, 9 Mass. 510 (1813); Felch v. Taylor, 13 Pick. (Mass.) 133 (1832); Pike v. Brown, 7 Gush. (Mass.) 133 (1851); Michigan:

Nugent v. Teachout, 67 Mich. 571, 35 N.W. 254 (1887); New York: Nelsnn v. Swan, 13 Johns. (N.Y.) 483 (1816); Bowen v. Bell, 20 Johns. (N.Y.) 338, 11 Am.Dec. 286 (1823); Whitbeck v. Whitbeek, 9 Cow. (N.Y.) 266, 18 Am.Dec. 503 (1828); Pennsylvania: Siltzell v. Michael, 3 Watts & S. (Pa.) 329 (1842).

88. Smith v, Chance, 2 B, & A. 753, 106 Eng.llep. 540 (1810).

89. Illinois: Toledo, IV. & W. U. Co. v. Chew, 67 111.

378 (1873); Massachusetts: Goodrich v. Laffliu, t Pick. (Mass.) 57 (1822); Loring v. Gurney, 5 Pick, (Mass.) 15 (1827); Shearer v. Jewctt, 14 Pick. (Mass.) 232 (1833); Bemis v. Charles, 1 Mete. (Mass.) 4-40 (1840); Wadsworth y. Gay, 118 Mass. 44 (1878); Knight v. New England Worsted Co., 2 Cush. (Mas&> 271 (1848); Michigan: Clark v. Moore, 3 Mich. 55 (1853); Willson v. Wagar, 26 Mich. 452 (1873); Larkin v. Mitchell & Rowland Lumber Co., 42

mcli. 290, 3 NW. 904 (1879); New York: Willson v. Force, C Johns. (N.Y.) 110, 5 Am.Dec. 195 (1810); Pennsylvania: Adams v. Columbian Steamboat Co., 3 Whart. (Pa.) 75 (1838).  
- Arden v. Pullen, 9 M. & W. 430, 152 Eng.Rep. 492 (1842).

#### OFFENSIVE PLEADINGS

money, Indebitatus Assumpsit will lie by the owner to recover the money, as received for his use, but such Form of Assumpsit will not lie where the goods are not converted into money by the wrongdoer.<sup>90</sup> 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 an Action of Trover.<sup>91</sup> Other courts, however, hold that the owner of the goods may waive the Tort, and sue in Indebitatus Assumpsit for the goods, as upon a Fictitious Sale, and Promise to Pay for them?<sup>2</sup>

90. Thus, a sale of an automobile to which (the manufacturer had title, was held to be a conversion by the party who sold it, for which the manufacturer could maintain a Trover or he could Waive the Tort Action and recover on the Common Counts, after disposition of the car for money or other property,

Alabama: Pinner v. Studebaker Corp. of America, 196 Mi. 422, 72 So. 54 (1916); Georgia: Parker v. Lee, 19 Ga.App. 499, 91 SE. 912 (1917).

DI. Alabama: Strother's Athn'r v. Butler, 17 Ala. 733, 52 Am.Dec. 190 (1850); Maine: Androscoggin Water Power Co. v. Metcalf, 65 Me. 40 (1870); Massachusetts: Jones v. Boar, 5 Pick. (Mass.) 285 (1827); Allen v. Ford, 19 Pick. (Mass.) 217 (1887); Michigan: Galloway v. Holmes, 1 Doug. (Mich.) 330 (1844); cf. Aidhie v. UG. Co. v. Barnard, 84 Mich. 632, 48 N.W. 280 (1891); Missouri: Kansas City, St J. & C. B. B. Co., 79 Mo. 278 (1883); Pennsylvania: Bethlehem Borough v. Perseverance Fire Co., 81 Pa. 445 (1876). See, also, Clark, Handbook on the Law of Contracts, - VI, 632 (3d ed., St. Paul 1914).

And in such jurisdictions, where the goods taken have been turned 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, 10 Pick. (Mass.) 218 (1837); Brown v. Holbrook, 4 Gray (Mass.) 103 (1855).

Where one wrongfully converts personal property, but does not receive any money therefor, the Tort cannot be Waived, and an Action *Contractu* brought, because, until the wrongdoer has received money to which the owner of the property is entitled, there can be no Action for Money *Had* and Received, or upon an Implied Promise to Pay. Woodruff v. Zaban & Son, 133 Ga. 24, 65 SE. 123, 134 Am.St.Rep. 186, 17 Ann.Cas. 974 (1909).

92. English: Russell v. Bell, 10 H.L. & W. 340, 152 Eng. Rep. 500 (1842); Illinois: Toledo, W. & W. B. Co. v. Chew, 67 Ill. 378 (1873); Michigan: Alamo Mfg. Co. v. Barnard, 94 Mich. C32, 48 N.W. 280 (1891); Mississippi: Evans v. Miller, 58 Miss. 120, 38 Am.Ecp.

(5) *The Count for Goods Bargained and Sold.*—The Common Count for Goods Sold and Delivered lies in those cases only in which there has been an actual or constructive delivery; but the Count for goods Bargained and Sold lies where there has been a complete sale but no delivery. It is necessary, however, that the property in the goods should have become vested in the vendee by virtue of such sale.<sup>93</sup> The right of property must be in the vendee, though the right of possession may be in the vendor; and although a sale be complete and binding in other respects, no property passes where anything material requires to be done before the delivery, to ascertain the price thereof, or the specific goods sold, and Goods Bargained and Sold therefore will not in such

313 (1880); New York: Willson v. Force, 6 Johns. (N.Y.) 110, 5 Am.Dec. 195 (1810); Goodwin v. Criffis, 88 N.Y. 629 (1882); Terry v. Mungcr, 121 N.Y. 161, 24 N.E. 272, 8 L.R.A. 216, 18 Am.St.Sep. 803 (1890); Pennsylvania: McCullough v. McCullough, 14 Pa. 295 (1850); Fianey v. McMahon, 1 Yentes (Pa.) 248 (1793); Wisconsin: Walker v. Duncan, 68 Wis. 624, 32 NW. 889 (1887); Clark, Handbook on the Law of Contracts, c. VI, 646 (3d ed., St. Paul, 1914).

But compare: English: Thurston v. Mills, 16 East 254, 104 Eng.Rep. 1085 (1812); Illinois: Creel v. Kirkham, 47 Ill. 344 (1868); Johnston v. Salisbury, 61 Ill. 316 (1871); Michigan: Tuttle v. Campbell, 74 Mich. 652, 42 N.W. 384, 16 Am.St.Rep. 652 (1880); Pennsylvania: Boyer v. Eullard, 162 Pa. 555 (1883); Veiler v. Korsbner, 109 Pa. 210 (1885).

<sup>93</sup>Where there has been a tortious taking or detention of property, which has not been sold by the tortfeasor, the owner may Waive the Tort and



recover the fair value thereof in an action of Assumpsit upon an Account for Goods Sold and Delivered. Con. away v. Popper, 7 Boyce (Del.) 511, 108 A. 676 (1919).

Where the defendant appropriated the plaintiff's property, the plaintiff may Waive the Tort and maintain an Action of Assumpsit for the value of the property, even though the defendant had not sold and converted the same into money. Daniels v. Foster & Kleiser, 95 Or. 502, 187 P. 627 (1920). See, also, an article by Deinard & Deinard, Election of Remedies, 8 Minn.L.Rev. 341, 358, 360, 502, 504 (1922).

03. Atkinson v. Boll, S B. & C. 277, 108 Eng.Llep. 1040 (1828).

358  
CIt 17

Sec. 176

### ACTION OF INDEBITATUS ASSUMPSIT

359

case lie. And so in the case of manufactured goods, unless the goods are specifically appropriated to the vendee, with his assent, no property passes, and Goods Bargained and Sold will not lie.<sup>04</sup>

(6) *The Count for Work, Labor and Services.*—When work is done or services are rendered, not under a Special Contract as to compensation, but under such circumstances that the law will imply a Promise to pay what they are worth, or where, though done **or rendered under a Special Contract, that Contract has been Fully Performed**, General Assumpsit will lie to recover compensation therefor. In such cases, the action may be in Indebitatus Assumpsit,<sup>95</sup> or on the *Quantum Meruit*~

(II) *Value Counts:* (A) *Quantum Meruit.*

—The *first* of the Value Counts, *Quantum Meruit*, is used where the plaintiff has performed services, and he alleges that, in Consideration that the plaintiff, at the request of the defendant had done certain work, he, the defendant, Promised the plaintiff to Pay him so *much money as he there for reasonably deserved* to have, and that the plaintiff deserved to have a certain sum<sup>7</sup>

DL Browne, A Practical Treatise on Actions at Law, c. VI Forms of Actions, § 3 Goods Bargained and Sold (London 1843).

95. Massachusetts: Fuller v. Brown, 11 Mete. (Mass.) 440 (1846); Pennsylvania: Kelly v. Foster, 2 Bin. (Pa.) 4 (1800); Miles v. Moodie, 3 Serg. & U. (Pa.) 211 (1817); Harris v. Christian, 10 Pa. 233 (1849).

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. & U. (Pa.) 235 (1823).

96. Illinois: Frazer v. Gregg, 20 Ill. 299 (1858); Massachusetts: King v. Welcome, 5 Gray (Mass.) 41 (1855); Atkins v. Earnstable County, 97 Mass. 428 (1867); Michigan: Allen v. McKibbin, 5 Mich. 440 (1858); Mooney v. York Iron Co., 82 Mich. 263, 46 N.W. 376 (1890); Pennsylvania: Summers v. McKim, 12 Serg. & B. (Pa.) 405 (1825).

(B) *Quantum Valebant.*—The *second* of the Value Counts, *Quantum Valebant*, is used where the plaintiff has sold goods to the defendant, and he alleges that the defendant, in Consideration thereof, Promised the plaintiff to Pay him *so much as the goods were reasonably worth*, and that they were reasonably worth a certain sum~

(C) *The Absorption of the Quantum Meruit and Quantum Valebant Counts into the Indebitatus Counts.*—As Debt originally lay for a sum certain only, that action could not be maintained on the facts of a *Quantum Meruit* or a *Quantum Valebant*, because of the uncertainty of the sum involved. But when Debt was extended to such implied Obligations, under the maxim *Id certum est quod certum reddi potest* [that is certain which can be made certain], and the Indebitatus Count in Assumpsit came to be permitted in cases where by evidence an uncertain sum could be reduced to a certainty, it thus was made possible to maintain the action on such factual situations as formerly required the use of the *Quantum Meruit* or *Quantum Valebant Counts*. The Value Counts of *Quantum Meruit* and *Quantum Valebant*, in the eyes of the legal profession in England, came to be regarded as unnecessary, their original scope and purpose being brought within the purview of the Indebitatus Count in Assumpsit and in Debt. In

recognition of this fact the Regulations of Trinity Term, in 1831, prescribed a Common Form for the Common Counts of Indebitatus Assumpsit and Account Stated, simplifying and relieving them from “unnecessary verbiage.” ~°

**In the United States it has been held that**

the use of the Value Counts is now not necessary, since the reasonable Value of Goods Sold and Delivered or Work and Labor Done may

98. Id. at 140.

99. Martin, Civil Procedure at Common Law, c. It, Personal Actions Ex Gontractu, Art. III, Assumpsit, 57, Common Counts, 57 (St. Paul, 1005).

See I Saunders, Pleading and Evidence, Assumpsit, Form of Remedy, 139, 140 (Philadelphia 1831).

360

**OFFENSIVE PLEADINGS**

**Ch. 17**

be recovered upon an Indebitatus Count.t Thus, in *Parker v. Macamber*,<sup>2</sup> **where the** plaintiff brought Indebitatus Assumpsit to recover compensation for board, maintenance, care and nursing, with the Declaration containing Four Counts, for Goods Sold and Delivered, Work and Labor, Money Had and Received, and for Interest, and the Jury returned a Verdict for the plaintiff, after which the defendant sought a New Trial, contending, among other things, that the evidence as to the services rendered was not admissible without a *Quantum Meruit* Count, the Court denied a *New Trial*, declaring: “We think it [the declaration] is sufficient. A Count in *Quantum Mcmii*, as well as one in *Intl ebitat us Assumpsit* for Work, Labor, Skill, Care, Diligence, etc., claims a certain sum due. In either case the plaintiff may recover less, and the Judgment is for so much of his stated claim as is found to be justly merited. The Counts in *Quantum Meruit* and *Quantum Valebat*, are therefore unnecessary in any case.” ~

The effect of such decisions has been to reduce the necessary Common Counts to the indebitatus Counts and the Account Stated, the latter of which will now be considered.

(111) *The Common Count on an Account &ated*.<sup>4</sup>—The Action of Indebitatus Assumpsit lies to recover the balance due upon an **Account Stated, for the law Implies a Promise to** pay it. The Account Stated must be with reference to former transactions between the parties, or some debt for which an action or suit would lie, or some demand which the defendant ought morally and in

s. *Norris v. School District No. I in Windsor*, 12 Me. 293, 28 Am.Dec. 182 (1825).

2. 17 RI. 674, 24 A. 464, 16 L.I?A. 858 (1892).

-3. *Parker v. Macomber* 17 RI. 674, 24 A. 464, 16 L. R.A. 858, 861 (1892).

justice to pay;<sup>6</sup> if not, the Count is not maintainable. The rule as to when the Count on an Account Stated will lie, was laid down in the case of *Porter v. Coaper*, by Baron Parke, who declared: “I take the rule to be this, that if there is an admission of a sum of money being due for which an action would lie that will be evidence to go to the Jury on the Count for an Account Stated.”<sup>7</sup> Thus, an Account Stated is an acknowledgment of debt.<sup>8</sup>

**CONTRACTS OF RECORD AND STATUTORY**

**LIARILITIES~**

177. Indebitatus Assuznpsit will not lie, in the absence of a statute, to enforce a Domestic **Judgment nor a Judgment rendered in a Sister State. But a Judgment of a Foreign Court is not considered a Debt of Record. Indehitatus Assumpsit will lie to enforce certain Statutory Obligations to pay money.**

*Action on Judgment*

A JUDGMENT of a Court directing the payment of money clearly cannot be regarded as a true Contract, for the element of agreement is wanting.’° Whether or not Assump

5. *Cjai-ke v. Webb*, I G.M. &R. 80, 149 Eng.ltep. 980 (1834).
6. I C.M. & It. 387, 149 Eng.ltep. 1180 (1834).
7. *Porter v. Cooper*, I ~.M. & B. 387, 304, 149 Lag. Rep. 1130, 1133 (1834).
8. English: *hopkins v. Logan*, 5 *Isf. & \V.* 241, 151 Eng.Rep. 103 (1830); *Irving v. Vouch*, 3 M. & W. bc, 150 Eng.llep. 1069 (1837); Illinois: *Throop v. Sherwood*, 4 Gil. (DI.) 92, 98 (1847); *MackIn v. O'Brien*, 33 Ill.App. 474 (1892); IBdiana: *Marshall v. Lewark*, 117 But. 377, 20 N.E. 253 (1559); Massachusetts: *hojt v. Wilkinson*, 10 Pick. (Mass.) 31 (1830); Michigan: *Stevens v. Tuller*, 4 Mich. 387 (1857); *Watkins v- Ford*, 60 Mich. 357, 37 N.W. 300 (1888); Vermont: *Warren v. Garyl*, 61 vt. 331, 17 A. 741 (1850); *W. F. Parker & Son v. demons*, 80 Vt. 521, 65 A. 646 (1908).
9. In general, on contracts of Record, see Note, ii **Ann.Cas.** 656 (1909).
10. Illinois: *Rae -v. HuThert*, 17 Ill. 572 (1850); *Be]-ford v. Woodward*, 158 ILL 135, 41 N.E. 1007, 29 L. R.A. 593 (1656); New York: *O'Brien v. Young*, 95 N.Y. 428, 47 Am.Rep. 64 (1884); Federal: State of
1. In general, on the Account Stated, see Note, 29 *L. itS. (N.S.)* 334 (1911).

## Sec. 177

### ACTION OF INDEBITATUS ASSUMPSIT

361

sit will lie depends on the character of the Judgment. Assumpsit will only lie on a Simple Contract, or a Quasi-Contractual Obligation having the force and effect of a Simple Contract Debt. It will not lie on a Contract under Seal, or on any other Specialty. A Judgment of a Court of Record, not being a Foreign Court, is not merely evidence of the debt, but is conclusive evidence of it. It is a Specialty, and therefore Indebitatus Assumpsit will not lie.<sup>1</sup>

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 Indebitatus Assumpsit may be maintained upon it.<sup>2</sup> The action will also lie on a Domestic Judgment of an Inferior Court Not of Record, since it is not a Specialty.<sup>3</sup> Some of the Courts have therefore held that Indebitatus 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 Specially.<sup>4</sup>

*Louisiana v. Mayor, etc., of City of New Orleans*, 109 IfS. 255, 3 Sot. 211, 27 LEd. 936 (1883).

11. **New** York: *Andrews v. Montgomery*, 19 .Tolujs. (N.Y.) 162, 10 Am.Dec. 213 (1821); Federal: *Du ibis v. Seymour*, 152 Fed. 600, 81 C.C.A. 590, 11 Ann.Cas. 656, note (1907).
12. English: *Hall v. Odher*, 11 East 121, 103 Lag. Rep. 949 (1809); *Walker v. Witter*, I Doug. 4, 99 Eng.Rep. 1 (1778); *Buchanan v. Bucker*, 1 Camp. 63, 170 Eng.llep. 877 (1807); *Sadler v. Robins*, 1 Camp. 253, 170 Eng.Rep. 048 (1808); *Grant v. Fasten*, L.R. 13 Q.B.Div. 302 (1883); *MeFarlane v. Derbishire*, 8 U.C.Q.B. 12 (1884); Massachusetts: *But-trick v. Allen*, S Mass. 273, 5 Ani.Dec. 105 (1811); New York: *Hubbell v. Coudrey*, 5 Johns. (Ni) 132 (1809); Vermont: *Boston india Rubber Factory v. lou*, 14 Vt. 92 (1842); Federal: *Mcllin v. Ilorliek*, 31 Fed. (C-C.) 865 (1887).
13. English: *Dictum in Williams v. Jones*, 13 11. & Iv. 031, 153 Eng.Rep. 264 (1845); Federal: *Green v. Fry*, Fed.Oas.No.5,758, I Ornneh, CC. 137 ~iS03).
14. New York: *Pease v. Howard*, 14 Johns. (N.Y.) 479 (1817); *James v. Henry*, 16 Johns. (N.Y.) 233 (1810); North carolina: *Rain v. Hunt*, 10 NC. 572 (1525);

It was at one time held in some states that the Judgment of a Court of Record in a Sister State is of the same effect as any other Foreign Judgment—merely evidence of the debt —so that Indebitatus Assumpsit will lie upon it;” but, in view of the Full Faith and Credit 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 renderedr 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 Indehitatus Assumpsit. The remedy is Dcbt.<sup>o</sup>

*Liability imposed by Statute*

WHERE an Obligation to Pay Money is imposed by Statute, it may be enforced by an action of Indebitatus Assumpsit. Illustrations of such an Obligation arise where a Statute imposes a duty upon one County or Parish to pay another for money expended

Ohio: *Adairs Ad,rir v. Rogers’s Adnir, Wright (Ohio) 428 (1833).*

The judgment of a j Is lice of the pen~ ii, another state is not a specialty debt of record. Indiana: *Collins v. Modisett, I Blae kf. (Tad.) GO (1820); New Hampshire: Robinson v. Prescott, 4 N.H. 150 (1828); Mahurin v. Biekferd, 6 N.H. 567 (1833).*

15. New York: *Hitchcock v. Aiken, 1 Caines (N.Y.) 460 (1803); Pawli]lg v. Willson. 13 Johns. (N.Y.) 192 (1816); South Carolina: Lambkin v. Nunece, 2 Rrev. (S.C.) 99 (1800).*

16. Arkansas: *Morelthead v. Grisham, 13 Ark, 431 (ISIS) ; Kentucky: Garland v. Tucker, 1 11 ibIs (Ky.) 301 (1800); Maine: MeKim v. Odom, 12 Me. 9-f (1835) New York: *Andre~vs v. Montgomery. 19 Johns. (N.Y.) 162, 10 Am.Dec. 213 (1821); Cf. Shuruway v. Stillrnan, C Wend. (N.Y.) 447 (1831); Vermont: Boston India Rubber Factory v. Hoit, 14 Vi. 92 (1542). But see Black, A Treatise on the Law of Judgments, Including the Doctrine of lies Juslicata, c. IX, §1 853—873 (2d ed., St. Paul 1002).**

In some states the Courts have 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. *Mellac v. Mattoon, 13 Pick. (Mass.) 53 (1832).*

362

**OFFENSIVE PLEADINGS**

**Ch. 17**

in the support of a pauper, or where a Statute allows an action to recover usury paid, or money lost and paid on a wager. But Indebitatus Assumpsit will not lie if the Statute prescribes some other remedy and impliedly excludes the remedy by Indebitatus Assuinpsit.’<sup>1</sup>

**DECLARATION IN INDEBITATUS ASSUMPSIT—ESSENTIAL ALLEGATIONS:**

**(I) IN GENERAL**

178. The Essential Allegations of a Declaration in Indebitatus Assuinpsit are:

(I) A Statement of the Executed Consideration, or quid pro quo, from **which the defendant’s indebtedness arose.**

**(II) A Promise by the Defendant to Pay**

Money.

**(III) A Breach of the Promise.**

**(IV) The Damages.**

THE Form of the Declaration in Indebitatus (General) Assumpsit is very simple, and needs scarcely any discussion. The chief difficulty is in determining when General Assumpsit will lie. Instead of stating the concrete facts of the cause of action, the Corn

17. Illinois: *Board of Sup’rs of Sangamon County v. City of Springfield, 63 111.66(1872); Massachusetts: Inhabitants of Bath v. Inabitants of Preeport, 5 Mass. 325 (1809); Watson v. Inhabitants of Cambridge, 15 Mass. 286 (1818); Inhabitants of Milford v. Commissioner, 144 Mass. 64, 10 NE. 516 (1887); Michigan: Woods v. Ayres, 39 Mich, 345, 33 Am, Rep. 396 (1878); New York: McCoun v. New York Cent. & H. B. B. Co., 50 N.Y. 176 (1872); Vermont: Woodsiock v. Town of Hancock, 62 Vt. 348, 19 A. 991 (1890); Federal: *Pacific Mail 5. 5. Co. v. Jolliffe, 2 WalL (U.S.) 450, 17 LEd. 805 (1864).**

At Common Law a Penalty given by Statute may be recovered either in Assumpsit or Debt *Ewbanks v. President, etc. of Town of Ashley, 36 Ill. 177 (1864).*

But, if the Statute prescribes the Form of Action for Its recovery, the recovery can be had only in that form of action. Illinois: *Confrey v. Stark, 73 Ill. 187 (1874); Massachusetts: Peabody v. Hayt, 10 Mass. 36 (1813).*

**Assumpsit is the proper remedy** under a Statute (providing no other remedy) to recover money paid for **intoxicating** liquor *Friend v. Dunks*, 37 Mich. 25 (1877); *Id.* 39 Mich. 733 (1878).

Common Counts state only General Conclusions of Law, as that defendant is indebted for money had and received, or some other vague reason. These General Statements do not disclose the exact ground of the liability, or assist in presenting the Issue of Law and Fact on which the case depends. They are convenient in avoiding the danger of a Variance and concealing the real basis of the claim, but violate the true principles and policies of pleading.<sup>18</sup>

#### DECLARATION IN INDEBITATUS ASSUMPSIT—ESSENTIAL ALLEGATIONS:

##### (2) STATEMENT OF AN EXECUTED CONSIDERATION

179. The Declaration must allege an **Existing Indebtedness to the plaintiff, based on a receipt of value by him, at his request.**

#### *Indebitatus Assumpsit*

##### **AS we have stated previously, in stating**

the debt and its cause in the Common Counts in Indebitatus Assumpsit, the plaintiff alleges that the defendant, on a certain day, at a certain place, was indebted for a sum certain, for a Specific Consideration furnished by the plaintiff, with a Statement that the Consideration was furnished at the Special Instance and Request of the defendant<sup>19</sup> Time and

18. For cases on the Common Counts, see the following: Alabama: *McLeod v. Powe & Smith*, 12 Ala. 9 (1847); California: *Pike v. Zadig*, 171 Cal. 273, 152 Pnc. 923 (1915); New Jersey: *Cory v. Board of Chosen Freeholders of Somerset County*, 47 N.J.L. 181 (1825); Pleading: *Sufficiency of the Common Counts*, 4 Calif.L.Rev. 352 (1916).

On the effect of General Declarations, of which the Common Counts in assumpsit are the most familiar, see **Simpson**, A Possible Solution of the Pleading Problem, 53 Harv.L.Rev. 169, 174—175 (1939).

19. *Victors v. Davies*, 12 1W. & W. 758, 152 Eng.Rep. 1405 (1844).

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 (1823).

And consequently, in those states where Special Distresses are abolished, it would seem that the Allegation of some of these facts would be unnecessary.  
Sec. 179

#### **ACTION OF INDEBITATUS ASSUMPSIT**

363

place are in general immaterial, except that a time must not be laid subsequent to the date when the Cause of Action arose; 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.<sup>21</sup> The statement of the sum claimed is also, generally, immaterial except that enough must be laid to cover the actual amount. Another requisite is the statement of the Cause of the Debt, as well as the debt itself; and this is both for the information of the defendant, so that he may know what debt is sued on and what defense to make, and in order to identify the subject-matter of the action, so as to enable him to Plead the Recovery in Bar of any subsequent action for the same debt.<sup>22</sup> 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.<sup>23</sup>

sary, though it is certainly the better practice to allege them. Alabama: *Isfcorary v. Brown*, 157 Ala. 515, 50 South. 402 (1909); Illinois: *MeEwen v. Morey*, 60 Ill. 32 (1871).

20. **Langer** v. Parish, S Serg. & 11. (Pa.) 134 (1822).

21. This is in addition to the statement of the County as a Venue. Massachusetts: *Billings v. President, etc. of Nantucket Bank*, 5 Mass. 96 (1809);

New

York: Wetmore v. Baker, 9 Johns. (N.Y.) 307 (1812); Virginia: Thornton v. Smith, 1 Wash. (Va.)

81 (1792).

22. Bibbert v. Courthope, Cartli. 276, 90 Eng.Eep. 764 (1693).

It is not necessary, however, to give a particular **description of** the work done or goods sold, etc. Lewis v. Culbertson, 11 Serg. & It. (Pa.) 49, 14 Am.Dce. 607 (1824). See: Michigan: Crane v. Grassnian, 27 Mich. 443 (1873); Federal: Edwards v. Nichols, 3 Day (Conn.) 16, Fed.Cas.No.4,296 **USGS**).

25. Alabama: McGrary -v. Brown, 157 Ala. 518, 50 S. 402 (1909); Connecticut: Canfid v. Merricl, 11 Conn. 425, 429 (1836); Massachusetts: Massachusetts Met. Life Ins. Co. v. Green, 185 Mass. 300, 70 N.E. 202 (1904). But compare Somerville v. Grim, 17 W.Va. 803, 810 (1881).

The statement that money was 'lent' implies that it **was advanced at the request of** the defendant But *Quantum Meruit and Quantum Valebant Counts*

IN the Quantum Meruit Count the plaintiff declares that, in Consideration of his has'ing performed some personal service for the defendant, at his Request, the latter Promised to pay him so much therefor as he reasonably deserved, and then states how much he deserves for such service,<sup>5</sup>

In the Quantum Valebant Count the plaintiff declares that, in Consideration of his having Sold and Delivered real or personal property to the defendant at his Request, he Promised to pay him so much as the goods or land were reasonably worth, and then states what the value was. There is no necessity for using the Value or Quantum Counts rather than the Indebitatus Counts to recover for what one's goods or services are reasonably worth.<sup>5</sup>

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;

this does not apply to money "paid". English: Victors v. Davies, 12 M. & W. 758, 152 Eng.Rep. 1405 (1844); West Virginia: Somerville v. Grim, 17 W. Vn. 803, 810 (1881). So of Count for goods sold and delivered. MeEwen v. Mercy, 60 Ill. 32 (1871).

24. Lawes, A Practical Treatise on Pleading in Assunipsit, c. XV, Of the Counts on a Quantum Meruit, or Quantum Valebant, 504 (Ed. by Story, Boston, 1811); Missouri: Lee v. Ashbrook, 14 Mo. 378, 55 AmDec. 110 (1851); Nebraska: Pareell v. MeComber, 11 Neb. 209, 7 N.W. 529, 38 Am.Rep. 366 (1880); New Hampshire: Wadleigh v. Town of Sutton, U N. H. 15, 23 Am.Dec. 704 (1832).

25. Rhode Island: Parker v. Macc,mher, 17 El. 074, 24 A, 404, 10 LEA. 858 (1892); Vermont: Viles vBarre & M. Traction & Power Co., 79 Vt. 311, 65 A. 104 (1906).

Recovery of the reasonable value of goods sold or services rendered may be had under an Indebitatus Count, so that neither a Quantum Meruit nor a Quantum Valebat Count is ever necessary. Maine: Norris v. School District No. I In 'Windsor, 12 Me. 293, 28 Am.Dec. 182 (1835); Parker v. Macomber, 17 11.1. 674, 24 A. 464, 10 LILA. 858 (1802).

364

## OFFENSIVE PLEADINGS

### Ch. 17

as that it was for work done, or goods sold, etc.<sup>20</sup> But it is not necessary to state the particular description of the work done, or goods sold, etc., for the only reason why the plaintiff is bound to show in what respect the defendant is indebted is that it may appear to the Court that it is not a Specialty.<sup>21</sup>

### 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.<sup>2</sup> 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.<sup>29</sup>

26. English: *Rooke v. Fleck*, Crojue. 245, 79 Eng. Rep. 210 (1610); Alabama: *Maury v. Olive*, 2 Stew. (Ma.) 472 (1830); Kentucky: *Becuehamp v. Bbs-worth*, 3 Bibb. (Ky.) 115 (1813); Maryland: *Chandler v. State*, 5 Bar. & 5. (Md.) 284 (1802).

27. English: *Jlibbert v. Courthope*, C.ai-th. 276, 00

Eng.Rep. 764 (1692); *Ambrose v. Roe*, Skin. 217, 90  
L'ng.Rep. 100 (1684); *Story v. AtkIns*, 2 Ld.Raym.  
1429, 02 Eugitep. 428 (1726); Pennsylvania: *Lewis*  
- *Culbertson*, 11 Serg. & B. (Pa.) 49, 14 Am.Dce. 607

<1824).

28. English: *Milward v. Ingram*, 2 Mod. 44, 86 Eng.

P.09. 860 (1726); *Trueman v. Hurst*, 1 Lit. 42, 99  
*Eng.Eep*. 1232 (1780); *Peacock v. Harris*, 10 East  
104, 103 Eng.ltep. 715 (1808); *Knowles v. Miel*, 13  
East 249, 104 Eng.llep. 360 (1511); Maryland: *Stullings v. Cottshalk*, 77 Md. 429, 26 A. 521 (1803).

Recovery on this Count can be only when a certain and fixed sum is admitted to be dim. Pennsylvania:

*Richey v. Hathaway*, 140 Pa. 207, 24 A. 191 (1892);  
Vermont: *Warren v. Caryl*, 61 Vt. 331, 17 A. 741 (1889),

D. English: *Milward v. Ingram*, 2 Mod. 44, 80 Eng. Rep. 800 (1726); Massachusetts: *Hoyt v. Wilkinson*, 10 Pick. (Mass-) 31 (1839); New York: *Montgomerie v. Ivers*, 17 Johns. (N.Y.) 38 (1819). And see: Pennsylvania: *Gilson v. Stewart*, 7 Watts (Pa.) 100 (1838); Vermont: *Cross v. Moore*, 23 Vt. 482 (1851).

#### DECLARATION IN INDEBITATUS AS SUMPSIT—ESSENTIAL ALLEGA

##### TIONS: (3) THE PROMISE

180. The Promise of the Defendant, though it is an Implied One, must *always* be **alleged**.

**IT is not intended by this that there** must be a detailed statement of the defendant's Contract, but a brief Allegation that the defendant "Promised" or "Agreed" to pay the sum owed or value claimed. This much is held essential to a proper statement of the Cause of Action, as the Declaration might otherwise show the rWeged Consideration to be merely a voluntary or gratuitous act on the part of the plaintiff, for which there could be no recovery.<sup>30</sup> It does not make any difference whether the defendant ever made any such Promise, nor is it necessary to prove

it. All that is necessary to prove is a debt, and the law Implies a Promise. But some Courts will reverse a case on this technical matter.<sup>5</sup>

#### DECLARATION IN INDEBITATUS ASSUMPSIT—ESSENTIAL ALLEGA TIONS: (4) THE BREACH

181. The Breach of the Promise in Indebitatus Assumpsit is the neglect and refusal

50. Massachusetts: *Kingsley v. Bill*, 0 Mass. 190 (1811); *Cooper v. Landon*, 102 Mass. 58 (1860); Missouri: *Muldi'ow v. Tappan*, 6 Mo. 270 (1840); New York: *Booth v. Farmers' & Mechanics' Nat. Bank of Rochester*, 1 Thomp. & C. (N.Y.) 10 (1800); *Candler v. Flossiter*, 10 Went. (N.Y.) 487 (1833). But see, *Clark v. Reed*, 12 S'nieeds & M. (Miss.) 554 (1849).

The word "Promised" is not necessary if an equivalent be used, as "undertook" or "agreed." See:

English: *Corbett v. Paekington*, 6 B. & C. 268, 108  
Eng.flep. 451 (1827); South Carolina: *Wingo v.*  
*Brown*, 12 Rich. (S-C.) 270 (1859); Pennsylvania:  
*Shaw v. Redmond*, 11 Serg. & B. (Pa.) 27 (1824);  
Virginia: *Sextoa v. Holmes*, 3 hunt. (Va.) 566  
(1809); Federal: *City of Newport News v. Potter*,  
122 Fed. 321, 58 C.C.A. 483 (1903).

31. Maine: *Coffin v. Hall*, 100 Me. 126, 75 All. 385

(1909); West Virginia: *Vaid v. Diton*, 55 W.Va.

191, 49 SE. 918 (1904); *Bannister v. Victoria Coal & Coke Co.*, 63 W.Va. 502, 61 SE. 338 (1008); *Dan5cr v. Mallouee*, 77 W.Va. 26, 86 5.31 595 (1915). But see, *Potomac Laundry Co. v. Miller*, 26 App.D.C. 230 (1995) rule or court. Contra: *Wheeler v. Wilson*, 57 Vt. 157 (1884).

Sec. 183

### ACTION OF INDEBITATUS ASSUMPSIT

365

**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?<sup>3</sup>

#### DECLARATION IN INDEBITATUS ASSUMPSIT—ESSENTIAL ALLEGATIONS:

(5) **THE DAMAGES**

**182. The Declaration must allege the Damages directly resulting from the Breach by the defendant, and must lay them high enough to cover the actual demand.**

THE measure of recovery in this action will obviously be the amount of the indebtedness due, or the reasonable worth and value of the services rendered or goods or land sold, where no sum was agreed upon; and the Damages must always be laid high enough to cover all the plaintiff expects to prove, as his recovery will be limited to the amount stated.<sup>33</sup>

#### STATUS UNDER MODERN CODES, PRACTICE ACTS AND RULES

#### OF COURT

**183. In spite of the reform under Modern Codes, Practice Acts and Rules of Court, a survey of the development of Indebitatus As-**

32. Hawaii: *Tong Den v. Hitchcock*, 11 Hawaii 270

(1598) New York: *Taft v. Brewster*, 9 Johns. (N. 1.) 335 (1812); Texas: *Helinan v. Criswell*, 13 Tex.

38 (1882).

33. Liquidated damages for Breach of special Contract cannot be recovered under the Common Counts. *Butterfield v. Sellman*, 17 Mich. 95 (1808). Compare, *Sprague v. Morgan*, 7 Ala. 952 (1545)

(semble, contra).

**sumpsit, covering the period from its origin until now, shows that the action is still operating with its earlier vitality substantially unimpaired.**

**THE Action of Indebitatus (General) Assumpsit** was in general use in the several states of the United States prior to 1848?~ After 1848, the action remained in vogue. Thus, for example, in the Rhode Island case of *Parker v. Macomber*<sup>5</sup> decided in 1892, in which the plaintiff brought Indebitatus Assumpsit for Goods Sold and Delivered, Work and Labor, Money Had and Received, and for Interest, and the Jury returned a Verdict for the plaintiff and assessed Damages at \$1,072.50, being at a certain rate for 390 weeks, and the defendant prayed for a New Trial, contending, among other things, that the services were performed under an Entire Contract, which had not been completed, the Court denied a New Trial. In so doing, Douglas, J. declared:

“The questions which are raised by the petition are, whether the plaintiff can recover what his services are reasonably worth, notwithstanding the making of the Contract, and, if so, whether this Declaration is sufficient without a Count in *Quantum Meruit* to admit evidence of the value of the services, and to sustain a Judgment



therefor.

“We cannot doubt that, when this action was brought, the agreement had been annulled, if it ever had had any validity.

“If the leasehold interest were for a term exceeding one year, the agreement amounted to an attempt to convey an interest in real estate by parol, and was void under the Statute of Frauds.

34. Massachusetts: *Jones v. Hoar*, 22 Mass. 285 (1827); **New** York: *Gillet, Adm’r. of clemens v. Maynard*, 5 Johns. (N.Y.) 85 (1809); *Willson v. Foree*, 6 Johns. (N.Y.) 109 (1810); *Feltier v. Sewall*, 12 Wend. 386 (1834); Virginia: *Brooks v. Scott’s Executor*, 2 Munf. (Va.) 344 (1811).

35. 17 RI. 674, 24 A. 464, 16 LiLA. 858 (1802).  
366

## OFFENSIVE PLEADINGS

### Ch. 17

“In such case, as the defendant refused to continue the arrangement, whether justifiably or not, the plaintiff, is entitled to re— cover the value of his services already rendered. *Lockwood v. Barnes*, 3 Hill, N.Y. 128; *King v. Welcome*, 5 Gray. 41.” ~

In New York case of *City of New York v. Fink*,<sup>31</sup> decided in 1927, the issue was raised as to whether, under the Code, an action would lie against a trespasser to land for the reasonable value of the Use and Occupation thereof? In denying a Motion by the defendant, under Rule 112 of the Rules of Civil Practice, for Judgment on the Pleadings, *McGoldrick, J.* said:

“As a Development of the Common Law a party was permitted to bring an Action of Assumpsit and thus avoid the difficulties presented in the Pleading and Proof of Causes of Action in Covenant, Debt and the like. The remedy, however, was not extended to a case in which the landlord sought to recover compensation for the use of his land, not reserved by deed, until the enactment of statutes (see 11 George II, chap. 19, § 14), in substance re-enacted in our Revised Statutes and contained in Section 220 of our Real Property Law. When it is said, therefore, that to maintain Use and Occupation the conventional relation must exist, and such action cannot be maintained against a **trespasser (Prof. Ames “Assumpsit for Use and Occupation,” 2 Harv.L.R. 377; Keener Quasi Contracts, 191, 192)**, this merely means that the Form of Action characterized as Assumpsit and based upon the existence of the conventional relation of landlord and tenant could not be maintained against one not bound expressly or impliedly as tenant, or against a trespasser.

“It would seem to follow that the historical reasons which prevented an owner of property from recovering Damages for tresSc. *Parker v. Macon*, 17 Ri. 674, 24 at. 4M, 16 L. BA. 858, 800 (1892).

§1. 130 Misc. 620, 224 N.Y.S. 404.

pass unless he had procured a Judgment [in Ejectment] against the wrongdoer no longer exists for the apparent object of the legislation was not that compensation for trespass could only be had in an action to recover the property or the possession thereof, but to remedy a condition which made it necessary for a plaintiff in Ejectment to institute, after Judgment, a separate proceeding for the collection of his Damages.” ~

In view of the Abolition of the Forms of Actions by the Codes, an issue was bound to arise as to whether the summary method of statement of a cause of action, as found in the Action of General Assunipsit, could be used under the Codes. Dean Pomeroy held to the position that in the face of the Code requirement that the Complaint should state the facts in plain and concise language, the practice of using the Common Counts in Indebitatus Assumpsit violated one of the fundamental objectives of the Codes.~ “But” said Judge Clark, “the Common Counts were apparently too well and favorably known and too convenient a form of pleading to succumb to this strenuous attack, for in probably all Jurisdictions the use of the Common Counts, at least for an indebtedness incurred with the defendant’s consent, is well settled.” 40

Judge Clark’s view finds confirmation in the New York case of *Maxherntan Co. Inc. v. Aiper*)’ decided in 1924.

The Complaint, which was in the form of a Common Count in *Indebitatus Assumpsit*, and sought to recover the value of goods alleged to have been sold and delivered to the defendants at their

38. *City of New York v. Finhi*, 130 Misc. 620, 621,  
224 N.Y.S. 404, 406 (1927).

39. **Pomeroy**, *Code Remedies*, ~ 436—435 Common counts Under the Codes, 660—676 (5th cci. by **carrington, Boston**, 1929).

40. Clark, *Handbook of the Law of Code Pleading*, c. V, *The Complaint*, 46, *The common Counts*, 290 (2d ed. St. Paul, 1947).

41. 210 App.Div. 380 (1924).  
Sec. 183

### ACTION OF INDEBITATUS ASSUMPSIT

367

special instance and request, was held sufficient on Motion by the defendants for Judgment on the Pleadings, even though a Bill of Particulars showed that the defendants had secured the goods from third persons on an alleged purchase, but with knowledge that the third persons had no title to the goods. Said the Court:

“While it seems to me that every Complaint should state facts giving rise to a Cause of Action, complaints in the Common-Law Form have been sustained since the enactment of the Civil Practice Act. Such being the case, I cannot distinguish the Complaint in the case at Bar, supported as it is by the Bill of Particulars, from the Complaints in numerous other adjudicated cases.”<sup>42</sup>

Finally, in the Federal case of *Stone v. White*,<sup>43</sup> decided in 1937, in which the plaintiff brought a statutory action for a refund

42. *Maxherman Co. Inc. v. Alper*, 210 App.Div. 380,

392 (1024).

43. 301 U.S. 532, 57 S.Ct. 851, 81 LEd. 1265 (1937).

of taxes erroneously collected, the Supreme Court of the United States sustained the plaintiff, Mr. Justice Stone observing:

“The action, brought to recover a tax erroneously paid, although an action at law, is equitable in its function. It is the lineal successor of the Common Count in *Indebitatus Assumpsit* for Money Had and Received. Originally an action for the recovery of debt, favored because more convenient and flexible than the Common Law Action of Debt, it has been gradually expanded as a medium for recovery -upon every Form of Quasi-Contractual Obligation in which the duty to pay money is Imposed by Law, independently of Contract, Express or Implied in Fact.”<sup>44</sup>

It thus appears that the Common-Law Action of *Indebitatus* (General) *Assumpsit* is still operating with its earlier vitality substantially unimpaired, despite our Modern Codes, Practice Acts and Rules of Court.

44. *Stone v. White*, 301 U.S. 532, 534, 57 S.Ct. 851, 81  
*LEU*. 1265 (1937).

## PART FOUR

### DEFENSIVE PLEADINGS

#### CHAPTER 18

### MOTIONS OF DEFENDANT AFTER THE DECLARATION AND BEFORE THE PLEA

Sec.

Demand of Oyer.

Views, Aid-Prayer and Voucher to Warranty.

Imparlanee.

Motion for a Bill of Particulars.

Status Under Model-n Codes, Practice Acts and Rules of Court.

## DEMAND OF OYEIZ'

184. The Demand of Oyer is the Assertion of the Right of a Party to hear read (Oyer), **or, in Modern Practice, to inspect, a deed of which Profert is made by the Other Party** in his Pleading.

IF the Declaration contained Profert of an Instrument under Seal, upon which the plaintiff grounded his Right of Action, the first steps of the defendant, after its receipt, was a Demand of Oyer; that is, the Right to

1. In general, on the subject of Demand of Oyer, see:

Treatises: Perry, *Common Law Pleading: Its History and Principles*, e. VI!, Of *the Proceedings* in an Action, from its Commencement to its Termination, 185—187 (Boston, 1897); Stephen, *A Treatise on the Principles of Pleading* In civil Actions, c. II, Of *the Proceedings* in an Action, from its Commencement to its Termination, 100—104 (3rd Am. ed. by Tyler, Washington, B. C. 1898); Martin, *Civil Procedure at Common Law*, c. VIII, *Motions of Defendant After Declaration and Before Plea*, Art. I, ~ 231, Demand of Oyer, 187—188 (St Paul, 1905); Shipman, *Handbook of Common Law Pleading*, c. XVIII, *Rules as to Alleging Place, Time, Title and Other Common Matters* ~ 289, Demand of Oyer, 482, (5th ed. by Balantino, St. Paul, 1923).

have the Instrument under Seal read, or in Modern Practice, to inspect it before Trial.<sup>2</sup> 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. It was necessary to have the Instrument read in Open Court, where the defendant desired to ascertain the authenticity of the Instrument, or to make use by Demurrer or Plea of such portions of the Document as were not set forth in the Declaration. The effect of granting Oyer was to make the Instrument under Seal a Part of the Record. And the Right of Oyer existed in all the Common-Law Actions, whether Mixed, Personal or Real, and by its exercise,

2. **Rand v. Rand**, 4 N.H. 267, 278 (1828); *Judge of Probate v. Merrill*, 6 N.H. 256 (1833).

The right to crave Oyer of Papers mentioned in pleading applies only to **Specialties** and to Letters of Probate and Administration, **not** to other writings. It only applies to a deed when the party pleading relies upon the direct and intrinsic operation of the deed, *Smith v. Wolslofer*, 110 Va. 247, 89 SE. 115 (1916).

184.  
185.  
186.  
187.  
188.

368

Sec. 184

### AFTER THE DECLARATION AND BEFORE THE PLEA

369

the defendant was relieved from pleading until it was granted. It was also demandable in response to Profert made in any pleading subsequent to the Declaration?

When a Deed is pleaded with Profert, it is supposed to remain in Court 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.<sup>4</sup>

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

3. Martin, *Civil Procedure at Common Law*, e. Vur, *Motions of Defendant After Declaration and Before Plea*, Art. I, Section 231, Demand of Oyer, 187 (St.

Paul, 1905).

Oyer could only be demanded where Profert is made. Thus in an action on a bond conditioned for performance of the covenant in another deed, the defendant cannot crave Oyer of such deed, but must himself plead it with a Profert. Perry, *Common-Law Pleading: Its History and*

Principles, c. VII, Of the Proceedings in an *Action*, from its Commencement to its Termination, ISO, note 2 (Boston, 1897).

4. Stephen, A Treatise on the Principles of Pleading in Civil Actions, c. 1, Of the Proceedings in an Action, from its Commencement to its Termination, 102 (3rd Am. ed. by Tyler, Washington, D. C. 1893).

According to the settled Common-Law Rule of Practice in this State, the same not having been abrogated or altered by statute, Oyer of a bond declared on cannot be craved after the First Term succeeding the final proceeding at rules, or after the defendant has pleaded, or a Rule to Plead has expired, as thereafter presumably the bond is not in Court. *County Court of Erooke County v. United States Fidelity & Guaranty Co.*, 57 W.V. 504. 105 SE. 787 (1021).

Oyer must precede defensive matter whether it be by Demurrer or Plea, Id.

forth by his adversary. In such 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.<sup>5</sup>

In Pleading Performance, for example, of the condition of a Bond, where, as is generally the case, the plaintiff in his Declaration has stated nothing but the Bond itself, without the condition, it is essential for the defendant to Demand Oyer of the condition and then set it forth.<sup>6</sup> And in pleading Performance of Matters contained in a Collateral Instrument, it is necessary not only to do this, but it is also essential to set forth and make Profert of the whole substance of the Collateral Instrument; otherwise it would not appear that the Instrument did not stipulate for the Performance of negative or disjunctive matters; and, in that case, the General Plea of Performance of the Matters therein contained, as shown above, would be improper.

According to Martin, Oyer was not demandable of a Record Recognizance, Private Act of Parliament, Letters Patent, Agreement, Note, or other Instrument not Under Seal. It was anciently allowed of the Orig

5. *Stibbs v. Cloughli*, 1 Str. 227, 93 Eng. flcp. 487 (3720).

Where the Declaration contains a Profert of the note sued on, and Oyer requested by the defendant is granted, the defendant may at his option, either Demur or Pleat], treating the note as incorporated in the Declaration, *Waterbous. - v. Sterchi Bros. Furniture Co.*, 139 Tenn. 117, 201 SW. 150 (1918).

The granting of Oyer *oper: 's* to make the instrument in question a part of the preceding pleading.

Illinois: *National Council of Knights & Ladies; of Security v. Hibernian Benefit Assn.*, 137 Ill.App. 175 (1903) Maryland: *State, to Use of Kelley v. Wilson*, 107 Md. 120, 68 A. 600, 126 Am.St.Rop. 370 (1905); West Virginia: *Riley v. Yost*, 58 W.Va. 213, 52 SE. 40, 1 L.R.A. (N.S.) 777 (1905), holding that Profert alone does not make a writing a part of the Declaration.

6. *Lord Arlinton v. Merricke*, 2 Wms. Saund. 409, note 2, 85 Eng.Rep. 1218 (1672).

7. *Earl of Kerry v. Baxter*, 4 East 340, 102 Eng.Rep.

861 (1803).

370

## DEFENSIVE PLEADINGS

CE is

inal Writ, in order to enable the defendant to Demur or Plead in Abatement for any defect or Variance between the Writ and the Declaration; but that practice was abolished by Rule of Court, and the plaintiff was permitted to proceed as if no Demand for Oyer of the Writ had been made.<sup>8</sup>

*Demand of Oyer, and getting Forth Deed in Plea*

FORM OF PLEA TO THE DECLARATION

(Title of Court and Cause)

And the said C. D., defendant in the above-mentioned action, by X. Y., his attorney, comes and defends the wrong and injury when, etc., and craves Oyer of the said writing obligatory, and it is read to him, etc. He also craves Oyer of the condition of the said writing obligatory, and it is read to him in these words: Whereas, (here the

condition of the bond, which shall be supposed to be for payment of one hundred dollars on a certain **day, is set forth verbatim**); which, being read and heard, the defendant says that the plaintiff ought not to have or maintain his aforesaid action against him, because he says that **he, the said defendant, on the said** day of \_\_\_\_\_, in the year aforesaid in the said writing obligatory mentioned, paid to the plaintiff the said sum of one hundred dollars in the said condition mentioned, together with all interest then due thereon, according to the form and effect of the said condition, to wit, at aforesaid, in the county aforesaid. And this the defendant is ready to verify. Wherefore he prays judgment if the plaintiff ought to have or maintain his aforesaid action against him.

SHIPMAN, Handbook of Common-Law Pleading, c. XVII, Rules as to Alleging Place, Time, Title, and Other Common Matters, §

S. Martin, Civil Procedure at **Common Law**, c. VIII,  
**Motions of Defendant After Declaration and Before**  
 Plea, Art. 1, 231, Demand of Oyer, 181, 198 (St.

Paul, 1005).

289, Demand of Oyer, 484 (3rd ed. by Ballantine, **St. Paul**, 1923).

#### IEWS, AID-PRAYER AND VOUCHER TO WARRANTY

**185. Preliminary to making a Defense in the Ancient Real Actions, a defendant might seek a View of the Land to better formulate his Defense, an Aid-Prayer, or a call for assistance in pleading, and a Voucher to Warranty, or a call to some other person to answer the action.**

*Views, Aid-Prayer and Voucher to Warranty* IN the Ancient Real Actions, now obsolete to all practical intents and purposes, there were certain motions available to the defendant as a preliminary to making his Defense. A mere enumeration and definition of these early procedural devices will suffice.

**In** Suits by a Demandant to recover land, the tenant, in certain of the Real Actions was permitted to Demand a View of the Land in dispute. The purposes of such Demand was that he might know with some certainty what specific land the plaintiff sought to recover. Such knowledge enabled him to properly shape his Defense.<sup>o</sup>

Where the tenant felt that his own estate was weak, he might, as was said Pray in Aid or call for the assistance of another to assist him in pleading. Such a motion might be made by the life tenant, asking that the owner of the inheritance in reversion or in renaainder be joined with him, or that he **should assist in defending the title.**<sup>o</sup>

9. Booth, The Nature and Practice of Real Actions, e. XV, Of View, 37-41 (1st Am. Cd. by Anthon, New York, 1808); Jackson, A. Treatise on the Pleadings and Practice in Real Actions, c. 1, 0? Real Actions **In General**, 14 (Boston, 1828); 4 Minor, Institutes of **Common and Statute Law**, 607 (Richmond, 1891—9-D).

10. Booth, The Nature and Practice of Real Actions, c. XVIII, Of Aid Praler, 59-84 fist Am. Ed. by Anthon, New York, 1808); Jackson, A Treatise on Pleadings and Praetice in Real Aetiono, e. IV, Pleas **in Bar, to Writs of Entry on Disselsin, ~ VIII, Of** Aid, and ReceIPT, 185 (Boston, 1828); 4 MInor, Insti Sec. 186

#### AFTER THE DECLARATION AND BEFORE THE PLEA

371

By Voucher to Warranty is meant the calling in of some person to respond to the Action, who has warranted **the title to the tenant** who has been sued. If and when the Vouchee put in an appearance, he was substituted as the defendant in place of the Vouching Tenant.”

#### IMPARLANCE

186. After the plaintiff had filed his Declaration, the defendant was entitled to time within which he might confer with his Adversary, with a view to an amicable settlement. The delay thus permitted was called an Imparance, and the word Imparance came to be applied to the time given to either party in responding to his adversary's pleading.

AFTER the defendant put in an Appearance, he was entitled to the indulgence of the Court, to some delay, before responding to the Declaration. This privilege was known as an Imparance, taken from the French "parler", meaning to speak. Martin says that in the Primitive or Oral Period of Pleading, it signified a leave to confer with the opposite party, with a view to an amicable settlement of the controversy.<sup>12</sup> In order to accomplish this end time was required, and, as a result, the word itself came to represent the time given by the Court to either Party to respond to the pleading of his opponent.<sup>13</sup> Imparances were of Three Kinds:

tutes of Common and Statute Law, 608 (Richmond, 1891—95).

-1. Booth, The Nature and Practice of Real Actions, c. XVII, Of Voucher, 42—58 (1st Am. ed. by Anthon, New York, 1808); Jackson, A Treatise on the Pleadings and Practice in Real Actions, 14 (Boston, 1828); 4 Minor, Institutes of Common and Statute Law, 608 (Richmond, 1891—95).

14. Civil Procedure at Common Law, c. VIII, Motions of Defendant After Declaration and Before Plea, Art. IV, 234, Imparance, 190 (St. Paul, 1905).

15. 1 Tidd, The Practice of the Court of King's Bench in Personal Actions, c. XIX, Of Imparance, and Time for Pleading, &c, 417 (1st Am. ed. Philadelphia, 1807),

(1) General; (2) Special; and (3) General Special."

A General Imparance is a delay granted by the Court in response to a General Prayer for leave to imparl, without the saving of any exceptions. If leave was granted, the party obtaining it could plead only in Bar of the Action; he could plead neither in Abatement, nor to the Jurisdiction of the Court. He was also precluded from pleading a Tender, claim of Conusance, or Demanding Oyer of a Deed. According to Martin, this Imparance, which was customarily granted, came to be entered by the attorneys as a matter of course, and operated as a Continuance of the Cause to the Next Term?<sup>15</sup>

A Special Imparance was granted in response to a prayer for an Imparance which reserved the right to make Dilatory Pleas in Abatement to the Writ, Bill, or Count, but not to the Jurisdiction of the Court, unless the Pleas were grounded on a personal privilege.<sup>16</sup> Such an Imparance was granted only by leave of the Court of King's Bench, or by the Court or Prothonotaries in the Court of Common Pleas, and its effect was to extend the time for pleading to some day during the same Term or to the first four days of the next Term.<sup>17</sup>

A General Special Imparance was distinguished from the foregoing Imparances, in that it secured to the applicant the right to make any exceptions to the Bill, Declaration or Writ. It was available only by leave of Court, and it operated as a Continuance in the same manner as in Special Imparances.

The effect of Imparances was generally to extend the time of pleading to the next Term, or some later Term. The Uniformity of Proc

14. Martin, Civil Procedure at Common Law, c. VIII, Motions of Defendant After Declaration and Before Plea, Art. IV, 234, Imparance, 190 (St. Paul, 1905).

15. Ibid.

16. Id. at 191.

17. Ibid.

ess Act of 1832,~~ was construed by a Conference of Judges as impliedly annulling Imparlanes in all Personal Actions. And Regulation 2 of the Hilary Rules of 4 *Wm. W.*, 'o practically abolished Entries of Imparlanes on Court Rolls, and prohibited the entry of Continuances by way of Imparlanes.

#### MOTION FOR A BILL OF PARTICULARS

187. Where the plaintiff filed a Declaration containing General Allegations, which operated to expand the **Scope of the Evidence** which he might **offer in Proof** thereof, and the defendant desired to compel the plaintiff to be More Specific, he moved for a Bill of Particulars.

#### *Bills of Particulars* 20

ASSUMING the plaintiff has filed a Declaration in a Common Law Action which contains a General Allegation, how could the defendant compel the plaintiff to make his General Charge specific? The answer is

la. 2 *Wm. IV*, C. 30, § fl, 72 Statutes at Large *118* (1322).

19. The relevant part of this regulation is set out in 3 *Chitty, Practice of the Law*, 701 (Philadelphia. 1830).

-o. In general, on the nature and scope of the Bill of Particulars at Common *Law* and under Modern *Codes*, Practice Acts and Rules of Courts, see:

Articles: Wood, Bills of Particulars in Actions Based Upon Negligence, 49 *Cent.L.J.* 362 (1800); Laudruru, DULs of Particulars in Actions Based on Negligence, 50 *Cont.L2.* 3134 (1000); Caskey & Young, The Bill of Particulars—A Brief for the Defendant, 27 *Va. LEer.* 472 (1941); Simpson, A Possible Solution to the Pleading Problem, 53 *Illav.L.Rev.* 1139 (1930); Van Hook, The Bill of Particulars in Illinois, 19 *Ill.L.Bev.* 315 (3925); Loth, Pleadings and Motions, 29 *Iowa L.Rev.* 23 (1043).

Comments: Pleading—Construction of Supreme Court Rule as to Bill of Particulars, 20 *Ill.L.Eev.* ITO (1025); Necessity of Answer to Allegations of Bill of Particulars, 2 *Fed.Rulos Sen.* 042 (Chicago 1039); Motion for Bill of Particulars 'to Prepare for Trial," 3 *Fed.Rules Sen.* 681 (Chicago 11140);

Procedure: Federal Practice: Pleadings: Remedies 10 clarify the Complaint: *O'Donnell v. Joliet & Eastern By. Co.*, 338 *U.S.* 384 (1949), 35 *Cornell L.Q.* 888 (1950).

Annotation: Effect of Bill of Particulars on Pleadings, 5 *ALII*, 550 (1920).

that he might accomplish this end by moving for a Bill of Particulars. The Procedural Device known as a Bill of Particulars enabled a defendant to ascertain the details of the plaintiff's claim. The mere naming of this Device raises two questions; one, as to its Origin, *two*, as to its Scope and Application.

As to its Origin, it may be said that its development was late in point of time. No satisfactory explanation of this has been given, but it is surmised that the Origin of the Bill of Particulars is connected with the fact that the early Common *Law* employed a System of Oral Pleading, which, unlike Modern Pleading, was conducted in Open Court in advance of the Trial by the Parties or their Counsel by *word* of mouth. Since the Pleading took place Orally in the presence of the Court, the Judge could direct each Stage of the Pleadings and compel the Parties to reach an Issue on which both parties were prepared to stand.

Thus, to illustrate, let us suppose that *A*, in stating his case, alleged that *B* took his horse, whereupon *B* inquired, what horse? Thereupon, the Judge required *A* to specify what horse, to wit, a black horse, with a white forefront foot. The plaintiff's Allegation having been made Specific, the defendant *B* might object that *A*'s case was insufficient in Law, he might deny the plaintiff's charge, or he might seek to avoid the alleged liability by admitting the taking of the horse, and then offer the excuse that he took the horse under an Execution. Assuming *B* admitted the taking and offered the excuse that he took the horse under an Execution, the Judge could turn to the plaintiff, *A*, and say, how about this? If *A* traversed *B*'s Plea, an Issue of Fact was raised as to whether *B* took the horse in Execution; if *A* Demurred to *B*'s Plea, an Issue of Law was raised as to whether the taking by Execution was a legally sufficient excuse. At each stage of this Oral Altercation, during the early Developmental Period of Pleading, the Court was

Sec. 187

#### AFTER THE DECLARATION AND BEFORE THE PLEA

available to rule at once as to the validity of **the plaintiff's Statement of his Cause of Action** or the defendant's Statement of his Defence. Thus, if the plaintiff's Allegation was too general, and the defendant objected, the Court could compel the plaintiff then and there to make his Declaration more specific, and so, likewise, the Court could compel the defendant to make his Defence more specific if the defendant was too general in setting forth his Defence. By permitting the Parties to restate their positions to meet with the Court's ideas, by a process of free Amendment, the Parties were directed in the development of an Issue of Fact or of Law which fairly presented the ground upon which the Parties were prepared to conduct their part of the action. If the Pleadings terminated in an Issue of Law, the Trial was heard by the Court; if they ended in an Issue of Fact, the Trial was had according to some one of the established ModS of Trial. Whether the Issue was one of Law or of Fact, the intervention of a Bill of Particulars was not necessary to bring the parties to Issue or to Judgment.

But the whole picture changed when Litigation in Person with the Pleader serving as his own mouthpiece was changed to Litigation by Attorney, who, according to the practice of the Court, was now required to commit his instructions to writing. So reduced to writing, the Prothonotary, *an Officer* of the Court, recorded them on a Parchment Roll.<sup>21</sup> It is not known when the pleading was first required to be written, but Holdsworth suggests a ease which arose during the Reign of Henry VI (1422—1461) as involving "perhaps the first and certainly an early mention of a 'paper' pleading."<sup>22</sup> The first departure probably took place when the Parties or their Counsel Entered the Pro-

21. 3 Ilo1ds~vortli, History of English Law, e. VI, Proceed.,ro and Pleading, 043—644 (4th ed. London 1035).  
ceedings on the Roll,<sup>23</sup> but in time this gave way to the later practice of putting the Pleadings in Writing at once. Whatever the reason for this transition, the change had a profound effect upon the Issue-Making Function of Pleading. According to Simpson,<sup>24</sup> "Technicality developed; ease of Amendment disappeared; most important of all, the Pleading Stage of a Common-Law cause ceased to be conducted in the presence of the Court and became a matter for the Parties and their Lawyers alone except where the Court's decision on the issues as developed between unsupervised counsel was required."

Thus, reverting to our hypothetical case, suppose that *A* under the new regime, files a Written Declaration containing a General Allegation that *B* took his horse. *B* wants to know what horse? Since the parties are no longer pleading Orally before an Open Court, the question naturally arose as to how *B could compel A* to make his General Allegation more specific? It was this predicament which the defendant found himself in, **which gave** rise to the demand for the development of some form of procedural device by which he could compel the plaintiff to make a General Charge in his Declaration specific.

And the procedural device developed to meet this situation came to be known as a Bill of Particulars. Apparently it made its first appearance in criminal prosecutions, such as an indictment for common barratry <sup>25</sup>and in legislative divorce cases.<sup>26</sup>

Whether the Bill of Particulars was in any way affected by the Statute of 1731 <sup>27</sup>re

23. Id. at 042-043.

24. See article by Simpson, A Possible Solution of the Pleading Problem, 53 Harv.L.Rev. 169, 173 (1939).

25. See ICing v. Grove, 5 Mod, 15, 87 Eng.Rep. 493 (1694), involving an Indictment for common Barratry.

26. SC. Duchess of Norfolk's Case, 12 Bow.St.Tr. 883, 889 (1692).

27. Id. at 040.

28. 4 Ceo. II, c. 26, 16 Statutes at Large 248.

374

## DEFENSIVE PLEADINGS

### Cl. 18

quiring the Pleadings to be in the English language is not clear, but shortly thereafter in 1763,



in the case of *Le Breton v. Braham*,<sup>28</sup> in which the defendant in an Action of Assumpsit offered to pay the plaintiff's claim when ascertained, Lord Mansfield granted a Bill of Particulars. And Tidd<sup>29</sup> observed that where it appeared by reference to the Bill of Particulars that some Counts were superfluous, the Court would expunge the superfluous Counts.<sup>30</sup>

By 1802, as illustrated by the case of *Gellett v. Thompson*,<sup>31</sup> the right of a defendant to Demand a Bill of Particulars, when the Declaration contained a General Allegation, had been firmly established. But as late as 1817, Chief Justice Gibbs, in *Lovelock v. Cheveley*,<sup>32</sup> referred to the practice of granting Bills of Particular as "almost a new system within the recollection of many of us."

It became the rule that in Actions of Indebitatus Assumpsit or in the Action of Debt for goods sold and delivered or work and labor done, when the Declaration failed to disclose the particulars of the demand, as was usually the case, the defendant's attorney might take out a Summons before a Judge requiring the plaintiff's attorney to show cause why he should not deliver to the defendant's attorney in writing the particulars of the plaintiff's demand, for which the action was brought, and why, in the meantime, all proceedings should not be stayed.<sup>34</sup> Apparently such a rule to show cause could be taken out

28. 3 Burr. 1359, 97 Eng. Rep. 889 (1763).

CD. Tidd, *The Practice of the Court of King's Bench in Personal Actions* (Dublin 1796).

30. *Id.* at 108.

31. 3 B. & P. 240, 127 Eng. Rep. 136 (1802).

32. Holt 552, 171 Eng. Rep. 337.

33. *Lovelock v. Gheveley*, Holt 552, 553, 171 Eng. Rep.

331 (1817).

34. Martin, *Civil Procedure at Common Law*, c. VIII, Motions of Defendant After Declaration and Before Plea, Art. U, § 232, Demallu of Particulars, 188 (St

Paul, 1905).

before appearance in both King's Bench and Common Pleas, so that the defendant might be advised of the full details of the demand, in order that he might pay it, if he so desired. In general, however, the rule was taken out after Appearance and the filing of the Declaration, but before the Plea.

Once the Order for a Bill of Particulars had been granted, the plaintiff was required to deliver in writing a particular account of the items in the demand, with an explanation of how and when it arose. And where there has been an Account Current, both the credits and debits should be shown. And, of course, after the receipt of the particulars, the defendant once again was given time within which to plead, such time being regulated according to the Rules of the Court in which the case was pending.

In the Actions of Covenant, Debt on Articles of Agreement, and Special Assumpsit, or in Actions on Matters of Record, according to Martin,<sup>35</sup> an Order for Particulars did not seem necessary.

In Tort Actions, as the wrong complained of was usually stated in the Declaration with some certainty, an Order for Particulars was not often demanded; it might be, however, when the Nature of the Tort was of such a character as to make such an Order necessary and proper.<sup>36</sup> And, of course, where the Bill delivered was defective in that it failed to make full disclosure, a further Bill of Particulars might be obtained by Order of the Court.

At Common Law, the plaintiff was entitled, at the Replication Stage of Pleading, to an Order for a Bill of Particulars in the specific instance where the defendant entered a Plea of Set-Off for goods sold.<sup>37</sup>

35. Id. at 189.

36. *Tilto v. Beecher*, 59 N.Y. 176 (1874).

37. Martin, *Civil Procedure at Common Law*, c. VIII, Motions of Defendant After Declaration and Before Plea, Art. II, § 232, Demand of Particulars, 189 (St. Paul, 1905).  
Sec. 188

## AFTER THE DECLARATION AND BEFORE THE PLEA

375

If a Bill of Particulars was delivered by the plaintiff, it was incorporated into the Declaration containing the Cause of Action upon which it rested, and the effect was to exclude at the Trial the submission of any evidence outside of the particulars delivered. The effect was the same as to Pleas, where, by Statute, the Right to Demand Particulars has been extended to plaintiffs.<sup>35</sup>

### STATUS UNDER MODERN CODES, PRACTICE ACTS AND RULES

### OP COURT

188. The *Demand of Oyer* and the Bill of Particulars continue **to function and serve a useful purpose. On the other hand, the Imparance, Views, Aid-Prayer, and Voucher of Warranty** have ceased to function.

OF the Six Procedural Devices which came After the Declaration and Before the Plea, four have become almost wholly *obsolete*, while two retain considerable vitality. The Imparance, Views, Aid-Prayer, and Voucher of Warranty, as previously indicated, have ceased to function, the Imparance, by a process of construction, having been largely nullified by the Uniformity of Process Act and by the Hilary Rules.<sup>40</sup>

### *Demand of Dyer*

BUT Demand of Oyer and the Bill of Particulars, we still have with us. Thus, taking

3-- *Dixon v. Swenson*, 101 N.J.L. 22, 127 A. 501 (1925).

<sup>1</sup>ly a Regulation of Trinity Term, 1831, the plaintiff, **in actions** containing Counts in *Indebitatus Assumpsit* or Debt on Simple Contract, was required to deliver full particulars of his demand under those Counts where this could be comprised within three folios, and if it could not be comprised in three folios, then a statement of the nature of his claim and balance due as may be comprised within that number of folios, without any Order to that effect." Martin, *Civil Procedure at Common Law*, c. VIII, Motions of Defendant After Declaration and Before Plea, Art. II, 232, Demand of **Particulars**, 180 (St. Paul, 1905).

3-- 2 Wm. IV, c. 39, § II, 72 Statutes at Large 118 (1832).

Regulation 2 of the Hilary Rules of 4 Wm. IV, the relevant part of which is set out in 3 Chitty, *Practice of the Law*, 701 (Philadelphia, 1836).  
the Demand of Oyer first, in the Modern Case of *County Court of Brooke County v. United States Fidelity and Guaranty Co.*,<sup>41</sup> decided in 1921, where one of the issues was as to the time when Oyer of a Bond could be craved, Lynch, J., of the West Virginia Supreme Court of Appeals declared: "Thus there is presented the novel procedural question whether Oyer of a Sealed Instrument can rightly be demanded at any time after a Demurrer or Plea is tendered or filed. This question must be answered according to the procedure prescribed at Common Law, there being no abrogation, modification, or alteration of the Common-Law Rule in that respect by any Statute of this State. Under the Title, 'Time to Demand,' the author of the Chapter on Pleading, found in 31 Cyc., says, at page 553: 'It is the settled rule of Practice at Common Law that Oyer cannot be craved after the first term or after the Rule for Pleading has expired, since the Deed is not supposed to be in Court after that time; but it is demandable at any period before the time for Pleading is out, although that has been extended, unless the order except the right to Demand Oyer. Oyer must precede the Matter of Defense, whether that be by Plea or Demurrer, and regularly it should precede the entry of Imparance'—the equivalent of a continuance." ~

### *The Bill of Particulars*

THE operation of the Bill of Particulars in Modern Law is well illustrated in the New Jersey case

of *Dixon v. Swenson*,<sup>43</sup> decided in 1925. The facts were that the plaintiff commenced an Action on July 19, 1923, to recover from the defendant the sum of \$1,000 for legal services performed. Rule

41. 57 W.Va. 504, 105 SE. 757.

42. County Court of Brooke County -v. United States Fidelity & Guaranty Co., 57 W.Va. 304, 512, 103 SE. 787, 791 (1921).

43. 101 N.L. 22, 127 A. 501 (1925).

376

## DEFENSIVE PLEADINGS

### Ch. 18

18 of the New Jersey Practice Act of 1912” provided that “Bills of Particulars may be ordered as heretofore.” And by Section 236 of the New Jersey Revised Laws of 1877, the right to have a Bill of Particulars was extended to the case where a plaintiff demands a Bill of Particulars of a defendant, provided he should, before Replication filed, demand in writing a Bill of Particulars. In this Action the defendant before Answer filed, demanded a Bill of Particulars, which was furnished. On August 13th the defendant notified the plaintiff of a Motion to be made on August 20th for a more Specific Bill of Particulars. The day following such notice the defendant filed an Answer to the Complaint, to which the plaintiff replied, thus bringing the Cause to an Issue. On hearing, the Court ordered a further Bill of Particulars. The plaintiff then moved to Vacate the Order. On appeal, the Court held that the Order requiring a further Bill of Particulars, after Answer filed, was improperly made and should be set aside. Rule 18 therefore merely adopted the General Common-Law Rule that a Demand for a Bill of Particulars must be made before Answer filed.<sup>40</sup>

In Vacating the Order, Kalisch, 3., declared; “That a Demand for a Bill of Particulars must be made before Answer filed was the Common-Law Rule and Practice. 1 Tidd Pr. 642. The filing of a Plea was stayed until the Demand was complied with. **If the Bill** of Particulars was insufficient a Demand for a more specific Bill of Particulars could undoubtedly be made, and, if ordered, upon application to the Court, the Proceedings would be stayed until the Demand was complied with. \*\*\*The Practice in

44. N.J.Pub.Law.t 388 (1912).

45- At p. 88.3.

46. For a review of *Dixon v. Swenson*, 101 N.L. 22,

127 A. 591 (1925), see note by floppy, Pleading— Construction of New Jersey Supreme Court Title as to Bill of Particulars, 20 Ill.L.Rev~ 170 (1925).

this State was patterned after the Common Law.

“**By the fifty-fourth Section of the Act of 1799** (*Pat.L.*, p. 361), it is provided: ‘That the plaintiff or his Attorney, if required, shall deliver to the defendant, or his Attorney, a copy of the Account, or a Bill of Particulars of the Demand, or a copy of the Bill, Bond, Deed, Bargain, Contract; Note, Instrument or other writing, whereon the Declaration is founded.’

“In the case of **Clinton v. Lyon**, 3 N.J.L. 1038, Hornblower, afterwards Chief Justice of the Supreme Court, who appeared for the plaintiff, said;

-Our Act on the subject of a Bill of Particulars, is not a New Law, but a confirmation of the Common Law, manifested by Universal Practice.’ \*

“**And in a case** under the title of Anony-mous, 16 N.L. 346, Mr. Gifford moved for a rule that he have further time to plead, the **Bill** of Particulars not having been delivered till the 15th instant, and Mr. Chief Justice Hornblower said:

“‘The rule is that the defendant has the same time for pleading, after receiving the **Bill of Particulars**, that he had at the time of demanding it. The delay in the delivery is not to be counted as part of his time for pleading.’ And in *Tillou v. Hutchinson*, 15 N.J.L. 178, Mr. Chief Justice Hornblower (at p. 179) said: ‘By the fifty-fourth section of the Practice Act, Record Laws of 1821, page 421, the defendant, or his attorney, at any time *before plea pleaded*, has right to require, and the

plaintiff or his attorney, if required, is bound to deliver to the defendant, or his attorney, a copy of any bond, bill or note, on which the declaration is founded. If regularly **required, the** plaintiff, or his attorney, must deliver such copy, at his peril. But the requisition should appear to have been made 'before plea pleaded,' and in writing. Section-54, above referred to, is the same as found  
Sec. 188

### AFTER THE DECLARATION AND BEFORE THE PLEA

377

in Pat.L., above referred to. The entire substance of this section is incorporated in section 236 of the Revision of 1877, page 885, with the extension to the case where a plaintiff demands a Bill of Particulars of a defendant he shall, before replication filed, demand, in writing, a Bill of Particulars, &c.

"This section, in turn, became section 102 of the Practice Act of the Revision of 1903. 3 comp.Stat. p. 4082. Under the new Practice Act (Pamph.L.1912, rule 18, p. 388), appended to the latter act, it is provided: 'Bills of Particulars may be ordered as heretofore.' This leaves the former statutes and practice thereunder undisturbed. Rules 32 and 94 of the Supreme Court accomplish no different result." ~

Under Modern Codes, Practice Acts and Rules of Court, a Bill of Particulars is generally still available as at Common Law, including matters of Defense or Set-off.<sup>48</sup> According to Clark,<sup>49</sup> some states limited the use of Bills of Particulars to actions involving accounts, or demands arising upon Contract. Motions to make the Complaint more Definite and Certain, or the Amendment of plaintiff's

47. *Dixon v. Swenson*, 101 N.J.L. 22, 23, 227 A. 59i,

592 (1925),

48. *Marl-el-Tucker Cook Co., Inc. v. Thrleli*, 200 App. Div. 171, 204 N.Y.S. 870 (1924).

49. *Fl~ndljook of the Law of Code Pleading*, § 54 Bills of Particulars, 338 (2d ed, St. Paul, 1947).

Complaint have frequently been used to perform the function of the Bill of Particulars. But in some states the Bill of Particulars is more limited in its application than an Amendment of the Complaint. It has been held that a Bill of Particulars limits the Complaint so that nothing can be claimed beyond what is set forth in the Bill.<sup>50</sup> On the other hand, it has been held that the plaintiff should not be permitted to rely on his Bill of Particulars to supplement his Complaint, but Clark suggests that the Bill of Particulars should perform this function and that an Amendment should not be required, and states this is the position taken in those State Systems where the Bill of Particulars is made definitely "a part of the pleading which it supplements." ~

In New York, as in many other states, the Bill of Particulars,<sup>52</sup> is regulated by Statute or Rule of Court.<sup>53</sup>

50. *Id.* at 338—339.

51. *Id.* at 340.

52. For a more detailed treatment of the Bill of Particulars under Modern Practice, consult Clark, *Handbook of the Law of Code Pleading*, § 54 Bills of Particulars, 838—344 (24 oct St. Paul, 1947).

53. See Section 3041 and Rule 3042 of the NOW York *Civil Practice Law and Rules* (2988); *Hackett v. Walters*, 162 Misc. 730, 295 N.Y.S. 022 (1037); *Ivey v. New York Telephone Co.*, 279 App.Div. 972, 111 N.Y.S.2d 032 (4th Dept.1952).

## CHAPTER 19 CONSIDERATIONS PRELIMINARY TO THE CLASSIFICATION OF DEFENSES

Parties Must Demur or Plead.

Pleas: Dilatory or Peremptory.

Other Stages of Pleading Beyond the Declaration and Plea.

Election to Demur or Plead—Factors to be Considered.

Forced Issues Under the Codes.

## PARTIES MUST DEMUR OR PLEAD

189. **After the Declaration, the Parties must, at each Stage of the Proceedings in the Action, either:**

**(I) Demur, or**

**(II) Plead:**

**(A) A Dilatory Plea, or**

**(E) A Peremptory Plea, or Plea in Bar**

IF it is assumed that Every Liability consists of Two Elements—a given combination of Facts or Events, plus a Rule of Substantive Law attaching legal consequences to those Facts or Events; and if it be remembered that in order to state a good cause of action one need only set out the combination of facts and events, the Court taking Judicial Notice of the Rule of Law without its statement, the question arises: In how many ways may the defendant resist the Alleged Liability asserted in the Declaration?

Confronted with this Alleged Liability, with a Declaration of the Facts only, the Minor Premise, and omitting the statement of the Rule of Law relied upon, the Major Premise, the defendant was compelled to Demur or Plead. He was bound to pursue one or the other of these *two* courses, until Issue was Tendered, if he desired to sustain his Defense. If he neither Pleaded nor Demurred, but Confessed the right of the adverse party, or appeared but said nothing, the Court immediately Entered Judgment in favor of his adversary; in the former case, as by Confession; in the latter, where he said nothing, by *nil dicit*,

If, however, the defendant Demurred, disputing the Rule of Law relied upon by the Plaintiff, he raised an Issue of Law, Triable by the Court; if he desired to Plead, thus disputing the Combination of Facts relied upon by the plaintiff, he raised an Issue of Fact, Triable by the Jury. If he desired to dispute the Rule of Law relied on by the plaintiff, he could do so by resorting to the procedural device known as the Demurrer, which developed in Two Forms, the General and the Special Demurrer, with the result that the Pleadings terminated in an Issue of Law, which Issue, once Tendered, must be accepted by what was known as a Joinder in Demurrer. If the defendant Demurred Generally an Issue of Law was presented as to whether the Declaration was Substantively Defective; whereas, if the defendant Demurred Specially, an Issue of Law was raised as to whether the Declaration was Formally Defective.

1. Stephen, A Treatise on the Principles of Pleading In Civil Actions, -IX, 157 (3d Am. ed, by Tyler, WashIngtton, 1893); Henry v. Ohio B. Co., 40 W.Va. 234, 21 SE. 863 (1895).

Sec.

189.

190.

191.

192.

**193.**

378

**Sec. 190**

## CLASSIFICATION OF DEFENSES

379

### PLEAS: DILATORY OR PEREMPTORY

190. **If the Declaration is sufficient in both Substance and Form, so that a Demurrer will not lie, or if the defendant does not wish to Demur, he must Plead:**

**(I) A Dilatory Plea, or**

**(II) A Peremptory Plea, or Plea in Bar:**

**(A) By Way of Traverse:**

(1) By Pleading the General Issue, or

(2) By Pleading the Specific or Common Traverse, or

(3) **By Pleading the Special**

Traverse

(B) **By Way of Confession**

**Avoidance:**

(1) **In Justification and Excuse, or**

(2) In Discharge

*Dilatory Pleas*

IF the defendant desired to dispute the combination of facts and events relied upon by the plaintiff, he could do so by resorting to a procedural device known as the Plea, which might assume either one or two forms—a Dilatory Plea, or a Peremptory Plea, better known as a Plea in Bar. A Dilatory Plea sought to prevent the Entry of a Final Judgment on the Merits, whereas a Plea in Bar sought to bring about a Final Judgment on the Merits. If the defendant desired to prevent a Final Judgment on the Merits, that is, if he wished to use a Dilatory Plea, he could resort to any one of three procedural devices, known as *one*, a Plea to the Jurisdiction, on the ground that the court had no jurisdiction over either parties or subject matter of the action; *two*, a Plea in Abatement, **which shows some ground** for Abating or Defeating the Particular Action, without destroying the Right of Action itself; or *three*, a Plea in Suspension of the Action, which offered some reason why the plaintiff was temporarily disabled from pursuing the action at the time.

*Peremptory Pleas By Way Of Traverse or Confession And Avoidance*

**IF, for any reason, the defendant did not**

desire to use a Dilatory Defense, or if such Defense proved futile, his only other recourse was to enter a Peremptory Plea or Plea in Bar, which might take either a Negative or Affirmative Form. If the defendant desired to dispute the combination of the facts relied upon by the plaintiff, he could do so by resorting to a procedural device known as a Traverse or Denial, which took one of three forms, *one*, the General Issue, which generally operated as a blanket denial of all the Material Allegations in the plaintiff's Declaration; *two*, the Common or Specific Traverse, which denied One or More Material Allegations in the plaintiff's Declaration; and *three*, the Special Traverse, a highly technical form, capable of being used only in limited circumstances, which consisted of an inducement, containing affirmative new matter, a denial, and a verification, and which did not terminate the pleadings. In the case of the General Issue and the Common or Specific Traverse, the Pleadings terminated in an Issue of Fact, triable by a Jury. In these Forms of Traverse, the General Issue and the Common or Specific Traverse, a Tender of Issue was required, which consisted of a Statement in the Pleading that the defendant was ready to go to the country, or to submit the issue to a Trial by Jury.

**If**, however, the combination of facts and events and the Rule of Substantive Law relied upon by the plaintiff was sufficient to constitute a cause of action; if the alleged liability could not be met by a Dilatory Plea or by some Form of Negative Plea in Bar, the defendant might dispute the asserted liability by stating that the plaintiff had not told the full story, that is, that the defendant was willing to admit the combination of facts set out by the plaintiff, or that the plaintiff had stated a *prima fade* case, but that there was an additional combination of facts and events,

380

**DEFENSIVE PLEADINGS**

Cl. 19

plus an additional Rule of Substantive Law which equalled non-liability, or which changed the legal effect of the Allegations admitted. The defendant could accomplish this end by use of the procedural device known as a Plea in Confession and Avoidance, which took either one of *two* forms, *one*, a Plea by Way of Confession and Avoidance in Justification and Excuse; or *two*, a Plea by Way of Confession and Avoidance in Discharge, the difference being that the former assumes that no liability ever existed, and the latter assumes that liability once existed but has ceased to exist because of the happening of some subsequent fact or event. Thus, to illustrate, in Trespass for Assault and Battery, the Plea of Self-Defense assumes that the defendant was never liable **in point of Substantive Law**, whereas in Debt for Five Hundred Dollars, the Plea of Payment assumes that a debt which once was existent is now no longer existent because of the happening of some subsequent fact or event, to wit, Payment. Pleas in Confession and Avoidance were terminated with a statement that the defendant stood ready to verify his facts.

**It will be observed that if the Pleadings** terminated in a Demurrer, an Issue of Law triable **by the Court**, arose; if the Pleadings terminated with some Form of Dilatory Plea, the settlement of the case on **its merits** suffered a temporary or permanent delay; if the Pleadings terminated in a Traverse, in the Form of the General Issue or the Common or Specific Traverse, an Issue of Fact triable by the Jury arose. But if the defendant pleads in Confession

and Avoidance, the pleadings remain open, and no issue emerges, and the altercation continues until an issue is produced either by a demurrer or by a traverse.

#### **OTHER STAGES OF PLEADING BEYOND THE DECLARATION AND PLEA**

that the defendant has met this by a Plea in Confession and Avoidance, the next Stage of Pleading is the **Replication, after which** follows a Rejoinder, a Surrejoinder, a **Rebutter and a Surrebutter. Such a result, however, assumes that the preceding pleading was in each case in Concession and Avoidance. This process continues until one side or the other Traverses or Demurs, thus producing either an issue of Fact or of Law.**

##### *Replication*

**IF** we assume that the defendant neither Demurs nor Pleads by way of Traverse, but seeks to evade liability by Pleading in Confession and Avoidance, the plaintiff, at the Third Stage of the Pleadings, may file a Replication to the defendant's Plea, either Traversing it—that is, totally denying it—as, if in an action of debt upon bond the defendant pleads Payment—that he paid the money when due—the plaintiff in his Replication may totally Traverse this Plea, by denying that the defendant paid it, or the Replication may Confess and Avoid the Plea, by alleging some new Matter or Justification consistent with the Plaintiff's Declaration. Thus, in an action for trespassing upon land whereof the plaintiff is seised, if the defendant shows a title to the land by descent, and that therefore he had a right to enter, and gives color to the plaintiff, the plaintiff may either Traverse and totally Deny the Fact of the Descent, or he may Confess and Avoid it, by Replying that true it is that such descent happened, but that since the descent the defendant himself demised the lands to the plaintiff for term of life.

##### *Eejoinder*

**TO** the Replication the defendant may file a Pleading known as a Rejoinder, to which the plaintiff may, in his turn, Demur, or **Plead**, either by way of a Traverse, or in Confession and Avoidance, in a Surrejoinder.

##### *Eurrejoinder*

THE plaintiff, now pleading for the third time, may answer the defendant's Rejoinder

**191. Assuming the plaintiff has stated a good cause of action in his Declaration and Sec. 192**

#### CLASSIFICATION OF DEFENSES

381

b~ filing what was known as a Surrejoinder, to which the defendant might interpose a Rebutter.

##### *Rebutter*

**UPON this Pleading the defendant may in turn Demur or Plead by Way of Denial or by Way of Confession and Avoidance.**

##### *Surrebutter*

**AND** the plaintiff might answer with a Pleading by Way of Surrebutter.

##### **It will be observed that these various**

Pleadings—Plea, Replication, Rejoinder, Surrejoinder, Rebutter and Surrebutter,—in legal theory, proceeded ad infinitum, until at some Stage of the Procedure the Pleadings terminated in either a Demurrer, thus raising an Issue of Law, triable by a Court; in some form of Dilatory Plea, in which instance the settlement of the case on its merits suffered a temporary or permanent delay; or in a Traverse, thus raising an Issue of Fact, triable by the Jury; but if the defendant in his Plea neither Demurs nor Traverses, but Pleads in Confession and Avoidance, the Pleadings remain open and do not terminate in either an Issue of Law or of Fact. Therefore, the plaintiff, at the Next Succeeding Stage of Pleading, the Replication Stage, may either Demur, or Plead by way of Traverse or in Confession and Avoidance, and so on, ad infinitum, until the plaintiff or defendant either Demurs, raising an Issue of Law, or Traverses, raising an Issue of Fact, thus reducing the controversy to a

single clear-cut well-defined Issue of Law, or of Fact, which is the Primary Function of Pleading.

If a party finds the Declaration or other pleading opposed to him to be Sufficient in Substance and Defective in Form, Sufficient in Form and Defective In Substance, or Insufficient in both respects, he has ample **ground for Demurrer; but whether he should Demur or Plead** is a matter of expediency, or of procedural tactics, which may influence favorably or unfavorably the outcome of the **litigation. It may be useful** therefore to examine the considerations by which, in view of what has been said about demurrers, the pleader should be governed in *making* his **election** to demur or plead.

#### ELECTION TO DEMUR OR PLEAD—FACTORS TO BE CONSIDERED

**192. In many cases, 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.**

If the Declaration or other Pleading which may be involved is sufficient in both Form and Substance, the pleader has no alternative but to plead. If the Pleading is insufficient in either Form or Substance, there is good ground for either a Special or a General Demurrer; **but whether the defect should be seized upon or taken advantage of depends upon several factors, If the Pleading be deemed insufficient in Form the pleader must inquire of himself whether it would be worth while to take the objection, in view of the indulgence which the law allows by way of Amendment; the pleader must also bear in mind that if the defect is not taken advantage of at that Stage of the Pleading, it may be Aided by a Subsequent Pleading, or after such Subsequent Pleading, by Verdict of the Jury, or by the Statutes of Jeofails and Amendments, If the pleader elects to Demur, he must take care to Demur Specially, lest, upon General Demurrer, he should be held excluded from the objection. If, on the other hand, the Pleading in question is Defective in Substance, it must be determined whether the insufficiency is in the case itself or in the manner of statement, such, for ex**

t. Stephen, A Treatise on the **Principles of Pleading** In Civil Actions, C. II, Of the Principal **Rules of Pleading**, 185 (3d Am. ed., by Tyler, Washington, 1898).  
382

#### DEFENSIVE PLEADINGS

#### Ch. 19

**ample, as the Omission of an Allegation required by the Substantive Law as essential to the Cause of Action or Defense. In the latter case the Defect could easily be cured by an Amendment, hence it may therefore not be worthwhile to Demur.**

And whether the Defect was of such character as an Amendment would remove or not, a further question may arise as to whether it might not be desirable to ignore the objection at the moment and plead. By such tactics a party often gained the advantage of contesting the case with his adversary, in the *first instance*, by a Trial on the Merits of an Issue of Fact by a Jury; and in the *second instance*, **if he lost on the Trial, by urging the Objection in Law, after Verdict and before Judgment, by Motion in Arrest of Judgment, or after Judgment, by Writ of Error.** This maneuver, however, may not always prove successful; for though none but Formal Objections are cured by the Statutes of Jeofails and Amendments,<sup>3</sup> there are some Defects of Substance as well as Form which may be Aided by Pleading Over as well as **by the 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.<sup>4</sup>

**It has been contended that Argument on** Demurrer is usually futile. Time and effort are spent by Lawyers and **Courts in** criticizing Pleadings on points far



removed from the

3. Id. at 166.

merits involved. The Demurring Attorney is engaged in educating his opponent on the Law. The tendency, therefore, is to avoid pointing out important Errors, or pressing them any more than is necessary to raise them on the Record in the Appellate Court. Demurring is seldom more than a waste of **time and a means of delay, except (1) where** there is some essential element of a Cause of Action or **Defense which is not set up, and** which cannot be supplied with any chance of proving it; (2) when the Pleading, although Good in Substance, is not as definite **and** certain as it ought to be, and by a Special Demurrer the Pleader may be required to state his case more in detail, thereby giving better notice, narrowing the issues, and increasing the risk of Variance in the Proof. In some jurisdictions Special Demurrers for Defects in Form have been abolished, but the line between Form and Substance is difficult to draw. To abolish Demurrers entirely, while allowing the same Objections in Point of Law to be raised under another name, is as ludicrous a piece of self-deception as the old Fictions in Ejectment. Some other solution of the abuses must be found.<sup>5</sup>

#### FORCED ISSUES UNDER TUE CODES

**193. An early joinder of issue is forced under Codes which do not permit pleading beyond the answer or reply stage.**

UNDER Code Systems an early issue is forced by the Limited Series of Pleadings, **the altercation** being cut **short at an arbitrary** stage—the Answer in some Codes, the Reply In others, If a material issue has not been already evolved, an Issue of Fact is **raised by Operation of Law**, and with respect to any material **New Matter alleged in the** last pleading, the adversary may prove at **Trial**, in response thereto, any Facts **by way**

L Shipinan, Randbook of Common-Law Plead Ing~ c. 12, Demurrer, AMer. and Amendment, 294 (3d ed. by Ballantine, St **Paul**, 1923).  
- Ibid.

Sec. 193

#### CLASSIFICATION OF DEFENSES

*of Denial or of Confession and Avoidance.*<sup>6</sup> *sues, but it was deemed more convenient to This is in line with the Policy of the Courts under the General Issue, when it was found **inconvenient to attempt to** focus the controversy upon ultimate and decisive Special Is*

a. romeroy, Code Remedies, c. TV, ~ 475, 47e, CODE provisions respecting reply, 812—sW (5th ed. Boston, 1929).

Koffler & Peppy Com.Law Pldg. H.B—14

383

leave a vague complex issue, to be analyzed **later at the Trial**. The Ancient Theory of Issues still remains, though all Pleadings subsequent to the Answer or Reply have been lopped off, leaving the case to be further developed by Evidence without Pleadings.

Sec.

#### CHAPTER 20

### THE DEMURRER<sup>2</sup>

The Nature and Office of the Demurrer.

The Speaking Demurrer.

The Demurrer and Other Pleadings Distinguished.

The Scope of a Demurrer.

General and Special Demurrers and Defects Available Thereunder.

Effect of Demurrer—By Way of Admission.

Effect of Demurrer—In Opening the Record.

Judgment on Demurrer.

Status of the Demurrer—Under Modern Codes, Practice Acts and Rules of Court.

## THE NATURE AND OFFICE OF THE DEMURRER

**19& If the Allegations of the Pleading of the Adverse Party are legally insufficient upon their Face to sustain the Cause of Action al**

1- In general, on the Demurrer at Common Law, Under Modern Codes, Practice Acts and Rules of Court, see:

Treatises: B. C., *Doctrine of Demurrers; Setting Forth a variety of Demurrers, in All Sorts of Actions; and in AU Several Parts Of Pleading*, (London, 1706); I-erteil, *The Demurrer: Or Proofs of Error in the Decision of the Supreme Court of New York, Requiring Faith in Particular Religious Doctrines as a Legal Qualification of Witnesses*, (New York, 1828); Stephen, *A Treatise on the Principles of Pleading in Civil Actions*, (London, 1824); 2 Tidd, *The Practice of the Court of King's Bench, e. XXX, Demurrers, and Amendment* (London, 1824); Shipman, *Handbook of Common-Law Pleading, c- XII, Demurrer, Aider and Amendment*, § 146, 277 (3d ed. by Ballantine, St. Paul, 1923); Perry, *Common-Law Pleading, c. IX, Of Demurrer*, 232 (Boston, 1897); Martin, *Civil Procedure at Common Law, c. IX, Defenses, Art. II, Demurrer*, ~ 236—242, pp. 194—204 (St. Paul, 1905); Gould, *A Treatise on the Principles of Pleading in Civil Actions, c. V, Of Demurrer*, 570 (6th ed. by Will, Albany, 1909); Scott, *Fundamentals of Procedure In Actions at Law, e. 'V. Amendment and Joef ails*, 143 (New York, 1922); Clark, *Handbook of the Law of Code Pleading, c. VIII, Demurrers and Motions* 499 (2d ed, St. Paul, 1947).

**Jeged or to Constitute a Defense, as the ease may be, Objection may be taken by Demurrer. A Demurrer will lie for insufficiency either in Substance or in Form. And since a Demurrer does not Deny the Facts which are alleged in the Pleading to which it is interposed, they**

**Articles:** Abbott, *To Demur or Not to Demur*, 44 *ATH. L.J.* 453 (1891); LoomIs, *The Effect of a Decision Sustaining a Demurrer to a Complaint*, 9 *Yale U.* 387 (1900); Edgerton, *The Consolidation of Preliminary Motions and Demurrers in Connecticut*, 22 *Yale Li.* 302 (1913); Millar, *Restriction of the Retroactive Operation of the Demurrer*, 10 *ILL.Rev.* 417 (1916); Cook, *Effect of the Abolition of the Equitable Demurrer*, 10 *Iowa L.tcv.* 193 (1925); smith, *Some Problems in Connection with Motions*, 25 *Col.LRev.* 752 (1925); Atkinson, *Allegations of Time in Pleading*, 35 *Yale L.J.* 487 (1926); Atkinson, **Some Procedural Aspects of the Statute of Limitations**, 27 *Col.L.Rev.* 157 (1927); Atkinson, *Pleading the Statute of Limitations*, 35 *Yale U.* 014 (1927); Clark & Tenon, *Amendment and Aider of Pleadings*, 12 *Minn.L.Rev.* 97, (1925); Welman, *Demurrer to Pants of Complaint*, 7 *Thd.L.J.* 165 (1931); Arnold, *Motions to Make Specific and to Resolve Conclusioas*, 7 *Ind.L.J.* 77, (1931); Millar, *The Fortunes of the Demurrer*, 31 *ILL.Rev.* 429 (1934); Eagleton, *Two Fundamentals for Federal Pleading Reform*, 3 *U. of Chl.L.Rev.* 376 (1930); Pike, *Objections to Pleadings Under the New Federal Rules of Civil Pro— cedure*, 47 *Yale L.J.* 50 (1937); Botwein, *Pleading and Practice Under the New Federal Rules—A SurtOy and Conipartson*, S *Brooklyn LSev.* 188 (1938); Stayton, *Scope and Function of the New Federal Rules and Texas Rules*, 20 *Texas Lliter.* 16, 24

194.  
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200.  
201.  
202.

384

Sec. 194

## THE DEMURRER

385

**stand admitted, with the result that the only question remaining is one as to their Sufficiency in Law.**

### *Definition*

THE word "Demurrer" is taken from the Latin word *demorari* and the French word *demeurer*, which, etymologically, primarily signifies a delay or pause, and is, at Common Law, the Formal and General Mode of disputing the sufficiency in Point of Law of the Pleading of an Adversary, either as to Form or Substance.<sup>2</sup> More specifically, a Demur-

(1941); Uoth, *Pleadings and Motions*, 29 *Iowa Lucy.* 23 (1943); Brown, *Some Problems Concerning Motions Under Federal Rule 12(b)*, 27 *Minn.L.Rev.* 415 (1943); Prashker, *New 'York Rules of Civil Practice Affecting Motions Directed to Pleadings: The Revision of 1944*, 19 *St. John's U.Rev.* 1 (1944); Friedman, *Comments on Several of the Proposed Amendments to the Federal Rules of Civil Procedure*, 6 *Fed.B.J.*

206 (1945); Cagen, Post-Trial Questioning of Defects in Pleadings, 24 Chi.Kent L.Rev. 335 (1940); Lathrop, The Demurrer Ore Tenus, 1947 Wis.U.L.Rev. 426; Mandelker, Practice—Use of Demurrer and Directed Verdict in Negligence Cases, 1949 Wis.L.Rev. 603; Tripp, Some Observations on Motion Practice in New York, 2 Syracuse L.Rev. 273 (1951).

Comments: Pleading—Foreign Law—Demurrer, 19 Col.L.Rev. 240 (1919); Pleading—Plea In Abatement—Code, 18 Mich.L.Rev. 433 (1920); Pleading—Wrongful Death—Statutory Period—Condition Precedent or Limitations Period, 29 Yale L.J. 572 (1920); Can the Bar of the Statute of Limitations be asserted on Demurrer? 30 W.Va.L.Rev. 110 (1924); Judgments—Res Judicata—General Dismissal of a Suit in Equity Upon a Demurrer Sustained, 32 W.Va.L.Rev. 248 (1920); Pleading—Demurrer to an Entire Answer, 24 Mich.L.Rev. 312 (1920) Pleading—Federal—procedure of a Spending Motion Under New Federal Rules, 15 So.Calif.L.Rev. 272 (1942); “Speaking” Motions to Dismiss Under the New Rules of Civil Procedure, 14 Rocky Mt.L. Rev. 131 (1942); Res Judicata: Effect of Judgment Entered on Demurrer, 30 Calif.L.Rev. 487, 488, n. 7 (1942); Statute of Limitations as a Pleading Problem In Iowa, 29 Iowa L.Rev. 591 (1944); Post-Trial Objections in Illinois, 43 Ill.L.Rev. 61 (1948).

Annotations: Admissibility as Evidence of Pleading as Containing Admissions Against Interest, 14 A.L. B. 22 (1021); Id., 90 SL.R. 1393 (1934).  
A demurrer is a Procedural Device, which neither asserts nor denies any Matter of Fact, but **which, by failing to Deny the Facts in the Pleading** to which it is interposed, leaves those Facts standing admitted, under the operation of the Rule that whatever is not Denied at the Next Succeeding Stage of Pleading, stands admitted, with the result that the only remaining question is One of Law as to whether, under the Substantive or Procedural Law, the Pleading Demurred to is sufficient, that is, in Form and in Substance. In other words, the Demurrer was one of the Procedural Devices which aided the Common Law in its Issue-Making Process.

While, in a certain sense, a Demurrer is not a Pleading, in another sense, it is a pleading; that is, in the sense that if it is interposed to a Declaration, it will prevent the Entry of a Judgment by Default,<sup>3</sup> in substantially the same way as would any Defense on the Merits. Thus, for instance, if *A* declares in Ejectment, alleging Title, Ouster and Damages, and *B* fails to Answer, a Judgment by Default will be Entered. Such, however, would not be the case if *B* interposed a Demurrer. In the sense that such use of a Demurrer will, like a Plea to the Merits, prevent the Entry of a Judgment by default, it may be regarded as a Pleading.

#### *The Office of a Demurrer*

**THE** Office of a Demurrer is to raise an Issue of Law as to whether the Pleading of the Adverse Party, to which the Demurrer is interposed, is sufficient on its Face to sustain the Cause of Action alleged, or to constitute a Defense, as the case may be. If a **Demurrer is interposed to a Declaration, it**

On the relation of Procedure to Substantive Law, see, article by Clark, The Handmaid of Justice, 23 Wash. L.J. Quarterly 296 (1931).

3. But while a Demurrer is not, in this limited sense, a Plea, it is so far a Pleading as to prevent the Entry of a Judgment by Default. *Oliphant v. Whitney*, 34 Cal. 25, 27 (1867).

2. Martin, Civil Procedure at common Law, c. IX,

Art. II, 236 (St. Paul, 1905).

386

## DEFENSIVE PLEADINGS

Cl. 20

raises an Issue of Law as to whether, on the Face of the Declaration, assuming the Facts alleged to be true, the plaintiff has stated Facts which, as a Matter of Substantive Law, and the Rules of Pleading, entitle him to the redress which he seeks. If he fails to include an Allegation required by the Substantive Law, this constitutes a Substantive Defect, which, if Apparent upon the Face of the Declaration, may be reached, at the Pleading Stage by Demurrer; after Verdict and before Judgment, by Motion in Arrest of Judgment; and after Judgment, by Writ of Error, and possibly by Motion for Judgment **Notwithstanding the Verdict. At the Trial Stage, the same Defect might possibly** be reached by Motion for Judgment on the Pleadings,

#### **If, however, the plaintiff includes in his**

Declaration all the Allegations required by the Substantive Law to state a good Cause of Action, but states these Allegations in violation of some Rule of Pleading, he is said to be guilty of a Defect in Form, which may be **reached at the Next Succeeding Stage of Pleading by a Special Demurrer. Thus, to illustrate**, if the plaintiff in Ejectment, by way of stating Title, alleged **that he had a “grant deed” of Blackacre, his Declaration** would be bad on Special Demurrer, as having stated an Evidentiary Fact, which violates **the Rule of Pleading that the plaintiff should** have stated the Ultimate Fact of Title, to **wit, that he was “seized” of Blackacre. If he had omitted any statement whatsoever** as to Title, he would have been guilty of a **Substantive Defect, which is**

generally available on General Demurrer. Generally speaking, therefore, a Special Demurrer was used to reach Defects in Form; while a General Demurrer was used to reach Defects in Substance; **but since a Special Demurrer includes a General Demurrer, a Special Demurrer** may also reach Defects in Substance, for reasons which will be explained in connection with the effect of the Statute of Demurrers enacted in 1585.~

#### *The Import of a Demurrer in Pleading*

A Demurrer, as we have seen, imports in Pleading that the Party will await the Judgment of the Court as to whether he is bound to answer the Pleading of his Adversary. **In short, it advances the legal proposition that the Pleading Demurred to is Insufficient in Law to maintain the case stated by the adverse party.**<sup>5</sup> A Demurrer may be entered by either Party and to any Pleading until an Issue is joined;<sup>6</sup> and it may be for insufficiency either in Substance, as that the case shown by the **opposite party is wanting** in an essential element, as, for example, where a Declaration in Special Assumpsit for Breach of a Contract fails to allege Consideration or a Promise; or in Form, as that the Matter Alleged is substantially sufficient, **but is stated in such an artificial manner** as to violate a Rule of Pleading. For it is a cardinal principle of Law that every Pleading must contain Matter Sufficient in Point of Substantive Law to constitute a Cause of **Action or a Defense, and that such Matter** must be deduced and alleged according to the Form required by Law, or without violating **any Rule** of Pleading as to how Substantive Allegations of any character must be set forth; and, if either of these require-

4. 27 Eliz. e. 5, § 1, O statutes at Large 360 (1585).

5. People v. Holten, 259 111. 219, 222, 102 N.E. 171, 172 (1913).

A Demurrer to a Declaration cannot properly be said to go to the Merits, except in cases where a Judgment on the Demurrer in favor of the defendant would be a Bar to a subsequent Suit on the Same Cause of Action; and this can never be the case where the Declaration is Defective only for the want of some necessary Averment. Quarles v. Waidron, 20 Ala. 217 (1852). And see Hick-ok v. Coates, 2 Wend. (N.Y.) 419, 20 Am.Dec. 632 (1829). Cf. Alabama: Glljasple v. Wesson, 7 Port. (Ala.) 454, 31 AmJllee. 715 (1888); Arkansas: Auditor v. Woodruff, 2 Ark. 73, 33 Am.Dec. 368 (1839).

6. 1 Coke Litt. Lib. 2. c. 3 § 96 (1st Am.Ed. by Day, Philadelphia, 1812).

#### **Sec. 195**

### **THE DEMURRER**

387

ments be wanting, it is cause for Demurrer;<sup>7</sup> **General if the Defect is Substantive, Special if it is Formal.**

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, assuming the Facts to be true because not Denied, to require the party Demurring to answer it. As questions of Law are for the determination of the Court, the Demurrer refers the Issue to the Judgment of the Court.<sup>8</sup>

### **THE SPEAKING DEMURRER**

195. A **“Speaking Demurrer” is one which Alleges some New Matter, not Declared by the Pleading against which the Demurrer is aimed and not Judicially Known or Presumed to be true.**

**WHEN** a party Demurs to an Adversary’s Pleading, his object is to raise an Issue in Point of Law as to whether the Facts alleged are sufficient to sustain his opponent’s Cause of Action or Defense, as the ease may be. If the Demurrer is successful it eliminates any necessity to answer on the part of the Demurrant. It follows, therefore, that **the Demurrant must accept the Facts Alleged in the Pleading Demurred to exactly as stated, and**

7. English: Colt & Glover v. Bishop of Coventry and Lichfield, Rob. 140, SO Eng.Rep. 290 (1612); Georgia: Wallace v. Holly, 13 (Ja. 389, 58 Am.Dec. 518 0853); Michigan, Stout v. Keyes, 2 Dong. (Mich.) 183, 43 Am.Dec. 105 (1895). See, also, Illinois: Ohio & If. fly. Co. v. People ex rel. Van Gilder, 149 Ill. 003, 30 N.E. 989 (1894).

A Demurrer is but a legal exception to the Sufficiency of a Pleading. *Mason v. Cater*, 192 Iowa 143, 182 N.W. 179 (1921); *Wood v. Papendiek*, 208 Ill. 385, 109 N.E. 266 (1915).

8- A Pleading which, with all reasonable inferences in favor of the Pleader, shows Facts entitling him to Relief, is not subject to Demurrer, the Office of which is to raise an Issue of Law as to the Substantial Rights of the Parties. *Sogn v. Koetzle*, 38 S.D. 99, 100 N.W. 520 (1916). that the Demurrer should be free from any Allegations of Fact additional to those **Alleged in the Pleading to which it is interposed**. And it should neither Deny the Facts stated, nor expand, reduce, modify or vary in any respect the Facts stated in the Pleading challenged.<sup>o</sup> A Demurrer which Denies **any Fact in the Pleading to which it is addressed**, or which, in order to sustain itself, requires the suggestion of Additional Facts not Appearing on the Face of the Pleading objected to,” or seeks in any way to change or qualify the Statement of Facts presented in the Adverse Pleading, is called a Speaking Demurrer.<sup>1</sup> Such a Demurrer is customarily overruled because, as a Speaking Demurrer, it violates a Rule of Pleading and **is out of order.**<sup>2</sup> **In some cases, however**, if such a Demurrer raises a meritorious Point of Law, it may be considered, the fact impertinently suggested being ignored.”

9. “It is not the Office of a Demurrer to Allege Facts.” *Jennings v. Peoria Co.*, 196 Ill.App. 195, 198 (1915); *Wood v. Papendick*, 268 Ill. 383, 109 N.E.

206 (1915).

14. As, for example, where a Demurrer suggests that another Suit between the same Parties and involving the same Subject-Matter is pending. *Arthur v. Richards*, 48 Mo. 298 (1871). See, also, Alabama: *watts v. Kennamer*, 210 Ala. 64, 112 So. 333 (1927); Federal: *Card v. Standard Co.*, 202 Fed. 351 (1912).

11. Georgia: *Clark v. Land Co.*, 113 Ga. 21, 38 SE. 323 (190- Michigan: *Walker v. Conant*, 65 Mich. 194, 31 N.W. 786 (1887); New York: *Brooks v. Gibbons*, 4 Paige (N.Y.) 374 (1834).

12. Connecticut: *Husbands v. Aetna Co.*, 93 Conn. 194, 105 Atl. 480 (1919); Illinois: *People v. Holten*, 259 Ill. 219, 202 N.E. 171 (1913); Federal: *United states v. Forbes*, 259 Fed. 585 (1919), acId ZOS Fed.

273 (1920).

On the Speaking Demurrer Under Modern Codes, see *Clark, Handbook of the Law of Code Pleading*, e. 8, § 80, p. 514 (2d ed., St. Paul 1947).

An interesting dispute as to “Speaking Motions” arose under the Federal Rules, as to which, see *Clark, Handbook of the Law of Code Pleading*, c. 8, 50, pp. 540—545 (24 ed., St. Paul 1947).

13. *Graham v. Spence*, 71 N.J.Eq. 183, 63 Atl. 344 (1906).  
388

## DEFENSIVE PLEADINGS

Cli. 20

### THE DEMURRER AND OTHER PLEADINGS DISTINGUISHED

#### 196. 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 of the Facts itself.**

#### THE distinction between a Demurrer and

Other Pleading is that a Demurrer raises an Objection as to the Intrinsic Insufficiency **of the Pleading to which it is interposed,**”

whereas a Plea, Replication, Rejoinder, or Other Pleading containing a Statement of Facts, undertakes to defeat the adversary by the injection into the Case of Matter Collateral to that which has been alleged by the adversary. Because of this distinction, the Common-Law Rule and the Rule under the Statute of Anne (1705)<sup>15</sup> was that a Party could not Plead and Demur at the Same Time to the Same Matter. The defendant was not, at Common Law, permitted to Plead and Demur because of the incongruity between **the Plea and the Demurrer. This Rule was not**

altered by the Statute of Anne (1705), as it merely permitted a defendant to Plead Several Defenses, and a Demurrer, as we have seen, was strictly speaking not a Plea, but rather an Excuse for Not Pleading.’<sup>o</sup>

## TUE SCOPE OF A DEMURRER

197. the Demurrer, as a Procedural Weapon, may be used to attack the Adversary’s Pleading as a Whole, or in Part. In so doing

14. Gould, A Treatise on the Principles of Pleading, Ft 111, 01 Pleading, 571 (6th ed. by Will, Albany, 1900).

15. 4 Anne, c. 16, § 4, 11 Statutes at Large 150, which provided: “And be it further enacted by the Authority aforesaid, That from and after the said first day of Trinity Term it shall and may be Lawful for any defendant or Tenant in any Action or Suit, or for any plaintiff in Replevin, in any Court of Record, with the Lea-re of the Same Court, to Plead as many Several Matters thereto, as he shall think necessary for his Defense.”

16. See Gould, A ‘Treatise on the Principles of Pleading Pt. III, Of Pleading, 340 (6th Cd. by Will, Albany 1909).

**the Demurrant must be careful not to make his Demurrer too large, and not to violate the Rule against Pleading and Demurring at the Same Time to the Same Matter.**

The Demurrer may be used as an offensive instrument for an attack upon an Adversary’s Pleading. And such attack may be directed at the whole of the Plaintiff’s Cause of Action or the Defendant’s Defense, as the case may be, or to a Part Only. In making such a use of the Demurrer, a defendant, in Demurring to a Declaration in its Entirety, must be certain that his Demurrer is not too large.<sup>7</sup> Thus, for example, in *Cochran v. Scott*,” the plaintiff Declared as the indorsee of a Promissory Note, payable to the Lawrence Power Company, Alleging an indorsement by the company, without setting forth the names of the members of the firm; he also Declared on several Money Counts; the defendant Demurred to the Whole Declaration, Assigning Special Cause for only One Count, and None for the others; and the Court gave Judgment for the plaintiff. Where a Declaration contains Several Counts or Statements of Causes of Action, some good in both Form and Substance, and some Defective, the defendant should Demur only to the Defective Counts, as Judgment will be given against him on an exception to the whole declaration, separate and divisible parts of it being good?<sup>9</sup> A Demurrer may sometimes be taken to part of a single Count or Plea, where the matters alleged are distinct and divisible in their nature.<sup>9o</sup>

It Powdick v. Lyon, 11 East 565, 103 EngRep. 1123 (1809).

18. 3 wead. (N.Y.) 229 (1829). See, also, the following cases: Illinois: Nash v. Nash, 16 In. 79 (1854);

New York: hlumford v. Pitzhugh, 18 Johns. (N.Y.)

457 (1821). And, see, North Carolina: Conant v.

Barnard, 103 N.e. 31Z, 9 SE. 575 (1889).

On Demurrer to Part of a Pleading, or to a Pleadilig Good in Part, see Decen]lial Digests, Pleading 204.

19. English: Powdick v. Lyon, 11 East 565, 103 Bug. Ilen. 1128 (IS®); New York, Douglaes v. satterl&e. 11 Johns. (N.Y.) 18 (1814).

CO. Douglass v. Satterlee, 11 Johns. (N.Y.) 16 (1814).

## Sec. 198

### THE DEMURRER

389

But a plaintiff’s Demurrer to Several Defenses, some good in Form and Substance and some bad in either Form or Substance, should not be too large, as a defendant needs but one Defense to win. Thus, in *Mayor,~ etc. oJ Newark v. Dickerson, et al.,’~ where the plaintiff Declared in Debt against a Surety on a Bond, to which the defendant interposed ten Pleas, and the plaintiff filed a single Demurrer to three of the Pleas, one of which was good in Substance, whereas the others were bad, the Court, through Dixon, J., said: “If any of the Pleas Demurred to presents a good Defence, the defendant is entitled to Judgment.” 22*

Whether the Demurrer is used as an offensive or Defensive Weapon, the Pleader should be careful not to Plead and Demur at the Same Time to the Same Matter, as such a course of procedure would violate a fundamental Theory of Common-Law Pleading that you cannot create an Issue of Law and an Issue of Fact simultaneously on the Same Matter,

**GENERAL AND SPECIAL DEMURRERS AND DEFECTS AVAILABLE  
THEREUNDER**

**198. There are two Kinds of Demurrer; they are:**

**(1) General, and**

**(2) Special.**

**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. In general, a General Demurrer reaches Defects in Substance.**

**A Special Demurrer takes Exception to the sufficiency of the Adverse Pleading by showing Specifically the Particular Defects in Form which are the basis of such Exception. It is necessary where the Objection turns on Matter of Form only. In general, a Special Demurrer reaches Defects in Form which are specified in the Demurrer, and also reaches Defects in Substance.**

21. 45 N.J.L. 38 (1883).

22. 14. **at** 30.

FORM OF GENERAL DEMURRER TO

THE DECLARATION

(For *Matter of Substance*)

(In Debt)

IN THE KING'S BENCH

Term, in the year of the reign of King George the Fourth.

Clyde Dowell

ats.

Arthur Brown

AND the said Clyde Dowell, by William Jones, his attorney, comes and defends the wrong and injury, when, etc.; and says that **the said declaration and the matters therein** contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said Arthur Brown to have or maintain his aforesaid action against him, the said Clyde Dowell; and that he, the said Clyde Dowell, is not bound by the law of the land to answer the same. And this he is ready to verify. Wherefore, for want of a sufficient declaration in this behalf, the said Clyde Dowell prays judgment, and that the said Arthur Brown may be barred from having or maintaining his aforesaid action against him, etc.

William Jones

Attorney for Defendant

STEPHEN, Principles of Pleading in Civil Actions, c. I, 82 (3d Am. Ed. by Tyler, Washington, D. C. 1892).

FORM OF SPECIAL DEMURRER TO THE DECLARATION

(For *Matter of Form*)

(In Debt)

IN THE KING'S BENCH

**Term, in the** year of the  
reign of King George the Fourth.

Clyde Dowell

ats.

Arthur Brown

399

**DEFENSIVE PLEADINGS**

**Ch. 20**

**AND the said Clyde Dowell, by William Jones, his attorney, comes and defends the wrong and injury, when, etc.; and says that the said declaration and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for**

the said Arthur Brown to have or maintain his aforesaid action against the said Clyde Dowell; and that he, the said Clyde Dowell, is not bound by the law of the land to answer the same. And this he is ready to verify. Wherefore, for want of a sufficient declaration in this behalf, the said Clyde Dowell prays judgment, and that the said Arthur Brown may be barred from having or maintaining his aforesaid action against him, etc. *And the said Clyde Dowell, according to the form of the statute in such case made and provided, states and shows to the court here the following causes 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. And also that the said declaration is in other respects uncertain, in formal and insufficient.*<sup>23</sup>

William Jones  
Attorney for Defendant

STEPHEN, Principles of Pleading in Civil Actions, c. I, 83 (3d Am. Ed. by Tyler, Washington, D. C. 1892).

FORM OF JOINDER IN DEMURRER <sup>24</sup> IN THE KING'S BENCH

**Term, in the**  
reign of King George the Fourth.

**year of the**

Arthur Brown  
v.

Clyde Dowell

}

23. The Italics are the author's.

24. A Party could not decline a Question on the Legal Sufficiency of his own Pleading without abandoning it. The acceptance was therefore as imperative as in the case of an Issue of Fact, and this end

AND the said Arthur Brown says, that the said declaration and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law for him, the said Arthur Brown, to have and maintain his aforesaid action against him, the said Clyde Dowell; and the said Arthur Brown is ready to verify and prove **the same as the court here shall direct and**

was secured by use of a set Form of Words called the "Joinder in Demurrer." With respect to Issues in Law Tendered by Demurrer, it was immaterial whether the Issue was Well or ill-tendered, that is, whether the Demurrer was in Proper Form or not. In either case the Opposite Party was equally bound to Join in Demurrer; for it was a Rule that there could be No Demurrer upon a Demurrer; and there was no ground for a Traverse or Pleading in Confession and Avoidance, while the Pleading to which the Demurrer was taken still remained unanswered.

For the Common-Law Rule, see Campbell v. St. John, 1 Ball. 219, 91 Eng. Rep. 194 (1693).

For the Code Rule that no Formal Joinder in Demurrer is required, see Conu. Prac. Ill., 102, p. 10 (1934).

Where an Issue in Law was Tendered by Demurrer, the opposing Party was required to join it.

English: Haiton v. Jeffreys, 10 Mod. 280, 88 Eng. Rep. 728 (1715); Illinois: Clay Fire & Marine Ins. Co. v. Wusterhausen, 75 Ill. 285 (1874); Maryland: Brown v. Jones, 10 Gill & J. (Md.) 334 (1830).

"Supposing the Cause to be at *lame*, the next proceeding is to make a transcript upon paper of the Whole Pleadings that have been filed or delivered between the Parties. This transcript, when the Issue Joined is an Issue of Law, is called the *Demurrer-Book*; when an Issue of Fact, it is called, in the King's Bench, in some cases, the Issue, in others the *Pape-Book*, and in the Common Pleas *the Issue*. It contains not only the Pleadings, but also Entries, according to the Ancient Forms used in Recording, of the Appearance of the Parties, the Continuances, and other Acts supposed to be done in Court up to the Period of Issue Joined, even though such Entries have not formed part of the Pleadings as filed or delivered; and it concludes with an Entry of an Award by the Court of the Mode of Decision Tendered and Accepted by the Pleadings. The making of this transcript upon an Issue in Law is called *making up the Demurrer-Book*; upon an Issue in Fact, *making up the Issue or Paper-Book*." Stephen, A treatise on the Principles of Pleading in Civil Actions, c. I, Of the Proceedings in an Action. from its Commencement to its Termination, 108 (3d Am. ed. by Tyler, Washington, D. C. 1892).

**Sec. 198**

**THE DEMURRER**



award. Wherefore, inasmuch as the said Clyde Doweil bath not answered the said declaration, nor hitherto in any manner denied the same, the said Arthur Brown prays judgment, and his debt aforesaid, together with his damages by him sustained by reason of the detention thereof, to be adjudged to him,

STEPHEN, Principles of Pleading in Civil Actions, c. I, 92 (3d Am. Ed. by Tyler, Washington, D. C. 1892).

### *The General and Special Demurrer Under the Regime of Oral Pleading*

PRIOR to the Statute of Elizabeth (1585) -25 cited or described in the books as the Statute of Demurrers, and an important Statute of Jeofails,<sup>26</sup> there were Two Kinds of Demurrer, the General Demurrer and the Special. According to the case, *Anonymous*,<sup>27</sup> decided in 1704, and in which the opinion rendered was by Chief Justice Holt of the Court of King's Bench, upon a General Demurrer, a Party might take advantage of all Types of Defects, Formal or Substantive,<sup>28</sup>

25. 27 Bus. c. 5, 6 Statutes at Large 360.

26. The word "Jeofails" means, I have failed; I am in error- Certain Statutes in English Law are referred to as Statutes of Amendment and Jeofails, because where a Pleader perceives any slip in the Form of his Proceedings, and acknowledges the error (jeofails) he is at liberty by those Statutes to Amend it.

For a complete list of the Statutes, the earliest of which was enacted in 1340, 14 Edw. III, e. 6, 1 Statutes at Large 474, see article by Reppy, The Hilary Rules and Their Effect on Negative and Affirmative Pleas Under Modern Codes and Practice Acts, C N.Y. LL.Rev. 95, 100, n. 19 (1929).

For a partial list of these Statutes, see, also, 1 Tidd, The Practice of the Court of King's Bench, e. XXX, 647-664 (1st Amed., Philadelphia 1807); Clark & Yerion, Aider and Amendment, 12 Minn.L.Rev. 97,

125 (1928).

And, for a discussion of Amendments and Jeofails, see Scott, Fundamentals of Procedure in Actions at Law, e. V. Amendments and Jeofails, 143 (New York 1922).

27. 3 Salk. 122, 91 Eng.flep. 729 (1704).

that of Duplicity only excepted, and without **the Assignment of Any Cause for Demurrer**. Upon a Special Demurrer, so called because it Assigned a Specific Cause of Demurrer, Ordinary Formal Defects were available as *on* a General Demurrer. As these Ordinary Formal Defects were reached by a General Demurrer, without the necessity of specifically pointing them out as was required in a Special Demurrer, the Latter Form of Demurrer was never necessary, except in a case involving Duplicity.<sup>29</sup> In such case it was not sufficient to say that the Pleading was Double, or contained Two Matters, but the Party Demurring was required to show of what the Duplicity consisted.<sup>30</sup> Perhaps the reason for this Exception may be *discovered* in the peculiarity of this Specific Defect. Technically, Duplicity constituted neither a Formal nor a Substantive Defect, that is, it was not a *Substantive* Defect, because *not* too few, but rather too many Facts had been alleged; and it was not a Defect in Form, for what was alleged had been stated without violation of a Rule of Pleading, hence the Only Defect present—the statement of Superfluous Facts— was held to be available only on Special Demurrer.

### *What the Statute of Elizabeth Provided*

WHAT did the Statute of Elizabeth provide and what was the effect of such provision?

29- Ibid.

Duplicity in the Declaration was a common Ground **for** Special Demurrer at Common Law. Handy v. **Chatfield**, 23 Wend. (N.Y.) 35 (1840). But for the *attitude* of the courts of today on Duplicity, see Oklahoma Gas & Electric Co. v. Bates Expanded **Steel** Truss Co., 11 P.2d 415 (19213). And in England, under the influence of the Common Law Procedure Act, 1552 (15 & 16 viet. c. 76, § 51), which provided that "No Pleading shall be deemed insufficient **for any Defect** which could heretofore o.,ly be objected to by Special Demurrer," Duplicity, along with other Formal Defects, ceased to be available on Demurrer. The remedy is now by Motion.

30. Lamplough v. Shortridge, 1 Salk, 219, 91 Eng.Rep

195 (1701).

## DEFENSIVE PLEADINGS

### Ch. 20

It provided that upon Demurrer Joined and Entered in any Action or Suit in any Court, the Judges should give Judgment “*according as the Very Right O/the Cause and Matter in Law shall appear unto them*” without regarding any Defect in Form whatsoever, “*except those only which the Party Demurring shalt Specially and Particularly set down and express together with his Demurrer!*”

What, in plain English, does this mean? The phrase, “according as the Very Right of the Cause and Matter in Law shall appear unto them” translated into plain English, means that the Judges thereafter shall decide the Cases on the Merits, **and** in complete disregard of any imperfection, defect or watt of Form in any Pleading, except those only which the Demurring Party specifically points out and sets down “together with his Demurrer.” What Demurrer? Answer, the General Demurrer. A Special Demurrer therefore, under the Statute, is merely a General Demurrer, to which is added a specification or pointing out of some Defect in Form in an Adversary’s Pleading, as indicated by the italicized part of the Form of a Special Demurrer set out above. In other words, the Statute provides that Defects in Form are aided or waived unless taken advantage **of by Special Demurrer at the next Succeeding Stage in Pleading.**

Defects in Form, after the Statute, might, however, still prove fatal, but only if specifically objected to by openly pointing out the defect at the next Stage of Pleading.<sup>31</sup> Thus,

31. “This Statute, by making kuown the Causes of Demurrer, was so far restorative of the common Law; and as a General Demurrer before did confess all Matters Formaliy Pleaded, so by this Statute, whenever the right sufficiently appeared to the Court, it confessed all Matters, though Pleaded informally.” 8 Tidd, *The Practice of the Court of King’s Bench*, c. XXX, 649 (1st. Sin. ed., Philndelphia 1807).

See, also, English: ICing v. Botham, Freem. 38, 89 Eng.Bep. 31 (1672); Illinois: Cook v. Scott, 1 Gil-man (Th.) 333 (1844); Gordon v. Bankard, 37 Iii. 147 (1863); Cover v. Armstrong, 66 Ill. 267 (1872); Mas

**in the famous case of Heard v. Baskerville**,~ decided in 1614, or only twenty-nine years after the Enactment of the Statute, the Court concluded, upon finding a Defect in a Pleading to be a Matter of Form, that the Defect could not be taken advantage of upon General Demurrer, as “a General Demurrer doth confess all matters pleaded”, though not pleaded in proper form. A General Demurrer, therefore, automatically waives all Defects in Form, except in the case of a General Demurrer to a Plea in Abatement,<sup>33</sup>

#### *What the Statute of Anne Provided*

THE Kinds and Forms of Deinurrers after 1705 remained substantially the same, except for a slight alteration in the Scope of the Special Demurrer. The Statute of Anne (1705), was merely a Reenactment of the Statute of Elizabeth (1585), almost word for word, with a proviso that “*sufficient Matter appear in the said Pleadings, upon which the Court may give Judgment according to the Very RAght of the Cause,*”<sup>34</sup> plus an enumeration of Certain Defects, which upon the construction **of the Prior Statute, had been held** to be Substantial, but which were now to be held Formal, and hence Aided upon General Demurrer, the conservative views of the Judges to the contrary notwithstanding. As Could ~ has so accurately stated, the Statute

saclmsetts: Steffe v. Old Colony B. Cc., 156 Mass. 262, 30 N.E. 1137 (1892); Vermont: wiley v. Car1)enter, 64 Vt. 212, 23 Atl. 630, 15 LIIA. 853 (1892).

32.I-lob, **232, 80** Eng.llep. 878 (1614).

-3. The *early* English ease on this point is Walden v. I-Iolmau, 2 Ld.flaym. **1015, 92** Eng.Itcp. 173 (1704).

34. 11 Statutes at Large 155, c, 10, § **I (1703).**

33. A Treatise on the Principles of Pleading, Pt. III, e. IV, Of Demurrer, 576, 577 (6th ed. by Will,

Albany 1909).

The Statute of Elizabeth, 27 Elm. e. 5, 1 (1585) and the Statute of 4 Anne, c. 16, § 4 (1705) are applicable only In Civil Actions, being confined to proceedings in an “Action or Suit” The former Statute is, **by** express proviso, not extended to criminal proceedings. In Indictments, therefore, **Formal Defects** are still available on General Demurrer as at Common Law. A proviso In the Statute of Anne

394

## DEFENSIVE PLEADINGS

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plaintiff failed to allege the writing, this was held to be a Defect available on Demurrer.<sup>43</sup>

### *Exception to the General Rule as to Defects Available upon a General Demurrer*

WHILE the General Rule is that upon a General Demurrer only Defects in Substance are available, there is an exception to the rule where the plaintiff files a General Demurrer to a Plea in Abatement Defective in Form.<sup>44</sup> In *Humphrey v. Whitten*,~ where the plaintiff brought Ti-over against the defendant in the name of *James Humphvreys*, the defendant Pleaded that he was and “always had been known by the name of *James Humphrey*, and not James Humphreys, as by the plaintiff’s Writ supposed, to which Plea the plaintiff Demurred Generally. Since the defendant’s Plea contained New Matter, in order to be in Proper Form, it should have concluded with a Verification, which it did not contain. There was therefore a question as to whether a Defect in Form in a Plea in Abatement could be reached by a General Demurrer after the Statute of Elizabeth and the Statute of Anne. In reviewing the Common Law, the Court concluded that the General Demurrer reached the Defect in Form—the failure to have a Verification—in the Plea **in Abatement**. Why? Because, at Common Law, prior to the Statute, a General Demurrer reached both Defects in Form and Defects in Substance in a Pleading to which it was interposed, and since the Statute of Elizabeth and the Statute of Anne only **applied to Pleas in Bar**, the Original Common Law as to the Scope of a General Demurrer **to a Plea in Abatement was not changed**, and therefore, as a General Demurrer reached a Defect in Form in a Plea in Abatement before 1585, it still reached it after 1585, the

<sup>43</sup>. Anonymous, 2 Salk 510, 01 Eng.Rep. 442 (1701);

Duppa v. Mayo, 1 Wms.Sauml. 275, 276 note 2, 85 Eng.Rep. 336, 342 note 2 (1670).

<sup>44</sup>. *fluniplirey v. Whitten*. 17 Ala. 30 (1949).

Common-Law Rule not having been disturbed, Thus, the Exception to the General Rule that in order to reach a Defect in Form in a Pleading after the Statute of Demurrers, you must Demur Specially.<sup>46</sup>

### *The General Rule as to Defects Available Upon a Special Demurrer After the Statute of Elizabeth (1585) and the Statute of Anne (1705)*

THE General Rule was that upon a Special Demurrer any Defect in Form, as created by a **Violation of a Rule of Pleading** as to the Manner and Form in which a Substantive Allegation should be Averred, was available, if the Cause of Demurrer was Specifically Assigned. Thus, for example, Uncertainty of Allegation, Improper Ending of a Plea, Joinder of Several Causes of Action in a single Count, or any other Violation of a Rule of Pleading, constitutes a Defect in Form.

In addition, as observed above, as a Special Demurrer is, under the Statute of Elizabeth (1585), merely a General Demurrer to which has been added a specification of some Defect in Form in the Adversary’s Pleading, Defects in Substance were also reached by a Special Demurrer.

### *The Defect of Duplicity*

PRIOR to the Statute of Elizabeth (1585), the Defect of Duplicity (which was neither a Formal nor a Substantive Defect) was, as a

<sup>46</sup>. *Shaw v. Duteher*, 19 Wend. (N.Y.) 216, 222, 228 (1838), in which Co-ven, 3., declared: “Testing the Plea below by these Rules, it is fatally defective. It begins and concludes by praying Judgment of the Said Bill, I Incline to think that this was a Defect of Substance; but if of Form only, being in Abatement, the Defect need not be assigned specially, SUCH IS the construction of the English Statutes of Special Deniurrers, 27 Eliz., e. V, & 4 Anne, c, 16, and ours is but an epitome of those Acts. 2 ITS. 276, 2d ccl. The English authorities to this point will be found in I chitty. Pleading, 404; *Walden v. flolman*, 2 DdJtaym. 1015; per Bayley, 3., in *Lloyd v. Williams*, 2 Maule & Selw. 484, 5. *Walden v. Holinan*, Is in point.”

<sup>4-</sup>. 17 Ala. 30 (1849).

Ch. 20

Sec. 198

## THE DEMURRER

3

of Anne (1705) was enacted “partly in explanation and partly in extension of the healing operation of the Former Act—and also expressly specifying a variety of Particular Defects, which, though before deemed *Substantial*, are, by this latter Act, virtually converted into Matters of *Form* and thus Aided on General Demurrer. The Statute of Elizabeth, then, requires Demurrers to be Special, for Formal Defects, *in general*; and that of Anne, after Reenacting the same *general* provision, extends, or applies it to certain *Particular* Defects, expressly named in the Act.”<sup>36</sup>

*The General Rules as to Defects Available  
Upon a General Demurrer After the  
Statute of Elizabeth (1585) and the  
Statute of Anne (1705)*

AFTER the Amendment of the Statute of Elizabeth (1585) by the Statute of Anne (1705), the General Rule was that upon a General Demurrer any Substantive Defect

was available.

Other Defects available upon General Demurrer include a Misjoinder of Causes of Action in the same Declaration; ~ Misjoinder or Nonjoinder of Parties plaintiff or defendant, **if the Defect is Apparent on the Face of the Pleading**; ~ a Variance; ~ or barred its extension to Actions on Penal Statutes, which are Civil Suits, But this proviso, in the year 1731, was repealed by the Statute of 4 Geo. II, c.

26, § 4.

36. “The Defects *specifically enuocrotej*, and cured, by this latter Statute, are *imnateriai traverses—the omissioii of profert of Deeds, Sm—or of the words vi ci armis, and contra pacern—or of a verification per recordim—or of a prout patet per records,...*

All these Defects nrc therefore Aided by this Statute, on Demurrer, unless specially assigned for Cause of Demurrer.” Could, A Treatise on the Principles of Pleading, Pt. III, c. IV, Of Demurrer, 577 (6th ed. by Will, Albany, 1909).

37. Gilmore et al. v. Christ Hospital & Dickinson, OS N.J.L. 47, 52 A. 241 (1902).

38. Burgess v. **Abbott** & Ely, 1 Hill (N.Y.) 476 (1841).

39. *Cooke v. Graham’s Adm’r*, 3 Craneb (U.S.) 229,

2 L.Ed. 420 (1805).

Allegations in the Disjunctive.<sup>48</sup> Ordinarily the Statute of Limitations is not available on Demurrer, as the General Rule is that it is no part of the plaintiff’s case to show that his Action is not Barred by the Statute of Limitations, Such a showing may be essential where the Period of Limitation is treated as a part of the right created by a Statute. If, in the absence of such a Statute, a Declaration or Complaint discloses on its Face that the Action is Barred by the Statute of Limitations, there is a conflict of opinion, the general tendency of which is against the availability of the Defect on Demurrer.<sup>45</sup> The situation with respect to whether the Statute of Frauds is available on Demurrer raises substantially the same problem as the Statute of Limitations. At Common Law the Rule was that where an Action was founded upon a Contract which at Common Law was valid without a writing, but which the Statute required to be in writing, it was not necessary for the Declaration to Count upon or take notice of the writing.<sup>42</sup> If, however, a Statute created a right which did not exist at Common Law, and required a writing, and the

40. *McCurda v. Lewisfown Journal Company*, 104 Mc. 554, 72 Atl. 400 (1908).

41. *Eulkley v. Nonvieii & Westerly fly. Co.*, 51 Conn.

281, 70 Atl. 1021 (100S). Cf. *Kirkpatrick v. Monroe*, 234 Ill.App. 213 (1024), reviewed critically in 20 111. L.Rcv. 391 (1925).

For an excellent discussion of the cases on this point specifically and on the Defense of the Statute of Limitations in general, see the articles by Atkinson, Pleading the *Statute of Limitations*, 00 Yale L.J. 014, 918—029 (1927); Atkinson, Some Procedural Aspects of the Statute of Limitations, 27 Col.L.Rev. 131 (1927); Atkioson, Allegations of *Time In Pleading*, 35 Yale L.J. 457 (3926).

For a discussion of the problem under the Codes, ~with citation of cases, Sec Clark, Handbook of the Law of Code Pleading, c. 8, ~ 82, 522—523 (24 S. St. Paul 1047).

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5) and ppjicarocod~ute is, ii pro~l Do-as at Anne  
42. Whitelsead v. Burgess, 61 N.J.L. 75, 38 At]. 802

(1597).

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matter of Precedent in Pleading, only available upon a Special Demurrer. In fact, the Special Demurrer was seldom used for any other purpose, as an Ordinary Defect in Form was available on General Demurrer, without any Assignment of Cause. After the Statute, Duplicity, despite its peculiarity as a fault, was treated as a Formal Defect, and hence available upon a Snecial Demurrer.<sup>47</sup> But in *Oklahoma Gas c~ Electric Co. v. Bates Expanded Steel Truss Co.*,<sup>48</sup> where the defendant Demurred Specially to the First and Second Counts of an Amended Declaration in Case on the Ground of Duplicity, the Court, regarding the Rules of Pleading as but juridical instrumentalities for the furtherance of Justice, and taking note of a statutory requirement that pleadings should be framed to promote “conciseness, brevity and plainness”, overruled the Demurrer, where at Common Law the Demurrer would have been sustained. And in England, under the influence of the Common Law Procedure Act of 1852, which provided that “no Pleading shall be deemed insufficient for any Defect which could heretofore only be objected to by Special Demurrer,” ~ Duplicity, along with other Formal Defects, ceased to be available on Demurrer. The remedy is now by Motion.M

47. Hump~.reyg v. flethily, 2 Vent 222, 86 Eng.Rep.

405 (1690); Seymour v. Mitclieh, 2 Root (Coun.) 145 (1794),

11 F.24 415 (1926).

D. 15 & 16 Viet. e. 76, § 51, 92 Statutes at Large

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395

*Five Exceptions to the General Rule that Every Violation of a Rule of Pleading is a Defect in Form*

THE General Rule is that any Violation of a Rule of Pleading constitutes a Defect in Form. To this General Rule, however, there were at least Five Exceptions, that is, there were some situations in which a mere Violation of a Rule of Pleading was held as a Matter of Precedent to constitute a Defect in Substance, and therefore could be taken advantage of on General Demurrer. This re-’ suited in case of (1) a Departure; (2) a Discontinuance; (3) a Misleader; (4) a Misconception of the Correct Form of Action; and (5) a Misjoinder of Counts. The first three of them are Aided by a Verdict; the last two constitute grounds for a Motion in Arrest of Judgment or Writ of Error, but are not Aided by a Verdict.<sup>5~</sup>

*Motions to Strike Out*

THE usual Method of Objection to parts of a Pleading is *now* by Motion to Strike Out what is superfluous, redundant, or immaterial, and thus clear up the Issues by use of the pruning hook.<sup>55</sup> By filing an Amended

**Sec. 198**

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**THE DEMURRER**

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50. In *Curtis Funeral Home v. Smith Lumber Co.*,

114 Vt. 150, 152, 40 A.2d 531, 332 (1945), Moulton, C.

3., declared: "Duplicity is a Defect of Form and Not of Substance. *Johnson v. Hardware Mutual Casualty Co.*, 109 Vt. 481, 459, 1 A.2d 817. At Common Law this fault in a Declaration could be reached only by a Special Demurrer. *Lewis v. John Crane & Sons*, 75 Vt. 210, 220, 62 At]. 60; 1 Chitty, Pleading, 16th Am. ed. 252; Gould, Pleading, 4th ed. 430, xi. 1. But under our Practice Act, which provides, *Pj*-. 1578, flint a Pleading shall not fail for want of Form and that the Sufficiency of all Pleadings In this respect is for the discretionary determination of the Trial Court, the function of a Demurrer is to test the Sufficiency of a Pleading in Matters of Substance only. *Ceburn v. Village of Swnton*, 05 Vt. 320, 324, 325, 115 A, 133. The Modern Demurrer resembles the Former Special Demurrer merely in that the Act, FL. 1574, III, requires it distinctly to specify the reason why the Pleading Demurred to is insufficient. *Coates v. Eastern States Farmers Exchange*, 99 Vt. 110, ITt 130 A. 709. It follows that, in our practice, Special Demurrers as known in the Common Law have been implicitly abolished, and therefore *Duplicity* in Pleading, being, as we have seen, a Defect In Form, is to be reached by an appropriate Motion under the Provisions of FL. 1578. A similar procedure obtains in other Jurisdictions where Special Demurrers are no longer recognized."

51. *ICEigwin*, Cases on Common Law Pleading, Bk. IT, The Rules of Pleading, 444, 445 (2d ed., Rochester, 1934).

52. The sufficiency of a Defense must be tested by Demurrer, and cannot be considered on Motion to Strike a Paragraph as irrelevant. *Bulova -cc B. L. Barnett, Inc.*, 111 Misc. 150, 181 N.tSupp. 247 (Sup.

Pleading after a Demurrer is sustained, or by answering after a Demurrer is overruled, the Party waives any Exception to the Ruling before the Appellate Court.<sup>03</sup> Therefore, a Motion to Strike Out, rather than a Demurrer, may be preferable to save the benefit of

the objection.

**EFFECT OF DEMURRER—BY WAY OF ADMISSION**

199. **Upon Demurrer, all Matters of Fact that are well Pleaded stand Admitted**, under the Operation of the Rule that whatever Allegations are not Denied are assumed to be **True, but only for the purpose of Decision on**

-the Demurrer. A **Demurrer does not admit Matters of Fact** which are Ill-Pleaded, nor does it **admit Allegations of Conclusions** of Fact or

of Law.

A Demurrer can never be founded on Matter **Collateral to the Pleading which it opposes, but** must always be based on the Face of the Pleading to which it is interposed. Thus, a Speak-

Ct., 1920), order modified, 193 App.Dir. 161, 183 N. Y.Supp. 495 (1st Dept 1920).

Where questions which should have been raised by Demurrer were raised by Motion to Strike Portion of Answer, the Motion may be treated as a Demurrer, *Lyons v. Farm Property Mut. Ins. Assn of Iowa*, 158 Iowa 500, 179 NW. 291 (1920).

It is not the Office of a Demurrer to test liupi'oper Allegations concerning Datneges, the remedy being by Motion to Strike or Objection to Evidence or Special Charges. *Western Union Telegraph Co. v. Morrison*, 15 AlaApp. 532, 74 8~. 88 (1917), judgment reversed, Ex Parte Wesh # Union TeU.gruplt Ce., 200 Ala. 496, 76 So. 438 (TOLL).

