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AN EXPOSITION

OF THE

PRINCIPLES OF PLEADING

UNDER THE

CODES OF CIVIL PROCEDURE.

By GEORGE L. PHILLIPS, LL. D.

CHICAGO:
CALLAGHAN AND COMPANY,
1896.

PREFACE.

THE plan and purpose of this book are stated in the introduction. I shall here state the reasons for its preparation and publication.

My study of procedure, and my experience, at the Bar and upon the Bench, have satisfied me that a complete exposition, analytic and synthetic, in brief and convenient compass, of the basis, the philosophy, and the application, of the principles of pleading under the Reformed American Procedure, is a desideratum in the literature of the law. The *science* of pleading has been neglected in legal literature, in legal instruction, and in the practice. Its neglect in the schools, and in the practice, is largely due to the want of a well-adapted text-book. The result is, that young men, upon their entrance into the profession, have not learned, and do not understand, the principles upon which the substantive law is to be applied to operative facts; and in practice, the tendency has been to follow distinct provisions of the codes, literally, rather than to interpret and apply them as parts of an entire and scientific system.

The over-fullness and prolixity of pleadings under the codes is proverbial; it is a needless hindrance in judicial procedure, and is as reprehensible as it is needless. Excessive statement in pleading comes from conscious uncertainty as to what is requisite, and what is sufficient. The ideal code pleading is brief and simple; but its brevity and simplicity come only from adherence to the scientific principles of the system. This needless fullness and prolixity can be avoided, and this characteristic simplicity, terseness, and brevity can be secured, only by an intelligent understanding of the true philosophy of the new procedure.

The common-law system of pleading, in its finished state, was regarded as a marvel of inventive genius, a masterpiece of subtle refinement, and a model of logical exactness. It held high rank as a means of intellectual and legal discipline; it was a leading topic in legal education; and mastery of this legal technique was a mark of sound and thorough training. Not so with the reformed system. It is generally regarded as wanting in educational value; it has low rank in the curricula of our law schools; and thorough mastery of its principles is exceptional, even among lawyers of learning and experience. The truth is, however, that the reformed system rests upon broad and rational principles; that it is thoroughly scientific; that its study is highly instructive and disciplinary; and that thorough mastery of it by the profession would expedite procedure, would elevate and dignify the practice, and would foster the exercise of care and precision in the administration of justice.

The profession has been amply provided with books of forms and precedents. These are helpful in their place, but they are too often followed without intelligent regard to the principles upon which the action or the defense should be placed. General forms may suggest matters for consideration, an order of statement, and modes of expression; they can seldom be exact models in a particular case; they do not teach the science of pleading, nor do they fortify the pleader for the new and ever-varying conditions that must at times confront him. A pleader should be able to separate operative facts from probative facts; to determine from the operative facts the legal nature of the right involved, and of the injury done or threatened; to distinguish between what is essential and what is superfluous in the statement of such right and the invasion thereof; to determine the kind of remedy most available, and the persons to be made parties. He should not only know what is requisite, and what is sufficient; he should know why it is so, and why, upon principle, it should be so. A pleader thus fortified may well dispense with forms and precedents, and he may safely make them subservient in the statement of a right of action or a defense.

The liberality of our courts in allowing amendments of pleadings has done much to cultivate indifference both as to the pleadings in a cause, and as to the science of pleading. This indulgence of the courts makes inefficient pleaders; it prolongs litigation, and loads our system of judicial altercation with the odium of a delay that is really caused by departure from its principles.

The new procedure has dispensed with authoritative forms and technical language, and requires each case to proceed upon a plain statement of its operative facts, made in "ordinary and concise language." Some have mistaken this for a relaxation of care, method, and skill in pleading. And if we are to judge from the files of our courts, the notion obtains that the requirements of the new procedure may be satisfied by a rambling narration of evidential facts and legal conclusions, constructed without regard to perspicuity, to sentential structure, the collocation of phrases, or the sequence of ideas. There could hardly be a greater mistake. It has led to much vagueness and uncertainty; it has caused the courts much needless labor, litigants much needless expense, has prolonged litigation, and has sometimes occasioned a miscarriage of justice.

Analytical Jurisprudence—the scientific exposition of the nature and sources of rights and of law, and of the means whereby the law effects the conservation of rights—has made material progress in recent times, and is carrying its scientific generalizations into the various fields of positive law, and is furnishing bases for a more orderly and systematic exposition of principles than has heretofore been possible. In no department is such help more needed or more available than in an exposition of the principles of the reformed system of pleading; yet there has been no attempt to make this advance in jurisprudence subservient in a methodical and scientific treatment of pleading.

These considerations have induced me to attempt a scientific exposition, in brief and compendious form, of the basis, the philosophy, and the application, of the principles of pleading, old and new, embodied in, or contributory to, what is commonly called "Code Pleading."

To gather from the mass of enactments and decisions the established principles of pleading, and to distribute them in clear synthetic order; to trace the origin and development of these principles; to illustrate their use in the application of substantive law to operative facts; and to discover the philosophy of this procedure,—is a work as formidable as it is needful. I doubt not I have come short of its full accomplishment; but I indulge the hope that, in some degree, my labor may tend to restore the topic to its proper place as an educational branch of the law; that it may help the student to an intelligent and comprehensive grasp of the subject; that it may tend to ground the pleader upon reason and principle, instead of dogma and precedent; and that it may contribute to accuracy and dispatch in judicial procedure.

GEORGE L. PHILLIPS.

CLEVELAND, *April*, 1896.

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NOTE.—The references in this work to "Stephen on Pleading" are to Andrews' edition, 1894, unless otherwise designated in the reference.

Rights Laws

THE PRINCIPLES OF PLEADING.

INTRODUCTION.

1. The Objects of Litigation.—The ultimate end of the law is the conservation of rights. Compensation by way of damages is a subordinate end, resorted to in particular instances wherein the law has otherwise failed of complete protection. When legal rights are not invaded, the supreme end of the law and its administration has been realized in the entire security of rights. When invasion of a right is threatened, and the law restrains the would-be-wrong-doer, the right itself is fully protected. But when, after a wrongful invasion, the law restores the object of the right, or when the law gives damages for injury sustained by such invasion, it only approximately protects the right.

Paradoxical as it may seem, litigation is a conservator of the peace; it not only ends particular controversies, it establishes principles, it lessens contention, and promotes harmony, confidence, and security. Litigation is a refuge from violence, oppression, and fraud. When impartial tribunals for the determination of controversies were substituted for the physical force of the parties, it was a great stride in the progress of civilization; when such tribunals came to be guided by definite rules, the science of jurisprudence had its birth.

2. Subjects of Jurisprudence.—The subjects of jurisprudence are, rights and laws. Rights arise from facts, made operative by law. From certain kinds of facts proceed rights, and from other kinds result infringements of rights. The laws define and establish rights, and restrain and compensate infringements thereof. One of the principal functions of government is, to protect rights, and enforce performance of correlative duties; in other words, to administer justice.

It is the office of judicial tribunals to hear and determine controversies respecting rights and infringements thereof, and to apply the law to the ascertained state of facts.[1] *Ex facto oritur jus.*

3. Classification of Facts.—The facts with which the law and its administration are concerned may be divided into two classes; operative facts, and evidential facts. Operative facts are (1) such acts and events as operate under the law to invest some one with a legal right, and are hence called investitive facts; (2) such as operate to divest some one of a legal right, and are hence called divestitive facts; and (3) such as work a wrongful interference with an existing legal right, and are hence called culpatory facts. And such facts as in their nature tend to prove or disprove the existence of any of the operative facts aforesaid are called evidential facts.[2]

4. Divisions of the Law.—All law may be divided into (1) substantive law, by which rights and duties are defined and established, and (2) the law of procedure, which provides and regulates a course of action whereby the requirements of the substantive law may be enforced in particular cases of violence to rights so defined and established. The substantive law operates *proprio vigore*, at all times, and upon all persons; the law of procedure operates only upon occasion —when put in operation to prevent or to redress the infringement of a right.

[1] Judge DILLON says: "It is to protect and enforce public and private rights, that courts, with their judges and officers, their jurisdiction and machinery, are established and maintained. Their usual function, their most obvious use, is to decide civil and criminal causes." Yale Lectures, 152.

[2] Some of the terms employed in this classification are new. What are here denominated "operative facts" are usually called "ultimate facts." But *ultimate* is opposed to *initial* or *inchoate*, and would apply as well to evidential facts as to operative facts. *Ultimate* does not correlate with evidential, while *operative* does. The term *ultimate facts* does not express, or even connote, the idea of a relation between such facts and the substantive law, while the term *operative facts* does; and this relation is the very *principium* of the science of pleading. The terms "investitive" and "divestitive" have been used by Bentham, Austin, Smith, and Holland. The use of "culpatory" has less sanction. The Roman lawyers used *culpa*, the root of the word, to denote an actionable wrong, free from intention. The term "evidential" is in common use.

The substantive law embraces the law of property, of contracts, and of torts; the law of procedure includes pleading, evidence, and practice. It is the office of the substantive law to announce under what circumstances the state will recognize and support a right; it is the office of the law of procedure to provide the means whereby that support may be obtained.[1]

The law of pleading deals with operative facts, and prescribes the manner in which they are to be asserted and made available in actions.

5. Importance of Procedure.—By far the greater part of any system of laws consists of substantive law; and if the rights which it defines, and the corresponding duties which it imposes, were always understood and voluntarily observed, no other law would be needed. But inasmuch as these rights are sometimes invaded, and performance of these duties sometimes withheld, there is necessity for the remedial branch of the law, whereby rights may be protected, obligations enforced, and injuries redressed. It is obvious that the efficiency and value of the whole legal system depend largely upon the adequacy and convenience of this suppletory department, the law of procedure; and it is equally obvious that to facilitate procedure is to enhance correspondingly the value and security of private rights.

6. Scope and Divisions of this Book.—This work is designed to set forth, in orderly progression, and in convenient compass, a complete *rationale* of pleading—its theory, its development, its framework, its guiding principles, and its practical application. It is in five general divisions.

PART I.—The Philosophy of Pleading—is an attempt to develop the philosophy of pleading under the Reformed Procedure. It is inductive in method, and natural in arrangement. It outlines, in orderly sequence, the elementary principles of the science, and shows that these are drawn from personal and property relations in their integrity, and adapted to the administration of justice in cases of violence to these relations. It defines and classifies private rights,

[1] Hol. Jur. (5th ed.) 77, 144.

shows the correlation of facts and rights, defines and distinguishes the remedial right, explains the remedial agency of courts and actions, and leads up to the affirmative subject-matter, the cause of action, which is the basis of judicial procedure ; and it concludes with an outline of the judicial altercation which evolves an issue.

PART II.—The History of Pleading—contains a summary of each of the systems of pleading that have contributed to the system established by the Reformed Procedure ; to wit, the civil-law system, the common-law system, and the equity system. The compendious statement therein of the essential principles of these older systems, many of which principles are embodied in the matured system of code pleading, will facilitate a clear understanding and an intelligent application of its rules and methods.

This part contains all of the common-law and equity systems that is essential to an understanding of these, or that is helpful in the study and practice of the modern system, and is designed to dispense with the use of the somewhat voluminous treatises upon these older systems, heretofore justly regarded as indispensable stepping-stones to an understanding of the new system. Following this exposition of the older systems, is a brief account of the origin and development of the Reformed American Procedure, and a compendious outline of its essential features, showing at once its dependence upon the older systems, and its superiority over them.

PART III.—The Orderly Parts of Pleading—sets forth the formal parts of code pleading, the framework of the system, explains their mechanism, and their uses as instruments for the practical application of the principles of the science. These formal pleadings are explained under two general divisions : The Regular Parts of Pleading—complaint, answer, and reply, whereby an issue in fact is to be regularly evolved; and the Irregular Parts—motions, demurrers, and amendments, whereby a supervision of the regular pleadings is provided, to the end that the issue evolved may be real, material, and definite.

PART IV.—General Rules of Statement—contains the

principal rules to be observed in the use of the formal parts of pleading, in the ascertainment of the question to be decided in a cause. It is of the first importance that the question evolved by the pleadings should be specific and material. To insure certainty and materiality, and to avoid obscurity, prolixity, and confusion, the pleadings are required to conform to certain general rules, based upon the nature of rights and the logic of procedure, and embodying the fundamental principles of the science of pleading. The pleadings are not only to evolve an issue, they are to furnish guidance in the introduction of evidence; and the rules subservient to this end are also embodied in this part. These general rules of statement are grouped and considered in three divisions—those relating to matters of substance, those relating to matters of form, and those relating to the proofs.

Part V.—Application of Principles—explains and illustrates the application of principles to particular cases. This is the ultimate object toward which all that precedes has tended, and to which it is subservient. The lawyer's greatest difficulty is not in the acquisition of principles, but in their application to the affairs of life. In this part are discussed, the means for discovering a right of action, the parties to an action, the jurisdiction of courts, and the substantive law that is to obtain. Some of the more common actions, legal and equitable, are considered, the nature of each explained, and the constituent elements of a complaint therein are concisely stated; and in like manner, some of the more common defenses are considered and explained. Some forms of pleading are here used, not as precedents, but for illustration only; there being no authoritative forms for pleadings, or "approved modes of expression," in pleadings under the Reformed Procedure.[1]

[1] The use of forms for pleadings, as known to the common-law procedure, is alien to the new procedure. The fact is, that *forms for pleadings* do not belong to pleading; and one well indoctrinated in the science does not need them. Of course, the law of procedure is not without form; there must be method in calling the powers of a court into action, and there must be method in its action, and there must be method and formality in pleadings; but there is a wide distinction between forms of procedure, and forms for pleadings.

The concluding chapter of this part embraces some occasional incidents of procedure, which relate more to practice than to pleading, but which are indispensable to a full treatment of the latter.

PART I.

PHILOSOPHY OF PLEADING.

CHAPTER I.

A GENERAL VIEW OF PLEADING.

7. Litigation an Unexpected Sequence.—Actions grow out of transactions and relations entered into without expectation of resulting litigation; and the facts upon which actions are prosecuted and defended usually come into existence without expectation that they are to be used in a lawsuit. As a rule, actions are precipitated by unexpected deflection from a course of conduct called for by contract or by law. Hence, the operative facts of a case are, at the outset, often confused and intricate, and the resulting rights and obligations of the parties are often ill-defined and obscure. These operative facts are first to be collected, differentiated, and grouped, so as to make apparent their legal operation. This is the office of pleading.

8. Orderly Course of Procedure.—Speaking comprehensively, the orderly course of action prescribed by the law of procedure whereby the judicial power may be put in motion for the protection of a right, or the redress of an injury, consists of a series of progressive steps; and these are, ordinarily, the following:—

I. Having selected the jurisdiction having cognizance of the matter,—the appropriate court, within the proper territory,—the first requisite is, to show to the court, by a written statement of operative facts, that there is, *prima facie*, occasion for it to act in behalf of the applicant.

II. The next step is, to notify the party complained of, and

thereby bring him within the jurisdiction of the court. This is done by the issuance and service of the process of the court.

III. Jurisdiction being thus acquired, there follows a judicial altercation *inter partes*, to ascertain and disclose the matters in controversy between them. This is carried on by means of alternate written statements and denials, based upon the application first presented; and these writings, from first to last, are called *pleadings*.

IV. The matter in dispute having been developed by the pleadings, and being a matter which, if decided in a particular way, will warrant the exertion of the public force in behalf of one party against the other, it is necessary in the next place to ascertain the truth as to the point in dispute, in order to determine whether there is in fact occasion so to direct the public force. Accordingly, the next stage in the procedure is the trial, wherein each party endeavors, in turn, to maintain, by evidence, his side of the question or questions made by the pleadings; and a finding follows, in favor of the party whose evidence preponderates.

V. Then follows the judgment of the court, which is a judicial determination of the rights of the parties, in accordance with the result of the trial. It is the application of the law to the ascertained state of facts.

VI. The last regular step in an action is the execution, which is a writ issued by the court to its proper officer, commanding him to carry the judgment into effect in the manner therein pointed out. *Executio est fructus et finis actionis.*[1]

9. Rationale of the Procedure.—It will be seen from the foregoing account that the end and aim of the whole course of procedure, up to the issuance of final process, is, to determine whether the public force shall be used in behalf of one party to compel some act or forbearance on the part of another. And it will be observed that the culminating point in the procedure is the trial; for the trial practically deter-

[1] This outline is provisional only. There are occasional incidents of procedure,—such as motions, demurrers, appeal, writs of error,—which do not fall within the purpose of this general view. See Hol. Jur. (5th ed.) 306–7.

mines whether the public force shall be so used. The precedent steps are but preparatory for the trial, and the judgment and execution follow the finding upon the trial. The rights and obligations of the parties are such as the substantive law attaches to the state of facts ascertained upon the trial; and the judgment announces, and the execution enforces, these rights and obligations.

But special importance belongs to the pleadings, for no legal remedy can be obtained without them. It is only by the pleadings that the existence of a right, and the invasion thereof, can be brought to the attention of the court, and judicial action invoked; for a court, of competent jurisdiction, can not exercise its powers upon persons or property, unless its action be properly invoked according to the methods prescribed by law.[1]

The pleadings apprise the court and the parties of the respective grounds of the controversy, they furnish the question to be tried, they determine the nature and scope of the trial, the evidence produced must be confined to the matters put in controversy by the pleadings, and the eventual judgment must be conformed thereto.

The law of pleading stands, therefore, at the very threshold of legal procedure; it is so interwoven, both in theory and in practice, with every other title of the law, as to be at once a most important and a most instructive topic of juridical science.

10. Development of an Issue.—When contending parties resort to a court of justice, to determine and to enforce their respective rights and liabilities under the substantive law and the operative facts of their particular case, there are, speaking comprehensively, two successive steps of procedure; to ascertain the question for decision, and to decide. For the ascertainment of the question to be decided, the law requires each party to state the facts and the denials upon which he relies; and from the opposition of their statements is evolved the point in controversy. When the point in controversy has been thus developed, so that it is affirmed on one

[1] Post. 465.

side and denied on the other, the parties are said to be at issue, that is, at the end [*ad exitum*] of their pleading; and the emergent question itself is called the issue, and is the question to be decided. When the point so presented for determination is a dispute as to facts, it is called an issue in fact; when the point so presented is a contention as to the legal effect of admitted facts, it is called an issue in law.[1]

11. Definition of Pleading.—The law of pleading is that part of the law of procedure which prescribes the order in which, and regulates the methods by which, the parties to an action shall state the operative facts, and the denials, upon which they respectively rely for relief or for defense. And the orderly statements of operative facts, and the denials thereof, alternately made by the opposing parties, for the purpose of disclosing to the court and to each other their respective claims and the resulting issue, are called *pleadings*.[2]

[1] Steph. Pl. 102 and note, 209, 459, 485.

[2] Blackstone says: "Pleadings are the mutual altercations between the plaintiff and defendant." This definition is deficient in its statement of differential attributes. It does not state the purpose of pleadings. Furthermore, the pleadings are not "altercations." There is but one judicial altercation in an action. The alternate allegations and denials, from beginning to end, amount to an altercation; and the pleadings are the instruments whereby this altercation, this entire contention, is carried on. The learned author has referred the concept, pleadings, to a genus, altercations, that does not embrace it.

Chitty says: "Pleading is the statement, in a logical and legal form, of the facts which constitute the plaintiff's cause of action, or the defendant's ground of defense; it is the formal mode of alleging that on the record, which would be the support of the action or the defense of the party in evidence." The former branch of this definition limits pleading to a statement of facts, and omits denials; the latter branch embraces evidential facts, whereas only operative facts are to be pleaded.

Stephen defines pleadings as, "the allegations of fact, mutually made on either side, by which the court receives information of the nature of the controversy." This definition is logical, and except for its omission of denials, and of disclosure to the parties, is perhaps adequate.

Gould says: "The pleadings consist of those formal allegations and denials which are offered on one side for the purpose of maintaining the suit, and on the other for the purpose of defeating it; and which, generally speaking, are predicated only of matter of fact." This defi-

12. Code System of Pleading.—Each system of judicature has its modes of procedure, and its system of pleading. Perhaps all systems require each party to make, *in limine litis*, a statement of his case; but they differ materially as to the principles upon which such statements are to be constructed, and their effect upon the subsequent course of the action.

The common law sought to adapt its remedies to the diversified natures of the various injuries cognizable by its courts, by means of a diversity of actions, each founded upon the nature of the particular right invaded; and it was strict in the requirement that an injury should be redressed only by its proper action. This rigid requirement gave rise to what may justly be regarded as a distinguishing characteristic of the common-law system of procedure—a thorough separation of actions into classes and forms of action, and an inflexible adherence to technical rules, forms, and distinctions.

By the system of pleading established by the Reformed Procedure, and commonly called "Code Pleading," technical forms have been abolished; the novelty of the injury complained of matters not, provided it be an invasion of a right recognized by the law; and the maxim, that every right shall have a shield, and every wrong a remedy, is fortified by the simplicity and pliancy of its modes of procedure.

13. Right and Remedy Concurrent.—It is a maxim of the common law, and a central principle of pleading, that where there is a legal right, there is a remedy for its infraction. *Ubi jus, ibi remedium.* And the converse of this maxim is equally true, that there can be no remedy, where there is no legal right. The only means provided by law for enforcing a right, or obtaining a remedy, is an action in a court of justice. It follows, that whoever invokes the action of a court of justice in his behalf must show (1) a legal right in himself, and (2) its infringement by him against whom he seeks redress.

Private rights are therefore the foundation, and they are

nition is logical in form, though wanting in perspicuity. Only in a very indirect sense can it be said that allegations are "for the purpose of maintaining the suit, and for the purpose of defeating it."

the sole concern, of civil procedure. The nature of such rights, and the principles of the substantive law defining and establishing them, are the groundwork upon which the science of pleading is constructed. A compendious view of private rights and their correlative duties is therefore necessary, to a complete explication of the philosophy of pleading.

CHAPTER II.

PRIVATE RIGHTS AND DUTIES.

I. OF THE NATURE OF PRIVATE RIGHTS.

14. Limited Scope of this Chapter.—The law of procedure has for its end the conservation of rights and the enforcement of duties. Its adaptation to this end can not be appreciated, nor can its principles be intelligently applied in practice, without an understanding of the nature and compass of those private rights which the law recognizes and protects, and of the correlative duties which the law undertakes to enforce. It is not intended to enter upon an inquiry as to the abstract nature of right, or as to the standard of right and wrong. A consideration of these metaphysical problems would be an unprofitable diversion here. It is proposed only to explain and to classify those established private rights [1] of which the substantive law takes cognizance; and this will be done only so far as necessary to an exposition of the principles of pleading.

15. Rights Not of Legal Obligation.—It must here be premised, however, that there are many rights which the law does not undertake to protect, and many obligations which the law does not undertake to enforce. The law defines and regulates the domestic relations; but so much of these relations lies outside the realm of the law, that a man may be a bad father, a bad husband, or a bad guardian, without coming into conflict with the law. So there are many rights and

[1] By *private rights* is here meant, all those rights which grow out of jural relations among persons, as contradistinguished from those *public rights* and duties which grow out of the rela'ions between the government and the people—such as allegiance to the government, and protection to the people. Such private rights entitle one person, usually called the person of inherence, and oblige another, usually called the person of incidence. Hol. Jur. (5th ed.) 79, 81.

duties that do not enter into the jural relations of persons; and the state does not undertake to enforce these, but relegates them to the forum of conscience, and to the fostering sanctions of society. This distinction, between juridical and non-juridical rights, and between actionable and non-actionable injuries, lies at the very threshold of procedure, and will frequently be referred to throughout this work.

16. Rights of Legal Obligation.—Having distinguished those rights and obligations as to which the law is indifferent, we come now to those private rights that are of legal validity —those for whose invasion the law furnishes a remedy. Without undertaking to define a legal right, in concise and adequate terms, it will be sufficient for the present purpose to say, that one has a legal right, when, by the law, another is bound to do or to forbear in regard to him.[1] The correlative obligation to do or to forbear is termed a legal duty.

A legal right may, or may not, coincide with a co-existent moral right. It draws its validity, not from ethical considerations, but from the fact that the state will lend its aid to maintain and enforce it.[2] This protection from the state is the essence of a legal right. It would be a vain thing in law to imagine a right, without the means to maintain it. *Lex nil frustra facit.*[3]

[1] Austin's Jur. 576.

[2] Hol. Jur. (5th ed.) 71; Amos' Sci. of Law, 95; Holmes' Com. Law, 214.

[3] Mr. Holland thus distinguishes might, moral right, and legal right: "If a man, by his own force or persuasion, can carry out his wishes, either by his own acts, or by influencing the acts of others, he has the *might* so to carry out his wishes. If, irrespectively of having or not having this might, public opinion would view with approval, or at least with acquiescence, his so carrying out his wishes, and with disapproval any resistance made to his so doing, then he has a *moral right* so to carry out his wishes. If, irrespectively of his having, or not having, either the might, or the moral right on his side, the power of the state will protect him in so carrying out his wishes, and will [at his instance] compel such acts or forbearances on the part of other people as may be necessary in order that his wishes may be so carried out, then he has a *legal right* so to carry out his wishes.

"If it is a question of might, all depends upon a man's own powers of force or persuasion. If it is a question of moral right, all depends on the readiness of public opinion to express itself upon his side. If it is a question of legal right, all depends upon the readiness of the

17. Rights Limited by Other Rights.—The law does not undertake to secure to every one complete indemnity from harm or inconvenience at the hands of others. Where there would otherwise be conflict of rights, the law must fix a bound to each, so that the orbit of the one may not impinge upon the orbit of the other. For example, the use of a street by the public, and the use thereof by an adjacent lot-owner, are each subject to certain incidental and temporary encroachments. The right of the public in the use of the street is the right of transit to every one who has occasion to use it. But the lot-owner may cut the street to lay pipes, or to build a sewer; he may, temporarily, fill it with building materials, or with debris from his lot. These incidental and temporary encroachments upon the highway, if necessary and reasonable, are not wrongful, because they do not invade any right of the public. The true theory is, not that the right of the public may be so far invaded, but that the right of the public to use the highway, is, in its integrity, only a qualified right of transit.

The reason that probable cause excuses one from liability for the prosecution of an innocent person is, not that the right of personal security may be so invaded with impunity, but that such right, in its totality, is subject at all times to prosecution, grounded on probable cause. The general welfare of the community demands that the right of personal security shall be so qualified; and many private rights

state to exert its force on his behalf." Hol. Jur. (5th ed.) 73, 74.

Justice HOLMES says: "A legal right is nothing but a permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution, or compensation, by the aid of the public force. Just so far as the aid of the public force is given a man, he has a legal right. . . . Every right is a consequence attached by the law to one or more facts which the law defines, and wherever the law gives any one special rights not shared by the body of the people, it does so on the ground that certain special facts, not true of the rest of the world, are true of him. When a group of facts thus singled out by the law exists in the case of a given person, he is said to be entitled to the corresponding rights; meaning, thereby, that the law helps him to constrain his neighbors, or some of them, in a way in which it would not, if all the facts in question were not true of him." Holmes' Com. Law, 214.

are, in their entirety, necessarily subject to like limitations.

II. CLASSIFICATION OF PRIVATE RIGHTS.

18. General Division of Rights.—Private rights are of two kinds; *jura in rem*, and *jura in personam*. Rights *in rem* are those which avail against persons generally, while rights *in personam* avail against certain or determinate persons. The phrase *in rem*, as here used, denotes, not the object, but the compass of the right. *Jus in rem* does not mean merely a right over a thing; it means a right that may be asserted against all the world. A right *in rem* clothes its owner with exclusive control of the object of his right. The essential idea is, the exclusion of all persons save the owner of the right. The essential idea of a right *in personam* is, the right to exact performance of an obligation. The duties that correlate with *jura in rem* are always negative—to forbear or abstain. Of the duties that correlate with *jura in personam*, most are positive—to do or perform. The duty to abstain from striking another, or from taking his property, or from defaming his reputation, is a negative duty, and the corresponding right is a right *in rem*, availing against persons generally. The obligation to pay a debt is a positive duty, and the corresponding right to exact payment is a right *in personam*, availing against a determinate person, the debtor. One in possession of land, with only an equitable title, has a right against persons generally to forbear from trespass, which is a right *in rem*; and he may, at the same time, have a right against the person holding the legal title to have such person convey the same to him, which is a right *in personam*. But the right *in rem* is not more a right over or in the land, than is the right *in personam*.[1]

[1] I have employed the terms *jus in rem* and *jus in personam*, because they are sufficiently expressive,—the former denoting generality, and the latter determinateness,—and because their meanings are sufficiently established by usage, both of the classical Roman jurists and of modern writers on jurisprudence, to render them unambiguous; though I agree with Austin and Holland, that a pair of antithetical terms, denoting briefly and precisely these two classes of rights, is yet a desideratum in the language of jurisprudence. These terms are

19. Rights in Rem.—*Jura in rem* are proprietary rights. They clothe the owner with control of the object of his right, to the exclusion of all other persons. The term *in rem* denotes the compass of the right, and connotes the object of the right. The principal rights *in rem* are, the right of property in one's self, and the right of property in things.

I. The right of self-ownership, or property in one's self, embraces the right of personal security, and the right of personal liberty.

(1) The right of personal security consists in the uninterrupted enjoyment of one's life, person, health, and reputation. It imposes upon all others the duty not to destroy or imperil the life, not to injure or annoy the person, not to injure or endanger the health, and not to defame the reputation.

(2) The right of personal liberty consists in immunity from imprisonment or other physical restraint. It imposes upon every person the duty not to abridge or interfere with the personal liberty of another, unless by due course of law.

II. The right of property in things consists in the free use, control, and disposal of one's acquisitions; and it imposes upon all others the correlative duty not to interfere with the object of such right. This right is derived from and rests upon the right of self-ownership. The exertion of a person in the lawful acquisition of a thing establishes a bond between the person and the thing; so that an attack of the thing is an attack of the person, and he may complain of the injury.

20. Rights in Personam.—*Jura in personam* are rights of obligation. The essential idea is, the right to exact performance of an obligation from a certain person. These rights originate *ex contractu*, or *ex lege*.

also used to designate actions and proceedings; proceedings *in rem* being against the specific thing, while proceedings *in personam* are against the person. The former include the condemnation of property, as in Admiralty or in the Exchequer, and proceedings to fix the personal *status* of parties, as in divorce and in bastardy. 1 Gr. Ev. 525, 540, 541. Decrees in equity, while they affect property, usually operate *in personam*. Post, 138; Bisph. Prin. of Eq. 47.

The generic expression *jus in rem* must not be confused with the elliptical and somewhat ambiguous expression *jus ad rem*, which usually signifies a right to a determinate thing. Austin's Jur. 534, 535.

I. Rights *ex contractu* arise from executory contracts. The law imposes upon the parties to a legal contract an obligation to perform their promises. *Pacta legem faciunt inter partes.* The primary right of an obligee is to have the promise of the obligor performed. Upon breach of the contract, a secondary or remedial right, a right to compensation in damages, arises.

II. Rights *ex lege* arise from various jural relations among men, without the intervention of either contract or delict. If one has another's money or property which in equity and good conscience he ought to restore, the law imposes an obligation to restore it, and creates a correlative right in the owner. The parent owes to his minor child the duty to support, and the child has the correlative right to demand support from the parent. One who is entitled to have a public officer do a particular official act for him, has a legal right to that effect, and the officer owes the corresponding legal duty.

If money be, by mistake, paid to one, when it should have been paid to another, there arises, by operation of law, a right in favor of the latter, and against the former; and upon demand and refusal to pay, an action may be maintained for its recovery.[1] If lost property be found by one not the owner, there is an obligation upon the finder to restore it to the owner, on demand. If property be, by mistake, delivered to the wrong person, the recipient is bound to deliver it, on demand, to the person for whom it was intended.

These legal relations are sometimes called implied contracts; but when divested of fiction and technicality, the true ground of such rights is the legal obligation, based upon natural justice and equity.[2]

[1] Right and Law, 192; Shaffer v. McKee, 19 O. S. 526.

[2] Some writers on jurisprudence include with rights *in personam* those arising *ex delicto*. These rights arise almost exclusively from torts, or violations of rights *in rem*, and are not primary rights, but secondary rights, arising from delicts. They are excluded here, because they are not primary rights, but remedial rights; and because this classification is made with the view, among others, to ground the distinction between rights and delicts, the two constituent elements of a cause of action. For a full and analytical discussion of legal rights and duties, see Holland's "Elements of Jurisprudence," Smith's "Right and Law," Austin's "Lectures on Jurisprudence," and "The Science of Law," by Amos.

CHAPTER III.

CORRELATION OF FACTS AND RIGHTS.

21. Rights Arise from Facts and Law.—Private rights and their correlative duties having been defined and classified, it will be in order to inquire what it is that will confer a right, and impose its corresponding duty. It is clear that rights do not belong equally to all persons. One may have the exclusive right to the use and disposal of certain property; one may have a right to the services of another, or may be entitled to the protection of another. What is it that gives a particular right to a particular person, and imposes the corresponding duty upon another?—Every right is a legal consequence arising from a particular fact or a particular group of facts; and when such particular fact or facts can be affirmed of any one, he has the consequent legal right; that is, the law will help him to constrain all other persons, or a particular person, in a way in which it would not, if the fact or facts in question were not true of him.[1] Hence, a statement that denotes such operative facts connotes the consequent right; but a statement that denotes such consequent right does not connote the corresponding operative facts. For example, the statement that A. made and delivered to B. his promissory note for one hundred dollars, payable in ten days, that the time has elapsed and the note is unpaid, clearly denotes the operative facts, and as clearly connotes the consequent right of B. to enforce payment; whereas, the statement that A. owes B. one hundred dollars, past due, would denote the same right, but would not disclose the facts from which the right arises by operation of law. The former statement asserts the right as a legal consequence, arising from the facts stated; while the latter statement

[1] Holmes' Com. Law, 214, 215; Hol. Jur. (5th ed.) 79 et seq.

asserts the right as a mere conclusion, drawn from facts not stated.

22. Constituent Factors of a Right.—Rights arise from facts, by operation of law. In the example just given, the statement that A. owes B. is the statement of a conclusion, drawn from facts not stated; while the statement that A. made and delivered to B. his note, which is due and unpaid, is the statement of facts to which the law attaches, as a legal consequence, the right embodied in the conclusion before stated.

The important thing to grasp is, that such relations are compounded of operative facts and consequent rights; and that, in determining whether one person has a legal right against another, two things must be considered; the operative facts that exist, and the consequences attached by the law to such facts.[1]

Not only do rights arise from facts, but rights are, in like manner, extinguished by facts. For example, suppose that A., heretofore indebted to B., has paid the debt. Here we have the operative fact of payment, and the consequent extinguishment of the right of A. to receive payment.

This correlation of facts and rights, regulated in the main by the substantive law, shows that to assert the existence of a legal right in any one, it is necessary only to affirm that certain operative facts are true of him, and to know that to these facts the law attaches the right. Here is the essential idea of pleading.

[1] Holmes' Com. Law, 215.

CHAPTER IV.

OF RELIEF BY CIVIL ACTION.

23. Right and Remedy Concurrent.—It is clear that one may be prevented from exercising his legal right, without losing the right itself. A man has a right to his liberty, though he be unlawfully imprisoned; and he has a right to his property, though unjustly deprived of it. It follows, that when one has been unlawfully deprived of the exercise of his right, he should be restored to its enjoyment, or compensated for its loss; for a right without a remedy is as though it were not. Hence it is a maxim of the law, that where there is a legal right, there is a remedy for its infraction. If restoration of the specific right be impracticable, restitution in value is to be made.[1] It is obvious that the security and the value of private rights are measured by the promptness and the adequacy of the remedy that may be had for their infringement.[2]

24. Right to Maintain Transferred to the State.—Primarily, and in the absence of a remedial agency, the right to maintain by force is incident to every recognized right. This right to maintain by force is, by the institution of government, taken from the individual and vested in the state; and in lieu thereof he is given a right of action, or the right to invoke the action of the state, for the maintenance of his

[1] 3 Bl. Com. 116.

[2] "A right that could be violated, without giving rise to any new legal relation between the person of inherence and the person of incidence, would not be a legal right at all. . . . The object of a developed system of law is the conservation, whether by means of the tribunals or of permitted self-help, of the rights which it recognizes as existing. So long as all goes well, the action of the law is dormant. When the balance of justice is disturbed by wrong-doing, or even by a threat of it, the law intervenes to restore, as far as possible, the *status quo ante*." Hol. Jur. (5th ed.) 273, 275.

private right.[1] *Jus persequendi judicio quod sibi debetur.*

The only remedial agency, in the state as in the individual, is compulsion; it is regulated public force substituted for unrestrained private force. This public force is exerted by compelling the wrong-doer either to restore the injured party to his former situation, or to pay him, in money, an equivalent for his loss.[2]

25. Court and Action Defined.—A court is a judicial tribunal empowered by the state to hear and determine controversies respecting legal rights, and invasions thereof, and to protect such rights, and redress such wrongs, by enforcement of its decisions.[3] An action [4] is a proceeding in a court of justice to procure its interposition to protect a right, or to obtain a remedy for its invasion. *Actio non est jus, sed medium jus persequendi.*[5] It will be seen that courts and actions are but instrumentalities of the state, (1) for

[1] The right of self-defense is an exception. This right of self-help is not conferred by the state, nor is it transferred to the state; it is simply retained by the individual. The reason is, that the pressing emergency will not admit of the delay necessary for resort to the state. To require one to resort to the state in such case, would be to deprive him of remedy. The law does not create the right of self-defense; it regulates its exercise.

The right of the injured party to abate a nuisance under certain conditions is another instance of the right of self-help reserved to the individual, because the injury is of a kind that demands an immediate remedy.

[2] Evans Pl. 5; Smith's Right and Law, 218; Hol. Jur. (5th ed.) 277.

[3] Blackstone adopts Coke's definition: "A court is a place where justice is judicially administered." 3 Bl. Com. 23. Judge DILLON says: "The essential attributes of courts of justice, if I may attempt to define them, are, that they shall be held by judges appointed or selected for that purpose; that cases and controversies therein shall be cast in some form of pleadings resulting in specific issues of law or fact, in which, on issues of fact, only competent evidence is admissible, and, if not documentary, to be given under the sanction of an oath, with the right to cross-examine; that there shall be a public trial or hearing resulting in a judgment or decree, which the court has the inherent power, by its own officers, process, and machinery, to enforce." Yale Lectures, 31, 32.

[4] The term "suit," which was formerly applied to such proceeding in equity, is sometimes used as synonymous with "action."

[5] Hol. Jur. (5th ed.) 277, and notes; Austin's Jur. 1035.

determining whether, in a particular case, the public force shall be used in behalf of one to compel some act or forbearance on the part of another, and (2) for enforcing the law, as embodied in the decision of the court. It must be remembered, that judicial power is never exercised for the mere purpose of giving effect to the will of the judge, but always for the purpose of giving effect to the law; the theory being, that the decision of the court is always *secundum legem*. It follows, therefore, that judicial power is not to be contradistinguished from the power of the law.[1]

26. Public Injuries not Redressible by Civil Action.— The law does not furnish a private remedy for anything but a private injury; that is, the invasion of a private right. Therefore, when the wrongful act invades only the public right, and is an injury to the entire community, no one of whom sustains injury different in kind from that sustained by the general public, the remedy by civil action does not apply. The reason generally given is, that where only a public right, one common to all the people, is affected, no one person can assign his particular portion of the injury; and if he could, it would be unjust to harass the offender by innumerable actions for one offense.[2] But an additional reason is, that in such case no private right is invaded.

An act may be at once a crime and a tort, and so may be both indictable and actionable. An assault and battery, for example, violates the private right of personal security, and gives the injured person a right of action for damages; but such act of violence is a menace to the safety of society generally, and so the state, as the guardian of public order, may indict and punish the offender.[3]

27. Actual Loss without Remedy.—There is a class of circumstances in which one may sustain loss that is not remediable by action, because the loss is not occasioned by anything that the law esteems an injury; that is, no recognized legal right has thereby been impaired. Such loss is termed *damnum absque injuria*. It is not enough that one sustain

[1] Per MARSHALL, C. J., in Osburn v. U. S. Bank, 9 Wheat. 738, 866.

[2] Co. Litt. 56a; Broom Max. 206.

[3] Hol. Jur. (5th ed.) 280.

loss by the act of another; the loss, to be remediable by action, must result from the invasion of some recognized legal right. It is not enough that there be *damnum;* there must be *damnum cum injuria.* For example, interference with another's trade by fair competition is not actionable, because the right of any one to pursue a trade is qualified by the equal right of every other person to pursue the same trade. Therefore, if A. compete in trade with B., to the damage of the latter, B. is remediless, because, though loss has ensued, the orbit of his legal right has not been impinged upon. There has been *damnum*, but not *injuria.*[1] So, if one, while doing what is lawful, and using due care, injure another by accident, the injured party is without remedy.[2] The reason is, that the right of the injured party, in its totality, was, to have only such degree of personal security as the exercise of due care by the other party would afford; and, although he has suffered loss by the unauthorized act of the other, his legal right of personal security has not been interfered with. He has not, in legal contemplation, been damnified. *Actio non datur non damnificato.*[3]

It may here be observed that courts have no authority over political questions. Of such matters the political departments of the government have exclusive cognizance, and their determination thereof is conclusive.[4] And the demand of an individual against the state can not be enforced by action, unless such action is specially authorized by law, or otherwise assented to by the state.[5]

28. Remedy without Actual Loss.—On the other hand, when a recognized legal right has been violated, its possessor has, in general, a remedy by action, even though he has not sustained actual loss. In such case, there is *injuria sine*

[1] Rogers v. Dutt, 13 Moore P. C. C. 207, 241. *Cf.* Per OKEY, J., in Knapp v. Thomas, 39 O. S. 377, 393.

[2] Gibbons v. Pepper, 1 Ld. Raym. 38; Wakeman v. Robinson, 1 Bing. 213.

[3] Post, 389, 390, and cases there cited.

[4] Cooley Prin. Const. Law, 146; Luther v. Borden, 7 How. 1.

[5] Hans v. Louisiana, 134 U. S. 1, 12; Clark v. Barnard, 108 U. S. 436. *Cf.* De Sausure v. Gaillard, 127 U. S. 216; Kentucky v. Todd, 9 Ky. 708.

damno; that is, there is legal injury, though no appreciable loss. Every invasion of a legal right threatens the right itself, and, to some extent, impairs the possessor's enjoyment of it, and is a legal injury, though no actual loss has resulted. In such case, unless the injury be so trifling as to fall within the operation of the maxim *de minimis non curat lex*, the injured party may have an action, for nominal damages at the least. For example, if one trespass upon the lands of another, an action will lie, even though no appreciable damage be done, for it is the wrongful invasion of a legal right, and if allowed to continue, might grow into an adverse right.

An action for a private nuisance,—such as the obstruction or diversion of a watercourse, so that it no longer flows through plaintiff's lands; or the projection of the eaves of a house over the lands of plaintiff,—may be maintained before actual damage has resulted. It is sufficient that a legal right has actually been invaded; and besides, if an action could not be maintained until after specific damage could be shown, the continued and uninterrupted adverse enjoyment might, in process of time, become evidence of an adverse right.[1] One entitled to vote at an election has a right of action against an officer who wrongfully refuses to receive his vote, although the candidates for whom he wished to vote were in fact elected. In such case, the elector suffers no pecuniary loss, but his legal right is infringed, and he is damnified.[2]

These instances—of actual loss without remedy, and of remedy without actual loss—are not anomalous; they exemplify the rule, that where, and only where, a legal right has

[1] Ang. Lim. 300; 1 Suth. Dam. 766; Wood Nuis. 97.

[2] Jeffries v. Ankeny, 11 Ohio, 372; Ashby v. White, 2 Ld. Raym. 938. In this case, HOLT, C. J., said: "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it. . . . Every injury imports a damage, though it does not cost the party one farthing; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. In an action for slanderous words, though a man does not lose a penny by reason of the speaking of them, yet he shall have an action. . . . So here in the principal case, the plaintiff is obstructed of his right, and shall therefore have his action."

been wrongfully invaded, the law furnishes a remedy.[1] They show, too, that the ultimate end of the law is the conservation of rights; and that indemnity for loss is subservient thereto.

[1] Hutchins v. Hutchins, 7 Hill, 407; s. c. 6 Am. Rep. 340; Post, 104; Kimball v. Harmon, 34 Md. 391.

CHAPTER V.

OF THE CAUSE OF ACTION.

29. Right of Action Defined.—It has been shown that where there is a legal right, there is a remedy for its infraction; and that the remedy is to be obtained by means of an action, in a court of justice. Therefore, when a legal right is wrongfully infringed, there accrues, *ipso facto*, to the injured party a right to obtain the legal remedy, by action against the wrong-doer. This secondary or remedial right is called a *right of action. Jus persequendi judicio quod sibi debetur.*[1]

From this perfect correspondence between rights and actions, it is plain that there can be an action only where there is a right; for, to give one an action where no right has been infringed, would be to impinge upon the right of another. One reason for requiring pleadings in an action is, to avoid using the public force in favor of a complainant, unless he is, *prima facie*, entitled to it.

30. Cause of Action Defined.—The question to be determined at the threshold of every action is, whether there is occasion for the state to interfere. Therefore, when a suitor asks that the public force be exerted in his behalf, he must show that there is, *prima facie*, occasion for the state to act in his behalf. That is, he must show a right in himself, recognized by law, and a wrongful invasion thereof, actual or threatened. And since both rights and delicts arise from operative facts, he must affirm of himself such investitive fact or group of facts as will show a consequent legal right in him, and he must affirm of the adversary party such culpatory fact or facts as will show his delict with reference to the right so asserted. The formal statement of operative

[1] Hol. Jur. 277; Aus. Jur. 1031–1038.

facts showing such right and such delict shows a *cause for action* on the part of the state and in behalf of the complainant, and is called, in legal phraseology, a *cause of action*.[1]

31. Right of Action and Cause of Action Distinguished. —From the foregoing definitions of right of action and cause of action, it will be seen that the former is a remedial right belonging to some person, and that the latter is a formal statement of the operative facts that give rise to such remedial right. The one is matter of right, and depends upon the substantive law; the other is matter of statement, and is governed by the law of procedure. These terms, right of action and cause of action, are therefore not equivalent terms, and can not be used interchangeably.[2] Whether a *right* of action

[1] The phrase, "cause *for* action," which expresses so exactly the office of such statement of operative facts, is, by a figure of syntax called *enallage*, changed to "cause *of* action." The real meaning of the latter phrase is lost, unless we have in mind the change of the preposition effected by the use of the figure.

[2] The distinction here made between *right of action* and *cause of action* is one not found elsewhere, so far as I am aware. In some of the codes these terms are used interchangeably, while in some only "cause of action" is used, meaning sometimes the remedial right, and sometimes the statement of facts showing such right. The courts and the text-writers have generally used them as equivalent terms.

Judge BLISS says: "As the action is a proceeding for the redress or prevention of a wrong, the *cause of action* must necessarily be the wrong which is committed or threatened." Code Pl. 1, 151. I respectfully suggest that this definition of an action is a misconception, and that the definition of cause of action, based upon it, is a *non sequitur*. The "wrong which is committed or threatened" may be the "cause of action" in the sense that it is what immediately induces the bringing of the action; but the learned author does not speak of it as the thing that moves the suitor to act, but as that which moves the court to act in his behalf. The error lies in a misconception of the office of an action. Primarily, an action is not "for the redress or prevention of a wrong;" it is a proceeding to protect a *right*. The basis of every action is, a *right* in the plaintiff; and the purpose of the action is, primarily, to preserve such right. Subservient to this primary object of the action, is compensation for infringement of the right. In no legal or logical sense can it be said that the *wrong*, the infringement of a right, is itself the cause of action.