A Demurrer is not the Proper Way to Test the Saulciency of a Notice of Deftnse filed cinder Section 46 of the Illinois Practice Ac-i, hut a Metion to Strike from the Files. *White v. 1k" ,rqn ii.,* 204 ILLApp. 83, 116 -(1917).

Sc-c, on Demurrers and Motious to Strike Out, hail v. O'Neil Turpentine Co., 56 Fla. 324, 47 Se. 609, 16 Aun.Cas. 735 11008); *State v. Seaboard Air Line fly.,* hO Fln. 670, 47 So. 086 (1908); *Southern Home Ins. Co. v. Putnal*, 57 Fla. 100, 49 So. 022 (1900).

-3. Error in sustaining a Dm11111-i-er is ~s'aived by Amending or asking leave to Amend or Plead Over. *lkqujctt v- Union Ccitt, Life los. Co.,* 203 ILL. 444, CI iV.E. 971 (1904).

-4. *Coxe v. Culicl*, 10 NiL. 328 (1.829).

That the Tunic is the same under the Modern Cases, see *Colorado: Downey i: Colorado Fuel & Iron Co.,* 48 Cob. 27, i08 Pac. 972 (1910); *Iowa: Wnpello State Say. Bank v. Cotton*, 143 Iowa 350. 122 NW. 149 (1009); *Wisconsin: Chicago & N. IV. fly. Co. v. Allen*, 94 Wis. 93, 65 NW. 873 (1896).

55. *Coxe y. Chuck*, 10 N.J.L. 328 (1820).

And under the Code, rite It ule is the same,— that a Dcin urreer ~vil not adini t llh-Pleaded Facts. *fleaton v. Packer*, 131 AmcDiv. 812, 116 N.Y.Supp. 40 (1st Dept. 1909½. I3ut these Facts which by fair intendinent itiny Ic implied are admitted. *New York: Bhti,a v. Whitney*, 185 N.Y. 232, 77 N.E. 1150 (1906):

*North Carolina: Whitaere v. City of Charlotte*, 216 NC. 687, 6 S.E.2d 558, 126 ALE. 438 (1940).

An Admission by Demurrer cannot be used against the Deinurrant at the Trial. *Sprague v. New York & N. E. fly. Co.,* 68 Coon, 345, 36 A. 791 (1896).

And see, the earlier Now York case of *Spencer v. Sooth~viek*, 0 Johns. (N1.) 314 (1812), in which it was held that an argumentative Plea is good on General Demurrer.

A Demurrer does not Admit the Law, l-laitna v. Lieutenshein, 225 N.Y. 570, 122 KB. 625 (1019); and an Admission by Demurrer is only for the Purpose of Pleading. *West v. H. 3. Lewis Oyster so.,* 99 Cona. 55, 121 Atj. 462 (1923).

396

## DEFENSIVE PLEADINGS

### Ch. 20

ing Demurrer, which, in order to sustain itself, requires Facts net appearing on the Face of **the Pleading Objected to, is not permitted.**

*Two Fundamental Rules Covet-fling Admissions by Dernun'er*

THERE are Two Rules that Govern Admissions by Demurrer. The *first* Rule is that a Demurrer will admit any Fact that is Well. Pleaded and will not admit any Fact that is IllPleaded; ~ the *second* Rule is that a Demurrer will not admit any Fact which the Court takes Judicial Notice to be impossible or untrue. And the Technical Objective of these two rules was to test the Legal Effect of the Allegations to which they were addressed and to aid in the Issue-Formulation Process of Separating Questions of Fact from Questions of Law, for ready reference to the Court or Jury, depending on whether the Pleadings terminated in an Issue of Fact or an Issue of Law.

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### Sec. 199

### THE DEMURRER

*A Demurrer wiTh Admit any Fact thzzt is Well-Pleaded and Will not Admit any Fact that is Ri-Pleaded*

IN connection with the first Rule, the question arises as to when is a Fact Well-Pleaded or Ill-Pleaded? A Fact is Well-Pleaded when it is required by the Substantive Law as essential to the Statement of a Cause of Action or Defense, and is then Pleaded without Violating any Rule of Pleading. A Fact is Ill-Pleaded when it is not required by the Substantive Law as essential to the Statement of a Cause of Action or Defense, or when, being so required, it is then Pleaded in Violation of one or more Rules of Pleading.

Thus if A sued B in Ejectment and Alleged, by way of Title, that he was Seized of Black-acre, the Allegation of Title was Well-Pleaded, because it was required by the Substantive Law of Real Property as essential to the Statement of a Cause of Action in Ejectment, and because it was Alleged without Violating any Rule of Pleading. If, however, A had Alleged, by way of Title, that he had a Grant Deed of Blackacre, his Allegation of Title would have been Ill-Pleaded, as a Deed is Mere Evidence of Title, and amounts to the Statement of an Evidentiary Fact, a Defect available on Special Demurrer.

Assuming that the Facts are Well-Pleaded, a Demurrer thereto admits, for the Purpose of Argument, that they are true,<sup>56</sup> and the only question for the Court is one of Law as to whether there is any Rule of Substantive Law attaching Legal Effect to the Facts

U. English: Barber v. Vincent, Freem.K.B. 531, 89

Eng.Rep. 398 (1580); Connecticut: Lamphear v.

Buckingham, 33 Conn. 237 (1866); Illinois: Conpher v. People, 12 Ill. 290 (1850); N.H. v. Laparle, 74 N.H. 376 (1874); Vermont: Matthews v. Tower, 39

Vt., 433 (ISGT).

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. Mortar, 26 Vt. 271 (1544), And, see also, Dickerson v. Winslow, 07 Ala. 491, 11 So. 918 (1892).

Stated.<sup>57</sup> The Rule is subject, however, to the qualification that the Matter must be sufficiently Pleaded, that is in the Manner and Form required by Law.<sup>58</sup> If the Facts were not Alleged in Proper Form, they were not admitted by a Demurrer under the Common-Law Rule which prevailed prior to the Statute of Elizabeth (1585) and the Statute of Anne (1705) P° This Rule was changed by these Statutes, the Law of Demurrers being altered in such a way that thereafter Facts not Alleged according to the Form required by Procedural Law, might be admitted by Demurrer in some instances.~° This usually results where the Demurrer is General, instead of Special, as this usually amounts to a Confession of the Matter Informally Pleaded, thus qualifying the earlier Common-Law Rule that a Demurrer did not admit an EPleaded Fact.&

A Demurrer does not admit Conclusions, either of Fact or of Law, which the Adverse Party may have seen fit to draw in his PleadingP Thus, in *Milvite Gas Light Company*

57. A Demurrer to the Declaration raises a question of Law whether the plaintiff, upon the Facts stated, is entitled to Recovery. Virginia: Henderson v. Stringer, S. Grat. (Vt) 130 (1849); Federal: Hobson 'cc MeArthur, 3 McLean, 241, Fed.Cas.Nq.6,554 (1843).

It is not the Office of the Demurrer to Allege Facts, but it is concerned with such Facts as are stated in the Pleading Demurred to. Jennings v. Peoria County, 196 Ill.App. 195 (1915).

Allegations of Fact contained in a Demurrer will be disregarded. Ibid.

58. Arkansas: Pierson v. Wallace, 7 Ark. 282 (1846);

Connecticut: Lamphear v. Buckingham, 33 Conn.

287 (1866); Vermont: Matthews v. Tower, 39 Vt.

433 (1867),

59. 5 Comyns Digest, 'Pleader,' Q. 4 (Dublin 1793).

60. Walden 'cc flolman, 2 Ld.Raym. 1015, 92 Eng.Rep.

175 (1704).

Cl, Ibid.

62. Millard v. Baldwin, 2 Gray (Mass.) 454 (3855). "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

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398  
**DEFENSIVE PLEADINGS**  
**Ch. 20**

v. *Sweeten, &c., et al.*, C the plaintiff Alleged that the defendants, under a contract with the city of Milville, for the construction of a sewage system, dug up certain streets in the city where the plaintiff had laid gas pipes, which it threupon became the defendants' duty to support, protect and render safe during the construction of the sewage system, and that in disregard of this duty the pipes were so negligently supported that they became broken, and severed, to the injury of plaintiff. The only information derivable from the plaintiff's Declaration, with reference to the existence of the defendant's Duty to plaintiff, was that plaintiff's pipes were "laid in the said streets by competent and legal authority." On a Demurrer by the defendant, it was held that the Demurrer did not admit the plaintiff's Allegation as to its authority to occupy the highway with its pipes; in short, a Demurrer does not admit a Conclusion of Law.

But this is not always so. When the plaintiff, in stating title to real estate alleges that he is seized of Blackacre, he is Alleging a Conclusion of Law, yet if the defendant Demurs, he will lose, as this particular **Conclusion of Law is one which, as a Matter of Precedent in Law, is treated as a Statement of Ultimate Fact, and hence the Demurrer admits it.** So, when *we* say that a Demurrer will not admit a Conclusion of Law, we refer to that type of Conclusion of Law, which, as a Matter of Precedent, is not treated as a Statement of Ultimate Fact,

"Where the Facts are stated in a Pleading the Pleader may, and often should, state that Conclusion from such Facts upon which he bases his right, but where the Facts upon which the Pleader's Conclusion is based are not stated his Conclusicyn from such Undis

conclusions, whether stated in the Complaint or not, that a Demurrer Is directed, and to which It applies the proper test." Branham y. Mayor, etc. of City of San Jose, 24 CaL 585, 602 (1864).

63. 74 N.J.L. 24, 04 AU. 950 (1906).

closed Facts goes for nothing, and not being in itself a Relevant Fact is not admitted by a **Demurrer.**" 64

Although a Demurrer admits Facts Well-Pleaded, its operation in this respect is only **for the purpose of determining their legal** sufficiency.<sup>65</sup> It is strictly confined to this purpose, and cannot be made use of as an Instrument of Evidence on an Issue of Fact,<sup>66</sup> or as Evidence of Facts in another Cause; **and, as** observed, the admission is for the purpose of the argument only.<sup>61</sup>

*A Demurrer will not Admit any Fact which 21w Court talce.s Judicial Notice to be finpossible or Untrue*

THE *second* rule as to Admissions by Demurrer Is that a Demurrer will not admit Any Fact which the Court takes Judicial Notice to be impossible or untrue.~ An ex

64.- Id. at 25, 64 Ati, at 960.

65. Anheuser-Buseh Brewing Ass's v. Bond, 65 Fed.

653 (1895).

66. Ibid.

67. English: Tomlcij,s v. Ashhy, Moody & 11. 32, 173 Eng.Rep. 1071 (1827); Connecticut: Pease v. Phelps. 10 Conu. 62 (1834); Seovili xc Seeley, 14 Conn. 238 (1841); Havens v. Hartford & N. U. ii. Co., 28 Conn. 6~ (1559); Doolittle v. Selectmen of Bran-ford, 59 Coun. 402, 22 Atl. 336 (1890); Maine: Sunson v. Gardiner, 33 Me, 94 (1851).

An Admission of Facts by a Demurrer in one Cause is not Evidence of those Facts in anot,er Cause, although between the same Parties. Stinson v. Cardiner, 33 Me. 94 (1851).

'A Default, like a Demurrer, is a constructive adnlssion of the truth of adversary's Pleading." East India Co. v. Glove,~, 1 Str. 612, 93 Eng.Eep. 733 (1724). But a Judgment on Default may he arrested or reversed, if the Declaration would be insuffi~ dent after Verdict. Collins v. Gibbs, 2 Burr. 899, 97 Eng.Rep. 623 (1759).

68. *Southera Railway Co. v. Covenia*, 100 Ge.. 40, 20 S.E. 219, 62 Em.St.Rep. 312, 40 LEA. 253 (1896), in which it was held, Ia a ease for the negligent injury of a child, that a Demurrer to the Declaration did not admit the AUegatlon that the child performed valuable services, as the Court Judicially knew that the services of a child that age, one year, eight L. 20

**Sec. 199**

**THE DEMURRER**

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ample of the operation of this principle is found in the case in which the plaintiff sues in Trespass to Real Estate, the defendant pleads that he has not been served with a Summons, and the plaintiff Demurs. The defendant says, "I win, because, by your Demurrer you admit a lack of Service." But the plaintiff wins, because a Demurrer does not admit a Fact which the Court by Judicial Notice knows to be untrue. Whether the defendant was served can only be Seen from looking at the Return of the Sheriff, which states that the defendant has been Served. The Return of the Sheriff is a part of the Common-Law Record, the Court Judicially Notices its own Record, hence the Court Judicially knows that defendant has been Served, that the defendant's allegation of lack of service is untrue, and what the Court Judicially knows to be untrue is not admitted by Deniurrer<sup>60</sup> This does not apply to facts of which the Court cannot take Judicial Notice, though the Court may have private knowledge that they are untrue. Thus, in the case of *Hodges v. Steward*,<sup>70</sup> in which the plaintiff brought Assumpsit upon an Inland Bill of Exchange, declaring upon a Special Custom in London for the bearer to bring the *Action*, and the defendant Demurred, it was held that since the Court only Judicially Noticed the general Law of Merchants, as part of the Law of England, whereas this custom was a local custom of England, the Demurrer admitted the local custom, even in the face of the fact that the Court might have known of its own knowledge that no such local custom existed. Accordingly, Judgment was given for the plaintiff, although the defendant might have had a good Defense if he had Traversed or Denied the local custom, instead of Demurring.

months and ten dayc, were not vaiuable, as it was incapable of performing valuable service.

49. *Cole v. Maunder*, 2 Bofle, Abridgment, 548.

70. 3 Salk. 68, 91 Eng.Uep. 696 (1693).

*Will a Demurrer Admit the Pleader's Conclusions as to the Construction of a Statute~*

AN interesting aspect of Admission by Demurrer as affected by the Doctrine of Judicial Notice appears in determining whether a Pleader's Conclusion as to the Construction of a Statute is Admitted by a Demurrer. The Issue was clearly presented in the Illinois Case of *Compher v. People*." This was an Action on a Bond executed by the county collector, in which the county collector and his sureties were defendants. One of the Pleas, after referring to various Statutes enacted subsequent to the date of the Bond, alleged that thereby the Liability of the sureties was materially changed; and it was insisted that the plaintiffs, by Demurring to the Plea, admitted to the truth of the Construction of the Statutes as set forth by the defendants. The Court held that the Laws in question were Public Acts, and that the plaintiffs, by Demurring to a Plea construing them, did not admit such construction to be correct.

In considering this problem there are three situations to bear in mind: (1) Where the Action is based upon a Local Statute, and the Pleading sets out the Statute in Substance or Verbatim, the construction of the Pleader is not admitted by Demurrer, as the Court takes Judicial Notice of Local Law; (2) Where a Pleading sets out the Terms of a Foreign Statute, and then places a construction upon it, such construction is not admitted by Demurrer; <sup>72</sup> and (3) where the Pleading states the Substance of a Foreign Statute, it is treated as any other Allegation of Fact, and hence is admitted by Demurrer. as the Court will not take Judicial Notice of a Foreign Statute.<sup>73</sup>

71. 12 Ill. 290 (1550).

72. *Finney v. Guy*, 189 11.5. 335, 23 S.Ct. 558, 47 L. Ed. 839 (1903). See, also, on this point the New York case of *Hanna v. Lichtenstein*, 225 N.Y. 570, 122 N. B. 625 (1019), citing *Pinney v. Guy*, above, as authority.

73. *American Trading & Storage Co. v. Cottsteln*,

123 Iowa 267, 98 N.W. 770 (1904).

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## DEFENSIVE PLEADINGS

### EFFECT OF DEMURRER—IN OPENING THE RECORD<sup>5-</sup>

**2Db. A Demurrer Opens up the Whole Record and the Court will render Judgment against the First Party Guilty of a Substantive Defect; as to Form, a Special Demurrer only reaches Defects in Form in the Pleading Demurred to, but since a Special Demurrer includes a General, it also Opens up the Entire Record as to Substantive Defects. These General Rules as to the Retrospective Effect of a Demurrer are sometimes subject to several exceptions.**

**Exceptions: A Demurrer will not Open up the Record back to the Declaration so as to cause Judgment to be rendered against the First Party Guilty of a Substantive Defect:**

- (1) Where the plaintiff Demurs to a Plea in Abatement**
- (2) Where there has been a Discontinuance along one of several lines of Pleading**
- (3) Where the defendant interposes more than one Plea, one of which is a Plea of the General Issue, and there is a Demurrer at a later Stage in the Pleadings**
- (4) Where the plaintiff Demurs to a Plea which has been entered by the defendant after defendant's Demurrer to the Declaration has been overruled**

**Although, on Demurrer, the Court will generally consider the Whole Record, and give Judgment for the Party who, on the whole, appears Entitled to it, where, though the Right,**

<sup>71.</sup> In general, on the Retrospective Effect of a Demurrer, see:

Treatises: Shipman, Handbook of Common Law  
Pleading, c. 12, 152, Demurrers Opening Record,

284 (3d ed. by Ballantine, St. Paul 1923); Clark, Handbook of the Law of Code Pleading, c. 8, § 83. Effect of Demurrer as Opening Up the Record, 524 (2,3 ed., St. Paul 1947).

**Articles:** Miliar, **Restriction of** the Retroactive Operation of Demurrer, 10 ILL.Ret 417 (1016); Carlin, Functions of a Demurrer Under the Revised Code.

41 W.VO.L.Q. 313 (1935); P11cc, ObjectIons to Pleadings Under the New Federal Rules of Civil Procetiure, 47 Yale Li. 50 (1937); Tripp, Some Observations on **Motion Practice** In New York, 2 Syracuse LEer; 273 (1951).

**on the Whole Record, appears to be with the plaintiff, if he has not put his Action on that Ground, the defendant will prevail.**

### *The General Rule*

**IT is a well-established Rule that on Demurrer to a Pleading or portions of it, the Court will consider the Whole Record, and give Judgment for the Party who, on the whole, appears entitled to it,~ or against the Party whose Pleading contains the First Substantive Defect,**<sup>6</sup>What this means in Prac

7~. English: Piggot's Case, 5 Co. 29a, 77 Eng.flep.

95 (1598); Elgeway's Case, 3 Co. 52a, 76 Bng,Rep.

753 (1594); Foster v. Jackson, Rob. 56, SO Eng.Rep.

201 (1615); Tippet tMay, I Bos. & P.411,126 Eng.

**Rep.** 982 (1799); Le Bret v. Papiflon, 4 East 57A2,

102 Eng.Rep. 023 (1804); Marsh v. Britcel. 5 Bar.,

& Aid. 507, 106 Eng.Rep. 1270 (1822); Bates v. coit.

2 Barn & C. 474, 107 Eng.flep. 460 (1824); Davies v.

Fenton, 6 Barn & C. 216, 108 Eng.flep. 433 (1527)

Connecticut: Bishop v. Quintard, 15 Conu. 391

(1847);FlorIda: Miller v. Kingsbury, S Fin, 55r;

(1859);Illinois: McFadden v. Fortier, 20 Ill. 509

(1858);Haynes v. Lucas, 50 Ill. 436 (1860); Mount

CarbonCoal & it. Co. v. Andrews, 53 Ill. 170

(1870); Illinois Fire Ins. Co. v. Stanton, 57 Ill 354

(1870); Ft. Dearborn Lodge v. Klein, 113 Iii. 171,

3 N.E. 272, 56 Am.St.Rep. 133 (1885); Dupee v.

Blake, 148 Ill. 453, 35 N.E. 807 (1593); Distilling &

**Cattle Feeding Co. v. People**, 150 Iii. 448, 41 N.E.

188, 47 Am.St.Rep, 200 (1895); Hedrick v. People,

221 Ifl, 374, 77 N.E. 441, 5 Ann.Cas. 690 (1906);

Heimberger v, Elliot Frog & Switch Co., 245 Ill. 448,

92 N.E. 297 (1010); New Hampshire: Leslie v. liarlow, 18 N.H. 518 (1841); Claggett v, Simes, 31 N.H.

22 (1855); New York: The Auburn & Ou'a,eo Canal Co. v, Leitch, 4 flenlo (N.Y.) 65 (1841) l'ennsylvania: Barnctt v. Barnett, 16 Serg. & B.

(Pa.) 51

(1827); Virginia: Day v. Pickett, 4 Munf. (Va.)

104 (1813); Federal: Gornian v. Limos, 15 Peters

(U.S.) 115, 10 *Ltd.* 680 (1841); Townsend v. Jemison, 7 flow. (U.S.) 706, 12 Ltd. 880 (1849).

And that **the Rule** is the same under the Code, see

Pierce v. Bristol, 130 Misc, 188, 223 N.Y.Supp. 678

(1027). See, also, Baxter v. McDonnell, 154 N.Y.

432, 48 N.E. 816 (1897).

74. That the situation on Demurrer is the same under the Code, see Schwab v. Furniss, 4 Sandf. (N. 7.) 704, **at** 704—S (1852) In which Sandlora, 3., declared: ~...On a Demurrer to a Pleading, or portions of It, the Rule now is the same as it was before the Code of Procedure, that Judgment shalt be given **against the** Party who committed the first Substantial Fault That is, If the Demurrer be to an Answer, and It appear that the Complaint do~

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## **Sec. 200**

## **THE DEMURRER**

lice is that upon Demurrer, the Court goes back to the Declaration and makes a Search of the Record for Substantive Defects, taking each Stage of the Pleadings in order, and then gives Judgment against the Party Guilty of the First Substantive Error. Before a Party Demurs, therefore, he should be certain that his own fences are in good repair.

Thus, if the plaintiff declares in Replevin for a Specific Chattel, but fails to allege *Title*, and the defendant Pleads the Statute of Limitations, to which the plaintiff Demurs, Judgment will go for the defendant, the plaintiff having failed to state Title in his Declaration, thus making himself guilty of the First Sub. stantive Defect. And, on Demurrer to a Replication, if the Court regards the Replication bad, but perceives a Substantive Defect in the Plea, Judgment will be given, not for the defendant, but for the plaintiff, provided the Declaration is good as a Matter of Substantive Law; but if the Declaration is Defective in Point of Substance, then, upon the same principle, Judgment would be given in favor of the defendant,<sup>77</sup> The Demurrer, at whatever Stage of the Pleadings it is interposed; reaches back in its effect, through the Whole Record, and ultimately attaches to the First Substantive Defect in the Plead-

not show a Cause of Action, Judgment shall be given against the plaintiff and the Complaint dismissed, (Code, Sec. 148). If the Demurrer be to the Reply, the plaintiff may show that the Answer is insufficient, and have Judgment in his favor.

“There is no more reason now than formerly, that a plaintiff should have Judgment on Demurring to an Answer, when it appears upon the Face of the Record that he has No Cause of Action; or that the defendant should succeed on Demurrer to the Reply, when it is apparent upon his Answer that he has No Defense.”

71. Piggot’s Case, 5 Co. 29a, 77 Eng.Rcp. 95 (1598), **and cases cited** in note 75, supra.

See, also, Chelsea Exch. Bank v. Travelers’ Ins. Co., 173 App.Div. 829, 160 )UY.Supp. 225 (1st Dep’t 1916), Ct. Rx Partc Hines, 205 Ala. 17, 87 So. 091 (1920), granting Certiorari in Hines v. McMillan, 17 Ala.App. 509, 87 So. 696 (1920).

ing~<sup>8</sup> 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.

However, a Demurrer will not open tip the Record back to the Declaration when the plaintiff, at the Replication Stage of Pleading, Demurs Specially to the defendant’s Plea, which is Substantively Defective, and there is a Defect in Form in the Declaration. This results from the Statute of Elizabeth,~ which provided for Waiver of all Defects in Form unless objected to at the next Succeeding Stage in Pleading, or to put the Matter in another way, a Special Demurrer only reaches Defects in Form in the Pleading

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78. The reason for this Iltil” is forcibly sta(c~l iii the ease of Ordinary v. Bruency, 1 Brev. (SC) 191. 196 (1802) by Grimpl~e, J., who declared: <sup>4</sup>An,l tlo reason of this Course of Proceeding in the Court is fundamentally right; for should they, i,i the first instance, rectify the Last Fault, they must then hear another Motion to set the preceding one to rights also: by which mole half a dozen questions might be made on the Propriety of Proceedings, only one of wh:eh might he determined at any one Court. This would be the means of lengthening out **an Issue** to an unreasonable length of time, and to the very great delay of Justice. Whereas, by the Rule laid down above, that the Court will look for the first Fault, and give Judgment accordingly, all

**the snbsequent Defective Proceedings** arc at once,.

**and by one** single decision, set at naught, and dismissed.”

## DEFENSIVE PLEADINGS

Demurred to, whereas, as to Substance, it goes all the way back to the Declaration, since, as previously observed, a Special Demurrer includes a General. Thus, to illustrate the point, if *A* puts in a Declaration Good in Substance, but Bad in Form, *B* puts in a Plea Good in Form and Bad in Substance, and *A* Demurs Specially, *B* will lose for two reasons, one because the Defect in Form in *A*'s Declaration is not open on *A*'s Special Demurrer; it was waived by *B*'s failure to Demur Specially at the Second Stage of Pleading; *two*, because *B* was Guilty of the First Substantive Defect, which was available even on *A*'s Special Demurrer, which included a General, and without regard to the Formal Defect in *A*'s Declaration.<sup>81</sup>

The Rule that a Demurrer will open up the Record back to the Declaration so as to cause Judgment to be rendered against the First Party guilty of a Substantive Defect, however, may, at Common Law, be subject to at least four Exceptions.

### *Exceptions to the Quetterai Rule*

The *first* Exception occurs where the plaintiff Demurs to a Plea in Abatement. Thus, for instance, let us suppose that *A* sues in Ejectment, but fails to allege Title, that *B* pleads that he was sued in the wrong County, but fails to give the plaintiff a better Writ, or to tell him in what County he might be sued in. This is a Plea in Abatement, Defective in Form for failure to give the plaintiff a Better Writ. Now, suppose *A* Demurs Generally to the Plea. Does the Demurrer reach back to the Defect in the plaintiff's Declaration, that is, his Failure to allege Title, If it were permitted to do so, the defendant would win the case on the Merits, without having taken any chance of losing it on the Merits, as, with one Exception, on a Plea in Abatement the Judgment is never on the Merits. In order to prevent the defendant from winning when, by his Plea in Abatement he took no chance of losing on the Merits, an Exception to the Rule as to the retrospective effect of a Demurrer was created where the Demurrer was interposed to a Plea in Abatement, and where, to permit the Demurrer to search the Whole Record, would sooner or later, as illustrated by the case above, result in a victory for the defendant where he had no chance

to lose.<sup>82</sup>

The second Exception arises where there has been a discontinuance along one of several lines of Pleading. An example of this

<sup>82</sup> Professor Charles A. Ice explains this point as follows: "Plea in Abatement are not within the Operation of the Usual Rule, and that for two reasons: (1) in Point of Policy such Pleas are discouraged, because odious in Law and often prejudicial to Justice; and (2) in Point of Principle, a plea in Abatement is addressed, not to the Declaration, but to the writ upon which the Declaration is based, and the Purpose of the Plea is to Abate or quash the Writ for some Defect in the framing of the case. Therefore, on Demurrer to a Plea in Abatement, the defendant cannot turn the Demurrer against the Declaration. Should the Plea be Replied to and the Replication Demurred to, the general principle operates so far as to carry the Demurrer back to the Plea, but not to make available any Objections to the Declaration." Cases in Common Law Pleading. II, The Rules of Pleading, 450 (2d ed. Rochester. 1934).

See, also, on the same point, the following cases:

English: Bastrop v. Hastings, 1 Salk. 212, 91 Eng. Rep. 189 (1692); Belasyse v. Hester, 2 Lut. 1592, 125 Eng. Rep. 873 (16136); Itouth -v. Wethell, 2 Lut. 1667, 125 Eng. Rep. 915 (1703); Alabama: Cobb v. Miller, 8 Ala. 499 (1846); Arkansas: Knott v. Clements, 13 Ark. 335 (1853); Illinois: Bunter v. Bilyeu, 39 Ill. 367 (1366); Finch v. Galigher, 181 Ill. 111, 031, 54 N.E. 611 (1899); Indiana: Pricey. Grand Rapids & I. F. Co., 18 Ind. 137 (1802)~ Massachusetts: Clifford v. Cony, 1 Mass. 495 (1805) New Jersey: Birch v. ICing, 71 N.J.L. 392, 59 A. 11 (1904); New York: *51mw* v. Duteber, 19 Wend, (N.Y.) 216 (1838); Rhode

Island: Ellis v. Ellis, 4 RI. 110 (1856).  
 The Exception as to the Retrospective Effect of a Demurrer to a Plea in Abatement also prevails under the Code. ICempton Hotel Co. v. Bicketts, 76 Ind.App. 458, 132 N.E. 308 (1921).  
 St Dunlevy v. Fenton, 80 St 505, 05 Atl. 651, 130 Am. St.Rep. 1009 (1908).

**Cl. 20**

**Sec. 200**

**THE OEMTJRRER**

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may be seen in the case of *Tippet v. May*,<sup>83</sup> in which the plaintiff declared in Assumpsit against A, B and C. Two of the defendants, A and B, pleaded a Debt of Record by way of set-off, without taking any notice of the third. The plaintiff Replied *Nul Tiel* Record, and gave a day to produce the Record to the two defendants A and B, but entered no suggestion on the roll respecting the third,

C. To this Replication, there was a General Demurrer. The Court held that the plaintiffs having Replied to a Plea by two of the defendants without taking notice of the third against whom they declared, had made a discontinuance; that the Cause being discontinued, Judgment must be given against the plaintiffs, as they were not in a position to take advantage of the Defect in the defendant's Plea.<sup>84</sup> To put the matter in another way, the plaintiffs, by neglecting to sign Judgment against the defendant, on Allegations the latter failed to answer, caused a Discontinuance of the Action. The principle involved was that the plaintiff, by omitting to follow up his entire demand against the three defendants, created an interruption in the proceedings, which is technically known as a "Discontinuance," and which creates an Error on the Record. The commission of this fault places the plaintiff where he is in no position to ask for Judgment; but such an Error is now generally cured by one of the Statutes of Jeofails,<sup>85</sup> after Verdict, as well as after Judgment.

The *third* Exception may appear where a defendant interposes more than one Plea, one of which is a Plea of the General Issue, and there is a Demurrer at a later Stage in the Pleadings. However, in *The Auburn c~ Owes-*

1 Bbs. & Pull. 411, 126 Eng.Rep. 082 (1799). See,

also, *Flemming v. Mayor, etc. of City of Hoboken*, 40 *N.J.L.* 270 (1875).

<sup>84</sup>. This type of error was touched upon in the Statute of Mispleadings, Jeofails, 32 Ben. VIII, c. 80, 5 Statutes at Large 45 (1540).

*co Canal Company v. Leitch*,<sup>86</sup> where the plaintiff declared in Assumpsit for certain installments due upon shares of the capital stock of the plaintiff's corporation, subscribed for by the defendant, the defendant Pleaded *Non Assumpsit and Nit! Tie!* Corporation; to which the plaintiff Replied, setting **out the act Incorporating the plaintiff, to** which Replication the defendant Demurred, **the Court held that the Declaration was Bad** in Substance, and that the Demurrer would Open Up the Record back to the Declaration; *that* the earlier case of *Wheeler v. Curtis*.<sup>87</sup> **had erroneously assumed, in dictum, that** to permit the Demurrer to operate retroactively under such circumstances would violate the

<sup>86</sup>. 4 Denio (N.Y.) 05 (1847).

<sup>87</sup>. 11 Wend. (N.Y.) 653 (1834). In accord: *Baldwin v. City of Aberdeen*, 23 S.D. 636, 123 NW. 80 (1909). Other New York cases decided between the *Wheeler* (1834) and *Auburn & Owaseo Canal Co.* (1847) cases, include: *Dearborn v. Kent*, 14 Wend. (N.Y.) 283 (1835); *Russell v. Rogers*, 15 Wend. (N.Y.) 831 (1836). Cf. *Miller v. Maxwell*, 16 Wend. (N.

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The earliest mention of this Rule In Illinois was in *Brawner v. Lomax*, 23 Ill. 496 (1860), which was decided without any reference to the New York decisions. *Wear v. Jacksonville & Savannah It. F. Co.*, 24 Ill. 5413 (1860), was decided against the Retrospective Effect of the Demurrer on the theory that a Party could not Plead and Demur at the Same Time to the Same Pleading. Other efler's followed: *Wilson v. Myriek*, 26 Ill. 34 (1561); *Clayton v. Munger*, 511 Ill. 373 (1869).

This was not, however, the rule in England. To the contrary, the Retroactive Operation of Demurrer was consciously permitted by the English Courts in this instance. In an account of certain features of the Common Law Practice, it was authoritatively said in 1830: "The defendant occasionally resorts to the expedient of Pleading *in addition* to some Plea sufficient in Point of Law, another which he knows to be insufficient, but to contain a True Statement of Facts. He thus sometimes succeeds in compelling the plaintiff to take Issue in Fact upon the First Plea, and to Demur to the Second; and, as upon the Argument of the Demurrer, the Court looks to the Whole Record, and decides *against* the Party First In Fault, the defendant, instead of supporting his Second Plea, attacks the Declaration, and thus, In effect, both Demurs and Pleadi to the Declaration." Third Report of Commissioners on the Superior Courts of Common Law, 26 (London, 1830).

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404  
**DEFENSIVE PLEADINGS**  
**Ch. 20**

well-established Rule that the defendant could not Both Plead and Demur to the same

Count.<sup>88</sup>

The *fourth* Exception occurs where the plaintiff Demurs to a Plea which has been entered by the defendant after his Demurrer to the Declaration has been overruled. Some Courts hold, as, for example, in *Stearns v.*

<sup>88</sup> In referring to this specific point, Bronson, C. J., observed: It is quite clear that the defendant cannot both Plead and Demur to the Same Count. And it is equally clear, that at the Common Law, he could not have Two Pleas to the Same Count. Indeed the two things, though stated in different *verdi*, are only parts of one Common-Law Rule; to wit, that the defendant cannot make Two Answers to the Same Pleading. The Statute c:f 4 and 5 Anne, e. 16, was made to remedy this inconvenience; and it allowed the defendant, with the leave of the Court, to Plead as many Several Matters as he should think necessary for his defence. With us, leave of the Court is no longer necessary. (2 ItS. 352, ~ 9). The Statute does not say that the defendant may both Plead and Demur; and consequently he cannot make Two Such Answers. But he may Plead Two or More Pleas; some of which may terminate in Issues of Fact, to be tried by a Jury; while others may result in Issues of Law, to be determined by the Court. And whenever we come to a Demurrer, whether it be to the Plea, Replication, Rejoinder, or still further onward, the Rule is to give Judgment against the Party who committed the First Fault in Pleading, if the Fault be such as would maine the Pleading bad on General Demurrer. This finle has always prevailed. It was the *Rule* prior to the Statute of Anne; and to say that the defendant, because he Pleads Two Pleas, one of which results la a Demurrer, cannot go back and attack the Declaration, would be to deprive him of a portion of the privilege which the Legislature intended to confer. he cannot Plead and Demur at the Same Time, because the Common Law forbids it; and the Statute does not allow it. But he may Plead Two fleas; and he takes the right with all its legitimate consequences; one of which is, that whenever there comes a Demurrer upon either of the two Lines of Pleading, he may run back upon that line to see which Party committed the First Fault; and against that Party Judgment will be rendered. Aside from the dicta in question, there *is* not a shadow of authority, either here or in England, for a different Doctrine." *The Auburn & Owasco Canal Co. v. Lelteh*, 4 DeMo (N.Y.) 65, 67

(1847).

*Cope*, that where the defendant has Demurred to the Declaration, his Demurrer has been overruled, and he has Pleaded over, an Exception is created to the General Rule, and the Court having once passed on the sufficiency of the Declaration, it is incompetent for the same tribunal, at a succeeding term to reverse the decision; also, that the defendant having submitted to the first decision, he thereby waived the Defect in the Declaration, if any. But in *Cummins v. Gray*,<sup>90</sup> the opposite view was taken.

*Where Plaintiff has not put his Action on the Proper Ground*

**AS has been observed, the Court** will generally consider the Whole Record, and give Judgment for the Party who, on the whole, appears entitled to it. But where, though the right, on the Whole Record, appears to be with the plaintiff, if he has not put his Action on that ground, the defendant will prevail. Thus, 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,

89. 109 Ill. 340 (1854).

Historically, It may be said that no such Rule was developed by the English cases, and in Illinois, it originated with the case of Brawner v. Lomax, 23 El, 496 (1860), although the Rule may have been foreshadowed in *McFadde v Fortier*, 20 Ill. 509 (1858). See, also, *Bills v. Stanton*, 69 Ill. 51 (1873).

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that the defendant had prevented the arbitrators from making their Award.<sup>9</sup>

#### JUDGMENT ON DEMURRER

201. **The Judgment rendered upon a Demurrer is the Judicial Determination by the Court, without a Jury, of an Issue of Law only.** When rendered **in favor of the Party Demurring to a Pleading-in-Chief, 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. When rendered against the Party Demurring, it was Final at Common Law, but is now permitted to **Plead Over.** And a Judgment on a Demurrer in Abatement is Final, but a Judgment on a Demurrer to a Plea in Abatement is not Final.

#### *The General Rule*

THE General Rule is that a Demurrer, either General or Special, follows the Nature

**of the Pleading Demurred to; and accordingly** the result will be different where the Demurrer is directed to a Dilatory Plea as opposed to a Plea in Bar.

*Where the Demurrer is Directed to a Plea in Abatement*

THUS, a Judgment on a Demurrer to a Plea in Abatement, if for the defendant, is that the Writ be Quashed; If for the plaintiff, it is a Judgment of *Respondeat Ouster*, or that the defendant Answer Over,<sup>92</sup>

*Where the Demurrer is Directed to any Pleading in Chief*

WHERE the Demurrer is directed to any Pleadings-in-Chief, such as the Declaration, Plea in Bar, or other Subsequent Pleading, which goes to the Action, the Judgment is Final, that is, if for the plaintiff, *quod recuperet; if for the defendant, quoci eat sine*

•-- Marsh v. Bolted, 5 Barn, & Aid. 507, 106 Eng.Rep. 1276 (1822).

And see, Head v. Baidrey, C Ad. & B, 459, 112 Eng.Rep. 175 (1837).

*die.*<sup>93</sup> **In other** words, on Demurrer to any Pleadings which go to the Action, the Judgment for **Either** Party will, at Common Law, be the same as upon an Issue of Fact Joined upon the Same Pleading, and found in favor of the Same Party.<sup>94</sup> At Common Law, in case of a Judgment in favor of the Party Demurring, it was Final against the Other Party, and disposed of the Action on the Merits. The latter could not Amend his Pleadings and go on with the Action. But in time the Rule was relaxed. Under Modern Practice and Statutes, generally the Courts will permit him to Amend. So, likewise, if the Judgment was against the Party Demurring, it was *Final at Common Law.*<sup>95</sup> In Modern Practice, however, and *under* the Statutes, it is otherwise, and he is very generally allowed to Plead Over on the Merits.

*Election to Stand on Demurrei~*

IF, the Demurrer of a Party was overruled, and he was still of the opinion that he was correct on his theory of the Law, he might, as was said, Elect to “stand **on his Demurrer,**” or **refuse to withdraw** it and enter a Plea to the Merits. In such an event his next move was to seek a Review in the Appellate Court on a Writ of Error.<sup>96</sup>

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Sec. 201

### THE DEMURRER

#### Ch. 20

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04. English: *Iruniphreys v. Betliily*, 2Ve.mL 222, 86 Eug.Rep. 403 (16S0); Alabama: *Perkins v. Moore*, 16 Ala. 17 (1849); Delaware: *Silver v. Rhodes*, 2 }Iar. (Del.) 360 (1837); Georgia: *Gray v. Gray*, 34 Ga. 400 (1860); Illinois: *Mt. Carbon Coal & It. Go. v. Andrews*, 53 1]). 176 (1870); Weiss v. Bi,mian, 173 IU. 241, 52 N.E. 009 (1899); Maine: *State v. Peck*, 60 Mo. 49S (1872); Maryland: *Brown v. Jones*, 10 Gill. & J. (aid.) 33-1 (18.30); *New Harnpshir.o: Little v. Perkins*, 3 Nil. 469 (1826); New Jersey: *Hale v. Lawrence*, 22 N.J.L. 72 (1840); New York: *Bouchaud v. Dias*, 3 Denio (N.t) 238 (1S40); Federal: *Martin v. Bartew Iron Works*, 35 Ga. 320, Fed.Cas. No. 9,157 (1800).

9~. *Hale v. Lawrence*, 22 NIL. 72 (1840); *State v. Peek*, 00 Me, 408 (1872).

90. This Rule is subject to the qualification that the Party whose Demurrer is overruled must take No Steps from which a Waiver of his Demurrer might

12. See Gould, *The Principles of Pleading at Common Law*, 587 (6th ed. by Will, Albany, 1900).

### *Where the Defendant Demurs in Abatement*

A Demurrer to a Plea in Abatement and a Demurrer in Abatement should be clearly distinguished. As previously observed the Statute of Elizabeth (1585) and the Statute of Anne (1705), did not apply to Pleas in Abatement, hence as before the Statutes, so, likewise, after the Statutes, a General Demurrer was sufficient to reach a Defect in Form in a Plea in Abatement.<sup>67</sup> And, as previously observed, the Judgment on a Demurrer to a Plea in Abatement was not Final. But where a defendant entered a Demurrer, and Assigned as Ground of his Demurrer, Matter which ought to have been Pleaded in Abatement, the Court gave a Final Judgment.<sup>97</sup> Contrary to the case of a Demurrer to a Plea in Abatement, in which case the Judgment is not Final, the Judgment on a Demurrer in Abatement is Final,<sup>99</sup> as a Demurrer cannot partake of the character of a Plea in Abatement.<sup>7</sup>

### *Effect of Judgment on Demurrer—Res Judicrta*

IN those instances where, as observed, a Final Judgment is Rendered on a Demurrer, it 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 Judgment in such case operates as an  
be implied, such as leave to Plead Over. *Bennett v. Union Cent, Life Ins. Co.*, 203 111. 430, 67 N.E. 971 (1903).

On the Effect of an Overraled Dermii' rer, not wiU' drawn, as an Admission of the Facts, see *Cutler v. Wrigfl*, 22 N.Y. 472 (1800).

07. *Walden v. flolmnu*, 2 Ld. Ilayni. 1015, 02 Eng. Rep.

175 (1703).

08. *Doekniioique v. DavenanI*, 1 Salk. 220, 91 E:ig. Rep,

195 (1704).

90. *Tyler v. Rand*, 7 How. (U.S.) 572 (1840).

1. Since the abolition of Pleas in Abatement by the Code, Defects formerly available on this Plea arc now taken advantage of in the Answer. New York: *Gardner v. Clark*, 21 N.Y. 890 (1860); Oklahoma: *Maxia v. Oklahoma Portland Genlent Co.*, 74 Okla. 31, 176 P. 907 (1918).

Estoppel, and Facts thus established can never afterwards be contested between the same Parties, or those in Privity with them, in another Suit.<sup>2</sup> If, therefore, on a Demurrer to a 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 into question. And the result confirms the view that one of the Fundamental Functions of Pleading is to Preserve a Record of a Controversy once Litigated, in order to serve as a basis of a Plea of Res Judicata, and thus prevent the Relitigation of a Cause once settled.

### STATUS OF THE DEMURRER—UNDER MODERN CODES, PRACTICE ACTS AND RULES OF COURT

202. Under the **Modern Reformed Procedure, the Demurrer, as a Procedural Device to test**

2. In general, on the Effect of a Judgment oji Duniurrev as lies Judicata, see:

Articles: *Loomis*, The Effect of a Decision Sustaining a Demurrer to a Complaint, 9 Yale U. 387 (1900); *Von Moschzisker*, *Iles Judieatn*, 33 Ink L.J. 299, 318—321 (1029).

**Comment: Jle.s** Judicala : Effect of Judgiu('nt Entered on Demurrer, 30 Galif.L. Itev. 487 (19i2).

See, also, the following cases: *Illinois: Vanlanding' ham v. Ryan*, 17 Ill. 23 (1855); *Indiana: Wilsoa v. Ray*, 24 Ind. 150 (1865); *Federal: Bissell v. Spring valley Twp.*, 124 U.S. 225, 8 S.Ct. 495, 81 LEd. 411 (1888); Cf. *Indiana: Stevens v. Dunbar*, 1 machf. (md.) 56 (1820); *Massachusetts: Wilbur v. Gilmore*, 21 Pick. (Mass) 250 (1838).

### THE DEMURRER

Sec. 202

the **Formal and Substantive Qualities of a** pleading, has been abolished in some States, and replaced by the Motion, in lieu thereof. It **seems doubtful whether the Change has been** one other than in the name used to describe the Procedural Device by which an Objecting Party may Assert his Right to Refuse to Answer.

IN some States, under Modern Codes, Practice Acts, and Rules of Court, the Demurrer has been abolished,<sup>3</sup> but in lieu thereof the same Defects, formerly available on Demurrer, may generally be reached by Motion.

Thus, in New Jersey, the Rules provided: Rule 26. "Demurrers Are Abolished. Any Pleading may be struck out on Motion on the Ground that it discloses no Cause of Action, Defense or Counterclaim respectively. The Order made upon such Motion is Appealable after Final Judgment. In lieu of a Motion to Strike Out, the same Objection, and any Point of Law (other than a question of Pleading and Practice) may be raised in

3. For an enumeration and discussion of Code provisions Abolishing the Demurrer, see Clark, *Handbook of the Law of Code Pleading*, c. A, § 86, pp. 535—545 12d ed, St. Paul, 1947).

the Answering Pleadings, and may be disposed of at, or after, the Trial; but the Court, on Motion of either Party, may determine the question so raised before Trial, and if the Decision be decisive of the whole case the Court may give Judgment for the Successful Party or make such order as may be Just."

Rule 27 provided: "Objections to Pleadings other than those provided for in Rule 26 above, shall be Made by Motion. The Action of the Court thereon is appealable after Final Judgment."

Rule 28 provided: "Every Motion addressed to a Pleading must present every Cause of Objection then existing."

How effective this Reform was is clearly seen in *Savage v. Public Service Ry. Co.*,<sup>5</sup> in which the plaintiff in a cause for personal

injuries alleged that, as a passenger while standing on the rear platform of the car, about to enter the body of the said car, she was suddenly jerked from her feet and thrown to the floor of the car "by the negligent operation thereof."

After the Pleadings were completed, and the case came on for Trial, on the basis of a Reserved Right, the defendant Moved to Strike Out the Complaint on the Ground that the Complaint disclosed no Cause of Action; in that a General Allegation of Negligence was Insufficient. The Motion was sustained, Judgment was entered, whereupon the defendant Appealed. After adverting to the abolition of the Demurrer by the provisions as set out above, the Court then proceeded with the discussion of the Issue as to whether a General Allegation of Negligence was good as against the Motion. Chief Justice Gummere declared:

"The question upon which the determination of this Appeal depends is whether the Complaint could have been successfully attacked by a General Demurrer, upon the Ground that it disclosed no Cause of Action; and we think that it must be answered in the

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A defendant may be permitted to Answer Over on the Merits after a Motion is denied. *Anserge v. Kane*, 244 N.Y. 395, 155 N.E. 683 (1927).

In general, on the abolition of the Demurrer, see:

Articles: Edgerton, The Consolidation of Preliminary Motions and Demurrers in Connecticut, 22 Yale L.J. 302 (1913); Rothschild, The Simplification of Civil Practice in New York, 23 Col.L.Rev. OhS, 732 (1923); Cook, Effect of the Abolition of the Equitable Demurrer in Iowa, 10 Iowa L.Rev. 193 (1925); Atkinson, Pleading the Statute of Limitations, 30 Yale L.J. 914 (1927); Rotwein, Pleading and Practice Under the New Federal Rules—A Survey and Comparison S Brooklyn L.Rev. 188 (1938); Pike, Objections to Pleadings Under the New Federal Rules of Civil Procedure, 47 Yale L.J. 50 (1937); Clark, Simplified Pleading in Connecticut, 16 Conu. B.J. 83 (1942); Brown, Some Problems Concerning Motions Under Federal Rule 12(b), 27 Minn.L.Rev.

415 (1943).

**Comment:** "Speaking' Motions to Dismiss Under New Rules of Civil Procedure, 14 Rocky Mt.L.Rev. 131 (1942).  
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4. Rules 26, 27 and 28, N.J. Practice Act 1012.

5. 95 N.J.L. 432, 113 Atl. 252 (1921).

negative. In the case of Central Railroad Co. v. Van Horn, 38 N.J.L. 133, 138, the defendant interposed a Demurrer to the Second Count of a Declaration, which showed merely that the plaintiff was in one of the cars of the defendant company under a duty *by* it to carry her safely, and while there that she was, 'through the negligence, carelessness and misdirection of the defendant and its agents and servants, thrown from and under the coaches of the said defendant.' It was held by the Supreme Court that, although this Averment was so uncertain and insufficient in detail as to afford the defendant little, if any, information as to what the Specific Act of Negligence was, or what agency of the company was responsible for it, it was clearly good on a General Demurrer, the Defect being one of Form and not of Substance. In Breese 's'. Trenton Horse Railroad Co., 52 Id. 250, 253, a Count which stated in General Terms that by the careless management of the car in a public street by the agents of the defendant it thereby ran over the body and arm of the plaintiff, was held good on a General Demurrer. In Race v. Easton and Amboy Railroad Co., 62 Id. 536, a Count in a Declaration simply Averring, in effect, that by reason of the negligent and improper running of defendant's railroad train, and *blowing* of the whistle on its locomotive, a horse which was being driven on the highway by the plaintiff became frightened and overturned the wagon, and that plaintiff was thereby thrown out

**and injured, although not specific enough for a proper Pleading was permitted to stand as** against a General Demurrer. Ferguson v. Western Union Telegraph Co., 64 Id. 222, is to the same effect. In Minnuci v. Philadelphia and Reading Railroad Co., 68 Id. 432, it was declared that an Averment in a Declaration which stated that the plaintiff's Injuries were caused solely by the negligence of the defendant, without more, although it did not fulfill the requirement of the Rule

## Ch.20

of Pleading **that the certainty of the Statement of the Plaintiff's Case must be such as in a reasonable measure to apprise the Defendant of the case to be made against him, was good on General Demurrer."**

**From the foregoing, it would seem clear that in New Jersey the abolition of the Demurrer, in effect, was in name only.<sup>6</sup>**

### *The Federal Solution of the Problem*

THE New Federal System,<sup>7</sup> provides for the abolition of the Demurrer, and the Statement of All Defenses in Law or Fact in the Responsive Pleading, where one is required. It also permits certain Defenses to be raised by Motion, which may be heard and determined in advance of Trial, or the Court may order the hearing and determination of the Motion deferred until the Trial.

Additionally, under the Federal Rules,<sup>t</sup> where a party contends that the opposing pleading has failed to state a claim upon which relief can be granted, matter outside **the pleading may be presented to and considered by the Court**, and in such event the Motion will be treated as one for Summary Judgment.

*Effect of Reform Sum,nwrired*

WHAT, one may well ask, has been accomplished in the states by substituting the Motion in lieu of the Demurrer? At first glance, it may appear that this change has been quite sweeping in its effect, whereas, in fact, it is more of a change in Form than in **Substance, because in order to determine the Scope of the substituted Motion, it is** necessary to understand the Scope of the Demurrer, as it exists and operates at Common Law. Thus, if it be asked, what kind of Motions do we have, the answer is, the

**408 DEFENSIVE PLEADINGS**

6. This is indicated also in the case of Newark Two.,tieth Century Taxicab Ass'n v. Lerner, 11 N.J.Super. 368, 78 A.2d 315 ~195i).

7. Fed.Rule 7(e); FeU.Rulc 32(4 Fed.Itu'e 12(fl.

8. Fed.Itule 12(11).

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Sec. 202

same kind of Motions as we had Demurrers at Common Law, or General Motions reaching Substantive Defects, and Special Motions reaching Defects in Form. If it is asked, what does a Motion Admit, the answer is, it Admits substantially the Same Facts as were formerly Admitted by a Demurrer. If the question is, what Defects in Pleading may be reached by a Motion, the reply is, the Same Defects which, at Common Law, were available upon General or Special Demurrer. If it is inquired, how far does a Motion Open up the Record, the answer is, back to the Declaration or Complaint, just as the Demurrer did; and finally, if it be asked, what Exceptions are there to the General Rule as to the Retrospective Effect

of the Motion, the answer is, the Same as at Common Law, in so far as those Exceptions are susceptible of application to a Code System of Pleading which ordinarily does not extend beyond the Replication Stage.

It thus appears that, except for the change in nomenclature, or the substitution of the name "Motion" in place of the name "Demurrer", and except for the fact that a Motion may come up f or Argument on five days notice, whereas a Demurrer came up for Argument on twenty days notice, there is in general no substantial difference between **the Motion and the Demurrer**, and it may be questioned whether sufficient gain has been registered to justify the change, with its resultant confusion and litigation.

**THE DEMURRER**

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## CHAPTER 21 PLEAS—DILATORY'

The Nature of Dilatory Pleas.  
The Order of Dilatory Pleas.  
Pleas to the Jurisdiction.  
Pleas in Abatement.  
Nonjoinder or Misjoinder of Parties Plaintiff in Contract.  
Nonjoinder or Misjoinder of Parties Defendant in Contract.  
Nonjoinder or Misjoinder of Parties in Actions Ex Delicto.  
Requisites of Pleas in Abatement.  
Pleas in Suspension.  
Judgment on Dilatory Pleas.  
Formal Commencement and Conclusion.  
Status Under Modern Codes, Practice Acts and Rules of Court.

### THE NATURE OF DILATORY PLEAS

203. **Dilatory Pleas** are those **which do not Answer the General Right of the plaintiff, either by Denial or in Confession and Avoidance, but assert Matter tending** to defeat the Particular Action by resisting the plaintiff's

1. In general, on the subject of Dilatory Pleas, see:

Treatises: 1 Tidd, *The Practice of the Court of King's Bench in Personal Actions*, c. XXVII, Of Pleas to the Jurisdiction (London, 1824); Stephen, *A Treatise on the Principles of Pleading in Civil Actions*, c. Of the Proceedings in an Action, from Its Commencement to Its Termination, 83—89 (3rd Am. ed. by Tyler, Washington, 11 C. 1900); Perry, *Common-Law Pleading: Its History and Principles*, c. VII, Of the Proceedings in an Action from Its Commencement to Its Termination, 175—178 (Boston, 1897); Martin, *Civil Procedure at Common Law*, c. X, Defences by Way of Dilatory Pleas, 205—215 (St. Paul, 1905); Gould, *A Treatise on the Principles of Pleading*, Pt. III, Div. IV, Of Dilatory Pleas, 405—473 (6th ed. Albany, 1909); Shipman, *Handbook of Common-Law Pleading*, c. XVI, Dilatory Pleas, 382—496 (3rd ed. by Ballantine, St. Paul, 1923); Keigwin, *Cases in Common Law Pleading*, e. XII, Dilatory Pleas 074—679 (2d ed. Rochester, 1934).

**ArtioJe:** Jones & Carlin, *Nonjoinder and Misjoinder of Parties in Common-Law Actions*, 28 W. Va. L. Q. 197, 260 (1022).

**Comments:** Nul Tiel Corporation, *A Plea in Bar*, 27 W. Va. L. Q. 355 (1021); *Parties—Joinder of Defendants In Tort Actions*, 18 Mich. L. Rev. 708 (1920);

**Present Right of Recovery; they may be divided** into three classes;

- (I) **Pleas to the Jurisdiction and Venue;**
- (II) **Pleas in Abatement;**
- (III) **Pleas in Suspension.**

IF the defendant does not Demur to the plaintiff's Declaration, his only alternative is to seek to dispute the alleged liability by some Form of Plea. Pleas are separated into Two Classes: *first*, *Dilatory* Pleas, or Pleas which seek to prevent a Final Judgment on the merits; *second*, *Peremptory* Pleas, or Pleas more popularly known as Pleas *in Bar*, which seek to bring about a Final Judgment on the merits.<sup>3</sup>

Pleading—Plea in Abatement—Code, 18 Mich. L. Rev. 433 (1920).

**Annotation:** **For**ts of Pleading Necessary to Raise Issue of Corporate Trustee, 55 Ala. 510 (1928).

2. 3 Blackstone, *Commentaries on the Laws of England*, c. XX, Wrongs, 301 (7th ed. Oxford, 1775). Gould, describes such Pleas as such as tend to delay the plaintiff's eventual remedy. *A Treatise on the Principles of Pleading*, c. II, Dilatory Pleas, 29 (New York, 1892).

3. 1 Chitty, *On Pleading*, e. VI, Of Pleas to the Jurisdiction, and in Abatement, and the Proceedings Thereon, 441 (13th Am. ed. Springfield, 1859).

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206.  
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209.  
210.  
211.  
212.  
213.  
214.

410  
Sec. 204

## PLEAS—DILATORY

411

Dilatory Pleas, with which we are concerned in this Chapter, may be divided into Three Classes: *first*, Pleas to the Jurisdiction and Venue of the Court; *second*, Pleas in Suspension of the Action; and *third*, Pleas in Abatement. Dilatory Pleas have sometimes been referred to by the generic name of Pleas in Abatement, but this term is more properly used to designate one of the classes into which Pleas of a Dilatory Nature are divided.

The general effect of these Dilatory Pleas is to suspend or terminate the particular Suit, but to leave the cause undetermined on its merits. And this was on the basis that there was an objection to the Action grounded on principles of Remedial Law as opposed to Substantive Law. And it was necessary that they be Pleaded before Pleas in Bar, which dispose of the Action entirely. Objections to the Jurisdiction of the Court, the Service of Process, and the Venue, are more favorably regarded than Pleas in Abatement proper; they do not have to be Verified by Affidavit, nor give the plaintiff a better Writ, and they may be Amended like Pleas in Bar.<sup>4</sup> A mistake in the Formal Prayer for Relief in a Plea in Abatement is fatal to the Plea.<sup>5</sup>

At Common Law, Pleas of every description were required to follow a certain order.

4. Smith v. Lurd's Rev. St. Ill. 1021, c. 1, § 1: Spencer v. Aetna Indemnity Co., 231 Ill. 82, 83 N.E. 102, 12 Ann. Cas. 323 (1907).

Though a Plea to the Jurisdiction is not properly a Plea in Abatement, like such a Plea, it should state what Court has Jurisdiction. Minch & Eisenbrey Co. v. Cram, 138 Md. 122, 110 A. 204 (1920).

In an Action of Trover the defendant's Plea to the Jurisdiction on the ground that it was a foreign corporation without a place of business or agent in the state was not -within the reason discouraging Dilatory Pleas, or one going merely to a Question of Venue within the State. Bank of Bristol v. Ash-worth, 122 Va. 170, 94 S.E. 469 (1917).

- Pitts Sons Mfg. Co. v. Commercial Nat. Bank, 121 Ill. 582, 13 NE, 156 (1857).

Thus, Dilatory Pleas had to be Pleaded before Pleas in Bar, and even as between the different Dilatory Pleas, a certain order was required. A Plea to the Jurisdiction of the Person must be taken before the defendant Demurs, Moves, or Offers any other Plea, or he will submit himself to the Jurisdiction of the Court,

### TILE ORDER OF DILATORY PLEAS

204. Dilatory Pleas must **be Pleaded before any others. Matters of Defense, which tend only to delay or defeat the particular Suit, without destroying the plaintiff's Right to Sue, must be presented Before Pleading to the Merits of the Action; the order of Pleading Dilatory** Objections is in general as follows:

- (I) Pleas to the Jurisdiction;
- (II) **Pleas in Abatement on Account** of the Disability of the Plaintiff;
- (III) **Pleas in Abatement on Account** of the Disability of the Defendant;
- (IV) **Pleas in Abatement for Defect of Parties;**



(1'') **Pleas in Abatement for Pendency of Another Action.**

THE Law has prescribed and settled the Order of Pleading which the defendant should pursue, and although, in some respects, the division has been objected to as more subtle than useful, the arrangement given above is still adhered to? as will be seen from the Chart set forth on page 412:

6. See the opinion of Chief Justice Bolt in *Longue ville v. Inhabitants of Thlstleworth*, 2 Ld.Raym. 969, 92 EngRep. 146 (1703); *Co.Lltt.* 303a (PhLladelpña, 1853).

This Rule can have no application in Code Pleading, as an defenses are to be covered by the answer, save  
• the objections specified for the use of a Demurrer.

In Equity Pleading, however, the analogy is plain, and a logical sequence of Pleas and Answers according to their object is, to a certain extent, still maintained.

412

**DEFENSIVE PLEADINGS**

**Ch. 21**

**ORDER IN WHICH PLEAS MUST BE PLEADED  
DILATORY PLEAS—**

- 1. To the Jurisdiction of the Court  
1 Of Plaintiff.
- 2, To the Disability of the Fersoa: {2: Of Defendant
- 3. To the Count or Decinration.

- 4. To the Writ:
  - (1. To the Form of the Writ:
  - 2, To the Action of the Writ.

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For Matter Apparent

on the Face of it.

For Matter dertors the Writ.

PEREMPTORY PLEAS—To the Action itself, b-i Bar thereof.

STEPHEN, *A Treatise on the Principles of Pleading in Civil Actions*, c. I, § 221, p. 420 (Ed. by Andrews, Chicago, 1894).

The Order, as set out in the Chart above, has been said to be the Natural Order, since each Subsequent Plea admits that there is **no foundation for the Preceding Plea**, 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 mid the defendant to besued; 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.'

7. Corny; Dig. "Abatement", C. 2, 3, 1, 23, 24 (Len-don, 1822); Massachusetts: *Carlisle v. Weston*, 21 Pick, (Mass.) 537, (1839); New York: *Palmer v. Evertson*, 2 Cow. (N.Y.) 417 (1828); Pennsylvania: *Potter v. McCoy*, 2~ Pa. 458 (1856); Federal: *D'Wolt v. Rabaud*, 1 Pet. 476, 7 LEd. 227 (1828); *Parmington v. Pillsbury*, 114 U.S. 138, 5 Sup.Ct. 807, 29 LEd. 114 (1885).

Pleas In Abatement and In Bar cannot be f teaded together. *Putnam Lumber Co. v. Ellis-Young Co.*, 50 Pta. 251, 80 So. 193 (1905).

**PLEAS TO THE JURISDICTION**

205. A Plea to the Jurisdiction is one by which the defendant excepts to the Authority and Power of the Court to entertain the Action, either for Lack of Jurisdiction of the Subject-Matter, or for Lack of Jurisdiction of

the Person of the Defendant.

### *Definition and Classification*

A Plea to the Jurisdiction asserts, by Way of Denial, that a Specific Court has no Jurisdiction to try the Cause of Action presented by the plaintiff.

In this connection, it is important to keep in mind that Courts are either of General or of Limited Jurisdiction. The first Type of Courts have Cognizance over 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.<sup>8</sup> Courts of General Jurisdiction have

8. No fact necessary to confer Jurisdiction upon these Inferior Courts will be presumed, but everything must appear upon the Record. *Clark v. Norton*, 6 Minn. 412 ((311. 277) (1861). But see, Illinois: *Renney v. Oreer*, 13111. 432,54 Am.Dec. 439 (1851);

Sec. 205

## PLEAS—DILATORY

413

no authority to try cases of a Local Nature arising **in a Foreign Country or in any place where the Process of the Court cannot run.**

Pleas to the Jurisdiction of the Court were **either one of Two Descriptions**: first, that the person of the Party making the Plea was **not subject to the Court's Jurisdiction**; *second*, **that the Cause of Action was not subject to the Court's Jurisdiction.**<sup>8</sup> These will now be discussed.

(I) *Plea that the Court Has No Jurisdiction Over the Party Defendant.*—Pleas of this character were limited in number, and **frequently consisted in a right of the defendant** to be exempted from liability to be sued in the Specific Court, as he was privileged to be exclusively sued in some other Court. The conclusion of such Pleas indicates that they should be Classed with Pleas to the Jurisdiction, but some authorities have Classed them with Pleas in **Abatement to the person** of the defendant<sup>10</sup> According to Martin, "Pleas challenging the right of the plaintiff to sue on account of any disability are not properly classed with Pleas to the Jurisdiction but more properly belong to a certain Class of Pleas in Abatement yet to be considered.

(II) *Plea that the Court Has No Jurisdiction Over the Subject-Matter of the Action.*

*Diblee v. Davison*, 25 111, 480 (1860) Massachusetts: *Ainalle 'cc Martin*, 9 Mass. 462 (1813); New Hampshire: *Flanders v. Atkinson*, 18 N.H. 167 (1846); Federal: *Sheppard v. Graves*, 14 How. (U.S.) 505, 14 L.Ed. 518 (1852).

• Martin, 01,11 Procedure at Common Law, c. X, Defences by Way of Dilatory Pleas, Art. II, Pleas to the Jurisdiction, \* 245 Defined and Classified, 207 (St Paul, 1905).

• Jacob, Dictionary, Amendment I (*London*, 1809). See, also, *Hunter v. Neck*, 3 31. & 0. 181, 133 Eng.Rep, 1107 (1841).

11. Civil Procedure at Common Law, c. X, Defences by Way of Dilatory Pleas, Art. II, Pleas to the Jurisdiction, \* 245, Defined and Classified, 208 (St Paul, 1905).

—Pleas of this character were, according to **Martin**,<sup>13</sup> **three in number**:

*First*, what may be determined privilege of tenure, under which fall Pleas of *Ancient Demesne*, a species of privileged tenure **Cognizable only in the Court of the Manor of which the land sued for was held.**<sup>13</sup> This type of Plea has no application in the United States.

*Second*, Causes of Action arising out of the **Local Limits of the Court's Jurisdiction**, as in Counties Palatine or other Inferior Courts **of Local Jurisdiction.**<sup>14</sup>

*Third*, want of power in the Court to take Jurisdiction over the Subject-Matter of the Action. When the *Nature of*

the Action is such that the Court is under no circumstances competent to try, the objection may be, but need not necessarily be raised by a Plea to the Jurisdiction.<sup>15</sup> If the Court is totally without power to take Cognizance of the Subject-Matter, the **Cause may be dismissed** on Motion, or without Motion, *ex officio*, for the whole proceeding would be *coram non iudice* [in presence of a person not a Judge] and utterly void.<sup>16</sup>

#### *Requirements of Pleas to the Jurisdiction*

##### **THE general Common-Law Rule was that**

Pleas to the Jurisdiction were Pleaded in Person and not by an Attorney, In *Mostyn*

v. *Fabrigas*,<sup>17</sup> it was held that such a Plea

12. *Ibid.*

13. *Ibid.*

14. *id.*

15. *ibid.*

15. Illinois: *Oakman v. Small*, 282 Ill. 360, 118 N.E.

775 (1918); Pennsylvania: *Black's Ex'r v. Black's Ex'rs*, 34 Pa. 354 (1859).

Under the Civil Code of Georgia, 2010, ~ 5605, requiring Special Pleas to the Jurisdiction unless want of Jurisdiction appears on the Face of the Proceedings, "Want of Jurisdiction" refers to Subject-Matter, not to the person. *Thurman v. Willingham*, 18 Ga.App. 895, 89 SE. 442 (1910).

12. 1 Cowp. 161, 98 Eng.Rep. 1021 (1774).

414

## **DEFENSIVE PLEADINGS**

### **Ch. 21**

should indicate another Jurisdiction in which the Action could be brought. Only Half Defenses were required,<sup>18</sup> Formal Commencements were omitted,<sup>19</sup> and such Pleas were concluded to the Cognizance of the Court by Praying Judgment, if the Court would take further Cognizance of the Action.<sup>20</sup> Pleas to the Jurisdiction, except such as denied Jurisdiction over the Subject-Matter of the Action under any circumstances, were required to be Pleaded first in order, for if the Pleader raises any other question which the Court must of necessity pass upon, he admits the Jurisdiction, and cannot afterwards be heard to deny it.<sup>21</sup> 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.<sup>22</sup> If the Action was brought in a Court of Limited Jurisdiction, every Fact essential to sustain the Jurisdiction had to be stated **in the Declaration; it would not be aided by presumptions.**<sup>23</sup>

13. 1 Chitty, On Pleading, e. VI, Of Pleas to tile Jurisdiction, and in Abatement, and the Proceedings Thereon, 4-14 (13th Am. ed., Springfield, 185W).

19. Stephen, A Treatise on the Principles of Pleading in Civil Actions, e. 11, Of the Principal Rules of Pleading, 370 (3rd ed. by Tyler, Washington, U. C. 1803).

20. Martin, Civil Procedure at Common Law, c. Defences by Way of Dilatory Pleas, Art. II, Pleas to the Jurisdiction, § 240 requeirements, 209 (St. Paul, 1005).

21. *D'Wolf v. Fabrigas*, 1 Pet. (U.S.) 470, 7 LEd, 227 (1828); *Farmington v. Pillsbury*, 114 US, 138, 5 S. Ct. 807, 29 LEd. 114 (1885).

An Objection to the *Venue* on the Ground of the defendant's privilege to be sued in his borne county is waived if not pleaded in Abatement. *Ales v. Fleidenreich*, 271 Ill. 480, 111 N.E. 524 (1016); *Cemmill v. Smith*, 274 Ill 87, 113 N.E. 27 (1910).

22. *Brady v. Richardson*, 111 Ill. 1 (1802).

The question of jurisdiction of a City Court must be raised by a Plea. *Buchanan v. Scottish Union & National Ins. Co.*, 210 Ill. App. 523, (1918).

23. I Saunders, *The Law of Pleading & Evidence*, in Civil Actions, 1 (Philadelphia, 1837).

#### *Methods of Taking Advantage of the Court's Lack of Jurisdiction*

WHERE the Action was brought in a Court of Limited Jurisdiction, if the Facts necessary to show Jurisdiction, did not appear, such Defect could be reached by Demurrer. But the Rule was to the contrary in Courts of General Jurisdiction. In the latter case, the Jurisdiction was presumed, unless perchance the Declaration showed on its face that the Action arose in some Exclusive Jurisdiction, in which case a Demurrer was available. If, however, no

Fact appeared in the Declaration which operated to rebut the Presumed Jurisdiction, the objection could be raised only by Plea, and such Plea, **in order to measure up to the requirements** of Good Pleading, was required to Negative Every Fact from which Jurisdiction might be presumed.<sup>24</sup>

Defects in the Service of Process, not Apparent on the Face of the Record or the Return of Service, should be raised by a Plea to the Jurisdiction of the Person, as, for example, where the Return of the Service is to be contradicted,<sup>25</sup> If the defendant wishes to object that the Court has not acquired Jurisdiction of his Person, owing to some Defect in the Service of the Summons, he should Appear in Person and not by Attorney,<sup>26</sup>

24. Diblee v. Davison, 25 Ill. **486** (1861).

25. Willard v. Zehr, 215 Ill. 148, 74 N.E. 107 (1905); Creer v. Young, 120 Ill. 184, 11 N.E. 167 (1887).

2-. A Plea to the Jurisdiction of the person must be Pleaded in person and not by Attorney, If Pleaded by an Attorney, it amounts to a Submission to the Jurisdiction of the Court. Illinois: Mineral Point

B. Co. v. Keep, 22 Ill. 0, 74 Am.Dec. 124 (1859);

Nispel v. Western Union II. Co., 64 Ill. 311 (1872);

Pratt v. Harris, 295 Ill. 504, 129 N.E. 277 (1920);

Virginia: Culpeper Nat. Bank v. Tidewater Imp.

Co., Inc., 119 Va, 73, 89 SE. 118 (1916), held that a

Plea to the Jurisdiction of the person by a corporation must be by an Attorney; West Virginia:

Davidson v. Watts, 111 Va. 394, 69 S.E. 328 (1910). “When we consider the tendency of the times is toward simple, efficient and common sense

that the Dilatory Plea is loaded down with technicalities, the reason for which, and the usefulness

Sec. 205

#### PLEAS—DILATORY

415

and restrict his Appearance to the sole purpose of raising this objection; otherwise he waives it.

*The Distinction Between Pleas to the Jurisdiction and Pleas in Abatement*

ACCORDING to Martin, Pleas to the Jurisdiction differed from Pleas in Abatement, in the following respects:

*First*, in being always Pleaded in Person;

*second*, in always requiring Half Defense, while some Pleas in Abatement were said to be good with Full Defense; and

*Third*, in Fraying Judgment, if the Court will take further Cognizance of the Action.

In other respects, says Martin, in that they -abated the Writ or Action, they were essentially the same.<sup>27</sup> Some authorities have classed Pleas to the Jurisdiction with Pleas in Abatement, while others have treated them under both heads.

#### FORM OF PLEA TO THE JURISDICTION AND VENUE

George T. Sidwell filed his Plea in person as follows: <sup>28</sup>

“State of Illinois, County of Vermilion—ss.:  
In the Circuit Court—

Ella Sandusky  
v.  
George H. Sidwell &  
George P. Sidwell,  
Gen. No. 11901.  
May Term, A.D. 1897.

of which, has long since departed, should we not do well to abolish it altogether and substitute therefor the Preliminary Motion?" Moreland, *The Plea to the Jurisdiction*, 3 Va.L.Reg. (N.S.) 249, 256 (1917).

~7. Martin, *Civil Procedure at Common Law*, c. X, Defences by Way of Dilatory Pleas, 245, Pleas to the Jurisdiction, 200 (St. Paul, 1905).

-8. See *Sandusky v. Sidwell*, 73 Ill.App. 491 (1897), aff'd in 173 Ill. 493, 50 N.E. 1003 (1898), in which the Plaintiff Demurred to the Plea in Abatement and  
Kaiser & Heppy Com.Law Pldg. HG—jS

"AND the said George T. Sidwell, one of the defendants in the above entitled cause, for the sole purpose of pleading to the Jurisdiction of the said court, comes and says that this court ought not to have or take further cognizance of the said action, because the supposed cause or causes of action, and each and every one of them, arose in the county of **Cook, in said state of Illinois, and not within** the said county of Vermilion, and that the **said action is not a local action, and that both** he and his codefendant, George H. Sidwell, **at the time said suit was** begun, and at all times since, have resided in said county of Cook, and not within the said county of Vermilion; that process was served on the said George H. Sidwell while he was on a public railroad train, passing through the said county of Vermilion, and not within the said county of Cook, where he resides, and was served on this defendant in the said county of Cook, and not within the said county of Vermilion; and this the said defendant is ready to verify.

"Wherefore he prays judgment whether this court can or will take further cognizance of this action. George T. Sidwell,"

"State of Illinois, County of Cook—ss.:

"George T. Sidwell, being first duly sworn, says that the foregoing Plea, by him subscribed, and the statements therein made, **are true.**

George T. Sidwell

"Subscribed and sworn to before me this **17th day of May, A.D. 1897.**

"[Seal.] Robert Jeffrey, Notary Public."

SHIPMAN, *Handbook on Common Law Pleading, c. XVI, Dilatory Pleas*, § 224, Form of Plea to the Jurisdiction and Venue, 387 (3rd ed., by Ballantine, St.

Paul, 1923).

therefore admitted that he did not commence the Action where the defendant resided. The Court ordered the Writ of Summons quashed and dismissed the Suit. See *Sherburne v. Hyde*, 185 Ill. 582, 57 N.E. 770 (1900).

416

## DEFENSIVE PLEADINGS

Cii. 21

### PLEAS IN ABATEMENT

206, A Plea in Abatement<sup>to</sup> is one that **shows some ground for Abating** or Defeating **the Particular Action**, without destroying the **Right of Action itself. Matters in Abatement include:**

(I) **Wrong Venue or Place of Trial;**

(II) The Personal Disability of one of the Parties to sue or be sued;

(iii) That the Action is Prematurely Brought;

(IV) The Pendency of **Another Action** for the same cause;

(V) Misnomer;

(Vi) **Nonjoinder or Misjoinder of Parties.**

*The Situation Which Called for the Use of five Plea in Abatement*

WHERE a defendant, on examination of the plaintiff's Declaration, perceives no ground for objecting to the

Jurisdiction of the Court, but finds that matters exist by reason of which, though the Cause of Action is not affected, the present Suit cannot be maintained, he should Plead in Abatement.<sup>30</sup>

#### *Definition and Effect*

PLEAS in Abatement are variously defined, depending upon their respective Classifications, **but, broadly speaking, include all** such Pleas as seek to defeat a *Specific Action*, **yet merely delay or prevent the enforcement of the Right of Action**. By way of contrast, Pleas in Bar seek to bring about

29. A Plea In Abatement has been defined by Martin as follows: "By a Plea In Abatement the defendant shows Matter to the Court why he should not be Impleaded or Sued; or if Impleaded, not in the manner and form employed by the plaintiff; and praying that the Writ or Plea may Abate." Martin, *Cis'Il Proceedre at Oommon Law, c, X, Defences by Way of Dilatory Pleas, Art. IV, Pleas in Abatement, 210* (St. Paul, 1905), *citing* Jacob, *Dictionary, Abatement I. (London 2809)*; Comyn, *Dig, "Abatement," B. 1 (London, 1822)*.

30. As to the nature and effect of, and the necessity for, Pleas In Abatement, see *Pltts Sons 1Mg. Co. v. Commercial flat, Bank, 121 111, 582, 13 N.E. 156*

(1887).

**a Final Judgment on the merits on the Right of Action.**

If sustained, the effect of a Plea in Abatement 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, as observed** above, 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*, which, thereafter, may again be prosecuted, avoiding the Defect which led to the demise of *the Particular Original Action*.

#### *Classification of Pleas in Abatement*

**IN any event the Writ, on which the plaintiff's Cause of Action was grounded, was Abatable by a Plea** formally attacking its **sufficiency, or by a Plea to the Person suing or to the Person sued, showing that No Writ** should have been issued in favor of the plaintiff or against the defendant. In accordance with this broad view, Pleas in Abatement were classified as follows:

*First, Pleas relating to the Writ, as to the Form of It and to the Action of It; ~*

*Second, Pleas relating to the Count or Declaration;*

*Third, Pleas relating either to the Disability of the Person of the Plaintiff or the Person of the Defendant.*

31. 1 Chitty, *Oa Pleading, c. VI, Of Pleas to the Jurisdiction, and In Abatement, and the Proceedings Thereon, 450—454* (13th Am. ed., Springfield, 1859);

1 Saunders, *The Law of Pleading & Evidence, in Clvii Aetloas, 2* (Philadelphia, 1831).

**Sec. 206**

### **PLEAS—DILATORY**

417

If ground for Abating the Action Appears on the Face of the Declaration or Record, a Plea in Abatement is not necessary, for the 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.<sup>32</sup>

(1) *Pleas in Abatement to the Original Writ or Bill.*—According to Stephen,<sup>23</sup> a Plea in Abatement of the Writ was one which showed some ground for Abating or Quashing the Original Writ, and made a Prayer to that effect. *Any* Matters of Fact tending to impeach the correctness of the Original Writ, that is, to show that it was improperly framed or sued out, without, at the same time, tending to deny the Right of Action itself, constituted sufficient ground for Abating the Writ. Such a Plea might be as to the Form of the Writ or to the Action of it.

Thus, for example, if there was a Variance between the Charge contained in the Original Writ and the Charge appearing in the Declaration, that discrepancy showed that the Original Writ was not properly adapted to the Action, and it was, therefore, a ground for Abatement.

And where the Writ appeared to have been sued out pending another Action already brought for the Same Cause, if it nam

32. Thus, 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, or outside of the record, as that the defendant was exempt from service, the Matter must be Plead in Abatement, so that an Issue may be made thereon, and tried, if desired, by a Jury, like any other Issue of Fact. Creer v. Young, 120 111. 184, 11 N.E. 167 (1857).

Pendency of another Action for the Same Cause must be Plead in Abatement. Moore v. Spiegel, 143 Mass. 413, 9 N.E. 827 (1887).

33- A Treatise on the Principles of Pleading in Civil Actions, e. I, Of the Proceedings in an Action from Its Commencement to Its Termination, 85—89 (3rd Am. ed., by Tyler, Washington, D. C. 1893).

ed only one person as the defendant, when it should have named several, or if it appeared to have been defaced in a material part, it was Abatable.

The objection that there was a Variance between the Original Writ and the Declaration was conditioned upon obtaining Oyer of the Writ. This Form of Objection, however, came into question when, during the reigns of George II (1727—1760) and George III (1760—1820), the Courts of Common Pleas and King's Bench adopted a Rule under which Oyer of the Original Writ was denied. The practical effect of this was to abolish Pleas in Abatement grounded on a Variance between the Original Writ and the Declaration.<sup>31</sup> All other Pleas in Abatement, which could not be Verified without benefit of Oyer of the Original Writ, were also necessarily abolished,<sup>35</sup> but this Rule had no application to Actions Commenced by Bill.

After this development, Pleas of this character, according to Chitty, were termed Pleas in Abatement rather from their effect upon the Writ than from any direct attack upon it, as under the early Common Law Rule.<sup>37</sup> Martin points out that where the Declaration, which was presumed to correspond with the Original Writ, was incorrect as to some Extrinsic Matter, it then became possible for the defendant to Plead in Abatement to the Writ through the medium of the Declaration.<sup>37</sup>

As to the Form of the Writ, Pleas in Abatement were grounded principally on Misnom

34. Martin, Civil Procedure at Common Law, e.

Defences by Way of Dilatory Pleas, Art. IV, Pleas in Abatement, § 251, Pleas in Abatement on account of Defects in the Count or Declaration, 212 (St. Paul, 1905).

35. Ibid.

36. Chitty, On Pleading, e. VI, Of Pleas to the Jurisdiction, and in Abatement, and the Proceedings Thereon. 450 (13th Am. ed., Springfield, 1859).

37. Martin, Civil Procedure at Common Law, e.

Defenses by Way of Dilatory Pleas, § 252, Pleas in Abatement to the Writ or Bill, 212 (St. Paul, 1905).

418

## DEFENSIVE PLEADINGS

### Ch. 21

er', Nonjoinder, Misjoinder, or that the plaintiffs or defendants suing or being sued as husband and wife were not married.<sup>34</sup>

As to the Action of the Writ, the principal grounds for a Plea in Abatement were that the Action had been prematurely brought, that Another Action was pending for the Same Cause, in the same Court, or in any other Superior Court,<sup>37</sup> or that there has been a Misconception of the Cause of Action. If, however, such Misconception was Apparent on the Face of the Declaration, it might also be taken advantage of by a Demurrer, and if not Apparent

on the Face of the Declaration, under a Plea of the General Issue.<sup>40</sup>

(U) *Pleas in Abatement to the Count or Declaration.*—A **Plea in Abatement to the** Count or Declaration is one which is founded **on some Defect applying immediately to the** Declaration, and only by indirect consequences affecting the Original Writ. Under the early Common Law, many matters might be Pleaded in Abatement of the Count or Declaration in Actions begun by an Original Writ. The basis of Pleas of this character was principally some Defect, Informality or Mistake appearing in the Recital of the Writ in the Declaration, which was deemed essential in all cases, or upon a Variance between the Writ as recited and the Count or Declaration, Such Pleas, therefore, although **they were primarily** directed against the Count or Declaration, and were denominated as Pleas to the Count or Declaration, indirectly referred to the Original Writ as recited therein.<sup>41</sup>

38. Ibid.

39. Ibid.

40. Ibid.

<sup>41</sup> On a Plea in Abatement on the Ground of a Variance between the summons, which, in our country, took the place of the Original Writ, and the Declaration, see; Illinois: *Snell v. Stanley*, 63 Ill. 891 (1872); West Virginia: *Anderson v. Lewis*, 64 W. Va. 297, 61 S.E. 160 (1908).

**In 1654 the Court of Common Pleas adopted a Rule of Court, ordering that Declarations in Actions on the Case, and upon General Statutes, except for Debt, should no longer recite the Original Writ, but only the Nature of the Action.**<sup>42</sup> As a result of this development, Pleas in Abatement founded on what appeared only in the recital in the Writ, were abolished. The objection of a variance between the Writ and the Declaration could not thereafter be taken advantage of except by obtaining Oyer of the Original Writ.<sup>43</sup> And when, by later Rule of Court, Oyer of the Original Writ was denied, Pleas in Abatement on the ground of a Variance between the Original Writ and the Count or Declaration, disappeared. But for some time thereafter, it was possible to plead in Abatement to the Writ through the medium of the Declaration<sup>44</sup>

(III) *Pleas in Abatement to the Disability of the Person of the Plaintiff.*—A Plea in Abatement to the Disability of the Person of the plaintiff or defendant was one which showed some personal legal disability in one of the *Two Parties to Sue or Be Sued.*<sup>45</sup> As to the plaintiff, such Pleas originally largely consisted of Pleas denying the existence of the plaintiff as a Person, setting up his Disability to Sue by reason of his being an alien **in** amity, or in enmity, his outlawry upon Mesne or Final Process, his Attainder for Felony or Treason, his Infancy when appearing otherwise than by Guardian or Next

<sup>42</sup> Martin, *Civil Procedure at Common Law*, e.

Defences by Way of Dilatory Pleas, Art. IV, Pleas In Abatement, ~ 251, Pleas in Abatement on Account of Defects in the Count or Declaration, 211 (St. Paul, 1905).

<sup>43</sup> Comyn, Dig. "Abatement," H. 1 (London, 1822).

<sup>44</sup> Martin, *Civil Procedure at Common Law*, c.

Defences by Way of Dilatory Pleas, Art. IV, Pleas in Abatement, § 252, Pleas in Abatement to the Writ or Bill, 212 (St. Paul, 1905).

<sup>45</sup> *Id.* at 210.

Sec. 206

## PLEAS—DILATORY

419

Friend, or his death.<sup>46</sup> When a female plaintiff sued otherwise than as a co-plaintiff with her husband, her Coverture was available in Abatement.<sup>47</sup>

(IV) *Pleas in Abatement to the Disability of the Person of the Defendant.*—As to the defendant, Pleas in Abatement included such Pleas as Coverture and Infancy.

The Defense of Coverture did not amount to a Denial of the Liability of the defendant on the Cause of Action involved, which might be opposed by a Plea in Bar; it merely questioned her liability to be Sued without the Joinder



of her husband.<sup>48</sup>

Anciently, Infancy was Pleadable in Suspension in certain Real Actions. This was also true in Debt, when the infant was Sued as heir on the Specialty or Sealed Obligation of his ancestor, in which case it was held that the Parol might Demur, that is, that the Pleadings might be Stayed until he had attained his full age.<sup>49</sup> Such right, however, never extended to an infant devisee, and in the year 1830, it was completely abolished by Section 10 of Chapter 47 of the Statute of 1 Wm. W, 70 Statutes at Large 295 (18~30).

Finally, with respect to these Pleas to the Person, it should be observed that they do not fall strictly within the Scope of Pleas in Abatement, for they do not Pray “that the Writ be Quashed,” but Pray Judgment “if

45. Gould, A Treatise on the Principles of Pleading, Pt. 111, Of Pleading, c. LII, Of Pleas to the Disability of the Plaintiff, 420, 421 (6th ed. by Will, Albany, 1909).

47. Martin, Civil Procedure at Common Law, e. X, Defences by Way of Dilatory Pleas, Art. iv, Pleas in Abatement, 249 Pleas in Abatement on Account of Disability of the Person of the Plaintiff, 211 (St. Paul, 1905).

48. I Chitty, On Pleading, e. vi, Of Pleas to the Jurisdiction, and in Abatement, and the Proceedings Thereon, 449 (13th Am. ed., Springfield, 1859).

49. Martin, Civil Procedure at Common Law, e. vi, Defences by Way of Dilatory Pleas, § 250, Pleas In Abatement on Account of the Disability of the Person of the Defendant, 211 (St. Paul, 1905).

**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 of Abatement, and classed *among them*.

As stated before, the effect of all Pleas in Abatement, if successful, is that the Particular Action is defeated, but the Right of Action itself is not gone; and the plaintiff, on obtaining a Better Form of Writ, may maintain a New Action, if the Objection was Grounded on Matter of Abatement; or, if the Objection were to the Disability of the Person, he may bring a New Action when that disability is removed, according to Stephen.<sup>50</sup>

FORM OF PLEA IN ABATEMENT—ANOTHER ACTION PERMITTED

THE CIRCUIT COURT OF COOK COUNTY The October Term, AD. 1926

AS.  
vs.  
C.D.

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 before the commencement of this action, to wit, on the day of **A.D.** 19\_, the plaintiff impleaded the defendant in the court of county, in **the state of** in a certain Plea of Trespass on the Case in Assumpsit for the same promises set forth and declared upon in the Declaration in the present action, as by the record thereof *in the court* last aforesaid more fully appears. And the defendant further says that the parties in this

50. A Treatise on the Principles of Pleading In Civil Actions, e. I, Of the Proceedings In an Action, from its Commencement to its Termination, ST (3d Am. ed., by Tyler, Washington, P. C., 1900).

#### DEFENSIVE PLEADINGS

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. Wherefore, inasmuch as the said former action is still pending and undetermined, he, the defendant, prays Judgment of the said Writ and Declaration, and that the same may be quashed.

### *The Grounds of Abatement Under Modern Law*

AS the Original Writ has not been adopted as such in the United States, it is not proper to speak of a Plea in Abatement "of the Writ." It is a Plea in Abatement "of the Action." A Plea that an Action is brought in the Wrong County or the Wrong District, is generally regarded as Matter of Abatement and does not go to the Jurisdiction of the Court.<sup>51</sup>

As we have no Original Writs, the Modern Grounds for Abatement of an Action are much more limited than they were formerly, and they have been further limited in most States by Statute,

The principal Grounds of Abatement under Modern Law are: That the Action is prematurely brought; ~ the Pendency of An-

51. *Paige v. Sinclair*, 237 Mass. 482, 130 N.E. 177 (1921).

A Plea in Abatement, claiming the defendant's privilege not to be Sued Out of the County where she resided or might be found, was held good in the case of *Gemmill v. Smith* 274 Dl. 87, 113 N.E. 27 (1916).

And a plea in Abatement setting up the defendant's right to be Sued in the County of his residence, other than that in which the Action is Pending, should specify where the Cause of Action accrued. *Williams v. Peninsular Grocery Co.*, 73 Ple. 937, 75 S. 517 (1917). See, *Roberts v. American Nat. Assur. Co.*, 201 Mo.App. 239, 212 S.W. 390 (2919).

42. *Archibald v. Argall*, 53 Ill. 307 (1870); *Palmer v. Gardiner*, 77 Ill. 143 (1875); *Grand Lodge Brotherhood of Railroad Trainmen v. Randolph*, 186 Ill. 89, 57 N.E. 882 (1900). which involves a failure to exhaust the remedies provided in the Contract. other Action for the Same Cause;" some Disability Incapacitating the Plaintiff from Suing; ~ the fact that the plaintiff or one

That an extension of time has been given after the maturity of a Debt cannot be Pleaded in Bar, but only in Abatement. *Pitts Sons 311g. Co. v. Commercial Nat. Bank*, 121 Ill. 582, 13 N.E. 150 (1887).

That a Debt is not yet due has been held to be a Plea in Bar which should be shown under the General Issue rather than under a Plea in Abatement. *Palmer v. Cardiner*, 77 Ill. 143 (1875) *Bacon v. Schepflin*, 185 Ill. 122, 56 N.E. 1123 (1900).

53. Illinois: *Buckles v. Harlan*, 54 Ill. 201 (1870) *Johnson v. Johnson*, 114 Ill. 611, 3 N.E. 232, 55 Am. Rep. 883 (1885); *Lowry v. Kinsey*, 20 Ill.App. 309 (1888); New Hampshire: *Smith v. Atlantic Mut. Fire Ins. Co.*, 22 N.H. 21 (1850).

But the pendency of an Action in another State is *not* ground for Plea in Abatement. English: *Manic v. Murray*, 7 Tn. 470, 101 Eng.Rep. 1081 (1798) *Unlay v. Bile! sen*, 2 East 457, 102 Eng.Rep. 442 (1802) Connecticut: *Hatch v. Spofford*, 22 Conn. 483. 58 Am.Dec. 433 (1853); Illinois: *Allen v. Watt*, (19 Ill. 035 (1873); New Hampshire: *Yelverton v. Conant*, 18 N.H. 124 (1846); New Jersey: *Kerr v. Willetts*, 48 N.J.L. 78, 2 A. 782 (1886); New York: *Rowne v. Joy*, 9 Johns. (N.Y.) 221 (1812); Pennsylvania: *Smith v. Lathrop*, 44 Pa. 326, 84 Am.Dec. 448 (1863); Federal: *Stanton v. Embry*, 93 U.S. 548, 23 L.Ed. 983 (1876).

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. Illinois: *Carricle v. Chamberlain*, 07 Ill. 620 (1881); Consolidated Coal Co. of St. Louis v. *Oeltjen*, 150 Ill. 85, 59 N.E. 000 (1901); Massachusetts: *Newell v. Newton*, 10 Pick. (Mass.) 470 (1830); Moore v. *Spiegel*, 143 Mass. 413, 0 N.E. 827 (1887); New York: *Nieholl v. Mason*, 21 Wend. (N.Y.) 239 (1839).

A Plea of a prior Action pending must Allege: (1) Pendency at the time the Present Action was brought; (2) That it is still pending at the time of the Plea; (3) Identity of the Cause of Action and Parties; (4) The Court in which the prior Action is pending (same state); and (5) A reference to the Record of the prior Action. *Olsey v. Wlate Rose*

Mig. Co., 19 RI. 492, 34 A. 997 (1800).

64. Infancy of the plaintiff suing La Ms own name, and not by guardian or next friend. Massachu~ setta: Smith v. Carney, 127 Mass. 179 (2879); *New* York; Schemerhorn v. Jenkins, 7 Johns. (N.Y.) 373 (1811).

420

Cit 21

Sec. 206

### PLEAS—DILATORY

421

of several plaintiffs was a Fictitious Person, or dead, when the Action was brought; ~ the death of a sole plaintiff, or one of several plaintiffs, since the Action was Commenced,<sup>56</sup> 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; ~ where the plaintiff or defendant is Misnamed; ~ where Several Per-

But Infancy is not a Dilatory Plea, if it goes to the Liability or Foundation of the Action. Greer v. Wheeler, 1 Seam. (2 Ill.) 554 (1839).

Marriage of feme sole plaintiff since the Commencement of the Action, whether she is suing in her own right, or as Executrix or Administratrix. Swan v. Wilkinson, 14 Mass. 295 (1817).

That the appointment of n guardian suing for an infant was void. Conkey v. Kingman, 24 Pick. (Mass.) 115 (1839).

That the plaintiff is insane and does not sue by his guardian. Chicago & P. It. Co. v. Manger, 78 Ill. 300 (1875); See, Isle v. Cranby, 190 Ill. 39, 64 N.E. 1065, 64 L.R.A. 513 (1902).

M. Comyn, Dig. "Abatement" B. 16, 17 (London, 1822) ; Illinois: Camden v. Robertson, 2 Seam. (Ill.) 507 (1840); New York: Doe v. l'enfold, 19 Johns. (N.Y.) 308 (1522).

66. Stoetzoll y. Fullerton, 44 Ill, 108 (1807) ; Mills Bland's Ex'rs, 70 Ill. 381 (1875).

61. English: Addison v. Overend, 6 T.It. 706, 10. Eng.Rep. 816 (1706); Illinois: Edwards v. Hill, 11 Ill. 22 (1849); Johnson v. Richardson, 17 Ill. 302, 63 Am.Dec. 369 (1855); Hennies v. Vogel, 66 Ill. 401 (1872); Chicago, It. I. & P. It. Co. v. Todd, 91 Ill. 70 (1878); Maine: Southard v. Hill, 44 Me. 02, 69 Am.Dec. 85 (1857); Missouri: Shoekley v. Fischer, 21 Mo.App. 551 (1586); Pennsylvania: Deal v. Rogue, 20 Pa. 228, 57 Am.Dec. 702 (1853); Vermont: Roberts v. McLean, 16 Vt. 608, 42 Am.Dec. 529 (1844).

68. Alabama: Oaths v. Clendenard, 87 Ala. 734, 6 S. 359 (1889); Illinois: Moss v. Flint, 13 Ill. 570 (1852); Pond v. Ennis, 69 Ill. 341 (1873); Springfield Consol. fly. Co. v. I-Ioeffner, 175 Ill. 634, ul **N. B. 884** (1808); Proctor v. Wells Bros. Co. of *New* York, 181 Ill.App. 468 (1913); Massachusetts: Mcdway Cotton Manufaetory v. Adams, 10 Mass. 360 (1813); New York: Reid v. Lord, 4 Johns. (N.Y.) 118 (1809); South Carolina: Norris v. Graves, 4 Strob. (S.C.) 32 (1849).

sons should be Joined as defendants, and some of them are omitted; ~° where Persons are Joined as defendants who should not be Joined; ~o or where a married woman is sued as a *feme sole*, when it is not permitted by Statute.<sup>65</sup>

“Under the head of Pleas to the Person may also be included Coverture, in the plaintiff or defendant; or that the plaintiffs or defendants, Suing or Being Sued as husband and wife, are not married; or any other Plea for want of Proper Parties, as that there-is an Executor, Administrator, or Other Per-son, not named, who ought to be made a co-plaintiff or co-defendant. We have already seen, that if an Action be brought for a Tort, by one of Several Joint Tenants or Tenants in Common, or against one of Several Partners, upon a Joint Contract, the defendant must Plead in Abatement, aild cannot otherwise take advantage of the Objection.”<sup>62</sup>

lint the Act ion ~vil I ii ot he Abat el on fl~ is groan 1 if the defendant is clearly identified ; and, farther than this, under the present prctice the

plaintiff will generally be allowed to Amend if no prejudice can result. *Adams v. Wiggin*, 42 N.H. 553 (1861).

- 3-- Illinois: *Chicago, It. I. & P.R. Co. v. Todd*, 91 Ill. 70 (1878); *Lasher v. Colton*, 225 Ill. 234, 80 N.E. 122, S Ann.Cas. 367 (1907); *David Butter & Co. v. McLaughlin*, 257 Ill. 199, 100 N.E. 500 (1913); Maine: *Southard v. Hill*, 44 Me. 92, 69 Am.Dec. 85 (1857); *Goodhue v. Luce*, 82 Me. 222, 19 A. 440 (1880); Vermont: *McGregor v. Baleh*, 17 Vt. 502 (18-15).
60. *Lurton v. Cihhiarn*, 1 Seam. (Ill.) 577, 33 AnLDec 430 (1839); *Shufeldt v. Seymour*, 21 Ill. 524 (1859); *Town of Harlem v. Emmert*, 41 Ill. 319 (18(10)); *Supreme Lodge A. O. U. W. v. Zuhike*, 129 Ill. 208, 21 N.E. 789 (1889); *Sinsheimer v. William Skinner Mfg. Co.*, 165 Ill. 116, 46 N.E. 262 (1896); *Powell Co. v. Finn*, 198 Ill. 569, 04 N.E. 1030 (1896).
61. *Streeter v. Streeter*, 43 Ill. 155 (1807); *Huftalin*

*v. Misner*, 70 Ill. 205 (1873).

At Common Law a married woman could Not Sue or Be Sued without her husband being Joined.

Or: *Tidd*, *The Practice of the Court of King's Bench in Personal Actions*, e. XXVII, Of Pleas to the Jurisdiction and Pleas in Abatement, 580 (1st Am. ed, Philadelphia, 1807).

422

## DEFENSIVE PLEADINGS

CIt. 21

AT Common Law there appears to have been some doubt as to the correct method for placing in Issue the Corporate Existence of the Plaintiff. Thus, in the case of *Boston Type & Stereotype Foundry v. Spooner*, in which the plaintiff brought an Action of Assumpsit, but made no Allegation as to its Incorporation, the defendant Pleaded in Abatement that there never was a person in being called or known by name of Boston Type & Stereotype Foundry, to which the plaintiff interposed a Demurrer, upon which a Judgment of *Respondeat Ouster* was rendered. The defendant Excepted and the Issue presented was whether the facts set forth in the Plea were the proper subject of a Plea in Abatement.

Before answering this Issue, a few preliminary observations may be helpful. The defendant should not be compelled to answer an Action unless it prosecuted in the name of a person, either Artificial or Natural, against whom he may have a Judgment, and an Execution. But how is he to Plead to bring this end about? As a General Rule, Matter in Bar cannot be Pleaded in Abatement, but to this Rule there are exceptions. Thus, the Nonjoinder of a Party Plaintiff may be Pleaded in Abatement, or taken advantage of under a Plea of the General Issue, which is a Plea in Bar; in Replevin, the defendant may Plead property in himself or a stranger, either in Abatement or in Bar; and certain personal disabilities which entirely defeat the Suit may be Pleaded in Abatement or in Bar, such as Alien Enemy, Attainder, Felony and Outlawry.

So, in the instant case, it appears that the defendant's effort to reach a Lack of the Corporate Existence of the plaintiff was a proper subject for either a Plea in Abatement or Bar; that is, the Plea might be directed to the disability of a plaintiff, denying

3. 5 Vt. 93 (1823). See, In this connection, Comment, Pleading—Necessity to Plead Corporate Capacity, 22 Mich. Rev. 175 (1923). his existence, showing that there was no such person in *rerum natura*, as that at the Commencement of the Suit he was a Fictitious Person,<sup>64</sup> or he may have Pleaded the Same Matter in Bar.<sup>65</sup> It follows, therefore, that the position of the Counsel for the plaintiff in the instant case, that the defendant could only avail himself of this Defense by Plea in Bar, is erroneous. And the objection that the defendant could not give a Better Writ is met by the fact that the Rule requiring the defendant to give the plaintiff a Better Writ has no application where a plaintiff, as in this case, cannot have a Better Writ, as there was no such person in existence.

Notwithstanding the above observations, there are two views as to whether the Corporate Existence of a Corporation was in Issue under a Plea of the General Issue. The generally accepted view was that the Existence of

the Corporation was not put in issue by a Plea of the General Issue. This appears to be the better view, as the function of the General Issue was to deny Material Allegations of Fact in the plaintiff's Declaration. If the Corporate Existence of the plaintiff were put in Issue the General Issue would be placing in Issue a Question of Law, as the Corporate Existence of the plaintiff can only be determined by construing the Charter of Incorporation, and Construction of a written document involves a Question of Law. The General Issue alone, therefore, should operate as an admission of the Corporate Existence of the plaintiff; <sup>66</sup> if it

64. *1 Chitty, On Pleading, e. fl Of Pleas to the Jurisdiction, and in Abatement, and the Proceedings*

*Thereon*, 435-436 (12th Am. ed., Springfield, 1859~

New York: Doe v. Penfieh, 19 Johns. (N.Y.) 308

(1522).

CS. *Mayor & Burgesses of Stafford v. Bolton*, 1 Bbs. & P. 40, 126 Eng.Rep. 767 (1797).

66. *Inhabitants of Orono v. Wedgewood*, 44 Me. 49,

69 Am.Dec. 81 (1857); 10 Cy. 1354.

*Keohuk & Hamilton Bridge Co. v. Wetzel*, 228 Ill. 253, 81 N.E. 864 (1907), which held that a Plea denying

Sec. 207

### PLEAS—DILATORY

423

was desirable to place it in Issue the defendant should Specifically Traverse the Corporate Existence of the plaintiff by use of the Plea of *Nul Tie?* Corporation.<sup>67</sup>

And the same principles operate where a defendant Pleads the General Issue to an Action brought by an Executor,<sup>68</sup> the Authority of the Plaintiff being admitted by the Plea.<sup>69</sup>

As we have seen all Matter of a Dilatory Character must be Pleaded before entering a Plea in Bar, and by a separate Plea limited to the purpose or delaying the Action. Nor was it possible to Plead to the Jurisdiction or in Abatement while Pleading in Bar, or in any manner affecting the Merits of the Cause.<sup>70</sup> And, of course, as may be seen from a glance at the chart on the General Order in which Pleas may be Pleaded, it is clear that any Plea, which contains Matter in Bar of the Action, constitutes a Waiver of all Objections to the Jurisdiction of the Court and to the Manner of Framing the Action.<sup>71</sup> Thus, a Plea of the General Issue, as we observed in discussing how the Corporate Existence of a Corporation might be placed in Issue, admits the competency of

that the plaintiff is a corporation is a Plea in Bar, hut a Plea denying that the defendant is a corporation is a Plea in Abatement.

67. That a Special Plea of *Nul flat* Corporation is necessary to question the Corporate Capacity of the plaintiff, see: 10 Cy. 1355; *Inhabitants of Orono v. Wedgewood*, 44 Me. 49, 09 Am.Dec. 81 (1857).

ER. *Jones, Executor of Broekaw v. Decker's Executor*, 2 N.J.L. 231 (1807).

68. *Ibid.* The Objection that the plaintiff is not competent to sue, because not entitled to the character which he asserts, may be raised either by a Plea in Abatement or a Plea in Bar. *Nooran v. Bradhy*, 9 Wall. (U.S.) 304 (1809).

See, also: Massachusetts: *Langdon v. Potter*, 11 Mass. 312 (1814); New York: *Thomas y. Cameron*, 10 Wend. (N.Y.) 579 (1837).

70. Florida: *Putnam Lnmber Co. v. Ellis-Young Co.*,

50 Fin. 251, 30 So. 103 (1905); Tennessee: *Douglas*

v. *Belcher*, 7 Yerg. (Tenn.) 104 (1834).

71. *Sheppard v. Graves*, 14 How. (U.S.) 504, 14 LEd.

518 (1852).

the plaintiff to Sue and to Maintain the Action as brought.<sup>72</sup>

### NONJOINER OR MISJOINER OF PARTIES PLAINTIFF IN CONTRACT

207. In Actions Ex Contractu, Misjoinder or Nonjoinder of Plaintiffs may be taken advantage of by Demurrer, Motion in Arrest

of Judgment, or Writ of Error, or, where the Defect is Not Apparent on the Face of the Pleadings, by Plea in Abatement or Motion for a Nonsuit.

THE Rules of the Common Law were strict as to the Persons who should be joined as Parties to the Action. Since the objection for Defect of Parties must sometimes be taken by Plea in Abatement, it is convenient to deal in this chapter with the Rules as to Parties and the consequences of Nonjoinder and Misjoinder, and how the Objection may be raised.

#### *Non joinder of Plaintiffs in Contract*

ALL Joint Contractors, such as Joint Promisees, Covenantees, or Obligees, and all Active Partners, should Join in Suits for Breach of Contract to which they are Parties.<sup>73</sup>

All Persons who were Partners in a Firm when a Contract was made must be Joined, unless some legal excuse for Not Joining them is alleged, as that a Partner is dead. It is no excuse for Nonjoinder that one of

72. Society for the Propagation of the Gospel v. Town of Pawlet, 4 Pet. (U.S.) 480, 7 LEEd. 927 (1830),

73. English: Eccleston v. Clipsham, 1 Wms.Saund.

153, 85 Eng.Rep. 158 (1068); Anderson v. Martin-dale, 1 East. 497, 102 Eng.Itep. 191 (1801); Hill v. Tucker, 1 Taunt. 7, 127 Eng.Bep. 731 (1807); Cahfornia: Harrison v. McCormick, 69 Cal. 016, 11 P. 456 (1880); Maine: Darling v. Simpson, 15 Me. 175 (1838) New Hampshire: Pickering v. Dc Ilochment, 45 N.H. 77(1863); New York: Dob v. Halsey, 10 Johns. (N.Y.) 34, 8 Am,Dce. 293 (1810) West virginia: Sandusky v. west Fork Oil & Natural Gas Co., 63 W.Va. 260, 59 SE. 1082 (1907).

See, also, Jones & Carison, Nonjoinder and Misjoinder of Parties in Common-Law Actions, 28 w.va.Law Quarterly 197, 266 (1922).

424

### DEFENSIVE PLEADINGS

Cli. 21

the Partners has sold his interest in a Contract to the others.~

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,<sup>75</sup> 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.<sup>76</sup>

When a person *who* ought to Join as plaintiff is omitted in an Action of Contract, *if* the Defect appears upon the Pleadings, the defendant may Demur, Move in Arrest of Judgment, or bring a Writ of Error. If it does not appear upon the Pleadings, but is disclosed by the evidence, the plaintiff will be Non-suited. It is not necessary to take the Objection by Plea in Abatement, though this may be done.

A Nonjoinder of Joint Contractors as plaintiffs is a fatal error, unless Amended, t.nd may be shown under the General Issue, as well as by Plea in Abatement. But dormant Partners need not be joined.”

Nonjoinder of Parties Plaintiff on a Joint Bond may be taken advantage of on Appeal

14. Illinois: Denient v. Rokker, 126 111, 174, 10 N.E. 83 (1888); Maine: Goodhue v. Lace, 82 Me. 222, 19 .4. 440 (1889).

If a partner be dead, the plaintiff, suing on a firm Contract, must Allege it as an excuse for Not Joining him.

75. Alabama: Murphy's Adm'r.s v. Branch Bank at Mobile, 5 Ala. 421 (1843); Massachusetts: Smith v. Franklin, 1 Mass, 480 (1805); Peters v. Davis, 7 Mass. 257 (1811); New York: Bernard v. Wilcox, 2 Johns Cases 874 (iSO!); Federal: Crocker v. Ecal, 1 Low, 420, Fed.Cas.No.3,396 (1869).

18. See The King v. Collector and Comptroller of the Customs at Liverpool, 2 M. & 8. 223, 225, 105 Eng. Rep. 360 (1813).

-7. Lasher v. Colton, 225 III. 234, 80 N.E. 222, 8 Ann.

'Car. 307 (1907); 1 Lacy. Pleading & Practice 16.  
or Writ of Error~'<sup>5</sup> even after Judgment by Default.'<sup>9</sup>

Nonjoinder of Executors or Persons suing in Representative Capacity may be raised only by Plea in Abatement or Special Plea.

*Misjoinder of Plaintiffs in Contract*

A Misjoinder of Plaintiffs is, unless Amended, fatal, and defendant may take advantage of it at any time.<sup>80</sup> Where plaintiffs sue as Joint Contractors, they must show a Joint Interest. Too few or too many plaintiffs in Contract will be fatal to recovery, and the Objection may be raised either In Abatement or under the General Issue,

Joint Plaintiffs must show a Joint Interest in the Contract.<sup>81</sup>

**NONJOINER OR MISJOINER OF PARTIES DEFENDANT IN CONTRACT**

208. In actions Lx Contractu, Misjoinder may be open to Demurrer, Motion in Arrest of Judgment, or Writ of Error; or, if Not Apparent on the Face of the Pleadings, by Motion *for* Nonsuit at the Trial; Nonjoinder only by Plea in Abatement, unless it Appear from the Pleadings of the plaintiff that the Party omitted Jointly Contracted and is still living.

*Nonjoinder of Defendants in Contract*

ALL persons with whom a Contract is made must be Joined as Defendants in an Action for the Breach. Where Several Persons are Jointly Liable on a Contract, they must all be made defendants. Joint Contractors must be Sued Jointly, except that Joinder may be excused:

- (1) Where a co-contractor has died.

is, International Hotel Co. v. Flynn, 938 Ill. 636, 87 NE<sup>7</sup>. 855, 15 Ann-Gas. 1059 (1009).

<sup>79</sup>. Ibid.

<sup>80</sup>. If it appears that too many persons have been  
made plaintiffs, this may be raised by Demurrer,  
Motion In Arrest of Judgment, Writ of Error, or by  
Motion for Nonsuit at the Trial. See!! v. DeLand,  
43 Xli. 323 (1807); Hennles v. Vogel, 66 Ill. 401

(1872).

is: Starrett v. Gault, 165 Ill. 101, 46 N.E. 226 (1806).  
Sec. 208

**PLEAS—DILATORY**

425

- (2) Where a co-contractor has become bankrupt.
- (3) Where an Action is brought against a firm, and some of the members are nominal or dormant partners.
- (4) Where a co-contractor is an infant or a married woman.
- (5) Where a co-contractor is Resident Out of the Jurisdiction.
- (6) Where a claim is Barred against one or more Joint Debtors, and *not* Against Others.

The Rule, as laid down by Chitty,<sup>32</sup> is thus stated: "Joint Contractors must all be Sued, although one has become bankrupt, and obtained his certificate, for if Not Sued, the others may Plead in Abatement."

Nonjoinder of Joint Contractors as Defendants must be Pleaded in Abatement, unless the Joint Liability appears on the Face of the Plaintiff's own Pleading.<sup>83</sup>

It has been held that the fact that plaintiff merely filed the Common Counts with an Affidavit of Claim does not change the Rule requiring a Plea in Abatement, since a Bill of Particulars may be demanded. The General Issue admits that there is no foundation for a Plea of Nonjoinder.<sup>84</sup>

82. 1 Chitty, On Pleading, e. I, Of the Parties to Actions, 42 (13th Am. ed., Springfield, 1859).

Statutes now frequently declare that Contracts in terms Joint shall, in effect, be Joint and Several. Stimson, American Statute Law, 4113 (Boston, 1886-92).

83. 4 Nonjoinder of a *Joint contractor*, as defendant, must be objected to by a Plea in Abatement,

Illinois: Lasher v. Colton, 225 Ill. 234, 80 N.E. 122, 8 Ann.Gas. 367 (1907); David Butter & Co. v. McLaughlin, 257 Ill. 199, 100 N.E. 509 (1913)~ Minnesota: Sundberg v. Gear, 92 Minn. 143, 99 NW. 635 (1904).

84. It appears that even if the proof shows that the plaintiff loaned the money to **A** and **B** jointly, and not Jointly and severally, or to **A** alone, the Nonjoinder of **B** ens be taken advantage of only by a Plea In Abatement. Pearce v. Pearce, 67 Ill. 207 (1873); Ross v. Allen, 67 Ill. 317 (1873); Wilson v. Wilson, 125 Ill.App. 389 (2907).

Where the Declaration shows on its Face a Nonjoinder of Joint Contractors as Defendants, defendant may take advantage of the Nonjoinder by Demurrer, Motion in Arrest, or by Writ of Error, without a Plea in Abatement. There is a presumption that any partner omitted is still living.<sup>85</sup>

A material distinction is to be noted between the case of Nonjoinder of Plaintiffs and Defendants in Actions *contra eum*, the remedy for Nonjoinder of Defendants being generally restricted to the use of a Plea in Abatement,<sup>86</sup> except in the ease 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.<sup>85</sup> 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 ~ (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

85. Illinois: Sinsheimer v. William Skinner Mfg. Co.,

165 Ill. 116, 40 N.E. 262 (1806); Maine: State v. Chandler, 79 Me. 172, 84. 553 (1887).

86. Whittier, Cases on common-Law Pleading, 00-i; See, Burgess v. Abbott & Ely, 11101 (N.Y.) 476 (1811).

See, also: Indiana: Bledsoe v. Irvin, 33 Intl. 293 (1871) ICent; Alien v. Ljeket~ 3 J.J. i. arsh. (Cy.) 165 (1830); Massachusetts: Wilson v.

Nevers, 20 Pick. (Mass.) 22 (1838); New Hampshire: Gove v. Lawrence, 24 N.H. 128 (1851); New Jersey: Gray

v. Sharp, 62 N.J.L. 102, 40 A, 771 (1898) New

York: Williams v. Allen, 7 Cow. (N.Y.) 316 (1827)

Pennsylvania: Lotter v. McCoy, 26 Pa. 458 (1856):

Vermont: Hicks v. Cram, 17 Vt. 449 (1845); Virginia: Prunty i. Mitchell, 76 Va. 1G& (1882).

87. See Scott v. Godwin, 1 Ens. & P. 67, 126 Eng.Rep.

782 (1797). Also, see; New Hampshire: Nealley v. Moulton, 12 N.H. 485 (1842); Vermont: McGregor v. Ealey, 17 Vt. 562 (1845).

88. Connecticut: Russell v. Tomlinson, 2 Conn. 206 (1817); New York: Franklin Fire Ins. Co. v. Jenkins, a Wend. (N.Y.) 130 (2829).

426

## DEFENSIVE PLEADINGS

### Ch. 21

ery; ~ 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 An, at his pleasure, the omission of one or more does not afford the defendant a Ground of Objection.<sup>90</sup> 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 be proved and is thus the basis of the Suit, Different Rules apply, and the mere Form of the Action will not gayem.<sup>91</sup> The application of the proper Rule, however, will depend upon the Statement of the Gist of the Action, as shown by the Declaration.

#### *Misjoinder of Defendants in Contract*

A Misjoinder of Defendants is, unless corrected, fatal. An Action against Several Persons must be established against them all, and, where the evidence shows that defendants are not Jointly Liable, failure to interpose a Plea denying Joint Liability will not permit a Joint Recovery.



Misjoinder is open to attack by Demurrer, Motion in Arrest of Judgment, or on Writ *ci Error*, if Apparent on the Face of the Record.<sup>92</sup> -

-9. See, *Govett v. Badnidge*, 3 East 62, 102 Eng.Rep. 520 (1802); *Nicoll v. Glennie*, 1 Manic & S. 588, 105 Eng.Rep. 220 (1813).

See, also, *Collneetient: Hayden v. Nott*, 0 Conn. 307 (1832); New York: *Jackson cx dem. Haiues v. Woods*, 5 Johns. (N.Y.) 280 (1810).

90. Even if it appear from the Pleadings that the Tort was Jointly committed by the defendant and another person. See *Rose v. Oliver*, 2 John. (N.Y.) 365 (1807),

91. *Wealt v. King*, 12 (1810). See *Pozzi v.*, Eng.Rep. 1106 (1538), red to; Connecticut; 194 (1819); Vermont:

.Am.Dec. 538 (1854).

Law Pleading, 613.

01. Illinois: supreme Lodge A. O. U. W. v. Zuhike,  
129 Ill. 298, 21 N.E. 789 (1889); *Powell Co. v. Finn*,  
198 Ill. 567, 64 N.E. 1036 (1002); *Hamllton v.*

**FORM OF PLEA IN ABATEMENT—NONJOINER OF PARTIES DEFENDANT**

### THE CIRCUIT COURT OF COOK COUNTY

The October Term, AD. 1926

A.B.

vs.

C.D.

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.M., 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.M. 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.

X.Y.

[The signature of Counsel]

(Add Affidavit of the truth in substance)

SHIPMAN, Handbook of Common-Law Pleading, c. XVI, Dilatory Fleas, § 232 Forms of Pleas in Abatement, 403 (3d ed. by Ballantine, St. Paul, 1923).

### NONJOINER 011 MISJOINER OF PARTIES IN ACTIONS LX DELICTO

209. The Objection of Nonjoinder of Plaintiffs in an Action c\$ Tort can be taken only by Plea in Abatement. In Actions for the recovery of property, Nonjoinder of Parties Plaintiff may be shown under the General

*fury Mfg. Co.*, 189 Ill.App. 100 (1913); *Heidelmeier v. BeebE*, 145 Ill.App. 116 (1908). Nonjoinder and Misjoinder of Parties in Common-Law Actions, H.

C. *Jones and Leo Carlin*, 28 SVVaLQ 266. See *Harris v. Worth*, 78 W.Va. 76, 79, 88 S.F. 603, 1 A. **LIZ. 356** (1916).  
East 452, 104 Eng.Rep. 176

*Shipton*, S Ad. & li. 663, 112  
and the decisions there referS  
*Walcott v. Canfield*, 3 Cons,  
*Wright v. Geer*, 6 Vt. 151, 27  
*Whittier*, Cases on Common

issue. If there is a Misjoinder of Parties plaintiff in Tort, this is a fatal error. Misjoinder of Defendants in Actions Upon a Joint Tort is no ground of Objection in any Mode by those properly made Defendants.

*Non joinder of Plaintiffs in Tort Gives Rise to a Plea in Abatement*

THE proper plaintiffs in a tort Action for injuries to property are MI the Joint Owners; but where the remedy seeks the recovery of Damages, and not the Speeiflc Thing, the Nonjoinder of one or more of the Joint Owners can only be taken advantage of to defeat the Action by Plea of Abatement.”

If a Plea in Abatement is not interposed to prevent the severance of the Joint Cause of Action in Tort, the plaintiff may recover according to his proportionate interest in the property, and the other Joint Owners Not Joined may afterwards sue and recover their proportion of the whole Damages.<sup>o4</sup>

*Misjoinder of Plaintiffs in Tort*

A Misjoinder of *plaintiffs* in Tort, as well as in Contract, is ground for Nonsuit on the *Trial*,<sup>o5</sup> It has *been* held that *married women* must sue alone for personal injuries. Hus

93. Illinois: Chicago II. I. & P. It. Co. v. Todd, 91 Ill. 70 (1878); Johnson v. Richardson, 17 Ill. 302, 63 Am.Dec. 809 (1855); Edwards v. 1111]], 11 Ill. 22

(1849).

Nonjoinder of plaintiffs in *Tort*, even though appearing on the face of Plaintiffs Pleadings, cannot be reached by Demurrer or Motion in Arrest of Judgment. Maine: Lothrop v. Arnold, 25 Me. 136, 43 Ant Dec. 256 (1845); Massachusetts: May v. Western Union Tel. Co., 112 Mass, 902 (1873); Phillips v. Cummings, 11 Cush. (Mass.) 469 (1853); Hart v. Fitzgerald, 2 Mass, 509, 3 Am.Dec. 75 (1807); Vermont: Chandler v. Spear, 22 Vt. 388 (1850).

91. See, Johnson v. Richardson, 17 Ill. 802, 03 Am. Dec. 369 (1855). In Ejectionment, if one of the plaintiffs has No Title, no recovery can be had by the other plaintiff, even if he have Title. Murphy v. Ocr, 32 Ill. 459 (1863).

d5. Whittier, Cases on Common Law Pleading, 612;

Illinois: City of Chicago v. Speer, 66 Ill. 154 (1872); Massachusetts: Gerry ‘cc Gerry, 11 Gray (Mass.) 381 (1855), band and wife sue together only when there is a Joint Interest.<sup>o6</sup> But at *Common Law* a married woman could not sue or be sued *without* having her husband Joined *with* her as a Party, and this is 8till the Rule in Some States.

*Nonjoinder or Misjoinder of Defendants in Tort*

A Nonjoinder or Misjoinder of Joint Tortfeasors as Defendants is no error, “Several persons acting independently, but causing together a single injury, may be Sued either Jointly or Severally) and the injured party may, at his Election, sue any of them Separately, or he may sue All or Any Number of them Jointly. If he sues all, he may, at any time before Judgment, dismiss as to either or any of the defendants, and proceed as to the others”.<sup>o7</sup>

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 *cx delicto* can generally

98. Cooper v. Cooper, 79 Ill. 57 (1875); Cljieago, B. & Q. B. Co. v. Dickson, 67 Ill. 122 (1873).

97. Nordhaus v. Vandalia R. Co., 242 Ill. 166, 174, 89 N.E. 974 (1909); Heidenreich v. Bremner, 260 Ill. 434—439, 103 N.E. 275 (1913); Tandrup v. Sampsell, 234 Ill. 526, 85 N.E. 331, 17 LILA. (N.S.) 852 (1908).  
be Sued Jointly only when the Wrongful Act is the Joint Act of all<sup>8</sup>

## BEQUISITES OF PLEAS IN ABATEMENT

210. Pleas in Abatement must be certain and must give the plaintiff a Better Writ or ThU. 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.<sup>97</sup> 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.<sup>98</sup> Thus, if a

ss. Defendants who cause refuse to be discharged into a stream, thereby injuring the lands of a lower riparian owner, cannot be joined as defendants, as they are not jointly liable, in the absence of concert or collusion. Parley v. Crystal Coal & Coke Co., 85 W.Va. 595, 102 S.E. 205, 9 AL 11. 033 (1920)-

so. English: Roberts v. Moon, 5 Term IL 48S, 101 Eng. Rep. 274 (1794); Connecticut: Gould v. Smith, 30 Conn. 88 (1801); Illinois: Parsons v. Case, 4 Ill. 296 (1867) Fowler v. Ainsworth, 25 Ill. 281 (1861); Feasler v. Schrieffer, 68 Ill. 322 (1873).

A Plea in Abatement, for instance, for Nonjoinder of a party defendant, is valid if it fails to allege that the party is alive and within the Jurisdiction of the Court. All facts which render the Joinder unnecessary must be negatived. Coodhne v. Luce, 82 Me. 222, 19 AU. 440 (1889). 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 (1875); In re Clark Const. Co. (In Adm.), 131 N.E. 921 (1921); Kempton Hotel Co. v. Ticketis, (Ind. App.) 132 N.E. 303 (1921)-

1. Comyns, Dig. "Abatement," I. 1 (London, 1822).  
English: Evans v. Stevens, 4 Term It. 224, 109 Eng. Rep. 986 (2791); Haworth v. Spraggs, 5 Term It. 515, 101 Eng. Rep. 1521 (1800); Illinois: American Exp. Co. v. Haggard, 1 Ill. 465, 87 Am. Dec. 257 (1865); Massachusetts; Wilson v. Nevers, 20 Pick.

## CIT 21

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,

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.<sup>5</sup>

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

(Mass.) 20 (1838); Michigan: Hoyman v. Covell. 36 Mich. 157 (1877); East v. Cain, 49 Mich. 473, 13 NW. 522 (1882). And see: Connecticut: Wadsworth

v. Woodford, 1 Day (Coan.) 28 (1802); Maine: Irown y. Gordan, 1 Green]. (Me.) 165 (1821); West Virginia; floffma,j y. Bircher, 22 W.Ya. ~37 (1883).

This Rule is NOT recognized save at Common Law, l'leas *in* Abatement not being nused in Code or Egnity Pleading.

2. Illinois: Pitts Sons' Mfg. CO. v. Commercial Nat. Bank, 121 111, 552, 23 N.E. 156 (158~ Massachusetts: Haley 'cc Ztubbs, 5 Mass. 280 (1809); Moore 'v. Spiegel, 143 Mass. 413, 9 N.E. 827 (1887); New York: Jenkins v. Pepoon, 2 Jobn.Cas, (N.Y.) 312

(1807).

428  
Sec. 211

DEFENSIVE PLEADINGS

PLEAS—DILATORY

429

not be set up by a Plea in Form a Plea in Bar.<sup>3</sup>

PLEAS IN SUSPENSION

211. 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.

THESE Fleas were limited in number, including such Pleas as Outlawry or Alien Enmity of the plaintiff, arising after the institution of the *Suit*.<sup>4</sup> The effect of this Plea is not to abate or defeat the Writ or Action, but merely to postpone or Suspend the Action. This characteristic is responsible for the Classification of such Pleas as distinct from Pleas in Abatement. When the Ground for Not Proceeding with the Action is removed, the plaintiff is permitted to go on with it, without the necessity of bringing a New Action.

Where an infant heir was Sued on a Specialty Debt of his deceased ancestor, he Pleaded his Nonage, not as a Ear or Defense, but merely in Suspension of the Proceedings until he should arrive at full age, whereupon the plaintiff could proceed with his Action. This was called a "Parol Demurrer," the meaning of which was that the Pleading should be Stayed.<sup>5</sup> By the Section 10 of Chapter 47 of the Statute of 1 Wm. IV, 70 Statutes at Large 295 (1830), the Parol Demurrer was abolished.

3. Pitts Sons' *Illg.* Co. v. Commercial Nat. Bank, 221 El. 552, 13 N.E. 156 (1887); Grand Lodge, Brotherhood of Railroad Trainmen v. Randolph, 186 Ill, 89, 57 N.E. 882 (1000). Compare Bacon v. Schepfiin, 185 Ill. 122, 127, 56 N.E. 1123 (1900).

4. Martin, Civil Procedure at Common Law, c. X. Defences by Way of Dilatory Pleas, Art. III, Pleas *in* Suspension, 209 (St. Paul, 1905).

~ Joyce v. McAxoy, 31 Cal. 273, 89 Arn.De. 172 (1866).

8cc, also, 1 Chitty, On Pleading, c. VI, 01 Pleas to the Jurisdiction, and in Abatement, and the Proceedinn Thereon, 448, 447 (18th Am. ed., Springfield, 1859).

Aid-Prayer and the Excommunication of the Plaintiff were subjects for Pleas in Suspension, but since the number of such Pleas was small and the Suspension of the Action was similar to an Abatement of the Suit until some future time or event, such distinction has not always served to distinguish them from Pleas in Abatement.<sup>6</sup>

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 Reai 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. Said the Court in the Massachusetts Case, "It is still called a Plea in Abatement, although 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 terrac fuerint communes*, until the intercourse or 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."

FORM OF PLEA IN SuSPENSIoN— PAROL DEMURRER

A.B.  
vs.  
C.D.

6. Martin, Civil Procedure at Common Law, c. X, Defences by Way of Dilatory Pleas, Art. I, Prefatory, 207 (St. Paul, 1905); Stephen, A Treatise on the principles of Pleading In Civil Actions, Appendix, note 21 (3d Am.ed. by Tyler, Washington, D.C., 1803).

7. Hutchinson v. Broek, 11 Mass. 118 (1814). Soe, Le Bret v. Papillon, 4 East 502, 102 Eng.flep, 92~ (1S04).  
430

**DEFENSWE PLEADINGS**

Cii. 21

AND the said C. D., defendant in the above-mentioned action, by EL 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.

E.F.

[The signature of the Guardian]  
SHIPMAN, Handbook of Common-Law  
Pleading, c. XVI, Dilatory Pleas, § 232  
Forms of Pleas in Abatement, 402  
(3d ed. by Ballantine, St. Paul, 1923).

**JUDGMENT ON DILATORY PLEAS**

212. **if** a Demurrer is sustained to a Plea to the Jurisdiction OR to a Plea in Abatement, the Judgment is Respondeat Ouster, and the defendant may Plead to the Action, If an Issue of Fact is joined, and the Jury find against the defendant, they assess damages for the plaintiff. If an Issue either of Law or Fact, upon a Plea in Abatement, is found for the defendant, the Judgment is that the Writ be Quashed.

WHERE a Plea to the Jurisdiction or a Plea in Abatement is found in favor of the defendant upon either an Issue of Fact or Law, the Judgment was that the Writ or Bill, as the case might be, should be Abated or Quashed. If the Plaintiff prevailed upon a Demurrer to the Plea, the Judgment was Interlocutory in Character, that is, Respondeat Ouster, or let the defendant answer over. Where an Issue of Fact was joined, and it was found in favor of the plaintiff, that is, that the defendant's Plea was false, a Final Judgment was immediately awarded in his favor on the merits.<sup>8</sup> The purpose of this Rule, obviously, was to discourage False Dilatory Pleas, and ft made it possible for the plaintiff in this single instance to Win on the Merits, without a Trial of the Issues raised in the Declaration. In no other instance may a party Win on the Merits on a Dilatory Plea?

**FORMAL COMMENCEMENT AND CONCLUSION**

213. Dilatory Pleas must be Framed with Great Strictness and with a Formal Conclusion.

WI-tETHER 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

8. Upon cloterminatio., of Iss.,tcs OR Fact raised by P'leas in Abatement, when found in favor of the plaintiff, Judgment should be Quod flecuperet and defendant will not be given an oportunity to Plead to the Merits. florida: Bisbop v. Camp, 39 Fin. 517, 22 South. 735 (1597); Illinois: Grcer v. Young, 120 Ill. 184, 100, 11 N.E. 187 (1887); Paterson Oonst, Co. v. First State Bank of Thebes, 133 IllApp.

75, 80 (1908); *Italian Swiss Agricultural Colony v. Pease*, 194 Ill. 98, 02 N.E. 317 (1001); *Brown v. Illinois Central Mutual Ins. Co.*, 42 Ill. 366 (1866);  
Vermont: *Jericho v. Town of Underhill*, 67 Vt. 85, 30 Vt. 690, 48 Am. St. Rep. 804 (1804).

9. 1 ThU. The Practice of the Court of King's Bench in Personal Actions, e. XXVII, Of Pleas to the Jurisdiction and Pleas in Abatement, 58—580 (Philadelphia, 1807), contains a discussion of Judgments on a Plea in Abatement

See *13'el's & Waterson v. Hunter Erwin & CO.*, 20 Ohio 382, 387 (1851), note: 'I. The Judgment on a Plea in Abatement is either (1) that the Writ or Declaration be quashed (canter *breve*, *nO,r&t/o*)

(2) *Respondet Ouster*; and (3) *Final (quod, 'ecupret)*, Judgment is rendered either (1) without Issue taken on the Plea; or (2) With Issue. Issues are either (1) Issues in Law or (2) Issues in Fact.

II. Issues on Pleas in Abatement are either (1) such as must be tried by the Court; or (2) such as may be tried either by the Court or Jury. The kind or form of Judgment, rendered on an Issue upon a Plea in Abatement, depends upon the question whether the Issue be found (1) for the plaintiff, and against the Plea; or (2) for the defendant, and in Favor of the Plea."

Sec. 213

## PLEAS—DILATORY

431

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. (Comyns' Digest, title "Abatement", b. 2.) 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." 10

Pleas in Bar do not require the same degree of certainty as a Plea in Abatement, for being addressed to the justness of the plaintiff's claim, they are favored by the Courts. Certainty to a common intent, therefore, is all that is required. A Plea in Abatement containing a wrong Prayer is bad, but it has been held that the Conclusion or Prayer of a Plea in Bar is not material; that "there is a distinction between a Plea in Bar and a Plea in Abatement,—in the former the Party

10. *Flits Sons' Mfg. Co. v. Commercial Nat. Bank*, 121 Ill. 582, 587, 13 N.E. 150, 158 (1887). See also, Massachusetts: *Lisley v. Stubbs*, 5 Mass 280 (1809); New York: *Jenkins v. Peppoo*, 2 Johns. Cas. (N.Y.)

312 (1501).

may have a right Judgment upon a wrong Prayer, but not in the latter." 11

A Plea to the Jurisdiction usually commences without any prayer for judgment." Its Conclusion is as follows: "... the said C. D. Prays Judgment if the Court will or ought to have further Cognizance of the Suit; "3 or, in some cases, the defendant Prays Judgment "whether lie ought to be compelled to answer".14

A Plea in Suspension seems also to be in general Pleaded without a Formal Commencement. Its Conclusion, in the case of a Plea of Nonage, is that the Parol shall Demur, or the proceedings be stayed, until the defendant comes of Full Age.'5

A Plea in Abatement founded on matter extrinsic to the Writ is also usually Plead-

"Atwood v. Davis, 1 Barn. & Alt]. 172, 173, 100 flag. hop. 04 (1817). And see: English: *flex v. Shakespeare*, 10 East 87, 103 Eng. lrep. 707 (1805); *flowles v. Lusty*, 4 fling. 428, 130 Eng. flep. 832 (1827); Federal: *Withers v. Greene*, 9 Bow. (U.S.) 213, 13 L. Ed. 109 (1850).

12. 1 Chitty, On Pleading. e. VI, Of Pleas to the Jurisdiction, and in Ahatenien t, anti the I'ro e'"' clings Thereon, 494 (Springfield, 1833).

13. 3 Blackstone, Com.uentaries on *fiur* Laws of E!!gland, 303 (7th ed. Oxford, 1775); English: *Powers v. Cook*, 1 Ld. Itaym. 63, Dl Eng. lrep. 038 (1695);

Illinois: *Drake v. Drake*, 83 Ill. 526 (1870) *Goldberg v. Barney*, 122 Ill. App. 106 (1005); *Fooler v. Southwick*, 120 Ill. App. 201 (1906) ;

Chris(o v. Nieola, 183 Ihl.App. 486 (1913).

14. Chitt<sup>1</sup>, On Pleading, e. VI, Of Pleas to the Jurisdiction, and in Abatement, and the Proceedings Thereon, 404 (Springfield, 1833); English: Eowyer v. Cook, 5 Mod. 140, 87 Eng. Rep. 573; Powers v. Cook, 1 Ld. Raym. 63, 01 Eng. Rep. 038 (1695); Illinois: Pooler v. Southwick, 126 Ill. App. 264 (1900), which held that a Plea to the Jurisdiction need not be verified, but must have a formal conclusion; Goldberg v. Barney, 122 Ill. App. 106 (1905). ivhrieli involved a Plea to the Jurisdiction.
15. 1 Chitty, On Pleading, e. VI, Of Pleas to the Jurisdiction, and in Abatement, and the Proceedings Thereon, 484 (Springfield, 1833).

As to other Pleas in Suspension, see: English: Trollop's Case, 5 Co. 69, 77 Eng. Rep. 577 (1008); Lefret v. Papillon, 4 East 502, 102 Eng. Rep. 923 (1804); Onslow v. Smith, 2 11 & P. 384, 126 Eng. Rep. 1340 (1801); Massachusetts: Butchinson v. Broek, 11 Mass. 118 (1814).

482

## DEFENSIVE PLEADINGS

Cl. 21

ed without a Formal Commencement, within the meaning of this Rule.<sup>10</sup> 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” ;“ In case of Plea to the Person, ... Prays Judgment if the said **LB.** ought to be answered to his said Declaration.” ~

### STATUS UNDER MODERN CODES, PRACTICE ACTS AND RULES OF COURT

214. In some states Pleas in Abatement have been abolished, and defects formerly available on such a Plea are reached either by a Motion or by an Answer in the Nature of a Plea in Abatement.

#### *In England*

AT Common Law there was no requirement as to Verification of either Pleas to the Jurisdiction or Pleas in Abatement. But the Statute of 4 Anne, c. 16, § 11, 11 Statutes at Large 157 (1705) provided that “no *Dilatory* Plea shall be received in any Court of Record, unless the Party offering such Plea, do, by Affidavit,<sup>9</sup> prove the truth thereof, or show some probable matter to the Court to induce them to believe that the Fact of such Dilatory Plea is true.” The Affidavit as to Truth required by this Statute might be made by the defendant himself, or by a third person; and as the Statute required only probable cause, there was no necessity for an Affidavit, where the Plea was for Matter Apparent.

And in 1833, by the Statute of 3 & 4 Wm. IV, c. 42, § 8, 73 Statutes at Large 275, it was provided that no Plea in Abatement for

16. Foxwist v. Tremaine, 2 Wins. Saund. 207, 209 note 1, 85 Eng. Rep. 996, 997 (1670).

fl. Cotnyn, Dig. “Abatement” I. 12 (London, 1822).

18. Tidd, The Practice of the Court of the King's Bench in Personal Actions, c. XXVII, ~85 (Philadelphia, 1807).

12. That a Plea in Abatement must be sworn to, and that a defective affidavit cannot be amended, see Spencer v. Aetna Indemnity Co., 281 Ill. 82, 88 N.E. 102 (1907).

the Nonjoinder of any Person as a Co-defendant should be permitted, unless it appeared from the Plea that such Person Resided Within the Jurisdiction, and that his residence was set out in the Affidavit Verifying the Plea. Section 9, of the Same Statute, allowed a Discharge in Bankruptcy to be Pleaded in Reply to a Plea of the Nonjoinder of Another Person. And by Section 11 of the Same Statute, Pleas in Abatement for Misnomer were abolished in all Personal Actions. The remedy substituted was by Summons to require the plaintiff to Amend his Declaration by inserting the correct name, supported by an Affidavit.

Pleas in Abatement for the Misjoinder and Nonjoinder could be responded to by amendment under the Common Law Procedure Act of 1852.<sup>20</sup>

Under Sections 135 to 142 of the Same Statute, the effect of Abatement, as well as the liability to Abate by reason of Bankruptcy, Death and Marriage, were relieved against by provisions under which the Suit might be continued, in all cases in which the Cause of Action survived against or for the benefit of others.

*In the Several States of the United States*

THE Statute of 4 Anne, e. 16, § 11, 11 Statutes at Large 157 (1705), which required Verification of Dilatory Pleas, was considered as effective in the Several States of the United States. Otherwise, for most part, the law governing such Pleas in this country followed the lines laid down at Common Law. But after the 1848 Code of Procedure in New York, the situation was affected by Statutory Changes. In Some States Pleas in Abatement were completely abolished, and defects formerly available on such a Plea were reached either by a Motion or *by* an Answer in the Nature of a Plea in Abatement.

15 & 18 Sic. c. 76, H 34 to 39, 92 Statutes at Large  
293—295 (1852).

## CHAPTER 22 PLEAS—PEREMPTORY OR IN BAR

Sec.

215. The General Nature of Pleas in Bar.
216. The Various Forms of Traverse or Denial.
217. The General Requisites of Traverse.
218. Materiality of the Traverse.
219. Selection of Issuable Proposition.
220. Denial of the Essentials Only.
221. Negatives and Affirmatives Pregnant.
222. The Specific or Common Traverse.
223. The Special Traverse.
224. The General Issue—Its Nature and Use.
225. Pleas in Confession and Avoidance—The Nature and Form.
226. Giving Color.
227. Pleadings in Estoppel.
228. Admission by Failure to Deny.
229. Protestation,
230. Argumentative Pleas.
231. Pleas Amounting to the General Issue.
232. Partial Defenses.
233. A Pleading Bad in Part is Bad Altogether.
234. Several Defenses.
235. Duplicity in Pleas—In General.
236. Duplicity—Immaterial Matter.
237. Duplicity—Matter III Pleaded.
238. Duplicity—Matters Forming a Connected Proposition.
239. Duplicity—Protestation.
240. What Defenses May be Shown Under the General Issue and What May or Must be Pleaded Specially.
241. The General Issue in Trespass.
242. Pleas in Confession and Avoidance in Trespass.
243. The Hilary Rules—Their Effect Upon Negative and Affirmative Defenses in Trespass.
244. The General issue in Trespass on the Case.
245. Pleas in Confession and Avoidance in Trespass on the Case.
246. The Hilary Rules—Their Effect Upon Affirmative and Negative Defenses in Trespass on the Case.
247. The General Issue in Trover.
248. Pleas in Confession and Avoidance in Trover.
249. The Hilary Rules—Their Effect Upon Negative and Affirmative Defenses in Trover.
250. The General Issue in Ejectment.
251. Pleas in Confession and Avoidance in Ejectment.
252. The General Issue in Detinue.
253. Pleas in Confession and Avoidance in Detinue.
254. The Hilary Rules—Their Effect Upon Negative and Affirmative Defenses in Detinue.
255. The General Issue in Replevin.
256. The Special Traverse in Replevin.



## DEFENSIVE PLEADINGS

Ch. 22

Sec.

- 257. Pleas in Confession and Avoidance in Replevin.
- 258. The General issue in Debt on Simple Contracts and Statutes.
- 259. Pleas in Confession and Avoidance in Debt on Simple Contracts and Statutes.
- 260. The Hilary Rules—Their Effect Upon the Scope of the General Issue in Debt on Simple Contracts and Statutes.
- 261. The General Issue in Debt on a Specialty.
- 262. Pleas in Confession and Avoidance in Debt on a Specialty.
- 263. The Hilary Rules—Their Effect Upon the General Issue in Debt on a Specialty.
- 264. The General Issue in Debt on Judgments.
- 265. Pleas in Confession and Avoidance in Debt on Judgments.
- 266. The General Issue in Covenant.
- 267. Pleas in Confession and Avoidance in Covenant.
- 268. The Hilary Rules—Their Effect Upon the General Issue in Covenant.
- 269. The General Issue in Special Assumpsit.
- 270. Pleas in Confession and Avoidance in Special Assumpsit.
- 271. The Hilary Rules—Their Effect on the Scope of the General Issue in Special Assumpsit.
- 272. The General Issue in General or Indebitatus Assumpsit.
- 273. Pleas in Confession and Avoidance in General or Indebitatus Assumpsit.
- 274. The Hilary Rules—Their Effect Upon the Scope of the General Issue in General or Indebitatus Assumpsit.
- 275. Comparison of Scope of Different General Issues.
- 276. Notice of Defenses Under the General Issue.
- 277. Plea Puis Darrein Continuance.
- 278. Recoupment and Set-Off.