Mr. Pomeroy says: "The primary right and duty and the delict combined constitute the cause of action; they are the legal cause whence the right of action springs." Again, he says: "The cause of action is what gives rise to the reme-

does in fact exist in a particular case, can be determined only by the result of the action; whether a *cause* of action appears, is determinable by inspection of the statement of operative facts. The only precautionary requirement that the law makes, or can make, is, that it shall appear, *in limine*, from facts affirmed to be true, that there is a *cause of action.*

32. Elements of a Cause of Action—It will appear, without further analysis, that a statement of facts, to constitute a cause of action, must show a right of action; that to show a right of action, it must state facts to show (1) a primary right and its corresponding duty, and (2) the infringement of this right by the party owing this duty. From the one set of facts the law raises the primary right and duty, and to the other set of facts the law attaches a remedial right, or right of action. For example, the statement that A. sold and delivered to B. a horse, for one hundred dollars, to be paid in ten days, shows a primary right in A. to receive one hundred dollars at the time fixed for payment, and the corresponding duty of B. to make payment accordingly. But this statement does not show a right of action, because no delict is shown. If a statement of facts be added, showing that the ten days have passed, and that payment has not been made, the remedial right appears; and the combined statement is a good cause of action, because it shows a

dial right, which is evidently the same as the term 'right of action,' frequently used by judges and text-writers. This remedial right, or right of action, does not arise from the wrongful act or omission—the delict—of the defendant alone, nor from the plaintiff's primary right and the defendant's primary duty alone, but from these two elements taken together. The 'cause of action,' therefore, must always consist of two factors, (1) the plaintiff's primary right, and the defendant's corresponding duty, and (2) the delict, or wrongful act or omisison of the defendant." Remedies, 453, 519. This author, not only in these passages, but throughout his work, plainly uses "right of action" and "cause of action" as equivalent and interchangeable terms. But he plainly shows that "the wrong which is committed or threatened" can not of itself be the cause of action.

This discrepant and inaccurate use of these important terms must tend to obscure, rather than to elucidate, the principles of a science wherein clearness of conception and perspicuity of statement are most essential.

remedial right of A. against B., growing out of the violation of a primary right and duty, and it therefore shows a cause for the state to act in behalf of A., for the enforcement of this antecedent right and duty.

This primary right and duty, and this delict of the party owing the duty, are the two constituent elements of a cause of action; and every sufficient statement of a cause of action, however simple or however complex, must contain these constituent elements.[1]

33. The Law an Element of Rights of Action, but not of Causes of Action.—Primary rights and duties, and violations of these, depend upon and are governed by the substantive law. It is these rights and duties, and violations thereof, actual or threatened, that constitute rights of action; and it is the statement of facts showing at once the existence of such primary right and duty, and a violation thereof, that constitutes a cause of action. But such facts are operative only by virtue of the substantive law; therefore, a statement of facts constituting a cause of action assumes that the investitive facts stated clothe the person of whom they are affirmed with a primary right recognized by the substantive law, and that the culpatory facts stated show a wrongful invasion of such right.

A complete statement of a right of action would therefore require a statement, not only of the operative facts, but of the law that makes them operative. But such statement of the law is needless, and is for that reason excluded from the definition of a cause of action. In the first place, the substantive law is operative at all times and upon all persons; it operates *proprio vigore*, both out of court and in court, and needs not to be called into operation by a statement of its existence. In the next place, the law of procedure assumes that the law is known to those entrusted with its administration, and that they need not be advised by a statement of its existence.[2]

[1] Pom. Rem. 453, 454.

[2] Steph. Pl. 362; Gould Pl. iii. 12. The requirement that private statutes and foreign laws are to be pleaded is not in conflict with this rule of exclusion, for these are regarded as operative facts, to be pleaded and proved. Post, 184.

CHAPTER VI.

OF THE ISSUE.

34. The Altercation Inter Partes.—The ultimate object of an action is, to procure the interposition of the court, as the depositary of the public force, for the maintenance of a legal right; and the primary object of the plaintiff's first pleading is, to show to the court that there is, *prima facie*, cause for it to act in behalf of the complainant, and against the party complained of. Another object of such pleading is, to advise the defendant of the grounds of the complaint against him. It follows, that one who invokes the action of a court must do so by a statement of facts showing, *prima facie*, a right of action in himself against the one complained of. Such *ex parte* showing does no more, in the first instance, than to give the complainant a right to the process of the court, for the purpose of bringing his adversary into court, and subjecting him to its jurisdiction. The philosophy of this application having already been shown, it remains to set forth the philosophy of the judicial altercation that may follow, and that results in the ascertainment of the question for decision.

When in court, the party complained of has a right to contest the claim of his adversary. This he may do in three ways: First, by denying the legal sufficiency of the facts stated, to authorize the interposition of the court; secondly, by denying the truth of the facts so stated; and thirdly, by stating other facts that make those stated by the complainant inoperative. When he questions the legal sufficiency of the facts stated, he is said to *demur* [*demoror*, to delay]; and when he denies their truth, or states other facts to avoid their operation, he is said to *answer*.[1]

[1] Steph. Pl. 134, 136.

35. Insufficiency of Facts Stated.—The substantive law is a constituent element of rights, and of rights of action, and though its existence is neither to be stated nor denied in any pleading, yet every allegation of facts assumes that the substantive law makes such facts operative to invest some one with a right, or to divest some one of a right. The ultimate question to be determined in a civil action is, whether the public force shall be used in behalf of one party to compel some act or forbearance on the part of the other; that is, whether one party has a right of action against the other; and at every stage of the action, whatever the state of the pleadings, an inquiry whether the pleadings, as they stand, will warrant such interposition is both pertinent and impending—matter of substantive law not being admitted by any pleading, or state of pleading.

When a party complained of denies, by demurrer, the legal sufficiency of the facts stated by his adversary, he simply presents the question whether the facts stated, if true, constitute a cause of action against him; and he asks and awaits the judgment of the court thereon.

Such demurrer does not dispute the facts stated; but, for the purpose of obtaining the judgment of the court as to their legal effect, it admits them to be true. Such demurrer disputes the assumed legal operation of the facts stated. It raises an issue *in* law, but not an issue *of* law. The demurrer may lead to an oral altercation as to what the law is, but it does not make an *issue* as to what the law is. It questions the assumed effect of the law as it is, and of the facts as alleged.[1]

[1] Some writers treat a statement of facts constituting a cause of action as part of a logical formula, whereof an assumed proposition of law is the major premise. For example, if the statement be, that A. agreed to give B. a horse, worth one hundred dollars, but now refuses to deliver him, to the damage of B., the following syllogism is involved: 1. *Major Premise.*—Breach of promise to give property to another renders the promisor liable in damages to the promisee. 2. *Minor Premise.*—A. agreed to give B. a certain horse, and afterward refused to deliver him. 3. *Conclusion.*—Therefore, A. is liable to B. in damages. A demurrer to such statement is said to deny the legal proposition involved, and thus make an issue of law. Gould

36. Denial of Truth of Facts Stated.—The legal sufficiency of the facts stated being admitted, or being adjudged on demurrer, the party against whom they are alleged may deny that the facts stated are true. Such denial may be general, that is, a denial of each and every operative fact stated; or it may be special, that is, a denial of any one or more of such facts. A denial, whether general or special, presents an issue in fact. If it be general, it rests the contention upon any and all of the facts stated; if it be special it limits the contention to the particular fact or facts denied.

37. Statement of New Matter.—To entitle a suitor to relief by civil action, not only must his statement of facts be sufficient in law, and true in fact, but there must not be antagonistic or divestitive facts that render those stated by him inoperative. Therefore, if the statements of complainant be both sufficient in law and true in fact, his adversary may contest his right to relief by a statement of new facts that render inoperative those stated by the other party. This statement of new matter tenders no issue. It simply avoids the operation of the statment to which it is opposed, and may in turn be met by demurrer or by answer.[1]

38. Demurrer, Denial, and Avoidance Distin-

Pl. i. 7, 8, 9; Bliss Pl. 137, 404.

This analysis proceeds upon the assumption that a proposition of law may be controverted in the pleadings. This is a false assumption; and it perverts the true theory of pleading. The substantive law is both certain and stable; and the rules of pleading rest upon this fact. The true theory is, not that a statement of facts implies a proposition of law that will make such statement operative, but that the pleader assumes that his statement of fact is operative under the law as it is. The assumption relates, not to what the law is, but to the legal effect of the facts. If the facts stated are insufficient, it may be because the pleader has mistaken the law, or has miscalculated the legal effect of his facts; and a demurrer questions, not a proposition of law, but the assumed legal operation of the facts. It is not the province of the pleadings to present an issue as to what the law is, but to formulate a contention as to the facts; either as to what the facts are, or as to their legal effect. A demurrer to the statement of facts before supposed should be overruled; because, the law being that a mere promise to give creates neither right nor obligation, the facts stated do not show a remedial right of B. against A. Ante, 32.

[1] Post, 236.

guished.—It is important to note the distinction between demurrer and answer, and between denial and avoidance. A demurrer is always founded upon what is stated in the pleading to which it is opposed, and which, for the purpose of the demurrer, is admitted to be true; while an answer is always founded on a denial of such matter, or on matter of fact collateral thereto. In other words, a demurrer questions only the *cause of action;* while an answer questions only the *right of action.*

An answer by way of denial always presents an issue, and limits the contention to one or more of the facts stated in the pleading to which it is opposed; while an answer of new matter makes no issue, and diverts the contention from the facts stated in the opposite pleading, to those contained in such answer.

39. Retrospective and Prospective.—In these introductory chapters, presenting a general view of pleading, a compendious view of private rights, the correlation of facts and rights, the function of courts, and the prerequisites for their action, the object has been to outline, in their natural and orderly sequence, the elemental principles which form the groundwork of pleading.

As a science, pleading is both inductive and deductive. It is inductive in that its general principles are drawn from the nature of private rights and the general laws of argument; it is deductive in its application of these general principles to particular cases. It is not a compilation of positive and arbitrary rules; it is a system of consistent and rational principles, drawn from personal and property relations in their integrity, and adapted to the administration of justice in particular cases of violence to these relations; and its methods are grounded upon the nature of rights, and the logic of procedure, as these have been outlined in the preceding pages.

But the philosophical order is not the historical order. The science of pleading was not a preconception; it is the result of experience and learning, and has been developed in the long course of judicial procedure. The principles of the science have been developed at irregular intervals, and

are historically separated; the philosophy of the science groups and arranges them.

Before proceeding to an explication of the more practical parts of this science, it will be profitable to turn aside and study its historical development; for the Reformed Procedure is so correlated to the older systems, and they to each other, that an understanding of their essential principles and their historical development is requisite to a clear comprehension and intelligent application of the reformed system. However much different systems of procedure may differ in matters of arbitrary and positive provision, the general principles upon which the truth of contested facts is to be investigated must be common to all; and it is true in this, as in other departments of jurisprudence, that in order to know what the law is, we should know what it has been, and what it tends to become.[1]

[1] Holmes Com. Law, 1.

PART II.

HISTORY OF PLEADING.

CHAPTER VII.

PROCEDURE UNDER THE ROMAN CIVIL LAW.

40. The Roman Judiciary.—The subject of procedure among the Romans is curious, rather than useful; yet some knowledge of it will be helpful in understanding the later systems, and some account of it is requisite in an historical treatment of pleading. The procedure in the English ecclesiastical courts, the immediate source of our equity procedure, was modeled upon that of the civil law. Of procedure under the regal government, but little is known. After the expulsion of the Tarquins, 509 B. C., and the establishment of the consular government, the duties of the supreme judicial office devolved upon the Prætor, an elective functionary, chosen annually, and who, in addition to his judicial powers, had an undefined supremacy over law and legislation.[1] The Prætor, who was generally a lawyer, was required, on commencing his term of office, to publish an edict, setting forth in what cases and in what manner he would grant relief to suitors. These annual proclamations were generally

[1] There were two Prætors—the *Prætor Peregrinus*, who administered justice in matters wherein foreigners were concerned, and the *Prætor Urbanus*, who administered justice between citizens only. The office of the latter was regarded as the more important and the more honorable. In dignity, the Prætor was next to the Consul. He held his court in the Forum, wore a white robe bordered with purple, sat in a chair of state, and was attended by lictors. In addition to his judicial powers, and his right to publish edicts, he was invested with the *imperium*, or military command. Anth. Rom. Antiq. 67, 81; Mack. Rom. Law (5th ed.) 338.

a republication of the last preceding edict, with some alterations or amendments providing for cases not theretofore provided for, introducing new forms of action, and regulating the mode of procedure. This incondite edictal law, thus amplified each year, soon became the chief guide in matters of legal right and of legal procedure.[1] In this way the Prætor gradually came to be governed, in a measure, by preestablished general rules; and the administration of justice partook more and more of uniformity and certainty. There began to grow up a body of rules and precedents for the guidance of the judiciary, and, indirectly, for the security of the people; and these, at length, took the form of positive law, and became a nucleus for commentaries and judicial exposition.[2]

41. Bringing the Defendant into Court. — In all systems of procedure, the appearance, actual or constructive, of the defendant in court is necessary to give the court jurisdiction of his person. The mode of procuring his appearance, whether voluntary or compulsory, and the stage of the proceeding at which he is to be brought in, differ in the different systems of procedure. Under the civil law, the complaining party ordered his adversary to go with him before the Prætor. This was called *vocatio in jus*, or summoning into court. If the accused refused to go with his accuser, the latter called a witness to the fact. If he concealed himself to elude the prosecution, he was summoned by the voice of a herald, or by the Prætor's edict; and if he still did not appear, the cause proceeded without his presence.[3]

[1] Anth. Rom. Antiq. 83; Maine An. Law, 59 et seq.

[2] Cush. Rom. Law, 167. The laws of the twelve tables, compiled about 450 B. C., though engraved on brass, and set up in a public place, in order that every one might know his rights, were so brief and concise as to render interpretation necessary. At first, the decemvirs, who had compiled them, were the interpreters; afterward, this function devolved upon the college of pontiffs, until about 300 B. C., when Flavius published a code of forms for legal proceedings, called *actiones leges*. This gave rise to a body of professional expounders of the law, called Jurisconsults. Cush. Rom. Law, 108, 120, 168; Mack. Rom. Law (5th ed.) 427.

[3] Anth. Rom. Antiq. 161; Taylor's

42. Modes of Trial.—In matters of little importance, the Prætor decided without formality, and at any time or place; but in all other cases, proceedings before the Prætor were conducted according to prescribed forms.[1] In the trial of causes, the Prætor announced and applied the law, while the questions of fact were decided either by a single *judex*, or by a number of *judices*. The Roman Prætor performed the office of judge, while the *judex* performed the functions of a jury.[2] This procedure, known as the formulary system, and which bears strict analogy to a trial at common law, before a judge and jury, was the *ordinary* jurisdiction of the Prætor, and required a rigid adherence to prescribed forms.

In the course of time, however, there grew up an *extraordinary* jurisdiction, in the exercise of which the Prætor decided both the law and the facts, without the aid of *judices*, with less regard for prescribed forms, and with more regard for conscience, justice, and right. In this way summary relief was afforded in many cases that were before remediless, threatened wrongful acts were restrained, former positions were restored, fraudulent transactions were set aside, infants were protected, and trusts were enforced. This extraordinary equitable procedure so reacted upon the ordinary legal jurisdiction that, during the reign of the Emperor Diocletian, A. D. 294, it was abolished, and the equitable procedure—which is clearly the prototype of our court of chancery—became the exclusive mode of trial in the Roman empire.[3]

Glossary, "*Vocatio in jus*," note; Mack. Rom. Law (5th ed.) 348.

[1] Anth. Rom. Antiq. 84; Pom. Rem. 12.

[2] The *Judex* was not a magistrate, holding jurisdiction; he was a delegated functionary, invested by the Prætor with judicial power in a particular cause only. Mack. Rom. Law (5th ed.) 339.

[3] Pom. Rem. 12, 14; Cush. Rom. Law, 128. Lord Mackenzie describes the three successive systems of procedure,—the actions of the law, the formulary system, and the system of extraordinary procedure, —and says, that during the prevalence of the formulary system great importance was attached to the distinction between actions *stricti juris* and actions *bonæ fidei*. Under the former, the powers of the judge were limited to the strict letter of the law; while under the latter, more latitude was allowed, and full effect given to considerations of equity. Mack. Rom. Law (5th ed.) 347, 358.

43. Pleadings Under the Roman Law.—The names of the several pleadings under this system of procedure were, the libel, the exception, the replication, the duplication, the triplication, and so on. In the libel, the plaintiff—or *actor*, as the complainant was called—stated the legal nature of his claim, and the relief sought. He was not required to state the facts upon which he based his action, but simply to identify his claim, so as to enable the defendant—or *reus*, as the adversary party was then called—to determine whether he would resist it. All subsequent pleadings were required to allege new matter in avoidance; no denial being required or allowed in any pleading.

If the defendant wished to contest the suit, he appeared in court and stated orally that he denied the truth of the libel. This ceremony, called the *litis contestatio*, put the plaintiff to the proof of his libel. If the defendant desired also to set up new matter as a defense to the plaintiff's claim, he pleaded an exception, containing a brief statement of the legal nature of such defense. The exception was in like manner followed by the replication, and so on, until the pleadings were ended. When the defendant wished to avail himself of a dilatory plea,—one that did not go to the merits,—he pleaded his exception before the *litis contestatio* took place; and if, upon trial of this plea, it was decided against the defendant, the *litis contestatio* then took place, and he was allowed to plead an exception going to the merits.[1]

This system of pleading did not aim at the production of an issue. The object was only to bring before the court the affirmative claims of the parties. When either party could not allege new matter in answer to his adversary's claim, the pleadings terminated; but no pleading was treated as admitted by failure to answer it.[2]

There was no demurrer, but before a pleading could be pleaded, it had to be submitted to the Prætor, who ordered it admitted, rejected, or amended, as the case might require;

[1] Lang. Eq. Pl. 13.

[2] Lang. Eq. Pl. 7; Steph. Pl. 495, note 54.

but, unlike a judgment on demurrer, such order did not terminate the action. If the pleading was rejected, the party might plead another, or go to trial as though he had not offered the defective plea.[1] If the libel was manifestly unjust, or was against one who could not be proceeded against, or was brought at too late a period, or was vitiated by some other objection apparent on its face, the Prætor might, *sua sponte*, refuse to take cognizance of the case.[2]

44. Conduct of the Trial.—As no denial was required in the pleadings, and as nothing was admitted by failure to answer, the parties were required to prove, in turn, their successive affirmative pleas. The plaintiff put in his evidence in support of the claim stated in his libel, and the defendant offered his evidence in contradiction thereof. The defendant then put in his evidence in support of the defense stated in his exception, and the plaintiff offered his evidence in contradiction; and so the trial proceeded, to the end of the pleadings, each party having the burden of proof as to his own pleading. When the evidence was all in, and the advocates had been heard, the judge examined the evidence in the order of its introduction. If he found the libel not proved, judgment was entered against the plaintiff. If he found the libel proved, he proceeded to examine the evidence upon the exception, and so on to the end of the pleadings; judgment being entered against the party who first failed in his proof. If all the pleas were sustained, judgment was entered for the party who filed the last. When the defendant had pleaded a dilatory plea, the trial began with the exception instead of the libel; and if decided against the defendant, the *litis contestatio* took place, and the pleadings and trial as to the merits proceeded as though no dilatory plea had been interposed. The sole purpose of the defendant's pleas being to defeat the libel on grounds independent of its truth, and the object of the plaintiff's subsequent pleas being only to resist such purpose, judgment in the case, no matter upon what plea the decision turned, was always based upon

[1] Lang. Eq. Pl. 6.

[2] Anth. Rom. Antiq. 167.

the libel, and was either that the plaintiff recover, or that the libel be dismissed.[1]

45. Positions and Articles.—About the thirteenth century, an important change was introduced into the civil-law procedure, whereby all the testimony was required to be taken and reduced to writing before the trial, and each party was given the right to examine his adversary. When the pleadings were completed, if either party desired to examine his adversary, he made a written statement, in numbered paragraphs called positions, of such facts in support of his own pleadings as he supposed to be within the knowledge of his adversary. After these positions had been inspected and approved by the judge, the adverse party was required to answer them in writing and under oath. As to all facts admitted by these answers, the party answering was concluded, and the adverse party was relieved from making proof.

Then each party prepared, in numbered paragraphs called articles, a statement of the facts he expected to prove by witnesses. These were likewise answered in writing, and as such answers were evidence against the adverse party, he was allowed to cross-examine the witnesses. In the course of time, the positions and articles were combined in one document, each paragraph being made both a position and an article, and such as were not admitted by the adverse party were afterward proved by witnesses. In some jurisdictions these positions and articles were likewise combined with the pleadings in the cause, so that each pleading contained not only the claim or defense relied upon, but a detailed statement of the evidence by which it was to be proved. This amplification of the pleadings was the uniform practice in the English ecclesiastical courts, whose procedure was modeled upon that of the civil law, and was the immediate source of our equity procedure.[2]

[1] Lang. Eq. Pl. 8, 11, 13.

[2] Lang. Eq. Pl. 14, 21, 23, 24.

CHAPTER VIII.

COMMON-LAW PROCEDURE.

GENERAL VIEW OF THE SYSTEM.

46. Growth and Development.—About the latter part of the thirteenth century, the judges of the common-law courts of England began systematically to prescribe and enforce rules of statement in pleading. Prior thereto, the pleadings had been very imperfectly regulated; duplicity and argumentativeness were common, and the pleadings were not always directed to the development of an issue. But from that time the manner of allegation was methodically and industriously cultivated by the judges; and the wisdom of their suggestions, and the utility of their requirements, were so generally perceived and sanctioned, that, with nothing to commend them but their fitness to promote the judicial inquiry, they were gradually accepted, and finally grew into a connected and scientific system of pleading.

For more than five hundred years this system of procedure, emanating from the wisdom of the common-law judges, was the boast and the pride of the English Bench and Bar. They not only lavished their encomiums upon it, they concentrated their ingenuity, their learning, and their experience, in endeavor to refine and mature it. Their love of subtlety and refinement led to the introduction of much that was formal, technical, and artificial. Numerous statutes were from time to time passed by parliament to remedy these technical inconveniences. By these procedure acts, as they were called, and by the rules of court made under their provisions, the system was somewhat simplified, and to some extent relieved from the perplexity of over-refinement.

The common-law system was based upon sound and enduring principles, and, in its finished form, was a marvel of in-

ventive genius, and a model of logical exactness. It bears such relation to the reformed procedure, that a comprehensive outline of the system—its distinguishing principles and methods, its perfections and its imperfections, its sources and its tendencies—is both helpful and needful in the elucidation of the Reformed Procedure. The purpose of this outline is twofold: it sets forth the common-law procedure as a complete and coherent system, and it shows the origin and the office of many rules that are retained in the reformed system.

47. The Value of Precedents.—The common law of England differs widely, in its administrative principles, from the civil law of Rome. In the former, controlling weight is given to precedents; in the latter, prior decisions have a less fixed and certain operation. Under the common law, there is certainty, with a corresponding stability of rights and obligations; under the civil law, there is a degree of uncertainty, because less respect is paid to precedents.[1] A corresponding difference is found in their modes of procedure. The common-law procedure aims at precision and certainty, and the very highest regard is paid to technical forms, because they are regarded as precedents. Approved forms embody principles, and the certainty of the principle is fixed and assured by adherence to the form which embodies it. Hence, actions are distinctly classified, and every action was required strictly to conform to the established precedents for such action. This adherence to precedents, with its consequent uniformity, certainty, and security, is a distinguishing characteristic of the common-law procedure.

This devotion to form had its evils, as well as its benefits. As forms were the embodiment of principles, and as it was easier to adhere to forms than to dispute about principles and their application, matters of form so grew in importance that principle was sometimes lost sight of. This devotion to form, and the consequent disregard of substance, often perplexed and prolonged litigation, sometimes led to a failure

[1] Steph. Pl. (Tyler's edition) 10–14. The references herein to "Stephen on Pleading" are to the pages in Andrews' edition, unless some other edition is designated in the reference.

of justice, and finally became a just ground of reproach to the system.

48. Development of an Issue.—One object of pleading is to ascertain the question for trial and decision. The common-law procedure ascertains this by requiring the alternate pleadings to be so constructed as to finally present some point distinctly affirmed on one side, and distinctly denied on the other. When the point in controversy has in this way been ascertained, the pleadings are ended, and the parties are, in legal parlance, said to be at issue.

The civil law did not aim at the production of an issue by the pleadings, nor did it require the pleadings to show distinctly the decisive matter in controversy. In that system the object of the pleadings was simply to give notice, to parties and to the court, of the affirmative claims of the parties. In a trial under the civil-law procedure, inasmuch as nothing was admitted by failure to deny, there might be as many stages as there were pleadings in the case, because the affirmative claim set out in each pleading had to be separately tried. But at common law, all the material allegations not denied by the party against whom they are made are taken as admitted, and need not be proved ; there is, therefore, properly but one stage of the trial—the trial of the issue.

This requirement of the common-law procedure, that the pleadings shall produce an issue decisive of the controversy, is broad and comprehensive in its effects, and has led to the establishment of numerous subsidiary rules, which will be considered in a subsequent chapter of this division.

49. Forms of Action.—In the development of its system of procedure, the common law sought to adapt its remedies to the diversified natures of the various injuries cognizable by its courts. Since an actionable injury is but the invasion of a legal right, the plain and natural remedy for a particular injury is either the restoration of the right invaded, or, if restoration be impracticable, an award of its legal equivalent in damages. The common law furnishes these remedies by means of a diversity of actions, each founded upon the nature of the particular right invaded ; and it is strict in the require-

ment that an injury shall be redressed only by its proper form of action.

By " form of action " is meant the peculiar technical mode of framing the pleadings according to the nature of the particular injury to be redressed. It is a peculiar form of expression appropriated by uniform and established practice to a class of actions, and so made a distinguishing characteristic of such class. The policy of this enforced practice of separating actions into classes, by means of forms of action, is, to define, with some certainty, the nature of those injuries for which the law will afford redress; to give the defendant some notice, from the very commencement of the suit, of the nature of the complaint; to preclude the plaintiff from changing entirely the ground at first taken by him; and to enable the court readily to apply to the case, as it progresses, its appropriate rules of pleading, of evidence, and of practice.

This classification of the subjects of litigation, and the allotment to each class of an appropriate formula of complaint, was one of the earliest refinements in forensic science. It was not a mere arbitrary device, it was adopted to insure singleness and certainty in judicial proceedings, and consequent safety to suitors; it was the product of great learning and experience, and had the sanction of long use and acknowledged adaptation for the safe and certain administration of justice. The common-law courts have gone so far in their adherence to established forms of action as to refuse to decide cases brought in forms of action not legally appropriate to them, even when the parties waive the informality, and agree to rest the case upon its merits, and to take no advantage of the defect in form.[1]

50. Legal Fictions.—A legal fiction, as the term is here used, is an assumption made in order to modify the operation of the law without changing its letter; the fact being that the law has been changed, the fiction being that it remains what it was.[2]

The common-law procedure grew up in an age of formalities

[1] Ker v. Osborne, 9 East, 381.

[2] Maine's An. Law, 24, 25.

and ceremonies. In the course of its development, and in the process of adapting its remedies to the new needs of a progressive people, numerous fictions and artificial ceremonies were resorted to, under sanction of the maxim, that *in fictione juris, semper subsistat æquitas.* The nature and operation of these fictions may be illustrated by the fiction of a loss and a finding, in the action of trover; the fiction of a promise, in the common counts; the fiction of a lease and an ouster, in ejectment; and the fiction of arrest and custody of the defendant, whereby the King's Bench greatly extended its jurisdiction.

Fictions in pleading were devised to promote the ends of justice. They were contrived to meet new demands by evading arbitrary forms while apparently observing them. They were intended to advance the law as a remedial agency, and bring it into harmony with the needs of society, without offending that conservative disrelish for change which then prevailed. On one hand they deferred to an habitual reverence for old formalities, and on the other they promoted the rival tendency to modify and improve. Legal fiction was a rude device, but it was a valuable expedient for overcoming the rigidity of arbitrary rules and forms.[1]

[1] Amos. Sci. Law, 55; Maine An. Law, 25; Pom. Rem. 7; 3 Bl. Com. 43; Gould Pl. iii. 18.

CHAPTER IX.

THE GENERAL DIVISIONS OF PLEADING.

I. OF THE EARLIER FORMS.

51. The Original Writ.—Formerly, an action was commenced, in any of the superior courts of common law having general jurisdiction, by original writ. This writ is not a pleading, but it bears such relation to the pleadings in an action, that some description of the writ and of its office is necessary to an intelligent consideration of the pleadings.

The original writ—*breve originale*—is a mandatory letter issued out of the Court of Chancery, in the king's name, and under the great seal, directed to the sheriff of the county wherein the injury is claimed to have been committed, requiring him to command the party complained of to satisfy the claim of the plaintiff, or else to appear in one of the superior courts of common law, on a day named in the writ, and answer the accusation against him; though in some cases the former command is omitted. The writ contains a brief statement of the nature of the complaint, and is issued in order (1) to give the courts of law cognizance of the cause, (2) to notify the defendant of the nature of the complaint made against him, and (3) to compel his appearance before the proper court to make answer to the complaint.[1]

The superior common-law courts of England were, the King's Bench, the Common Pleas, and the Exchequer. Formerly, no action could be maintained in any one of these courts, without the sanction of the king's original writ; the effect of which was, to give cognizance of the cause to that court in which it directed the defendant to appear, and to which court the sheriff was required to make return of the

[1] Steph. Pl. 62–66, and note 2 on page 62.

writ, showing the manner of service thereof.[1] In more modern practice, however, this writ was sometimes dispensed with in personal actions, and a proceeding *by bill* substituted. This is a proceeding founded originally upon a privilege of the plaintiff or defendant because of his official relation to the court, and afterward, by resort to a fiction, extended to other suitors.[2]

The theory of the English law is, that the king is the fountain of justice, and that the courts of law, being only substitutes for the crown in the administration of justice, should take cognizance of only such matters as are expressly referred to them by original writ, issued in the king's name, and under the great seal. But in this country, the courts derive their jurisdiction from the constitution and the laws, and require no original writ to confer it. In England, this writ is now disused in the ordinary actions.

52. Form of Original Writ.—Following is the form of an original

WRIT OF COVENANT.

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 Middlesex, greeting:

Command C. D., late of , gentleman, that justly and without delay he keep with A. B. the covenant made by the said C. D. with the said A. B., according to the force, form and effect of a certain indenture in that behalf made between them, as it is said. And unless he shall so do, and if the said A. B. shall make you secure of prosecuting his claim, then summon, by good summoners, the said C. D., that he be before us, in eight days of Saint Hilary, wheresoever we shall then be in England, to show wherefore he hath not done it; and have you there the names of the summoners, and this writ.

Witness ourself at Westminster, the day of in the year of our reign.[3]

[1] Steph. Pl. 63, 64.
[2] Steph. Pl. 128–131.
[3] Steph. Pl. 78, 79.

53. Process and Appearance.—In early times, the actual appearance of the parties, either in person or by attorney, was requisite. If the defendant did not appear in obedience to the original writ, there issued from the court of common law into which the original writ was returned, judicial writs, called writs of process, to enforce his appearance.[1] These successive writs, issued to compel compliance with the original writ, and founded on that writ, are called *original process*, to distinguish them from *mesne process*, which issues pending the suit, upon some collateral matter—as, to summon juries, witnesses, and the like; and mesne process is again distinguished from *final process*, or process of execution.[2]

54. Pleadings Delivered Orally.—When the appearance of the defendant was procured, in obedience to the original writ, or by means of judicial process, the plaintiff was required to appear also; and both parties being present, in person or by attorney, thereupon followed the allegations of fact, alternately made, whereby the court was informed of the nature of the controversy. These allegations were made *viva voce*, by the parties, or by professional pleaders, called advocates, and in open court in the presence of the judges. These oral allegations, at the first called *loquela*, were afterward denominated the pleadings. It was the duty of the judges to superintend this oral contention, so as to bring the pleaders ultimately to some specific matter affirmed on one side and denied on the other, called the issue. During this oral altercation, an officer of the court made up a minute in writing of the alternate allegations of fact, to and including the issue. This minute of the pleadings, together with a short statement of the nature of the action, and of other incidents and proceedings in the case as it progressed, constituted, when made on the parchment roll, what was called the record. This record, so far as it recited what took place in the progress of the case, was held to import absolute verity, and could not be contradicted.

55. Written Pleadings.—The actual appearance of the parties, and the oral delivery of the pleadings in open court,

[1] Steph. Pl. 97.

[2] 3 Bl. Com. 279.

are practices that have long since disappeared. The plaintiff is considered as already in court, by the bringing of the action. The defendant, when not arrested, appears by making a formal entry of appearance in the proper office ; and in case of arrest, he appears by giving bail to the action.[1] The pleadings are written out by the parties or their attorneys, and delivered to the opposite parties, or filed in the proper office. For about four centuries prior to 1731 A. D., the pleadings and the record were in the Latin language ; since that date, they have both been framed in English.

The record, drawn up from the minutes made contemporaneously with the oral pleadings as they were delivered in open court, was, of course, written in the third person. The written pleadings, when brought into use, pursued, and still pursue, the same style of allegation, and are expressed as if they were extracts from the record ; thus, " A. B. complains," or, " Now comes the said C. D. and says."

With the introduction of written pleadings, the manner of allegation became more orderly and uniform, rules of statement were prescribed and enforced by the courts, method was observed and precedents were followed, until there was developed a connected and orderly system, regulating not only the order but the individual construction of the successive pleadings. The orderly pleadings of fact in use at common law are, declaration, plea, replication, rejoinder, surrejoinder, rebutter, and surrebutter. After the surrebutter, the pleadings have no distinct names ; and it is doubtful if in any case the pleadings have been carried beyond those named.

II. OF THE DECLARATION.

56. Its Parts and Requisites.—The pleadings begin with the declaration, which is a written statement on the part of the plaintiff, in methodical and legal form, of the facts which constitute his right of action. In real actions it was formerly called the *count*, but now, in both real and personal actions, it is commonly called the declaration ; and

[1] Steph. Pl. 104 ; 3 Bl. Com. 287, 290.

when the declaration embraces two or more causes of action, or when it contains several statements of one and the same right of action, each several statement is called a count, and all of the counts, taken collectively, constitute the declaration.

The general requisites of a declaration are; (1) that it correspond with the preceding writ of process, (2) that it contain a statement of the facts necessary in law to sustain the action, and (3) that these be stated with certainty and truth.[1]

The particular requisites of a declaration are these six: (1) the title of the court and the term thereof; (2) the venue, which is a statement of the county in which the facts occurred, and wherein the cause is to be tried; (3) the commencement, stating (*a*) the names of the parties to the action, (*b*) how the defendant has been brought into court, and (*c*) the form of the action; (4) the body, or a statement of the right of action; (5) the conclusion or *ad damnum*—"to the damage of the plaintiff," etc.; (6) the profert.[2]

More than one count may be inserted in the same declaration; and it was formerly the practice, in some forms of action, to insert two or more counts upon one set of facts, making several *causes of action* where there was only one *right of action*. This was done to avoid the consequences of a variance between the declaration and the evidence; for if the evidence sustained any one of the counts, the plaintiff would recover. Where several counts are inserted in one declaration, each count must be sufficient in itself; that is, it must contain a complete cause of action. Counts sounding in contract and counts sounding in tort cannot be joined in the same declaration.[3]

The commencement of the declaration should contain a recital of the original writ; and the right of action stated in the declaration should conform to and agree with the complaint made in the writ. The original writ gives the court

[1] 1 Ch. Pl. 244; Steph. Pl. 416; Gould Pl. iv. 51.

[2] 1 Ch. Pl. 240–420.

[3] Nimocks v. Inks, 17 Ohio, 596.

cognizance of the action, and is the foundation of all the subsequent proceedings therein, and departure from it in the declaration is said to "abate the writ," and leave the court without authority to proceed in the action.[1]

The declaration should, in its conclusion, lay damages, and allege production of suit. In personal and mixed actions, it must be alleged that the injury complained of is to the damage of plaintiff, and must specify the amount of the damage; and in all actions, the plaintiff must allege production of suit—"and thereupon he brings his suit." This formula grew out of the requirement in ancient times that the plaintiff should, on making his complaint, bring with him a number of persons, called his *suit* or *secta*, to confirm his statements. The formula is all that remains of this ancient practice.

57. Form of Declaration.—Following is the form of a

DECLARATION IN COVENANT.

In the King's bench, Term, in the year of the reign of King George the Fourth.

Middlesex, to wit, A. B., the plaintiff, by E. F., his attorney, complains of C. D., the defendant, who has been summoned to answer the said plaintiff, in an action of covenant: For that whereas heretofore, to wit, on the day of , in the year of our Lord , by a certain indenture then and there made between the said plaintiff of the one part, and the said defendant of the other part (one part of which said indenture, sealed with the seal of said defendant, the said plaintiff now brings here into court, the date whereof is the day and year aforesaid), the said plaintiff, for the consideration therein mentioned, did demise, lease, and to farm let, unto the said defendant, a certain messuage or tenement, and other premises in the said indenture particularly specified, to hold the same, with the appurtenances, to the said defendant, his executors, administrators and assigns, from the twenty-fifth day of March next ensuing the date of said

[1] Gould Pl. iv. 51.

indenture, for and during and unto the full end and term of seven years from thence next ensuing, and fully to be complete and ended at a certain rent payable by the said defendant to the said plaintiff, as in the said indenture is mentioned. And the said defendant, for himself, his executors, administrators and assigns, did thereby covenant, promise and agree, to and with the said plaintiff, his heirs and assigns, amongst other things, that he, the said defendant, his executors, administrators and assigns, should and would, at all times during the continuance of the said demise, at his and their own costs and charges, support, uphold, maintain and keep the said messuage or tenement and premises in good and tenantable repair, order and condition; and the same messuage or tenement and premises, and every part thereof, should and would leave in such good repair, order and condition, at the end, or other sooner determination of the said term, as by the said indenture, reference being thereunto had, will, among other things, fully appear. By virtue of which said indenture, the said defendant afterward, to wit, on the twenty-fifth day of March, in the year aforesaid, entered into the said premises, with the appurtenances, and became and was possessed thereof, and so continued until the end of the said term. And although the said plaintiff hath always, from the time of the making of the said indenture, hitherto done, performed and fulfilled, all things in the said indenture contained on his part to be performed and fulfilled, yet the said plaintiff saith that the said defendant did not, during the continuance of the said demise, support, uphold, maintain and keep the said messuage or tenement and premises in good and tenantable repair, order and condition, and leave the same in such repair, order and condition, at the end of the term; but for a long time, to wit, for the last three years of the said term, did permit all the windows of the said messuage or tenement to be, and the same during all that time were, in every part thereof, ruinous, in decay, and out of repair, for want of necessary reparation and amendment. And the said defendant left the same, being so ruinous, in decay and out of repair as aforesaid, at the end of the said term, contrary to the form and effect of the said covenant so

made as aforesaid. And so the said plaintiff saith that the said defendant, although often requested, hath not kept the said covenant so by him made as aforesaid, but hath broken the same, and to keep the same with the said plaintiff hath hitherto wholly refused, and still refuses, to the damage of the said plaintiff of pounds; and therefore he brings his suit, etc.

III. OF PLEAS—DILATORY.

58. Dilatory Pleas Defined and Classified.—The first pleading on the part of the defendant, and which opposes matter of fact or denial to the declaration, is called a plea. Pleas are divided into pleas dilatory, and pleas in bar; and the latter—sometimes called "peremptory pleas," and sometimes "pleas to the action"—are again divided into pleas by way of traverse, and pleas in confession and avoidance.

Dilatory pleas are such as tend merely to delay the action by questioning, not the right of action, but the propriety of the suit as brought. They delay, and sometimes defeat, the particular suit, without affecting the merits of the plaintiff's demand. Dilatory pleas are divided into (1) pleas to the jurisdiction, (2) pleas to the disability of the person, and (3) pleas in abatement.

A plea to the jurisdiction is one that questions the jurisdiction of the court to entertain the action. Such plea alleges facts to show want of jurisdiction, and then prays the judgment of the court whether it will take further cognizance of the suit.

A plea to the disability of the person is one that alleges some legal disability of the plaintiff to sue, or of the defendant to be sued, and prays judgment whether the defendant ought to be compelled to answer.

A plea in abatement is one that shows some ground for abating either the original writ, or the declaration. Pleas of this class are founded upon some legal defect in the writ or declaration; as, that the defendant is misnamed therein, or that the declaration does not pursue the writ, or that there is repugnance between them, or that there is a prior action pending between the same parties, for the same cause. An

insufficiency apparent upon the face of the declaration, and without reference to the writ, or other extrinsic matter, is not ground for abatement, but must be taken advantage of by demurrer. A plea in abatement prays judgment of the writ, or the declaration, and that the same may be quashed.

59. Dilatory Pleas Odious in Law.—Formerly, dilatory pleas were often resorted to merely for delay, and without any foundation in truth; and for this reason, and because their object always is to suspend or defeat a suit upon grounds other than its merits, they are regarded unfavorably in law, and the greatest precision is required in their construction and use. They must be pleaded at a preliminary stage of the action; that is, before a plea in bar. They must be pleaded in due order; that is, first, to the jurisdiction; secondly, to the disability; thirdly, to the declaration; and fourthly, to the writ; and all pleas in abatement must give the plaintiff a better writ or declaration. This last requirement is to enable the plaintiff to cure the defect relied upon, and to frame a new writ or declaration that will not be obnoxious to the same objection. For example, if a misnomer is the ground of a plea in abatement, the plea must state the true name.[1]

60. Judgments on Dilatory Pleas.—If a dilatory plea be sustained, either upon an issue in fact or upon an issue in law, the judgment is, that the cause be dismissed from that jurisdiction, or that the writ or declaration be quashed, or that the suit be stayed until the disability be removed. If an issue in law upon such plea be decided for the plaintiff, the judgment is, that the defendant answer over; that is, that he plead again, either in bar, or by a dilatory plea subsequent in order to the one upon which the judgment is entered. This is called a judgment of *respondeat ouster*. If an issue in fact upon such plea be decided for the plaintiff, the judgment is, that he recover. Such judgment is called a judgment *quod recuperet*, and may be either final or interlocutory. If the action be one for damages only, and the issue be in law, or in fact and not tried by jury, the judgment is only that the

[1] Steph. Pl. 420, 424.

plaintiff ought to recover. Upon this *interlocutory* judgment a writ of inquiry issues to the sheriff, commanding him to summon a jury and assess the amount of damages sustained. Upon return of this inquisition, the plaintiff is entitled to a *final* judgment for the amount of damages so assessed. But if such issue in fact be, in the first instance, tried by a jury, the damages are then assessed, and final judgment entered therefor. If the action be not for damages only, a judgment for the plaintiff is, in general, final in the first instance.

IV. OF PLEAS—BY WAY OF TRAVERSE.

61. Pleas in Bar Defined and Classified.—It has been shown that dilatory pleas are such as tend merely to divert the action to another jurisdiction, or to suspend or delay further proceedings therein, without at all impugning the merits of the plaintiff's demand. A plea in bar, on the other hand, goes to the merits of the plaintiff's demand, and shows some ground for barring or defeating the action upon its merits. A dilatory plea makes a merely formal objection to the proceeding; a plea in bar makes a substantial and conclusive answer to the plaintiff's demand. The former questions only the propriety of the suit, while the latter questions the right of action.

A plea in bar may oppose matters of fact or of denial to the right of action stated in the declaration, in either of two ways; (1) it may deny the truth of all or any of the material facts alleged in the declaration, or (2) it may admit the facts so alleged, and state other facts to show that, because of such new facts, those alleged by the plaintiff do not give him a right of action. In the former case, the defendant is said to traverse the matter of the declaration; in the latter, to confess and avoid it.

Pleas in bar are therefore divided into pleas *by way of traverse*, and pleas *by way of confession and avoidance*.

62. Pleas by Way of Traverse.—Traverse means, literally, anything that hinders, thwarts, or obstructs. In pleading, it is the denial of some matter of fact alleged on the other side, and may be interposed to any pleading of fact.

A plea by way of traverse is said to tender issue upon the matters of fact so traversed, and should conclude by a formal offer to refer the issue thus tendered to some authorized mode of trial.[1] If the offer be to refer the issue to the decision of a jury, the usual formula is, "and of this he puts himself upon the country." This is known as the "conclusion to the country," as distinguished from the formal conclusion of a plea containing new matter, which is, "and this the said defendant is ready to verify," and is known as a "verification."

When a pleading of the plaintiff concludes to the country, it does so in these words: "And this the said A. B. prays may be inquired of by the country." And when either party concludes to the country, the issue, if well tendered both in point of substance and in point of form, must be accepted by the other party. This is done by adding what is called the *similiter*, or joinder in issue, which is in these words: "And the said doth the like."[2] A plea of a record concludes, of course, with a verification—"And this the said defendant is ready to verify by the said record;" and a plea of *nul tiel record* also concludes with a verification, and the other party then closes the issue by reaffirming the existence of the record, and praying that it may be inspected by the court.[3] The requirement that an issue well tendered must be joined, is peremptory; because, to allow a party to make any other reply to a mere denial of what he had before alleged, would be to authorize an abandonment of the ground at first taken by him.

[1] The several modes of trial provided by the common law in civil cases are seven: (1) by record; (2) by inspection, or examination; (3) by certificate; (4) by witnesses (without jury); (5) by wager of battle; (6) by wager of law; and (7) by jury. 3 Bl. Com. 330. Trial by record is used in only one instance, and that is where a matter of record, as a judgment or the like, is pleaded, and the opposite party pleads *nul tiel record*—that there is no such record. This issue is triable only by inspection of the record by the court. The other modes of trial by common law, except trial by jury, are rarely, if ever, used in the United States. Substantially all issues in fact, except that of *nul tiel record*, are therefore triable by jury. Gould Pl. vi. 16, 17, 18; Steph. Pl. 189.

[2] Steph. Pl. 150, 166, 291; Gould Pl. vi. 20.

[3] Steph. Pl. 288; Gould Pl. vi. 17.

Traverses may be divided, according to the form and scope of the denial, into four kinds; the general traverse, the common traverse, the special traverse, and the traverse *de injuria.*

63. The General Traverse.—A general traverse is one that denies all that is alleged in the pleading to which it is addressed. As a plea, it is a compendious denial of the whole of the declaration. In most, if not all, of the ordinary actions, there is a fixed and appropriate form of general traverse of the declaration, called the *general issue* in that action. These formal traverses are called general issues, because they import an absolute denial of what is alleged in the declaration, and amount at once to an issue, and because the issue so made is general and comprehensive, involving as it does the whole declaration. This form of general traverse, called the general issue, occurs only as a *plea*—the second in the series of pleadings. It is a general rule, that when a plea amounts to the general issue, it should be so pleaded; though special pleas, amounting to the general issue, are, it seems, sometimes allowable, in the discretion of the court.[1]

The general issue is pleaded by a short and simple formula, yet it is tantamount to a specific and literal negation of all the material allegations of the declaration.

The scope of the general issue in the different actions—the matters put in issue by it, and the evidence admissible under it—is one of the most important topics of the common-law system of pleading. The names, and the general scope and operation of the general issues, will be hereafter stated in connection with the description of the different forms of action wherein such traverse may be pleaded.

64. The Common Traverse.—The common traverse is a direct contradiction, *modo et forma*, of some particular matter alleged by the opposite party. It is usually negative in form, but when it traverses a negative allegation, it should be affirmative in form, otherwise it would not make an issue.[2] It always concludes to the country. For ex-

[1] Steph. Pl. 407; Gould Pl. vi. 85–87.

[2] Post, 360.

ample, if a lessor sue his lessee for breach of covenant to repair, alleging in the declaration the leasing by indenture, the covenant of the defendant to maintain and repair, his enjoyment of the premises for the term, and that he left the same "ruinous, in decay, and out of repair"—as in the form of declaration in section 57, ante, the defendant may, by common traverse, deny the single allegation that the premises were out of repair. His plea would be in this negative form: "And the said defendant says, that said premises were not, in any part thereof, 'ruinous, in decay, or out of repair,' in manner and form as the said plaintiff hath complained. And of this he puts himself upon the country." A plea of the statute of limitations is negative in form; as, "that the defendant did not, at any time within six years next before the commencement of this action, undertake or promise, in manner and form as the plaintiff hath above complained." To such plea, the replication of the plaintiff, using the common traverse, would be in this affirmative form: "And the said plaintiff says, that the said defendant did, within six years next before the commencement of this suit, undertake in manner and form as he the said plaintiff hath above complained. And this he prays may be inquired of by the country."[1] In each of these instances the traverse is in terms of the allegation traversed, and by way of direct contradiction; though in one case it is negative, and in the other affirmative in form.

65. **The Special Traverse.**—The two kinds of traverse that have been described consist exclusively of denials; the general traverse denying all, and the common traverse denying, generally, some particular part only, of the matters last alleged on the opposite side. By neither of these forms of traverse can any new matter be alleged. But it is sometimes necessary that the denial of an allegation be explained or qualified, instead of being put in the direct and absolute form of either a general or a common traverse; or that the denial be accompanied by affirmative matter, in order that the materiality of the denial shall appear. For example,

[1] Steph. Pl. 229.

suppose a declaration charge false imprisonment on the *first* of May, and the fact be that the defendant, as sheriff, arrested the plaintiff under a writ issued on the *tenth* of May. He can not, by a general traverse, deny all that is alleged in the declaration, because, without the affirmative fact of the writ, the declaration is all true except the date; and, so far as would then appear, the date is not material, for the act charged is as wrongful on one day as on another. For the same reason, he can not deny, by a common traverse, that he imprisoned him on the day charged. And an affirmative plea of his office and his writ would not justify the arrest charged, because the writ did not exist at the date of the alleged arrest. It is clear that he must show, affirmatively, his office, his writ, the arrest under it, and that such arrest is the same one charged; and he must then deny that he arrested the plaintiff on the *first* of May as charged. These affirmative facts, while they deny nothing, are inconsistent with the declaration; and they show that the *time* of the arrest, although generally immaterial, is, in this special case, material. The time alleged being thus made material, the denial becomes material. If, in the case supposed, the declaration charged the imprisonment to have been in a certain county, and the defendant was sheriff of another county, wherein he made the arrest, he can not, by a general traverse, deny the whole declaration; he can not, by a common traverse, deny the allegation as to place, for the place, as well as the time, is immaterial in the declaration; and he can not plead his authority as a justification, for the arrest will not appear to be the same. He must allege his office, his writ, the arrest by virtue thereof, and that the arrest alleged is the same as the one complained of; and he must deny the arrest in the county named in the declaration.[1] Such defense, when pleaded, is called a *special traverse*. It is a pleading of peculiar character, in that it both discloses new matter, and denies matter previously alleged.

66. Special Traverse—Defined and Analyzed.—We may therefore define a special traverse to be, an affirmative state-

[1] Evans Pl. 24. 25; Steph. Pl. 243–260.

ment of facts inconsistent with those alleged by the opposite party, followed by a denial of allegations rendered material by such affirmative statement. The affirmative part of a special traverse is called the *inducement*, and the negative part is called the *absque hoc*—these being the words by which this technical form of negation was formerly introduced. The inducement, while it is always repugnant to, and inconsistent with, all or some part of the adverse pleading, does not properly make an issue, because it alleges new matter, and because both allegations are in the affirmative. The *absque hoc*, being a denial of material allegations, does tender an issue.

Considering only the inducement, such pleading should conclude with a verification; but considering only the denial, it should conclude to the country. We accordingly find a diversity in the authorities, as to how a special traverse should conclude. Upon principle, it would seem that where the special traverse embraces the whole substance of what is alleged on the other side, it should conclude to the country; but if it embrace only a part of what is alleged on the other side, it should conclude with an offer to verify, thus leaving the pleadings open so that the adverse party may plead to the matters stated in the inducement.[1]

67. Special Traverse—Its Object and its Form.—The object of the special traverse is twofold: (1) it enables the pleader to avail himself of affirmative defensive matter which, if taken alone, would be only an indirect and argumentative denial, and hence not pleadable;[2] and (2) it enables him to traverse an allegation that would appear immaterial, and hence not traversable, if denied by any other form of traverse.[3] The inducement contains matter that is in substance an answer, but it is only an indirect denial; the *absque hoc* is added to put the denial in direct form.

The form of a denial in a special traverse is anomalous.

[1] Gould Pl. vii. 14–24. By the Pleading Rules of Hil. T. 4 Will. IV. all special traverses are to conclude to the country; but this shall not preclude the opposite party from pleading to the inducement. 1 Chit. Pl. 741.

[2] Steph. Pl. 253.

[3] Evans Pl. 24.

After the characteristic words, "*absque hoc*," the matter intended to be denied is stated affirmatively. For example, if a plaintiff show title in himself by alleging "that A. B. devised the land to him," and then died seized in fee; the defendant may plead that A. B. died intestate, seized in fee, leaving the defendant his sole heir at law, to whom the land descended: *Without this*, "that A. B. devised the land to the plaintiff." Such plea would be a special traverse; the allegation of A. B.'s intestacy is the inducement, and the part beginning with the phrase, "without this," is the denial of the alleged devise; and is technically termed the *absque hoc*. How this phraseology came to import a denial, is neither easy to learn, nor important to know. In some instances, however, the denial is introduced by other words of equivalent import. "*Et non*" has been held sufficient.

This form of traverse is a relic of the subtle genius of the ancient pleaders, and the rules and distinctions connected with its use are supposed to be among the most intricate in the whole science. It was formerly of frequent occurrence, but is said to have fallen into comparative disuse.[1] There are some defenses, however, that can not be made available without combining both denials and new matter in one defense; and for this reason, a defense similar to the special traverse is allowable under the Reformed Procedure.[2]

68. The Traverse de Injuria.—There is yet another kind of traverse, called the traverse *de injuria sua propria absque tali causa;* or, as it is compendiously called, the "traverse *de injuria*." It occurs only in the replication, and can be used only in certain actions, and when the plea contains matter of excuse. It does not, like the special traverse, follow the words of the allegations traversed, but, like the general issue in its denial of the allegations of the declaration, this traverse denies the whole matter of the plea, by a general and comprehensive formula, devised for the purpose of abridging the replication. The import of this form

[1] Steph. Pl. 251–261; Gould Pl. vii. 8; Evans Pl. 24, 33.

[2] Post, 245.

of traverse is, to insist that the defendant committed the act complained of, under circumstances altogether different from those insisted on by the plea. For example, if to an action of trespass for assault and battery, the defendant pleads *son assault demesne*,—that the plaintiff made the first assault, —the plaintiff, instead of traversing specially the several allegations in the plea, may deny the whole, by replication *de injuria*. The form of such traverse would be " that the said defendant, at the said time when, etc., of his own wrong, and without the cause by him in his said plea alleged, committed the said trespass in the introductory part of that plea mentioned, in manner and form as the said plaintiff hath in his said declaration complained ; and this he prays may be inquired of by the country." It will be seen that this form of traverse differs essentially from the special traverse. The inducement, *de injuria*, etc., alleges no new matter, but only reaffirms, in general terms, the wrong complained of in the declaration ; and the traverse, *absque tali causa*, is an abridged denial of the special justification. The replication *de injuria* was formerly limited to the actions of trespass and case, but it has been permitted in replevin, in debt, and in assumpsit.

This traverse always concludes to the country. This is so for two reasons : (1) since it contains no new matter to be answered, there is no reason for longer keeping the pleadings open ; and (2) since it traverses the whole of the plea, it can not be immaterial, and, if not faulty in form, must be accepted by the defendant. This form of denial is not only restricted to the denial of what is pleaded as an excuse ; it is improper if the plea contain matter of record, of title, or of authority derived from the plaintiff. The reasons are : (1) *de injuria* concludes to the country, and a jury is not the proper tribunal to pass upon a record ; (2) where title is involved, the traverse should be more direct, and the issue less complicated ; and (3) where authority from the plaintiff is pleaded, he knows whether it is true, and should either admit it, or deny it specifically.[1]

[1] Steph. Pl. 242 ; Gould Pl. vii. 9, 17, 27 ; Ames' Cases on Pl. 143.

V. OF PLEAS—IN CONFESSION AND AVOIDANCE.

69. General Nature of Pleas in Avoidance.—Having described the several kinds of pleas in bar by way of traverse, it remains to explain and classify pleas in bar by way of confession and avoidance. These are such as admit the facts alleged in the declaration, and avoid their legal effect by alleging other facts which show that the plaintiff either never had a right of action, or that his right is barred by some supervenient fact. Pleas by way of confession and avoidance do not traverse the facts stated in the declaration, and therefore do not tender issue, and do not conclude to the country. The formal conclusion of such pleas is called a verification—"and this the said defendant is ready to verify." It is a general rule in common-law pleading, that any pleading merely introducing new matter should conclude with a verification, and thus leave the pleadings open, so that the other party may either deny or avoid such new matter.

70. Pleas in Excuse, and in Discharge.—Pleas by way of confession and avoidance are usually divided into pleas in excuse, and pleas in discharge. A plea of the former class shows some justification or excuse of the matters alleged in the declaration. Such plea shows, in effect, that the plaintiff never had a right of action by virtue of the facts by him alleged. Of this class are, the plea of *son assault demesne*, in trespass for assault and battery; imprisonment under a warrant; incapacity to contract; duress, and the like.

A plea in discharge shows some release or discharge of the duty stated in the declaration. The effect of such plea is, to show that although the plaintiff once had the claim stated by him, the defendant is freed from it by matter subsequent. Of this class are, pleas of payment, of release, of accord and satisfaction, the statute of limitations, and discharge in bankruptcy.[1]

71. Plea Must Give Color.—Every pleading by way of confession and avoidance must *give color;* that is, it must

[1] Steph. Pl. 265; 1 Chit. Pl. 526.

admit an apparent right in the opposite party, and rely on new matter to defeat such apparent right. A plea by way of confession and avoidance must, expressly or impliedly, concede that the plaintiff has, *prima facie*, a right of action.[1] This is a logical requisite to justify the statement of new matter; for otherwise, the new matter would go only in denial, and the plea would be bad, as amounting only to a traverse. For example, in an action for breach of covenant, if the defendant pleads a release, he admits the execution and the breach of the covenant, and so gives color to the declaration; and if the plaintiff replies that the release was obtained by duress, he impliedly admits the execution of the release, and thus gives color to the plea. But if the plaintiff reply that he executed the release to a person other than the defendant, his replication would not give color, and therefore would not make place for his statement of new matter. The proper replication in such case would be a traverse, denying that the release pleaded is the plaintiff's deed; and proof of the release to another, which is an evidential fact, would sustain the denial.

72. Form of Plea in Avoidance.—Following is a form of plea in bar by way of confession and avoidance, and *in discharge* of the right of action stated in the declaration in section 57, ante.

C. D. ats. A. B. } And the said C. D., by G. H., his attorney, comes and defends the wrong and injury, when and where it shall behoove him, and the damages, and whatsoever else he ought to defend, and says, that after the said breach of covenant, and before the commencement of this suit, to wit, on the day of , in the year , the said A. B., by his certain deed of release, sealed with his seal, and now shown to the court here, did remise, release, and forever quitclaim to the said C. D., his heirs, executors and administrators, all damages, cause and causes of action, breaches of covenant, debts, and demands whatsoever, which had then accrued to the said A. B., or which the said A. B. then had against the said C. D., as by the said deed of release, refer-

[1] 1 Chit. Pl. 527; Steph. Pl. 266; Bliss Pl. 340; Post, 240.

ence being thereto had, will fully appear. And this the said C. D. is ready to verify.

73. Pleas Puis Darrein Continuance.—Under the old practice, the law allowed the proceedings in a case to be adjourned over from one term to another, or from one day to another in the same term. Such adjournment, when allowed, was entered upon the record, and was called a continuance.[1] It sometimes happened that after a plea had been pleaded, and during a continuance, some new matter of defense arose. This new defense, which the defendant had not before had opportunity to plead, he was allowed, upon the day fixed by the continuance for his reappearance, to plead as a matter that had happened after the last continuance.

A plea *puis darrein* continuance is not a departure from the former plea, but is a waiver of it, and is always pleaded by way of substitution for it. Such plea may be in abatement or in bar, and is followed by replication and other pleadings, until issue is attained. Great certainty is required in pleas of this kind, and they must be verified on oath before they are allowed.[2]

74. Pleas in Estoppel.—All pleas in bar that advance new matter are called *special pleas* in bar, to distinguish them from pleas that do not advance new matter, but simply deny that previously alleged on the other side. Pleas by way of confession and avoidance, whether in excuse or in discharge, and pleas *puis darrein* continuance are therefore special pleas in bar. There is another kind of plea, called *plea in estoppel*, which is neither by way of traverse, nor by way of confession and avoidance. Estoppel arises from matter of record, from deed, or from matter *in pais;* and a plea of this kind, without denying or admitting the matters adversely alleged, relies merely on the estoppel, to preclude the adverse party

[1] If an interval took place without such adjournment duly obtained and entered, such hiatus in the progress of the suit was called a *discontinuance;* and the cause and the parties were considered as out of court by the interruption, and the parties could not thereafter proceed in the action. 3 Bl. Com. 316; Steph. Pl. (Tyler's ed.) 60.

[2] Steph. Pl. 156; 1 Chit. Pl. 658.

from availing himself of his averments inconsistent therewith. Such plea simply alleges the inconsistent record, deed, or act, to which the plaintiff was party or privy, and prays judgment if he shall be admitted to aver contrary thereto.[1]

A plea in estoppel, like one in confession and avoidance, always advances new matter in avoidance, and is, therefore, a special plea in bar, as distinguished from pleas by way of traverse; but it differs from the other pleas in bar, in that it neither denies nor confesses the plaintiff's allegations.

75. Must Answer the Whole Declaration.—All pleas by way of confession and avoidance must answer the whole declaration; that is, they must *confess* the whole declaration, without omission, condition, or qualification, and then must as fully *avoid* it. For example, if in an action for slander, a special plea alleges that A. B. spoke the words, in the hearing of defendant, and that on the occasion in question the defendant simply said that he had heard A. B. say, of and concerning the plaintiff, the words charged, such plea is bad because it does not admit the speaking of the words in the unqualified sense charged in the declaration. Such plea does not give color to the declaration. Again, if the plea should allege the truth of the words, and not confess the speaking of them, a material part of the declaration would remain unanswered. The truth of the words would not be material, unless the defendant spoke them. Under this rule, a special plea that, instead of confessing the contract as stated in the declaration, should assert qualifications and conditions therein, would be bad as a special plea, for it would, in effect, controvert the plantiff's allegations, and that should be done by a traverse.[2]

VI. OF PLEADINGS SUBSEQUENT TO THE PLEA.

76. The Replication.—When the plea traverses the declaration, and properly concludes to the country, the plaintiff must, in general, join issue by adding the *similiter*. But when the plea introduces new matter, and therefore con-

[1] Gould Pl. i. 18; ii. 38, 42; Steph. Pl. 280.

[2] Ames' Cases on Pl. 69; Davis v. Mathews, 2 Ohio, 257.

cludes with a verification, the plaintiff may reply thereto. His replication, as such reply is called, may allege matter in estoppel, may traverse the plea, may confess and avoid it, or may new assign the cause of action. The traverse, the estoppel, and the confession and avoidance have been fully explained in what has been said of pleas ; and the traverse *de injuria*, which is used only in the replication, has been fully explained. It remains only to explain the kind of replication called a new, or novel, assignment.

Declarations are conceived in very general terms, and it sometimes happens that the defendant mistakes the plaintiff's claim, and applies his plea to a matter different from that which the plaintiff had in view. For example, in trespass for assault and battery, suppose the fact to be that the defendant had twice assaulted the plaintiff, and that one of these assaults was justifiable, and the other, the one in fact sued for, was without legal excuse ; and suppose the defendant to justify, in a plea of *son assault demesne*. The plaintiff can not safely traverse this plea, by replication *de injuria*, because, the defendant having already applied his plea to the justifiable assault, a denial must necessarily refer to the same matter, and would therefore be an admission that the defendant is right as to the particular assault complained of. In such case, the plaintiff may, to remove the misconception of the defendant, file a replication describing more particularly the assault which he had before described too generally, and showing that he brought his action for an assault different from that referred to by the defendant. Such correction of the generality of the declaration is called a new, or novel, assignment.

A new assignment is in the nature of a new declaration, and is to be followed by plea, and not by rejoinder. Of course, a new assignment may generally be guarded against by anticipation ; as in the case supposed, the declaration might charge both assaults, in separate counts, and so compel the defendant to respond to both in his plea.[1]

77. Form of Replication.—Following is a form of repli-

[1] Steph. Pl. 281 ; 1 Chit. Pl. 578.

cation by way of confession and avoidance, in reply to the plea in section 72.

A. B. v. C. D. } And the said plaintiff says, that at the time of the making of the said supposed deed of release, he was unlawfully imprisoned and detained in prison by the said defendant, until, by force and duress of that imprisonment, he, the said plaintiff, made the supposed deed of release, as in the said plea mentioned. And this the said plaintiff is ready to vertify.

78. The Rejoinder and Subsequent Pleadings.—A rejoinder is the defendant's answer to the replication. It must support, and not depart from, the plea, and is governed, in general, by the same rules that govern pleas.

Surrejoinders, rebutters, and surrebutters seldom occur in pleading; and it will be sufficient to say of them, that they are, in general, governed by the rules which govern the precedent pleadings of the party using them.[1]

VII. OF DEMURRERS.

79. Nature and Office of Demurrer.—Instead of traversing, or confessing and avoiding, the matter of the declaration, the defendant may, by demurrer, question its sufficiency in law to entitle the plaintiff to relief. Demurrer was not known to the civil-law procedure, but the court exercised a supervision over the pleadings as they were presented, and no pleading could be received or filed without the sanction and direction of the court.[2] But at common law the pleadings are filed or served without the knowledge of the court, and if the adversary party desires to have the sufficiency of a pleading determined, he must bring it to the attention of the court by demurrer.

The philosophy of the demurrer has heretofore been explained,[3] but it may here be added, that the body of the declaration must state all that is essential to the plaintiff's recovery; for he cannot *prove* a material fact not so *alleged*,

[1] 1 Chit. Pl. 652; Steph. Pl. 397.
[2] Ante, 43.
[3] Ante, 35.

and he can recover only *secundum allegata et probata.* Therefore, if his recovery is limited by his proofs, and his proofs restricted to his allegations, it follows, that if his allegations are wanting in any matter essential for recovery, he can not recover, though all he has alleged be true. For these reasons, the defendant may, by demurrer, submit the case upon the facts in the declaration, admitted thereby to be true.

The law requires every pleading to be sufficient in substance, and to be expressed according to the forms of law; therefore, a demurrer may be for deficiency in substance or in form, and it may be addressed to any pleading in a cause.

80. Joinder in Demurrer.—There can not be a demurrer to a demurrer; but the party whose pleading is opposed by a demurrer must formally accept the issue in law which it tenders. This is done by a formal reaffirmance of the legal sufficiency of the pleading demurred to, called a *joinder in demurrer.* There is this difference between joinder in issue, and joinder in demurrer; a party is required to accept an issue in fact, only when it is well tendered both in point of substance and in point of form;[1] while an issue in law must be accepted, whether well or ill tendered—that is, whether the demurrer be in proper form or not; an informal demurrer being regarded as sufficient to bring the record before the court for inspection and adjudication.[2] Failure to join in demurrer works a discontinuance of the action or the defense, as the case may be.[3]

81. Form and Substance Distinguished.—All matters alleged that are essential to the right or the defense asserted are matters of *substance;* and all requisite allegations not essential to the right or the defense are matters of *form.* In other words, if, without reference to the manner of pleading it, the matter pleaded be in itself insufficient, the defect is in substance; but if matter alleged be not stated in the manner, or with the fullness, required by the rules of pleading, the defect is in form. Failure to allege conversion, in an action

[1] Ante, 62; Steph. Pl. 292.
[2] Steph. Pl. 293.
[3] Gould Pl. ix. 33.

of trover; omission of malice, in an action for malicious prosecution; and of consideration, in an action of assumpsit, would be defects in substance. Duplicity, argumentativeness, and a special plea equivalent to the general issue, are defects in form.[1]

82. General and Special Demurrers.—Demurrers are of two kinds, *general* and *special*. A general demurrer questions the sufficiency of the pleading to which it is addressed, in general terms, without assigning any particular ground of objection; a special demurrer adds to this a specification of particular defects in such pleading. If the defect aimed at be one of substance, a general demurrer is sufficient; but where the fault is in matter of form, a special demurrer is necessary. Upon general demurrer, no mere matter of form can be objected to; but upon special demurrer, advantage may be taken not only of the particular faults specified, but of faults of substance as well. The reason is, that a special demurrer, both in form and in effect, is a general demurrer and something more—it objects in general terms, and then specifies particular faults.

A special demurrer must point out with particularity the ground of objection. For example, a demurrer for duplicity, asserting merely that the pleading is double and informal, would be treated only as a general demurrer. A demurrer for such cause should point out specifically in what particular the duplicity consists. And the same particularity is necessary in all demurrers for faults in mere form.[2]

To the rule that a general demurrer reaches only faults of substance, there is an exception as to dilatory pleas; for as these are not favored in law, formal defects therein may be taken advantage of by general demurrer.[3]

83. Demurrer Admits Facts Well Pleaded.—A demurrer admits all such matters of fact as are well pleaded. The party having chosen to demur, rather than to plead, is regarded as admitting the truth of the facts alleged, and as questioning only their legal sufficiency; which question,

[1] Ames' Cases on Pl. 14; Gould Pl. ix. 17, 18.

[2] Gould Pl. ix. 16; Kipp v. Bell, 86 Ill. 577.

[3] Gould Pl. ix. 12.

being a matter of law, is referred to the court. But this admission is limited, however, to such facts as are properly pleaded. If the demurrer be general, it is said to admit all material facts, though they be informally pleaded.[1] But a conclusion of law stated in the pleading demurred to is not so admitted; nor is a statement contrary to the court's judicial knowledge so admitted; nor an allegation which the pleader is estopped to make; nor an averment of a thing impossible, or of facts that make a departure.[2]

84. Effects of Pleading Over.—Some faults that render a pleading demurrable are aided—that is, remedied—by pleading over without demurrer. All formal defects are thus aided; but insufficiency in matter of substance is not, as a rule, so aided. It has been shown that a demurrer admits the truth of the facts pleaded, and questions only their legal sufficiency; but it can not be said, *e converso*, that a pleading which questions the truth of facts pleaded, admits their legal sufficiency. On the contrary, the legal sufficiency, in matter of substance, of any pleading is an open question throughout the case.[3] It is a principle of procedure, that the court is bound, in legal contemplation, to examine the whole record before giving judgment in any case, and then to give judgment according to the legal right as it may appear from the whole record, regardless of any issues in law or in fact, or of any prior decisions thereof.[4] Therefore, even after issue in fact and verdict thereon, the unsuccessful party may take advantage of the legal insufficiency of his adversary's pleading, by motion for judgment *non obstante veredicto*, or, after judgment, by writ of error.[5] Of course, if the pleading of one party is substantially bad in law, a verdict, which merely finds it true in fact, can not entitle that party to a judgment, which is merely the application of the law to an ascertained state of facts.[6]

Sometimes a defect in substance is aided by the pleading of the other party; as, where the declaration omits a material fact, and the plea alleges such fact, the defect is thereby

[1] Steph. Pl. 221.
[2] Gould Pl. ix. 25–29.
[3] Ante, 35.
[4] Steph. Pl. 204, 205.
[5] Steph. Pl. 186, 201, 224.
[6] Steph. Pl. 186; Ante, 8.

cured.[1] And sometimes a fault in pleading is aided by verdict. Where the issue joined is such as necessarily to require proof, on the trial, of facts defectively stated in, or omitted from, the pleadings, a verdict that could not be found without proof of such facts will cure the defect in the pleadings. This rule of aider by verdict rests upon the logical ground that the verdict must be considered as true, and as founded on legal evidence, and therefore it must be presumed that every fact necessary to warrant such finding was proved on the trial; and thus the verdict, by legal intendment, sometimes supplies facts omitted from the pleadings. But omitted facts not implied in, or inferrible from, those alleged and found, can not be presumed to have been proved. Thus, if a declaration in assumpsit fail to allege consideration, a verdict for the plaintiff will not cure the omission; for the fact, alleged and proved, that the defendant promised, furnishes no legal inference that the promise was founded upon a consideration.[2]

85. A Demurrer Searches the Record.—On demurrer to any pleading, the court will consider the whole record, and give judgment for the party who, upon the whole record, is entitled to it, disregarding merely formal faults. For example, on demurrer to a plea, if the plea be found bad, yet if the declaration be bad in substance, judgment should be for the defendant; for, the defects in substance in the declaration not being aided by the plea, the plaintiff must ultimately fail, and suffer judgment against him. As it is sometimes said, "a bad plea is sufficient for a bad declaration." Again, if, on demurrer to the replication, the declaration be good, and both plea and replication bad in substance, judgment should be against the defendant, because the first substantial fault is on his part.[3] This rule is but an application of the general principle before stated, that when judgment is to be given, at whatever stage of the case, it must be given upon consideration of the whole record.

[1] Gould Pl. iii. 192.

[2] Steph. Pl. 224; Gould Pl. x. 222.

[3] Gould Pl. ix. 36–40; Steph. Pl. 85.

This rule as to judgment on demurrer is subject, however, to some exceptions. If the plaintiff demur to a plea in abatement, and the plea be found bad, any defect in the declaration will be disregarded, and the judgment will be *respondeat ouster*. And if, on the whole record, the right be found with the plaintiff, judgment will not be given for him, unless he has himself put his action on that ground. For example, in an action on a covenant to perform an award, and not to prevent the arbitrators from making an award, if the plaintiff assign as a breach that the defendant would not pay the sum awarded, and the defendant plead that before the award he revoked, by deed, the authority of the arbitrators, such plea is good on demurrer; for it is a good answer to the breach alleged. The matter stated in the plea would give the plaintiff a right of action, if he had alleged it; but this can not avail him, for he has put his action on other ground.

In examining the whole record, the court will disregard defects in matters of form, such as should have been the subject of special demurrer.[1] The reason for such disregard of formal errors is, that form is intended only as a security for substance, and when a party, by answering a pleading, admits it to be good in substance, and admits that he understands it, he ought not thereafter to object to a want of form, that, as to him, was not essential for the purposes of justice.[2]

86. Judgment on Demurrer.—Judgment is pronounced upon an admitted, or an ascertained, state of facts. The pleadings always terminate in issue joined upon a traverse, or in issue joined upon demurrer. In the one case, all the allegations, except that upon which the traverse is taken, stand admitted; in the other case, all the pleadings stand admitted—the last one by the demurrer, and each preceding one by that immediately following it. If issue joined upon a traverse be decided against the party traversing, the truth of all the facts alleged in the pleadings is established, and the ascertained state of facts is the same as the admitted state of facts would be, if the pleading traversed had been demurred to. For example, if a plea in confession and avoidance be

[1] Steph. Pl. 223. [2] Evans Pl. 38.

traversed, and issue thereon decided for the defendant, the verdict finds the plea true, and the plea having confessed the facts in the declaration, all the facts alleged on both sides are established. And if such plea be demurred to, all the facts well pleaded therein are admitted by the demurrer, and the admitted state of facts is then the same as the ascertained state of facts before supposed. But if in such case the issue in fact be found against the defendant, his plea is destroyed, and the case stands with the facts of the declaration established.

When the facts of a case are established, either upon trial or upon demurrer, it is the duty of the court to give judgment for the party entitled thereto; and this is determined by an inspection of the whole record, bearing in mind that the legal sufficiency of any pleading is not admitted by any subsequent pleading, or by any state of the pleadings.[1]

From what has been said it will be seen that when a party demurs, he in effect prays the judgment of the court upon the pleadings as they stand; and the adverse party, by joining in demurrer, prays the like judgment. The judgment follows the nature of the pleading demurred to. Upon demurrer to a dilatory plea, judgment for the defendant is, that the writ or declaration be quashed, that the suit be dismissed from that jurisdiction, or that it be stayed; if the judgment be for the plaintff, it is *respondeat ouster*—that the defendant answer over. In like manner, upon demurrer to any of the pleadings which go to the action, the judgment is final. If for the plaintiff, it is *quod recuperet*—that he recover; if for the defendant, it is *quod eat sine die*—that he go hence without day. So that, judgment on demurrer to any pleading is the same that it would be upon an issue in fact, joined upon a traverse of the same pleading, and decided in favor of the same party.[2]

A judgment on demurrer, if upon the merits of the cause, is equally conclusive, as an adjudication of the right in controversy, as judgment for the same party, entered upon a verdict, would be.[3]

[1] Lang. Eq. Pl. 96; Ante, 35.

[2] Steph. Pl. 192; Gould Pl. ix. 41, 42.

[3] Gould Pl. ix. 43.

CHAPTER X.

DIVISION OF ACTIONS.

I. REAL AND MIXED ACTIONS.

87. Classification of Actions.—The orderly parts of pleading having been explained, and the general form and manner of pleading having been shown, the several forms of action will now be defined and distinguished, and their scope and uses explained. The actions known to the common-law procedure are divided, according to their subject-matter, into actions real, personal, and mixed.

Real actions are for specific recovery of lands, tenements, or hereditaments. Personal actions are for the recovery of specific chattels, or for pecuniary satisfaction for the breach of a contract, or an injury to person or property. Mixed actions partake of the natures of the other two divisions, and are for the recovery of real property, and for damages sustained in respect to such property.[1]

The real and mixed actions are, writ of right, formedon, writ of dower, quare impedit, and ejectment. But this ancient division of actions is now of little importance, because, by various statutes in England, most of the real and mixed actions have been abolished, and the procedure in those that remain has been much simplified.

Personal actions are also divided, according to the nature of the wrong to be redressed, into actions *ex contractu*, which are for the breach of a contract, and actions *ex delicto*, which are for wrongs not connected with contract. The actions in form *ex contractu* are, debt, covenant, assumpsit, and detinue; those in form *ex delicto* are, trespass, trespass on the case, trover, and replevin.[2]

[1] Steph. Pl. 61; Heard Pl. 14; 1 Chit. Pl. 97; 3 Bl. Com. 117.

[2] It is probable that this classification of actions led to the corre-

88. Actions Real and Mixed.—*Writ of right* is the remedy appropriate where one claims the specific recovery of corporeal hereditaments in fee-simple, founding his title on the right of property, or mere right, arising either from his own seizin, or the seizin of his ancestor or predecessor.[1]

Formedon is the proper action where, by an alienation of the tenant in tail the reversion or remainder is, by the failure of the particular estate, displaced and turned into a mere right.[2]

Writ of dower lies for a widow claiming the specific recovery of her dower, no part thereof having yet been assigned to her. This is dower *unde nihil habet*. There is also a *writ of right of dower*, seldom used, which is to recover the residue of dower; part of it having been already assigned by the tenant.[3]

Quare impedit is the form of action adopted to try a disputed title to an advowson. It lies to recover the presentation, where the right to a benefice is obstructed.[4]

In *formedon*, the general issue is *ne dona pas*, or *non dedit;* in *quare impedit*, it is *ne disturba pas*. In the other real actions there seems to be no fixed form of general issue.

In very early times, there were in use two other remedies for the recovery of possession. These were: (1) *a writ of entry*, wherein the demandant maintained his right to possession by showing the unlawful commencement of the defendant's possession; and (2) *a writ of assize*, wherein the demandant maintained his right by showing his own or his ancestor's possession. These possessory remedies, long since obsolete, decided nothing as to the right of property. Their only office was to restore the demandant to possession, when found

sponding classification of property. Under the old feudal system, things real were denominated "lands, tenements, and hereditaments;" while things personal were called "goods and chattels." But it became obvious that the essential difference between lands and goods was in the remedies for the deprivation thereof. In the one case, the *real* thing—the land itself, was recovered; in the other, the remedy was against the *person* of the wrong-doer. Hence the designations, *real property*, and *personal property*. Williams on Real Prop. 6.

[1] Steph. Pl. 66.
[2] 3 Bl. Com. 191.
[3] Steph. Pl. 67.
[4] Steph. Pl. 68.

entitled thereto. Adversary claims as to the right of property could be determined only in the action known as "*writ of right*," or in some other action of that nature.[1]

89. The Action of Ejectment.—This action lies for the recovery of possession of real property, and of damages for the unlawful detention thereof. The history of this action well illustrates the way in which fictions were resorted to in the adaptation of procedure to new requirements, without changing its external form; and it shows the strong attachment to form, which characterizes the development of the common-law system of procedure.

The action of ejectment was invented to enable a tenant for a term of years to recover possession of the demised lands. Originally, the interest of a tenant for years was not regarded as an estate, nor as a right which the courts would specifically restore to him when wrongfully dispossessed; and his only remedy against a wrongful ejector was a personal action of trespass, to recover damages. In the course of time, however, his interest in the land came to be regarded as a low kind of estate, and the courts determined that he was entitled not only to recover damages, but that, by way of collateral and additional relief, he should recover possession of the land itself for the term of which he had been ousted. The action of trespass in such case was accordingly so modified as to give the tenant this additional relief, and was thereafter known as the action of ejectment. This new action was designed solely for the relief of tenants for years, and it was applicable only where there was a real demise, an actual tenant, and a wrongful ejector who detained the possession; it was free from fiction, and was limited to the relief of tenants for years.

90. Ejectment, Continued.—The old actions for the recovery of lands were embarrassed by many technicalities and much cumbersome machinery. To obviate their defects, and to provide a remedy adapted to all cases, the courts conceived the idea of employing the action of ejectment as a substitute for these intricate modes of procedure. It was already per-

[1] 3 Bl. Com. 180.

ceived that when both the tenant for life and his lessor were wrongfully removed from the land, an action of ejectment by the tenant restored, not only the tenant who brought the action, but his lessor as well; because, the possession of the tenant being in law the possession of the lessor, the restoration of the lessee to the actual possession was, *ipso facto*, a restoration of the lessor to his former condition. This incidental result of ejectment suggested the idea of making a lease to serve as the foundation for extending the action to cases not already within its purview.

Fiction was now resorted to. As none but tenants who had been ousted from a term of years could maintain the action, to enable one claiming the land in fee to avail himself of the action, a fictitious tenant, say John Doe, was named in the declaration as plaintiff, and was made to allege a lease to himself from the real person who claimed to own the lands in fee, and who sought to establish his ownership by the action. Then as the action could be maintained only against one in possession, and as the adverse claimant of the fee might not be in possession, a fictitious ejector, say Richard Roe, called the *casual ejector*, was named as defendant. The real adversary was notified, and was allowed to become defendant in the stead of the casual ejector, upon condition that he confess the alleged lease and the alleged ouster, both of which were mere fictions. This admission of the lease was construed as admitting its validity only as between the parties to it; that is, it was an admission that the alleged lessor had made as good a lease as he could make if in possession. The question to be tried is, whether the plaintiff's lessor had title; and this is tried between the real parties. In this way the action was completely transformed, and ejectment became the usual remedy for the trial of titles to real property.

91. Ejectment, Continued.—Ejectment will lie only for corporeal hereditaments, or things tangible, upon which an entry can be made, and of which the sheriff can deliver actual possession. To maintain the action, the plaintiff must have the legal title, whether in fee or for a less estate, and he must have a present right of entry. A mere equitable in-

terest will not support the action. The plaintiff must recover on the strength of his own title, and not on the insufficiency of his adversary's title.

The general issue in ejectment is, *not guilty;* and this, by the terms of the consent rule, is the only issue that may be pleaded, unless leave be obtained to plead specially. The declaration avers only that the plaintiff's lessor had demised to him a certain piece of land, for a certain time not yet expired, and that the casual ejector ejected him therefrom. Strictly, the defendant's plea of not guilty would put in issue only the ouster; but the question really tried is, whether the plaintiff's lessor had right to possession.

Judgment, if for the plaintiff, is, that he recover his term, of and in the tenements, with damages and costs. A writ of execution, called *habere facias possessionem*, issues upon such judgment, to put the plaintiff in possession of the property.[1]

92. Action for Mesne Profits.—The action of ejectment, being brought by a nominal plaintiff against a nominal defendant, and for a supposed ouster, only nominal damages are, in general, given therein. For the injury sustained by the real plaintiff by being kept out of the mesne profits, the common law provided an action which is, in form, an action of trespass, but is, in effect, to recover the rents and profits of the estate. The right to sue in trespass for mesne profits is a consequence of a recovery in ejectment; and in such action the judgment in ejectment is conclusive evidence of plaintiff's right to all profits accrued after the date of the ouster complained of in the ejectment suit.[2]

II. ACTIONS IN FORM EX CONTRACTU.

93. The Action of Debt.—This action is so called because it lies for the recovery of a debt *eo nomine et in numero*. The gist of the action is the *duty* of the defendant to pay; and not his *promise* to pay. It is a more extensive remedy for the recovery of money than either assumpsit or covenant; for assumpsit will not lie upon a specialty, and

[1] 1 Chit. Pl. 187; Steph. Pl. 94, 119; Evans Pl. 278-290.

[2] 3 Bl. Com. 205; 1 Chit. Pl. 193; 2 Grlf. Ev. 332.

covenant will not lie upon a simple contract, whereas debt will lie upon either.

Debt will lie for money lent, for money had and received, for money due on an account stated, for work and labor, for the price of goods, for use and occupation, on notes and bills, on bonds conditioned for the payment of money, on judgments, and on penal statutes, either at the suit of the party aggrieved, or of a common informer. It is the proper remedy in general, where the demand is for a liquidated and certain sum, and is not for damages.[1]

Debt is of two forms: in the *debet* (he owes), which is the common form; and in the *detinet* (he detains), which lies for the specific recovery of a certain quantity of goods, under a contract to deliver them. This latter form differs from the action of detinue, in that the plaintiff need not have a property in any specific goods at the time he brings his action.

The declaration in debt states the operative facts showing an indebtedness in a certain sum, that it is past due, and that it is unpaid; but it does not, as in assumpsit, state a promise to pay.

The action of debt being maintainable for a variety of demands, the pleas therein are correspondingly varied. In debt on simple contract, the general issue formerly was *nil debet*, —"that he does not owe the sum demanded, or any part thereof." This traverse, being in the present tense, and the declaration simply alleging an existing indebtedness, it was held that any evidence tending to show that there was no subsisting debt when the suit was commenced, was admissible; and under this literal interpretation of the plea of *nil debet*, payment, the statute of limitations, and other defenses of new matter, were available to the defendant, without any notice thereof to the defendant. To remedy this evil, the plea of *nil debet*, in debt on simple contract, was abolished, and instead thereof the defendant was allowed to plead *nunquam indebitatus*—"he never was indebted;" or to plead in confession and avoidance.[2] In debt on a specialty, the

[1] 1 Chit. Pl. 108; Steph. Pl. 77.

[2] 1 Chit. Pl. 481, 518, 743; McKyring v. Bull, 16 N. Y. 297.

general issue is *non est factum*—"it is not his deed." This plea operates as a denial of the execution of the deed in point of fact only; and all facts showing that the deed is merely voidable must be specially pleaded.[1] In debt on a record, the general issue is *nul tiel record*. This only puts in issue the existence of the record, and any matter in discharge must be specially pleaded. In debt upon a statute, *nil debet* is the proper plea, though *not guilty* has been held sufficient.

Judgment in debt, if for the plaintiff, is, that he recover his debt and his costs; if for the defendant, that he recover his costs.

94. The Action of Covenant.—The rules respecting this action are few and simple. It lies to recover damages for the breach of a contract under seal. In debt, the plaintiff relies upon the nature and essence of the obligation; in covenant, he relies upon its form. Where the action is for breach of an instrument under seal, and the sum demanded is fixed and certain, either covenant or debt will lie; but if the sum demanded in such case is unliquidated, covenant is the only proper remedy. Debt is the only action with which covenant has any common ground.

The declaration in covenant should set forth so much of the covenant as will show the primary right and duty, and that the contract is under seal, and should make profert thereof, or show an excuse for its omission. *Profert in curia* is usually in these words: "Which said writing obligatory, sealed with the seal of the defendant, the plaintiff now *brings here into court*." The consideration need not, in general, be stated; but if the performance thereof is a condition precedent, such performance must be averred.[2] The declaration should assign a breach of the covenant by the defendant, and should lay damages.

The general issue in covenant is said to be *non est factum* —that the said supposed writing obligatory is not his deed. Strictly, this plea, in covenant as in debt on a specialty, denies only the execution of the deed, and does not traverse the whole declaration. It directly denies the

[1] 1 Chit. Pl. 484, 518, 743. [2] Gould Pl. iv. 13; 1 Chit. Pl. 120.

covenant, and only indirectly denies the breach; but it is the most general form of denial of which the action admits.[1]

All other defenses, including as well those which make the deed void as those which render it voidable, must be specially pleaded.[2]

Judgment in covenant, if for the plaintiff, is, that he recover an ascertained sum as his damages for the breach of the covenant, together with his costs; if for the defendant, the judgment is for costs.

95. The Action of Assumpsit.—This action—so called because, when the pleadings were in Latin, the word *assumsit* (he promised) was always used in the declaration to describe the defendant's undertaking—is for the recovery of damages for the breach of a simple contract, whether it be written or unwritten, express or implied.

In early times, the only remedy for breach of an unsealed contract was an action of debt. But in this action the defendant had the right to wage his law; that is, if the defendant, after denying the indebtedness, would swear that he did not owe the plaintiff, and if eleven of his neighbors, called compurgators, would also swear that they believed the defendant had sworn truly, the plaintiff was forever barred. This was known as "trial by wager of law."[3] To avoid this embarrassing incident of the action of debt, the action of assumpsit was invented. The gist of this action was, and is, the defendant's promise; it was the distinctive and indispensable averment of the declaration, for want of which, a demurrer would be sustained, judgment arrested, or reversed on error.[4] The promise alleged in assumpsit was an express promise, and, for a long time after the invention of assumpsit, only an express promise would support the action; so that, the averment of the declaration was, in this respect, in strict accord with the real transaction as shown by the evidence.

In the course of time, there arose a class of recognized rights and obligations for which the forms of action then in

[1] 1 Chit. Pl. 120; Gould Pl. vi. 10, note 2; Granger v. Granger, 6 Ohio, 35, 41.

[2] 1 Chit. Pl. 518.

[3] 3 Bl. Com. 341; Evans Pl. 305; Pom. Rem. 512.

[4] 1 Chit. Pl. 301; Pom. Rem. 512.

use did not furnish a remedy; and the courts, instead of inventing a new action to meet this new demand, chose to extend the application of assumpsit. As usual, they resorted to fiction; but instead of adapting the action, by introducing a fictitious element, they actually adapted the operative facts to be alleged, by adding thereto a false and fictitious feature. The fiction so invented was that of an implied promise to pay, in those cases wherein the law imposes an obligation to pay without express promise. The addition of this fictitious promise to the facts and circumstances to which, without any promise, the law attached the obligation, brought such cases formally within the scope and operation of assumpsit, whose distinctive requisite was the defendant's promise to pay. This was doubtless the origin of "implied contract," a term very inaptly used to designate an obligation that arises *ex lege*, and not *ex contractu*.[1]

96. Assumpsit, Continued.—The action of assumpsit, thus enlarged by the fiction of an implied promise, and modified by the introduction of the common counts, became a remedy of extensive application. It lies to recover money lent, or paid for the defendant at his request, or had and received by him to the use of the plaintiff. It is the proper remedy for work done, or for services rendered, for goods sold and delivered, for an account stated, for breach of promise to marry, to recover for the sale or hire of personal property. It is the proper action on bills of exchange, checks, promissory notes, policies of insurance, guaranties, and warranties. In some cases, where the defendant has, by his tortious act, received the plaintiff's money or property, the plaintiff may waive the tort, and sue in assumpsit.[2] When the action is upon an express contract, it is called *special assumpsit*; when upon an implied promise, it is called *general assumpsit*.

The declaration in assumpsit states the promise of the defendant, the consideration,—except when the action is on a negotiable instrument,—and the breach thereof. A promise

[1] Metc. on Cont. 5, 203, 204; Pom. Rem. 512.

[2] 1 Chit. Pl. 99; Heard Pl. 25; Steph. Pl. 85.

must always be alleged, whether there be in fact an express promise, or only circumstances from which the law will create a liability.[1] There is, in common-law pleading, no such thing as an implied promise. Such character of alleged promise will appear only in the evidence; and proof of circumstances giving rise to an implied promise will support the allegation of an express promise.[2]

The general issue in this action is *non assumsit*—he did not promise. The form of this plea is, that the defendant "did not undertake or promise, in manner and form as the plaintiff hath complained." This denies, in terms, only the promise. Formerly, a defendant was allowed, under this plea, not only to maintain his denial of a promise, but to prove affirmative facts, in discharge or in excuse.[3] But more recently, this plea has been allowed to operate only as a denial in fact of the express contract alleged, or of the circumstances from which the promise alleged may be implied by law;[4] and all matters in discharge or in excuse must be specially pleaded.[5]

Judgment in assumpsit, if for plaintiff, is, that he recover a specified sum as damages, and his costs; if for defendant, it is that he recover costs.

97. The Common Counts.—There are certain modifications of the action of assumpsit, known as the "common counts." These are, the *indebitatus assumsit*, the *quantum meruit*, the *quantum valebant*, and the *insimul computasset*. A shorter and more general form of statement obtains in these than in most other actions. They were brought into use, and at first used in connection with special counts, to prevent the defeat of a just claim by an accidental variance between the allegations in the special count and the evidence on the trial. But in recent times, the joinder of the common counts with a special count on the same right of action is generally prohibited.

[1] Steph. Pl. 85, 86, note 1; Gould Pl. iii. 19; Bliss Pl. 152, 154; McKelvey's Com. Law Pl. 40–42. *Cf.* Mass. Mut. Life Ins. Co. v. Kellogg, 82 Ill. 614.

[2] Gould Pl. iii. 19.

[3] 1 Chit. Pl. 476.

[4] 1 Chit. Pl. 513, 742.

[5] 1 Chit. Pl. 516; SELDON, J., in McKyring v. Bull, 16 N. Y. 297.

Indebitatus assumpsit is that species of action in which the plaintiff first alleges an indebtedness in a named sum, stating briefly the subject-matter of the debt, and then alleges that in consideration thereof the defendant, being so indebted, promised to pay the plaintiff. This species of action lies for work done, for materials furnished, for goods sold and delivered, for use and occupation, etc.

The general issue in this form of assumpsit puts in issue all the facts essential to establish the indebtedness alleged.[1]

Assumpsit on a *quantum meruit* lies for work done at the request of another. It differs from indebitatus assumpsit in this, that instead of alleging a promise to pay a certain sum specified, the plaintiff alleges first, the doing of the work, and then a promise to pay as much as he reasonably deserved, and that for the work he reasonably deserves to have a specified sum. Where there is an express contract for a stipulated amount to be paid for services, the plaintiff can not abandon the contract and resort to this action on an implied assumpsit.[2]

98. The Common Counts, Continued.—The form of action called assumpsit on a *quantum valebant* lies for goods sold without specifying any price. In such case, the law implies a promise to pay as much as the goods are worth; and in this form of action the plaintiff alleges the promise of the defendant to pay as much as the goods were reasonably worth, and then alleges that they were worth a named sum.

Insimul computasset is the assumpsit on an account stated. An account stated is the settlement of an account between parties, whereby a balance is ascertained in favor of one of them. In assumpsit on an account stated, the plaintiff alleges that the defendant accounted with him, and was then found to be in arrears to plaintiff a named sum, which he then promised to pay.

In all these counts the implied promise is averred as an express promise. For example, in indebitatus assumpsit for goods sold and delivered, the averment of a promise is as

[1] Steph. Pl. 339, note f.; 1 Chit. Pl. 513, 517, 742.