## THE GENERAL NATURE OF PLEAS IN BAR

215. If the Declaration is sufficient both in Substance and in Form, so that neither a Dilatory Plea nor a Demurrer will lie, the defendant must Plead in Bar, and his Pleading must be either:

(I) **By Way of Traverse**

(II) **By Way of Confession and Avoid-**

ance

(III) **By Way of Estoppel**

*Methods of Pleading in Bar*

ASSUMING that the plaintiff has stated a good Cause of Action in his Declaration, and the defendant desires neither to avail himself of any of the Dilatory Pleas, nor to Demur, he must interpose a Plea in Bar, which may be any one of Three Forms of Plea:

*First*, he may meet the plaintiff's alleged Cause of Action by Traversing or Denying some or all of the Material Allegations of

Fact stated in the Declaration; this he might do by Pleading the General Issue, which generally denied all the Material Allegations in the plaintiff's alleged Cause of Action; he might plead a Common or Specific Traverse, which was a Denial of a Material Fact in the pleader's own language; or he might plead a Special Traverse, which was an Indirect Denial of a Material Allegation; *Second*, he may meet the plaintiff's Declaration by admitting the Truth of the Facts stated therein, and then alleging a new combination of Facts or Events, to which a Rule of Substantive Law attaches the consequence of Non-Liability; such a Plea, known as a Plea in Confession and Avoidance, might be either in Discharge or in Justification and Excuse; *Third*, the defendant, without either Admitting or Denying the Facts alleged, may set up New Facts which operate to prevent the plaintiff from sustaining the Allegations

Sec. 216

contained in the plaintiff's Declaration. Thus, to summarize, the defendant may meet an Alleged Cause in a Declaration by Pleading One of Three Forms of Traverse; by Pleading in Confession and Avoidance in Justification, in Excuse, or in Discharge; or by Pleading by Way of Estoppel.

*Special Pleas—The Different Varieties*

PLEAS other than General Issues are ordinarily distinguished from them by the name of Special Pleas; and when resort is had to these a Party is said to Plead Specially, as contrasted with Pleading the General Issue. The Issues produced upon Special Pleas, as being usually more specific and particular than those of Not Guilty, etc., are sometimes described as Special Issues, as contrasted with what were called General Issues; the latter term having been afterward applied, not only to the Issues, but to the Pleas which tendered and produced them. Thus, instead of Pleading the General Issue, the defendant, in certain cases, may effectually answer the Declaration by interposing a Special Plea which creates a Specific Issue. Such an Issue was raised by a Common or Specific Traverse denying some one Material Allegation in the Declaration upon which the Right of Action depends. Many Special Pleas in Bar, however, Admit the Truth of the Plaintiff's Allegations, but allege New or Affirmative Matter in avoidance of their legal operation.. One type of Special Flea, alleging Matter of Estoppel, neither con fesses nor denies the truth of the Declaration, though like other Pleas in Bar, It sets up Matter which defeats the Right of Action. Recoupment and Set-Off assert cross-de?nands due from the plaintiff to the defendant.

It Is generally improper to set up a Defense by a Special Plea which can be shown under the General Issua But in many eases the defendant may be at liberty to show spedaily to the Court matters of defense, not merely consisting in a denial, but introductory of new matter, such as coverture or infancy. Although these may be admissible under the General Issue, yet being matter of justification or excuse, it is convenient to set forth the particular facts relied on as a defense in a Special Plea, which will apprise the Court and the adverse party of the circumstances and nature of the defense, and keep the Facts and the Law distinct.

Pleas which set up no new affirmative matter, but which merely set up evidential facts inconsistent with the plaintiff's *prima facie* case, are said to be argumentative denials and improper. But there is a peculiar species of plea, known as a Special Traverse, which is an exception to the rule.

**THE VARIOUS FORMS OF TRAVERSE OR DENIAL**

216. The different Forms of Traverse or Denial may be classified as:

- (I) The Specific or Common Traverse
- (II) The Special Traverse
- (III) The General Traverse, including
  - (A) The General Issue
  - (B) The Replication De Injuria

A Traverse concludes with a Tender of Issue.

AS previously pointed out, Pleas are of Two General Classes, *viz.*, Dilatory Pleas; and Peremptory Pleas, or Pleas in Bar. Pleas in Bar are said to be either in Denial, that is, by Way of Traverse—or by Way of Confession and Avoidance of the Action—or by Way of *Estoppel*. It will be seen, however, that under the General Issue, Defenses may sometimes be raised of the sort raised by a Plea in Confession and Avoidance, as well as those raised by a Traverse. And of Traverses there are four sorts: *First*, **the** Specific or Common Traverse; *Second*, the Special Traverse; *Third*, the General Traverse, which includes the General Issue and the Replication *De Injuria*. The latter form of the General Traverse will be discussed in the next Chapter,

Where an Ailegation 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, where matter was affirmed on one side and denied on the other, the party interposing the Traverse is generally obliged to offer or refer this question to some Mode of Trial, or as it is said, to Tender Issue. This he does by annexing to the Traverse an appropriate formula, as for instance: "And of this he puts himself upon the

country,” thus proposing a Trial by the country—that is, by a Jury. If the Tender of Issue be accepted by the other Party, the Parties were at issue on a Question of Fact, and the question itself was called the “Issue.” A Tender of an Issue of Fact was and is accepted by what is called a “Joinder in Issue,” or “Similiter,” which consisted of a Form which read thus: “And the said A, as to the Plea of the said B, above Plead, 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 true of the Tender of an Issue in Fact. An Issue of 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.

## Ch. 22

With this general statement in mind, the general rules relating to the Traverse may be considered, and then various Forms of Traverse may be considered in order.

### THE GENERAL REQUISITES OF TRAVERSE

217. The following General Rules apply to the Traverse, without regard to whether, in Form, it is Common, General, or Special:

- (I) The Traverse should generally deny the Opposing Allegation in the Manner and Form in which it is made (*modo et forma*; i. e. 9xt Manner and Form as alleged”); thus putting the opposite Party to Proof in Manner and Form, as well as in general effect.
- (II) 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.
- (III) The Traverse must not involve an Estoppel against the Party Pleading it.

THE different kinds or Forms of Traverse having been previously explained, we shall here take up certain Rules as to the Manner of Pleading Denials.

### *Form of Denial*

IT is customary in a Traverse to deny the Allegation in the Manner and Form in which it is made, and therefore to put the opposite party to prove it to be true in Manner and Form, as well as in general effect. Accordingly, he is often exposed at the Trial to the danger of a Variance by a slight deviation in his evidence from his Allegation. This doctrine of Variance, says Stephen, is founded **on the strict quality of the Traverse here stated.**’ This strictness is so far modified

436

### DEFENSIVE PLEADINGS

1. Stephen, A Treatise on the Principles of Pleading  
In Civil Actions, - II, Of the Principal Rules of

### PLEAS—PEREMPTORY OR IN BAR

Sec. 217

that it is, in general, sufficient to prove accurately the substance of the Allegation, and a deviation in point of mere Form or in Matter quite Immaterial will be disregarded. The general principle is that the Traverse brings the fact into question, according to the Manner and Form in which it is alleged, and that the opposite Party must consequently prove that, in Substance at least, the Allegation is accurately true. The existence of this principle is indicated by the wording of a Traverse, which, when in the negative, generally denies the last pleading mode *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 Fist 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.<sup>2</sup>

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? A Denial of

Pleading, 219 (Edited by Williston, Cambridge, Mass., 1895).

~ Comyn, Digest, Pleader, 0. 1 (London 1522); *Nevill and Cook's Case*, 2 Leon. 5, 74 Eng.Rep. 310 (1589).

3. *Bonnet v. Flikins*, 1 WmsSaund. 23, *ii. 5*, 85 Eng. Rep. 20, 24 (1666).

-See, also, the following cases: English: *ICenleot v.*

*Bogan*, Yelv. 200, 80 Eng.Rep. 131 (1610); *Priddle &*

*Napper's Case*, U Coke 10b, 77 Eng.Rep. 1155

(1612); *Richardson v. Mayor & Coinmonalty of*

*Orion*, 2 31.11. 182, 126 Eng.Rep. 496 (1703); *Hobson v. Middleton*, 6 Barn. & C. 297, 108 Eng.Rep. 461

(1527); *Seymour v. Maddox*, 16 48. 320, *117 Eng.*

437

**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.' Upon the same principle, if a Matter be Alleged in Pleading, "by reason whereof" [*virtute cujus*] a certain legal inference is drawn, as that the plaintiff "became seised," etc, or the defendant "became liable," etc., this *virtute cujus* is not Traversable, because, if it be intended to question the Facts from which the seisin or liability is deduced, the Traverse should be applied to the Facts, and to those Only; and, if the legal inference be doubted, the course is to Demur.

*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.<sup>6</sup> For example, in answer to an

Bcp. 004 (255~ *Russell's Case*, 1 Dyer 2Gb, p1. 171,

73 Eng.Rep. 59 (1536); *Grills v. Mannell*, Wines 378,

125 Eng.Rep. 1223 (1742); New York: *Fosliny v.*

*fiche*, 2 Hill (Nt) 247. (1842).

4, *Richardson v. Mayor & Coinmonalty of Orion*, 2

31.11. 182, 126 Eng.Rep. **406 (1793).**

S. Euer, *Doctrina Placitandi*, 351 (London, 1677); *Priddle & Napper's Case*, U Coke 10b, 77 Eng.Rep. 1155 (1612).

6. *Rennet v. Filkina*, 1 Wms.Saund. 23, a. 5, 55 Eng. Rep. 20, 24 (1600); *Deal v. Simpson*, 1 LdRnym, 4i2, 91 Eng.Rep. 1171 (1698);

*Warden & Cominonalty of the Mystery at Grocers v. Archbishop of Canterbury*, 3 Wils. KB. 221, 95 Eng.Rep. 1023 (1771); *Lucas r.*

*Noekells*, 4 Bing. 729, 130 Eng.Rep. 950 (1828);

438

**DEFENSIVE PLEADINGS**

Ch. 22

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."<sup>7</sup> 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 “Matters of Law, or rather Matter of Right (as is this) resulting from Facts.” 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.<sup>o</sup>

*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.<sup>10</sup> 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 1 200 on demand if he did not take her to wife, and Alleged in her Declaration that, though she had tendered herself to marry the

Drewe v. Lainson, 11 Ado, & 13, 538, 113 Eng.Rcp. 5110 (1840).

7. Deal v. Simpson, 1 Ld.flnyrn. 412, 91 Eng.llep. 1171 (1608),

8. Warden & Conirmonalty of the Mystery of Grocers v. Archbishop of Canterbury, 3 Wils. 1CR. 221, 234, 95 Eng.llep. 1023, 1030 (1771).

9. Ibid.

10. Rex v. ICilderhy, 1 Wrns. Sound. 311, 3124, a. 4, 85 Eng.Eep. 428; 4-33 (1669); Crosse v. Hunt, Carth. 00, 90 Er.g.Rep. 062 (1688); Powers v. Cook, 1 Ld.Raym. 63, 91 Eng.Rep. 938 (1005); Worley v. Harrison, 3 Adol. & F. 660, 111 Eng.llep. 508 (1835); Bii-d v. Bolman, 9 Mees. & \V. 761, 152 Eng.llep. 322 (1842).

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 wile 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 plainff had not affirmed.<sup>11</sup> 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 *abs que 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 subsqquent grant of Letters of Administration. But the Court held the Plea good in that respect; and I-Jolt, 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 riot Alleged in his Declaration.”<sup>12</sup>

ii. Crosse v. Bunt, carth. 00, 90 Eng.llep. 662 (1688),

12. Powers v. Cook, 1 Ld.Raym. 03, 01 Eng.Rop. 938 (1605).

**Sec 215**

**PLEAS—PEREMPTORY OR IN BAR**

439

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.’~ Thus, in Replevin for taking cattle the defendant made Cognizance that A was seised of the close in question, and, by his command, the defendant took the cattle *damage feasant*. The plaintiff Pleaded in Bar that he himself was seised of one-third part, and put in his cattle *abs*

*que hoc*, “that the said A was sole seised.” On Demurrer, it was objected that this Traverse was taken on 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.” 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 *Mocto et F’orma*, 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.<sup>5</sup> 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,

11. Rex v. Kilderby, 1 Wms.Saund. 311, 3124, n. 4, 85 Eng.Bep. 428, 433 (1669); Gilbert v. Parker, 2 Salk, 629, 91 Eng.Rep. 532 (1704); Meriton v. Briggs, 1 Ld. Raym. 39, 91 Eng.Rep. 922 (1695).

14. Gilbert v. Parker, 2 Salk. 629, 91 Eng.Eep. 537 (1704).

16. Robinson v. Corbett, 1 Let. 662, 125 Fog. Rep. 344 (1699); Taylor v. Needham, 2 Taunt. 278, 127 Rug. Rep. 1084 (1810).  
allegation, or denial to the contrary, and this preclusion is called an “Estoppel.” It may arise either from Matter of Record, from the Deed of the Party, or from Matter in Pais; that is, Matter of Fact.

It is from this Doctrine of Estoppel, apparently, that the Rule as to the mode of Traversing deeds has resulted, for though a Party against whom the deed is alleged may be allowed, consistently with the Doctrine of Estoppel, to say “*Non Est Factum*,” viz, that the deed is not his, he is, on the other hand, precluded by that doctrine from denying its effect or operation; because, if allowed to say “*Non Concessit*” or “*Non Demisit*,” when the instrument purports to grant or to demise, he would be permitted to contradict his own deed. Accordingly, it will be found that in the case of a person not a Party, but a Stranger, to the deed, the Rule is reversed, and the Form of Traverse in that case is “*Non Concessit*,” etc.; the reason of which seems to be that Estoppels do not hold with respect to strangers.

## **MATERIALITY OF THE TRAVERSE**

215. A Traverse must not be taken on an Immaterial Allegation. This rule prohibits a Traverse;

(I) On Matter that is Irrelevant or Insufficient in Law;

(II) On Matter that is Prematurely alleged;

(III) On Matter of Aggravation;

(IV) On mere Matter of Inducement

THIS rule prohibits a Pleader from Traversing on Matter that is either Irrelevant or Insufficient in Law.<sup>7</sup>  
Thus, in Debt for Rent

10. Taylor v. Needham, 2 Taunt. 278, 127 Eng.Rep. 1084 (1810).

1084 (1810).

11. English: Serjoant v. Fairfax, 1 Lov, 32, 83 Eng. Rep. 283 (1061); Kent and Rail, Nob. us, 80 Lug. Rep. 262 (1600); Bridgwater v. Bythway, 3 Let. 113, 83 Eng.Rep. 602 (1682); Connecticut: Parish v. Stanton, 2 Root (Conn.) 155 (1704); New Hampshire: Thompson v. Fellows, 21 N.H. 425 (1850);

440

## **DEFENSIVE PLEADINGS**

Cl. 22

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.<sup>8</sup> 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.<sup>9</sup> 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 *mollit sr mantis 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.<sup>10</sup>

The Rule also prohibits a Pleader from Traversing on Matter which, though not **Immaterial** to the case, is prematurely alleged.<sup>21</sup>

New York: Rogers v. Lurk, 10 John~. (New Yoric) 400 (1813).

18. Serjeant v. Fairfax, 1 Lev. 32, 83 Eng.Rep. 283 (1661).

19. Kent and Hall, Rob. 113, 80 Eng.Rep. 262 (1600).

20. Bridgewater v. Bythway, 3 Lev. 113, 88 Eng.Rep. 602 (1682).

21. Sir Ralph Bovy's Case, 1 Vent. 217, 86 Eng.Itep. 146 (1672); Ricketts v. Loftus, 14 Q.B. 482, 117 Eng. Rep. 188 (1849); Middlcton v. Craveley, i2 Price 513, 147 Eng.Rcp. 794 (1823).

Thus, If, in Debt on Bond, the plaintiff should declare that, at the 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.<sup>22</sup>

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.<sup>23</sup>

And where Matter of Inducement is sb leged, which is not essential to the substance of the case, but only explanatory of the main Allegations, a Denial would be unriecessary.~ It is otherwise, however, when such matter is **not merely explanatory. If essential, though** in the Nature of Inducement, it may still be Traversed.<sup>25</sup>

22. Sir Ralph llovy's case, 1 Vent. 217, 86 Eng.Itep. 148 (1672).

23. Leech v. Widsley, 1 Vent. 54, 86 Eng.Rep. 38. (1669).

24. 5 Bacon, New Abridgment, Pleas and Pleading, 11. 5, 586 (Philadelphia, 184a); Spaeth v. Hare, 0 Mees. & W. 326, 1~2 Eng.Rep. 138 (1842). 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 sari 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. Comyrt, Digest, Pleader, G. 14 (London 1822); The Protector v. Bolt, tlardres 68, 145 Log. Rep. 385 (1856).

25. Rimeraly v. Cooper, Cro.E11z. 168, 78 Lng.Rop.. 426 (1589); Carvike y. Blagravo, 1 Brod. & 13. 531, 129 Eng.Rep. 827 (1819). Thus, where the plaintiff declared, in Trespass on the Case for slander, that

## SELECTION OF ISSUABLE PROPOSITION

219. Where there are Several Allegations, all of which are Material, the Party may Traverse any one he pleases.

THE Principle of this Rule is that where the case of any Party rests upon Several Allegations, each of which is essential to its support, it may be as effectually destroyed by controverting one part as another.<sup>20</sup> 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.<sup>21</sup> Again, in Trespass, if the defendant Pleads that *A* was Seized, and enfeoffed *B*, who enfeoffed *C*, who enfeoffed *D*, whose estate the defendant bath, the plaintiff may Traverse whichever of the feoffments he pleases.<sup>28</sup> 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* see in another place, those not expressly denied are taken as admitted.<sup>20</sup>

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*.

26. *Comyn, Digest, Pleader*, 0. 10 (London, 1822). See, also, the following cases: English: *Moor v. J'ndsey*, 1-Iardreg 210, 145 Eng.flep, 475 (1602); *Young v. Rudri*, Carth. 847, 90 Eng.Rep. 803 (1695); *He3'doa v. Thompson*, 1 Ado?. & B. 210~ 110 EngEep. 1186 (1834); *Learmonth v. Grandine*, 4 Mees. & W. i15\$, 150 Eng.Rep. 1585 (1830); *Read's Case*, C Coke 24, 77 Eng.Ilep. 289 (1600); *Young v. Ruddle*, 2 Salk. 627, 91 Eng.Rep. 530 (1695); *Baker v. Blackman*, Oro.Jac. 082, 79 Eng.Rep. 591 (1623); Illinois: *Hopkins v. Medley*, 02 Ill. 402 (1881).

27. *Moor v. Pudsey*, Bardres 316, 145 Eng.Rep. 475 (1002). See, also, *Comyn, Digest, Pleader*, 0. 10 (London, 1822).

-. *Luer, Doctrina Placitandi*, 365 (London, 1677)-

29. *Toland v. Sprague*, 12 Pet. (U.S.) 335, 9 *LEd*, 1093 (1838).

## DENIAL OF THE ESSENTIALS ONLY

220. A Traverse must not be Too Large, nor, on the other hand, too Narrow.

**Qualification—A Material Allegation** of Title or Estate may be Traversed as Alleged, though stated with unnecessary particularity.

AS a Traverse must not be taken on an Immaterial Allegation, so, when applied to an Allegation that is Material, it should take in no more and no less of that Allegation than is necessary to raise a Material Issue. If it involves more than some essential proposition of operative fact, it is said to be too large; if less, too narrow.

*Traverse Too Large*

IN the first place, it must not be too large.m It may thus be too large by involving in the Issue circumstances of time, place, quantity, etc., which are Immaterial to the Merits of the particular case, though forming part of the Allegation Traversed. Thus, in an Action of Debt on a 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, con-o. *Comyn, Digest, Pleader*, C. 15 (London, 1822).

See, also, the following cases: English: *Comorne v. Stockdale*, 1 Str. 493, 93 Eng.Bep. 655 (1721); *Lane v. Alexander*, Cro.Jac. 202, 70 Eng.Rep. 177 (1607); *Goram v. Sweeting*, 2 Saund. 206, 85 Eng. Rep. 901 (1070); *Osborne v. Rogers*, 1 Sannd. 267, 85 Eng.Rep. 318 (1669); *Arlett v. Ellis*, 7 Barn. & C. 846, 108 Eng.Itep. 752 (1821); *Palmer v. BUns*, 2 Str. 817, 03 Eng.Rep. 869 (1728); *Stubbs v. Lainson*, I Moos. & \V. 728, 150 Eng.Rep. 027 (1836); *Thurman v. Wild*, 11 Adol. & E. 453, 113 Eng.Itep. 487 (1840); California: *Caulfield v. Sanders*, 17 Cal. 569 (1801); Illinois: *Wadhams v. Swan*, 109 111. 46



(1834); New Hampshire: Thompson v. Fellows, 21  
Nil. 425 (1850); New York: Rogers v. Rink, 10  
Johns, (N.Y.) 400 (1813); Davison v. Powell, 16 How.  
Er. (N.Y.) 461 (1858); Wisconsin: Schaezsl t.  
Germantown Farmers' Mut. Ins. Co., 22 Wis. 412

(1.865).

*It is a mistake to cover by denial, not only the Material Allegations necessary to support the plaintiff's Cause of Action, but also some immaterial quali. caflons of the Allegation. English: Lush v. Ruesell, 5 Exeb. 203, 155 Eng.Rep. 87 (1850); Vermont: Briggs v. Mason, 31 Vt 433 (1859).*

442

## DEFENSIVE PLEADINGS

Cii. 22

trary 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.<sup>31</sup> So where the plaintiff Pleaded that the Queen, at a Manor Court, held on such a day by L 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 allege<sup>32</sup>

Again, a Traverse may be Too Large by being taken in the Conjunctive instead of the Disjunctive, where it is not Material that the Allegation Traversed should be proved Conjunctively. Thus, in an Action of Assumpsit **the plaintiff** declared on a policy of insurance, and averred "that the ship insured did not arrive in safety, but that the said ship, tackle, apparel, ordnance, munition, artillery, boat,

<sup>31</sup> Colborne v. Stoekdale, 1 Str. 493, 93 Eng.Rep. 655 (1721).

U. Lane v. Alexander, Cro.Jac. 202, 79 Eng.Rep. 177

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." ~

### *Traverse Too Large—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.<sup>33</sup> 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 *denjesne*

<sup>33</sup> Goram v. Sweeting, 2 wms.saund. 206, 85 Rag. Rep. 991 (1670). And, see also, Stubbs v. Lninson, 1 Meea. & W. 728, 150 Eng.Rep. 627 (1836); California: Richardson v. smith, 29 Cal. 529 (1866).

On the negative pregnant, see Jones v. Jones, 16 Moos. & W. e9B, 153 Eng.Bep. 1371 (1847); 31 Cyc. 203—205 2 Standard Enc.Proc. Answers, 56—59.

31. Comyn, Digest, Pleader, 0. 16 (London, 1822).  
 English: Sir Francis Leake's Case, 3 Dyer 30-19. 73  
 Eng.Rep. 819 (1578). Goram v. Sweeting, 2 Wms.  
 Saund. 205, 206a, n. 22, 85 Eng.Rep. 991, 992 (1670);  
 Wood v. Eudden, Rob. 119, 80 Eng.Rep. 269 (1610);  
 Tatem v. Perient, Yel. 195, 80 Eng.Rep. 128 (1610);  
 Webb v. Ross, 4 Hurl. & N. 111, 157 Eng.Rep. 778  
 (1859); Smith v. Dixon, 7 Adol. & B. 1, 112 Eng.Rep.

371 (1837).

(1607).

**Sec. 220**

**PLEAS—PEREMPTORY OR IN BAR**

443

as of fee of *B.* close, adjoining to the place in which, etc.; that *Sir F. L.* was bound to repair the fence between *B.* close and the place in which, etc.; and that the cattle escaped through a defect of that fence. The defendant Traversed that the plaintiff was seised in his *demesne* as of fee of *B.* close, and on Demurrer the Court was of opinion that it was a Good Traverse; for, though a less estate than a seisin in fee would have been sufficient to sustain the plaintiff's case, yet as the plaintiff, who should best know what estate he had, had Pleaded a seisin in fee, his adversary *was* entitled to Traverse the Title so laid.<sup>35</sup> 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 Toflard 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 that now takes the exception, for he puts in his Plea more than he needed, scil., 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."<sup>38</sup>

*Traverse Too Narrow*

A TRAVERSE must not be Too Narrow)<sup>1</sup> Of a Traverse that is Too Narrow, the following is an example: In an Action of Assumpsit brought for a compensation for the plaintiff's service as a hired servant, the plaintiff alleged that he served from March 21, 1647, to November 1, 1664. The defendant Pleaded that the plaintiff continued in the service till December, 1658, and then voluntarily quitted the service, without this, that he served until November 1, 1664. This was a Bad Traverse; *for*, as the plaintiff **in this Action for Damages** is entitled to compensation *pro tanto* for any period of service, it is obviously no answer to say that he did not serve the whole time alleged)<sup>8</sup> 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 *B.C.* only, dropping *E.G.*; but the Court held that the Traverse could

38. Wood v. Budden, Rob. 119, 80 Eng.Rep. 269 (1616).

37. Osborne v. Rogers, 1 Wms.Saund. 264, 289, n. 1, 85 Eng.Rep. 322, 325 (1670); Morewood v. Wood, 4 T.R. 157, 100 Eng.Rep. 948 (1791); Bradburn v. Kennerdale, Carth. 164, 90 Eng.Rep. 1196 (1688); Richards v. Peake, 2 Barn. & C. 918, 107 Eng.Rep. 623 (1824).

35. Sir Francis Leake's Case, 3 Dyer 364b, 73 Rng.Rep. 819 (1578).

38. Osborne v. Rogers, 1 Wms.Snund. 264, 269, n. 1, 85 Eng.Rep. 322, 325 (1670).

## DEFENSIVE PLEADINGS

CE 2~

not be so confined, and must be taken on the whole prescription as laid.<sup>39</sup>

### NEGATIVES AND AFFIRMATIVES PREGNANT<sup>46</sup>

221. These are Statements of Fact, either in a Negative or Affirmative Form, which carry **within 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 für **Ambiguity**.

THE doctrine of Negatives and Affirmatives Pregnant appears most properly to arrange itself under the head of ambiguity or evasiveness. The principle underlying the Rule against a Negative Pregnant has not been always clearly and satisfactorily explained **in the various treatises**. This seems true even though the older cases reveal that the fault was a frequent ground of objection. Thus, as early as the year 1449, in the case which appeared in a Year Book,<sup>41</sup> in an action for negligently keeping a fire, by which 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, as it had *Two* Intendments,—one, that the houses were not burned; the other, that they were burned, but

89. Morewool v. Wood, 4 TB. 157, 100 Eng.Rep. 948 (1791).

40- In general, on the subject of Negatives and Affirmatives Pregnant at Common Law, and under Modern Codes, Practice Acts and Rules of Court, see:

**Treatises:** Stephen, A Treatise on the Principles of Pleading In Civil Actions, c. IT, Of the Principal Rules of Pleading, § 5, pp. 335—337 (3d Am. ed. by Tyler, Washington, 3). C., 1900); Shipman, Handbook of Common-Law Pleading, e. xvii, General Rules Relating to Pleas, § 251 (3d ed. by Ballantine, St. Paul, 1923); Fowles, Code Remedies, c. IV, §~ 509—514 (4th ed. by Bogle, Boston, 1904).

Comments: Rule of Negative Pregnant *In* Pleading Applies only to Averment of Material Facts, 83 Cent. U. 145 (1916); Pleading—Negative Pregnant, 18 Ky.L3. 394 (1930).

41. 28 Hen. VI, 7 (14-49).

not by negligent keeping of the fire; and so it was a Negative Pregnant. The same ground, that is, that of ambiguity, was taken in a case in the early part of the Reign of Edward II (1307—1327).<sup>42</sup> These two cases are believed to be the earliest authorities on the rule itself. And what is found in the later books on the subject tend to support the same view.

A Negative Pregnant, therefore, may be defined as such a form of Negative Expression as may imply, or carry with it, an Affirmative, or to put the matter in another way, it is a Specific Denial which apparently Denies a Material Allegation, but which in fact leaves an Affirmative Allegation standing admitted, whereas an Affirmative Pregnant is an Affirmative Allegation implying a **Negative**.<sup>43</sup> To illustrate the Negative Pregnant, let us take two cases, one in which the issue is Immaterial and one in which the issue is Material. Suppose, in the first case, that A alleges that B went out into the rain without an umbrella, and then B Specifically Traverses or Denies that he went out into the **rain without an umbrella**. Has he denied that he went out into the rain? He has not. In

4-- 7 Edw. U, 213, 226 (1313).

42. Blachmore v. Tiddlerley, 2 Ld.Raym. 1099, 92 Eng Rep. 228 (1704); Macfadzen v. Olivant, 6 East 387, 102 Eng.Rep. 1335 (1805).

“Such a denial is one pregnant with the admission of the Substantial Fact which is apparently controverted; or In other words, one which, although in the Form of a *Traverse*, really admits the important fact contained In the Allegation

“Denials In the Form of a Negative Pregnant arise (1) when the Allegation is of a Single Fact, with some qualifying or modifying circumstances, and the Traverse is *in ipsiis verbis*, using exactly the same-language, and no more; (2) when the Allegation is of several distinct and separate facts or occurrences connected by the copulative conjunction, and the-traverse Is *in ipsiis verbis* of the same facts and occurrences also connected by the same conjunction.” *Cumow v Phoenix Ins. Co.*, 46 S-C. 70, 94,24 S.E. 74~ 77 (1896). Thus, If the defendant Is charged with taking a horse and a mule, a denial that he took the horse and the mule Is a Negative Pregnant;

PLEAS—PEREMPTORY OR IN BAR

445

this instance the Issue is Immaterial But suppose that *A* alleges that *B* struck him over the head with a hickory stick, and then that *B* Specifically Traverses or Denies that he struck *A* **over the head with a hickory stick**, Has *B* **denied that he struck *A***? The answer is no, and in this case the defendant, by the Form of his Plea, has left Affirmatively Standing a Material Allegation, to wit, the striking.”

Such a Mode of Pleading was deemed faulty under the Rule that such an Ambiguous Form of Expression must be strictly construed against the Pleader. Thus, in the early case of *Myn v. Cole*,~~ in Trespass for Entering *A*’s house, *B*, the defendant, Pleaded that the plaintiff’s daughter gave him a License to do so, and that he entered by that License. In the Replication *A* stated that **he did not Enter by her License**, This was considered as a Negative Pregnant. It will be observed that this Form of Traverse may imply, or carry within it, that a License was given, though the defendant, *B*, did not Enter by that License. It is, therefore, in the Language of Pleading, said to be Pregnant with that Admission, that is, 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.<sup>46</sup>

44- In *Baker v. Balley*, 16 Barb. 54 (1852), under the New York Code of 1848, the administrators of *A*’s estate alleged that *B* assaulted *A* on a certain day at a certain place, and that the assault caused the death of *A*. The answer, among other things, traversed or denied that .8 assaulted *A*, the decedent, on the day alleged. At the Trial, *B* offered evidence to prove that he never assaulted *A* at all. It was held that this Offer of Proof was inadmissible under the Answer, as the Negative Pregnant admitted that the defendant made the assault alleged, but on a different day.

45. Oro.Jac. 87, 79 Engtep. 75 (1605).

46. Stephen, A Treatise on the Principles of Pleading in Civil Actions, a II, Of the Principal Rules of

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 *Abs que 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.<sup>47</sup> If the plaintiff had Replied that the defendant Immoderately Chastised him, the objection would have been avoided; but the proper Form of Traverse would have been *de injuria sua propi--la abs que aliqua tall cansa*. 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 dePleading, § 5, 335 (3d Am. ed. by Tyler Washington,

B. C. 1882); *Blade v. Drake*, Bob. 295, 296, 80 Eng. Rep. 439, 440 (1617), in which the Court declared:

“Therefore the Law refuseth Double Pleading, and Negative Pregnant, though they be true, because they do inveagle, and not settle the Judgment upon one point.”

47. *Aubery v. James*, 1 Vent. 70, 86 Eng.Rep. 49 (1670); See, also: *Utah: Rock Spring Coal Co. v. Salt Lake Sanitarium Aas’n*, 7 Utah 158, 25 P. 742 (1891); Federal: *Ex Pane Wall*, 107 U.S. 265, 2 S. Ct. 560, 27 L.Ed. 552 (1882); *Davis v. Green*, 260 U.S. 349, 43 S.Ct. 123, 67 LEd. 290 (1922).

446

defendant, the lessee, would not deliver possession to any but the lessor, or such persons as should lawfully evict him, the defendant Pleaded, that he did not deliver the possession to any but such as lawfully evicted him. On Demurrer to this Plea, it was Objected that the same was ill, and a Negative Pregnant, and that he ought to have said that such a one lawfully evicted him, to whom he delivered the possession, or that he did not deliver the possession to any; but the Court held the Plea, as pursuing the words of the covenant, good, being in the Negative, and that the plaintiff ought to have Replied, and Assigned a Breach; and therefore Judgment was given against him.<sup>48</sup>

A Denial that a person “carelessly and negligently did an act” is not a Denial that he did the act, and a Denial that a person “negligently” failed to look out for danger, is not a Denial that he actually failed to do so.

“Material Facts alleged Conjunctively must be Denied Disjunctively.” ~ The denial must not be in a Form that raises an Issue of the literal truth of the Entire Allegation, without indicating whether it is claimed to be entirely or only partially false.

#### THE SPECIFIC OR COMMON TRAVERSE

222. The Specific or Common 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. OF the various kinds of Traverses, Specific, Special or General, the most ordinary and the most natural and primitive Traverses~ is the so-called “Common or Specific Traverse.” It consists of a Tender of Issue;

<sup>48</sup>. Pullilt v. Niurl-o1as, 1 Ley. S3, 53 Eng.itep, 300 (11662j).

<sup>49</sup>. White v. East Side Mill Cc., 81 Or, 107, 114, 155 P. 364 (1910), 158 P. 173, 174 (1916).

See, also, Comment: Rule of Negative Pregnant in Pleading Applies only to Averment of Material Facts, 83 *Cent.L.J.* 143 (1910), that is, of a Denial, accompanied by a Formal Offer of the point Denied for decision; and the Denial which it makes is in the Pleader’s Own Language and is by way of express contradiction in Terms of the Allegation Traversed—a point of considerable importance when we come to point out the danger of using the Specific Traverse. Such a Traverse or Denial, which for this purpose are synonymous terms, controverts a Single Specific and Material Allegation of the Pleading to which it is interposed.~°

#### *The Function of a Specific Traverse*

**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 Specific or Common Traverse, would read as follows:

“And the said B, the defendant, by X, his Attorney, comes and defends the wrong and injury when, etc., and says that the said A ought not to have or maintain his aforesaid action against him, the said B, 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 the Manner and Form as the said A hath above complained against him, the said B. 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 Specific or Common Traverse; for if it be opposed to a precedent Negative Allegation, it will, of course, be in the Affirmative. Thus, where

so. But see statement by Martin: ~The Plea must consist In the denial or traverse of one or more facts contained in the Declaration, without which the plaintiff would have no Cause of Action.” Civil Proeedure at Common Law, e. XI, Defences in Bar by way of Traverse, Article 1, § 257, p. 217 (St. Paul, 1905).

#### **Sec. 223**

in Special Assumpsit, the defendant Pleads the Statute of Limitations, saying in his Plea “that he, the said B, did not, at any time within six years next before the Commencement of this Suit, Undertake or Promise in the Manner and Form as the said A hath above complained,” etc., the plaintiff’s Replication Traversing the Plea would be in the Affirmative, thus: “And the said A 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 B, because he says that the said B did, within six years next before the Commencement of this Suit, Undertake and Promise,” etc.

*The Danger of Using the Specific Traverse*

IN Pleading a Specific or Common Traverse, the Pleader was in grave danger of running into either an Argumentative Denial or a Negative Pregnant.

*First*, as to the Argumentative Denial:

An example is found in the famous case of *Gibbons v. Pepper*,<sup>51</sup> where the plaintiff brought Trespass for Assault and Battery, to which the defendant Pleaded that he rode his horse upon the highway, his horse became frightened and ran away with him, and **he couldn’t stop it; that he called to plaintiff** to take care, the plaintiff did not get out of the way, and the horse ran over plaintiff against the will of the defendant. The plaintiff demurred to this Plea, and the Court gave judgment for plaintiff. It may not be considered a proper Plea in Confession and Avoidance, as it did not confess a trespass by defendant and then justify it, but rather alleged, hi effect, that the wrong was committed by the horse. Thus, it could be considered an Argumentative Plea, as there are two affirmatives, the Allegation by the plaintiff of an act done by defendant, and defendst. ~ Ld.Itaym. 38, 91 Eng.1tep. 922 (1695). ant’s Plea that this Act was done by the horse. And, the General Rule is that Two Affirmatives do not make a good Negative.

*Second*, as to the Negative Pregnant: A Negative Pregnant is a Plea which apparently traverses a Material Allegation in the Opponent’s Pleading, but which Affirmatively leaves a Material Allegation standing Admitted, under the theory that whatever is not Denied at the next Succeeding Stage of Pleading stands Admitted. Two examples, previously mentioned, will illustrate the point. A alleges that B went out into the rain without an umbrella. B specifically traverses or denies that he went out into the rain without an umbrella. Has he denied that he went out into the rain? Certainly not. But in this instance the Issue is Immaterial. Now, take a case where the Denial is material. A alleges that B struck him over the head with a hickory stick. B specifically Traverses or Denies that he struck A over the head With a hickory stick. Has he Denied the striking? Certainly not, and this time the Admitted Fact is Material, as that is the Fact which counts in an Action of Trespass for Assault and Battery. Thus, the danger of a defendant running into either an Argumentative Denial or a Negative Pregnant, had a tendency to discourage the use of the Specific Traverse—a procedure which it has been the aim of Modern Pleading to restore.

TILE SPECIAL TRAVERSE

223. The design **of a Special Traverse, as** distinguished from a Specific or Common Traverse, and the General Issue, is to explain or set forth the Grounds of the Denial. The matter set up in the Inducement must **be such as** amounts to a sufficient answer to the Declaration. **The essential parts are:**

(a) **The Inducement.**

(b) **The Denial.**

DEFENSIVE PLEADINGS

(c) **The Verification.**

(I) **The Inducement in a Special Traverse is that Part which consists of an Affirmative Statement, Introductory to or Explanatory of the Denial;** in itself it is an Argumentative or **Indirect Denial;** it must in itself amount to a sufficient Answer in Substance to the Opposing **Pleading;** and it must not consist of a **Direct Denial, nor be in the Nature of a Confession and Avoidance.**

The sufficiency of the Affirmation stated by way of Inducement to constitute a Defense may be tested by Demurrer.

**The Inducement cannot be Traversed unless the denial under the “Absque hoc” clause is bad, for it is a Rule that there can be no Traverse upon a Traverse, unless the first one is bad; nor, subject to the same Exception, can it be answered in Confession and Avoidance.**

(II) **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 Roe” (without this), that, etc.**

(III) **The Special Traverse does not Tender Issue, but concludes with a Verification, thus: “And this the said**

**is ready to Verify.”**

(IV) **Where a Special Traverse is sufficient, the Other Party must Tender Issue, to be accepted by the Party Traversing.**

### *The Essential Requisites of the Special Traverse*

THE Special Traverse had to satisfy Three Requirements as to Form; it consisted of:

*First*, an Inducement containing an Affirmative Statement of New Matter, which constituted an Indirect Denial of some Material Allegation in the Pleading to which it was interposed;

*Second*, the *Absque Hoc* clause, constituting a Direct Denial of the Same Material Allegation and in the Same Language in which it is made; and

*Third*, the Conclusion in which the Party Pleading stated that he was ready to establish the truth of the matters set forth in his Plea, and which went by the name of Averment or Verification.

The foregoing requisites were essential in order for a Special Traverse to be Good as to Form. It was also required that the Indirect Denial contained in the Affirmative Statement by Way of Inducement and the Direct Denial in the *Abs que Hoc* Clause, should relate to the same matter in the Adverse Pleading, according to Gould.<sup>52</sup> It may be observed that it was only a logical conclusion, from the very nature of a Special Traverse, that the Direct Denial of the *Abs que Hoc* Clause was always a Negative Averment, which necessarily required the Party Pleading to it to do so by repeating his Affirmative Averment and Tendering Issue therein.<sup>53</sup>

### *Distinguished from the Specific Traverse— Effect*

**The Traverse** known more commonly as the Special Traverse differs from the Specific or Common Traverse, in that it 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.<sup>54</sup>

52. Gould, A Treatise on the Principles of Pleading, Part III, Of Pleading, Div. V, Of Pleas to the Action, e. III, Of Traverse, 537, 541, M2 (6111 ed. by Will, Albany, 1909).

63 Id. at 541.

54. As to the form of Traverse, see: English: *Brudenell v. Roberts*, 2 Wils. 143, 95 Eng. Rep. 732 (1702); *Palmer v. Ekius*, 2 Ld. Raym. 1550, 92 Eng. Rep. 505 (1728); *Blake v. Foster*, 8 Wils. 487, 101 Eng. Rep. 1505 (1728); Delaware: *Thomas v. Black*, 5 S. Houst. (Del.) 507, 18 A. 771 (1889); Illinois: *Wilcox v. Kinzle*, 3 Scam. (Ill.) 218 (1841); *People ex ret. Maloney v. Pullman’s Palace Car Co.*, 175 Ill. 125, 135, 51 N.E. 664, 64 LBS. 366 (1898); New Hampshire: *Breck v. Blanehard*, 20 N.H. 323, 51 N.H. 222 (1850).

## **Sec. 223**

### **PLEAS—PEREMPTORY OR IN BAR**

449

While it was not ordinarily allowed to Plead Argumentatively what amounted to the General Issue, yet if the defendant were desirous of raising a Question of Law, and referring it to the Court rather than to the Jury, he was allowed, by this curious hybrid Plea known as the Special Traverse, to make an Argumentative Denial. The

Inducement to the Traverse discloses the real nature of the Party's Case and shows the Grounds upon which the Denial proceeds. The Plea Concludes with a Direct Denial under the *Abs que Ilcc* Clause and an offer to Verify.

(1) *The EpeciaZ Traverse—Normal Form.*

—An illustration of how such a Traverse, in its Normal Form, operates will help to make the matter clear. Let us assume that *A*, the heir of a lessor, *L*, brought an Action of Debt against *B*, the lessee, on a covenant to pay rent, the Declaration alleging that the plaintiff's ancestor, *L*, was seised in fee of the land; that *L* demised the land to the defendant *B*, for a certain term of years; that the defendant, *B*, covenanted to pay a certain rent; that *L*, the ancestor of the plaintiff died, that the reversion descended to *A*, the plaintiff; and that the rent became due from *B*, the defendant, to *A*, the plaintiff.

Suppose that *B*, the defendant, opposes the alleged liability, as set forth in 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 *L*, the plaintiff *A*'s ancestor, and his heirs in the Manner and Form as the said *A* hath in his said Declaration alleged. And of this the said *B* puts himself upon the country." This is a Specific or Common Traverse.

Suppose, however, that instead of using a **Specific Traverse, the defendant *B*** pleads that the plaintiff, *A*, ought not to maintain his action "because he says that *L*, the plaintiff's ancestor, **now deceased, at the time of the making of the said indenture, was seized** in his *demesne* as of a freehold, for the term of his natural life, of and **In the said demised**

premises, and continued so seized thereof until and at the time of his death; and that, after the making of the said indenture, and before the expiration of the said term, to wit,

on the                    day of                    , A.D.

at                    aforesaid, the said *L* died; where

upon 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 belonging to the said *L* and his heirs in the Manner and Form as the said *A* hath in his said Declaration alleged. And this the said *B* is ready to verify. Wherefore he Prays Judgment if the said *A* ought to have or maintain his aforesaid action against him."

- The Substance of this Plea is that the plaintiff's ancestor, *L*, was seized 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 (by using the Specific or Common Traverse), he has adopted the Special Form (the Special Traverse), first setting out the New Affirmative Matter, that the plaintiff's ancestor, *L*, was seized 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 the Specific or Common Traverse, Tender Issue, but Concluded, prior to the Hilary Rules in 1834, with the words: "And this the said *B* 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.<sup>55</sup> The Affirmative

65. There never was, apparently, any good reason for concluding this Plea with a verification, thus postponing the tender of the Issue. By the Hilary Rules In 1834, such a Plea was required to conclude to the country; that is, to tender Issue. Martin, Civil Procedure at Common Law, c. XI, Defences in Bar by

## DEFENSIVE PLEADINGS

### Ch 22

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* Clause"; those being the Latin words formerly used, and from which the modern expression, "without this," is translated.<sup>56</sup> 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; that is, prior to the Hilary Rules.

The Regular Method of Pleading in answer to a Special Traverse was to Tender Issue upon it, with a repetition



of the Allegation Traversed. Thus, to the Plea heretofore given by way of illustration, the Replication would read:

“And, as to the said Plea by the said *B* above Pleaded, the said *A*. says that by reason of anything therein alleged he ought not to be barred from having and maintaining his aforesaid action against the said *B*, because the said *A* says that after the making of the said indenture the reversion of the said demised premises belonged to the said *L* and his heirs, in the Manner and Form as the said *A* hath in his said Declaration above alleged. And this he Prays may be inquired of by the country.”

The effect, therefore, of a Special Traverse, is, as in Replevin where the defendant Pleads an Avowry, to postpone the Issue to One Stage of the Pleading later than would be attained by a Specific or Common Traverse, for if the defendant should Deny in the Common Form without an Inducement, and Conclude to the Country, it would only remain

Way of Traverse, § 286, Conclusion of Special Traverse, 243, 244 (St. Paul, 1905).

-6. The denial may be introduced by other forms of expression besides *abaqite koc. Et non* will suffice. Bennet v. J4' Ilkins, 1 Wms.Saund. 20, 85 Eng.Rep. 20 (1666); Walters v. Hodges, *Lut.* 1625, 125 Eng.llep.

684 (1692).

for the plaintiff to add the Similiter, and Issue would therefore be Joined, whereas, on a Special Traverse, the Issue is Not Tendered until the Next Pleading.

(II) *The Special Traverse—Abnormal Form,~—Once* established as a recognized part of the Common Law System of Pleading, the Special Traverse grew in favor. As a result of this development it was adopted in cases where the original reasons for such a Form of Pleading were inapplicable, as in cases where the Inducement included No New Explanatory Matter, but consisted in a mere repetition of the Original Declaration.<sup>57</sup> Thus, for example, in cases of assault, where the defendant Justified his act under a Warrant of Arrest, the plaintiff was permitted to Reply that the defendant of *his own wrong*, made the assault, *without this,—that he had* any Warrant of Arrest to justify his act.

Although this Form of the Special Traverse was Abnormal and a manifest departure from the General Requirements of a Special Traverse as defined by the leading authorities, it nevertheless received the approval of the Courts~ As, however, it was used only occasionally, it has in Modern Times been largely superseded by the Specific or Common Traverse.

#### *Form of Declaration and Special Traverse*

##### **AS the Special Traverse was and is one**

of the most technical Pleas known to the Common Law, its Character and Scope may appear more clearly from a study of its form. Accordingly, a Form of a Declaration, to

57. Stephen, A Treatise on the Principles of Pleading in Civil Actions, c. II, Of the Principal Rules of Pleading, § 1, p. 186 (3d ed. by Tyler, Washington, P. C. 1882).

58. See Martin, civil Procedure at Common Law, e. XI, Defences In Bar by Way of Traverse, 285, Special traverse—Abnormal Form, 242 (St. Paul, 1905), citing as authority the case of Stennel v. Hogg, 1 Wms.Saund. 223, 85 Eng.Rcp. 240 (1669), Sec. 223

#### **PLEAS—PEREMPTORY OR IN BAR**

451

gether with a Special Traverse, are included below:

#### FonM OF DECLARATION

IN THE KING'S BENCH,

Term, in the -year of the reign of King George the Fourth.

*C.D.* was summoned to answer *A.B.*, son and heir of *ES.*, his late father, deceased, of a plea that he keep with the said *AS.*

the covenant made by the said *CD.* with the said *ER.*, 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 *MB.*, 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 *Cii*; and, being so seised, he, the said *ES.*, in his life

time, to wit, on the \_\_\_\_\_ day of \_\_\_\_\_  
in the year of our Lord \_\_\_\_\_ at \_\_\_\_\_

in the county of \_\_\_\_\_ by a certain in-denture then and there made between the said *ES.* of the one part and the said *CD.* of the other part (one part of which said indenture, sealed with the seal of the said *C. D.*, the said *AS.* 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 *CD.*, 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 *ES.*, 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 *CM.* did thereby, for himself, his executors, administrators, and assigns, covenant, promise, and agree, to and with the said *ES.*, 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 *ES.*, 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 *LID*, 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 *AS.*, as son and heir of the said *E. &*; whereby the said *AS.* was seised of the reversion of the said demised premises in his demesne as of fee. And the said *A.E.* in fact says that he, the said *A.Th.*, 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. \_\_\_\_\_, 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 AS.** in fact

452

## DEFENSIVE PLEADINGS

### Ch, 22

**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 *AS.* of dollars; and therefore he brings his suit, etc.

SHIPMAN, Handbook of Common-Law Pleading, 346 (3d ed. by Ballantine, St. Paul 1923).

The following Plea would be a Special

Traverse:

### FORM OF SPECIAL TRAVERSE

IN THE KING'S BENCH,

Term, in the

\_\_\_\_\_ year of the reign of King George the Fourth.

And the said *CD.*, by \_\_\_\_\_, his attorney, comes and defends the wrong and injury, when, etc.; and says that the said *AS.* ought not to have or maintain his aforesaid action against him, because he says that the said *ES.*, 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.*, \_\_\_\_\_, at \_\_\_\_\_, aforesaid, the said *ES.* 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 *Cii* is ready to verify. Wherefore he prays judgment if the **said** *A.B.* ought to have or maintain his aforesaid action against him.

SHIPMAN, Handbook of Common-Law Pleading, 347 (3d ed. by Ballantine, St. Paul 1923).

### *The Use and Object of the Special Traverse*

OBSERVING that “it is remarkable

that no author should have hitherto offered any explanation of the objects for which it [the Special Traverse] was originally devised, and in a view to which it continues to be, in some cases, adopted,” 50 Stephen declares that the general design of a Special Traverse, as distinguished from a Specific or Common Traverse, is to explain or qualify the Denial, instead of putting it in the Direct Form; and there were several different factual situations, in reference to which the Ancient Pleaders seemed to have thought it necessary to adopt this Form of Pleading. 60

(I) *Where the Defendant is Estopped by Some Rule of Law from Making a Direct and Positive Denial.*—In some factual situations as presented in a Declaration, a Direct Denial may be regarded as inappropriate by reason of its opposition to some General Rule of Law. Thus, in the example of a Special Traverse above discussed, it was improper to Traverse in the Specific or Common form, viz., “that after the making of the said indenture the reversion of the said demised premises did not belong to the said *L* and his heirs,” &c., because, by a Rule of Law, **a tenant is precluded, or in the Language of Pleading, Estopped from Alleging that his lessor, *ti*, had no title in the premises demised;** and a general assertion that the reversion did not belong to him and his heirs would appear to be prohibited by the same Rule. A tenant, however, is not by law

-o. A Treatise on the Principles of Pleading in Civil Actions, c. II, Of the Principal Rules of Pleading,

\* 1, p. 180 (34 ed. by Tyler, Washington, ii 0. 1882).

60. Id. at 180, :190.

### **Sec. 223**

### **PLEAS—PEREMPTORY OR IN BAR**

45~

Estopped to say that his lessor had only a particular estate, which has since expired.<sup>o1</sup>

In a case, therefore, in which the Declaration alleged a seisin *in fee* in *I.*, the lessor, and the nature of the Defense was that he had a particular estate only, namely, 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* Clause By such a course the defendant is thus enabled to avoid an objection that might otherwise arise on the ground of Estoppel.

(U) *Where the Defendant Desires to Avoid an Issue of Pact as on a Specific or Common Traverse in Favor of Developing and Submitting Some Aspect of the Con. troversy to the Judgment of the Court as an Issue in Law.*—In some factual situations it may be inexpedient to submit the Issue involved as an Issue of Fact as on a Specific Traverse; it may be more propitious to submit to the question involved to the Judgment of the Court as an Issue in law. There may be many reasons why it might be desirable that, without going to Trial, a litigant bring a question before the Court for determination in the first instance, and for that purpose an Issue of Law should be raised. In such a case, therefore, the Pleader would state the circumstances of the transaction in an Inducement, substituting a Special for a Specific Traverse. The facts thus alleged by Way of Inducement are not subject to Traverse, but may be Demurred to as insufficient in Law to contradict the Declaration. This

operates to submit the case to the Court on the Law without the intervention of a Jury.<sup>62</sup>

• Blake v, Foster, 5 T.R. 487, 101 EngRep. 1505 (1800).

§2. If the Inducement Is Injunctive In Law to show

\* Defense, the entire Plea is bad on a General DoThurrer. People ex rel. Maloney v. Pullman's Palace

(UI) *The Abs que Hoc Clause and the Conclusion with a Verification.*—Although 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 *etbsque hoc* Clause and the Conclusion with a Verification. For it will naturally suggest itself that the Affirmative Matter, in each of the above cases, might have been Pleading *per se*, without the addition of the *Absque Hoc* Clause. So, whether the *Abs que Hoc* were added or not, the Pleading, consistently with any of the above reasons, might have Tendered Issue, like a Specific or Common Traverse, instead of Concluding with a Verification.

These latter Forms were dictated by other principles. The Direct denial, under the *Abs que Hoc* Clause, was made necessary by this consideration: that the Affirmative Matter, taken alone, would constitute only an Indirect, or as it is called in Pleading, an Argumentative Denial of the precedent statement; and under the Rule that Pleadings must be Direct and not Argumentative, all Argumentative Pleading is prohibited. In order, therefore, to avoid the Defect in Form of Argumentativeness, the course adopted was to follow up the Explanatory, Affirmative Statement of Matter by Way of Inducement with a Direct Denial.<sup>62</sup>

With respect to the Verification, this Conclusion was adopted in a Special Traverse, with a view to Another Rule, to the effect that wherever New Matter is introduced into a Pleading it is improper to Tender Issue, hence the Conclusion must consequently close with a Verification. The Inducement setting forth new matter makes a Verification

(1898).

63. 3 Beeves, History of the English Law, c. XXIII, Of Pleading, 584 (Edited by Pinlusion, Philadelphia, 1880); LB. 10 lien. VI, 7, pl. 21 (1432); Courtney v. Phelps, 1 Skl. 301, 82 Eng.Rep. 1119 (1664); Herring v. Jlaclldow, Cro.Dliz. 30, 78 Eng.Rep. 205 (15s3X 454

## DEFENSIVE PLEADINGS

Ch. 22

tion necessary, in conformity with that rule.<sup>64</sup>

*The Thiles for Determining the Sufficiency of a Special Traverse*

THERE were, according to Martin ~ Three Well Established Rules for determining the sufficiency of a Special Traverse as heretofore defined and described.

The *first* rule was that the Inducement in a Special Traverse must **be such as in** itself amounts to a sufficient Answer in Substance to the Last Pleading. 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 *Abs que Hoc* being added merely to put that Denial in a Positive Form, which previously had been made in an Indirect Form. Now, an Indirect Denial amounted, in Substance, to an Answer, without the aid of the *Absque Hoc* Clause, and despite the fact **that it was Argumentative in Form.** It follows, therefore, that an Inducement, when properly framed, must always in itself contain, without the aid of the *Abs qua Hoc* Clause, an Answer, in Substance to the Last Pleading.~ Thus, in our example above, the Allegation that *L* was seised for life, and

64. But see Mactin, Civil Procedure at Common Law, c. XI, Defences in Bar by Way of Traverse, Art. IV, Special Traverse, 286 Conclusion Thereof, 243 (St. Paul, 1005); Gould, A Treatise on the Principles of Pleading, Part III, Of Pleading, Div. II, Rules Applicable to Pleading in General, - II, Miscellaneous Rules: Verification, 323, 324 (6th ed, by Will, Albany, 1909).

65. civil Procedure at common Law', c. XI, Defences in Bar by Way of Traverse, Art. iv, Special Traverse, § 284, Rules for Determining the Sufficiency Thereof, 241, 242, (St. Paul, 1905).

66. Comyns, Digest of the Laws of England, "Pleader," 0. 20 (New York, 1825); English: Pile v. Ricks, Cro.Car. 336, 79 Eng.Rep. 893 (1632); Thorn v. Shering, Cro.Car. 586, 79 Eng.Rep. 1104 (1630); Anonymous, 3 Salk. 353, 91 Eng.Rep. 868 (1697); Connecticut; Fowler v. Clark, 3 Day (Conn.) 231 (1808); New York: Van Ness v. Hamilton, 10 Johns. (N.Y.) 371 (1822).

that estate is since determined, is in itself and in Substance, a Sufficient Answer, as Denying, by Implication, that the fee descended from *L*, the lessor, to *A*, the Plaintiff.

The *second* Rule, which followed from the same consideration, as to the object and use of a Special Traverse, was that the Answer given by the Inducement could be of no other nature than that of an Indirect Denial; the Inducement was bad if it consisted of a Direct Denial.<sup>67</sup> Thus, the plaintiff being bound by Recognizance to pay one *X* £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 *X* one of the said installments of £50, but that *X* was not there to receive it. To this the defendant Pleaded that *X* was ready at the place to receive the £50, *Abs que hoc*, that the plaintiff was there ready to have paid it. The plaintiff Demurred on the ground that the Inducement alleging *X* to have been at the place ready to receive contained a Direct Denial of **the plaintiff's precedent** allegation that *X* was not there, and should therefore have Concluded to the Country, without the *Abs qua Hoc* Clause, and Judgment was given accordingly for the plaintiff.<sup>68</sup>

The *third* rule was that the answer given by the Inducement must not be in the Nature of a Plea in Confession and Avoidance.<sup>69</sup> Thus, if the defendant, *B*, makes title as the assignee of a term of years of *X*, and the plaintiff, *A*, in answer to this, claims under a prior assignment to himself from *X* of the same term, this is a Confession and Avoidance; for it admits the assignment to the

67. Stephen, A Treatise on the Principles of Pleading in Civil Actions, e. II, Of the Principal Rules of Pleading, 1, p. 196 (3d ed. by Tyler, Washington DC. 1882).

68. Hughes v. Phillips, Yelv. 35, SO Eng.flep. 28 (1603).

69. Comyns, Digest of the Laws of England, "Plead-Cr" 0. 3 (New York, 1825); Lambert v. Coolr, I Lii. itayns 238, 91 Eng.Rep. 1055 (1697); Huller v. Why-tier, Cro.Eliz. 650, 78 Eng.Rep. 889 (1599).

**Sec. 223**

**PLEAS—PEREMPTORY OR IN BAR**

455

defendant, *B*, but seeks to avoid its effect, by showing the prior assignment. Therefore, if the plaintiff, *A*, Pleads such assignment to himself by Way of Inducement, adding, under an *Absque Hoc*, a Denial that *X* 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.

Still a *fourth* Rule may be added, which Martin<sup>70</sup> says was more distinctively a Rule of Practice, resulting from the Nature of an Inducement. The Rule was that with respect to Special Traverses, the Opposite Party has no right to Traverse an Inducement, or, as the Rule is more commonly expressed, there could be no Traverse upon a Traverses' Thus, in the example given above, if the Replication, instead of reaffirming the matter denied in the *Absque Hoc* Clause, had Traversed the Inducement either in the Special or Common form, denying that *L*, the lessor, 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 for **the Rule is both Formal and Technical.**<sup>72</sup> By the first Traverse a matter

**is denied by one of the parties which had been alleged by the other, and which, having**

19. civil Procedure at Common Law, c. XI, Defences in Bar by Way of Traverse, Art. IV, Special Traverse, § 284, Rules for Determining the Sufficiency Thereof, 242 (St. Paul, 1905).

11. Comyns, Digest of the Laws of England, "Pleader" 0. 17 (New York, 1825); English: Anonymous, 3 Salk. 353, 91 Eng.ltep. 868 (1697); King v. Bishop of Worcester, vaughan 62, 124 Eng.Rep. 967 (1669); Dighy 'v. Pitzharbert, Bob. 104, 80 Eng.Rep. 253 (1615); Thorn v. Shering, Cro.Car. 586, 79 Eng.ltep. 1104 (1639); Illinois: People v. Central Union Tel. co., 232 Ill. 260, 83

N.E. 829 (1908); *People v. Strawn*, 265 111. 292, 106 N.E. 840 (1914); Massachusetts: *Gerrish v. Train*, 3 Pick. (Mass.) 124 (1825); New York; *Presser v. Woodward*, 21 Wend. (N.Y.) 205 (1839), once alleged it, the latter is bound to maintain, instead of prolonging the Series of the Pleadings and retarding the Issue by resorting to a new Traverse.

This Rule is, however, 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 *Abs que Hoc* of the first Traverse be Insufficient in Law, it may be passed by, and a new Traverse taken on the Inducement.<sup>73</sup> Thus, in an Action of Prohibition, the plaintiff declared he was elected and admitted as one of the Common Council of the City of London, but that the defendants delivered a Petition to the Court of Common Council, complaining of an undue election, and suggesting that they themselves were chosen; whereas (the plaintiff alleged) the Common Council had No Jurisdiction to examine the validity of such an election, but the same belonged to the Court of the Mayor and Aldermen. The defendants Pleaded that the Common Council, time out of mind, had authority to determine the election of Common Councilmen; and that the defendants being duly elected the plaintiff intruded himself into the office; whereupon the defendants delivered their Petition to the Common Council, complaining of an undue election; without this, that the Jurisdiction to examine the validity of such election belonged to the Court of 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 defendants Demurred, and the Court adjudged that the first Traverse was bad, because the question in this

13. Cornyns, Digest of the Laws of England, "Pleader," G. 18, 19 (New York, 1825); English; *Thrane v. Bishop of London*, I Bill. 377, 126 Eng. ltep. 221 (1790); *Richardson v. Mayor & Commrnrlty of Or-ford*, 2 111.11. 186, 126 Eng. ltep. 498 (1703); *Crosse v. Hunt*, Carth. 99, 90 Eug.Rop. 662 (IOSS); *Rex v. Bolton*, I Str. 117, 93 Eng. ltep, 421 (1718),  
72. *People v. Central Union Tel. co.*, 232 Ill. 260, 83 N.E. 829 (1908).

456

## DEFENSIVE PLEADINGS

CIt 22

Action of Prohibition was not whether the Court of Mayor and 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 *.tbsque 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 *Abs que 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 *Abs que 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 *Abs que Hoc* be good, for this insufficiency in the Inducement.

### *The Use of the Special Traverse at the Present Time*

HAVING explained the Form, the Effect, and the Use and Object of a Special Traverse, it remains to show in what cases this Method .01 Pleading **is or ought to be** applied at the present day. First, it is observed by Stephen,

**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 plea of Special Traverse has** never been applied, and which have always been and still are the subjects of Traverse in the Common Form exclusively.<sup>14</sup> These it is not easy to enumerate or define; they are determined by the course of precedent, **and in that way become known to the practitioner. On the other** hand, in many cases where the Special Traverse used anciently to occur, it is now no longer practiced. Even when

the formula was most in repute, the use of this species does not appear to have been regarded as matter of necessity; and, **in cases which admit or require no Allegation of New Matter**, we find the Special and the Common Traverse to have been indifferently used by the Pleaders of those days. But in Modern Times the Special Traverse, without an Inducement of New Matter, has been considered, not only as unnecessary, but as frequently improper. As the taste in Pleading gradually simplified and improved, the prolix and dilatory effect of a Special Traverse brought it into disfavor with the Courts; and they began, not only to enforce the doctrine that the Common Form might allowably be substituted in cases where there was No Inducement of New Matter, but often intimated their preference of that Form to the other.<sup>75</sup>

There is a tactical disadvantage to the Pleader, in the use of the Special Traverse, that the Inducement tends to open the real nature of the party's case, by giving notice to his adversary of the precise grounds on which the Denial proceeds, and thus facilitates to the latter the preparation of his Proofs, or enables him to test the Grounds of Defense by Demurrer. And even though the case be

74. *Borne v. Lewin*, 1 Lditaym. 041, 91 Eng.Rep.

1328 (1700).

7th RobInson v. I<sup>4</sup>aley, 1 Burr. 320, 97 Ellg.Itop. 330 (3757).

## Sec. 224

### PLEAS—PEREMPTORY OR IN BAR

457

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 allowable when the case is such as admits of an Inducement of *New Matter*, except in certain instances 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.

#### TUE GENERAL ISSUE—ITS NATURE AND USE

##### 224. The General issue is a Denial of the

Legal Conclusion sought to be drawn from the Declaration.

It Denies by a General Form of expression the defendant's liability, and enables the defendant to contest, without Specific Averments of the Defense to be asserted, most of the Allegations which the plaintiff may be required to prove in order to sustain his action, and in some actions to raise also various Affirmative Defenses. It fails to perform the Functions of **Pleading, either in giving Notice or in** reducing the case to Specific Issues.

#### *The Nature and Use of the General Issue*

WHILE the Specific or *Common* Traverse is of frequent occurrence, there is another class of Traverse which, from its great importance and use, requires particular study. This form of Traverse is known as the General issue, under which, in most of the *Modern* Common-Law Actions, there is an appropriate Form of Plea fixed by Ancient Usage, as the proper method of Traversing the Declaration, where the defendant means to deny the defendant's liability. This Form of Traverse appears to have been so called because the issue that it Tenders is of a more general and comprehensive character

**than that tendered by** the Specific or Common Traverse. The General Issue, which is one of the two General Traverses, the Replication De Injuria <sup>76</sup> being the other, differs from the Specific or Common Traverse in that it Denies by a General Form of expression, such as "Not Guilty," the defendant's liability, instead of Denying some Specific Allegation of Fact on which his liability depends. Or, put in a slightly different way, it differs in two respects:

*First*, in Point of Form, the General Issue Traverses, not by words of Direct Denial, but, as Professor Keigwin says, "by a fixed phrase of compendious negation", such as *Nil Debet* in Debt or *Non Assumpsit* in

Special or General Assumpsit; and

*Second*, it generally operates to Deny and thus places in Issue, not a Single, Material Allegation, but all the Essential facts which constitute the plaintiff's cause of action,<sup>n</sup>

As thus developed, the Scope and Effect of the Plea by way of the General Issue assumes great significance, as the Tender of Issue thus made on the Declaration operates to close the Pleadings, and to enable the defendant to escape from the earlier requirement that he must rest his Defense

**on a Single, Material Allegation, thereby, from** the defendant's point of view, facilitating the progress of the cause. It should be observed, however, that the General Issue was in Form a Specie of "Licensed Duplicity, in that by such a Plea the defendant, into *flatu* [at one breathil Denies all the Several Facts alleged in the Declaration." ~ Thus, the General Issue provides a brief and convenient form of Plea in many actions, comprehensive in its nature, and under which the defendant is or was permitted to prove,

6. The Replication De Injuria Is discussed in Chapter 23.

-/- Keigwin, Cases In Common-Law Pleading, Bk. II, The Rules of Pleading, e. VII, The General Issues, 500 (24 ed. flochester, 1934).

78. Ibid.

### DEFENSIVE PLEADINGS

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.

. In Case, Eiectment, Trespass, in its Three Forms, and Trover, the Plea of the General Issue was, *Not Guilty*; in Replevin, Won *Cepit*; in Detinue, *Non Detinet*; in Debt upon a **Simple Contract, Nil Debet**; in Debt on a **Specialty and in** Covenant, it was *Non efl Factum*; and, in both Special and General Assumpsit, *Non Assumpsit*, or that the defendant made no such Promise. The effect of these General Issues varied with the different Forms of Action, as to what Defenses could **be set up** under them, and what must be raised by Specific Denials aimed at Particular Allegations, and what by Pleas in Confession and Avoidance.

To confine the investigation to the points of actual disagreement, and relieve the plaintiff of the burden of proving what the defendant does not really dispute, it is provided in Code Pleading that the plaintiff may Verify his Complaint, and then the Denials of the Answer must be Specific, and must also be made under Oath. This requires the Denials **to be truthfully made**, and to put in Issue only the points on which the defendant means to rely. Thus, in a suit on a fire insurance policy, there may be rio dispute as to the execution of the contract sued on, but the company may expect to avoid liability by showing in Defense some excuse. Accordingly, if the Complaint be Verified, the company cannot Deny the signature or due execution of the policy, of which the Proof might be difficult for the plaintiff to obtain and produce. It is a great imposition to compel the plaintiff to produce, and the Court to hear, evidence in regard to what is not truly disputed. It is burdensome enough to have to establish rights in real controversies.<sup>70</sup> At Common *Law*, while it is a prin

ciple that Pleadings ought to be true, ye there were no means of enforcing the Rule Thus the Common-Law Pleadings often fail **ed to reduce the case to the real Issues** ii dispute.

Report of the Common-Law Commissioners, ot which the Rules of HilT. 4 Wm. IV were founded by which the Scope of the General Issue was limit *ed*, it is said: "Special Pleading, considered in its principle, is a valuable forensic invention peculiar to the Common Law of England, by the effect of which the precise point in controversy between the parties is developed, and presented in a shape fit for decision. If that point is found to consist of matter of fact, the parties are thus apprised of the exact nature of the question to be decided by the Jury, and are enabled to prepare tl,eir proofs with proportionate precision. If, on the other hand, it turns out to be Matter of Law, they have the means of immediately obtaining the decision of the cause, without the expense and trouble of a Trial, by Demurrer; that is, by referring the legal question so evolved, to the determination of the Judge. But where, Instead of Special Pleading, the General Issue is used, and under it the defendant is allowed to bring forward matters in Confession and Avoidance, these benefits are lost. Consisting, as that Plea does, of a mere summary denial of the case stated by the plaintiff, and giving no notice of any defensive Allegation on which the defendant means to rely, it sends the whole ease on either side to Trial, without distinguishing the fact from the law, and without defining the exact question or questions of *fact* to be tried. It not unfrequently, therefore, happens that the parties arc taken by surprise, and find themselves opposed by some unexpected matter of defense or reply, which, from the want of timely notice, they are not In due condition to resist. But nfl effect of more common, a,id indeed almost invariable, occurrence is the unnecessary accumulation of proof, and consequently of expense; for as nothing is admitted upon the Pleadings, each party is obliged to prepare



himself, an far as it is practicable, with evidence upon nil the different points which the Nature of the Action can by possibility make it Incumbent upon him to establish, though many of them may turn out to be undisputed, and many of them may be such as his adversary, if compelled to plead specially, would have thought it unnesirable to dispute. It may even happen (and that Is not an unfrequent occurrence) that the controversy under this form of Plea turns entirely upon the Matter of Law, there being no fact really in dispute; and In that case the Mode of Decision by Jury is not only defective, but misplaced, and the Trial might have been spared altogether, if the parties had proceeded by way of Special Pleading, and raised the questIon upon Demurrer.”

458

**Gb. 2**

-9. Bliss, Law of Pleading Under the Codes of Civil Procedure, ~1 138, 422 (St. Louis, 1987), **In** the

Sec. 224

Nothing could be more absurd than the **irregular, variable, and arbitrary Scope of the General Issue in the Different Forms of Action. There is no rhyme or reason or policy** in it; nothing but a bewilderment of historical eccentricities. The Function of **Pleading is to ascertain with precision the Matters on which the Parties differ** and the points on which they agree, and thus to arrive at Certain Clear-Cut Issues upon which the case has to be decided. The main Object of Pleadings is to produce such Issues, **and thus to narrow the controversy to the real points which have to be contested and proved. The practical utility of Pleadings to accomplish this function or object has been grievously impaired by the unreasonable Scope and Latitude which are allowed** to the General Issue in some actions. The apparent Singleness and Simplicity of the General Issue are entirely illusory. It fails to **focus the controversy upon the real point. It frequently violates the Rule that a Party must either Plead by Way of Denial or in Confession and Avoidance. In Assumpsit, Case, Debt on Simple Contract, Ejectment, and Trover, the General Issue has an Exceedingly Broad Scope, which cannot be explained by any principle or process of reason.** ing. **What has to be Specially Pleaded is** largely an accidental matter of arbitrary exceptions. *so*

When the defendant Pleaded Affirmatively to justify or excuse the charge, it was necessary to set forth the Particular Facts of palliatidn and excuse by a Special Plea of Confession and Avoidance, which would apprise the Court and the Adverse Party of the nature and circumstances of the Defense; **but, Special Pleading having become perverted** into an obstacle to justice, the Courts, by relaxation of the strictness anciently observed, permitted the Scope of the General

aO. See Ballantine, The Proposed New Practice Act, 2 U.III.L.Bul., 149, 158 (1919).

459

Issue to be extended, so as to leave almost every Defense open, and to allow many affirmative Defenses to be given in evidence at the Trial under the General Issue.

Where a given Defense can be set up under the General Issue, it is improper to attempt to raise that Defense by a Specific Traverse. Where the General Issue can be used as a Denial, it must be used. The reason for, requiring the General Issue seems to have been to close the Pleadings at an early Stage. The Rule, however, does not prohibit a Party from Pleading Affirmatively New Matter which is Admissible under the General Issue, but only such as constitutes a mere Denial<sup>81</sup>,

In view of the important character of this Plea in restricting the progress of the Pleadings and extending the privilege of the **defendant in establishing his** Defense in evidence, it seems proper here to explain in what cases it should be used. To do this, it is necessary to examine the Scope of the Different General Issues in each Particular Action, to ascertain what Defenses must or must not be Pleaded Specially.

In One Action a given Defense may be Admissible under the General Issue, while **in another the Same Defense would require** a Specific Traverse or an Affirmative Plea.

81. English: Warner v. Wainsford nob. 127, 50 Eng. Rep. 276 (1603); Illinois: Governor, to Use of Thomas v. Lagow, 43 Iii. 134 (1867); MeCord v. Mechanics' Nat. Bank of Chicago, 84 III. 49 (1876); Wad-hams v. Swan, 109 III. 46 (1854); New York Ott v. Schroepel, 3 Barb, (N.Y.) 56 (184S).

Where defendant's special pleas were no more than pleas of General Issue, and all matters alleged were available under that Plea, sustaining

Demurrers to special pleas was not error. Alabama: People's Savings Bank of Tallahassee v. Jordan, 200 Ala. 500, 76 So. 442 (1917); Shepherd v. Butcher Tool & Hardware Co., 198 Ala. 275, 73 So. 498 (1916); Huntsville Knitting Co. v. Butner, 198 Ala. 528, 73 So. 907 (1916); Virginia: Cox v. Hagan, 123 Va. 656, 100 SE. 666 (1919).

### PLEAS—PEREMPTORY OR IN BAR

460

#### DEFENSIVE PLEADINGS

Cl. 22

#### PLEAS IN CONFESSION AND AVOIDANCE —THE NATURE AND FORM

225. **If, instead of Denying in the Direct Form**, the Party wishes to assert a Defense in Justification or Discharge of the Matter alleged, he must Plead by Way of Confession and Avoidance. **Pleading in Confession and Avoidance Admits the Truth** of Opposing Allegations, and Avoids their Legal Effect by alleging Other Facts.

Pleas in Confession and Avoidance are divided, with reference to their subject-matter,  
into

(a) Pleas in Justification or Excuse. Such a **Plea, while Admitting the Facts alleged by the plaintiff, shows in effect that he had not at any time a Good Cause of Action, either by reason of some legal right of the defendant justifying his conduct in Point of Law, or some act or conduct of the plaintiff excusing him from liability in the particular case.**

(b) **Pleas in Discharge. Such a Plea Admits that a Cause of Action once existed in the plaintiff, but shows that it has been Discharged by some Matter subsequent, either of Fact or of Law.**

Pleadings in Confession and Avoidance tie not Tender Issue, but Conclude with a **Verification and Prayer of Judgment.**

#### *In General*

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

avoids them— Thus, in an Action of Trespass **for Assault and Battery**, a Plea Admitting Facts alleged to have been done by the defendant, but showing that they were done by the plaintiff, is a Plea in Confession and Avoidance.

Affirmative Pleas in Confession and Avoidance are either by Way of Justification and Excuse, showing that, even admitting plaintiff's *prima facie* case, he never had a Cause of Action, or by way of Discharge, showing that, although a Cause of Action once existed, yet it has been taken away by some Subsequent Matter. Pleas of Estoppel are another variety of Affirmative Pleas.<sup>52</sup>

#### *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 Mediate 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. ss But where, still Adm, Dana v. Bryant, 1 Gil. (Ill.) 104 (1844).

83. English: Smart v. Hyde, 8 Mees & W. 723, 151 Eng. Rep. 1231. (1841); Wise v. Hodsoll, 11 Mel. & B. 810, 113 Eng. Rep. 624 (1841); California: Glazer v.

Clift, 10 Cal. 303 (1858); Tennessee: *Tosuhinson v. Darnan*, 2 Head. (Tenu.) 538 (1839); Vermont; in necessary Self-Defense against an assault *Briggs v. Mason*, 31 Vt. 433 (1559).  
Sec. 225

**PLEAS—PEREMPTORY OR IN EAR**

**461**

mitting 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.<sup>84</sup> Pleas in Justification or Excuse generally include all Pleas in Confession and Avoidance *which* are not in Discharge of the defendant's liability. The form of Plea in Justification and Excuse is set out below:

FORM OF PLEA IN CONFESSION  
AND AVOIDANCE

*(In Justification and Excuse)*

Term, in the year of the reign of King George the Fourth.  
Clyde Dowell  
aft.  
Arthur Brown



THAT at the time of the alleged trespasses the plaintiff made an *assault* upon John Kane, and was beating him, in breach of the

A Plea In Justification or excuse admits plaintiffs Allegations, but in effect denies plaintiff's Cause of Action, either because defendant Is justified, or is excused from liability through some act or conduct of plaintiff. Florida East Coast Ry. Co. v. Peters, 72 Pie. 311, 73 So. 151 (1916).  
*st. Per Builer, J, in flex v. Lyme, I Doug. 159, 99 Eng.Rep, 98 (1779).*

*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, Law of Pleading Under the Codes of Civil Procedure Pt. 2, c. 17 (St. Louis, 1887).*

All matters In Confession and Avoidance must be Plead Specially. Florida East Coast By. Co. v. Peters, 72 Ftg. 311, 78 So. 151 (1910).

peace, whereupon the defendant gently laid his hand on the plaintiff in order to preserve the peace, and to prevent the plaintiff from further beating the said John Kane, doing no more than was necessary for that purpose, which are the alleged trespasses. **And this the said Clyde Dowell is ready to verify.**

Wherefore he prays judgment if the said Arthur Brown ought to have or maintain his aforesaid action against him, etc.

3 CHITrY, Treatise on Pleading with Precedents and Forms, 1070—1071 (13th Am. ed., Springfield 1859), contains other forms.

*Pleas in Discharge*

A PLEA in Discharge admit.s that the plaintiff once had a Right of Action, but shows that it is Discharged or Released by Some Matter Subsequent, either of Fact or Law. The most Common Pleas in Discharge are Payment; Release; Tender; Set-Off; Bankruptcy; the Statute of Limitatlons.~

83. See Note, Statute of Limitations—Permanent or Temporary Injury—Plea of Non-Acreevit, 11 Ill.L. Rev. 56 (1916).

As to Arbitrament and Award, see, Indiana: Ilrown v. Perry, 14 Ind. 32 (1830); Maryland: lingling v. Kohihass, 18 *Id.* 148 (1862).

As to Payment or Accord and Satisfaction, see, English; Goodchild v. Pledge, 1 Mees. & W. 363, 150 Eng.Rep. 474 (1836); Indiana: Nill v. Comparet, 15 Ind. 243 (1860).

As to a Release, see, English: Brooks v. Stuart, 9 Adol. & B. 854, 112 Eng.flep. 1437 (1830); Indiana: Rosier v. Eliason, 14 Ind. 523 (1860).

As to the *Statute of Limitations*, see Earcstaff v. Russell, 10 Macs. & \V. 365, 152 Eng.Rep. 511 (1842).

As to set-off, see, Florida: Mitchell v. McLean, 7 Fla. 329 (1857); New York: MeAllister v. Reab, 4 Wend. (N.Y.) 483 (1830); Pennsylvania: Rimes v. Barnitz, S Watts (Pa.) 39 (1839).

As to bankruptcy, see Gould v. Lasbury, 1 Cr.M. & II. 254, 140 Eng.Rep. 1075 (1834).

A Railway Company's Plea in Action for killing cat tie claiming a Release of liability, but denying negligence, was held bad, as it sought to avoid lIabil. ity, but failed to confess negligence. Central of Georgia By. Co. v. Williams, 200 Ala. 73, 75 So. 401 (1917).

462

## DEFENSIVE PLEADINGS

Cli. 22

### *Conclusion of Pleading*

A PLEADING in Confession and Avoidance does not Tender Issue, and, like all other Pleadings which do not Tender Issue, it Concludes with a Verification and Prayer of Judgment.

## GIVING COLOR

226. A Plea in Confession and Avoidance **must Give Color; that is, admit the apparent truth of the plaintiff's Allegations and give him credit for an apparent or prima facie** Right of Action, which the New Matter in the **Plea** destroys. Color may be Express or implied.

**Implied Color is the tacit admission of the plaintiff's prima facie case by failure to deny it.**

Express Color is a Fictitious Allegation, **not Traversable, to give an appearance of right to the plaintiff, and thus enable the defendant** to Plead Specially his own Title, which would **otherwise amount to the General Issue. It is a licensed evasion of the rule against Pleading Contradictory Matter Specially.**

### *Giving Color*

IT is a rule that Every Pleading by way **of Confession and Avoidance must Give Color**. "Color", as a Term of Pleading, signifies an apparent or *prima fade* 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.<sup>50</sup>

English: Could v. Lasbury, 1 Cr.M. & B. 254, 149 EngJ{ep. 1075 (1834); Holler v. Bush, 1 Salk. 304, 91 Eng.Rep. 342 (1697); Hatton v. Morse, 3 Salk. 273, 91 Eng.Bep. 820 (1702); Ballet v. Byrt, 5 *Mod.* 252, 87 Eng.Rep. 639 (1696); Margetts v. Bays, 4 Adol. & B. 489, 111 Eng.Rep. 871 (1836); McPherson v. Daniels, 10 B. & C. 263, 109 Eng.Rep. 448 (1829); Patrickson v. Barton, Cro.Jac. 229, 79 Eng.Eep. 198 (1600); Taylor v. Eastwood, 1 East. 215, 102 Bag. Rep. 83 (1801); Rex v. Johnson, 6 East. 582, 102 Bng.Itep, 1412 (1805); Massachusetts: Thayer v. Brewer, 15 Pick. (Mass.) 217 (1834); New York:

Brown v. Artcher, 1 11111 (N.Y.) 266 (1841); Van Et-

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 AS. ought not to have or maintain his aforesaid action against him, the said CD., because he says that after the said Breach of Covenant, and before the Commencement of this Suit, to wit the said A.B. by his certain deed of release, Sealed with his Seal and now shown to the Court here, did remise, release," etc., all Damages from said Breach of Covenant, etc. This Plea Gives Color to the Declaration, for it admits an apparent right in the plaintiff, namely, that the defendant did, as alleged **in the Declaration, execute the deed, and** break the Covenant therein contained, and would, therefore, *prima fade* 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 *priflla fade* a good Defense, namely, that such Re.

ten v. Hurst, 0 11111 (N.Y.) 311 (1544); Conger v. Johnston, 2 Denio (N.Y.) 96 (1846); Ohio: Davis v Mathews, 2 Ohio 257 (1826); Vermont: Merritt v. Miller, 13 Vt. 416 (1841); Federal: Dibble v. Duncan, 2 McLean, 553, Fcd.CasNo.3,880 (1811). Pleas in Confession and Avoidance must either expressly or impliedly admit that the Allegations in the Declaration are true, with a statement of matter which destroys their effect, and must confess a *prima fade* Right of Action in the opposite party, and then state new matter by which that apparent right Is defeated. Bavarian Brewing Ca v. Eetkowski, 1 W.W.Harr, 225, 113 A. 903 (Del.Super.192<sup>1</sup>).

Sec. 226

## PLEAS—PEREMPTORY OR IN BAR

463



lease 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.<sup>8~</sup> In such

*sz.* So, in Trespass de bonis Asportatis, a Plea that the goods in question were the property of a third person, and that the defendant took them by virtue of an attachment against him, is bad, as amounting to the General Issue, for it involves a denial of the plaintiff's possession, and therefore gives no color to the Action. The thing to do in such a case, as We shall see, is to give express color. See, in support and illustration of the text, Brown v. Artcher, 1 Hill (N.Y.) 266; Collet v. Flinn, 5 Cow. (N.Y.) 466.

In Conger v. Johnston, 2 Denio (N.Y.) 96, it was held that a Plea of the Statute of Limitations averring that "the severai 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 fade* 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.

a case the usual and regular course would be, not to Plead in Confession and Avoidance, but to plead the General Issue, *Not Guilty*, which puts the plaintiff's possession of the close in issue, as well as the mere fact of the Trespass.

The tacit admission, by failure to Deny, which we have just been considering, has been called "Implied Color," to distinguish it from another kind, which is in some instances inserted in the Pleading, and is therefore called "Express

Color.”<sup>88</sup>

Where the Nature of the Defense is such that it would contradict the plaintiff’s *prima fade* case, the defendant cannot Plead it

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. & B. 489, 111 Bug. Rep. 871 (1836); *Gould v. Lashury*, 1 Cr., M. & Li. 254, 140 Eng.Rep. 1075 (1834), (where, in an Action of Debt on Simple Contract, a Plea that the defendant was discharged under tile insolvent debtor’s act from the debts and Causes of Action, “if any,” etc. was held bad).

But see, contra, *Wise v. Hodsoll*, 11 Adol. & E. SIB, 113 Engltep. 024 (1541), 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.

88. “The learned Serjeant Williams, whose notes upon Saunders’ Reports are often cited in this work; was a gentleman of very florid complexion, which circumstance gave the irreverent youth of the bar occasion to say that he had much express color. Tradition Informs us also that the same Serjeant Williams had a country place near Londoji, to which he was wont to resort for the week-end, and that he drove a horse which was given to balking; whereupon it was commented, hew strange it was that a horse belonging to s~ learned a pleader should demur when he ought to go to the country.” *Kcigwin, Precedents of Pleading at Common Law*, 554 (Washington, fl C., 1910).

464

## DEFENSIVE PLEADINGS

Cli. 22

Specially without giving Express Color in order to have something to avoid.

Express Color is defined to be “a feigned matter pleaded by the defendant in an Action of Trespass, from which the plaintiff seems to have a good cause of action, whereas he has in truth only an Appearance or Color of Cause.”<sup>89</sup> It is the setting up of a straw man, in order to have something to knock down. It occurs at present only in Trespass, and is very seldom used even in that action. Its use and nature may be thus explained: The necessity of an Implied Color has evidently the effect of obliging the Pleader to Traverse in many instances in which his case, when fully stated, does not turn on a mere Denial of Fact, but involves some consideration of *Law*. **In the example** first above given of Want of Color, this would not be so, for if the 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 tmder 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,

<sup>89</sup> 5 Bacon, Abridgment of the Law, “Trespass,” 1, 208 (Oth ed. Dublin, 1793); English: *Leyfield’s Case*, 10 Ce. SOB, 77 Eng.Bep. 1057 (1610); *Comyns v. Boyer*, Cro.Elis. 485, 78 Eng.Itep. 786 (11590); *Fletcher v. Marilhier*, 9 Adol. & B. 457, 112 Bng.Rep. 1285 (1830); *New York: Brown v. Arteher*, 1 Hill. (N.Y.) 206

(1841).

See, also, *Tbaycr, Preliminary Treatise on Evidence at the Common Law*, e. V, Law and Fact In Jury TrIals, 232—234 (Boston, 1598), on Express Color as a method of withdrawing questions from the Jury by Pleading in confession and Avoidance.

and they 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 cam 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 contained 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.

**Sec. 228**

### PLEAS—PEREMPTORY OR IN BAR

465

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.~ 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.<sup>o1</sup>

### PLEADINGS IN ESTOPPEL

227. **A Plea in Estoppel is one which neither Confesses nor Avoids, but Pleads a previous inconsistent Act, Allegation, or Denial of the Party which precludes him from maintaining his Action or Defense.**

A MAN is sometimes precluded in law from alleging or denying a fact in consequence of **his own previous Act, Allegation, or Denial** of a contrary tenor; and this preclusion is called an Estoppel. An Estoppel may arise either from Matter of Record,—from the deed of the party,—or from Matter in *Pais*, that is, matter of fact. Thus, any

<sup>o1</sup> Comyns, Digest of the Laws of England, "Pleader," 3, M. 41 (New York, 1825).

<sup>o2</sup> *Radford v. Harbyn*, Cro.Jac. 122, 79 Eng.Rep. 106

matter adjudicated in a Court of Record will forever preclude the party from afterwards contesting the same fact in a subsequent suit with his adversary. This is an Estoppel by Matter of Record. As an instance of an Estoppel by Deed may be mentioned the case of **a bond reciting a certain fact. The party** executing the bond *will* be precluded from afterwards denying, in any action brought upon that *instrument*, the fact so recited. An example of an Estoppel by Matter in *Pais* occurs when one man has accepted rent of another. He will be estopped from afterwards denying, in any action with that person, that he was at the time of such acceptance his tenant. The tenant is likewise estopped to deny his landlord's title.

This doctrine of law gives rise to a Kind of Pleading that is neither by Way of Traverse nor Confession and Avoidance, viz.: a Pleading that, waiving any Question on the Fact, relies merely on the Estoppel; and, after stating the previous Act, Allegation, or Denial on the Opposite Party, Prays Judgment if he shall be received or admitted to aver contrary to what he before did or said.~ 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<sup>Y3</sup>

### ADMISSION BY FAILURE TO DENY

**228. 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.

92. English: *Pinminer v. Woodburne*, 4 B. & C. 025, 107 Eng.Rep. 1103 (1825); *Eastmure v. Laws*, 5 Bing. (N.C.) 444, 132 Eng.Rep. 1170 (1839); *Doe v. Wright*, 10 Adol. & E. 763, 113 Eng.flep. 289 (1839); Illinois: *City of East St. Louis v. Flannigen*, 34 Ill. App. 596 (1889); Vermont: *Webster v. State Mat. Fire Ins. Co.*, 81 Vt. 75, 69 A. 319 (1908).

(1606).

93. See *Dana v. Bryant*, 1 Gil. (Ill.) 104 (1844).

466

## DEFENSIVE PLEADINGS

### Ch. 22

verse.<sup>94</sup> Thus, in an Action of Covenant on an indenture, a Plea of Release, as it does not Traverse the execution of the indenture, is taken to admit it, And a Replication of Duress to such a Plea, since it does not Traverse the Release, admits its execution. So, in an Action of Covenant on an indenture of lease, for failure to repair, a Plea Traversing the want **of repair** admits the indenture. The effect of such an admission is to Conclude the Party, even though the Jury should improperly go out of the Issue and find the contrary of what is thus Confessed on the Record<sup>95</sup>

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.<sup>96</sup>

S4. Comyns, Digest of the Laws of England, "Pleader," 0. 2 (New York, 1825); English: *Hudson v. Jones*, 1 Salk. 90, 91 Eng.flep. 84 (1706); *Nicholson v. Simpson*, 11 Mod. 336, 88 Eng.Bep. 1075 (1721); Illinois: *Dana v. Bryant*, 1 Gil. (Ill.) 104 (1844); *McCormick -c. Illuse*, 66 Ill. 315 (1872); People, to Use of *Foster v. Gray*, 72 Ill. 843 (1874); Kentucky: *Fowier 'c. Commissioner, to Use of Taylor, I Dana* (Ky.) 358 (1833); *New Hampshire: Chcevr v. Morrnick*, 2 N.H. 370 (1821); New York: *Brigga v. Don*, 19 Johns. (N.Y.) 95 (1821); Vermont *Carpenter v. Briggs*, 15 Vt. 34 (1843); Federal: *United States v. Willard*, 1 Paine 539, Fed.Cas.No.16,698 (1826); *Buckeye Cotton Oil Co. v. Sloan*, 250 Fed. 712, 163 C.G.A. 44 (1918); English *v. Arizona ex rd. Griffith*, 214 U.S. 359, 29 S.Ct. 668, 53 LEd. 1030 (1909).

-5. Hughes, Procedure, Its Theory and Practice, 748 (Chicago, 1905); *Boileau v. Butlin*, 2 Exeh. 604, 12 Jur. 899, 154 Eng.flep. 057 (1848); *Wilcox v. Servant of Skipwith*, 2 Mod. 4, 86 Eng.llep. 909 (1675).

A party is bound by the Allegations of Fact in his own pleading, and when there is no denial of such Allegations they are accepted as true, if material, and that meaning ascribed to the words that is usually intended by their use. *Florida East Coast fly. Co. v. Peters*, 80 Fla. 382, 86 So. 217 (1916).

An admission In pleading is conclusive against the party making it on the Trial of the Particular Issue to which the admission relates. Where the defendant pleads several pleas, the plaintiff cannot use an admission in one plea to establish a fact denied in another. *Starkweather v. Kittle*, 17 Wend. (N.Y.) 20 (1857).

94. *King v. Bishop of Chester, Pierce and Cook*, 2 Salk. 581, 91 Eng.Itep. 472 (1697).

## PROTESTATION

229. A Traversable Fact in **Pleading may be passed over without Traverse, and the right to contest it in another action preserved by a Protestation in the Pleading in the present action. A Protestation has no effect in the existing suit. Now that several Pleas may be used, there is little, if any, need for Protestation.**



THE practice of Protestation of Facts not Denied arose where the Pleader, wishing to avail himself of the right to contest in a future action some Traversable Fact in the pending action, passes it by without Traverse, but at the same time makes a declaration collateral or incidental to his main Pleading, importing that the Fact so passed over is untrue. The necessity for this arose from the Rule that Pleadings must not be double, and that Every Pleading is taken to Admit such Matters as it does not Traverse.<sup>97</sup> Such being its only purpose, it is wholly without effect in the action in which it occurs, as, notwithstanding its use, every Traversable Fact not Traversed is taken as Admitted in the existing suit. Now that Several Pleas may be employed, there seems no reason for not denying every Allegation that one does not wish to admit, and no occasion for Protestation.

Suppose, in an Action of Assumpsit for goods sold, the defendant Pleads that he gave the plaintiff certain goods in full satisfaction and Discharge, etc., and that the plaintiff accepted them in full satisfaction and Discharge; and the plaintiff, while Traversing the acceptance, does not wish to admit the delivery of the goods to him, lest the deliv

91. Comyn, Digest of the Law vs of Enrtland, "Pleader,"  
N (New York, 1825); English: Young v. Rndd.  
Garth, 347, 00 Eng. Rep. 803 (1695); Illinois: Thus v.  
Stobie, 81 Ill. 202 (1876); New Hampshire: State v.  
Beasom, 40 N.E. 372 (1860); New York: Briggs v.  
Don, 19 Johns. (N.Y.) 96 (1821).

This practice was abolished by a rule of Hilary Term and the admission ceased to be conclusive in subsequent actions.

#### PLEAS—PEREMPTORY OR IN BAR

ery; 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 .4.3. 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 *O.D.* did not give or deliver to him, the said .4.3., the said goods as the said *C.D.* hath above in Pleading alleged, for Replication, nevertheless, in this behalf, the said .4.3. says that he, the said .4.3., 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 .4.3. by reason of the Nonperformance thereof, in Manner and Form as the said *C.D.* hath *above* alleged; and this the said .4.3. 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.<sup>95</sup>

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

e~. DilTh v. Stobie, 81 Ill. 202 (1876). See also, Boatman's Say. Inst. v. Holland, 38 1-to. 49 (1860); 31 Cyc. 214, v. 4s; Id. 215, n. 50.  
though the Issue taken were decided against him.<sup>99</sup>

#### ARGUMENTATIVE PLEAS

230. As a **Pleading** is a Statement of the **Operative Facts which constitute the Plaintiff's Cause of Action** or the Defendant's Defense, **and not of evidence or argument**, it must set **forth its Allegations of Fact in a Direct and Positive Form**, and not leave *them* to be collected by Inference and argument only.

IT is a branch of this Rule that Two Affirmatives do not make a Good Negative; nor Two Negatives a Good

*Affirmative.* The reason for this Rule is that not only must precision be observed in Allegations of Material Facts, but the Adverse Party must be enabled to Traverse such Allegations by a Direct and Distinct Denial.

Thus, for example, if 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.<sup>1</sup>

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

*v. i~&Jj,p v. Otivay, 2 Wnis.Saund. 102, IOSa, n. 1~  
85 Engitcp. 803 (1670~.*

1. Hodgson v. East India Co., S T.R. 278, 101 Eng. Rep. 1389 (1700); Boone v. Eyre, 2 Bl.W. 1312, 90 Eng.Rep. 767 (1778).

On the subject of argumentativeness, see the case of *Moses v. Allen*, 01 Md. 42, 50, 46 A. 323 (1900), in which the Flea set forth reasons which properly were Matters of Evhence, and hence could not be traversed except by a replication of the same faulty *character*. The Demurrer, therefore, was properly sustained.

Sec. 230

467

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 the trying it:

and when it is so found by the measuring, he had good cause to deliver them out of his hands to him who had won the wager. But Fenner and Popham held, that the Plea was not good: for it may be that the measuring was false, and therefore he ought to have Averred in fact, that there were ten yards, and that it was so found upon tile measuring thereof." <sup>2</sup>

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."

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.<sup>4</sup> The reason of *this*

2. Ledesham v. Lubram, Cro.Eliz. 870, 78 Eng.Itcp.

1096 (1602).

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.<sup>5</sup> 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 alleged that he died seised in tail, this is not a Good Issue; ~ because the Latter Allega. tion amounts to a Denial of a seisin in fee, **but denies it by Argument or Inference only. It is this Branch of the Rule against** Argumentativeness that gave rise to the Form of a Special Traverse. Where, for any of the reasons mentioned in a preceding part of this work, it became 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.<sup>7</sup> Thus, in the example last given, the plaintiff

(1827); New Hampshire: *Watriss v. Pierce*, 36 N.  
H. 230 (1858); New York: *Spencer v. Southwick*, 9

Johns. (N.Y.) 314 (1812); Dyett v. Pendleton, S Cow. (N.Y.) 723 (1326); Fidler v. Deiavan, 20 Wend. (N.Y.) 57 (1838); Federal: Fletcher v. Peek, 6 Cranch (U.S.) 87, 3 LEd. 162 (1810).  
 5. Comyas, Digest, 'Pleader,' B. 3 (New York, 1825):  
 Coke, Littleton, 126a (Philadelphia, 1853); Euer, Doctrina Placitand\$, 43, 349, 360 (London, 1677).

See, also, Chandler v. Roberts, 1 Doug. 60, 99 Eng. Rep. 41 (1779); Y.B. 5 Hen. VII, 11, 12.

8. Euer, Doetriaa Plaeitandi, 349 (London, 1677); Y. B. 5 Hen. VII, 11, 12.

7. 4 Bacon, Abridgment of the Law, "Pleas", H. 3 (Dublin, 1786).

See, also, Courtney v. Phelps, SkI. 301, 82 Eng. Itep. 1119 (1664); I-Ierring v. Blacklow, Cro.Eliz. 30, 78 EngJlep. 295 05S3); I.E. Hen. VI, 7, p1. 21.

468

## DEFENSIVE PLEADINGS Ch.22

3. flier, Doctrina Placitandi, 41 (London, 1677).

4. Wood v. Butts, Cro.Eliz, 260, 78 Eng.Rep. 515 (1~91). For other statements of the rule, with illustrations, see 4 Bacon, Abridgment of the Law, 'Pleas' I, 5 (Dublin, 1786); Comyns, Digest, 'Pleader' 15. 3 (New York, 1825).

See, also, the following cases: English: Blaekiuo~e v. Tidderley, 11 Mod. 38, 88 Eng.Rep. 869 (1704); Id. 2 Salk. 423, 91 Eng.Rep. 869 (1704); Murray v. East India Co., S Earn. & Aid. 215, 106 Eng.Rep. 1167 (1821); Connecticut Goshen & Sharon Turnpike Co. v. Sears, 7 Conn. 92 (1828); Illinois: Mis-ncr v. Granger, 4 Gil. (Ill.) 09 (1847); Spurck v. For~ gyth, 40 ILL 438 (1866); Indiana: Clark v. Lineberger, 44 mcl, 223 (1873); Board of Com'rs of Clinton County v. Hill, 122 Ted. 215, 23 N.E. 779 (1890); Massachusetts: Dale v. flennie, 4 Pkk. (Mass.) 503

### Sec. 231

## PLEAS—PEREMPTORY OR IN BAR

4i30

may allege, if he pleases, that the Party died seised in tail; but then he must add, *Absque Hoc*, that he died siesed in fee, and thus resort to the Form of a Special Traverse.<sup>5</sup> 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 Affinnative 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.<sup>9</sup>

Another Branch of the Rule against Argumentativeness is that Two Negatives do not make a Good Issue.<sup>10</sup> 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.<sup>11</sup>

## PLEAS AMOUNTING TO THE GENERAL ISSUE

231. Where a **Plea amounts** to the General Issue, it should be so Pleaded. In other words, where the Matter of Defense may be raised under the General Issue in the Particular Action involved, it must be so Pleaded. This **General Rule is subject to the Qualification that** where Express Color is given, or where sult **ident Implied Color is given, the Plea will not Amount to the General Issue, Where the Dc-tense is in Confession and Avoidance, it may**

S. Duer, Doctrina Plaelandi, 349 (London, 1677).

9. Coke, Littleton, 126a (Philadelphia, 1853); TomlIn cc Burlace, 1 Wils.K.E. 6, 95 Eng.Rep. 461 (1742).

10. comyns, Digest, "Pleader", B. 3 (New York, 1825). See, also, English: Martin v. Smith, 0 East 557, 102 Eng.Rep. 1401 (1805); Illinois: Ryan v. Vanlandingham, 25 ILL 128 (1800).

11. Martin v. Smith, 6 East 557, 102 Eng.Rep. 1401

be Specially Pleaded, even though the Plea consists of Matter which may be given in **evidence under the General Issue.**

IT is a well-established Rule of Pleading that, if Facts are alleged Specially which can **be given in evidence under the General Issue**, such Plea is obnoxious to Special Demurrer. The point has been frequently urged with success that a Special Plea amounted to the General Issue.<sup>2</sup> If the General Issue can be used, then it must be used, and to employ a Specific Denial would be Bad in Form. Thus, even if the defendant wishes to Deny one of Several Material Elements making up the Cause of Action, thereby narrowing the issues of Fact, he is not allowed to do so. The reason or purpose of insisting upon the General Issue seems to have been that of avoiding making of Long Records and of Closing the *Pleadings* at an Early Stage.<sup>3</sup>

12. Coke, Litueton, 303b (Philadelphia, 1853)  
 Comyns, Digest, "Pleader", E. 14 (New York. 1825). See, also, the following cases: English: Holler v. Bush, Salk. 394, 91 Eng.Rep. 342 (1607); Birch v. Wilson. 2 3Iod 274, 86 Eng.Rep. 1068 (1C77); Lywier V. Wood, CroCar. 1s7, 79 Eng.llep. 737 (1629); Warner v. Wainsford, Rob. 127, 80 Eug.liep. 276 (1603); 1.15. 10 Hen. VI, in; YR 22 Ilen, VI, 37 Illinois; City of Qnincy v. Warfield, 25 III. 276 (1861) Knoebel v. Kireher, 33 III. 308 (1864); Illinois Cent. I?. Co. r. Johnson, 34 Xli. 389 (2864); *Johnston v. Ewing Female University*, 35 III. 518 (18641; Governor, to use of Thomas v. Lagow, 43 III. 134 (1867) Cushman v. Hayes, 46 III. 155 (1807); Mceord v. Mechanics' Nat. Bank of Chicago, 84 III. 49 (1876); Wadhams v. Swan, 109 III. 54 (1884); Massachusetts: Thayer v. Brewer, 15 Pick. (Mass.) 217 (1834); Purintoi~ v. Jamroek, 195 *Mass.* 187, 80 N.E. 802, 18 L.I.A.,N.S., 929 (1907); New York: President, etc., of Think of Auburn v. Weed, 10 ,Tohns. (N.Y.) 309 (1822); Wheeler v. Curtis, 11 Wend. (N.Y.) 660 (1834); Underwood v. Campbell, 13 Wend. (N.Y.) 7S (1834); Collet v. Flinn, 5 Cow. (NY.) 466 (1826); Federal: Van Ness v. Forrest, 8 Cranth 30, 3 LED. 478 (18W).

13. Warner v. Wainsford, Rob, 127, 80 Eng.ltep, 270 (1603).  
 "The reason for disallowing Pleas of this kind is not, however, that they tend to inconvenient *prolicity*, or that they refer matters of fact to the Court—for they are not, like Pleas of the former class, liable to either of those objections); but they lead to *innovation* awl *confusion*, In the established Modes of (1805).  
 470

## DEFENSIVE PLEADINGS

### Ch, 22

It is clear, however, that Pleading the circumstances Specially has the advantage of presenting the Questions of Law on which the case turns and of making the Issue more Specific; yet the Rules of Common-Law Pleading defeated their own ends and purposes by insisting on the General Issue for the sake of the false appearance of singleness, simplicity, and brevity, and made the plaintiff prove what the defendant could not actually dispute. This abuse has been remedied to some extent under Modern Statutory Systems.<sup>4</sup>

The following cases illustrate the General Rule: In an Action of Trespass for entering **the plaintiff's garden**, the defendant Pleaded that the plaintiff had no such garden. This was Ruled to be No Plea, as it amounted to nothing more than "Not Guilty"; for, if he had no such garden, then the defendant was Not Guilty. So the defendant withdrew his Plea, and said, "Not Guilty." <sup>15</sup>

So, in Trespass for Depasturing the plaintiff's herbage, "*Non depascit herbas*" is No Plea; it should be "Not Guilty" <sup>16</sup>

**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.* <sup>17</sup>

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

Pleading, and tend, not only to destroy the settled distinctions between the different species of pleas, but also to the introduction of *New Pleas, unknown to the Law.*" Gould, *A Treatise on the Principles of Pleading*, Pt. III, Div. V, c. 11, 519 (6th ed. by Wih, Albany, 1009).

fi. In Vermont, the fact that a Special Plea amounts to the General Issue, did not make it objectionable under the Practice Act. *Roberts v. Danforth*, 92 Vt. 88, 102 A. 335 (1917).

See, also, *Holden v. Fitchburg H. Co.*, 70 Vt. 125, 39 A. 771 (1898).

13. Y.B. 10 Hen. VI, 16.

16. Ruer, *Doctrina Placitandi*, 42 (London, 1077).

17. Y.B. 22 Edw. IV, 29,

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<sup>8</sup>

#### **So, in an Action of Trover for divers loads**

of corn, the defendant in his Plea entitled himself to them as tithes severed. The plaintiff Demurred Specially, on the ground that the Plea "amounted but to Not Guilty," and the Court gave Judgment for the plaintiff<sup>1-</sup>

#### **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."<sup>20</sup>

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*.<sup>o</sup>

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

is. *Saunders' Case*, 12 Mod. 513, 88 Eng.Rep. 1486 (1701),

10. *Lynner v. Wood*, Cro.Car. 157, 79 Eng.Bep. 737 (1029),

20. *laques' Case*, Style 355, 82 Eng.Rep. 773 (1652); *Jalhet v. Iyrt*, S Mod. 253, 87 Eng.Rep. 4337 (1606).

21. *Gifford v. Perkins*, 1 Sid. 450, 82 Eng.ltep. 1211 (1670).

Where matters set up in a Special Plea in an Action on a Sheriff's bond were provable under the General Issue, the Plea was properly rejected. *Raleigh County Court v. Cottle*, 79 W.Va. 661, 92 tE. 110 (1918).

### **Sec. 231**

#### **PLEAS—PEREMPTORY OR IN BAR**

471

the plaintiff had no such garden," is evidently but an Argumentative Allegation that the defendant did not commit, because he could not have committed, the trespass. This, however, does not universally hold; for in the second and third examples the Allegations that the defendant "did not depasture," and "did not buy," seem to be in as Direct a Form of Denial as that of Not Guilty. If the Plea be in the Affirmative, the following considerations will always tend to detect the improper construction: If a Good Plea, it must, as heretofore shown, be taken either as a Traverse or as in Confession and Avoidance. Now, taken as a Traverse, such a Plea is clearly open to the Objection of Argumentativeness; for as we have seen, **Two Affirmatives make an Argumentative Issue**. Thus, in the fourth example, the Allegations show that the house in question was the house of *J.B.*, and they therefore Deny Argumentatively that it was the house of the plaintiff as stated in the Declaration. On the other hand, if a Plea of this kind be intended by Way of Confession and Avoidance, it is bad for Want of Color, for it admits no apparent right in the plaintiff. Thus, in the same example, if it be true that *J.S.* was seised in fee and gave License to the defendant to enter, who entered accordingly, this excludes all title of possession in the plaintiff, and without such title he has No Color to maintain

an Action of Trespass.<sup>22</sup> 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,<sup>23</sup> Thus, in the example of Express Color given, in a former part of this work, the Plea is cured, by the Fictitious Color of Title there given to the plaintiff, of the objection to which it would otherwise be subject—that it amounts to Not Guilty. So, where sufficient Implied Color is given, a Plea will never be open to this kind of objection. And it is further to be observed that, where sufficient Implied Color is given, the Plea will be equally clear of this objection, even though it consist of matter which might be given in evidence under the General Issue. Defendants are allowed, in certain actions, **to prove, under this Issue, matters in the Nature of Confession and Avoidance**, as, for *example, in* Assumpsit, a Release or Payment. **In such cases the plaintiff, though allowed**, is not obliged, to Plead Non Assumpsit, but may, if he pleases, Plead Specially the Payment or Release; and, if he does, such Plea is not open to the objection that it amounts to the General Issue.<sup>24</sup>

**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.<sup>25</sup> It is also said that, as the Court has such discretion, the proper method of taking advantage of this fault is not by Demurrer,

23. Anonymous, 12 Mod. 537, 88 Eng.Bep. 1502 (1701); Saunders Case, 12 Mod, 513, 88 Eng.llep. 1486 (1701); Lynner v. Wood, Cro.Car. 157, 79 Erig.ltep. 737 (1029); Birch v. Wilson, 2 Mod. 27-1, Stt Eng. Rep. 1068 (1677); Borne v. Lewin, 3 Salk. 273, '31 Eng.flep. 821 (1700).

24. English: Maggs v. Ames, 4 Ring. 470, 130 Eng. Rep. 849 (1828) ; 1101 lcr v. Bush, 1 Salk. 394, Dl Eng.llop. 342 (1607); Carr v. Hincliliff. 4 Barn. & C. 552, 107 Eng.Rep. 1104 (1825); Illinois: Bones v. Bankers' Life Ins. Co., 282 Ill. 236, 118 N.E. 443 (1918); virginia: Baltimore & O. It. Co. v. Folly, Woods & Co., 14 Grat. (Va.) 447 (1858); West Virginia: Morgantown Bank v, Foster, 35 W.Va. 357, 13 SE. 996 (1891).

20. Bacon, New Abridgment of the Law, "Pleas" G 3. 374 (Dublin, 1793); Birch v. Wilson, 2 Mod. 274, 86 Eng.Rep. 1068 (1677). RoBert Bush, 1 Salk, 394, 91 Eng.Rep. 342 (1697). 472

## DEFENSIVE PLEADINGS

### Ch. 22

but by Motion to the Court to set aside the Plea and enter the General Issue instead of it.<sup>25</sup> 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.<sup>27</sup>

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, for it is laid down that "the reason of pressing a General Issue is not for Insufficiency of the Plea, but not to make Long Records when "there is no cause." 28

## PARTIAL DEFENSES

232. Every Pleading must be an Answer to the Whole of what it Professes to Answer. Partial Defenses must be

Pleaded as such.

26. English: Warner v. Wainsford, Hoh. 127, 80 Erg. Rep. 276 (1603); Ward and Blunt's Case, I Leon. 178, 74 Eng.Rep. 164 (1589); Connecticut: Whittelsey v. Wolcott, 2 Day (Conn.) 431 (1807).

27. In addition to the cases cited above, see, also,  
English: Sinclair v. Bervy, 2 Chit. 642, 18 E.C.L.  
826 (1771); Saunder's Case, 12 Mod. 518, 88 Eng.  
Rep. 1486 (1701); Lynner v. Wood, Cro.Car. 157, 79  
Eng.Rep. 737 (1629); Illinois: Cushman v. Hayes, 46  
111. 155 (1867); Cook v. Scott, 1 Gil. (Ill.) 333 (1844);  
Curtis v. Martin, 20 Iii. 557 (1858).

28. Warner v. Wainsford, Rob. 127, 80 Eng.Rep. 270 (1615); Comyns, Digest, "Pleader", E. 13 (*New York*, 1825); But compare statement of Gould, A Treatise on the Principles of Pleading, Pt. III, *Div.* V, C. 11, ~19 (6th ed. by Will, Albany, 1909).

THE effect of this Rule is that a Pleading must fully meet the cause of action stated by answering the Whole of it, or all that is Material. If it fails in this, it is bad.<sup>20</sup>

**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 a case 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 *Ni? Dic'it* 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

29. Stephen, A Treatise on the Principles of Pleading in Civil Actions, e. II, Of the Principal Rules of Pleading, ~ 1, p. 215 (34 Am. ed. by Tyler, Washington, O. C., 1875); Comyn, Digest, "Pleader", B. 1, F. 4 (London, 1822).

See, also, the following cases: English: Earl of Manchester v. Vale, I Wms.Saund. 27, 28, n. 3, 85 Eng. Rep. 28, 29 (1666); Herlakenden's Case, 4 Co. 62a, 76 Eng.Rep. 1025 (1588); Illinois: Goodrich v. Reynolds, 31 Ill. 490 (1863); Maryland: Mitchell v. Sellman, 5 Md. 376 (1854); *New Jersey*: Sprague Nat. Bank v. Erie B. Co., 62 N.J.L. 474, 41 A. 681 (1898); *New York*: Sterling v. Sherwood, 20 Johns. (N.Y.) 204 (1822); Riggs v. Deniston, 3 Johns.Cas. (N.Y.) 198 (1802); Nevins v. Keeler, 6 Johns. (N.Y.) 63 (1810); Boyd v. Weeks, 5 Hill (N.Y.) 893 (1843); Vermont: Carpenter v. Briggs, 15 Vt. 54 (1848).

A Plea undertaking to answer the whole of the matter set forth answers only a part thereof is bad. Alabama: Jackson v. Bohlin, 10 Ala.App. 105, 75 So. 997 (1917); Florida: Florida East Coast Ry. Co. v. Peters, 72 Fla. 311, 78 So. 151 (1918); North Carolina: Singer Sewing Mach. Co.

v. Burger, 151 N.C. 241, 107 S.E. 14 (1921) Now  
York: Wagecic v. Travelers' Ins. Co., 108 Misc. 61, 177 N.Y.S. 327 (1919).  
Sec. 233

### PLEAS—PEREMPTORY OR IN BAR

473

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.<sup>30</sup> 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.<sup>31</sup> Where, however, the defendant does Profess to Answer the Whole Declaration, **but in fact gives a Defective Answer**, applying to a Part only, this amounts merely to Insufficient Pleading, and the plaintiff's course, therefore, is not to sign Judgment for the Part Defectively Answered, but to Demur to the Whole Plea.<sup>32</sup>

20. On a discontinuance by a reply to a partial plea without taking a Judgment for the part not answered to upon nil dicit, see Davis v. Burton, 3

Scam. (In.) 41, 36 Am.Dec. 511 (1841); Stephen, A Treatise on the Principles of Pleading in Civil Actions, c. II, Of the Principal Rules of Pleading, § 1, p. 215 (3d Am. ed. by Tyler, Washington, D. O., 4875); Earl of Manchester v. Vale, 1 Wms.Saund. 27, 28, n. 3, 85 Eng.Rep. 28, 29 (1666).

See, also, the following cases: English: Herlakenden's Case, 4 Co. 62a, 76 Eng.Rep. 1025 (1588); Tippet v. May, 1 Bos. & P. 411, 126 Eng.Rep. 982 (1790); New

Jersey: Flemmiag v. Mayor, etc. of City of Ho~ bokcn, 40 N.J.L. 270 (1878); Tennessee: Young v. Fentress, 10 Rumph. (Tenn.) 151 (1849); West Virginia: Ilisher v. Wheeling Roofing & Cornice Co., 5? W.Va. 149, 49 SE. 1016 (1005). Cf. Carpenter v. Briggs, 15 Vt. 31 (1843).

1. Vats v. King, Cro.Jac, 353, 79 Eag.Itep. 302 (1614). But such an error is cured after Verdict by the Statute of Jeofans, 32 Hen. VIII, C. 30 (1540), and after Judgment by *nil dicit*, Confession, or non *zum iffoi'matus*, by the Statute of 4 Anne, e. 10 (1705).

32. Earl of Manchester v. Vale, 1 Wms.Saunders 27, 28, n. 3, 85 Eng.Rep. 28, 29 (1066); Stephen, A Treatise on the Principles of Pleading in Civil Actions, c. II, Of the Principal Rules of Pleading, § 1, p. 216 (3d Am. ed. hy Tyler, Washington, O. C., 1875). See, also, Harpham v. Eaynes, 30 IIJ. 404 (1863); Snyder v. Gaither, 3 Scam, (III.) 01 (1S41)~ Hinton v. husbands, 3 Scam. (III.) 187 (1841); Illinois Cent. It. Co. v. Leidjg, 64 III. 151 (1872); People, to Use

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 Ni? *Dicit*; and that such a course will not amount to a Discontinuance.<sup>33</sup>

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.<sup>34</sup>

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.<sup>35</sup>

## A PLEADING BAD IN PART IS BAD ALTOGETHER

233. **A Pleading which is Bad in Part is Bad Altogether. In other words, a Plea is treated** as a unit, and hence, if it is deficient in any

of Busch v. McCormack, 08 III. 226 (1873); Bonbam v. People, to Use of Wilson, 102 III, 434 (1882).

A Plea professing to answer the whole Declaration, and which answers but One Count, is bad on Demurrer. People's Shoe Co. v. Sclally, 196 Ala, 349, 71 So. 719 (1916).

A Plea to the entire Declaration, omitting to answer to a material part, is Demurrable. Florida East Coast Ry. Co. v. Peters, 72 Fla. 311, 73 so. 151, Ann. Cas.1918D, 121 (1918).

33. English: Bullythorpe v. Turner, Willes, 475, 480, 125 Eng.Itep. 1275 (1744); New York: Sterling v. Sherwood, 20 Johns. (N.Y.) 204 (1822); Riggs v. Denniston, 3 Johns.Cas. (N.Y.) 108, 2 Am.Dcc. 145 (1802); Hick-ok v. Coates, 2 Wend, (N.Y.) 419, 20 Am.Dec, 632 (1820).

34. Earl of Manchester v. Vale, 1 Wms.Saund. 27, 28, n. 3, 85 Eng.Rep. 28, 29 (1666).

35. Weeks v. Peach, 1 Salk 179, 01 EngIlep. 101 (1701).

An item pleaded by the Answer In reduction of any Judgment recovered by the plaintiff ~c'ag pro tanto a defense. Oregon Engineering Co. v. City of West Linn, 94 Or. 254, 185 P. 750 (1919).

474

## DEFENSIVE PLEADINGS

### Ch. 22

**Material** Fact, or in reference to **any of the Material Things which** it undertalies to Answer, or **as to either of the Parties Answering.** though otherwise free from objection, the Whole is open to Demurrer.

### BY the proper Forms of Commencement

and Conclusion, the matter which any Pleading contains is offered either as an Entire or as a Partial Answer to the



Whole of that which last preceded. If it falls in any Material Part, it fails altogether?° 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.<sup>37</sup> 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

St See Comyn, Digest, Pleader, E. 3G. F, 25 (London, 1822).

See, also, the following cases: English: *Wehi, v. Martin*, 1 Lev. 48, 85 Eng.llep. 201 (1661); *Dufield v.*

*Scott*, 3 T.R. 374, 100 Eng.llep. 025 (1780); Indiana:

*Ferrnd v. Walker*, 5 Blackf. (Iad.) 424 (1840);

*Shearman v. Fellows*, 5 Blackf. (md.) 459 (1840);

New York: *Bradley v. Powers*, 7 Cow. (N.Y.) 330

(1527); *Ten Byck v. Waterbury*, 7 Cow. (N.Y.) 51

(1827).

3-• *Webb v. Martin*, 1 Lev. 48, 83 Eng.Rep. 291

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?<sup>8</sup>

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.<sup>39</sup>

38. *Hedges v. Chapman*, 2 Bing 523, 130 Eng.Rep. 408 (1825); *Bradley v. Powers*, 7 Cow. (N.Y.) 830 (1827).

39. *Webb v. Martin*, 1 Let 48, 83 Eng.flep, 291 (1661). (1661).

**Sec. 234**

**PLEAS—PEREMPTORY OR IN BAR  
SEVERAL DEFENSES<sup>°</sup>**

234. The respective Pleadings subsequent to the Declaration must not contain Several Distinct Answers to the Opposing Pleading. But—

(I) **Several Facts may be Pleaded, if necessary, to constitute a Single Complete Answer.**

(II) **A defendant in the Same Plea may Plead separately to Different Matters of Claim.**

(III) **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:**

(A) **The Statute only applies to**  
the Pleas of the defendant.

**It does not apply to the Replication or Subsequent**

**Pleadings.**

**(B) Leave will** not be granted so as to extend the Statute to

**Dilatory Pleas.**

**(C) Where Several Pleas are thus presented, each is to**

**be considered as Independent, and to operate as if Pleaded Alone.**

40. In general, on the subject of several Defenses, see:

Treatises: 1 Todd, Practice of the Court of King’s Bench in Personal Actions, c. XXVIII, Of Pleas in Bar (London, 1824); Stephen, A Treatise on the Principles of Pleading In Civil Actions, c. II, Of the Principals of Pleading, 3, pp. 262—267 (3d Am. ed. by Tyler, Washington, O. C., 1900); Shipmnn, Handbook of Common-Law Pleading, c. XVII, General Rules Relating to Pleas, 239 (3d ed. by Ballantine, St. Paul, 1923).

**Articles:** Simpson, A Possible Solution of the Pleading Problem, 53 Harv.L.Rev. 169 (1930); **McDowall**, Alternative Pleading in the United States, 52 Col. L.Rev, **603**, 605—605 (1952).

Notes: Inconsistent Defenses, 8 Mich.L.Rev. 134 (1909); Pleading—Answer—Inconsistent Pleas, 23 Yale L.J. 187 (1913); The Right to Employ Inconsistent Defenses, 15 Mich.L.Rev. 152 (1916); Pleading and Practice—Inconsistent Causes of Action in Same Complaint—Contract and Tort, 20 Col.L.Rev. 712, 800 (1920); Pleading Inconsistent Defenses, 10 Calif.L.Rev. 251 (1922); Pleading—Inconsistent Defenses, 23 Minn.L.Rev. 840 (1939); Pleading: Alternative Liabilities and Inconsistent Causes of Action:

C.P.A. Sections 211, 212 and 25S Interpreted, 11 Cornell L.Q. 113 (1925).

**(IV) Several defendants may Plead Sep**

**arately.**

*Singleness of issue*

IT was the avowed object of Common-Law Pleading to reduce the controversy of the parties to a Single Material Issue decisive of the case. If a defendant had Several Defenses, the Common Law required him to make his Election between them and rest his

**one selected. In Whitaker v. Chief Justice Marshall says:**

“The principle in Pleading that a Special Plea must Confess and Avoid the fact charged in **the Declaration was introduced at a time when the Rigid Practice of the Courts required that every cause should be placed on a Single Point, and when it was deemed error to Plead Specially Matter which Amounted to the General Issue; it was not allowed to Deny the Fact and also to Justify it. The defendant might select his Point of Defense; but, when selected, he was confined to it.**

That a Single Point might be presented to the Jury, he was under the necessity of Confessing everything but that point. The attention of the Jury was not directed to Multifarious Objects, but confined to one on which alone the cause depended.” ~

The Rule is well settled that No Plea or Traverse can be good which embraces Different Matters, which cannot be brought within the scope of One Issue.<sup>43</sup> A Plea or

4. Whitaker v. Freeman, 12 N.C. 271, Fed.Cas.No. 17,527a, 29 FeciCas. 955 (C.C.1S27).

42. Originally, at Common Law, the plaintiff was allowed to plead only One Plea in Bar, as the great aim of Pleading n-as to reduce the controversy to a Single, Clear-Cut, Well-Defined Issue for the Jury, and thereby simplify the Investigation. By use of the various General Issues, Singleness of the Issue early became a fiction, since the Issue, though apparently single in words, was in reality Complex.

43. Comyn, Digest, Pleader, E. 2 (London, 1522).

Every Plea must be Simple, Entire, Connected, and Confined to a Single Point, and a Ploa sotting up more than one Independent fact or set of facts, either of which ts sufficient answer, Is bad for duplicity, whether the Plea Is in Bar, In Abatement,

475

case on the  
*Freeman*,<sup>4</sup>,

476

**DEFENSIVE PLEADINGS**

CIt 22

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.<sup>44</sup> It is not necessary, however, that the Single Ground of Defense or Answer to which each Flea or Replication is thus

limited shall consist of a Single Fact,<sup>45</sup> 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.**<sup>46</sup>

### **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**

or Both. Florida East Coast By. Co. v. Peters, 72 Fla. 311, 73 So. 151 (1918).

44. See the following cases: English: Vivian v. Jenkin, 3 Ad. & Li 741, 30 E.C.L., 330, 111 Eng.Rep. 595 (1835); Illinois: Armstrong v. Webster, 30 Ill. 333 (1863); New Hampshire: Watriss v. Pierce, 36 N.H. 232 (1858); New Jersey: Star Brick Co. v. Ridsdale, 84 N.J.L. 428 (1871); New York: Eradner v. Demick, 20 Johns. 405 (1823); Federal: United States v. Gurney, 1 Wash.C.C. 446, Fed.Cas.No.15,271 (1806).

A Plea of Abatement on the ground of Wrong Venue, and on the ground of defendant being immune from service of process when and where he was served, is bad for duplicity. Fitzgerald v. Southern Farm Agency, 122 Va. 264, 94 S.E. 761 (1918).

45. As to the test of duplicity, see People ex rel. Attorney General v. River Raisin & L. B. It. Co., 12 Mich. 390, 88 Am.Dec. 64 (1864).

46. English: Robinson v. Raley, 1 Burr. 316, 97 Eng. Rep. 330 (1757); Illinois: Kinney v. Turner, 15 Ill. 182 (1853); Kipp v. Bell, 86 Ill. 577 (1877); Maine: Potter v. Titcomb, 10 Me. 453 (1833); New Hampshire: Tebbets v. Tilton, 24 N.H. 120 (1851); New York: Strong v. Smith, 5 Caines (N.Y.) 100 (1805); Cooper v. Heermance, 3 Johns. (N.Y.) 318 (1808); Tubbe v. Catwell, 8 Wend. (N.Y.) 130 (1831); Vermont: Robinson v. St. Johnsbury & L. C. It. Co., 80 Vt. 129, 66 A. 814, 9 L.R.A., N.S., 1249 (1907).

Another to Another Part, or may Plead in Abatement to One Part of the Demand, and in Bar as to Another.~ 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 Subsequent Pleadings in the series, a severance being always proper when there are Several Subjects of Claim or Complaint. This right, however, of thus Pleading Distinct Matters, appears to be subject to the restriction that neither of the Separate Defenses thus alleged can be such as would alone constitute a sufficient Answer to the Whole of the Opposing **Claim, since then one only would be necessary.**<sup>49</sup>

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

47. Stephen, A Treatise on the Principles of Pleading in Civil Actions, c. II, Of the Principal Rules of Pleading, 245—246, 267, 306 (3d ed. by Tyler, Washington, D. C., 1875).

48. Lawe v. King, 1 Wms.Saunders 76, 85 Eng.Rep. 88 (1667); Keigwin, Precedents of Pleading at common Law, 1, 11 (Washington, 1910).

Each Plea, of course, must be addressed and limited to a different element of the Cause of Action.

40. Stephen, A Treatise on the Principles of Pleading in Civil Actions, c. It, Of the Principal Rules of Pleading, 292 (5th ed. by Williston, Cambridge, 1893).  
Sec. 234

#### PLEAS—PEREMPTORY OR IN BAR

477

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.<sup>50</sup> 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.

The Rule was changed by the Statute of 4 Anne, c. 16, § 4, 11 Statutes at Large 156 (1705). That section provides that “it shall and may be lawful for any defendant or tenant In any Action or Suit, or for any plaintiff in Replevin, in any Court of Record, with the leave of the same 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 I *or* a Rule of Court permitting him to do so; and upon this a Rule is accordingly drawn up for That purpose.<sup>51</sup>

When Several Pleas are Pleased, either to Different Matters, or, by virtue of the Statute, to the Same Matter, the plaintiff may, according to the nature of his case, either Demur to the Whole, or Demur to One Plea

M. See dictum *In Auburn & Onwasco Canal Co. v. Leltch*, 4 Denlo (N.Y.) 65 (1847).

41. Stephen, A Treatise on the Principles of Pleading In Civil Actions, e. It, Of the Principal Rules of Pleading, § 3, p. 263 (3d Am. ed. by Tyler, Washington, D. C. 1875).

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 Pleased 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,<sup>52</sup> 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 *£* or 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  
st. *Clinton v. Morton*, 2 Slr. 2000, 93 Eng.flop. 994  
(1734).

#### DEFENSIVE PLEADINGS

this extent, therefore, is the use of Several Pleas now carried.

Some efforts, however, were at one time made to restrain this apparent abuse of the indulgence given by the Statute; for that leave of the Court which the Statute requires was formerly often refused where the proposed Subjects

of Plea appeared to be inconsistent, and on this ground leave has been refused to Plead to the same trespass, “Not Guilty” and “Accord and Satisfaction,” or “Non Est Factum” and “Payment” to the same demand.<sup>53</sup> In modern Practice, however, such Pleas, notwithstanding the apparent repugnancy between them, are permitted,<sup>1-</sup> and the only Pleas, perhaps, which

53. Corny, Digest, Pleader, B. 2 (London, 2822). See, also, *Gully v. Bishop of Exeter & Do-vliJg*, 5 Bing. 42, 130 Eng.llep. 975 (1828).

54. English: *Chitty v. flume*, 13 East 255, 104 Bug. Rep, 308 (1811); *Macclellan v. Howard*, 4 TB. 194, 100 EngJtep. 969 (1791); *Jenkins v. Edwards*, 5 TB. 97, 101 Eng.Rep. 55 (1793); Illinois: *Miller v. Stanley*, 186 IN.App. 340, 346 (1914); *Peiree v. Sholtey*, 190 m.App 341, 346 (1914); Maine: *Gordoff v. l'circe*, ii lle. 213 (183-1); Massachusetts: *Jackson v. Stetson*. 1~ Mass. 54 (isiSs *Whitweu v. Wells*, 2-4 Pick. (Mass.) 25 (1834); *Merry v. Cay*, 3 Pick. (Mass.) 388 (1820); New Hampshire: *flow v. Epplag*, 48 NIT. 7.5 (1368); New York: *Buhler v Wentworth*, 17 Barb. (N.Y.) 649 (1854); *Lansingh -v. Parker*, 0 ilow.Pr. (N.Y.) 288 (1854); *Thayer v. Rogers*, I *Joljns.Cas.* (N.Y.) 152 (1799); Pennsylvania: *Peters v. tImer*, 74 Pa. 402 (1873).

In an Action of Trespass on the Case, since the adoption of Rules 71 and 72 of the Circuit Court in Coinmon-Law Actions, the defendant may file a Plea of Not Guilty with Special Pleas of Confession and Avoidance, and to avail himself of certain Matters of Defense must file such special Pleas. *Florida East Coast By. Co. v. Peters*, 72 Fla. 311, 73 So. 151 (IOIS).

A defendant may plead as many Grounds of Defense as he may have, provided that they are not so repugnant that if one be true another must be false. *Itawitzcr v. Mutual Benefit Health & Accident Ass'n*, 101 NeL'. 210, 102 NW. 037 (1917); *Haight v. Oniaha & C. B. St. By. Co.*, 101 Web. 841, 166 NW. 248 (1917).

A defendant is not entitled to Notice of a Special Matter of Defense under the General Issue and also to a Special Plea. *Aurora Trust & Savings Bank v. Whildin*, 208 Ill.App. 527 (1917).

have been uniformly disallowed, on the mere ground of inconsistency, are those of the General Issue and a Tender<sup>5</sup> As Tidd states the law:

“But subject to these Exceptions, the defendant may Plead as many different matters as he shall think necessary for his Defence, though they may appear to be contradictory or inconsistent; as *Non Assumpsit* and the Statute of Limitations, or in Trespass, Not Guilty, a Justification, and Accord and Satisfaction, etc. So he may Plead *Non Assumpsit* and Infancy, or Not Guilty and *Libcrum Tenementum*; though, as Infancy may be given in evidence upon *Non Assumpsit*, and *Liberurn Tenementum* upon Not Guilty, the Pleading of these Matters Specially seems to be unnecessary.”<sup>56</sup>

55. Stephen, *A Treatise on the Principles of Pleading in Civil Actions*, c. II, Of the Principal Rules of Pleading, § 3, p. 265 (3d Am. ed. by Tyler, Washington, D. C. 1875); *Omeara v. Cardiff Coal Co.*, 154 Ill. App. 321 (1910), in which a Plea of the General Issue and Tender was involved. But, see, *5Mw v. Lord Alvanley*, 2 Bing. 325, 130 Eng.Rep. 331 (1824); 31 Cyc. 148, n. 19.

56. Tidd, *Practice of the Court of Kings Bench in Personal Actions*, c. XXVIII, Of Pleas in Bar and Notice of Set-Off, 610 (1st Am. ed., Philadelphia, 1807),

“Where a defeadant ploads inconsistent Pleas, the admissions necessarily made in One Plea cannot be used against him upon another; as where the General Issue is pleaded with a Plea in Confession and Avoidance, the admission contained in the latter Plea does not relieve the plaintiff of proving his whole case against the General Issue. *Glenn v. Sumner*, 232 U.S. 157; *Whitaker v. Freeman*, 1 Devercu x 270 .. Among tl;o traditiolls of the Bar is the famous Case of the Kettle, in which plaintiff alleged flint defendant had borrowed plaintiff's kettle, and had suffered the same while tu defendant's possesston to be~me cracked, for which impairment damages were claimed. Defendant pleaded (1) that he did not borrow the kettle; (2) that the kettle was never cracked; and (3) that the kettle was cracked when he borrowed it. And these Pleas were held on Demurrer to be pleadabe together; but, according to a supplemental tradition, the Demurrer was sustained on the ground that the Pleas amounted only to the General Issue.” *Keigwiu*, *Precedents of Pleading at Common Law*, 270 (Washington, D. C., 1910).

478

Cl. 22

Sec. 234

#### PLEAS—PEREMPTORY OR IN BAR

479

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 Rule* 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,<sup>57</sup> nor to the same Replication more than One

Rejoinder; and so to the end of the series. The legislative provision allowing Several Matters of Plea was confined to that case, under the impression, probably, that it was in that Part of the Pleading that the hardship of the Rule Against Duplicity was most seriously and frequently felt, and that the Multiplicity of Issues which would be occasioned by a further extension of the enactment would have been attended with expense and inconvenience more than equivalent to the advantage. The effect, however, of this state of Law is somewhat remarkable. For example, it empowers a defendant to Plead to a Declaration in Assumpsit for goods sold and delivered (1) the General Issue; (2) that the cause of action did not accrue within six years; (3) that he was an infant at the time of the contract. On the First Plea the plaintiff has only to Join Issue, but with respect to each of the Two Last he may have Several Answers to give. The case may be such as to afford either of these Replications to the Statute of Limitations, namely, that the cause of action did accrue within six years, or that at the time the cause of action accrued he was beyond sea, and that he commenced his Suit within six years after his return. So, to the Plea of Infancy, he may have ground for Replying, either that the defendant was not an infant, or that the goods for which the action is brought were necessaries suitable to the defendant's condition in life. Yet, though the defendant had

57- But compare *Priest v. Dodsworth*, 235 Ri. 612, 619, 85 NE. 040, 942 (1005).

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.r~

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,<sup>50</sup> 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.<sup>00</sup>

As the Several Counts in the Declaration are required, apparently at least, to be distinct and complete Statements of Separate

55. Stephen, *A Treatise on the Principles of Pleading in Civil Actions*, -II, Of the Principal Rules of Pleading, 3 p. 266 (3d Am. ed. by Tyler, Washington, P. C. 1875).

-d. Illinois: *Millikin st. Jones*, 77 Ill. 872 (1875);  
Massachusetts: *Jackson v. Stetson*, 15 Mass. 48 (1815); New Hampshire: *Watriss v. Pierce*, 30 N. H. 232 (1858).

60. *Priest v. Dodsworth*, 235 311. 013, 85 N.E. 940 (1908); *Keokuk & Hamilton Bridge Co. v. Wetzell*, 228 Ill. 258, 81 N.E. 864 (1907); *Mix v. People*, 02 Ill. 540, 663 (1879).

See, also, Note: Speethc Denials in Affirmative Dc-tenses, 20 CoLL.Rev. 170 (1920).

*Kolier & Reppy ConLaw Pldg. hft-17*

480

## DEFENSIVE PLEADINGS

Ch. 22

Causes of Action, and are so considered and treated, so as stated above, each of Several Pleas, when Pleaded together, must be stated as a New or Further Plea, with Formal Commencement and Conclusion, and must stand and be treated as if Pleaded alone. One Plea cannot be taken in to help or destroy another, but Every Plea must stand

or fail by itself.<sup>61</sup> 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.<sup>62</sup>

### *Several Defendants iWay 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.<sup>63</sup> 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 for 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

<sup>61</sup> English; Grills v. Mannell, Wiles 378, 125 Eng. Rep. 1223 (1742); Arkansas: Clark v. Bolt, 10 Ark. 257 (1855); Indiana: Potter v. Earnest, 45 Ind. 416 (1873).

416 (1873).

<sup>62</sup> Illinois: West Chicago St. B. Co. v. Morrison, Adams & Allen Co., 100 Ill. 288, 43 N.E. 393 (1896); New Hampshire: Bartlett v. Prescott, 41 N.H. 499 (1860); New York: Starkweather v. Iottie, 17 Wend. (N.Y.) 20 (1837); Federal: Whitalcer v. Freeman, 12 NC. 271, Fed.Cas.No.17,527a, 29 Fed.Cas. 055 (1826).

<sup>63</sup> Coke, Littleton, 303a (London, 1832); Essington v. Bourther, Bob. 245, 80 Eng.Rep. 390 (1618). See, also, English: Cuppledick v. Terwflit, Bob. 250, 80 Eng.Rep. 396 (1618); New York: Stilweli v. Hasbrouck, 1 Bill (N.Y.) 561 (1841).

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, tre several as well.

### DUPLICITY IN PLEAS—IN GENERAL

235. A Pleading which Contains Several Answers, whatever their Class or Quality, will be Double.

THIS Rule rests upon the principle, previously stated, that where One of Two or More Facts would constitute a sufficient ground of Defense, only One such Fact should be stated. If, therefore, a Pleading included Several Matters in Abatement or in Bar,<sup>64</sup> or contained One of each Character,<sup>65</sup> it would be Double, and hence fatal on a Special Demurrer. The same 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.<sup>66</sup>

### DUPLICITY—IMMATERIAL MATTER

236. 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

<sup>64</sup> Calhoun v. Wright, 3 Scam. (Ill.) 74 (1841); Barross v. Hewitt, 3 Seam. (Ill.) 224 (1841).

<sup>65</sup> Comyn, Digest, Pleader, E. 2 (London, 1822); See, also, English; Bleeke v. Grove, 1 Sid. 176, 82 Eng.Rep. 1040 (1063); Illinois: McConnell v. Stettinius, 2 Ill. (Ill.) 707 (1845).

<sup>66</sup> English: Bleeke v. Grove, 1 Skl. 175, 82 Eng.Rep. 1040 (1663); Wright v. Watts, 3 Q.E. 89 (1642); Illinois: Priest v. Dodsworth, 235 Ill. 613, 85 N.E. 940 (1908); Vermont: Vaughan v. Everts, 40 Vt. 526 (1808).

1040 (1663); Wright v. Watts, 3 Q.E. 89 (1642); Illinois: Priest v. Dodsworth, 235 Ill. 613, 85 N.E. 940 (1908); Vermont: Vaughan v. Everts, 40 Vt. 526 (1808).

Sec. 237

### FLEAS—PEREMPTORY OR IN BAR

though Pleaded in connection with what is Material. Such Matter will be rejected as Impertinent <sup>67</sup> and Superfluous, since it requires no answer, and it therefore cannot occasion the fault for which all Double Pleadings are objectionable, that is, a Multiplicity of Issues.<sup>68</sup>

Thus, in an Action by the Executors of *A* on a bond conditioned that the defendant should warrant to *A* 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 fall 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 *A*, during his life, peaceably enjoyed the meadow, which descended after his death to one *B*, his son and heir who, by 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

87. An Impertinent Averment is a statement of matter altogether foreign to the Merits of the Cause, and may, therefore, be struck out in its entirety, without injury to the pleading, and, of course, no proof of such an Allegation can be required; on the other hand, an immaterial Averment must, in many cases, be proved, and is a statement of unnecessary particulars in connection with, and as descriptive of, What Is material. GouM, A Treatise On the Principles of Pleading, Part III, Of Pleading, Div. II, Rules Applicable to Pleadings in General e. II, Miscellaneous Rules, 317—320 (6th ed. by Will, Albany, 1909).

68. English: Countess of Northumberland's Case, 5 Coke 97b, 77 Eng.Bep. 206 (1597); Illinois: Hereford v. Crow, 3 Seam. (Ill.) 423 (1842); Maryland: Stewardson v. White, 3 Bar. & MeN. (MO.) 455 (1796); Massachusetts: Lord v. Tyler, 14 Pick. (Mass.) 156 (1833); Michigan: Comstock v. MeEtoy, 52 Mich. 324, 17 NW. 931 (1883); New York: Panton v. Holland, 17 Johns. (N.Y.) 02, 5 Am.Dec. 369 (1819).

A <sup>2</sup>ica setting up two defenses, one of them bad, is not Demurrable for duplicity. Guest Piano Co. v. Bicker, 274 Ill. 448, 113 N.E. 717 (1910).

Double; because in showing the forfeiture to have accrued by the heir's own wrongful act, Two Several Matters are alleged: *First*, that he entered without admission, against the custom; *secondly*, that three shillings of rent were in arrear. But the Judges held that the only sufficient cause of forfeiture was the nonpayment of rent; that, there being No Custom alleged for forfeiture in respect of entry without admission, the Averment of such Entry was mere Surplusage and could not, therefore, avail to make the Plea Double.<sup>69</sup> 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 who take the same view.<sup>70</sup>

#### DUPLICITY—MATTER ILL PLEADED

237. Material Matter, though Ill Pleaded, will occasion the Fault of Duplicity.

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 treated 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,

<sup>69</sup>. Executors of Grenelife, 1 Dyer 4<sup>2</sup>a, 73 Eng.Rep.

01 (1538)~

<sup>70</sup>. Stephen, A Treatise on the Principles of Pleading in Civil Actions, c. 11, Of the Principal Rules of Pleading, 260 (4th Am. ed. by Treubart, Philadelphia, 1841).

482

#### DEFENSIVE PLEADINGS

Ch. 22

would give rise to Duplicity, will have the same effect when Ill Pleaded, especially if, in spite of such faulty statement, it would be Aided by a Verdict.<sup>71</sup>



Thus, in an Action of Trespass *for* Assault and Battery where the defendant Pleaded that he committed the trespasses in the moderate correction of the plaintiff as his servant, and further, Pleaded that since that time the plaintiff had Discharged and Released to him the said trespasses, without alleging, as he ought to have done, a Release under Seal, the Court held that the Plea was Double, the moderate correction and the Release being each a Matter of Defense; and although the Release was insufficiently Pleaded, it was, nevertheless, a Matter upon which a Material Issue might have been taken, and hence it was sufficient to make the Plea Double.<sup>72</sup>

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 previously explained. That object is the avoidance of Several Issues. So, whether a Matter be Well or Ill Pleaded, yet if it be sufficient in Substance, as to make it possible for the opposite party to take Issue upon it, if he chooses to Plead Over, without pressing 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, therefore, tend to a Separate Issue, nor, consequently, fall within the Rule against Duplicity.