[2] 1 Chit. Pl. 341; 2 Bouv. Dic., *voce* "*Quantum Meruit.*"

follows: "That the defendant, on the day of , was indebted to the plaintiff in dollars, for goods then sold and delivered by plaintiff to defendant at his special instance and request; and being so indebted, the defendant, in consideration thereof, then promised to pay the said sum of money to the plaintiff, upon request." [1]

The common counts are also sometimes used in the action of debt; omitting, of course, the allegation of a promise. Thus, for goods sold, an indebitatus count in debt would allege that on a certain day the defendant was indebted to plaintiff in a certain sum, for divers goods, wares, and merchandise, by the plaintiff before that time sold and delivered to the defendant at his special instance and request, to be paid when requested; and that, although often requested, he has not paid the same, or any part thereof, to the damage of plaintiff dollars.[2]

99. The Action of Detinue.—This action lies for the specific recovery of goods and chattels, or deeds and writings, wrongfully detained. It is the only action for recovery of personal chattels in specie, except replevin, which gives specific recovery of goods taken. To support this action, three conditions are requisite. (1) The goods sought to be recovered must be distinguishable from all others, so that if the plaintiff obtain judgment, the sheriff may be able to deliver the particular goods to him. (2) The plaintiff must have a right to immediate possession of the property. A reversioner can not, therefore, maintain the action; though a bailee, having only a special property, may maintain it. (3) The defendant must have the actual possession, and must have acquired it by lawful means,—as, by delivery, bailment, or finding,—and not tortiously.

Detinue is peculiar in its nature, and not clearly referable to either class of actions. The right to join detinue with debt, and to sue in detinue for goods detained by a bailee, together with the history of the action, showing that it was originally an action of debt in the detinet, would seem to place it with actions *ex contractu*. On the other hand, as

[1] 2 Chit. Pl. 37, 55; Steph. Pl. 120. [2] 2 Chit. Pl. 385; Steph. Pl. 115.

detinue lies for wrongful detention, without reference to any contract; and as the wrongful detainer is the gist of the action, some writers, regarding it as founded on tort, have classed it with actions *ex delicto*.[1]

The general issue in this action is *non detinet*, and is in form as follows: "And the said defendant says, 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 plaintiff hath above complained. And of this the said defendant puts himself upon the country." The plea of *non detinet* denies only the alleged detention; if the defendant wishes to deny the plaintiff's property in the goods, or if he relies upon a justifiable detainer, he must plead specially.

The judgment in detinue, if for the plaintiff, is always in the alternative—that he recover the goods, or the value thereof if he can not have the goods, with damages for the detention, and his costs.[2]

III. ACTIONS IN FORM EX DELICTO.

100. The Action of Trespass.—Civil injuries not connected with contract are of two kinds: the one, direct, and coupled with force and violence; as, assault and battery, false imprisonment; the other, consequential, and without force and violence; as, slander, malicious prosecution. The term trespass, in its technical signification, means an injury committed with force, or as it is generally stated, *vi et armis*. The action of trespass lies only for injuries committed with force, and generally for only such as are immediate, and not consequential.[3]

Force is either actual or implied. If one unlawfully and with force break down the gate and enter the close of another, the force is actual, and the act is a trespass. If one unlawfully, but peaceably, enter the close of another, force is implied, for there is a breaking of the ideal inclosure which encircles every man's possessions, when he is owner of the

[1] 1 Chit. Pl. 98, note, 121, note.
[2] 1 Chit. Pl. 125.
[3] 1 Chit. Pl. 127, 166.

surface. In either case, the injury ensuing is remediable by an action of trespass *quare clausum fregit.*

Trespass is the proper remedy for assault and battery, for false imprisonment, and for beating, wounding, or imprisoning a wife or servant, whereby the husband or master sustains loss of service. It lies for criminal conversation, and for debauching a daughter; force being implied in these cases. It is the proper remedy for injuries to personal property, committed by unlawfully striking, chasing—if alive, or carrying away, a personal chattel of which another is the general or qualified owner and is in possession, actual or constructive; but a naked possession, or right to immediate possession, is a sufficient title to support the action.

Trespass is also the proper remedy for the several acts of breaking and entering the close of another, and causing damage thereto. The thing injured must be something tangible and fixed, such as land, a house, or other building. It is not necessary that the close be fenced from the property of others, the term "close" being technical, and signifying the interest in the land, and not merely an inclosure. There must be some injury to authorize a recovery; but the slightest injury, as treading down the grass, is sufficient.[1]

101. Trespass, Continued.—The gist of this form of the action (for breaking and entering) is the injury to the possession; and the general rule is, that unless the plaintiff was in actual possession at the time the injury was committed, he can not support trespass. Therefore, a landlord can not, during a subsisting lease, support trespass for an injury to the land, but the action must be in the name of the tenant in possession.[2] There is a material distinction in this action between personal and real property. As to the former, the general property draws it to the possession so as to enable the owner to maintain trespass, although he never had actual possession; but as to the latter, there is no such constructive

[1] In some of the states it is provided by statute that trespass, instead of ejectment, may be maintained to try title to real estate. But without such statutory provision an action of trespass will not determine a dispute as to title, even though the issue in the case be as to title. 6 Wait's Ac. and Def. 90.

[2] 1 Chit. Pl. 175.

possession, and unless the plaintiff had the actual possession, by himself or his servant, when the injury was committed, he can not support this action.[1]

102. Trespass, Continued.—The declaration in this action states the injury to the person, or to the property, and alleges that it was committed *vi et armis* and *contra pacem.* For example, in trespass for assault and battery, the allegations are, "that the defendant, on the day of , with force and arms, made an assault upon the plaintiff, and beat, wounded, and ill-treated him, so that his life was despaired of, and other wrongs to the plaintiff did, against the peace of our said lord, the king, and to the damage of plaintiff pounds." And in trespass *quare clausum fregit*, the allegations are, "that the defendant, on etc., with force and arms, broke and entered the close of plaintiff, that is to say, (describing the close), and with his feet, in walking, trod down, trampled upon, consumed and spoiled the grass and herbage of the said plaintiff then and there growing, and other wrongs to the plaintiff then and there did, against the peace" etc.

The general issue in trespass is *non culpabilis*—not guilty, and is in the form following: "And the said defendant says that he is not guilty of the said supposed trespasses above laid to his charge, or any part thereof, in manner and form as the said plaintiff hath above complained. And of this the

[1] 1 Chit. Pl. 176. The plaintiff's possession is inseparable from that character of the injury which makes it redressible by this action, and which is expressed by the distinguishing phrase, "*vi et armis.*" Mr. Evans, in distinguishing trespass from case, says: "The real distinction is in the thing signified by this phrase. The thing signified is a technical or imaginary force, inferred by the law from every direct unlawful intermeddling with the person or property of another. The distinction is in the intermeddling being direct; for the law supposes that no man will tamely permit a direct interference in his concerns, and therefore that no man will attempt such direct interference, unless he is prepared with a force to support his intrusion. This interference, it will be seen, arises out of the notion that the plaintiff will resent the attack upon himself or his property. *We are, therefore, to look at the condition of the plaintiff, not of the defendant, to ascertain whether the law will impute force to the defendant.*" Evans Pl. 67.

said defendant puts himself upon the country." This plea is only a denial of the trespass alleged. In trespass *quare clausum fregit*, it does not deny the plaintiff's possession or right of possession. In trespass *de bonis asportatis*, it does not deny the plaintiff's property in the goods. To put these matters in issue, they must be traversed specially; and any matter in excuse or justification must be specially pleaded.[1] In trespass to the person, the defendant may justify under the plea of *son assault demesne*—that the plaintiff made the first assault; or under the plea of *moliter manus imposuit*—that to preserve the peace, he gently laid his hands upon the plaintiff.

Judgment for plaintiff in trespass is for damages and costs. The effect of such judgment for the value of personal property tortiously taken is, to transfer the title thereto to the defendant.[2]

103. Trespass on the Case.—This action, sometimes called an "action on the case," and sometimes only "case," was invented to furnish redress for numerous wrongs not remediable by the established forms of action at that time in use. When all civil actions in the Superior Courts of common law were required to be commenced by original writ, these original writs differed from one another in form and tenor, each form of writ corresponding to the form of action to which it was exclusively appropriate, and to which it had probably given name. These established forms of writs were collected into a book, called *Registrum Brevium*, or Register of Writs; and the remedies afforded were limited to cases to which some one of these writs and its corresponding form of action were applicable. In the progress of society, cases of injury arose that were novel in their circumstances, and that were not within the scope of any of the actions then in use, though they came within the recognized principles of the substantive law. To supply this deficiency, the clerks of chancery were empowered, by act of parliament, grounded upon the maxim *ubi jus, ibi remedium*,[3] to frame new writs

[1] 1 Chit. Pl. 520, 744; Steph. Pl. 235.

[2] Acheson v. Miller, 2 O. S. 203.

[3] Br. Max. 192.

in consimili casu with those already known. Under this power they constructed many writs for different injuries supposed to bear analogy to trespass; and from this supposed analogy, and from the fact that these new writs were founded upon the peculiar circumstances of the particular case, they were distinguished from the old writs of trespass, by the appellation of "writs of trespass on the case." These new writs, though invented *pro re nata* and in various forms, differing according to the natures of the particular cases that called them forth, came to be regarded as constituting collectively a new and distinct form of action, to which was given the generic name of "trespass on the case."[1]

104. Trespass on the Case, Continued.—This action lies generally to recover damages for torts committed without force, actual or implied; or, if occasioned by force, where the matter affected is not tangible, or the injury is only consequential; or where the interest in the property injured is only in reversion. It is the proper remedy for a landlord, where the injury affects his reversionary interest;[2] for putting a spout so near the plaintiff's land as to run the water upon it;[3] for obstructing a private way; for special damages arising from a public nuisance; and for damage resulting from want of skill or care on the part of a surgeon, or from neglect or misfeasance of an attorney; though in such action against a surgeon or an attorney it is said that assumpsit will lie.[4] Case will lie for criminal conversation, and for debaunching a daughter; though it is the better practice, and the more usual, to declare in trespass. It lies for libel, for slander, for malicious prosecution, for disturbing one in the enjoyment of an easement, or of a franchise.[5]

[1] Steph. Pl. 64, 83. The action of assumpsit, in form *ex contractu*, and the action of trover, in form *ex delicto*, are said to have originated as species of this new genus. 1 Chit. Pl. 132; Steph. Pl. 85. Blackstone thought that one of the most important amendments of the law was that of "extending the remedial influence of the equitable writ of trespass on the case, according to its primitive institution by King Edward the First, to almost every instance of injustice not remedied by any other process." 4 Bl. Com. 442.

[2] 1 Chit. Pl. 175.

[3] Wood on Nuisances, 101.

[4] 1 Chit. Pl. 134.

[5] 1 Chit. Pl. 134, 142.

If a log be wrongfully thrown upon a man's foot, with however little violence, the remedy would be trespass, for the injury would be the immediate result of actual force; but if a log be wrongfully thrown into the highway, with whatever violence, and a man fall over it, the remedy would be case, for the injury would be consequential.[1] In some cases, though the injury be forcible and immediate, the plaintiff may waive the trespass, and sue in case or in trover.[2]

The general issue in trespass on the case is *not guilty*. Formerly this plea admitted proof of facts in justification, in excuse, or in discharge; but more recently, it is made to operate only as a denial of the breach of duty, or wrongful act alleged to have been committed by the defendant. Judgment for plaintiff is for damages and costs.

105. The Action of Trover.—The word *trover* means to find. The action of trover, or "trover and conversion," as it is sometimes called, was originally a species of trespass on the case for the recovery of damages against one who had found another's goods, and who refused to deliver them on demand to the owner, but converted them to his own use. But at length the finding came to be treated as a mere fiction of law, and the action was permitted to be brought against any one who, having possession, by any means, of the personal property of another, sold or used the same without the consent of the owner, or refused to deliver it when demanded. In form, this action is a fiction; in substance, it is to recover the value of personal property wrongfully converted. The gist of the action is the conversion; this is the tort, or *maleficium*. While the form of the action supposes the defendant may have come lawfully into possession, it is immaterial whether in fact he acquired the possession rightfully or wrongfully, for the wrong is predicated of the conversion, and not of the taking.[3]

Three things are requisite for the support of this action. (1) The property affected must be a personal chattel, and the plaintiff's right must be to some identical or specific

[1] 1 Chit. Pl. 126.
[2] 1 Chit. Pl. 139.
[3] 1 Chit. Pl. 146.

goods. (2) The plaintiff must, at the time of the conversion, have had a property, general or special, in the chattel; and he must have either actual possession, or the right to immediate possession. (3) There must have been a conversion of the property. The tortious asportation of property is, of itself, a conversion; but when the original taking was lawful, and there has not been an actual conversion, there must be a demand of the property and a wrongful refusal to deliver, before the conversion is complete.[1] For a wrongful taking of goods, trover is, in general, a concurrent remedy with trespass; but where the taking is lawful or excusable, trover alone will lie.

The declaration in this action states that the plaintiff was possessed, as of his own property, of certain goods and chattels, describing them; that he casually lost them out of his possession; that they came to the possession of the defendant by finding; that he, well knowing the said goods and chattels to be the property of plaintiff, and contriving and fraudulently intending to defraud plaintiff, converted them to his own use.

The general issue is *not guilty*, which denies only the conversion, and not the plaintiff's title. The measure of the recovery in trover is in general the value of the goods when converted, with interest; and judgment for the value of property converted, in trover, as for property carried away, in trespass, transfers the title to the property to the defendant;[2] though in some jurisdictions it is held that title does not pass until satisfaction of the judgment.

106. The Action of Replevin.—This is an action for specific recovery of personal property unlawfully taken and detained from one rightfully in possession thereof. It is probable that this action was originally limited to one instance of unlawful taking—that of wrongful distress, either of cattle damage feasant, or of chattels for rent in arrear.[3] However this may be, it was early extended to all cases of a tortious taking.

[1] 1 Chit. Pl. 146–154; Mayne on Dam. 497, n.

[2] 1 Chit. Pl. 161, n. 2; Acheson v. Miller, 2 O. S. 203; 2 Kent Com. 337; 6 Wait's Ac. and Def. 224.

[3] 3 Bl. Com. 145; 1 Chit. Pl. 164.

To support replevin, the property affected must be a personal chattel; the plaintiff must, at the time of the taking, have had the right of immediate possession, either as the general owner, or as owner of a special property therein; and the property must be susceptible of identification and of distinguishment from other like property.[1] Replevin is, in form, an action for damages for the unlawful taking and detaining of the goods; and while a judgment for damages is the only relief prayed for, the real object of the action is the recovery of the specific property.[2] This remedy, at common law, is called replevin in the *cepit*, because it lies only where there has been a tortious taking; but where, as in the United States generally, the remedy has been enlarged by statute so as to make it apply to cases where only the detention is wrongful, it is called replevin in the *detinet*. Replevin is not commenced in any of the Superior Courts of common law, though sometimes removed to them from an inferior jurisdiction.

107. Replevin, Continued.—The declaration in replevin alleges the taking of plaintiff's property by the defendant, at a certain place named, and his detention of it, to the damage of plaintiff.

The general issue in replevin in the *cepit* is *non cepit*—"that he did not take the property, or any of it, in manner and form as above complained." This plea admits the plaintiff's property and his right of possession, and puts in issue only the taking and the place of taking as alleged.[3] If the action is in the *detinet*, the defendant may plead *non detinet*, which denies only the detention; though it is sometimes given a wider operation. The defendant may justify the taking, by way of avowry, which is an assertion of rightful taking, as for arrears of rent, damage feasant, or the like; or by way of recognizance, which is the assertion of taking by the command of another, who had a right to restrain. These counter allegations in replevin, and which are analogous to pleas in bar by way of confession and avoidance,

[1] 3 Bl. Com. 145; 1 Chit. Pl. 162.
[2] Steph. Pl. 92.
[3] 1 Chit. Pl. 499.

place the defendant in the attitude of a plaintiff, and both parties are said to be actors.[1]

Judgment for the plaintiff in replevin is for damages for the taking and detention only, or for the value of the property in addition thereto. If, upon the writ issued, the sheriff has found the property and delivered it to the plaintiff, the declaration is then in the *detinuit*,—that is, the plaintiff declares that the defendant took the property and detained it until replevied by the sheriff; and the judgment is for the taking and detention only. But if the sheriff has not found the property, and has so returned his writ, the declaration is in the *detinet*,—that is, it alleges that the defendant took the goods and still detains them; and the judgment is for the detention and for the value of the goods. If the goods have been delivered to the plaintiff, and judgment is for the defendant, it is for costs, and for a return of the goods—*pro retorno habendo*. If the goods remain in the defendant's possession, his judgment is only for costs.[2]

IV. A GENERAL VIEW OF PERSONAL ACTIONS.

108. Covenant and Debt the Earliest Forms.—In very early times comparatively few obligations were enforced by the courts. The majority of the people were ignorant of the art of writing, and their written contracts could be authenticated only by their seals, which were generally impressions made upon wax. In judicial proceedings, it was regarded as unsafe to trust to the memories of illiterate persons for the particulars of contracts, with the single exception of a contract for the payment of a liquidated and certain sum of money. With such contract it was thought the memory of a witness might be trusted, provided the claimant was able to show a consideration for the debt. For these reasons, contracts under seal, and those for the payment of a sum certain, were the only contracts which the law enforced; and it is therefore probable that the actions of debt and of covenant—the one based upon the essential *nature* of the obliga-

[1] 1 Add. on Torts, 765; Steph. Pl. (Troubat's Ed.) 2d App., note 2.

[2] 1 Chit. Pl. 165; 5 Wait's Ac. and Def. 456.

tion, and the other having regard only to the *form* of the obligation—covered, originally, all the breaches of contracts remediable by law.[1]

Covenant is still limited to the enforcement of contracts under seal. It occupies no ground in common with any other form of action, except the action of debt. Where one has bound himself by an obligation under seal to pay to another a liquidated sum of money, the obligee may elect between debt and covenant to enforce payment.[2] Debt, however, occupies very little exclusive ground. When an obligation to pay a sum certain is evidenced by an instrument under seal, this action is, as has been stated, concurrent with covenant; when evidenced by writing not under seal, or when not evidenced by writing, it is generally concurrent with assumpsit. So that the action of debt is almost always an elective remedy.[3]

109. Assumpsit, Debt, Covenant.—Assumpsit and covenant are each the precise counterpart of the other. Each lies for a breach of contract, but the one lies always upon a breach of contract not under seal, and never upon a contract under seal; while the other lies always upon a contract under seal, and never upon one not under seal. They have no ground in common, and in no case can there be an election between them.[4] But each of these actions occupies common ground with debt. On a contract under seal, if to pay a sum certain, debt or covenant will lie; if to do something other than to pay a sum certain, only covenant will lie. On a contract not under seal, if to pay a sum certain, debt or assumpsit will lie; if to do something other than to pay a sum certain, assumpsit and not debt—unless in the *detinet*—will lie.

110. Trespass, Trover, Detinue.—Where there has been an unlawful taking of the personal property of one in actual possession, or having the right to immediate possession, the injured party has, in general, a choice of remedies, and may sue in trespass or in trover. In such case the wrongful taking and carrying away is a trespass, for which an action of

[1] Evans Pl. 72.
[2] Evans Pl. 72.
[3] Evans Pl. 74.
[4] Evans Pl. 77.

trespass *vi et armis de bonis asportatis* will lie; and such tortious asportation is, of itself, a conversion of the property, for which trover will lie.[1] But while trover and trespass are, in general, concurrent remedies for a wrongful taking of goods, they are not concurrent remedies where the taking is lawful or excusable. In such case, trespass can not be supported, because the tortious act complained of is not committed with force, actual or implied.[2] If the goods so taken are in the actual possession of the defendant, and are distinguishable from all others, the plaintiff may bring detinue, for the specific recovery of the goods detained; if the goods have been converted, he may bring trover for their value.[3]

111. Election Between Tort and Contract.—Where personal property has been tortiously converted, the owner may sue in an action *ex delicto*, or he may waive the tort, and sue in assumpsit. The right to do this rests upon two grounds. One ground is the fiction of an implied promise on the part of the wrong-doer to pay for the property so converted. The other ground is in the nature of estoppel. The defendant will not be allowed to deny the promise alleged, by asserting his own wrong. If the wrong-doer has sold or disposed of the property, he may be sued in assumpsit as for money had and received; if he remains in possession of it, he may be sued as for goods sold and delivered.[4]

112. Consequences of Mistake in the Form of Action.—The courts have been careful to preserve the boundaries of the different actions; and the consequences of adopting a form of action not applicable to the particular case are always prejudicial, and sometimes irremediable. If the objection appear upon the face of the declaration, advantage may be taken of it by demurrer, by motion in arrest of judgment, or by writ of error. If the objection may be made to appear only by proof of extrinsic facts, advantage may be taken of it upon the trial, by nonsuit for the variance.

[1] 1 Chit. Pl. 146, 153, 161, 171.
[2] 1 Chit. Pl. 161.
[3] 1 Chit. Pl. 172.
[4] 1 Wait's Ac. and Def. 405; Bliss Pl. 154; Pom. Rem. 568; Steph. Pl. 52–55; Terry v. Munger, 121 N. Y. 162.

If by either of these means the plaintiff fail in his action, and judgment be given against him for that reason, and not upon the merits, he may bring a new action, and the judgment in the ineffectual suit will not be a bar to the second action. But if in such mistaken action the defendant plead, and the plaintiff take issue, and a verdict be found for the defendant upon the merits, the plaintiff will be estopped from bringing a new action, provided such verdict be especially pleaded as an estoppel.[1]

V. ADDITIONAL REMEDIAL FORMS.

113. Extraordinary Remedies.—In addition to the several remedial instruments of justice denominated "forms of action," there are at common law certain proceedings whereby the extraordinary powers of the government are called to the aid of a party. Among these are, *habeas corpus mandamus*, *quo warranto*, and prohibition.

The writ of *habeas corpus* is an order issued by a court or judge, directed to a person having another in custody, and commanding him to produce such person, at a time and place named, and then and there to show the cause for his caption and detention, and to receive and do whatsoever such court or judge shall then and there consider and order in that behalf. This writ is usually prosecuted by a person claiming to be unlawfully restrained of his liberty; and upon a hearing he is to be discharged, admitted to bail, or remanded. In some jurisdictions this writ may be issued at the instance of one claiming to be entitled to the custody of another, of which custody he is unlawfully deprived.

The writ of *mandamus* is a command issuing in the name of the sovereign, from a court of law, directed to some officer, corporation, or inferior tribunal, requiring the performance of a particular duty specified in the writ, and arising from an office, trust, or station, or from operation of law. It was originally a high prerogative writ, but in this country it is regarded much in the nature of an action by the person on whose relation it is granted for the enforcement of a right in

[1] 1 Chit. Pl. 197.

extraordinary cases wherein there is no adequate remedy by the ordinary modes of procedure.

The writ of *quo warranto* was a high prerogative writ, issued in the name of the government, against one who usurped any office or franchise, requiring him to appear before the court issuing the writ, and to show by what warrant he claimed the office or franchise. This ancient writ has been superseded by the more modern remedy of an information in the nature of a *quo warranto*, which, while in some of its forms and incidents it partakes of the nature of a criminal proceeding, is, in substance, a strictly civil proceeding, to try the title to an office or franchise, and to oust one wrongfully in possession thereof.

The writ of *prohibition* is an extraordinary judicial writ issued by a superior court, and directed to an inferior court, commanding it to cease from the exercise of jurisdiction in a specified suit. Its object is to restrain a subordinate judicial tribunal from usurping a jurisdiction with which it is not legally vested, and to save a party from the annoyance of being required to answer in a proceeding that is *coram non judice*. It is the opposite of mandamus; and it differs from injunction in equity to restrain proceedings at law, in that the latter affects only the parties, while the former is directed against the forum itself.

114. The Writ of Scire Facias.—The proceeding by writ of *scire facias* is sometimes spoken of as an action. It is a judicial writ founded upon some record, and addressed to the sheriff, commanding him to make known to the defendant that he is required to appear and show cause why the plaintiff should not, as against him, have the advantage of some obligation of record that does not furnish ground for an immediate execution against him. It is the proper proceeding for the revivor of a dormant judgment; or to make an obligor not served in the original suit, a party defendant to the judgment therein; and, in some cases, to enforce the liability of bail on a recognizance.[1]

[1] 3 Bl. Com. 416, 421; Bank v. Hart, 19 Ohio, 372.

CHAPTER XI.

THE PRINCIPAL RULES OF PLEADING.[1]

115. Origin and Object of Rules.—The immediate object of the judicial altercation is, to ascertain the subject for decision; and under the common-law procedure, this is done by the production of an issue. To facilitate as well the production of an issue as its decision thereafter, parties are required to construct their opposing statements according to certain logical and legal principles, in order that the statements may be intelligible, certain, consistent, and truthful; that the issue evolved may be real, material, and definite; and that its decision may be conclusive of the controversy. For the promotion of these objects, there grew up in the common-law procedure certain *rules of pleading*, which, while they furnished practical guidance to the pleader, gave to the system that logical coherence and scientific character which distinguish it. These rules, most of which are equally applicable to pleading under the reformed procedure, will here be stated, with such comment as will make clear their meanings and uses.

I. RULES FOR THE PRODUCTION OF AN ISSUE.

116. After the Declaration, the Parties Must Alternately Demur or Plead.—This rule requires the defendant either to demur to the declaration, or to plead thereto. If he demurs, he tenders an issue in law; and if he pleads by

[1] The arrangement used by Mr. Stephen, though not the most logical, is convenient, and is substantially followed in this chapter. For more detailed treatment than is given in this historical outline, the reader is referred to the same topics in the works of Stephen, Gould, Chitty, and Evans.

way of traverse, he tenders an issue in fact. If he pleads by way of confession and avoidance, he of course does not tender issue; but, under this rule, the plaintiff must then either demur to the plea, or reply thereto; and so on, until issue is tendered. If a party, required by this rule to demur or to plead, does neither, his adversary may have judgment by *nil dicit*.

The nature, the kinds, and the effects of demurrer have already been fully explained.[1] So, also, have the pleadings subsequent to the declaration, both by way of traverse and by way of confession and avoidance, been fully considered.[2] Two rules, however, should here be noticed. The first is, that every pleading should answer the whole of what is adversely alleged; and the second, that every pleading is taken to confess all such traversable matters alleged on the other side as it does not traverse.

This latter rule gave rise to the practice of protestation, whereby a party saves himself from being concluded by his failure to traverse some matter alleged against him. When a party is not at liberty to traverse the whole of his adversary's pleading, he may preserve the right to traverse, in another action, the matter passed over, by simply protesting that it is untrue. By protestation the pleader denies a fact, without putting it in issue. Such denial has no effect in the principal case, for so far as that case is concerned, the fact protested against is taken as admitted.

117. Upon a Traverse, Issue Must be Tendered.—It has been shown that tender of issue is a necessary incident to all forms of traverse, except the special traverse.[3] The reason is, that as the matter in dispute sufficiently appears by the traverse, there is nothing to be accomplished by further altercation. The formulæ for tendering an issue in fact vary according to the mode of trial. The tender of an issue to be tried by jury is by a formula called the "conclusion to the country;" which, if by the plaintiff, is, "And this the said A. B. prays may be inquired of by the country;"

[1] Ante, 79 et seq.
[2] Ante, 58 et seq.
[3] Ante, 66.

and if by the defendant, it is, "And of this the said C. D. puts himself upon the country." [1] When the fact traversed is matter of record, issue is not tendered by conclusion to the country, for the reason that a record is of a nature so high, and imports such verity, that it should be tried only by an inspection of the record itself. Hence, when a matter of record is pleaded, and the opposite party pleads *nul tiel record*, he must tender issue by a formal demand that the matter be inquired of by the record; and the issue, when joined, is triable only by inspection of the record, by the court.[2]

118. Issue, When Well Tendered, Must be Accepted.—When a pleading concludes to the country, the opposite party must, if the issue be well tendered, both in point of substance and in point of form, accept or join in it. This is done by filing what is called the *similiter*, in these words: "And the said doth the like." [3] If the issue be not well tendered, that is, if the traverse be bad, in substance or in form, or if the issue be not triable by jury, the opposite party may demur. When the issue tendered is to be tried by the record, no formal acceptance of it is required.

This rule applies, also, to an issue in law, tendered by demurrer; and the party whose pleading is opposed by a demurrer must formally accept the issue, whether well or ill tendered, by a set form of words called "joinder in demurrer," whereby he reaffirms the legal sufficiency of his pleading.[4]

119. Rules to Prevent Prolixity and Delay.—Subservient to the foregoing rules for the production of an issue, are the following, to prevent the retardation of the issue.

There must be no departure in pleading. Departure takes place when a party deserts his former ground of complaint or defense, and resorts to another. Each successive pleading must fortify what has previously been pleaded by the same party. That is, the replication must support the declaration, the rejoinder, the plea in bar, and so on; otherwise, the parties might, by changing the grounds of complaint and of defense, indefinitely prolong the judicial altercation, and

[1] Ante, 62.
[2] Ante, 62, and note.
[3] Ante, 62.
[4] Ante, 80.

delay the issue. If to assumpsit the defendant plead infancy, and to a replication of necessaries he rejoin payment, the rejoinder is a departure; but if to a declaration upon a statute, the defendant plead its repeal, a replication that it has been revived by a subsequent act is not a departure. The replication would fortify the ground taken in the declaration; for the reviving act gives new effect to the former, on which the action is founded.[1]

A plea that amounts to the general issue should be so pleaded. In debt for the price of a horse sold, a plea that the defendant did not buy is bad, for it amounts to *nil debet*. If in debt on bond, the defendant confess the bond, but allege that it was executed to a person other than the plaintiff, the plea is bad, as amounting to the general issue *non est factum*, which would be the proper plea.[2]

All surplusage should be avoided. This rule excludes not only matters wholly foreign, but matters which, though not wholly foreign, do not require to be stated; it sanctions terseness and brevity of statement, and condemns prolixity. Superfluous matter does not, in general, vitiate a pleading; the maxim being *utile per inutile non vitiatur*.[3] But where the surplusage consists in an unnecessary detail of circumstances, so connected with material matter as to be inseparable from it, the whole may be traversed, and the party so pleading will then be required to prove his allegations with the same particularity with which he has pleaded them.[4] The court may order redundant and immaterial matter to be stricken from a pleading.

II. RULES FOR SECURING MATERIALITY IN THE ISSUE.

120. Of Materiality in General.—Materiality is of the essence of the judicial altercation. Immateriality is an unpardonable fault in pleading. It is a defect which no circumstance, not even the verdict of a jury, or the judgment of a court, can cure. If averments or denials be not important to the decision of a cause, no matter how formally they

[1] Gould Pl. viii. 71.
[2] Steph. Pl. 407.
[3] Steph. Pl. 411; Gould Pl. iii. 170.
[4] Steph. Pl. 413.

may be made, and no matter how true they may be, they can not avail the parties, or advance the administration of justice.

A pleading must be material in itself ; that is, if a declaration, it must show a right of action in the plaintiff and against the defendant. If a subsequent pleading, it must respond to that next preceding it, must be consistent with the state of the case at the time, and must tend to forward the altercation. A pleading must also be material as to the parties. The declaration must make the proper person plaintiff, and the proper person defendant, and the averments of subsequent pleadings must relate to these parties. And a pleading by way of traverse must tender a material issue ; that is, an issue fit to decide the action.

121. Only Material Matter Traversable.—The object of the judicial altercation is to ascertain the subject for decision. This the common-law procedure does by the development of an issue—a specific matter affirmed by one party and denied by the other. It is clear that the point so proposed and accepted for decision must be one whose determination will decide the real controversy ; otherwise, the determination of it decides nothing, and the court may award a repleader, in order to obtain a material issue.

In debt on bond, an allegation that defendant was of full age when he gave the bond is premature and unnecessary, and a traverse of such allegation would present an immaterial issue. In such case, infancy is a defense, and should not be anticipated in the declaration.

Traverse of matter of aggravation, which tends only to increase the amount of damage, and does not concern the right of action, tenders an immaterial issue. In trespass for chasing sheep, whereby they died, a traverse of the dying, which is matter of aggravation, tenders an immaterial issue.

The traverse of only one of several material allegations is not in conflict with this rule ; for where several distinct allegations are essential to a cause of action, the denial of any one of these is destructive of the right of action, and tenders a material issue.[1]

[1] Steph. Pl. 295

III. RULES FOR SECURING SINGLENESS IN THE ISSUE.

122. Pleadings Must Not be Double.—This means that the declaration must not, in support of a single demand, allege several distinct matters, any one of which will support such demand; and that any subsequent pleading must not contain several distinct answers to that which precedes it. A violation of this rule tends to create several issues in respect of a single claim, and is called *duplicity*.

In assumpsit for nourishing the defendant, if the plaintiff allege the defendant's request, and his promise to pay a sum certain for the services, and also that he promised to pay so much as the services were reasonably worth, the declaration is bad for duplicity.

This rule does not, however, forbid the allegation of distinct matters in support of as many several demands; and it allows the making of distinct answers to different matters of complaint, but not several answers to the whole of the declaration. In an action on two bonds, the defendant may plead payment as to one, and duress as to the other; but if he plead as to one a release of all actions, and as to the other duress, his plea will be double, because the release is an answer to the whole of the declaration.

Matter that is immaterial will not make a pleading double; though material matter ill pleaded will. The reason is, that no issue can properly be taken upon immaterial matter; but if material matter be ill pleaded, the opposite party may waive the formal objection, and go to issue upon it.

Neither a protestation, nor matter that is only an inducement to another allegation, will make a pleading double. And several matters that together constitute but one connected proposition do not make a pleading double.[1]

123. The Joinder of Causes.—Where a plaintiff has several distinct rights of action against the same defendant, he may, subject to certain limitations as to the character of his demands, join them in the same action. In cases of joinder, each cause of action must be separately stated, and must be complete within itself. Each of several causes so joined

[1] As to duplicity at common law, see Steph. Pl. 300–310.

is called a count; and to each count the defendant may demur or plead, as though it stood alone.

As to what causes may be joined, there has always been some diversity among writers on pleading. The general rule seems to be, that only those within the same form of action, and not requiring different judgments, may be joined. Thus, debt on bond and debt on simple contract may be joined, but debt and trespass can not be. The reasons probably are; (1) that each form of action had, originally, its peculiar form of original writ, and one action could not be grounded on two writs, and (2) that only one judgment could be rendered in one action, and causes requiring different forms of action might also require different judgments.[1]

Actions in form *ex contractu* can not be joined with those in form *ex delicto*. A plaintiff can not join a demand in his own right and a demand *en autre droit;* nor can he join a demand against the defendant on his own liability and one on his liability in a representative capacity. For example, a demand against the defendant as executor and a demand against him personally may not be joined; for as to one the judgment would be *de bonis testatoris*, and as to the other it would be *de bonis propriis*.[2]

Misjoinder of causes is fatal to the declaration, on demurrer, on motion in arrest of judgment, or on writ of error.[3]

The joinder of several counts, each relating to a distinct demand, does not violate the rule against duplicity, the object of which is only to prevent several issues in respect of a single demand.[4]

124. Use of Several Counts for One Right of Action.— It sometimes happens that a pleader, having stated a case in one form, is in doubt as to its sufficiency in point of law, or as to sustaining it in point of fact. To avoid miscarriage in such case, the practice grew up, under a relaxation of the rule against duplicity, of inserting two or more counts, differing in form, but all based upon the same state of facts, and

[1] Evans Pl. 80; Gould Pl. iv. 84, 86, 97.

[2] 1 Ch. Pl. 199–204.

[3] Gould Pl. iv. 97; 1 Ch. Pl. 205.

[4] Steph. Pl. 310.

in support of the same demand. For example, in an action for the price of goods, the circumstances of the transaction may be such as to make it doubtful whether the action should be for goods sold and delivered, or for work and labor done; in which case, two counts would be inserted, setting forth the one demand in these two ways.

It is to be observed, however, that when a declaration contains several counts, whether for distinct demands or for but one, they must always purport to be founded on separate and distinct rights of action, and not to refer to the same matter. In this way, while the rule against duplicity is evaded, it is not directly violated.[1]

125. Use of Several Pleas.—Formerly, but one plea could be pleaded to any one count; and if the defendant had several defenses to one demand of the plaintiff, he was obliged to rely upon the one he thought most available. But this restriction, after being observed for ages, was finally so far relaxed by legislative enactment, as to allow the defendant, by leave of the court first obtained, to plead several defenses to one subject of complaint. This relaxation extends only to pleas in bar, and not to dilatory pleas; and it does not extend to subsequent pleadings.

For the same reason that a party is not allowed to *plead* double, he is not permitted both to plead and demur to the same matter, lest an issue in fact and an issue in law, in respect of a single subject, be thereby produced. But this inhibition does not prevent a party from pleading as to one matter, and demurring as to another distinct matter.[2]

IV. RULES FOR SECURING CERTAINTY IN THE ISSUE.

126. Certainty in Pleading.—It is obvious that some degree of certainty is indispensable to the judicial altercation. The old writers perplexed the subject with much useless refinement as to degrees of certainty. They distinguished three degrees; certainty to a common intent, certainty to a certain intent in general, and certainty to a certain intent in

[1] Steph. Pl. 314; Post, 206 et seq. [2] Steph. Pl. 323.

every particular. The third, or highest degree of certainty, being required only in pleas of estoppel, and in dilatory pleas; these being odious pleas, the former because they preclude a party from asserting the truth, inconsistent with the matter pleaded, and the latter because they tend to defeat suits upon grounds other than their merits.[1] Such precision and clearness as will make the meaning plain to the ordinary mind—and this is certainty to a common intent—is all that the object of pleading requires, and is all that is ordinarily demanded as to the manner of statement. The certainty required at common law relates mainly to parties, place, time, and subject.[2]

127. Certainty as to Parties.—For the purpose of identifying the parties, they should be described by both Christian name and surname; and if either has a name of dignity, that, too, must be used.

If two or more persons sue, or are sued, as copartners, the full name of each person must be used. The use of the firm name alone would not be a sufficient description; for such name, being purely arbitrary, may not contain the name of any member of the firm, and so would not identify the persons suing or being sued.[3]

A corporation differs from a copartnership in this, that it must sue or be sued in its corporate name; for, being an artificial person, its corporate style is its personal name, and identifies it with certainty.

A mistake in the name of a party is ground for plea in abatement only;[4] but misnomer of one not a party is a fatal variance.[5]

128. Certainty of Place.—Formerly, jurors were summoned from the particular neighborhood where the facts in dispute arose; and as a guide to the sheriff in executing the *venire facias*, the declaration was required to show the county and neighborhood in which the matter complained

[1] Gould Pl. iii. 52–58.

[2] Gould Pl. iii. 60.

[3] This rule is changed in many of the states, authorizing a copartnership to sue or be sued in the firm name. Post, 171, 180.

[4] Ante, 58.

[5] Steph. Pl. 341.

of arose. Such place was called the *venue* in the action, and the allegation thereof was called *laying the venue*. If a subsequent pleading alleged new matter, so as to divert the contention to such new matter, it was, for the same reason, required to lay the venue of such new matter. If, in debt on bond, the defendant simply denied the bond, the issue would be tried by a jury from the county laid in the declaration; but if the defendant pleaded a release, laying the venue thereof in another county, the issue, upon a traverse of such plea, would be tried by a jury from the latter county. And upon the establishment of *nisi prius* trials, issues triable by jury were to be tried, not only by a jury of the vicinage, but within the county where the facts arose; hence the laying of the venue served the additional purpose of indicating the place for trial. But in more modern times, when jurors are to decide causes upon the testimony of witnesses, and not upon what they personally know of the facts in issue, they are uniformly summoned from the body of the county in which the action is laid, whether that be the venue laid to the fact in issue or not.

Before the change in the constitution of juries, the reason of the law required the venue to be laid in the true place where the fact arose; but after such change, and when the venue came to relate only to the place for trial, this reason ceased to operate, and the law began to distinguish between cases wherein the truth of the venue was material, or of the substance of the issue, and those in which it was not so. A difference now began to be recognized between matters *local* and matters *transitory*.[1] It was held that when a local fact was laid at a certain place, and issue was taken on such fact, the place was part of the substance of the issue, and must be proved as laid; but that a transitory fact might be laid as having happened at one place, and might be proved to have occurred at another. It was accordingly held, that in a local

[1] Steph. Pl. 329, 330. Local facts are such as carry with them the idea of some certain place; and comprise all matters relating to realty. Transitory facts are such as might have happened anywhere; and comprise generally all matters relating to the person or to personal property; such as debts, contracts, etc.

action—one in which all the principal facts on which it is founded are local—the venue in the action must be laid truly; but that in a transitory action—one in which any principal fact is of the transitory kind—the venue may be laid in any county.[1] But whether the action be local or transitory, every local fact alleged in any pleading must be laid with its true venue, on peril of a variance, should the fact be brought in issue. And it seems that when a transitory matter is alleged out of its true place, it should be laid under a *videlicet;* that is, with the prior intervention of the words "to wit," or "that is to say;" the effect of which is, to mark that the party does not undertake to prove the precise place.[2]

129. Certainty of Time.—In personal actions, the pleadings must allege the time when each traversable fact occurred; and when a continuous act is alleged, the period of its duration should be stated. If the continuity of the act be such as to constitute but one occasion, it should be laid with a *continuando*—"and continuing the said acts for three days following;" otherwise, the acts should be laid on a particular day, "and on divers other days and times," between that and another day named.[3] The laying of time, like the laying of venue, applies only to traversable facts, and does not extend to matters of inducement or of aggravation.

The same liberty that applies to the allegation of place, in transitory matters, applies to allegations of time, in matters generally. But this rule is subject to certain restrictions. (1) If the pleader does not wish to be held to prove the time alleged, it should be laid under a *videlicet.* (2) A time that is intrinsically impossible, or is inconsistent with the fact to which it relates, should not be laid; and if so laid, to a traversable fact, is subject to demurrer. (3) If time is a

[1] From an abuse of this right to lay the venue in transitory actions in any county, arose the practice of *changing the venue,* on motion of the defendant, and for his protection.

[2] Steph. Pl. 332.

[3] Gould Pl. iii. 86–89; Bouv. Dic., *voce* "*Continuando.*"

material point in the merits of the case, and the time laid be traversed, it is of the substance of the issue, and must be strictly proved, to avoid a variance. In such case, the insertion of a *videlicet* will not avail.

The general rule is, that when time is immaterial, the pleader is not confined in his allegations to the true time, nor in his proofs to the time alleged. But in pleading any writing,—such as a record, promissory note, or bill of exchange,—the date thereof should be truly stated; for though the date of a contract is strictly no part of the contract, it enters into the description of it, and if misstated in the pleading, there will be a variance in the proof. Certainty in such case is required for the further reason, that the judgment on such instrument may be a bar to another suit on the same instrument.[1]

130. Certainty as to the Subject of the Action.—In actions for injury to goods and chattels, the declaration should show the quantity, quality, and value; and in actions for the recovery of real property, its quantity and quality should be specified. This requirement as to description of the property is for the purpose of identifying it; the value is to be alleged to furnish, *prima facie*, a rule of damages. But as the pleader is not obliged to state the true value, this requirement is of no practical use.[2]

Pleadings must show title. That is, when a right is asserted in respect of certain property, real or personal, some adequate title thereto must be alleged; or if a pleading charges one with liability in respect of certain property, his title to such property must be alleged. Such title must be alleged as will, in law, sustain the right asserted, or the liability charged.[3]

Where the property is personal, if a title of possession is sufficient, it may be shown by following a description of the property with the phrase "the goods and chattels of the said plaintiff." Ownership of chattels may be shown by alleging that the party was "lawfully possessed of them as of his own

[1] Gould Pl. iii. 60–101; Steph. Pl. 333 et seq.

[2] Gould Pl. iv. 37; Steph. Pl. 340.

[3] Steph. Pl. 342; Post, 323–325.

property." Where the property is real, and a title of possession is sufficient, if it be a corporeal hereditament, the allegation may be that it was "the close of the plaintiff," or, that he was "lawfully possessed of a certain close." If it be an incorporeal hereditament, the allegation should be that the party was possessed of the corporeal thing in respect of which the right is claimed, and by reason thereof was entitled to the right in question, at the time in question. If more than a title of possession is required, it must be stated in its full and precise extent; as, that the party was "seized in his demesne as of fee of and in a certain messuage."

Where it is necessary to allege the derivation of title, if the party claim by inheritance, he must show how he is heir; to wit, as son or daughter. If he claim by immediate descent, he must show the pedigree; for example, if he claim as nephew, he must show how he is nephew. If a party claim by conveyance or alienation, the nature of the conveyance or alienation must be stated, and stated according to its legal effect rather than its form of words.[1]

131. Certainty as to Subject of Action, Continued.— Where a party alleges title in his adversary, it need not be alleged more precisely than is sufficient to show the liability sought to be charged in respect of it; and generally, less precision is required than where a party states his own title. For example, where a plaintiff alleges title in himself to a *particular* estate, the commencement thereof should be shown, unless it be alleged by way of inducement; but in pleading such title in his adversary, the commencement need not be shown.[2]

Where the opposite party is estopped from denying title, no title need be shown. Thus, in an action for goods sold and delivered, the plaintiff need not allege that they were his goods. So, in an action by lessor against lessee, on the lease, title need not be alleged; for the tenant is estopped from denying his landlord's title, so far as necessary to authorize the lease. But if such action be by the heir, executor, or assignee of the lessor, title of the lessor must be

[1] Steph. Pl. 349.

[2] Steph. Pl. 353.

alleged, to show that the reversion is legally vested in the plaintiff; for the tenant is not bound to admit title greater than would authorize the lease.[1]

Pleadings must show authority. That is, where a party justifies under a writ, or other authority, he must set it forth particularly, and must show that he has substantially pursued it. Where a defendant justifies under judicial process, if he be an officer who executed the writ, he is required to plead only the writ, and not the judgment on which it was founded; otherwise, he must set forth not only the writ, but the judgment as well. The reason for this distinction is, that it is an officer's duty to execute a writ that comes properly to him, without inquiring about the validity of the judgment on which it was founded.[2]

The allegation of title, or of authority, if put in issue, must be strictly proved as laid.[3]

Pleadings must not be in the alternative. A charge that the defendant wrote and published, *or* caused to be written and published, a certain libel, is bad for uncertainty.[4]

132. Rules Limiting the Degree of Particularity.— The foregoing rules for securing certainty in the issue are both modified and amplified by certain rules tending to secure brevity, and thereby clearness, in the pleadings.

It is not necessary in pleading to state that which is merely matter of evidence; in other words, in alleging a fact, those subordinate circumstances, which merely tend to prove such fact, need not be stated. This rule requires discrimination between operative facts and evidential facts.[5]

Matters of which the court will, *ex officio*, take notice, need not be stated. This includes matters of law, except private statutes and foreign laws, and all those facts of which courts, for various reasons, take judicial notice without allegation and proof.[6]

A party should not state matter that would come more properly from the other side. This means that a pleader

[1] Steph. Pl. 354.
[2] Steph. Pl. (Tyler's edition) 303.
[3] Steph. Pl. 324–356; Gould Pl. iii. 166 et seq.
[4] Steph. Pl. 389.
[5] Ante, 3; Post, 347.
[6] Post, 341, 342.

should not anticipate the answer of his adversary; which, as Lord Hale said, is "like leaping before one comes to the stile." Pleadings in estoppel are an apparent exception to this rule. These must be certain in every particular, must leave nothing to intendment, and must remove, by anticipation, every possible answer of the adversary.

It is not necessary to allege a fact necessarily implied from other facts alleged. Thus, if a feoffment be pleaded, livery of seizin need not be alleged. Nor is it necessary to allege what the law will presume. In an action for slander imputing theft, the plaintiff need not aver that he is not a thief, for the law presumes that.

A general mode of pleading is allowed where great prolixity is thereby avoided, or where the allegations on the other side must reduce the matter to certainty. This is doubtless the foundation of general allegation of performance of conditions precedent, authorized by some of the codes.[1]

No greater particularity is required than the nature of the thing pleaded will conveniently admit of. And less particularity is required, when the facts lie more in the knowledge of the opposite party than of the party pleading.

Less particularity is necessary in the statement of matter of inducement, or of aggravation, than in the main allegations. This is probably for the reason that matters of inducement and of aggravation are, as a general rule, not traversable, and therefore, particularity therein will not conduce to certainty in the issue.

When an act valid at common law is regulated as to the mode of performance, by statute, only such certainty of allegation is required as was sufficient before the statute. For example, certain leases, valid at common law if made by parol, are required by the statute of frauds to be in writing; yet in declaring upon such lease, it is not necessary to allege it to be in writing. A distinction has been taken, however, between a declaration and a plea, and when a lease, within the statute, is pleaded in bar, it must be shown to be in writing.[2]

[1] Post, 372, 373.

[2] Post, 333.

V. RULES TO PREVENT OBSCURITY AND CONFUSION.

133. Repugnancy and Surplusage.—When matter wholly inoperative and useless is stated, it is denominated *surplusage*, and will be disregarded by the court; the maxim being, *utile per inutile non vitiatur*. But if the unnecessary matter shows that the party has no right of action, or no defense, it renders the pleading ill in substance, and can not be rejected as immaterial.[1]

Where material facts stated in a pleading are inconsistent one with another, the fault is denominated *repugnancy*, and is ground for demurrer.

134. Of Ambiguity.—A pleading that is doubtful in meaning, is to be construed most strongly against the party pleading. This rule of construction is directed against ambiguity, and is based upon the presumption that every person states his own case as favorably to himself as possible. If, in trespass *quare clausum fregit*, the defendant plead that the *locus in quo* was his freehold, he must allege that it was his *at the time of the trespass*. But a pleading is to have a reasonable intendment and construction, and this rule is to be applied only where the language is clearly equivocal and capable of different meanings.[2]

In debt on bond, conditioned to procure A. to surrender a copyhold to the use of plaintiff, a plea that A. surrendered and released the copyhold to plaintiff, without alleging that the surrender was to the plaintiff's use, is sufficient; for this shall be intended.

135. Forms of Allegation.—Much care and attention is given, at common law, to the forms of statement, with a view to prevent obscurity and confusion. All pleadings are required to be absolute in form, and argumentativeness is not allowed. Negatives pregnant—denials which imply an affirmative—are not allowed, because they are both ambiguous and argumentative; and two affirmatives, or two negatives, do not make a good issue, because they traverse only by way of argument.[3]

[1] Gould Pl. iii. 171.

[2] 1 Ch. Pl. 237, 238.

[3] Steph. Pl. 384–389. These faults in pleading being equally faults

Things are to be pleaded according to their legal effect or operation. A written instrument should be set forth, not according to its terms, or its form, but according to its effect in law; because, to plead it in terms or form only, is an indirect and circuitous method of allegation. If a deed purporting to "give, grant, bargain, sell and release," can be operative in law only as a *release*, it should be pleaded as a release; and if it can operate only as a deed of *bargain and sale*, it should be pleaded as such. This rule extends, not only to writings, but to all matters and transactions in which the form is distinguishable from the legal effect. But in modern times this rule is in many cases relaxed, and the pleader allowed to recite the instrument in *hæc verba*, and refer its legal operation to the court; and in actions for libel and slander, where the words themselves must be set forth this rule never obtained.[1]

136. Approved Forms of Expression.—Pleadings should observe the ancient forms of expression, as contained in approved precedents. It was not possible that set forms of expression could be devised for every matter that might become the subject of judicial inquiry; but some kinds of cases recurred so often, that there grew up for them stated and apt forms of allegation, which were adhered to by pleaders until, by long usage, they became established. The forms of traverse called the general issues are examples of these established precedents.[2]

Pleadings should also have their proper formal commencements and conclusions. This requirement relates only to pleadings subsequent to the declaration; and its importance lies in the fact that the formal commencement and conclusion mark the object and tendency of the pleading, as being to the jurisdiction, to the disability, in abatement, or in bar.[3]

Pleas must be pleaded with a defense; that is, they must be introduced by a formal resistance of the matters charged in the declaration. In personal actions, this formal introduc-

under the Reformed Procedure, their full consideration is reserved for a subsequent part. Post, 360–362.

[1] Steph. Pl. 390; Gould Pl. iii. 174–182.

[2] Steph. Pl. 392.

[3] Steph. Pl. 399.

tion is—"And the said C. D., by E. F., his attorney, comes and defends the wrong and injury, when and where it shall behoove him, and the damages, and whatsoever else he ought to defend, and says," etc.[1] A plea in bar has this formal commencement: "says that the said plaintiff ought not to have or maintain his aforesaid action against him, the said defendant, because, he says," etc. And it has this formal conclusion, following the verification: "Wherefore he prays judgment of the said plaintiff ought to have or maintain his aforesaid action against him." But such pleadings as tender issue do not conclude with this formal prayer of judgment, but with a formal offer to refer the issue to some authorized mode of trial.[2] And all pleadings by way of estoppel have a commencement and conclusion peculiar to themselves. A plea in estoppel has this commencement: "says that the said plaintiff ought not to be admitted to say" (stating the matter to which the estoppel relates), and this conclusion: "Wherefore he prays judgment if the said plaintiff ought to be admitted, against his own acknowledgment by his deed aforesaid, (or as the matter of estoppel may be), to say that," etc.[3]

A pleading that is bad in any material part is bad altogether. If a declaration in assumpsit contain two counts, on different promises, a plea of the statute of limitations, to both counts conjointly, if good as to one and insufficient as to the other, is a bad plea; and upon demurrer, judgment would be given for the plaintiff, This rule seems to result from the requirement that each pleading shall have its proper formal commencement and conclusion. As the commencement and conclusion of a single plea relate to and question the *whole action*, the sufficiency of the plea must be determined by considering it as an answer to the action as an entirety; and if it be insufficient as to one count, it can not avail as to the other. If, in the case supposed, the statute were pleaded to each count separately, each plea having its own commencement and conclusion, the invalidity of one could not vitiate the other.

[1] Gould Pl. ii. 6; Steph. Pl. 421. [3] Steph. Pl. 397.
[2] Ante, 62.

The declaration, having no such commencement and conclusion, does not fall within this rule. Therefore, if a declaration be bad in part, but good in another part, relating to a distinct demand, a demurrer to the declaration as an entirety would be overruled, and judgment given for the plaintiff.[1]

[1] Steph. Pl. 401.

Chap 12, 13, 14

CHAPTER XII.

NATURE AND EXTENT OF EQUITY JURISDICTION.[1]

137. Defects of the Common-law Procedure.—The common-law procedure is confined within narrow channels, and the relief afforded by its courts is limited to such as may be had within certain well defined forms of action. Its mode of procedure is fixed and unpliable, while the affairs of life, to be regulated by law and its administration, are ever increasing in novelty and in complexity. The substantive law, tending to adapt itself to the changing conditions of the people, is continually recognizing new jural relations, giving rise to new rights to be protected, and new duties to be enforced. The technical and unyielding procedure of the common law, aided and adapted from time to time by the introduction of fictions, was long ago found inadequate to give relief in many cases where recognized rights were threatened or invaded.

The common-law courts do not protect rights by laying personal commands upon those who invade them, or threaten to invade them. For refusal to perform a contract, a court of law can only adjudge damages, no matter how inadequate such relief may be, or how important actual performance may be to the party entitled thereto. A court of common law can not interfere to prevent a threatened injury, though it be in its nature irreparable by damages; all it can do is to award damages, after the injury has been committed.

[1] Equity procedure has been much modified in this country, by rules prescribed by the Supreme Court of the United States, and by statutes and usage in the several states; but as this outline is designed, not for practical guidance in courts of chancery, but to set forth the *equity system*, as one of the progressive stages in the historical development of pleading, it is the earlier matured system, and not the modern modifications thereof, that is presented.

An important limitation upon the power of common-law courts is, that they can not deal with a controversy to which there are more than two sets of parties. The jurisdiction of a court of law is contentious only, and is strictly limited to deciding controversies. A judgment at law must be simply for the plaintiff, or simply for the defendant; there can be no qualification or modification thereof, however much justice may require it; and a defendant can not have affirmative relief touching the subject-matter of the action, from either the plaintiff or a co-defendant. And a common-law court can enforce its judgment for the recovery of money, only by execution against tangible property; choses in action, and equitable interests, whatever their amount and value, can not be reached by its process.

138. Origin and Nature of Equity Jurisdiction.—The jurisdiction in equity arose as the complement of the common law; in some instances to mitigate and moderate it, in others to extend and amplify it. So narrow and so technical had the common-law procedure become, that in some cases of violence to recognized rights it was unable to afford any relief; in others it did not furnish an adequate remedy, and in some instances it was practically subversive of justice. To effectually remedy these defects, it was necessary to create a subsidiary juridical system, with a tribunal not trammeled by the rigid formalities that circumscribed the common-law procedure. A juridical system was needed that would regard the real intent of parties, rather than the outward forms they had employed; a system that aimed at the prevention of injuries, and the enforcement of duties, rather than mere compensation in damages. A judicial tribunal was needed that should proceed upon the theory that parties litigant owe a personal obedience to the court; a tribunal whose decrees should operate *in personam*, compelling the parties to do whatever it should be decided they ought to do; a tribunal that could deal with more than two parties to an action, and that could mould its decrees to suit the exigencies and peculiar circumstances of a particular case.

To supply this need in the administration of justice, the

jurisdiction in equity arose, whereby the Chancellor, without the intervention of a jury, made and enforced his orders, *secundum æquum et bonum.*[1]

139. Extent of the Jurisdiction.—To bring a cause within the jurisdiction of a court of equity, it is requisite, either that the primary right involved be an equitable right, as contradistinguished from legal rights; or, that the remedy at law—the right involved being a legal right—is not full, adequate, and complete. For example, equity recognizes and protects a title in a *cestui que trust* that is not recognized at law. The essential idea of a trust is, the separate coexistence of the legal title in one, as trustee, and of the beneficial ownership in another, as *cestui que trust.* Of this beneficial interest the courts of common law took no cognizance; but courts of equity have given it the dignity and the protection of a title.

At common law, a mortgagee becomes, upon default of the mortgagor, the absolute owner, and the mortgagor's title is wholly gone. But equity, to relieve the mortgagor from this hardship of the common law, recognized a title still remaining in the mortgagor; to wit, his equity of redemption. Equity having thus interposed in favor of the mortgagor, interposed again in favor of the mortgagee, by entertaining his suit to foreclose the mortgagor's equity of redemption; otherwise, the tenure of the mortgagee after default would be continuously menaced by the mortgagor's right to redeem at any moment.

Equitable liens furnish an instance of rights that are purely of equitable conception. The lien of a vendor on the land

[1] The creative and progressive capacity of the equity branch of the law is thus stated by a distinguished equity judge: "It must not be forgotten, that the rules of courts of equity are not, like the rules of the common law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time. . . . The doctrines of equity are progressive, refined, and improved; and if we want to know what the rules of equity are, we must look, of course, rather to the more modern, than to the more ancient cases." Sir GEORGE JESSEL, M. R., *in re* Hallett's Estate, Knatchbull v. Hallett, 13 Ch. D. 710.

sold, for unpaid purchase-money, is an example of equitable liens, enforceable only in a court of equity.

Specific performance is a familiar example of equitable remedy for breach of a legal right, on the ground that the only legal remedy, in damages, is not full and adequate. And injunction is an equitable remedy often resorted to for the protection of legal rights, on the ground that the law does not furnish an adequate remedy. On this ground, equity will restrain waste, trespass, nuisance, and the alienation of property.

It will be observed, therefore, that the general field of equity jurisdiction embraces (1) causes wherein the title or the right involved is one recognized only in equity, and (2) causes wherein the right involved is a legal right, and is without adequate protection at law.

140. Equitable Remedies.—Of the remedies afforded by courts of equity, some are purely *ancillary* and *provisional.* Such, for example, are, the appointment of a receiver to take charge of property pending a litigation concerning it; bills of discovery, whereby a party is compelled to make disclosures under oath; and bills to take and perpetuate testimony as to a matter likely to be in litigation.

Some equitable remedies are purely preventive. For example, the writ of *ne exeat regno*, to restrain a defendant from evading the jurisdiction; injunctions, to prevent a threatened injury, or to restrain an actual wrong-doer; and bills *quia timet* to guard against future and contingent injuries.

Other remedies are in their nature *final*, affording ultimate relief. Of this class are, the partition of lands, the specific performance of contracts, the reformation and cancellation of contracts, bills for account, partnership bills, creditors' bills, and the instances in which a court of equity will, *virtute officii*, exercise a guardianship over the property and persons of infants, idiots, and lunatics.

141. Foundation Principles of Equity.—Something has been shown of the nature and the subjects of equity jurisdiction, and of the remedies which it supplies; and some of the necessities that called for this subsidiary juridical system

have been briefly pointed out. Equity recognizes titles and rights not recognized at law, and it supplies remedies not furnished at law; but it does not exercise an arbitrary jurisdiction. There are well defined principles and doctrines underlying and permeating the whole system, largely drawn from the essential truths of morality, and based upon the enduring principles of justice and right. Cases of new impression, as they arise, are decided according to the principles upon which former cases have been decided, and thus the application of those principles is illustrated and enlarged; but the principles themselves are fixed and certain.

These underlying principles and doctrines—embodied, for the most part, in the maxims of equity—are the real *principia* of the system; they are the never-failing source of its particular rules, they distinguish the system, they give to it character and coherence, they measure its jurisdiction, and are inseparable from its procedure.

CHAPTER XIII.

CONDUCT OF A SUIT IN AN EQUITY.

142. Origin and Nature of Equity Procedure.—Under the English constitution, the king is regarded as the fountain of justice; and from time immemorial it was a prerogative of the king to administer justice to his subjects. He was bound to administer justice according to law; but, in the absence of legislative direction, was at liberty to employ such system of procedure as he chose. When the equity jurisdiction arose, to supply the deficiencies in the common law, it was regarded, in theory, as the exercise of that part of the king's judicial prerogative that had never been delegated to the common-law courts; and the delegation of this reserved judicial power to the High Court of Chancery,[1] carried with it the right to employ such mode of procedure as might be adapted to the dispensation of justice in this new and extraordinary jurisdiction. Accordingly, the mode of procedure that was so adopted, and that gradually grew up in the court of chancery, followed in part the analogy of the common-law procedure, and in part the procedure then in use in the English Ecclesiastical Courts, which was modeled upon that of the Roman Civil Law.

In all that related to the formal conduct of an action, there

[1] This court, having both common-law and equity jurisdiction, is of very ancient institution, and is presided over by the Lord Chancellor, assisted by the Master of the Rolls, and three Vice-Chancellors. These four subordinate judges sit in separate courts, and exercise their jurisdiction severally; but, together with the Lord Chancellor, they constitute the High Court of Chancery. In the United States, the jurisdiction of the federal courts extends to "cases in law and equity," and these courts sit as courts of law or as courts of equity, according to the nature of the case. In some of the states, distinct courts of chancery are established; but in most of them the two jurisdictions are exercised by the same tribunal.

was a wide difference between the procedure in the ecclesiastical courts and the courts of common law. In the former, the proceedings were mainly conducted in open court, and the court exercised an active supervision and direction of the proceedings as they were in progress. In the latter, the proceedings were chiefly conducted out of court, by the attorneys, and the court interposed only upon the motion of one party and notice to the other. In the one court, no pleading could be received without the approval of the court, first obtained; in the other court, the pleadings were filed or served without permission, and their sufficiency, if questioned, was thereafter determined by the court. In these and some other formal matters, chancery followed the common law. It followed the ecclesiastical procedure in its mode of taking the testimony of witnesses, in requiring each party to submit to an examination under oath by his adversary, and in particular it followed the ecclesiastical courts in adjudicating upon the *duties* of litigants, and compelling performance thereof.

143. Commencement of Suit in Equity.—A suit in equity is commenced by preferring, to the court having jurisdiction of the cause and of the parties, a petition in writing, setting forth the facts and circumstances on which the claim for relief is founded, and praying for such relief as the nature of the case may require, or as the petitioner may be entitled to. This petition, if preferred by an individual, is called a bill; if preferred by the government, it is called an information. The plaintiff, if an individual, styles himself, in the bill, "your orator;" if the suit be instituted by the government, the information is exhibited by an officer of the government, or on the relation of an individual, called the "relator."

144. Appearance of the Defendant.—Upon the filing of the bill, the plaintiff files with the proper officer of the court a *præcipe*, which is a written command to the officer to issue the process of the court for the appearance of the defendant. Thereupon there issues to the defendant a subpœna, which is a mandatory writ, under the seal of the court, requiring the defendant to appear on a day certain, and answer the bill. Appearance is the formal proceeding by which the defendant submits himself to the jurisdiction of the court. For-

merly, if the defendant failed to appear in obedience to the command of the subpœna, there issued against him a long chain of process, ending in a sequestration of his property, for the purpose of compelling an appearance; but in more modern times an actual appearance is dispensed with, and a decree *pro confesso* may be rendered against an absconding or contumacious defendant.

It will be observed that the commencement of a suit in equity differs materially from the procedure of both the civil law and the common law; for in each of these systems the appearance of the defendant must be effected before the plaintiff can file his first pleading, while equity pursues the more logical theory of requiring the plaintiff to make formal complaint of the defendant before he may use the process of the court to subject him to its jurisdiction.

145. Of Defenses in Equity.—The defendant, having appeared, may defend himself against the allegations of the plaintiff's bill by disclaimer, by demurrer, by plea, by answer, and by cross-bill.

If the defendant has no interest in the subject concerning which the suit is brought, he may answer the plaintiff's bill by a simple disclaimer, which is a formal renunciation of all claim in or to the subject of the action. But a defendant may not avoid an alleged liability by mere disclaimer.

If it appear, upon the face of the bill, that the plaintiff has no right to require the defendant to answer, objection should be made by demurrer to the bill, or to some part thereof.

If there are facts, not stated in the bill, which show that the defendant should not be required to answer the bill, these facts may be set up by a plea, which is a special answer, relying upon one or more facts as a reason why the action should be dismissed, delayed, or barred.

If the defendant neither disclaims, nor demurs, nor pleads, he must answer. An answer in chancery may be a denial, or a statement of additional facts, or it may be both. And a defendant may, by cross-bill, ask for discovery or for relief, or for both, against the plaintiff, or against a co-defendant.

The cause, as in an action at law, may proceed to trial upon

the bill and the answer or plea, or a formal replication may sometimes be filed.

146. The Witnesses, the Hearing, and the Decree.—In courts of law, witnesses are examined *ore tenus*, in open court; but in chancery, the examination is conducted in private, and upon interrogatories in writing, previously framed. But this practice has been greatly modified in this country; and in many jurisdictions witnesses are now examined in courts of chancery as they are in courts of law.

The cause being ready, and having been regularly set down for hearing, the parties appear by their counsel, and the hearing proceeds. The counsel state, briefly, the nature of the case, and the points in issue; the testimony of the witnesses is read, and the arguments of counsel are heard; whereupon, the court announces its decree, which is the judgment or order of the court, determining the rights of the parties as to all matters submitted upon the hearing.

A decree is *final* when it determines the whole merits of the cause, and reserves or leaves no matters therein for the future consideration of the court; it is *interlocutory*, when it is made in the course of a cause, and does not finally dispose of it. An order appointing a receiver, or directing a sale, is interlocutory.

147. Of the Execution of Decrees.—It is a general principle, that courts must have power to carry their judgments and decrees into effectual operation; otherwise, courts would be of no avail for the protection of rights, and litigation would be a fruitless ceremony. For this reason, a court of equity will not entertain a suit wherein it can not render a decree that it may enforce. For example, in an action by the vendee of land, for specific performance, if the defendant has, before suit, conveyed the land to a *bona fide* purchaser for value, and without notice, the court will not decree performance. For a like reason, performance of a contract for personal services, or for the construction of a building, will not be decreed.[1] If a decree in chancery be *in personam*, the regular course is, to issue a writ of

[1] 3 Pom. Eq. Jur. 1405, and notes.

execution. This writ, which must be served personally on the defendant, recites the decree, and commands performance of it. If the defendant refuse to perform the decree, he may be proceeded against as for contempt, and a writ of sequestration may issue. If the decree be *in rem*, as for the delivery of lands, it is usual, after service of execution and attachment, to award an injunction to give the plaintiff possession.

Formerly, a decree in chancery, being a personal command to the defendant, and requiring his personal act to carry it into effect, did not operate *ex proprio vigore* to create or to vest a right or title; but this ancient doctrine has very generally been modified, so that in all cases requiring some specific act to be done by the defendant,—as, for example, the conveyance of title to land,—the decree is made to operate of itself as such act of the defendant, or the decree directs that the thing required of the defendant be done by an officer of the court, acting for him.

CHAPTER XIV.

THE PLEADINGS IN EQUITY.

148. General Character of Pleadings.—In early times, when applications for equitable relief were comparatively rare, the pleadings were very brief, and were simple and informal in structure. As the business increased in volume and importance, the courts of chancery, untrammeled by the technical rules of the common law, and proceeding upon the broad equities of the case, naturally adopted a procedure characterized by the same breadth and adaptation that distinguish the equity jurisdiction. The natural tendency was, to tolerate a full and indiscriminate statement of facts, operative and evidential, not always excluding a statement of the law. This liberality led to a cumbersome prolixity and a perplexing confusion in the pleadings; and, although they have gradually been subjected to rules and formal requirements for securing certainty and uniformity, they have always been free from those niceties and subtleties which characterize the pleadings at common law.

149. Of the Bill in Equity.—The pleadings in equity consist, regularly, of bill, demurrer, plea, and answer; and to these is sometimes added a replication.

A bill in equity has two general purposes; the statement of a right to relief, and the examination of the defendant upon oath. In its most technical and artificial form, the bill consisted of the following nine parts:—

I. The Address.—In England, the bill is addressed to the Lord Chancellor; in the United States, to the judges of the court in which the suit is brought. For example, "To the Honorable, the Judges of the Circuit Court of the United States, within and for the district of ———, sitting in Equity."

II. The Introduction.—This states the name and description of the plaintiff, and the character in which he sues, whether in his own right, or *en autre droit*. The object is to fix the identity and the locus of the parties, and to facilitate a resort to the plaintiff for compliance with any order that may be made upon him during the progress of the suit. In the courts of the United States, in cases where the jurisdiction depends upon the citizenship of both parties, their citizenship should be stated in the introduction.

III. The Premises.—This part of the bill, called also the *stating part* thereof, contains a full statement of the operative facts showing a right of action in the plaintiff, against the defendant. It is upon this part of the bill that the plaintiff must ground his right to relief. It should state matters of which the court has jurisdiction, and which, if true, entitle the plaintiff to the interposition of the court in his behalf.

IV. The Confederacy.—This part charges that the defendant combined and confederated with divers other persons, to plaintiff unknown, to injure and defraud the plaintiff; and it prays that these persons, when known, may be made defendants to the bill. This requisite of a bill probably arose from the mistaken notion that new parties could not be added by amendment, and that an allegation of confederacy would, of itself, sustain the jurisdiction of the court. But as there never was a time when such amendment could not be made, and as a mere confederacy was not sufficient to give a court of equity jurisdiction, it would seem, upon principle. that this requirement has always been useless and nugatory.

V. Charging Part.—This part alleges the pretenses which it is supposed the defendant will set up as a defense, and then charges other matter to disprove or avoid them. Formerly, the answer of the defendant was followed by replication and rejoinder. These pleadings were in most cases dispensed with, and instead of leaving the case to be further developed by evidence, and without pleadings, the plaintiff was allowed either to amend his bill after answer, or to anticipate the defense, and in this way expedite the case by incorporating in this part of his bill what was properly matter

for reply. This is directly contrary to the common-law rule that defenses must not be anticipated.

VI. Averment of Jurisdiction.—This clause avers that the acts complained of are contrary to equity, that the plaintiff is remediless at law, and can obtain relief only in a court of equity. But as the jurisdiction of the court always depends upon the nature of the case as disclosed by the facts alleged, and not in any sense upon this mere assertion of a conclusion, this part of the bill serves no purpose whatever, and may, in any case, be omitted.

VII. Interrogating Part.—The defendant is required, without interrogatories, to answer all the matters stated and charged in the bill. But to guard against evasiveness, and to obtain direct and full answers, the practice of inserting specific interrogatories grew up. These interrogatories do not enlarge the duty of the defendant, for without them he must answer all the allegations and charges in the bill, and he is bound to answer the interrogatories only so far as they are based upon such allegations and charges. This part of the bill is purely subservient to its general purpose to require the defendant to answer under oath; and it is important only as a means for obtaining a response as to collateral and minute circumstances, which, however material, the defendant might otherwise purposely evade, or honestly suppose he was not called upon to answer.

VIII. Prayer for Relief.—The defendant is entitled to know upon what facts the plaintiff relies for relief, in order that he may prepare to meet them; and for the same reason, he is entitled to know what use the plaintiff intends to make of his alleged facts. To this end, every bill for relief is required to contain a prayer for relief. This prayer is *special*, stating the particular relief sought; or *general*, asking such relief as the party may be entitled to. The use of the general prayer is, that if the plaintiff has, in his special prayer, mistaken the relief to which he is entitled in the case, the court may, under his general prayer, grant him such relief as he may be found entitled to. The two forms are therefore generally combined; in fact, it is never prudent or safe to omit a prayer for general relief. If the plaintiff is in doubt

as to the proper relief in the case, he may, and should, frame his special prayer in the alternative. And if any special order, such as injunction, or a writ of *ne exeat*, is desired pending the suit, it should be specially prayed for.

Where it does not appear, from the facts stated and from the prayer for relief, upon what legal grounds the plaintiff rests his claim, such legal grounds should, for the reason already given, be specially stated. For example, if a waiver of some right be relied upon, it is not, ordinarily, sufficient merely to state the facts constituting the waiver; the use to be made of such facts, if it is not apparent from the statement of the facts, must be shown by alleging that the right has been thereby waived.[1]

IX. Prayer for Process.—The bill concludes with a prayer that a writ of subpœna may issue, requiring the defendant to appear and answer the matters alleged against him, and abide the determination of the court thereon. This prayer for process should state the names of all the defendants, designating those under age, or under guardianship.

Every bill is required to be signed by the plaintiff's solicitor, as a security that no impertinent or improper matter is contained therein. Formerly, the court examined the bill before it was filed, but with the increase of business this became impracticable, and the matter was left to the honor of the solicitor.

150. The Essentials of a Bill.—It is apparent that a bill containing all the nine parts just described would contain much that is not essential in a pleading invoking the interposition of a court of justice. In fact, the use of some of these parts has always been optional, and some of them have been dispensed with by the rules of practice in courts of equity in England and in the United States.

Upon principle, the essential parts of a bill, so far as it is a mere pleading, are only two—a statement of facts, and a prayer for relief; all the other parts are formal, or precautionary, or superfluous. The statement of facts, by

[1] Langdell's Eq. Pl. 61, 62.

setting out the circumstantial relation of the parties, shows at once a right of action, the jurisdiction of the court, and what the defendant is to answer; and the prayer for relief advises both the court and the defendant as to what the plaintiff seeks to attain by the suit.[1] So far as the bill is to operate as an examination of the defendant, the charging and inquisitive parts thereof are essential; but this use of the bill is purely a matter of practical expediency.

The bill is not required to be sworn to; but the answer thereto, being in part responsive to interrogatories, is required to be under oath.

151. Original Bills.—Bills vary in their form and denomination, according to the purpose for which they are used. The most general division is into *original bills*, and *bills not original;* and to this division is sometimes added, bills in the nature of original bills.

Original bills are those filed in the commencement of a suit. They relate to some matter not before litigated between the parties, and present it for the consideration of the court for the first time. Original bills are again divided into such as pray for relief, and such as do not pray for relief. In a general sense, every bill in equity asks relief; but technically, only such as seek an adjustment of the matters therein complained of are so called.

152. Bills for Relief.—Original bills praying for relief are these: Bills praying for the order or decree of the court touching some right claimed by the plaintiff, in opposition to some right claimed by the defendant, or touching some violation of the plaintiff's right; such are, bills to redeem, bills of foreclosure, bills for specific performance, for partition, for contribution, and for cancellation. To this class belong bills of interpleader, wherein the plaintiff prays only that the defendants, each of whom claims the same debt or duty from the plaintiff, may be required to interplead, that the court may, for the protection of the plaintiff, determine to which of the claimants he shall render that which he admits he owes.

[1] Lang. Eq. Pl. 55.

Of this class are bills of *certiorari*, praying for the removal of a cause pending in an inferior court, to the superior court wherein the bill is filed. Such bill proceeds upon the suggestion that the inferior court, by reason of its limited jurisdiction, can not do full justice in the case. The prayer is for a writ of *certiorari*, directed to the inferior court, requiring it to certify the proceedings in the case to the superior court. If the suggestion for removal is not sustained in the superior court, a writ of *procedendo* issues, directing the inferior court to proceed in the cause. These writs, of *certiorari* and *procedendo*, are not peculiar to the court of chancery.

153. Bills Not for Relief.—Original bills not praying for relief are these: (1) Bills to perpetuate testimony, which pray that the testimony of witnesses may be taken with reference to a matter not in litigation, but that may hereafter be in litigation. Such bills must show a right of the plaintiff in the subject with reference to which the testimony is to be taken; an interest in the defendant to contest the same; and some ground for perpetuating the evidence; as, that the matter in question can not at once be made the subject of judicial investigation. (2) Bills to take testimony *de bene esse*, which are to take testimony in an action at law, already pending, when there is cause to fear that by reason of the age, or infirmity, or intended absence of a witness, his testimony may otherwise be lost before the time of trial. Bills to perpetuate testimony can be resorted to only when no present suit can be maintained; while bills to take testimony *de bene esse* can be used only in aid of a pending action, and may be filed by either party to such action. (3) Bills of discovery, which pray for the disclosure of facts resting within the knowledge of him against whom the bill is exhibited, or of deeds, writings, or other things, in his custody or power, and material to enable the party exhibiting the bill to prosecute or defend an action at law, between the same parties, already pending, or about to be brought.

For a long time, a bill of discovery was the only means for obtaining the testimony of parties to an action at law. But

since parties are now generally allowed to testify in their own behalf, and may be required to testify in behalf of their adversaries; and since the adoption of the summary and inexpensive method of taking the testimony of witnesses by written depositions, these cumbrous auxiliary proceedings, by bill not for relief, once so necessary for the attainment of justice, have been practically superseded, if not expressly abolished, both in England and in the United States.

154. Bills Not Original.—During the progress of a suit, there may be such change in the relation of the parties, either before decree, or after decree and before execution thereof, as to require the filing of an auxiliary bill, setting forth such change. If such secondary bill merely add new incidents to a still subsisting relation, it is supplemental; if it state a new relation, between new parties, it is a revivor.

A supplemental bill is an addition to an original bill, to supply some defect in it or in the proceedings thereon, not curable by amendment, or to allege facts occurring since the filing of the original bill.

A bill of revivor is to renew and continue the original bill, when, by death or marriage of a party, the suit has been abated. A secondary bill may be both a revivor and a supplement, reviving the suit, and at the same time supplying defects or adding new events.

155. Bills in the Nature of Original Bills.—Among secondary bills are some of such nature as to be, strictly, original bills, yet the injuries they complain of proceed from a former or a pending suit. Bills of this kind are numerous, and only a few of them will be described.

A cross-bill is one exhibited by a defendant, against the plaintiff, or a co-defendant, in a suit pending, seeking discovery touching matters in the original bill, or asking relief founded on some collateral claim against the plaintiff or a co-defendant. It frequently happens that in no other way can all the matters in dispute be brought fully before the court, and the court be enabled to make a complete decree.

Bills of review are in the nature of writs of error. They are brought to have the decree of the court reviewed, modi-

fied, or reversed, on account of error in the proceedings, or because of newly discovered evidence.

To this class belong bills to impeach a decree on the ground of fraud, bills to suspend a decree, and bills to carry a decree into operation.

156. Demurrer to the Bill.—The defendant may respond to the bill in two ways; he may contest the suit, or he may show reason why he is not called upon to contest. If he submits to contest the suit, he files an answer to the bill; he shows cause for not answering, by demurrer or by plea. While both demurrer and plea are used to avoid answering the bill, they are based upon entirely different grounds; a demurrer resting upon the apparent insufficiency of the bill, and a plea resting upon new facts alleged to show that the suit should be dismissed, delayed, or barred. Both demurrers and pleas were borrowed from the common law.

It has been shown that an original bill for relief has two objects—discovery, and relief. A demurrer assumes the facts alleged in the bill to be true, and it questions their sufficiency to entitle the plaintiff to call upon the defendant for discovery, or for relief.

The effect of a demurrer in equity is very different from its effect at common law. When a defendant demurs to a declaration, he prays judgment upon the plaintiff's claim; and the plaintiff, by joinder in demurrer, prays the like judgment. The case being thus at issue, the decision is always followed by judgment, unless the defeated party obtains leave to amend or to plead. But when a defendant demurs to a bill, he prays judgment, not upon the plaintiff's claim, but whether he must answer the bill. The decision of the demurrer is not followed by a decree; for all that is decided is, that the defendant is, or is not, bound to answer. If the demurrer be overruled, the defendant must plead or answer; if it be sustained, and the plaintiff does not obtain leave to amend, the defendant may move to dismiss the bill for want of prosecution.

The theory of this distinction is, that a demurrer to a declaration *admits* the facts alleged, whereas a demurrer to a bill only *assumes* the truth of the bill, *pro re nata*. In the one

case, the facts are before the court for its decision as to plaintiff's right to relief; in the other case, an assumed state of facts is before the court for its decision as to the defendant's obligation to proceed in the suit. The form of demurrer to a bill shows that both the admission of facts and the submission of the case are qualified and provisional. The usual form is as follows: "This defendant, by protestation, not confessing any of the matters in and by said bill complained of to be true in manner and form as the same are set forth, says that he is advised that there is no matter or thing in said bill, good and sufficient in law, to call this defendant to account in this honorable court for the same. [Stating here the grounds of the demurrer.] Wherefore, this defendant demurs thereto, and humbly craves the judgment of this honorable court, whether he is compellable, or ought to make any answer thereunto, otherwise than as aforesaid."

The bill is the only pleading that may be demurred to in equity.[1] The reason probably is, that one of the chief objects in introducing demurrers was to protect the defendant from giving discovery.

157. Of Pleas.—A plea is a statement of facts not contained in the bill, to show cause why the suit should be dismissed, delayed, or barred. It differs from an answer, as it demands the judgment of the court in the first instance, whether the matters alleged in it do not debar the plaintiff from the right to an answer.

Pleas are usually divided into these four classes: (1) Pleas to the jurisdiction; which do not dispute the right of the plaintiff, but assert that his claim is not cognizable in equity, or that some other tribunal has the jurisdiction. (2) Pleas to the person; which deny the capacity of the plaintiff to sue. (3) Pleas to the bill, or to the frame of the bill; which allege that for some reason, such as the pendency of another suit, or the want of proper parties, complete justice can not be done, and the suit ought not to proceed. (4) Pleas in bar; which are founded on some bar created by statute, or by matter of record, or by matter *in pais*.

[1] Crouch v. Kerr, 38 Fed. Rep. 549, and authorities there cited.

Two questions may arise upon a plea: first, is it sufficient in law; and secondly, is it true in fact? If, upon argument, it is held to be good in law, the plaintiff may controvert its truth by replication.

158. Of the Answer.—If the defendant does not demur, or plead, or make disclaimer, or if his demurrer or plea has been overruled, he may controvert the plaintiff's claim by answer. The answer in chancery contains two distinct elements—a discovery, and a defense. As to the former element, the answer must contain a distinct and categorical answer to every material allegation in the stating part of the bill, and in the charging part thereof. The object of these personal answers is to aid the plaintiff in proving his bill. If the bill contain irrelevant or immaterial allegations, the answer need not respond to them, because the plaintiff would not be entitled to prove them. So, if the bill contain matter to answer which would subject the defendant to a criminal prosecution, he need not make answer to such matter. The defendant may set up in his answer as many defenses, and of as many kinds, as he is able consistently to swear to.

If the discovery in the answer be incomplete, or if the defensive matter be insufficient or indefinite, the plaintiff may file exceptions thereto, and require the answer to be made full and particular.

It was originally the practice to follow an affirmative defense by a replication. The replication is now generally dispensed with, and the same end is accomplished by amendment of the bill; though in some jurisdictions a formal replication is still required.

In courts of equity, matters of mere form are not allowed to prejudice the rights of parties; consequently, there is great liberality as to amendment of pleadings, when substantial justice will be thereby promoted.[1]

[1] For studies in forms of pleadings in equity, and for Rules of Practice established by the Supreme Court of the United States, see "Barton's History of a Suit in Equity," and Rapalje's edition of "Lube's Equity Pleading."

CHAPTER XV.

THE REFORMED AMERICAN PROCEDURE.

159. The Origin of Code Pleading.—The preceding chapters of this part have been devoted to an historical outline of the several systems of procedure that led the way to the modern system, whose principles and their application are to be developed in the succeeding chapters of this treatise. It is not the purpose here to extol the new, or to decry the old; but to give some account of the origin, and of the inherent excellence, of the modern system.

Numerous attempts were made, both in England and in this country, so to amend and simplify the common-law system as to free it from artificial technicalities, and bring it into harmony with the natural and logical foundations of procedure. But its forms and formalities, its precise verbiage and its tedious ceremonies, had been wrought into a method so cumbrous that the iconoclastic hand of the legislature was required for the introduction of a plain and simple substitute, based upon the inherent nature of legal rights, the principles of the substantive law, and the general rules of argument. This innovation began in 1848, when the legislature of New York adopted a Code of Procedure. Since that time, two concurrent agencies—the one legislative, the other judicial—have contributed to the development of the system. These agencies have contributed dissimilar elements. The statutory rules are positive, sometimes arbitrary, and are in their nature fixed and stable; the judicial elements rest upon principle and reason, and are in their nature pliant and progressive. From these sources, a system has been matured that is unique in its simplicity, complete in its scientific character, and unrivaled in its adaptability.

160. Fictions in Pleading are Abolished.—Resort to

fiction was not a progressive step in the development of pleading. It was a means for adapting the old forms to new demands, and at the same time preserving the time-honored forms. Fictions were invented to promote the ends of justice, not to thwart them; and they were indulged only when promotive of justice. They required no proof, and were not traversable; because, to require the one, or to permit the other, would defeat the purpose for which they were designed.[1] In the Reformed Procedure, the pleader is required only to state the facts which, under the substantive law, constitute his particular right of action or defense, and is not required to state such facts as would show a right or a defense according to some ancient form. There are, accordingly, no "established forms;" fictions are not needed, and they have, with trifling exceptions, been abolished.

161. Forms of Action are Abolished.—The builders of the common-law procedure classified actions, and adopted a distinct "form of action" for each class; and they persistently adhered to these established forms of action. Each form of action had its peculiar technical phraseology, and the pleader, having determined the class to which his right of action belonged, was required to conform his statement to the forms of expression peculiar to the form of action so adopted. This requirement aimed at certainty and precision. It was intended to give the defendant notice, from the very commencement of the action, of the nature of the complaint against him; to preclude the plaintiff from changing the ground of his complaint; and to enable the court to apply to the case, as it progressed, its appropriate rules of pleading, of evidence, and of practice.[2]

These framers of the old system understood the objects of pleading, but the means they employed were sometimes ill adapted to the end in view. Greater diversity could hardly be found than that which distinguishes the different sets of operative facts conferring rights of action in the infinitude

[1] Gould Pl. iii. 18; BRINKERHOFF, J., in Wilson v. Wilson, 17 O. S. 156; Ante, 50.

[2] Ante, 49.

of cases daily arising out of the jural relations among men. To group these into a few classes, to bring into each class an almost endless variety of circumstances, and to force these various sets of circumstances into a prescribed formula, is to obscure, rather than to disclose, the true state of facts relied upon. And in the use of forms of action, there is superadded to the task of determining whether the operative facts give a right of action, the further task of referring the case to its proper form; and a mistake in adopting the form of action is always prejudicial, and sometimes irremediable.[1] The new procedure abolished these "forms of action," and substituted a single action for all cases, whether at law or in equity.

162. The Civil Action of the Reformed Procedure.— One of the most important reforms of the new procedure is the entire abolishment of "forms of action" as they existed at common law, and the use of one form of judicial proceeding, known as "a civil action." It did not affect, or undertake to affect, the composition of a right of action—the investitive and culpatory facts that give rise to the remedial right; for it is the province of the substantive law, and not of the law of procedure, to determine what facts shall confer a primary right, and what facts shall amount to an invasion thereof, and authorize an action. In the great variety of causes that may arise, there must be a great diversity of facts and groups of facts constituting a right of action or a defense; and these diversified facts require correspondingly diversified statements thereof. The reformed system simply adapts the procedure to these inherent differences in the operative facts of cases, instead of adapting the facts to a rigidly formal procedure, as was habitually done at common law.

A plain statement of the operative facts relied upon is the most effectual means of advising the adversary party and the court; it makes full disclosure and precludes the party from changing the ground of his claim; and it rests upon, and demands an application of, the principles of substantive law,

[1] Ante, 112.

instead of the forms of procedure. This single action of the modern procedure is readily adapted to the diversified forms of jural relations; it recognizes substantial differences, and ignores formal differences; and it enhances the certainty and the safety of procedure.

163. Combining Legal and Equitable Actions and Defenses.—Under the former procedure, actions at law and suits in equity were entertained by separate courts; a legal right of action and an equitable right of action could not be combined in one action; and an equitable defense could be asserted only in an equitable action, and in a court of equity. A plaintiff having two distinct rights of action, one legal and the other equitable, both growing out of the same transaction, was compelled to pursue them in separate actions and in different courts. For example, one holding a note secured by mortgage, and entitled to a judgment on the note and a decree of foreclosure on the mortgage, was driven to two actions to obtain these remedies—an action at law to obtain judgment on the note, and a suit in equity to foreclose the mortgage. And a defendant having an equitable defense to an action at law was compelled to commence another action, in a court of equity, and there, upon giving bond, to enjoin the plaintiff in the action at law from proceeding therein until after the court of equity had passed upon his equitable defense. If, for example, A., having the legal title to land in the possession of B., sued B. in an action of ejectment to recover the possession of the land, B. could not plead, in that action, that he was in possession under purchase from A., that he had paid the purchase price and was entitled to a conveyance of the legal title from A. His equitable right was not recognized in a court of law, and could not be enforced therein to defeat a recovery. He was required to obtain, by an independent suit in chancery, a decree for specific performance of his contract with A.; and having thus obtained the legal title, he could set it up in the action at law.

Under the Reformed Procedure, which abolished the distinction between actions at law and suits in equity, an equitable right may be set up to defeat recovery in an action brought

to enforce a legal right. In the example just stated, the defendant may plead his equitable right, not only to defeat recovery by the plaintiff, but to obtain, at the same time, the affirmative relief of specific performance.

The reformed procedure has abolished the distinctions between actions at law and suits in equity, so far as the names and forms thereof are concerned, and has substituted one form of judicial procedure, known as a civil action; and has provided that a plaintiff having several rights of action against the same defendant may, subject to certain restrictions as to the union of causes of action in one complaint, pursue them all in one action. And under the new procedure a defendant may join in his answer as many grounds of defense, counter-claim, and set-off, as he may have, whether they are such as have heretofore been denominated legal, or equitable, or both.

These provisions have neither abolished nor affected legal or equitable rights and reliefs; the object has been to avoid circuity of action and multiplicity of suits, and to simplify, facilitate, and cheapen procedure. Legal and equitable rights and defenses remain as before; the modes of asserting them are changed.

164. Several Issues in One Action.—The combination of legal and equitable demands and defenses, under the reformed system, sometimes presents both legal and equitable issues in one action. It is the policy of the Reformed Procedure to enable suitors to develop, in one action, as many consistent grounds, both for relief and for defense, as they may have, or claim to have. This is for the convenience and economy of litigants; and to this end, the codes are liberal in their provisions for the joinder of demands and of defenses, and for the bringing in of parties. If A., holding the legal title to land, sue B. for trespass thereon, and if C., the equitable owner of the land, and the one under whom B. claims, be made a party, and ask that the action for trespass be enjoined and the legal title decreed to him, the controversy between A. and B. would be purely legal, while that between A. and C. would be purely equitable. Yet both these issues may be tried and determined in the one action.

The usual practice in such case is, to stay the issue as to the trespass, until the equitable issue has been determined; for if that should be determined against the plaintiff, the whole case would be ended.[1]

The common law sought to avoid several issues in one action; the new procedure seeks to settle all cognate questions in one action, but to keep the several issues separate and distinct. A defendant may, subject to certain limitations, have affirmative relief against the plaintiff, or against a co-defendant.

165. Résumé of Part Two.—The history of pleading is the history of a struggle to maintain an adequate procedure. Jurisprudence has grown with the growth of civilization. In its infancy, its methods were fixed and arbitrary; in its maturity, reason and equity hold sway in modes of procedure.[2] In the very earliest times, the only authoritative statement of right and wrong was a judicial sentence after the facts; not one presupposing a law that has been violated.[3] In the infancy of judicial procedure, forms, the most artificial and arbitrary, are found; and these were the very center of the substantive law. The notion that the law emanated from the judge's inspiration has not been more completely dissipated, than has been the idea that procedural forms embody the law. From generation to generation, reason and right have controlled, more and more, the modes of procedure.

The Civil-law Procedure, while it was cumbrous, and lacked the inspiration of scientific methods which permeate the more modern systems, had much of the true spirit of judicial procedure.

The Common-law System was overlaid with erudition, and was crippled with refinements and technical restrictions. But considering its time and its origin, it was a wonderful achievement, and worthy of the encomiums that have been lavished upon it. Its chief distinguishing excellence is the complete separation of law and fact, not only in the plead-

[1] Pom. Rem. 86; Massie v. Stradford, 17 O. S. 596.

[2] Pom. Rem. 7–9.

[3] Maine Ancient Law, 7.

ings, but in the trial. It formulated a system of general rules of statement and of construction that have not been excelled, and that can not be dispensed with.

The Equity Jurisdiction was an enlarged view of rights and remedies, and its procedure was adapted to its wider range of remedial right; but its pleadings became cumbersome and confused, and were wholly wanting in scientific method and in certainty and simplicity.[1]

The Reformed Procedure is at once scientific and simple. By its methods there is presented a plain and simple inquiry as to the rights and duties of parties litigant, as these arise from facts made operative by law. The judicial investigation is not hampered by adherence to arbitrary forms and technical distinctions; and the procedure is readily adjustable to any violation of a legal right, however novel it may be.

166. Résumé, Continued.—The history of pleading, as it has been outlined, shows that the several systems of procedure do not together form one rational progressive order of development. Each system has its excellences, and each bears an impress of the stage of social and professional culture of its time. Each shows improvement over preceding systems, and there is such connection as comes from the retention of what was of lasting value in others.

The common-law procedure was made up at intervals and by piecemeal, without preconceived plan, and by resort to temporary expedients to meet the exigencies of occasion.[2] The reformed system is a synthetical and philosophical system, complete in its entirety, and harmonious in its parts. The old procedure required an obsequious adherence to forms and precedents; the new procedure requires a rational and discriminating application of principles. It has not affected legal rights and obligations, nor has it dispensed with rules of statement; it has substituted for a procedure that was dogmatic and formal, one that is rational and logical, and that is thereby better adapted to the administration of justice. The pleadings are, as to matter of substance, governed by the

[1] Ante, 148.