#### DUPLICITY—MATTERS FORMING A CONNECTED PROPOSITION

238. No Number of Circumstances, however multifarious, that together constitute but One

72. See *Bleeke v. Grove*, 1 Sid. 175, 82 Eng.Bep. 1040 (1663).

73. 4 Bacon, Abridgment of the Law, 'Pleas' K. 2 (Dublin, 1786); *Bleeke v. Grove*, 1 Sid. 175, 82 Eng.Rep. 1040 (1663). Connected Proposition or Entire Point, will operate to make a Pleading Double.

THE Rule against Duplicity has been qualified, not only as to Pleadings in Confession and Avoidance, but also as 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.<sup>73</sup>

Thus, to an Action of Trespass 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, taken alone, may be sufficient to Justify the arrest; for, all of them, taken together, amount to one connected cause of suspicion.<sup>14</sup>

And, 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 to the Replication for Duplicity, it was objected that

73. English: *Robinson v. Raley*, 1 Burr. 316, 97 Eng. Rep. 330 (1757); Illinois: *Holland v. Kibbe*, 16 Ill. 133 (1854); Maine: *Potter v. Titcomb*, 10 Me. 53 (1833); New Jersey: *Harker v. Brink*, 24 N.J.L. 833 (1854); New York: *Tucker v. Ladd*, 7 Cow. (N.Y.) 450 (1827); Vermont: *Torrey v. Field*, 10 Vt.

353 (1888).

74. See the following cases: English: *Robinson v. Raley*, 1 Burr. 316, 97 Eng.Rep. 330 (1757); *Palmer v. Gooden*, 8 Iv! & w. 890, 151 Eng.Bep. (1841); Connecticut: *Raymond v. Sturges*, 28 Conn. 134 (1854); Illinois: *calhoun v. Wright*, 4 Ill. 74 (7841); *Itch land v. Kibbe*, 16 Ill. 133 (1554); *Henry v. Heldmafer*, 226 Ill. 152, 8 N.E. 705 (1907); *Mississippi Deut v. Coleman*, 10 Smodes & M. (Miss.) 83 (1848); New York: *Russell v. Rogers*, 15 Wend. (N.Y.) 351 (1536); *Gafr'ney v. Colvill*, 0 Hill (N.Y.) 507 (1844); *Tucker -v, Ladd*, 7 Cow. (N.Y.) 450 (1827); Federal: *Clearwater v. Meredith*, 1 Wall. 25, 17 LEd. 604

(1863).

Sec. 238

#### PLEAS—PEREMPTORY OR IN BAR

483

there were Three Distinct Facts put in Issue, 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 couehant, and that they were conimonable 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.<sup>75</sup>

There is some difficulty in the application of this *Rule* in establishing a test between those cases in which Several Averments make up a Single Point, and may therefore be Alleged or Traversed together, and those in which each constitutes a Separate Point, though insufficient in itself as a Defense without union with the others. The governing principle seems to be that while each Successive Denial or Allegation in Pleading must contain no Superfluous Matter, and must be limited to what is strictly necessary to constitute a Good Defense or Reply to the Pleading it seeks to answer, it may still go as far, and cover as much ground, as may be requisite to attain that object. Therefore Two Distinct Facts cannot ordinarily be Averred or Denied Together, if the Proof or Disproof of one would be sufficient to defeat or maintain the action.<sup>76</sup> 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

75. Robinson v. Raley, 1 Burr. 316, 97 Eng.Rep. 330 (1757).

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 *Dc Injuria*, 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.<sup>77</sup> There is a restriction upon the use of this Form, however, 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.<sup>78</sup>

### *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 defendant is permitted, *under* the General Issue, in that ac~ tion, to avail himself, with some few Exceptions, of any Matter *tending to* disprove his liability. The consequence is, that under these General Issues the *defendant* has the advantage of disputing, and therefore of putting the plaintiff to the Proof of every Averment in the Declaration. Thus, by Pleading Not Guilty, in Trespass *quare clau.sum fregit*, he is enabled to Deny, at the Trial, both that the land was the plaintiff's and that he corn-

77. O'Brien v. Sason, 2 Barn. & C. 908, In Eng.Rep.

619 (1824).

78. Stephen, A Treatise on the Principles of Pleading in *Civil Actions*, a. XI, Of the Principle Rules of Pleading, 3, pp. 251, 252 (3d Am. ed. by Tyler, Washington, P. C., 1900).

76. See Tebbets v. Tilton, 24 N.H. 120 (1851).

454

## DEFENSIVE PLEADINGS

Cl. 22

mitted 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 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.<sup>70</sup>

The Replication *Dc Injuria* is similar to the General Issue in being a General Traverse, which is allowed where an Affirmative Defense is set up by Way of Excuse. Like the General Issue, it is an anomaly and a violation of the Rule against Duplicity, since it permits the Party to set up Numerous Defenses by one Plea.

#### DUPLICITY—PROTESTATION

239. 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 and acceptance of goods in satisfaction of the plaintiff's demand, though the plaintiff cannot Reply that the goods were neither delivered nor accepted in satisfaction, for this would be Double, yet he may Protest that they were 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.

#### WHAT DEFENSES MAY BE SHOWN UNDER THE GENERAL ISSUE AND WHAT MAY OR MUST BE PLEADED SPECIALLY

240. Defenses which may be shown under the General Issue in the various Actions, and those which may or must be Specially Pleaded are set out in the following Sections.

IN the succeeding sections each of the actions is analyzed with reference to the defenses which may be shown under the general issue and those which may or must be specially pleaded. As will appear, especial attention is given to the effect of the Hilary Rules *on* these questions.<sup>81</sup>

*Be.* In general, on the Origin, Development and *Effect* of the Hilary Rules of 1834, see:

**Treatises:** Price, *New Practice of the Courts of Law at Westminster in Personaj Actions* (London, 1833— 1835); Petersdorf, *Practical Precedents In Pleading, Prepared in Accordance with the Recent Rules and Statutes; with Explanatory and Practical threotions, and Preliminary Remarks Upon the Effect and Application of the Late Rules in Pleading* (London, 1835); Charnock, *Digest of the various Decisions Since the New Pleading Rules Came into operation, with Explanatory Observations, Distinguishing What Defenses May be Given tinder the General Issue* (London, 1837); Kennedy, *A Treatise on the New Rules of Picading, &c.* (London, 1841);

o. *Id.* at 253.

81. See note SI 01% page 485.

Sec. 241

#### PLEAS—PEREMPTORY OR IN BAR THE GENERAL ISSUE IN TRESPASS

241. “Not Guilty” is the General Issue in Trespass, and it operates as a Denial of the Act of Trespass alleged. It also Denies the

Lut-vyehe, *An Inquiry into the Principles of Pleading the General Issue Since the Promulgation of the New Rules. With a List of Statutes which Allow the Special Matter to be Given in evidence mider the General Issue, and an appendix.* (London, 1842); McNamara, *A Practical Treatise oil the Several Counts and Pleas, Allowed to be Pleaded Together in Civil Proceedings, under the Statute, 4 Anne, c. 16 (1705); and the New Rules of Hilari' Term, 4 Wm. IV, and other Rules and Statutes* (London, 1844); Roscoe, *Of Pleading the General Issue Under the New Rules of the courts of Westminster: and of the Evidence Applicable to Issues Obtained by Pleading Specially Under those Rules* (London, 1845).

Articles: Reppy, *The Hilary Rules and Their Effect on Negative and Affirmative Pleas Under Modern Codes and Practice Acts*, 6

N.Y.U.L.Q.Rev. 95 (1929); Simpson, A Possible Solution for the Pleading Problem, 53 Harv.L.Rev. 169, 177—178 (1039).

Comment: Actions and Pleadings Affected by the New Rules, 10 Monthly L.Mag. 24 (1841).  
In general, on the Origin, History and Development of the General Issue, see:

Treatises: Stephen, A Treatise on the Principles of Pleading in Civil Actions, - IT, Of the 1-iiw-ii,al Rules of Pleading, 168—170, 252, 253 xlvii, lii (3d ed. by Tyler, Washington, D.C. 1893); Perry, Common-Law Pleading: Its History and Principles, c. IX, Of the Rules Which Tend Simply to the Production of an Issue, 241—251 (Boston, 1597); Gould, A Treatise on the Principles of Pleading, Pt. III, Div. c. V, Of the General issue and Special Issues, 474; Id. c. II, Of Special Pleas in Bar, 519 (6th ed. by Will, Albany, 190~); Keigwin, Cases in Common Law Pleading, Bk. IT, The Rules of Pleading, a VII, The General Issues, 589—015 (2i1 ed. Rochester, 1034).

Articles: Langdell, Discovery Under the Judicature Acts, 1873, 1875, Part 1, 11 Harv.L.Bev. 148—155 (1897); Eeppy, The Anomaly of Payment as an Affirmative Defense Under Modern Codes and Practice Acts, 10 Cornell L.Q. 269 (1925); Reppy, The Hilary Rules and Their Effect on Negative and Affirmative Pleas Under Modern Codes and Practice Acts, 6 N.Y.U.L.Q.Rev. 95 (1020); Stayton, The General Issue in Texas, 7 Tex.L.Sey. 345—347 (1929); Simpson, A Possible Solution of the Pleading Problem [The General Issue and Its Scope], 53 IJa"r.L.Ret 175— 178 (1939).

plaintiff's Title or Right of Possession of Goods or Land, unless limited by Statute or Rule of Court. All Defenses in Justification and Excuse, or in Discharge, must be Specially Plead.

FORM OF THE GENERAL ISSUE IN TRESPASS

In the King's Bench, Term, in the Year of the Reign of King George [Trespass: Not Guiltyj the Fourth. C. D. ats. A.B.

AND the said defendant by William John-son, his attorney, says that he is not guilty of the said trespasses above laid to the charge or any part thereof, in manner and form, as the said plaintiff hath above complained. And of this the said defendant puts himself upon the country.

MARTIN, Civil Procedure at Common Law, Appendix, Form (52) (St. Paul 1905).

IN Trespass, whether to person or property, the General Issue is "Not Guilty." It operates in the first place as a Denial that the defendant committed the Act of Trespass alleged, to wit, the application of force to the plaintiff's person, the entry on his land, or the taking or damaging of his goods. It also Denies the plaintiff's Possession, Title, or Right of Possession of the Land or Goods.

Trespass on the Case—Office of "Not Guilty," 9 III. L.Rev. 442 (1910); Effect of the Presence of the General Issue on the Retrospective Operation of a Demurrer, 10 111,L.Itev. 417, 421 (1016); PleadIng— Statute of Frauds—Admissible Under General Denial, 64 U.Pa.L.Rev. 754 (1916); Pleading—General Denial—Bills and Notes—Proof of Payment, 1 hlinn L.Rev. 462 (1917); Pleading—Replevin—Wliat Defenses are Provable Under a General Denial, \$ ?,iinn.1,Rev. 563 (1921); Pleading— Proof of Par ment Under a General Denial in Actions of Account, 27 Minn.L,Rcv. 31S (1942).

Annotations: Assumpsit—General Issue, 40 LIA. (N. 5.) 43 (1914); Defenses Available ruder Genera! Denial or a Plea of the General issue in Action of Ejcctment, L.It.A.19181'. 2-IT (1918).

485

Comments: Plearling—Trespass on the Case—Office of 'Not Guilty,' 9 III.L.Rev. 44 (1900); Pleading— 486

DEFENSIVE PLEADINGS

Under it, therefore, the defendant can show such Matters as directly controvert the fact of his having committed the acts complained of.<sup>82</sup> Matter of Justification and Excuse would admit them, and must therefore be Specially Plead.<sup>83</sup> 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.<sup>83</sup> So, in Trespass *Quare Olausuni Fi-egit*, 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

<sup>82</sup> See *Gibbons v. Pepper*, 1 Ld. flayru. 38, 91 Erig. Rep. 922 (1695), (where the horse ran away with the defendant, and so it would not be his act which produced the inju,-v) : English: *Pearcy v. Walter*, U Car. &P. 232, 172 Eng.Rep. 1220 11834); *New Hampshire: Puller v. Itourieevilhe*, 29 N.H. 554 (1854).

<sup>83</sup> English: *Cotterill v. Starkey*, S Car. & 1'. 091, 34 Eng.Com.Law 905, 173 Eng.Rep. 070 (1839); *Ilall v. Fearuhey*, 3 Q.B, 910, 114 Eng.flep. 781 (1842) (ineritajie accident); Massachusetts: *Waters v. Li-Icy*, 4 Pick. (Mass.) 147 (1826); New York: *Butterwertli v. Soper*, 13 Johns. (N.Y.) 443 (1810); South Carolina: *Gambling v. Prince*, 2 Nott. & 11cC. (S.C.) 138 (1819).

<sup>84</sup> English: *fladkin v. Powell*, I Cowp. 478, 98 Eng. Rep. 1105 (1776); Illiuko: *Olsen v. Upsahl*, CO Ill. 273 (1873); Chicago Title & Trust Co. m'. Core, 223 IU. 58, 79 N.E. 108 (1006).

In case of Trespass to the person the defendant must always Plead his Justification specially when the act *is* his own. English: *Knapp v. Salsbui'y*, 2 Camp. 500, 170 Eug.Rep. 1231 (iSle); *Boss r. Litton*, 5 Car. & P. 407, 172 Eng.Rep. 1030 (1832).

In case of self-defense, justifying the act done in defense of property, see: Kentucky: *Ford v. Logan*, 2 A.K.Marsh. (Ky.) 324 (1820); Massachusetts: *Satupson v. Henry*, 11 Ph-k. (Mass.) 379 (3831); New

York: *Hyatt v. Wood*, 3 Johns. (N.Y.) 230 (1808). And see Illinois: *Conis leek m'. Oderman*, 18 Ill App. 326 (1885); New York: *Ht.rrick v. Manly*, I Caines ~N.Y.) 253 (1803); *Gates v. Lomishui'y*, 20 Johns. (N. 1.) 427 (1823).

against the better title of the defendant, or li he did take the goods, but they did riot 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 tile goods, sufficient to entitle him to call them his own.<sup>85</sup> If the Defense is of a'y other kind, the General Issue will not apply; as, for instance, where the defendant intends to show a Justification or Excuse, or a Discharge.<sup>86</sup>

## PLEAS IN CONFESSION AND AVOIDANCE IN TRESPASS

242. In Trespass, all Defenses in Justification and Excuse, or in Discharge, must be

<sup>85</sup> English: *Badkin v. Powell*, I Cowp. 475, 95 Eng. Rep. 1195 (1770); illinois: *Ebersol v. Trainer*, SI Ill.App. 645 (1898); *smith v. Edelstein*, 92 Ill.App. 38 (1900); Massachusetts: *Proprietors of Monumoi Great Beach v. Rogers*, I Mass. 100 (1804); New York: *Brown v. Arteher*, I Hill. (N.Y.) 200 (1841).

Jim 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 (1802); *Strange v. Durham*, 2 Bay (S.C.) 420 (1802). And see *Norms v. Keeler*, 6 Johns. (N.Y.) 63 (1810),

The Plea of "Liberuni Tenemntum," which states a general freehold title in the defendant without ethenvise describing it, is an instance of a Special Plea *in* Trespass "Quare Clausum Fregit" which admits both the plaintiff's possession and the Trespass charged. Illinois: *Fort Dearborn Lodge v. Klein*, 115 Ill. 177, 3 N.E. 272, 56 Am.Rep. 133 (1885); *Marks v. Madsen*, 261 Ill. 51, 103 N.E. 623 (1913); *Ward v. Mississippi River Power Co.*, 265 Ill. 480, 107 N.E. 115 (1914); South Carolina: *Caruth v. Allen*, 2 MeCord (S.C.) 220 (1822).

<sup>86</sup> Alabama: *Finch's Ex'rs v. Alston*, 2 Stew. & P. (Ala.) 83, 23 Am.De. 299 (1532); Illinois: *Hahn v. Ritter*, 12 Ill. 80 (1850); Chicago Title & Trust Co. i'. Core, 223 Ill. 58, 79 N.E. 108 (1006); Massachusetts:

Huggles v. Lesure, 24 Pick. (Mass.) 187 (1830); Michigan: Seneal v. Labadin, 42 Mich. 126, 3 NW. 290 (1870); New York: Coles v. Carter, 0 Cow. (N.Y.)

091 (1827).

Sec. 242

PLEAS—PEREMPTORY OR IN BAR

487

Specially Pleaded in Confession and Avoidance.

ALL Defenses in Justification and Excuse, and in Discharge, must be Specially Pleaded in Confession and Avoidance in Trespass,<sup>87</sup> as Self-Defense (*Son Assault Demeane*), Leave and License, Defense of Property, Entry or Seizure by Virtue of Judicial Process, or Contributory Negligence, and such Matters in Discharge as Release,<sup>88</sup> Statute of Limitations, Arbitration and Award, and Former Recovery.

The Plea of *Liberum Tenementum*, the “Common Ear,” is that the land was the soil and freehold of the defendant. This Plea admits possession in the plaintiff, such as would enable him to sue a stranger, but asserts a freehold in the defendant and a right

87. Under leave and license: In Trespass, Justification under a license must be specially pleaded, and cannot be shown under the General Issue, notwithstanding the broad provisions of Code 1007, Ala.

5331. Louisville & N. B. Co. v Barte. 204 Ala.

539, 55 So. 304, 12 A.L.R. 251 (1020); Sturman

- Colon, 48 Ill. 463 (1808) Chicago Title & Trust

- Co. v. Core, 223 Ill. 55, 70 N.E. 108 (1906), Cf. Kapisehki v. Koch, 180 Ill. 44, 54 N.E. 179 (1809).

Concerning self-defense (son assault demesne) see:

Thomas v. Riley, 114 Ill.App. 520 (1004).

For defense of property, see Illinois Steel Co. v. Novak, 184 Ill. 503., 56 N.E. 066 (1000).

Necessity for landlord to enter to make repairs, see:

Comsteek v. Oderman, 15 Ill.App. 320 (1885).

For cases under entry or seizure by virtue of Judicial Process, see: Olsen v. Upsahl, 69 Ill. 273 (1873);

McNall v. Vehon, 22 Ill. 499 (1850); Bryan v. Bates,

15 Ill. 87 (1853); hg v. Burbank, 50 Ill.App. 291

(1894); Blakek v. Randall, 76 Ill. 224 (1875).

Justification under Legal Authority is not available as defense to Action of Trespass unless Specially Pleaded, but defendant may show under General Issue in mitigation that he was acting in good faith and under what he considered Legal Authority. Jackson v. Boblin, 16 Ala. ADp. 105, 75 So. 697 (1017).

88. In general on the subject of a Release as a Defense see:

Article: Fallon, Time Nature of Release, 11 Temple L.Q. 170 (1937).

**Comment: Who Has** the Burden of Proof in Setting Aside Releases Executed by Injured Railroad Employees, 53 Dicl.L.Rev. 298 (1049).

to the immediate possession as against the plaintiff. This admits that the defendant did the act complained of against the possession of the plaintiff, but Justifies *IL*<sup>80</sup> The General Issue disputes both possession and title, but this Plea shows defendant’s Title on the Record, and may compel the plaintiff to make a New Assignment of the *locus in quo* with more specific description.

FORM OF PLEA OF LIBERUM TENEMENTUM IN TRESPASS QUARE CLAMOREM FRECIIT

In the Court, Term,

C.D.

ats.

A,B.

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

89. *Ft. Dearborn Lodge -v. Klein*, 115 Ill. 177, 3 N.E. 272, 56 Am.Rep. 133 (1885); *Illinois Ceut. B. Co. v. Ratter*, 207 Ul. 88, 69 N.E. 751 (1904); *Marks v. Madsen*, 261 Ill. 51, 103 N.E. 625 (1913); *Ward v. Mississippi River Power Co.*, 265 Ill. 480, 107 N.E.

115 (1914).

In *Trespass Quare Clausum Fregit* for coustrnctiflg a s,dc'wallc along *land* against objection, the defendant, by pleading *Liborum Tenementum*, admits that plaintiff was ia possession and the doing of the acts charged. *Morgan v. City of Vienna*, 206 Ill.App. 322 (1917); *Boyd v. Kiimmel*, 161 Ill.App. 206 (1011).

488

#### DEFENSIVE PLEADINGS

Cli. 22

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.

SHIPMAN, *Handbook of Common-Law Pleading* 311 (3d ed. by Ballantine, St. Paul 1923).

#### THE HILARY RULES—THEIR EFFECT UPON NEGATIVE AND AFFIRMATWE DEFENSES IN TRESPASS

243. Under the Hilary Rules “Not Guilty” operated in *trespass quare clausum fregit* only as a denial that the defendant committed the trespass alleged in the place mentioned; and in *trespass de bonis asportatis* only as a denial of the defendant having committed the trespass alleged by taking or damaging the goods.

The Hilary Rules of 1834 restricted the Scope of the General Issue by providing that, in *Trespass Quare Clausurn Fregit*, the Plea of Not Guilty shall operate as a Denial that the defendant committed the Trespass alleged in the place mentioned, but not as a Denial of the plaintiff’s Possession or Right of Possession. If this is intended to be Traversed, it must be by a Specific Traverse.

In *Trespass De Bonis Asportatis*, the Plea of Not Guilty operated under the Hilary Rules as a Denial of the defendant having committed the Trespass alleged, by taking or damaging the goods mentioned, but not of plaintiff’s property therein. To put in Issue the plaintiff’s Right, the Specific Trayerse “Not Possessed” was used. Prior to these Rules of Court there was no occasion for a Specific Traverse.

#### THE GENERAL ISSUE IN TRESPASS ON THE CASE

244. The Plea of “Not Guilty” is the proper General Issue in an Action of Trespass on the Case, and is a Formal Denial of Liability, admitting almost All Defenses.

#### FORM OF THE GENERAL ISSUE IN

#### TRESPASS ON THE CASE

[Trespass on the Case:

Not Guilty]

In the King’s Bench,

Term, in the *Year* of the Reign of King George  
the Fourth.

C. D.

ats.

A.a

1k

AND the said *CD.*, by William Johnson, his attorney, comes and defends the wrong and injury, when, etc., and says that he is not guilty of the premises above laid to his charge in manner and form as the said *A.B.* hath above complained. And of this tile said *CD.* puts himself upon the country.

STEPHEN, Principles of Pleading in Civil Actions, 278 (2d ed. by Andrews, Chicago 1901).

THE General Issue in the Action of Trespass on the Case is “Not Guilty,” and the Scope and Effect of this Plea is much broader than in the Action of Trespass *Vi Fit Armis*, where it operates as a Mere Denial or Traverse of the Facts alleged. An effect is given it similar to that in the Action of Assumpsit, by which the defendant may contest under it, not only the truth of the Material Facts alleged in the Declaration, but may also give in evidence any Defense which, as Lord Mansfield observed, “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

Sec. 244

#### PLEAS—PEREMPTORY OR *IN BAR*

489

that only.” The defendant, upon the General Issue of Not Guilty, not only put the plaintiff upon the Proof of the Whole Charge in the Declaration, including Matters of Inducement, as well as Matters constituting the Gist of the Action, but he might also offer evidence of Defenses going to Dispute Liability, more popularly known as Affirmative Defenses. And this included Affirmative Defenses in Discharge of the cause of action, as well as Defenses in Justification and Excuse. The net effect of this departure from the True Principles of Pleading, was to permit the defendant, under the General Issue, any Matter of Defense in contravention of the Plaintiff’s Right of Action, even though such matters were strictly the proper subjects of a Plea in Confession and Avoidance of the Declaration; although the defendant could, if he chose, bring forward by Way of a Special Plea all Matters in Confession and Avoidance of the Declaration. Thus, in effect, under the General Issue, the defendant’s Defense might be that he did not commit the Wrongful Act complained of, or that

90. *Bird v. Randall*, 3 Burr. 1353, 07 EngRep. 566 (1762). See, also, the following cases: English: *Birch v. Wilson*, 2 Mod. 276, 86 Eng.Rep. 1008 (1617); *Bradley v. Wyndbam*, 1 Wils.K.B. 44, 05 EngRep. 483 (1743); Pennsylvania: *Greenwalt v. Hornex*, 6 Serg. & B. (Pa.) 76 (1820); Tennessee: *Plowman v. Foster*, C Cold. (Tenn.) 52 (1808),

91. English: *Newton v. Creswick*, 3 Mod. 166, 57 Rag. Rep. 107 (1687); *Underwood v. Pants*, 2 Str. 1200, 03 Eng.Rep. 1127 (1743); Maine: *Taylor v. Robinson*, 29 Me. 323 (1849); Illinois: *Wiggins Ferry Co. v. Blakeman*, 54 Ill. 201 (1870) (Contributory Negligence); *Chicago City fly. v. Leach*, 208 Ill. 108, 70 N. B. 222, 100 Am.St.Bep. 21(3 (1004) (Fellow Servant).

In Trespass on the Case the defendant may, with few exceptions, prove under the General Issue matters in Confession and Avoidance. *Dnnham v. Western Union Telegraph Co.*, 85 W.Va. 425, 102 SE. 113 (1920).

Evidence of a Defense in Justification Is competent under a Plea of the General Issue, though the commencement and ending of the Declaration describe the Action as Trespass, provided the body of the Declaration describe an Action in the Nature of an Action of Trespass on the Case. *George v. Illinois Cent. B. Co.*, 197 Xi].App. 152 (1015). it was Excusable, or that he was Released from its consequences.<sup>92</sup> This latitude was probably allowed for the same



reason that permitted the extended use of the General Issue in Assumpsit, though it is difficult to see how it is reconcilable with any of the Principles of Pleading.

Thus, if your automobile is damaged and you sue the wrongdoer in Trespass, the Plea *of* Not Guilty will serve as a Denial of the Facts stated in the Declaration, and no more. Matters of Justification or Excuse, such as the Defenses of Contributory Negligence, or Leave and License, cannot be proved under this Plea. But if you sue in Case, the defendant may, under a Plea of Not Guilty, not only put the plaintiff upon Proof of the whole Charge contained in the Declaration, but may offer any Defense in Justification or Excuse, or he may set up a Former Recovery, or a Release, or Discharge.<sup>93</sup> An Action on the Case is said to be in the Nature of a Bill in Equity, and the defendant may prove, under the General Issue in that action, almost anything, except the Statute of Limitations and Truth in Libel and Slander, which shows that the defendant ought not to recover—an illogical and whimsical reason for slipshod Pleading.

<sup>92</sup> City of Chicago v. Babcock, 143 Ill. 358, 32 N.E.

271 (1902) (Accord and Satisfaction) Papke v. O-H. Hammond Co., 192 Ill. 631, 61 N.E. 910 (1901) (Release); Cooper v. Lawrence, 204 Ill.App. 261 (1917) (Conditional privilege in defamation cases—such as fair comment on the public acts of a public man).

The exceptions to the General Rule above stated are the Statute of Limitations, a Justification in Slander, and the Retaking of a Prisoner on Fresh Pursuit, which must be specially pleaded.

<sup>93</sup> Illinois: Wiggins Ferry Co. v. Blakeman, 54 Ill.

201 (1870) (Contributory Negligence); City of Chicago v. Babcock, 143 Ill. 858, 32 N.E. 271 (1892) (Accord and Satisfaction); Kapishki v. Koch, 180 Ill. 44, 54 N.E. 179 (1899) (Former Recovery); Papke v.

C. H. Hammond Co., 192 Ill. 631, 61 N.E. 910 (1901) (Release); Maryland: Herrick v. Swomley, 56 Md. 439 (1881) (Release); Federal: Brown v. Baltimore & Ohio R. Co., C App.D.C. 237 (1805) (Release).

490

## DEFENSIVE PLEADINGS

Ch. 22

### PLEAS IN CONFESSION AND AVOIDANCE IN TRESPASS ON THE CASE

245. At Common Law, under a Plea of the General Issue in Trespass on the Case, as in Assumpsit, Debt on Simple Contracts, and Trover, most of the Affirmative Defenses may be admitted without being Specially Pleaded. The Two Principal Exceptions are the Defenses of the Statute of Limitations and Truth in Libel and Slander.

In general, all matters in Justification and Excuse, or in Discharge of the alleged Right of Action, could be shown under the General Issue in Case rather than Pleaded Affirmatively in Confession and Avoidance. There were Two Principal Exceptions to this Rule, which will be considered shortly—the Statute of Limitations and Truth in Slander and Libel Cases.

*The Defense of the Statute of Limitations* ~ IN the 1690 case, *Anonymous*,<sup>93</sup> in Debt for rent, upon Nil *Debet* Pleaded, Chief Jus

<sup>94</sup> In general, on the Statute of Limitations as Defense, see:

Treatises: Brook, Reading Upon the Statute of Limitations (London, 1047); Ballantine, A Treatise on the Statute of Limitations (London, 1812); Blanhard, Treatise on the Statute of Limitations (London, 1526); Wilkinson, A Treatise on the Limitation of Actions, &c. (London, 1833); Berry, Recent Statutes Relating to Prescription and Custom

The Limitation of Real Actions, &c. (London, 1833); Stalman, Acts Relating to Real Prop

erty... on Inheritances, Fines and Recoveries, Dower, Limitation of Actions, &c. (London, 1833); Gibbons, Treatise on the Law of Limitation and Prescription (London, 1835); Manse, Treatise on the Law of Limitation (London, 1839); Shelfond, The Real Property Statutes... (London, 1835); Darby & Bosanquet, Practical Treatise on the Statute of Limitations (London, 1867); Brown, Law of Limitation as to Real Property (London, 1869); Angell, Treatise on the Limitations of Actions at Law (6th ed., Boston, 1870); Banning, A Com

-pact Treatise on the Statute Law of the Limitations of Actions (London, 1877); Walter, Manual of the Statutes of Limitation (4th ed., London, 1883); Wood, A Treatise on the Limitations of Actions at Law and in Equity; with an Appendix Containing the English and American Statutes of Limitation (Boston, 1883); Trickett, Law of Limitations of Actions in Pennsylvania (Jersey City, 1888).

Justice Holt held that the Statute of Limitations might be given in evidence, as the Statute had made it no debt at the

time of the Plea Pleaded, the words of which were in the present tense; but in Case on Non Assumpsit, the Statute of Limitations could not be given in evidence,<sup>98</sup> as it spoke of a time past, and related to the time of making the Promise. In 1830, in the case of *Chapple v, Durston*,<sup>97</sup> Vaughan, 3., in referring to Chief Justice Holt's decision in the Anonymous Case of 1690, declared: "It appears to us that this distinction savors more of ingenious refinement than of plain and practical good sense, and we conceive that the same Rule would now be extended as well to Actions of Debt as of Assumpsit, the same reasons for Pleading the

**Articles:** Wigmore, Civil Procedure and Football—Defeating a Valid Claim by Pleading and Then Demurring, While the Statute of Limitations Bars, 4 *Ill.L.Rev.* 344 (1909—1910); Atkinson, Some Procedural Aspects of the Statute of Limitations, 27 *Col L.Itcv.* 157 (1927); Atkinson, Pleading the Statute of Limitations, 36 *Yale L.J.* 914 (1927); Danson, Undiscovered Fraud and Statutes of Limitation, 31 *Mich.L.Rev.* 591 (1933); Blume & George, Limitations and the Federal courts, 49 *Mich.L.Rev.* 937 (1951).

Comments: Pleading—Statute of Limitations—Permanent or Temporary Injury—Plea of Non-Accrevit, 11 *Ill.L.Rev.* 56 (1916); Limitation of Action—Plead-big—Amendments Restating Cause of Action, 5 *Iowa L.Rev.* 275 (1919); Representations Reasonably Belied Upon Against Actual Active Concealment in Tolling the Statute of Limitations, 22 *Iowa L.Rev.* 704 (1937); Raising Statute of Limitations by Motion to Dismiss, 3 *Fed.Rules Serv.* 071 (1940); Lienation of Actions: Pleading the Statute of Limitations in California, 29 *Calif.L.Rev.* 210 (1941); Limitation of Actions—Landlord and Tenant—Installment Rent Payments, 40 *Mich.L.Rev.* 132 (1941); The Statute of Limitations as a Pleading Problem in Iowa, 29 *Iowa L.Rev.* 501 (1944); Statute of Limitations as a Defense to Wrongful Death Statute, 42 *Ill.L.Rev.* 688 (1947); Effect of Failure to Plead the Statute of Limitations as an Affirmative Defense, 1949 *Ill.L.Forum* 170 (1949); Developments in the Law: Statute of Limitations, 63 *Harv. L.Rev.* 1177 (1950).

95. 1 *Salk.* 278, 91 *Eng.Bop.* 243 (1600).

90. *Ibid.*

91. 1 *C. & 3.* 1, 148 *Eng.Bep.* 1311 (1830).  
Sec. 245

#### PLEAS—PEREMPTORY OR IN BAR

491

Statute applying equally to both. If the Statute is not Pleaded, the plaintiff is liable to be surprised, and therefore equally unprepared to answer in the one action as in the other. In neither case does the Statute extinguish the debt, but Bars only the Remedy, and it is optional whether the defendant will insist upon the Statute or waive it. If he intends to insist upon it, he should Plead it, to prevent surprise, and if he does not, it should be presumed he intends to waive it. This is the view taken by the late Mr. Serjt. Williams, than whom a sounder lawyer, or more accurate Special Pleader has rarely done honor to his profession; and he states it to be very usual, and the Modern Practice, to Plead to Debt on Simple Contract, that the Cause of Action did not accrue within six years, that the plaintiff may Reply, either that he was within the Exceptions in the Statute, or that he has sued out a Writ within time, as is the common ease in Assumpsit," ~

The real reason, however, why the Statute of Limitations must, in general, be Pleaded Specially, stems from another cause. Any Allegation which the Pleader is not obliged to Prove as he states is Immaterial. Allegations of this character include the specification of time, which in pleading is ordinarily Immaterial, unless the date of a transaction is, for some other reason, Material as to its validity. Such Immaterial Allegations are not admitted by Demurrer.<sup>99</sup> It follows, therefore, that the Statement of a Right which appears, according to the date laid for it, to be Barred by the Statute of Limitations, is not, for this very reason, held to be bad on Demurrer, as the plaintiff, in Stating his Declaration, is not bound by the Allegation of a Specific Time. Hence, if the defendant desires to take *advantage* of the *Bar* of the Statute of Limitations, he can

98. *Chapple v, Durston*, 1 *C. & 3.* 1, 9, 148 *Eng.Rep.* 1311, 1314 (1830).

99. *Georgia Rome Ins. Co v. Wal-ten*, 113 *Ala.* 479, 22 *So.* 288 (1807).

do so only by Pleading the Statute Specially

—that is, by Averring that the Cause of Action did not accrue to the plaintiff within the period fixed by the Statute. Subject to a few Exceptions,<sup>1</sup> this was and is the Common-Law Rule. In Equity <sup>2</sup> and at Law,<sup>3</sup> in a few states, the Statute may be reached on Demurrer.

*The Defense of Truth in Trespass on the Case for Libel and Slander*

THERE was at least One Exception to the *extraordinary* latitude of Proof tolerated un

1. Lambert v. Ensign Mfg. Co., 42 W.Va. 813, 26 SB. 431 (1896).
2. Lambert y. Trinity Chnrch, 7 Paige (N.Y.) 195 (1838).
3. Chemung Canal Bank v. Lowcry, 93 C'S. 72, 23 LEJ. 800 0570).
4. In genera), on the subject of Truth as a Defense in Libel and Slander cases, see:

Treatises: Rayner, Digest of the Law Concerning Libels: Containing all the Resolutions i,i the Books on that Subject, and many Manuscript Cases, iIInstrated with *Occasional* Observations; to which, is added a Supplement Containing Considerable Additions (London, 1770); Adair, Discussions of the Law of Libels as at Present Received; in which its Authenticity is Examined, with Incidental Observations on the Legal Effect of Precedents and Authority (London, 1785) ; Highniore, I'ariai,nentary Debates on tho Statute, 32 Ceo. III, c. 00, for Removing Doubts Respecting the Functions of Juries in Cases of Libel (London, 1792); Jones, De Libellis Famosis, or the Law of lAbels (London, 1512) ; 1-Jolt, On the Law of Libel: in which is Contained a General History of this Law in the Ancient Codes, and of its Introduction and Successive Alterations (London, 1816; New York, 1818) ; Cuolce, A Treatise on the Law of Defamation, with an Appendix Containing the Recent Statutes Affecting this Portion of the Law, and Precedents of Pleading Under the New Act (London, 1844),

Articles: Veedor, Flistory and Theory of the Law of Defamation, 3 Col.L,Re--, 516 (1003); Bryan, Pii,lication of Record Libel, 5 Ya.L.Bei'. 513 (1918); flallen, Excessive Publication in Defamation, 10 Ninn,L.1{ev, 160 (1932); McCor,niclc, Measure of Damages for Defamation, 12 N.C,L.Bev. 120 (1034),

**Comments:** Negligence in the Law of Defamation, 20 Hare-LEe,- 533 (19W); Libel and Slander: Dcfamatory Acts as Publication: Placing White Person in Colored Ward, 5 Cornell L.Q. 340 (1020); Libel: Publication to a Stenographer; Excess of Pric  
492

## DEFENSIVE PLEADINGS

### Ch. 22

der a Plea of the General Issue in an Action of Trespass on the Case in Actions for Defamation. Logically, the Defense of Truth in Case for Libel or Slander, should have been permitted under the General Issue. But the rule has been that Truth in Slander and Libel must be pleaded Specially, with specific inllge, 0 ComeU L.Q. 430 11921); lAbel amid Sla'~dt'v

—Privilegc—Roport of Municipal Council, 23 Mid.: *Liter.* 420 (1924); Libel and Slander—Dictation of Letter to Stenographer as Publication, 28 Mieh.L. 11ev. 348 (1930); Libel and Slander—Liability of icewspaper for Publication of a False News Dispatch, 17 Minn,L.Rev. 820 (1933); Libel—Defamatory Statements in Appellate Brief—Publication of Excerpts by Legal Scholar as Priveleged, 31 Mich. L.Rev. 255 (1933); Libel and Slander—Liability of ~ce',vspaper for Publication of a False News Dispatch, 17 Minn.L.Rev. 820 (1933); Torts—Defaniation by Radio—Liability of a Broadcasting Station, S So.Cal.L.Rev. 359 (1935); Libel aad Slandci~ Qualified Privilege—Refutntioli of Defamatory ~tatcncnts Made Against a Third Person, 20 Minim. *Liter.* 438 (1936); Wills—Testamentary Libel— Omission of Libelous Matter from Probate, 21 Minim. J.,lev. 870 (1937); Libel—Grand Jury—Absolute Privilege Accorded in Reportimmg Misconduct of Pub3ie Official, 31 Minn.LRev. 500 (1047); Libel arid

Siander—Liability of Radio Broadcaster for Defamatory Utterances Made by Ommc Not in Its Employ, 24 Mimi.L.Rev. 118 (1930); Libel amid Slander—Absolute Immunity Under Statute, 38 Miclm.L.Itev. 732 (1940); Libel and Slander—Classification of Radio Defamation—Liability of Broadcaster, 39 Mich.L. Rev. 1002 (1941); Torts—Libel and Slandev—I'ieblication of Jnadvortent Defanmatory Material, 25 3linn.L.Iiev. 495 (1041); Libel and Slammder—Extcmmsion of the Doctrine of Absolute Privilege to Imm-ferior Executive and AdnmimiistratiVc Officials, 41 l4iclm.L.Rev. 919 (1942) ; Wills—Testamentary Libel —Liability of Decedent's Estate and of Executor for the Probate and Pnblication of a Libellous Will, 32 Va.L.Rev. 189 (1945); Torts—Libel—PublicatiOn tf Allegations in a Declaration, 44 Mieh.L.Rev. 675 (1946); Libel and Slander—Testamentary Libel, 48 Mich.L.Rev. 220 (19~9) ; Defanatiomm by Will, Wash. U.L.Q. 122 (Winter, 1950); Stateniemmts to F.B.I. Concerning Government Employees as Privileged Communications, 51 Col.L.Rcv. 244 (1051); Tort:

Libel: PnblicatiOn Through Negligent Failure to

Act: Duty of Property Owner to Remove Defanatory Statements from Premises, 40 CaLL.Itev. 625 fl952); The Law of Commrcial Disparagement:

Business Defamation's Inmpotemmt Ally, 63 Yale L.J.

65 (1953).

stances of the misconduct charged, with time and place.<sup>5</sup>

The Common Law Courts felt that to permit the Defense to be shown by the defendant under the General Issue, would result in talcing the plaintiff by surprise. It is reported that this Issue was taken up at a meeting of all the Judges, called to consider a case involving this Issue which arose in the Court of Common Pleas. At that meeting it was determined by a large majority of the Judges that, in the future, evidence of the Defense of Truth of the

Defamatory Matter Charged in the Declaration, should not be admissible under a Plea of the General Issue, but should be Pleaded Specially.<sup>6</sup>

THE HILARY RULES—THEIR EFFECT UPON AFFIRMATIVE AND NEGATIVE DEFENSES IN TRESPASS ON THE CASE

246. In Trespass on the Case, the General Issue of “Not Guilty” under the Runty Rules operated only as a Denial of the Breach of Duty or Wrongful Act; all other Defenses were required to be Pleaded Specially.

THE Scope of the Plea of the General Issue in Trespass on the Case—Not Guilty—was greatly restricted by the Hilary Rules of 1834, Section IV, which provided that “the Plea of Not Guilty shall operate as a denial only of the *breach of the duty or wrongful act* alleged to have been committed by the defendant, and not of the facts stated in the Inducement; and no other defense than such denial shall be admissible under that Plea; all other Pleas in denial shall take issue on some particular matter of fact alleged in the Declaration.” The term “Inducement”, as used therein, refers to those Facts and Circumstances which are required to be Stated in an Action of Trespass on the Case, in order to disclose the plaintiff’s Right as it existed

s. *Stoevell v. Beagle*, 57 Ill. 97 (1870); *Dowd v. Pridcile*, 216 Ill. 553, 75 N.E. 243, 3 Ann.Cas. 526 (1905).

6- *Underwood v. Parks*, 2 Str. 1200, 93 Eng.Eep. 1127 (1744).

PLEAS—PEREMPTORY OR IN BAR

at the time of the defendant’s Wrongful Act. The Plea of the General Issue, after the Hilary Rules, operated to Deny the Wrongful Act of the defendant, and to admit the Inducement, which disclosed the plaintiff’s Right.

Under Section IV of the Hilary Rules all Matters in Confession and Avoidance were required to be Pleaded Specially, as in Actions of Assumpsit. The Defenses of the Statute of Limitations and Truth in Defamation were required to be so Pleaded even before the Hilary Rules, as we have previously observed.

THE GENERAL ISSUE IN TROVER

247. The General Issue in Trover, as in Trespass and Trespass on the Case, is “Not Guilty,” which is a Formal Denial of the Wrongful Conversion. It denies a Legal Conclusion, and so Admits All Defenses, except Release and the Statute of Limitations.

FORM OF THE GENERAL ISSUE IN TROVER

In the King’s Bench,                      Term,                      [Trover:  
Not Guiltyj  
William TV  
C. D, 1  
ats.  
A.B.

AND the said defendant, by William Johnson, his attorney, comes and defends the wrong and injury, when, etc., and says, that he is not guilty of the said supposed grievances above laid to his charge, or any or either of them, or any part thereof, in manner -and form as the said plaintiff hath above thereof complained against him. And of this he the said defendant puts himself upon the -country, etc.

3 CHITTY, Treatise on Pleading with Precedents and Forms, \* 1030 (13th Am. ed., Springfield 1859).

THE scope of the General Issue in the Action of Trover is so broad, because of its relationship to Trespass on the

Case, that nearly

Any Defense may be shown, whether going to Dispute a Material Allegation in the Plaintiff's Declaration, or going to Dispute Liability. Thus, such a Defense as the Bankruptcy of the defendant, may be shown, but neither a Release nor the Bar of the Statute of Limitations may be admitted.' This latitude is permissive only, however, and the defendant is at liberty to Plead Specially any Defense which admits both the property in the plaintiff and the conversion, but Justifies the latter.<sup>8</sup>

#### PLEAS IN CONFESSION AND AVOIDANCE IN TROVER

248. The Defenses of a Release and the Statute of Limitations were required to be Plead Specially.

AS stated above, in Trover under Not Guilty, the only Defenses which could not be shown were a Release and the Statute of Limitations.

#### THE HILARY RULES—THEIR EFFECT UPON NEGATIVE AND AFFIRMATIVE DEFENSES IN TROVER

249. The Effect of the Hilary Rules in Trover was to restrict the General Issue of "Not Guilty" to a Denial of the Wrongful Conversion only.

7. English: Webb v. Fox, 7 T.R. 391, 101 Eng.Rep. 1037 (1797); Ward v. Blunt, cro.Eliz. 147, 78 Eng. Rep. 404 (1555); New York: Kennedy v. Strong, 10 Johns. (N.Y.) 291 (1815); Hurst v. Cook, 19 Wend. (N.Y.) 463 (1838).

As taking the goods for just cause, Kline v. Rusted, 3 Caines (N.Y.) 275 (1805); or disproof of plaintiff's title by showing title in a stranger, Itotan v. Fletcher, 15 Johns. (N.Y.) 207 (1818); though in the latter case the defendant must also show some title in himself, Duncan v. Spear, 11 Wend. (N.Y.) 54 (1833). And see Illinois: Fisher v. Meek, 38 Ill. 92 (1865); Maine: Fenlason v. Rackliff, 50 Me. 362 (1803).

b. Webb v. For, 7 TB. 391, 101 Eng.Rep. 1037 (1797); But see, Kennedy v. Strong, 10 Johns. (N.Y.) 291 (1815), where the practice of Special Pleading in such cases is condemned. Any Special Plea showing no conversion Is bad on Special Demurrer in Trover. Illinois: Fulton v. Merrill, 23 Ill.App. 599 (1887); Gates v. Thede, 91 Ill.App. 603 (1900).

Sec. 249

493

494

#### DEFENSIVE PLEADINGS

Cl. 22

AS Trover was in Form an Action on the Case, it fell within the Scope of Section IV of the Hilary Rules. Under the Reforming Rule, the Plea of the General Issue operated to Deny the Wrongful Act of the defendant, and no longer, as at Common Law, Denied the Right in the plaintiff, even though the Facts of Right might, in some degree, constitute a part of the description of the Wrongful Acts.<sup>9</sup> In the examples which the authors of the Hilary Rules gave under Section IV, in Paragraph 3, with respect to the Operation of the Rule as to the General Issue in Trover, it was said that "in an action for converting the plaintiff's goods, the conversion only, and not the plaintiff's title to the goods," were in issue under the Plea.

According to Chitty 10 and Greenleaf," only the Conversion in Fact, was in issue, irrespective of its character. Martin, however, states that the decisions have receded from this view, and that the term "*Converskm/*" as used in the Rules, means a Wrongful Conversion, in the same sense as it did Prior to the Rules, and that there can be no such thing as a Justifiable Conversion.<sup>2</sup>

After the Hilary Rules, under a Plea of the General Issue in Trover, a defendant was permitted to prove any Defense tending to show that the Act complained of was not Wrongful, and hence not a Conversion, and, of course,

such Plea admitted the plaintiff's title, which constituted the sole Inducement

P. Fraukum v. Earl of Falmouth, 2 Ad. & E, 452, 111 Eng.Rep. 175 (1835).

10. 1 Ohitty, Treatise on Pleading and Parties to Actions with Precedents and Notes, c. VII, Of Pleas in Bar, 053 (16th Am. ed. by Crkkins, Springfield, 1879).

ii. 2 GreeMeaf, Treatise on the Law of Evidence, 6-48 Trover (10th ed. Boston, 1568).

12. Civii Procedure at Common Law, c. XI, Defences in Bar by Way of Traverse, Art. II, General Traverse—Application Thereof, \* 266, Trover, 227 (St. Paul, 1905). See, also. Young v. Cooper, 6 Each, 259, 135 Eng.Rep. 038 (1851); Whitmore v. Green, 13 Sf. & W. 104, 153 Eng.ltep. 43 (1844).

in the action, to be true." Evidence of a lien cannot be shown under this Plea," as it questions the plaintiff's possession or right of possession, which stands admitted by the Plea; ~ if this Allegation is to be placed in Issue, in England, after 1834, it must be done by a Specific Traverse. After the Hilary Rules, in England, the Scope of the General Issue was greatly restricted, being limited to a Denial of the Wrongful Act of Conversion, hence most Defenses had thereafter to be Pleadcd Specially.'<sup>6</sup> If the plaintiff's title was to be put in Issue, the defendant was required to interpose a Specific Traverse of "Not Possessed."

In general, it has usually been said, that in the Several States of the United States, the Rules as they existed in England prior to 1834, or at Common Law, are followed.

#### TUE GENERAL ISSUE IN EJECTMENT

250. The General Issue in Ejectment is "Not Guilty," which permits all Defenses, Affirmative as well as Negative, to be shown. Equitable Defenses are still not allowed in sonic jurisdictions.

#### FORM OF THE GENERAL ISSUE IN EJECTMENT

		[Ejectment: Not Guilty]
In the King's Bench,	Term,	William IV
		C. D.
		ats.

ANTI) the said C. D. by William Johnson, his attorney, comes and defends the force

13. See, on this point, the remarks of Alderson, B., in Lewis v. Alcoclc, 3 11. & W. 188, 150 Eng.ltep. 1110 (1838).

14. White v. Teale, 9 L.J. (Q.B.) 377 (1840).

1-. 2 Selwyn, Nlsl Prius, 1380 (Edited by Fish, Philadelphia, 1857).

10. Martin, CIVII Procedure at Common Lan-, c. XI, Defences in Bar by Way of Traverse, Art. 11, Coneral Traverse, 266, Trover, 227 (St. Paul, 1905).  
Sec. 251

#### PLEAS—PEREMPTORY OR IN BAR

495

and injury, when, etc. and says, that he is not guilty o the said supposed trespass and ejectment above laid to his charge, or of any part thereof, in manner and form as the said A. B. hath above thereof complained against him; and of this he the said C. D. puts himself upon the country, &c.

3 CHIFFY, Treatise on Pleading with Precedents and Forms, ¶1141 (13th Am. ed., Springfield 1859).

IN view of the fact that Ejectment originated as a Personal Action in which the lessee sued for Damages for Ouster from his Term, the Plea of the General Issue constituted a General Traverse as in other forms of Trespass Actions, It thus operated to place in Issue all the Material Allegations stated in the Declaration, that is, the Right to Let, the Entry, the Actual Lease, and the Ouster. But in time the Scope of "Not Guilty" was restricted by the Common Consent Rule, under which the Actual Tenant, as a condition of being substituted in place of the Casual Ejector, was compelled to admit the Entry, the Lease and the Ouster, leaving in Issue only Title.

As a result of the development of the Action, the General Issue in Ejectment—"Not Guilty"—operates as follows: (1) As a Denial of the Unlawfulness of the withholding, that is, of the Plaintiff's Title and Right to Possession; (2) All Defenses in Excuse or Discharge, including the Statute of Limitations, are available.<sup>17</sup>

### *Specific Traverse*

THE defendant, under the General Issue, cannot be heard to dispute that he held

17. English: Taylor v. Horde, 1 Burr, 60, 97 Eng. Lrep. 190 (1757); Alabama: Bush v. Thomas, 172 Ala. 77, 55 So. 622 (1911); Illinois: Roosevelt v. Hungate, 110 Ill. 595 (1854); Federal: Hogan v. Kurtz, 94 U. S. 773, 24 LEd. 817 (1876).

In general, as to Defenses admissible under the General Issue or General Denial in Ejectment, see Note. L.R.A. 1918F, 247 (1918).

possession. In Illinois, the defendant would Deny by a Special Plea, Verified by Affidavit, that he was in possession or claims any interest or title in the premises, or that any demand of possession was made.<sup>15</sup>

### PLEAS IN CONFESSION AND AVOIDANCE IN EJECTMENT

251. In Ejectment, as Affirmative Defenses are admissible under the General Issue, it is not proper to Plead them Specially. Equitable Defenses are not allowed in Ejectment.

AFFIRMATIVE Defenses are wholly improper in Ejectment, as these Matters are available under the General Issue,<sup>18</sup> nor are Equitable Defenses<sup>20</sup> permitted in Ejectment. It constitutes no Defense in Ejectment that the deed of the plaintiff was secured by fraud going to the consideration, as contrast

18. Itev. St. Ill. c. 45, § 21 (1955) A Chart of Illinois Defensive Pleading, 1 Univ. Ill. L. Bull. No. 5. 189, 212—213 (1918), by Professor Henry W. Ballantine.

29. Edwardsville B. Co. v. Sawyer. 02 Ill. 377 (1870).

20. In general, on the subject of Equitable Defenses, see:

Treatise: Mayne, Equitable Defenses and Ejections under the Common Law- Procedure Act of 1854 (London, 1854).

#### **Articles:** Ames, Specialty Contracts and Equitable

Defenses, 9 Harv. L. Rev. 49 (1895); Ilinton, Equitable Defenses under Modern Codes, 18 Mich. L. Rev.,

717 (1920); Cook, Equitable Defenses, 32 Yale L.J.

645 (1923); Hutchins, Equitable Ejectment, 26 ColL.

Rev. 436 (1926); Meffaine, Equitable Defenses to

Actions at Law in the Federal Courts, 17 Calif. L.

Rev. 591 (1920); Crawford, Equitable Defenses to

Actions at Law Under the Missouri Code, 25 Wash.

U.L.Q. 60 (1939); Moreland, Equitable Defenses, 1

Wash. & Lee L. Rev., 153 (1940).

Comments: Procedure: Nature of Actions: Interposition of Equitable Cross-Complaint to Legal Actions, 13 Calif. L. Rev. 345 (1925); Actions—Equity—Reformation of Instruments—Equitable Defenses, 9 Minn. L. Rev. 567 (1925); Necessity of Trial of Equitable Defenses to Law Actions, 25 ColL. Rev. 630 (1925); Pleading: Equities Affecting Legal Causes of Action as Defenses or Counterclaims:

DEFENSIVE PLEADINGS

Ch. 22

ed to fraud in the execution, although a Court of Equity might rescind the conveyance.<sup>21</sup>

At Common Law, it took a Legal Title to maintain or defeat an Action of Ejectment. *It follows, therefore, that an Equitable Defense constituted no Bar to a recovery. Thus, it is no Defense in Ejectment to show that a deed was procured by the plaintiff's fraud, even though a Court of Equity, on the same showing, might rescind the conveyance.* Possession of land under a verbal contract, payment of the price, and the making of valuable improvements thereon, will operate to take the case out of the Statute of Frauds in Equity, but not in a Court of Law, and such facts constitute no Defense to an Action of Ejectment. The defendant, for relief, must have recourse to a separate proceeding in Equity.<sup>23</sup>

*In Illinois, when the distinction between the Common Law and Chancery Courts was being maintained, it was not permissible, in an Action of Ejectment, to attack a deed upon the ground that the grantor was mentally incompetent to execute the deed, as the remedy in such case is in a Court of Equity.*

In those states, in which the distinction between Common Law and Equity Jurisdiction is not so strictly maintained, the Defense of Incompetency can be raised in an Action of Ejectment.<sup>24</sup> In an Ejectment Action, the Court cannot adjust the equities, if any, be-

21. *Dyer v. Day*, 61 Ill. 336 (1871); *Esheriek v. Prayer*, 65 Ill. 379 (1872); *Fleming v. Carter*, 70 Ill. 286 (1873); *Baltimore & O. & C. It. Co. v. Illinois Cent. B. Co.*, 137 Ill. 9, 27 N.E. 38 (1891).

Estoppel in Pais is available in Equity only.

22. *Dyer v. Day*, 61 Ill. 336 (1871); *Union Brewing Co. v. Meler*, 163 Ill. 427, 45 N.E. 264 (1896).

23. *Fleming v. Carter*, 70 Ill. 286 (1873); *Herrell v. Sizeland*, 81 Ill. 457 (1876).

24. *Walton v. Malcolm*, 264 Ill. 389, 106 N.E. 211, Ann. Cas. 1915D, 1021 (1915).

In general, on Mental Incompetence as a Defense, see article by Wilkinson, Mental Incompetency as a Defense to Tort Liability, 17 *floc]cy Mt.L.Eev.* 38 (1944).

tween the parties, nor can the defendant rely upon the doctrine of Estoppel in Pais. In an estoppel by the conduct or admissions of the party] as a Defense.<sup>25</sup>

The Hilary Rules had no application to Ejectment.

THE GENERAL ISSUE IN DETINUE

252. "Non Detinet" is the General Issue in Detinue, and is a Formal Denial of the Detention, and also operates as a Denial of the Right of Possession or Property of the plaintiff in the goods claimed.

FORM OF THE GENERAL ISSUE IN DETINUE

In the King's Bench,	Term,	[Detinue: Non Detinet]
		William IV.
		C.D. ats. A.B.



AND the said *C. IL*, by William Johnson, his attorney, comes and defends the wrong and injury, when, &c., and saith, that he does not detain the said goods and chattels in the said Declaration specified, or any part thereof, in manner and form as the said *AS*. hath above thereof complained against him, and of this he the said *C.D.* puts himself upon the country, &c.

MARTIN, Civil Procedure at Common Law, Appendix, Form (53) (St. Paul 1905).

### *Scope of five General Issue in Detinue*

IN Detinue, the Declaration states that the defendant detains certain goods or chattels of

25. *Lanum v. Barrington*, 267 Ill. 57, 107 N.E. 820 (1915); *Nichols v. Caldwell*, 275 Ill. 520, 114 N.E. 278 (1916).

The same rule applies in Forcible Entry and Detainer. *Baltimore & O. & C. B. Co. v. Illinois Cent. B. Co.*, 137 Ill. 9, 27 N.E. 38 (1891).

“Even in the case of a naked trustee the Law is so streixuous for the Legal Title that It enables the trustee to recover In Ejeement against the *ceetti que trust.*” *Kirkpatrick v. Clark*, 132 Ill. 342, 24 N. E. 71, 22 Mn.St.Bep. 531. 8 IJ.R.A. 511 (1890).

PLEAS—PEREMPTORY OR IN BAR

497

### Sec. 255

the plaintiff, and the General Issue—“Non Detinet”—alleges that “he does not detain the said goods and chattels 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 places Both Facts in Issue. Any Proof necessary to controvert these Facts, therefore, is admissible, as showing that there has been no detention.<sup>26</sup>

PLEAS IN CONFESSION AND AVOID.  
ANCE IN DETINUE

253. In Detinue, matters in Excuse or Discharge should be Pleaded Specially.

EVIDENCE strictly in Justification, as that the goods are pledged to the clef endant,<sup>27</sup> or as establishing a lien upon them in his favor,<sup>27</sup> are not admissible under the General Issue, as the detention would be thereby admitted. These are Special Defenses, which tend to show that the detention was rightful. Matters in Excuse or in Discharge should be Specially Pleaded.

THE HILARY RULES—TJIEIR EFFECT UPON NEGATIVE AND AFFIRMATIVE  
DEFENSES IN DETINUE

254. “Non Detinet”, after the Rilary Rules, operated as a Denial of the Detention of the Goods by the defendant, but not of the Plaintiff’s Property therein; *and no defense* other

-Alabama: *Dozier y. Joyce*, 8 Port. (Ala.) 303 (1838); *Brown x. Brown*, 13 Ala. 208, 48 Am.Dec. 52 (1848); Illinois: *Robinson v. Peterson*, 40 Ill.App. 132 (1865); *Kentucky: Tanner v. Allison*, 3 *Dana* (Ky). 422 (1835); Virginia: *Smith v. To-vnes’ Adm’r.*, 4 *Munf.* (Va.) 191 (1814).

27. *Martin*, Civil Procedure nt Common Law, c. XI, Defences in Bar by Way of Traverse, Art. II, General Traverse, § 267, *Detinue*, 228 (St. Paul, 1905); *Richards v. Frankum*, 6 M. & W. 420, 151 Eng.Rep. 476 (1840).

When the detention is excused or justified, the defendant must plead his defense.

-*Philips v. Robinson*, 4 Ding. 106, 130 Eng.Eep. 708 (1827); *Richards v. Franl-um*, 6 hI. & W. 420, 151 tng.Rep. 476 (1840).

than such Denial was admissible under that Plea.

In Detinue, under the General Issue of “Non Detinet,” at Common Law the del end-ant might offer evidence of his property in the goods, or that the plaintiff had made a gift of them to him, as that proved that he did not detain

the plaintiff's goods. But by the Hilary Rules it was provided that "the Plea of Non Detinet shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defense than such denial, shall be admissible under that Plea." The detention contemplated by the Rules, however, is an adverse and wrongful one.<sup>29</sup> In this action, the defendant must, under the above Rule, Specifically Deny the plaintiff's property in the goods, when necessary for his Defense."

#### THE GENERAL ISSUE IN REPLEVIN

255. "Non Cepit" is the General Issue in Replevin, and is a Formal Denial of the Fact and the Place of the alleged taking. It Denies the Taking only, and not the Plaintiff's Right of Possession,

Where Replevin may be and is brought for goods Lawfully Obtained, but Unlawfully Detained, the General Issue is "Non Detinet,"

which is a Denial of the detention only, and not of the Plaintiff's flight

#### FORMS OF THE GENERAL ISSUE IN

#### REPLEVIN

(For a Taking—Non Cepit)

State of \_\_\_\_

The \_\_\_\_\_ Court for the County of C.D.

ats.

A.B.

AND the said defendant, by William Johnson, his attorney, comes and defends the

<sup>29</sup> Clements v. Flight, 16 H.L. & W. 42, 153 Eng. Rep. 1000 (1848).

<sup>30</sup> Richards v. Frankun., 6 M. & W. 420, 151 Eng. Rep. 476 (1840).  
498

#### DEFENSIVE PLEADINGS

Ch. 22

wrong and injury, when, etc., and says, that he did not take the said goods and chattels (describing them), in the said declaration mentioned, or any or either of them, or any part thereof in manner and form as the said plaintiff hath above thereof complained against him, and of this the said defendant puts himself upon the country, etc.

Encyclopedia of Forms. Form No. 17,759.

(For a Detention—Non Detinet)

State of \_\_\_\_

The \_\_\_\_\_ Court for the County of

C.D.

ats.

A,R

AND the said defendant, by William Johnson, his attorney, comes and defends the wrong and injury, when, etc., and says, that he does not detain the said goods and chattels (describing them) in the said declaration mentioned, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against him, and of this the said defendant puts himself upon the country, etc.

Encyclopedia of Forms. Form No. 17760.

THE General Issue in Replevin—"Non Ce-pit Mocio Et Forma"—operates to Deny the taking of the goods or chattels in the place mentioned.<sup>31</sup> As it denies only the taking, the property in the goods, and possession of the goods

by the plaintiff at the time of the

31. "The plea of Non Cepit Modo Et Forma, as used in this Action, has been classed with Pleas of General Traverse, raising the General Issue. But it is a Plea of such limited Scope that its classification with General Traverses may well be questioned." Martin, Civil Procedure at Common Law, c. XI, Defences in Bar by Way of Traverse. Art. IT, General Traverse, 268, Beplevin, 229 (St. Paul, 2905). seizure, are admitted,<sup>35</sup> and hence under this Plea the defendant cannot have a return of the goods.<sup>33</sup> This Plea applies to the case where the defendant did not in fact take the goods or chattels alleged, and where he did not take or have them at the place mentioned in the Declaration.<sup>34</sup> Thus, the Sole Issue raised is whether the defendant seized the goods at all, or at the place stated. It follows, therefore, that the Traverse is clearly

32. *Dover v. Rawlings*, 2 31. & Bob. 544, 174 Eng.Rep.

375 (1844).

"The distinction between the effect of "Non Copit" in Replevin and "Non Detinet" in Detinue and "Not Guilty" in Trover is here noticeable. See *Windman v. North*, 2 Let. 92, 83 Eng.Rep. 465 (1613), in which the opinion reads:

"Beplevin, the defendant justified and Pleaded in Bar, that the beasts belonged to a stranger, absque hoc that they were the beasts of the plaintiff. Upon this the plaintiff demurred, because this is only Matter in Abatement, and not in Bar and also it amounts to the General Issue. *Cljria*, In Trespass this would amount to the General Issue; but not in Replevin, and may be pleaded either in Abatement or in Bar. And there needs no Avowry Pro Rejonjo *Jfabe,ulo* in this ease, for the goods being not the plaintiff's, the Avowant must have a return of them, 2 Cro. *Sakud* against Shelton; and Judgment was given for the defendant."

See, also, the following cases: Illinois: *Galusha v.*

*Butterneld*, 2 Scam. (Ill.) 227 (1840); *Dole v. Kennedy*, 38 Ill. 282 (1865); *Dyer v. Brown*, 71 Ill.App, 317 (1897); Indiana: *Trotter v. Taylor*, 5 Blackt (Ind.) 431 (1840); *Mni.,e: Viekey v. Sherburne*, 20 31e. 34 (1841); Pennsylvania: *Williams v. Smith*, 10 Serg. & K. (Pa.) 202 (1823).

33. Illinois: *Mount Carbon Coal & Li. Co. v. Audreus*, 53 Ill. 176 (1870); *van Namee v. Bradley*, 69 Ill, 299 (1873); Massachusetts: *Simpson v. McFarland*, 15 Pick. (Mass.) 427, 29 Am.Dec. 602 (1836).

34. English: *3o1,nsor, 'cc Woflyer*, 1 Str. 507, 53 Eng. Rep. 666 (1721); *Potter v. North*, 1 Wrns.Saund, 347, it 1, 85 Eng.Bep. 503 (1669); *New York: Smith v. Snyder*, 15 Wend. (N.Y.) 825 (1836).

Where the Declaration is for the unlawful detention only, the Plea in Denial should be "Non Detinet" or "Non Detinuit" and that would seem on principle to be the Proper Plea at the present time, unless in case of an actual wrongful taking, since the gist of the Action is now the Wrongful Detention. *Bourk v. Riggs*, 38 Ill. 321 (1865); *Chandler -cc Lincoln*, 52 Ill. 14 (1869).

Sec. 256

#### PLEAS—PEREMPTORY OR JN BAR

499

in the Nature of a Specific Traverse, and hence should be so classified.<sup>35</sup>

#### *The Effect of the Statutory Merger of Detmug and Replevin Upon the General Is-sue in Replevin*

WHEN the Wrongful Act of the defendant consists only of a Wrongful Detention, after a Lawful Taking, and Replevin is allowed by Statute, "Non Detinet" becomes the General Issue as in Detinue; but the effect of this Plea is no greater than that of "Non Cepit," and, therefore, if the defendant wishes to Deny the Plaintiff's Property, he must allege an Adverse Title in himself, or some one under whom he claims. The Pleas of "Non Cepit" and "Non Detinet" thus both concede the Right of Possession to be in the Plaintiff, and only put in Issue the Taking and the Detention, as the case may be.<sup>3o</sup>

By Statute, in Some States, a Plea of "Not Guilty" or other General Issue, is allowed to put in Issue, not only the Wrongful Taking and Detention, but also the Right of the Plaintiff to the Possession of the property claimed, and even Matters in Excuse may be admissible under it.<sup>3,</sup>

#### THE SPECIAL TRAVERSE IN REPLEVIN

256. The Denial of the Right or Title of the Plaintiff is commonly made by a Peculiar Argumentative Species of

Denial, known as  
a Special Traverse.

35. Martin, *Civil Procedure at Common Law*, c. XI, Defences in Bar by V/ny of Traverse, Art. II, Gem cml Traverse, § 268, Replevin, 229 (St. Paul, 1905).

-6. Florida: *Hopkins v. Bumney*, 2 Fla. 42 (1848);  
Illinois: *Van Namee v. Bradley*, 09 Ill. 299 (1873).

37. Florida: *flolliday v. EcKinne*, 22 Fla. 153 (1886);  
Mississippi: *Bennett v. Holioway*, 55 Miss. 211

(1877).

The General Denial in Beplevin under the Codes has a peculiar comprehensiveness and permits almost all Defenses, Affirmative as well as *Negative*. Note:  
Pleading—Beplevin—-. What Defenses are Provable Under a General Denial, S Minn.L.Rev. 563 (1021); Squire, General Denial in Replevin, 24 Case & Cornmonl 21 (1017).

A SPECIAL Traverse is the proper Form of Denial of the Right or Title of the Plaintiff in an Action of Replevin. It consists of two parts: (1) An Affirmative Statement by Way of Inducement, setting up the facts and circumstances inconsistent with the Right or Title of the Plaintiff, such as Title in the Defendant or in a Third Person; (2) An *Abs que Hoc* Cause follows this Argumentative Denial with a Direct Denial of the Plaintiff's Right.<sup>35</sup> Thus, to illustrate, suppose the plaintiff in Replevin alleges that the defendant Wrongfully took his cattle. The defendant, Pleading an *Affirmative Statement* by Way of Inducement, *would* allege "that the cattle were the cattle of X, a stranger." But Two Affirmatives do not create an Issue. If, therefore, the defendant ended his Plea at this point, it would be subject to a Special Demurrer as an Argumentative Denial. To avoid this, the defendant adds his *Absqw3 Hoc* Clause—and not the cattle of the plaintiff—which turns the Argumentative Denial into a Negative Plea Denying Title.<sup>3o</sup>

Under a Plea by Way of Special Traverse, the plaintiff had the burden of Proof, and the defendant, if he succeeds, is entitled to a return of the goods, *without* the necessity of making an Avowry or Cognizance, because the plaintiff must recover on the strength of his own title and right to immediate possession.<sup>4o</sup>

38. *Chandler v. Lincoln*, 52 Ill. 74 (1869); *R~'ynolds v. McCormick*, 62 Ill. 412 (1872); *Vaji Naniec v. Bradley*, 69 Ill. 299 (1878); *Atkins v. Byrnes*, 71 Ill. 326 (1874); *Lamping v. Payne*, 53 Ill. 403 (1876); *Pease v. Ditto*, 189 Ill. 456, 59 N.E. 083 (1001).

39. *Chambers v. Hunt*, 18 N.J.L. 339 (1841).

4o. Illinois: *Reynolds v. McOormick*, 62 Ill. 412 (1872); *Atkins v. Byrnes*, 71 Ill. 326 (1874); Massachusetts: *Quincy v. Hall*, 1 Pick. (Mass.) 857, 11 Am. Dec. 198 (1823).

The Plea of property in a third person in Replevin is matter of Inducement to a Formal Traverse of the right of property in the plaintiff, which must be proved by the plaintiff. Delaware: *Beatty v. Parons*, 2 Boyce (Del.) 134, 78 A. 302 (1910), involving a denial of property in the plaintiff; Illinois: *Kee &*

500

## DEFENSIVE PLEADINGS

Ch. 22

### FLEAS IN CONFESSION AND AVOIDANCE IN REPLEVIN

#### 237. Affirmative Defenses must be Specially

Pleaded. An Avowry or Cognizance is a Plea somewhat in the nature of a Cross-Action by the defendant.

MATTER in Justification and Excuse for the taking, such as Levy on Execution or Attachment, or on Distress, or Seizure for Taxes, must be Specially Pleaded,<sup>41</sup> as also the Statute of Limitations, Satisfaction or Release,<sup>42</sup> and Estoppel to claim the goods.<sup>43</sup>

Where the defendant desired to Justify his taking as landlord, or on behalf of someone else from whom he derived his right to distrain, he Pleaded what was known as an Avowry, which justified the taking of the goods in his own right, or Cognizance, under which he claimed the goods or chattels in the right or on behalf of another. The

usual grounds were the taking on Distress Warrant for rent in arrear, or taking under Legal Process,<sup>44</sup> Such Fleas avowed or acknowledged the seizure of the goods or chattels in question, and set forth the facts of a tenancy and of arrearage in rent, and Concluded by demanding a return of the seized property. The Avowry or Cognizance thus admits that the plaintiff is the owner of the goods, and alleges a right to take or detain them as security for the rent alleged to be due. Such a Plea was in the nature of a Cross-Declaration, and hence the

Cliapell Dairy Co. v. Pennsylvania Ce., 291 Ill., 248, 120 N.E. 179 (1920).

41. Wheeler v. Mecorristen, 24 Ill. 41 (1860); Mount Carbon Coal & It. Co. v. Andrews, 53 Ill. 170 (1870); Lammets v. Meyer, 59 Ill. 214 (1871); Schemerhorn v. Mitchell, 15 Ill.App. 418 (1884); Lowry v. Kinsoy, 26 Ill.App. 209 (1887).

42. Anderson v. Takoit, 1 Oil. (Ill.) 365 (1844); Simincus v. Jenkins, 76 Ill. 470 (1875).

43. Leeper v. fleraman, 58 Ill. 218 (1871); Colwell v Brower, 75 Ill. 510 (1874); Mann v. Oberne, 15 Ill. App. 35 (1884).

44. James v. Dunlap, 2 Seam. (Ill.) 481 (1840); Dayton v. Fry, 29 Ill. 525 (1863); Krause v. Curtis, 73 Ill. 450 (1874).

plaintiff's Next Plea was not a Replication but a Plea in Bar, after which followed the Replication, Rejoinder, etc., the ordinary name of each Stage of Pleading being thus postponed one step further than in an ordinary action. In Pleading thereto, the plaintiff invoked the Plea of *Rien.s en Arrere* (nothing in arrear), which was recognized as the General Traverse for rent due on a demise.<sup>43</sup> This Plea, entered at what was usually the Replication Stage of Pleading, and in Form more like a Specific than a General Traverse, was restricted in Scope, admitting the defendant's title as stated in the Avowry, and operating only to Deny that any rent was in arrear.<sup>40</sup>

The Hilary Rules in no way changed the Scope of the So-called General Issue in Replevin, as in Form it was already in the Nature of a Specific Traverse. As has been observed, "Non *Cepit*," the General Issue, operated only to Deny the taking in the place mentioned; it did not operate to put in issue title, and hence the development of the Special Traverse, discussed in a preceding section, to accomplish that end when desired.

#### THE GENERAL ISSUE IN DEBT ON SIMPLE CONTRACTS AND STATUTES

258. The proper General Issue in Debt on Simple Contracts or on Statutes is "Nil Debet," which is a Formal denial of the Debt. It Not only Denies the existence of any contract, but under it Defenses in Excuse or in Discharge may also be shown.

FORM OF THE GENERAL ISSUE IN DEBT

[Debt on Simple Contract:

Nil Debet]

In the King's Bench,

Term, in the Year of the Reign of King George  
the Fourth.

IS. Gould, A Treatise on the Principles of Pleading, Part III, Of Pleading, Div. V, Of Pleas to the Action, e. i, Of the General Issue, and Special Issues; Including Also Immaterial and Informal Issues, 481 (6th ed. by Will, Albany, 1909).

46. Huh'. Wright, 2 Esp. 069, 170 Eng.Eep. 491 (1798).

Sec. 258

#### PLEAS—PEREMPTORY OR IN BAR

501

C. 31

ats.

A.B.

AND the said C. D., by William Johnson, his attorney, comes and defends the wrong and injury, when, &c., and says that he does not owe the said sum of money, above demanded, or any part thereof, in manner and form as the said A. B. hath above thereof complained against him, and of this he, the said C. D., puts himself upon the country, &c.

MARTIN, Civil Procedure at Common Law, Appendix, Form (50) (St. Paul 1905).

FORM OF THE GENERAL ISSUE IN DEBT

UNDER THE HILARY RULES

[Debt on Simple Contract:

In the King's Bench, Nunquam Indebitatus] Term, in the Year of the Reign of King William the Fourth. CD.

ats. A. B.



AND the said Defendant, by William Johnson, his attorney, says, that he never was indebted in the manner and form as in the declaration alleged. And of this he puts himself upon the country.

MARTIN, Civil Procedure at Common Law, Appendix, Form (50) (St. Paul 1905).

WHERE the Action of Debt is not founded on a Record or a Specialty, the General Form of Traverse is "Nil Debet," meaning that the defendant owes nothing; and it applies without regard to whether the debt arises by the operation of a Statute or by Simple Contract. As "Nil Debet" denied a present existing debt, the Courts gave a very broad construction to it, permitting Defenses which went to show the non-existence of the debt. Thus, for example, where the Declaration in Debt on Simple Contract alleged that the defendant is indebted to the plaintiff for goods sold and delivered, to which the defendant pleaded "Nil Debet", that is, that "he does not owe the money alleged to be due," the Issue on the Pleadings, framed in the present tense, is: Is the defendant presently indebted to the plaintiff? Were the Allegation merely "that the goods were not sold and delivered," it would, of course, be applicable to no case but one where the defendant intends 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 Arbitrament, Satisfaction, Release, and a multitude of others, to which a Traverse of a narrower kind would be inapplicable.<sup>47</sup> It has been said that the Defenses of Bankruptcy, the Statute of Limitations and Tender are the only ones which could not be proved under the Plea of Nil Debet.<sup>48</sup> However this may be, it appears that there is hardly any Matter of Defense to an Action of Debt to which the Plea of "Nil Debet" is not applicable, because almost all Defenses resolve themselves into a Denial of the Debt.<sup>49</sup> The Scope of the

<sup>47</sup> In general, on the subject of *Payment* as a DC-tease, see;

**Articles:** Alden, The Defense of Payment Under Code Procedure, 19 Yale Li 047 (1910); Reppy, The Anomaly of Payment as an Affirmative Defe.,se 10 Cornell LQ. 269 (1925).

Comment: Pleading—Hocq to Raise the Issue of *Payment*, 31 Mich.L.Rev. 182 (1932).

Annotation: May Payment be Proved Under the General Issue or General Denial, or Must it be Specially Plead? 100 A.L.R. 264 (1936).

<sup>48</sup> Martin, Civil Procedure at Common Law, e. XI, Defences in Bar by Way of Traverse. Art II, General Traverse, § 200, Debt, 220 (St. Paul, 1905).

<sup>49</sup> English: Bussey v. Barnett, 9 M. & W. 312, 152 Eng.Lrep 132 (1842); Illinois: Bailey v. Cowles, 80 In. 333 (1877) involving the Defense of Accord aail

In Debt on a Penal Statute, the more appropriate Traverse is that of “Nil Debet,” as it accords with the Form of the Action. However, the Plea of “Not Guilty” may be interposed, because the action is to enforce the penalty for an offense.<sup>70</sup>

#### PLEAS IN CONFESSION AND AVOIDANCE IN DEBT ON SIMPLE CONTRACTS AND STATUTES

259. With the possible Exception of Bankruptcy, the Statute of Limitations and Tender, which it may be necessary to Plead Specially, most Defenses in Debt might be shown under “Nil Delict,” whether going to the Denial of a Material Allegation or to Dispute Liability.

AS previously observed, it was said that the Scope of “Nil Debet” was so broad, that the only Defenses which had to be Pledged Affirmatively were Bankruptcy, the Statute of Limitations and Tender.<sup>71</sup>

Satisfaction: Massachusetts: *Stilson v. Tobey*, 2 Mass. 521 (1807); *Burnham v. Webster*, 5 Mass. 200 (1809) New Hampshire: *Trustees of Dartmouth College v. Clough*, 5 N.H. 22 (2835); New York: *Rullis v. Giddens*, 5 Johns. (N.Y.) 52 (1811); *McKyring v. Bull*, 26 N.Y. 295, 09 Ani.Dec. 006 (1857); Tennessee: *McGavock v. Pui’ear*, 0 Cold. (Ten.,...) 34 0868); Federal: *Lindo v. Gardner*, 1 Cranch (V.a.) 343. 2 LEd. 130 (1803).

-0. Gould, *A Treatise on the Principles of Pleading*, Part III, Of Pleading, Div. V. Of Pleas to the Action, a I, Of the General Issue, unit Special Issues; Ineluslug Also Inmaterial and Infonuat Issues, 480 (0th ed. by Will, Albany, 100(1).

51. Martin, *Civil Procedure at Common Law*, c. XI, Defences in Bar by Way of Traverse, Art. II, General Traverse, 200, Debt, 220 (St. Paul, 1905). See, in this connection, *Chapple v. Durston*, 1 Cr. & 3. 1, 0, 145 Eng.lrep. 1311, 2314 (153w, in which Vaughan, 3., in referring to Chief Justice Holt’s holding, in the Case Anonymous, 1 Salk, 278, 91 Eng.Rep. 243 (2090), that the Statute of Limitations might be given in evidence upon “Nil Debet” pleaded, observed:

“It appears to us that this distinction savors more of ingenious refinement than of plain and practical good sense, and we conceive that the same rule would now be extended as well to Actions of Debt

#### THE HILARY RULES—THEIR EFFECT UPON THE SCOPE OF THE GENERAL ISSUE IN DEBT ON SIMPLE CONTRACTS AND STATUTES

260. The Hilary Rules changed the General Issue in Debt from “Nil Delict” [I do not owe] to “Nunquam Indebitatus” [I never did owe], in Actions of Debt on Simple Contracts other than Bills of Exchange and Promissory Notes, and hence, as in *Indebitatus Assumpsit* after the Hilary Rules, all Matters in Confession and Avoidance are to be Specially Pledged.

The Hilary Rules abolished the Plea of “Nil Debet.”<sup>52</sup> The Plea “Nunquam Indebitatus” was substituted in lieu thereof in all Actions on Simple Contracts, other than Bills of Exchange and Promissory Notes.

The same effect was given to this New Form of Plea as to the Plea of “Non Assumpsit” in *Indebitatus Assumpsit* under the Hilary Rules, and all Matters in Confession and Avoidance were to be Specially Pledged as in the Action of *Assumpsit*.

In other Actions of Debt in which the General Issue of “Nil Debet” had been used, including those on Bills of Exchange and

as of *Assumpsit*, the same reason to, Pleading the Statute apply, equally to both. If the Statute is not pleaded, the plaintiff is liable to be surprised, and therefore equally unprepared to answer in the One Action as in the Other. In neither case does the Statute extinguish the Debt, but Bars only the Issue, and it is optional whether the defendant will insist upon the Statute or waive it. If he intends to insist upon it, he should plead it to prevent surprise, and if he does not, it should be presumed he intends to waive it. This is the view taken by the late Mr. Serjt. Williams, than whom a sounder Lawyer, or more accurate pleader has rarely (to the honor to his profession ; and he states It to be very usual, and the modern practice, to plead to debt on Simple Contract, that the Cause of Action did not accrue within six years, that the plaintiff may reply, either that he was within any of the exceptions in the Statute, or that he has sued out a Writ within time, as in the Common Case in *Assumpsit*.”

52. Martin, *Civil Procedure at Common Law*, Defences in Bar by Way of Traverse, Art. II, General Traverse, ~ 260, Debt, 220 (St. Paul, 1905).

See. 262

PLEAS—PEREMPTORY OR IN BAR

Promissory Notes, the defendant was required to Specifically Traverse some particular Matter of Fact, or enter a Plea in Confession and Avoidance.

THE GENERAL ISSUE IN DEBT ON A SPECIALTY

261. The General Issue in Debt on a Specialty is “Non Est Factum,” which is a Formal Denial that the Deed mentioned in the Declaration is the Deed of the defendant; but it is only proper when the Deed is the foundation of the Action. It Denies the Execution and Validity of the Deed.

FORM OF THE GENERAL ISSUE IN DEBT ON A SPECIALTY  
[Debt upon Specialty:

Non Est Factum]

In the King’s Bench, Term, in the \_\_\_\_\_ Year of the Reign of King George the Fourth.  
C. D.  
ats.  
A. B.

AND the said C. D., by William Johnson, 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.

STEPHEN, Principles of Pleading in Civil Actions, 276 (Andrews ed., Chicago 1901).

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.<sup>53</sup> Under “Non Est Factum,” the

53. English: Warren v. Consett, 2 Ld. Rep. 1500, 02 Eng. Rep. 474 (1720); Colorado: Gargan v. School Dist., 4 Cob, 53 (1878); Illinois: Russell v. Hamilton, 2 Scam. (Ill.) 56 (1839); Mix v. People, 02 Ill. 549 (1879); Price v. Farrar, 5 Hill App. 536 (1879); Missouri: Boynton v. Reynolds, 3 Mo, 70 (1831).

defendant may show either that he Never Executed the Deed in Point of Fact, or that it is absolutely Void in Law,<sup>4</sup> but not Matters which show that it was merely Voidable.

PLEAS IN CONFESSION AND AVOIDANCE IN DEBT ON A SPECIALTY

262. Unlike Matters which operated as a Denial of the Execution of the Deed in Point of Fact Only, or which showed that the Deed was absolutely Void in Law, Defenses going to show that the Deed was merely Voidable were required to be Specially Pleaded.

ALL Defenses which went to show that the Deed sued on in Debt upon a Specialty was merely Voidable had to be Specially Pleaded.~ Thus, the Defenses that the Deed was executed by a married woman alone, or by a lunatic, or that there had been an erasure by an obligee, could be shown under “Non Est Factum”, as they went to dispute the Deed in

In a Declaration in Debt on Specialty, where the defendant pleaded: (1) that he never was indebted as alleged; and (2) that he did not pronounce as alleged  
—such Pleas were held improper. 2[er, -yninn v. Wheeler, 130 Md. 506, 101 A. 551 (1917).

In an Action of Debt upon Specialty, the Plea of the General Issue is “Non Est Paetum” and, if other Defenses are relied upon, they must be Specially Pleaded. Merryman v. Wheeler, 130 Md. 560, 101 A. 551 (1917). But Cf. Adams v. Adniss, 79 W.Va.



546, 02 SE. 463 (1917).

That the defendant did not nice or sign the 'vri i ing sued on is a Defense which may l.e properly put in Issue in an Action of Debt on a Sealed l]isl i-u, nent, either by a Plea of "Nil Debet," accompanied by the defendant's affidavit denying his signature to the writing, or by a Plea of "Non Est Factuin". Adan, s v. Adams, 79 W.Va. 540, 92 SE. 463 (1917).

54. English: Yates v. ben, 2 Str. 1104, 03 Eng.Rep. 1060 (1738); Pigors Case, 11 Co. 2Gb, 77 E, ig.ltep. 1177 (1614). Illinois: Landt v. McCullough, 130 Ill. App. 515 (1906); Massachusetts: Anthony v. IVilson, 14 Pick. 303 (1833); New York: Van Valkejiburgh v. Honk, 12 Johns. (N.Y.) 337 (1815).

At Common Law, the Plea of "Non Est Fnetuni" to a Declaration in Debt on a Bond, ,neiejly placed in Issue the Execution of the Bond. Beggs v. Chicago Bonding & Surety Co., 207 Ill.App. 621 (1917).

55. English: Collins y. Blantomn, 2 Wiis.K.E. 341, 05 Eng.ltep. 847 (1763); Federal: Mn'-ine Ins. Co. v. Hodgsoa, 6 Craneh (U.S.) 219, 3 LED. 200 (1810).

504

## DEFENSIVE PLEADINGS

Cl. 22

Point of Law; but the Defenses of Duress, Fraud, or Infancy -° had to be Affirmatively pleaded, as they rendered the Deed Voidable only.<sup>57</sup>

### THE HILARY RULES—THEIR EFFECT UPON THE GENERAL ISSUE IN DEBT ON A SPECIALTY

263. Under the Hulary Rules "Non Est Factum" was restricted to a Denial of the Execution of the Deed in Point of Fact Only; all other Defenses were required to be Specially Pleaded, including matters which made the Deed Absolutely Void, as well as those which made it Voidable.

The Hilary Rules expressly provided that the Plea of "Non Est Factum" was restricted to a Denial of the Execution of the Deed in Point of Fact Only; all other Defenses, including those which made the Deed Absolutely Void, as well as those which made it Voidable, were thereafter to be Specially Pleaded. In this action, therefore, the defendant must still Plead, as prior to the above Rule, Payment at or after the day, Performance of the Condition of the Bond, or any Matter in Excuse of Performance, such as Non Damnificatus [not injured] to a bond of indemnity, and no award to an arbitration bond. The defendant must also Plead Specially, a Tender or Set-Of f55

### THE GENERAL ISSUE IN DEBT ON JUDGMENTS

264. The proper General Issue in Debt on Judgments is "Nul Tie! Record," which Denies the Existence of the Record alleged.

56. In general, on the Defense of Infancy, see:

**Treatises: Infants' Lawyer;** or, the law (ancient *and* modern) relating to infants (3d ed. London, 1720); Bingbam, The Law of infancy and Coverture (1st Am. Cd. Exeter, 1824); McPherson, A Treatise on the Law Relating to Infants (Philadelphia, 1843).

07. Whelpdale's Case, 5 Co. lloa, 7? Eng.Rep. 238 (1603).

08. 1 Tidd, The Practice of the Courts of Icing's Bench hi Personal Actions, e. XXVIII, Of Pleas In Bar, and Notice of Set-Off, 586 (Philadelphia, 1807).

"Nul Tiel Record" sets up: (1) The Defense either that there is No Record at all in existence; or (2) one different from that which the plaintiff has declared on; or (3) that the *Judgment is* Void on the Face of the Record.

All other defenses must be Specially Pleaded.

### FORM OF THE GENERAL ISSUE IN DEBT ON JUDGMENTS

[Debt upon Judgments: Nul Tiel Record] In the King's Bench, Term, in the Year of the Reign of King George the Fourth.

C. D.

ats.  
A.B.

}

AND the said *C. V.*, by William Johnson, his attorney, comes and defends the wrong and injury, when, etc., and says that there is not any record of the said supposed recovery in the said declaration mentioned, remaining in the said court of , in manner and form as the said plaintiff hath above in his said declaration alleged, and this the said defendant is ready to verify. Wherefore he prays judgment if the said plaintiff ought t& have or maintain his aforesaid action thereof against the said defendant, etc.

3 CHITTY, Treatise on Pleading with Free..

edents and Forms, 994 (14th Amer. ed., Springfield 1867).

THE Plea of “Nul Tiel Record” (no such record) attacks the existence of the obligation alleged; and under it, it may be shown that no such Record exists as is alleged, which is generally done by establishing its invalidity as a Judgment, or advantage may be taken of a Variance in stating it.<sup>9</sup> As it

59. Ohio: *Bennett v. Morley & Grifflth*, 10 Ohio 100 (1840); Massachusetts: *Warren v. Flagg*, 2 Pick, (Mass.) 448 (1824); Mississippi: *Wright v. Weisinger*, 5 smeden & 14. (*Miss.*) 210 (1045); New York: *Bulhis v. Giddens*, 8 Johns. (N.Y.) 82 (1811); Starbuck v. Murray, 5 Wend. (*N.Y.*) 148, 21 Am.Dec. 172 (1830); Vermont: *Stevens -cc Fisher*, 30 Vt. 200

(1857).

#### PLEAS—PEREMPTORY OR IN BAR

*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; and, as this Plea merely puts in Issue the existence of the Record as stated, any Matter of Discharge, such, for example, as a Release, must be Specially Pleaded.

“Nul Tiel Record” sets up the Defense either: (1) that there is no such Record at all in existence, or (2) a Variance, the Record being Different from that Declared on by the Plaintiff, or (3) that the Judgment is Void on the Face of the Record. All other Defenses

must be Specially Pleaded.<sup>6</sup>

#### PLEAS IN CONFESSION AND AVOIDANCE IN DEBT ON JUDGMENTS

265. Matters in Discharge, such as Satisfaction of the Judgment, Release, and Statute of Limitations, must also be Affirmatively Pleaded.

ALL defenses, other than set forth above as available under “Nul Tiel Record,” must be Specially Pleaded. If extrinsic evidence is necessary to show that the Judgment is Void, as that it was fraudulently obtained, or that the Court had No Jurisdiction of the Person or Subject Matter, the Defense must be

In an Action of Debt on a Judgment or Recognizance, there is properly no true General Issue. “Nil Debet” is said not to be a good Plea to an Action of Debt on a domestic Judgment, nor on a Judgment Tendered in a Sister State. *Knickerbocker Life Ins. Co. v. Barker*, 55 Ill. 241 (1870). Cf. *Hilton v. Guyot*, 150 U.S. 113, 16 Sup.Ct. 189, 40 *L.Ed.* 05 (1805).

60. Iowa: *Gay v. Lloyd*, 1 G.Greene (Iowa) 78, 46 Am.Dec. 499 (1847); Mississippi: *Cannon v. Cooper*, 39 Miss. 784, 80 Am.Dec. 101 (1861); New York: *McFarland -v. Irwin*, 8 Johns. (N.Y.) 77 (1811); Pennsylvania: *Cardesa v. Humes*, 5 Serg. & H. (Pa-) 05 (1819); Vermont: *Gray v. Fingry*, 17 Vt. 419, 44 Am.Dec. 345 (1845).

61. Forsyth v Barnes, 228 Ill. 326, 81 N.E. 1028, 10 Ann.Oas. 710 (1907); Id. 131 Ill.App. 467 ~1907); Waterbury Nat Bank v. Reed, 231 Ill. 246, 83 N.E. 185 (1907), involving a Writ of Scire Facias.

Pleaded Specially.<sup>62</sup> Matters in Discharge, such as Satisfaction of Judgment, Release, and the Statute of Limitations, must be Affirmatively Pleaded.<sup>63</sup>

The Nilary Rules contained no provision concerning the General Issue in Debt on Judgments.

## THE GENERAL ISSUE IN COVENANT

266. The General Issue in Covenant is “Non Est Factum,” which is a Formal Denial that the Deed is the Deed of the defendanL It places in Issue the Execution and Validity of the Deed.

### FORM OF THE GENERAL IssuE IN COVENANT

[Covenant:

Non Est Factum]

In the King’s Bench,

Term, in the Year of the Reign of King George  
the Fourth.

C. D.

ats.

A.E.

AND the said *C.D.*, by William Johnson, his attorney, comes and defends the wrong and

62. Illinois: Welch v. Sykes, 3 Gil. (Ill.) 197, 44 Am.

Dec. 689 (1846); Hopkins v. Woodward, 75 Ill. 62, note (1814); Ambler v. Whipple, 130 Ill. 311, 324, 28 N.E. 841, 32 Am.St.Rep. 202 (1801); Federal: Hill v. Mendenhall, 21 Wall. (U.S.) 453, 22 LEd. 016 (1815);

Comment: Actions on Judgments of Other States— Nul Tiel Record, 2 IU.L.Rev. 326 (1907).

But in Forsyth v Barnes, 228 Ill. 320, 81 N.E. 1028, 10 Ann.Cas. 710 (1907), It was held that in an Action of Debt on a Judgment by Confession on a note signed by a married woman, the coverture of the defendant may be proved under a Plea of “Nul P101 Record,” though not specifically put in Issue by the Pleading or on the face of the record. “In Debt or Scire Fncias on a Judgment or Recognizance, the General Issue is Nul Tleh Record, which may be properly pleaded, where there is either no record at all, or one different from that which the plaintiff has declared on. But, as this Plea only goes to the existence of the record, the defendant roust plead payment, or any matter in Discharge of the Action.”

63. Hehhen v. Hellen, 170 Ill.App. 464 (1912); 1 Tidd, The Practice of the Courts of King’s Bench in Personal Actions, e. XXVIII, Of Pleas in Bar, and Notice of Set-Off, 596 (Philadelphia, 1807).

Sec. 266

505

506

## DEFENSIVE PLEADINGS

Ch. 22

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.

STEPHEN, Principles of Pleading in Civil Actions 276, 277 (2d ed. by Andrews, Chicago, 1901).

THE Plea of “Non Est Factum” in Covenant only puts the execution and validity of the deed in Issue in the same manner as in Debt on Specialty, and admits the same Proof only<sup>64</sup> Such a Plea is not a true General Issue, as it only puts the deed in Issue, and not the Breach of the Covenant. Most Defenses in Covenant must, therefore, be by Specific Traverse, or a Speciai Plea, when statutes do not provide otherwise. In this action, however, the defendant could give in evidence, under a Plea of “Non EstFactum,” that the deed declared on was delivered as an escrow, on a condition not performed; or that it was Void at Common Law *ab initio*, as being made by a married woman, or lunatic, and the like; or that it afterwards became Void by alteration, cancellation or erasure.

Where, therefore, the defendant Pleads “Non Est Factum” to a Declaration, only the deed is placed in Issue, and

all other Facts stand admitted by the defendant's failure to Deny them by an appropriate Plea.<sup>o5</sup>

The Plea of "Non Est Factum" in Covenant, as developed at Common Law, is restricted in Scope when compared with the General Issue in Assumpsit, Case or Debt on Simple Contract, confining the Issue to

84. The Rules as to Pleas in Debt on Specialty are applicable also to Covenant. Illinois: City of Chicago v. English, 180 Ill. 476, 54 NE. 609 (1899); Goldstein v. Reynolds, 190 Ill. 124, 60 NE. 65 (1901); Badainshi v. Ahlswede, 185 Ill.App. 513 (1914); New York: McNeish v. Stewart, 7 Cow. (N.Y.) 474 (1827); Cooper v. Watson, 10 Wend. (N.Y.) 205 (1833); Norman v. ~Vells, 17 \Vend. (N.Y.) 136 (1537); Kane v. Sanger, 14 Johns. (N.Y.) 50 (1817).

03. Marine Ins. Co. v. Hodgson, C Crancli (U.S.) 200, 3 LEd. 200 (1510).

*the* Existence of the Deed in Fact and in Law, All Other Defenses being required to be Specially Pleaded,<sup>o6</sup> Saunders 67 and Chitty ~ felt that the Plea lacked the requisites of a General Traverse, as it is so narrow in Scope. The reason for this characteristic of the Plea—its narrowness—may be traced to the fact that in ancient times there was no Defense to a Sealed Contract outside of its conditions, except such as had a logical tendency to show that it had not been executed, or that the cause had been released under seal. Thus, in the early period of the action, Fraud, Want of Consideration, and Release, unless under Seal, constituted No Defense. No Defense *in Pais* outside of Non-Performance of conditions, except Duress, would be entertained.<sup>69</sup>

In an Action on a Sealed Contract of Lease, if you sue in Covenant for the rent, the defendant must Plead to some Particular Allegation. The Defendant may plead Non Est Factum, yet that only puts the Execution or Validity of the deed in Issue, and not the Breach of the Covenant. If, however, you sue in Debt on the Lease, though it be Sealed, the defendant can Plead the General Issue of Nil Debet, as the Specialty is considered as but the Inducement to the action. In Actions of Debt on the Specialty itself, the General Issue is Non Est Factum, as in Covenant. Under Nil Debet, the defendant may not only put the plaintiff to the necessity of showing the existence of a legal contract, but he may give in evidence the Performance of it, or Matter in Excuse of Performance, or a Re

66. Martin, Civil Procedure at Common Law, c. XI, Defences In Bar by Way of Traverse, Art. II, General Traverse, § 261, Covenant, 221 (St. Paul, 1905)-

67. 1 Saunders, Law of Pleading and Evidence in Civil Actions, with Forms and the Pleading and Evidence, 393 (3rd Am. ed. Philadelphia, 1837).

63. 1 Chitty, Treatise on Pleading and Parties to A& tions with Precedents and Forms, c. VII, Of Pleas in Bar, 486 (12th Am. ed. springfield, 1855).

89. Ames, Farol Contracts Prior to Assulnpsit, S larv.L.Rev. 252 (1894).

See. 268

#### PLEAS—PEREMPTORY OR IN BAR

507

lease, or Other Matter in Discharge. But, if plaintiff sues in Covenant, the defendant may be compelled to Plead his grounds of Defense Specially.<sup>78</sup>

#### PLEAS IN CONFESS1ON AND AVOIDANCE IN COVENANT

267. Matters showing that the Deed was merely Voidable, Not I<sup>T</sup>oid, such as Duress, Fraud in the Inducement, Gaming, Infancy and Usury, were required to be Pleaded Specially.

IT was an Inflexible Rule that in actions on deeds, Special Matters showing that the instrumnet was merely Voidable, Not Void, such as Duress, Fraud in the Inducement, Gaming, Infancy and Usury, were required to be Pleaded Specially,<sup>71</sup> when, *in* the course of time, they came to be recognized as Valid Defenses at Law.<sup>72</sup>

In referring to the late recognition of some Defenses, as Legal Defenses, Martin declares: "It may be proper to mention in this connection that under the Common Law, as prevailing down to very recent times, Fraud was no Defense at Law to an Action on a Sealed InstrumenW<sup>1</sup> The same is true of the Defense

70. 1 Chitty, Treatise on Parties to Actions, Forms of Actions, and Pleading, 510, 517, 522 (6th Am. ed., Springfield, 1833),

71. A Special Plea coimnon to Coveiu, at is: "Non Infregit Conventionem", covenant not broken, which denies the Breach, but not the Deed. It, therefore, is Dot the General Issue, but a Plea in Bar. New York; Roosevelt v. Pulton's Heirs, 7 Cow. (N.Y.) 71 (1821); Vermont: Phelps v. Sawyer, 1 Aikens (Vt.) 150 (1826). "Covenants Performed" is proper if the Covenants sued on are in the Affirmatis-e. This cannot be

supported by evidence showing excuse.

Illinois: Radzinslri v. Ahlswede, 185 Ill.App. 513 (1914); Virginia: Cheuning v. Wilkinson, 95 Va. 667, 29 St. 680 (1898).

72. Martin, Civil Procedure at Common Law, c. XI, Defences In Bar by Way of Traverse. Art. II, General Traverse, § 261, Covenant, 221 (St. Paul, 1905).

-1. English: Wright v. Campbell, 2 F. & F. 393, 175 Eng.Rep. 1111 (1501); Missouri: Montgomery v. Tipton, 1 Mc. 446 (1824); Federal: George v. Tate, 102 U.S. 561, 26 LEO. 232 (1881); Ames, Parol Contracts Prior to Assumpsit, S Ilarv.L.Rev. 252 (1894)- of a Want or Failure of Consideration.<sup>74</sup> Illegality, unless apparent on the face of the instrument, was likewise no Defense at Law prior to 176775 Neither *was* Payment, unaccompanied with Release under Seal, a Valid Defense in England until it was made so by Statute in 1705~° To the General Rule of the Common Law prohibiting the Avoidance of Sealed Instruments by Defenses *in Pais*, there was an Exception in the Case of Duress, which was always, and still remains, a Valid Defense at Law; but which must be Affirmatively Pleaded; and is not admissible under the General Issue?' ~

THE HILARY RULES—THEIR EFFECT UPON THE GENERAL ISSUE IN COVENANT

265. Under “Non Est Factum” after the Hilary Rules, only the Deed in Point of Fact was in Issue; all other Defenses were required to be Specially Pleaded.

ALTHOUGH the Plea of “Non Est Factum” in Covenant was originally of Limited Scope, as compared with the General Issue in some of the other Common Law Actions, such, for example, as Assumpsit or Case, the effect of the Hilary Rules was to further restrict its effect. Thereafter, it operated as a Denial of the Execution of the Deed in Point of Fact Only,<sup>78</sup> all other Defenses being required to be Pleaded Specially, including Matters which went to make the deed Absolutely Void, as well as those which made it Voidable,

74. English: Collins v. Blantern, 2 Wils.IC.B. 341, 95 Eng.Bep. 847 (1765); New York: Parker v. l’armlee, 20 Johns, (N.Y.) 130 (1822).

76- Collins v. Blantern, 2 Wils.K.B. 341, 95 Eng.Itep. 847 (1765).

u 4 Anne, c. 16, I2, 11 Statutes at Large J57 (1705).

-7. Martin, Civil Procedure at Common Law, e, XI, Defences in Bar by Way of Traverse, Art. II, General Traverse, 261, Covenant, 221 222 (St. Paul, 1905).

78. Martin, Civil Procedure at Common Law, c, XI, Defences in Bar by Way of Traverse, Art. II, General Traverse, 261, Covenant, 222 (St. Paul, 1905), 508

DEFENSIVE PLEADINGS

Ch. 22

THE GENERAL ISSUE IN SPECIAL ASSUMPSIT

269. “Non Assumpsit” is the General Issue in Special Assumpsit, and is, in effect, a Formal Denial of Liability on the Promise or Contract alleged. It Denies not only the Inducement or Statement of the Plaintiff’s Right, but also the Breach, and allows Any Defense tending to show that there was No Debt or Cause of Action at the time of Commencing Suit.

FORM OF THE GENERAL ISSUE IN SPECIAL ASSUMPSIT  
[Special Assumpsit: Non-Assumpsit]

In the King’s Bench, Term, in the Year of the Reign of King George  
the Fourth,  
CD.  
ats.  
A.B.



AND the said *CD.*, by William Johnson, his attorney, comes and **defends** the wrong and injury when, etc., and says that he did not undertake or promise in manner and form as the said *A.R.* hath above complained. And of this the said *C.D.* puts himself upon the counfry.

STEPHEN, Principles of Pleading in Civil Actions, 277 (2nd ed. by Andrews, Chicago 1901).

*Scope of the General issue in Special Assumpsit*

WHERE the action is in Special Assumpsit, the General Issue of “*Non Assumpsit*” is a Denial of the Contract as alleged, covering all that is covered by what is termed the “*Inducement*” or “**Statement**” of the Plaintiff’s **Right**. **Under it, any Proof** is proper showing **that** no such Contract as is stated was in fact made; ~ that the Statement of the Contract

79. **Id.** at 223; **English: Lyall** v. Higgins, 4 Q.B. 525,

114 **Eng.Rep.** 997 (1848); **Bilad v. Dale**, 2 *lii.* &

**W. 775, 150 Eng.Bep. 970** (1837); **Smith v. Parsons**,

8 Or. & P. 199, 173 **Eng.Rep.** 459 (1837); Alabama:

**Hunt v. Test, S Ala.** 713, 42 **Am.Dec.** 659 (1845);

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; ~ or **that** the Promise of the defendant is not the Agreement Pleaded; or that he made No Promise at all.<sup>85</sup>

**In the case of *Renes v. Rankers’ Life ma Co.***<sup>82</sup> the Bhinois Supreme Court states the Scope of the General Issue in Assumpsit as follows: “It is well settled that nearly every Defense is Admissible, under the General Issue or Plea of Non Assumpsit, which shows that there was not a subsisting cause of action in the plaintiff at the time the suit was brought. A bankrupt or insolvent’s Discharge and the Statute of Limitations are among the very few Exceptions to this Rule. Under such General Issue, the defendant may put in Issue the plaintiff’s Capacity to Sue, the Execution of the Contract, and the Release and Satisfaction and Payment of the debt, if made previous to the Commencement of the Suit, 2 R.C.L. § 28, p. 770. Whatever Matter of Defense was contained in the Special Plea, **which plaintiff was bound to prove** under the General Issue, renders that Plea subject to the objection that it Amounted to **the General Issue** and was therefore proper-

Pennsylvania: **Falconer v. SmIth**, 18 Pa. 130, 55 **Am.Dec.** 611 (1851),

80. New Hampshire: **Hilton v. Burley**, 2 N.H. 103

(1820); South Carolina: **Talbert v. Cason**, 1 *firer.*

(S.C.) 298 (1803); **Federal: Craig v. Missouri**, 4 Pet,

(U.S.) 430, 7 **LEd.** 903 (1880).

**st English: Metznor** v. Boiton, 9 Exch. 515, 155

**Eng.Rep.** 221 (1554); **Latham v. Rutley**, 3 *fowl. &*

*it.* 211, 171 **Eng.Rep.** 925 (1824); Massachusetts:

**Baylles v. Fettyplae**, 7 Mass. 325 (151fl; New

York: **Wailing v. Toll**, 9 Johns. (N.Y.) 141 (1812):

**Wilt v. Ogden**, 13 **Johns. (N.Y.) 56** (1816); **Sill ~**

**flood**, 15 Johns. (Nt) 280 (1818); **Edson v. Weston**,

7 **Cow. (NS.) 278** (1827); Pennsylvania: **Carvill v.**

**Garrlgues, 5 Pa. 152** (1847); **Vermont: Britton** ~

**Bishop**, 11 **Vt.** 70 (1839); **Federal: Vasse v. Smith, S**

**Cranch (U.S.) 231**, 3 **LEd.** 207 (**1810**); **Young v.**

**Black, 7 Craneb (U.S.) 565, 3 LED.** 440 (1613).

82. 282 **III. 230, 241**, 118 N.E. 443 (1918).

ly held Demurrable by the Court. *Wadhams v. Swan*, 109 Ill. 46.”

Tidd states the Scope of the General Issue in Assumpsit as follows; ~ “In Assumpsit, we have seen, the General Issue, or Common Plea in Denial, is Non Assumpsit: and this Plea was formerly holden to be proper, when there was either no contract between the parties, or not such a contract as the plaintiff had declared on; and the defendant might have given in evidence *under* it, that the contract was Void in Law, by Coverture (*James v. Fowkes*, 12 Mod. 101), Gaming (*Hussey v. Jacob*, 1 Ld- Raym. 87), Usury (Ld. *Bernard v. Saul*, 1 Strange, 498), etc., or Voidable by Infancy (*Darby v. Boucher*, 1 Salk. 279; *Madox v. Eden*, 1 Bos. & P.481, {a} ), Duress, etc.; or, if good in Point of Law, that it had been Performed (*Brown v. Cornish*, 1 Ld. Baym. 217; *Paramore v. Johnson*, 1 Ld. Raym. 566, 12 Mod. 376; *Sea v. Taylor*, 1

In England prior to the Hilary Rules of 1333, coverture, like many other affirmative defenses, was admissible under the General Issue. *Culver v. Johnson*, 90 Ill. 91 (1878).

On Accord and Satisfaction, see, Maryland: *Horriek v. Swamley*, 56 Md. 439, 456 (1881); *Ithole Island: Covell v. Carpenter*, 24 Ill. 1, 51 Atl. 425 (1902):  
*West Virginia: First Nat. Bank of Wellburg v. Kinnberlands*, 10 W.V. 555 (1880).

## 509

Salk. 394), or that there was some Legal Excuse for its Non-Performance, as a Release, or Discharge before Breach, or Non-Performance by the Plaintiff of a Condition Precedent, etc. This sort of evidence was calculated to show that the plaintiff never had a cause of action: but if he had, the defendant might have given in evidence under the General Issue, that it was Discharged by an Accord and Satisfaction (*Paraniore v. Johnson*, 1 Ld. Raym. 586, 12 Mod. 376; *Martin v. Thornton*, 4 Esp. Rep. 151, per Ld. Alvanley, C. 3.; but see *Adderley v. Evans*, 1 Ken. 250; *Roades v. Barnes*, 1 Ken. 391, 1 *Burr.* 9, 1 Blac.Rep. 85. S.C. 65; and see *Rolt v. Watson*, 12 Moore, 82, 4 Bing. 273. S.C.; *Siboni v. Kirkman*, 1 Meeson. & W. 418, 1 Tyr. & C. 777. S.C.), Arbitrament, Release, Foreign Attachment, or Former Recovery for the Same Cause, etc.: In short, the question in Assumpsit, upon the General Issue, was whether there was a subsisting debt or cause of action, at the time of Commencing the Suit. But *Matter* of Defence arising after action brought could not *have* been Pleaded in Bar of the action generally; ~ and therefore was not admissible in evidence under the General Issue; and Matters of Law in Avoidance of the Contract, or Discharge of the Action, were usually Pleaded. **It** was also necessary to Plead a Tender, or the Statute of Limitations, etc., and to Plead or give a Notice of Set-off. Anciently, Matters in Discharge of the Action must have been Pleaded Specially. Afterwards, a distinction was made between Ex

### PLEAS—PEREMPTORY OR IN BAR

83. TidQ, *New Practice of the Courts of King's Bench, Common Pleas, and Exchequer of Pleas, in Personal Actions and Ejectment, c. XXVII, Of Pleas in Bar, etc.*, 339 (London, 1837).

On Illegality, see, *Pollak v. Electric Ass'n*, 125 U.S. 446, 9 Snp.Ct. 119, 82 L.Ed. 474 (Ala.Law); *McCrea v. Parsons*, 112 Fed. 917, 50 C.C.A. 612 (Ili.Law).

Evidence of infancy was allowed under the Plea of Non-Assumpsit. Maryland: *Forresten v. Wood* (Md.) 23 4±1, 133 (1891); *Thorpe v. Fox*, 67 Md. 67, 73, 5 Atl. .007 (1887); Vermont: *Thrall v. Wright*, 88 Vt. 494 (1866). Cf. *Lynch v. Johnson*, 109 Mich. 640, 67 N.W. 908 (AthrmatlVe Defense).

Insanity or drunkenness admissible under General Issue. Alabama: *Walker v. Win*; 142 Ala. 560, 39 Se. 12, 110 Am.St.Rep. 50, 4 Ann.Cas. 537 (1905); Missouri: *Collins v. Trotter*, 51 Mo. 275 (1883); New Hampshire: *Young v. Stevens*, 48 N.H. 133, 136, 2 Ain.Rep. 202, 97 Am.Dec. 592 (1868).

On Coverture see, *Streeter v. Streeter*, 43 Ill. 155 (1867).

84. Matter of Defense arising after Action brought cannot be Pleaded In Bar of the Action generally, and therefore Is not

admissible in evidence under the General Issue. It is necessary to plead the Statute of Limitations Specially; also in discharge in bankruptcy, Statute of Frauds, Tender, and Set-Off. *Jochish v. Hnrtdke*, 50 flApp. 202 (1893); *Ward v. Athens Mm. Co.*, 98 111.App. 227 (1901); *Collins v. Montomy*, 3 Ill.App. 152 (1878); *Minard v. Lawler*, 26 IU. 802, 304 (1561); Tidd, *Practice of the Courts of King's Bench in Personal Actions*, c. XXVIII, of Floss in Bar, and Notice of Set-Off, 593 (Philadelphia. 1807).

510

## DEFENSIVE PLEADINGS

Ch.

press and Implied Assumpsits; in the former, these matters were still required to be Pleaded, but not in the latter. At length, about the time of Lord Holt, they were universally allowed to be given in evidence under the General Issue.”

### PLEAS IN CONFESSION AND AVOIDANCE IN SPECIAL ASSUMPSIT

270. Matters of Defense arising after the Commencement of the Action were required to be Pleaded Specially; and Matters of Law in Avoidance of the Contract, or in Discharge of the Action, were usually Specially Pleaded. It was necessary to Plead Bankruptcy, Tender, the Statute of Limitations, and Set-Off.

AS we have seen, the General Rule in Special Assumpsit was that any Defense which went to show there was no subsisting cause of action at the time of the Commencement of the Action, could be shown under the General Issue. But Defenses arising after the action had Commenced were not Pleadable in Bar of the action generally, and hence were not admissible in evidence under the General Issue. Matters of Law in Avoidance of the Contract, or in Discharge of the Action, were usually pleaded.<sup>85</sup> It was necessary to Plead Bankruptcy, the Statute of Frauds,<sup>86</sup> the Stat-

85. j Tidd *Practice of the Courts of Kings- Bench in Personal Actions*, e. XXVIII, of Pleas in Bar and Notice of Set-Off, 592, 5~33 (Philadelphia, 1807).

SC. Note: Pleading—Statute of Frauds—Admissible Under General Denial, 64 U.lia.L.Iev, 754 (1916).

The Statute of Frauds must be Specially Pleaded in Special Assumpsit. *Beard v. Converse*, 84 Ill, 512 (1871). See *Maggs v~ Ames*, 4 Bthg. 470, 130 Eng. Rep. 849 (1828). In Equity, the Statute of Frauds must be Pleaded Specially in all cases. *Clayton v. Lemon*, 233 Ill. 435, 54 N.E. 691 (1908). In some States, the defendant is permitted to show nonofflplial]ce with the Statute of Frauds under a denial of the Contract. Maryland: *Mega it v. Smouse*, 108 Md. 403, 03 A. 1070, 115 AnLSt.Ilep. 267, 7 Ann.Cas. 1140 (1906); Vermont: *U~1t v. howard*, 77 Vt. 40, 58 A. 797 (1904); West Virginia *Barrett v. McAllister*, 83 W.Va. 738, 11 SE. 22(.

tison).

ute of Limitations,<sup>87</sup> Tender ss and Set-Off; and in suits on Negotiable Bonds and Promi:sory Notes, Want of Consideration, Total an Partial Failure of Consideration, and Fraut either in the Execution or in the Considers tion, were required to be Pleaded Speciall3 Former recovery might be shown under th General Issue.<sup>88</sup>

Some doubt has been raised as to whethe: the Defense of the Statute of Frauds could b availed of under the General Issue. The Gen eral Rule, if a party would avail himself of the Statute of Frauds as a Defense, is that he must Plead it. The reason for the Rule at Common Law appears obvious, for a Contract is not Absolutely Void, but merely Voidable at the Election of the Party against whom it is to be enforced. When, therefore, such a Contract is declared upon, if a Party fails to Plead the Statute of Frauds, he will be deemed to have waived it.<sup>89</sup>

### THE RILARY RULES—THEIR EFFECT ON THE SCOPE OF THE GENERAL ISSUE IN SPECIAL ASSUMPSIT

271. The Ililary Rules restricted the General Issue in Special Assumpsit to a Denial in Fact of the Promise or Contract Alleged.

ANCIENTLY, as we have seen, Matters in Discharge of the Action were required to be Specially Pleaded. Afterward, a distinction was made between Express and Implied Assurnpsit; in the former, or in Special Assumpsit, they were still required to be Pleaded, but not in the latter—General or Indebitatus Assumpsit. At length, about the time of Lord Holt there was a general relaxation of the earlier view, arid they were

87- 1 Tidd, *Practice of the Courts of King's Bench in Personal Actions*, e. XXVIII, Of Pleas in Ear and Notice of Set-Off, 593 (Philadelphia, 1807).



88. Ibid.

8-. Ibid.

90. Young v. Rummeil, 2 Hill. (N.t) 478, 38 Am.Dec.

594 (1842).

91. Beard v. Converse, 84 111. 512 (1877).

Sec. 272

PLEAS—PEREMPTORY OR IN BAR

511

universally allowed to be given in evidence under the General Issue in either Form of Action.

Thereafter,

declared that “in all Actions of Assumpsit, except on Bills of Exchange and Promissory Notes, the Plea of Non-Assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied in law.” Thus, if the defendant be charged with an Express Promise, and his case be that, alter making such Promise, it was Released, this plainly Confesses and Avoids the Declaration. To permit 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.

Under the Hilary Rules, this misapplication and abuse of the General Issue was corrected. It restricted “Non Assumpsit” to a Denial of the Contract alleged. It did not Deny the Breach,<sup>92</sup> nor Performance by the plaintiff of a Condition Precedent to his Right to sue, nor Performance by him of a Bilateral contract. These were, under the Hilary Rules, properly the subject of a Common or Specific Traverse.

In Actions on Bills of Exchange and Promissory Notes, under the Hilary Rules, the General Issue was not permitted. What was required was a Specific Traverse of some Matter of Fact alleged in the Declaration, such as making, drawing, indorsing, accepting, presenting or giving notice.<sup>o3</sup>

92. Smith v. Parsons, S Car. & P. 199, 173 Eng.Rep.

459 (1837).

Matter In Confession and Avoidance, including Matter in Discharge, was required to be Specially Pleaded under the Florida Circuit Court Rule 66. Mizell v. Watson, 57 Fla. 111, 49 So. 149 (1909).

93. 1 flrty, Treatise on Pleading and Parties to Actions, with Precedents and Notes, c. VII, of Pleas In Bar, 502 (16th Am, ed. by Perkins, Springfield, 1885).

FORM OF THE GENERAL ISSUE IN GENERAL

OR INDEBITATUS ASSUMPSIT

[General Assumpsit:

Non-Assumpsit]

In the King’s Bench,

Term, in the \_\_\_ Year of the Reign of King George the Fourth.

C. D.

ats.

A.a

AND the said C.D., by William Johnson, his attorney, comes and defends the wrong and injury, when, etc., and says that he did not undertake or promise in manner and form as the said AR hath above complained. And of this the said C.D. puts himself upon the country.

STEPHEN, Principles of Pleading in Civil Actions, Pleading, 277 (2d ed. by Andrews, Chicago 1901).

*The Scope of the Genera? issue in Gnwral or Indebitatus Assumpsit*

THE General Issue in the Action of General Assumpsit is “Non-Assumpsit”. This Plea operates similarly to the General Issue in Special Assumpsit and in Debt on Simple Contract, but with certain peculiarities. It is, in the first place, a Denial of the indebtedness and of all the Matters of Fact from which the Debt and the Promise alleged may

be Implied by Law, such as the bargain, sale and delivery, the performance of work, or the receipt of money to the use of the plaintiff. Defenses in Excuse and in Discharge may, for the most part, be shown under the General Issue. Many matters in Discharge need

#### THE GENERAL ISSUE IN GENERAL OR INDEBITATUS ASSUMPSIT

272. The General Issue in General or In-

the Hilary Rules of 1834

debitatus Assumpsit—<sup>4</sup>“Non-Assumpsit”---oper-ates as a Denial of the indebtedness of the

defendant, but a Discharge in Bankruptcy, the Statute of Limitations, and a few other Defenses, must be Specially Pleaded.

Kofler & Reppy ComLaw Pug HB.—18  
512

#### DEFENSIVE PLEADINGS

Cl. 22

not be Specially Pleaded.<sup>4</sup> All Defenses, which show the transaction to be Void or Voidable, including Illegality, Fraud, Duress, and Incapacity, may be shown under the General Issue.

#### PLEAS IN CONFESSION AND AVOIDANCE IN GENERAL OR INDEBITATUS ASSUMPSIT

273. While many Matters in Discharge may be shown under the General Issue in General or Indebitatus Assumpsit, some Defenses, such as Discharge in Bankruptcy, and the Statute of Limitations, must be Specially Pleaded.

MANY matters in Discharge, such as Payment, Novation, Accord and Satisfaction, Conditions Subsequent, may be shown under the General Issue, with some exceptions, among which are the following: (1) Discharge in Bankruptcy; (2) Failure and Lack of Consideration of Negotiable Notes, if copy is filed with the Common Counts; ~ (3) Infancy (query); (4) Set-Off; ~ (5) Statute of Limitations; and (6) Usury.

#### THE HILARY RULES—THEIR EFFECT UPON THE SCOPE OF THE GENERAL ISSUE IN GENERAL OR INDEBITATUS ASSUMPSIT

274. Under the Hilary Rules “Non Assumpsit”, in General or Indebitatus Assumpsit, oper. ated as a Denial of the Matters of Fact from which the Contract or Promise alleged may be Implied by Law.

BY the Hilary Rules of 1834, it was provided that “Non Assumpsit”, in General Assumpsit, shall operate only as Denial of the Matters of Fact from which the Contract or Promise alleged may be Implied in Law.

94. Oillfillan v. Parrington, 12 Ill.App. 301, 107 (1882).

96. Wilson v. ICing, 88 RI. 232, 238 (1876); Columbia Heating Co. v. O’Halloran, 144 fLApp. 74 (1908).

it the Common Counts alone are used, the defendant has no notice describing the instrument relied upon for a recovery, and accordingly, it is held that the defendant cannot be required to set up Defenses such as the Statute of Frauds specially.

96. Kennard v. Secor, 57 ILLApp. 415 (1804).

And hi compliance with this Rule, it was declared that in General Assumpsit for goods sold and delivered, or for money had and received, “Non Assumpsit” was to operate only as a Denial of the sale and delivery, or of the receipt of the money to the plaintiff’s use.

In consequence of the Hilary Rules, in General Assumpsit, as in Special Assumpsit, all Matters in Confession and Avoidance, not only those in Discharge, but those which show the transaction to be either Void or Voidable in Point

of Law, on the ground of Fraud or otherwise, were required to be Specially Pleaded.

#### COMPARISON OF SCOPE OF DIFFERENT GENERAL ISSUES

275. The General Issue has a wide Scope in Case, Trover, Assumpsit, Debt on Simple Contract, and Ejectment. It has the effect of a General Denial only in Trespass and Detinue. In other Actions, the General Issue is more in the nature of a Specific Denial than a General Denial.

IT has been observed that, at Common Law, by the General Issue in Assumpsit, in Debt on Simple Contract, in Trover, in Case, and in Ejectment, the defendant puts the plaintiff to the Proof of almost all the elements of his cause of action, and at the same time he may prove in his own Defense almost all Matters in Justification and Excuse, and most of the matters in Discharge. In Trespass and Detinue, however, the General Issue is only a Summary Denial of the Material Allegations of the Declaration, and matters in Confession and Avoidance must be Specially Pleaded, and cannot be admitted under the General Issue.

In the Actions of Covenant, Debt on Specialty, Debt on Judgment, and Replevin, the General Issue does not perform the function of a General Denial, but rather has the effect of denying only some of the Material Allegations in the Declaration, therefore, in truth, partaking of the characteristics of a Specific Traverse, rather than a General Traverse;  
Sec. 277

#### PLEAS—PEREMPTORY OR IN BAR

513

and, in these instances, matters in Confession and Avoidance must be Specially Pleaded, and cannot be admitted under the General Issue.

By the FRIary Rules of 1834, promulgated in England under Stat. 3 and 4 Wm. IV, c. 42, the Scope of the General Issue, as it existed at Common Law, in admitting almost every possible Defense in certain actions, was limited. The particular object of these Rules was to generally limit, in England, the operation or Scope of the General Issue in actions upon Contracts, to a Direct Denial of the Contract, and in Actions for Wrongs, to a Denial only of the Breach of Duty or Wrongful Act of the defendant, making the defendant Specifically Traverse or Deny any other Material Fact stated in the Declaration, and Plead Affirmatively all Matters in Confession and Avoidance.

#### NOTICE OF DEFENSES UNDER THE GENERAL ISSUE

276. Statutes sometimes have permitted the setting up of matter in Confession and Avoidance without a Special Plea at the option of the Pleader, by giving Notice in Writing under the General Issue of the Special Matters intended to be relied on for Defense at the Trial.

INSTEAD of developing the Rules of Pleading in the direction of substituting Specific Pleas for General Traverses, as was done in England under the FRIary Rules of 1834, the Common-Law Procedure Act of 1852, and later Acts, some American states have gone in the opposite direction. Statutes sometimes have permitted the setting up of matter in Confession and Avoidance without a Special Plea at the option of the Pleader, by giving Notice in Writing under the General Issue of the Special Matters intended to be relied on for Defense at the Trial,<sup>97</sup>

No Issue of Fact or of Law can be raised on a Notice of Special Matter of Defense filed with the General Issue<sup>8</sup> This Rule was criticized as follows by the Illinois Supreme Court in the case of *Hunt v. Weir*.<sup>99</sup> “Treating the Notice as a Plea, and open to Demurrer, these consequences would be avoided. If a Demurrer be sustained to the Notice, the defendant can Amend it as he can a Defective Special Plea, and he is in no danger of being caught in a trap, which, though he may have set himself by his Defective Notice, need not, to advance justice, be suddenly sprung upon him on the Trial of the cause. The quality of the notice is a preliminary matter, and should be determined before the Trial. Like objections to Depositions, they are heard and disposed of before the Trial, and cannot be started for the first time on the Trial.”<sup>1</sup>

#### PLEA PUIS DARREIN CONTINUANCE

277. A Plea Puis Darrein Continuance is a Plea by the defendant of Matter of Defense which has arisen since the last

Continuance of the cause.

Such a Plea waives and supersedes all former Pleas.

UNDER the Ancient Law, there were Continuances or Adjournments of the proceedings for certain purposes from One Day or one Term to another; and in such cases there was an Entry made on the Record expressing the ground of the Adjournment, and appointing a day for the parties to reappear. In the intervals between such Continuances and the Day appointed, the Parties were out of Court, and therefore not in a situation to Plead. But it sometimes happened that after a Plea had been Pleaded, and while the Parties were out of court, in consequence of such a Continuance, a New Matter of Defense arose,

98. Illinois: *Burgwin v. Babcock*, 11 Ill. 30 (1849);  
*Bailey v. Valley Nat. Bank*, 127 Ill. 332, 10 N.E. 095  
(1889); Michigan: *Rosenbury v. Angel!*, 6 Mich. 508  
(1859).
99. 29 Ill. SB (1862).

1. *Id.* at 86.  
97. Ill.Rev.St. e. 110, § 46 (Hard, 1021); *Powers v.*  
*Rutland E. Co.*, 83 Vt. 413, 70 A. 110 (1910).

#### DEFENSIVE PLEADINGS

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  
ance." 2

Darrein Continu

Defenses arising after the action has been begun cannot, as a Rule, be shown under the General Issue, for the reason that they do not Deny that a cause of action existed at the Commencement of the suit.<sup>3</sup> Such Defenses must be Pleaded either "to the further maintenance of the action," or, if they do not arise until after Plea, they must be Pleaded 'Puis Darrein Continuance.'" ~ But in the Action

2. Stephen, *A Treatise on the Principles of Pleading in Civil Actions*, - I, Of the Proceedings in an Actioa, from its Commencement to its Termination, 07 (34 Am. ed. by Tyler, Washington, B. C., 1900).
3. *Mount v. Scholes*, 120 Ill. 30.1, 11 N.E. 401 (1887).
4. English: *Le Bret v. Papillon*, 4 East 502, 102 Rag. Rep. 023 (1804); *Evans v. Prosser*, S TAt. 186, 100 Eng. Rep. 524 (1789); Arkansas: *Costar v. Davies*, 8 Ark. 213, 46 Am.Dec. 311 (1847); Illinois: *Ross v. Neshit*, 2 Gil. (Ill.) 252 (1845); *Gibson v. Bourland*, 13 Ill.App. 352 (1883); Maine: *Rowell v. Hayden*, 40 Me. 582 (1855); North Carolina: *Smithwick v. Ward*, 52 N.C. 64, 75 Am.Dec. 453 (1850); New Jersey: *Hutchinson v. Hendrickson*, 29 N.J.L. 180 (1881); Rhode Island: *Fitzpatrick v. Fitzpatrick*, (3 Ed. 64, 75 AntDec. 081 (1850).

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 the Plea or Issue joined, it must be set up by a Plea of Pals Darrein Continuance. Illinois:  
*Mount v. Scholes*, 120 Ill. 394, 11 NE. 401 (1887);  
Missouri: *Wade v. Emerson*, 17 Mo. 267 (1852); New Jersey: *Hutchinson v. Hendrickson*, 20 Tc.3.L. 180 (1861); New York: *Bowne v. Joy*, 9 Johns. (N.Y.) 221 (1812); Ohio: *Long-worth v. Flagg*, 10 Ohio 301 (1891); Rhode Island: *Smith v. Carroll*, 13 ILL 125, 21 A. 343, 12 LILA. 301 (1891); Federal:  
*Leggett v. Rumphreys*, 21 How. (U.S.) 66, 16 LEd. 50 (1858).

"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 on the Case an Exception to this Rule exists, and such Defenses as a Release Executed after Suit Begun and Issue Joined may be shown under the General Issue, and it is not necessary that they be Pleaded Puis Darrein Continuance.<sup>5</sup>

The Plea Puis Darrein Continuance may be either in Abatement or in Bar, like other Pleas, according to the Matter. It must be certain and definite in every particular, the greatest degree of strictness being required.<sup>6</sup>

A Plea Puis Darrein Continuance is a waiver of and substitute 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

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 sue, and the parties proceed to settle the Pleading file. When filed, it, in Operation of Law, supersedes all other Pleas and Defenses in the Cause, and the parties proceed to settle the Pleading file. 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. Seholes*, 120 Ill. 304, 399, 11 N.E. 401, 402 (1887).

And see the following cases: Illinois: *Van Norman v. Young*, 228 Ill. 425, 81 N.E. 1060 (1907); Oklahoma: *Ham v. Security Nat. Bank of Oklahoma City*, 74 Ok-I. 184, 177 P. 508 (1918).

5. *City of Chicago v. Babcock*, 143 Ill. 358, 32 N.E. 271 (1892); *Papke v. O. H. Hammond Co.*, 102 Ill. 631, 61 N.E. 910 (1901).

6. Alabama: *Henry v. Porter*, 29 Ala. 619 (1857); Illinois: *Ross v. Nesbit*, 2 Gil. (111.) 252 (1815); *Kenney v. Sutherland*, 3 Gil. (Ill.) 99 (1840); *Mount v. Scholes*, 120 Ill. 394, 11 N.E. 401 (1887); *Gibson v. Bourland*, 13 Ill.App. 352 (1883); Maine: *Wheeler v. Smith*, 50 Me. 568, 70 Am.Dec. 629 (1802); *City of Augusta v. Moulton*, 75 Me. 551 (1884); Pennsylvania: *Vieary v. Moore*, 2 Watts (Pa.) 451, 27 Am. Dec. 823 (1834).

514

Ch. 22

## PLEAS—PEREMPTORY OR IN BAR

the Pleadings de novo, just as if no Plea had theretofore been filed in the case.

### RECOURPMENT AND SET-OFF

278. By Statute the defendant is generally permitted in Contract Actions to set up a Counter Demand, if liquidated, as a Set-Off to defeat plaintiff's recovery in Whole or in Part. In some states an Affirmative Judgment for the defendant is permitted.

- Recoupment is generally a Cross-Demand for Damages sustained by defendant in the same transaction, allowed in Reduction of Damages.

### *The Doctrine of Recoupment*

AT Common Law, if A owed B a thousand dollars and B owed A a thousand dollars, A

7. Illinois: *Dinet v. Firsching*, 56 Ill. 83 (1877); *Mount v. Seholes*, 120 Ill. 394, 11 N.E. 401 (1887); *People v. Chicago Flys. Co.*, 270 Ill. 87, 110 N.E. 356 (1915); *Id.* 270 Ill. 140, 110 N.E. 402, holding that under the Illinois Practice Act as it then existed, former Pleas no longer waived; New York: *Kimball v. Huntington*, 10 Wend. (N.Y.) 679, 25 Am.Dec. 590 (1833); Rhode Island: *Davis v. Burgess*, 15 Ill. 85, 25 A. 848 (1892); Vermont: *Lincoln v. Thrall*, 26 Vt. 304 (1854); Wisconsin: *Adams v. Filer*, 7 Wis. 306, 73 Am.Dec. 410 (1858); Federal: *Wallace v. McConnell*, 13 F. (U.S.) 136, 10 LEd. 95 (1830).

"It is laid down in Bacon's Abridgment (0 Bae.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. (N.Y.) 679, 25 Am.Dec. 590. The Court say the Plea Puis Darrein Continuance waived all previous Pleas, and on the Record the Cause of Action was admitted to the same extent as if no other defense had been urged than contained in this Plea.” *Wallace v. McConnell*, 13 Pet. (U.S.) 136, 10 LEd. 95 (1839).

8. In general, on Recoupment, Set-Off and Counterclaim, see:

Treatises: Montagu, *A Summary of the Law of Set-Off*, with an Appendix of Cases Argued and Determined in the Courts of Law and Equity upon that Subject (New York, 1806); Babington, *A Treatise on the Law of Set-Off and Mutual Credit*, with an Appendix of Precedents (London, 1827); Barbour, *A Treatise on the Law of Set-Off*, with an Appendix (New York, 1841); A Treatise on the Law of Set-Off, Recoupment and Counterclaim (3d ed. New York, 1872).

Articles: Leyd, *The Development of Set-Off*, 44 U. Pa.L.Rev. 541 (1916); Kerr, *Counterclaim and Recoupment in Tort*, 95 *Cent.L.J.* 27 (1922); Blume, *A Rational Theory for Joinder of Causes of Action and Defences and for the Use of Counterclaims*, 26 *Mich. L.Rev.* 1 (1927); Howell, *Counterclaims and Cross-Complaints in California*, 10 *So.Calif.L.Rev.* 415 (1937); Lowry, *Counterclaims (or Cross Petitions) in Ohio Practice*, 19 *U.Cin.L.J.Rev.* 311 (1950); Czyak, *Counterclaims, Cross-Claims, and Third-Party Petitions under the 1945 Missouri Code*, Wash. U.L.Q. 201 (Winter, 1950); Wright, *Estoppel by Rule: The Compulsory Counterclaim Under Modern Pleading*, 38 *Minn.L.Rev.* 423 (1954).

Comments: Set-Off and Counterclaim—Chose in Action Assigned before Maturity Subject to Set-Off for Claim Against Assignor Acquired Before Notice of Assignment, 31 *Yale L.J.* 669 (1922); Set-Off and Counterclaim—Right to Plead Set-Off and Counterclaim in a Reply, 5 *Minn.L.Rev.* 487 (1921); Recoupment—Set-Off and Counterclaim, 28 *W.Va.L.Q.* 139 (1922); Pleading: Equity Affecting Legal Causes of Action as Defenses or Counterclaims: Mode of Trial of Such Issues, 11 *Cornell L.Q.* 396 (1920); Counterclaims in Courts of Limited Jurisdiction, 44 *Harv.L.Rev.* 273 (1930); Pleading—Counterclaim—Mutual Liabilities as Arising out of the Same Transaction, 1 *Mo.L.Rev.* 201 (1936); Counterclaim in Iowa, 24 *Iowa L.Rev.* 310 (1939); Pleading—Complaint—Common Counts in Assumpsit Followed by Allegation of Promise to Pay, 21 *Minn.L.Rev.* 756 (1939); Set-Off, Counterclaim and Recoupment—Limitation of Actions—Claim Not Barred by Expiration of Limitation Period, 28 *Va.L.Rev.* 557 (1942); Counterclaim: Effect of Statute of Limitations, 31 *Calif. L.Rev.* 210 (1943); Counterclaim for Malicious Prosecution in the Action Alleged to be Malicious, 58 *Yale L.J.* 490 (1940); Pleading—Counterclaim—Right of Administrators to Counterclaim in Another Capacity, 12 *U.Detroit L.J.* 140 (1949); Governmental Immunity from Counterclaims, 50 *ColLect* 505 (1950).

Annotations: Set-Off, Counterclaim, and Recoupment. in Replevin or other Action for Possession of Personal Property, 151 *A.L.R.* 519 (1944); Claim Barred by Limitation as Subject of Set-Off, Counterclaim, Recoupment, Cross Bill or Cross Action, 1 *A.L.R.* 24 630 (1948); Cause of Action in Tort as Counterclaim In Tort Action, 10 *A.L.R.2d* 1167 (1950); Failure to Assert Matter as Counterclaim as Precluding Assertion Thereof in Subsequent Action, under Federal Rules or Similar State Rules or Statutes, 22 *A.L.R.2d* 621 (1952).

Sec. 278  
515

516

## DEFENSIVE PLEADINGS

Ch. 2

to sue and recover from *A* in a separate action. This was so because the early Common Law doctrine was that the only remedy where Cross-Demands existed was for each party to sue separately,<sup>9</sup>

The absurdity of this situation became crystal clear in a situation where *A* sold a thousand bushels of Grade *A* wheat to *B*, but on delivery it turned out to be Grade *B* wheat, whereupon *B* refused to pay. When, therefore, *A* sued *B* for the purchase price, and *B* desired to cut down the amount of *A*'s recovery by asserting his Claim for Damages for Breach of Warranty, it was necessary for *him* to bring a separate action.

However, through a long series of judicial decisions, the Common-Law Doctrine of Recoupment was developed. At first, Recoupment could be used solely as a Defense to diminish the plaintiff's recovery. Furthermore, it was confined to Contract Actions, and to Cross-Demands arising from the very contract sued upon by plaintiff.<sup>10</sup> As it evolved, however, Recoupment came to lie for Matters arising from the same transaction, as well as the same contract.

The defendant may generally Recoup for Damages caused by plaintiff's Breach without Notice under the General

Issue.<sup>1</sup>

9. Pomeroy, Remedies and Remedial Rights by the Civil Action, 789 (Boston, 1594).

10. Id. at 792.

11. Illinois: Higgins v. Lee, 16 Ill. ~93 (1835); Babcock v. Trice, 18 Ill. 420, 68 Am. Dec. 560 (1857); Streeter v. Streeter, 43 Ill. 155, 160 (1867); Murray v. Carlin, 67 Ill. 286 (1873); Waterman v. Clark, 76 Ill. 428, 431 (1875) (note, Special Plea); Cooke v. ProNe, SO Ill. 381 (1875); Baker v. Fawcett, 69 Ill. App. 300 (1886); Peiree y. Sholtey, 100 Ill. App. 341 (1914); Maryland: Sullivan v. Boswell, 122 Md. 539, 89 Atl. 040 (1914); New York: Barber v. Rose, 5 (Till. (N.t) 76 (1843).

For Recoupment under the General Issue, see: Icrank.

En v. P. B. Lilly Lumber Co., 66 w. Va. 164, 66 SE.

225 (1909); Cf. Set-Off, independent items, Plea of

Set-Off required. Illinois: Wilson v. Wilson, 125

Ill. App. 385 (1906); West Virginia: Philippi Planing Mill Co. v. Cross, 75 W. Va., 303, 83 S.W.2d 1004 (1914)-

It is not necessary that the Claim by way of Recoupment be a liquidated debt. In *Stow v. Yarwood*,<sup>2</sup> the Court speaks of Recoupment as follows: "This Doctrine of Recoupment tends to promote justice, and to prevent needless litigation. It avoids circuitry of action, and multiplicity of suits. It *adjusts* by one action adverse claims growing out of the same subject-matter. Such claims can generally be much better settled in one proceeding, than in several. It is not necessary that the opposing claims should be of the same character. . . . A claim originating in contract, may be set up against one founded in tort. It is sufficient that the counter claims arise out of the same subject-matter, and that they are susceptible of adjustment *in* one action." 13

### *The Doctrine of Set-Off*

At Common Law, where Cross-Demands existed, the defendant, until Recoupment was recognized, could not Pray for any Relief in his Pleadings. If he had a claim against the plaintiff, he could only set it up in another suit of his *own*. Although the Doctrine of Set-Off of Mutual Claims had early been recognized in Equity, it had not found its way into the Common Law. But in 1729 the doctrine was incorporated into the Common Law by means of the Statute of 2 George II, c. 22, § 13, 16 Statutes at Large 53 (1729).

By this Statute a defendant was allowed in an Action upon a Debt to set up a liquidated demand of his own to counter-balance that of the plaintiff, either in whole or in part<sup>14</sup>

12. 14 Ill. 423 (1853).

13. Id. at 426, See, also: Delaware: Houghton & Co.

v. Alpha Process Co., 5 Boyce (Del.) 383, 05 AU. 669

(1915); Florida: Jarrett Lumber Co. v. Reese, 66 Fla.

317, 63 So. 581 (1912); Illinois: Keegan v. Iunnare,

123 Ill. 280, 14 N.E. 14 (1887); Massachusetts:

Bennett v. Kupfer Bros. Co., 213 Mass. 218, 100 N.E.

332 (1913).

14. The Statute of 2 Geo. II, c. 22, § 13, 16 Statutes at Large 59 (1729), was re-enacted and amended in 1733, by the Statute of 5 Geo. II, c. 24, § 5, 16 Stat-

### PLEAS—PEREMPTORY OR IN BAR

And, as Set-Off developed, it was necessary that it be for a liquidated demand, whereas Recoupment could be for an unliquidated demand. Also, the defendant could recover a balance in Set-Off, but not in Recoupment.<sup>15</sup> Set-Off answered very nearly to the

utes at Large 535, and, as amended, read in part as follows: "Mutual Debts may be set against each other, either by being Pleaded in Bar, or given in evidence on the General Issue ~nd in case the plaintiff shall recover in any such Action or Suit, Judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff, after one debt being set against the other as aforesaid."

15. Pomeroy, Remedies and Remedial Rights by the Civil Action, 792 (Boston, 1894).

*compensatio* of the Civil Law, where Mutual Debts compensate each other, and operate as payment, to extinguish so much of the reciprocal demand. But in English Law this Right of Set-Off only arises in the course of an action as

a Plea. A debt is not extinguished *pro tanto*, by mere operation of law, when the debtor acquires a claim against the creditor.<sup>1o</sup>

ic. Loyd, Development of Set-Off, 04 U.PaL.Uev. 541, 543 (1016). Cross-Demands do not cancel each other in the Common Law. 2 Williston, The Law of Contracts, § 859 (New York, 1927).

Sec. 278

517'

Sec.

## CHAPTER 23

### THE REPLICATION

- 279. The Various Kinds of Replication.
- 280. The Replication De Injuria—Definition, Scope and Availability.
- 281. Forms of Plea and Replication De Injuria Thereto.
- 282. Formal Parts of Replication.
- 283. Status of the Replication De Injuria Under Modern Codes, Practice Acts and Rules of Court.
- 284. Departure Defined and the Reason for the Rule Against Departure.
- 285. The Kinds of Departures and the Stage of Pleading at Which They May Occur.
- 280. The Mode of Taking Advantage of a Departure.
- 287. Status of Departure Under Modern Codes, Practice Acts and Rules of Court.  
New Assignment—Definition, Necessity and Application,  
Form of New Assignment.  
New Assignment as in the Nature of a New Declaration.  
Status of New Assignment Under Modern Codes, Practice Acts and Rules  
of Court.

#### THE VARIOUS KINDS OF REPLICATION

279. A replication must either traverse a plea, or confess and avoid the matter pleaded by the defendant, or present matter of estoppel to the plea. A fourth sort of replication is a new assignment.

1. In general, on the subject of Replications, see:

Treatises: Ener, A System of Pleading, e. XXXII, Departure, 213—217 (Dublin, 1791) ; La~ves, An Elementary Treatise of Pleading in Civil Actions, e. VII, Of Replications and the Subsequent Pleadings, 140—165 (1st Am. ed. Portsmouth 1808); lening, The American Pleader and Lawyers Guide, Replications (Richmond 1520); 1 Saunde-s, The Law of Pleading and Evidence, Replication, 774—776 (4th Am ed., Philadelphia 1844); Rime, A Treatise on the Repleatio, de Injuria (London 1842); Shipinn, I-land book on Corn 'no,' Lan' l'lr, ad in g, e. XV, II ej i - eatious, ~ 211—213, (Svd ed. by Ballantine, St. Paul 1923) ; 1 Chitty. A Treatise on the Parties to Actions, the Fo,'as of Actions, and on Pleading, e- VII Of Replications, 603—685 (6th Am. ed., Springfield, 1833); Stephen, A Treatise on the Principles of Pleading in Civil Actions, 93—95, 265—207, 345—348 (3rd Am. ed. by Tyler, Washington, O. C., 1000); 1 Tidd, Practice of the Court of ICING's Bench in Personal Actions. c- XXIX, Of XThpleiations, and other Subsequent Pleadings, 625—640 (Philadelphia, 1807).

WHERE a defendant pleads in Confession and Avoidance, at the Replication stage of Pleading the plaintiff may Demur or Plead. If he does not Demur, he may deny or traverse the truth of the matter alleged in the Plea, either in Whole or in Part, or he may confess and Avoid the Plea.<sup>2</sup> If he decides upon the latter, he must be careful to avoid a Departure, which, in the case of the plaintiff, is an abandonment at a later Stage of Pleading of the ground on which the plaintiff placed his Cause of Action. In case of an Evasive Plea it may be permissible for plaintiff to enter a New Assignment, and, in some cases, he may Reply by showing Matter in Estoppel.

To a large degree, the Requisites of a Replication resemble those of a Plea, and are, *first*, that it must Answer so much of the Plea as it professes to Answer; *second*, that it must not Depart from the Cause of Action

2. *Henry v. Ohio River B. Co.*, 40 WVa. 234, 21 S.E.

863 (1893).

288.

289.

290.

291.



set up in the Declaration; *third*, that, like a Plea, it should be Certain, Direct and Positive, and not Argumentative; and *fourth*, that it must be Single.

THE REPLICATION DE INJURIA—DEFINITION, SCOPE *ANT?* AVAILABILITY

280. 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. Such a Pleading is Known as the Replication De Injuria.

A REPLICATION DE INJURIA is a compenius Form of Denial which, broadly speaking, does for the plaintiff at the Replication Stage of Pleading, what a Plea of the General Issue does for the defendant at the Plea Stage of Pleading, that is, it denies all the Material Allegations in the Plea. But in what situation is this most technical procedural device used? If we suppose that the defendant's Plea sets out several Distinct Matters which are essential to constitute his Defense, the General Rule has been, according to the principles so far observed, that the plaintiff, in *framing* his Reply to such a Plea, was required to select one of the several Facts or Matters alleged and Traverse or Confess and Avoid that Particular Fact or Matter, and, as an incident thereof, admit by implication all the other matters. Thus, for example, in Trespass De Bonis Asportatis for taking goods, conceivably the defendant might Plead that the goods in question consisted of a number of cases of alcoholic liquor, that the plaintiff was unlawfully in possession of them, having no License to keep such goods and having them f or illegal sale, that the defendant was an officer having the authority to seize liquors *unlawfully* kept, and that he did seize them for the reason stated, and delivered them to the officer appointed by the Law to receive goods so seized. Assuming that the goods were not contraband, that the

plaintiff had lawful possession of them, that the defendant was not an officer, that he had no authority to seize any goods, and that he used the goods for his own consumption, the plaintiff, at the Replication Stage of Pleading might Reply by Traversing any one of the facts relied upon by the defendant. If, however, he undertook to Traverse more than one, or all of these facts, he would be guilty of violating the Rule of Pleading against Duplicity, unless the Common-Law Rule as to Singleness of Fact Denied be changed in such a situation. The *Common-Law*, under such circumstances, did permit the plaintiff to Traverse a Plurality of Matters or Facts contained in the defendant's Plea, by Replying that the defendant committed the trespasses stated itt the Declaration, of his own wrong and without such cause as in the plea alleged, *Dc Injurja Sua Pro pr-ta Abs que Tali Ca-usa*. Such a Form of Replication, known as a Replication Dc Injuria,<sup>3</sup> operates as a Compendious Denial of Every Material Fact set out in the *Plea*, thus creating an *Issue* of Fact, just as the General Issue enabled a defendant to Traverse, at the Plea Stage of the Pleading, all the Material Allegations in the *plaintiff's* Declaration. The Replication De Injuria differed from a Common Ti-averse, which was a Denial of a Material Allegation of Fact in the Pleader's Own Language, in that the Replication De Injuria was not a Denial in Direct and Categorical Terms, but rather by a Fixed Form in the Nature of a Blanket Negation and in that it operated to put in Issue Not One, but All the Material Facts constituting the defendant's composite Defense.

*The General Rule as to When the Replication Dc Infuria May be Interposed to a Plea*

THE Common-Law Rule was that a Replication could not be Double or contain Two or More Replies to the Same Plea. And it

3. Gould, A Treatise on the Principles of Pleading, Part UI, Of Pleading, Div. v, Of Pleas to the Action, c. III, Of Traverse, 539 (6th ed, by Will, Albany, 1909).

t20

DEFENSIVE PLEADINGS

Cli. 23

should be kept in mind that the Statute of Anne,<sup>4</sup> enacted in 1705, which permitted a defendant to Plead Several Defenses, did not extend to Replications, except in the single instance of a Plea in Bar to an Avowry in Replevin, which is in the Nature of a Replication, but which is in reality a Plea, as the Avowry was in reality in the Nature of a Declaration.

Where a Plea sets up a series or group of circumstances which together constitute the Defense, the strict Theory of Pleading requires the plaintiff to select some one of such Several Matters and take Issue upon that Single Specific Allegation alone. The Replication *De Injuria*, like the General Issue, is an instance of Licensed Duplicity, to permit a Denial of Several Matters in one Compendious Form. Before the enactment of Modern Statutes permitting the filing of more than One Replication, the use of the Replication *De Injuria* was of great advantage to the plaintiff as it put the defendant to the Proof of all the Material Allegations in his Plea, instead of leaving the plaintiff to stand or fall by the Denial of a Single Allegation, the others being admitted by failure to Deny them.<sup>5</sup>

As the General Issue was used by a defendant, so a Replication *De Injuria* was available to the plaintiff at the Replication Stage of Pleading. It was said to be a Uniform

4. 4 Anne, c. 16, ~ 4, 11 Statutes at Large 135 (1705). Since the Statute, which permitted the defendant to Plead more than One Defense or Plea to a Single Count, did not give plaintiffs a similar privilege of making more than One Replication to One Plea, the Proethical Device of the Replication *De Injuria*, which was a Comprehensive Traverse, was created to cover the need, and become of great importance. But under the Modern Procedure Reforms, the great mass of technical learning on the subject has become largely obsolete. Ames, cases on Pleading, 104, note (24 ed., Cambridge 1905).

s. I Cillity, On Pleading, e. VIII, Of Replications § 2, Forms and Parts of Replications, 600 (10th Am. ed., Springfield 1867); Keigwin, Precedents of Pleading at common Law, 464-474 (Washington, 110., 1910) Poe, Pleading, c. XXVI, Replication and Subsequent

Rule that such a Replication would be used only when the defendant set up Matter merely in Excuse of the wrong alleged in the Tort Actions of Trespass and Case, and the Contract Actions of Assumpsit, Covenant and Debt, and where such Plea was untrue. It was said not to be admissible where the Facts Pleaded amounted to a Justification.~ It was not, however, an easy matter to distinguish between Matter of Excuse and Matter of Justification. Accordingly, it is not surprising to learn that *De Injuria* has frequently been used in Replying to Pleas which were in Justification and not in Excuse, As a result the distinction came to be largely disregarded in both England and the United States.<sup>8</sup>

### *The Effect of the Replication De Injuria*

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 his Plea alleged), committed the injury complained of.<sup>9</sup> It is preceded by a general Inducement or Introduction, and Denies, in General and Summary Terms, and

6. Massachusetts: Sampson v. Henry, 11 Pick. (Mass.) 379 (1831); New York: Gates v. Lounsbury, 20 Johns. (N.Y.) 427 (1823).

It was formerly allowed only in Trespass and Trespass on the Case. English: Jones v. Kitdhin, 1 Bbs. & 1<sup>st</sup>. 70, 126 Eng.Rep. 787 (1797); Isaac v. Farrar, 1 Mees. & IV. 415, 150 Eng.Rep. 348 (1830); Massachusetts: Coffin v. Bassett, 2 Pick. (Mass.) 357 (1824).

7. In New York, the Courts followed this distinction until common-Law pleading was abolished by the Code of Procedure in 1848. The same Doctrine applied in Illinois in the case of Allen v. Scott, 13 Ill. 50 (1851), and in New Jersey in the case of Taverna v. Ohm-chill, 77 N.J.L. 430, 72 A. 43 (1909). In Delaware the Replication *De Injuria* remained restricted to cases in which the defendant's Plea contained Matter of Excuse. Murden v. Russell, 5 Boyce (Del.) 362, 93 A. 379 (1915). But, in the Federal Courts, no such distinction was observed. Erskine v. Hohabach, 14 Wall. 624, 20 L.Ed. 745 (1871).

s. English: Chancy v. Win, 12 Mod. 580, 88 Eng.Rep. 1533 (1701); O'Brien v. Saxon, 2 B. & C. 908, 107 Eng.Rep. 619 (1824); Selby v. Bardons, 3 S. & Ad. 2, 110 Eng.Rep. 1 (1832); Federal: Erskine v. Hohabach, 14 Wall. 614, 20 L.Ed. 745 (1871).

Pleadings, 1 678 (Baltimore 1906).

e. Crogate's Case, 5 Coke 66, 77 Eng.Rep. 574 (1608)-

Sec. 281

## THE REPLICATION

1121

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 *Abs que 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 in the Plea, as it goes to the Whole Plea, but only where such Allegations show Matter of Excuse for the Tort or injury committed.<sup>10</sup> It can never be used when the Matter set forth in the Plea is insisted on as conferring a positive right.” Its import is to insist that the defendant committed the act in question from a different motive than that assigned in the Plea.<sup>12</sup>

## FORMS OF PLEA AND REPLICATION DE INJURIA THERETO

281. This section illustrates Form of Plea In Confession and Avoidance and 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

10. Comyn.Dig. “Pleader” F. 19 (London, 1822); Illinois: Allen v. Scott, 13 Ill. 80 (1851) ; Iron Clad Dryer Co. v. Chicago Trust & Savings Bank, 50 Ill. App. 461 (1593); New York: Coburn v. Hopkins, 4 Wend. (N.Y.) 577 (1830).

Where the Defense Is an Excuse for the Nonperformance of a Promise which the defendant made, however many the parts or facts of that Excuse may be, the Replication *Be Injuria* denies them all.

11. Plumb v. McCrea, 12 Johns. (N.Y.) 491 (1815).

u. For limitations upon the use of the Replication *de Injuria*, see Keigwia, Cases In Common-Law Pleading, c. VIII, The Replication *Be Injuria*, 130, 620 (2d ed., Rochester 1934).

ease 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, against the said plaintiff, which are the supposed trespasses in the introductory part of this Plea mentioned, and whereof the said plaintiff hath above complained. And this the defendant is ready to Verify. Wherefore he Prays Judgment if the plaintiff ought to have or maintain his aforesaid action thereof against him.

In such a case a Replication *De Injuria* would be as follows:

And as to the said Plea by the said defendant last above Pleaded in Bar to the said several Trespasses in the Introductory Part of that Plea mentioned, the said plaintiff says that, by reason of anything therein alleged, he ought not to be Barred from having and maintaining his aforesaid action thereof against the defendant, because, he says, that the defendant, at the said time when, &c., of his own wrong, and without the cause in the said last-mentioned Plea alleged, committed the said several trespasses in the Introductory

522

## DEFENSIVE PLEADINGS

Cl. 23

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.

11 -

## FORMAL PARTS OF REPLICATION

282. Properly Commencing and Concluding a Replication requires considerable skill in Pleading, hence some suggestions as to the Formal Parts of a Replication are discussed below.

A REPLICATION was usually Entitled in the Court and of the Term at which it was Pleaded; and the names of the plaintiff and of the defendant were stated in the margin— thus, “AD. v. C.D.” ~

When the Body of the Replication only contained an Answer to a Part of the Plea, the Commencement should then specify the Part intended to be Answered, for if the Commencement professed to Answer the Whole. but the Body contained an answer to Part only, the whole Replication was insufficient.

Every Replication must Conclude either to the Country or with a Verification and Prayer of Judgment.

A Replication to a Plea in Bar has this Commencement: ~ \* \* Says that by reason of anything in the said Plea alleged he ought not to be barred from having and maintaining his aforesaid action against him, the said C.D., because, he says,” etc. This Formula is commonly called “Precludi Non.” The Conclusion is thus: In Debt, “Wherefore he Prays Judgment, and his debt aforesaid, together with his Damages by him sustained by reason of the detention thereof, to be adjudged to him;” in Covenant, “Wherefore he Prays Judgment, and his Damages by him sustained by reason of the said Breach of Covenant, to be adjudged to him;” in Trespass, “Wherefore he Prays Judgment, and his Damages by him sustained by reason of the committing of the said Trespasses, to be ad-

13. Chitty, On Pleading, c. VIII, Of Replications, 628 (16th Am. ed. by Perkins, Springfield 1876).  
judged 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 him sustained by reason of the committing of the said several grievances, to be adjudged to him.”

And so, in all other actions, the Replication Concludes with a Prayer of Judgment for Damages, or other appropriate redress, according to the nature of the action.

With respect to Pleadings Subsequent to the Replication, it will be sufficient to observe, in general, that those on the part of the defendant follow the same form of Commencement and Conclusion as the Plea; those on the part of the plaintiff, the same as the Replication.

STATUS OF THE  
INJURIA UNDER  
PRACTICE ACTS

COURT

283. Cases decided under Modern Codes, Practice Acts, and Rules of Court, evince the continued existence and application of the Replication De Injuria.

UNTIL somewhat more than a century ago, the Replication De Injuria was limited to Trespass and Trespass on the Case; in 1832, as a result of *Selby v. Bardons*,<sup>14</sup> it was extended to Replevin. Two years later, the situation was complicated by the promulgation of the Hilary Rules, which sought to restrict the Scope of the General Issues in the Various Forms of Action. As one of the consequences the institution of Special Pleading was given an additional impetus, thus causing great difficulty when it came to framing Replications in Contract Actions. It is, therefore, not surprising to find that the English courts began, in the year 1836 in the case of *Issac*

REPLICATION DE  
MODERN CODES,  
AND RULES OF

14. 3 B. & Ad. 2, 110 Eng.Rep. 1 (1832).  
Sec. 283

THE REPLICATION

v. *Farrar*,<sup>15</sup> to hold that the Replication De Injuria was applicable to an Action of Trespass on the Case for a Breach of Promise.

In the United States, where, in theory at least, the Hilary Rules had not been adopted, it was natural that the

English decisions, as *influenced by* those Rules, should not be adopted. Thus, we find Gould stating that the *Traverse De In~uria, ccc., Abs que Tall Causa*, though of frequent occurrence, is confined to actions *Ex Delicto*, and used only in Replications.<sup>10</sup>

But this view did not prevail, as shown by the Statement of Scudder, J., in the New Jersey case of *Ruckman v. The Ridge field Park Railroad Company*,” in which it was urged that the Replication De Injunia was inapplicable in Actions *Ex Contractu*. The Judge declared: “Formerly the General Traverse, *Dc injuria*, was confined in practice to Actions of Trespass, Replevin, and cases for injuries. But when, under the New Rules [the Hilary Rules], Special Pleas in Excuse became frequent in Actions of Assumpsit and Debt on Simple Contracts, it became reasonable that the plaintiff should be allowed to take Issue by a General Traverse of the Whole Matter of Excuse alleged, and such Pleading was sustained by the Courts. There *was* no occasion to use this Replication when the usual Plea in Assumpsit was the General Issue. But, as more Special Defenses by Pleading are being favored in the modern practice of our Courts and by Legislation, the Replication De Injuria becomes applicable as a General Traverse of the Excuse and all the Material Allegations in the Special Plea. It is only allowed where the Plea is in Excuse, and not in Denial of the Cause of Action. It is bad when the

15. 1 M. & W, 65, 150 EngRep. 248 (1836).

10. Gould, A Treatise on the Principles of Pleading, Part III, Of Pleading, Div. v, Of Pleas to the Action, c. III, Of Traverse, 539 (6th ed. by Will, Albany, 1909).

17. -38 N.J.L. 95 (1875).

defendant insists on a Right as a Justification; nor is it permitted where the Plea amounts to Matter of Discharge and Not of Excuse, as when the Plea is Payment, Accord and Satisfaction, Release, tcc.” ~

Prior to the Ruckman Case, however, in England in 1852, under the first *Common-Law Procedure Act*,<sup>9</sup> it was provided that either Party might Plead, in Answer to the Plea or Subsequent Pleading of his adversary, the General Issue, using the following form:

“The plaintiff Joins Issue on the defendant’s [1st] plea,” or “the defendant Joins Issue~ upon the plaintiff’s Replication’ to the first plea.” This Form of Replication, in *Clover v. Diccon*,<sup>20</sup> was said, by Pollock, C.B., to be “in the nature of a General Replication De *Injuria*,”<sup>21</sup> and the effect of such a Joinder was to place in Issue all the Material Allegations of the Pleading to which it was interposed. In Maryland, in 1856, or just four years after the English Act,<sup>22</sup> the Replication Dc Injuria was abolished by Statute and a Joinder of Issue was substituted in lieu thereof. And in the District of Columbia, as early as the year 1879, this Form of Joinder was authorized by a Rule of Court, the effect of which was to put in Issue the Substance of the Plea.<sup>23</sup> In most American Jurisdictions, following the example of Maryland, a similar Joinder of Issue has been authoriz~d in most actions and at any Stage of the Pleading, such Form of Pleading being broadly the equivalent of the Replication Dc Injuria, having the effect of a Compendi

18. Rueknan ~ Ridgefield park u. Co., 38 N.J.L, 98,

99 (1875),

19. 15 & 16 Vict. c. 70, 92 Statutes at Large 285, 301 (1852).

20. 9 Exch. 158, 156 Eng.Rep. 08 (1853).

21. Glover v. Dixon, 9 Exch. 158, 150 Eng.Rep. 68, 09 (1853).

22. 15 & 10 vtht. c. 76, 92 Statutes at Large 285, 201 (1852).

23. United States v. Schurz, 102 U.S. 37’S, 20 LEd. 167 (1880).

524

## DEFENSIVE PLEADINGS

Ch. 23

otis Denial. Keigwin suggests that the practical effect is that in any action a Party may “not only Reply, but Rejoin or Surrejoin Dc Injuria” 21 He wrote that “some Lawyers who shudder at the imaginary intricacies of Pleading would be shocked to learn that they have all their lives been using the archaic and mysterious Replication Dc Injuria in disguise, and to an extent vastly beyond the

• Contemplation of the Common-Law, very ‘much as the *bourgeois* in Moliere’s comedy was startled to discover

that he had always spoken prose without knowing that it was prose.”<sup>26</sup>

Two Delaware cases testify as to the continued existence and application of the Replication De Injuria in its virgin form where the Code is not adopted. In the *first* case, *Murden v. Russell*,<sup>26</sup> decided in 1915, the plaintiff brought an Action of Trespass by Assault, and for the removal of the plaintiff's houseboat from a beach. The defendant Pleaded in Justification, that the title to the beach was in a Town, and that as the Agent of the Town, he removed the boat, as he lawfully might do, The plaintiff filed a Replication De Injuria to each of the two Pleas as set forth above, whereupon the defendant filed a Special Demurrer, on the ground, *first*, that such a Replication is proper only in Reply to a Plea in Excuse; and *second*, that such a Replication is improper when the defendant, in his own right, or as a servant to another, claims an Interest or Title in Land, citing as authority the famous English *Crc gate's Case*,<sup>27</sup> New Jersey Case of *Taverna v. Churchill*,<sup>28</sup> and the New York Case of *Plumb v. M'Crea*.<sup>29</sup>

4. Cases in Common-Law Pleading, Bk. IT, The Replieation Do Injuria, § 137, The Joinder in Issue, 619 (2d ed, Rochester 1934).

-Ibid.

1. ~ Boyce (Del.) 362, 93 A. 379 (1015). St. S 'Co. Gob. 77Eng.Rep. 574 (1608).

ss. 77 N.J.L. 430, 72 A. 43 (1(103).

The plaintiff did not dispute the principles urged in support of the Demurrer, and left the question of their application to the Court, which sustained the Demurrer and gave Judgment for the defendant, Boyce, 3., in accordance with the Rule at Common-Law, declaring: "The Replication De Injuria is proper when Matters in Excuse are pleaded; but when Justification, or a claim of Title or Interest in Land, is pleaded the Replication must be by way of a Special Traverse." ~

In the second case, *Empire Box Corporation v. Jefferson island Salt Mining Co.*,<sup>31</sup> decided in 1941, the plaintiff filed a Declaration containing Four Counts, Three Special Counts, and One on a Common Count. To the eleventh and twelfth Pleas, the plaintiff filed a Replication De Injuria, whereupon the defendant entered a Special Demurrer, on the grounds *first*, that a Replication De Injuria is not available in Actions *Ex Contractu*; and *second*, that a Replication De Injuria is not permitted where a Plea sets forth Matters of Discharge. The Special Demurrer to the Replication De Injuria was sustained on the ground that such Form of Replication was not a Proper Form of Traverse in an Action of Assumpsit. While this is not correct as the Replication De Injuria finally developed, the position of the Court is made clear by Chief Justice Layton, who declared: "The System of Pleading in force in this State, and strictly adhered to, is that System which prevailed in England at the time of our Independence except as changed or modified by Constitutional or Statutory Enactment. In Assumpsit, the General Issue of Non-Assumpsit puts the whole Declaration in issue, and almost everything may be given in evidence which shows that the plaintiff at the time of Commencing Suit had no Cause of Action. Reading's Heirs v. State, 1 Han. 190. By the Rules adopted by the Judges of the Superior Courts of Common

30. J%f,wdon y, Ituasell, 5 Boyce (Del.) 202, 304, 03 4.

379, 380 (1915~.

31. 12 .Jobns. (N.Y.) 401 (1815).

31.2 Terry (Del.) 409, 413, 24 A.2d 322, 324 (1941).

Sec. 284

## THE REPLICATION

525

Law at Westminster at Hilary Term, 1834, it was provided that 'in every Species of Assumpsit, all matters of Confession and Avoidance, including not only those by way of Discharge, but those which show the transaction to be either void or voidable in point of Law, on the ground of fraud or otherwise, shall be Specially Pleaded \*\*~ These Rules are not in force in this State. Wooley, Del. Pr. § 340, 1463. The Replication De Injuria is a Species of Traverse varying from the Common Form of General Denial. At the Common Law it was confined to Actions of Tort where the Plea consisted of Matter of Excuse. Chitty, Pleading (4th Am. from 3d. London Ed.1825) 593; Gould, Pleading, 539; Stephen, Pleading (3d Am. from 2nd. London Ed.) 180; Coffin v. Bassett, 2 Pick., Mass., 357; Tubbs v. Caswell, 8 Wend., N.Y.,

129. There is, perhaps, no direct decision in this State which so limits the use of this Form of Traverse, but the limitation is necessarily inferred from the System of Pleading itself in force with us, and from whatever decisional authority there may be. *Thomas v. Black*, S Houst. 507, 18 A. 771; *Murden v. RusseU*, 5 Boyce 362, 93 A. 379; *Woolley*, Del.Pr. § 475. In England, after the adoption of the Hilary Rules by which the Scope of the General Issue in Assumpsit was greatly narrowed, the use of this Form of Traverse seems to have been permitted in Actions Ex Contractu; and the decision in *Ridgefield Park R. R. Co. v. Ruckman*, 38 N.J.L. 98, is apparently based on the System of Pleading obtaining in the State of New Jersey in which Special Pleas in Excuse of alleged Breach of Contract were allowed to be Plead.”

DEPARTURE DEFINED AND THE REASON  
FOR THE RULE AGAINST DEPARTURE

**284. A Departure is an Abandonment at a Later Stage of Pleading of the Ground on which the Plaintiff has placed his Cause of Action, or the Defendant his Defense. Such a Fault in Pleading is not permitted as the Record would by such means be extended to an indefinite length, and the Formulation of a Specific Issue unnecessarily delayed.**

*Departure Defined*

THE Common-Law Rule was that in Pleading there must be no Departure. A Departure occurs where, in any Pleading, a Party Abandons the Ground taken in his last Antecedent Pleading, and Resorts to Another, distinct from and not fortifying the first. From this definition it becomes clear that this Fault in Pleading can never arise until the Replication, but it may arise in that or any Subsequent Stage of Pleading. It is, therefore, a Settled Rule that the Replication or Rejoinder must not Depart from the Allegations of the Declaration or Plea in any material matter.<sup>32</sup> Its most frequent point of occurrence is in the Rejoinder by the defendant, and the Fault may be either in the Substance of the Defense, or the Law on which it is founded, and this also applies where plaintiff Departs in his Replication from the Ground on which he placed his Action in the Declaration. The Pleader must not Abandon a Previous Ground in his Pleading and assume a New One, For

32. Co.Litt. 304a (Philadelphia 1853); English: *Hickman v. Walker*, wines 27, 125 Eng.Rep. 1037 (1737); *Tolputt v. Wells*, 1 Maule & S. 895, 105 Eng.Rep. 148 (1813); *Roberts v. Mariett*, 2 Saund. 188, 85 Eng.Rep. 954 (1670); *Cutler v. Southern*, 1 Saund. 116, 85 Eng.flep. 125 (1667); *Dudlow v. Watchorn*, 16 East 39, 104 Eng.Rep. 1003 (1812); *Winstone v. Linn, a Barn. & C.* 460, 107 Eng.Rep. 171 (1823); *Prince v. Brnnette*, 1 Ring. (N.C.) 435, 131 Eng.llep. 1184 (1835); *Meyer v. Haworth*, S Ad. & E. 467, 112 Engdtep. 910 (1838); *Green v. James*, 6 M. & W. 656, 151 Eng.Itep. 575 (1840); Illinois: *McConnel v. Kibbe*, 29 Ill. 483 (1863); *Pressley v. Bloomington & N. By. & Light Co.*, 271 Ill. 622, 111 N.E. 511 (1916); Massachusetts: *Keay v. Goodwin*, 16 Mass. 1 (1819); *Sibley v. Brown*, 4 Pick. (Mass.) 137 (1826); Mississippi: *McGavock v. Whitfield*, 45 Miss. 452 (1871); New Hampshire: *Tarleton v. Wells*, 2 N.H. 308 (1820); New York: *Munro v. Alaire*, 2 Cai. (N.Y.) 820 (1805); *Sterns v. Patterson*, 14 Johns. (N.Y.) 132 (1817); *Andrus v. Waring*, 20 Johns. (N.Y.) 160 (1822); Pennsylvania: *Allen v. Colliery Engineers Co.*, 106 Pa. 512,46 A. 899 (1900); Tennessee: *Haley v. McPherson*, 3 Humph. (Tenn.) 104 (1842).

526

DEFENSIVE PLEADINGS

Cl. 23

**example**, he must not Rely on the Effect of the Common Law in his Declaration or Plea, and on a Custom or Statute in his Replication or Rejoinder?<sup>3</sup> But 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, is not a Departure?<sup>4</sup> Thus, in Special Assumpsit, if the Declaration, in a case where the Time is not Material, state a Promise to have been made ten years ago, and the defendant Plead that he did not Promise within six years, the plaintiff may Reply that the defendant did

Promise within six years without a Departure, because the Time laid in the Declaration *was* immaterial.<sup>35</sup>

13. Co.Litt, 304a (Pbiladelphia 1853); English: Rex v. Larwood, Carth. 306, 90 Eng.Rep. 780 (1694); Mole v. Walls, 1 Lev. 81, 83 Eng.Rep. 307 (1662); Fulmerston v. Steward, Plow. 102, 75 Eng.Rep. 160 (1554); Indiana: *leatman v. Cullen*, 5 Blacif. (lad.) 240 11839); Pennsylvania: *Allen v. Tusearora \al. fly. Co.*, 229 Pa. 97, 78 A. 34 (1910).

In a divorce suit, where the Petition relied on irapoteny, additional grounds cannot be set up in the Reply, for a Reply cannot be used to aid the Petition **by** setting up a New Cause of Action or to in-graft thereon an Omitted Aflegation. *Smith v. Smith*, 206 Mo.App. 646, 220 SW. 398 (1021).

A Replication setting up a Different Cause of Action from that alleged in the Declaration is a departure. New Jersey: *Potts v. Point Pleasant Land Co.*, 47 NiL. 476, 2 A. 242 (1885); Rhode Island: *EunUch v. ICenyon*, 20 11.1. 498. 40 A. 99 (1808); Federal: *Wiard v. Semken*, 19 D.C. 475 (1891).

34- *Gledstane v. Hewitt*, 1 C. & J. 505, 148 Eng.Itep. 1548 (18S~ *Legg v. Evans*, 6 1~1. & W. 36, 151 Eng. Rep. 311 (1840); *Lee v. Rogers*, 1 Lev, 110, 83 Eng. Rep. 322 (1603); *Cole v. Hawkins*, 10 Mod. 348, 88 EngSep. 759 (1717).

Matter which maintains, explains, and fortifies the Declaration or Plea is not a Departure. *Yore v. Smith*, 2 Lev. 5, 83 Eng.Rep. 426 (1683); *Owen v. Reynolds*, Fort. 341, 92 Eng.Rep. 851 (1719); *Dye v. Leatherdale*, 3 Wils. KB, 20, 95 Eng.Rep. 010 (1769); *Woods v. Haukshead*, Yelv. 14, 80 Eng.Rep. 11 (1602); *Fisher v. Pimbley*, 11 East 188, 103 Eng. Rep. 976 (1809).

A Replication in Estoppel is No Departure or abandoiment of the ease statod in the Declaration.

*The Reason for the Rule Against Departure* THE Rule against Departure was evidently necessary to prevent the retardation in the development of the Issue. For, while the Parties, in Pleadin~ are respectively confined to the grounds they have first taken in their Declaration or Plea, the Process of Pleading, after a few Alterations of Stateiment, will exhaust all the Facts involved in the cause, and thereby develop the Issue in dispute. But if at any Stage of the Available Series of Pleadings, a New State of Facts be introduced, the Termination of the Pleadings in a Single, Clear-Cut, Well-Defined *Issue* of Fact, is in consequence postponed. Besides, if One Departure were permitted, the Parties might, on the same principle, shift their ground, either in Point of Fact or in Point of Law, as often as they pleased; and an almost indefinite, if not intolerable length of altercation might, in many cases, be the consequence.

#### THE KINDS OF DEPARTURES AND THE STAGE OF PLEADING AT WHICH THEY MAY OCCUR

**285. Departures were of Two kinds, being either in Point of Fact, or in Point of Law. The earliest Stage of Pleading at which a plaintiff may Depart is in the Replication; the earliest Stage of Pleading at which a defendant may Depart is in the Rejoinder.**

##### *Departure in the Replication*

THE Replication is the earliest Stage of Pleading at which *the* plaintiff may be guilty of the Fault of Departure. And such a Departure may be in Point of Fact or in Point *of* Law.

(I) *In Point of F'act*.—Thus, for example, where, ha Special 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, to which the plaintiffs Replied

<sup>35.</sup> *Lee v. Rogers*, 1 Let 110, 83 Eng.Rep. 322 (1663); *Cole.*, *Hawkins*, 10 Mod. 348,88 Eng, lte~ti759 (1717).

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 that there was a Departure,



as in the Declaration they had laid Promises to the Testator, whereas in the Replication they had alleged a Right of Action as accruing to themselves as Executors.<sup>36</sup> If they meant to put their action on this ground, in the Declaration they ought to have laid Promises to themselves, as Executors.

(II) *In Point of Law.*—Thus, for example, in *Mole v. Wallis*,<sup>37</sup> 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 left his service within the seven years, the defendant Pleaded Infancy, to which the plaintiff Replied that, by the Custom of London, infants may bind themselves as apprentices, the Court held there was a Departure in Point of Law between the Declaration and the Replication, as that which is Pleaded Generally as the Common Law cannot be maintained by a Custom.

#### *Departure in the Rejoinder*

THE Rejoinder is the earliest Stage of Pleading at which the defendant may be guilty of the Fault of Departure, and it occurs more frequently at this point than in the Replication. And such a Departure may be in Point of Fact or in Point of Law,

(I) *In Point of Fact.*—Thus, for example, in Debt on a Bond conditioned to perform an Award, so that the same was delivered to the defendant by a certain time, the defendant Pleaded that the Arbitrators did not make any Award, to which the plaintiff replied that the Arbitrators did make an Award to such an effect, and that the same was

—Hickman v. Walker, Willes 27, 125 Eng.Bep. 1037 (1737).

527

Tendered by the proper time, to which Replication the defendant Rejoined that the Award was not so Tendered, to which Rejoinder the plaintiff Demurred on the ground that the Rejoinder was a Departure from the Plea in Bar. In sustaining the plaintiff's Demurrer, the Court relied on the fact that in the defendant's Original Plea in Bar, he had said that the Arbitrators made no Award, whereas, in his Rejoinder, he implicitly confessed that the Arbitrator had made an Award, but says that it was not Tendered according to the condition of the bond. This, in the view of the Court, was a clear Departure, for it is one thing not to make an Award and another thing not to Tender it when made. And although these things were necessary, by the condition of the bond, to bind the defendant to perform the Award, yet the defendant should have relied only upon one or the other by itself.<sup>39</sup>

And so where the plaintiffs declared in Debt on a Bond conditioned to keep the plaintiffs harmless and indemnified from all suits of one Cook, the defendants Pleaded that they had kept the plaintiffs harmless, to which the plaintiffs Replied that Cook had sued them, so that the defendants had not kept them harmless, to which the defendants Rejoined that they had not had any notice of the Damnification. The Court held *first*, that the Matter of the Rejoinder was bad, as the plaintiffs were not legally bound to give notice; and *second*, that the Rejoinder was a Departure from the Plea in Bar, as in the Plea in Bar the defendants Pleaded that they had saved harmless the plaintiffs, whereas in the Rejoinder they confessed that they had not saved the plaintiffs harmless, and said that they had not had Notice of the Damnification; which was a plain Departure?<sup>o</sup>

ss- itoberts v. Marlett, 2 Saund. 168, S~ Eng.Rep. 954 (1670).

Sec. 285

TUE REPLICATION

37-1 Lev. 81, 83 Eng.Rep. 307 (1662).

39.Cutler v. Southern, 1 Saund. 116, 85 Eng.Itop. 125 (1607).

528

DEFENSIVE PLEADINGS

Cli.

And where, in Debt on a Bond conditioned to perform the covenants in an indenture of lease, one of which was that the lessee, at every felling of wood, would make a fence, the defendant Pleaded that he had not felled any wood, to which the plaintiff Replied that he felled two acres of wood, but make no fence, to which the defendant Rejoined that he did make a fence, the Court held there was a Departure.<sup>4o</sup>

(II) *In Point of Law.*—The cases discussed above were cases in which the defendant, at the Rejoinder Stage of Pleading, deserted the ground, in Point of Fact, that he had first taken in his Plea. It is, however, also a Departure, where he puts the Same Facts on a new ground in Point of Law, as where he relies on the effect of the Common Law

in his Plea, and on a Statute in his Rejoinder.

Thus, where, in Trespass, the defendant made Title to the premises, Pleading a demise for fifty years made by a certain college, to which the plaintiff Replied that there was another lease of the same premises, which had been assigned to the defendant, and which was unexpired at the time of the making of the said lease for fifty years, and alleged a proviso in the Act of 31 Hen. VIII, c. 13, 4 Statutes at Large 455 (1539), avoiding all leases, by the colleges to which that Act related, made under such circumstances as the lease last mentioned, to which the defendant, by way of Rejoinder, Pleaded another Proviso in the Statute, which allowed such leases to be good for twenty-one years, if made to the same person, and that by virtue thereof, the devise stated in his Plea was available for twenty-one years at least, the Judges held the Rejoinder to be a *Idem*-

40. *Vernon v. Gatacre*, 3 Dyer, 253a, 73 Eng.Eep. 501 (1566).

A party to a Suit, In the course of litigation, cannot assert and maintain radically inconsistent positions. *Lindsey v. Mitchell & McCauley*, 174 NC. 458, 93 8. E. 955 (1917).

parture from the Plea; “*for* in the Bar Pleads a lease for 50 years, and in the F joinder he concludes upon a lease for years.” And they observed that “the defendant might have shown the statute at the whole matter at first.” 41

#### THE MODE OF TAKING ADVANTAGE OF A DEPARTURE

##### 286. The Method of Taking Advantage

the Fault of Departure is by a General *Th* murrer; it involves, however, an Exception to the General Rule that a violation of a Rule Pleading constitutes a Defect in Form.

At Common Law any violation of a Rule of Pleading was said to create a Defect in Form; any violation of a Rule of Substantive Law a Defect in Substance. As a Departure involved a violation of the Rule of Pleading that there must be No Departure, it would appear, on analysis, that such a Fault constituted a Defect in Form and should, therefore, have been available on Special Demurrer. But this was not the Law; the Rule was that the Mode of taking Advantage of a Departure was by General Demurrer,<sup>42</sup> the Fault being an Active Abandonment of the ground on which the plaintiff had placed his Cause of Action or the defendant his Defense, and hence it was treated as a Fault in Substance.<sup>43</sup> 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

41, *Pulmerston v. Steward*, Flow. 102, 73 Engitep160 (1554).

42. The availability of the Fault of Departure on a General Demurrer, results from the fact that the Defect of Departure is one of the Five Exceptions to the General Rule that a Violation of a Rule of Pleading constitutes a Defect in Form.

43- *Massachusetts: Itay cc Goodwin*, 16 Mass. 1 (1819); *New Hampshire: Tarleton v. Wells*, 2 N.H. 306 (1520); *New York: Sterns v. Patterson*, 14 Johns. (N.Y.) 132 (1817); *Andrus v. Waring*, 211 Johns. (N.Y.) 160 (1822).

sufficient provided he had Pleaded it in the first instance.<sup>44</sup>

#### STATUS OF DEPARTURE UNDER MODERN CODES, PRACTICE ACTS AND RULES OF COURT

287. In general, under Modern Codes and Practice Acts, the Common-Law Doctrine as to Departure still prevails.

THE rule as to Departure under Modern Codes and Practice Acts is generally the same as at Common Law, that is, that the plaintiff in his Replication, and the defendant in his Rejoinder, may not Depart from the Cause of Action set forth in the Declaration or the Defense set forth in the Plea.<sup>44</sup>

Under the Federal Rules of Civil Procedure, where there is no counterclaim or cross claim in the Answer, a Reply is permitted under Rule 7(a) only upon order of the Court. It has been contended that a rigid enforcement of the Rule against Departure would be Inconsistent with the Spirit of the Federal Rules, particularly as it is said that the Pleadings are no longer of the same importance in the Formulation of Issues, the Pre-Trial Conference and Discovery having presumably taken over much of this task.

#### NEW ASSIGNMENT—DEFINITION, NECESSITY AND APPLICATION

288. 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 literally are 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

4-. English: Lee v. Raynes, T.Raym. 86, 83 Eng.Itep. 47 (1063); Richards v. Hodges, 2 Saund. 844, 85 Eng.Rep. 751 (1669); Rhode Island: Burdick v. ICenyon, 20 RI. 498, 40 A. 99 (1898).

5. Minnesota: Finn v. Modern Brotherhood, 118 Minn. 307, 136 N.W. 850 (1912); New York: Young v. Dresser, 137 App.Div. 313, 122 N.Y.S. 29 (1910); Washington: Perlus v. Market Investment Co., 95 Wash. 484, 164 P. 65 (1917).

529

defendant, but for some Other Cause, to which the Plea had no application,

THE necessity for this Form of Procedural Device arose from the very General Mode of Statement sometimes permitted in the Declaration, as in Trespass to land. This made it possible for the defendant to Plead an evasive Plea, which, in turn, rendered it necessary for the plaintiff in his Replication to restate the Cause of Action intended, with greater precision and particularity.<sup>46</sup>

Thus, for example, in an action of Trespass for Assault and Battery, 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.<sup>41</sup> The defendant may therefore suppose, or affect to suppose, that the first is the assault intended, and will Plead *Son Assault Dcmesne*. 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

46. Bacon, Abridgment, "Trespass," I, 4 (Philadelphia, 1846).

47. Stephen, A Treatise on the Principles of Pleading in Civil Actions, c. H, Of the Principal Rules of Pleading, 222 (3rd Am. ed. by Tyler, Washington, D.C., 1875).

Sec. 288  
530

#### THE REPLICATION

#### DEFENSIVE PLEADINGS

Ch. 23

into which he had been led by the Generality of the Plaintiff's Declaration. The plaintiff, therefore, in the case supposed, not being able to safely 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 "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.<sup>45</sup> There

are other situations where similar considerations make necessary a New Assignment of the plaintiff's Real Cause of Action, which was left uncertain by reason of having been Generally Alleged in the Declaration.

#### FORM OF NEW ASSIGNMENT

289. A New Assignment appears in the Replication; it is not, however, a true Replication, as it does not attempt, by either Pleading by Way of Traverse or in Confession and Avoidance, to meet the Defendant's Plea.

THE Form of the Replication which appears below is a New Assignment in a case where the defendant, in Trespass for Assault and Battery, has Pleaded in Confession and Avoidance of Trespasses other than those intended to be declared upon by the plaintiff:

#### FORM OF NEW ASSIGNMENT

AND as to the said Plea of the said CD. 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 LB. 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 CD. heretofore, to wit, on the day of \_\_\_ AD. 19\_, with force and arms, at

aforesaid, in the county aforesaid, upon another and different occasion, and for another and different purpose, than in the said second Plea mentioned, made another and different assault upon the said AR 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, bath 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.R, Prays Judgment and his Damages by him sustained by reason of the committing thereof to be adjudged to him, etc.

#### NEW ASSIGNMENT AS IN THE NATURE OF A NEW DECLARATION

290. It has been said that a New Assignnient is in the Nature of a New Declaration, meaning that it is not a true Replication, as it does not profess to Reply to anything in the defendant's Plea; rather it seeks to state afresh, and with greater detail, the circumstances of the plaintiff's case originally Generally Laid in the Declaration.

A NEW ASSIGNMENT is said to be in the Nature of a New Declaration, although in reality it was a Form of Common-Law Amendment, which contrary to the Ordinary Amendment could be exercised as a Matter of Right rather than in the Discretion of the Court. It may, however, more properly be considered as a repetition of the Declaration, differing only in this: that it distillguishes the true ground of complaint as being

4-. Id. at 222, 223.  
Sec. 291

#### THE REPLICATION

531

different from that which is covered by the Plea. Being in the Nature of a New and 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— a Plea of *Libe rum Tenementum*—, which obliges the plaintiff to New-Assign, he must, in his New Assignment, either give his close its name, or otherwise sufficiently describe it, even though such name or description was not required in the Declaration .-

#### STATUS OF NEW ASSIGNMENT UNDER MODERN CODES. PRACTICE ACTS AND RULES OF COURT

291. The need for New Assignment under the Codes is minimized by virtue of the more complete statement of the claim in the Complaint and the liberal rules with respect to ~amendment, but its use has been permitted under some

Codes.

SINCE the facts are fully set forth in plaintiff's Complaint under the Codes, there

<sup>49.</sup> Soe 1 Clittv, On Pleading, e~ VIII, Of Replicadons, 628 (14th Am. ed. by Perkins, Springfield, is considerably less need for New Assignment than there was at Common Law.

However, in some Code States, the plaintiff is permitted to interpose a reply in the nature of New Assignment, where this becomes necessary in order to show that the plaintiff's action is grounded on matter other than that to which the Answer speaks.<sup>50</sup> But the need for the use of such procedure is minimized by the fact that the same result can be accomplished by amendment of the Complaint.<sup>51</sup>

Clark points out that the simplified pleading of the Federal Rules gives little or no occasion for the use of New Assigmiient, and concludes that it does not appear to be a matter of great importance in modern procedure, perhaps hardly justifying attempts which have been made to limit, if not prohibit, anything savoring of New Assignment.<sup>52</sup>

<sup>50.</sup> Bishop v. Travis, 51 Minn. 183, 53 NW. 461 (1892); Campbell v. Bannister, 79 Ky. 205 (1580).

<sup>51.</sup> Puget Sound Iron Co. v. Worthington, 2 Wash.T. 472, 7 Par. 880 (1855); Stewart v. Vallis, 30 B:rrl., 344 (NY.1855).

<sup>52.</sup> Clark, Handbook of the Law of Code Pleading, c.

11, The Reply, § 111, New Assignment, 700 (St. Poul 1047), making reference to American Judicature Society model rule, Am.,Jud.,Soc.Bull. 14, 1919, Art. 15, 13: 'No pleading after answer shall state any ground of claim or defense not included in a previons pleading of die some pofly.' 1867).

## CHAPTER 24

### TiIE PRODUCTION, TENDER, AND JOINDER OF ISSUE

Sec.

292. Production of Issue.

293. Tender of Issue.

294. Joinder of Issue.

#### PRODUCTION OF ISSUE

292. An Issue in Pleading is a Specific proposition or point of controversy, Affirmed on the O--te Side and Denied on the Other. The reduction of the controversy to Issues is the great Object of Pleading.

WE have already seen that the defendant, in opposing the Allegations of the Declaration, must either Demur or Plead, and that, in the course of the Pleadings, they must finally reach a point where there is some question or point presented, Affirmed on One Side and Denied on the Other. The reduction of the controversy to some specific question is the Object of all Pleading, and when reached, it is called the "Issue"; and the Cause, when at Issue, is ready for Trial or for the decision of the Issue raised. A Demurrer, either by the defendant to the Declaration or Other Pleading of the plaintiff, or by the plaintiff to a Plea or Other Pleading of the defendant, being a Denial of the legal sufficiency of the Opposing Pleading, raises at once a Question of Law which it is always the peculiar Province of the Court to determine, without the aid of a Jury. This question must be decided before further proceedings are had, and it is therefore said that the Demurrer always Tenders an Issue in Law. Again, if the Declaration or Other Pleading is sufficient on its face, and no Demurrer is interposed, the Pleadings, whether of the defendant or the plaintiff, stating Matters of Fact, must at length reach a point where the Opposing Party will simply Traverse or Deny what is alleged, and this Traverse must always Tender an Issue, which is One of Fact, and which the formal words of the Traverse refer to a Trial by Jury, by concluding "to the Country."

The decision on an Issue of Law may not necessarily end the Pleadings, except for the time being, since if the Demurrer be overruled, the Party offering it is now generally allowed to Plead Over, as it is termed—that is, to offer the Pleading he would have made if he had considered the Pleading Demurred to sufficient; but the Tender and

Acceptance of an Issue of Fact closes all Pleading in the Action, as there is then nothing left but a Trial, which must dispose of the Action on its Merits.

#### TENDER OF ISSUE

293. Upon a traverse, Issue must be Tendered- AU Pleadings which Form the Issue by *an* Affirmative and Negative 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

532

See. 293

#### PRODUCTION, TENDER, AND JOINDER OF ISSUE

533

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 Formulae 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 CD. puts himself upon the Country"—if by the defendant.<sup>1</sup> Wherever, therefore, a Denial or Contradiction of Fact occurs in Pleading, Issue ought at the same time to be Tendered on the Fact Denied, by Concluding the Pleading in One of the above Forms, The Form of Tendering Issue to be tried by Matter of Record is as follows: The Party setting up the Matter of Record (in the Plea, for instance) says: "And this the said CD. 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

1. Stephen, A Treatise on the Principles of Pleaffing in Civil Actions, - I, Of the Proceedings in an Action, from its *Commencement to Its Termination*, 48, 60 (Williston ed., Cambridge, Mass., 18~5).

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*, 10 Mod. 166, 88 Eng.Rep. 677 (1713).

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.

#### *Conciw~ion 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.<sup>2</sup> 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."

To this exception belongs the case formerly noticed, of Special Traverses. These, as already explained, never Tender Issue, but always Conclude with a Verification; and the reason seems to be, that in such of them as contain New Matter in the Inducement, the introduction of that New Matter will give the Opposite Party a right to be heard in answer to it if the *absque hoc* be immaterial, and consequently makes a Tender of Issue premature. And, on the other hand, with respect to such Special Traverses as contain no New Matter in the Inducement, they seem in this respect to follow the analogy of those first mentioned, though they are not within the same reason.

Not only in the case of Special Traverses, but in other instances also, to which that Form does not apply, a Traverse may sometimes involve the Allegation of New Matter;

2. *Hayman v. Oerrard*, 1 Wms.Saund. 102, 103, note I, 85 Eng.Rep. 109, 110 (1667); *Chandler v. Roberts*, 1 Doug. 58, 99 Fng.Rep. 41 (1779); *Henderson v. Wlthy*, 2 Term B. 576, 100 Eng.Rep. 300 (1788).

3. Stephen, *A Treatise on the Principles of Pleading in Civil Actions*, e. II. Of the Principal Rules of Pleading, 230 (3d Am. ed. by Tyler, Washington, B.

C., 1000).

534

## DEFENSIVE PLEADINGS

Ch. 24

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.<sup>4</sup> 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 Dam-nificatus, 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.<sup>5</sup> To these it may be useful to add another example. The plaintiff declared in Debt on a Bond Conditioned for the Performance of certain Cove-nants 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

4. *Gainsford v. Griffith*, 1 Vms.SaunJ. 51, 85 Eng. Rep. 59 (1667).

5. *Richards v. Hodges*, 2 Vms.SaunJ. 80, 85 Eng. Rep. 749 (1670).

the counting-house and stole the money, and that he acquainted the plaintiff of the *fact*; and he Concluded with a Verification. The Court held that, though there was an express affirmative that he did account, in contradiction to the Statement in the Replication that he did not account, yet the Conclusion ~with a Verification was right; for New Matter being alleged in the Rejoinder, the plaintiff ought to have liberty to come in with a Surrejoinder, and Answer it by Traversing the robbery.<sup>6</sup>

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 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.<sup>7</sup>

6. *Vere v. Snnth*, 2 Ley, 5, 1 Vent, 121 83 Eng.ReP

426 (1671).

7. *Hayman v. Gerrard*, 1 Wms.Saund. 102, 85 Eug. Rep, 109 (1667).

Sec. 294

## PRODUCTION, TENDER, AND JOINDER OF ISSUE

535

JOINDER OF ISSUE

291. Issue, when well Tendered, must be accepted. The Rule applies both to Issues—  
(I) In Fact; and (II) In Law

IF issue be well Tendered both in Point of Substance and in Point of Form, nothing remains for the Opposite Party but to accept or Join in It; and he can neither Demur, Traverse, nor Plead in Confession and Avoidance.<sup>8</sup>

The Form of accepting or Joining in the Tender of an Issue in Fact is by the use of the words “And the said A.B. doth the like.” This is called the “Similiter.” It is only required when the Conclusion of the Adverse Pleading Tenders a Trial by Jury, but is then essential. If omitted by the Party, it may be added for him to complete the Record, as, when the Issue is well Tendered, he has no option but to accept it.<sup>9</sup> An Issue need never be accepted unless it is well Tendered. If

s. Stepfen, A Treatise on the Principles of Pleading in Civil Actions, c. IT, Of the Principal Rules of Pleading, 233 (3rd Am. ed. by Tyler, Washington, D. C., 1900).

Digby v. Fitzharbort, J’Job. 101, 80 E-ig,Re’p. 251 (1615) Dawes v. Winship, 16 Mass. 291 (1820); Hapgood v. Houghton, S Pick. (Mass.) 451 (1829).

-. See, English: Hayman v. Gerrard, 1 Wms.Saund. 102, 85 Eng.Rep. 109 (1667); Sayre v. Minus, 2 co-vp. 575, 98 Eng.Rep. 1248 (1777); Digby v. Fitzharbert, Bob, 101, 80 Eng.Rep. 251 (1615); Wilson v. Kemp, 3 M. & S. 549, 103 Eng.Rep. 496 (1814) Illinois: Stomps v. Kelley, 22 Ill. 140 (1859); Davis v. Ransom, 26 Iii, 100 (1801).

the Opposite Party thinks the Traverse is Bad in Substance or in Form, or objects to the Mode of Trial proposed, in neither case is he obliged to add the Similiter; but he may Demur, and if it has been added for him he may strike it out and Demur. As now used, the Similiter serves to mark both the acceptance of the question itself and the Manner of Trial proposed. As the resort to a Jury could in ancient times only be had by consent of both the Parties, it appears to have been formerly used only to indicate an expression of such consent. A Form of the Joinder in Issue in Fact is set out below, and a Form of Joinder in Demurrer is heretofore set out in section 198 of Chapter 20, the Demurrer.

FORM OF JOINDER IN ISSUE, OR SIMILITER

In The King’s Bench.

Term, in the                      year of the reign of Queen Victoria.

**A.a**

v.

C. D,

AND the said A.B., plaintiff in the above-mentioned action, as to the plea of the defendant pleaded therein, and whereof he bath put himself upon the country, doth the like.

SHIPMAN, Handbook of Common-Law Pleading, c. 17, General Rules Relating to Pleas, § 255, Joinder of Issue, 449 (3d ed. by Ballantine, St. Paul 1923).

See.

295. Trial by Court.

296. Trial by Jury.

TRIAL BY COURT

295. The decision of the Issue in Fact is called the Trial.

Issues of Law are always decided by the Court without a Jury, after Argument by Counsel for the respective Parties.

The decision of an Issue of Fact in an Action at Law is by Trial, which is generally

i. IJI general, on the History and Development of



Trial by Jury, see:

Treatises: Barnard, A Guide to Grand Jurymen (London 1629); Williams, The Excellence and Pre-eminence of the Lawes of England (London 1080); A Guide to English Juries; Setting Forth Their Antiquity, Power and Duty, from the Common Law and the Statutes (London 1082); Babington, Advice to Grand Jurors in Cases of Blood (London 1692); Somers, The Security of Englishmen's Lives: or Trust, Power, and Duty of the Grand Juries Of England (London 1706); Duneombe, Trials Per Pais: or Law of England Concerning Juries by Nisi Prius, &c., 2 vols. (London 1760); Pcttingal, An Enquiry into the Use and Practice of Juries Among the Creeks and Bonrnns, whence the Origin of the English Jury may Probably be Deduced (London 1709); Buller, Introduction to the Law Relative to Trials at Nisi Prius (5th ed., London 1790) Davies, The Juryman's Guide (London 1779); Complete Jnryinan (Dublin 1752); Towers, Observations on the flights and Duty of Juries in Trials for Libels, Together with I~emark-s on the Origin and Nature of the Law of Libels (London 1784); Maseres, An Inqoiry into the Extent of the Power of Juries on Trials of Indictments, or Information for Publishing Seditious or other Criminal Writings (London 1792); Phillips, On the Powers a]ld Ditties of Juries, and on the Criminal

536

a Trial by the Court and a Jury. The parties, however, may waive a Jury Trial, and submit an Issue of Fact to the Court. in Equity, Cases are tried by the Court.

Where there was no right of Trial by Jury, or where the Parties waived it, the Trial might be by the Court. In such a case, before a final decision, the Parties might request a

Law of England (London 1811)z Worthington. An Inqui,'y into the lower of Juries to Dec-ide Incidentally on Questions of Law (Londoa 1825):

Kennedy, A Treatise on the Law and Practice of Juries, as Amended by the Statute of 6 Geo. IV, c. 50 (London 1826); Cary, Practical Treatise on the Law of Juries and Jurors, as founded on the Act 6 Geo. IV (London 1826); Repp, A Historian's Trease on Trial by Jury, Wager of Law and Other Onordinate Forensic Institutions Formerly in Use in Scandinavia and Iceland (Edinburgh 1832); Steele, On the Powers and Duties of Juries on Criminal Trials in Scotland (Edinburgh 1833); Smith, Charges and Addresses from Grand Juries, with their Answers at Length (Dublin 1834); Adams, A Pra& tical Treatise and Observations on Trial by Jury in Clvii Causes, (Edinburgh 1830); McFarlane, The Practice of the Court of Session in Jury Court Civil Causes (Edinburgh 1837); Eest, Exposit-ion of the Practice Relative to the Eight to Begin and Bight to Reply, in Triam by Jury (London 1837); Murray, Reports of Cases tried in the Court of Session, by Jury Trial, from 1815 to 1830, 5 Vols. (Edinburgh 1838); Worthington, Inquiry into the Power of Juries to Decide Incidentally on Questions of Law (Pluladelpluia 1840); Cornish, Juryman's Logal Hand-bools and Manual of Conimon Law, &e (London 1843); Joy, On Peremptory Challenge of Jurors, &c. (Dubliji 1844); Forsyth, History of

## PART FIVE

# LITIGATING THE CONTROVERSY

## CHAPTER 25

### TRIAL BY COURT OR BY JURY'

537

Sec. 295

Finding of the Facts and a Statement of the

Conduions of Law thereon.

Trial by Jury (London, 1852); Bigelow, History of procedure in England, e. IX, The Trial Term, 301 (Boston 1880); Thayer, A Preliminary Treatise on Evidence at the Common Law, cc. II—TV, 47—182 (Boston 1898); Brickwood's Saclrctt Instructions to Juries (3d ed., Chicago 1008); Bigelow, Papers on the Legal History of Go--ez'nment, c. IV, The Old Jury, 152 (Boston 1020); Scott, Fundamentals of Procedure in Actions at Common Law, e. III, Trial by Jury, 70 (New York 1922); Green, Judge and Jury (Kansas City 1930); von Moschzisker, Trial by Jury (2d ed., Philadelphia 1030); Abbott, A Brief for the Trial of Civil Issues Before a Jury (5th ed. by Viessenhnan, Rochester 1935); Goldstein, Trial Technique (Chicago 1035); Wigmore, A Treatise on the Anglo-American System of Evidence iii Trials at Common Lan-, c. 1, Introduction, 8, General Survey of the Historical Development of the Rules of Evidence, 234 (3d ed, Boston 1940); Busch, Law and Tactics in Jury Trials (Indianapolis 1940); Millar, Civil Procedure of the Trial Court in Historical Perspective (New York 1952); Bclli, Modern Trials, 3 vols. (Indianapolis 1054).

Articles: Thayer, The Jury and Its Development, S *Han-.L.Rer*, 24~ 295, 357 (1892); Clark, The Supreme Court of North Carolina, 4 *Green Bag* 457, 472 (1592); Dennis, Jury Trial and the Federal Constitution, 6 *Col.L.Rev.* 423 (1906); Schofield,

. New Trials and the Seventh Amendment, S *Ill. L.Rev.* 257 (1013); Thorndike, Trial by Jury in the United States Courts, 26 *HarvL.Rev.* 732 (1913); Wells, Early Opposition to the Petty Jury in Criminal Cases, 30 *L.Q.ltev.* 07 (1014); Thayer, Judicial Adminirt'ation, 63 *ILL'a.L.lter.* 585 (1915); Sunderland, The Inefficiency of the American Jury, 13 *MiekL.Rev.* 302 (1913); Scott, Trial by Jury and the I :efoi-uu of Civil l'roeedu re 31 *l-larv.L.ltev.* GCO (1018) ; Smith, The Power of tlle Judge to Direct A Verdict, 24 *Col.L.ltev.* 111 (1924); Smith, F orne

Problems *ut* Connect jolt with Motions During the Trial of a Civil Action Before a Jury, 25 Col.L.Rev. 752 (1925); Conhoy, The Preparation of a Case for Trial, 11 A.B.A.J. 310 (1925); Frankfurter and Corcoran, Petty Federal Offences and the Constitutional Guaranty of Trial by Jury, 30 Harv.L.Rev. 917 (1925); Wicker, Special Interrogatories to Juries in Civil Cases, 35 Yale L.J. 200 (1926); Sunderland, The Problem of Trying Issues, 5 Text.Rev. IS (1920); Moore, *Voir Dire* Emancipation of Jurors, I, *The English Practice*, 16 Geo.L.J. 435 (1928); II, *The Federal Practice*, IT Geo.L.J. 13 (1928); Harris, Is the Jury Trial Vanishing, 7 N.Y.U.L.Q.Rev. 657 (1930); Morgan, Instructing the Jury upon Presumptions and Burden of Proof, 47 Harv.L.Rev. 59 (1933); Langbein, The Jury of Presentment and the Coroner, 33

### *Argument Upon Demurrer*

THE decision of an Issue of Law is exclusively vested now, as it always has been, in

Col.L.Rev. 1329 (1933); Clark and Shulnian, Jury Trial in Civil Cases—A Study in Judicial Administration, 43 Yale L.J. 867 (1934); James, Trial by Jury and the New Federal Rules of Procedure, 45 Yale L.J. 1022 (1936); Pike and Fischer, Pleadings and Jury Rights in the New Federal Procedure, 88 CLPa.L.Rev. 645, 654 (1935); Jackson, The Incidence of Jury Trial During the Past Century, 1 Mod.L.Rev. 132 (1937); Ladd, Common Mistakes in the Technique of Trial, 22 Iowa L.Rev. 609, 612—Oil (1937); Jackson, Jury Trial Today, 6 Camb. U. 367 (1938); Rodda, Trial Practice—Right to Trial by Jury—Declaratory Judgment, 13 So.Calif.L. 11ev. 170 (1939); DoNe, The Federal Rules of Civil Procedure, 25 Va.L.Rev. 261, 281 (1930); JeCaskill, Jury Demands in the New Federal Procedure, 88 U.Pa.L.Rev. 315 (1940); Soper, The Charge to the Jury, 24 J.Am.Jud.Soc. 111 (1940); McKenna, Trial by Jury under the Federal Rules, 20 Geo.L.J. 88 (1940); Deutsch, Jury Trial under the Federal Rules and the Louisiana Practice, 3 La.L.Rev. 422 (1941); Stayton and Watkins, The Pick-Up Jury, 19 Tex. L.Rev. 141 (1941); Bouchelle, Requirement of Consent of Three-Fourths of Jury to Verdicts in Civil Actions, Abolishing Law of Unanimous Consent, 48 W.Va.L.Q. 140 (1942); Morris, Jury Trial under the Federal Fusion of Law and Equity, 20 Tex.L.Rev. 427 (1942); Rossman, The Judge-Jury Relationship in the State Courts, 3 RRD, 11S (1944); Moseowitz, Glimpses of Federal Trials and Procedure, 4 F.R.D. 216 (1946); Nizer, The Art of Jury Trial, 32 Cornell L.Q. 59 (1946); Thatcher, Why Not Use the Special Jury? 31 MinnLRev 232 (1947); Simpson, The Problem of Trial, in David Dudley Field Centenary Essays, 141 (Ed. by fleppy, New York 1940); Ehume, Origin and Development of the Directed Verdict, 48 MichLRev. 555 (1950); Levin, Equitable Clean-Up and the Jury: A Suggested Orientation, 1- ILPa.L.Rev. 820 (1951); Wright, The Invasion of Jury: Temperature of the 'Vat', 27 Texnp.L.Q. 137 (1953); Vanderbilt, Judges and Jurors: Their Functions, Qualifications and Selection, 36 B.U.L.Rev. 1 (1956).

Comments: Trial by Jury in Suits to Enjoin Nuisances, 25 Col.L.Rev. 641 (1925); Jury Trial Under Federal Declaratory Judgments Act, 3-5 ILL.Rev. 339 (1940); Right to Jury Trial as to Fact Essential to Action or Defense but not Involving Merits Thereof, 170 A.L.R. 383 (1947); Right to Jury Trial in Declaratory Judgment Actions: A Narrowing Interpretation, 59 Yale L.J. 168 (1949); Plung Juries— Admonitions Urging Agreement and Directions as to Methods of Deliberation, 20 Ind.L.J. 86 (1950); The Right to Jury Trial Under Merged Procedure, 65 Harv.L.Rev. 453 (1952); Psychological Tests and

## TRIAL BY COURT OR BY JURY

538

### LITIGATING THE CONTROVERSY

#### Ch. 25

the Judges of the Court. In this connection, however, it should be kept in mind that sometimes the Court decides *certain* Issues of Fact, as when the Action is founded upon a Record and the defendant has pleaded *Nut Tiel Record*, as in an Action on a Domestic Judgment, or where a Jury Trial is waived.

Where, therefore, upon a Demurrer, the Issue in Law has been Entered on Record, the next step at Common Law is to *Move for a Conciliuhi*, that is, to move to have a day appointed on which the Court will hear the Counsel of the Parties argue the Demurrer. In this country this development is described as placing the Demurrer on the argument list or "Law and Motion Calendar," according to the practice which prevails. And on the day entered for argument, or as soon thereafter as the business of the Court will permit, the Demurrer is argued *viva voce* in Court by the respective counsel of both parties, after which the Judge or Judges announce their decision,

#### *Trial Without a Jury—Findings of Fact and Conclusions of Law*

IN some instances, at Common Law, a case might be tried by a Court without a Jury. This might occur where there was no right to a Jury Trial or where the parties had waived the right. In such Trials, the ordinary incidents of a Jury Trial, such as the Selection of Jurors, Requests to the Court to Charge the Jury, Exceptions to the Charge, various Motions, and Verdict, are absent. The Opening Statements be-

Standards of Competence for Selecting Jurors, 65 Yale L.J. 531 (1956).

**Annotations:** Province of Court and Jury Respectively as to Construction of Written Contract Where Extrinsic Evidence as to Intention has been Introduced, 85 A.L.J. 648 (1930); Right to Jury Trial of Issues as to Personal Judgment for Deficiency in Suit to Foreclose Mortgage, 112 ALt. 1402 (1938); Nature and Effect of Jury's Verdict in Equity, 156 A.L.R. 1147 (1945); Disregard or Correction by Court of Apportionment of verdict Among Joint Tortfeasors, 8 A.L.R.2d 862 (1949); Jury Trial in Action for Declaratory Relief, 15 A.L. R.2d 777 (1950).

come informal outlines of the principal contentions of the contending Counsel. Evidence may be admitted more

freely than in a Trial by Jury, but for the most part the Requirements of Proof are the same. Before final submission of the case to the Court for Judgment each Party has an opportunity to Request a Finding of Facts <sup>2</sup> and a Statement of the Conclusions of Law thereon, to serve as a basis of the Final Judgment, and, if it becomes necessary, to make an Appeal. Under Section 4213 of the New York Civil Practice Law and Rules, the decision of the Court may be Oral or in Writing, and must state the Facts which it deems essential.

Under Rule 52 of the Federal Rules of Civil Procedure, in Trials by the Court upon the facts without a Jury or with an Advisory Jury, the Court is obligated to Find the Facts Specially <sup>3</sup> and then state separately its Conclusions of Law thereon, after which it directs that the appropriate Judgment be entered. For purposes of Review, Requests for such Findings are not essential. Such Findings of Fact, however, shall not be set aside except where clearly erroneous. And, of course, the Trial Court must have had full opportunity to consider the credibility of the Witnesses. And if an opinion or memorandum of decision is filed, it will be deemed sufficient if the Findings of Fact and Conclusions of Law appear therein.<sup>4</sup>

### TRIAL BY JURY

**296.** At Common Law Trials by Jury were either at Bar or Nisi Prius, The latter type of Trial was a product of the Statute of Westminster II (1285), which permitted actions, except those of great importance, to be tried out on the Nisi Prius Circuits, thus eliminating the inconvenience to the Parties, Jurors and Witnesses of Attending the Trial at West

2. New York Civil Practice Law and Rules, § 4213. .

3. Federal Rules of Civil Procedure, Rule 52, 28 U.S. CA.

4. Ibid.  
Sec. 296

### TRIAL BY COURT OR BY JURY

539

minster, when they lived in a distant County and the means of transportation were inadequate.

#### *Trial at Bar or at Nisi Prius*

TRIALS by the Jury are either at Bar, or Nisi Prius. Prior to the Statute of Westminster II (1285)~ civil causes were tried at the Bar, before all the Judges of the Court, in Term-Time; or, when of no great moment, before the Justices in Eyre. All causes anciently commenced in the Superior Common-Law Courts were tried at the Bar of the Specific Court in which they were commenced, wherever the Court might be sitting. The Jury was, therefore, necessarily brought before the Court from the County in which the Venue was laid by a Writ of *Venire Facias Juratores*. Only actions of great importance were brought in the Superior Courts, suits of less significance being disposed of in the Court Baron, the Hundred and County Courts. In time, however, by reason of the superior quality of justice administered in the Superior Courts, cases of a trifling amount and nature were brought to these Courts for Trial, and it imposed an intolerable burden upon the Parties, Jurors and Witnesses to compel them to attend the Trial at Westminster when they lived in a distant County and the means of transportation were scarce and difficult. Accordingly, at a very early date, the practice developed of continuing the cause from Term to Term in the Court above, provided the Justices in Eyre did not come into the County where the cause of action arose; and if it appeared that they arrived there during the continuance, the whole cause was removed from the Jurisdiction of the Superior Court to that of the Justices in Eyre.<sup>5</sup>

5. 13 Edw. 1, c. 30, 1 Statutes at Large 203 (1285).

8. 2 Tidd, The Practice of the Court of King's Bench in Personal Actions, c. XXX~li, Of Trials by the Country, and their Incidents, 706 (Philadelphia, 1807).

But when the Court of Common Pleas became fixed at Westminster Hall by virtue of Magna Charta in 1215, the practice of conducting Trials before the Bar of one of the Superior Courts, in cases which could not be properly removed therefrom, was fraught with great hardship to the Parties, Witnesses, and Jurors, whose attendance was required. Once it was recognized that the Fact-Finding Process could be separated from the Law and from the rest of the legal procedure involved, the way was opened to relieve the hardship to the Parties, Jurors and Witnesses occasioned by the necessity of traveling to Westminster in London.

This relief came in 1285 in the Form of the Statute of Westminster II, 13 Edw. I, c. 30, 1 Statutes at Large 203. Under this Statute power was conferred upon the Justices of Assize, who had superseded the Justices in Eyre, to try Common Issues in Trespass, and other less important actions, with instructions to return them, when tried, into the Superior Courts above, where alone Judgment could be Rendered and Enrolled.<sup>8</sup>

Since, under the Statute, only the Trial, and not the determination in the entire case, was now to be conducted in the Lower Court, the *Nisi Prius* Clause was omitted from the Conditional Continuances. Instead, the Statute directed that there should be inserted in the Writs of *Venire Facias* the following language, “that the Sheriff should cause the Jurors to come to Westminster (or wherever the King’s Courts should be held) on such a day in Easter and Michaelmas terms (*Nisi Prius*), unless before that day the Justices assigned to take Assizes shall come into his said County.” As the Justices in Assize were al

7. Martin, *Civil Procedure at Common Law*, c. XIV, Trial, Verdict, Judgment, and Execution, Article I, Trial, § 302, Trials by Jury Ordinary, 307 (St. Paul, 1905).

8. 2 Tidd, *The Practice of the Court of King’s Bench in Personal Actions*, e. XXXVII, Of Trials by the Country, and their Incidents, 766, 777 (Philadelphia, 1807).

540

## LITIGATING THE CONTROVERSY

### Ch. 25

most certain to appear in the County before the Return Day of the Writ in the Superior Court in question, the Sheriff, by virtue of the Statute, Summoned the Jurors to Appear in the Court of the Judges of Assize, and there the Trial was carried on during the Vacation of the Upper Court. This Statute was commonly known and designated as the Statute of *Nisi Prius* (1285), and, in consequence, the same name was given to the Trial conducted in pursuance of its authority before the Justices of Assize.<sup>9</sup>

The practice under the Statute of *Nisi Prius* (1285) developed an inconvenience. It arose out of the fact that the Sheriff made no Return of the Jury to the Superior Court. Thus, the parties to the action remained in ignorance as to the Names of the Jurors until they were actually called at the Trial. The Counsel of the Parties, therefore, found themselves unprepared to make Challenges or take Exceptions. This difficulty was corrected by the Statute of 42 Edw. III, c. 11, 2 Statutes at Large 183, enacted in 1368. Under this Statute, the Method of Trial at *Nisi Prius* was changed. It was provided that no Inquest, except of Assize and Gaol Delivery, should be taken by Writ of *Nisi Prius* until after the Sheriff had made a Return of the Names of the Jurors to the Superior Court.

### *Selection of the Jury—Summoning, Impanelling and Examining*

(I) *Summoning the Jury*.—When the parties have put themselves upon the Country, which is the technical way of referring the issue between them to the Jury, one of the Entries upon the Roll is the Award of the Mode of Decision, which, in the case of Trial by Jury, directs the issuance of a Writ of *Venire Patios* commanding the Sheriff of the County where the facts stated in the pleading

9. See Martin, *Civil Procedure at common Law*, e. XIV, Trial, Verdict, Judgment and Execution, Article I, Trial, § 362, Trials by Jury Ordinary, 307 (St. Paul, 1905).

are alleged to have occurred, to Summon a Jury to try the issue.

(II) *impanelling the Jury*.—When the Jurors appear in Court, the first step and one of the most important in Trial by Jury, is the process of Drawing and Selecting the Jurors from what is known as the “Panel.” It is a list of the prospective Jurors summoned by the Sheriff to serve on the Juries which may be needed during a Particular Term, or for the Trial of a Particular Action. The Names of these Jurors are written on ballots or tickets and placed in a box, and from the larger number of prospective Jurors in the Panel, names are drawn by lot and called to be sworn as Jurors upon the Jury, unless challenged or excused. If the Original Panel be exhausted by Challenges or Excuses, a further supply, known as “Tales-men,” may be summoned.

(III) *Challenges to the Jury*.—Tidd says that Challenges are of two kinds, *first*, to the Array; and *second*, to the Polls?<sup>2</sup>

Challenges to the Array took the form of an Exception to the Whole Panel, in which the Jury are Arrayed, or set

in order by the Sheriff on his Return. Such objections to the Jury may be based upon some charge of partiality, or upon some default in the Sheriff, or his Deputy who Arrayed the Panel. Also, if there be no personal objection against the Sheriff, yet if he Arrays the Panel at the nomination, or under the direction of either

10. By the Balloting Act, 3 Geo. II, c. 25, § 11, 16 Statutes at Large 167 (1730), the process of selecting Jurors by ballot was carefully restricted.

11. "The qualification of a Tales man, In point of estate, is only five pounds per annum. And, by the 7 & 8 Wm. III, c. 32, § 3 [9 Statutes at Large 492 (1690)], the Sheriff is directed to return such persons, to serve upon the Tales, as shall be returned upon some other Panel, and then attending the Court." 2 Tidd, *The Practice of the Court of King's Bench in Personal Actions*, c. XXXVII, Of Trials by the Country, and their Incidents, 784 (Philadelphia, 1807).

12. *Id.* at 779.  
Sec. 296

## TRIAL BY COURT OR BY JURY

541

party, it is good cause of Challenge to the Array.

Challenges to the Polls, *in capita*, are exceptions to Particular Jurors. According to Sir Edward Coke, Challenges of this description are of four kinds:

*First, Propter Honoris Respectum*, as if a Lord of Parliament be empanelled on a Jury, in which case he was permitted to challenge himself, or be challenged by either party.

*Second, Propter Defectum*, as if a Jury-man be an alien born, or a slave or bondsman, or if he is not a resident of the County, or lacks the necessary qualification of estate.

*Third, Propter Affectum*, as where a Juror is of kin to either party, within the ninth degree; that he has been arbitrator, or declared his *opinion* on either side; that he has an interest in the cause; that there is an action pending between him and the party; that he has accepted money for his Verdict, or even food and drink at either party's expense; that he has formerly been a Juror in the same cause; or that he is the party's master, servant, tenant, counsellor, steward, attorney, or of the same society or corporation with him. Besides these, there are Challenges to the Favour, where the party objects only on account of some probable grounds of suspicion, as acquaintance, and the like.

*Fourth, Propter Delictum*, as where a Juror was challenged for a conviction of Treason, Felony, Perjury, or Conspiracy; or if, for some Infamous *Offence*, he has received Judgment of the Pillory, Tumbrel, or the like, or to be branded, whipped or stigmatized; or if he be outlawed or excommunicated, or has been attainted of False Verdict, Praemunire, or Forgery.

(IV) *The Examination of the Jurors*.— Great latitude is permitted in the examination of Jurors on the Voir Dire, with regard to the various causes of Challenge, in order that there may be a full and thorough test of their qualifications. The extent of the Examination should fit the importance of the case, being searching and thorough in a momentous case, but brief in a minor one, and perhaps addressed to the whole twelve, rather than to the individuals separately. It is advantageous, if possible, to show confidence in the Jury.

The Juror knows best his own condition of mind and may be examined fully, though not to his infamy or disgrace. Examples of the kinds of questions which may be put are as to his membership in secret organizations, under oath and obligation to assist fellow members; whether he has formed a partial opinion from rumors he has heard, or from the newspapers (facts not in themselves disqualifying, though, if taken with others, they might show bias, so further Examination is necessary to make a *prima fade* case for exclusion); whether he has any personal knowledge of the facts of the case, or has formed any opinion about it, which he would favor if the testimony were equally balanced; whether he has an opinion which it *would* require evidence to remove; whether his attention has been called directly or indirectly to any litigation of the same kind in such a way as to influence his Judgment (as if he were a plaintiff himself against an Insurance company); whether he has any prejudice against corporations, as grasping and oppressive; whether he would take the Law from the Court, and be guided and controlled by its

Instructions, or whether he disagrees with some rule involved; whether he has conscientious scruples against the infliction of death penalty; in short, he may be Exammed generally in regard to his occupation, nationality, religion, social bonds, his sympathy and intellect, and evidence may be introduced by other witnesses as to his relations or expressions of opinion on the merits of the case. The grounds of objection should be specifically stated, in order to assign Errors

542

## LITIGATING THE CONTROVERSY

### Ch. 25

in Law in ruling on the Challenges upon Motion for a New Trial.’<sup>3</sup>

#### *The Burden of Proof*

It may be said that in general the Burden of Proof will rest on the plaintiff for some specific propositions, but on the defendant for others,<sup>4</sup> depending upon which side has the Affirmative or Negative of the points at issue. This turns on what facts in dispute are essential to the case, or *prima fade* Cause of Action, and what to the Defence, respectively; he who asserts must prove. The plaintiff must make out a *prima facie* Cause of Action, while the defendant must satisfy the Court of the truth and adequacy of any Defences of New Matter pleaded in Confession and Avoidance. As to these, the plaintiff need only repel the attack and keep them balanced or doubtful, that is, below the required degree of persuasion.

(I) *Prima Facie* Case.—The first task of the plaintiff at the Trial is to make out a *prima facie* case by presenting proof of the facts or points essential to his recovery, if these be denied, in order to move the tribunal to decide in his favor. What facts and propositions are sufficient *prima fade* for a decision in the plaintiff’s favor are, in general, determined by the Rules of Substantive Law applicable to the particular case, as to what facts must be proved to make out a good cause of action; and, these in turn may be affected by the Rules of Pleading as to the Manner and Form required in the Statement of the Cause of Action, which marshal and apportion the respective grounds of Claim and Defence. But the Apportionment is not accomplished by the Pleading alone, but is further determined by the Specific Rules as to the Burden of Proof in various cases. Thus, there is no general test as to what con-

13. Shipman, Hanc]book of Common Law Pleading, c. 1, Outline of Proceedings In an Action, 35 (3rd ed. by Ballantine, St. Paul, 1023).

14. lii. at 3t

stitutes a *prima fade* showing, as this depends upon a combination of factors, such as the Substantive Law, the Rules of Pleading, and the Rules of Evidence, which in turn are affected by a sense of Fair Play and Public Policy.

Under the irregularity of pleading which characterized the various Common-Law Forms of Action, and under the limited Series of Pleadings under the Codes, which ordinarily do not extend beyond the Replication Stage of Pleading, the Pleadings do not fully indicate by whom proof must be made or clearly Apportion to Each Party the propositions which are essential to his case, and which fall to him as the case progresses.

Under an ideal System of Pleading, the turns and logical Stages of the Proof Process would be indicated by the Series of Pleadings, viz., the Declaration, Plea, Replication, Rejoinder, Surrejoinder, Rebutter and Surrebutter. But, as we have seen in the Chapter on Pleas, Peremptory or in Bar, the General Issue, at Common Law, did not always mean that the defendant’s Defences were Negative; in many instances Affirmative Defences were hidden thereunder; in consequence, the Pleadings sometimes failed to disclose who had the Burden of Proof.

(II) *The Burden of Rebuttal*—When the plaintiff makes out his *prima fade* case by reasonable and credible evidence, the Burden of Proof is said to shift to the defendant, but this use of the phrase is very inaccurate and confusing. The plaintiff must at all times keep the proof of his contentions at the required height. This Ultimate Burden of making out a *prima facie* case and keeping it good cannot shift; -- but the Burden of going for

15. Professor James Bradley Thayer was the first to demonstrate clearly the inaccuracy of the expression that the Burden of Proof “shifts,” and to elaborate on the distinction between the Burden of Proof, in the sense of the “duty to establish,” which never shifts, and what is awkwardly termed “the duty of going forward with the evidence,” which does have the characteristic referred to as ‘shift

ward with the evidence may shift from time to time. Perhaps an illustration would help to make the matter clear.

Suppose *A* brings Trespass for Assault and Battery against *B*, who pleads Self Defense, whereupon *A* Traverses the Plea, thus *creating* an Issue of Fact as to whether the defendant *B* did strike in Self Defense. At the Trial, as *B*'s Plea admits the striking, *A* has, at the outset, a *prima facie* case; but suppose *B* goes forward with the evidence *by offering* sufficient Proof of Self Defense, then the Burden of Rebuttal, or the need to go forward with the evidence and repel the Proof of *B*, shifts to *A*, who as tile asserter of the cause of action, or the proponent, must establish a Preponderance of Proof in favor of his cause of action, If he succeeds in this, the Burden of going forward with the evidence will again shift to *B*. Thus, in the course of the Trial, the Burden of going forward with the evidence may shift from the plaintiff to the defendant, and vice versa. When, however, the case finally goes to the Jury, the Burden is always on the Affirmative to keep a Preponderance of Proof in his favor, while the Negative is safe with an even balance or equilibrium.

(III) *Respective Functions of Judge and Jury.*—Each Party must first pass the gauntlet of the Judge with his evidence in order to get to the Jury on the Issue. Unless the plaintiff makes a *prima fade* case and satisfies the Judge that he has sufficient evidence to be considered by the Jury, and to form a reasonable basis for the Verdict, a Motion for a Nonsuit should be granted by the Judge. This Motion may be made by defendant at the close of plaintiff's case, when it is incumbent upon the plaintiff to establish an alleged fact, and there is insufficient evidence on the point, or the only testimony contradicts it.

big." See flayer, The Bulden or Proof, 4 Harv.L. Dci'. 45 (1590); 9 Wigniore, Evidelce, §2487 (3d ed., Boston 1940); Mekdams v. Bailey, 169 Ind. 518, 82 Nt. 1057 (190?).

543

A Motion to Direct a Verdict for insufficiency of the opponent's evidence to go to the Jury may be made by either Party at the close of defendant's case. The case should be taken from the Jury: (1) Where there is no evidence to support the Burden of Proof on some essential fact; (2) where there is no conflict in evidence, as where by the testimony of the plaintiff he put his head out of the window in the train, which is contributory negligence, and precludes recovery as a Matter of Law; (3) where the evidence is somewhat conflicting, but so certain and convincing that no reasonable man could decide otherwise. Directing a Verdict saves the need of a Motion for a New Trial; but the result of Setting Aside a Verdict is different, in that it results in a New Trial, while Directing a Verdict results in Final Judgment. The test for the Two Motions is not necessarily identical, though very similar.<sup>16</sup> The Judge thus has supervisory control over the Proof and the Jury may be prevented from rendering a Verdict against reason which would later have to be set aside as against the evidence.<sup>17</sup>

By a Demurrer to the Evidence, interposed at the close of the plaintiff's evidence, the Court may be asked to pronounce the Law upon the case, admitting all facts which the evidence tends to establish and all reasonable inferences therefrom. Where the evidence fails to prove a *prima facie* case, the Demurrer will be sustained. In theory the Functions of Court and Jury are sharply divided. **It** is for the Court to decide Questions of Law and for the Jury to pass on Questions of Fact. In practice the Court has important functions in passing on the evidence and controlling the work of the Jury, and the Jury applies the *Law* to the facts under the Instructions of the Court.

(IV) *The Order of Proof.*—When the plaintiff has the Burden of Proof on any one

10. 9 Wigmore, Evidence, ~ 2494, (3d ed., Boston

1940).

17. Id. at § 2487.

## TRIAL BY COURT OR BY JURY

## LITIGATING THE CONTROVERSY

of the Issues, he has the right to open the evidence and prove the facts on which he relies to establish his case. The defendant may then present evidence to contradict the plaintiff, and also to support his own propositions in defense, to relieve himself from the consequences of the plaintiff's *prima facie* case, and by way of Cross-Action. Finally, the plaintiff may disprove in Rebuttal the affirmative portion of his opponent's evidence. Affirmative Evidence cannot, in strictness, be given by the plaintiff in Rebuttal. He should not reserve his real or main attack until after he has drawn out the testimony of the other party, and until the defendant has closed his case. He should offer all his evidence in chief on the points upon which proof is essential to his recovery. In Rebuttal he is confined to Rebutting evidence only, unless the Court, for good reason, permits him to offer evidence on his original case, If the plaintiff be allowed to give Affirmative Evidence in Rebuttal, the defendant should be allowed to contradict it, by Surrebuttal; so where the credibility of defendant's witnesses is assailed. Each side must in turn exhaust his case, and neither may give evidence by piecemeal, but must in the first instance produce all his evidence in chief, on which he relies to establish his case, and is confined in Rebuttal to the contradiction of affirmative facts brought out by his adversary's evidence. But it is no objection to Rebuttal that it incidentally tends to corroborate the party's case in chief.

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

-pounds this, the plaintiff may rebut or refute

.it.

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

#### *The Right to Open or Close*

**(I) The Objective Sought in the Exercise of the Right.**—Generally speaking, at Common Law, the advantage of the Opening and Closing Speech to the Jury, as well as the Right to Open and Close the Evidence, belongs to the plaintiff, if he has anything to prove essential to his *prima facie* right of action; but it belongs to the defendant if there be no issue on the Allegations of the Declaration.<sup>18</sup>

In Criminal Cases, the prosecution always has the Opening and Closing Argument, and it may be given to the plaintiff in all Civil Actions by a Mere Rule of Practice, irrespective of his true position with respect to the Burden of Proof. This right to have the last word, after the opponent has been heard, with

18. If the defendant admits all the material facts alleged In the Declaration, he may assume the entire affirmative and have the Right of Opening and Closing the Case, as where he admits the due execution of a contract, but sets up the Affirmative IJetense of Discharge by Release; or by Operation of Law. Gardner v. Meeker, 109 Ill. 40, 48 N.E. 307 (1897); Nagle v. schnadt, 239 ILL 595, 58 N.E. 178 (1900); Gibson v. Reisel, 123 fLApp. 52 (1905).

### **TRIAL BY COURT OR BY JURY**

545

See- 296

no opportunity thereafter to explain, expose fallacies, or remove the spell of an emotional appeal, is regarded as giving a very distinct advantage to the side which acquires it.

**(II) The Opening Statement—Its Scope and Content.**—As a preliminary to the introduction of the evidence, the plaintiff's counsel, or that side which has the Affirmative of the Issue, and from whom Proof is first required, has the right to make an Opening Statement. He briefly sets forth the issues of the ease as presented in the Pleadings,



states what is admitted and what is disputed thereunder, gives an outline of the main points he expects to prove in support of his case, and attempts to show what bearing the evidence will have on the points he intends to establish. After this prologue, he then proceeds to call his Witnesses and to introduce his Documentary Evidence.

The defendant may reserve his Opening Statement until after the close of the plaintiff's evidence, or it may be made immediately after the Opening Statement by the plaintiff, in order to place the issues before the Jury at the outset.

### *The Evidence*

(I) *Methods of Production- of Evidence.*— The mode of offering testimony is generally by Witnesses who are present in Court and testify Orally before the Jury, though in all the states there are provisions under which, in certain circumstances, the evidence of Material Witnesses may be taken before the Trial, reduced to writing and certified by a proper Officer, and thus used at the Trial without the appearance of the Witnesses themselves, Where Witnesses testify Orally, they are first questioned by the Counsel for the Party producing them, which is called the "Direct Examination" or "Examination-in-Chief", and then by the Opposing Counsel, which is called the "Cross-Examination," and perhaps again by the former, which is known as the "Re-Direct Examination," and by the latter, which is known as "Re-Cross Examination,"

(II) *The Examination of Witnesses:* (A) *The Oath of Witness.*—When a Witness is called, before he takes his seat in the witness stand, the Clerk of the Court Administers the Oath that "the evidence that you shall give to the Court and Jury, touching the matters *in* question, shall be the truth, the whole truth, and nothing but the truth. So help you God!"

(B) *The Direct Examination.*—The witness, having asserted to the Oath, the Counsel producing the Witness then proceeds with what is called the Direct Examination. He usually begins by asking the Witness his name, residence, business, and other preliminary matters, and then he proceeds to extract the desired information, He may do this either by plying the Witness with successive questions, or instead of requiring answers to specific questions, by permitting the Witness to tell his own story uninterrupted and unguided by questions from Counsel. The advantage of the second method is that it gives the opposition less opportunity to know beforehand *what* evidence is to be offered, and hence lessens the likelihood of the Examination being interrupted by captious objections, designed to weaken the impact of the evidence upon the minds of the Jurors.<sup>19</sup>

**It** is the duty of the Court to exercise a reasonable control over the Mode of Examination and the Scope of the Evidence offered. Leading Questions, or questions so framed as to suggest to the Witness the desired answer, may elicit answers based on Counsel's suggestion, rather than on the Witness' own knowledge. Questions which obviously instruct the Witness as to the tenor of his reply, are, on this ground, generally objectionable. However, in dealing with a hostile Witness, as on Cross-Examination, the bias and

<sup>19</sup> On the art of examining a Witness on the Stand,  
see John C. Reed's "The Conduct of Lawsuits."

546

## LITIGATING THE CONTROVERSY

¶1. 2~.

reluctance of the Witness removes much of the danger of suggestion from Leading Questions. It is proper for the Court or Jurors to put additional questions to elicit the facts upon which they desire fuller knowledge.

(C) *The Cross-Examination.*—*Each* Witness is not only subject to Direct Examination by the side which produced him; he is also subject to Cross-Examination by the opposite party, for the purpose of extracting his whole knowledge and to test its credit and significance before he leaves the stand. According to Dean Wigmore, a most distinguished authority in Evidence, "the belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement(unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience. Not even the abuses, the mishandlings, and the puerilities which are so often found associated with Cross-Examination have availed to nullify its value. It may be that in more than one sense it takes the place in our system which torture occupied in the mediaeval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth."<sup>20</sup>

(D) *The Advantages and Danger of Cross-Examination.*—Cross-Examination is effective, because it exposes falsehood and inaccuracies, and beats out the truth, by disclosing the ability and willingness of the Witness to declare the truth, his opportunity to ascertain the facts, his powers of observation and memory, his situation and motives, and by fixing the Witness as to all the minute details of time and place. It is very difficult to make a fabricated story agree with all the circumstances. Truth alone will match all around.

But Cross-Examination often is a two-edged sword, for it may extract the most unfavorable and damaging facts, confirming the opponent's case, demonstrating the Witness' credibility, or supplying fatal gaps which the opponent had left in his Proof.

### *Methods of Withdrawing the Case from the Jury*

AT Common Law, in the course of a Trial by Jury, the respective functions of the Judge and Jury were apportioned, the General Rule being that the Court decided the Law and the Jury the Facts, although this is not invariably true. From this practice, it follows logically that where the plaintiff failed to produce legally relevant evidence at the Trial, the matter might be withdrawn from the Jury. And the classic Common-Law procedural device for securing this end was the Demurrer to the Evidence.

#### (I) *The Demurrer to the Evidence:*"

(A) *In General*—A Demurrer to the Evidence is analogous to a Demurrer in Pleading, and it operates to withdraw a case from the Jury. It questions the sufficiency of the Evidence in Point of Law, and calls for the opinion of the Court upon the legal effect of the facts shown in evidence. And, for this purpose, it admits all the facts presented in the

21. In general, on the Origin, history and Development of the Demurrer to the Evidence, see:

*Treatises:* Mansel, A Treatise on the Law and Practice of Demurrer to Pleadings and Evidence (Philadelphia & New York 1839); Thayer, A Preliminary Treatise on Evidence at the Common Law, c. V, Law and Fact in Jury Trials (Boston 1898); Scott, Fundamentals of Procedure in Actions at Law, c. III, Trial by Jury, § 3, Demurrer to the Evidence, 94 (New York 1922); Millar, Civil Procedure of the Trial Court in Historical Perspective, c. XIX, Trial by Jury, 2, Withdrawing the Case from the Jury, 297—303 (New York 1952).

**Article:** Carlin, Anomalous Features of Demurrers to the Evidence in West Virginia, 27 W.Va.L.Q. 286 (1927).

**Comment:** Effect of Demurring to the Evidence on Matters Relating Merely to the Question of Illegality, C Va.L.Rev. 276 (1919).  
20.5 Wigmore, Evidence, § 1307 (3d ed. Boston 1940)-  
Sec. 296

## TRIAL BY COURT OR BY JURY

547

evidence or which it conduces to prove.<sup>22</sup> If the plaintiff's evidence does not make a *prima facie* case, the defendant may Demur. But if he wishes to contradict it, he must resort to the Jury.

This step is taken only in cases in which it is Very clear that the evidence has no tendency to prove the case; and naturally it is not often resorted to, for it is generally unsafe for a party to rest his case solely upon the test of what the evidence tends to prove—a matter often difficult to determine. 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. The effect of the proceeding is to determine the question whether the plaintiff's evidence shows a *prima facie* case or right of action.<sup>3</sup>

The Demurrer to the Evidence withdraws from the Jury the Application of the Law to the Facts, as in the case of a Special Verdict. On a Demurrer to the Evidence or Motion for Nonsuit, no Objection can be made to the Pleadings.<sup>4</sup>

#### (B) *In the Several States.*—In many States, the practice of Demurring to the Evidence

22. English: Gibson v. Hunter, 2 B.B. 187, 126 Eng. Rep. 499 (1793); Illinois: Rockhill v. Congress Hotel Co., 237 Ill. 08, 56 N.E. 740 (1908); Massachusetts: Copeland v. New England Ins. Co., 22 Pick. (Mass.) 135 (1839); Federal: Slooquin v. New York Life Ins. Co., 228 U.S. 36-1, 33 S.Ct. 523, 57 L.Ed. 879 (1914); Fowle v. Alexandria, 11 Wheat. (U.S.) 320, 6 L.Ed. 484 (1826).

23. A Demurrer to plaintiff's Evidence raises a Question of Law whether the Evidence in favor of the plaintiff, if considered to be true, together with the inferences which may fairly be drawn therefrom, tends to support the Cause of Action of the plain. *tiff. Libby, McNeill & Libby v. Cook*, 222 Ill. 206, 78 N.E. 599 (1006); *Brophy v. Illinois Steel Co.*, 242 Ill. 55, 80 N.E. 684 (1000); *Kee & Chapell Dairy Co. v. Pennsylvania Co.*, 201 Ill. 248, 126 N.E. 179 (1920).
24. English: *Lumby v. Allday*, 1 Cr. & J. 301, 148 Eng.Rep. 1434 (11831); Georgia: *Kelly v. Strouse & Bros.*, 110 Ga. 872, 43 SE. 280 (1909); Federal: *Bank of United States v. Smith*, 11 Wheat. (U.S.) 171, 6 LEd. 443 (1826).
- defence has become obsolete." It is superseded by a Motion for a Nonsuit or by a Motion to Direct a Verdict for the Defendant.'°

On the Federal level the Supreme Court of the United States, in 1808 in the case of *Pawling v. United States*,<sup>27</sup> originally approved the rule as to admissions by Demurrer applied in the English case of *Cocksedge v. Fanshaw*,<sup>25</sup> to the effect that "by the Demurrer, the defendant admits every fact which the Jury could have found upon the evidence." 29 But some five years later, in 1813, in the case of *Young v. Black*,<sup>30</sup> the Supreme Court, speaking through Mr. Justice Story shifted to the rule as enunciated in *Gibson v. Hunter*.<sup>31</sup> In that case, decided in 1793, the Court held that where the testimony was oral and loose and indeterminate, or circumstantial, the plaintiff was not required to join in the Demurrer except where there was a specific admission in the Demurrer of every fact which the evidence conducted to prove. Thereafter, unless the plaintiff voluntarily joined in the Demurrer, the issue as to whether the Jury could have found the facts was no longer the subject of the inquiry; if the evidence at all conducted to prove the facts, those facts had to be admitted on the Record. This ruling was, in the words of Professor Thayer,<sup>32</sup> a

25. *Colegrove v. New York & New Haven It. It.*

Company, 20 N.Y. 492 (1859).

26. New York: *Ltmer v. Meeker*, 25 N.Y. 361 (1862);

Pennsylvania: *Finch v. Conrade's Ear*, 154 Pa. 326, 26 A. 368 (1893); Tennessee: *Hopkins v. Nashville, C. & St. L. It. H.*, 96 Tenn. 400, 34 SW. 1029 (1896); Federal: *Central Transp. Co. v. Pullmans Palace Car Co.*, 130 U.S. 24, 11 S.Ct. 478, 35 LEd.

55 (1890).

27. 8 U.S. 219 (1808).

28. 1 Doug. 119, 99 Eng.Rep. 80 (1779).

CII. *Cocksedge v. Fanshaw*, 1 Doug. 119, 132, 90 Eng. Rep. 80, 88 (1779).

- 30.ii U.S. 505 (1813).

31. 2 Bl.H. 187, 207—209, 126 Eng.Rep. 499, 569—510 (1793).

32. Thayer, *Preliminary Treatise on Evidence at the*

*Common Law*, 235 (Boston, 1898).

548

## LITIGATING THE CONTROVERSY

### Ch. 2~

"death blow" to the Demurrer to Evidence in England. In consequence of this division of view as to the Demurrer to the Evidence in the United States Supreme Court, some States followed the more liberal rule of the *Cocksedge* Case, while others followed the stricter rule of the *Gibson* Case. Virginia developed an unorthodox view which included deferring the Demurrer until both Parties had completed their evidence.<sup>33</sup> This practice was adopted in West Virginia,<sup>34</sup> where it was further distorted by allowing the Court, in certain situations, to determine the sufficiency of the Demurrer on the preponderance of the evidence.<sup>35</sup> As thus modified, in Virginia and West Virginia, the Demurrer to the Evidence still flourished. In England, the place of its origin, by way of contrast, it has long since fallen into disuse.

(II) Nonsuit.<sup>36</sup>—Another method of withdrawing a case from the consideration of a

33. *Patteson v. Ford*, 43 Va. 18, 28 (1845).

34. *Muhleman v. Nat. Insurance Co.*, 6 W.Va. 508 (1873).

35. See article by Carlin, *Anomalous Features of Demurrers to the Evidence in West Virginia*, 27 W.Va. L.Q. 236, 245 (1921).

36. In general, on the Origin and Development of the Nonsuit, see:

Treatises: Scott, *Fundamentals of Procedure in Actions at Law*, c. III, *Trial by Jury*, 7, *Compulsory Nonsuit*, 100 (New York 1922) Millar, *Civil Procedure of the Trial Court In Historical Perspective*, c. XIX, *Trial by Jury*, § 2, *Withdrawing the Case from the Jury*, 303—305 (New York 1952).

Articles: Demarest, *Non-Suits, New and Old*, 65 Albany L.J. 363 (1903); Head, *The History and Development of Nonsuit*, 27 W.Va.L.Q. 20 (1920); Heitz, *Voluntary and Involuntary Nonsuits in Missouri*, 5 Mo.L.Rev. 131 (1940).

**Comments:** *Practice and Procedure—Voluntary Nonsuit—Treatment Under Michigan Court Rules*, 40 Mich.L.Rev. 010 (1942); *The Right of a Plaintiff to Take a Voluntary Nonsuit or to Dismiss his Action Without Prejudice*, 37 Va.L.Bev. 969 (1951).

**Annotation:** **Right of Plaintiff to Take a Nonsuit** When the Defendant has Interposed a Counterclaim Entitling Him to Affirmative Relief, Where Right to Such Dismissal is Not Defined or Denied by Statute, 15 L.I.L.A.(N.S.) 341 (1008),

Jury was by use of the procedural device known as a Nonsuit. At Common Law, a Nonsuit was not granted without the plaintiff's consent, and the Court had no power to order a Nonsuit where the plaintiff insisted on a submission of a case to the Jury. But *now*, in many Jurisdictions, a Court may grant a Motion for a Nonsuit where the plaintiff's evidence fails to make out a prima facie case.

Broadly speaking, a Nonsuit is a Judgment given against the plaintiff when he is unable to prove his case, or when he neglects or refuses to proceed to Trial. And Nonsuits are of two descriptions: 1. The Voluntary Nonsuit, which is an abandonment of his cause by the plaintiff either before the Trial is commenced, or during the presentation of his case; and 2. The Involuntary Nonsuit, which is a Judgment ordered by the Court where the plaintiff fails to appear, or where he has given no evidence on which a Verdict in his favor can be rendered.

(~) *The Directed Verdict.*<sup>37</sup>—By far the most important method of withdrawing a

See in general, on the History and Development of the Directed Verdict, see:

Treatises: Scott, *Fundamentals of Procedure in Actions at Law*, c. III, *Trial by Jury*, § 6, *Direction of Verdict*, 98 (New York, 1922); Millar, *Civil Procedure of the Trial Court In Historical Perspective*, c. XIX, *Trial by Jury*, 2, *Withdrawing the Case From the Jury*, 305—309 (New York 1952).

Articles: Hackett, *Has a Trial Judge of a United States Court the Right to Direct a Verdict*, 24 Yale L.J. 127 (1914); Sunderland, *Directing a Verdict for the Party Having the Burden of Proof*, 11 Mich. L.Rev. 198 (1913); Smith, *The Power of the Judge to Direct a Verdict: Section 457a of the New York Civil Practice Act*, 24 Col.L.Rev. 111 (1924); Smith, *Some Problems in Connection with Motions During the Trial of a Civil Action Before a Jury*, 25 Col.L.Rev. 752 (1925); Blume, *Origin and Development of the Directed Verdict*, 48 Mich.L.Bev. 555 (1950).

Comments: *Criminal Procedure—Variance*, 03 U.Pa. L.Rev. 804 (1915); *The Right of a Jury in a Criminal Case to Render a Verdict Against the Law and the Evidence*, 19 Mich.L.Bev. 325 (1920); *Practice—Directed Verdicts in Criminal Cases—Judge and*

## **TRIAL BY COURT OR BY JURY**

### Sec. 296

case from the Jury is the Directed Verdict, which is, in effect, the Modern Substitute for the Old Demurrer to the Evidence. The reason for this situation was that the Demurrer to the Evidence was highly technical and difficult to draft, as it was required to contain a full written statement of all the facts shown in evidence by the opposition Party, together with every reasonable inference favorable to the Party who presented the evidence.<sup>36</sup> Moreover, the use of the Demurrer was “an absolute, final and irrevocable withdrawal of the case from the Jury, which resulted necessarily in a Final Judgment on the merits for one party or the other.” ~ In consequence, one who had a meritorious Defense was reluctant to risk his whole case on one fling—the Demurrer to the Evidence.

The substituted motion for a Directed Verdict avoided the defects above set forth. Presented orally at the Trial, and grounded on the evidence as preserved by the Court

51~,

Stenographer and in the memory of the Judge, such Motion, if sustained, results in a Verdict being directed by the Court, upon which is entered a Judgment on the merits; **if** overruled, the moving Party may still go on with the Trial, and seek a Verdict *from* the Jury.<sup>40</sup>

### *The Charge of the Court*

(I) *Instructions—Charging the Jury*—The Jury, in finding a General Verdict for Plaintiff or Defendant, must necessarily apply the Law to the Facts found; e.g., to decide whether or not they show a legal liability. Accordingly, after the Arguments, the Judge Orally Charges the Jury, and lays down the Rules of *Law* which they are to apply to the Facts proved in rendering their Verdict for one or the other Party. The Judge will ordinarily state the Nature of the Action and Defense, the Points in Issue, what the plaintiff must prove to recover, and what rules will apply to the different states of fact which may possibly be established in the Opinion of the Jury.

(II) *Restrictions on the Charge*.—At Common Law the Judge was under slight restraint in guiding the Jury. He could sum up the evidence, observing where the main issue lay, stating what evidence had been given to support it, and giving them his opinion on the credibility of the Witnesses and the *weight* and effect of the evidence—e.g., that the defendant's case was a very "thin" one; but under our practice in the United States such comment, even if correct, would be regarded as an invasion of the Province of the Jury, and as such Reversible Error. The Judge cannot single out and disparage a Particular Witness, or express his belief or disbelief of certain testimony, or even make a comparison between direct and circumstan

40. Eberstadt v. State, 92 Tex. 94, 45 S.W. 1007 (189s)~ As to the relation of the Burden of Proof and the Directed Verdict, see article by Sunderland, Directing a Verdict for the Party Having the Burden of Proof, 11 Mich.L.Rev. 198 (1912). Jury—Instructions as to Law in Effect Directing a Verdict, 30 Yale L.J. 421 (1921); Directed Verdict Under the New York Civil Practice Act, 22 Col.L. Rev. 250 (1922); The Effect of Motions by Both Parties for Directed Verdicts on the Right to a Jury Trial, 22 Col.L.Rev. 358 (1922); Practice—Motion by Both Sides to Direct the Verdict, 1~ ru. L.Rev. 474 (1925); Practice: Motion by Both Sides to Direct the Verdict: Waiver of Jury Trial, II Corn.L.Q. 400 (1926); Trial Practice—Effect of Each Party Moving for a Directed Verdict, 27 Mich. L.Rev. 719 (1929); Practice and Procedure—Reservation of Decision on Motion for Directed Verdict as a Means of Avoiding Unnecessary New Trials, 34 Mich.L.Rev. 93 (1935); Practice and Procedure—Dismissal and Directed verdict in Minnesota, 23 Minn.L.Rev. 363 (1939); Federal Courts—Directed Verdicts in Civil Actions, 47 Mich.L.Ee-c-. 974 (1949).

Annotations: Direction of Verdict on Opening Statement of Counsel, 83 ALIt, 221 (1933); Id., 129 AL. R. 557 (1940); Request by Both Sides for Directed Verdict as Waiver of Sobinissioo to Jury, IS A.LIt. 1433 (1922); Id., 69 A.L.R. 633 (1930); Id., 108 A.L. R. 1315 (1936); Cross Motions for Directed Verdicts, 11 U. of Cinn.L.Rev. 72 (1937).

~r Sunderland, Directing a verdict for the Party Having the Burden of Proof, 11 Mich.L.flev. 198 (1912).

*Ibid.*

550

## LITIGATING THE CONTROVERSY

Cl. 25

tial evidence. It is almost universally provided that Judges may not Charge Juries with respect to Matters of Fact, but may sum up the testimony and Declare the Law. The Judge is not to state abstract principles of Law, but should state the Law concretely as applied to different conceivable theories of the case, and instruct the Jury to find for the plaintiff or defendant according to one hypothesis or another. He may lay down the Rules by which the credibility of the Witnesses in general is to be judged, and where there is no Evidence or where a fact is admitted he may so state; but he cannot indicate his opinion as to what the Evidence proves, and the Jury is thus deprived of the benefit of his training and exuerience.

(III) *Requests to Charge*—It is the duty of the Judge to Instruct the Jury, upon proper request, as to the correct decision, assuming any reasonable hypothesis in relation to the Facts in Evidence, and it is error for the Court to refuse any instruction which correctly Declares the Law, framed on a theory pertinent to the case. These requests

may be presented to the Judge before or during Argument, but should be made in such time as will give the Judge opportunity to examine and pass upon them without delaying the Trial. There seems to be no limitation on the number or length of the instructions which may be requested. Very few Lawyers are competent to write an elaborate Set of Instructions without committing errors which might conceivably mislead the Jury, and in the hurry of a Trial the ablest Judge may mistake the Law and misdirect the Jury; yet a Verdict for the plaintiff, obtained upon erroneous instructions, is practically worthless. This is one of the most serious abuses connected with Jury Trials. Exceptions for errors in giving, refusing, or modifying instructions should be taken before the retirement of the Jury, and should specifically point out the ones objected to. In some States exceptions may be entered at any time before Entry of Final Judgment.

### *The Deliberations of the Jury*

THE Jury, after the Charge, unless the case be very clear, withdraws from the Bar to deliberate upon their Verdict. After the case was finally submitted to them, they could not separate, but were kept in charge of a Bailiff or Officer of the Court, duly sworn to attend them, but this is not always the case in Modern Practice. By the old English Practice they were to be kept without meat, drink, fire, or candle, unless by permission of the Judge, till they were unanimously agreed, a method of accelerating unanimity which is now given up. Formerly, if they did not agree in their Verdict before the Judges left town, they might be carried around the Circuit from town to town in a cart. Now, if it appears to the Court that they cannot agree, they are Discharged, and the case must be retried. The Court is not permitted to coerce the Jury into finding a Verdict, and should refrain from anything savoring of a threat as to how long the Jury will be kept together unless a Verdict is rendered.<sup>41</sup>

### *The Verdict*

(I) *The General Verdict—Its Form and Tenor.*—The Verdict, regardless of its character, must be responsive to the Issue submitted for Trial. At the Pleading Stage, in connection with the Development of the Common-Law Forms of Action, two inflexible rules of pleading grew up, *one*, that the Charge in the Declaration must correspond with the Charge in the Original Writ; *two*, that the Charge proved at the Trial must correspond with the Charge in the Declaration. It follows, therefore, that the Rule that the Issue found by the Verdict must correspond with the Issue found by the Declaration.<sup>41</sup> Alabama: *DeJarnette v. Cox*, 128 Ala. 518, 29 S.

618 (1900); Massachusetts: *Highland Foundry Co. v. N. Y.*, 144 Mass. 403, 85 NE.

437 (1905); Virginia: *City of Danville v. City of Charlottesville*,

93 Va. 200, 24 S.E. 830 (1896).

Sec. 296

## TRIAL BY COURT OR BY JURY

551

respond with the Issue submitted for Trial, is merely a continuation, at the Trial Stage, of the effort of the Common-Law Courts to maintain unity in their procedure. And, of course, the Judgment must correspond with the Issue as found by the Verdict. By these devices the procedure at Common Law, both in the Pleading and Trial Stages, was able to secure what, in English Composition, in relation to writing a paragraph, we refer to as unity and coherence.

The General Verdict is in general terms, that is, merely “for the plaintiff” or “for the defendant.” If it is returned for the plaintiff, it contains a Finding as to the Amount of Damages to which the Jury thinks him entitled, where Damages are claimed in the action.

At Common Law, the Rule of Unanimity, made it essential that the Jurors must be in complete agreement as to the Verdict. After the Verdict was rendered, it was Entered on the back of the Nisi Prius Record) and was called the Postea (afterwards), from the name in Latin with which the recital began.

(II) *The Special Verdict—Its Form and Tenor.*<sup>42</sup>—In a Special Verdict, permission

<sup>42</sup> In general, on the History and Development of the Special Verdict, see:

Treatises: Thayer, *A Preliminary Treatise on Evidence at the Common Law*, c. V Law and Fact in Jury Trials (Boston 1897); Scott, *Fundamentals of Procedure in Actions at Law*, e. III, Trial by Jury, § 4, The Special Verdict, 95 (New York 1922).

Articles: Sunderland, *Verdicts, General and Special*, 29 Yale L.J. 253 (1919); Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 Yale L.J. 575 (1922); Coleman, *Advantages of Special Verdict*, 13 J.Am.Jud.Soc. 122 (1929); Staton, *The Special*

Verdict as an Aid to the Jury, 13 J.Am.Jud.Soc. 176 (1930); Lipscomb, Special Verdicts under the Federal Rules, 25 Wash. L.Q. 185 (1940); Nordhyc, Use of Special Verdicts under Rules of Civil Procedure, 2 LED., 138 (1943); Dooloy, The Use of Special Issues Under the New State and Federal Rules, 20 Texas L.Rev. 32 (1941); Driver, A Consideration of the More Extended Use of the Special Verdict, 25 Wash.L.Rev. 43 (1950); Driver, The Special Verdict—Theory and Practice, 26 Wash.L. 12ev 21 (1951); McCormick-

for which was given by Chapter 30 of the Statute of Westminster II (1285), the Jury states the Naked Facts as they find them, concluding, conditionally, that if upon the whole matter the Court should be of the opinion that the plaintiff has a cause of action, they then find for the plaintiff; if otherwise, then for the defendant. Such Special Verdict, rendered in lieu of a General Verdict, leaves it to the Court to Apply the Law to the Facts, and largely obviates the necessity for Instructions, whereas, under a General Verdict, the Jury is required to Apply the Law to Questions of Fact under the Instructions of the Court.

At Common Law, it was entirely optional with the Jury to find Generally or Specially. If they returned a Special Verdict, setting forth their Findings of Fact, it concluded as follows: "that they (the Jury) are ignorant in Point of Law on which side they ought upon these Facts to find the Issue; that, if upon the whole matter the Court shall be of the opinion that the issue is proved for the plaintiff, they find for the plaintiff accordingly, and Assess the Damages at (a stated sum); but if the Court is of an opposite opinion, then *vice versa*." Such Special Findings,

Jury Verdicts upon Special Questions in Civil Cases,  
2 FED. 176 (1943),

Comments: Trial—Special Issues—Comlitional Sub-mission, 16 Texas L.Bov. 383 (1985); The Special Verdict Under the Federal Rules of Civil Procedure. 34 Ill.L.Rev. 96 (1939); Ultimate and Controfling Issues in Texas: special Issue Submissions, 25 Texas L.Rev. 391 (1947); Special Findings and General Verdicts: The Reconciliation Doctrine, 18 U. of Chi.L.Rcv. 321 (1951); Trial Practice—Special Verdicts—Conclusions of Law— Failure to Find on All Issues, 16 Ohio St.L.J. 120 (1955).

Annotations: Effect of Failure of Special Verdict or Special Finding to Include Findings of All Ultimate Facts or Issues, 76 ALE. 1137 (1932); Failure of One or More Jurors to Join in Answer to Special Interrogatory or Special Verdict as Affecting Verdict, 155 ALE. ~SG (1945)  
43.Stat. of Westminster II, 13 114w. i, i statutes at Large, 205 (1285).

t52

## LITIGATING THE CONTROVERSY

### Ch. 25

called a Special Verdict, hold the Jury to the line of duty, require orderly thought, and facilitate the granting of New Trials or adequate Appellate Review on separate and specific points. The situation in respect to the Special Verdict is like that when the Trial is by the Court, in which case the Judge is not permitted to make a General Finding of Fact and Law, as in a General Verdict, without separate findings on the particular issues raised.

Under Modern Statutory Provisions, however, Special Questions, stating Each Point Separately, may be framed and submitted by the Court on request of Counsel, which the Jury must answer before their discharge, so that the true legal significance of Ascertained Facts may be declared by the Court. It is thus possible to see how the Facts are determined, whether the *Law* is properly applied, and how the Special Findings harmonize with the General Conclusion.

(111) *The Effect of a Variance Between the Charge and the Proof.*—As observed above, the Verdict must be responsive to the Issue as made by the Pleadings and as submitted for Trial. It was, therefore, essential for the Party upon whom rested the Burden of Proof to establish by Adequate Proof the Substance of the Issue in his favor. Of course, if there was a Total Failure of Proof, it became the duty of the Jury to Find the Issue in favor of the opposite party. When, however, there was a discrepancy between what the plaintiff alleged in his Declaration and what he proved at the Trial, the discrepancy was called a Variance. Thus, if *A* alleged that *B* took his black horse, to which *B* pleaded Not Guilty, and at the Trial *A* offered evidence that *B* took his white horse, with a black front forefoot, *B* could Move for a Nonsuit on the ground of a Variance. Such a Variance at Common Law was as fatal to the party bearing the Burden of Proof as if there were a Total Failure of Evidence, as the Jury is bound to find against him upon such discrepancy between the Issue and the Proof.

(W) *The Rule Nisi.*—After a Verdict at the Nisi Prius Trial, the Party against whom the Verdict has been rendered, may obtain a “RuJe Nisi,” as, for example, to set aside the Verdict and Enter a Nonsuit, which, in effect, is an Order by the Court to the Adverse Party to show cause why such relief should not be granted. Upon Motion and Argument of the question, if the Court grants the relief requested, it makes (as it is said) the Rule Absolute. If, however, the Court denies the Motion, it (as it is said) Discharges the Rule, which means that the party who obtained the Rule Nisi should obtain nothing.

(V) *A Special Case, or Reservation of a Point*—Whether a Jury shall return a General or Special Verdict is a matter entirely in its own option. The party objecting in Point of Law cannot therefore insist on a Special Verdict, hence he may be compelled to Demur to the Evidence, if he desires to make the objection a Matter of Record, without which no Review may be had on Writ of Error. If, however, his object be merely to obtain a decision in the Court in *bane* at Westminster, he need neither Demur to the Evidence, nor take a Special Verdict, but merely take a General Verdict, subject, as it is said, to a Special Case.

A Special Case is a written statement of all the Facts proved at the Trial, drawn up for the opinion of the Court *in bane*. It is usually drawn up by the Counsel and Attorneys on either side, under the direction of the Judge at fl183 *prius*. The Party for whom the General Verdict is given, is not entitled to Judgment until the Court *in bane* has decided the Special Case. According to the result of that decision, the Verdict is ultimately entered for him or his adversary.

Sec.  
297.  
298.  
299.  
300.  
301.  
302.

## CHAPTER 26

### AIDER AND AMENDMENT'

Pleading Over Without Demurrer,  
Aider by Pleading Over: Without Verdict.  
Aider by Verdict.  
The Statutes of Jeofails.  
and Rules of Court.

#### PLEADING OVER WITHOUT DEMURRER

297, 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. Rut there are certain exceptions to this rule.

i. In general, on the Origin, Flistory and Development of- the subjects of Aider, Amenduient and the Statutes of Jeofails, see:

Treatises: Gilbert, *The History and Practice of civil Actions Particularly in the Court of Common Pleas*, c. X, Of Amendments at Common Law, and by the Statutes, and Objections to the Uncertainty of Declarations, 107—182 (3d ed. London 1779); 1 Tidd, *The Practice of the Court of King's Bench in Personal Actions*, c. XXX, Of Demurrers and Amendment, 647 (Philadelphia, 1807); 3 Reeves, *History of the English Law*, e. XIX, The Statute of Amendments, 451; c. XX, Statutes of Jeofails, 474; c. XXI, Of Pleading—Of Jeofail and Amendment, 610 (Edited by Finlason, Philadelphia, 1880); 4 Id., c. XXVIII Statute of Jeofail, 406; 5 Id., c. XXXVIII, Of Jeofails, 308; Stephen, *A Treatise on the Principles of Pleading in Civil Actions*, c. II, Of the Principal Rules of Pleading, 110, 126, 165, 370, 393 (3d Am. S. by Tyler, Washington, D.C., 1900); Holdsworth, *The Development of Written and Oral Pleading*, 2 *Select Essays in Anglo-American Legal History*, Pt. III, 614 (Boston 1908); Scott, *Fundamentals of Procedure in Actions at Law*, e. V, Amendments and Jeofails, 143 (New York 1922); Shipman, *Handbook of Common-Law Pleading*, e. XII, Demurrer, Aider and Amendment, 277—297 (St. Paul 1923); Keigwin, *Cases In Common Law Pleading*, Bk. II, Rules of Pleading, c III, Aider of Defects, 494 (24 ed., Rochester 1934); Clark, *Handbook of the Law of Code Pleading*, c. 12, *Amendment and Aider of Pleadings*, 708 (2d ad., St. Paul 1947)-

EXCEPTIONS: When faults in Pleading are



aided by

(I) Pleading Over.

(II) Verdict.

(III) The curative effect of Statutes as to Matters of Form.

WHILE, as we have seen, it is the effect of a Demurrer to admit the truth of all Matters

Articles: Clark & tenon, Amendment and Aider of

Pleadings, 12 Minn.L.Rev. 97 (1928); Scott, The Progress of the Law, 1018—1919, Civil Procedure—Amendment of Pleadings, 33 Harv.L.Rev. 212 (1919).

**Comments:** Statute of Limitations—Amendment of Declaration, 11 Harv.L.Rev. 345 (1898); Statute of Limitations—Amendment of Declaration After Statutory Period, 15 Harv.L.Rev. 587 (1902); Civil Procedure and Football—Defeating a Valid Claim by Pleading and then Demurring, While the Statute of Limitations Runs, 4 Ill.L.Rev. 344 (1909); Pleading—Amendment After Limitation Period, 23 Harv.L.Rev. 570 (1910); Pleading—Amendment of Declaration After Statute has Run—Whether an Amendment from Common Law Action to Statutory Action on the Same Facts Is Permissible, 30 Harv.L.Rev. 294 (1916); Pleading—Federal Employers’ Liability Act—Limitations—Defenses, 3 Minn.L.Rev. 59 (1918); Limitation of Action—Pleading—Amendments Restating Cause of Action, 5 Iowa L.Rev. 275 (1920); Pleading—Limitation of Action—Amendments Stating New Cause of Action, 29 Yale L.J. 685 (1920); Amendment of Plaintiff’s Pleading to Assert Claim Against Third-Party Defendant, 7 Fed.Rules Serv. 811 (1942); Pleading—Amendments Changing the Cause of Action—Limitations of Action—New Statute Proposed, 25 N.C.L.Rev. 7 (1940); Process—Misnomer in Summons—Amendment, 48 Mich.L.Rev. 719 (1950).

**Amendments.**

Status of Aider and Amendment—Under Modern Codes, Practice Acts

553

554

**LITIGATING THE CONTROVERSY**

**Ch. 26**

of Fact sufficiently Pleading on the other side, it cannot be said, *e converso*, that it is the effect of a Pleading to admit the sufficiency in Law of the Facts adversely alleged. On the contrary, it has been seen that, upon a Demurrer arising at a later Stage of the Pleading, the Court will retrospectively consider the sufficiency in Law of Matters to which an answer in Fact has been given. And it has also been shown that, even after an Issue of Fact and Verdict thereon, the Court is bound to give Judgment on the whole record, based upon an examination of the legal sufficiency of all Allegations, throughout the whole series of the Pleadings. It follows, therefore, that advantage may be often taken by either party of a legal insufficiency in the Pleading of the other side, either by Motion in Arrest of Judgment, Motion for Judgment *Non Obstante Verdicto*, or Writ of Error, according to the circumstances of the Case, although he has answered instead of Demurring, provided the Case is not one within the exceptions above noted, and which will now be 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:  
WITHOUT VERDICT**

298. 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 waiver of such defects by the formation of a complete issue. 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. A defect of this character may be thus supplied either:

(I) Expressly, or

(II) By Implication.

*Aider Defined*

ASSUMING that a Pleading is either formally or substantially defective, any subsequent Act in the course of the litigation which supplies, waives or otherwise rectifies the error in the Pleading, whether it be one

of Commission or omission, is an Aider. Thus, for example, to maintain an Action of Trover the plaintiff must allege Possession or Right to Immediate Possession, Wrongful Act of Conversion and Damages. Suppose, however, he omits the Allegation as to Possession or Right to Immediate Possession. If, at the next succeeding Stage of Pleading, the defendant, by his Plea, supplies the missing Allegation of Possession or Right to Immediate

Possession, the defect in the plaintiff's Declaration is said to be Aided or cured.

The Modes of Aider were five in number, three of which operated in advance of any Verdict and independent thereof, whereas two came into play after Verdict and only by reason of the Verdict. For purpose of discussion, therefore, we may say that we have two types of Aider, to wit, Aider without Verdict and Aider by Verdict<sup>2</sup>

#### *Aider Without Verdict—By Subsequent Pleading*

PRIOR to a Verdict and independent of a Verdict, defects in a Pleading may be cured in one or more of three possible ways, the Mode of Aider being dependent upon the character of the defect.

(I) *By Pleading Over*—As we have seen, after the Statute of Elizabeth (1585) and the Statute of Anne (1705), all Defects in Form not made the subject of a Special Demurrer were Aided. If the Adverse Party failed to **Demur** at all or entered a General Demurrer, or Pleaded over Matter of Fact, he automatically waived the Formel Defect in the Pleading and thereafter could not take advantage of such insufficiency upon any Demurrer at

2. This division of the topic is borrowed directly **from ICEIGWIN, Cases in Common Law Pleading, Bk.**

II, -e. III, Aider of Defects 494 (24 ed. Rochester, 1934).

Sec. 298

### AIDER AND AMENDMENT

555

any Subsequent Stage of the Pleadings,<sup>3</sup> and obviously not after Verdict. In the *Anon ynzaus* case, Holt, Chief Justice, in referring to Objections in Form, said 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 a General Demurrer." ~

(II) *By Express Averment* .—Where a Substantive Allegation of Fact is Omitted from a Declaration or Other Pleading, and in the Next Succeeding Stage in Pleading is supplied by the Adverse Party, such subsequent statement operates to cure the Defect in the Original Pleading. Thus, in the famous case of *Brooke v. Brooke*,<sup>6</sup> A brought Trespass for taking a hook, but failed to allege possession. B Pleaded that while going over A's land, over which he had a right of way, he met A and took the hook out of his hands. On Motion in Arrest of Judgment, the Court held that the defendant by his Special Plea had cured the Declaration by supplying the Missing Allegation of Possession. And so, in *La-*

-. Tubes v~ Caswell, S Wend. (N.Y.) 130 (1831); *Cooke v. Graham's Acclm'r*, 3 Craneli (U.S.) 229, 2 LEd. 420 (1805).

4. 2 Salk. 519, 91 Eng.Rep. 442 (1701). See, also, Illinois: *Nordhaus v. Vandalia It. Co.*, 242 Ill. 166, 169, 89 N.E. 074 (1900) *People v. American*

**Life Ins. Co.**, 267 Ill. 504, 507, 108 N.E. 679 (1915).

See, also, *Bauman v. Bean*, 57 Mich. 1, 23 NW. 451

(1885).

And that Defects not subject to General Demurrer are cured by Pleading Over, see 31 Cyc, 7Th, it 75.

5. Anonymous, 2 Salk'. 519, 91 Eng.Rep. 442 (1701).

6. 1 SM. 154, 82 Eng.Rep. 1044 (1064). See, also,

English: *Fletcher v. Pogson*, 3 Barn. & O. 192, 107 **Bng.Rep. 705** (1524); Illinois: *Wallace y. Curtiss*, 36 Ill. 156 (1884).

Pleading the General Issue waives Defects in the

Writ or a Variance between the Writ and Declaration. Mississippi: *Barrow v. Burbridge*, 41 Miss.

622 (1568); North Carolina: *Mills v. carpenter*, 32

N.e. 298 (1849); Federal: *M'Kenna v. Fisk*, 1 flow.

241, 11 L.E4. 117 (1843).

But although waiving Averments otherwise necessary, it does not dispense with Proof of Material **Allegations**. *Ohio & M. B. B. Co. v. Brown*, 23 In. 93 (1859).

*fayette In\$. Go, v. Frenclv*,<sup>7</sup> a Declaration which failed to affirmatively show the Jurisdiction of the Court, was cured by a Replication which contained the necessary Averments. Likewise, a Defective Plea may be cured by the required Allegation in the Replication.<sup>8</sup>

(III) *By Implied Admission, s.*—An Answering Pleading may actually supply a Defect or Omission by Express Allegation of the Fact which should have been stated, or it may contain an Implied Admission, correcting the Informality by waiving it.<sup>9</sup> Thus, where the plaintiff sues as a corporation, Alleging due incorporation according to the Laws of the State wherein it was organized, and the defendant Pleads to the merits without raising any question as to the Authority of the Plaintiff to Sue, the defendant’s Plea implies that the plaintiff is entitled to Sue in the Capacity of a Corporation, and any imperfection in the plaintiff’s Authority will, in some States at least, be deemed to be waived. And likewise where a plaintiff purports to Sue as a Personal Representative, that is, as an Administrator or Executor. And a General Allegation of a “good and valuable consideration” in the Contract Field, or that the plaintiff was injured “by the negligent operation of the defendant’s engine”, in the Tort Field, may be waived by a General Demurrer, or taken advantage of upon a Special Demurrer; but if the Adverse Party fails to Demur for insufficiency, or to take Issue upon an Ill-Pleaded Allegation, and Pleads to other Facts stated in the Pleading, the Ill-Pleaded Fact will stand Admitted by Implication as a result of ignoring it and taking Issue upon a Collateral Matter. But no such Implied Ad18 flow. 404, 15 LEd. 451 (1855).

**United States** v. Morris, 10 Wheat. 246, 286, 6 LEd. 314, 323 (1825).

9. A ground of General Demurrer can be waived by Pleading to the Merits, but not suet, substantial defects as would render it insufficient to sustain a Judgment. *Chicago & A. B. Co. v. Clausea*, 173 Ill. 100, 50 N.E. 680 (1898).

7.

8.

556

## LITIGATING THE CONTROVERSY

### Ch. 26

mission will operate to cure a Defect in Substance.<sup>10</sup> Such an Omission must be Expressly Supplied.”

In cases where Defects have been supplied by Implication, the passing over of such Insufficient Averment, plus the Pleading to a Collateral Matter, has been said to be Aided by Verdict under the Statutes of Jeofails, and, according to Keigwin,<sup>12</sup> where there is a Verdict, the Courts seem to have a preference for putting the Aider upon those Statutes, as if the curative effect of such Pleading was of Statutory Origin. But, says Professor Keigwin, “in *Buckland v. Otley*,<sup>13</sup> . . . although there was a Verdict, the Declaration was said to be made good by the Mere Pleading of a Collateral Plea; and in *Cutler v. Southern*,<sup>14</sup> there was no Verdict at all, and the bad Pleading as to Cook’s Suit was held on Demurrer to be waived by the defendant’s Pleading to something else. These and some like cases appear to establish the principle

that a Defect may be Waived by Pleading to a Collateral Matter, and this upon the theory of an Implied Admission, and without the Aid of a Verdict or of Statutes which require a Verdict for their operation.”

### AIDER BY VERDICT

299. **At Common Law, and independent of any Statutory provision, After Verdict, it shall**

20. Illinois: *Cross v. City of Chicago*, 195 mAp. 86, 89 (1915); New Hampslurc: *Roberts v. Dame*, 11 N.H. 226 (1840); New York: *White v. Dehavan*, 21 Wend. (N.Y.) 26 (1839).

An express denial of a Material Fact, omitted from the Declaration or other Pleading, will by the weight of authority cure such omission. Illinois: *Wallace v. Curtiss*, 36 Ill. 156 (1864); Tennessee: *Bruce v. Beaf*, 100 Tenn. 573, 47 SW. 204 (1898); 31 Cyc.

714—716.

11. See, Illinois: *Wallace v. Curtiss*, 36 mU. 156 (1764); Maine: *Luhiot s’ Stuart*, 15 Me. 160 (1838); Massachusetts: *Slack v. Lyon*, 0 Pick. (Mass.) 62

0829).

12. Cases in COMMON Law Pleading, Bk. IT, c. III, Aider of Defects, 495 n. 6 (24 ed. Rochester, 1934).

it ‘Cro.J.e. 683, 79 Eng.Rep. 592 (1623).

14. 1 La.. 194,83 EngRep. 365 (1667).

be intended that Due Proof was made at the Trial of any Fact which, though Ill-pleaded, was so far a part of the Issue as made by the Pleadings that the Verdict rendered could not have been found without such Evidence of the Facts Insufficiently Alleged as is necessary to establish completely the validity of their existence; and by virtue of the presumption thus raised, the Verdict operates to cure or Aid the Defective Allegation so that any Deficiency therein cannot be seized upon to Arrest the Judgment.

A VERDICT is rendered by a Jury, Impaneled and sworn for the Trial of a Cause, upon which Evidence is presented by Both Parties, and it is reported to the Court, upon Issues duly submitted to the Jury upon the Trial. As a result of the Trial, on the basis of Evidence presented, the ease as presented by the Pleadings may be supplemented. Thus, the Evidence may supply matters not previously disclosed, make clear Facts which were left in doubt by the Allegations in the Pleadings, and clarify other Issues not clearly presented in the Pre-Trial Proceedings. Under such circumstances certain Deficiencies in the Pleadings may be Aided by a Verdict, operating by either one of Two Methods, which are diverse in character. In *one* situation the remedial effect of the Verdict is the result of the Common Law Principle of **Intendment After Verdict**; in the *other* the Aider by Verdict flows directly from the effect of a Series of Statutes, known as the Statutes of Jeofails. Aider by the Common Law Principle of Intendment after Verdict, and Aider by virtue of the Statutes of Jeofails, constitute the Fourth and Fifth Modes of Aider, which will now be considered in their respective order,

#### *Aider by the Common Law Principle of Intendment After Verdict*

WHERE, **iii setting** forth a Cause of Action or a Defense, as the case may be, a Pleader fails to allege a Fact sufficiently or to adequately state a right, no presumption arises to validate his Fact or to complete his right.

Sec. 299

### AIDER AND AMENDMENT

557

In fact, as the Pleader is presumed to tell his side of the controversy in the light most favorable to himself, the presumption is **that** any failure to sufficiently state what is essential to make out his case is to be attributed to the circumstance that the Omitted Facts did not exist. However, in the case of *Hitchin v. Stevens*,<sup>15</sup> where the purchaser of a reversion brought an Action of Debt for rent, but alleged no attornment, the defendant pleaded *Nil Debet*, and there was a Verdict for the plaintiff, whereupon the defendant Moved in Arrest of Judgment on the **ground that the plaintiff had insufficiently** set forth his title to the rent, having failed to allege an attornment, the Court held that in any case where anything is Omitted in a **Declaration, even though** it be Matter of Substance,<sup>16</sup> if it be such as, without proving it at the Trial, the Court could not have had a Verdict, and there be a Verdict for the plaintiff, such Omission shall not Arrest the Judgment. Accordingly, Judgment was Entered for the plaintiff. The Verdict thus placed the case in a different light; the Fact of Title having been imperfectly alleged, because of

<sup>15</sup> 2 Show.K.B. 233, 89 Eng.Rop. 909 (1682).

<sup>16</sup> But compare *Da costa v. Clarke*, 2 B. & P. 257,

126 Eng.Rep. 1265 (1500), where the court held that an imperfect Averment of a Material Fact was not Aided by Verdict in favor of the pleader In such **a case**, before the Rule can operate, there must be a sufficient Averment to serve as a peg to hang the omitted matter on, [See opinion of Buluer, J., in *Spiers v. Parker*, 1 T.R. 141, 99 Eng.Rep. 1019 (1786)], or, stated otherwise, there must be at least *a* partial statement of a substantive fact before any presumption will arise that the circumstances requisite to a complete statement were in reality proved at the Trial.

For an instructive statement and application of the principle, see *Wills v. Claflin*, 92 U.S. 135, 23 LEd. 490 (1875). See, also, *Alabama: Contorno v. Ensley CO.*, 211 Ala. 211, 100 So. 127 (1924); *Illinois:*

*Miller v. Kresge Co.*, 309 Ill. 104, 137 N.E. 385 (1922); *New York: Sherwood v. Chace*, 11 Wend, (N.Y.) 381 (1833).

And for an exhaustive discussion of this topic, with citation of many authorities, see *State v. Freeman*,

63 Vt. 496, 22 AU. 621 (1891).

failure to show attornment, was nevertheless put in Issue so that its truth had to be tried, and on the basis of the evidence as presented at the Trial, the Fact of Title was found in favor of the plaintiff. From this flowed a presumption that at the Trial the plaintiff **Proved the Allegations, though** not correctly stated, which were essential to make out the Ultimate Fact of Title.

To the Common Law Principle of Intendment After Verdict there were two limitations:

(I) *Where There is no Peg to Hang the Omitted Matter On.—Where the Defective Pleading sought to be*

Aided by Verdict under the Principle of Intendment contains no Averment at all, imperfect or otherwise, of the Ultimate Fact required to establish the Pleader's Case, no presumption can arise that the Fact was proved, and it follows logically that the Verdict cannot Aid the Complete Omission. The same idea has frequently been expressed in the statement that a Verdict will cure a Defective Statement of a **Good Title, but not the Statement of a Defective Title**; in other words, as Professor Keigwin observed: "The Verdict will supplement an Incomplete Pleading, but will not supply a Total Want of Averment."<sup>17</sup> Although one who alleges an imperfect case is entitled to a Verdict if he proves the Facts as alleged, obtaining a Verdict affords no presumption that he has proved what he has failed to allege at least by implication, or to some extent by suggestion. Thus, in the case of *Buxendin v. Sharp*<sup>18</sup> where the plaintiff alleged that the

11. Cases in Common-Law Pleading, Bk. II, c. III, Aider of Defects, 495 (2d ed., Rochester 1934).

But see, *Skinner v. Gunton*, 1 Wins. Saund. 229, 85 Englep. 249 (169W, in which it was held that a Declaration in case for **Malicious Prosecution**, which omitted an Allegation that the former proceeding had ended, was Aided by a Verdict for the plaintiff. But a failure to allege want of probable cause constitutes a substantive defect, and hence presumably would not be Aided by Verdict. *Dennehey v. Woodsum*, 100 Mass. 195 (1868).

11. 2 Salk-. 1362, 91 Eng.Rep. 564 (1696).

558

## LITIGATING THE CONTROVERSY

### CK. 26

**defendant kept a bull that ran at and injured the plaintiff, but failed to allege that the plaintiff had knowledge of the bull's dangerous propensities, the Defect was held not Aided after Verdict, as the Action would not lie unless the master knew of this quality, and there could be no Intendment that it was Proved at the Trial, as the plaintiff was under no obligation to prove more than he alleged.**<sup>19</sup>

(II) *Where There is a Peg to Hang Omitted Matter on, but the Matter Inadequately Allcgcd is not Pleaded in such a way as to Become a Part of the Issue.*—Where the Ill-pleaded Fact is not Traversed, or otherwise Pleaded in such a way as to become a part of the Issue actually produced by the Pleadings, such Fact, not being in Issue, need not be Proved at the Trial. Under such circumstances the Verdict raises no presumption that the Ill-pleaded Fact was made effective by the evidence produced at the Trial. For example, if in a Declaration in Special Assumpsit, the Consideration is Defectively Alleged, and the defendant Pleads the Statute of Limitations, since No Issue is taken on the Fact of Consideration, no Proof is required, and hence a Verdict for the plaintiff does not Aid the Defective Statement of the Consideration on the theory that the evidence at the Trial supplied any Omitted Element. Cases of this charactel' therefore do not fall within the scope of the Common Law Principle of Intendment after Verdict. It may be, however, that such cases may fall within the purview of that series of Remedial Enactments known as the Statutes of Jeofails.

### THE STATUTES OF JEOFAILS

**300. As a result of the English Statutes of Jeofails, beginning in 1340 and extending down to Modern Times, there has been a gradual liberalization of the earlier strict policy against permitting Free Amendments of Pleadings,**

19. **English:** *Jackson v. Pesked*, 1 M. & S. 234, 105 Eng.Jlep. 88 (1513); Alabama: *Douglas v. Beasley*, 40 Ala. 142 (1866); Illlaois: *Chicago & A. R. Co. v. Clausen*, 173 Ill. 100, 50 N.E. 680 (1898).

AFTER the appearance of Written Pleadings, and after the proceedings in any given case were Entered on Record, at Common Law, or prior to the grant of Statutory Authority, the Courts would permit no further Amendments. This resulted in many litigants losing their cases when they were clearly entitled to win as a matter of substance. They were accordingly left without remedy. To meet this situation Parliament gradually began to provide a piecemeal remedy in a series of Enactments now known as the Statutes of Jeofails. Most of the ensuing Statutes, enacted between the years 1340 and 1705, applied to Errors which called for correction after Trial, but two of them, the Statute of Elizabeth (1585) and the Statute of Anne (1705), applied to the Record before Verdict.

According to Plucknett,<sup>20</sup> efforts to improve the System of Special Pleading, which tended to become more rigid as time went on, by the Enactment of Statutes of Jeofails, began in the early Fourteenth Century. And Professor Samuel Tyler, in his Preface to *Stephen*,<sup>21</sup> stated: "No less than Twelve Statutes, beginning in the Reign of Edward III [1327-1377], and coming down to that of George I [1714—1727], had been passed by Parliament before

we separated from England, to remedy technical inconveniences.”

## AMENDMENTS

30L 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 Lies 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 Defence, or prejudice the Adverse Party**.

20. **Pjucknctt**, A Concise History of the Common Law, 351 (2nd ed., floeliester, 1951).

21. **Stephen**, A Treatise on the Principles of Pleading in Civil Actions. Preface, (3d Au. cd. by Tyler, **Washington. D. C.** 1000).

THE Court will generally allow an Amendment to correct Mistakes in the Names of the Parties,<sup>22</sup> or to strike out Parties Improperly Joined,<sup>23</sup> or bring in Parties Improperly Omitted, or who have become Necessary Parties since Commencement of the Suit,<sup>24</sup> or to correct the Pleading as to the Capacity in which a Party Sues or is Sued.<sup>25</sup> And an Amendment is frequently allowed in order to Conform the Pleadings to the Proof that has been offered, so as to avoid a Vanancë, 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 Thal has Commenced, for the Court may refuse to allow an Amendment after that time.<sup>26</sup> A Party cannot insist upon a right to Amend if he has been guilty of Laches.<sup>2</sup> 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,<sup>28</sup> and some Amend-merits, as Amendments to Conform to Proof, may be allowed after Verdict, and even after Judgment.<sup>29</sup>

22. Porter v. I-lildebrand, 14 Pa. 129 (1850).

23. Miller v. Polloek, 99 Pa. 202 (1881).

24. **Alabama: Steed v. McIntyre, 68** Ala. 407 (1880);  
Georgia: Braswevl v. McDaniel, 74 Ga. 319 (1884).

25. Georgia: nines v. Rutherford, 67 Ga. 606 (1881); i\liehigan: Sick v, Michigan Aid Ass':], 49 Mich. 50, 12 N.W. 905 (1882).

28. Ritehie v. **Van Gelder, 9 ExeL. 762, 156** Eng.llep.

**326** (1854).

27. **Massachusetts: Dawes v. Gooch**, 8 Mass. 488 (1812); New York: Saekett v. Thompson, 2 Johns. (N.Y.) 206 (1807); Ohio: Fowble v. Rayberg, 4 Ohio 45 (1829); Virginia: Elder's Ex'rs v. Harris, 76 Va. 187 (1882); Federal: Jones v. Welling, 16 Fed. 655 (D.C.S.D.N.Y.1883).