[2] Walker's Am. Law, 504.

substantive law, defining rights and obligations; and in matter of structure and interpretation, they are governed by rules of statement based upon the nature of rights and the logic of procedure. The true conception of pleading under the reformed system is, a brief and simple statement of operative facts, measured by the substantive law as to the *requisite* effect, and by the law of procedure as to the *actual* effect. The crowning excellence of the Reformed Procedure is, not that it has discarded forms and abolished fictions, not that it has condensed external methods into a single civil action, not that it has joined legal and equitable demands and defenses, but that it has, when rightly understood, brought pleading into harmony with the true nature and theory of legal right and obligation; it has made form subservient to substance, and has subordinated the statement to the thing stated. This distinguishing feature of Code Pleading, outlined in Part I., will be apparent in the study of its formal parts, its rules of statement, and the application of principles, hereinafter treated of.[1]

[1] This chapter is brief, because the subject will be elaborated throughout the remainder of the work. I will here venture to add, however, some words of commendation from two of the most distinguished jurists of these times—the late David Dudley Field, of New York, and Lord Coleridge, the Chief Justice of England. In 1893, Mr. Field prepared, by request, a paper for the Columbian Exposition at Chicago, in which he said that codes of civil procedure, or what are such in substance, have been adopted "in twenty-eight American States and Territories—New York, Missouri, Wisconsin, California, Kentucky, Ohio, Iowa, Kansas, Nevada, North Dakota, South Dakota, Oregon, Idaho, Montana, Minnesota, Nebraska, Arizona, Arkansas, North Carolina, South Carolina, Wyoming, Washington, Connecticut, Indiana, Colorado, Georgia, Utah, and Maine. The example was contagious, even so far as across the sea; and in 1873 the Parliament of England took up the subject, and adopted the Judicature Act, by which the forms of action were abolished and law and equity fused together. This act extended to Ireland, and has been followed in the English colonies of Victoria, Queensland, South Australia, Western Australia, Tasmania, New Zealand, Jamaica, St. Vincent, the Leeward Islands, British Honduras, Cambia, Grenada, Nova Scotia, Newfoundland, Ontario, and British Columbia."

In 1883, Lord Coleridge, at the reception tendered him by the Bar Association of New York City, in replying to the address of welcome, took occasion to say: "You are probably aware that we in England

have been engaged for the last ten years, beginning in 1873, when as attorney-general I was responsible for passing the Judicature Act through the House of Commons, in endeavoring to cheapen and simplify and expedite our procedure upon the lines of those salutary statutes which the wisdom of Parliament enacted about thirty years ago (in 1852 to 1854). It was high time that something was done to expedite and amend and simplify the common law. It had become associated in the minds of many men with narrow technicality and substantial injustice. That was not the fault of the common law, but it was the fault, if fault it were, of the system of pleading, which, looked at practically, was a small part of the common law, but very powerful men had contrived to make it appear that it was almost the whole of it,—that the science of statement was far more important than the substance of the right, and that rights of litigants themselves were comparatively unimportant unless they illustrated some obscure, interesting, and subtle point of the science of stating those rights. But it is really a great pleasure for me to find that slowly, and if I may say so, with wise hesitancy, you are gradually admitting into your system those changes which we have lately made, as and when they satisfy the needs, the temper, and the genius of your people."

The learned Chief Justice seemed for the moment to forget that America had led the way in this reform.

OUTLINE OF CODE PLEADING.

I. REGULAR PARTS OF PLEADING.

1. Complaint.
   1. Title.
   2. Statement.
   3. Relief.
   4. Verification.

2. Answer.
   1. Denials.
      - *a.* General.
      - *b.* Special.
   2. New Matter.
      - *a.* Dilatory.
        - To Jurisdiction.
        - In Abatement.
      - *b.* In Bar.
        - In Excuse.
        - In Discharge.
      - *c.* Affirmative Relief.
        - Counter-claim.
        - Set-off.
        - Cross-complaint.

3. Reply.
   1. Denials.
      - *a.* General.
      - *b.* Special.
   2. New Matter.

II. IRREGULAR PARTS OF PLEADING.

1. Motions.
   1. To Strike from Files.
   2. To make Definite.
   3. To Separately State and Number.
   4. To Strike Out Redundant Matter.

2. Demurrers.
   1. General.
   2. Special.

3. Amendments.
   1. Of Right.
   2. By Leave Obtained.
   3. Supplemental Pleadings.

PART III.

ORDERLY PARTS OF PLEADING.

SUBDIVISION I.

THE REGULAR PARTS OF PLEADING.

167. Scope and Divisions of This Part.—Having set forth, in Part I., the philosophy of pleading under the Reformed Procedure; and having, in Part II., presented the essential principles and the historical development of the older systems of procedure, and an outline of the new system; we come now, according to the order of treatment proposed, to the orderly parts of pleading under the Reformed Procedure. These formal parts of pleading are but the framework of the system; they are its mechanism, adapted for use in the practical application of principles.

For convenience and perspicuity of treatment, these formal parts of pleading will be considered under two general divisions or groups—the regular, and the irregular parts. Each of the several pleadings will be herein separately described, and such matters as pertain only to the use of the particular pleading under consideration will be stated, leaving those rules applicable to the pleadings in general to be stated in Part IV.

168. Regular Parts of Pleading.—The pleadings whereby an issue in fact is to be regularly evolved are, the complaint,[1] the answer, and the reply. The complaint, which is the first pleading on the part of the plaintiff, must contain a plain statement of the operative facts which constitute his right of action, and a demand of the relief sought. The

[1] I have used "complaint" in preference to "petition," found in some of the codes, because it is the term used in most of the states, and because it seems to be etymologically preferable.

answer of the defendant may deny the allegations of the complaint, or may allege any new facts that are defensive. When the answer states new matter, the plaintiff may, by reply, deny such statement of new matter, or allege new facts in avoidance thereof. New matter in the reply is to be deemed controverted by the defendant, without further pleading.

These are the only pleadings of fact, and when sufficient in substance, and proper in form, they will always present a material issue in fact. As these pleadings are incident to every suit, and regularly occur in the ordinary course thereof, they may properly be termed the *regular parts of pleading.*

Complaint must contain a plain statement of the operation which constitutes his right of action and a demand for relief.

Reg. parts of pleading are Complaint, answer and reply

a reply is deemed controverted by the def. and no further pleading

the Cir. Ct of the State of Ills.
for the Cty of Madi.

Plaintiff } Complaint
vs
Williams + Thomas [illegible] doing business under firm name of Williams + Thomas [illegible]

Pltf. } sets for cause of action against the def
alleges:

CHAPTER XVI.

THE COMPLAINT.

169. Its Formal Parts.—The complaint must contain, (1) the title of the cause, including the name of the court and of the county in which the action is brought, and the names of the parties; (2) a statement of the facts constituting the right of action; and (3) a demand of the relief to which the plaintiff supposes himself entitled. To these may be added, what is really not a part of the pleading, a verification on oath.

I. OF THE TITLE.

170. The Court and the County.—The title must contain the name of the court and of the county in which the action is brought. At common law, the declaration was required to state the county in which the matter complained of arose; formerly, as a guide to the sheriff in summoning the jury; and afterward, to designate the place for trial. The naming of the court and county, required by the Reformed Procedure, has no such effect as the laying of venue at common law. The object is, to identify the pleading with the action and the court. In New York, however, where some actions may be brought in one county and tried in another, the title must, in such actions, specify both the county where the action is brought and that in which it is to be tried.

An omission of the name of the court in a complaint is a formal defect, that may be corrected on motion in the trial court; and if not so corrected there, it can not be urged in a court of errors.[1]

171. The Names of the Parties.—The title must contain the names of the parties to the action, and should desig-

[1] McLeran v. Morgan, 27 Ark. 148.

nate them as plaintiff and as defendant. This requirement is for the purpose of identifying the persons; and the rules following will show with what degree of certainty the parties to an action are to be designated.

They should be designated by their true names, and both the Christian name and the surname should be given. If one is known by different names, either may be used, or he may be sued with an *alias dictus;* as, "John Jones, *alias* John Brown." One whose name is unknown may, generally, be sued by a fictitious name and a description of the person, stating the reason, and amending the complaint before judgment, by inserting his true name.[1] A defendant sued by a fictitious name is a party to the action from its commencement, and the amendment of the complaint by inserting the true name does not change the cause of action.[2]

In actions by or against partners, each person should be named in the title, except when, by favor of a statute, the suit is by or against them in the firm name; and in such case, the complaint must, by proper averments, bring the partnership clearly within the purview of the enabling statute.[3] A corporation, on the other hand, can sue or be sued only in its corporate name, which must be stated in the title.

If one sue or be sued in an official or representative capacity, he should be so designated in the title. Thus, "A. B., as administrator of the estate of C. D., deceased, **plaintiff,** against E. F., as executor of the will of G. H., deceased, defendant." The word "as" should not be omitted. It is true that "A. B., administrator," etc., may sufficiently identify the person; but it is merely *descriptio personæ*, and not a designation of the capacity in which A. B. is a party to the action.[4] Where a defendant is designated as "A. B., mayor," etc., omitting the word "as" between the name and the official designation, and where the scope and averments of the complaint harmonize with the omission, the addition of the official title is mere *descriptio personæ*, and the action

[1] Earle v. Scott, 50 How. Pr. 506; Gardner v. Kraft, 52 How. Pr. 499; Rozencrantz v. Rogers, 40 Cal. 489.

[2] Farris v. Merritt, 63 Cal. 118.

[3] Haskins v. Alcott, 13 O. S. 210.

[4] Sheldon v. Hoy, 11 How. Pr. 11; Bennett v. Whitney, 94 N. Y. 302.

is against the defendant as an individual.[1] But where the body of the complaint plainly discloses an official or representative capacity as the ground of the action, the omission of the word "as" is not conclusive.[2]

Where an infant sues by his guardian, or by his next friend, the infant is the real party, and should be so designated in the title. Thus, "A. B., an infant, by E. F., his next friend."[3]

172. Use of Initial Letters and Abbreviations.—The initial letter of a name is not a legal name, and should not be used to designate a party;[4] but a single letter, whether vowel or consonant, may be the Christian name of a person, and unless the contrary appear, it will, when standing alone, generally be so regarded by the court.[5] As a rule, the law recognizes but one Christain name, and the initial letter of a middle name may generally be treated as surplusage, and a mistake therein disregarded.[6]

A party may be designated by any known and accepted abbreviation of his Christian name, and the court will take notice of what such abbreviation stands for; as, "Jas." for James; "Christ." for Christopher; "Wm." for William; "Jno." for John.[7] The words "junior" and "senior" added to a name are mere description, and not part of the name, and need not be proved as alleged.[8] If father and son have the same name, the former is, in the absence of proof, presumed

[1] Bennett v. Whitney, 94 N. Y. 302; Gould v. Glass, 19 Barb. 179.

[2] Beers v. Shannon, 73 N. Y. 292; Bennett v. Whitney, 94 N. Y. 302.

[3] Vincent v. Starks, 45 Wis. 458; Whittem v. State, 36 Ind. 196; Bowie v. Minter, 2 Ala. 406; Jack v. Davis, 29 Ga. 219; Williams v. Ritchey, 3 Dillon, 406.

[4] Herf v. Shulze, 10 Ohio, 263.

[5] Tweedy v. Jarvis, 27 Conn. 42, 45.

[6] Franklin v. Talmage, 5 Johns. 84; Choen v. State, 52 Ind. 347; State v. Martin, 10 Mo. 391; Smith v. Ross, 7 Mo. 463; Isaacs v. Wiley, 12 Vt. 674.

[7] Stephen v. State, 11 Ga. 225, 240; Weaver v. McElhenon, 13 Mo. 89; Kemp v. McCormick, 1 Mon. Ty. 420; Studstill v. State, 7 Ga. 2.

[8] Coit v. Starkweather, 8 Conn. 293; Cobb v. Lucas, 15 Pick. 7; Kincaid v. Howe, 10 Mass. 203, 205; Neil v. Dillon, 3 Mo. 59; Headley v. Shaw, 39 Ill. 354; Allen v. State, 52 Ind. 486; People v. Cook, 14 Barb. 259; People v. Collins, 7 Johns. 549; Fleet v. Youngs, 11 Wend. 522; Prentiss v. Blake, 34 Vt. 460; Brainard v. Stilphim, 6 Vt. 9; Blake v. Tucker, 12 Vt. 39.

to be intended;[1] but the real intent may be proved *aliunde*.

173. Misspelling—Idem Sonans.—In very early times, when the judicial altercation was oral, and a minute of the allegations was made in writing, by an officer of the court, it sometimes happened that the officer misspelled the names of the parties. But if the name so written sounded like the name so spoken, it was held to be sufficient. This rule, of *idem sonans* as it is called, still obtains. Under this it has been held that Mars is *idem sonans* with Marres;[2] McDonnell with McDonald;[3] Beckwith with Beckworth;[4] Johnson with Johnston;[5] Louis with Lewis;[6] McGloflin with McLaughlin;[7] and Erwin with Irvin.[8] Resort to this rule is often necessary in spelling the names of foreigners. Whether one name is *idem sonans* with another is not a question of orthography, but of pronunciation; and when it arises in evidence on the general issue, it is for the jury, and not for the court.[9]

A party who is misnamed in a written obligation may sue or be sued thereon in his true name, adding an explanatory statement;[10] though some authorities hold that where a defendant has himself signed a wrong name to the instrument sued on, he should be sued in such name, and if he pleads the misnomer, the facts may be stated in the reply.[11] If one is sued by a wrong name,[12] or by his Christian name alone,[13] is served with process, and does not plead the misnomer, judgment will bind him. Matter in abatement, if there be actual notice to the defendant, is waived if not pleaded.[14]

[1] Brown v. Benight, 3 Blackf. 39; Bate v. Burr, 4 Harr. (Del.) 130.

[2] Com. v. Stone, 103 Mass. 421.

[3] McDonald v. People, 47 Ill. 533.

[4] Stewart v. State, 4 Blackf. 171.

[5] Bank v. Kuhnle, 50 Kan. 420; 31 Pac. Rep. 1057.

[6] Girons v. State, 29 Ind. 93.

[7] McLaughlin v. State, 52 Ind. 476.

[8] Williams v. Hitzie, 83 Ind. 303.

[9] Com. v. Mehan, 11 Gray, 321; Com. v. Donovan, 13 Allen, 571.

[10] Society v. Varick, 13 Johns. 38; Loving v. State, 9 Tex. App. 471; Ansley v. Green, 82 Ga. 184; Pinckard v. Milwine, 76 Ill. 453.

[11] Wooster v. Lyons, 5 Blackf. 60; Gould Pl. v. 77.

[12] Guinard v. Heysinger, 15 Ill. 288; State v. Tel. Co., 36 O. S. 296; Ry. Co. v. Burress, 82 Ind. 83.

[13] Hammond v. People, 32 Ill. 446.

[14] Hammond v. People, 32 Ill. 446.

174. Consequences of Misnomer.—At common law, misnomer, whether of plaintiff or defendant, was ground for plea in abatement.[1] Under the Reformed Procedure, the practice is not uniform as to the way in which misnomer is to be taken advantage of. In most jurisdictions, it may be done only by answer;[2] while in some it may be done by motion. Upon principle, an answer setting out the mistake and giving the true name is the right method, for this is the proper way to bring new matter upon the record; and both the averment of mistake, and the disclosure of the true name, are new matter.

A demurrer will not lie for misnomer, for new matter can not be brought upon the record by demurrer.[3] But where a complaint on a written obligation shows that the name of the obligor is not that of the defendant, and there is no allegation of identity, a demurrer will lie, not for misnomer, but because such complaint does not show a right of action against the person sued.

A mere misnomer is a formal error that may generally be cured by amendment, and is always waived by answering to the merits. But where one is sued by a name entirely different from his true name, that is not *idem sonans* therewith, and that is not alleged to be a fictitious name used in ignorance of the true name, he is not bound to appear; and unless he does appear, it would seem that no amendment can be made, for want of jurisdiction of the right party.

Where, by a mere clerical error, a wrong name is written in a pleading, and it is obvious from the pleading itself what name was intended, the mistake is immaterial; for if a party is misled by such mistake, it must be by his own carelessness.[4] Such mere mistake is not ground for demurrer, and may at any time be corrected on motion, or upon leave obtained; and this is generally allowed to be done by erasure and interlineation.

175. Title as Part of Complaint.—The requirement that

[1] Steph. Pl. 284; Gould Pl. v. 69, 78.

[2] Thompson v. Elliott, 5 Mo. 118; State v. Tel. Co., 36 O. S. 296.

[3] Slocum v. McBride, 17 Ohio, 607.

[4] Fears v. Albea, 69 Tex. 437; 5 Am. St. Rep. 79.

the complaint shall contain the names of court and county, and the names of parties plaintiff and defendant, makes the title a part of the complaint. For this reason, the title is to be regarded in construing the complaint;[1] and for the same reason, the parties may generally be referred to in the body of the complaint as "the plaintiff," and "the defendant," without again naming them,[2] or only the surname may be used; and, generally, a defect or omission in the title, if the defective or omitted matter be correctly set out in the statement, will not make the pleading demurrable, though it may subject it to a motion.[3]

It may here be stated that natural persons are presumed to have capacity to sue and to be sued; and where a party is designated by an individual name, and there is nothing to indicate want of capacity, no statement of capacity need be made, either in the title or in the body of the complaint.[4] And parties will be presumed to be citizens of the state, unless the contrary appear.[5]

176. Complaint to be Further Entitled.—The codes generally provide that the names of court, county, and parties shall be followed by the word "Complaint," or "Petition." This part of the caption is purely formal. Its omission is to be reached by motion to strike from the files, and may be supplied by amendment, without delay.[6] There is generally no such requirement as to the subsequent pleadings, though it is good practice to properly entitle all pleadings.

II. OF THE STATEMENT.

(1) THE MATTER TO BE STATED.

177. Capacity of Parties.—It must appear from the

[1] King v. Bell, 13 Neb. 409; McCloskey v. Strickland, 7 Iowa, 259.

[2] King v. Bell, 13 Neb. 409; Lowry v. Dutton, 28 Ind. 473; McLeran v. Morgan, 27 Ark. 148. *Cf.* Cosby v. Powers, 137 Ind. 694.

[3] Ammerman v. Crosby, 26 Ind. 451; State v. Patton, 42 Mo. 530; Blackwell v. Montgomery, 1 Handy, 40.

[4] Gould Pl. iii. 194; Prince v. Towns, 33 Fed. Rep. 161.

[5] BRONSON, J., in Lester v. Wright, 2 Hill, 320.

[6] Butcher v. Bank, 2 Kan. 70; Blackwell v. Montgomery, 1 Handy, 40.

complaint, either by averment or by legal presumption dispensing with such averment, that the parties to the action are capable in law of sustaining the jural relation on which the action is founded, and of suing and being sued in regard thereto. If they are natural persons, and their names are correctly given in the title, their existence, and their capacity as individuals, will be presumed, and no statement in this regard is needed.[1] If either party stands in a representative capacity, is an artificial person, or is an association of persons, qualifying statements are called for, in addition to the designation contained in the title; for the title is not the place for allegations, and any designation therein will not supply the want of allegations to show capacity of parties.[2]

On the other hand, if the designation in the title show the incapacity of a party, as that he is an infant, and the body of the complaint contain no averment showing such incapacity, the legal capacity of such party will be assumed, notwithstanding the designation in the title.[3]

Where either party is the personal representative of a deceased person, the facts which clothe him with representative power should be stated, and stated issuably. If one sue as administrator, he should, in addition to describing himself in the title "as administrator," allege the death of the intestate, that on a day named a court of competent jurisdiction granted to him letters of administration, and that he qualified and is acting.[4] Thus; "On the day of , letters of administration on the estate of A. B., theretofore deceased intestate, were, by the Probate Court of County, Ohio, duly issued to the plaintiff, who thereupon duly qualified and entered upon the duties of said office." The mere allegation that a party was "duly appointed," or that he "is administrator," has sometimes been held sufficient on demurrer, or as against a denial;[5] but such allegation is

[1] Prince v. Towns, 33 Fed. Rep. 161; Maxedon v. State, 24 Ind. 370.

[2] Tolmie v. Dean, 1 Wash. Ter. N. S. 46, 50; Gould v. Glass, 19 Barb. 179.

[3] Funk v. Davis, 103 Ind. 281; 2 N. E. Rep. 739.

[4] Beach v. King, 17 Wend. 197; Sheldon v. Hoy, 11 How. Pr. 11.

[5] Gutridge v. Vanatta, 27 O. S. 366; Meara's Adm. v. Holbrook, 20

faulty, and amenable to motion to make definite. Where one sues or is sued in any representative capacity,—such as executor, guardian, trustee, receiver, assignee in insolvency,—the extrinsic facts conferring such power should be stated, so that it may appear to the court, as matter of fact, that he sustains such relation; and these facts should be stated with such fullness and certainty that they may be traversed, because they are material and traversable facts.[1]

178. Capacity of Parties—Corporations.—A corporation transacts its business, and is known to the world, by its corporate name; and by such name it must sue and be sued. When a corporation is party to an action, its corporate existence must be made to appear; that is, it must appear that the name used stands for something that has legal existence and capacity. If the corporation be a domestic municipal corporation created by a public act, or a domestic private corporation created by a public law, the courts will take judicial notice of its existence and powers, and for this reason no allegation thereof is necessary.[2] This is because all courts take judicial cognizance of the public laws of their own state. As to other corporations there is such diversity of holdings and enactments that no general rule can be formulated; and to give the rules in the different states, with such particularity as to give practical guidance, would be beyond the purpose and the compass of this work.[3] In some states, as at common law, no averment of corporate existence is required; in others, an averment that the party is a corporation, organized under the laws of a given state, is sufficient; while in others, the facts which give the corporation legal existence are required to be stated. In some jurisdictions, failure to make the requisite allegations is to be taken advantage of by demurrer; in others, by motion. In

O. S. 146; Schrock v. Cleveland, 29 O. S. 499; Bird v. Cotton, 57 Mo. 568. *Cf.* Trustees, etc. v. Odlin, 8 O. S. 293.

[1] Sheldon v. Hoy, 11 How. Pr. 11.

[2] Post, 341.

[3] Boone Pl. 31, 138; Bliss Pl. 246–260, 408, 408a; Abb. Pl. Brief, 203–206; Abb. Tr. Ev. 18, 19; Pom Rem. 208, note; Moraw. on Corp. 772; 2 Beach on Corp. 862; Ang. and Ames on Corp. 632; 4 Am. and Eng. Encyc. 284; 14 Am. Dec. 526; 16 Id. 735; 76 Id. 68; 78 Id. 769.

common-law pleading, a corporation may declare in its corporate name, without averring corporate existence ; and its corporate existence is put in issue by the general issue. In some states, corporate existence is put in issue by general denial, while in some a special plea is required.

Upon principle, it would seem that corporate existence should be alleged. A corporation is an artificial person ; and its capacity to sue and be sued results from its corporate existence ; the mere name furnishes no presumption of corporate existence or of legal capacity; and in no way but by averment can its existence and its capacity be made to appear to the court whose action is invoked for or against it.

179. Corporate Capacity, Continued.—Incorporation is a fact—an ultimate fact, the fact to be pleaded. It is true that corporate existence involves, (1) a grant of corporate franchises by the government, generally by legislative sanction, (2) an acceptance of such grant by persons associated for that purpose, and (3) regularity of origin, conforming to the legislative sanction. But there is a distinction between cases which involve the mere *being*, and those which involve the *right to be*. In ordinary actions by or against corporations, whether upon contract or for wrongs committed, where the fact of corporate existence is mere matter of inducement, the regularity of the organization can not be inquired into, and it is sufficient if the party be shown to be a corporation *de facto*. In such cases, a general allegation that the party is a corporation duly organized under the laws of a given state should be sufficient ; [1] and such allegation is sustained by proof of existence under color of law, without proof of regular organization in conformity to law.[2] On the other hand, in actions which involve the right to be, and where the corporate existence is the gist of the action, fuller allegations and proof should be required.[3] And where the powers and franchises granted to a corporation by one state,

[1] Smith v. Sewing Machine Co., 26 O. S. 562. *Cf.* Lorillard v. Clyde, 86 N. Y. 384.

[2] Abb. Tr. Ev. 18–29.

[3] Abb. Tr. Ev. 18 et seq. ; Bliss Pl. 311.

or any right claimed under them, becomes the foundation of an action in another state, such powers and franchises must be specially pleaded.[1]

The weight of authority is to the effect that where an instrument by its terms recognizes the representative capacity, or the corporate existence, of any party to it, no qualifying averments as to such party are necessary in a complaint thereon. But as the decisions are not uniform as to the application of this rule, or as to the grounds upon which it should rest, the careful pleader will not omit such averments where they would otherwise be called for.

180. Capacity of Parties—Partnerships.—It has been seen that in actions by or against partners, as such, the names of the persons composing the firm should be set forth in the title.[2] In addition to this, the fact of partnership should be alleged in the statement. Partnership demands and liabilities being joint, such allegation is necessary to authorize the joinder of parties. And where either party to an instrument is a partnership, designated therein by its firm name, a complaint thereon, joining the individuals as parties, should allege the partnership; for otherwise, the instrument would not, as evidence, support the complaint.[3] And this is so, whether the instrument be pleaded by its legal effect, or by copy.

If the names of the persons composing the firm are given in full in the title, as they should be, it is not necessary to repeat them in the allegation that they are partners; it is sufficient to allege only that the plaintiffs, or defendants, are partners.[4]

In actions under favor of a statute authorizing certain partnerships to sue and be sued by their firm names, without disclosing the names of the several partners, the firm so designated must, by allegations, be brought clearly within the statute; otherwise, it would not appear that the words used stood for anything capable of sustaining the relation of

[1] Devoss v. Gray, 22 O. S. 159.
[2] Ante, 171.
[3] Neteler v. Culies, 18 Ill. 188.
[4] Adams Exp. Co. v. Harris, 120 Ind. 73; 16 Am. St. Rep. 315; King v. Bell, 13 Neb. 409.

party to an action, and the proceedings would lack that degree of certainty which is essential to judicial procedure.[1]

If it appear from the complaint that the plaintiff has not capacity to sue, the defendant may demur on that ground; but if he pleads to the merits, he admits the plaintiff's capacity, and waives the apparent defect.[2]

181. Jurisdictional Facts.—It should appear from the complaint that the court selected by the plaintiff may legally entertain the action. The right and power of the court to entertain the action is called jurisdiction.

There is an important distinction between courts of general jurisdiction and those of limited jurisdiction.[3] In respect to the former, jurisdiction will be presumed, unless the want of it appear;[4] but in respect to the latter, there is no such presumption, and their jurisdiction must be made to appear upon the record of their proceedings.[5] And this is so as to all persons and tribunals exercising a special delegated authority.

When jurisdiction is specially conferred by statute, whether in a court of general or of inferior jurisdiction, the complaint must show that the case is of the class provided for by the statute; otherwise, the plaintiff, by not showing his right to resort to the statute for relief, fails to bring his case within the jurisdiction.[6] If a statute authorizes proceedings *in invitum*, only after an effort and failure of the parties to agree, as in some cases to appropriate private property, the complaint must show such effort and failure.[7] The general rule is, that in courts of general jurisdiction, it is sufficient, except when the jurisdiction invoked is specially conferred by statute, if want of jurisdiction does not affirmatively ap-

[1] Haskins v. Alcott, 13 O. S. 210, 216.

[2] Meth. Ch. v. Wood, 5 Ohio, 283; Spence v. Ins. Co., 40 O. S. 517.

[3] Post, 374, 375.

[4] Weider v. Overton, 47 Iowa, 538.

[5] Doll v. Feller, 16 Cal. 432; Schell v. Leland, 45 Mo. 289; Bank v. Treat, 18 Me. 340; Barrett v. Crane, 16 Vt. 246; Strughan v. Inge, 5 Ind. 157.

[6] Edmiston v. Edmiston, 2 Ohio, 251.

[7] Reitenbaugh v. Ry. Co., 21 Pa. St. 100; Ellis v. Ry. Co., 51 Mo. 200. *Cf.* Burt v. Brigham, 117 Mass. 307.

pear; and in courts of limited jurisdiction, the complaint must affirmatively show that the case falls within the jurisdiction of the court whose action is invoked. But in all cases, and in all courts, where the right to exercise jurisdiction depends upon the existence of certain extrinsic facts, their existence must be alleged. In actions in their nature local,—such as for the recovery of real property, or the foreclosure of a mortgage,—the complaint should, as a rule, show that the subject of the action [1] is within the territorial jurisdiction of the court. And where jurisdiction depends upon the value of specific property in controversy, its value should be alleged in the complaint. Where jurisdiction of a cause depends upon the citizenship of parties, as it does in some cases in the Federal Courts, the requisite fact should appear in the complaint.

The absence of jurisdictional facts, when such are required to be alleged, renders a complaint demurrable. And when want of jurisdiction appears on the record, the court should, of its own motion, dismiss the action.[2] It has been held that a defendant in an equity action can not avail himself of the defense that an adequate remedy at law exists, unless he pleads that defense in his answer; and where the facts alleged are sufficient to entitle plaintiff to relief in some form of action, and no objection has been made by defendant to the kind of action, either in his answer or on the trial, it is too late to raise the objection after judgment, or on appeal.[3]

182. The Cause of Action.—Facts stated to show the capacity of the parties, when such qualifying facts are called for, and jurisdictional facts, when these are necessary, constitute no part of the cause of action. In addition to, and

[1] There is a distinction, not always observed, between the *subject-matter* of an action—the nature of the right asserted, and the *subject* of an action—the thing upon which it is to operate. The one may be within the jurisdiction, and the other without. A court may, for example, have jurisdiction of ejectment, the *subject-matter*, but not of the land, the *subject* of the action. Post, 462. *Cf.* post, 330, 468.

[2] Metcalf v. Watertown, 128 U. S. 586.

[3] Lough v. Outerbridge, 143 N. Y. 271; Mentz v. Cook, 108 N. Y. 504.

independently of, such facts, the complaint must contain a statement of facts constituting a cause of action. The provision of the codes as to this part of the complaint is, that it shall contain "a statement of the facts constituting the cause of action, in ordinary and concise language." This limits the statement, (1) to facts, and (2) to such facts as constitute the right of the plaintiff and the delict of the defendant. It excludes, (1) facts that are only probative, (2) statements of the law, and (3) inferences and arguments. A right of action, as explained in a former chapter,[1] is a remedial right, arising out of a primary right in the plaintiff, a corresponding duty of the defendant, and a breach of this duty. This primary right and duty, and the defendant's violation thereof, are to be displayed in the complaint; and this is to be done by stating, (1) such constitutive facts as, under the substantive law, operate to create such right and duty, and (2) such culpatory facts as show an invasion of the right, and a breach of the duty. Such statement shows a right of action in the plaintiff, against the defendant, and authorizes the interposition of the court, and hence constitutes and is a *cause of action*.[2] Where the facts to be stated tend to indefiniteness and multiplicity, a general allegation is generally allowed.[3]

183. When only Delict to be Stated.—There is a class of cases, however, in which it is not necessary to state the facts from which arise the primary right and duty. Actions for assault and battery, and for slander, are examples. The primary right in both these cases is the right of personal security—the uninterrupted enjoyment of the person, in the one case, and of the reputation in the other; and the primary duty in the one case is, not to injure or annoy the person, and in the other, not to defame the reputation.[4] These are rights *in rem*, available to all persons, and against all persons; they require for their assertion no facts but the existence of the person of inherence; and when natural persons

[1] Ante, 29–32.
[2] Ante, 31.
[3] Eq. Ac. Ins. Co. v. Stout, 135 Ind. 444.
[4] Ante, 19.

are named in a complaint, their existence is presumed.[1] In all such actions, therefore, only the facts showing the delict need be alleged. But notwithstanding this abridgment of the complaint in such cases, it displays the same constituent elements—right and delict—that are required in other cases, and is not an exception to the general rule as to the requisites of a right of action.[2]

184. Only Facts to be Stated.—It has been shown that a remedial right, or right of action, arises from both facts and law—facts made operative by law.[3] Therefore, a complete statement of all the constitutive elements of a right of action would embrace, not only the operative facts, but the law that makes them operative. But for reasons heretofore stated,[4] the law which enters into the remedial right must be excluded from the complaint, and only the operative facts stated. Any attempt to combine facts and law, to give the facts a legal coloring, is a violation of this fundamental principle of pleading.

Violations of this rule generally occur, not in the statement of abstract rules of law, but in the blending of law and facts, or in the statement of legal conclusions drawn from facts not stated.

An allegation that one is "heir" of another is a conclusion of law; the facts should be stated, so that the legal relation may appear to the court. An allegation that one is "indebted" to another, or that the defendant was "bound to repair," or that an act was "wrongful," or "unlawful," or that one "is entitled to" a thing, or that a certain injury would be "irreparable" in damages, is a mere legal conclusion. Such allegations are insufficient on demurrer, and will not admit evidence to support them; they call for no responsive pleading, and are not admitted by failure to deny.[5] This rule of exclusion does not apply, however, to private statutes,

[1] Ante, 177. *Cf.* Stafford v. The M. J. Assn., 142 N. Y. 598.

[2] Pom. Rem. 525.

[3] Ante, 30.

[4] Ante, 33.

[5] Post, 343 et seq., where the rule excluding conclusions of law from all pleadings is fully illustrated, and authorities cited.

or to foreign laws; for these are regarded as facts, to be pleaded and proved.[1]

Where only the law, or a legal conclusion, is pleaded, the complaint, not stating *facts* sufficient to constitute a cause of action, is demurrable. But where sufficient facts are stated, either separate from, or blended with, legal conclusions, the remedy is by motion. If the objectionable matter can be separated from the other averments, it may be stricken out; otherwise, the motion should be to make definite.

185. Operative and Evidential Facts Distinguished.— In the statement of a cause of action, not only must facts be stated, to the exclusion of the law and of legal conclusions; but only operative facts, as distinguished from evidential facts, are to be stated. The facts with which the administration of justice is concerned are *operative* facts, and *evidential* facts. Operative facts are those to which the substantive law annexes consequences. They are the facts from which proceed rights and obligations and wrongs. They are the facts which enter into and create jural relations between persons. The legal rights and obligations of persons sustaining jural relations are such as the substantive law attaches to the facts which enter into and create those relations; and these facts, because they operate under the law to create rights and obligations, are called operative facts. Operative facts are divided into three classes; (1) such as operate to invest some one with a legal right, and are hence called *investitive* facts, (2) such as operate to divest some one of a legal right, and are hence called *divestitive* facts, and (3) such as work a wrongful interference with an existing legal or equitable right, and are hence called *culpatory* facts. Evidential facts are such as in their nature tend to show that any of the operative facts aforesaid do, or do not, exist.

In the statement of a cause of action, only the ultimate, operative facts of the transaction involved are to be stated; because it is these, and these only, that give the plaintiff a right of action. The subordinate and intermediate facts, the probative matter of the transaction, should not be stated.

[1] Post, 340.

186. Operative and Evidential Facts—Illustrations.—The process of evaluating and differentiating the confused facts of a transaction, and separating the operative from the probative facts, is one that requires much care and discrimination. It is the first step in determining whether a right of action exists, and is an indispensable prerequisite to an intelligent statement of a cause of action. A familiar example will illustrate the distinction here made, and its practical application. Suppose that B. sold and delivered to A. a horse, for one hundred dollars, to be paid in thirty days; that the thirty days have elapsed, and no part of the price has been paid; that B. offered to sell the horse to C., and afterward sold him to D.; that he told E. and F. that he had bought the horse and had not paid for him; and that he now denies the purchase. The jural relation between A. and B. is plainly that of creditor and debtor, and it is clear that A. has a right of action against B. It is equally clear that some of the facts stated are operative, and that others are evidential. That A. sold the horse to B., for the agreed price of one hundred dollars, to be paid in thirty days, and the lapse of this time, are operative facts. These are constitutive facts, showing a primary right in A. to receive one hundred dollars from B., and the corresponding duty of B. to make payment. That B. has not paid, is a culpatory fact, showing the delict of B. These operative facts entitle A. to an action against B. The other facts are evidential. The subsequent sale of the horse by B. was no part of his transaction with A., and in no way affected their jural relations. It is merely an act of B. that tends to show his understanding of his relation to the property; and his admission of purchase and non-payment bears the same relation to his transaction with A.

In an action to recover damages for the breach of a written contract, an allegation that the defendant executed the contract is an operative fact, material and issuable; a right of action can not be asserted without it. But the facts that the defendant admitted the execution of the contract, that another saw him sign it, and that another will testify that the signature is his, are evidential facts, and do not enter into

the plaintiff's right. A denial of the operative fact will thwart the plaintiff's right, and present a material issue; not so as to the evidential facts. If the operative fact be modified, disproved, or abandoned, the right of action will disappear; but the probative facts may be varied, or they may be abandoned and others resorted to, without affecting the remedial right.[1]

187. Operative and Evidential Facts, Continued.— One distinction between operative facts and evidential facts is, that the former are issuable, while the latter are not. In the example of sale just given, a denial of any of the operative facts, if sustained, would defeat the action of A. A denial that there was a sale, or that the credit had expired, would present a material issue; and an allegation of payment would be a good defense. But the fact of B.'s admission might be denied, and the denial sustained, and yet A.'s right of action would not be affected thereby.

In an action to restrain the execution of a tax deed, on the ground that requisite preliminary proceedings had not been had, the plaintiff, instead of alleging that such proceedings were not had, averred only that he had searched in the proper offices, and failed to find any evidence that they were had. A traverse of this averment would present an entirely immaterial issue, to wit, whether he had searched and failed to find the evidence.[2] The fact here averred was a probative fact, that might have been used in evidence to sustain an allegation of the ultimate, operative fact—the absence of specified requisite preliminary proceedings.

If, in trover, the plaintiff alleges property in the goods, the loss, the finding, and a *demand and refusal*, omitting an allegation of conversion, the declaration is ill; for the demand and refusal are only evidence of a conversion, which is the gist of the action.[3]

An allegation that A. and B. are partners is an allegation

[1] Pom. Rem. 526. The distinction between an ultimate fact and a conclusion of law is well considered by SEARLS, C., in Levins v. Rovegno, 71 Cal. 273.

[2] Rogers v. Milwaukee, 13 Wis. 610.

[3] Gould Pl. iii. 166.

of the ultimate, operative fact. The facts showing the formation of a partnership are evidential facts, not to be pleaded.[1] The use of one's name in connection with the business of a firm—as in advertisements, or over the door, or on cards—may be an evidential fact, or an operative fact, according to the circumstances. If the question is whether such person is in fact a partner, such use of his name is an evidential fact, in the nature of an admission; but if the claim is, not that he is in fact a partner, but that he has by such means held himself out as a partner, and that such use of his name has misled somebody, it becomes an operative fact in the nature of an estoppel, and should be pleaded.

An allegation of purely evidential matter in a complaint is surplusage; it is not admitted by failure to deny, and may be stricken out on motion.

188. Legal and Equitable Causes of Action.—It is supposed by some that greater latitude is allowed in the statement of a cause for equitable relief, than in the statement of a cause for legal relief. It is true that in the early history of equity procedure the tendency was to permit a full and sometimes indiscriminate statement of facts, both operative and evidential, and not always excluding conclusions of law. This tendency was in part due to the double purpose of the bill in equity—the statement of a case for relief, and for the examination of the defendant under oath. But under the Reformed Procedure, the statement of a cause of action, whether legal or equitable, is limited to operative facts, to the exclusion of evidence and of law.

In actions for equitable relief, however, the facts constituting the cause of action may be more numerous, more complex, and more involved, than in an action for legal relief, and may therefore require a much more extended statement to display the right to relief. In legal causes of action, the primary right is generally plain and simple, calling for but a single act or forbearance, and the delict is generally of the same simple and single nature; while in equitable causes of action, both these factors may be intricate and complex.

[1] Ab. Pl. Brief, 328; Post, 347.

The primary right may arise from a series of facts, and may demand from the defendant, not a single act, but a series of acts or omissions.

Again, the relief obtainable in equitable actions, unlike the simple award of damages, or of possession of specific real or personal property, obtainable in legal actions, may be of the most varied and complex character, requiring a correspondingly full detail of facts and circumstances to show the nature and extent of the relief to which the plaintiff is entitled. Such facts, essential to the relief, are but auxiliary to the right to be enforced.

Notwithstanding this requirement of more extended detail of facts to display the full remedial right in actions for equitable relief, the fundamental principle, that only operative facts—those showing the right, or affecting the remedy —are to be employed in stating a cause of action, obtains in equitable as well as in legal actions.

189. Collateral Facts to be Stated.—In the statement of a cause of action, only such facts as are legally operative should be stated. Sometimes, however, a particular act, or particular conduct, would be indifferent, but for the accompanying circumstances or collateral facts. Such collateral facts, when necessary to give effect to the main charge, or to make other facts operative, should be stated. For example, in a complaint for deceit, or for keeping a vicious animal, *scienter*, being requisite to make the representation in the one case, and the keeping in the other, wrongful and actionable, must be averred. A statement that defendant ran his wagon against plaintiff's, does not show that the act complained of was culpatory and actionable. It may have been unavoidable accident. It should be alleged that he willfully or negligently did the act. It is a general rule, that where one complains of an act not wrongful *per se*, but which may be entirely consistent with good faith and fair dealing, he must state the collateral facts giving to it a different character, and rendering it actionable.[1] In an action on a foreign contract, valid by the *lex loci contractus*, but

[1] Hughes v. Murdock, 45 La. Ann. 935 ; s. c. 13 So. Rep. 182.

invalid by the *lex fori*, both the place and the law of the place must be alleged. Performance of conditions precedent, and notice and demand, when necessary to create a liability or a right to sue, must be alleged. When special damages—those in fact sustained, but not implied by law—are claimed, the facts out of which they arise must be stated.[1] And facts in aggravation of damages, if not part of the act complained of, and if separable from the manner of doing such act, should be alleged.[2] In an action for breach of promise of marriage, the seduction of plaintiff by means of the promise to marry can not be shown in evidence, to enhance the damages, unless alleged in the complaint.[3]

190. Collateral Facts, Continued.—In actions for equitable relief touching a legal right, on the ground that there is no adequate remedy at law, if such ground does not appear from the statement of the right and the delict, it should be specially averred; otherwise, the complaint would be demurrable for want of equity. Thus, in an action to prevent destructive trespass, it should appear that the injury would be irreparable in damages. But a mere allegation that the damages would be irreparable would be a conclusion of law, and not sufficient. The facts showing the inadequacy of a judgment at law should be stated; for example, that the trespasser is insolvent, or that the property would be permanently ruined.[4]

In actions for slander, where the words are not actionable *per se*, but are so by reason of some extrinsic fact, such extrinsic fact must be alleged. And where one is defamed generally in regard to his business or profession, the fact that he is engaged in such business or profession is an extrinsic fact, to be stated in his complaint.

In actions in tort for breach of an implied duty arising out of contract,—as for negligence of a physician or of an attor-

[1] Post, 425; Wilcox v. McCoy, 21 O. S. 655; Burrage v. Melson, 48 Miss. 237.

[2] Schofield v. Ferrers, 46 Pa. St. 438; Cates v. McKinney, 48 Ind. 562; Leavitt v. Cutler, 37 Wis. 46.

[3] Leavitt v. Cutler, 37 Wis. 46; Cates v. McKinney, 48 Ind. 562.

[4] Bisph. Eq. 435-6; Bliss Pl. 280, 281.

ney,—the complainant should, in addition to alleging the contract, the negligence, and the injury, state the occupation of the defendant; otherwise, it will not appear that the duty to exercise peculiar skill arose by implication from the contract.[1]

191. Collateral Facts, Continued.—If facts ordinarily requisite be omitted from the complaint because dispensed with in the particular instance, the facts showing the reason for the omission should be stated. For example, where notice has not been given, or demand has not been made, because waived by the defendant, such waiver must be averred. But in such cases care should be taken not to anticipate or avoid what is properly matter of defense.

When it appears from the statement of the cause of action that the action is subject to the bar of the statute of limitations, extrinsic facts that will save it from such bar, if such facts exist, should be averred in the complaint.[2] But in some jurisdictions, where, by statutory provision, the statute of limitations can be made available only by answer, such extrinsic facts should not be averred in the complaint.[3] Where the limitation is a part of *the right itself*, the complaint should show that the action is brought within the prescribed time.[4] And in actions under a statute containing

[1] Bliss Pl. 150.

[2] Bliss Pl. 205; Combs v. Watson, 32 O. S. 228. This rule, which is established by an almost unbroken line of authority, is, apparently, a departure from the true principles of pleading. The statutory bar is matter of defense, and is a personal privilege that may be asserted, and that is waived if not asserted. To avoid it by averment, before it can be known whether it will be asserted, is, it would seem, to anticipate a defense. But in those jurisdictions where the statute is available on *general demurrer*, the rule rests upon defensible ground; or rather, the one rule is a vindication of the other. If we concede that a statement of facts all of which are requisite to the statement of a cause of action, and which is on its face amenable to the bar of the statute, but which is not otherwise faulty, is demurrable *on the ground that it does not state facts sufficient to constitute a cause of action*, we must, by parity of reasoning, sanction the introduction of extraneous facts to supply the conceded defect. The prime error is in the concession. Post, 336.

[3] Butler v. Mason, 16 How. Pr. 546.

[4] Davis v. Hines, 6 O. S. 473, Per BRINKERHOFF, J.

an exception, as distinguished from a proviso, the complaint should show that the case does not fall within the exception.[1]

192. Gist, Inducement, and Aggravation.—In common-law pleading, all matter to be pleaded is (1) of the gist of the complaint or defense, or (2) is matter of inducement, or (3) matter of aggravation. The gist of a complaint or defense is the essential ground or subject-matter of it—that without which no right of action could appear on the one hand, and no legal defense on the other. The defendant's promise in assumpsit, the conversion in trover, injury to the possession in trespass, are severally of the gist of the action; so, also, where performance of a condition, the giving of notice, or the making of demand is essential to the right of action, averment thereof is of the gist of the complaint.

Matter of inducement is that which is introductory to the essential ground of the complaint or defense, or which is necessary to explain or elucidate it. The loss and finding in trover is matter of inducement; so, also, are allegations to show capacity of parties.

Matter of aggravation is that which tends to increase the amount of damages, but does not affect the right of action. In trespass for breaking and entering a house, an allegation that defendant expelled plaintiff and destroyed his goods is matter of aggravation; the breaking and entering being the whole gist of the action.[2]

The practical importance of this classification at common law is in the fact that in pleading matter of inducement and matter of aggravation less particularity is required than in pleading matter of substance; and matter of aggravation is never to be traversed. It is sufficient, as matter of inducement, to allege that plaintiff is duly incorporated under the laws of a given state; but if corporate existence is of the gist of the action, the grant of the corporate franchise, its acceptance, and regular organization thereunder, should be alleged. In trespass for chasing sheep, *per quod* the sheep died, the

[1] Church v. Ry. Co., 6 Barb. 313; Walker v. Johnson, 2 McLean, 92; Post, 339.

[2] Taylor v. Cole, 3 Term Rep. 292.

dying of the sheep, being aggravation only, is not traversable.

It is sometimes said that traverse is not to be taken on matter of inducement.[1] But in many instances matter of inducement is in itself essential, and of the substance of the case; in such instances at least, whatever the general rule, matter of inducement is traversable.

(2) THE MANNER OF THE STATEMENT.

193. Ordinary and Concise Language.—The statement of facts constituting the cause of action is to be "in ordinary and concise language." This means that the statement should be neither ornate nor prolix, that the words employed should be those in common use, and that the manner of the statement should be brief and compendious. This requirement aims at strength and perspicuity, rather than elegance of expression. Pompous diction would be out of place in a legal paper designed to lay before the court only operative facts, as a basis for judicial action.

In the common-law pleadings, much attention was given to the form of the statement. The authorized forms were so prolix, the statement so verbose and involved, and the facts relied upon were so obscured, that very often the pleadings entirely failed to disclose the operative facts to be proved or disproved upon the trial. This requirement of the reformed system aims to banish these technical forms from practice, and to substitute a statement so plain and concise that parties and court may readily see, and clearly understand, what facts are relied upon, and to what facts the further proceedings are to be directed.

But an error must here be guarded against. It must not be thought that "ordinary and concise language" is an indifferent phrase, dispensing at once with all care and skill in framing the statement. On the contrary, a system of pleading that dispenses with authoritative forms, and requires each case to proceed upon a plain statement of its operative

[1] Steph. Pl. 294.

facts, intensifies the necessity for a clear understanding of the law and the facts of a case, and for an intelligent and accurate use of language by the pleader. Clearness of conception and accuracy of expression are of the very essence of good pleading under the Reformed Procedure.

194. The Order of the Statement.—At common law, the pleadings were required to observe the ancient and established forms of expression, and to conform to the approved precedents; and the pleadings subsequent to the declaration had, severally, their proper formal commencements and conclusions.[1] But under the reformed system, there is no prescribed form or order in which the facts constituting a cause of action are to be set forth. This is left to the judgment and intelligence of the pleader. Not because it is a matter of indifference, for it is not; but because no form or order can be prescribed for displaying rights of action that must, in the nature of things, be as diversified as are the jural relations from which they arise.

It was a just reproach to the common-law procedure that it required great strictness in matters of form, and allowed much looseness in matters of substance. It is a distinguishing achievement of the Reformed Procedure that matter of form is made subservient to matter of substance. In the complaint, as in all the pleadings, controlling consideration is given to the substance of the statement, rather than to the mere form thereof; and the instances are numerous in every jurisdiction, where mere matter of form is disregarded in the interest of justice and of economy to suitors.

195. Joinder of Causes of Action.—Where a plaintiff has several distinct rights of action against the same person, he may pursue them in one action; subject, however, to certain restrictions as to the union of separate causes of action in one complaint. The general rule to be gathered from the several statutory provisions, is, that several causes of action may be joined in the same complaint, when the several rights of action all arise out of (1) the same transaction, or transactions connected with the same subject of action; or (2) con-

[1] Ante, 136.

tract, express or implied; or (3) injuries, with or without force, to person and property, or to either; or (4) injuries to character; or (5) claims to recover personal property, with or without damages for the withholding thereof; or (6) claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same; or (7) claims against a trustee, by virtue of a contract, or by operation of law.

The causes of action so united must all belong to some *one* of these classes; must not require different places of trial; must affect all the parties to the action; and must be separately stated.[1]

196. Joinder of Causes—Same Transaction.—Two difficulties, and only two, are likely to arise in the application of the foregoing provisions. The first is, the danger of confounding the reliefs prayed for with the causes of action upon which they are based. This danger may be avoided by the exercise of care and discrimination, remembering that the prayer for relief, while a requisite of the complaint, is no part of the cause of action.

The other difficulty likely to arise is in the joinder of causes of action upon rights that arise out of the same transaction, or transactions connected with the same subject of action. This provision is broad and comprehensive. The term "transaction" has no technical meaning, and was probably used in the codes for that reason; the purpose being, to avoid a multiplicity of suits between the same parties.

A cause of action is a statement of operative facts showing a right and a delict. When the operative facts of one transaction create two or more primary rights in one party to the transaction, and also show violations thereof by the other party, then two or more rights of action have arisen out of such transaction, and separate causes of action thereon may be united in one complaint. Again, if several rights of action—several primary rights of plaintiff, and corresponding delicts of defendant—arise out of different transactions, several causes of action thereon may be joined in one complaint, if

[1] Pom. Rem. 438; Bliss Pl. 112; Boone Pl. 37.

the several transactions are connected with the same *subject of action.*

197. Joinder of Causes—Same Subject of Action.—The meaning of "subject of action" is not authoritatively settled. It does not mean the right of action, or the object of the action. It has been interpreted as synonymous with "subject-matter of the action."[1] But the subject-matter of an action, especially when used with reference to jurisdiction, means the right asserted by the plaintiff, and upon which he demands the judgment of the court.[2] It has been held to mean the primary right of plaintiff which has been invaded by the defendant.[3] These definitions, which do not materially differ, would require the "subject of action" to be common to all the several causes of action to be joined; while in fact it can not be common to the causes of action, but must be common to the several transactions out of which the several rights of action arise. The "subject of action" is one single thing, a unit; the transactions connected therewith are plural; and the rights of action arising therefrom may be various. Again, by "subject of action" can not be meant the primary rights of plaintiff, for these are two degrees removed from each other by the intervention of the "transactions." The rights of action are product of the different transactions, and the different transactions must be connected with the subject of action. Perhaps no definite and invariable exposition of the meaning of these terms can be made, aside from their application in individual cases as they arise.

198. Joinder of Causes—Necessary Averments.—When causes are united because they arise out of the same transaction, or out of transactions connected with the same subject of action, if the facts showing such common origin, or such connection, do not appear in the narration of operative facts, they should be stated, in order that the right to join may appear. A mere allegation that the causes arose out of the same transaction is not sufficient.[4]

[1] Pom. Rem. 475.
[2] Post, 462.
[3] Scarborough v. Smith, 18 Kan. 399.
[4] Flynn v. Bailey, 50 Barb. 73; Woodbury v. Deloss, 65 Barb. 501.

199. Joinder of Causes—Application of Rule.—Under these provisions for the joinder of several causes in one action, causes of action in their nature legal or equitable, or both legal and equitable, may be joined; and, contrary to the common-law rule, causes arising *ex delicto* may be joined with those arising *ex contractu*, if they have a common origin in one transaction, or in transactions connected with the same subject of action.[1] Causes for malicious prosecution and for false imprisonment;[2] for breach of contract and for personal injury;[3] for slander and for malicious prosecution;[4] for breach of express contract and for money had and received; for trespass to person and to property;[5] and for specific performance and for damages,[6] are joinable.

A claim for specific relief incidental or preliminary to the main object of the suit may be joined therewith, when arising out of the same transaction. Claims to set aside a conveyance as fraudulent, to determine adverse claims to the property, and to recover possession, with rents and profits;[7] claims for the recovery of real property, for rents and profits, and for partition;[8] causes for injury from the overflow of a dam, and for injunction to restrain its maintenance;[9] and causes to set aside a release of damages for injury, and for the recovery of the damages,[10] may be joined in one action.

The causes of action joined in one complaint must not be inconsistent with each other. This is a logical requirement, and one not generally expressed in the codes. A demand for an agreed price for work, and one for the reasonable value of the same work, are inconsistent;[11] though there is authority

[1] Barr v. Shaw, 10 Hun, 580; Jones v. Cortes, 17 Cal. 487; SWAN, J., in Sturges v. Burton, 8 O. S. 218.

[2] Barr v. Shaw, 10 Hun, 580; Krug v. Ward, 77 Ill. 603.

[3] Jones v. Cortes, 17 Cal. 487.

[4] Shore v. Smith, 15 O. S. 173; Harris v. Avery, 5 Kan. 146.

[5] DILLON, J., in Holmes v. Sheridan, 1 Dillon, 351.

[6] Worrall v. Munn, 38 N. Y. 137, 141.

[7] Pfister v. Dascey, 65 Cal. 403; Bank v. Newton, 13 Col. 245.

[8] Scarborough v. Smith, 18 Kan. 399.

[9] Akin v. Davis, 11 Kan. 580.

[10] Blair v. Ry. Co., 89 Mo. 383.

[11] Plummer v. Mold, 22 Minn. 15; Hewitt v. Brown, 21 Minn. 163.

for uniting such causes, where neither can safely be relied upon alone.[1]

200. Joinder of Causes—Application of Rule, Continued.—Causes of action, to be joinable, must each affect all the parties to the action. If, therefore, all the parties, plaintiff and defendant, are not affected by each cause of action, there is—except in foreclosure suits—misjoinder of causes, and demurrer for this cause will lie. Separate claims by two plaintiffs, against one defendant, growing out of the same transaction, are not joinable.[2] Nor may a wrong to a firm, and a wrong to one member thereof;[3] or a claim against two defendants, and a claim against one of them,[4] be joined.

Where the owner of a lot caused excavation to be made in and under the sidewalk in front of his lot, and plaintiff fell into the excavation and was injured, it was held that although the lot-owner and the city were both liable, they could not be joined.[5] In such case, the liability of the city depends upon a state of facts not affecting the lot-owner; and the converse. They did not *jointly* conduce to the injury by acts either of omission or of commission. A claim against one for erecting a dam, and against his grantee for continuing it;[6] and claims against successive tenants for respectively maintaining the same nuisance,[7] are not joinable. Several owners of different animals can not be joined in one action for trespass by the animals.[8] And causes of

[1] Wilson v. Smith, 61 Cal. 209; Post, 208.

[2] Bort v. Yaw, 46 Iowa, 323.

[3] Taylor v. Ry. Co., 53 Hun, 305.

[4] Doan v. Holly, 25 Mo. 357.

[5] Trowbridge v. Forepaugh, 14 Minn. 133. *Cf.* Bateman v. St. Ry. Co., 5 N. Y. Supp. 13, where it was held, by the Common Pleas of New York City, that in an action against the city for injury caused by its neglect to keep the street in repair, and against the railway company which had agreed with the municipality to keep it in repair, there was not a misjoinder of causes.

[6] Hines v. Jarrett, 26 S. C. 480.

[7] Green v. Nunnemacher, 36 Wis. 50.

[8] Cogswell v. Murphy, 46 Iowa, 44. In such case, each owner is not liable for the aggregate trespass, though done by all the animals together; for, in legal contemplation, there is a separate trespass on the part of each. Van Steenburgh v. Tobias, 17 Wend. 562; Auchmuty v. Ham, 1 Denio, 495; Partenheimer v. VanOrder, 20 Barb. 479. Where *persons* join in wrong doing, there is intention and volition on the part of

action against principal and sureties, on two official bonds, one being an additional bond, both given for the same term of office, but with different sureties, can not be joined.[1]

Where one is a party in two capacities, there is misjoinder, unless each cause of action affects him in both capacities. A personal claim or liability can not be joined with one in a representative capacity.[2] Demands against a common guardian for maintenance of several wards can not be joined.[3] A cause of action against an administrator on his promise as such administrator, and a cause against him on a promise of his intestate, may be joined, provided both causes require the same judgment.[4] There can not be two different judgments, one *de bonis propriis* and another *de bonis testatoris*, in one action; and this is said to be a test in the matter of the joinder of causes.[5]

201. Joinder of Causes—Consequences of Misjoinder.—When causes of action that are not properly joinable are united in one complaint, the misjoinder, if apparent upon the face of the complaint, may be objected to by demurrer; if not so apparent, the objection may be made by answer. If causes not joinable be not only joined in the same action, but combined in a single statement, instead of being separately stated, the defendant may nevertheless demur for the misjoinder, though such complaint would also be amenable to a motion to require the causes therein to be separately stated;[6] and for convenience and certainty it is the better practice first to have the confused allegations separated, so that the several causes may distinctly appear, and then to demur for

each. Not so, where one's *animals* co-operate with those of another. In such case, each owner is liable for the injury done by his own animals, and for no more. Auchmuty v. Ham, 1 Denio, 495. And in the absence of proof, the law will infer that the animals did equal damage. Partenheimer v. VanOrder, 20 Barb. 479.

[1] Holeran v. School Dist., 10 Neb. 406.

[2] Martens v. Loewenberg, 69 Mo. 208; Brown v. Webber, 6 Cush. 560.

[3] Orphan Society v. Wolpert, 80 Ky. 86.

[4] Howard v. Powers, 6 Ohio, 92.

[5] Per TILGHMAN, C. J., in Malin v. Bull, 13 Serg. & R. 441.

[6] Wiles v. Suydam, 64 N. Y. 173; Liedersdorf v. Bank, 50 Wis. 406; Wright v. Connor, 34 Iowa, 240; Per CHURCH, C. J., in Goldberg v. Utley, 60 N. Y. 427.

the misjoinder. In such case, the motion goes to the *informality* of the union, and the demurrer to the *fact* of the union.

When a misjoinder is found, either upon demurrer or upon answer, the action may be divided and several complaints filed, making as many independent suits as should have been brought originally;[1] or the plaintiff may be required to elect upon which cause of action he will proceed.

Misjoinder, being a defect of form, and not of substance, is waived, if not objected to by demurrer or by answer.[2]

202. Causes to be Separately Stated.—When two or more causes of action are joined in one complaint, they must be separately stated; and in most states they are required to be consecutively numbered. The joinder of causes is not a *requirement* of pleading; it is a *privilege* intended for the convenience and economy of suitors. But the *separate statement* of causes, when joined, is an imperative requirement. Each cause must not only be set forth in a separate and distinct division of the complaint, but it must, of itself, be a complete and independent cause of action. These separate divisions are sometimes designated by the common-law term "count;" in a few states they are termed "paragraphs;" but they are generally, and more properly, called "causes of action."

Such separate statement of causes is clearly indispensable to an orderly system of pleading. In no other way can the legal sufficiency of any one cause be tested by demurrer; in no other way can different defenses be made to the different causes; in no other way can separate and distinct issues be made or tried; in no other way can the introduction of evidence be intelligently conducted; and in no other way can the record be made clearly to show what matters have been adjudicated, and how decided. The provision for the joinder of distinct demands in one action is for the conveni-

[1] Per BREWER, J., in Houston v. Delahay, 14 Kan. 125.

[2] McCarthy v. Garroghty, 10 O. S. 438; Turner v. Althaus, 6 Neb. 54; Berry v. Carter, 19 Kan. 135; Jones v. Hughes, 16 Wis. 683; Marius v. Bickwell, 10 Cal. 217.

ence and economy of litigants, and its object may be promoted by liberality in its application; but the requirement that causes of action, when joined, shall be separately stated, is to enhance the certainty, the precision, and the safety of procedure, and its object can be promoted only by enforcing it with reasonable strictness. "To secure the simplicity and terseness exacted by the codes, it is essential that different causes of action be disassociated, and that reiteration be avoided."[1]

203. Adopting in One Cause, Statements in Another.—Each separate statement must, of itself, be a complete cause of action. If the same allegation is a requisite of two or more of the separate statements, it must be inserted in each; for an allegation in one can not be treated as supplying an omission in another.[2] But the maxim that words in one instrument may be incorporated in another by reference—*verba relata inesse videntur*—applies to the separate divisions of a pleading; and statements in one cause of action may be incorporated in another, by apt words of reference and adoption therein.[3] A single copy of an instrument may be referred to as an exhibit, in different causes of action, or in different defenses.[4] And an instrument set out in a complaint may, in this way, be made part of a cross-complaint.[5] Where several causes of action are founded upon an instrument, a copy of which is required to be filed with the pleading, and but one copy is filed, each cause of action should refer to the copy as filed with that cause of action.[6] Reference to allegations in a former cause of action by the phrase "as aforesaid," is sufficient, if the matter so

[1] Per COLLINS, J., in West v. Imp. Co., 40 Minn. 394. *Cf.* Goldberg v. Utley, 60 N. Y. 427.

[2] Farris v. Jones, 112 Ind. 498; Smith v. Little, 67 Ind. 549; Davis v. Robinson, 67 Iowa, 355; Catlin v. Pedrick, 17 Wis. 88; Barlow v. Burns, 40 Cal. 351; Haskell v. Haskell, 54 Cal. 262; Boeckler v. Ry. Co., 10 Mo. App. 448.

[3] Dorr v. McKinney, 9 Allen, 359; Freeland v. McCullough, 1 Den. 414; Beckwith v. Mollohan, 2 W. Va. 477.

[4] Maxwell v. Brooks, 54 Ind. 98; Hockstedler v. Hockstedler, 108 Ind. 506.

[5] Coe v. Lindley, 32 Iowa, 437; Pattison v. Vaughan, 40 Ind. 253; Craigin v. Lovell, 88 N. Y. 258.

[6] Peck v. Hensley, 21 Ind. 344.

referred to is thereby plainly identified.[1] So, the phrase "of and concerning the action tried as aforesaid," has been held a sufficient reference;[2] so also, the phrase "on the day and year, and at the place last aforesaid."[3]

204. Certain Allegations Not to be Repeated.—Some statements of fact may be a requisite part of the complaint, but not of the cause of action. Such are, facts to show the capacity of the parties, the character in which persons are made parties, or the jurisdiction of the court. All such matters may be stated but once, and need not be repeated in each separate cause of action.[4] Sometimes, however,—and the practice is in good taste,—such statements are grouped at the beginning of the complaint, and made part of each cause of action. Thus: "As a part of each cause of action herein, the plaintiff says:—" Here add the facts referred to, and follow these with the several causes of action, separately stated and numbered.[5]

The prayer for relief, being a requisite of the complaint, but not of the cause of action, a single prayer, at the close of the complaint, is all that is required.[6] It has been held that statements in a cause of action that has been abandoned may yet be considered in aid of others,[7] when properly referred to therein.

205. Several Grounds for Single Relief.—In determining whether there should be a single cause of action, or several, care must be taken not to confound the right of action and the relief to be obtained. The two guiding principles are, (1) that for each distinct right of action there must be a separate statement, or cause of action, and (2) that the prayer for relief, though part of the complaint, is no part of the cause of action. A single right of action may

[1] Beckwith v. Mollohan, 2 W. Va. 477.

[2] Crookshank v. Gray, 20 Johns. 344.

[3] Rathbun v. Emigh, 6 Wend. 407.

[4] Bank v. City, 74 Mo. 104; West v. Imp. Co., 40 Minn. 394; Rider v. Robbins, 13 Mass. 284; Abendroth v. Boardley, 27 Wis. 555.

[5] West v. Imp. Co., 40 Minn. 394.

[6] Larkin v. Taylor, 5 Kan. 433; Spears v. Ward, 48 Ind. 541.

[7] Jones v. Van Zandt, 5 McLean, 214.

entitle the plaintiff to several kinds of relief, and several rights of action may authorize but a single relief.

One may have several distinct grounds of recovery, each complete of itself, arising out of the same transaction, and may be entitled to but one recovery thereon. In the sale of a horse, the vendor may make both a false warranty and a false representation, and thus become liable to the vendee for the deceit, and for the breach of warranty; and the vendee would correspondingly have two grounds of recovery, but would be entitled to only one relief, in damages. The vendee in such case can maintain an action based upon either right of action alone, or, since both rights of action arise out of the same transaction, he may base his action upon both grounds, stating them in separate causes of action.[1] One of these two rights of action would arise from tort, the other from contract. A cause of action, to display the one right, must assert the falsity and the materiality of the representation, reliance upon it, the *scienter* and the intent of the defendant, and that plaintiff was misled; whereas, to display the other right, only the warranty and the breach are to be asserted.[2]

A complaint for horses killed by the defendant's train contained two causes of action; one alleging neglect to keep a fence in repair as required by contract, and the other alleging negligence in running the train. It was held, that there were two rights of action,—one for breach of contract, and the other for a tort,—and that the plaintiff should not be required to elect.[3] Here were two independent culpatory acts, or delicts, and but one right—the right of property—invaded.

206. Duplicate Statement of One Right of Action.—At common law, it was familiar practice to set forth a single right of action in two or more counts, in different forms, in

[1] Pom. Rem. 467; Humphrey v. Merriam, 37 Minn. 502; Robinson v. Flint, 7 Abb. Pr. 393; Murphy v. McGraw, 74 Mich. 318; Freer v. Denton, 61 N. Y. 492. *Cf.* Springsteed v. Lawson, 14 Abb. Pr. 328; Sweet v. Ingerson, 12 How. Pr. 331.

[2] Bliss Pl. 120, 292; Pom. Rem. 467; Abb. Pl. Br. 86; Williams v. Lowe, 4 Neb. 382.

[3] Ry. Co. v. Hedges, 41 O. S. 233.

the same declaration. This was done in order that some one of the counts might correspond with, and be supported by, the evidence upon the trial, and in this way avoid a variance; the rule being, that if the proof sustained the case laid in any one count there could be a recovery upon that count, though there should be a failure of proof as to all the other counts.[1] In equity, when there was uncertainty as to the ground of recovery, it was the practice to accommodate the statement of the case to the possible state of the proof by an alternative statement, in accordance with the facts of the claim.[2]

The needless multiplication of counts in common-law pleading had grown to be burdensome, and the Reformed Procedure undertook to correct this abuse, by requiring only the operative facts to be stated, as they actually occurred, and without unnecessary repetition. Under this new procedure, each separate statement is intended to set forth a distinct and independent right of action; and the rule is, that a plaintiff having but one right of action is not permitted to set it forth in two or more different forms.[3]

207. Duplicate Statement, Continued.—The rule just stated is not an inflexible rule, and is sometimes made to yield to the demands of justice; for it is a distinguishing merit of the Reformed Procedure, that it makes formal requirements subservient to the rights of parties and the ends of justice. The reformed system is a substitute for both common-law pleading and equity pleading; it has not taken away any right; it has affected only the manner of stating a right. A plaintiff may, in a complaint under the code, state any right of action, with demand of appropriate relief, that he might formerly state in a declaration at law, or in a bill in chancery. If a plaintiff has two distinct grounds for a single recovery, he may now, as before, make both grounds available in one action; and so, if he has but a single right of action, resting

[1] 3 Bl. Com. 295; Gould Pl. iv. 4, 5, 6.

[2] Bennett v. Vade, 2 Atkins, 324; Williams v. Flight, 5 Beav. 41; Rawlings v. Lambert, 1 J. & Hem. 458, 466; Cooper's Eq. Pl. 14.

[3] Sturgess v. Burton, 8 O. S. 215; Ferguson v. Gilbert, 16 O. S. 88, 91; Ford v. Mattice, 14 How. Pr. 91; Fern v. Vanderbilt, 13 Abb. Pr. 72.

upon one or the other of two grounds, and can not foreknow which ground may be established by the evidence, he ought to be allowed, now as formerly, so to frame his complaint as to adapt it to the possible state of the proof, if this can be done without embarrassment to the defendant.

In many of the more recent cases, this view has obtained, as being at once the more rational, more conducive to the ends of justice, and consistent with the spirit and purpose of the Reformed Procedure; and it may safely be said that the true rule, resting upon principle, and supported by the weight of authority, now is, that where a plaintiff has a single right of recovery, that may rest upon one ground or upon another, according to the facts to be shown by the evidence, and he can not safely foretell the precise nature and limits of the defendant's liability, to be developed upon the trial, he may state his right of action variously, in separate causes of action.[1] This privilege is an exception to the general rule that each separate statement should set out a distinct and independent right of action, and inasmuch as a plurality of statements multiplies the issues, and tends to obscure the real claim which the defendant will have to meet, it is to be indulged only where it is fairly necessary for the protection of the plaintiff, and where it will not mislead or embarrass the defendant in his defense. Courts should not, on the one hand, by an unyielding adherence to the general principle, endanger the plaintiff's right; nor should they, on the other hand, encumber the record, or embarrass the defense, by allowing needless latitude in the statement of a single right of recovery. And where, under favor of this

[1] Birdseye v. Smith, 32 Barb. 217; Velie v. Ins. Co., 65 How. Pr. 1; Smith v. Douglas, 15 Abb. Pr. 266; Van Brunt v. Mather, 48 Iowa, 503; Pierson v. Ry. Co., 45 Iowa, 239; Supervisors v. O'Malley, 46 Wis. 35; Brinkman v. Hunter, 73 Mo. 172; Snyder v. Snyder, 25 Ind. 399; Stearns v. Dubois, 55 Ind. 257; Cramer v. Lovejoy, 41 Hun, 281; Walsh v. Kattenburgh, 8 Minn. 127; Bank v. Webb, 39 N. Y. 325; Bank v. Gaines, 10 Ky. L. Rep. 451; Matthews v. Copeland, 79 N. C. 493; Jones v. Palmer, 1 Abb. Pr. 442; Cramer v. Oppenstein, 16 Colo. 504; Whitney v. Ry. Co., 27 Wis. 327; Lancaster v. Ins. Co., 1 Am. St. Rep. 739. *Cf.* Greenfield v. Ins. Co., 47 N. Y. 430; Dunning v. Thomas, 11 How. Pr. 281.

rule, the complaint contains a duplicate or alternative statement of one right of action, it should state also the reasons therefor; and in such case the verification of the complaint need not be more specific than the statements of facts are.

208. Duplicate Statement — Illustrative Cases. — Where the facts which determine the legal nature of the plaintiff's right and the defendant's delict are within the exclusive knowledge of the defendant, and can be developed only upon the trial, the plaintiff may, under favor of the foregoing rule, state his claim in different forms in several causes of action, stating also his reasons for so doing. For example, the plaintiff, not knowing whether goods shipped on defendant's road and not delivered, were lost in transit, or burned at defendant's warehouse, joined two causes of action, one against the defendant as common carrier, and the other against it as a warehouseman, and the court sustained the pleading, and refused to require the plaintiff to elect on which cause he would proceed.[1]

In an action for work and labor, the complaint contained a cause of action alleging an agreement to pay a stipulated price, and another cause upon the *quantum meruit*. It appearing that the work mentioned in both causes was the same, the defendant moved the court to require the plaintiff to elect on which count he would proceed to trial. This motion was overruled, and the pleading sustained on the ground of inability to rely safely upon only one ground of liability.[2]

Where a plaintiff claims to recover upon either of two causes of action, both of which can not be true, and he does not know which one is true, he may state them in the alternative, in one complaint. Thus, in an action against a corporation, the plaintiff complained that he was induced to purchase shares of stock in the defendant corporation, upon its representation that they were valid, and that after his

[1] Whitney v. Ry. Co., 27 Wis. 327; Stearns v. Dubois, 55 Ind. 257.

[2] Wilson v. Smith, 61 Cal. 209; Langprey v. Yates, 31 Hun, 432; Ware v. Reese, 59 Ga. 588; Wagner v. Nagel, 33 Minn. 348; 23 N. W. Rep. 308. *Cf.* Embry v. Palmer, 107 U. S. 3; Beers v. Kuehn, 84 Wis. 33.

purchase the corporation denied the validity of the shares of stock, and refused to issue a certificate to the plaintiff. In one cause of action, he treated the stock as valid, and asked judgment for its value, on the ground that the defendant had converted it; and in another cause he asked that if the stock was void, being non-issue or over-issue, he be awarded judgment for the money he had been induced, by defendant's false statement, to pay for it. It was held that the facts warranted such alternative statement.[1] The statement of alternative grounds for one relief is sanctioned by numerous cases, in some of which their combination in a single cause of action is approved.[2]

209. Duplicate Statement—Illustrative Cases, Continued.—In an action to recover insurance money, the complaint stated two grounds; one that the defendant issued its policy insuring plaintiff's property, the other that, by its agent, it promised and contracted to insure the property, and to issue its policy to plaintiff. A motion to require plaintiff to elect on which ground he would rely was refused, for the reason that where there are distinct lines of fact, each of which would give the plaintiff a right to recover, and when it is apparent that different averments are proper to meet an emergency of the trial, it is unjust to limit the pleader to any one of them.[3] A further reason, and one applicable in all such cases, may be suggested: If the plaintiff should be limited to the statement of only one ground, and should fail to establish that, it is more than doubtful whether he could thereafter avail himself of the other ground, in a second action for the same recovery.

[1] Bank v. Ry. Co. (Cin. Sup. Ct.), 9 O. L. Bull. 355.

[2] Everitt v. Conklin, 90 N. Y. 645; Milliken v. Tel. Co., 110 N. Y. 403; Floyd v. Patterson, 72 Tex. 202; The Emily, 9 Wheat. 381; Williams v. Lowe, 4 Neb. 382; Thompson v. Minford, 11 How. Pr. 273; Walters v. Ins. Co., 5 Hun, 343; Paving Co. v. Gogreve, 41 La. An. Rep. 251; 5 So. Rep. 848; 24 Abb. N. C. 326, *in nota*. *Contra*, Kewaunee Co. v. Decker, 30 Wis. 624; Durant v. Gardner, 19 How. Pr. 94. The English Pleading Rules, and the Mass. Practice Act, have each, to some extent, sanctioned the use of alternative statements. 1 Chit. Pl., 16th Am. Ed., 260.

[3] Velie v. Ins. Co., 65 How. Pr. 1.

In an action for the price of land, the plaintiff was allowed to claim, in one cause of action, on a special contract, and in another to claim on the *quantum valebant;* and under the latter, he was allowed to introduce evidence as to the value of the land.[1]

A cause of action on a renewal note, and one on the original note, may be joined, where the renewal note is usurious.[2] And in some cases, the courts have sanctioned the joining of a cause on a promissory note with another stating the transaction that furnished the consideration for the note.[3]

This relaxation of the general rule, allowing duplicate and alternative statements of a single right of recovery, carries with it, of course, the right to introduce evidence to sustain such of them as the defendant may put in issue.

210. Several Kinds of Relief on One Cause of Action. —From one right of action,—that is, from one primary right and one breach thereof,—may arise a right to two or more different kinds of relief, obtainable in one action. In such case, there being but one right of action, there should be but one cause of action stated in a complaint asking for the several kinds of relief. Where one is the owner of land, and entitled to the possession thereof, and another wrongfully takes possession of the land and uses it, there is but a single right of action, to wit, the one primary right of possession, and the invasion thereof by one continuous wrongful act; but the reliefs to which the land-owner is entitled are, (1) restoration of possession, (2) damages for the detention, and (3) the rents and profits received by the wrong-doer. A complaint in such case should contain but one cause of action, and a prayer for full relief. In like manner, upon a single set of facts, stated in one cause of action, a plaintiff may have the threefold relief of (1) abatement of a nuisance, (2) dam-

[1] Stearns v. Dubois, 55 Ind. 257; Rhodes v. Pray, 36 Minn. 392.

[2] Bank v. Webb, 39 N. Y. 325.

[3] Van Brunt v. Mather, 48 Iowa, 503; Vibbard v. Roderick, 51 Barb. 616, 628; Camp v. Wilson, 16 Iowa, 225; Kimball v. Bryan, 56 Iowa, 632; 10 N. W. Rep. 218; DEVENS, J., in O'Conner v. Hurley, 147 Mass. 145; 16 N. E. Rep. 767. *Contra*, Ferguson v. Gilbert, 16 O. S. 88.

ages therefor, and (3) its further commission enjoined.[1] In such cases, the different kinds of relief do not constitute separate rights of action; there is but one primary right, and one delict, and these afford but one right of action, requiring but one cause of action for its statement, however many kinds of relief may be had. Where each kind of relief is asked upon precisely the same operative facts, but one statement of the facts is required.

211. Several Reliefs on One Cause, Continued.—In suits in equity, where the bill is for relief, as distinguished from bills not for relief,[2] so that the general jurisdiction of the court attaches for the purpose of affording relief, it is a general rule that if the chancellor gives equitable relief, he will retain the cause and give the plaintiff such further legal relief, connected with, or growing out of, the equity, as he may be entitled to; in other words, the chancellor, having acquired jurisdiction for the purposes of relief, will try the whole cause, and not drive the plaintiff to another action at law to obtain full relief.[3] This rule of procedure in equity, adopted to prevent multiplicity of suits, obtains under the new procedure. But while this is a rule of procedure, it is not, and never was, a rule of pleading; and it does not authorize the joining of separate causes not otherwise joinable, much less the commingling of several causes in one statement, though the prevailing practice is, to employ but a single statement in cases falling within this rule.

In an action to enjoin the maintenance of an elevated railroad in front of plaintiff's property, and for damages theretofore caused by its maintenance, there is but one right of action. But one right is asserted, and but one wrongful act complained of; and but one cause of action should be stated, though two kinds of relief, one equitable and the other legal, are asked.[4] The damages are but an incident to the main

[1] Hudson v. Caryl, 44 N. Y. 553. See also, Hammond v. Cockle, 2 Hun, 495; Henry v. McKittrick, 42 Kan. 485. *Contra*, Dictum of SWAN, C. J., in McKinney v. McKinney, 8 O. S. 423.

[2] Ante, 152.

[3] Sto. Eq. Jur. 64k–74c; Bisph. Eq. Jur. 565.

[4] Shepard v. Ry. Co., 5 N. Y. Supp. 189. In Akin v. Davis, 11 Kan. 580, it was held that where one

object of the action, and the right to both kinds of relief arises from the same facts.

A plaintiff may, on a single cause of action, ask for different kinds of relief, in the alternative.[1]

212. Action to Reform and to Enforce an Instrument.—It has generally been held that in actions to reform written instruments, and to enforce them as reformed, only one cause of action is required. It is so held in actions to reform a promissory note, and for judgment thereon as reformed;[2] to reform a written contract, and for judgment thereon as corrected;[3] to reform a policy of insurance, and for judgment thereon as reformed;[4] to reform a mortgage, and to foreclose it as reformed,[5] or to reform a deed, and to quiet the title thereunder.[6]

So, also, in actions to cancel an instrument and to recover damages, or to set aside a conveyance and to recover or appropriate the land, it has generally been held that but one cause of action is necessary. It has been so held in an action to recover for personal injuries and to cancel a release from liability therefor;[7] and in an action for divorce and alimony, and to set aside a fraudulent conveyance from defendant.[8]

These holdings, which are supported by abundant author-

builds a dam, and thereby causes a stream of water to overflow another's land to his damage, the injured person has two rights of action; one for damages, which is a legal right, and one to restrain the continuance of the dam, which is an equitable right. The error of this view is, that it has regard to the kinds of relief to which the plaintiff is entitled; a matter that should not be considered in determining whether the facts constitute more than one right of action. There was clearly only one primary right invaded, by only one culpatory act. The right to two reliefs grew out of the same facts.

[1] Hardin v. Boyd, 113 U. S. 756; Ins. Co. v. Ins. Co., 1 Paige, 284; Korne v. Korne, 30 W. Va. 1; Wood v. Seely, 32 N. Y. 105.

[2] Pom. Rem. 459.

[3] Gooding v. McAllister, 9 How. Pr. 123.

[4] Bidwell v. Ins. Co., 16 N. Y. 263; N. Y. Ice Co. v. Ins. Co., 23 N. Y. 357; Ins. Co. v. Boyle, 21 O. S. 119.

[5] Hutchinson v. Ainsworth, 73 Cal. 452; McClurg v. Phillips, 49 Mo. 315.

[6] Hunter v. McCoy, 14 Ind. 528.

[7] Whetstone v. Beloit, etc., Co., 76 Wis. 613.

[8] Damon v. Damon, 28 Wis. 510.

ity, rest upon the theory that the reformation or cancellation is but ancillary to the main relief sought, and that because the right to a judgment depends upon the reformation or cancellation, the allegations for that purpose become part of the ground for judgment. It is true that if we look only to the purpose of the reliefs sought, the one is subsidiary to the other; but it by no means follows that only one cause of action is stated.[1] In an action to reform and to enforce a contract, there are, generally, two causes of action—one on equitable ground, the other on legal ground. Some averments that are necessary in one would be surplusage in the other. In the legal cause, the contract should be pleaded as it was actually made, and the breach should be alleged; but, generally, no mention of the fraud or mistake—the ground for reformation—is either necessary or proper. In the equitable cause, the contract as actually made, and also the fraud or mistake, should be averred; but an allegation of the breach is neither necessary nor proper. It is clear that a statement of facts sufficient for the one relief may not show a right to the other.

213. Action to Reform and to Enforce an Instrument, Continued.—Another ground upon which the sufficiency of a single cause of action in such cases is maintained is, that the legal demand does not arise until after the decree of the chancellor on the equitable demand; that the plaintiff's power to enforce his legal demand begins only when the instrument has been corrected; and that before the reformation of the instrument, no legal ground for relief can be stated.[2]

This view regards the equitable relief sought as giving character to the action, and regards the legal relief as a mere incident. It arises from a misinterpretation of the rule in equity procedure, that when the chancellor has acquired jurisdiction for the purpose of relief, he will give full relief.

[1] Fæsi v. Goetz, 15 Wis. 231; Stephens v. Magor, 25 Wis. 533; Harrison v. Bank, 17 Wis. 340; Guernsey v. Ins. Co., 17 Minn. 104, 108; Peyton v. Rose, 41 Mo. 257; Henderson v. Dickey, 50 Mo. 161; Stewart v. Carter, 4 Neb. 564; Bank v. Newton, 13 Colo. 245.

[2] Bliss Pl. 166–171.

This power of the chancellor, never very clearly defined, arose for the prevention of a multiplicity of actions, and has no reference to the rule of pleading under consideration. The new procedure, with the same end in view, has gone a step further, and authorized the joinder of legal and equitable causes in one action. But this rule of procedure has not affected the inherent distinctions betweeen legal and equitable rights; on the contrary, it has intensified the necessity for separate statements thereof, to the end that issues thereon may be separate and distinct, and, when necessary, that they may be separately tried—legal issues being of right triable to a jury, and equitable issues to the chancellor. In an action for specific performance of a contract to convey land, the action is primarily for equitable relief, and damages for the detention of possession, being an incident only, may properly be awarded by the chancellor,[1] and, looking to the prevailing practice, need not be demanded by a separate statement of operative facts; but in an action to correct an error in such contract, and for damages for breach thereof, the equitable relief is ancillary to the legal relief sought, and each of the two branches of the action should be distinguished, both in the pleadings and in the trial.

214. Action to Reform and to Enforce an Instrument, Continued.—In such action there are two distinct primary rights of the plaintiff, each invaded by a distinct and separate wrong of the defendant, giving rise to separate remedial rights, or causes of action. The right to reformation arises before there has been a breach of contract. The earlier right, founded on mistake or fraud, is in no way affected by the accruing of the later right, arising from a breach of the contract. These two rights, resting partly upon the same facts and partly upon different facts, differ in their nature and in their origin. They arise at different times, and may each be the subject of a separate action. It is axiomatic in pleading, that where the operative facts will sustain two

[1] Worrall v. Munn, 38 N. Y. 137; Sto. Eq. Jur. 796. In such case, the chancellor may proceed directly with the inquiry, or may refer it to a master, or may order an issue *quantum damnificatus*, to be tried by a jury.

separate actions, there are two rights of action.[1] Then if the facts necessary to be stated to obtain full legal and equitable relief in one action will sustain two separate actions, there should be two causes of action in a complaint for full relief.

It is not correct to say that the legal demand does not arise until after the decree correcting the error in the instrument. The remedial right—the real contract and the breach thereof—exists without the reformation. The decree of the chancellor correcting the mistake creates no right; it simply removes an obstruction to the enforcement of a pre-existing right, and furnishes the means for proving it. In cases where the statement of facts for legal relief will necessarily disclose such defect in the written instrument that no remedial right will appear, it may be necessary to add, either by allegation or by reference to the other cause of action, a statement of the fraud or mistake.

The complaint has been held to embody more than one cause of action, in a suit to correct an official bond, and for judgment for a breach thereof;[2] to reform an insurance policy, and to recover thereon for loss;[3] to reform a written contract, and for a money judgment thereon;[4] to cancel a fraudulent conveyance, and to recover possession of the land;[5] to have a deed to plaintiff declared a mortgage, a forged deed from the mortgagor set aside, and to have plaintiff's mortgage foreclosed.[6]

In actions to reform an instrument, and to enforce it as reformed, the causes should be separately tried; and the one asking equitable relief should be first tried.[7] This is the

[1] SWAN, J., in Sturges v. Burton, 8 O. S. 215.

[2] Stewart v. Carter, 4 Neb. 564.

[3] Guernsey v. Ins. Co., 17 Minn. 104, 108.

[4] Harrison v. Bank, 17 Wis. 340.

[5] Peyton v. Rose, 41 Mo. 257; Bank v. Newton, 13 Colo. 245.

[6] Moon v. McKnight, 54 Wis. 551. In this case, the court say: "The plaintiff might have brought three actions: (1) to have the first deed declared a mortgage; (2) to have the second declared void because a forgery, and to have it canceled; (3) to foreclose the mortgage."

[7] Boeckler v. Ry. Co., 10 Mo. App. 448; Guernsey v. Ins. Co., 17 Minn. 104; Harrison v. Bank, 17 Wis. 340.

proper practice, for two reasons: (1) a trial of the equity cause may terminate the case; for if the plaintiff should fail therein, he may then have no right, or only a modified right, under the legal cause; (2) the instrument, as modified, may be necessary evidence in the trial of the cause for legal relief.

215. Action for Debt, and to Enforce Lien.—It has been held that an action on a note and mortgage, for a personal judgment and a foreclosure,[1] and an action to recover unpaid purchase-money and to enforce a vendor's lien therefor, should each contain but one cause of action, for the reason that the legal and equitable relief arise in each case from a single state of facts.

But there are contrary holdings, and they rest upon sounder principle.[2] To blend in one cause of action a demand for a personal judgment and for the enforcement of a lien, whether the lien be legal or equitable, is to disregard the rule requiring causes of action to be separately stated, and to lose sight of all distinctions between rights of action. In an action for judgment on a note, and foreclosure of a mortgage, there are clearly two rights asserted; the one legal, the other equitable. These separate rights could be made the subject of two independent actions; therefore, they require, when joined in one action, two separate statements or causes of action.

Prior to the union of legal and equitable actions, under the Reformed Procedure, such mortgagee had three separate remedies, two legal, and one equitable. He could maintain (1) an action at law on the note, with judgment and execution, as though no mortgage existed; (2) an action of ejectment to recover possession of the mortgaged premises, the legal title being in the mortgagee; and (3) a suit in equity to foreclose the equity of redemption. The full relief, of

[1] Pom. Rem. 459; Rollins v. Forbes, 10 Cal. 299; Andrews v. Alcorn, 13 Kan. 351.

[2] Harrison v. Bank, 17 Wis. 340; Ladd v. James, 10 O. S. 437; McCarthy v. Garraghty, 10 O. S. 438; Giddings v. Barney, 31 O. S. 80; Spence v. Ins. Co., 40 O. S. 517; Sauer v. Steinbauer, 14 Wis. 70; Stephens v. Magor, 25 Wis. 533.

judgment and foreclosure, could not be obtained without two actions, in separate and distinct tribunals; the one to enforce a right purely legal, the other to enforce a right purely equitable.[1] These separate rights lose none of their distinct and independent characteristics by being brought into one action for their enforcement. The cause of action on the note is legal, that on the mortgage is equitable; an issue upon the one is triable by a jury, an issue upon the other is triable by the court; as to one, constructive service will give jurisdiction, as to the other, actual service is requisite; the remedy upon one is by judgment and execution, upon the other by decree and order; the action may be barred as to one by the statute of limitations, when it is not as to the other; and one may be answered by a defense not available as to the other.

216. Action for Debt, and to Enforce Lien, Continued.—The discrepancy in the decisions as to whether a complaint asking personal judgment on a note, and foreclosure of a mortgage securing the note, should contain one cause of action or two, is due to a failure to discriminate between the right of action and the cause of action. A distinguished writer says: "There is but one cause of action, [right of action] although two actions may be based upon it. The cause of action is the refusal to pay; if he seeks to enforce the lien, the plaintiff has the same cause of action, only another remedy."[2] But "the refusal to pay" is only one element of a right of action—the *delictum*. The promise in the note, and the breach thereof, constitute the legal right of action, for a money judgment; the conveyance to secure payment, and breach of its condition, constitute the equitable right of action, to foreclose the defendant's equity of redemption. It is true that the same culpatory fact, "refusal to pay," constitutes the delict in each right of action, but the investitive facts are not the same.

If the complaint in such action should contain but a single

[1] The practice in equity of awarding execution for the unpaid balance of the debt, in a suit to foreclose, was not the equivalent of a judgment at law.

[2] Bliss Pl. 171.

cause of action, it is because there is in such case but one right of action. If the right to judgment on the note, and to foreclosure of the mortgage, constitute but one right of action, then an action and judgment on the note alone would be an adjudication of the whole right of action, and would bar a subsequent action to foreclose the mortgage; and, *e converso*, the pendency of an action to foreclose the mortgage would be a good plea in abatement in a subsequent action on the note alone. But it has been held in such case that separate actions may be maintained at the same time, and that the pendency of one is not matter of defense in the other.[1] Indeed, since the one action may proceed without actual service and the other may not, the prosecution of both actions at the same time, and in different jurisdictions, may be necessary to obtain a complete remedy.

217. Remedy for Duplicity.—Two or more causes of action may be improperly united in a complaint, (1) by separate statements of causes not joinable, called misjoinder, or (2) by commingling two or more causes in one statement, which is commonly called duplicity. Misjoinder[2] relates to the fact of the union, and is remediable by demurrer;[3] duplicity relates to the form of the union, and is remediable by motion to require the causes to be separately stated.[4] If several causes, not joinable, are united in one statement, so that, in form, but one cause of action is stated, when in fact two or more that can not be joined in any form are embraced therein, the complaint is faulty both in the fact of joinder and in the form thereof, and is amenable to either motion or demurrer, or both may be addressed to it successively. It seems the more approved practice is, to demur for misjoinder; though if we consider the consequences of a misjoinder,[5] it will be seen that the more convenient course would be to have the causes separated in the first instance, so that the

[1] Spence v. Ins. Co., 40 O. S. 517.

[2] Multifariousness, the term used in equity to signify the improper union of distinct and independent demands in one bill, is sometimes used as synonymous with misjoinder.

[3] Ante, 201; Post, 299, 300.

[4] Post, 285, 286.

[5] Ante, 201.

Motion to strike out
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duplicity

several causes may distinctly appear, if misjoinder be found. If a single statement embrace two or more causes in their nature joinable, but all of which are insufficient in substance, a general demurrer may properly be addressed to the complaint. If only part of the causes so commingled are defective in substance, there is authority for demurring to such defective cause or causes, without first separating them;[1] for the plaintiff may not urge the formal defect of his pleading to defeat a demurrer that questions it in substance; and the same rule of practice has been applied to an answer commingling two distinct defenses in one statement.[2] But the better practice is, to have the causes separated, by motion, and then to demur to such as are insufficient.

If facts constituting a single right of action be improperly divided into two or more separate statements, the pleading will not thereby be rendered duplex, but each statement will, of course, be insufficient in substance, and subject to demurrer for that cause.[3] But some courts, regarding the defect as one of form rather than of substance, have disregarded the formal separation, and treated the dissevered statement as an entirety, and therefore sufficient as a single cause of action.[4]

Neither a commingled statement of several causes,[5] nor a dissevered statement of a single cause,[6] is ground for a motion to require the plaintiff to elect. Nor is a dissevered statement of a single cause amenable to demurrer for misjoinder of causes.[7]

The commingling of several causes in one statement, being a defect of form only, is waived if the defendant answer without objecting to such defect.[8] And the requirement

[1] Burhaus v. Squires, 75 Iowa, 59.

[2] Wright v. Connor, 34 Iowa, 240.

[3] Catlin v. Pedrick, 17 Wis. 88.

[4] Everett v. Wagmire, 30 O. S. 308; Andrews v. Alcorn, 13 Kan. 351; Norman v. Rogers, 29 Ark. 365; Shook v. Fulton, 4 Cow. 424; Rice v. Coolidge, 121 Mass. 393; Brooks v. Ancell, 51 Mo. 178: Welch v. Platt, 32 Hun, 194; Madge v. Puig, 12 Hun, 15.

[5] Craig v. Cook, 28 Minn. 232.

[6] Rinehart v. Long, 95 Mo. 396.

[7] Hillman v. Hillman, 14 How. Pr. 456.

[8] Alpin v. Morton, 21 O. S. 536.

that different causes shall be separately stated and numbered being a matter of practice, the right to enforce it is formal rather than substantial, and is generally within the control of the trial court. An order denying a motion to require commingled causes to be separated will not be reversed, unless the party complaining has thereby been deprived of some legal right.[1]

III. OF THE PRAYER FOR RELIEF.

218. Office of Prayer for Relief.—The third requisite of the complaint is "a demand for the relief to which the plaintiff supposes himself entitled."[2] Every action has an object; that is, it is brought to obtain some particular remedy or relief. This relief sought is to be stated in the prayer of the complaint, and, when obtained, is embodied in the judgment of the court. The defendant is entitled to know what facts the plaintiff relies upon and intends to prove, in order that he may prepare to meet them, and for the same reason he is entitled to know what use the plaintiff intends to make of his alleged facts. To advise the defendant in this regard, the plaintiff is required to state what relief he demands. The prayer should make the complaint definite in this particular; and if the legal grounds of the plaintiff's claim do not sufficiently appear from the facts stated and the relief demanded, he should indicate such grounds by special statement.[3] For example, if facts relied on as constituting a waiver, or an estoppel, are stated, and such effect is not obvious from the facts and the prayer for relief, the pleader should add the statement that the right has thereby been waived, or the party thereby estopped. While this is asserting a mere inference of law, it is allowable for the purpose of showing the intended application of the facts stated, when that would otherwise be obscure.[4]

[1] Goldberg v. Utley, 60 N. Y. 427.

[2] Ante, 169.

[3] Lang. Eq. Pl. 62; Clive v. Beaumont, 1 DeG. & Sm. 397, 406; Gaston v. Frankum, 2 DeG & Sm. 561, 569.

[4] Gould Pl. iii. 15.