28. Mississippi: Barker v. Justice, 41 Miss. 240 (1866); Wisconsin: Hill v. Chiprnan, 59 Wis. 211, 18 NW. 160 (1884).

29. McKinney v. Jones, 55 WIs. 39. 11 N.W. 606 (1882), and 12 N.W. 381 (1882). See, also, 31 Cyc. 393—407.

*Amendments to Ciwn-ge the Form of Action* UNDER the Common Law a plaintiff was not permitted to Amend his Declaration if it operated to change the Form of the Action, as from Assumpsit to Covenant, or from Case to Trespass.<sup>30</sup> There was a sensible reason for such a holding. The Rule was that the Charge in the Declaration had to conform to the Charge in the Original Writ as issued out of Chancery. If there was a Variance between the two, it was ground for a Plea in Abatement. Thus, if A sued out an Original Writ in Debt, his Declaration was but an Amplification of the Charge of Debt as set forth in the Writ. Naturally, an attempt to Amend his Declaration to Covenant would be Error, as Covenant did not fall within the scope of the Charge of Debt as Stated in the Original Writ. Nor could such a Defect be waived by agreement of the Parties.<sup>31</sup> Even where an Amendment would otherwise be permissible, it should not be allowed if it would result in prejudice to the Ad-

30. Alabama: Mahan v. Smitherman, 71 Ala. 563 (1882); Maine: Flanders v. Cobb, 88 Me. -188, 34 A. 277 (18941); Rhode Island: Slater v. Fehlherg, 24 RI. 574, 54 A. 383 (1002).

In some States the Rule is changed by Statute, or is not recognized. See Redstrake v. Cumberland Slut. Fire Ins. Co., 44 NIL. 294 (1882), where an Amendment was allowed, changing the Form of Action from Assumpsit to Covenant: Connecticut: North v. Nichols, 39 Conn. 355 (1872); Delaware: Philadelphia, B. & W. R. Co. v. Gatta, 4 Boyce (Del.) 38, 85 A. 721 (1916); New ilanipsl-ire: Morse v. Whitcher, 64 Nil. 591, 15 A. 207 (1888).

An Amendment changing the legal theory or basis of **the** claim is sometimes held to set up a New Cause of Action. *Allen v. Tuscarora Val. It. Cc.*, 229 F.a. 97,78 A. 34(1010).

On the effect of a Departure from Law to Law, see  
Article by Scott, *The Progress of the Law, 1918—1019*, Civil Procedure, A[uel]d]llent of l'lcadings,  
**33** Harv.L.Rev. 236, at 23 (1910); Notes: Pleading  
—Amendment—Federal Employers' Liability Act— Limitations—Defenses, 3 Minn.L.IIcv. 59 (1918);  
Pleading—Amendment—Departure from Law to  
**Law**, a Minn.L.Rev. 132 (1919).

31. **Scott**, *Fundamentals of Procedure in Actions at Law, c. V, Amendments and Jcofalls, 154* (New York, 1922).

**See. 301**

## **AIDER AND AMENDMENT**

559

560

### LITIGATING THE CONTROVERSY

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verse Party.<sup>32</sup> And always, when it is allowed, the Court may and should impose such terms as **will** fully protect the Adverse Party, such as payment of Costs of the Application, and, in some cases, Costs of the Whole Suit up to the time of **the Amendment**.

#### *The Situation Under Modern Law as to Amendment Changing the Form of Action-*

IN England, as earlier observed, as long as the Original Writ operated, an Amendment changing the Form of Action was fatal. But with the abolition of the Original Writ in 1833, ~~ Amendments were permitted in the discretion of the Court. In New Hampshire, in the case of *Stebbins v. Lancashire Ins. Co.*,<sup>34</sup> **the Court followed this liberal English view**, but in the Several States of the United States, despite the fact that Original Writs were not used, Amendments changing the Form of Action have been frequently disallowed.<sup>35</sup>

With the abolition of the Forms of Action after 1848, all reasons for observing the Rule prohibiting Amendments changing the Form of Action ceased to exist, and it would seem that the Code States might have followed the **liberal** view in penning amendments. But according to Professor Scott, "this rule was **replaced** by one which is even worse." It was held that an Amendment could not be **allowed if it changed the Cause of Action**. "This is in many ways a more sweeping limitation upon the power of the Court than the **Common-Law Rule**." ~ **Fortunately, this departure from the ways of Good Pleading was**

32. **Tulle v. Ege, 82 Pa. 102 (1876)**.

33. **3 & 4 Wm. IV, c. 42, 33, 73 Statutes at Large**

**272 (1833)**.

3. 59 N.H. 143 (1879); *Merrill v. Perkins*, 59 N.H.

**343 (1879)**.

35.1 Eney.Pl. & Pr. 547; Note: Pleading—Amendment—**Discretion, 63 U.Pa.L.Itev. 61 (1914)**.

30. Scott, *Fundamentals of Procedure In Actions at*

141w, e. V. *Amendments and Jeofalls, 155 (New York*

**1922)**.

met by Statutory Repudiation in Several States.<sup>37</sup> In some States, under a liberal policy of Amendment, Amendments were permitted by which an Action at Law could be changed into a Suit in Equity, or a Suit in **Equity into an Action at Law**. This was provided for in Wisconsin under its Code.<sup>38</sup> As Winslow, J. said, in *Jilek v. Zahi?* in referring to the purpose of the Wisconsin Statute: "The beneficent effect of **this provision can hardly be overestimated**. It means that it will no **longer be necessary to kick the plaintiff out the back door of the Courtroom (with Costs)** in order that he may re-enter by the front door in a different garb."

*Amendment and the Statute of Limitations* IF an Amendment introduces into the Declaration a New and Different Cause of Action from the One Originally Stated, it is subject to a Plea of the Statute of Limitations, if **the Statutory Period had run against the claim**. And this is true although the Statute had not run at the time the Original Action began. But obviously Amendments should be allowed which do not introduce a New Cause of Action, but

where the Allegations merely amplify or vary the claim set up in the **Original Count**, **md this is true even** where Essential Elements are added.<sup>37</sup>

The **'question** of the running of the Statute of Limitations and the right to Amend the **Declaration thereafter should never** turn upon the question whether the Declaration states a Good Cause of Action. The correct test should be whether the Commencement of the Action constituted fair notice of the assertion of that particular claim.

37. See N. J. Laws, 1912, e. 231; Wis.Stats. § 283Gb (**Laws 1915, c. 219, ~ 2**).

38. Wis.Stats. **2836b (Laws 1915, e. 219, ~ 2)**.

39- **162 Wg. 157, 101, 155 N.W~ 008, 810 (1916)**.

40. Carlin v. **City of Chicago, 262 Ill. 564, 104 N.E.**

905 (1915); Foster v. St.. Luke's Hospital, 191 Ill.

**94, 60 N.E. 803 (1901)**.

Sec. 302

## AIDER AND AMENDMENT

561

But the Law in Illinois has been otherwise.  
**The Statute of Limitations continued to run**

in spite of a Defective Declaration. In the case of *Walters v. City of Ottawa*,<sup>41</sup> an Action was brought against the City for personal injuries due to a defective sidewalk, in which the Declaration failed to state that Formal Notice had been given as required by Statute. The City Pleaded the General Issue, but later withdrew this Plea and filed a Demurrer, which was sustained. **Thereupon the plaintiff Amended her Declaration** by adding to each Count Averments showing the giving of the Notice in due season, Now, the City again Pleaded the General Issue and added a Plea of the One-Year Statute of Limitations. A Verdict of \$1,000 was rendered against the City, but on Review by the Supreme Court, the Judgment which had been Entered was Reversed, the Court holding that an Amendment to the Declaration supplying such Essential Averments more than a year after the injury was open to a Plea of the Statute of Limitations.<sup>42</sup>

By the weight of authority, to supply one **of the Essential Elements of a Cause of Action**, does not constitute a New and Sepa

41. 240 Ill. 259, 88 N.E. 651 (1909). See, also, Bradley v. Chicago-Virden Coal Co., 231 Ill. 622, 83 N.E. 424 (1907); Allis-Chalmers Mfg. Co. v. City of Chicago, **297 Ill. 444, 130 N.E. 736(1921)**.

The Statute of Limitations, under this view, continues **to** run until a good Cause of Action with all Essential Facts is stated, and, if at that time, it has run, it will operate as a Bar to a New Cause of Action stated in the Amended Count, Allis-Chalmers Mi g. Co. v. City of Chicago, 297 Ill. 444, 450, 130 N.E. 736, 738 (1921).

42. This case has been severely criticized by Dean Wigmore, in an Editorial Note, Civil Procedure and Football—Defeating a Valid Claim by Pleading and then Demurring, while the Statute of Limitations Buns, 4 Ill.L.Rev. 344 (1909). See, also Proceedings of the Illinois Bar Association, 310, 314 (1909). And compare Enberg v. City of Chicago, 271 Ill 404, 111 Nfl 114 (1916); Comment: Practice—Statement of Claim in the Municipal Court, 11 Ill.L.Bev. 117 (1916); Note: Pleading—Amendment, 64 U.Pa.L. Rev. 640 (1916).

rate Cause of Action. And Amendment after the Limitation Period is permissible, although the Declaration was Demurrable, where it perfects the Same Cause of Action Originally Pleaded. That is the only sort of Amendment that is really important.<sup>43</sup> It is well settled that the Statute of Limitations is no Bar to an Amendment of the Declaration as to non-essentials.<sup>4~</sup>

### STATUS OF AIDER AND AMENDMENT— UNDER MODERN CODES, PRACTICE ACTS AND RULES OF COURT

302. Aider and Amendment, in both **the State and Federal Courts, is now largely a matter of statutory regulation. In General, the Statutes provide for Amendments Without the Leave of the Court, or as a Matter of Course, and for Amendments With the Leave of the Court.**

UNDER Modern Codes, Practice Acts and Rules of Court, Aider and Amendment, in both the State and Federal



Courts, is now largely a matter of Statutory Regulation.<sup>45</sup> The Statutes, in general, provide for Amend-

43. *Neubeck v. Lynch*, 37 App.D.C. 576 (1911). See, also, cases collected in 33 L.R.A.(N.S.) 196 (1911); 47 L.R.A.(N.S.) 932 (1913); Alabama: *Alabama Consol. Coal & Iron Co. v. Field*, 154 Ala. 580, 45 So. 686 (1907); Iowa: *Lammers v. Chicago Great Western R. Co.*, 187 Iowa 1277, 175 NW. 311 (1919); North Carolina: *Linsiter v. Norfolk & C. B. H. Co.*, 136 N.C. 89, 48 SE. 642 (1904).

And, see further, Notes: Pleading—Amendment of Declaration After Statute Has Been—Whether an Amendment from Common Law Action to Statutory Action on the Same Facts is Permissible, 30 *Harv. L.Rev.* 294 (1917); Pleading—Limitation of Actions—Amendments Stating New Cause of Action, 29 *Yale L.J.* 685 (1920); Limitation of Action—Pleading—Amendments Re-Stating Cause of Action, 5 *Iowa Law Bull.* 275 (1920).

44. *Peering Co. v. Barzak*, 227 Ill. 71, 81 N.E. 1 (1907); *Lake Shore & M. S. Tty. Co. v. Enright*, 227 Ill. 403, 81 N.E. 374 (1907); Ames, *A Selection of Cases on Pleading*, 242, 243, 244 note (Cambridge, Mass. 1905).

45. Clark, *Handbook of the Law of Code Pleading*, e, 12, Amendment and Order of Pleadings, 115, The Code Provisions, 708 (24 ed., St. Paul 1947).

562

## LITIGATING TITLE CONTROVERSY

### Ch. 2~

ments Without the Leave of the Court, or as a Matter of Course, and for Amendments With the Leave of the Court.<sup>46</sup>

#### *Amendments With or Without Leave of the Court*

UNDER the Code Provisions, as exemplified by Rule 3025(a) of the New York Civil Practice Law and Rules, a Pleading, without Leave of the Court, may once be Amended by the Party as “of course,” within the time fixed in the Rule. But, under a number of Codes, if it appears that the Amendment was for the purpose of delay and that the Adverse Party will be prejudiced, the Amended Pleading may be stricken out, on such Terms as the Court may deem just. And Some State Statutes have provided in effect that the Court may permit Amendment of Any Pleading by adding or striking out the entire of Any Party, or by correcting a Mistake in any other respect; or, provided the Amendment does not substantially change the Claim or Defense, by Conforming the Pleading to the Facts proved.<sup>47</sup>

Federal Rule 15(b) provides that when Issues not raised by the Pleadings are tried by express or implied consent of the Parties, they shall be treated in all respects as if they had been raised in the Pleadings. Moreover, even After Judgment, a Party may upon Motion Amend his Pleadings to Conform to the Evidence, and failure to so Amend does not affect the result of the Trial of these Issues. And where there is an Offer of Evidence which is objected to at trial on the ground that it is not within the Scope of the Issues as Made by the Pleadings, the Court may allow the Pleadings to be Amended where the Merits of the Action will be subserved and **the Objecting Party** fails to satisfy the Court

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that the admission of such evidence would prejudice him.<sup>48</sup>

Certain States attempted to Regulate the Form of Amendments. Oregon, for example required an Amended Pleading to be complete in itself, aside from the Original Pleading; some States required Motions to be in writing and to specifically set forth the words sought to be inserted or stricken out; and in at least one State Amendment was not permitted to be made by erasure or interlineation, a separate paper being required to be filed, and when so filed, to constitute with the Original but a Single Pleading. In the absence of statutory requirement, the Form of an Amendment lies within the discretion of the Court. In Some States it was required that the Application for Amendment be accompanied by Affidavit stating the reasons therefor.<sup>51</sup>

### *Amendments Changing the Cause of Action*

AS we have seen in the earlier discussion of this subject as it stood at Common Law, with the abolition of the Original Writ in England in 1833 and the Forms of Action in New York in 1843, the reasons for not permitting an Amendment changing the Form of Action ceased to operate.

In the Code States where the Statute Regulating Amendment does not in specific terms restrict the power, it would appear that such unrestricted power should extend far enough to permit an Amendment changing the Cause of Action. The situation is, however, more restrictive where under the Statute a Court has power to Conform the Plead-

48. Pot a citation of State Statutes, see Clark, *Handbook of the Law of Code Pleading*, c. 12, Amendment and Aider of Pleadings, § 115, The Code Provisions, 712 (2d ed., St. Paul 1947).

49. Oregon Comp.Laws Ann., 1940, 1—bOO.

-o. Indiana Stat. Ann., (Burns), 1983, § 2—1069.

DI. Bedman Imp. Co. v. ICrabo, 185 AppDLv. \$82, III N.Y.S. 617 (1918); Copeland v. Hugo, 23-2 .&~p.Div. 229, 207 NYC. 466 (1925).

-47. **Ark.Pig.Stat., Pope. § 1463 (193V, Is an example**  
of such a Statute.

ings to the Proof only “when the Amendment does not change substantially the Claim or Defense.”

In the Federal Courts, *first*, a liberal view as to Amendments was taken.<sup>52</sup> *Second*, due to the case of *Union P. I?. Co. v. ~y7er;~ in* which an employee of a railroad was not permitted to shift his claim for Damages from the Common Law to a Kansas Statute, a stricter view was assumed, the Court indicating that a “Departure from Law to Law” was not permissible. *Third*, in the more recent case of *Missouri, K. c~ T.*

H. *Co. v. Wulf;~* the trend again turned in the direction of liberality, where a Claim Under a Kansas Statute was, as a result of Amendment, converted to a Suit under the Federal Employers’ Liability Act. Instead of finding a New Cause of Action, the Court said the change was merely in Form and Not in Substance, In the process of development, the Federal Courts made clear that they had abandoned the restrictive “Law to Law” rule, and when the Federal Rules of Civil Procedure were adopted, they contained no such restriction.~ It may be said, therefore, that the earlier policy of restricting the Power of Amendment has lost favor, with the Courts generally accepting the broader concept of the Cause of Action as

consisting of a Group of Operative Facts. The “Law to Law” test was abandoned in New York as early as 1872,~ and Other States have followed her leadership.<sup>57</sup> New York

52. Chapman v. Barney, 129 U.S. 677, 9 S.Ct. 428, 32 L.Ed. 800 (1889).

53. 158 U.S. 285, 15 S.Ct. 877, 39 LEd. 983 (1855).

54. 226 U.S. 570, 33 S.Ct. 135, 57 LEd. 855 (1013).

55. Clark, *Handbook of the Law of Code Pleading*,  
e. 12, Amendment and Aider of Pleadings, § 110,  
Amendments Changing the Cause of Action, 715,  
710, 720 (2d ed. St. Paul 1947).

58. Brown v. Leigh, 49 N.Y. 78, (1872). Cf. also, Watson v. Rushmore 15 Abb.Pr.(N.Y.) 51 (1862).

57. Ohio: Raymond v. Toledo, St. L. & K. C. H. Co.,  
57 Ohio St. 271, 48 N.E. 1093 (1897) Oregon: Vol.  
lock v. Lumbermaas Nat. Bank of Portland, 86 Or.

also led in establishing a liberal rule as to Amendments by a defendant, the Court in *Bowman v. DePeyster*,<sup>TM</sup> referring to the greater liberality afforded to Amendments by a defendant at Common Law, declaring: “The reason for this distinction was, that the plaintiff, if he had Another Cause of Action, could sue upon it afterward; while a defendant had to avail himself of his Defense in the Action brought against him, or he might lose

the benefit of it.”

*Amendments and the Statute of Limitations*

**SOME** of the State Courts take the view that where an Amendment to the Complaint sets up a New Cause of Action, and in the meantime the Statute of Limitations has run against such Action, the Action is Barred as the Amendment does not relate back.<sup>59</sup> Other State Courts take the view that such an Amendment is merely an Amplification of the Same Action, provided it refers to the same Group of Operative Facts, broad enough in scope to support the New Cause of Action. Changes in legal theory should be ignored in determining the Issue. Under the Federal Rules,<sup>60</sup> unless there has been a material change in the Operative Facts, an Amendment should be allowed.<sup>61</sup>

324, 108 P. 637 (1917): South Carolina: Colt Co. v. K~er, 131 S.C. 78, 120 SE. 520 (1925) Mallard Lumber Co. v. Carolina Portland Cement Co., 134 S.C. 228, 132 SE. 014 (1926).

58. 2 Daly (N.Y.) 203, 208 (1807).

59. Hughes v. Gaston, 281 Mass. 292, 183 N.E. 752 (1932); Capps v. Atlantic Coast Line B. Co., 183 NC. 181, 111 SE. 533 (1922).

On the relation back of Amendments see, Illume & George, Limitations and the Federal Coni'ts: Relation Back of Amendment, 49 Mich.L.Bev. 937 at 957 (1951).

60. Federal Rule of Civil Procedure 15(c), Title 28, U.S.C.A., reads in part as follows: ‘Whenever the claim or defense asserted In the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.’

61. For a detailed statement comic-era lug Ap.iend,nouts and the Statute of Limitations, see Clark, iLiad-

Sec. **302**

**AIDER AND AMENDMENT**

**Ch. 26**

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564

**LITIGATING Tilt CONTROVERSY**

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*Aider*

THE Codes have not made great changes in the Common-Law Doctrine of Aider in its Various Forms, as previously discussed. Thus, the principle enunciated in *Birooke v. Broolce*,<sup>o2</sup> **the famous hook Case, that a Defect in the Plaintiff’s Declaration may be cured or supplied by a Subsequent Plea, applied under the Codes,~ although it has been qualified in Some States by the Rule that a Defect cannot be supplied by a Mere Denial.~**

When we come to Aider by Verdict, it may be said that for most part the Common-Law Rules still prevail. Thus, the famous, but not very enlightening Rule that a Defectively Alleged Cause of Action may be cured by Aider, but not the Statement of a Defective Cause of Action, still prevails. In general, however, mere Defects in Form are waived by a failure to Move or Demur. Defects of a more serious character may be waived if not raised until after Verdict or Judgment. But, as Judge Clark observes, "if a System of Written Pleadings is to be enforced, there will necessarily remain a Class of Cases where the Court will feel that the Pleadings have not served their purpose of bringing out the Cause of Action even in a general fashion."<sup>65</sup>

book of the Law of Code Pleading, e. 12, Amendment and Aider of Pleadings, 118, Amendments and the **Statute of** Limitations, 729—734 (2d ed., St. Paul 1947).

<sup>62</sup> 1 Sid. 184, 82 Eng.Rep. 1046 (1004).

### *Variance*

THE situation where there is a Variance between the Allegations in the Complaint and the Proof at the Trial, is now covered in the Codes by a Statutory Provision, of which an example is Rule 3025(c) of the New York Civil Practice Law and Rules, which provides: "The Court may permit Pleadings to be Amended before or after Judgment to Conform them to the Evidence, upon such terms as may be just including the granting of costs and continuances."

### *Defective Pleadings Aided by Statute*

THE related Section 2001 of the New York Civil Practice Law and Rules, covering Mistakes, Omissions, Defects and Irregularities in Pleading, provides: "At Any Stage of an Action, the Court may permit a Mistake, Omission, Defect or Irregularity to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the Mistake, Omission, Defect or Irregularity shall be disregarded."

### *Supplemental Pleadings*

SUPPLEMENTAL Pleadings, as provided for in Statutory Provisions, are usually restricted to a Statement of Facts which occurred after the Filing of the Original Pleading by the Party. In this sense such Pleadings, strictly speaking, are not Amendments. But they may well fall within this class under those Code Provisions which permit Supplemental Pleadings to set forth Facts which existed, but of which the Pleader had no knowledge, when the Original Pleading was Filed. In any event, the Allowing of such Pleadings, like Amendments, is largely a matter for the discretion of the Court, and the measure of their allowance ought to be whether they result in general in the Furtherance of Justice.<sup>66</sup>

<sup>66</sup> **Per a detailed statement concerning Supplemental Pleadings**, see Clark, Handbook of the Law of Code **Pleading, e. 12, Amendment** and Aider of Pleadings, ~ 121, Supplemental Pleadings, 141—144 (2d ed, St.. Paul 1947).

<sup>63</sup> **Arkansas: Thompson v. Jacoway**, 97 Ark. 508,

134 SW, 955 (1911); **Conaectiot: Vickery v. New**

Lender' Northern B, Co., 87 Conn. 634, 89 A. 277

(1914); **Indiana: Lux & Talbott Stone Co. v. Donaldson**, 162 Ind. 481, 68 N.E. 1014 (1903); **Massachusetts: Slack v. Lyon**, 9 Pick. (Mass.) 62 (1829);

**Missouri: City of Maysville v. Trnex**, 235 Mo. 619,

139 SW. 390 (1910); **Montana: Burley v. Great**

Falls Baseball Ass'n, 59 Mont. 21, 195 P. 559 (1921);

**Federal: United States v. Morris**, 10 Wheat (U.S.)

246, 6 LEd. 314 (1825).

<sup>64</sup> **Seofield v. Whltelegge**, 49 N.Y. 250 (1872); **Tooker v. Arnoux**, 76 N.Y. 397 (1879).

<sup>65</sup> Clark, Handbook of the Law e-f Code Pleading, c. 12, Amendment and Aider of Pleadings. ~ 119, **Aider by Verdict, 737** (2.1 ed., St. Paul 1947).

Sec.

## CHAPTER 27

# RETROSPECTIVE MOTIONS<sup>1</sup>

The Form, Tenor and Effect of the Verdict.

Matter of Record Versus Matter of Exception.  
 The Motion for a New Trial.  
 The Motion for Venire Facias De Novo.  
 The Motion in Arrest of Judgment.  
 The Motion for Judgment Notwithstanding the Verdict.  
 The Motion for Repleader.  
 Status of Retrospective Motions Under Modern Codes, Practice Acts and Rules of Court.

**THE FORM, TENOR AND EFFECT  
 OF THE VERDICT**

303. As the Retrospective Motions for a New Trial, for Venire Facias De Novo, for Arrest of Judgment, for Judgment Notwithstanding the Verdict, and for a Repleader, come after Verdict and before Judgment, it is essential to understand that Judgment does not immediately follow Rendition of a Verdict. It is suspended for a short period of time to permit the Losing Party at the Nisi Prius Trial to examine the Pleadings in order to determine whether the Matters Alleged by the Prevailing Party are sufficient to sustain a Judgment on the Verdict, and to examine the Conduct of the Trial with reference to rulings of the Court and other conduct which might invalidate the Verdict.

1- in general, *or*) the subject of the Retrospective Motions, see:

Treatises: 2 Tidd, The Practice of the Court of King's Bench in Personal Actions, e. XXXVIII, of New Trials; and Arrest of Judgment, &c., 813—840 (Philadelphia, 1807); Ames, A Selection of Cases on Pleading at Common Law, c. vii, Motions Eased on the Pleadings, 26—299 (1st ed. Cambridge, 1875); Stephen, A Treatise on the Principles of Pleading in Civil Actions, c. I, Of the Proceedings in an Action, 124—129 (3d Am. ed. by Tyler, Washington, D. C., 1900); Gould, A Treatise on the Principles of Pleading, Pt. II, Procedure, c- V, Arrest of Judgment and Repleader, 151—175 (6th cit by Will, Albany 1909); Shipman, Handbook of Corn-

-mon-Jaw Pleathing, c. XX, Objections to Defects During or After Trial, 526—537 (3d ed. by Ballantine,

“WHEN it is said, as it must be said concerning four of the five Retrospective Motions, that the Motion goes only upon the Record, what is meant is that in the consideration of that Motion the Court can look only at the Common Law Record, the Pleadings, the Process and the Verdict, all entered upon the Roll; and matters occurring at the Trial are not to be taken into account in Judgment upon that Motion.”—Keigwin, Cases in Common Law Pleading, Bk. II, The Rules of Pleading, XVIII, Retrospective Motions, 768 (2d ed., Rochester 1934).

Where the Pleadings have terminated in a single, clear-cut, well-defined, material Issue of Fact and the Jury has Returned a

St. Paul 1923); Keigwin, Cases in Common Law Pleading, e. XVIII, Retrospective Motions, 767—775 (2d ed., Rochester 1934); Millar, civil Procedure of the Trial Court in Historical Perspective, c. XIX, Trial by Jury, ~ -, The Motion in Arrest and Its Congeners, 323 (New York 1902).

**Articles:** Carlin, Remittitur and Additur, 40 W.Va. L.Q. 1 (1942); Riddefl, New 'rrials in i'resent Practice, 27 Yale L.J. 353 (1918).

**Note: Judicial Administration: Power of the** Trial Court to Reduce Excessive Damages, IS Iowa L.Rev. 404 (1933);

**Comments;** Practice and Procedure—Power of the Courts to Increase Inadequate verdicts, 32 Mich.L. Rev. 538 (1934); Correction of Damage Verdicts by Remittitur and Additur, 44 Yale L.J. 318 (1934).

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Verdict on that Issue, it would seem that a Judgment according to the Verdict should ordinarily be Entered.<sup>2</sup> Frequently, however, an Error by Either One or Both Parties, prevents a presentation of the Issue on the Pleadings in such a manner so as to make possible a decision of the controversy, or it may be that an Error on the Part of the Court may result in a failure to correctly determine the Issue as made by the Pleadings. Thus, for example, if A sues B in Case for Slander, alleging that B spoke of and concerning A, stating that A is a liar, A is not entitled to recovery, even though a Jury finds the Facts as A alleged, if the alleged statement is derogatory language which, as a Matter of Substantive Law, is not actionable even if proven. And if, by Way of Defense, B alleges that he was merely repeating what someone else said, this Fact, if true, constitutes No Defense as a Matter of Substantive Law. In either case a Verdict by the Jury would not constitute a sufficient basis to war-

2. But, much was not the case, as Tidd explains. He declared:

“After a General Verdict, or upon a View of Inquiry, or Order of Appraisal, or Judgment by Default, or Judgment, it is incumbent on the prevailing party to enter a Rule for Judgment *Nisi Cause*, on the Justice or Justice, with the clerk of the Rules, This Rule expires in four days after the trial, or on any other day which the Court shall not sit in any of the four days, unless it be entered on the first day of the trial. If it be entered on any other day, it is the practice to enter these Rules, as of the last day of the trial, or on the day of the expiration of four days exclusive of the day on which such Rule is entered. If it be entered on the day of the trial, it is not necessary if the plaintiff be nonsuited, for in that case Judgment may be entered immediately after the day in which the trial is held.”

“VII. The time limited by the Rule, the defendant may move the Court for a New Trial, or Inquiry; or in Arrest of Judgment; or for Judgment Non Obstante Verdicto, a Repleader, or *Veni de Facto*.”<sup>2</sup> The Practice of the Court of King's Bench, in Personal Actions, c. XXXVIII, Of New Trials; and Arrest of Judgment, § 813 (Philadelphia 1807).

**Grant a Judgment.** As a Verdict is therefore not necessarily decisive of the Cause, the Court, in considering an appropriate Motion should thoroughly examine the Pleadings for the purpose of ascertaining whether the Fact alleged by the victorious Party will sustain Judgment in his favor. And in some cases the conduct of the Trial may have to be considered, particularly with reference to the Rulings of the Court on offers and rejections of evidence, some of which may operate to invalidate a Verdict. To meet these eventualities and to give an opportunity for the losing party to examine the Record and the Trial, at Common Law the Entry of the Judgment was delayed. This resulted in English Practice from the circumstance that *Nisi Prius* Trials were usually held out on the Circuit away from Westminster, during a Vacation of the Court, and therefore the Record Roll, with the Entry of the Verdict, could not be presented to the Full Court for Judgment, until after the Commencement of the Next Term. Within four days after the Court met *En Banc* at Westminster the Losing Party at the *Nisi Prius* Trial was permitted any Motion seeking to avoid the Judgment which in the normal course of affairs would logically follow upon a Verdict.<sup>3</sup> A similar Rule has usually been followed in the American Courts, except where changed by Rule of Court or Statute.<sup>1</sup> The effort to avert the Entry of Judgment on the Verdict took the Form of One or More Motions, which, as Professor Keigwin observes, “because they look backward over the course of the proceeding, may be called Retrospective Motions,” ~ which were Five in

3. Keigwin, *Cases in Common Law Pleading*, Bk. II, The Rules of Pleading, c. XVIII, Retrospective Motions, 160, Effect of the Verdict, 767, n. 1 (2d ed., Rochester 1934),

4. *True R. v. Legg*, 32 Md. 147 (1870); *Hutchinson v. Brown*, 8 AppD.C. 157 (1896).

5. Keigwin, *Cases in Common Law Pleading*, Bk. II, ‘The Rules of Pleading, c. XVIII, Retrospective Motions, 738 (2d ed., Rochester 1934). number, the Motion for a New Trial, the Motion for *Veni de Facto*, the Motion in Arrest of Judgment, the Motion for Judgment Notwithstanding the Verdict, and the Motion for Repleader.

With the exception of the First Motion, all proceed upon the theory of taking advantage of some Defect Apparent Upon the Face of the Common Law Record. The Motion for a New Trial seeks to reach Errors

which lie Outside that Record, and which can be shown without reference to the Roll.

**MATTER OF RECORD VERSUS  
MATTER OF EXCEPTION**

**304. Four out of five of the Retrospective Motions are addressed to Errors Apparent Upon the Face of the Common-Law Record. The**

• Common-Law Record consists of the Process, **the Pleadings, the Verdict and the Judgment. After Judgment, such Errors were Reviewable**

**by Writ of Error. Errors which occurred at the Trial were not part of the Common-Law Record, and could be Reviewed by a Motion for a New Trial, after Verdict and before Judgment; by Statute, such Errors could be Reviewed after judgment by incorporating them into the Record by means of a Bill of Exceptions. It was therefore essential to keep clearly in mind the distinction between Matter of Record and Matter of Exception.**

UNDER the ancient practice, the Proceed-ings in a litigated case were Entered upon the Parchment Roll, and when this was completed, the end product became known as

the Common-Law Record. It consisted of Four Parts, the *Process*, which included the Original Writ and the Return of the Sheriff, by which the Court acquired Jurisdiction over the defendant; the *Pleadings*, presented by the Parties in the prescribed order to develop **an Issue of Law or of Fact**, and which included the Declaration and all subsequent Pleadings, together with the Demurrers, if any; the *Verdict*; and the *Judgment*, These Four Elements formed the Common-Law Record, but it should be observed that at the point where the Retrospective Motions come into

567

play, the Record has not been developed beyond the Stage of Entering the Verdict upon the Roll.

At this point it should also be recalled that between the time when the Pleadings Terminated in an Issue, which Joinder in Issue was duly Recorded on the Parchment Roll, and the time when an Entry of the Verdict was made, nothing was Recorded on the Parchment Roll. The reason for this was that between the Joinder of Issue and the Rendition

**of the Verdict, the Trial takes place, and**

what occurs during this Trial does not Appear upon the Face of the Common-Law Record. Thus, Offers and Rejection of Evidence, the Court's Instruction of the Jury, or its Refusal to Instruct as requested by Counsel, or any Misconduct Connected with the Trial, such as Prejudicial Remarks on the Part of the Court, **and the like—that is—any Error that occurs at the Trial—cannot be corrected by resort** to the Common-Law Record because not Apparent Upon its Face. Such Errors were preserved only in the notes made by the Presiding Judge, or in his memory, and were review-able, after Verdict and before Final Judgment, by a Motion for New Trial made before the Court *En Bane* at Westminster, within four days after the Commencement of the Next Term following the Rendition of the Verdict. As each of the Judges of the Court had Motions of a similar character coming up for decision from the Trials over which they had presided, the natural inclination of each Judge was to support the Rulings of his brother Jurists, and thus Overrule the Motion for a New Trial. Furthermore, Errors that occurred at the Trial were not Reviewable after Judgment on Writ of Error, because Not Apparent on any one of the Four Parts of the Common-Law Record. To remedy this Defect, Parliament enacted Chapter 31 of the Statute of Westminster II in 1285,6 which provided for Review of such Errors through

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**Sec. 304**

**RETROSPECTIVE MOTIONS**

**Ch. 27**

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## LITIGATING THE CONTROVERSY

### Ch. 27

the use of is-hat came to be known as a Bill of **Exceptions**.~

Thus, it appears that in four out of five Retrospective Motions, the Court is permitted to consider only Defects Apparent Upon the Face of **Part of the Common-Law Record—the Process, the Pleadings, and the Verdict—and Errors Occurring at the Trial** were regarded **as extraneous and not to be considered in rendering Judgment upon the Motions.** Matters extraneous to or outside of the Record could be tested after Verdict and before Judgment only by a Motion for a New Trial. A distinction is made between *Matter of Record* and *Matter of Exception*, Matter of Record referring to those **Errors Apparent upon the**

Face of the Common-Law Record and hence **Reviewable after Final Judgment upon a Writ of Error, and Matter of Exception referring to those Errors which Occurred at the Trial, and were Not Apparent on the Face of the Common-Law Record, hence Reviewable after Final Judgment only by incorporating such Errors into the Record by means of a Bill of Exceptions, as authorized by Chapter 31 of the Statute of Westminster II in 1285.**~ .

### THE MOTION FOR A NEW TRIAL

305. **A Motion for a New Trial calls for a re-examination by the Court of the occurrences at the Trial to determine whether any errors had been made upon the Trial, or whether any irregularities had occurred in connection with the Trial. A Motion for a New Trial does not reach defects in the Pleadings.**

### *New Trial*<sup>9</sup>

**AT Common Law, Proceedings leading to a**  
decision might be corrected or Reviewed after

7. **The Bill of Exceptions** Is discussed in Chapter

30.

s. 15 Edw. I., e. 31, 1 Statutes at Large 206 (2255).

9. **In general, on the subject of New Trials, see:**

**Articles:** Illddell, *New Trials In Present Practice*, 27 *Yale L.J.* 353 (1918); Sipith, *The Power to Direct a Verdict*, 24 *Col.L.Rev.* 112 (1924).

Verdict and before Judgment by a Motion for a New Trial; and alter Judgment, by Writ of Error, if the Error was Apparent Upon the **Face of the Common-Law Record**, or, after 1285, by Bill of Exceptions, if the Error **Occurred at the Trial. In the first instance, there-examination of the case afresh took place-in the same Court; in the second, the re-examination occurred by reason of the Removal of the Record to a Higher Court by Writ of Error.** When the Review was by a Motion for New Trial, which occurred before Judgment, the Entry of Judgment was necessarily sus~ pended pending a Ruling on the Motion,

The Motion for a New Trial was not the procedure to Review Defects on the Face of



**the Pleadings, but was and is a Remedy for-any Misconduct, Error or Slip occurring in the progress of the Trial itself which might endanger its fairness, and which indicates the probability of a different result. Its purpose was to have the Court set aside the Verdict and order a New Trial on the ground that some Error had occurred at the Trial, consisting of some alleged Misconduct of the Parties, the Counsel, the Jurors or the Judge.** Prior to 1655, the Law Courts, it was said, held themselves incompetent to set aside Verdicts, hence the only Remedy available for a Party who had been prejudiced by an improper Verdict was either by the then impractical Proceeding to Attaint the Jury, or by an Appeal to a Court of Equity, which, under some-conditions, might procure New Trials. The first case in which it was said a New Trial was granted at Law, in order to meet the inadequacy of the Courts in refusing to set Verdicts-aside, was *Wood v. Ounston*,<sup>10</sup> decided in 1655. But Lord Mansfield was of the opinion that New Trials were granted at Law at an earlier time?

Note: New Trial—Exclusiveness Grounds, 5 Minn.L.Rev. 564 (1921).

10 Style 466, 82 Eng.Rep. 867(1655).

11. *Bright v. Eynon*, 1 Burr. 390, (1757).  
of Statute

97 Eng.Rep. 385-

## Sec. 305

**As heretofore indicated, at Common Law,** after a Nisi Prius Trial, the Losing Party could Move for a New Trial before the Court, *En Bane*, at Westminster, the Judge who presided at the Trial being one of the members of this Court. As the procedure evolved in **the American Courts, the Motion for a New Trial** became one which was generally addressed directly to the Judge who conducted the Trial, and sought to persuade him that he **had committed some Error in one or more of** his Various Rulings during the Trial, or that for some other reason Justice was not done. **it is altogether proper that this Motion should be heard by the very Judge who tried the Case**, as he is personally acquainted with the Facts involved, and able to judge as to their bearing upon the merits of the controversy, *as well as give them their proper evaluation*. And it was for this very reason that it became **the established Rule that a Judge in passing** upon a Motion for a New Trial exercised his own discretion, which, in general, *was* not reviewable in an Appellate Court, as the Grant or Refusal of a New Trial could not be Assigned as Error in Another Court,

While the discretion exercised by the Trial Court in passing upon a Motion for a New Trial was *not* ordinarily subject to Appellate Review, it should be observed that some of the Errors urged in support of such a Motion may be and frequently are made the subject of Exceptions, and are thus incorporated into the Record by means of a Bill of Exceptions. In this way the same Errors which are urged below on Motion for a New Trial may be Reviewed by Writ of Error, which brings the Bill of Exceptions to the Appellate Court, or by Statutory Appeal.

if the Bill of Exceptions reveals that the Trial Court committed Errors, as in improperly Admitting or Excluding Evidence, or in **failing to correctly** Instruct the Jury, the Appellate Court may, on the ground of such Errors, Reverse the Judgment and grant a New Trial. Such a Course of Procedure involves no revision of the decision of the Trial Court on the Motion for New Trial; that which is revised is the Erroneous Ruling which occurred at the Trial. And the New Trial which is granted, is granted not because the Trial Judge Erred in refusing it, but on the ground that he had previously Erred in his hearing of the case and with respect to a Matter which Impaired the Validity of the Judgment.<sup>12</sup>

### *Grounds for New Trial*

**At Common Law there was a wide discretion in the Judge as to the Causes for granting a New Trial, and the Statutory Grounds laid down in our Modern Codes and Practice Acts are not exclusive of all others.**<sup>13</sup>

The Grounds for the Motion generally include such Errors and Irregularities in the Conduct of the Trial as Errors in Impaneling **the Jury, Bribes and Private Communications** of the Prevailing Party to the Jury, which may have influenced their Verdict, or Misbehavior of the Jury in their deliberations, as by intoxication, separation, private investigations, casting lots or drawing straws for the Verdict, or of the Jury bringing in a Verdict contrary to the weight of the evidence, so that the Judge is reasonably dissatisfied therewith, or if the Jury has given Excessive Damages indicating passion and prejudice, or if the Judge has erroneously Excluded or Admitted Evidence, or Misdirected the Jury on the Law controlling the case, so that in consequence they may have found an Unjustifiable Verdict; for these and any other reasons, which may amount for Error at the Trial, it is the duty of the Court to award a Retrial if

12. **On the distinction between** Review by Motion for **New Trial and Review by** Bill of Exception, see **M'Lanalan v. Universal Ins. Co., 1 Pet. 170, 7 L Ed. 98 (1528).**

23. See *Note, New Trial—Exclusiveness of Statutory Grounds—Loss of Reporter's Notes*, 5 Minn.L.Rev. 564 (1921). See, also, the case of *Valerius v. Richard*, 57 Mimi. 443, 59 N.W. 584 (1894), per Canty J., die so n tin g.

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## RETROSPECTIVE MOTIONS

569

### Ch. 27

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## LITIGATING THE CONTROVERSY

a fair hearing had not been had iii the Original Trial.<sup>14</sup>

All such Grounds for a New Trial, it should be noted, fall Outside the Common Law Record, as there was no place on the Roll for the Entry of such Errors, being known to the Judge only by memory, or by representations made to him by the Parties and incorporated into Sworn Affidavits submitted to the Trial Court.

And, of course, the Motion for a New Trial, should be clearly differentiated from the Motion for *Veniye l'acian De Novo*.<sup>15</sup>

Another Matter for which New Trials are sometimes granted is surprise, where a Party using all diligence and care is placed in a situation injurious to his interests without his own default.<sup>16</sup> One may regularly Subpoena a 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 ~vas no opportunity to Move for a Continuance of the Cause. If he liad the opportunity and neglected it, he cannot take the chance of a Verdict in his favor, and afterward claim the benefit of a Rehearthgi

14. In order to bring the question of the sufficiency of the Evidence to sustain the Verdict before the Appellate Court for Review, it is necessary

for the losing party to make a Motion for a New Trial, and to include the Motion, the order overruling it, and the Exceptions in a Bill of Exceptions. *Yarber v. Chicago & A. R. Co.*, 23-5 Ill. 589, 85 N.E. 928 (1908).

15. See, *Witliam v. Lewis*, 1 Wils. 45, 55, 95 Eng.Rep. 485, 489 (1744).

16. *Ituggles v. hall*, 14 Julius. (N.Y.) 112 (1810). See also, *State v. Morgan*, 80 Iowa 413, 43 NW. 1070 (1800); *Solomon v. Norton*, 2 Ariz. 100, 11 P. 108 (1886); *Albert v. Seller*, 31 Mo.App. 241 (1888).

17. *McClure v. King*, 15 LaAnn. 220 ~1560 Grant v. *Popejoy*, 15 Did. 311 (1860); *Klein v. Gibson* (Ky.) 2 Sw. no (1880).

### THE MOTION FOR VENIRE FACIAS DE NOVO<sup>15</sup>

306. The Motion for Venire Facias *De Nova* was, unlike the Motion for New Trial, designed to vacate the Verdict and obtain a Retrial on the basis of Defects Appearing on the Record; and if granted when it should not be, it was Error, and the Award of it could be reversed, whereas a Motion for a New Trial was commonly granted after a General Verdict for some Cause not Apparent on the Record, and was not Assignable for Error,

THE Motion for *Venire Facias De Novo* was an Ancient Proceeding of the Common Law, in use long before the Motion for a New Trial.

IS. In referring to the distinction between a Motion

for *Venire Facias De Novo* and a Motion for a New Trial, in the case of *Witham v. Lewis*, 1 Wils. KB. 48, 55, 95 Eng.Rep. 485, 489 (1744), Chief Justice Willes declared:

"The Counsel at the Bar endeavored to confound a *Venire Facias De Novo* and a Motion for a New Trial, but they are very different things they are erroneous in some things, but differ in many: the error is in this, that a *Venire Facias De Novo* must be awarded in both, and that the Court may or may not grant either of them; but they differ first in this, that

\* *Venire Facias De Novo* is the ancient proceeding of the Common Law, a New Trial is only a new invention; the first is as ancient as the Law, while the latter were in use, but Motions for New Trials were introduced in this manner; the Judgment in Attainder was very severe, and the punishment excessively hard, and therefore to avoid that severity it was thought better in a milder way, and so Motions for New Trials were introduced, They likewise differ in this respect, that New Trials are generally granted where a General Verdict is found, a *Venire Facias De Novo* upon a Special Verdict.

"But the most material difference between them is this, that a *Venire Facias De Novo* must be granted upon Matter appearing upon the Record, but a New Trial may be granted upon things out of it; if the Record be false so right; if the Verdict appear to be contrary to the Evidence given at the Trial, or if it appear that the Judge has given wrong directions, a New Trial will be granted: but it is otherwise as to a *Venire Facias De Novo*, which can only be granted in one or other of these two cases, as 1<sup>st</sup>, if it appear upon the Face of the Verdict, that the Verdict is so imperfect that no Judgment can be given upon it; 2<sup>d</sup>, where it appears that the Jury ought to have found other facts differently, and it cannot be granted in any other case."

570

Ch. 27

Its Object, of course, was to obtain a New Trial; and it was commonly employed after a Special Verdict imperfectly found, but always for some Cause Upon the Record.<sup>19</sup> It differed from the Motion for New Trial, which was based on Matters Extraneous to the Record. If granted when it should not be, it was Error, and the Award of it could be reversed, whereas a Motion for a New Trial was commonly granted after a General Verdict and was not assignable for Error. The Motion for *Venire Facias De Nova* was granted where a Verdict was so imperfect that Judgment could not properly be grounded upon it.<sup>20</sup> This might occur where the Verdict was not responsive to the Issue, or where some irregularity in the Impanelling of the Jury was involved, provided such insufficiency or irregularity was Apparent on the Roll. If the Motion to Set Aside the Verdict and to

Award a *Venire Facias De Novo* was granted, a Writ was then issued requiring the Sheriff to Summon a New Jury to try the Cause.<sup>21</sup>

### THE MOTION IN ARREST OF JUDGMENT

307. **The Court will generally, on Motion, refuse to Enter Judgment upon a Verdict, Default, or Demurrer to Evidence, when substantial Defects exist in the Pleadings or the Verdict. And 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. 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, of course, a Motion in Arrest of Judgment must be made After Verdict and Before Rendition of the Judgment. It operates, with significant differences, as a kind of Delayed Demurrer.**

19. **Butcher** *it.* Metts, 1 Miles (D.C.Phila.) 233 (1830).

20. Keigwin, Cases in Common Law Pleading, Bk. II, The Rules of Pleading, c. XVIII, Retrospective Motions, 771 (2d ed. Rochester, 1934).

### *Definition*

IN Legal Proceedings, a “Motion” is an **application, either** written or made *viva voce*, by a Party to an Action or a Suit for some **kind of Relief.**<sup>22</sup> And a Motion in Arrest of **Judgment is a procedural device, entered upon** the Record, and is designed to Stay Judgment, or prevent its Entry, pending a determination of whether the Record will support the Judgment. Such a Motion usually occurs after an Issue of Fact has been tried and a Verdict Found, but the Motion is also available after a Default, in which case it is treated exactly as if it had been a Demurrer to the Declaration, and not like a Motion made after Verdict,<sup>24</sup>

### *The Principle Underlying the Motion*

TUE Theory of the Motion in Arrest of **Judgment is that the** Judgment of the Court is a Conclusion of Law from all the Facts ascertained and spread upon the Record, and as **such Conclusion must rest upon and be** collected from the Whole Record, the Party who does not, upon the Entire Record, appear entitled to Judgment, cannot have it, Thus, **a Substantive Defect is available at the Pleading Stage,** by Demurrer; After Verdict and Before Judgment, by Motion in Arrest of Judgment; and After Judgment, by Writ of Error. And this principle holds true even though a Verdict has been found, a Default suffered, or a Demurrer to Evidence determined in favor of the Party, who, upon the Whole Record, appears not to be entitled to Judgment. For even in the face of such Verdict, Default or Final Ruling on a Demurrer to **Evidence, the** Record, as viewed as a whole, may disclose No Right of Action, or no Legal

22. **State** *it.* Warner Valley Stock Co., 08 Ore. 406, 137

P. 740 (1914).

23. 3 Blackstone, Commentaries Upon the Laws of England, c. XXIV, Of Judgment and Its Incidents, 386—387 (7th en. Oxford, 1775).

24. Collins v. Gibbs, 2 Burr. 899, 900, 97 Eng.flep. 023, 024 (1759).

## Sec. 307

## RETROSPECTIVE MOTIONS

57i

### Ch. 2-7

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21. Ibid.

572

## LITIGATING THE CONTROVERSY

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Defense, in his favor,<sup>2~</sup> as the Case may be. And, therefore, if a Verdict is found for the plaintiff, upon a Declaration substantively defective—as in Ejectment in which there is a failure to allege title—or for the defendant, on a Plea in Bar totally void, Judgment must in either case be Arrested. The Motion in Arrest of Judgment, of course, must be made Before Judgment and it operates, with significant differences, as a kind of Belated Demurrer,<sup>2o</sup>

### *The Question on a Motion in Arrest of Judgment is One of Law,*

THE Motion in Arrest of Judgment raises a Question of Law; it in effect asserts that there is some Error Apparent on the Face of the Record which in Point of Law vitiated the proceedings culminating in the Verdict; that is, Judgments were Arrested only for intrinsic causes.<sup>2v</sup> And after the Statutes of Amendments and Jeofails, the Error Manifest upon the Face of the Record was required to

**be One of Substance** and Not One in Form.

### *Defects Available Upon Motion in Arrest of Judgment*

UNDER the Ancient Common Law a Motion in Arrest of Judgment could reach mere Defects in Form in the Pleadings. After the Enactment of the English Statutes of Amendments and Jeofails, this Practice of using the Motion in Arrest to reach Formal Faults in

2& Bayard *it.* Malcolm, 2 Johns. (N.Y.) 550 (1807).

26. Hitchcock v. Haight, 2 Gil. (111.) 604 (1845); Sawyer *it.* Boston, 144 Mass. 470, 11 N.E. 711 (1887); Bedell *it.* Stevens, 28 N.H. 118 (1853).

The relief must be applied for before Final Judgment, Keller *it.* Stevens, 66 Md. 132, 6 A. 533 (1886). See, Miller *it.* Gable, 30 Ill. 578 (1888); Smith *it.* Biesiada, 174 hid, 134, 90 N.E. 1009 (1909).

And the errors must be apparent on the Face of the Record. Jordan *it.* State, 22 Pin. 528 (1880).

But **the** Evidence is no part of the Record. Bond v. Dustin, 112 11.5. 604, 5 S.Ct. 290, 28 LEd. 835 (1884).

the Pleadings, was corrected.<sup>25</sup> In consequence of these Statutes, Judgments are now largely protected against Arrest for Defects in Form, as well as for Various other Defects, which had once been treated as Substantive, but which, by the combined impact of the Statute of Elizabeth in 1585 ~ and the Statute of Anne in 1705,~<sup>o</sup> have been specifically enumerated and expressly cured.<sup>31</sup>

At Common Law, and aside from any Statutory Provisions, there are Many Defects in Pleading which formerly have been treated as Substantive, and which would be regarded as fatal, except for their being Aided by Verdict. If a

Defect is Cured by Verdict, a Motion in-Arrest of Judgment will not be sustained.

With respect to such imperfections as are Aided by Verdict at Common Law, it was early observed, “that where there is Any Defect, Imperfection, or Omission in Any Pleading, whether in Substance or Form, which would have been a Fatal Objection upon 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 by the Common Law.” ~ And this Rule has subsequently been followed,<sup>33</sup>

28. Mekelvey, Principles of Common-Law Pleading,

174 (*New York*, 1914).

29. 27 Eliz. c. 3, § 1, 6 Statutes at Large 360 (1585).

30. 4 Anne, e. 16, § 1, 11 Statutes at Large 155 (1705).

31. The Motion In Arrest of Judgment Is succinctly discussed In Huger *it.* Cunningham, 126 Ga. 684, 58 S.E. 64 (1906).

32. Stennel *it.* Hogg, 1 Wms.Saund. 226, 228 note I.  
85 Eng.Rep. 244, 245 (1669).

33. English: Smith v. Keating, 6 C.B. 136, 136 Eng.  
Rep. 1203 (1848); KIdgill *it.* Moor, 9 (B. 364, 137  
Eng.Rep. 934 (1850); Massachusetts: Worster v.  
Proprietors of Canal Bridge, 16 Pick.-(Mass.) 541

(1835).

27. Walker *it.* Sargeant, 11 Vt. 327 (1839); Hughes *it.*  
Fruni, 41 W.Va. 445, 23 S.E. 604 (1805).

## Sec. 307

Since after the Statute of Demurrers,<sup>34</sup> in 1585, Supplemented and Amended by the Statute of Anne in 1705,~~ Formal Defects in the Record were Waived except on Special Demurrer, it followed that thereafter Judgment could not be Arrested for any other than a Substantive Defect. Such a fault may be found either in the Pleadings or in the Verdict if one has been rendered. Thus, where the plaintiff has been Awarded a Verdict on a Declaration Totally Defective in Substance—as where in Trover he fails to allege a Conversion—or varies totally from the Original Writ—as where the Writ sued out

.. was in Special Assumpsit for Breach of a Contract and the Verdict was in Case for a Tort— Judgment may be Arrested on the defendant’s Motion. But if the Declaration was Substanlively Vaid, and the Plea in Bar on which the

defendant obtained a Verdict is Substantively Defective—as where the defendant Pleased

Not Guilty to a Declaration in Assumpsit— the Judgment may in turn be Arrested on the Motion of the Plaintiff.<sup>36</sup> In each instance the Defect at which the Motion Struck was in the

Pleading.

The Defect may, however, be in the Verdict. Thus, where the Pleadings terminate in

a Perfect Issue, but the Jury finds a Verdict Materially at Variance with the Issue—as

where the Issue is whether the defendant owns Blackacre and the Jury by its Verdict finds that the defendant owns Greenacre— Judgment will be Arrested for the insufficiency of the Verdict The Court cannot tell from such a Verdict for which Party the Judgment should be given. And, in general, it is a universal Rule in Arresting Judgment, that any Defect in the Record which would render erroneous a Judgment entered in pursuance of a Verdict, constitutes a valid ground for Arresting the Judgment. “For,”

34. 27 Eliz. c. 5, 6 Statutes at Large 360 (1585).

35. 4 Anne, e. 16, 11 Statutes at Large 155 (1705).

36. Dighton *it* Bartholomew, Cro. Eliz, 778, 78 Eng. Rep. 1008 (1600). - says Gould, "no Court should do so nugatory an act, as to render a Judgment, which~ when Rendered, must be *erroneous.*" ~

### *Defects in the Pleadings*

**IT** has been 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,<sup>38</sup> Formal Defects being Cured by Statute or open only to Special Demurrer. The Converse of the Rule, however—that all 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 have heretofore considered, the Court will presume, after a Verdict, to have been duly proved.<sup>39</sup> 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.<sup>40</sup>

As Smith declares: "A Motion in Arrest of Judgment is the exact reverse of that for Judgment *Non Obstante Verdicto*. The applicant in the one case insists that the plain-

37. Gould, A Treatise on the Principles of Pleading, 155 (6th Am. ed. by Will, Albany, 1909).

32. Pittsburg, C., C. & St. L. R. Co. v. City of Chicago, 144 Ill.App. 293 (1908).

A Misjoinder of Causes of Action or of parties is ground for Arrest of Judgment. Bull *it* Mathews, 20 RI. 100, 37 A. 536 (1897); Gulnrip *it* Carter, 58 Ill. 296 (1871). Cf. Chicago & A. H. Co. *it* Murphy, 198 IU. 462, 64 N.E. 1011 (1902).

39. Lane *it* Maine Mut. Fire Ins. Co., 12 Me. 44 (1835); Avery *it* Inhabitants of Tyringham, 3 Mass, 160 (1807); Bead v. Inhabitants of Cheimsford, 16 Pick. (Mass.) 128 (1834).

40. ChIcago & A. B. Co. *it* Clausen, 173 Ill. 100, 50 N.E. 680 (1898).

A Verdict will not mend the defect, where an essential element of the case is not alleged in the Declaration, but it will cure an ambiguity or generality of statement. Thus, In a Contract Action, Judgment will be arrested for failure to allege performance of conditions precedent. Rushton *it* Aspiaall, 2 Doug. 679, 99 Engiiep. 430 (1781).

## **RETROSPECTIVE MOTIONS**

**573**

### **Ch. 27**

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tiff is entitled to the Judgment of the Court, although a Verdict has been found against him. In the other case, that he is not entitled to the Judgment of the Court, although a Verdict has been delivered in his favor. Like the Motion for Judgment *Non Obstante Verdicticio*, that in Arrest of Judgment must always be grounded upon something Apparent on the Face of the Pleadings; for instance, if, in an Action against the indorser of a Bill of Exchange, the plaintiff were to omit to allege in his Declaration that the defendant had notice of dishonor, Judgment would be Arrested even after a Verdict in the plaintiff's favor.

"The power to make these respective Motions, coupled with the inability to Demur and Plead at the Same Time, led to a practice of passing over Objections to the Pleadings until After the Trial, when it was too late to Amend, and the successful litigant was often deprived of the fruits of a Verdict according to the merits by a slip in the Pleadings, which might have been remedied if brought to his notice by Demurrer." ~

An utter failure to keep in view the proper Functions of Pleading is strikingly shown when a Fair Trial on the merits of a case is set at naught by a Motion in Arrest of Judgment, by Judgment Notwithstanding the Verdict, or even on Writ of Error, because of a lack of some Allegation in the Declaration. And some have regarded such an outcome a perversion of Justice by the Rules of Procedure, resulting from the blind and mechanical application of Rules for their own sake. Of course, all too often, astute practitioners, instead of giving gratuitous instructions to their opponents, permit them to go through the Trial on Defective Pleadings, and then wipe out all the results of the Trial if it goes against them, by Motion in Arrest of Judgment, or a Similar Motion.

41. J. W. Smith, *Action at Law*, 183 (11th ed, London 1813). See, also, *Kelly v. Chicago City R. Co.*, 283 Ill. 640, 119 N.E. 622 (1018i).

In referring to this type of practice, in the Illinois case of *Oilman V. Chicago Railway Co.*,<sup>42</sup> Craig, J., in dissenting, declared: "The defendant, if not sufficiently informed of the Statement of Claim, had the right to demand a more Specific Statement, but instead of that it filed an Affidavit of Merits, in which it reserved the right to object to any insufficiency of plaintiff's claim, went to Trial, and had a Fair Trial on the Merits, and, having been unsuccessful in the Trial, now asks that the Judgment be Reversed because the Statement of Claim did not set out a Complete Cause of Action." ~ The majority of the Court failed to appreciate that the main Function of Pleading is to clear the ground preparatory to the Trial. The need of a formal "basis for the Judgment" is not a sufficient reason for permitting such Objections to Pleadings to be raised and be availed of after a Trial on the Merits, unless it is shown that the defendant was actually prevented from having a Fair Trial by reason of the Defect.

In some States, a defendant, when a Demurrer has been erroneously overruled, may not Move in Arrest of Judgment; yet he may Move for Judgment *Non Obstante Verdictio*, or he may secure a Reversal of the Judgment on Writ of Error.~ But it has been well said that "a Court, by Ruling Wrongly on a Demurrer, does not preclude itself from afterwards Ruling Rightly upon a Motion in Arrest of Judgment." ~

C. 205 El. 305, 311, 109 N.E. 181, 183 (1915).

43- See, also, *Enberg it. City of Chicago*, 271 Ill. 404, 411, ill N.E. 114,117(1915).

44 ~-Chicago & B. I. U. Co. *it. Hines*, 132 Ill. 161, 23 N. E. 1021 (1800); *Chicago & A. It. Co. it. Clausen*, 173 El. 100, 50 N.E. 650 (1895); *Beavely it. HarrIs*, 239 Ill. 526, 88 N.E. 238 (1909). See, also, *People it. Powell*, 274 Ill. 224, 113 N.E. 614 (1916).



45. *Hyde's Ferry Turnpike Co. v. Yates*, 108 Penn. 428, 430, 67 SW. 69 (1902). Cf. *Warren v. Badger Lead & Zinc Co.*, 255 Mo. 138, 164 SW. 206 (1914).

## Sec. 307

### *Defects in the Verdict*

FROM the logical nature of the Rules governing all Common-Law Pleading, it is apparent that, if a Verdict is to be effective as a finding upon the Issues presented, it must conform to and include all matters of Substance covered by such Issues. Judgment will consequently be Arrested when a General Verdict, awarding Entire Damages, is given on a Declaration containing Several Counts, some of which are bad, but not when it is silent as to matters which, though submitted, can have no effect upon the merits of the controversy.<sup>46</sup>

### *Relation of Motion in Arrest of Judgment and*

#### *Aider by Verdict*

AS we have seen,<sup>47</sup> 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 can be taken on that ground by motion in Arrest of Judgment, or by Writ of Error.~ The doctrine of Aider by Verdict is

46. *Leach v. Thomas*, 2 Id. & W. 427, 150 Eng.Bep. 824 (1837); *Posnett v. Marble*, 62 Vt. 481, 20 A. 813 (1890).

In most States if there is One Good Count by which a General Verdict can be supported, Judgment will not be arrested because some of the counts are defective. *Langan v. Enos Fire Escape Co.*, 233 Ill.

308, 84 N.E. 267 (1908); *Klofski v. Railroad Supply Co.*, 235 Ill. 146, 85 N.E. 274 (1908); *yarn v. Pelot*, 55 Fla. 357, 45 So. 1015 (1908). See, also, *White v. Bailey*, 14 Conn. 272 (1841), absence of finding on immaterial issues; *Patterson v. United States*, 2 Wheat 221, 4 LEd. 224 (1817).

47. See *Alder and Amendment*, e. 26, § 299.

48. *Lightfoot v. Brightman*, Hut 54, 123 Eng.ltep.

1096 (1622); And see, Arkansas: *Knight v. Sharp*, 24 Ark. 602 (1867); Illinois: *Beeves v. Forman*, 26

founded on the Common Law, and is entirely independent of any Statutory Enactment. The expressions "Cured" or "Aided by Verdict" signify that the Court will, after Verdict, presume or intend that the particular thing which appears to be Defectively or Imperfectly Stated, or Omitted, was duly proved at the Trial so as to support the Verdict. But, if the Declaration fails to allege any Substantive Fact which is essential to the Statement of a Cause of Action, and which is not implied in, or inferrable from the finding on those which are alleged, a Verdict for the plaintiff does not Cure the Defect. Thus, for example, if in Ejectment the plaintiff Omits the Allegation of Ouster, and the Jury nevertheless finds a Verdict for the plaintiff, the Judgment must be Arrested.

The extent and principle of this doctrine has been succinctly stated in the famous English case of *Jackson v. Pesked*,<sup>49</sup> in which

Ill, 3J.3 (1861); *Commercial Ins. Co. v. Treasurit Bank*, 61 Ill. 482 14 Am.ltep. 73 (1871); *Compton v. People*, 86 Ill. 176 (1877); *Barnes v. Brookman*, 107 Xli. 317 (1883); Maryland: *Merrick v. Trustees of Bank of Metropolis*, 8 Gill. (Md.) 50 (1849); Massachusetts: *Colt v. Itoot*, 17 Mass. 229 (1821); New Hampshire: *White v. Concord J3. Co.*, 30 N.H. 188 (1855); New York: *Addingtoun v. Allen*, 31 Wend. (N.Y.) 375 (1833); Vermont: *Harli]lg v. ('aigie*, 8 Vt. 501 (1836).

For a failure to aiter full performance by plaintiff in an Action on a Contract, see *Warren v. Harris*, 2 Gil. (Ill.) 307 (1845) ; for a defective statement in an action for rent against a tenant holding oiter, see *Clinton Wire'Cloth Co. v. Gardner*, 99 Ill. 151 (1881); for failure to count on the Statute under which the action was brought, see *Pearce v. Foot*, 113 Ill. 228 (1885); for want of Venue, see *Toledo, P. & W. By. Co. v.*

Webster, 55 Ill. 338 (1870); Roberts *it.* Corby, 86 Ill. 182 (1877); for want of a sum in the Ad Damnum clause where the body of the Declaration shows a claim of Damages, see Burst v. Wayne, 13 Ill. 599 (1852); for want of formal Joinder in Issue, see Strohm *it.* Hayes, 70 Ill. 41 (1873); Imperial Fire Ins. Co. *it.* Shimer, 96 Ill. 580 (1881). See, also, note, Aider by Verdict, 6 Va.L.Rev. 285 (1020).  
 40. 1 Id. & S. 234, 105 Eng.Rcp. 88 (1813). See also, Snuth *it.* Eastern B. B., 85 N.H. 303 (1857); Flanders *it.* Town of Stewartstown, 47 N.H. 549 (1867); Wallace *it.* Curtiss, 36 Iii. 156 (1864); Helman *it.*

**RETROSPECTIVE MOTIONS**

**575**

**Ch. 27**

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576

**LITIGATING TUE CONTROVERSY**

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Lord Ellenborough, J., declared: “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.” And, the principle was well stated, as previously observed, that “where there is any Defect, Imperfection, or Omission in Any Pleading, whether in Substance or Form, which would have been a Fatal Objection upon 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 by the Common Law.” 50

It is only where a “Fair and Reasonable Intendment” can be implied 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

Schroeder, 74 Ill. 158 (1874); Ladd *it.* Piggott, 114

III. 647,2 N.E. 503 (1885).

be. *Stennel v. Hogg*, 1 Wms.Saund. 226, 228 note i, 85 Eng.Rep. 244, 245 (1609). See, also, *City of Elgin v. Thompson*, 98 Ill.App. 358 (1001).

which are, and such as are not, Cured by Verdict, was laid down in the year 1781, by Lord Mansfield, in the case of *Rushton v. Aspinall*,<sup>51</sup> to the following effect: Where the statement of the plaintiff's Cause of Action, or Title, is Defective or inaccurate, the Defect is Cured by a General Verdict **in his favor**; because, to entitle him to recover, all circumstances necessary, in Form or Substance, to complete the Title so Imperfectly Stated, must be proved at the Trial, and it is therefore a fair presumption that they were so proved. But, where no Title or Cause of Action is shown, the Omission is Not Cured; for if a necessary Allegation is altogether Omitted from the Pleading, or if the latter contains Matter Adverse to the Right

51.2 Doug. 679, 09 Eng.Rep. 430 (1781)~ And see,

English: *Jackson v. Pesked*, 1 Id. & 5. 234, 105 Eng. Rep. 88 (1813); *Nerot v. Wallace*, 3 T.R. 25, 100 Eng.Rep. 436 (1780); *weston v. Mason*, 3 Burr. 1725, 97 Eng.Rep. 1067 (1765); Illinois: *Bowman v. People*, 114 Ill. 474, 2 N.E. 484 (1885); *Barnes v. Brookman*, 107 Ill. 317 (1888); *Smith v. Curry*, 16 Ill. 147 (1858); Missouri: *Richardson v. Farmer*, 36 Mo. 35 (1865); *Roper v. Clay*, 18 Mo. 383 (1853); New Hampshire: *White v. Concord B. Co.*, 30 N.H. 188 (1855); *Town of Colebrook v. Merrill*, 46 N.H. 160 (1865); Pennsylvania: *Miles v. Oldfield*, 4 Yeates (Pa) 423 (1807).

As to the assignment of a General instead of a Special Breach, see *Minor v. Mechanics' Bank of Alexandria*, 1 Pet. (U.S.) 63, 7 LEd. 47 (1828). Cf. *Abrahams v. Jones*, 20 Ill.App. 83 (1880).

On the Statement of a wrong Venue, see *Barlow v. Garrow*, *Minor (Ala.)* 1 (1820); on a Defective Consideration, see *Hendrick v. Seely*, 6 Conn. 176 (1826); on a Joinder of Good and Bad Counts in the same Declaration, See *Payson v. Whitcomb*, 15 Pick. (Mass.) 212 (1834); on the Defective Statement of a Good Title or Cause of Action, see *Gardner v. Lindo*, 1 Cranch CC. 78, Fed.Cas.No.5,231 (1802); *New Hampshire Mut. Fire Ins. Co. v. Walker*, 30 N.H. 324 (1855); *Clark v. Fairley*, 24 Mo.App. 420 (1888); on Want of Special Demand, see *Bliss v. Arnold*, 5 Vt. 252 (1836). See, also, *Andros v. Childers*, 14 Or. 447, 13 P. 65 (1887); *McCune v. Norwich City Gas Co.*, 30 Conn. 521 (1862); *Moline Plow Co. v. Anderson*, 24 Ill.App. 3M (1887); *Blair v. Chicago & A. By. Co.*, 89 Mo. 353, 1 S.W. 350 (1887); *Palmer v. Arthur*, 131 U.S. 60, 9 SOT. 649, 33 LEd. 87 (1888); *Western Union Tel. Co. v. Longwill*, 5 N.M. 308, 21 P. 839 (1889).

## Sec. 308

### RETROSPECTIVE MOTIONS

577

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.

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.<sup>52</sup>

#### THE MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

308. When a Plea is Good in Form, but shows no valid Answer to the Merits of the Action, the Court will order Judgment for the plaintiff, Notwithstanding a Verdict in favor of the defendant. The Motion will now be Granted in favor of a defendant, where the plaintiff's Pleadings are not sufficient to support a Judgment upon a Verdict in his favor.

IN a certain class of cases, where the Party who has secured a Verdict, is not entitled to a Judgment upon it, the Court may not only Arrest the Judgment in pursuance of the Verdict, but may give Judgment in Chief, Non *Obstante*

*Verdicto*; that is, in favor of the Party against whom the Verdict was found. But such a course of procedure was taken only in clear cases where there was no doubt that the Party, against whom the Issue was found, was entitled to Judgment upon the Whole Record.<sup>53</sup> This was, in effect, a Motion for Judgment on the Pleadings, and was granted, for example, where a Plea in Bar confessed a good Declaration, but the matter Alleged in Avoidance constituted no Legal Defense. In such

§2. *Easton v. Pratehett*, 4 Tyr. 472 (1834); *Keller v. Chicago City H. Co.*, 256 Ill. 454, 100 N.E. 145 (1912).

§3. *Trussel's Case*, Cro. Eliz. 213, 78 Eng. Rep. 469

(1591); *Clafin v. Lawes*, 8 Mass. 201 (1811); *Lough v. Thornton*, 17 Minn. 253 (1871).

a situation, as the right of the plaintiff to recover had been confessed by the Defective Plea, it would amount to a denial of Justice to withhold from the plaintiff a Judgment in Chief.

It should be observed that in such a case the Judgment is in reality grounded upon the Confession made in the Plea, without regard to the Verdict, as the Verdict decides nothing however it may go.

Formerly, the Motion for Judgment *Non Obstante Verdicto*, was granted only where it Appeared upon the Record that the plaintiff was entitled to Judgment Notwithstanding the Verdict for the defendant; and the defendant was limited to a Motion in Arrest of Judgment, and could not obtain a Judgment after a Verdict for the plaintiff upon a Bad Declaration.<sup>55</sup> But, under Modern Law, the Motion was also held available by some American Courts in favor of a defendant, where the plaintiff's Pleadings were not sufficient to support a Judgment in his favor.

It has been urged that this difference is unsubstantial, since a Judgment for the defendant without regard to the Verdict is in fact an Arrest of Judgment.<sup>57</sup> But according to Keigwin,<sup>54</sup> the difference is not altogether unsubstantial, as an Arrest of Judgment is by no means equivalent to the Entry of Judgment *Non Obstante Verdicto*. He ob

54. *Collier v. Jeneks*, 19 R.I. 403, 34 A. 998 (1896); Gould, *A Treatise on the Principles of Pleading*, Pt. II, Procedure, e. V. Arrest of Judgment and Ito-pleader, 171, 172 (6th ed. by Will, Albany, 1909).

155. *Bumham v. New York Co.*, 17 R.I. 544, 23 A. 628 (1891); *Bellows v. Shannon*, 2 Hill (N.Y.) SO (1841).

56. *Tooker v. Arnoux*, 76 N.Y. 397 (1879); *Plunkett v. Detroit Electric By. Co.*, 140 Mich. 299, 103 NW. 020 (1905); *Garrett v. Beaumont*, 24 Miss. 377

(1852); *Shiites v. Eno Cotton Mills*, 151 NC, 290,

60 S.E. 141 (1909); *Cruikshank v. St. Paul Fire & Marine Ins. Co.*, 75 Minn. 266, 77 NW. 958 (1899).

57. Keigwin, *Cases In Common Law Pleading*, c.

XVIII, *The Retrospective Motions*, 773, n. 3 (24 ed. Rochester 1934).

ss. *Ibid.*

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## LITIGATING THE CONTROVERSY

### Ch. 27

serves that upon an Arrest of Judgment, no Entry of Judgment is made for Either Party, except where the plaintiff desires a Judgment to be Entered for the defendant to serve as the basis of an Appeal, thus enabling him to have a Final Adjudication of the alleged Cause of Action. In the absence of such an Entry, the action stops at the Arrest of Judgment, with the rights of Neither Party prejudiced, and with the plaintiff free to renew the litigation in some other form and at some other time when success is more apt to attend his efforts. By contrast, a Judgment *Non Obstanto Veredjcto* is as conclusive as is any other Judgment.<sup>50</sup>

And there is also a distinction between a Judgment *Non Obstante Veredicto* and a Re-pleader; 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 aa'i 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.<sup>60</sup> 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.

58. Birmingham *it. Andrews*, 222 Ala. 362, 132 So. 877 (1931).

60. English: Lambert *it. Taylor*, 4 Barn. & C. 138,

107 Eng.Rep. 1010 (1825); New York: Otis *it. Hitchcock*, 6 Wend. 433 (1831).

See, also, English: Wilkes *it. Broadbent*, 1 Wils.TCB. 63, 95 Eng.Rep. 494 (1744); Alabama: Adams *it. Munter* 74 Ala, 338 (1883); Pennsylvania: Buckley *it. Duff*, 111 Pa. 223, 3 A. 823 (1886); Inquirer Printing & Publishing Co. *it. Rico*, 106 Pa. 023 (1884).

### THE MOTION FOR REPLEADER

**309.** When the Court, from the Whole Record, is unable to determine for whom the Judgment should be given, by reason of the Issue as developed by the Pleadings having been an Immaterial One, it may order the Parties to Plead De Novo.

WHEN the Parties to an Action have Joined Issue and the Jury has rendered a Verdict upon a point which in its nature is not calculated to determine the controversy on its merits, the Court, not having the proper material upon which to render a Final Judgment in Bar for One Party or the Other, will direct the Parties to Replead the case from the point where there was a Departure from correct Allegation.<sup>61</sup> Such a direction is only ordered after Verdict, for the obvious reason that until then the question for whom the Judgment should be rendered cannot well arise. Beginning with the first Defective Allegation, without regard to the side on which it appears, the New Pleading continues until each Faulty Pleading is replaced with a correct one, and there is a Joinder on a Material Issue, Which will make it possible to determine the case on the merits.

The usual case for Awarding a Repleader occurs when the defendant, Not Confessing the Plaintiff's Cause of Action, sets forth some Fact which is immaterial and hence not calculated to decide the controversy on *the* merits, whereupon the plaintiff inadvertently traverses the Immaterial Allegation, upon which a Verdict is rendered. The Fact found by the Verdict, not being adapted to determine the litigation, and the Court, not able to render a Judgment on the merits, should order a Repleader for the purpose of producing a Material Issue. Thus, for example, where A brought Assumpsit against

61. For a discussion of Repleader, see McRelvey, Common-Law Pleading, e. VII, Motions Based on the Pleadings, III, Repleader, 179—182 (Now York 1914). See, also, Ex parte Pearce, 80 Ala. 195

(1885).

an Administrator, and alleged a Promise by the decedent to pay money, and B, the defendant, Denied that he so Promised, the Plea neither Admits nor Denies the Promise of the decedent. The fact that B set up, to wit, that he had made No Promise, whether true or untrue, was irrelevant, and not responsive to A's Allegation that the decedent had promised to pay the money. To this Plea, the plaintiff should Demur, but if he should mistakenly Traverse it, the Issue created would be an immaterial one, and a Verdict would not, therefore, be decisive as to the merits of the case. Accordingly, the Court should Award a Repleader to establish an Issue of Fact upon which a Judgment on the merits might be rendered for one Party or the other.<sup>62</sup>

The famous case of *Staple v. Heydon*<sup>63</sup> affords another example of a situation which called for a Repleader. A brought Trespass against B, alleging that B had wrongfully entered upon a certain wharf in the Thames river. This wharf was held by A under a lease from C and adjoined a lot on the bank which was held by B under a lease from the same C. B Pleaded that he had a right of way over the wharf, derived from C; but the Plea was Defective in Form because in tracing title it showed that C himself was a lessee, and it did not show from what seisin in fee his term was derived. For this reason his Plea was held Demurrable in Form although it was Valid in Substance. In order to bolster his Defence, B in his Plea further alleged that he had no other way of egress from his lot to the river than by crossing the wharf, which Plea of a right of way by necessity was not supported by the Facts stated in relation to his title. To this part of the Plea A Replied that B had "another convenient way to the river." The Issue thus taken upon the Replication of A was

62. Fairfax v. Lewis, 2 Rand. (Va.) 20, 43 (1823).

63. 2 At. Raym. 921, 92 Eng. Uep. 115 (1703).

clearly Immaterial, and upon a Verdict for the defendant at the Trial, the Court held that the case was one in which a Repleader was proper. So, where, as in the instant case, a defendant interposes a Defense which in itself is valid, but then adds an Allegation of an Immaterial Fact, and the plaintiff mistakenly takes Issue upon that Fact, after which a Verdict is rendered, no Material Issue arises upon which the Court can determine the case upon its merits, and the Verdict, whether for One Party or the Other, fails to guide the Court as to who is entitled to Judgment.

In the example above, the Plea does not Confess the plaintiff's Cause of Action by admitting his title, but Denies his right, although placing the Defense upon an untenable ground. As the defendant has not admitted a *prima facie*

right in the plaintiff, which he has not sufficiently avoided, but on the contrary has disputed the plaintiff's right, but for reasons which are invalid, the plaintiff is not in a position to demand a Judgment Notwithstanding the Verdict. The Verdict upon the Issue as to whether the defendant had a convenient egress from his lot to the river other than by crossing the wharf, was not determinative of the Issue as to whether the defendant had trespassed upon the plaintiff's wharf. It follows, therefore, that the distinction between a case for Judgment *Non Obstante Verdicto* and one for Repleader turns on whether or not the defendant has by his Plea Confessed the plaintiff's Cause of Action." As Iceigwin observes: "If the Plea admits the Tort or the Breach of Contract alleged and undertakes to Justify or Discharge it by matter not sufficient for that purpose, a Verdict for the defendant merely proves the insufficient Avoidance and leaves the Admission still effective. But, if the Plea contains No **CON**-fession and only some Immaterial Matter

64. Lanther *vs.* Taylor, 4 Barn. & C. 138, 107 Eng.Rep

1010 (1825).

Sec. 309

**RETROSPECTIVE MOTIONS**  
**Ch. 27**

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580

**LITIGATING THE CONTROVERSY**

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of Avoidance (or evasion), there is no gi-ound for Judgment *Non Obstante*, and the Parties should be required to Plead to an Issue appropriate to determine the dispute." 65

**STATUS OF RETROSPECTIVE MOTIONS**  
**UNDER MODERN CODES, PRACTICE**  
**ACTS AND RULES OF COURT**

310. In general, it may be said that the Retrospective Motions, as they existed at Common Law, were adopted in the Early Period of American Procedural Development. Subsequently, due to **the** lack of a Centralized Court System, under which the Trial Judges sat En Banc, as in England, certain Modifications *in* the Procedures Regulating these Motions were made. But in substance these Procedures followed and still follow the Pattern developed by the Common Law Practice.

*Motions for New Trials*

WITH certain Modifications it may be said that the English Common-Law Practice as to Granting New Trials was adopted by the American Courts, being used to Review Errors that occurred at the Trial and which were not Apparent on the Face of the Common-Law Record. And the Grounds for Granting New Trials, as developed in Eng-land, have become the recognized Grounds for New Trials in both Common-Law and Code Jurisdictions.<sup>68</sup> The Four

Day Period after the Entry of the Verdict, during which, at Common Law, the Motion is normally made, has ranged from Two Days in the State of Washington <sup>67</sup> to Sixty Days in Wisconsin. Rule 59(b) of the Federal Rules of Civil Procedure provides that the Motion may be made *as late as Ten Days* after Judgment.

67. ICsigwin, *Cases in Common Law Pleading*, e. XVI II, *Retrospective Motions*, 775 (24 ed., Itocliester 1934).

68. Millar, *Civil Procedure of the Trial Court In Historical Perspective*, c. XIX, Trial by Jury, 7, The Motion for New Trial, 3341 (New York 1952).

69. Wash.Rev.Stat. ~ 402 (Remington, 1932).

70. Wjs.Stat. ~ 270.49 (1949).

According to Millar,<sup>69</sup> our Courts have followed the Common-Law Practice in allowing more time where the Motion for New Trial is based upon Newly Discovered Evidence. A Motion on this Ground may be made within a reasonable time, Not More than One Year from the Date of Judgment, under Rule 60(b) of the Federal Rules of Civil Procedure,

The Motion for New Trial, as at Common Law, is still addressed to the Court's discretion.<sup>70</sup> While there is a distinction between a Motion Raising a Question of Law, and one incorrectly characterized as an "Error in Fact," as, for example, where it is asserted that the Verdict is against the weight of evidence, it seems clear that in most Jurisdictions Errors of Law not productive of manifest injustice will not warrant the granting of a New Trial. Unfortunately, some American Courts have followed the 1835 English Court of Exchequer Rule, under which, in the matter of evidence, "an Error of Ruling created *per se* for the excepting and defeated party a right to a New Trial." The Common-Law Rule, under which a New Trial was not in order, even though mistakes may have occurred, if it appeared upon the whole that substantial Justice had been done, now seems the proper solution. Within forty years after it was adopted, the "Exchequer Rule" was abolished in England under the Judicature Acts, with the Rules of 1875, which provided that a New Trial on the ground of an improper Instruction by the Court or an improper Admission or Rejection of Evidence, was not to be granted unless "some substantial wrong or mis-

69. 3111 Cr. Civil Procedure of the Trial Court In Historical Perspective, c. XIX, Trial by Jury, § 7, The Motion for New Trial, 337 (New York 1952).

70. *Id.* at 338.

71. Millar, *Civil Procedure Of the Trial Court in Historical Perspective*, e. XIX, Trial by Jury, § 7, The Motion for New Trial, 338 (New York 1952). see, also, *Crease v. Barrett*, 1 Cr. M. & It. 919, 149 Eng.Lrep. 1353 (1835).

## Sec. 310

### RETROSPECTIVE MOTIONS

carriage has been thereby occasioned in the Trial of the Action."<sup>72</sup>

The Motion for a New Trial in America is generally no longer passed upon by the Court *En Banc*, but by the Trial Judge. This change in the Common-Law Practice resulted from a decentralization of the Trial Courts, and the development of Review of Errors by separate Appellate Courts.

At Common Law a Verdict was indivisible, hence a New Trial involved a Retrial of All Issues, and this was true although the Motivating Error was not applicable to All Issues, and the Same Parties were also involved in the New Trial. One of the earliest recognitions of the Doctrine of Severability of Issues and Parties came in Massachusetts in 1831 in the case of *Winat v. Columbian Insurance Co.*,<sup>73</sup> and since then has come to prevail in Other States.

Related to this problem is that of whether a Court may condition its refusal of a New Trial on the plaintiff's remission of an appropriate amount for that of the Verdict. In *Wood v. Gunstone* ~ decided in 1655, a New Trial was granted because the Damages were Excessive, and this practice has continued.<sup>3</sup> Nor does the Court's Action in this respect violate the Constitutional Right to Trial by Jury.<sup>o</sup> A more difficult question arose when the Amount of Damages given in the Verdict appeared Inadequate, and there has been some doubt expressed as to the Constitutionality of Statutes in Some States prohibiting

72. For the details of this development, see Millar, *Civil Procedure of the Trial Court In Historical Perspective*, e. XIX, Trial by Jury, § 7, The Motion for New Trial, 339 (New York, 1952).



73.29 Mass. 279 (1831).

74. Style 466, 82 Eng. itep. 867 (1655).

- Scott, Fundamentals of Procedure in Actions at Law, c. IV, Excessive and Inadequate Damages, 110 a. 4 (New York 1922).

76. Smith v. Times Pub. Co., ITS Pa, 481, 36 A. 296 (1896).

New Trials because of the Smallness of the Damages Awarded.” The narrow English doctrine as to the Severability of Issues received a check in the decision of Chief Justice Doe of New Hampshire in the case of *Lisbon v. Lyman*,<sup>76</sup> in which he took the position that a Party had a right to have a Prejudicial Error in a Trial corrected, but not a right to a New Trial if the error could be otherwise corrected, and that in making such correction it was necessary to destroy only what was erroneous when the latter could be severed from the former. This Ruling was followed in Other States, New Jersey making it the subject of a Provision of the New Jersey Practice Act of 1912.~° And in *Dimick v. Schiedt*,<sup>80</sup> the problem dealt with the Issue in a negative manner, the Supreme Court holding that, regardless of Earlier Rulings, the Common Law at the time of the adoption of the Constitution “forbade the Courts to increase the Amount of Damages awarded by a Jury in Actions such as that here under consideration,”—that the practice of Increasing Damages, where the Damages given by the Verdict were Inadequate, was no part of recognized practice—and hence was to be regarded as in violation of the Seventh Amendment. Mr. Justice Stone, in a dissenting opinion, viewed this conclusion as untenable, and it has been urged that there appears to be no convincing reason why the Additur should not be governed by the same considerations as the Remittitur.<sup>81</sup>

77. Ilughey v. Sullivan, 80 F. 72 (1897). ts. 49 N.H. 553 (1870).

79. See sub 73, which provided: “When a New Trial ~s Ordered because the Damages are excessive or inadequate and for no other reason, the Verdict shall be set aside only in respect of Damages, and shall stand good in all other respects.” See, also, *Gaffney v. Lilings*, 90 N.J.H. 490, 101 A. 243 (1917)t

80. 293 U.S. 474, 482, 55 S.Ct. 206, 299 (1935).

St. Millar, Civil Procedure of the Trial Court in Historical Perspective, c. XIX, Trial by Jury, f 7, The Motion for New Trial, 345 (New York, 1952).

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## LITIGATING THE CONTROVERSY

### Ch. 27

#### *The Motion in Arrest of Judgment*

THE Motion in Arrest of Judgment was used in the Early Period of American Procedure, and is still in effect in our Common Law Jurisdictions. In Some States, as, for example, Massachusetts 87 and Rhode Island,<sup>83</sup> its use was limited to cases involving a Lack of Jurisdiction of the Court, whereas in Maine,<sup>84</sup> the Motion was abolished entirely in Civil Cases. No mention of the Motion was included in the New York Code of Procedure in 1848, but it has received Statutory Recognition in a Few States having Unitary Procedures, such as Arizona, Georgia, Indiana, North

Carolina and Texas, In a Few Other States such as Colorado and South Carolina, it has been used without such Statutory Recognition. In still Other States, as in Kentucky, the Motion in Arrest and the Motion for Judgment *Non Obstante* were fused by Statutory Enactment,<sup>85</sup> and this practice has been adopted in a number of Other States. This latter Motion, which is in effect a Motion for Judgment on the Pleadings, is not restricted to a Motion After Verdict, and it had the combined effect of a Demurrer and the relevant Common-Law Motions. In New York the recognition of the Judicial Equivalent of the Common-Law Motions was given Statutory Effect in 1908 when the Legislature provided that where either Party was entitled to Judgment on the Pleadings, the Court might give Judgment at any time after Issue Joined,<sup>86</sup> and this provision was carried forward in the Civil Practice Act

82. Mass. Ann. Laws, c. 231, § 136 (1933).

83. R.I. Gen. Laws Ann., e. 522, 1 (1938).

84. Me. Rev. Stat., e, 100, 52 (1944).

85. ICy. Code Pract. In Civil Cases, § 424 (1851), reenacted in the Code of 1854, § 410. The Statute required that "where, upon the statements in the Pleadings, one party is entitled by Law to Judgment in his favor, Judgment shall be so rendered by the Court, though a Verdict has been found against such party."

of 1920, ~ being expanded to permit consideration of Admissions outside the Pleadings, and it was made available at any Stage of an Action or Appeal. In the Common-Law Motions, the result of the Motion turns upon the Pleadings exclusively, without any regard to the evidence. The Rule is probably to the contrary under the liberal provisions as to Amendment which now prevail, except where the Fact involved was neither alleged nor subject to Proof. This situation was met in England by the Common Law Procedure Act of 1852, ~ which permitted the Party whose Pleadings were said to be Defective to suggest the existence of the Fact in question, which, when Pleaded to by the Opposite Party, was then tried. If found in favor of the Suggesting Party, he was entitled to the rendition of the same Judgment which would have been entered if the fact had been Originally Stated in the Pleading under attack. This Practice was adopted in substance in Florida.<sup>89</sup>

Under the Federal Rules of Civil Procedure the Motion in Arrest of Judgment is not recognized, but the same work to some extent is done by the Motion for Judgment on the Pleadings, which may be made in advance of the Trial.<sup>90</sup> And under the Amendments of 1946, and the rule currently in effect, it is provided that if Matters Outside the Pleadings are considered on the Motion, such Motion is to be treated as One for Summary Judgment.<sup>91</sup>

*The Motion for Judgment Notwithstanding the Verdict*

THE Motion for Judgment *Non Obstante Verdicto* operated on the theory that the defendant's Plea had expressly admitted the Cause of Action Stated in the Declaration,

87. N.Y.C.P.A. 476 (Clevenger, 1962).

88. 15 & 16 Vict. e. 76, li 143, 144.

89. Pla. Stat. § 5427 (1949).

90. Rule 12(c).

91. N.Y. Laws, e. 166 (1908).  
 92. Ibid,

**Sec. 310**  
**RETROSPECTIVE MOTIONS**

583

while failing to interpose a legally sufficient Defense. This Motion, like that in Arrest of Judgment, was affected by the Statute of Demurrers<sup>92</sup> and the doctrine of Aider by Verdict. It was used during the Developmental Stage of American Procedure, and, like the Motion in Arrest, has been retained in the Common Law States. It received no recognition in the New York Code of Procedure in 1848. Under Modern English Law the names of the Retrospective Motions no longer constitute a part of "the working procedural vocabulary." ~ Under the English Rules, the Issue as to a failure to State a Cause of Action or Defense after Verdict, is converted into one as to whether a Proper Cause of Action or

Defense has appeared in the evidence, as the applicable principle now is, according to Lord Atkin in *Bell v. Lever Bros., Ltd.*,<sup>94</sup> that “if the Issue of Fact can be fair]y determined upon the existing evidence, they (the Parties) may of course Amend.”

The Motion for Judgment Notwithstanding  
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92, 27 Elis. c. 5, 6 Statutes at Large 300 (1553).

93 Millar, Civil Procedure of the Trial Court in Historical Perspective, e. XIX, Trial by Jury, § 5, The Motion In Arrest and its  
Congeners, 329 (New York 1952).

H 11932i AC. 161, 218.

Development, must not be confused with the Motion for Judgment on the Evidence Notwithstanding the Verdict, as  
the former is governed by the State of the Pleadings, while the latter is influenced by the State of the Evidence.<sup>95</sup>

*The Motion for Re pleader*

THE Motion for Repleader, granted upon the Immateriality of the Issue as made by the Pleadings, has survived in  
most Common Law Jurisdictions<sup>96</sup> and in some other places.<sup>97</sup> Where not present in its Common-Law Procedural  
Form, the same result may generally be accomplished by obtaining an Order for an Amendment of the Pleadings and  
the Award of a New Trial.<sup>85</sup>

90' For a full discussion of this new procedural de~ vice, see, Millar, Civil Procedure of the Trial Court in Historical Perspective, c. XIX, Trial by  
Jury, 6, The Motion for Judgment on the Evidence Not~vitlistanding the Verdict, 330435 (New York 1052).

90. Millar, Civil Procedure of the Trial court in Historical Perspective, e. XIX, Trial by Jury, § 5, The Motion in Arrest and its congeners, 320  
(New York 1952).

97. 49 C.J. 580, § 812.

98. 1sf Illar, Civil Procedure of the Trial Court in Historical Perspective, c. XIX, Trial by Jury, 5, The Motion in Arrest am] its  
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## PART SIX

### JUDGMENT, EXECUTION AND APPELLATE REVIEW CHAPTER 28 THE JUDGMENT

The Definition and Nature of a Judgment.

The Judgment the Object of an Action.

The Judgment at Law and Decree in Equity Compared and Distinguished.

The Classification and Scope of Judgments.

Revival of Judgments.

Status Under Modern Codes, Practice Acts and Rules of Court.

## THE DEFINITION AND NATURE OF A JUDGMENT

311. A Judgment is the Award of Relief pronounced by a Court, upon the Facts Found.

AT Common Law, on the expiration of the Rule for Judgment, if there were no previous Motion for a New Trial, or in Arrest of Judgment, and if the prevailing Party had had the Postea stamped and marked by the Clerk of the Postea, he might proceed to sign Final Judgment.

According to Blackstone, in Ancient Times a Judgment was represented as the determination and Sentence of the Law and not the determination or sentence of the Judge pronouncing it, 'The theory was that it would better command the obedience of the suitors and the support of the community if it was regarded as the Act of the Law, binding on all, as opposed to being treated as the Act of the Judges, who were not infallible. This distinction found expression in the Style and Form of the Judgment, which were said to be

2-3 Blackstone, Commentaries on the Laws of England, 396 (6th ed., Dublin, 1775).

"the Sentence of the Law, pronounced by the Court upon the Matter Contained in the Record." 2 Thus, the Ancient Judgment made no mention of the Judges,<sup>3</sup> but read: "It is considered by the Court" (*consideratum est per curiam*) that the plaintiff do recover his Damages, his Debt, his Possession, and the like; which implies that the Judgment is none of their own, but the Act of Law, pronounced and declared by the Court.<sup>4</sup>

### THE JUDGMENT THE OBJECT OF AN ACTION

312. An Action or Suit is a Proceeding, the object of which is to secure a Judgment.

UNDER the Modern View, it may be said that the Final Judgment or Decree is the Award of the Relief provided by Law for the redress of injuries or the enforcement of

2. Id. at 305.

3. Martin, Civil Procedure at Common Law, c. XIV, Trial, Verdict, Judgment and Execution, Art. III, Judgment, 374, Defined, 315 (St. Paul, 1005).

4. Ibid.  
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### Sec. 313

### TUE JUDGMENT

585

rights, as that the plaintiff do recover his Damages, his Debt, his Possession and the like, and the entire Action or Suit is merely the vehicle or means of pursuing and making application for this Award. An Action or Suit may be defined as a Proceeding to obtain a Judgment (which term we may use to include the Decrees of Courts of Equity), which is the great end and object of all contentious proceedings. The Final Judgment is the Conclusion of Law officially declared and pronounced by the Court upon the Facts Found, after due deliberation and inquiry, declaring that the plaintiff has either shown himself entitled, or has not, to recover the redress he sues for. In Jurisdictions which have abolished the distinctions between Law and Equity as far as Procedure is concerned, the final determinations of any Action or Suit is called a Judgment.<sup>5</sup>

The natural right to relief for Breaches of Contracts would seem to be performance in Kind, to be enforced by an Order of the Court directing the defendant to perform under threat of punishment by imprisonment or fine. So, in the case of Tort, it would seem that the plaintiff should have a right to specific reparation, by a decree compelling the Tort-Factor to restore the state of things that would have existed but for his wrong. Likewise, in the case of a claim

to property, the natural relief would seem to be a decree requiring the detainer to deliver possession of the property and make restitution of the very thing itself.

As a General Rule, however, Money Damages **are** the panacea of the Common Law; Specific Relief is regarded as exceptional and extraordinary, and generally attainable only in Equity, except in the case of recovery of Debts and of Possession of Real and Personal Property.

5- See Walker y. Walker, 93 Iowa 643, 61 N.W. 930

(1895).

#### THE JUDGMENT AT LAW AND DECREE IN EQUITY COMPARED AND DISTINGUISHED

313. A Judgment at Law merely determines the Matter of Right between the Parties, whereas a Decree in Equity not only determines the Matter of Right between the Parties, but orders the defendant to obey the Decree on Peril of Contempt for failure so to do.

THE Judgment of a Common-Law Court did not order the wrongdoers to do anything; it did not directly seek to compel them to repair their wrongs. It merely determined the Matter of Right between the Parties. Thus, the Judgment was simply that the plaintiff do recover the Damages, Debt or Possession, as the case may be. If the moral persuasion of the Judgment was not sufficient to move the wrongdoer, then the Law intervened in aid of the Judgment. It sought by the exertion of physical force through the Sheriff and the seizure of the defendant's property on Execution to give the plaintiff the Redress Awarded, The Sheriff was invested with legal authority, under Writs **of Execution, to** seize, sell and transfer Title to the defendant's property subject to debts, and by such seizure and sale to pay the Money Judgment out of the proceeds. But in no case was it adjudged at Common Law that the defendant be compelled to act or aid the plaintiff or Sheriff to *do* Justice or Satisfy the Judgment. All that the defendant was required to do was to submit to the authorized acts of the Sheriff. The defendant could not be called before the Court and punished for a contempt because he did not actively exert himself in surrendering his property or disclosing its whereabouts to the Sheriff, so that he might carry out and Satisfy the Judgment. As Professor Langdell remarked: "The defendant may know where the property is, having purposely removed **it** or concealed it from the Sheriff; still he can-not be ordered to deliver it to the plaintiff. **So**, if a defendant has refused to Perform a Contract, a Court of Common Law can only give the plaintiff Damages, no matter how

586

#### JUDGMENT, EXECUTION AND APPELLATE REVIEW

#### Ch. 28

important to the latter actual performance may be." Neither did the Common-Law Courts successfully accomplish a division or partition of real estate among the several coowners, nor compel the rendering of an account, though this was formerly attempted.

A Decree in Equity, as contrasted to a Judgment at Common Law, not only determined the Matter of Right between the parties; it ordered the defendant to do something about it, on peril of being jailed for Contempt if he failed so to do. This was done in the theory that in refusing obedience to the Decree, the defendant was guilty of a Contempt, not to the Chancellor, but to the King, and hence when he proceeded to punish him for Contempt, he used a Procedure unknown to the Common Law, the defendant being treated as if he were a rebel and contemner of the King's Sovereignty.<sup>7</sup>

#### THE CLASSIFICATION AND SCOPE OF JUDGMENTS

314. Judgments are either Interlocutory or Final. The former is one which defines the rights of the parties at an intermediate stage of the action, whereas the latter is one which **ends** the particular Action. The Scope of a Judgment is determined by its Form and **object**.

#### *interlocutory Judgments*

INTERLOCUTORY Judgments define the rights of the parties at an intermediate stage of the action, but they do not

Terminate the Suit. Probably the best instances of Interlocutory Judgments are those entered by Default **in** Actions of Assumpsit, Case, Covenant and Trespass, 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 a Writ of Inquiry or other proceedings

6. A Summary of Equity Pleading, Introduction, IT, Origin and Nature of Equity Jurisdiction and Procedure, 40, p. 32 (3d ed., Cambridge, 1882).

<sup>1</sup> Id. at 138, p. 30.

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. A Judgment for the plaintiff on a Demurrer to **a** Plea in Abatement is such a Judgment as it is a decision on a point independent of the Merits of the Case, and in Form is always that the defendant Answer Over. There are many Judgments, Interlocutory in character, which define the rights of the parties at an Intermediate Stage of the Action.<sup>8</sup>

Judgments before Issue Joined are of various Kinds, including those referred to above, and are in their nature Interlocutory, though often not classed as such. They are generally the result of the fault or neglect of one of the Parties in failing to pursue the means available, and may be for either Party, If for the plaintiff, Judgment may be for Default of Appearance of the defendant, **after** being served with Process; or, in All Actions, *of Nit Dicit*, where, having Appeared, he neither Demurs nor Pleads, nor maintains his Pleadings until the Issue is complete. Again, if the defendant's Attorney Enters on Record a statement that he is not informed of any answer to be given, or if the defendant, having no Defense, chooses to Confess the Action, Judgment for the plaintiff will be respectively *Non Sum Infarnwtus*, or by Confession. **If** for the defendant, Judgments of *Non Prose quitur*, *Retraxit*, (*Jassetur Breve*, *Nofle Prose qui*, 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.<sup>9</sup>

Thus, Interlocutory Judgments at Common Law may be Judgments which are followed by Final Judgments, such as a Default

8. See Martin, Civil Procedure at Common Law, c. XIV, Trial, Verdict. Judgment and Execution, Art. ITT, Judgment, 310—310 (St. Paul, 1905), for a discussion of the various types of Interlocutory Judgments.

<sup>9</sup> Id. at 311.

**Sec. 315**

## THE JUDGMENT

587

Judgment which is followed by an Inquiry to assess Damages and then a Final Judgment; or, Interlocutory Judgments at Common Law may be such as settle an Issue in the course of the Action, but only to clear the way for another Issue to be raised in the same case, such as where the Judgment on an Issue of Law on a Dilatory Plea is in favor of the plaintiff, in which case the Judgment is, Let the Defendant Answer Over to the Action, called a Judgment *Respondeat Ouster*.<sup>10</sup>

### *Final Judgments*

FINAL Judgments are instanced by the Judgments rendered where an Issue of Fact has been tried by a Jury, who also Assess the Damages. Also, at Common Law, a Judgment for plaintiff on a Demurrer to a Pleading-in-Chief, where the damages are liquidated, and a Judgment for defendant on a Demurrer to a Pleading-in-Chief, are Final Judgments. In these cases, there is nothing left to be done, and the Judgment, therefore, necessarily ends that Particular Action, as distinguished from an Interlocutory Judgment, which leaves something remaining to be done and does not Terminate the Action. Thus, a Judgment for plaintiff at Common Law on a Demurrer to a Pleading-in-Chief where the damages are unliquidated, may initially be classified as Interlocutory, but it is followed, after assessment of damages, by a Final Judgment." Final Judgments may be in different forms. If, for example, there is a Judgment for defendant on a Dilatory Plea, either on an Issue of Fact or Law, the Judgment is generally that the Writ be quashed, or the Action Dismissed. Though such a Judgment is not conclusive on the Merits of the Case, it

10. Stephen, A Treatise on the Principles of Pleading

in Civil Actions, c. I, Of the Proceedings in an

11. Martin, Civil Procedure at Common Law, c. IX, Deleices, Art. IT, Demurrer, § 241, Judgments on Demurrer, 201, 202 (St. Paul, 1905). nevertheless disposes of the particular Suit, and has been classified as a Final Judgment.<sup>12</sup>

Under Modern Practice and Statutes, a ruling on a Demurrer to a Pleading-in-Chief usually does not result in a Final Judgment, as where a Demurrer to a Pleading-in-Chief is sustained, the Party whose Pleading is found defective is generally permitted to Amend his Pleading; and where a Demurrer to a Pleathing-in-Chief is overruled, the Party who interposed the Demurrer is generally permitted to Plead Over.

## REVIVAL OF JUDGMENTS

315. If no execution was had upon a *judgment* in a real action for a year, it was necessary to obtain a Scire Facias in order to execute. The same procedure was made available, by Statute, in cases where a Judgment had been obtained in a personal action.

A Scire Facias was also necessary where a new person was to receive the benefit of or to be charged by the execution.

WHEN, in a real action, Judgment was obtained at Common Law for a particular parcel of land, it was required that any execution thereunder be entered on the Roll. If no such entry appeared on the Roll for a year, execution could thereafter be had only by resort to a Writ of *Scire Facias*, which issued to show cause why execution should not be awarded under the Judgment.<sup>13</sup>

The reason the plaintiff was required to resort to *Scire Facias* after the lapse of a year was because it was presumed, in view of his long delay in executing upon the Judgment, that the execution was released. The defendant would not be disturbed in his possession without having the opportunity to plead release in Court, or showing cause why the execution should not be had.

12. ItL. tit 319. 320.

13. Tiddi, The Practice of the Court of King's Bench in Personal Actions, c. XLII, Of Seire Facias, 1000 (1st Am. ed., Philadelphia, 1807). 588

## JUDGMENT, EXECUTION AND APPELLATE REVIEW

### Ch. 28

However, with respect to personal actions, the Common Law rule was otherwise. Where a plaintiff had taken no process of execution for a year, he could not then resort to *Scire Facias*, but was required to commence an action upon the Judgment, and the defendant was obliged to show how the debt, which was evidenced by the Judgment, had been discharged.<sup>14</sup>

This situation with respect to Judgments which had been obtained in personal actions was changed by Statute in 1285, and the plaintiff in a personal action was given recourse to a *Scire Facias* to revive his Judgment, thereby conforming the procedure available to him with that which prevailed with respect to judgments in real actions. However, due to the wording of the Statute some question arose as to whether this was true in the case of a Judgment obtained in an action of Ejectment, which was considered a personal action, or whether the Statute had failed to give the right to one holding a Judgment in Ejectment. In practice, however, the remedy was granted in such cases, which in fact appeared proper under a reasonable interpretation of the statutory language.

A *Scire Facias* was also necessary in cases where a new person was to receive the benefit of or to be charged by the execution, because of the rule that executions must correspond with the Judgments upon which is-sued.

14. l.iii. at 1000, 1001.

15. 13 *Ediw.* 1, Stat, I c 45, 1 Statutes at Large 224 (1955).

<sup>16</sup> Martin, *Civil Procedure at Common Law*, c. II, *Personal Actions Ex Contractu*, A it. VI, *Seire Paeias*, § 72, *Definition and History*, 67 (St. Paul, 1905). At page 68 there is a succinct discussion of 'the Writ of Beivor, the origin of which is found in the Common Law Procedure Act of 1852, which

'was made in many instances to serve the purpose of a *Seira Facias* in the enforcement of Judgment

### STATUS UNDER MODERN CODES, PRACTICE ACTS AND RULES OF COURT

316. The Codes often define the Judgment so as to include both the Common Law Judgment and the Decree in Equity. Nevertheless, a Judgment on a claim essentially legal in nature retains the attributes of the Common Law Judgment, while a Judgment on a claim essentially equitable in nature retains the attributes of a Decree **in** Equity.

Under the Codes a Judgment is generally defined *as* the final determination of the rights of the parties in an action or a proceeding.<sup>17</sup> And where the Codes have purported *to* abolish the distinction between actions at law and suits in equity, the final determination of the controversy, be it at law or equity, is termed a Judgment.<sup>18</sup> Thus, the decree in equity has, from the standpoint of nomenclature, been replaced by the Judgment.

To consider this change as being of substantive import, however, would obviously be in error. At Common Law, as indicated in the above discussion, the Judgment at Law was limited to a determination of the matter of right between the parties, while the Decree in Equity not only determined the Matter of Right between the parties, but also ordered the defendant to do something about it, on peril of being jailed for contempt if he failed to do so.<sup>19</sup> The fact that under the Codes the term Judgment now is generally used to embrace both situations does not change the fact that a Judgment on a claim essentially legal in nature will still have the attributes of the Common Law Judgment, while a Judgment on a claim essentially equitable in nature will retain the attributes of a Decree in Equity.

17. *Wood v. City of Salamanea*, 289 N.Y. 279, 45 N. E.2d 443 (1942); *Bell Grocery Co. v. Booth*, 250 Ky. 21, 01 S.W.2d 379 (1933).

18. *Flayinond v. Blanegrass*, 38 Mont. 449, 93 P. 848 (1908).

19. Discussed *supra* at Section 313.

Sec.

## CHAPTER 29 THE EXECUTION<sup>1</sup>

317. Writs of Execution.

318. The Lien of Executions.

319. Status of Execution Under Modern Codes, Practice Acts and Rules of Court.

### WRITS OF EXECUTION

317. A Writ of Execution is an authorization to **an** Executive Officer, Issued from a Court in which a Final Judgment has been rendered, for the purpose of carrying such Judgment into Force and Effect.

1. In general, on the subject of Enforcement of Judgments by Execution, see:

Treatises: Carter, *The Law of Executions* (London 1706); Gilbert, *The Law of Executions, &c.* (London 1763); Burgham, *The Law and Practice of Judgments and Executions Including Extent at the Suit of the crown* (London 1815); Theobald, *The Law for Abolishing Imprisonment for Debt on Mesne Process, Extending the Remedies of Judgment Creditors, &c.* (London 1838); Berman, A. *Treatise on the Law of Executions* (New York 1878); Freeman, *A Treatise on the Law of Executions in Civil Cases and of Proceedings in Aid and Restraint Thereof* (San Francisco, 1876).

Articles: Loyd, *Execution at common Law*, 62 U.Pa. L.Rev. 354 (1913); Riddell, *Why Pickwick was Gao*, 17 ILL.Rev. 14 (1923); 'Fieri Facias Lands' in Upper Canada, 7 Canada Bar.Rev. 448 (1929); Finley, *Arrest of Defendant in civil Cases*, 20 I.Cy.L.J. 478 (1932); Newman and Kaufman, *The New York Garnishee Execution as a Practical Remedy*, 12 N.Y.ILL.Q.Rev. 255 (1934); Lunn, *Modernized*



Process for Enforcement of Judgments, 22 A.B.A.J. 76 (1936); Conard, Judgment-Proof Wealth; A Study of Some Deficiencies in Pennsylvania Attachment Executions. 42 *Di&L.Rev.* 119 (1938); Busehman & Mayersohn, Civil Arrest and Execution Against the Person, 12 Albany L.Rev. 17 (1948); Thompson, Collecting a Judgment, 30 Ore. L.Rev. 95 (1951); Bowman, How to Collect a Judgment, 56 Commercial U. 198 (1951).

**Comments:** Execution Against a Debtor in the House of a Third Party, 57 Albany L.a. 397 (1898); Debtor-Creditor *Law—Exemption from Execution and Other Legal Process*, 10 Wis.L.Rev. 277

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.

(1935); Execution—Contents of Safe Deposit Box Rented by Judgment Debtor, 3 U.Pitt.L.Rev. 159 (1936); Seizure Under Execution—Exemptions— Substitution, 11 Tulane L.Rev. 145 (1936); Levy and Execution—Conditional Sales—Leviahie Interest of Conditional Vendee—Waiver of Reservation of Title, 13 N.Y.J.L.Q.Rev. 623 (1936); Levy of Attachment and Execution on Buyer's Interest Under Conditional Sales Contract, 42 W.Va.L.Q. 152 (1936); Execution—Waiver of Inquisition or Condemnation—Waiver of Irregularity, II Temple L.Q. 106 (1936);

Corporations: Execution: Right of Minority Stockholder to Issue Execution on a Judgment Secured on Behalf of Corporation as Result of Stockholder's Bill, 22 Cornell L.Q. 105 (1936); Emblems—Requisites—Execution, 2 U. of Newark L.Rev. 85 (1937); Execution—Liability for Wrongful Issuance—Malicious Use of Process, 12 Temp.L.Rev. 412 (1938); Execution Against the Person—Special Finding that Defendant was Malicious as Condition Precedent to Issuance of the Writ under Illinois Statute, 17 Chi-Kent L.Rev. 278 (1939); Trial Practice—Levy and Execution—Right to Levy on a Judgment or on a Debt, 14 So.Calif.L.Rev. 172 (1941); Judgments—Executions—Statutes of Limitation, 22 N.C.L.Rev. 146 (1944); Orders of Court and Garnishee Process, 21 Australian L.J. 346 (1948); Execution—Interest Necessary to Support an Exemption Claim, 34 Minn.L.Rev. 350 (1950); Personal Property Exemptions under Missouri Statutes, 19 U.Knn.City L.Rev. 72 (1951); Perpetuating the Force of Judgments and Judgment Liens In Texas, 29 Tex.L.Rev. 580 (1951); Execution—Wife of Judgment Debtor in Contempt (or Violation of Restraining Provision of C.P.A., § 781, 3 Buffalo L.Rev. 318 (1954).

589

590

## JUDGMENT, EXECUTION AND APPELLATE REVIEW

### Ch. 29

There were a variety of Writs of Execution at Common Law against person and property, all of which must be sued out within a year after Final Judgment.

#### *The Definition and Nature of Execution*

AFTER Final Judgment, which in theory is the end of an Action, the plaintiff may, at any time within a year, sue out a Writ of Execution against the body, lands, or goods of the defendant, provided there be no Writ of Error pending, or agreement to the contrary.<sup>2</sup>

An Execution may be defined as a Judicial **Writ** grounded on the Judgment of the Court from which it issues,<sup>3</sup> and is supposed to be Issued by the Court at the request of the party entitled thereto, to give him Satisfaction on the Judgment standing in his favor.<sup>4</sup>

The mere Judicial Declaration of the right to redress, the award of relief, can produce no practical benefit or result, unless the defendant, under its moral persuasion, voluntarily submits to its determination of the Matter of Right between the parties, and satisfies the plaintiff's demand, If such voluntary action is not forthcoming, then the plaintiff must resort to some Form of Execution, the compulsory process for satisfying the plaintiff's demand and putting the relief awarded by Judgment into Legal Effect by the exercise of Executive Force.

Execution, therefore, is in the nature of an Executive Remedy, supplementary to the Judicial Remedy, and may consist:

(1) In placing the plaintiff in possession of his land or property by force, the actual restitution of the thing taken or detained;

<sup>2</sup> Tidd, The Practice of the Court of King's Bench In Personal Actions, c. XLI, Of Execution, 909 (1st Am. ed., Philadelphia, 1807); California: Hastings v. Cunningham, 39 Cal. 137 (1870); Wisconsin: Drake v. Leighton, 69 Wis. 99, 33 NW, 81 (1887).

3. Martin, Civil Procedure at Common Law, c. XIV, Trial, Verdict, Judgment and Execution, Art. IV, Execution, 381, Defined, 324 (St. Paul 1905).

4. Id. at 324, 825.

(2) In taking from the defendant what belongs to him and turning it over to the plaintiff, or selling it at public auction, transferring Title against the owner's will, and applying the proceeds to satisfy the Judgment for money;

(3) In seizing the goods or land of the defendant, and holding them as security until the defendant complies with the Judgment;

(4) In seizing the person of the debtor himself and imprisoning him until he pays the debt or performs the commands of the Court.

At Common Law, the Execution following the Judgment, is either for the plaintiff or the defendant. If for the plaintiff, the Execution upon a Judgment in Assumpsit, Case, Covenant, Replevin or Trespass, was for the damages and costs; in Debt, for the debt damages and costs recovered; in Detinue, the Execution is for the goods or their value, with damages and costs. If for the defendant, upon a Judgment in Replevin at Common Law, the Execution is for a return of the goods. And, in the other Actions, upon a Judgment of Non-pros, Non-suit or Verdict, it is for the costs only.<sup>5</sup>

An Execution must be sued out of the Court which issued the Judgment. And while supposedly awarded by the Judge or Judges in Court, in reality and in practice no such award is in general actually made. The party who secured the Judgment, and who has a Right to a Writ of Execution, usually sued it out of the proper office in the Form adopted under the Law to the Form of Action and Nature of the Judgment to be carried into effect. According to Martin,<sup>6</sup> Executions fall properly into two general classes, each class turning upon the nature of the

5. 2 Tidd, The Practice of the Court of King's Bench in Personal Actions, c. XLI, Of Execution, 911 (1st Am. ed., Philadelphia, 1807).

S. Martin, Civil Procedure at Common Law, c. XIV. Trial, Verdict, Judgment and Execution, Art IV, Execution § 381, Defined, 325 (St. Paul 1905).

## Sec. 317

### THE EXECUTION

591

Judgment to be enforced. These two types of Execution will now be considered, with attention being directed first to executions where the judgment awards possession of property, and second, where the judgment is for the recovery of money only, as a debt or damages.

#### *Restitution of Possession*

IN the case of a Judgment awarding possession of land, a Writ of Possession to the Sheriff, commanding him to give actual possession to the plaintiff of the land so recovered, is an efficient means to put the sentence of the Law into Force. To accomplish the delivery, the Sheriff may take with him the *Posse Comitatus*, or power of the county, calling to his assistance private citizens, and may justify breaking open doors, if the possession be not quietly delivered. But in the Action of Detinue for recovery of personal chattels, if the wrongdoer were very perverse, he could not be compelled to make restitution of the identical thing taken or retained; but he had his election to deliver the goods or their value, an imperfection in the Law, which resulted from the Nature of the Judgment and the methods of Execution employed.<sup>7</sup>

*Execution Against Goods and Profits of Land* THE only Judgments given by the Common-Law Courts were those for the delivery of possession, or for the recovery of a debt or damages. By the Common Law a man could procure satisfaction for his money judgment from the goods and chattels of his debtor, or the present profits of his debtor's land, by the Writs of *then Facias* and *Levavi Facias*. The Writ of *Fieri Facias*

THE Writ of *Fieri Facias* is a Common-Law Writ of Execution, directed to the Sher

7. For an enumeration and discussion of the various forms of executions in actions for the recovery of specific real or personal property, see Martin, Civil Procedure at Common Law, c. XIV, Trial, Verdict, Judgment and Execution, Art. IV, ~ 382, pages 325— 327 (St. Paul 1905).

iff of the County where the Action is laid, commanding him that of the goods and chattels of the defendant, in his bailiwick, he cause to be made or levied, the sum of damages, or the debt recovered, and have it before the King at Westminster on the return day.<sup>8</sup>

This Writ was issuable against privileged persons, peers and the like, as against other common persons; and against executors and administrators, in which latter case, the Sheriff was commanded to make the damages or debt out of the goods of the deceased.<sup>9</sup> By this Writ, the Sheriff has authority to seize and sell all tangible goods and chattels of the defendant, to satisfy the Judgment.”

#### *The Writ of Levani Facias*

AT Common Law, because of the high esteem in which real property was held, such property was not actually subject to Execution for the payment of the plaintiff’s debts. Therefore, when the Writ of *Levani F’acias* issued, commanding the Sheriff to levy the plaintiff’s debt on the lands and goods of the defendant, the Sheriff in executing the Writ, levied only on the goods of the debtor, and the rents and profits of the land, but not on the land itself.” The Sheriff was authorized to continue collection of the rents and profits of the land *until* the satisfaction of the Judgment had been secured.

According to Martin, the Writ of *Lerari Facias*, was substantially superseded by the Writ of *Elegit*, which will be considered next -12

8. 2 Tidd, *The Practice of the Court of King’s Bench in Personal Actions*, c. XLI, Of Execution, 013 (1st Am. ed., Philadelphia, 1807).

9. 3 Blackstone Commentaries on the Laws of England, c. XXVI, Of Execution, 417 (Worcester, 1790).

10. Ibid.

11. Ibid.

12. Martin, *Civil Procedure at Common Law*, c. XIV, Trial, Verdict, Judgment and Execution, Art. IV, ~92

## JUDGMENT, EXECUTION AND APPELLATE REVIEW

### Ch. 29

#### *The Writ of Elegit*

The Writ of *Elegit* was authorized by the Statute of Westminster II (1285), Chapter 18. By reason of this Writ, the Sheriff seized the goods and chattels of the defendant, empannelled a Jury, who appraised the goods and chattels so seized, and, except for oxen and beasts of the plough, thereafter delivered them to the plaintiff at the price placed upon them in part satisfaction of the debt. If the goods and chattels proved insufficient to satisfy the Judgment, then one-half of his freehold lands were also delivered to the plaintiff, to be held until he had satisfied his Judgment or the debt out of the rents and profits thereof, or until the interest of the defendant in the land had expired. While holding the land for this purpose, the plaintiff was called a Tenant by *Elegit*.<sup>13</sup>

This Execution, or seizing of land under an *Elegit*, is of such high nature that after its issuance the body of the defendant could not be taken upon any Other Writ; but where the *Elegit* could not be executed by delivery of lands for the reason that the defendant owned none, and where it appeared that any chattels and goods levied upon were not sufficient to satisfy the plaintiff’s Judgment, the plaintiff might then sue out a Writ of *Capias Ad Satisfaciendum*.<sup>14</sup>

#### *The Writ of Extendi Facias, or Extent*

THE Writ of *Extendi F’acias*, or *Extent*, at Common Law, lay, *first*, for the debts owed to the Crown; *second*, on a Statute Merchant or Statute-Staple, or Recognizance in the Nature of a Statute-Staple; and *third*, on a

Execution, 383, Executions In Actions for the Recovery of Money, 325 (St. Paul 1005).

13. 3 Blackstone, Commentaries on the Laws of England, c. XXVI, Of Execution, 418 (Worcester, 1790).

14. 2 Tidd, *The Practice of the Court of King’s Bench In Personal Actions*, c. XLI, Of Execution, 042 (1st Am. ed., Philadelphia, 1807). Judgment in an Action of Debt against an heir, on the obligation of his ancestor. ~

The debts owed to the King are either of Record, or Not of Record, but in both cases the Execution for them is a Writ of *Extent*, which is either an immediate extent, or one in aid of the King's Debtor. As to debts Not of Record, the Remedy for recovery of them was governed by the Statute of 33 Hen. VIII, c. 39, 5 Statutes at Large 115 (1541), which provided that all obligations and specialties made for any cause touching the King or his heirs, were to be of the same effect as writings obligatory acknowledged according to the Statute of the Staple at Westminster.

The Execution of this Writ was directed against the body, lands and goods of the Crown debtor. And the Sheriff was commanded to inquire by a Jury what goods and lands the defendant was seized of, to appraise and extend them, and to take and seize the same into the King's hands.

In the court of Exchequer, under a practice recognized and controlled by Statutes, a debtor of the Crown might invoke in his behalf, the **Writ of *Extendi Facias***, for the purpose of collecting a debt of equal amount due him from any subject, the theory being that without the aid of such Writ the Crown might be unable to collect its claim against its debtor. Such a Writ could also be invoked by a surety of a debtor to the Crown **who** had paid the debt of the Crown Debtor. As so used the writ was called a Writ of *Extendi Facias* in Aid, as opposed to a Writ of *Extendi Facias* in Chief, where it was employed only to collect debts directly due to the Crown.

#### *The Writ of Capias Ad Satisfaciendum*

The ordinary Common-Law Method of enforcing a Judgment where money only is recovered, as damages or a debt and not any specific chattel, is now, as it anciently was,

<sup>15</sup> Id. at 043.

Sec. 317

### THE EXECUTION

#### 59a

by seizure and sale of the property of the defendant. Execution against the person was, however, at an early date extended from criminal procedure, so that the body of the debtor was or might be imprisoned until satisfaction was made for the debt, costs or damages.

This species of Execution was by a Writ of *Capias Ad Satisfaciendum*, and was assumed by the Courts to be available wherever the defendant was liable to be taken upon a writ of *Capias Ad Res'pondendum*, to compel appearance at the beginning of the suit, or as a provisional remedy and security for the Judgment. At first this Writ was available to subject to imprisonment the body of the defendant in Trespass *Vi Et Armis* only.<sup>16</sup> It was then extended to the Actions of Debt and Detinue by the Statute of 25 Edw. III, c. 17, 2 Statutes at Large 59 (1350), and to the Action on the Case in 1503.<sup>17</sup> The original exemption from arrest at Common Law was probably due to feudal reasons, rather than to a regard for personal liberty.

Where a defendant is at large when the Writ issues, it commands the Sheriff to take body of the defendant, to keep him safely, so that he may have his body in Court on the return-day to satisfy the plaintiff of the debt or damages recovered. When the defendant was already in custody, there was no occasion for the Writ. The effect of this Writ, taken after Judgment, was to deprive the defendant of his liberty until he made satisfaction **of** the debt or damages.<sup>18</sup> If he

<sup>18</sup> Forsythe v. Washteraw circuit Judge, 150 Mieb. 633, 147 NW- 540 (1014).

<sup>17</sup> 10 Hen. VII, c. 9, 4 Statutes at Large 91 (1503).

<sup>16</sup> For a discussion of a series of statutes relieving the harsh technicalities of Execution against insolvent debtors, see Tidd, The Practice of the Court of King's Bench In Personal Actions, c. XLI, Of Execution, 962 (1st Am. ed., Philadelphia, 1807); Including the Lords Act, 22 Geo. II, c. 28, § 13, 22 Statutes at Large 495 (1750); 26 Geo. III, e. 44, 35 Statutes at Large 510 (1786); 33 Geo. ur, c. 5, 39 Statutes at Large 24 (1703); 39 Geo. 111, C. 50, 42 Statutes at Large 238 (1798).

*did not* make satisfaction, he had to remain in custody, at his own expense or the charity of others.th

And the fact that the Writ, among other things, took a man's liberty, led to great hardship and injustice, as is well portrayed in the writings of Dickens.<sup>20</sup> In the Eighteenth Century, by Rules of the King's Bench Prison, by Rules of court, and by Statute, steps were taken to reduce the hardships of poor debtors confined *in* prison on Civil Process. Thus, if a prisoner tendered **sufficient** security, he was permitted his freedom within certain limits outside the jail

walls. By the Statute of 32 Geo. II, c. 28, § 13, 22 Statutes at Large 495 (1759) known as “The Lord’s Act,” if a defendant charged in Execution for a debt not exceeding 1100, which was later extended to £300 by 33 Geo. UI, c. 5, 39 Statutes at Large 24 (1793) surrendered his assets to his creditors, except wearing apparel, bedding and tools of trade, not in excess of £10, and made oath to comply with the Statute, he might be discharged, unless the creditor otherwise insisted, in which case he was compelled to pay the prisoner a certain amount per week. Thereafter, in England, imprisonment for debt was abolished, except in the case of fraudulent debtors, by the Debtors Act, 32 & 33 Vict. c. 62, 109 Statutes at Large 201 (1869), and its amendments.

19. *Manby v. Scott*, 1 Mod, 124, 182, 86 Eng.Rep.

781, 780 (1059). In which Hyde, 3., said: “If a man be taken in Execution and *lie in prison for debt*, neither the plaintiff at whose suit he is arrested, nor the Sheriff who took hint, is bound to find him meat, drink, or clothes (a); but he must live on his own, or on the charity of others: and if no nina will relieve him, Jet him die In the Name of Cod, says the Law (b); and so say I.”

20. See article by Itiddell, Why Pickwick was Gaoled,

17 Ill.L.Rev. 14, 21 (1022).

21. See Tidd, *The Practice of the Courts of King’s Bench in Personal Actions*, c. XLI, Of Execution, 962—978 (1st Am. ed., Philadelphia, 1807) for a disussion of this Statute.

22. Id. at 962—969 for a discussion of this Statute.

594

## JUDGMENT, EXECUTION AND APPELLATE REVIEW

### Ch. 29

#### THE LIEN OF EXECUTIONS

318. A General Lien of an Execution binds property after the **Writ** has come into the hands of the Sheriff and while the Writ remains unsatisfied.

Where goods taken in Execution were permitted to remain in the custody of the debtor, at Common Law such goods might be seized at the suit of another creditor.

At Common Law and in England, the Writ of *Fieri Facias* bound the defendant’s goods from the time of its teste, so that a sale of the goods made thereafter by the defendant, though *bona fide*, might have been avoided.<sup>23</sup> This was changed by Section 16 of the Statute of Frauds,<sup>2-</sup> under which the Writ was to bind the property from the time such Writ was delivered to the Sheriff to be executed, who was to endorse on the back thereof when he received the same. But even so, the property in the goods is not altered until the Writ is actually executed.

If the party dies after the teste, but before the delivery of the Writ to the Sheriff, the goods are bound in the hands of his executors or administrators. As to this situation, the Law is as it was before the Statute, as this involved no change of property by sale and for a valuable consideration.

And under the Statute of Frauds,<sup>25</sup> it has been held that a party who bought goods at a sale under an Execution, which had been delivered to the Sheriff subsequent to the delivery of a prior Execution, was protected from the prior Execution, although, as to any other party, the goods were bound by the prior

23- This common-Law Rule prevailed in Tennessee:

*coffee v. Wray*, S Yerg. (Penn.) 464 (1835); *cecil v. carson*, 80 Tenn. 139, 5 S.W. 532 (1887); in North carolina: *Palmer v. clarke*, is ltc.(2 Dev.L.) 354 (1830), where it has been changed under the code, *welsenfield v. McLean*, 96 N.c. 248, 2 SE. 56 (1587).

2& 29 Car. II, c. 3, 8 Statutes at Large 408 (1676).

delivery of the first Writ, under which the Sheriff ought to have taken and sold them<sup>tm6</sup>

In *Rogers V. Dickey*,<sup>21</sup> an fllinois Court, in commenting on the priority of Execution, declared: “First, that where two or more Writs of *Fieri Facias* are delivered at different times, either to the same or different officers, and no sale is actually made of the defendant’s goods, the Execution first delivered must have the priority, though the first seizure may have been made on a subsequent Execution. Second, but where the goods are actually sold by virtue of a

levy made under a Junior Execution, the sale will be good, and the property can not afterwards be taken from the purchaser by the Senior Execution. The only remedy of the party injured is against the officer.<sup>25</sup>

Where goods were taken in Execution and suffered to remain in the custody of the debtor, at Common Law, such goods might be seized at the suit of another creditor.<sup>26</sup>

Finally, a General Lien of an Execution binds property acquired after the Writ has come into the hands of the Sheriff and while the Writ remains unsatisfied.<sup>30</sup>

## STATUS OF EXECUTION UNDER MODERN CODES, PRACTICE ACTS AND RULES OF COURT

319. The early Common Law Rule exempting lands from sale on Executions has been abolished **by** statutory enactments, and while under such Statutes resort must usually first

26. *Smalleomb v. cross*, 1 Ld.Raym. 253, 91 Eng.Rep. 1064 (1697); *Hutcheon v. Johnson*, 1 P.R. 729, 99 Eng.Rep. 1343 (1787).

27. 6 Ill. 495 (1844).

28. *Rogers v. Dickey*, 6 Ill. 495, 500. See also, English: *Payne v. Drewe*, 4 East 523, 102 Eng.Rep. 931 (1804); *Colorado: Speelman v. Chaffee*, 5 Cob. 247 (1880).

29. Iowa: *Border v. Bengel*, 12 Iowa 330 (1861); New York: *Farrington v. Sinclair* ~5 Johns, (N.Y.) 420 (1818).  
28. *Ibid.*

30. *Roth v. Wells*, 29 N.Y. 471, 490 (1864).

be had to personalty, the general rule now is that the Judgment creates a **lien on Real Property**.

**Certain of the Common Law Writs continue in use, especially that *Of Fieri Facias*, although they may be designated by other names.**

AS among the Common Law Writs, *Fieri Facias* still flourishes, "frequently, it is true, in a code disguise." 31  
The Writ of *Elegit* was too feeble a Remedy to *survive*, although it was long used in Virginia.<sup>32</sup>

31. **Loyd, Executions at Common Law, 62 13. of Pa. L.Rev. 35-1, 364 (1014).**

32. Va.Rev.Cocle (1819), c. 134, where the earlier Acts are alluded to. See, also, *Earbour v. Breckenridge*, 4 Bibb.(Ky.) 548 (1817).

595

One of the *surviving* Common-Law Writs of Execution, the **Writ of *Fieri Facias***, is employed in some States under its original name, whereas in others it is used under the Code designation of a Writ of Execution. The early Common-Law Rule exempting lands from sale on Executions has been abolished by Statutes, and while under such Statutes resort must usually first be had to personalty, the general rule now is that the Judgment creates a lien on the Real Property.

See. 319

## THE EXECUTION CHAPTER 30 APPELLATE REVIEW'

The Writ of Prohibition.

The Writ of Certiorari.

The Writ of Error.

Bills of Exceptions.

Status Under Modern Codes, Practice Acts and Rules of Court.

### THE WRIT OF PROHIBITION

320. In general the Writ of Prohibition lies

to restrain judicial acts affecting either private or public rights; more specifically it is an Extraordinary Writ under which a

## Superior Court

1. In general, on the subject of Appellate Review, see:

**Treatises:** Duller, Introduction to the Law Relative to Trial at Nisi Prius, Pt. VII, c. V, Bills of Exception, 315 (Dublin 1791); Lilly, A Collection of Modern Entries, (6th ed., Dublin 1792); Sydney, A Treatise on the Jurisdiction and Modern practice in Appeals to the House of Lords, &c. (London 1824); Palmer, Practice in the House of Lords on Appeals, Writs of Error-, &c. (London 18~O) Clark, A Summary of Colonial Law, the Practice of the Court of Appeals from the Plantations, &c, (London 1834); Adam, Additional Observations on Bills of Exception, being a Supplement to His Treatise on Trial by Jury (Edinburgh 1836); Burge, Observations on Supreme Appellate Jurisdiction of Great Britain, as it is Now Exercised by the Court of the Queen in Council and the House of Lords (London 1841); Macqueen, A Practical Treatise on the Appellate Jurisdiction of the House of Lords and Privy Council, together with the Practice of Parliamentary Divorce (London 1842); Hodgson, An Analytical Digest of Statutes and Cases Relating to the Practice of Appeals Against Orders of Removal (London 1845); Grant, The Practice in the High Court of Chancery, Including Appeals to Parliament, and Proceedings in Lunacy, with Official Forms, Pleadings and Costs, 2 vols. (5th ed., London 1845); Elliott, A Treatise on Appellate Procedure (Indianapolis 1892); Stephen, A Treatise on the Principles of Pleading in Civil Actions, c. I, Of the Proceedings in an Action, 121 (3d S. by Tyler, Washington, D.C. 1893); Id., c. II, Of The Rules of Pleading, 142, 162; Spelling, A Treatise on New Trial and Appellate Practice (San Francisco, 1903); Pound, Appellate Procedure In Civil

has authority to prevent an Inferior Court

from exceeding its Jurisdiction in a matter over which it has no control, or from going beyond its powers in a matter over which it admittedly has Jurisdiction.

Cases, c. II, Appellate Procedure in England in the Eighteenth Century, 38 (Boston 1941); Id. c. II, Appellate Review in England in the Eighteenth Century: Bill of Exceptions, 44—46 (Boston 1941); Stone, The Scope of Review and Record on Appeal, Am.B.A.Jud.Adm. Monograph, No. 10 (1942); Goebel, Cases and Materials on the Development of Legal Institutions, e. II, Writ of Error, 128 (Brattieboro 1946).

Articles: Kingsbury, Writs of Error and Appeals from the Territorial Courts, 16 Yale L.J. 417 (1907); Sunderland, The Problems of Appellate Review, 5 Tex.L.Rev. 126 (1926); Curran and Sunderlind, Organization and Operation of Courts of Review, 3 Mich.Jud.Coun.Rep. 51 (1933); Crick, The Final Judgment as a Basis for Appeal, 41 Yale U. L.J. 539 (1932); Clark, Power of the Supreme Court to Make Rules of Appellate Procedure, 49 Harv.L.Rev. 1303 (1930); Lisen & Hone, Federal Appellate Practice as Affected by the New Rules of Civil Procedure, 24 Minn.L.Rev. 1 (1930); Sunderlind, Improvement of Appellate Procedure, 26 Iowa L.J. 3 (1940); Brown, Fact and Law in Judicial Review, 56 Bars' L.Rev. 899 (1943); Pound, Appeal and Error—New Evidence in the Appellate Court, 56 Harv.L.J. 1313 (1943); Longdorf, Record on Appeal in Civil Cases In Federal Courts, 26 J.Am.Jud.Soc. 179 (1943); Bennett, Evidence Clear and Convincing Proof: Appellate Review, 32 Calif.L.Rev. 74 (1944); Nims, Shortening Records on Appeal, 4 F.R.D. 153 (1946); Yankwieh, Release on Bond by Trial from Appellate Courts, 7 F.R.D. 271 (1948); O'Halloran, Right of Review and Appeal In Civil Cases Before the Judicature Acts 1875, 27 Can.B.Rev. 46 (1949); Buehsbaum, Appeal as of Right to the New York Court of Appeals on Constitutional Grounds, 24

Sec.

320.

821.

322.

328.

324.

## APPELLATE REVIEW

597

THE Writ of Prohibition lies to restrain a judicial act; and judicial acts include all acts based upon a decision, judicial in its nature and affecting either a public or private right. Thus for example, it may be used to prevent a Judge or Court from proceeding in Execution of a Judgment after an Appeal has been taken;<sup>3</sup> and it lies to prevent a Court of Criminal Jurisdiction from extending its Jurisdiction beyond the proper

N.t.U.L.Q.Rev. 158 (1949); Desniond, *The Limited Jurisdiction of the New York Court of Appeals*, 2 *Syracuse L.Rev.* 1 (1950); Pest, *Oral Aspects of Appellate Argument*, 22 *Rocky Mt.L.Rev.* 273 (1950); Koch, *Suggestions to Attorneys Concerning Appellate Rules and Practice*, II *FED.* 117 (1952); Ben-nick, *Missouri Appellate Practice and Procedure in Civil Cases*, *Wash.ELL.Q.* 486 (1951); Vestal, *Tile Certified Question of Law*, 36 *Iowa L.Rev.* 629

(1951).

*Comment:* *Appellate Hlet-k-w in California with The Extraordinary Writs*, 36 *Calif.L.Rev.* 75 (1948).

*Notes:* *The Harmless Error Rule Reviewed*, 47 *Col. L.Rev.* 450 (1947); *Time to Appeal in Minnesota*, 35 *MinnL.Rev.* 640 (1951); *Raising New Issues on Appeal*, 64 *Harv.L.Rev.* 052 (1951); *Appeal and Error—Municipal Annexation Proceedings—Scope of Appellate Review*, I *Villanova L.Rcv.* 162 (1956); *New Trial—Court Below—Scope of Discretion—Appellate Review*, 17 *U. of Pitt.L.Rev.* 305 (1956).

2. In general, on the Origin, History and Develop-meant of the Writ of Prohibition, see:

*Treatises:* Rogers, *A Practical Arrangement of Ecclesiastical Law, including a Treatise on Prohibition, and Showing the Present Practice in the Ecclesiastical Courts*, (2nd ed., London 1849); High, *A Treatise on Extraordinary Legal Remedies, Pt. II, Quo % Varronto and Prohibition, c. XXI, Of the Writ of Prohibition*, 603—613 (2d ed., Chicago 1884); Plncknett, *A Concise History of English Law, Bk, 1, Pt. II, e. VIII, The Rise of the Prerogative Courts*, 188 (5th ed., Boston 1956).

**Articles:** Adams, *The Writ of Prohibition to Court*. Christlan, 20 *Minn.L.Rev.* 272 (1936); Wolfram, *The “Ancient and Just” Writ of Prohibition in New York*, 52 *Col.L.Rev.* 334 (1952).

-*Comments:* *Prohibition Not Maintainable Where Another Remedy Exists*, 20 *Barv.L. Rev.* 334 (1907); *Prohibition—Whether a Writ of Right*, 26 *Harv.L. Rev.* 378 (1913); *Prohibition—Is the Writ of Pro. hibition a Prerogative Writ?* 37 *ldich.LJlev.* 789 (1939).

-*L State v. Judge of Fifth District Court*, 21 *LeArnt.* 113 (1869).

limits. It does not lie to restrain the institution of a threatened suit, but only one already commenced, If, however, the act is judicial, and can be performed without the existence of an action, Prohibition will lie.<sup>4</sup> It will not lie to restrain an act which can be disposed of upon an Appeal or other ordinary Method of Review.<sup>5</sup> It may be invoked to restrain an Inferior Court or other tribunal from doing an illegal act beyond its Jurisdiction,<sup>6</sup> where it appears that there is no remedy by Certiorari or other adequate proceeding; - and it may be used to restrain an unauthorized act, even where the Court has Jurisdiction,<sup>8</sup> It operates only to prevent the doing of an act, not as a remedy for acts already done.<sup>9</sup>

### THE WRIT OF CERTIORARI<sup>0</sup>

321. In general a Writ of Certiorari is an Order by a Superior Court directing an Inferior Court to send up the Record of some Pending Proceeding for Review; or it may serve to bring up the Record of a Case already terminated be-

<sup>4</sup> *Sweet v. Ilulbert*, 51 *Barb-(N.Y.)* 312 (1868).

<sup>5</sup> *People v. Wayne Circuit Court*, 11 *3fich.* 393 (1863).

<sup>6</sup> *United States v. Peters*, 3 *Dallas (U.S.)* 121 (1795).



1. State v. Whitaker, 114 N.C. 818, 19 SE. 376, (1894).

s. Appo v~ The People, 20 N.Y. 531 (1800).

o. United States v. Hoffman, 4 Wal].(US.) 158 (1866)

o. In general, on the Origin, History and Development of the Writ of Certiorari, see:

Treatises: I Ti&1, The Practice of the Court of King's Bench ia Personal Actiens, c, Xvii, Of the Removal of Causes from Inferior GourtS, 329-- Sod (Philadelphia 1807); Kinsey, An Abridgment of Decisions of the Supreme Court of New Jersey, on certiorari, to Courts for the Trial of Small Causes, ~5,-c. (Burlington, N, J. 1815); Wood, A Treatise on the Legal Remedies of Mandamus aji,l Prohibition, Habeas Corpus, Certiorari anti Quo Wlt'ral,to (Albany 1880).

Articles: Jenks, The Prerogative Writs in English Law, 82 Yale L.J. 523 (1923); Boskey, Mechanics of the Supreme Court's Certiorari Jurisdiction, 46 ~Jol.LRev. 255 (1946); Hannoek, Certiorari—Mandamns—Quo Wgrranto\_Prohibiejon. Should Thoy he Consolidated? 68 N.J.URv. 37, 39, 47 (1945); Smith, The Prerogative Writs, II CambL.J. 40 (1951).

598

## JUDGMENT, EXECUTION AND APPELLATE REVIEW

### Ch. 34

low, in Cases where the Proceedings are Not According to the Course of the Common Law, and there is no other Method of Review.

THE established method by which the Court of King's Bench from the earliest times exercised superintendence over the due observance of their limitations by Inferior Courts, checked the usurpation of Jurisdiction, and maintained the Supremacy of the Royal Courts, was by the Writs of Certiorari and Prohibition, A Writ of Certiorari (cause to be certified) is a Special Proceeding by which a Superior Court Orders some Inferior Tribunal, Board, or Judicial Officer to trails-mit the Record of its Proceedings for Review, for Excess of Jurisdiction. It is similar to a Writ of Error, in that it is a Proceeding -in a Higher Court to Supervise and Review Judicial Acts, but it was available only in cases Not Reviewable by Writ of Error or otherwise. It does not Review Proceedings within the Jurisdiction of the Lower Court, but inquires into the Jurisdiction and Regularity of the Proceedings. Ordinarily, the Writ did not lie after Judgment. But in some instances, as in certain cases of summary proceedings before an Inferior Court, where the proceedings were not according to the Course of Common Law," and there was no other method of review, Certiorari was permitted even after Final Judgment.<sup>2</sup> But Errors in rulings which occurred at the Trial could only be reviewed by Motion for New Trial, Bill of Exceptions, or under Modern Procedure, by Appeal. Certiorari does not lie to Review Executive, Ministerial, or Legislative action of other Departments of Government, but merely corrects encroachments of Jurisdiction, where some Judicial Officer has exceeded his authority, and there is no other remedy for Review by Writ of Error or Appeal.<sup>3</sup>

1-. Groenwelt v, Buru-ell, 1 Sal]t. 144, 91 Eng.Rep.

134 (1700).

1L King v. inhabitants oC Seton, 7 TB. 378, 101 EngSep, 1027 (1797).

It is granted by the Court at its discretion upon Motion or Petition." The Writ is gen erally granted only upon security given for it due prosecution, and is first used to bring iij the Record and Proceedings in the Court below. When returned to the Higher Court, th Party Respondent is notified to Appear by Notice Similar to a Summons, and the Cour proceeds to act according to Law and Justic in the decision of the case.<sup>15</sup> The Return il conclusive as to the Facts,<sup>o</sup> and is generall3 the only thing to be considered by the Highei Court, though in some states the Proceedini is a Trial of the whole matter de novo. The Writ is also a Mode of Review of the Action ol Administrative Tribunals and newly createc Municipal Boards or Officers whose Proceedings are of a Quasi-Judicial Character, am not in the Manner of a Common-Law Court.'

visors, 8 Cal. 58 (1857); Illinois: Bourland v. Snyder, 224 Ill. 478, 79 N.E. 568 (1900); Iowa: DayS County v. Horn, 4 Greene (Iowa) 94 (1853); Michigan: In re Robinson's Estate, 6 Mich. 137 (1858) New Hampslure: Logue v. Clark, 62 NFL. 1& (1882).

14. Farrell v. Taylor, 12 Mich. 113 (1863); Adam:

v. Abram, 38 Mich. 302 (1878); People v. Cunimings 88 Mich. 249, 50 NW. 310 (1801).

15. "It was at one time abused by suing out the Writ and not producing it until the plaintiff's evidencm had been given in the Low-er Court thus causint expense and enabling a defendant to hear his Adversar3-'s Witnesses in advance. This was remedied by a Statute of 1601 [43 Eliz. e. 5) and another ol 1624 [21 James I, e. 23, ~ 2), the first allowing thE Court Below to proceed unless the Writ ~was pr~ duced before the Jury appeared and one wa~ sworn, and the other requiring the Writ to be produced before Issue or Demurrer w-as Joined. Another Statute [21 James I, e- 23, § 4 (1624)] provided that causes other than those involving freehold or inheritance or title of land, lease or rent' should not be

stayed or removed unless the debt, damages or things demanded amount to or exceed £5." Pound, Appellate Procedure in Civil Cases, c. II, Appellate Procedure in England in the Eighteenth Century, 61 (Boston 1041).

18. Central Pac. B. Co. v. Board of Equalization of Placer County, 46 Cal. 668 (1873); Lo's v. C. aletta & C. U. B. Co., 18 111. 324 (1857); Starr v. Trustees of villagu of Rochester, 6 Wead.(N.Y.) 564 (1831).

17. Groenwelt v. Bursvell, I Salk. 144, 91 Eng.Rep. 134 (1700).

3. Arkansas: Auditor v. Woodruff, 2 Ark. 73 (1830);  
California: People v. El Dorado County Super-  
Sec. 322

## APPELLATE REVIEW

599

### THE WRIT OF ERROR<sup>15</sup>

322. At Common Law a Writ of Error was

-an Original Writ, issuing **out of Chancery**, at the instance of a Party aggrieved by any Error in the Foundation, Proceeding, Judgment  
-or Execution of a Suit, in a Court of Record; and was in the **Nature** of a Commission to the Judges of the same or a Superior Court, by which they were authorized to examine the Rec  
-end, upon which Judgment was given, and on such examination to Affirm or Reverse the same.

#### *The Writ of Error: in General*

AT Common Law, a Substantive Defect Apparent Upon the Face of the Record, was  
-available at the Pleading Stage, on Demurrer; After Verdict and Before Judgment, by Motion in Arrest of Judgment; and After Final Judgment, by Writ of Error, which, if  
-obtained and allowed before Execution, op  
-erated as a suspension of the Latter Proceeding till the Former was determined.

A Writ of Error was an Original Writ is-  
-suing out of Chancery, at the instance of the Party who was aggrieved by any Error in the Foundation, Proceeding, Judgment, or Execution of a Suit, in a Court of Record,<sup>16</sup> and

13. In general, on Appellate Review by Writ of Error, see:

Treatises: 2 Tidd, The Practice of the Court of King's Bench in Personal Actions, a XLIII, Of Error, J051—1141 (Philadelphia 1807); Stephen, A Treatise on the Principles of Pleading in Civil Actions, c. I, Of the Proceedings in an Action, 142 (3d Am. ed. by Tyler, Washington, D. C. 1900); Martin, Civil *Procedure* at Common Law, e. XIV, Trial, Verdict, Judgment and Execution, ~ 379, 380, Writs of Error, 322—324 (St. Paul 1005); Gould, A Treatise on the Principles of Pleading, Pt. II, Procedure, c. I, Procedure in General, 112—1 18 (6th ed. by Will, Albany 1900); Goebel, Cases anti Materials on the Development of Legal Institutions, c. II, Writ of Error, 128 (Brattleboro 1946); Pound, Appellate Procedure in Civil Cases, e. II, Appellate Procedure in Englanti in the Eighteenth Century, 38 (Boston 1041); Frank, Coram Nobis: Common Law, Federal, Statutory, with forms (Albany 1053).

110. Coke, Littleton, 288b (Philadelphia 1853); see, also Jagues v. Cesar, 2 Wms.Saund. 100, 85 Eng.Rep. 776 (1670).

was in the Nature of a Commission to the Judges of the Same or a Superior Court, by which they were authori~ed to examine the Record upon which Judgment was given. In other words the Writ of Error was an Order, directed to the Judges of the Court in which the Judgment had been given, commanding them, in some cases themselves, to review the Record; in others, to send it to another Court of Appellate Jurisdiction to be examined in order that some alleged Error in the Proceedings might be corrected. The *first* Form of Writ was called a Writ of Error *Corarm Nobis*, or *Corain Vobis*, and was designed to reach the situation where the Error consists of Matter of Fact; the *second*, called a Writ of Error generally, was directed at an Error in Law Apparent Upon the Face of the Common-Law Record. The Writ was grantable *cx debito justitiae* {from or as a debt of justice, or as a matter of right] in all cases except Treasons and Felony.<sup>20</sup>

The strict Common-Law Record consisted of four parts: (1) The Process, which included the Original Writ and the Return of the Sheriff; (2) The Declaration and All Subsequent Pleadings, including Demurrers, if any; (3) The Verdict, and (4) The Judgment. After the Judgment has been entered on the Record, by removing this Record to the Appellate Court and Assigning Errors upon it, the unsuccessful Party in the Trial Court could secure a Review of any Error of Law Apparent upon the Face of Any Portion of the Common-Law Record, the objective being to

reverse or modify the Judgment for some Error of Law supposed to exist in the Proceedings as recorded. And in Ruling on such Writ, Errors Not Apparent on the Common-Law Record constituted no ground of Error. If the alleged Error was Not One Apparent upon the Face of the Record, but consisted of an Error that occurred at the Trial, such as the Improper Admission or Re-

20. *Domina Regina v. Paty*, 2 Salk. 503, 91 Eng.Rep.

431 (1705).

600

## JUDGMENT, EXECUTION AND APPELLATE REVIEW

Cli. 30

jection of Evidence, Prejudicial Remarks on the Part of Counsel in the Opening and Closing Arguments, Misdirection of the Jury, and the like, there was, prior to 1285, No Method of Review, except by Motion for New Trial, which Motion was made After Verdict and Before Judgment, before the Court *En Bane*, sitting at Westminster, of which Court the Trial Judge was usually a member. This Court could grant or refuse a New Trial as a matter of discretion, the exercise of which was not Reviewable at Common Law.

The Writ of Error is usually brought by the Party or Parties against whom the Judgment was given; but it may be brought by a plaintiff to Reverse his own Judgment, if erroneous, in order to enable him to bring another action.<sup>21</sup> But the defendant was not permitted to bring it contrary to his own agreement or that of his Attorney.<sup>22</sup>

In general, a Writ of Error was available for any Error or Defect in Substance that had not been Aided, Amended or Cured at Common Law, or by the effect of one or more of the Statutes of Amendments and Jeofails.<sup>23</sup> Thus, the Entry of a Judgment in a Form inappropriate to the Specific Form of Action, constituted an Error of Law. And if the plaintiff brings an Action of Ejectment and omits the Allegation of Ouster, alleging only Title and Damages, such omission of a Substantive Allegation will be available on Writ of Error after Final Judgment.

And in this connection, it should be observed that there was some doubt as to whether a Judgment on Demurrer could be Reviewed as a part of the Common-Law Record, without taking an Exception. Speaking to this very point in *Hamlin v. Reynolds* <sup>24</sup>

21. *Johnson v. Jebb*, 3 Burr 1772, 97 Eng.Rep. 1091 (1705).

22. *Cates v. West*, 2 T.R. 183, 100 Eng.Rep. 90 (1787).

23. See Chapter 20, Aider and Amendment

24. 22 D.L. 207, 200 (1859).

Walker, 3., declared: "It is believed that no reported case can be found, either in Great Britain or this country, in which it has been held that it is necessary to Except to the Judgment on a Demurrer, to enable the Party to have the decision Reviewed in an Appellate Court. By the Ancient Practice it was the Final Judgment in the case, on the Count or Plea to which the Demurrer was interposed, and Leave to Amend or Plead Over was rarely if ever given. And the Judgment on Demurrer, by the Modern Practice, is Final, unless the Court in the exercise of its discretion permits an Amendment, or grants Leave to Plead Over. The Judgment on the Demurrer is as much a Part of the Record as any other Judgment that is rendered by the Court in the Cause. The Office of a Bill of Exceptions is to preserve that of Record, which otherwise would not Appear of Record. By the Practice of Courts of Common-Law Jurisdiction, the Evidence in a Cause, the Decisions of the Court in Admitting or Rejecting Evidence, Affidavits on Motions, and the Reasons Upon which Motions are Made, the Giving and Refusing Instructions, and Various Other Matters, do not Appear of Record, and are no part of it, unless embodied in a Bill of Exceptions, and by that means are made a part of the Record in the case. In the-decision of all such questions, the Judgment of the Court is not usually spread upon the Roll of its Proceedings. While Judgments by Default, on Demurrer, in cases of Nonsuit, Final Judgment on Verdict, etc., have by the practice at all periods, been so Entered and regarded as a Part of the Record. It would be improper practice, to embody a Judgment on a Demurrer in a Bill of Exceptions, as it would uselessly incumber the Record and unnecessarily add to the expense of litigation. The position that the Judgment on the Demurrer to the Second and Third Pleas in this case, was not Excepted to in the Court Below is-wholly untenable,"

Sec. 323

## APPELLATE REVIEW

601

*The Writ of Error: Coram Nobis*

WHERE a Judgment was Erroneous in Point of Fact only, and Not in Point of Law, it could be reversed by the same Court, by Writ of Error *Coram Nobis*, or *Quac Corant Nobis Resident*, so called from its being founded on the Record and Process, which were -stated in the Writ to remain in the Court of the Lord the King, before the King himself; as where the defendant, being under age, appeared by Attorney, or the plaintiff or defendant was a married woman, at the Commencement of the Suit, or died before Verdict, or Interlocutory Judgment; for Error in Fact was not the Error of the Judges, hence reversing it was not reversing their own Judgment.

## BILLS OF EXCEPTIONS<sup>25</sup>

323. A Bill of Exceptions is a Statement of Objections or Exceptions taken by a Party to the Rulings of the Court on Points of Law, Signed *by* the Judge who made the Decision, and Sealed with the Seal of the Court. -

AS observed in the discussElon of the Writ -of Error, Errors Apparent Upon the Face of the Common-Law Record, after Final Judgment, were Reviewable by Writ of Error. If the alleged Error was One Not Apparent Upon the Face of the Record, but consisted of an Error that occurred At the Trial, such

2-. In general on Appellate Review I y Bills of Exceptions, see:

Treatises: 2 Tidd, *The Practice of the court of King's Bench in Personal Actions c. XXXVII, Of Trials by the Country and their Incldents*, 785—791 (Philadelphia 1807); Mansel, *A Treatise on the Law nnd Practice of Demurrer to Pleadings and Evidence, of Bills of Exception; Wager of Law; Issue and Trial by Itceord, &c.* (London 1828); Stephen, *A Treatise on the Principles of Pleading in Civil Actions, c. I, Of the Proceedings in an Action, from Its Commencement to its Termination*, 120—121 (3d Am. ed. by Tyler, Washington, D. C. 1900); Gould, *A Treatise on the Principles of Pleading, Pt. II, Procedure, e. I, Procedure In Gen— oral*, 111—112 (0th ed. by Will, Albany 1909); Martin, *Civil Procedure at Common Law, c. xiv, Trial, Verdict, Judgment and Execution*, 368 (St Paul 1905).

as the Improper Admission or Rejection of Evidence, Misdirection ofthe Jury, or Prejudicial Remarks on the Part of Counsel in Opening and Closing Arguments, and the like, prior to 1285, there was No Method of Review except by Motion for New Trial, which Motion, as we have seen, was made before the Court *En Banc* sitting at Westminster, of which Court the Trial Judge was frequently a member. This Court could grant or refuse to grant a New Trial in its discretion, the exercise of which at Common Law was not Reviewable. This Method of Review left the Aggrieved Party somewhat at the mercy of the Original Trial Judge, as he was usually a Part of the Reviewing Court *En Banc*, and it provided No Method for Review, after Judgment, of Errors which occurred At the Trial. Obviously, a New Method was needed by which such Errors could be incorporated into the Record.

### *The Origin of the Bifl of Exceptions*

THE Method devised had its origin in that Great Remedial Statute of the Common Law, the Statute of Westminster II, 13 Edw. I, c. 31, 1 Statutes at Large 206 (1285), under which it was provided, in Substance, that where an Error occurred At the Trial, such as the Improper Admission of Evidence, the Aggrieved Party could allege an Exception; if the Exception was not allowed, he could reduce the Exception to Writing,<sup>26</sup> have it Signed and Sealed by the Judge, and Attach it to the Record. This operation incorporated the alleged Errors into the Record and when the Writ of Error issued, not only those Errors Apparent Upon the Face of the Common-Law Record, if any, but also those Errors which occurred At the Trial, and which had now been incorporated by means

26.The time for reducing the exception to writing was not prescribed by the statute, but it was held in the case of Wright -r. Sharp, 1 Salk. 288, 250, 91 Eng. Rep. 255, 258 (1705), that reason required the substance of the exception be reduced to writing when taken and disallowed. 602

## JUDGMENT, EXECUTION AND APPELLATE REVIEW

### Ch. 30

of the force and effect of Chapter 31 of the Statute of Westminster U, also went up to the Appellate Court for Review. And thus the explanation of the distinction between Matters *on* the Record, and Matters *in* the Record, or, as sometimes otherwise expressed, between Matter of Record and Matter of Exception, Matter of Record consisting of Errors Apparent Upon the Face of the Strict Common-Law Record; Matter of Exception referring to those Errors placed in the Record by the Bill of Exceptions.

## STATUS UNDER MODERN CODES, PRACTICE ACTS AND RIFLES

## OF COURT

324. Review is now generally by Appeal, which is a Statutory Proceeding. Where the *Action* is Legal in *Nature*, the Appeal is generally limited to a Review of Questions of Law. Where the *Action* is Equitable in Nature, Questions of both Law and Fact are Reviewed on Appeal, as was traditionally the case in Equity.

In 1848 the New York Code of Civil Procedure made an Appeal the only Form of Review in that State. Other States abolished the Writ of Error, but created a System of Review which included a Review of Legal Causes by Proceedings in Error, and for Equitable Causes Review on the lines of the Appeal in Chancery.<sup>27</sup> An Appeal in New York was at that time regarded as a New Action.<sup>28</sup> In those States which did not adopt the New York Statutory Appeal, an Appeal in the Nature of a Writ of Error was adopted, including Alabama in 1853, Connecticut in 1882 and 1889, and Pennsylvania in 1889.<sup>29</sup> The Method of Appeal in New York, being entirely Statutory, it was available only in the situations specifically provided for by the

27. Pound, *Appellate Procedure in Civil Cases*, c. IV, *Appellate Procedure in the United States to the End of the Nineteenth Century*, 260 (Boston 1941).

15. *Pratt v. Allen*, 19 How.Pr. 450. 456 (1858).

19. Pound, *Appellate Procedure in Civil Cases*, c. XV, *Appellate Procedure in the United States to the End of the Nineteenth Century*, 261 (Boston 1941).

Code. In States where there was a Concurrence of Review by a Writ of Error and an Appeal in the Nature of Error, the term "Appeal" began to be regarded as covering both Types of Review. This gradual merger of the two principal Modes of Review was a byproduct flowing from the introduction of Equitable Defenses and Equitable Relief in Actions at Law. -

*In* the States today, Review on Appeal is generally a Statutory Proceeding, with more of the characteristics of the Common-Law Writ of Error, rather than the Appeal in Equity, by which the whole cause was removed from a lower to an Appellate Court, and

there tried *de novo* without reference to the

conclusions of the Inferior Court. The Modern Appeal *is* more in the nature of a Writ of Error, in that the Appellate Court does not try the cause afresh or hear evidence. It is regarded as a continuation of the Original Litigation.

In an attempt to modernize and simplify Appellate Review in the Federal Courts, even before the Federal Rules of Civil Procedure were adopted, Congress, in 1928, abolished the Writ of Error in all cases, Civil and Criminal, except in cases coming from State Courts, and substituted the Modern Appeal as the Vehicle for Ordinary Appellate Review.<sup>30</sup> The effect of this Legislation was to make *Uniform* the Procedure for Review in both Law and Equity, since prior to 1928 the Appeal, and not the Writ of Error, *was* the Method of Review from a Decree in Equity.<sup>31</sup>

However, this Legislation did not remove the differences that had theretofore existed

<sup>30</sup> Act of January 31, 1928 c. 14, as amended by Act of April 26, 1928, c. 440. The wisdom of this enactment has been questioned, see, *The Supreme Court Under the Judiciary Act of 1789*, 42 Harv.L. Rev. 1, at 27—29 (1928).

<sup>31</sup> Robertson and Kirltham, *Jurisdiction of the Supreme Court of the United States*, 806 (New York, 1951). Sec. 324

### APPELLATE REVIEW

603

with respect to the Scope of Review for Actions at Law and in Equity. Perhaps the most significant difference was that Appeals from Judgments of Law Courts continued to be limited to Review of Questions of Law only, whereas an Appeal from an Equitable Decree permitted Review of the Facts as well as the Law.<sup>32</sup>

Today, the basic Federal Judicial Structure is composed of District Courts,<sup>33</sup> Courts of Appeals and the Supreme Court.<sup>35</sup> The District Courts "are the Trial Courts of the System" and exist in each of the numerous Judicial Districts

established by Statute.<sup>36</sup> Decisions of the District Court are Appeal

35. Marker, Federal Appellate Jurisdiction and *ProCeture*, 272—270 (Chicago 3935).

33. Sections 81—132, 3331—1359, Title 28 U.S.C.A.

U- Sections 41—48, 1201—12.94, Title 28 U.S.C.A.

35. *Sections 1—40*, 1251—3257, Title 28 JJ.S.C..A. There are, of course, other Federal Courts such as, for example, the Court of Claims (Sections 171—175, Title 28 TJ.S.C.A.), the Court of Customs and Patent Appeals (Sections 211—216, Title 28 U.S.C.A.), the Customs Court (Sections 251—255, Title 28 U.S.C.A.). The “Tax Court of the United States” is strictly speaking, not a Court but rather “an independent agency in the Executive Branch of the Government”, *Ann. Jurisdiction and Practice of the Courts of the United States*, 33 (St. Paul, 1949).

36. Bunn, *Jurisdiction and Practice of the Courts of the United States*, 31 (St. Paul, 1949); See Sections *81—131*, Title 28 U.S.C.A., for enumeration and location of these Judicial Districts.

able as of Right to the Court of Appeals, “except where a Direct Review may be had in the Supreme Court.” ~ The distinction between Appeals in Actions which are Legal in Nature, and those which are Equitable in Nature, is maintained, with the Appellate Court reviewing Questions of Law as to the Former and both Law and Fact as to the Latter,<sup>33</sup> except that the Appellate Court also reviews Questions of both Law and Fact in Actions which are Legal in Nature when the Action is tried by a Court without a Jury.<sup>39</sup> In Actions which are Equitable in Nature, and those which are Legal in Nature and tried by a Court without a Jury, the Findings of Fact of the Trial Court may, however, be set aside by the Appellate Court only when they are dearly erroneous, and provided due regard is given to the opportunity of the Trial Court to judge the credibility of witnesses.<sup>40</sup>

37. Section 1291, Title 28 U.S.C.A. This section by its terms refers only to “final” decisions of the District court; however, the following section, 1292, permits Appeals also from certain interlocutory decisions.

33. *Burns Bros. v. Cools Coal Co.*, (3d Cir. 1930) 42 F.2d 109; See 6 *Ohllnger, Jurisdiction and Procedure of the Courts of the United States in Civil Actions*, 590 (cincinnati, 1954).

39. Federal Rule of Civil Procedure 52(a), Title 28 U.S.C.-A. -

40. *Ibid.*

## TABLE OF CASES

### References are to Pages

Abbott v. Kimball, 201  
Abe Lincoln Mut. Life & Accident  
Aber v. Bratton, 267  
Abererombic v. parkburst, 268  
Abington v. Lipscombe, 222  
Abrahams v. Sones, 576  
Aeerro v. Petrone, 113  
Ackcrson v. Eric Ri'. Co., 104  
Acme Food Co. v. Older, 345  
Acton v. Simonds, 355  
Acton v. Symon, 320  
Adair v. Loft, 233  
Adair's Adm'r v. Rogers' Adnfr, 361  
Adam v. Arnold, 304  
Adams v. Abram, 598  
Adams v. Adams, 503  
Adams v. Barry, 129  
Adams v. Clark, 221  
Adams v. Columbian Steamboat Co., 357  
Adams v. Crosby, 342  
Adams v. Cross, 117  
Adams v. Filer, 515  
Adams v. Freeman, 168  
Adams v. Gardner, 129  
Adams v. Bemmenway, 154, 166, 176, 177  
Adams v. Munter, 578  
Adams v. O'Connor, 161, 830

Adams v. Richardson, 201  
Adams v. Wiggan, 421  
Adams v. Wood, 268  
Adamson v. Jarvis, 189  
Addams v. Tutton, 305  
Addington v. Allen, 575  
Addison v. Overend, 421  
Adler v. Prctstwood, 246  
Admiralty Com'rs v. The Amerika, 165  
Aetna Ins. Co. v. Phelps, 331  
Aetna Life Ins. Co. v. Hoppin, 242  
Ahitbol v. Benneditto, 113, 114  
Ainslie v. Martin, 413  
Ainsworth v. Partillo, 219  
Aireton v. Davis, 201  
Akerley v. Hales, 161, 165, 192  
Alabama Consol. Coal & Iron Co. v. Heald, 561  
Alabama Fuel & Iron Co. v. Bush, 94  
Albert v. Seiler, 570  
Allan v. Talbot, 98  
Alderman v. Way, 159  
Alderson v. Ennor, 352  
AMine Mfg. Co. v. Barnard, 343, 358  
Aleberry v. Walby, 333  
Alex v. Shalala, 239  
Alexander v. Capital Paint Co., 340  
Alexander v. Shalala, 230  
Alexander v. Vane, 351  
Algeo v. Algeo, 341, 359  
Allen v. Colliery Engineer Co., 525  
Allen v. Crary, 280  
Allen v. Ford, 358  
Anderson v. Martindale, 423  
Anderson v. Talcott, 500  
Anderson v. Todesco, 208  
Andrew v. Deshler, 200

## A

Soc. v. Miller, 348  
Allen v. Gray, 108  
Allen v. Hartfield, 330  
Allen v. Locket, 425  
Allen v. McKibbin, 342, 359  
Allen v. Oppenheimer, 200  
Allen v. Patterson, 12, 22, 90, 299, 300  
Allen v. Scott, 7, 520, 521  
Allen v. Smith, 213, 285  
Allen v. Taylor, 113  
Allen v. Player, 160  
Allen v. Tnsarora Val, Ry. Co., 526, 559  
Allen v. Watt, 420  
Allen Clark Co. v. Praneovich, 94  
Allied Amusement v. Glover, 309  
Allis-Chalmers Mfg. Co. v. City of Chicago, 561  
Almada v. Vandecar, 263  
Almond v. Bonnell, 118, 238  
Almy v. Rarris, 201, 297  
Alsope v. Sytwell, 137  
Altes v. thnckler, 208  
Ambler v. Whipple, 505  
Ambrose v. Roe, 364  
American Insp. Co. v. haggard, 428  
American Trading & Storage Co. v. Gottstein, 399  
Amburst v. Skymer, 146  
Amory v. Flynn, 209  
Amos v. Cosby, 308  
Anderson v. Boneman, 267  
Anderson v. Courtright, 235

Anderson v. Hapler, 257  
 Anderson v. Lewis, 418  
**Koffler & Reppy Com.Law Pldg. KB**  
**605**  
 Androseoggin Water Power Co. v. Metcalf, 358  
 Andrus v. Waring, 525, 528  
 Anheuser-Busch Brewing Ass'n v. Bond, 398  
 Anniston Electric & Gas Co. v. Rosen, 147  
 Anonymous, 162, 191, 260, 278, 280, 290, 334, 454, 455, 471, 490, 555  
 Aasorge v. Kane, 407  
 Anthony v. Wilson, 503  
 Applebee v. Rumery, 180  
 Appleby v. Brown, 311, 312  
 Appleton v. Barrett, 268  
 Appo v. The People, 597  
 Arasmith v. Temple, 165, 193  
 Archer v. Cjafflin, 120  
 Archibald v. Argall, 420  
 Arden v. Pullen, 357  
 Arizona Commercial Mining  
     Co., 105, 208, 352  
 Arlett v. Ellis, 441  
 Anus v. Ashley, 351  
 Armstrong v. Cooley, ISO  
 Armstrong v. Webster, 149, 476  
 Arnold v. Dodson, 352  
 Arnold v. Foot, 179  
 Arnold v. Jefferson, 213  
 Arthur v. Griswold, 194  
 Arthur v. Ingels, 251  
 Arthur v. Richards, 387  
 Ashley v. Root, 187  
 Aslin v. Parbin, 240  
 Atkins v. Barnstalle County, 359  
 Atkins v. Byrnes, 499  
 Atkins v. Lewis, 233  
 Atkinson v. Baker, 200, 247  
 Atkinson v. Bell, 288, 358  
 Atkinson v. Scott, 351  
 Atlanta & W. P. R. Co. v. Jacobs' Pharmacy Co., 331  
 Atlantic Mut. Fire Ins. Co. v. Young, 332  
 Atlantic Refining Co. v. Feinberg, 254  
 Atlas Shoe Co. v. Beehard, 212, 218  
 Atlee v. Baclthouse, 352  
 Attersoll v. Steve,js, 189  
 Attorney General v. Meller, 122, 123  
 Atwood v. Davis, 431  
 Atwood v. Lucas, 344  
 Aubery v. James, 445  
 Auburn & Dwasco Canal Co., The v. Lelteb, 400, 403, 404, 477  
 Auditor v. Woodruff, 880, 598  
 Augusta, City of v. Moulton, 514  
 Aurora Trust & Savings Bank v. Whildln, 478  
 Austen v. Gervas, 133  
 Austin v. Dills, 126  
 Austin v. Jervoyse, 133  
 Avery v. Inhabitants of Tyringham, 324, 573  
 Avery v. Spieer, 171, 172  
 Axford v. Mathews, 214  
 Aycr v. Bartlett, 157, 183  
 Ayes v. Hewett, 266  
 Ayliff V. Arehdale, 321  
 Azparren v. Ferrel, 257, 263

## B

Baals v. Stewart, 212  
 Babb v. Mackey, 201



Babcock v. Trice, 516  
 Bach v. Owen, 329  
 Bacon v. Davis, 267  
 Bacon v. Sehepflin, 420, 429  
 Backus v. Clark, 110  
 Badger v. Batavia Paper Mfg. Co., 219  
 Badkin v. Powell, 486  
 Badlam v. Tucker, 213  
 Bagagiio v. Paolino, 319  
 Bailey v. Adams, 218  
 Bailey v. Bussing, 326  
 Bailey v. Clay, 329, 331  
 Bailey v. Cowles, 501  
 Bailey v. Ellis, 262  
 Bailey v. Freeman, 326  
 Bailey v. Valley Nat. Bank, 513  
 Baillie v. Columbia Gold Mm. Co., 77  
 Bain v. Hunt, 361  
 Baker v. Bailey, 445  
 Baker v. Beers, 222  
 Baker v. Blackman, 441  
 Baker v. Corey, 340  
 Baker v. Dumbolton, 97  
 Baker v. Fales, 264, 266, 267  
 Baker v. Faweett, 516  
 Baker v. Fuller, 330  
 Baker v. Howell, 215  
 Baker v. Jameson, 325  
 Baker v. *KIng*, 160  
 Baker v. Lauterbaeh, 343  
 Baker v. Lothrop, 221  
 Baker v. Morphew, 198  
 Balcom v. Craggin, 327  
 Baldrige v. Allen, 167  
 Baldwin v. City of Aberdeen, 403  
 Baldwin v. Cole, 219, 221  
 Baldwin v. Whittier, 169  
 Ball v. Fatterson, 216  
 Ballance v. Flood, 233  
 Ballou v. O'Brien, 268  
 Baltimore & O. B. Co. v. Polijc Woods & Co., 340, 471

## TABLE OF CASES

### References are to Pages

606

Andrews v. Allen, 312  
 Andre~vs v. C~allenth'r, 320  
 .Aaidrews v. Hoeslich, 267  
 Andrew's v. Ives, 321  
 Andrews v. Montgomery, 361  
 Andrew's v. Morris, 125  
 Andrew's v. Thayer, 108  
 Andrews v. Whiteliend, 111, 132, 136, 327  
 Andrews v. Williams, 126  
 Andros v. Childors, 376  
 Co. v. *Iron Cap Copper*  
 Baltimore & O. & C. B. Co. v. flUnols CenC~ K Cc., 490  
 Bane v. Detrick, 221  
 Banik v. Bishop-Stoddard Cafeteria Co., 336  
 Bank of Bristol v. Ashworth, 411  
**Bank of Buffalo v. Crouch, 264**  
 Bank of Columbia v. Hagner, 330, 340  
 Bank of New Brunswick v. Arrowsmith, 72  
 Bank of New South Wales v. O'Connor, 251  
 Bank of Orange County v. Brown, 188  
 Bank of United Stotes v. Smith, 541  
 Banks v. Whetstone, 247

Bannister v. Read, 341, 342  
 Bannister v. Victoria Coal & Coke Co., 324, 364  
 Banorgee v. Hovey, 320, 321  
 Banyer v. Empie, 235  
 Barber v. Chester County, 276  
 Barber v. Rose, 516  
 Barber v. Summers, 145  
 Barber v. Vincent, 397  
 Barbour v. Breckenridge, 505  
 Barhour's Adm'rs v. Areher~ 126  
 'Barclay v. Howell, 238  
 Barkeloo v. Randall, 168  
 Barker v. Braham, 168  
 Barker v. Chase, 161  
 Barker v. Justice, 559  
 Barker v. Lade, 126, 127  
 Bark-er v. Miller, 213  
 Barkhamsted, Town of v. Parsons, 297  
 Barley v. Roosa, 115  
 Barlow v. Garrow, 576  
 Barnard v. Duthy, 332  
 Barnard v. Poor, 180  
 Barnes v. Bartlett, 265  
 Barnes v. Brookman, 575, 576  
 Barnes v. Cole & Fitzhugh, 178  
 Barnes v. ford, 165, 193  
 Barnes r. Jcenyon, 105  
 Barnes v. Northern Trust Co., 144  
 Barnett v. Barnett, 400  
 Barnett v. Phelps, 198  
 Barney v. Dewey, 189  
 Barnitz v. Casey, 235  
 Barnum v. Landon, 311, 312, 316  
 Barnum v. Martin, 187  
 Barnum s'. Stone, 209, 219  
 Barr v. *Craig*, 352  
 Barrett v. Carden, 294, 295  
 Barrett v. Douglas Park Bldg. Ass'n, 285  
 Barrett v. McAllister, 510  
 Barrons v. Ball, 199  
 Barrow v. Burbridge, 555  
 Barry v. Peterson, 154, 166, 176, 177  
 Bartholomew v. Jackson, 319  
 Bartlett v. Perkins, 159, 190  
 Bartlett v. Prescott, 480  
 Barton v. Dunning, 212  
 Barton v. Webb, 134  
 Barwjck v. Barwlck, 213  
 Bascom v. Dempsey, 157  
 Basset v. Maynard, 210  
 Bateman v. Allen, 122

## TABLE OF CASES

References **are to Pages**

Bates v. *Campbell*, 233  
 Bates v. Conkling, 221  
 Bates v. Cort, 400  
 Batterten v. Yoakum, 233  
 Battin v. Bigelow, 239  
 JIntrel v. Ohio RiVer By. Co., 130  
 Baum v. Tonkin, 282  
 Bauman v. **Bean**, 555  
 BaVarian Brewing Co. v. Retkowskl, 462  
 Baxter v. Jackson, 332  
  
 Baxter v. McDonnell, 400  
 Bayard v. Inglis, 239  
 Bayard v. Malcolm, 150, 572

Bay County v. Bradley, 232  
Bayley v. Bryant, 222  
Baylies v. Fettyplae, 340, 508  
Baylis v. Cronkite, 220  
Baynes v. Brewster, 91  
B. B. Ford & Co. v. Atlantic Compress Co., 322  
Beach v. Beach, 234  
Beach v. Hotehkiss, 311, 312  
Beach v. Ranney, 129  
Beal v. Simpson, 437, 438  
BeaU v. Folmar, 03  
Bean v. Atwater, 320  
Bean v. Ayres, 128  
Bearcamp River Co. V. Woodman, 201  
Beard v. Converse, 510  
Beatty v. Parons, 499  
Beaty v. Perkins, 169  
Beauchamp v. Bosworth, 364  
Becker v. Germnn Met. Fire

607

Ins. Co. of North  
Chicago, 113, 145  
Becker v. Smith, 157  
Beekwith v. Shordike, 167, 179  
Bedell v. Stevens, 572  
Beebe v. Knapp, 150, 189, 212, 218  
Beers v. Shannon, 115  
Beggs v. Chicago Bonding & Surety Co., 503  
Bchr v. Gerson, 250  
Belrnc v. Dunlap, 284  
Belalleek v. People, 295  
Belasyse v. Hester, 402  
Belden v. Laing, 263  
Belford v. Woodward, 284, 360  
Belle v. Broadbent, 125  
Bell v. Lever *Bros., Ltd.*, 583  
Boll v. Wood, 188  
Bell Grocery Co. v. Booth, 588  
Bellant v. Brown, 163, 180  
Bellows v. Shannon, 577  
Belton v. Fisher, 325  
Bemis v. Charles, 357  
Bcrnls v. Faron, 101, 108  
Benden V. Manning, 326, 327  
Bender v. Manning, 332  
Bender v. Sampson, 294, 295  
Bencs v. Bankers' Life Ins. Co., 471, 508  
Benjamin v. Bank of England, 214  
KaiSer & Reppy CornLaw Plug H5—2l  
Benjamin v. Stromple, 220

608

Bennet v. Flikins, 437, 450  
Bennet v. Pixley's Ex'rs, 329  
Bennett v. Appleton, 170  
Bennett v. Connelly, 351  
Bennett v. Holloway, 499  
Bennett v. Kupfer Bros. Co., 510  
Bennett v. Morley & Griffith, 504  
Bennett v. Union Gent. Life Ins. Co., 396, 400  
Bentley v. Smith, 115  
Benton v. Brown, 103  
Bequette v. Lasselle, 143  
Bernard v. Wilcox, 424  
Berry v. Harper, 326  
Berry v. Stinson, 297  
Bertie v. Beaumont, 157, 159

-Bertie v. Pickering, 111, 112, 131  
 Bertwhistle v. Goodrich, 268  
 Bethea v. Jeffres, 208  
 Bethea v. McLennoa, 247  
 Bethlehem Borough v. Perseverance  
 Bevercley v. Holmes, 326  
 Biddle v. Wilkins, 299  
 Bieri v. Fonger, 159  
 Bigaoutte v. Paulet, 182  
 Bigclow v. Cambridge, etc., Bigelow v. Stearns, 168  
 Bilderback v. Pouner, 307  
 Billings v. Lafferty, 200  
 Bills v. Stanton, 404  
 Bimelcr v. Dawson, 75  
 Bingham v. Dickie, 114  
 Bins v. Tyler, 128  
 Birch v. Bellamy, 138  
 Birch v. King, 402  
 Birch v. Wilson, 469, 471, 489  
 Bird v. Hempstead, 157  
 Bird v. Holman, 438  
 Bird v. Randall, 489  
 Birmingham v. Andrews, 578  
 Birmingham fly., Light & Power  
 Birmingham By., Light & Power  
 Birney v. Halm, 126  
 Bishop v. Baker, 97  
 Bishop v. Camp, 430  
 Bishop v. Montague, 210, 218, 255  
 Bishop v. Quintard, 400  
 Bishop v. Salisbury's Case, 137  
 Bishop v. Travis, 531  
 Bishop v. Young, 283, 290  
 Bissell v. Spring Valley Twp., 406  
 Bize v. Dickason, 352  
 Black-borough v. *Davis*, 120  
 Blackburn v. Baker, 296  
 Btackmore v. Tidderley, 444, 468  
 Black's Bx'r v. Black's Ex'rs, 413  
 Black's Lessee v. Hepburne, 231, 232  
 Blaekstone Nat. Bank v. Lane, 103  
 Blackweli v. Irvin's Adm'rs, 825  
 Blades v. .Anindale, 213  
 Blair v. Chicago & A. fly. Co., 576

## TABLE OF CASES

References are to Pages

Blake v. Foster, 122, 123, 448, 453  
 Blakeslee v. foil, 341  
 Blakey v. Douglas, 222  
 Blalock v. Randall, 154, 169, 487  
 Blankenship v. Berry, 223  
 Bjattner v. Frost, 298  
 Bleddsoe's Ex'r v. Wadsworth, 308  
 Bledsoe v. Irvin, 425  
 Bleeke v. Grove, 480, 482  
 Bletch v. Jobnson, 113  
 Blick v. Brigg, 325  
 Bun v. Campbell, 178, 181  
 Bliss v. Arnold, 576  
 Biome v. Wabl-Henius Institute of Fermentology, 149  
 Blood v. Wilson, 341  
 Bloomfield v. Hancock, 284  
 Bloss v. Holman, 158, 214  
 Bloxam v. Sanders, 212, 214  
 Blum v. Whltney, 396  
 Blunt v. McCormick, 163, 180  
 Board of Com'rs of Clinton County v. Hill, 468

Board of Highway Com'rs v. City of Bloomington, 319, 352  
 Board of Sup'rs of Sangamon County v. City of  
     Springfield, 362  
 Boatman's Savings Inst. v. Holland, 467  
 Boccock v. Leet, 13  
 Bodley v. Hoop, 97, 149  
 Bogardus v. Phoenix Mfg. Co., 330  
 Bogardus v. Trinity Church, 139  
 Boileau v. Itutlin, 466  
 Boles v. Pinkerton, 170  
 Bolton v. Cannon, 149  
 Bomeisler v. Dobson, 340  
 Bond v. Dustin, 572  
 Bond v. Mitchell, 263  
 Bond v. Ward, 221  
 Bonham v. People, to Use of Willson, 473  
 Boone v. Eyre, 329, 467  
 Booth v. Farmers' &  
     Rochester, 324, 335, 336, Boraston v. Green, 208  
 Border v. Benge, 594  
 Boss v. Litton, 486  
 Bostick v. Brittain, 264  
 Boston India Rubber Factory v. Ho1~ 298, 361  
 Boston Type & Stereotype Foundry v. Spooner, 422  
 Boston & 1W. R. B. v. County Com'rs of Middlesex Co., 92  
 Bouchaud v. Dias, 405  
**Bourk v. Riggs, 498**  
 Bourland v. Snyder, 598  
 Bovey v. Castleman, 279  
**Bowen v. Bell, 357**  
 Bowlin v. Nye, 219, 220  
 Bowman v. DePeyster, 563  
 Bowman v. People, 576  
 Bowne v. Joy, 420, 514  
 Bowyer v. Cook, 431  
 Boyce v. Whltaker, 139  
  
 Co. v. Llttclton, 94 Co. v. Nicholas, 147  
 Mechanica Natl. Bank of 364  
 Brawner v. Lomax, 403, 404  
 Bray v. Bray, 221  
 Breck v. Blanchard, 448  
 Bredin v. Dwen, 311, 312  
 Bredin v. Kingland, 311  
 Brent v. *Shook*, 114, 115  
 Brereton v. Canadian Pac. fly. Co., 104  
 Brewer v. Strong's Ex'rs, 250  
 Erichend v. Archbishop, 333  
**Bridge v. Austin, 325, 331**  
 Bridgwater v. Bythway, 106, 439, 440  
 Briefly v. Kendall, 161  
 Briggs v. Boston & L. B. Co., 219  
 Briggs v. Dorr, 466  
 Briggs v. Grand Trunk fly. Co., 149  
 Briggs v. Mason, 441, 460  
 Briggs v. President, etc. of Nantucket  
     363  
**TABLE OF CASES**  
 References are to Pages  
 Brockley v. Slater, 120  
 Brolaskey v. McClain, 234  
 Bronson v. Earl, 108  
 Brooke v. Brooke, 555, 564  
 Brooke County Court v.  
     Guaranty Co., 126  
 Brooks v. Gibbons, 387

Fire Co., 358  
 Turnpike Corp., 296

Brooks v. Olmstead, 166  
Brooks v. Scott's Ex'rs, 840, 365  
Brooks v. Stuart, 461  
Brophy v. Illinois Steel Co., 547  
Broughton v. Whallon, 165, 193  
*Brown v. Artelier*, 462—464, 486  
Brown v. Baltimore & Ohio B. Co., 489  
Brown v. Barnes, 325  
Brown v. Brown, 497  
Brown v. Bussey, 283  
Brown v. Cook, 120, 222  
Brown v. Caldweu, 257  
Brown v. Dixon, 97  
Brown v. Edglington, 188  
Brown v. Ellison, 247  
Brown v. Gordan, 428  
Brown v. Harmon, 291  
Brown v. Hearon, 308  
  
Brown v. Holbrook, 358  
Brown v. Illinois Cent. Mut. Ins. Co., 430  
Brown v. Jones, 185, 390, 405  
Brown v. Leigh, 563  
Brown v. Nichols, Shepard & Co., 148  
Brown v. Perry, 461  
Brown v. Bands, 133  
Brown v. St. Charles, 209  
Brown v. St. Paul, 1W. & 1W. By. Co., 343  
Brown v. School Dist. No. 9 of Rutland, 351  
Brown v. Sheedy, 263  
Brown v. Smith, 285  
*Brown v. Stac!thouse*, 164  
Brown v. Thurlow, 131  
Brown v. Wallis, 207, 257  
Brown v. Waterman, 220  
Brown v. White fleer Tp., 201  
Browne v. Knill, 331  
Brownell v. Manchester, 213  
*Browning v. Bancroft*, 266  
Browning v. Cover, 220  
Brubaker v. Poage, 115  
Bruce v. Beall, 556  
Bruekshaw v. Hopkine, 101  
Brudnell v. Roberts, 448  
Brumbach v. Flower, 189  
Brumleve v. Cronan, 13  
Bruner v. Dyball, 212, 221  
Brunswick Land Corp. v. Perkinson, 233  
Bryan v. Bates, 487  
  
Bryan v. Spurgin, 330  
Bryant v. Herbert, 245  
Bryant v. Sparrow, 162  
Bryce v. Brooks, 221  
Buchanan v. Bucker, 361

609

United States Fidelity &

Boyd v. Kimmel, 487  
Boyd v. Weeks, 472  
Boyden v. Fitchburg R. Co., 470  
Boyer v. Bullard, 358  
Boylan v. Meeker, 253  
Boynton v. Reynolds, 503

Braban v. Bacon, 133, 134  
 Bracelin v. McLaren, 208  
 Bradburn v. ICelinerdale, 443  
 Bradford v. Ball, 106, 178  
 Bradford v. City of Chicago, 351  
 Bradford v. Stewart, 284  
 Bradley v. Chicago.-Viriden Coal Co., 561  
 Bradley v. Jenkins, 101  
 Bradley v. Powers, 474  
 Bradley v. Wyndham, 489  
 Bradner v. Demick, 476  
 Bradubaw v. Ashley, 234  
 Bradehaw's Case, 136  
 Brady v. Brady, 105  
 Brady v. Richardson, 414  
 Brady v. Spurck, 97, 305  
 Bragg v. City of Chicago, 119  
 Brainard v. Stulphln, 114  
 Branch & Co., Lx parte, 69  
 Brand v. Henderson, 340  
 Branbam v. Mayor. etc., of City of San Jose, 398  
 Branwell v. Penneek, 168  
 Braswell v. McDaniel, 559  
 Bratton v. Seymour, 113  
  
 Bank, 103, 350,  
  
 Bright v. Bynon, 568  
 Brind v. Dale, 508  
 Brisbane v. Pennsylvania B. Co., 104, 105  
 Bristol v. Burt, 219  
 Bristol v. Guyse, 123  
 Bristow v. Wright, 124, 143, 323  
 British South Africa Co. v. Companhia de Mocambique, 105  
 Britton v. Bishop, 508  
 Britton v. Cole, 125  
 Brondbent v. Ledward, 245  
 Brook v. Headen, 250

610

Buchanan v. Scottish Union & Nat. Ins. Co., 414  
 Buckeye Cotton *Oil* Co. v. Sloan, 466  
 Bueki v. Cone, 119, 157, 183  
 Buckland v. Otley, 556  
 Buckles v. Harlan, 420  
 Buckley v. Dolbeare, 157  
 Buckley v. Duff, 5Th  
 Buckley v. Thomas, 135  
 Buckmaster v. Grundy, 351  
 Fuekataff v. Russell & Co., 331  
 Buddington v. Shearer, 143  
 Buell v. Irwin, 234  
 Buffum v. Chadwick, 115  
 Bubles v. Wentworth, 478  
 Bulkley v. Dolbeare, 158, 160  
 Bulkley v. Lnndon, 327  
 Bulkley v. Norwich & Westerly Ry. Co., 393  
 Bulkley v. Storer, 188  
 Bull v. Mathews, 573  
 Ballard v. Bell, 291  
 Ballard v. Young, 219  
 BulBs v. Giddens, 502, 504  
 Bullythorpe v. Turner, 473  
 Bulova v. H. L. Barnett, Inc., 895  
 Bulstrode v. Gilburn, 306

Bunker v. Shed, 101  
Buntin v. City of Danville, 550  
Burbank v. Crooker, 220  
Burdick v. Green, 101  
Burdick v. Kenyon, 526, 529  
Burdick v. Tum-A-Lum Lumber Co., 257  
Burgess v. Abbott & Ely, 393, 425  
Burgess v. Sonther, 298  
Burgwin v. Babcock, 513  
Burk v. Webb, 213  
Burke v. Daley, 165, 177  
Burke v. SaVage, 161  
Burke v. Great Northern Ry, Co., 267  
Burnap v. Wight, 143  
Burnett v. Lynch, 188, 190  
Burnhain v. New York Co., 577  
Burnham v. Webster, 502  
Burnley v. Lambert, 250  
Burns v. Curran, 238, 234  
Burns v. Dockray, 189  
Burns v. Morrison, 250, 251  
Burns Bros. v. Cook Coal Co., 603  
Burrass v. Hewitt, 147, 480  
Burst v. Wayne, 575  
Burton v. Hansford, 231  
Burton v. McClellan, 180  
Busch v. Nester, 265  
**Bush v. Bender**, 263  
Bush v. Hush, 263  
**Bush v. Dunham**, 146  
Bush v. Clover, 288  
Bush v. Lyon, 214  
Bush v. Thomas, 495

Bnsklrk v. Strickland, 166, 179  
Dussey v. Barnett, 501

## **TABLE OF CASES**

References are to Pages

Butcher v. Metts, 571  
Butcher v. Steuart, 247  
Butler v. Borroum, 233  
Butler v. Frontier Telephone Co., 231, 232  
Butler v. Miller, 320, 321  
Butler v. Tucker, 325  
Butterfield v. Seligman, 365  
Butterworth v. Soper, 486  
Buttrick v. Allen, 361  
Butts v. Collins, 101  
Butt's Case, 145  
Buxendin v. Sharp, 201, 557  
Byard v. Holmes, 194  
Byers v. Ferguson, 268  
Bynum v. Ewart, 145  
Byrd v. Knighton, 805  
Byrne v. McNulty, 307

## **C**

Caddell v. Allco, 26  
Cadman v. Markle, 843  
Cadwell v. Farrell, 188  
Cadwell v. Pray, 268  
Cairnes v. Bleecker, 220  
Cairo & St L. B. Co. v. Woosley, 160, 183  
Caldbeck v. Simanton, 322  
Caldwell v. Cowan, 212, 215  
Caldwell v. Eaton, 213



Caidwell *v.* Fenwick, 247  
Caldwell *v.* Heltshu, 101  
Caldwell *v.* Lowden, 235  
Caldwell *v.* Richmond, 294  
Cathoon *v.* Wright, 147, 480, 482  
California Packing Corp. *v.* Kelley Storage & Distributing Co., 92  
Calumet Iron & Steel Co. *v.* Martin, 202  
Camden *v.* Robertson, 421  
Camden, City of *v.* Allen, 201  
Camp *v.* Bank of Oswego, 283  
Camp *v.* Douglas, 308  
Camp & Bros. *v.* Ball, 90, 93  
Campbell *v.* Arnold, 157, 159, 160, 191  
Campbell *v.* Bannister, 531  
Campbell *v.* Phelps, 165  
Campbell *v.* Walker, 92, 132  
Candler & Hart *v.* Roselter, 334, 364  
Canfield *v.* Merrick, 350, 363  
Cannon *v.* Cooper, 505  
Cannon *v.* Kinney, 158  
Canton Nat. Bldg. Ass'n *v.* Weber, 98  
Cantwell *v.* Harding, 194  
Caperton *v.* Schmidt, 231  
Capp *v.* Gillian, 103  
Capps *v.* Atlantic Coast Line H. Co., 563  
Carbett *v.* Packington, 188  
Card *v.* Standard Co., 387  
Cardesa *v.* Humes, 505  
Carl *v.* McGonigal, 263  
  
Carleton *v.* Haywood, 352  
Carleton *v.* Lovejoy, 221  
Carlin *v.* City of Chicago, 144, 580  
Carlisle *v.* Trenra, 108, 109  
Carlisle *v.* Weston, 412  
Caranby *v.* Welby, 116  
Carney *v.* Rease, 220  
Carpenter *v.* Briggs, 46(3), 472, 473  
Carpenter *v.* Butterfield, 101  
Carpenter *v.* Joiner, 235  
Carpenter *v.* McClure, 149  
Carpenter *v.* Smith, 159  
Carpenter *v.* Smithey, 340  
Carr *v.* Hinchliff, 471  
Carrier *v.* Esbaugh, 169  
Carrel *v.* Green, 319  
  
Carson *v.* Prater, 161  
Carter *v.* Glass, 189  
Carter *v.* Kingman, 221  
Carter *v.* Ring, 329  
Carter *v.* Simpson, 157  
Carter *v.* White, 319  
Cartersville Coal Co. *v.* Abbott, 144  
Caruth *v.* Allen, 486  
Carvick *v.* Blagrove, 440  
Carvill *v.* Carrigues, 508  
Cary *v.* Gerrish, 353  
Cary *v.* Hewitt, 265  
Case *v.* Barber, 189  
Case *v.* Mark, 167  
Casey *v.* Kimme], 233  
Casey *v.* Walker & Mosby, 319  
Casey Pure Milk Co. *v.* Booth Fisheries Co., 147  
Cassady *v.* Laughlin, 284  
Casseres *v.* Bell, 132  
Cassidy *v.* Leiteb, 75

Castleberry v. Pennell, 115  
 Castor v. McShffery, 21.2  
**Cates v. West**, 600  
 Catholic Bishop of Chicago v. Bauer, 341, 342  
 Catlin v. Birchard, 351  
 Caulfield v. Sanders, 441  
 Cave v. Mountain, 168  
 Carnes v. Ining, 316  
 Cecil v. Carson, 594  
 Central of Georgia By. Co. v. Williams, 461  
 Central Pac. It. Co. v. Board of Equalization of  
     *Placer County*, 598  
 Central Transp. Co. v. Pullman's Palace Car Co., 547  
 Cernahaa v. Chrysler, 228  
 Challe v. Belsbaw, 138  
 Chamberlain v. Greenfield, 112, 137, 138, 153  
 Chamberlain v. Haziewood, 165, 177, 179, 182, 191, 192  
 Chamberlain v. Porter, 334  
 Chamberlain v. Shaw, 221  
 Chambers v. Donaldson, 162  
 Chambers v. Handley's Heirs, 232  
 Chambers v. Hunt, 499  
**Chambers v. Union Nat Bank**, 352  
 Chance V. Carter, 233  
 Chancy v. Win. 520  
 Chandler v. Colcord, 268  
 Chandler v. Lincoln, 498, 409  
 Chandler v. Roberts, 408, 533  
 Chandler v. Spear, 427  
 Chandler v. State, 364  
**Channon v. Lusk**, 220  
 Chapln v. Jenkins, 268  
 Chapman v. Barney, 563  
 Chapman v. Pickersgill, 142  
 Chapple v. Durston, 490, 491, 502  
 Charles v. Elliott, 250  
 Charles H. Thompson Co. v. Burns, 128  
 Chanley v. Winstanley, 333  
 Chatteris v. Cowper, 162  
 Chatterton v. Saul, 257  
 Cheasloy v. Barnes, 125, 162  
 Cheda v. Bodkin, 93  
 Cheetham v. Lewis, 108  
 Cheever v. Merrick, 466  
 Chelsea Exeb. Bank v. Travelers' Ins. Co., 401  
 Chemung Canal Bank v. Lowery, 491  
 Cheney v. Cheney, 234  
 Cheney v. Ricks, 311, 316  
 Cheney v. Straube, 308  
 Chesapeake & O. Canal Co. v. Knapp, 340  
 Chester v. *Willon*, 126, 127  
 Cheuning v. Wilkinson, 507  
 Chicago Bldg. & Mfg. Co. v. Talbotton Creamery &  
     Mfg. Co., 125  
 Chicago, B. & *Q.* It. Co. v. Dickson, 427  
 Chicago, City of v. Babcock, 489, 514  
 Chicago, City of v. English, 506  
 Chicago, City of v. McDonough, 183  
*Chicago, City of v. McLean*, 187  
 Chicago, City of v. Selz, Schwab & Co., 184, 185  
 Chicago, City of v. Speer, 427  
 Chicago City fly. Co. v. Jennings, 185  
 Chicago City fly. Co. v. Leach, 489  
 Chicago City By. Co. v. Shreve, 185  
 Chicago, U. & St F. U. Co. v. Hoyt, 308  
 Chicago, B. I. & P. It. Co. v. Todd, 421, 427  
**Chicago Terminal Transfer B. Co. v. Young**, 145

Chicago Title & Trust Co. v. Core, 154, 486, 487  
 Chicago, W. D. By, Co. v. Ingrabam, 97, 147, 148  
 Chicago & A. B. Co. v. Clause, 555, 558, 573, 574  
 Chicago & A. B. Co. v. Murphy, 573  
 Chicago & A. B. Co. v. O'Brien, 384  
 Chicago & H. I. B. Co. v. Hines, 574  
 Chicago & N. W. v. Peacock, 193  
 Chicago & N. W. fly. Co. ~ Alien, 396  
 Chicago & P. B. Co. v. Munger, 421, 428  
 Chiekering v. Raymond, 209, 212, 214, 218, 219  
 Childes v. Wescot, 122  
 Chfldress v. Emory, 277, 344  
 Chiles v. DaVis, 234  
 Chlnn v. Russell, 263  
 Chirac v. Reinlcker, 240  
 Ohitty v. flume, 418  
 Choctaw Coal & Mining Co. v. tlllch, 198  
 Christensen v. Hanna, 257

**TABLE OF CASES**

**611**

References are to **Pages**

Clink v. Gunn, 221  
 Clinton v. Morton, 477  
 Clinton Wire-Cloth Co. v. Gardner, 575  
 Clough v. Penney, 179  
 Cloves v. Williams, 283  
 Coates v. Hewit, 284  
 Cobb v. Lucas, 114  
 Cobb v. Miller, 402  
 Coburn v. Hopkins, 521  
 Cochran v. Tatum, 340

**TABLE OF CASES**

References are to **Pages**

**612**

Christo v. Nicola, 431  
 Christopher v. Detroit, L. & N. It. Co., 23  
 Christy v. Farlin, 304  
 Church v. Brownswiek, 134  
 Church v. Gilman, 91  
 Church v. ~, lumford, 97, 187  
 Chureher v. Stringer, 354  
 Churchill v. Churchill, 169  
 Citizens' Bank of Baltimore v. Graffliu, 352  
 Citizens Gaslight & Heating Co. v. Granger, 342  
 City Council of Charleston v. King, 113, 114  
 City of. See under name of city.  
 Claflin v. Boston, etc. B. Co., 219  
 Claflin v. Godfrey, 353  
 Claflin v. Hawes, 577  
 Claflin v. Wilcox, 154, 166, 167, 176, 178, 182  
 Claggett v. Simes, 400  
 Clare v. State, 139  
 Clark v. Chamberlain, 223  
 Clark v. Chicago, M. & St. P. By. Co., 94  
 Clark v. Clark, 238  
 Clark v. Draper, 214  
 Clark v. Parlrey, 576  
 Clark v. Hale, 222  
 Clark v. Bolt, 480  
 Clark v. Land Co., 387  
 Clark v. Lewis, 268  
 Clark v. Lineberger, 408  
 Clark v. Maloney, 213  
 Clark v. Moore, 357  
 Clark v. Norton, 412

Clark v. Reed, 3(34)  
 Clark v. Smith, 159  
 Clark v. Van Cleef, 319  
 Clark v. Weis, 380  
 Clark v. Zcigler, 308  
 Clarke v. Crandall, 330  
 Clarke v. Webb, 360  
 Clarkson v. Gifford, 105  
 Clay v. City of St. Albans, 116  
 Clay Fire & Marine Ins. Co. v. Wusterhausen, 390  
 Clayton v. Lemen, 510  
 Clayton v. Munger, 403  
 Clearwater v. Meredith, 482  
 Cleaves v. Herbert, 117, 264, 265  
 Clement v. Boone, 218  
 Clementi v. Goulding, 180  
**Clements v. Flight**, 497  
 Cleveland v. Rodgers, 294  
 Clifford v. Cony, 402  
 Cocksedge v. Fansliaw, 547  
 Codman v. Jenkins, 320  
 Codner v. Dalby, 133  
 Coffee v. Wray, 504  
 Coffin v. Anderson, 213  
**Coffin v. Bassett**, 520  
 Coffin v. Coffin, 131, 132  
 Coffin v. Hall, 384  
 Cobens v. Virginia, 69  
 Cohoon v. Simmons, 100  
 Colborne v. Stoekdale, 441 442  
 Cole v. Driskell, 208  
 Cole v. Fisher, 168  
**Cole v. Hawkins**, 526  
 Cole v. Hindson, 169  
**Cole v. Maunder**, 399  
 Cole v. Terry, 220  
 Colebrook, Town of v. Merrill, 216, 576  
 Colegrove v. New York & New HaVen B. B. Company, 547  
 Coles v. Carter, 486  
 Cole's Case, 169  
 Collict v. flnn, 463, 469  
 Collet v. Lord Keith, 124, 225  
 Collett v. Thompson, 374  
 Collier v. Jencks, 577  
 Collins v. Blantern, 503, 507  
 Collins v. Evans, 263  
 Collins v. Gibbs, 329, 331, 398, 571  
 Collins v. Lynch, 160  
 Collins v. Modisett, 361  
 Collins v. Montemy, 509  
 Collins v. Sanitary Dist. of Chicago, 144  
 Collins v. Trotter, 509  
 Colt v. How, 333  
 Colt v. Boot, 331, 575  
 Colt Co. v. Kyzer, 563  
 Colt & Glover v. Bishop of Coventry & Licliffeld, 387  
 Columbia Heating Co. v. O'Halloran, 512  
 Colwell v. Brower, 500  
 Colwill v. Reeves, 162  
 Combs v. Steele, 340  
 Commercial City Bank v. Mitchell, 321.  
 Commercial Ins. Co. v. Treasury Bank, 575  
 Commissioner v. Green, 298  
 Commissioner v. Perkins, 113  
 Commissioner v. Shearman, 113  
 Commissioners of Treasury v. Brevard, 143  
 Commonwealth v. Hart, 145  
 Compher v. People, 397, 399

Compton v. People, 575  
Comstock v. McEvoy, 481  
Comstock v. Oderman, 486, 487  
Comyns v. Boyer, 464  
Conant v. Barnard, 388  
Conaway v. Pepper, 358  
Concord Apartment House Co. v. O'Brien, 342  
Condict v. Erie B. Co., 232  
Confrey v. Stark, 296, 362  
Conger v. Johnston, 462, 403

## TABLE OF CASES

References are to Pages

Courtney v. Phelps, 453, 468  
Covell v. Carpenter, 509  
Cover v. Armstrong, 302  
Covington v. Lide's Exrs, 334  
Coy v. Cooper, 101  
Cox v. Hagan, 92, 459  
Coxe v. Guliek, 396  
Coxe v. RobbinE, 201  
Coyle v. Coyle, 101  
Cruig v. Missouri, 508  
Cram v. llutehmson, 351  
Crane v. Grassman, 350, 363

613

Conkey v. Kingman, 421  
Conklin v. Bush, 312  
Connali v. Bale, 164, 221  
Connelly v. Pierce, 148  
Connoss v. Neir, 217  
Conservation Co. v. Stimpson, 310  
Consolidated Coal Co. of St. Louis v. Oelt3en, 420  
Continental Life Ins. Co. v. itogers, 128, 329—331  
Contorno v. Ensley Co., 557  
Conwell v. Clifford, 295  
Cook v. Cook, 129  
Cook v. Coy, 146, 147  
Cook v. Dade, 339  
Cook v. Hopper, 219  
Cook v. Howard, 161  
Cook v. Scott, 15, 392, 472  
Cook & Songate's Case, 288  
Cooke v. England, 834  
Cooke v. Graham's Adm'r, 393, 555  
Cooke v. Preble, 516  
Cooke v. Simms, 324  
Cooley v. Penfield, 235  
Coomait v. Stanley, 257  
Cooper v. Bissell, 98, 149  
Cooper v. Cooper, 214, 352, 427  
Cooper v. Ilermance, 476  
Cooper v. Landon, 324, 364  
Cooper v. Lawrence, 489  
Cooper v. Monke, 218  
Cooper v. Newman, 221  
Cooper v. Watson, 246, 506  
Coopwood v. lolton, 187  
Copeland v. Flowers, 97  
Copeland v. Hugo, 562  
Copeland v. New England Ins. Co., 547  
Coppin v. Hurnard, 330  
Corbett v. Paelcington, 188, 304  
Corbltt v. Brong, 244  
Corey v. Bath, 187  
Corley v. Pentz, 235  
Cornwafllis v. Sas-ery, 184, 148  
Corwin v. Wallace, 341

Cory v. Board of Chosen Freeholders of Sonwrsset  
     County, 352, 862  
 Coryton v. Lithbye, 134  
 Costar v. DaVies, 514  
 Cotteral v. Cummins, 154, 170  
 Cotterill v. Cuff, 323, 324  
 Cotterill v. Starkey, 486  
 Couch v. Ingersoll, 324, 329  
 Coughlin v. Blumenthal, 132  
 Count Joannes v. Burt, 129  
 Countess of Northumberland's Case, 481  
 Countess of Salop v. Crompton, 100  
 County v. Pacific Coast Borax Co., 74  
 County Com'rs of Hartford County v. Wise, 103  
**County Court of Brooke County v. United States**  
     Fidelity & Guaranty Co., 369, 375  
 Cray v. Goodman, 239  
 Crease v. Barrett, 580  
 Crecey v. Jay, 94  
 Creel v. Kirkham, 351, 358  
 Creen v. Michigan Cent. B. Co., 148  
 Creigh v. Shatto, 233  
 Crenshaw v. Moore, 97  
 Cresson v. Stout, 257  
 Crisfield v. State, to Use of Hand, 351  
 Crispin v. Williamson, 112  
 Crittenden v. French, 126  
 Crocker v. Atwood, 214  
 Croel.er v. Beal, 424  
**Crockett v. Lashbrook, 118**  
 Crockett v. Moore, 284  
 Croft v. Rains, 91  
 Crogate's Case, 520, 524  
 Cromelien v. Brink, 257  
 Crook v. Pitcher, 105  
 Crooker v. Hutehmanson, 188  
 Crooker v. Willard, 97  
 Cross v. Barber, 222  
 Cross v. Cheshire, 351  
 Cross v. City of Chicago, 556  
 Cross v. Moore, 364  
 Cross v. United States, 295, 297  
 Crosse v. Hunt, 433, 455  
*Croston v. MeVieker, 239*  
 Crouch v. Fowlo, 305  
 Crousillat v. McCall, 312  
 Crow v. Mark, 312  
 Cruikshank v. Brown, 98  
 Cruiksbanlc v. Comyns, 114  
 Cruikslank r. St. Paul Fire & Marine Ins. Co., 51?  
 Crum v. Ejliston, 262  
 Crump v. Mims, 6, 22  
 Cryps v. Baynton, 112, 134  
 Cubbins v. Mississippi River Comm'n, 283, 848  
 Cudlip y. Bundle, 124  
 Cuilen v. O'Hara, 213  
 Culpeper Nat, Bank v. Tidewater Imp. Co., 414  
 Culver v. Avery, 189  
 Culver v. Johnson, 509  
 Cumberland Valley B. Co. v. MeLanahan, 235  
 Cummings v. Gray, 404  
 Cummings v. Smith, 514  
 Commins v. Holmes, 205  
 Cunningham v. Dean, 234  
 Coupledike v. Coupledike, 246  
 Curtis v. Cane, 221  
 614

Cunningham v. Macon & B. B. Co., 226  
Cunningham v. Morrell, 329  
Cuppledlele v. Terwhit, 480  
Curl v. Lowell, 163  
Curley v. Dean, 325, 326  
Curnow v. Phoenix Ins. Co., 444  
Curry v. People, 126  
Curtis v. Curtis, 50  
Curtis v. Martin, 472  
Curtis Funeral Home v. Smith  
Cushing v. Dill, 296  
Cushnian v. Hayes, 469, 472  
Cuthbertson v. Irving, 119, 124  
Cutler v. Southern, 133, 525, 527, 556  
Cutler - Wright, 406  
Cutter v. Powell, 288, 339, 341

p

Da Costa v. Clarke, 557  
Daggett v. Davis, 209, 218, 222  
Dahill v. Booker, 223  
Dahlberg v. P15-se, 314  
Dails v. Lloyd, 352  
Dale v. Phillipson, 111, 112  
Dallam v. Fitler, 158  
Dally v. King, 150  
Dalson v. Bradberry, 98  
Dalton v. Favour, 167, 178, 181  
Dalton v. Rhode Island Co., 202  
Dame v. Dame, 207, 244, 247, 248, 250, 251, 266  
Dana v. Bryant, 460, 465, 406  
Daniel v. Holland, 157  
Daniels v. Ball, 214  
Daniels v. Clegg, 166, 167  
Daniels v. Foster & Kleiser, 221, 358  
Daniels v. Pond, 159, 160, 164, 208  
Danser v. Mailonee, 364  
Danziger v. Boyd, 239  
Darling v. Simpson, 423  
Darrah v. Baird, 208  
Dartnall v. Howard, 324, 326  
David v. David's Adm'r, 132  
David flutter & Co. v. McLaughlin, 425  
Davidson v. Waldron, 212  
Davidson v. Watts, 414  
Davies v. Peuton, 400  
Davis v. Ayres, 842  
Davis v. Burgess, 515  
Davis v. Burton, 473  
Davis v. Clancy, 150, 160  
Davis v. Duncan, 221  
Davis v. Easley, 257  
Davis v. Green, 445  
Davis v. Hurt, 220  
Davis v. Jones, 208  
Davis v. Judge, 238  
Davis v. Mathews, 462  
Davis v. Ransom, 535  
Davis v. Shoemaker, 277

**TABLE OF CASES**

**References are to Pages**

Davis v. Smith, 339  
Davis v. Taylor, 208  
Davis v. Wood, 160  
Davis County v. Horn, 508  
Davison v. Gill, 169

Davison v. Powell, 441  
Davisson v. Ford, 325  
Da-ves v. Gooch, 559  
Dawes v. Winship, 535  
Day v. Chism, 120, 308  
Day v. Edwards, 176  
Day v. Lamb, 101  
Day v. Leal, 321  
Day v. Pielcett, 400  
Dayton v. Fry, 500  
Deal v. Bogue, 421  
Dean v. Comstoek, 160  
Dean v. Walker, 320  
Dearborn v. Dearborn, 187  
Dearborn v. Kent, 403  
DeArman v. Massey, 76  
De Begnis v. Armistead, 351  
Deberry v. DaneU, 284  
Debow v. Collar, 212  
Decker v. Gammon, 164, 179, 150  
DeCordova v. Sanville, 90  
Deeley v. Dwight, 212  
Deerug Co. v. Barzak, 561  
Dojamette v. Cox, 550  
Do Kentland v. Somers, 114  
Delaney v. Boot, 220  
Delano v. Curtis, 222  
Do Medina v. Poison, 357  
Dement v. Rokker, 424  
Demesmey v. Gravelin, 353  
Dench v. Walker, 218, 219, 220  
Den cx dem. Bray v. McShane, 241  
Den cx dem. Carson's Heirs v. Smart, 232  
Den cx dem. Johnson -v. Morris, 231  
Denham v. Stephenson, 122, 123, 136  
Denison v. Richardson, 108  
Denison v. Williams, 299  
Dennehey v. Woodsum, 557  
Dennison v. Goehring, 312  
Donnison v. Leech, 128  
Denton v. Smith, 268  
Derby v. Johnson, 341, 342  
Derisley v. Custanee, 122, 123  
Dermott v. Jones, 340, 341  
Detroit Post Co. v. McArthur, 201  
Deuehatell v. Robinson, 235  
Dent v. Coleman, 482  
Deveroux v. Barclay, 219, 220, 251  
Devine y. Edwards, 351, 352  
Dewei v. Moxom, 215, 223.  
Dewey v. Osborn, 240  
De Wolff v. Morino, 267  
Dexter v. Manley, 305  
Dozell v. Odell, 264  
Dibble v. Duncan, 462

Lumber Co., 395

Diblee v. Davison, 413, 414  
Dicas v. Baron Brougham, 168  
Dickerson v. Jlendryx, 238  
Dickerson v. Winslow, 397  
Dickinson v. Goodspeed, 162  
Dickson y. Clifton, 188  
Pietrieli v. Berk, 163  
Dietus v. Fuss, 217  
Digby v. Fitaharbert, 455, 535  
Dighton v. Bartholomew, 573  
Dike v. Ricks, 454  
Dhllenback v. Jerome, 218, 214  
Dilinghan v. *Skein*, 276



Dills v. Stobie, 466, 467  
 Dilts v. Kinney, 113  
 DiMarcho v. Builders' Iroa Foundry, 202  
 Dimick v. Schiedt, 581  
 Dinet v. PflirsliIng, 515  
 Distilling & Cattle Feeding Ca. v. *People*, 400  
 District of Columbia v. Washington & O. B. Co., 276  
 Ditebam v. Bond, 161, 165, 182  
 Divivier v. French, 397  
 Dixon v. Swenson, 375—877  
 Dob v. Halsey, 423  
 Dobbias v. Delaware, L. & W. B. Go., 127  
 Dobbs v. Edmunds, 131  
 Dobbs v. Gullidge, 160  
 Docitminique v. Daveaant, 406  
 Dodge v. Adams, 327  
 Dodge v. Coddington, 329  
 Dodge v. Colby, 104  
 Dodge v. Irvington Co., 284  
 Doe v. Dyeball, M. & Ivi., 283  
 Doe v. Penfield, 421, 422  
 Dee v. Wrlght, 118, 465  
 Doe ex dam. Alabama State Land Co. v. McCullough, 243  
 Doe ox dom. Braclshaw v. Plowman, 111  
 Doe ex dern. Butcher v. Musgrave, 232  
 Doe ex dem. Campbell v. Fletcher, 233  
 Doe ex dem. Da Costa v. Wharton, 234  
 Doe er dem. Harding v. Cooke, 233  
 Doe ex den. Moore v. Hill, 283  
 Doe ex den. Shewen v. Wroot, 234  
 Doe ex den. Townsend v. Roe, 243  
 Doe ex den. Whatley v. TellIng, 235  
 Tjoeblcr v. Fisher, 340  
 Dole v. Kennedy, 263, 498  
 Dole v. Weeks, 324  
 Dolpb v. Ferris, 164  
 Doming Regina v. *Party*, 599  
 Donaboe v. Emery, SOS  
 Donlin v. McQuadc, 221  
 Donnelly v. Foote, 100  
 Doody v. Collins, 263  
 Doolittic v. Selectmen of Branford, 398  
 Doose v. Doose, 94  
 Doremus v. Selden, 351  
 Dorman v. Kane, 220  
 Dome v. Cashford, 143  
 Don v. Dudderar, 257  
 Dorsey v. Eagle, 159, 162  
 Dorsey v. Lawrence, 284  
 Doswell v. Impcy, 168  
 Doty v. Martin, 321  
 Douglas v. Beasley, 558  
 Douglas v. Bekhor, 423  
 Douglass v. Jlonnessey, 255, 304  
 Douglass v. libbey, 233  
 Douglass v. Satterlee, 388  
 Doulson v. Matthews, 104, 105  
 Devastoa -Payne, 117, 131, 182, 346  
 Dover v. Bawlings, 498  
 Dow v. Epping, 478  
 Do--vd v. Wadsworth, 223  
 Don'ic v. Priddie, 402  
 Dowland v. Slade, 150  
 Downer v. Garland, 108  
 Downey v. Colorado Fuel & Iron Co., 396  
 Doyle *ii* Wilkinson, 276  
 Dozier v. Joyce, 497  
 Drake v. Drake, 481  
 Drake v. Leighton, 590

Drew v. Snaulding, 160, 169, 218  
 Drewe v. Lainson, 438  
 Dubois v. Delaware & H. Canal  
 Dii Bois v. Seymour, 361  
 Dubois' Ezra v. Van Orden, 141  
 Duchess of Norfolk's Case, 373  
 Dudlow v. Watehorn, 525  
 Duf field v. Scott, 474  
 Dugan v. Nichols, 266  
 Dugan v. Hammond, 238  
 Dugger v. Oglesby, 307  
 Duke of Newcastle v. Wright, 12.3  
 Dukes v. Gostlins, 143  
 Dutmont v. Lockwood, 107  
 Dumsday v. Hughes, 120  
 Duncan v. Journey, 239  
 Duncan v. Markloy, 334  
 Duncan r. Spear, 213, 214, 493  
 Dundass v. Lord Weymouth, 143  
 Dunham v. Western Union Telegraph Co., 489  
 Dunham v. Wyck-off, 264  
 Dunlevy v. Fenton, 402  
 Dunstall v. Dunstali, 131  
 Dupee v. Blake, 400  
 Duppa v. Mayo, 138, 804  
**Durden** v. Barnett, 180, 201  
 Duvivier v. French, 199  
 Duyckinek v. Clinton Mutual Ins. Co., 66, 103  
 Dwell v. Moron, 222  
 Dwight IUG. Co. v. Holmes, 94  
 D'Wolf v. Rabaud, 412, 414  
 Dye v. Leatherdale, 526  
 Dyer v. Brown, 498  
 Dyer r. Day, 234, 490  
 Dyer v. Pearson, 251  
 Dyett v. Peadleton, 468

**TABLE OF CASES**

References are to Pages

**615**

Co., 840, 341, 342, 343

616

Dyson v. Collick, 162

Dystor v. Battye, 150

**F**

Eames v. Salem & L. B. Co., 177  
 Earl of Palmolith v. George, 277  
 Earl of Kerry v. Baxter, 147, 869  
 Earl of Manchester v. Vale. Ill, 472, 473  
 Earle v. Bickford, 353  
 Eason v. Newman, 210  
 East v. Cain, 428  
 East India Co. v. Glover, 398  
 Eastmure v. Laws, 405  
 Easton v. Pratchett, 577  
 East St. Louis, City of v. Flannigen, 465  
 East St. Louis Connecting fly. v. Wabash, St. L. & P.  
 By. Co., 155  
**Eaton** v. Lynde, 213, 214  
 Eaton v. Southby, 91  
 Eaton v. Winnie, 154, 176, 179  
 Eavostaff v. Russell, 461  
 Ebersol v. Trainor, 486  
 Bocleston v. Clipsbnm, 423  
 Hoker v. Bohn, 138  
 Eddy v. Chace, 807

Edgoomb v. Dee, 275  
Edgerly v. Emerson, 216  
Edgorly v. Whalan, 218  
Edson v. Weston, 508  
Edwards v. Edwards, 157  
Edwards v. Frank, 219  
Edwards v. Hammond, 143  
Edwards v. Hill, 421, 427  
Edwards v. Hooper, 221, 222  
Edwards r. Nichols, 350, 368  
Edwardsville It. Co. v. Sawyer, 495  
Edward Thompson Co. s-. ICollmeyer, 339  
Eggleston's Lessee v. Bradford, 234  
Egler v. Marsden, 217  
Eibel v. Von Fell, 194  
Eieholz v. Bannister, 353  
Elmer v. Richards, 298  
Eisendrath v. Knauer, 212, 214  
Bisener v. Maxwell, 203, 204  
Elherson v. Richards, 113  
Elder v. Hood, 357  
Elder's Ex'rs w. Harris, 559  
Elgin, City of v. Joslyn, 342  
Elgin, City of v. Thompson, 576  
Ellenwood v. Marietta Chair Co., 63, 104, 106  
Elliot v. Stuart, 556  
Elliott v. Hardy, 135  
Ellis v. Cary, 343  
Ellis v. Ellis, 402  
Ellis v. \Valdron, 186  
Elsee v. Gatward, 189, 324  
Elting v. Vanderlyn, 12i  
Ehves cc Maw, 208  
Emerson v. Nash, 146  
Emertoa cc Andrews, 340  
Emery v. Fell, 276, 284  
Emigh cc Pittsburg, Ft. W. & C. B. Co., 188  
Emmett v. Lyne, 165  
Empire Box Corp. v. Jefferson Island Salt Mm. Co., 524  
Enherg v. City of Chicago, 561, 574  
Enfield v. Stewart, 266  
Engel v. Scott & Holston Lumber Co., 214  
England cx Oem. Syhurn v. Slade, 234  
English v. Arizona en rd. Griffith, 466  
Ensley By. Co. v. Chewing, 184  
Enterprise Oil & Gas Co. v. National Transit Co., 312  
Entsminger v. Jackson, 264  
Erbes v. Wehmeyer, 164  
Ernst v. Eartle, 320  
Erskine v. Davls, 113  
Erskine v. llohnbach, 520  
Erwin v. Clark, 219  
Escheriek v. Traver, 496  
Essington v. Bourcher, 480  
Esson v. Tarbell, 264  
Etter v. Bailey, 212  
Evans v. Elliott, 259  
Evans v. Howell, 342  
Evans v. Miller, 343, 358  
Evans v. Prosser, 514  
Evans v. Stevens, 428  
Eveleth v. Blossom, 266  
Everett v. Gray, 340  
Everett v. Saltus, 213  
Evertson's Ex'rs v. Miles, 189  
Evertt v. Coffin, 219  
Ewbanks v. President, etc. of Town of Ashley, 295, 362  
Espanded Metal Fireproollaig Co. cc Boyce, 330, 342

## F

Faget v. Brayton, 268  
Fairbank v. Phelps, 213, 215  
Fairfax v. Lewis, 579  
Falconcr v. Smith, 508  
Falmouth v. Penrose, 277  
Parley v. Crystal Coal & Coke Co., 428  
Parley v. Lincoln, 221, 266, 208  
Farmers' Nat. Bank v. Fonda, 319  
Farmers' State Guaranty Bank v. Pierson, 217  
Farmington v. Pillsbury, 412, 414  
Farnham v. Hny, 97, 288  
Parr v. Smith, 220  
Farrand cc Hurlburt, 219  
Farrar v. Rollins, 222  
Farrell r. Taylor, 598  
Farrington cc Payne, 16, 218  
Farrington v. Sinclalr, 594  
Parrington & Smith v. Payne, 16  
Farwell v. Hanchett, 268  
Farwell v. Myers, 352

References are to Pages

## TABLE OF CASES

Florida Life Ins. Ce. v. Dillon, 92  
Floyd v. Day, 351  
Flyn v. Staples, 96  
Folger v. Fields, 100  
Follett v. Edwards, 219  
Fonda v. Van Horse, 267  
Fontaine v. Aresta, 283, 284  
Forbes v. Ft. Lauderdale Mercantile Co., 92  
Ford v. Logan, 486  
Ford v. Schliessman, 159  
Foreman v. Sawyer, 187  
Poster v. Lumbermen's Mm. Co., 214  
Foster v. Pennington, 113  
Fester v. St. Luke's Hospital, 560  
Foster v. Woodward, SOS  
Pealder v. Willoughby, 63, 164, 218  
Foulds v. Watson, 329  
Fowble v. Itsryberg, 559  
Fowic v. Alexandriml, 547  
Fowle v. Kirkland, 311  
Fowler v. Arnold, 428  
Fowler v. Clark, 434  
Fowler v. Commissioner, Fowler v. Down, 158  
Fox v. Holeonib, 102  
Fox River IUG. Co. v. Reeves, 283, 284  
Fexsvist v. Tremaine, 432  
flancy v. True, 149  
Frankenthal v. Camp, 154, 176, 178  
Franklin v. Talmadge, 113  
Franklin v. T. H. Lilly Lumber Cc., 516  
Franklin Fire Ins. Co. v. Jenkins, 42~  
Frankum v. Earl of Falmouth, 494  
Fraser v. Gregg, 359  
Fredericks v. Tracy, 254  
Freeman v. Smith, 169  
French v. Merrill, 215

## TABLE OF CASES

References are to Pages

Flessner v. Carstens Packing Co., 188  
Fletcher v. Ijarillier, 464  
Fleteber v. Peck, 468  
Fletcher v. Pegion, 555  
Fletcher v. Wilkins, 259  
Flexner v. Farson, 76

617

Flint & Walling Mfg. Co. v. Beelcett, 188  
 Florida Cent. & P. B. Co. v. Ashmore, 145  
 Florida East Coast fly. Co. v. Peters, 461, 466, 472, 473, 476, 478  
 Faulkner v. Alderson, 162  
 Faulkner v. Brown, 212, 214  
 Faulkner v. First Nat. Bank of Santa Barbara, 251  
 FAVOR v. Philbriclc, 323  
 Fay v. Goulding, 325  
 Fay v. Taft, 55  
 Eberstadt v. State, 549  
 Feasler v. Schriever, 428  
 Feleb v. Taylor, 357  
 Felton cc Dickinson, 340  
 Fenlason v. Raekliff, 493  
 Fenton v. Clark, 341  
 Ferguson v. Cappean, 331  
 Ferguson v. Carrington, 189, 212  
 Ferguson v. National Shoemakers, 148  
 Ferguson v. Tucker, 323  
 Pernald v. Garvin, 149  
 Ferrnd v. Walker, 474  
 Ferriss v. North American Fire Ins. Co., 146  
 Ferry v. Williams, 331  
 Fetter cc Real, 334  
 Fidler v. Delevan, 91, 468  
 Film v. Stratton, 332  
 Final v. Backus, 208  
 Finch v. Brian, 157  
 Finch v. Coeken, 113  
 Finch v. Conrade's Ex'r, 547  
 Finch v. Galigher, 402  
 Finch's Ex'rs cc Alston, 486  
 Firm v. Modern Brotherhood, 529  
 Finney v. Guy, 399  
 Finney v. McMahan, 358  
 Fmnney v. Studebaker Corp. of America, 358  
 Fiquet cc Allison, 220  
 First Congregational Meetinghouse Society v. Town  
     of Rochester, 304  
 First Nat. Bank v. Kreuzberg, 263  
 First Nat. Bank of Manmouth v. Donbar, 220  
 First Nat. Bank of Sutton v. Grosshans, 94  
 First Nat. Bank of Wellsburg v. Kiniberlands, 509  
 Fish v. Branamon, 160  
 Fish v. Dodge, 128  
 Fisher v. Cobb, 161  
 Fisher v. Kyle, 220  
*iither* v. Meek, 493  
 Fisher v. Morris, 118  
 Fisher 'cc Pimbley, 526  
 Fitch v. Beise, 100  
 Fidler v. Shotwell, 157, 158  
 Fitzgerald v. Southern Farm Agency, 476  
 Fitzpatrick cc Filtzpatrick, 514  
 Fitzpatrick v. Robinson, 133  
 Flanagan v. Camden Mut. Ins. Co., 283  
 Flanders cc Atkinson, 413  
 Flanders v. Cobb, 559  
 Flanders v. Stewartstown, 114, 575  
 Fleming v. Balley, 295  
 Fleming v. Carter, 496  
 Fleinmlng v. Mayor, etc. of City of Hobolcen, 405, 473  
 Forman v. Jacobs, 113  
 Fo,'rcstell v. Wend, 509  
 Forsdiek v. Collins, 221  
 Forsyth v. Barnes, 505  
 Forsyth v. Wells, 208  
 Forsythe v. Washtenaw, 593

Fort Dearborli Lodge v. Klein, 118, 150, 400, 480, ~T  
Forth v. Pursley, 215, 218  
Foshny v. fiche, 437  
Foss v. Stewart, 109

Foster v.  
Foster v.  
Foster v.  
Aflanson 312  
Elliott, 146  
Jackson, 400

to Use of Taylor, 466  
618

French v. 11 obb, 231  
Freidlander - llapley, 92  
Freidman cc Denhalter Bottling Co., 94  
Friar v. Grey, 134  
Frick v. Miller, 265  
Friend v. Dunks, 201, 362  
Frink v. Pratt, 212, 214  
Frost v. Raymond, 305  
Fry v. Baxter, 217  
Fuller v. Mimer, 264  
Fuller v. Brown, 841, 359  
Fuller v. Fuller, 93  
Fuller v. Rouneeville, 486  
~'uller v. Town of Hampton, 132, 146  
Pulmerston v. Steward, 526, 528  
Fulton v. Merrill, 493  
J'ulton v. Whalley, 212  
~'urman v. Parke, 279  
russelman cc Yellowstone Val. Land & Irrigation Co.,

94

## G

Gaff v. Harding, 267  
Gaffney v. Colvill, 482  
Gaffney v. Hayden, 342, 343  
Gaffney v. Illingsworth 581  
Gaile v. Betts, 147  
Gainsford v. Griffith, 534  
Gale v. Nixon, 304  
Gale v. O'flyan, 284  
Gale v. Reed, 1313  
Galloway v. Holmes, 358  
Gait v. Chicago & N. W. H. Cc., 154  
Galusha v. Butterfield, 498  
Calvin v. Galvin Brass & Iron Works, 222  
Gambling v. Prince, 486  
Gardiner v. Corson, 307  
Gnrdriner v. Croasdale, 334  
Gardner v. Armstrong, 332  
Gardner v. Clark, 406  
Gardner v. Dutch, 265  
Gardner v. Humphrey, 268  
Gardner v. Linde, 576  
Gardner v. Meeker, 544  
Gardner v. Thomas, 105  
Gargan v. School That., 503  
Garland v. Tucker, SOt  
Garnsey v. Pike, 235  
Garrett v. Beaumont, 577  
Garrett v. Hitchcock, 332  
Garrick v. Chamberlain, 420  
Garthi v. Draper Coal & Coke Co., 96  
Gartlan v. C. A. Hooper & Co., 98  
Garvey v. Metropolitan West Side Elevated B. Co., 187

Gastineau v. McCoy, 200  
Gatas t. Caldwell, 805, 507  
Gates v. Lounsbury, 486, 520  
Gates v. Miles, 167

## **TABLE OF CASES**

References **are to Pages**

Gates v. Neal, 201  
Gates v. Thede, 4~J3  
**Gatton v. Dfmmitt**, 125  
Gauche v. Mayer, 215  
Gay v. Lloyd, 505  
Geary v. Bareeroft, 167  
Gedney v. Inhabitants of Tewksbury, 296  
Geiges r. Greiner, 234  
Gemmill v. Smith, 148, 414, 420  
Geneva, Town of v. Cole, 296  
George cc English, 115  
George v. Fisk & Norcross, 183  
George v. Illinois Cent. H. Co., 154, 489  
George v. Tate, 507  
Georgia Home Ins. Co. v. Warten, 491  
German Fire Ins. Co. of Peoria v. Grunert, 330  
German Nat. Bank of Chicago v. Meadowcroft, 209  
Gerrish v. Train, 455  
Gerry v. Gerry, 427  
Gibbons v. Farwell, 218, 219  
Gibbons v. Pepper, 447, 486  
Gibbs v. Bryant, 339  
Gibbs v. Chase, 219  
Gibbs v. Guild, 802  
Gibbs v. Jones, 221  
Gibson v. Bourland, 514  
Gibson v. Hunter, 547  
Gibson v. Kirk, 354,856  
Gibson v. Reiselt, 544  
Gibson v. Wells, 190  
Gifford v. Perkins, 470  
Gift v. Hall, 284  
Gilbert v. Dickerson, 220  
Gilbert v. Kennedy, 129  
Gilbert v. Parker, 439  
Gilbert v. Williams, 187  
Gildas v. Crosby, 267  
Gillaspie v. Wesson, 586  
Gillespie v. Dew, 160, 163  
Giles v. Edwards, 353  
Gillet, Adm'r of Clemens v. Maynard, 365  
Giliett v. Ball, 157  
Gillett v. Treganza, 234  
Gilfillan v. Farriugten, 512  
Gillujan v. Chicago fly. Co. 184, 574  
Gilman v. Hill, 219  
Gilmore v. Christ Hospital & DickInson, 393  
Gilmore v. Newton, 221, 222  
Gilmore v. Wilbur, 352  
Gilsen v. S~ewart, 364  
Girard cc Taggart, 340  
Given v. Driggs, 115  
Gladwell cc Steggall, 189  
Glanser v. Shepard, 336  
**GLASS v. Basin & Bay State Mlii. Co.**, 201'  
**Glaze cc McMillion**, 212  
Glazer v. 01ff t, 460  
Gledstane v. Hewitt, 245, 526  
Glenn v. Garrison, 217, 218  
Glover v. Dixon, 523

Gould v. Lasbury, 4611, 462, 463  
Gould v. Ray, 149  
Gould v. Smith, 428  
Goulet v. Asseler, 26, 67, 170, 100, 224  
Gourney v. Fletcher, 131

## **TABLE OF CASES**

**References are to Pages**

Grannis v. Clark, 108, 805, 307  
Grannis v. Hooker, 127  
Grant v. Easton, 861  
Grant v. Ring, 2143, 219, 221  
Grant v. Popejey, 570  
Gratu v. Phillips, 312, 316  
Graves v. McKeon, 105  
Graves v. Ticknor, 108  
Gray v. Gray, 405  
Gray v. Griffith, 352  
Gray v. Johnsen, 9?  
Gray v. Pingry, 505  
Gray v. Shnrp, 425  
Greasley v. Codling, 180, 163  
Greathouse v. Smith, 298  
Greco v. S. S. Kresge Co., 336  
Greeley v. Stilsen, 207, 208  
Green v. Ashland mm Co., 257  
Green v. Belitz, 166, 177  
Green v. Biddle, 241  
Green v. CeVillaud, 146  
Green v. Dana, 298  
Green v. Dunn, 222  
Green v. Fry, 361  
Green v. Gilbert, 342  
Green v. Goddard, 164  
Green v. James, 525.  
Green v. Morse, 168  
Green v. Ovington, 299  
Green v. Russell, 212  
Greene v. Cole, 189  
Greene v. Fish Furniture Co., 87  
Greene v. Haley, 841  
Greenhow v. Isley, 116  
Greenwalt v. Homer, 489  
Greenwood v. Curtis, 329  
Greer v. Wheeler, 421  
Greer v. Young, 414, 437, 430  
Gregoir v. Leonard, 177  
**Gregory v. Bewly, 282**  
Gregory v. Piper, 154, 165, 166, 176, 178, 193  
**Gregory v. Thompson, 283, 290**  
Greinke v. Chicago City By. Co., 94, 185  
Orenelife, Executors of, 481  
Gresham v. Walker, 114  
Grew v. Burdett, 115  
Gridley v. City of Bloomington, 143  
Griffin v. Long Island By. Co., 271  
Griffin v. Rising, 201  
Griffin v. Reynolds, 308  
**Griffith v. Willing, 311**  
Griffith v. Willins, 316  
Griffiths v. Eyles, 146, 147  
Grills v. Mannell, 437, 480  
Grimstead v. Marlowe, 116  
*Grinwoed v. Barret, 109*  
Grithneil v. Phillips, 165  
Griewold v. Plumb, 222  
Griswold v. Sedgwick, 168, 169



Grist v. Hodges, 128  
 Clover v. Tuck, 328  
 Gloyd v. Hotel La Salle Cc., 351  
 Goetehins cc Sanbomn, 157  
 Goff v. Gott, 250  
 Goldberg v. Barney, 431  
 Geldey cc Morning News of New Haven, 76  
 Gc,ldsby v. Ilobertson, 327  
 Goldsehmidt v. Berry, 263, 268  
 Goldstein cc Reynolds, 506  
 Good cc Board of Pollee Com'rs of City of Balti-  
     more, 257  
 Goodehild v. Pledge, 461  
 Goodhue v. Luce, 421, 424, 428  
 Goodman v. Walker, 187  
 Goodrich m, Jones, 208  
 Goodrich v. Lafflin, 342, 357  
 Goodrich v. Leland, 304, 320  
 Goodrich v. Reynolds, 472  
 Geodright ex dem. Balch v. Rich, 235  
 Goodtitle v. Baldwin, 233  
 Goodtitle cc Tombs, 243  
 Goodtitle cx dem. Miller v. Wilson, 238  
 000dtitle cx dem. Wright v. Otway, 111  
 Goodwin v. Gilbert, 357  
 Goodwin v. Griffis, 343, 358  
 Goodwin v. Lynn, 307, 320  
 Geram v. Sn'eeting, 441, 442  
 Gordon v. Bankard, 392  
 Gordon v. Harper, 154, 157, 158, 176, 183, 208, 214, 215, 263  
 Gordon v. Jenney, 264  
 Gordon v. Journal Publishing Co., 108, 109  
 Gordon v. Kennedy, 128  
 Gordon v. Peirce, 478  
 Gore v. Condon, 148  
 Gorman v. Lenox, 400  
 Geshen & Sharon Turnpike Co. v. Sears, 140, 468  
 Gossett v. Morrow, 245  
 Gould v. Aurora, F. & C. By. Co., 202  
 Gould v. Coal & Coke B. Co., 131  
 Gould v. Jacobson, 264  
 Gove v. Lawrence, 425  
 Governor, to Use of Thomas v, Lagow, 459, 469  
 Govett v. fladnidge, 426  
 Cower v. Quinlan, 235  
 Graffenreid v. Kundert, 853  
 Graham v. Peat, 161, 162  
 Graham v. Spenee, 387  
 Grand Island Banking Co. t First Nat. Bank of  
     Grand Island, 251  
 Grand Lodge, Brotherhood of Railroad *Trainmen* v.  
 Randolph, 420, 429  
 Grand Rapids. City of v. Whlttlesey, 232  
 Graner v. Jones, 239  
 620

Grobart v. Society For ~stabil~iiiiig Useful Mallufacturos, 20  
 Groenvelt cc Burnc'II, 91  
 Groerrvelt s'. Burwell, 598  
 Crossetti v. Sweasey, 94  
 Grosvenor cc Phillips, 264  
 Grove v. Wise, 213, 221  
 Guerard v. Jenkins, 238  
 Guerdom cc Gomhett, 341  
 Guernsey v. Carver, 16  
 Guest Piano Co. v. Bicker, 481

Guille xc Swan, 164, 166  
Guinnip v. Carter, 98, 573  
Gulf, C. & S. F. fly. Co. v. Cities Service Co., 128  
Gully v. Bishop of Exeter & Dowliag, 478  
Gunsolus v. Lormer, 157, 162  
Günter v. Dale County, 297  
Gunzburger v. Rosenthal, 213  
Guptill v. Richardson, 168, 169  
Guttner v. Pacific Steam Whaling Co., 214  
Gutsch v. Melihargey, 267

## H

Ilaasn,an c'. Pacific Alaska Air Express, 186  
Hackett v. Walters, 377  
Baddim~ v. Einstman, 219  
Hagar v. Randall, 222  
Hahn v. Hitter, 486  
flaight v. Omaha & C. B. St. Ry. Co., 478  
Hail v. heed, 250  
Haines v. Parkersburgs, M. & I. fly. Co., 132  
Eniton v. Jeffreys, 390  
Bake v. Buell, 221  
Hale v. Dennie, 468  
Hale v. Lawrence, 105, 405  
Haley v. McPherson, 525  
Haley v. iowan, 251  
Ball v. Boston & W. B. Co., 219  
Hall v. Bumstead, 297  
Hall v. Chaffee, 162  
Ball cc Corcoran, 220  
Hall v. Daggett, 214  
Ball v. Durham, 262  
Ball v. Fearnley, 480  
Ball v. Gittings' Lessee, 233  
Hall v. Ligon, 205  
Ball v. Odher, 361  
Hall v. O'Neil Turpentine Co., 396  
Ball v. Piekard, 157, 158, 183, 214, 215  
Ball v. Rodgers, 283  
Ball v. Rupley, 341  
flail v. White, 267  
  
Ballenbake v. Fish, 222  
Hajlet cc Byrt, 462, 470  
Hallett v. Fowler, 263  
Balligan v. Chicago & ft. I. B. Co., 146. 157. 191  
Halilock v. Powell, 97, 189  
Halsey v. Carpenter, 108, 133  
'Halsey v. Simmons, 265  
Jiambly v. Trott, 207  
Hamilton v. century Mfg. Cc., 426  
hamilton v. Hart, 320  
jlainhitO3l s. Lusk, 308  
hamilton v. Plainwell Water-Power Co., 179  
Hamilton v. Singer Mfg. Co., 268  
J-Iamlin v. Reynolds, 600  
l-lammer v. Wilsey, 161  
Hammond v. Hopping, 320, 321  
flammond v. Plimpton, 158  
flance v. Tittabawassee Boom Co., 212  
flaneocke v. Vrowd, 111  
Hand v. Winton, 200  
j-Iantly cc Chatfield, 391  
Haney v. Townseud, 179  
j'Inna v. Lichtenshein, 396, 399  
Hanneu v. Edes. 170  
Ilapgood v. hloughton, 535  
Hardin v. Jordan, 232

Harding v. Craigie, 3243, 327, 575  
 Harding v. Larkin, 305  
 Hard's Case, 279  
 Hardy v. Catheart, 108  
 Barker v. Brink, 482  
 Harlem, Town of v. Eninnert, 421  
 Harley v. Parry, 320  
 Harlow *i.* Thomas, 305  
 Harmon v. O'vden, 333  
 Ham v. Security Nat. Bank  
 Harper v. Charlesworth, 102  
     Harper v. Scott, 207  
     Hnrpham v. Haynes, 473  
     Ifnret v. Kinney, 234  
     Harrington v. Deane, 311  
     hiarrington cc Macmerris, 353  
     Harris v. Christian, 359  
     Harris v. Coeoanut Grove Development Co., 85  
     Harris v. de flervoir, 313  
     Harris v. Jaffray, 128, 334  
     Harris v. Mantle, 332  
     Harris v. Smith, 203, 2434, 265  
     Harris v. Worth, 426  
     Harris Photographic Supply  
     Harrison v. Luke, 340  
     Harrison v. McCormick, 423  
     Harrison v. Mathews, 291  
     Harrison v. Taylor, 307, 329  
     Hart v. Boston & M. It. B., 267  
     Hart v. Ciels, 297  
     Hart v. Fitzgerald, 265, 427  
     }Inrt v. Hill, 163  
     Hart s. Lindsey, 113  
     Hart v. Longfield, 100, 145  
     Hart v. Skinner, 223  
     Hartley v. Herring, 135  
     Hartley State Bank v. McCorkell, 223  
     Hartman *ie* Keown, 264  
     Hartman v. Keystone Ins. Co., 91  
     Bartnett cc Boston Store of Chicago, 186  
     Harvey v. Drew, 351

## TABLE OF CASES

### References are to Pages of Oklahoma City, 514

Co. v. Flsher, 138  
 Harvey v. Parkersburg Ins. Cc., 132  
 Harvey v. Stokes, 113  
 Harwood v. Smethurst, 247, 256, 270  
 Haskell v. Inhabitants of Woolwieh, 107  
 Hastings v. Cunningham, 590  
 Hastrop v. Hastings, 402  
 Hatch xc Spofford, 420  
 Hatton v. Morse, 462  
 Havens v. Hartford & N, H. B.  
 Haverstick v. Fergus, 263  
 Hawkins v. Helcles, 117  
 Hawkins v. Hoffman, 219, 220.  
 Hawkins v. Johnson, 249  
 Fawn v. Norris, 238  
 Haworth v. Spraggs, 428  
*Hayden* v. Nott, 426  
 Hayes v. Livingston, 234  
 Hayes v. Massachusetts Mat, Life  
  
 Hayes v. Shattuck, 79  
 Hayes cc Warren, 327  
 flayman v. Gerrard, 533, 534, 535  
 Haynes v. Crutchfield, 1112, 249  
 Haynes v. Lucas, 275, 282, 400

Haythorn cc Rushforth, 206  
Hayward v. Leonard, 341  
Hazard v. Franklin Mat. Fire Ins. Co., 352  
Hazen v. Essex Co., 201  
Hazieton v. Locke, 216  
Head v. Baldrey, 405  
Headhey v. Shaw, 114  
Heard v. Baskerville, 120, 333, 392  
Heath v. White, 75  
Heaton v. Packer, 396  
Hedges v. Chapman, 474  
Hedriek v. People, 400  
Heffner xc Beta, 233  
Heffron v. Rochester German  
Rether v. Fidler, 247, 249  
Heidehmeier v. Hecht, 426  
Heidenreich v. Bremner, 427  
Heilbronn xc Herzog, 189  
Heilbut v. Buckleton, 322  
Heiman v. Schroeder, 575  
hleimberger v. Elliot Frog &  
Heineman cc Steiger, 212, 218  
Heinman v. Felder, 92  
Heinmiller v. Hatheway, 235  
Helier cc Whytler, 454  
lichen v. Hellen, 505  
iJei]er cc Hufsmth, 220  
Belmiak v. Carter, 92  
Eemrnings v. Gasson, 200  
Henderson v. Lauck, 330  
Henderson cc StrInger, 397  
Henderson v. Withy, 533  
*Hendrick cc Seely*, 576  
Hendricks v. Decker, 161  
Hendrickson v. Walker, 264  
Heady v. Stephenson, 119

**TABLE OF CASES**  
**References are to Pages**

Henkel v. Beyman, 146  
Hennles cc Vogel, 421, 424  
Hennlker cc Contoocook VaL  
Henry v. Allen, 299  
Henry v. Gamble, 284  
Henry v. Beldmaler, 482  
Henry cc Ohio V. Co., 37~ 518  
Henry v. Porter, 514  
Henry xc Sowles, 217  
Henry v. Spittler, 85  
Henry Glass & Co. v. MIsrochi, 03, 288  
Henry mv. Co. cc Seraonian, 6, 22  
Henshall v. Roberts, 115  
Hensley v. Orendorff~ 250  
Benwood v. Cheeseman, 105, 100  
Hereford v. Crow, 481  
Bert v. Schulze, 114  
Herlakenden's Case, 472, 473  
Herne s. Bemhocv, 190  
Berrell v. Sizelend, 496  
Horreshoff v. Trlpp, 239  
Herrick v. Manly, 480  
Herrick v. Swomley, 489, 509  
Berries v. Jamieson, 276  
Herring v. Bhaeklow, 453, 403  
Hersey v. Northern Assurance  
Hesketh v. Lee, 112, 257  
Hess v. Griggs, 266  
Heydon v. Thompson, 441

Heydon & Smith's Case, 161, 162  
Heymnan v. Covell, 428  
Jibbert cc Courthope, 350, 363, 364  
Hickey v. Binsdahe, 267  
Hiekingbotton, v. Lehman, 257  
Hickman cc Walker, 525, 527.  
Hickok v. Coates, 386, 473  
Hicks v. Cram, 425  
Hicks v. Lyle, 209, 219  
Ricks v. Rogers, 232  
Higgins cc Began, 307  
Higgins v. Farnsworth, 118  
Higgins v. Halllgan, 115  
Higgins v. Highuield, 240, 241  
Higgins v. Lee, 516  
Higgins v. Sargent, 353  
Higgins Carpet Co. v. Latimer, 150  
Higgon v. Mortlmer, 208  
Highland Foundry Co.  
550  
Hulareth v. Becker, 132  
Hildrith v. Harvey, 115  
Hill v. Belasco, 222  
Bill v. Brennan, 215  
Bill v. Chipman, 559  
Bill v. Green, 342  
Hill v. Bill, 232  
Bill v. Mendenhall, 506  
Bill v. Montague, 134  
Bill sc Nelson, 104, 105  
Bill v. Bobeson, 109

B. B. Co., 201, 297

## 621

Co., 165, 192, 308  
223  
Ins. Co., 209, 221,  
Ins. Cc., 283, 348  
Co., 145, 287, 288, 839

v. N, t, N. B. & H. U. Cc.,

## 622

Hill v. Tucker, 423  
Hill v. wright, 500

SwItch Co., 4.00

Hillborn v. Artus, 283  
 Billyer v. Eggers, 257  
**Hilton** v. Burley, 508  
 Hilton v. Guyot, 505  
 flimes cc Barnitz, 461  
 Hinckley v. Baxter, 208  
 Hindmarch v. Hoffman, 352  
 Hines, Er pnrte, 401  
 Hines v. McMillan, 401  
 Hines v. Rutherford, 550  
 Hinks v. Minks, 165, 177  
 Hinton v. Husbands, 473  
 Hitchcock v. Aiken, 361  
 Hitchcock v. Covill  
 Hitchcock v. Haight, 572  
 Hitchcock v. Munger, 100  
 Hitchin v. Stevens, 557  
 Hoagland v. Moore, 341  
 Hobbs v. flay, 169  
 Hobbs v. Smith, 322  
 Bobson v. McArthur, 397  
 Hobson v. Middleton, 437  
 Hodges v. Steward, 399  
 Hodgson xc Barrett, 330  
 Hodgson v. East India Co., 147, 467  
 Hoey v. Furman, 233  
 Hofferma n. Simmons, 271  
 Hoffman r. Bircher, 428  
 Hoffman -.Iarrington, 162  
 Hogan v. }Curtz, 495  
 Holt v. Molony, 128  
 Holbrook v. Brenner, 233  
 Holden v. Rutland & B. U. Co., 177  
 Holder v. Aultman, 107  
 Holdipp xc Otway, 467  
 Holland xc Kibbe, 482  
 Holler v. Bush, 402, 400, 471  
 Holler v. Coleson, 263  
 Holliday v. Camsell, 220  
 flolliday v. McKinne, 499  
 Holman v. Criscrell, 365  
 Holmes v. Barclay, 104  
 Holmes v. Bell, 321  
 Holmes v. Newlands, 110  
 Holmes x'. Peek, 187  
 Hoiroyd v. Brcare, 169  
 Bolt v. City of Moline, 04  
 Bolt v. Howard, 510  
 Bolt v. Rees, 238  
 Home v. Semple, 283  
 Home Ins. Co. of New York v. Duke, 330  
 Homer v. Ashford, 307  
 Homer v. Thwing, 220  
 Honk cc Roblson, 353  
 Booker cc Smith, 168  
 Hooper's Case, 321  
 Hopkins v. Burney, 499  
 Hopkins v. Logan, 360

## TABLE OF CASES

References *are* to **Pages**

Hopkins cc Medley, 441  
 Hopkins v. Nashville, C. & St. ti. U. B., 547  
 Hopkins v. Ward, 234  
 Hopkins v. Woodward, ~05  
 Hopkins v. Young, 304  
 Hophinson v. Sears, 75  
 Bore v. Chapman, 131  
 Horn v. Zimmer, 265

Home v. Lewin, 456, 471  
 Horrel v. McAlexander, 333  
 Horsefield v. Cost, 221, 222  
 Horton v. Auchnoody, 168  
 Horton v. Hensley, 161  
 Hosier v. Eliason, 461  
 Hosley v. Black, 126  
 Hotchkiss xc Mcvicar, 212  
 Hotham cc East India Co., 140, 141  
 Rough v. Rawson, 328, 330  
 Houghton & Co. v. Alpha Process Co., 516  
 Hocy v. Smith, 305  
 Howard v. Bankes, 179  
 Howard v. Tyler, 178  
 Howe v. Newmarch, 165  
 Howell v. Biehards, 126  
 Howell v. Young, 187  
 Hewitt v. Estelle, 221  
 Rowland v. Davis, 100  
 Howton v. Mathias, 217  
 Hoy xc Roy, 282, 283, 284  
 Hoyt xc Ge)ston, 158, 161  
 Hoyt v. Wilkinson, 860, 364  
 H. S. Benjamin Wagon &  
 Exeh. Bank, 223  
 Hubbard v. Davis, 299  
 Hubbard v. Lymnn, 161  
 Hubbell v. Comlrey, 301  
 Hubbell v. Wheeler, 165  
 Huddleston v. Garrott, 233  
 Budson v. Jones, 460 -  
 Hudspeth v. Gray, 284  
 Huebschmann v. McFienry, 257  
 Huff v. Campbell, 308  
 Huftalin v. Misner, 421  
 Huger v. Cunningham, 572  
 Huggins v. Wiseman, 134  
 Hughes v. Frum, 572  
 Hughes v. Gaston, 563  
 Hughes v. Phillips, 454  
 Hughes v. Smith, 112, 134, 140  
 Hughes v. Woosley, 316, 317  
 Hughey v. Sulhiran, 581  
 Hull v. Blaisdell, 168  
 Hull cc Southworth, 207  
 Hulme v. Renwlek, 326  
 Bumbert r. Trinity Church, 491  
 Humiston cc Smith, 188  
 Humphrey xc Whitten, 394  
 Humpbreys xc Bethily, 147, 149, 895, 405  
 Bunnemann v. Inhabitants of Grafton, 340  
 Hunt v. Bolton, 221

Carriage Co. v. Merchants'

623

#### TABLE OF CASES

References are to Pages

Jackson x'. Anderson, 209, 219  
 Jackson v. Baker, 09  
 Jackson v. Bohlin, 472, 487  
 Jackson v. Bud, 231—233  
 Jackson v. Givin, 233  
 Jackson v. Loomis, 241  
 Jackson v. Pesked, 183, 191, 558, 575, 576  
 Jackson v. Randall, 240  
 Jackson v. Sisson, 234  
 Jackson v. Stetson, 478, 479  
 Jackson v. Tribhlo, 238  
 Jackson v. Waddil], 304, 305  
 Jackson and Sharp Co. v. fly, 187

Jackson en 6cm. Clowes v. Rakes, 235  
Jackson en 4cm. Duaeon v. Harder, 233  
Jackson cx dem. Haines v. Woods, 426  
Jackson cx 4cm. Hardenberg xc II. L.  
235

Hunt xc Strew, 203  
Hunt v. Test, 508  
Hunt v. Weir, 513  
Hunt's Case, 283, 284  
Hunter v. Bilyeu, 402  
Hunter v. ('ochran, 233  
Bunter v. Neck, 413  
Hunter v. Stewart, 129  
Hunter v. Wilkinson, 95  
Huntington x'. Attrlll. 105  
Huntsville Knitting Co. v. Butner, 459  
Rurley v. Great Falls Baseball Ass'n, 564  
Hurst v. Carlisle, 164  
Hurst v. Cook, 493.  
Husbands v. Aetna Co., 387  
Huston v. Wickersham, 241  
Hutchinson xc Brock, 429, 431  
Butchinson v. Brown, 566  
Hutehinson v. Dubois, 266  
Hutehinson --c Granger, 129  
Hutchinson v. Hendrickson, 514  
Hutehinson v. Johnson, 594  
Hutton v. Arnett, 214  
Hoyck xc Andrews, 308  
Hyatt v. Wood, 163, 486  
Hyde v. Mon at, 397  
Hyde v. Noble, 221  
Hyde v. Stone, 220  
Hyde's Ferry Turnpike Ce, v. Yates, 574

## I

laques' Case, 470  
Iasigi v. Shea, 217  
I. H. Pitts & Son Co. v. Bank of Shuloh, 223  
Ilderton ~~xx~~ Ilderton, 103, 107  
Des v. Heidenreich, 414  
hg v. Burbank, 487  
Illinois Cent. By. Co. v. Aland, 185  
Illinois Cent. B. Co. v. Ratter, 118, 487  
Illinois Cent. B, Ce, xc Johnson, 469  
Illinois Cent. H, Co. v. Leidig, 473  
Illinois Cent. B. Co. xc Parks, 210  
Illinois Cent. It. Co. r, Reedy, 193  
Illinois Cent. H. Co. v. Rudy, 193  
Illinois Fire Ins. Co. v. *Stanton*, 400  
Illinois Land & Loan Co. xc Bonner, 305  
Illinois State Hospital for Insane xc Higgins, 284  
Illinois Steel Co. v. Novak, 487  
Illinois Steel Co. xc Ostrowski, 92  
Illinois & St. L. Bailroad & Coal Co. v. Cobb, 161  
ilsley v. Stubbs, 266, 428, 431  
v. fllefsen, 420  
Imperial Fire Ins. Co. cc Shinier, 575  
Independent Order of Hut, Aid v. Paine, 329  
Indianapolis & St. L. B. Co. v. Herudon, 219  
Ingersoll v. Barnes, 208  
Ingersoll v. Van Bokkelin, 214  
Ingrabam v. Martin, 264  
Inhabitants of Barnstable cc Thatcher, 162  
Inhabitants of Bath v. **Inhabitants** of F'reeport, 362  
Inhabitants of First Parish **In** Sudbury v. Stearns, 209  
Inhabitants of Milford cc Bangor fly. & Electric Co., 322  
Inhabitants of Milford v. Commissioner, 362



Inhabitants of Omono v. Wedgew000, 422, 423  
Innis v. Crawford, 232  
Innkeeper's Case, *The*, 175  
Inquirer Printing & Publishing Co. v. like, 578  
International Harvester Co. v. Commonwealth of Kentucky, 76  
International Hotel Co. v. Flynn, 424  
International & O. ic. H, Co. v. Pape, 110  
Iron Clad Dryer Co. v. Chicago Trust & Savings Bank, 521  
Irvine v. Hanlin, 311  
Irving x'. Veitch, 360  
Isaac v. Farrar, 520, 523  
Isaak v. Clark, 247, 250  
rsaaes v. Wiley, 113  
isle v. Cranhy, 421  
Israel v. President, etc. of Town of Jacksonville, 296  
Italian Swiss Agricultural Colony v. Pease, 430  
Ivey x'. New York Telephone Co., 377

## J

Schoonlnaker, Jackson en dem. Murray v. Hacen, 233

Jackson en 4cm, Pull v. Prevost, 114  
Jackson en dem, Saxton v. May, 232  
Jackson cx dem. Simmons v. Chase, 234  
Jacksonville Electric Co. xc Batchis, 120  
Jacksonville, N. W. & S. E. By. Co. v. Brown, 145  
Jacobs v. Colgate, 104  
Jacobs v. Humphrey, 201  
Jacobsou v. Ramey, 94  
Jacobus v. Colgate, 104  
Jacques v. Cesar, 599  
James v. Adams, 328  
James v. Caldwell, 168  
James v. Dunlap, 500  
James v. Henry, 361  
January v. Goodman, 320  
January v. Henry, 284  
Jarrett Lumber Co. v. Reese, 516  
Jefferies v. Duneombe, 105  
Jell v. Douglas, 325  
Jencks v. Phelps, 108  
Jenkins v. Edwards, 478  
Jenkins v. Pepoon, 428, 431  
Jenkins xc Thompson, 342  
Jones v. Green, 250  
Jones v. Hill, 190  
Joaes v. Hoar, 352, 358, 365  
Jones v. Johnson, 320  
Jones v. Jones, 442

### TABLE OF CASES

References are to Papes

Jordan v. State, 572  
Jordan v. Wyatt, 166, 168, 177, 180  
Joy xc Berdell, 233  
Joyce v. MeAvoy, 429  
Judd v. Leonard, 231  
Judge of Probate v. Merrill, 125, 126, 368  
Juliand v. Burgott, 332  
Kemp v. McCormick, 113, 114  
Kemp v. Merrill, 316  
Kempton Hotel Co. v. Blcketts, 402, 428  
Kenege cc Elliot, 232  
Kenleot cc Hogan, 437  
Kennard v. Burton, 166, 167  
Kennard v. Secor, 512

James & Mitchell v. Adams, 327  
 Janieson v. Board of Education, 283, 334  
 Jameson v. Isaacs, 114  
 J'Anson v. Stuart, 134  
 Jones v. Judd, 341, 342  
 Jones v. Kitchln, 520  
 Jones v. McNeil, 161  
 Jones v. Monson, 146  
 Jones v. Owen, 325  
 Jones v. Park, 163, 180  
 Jones v. Robinson, 334  
 Jones cc Smith, 268  
 Jones v. TcVis, 179  
 Jones v. Warner, 305  
 Jones v. Welling, 559  
 Jones' Estate, In re, 113, 114  
 Jones, Executor of Brockaw v. Decker's Executor, 423  
 Jennings v. Lyons, 342  
 Jennings v. Newman, 149  
 Jennings v. Peoria County, 387, 397  
 Jericho v. Town of Underhill, 430  
 Jermv v. Jenny, 91  
 Jerome v. Ortman, 304  
 Jerome v. Whitney, 143, 326  
 Jewell v. Blandford, 342  
 Jewell v. Schroepfel, 340  
 Jilek v. Zahl, 560  
 Jobbins v. Kendall Mfg. Co., 308  
 Jockish v. Hardtke, 509  
 Joel v. Morrison, 193  
 Johns v. Whitloy, 119  
 Johnson v. Castleman, 185, 193  
 Johnson v. Clark, 324  
 Johnson v. Coullard, 222  
 Johnson v. Elliot, 55  
 Johnson v. Jebb, 600  
 Johnson v. Johnson, 420  
 Johnson cc Long, III  
 Johnson cc May, 356  
 Johnson v. Neale, 263  
 Johnson v. Picket, 109  
 Johnson v. Prussing, 266  
 Johnson cc Richardson, 421, 427  
 Johnson v. Trinity Church Soc., 341  
 Johnson v. Von Kettler, 169  
 Johnson v. Weedman, 219  
 Johnson v. Wollyer, 498  
 Johnson's Ex'rs v. Jennings' Adm'r, 352, 353  
 Johnston v. Ewing Female University, 469  
 Johnston v. Jackson, 233  
 Johnston v. Sallsbury, 305, 351, 358  
 Johnston v. Whittemore, 219  
 John W. Waldeck Co. cc Emmart, 307  
 Jones v. Ashburnham, 326  
 Jones v. Lien, 297  
 Jones v. Brinley, 351  
 Jones xc Dowle, 251  
  
 Jones v. Dugan, 218  
 Jones v. Fort, 221

## K

Kane v. Hood, 328, 329  
 Kane v. Sanger, 506  
 Kankakec & S. B. Co. v. Horan, 159  
 Kankakec & S. W. B. Co. xc Fitzgerald, 177 188

Kansas City, St. J. & C. B. B. Co., 358  
 Kapischki v. Koch, 154, 487, 489  
 Karthaus v. Owings, 332  
 Katin v. Crispel, 300  
 Kauffelt v. Leber, 358  
 Kean xc Mitchell, 92, 327  
 Keay v. Goodwin, 525, 528  
 RCA & Chapel! Dairy Co. v. Pennsylvania Co., 500, 54?  
 Reefer cc Zimmerman, 320  
 Keegan cc Kinnare, 516  
 Keene v. Meade, 113, 339  
 Keith v. Howard, 201  
 Keith v. Tilford, 162  
 Kelleher cc Chicago City B. Co., 577  
 Keller cc Stevens, 572  
 Rellc, v. Foster, 340  
 Kellogg v. Holly, 223  
 Kellogg v. Turpie, 189  
 Kelly v. Chicago City B. Co., 574  
 Kelly v. Foster, 359  
 Kelly v. Kelly, 311  
 Kelly v. Strouse & Bros., 547  
 Kelly v. Town of Bradford, 341  
 Kelshan v. Elgin, Aurora & S. Traction Co., 145  
 Kelso cc toungren, 257  
 Kemp v. Fender, 351

Lath! v. Billings, 265  
 Ladd v. Piggott, 576  
 Lady of Shandois, The v. Simson, 109  
 Lafayette Ins. Co. v. French, 555  
 Laflin v. Howe, 353  
 Laing cc Pidgeon, 326  
 Laing v. Nelson, 161, 162  
 Lakeman v. Pollard, 341  
 Lake Shore & M. S. fly. Co.  
 Lake Shore & M. S. By. Co.  
 Lake Shore & M. S. By. Co.  
 Lamb v. Mills, 124  
 Lambert xc Cook, 454  
 Lambert xc Ensign Mfg. Co., 491  
 Lambert cc Hoke, 163, 180  
 Lambert v. Stroother, 162  
 Lambert v. Taylor, 578, 579  
 Lambkin v. Nance, 361  
 Lammers v. Chicago C. W. it. Co., MI  
 Lammers v. Moyer. 500

**TABLE OF CASES**

**References are to Pages**

625

Kinney v. McNabb, 339  
 Kinney v. Turner, 148, 416  
 Kipp v. Bell, 149, 478  
 Kipp v. Massin, 341  
 Kirkiond v. Filcher, 246--248  
 Kirkpatrick v. Clark, 234, 496  
 Kirkpatrick v. Monroe, 393  
 Klein v. Gibson, 570  
 Kline v. Husted, 493  
 iCloski v. flailrond Supply Co., 575  
 Knapp v. Salsbury, 486  
 Knapp v. Winchester, 213, 222  
 Knepper xc Kurta, 305  
 Knickerbocker Life Ins. Co. v. Barker, 298, 505  
 Knight v. Keech, 333  
 Knight v. New England Worsted Co., 340, 357  
 Knight xc Sharp, 575  
 Knight xc Symma, 111. 113  
 Knoebel v. Kircher, 143, 469  
 Knott v. Clements, 402

Knotts v. Clark Const. Co., 428  
Knowles v. Harris, 3)2  
Knowles v. Inhabitants of Eastham, 282  
Knowles v. Michel, 364  
Knowlton v. Johnson, 207  
Knox v. Metropolitan Elev. By. Co., 115  
Knox v. RInehart, 301  
Korbly v. Loomis, 330  
Kraft v. Porter, 169  
Kramer v. Mathews, 264  
Kran v. Case, 352  
Krause v. Curtis, 500  
ICrihbs v. Downing, 235  
Kyle v. Gray, 221  
Kyle v. *Sworn*, 250

## L

Kennedy v. Fury, 235  
Kennedy v. Stahvorth, 98  
Kennedy v. Strong, 493  
Kennet v. Robinson, 221  
Kenney v. Greet., 412  
Kent v. Welch, 305  
Kent and Ball, 439, 440  
Kcnyon v. Semen, 113, 114  
Kenyon v. Sutherland, 514  
Keokuk & Hamilton Bridge Co. cc Wetsel, 422, 471)  
Kerby v. Quinn, 215  
Kerr v. Sharp, 170  
Kerr v. Willets, 420  
Kerr, Evans & Co. v. Cooperative Improvement Co., 307  
Kershaw's Ex'rs v. Boykin, 251  
Kerwin v. Ealhatehctt, 216  
Kettle v. Eromsall, 245, 250  
Keyes v. Dearborn, 126  
Keyser v. Shafer, 350, 362  
Kidd v. Beekley, 294  
Kidder v. Bacon, 109  
Kidgill v. Moor, 572  
Kierbow v. Young, 267  
Kiewort v. rmdslcopf, 352  
Kilgore v. Birmingham By. Light & Power Co., 94  
Kille v. Ege, 560  
Kimball v. Cunningham, 212  
Kimball v. Huntington, 515  
Kimball v. Sumner, 190  
Kimersly v. Cooper, 440, 441  
Kinaston v. Moore, 210  
Kincaid xc Howe, 114  
Kindy v. Green, 265  
King v. Baker, 240  
King cc Bishop of Chester, Pierce and Cook, 466  
King v. Bishop of Worcester, 455  
King v. Erereton, 146, 147  
King v. Fraser, 277, 357  
King v. Grove, 373  
King v. Bollond, 108  
King v. Inhabitants of Seton, 598  
King v. Mason, 352  
King v. Mayor & Burgesses of Lyme Regis, 132, 139  
King v. Botham, 392  
King v. Stephens, 356  
King v. Watson, 160  
King v. Welcome, 359  
King v. Wilmington & N. C. Electric By. Co., 185  
King, The v. Collector and Comptroller of the Customs  
at Liverpool, 424  
King, The v. Mayor & Burgesses of Lyme Regis 132

Kingdom v. Nettle, 149  
Kingman & Co. cc *Reinerner*, 257  
Kingsbury v. Buchanan, 263  
Kingsbury v. Smith, 228  
Kingsley xc Bill, 364  
Kinlyslde cc Thornton, 44, 189, 506  
Kinne v. Lane, 340  
Kinney cc Barrett, 235  
v. Enright, 561  
v. Hessions, 96  
v. Ward, 144  
Laniphear v. Buekingham, 87, 397  
Lainping v. Payne, 499  
626

Lampleigh v. Brathwait, 327  
Lamplough v. Shortrlidge, 391  
Landt v. McCullough, 503  
Lane v. Adams, 340

254

Leffingwell xc White, 331 Lefkovitz v. City of Chicago, 93

## TABLE OF CASES

References are to Pages

Lewis v. Mobley, 212  
Lewis v. Preston, 133  
Lewis v. Robinson, 352  
Lewis v. Shortledge, 209  
Lewis cc Wolk, 186  
Leyfield's Case, 464  
Libby, McNeill & Libby v. Cook, 547  
Libby, McNeill & Libby v. Seherman, 202  
Lienow v. Ritclite, 157, 159  
Liford's Case, 162  
Lightfoot v. Brightman, 575  
Lincoln v. Thrall, 515  
Lindeman v. Lindsey, 163, 180, 188  
Linder v. Monroe's Ex'rs, 285  
Lindley v. Downing, 219  
Linde v. Gardner, 502  
Lindsey v. Mitchell & McCauley, 528  
Lindsey v. Perry, 247  
Leggett cc Humphreys, 514  
Lehman xc Kellenan, 257  
Lehr v. Taylor, 208  
Leinhart v. Kirkwood, 312  
Leman v. Best, 207, 222  
Leneret v. Rivet, 133  
Lent v. Padelford, 126, 294, 307, 824  
Leonard v. Diamond, 234  
Leonard v. Dyer, 341  
Leonard v. Leonard, 311  
Leoncini v. Post, 223  
Lepnrt v. Todd, 233, 234  
LeRoy v. East Saginaw City B. Co., 268  
Leshar v. United States Fidelity & Guaranty Co., 285  
Leslie v. Barlow, 400  
Lester v. Jewett, 32a, 320  
Lester v. McDowell, 263  
Lester v. People, 126  
Leverson v. Kirk, 210  
Levy & Ripple Motor Co. v. City Motor Cab Co., 342  
Lewis v. Alcock, 494  
Lewis v. Culbertson, 350, 363, 364  
Lewis v. Hoover, 247  
Lane v. Alexander, 441, 442  
Lane v. Maine Mut. Fire Ins. Co., 573  
Lane v. Thompson, 157

Langan xc Enos Fire Escape Co., 575  
Langdon v. Potter, 423  
Langdon cc Templeton, 162  
Langer v. Parish, 105, 350, 363  
Langford v. Webber, 116, 117  
tanhorne v. Richmond Ry. Co., 125  
Lansing v. MeKillip, 327  
Lansing v. Wiswall, 163, 180  
Lanslugh v. Parker, 475  
Lantz v. Drum, 215  
Lanum v. Barrington, 496  
Lapham v. Osborne, 343  
Laporte v. Cook, 145  
Larkin xc Mitchell & Rowland Lumber Cc., 357  
LaSalle, City of v. Kostka, 202  
Lasher v. Colton, 421, 424, 425  
Lashlie v. Wily, 101  
Lassiter v. Norfolk & C. B. B. Co., 561  
Lassiter v. Ward, 322  
Latham v. Rutley, 505  
Latlibury v. Arnold, 121  
Latbrop v. Blake, 219  
Laurissini v. Doe ex dem. Corquette, 235  
Law v. Grommes, 75  
Lawe v. King, 476  
Lawly v. Gattacro, 111  
Lawrence v. Ballou, 235  
Lawry v. Lawry, 154, 171, 191  
Lawson v. Crane & Hall, 822  
Layton v. Grindall, 112  
Lazar v. Caston, 237  
Leach cc Thomas, 575  
Leake v. Loveday, 216  
Leame v. Bray, 154, 166, 167, 176, 177, 179, 181, 201  
Learmonth v. Grandine, 441  
Lebanon v. Griffin, 114  
Le Bret v. Papillon, 400, 429, 431, 514  
Le Breton v. Braham, 374  
Ledbetter v. Fitzgerald, 160  
Ledesham v. Lubram, 468  
Lee v. Abrams, 811, 312  
Lee v. Ashbrook, 363  
r.ee v. Follensby, 125  
Lee cc Raynes, 529  
Lee v. Rogers, 526  
Leech v. Widsley, 440  
Leeper v. Hersman, 500  
Leeper, Graves & Co. v. First Nat. Bank of Hobart,  
Lirningtlale v. Liviagston, 342  
Lion v. Burtis, 240  
Lisbon v. Lyman, 581  
Litehfield v. Ferguson, 162  
Litehtenhein v. Boston & P. B. Cc., 219  
Little v. Blunt, 109  
Little v. Chicago, St. P., M. & O. By. Co., 104  
Little v. Martin, 343  
Little v. Perkins, 148, 405  
Little York Gold-Washing & Water Co. v. Keyes, 92  
Livingston v. Anderson, 307  
Livingston v. Jefferson, 104  
Livingston cc Buff, 238  
Lobdeli v. Hopkins, 829  
Lockhart v. Little, 262  
Lockwood v. Bull, 189, 219  
Lockwood v. Drake, 285  
Lodge cc Frye, 120  
Lochr v. Dickson, 842  
Legaux v. Feasor, 179  
Legg v. Evans, 526

Logan v. Houlditeh, 222  
Logue v. Clark, 598  
Lower v. Meeker, 547  
Long v. Fitaimmons, 311  
Longueville v. Inhabitants  
Lengworth v. Flagg, 514  
Loomis v. Jackson, 94  
Loomis v. O'Neal, 351, 252  
Loose v. LOose, 283  
Lord v. Tyler, 481  
McAdams cc Bailey, 543  
McAllister v. Hammond? 166, 178  
McAllister v. Kuhn, 91  
McAllister v. Itab, 461

## TABLE OF CASES

### References are to Pages

Of Thistleworth, 411  
Lord Arlington v. Merricke, 134, 146, 369  
Lord Electric Co. v. Barber Asphalt Paving Co., 322  
Loring v. Gurney, 340, 357  
Loring V. Muleliay, 218  
Lormaii v. Benson, 162  
Lotan v. Cross, 157, 183  
Lothrop v. Arnold, 169, 427  
Loubz v. Bather, 168  
Lough v. Thornton, 577  
Louis xc Smith-McCormick Const. Co., 94  
Louisville, B. & St. L. B. Ce, v. Harlan, 334  
Louisville & N. H. Co. v. Bartec, 169, 487  
Lovell v. Martin, 221  
Lovelock v. Cheveley, 374  
Low v. Galena & C. U. K. Co., 598  
Lowell, City of v. Morse, 114  
Lower v. Winters, 325  
Lowery v. Manhattan R. Co., 178  
Lowry v. Houston, 251  
Lowry v. Kinsey, 420, 500  
Lowthrop v. Smlth, 220  
Lubbock v. Inglis, 219  
Lucas v. Godwin, 341  
Lucas cc Nockells, 437  
Lucas xc Trumbull, 220  
Ludden v. Leavitt, 214  
Lumby xc Allday, 547  
Lummis v. Stratton, 194  
Lundy v. Lundy, 235  
Lunn v. Payne, 332  
Lunt v. Brown, 157, 158  
Lunt xc Wrenn, 353  
Lurton v. Giliam, 421  
Lush v. Russell, 441  
Lusk v. Cassell, 284  
LUX & Talbott Stone Co. v. Donaldson, 564  
Lyll v. Higgins, 508  
Lynch cc Beecher, 268  
Lynch v. Commonwealth, to Use of Barton, 188  
Lynch v. Johnson, 509  
Lynner v. Wood, 469-472  
Lyons v. Farm Property Mut. Ins. Ass'n of Iowa, 396  
Lyons v. Stickney, 238

## M

627

McArnlews v. Chicago, L. S. & B. B. Ca, 94  
McArthur v. Moffet, 26  
McArthur v. Oliver, 206

MeArthur Bros. Co. v. Whitney, 340  
McAuliffe v. Mann, 257  
McFlrian v. Morrison, 267  
McCann v. Ruthbone, 2315  
MeCaughey v. Schuette, 90  
MacClellon v. Howard, 478  
McClure, By parte, 342  
McClure v. King, 570  
McClure's Ex'rs v. Miller, 179  
M'Combie v. Davies, 219, 220  
McConnel v. Kibbe, 525  
M'Connell v. Maxwell, 214  
McConnell v. Stettinius, 480  
McCord v. The Mechanics' Nat. Bank of Chicago, 459, 469  
McCormick v. Conuoly, 343  
McCormick v. Muse, 486  
McCoun v. New York Cent. & H. K. B. Co., 302  
Mccoy v. Hill, 308  
Mccoy v. McKowen, 165  
MeCrary v. Brown, 350, 363  
MeCrea v. Parsons, 509  
MeCrea v. Purmort, 352  
McCrillis v. How, 320, 821  
McCullough v. McCullough, 358  
MeCune v. Norwich City Gas Co., 576  
MeCurda v. Levisvostown Journal Co., 393  
M'Daniel v. Terrell, 170  
McDaniels v. Reed, 235  
McDonald v. Brown, 352  
McDonald v. Hall, 137  
McDonald v. Mabee, 76  
MeDuff v. Portland & K. K. B., 105  
MeEwen v. Joy, 277  
MeEwen v. Morey, 3150, 363  
McFadden v. Crawford, 248  
McFadden v. Deck, 128  
McFadden v. Fortier, 400, 404  
Macfadzen v. Olivant, 165, 444  
MeFall v. Kirkpatrick, 234  
McFarland v. Irwin, 505  
Mcyarlane v. Derbisire, 361  
Meraul v. Ramsey, 7  
MeGanahan v. East St. Louis & C. By. Co., 186  
MeGavoek v. Puryear, 502  
MeGavock v. Whitfield, 525  
MeGehee v. Childress, 333  
Mctlehee v. Hill, 329  
McGinnis v. Fernandes, 348  
McGinnity v. Laguerenne, 98, 149, 275, 292, 324  
MeGlamery v. Jackson, 187  
McGregor v. Balch, 421, 425  
McInerney v. Western Packing & Provision Co., 202  
McIntire v. Clark, 329  
McIntire v. Wing, 235  
Mackay v. Reynolds, 486  
McKay v. Speak, 113  
McKenna v. Fisk, 104, 555  
628

McKcon v. Whitaey, 277  
Mackey v. Northern Mill Co., 184  
McKim v. Odom, 361  
Mackin v. O'Brien, 360  
McKinney v. Jones, 559  
McKinnie v. Lane, 284  
McKinnoa v. Meston, 257  
McKyring v. Bull, 300, 801, 502



M'Lanahan v. Universal Ins. Co., 569  
 MacLaughlin v. Fisher, 198  
 McLaughlin v. Salley, 220  
 McLaughlin v. Waite, 213  
 McLean v. Walker, 221  
 McLeau's Ex'rs v. Wade, 311  
 MeLcod v. Powe & Smith, 362  
 Mci-Ianus v. Crickctt, 165, 193  
 McMtlaa v. Mafloy, 341  
 McMorris v. Simpson, 220  
 McMullin v. Church, 98  
 McMurray v. Rawson, 316  
 McNail v. Ziegler, 263  
 McNall v. Vehon, 487  
 McNear xc Atwood, 215  
 McNeish v. Stewart, 506  
 Mcpherson v. Daniels, 462  
 McPherson v. McPherson, 312  
 Meltac v. Mattoon, 361  
 Macurda v. Lewistoa Journal Co., 147  
 McVoy v. Wheeler, 304  
 McWhorter v. Sayre, 128  
 Maenncr v. Carroll, 184  
 Magee v. Fisher, 125  
 Magee v. Siggerson, 262  
 Maggs v. Ames, 471, 510  
 Mahaffey cc J. L. Eumbarger Lumber Co., 91  
 Mahan v. Smitherman, 559  
 Maher v. Ashmead, 168  
 Mahurin v. Bickford, 861  
 Mahurin v. Harding, 189  
 Mair v. Rio Crank Rubber Estates, Ltd., 93  
 Malcolm v. Spoor, 169  
 Mali xc Lord, 193  
     Mallard Lumber Co. cc Carolina Portland Cement Co., 563  
     1% Ianby v. Scott, 593  
     Manguire v. Town of Xenia, 285  
     Mann v. Oberne, 500  
     Manser's Case, 146, 148  
     Manton v. Gammon, 340  
     Margetis v. Bays, 462, 463  
     Marine Ins. Co. v. Hodgson, 503, 506  
     Marliel-Tucker Cook Co. v. Ehrlich, 877  
     Marks v. Madsen, 486, 487  
     Marquette, H. & O. B. Co. cc Atkinson, 257  
     Marriott v. Lister, 291  
     Marsh v. Bulteel, 141, 142, 400, 405  
     Marshall v. Davis, 221, 286, 267  
     Marshall v. Lewark, 360  
     Marshall v. Riggs, 131  
     Marshall v. Stalnaker, 233  
 Marshalsea, Case of, 168  
 Martin v. Bartow Iron Works, 405  
**Martin** v. Hamilu, 320  
 Martin v. Kesterton, 118  
 Martin v. Murphy, 320  
 Martin cc Payne, 179  
 Martin v. Smith, 460  
 Martini cc Coles, 213  
 Mafl- v. Knowily, 220  
 Mason v. Buckmaster, 125  
 Mason v. Cater, 387  
 Mason v. Cheney, 74  
 Mason v. Dixon, 235  
 Mason v. Keeling, 164, 167, 179, 180, 201  
 Mason v. Paynter, 200  
 Mason v. Waite, 351  
 Mason v. Warner, 105  
 Mason v. Welland, 356

Massachusetts Mat. Life  
 Massachusetts Mat. Life  
 Massengill v. Boyles, 233  
 Mast v. Goodson, 188  
 Masters v. Stratton, 187  
 Masterson v. Cheek, 233  
 Mather v. Ministers of Trinity  
 Mathews cc Cary, 125  
 Mathews v. Spiecr, 109  
 Matthews v. Tower, 397  
 Mnttingly v. Darwin, 129, 223  
 Maule v. Murray, 420  
 Maule v. Weaver, 304  
 Maury v. Olive, 364  
 Idaxherman Co. v. Alper, 366, 367  
 Maxia xc Oklahoma Portland Cement Co., 406  
 Maxon v. Ferrott, 268  
 May v. Harvey, 222  
 May v. Western Union Tel. Co., 427  
 Mayelstone v. Lord Palmerston, 14. & 14., 113  
 Mayer v. Lawrence, 98, 149  
 Mayer v. Mayor, etc. of City of New York, 352  
 Maylard cc Kister, 289  
 Maynard v. Talcott, 108  
 Mayor v. Clarke, 277  
 Mayor, etc. of Newark cc Dickerson, 389  
 Mayor & Burgesses of Stafford v. Bolton, 114, 422  
 Maysville, City of v. Truer, 564  
**Mead** v. Hews, 169  
**Mead** cc Kilday, 264  
**Mead** v. Thompson, 219  
 Meader v. Stone, 163  
 Medbury v. Watrous, 342, 343  
 Medway Cotton Manufactory 'cc Adams, 114, 421  
 Mehrhof Bros. Brick l'flg. Co. v. Delaware, L, & SS'~.  
     B. Co., 103  
 Mellon v. Western B. Corp., 201  
 Mellin v. Horlick, 361  
 Mellor cc Barber, 108  
 Melville v. Brown, 169  
**Melvin** v. Fisher, 169  
 Menifee v. Higgins, 325

**References are to Pages**

Ins. Co. v. Kellogg, 329  
  
 Mennie v. Blake, 247, 254—256 270  
 Merecron v. Dowson, 130  
 Meriton v. Brlggs, 439  
 Merrick v. Trustees of Bank of Metropolis, 575  
 Merrill v. Perkins, 560  
 Merrill v. Sheffield Co., 145  
 Merrit xc Warmouth, 251  
 Merritt v. Miller, 462  
 Merry v. Gay, 478  
 )erryman v. Wheeler, 301, 320, 503  
 Merscreau v. Norton, 220  
 Mertens xc Adcock, 251  
 Mets v. Albrecht, 328, 330  
 Metzner v. Bolton, 508  
 Meyer v. Haworth, 525  
 Meyers v. Schemp, 340  
 Middlet'rook v. Corwin, 208  
 )fiddleton v. Graveley, 440  
 Middleton v. Price, 125  
 Midvale Steel Works v. Hallgarten & Co., 264  
 Miles v. Allen, 250

**TABLE OF CASES**

Ins. Co. 'cc Green, 350, 363  
  
     Church, 159, 208

Miles V. Caldwell, 239  
 Miles v. Moodie, 340, 859  
 Miles v. Oldfield, 07, 576  
 Miles v. Sheward, 324  
 Miles v. Weston, 129  
 i' lillikin v. Jones, 479  
 Millard v. Baldwin, 397  
 Miller v. Adsit, 265  
 Miller v. Ambrose, 320  
 Miller xc Drake, 325  
 Miller v. Eldrige, 343  
 Miller v. Prick's Adm'r, 265  
 Miller v. Gable, 572  
 Miller v. Grice, 109  
 Jillier v. Kingsbury, 4~  
 Miller v. Kresge Co., 557  
 Miller v. Ord, 352  
 Miller v. Poilock, 559  
 Miller v. Roessler, 139  
 Miller xc Stanley, 478  
 Miller v. Warden, 264  
 Miller v. Wesson, 257  
 Miller v. Wittier, 330  
 Miller's Case, 175  
 Milligan v. Keyser, 128  
 Milligazi v. Thorn, 198  
 Milliken cc Brown, 168  
 Millikcn v. Meyer, 76  
 Mills v. Ball, 222, 223  
 Mills v. Carpenter, 555  
 Mills v. Graham, 207  
 Mills v. Scott, 296  
 Mills Bland's Ex'rs, 421  
 Millville Gas Light Co. v. Sweeten, 397  
 Milward v. Ingram, 864  
 Minard cc Lawler, 509  
 Mine!. & Eisenbry Co. v. Cram, 411  
 Mineral Point It. Co. v. Keep, 414  
 Mink v. Shaffer. 299

**TABLE OF CASES**

**629**

*References are to Pages*

Minnick v. Williams, 275, 284  
 Minor v. Mechanics' Bank of Alexandria, 576  
 Minter v. Mower, 180  
 Misner v. Granger, 468  
 Missouri, K. & T. B. Co. v. WuIf, 503  
 Nissouri, K. & T. Trust (Jo. v. Norris, 75  
 Mitchell v. McLean, 461  
 Mitchell v. McNabb, 03  
 Mitchell v. Roberts, 207  
 Mitchell v. Sellman, 472  
 Mitchell v. Williams, 222  
 Mitehinson v. Hewson, 326  
 Mitsakos v. Mnrrill, 321  
 Mix v. Nettleton, 277, 282, 284  
 Mit v. People, 479, 503  
 Mizell xc Watson, 511  
 Moale v. Rollins, 320  
 Mogart v. Smouse, 510  
 Mole v. Wallis, 520, 527  
 Molinc Plow Co. v. Anderson, 576  
 Monell v. Colden, 189  
 Monkton v. Pashlcy, 111  
 Monroe v. Whipple, 221  
 Montague v. Carnett, 343  
 Montesano Lumber Cu. v. Poruand Iron Works, 104  
 Montgomerie v. Ivers, 304  
 Montgomery v. Brush, 215

Montgomery v. Tipton, 501  
Montgomery Co. v. New Parley Nat. Bank, 840  
Moody v. Amazon Iris. Co., 331  
Mooers v. Wait, 208  
*Moon v. Avery*, 157  
Mooney v. York Iron Co., 341, 342, 359  
Moor v. Fudsey, 441  
Moore v. Earl of Plymouth, 126, 127, 325  
Moore v. Hitchcock, 214  
Moore v. Jones, 294, 307  
Moore v. Moore, 159, 162, 208  
Moore v. Spiegel, 417, 420, 428  
Moore v. Vail, 304, 395  
Moorehead v. Seofield, 218  
Moran v. Dawcs, 161, 170, 182, 102  
Moravia v. Sloper, 125  
Morehead v. Grisham, 361  
Morehouse sc Fowier, 132  
Moreton -v. Hardern, 165, 178, 193  
Morewood v. Wood, 443, 444  
Morford v. Mastin, 329  
Morgan v. Adams, 312  
Morgan v. City of Vienna, 487  
Morgan v. Jones, 353  
Morgantown Bank v. Foster, 471  
Moriarty v. Stofferan, 265  
Morris v. Pugh, 222  
Morris Canal & Banking Co. v.  
Morrison v. Berry, 208  
Morrison v. Lumbord, 268  
Morse v. Aldrich, 304  
Morse v. James, 125  
Morse v. Sherman, 324

Van Voorst, 284, 295

630

Morse v. **Whitcher**, 559  
Morton v. Frick Co., 223  
Morton v. Lamb, 325, 330  
Morton v. McClure, 128, 334  
Morton v. Preston, 209  
Moseley v. Jones, 326  
Moser v. Jenkins, 444  
Moses v. Allen, 467  
Moses v. Maeflerlan, 351  
Moses v. Norris, 219, 220  
Moses v. Stevens, 342  
Noss -v. Flint, 421  
Mostyn v. Pabrigas, 104—106, 413  
Moulton v. Trask, 311  
Mount v. Scholes, 514, 515  
Mount Carbon Coal & H. Co.  
500  
Mountford v. Horton, 824  
Moxley's Adm'rs v. Moxley, 332  
Muggridge v. Eveleth, 158  
Mubleman v. National Ins. Co., 548  
Muldrow v. Tappan, 364  
Mulford v. Tunis, 234  
Mulgrave v. Ogden, 03, 219  
Mullaly v. Holden, 138  
Mullan v. Belbin, 178  
Mumford v. Fitzhugh, 388  
Mumford v. McKay, 220  
Mundy v. Mundy, 55  
Munre v. Alaire, 525  
Munroe v. Perkins, 342  
Munson v. Munson, 237

Murden v. Russell, 520, 524  
Murdock v. Caldwell, 326  
Murphy v. McGraw, 143  
Murphy cc Orr, 427  
icealley v. Moulton, 425

Neate v. Harding, 352

Needham v. Hill, 220

## TABLE OF CASES

References are to Pages

Neiler v. Kelley, 200  
Neilsen v. Hyland, 207  
Nelson v. Burt, 208  
Nelson v. Chicago, B. & O. R. Co., 76  
Nelson v. Dubois, 325  
Nelson V. Ford, 284  
Nelson cc Swan, 348, 357  
Nerot v. Wallace, 576  
Neubeck v. Lynch, 561  
Nevil cc Soper, 145  
Nevil and Cook's Case, 437  
NeVin v. Pullman Palace Car Co., 188  
Nevins v. Keeler, 472, 456  
Nevins v. Peoria, 179, 180  
Newark Twentieth Century  
v. Andrews, 400, 405, 498, 408  
Taxicab Ass'n V. Lerner, Newby v. Mason, 00  
Newcomb V. Brackett, 330  
Newcomb v. Irwin, 162  
Newell v. Newton, 420  
New Hampshire Mut. Fire Ins. Co. cc Walker, 576  
New H avdll Steamboat & Transp. Co. v. Vanderbilt, 167  
New Holland Turnpike Co. v. Lancaster. 304, 305  
New Market Iron Foundry v. HarVey, 326  
New Orleans v. Gaines, 241  
Newport News, City of v. Potter, 364  
Newsome v. Graham, 353  
Newsum v. Newsum, 221  
New Staunton Coal Co. v. Fromm, 94  
Newton v. Creswiek, 480  
Newton v. Marshall, 162  
Newton Rubber Works v. Graham, 330  
New York, City of v. Fink, 366  
New York Corp. cc Dawaon, 105  
New York, L. B. & W. R. Co. v. New Jersey Electric  
By. Co., 183  
New York News Pub. Ce. v. National Steamship Co., 90  
Nicholl v. Mason, 420  
Nichols v. Caldwell, 234, 496  
Nichols v. Dewey, 257  
Nichols v. Ely Beet Sugar Factory, 170  
Nichols v. Lewis, 231, 232  
Nichols v. Michael, 267  
Nicholson v. Chapman, 219  
Nicholson v. Simpson, 406  
Niekerson v. Thneher, 162  
Nickerson v. Wheeler, 351  
Nicoll v. Glennie, 222, 426  
Nielsen V. Rebard, 267  
Nightingale v. Devlsme, 353  
Nill v. Comparet, 401  
Nirdlinger v. American Dist. Tel. Co., 177  
Nispel v. Laparle, 397  
Nispel v. Western Union fi. Co., 414  
Noble v. Adams, 212  
Nobel's Adm'r v. Lnley, 149  
Noetling v. Wright, 145

Noonan v. Bradly, 423  
Nordhaus v. Varidalia R. Co., 427, 555  
Murphy's Adm'rs cc Branch Bank at Mobile, 424  
Murray v. East India Co., 468  
Murray v. Carlln, 516  
Moser v. Robertson, 22, 90  
Mutual Ace. Ass'n of the Northwest cc Tuggle, 324  
Myers & Waterson - Hunter Erwin & Co., 430  
Myrick v. Bishop, 102

## N

Nnehtrieb v. Stoner, 157  
Naftzger v. Gregg, 329  
Nagle v. Schmidt, 544  
Nash v. Nash, 294, 3S8  
National Council of Knights & Ladies of Security v.  
Hibernian Banking Ass'n, 309  
National Lancers v. Lovering, 109  
National Parlor Furniture Co. v. Strauss, 132  
National Surety Co. v. Nazzaro, 298  
National Surety Co. v. United States, 214  
Nations v. Hawkins' Adin'rs, 215  
v. Rogers, 327, 441,  
v. Skinner, 330  
v. Brlstow, 117  
Hitchcock, 578

Smith, 232

Overdeor v. Lewis, 103  
Overt ON v. Williston, 208  
Owen v. Reynolds, 526  
Owens v. Starr, 169  
Owens v. Weedman, 212  
Owings v. Prier, 250  
Owings v. Hull, 130  
Ownbcy v. Morgan, 74  
Owsten v. Ogle, 313  
Oystead v. Shed, 132  
Pacific Mail S. S. Co. v. Joliffe, 362  
Packard v. Getman, 219  
Paddock v. Higgins, 126  
Padgett v. Lawrence, 114  
Page v. Crosby, 206  
Page v. DePuy, 169  
Page v. Jones, 265  
Paige v. SInclair, 420  
Pain, fix parte, 147  
l'ainter s'. Baker, 154, IOS, 176  
Palmer v. Arthur, 576  
Palmer v. Clarke, 504  
Pahiiier v. Eldns, 441, 448  
Palmer v. Evertson, 412  
Palmer v. Gardiner, 420  
Palmer r. 000dcn, 482  
Pangbrn v. Patridge, 247, 255, 206  
Panton v. Holland, 481  
Papke v. Ci. H. Hammond Co., 489, 514  
Parell v. McCormber, 363  
Parish v. Stanton, 439  
l'ark v. McGowen, 312  
Parker v. Crane, 327  
Parker v. Elliott, 179  
l'arker v. Hall, 169  
Parker v. Lee, 358'  
Parker v. McConiber, 341, 360, 303, 365, 366  
Parker v. Parker, 97, 113, 148  
Parker v. Parmele, 320, 507  
Parker v. Steed, 341  
Parmly v. Farrar, 342

Parr v. Van Horn, 238  
 Parsley & Co. v. Nicholson, 6  
 Parsons v. Case, 425  
 Parsons v. Dickinson, 157, 158  
 Parsons v. Hill, 3.3  
 Parsons v. Loyd, 168  
 Parsons v. Smith, 147  
 Partlaud v. Read, 218  
 Partridge v. Strange, 135  
 Pasley v. Freeman, 189, 194  
 Pate v. People, 298

**TABLE OF CASES**

References are to Pages

631  
 P

Norman v. Beckman, 238  
 Norman v. Wells, 501J  
 Norris v. Graves, 421  
 Norris v. School Dist. No. 1 ia Windsor, 282, 283, 320, 341, 360, 363  
 North v. Kizer, 125, 324  
 North v. Nichols, 559  
 North v. Turner, 158  
 Northern Pac. H. Co. v. Paine, 212  
 Northern Traction Co. of Ohio v. Selliek, 221  
 Northwestern Ben. & Mut. Aid Ass'n of Illinois v. Wanner, 304  
 Nottingham v. Aekiss, 294  
 Nowleji v. Colt, 220  
 Nugent v. Teachout, 340, 343, 348, 357

O

Oakman v. Small, 413  
 Oates v. Clendenard, 421  
 Ontman v. Fowler, 150  
 Obermyer v. Nichols, 329  
 O'Brien v. Cavanaugh, 160, 102  
 O'Brien v. Saxon, 483, 520  
 OBrien v. Young, 360  
 O'Connor v. Gidday, 267  
 O'Donnell v. Joliet & Eastern fly. Co., 372  
 Ogden v. Stock, 257  
 Ogle v. Barnes, 178  
 Oglethorp v. Hyde, 147  
 Ohio & M. Il. B. Co. v. Brown, 555  
 Ohio & If. fly. Co. v. Noe, 268  
 Ohio & li. fly. Co. v. People ex rd. Van Gilder, 15, 144, 387  
 Okeson v. Patterson, 163, 150  
 Oklahoma Gas & Electric Co. v. Bates Expanded Steel Truss Co., 391, 395  
 Ohiphant v. Whitney, 385  
 Olsen v. Upsahl, 488, 487  
 Olson v. Kelly Coal Co., 96  
 Omeara v. Cardiff Coal Co. 478  
 Onion v. Clark, 140  
 Onondga County Bank v. Bates, 283  
 Onslow v. Smith, 431  
 Opdycke v. Easton & A. U. Co., 108  
 Ordinary v. Braeey, 401  
 Oregon Rngijleering Co. v. City of West Linn, 473  
 Ortmann v. Sovereign, 257  
 Orton v. Butler, 200  
 Osborne v. Butcher, 180  
 Osborne v. Fulton, 284  
 Osborne 443  
 Osgood  
 Osway  
 Otis v.

Otis v.  
Ott v. Schroepfel, 450  
Ottawa Gaslight & Coke Co. v. Thompson, 163, 180  
Outlaw v. Davis, 169  
Outtoun v. Dulin, 304  
Paterson Coast. Co. v. First State Bank of Thebes, 480  
Patrick v. Buckner, 98, 285, 295  
Patriekson cc Barton, 462  
Patten v. Hicks, 343  
Patterson v. Jones, 332  
632

patterson v. United States, 575  
Patteson v. Ford, 5-IS  
Pattison v. Adams, 263  
Paul v. GraVes, 84  
pawling v. United States, 541  
Pawllng v. Willson, 361  
Payne v. Drewe, 594  
Payne v. Smith, 166, 178  
Payne v. Treadwell, 03  
Payson v. Whitcomb, 576  
Peabody v. Bayt, 297, 362  
Peacock v. Harris, 364  
Peacock v. Peacock, 106  
Pearce, Ex parte, 578  
Pearce v. Foot, 575  
Pearce v. Pearce, 425  
Pearey v. Walter, 480  
Pearpoint v. Henry, 217  
Pearson r. Roberts, 250  
Pearnons v. Lee, 12S  
Pease v. Burt, 170  
Pease v. Ditto, 158, 214, 263, 265, 499  
Pease v. Howard, 301  
Pease v. Phelps, 398  
Peasley v. Eoatsvright, 324  
Peek v. Brewer., 189  
Peck v. Carmichael, 233  
Peek v. Houghtaling, 305  
Pedan v. Hopkins, 342  
Pedrick v. Kuemniell, 254, 267  
Peiree v. Hill, 250  
Pekin, City of v. Brereton, 163, 166, 179, 180  
Pell v. Lovett, 98  
Peltier v. Sewall, 340, 305  
Penley v. Whitney, 297  
Pennington v. Gibson, 299  
Pennington's Ex'rs v. Yell, 187  
Pennoyer v. Neff, 72, 73, 75—78  
Penny v. Purter, 325  
Penobseot fi. Co. v. Mayo, 352  
People v. American Life Ins. Co., 555  
People v. Central Union Tel. Co., 455  
People v. Chicago Rys. Co., 515  
People v. Cummings, 598  
People v. Bummer, 276, 296  
    People v. Dunlap, 130  
    People v. El Dorado County Supervisors, 598  
    People v. Boltcn, 386, 387  
    People v. Mauran, 232  
    People v. Powell, 574  
People ex rd. Attorney General v. River Raisin & I-  
    E. B. Co., 470  
People ex tel. Chicago & I. B. Co. v. *01mm*, 329  
People ex rd. Maloney v. Pullman's Palace Car Co.,  
    448. 453



People, to Use of Christian County v. Davis, 296  
 People, to Use of Foster v. Gray, 466  
 People's Bank v. Niekerson, 95  
 People's Ins. Co. v. Spencer, 28.3  
 People's Nat. Bank v. Niekerson, 148  
 People's Savings Bank of Tallasnee v. Jordan, 450  
 People's Shoe Co. v. Skally, 473  
 Pepper v. Haight, 329  
 Percival v. Rhekey, 167, 178, 182  
 Perham v. Coney, 220  
 Perkins v. Hart, 340—342  
*Perkins v. Moore*, 405  
 Perkins v. Proctor, 168  
 Perkins v. Reeds, 307  
 Perley v. Foster, 264  
 Perlus v. Market Investment Co., 520  
 Perry r. Marsh, 143  
 Perry v. Skinner, 180  
 Peters v. Ballistier, 212  
 Peters v. Davis, 424  
 Peters v. Ulmer, 475  
 Peterson v. Pusey, 342  
 Petree v. Duke, 259  
 Petrie v. Woodworth, 114  
 pettigru v. Sanders 221  
 Pfistner v. Bird, 159  
 Pforzheimer v. Selkirk, 104  
 Pharr v. Bachelor, 108, 149  
 Phelps v. Sawyer, 507  
 Phelps v. Sill, 131  
 Philadelphia, B. & 'W. It. Co. v. Gate 38, 550  
 Philadelphia, W. & B. H. Co. v. Constable, 1S8  
 Pbilippi Planing Mill Co. cc Cross, 516  
 Philips v. Beriek, 16  
 Philips v. Robinson, 222, 497  
 Phillips v. Covert, 160  
 Phillips v. Cummings, 427  
 Phillips v. Fielding, 143  
 Phillips & C. Const. Co. v. Seymour, 304  
 Pickering v. De Itoehement, 423  
 Pierce v. Benjamin, 215, 221  
 Pierce v. Bristol, 400  
 Pierce v. Carey, 148  
 Pierce v. Crafts, 200  
 Pierce v. Piekens, 109  
 Pierce v. Seheneck, 219  
 Pierce v. Sholtey, 478, 516  
 Pierce v. Woodward, 128, 334  
 Pierson v. Spnuldng, 340  
 Pierson v. Wallace, 397  
 Piggot's Case, 400, 401  
 Pigot's Case, 503  
 Pike v. Brown, 357  
 Pike v. Zadig, 362  
 P:nehes v. Swedish Evangelical Lutheran Church, 34t  
 Pinhorn cc Tuckington, 354  
 Pinkbam cc Gear, 208  
 pltkin v. Yaw, 235  
 Pitt cc Russell, 123  
 Pitt v. Skew, 208

**References are to Pages**

v. Ryder, 92  
 v. Strawn, 455

**TABLE OF CASES**

People  
 People  
 People  
 People

v. Wayne Circuit Court, 597  
 v. Wood, 352  
 People, to Use of Busch v. McCormack, 473  
**Pittsburgh, C., C. & St. L. B. Co. v. City of Chicago, 573**  
 Pittsburgh, C., C. & St. L. By. Co. v. Nichols, 94  
 Pitts Sons Mfg. Co. v. Commercial Nat. Bank, 411, 416, **420, 428, 420, 431**  
 Planebe v. Colburn, 342  
 Planters' Bank v. Galloway, 283  
 Platt v. Hill, 139  
 flats v. MeKean Twp., 103  
 Homer v. **ROSS**, 133  
 Plowman v. Foster, 489  
 Plumb v. MeCrea, 521, 524  
 Hummer v. Deanett, 169  
 Plumuler v. Woodburne, 4435  
 Plunkett v. Detroit Electric By. Co., 577  
 Pollak v. Electric Ass'n, 500  
 Pollard v. Lock, 115  
 Pollard v. Lyon, 80, 180, 187  
 Pollock v. Lumberman's Nat. Bank of Portland, 563  
 Polsey v. White Rose P11g. Co., 420  
 Pomeroy v. Trirnper, 262  
 Pond v. Ennis, 421  
 Poole v. Symonds, 212, 213  
 Poole v. Vahanes, 353  
 Pooler v. Southwick, 431  
 Pope v. Foster, 108  
 Pope v. Tillman, *III*, 122  
 Porter v. Cooper, 360  
 Porter v. Drennan, 06  
 Porter v. Gray, 121  
 Porter v. Hildebrand, 559  
 Portland Dry Deck & Ins. Co. v. Trustees of Portland, 296  
 Portuguese.American Bank v. **Welles**, 286  
 Posuett v. Marble, 575  
 Pest v. Munn, 166  
 Post v. Neal ie, 298  
 Potomac Laundry Co. v. Miller, 364  
 Potter v. Bacon, 308  
 Potter v. Brown, 18?  
 Potter v. Earnest, 326, 480  
 Pottr v. Gronbeek, 283, 348  
 Potter v. John Hutchison Pit g. Co., 72  
 Potter v. McCoy, 412, 425  
 Potter v. North, 260, 498  
 Potter v. Titeomb, 476, 482  
 Potter v. Washburn, 161  
 Potts -. Clarke, 183, 191  
 Potts v. Point Pleasant Land Co., 526  
 Powdiek v. Lyon, 388  
 Powell v. Bradlee, 204  
 Powell v. Salisbury, 177  
 Powell v. Smith, 257  
 Powell Co. v. Finn, 421, 426  
 Power Equipment Co. v. Gale Installation Co., *340*  
 Powers v. Cook, 431, 438  
 Powers v. Rutland It. Co., 513  
 Powers v. Ware, 120  
 Powrml v. Ferrand, 339, 351  
 royser v. Minors, 8  
  
 Pratt v. Allen, 602  
 Pratt v. Harris, 414  
 Pratt v. Parkman, 264  
 Presbyterian Congregation v. Johnston, 235  
 Prescott v. Wright, 218  
 President, etc., of Bank of Auburn v. Weed, 469  
 President, etc., of City of Natchez v. Minor, 146  
 President, etc., of Commercial Bank v. French, 114, 126  
  
 Pozzi v. Shipton, 188, 426

President, etc., of Town of Jacksonville v. Block, 205  
President & College of Physicians London v. Salmon,

201

Pressey v. Snow, 72  
Pressley v. Bloomington  
Price v. Easton, 325  
Price v. Farrar, 503  
Price v. Fletcher, 143  
Price v. Furman, 342  
Price v. Grand Rapids & I. It. Co., 402  
Price v. Moulton, 320  
Priddle & Napper's Case, 437  
Priddy v. Henbrey, 290  
Priddy v. Thompson, 232  
Priest v. Dodsworth, 145, 479, 480  
Prince v. Brunatte, 525  
Prince v. Lamb, 101  
Proctor v. Wells Eros, Co. of New York, 421  
Proprietors of Fryeburg Canal Co. v. Frye, 201  
Proprietors of Monumol Great Beach v. Rogers, 480  
Proprietors of Sudbury Meadows cc Proprietors of  
Middlesex Canal, 201  
Prosser v. Woodward, 455  
Protector, The v. Holt, 440  
Provident Inst. for Savings v. Burnham, 243  
Provident Life & Trust Co. v. Fins, 308  
Prunty v. Mitchell, 425  
Puget Sound Iron Co. v. Worthington, 531  
Pugh v. Robinson, 84  
Pullen v. Bell, 208  
Pullen v. Chase, 103  
Pullin v. Nicholas, 4-46  
Purcell v. Bradley, 146  
Purinton v. Jamrock, 469  
Putnam v. Bond, 105  
Putnam v. Wyley, 157, 158  
Putnam Lumber Co. v. Ellis'Young Cc., 412, 423  
Pyster v. I-Iernling, 119

## Q

Quarles v. Waldron, 386

Quiney v. Hall, 490  
Quincy, City of v. Warfield, 469  
Quinn v. Schmidt, 264

## It

Baborg v. Poyton, 283  
Race v. Chandler, 2i~ 222  
Race v. Easton & A. B. Co., 185

### TABLE OF CASES

References are to Pages

References **are to Pages**

634

Itackham v. Jesup, 158, 161  
Baclford v. Rarbyn, 405  
Radzinski V. Ahlswede, 304, 506, 507  
Rae v. Hulbert, 299, 360  
Raheer v. flaher, 76  
Raleigh County Court v. Cottle, 470  
Ralph v. Bayley, 162  
Ramsey v. Hurley, 223

633

& N. By. & Light Co., 525

### TABLE OF CASES

Rand v. Band, 365  
 Randall v. Eigby, 291  
 llandel v. President, etc. of Chesapeake & P. Canal, 808  
 Bandot v. Rogers, 308  
  
 Raney CC Boyd, 353  
 Rankln v. Darnell, 342  
 Ranlett v. Moore, 324, 340  
 Rann v. Hughes, 326  
 Rathbun v. Payne, 178  
 Rawitzer v. Mutual *Benefit* Health & Accident Ass'n, 478  
 Rawson v. Taylor, 118  
 flaxworthy v. nelsen, 184  
 Bay v. Haines, 342  
 Raymond v. Andrews, 55  
 Baymond v. Blanegrass, 588  
 Raymond v. People, 145  
 Raymond v. Sturges, 482  
 Raymond v. Toledo, St. L. & K. C. R. Co., 563  
 Read v. Brookman, 13, 307  
 Read v. Brown, 87  
 Read v. Inhabitants of Chelmsford, 573  
 Read v. Smith, 328  
 Read v. *Walker*, 103, 105  
 Read's Case, 441  
 Read v. Lord, 114  
 Beam v. flank, 179  
 Reavely v. Harris, 574  
 Rebman v. San Gabriel Valley Land & Water Ce., 343  
 Bedding, City of v. Shasta County, 327  
 Red Men's Fraternal Ace. &ss'n v. Rippey, 331  
 Redstrake v. Cumberland Mut. Fire Ins. Co., 559  
 Reeb v. Bronson, 345  
 Reed v. Davis, 296  
 Reed v. Guessford, 177  
 Reed v. Shepley, 233  
 Reed v. Tayler, 235  
 Reeve v. Palmer, 251, 252  
 Reeves v. Forman, 575  
 Regents of the Univermity of Michigan v. Detroit  
     Young Men's Soc., 126  
 Reichenbach v. MeKean, 264  
 Reid v. Lord, 421  
 Remington v. Taylor, 108  
 Renriyson v. Reifsnnyder, 325  
 Reubens v. Joel, 26  
 flex v. Dalton, 455  
 Rex v. Faweet, 52  
 Rex v. Rome, 132  
**Rex v. Jones & Palmer**, 260  
 Rex v. Kilderby, 438, 439  
 Rex v. Knollys, 140  
 Rex v. Larwood, 526  
 Rex v. Lyme, 461  
 Rex v. Malland, 295  
 Rex v~ Shakespeare, 431  
 Rex v. Stevens, 146  
 Roxroth v. Coon, 212  
 Reynel] v. Langeastle, 277  
 Reynolds v. Blackburn, 149  
 Reynolds v. Clarke, 63, 176, 170  
 Reynolds v. Clerk, 154, 168  
 Reynolds v. Hurst, 284, 295  
 Reynolds v. McCormick, 490  
 Reynolds v. Shuler, 219  
 Ribble v. Lawrence, 212  
 Rice v. Clark, 219  
 Rich v. Rider, 264  
 Rich v. Woolley, 124  
 Richards v. Frankum, 497

Richards v. Hodges, 529, 534  
Richards v. Killam, 320  
Richards v. Peake, 443  
Richardson v. Atkinson, 219  
Richardson v. Farmer, 576  
Richardson v. Mayor & Commonalty of Orford, 437, 455  
Richardson v. Murrill, 162  
Richardson v. Reed, 267  
Richardson v. Rice, 221  
Richardson v. Smith, 442  
Richardson v. York, 257  
Riehey v. Hathaway, 364  
Richter v. Chicago & E. B. Co., 202  
Riciotto v. Clement, 267  
Bicker v. Freeman, 154, 164, 167, 176, 178, 179  
Ricketts v. Loftus, 440  
Riddle v. Driver, 208  
Rider v. Bobbins, 262  
Rider v. Smith, 122, 136  
Ridgeley v. Crandall, 340  
Ridgway v. Homer, 79  
Riford v. Montgomery, 221  
Rigeway's Case, 400  
Riggs v. Bullingham, 137  
Riggs v. Dennisten, 472, 473  
Right ex dem. Lewis v. Beard, 235  
Rightmyer v. Raymond, 219  
Riley v. Boston Water Power Co., 208, 221  
Riley v. Yost, 126, 369  
Rinfret & Arruda v. Plorrlsey, 230  
Ring v. Roxbrough, 108, 110, 325  
Itipka v. Sergeant, 157  
Ripley v. Case, 353  
Ripley v. Davis, 221  
Ripley v. Dolbier, 219  
Ripley v. Yale, 159  
Ilisher v. Wheeling Roofing & Cornice Cc., 473  
Ritche v. Van Colder, 550  
flex y. Inhabitants of Mellor, 233  
Rex v. Johnson, 462  
Ritzwoller v. Lurie, 131  
Rivers v. Griffiths, 113  
Roach v. Damron, 105  
Robb v. Cherry, 251  
Robb v. Montgomery, 329  
Bobbins v. Baltimore & Ohio R. Co., 94  
Robert v. Harnage, 106  
Robert Grace Contracting Co. v. Norfolk & IS'. Ry. Co., 128  
Roberts v. American Nat. Assur. Co., 420  
Roberts v. Curby, 575  
Roberts v. Dame, 556  
Roberts v. Danforth, 470  
Roberts v. Dauphin Deposit Bank, 257  
Roberts cc McLean, 421  
Roberts v. Mariett, 525, 527  
Roberts v. Moon, 428  
Roberts v. Wyatt, 214  
Robertson v. Hooton, 217  
Robinson v. Austin, 220  
Robinson v. Corbett, 439  
Robinson v. Hagtridge, 222  
Robinson v. Peterson, 244, 247, 497  
Robinson v. Prescott, 361  
Robinson v. Rnley, 6, 456, 476, 482, 483  
Robinson v. Roberts, 232  
Robinson v. St. Johnsbumy & L. C. R. Co., 476  
Robinson v. Smith, 119  
Robinson v. Woodford, 249  
Robinson's Estate, Ta me, 598

Bobson v. Godfrey, 340  
Rochester City Bank & Lester v. Suydam, 12  
Rocker v. Perkins, 104  
Rockfo,'d Ins. Co. v. Nelson, 140, 331  
Rockford, R. I. & St. L. B. Co. v. Beckemeler, 304  
Rockhill v. Contress Hotel Co., 547  
Rock Spring Coal Co. v. Salt Lake Sanitarium Ass'n, 445  
Rodgers v. Brittalr, 221  
Rodman Imp. Co. v. Krabo, 562  
Roebuck v. Duprey, 305  
Boella v. Follow, 198  
Rogers v. Brooks, 295, 297  
Rogers v. Burk, 440, 441  
Rogers v. Dickey, 594  
Rogers v. Imbleton, 178  
Rogers v. Jenkins, 100, Wi  
Rogers v. Windoes, 215  
Rolte v. Sharp, 325  
Bomani v. Shoal Creek Coal Co., 184  
Rooke v. Rooke, 364  
Roosevelt v. Fulton's HeIrs, 507  
Roosevelt v. Cardinier, 113  
Roosevelt v. Hungate, 495  
Root v. Woodruff, 262  
Booth v. Wilson, 162, 165, 177, 213  
Roper v. Clay, 576  
Rose v. Bowler, 140  
Rose v. Lewis, 209  
Rose v. Miles, 163, 180  
635

Rose v. Oliver, 426  
Roseboom v. Mosher, 238  
Rosenbury v. Angell, 513  
Itoss v. Allen, 425  
Ross v. Johnson, 220  
Ross v. Nesbit, 514  
Rotan v. Fletcher, 493  
Roteli v. Hawes, 188, 220  
Roth v. Wells, 594  
Rountree v. Little, 234  
Roussin v. Benton, 159  
Routh v. Weddell, 402  
Rowell v. Hayden, 514  
Rowland v. Veale, 125  
Rowles v. Lusty, 431  
Roworth v. Wilkes, 180  
Royalton, Town of cc Royalton & W. Turnpike Co.. 132  
Royce cc Oakes, 209, 217  
Bribery v. Stevens, 112  
Rubin v. Huhn, 218  
Racker v. Halnhlton, 251, 252  
Bucker v. McNeely, 159  
Ruckman v. Ridgefield Park B. Co., 523  
Ruckman -cc The Ridgefield Park Railroad Co., 523  
Rudder v. Price, 282—284, 319, 343  
Rugg v. *Minctt*, 215  
Ruggles v. Fey, 220  
Ruggles v. Hall, 570  
Buggies v. Lesure, 486  
Buggles v. Sands, 160  
Rumbarger -cc Stiver, 148  
Rupert v. Mark, 233  
Rushton v. Aspinall, 573, 576  
Eushworth v. Taylor, 222  
Russell v. Bell, 342, 358  
Russell v. City of Chicago, 285

Russell v. Clark's Ex'rs, 189  
 Russell v. Hamilton, 503  
 Russell v. Irwin's Adm'r, 233  
 Russell v. Rogers, 143, 403, 482  
 Russell v. Scott, 158  
 Russell v. *Slade*, 328  
 Russell v. Tomlinson, 425  
 Russell's Case, 437  
 Russo v. D'merstein, 179  
 Rutter & Co. cc McLaughlin, 421  
 Ryan v. Brant, 212, 221  
 Ryan v. Clark, 118  
 Ryan v. Gallatin County, 296  
 Ryan v. Vanlaadingham, 469  
 Ryder cc Flanders, 234  
 Rynders cc Coxie, 284  
 Sabourln y. Marshall, 200  
 Sackett v. Thompson, 550  
 Sadler v. Robinr, 261  
 Saffomd cc Barso, 160  
 Safford v. Miller, 98

## S TABLE OF CASES

References are to Pages

Scidmore v. Smith, 201  
 Scilly v. Dally, 117—120  
 Seofield v. Whitelegge, 564  
 Scott v. Colson, 238  
 Scott v. Conover, 284, 305  
 Scott v. Curd, 294  
 Scott v. Godwin, 425  
 Scott v. Hull, 79  
 Scott v. Leiber, 294, 307  
 Scott v. Parlen & Orendorff Co., 96  
 Scott v. Shepherd, 154, 164, 170, 179  
 Scott v. Whipple, 147  
 Scovill v. Seeicy, 308  
 Scudder v. Anderson, 219  
 Scudder v. Worster, 265  
 Seurfield v. Gowland, 321  
 Seare v. Prentice, 189  
 Searing v. Butler, 109  
 Searlv. Bunion, 117, 119, 120  
 Seckel v. Scott, 345  
 Secor v. Sturgis, 16  
 Seeley v. Dunlop, 314  
 Seeley v. Howard, 237  
 Seipel v. International Life  
 Selby v. Bardons, 520, 522  
 Selby v. Hutchinson, 97, 341  
 Selton v. Bruce, 326  
 Senecal v. Labadie, 486  
 Seretto v. Rockland, S. T. &  
 Serjeant v. Fairfax, 439, 440  
 Serra v. Wright, 333  
 Severin v. Keppel, 220, 222  
 Sewall v. Lancaster Bank, 209  
 Sexton v. Holmes, 324, 364  
 Sexton v. McDowd, 266  
 Sexton v. Miles, 327  
 Seymour v. Maddox, 184, 437  
 Seymour v. Mitchei, 149, 395  
 Shadwell v. Hutebinson, 163, 180  
 Shafer v. Security Trust Co., 97

## TABLE OF CASES

References are to Pages

636

St. John v. St. John, 140, 141, 342  
 St John cc Standrlng, 220  
 St. Louis A. & C. R. Co. v. Dalby, 193  
 St Louis, A. & T. H. R. Ce. v. Miller, 298  
 St. Louis A. & T. fly, Co. v. Whitley, 105  
 St. Louis, Vandalia & T. B. B. R. Co. v. The Town of  
     Summit, 171  
 Salinas v. Wright, 307, 324  
 Salmon v. Jenkins, 329  
 Salt Springs Nat. Bank v. Wheeler, 224  
 Sampson v. Henry, 163, 486, 520  
 Samuel v. Judin, 189  
 Samuel v. Morris, 218  
 Sanboeuf v. Murphy Const. Co., 94  
 Sanders v. Hussey, 117, 118  
 Sanderson v. Baker, 169  
 Sanderson v. Haverstick, 208  
 Sanderson's Ex'rs v. Marks, 262  
 Sandford v. Halsey, 307  
 Sandferd v. Milliken, 265  
 Sandier v. Heard, 107  
 Sands v. St. John, 140  
 Sands v. Trevilian, 286, 289  
 Sandusky cc Sidwell, 415  
 Sandusky v. West Fork Oil & Natural Gas Ce., 423  
 Sandwich hUg. Co. v. Bogie, 317  
 Sanger v. City of Chicago, 341  
 Sarch v. Blackburn, 180, 201  
 Sargent v. Gile, 222  
 Sargent Co. v. Baublis, 184  
 Saunders v. Crawley, 149  
 Saunder's Case, 470—472  
 SaVacoool v. Boughton, 169  
 SaVage v. Public Service Ry. Cc., 94, 407  
 Sawtelle v. Rollins, 266  
**Sawyer v. Boston, 572**  
 Saxton cc Bacon~ 165, 177  
 Sane v. Miuns, 133, 535  
 Scarborough v. Lucas, 204  
 SeaVage v. HawkIns, 119  
 Schaetzsl v. Germantown Farmers' Mut. Ins. Co., 441  
 Schauber v. Jackson, 233  
 Schee v. Hassinger, 313  
 Schemerhorn v. Jenkins, 420  
 Sehemerhorn v. Mitchell, 500  
 Schlllinger Bros. Co. v. Sniith, 202  
 Schlossburg v. Wilingham, 217  
**Schmidt v. Glade, 304**  
 Schnable v. Koehler, 157  
 School District in Medfield cc Boston, H. & F. R. Co., 188  
 SehoonoVer v. Vachon, 343  
 Schroeder y. Merchants' & Mechanics' Ins. Co., 74  
 Schueler v. Mueller, 94  
 Schuer v. Veeder, 166, 178  
 Schultz v. Short, 199  
 Schumway v. Stillman, 361  
 Schwab v. Furniss, 400  
 Schwlndt v. Lane-Potter Lumber Co., 148  
 Schwinger v. Hickok, 353

Inz. & Trust Co., 343

O. H. By. Co., 276, 283



Shafer v. Smith, 180  
 Sbandois v. Simson, 291  
 Shane v. Smith, 343  
 Sharp v. State for Use of Brown, 92  
 Sharrod v. London & North Western Ry. Co., 176  
 Shattuck v. Gragg, 190  
 ShaVer v. McGraw, 235  
**Shaver v. White**, 105  
 Shaw v. Chambers, 232  
 Shaw v. Dutcher, 394, 402  
 Shaw v. Lewistown & K. Turnpike Co., 380  
 Shaw v. Lord Alvanley, 478  
 Shaw v. Redmond, 327, 364  
 Shaw v. Woodcock, 352  
 Shawneetown, City of v. Baker, 320  
 Shearer v. Jewett, 340, 357  
 Shearman y. Fellows, 474  
 Sheers v. Brooks, 141  
 Sheffield Nat Bank v. Corinth Bank & Trust Co., 93  
 Sheldon v. Hopkins, 299

**TABLE OF CASES**  
 Roterenoos *are* to **Pages**

Sloeum v. New York Life Ins. Co., 547  
 Smallcomb v. Cross, 594  
 Smalley v. Briste~, 140  
 Smart v. Hyde, 460  
 Smith v. Airey, 278  
 Smith v. Archer, 208  
 Smith v. Atlantic Mut. Fire Ins. Cc., 420  
 Smith v. Benson, 208  
 Smith v. Biesiada, 572  
 Smith v. Boston, C. &  
 Smith v. Bull, 105  
 Smith y. Butler, 105  
 Smith v. Carney, 420  
 Smith v. Carroll, 514  
 Smith v. Chance, 357  
 Smith v. Clark, 105  
 Smith v. Curry, 576  
 Smith v. Dixon, 442  
 Smith v. Doe cx deni. Walker 235  
 Smith v. Drew, 206  
 Smith v. Eastern B. B., 575  
 Smith v. Euelstein, 486  
**Smith** v. Fowk' & Dunham, 83  
 Smith y, Franklin, 424  
 Smith v. Gates, 169  
 Smith v. Goodwin, 97  
 Smith v. Jacksonville Oil Mill Co., 13  
 Smith y, James, 213, 215  
 Smith y. Keating, 572  
 Smith v. Lathrop, 420  
 Smith v. Lewis, 330  
 Smith cc Lorillard, 233  
 Smith v. McCann, 234, 235  
 Smith y. Moore, 297  
 Smith y. Parsons, 508, 511  
 Smith v. Philadelphia B. & W. B. Co., 96  
**Smith v. Plomer**, 158  
 Smith v. Proprietors of First  
   house in Lowell, 07, 270  
 Smith v. Rutherford, 154  
**Smithy**, Ryan, 234  
 Smith v. Scott, 124  
**Smith** cc Segar, 283  
 Smith v. Smith, 526  
 Smith v. Snyder, 498

Smith v. Stokes, 220  
Smithy. Times Pub, Co., 581  
Smith v. Townes' *Adm'r*, 497  
Smith v. United States, 297  
Smith y. Webb, 128, 324  
Smith v. Webster, 154, 323, 825  
Smith v. Wenderlich, 240  
Smith v. White, 189  
Smith v. Wiggl, 91  
Smith v. Williamson, 263  
Smith v. Wolslefer, 368  
Smith cc Wooding, 343  
Smith v. Woodmau, 296  
Smith v. Young, 222  
Smith's *Adm'r* v. Lloyd's *Ex'r*, 330

637

N. B. B., 112, 134, 323, 325  
Shelling v. Farmer, 104  
Shepard cc Palmer, 325  
Shepherd's Case, hO  
Shepherd cc Butcher Tool & Hardware Co., 459  
Sheppard v. Furniss, 98  
Sheppard cc Graves, 413, 423  
Sheppard v. Peabody Ins. Co., 131  
Sherburne v. Hyde, 415  
Sherland v. Heaton, 131  
Sherwood v. Cbace, 557  
Shiipherd v. Feld, 143, 188  
Shipley v. Shipley, 77  
Shives v. Eno Cotton Mills, 577  
Shecldey v. Fischer, 421  
Shoemaker v. Nesbit, 168  
Short v. Wilson, 189  
Shortland v. Govett, 125  
Shoup v. Shields, 162  
Shreeve v. Adams, 188  
Shrewsbury's Case, 191  
Shriver v. Nimiclc, 511  
Shufeldt v. Seymour, 421  
Shult v. Barker, 215  
Shum v. Farrington, 112  
Shumway v. Phillips, 233  
Sibley v. Brown, 145, 525  
Sick v. Michigan Aid Ass'n, 559  
Sill v. Rood, 508  
Siltzell v. Michael, 257  
Sliver v. Rhodes, 405  
Simkirts v. Rogers, 208  
Simmons v. Jenkins, 266, 500  
Simonton v. Winter, 304  
Simpson v. Alexander, 223  
Simpson v. Band, 167  
Simpson v. M'Farland, 266, 498  
Simpson v. Wren,, 263  
Sims v. Sims, 174, 157, 193  
Sinclair v. JierVey, 472  
Sinclair y. Jackson ex dem. Feld, 235

Sinclair v. Piercy, 284  
Singer Sewing Mach. Co. cc Burger, 472  
Sinnott v. Feieck, 267, 270  
Sinsheirner v. William Skinner Mfg. Co., 421, 425  
Sir Francis Leke's Case, 143, 442, 443  
Sir Ralph Bevy's Case, 141, 440  
Six Carpenters' Case, 165, 169  
S. J. & W. N. Bayard v. Smith, 184  
Skevil v. AVery, 117, 120  
**Skinner y. Gunton, 557**  
Skinner v. McDowell, 160  
Slack v. Bowsal, 355  
Slack cc Lyon, 550, 564  
Slade v. Dowland, 150  
Slade v. Drake, 445  
Slade's Case, 279, ~ 356  
Slate v. Post, 103  
Slater v. Pehlberg, 101, 559  
Sleeper y. World's Pair Banquet Hall Co., 96  
Sloeum v. Clark, 146  
Congregational Meeting-  
**638**

Smith's Heirs ~c Christmas, 329  
Smithwick v. Ward, 514  
Snelder v. I. Seliwenk, Inc., 239  
Snell v. DeLani, 424  
Snell v. Kirby, 284  
Snell v. Stanley, 418  
Snow v. Boy, 267  
Snyder v. Gaither, 473  
Snyder v. Vaugx, 257  
Society for Il~e Propagation  
Pawlet, 423  
Sogn v. Koetzle, 387  
Solomon v. Norton, 570  
Solomon v. Vi, isOn, 6, 22  
Somerville v. Grim, 350, 363  
Soper v. Sumner, 158  
Southard v. Hill, 421  
Southern Cotton Oil Co. v. Woods, 94  
Southern Express Co. v. McVeigh, 188  
Southern Hardware & Supply Co. v. Lester, 244  
Southern Home Ins. Co. v. Putnal, 396  
Southern Railway Ce. xc Covenia, 398  
Sowter v. Seekonk Lace Co., 99  
Spaeth v. Hare, 4-40  
Spangler v. Pugh, 145  
Spann v. Baltacll, 330  
Sparhawk xc Bagg, 159, 160  
Sparks v. Garrigues, 276, 283  
Speake v. Richards, 276  
Spear v. Cummings, 201  
Speelman v. Chaffee, 594  
Spencer v. Aetna Indemnity Co., 411, 432  
Spencer v. Court of Honor, 79  
Spencer v. Southwick, 132, 390, 468  
Spencer v. Trafford, 109  
**Spcyer v. Dcsjardins, 138**  
Spieres v. Parker, 139  
Spiers v. Parker, 557  
Spiker v. Eehrer, 130  
Spooner v. Warner, 299  
Sprague v. Morgan, 305  
Sprague v. New York & N. B. By. Co., 396  
Sprague Nat. Bank v. Erie It. Co., 472

Springfield Consol. By. Co. v. Hoeffner, 421  
 Spurck cc Forsyth, 468  
 Spuraway v. Rogers, 313  
 Staat v. Evans, 352  
 Stafford v. Forcer, 108, 109  
 Stahl v. GroVer, 162  
 Stailings v. Gottschnlk, 364  
 Stamper v. Temple, 319  
 Stamps v. Graves, 101  
 Standard Fashion Co. v. Lopinsky, 339  
 Stanley v. Neale, 263  
 Stanton v. Enibry, 420  
 Staple v. Hoydon, 579  
 Staples v. Smith, 157  
 Star v. Rookesby, 164, 165, 177, 180  
 Star Brick Co. v. Ridsdale, 476  
 Starbuck v. Murray, 504  
 Steele, In re, 69  
 Steffan v. Zeust, 234  
 Steffe v. Old Colony Il. Co., 392  
 Stehman v. Cruli, 233  
 Stempl v. Thomas, 352  
 Stennel v. Hogg, 450, 572, 576  
 Stephens v. Graham, 325  
 Stephens v. Steckdaub, 257  
 Stephens v. Sweeney, 285  
 Stephenson v. Cady, 328  
 Stephenson v. Hart, 219  
 Stephenson v. Little, 212  
 Sterenberg v. Beach, 128  
 Sterling v. Sherwood, 472, 473  
 Sterns v. Patterson, 525, 528  
 Steuben County Bank v. Mathewson, 91  
 Stevens v. Austin, 212, 221  
 Stevens v. Duabar, 406  
 Stevens v. Evans, 290  
 Stevens v. Fisher, 504  
 Stevens v. Lockwood, 16  
 Stevens v. Proprietors of  
 Stevens v. Tuller, 360  
 Steven's Ex'rs v. Lee, 343  
 Stewardson v. White, 481  
 Stewart v. Bright, 212  
 Stewart v. Camden & A. B. Cc., 237. 241  
 Stewart cc Walker, 342  
 Stewart v. Walils, 531  
 Stibbs v. Clough, 369  
 of the Gospel v. Town of

## **TABLE OF CASES**

References are to Pages

Starke v. Cheeseman, 324  
 Starkweather v. Kittle, 466, 480  
 Starr v. Jackson, 159, 190, 191  
 Starr v. Trustees of Village of Rochester, 698  
 Starrctt v. Gault, 424  
 State v. Beasom, 466  
 State v. Chandler, 425  
 State v. Folsom, 298  
 State v. Freeman, 557  
 State cc Hcaphy, 238  
 State v. Judge of Fifth District Court, 597  
 State cc Morgan, 570  
 State v. Peck, 405  
 State cc Seaboard Air Line fly.. 396  
 State v. Vlttum, 114  
 State v. Warner Valley Stock Co., 571  
 State v. Whitaker, 597  
 State ex rd. Anderson v. Leonard, 91  
 State ex rd. Ballard v. Greene, 131

State of Louisiana v. Mayor, etc., of City of New Orleans, 360, 361  
State, to Use of Kclley v, Wilson, 369  
Statoa v. Pittman, 250  
Stearnes v. Barrett, 323  
Stearnes v. Raymond, 257  
Stearns v. Cope, 404  
Stearns v. Dillingham, 352  
Stebbins v. Lancashire Ins, Co., 500  
Steckel v. Steckel, 351  
Steed v. McIntyre, 559

Middlesex Canal, 201

Stiles v. Basley, 352  
Stiles v. Stewart, 209  
Stillman v. Squire, 268  
Stiliwell v. Carpenter, 115  
Stilson v. Tohey, 502  
Stilwell cc Uasbrouck, 480  
Stthchfie]d cc Twaddle, 216  
Stinson v. Edgemoor Iron Works, 301, 302  
Stinson v. Gardiner, 398  
Stirling v. Carrito, 223  
Stirling v. Vaughan, 213  
Stock-dale v. Buckingham, 79  
Stoetzell v. Fullerton, 421  
StoeVer v. Stoever, 327  
Stone v. Bliss, 133  
Stone v. Codman, 223  
Stone v. Knowlton, 325  
Stone v. Perry, 268  
Stone v. White, 328, 367  
Stonegap Colliery Co. v. Hamilton, 92  
Stonehouse v. Sodvil, 291  
Storm v. Livingston, 229  
Story v. Atkins, 364  
Stout v. Keyes, 157, 387  
Stout v. Bessel, 109  
Stovall's Ex'r v. Woodsoa, 288  
Stow v. Yarwood, 516  
Stocvel v. Lord Zoueh, 141  
Stowell v. Beagle, 492  
Stocvell v. Lord Zouch, 140  
Stoyel v. Westcott, 97, 188  
Strain v. Strain, 186  
Strange v. Durham, 486  
Strange v. Powell, 206  
Stratton v. Hill, 283  
Street v. Nelsen, 212  
Streeter v. Streeter, 108, 421, 509, 516  
Strickler v. Todd, 180, 188  
Stringer v. Mitchell, 237  
Strohl cc Levan, 165, 166, 178  
Strohm cc Hayes, 575  
Strong cc Adams, 157  
Strong v. Smith, 476  
Strother's Adm'r v. Butler, 358  
Stroud cc Lady Gerrard, 126, 127, 324  
Stuart v. Dutton, 233  
Stuart v. Sears, 352  
Stuart v. Wilkins, 189  
Stubbs v. Lainson, 441, 442  
Stultz cc Dickey, 102  
Stumps v. jCelley, 180, 201, 535  
Sturges v. Bush, 310  
Sturges v. Keith, 220, 222  
Sturman v. Colon, 487  
Stuyvesant v. Tompkins, 159  
Suffern v. Townsend, 160  
Sullivan cc Boswell, 516  
Sullivan v. Jones, 168

Sullivan v. Waterman, 187

Summers v. McKim, 359

## TABLE OF CASES

### References are to Pages

Sumner v. Flanagan, 105

Sundberg v. Ooar, 425

Supreme Lodge A. O. U.

Swain & Son v. Chicago

Swan cc Wilkinson, 421

Sweet v. Hulbert, 507

Swift v. Crocker, 108

Swift v. Moseley, 212, 215

Swift Co. v. Gaylord, 202

Swift & C. & a Co. v.

Sykes cc Walls, 210

Symceck v. Payn, 355

Taft v. Brewster, 365

Talbeá-t v. Cason, 508

Talmadge v. Scudder, 158

Tandrup v. Sampsell, 427

Tanner v. Allison, 497

Tappaa cc Campbell, 288

Tappscott v. Gibbs, 234

Tarleton v. Wells, 525, 528

Tate v. Wellings, 108

Tatem v. Perient, 442

**W. V. Zuhlke, 42!, 426**

B. & O. B. Co., 89, 120

639

United States, 852

## T

Tatrn v. Louisville & N. U. Co., 94

Taverna v. Churchill, 520, 524

Taylor v. Eastwood, 116, 482

Taylor xc Gladwin, 232

Taylor v. Hanlon, 222

Taylor v. Higgins, 351

Taylor v. Horde, 495

Taylor v. Jones, 160, 169

Taylor v. Laird, 319

Taylor v. Morgan, 216

Taylor v. Needham, 147, 439

Taylor v. New Jersey Title Guarantee & Trust Co., 133

Taylor v. Pope, 308

Taylor v. Robinson, 489

Taylor v. Russell, 233, 234

Taylor v. Summers Bros. Match Co., 105

Taylor v. Wells, 1.11, 249

Taylor v. Williams, 341

Taylor v. Wilson, 304, 305

Tebbetts cc Titton, 148, 476, 483

Ten Eyck v. Waterbury, 474

Pennant's Ex'r v. Gray, 128, 334

Terry cc Munger, 358

Thatcher v. Lyman, 125

flayer cc Brewer, 462, 489

Thayer v. Hutchinson, 213

Thayer v. Rogers, 478

Theis v. Svoboda, 339

Thomas v. Black, 448

Thomas v. Brady, 352

Thomas cc Cameron, 423

Thomas v. Mott, 339  
Thomas v. Riley, 487  
Thomas v. Roosa, 143, 333  
Thomas v. Spofford, 262, 263  
Koffler & Reppy ComLaw Pldg. H.B.—22

Torrence v. Irwin, 159  
Torrey v. Field, 482  
Touchard v. Keyes, 232  
Towle cc Lovet, 215  
Town of. See under name of town, Townsend cc Crowdy, 352  
Townsend cc Jemison, 400  
Tracy v. Warren, 263  
Trammel v. Lee County, 340  
Trapnall v. Merrick, 277  
Trauger v. Sassaman, 163  
Traylor v. Horrall, 212  
Treat v. Barber, 128  
Treich v. Kamka, 89  
Trevor cc Roberts, 356  
Tribble v. Frame, 118  
Tribble v. Oldham, 304  
Triggs v. Sun Printing &  
Trinkle v. Reeves, 353  
Tripp v. Grouner, 219  
Trollop's Case, 431  
Trotter v. Taylor, 498  
Troville v. Tilford, 213  
Troy Laundry Machinery  
Co., 256  
Trudo v. Anderson, 268  
Trueman v. Hurst, 364  
Truett v. Legg, 566  
Trunibuli v. Campbell, 351  
Trussel's Case, 577  
Trustees of Dartmouth College v.  
Tubbs v. Casweil, 476, 555  
Tucker v. Ladd, 482  
Tullidge v. Wade, 165, 179, 191  
Tunnisoa v. Field, 340  
Turner cc Eyles, 143  
Turner v. Irlgate, 125  
Turner v. Hawkins, 165, 166, 178  
Turner v. Reynolds, 232  
Turner cc Waldo, 216, 219  
Turney cc Sturges, 122  
Tuttle cc Atlantic City B. Co., 173  
Tuttle v. Campbell, 358  
Tuttle v. Gilbert Mfg. Co., 188  
Tuttle v. Robinson, 268  
Tweedy v. Jarvis, 113, 114  
Tyler v. Balley, 353  
Tyler v. Freeman, 264  
Tyler v. Hand, 406  
Ultramares Corp. cc Touche, 73  
Underhill v. Ellicombe, 295, 296  
Underwood v. Campbell, 489  
Underwood v. Parks, 489, 492  
Union Brewing Co. cc Meter, 234, 496

#### TABLE OF CASES

Publishing Ass'n, 198

640

Thomas v. Van Ness, 330  
Thomas Mfg. Co. v. Watson, 340  
Thomasson v. Agnew, 201  
Thome cc Haley, 308  
Thompson v. Adams, 234  
Thompson v. Bell, 101

Thompson v. Fellows, 439, 441  
Thompson v. French, 275, 276, 282  
Thompson v. Heward, 352  
Thompson cc Jacoway, 564  
Thompson v. Lee, 113  
Thompson v. Lyon, 234  
Thompson v. Moore, 201  
Thompson v. Rose, 221  
Thomson v. Locke, 105  
Thorn v. Shering, 454, 455  
Theme v. Fox, 509  
Thomne & Thorne v. Deas, 288, 334  
Thornton cc Adams, 146  
Thornton v. Smith, 850, 363  
Thornton v. Village of Sturgis, 319  
Thomp cc Hurling, 157, 215  
Thorpe & Uxer v. Booth, 329  
Thorwarth cc Blanchard, 103  
Thouron v. Paul, 310  
Thrale v. Bishop of London, 455  
Thrall v. Wright, 509  
Throop v. Sherwood, 340, 360  
Thurber v. Conners, 55  
Thurman v. Wild, 441  
Thurman v. Wiliingham, 413  
Thursdy cc Plant, 143  
Thurston cc Blanchard, 212, 221  
Thurston v. Mills, 358  
Thurston v. Percival, 342  
Tiemney v. Corbett, 247, 248  
Tillotsan cc Stipp, 97  
Tilson cc Town of Warwick Gaslight Co., 295  
Tilton v. Beecher, 374  
Tinklem v. Poole, 210  
Tinney v. Ashley, 330  
Tippet v. May, 400, 403, 473  
Tobey v. Berly, 330  
Tobey v. Webster, 157, 159  
Tolan v. Hodgeboom, 220  
Toland cc Sprague, 441  
Toledo, P. & W. By. Co. cc Webster, 575  
Toledo, W. & W. U. Co~ v. Chew, 342, 357, 358  
Toledo, W. & W. B. Co. v. Harmon, 193  
Toledo, W. & W. U. Co. v. Jacksonville Depot Building Co., 97  
Tolputt v. Wells, 525  
Tomkins cc Ashby, Moody & It, 398  
Tomlin v. Durlace, 469  
Tomllnson v. Damall, 460  
Tomlinson v. Day, 857  
Tompkins cc Baile, 221  
Tooker cc Arnoux, 564, 577  
Topping cc Evans, 157  
Co. v. Carbon City Laundry

Clough, 50k

## U

Union Cotton Manutnetory cc Lobdell, 95, 97  
tnlon Pacific R. Co. cc Wyler, 568  
Union Petroleum Co. cc Bliven Petroleum Co., 163, 180

127

University of Vermont v. Joslyn, 100  
Upton v. Craig, 169  
Upton cc Vail, 189, 194  
Vaughan v. Thompson, 295, 298  
'Tausse v. Russell, 257  
Vaux cc Malnwareing, 343  
Vavasour v. Ormrod, 331  
Vere v. Smlth, 526, 534



Vernon v. Gatacre, 528

## TABLE OF CASES

References are to Pages

Verschures Creameries, Ltd. v. Hull S. Co., 352  
Union Stockyard & Transit Co. v. Mallory Son & Zimmerinan Co., 221  
United Copper Mining & Smelting Co. v. Franks, 157  
United States v. Brown, 804, 305  
United States v. Colt, 282  
United States v. Cruikshank, 15  
United States v. Forbes, 387  
United States v. Gurney, 476  
United States v. Hoffman, 597  
United States v. Morris, 555, 564  
United States v. Peters, 597  
United States v. Schumz, 523  
United States cc Willard, 468  
United States Fidelity & Guaranty Co. v. District  
Grand Lodge No. 27 of Grand United Order of Odd  
Fellows, 294  
United States Printing & Lithograph Co. v. Powers,  
**641**  
& Netherlands S.  
Vicary v. Moore, 514  
Vickery v. New London Northern R. Co., 564  
Vickery v. *Sherburne*, 4.93  
Victors v. *Davies*, 350, 362, 363  
files v. Barre & M. Traction & Power Co., 341, 363  
Vincent v. Cornell, 221, 222  
Vining v. Baker, 213  
Vivian v. Jenkin, 470  
Vogrin v. American Steel & Wire Co., 184  
Vroeman v. Lawyer, 201  
Vrooman v. MelCaig, 352  
Vynior's Case, 141, 142

## W

Wabash H. Co. v. Billings, 144  
Wabash, St. L. & P. By. Co. v. McCasland, 188  
Wabash Western By. Co. cc *Friedman*, 144  
Waddell v. Phillips, 339  
Wade v. Emerson, 514  
Wadhams v. Swan, 441, 459, 469  
Wadleif cc Janvrin, 208, 218  
Wadleigh v. Katahdin Pulp & Paper Co., 184, 319  
Wadleigh v. Town of Sutton, 341, 303  
Wadsworth v. Gay, 357  
Wadsworth cc Woodford, 428  
Wageelt v. Travelers' Ins. Co., 472  
Waid v. Dixon, 324, 364  
Wailing v. Toll, 508  
Waistel v. *Holman*, 298  
Wait cc Baldwin, 257  
Wallace v. McConnell, 515  
Walcott v. Canfield, 426  
Walden cc Feller, 257  
Walden v. Holman, 392, 397, 406  
Wales cc Bogue, 235  
Walker v. Conant, 351, 352, 387  
Walker v. *Duncan*, 343, 358  
Walker v. Penner, 250, 251  
Walker v. Goodman, 187  
Walker v. President, etc., of Michigan State Bank, 141  
Walker cc Richards, 325  
Walker cc Sargcant, 572  
Walker cc Shackelford, 343

Walker v. Walker, 278, 585  
Walker cc Wizrn, 509  
Walker v. Witter, 361  
Wall, En parte, 445  
Wail v. Chesapeake & O. II. Co., 148  
Wallace v. Curtiss, 555, 556, 575  
Wallace v. Dixon, 109  
Wallace v. Holly, 387  
Wallace v. McConnell, 515  
Wailer v. Bowling, 223  
Waller v. Village of River Forest, 128  
Wallis v. Doe ex dem. Smith's Heirs, 235  
Wallia v. Fra2ier, 325  
Walpole v. Smith, 203, 264

## V

Vail v. Lewis, 168, 169  
Valentine v. Northrop, 235  
Valerli v. Breakwater Co., 94  
Valerlus v. Richard, 569  
Van Baalen v. Dean, 265  
Van Brunt cc Schenelr, 157, 160, 169  
Van Buren Light & Power Co. v. Inhabitants of Van  
Buren, 305, 220  
Vanderkarr cc Vandemkarr, 305  
Van fleusen v. Bluin, 276, 343  
Van Doren v. Everitt, 162  
Vandrink v. Archer, 210  
Van Etten v. Hurst, 462  
Van Horn v. Freeman, 179  
Vanlandingham cc Ryan, 406  
Van Namee cc *Bradley*, 285, 498, 499  
Van Ness v. Forrest, 469  
Van Ness v. HamIlton, 454  
Van Norman v. Young, 514  
Van Ommert v. Hageman, 104  
Van Rensselaer's Efrs cc Platner's Ex'rs, 128, 334  
Van Santwood cc Sanford, 294  
Van Vaeter v. McKillip, 179  
Van Valkenburgh v. Rouk, 503  
Van Vleet v. Blackwood, 235  
Vamo v. Pelot, 575  
Varnes cc Seaboard Air Line Railway Co., 137  
Vasse v. Smith, 188, 508  
Vaughan cc Everts, 480

## 642

Walser v. I-ioran, 322  
Walsh v. North American Cold Storage Co., 330  
Walsh v. Slsson, 189  
Walsingham's Case, 140, 141  
Walter v. Loughton, 86  
Walters v. City of Ottawa, 202, 561  
Walters v. Hodges, 450  
Walters v. Sheffield, 231, 232  
Walton v. Clarke, 160  
Walton v. Follansbec, 233  
Walton cc Malcolm, 234, 496  
Wann v. McNulty, 320  
Wapello StateSavings Bank v. Colton, 306  
Ward v. Athens Mm. Co., 509  
Ward v. Bell, 99  
Ward v. Blunt, 493  
Ward v. Harris, 327, 328  
Ward v. fluff, 4, 66. 67  
Ward v. Macauley, 154, 157, 158, 176, ISo  
Ward c'. Mississippi River Power Co., 486, 487  
Ward v. Warner, 319  
Ward v. Wiman, 189

Ward and Blunt's Case, 472  
 Wardell v. Fosdick, 189  
 Warden & Commonalty of the Mystery of Grocers v. Arehi-ibop of Canterbury, 437, 438  
 Ware v. Dudley, 146  
 Waring v. Griffiths, 116  
 Waring v. Yates, 108  
 Warn cc Bickford. 332  
 Warner -v. Bacon, 128, 334  
 Warner v. Canton, 263  
 Warner cc Dunuac'an, 188  
 Warner v. Wainsford, 459, 469, 472  
 Warren v. Badger Lead & Zinc Co., 574  
 Warren v. Caryl, 360, 364  
 Warren v. Consett, 503  
 Warren v. flall, 26  
 Warren cc Dwyer, 212  
 Warren v. Flagg, 504  
 Warren v. Harris, 575  
 Warren v. Leland, 264, 265  
 Warren cc McCarthy, 298  
 Warren v. Webb, 104, -105  
 Washburn v. Mosely, 132  
 Washington v. Baltimore & O. it. Co., 187  
 Washington Ice Co. v. Webster, 268  
 Waterbury Nat. Bank v. Reed, 505  
 Waterhouse cc Sterehi Bros. Furniture Co., 369  
 Waterman cc Clark, 516  
 Waterman v. Hall, 181  
 Waterman cc Robinson, 263, 264  
 Waters v. Lilley, 486  
 Watkins y. Ford, 360  
 Watkins v. Wake, 283  
 Watriss v. Pierce, 91, 468, 476, 479  
 Wats v. King, 473  
 Watson v. Inhabitants of Cambridge, 862  
 Watson v. Jones, 194  
 Watson v. King, 209

## **TABLE OF CASES**

References are to Pages

Watson v. M'Nairy, 277  
 Watson v. Rushmore, 563  
 Watson v. I'oolverton, 351  
 Wattles v. flu l'bls, 205  
 Watton v. Brintb, 288, 334  
 Watts v- Konnnmer, 387  
 Watts v. Lehman, 208  
 Watts v. Thomas, 105  
 Waugh cc Russell, 127  
 Wcall v. King, 426  
 \Vcar cc Jacksonville & Savannah H. H. Co., 403  
 WeaVer v. Bush, 164  
 Weaver v. Lawrence, 266  
 Webb v. Fox, 216, 403  
 Webb v. Mann, 220  
 Webb v. MartIn, 474  
 Webb v. Ross, 442  
 Webb v. Sturtevant, 162  
 Webber cc DaVis, 210  
 Webber v. Tivill, 350  
 Webster v. Hill, 233  
 Webster v. Holmes, 198, 199  
 Webster v. State Mut. Fire Ins. Co., 485  
 Weed v. Hall, 263  
 Weeding v. Aldrich, 140  
 Weedon v. Timbrell, 165, 179  
 Weeks v. Peach, 473  
 Weeton v. Woodcock, 208  
 Wegersioffe v. ICecnc, 324  
 Weidensaul v. Reynolds, 213

Weigley's Adm'rs v. Weir, 333  
Weller v. Kershuer, 358  
Weisenfeld v. Macan, 594  
Weiss v. Binnian, 405  
Weiss cc Mauch Chunk Iron Co., 2~  
Welch v. Jenks, 161, 162  
Welch V. Sykes, 505  
Weld cc Hubbard, 201  
Weld v. Oliver, 220  
Weldon v. Lytle, 208  
Welker's Lessee v. Coulter, 233  
Weller v. Weyand, 201  
Weller & Co. v. Camp, 132  
Wellington cc Milliken, 108, 110  
Wells v. Howell, 164, 180  
Wells v. Iggulden, 130, 297  
Wells cc ICanawba & I.1. By. Co., 97  
Wells v. Knight, 178  
Welsh v. Seaborn, 353  
Wcltale v. Clover, 533  
Weltenhall v. Sherwin, 131  
West cc H. 3. Lewis Oyster Co., 396  
West v. Hughes, 240 West v. Ratledge, 68  
West v. Treude, 160, 191  
West v. Troles, 100  
West Chicago St. II. Co v. Levy. 129  
West Chicago St. H, Co. cc Morrison, Adams & Mica  
Co., 480  
Western Loan & Say. Co. cc Butte & B, Consol. hUn.  
Co., 79  
Western Union Tel. Co., Er Porte, 306  
Western Union Tel. Co. v. Bowen, 322  
Western Union Tel. Co. v. Longwilll, 576  
Western Union Tel. Co. v. Morrison, 396  
Weston cc Mason, 576  
Westropp v. Solomon, 353  
Westwood v. Cowne, 129  
Wetherell v. Spencer, 265  
Wetmore v. Baker, 350, 363  
Wetnel v. Hancock County, 79  
W. F. Parker & Son 'v. Clemons, 360  
Wheeler v. Curtis, 403, 469  
Wheeler v. Hotchkiss, 160  
Wheeler v. MeCorristen, 500  
Wheeler v. Train, 215, 263  
Wheeler v. Wilson, 364  
Wheeler & Wilson Mfg. Co. v. Hell, 221  
Wheeling Mold & Foundry Co. v. Wheeling Steel &  
Iron Co., 324  
Wbeelock v. Wheclright, 220  
Whelan v. Massachusetts Bonding & Ins. Co., 330  
Wbelpdale's Case, 504  
Whidden v. Seelye, 208  
Whipple v. Fuller, 97  
Whipple v. Gilpatrick, 210  
Whippie v. McGinn, 238  
Whipple v. Parker, 343  
Whitacre v. City of Charlotte, 396  
Wbltaker v. Freeman, 475, 480  
Whitall cc Morse, 330  
Wbitbeck v. Whitbeck, 357  
White v. Bailey, 575  
White v. Bourquln, 396  
White v. Brantlcy, 157  
White v. Concord B. Co., 575, 576  
White v. Delavan, 556  
White cc Demary, 222  
White v. East Side Mill Co., 446  
White v. Hapeman, 235

White v. Oliver, 841  
White v. Romans, 131  
White v. Sanborn, 105  
White v. Sheffield & T. St. By. Co., 251  
White v. Street, 308  
White v. Teale, 404  
White v. Thomas, 294  
White v. White, 232  
White v. Wilson, 327, 828  
White Co. v. Union Transfer Co., 265  
Wifitecraft v. Vanderver, 296, 297  
Whitehead v. Burgess, 121, 393  
Whitehead v. Harrison, 246, 249  
Wbltfield v. Whltfield, 247  
Whitford v. Drexel, 235  
Whitley v. Bramble, 235  
Whitmaker cc Fitcairn, 186  
Whitman cc Merrill, 267  
Whitmore v. Green, 494  
Whitney v. Spencer, 294  
Whitney v. Wright, 233  
Whittclscy v. Wolcott, 472  
Whittington v. Christian, 240  
Whitwell v. Wells, 478  
Wiard v. Semken, 246, 526  
Wiatt v. Essington, 111, 131  
Wickham cc Freeman, 159, 160  
Wickliffe v. Hill, 327  
Wiggins Ferry Co. v. Blakeman, 489  
Wilbraham v. Snow, 116, 161, 165, 213, 215, 220, 221  
Wilbur v. Gilmore, 406  
Wilby v. Bower, 183  
Wilcox v. Cohn, 332  
Wilcox v. Kiazic, 160, 448  
Wilcox v. Servant of Skipwitb, 466  
Wilde v. Cantillon, 163  
Wilder cc Bandy, 131  
Willey v. Fractional School Dist. No. I of Paw Paw  
and Antwcrp, 342  
Wildman v. North, 498  
Wildman v. Wildman, 87  
Wilkerson v. McDougal, 247  
Wilkes v. Broadbent, 578  
Wilkin v. Wilkin, 313  
Wilkins v. Wingate, 277, 356  
Wilkinson v. Connell, 157  
Wilkinson v. Hall, 280  
Wilkinson v. Verity, 243, 250, 251  
Willard v. Missani, 100  
Willard v. Zehr, 414  
Willey v. Carpenter, 392  
Willey v. Paul, 129  
*Williams cc Allen*, 425  
Williams v. Bemis, 343  
Williams v. East India Co., 142  
Williams v. Cease, 220-  
Williams v. Holland, 160, 178, 1-  
Williams v. Jones, 361  
Williams v. Lewis, 157  
Williams v. Morland, 163, 180  
Williams v. Ogle, 113  
Williams v. Peninsula Grocery Co., 93, 420  
Williams v. Preston, 208  
Williams v. Sherman, 340  
Williams v. Smith, 329, 498  
Williams v. Staton, 333  
Williams v. Wilcox, 91  
Williamson y. Allison, 189  
Williamson cc Columbia Gas & Electric Corp., 203, 302  
Willington cc Inhabitants of West Boylston, 341

Willis v. Noyes, 265  
 Willmarth v. Crawford, 283, 290  
 Willis v. Barrister, 267  
 Wills cc Clatlin, 557  
 Wilison v. Force, 243, 357, 358, 365  
 Wilison v. Willson, 313  
 Wilmington & Raleigh U. U. Co. v. Itobeson, 331  
 Wilson v. Alexander, 353  
 Wilson v. Bibb, 118

## TABLE OF CASES

### References are to Pages

643

cc Breehemin, 304  
 v. Eilis, 109  
 v. Gilbert, 148  
 v. Guyan]otte Timber Co., 92  
 cc Hick-son, 284, 305  
 v. Hobday, 142  
 v. Kemp, 535  
 v. King, 512  
 v. Martin, 158  
 v. Myrick, 403  
 v. Nevers, 425, 428  
 Wood v. City of Salamancn, 588  
 Wood v. Darndll, 262  
 Wood v. Fletcher, 113  
 Wood v. Cunston, 508, 581

644

Wilson  
 Wil so a  
 Wilson  
**Wilson**  
 Wilson  
 Wilson  
 Wilson  
 Wilson  
 Wilsoa  
 Wilson  
 Wilson  
 Wilson v. Ray, 400  
 Wilson v. Reed, 220  
 Wilson v. Boyston, 263  
 Wilsoa v. Smth, 103, 160, 178, 181  
 Wilsoa v. Wagar, 357  
 Wilsoa v. Wilson, 180, 425, 516  
 Wilson's Adm'r v. Bowens, 128  
 Wilson's Lessee v. Inloes, 235  
 Wilt v. Ogden, 340, 508  
 Wilt v. Vickers, 179  
 Wimberly v. *Hurst*, 233  
 Wimbish v. Tailbois, 135  
 Wimbleton v. Hoidrip, 133  
 Wincher y. Slirewsbnry, 162  
 Winchester v. Rounds, 216  
 Wing v. Milliken, 220  
 Wingate cc Smith, 202  
 Wingo v. Brown, 324, 364  
 Winbeim v. Field, 03  
 Winkler v. Moister, 179  
 Winn cc Columbian Ins. Co., 581  
 Winsbip v. Neale, *1ST*, 214  
 Winslow v. Benl, 154, 176  
 Winstone v. Linn, 525  
 Winston's Efr v. Francisco, 327  
 Wintle v. Freeman, 200  
 Wire v. Sloeum, 217  
 Wisconsin Cent. B. Co. v. Wleezerolc, 7  
 Wiseots' Case, 122

Wise v. Hodsoll, 460, 463  
Wisner v. Wilhelm, 314  
Witbeck v. Waine, 371  
William cc Lewis, 570  
Witherell v. Clerkson, 137  
Withers v. Greene, -131  
Withers v. Knox, 332  
Witherspoon v. Clegg, 213  
Witt v. St. Paul & N. P. fly., 169  
Wolf v. Bearcl, 352  
Wolf v. Binder, 114  
Wolfe v. Howcs, 143, 341  
Wolkau 'c Wolkau, 312  
Wonsettler cc Lee, 343  
Wood v. Budden, 442, 443  
Wood v. Butts, 468

## TABLE OF CASES

### References are to Pages

Wood v. Morton, 235  
Wood v. Papendick, 387  
Wood cc Weimar, 264, 265  
Woodcock v. Cole, 133  
Wooderman cc Baldoek, 215  
Woodgate v. Knatclibull, 169  
Woodruff v. Zabsn & Son, 358  
Woods v. Ayres, 338, 362  
Woods v. Haukshead, 526  
Woods cc *Lane*, 233, 234  
Woods v. Nixon, 264  
Woods cc Pettis, 298  
Woodstock v. Town of Hancock, 362  
Woodward v. Grand Trunk Ry. Co., 266  
Woodward v. Walton, 161  
Woodward v. Walton, 182, 191  
Woodworth v. Kiasain, 212  
Woodworth v. Woodburn, 129  
Woolaston v. Webb, 137  
Wooster cc Butler, 237  
Worley v. Rarrisou, 438  
Worley v. Johnson, 348  
Wormouth v. Cramer, 199  
Worsley v. Wood, 329  
Worster v. Proprietors of Canal Bridge, 572  
Worth v. Butler, 197  
Wright cc Armstrong, 266  
Wright v. Atlantic Coast Line B. Co., 92  
Wright v. Campbell, 507  
Wright v. Carter, 232  
Wright v. Dickinson, 351, 353  
Wright v. Freeman, 180  
Wright cc Geer, 426  
Wright v. Guy, 316  
Wright cc Haskell, 341  
Wright v. *Johnson*, 338  
Wright cc Raniseot, 106  
Wright v. Sharp, 601  
Wright cc Tuttle, 330  
Wright v. Watts, 480  
Wright v. Weisinger, 504  
Wright v. Wilcox, 165, 193  
Wynnt v. Crouso, 178  
Wyat v. Aland, 143, 145, 146  
Wyd v. Pickford, 219  
Wyman v. Brown, 55

## Y

Yale v. Saunders, 222, 223  
Yarber cc Chicago & A. H. Co., 570

Yates v. Boeu, 503  
 Yates v. Carlisle, 143  
 Yates v. Joyce, 190  
 Yeager cc Wallace, 221  
 Yeatmari v. Collen. 526  
  
 teasel v. Rarber Bros., 149  
 Yelverton v. Conant, 420  
 te~er cc Warren, 165  
 Yerrington v. Greene, 341  
 Tingling v. l-Coljllras~, 461  
 Yocum v. ZalIjtei~ is?  
 Yong Den v. Hitchcock, 365  
 York v. Marshall, 257  
 York v. Texas, 79  
 Young v. Black, 508, 547  
 Young, Cooper, 298, 494  
 Young v. Dresser, 529  
 Young v. Edwards, 245  
 Young cc Fentress, 473  
 Young v. Hawkins, 276, 284  
 Young v. Hcrdic, 257  
 Young v. Kimball, 264

References are to **Pages**

Young, Huddle, 441  
 Young v; Rummell, 510  
 Young v. Scott, 284  
 Young v. *Stevens*, 509  
 Young & Ashburnsham's Case, 283  
 Younglove v.~ Knox, 268  
 Yundt cc Hartrunft, 182  
 Zeidler v. Johnson, 147  
 Zell v. Jiunkle, 322  
 Zerger cc Sailer, 329

## TABLE OF CASES

### S

Youngv. Rudd, 441, 466

## Z

645

## INDEX

References are to **Pages**

### ABATEMENT

See Dilatory Pleas.

### ADMISSION

Demurrer, 396—390.  
 Failure to deny, 465—466.  
 Ill-pleaded facts, 397—305.  
 Oath, 21.  
 Protestation to prevent, 466-461.  
 WeU-pleaded facts, 307—398.

### AFFIRMATIVE DEFENSE

See Confession and Avoidance.

### AFFIRMATIVE PREGNANT

t~ature and effect, 444.

### AGGRAVATION

PartIcularity, 156—138.

Purpose, 187—138.

### ALTERNATIVE PLEADING

Nature and effect, 146—147.

Special demurrer to, 147.

### AIDER



Defective pleadings, by statute, 504.  
Definition, 554.  
Modern codes, rules, etc., 5431, 564.  
Pleading over without verdict, in general, 554—556.  
Express averment, 555.  
Implied admissions, 555—556.  
**Supplemental pleadings**, statutory provisions, 564. Verdict,  
in general, 550—558.  
intendment after verdict, 556—551.  
Relation to motion for arrest of judgment, 575—577.

#### **ABSCUE HOC**

See also Traverse.  
Clause *In* special traverse, 447-457.

#### **ACCOUNT**

Concurrent, other *actions*, distinguished, 313—314. Declaration, essential allegations,  
In general, 315.  
Damages, 816.  
Pacts showing right, 815—316.  
Refusal or breach, 316.  
Declaratio (Form), 314—315.  
Modern codes, rules, etc., 310—317.  
Scope and nature, 310—313.

#### **ACTIONS**

See also Mixed Actions: Personal Actions; Real Actions.  
Appearance,  
Default, 80.  
General, 78--SO.  
Special, 78—SO.  
Classification, 45—48, 55—SC.  
Commencement,  
Generally, CS—Si.  
Modern practice, 72.  
Original writ, 72.  
?raecipe, 72.  
Contract, prima facie case, 274. Dilatory character of, 61—62.  
*Judgment*,  
Classification and scope, 586—587.  
Relation to, 584—585.  
Local and transitory, 103—107.  
Proceedings to obtain judgments, 58-1-585.  
Right to be heard, 72.

#### **ADJECTIVE LAW**

Position in Anglo-American Law, b—u.  
**AMSIU IT?**  
Meaning and effect, 1443, 444-446.

#### **AMENDMENT**

Change of cause of action,  
Modern codes, rules, etc., 562—563.  
Relation to form of action, 662—563. Change of form of action,  
in general, 559-560.  
Modern law, 560.  
Defective pleadings, statutory provisions, 564.  
Leave of court, modern rules, 502,  
Status under modern codes, 561—503.  
Statute of limitations,  
In general, 560—562.  
Modern codes, rules, etc., 503.  
Statutes of Jeofails,  
History, 558.  
Purpose and effect, 558.  
Variance, modern codes, rules, etc., 564. Where permitted, 558—561.

#### **ANOTHER ACTION pgNufpJG**

See Dilatory Pleas.

#### **ANTICIPATING DEFENSES**

Exception, estoppel, dilatory pleas, 132, 140.

Not required, 140—141.

#### **APPEARANCE**

See Actions.

647

Kotfr & licppy Com.Law Ridg. HR

#### **APPELLATE REVIEW**

Bill of exceptions,

Nature, 601—602.

Origin, 601—602.

Statute of Westminster II (1285), 801—602.

Certiorari, writ to review record, 597—308.

Modern codes, rules, etc., 602—603,

Prohibition, writ, excess of jurisdiction, 590—507.

Writ of error,

Common law record, 509—000.

Coram Nobis, 599, 601.

Coram Vobis, SPa.

Matter of right, 590.

Nature, 5913-601.

#### **ARGUMENTATIVENESS**

improper pleading, 407.

Nature of, 467—460.

Two affirmatives rule, 467—489.

Two negatives rule, 467—469.

#### **ARREST**

Ball, special and common, 73.

Capias Ad Respondendum, 73.

Capias Ad Satisfaciendum, 502—593.

Imprisonment for debt, 503.

#### **ARREST OF JUDGMENT, MOTION**

Alder by verdict, relation, 573—577.

Defects in pleadings, 572—574.

Defects in verdict, **575**.

Definition, 571.

Misjoinder or nonjoinder, 424, 426.

Modern codes, rules, etc., 582.

Nature and function, 571—577.

Non obstante veredicto, compared, 573, 574.

Question of law raised, 572.

Theory underlying, 571—572.

#### **ASSAULT AND BATTERY**

See Trespass.

#### **ASSUMPSIT**

See Indebitatus Assumpsit; Special Assumpsit.

#### **ATTACHMENT**

See Courts; Process; Writ of Attachment

#### **AUTHORITY**

Cognizance in replevin, 125.

Justification, 124—125.

Particularity in showing, 124—125.

#### **AVOWRY**

See Replevin.

#### **BENTHAM, JEREMY**

Influence on procedural reform, 3.

#### **BILL OF EXCEPTIONS**

Nature, 601-602.  
Origin, 601—602.  
Statute of Westminster II (1285), 601—602.

#### **BILL OF PARTICULARS**

Modern codes, rules, etc., 375—377.  
Nature, 372—375.  
Origin, 372—373.  
Scope, 373—375.

#### **BLACKSTONE, WILLIAM**

Classification of common law actions, 47.

#### **BOND**

Effect, condition of, 133.  
Debt on a specialty for, 292—293.  
Performance, condition of, 183.

#### **BREACH**

See specific actions for allegations of breach.

#### **BURDEN OF PROOF**

Affirmative of issue has, 542.  
Burden of rebuttal, 542—543.  
Function of judge and jury, 348—544.  
Indicated by pleadings, 15—IC, 542.  
Prima facie case, 542.

#### **CASE**

See Trespass on the Case.

#### **CAUSA DEBENDI**

See also Debt.  
Debt obligation, 275, 278, 280, 287, 204, 206.

#### **CAUSE OF ACTION**

Analysis of, 12.  
Defined, 85.  
Form of action distinguished, 59—60.  
Joinder, 06—08.  
Pleading, 85, SO—GO.  
Prima facie, 92.  
Statement of, 85, 80-90.

#### **CERTAINTY**

Degrees of,  
    To certain intent,  
        Every particular, 132—133.  
        In general, 132.  
    To common intent, 132.  
General rules in pleading, 131.  
In pleading,  
    Authority, 124—125.  
    Names of persons, 113—114.  
    Performance of condition, 133.  
    Place, 107.  
    Quality, 111—113.  
    Quantity, 111—113.  
    Time, 108—111.  
    Title, 115—116.  
    Value, 111—113.  
Subordinate rules limiting degree of, 134—ISO.

#### **CERTIORARI**

See Writ of Certiorari.

#### **CIVIL ACTION**

See also Cause of Action; Forms of Action. Form of, under codes, 66-CT.

#### **CIVIL LAW PROCEDURE**

States adopting, 26.

#### **CODE PLEADING**

Common law actions and, 26.

Common law and equity suits, 26,  
Complaint under, 23.  
Forced Issue In, 382—383.  
Nature of, 21—23.  
Objections of judges to, 26—27.  
Principles applicable to, 25.  
Relation to common-law pleading, 21—23.  
Restatement of common law, 22.

648

## INDEX

References are to Pages

### COGNIZANCE

See Repievin.

### COMMENCEMENT AND CONCLUSION

Conclusion of plea,  
Confession and avoidance, 462, 532—Sat Traverse, 436, 532—534.  
Of a,  
Plea In abatement, 431-432.  
Plea in suspension, 431.  
Plea to jurisdiction, 431  
Replication, 522.  
Subsequent pleading, 522

### COMMENCEMENT OF ACTION

See Process.

### COMMON BAR, PLEA OF

Liberum Tenementum, 487.

### COMMON BREACH

Alleged with common counts, 344, 347.  
In declaration (Form), 347.

### COMMON COUNTS

See also Irdebitatus Assumpsit.  
Classification, 349.  
Field, David Dudley, on, 93.  
Indebitatus count in debt, 292.

### COMMON LAW ACTIONS

Mixed actions, 28, 46—47, 48, 53. Personal,  
In general, 46—47, 56—58.  
Modern, —58.  
Iteal,  
In general, 46—56.  
Ancient, 28, 47—51.  
Modern, 53—56.

### COMMON LAW PLEADING

Characteristics of, 25.  
Civil law compared, 21,  
Evolutionary development, 27.  
Functions of, 13—17.  
Importance of, 10—12.  
Methodology, 1—8.  
Modern *procedure*, relation to, 27—29.  
Nature of, 19-24.  
Real and mixed actions under, 28.  
Reform of, 3'-6.  
Relation to,  
Code pleading, 21—23.  
Equity pleading, 19—21.  
Federal rules, 23, 24.  
Other systems, 19—24. Status under codes, 24—27.

### COMMON TRAVERSE

See Traverse.

### CONCLUSIONS OF LAW

Insufficiency in pleading, 92-04.

Ultimate or operative facts, 90—94.

#### CONDITIONS

Averment of performance,

    Certainty in pleading, 133,

    in covenant, 307.

    in special assumpsit, 328—332.

### INDEX

References are to Pages

649

#### CONFESSION AND AVOIDANCE

See also Pleas in **Ear**.

Admission, adversary's allegations, 460—465.

Classification of pleas, 434—435.

Conclusion of, 462.

Color,

    Express, 462, 463—465.

    Implied, 462, 463.

*Discharge*, 460, 461.

Hilary Rules, effect, 57—58, 484, 488, 492—404, 496, 497, 500, 502—505, 507, 510—511, 512.

Justification or excuse, 370—380. 400—461.

Nature, 460-482.

Plea (Form), 461.

Plea in,

    507.

    judgment, 505.

    simple contract, 502.

    specialty, 503—504.

    statute, 502.

        Covenant,

        Debt on a

        Debt on a

        Debt on a

        Debt on a

        Retinue, 497.

        Ejectment, 405—496.

        Indebitatus assumpsit, 512.

        Replevin, 500.

        Special assumpsit, 510.

        Trespass, 486-488.

        Trespass on the ease, 490—192.

        Trover, 493.

Replication de injuria, relation. 521—522.

Statute of limitations, defense, 490—491.

Trespass, *liberum tenementum* (Form), 487—188.

#### GONSIMILI CASU

See also Trespass on the Case; Westminster II (1285), Statute of.

Trespass on the ease, history, 44—4.5, 175.

#### CONSTRUCTION OF PLEADINGS

Generally, 146—147, 444—446.

Dilatory pleas, 132. 423—429, 430—431.

#### CONTINUANCE

Imprisonment, 371—372.

#### CONTRACTS

See also Covenant; Debt; Indebitatus Assumpsit; Special Assumpsit.

Collateral promise, debt not available. 289—291.

Common law and modern meaning. 289.

*Debt*, simple, mode of declaring, 291—291

Executory, 288—289.

Express, indebitatus assumpsit, applicability, 338—343.

Implied, indebitatus assumpsit, 838.

**Plea in abatement,**

    Defendant nonjoinder and misjoinder, 424—426. Plaintiff nonjoinder and misjoinder, 423-424.

    Pleading according to legal effect, 126—128.

    Prima *fade* case, 274.

    Writing required by statute, pleading, 133.

#### CONVERSION

See Trover.

**CONVEYANCE**

Manner of pleading, 120—122, 126—128.  
Release, 127.

**CORAM NOBIS**

See Appellate *Review*.

**CORAM VOWS**

See Appellate *Review*.

**COUNTS**

See Declaration; Duplicity.

**COURT AND JURY**

See Courts; Jury Trial,

**COURTS**

Action on a record, facts triable by, 538.

Different kinds, 69—70.

Effect of procedure on judicial organization, 19.

England, development of,

Common pleas, 33.

Exchequer, 33.

King's Bench, 33.

Findings of fact and conclusions of law,

Federal rules, 538.

New York CPLR, 538.

Trial without jury, 538.

Issues tried by courts of equity, 536.

Judicial notice, 88.

Jurisdiction,

Appearance, 78—80.

Appellate, 70.

Constitutions as source of, 70, 71.

Constructive service, 76—78.

Corporations doing business, 76.

England, 70—71.

Federal system, 71.

General, 69—70.

In rem, 76.

Legal and equitable, 71.

Non-residents, 76.

Original, 70.

Parties, 70.

Personal service, 75.

Quasi in rem, 70—78.

Residuary in equity, 71.

Special, 60—70.

Subject-matter, 70.

Substituted service, 75—70.

Supreme Court, 71.

Trial, 70.

United States, 70—71.

Nature, 69.

Not of record, 70.

Of record, 70.

Personal judgments, 75.

Trial,

Argument on demurrer, 537—538. Issue of law, 536—538, Without jury, 538.

**COVENANT**

Certainty in pleading performance, 133.

Concurrent, other actions, distinguished, 305—306.

Confession and avoidance, 507.

Contract and, 44.

**Debt**, distinguished, 279.

Declaration, essential allegations, in general, 306.

Breach, 307—308.  
Damages, 308.  
Execution of covenant, 306.  
Performance, conditions precedent, 307.  
Promise, 307.

#### **COVENANT—Cont'd**

Declaration (Form), 306.  
Facts In knowledge of adversary, 136.  
General issue, 505-507. Form, 505-500.  
Hilary Rules, effect on defenses, 507.  
Modern codes, rules, etc., 308—a®.  
Scope and nature, 303—305.  
Writ of, 36.

#### **DAMAGES**

Account, 310.  
Covenant, 308.  
Debt, 275, 278—279, 282—286,  
Defamation, 198—199.  
Detinue, 244—247, 251.  
Ejectment, 238—239.  
General and special, 89, 128-129.  
Gist of action, when, 80.  
Indebitatus assumpsit, 365.  
Mesne profits, 241, 243.  
Mixed actions, 129.  
Personal actions, 129.  
Recoupment, cross-demand for, 515—516.  
Reduction by recoupment, 515—516.  
Replevin, 268—209.  
Set-off, defeat of recovery, 516—517.  
Special assumpsit, 333—334.  
Trespass, 170.  
Trespass for mesne profits, 241.  
Trespass on the case, 186—187,  
Trover, 206—207, 223.

#### **DE BONIS ASPORTATIS**

See Trespass.

#### **DE INJURIA**

See Replication.

650

### **INDEX**

#### **References are to Pages**

289, 202—294, 296, 208.  
Venue, 84—85,

#### **DEBT**

Breach, 284—285.  
Causa Debendi, 275, 278, 286, 287, 294, 296.  
Collateral promise, 289—201.  
Concurrent, other actions, distinguished, 278—279.  
Covenant, compared, 279.  
Damages, 285, 286.  
Declaration, essential allegations, *In general*, 282—285.  
Detinet, chattels, 276—278.  
Executory contracts, 288—289.  
Indebitatus assumpsit, compared, 279.  
Indebitatus count, 292, 359.  
Modern codes, rules, etc., 290—302.  
On a judgment,  
Confession and avoidance, 505.  
Declaration (Form), 281—282.  
Essential allegations, 297—298.  
General issue, 504—505. Form, 504.  
Hilary Rules, no effect, 505.  
Mode of declaring, 298—299.  
On a simple contract,  
Confession and avoidance, 502.

Declaration (Form), 279—280.  
Essential allegations, 285—292.  
General issue, 500—503. Form, 500—501.  
Hilary Rules (Form), 501.  
Hilary Rules, effect on defenses, 502-403.

Mode of declaring, 291—292.

## INDEX

651

References **are to Pages**

### DEBT—Cont'd

On a specialty,

Confession and avoidance, 503—504.

Declaration (Form), 280.

Essential allegations, 292-295.

General issue, 503, 504. Form, 503.

Hilary Rules, effect on defenses, 504.

Mode of declaring, 294—295.

On a statute,

Confession and avoidance, 502.

Declaration (Form), 280—281.

Essential allegations, 295—297.

General issue, 500—503.

Hilary Rules, effect on defenses, 502—503.

Mode of declaring, 297.

Proof of bond, 126.

Promise, 278, 286.

Quantum meruit count, 292, 859.

Quantum valebant count, 292, 359.

Quid pro quo, 11, 278, 279, 286, 287, 289, 291.

Recognition, 298.

Scope and nature, 274—278.

Sealed instrument,

Future obligation, 203—294.

Present obligation, 292—293.

Special assumpsit, compared, 278—279, 287—288.

Statute of frauds, 291.

Sum *certain*, 282—234, 239, 292, 295, 296, 299.

Title, as basis of action, 275—276.

Writ of, 36.

### DECLARATION

See also for essential allegations in each action:

Accout; Covenant; Debt; Detinue; Ejectment; Indebtatus Assumpsit; Replevin;

Special Assumpsit; Trespass; Trespass for Mesne Profits; Trespass on the Case; Trover. For other matters, see specific topics.

Conformance to process, 100—101. Form, 83.

Formal parts of,

Body, 82—83, 85.

Commencement, 82—83, 85.

Conclusion, 52—83, 85—86.

Production of suit, 86.

Title of court and term, 82—84.

Venue, 82—83, 84-85.

General form of, 82—88,

Joinder of counts,

Different causes of action, 96—98.

Different versions of same action, 98—100.

Several, 94—06.

Statement of cause of action,

Consequent damages, 89.

Facts only alleged, 90—94.

Exceptions, 93—94.

Prima facie case, 152, 274.

Contract, 274.

Tort, 152.

Right of plaintiff, 88—89.

Wrongful act of defendant, 89.

### DECREE



Contempt for failure to obey, 585—586.  
Included in judgment, by modern codes, 588.  
Judgment at law compared, 585-586.  
Nature, 585—586.

#### DEEDS

Oyer, 126.  
Profert, 125—126.

#### DEFAMATION

See also Trespass on the Case.  
Colloquium, 107—195.  
Damages, 198—199.  
Essential allegations, 197—199.  
Gravamen, 107.  
Inducement, 197.  
Innuendo, 198.  
Libel and slander, modern practice, 200.  
Publication, 198.  
Slander, declaration (Form), 196—107.  
Strictness of pleading, 195—196.  
Truth as defense, 491—492.  
Words, verbatim statement, 199.

#### DEFENSE

See also Confession and Avoidance; Demurrer; Dilatory Pleas; General Issue; Pleas; Pleas In Bar; Traverse.  
Anticipated matter, not required, 140—141.  
Confession and avoidance, 379—350.  
Demurrer, 384—409.  
Denial by traverse, 379.  
Election to demur or plead, 378, 381—382.  
Forced Issues under code, 382—383.  
General issue, notice, 513.  
General issue and specially pleaded, 434-435. 484—513.  
Partial, 472—473.  
Several, pleas in bar, 475—480.

#### DEMAND

Allegation in declaration In,  
Detinue, 250—251.  
Replevin, 268.  
Trover, 221—222.

#### DEMAND OF OVER

See Oyer.

#### DEMURRER

Admission, -  
In general, 396—399.  
Ill-pleaded facts, 397—398.  
Well pleaded facts, 307—305.  
Defects available,  
General, 389—305.  
Special, 389—395.  
Election to demur or plead, 378, 381—382. Expediency of, 381—382.  
For,  
Alternative pleading, 147.  
Departure, 528—529.  
Duplicity, 148, 149, 394—395.  
Misjoinder, 140.  
General (Form), 380.  
General and special, history, 301—395.  
Issues of law, raised by, 378.  
Jeinder in, 390, 53- Form, 300—391.  
Judgment on,  
In general, 405—406.  
Demurrer to plea in abatement, 405.  
*Demurrer* to pleading in bar, 405.  
Election to stand on, 405.  
Res judicata, 400.  
DEMURRER—Cont'd  
Judicial notice and, 308—309.  
Modern codes, rules, etc., 406—409.  
Motions to strike out and, 305—396.

Nature and function, 384—387.  
Opening record,  
    Discontinuance, 400, 402—403.  
    Effect, 400—402.  
    Exceptions, 400, 402—404.  
    General issue, 400, 403—404.  
    Plaintiff's demurrer, later stage, 400, 404.  
    Plea in abatement, 400, 402.  
    Proper ground for action, 404—405.  
Other pleadings, distinguished, 388.  
Plea treated as a unit, 473—474.  
Pleading over without, 553—554.  
Scope, 388—389.  
Speaking demurrer, 387.  
Special (Form), 380—390.  
Tendered issue accepted, 390, 535.  
Statute of Anne (1705), 392—303.  
Statute of Elizabeth (1585), 391—392.  
Violation of rule of pleading, 305.

#### **DEMURRER TO EVIDENCE**

In general, 543, 546—548.  
In several states, 547—548.

#### **DENIAL**

See General Issue; Pleas; Pleas in Bar; Traverse.

#### **DEPARTURE**

Classification,  
    In point of fact, 526—528.  
    In point of law, 520-525,  
    In rejoinder, 527—528.  
In replication, 526—527.  
Mode of objection, demurrer, 528—529.  
Modern codes, rules, etc., 520.  
Nature, 525—526.  
Rule against, reason, 526.

#### **DESCRIPTION**

Chattels described by,  
    Quality, 111—113.  
    Quantity, 111—113.  
    Value, 111—113.  
Premises described. ejectment, 237. Proof, as alleged, 14-4—145.  
Property described, declaration in,  
    Detlauc, 249.  
    Ilcplevin, 262.  
    Trespass, 156, 163, 531.  
    Trover, 216—217.  
Variance for non-proof, 144—145.

#### **DETINUE**

Chattel recovery, 244—247.  
Concurrent, other actions, distinguished, 247—248.  
Confession and avoidance, 497.  
... Declaration, essential allegations,  
    In general, 249.  
    Damages, 251.  
    Plaintiff's right, title, etc., 240—250.  
    Wrongful detention of chattel, 250—251.  
Declaration (Form), 248.  
Demand and refusal, 250—251.  
General Issue, 496—497. Form, 496.  
On statutory merger, 499.

#### **DETINUE—Cont'd**

Judgment (Form), 248—249.  
Modern codes, rules, etc., 251—252.  
Property, description, 240.  
Scope and nature, 244—247.

## **DILATORY PLEAS**

Classification, 411.  
Commencement and conclusion, 430—432.  
Judgment on, 430.  
Jurisdiction and venue, 411.  
Modern codes, rules, etc., 432.  
Nature, 410—411.  
Order of pleading, 411—412.  
Plea in abatement,  
    Another action pending, 416—417.  
    Letter writ for plaintiff, 428.  
    Certainty, 428—429.  
    Classification, 416—420.  
    Contract,  
        Defendant nonjoinder, misjoinder, 424—429. Plaintiff nonjoinder, misjoinder, 423—424.  
    Corporate existence, 422.  
    Count or declaration, 418.  
    Defendant nonjoinder (Form), 426.  
    Definition, 416.  
    Demurrer to, 400, 402.  
    Disability of defendant, 419.  
    Disability of plaintiff, 418—419.  
    Effect, 416.  
    Form, 410—420.  
    Function, 416.  
    Misnomer, 416, 421.  
    Modern law, 420—423.  
    Order of pleading, 411—412.  
    Original writ, 417—418.  
    Requisites, 428—429.  
    Tort,  
        Defendant nonjoinder, misjoinder, 427. Plaintiff nonjoinder, misjoinder, 426—427.  
    Wrong venue, 416, 419.  
Plea in suspension, -Form, 429—430. Nature and scope, 420—430. Original writ, 420—430.  
Plea to jurisdiction,  
    Abatement, distinguished, 415.  
    Classes, 413.  
    Courts of general jurisdiction, 414—415.  
    Courts of limited jurisdiction, 414—415.  
    Defined, 412—413.  
    Form, 415.  
    Locality, 413.  
    Person, 413.  
    Requisites, 413—414.  
    Subject matter, 413.

## **DIRECTED VERDICT, MOTION FOR**

Jury trial, 548—549.

## **DISCONTINUANCE**

Neglect to enter judgment, 403.  
Replying to partial pleas, 472—473.

## **DOWER**

Classification, 48.  
Development, 53, 55.  
Writ, unde nihil habet, 53,

652

## **INDEX**

References **are to Pages**

## **DUPLICITY**

Defect in form, special demurrer, 14E—140, 304495. Duplicity in,  
    Declaration, 94—100.  
    General issue, 483—484,  
    Inducement, 148.  
    Pleas, 476—484,  
    Replication, 482—483.  
    Several counts, 96, 95, 100.  
    Several grounds of action, 96—147—148.

Ill-pleaded matter, 481—482.  
Immaterial matter, 480—481.  
Matters forming connected proposition, 482—484.  
Protestation, 484.  
Several pleas allowed, 476—480.  
Singleness of issue, 475—470, 480—481.

## **EJECTMENT**

Common consent (Form), 237.  
Common Consent Rule, 220—280.  
Concurrent, other actions, distinguished, 236.  
Confession and avoidance, 495-496.  
Declaration, essential allegations, In general, 237.  
    Damages, 238—239.  
    Plaintiff's right, title, etc., 238.  
    Wrongful ouster, 238,  
Declaration (Form), 236—237.  
Description of premises, 237.  
Extension to freeholders, 227—230.  
Fiction In, three stages, 227—230.  
Fictitious proceeding, chart, 230.  
**General** issue, 494—405. Form, 404—405.  
History, 226—230, 241—243.  
Judgment, 239.  
Modern codes, rules, etc., 241—248.  
Origin in trespass, 226—227.  
Parties in, 235—236.  
Premises, description, 237.  
Quare ejectione flrmae, 227—230.  
Real property, recovery of, 231-232.  
Scope and nature, 225—236.  
Status In England, 241—242.  
Statutory substitutes, 54—55, 242—243.  
Title to support, 232—223.  
Trespass for mesne profits, 239—241, 243.  
Trespass to try title, 54—55.

## **ELECTION**

To demur or plead, 378, 381—382.

## **EQUITY PLEADING**

Affirmative pleadings, 21.  
Answer, 21.  
Bill, 21.  
Charge, 21.  
Common law pleading, compared, 19-21.  
Decree,  
    Contempt, 585—586.  
    Specific relief, 585—586.  
Influence of civil law, 20.  
Interrogative, 21.  
Narrative, 21.  
Nature of, 19—21.  
Power of Chancellor, 19—21.  
Replication, 21.

Nature, 46-.

Precluding party's action or defense, 465.  
Previous Inconsistent acts, 465.  
Special traverse, avoidance by, 452—453.  
Title, cstoppel of adverse party, 124, 439.  
Traverse and, 439.

See also Jury Trial,  
Demurrer to, 543, 546-548.  
Not pleaded, 90—92.  
Order of proof, 543—544.

Common law, 21. Equity pleading, 21.

## **ESTOPPEL**

## **EVIDENCE**

Scope,

## EX DELICTO

See also Detinue; Ejectment; Replevin; Trespass; Trespass on the Case; Torts; Trover.  
Classification of actions, 56—57.

## EXCEPTIONS

See Appellate Review.

## EXCUSE

See Confession and Avoidance.

## EXECUTION

Capias ad satisfaciendum, writ, 592—593.  
Debtors and creditors, 594.  
Definition and nature, 589—593.  
Elegit, writ, 592.  
Extendi facias, writ, 592.  
Fieri facias, writ, 501.  
Goods, 591.  
Imprisonment for debt, 592—593.  
Levari facias, writ, 591.  
Lien, 594.  
Modern codes, rules, etc., 594—595.  
Profits of land, 591.  
Restitution of possession, 591.  
Scire facias, 587—588.

## EXHIBITS

Pleading not done by, 128.

## EXTRAORDINARY WRITS

Certiorari, 597—598.  
Prohibition, 596—597.

## FACTS

Aggravation, manner of pleading, 136—137.  
Allegation in declaration, 90—91.  
Capable of proof, 149—150.  
Certainty in pleading, 131—133,  
Defined, 89.  
Evidentiary, 90.  
In knowledge of adversary, 136.  
Inducement, 136—137.  
Judicially noticed, 139.  
Operative, 90—94.  
Statements,  
    Affirmative pregnant, 444—446.  
    Negative pregnant, 444—446.  
Ultimate, 89—94.

## FEDERAL RULES OF CIVIL PROCEDURE

Flexibility, 24.  
Formulation, 28—24.

References are to Pages

## INDEX

653

654

## INDEX

References are to Pages  
FORMAL DEFECTS

Cured by statute, 558.

## GENERAL ISSUE—Cont'd

In debt on a simple contract—Contract  
    Hilary Rules, effect, 502—503.  
    Scope, 500—502, 502—503.  
    Under Hilary Rules (Form), 501. In debt on a specialty,  
        Form, 503.  
        Hilary Rules, effect, 504.  
    Scope, 503, 504. In debt on a statute,  
        Hilary Rules, effect, 502—503. Scope, 500—503.  
  
    In detinue,  
        Form, 496.  
        Hilary Rules, effect, 497.  
        Scope, 496—497.

In ejectment,  
Form, 494—495.  
Hilary Rules, not applicable, 496.  
Scope, 494—495. In *Indebitatus assumpsit*,  
Form, 511.  
Hilary Rules, effect, 512.  
Scope, 511—512. In *replevin*,  
Form, 497—498.  
Hilary Rules, not applicable, 500.  
Scope, 497-499, 500.  
Under statutory merger, 497—499. In *special assumpsit*,  
Form, 508.  
Hilary Rules, effect, 510—511. Scope, 508—510, 510—511. In *trespass*,  
Form, 485.  
Hilary Rules, effect, 488.  
Scope, 485—486, 488. In *trespass on the case*,  
Form, 488.  
Hilary Rules, effect, 492—493.  
Scope, 488—489, 492—493. In *trover*,  
Form, 493.  
Hilary Rules, effect, 493—494.  
Scope, 493-494.  
Irregularity of, 459.  
Legal conclusions, denial, 457—458.  
Nature and use, 457—459.  
Notice of defenses, 513,  
Pleas amounting to,  
Effect upon specific traverse, 459,  
Exception where color given, 471,  
General rule, 469—472. **Specific** traverse, distinguished, 457—459,

#### **GENERAL PLEADING**

Inducement, 136—138.  
Title in adversary, 136.  
When allowed, 93—94, 234-238.

#### **CRA VA MEN**

Nature, 137.

#### **FEDERAL RULES OF CIVIL PROCEDURE—Cont'd**

Fusion of common law and equity, 23.  
Power of United States Supreme Court, 23.  
Relation to other systems, 23—24.

#### **FIELD, DAVID DUDLEY**

New York Code of Procedure (1848), 24.

#### **FORCIBLE ENTRY AND DETAINER**

See *Real Actions*.

#### **FOREIGN JUDGMENTS**

See also *Debt*; *Indebitatus Assumpsit*. *Debt on, alleging jurisdiction*, 299.

#### **FORMS**

See specific topics for forms.

#### **FORMS OF ACTION**

See also *Original Writ Cause of action distinguished*, 66. *Change by amendment*, 559—560. *Common law*,  
Classification, 46—47.  
Development, 31—67.  
Defined, 65—CC.  
Distinctions between, 60—62.  
Effect on liability, 60—CC.  
History of, 63—65.  
*Law and equity*, distinction abolished, 57, 67.  
*Mixed actions*, 46—48, 53.  
**One** form, under code, 66—67,  
*Original writ*, 33—43. *Historical background*, 33—34.

Personal actions, 46, 47, 56—58.  
Pleading and, 63, 66.  
Procedure and, 65, 66.  
Real actions, 46—56.  
Register of writs, 35, 59.  
Substantive law, relation to, It.

#### **FRAUDS, STATUTE OF**

Necessity to allege writing, 121—122, 138—139.

#### **FUNCTIONS OF PLEADING**

Functions enumerated, 13—17.  
Issue raising, 13—14, 17.  
Notice to adversary, 13—15, 17,

#### **GENERAL ASSUMPSIT**

See Indebitatus Assumpsit.

#### **GENERAL ISSUE**

Comparison of general Issues, 512—513.  
Defects of, 459.

Duplicity, 483—484.

Essential facts, denial, 457.

In covenant,

Form, 505—SOC.

Rilary Rules, effect, 507.

Scope, 505—SO?. In debt on a judgment,

Form, 504.

Hhlary Rules, not applicable, 505-. Scope, 504—505,

In debt on a simple contract,

Form, 500-501.

#### **HILARY RULES**

Affirmative defenses, effect upon, 57—58, 484, 488, 494—494, 490, 497, 500, 502—505, 507, 510—511, 512.

Failure to appear, under, 78—79.

#### **HILARY RULES—Cont'd**

General issues, effect upon, 3, 57—38, 484, 488, 492—494, 498, 497, 500, 502—505, 507, 510—511, 512.

Negative defenses, effect upon, 3, 57—58, 484, 488, 492—494, 496, 497, 500, 502—505, 507, 510-511. 512.

Venue, under, 103.

#### **HYPOTHETICAL PLEADING**

Defect in form, 140—147.

#### **IMPARLANGE**

Nature, 371—372.

#### **IMPRISONMENT FOR DEBT**

History, 593.

#### **INCONSISTENCY**

Allegations, same pleading~ 145—148.

Between defenses, 475—480.

#### **INDEBITATUS ASSUMPSIT**

Common breach (Form), 347. Common counts,

Account stated. 360, 304.

Form, 346—347.

Board and lodging, 357.

Classification, 349.

Declaration (Forms), 344—347.

Goods bargained and sold, 358—350.

Goods sold and delivered, 857—358. Form, 344—345.

Indebitatos counts, 350-360.

Land sold and conveyed, 357.

Money counts, 350—354.

Money had and received (Form), 346.

Money lent (Form), 345.

Money paid (Form), 345—346.

Nature, 347—348.

Quantum xneruit, 359—360, 363—364. Form, 346.

Quantum valebant, 359—360, 863—364. Form, 346.

Use and occupation of land, 854—357.

- Value counts, 359—360.
- Varieties, 348—360.
- Work, labor and services, 350.
- Work and labor (Form), 845,
- Concurrent, other actions, distinguished, 348—344.
- Confession and avoidance, 512.
- Contracts of record, relation, 360—362.
- Debt distinguished, 279.
- Declaration, essential allegations, In general, 862.
  - Breach, 364—385.
  - Damages, 365.
  - Executed consideration, 302—884.
  - Promise, 364.
- Express contracts,
  - Additional *work done* on request, 343.
  - Applicability, 338—M3.
  - Benefit received by defendant, 341.
  - Facts equivalent to contract duty, 339—340.
  - Fully executed or performed, 340.
  - Performance prevented by defendant, 341-342.
  - Where contract is void, 342. General Issue, 511—512.
  - Form, 511.
- Hilary Rules, effect on defenses, 512.
- Implied contracts, 338.
- Modern codes, rules, etc., 365—367.
- INDEBITATUS ASSUMPSIT—Cont'd
- On a judgment, 360—361.
- Quasi contracts, 279.
- Scope and nature, 337—338.
- Statutory liabilities, relation, 360—362.

#### **INDUCEMENT**

- Definition and function, 137.
- Duplicity, 148,
- In declaration (Form), 83.
- Manner of allegation, 136—137.
- Nature of, 137.

#### **INSTRUCTIONS**

- Sec Jury Trial.

#### **INTANGIBLE PROPERTY**

- Trespass on the case, 163, 180—181.

#### **ISSUES**

- See also Issues of Fact; Issues of Law.
- Equity, extracted from pleadings, 21.
- Framed by parties, 21.
- Functions of pleading to produce, 12, 13—17.

#### **ISSUES OF FACT**

- Action on a record, judge's role, 538. Conclusion,
  - By verification, 533—534.
  - To the country, 532—534. Decided by jury, 19—21. Equity, 19—21. Joinder, Nature, 436, 535.
  - Similiter, 436, 533.

Form, 585.

- Production of, 12, 13—17, 378, 532—535.
- Tender, traverse, 436, 532—534.
- Trial by jury, waiver, 536—538.

#### **ISSUES OF LAW**

- Production of, 12, 13—17, 378, 532. Tender,
  - Demurrer, 378, 385—396, 436, 535.
  - Joinder in demurrer (Form), 390—391. Triable by court, 10—21, 536—53&

#### **JOINDER, STATUTES OF**

See Amendment.

#### **JOINDER**

- Causes of action, 06—98. Issues of,



Fact, 436, 535.  
Law, 390—391, 585 Parties, 423—428.

### **JUDGMENT**

Action of debt on, 297—290.  
Classification and scope, 586—587.  
**Decree**, modern codes, rules, etc., 585.  
Decree in equity,  
    Compared, 585—586.  
    Contempt, 585—586.  
    Specific relief, 585—556. Definition, 584, 585.  
Demurrer,  
    Basis of, 405—406.  
    In abatement, 406.  
    Iles judicata, 406.  
    To plea In abatement, 405.  
    To pleading in chief, 405.

### **INDEX**

655

References are to Pages

### **JUDGMENT—Cont'**

Dilatory pleas as basis of, 430.  
Ejectment, 230.  
Execution,  
    Common law, 20, 585—586, 580—503. Equity, 20, 535-586.  
Final, 1387.  
Indebltatus assumpsit on, 360—361.  
Interlocutory, 586—587.  
Modern codes, rules, etc., 588.  
Money damages, 585.  
Motion for,  
    Non obstante voredicto, 57T—578.  
    Notwithstanding verdict, 577—578. Modern codes, 582—533,  
Nature, 584, 585.  
Nil thelt, 472-473.  
Nonsuit, 548.  
Object of action, 584—585.  
Pleadiag as basis, 16, 17.  
Pleading judgments, 125.  
Replevin, 269.  
**Revival**, scirc facias, 587—588.

### **JUDICIAL NOTICE**

Demurrer and, 308—309.  
Pleading, not necessary, 139—140.  
Scope, 139—140.

### **JURISDICTION**

See Actions; Courts; Dilatory ?leas; Process.

At bar, 538-540.

Burden of proof,  
    In general, 542—544.  
    Prima faeie case, 542.  
    Bebuttal, 542—543.

    In capita, 541.  
    Propter affectum, 541.  
    Propter defectum, 541.  
    Propter dellectum, 541.  
    Propter bonoris respectum, 541.  
    To the array, 540—541.  
    To the polls, 540—541.

Charge,

    Instructions, 540.  
    Bequest to, 550.  
    Restrictions, 540—550. Demurrer to evidence,  
        In general, 543, 546—548.  
    In several states, 547—548.  
Directed verdIct, 543, 548—549.  
Equity, discretion of chancellor, 20.

### **JURY TRIAL**

Challenges,

J-yidence~ method of production, 545—546.  
Evolution, 84—85.  
Jurors,  
    *Examination*, 541—542.  
    Impanelling, 540.  
    Selection, 540—542.  
    Summoning~ 540.  
Nisi prius, 538—540.  
Nonsuit, 548, MS.  
Order of proof, 543—544.  
Right to, at common law, 20.  
JURY TRIAL—Cont'd Right to open and close,  
    Objective, 544—545.  
    Opening statement, 545.  
Traverse and, 436.  
Variance between charge and proof, 552.  
*Venre facias*, writ, 530—540.  
Verdict,  
    General, 550—551.  
    Rule nisi, 552.  
    Special, 551—552.  
    Special case, 552.  
Voir dire, 541—542.  
Westminster II (1285), Statute of, 538—540.  
Withdrawing a case, methods, 546-549.  
Witnesses,  
    Cross examination, 546.  
  
    Direct examination, 545—546.  
    Leading questions, 545—546.  
    Oath, 545.

#### JUSTIFICATION

See Authority; Confession and Avoidance.

#### LEGAL EFFECT

Pleading according to, 120—128.  
Specific words, libel and slander, 199.

#### LIBEL AND SLANDER

See Defamation; Trespass on the Case.

#### LIMITATIONS. STATUTE OF

Amendments, 560—561, 563.  
Confession and avoidance, 490-491.

#### LIVINGSTON, EDWARD

Code of Practice of Louisiana (1805), *a*  
*Proposed Penal Code* (1824) for Louisiana, *a*

#### MALICIOUS PROSECUTION

Allegations in action, 194—195.  
Declaration (Form), 195.

#### MATERIALITY

Traverse denies material allegations, 430—446.

#### MESNE PROFITS

Ejectment in early form, 243.  
Recovery under statutes, 243.  
Trespass for, essential allegations, 239—241.

#### MISJOINDER

See Demurrer; Dilatory Pleas.

#### MIXED ACTIONS

Classification, 46—48.

Decline In England, 28, 53.  
Definition and scope, 46—47.  
Recovery of,  
    Damages, 48, 129.  
    Land, 48.

#### **MONEY HAD AND RECEIVED**

See *Indebitatus Assumpsit*.

#### **MONEY LENT**

See *Indebitatus Assumpalt*.

#### **MOTIONS**

Arrest of judgment, 571—574.  
Bill of particulars, 872—875.

656

### **INDEX**

References **are to Pages**

### **INDEX**

References are to Pages

657

#### **MOTION S.-Cont'd**

Directed verdict, 548—549.

Judgment non obstante veredicto, 573—574,

Judgment notwithstanding verdict, 573—574,

*New trial*, 568—570.

Nonsuit, 548.

Repleader, 578—580.

Retrospective, 585—583.

    Under modern codes, 580—583.

To strike out, 395—396.

*Yertire facias de nova*, 570-571.

#### **NAMES**

Description of,

    Corporations, 114.

    Parties, 114—115.

    Partners, 115.

    Persons other than parties, 113—114.

#### **NEGATIVE PREGNANT**

Nature and effect, 444—447.

#### **NEW ASSIGNMENT**

Application, 529—530.

Form, 530.

Modern codes, rules, etc., 531.

Nature, 520—531.

Purpose, 529.

#### **NEW TRIAL, MOTION FOR**

Grounds (or motion), 569—570.

Modern codes, rules, etc., 580-581.

Nature, 568—570.

*Vcnire judas de novo*, compared, 570—571.

#### **NEW YORK CODE OF PROCEDURE (164~**

Field, David Dudley, and, 24.

Forms of action under, 24—25, 170—171.

Fusion of law and equity under, 28.

Influence in other states, 25, 28.

#### **NIL DEBET**

General issue,

    Debt on a simple contract, 500—503. Debt on a statute, 500—503.

#### **NIL DICIT**

Judgment of, 472—473.

**NISI FRILIS**

Trials, 538—540.

Venire facias, writ, 539.

Westminster II (1285), Statute of, 538—540.

**NON ASSUMPSIT**

General Issue,

Indebitatus assumpsit, 511—512. Special assumpsit, 508—511.

**NON CEPIT**

General issue In replevin, 497—499, 500.

**NON DETINET**

General issue,

Detinue, 496—497.

Replevin, under statutory merger, 497—499.

**NON tSr rACTUM**

General Issue,

Covenant, 505-SOT.

Debt ON a specialty, 503, 504.

**NON OBSTANTE VEREDICTO, MOTION  
JUDGMENT**

Modern codes, rules, etc., 582—583.

Repleader motion, distinguished, 578, 579.

Scope, 577—578.

**NONSUIT, MOTION FOR**

Purpose and effect, 543, 548.

**NOT GUILTY**

General Issue,

Ejectment, 494-405.

Trespass, 485—486, 488.

Trespass on the case, 488—489, 492—403.

Trover, 493—404.

**N OII CE**

Objective of pleading, 14—15, 17.

**NOTWITHSTANDING VERDICT, MOTION FOR  
JUDGMENT**

See Non Obstante Veredieto, Motion for Judgment.

**NUL TIEL RECDRD**

General issue, debt on a judgment, 504—505.

**NUNQUAM INDEBITATUS**

General issue, debt on a simple contract, under Rhlary Rules, 501, 502—503.

**OPENING RECORD**

See Demurrer.

**ORAL PLEADING**

Development, 80—81.

**ORIGINAL WRIT**

See also Forms of Action.

Basis of jurisdiction, 71, 72. Charge and, 38—39.

Conformance of declaration to, 100—101.

Debt (Form), 37.

Nature, 36—37.

Plea In abatement to, 417—418.

Praeipie in cnpitc, (Form), 37.

Purposes, 37—38.

Relation to,

Cause or action, 39.

Form of action, 30.

Beplevin, 258—259.

Form, 260.  
Selecting correct *form*, 39.  
Source of law, 40—41.  
Writ of error, 590—601.

#### **OVER**

Deed, inspection, 126, 368—370.  
Demand, 368—370.  
Form, 370.  
Modern codes, rules, etc., 375.  
Nature, 368—370.  
Profert, relation to, 125—126, 369.

#### **PAROL DEMURRER**

Form, 429-430.

Plea In suspension for nonage, 429.

#### **PEREMPTORY PLEAS**

Boo Confession and Avoidance; General Issue; Pleas; Picas in Bar; Traverse.  
577—579,  
577—579.

#### **FOR**

#### **INDEX**

**are to** Pages

#### **PROCESS**

Abuse and misuse, 169.  
Arrest, 73.  
Notice, 72.  
Original *wilt*, 72.  
Praeipe, 72.  
Service,  
    Constructive, 75—78. Personal, 75.  
    Summons,  
Commencement of action, 72, 73, Conformity with complaint, 100—101.  
Constructive service, 76—78.  
Notice by publication, 76.  
Notice to non.residenta, 70.  
Personal service, 75.  
Service by publication after Substituted service, 75—76.  
Writ of attachment, 73—74.

**PRODUCTION OF ISSUES** See *Issues of Fact*; *Issues of Law*.

#### **PRDFERT**

Nature of, 125-128,  
Oyer, relation to, 120, 368—369.  
Production of deed, 123—126, 368—309.

#### **PROHIBITION**

See Writ of Prohibition.

#### **PROTESTATION**

Duplicity, 484.  
Nature and function, 466—467.

#### **PROVISIONS OF OXFORD (1256)**

Chancellor's power effected, 43-44.  
Writs of course under, 42, 43—44.

**PUIS DARREIN CONTINUANCE** See Pleas.

**QUANTITY, QUALITY, VALUE**

Necessity for alleging, 111—113.

**QUANTUM MERUIT**

See Debt; Indebitatus Assumpsit.

**QUANTUM VALEBANT**

See Debt; Indebitatus Assumpsit.

**QUARE CLAUSUM FREGIT**

See Trespass.

**QUASI CONTRACTS**

See Debt; Indebitatus Assumpsit.

**QUID PRO QUO** See Debt.

**REAL ACTIONS**

Aid prayer by tenant 370,373.

Classification, 46-48.

Damages need not be alleged, 128-fid.

Decline in England, 28, 53.

Definition and scope, 47.

Ejectment, 53-54.

Pondal origin of, 417.

Forcible entry and detainer, 49-50, 52, 56.

Freehold, 47.

Ownership, 50-51.

Possession, 46-ill.

seigneurie, 77—78.

658

References

**PERSONAL ACTIONS**

See also Account; Covenant; Debt; Detinue;

Ejectment; Indebitatus Assumpsit; Replevin;

Special Assumpsit; Trespass; Trespass on the

Case; Prover. Breach of contract, 56, 57, Classification, 46—47, 56—57. Damage to, Personal property, 56, 57.

Real property, 56, 57.

Damages, allegation, 123-129.

Decline in England, 57—58.

Ex contractu, 56, 57.

Es delicto, 56, 57.

Injury to, Person, 56, 57.

Relative rights, 56, 57.

Recovery of,

Damages, 50~ 57.

Debt, 56, 57.

Personal property, 56, 57.

Real property, 56, 57. Scire facias, 588.

**PLEADINGS**

Declaration, 82.

Demurrers, 384—386, 389—395.

Dilatory pleas, 410—411.

Functions and objects of 13—17.

Names, manner and order of, 80.

Pleas in bar, 434—433.

Replication and subsequent pleadings, 380—381.

**PLEAS**

See also Confession and Avoidance; Dilatory Pleas; General Issue; Pleas in Bar; Traverse.

Admission by failure to deny, 465—466.

Amounting to general issue, 469—472.

Argumentative, 467—469.

Confession and avoidance, 460—465.

*Dilatory*,  
Abatement, 410—429.  
Jurisdiction and venue, 412—415.  
Suspension of action, 429—430.  
In bar, 434—436.  
In estoppel, 465.  
Issues of fact, raised by, 378,  
Partial defenses, 472—473.  
Fuis darrein continuance, Nature, 513—515.  
Waiver of former pleas, 513—515.  
Several defenses, 475—480.

#### **PLEAS IN BAR**

See also Confession and Avoidance; General issue; Pleas; Traverse.  
Classification, 434—436.  
Method of pleading, 434—435.  
Nature, 434—435.  
Several defendants, separate pleading, 480.  
Several defenses, 475—480.  
Treated as a unit, 473—474.

#### **POSSESSORY ASSIZES**

See Real Actions.

#### **PRAECIPE**

See Actions; Process.

### INDEX

References are to Pages

659

#### **REAL ACTIONS—Cont'd**

Possessors actions, 47—51.  
Proprietary actions, 47—51.  
Proprietary and possessory, compared, 48—51.  
Right of entry, 40—59.  
Seite facias, 587—588.  
Seisin, 46, 47, 51.  
Self-help, 49—50.  
Trespass to try title, Nature, 54—55.  
States adopting~ 54, 55.  
View of land, 370, 375.  
Voucher to warranty, 371, 375.  
Writ of disseisin, 55.  
Writ of partition, 50.  
Writs of assize, Classified, 48.  
Novel disseisin (Form), 52.  
Writs of entry,  
Classified, 48, 50.  
Modified form, 55.  
States adopting, 55. Writs of right,  
Classified, 48.  
Form, 51—52.

#### **REAL PROPERTY LIMITATIONS ACT (1833)**

Misad actions, effect upon, 28, 53.  
Real actions, effect upon, 28, 53.

#### **REBUTTER**

Definition, 381.

#### **RECITAL**

Objection by special demurrer, 180—131.  
Positive pleading requirement, 130—131.

Action of debt on, 298.

Action of debt on, 297—298.

#### **RECOGNIZANCE**

#### **RECORDS**

#### **RECOUPMENT**

Nature, 513—516.

Origin, 513—516.

### **REJOINER**

Definition, 380.  
Departure, 527—528.

### **REPLEADER, MOTION FOR**

Circumstances for awarding, 578—580.  
Modern codes, rules, etc., 583.  
Non obstante vcredicto, compared, 578, 579.

### **REPLEVIN**

A v owry,  
Pleading, 117, XIS, 500.  
Special traverse, relation to, 409.  
Cognizance,  
Pleading, 125, 500.  
Special traverse, relation to, 409.  
Concurrent, other actions, distinguished, 251—258. Confession and avoidance, 500.

### **REPLEVIN—Cont'd**

Declaration, essential allegations, In general, 262.  
Damages, 268—269.  
Plaintiff's right, title, etc., 262—263.  
Wrengful act, taking and detention, 266—268.  
Declaration (Form), 201—262.  
Demand and refusal, 268.  
Detinet and detinuit, 239—260.  
Dctinue and, 254, 257—268.  
General issue, 497—499, 500. Form, 497—498.  
Judgment, 269.  
Modern codes, rules, etc., 270—272.  
Original writ, 258—259. Form, 260.  
Plaint (Form), 261.  
Property, description, 262.  
Property recoverable by, 256—257.  
Provisional remedy, 254.  
Scope and nature, 233—257.  
Special traverse, 490.  
Statutory merger, dei-inuc. general  
Unlawful taking, distress, 254—255.

### **REPLJCATJ ON**

Classification, 518—519. Do injuria,  
Confession and avoidance, relation, 521—522.  
Effect, 520—521.  
Form, 521-522.  
Modern codes, rules, etc., 322—525.  
Nature and scope, Si 0—521.  
When used, 510—520.  
Definition, 350.

Departure, 526—527.  
Formal parts, 522.  
New assignment (Form), ~30.

### **REPLICATION DE INJURIA**

See replication.

### **REPUGNANCY**

See Inconsistency.

### **RES JUDICATA**

Judgment on demurrer, effect, 406.  
Pleadings as foundation for, 16-IT.

### **RULE NISI**

Order to show cause, 552.

### **RELEASE**

Conveyance, 127.  
Pleading, 127, 462—403.



## **RULES OF COURT PROCEDURE**

Advantages of, 26.  
Code pleading, distinguished, 25—26.

## **RULES OF PLEADING**

See also specific topics.  
Bad in part, bad altogether, 473—474, Certainty it, pleading,  
    Certainty of place, 107.  
    Certainty of time, 108-111.  
    General requirement, 131—133.  
    Show authority, 124—225.  
    Show title, 115—116.  
    Specify names of persons, 112—114.  
    Specify quantity, quality, value, Ili—Irn Conform to precedent, 150.  
Demurrer Or plead, 318.

Issue, 497 .190.

## **RULES OF PLEADING—Cont'd**

### **Departure objectio~mb)e, 525-526.**

Dilatory pleas, when pleaded, **411—412.**

Evidence and ultimate facts, 90—02.

Facts only alleged, 90—92.

### **General mode, when proper, 134.135.**

Issue accepted, 389, 535.

Legal conclusions, 92—94.

Legal effect, pleading by, 92—94.

Materiality in pleading, Denial of esential]s, 441—446,

    Traverse, 439—440.

### **Not to be,**

*Alternative*, 146—147.

    Ambiguous or doubtful, 146.

    Argumentative, 407—409.

    Double, 147—149.

    Inconsistent or repugnant, 145—146. Omitted may be matters,

    Implied, *141—142.*

    In anticipation, 140—141.

    Judicially noticed, 139—140.

    Presumed, 142. Operative or ultimate facts, 91—92. Particularity, extent required,

        Generally, 135-436.

    Acts regulated by statute, 138-130.

    Facts known to adversary, 136.

    Inducement or aggravation, 136-438.

Positive, not recital, 130—131.

Production of issue, 378—383.

Singleness or unity, 147—149.

Surplusage to be avoided, 142—144.

Traverae tenders issue, 532—533.

## **SCIRE FACIAS**

Allegation of damages unnecessary, 128—129. Revival of Judgments,

    Personal actions, 588.

    Real actions, 587—588.

## **SEALED INSTRUMENT**

See Covenant; Debt.

## **SEISIN**

See Real Actions.

## **SET-OFF**

Nature, 516—517.

Statutory origin, 516—517.

## **SIMILITER**

See Issues of Fact.

## **SINGLENESS OF ISSUE**

See also Duplicity.

Pleadings not to be double, **147—148**, 475—ISO.

Qualifications of requirement, 148, 476—478, 480—481.

Requirement of, 475—480.

## **SPECIAL ASSUMPSIT**

Concurrent, case for tortious conduct, 321.  
*Concurrent*, other actions, *distinguished*, 321—322.  
Condition subsequent, 331—332.  
Confession and avoidance, 510.  
Debt- compared, 278—279, 288—288.  
Declaration, essential allegations, In general, 323.

### **Breach, 332—333.**

## **SPECIAL ASSUMPSIT—Cont'd**

Consideration, 325—328.  
Contract and promise, 323—325.  
Damages, 383-'334.  
Performance, conditions precedent, 328—33Z  
Declaration (Form), 322—323.  
Er delicto, and, 319.  
Executed consideration, 327.  
Executed contracts, 286—287.  
Executory coasideratlon, 327-323.  
Executory contracts, 288—289.  
Explanatory inducement, 323—324.  
General Issue, 508—511. Form, 508.  
Hilary Rules, effect on defenses, 510—51L  
Modern codes, rules, etc., 334—336.  
Promise, 288—289.  
Scope anti nature, 318-321.

## **SPECIAL TRAVERSE**

See Traverse.

## **SPECIALTY**

See Covenant; Debt.

## **SPECIFIC TRAVERSE**

See Traverse.

## **SUMMONS**

See Process.

## **SUPREME COURT OF JUDICATURE ACT (1873)**

Forms of action, effect, 29.  
Law and equity, effect, 58.

## **SURRERIJTTER**

Definition, 381.

## **SURREJOINDER**

*Definition*, 380—381.

## **SUSPENSION, PLEAS IN**

See Dilatory Pleas.

## **TENDER OF ISSUE**

See also Issues of Fact; Issues of Law. Form of tender, 533.  
Nature and purpose, 532—534.

## **TIME**

Continuing acts, 110—111.  
Not truly stated, 109—110.  
Plea follows declaration, 110.  
Traversable facts, 108.  
Truly stated, 108—109.

## **TITLE**

Adversary's title alleged, 122, 123.  
Allegation of general freehold title, *lit*  
Allegation of title of possession, Not fully stated, 116—118.  
Sufficient to show liability, 122—123. Alleging derivation of title,  
By conveyance or alienation, 120.  
*By Inheritance, 120.*  
Fee simple, 118—110.  
Particular estates, 119—120.  
Estoppel of adverse party, 124.  
Pleading conveyance, manner of, 120-:122.

Proof, 123-124.  
When *fully* stated, 117—118,

References are to Pages

## 660 INDEX

Specific,  
  Argumentative denial, 447.  
  Classification, 435.  
  Express denial, 446-447.  
  Function, 446—447.  
  General Issue, distinguished, 457.  
  Negative pregnant, 447.  
  Special, distinguished, 448—450.  
Too large, allegations, 441-443.  
Too narrow, allegations, 443—444.  
Variance and, 436—437.  
Various forms of, 435—436.

## INDEX

661

References are to Pages TRAVERSE—Cont'd

### TORTS

See also Detinuc; Ejectment; Iteplevin; Trespass; Trespass on the Case; Trover.  
Classification of actions, 56-57.  
Plea in abatement, parties,  
Misjoinder, 426—428.  
  Nonjoinder, 426—428.  
Trespass and case as source, 174—175, Westminster II (1285), Statute,  
  Consimil casu, 44—45, 175.  
  Effect, 44—45, 175.

### TRANSITORY ACTIONS

See also Actions; Venue.  
Contrasted with local, 103—105.

### TRAVERSE

See also General Issue; Picas; Pleas in Bar.  
Aggravation, matter of, 439—440.  
Common, see Specific Traverse.  
Defense of denial, 379.  
Denial of essentials only, 441—444.  
Estoppel and, 439.  
Form of denial, 436—437.  
General, classification, 435.  
General issue,  
  Classification, 435.  
  Compendious negation, 457.  
  Essential facts, denial, 457.  
  Liability, denial, 457—458.  
  Nature and use, 457—459.  
  Specific traverse, distinguished, 457.  
General requisites, 436—439.  
Immaterial allegations, 439—440.  
Inducement, matter of, 439—440.  
Insufficient in law matter, 439—440.  
Irrelevant allegations, 439-440.  
Issuable proposition, selection, 441.  
Issues of fact, 436.  
Law, matter of, 437.  
Law and fact, matter of, 437—438.  
Materiality, 439—440.  
Matter not alleged, 438—439.  
Modo et forma, 437, 439.  
Necessarily implied matter, 439.  
Negative and affirmative pregnant, 444-418.  
Prematurely alleged matter, 439—440,  
Replication de injuria,  
  Classification, 485, 457.

Modo et forma, 437.  
 Nature and scope, 519—521. **Several** allegations, election, 441.  
**Special**,  
 Abnormal form, 450.  
 Absque hoc clause, 447—457.  
**Classification**, 435.  
 Conclusion with verification, 448-449, 453—454.  
 Form, 452.  
 Function, 452-453.  
 In replevin, 499.  
 Inducement, 447—449, 455—457,  
 Modern use, 456—457.  
 Normal form, 449—450.  
 Requisites, 447—448.  
 Specific, distinguished, 448-450.  
 Sufficiency rules, 454—456.

### **TRESPASS**

Ab-initio, 269—170.  
 Assault and battery (Form), 154—155.  
 Ballee, 158, 161—182.  
 Confession and avoidance, 486—488.  
 Do bonis asportatis, 36. Form, 155.  
 Declaration, essential allegations,  
 In general, 156,  
 Damages, 170.  
 Defendant's wrongful act, 164—170.  
 Plaintiff's right, title, etc., 156—164.  
 Direct injury, 152, 154, 165—168.  
 Ejection and, 226—230.  
 Election, remedy, trespass on the case, 181—182.  
 Force, 164—165, 178—177.  
 Force Implied, 164—165, 177.  
**General** issue, 435—486, 488. Form, 485.  
 Filialy Rules, effect on defenses, 488.  
 History, 36, 44, 153.  
 Immediate injury, 152, 154, 165—168.  
 Landlord, 159—162.  
 Liberum tenementum plea, 487. Form, 487—488.  
 Modern **codes, rules, etc.**, 170—172,  
  
 Negligence, 181—182.  
 Nonfeasance, 165, 177.  
 Personal injury, 156—157, 165—187.  
 Personal property, 157—158, 162—163.  
 Possession, 157—163,  
 Process, abuse, 169.  
 Property, description, 156, 163, 531.  
 Quare clausum fregit, 36, 157—164. Form, 155.  
 Quare ejectione firmæ, 227—230.  
 Real property, 36, 157—164.  
 Scope and nature, 152—154.  
 Servant, 158.  
 Tenant, 159—162.  
 Tenant at will, 159—162.  
 Tort remedy, 44, 56—57, 152—153, 174.  
 Trespass on the case distinguished, 152—154, 165—168,  
 176-181.  
 Trover compared, 209—210.  
 VI et armis, 154.  
 Violence as element, 153, 154.  
 Writ of, 36, 153.  
 Wrongful prosecution, 168.

### **TRESPASS FOR MESNE PROFITS**

See also Mesne Profits.  
 Declaration, essential allegations,  
 In general, 239—240.

**TRESPASS FOR MESNE PROFITS—Cont'd**

Declaration, essential allegations—Cont'd  
 Damages, 241.  
 Ouster or ejection, 241.  
 Plaintiff's right, title, etc., 240.

**TRESPASS ON THE CASE**  
 Adaptability to new situations, 203.  
 Alienation of affection, 193.  
 Animals, 201.  
 Anticipating defenses, 202.  
 Bailor, 183.  
 Confession and avoidance, 490—492.  
 Consequential injury, 154, 166, 177—180.  
 Consimil easu, 44—45, 175.  
 Contract, tort in connection with, 187—100.  
 Deceit, 194.

Declaration, *essential* allegations, In general, 183.  
 Damages, 186—187.  
 Defendant's wrongful act, 184—186.  
 Duty of defendant, 188—184.  
 Plaintiff's right, title, etc., 182.

Direct injury, 166, 177—180.  
 Election, remedies, trespass, 181—182.  
 Expansionistic character or, 203.  
 Freehold, injury by tenant at will, 191.  
 General Issue, 488—489, 492—493. Form, 488.  
 EL ilary Rules, effect on defenses, 492—493.  
 History and development, 44—45, 175—176, 203.  
 indirect injury, 154, 166, 177—180.  
 Intangible property, 163, 180—181.  
 Lien, 190.  
 Malicious prosecution, 104—195. Form, 195.  
 Modern codes, rules, etc., 203—205.  
 Negligence, 181—182.  
 Nonfeasance, 177.  
 Official duty, neglect, 200—201.  
 Personal injury declaration (Form), 152—183.  
 Residuary common law remedy, 187—201.  
 Reversionary interest, 157—159, 183, 190—191.  
 Scope and nature, 173—176.  
 Seduction, 191—192.  
 Slander, declaration (Fon-u), 190—197.  
 Slander and libel, 195—200. Truth, defense, 491—492.  
 Statutory liability, 201.  
 Super Be assumpsit, 11.  
 Tort remedy, 44, 56—57, 152—153, 174—175.  
 Trespass distinguished, 152—154, 105—168, 110—181.  
 Vicarious liability, 192—193.  
 Westminster II (1285), Statute, effect, 44—43, 175.

**TRIAL**

See Jury Trial.

**TROVER**

Concurrent, other actions, distinguished, 209—210.  
 Confession and avoidance, 493.  
 Constructive possession, 214—216.  
 Conversion,  
 Nature of, 217—218.  
 Property converted, 207—209.  
 Wrongful detention, 221—222.  
 Wrongful taking, 218.  
 Wrongful user, 218—220.

**are to Pages****TROVER—Cont'd**

Declaration, essential allegations,  
 In general, 211.

Damages, 223.  
Plaintiff's right, title, etc., 212—217.  
Wrongful act of conversion, 217—222. Declaration (Form), 211.  
Demand and refusal, 221—222.  
General issue, 493—494.  
Form, 493.  
Hilary Rules, effect on defenses, 493—494.  
Modern codes, rules, etc., 223—224.  
Possession, 212—214.  
Property description, 216—217.  
Right to possession, 214—216.  
Scope and nature, 206—207.  
Title, 212—214.  
Third party, 216.

#### **VALUE**

Necessity for alleging, 111—113.

#### **VARIANCE**

Between process and declaration, 100—101.  
Danger of, 324, 436.  
Descriptive averments, proof, 144—145,  
Modern codes, rules, etc., 564.  
Plea in abatement for, 101.  
Strict proof required, 109, 113—114, 123—124, 127, 324, 325, 436.  
Traverse. inodo et forma, 436—437.  
Unnecessary allegations, proof, 144.  
Videlicet, allegations under, 144.

#### **VENIRE FACIAS DE NOVO, MOTION FOR**

Motion for new trial distinguished, 570, 371.  
Nature, 570—571.  
**Object**, 571

#### **VENUE**

Consequences of error, 107—108.  
Declaration, stating, 82—83, 84-85, 103-107.  
*How* laid, 102—107.  
Local actions, stating, 103—105.  
Local facts, stating, 107.  
Pleadings subsequent to declaration, 107.  
Transitory actions, stating, 105—107.

#### **VERDICT**

Aider by, 556—558.  
Arrest of judgment for defects, 571—572.  
Conformance to issues, 575.  
General, 550—551.  
Rule nisi, 552.  
Special. 551—552.  
Special ease and, 552.  
Special verdict in alternative, 551.

Variance, effect, 144.

j See Jury Trial,

#### **WAI VER**

Of defects by failure to demur, 554—566.  
Of objections to process, 79, 414—415.

#### **WESTMINSTER 11(1285), STATUTE OF**

Bill of exceptions, 601—602.  
Consimill casu, 44—45, 175.

#### **WESTMINSTER II (1285), STATUTE OF—Cont'd**

New writs under, **28**, 44—45, 175,  
Nisi prius trials, 538—540.  
Trespass on the case and, 44—45, 175.

#### **VIDELICET**

#### **VOIR DIRE**

#### **WITNESSES**

See Jury Trial.

**WORK AND LABOR**

See Debt; Indebitatus Assumpsit.

**WRIT OF ATTACHMENT**

Commencement of action by, 73—74.  
Dissolution, by bond, 74.  
Execution, distinguished, **74**.  
Nature, 73—74.

**WRIT OF CERTIORARI**

Nature of, 597—598.  
When available, 598.

**WRIT OF DISTRINGAS**

Purpose and effect, 79—80.

**WRIT OF ERROR**

Common law record, 599—500,  
Coram nobis, 599, 601,  
Coram vobis, 599.  
Granted as matter of right, 590.

**WRIT OF ERROR—Cont'd**

Model'n codes, rules, etc., 602—608.  
Nature, 509—601.  
Original writ, 599.  
Questions of law, 20, 599—600.

**WRIT OF PROHIBITION**

Nature of, 596—597.  
When available, 596—597.

**WRIT OF SCIRE FACIAS**

See Scire Facias.

**WRITS**

See also Forms of Action Original Writ; and *writs* by their specific names.  
Magisterial, 59.  
Register of writs, 35, 59.  
Writs of course, 59.

**WRITS OF ENTRY**

See Real Actions.

**WRITS OF EXECUTION**

See Execution.

**WRITS OF RIGHT**

See Real Actions,

-PuDLI5HIHG50

683

**INDEX**

Rererences **are** to Pages