The prayer for relief is a requisite of the complaint, but it is no part of the cause of action. Hence a complaint containing several causes of action may, and properly should, contain but one prayer for relief. In such case it is requisite only that each separate statement shall be complete *as a cause of action;* not that it shall be, within itself, a complete complaint.

219. Prayer for Alternative Relief, and for General Relief.—A plaintiff may, whether his complaint contain one cause of action or several, demand several kinds of relief, whether legal or equitable, or both;[1] and he may pray for alternative relief.[2] In a complaint on a contract to convey, the prayer may be for specific performance, or, if this relief can not be had, then for damages for breach of the contract.[3]

In actions for equitable relief, it is usual to follow the prayer for specific relief with what is known as a prayer for general relief—" and plaintiff prays for such other and further relief as may be just and equitable." Under such prayer, the court may decree such relief, other than that specifically prayed for, as the facts alleged in the complaint and proved upon the trial will justify.[4]

220. Relief Not Prayed for.—Under the former practice, if a plaintiff misconceived the nature or form of his action,—if he brought an action at law, and on the trial proved a case for equitable relief, or if he sought equitable relief, and on the hearing showed himself entitled only to a judgment at law,—he failed entirely, and was sent out of court without relief. But under the new procedure, a plaintiff may, in such case, have relief according to his allegations and his proofs. The court will not be controlled by the prayer alone, but will look to the facts alleged and proved, and if they entitle the plaintiff to a remedy, legal or

[1] Ante, 210, 211; Richwine v. Presb. Ch., 135 Ind. 80.

[2] Barlow v. Scott, 24 N. Y. 40.

[3] Henry v. McKittrick, 42 Kan. 485. See, also, Hardin v. Boyd, 113 U. S. 756; Ins. Co. v. Ins. Co., 1 Paige, 284; Korne v. Korne, 30 W. Va. 1.

[4] Jones v. VanDoren, 13 U. S. 684; Riddle v. Roll, 24 O. S. 572; English v. Foxall, 2 Pet. 595; Tayloe v. Ins. Co., 9 How. 390.

equitable, it will be awarded, whether prayed for or not.[1] For example, where the facts alleged entitle the plaintiff to an accounting, but not to a money judgment, the equitable relief should be granted, if the facts alleged are sustained by the proof.[2] But if sufficient facts are not alleged, or, being alleged, are not proved, no relief can be given, although prayed for in the most formal way.[3] Recovery must be *secundum allegata et probata;* and allegations without proof, or proof without allegations, will not avail. Thus, if the facts alleged show a right to recover money laid out and expended, but not a right to an accounting, and the prayer is for a legal judgment, if the proof fails to sustain the averments of the complaint, but does show a right to an accounting, the equitable relief should not be granted; for while the proof would warrant such relief, there are no allegations to which the proof can be applied.[4]

The default of defendant for answer is not an admission of right to the relief prayed for, but only to such as is both prayed for and warranted by the facts alleged.[5] Therefore, upon default for answer, relief not prayed for can not be had; nor can that prayed for, if not warranted by the facts alleged.[6]

221. Prayer an Election between Remedies.—Where the facts stated in a complaint entitle the plaintiff to either of two remedies, he may elect the one or the other by his prayer for relief, and thereby determine the character of the action.[7] If, for example, the declaration state a contract to convey, and a breach thereof, so that plaintiff may have specific performance or damages, he can not have both remedies, and should, in his prayer for relief, elect the one or the other; though in such case he may pray for alternative relief.

[1] White v. Lyons, 42 Cal. 279; Graves v. Spier, 58 Barb. 349; Leonard v. Rogan, 20 Wis. 540; Hamil v. Thompson, 3 Colo. 518; Williams v. Slote, 70 N. Y. 601.

[2] Emery v. Pease, 20 N. Y. 62, 64.

[3] Bradley v. Aldrich, 40 N. Y. 504.

[4] Drew v. Ferson, 22 Wis. 651.

[5] Argall v. Pitts, 78 N. Y. 239.

[6] Bliss Pl. 160.

[7] Gillett v. Freganza, 13 Wis. 472; Lowber v. Connit, 36 Wis. 176; Corry v. Gaynor, 21 O. S. 277. Per WELCH, C. J; O'Brien v. Fitzgerald, 143 N. Y. 377.

222. Prayer for Relief Not Demurrable.—A complaint is not demurrable because the relief asked is not warranted by the facts stated,[1] or is inconsistent,[2] or unnecessary;[3] and it has been held that a motion to make a complaint specific and definite can not be applied to the prayer.[4] It is a general rule that the prayer may be amended at any stage of the cause, without delay, and without terms.[5]

223. Complaint to be Subscribed.—All pleadings must be subscribed by the party or by his attorney. This, like the requirement that the word "complaint" or "petition" shall follow the title of the cause, is purely formal, and objection to a pleading for want of subscription is to be taken by motion to strike it from the files;[6] but so long as such defective pleading remains on file, it furnishes no ground for dismissing the action.[7] The subscription may be either printed or written,[8] and in the absence of a motion to strike from the files, the signature of the party to the verification is a sufficient subscription of the pleading.[9]

The omission of the subscription to the complaint does not affect the jurisdiction of the court, or the validity of a judgment,[10] can not be made ground for delay,[11] and may, on leave obtained, be supplied at any time. One of the essential features of the reformed system is, that matters merely formal are not necessary to jurisdiction or to the validity of procedure, and that mere informalities are not to be regarded,

[1] Orman v. Orman, 26 Iowa, 361; Northcraft v. Martin, 28 Mo. 469; Tisdale v. Moore, 8 Hun, 19; Mackey v. Auer, 8 Hun, 180, 183. *Contra*, in Iowa and Connecticut, by statute.

[2] Metzner v. Baldwin, 11 Minn. 150; Connor v. Bd. of Ed., 10 Minn. 439.

[3] Saline Co. v. Sappington, 64 Mo. 72.

[4] Sieberling Co. v. Dujardin, 38 Iowa, 403. *Sed quære;* for in some cases it is the office of the prayer to make the complaint definite.

[5] Foote v. Sprague, 13 Kan. 155; Culver v. Rogers, 33 O. S. 537, Per JOHNSON, C. J.

[6] Fritz v. Barnes, 6 Neb. 435; Post, 278.

[7] Fritz v. Barnes, 6 Neb. 435.

[8] Hancock v. Bournan, 49 Cal. 413; Ins. Co. v. Ross, 10 Abb. Pr. 260, n.

[9] Hubbell v. Livingston, 1 Code Rep. 63; Conn v. Rhodes, 26 O. S. 644.

[10] Conn v. Rhodes, 26 O. S. 644.

[11] Ry. Co. v. Owen, 8 Kan. 409.

if to disregard them will work no prejudice, and if to regard them will work delay.

IV. OF THE VERIFICATION.

224. The Object of the Verification.—With the view to secure good faith and truthfulness in pleading, to confine litigation to matters really in dispute, and to avoid frivolous and false issues, nearly all the codes require pleadings of fact to be verified upon oath. By thus requiring parties to sustain their statements and denials by affidavit of their truthfulness, facts not believed to be true will seldom be alleged on the one hand, and alleged facts believed to be true will seldom be denied on the other hand, and the judicial controversy will thus be limited to such statements and denials as the parties are willing to swear to.

In some states no verification is required; in some it is optional; in some it may be omitted in certain actions, or under particular circumstances; and, when required, it may generally be made by the party, by one of several parties, or by an agent or attorney of the party.

225. Defective Verification.—The verification is not required to be more specific than the statements or denials supported by it. If facts are stated on information or belief, or if two causes of action are stated in the alternative, only one of which can be true, the verification may be correspondingly qualified.[1]

The verification is not strictly a part of the pleading,[2] and is not necessary to vest jurisdiction.[3] If omitted, it may be supplied,[4] and if defective, it may be amended.[5]

[1] Boone's Pl. 34; Orvis v. Goldschmidt, 64 How. Pr. 71; Ladue v. Andrews, 54 How. Pr. 160; Truscott v. Dole, 7 How. Pr. 221.

[2] George v. McAvoy, 6 How. Pr. 200; Bank v. Shaw, 5 Hun, 114. Complaint on note dated June 18, 1874, payable in two months; jurat to verification dated June 24, 1874. General demurrer overruled on ground that the jurat was no part of the complaint.

[3] Johnson v. Jones, 2 Neb. 126; Dorrington v. Meyer, 8 Neb. 211, 214; Rush v. Rush, 46 Iowa, 648.

[4] Bragg v. Bickford, 4 How. Pr. 21; Meade v. Thorne, 2 W. L. M. 312. *Cf.* Boyles v. Hoyt, 2 W. L. M. 548; White v. Freese, 2 C. S. C. R. 30, holding that upon supplying a verification, on motion of plaintiff, a new summons must issue.

[5] Johnson v. Jones, 2 Neb. 126;

Objection to a pleading, for want of verification, or for defective verification, should be made by motion to strike from the files.[1] But such omission or defect is waived by demurring, or by pleading over,[2] or by confession on a warrant of attorney releasing all errors.[3]

226. Conspectus of the Complaint.—The complaint must display a state of facts that, under the substantive law, entitles the plaintiff to judicial action in his favor and against the defendant; and it must show, by allegations, unless dispensed with by legal inference, that the court has jurisdiction, and that the parties have legal capacity to sue and to be sued. These requisites are matters of substance, and can not be waived or dispensed with. The other parts of the complaint—title, name, prayer, subscription, verification—are matters of form, and are, for the most part, not essential to the jurisdiction of the court or the validity of its procedure. The manner in which the matter of the complaint is to be stated—in ordinary and concise language, by joinder of causes, and by separate statement of causes—is a formal requirement, designed to expedite procedure, lessen its cost, and enhance its certainty and safety.

A tabular synopsis of the orderly parts of the complaint will serve as a retrospect of what has been described in detail, and will envisage and fix in their order the constituents of this first pleading.

Rush v. Rush, 46 Iowa, 648; Jones v. Slate Co,. 16 How. Pr. 129.

[1] Fritz v. Barnes, 6 Neb. 435; Warner v. Warner, 11 Kan. 121; Pudney v. Burkhart, 62 Ind. 179; Post, 278.

[2] Hughes v. Feeter, 18 Iowa, 142; Butler v. Church, 14 Bush, 540; State v. Ruth, 21 Kan. 583; Pudney v. Burkhart, 62 Ind. 179.

[3] Bank v. Reed, 31 O. S. 435.

SYNOPSIS OF COMPLAINT.

I. The Title.
    1. Court and County.
    2. Parties, Plaintiff and Defendant.
II. The Word "Complaint," or "Petition."
III. The Statement.
    (1) The Matter to be Stated.
        1. Capacity of Parties.
        2. Jurisdictional Facts.
        3. The Cause of Action.
            (*a*) Right of Plaintiff.
            (*b*) Delict of Defendant.
            (*c*) Collateral Facts.
    (2) The Manner of Statement.
        1. Ordinary and Concise Language.
        2. Joinder of Causes.
        3. Separate Statement of Causes.
IV. The Prayer for Relief.
V. The Subscription.
VI. The Verification.

7 + cus Co. 26 Or. 452 - acct stated.

Joinder in

M & C. 24 Or. 393 - Distinction between law & equity.

Sec 1 abolishes forms - Equity but distinct in Oregon.

CHAPTER XVII.

THE ANSWER.

227. Defenses Defined and Classified.—The answer, which is the first pleading of denial or of facts by the defendant, is to set forth such defense or defenses as he may have to the demand of the plaintiff. The term "answer" applies to the entire pleading, and should not be used to designate any one of several defenses embraced within such pleading. Any denial, or any statement of operative facts, which will show that the plaintiff is not entitled to relief, or that will wholly or partly defeat his claim, is a defense.[1] For example, if the plaintiff sue to recover the price of property sold, the defendant may answer (1) that payment is not due, and thus defeat the action while admitting the indebtedness; or (2) he may deny that he bought the property, and thus defeat recovery, unless the plaintiff prove the sale as alleged; or (3) he may admit the purchase, and allege payment, which will defeat recovery, unless payment be denied, and not proved. Any one of these responses to the plaintiff's complaint would show that he ought not to recover as claimed therein, and would be a defense thereto. The defendant may also, in such supposed case, allege a warranty of the property, and a breach thereof, and make a counter-claim for damages.

228. Denials and New Matter.—Pursuant to the foregoing definition and classification of defenses, the answer should contain (1) a general denial of all the allegations of the complaint, or a specific denial of one or more of its material allegations; or it should contain (2) a statement of new

[1] WORDEN, J., in Wilson v. Poole, 33 Ind. 443; ALLEN, J., in Bush v. Prosser, 11 N. Y. 347, 352; Ry. Co. v. Crawford, 1 Idaho, 770; GRANT, J., in Ry. Co. v. Washburn, 5 Neb. 117, 125.

matter constituting a defense, a counter-claim, or set-off, in ordinary and concise language. The defendant may join in his answer as many grounds of defense, counter-claim, and set-off, as he may have, whether they are such as have heretofore been denominated legal or equitable, or both; and he may therein demand relief touching the matters in question in the complaint, against the plaintiff, or against other defendants; but each defense, and each affirmative demand, must be separately stated, and must refer in an intelligible manner to the causes of action which they are intended to answer.

There is, generally, no statutory requirement that the answer shall be entitled. The complaint must be entitled with the names of the court, county, and parties, followed by the word "complaint"; and it is good practice, if not an express requisite, so to entitle all subsequent pleadings, substituting, of course, "answer" or "reply" in the place of "complaint." In no other way can these pleadings be so surely and so conveniently identified with the court and the action.[1]

I. OF DENIALS.

229. The General Denial.—At common law, the general traverse is a compendious denial of all that is alleged in the declaration. It is commonly pleaded by a short and simple formula, called the general issue; but it is equivalent to a specific negation of each material averment of the declaration.[2] In like manner, the general denial under the Reformed Procedure is a general traverse; that is, it is a traverse of all the issuable facts alleged in the complaint. It is the *litis contestatio* of the civilians, which put the plaintiff to the proof of his libel.[3] But notwithstanding this broad and comprehensive character of the general denial, it puts in issue only the material allegations of the complaint. A material allegation in a pleading is one that is essential to the claim or defense; one that could not be stricken from the pleading without leaving it insufficient. An immaterial allegation in a complaint—one not essential to the plaintiff's

[1] Boone Pl. 59.
[2] Ante, 43.
[3] Ante, 63.

demand—need not be proved,[1] and is not admitted by failure to deny; a traverse thereof would present an immaterial issue, equivalent to no issue.

230. Forms of General Denial.—There are several distinct forms of the general issue; for example, *non est factum*, in covenant and in debt on a specialty; *nul tiel record*, in debt on a record; *non assumsit*, in assumpsit; *non detinet*, in detinue; *non culpabilis*, in trespass, in case, and in trover; and *non cepit*, in replevin. But no particular form of general denial is prescribed or required; it is requisite only that each and every allegation of the complaint be traversed. A form in common use is, "The defendant, for answer to the complaint herein, denies each and every allegation thereof." A denial in this form, "The defendant says he denies," while sufficient, is in bad form, and has been criticised.[2] A denial of "all the material allegations of the complaint" is good on demurrer, but is amenable to a motion to make definite.[3] It is faulty in that it is uncertain as to what allegations are denied, and what are not denied; and it allows the pleader to determine, without stating, what allegations are by him deemed material. An answer that the defendant can not admit the facts alleged in the complaint, and that he calls for proof, is not, in form or in substance, a denial of any allegation of the complaint.[4] Whatever form is employed, the denial must be direct and positive. An argumentative denial, a legal conclusion, or a plea of "not guilty," is insufficient.[5]

231. The Special Denial.—The object of denials, whether general or special, is to put in issue the allegations of the complaint. It has been shown that the general denial traverses and puts in issue all the material and issuable facts

[1] Gaines v. Ins. Co., 28 O. S. 418.

[2] Espinoa v. Gregory, 40 Cal. 58; Chapman v. Chapman, 34 How. Pr. 281; Jones v. Ludlum, 74 N. Y. 61; Moen v. Eldred, 22 Minn. 538; Munn v. Taulman, 1 Kan. 254. *Cf.* Smith v. Nelson, 62 N. Y. 286.

[3] Edmondson v. Phillips, 73 Mo. 57; Pry v. Ry. Co., 73 Mo. 123; Ingle v. Jones, 43 Iowa, 286; Lewis v. Coulter, 10 O. S. 451.

[4] Bently v. Dorcas, 11 O. S. 398; Bldg. Assn. v. Clark, 43 O. S. 427.

[5] Schenk v. Evoy, 24 Cal. 104; Post, 343, 358.

stated in the complaint. In most cases the plaintiff's right of action rests upon a series or group of facts, each one of which is an indispensable part of his cause of action. It is obvious that where the right of the plaintiff is thus built upon several allegations, each of which is essential to its support, the right so asserted is effectually controverted by the denial of any one of these essential parts. The complaint may sometimes contain averments—such as those of time, place, value—that must be stated, but that need not be proved as stated; and sometimes the complaint will contain evidential facts—mere details of evidence, from which the existence of the operative facts is to be inferred; and again it may contain mere conclusions of law, resulting from facts stated, or from facts not stated; all such allegations, whether of the kinds that are necessary or of the kinds that are not necessary in the complaint, are not issuable, and a denial of such allegations will not present a material issue, and is not defensive.

It follows from what has been stated that the denial of any material and issuable allegation of the complaint makes a material issue, and is a good defense.[1] Such traverse of a particular averment of the complaint is termed a *special denial.* It is, substantially, the "common traverse" of the common-law pleadings,[2] and is available where some of the issuable facts of the complaint are true, and can not be controverted by a general denial. Whether a specific denial in a given case, sufficient in form, constitutes a defense, depends upon whether the allegation traversed is in itself essential to the plaintiff's right of action.

232. Special Denial, Continued.—Some examples will illustrate this form of denial. An allegation that the defendant never gave to plaintiff the note sued on, is a denial of the plaintiff's allegation that the defendant made and delivered it.[3] In replevin, a denial that the property came into defendant's possession, or that it was or remained in his possession at the commencement of the action, is a denial of

[1] Steph. Pl. 295; Pom. Rem. 615.
[2] Ante, 64.
[3] Sawyer v. Warner, 15 Barb. 282, 285.

possession.[1] An allegation that certain land was dedicated as a homestead, by certain acts stated, is traversed by a denial of the ultimate fact—the dedication as a homestead;[2] and an allegation that a note and mortgage "were executed by the duly authorized board of trustees of the defendant," is put in issue by denial "that either note or mortgage was executed or made in any way by defendant."[3] Where a complaint alleges the making and delivery of a note to a payee, and a sale and delivery thereof by the payee to the plaintiff, an answer admitting the making and delivery, alleging payment, and denying each and every other allegation, puts in issue the sale and delivery to plaintiff;[4] and an answer to a complaint for work performed and materials furnished, of a certain value, that admits the doing of the work and the furnishing of the materials, but denies that they were of the value specified, puts the value in issue.[5]

There may be several special denials in one answer, each directed to a separate and distinct averment of the complaint. In such case, each denial should be specific and direct, and should point out clearly the statement of the complaint intended to be controverted by it. In some states a special denial is required in all cases, in some it is required only to a verified pleading, while in others it is always optional.

233. General Denial of Part of Complaint.—It is common practice to admit certain allegations of the complaint, and to deny all allegations therein not expressly admitted. This general denial of only a part of the allegations of the complaint, combined with an admission as to others, has been criticised as "a mongrel form of answer" not contemplated by the reformed system, and not in har-

[1] Roberts v. Johannas, 41 Wis. 616.

[2] Lowell v. Lowell, 55 Cal. 316. *Sed quære.* On principle, if the allegation of dedication is merely collateral, or by way of inducement, such allegation would be the operative fact, and denial thereof would be a good traverse; otherwise, the dedicatory acts stated would be the operative facts, and the allegation of dedication a legal conclusion, denial of which would make an immaterial issue.

[3] Babbage v. Church, 54 Iowa, 172.

[4] Allis v. Leonard, 46 N. Y. 688.

[5] Van Dyke v. Maguire, 57 N. Y. 429.

mony with its true theory.[1] But it has the sanction of uniform practice, and the approval of numerous courts,[2] and may be regarded as the settled and authorized practice. Such denial may be in this form: The defendant denies each and every allegation of the complaint not herein expressly admitted. Express admissions are, of course, not called for, but they serve to qualify and make certain the extent of the denial.

If such combination of admissions and denials is so framed as to be indefinite or uncertain as to what is admitted and what is denied, the remedy is by motion to make the answer definite and certain, and not by the exclusion of evidence upon the trial.[3] A general denial and a special denial of the same allegation is needless, and is not permitted.[4] A defendant may make a specific denial of one distinct part of a complaint, and a general denial of the remainder;[5] though he may not specifically admit part of an entire allegation, and deny other parts of it.[6]

234. Allegations Admitted by Failure to Deny.—All material allegations in the complaint, not traversed by general or special denial, are, for the purposes of the action, admitted to be true.[7] This rule, drawn from the common law,[8] is to compel the defendant to admit so much of the complaint as he can not conscientiously deny.[9] Failure to deny a material allegation is a conclusive admission thereof, and dispenses with proof, as to such allegation;[10] and the denial of an allegation not traversable does not call for proof.

[1] Pom. Rem. 633 et seq.

[2] Wheeler v. Billings, 38 N. Y. 263; Leyde v. Martin, 16 Minn. 38; Kingsley v. Gilman, 12 Minn. 515, 517, 518; Allis v. Leonard, 46 N. Y. 688; Calhoun v. Hallen, 25 Hun, 155; Falls Co. v. Bridge Co., 23 Minn. 186; Ingle v. Jones, 43 Iowa, 286; Parshall v. Tillon, 13 How. Pr. 7.

[3] Greenfield v. Ins. Co., 47 N. Y. 430, 447; Burley v. Bank, 111 U. S. 216.

[4] Blake v. Eldred, 18 How. Pr. 240; Fogerty v. Jordan, 2 Robt. 319, 322.

[5] Blake v. Eldred, 18 How. Pr. 240.

[6] Fogerty v. Jordan, 2 Robt. 319, 322.

[7] Maguire v. O'Donnell, 103 Cal. 50.

[8] Steph. Pl. 276.

[9] Hartwell v. Page, 14 Wis. 49.

[10] Lillienthal v. Anderson, 1 Idaho, 673; Burke v. Water Co., 12 Cal.

Allegations of evidential facts, or of legal conclusions, are not issuable;[1] and generally, allegations of time, place, and value, are not issuable, but may, without traverse, be the subject of proof.[2] Failure to deny an allegation that is not material is not an admission of its truth;[3] and a fact not well pleaded is not admitted by failure to answer it;[4] for a tacit admission ought not to help a complaint, and make it broader than it is by allegations. And where material facts, omitted from the complaint, are stated in the answer, the defect in the complaint is thereby cured.[5]

II. OF NEW MATTER.

235. The Defense of New Matter.—The defense of denial, whether general or special, does not allege any fact; it simply denies facts alleged in the complaint, and rests the contention upon the allegations so traversed. The defense of new matter, on the other hand, does not deny any fact; without controverting any averment of the complaint, it asserts other facts which show that, notwithstanding the facts stated in the complaint, the plaintiff has not a right of action against the defendant. It proceeds upon the tacit admission that the issuable facts stated in the complaint are true. This is called "giving color," which is a prerequisite justification for introducing the new matter, and is a logical concomitant of this defense. But this is only a logical admission, made *pro re nata*, to authorize the introduction of new facts in the defense; the defendant may, in the same answer, and as a separate defense, deny any or all the averments of the complaint.

236. Philosophy of this Defense.—Whether a particular

403; Mulford v. Estrudillo, 32 Cal. 131; Wright v. Butler, 64 Mo. 165; Steele v. Russell, 5 Neb. 211.

[1] Racouillat v. Rene, 32 Cal. 450, 455; Siter v. Jewett, 33 Cal. 92; Cutting v. Lincoln, 9 Abb. Pr. N. S. 436; Bank v. Bush, 36 N. Y. 631; Downer v. Read, 17 Minn. 493.

[2] Jenkins v. Steanka, 19 Wis. 126; Counoss v. Meir, 2 Smith, E. D. 314.

[3] Counoss v. Meir, 2 Smith, E. D. 314; Fry v. Bennett, 5 Sand. 54; Oechs v. Cook, 3 Duer, 161.

[4] Harlow v. Hamilton, 6 How. Pr. 475; Fry v. Bennett, 5 Sand. 54; Clay Co. v. Simonson, 1 Dakota, 403.

[5] Shively v. L. & W. Co., 99 Cal. 259.

act is legally right, or legally wrong, may depend upon the *occasion* upon which it is enacted. An act apparently unlawful when considered by itself, may be clearly lawful when considered in conjunction with the correlated circumstances. So, a statement of facts that by themselves show a right of action, may not show such right when taken in connection with other and correlated facts. The defense of new matter is based upon this principle. It brings upon the record other facts, so correlated to those already alleged as to form with them an entire group of circumstances, which, taken together, show that the plaintiff has not the right of action disclosed by that part of the facts disconnected by him from the entire group, and stated in the complaint. For example, in trespass for assault and battery, the plea of *son assault demesne* simply brings upon the record the additional fact that the plaintiff first assaulted the defendant, and that he, to save himself, assaulted and beat the plaintiff. By this complement of facts, the segregated fact asserted by the plaintiff is shown not to have wrongfully invaded any right of his; and the apparent liability of the defendant is avoided, without controverting any fact alleged against him. So, an answer alleging the fraudulent representations of the plaintiff simply completes, upon the record, the group of operative facts, part of which the plaintiff had stated. In such case the facts stated by the plaintiff are not questioned; they are simply placed in juxtaposition with correlated facts, to show that, as part of the entire group of facts to which they belong, they do not give the plaintiff the right which they apparently do when disconnected and standing alone.

The connection between the segregated facts stated by the plaintiff, and the complemental facts pleaded in defense, is not always so apparent as in the case just stated. Payment, for example, is, generally, a defense of new matter. If payment be made at the time the obligation is incurred, its connection with the facts creating the duty to pay is apparent; but if payment be made long after the liability is incurred, it is none the less a part of the entire transaction, though removed in point of time. Payment, whenever made, is one of the entire group of facts which must be taken to-

gether, to show the true relation between the parties. A plea of the statute of limitations is a defense of new matter not immediately connected with the facts stated by the plaintiff; but it brings upon the record a new fact, the lapse of time, which, by virtue of the statute, enters into the group of facts fixing the legal relation of the parties, only part of which has been stated by the plaintiff.

If the plaintiff allege a contract with the defendant, and breach thereof, the defendant may not answer that he made the contract with another. The making of a contract with another is not a cognate fact, and in no way affects the legal operation of the facts stated by the plaintiff. An answer stating such fact would not *give color*, and therefore would not make place for the new matter.[1] The proper answer in such case would be a denial; and the making of the contract with another would be an evidential fact in support of the denial. An answer of new matter should be limited to facts not embraced in a judicial inquiry as to the truth of matters stated in the complaint.[2]

So, in an action for injury caused by the wrongful act of the defendant, he may not plead payment by a stranger. For example, if property insured against fire be burned by the actionable negligence of the defendant, he may not plead payment by the insurance company. Payment by a third party is a fact that does not belong to the group of facts that fix the jural relations of the plaintiff and defendant. Such payment comes from a collateral source, and is *res inter alios acta*.[3] The right of the insurer, in some cases, to be reimbursed out of the amount recovered from the wrong-doer who occasioned the loss, rests upon the equitable doctrine of subrogation.[4]

237, Dilatory Answers.—Answers of new matter may be

[1] Ante, 71; Post, 240.

[2] Pom. Rem. 593.

[3] Perrott v. Shearer, 17 Mich. 48; Yates v. Whyte, 4 Bing. N. C. 272; Cunningham v. E. & F. H. Ry. Co., 102 Ind. 478; s. c. 20 Reporter, 428; Hayward v. Cain, 105 Mass. 213; Sherlock v. Alling, 44 Ind. 184; Klain v. Thompson, 19 O. S. 569; Post, 437, where this doctrine is more fully stated.

[4] Weber v. Railway Co., 35 N. J. L. 409; Newcombe v. Ins. Co., 23 O. S. 382.

classed as (1) dilatory, (2) in bar of the action, and (3) for affirmative relief. Dilatory answers, like dilatory pleas at common law,[1] question, not the merits of the demand, but the occasion of the action; they relate to some incident of the particular suit, and not to the merits of the plaintiff's demand, and are (1) to the jurisdiction, or (2) in abatement.

An answer to the jurisdiction questions the right and power of the court to entertain the action, on ground not apparent upon the face of the complaint. If the want of jurisdiction affirmatively appears from the complaint, it should be taken advantage of by demurrer.[2]

An answer in abatement sets up some matter of fact, the legal effect of which is to overthrow the pending action, without questioning the merits of the plaintiff's demand. Among the defenses that may be pleaded in abatement are, misnomer, present want of capacity to sue, a defect of parties, and the pendency of another action. As at common law a plea in abatement was required to give the plaintiff a better writ or declaration,[3] so, under the new system, such answer must furnish information—such as the true name of defendant, where misnomer is pleaded, and the names of necessary parties, where defect of parties is pleaded—that will enable the plaintiff to cure the defect by amendment, if it be a defect that can be so cured.

Generally, if the ground of an objection that may be made by dilatory answer appears in the complaint, advantage may be taken of it by demurrer; but if it does not so appear, the facts, being new matter, must be brought upon the record by answer, and can not be proved under a denial. And, generally, where a defendant pleads in bar, instead of in abatement, he waives such defects as might be the subject of plea in abatement.[4]

238. Answer of New Matter in Bar.—A dilatory answer, whether to the jurisdiction or in abatement, tends merely to overthrow the pending *action*, by diverting it to another jur-

[1] Ante, 58.

[2] Post, 291. For full discussion of jurisdiction, see Post, 461 et seq.

[3] Ante, 69.

[4] Board of Comrs. v. Huffman, 134 Ind. 1. *Cf.* Black v. Thompson, 136 Ind. 611.

isdiction, or by suspending or abating it. An answer in bar, whether a denial or new matter, impugns the *right of action*, and controverts the plaintiff's claim. An answer of denial is always in bar; an answer of new matter is either dilatory, or in bar. An answer of denial makes an issue, and terminates the pleadings; an answer of new matter, whether dilatory or in bar, does not make an issue, but calls for a reply.

Answers of new matter in bar are either *in excuse*, or *in discharge*. An answer of new matter in excuse alleges some justification of the matters charged in the complaint, and shows that the plaintiff never had a right of action by reason thereof. An answer of new matter in discharge shows some release or discharge of the duty arising from the facts stated in the complaint. Of the former class are, pleas of self-defense, of infancy, of duress, and the like; of the latter class are, pleas of payment, of release, of the statute of limitations, and the like.

239. Equitable Defenses in Legal Actions.—One of the most radical reforms of the new procedure is that of allowing equitable defenses in actions founded on legal rights. Formerly, a defendant having an equitable defense to a legal right asserted against him was driven to another action, in a court of equity, to establish his defense; in the mean time restraining his adversary, by injunction, from proceeding in the action at law. But under the new procedure, a defendant in an action at law may assert legal or equitable defenses, and he may join both in the same answer.

An equitable defense, as contradistinguished from a legal defense, is a right in the defendant formerly recognized and enforceable only in a court of equity, and which would formerly have authorized an application to the court of chancery for relief against a legal liability, but which could not, at law, be pleaded in bar.[1] An equitable defense is new matter, and must be so pleaded; it can not be proved under a general denial.[2] This is so, because such defense does not

[1] ALLEN, J., in Dobson v. Pearce, 12 N. Y. 156, 166.

[2] Powers v. Armstrong, 36 O. S. 357; Kenyon v. Quinn, 41 Cal. 325; Stewart v. Hoag, 12 O. S. 623.

controvert the facts stated by the plaintiff; it sets up new facts showing an equity in the defendant inconsistent with the right asserted by the plaintiff, but not inconsistent with his facts alleged. In an action for the recovery of real estate, whereof the legal title is in the plaintiff, a defense grounded on an equitable title and right of possession under it is an equitable defense, is new matter, and must be specially pleaded.[1] Such defense does not question the plaintiff's facts, but questions his apparent right by reason thereof.

The interposition of an equitable defense in such case does not convert a legal action into an equitable one;[2] and an issue upon such new matter, if asserted as a mere defense, would be triable to a jury. But if the defendant goes further, and asks affirmative equitable relief,—if, for example, in ejectment, the defendant alleges that the land involved was, by mistake, described in a deed from him to plaintiff, and asks a correction of the deed,—such claim is properly addressed to the chancery side of the court.

240. Confession and Avoidance—Giving Color.—The answer of new matter in bar is essentially a plea in confession and avoidance;[3] and like such pleas, it must *give color;* that is, it must admit, expressly or tacitly, that, independently of the matter disclosed in the answer, the plaintiff would have a right of action.[4] If, in an action on contract, the defendant pleads infancy, he tacitly admits the contract, in avoiding its obligation. If such answer does not give color, there is no place for the new matter; for example, a plea of payment must admit a debt; otherwise, there is no place for the payment. An answer of new matter in bar, that does not give color, can not amount to more than a denial, and does not require a reply.[5]

[1] Powers v. Armstrong, 36 O. S. 357.

[2] Webster v. Bond, 9 Hun, 437; Wisner v. Ocumpaugh, 71 N. Y. 113.

[3] Bauer v. Wagner, 39 Mo. 385; State v. Williams, 48 Mo. 210.

[4] Ante, 71; Bliss Pl. 340. Tacit admission in a defense of new matter does not stand in the way of a defense of denial in the same answer. Siter v. Jewett, 33 Cal. 92; Post, 262.

[5] Abb. Pl. Br. 639; Sylvis v. Sylvis, 11 Colo. 319; Netcott v. Porter, 19 Kan. 131; Engle v. Bugbee, 40 Minn. 492; State v. Williams, 48 Mo. 210.

The common-law rule is very strict in its requirement that a plea of new matter in avoidance shall confess, without qualification, the matters stated in the declaration.[1] In pleas of the statute of limitations, of infancy, and the like, it is common to refer to the right of action stated in the declaration as the "alleged," or the "supposed," right of action; and these expressions are held not to qualify the confession,[2] the word "supposed" meaning no more than "alleged." But such use of the phrases "if any," or "if any such there be," renders the confession hypothetical, and vitiates the plea.[3] But this rule has no application to dilatory pleas, for they do not relate to the right of action.[4]

241. Partial Defenses—Common-law Rule.—At common law, the rule seems formerly to have been that the defense, whether by denial or by avoidance, should answer the whole declaration. The defendant might plead several defenses to different parts of the declaration, but the entire defense pleaded was required to answer the whole complaint; and if it answered a part only, it was considered as no plea, and the plaintiff was entitled to a judgment by *nil dicit*.[5] The severe logic of the common-law system in its earlier stages demanded the perfect issue of a complete denial, and regarded any state of the record admitting the plaintiff's right to recover as presenting no issue. Under this rigid devotion to theory, and to logical forms, a defendant could avail himself of a partial defense, such as part payment, or facts in mitigation, only by pleading the general issue, or a special plea answering the whole complaint.

In later time, the courts allowed a partial defense, and sustained a plea answering any material and severable part of the declaration, such as part payment, or part performance,

[1] Taylor v. Cole, 3 Term Rep. 292; Griffiths v. Eyles, 1 Boss. & Pull. 413.

[2] Gale v. Capern, 1 Ad. & Ell. 102; Eavestaff v. Russell, 10 M. & W. 365.

[3] Gould v. Lasbury, 1 Cromp. M. & R. 254; Margetts v. Bays, 4 A. & E. 489; Conger v. Johnston, 2 Den. 96; McCormick v. Pickering, 4 Comst. 276.

[4] PARKE, B., in Eavestaff v. Russell, 10 M. & W. 365.

[5] Gould Pl. vi. 102 et seq.; Pom. Rem. 607, 693.

as a good defense *pro tanto*,[1] leaving the plaintiff entitled to judgment for the unanswered part, as by *nil dicit*. Concurrently with this relaxation of the former rule requiring every plea to answer the whole declaration, there arose the requirement that a plea answering only a part of the complaint should profess to answer only such part; and if a plea answering only a part of the complaint assumed to answer the whole, it was bad on demurrer.[2] And under this rule, every plea to the action was taken as extending to the whole declaration, unless expressly limited to a part thereof.[3]

242. Partial Defenses Under the Reformed Procedure.—The new procedure allows the defendant to plead, in one answer, as many grounds of defense, whether complete or partial, as he may have, subject only to the requirement that they must not be inconsistent, and that each shall be separately stated and numbered; and where a partial defense is pleaded, it must be designated and pleaded as partial.[4] If a partial defense is pleaded as a defense to the whole complaint, it will be insufficient on demurrer.[5] This remnant of the old system is at variance with the true spirit and purpose of the reformed system, but it is well established by the authorities. And under the new system, as under the old, a defense not designated and pleaded as partial, will be taken as intended for a complete defense; and if it can be operative only as a partial defense, it will be vulnerable to demurrer. But this rule does not apply to an answer simply pleading a set-off less than the plaintiff's demand, because a set-off is not strictly a defense.[6]

It has been held that an answer expressly limited to a part

[1] 1 Chit. Pl. 523; Somerville v. Stewart, 48 N. J. L. 116.

[2] 1 Chit. Pl. 524; Gould Pl. vi. 104; Gebrie v. Mooney, 121 Ill. 255; Orb v. Coapstick, 136 Ind. 313.

[3] Gould Pl. vi. 104.

[4] Fitzsimmons v. Ins. Co., 18 Wis. 234; Davenport Co. v. City of Davenport, 15 Iowa, 6; Webb v. Nickerson, 11 Oreg. 382; Ward v. Polk, 70 Ind. 309.

[5] Reynolds v. Roudabush, 59 Ind. 483; Peck v. Parchin, 52 Iowa, 46; McMahan v. Spinning, 51 Ind. 187; McLead v. Ins. Co., 107 Ind. 394; Thompson v. Halbert, 109 N. Y. 329; Fitzsimmons v. Ins. Co., 18 Wis. 234.

[6] Mullendore v. Scott, 45 Ind. 113; Curran v. Curran, 40 Ind. 473.

of the complaint is not bad because it in fact goes to the whole of the complaint.[1] And it has been held that in an action for equitable relief an answer denying, or avoiding, some material part of the plaintiff's case, so as to abridge or modify the right to relief, is good as against a demurrer, though it is not a complete defense to the action.[2]

Many of the codes provide that when any distinct and severable part of the plaintiff's demand is not put in issue by the answer, he may have judgment for such part, without prejudice to his rights as to parts of his demand that are disputed. Under such provision, judgment may be entered as by *nil dicit* for the admitted part of the plaintiff's claim, and the action proceed to trial as to the disputed part.[3]

243. Partial Defense and Special Denial Distinguished.—The partial defense must not be confused with the special denial. The latter is a specific traverse of some particular fact or facts alleged in the adverse pleading; and if the particular matter so traversed is essential to the cause of action, the special denial is a complete defense. If a complaint for breach of warranty allege, as it must, the warranty and a breach thereof, the defendant may deny only the making of the warranty, or he may traverse only the alleged breach; either would be a special denial, and either would be a full and complete defense to the action.

A partial defense always leaves in the plaintiff a right of recovery. It may be asserted by mere denial, or by pleading new matter. If asserted by denial, it must be by special denial, for a general denial is a complete defense, leaving no right of recovery in the plaintiff.

244. How New Matter in Defense to be Pleaded.—The answer of new matter should contain only operative facts, and these facts of the answer, like those of the complaint, should be stated in ordinary and concise language, and with the same fullness, exclusiveness, and certainty, required in

[1] Cooper v. Jackson, 99 Ind. 566.

[2] Peebles v. Isaminger, 18 O. S. 490.

[3] Moore v. Woodside. 26 O. S. 537; Benson v. Stein, 34 O. S. 294. *Cf.* Weaver v. Carnahan, 37 O. S. 363.

New matter in defense pleaded like allegations in Complaint

the statement of facts constituting a cause of action in the complaint. Evidential facts, conclusions of law, inferences, and arguments are out of place in any pleading. A few illustrative cases will explain these requirements.

That the plaintiff is not the real party in interest, is a defense of new matter, and is not admissible under a denial.[1] But the mere statement that "the plaintiff is not the real party in interest" is a legal conclusion. The operative facts which give rise to this conclusion should be stated.[2] And the allegation that some person other than the plaintiff is the real party in interest, without stating the facts which support that conclusion, is equally faulty.[3] In a defense of fraudulent representation, or deceit, the same operative facts should be stated that are requisite in a complaint for deceit;[4] to wit, the representation, its falsity, the *scienter* of the plaintiff, his intent, and the defendant's reliance; and it must appear, from facts alleged, that the representation was as to a material matter, that the defendant had a right to rely upon it, and that he was thereby misled to his injury.[5] An allegation that the defendant was induced to make the engagement sued on, "by the fraud of the plaintiff," states a conclusion, and is insufficient as a defense.[6] So, an allegation that the defendant was "induced by coercion" to execute the instrument sued on is insufficient.[7] The facts constituting the duress should be stated, so that the adverse party

[1] Smith v. Hall, 67 N. Y. 48; Hereth v. Smith, 33 Ind. 514.

[2] Shafer v. Bronenberg, 42 Ind. 89, 90; Cottle v. Cole, 20 Iowa, 481.

[3] Raymond v. Pritchard, 24 Ind. 318; Hereth v. Smith, 33 Ind. 514; Swift v. Ellsworth, 10 Ind. 205.

[4] King v. Eagle, 10 Allen, 548; Wilder v. DeCon, 18 Minn. 470; Joest v. Williams, 42 Ind. 565.

[5] Keller v. Johnson, 11 Ind. 337; People v. San Francisco, 27 Cal. 656; Van De Sande v. Hall, 13 How. Pr. 458; Simmons v. Kayser, 11 Jones & S. 131; Lefler v. Field, 52 N. Y. 621; Ry. Co. v. Supervisors, 37 Cal. 354; Capuro v. Ins. Co., 39 Cal. 123; Shook v. Singer Mfg. Co., 61 Ind. 520.

[6] Ham v. Greve, 34 Ind. 18, 21; Hale v. Walker, 31 Iowa, 344, 355; McMurray v. Gifford, 5 How. Pr. 14. *Cf.* King v. Davis, 34 Cal. 100, holding that after issue and trial upon such answer, without objection, it will be sustained.

[7] Richardson v. Hittle, 31 Ind. 119; Ins. Co. v. McCormick, 45 Cal. 580.

may know what facts he is to meet, and may have their legal sufficiency determined.

245. Denials and New Matter in One Defense.—It is sometimes necessary that a denial be qualified or explained by the introduction of new matter therewith, in order that the materiality of the denial shall appear; and it is sometimes necessary that affirmative matter be accompanied by a denial, in order that the defensive character of the new matter shall appear. In such cases, the common-law procedure allows denial and new matter to be coupled in one defense, called the "special traverse."[1] And this may, for the same reasons, be done under the Reformed Procedure; for in no other way can certain defenses be made available.

If one be sued as trustee, on a demand that, if it did not grow out of a trust relation, would be subject to the bar of the statute of limitations, he may, in one defense, both deny the trust and assert the statute. In no other way could the statutory bar be asserted. In such defense, the denial is simply to make way for the statute, and the entire defense is simply a plea of the statute. The denial is used as matter of inducement, and can not be treated as making an issue, except for the purpose of introducing the plea of the statute.[2] In an action to recover the agreed price of property sold, the defendant may, in one defense, deny that the agreed price was that stated by plaintiff, allege the true price agreed on, and full payment thereof. In such case, it requires both the denial and the affirmative facts to assert the defense of payment in full, and the entire defense is simply that of payment. To allege simply that the agreed price was so much, and that it has been paid, would be an argumentative traverse as to the price.[3]

III. OF COUNTER-DEMANDS.

246. Recoupment of Damages.—In the early and more technical period of the common law, a defendant holding an

[1] Ante, 65, 66.

[2] Colglazier v. Colglazier, 117 Ind. 460, 464.

[3] Post, 358.

affirmative demand against the plaintiff could not assert it in a pending action, but was required to prosecute it in an independent suit; and after judgment in both cases, the chancellor might decree a set-off between the judgments. This was on the ground that such right in the defendant is not strictly a matter of defense to the plaintiff's claim. A defense is a mere negation; it controverts either the plaintiff's right to maintain the particular action, or his right to recover. A counter-demand questions neither the propriety of the suit, nor the right of action, and so was regarded as not a fit matter for plea.

But it sometimes happened that a defendant would have a right of action against the plaintiff, growing out of the matters upon which the plaintiff's claim was based in the declaration; and the evident economy and fairness of requiring the plaintiff to account, in his own action, for his own disregard of the contract which he sought to enforce, led to the practice of allowing the defendant to reduce or extinguish the plaintiff's claim by asserting his correlated right. For example, if in an action to recover for goods sold and delivered, the defendant had a claim against the plaintiff for defect in quality or quantity of the goods, he was allowed, upon notice to the plaintiff, to set up such claim; not as a defense to the plaintiff's demand, but to reduce the amount of his recovery.[1] This was called *recoupment*, from the French *recouper*, to cut again. It is not a defense, but a reduction of damages; and is not the subject of plea, but it is to be had under a general denial and notice. As stated by Bronson, J., "It is a matter that is never pleaded in bar. It is in the nature of a cross-action. The right of the plaintiff to sue is admitted; but the defendant says he has been injured by the breach of another branch of the same contract on which the action is founded, and claims to stop, cut off, or keep back, so much of the plaintiff's damages as will satisfy the damages sustained by the defendant."[2]

247. Set-off in Equity.—While the scope of the action

[1] Upton & Co. v. Julian & Co., 7 O. S. 95.

[2] Nichols v. Dusenbury, 2 N. Y. 283.

was thus enlarged by the doctrine of recoupment, its operation was still confined to the particular subject of litigation that gave rise to the suit; and cross-demands arising out of independent contracts, and involving an examination of separate transactions, could not be settled in one action. But the English Court of Chancery, to prevent circuity of action, and to avoid multiplicity of suits, adopted from the civil law a principle there known as "compensation," [1] whereby parties indebted to each other, under independent contracts, may in one action set off their respective demands, and prevent recovery except for the excess of the larger over the smaller demand. This right of set-off, originating in equity, was afterwards conferred upon litigants in the common-law courts of England by statute.[2]

This just and economic doctrine that cross-demands may be settled in one action, a doctrine in the interest of individual justice and of public policy, but a doctrine that slowly made its way to favor, is to be found, in some form or other, in perhaps every state of the Union. Under the Reformed Procedure it has been extended and amplified, and is made available to a defendant by means of a counter-claim, set-off, or cross-complaint.

248. The Counter-claim.—The answer, as has already been shown, may contain (1) matters of defense, and (2) grounds for affirmative relief to the defendant. The matters of defense are either denials, or new matter in avoidance; the grounds for affirmative relief that may be asserted in the answer are, counter-claim and set-off. In addition to these, a defendant may have affirmative relief by cross-complaint; but this is not properly a part of the answer, though often inserted therein.

There is a clear distinction between new matter as a defense, and new matter as ground for affirmative relief. In the first place, a separate right of action in the defendant is the essence of a counter-demand, while new matter constituting a mere defense need not constitute a right of action in

[1] Haynes' Outlines of Equity, 153, 154,158; Bisph. Eq.Jur. 327, *in nota.*

[2] 2 Geo. II., c. 22, A. D. 1729.

the defendant.[1] In the next place, a counter-demand does not necessarily attack the claim of the plaintiff, but, admitting the plaintiff's right of action, it simply sets up an affirmative demand; on the other hand, a defense of new matter attacks the plaintiff's right of action. The one admits the right of the plaintiff to recover, while the other admits the facts by him stated, but questions the right to recover. In an action to recover the price of property sold, an answer of payment is a defense of new matter; it admits the facts stated by the plaintiff, but asserts a new and correlated fact which shows that, notwithstanding the facts stated by the plaintiff, he has no right of action. But if in such case the defendant allege a warranty, and demand damages for breach thereof, he questions neither the facts stated by the plaintiff, nor his right of action by reason thereof; he asserts a separate right of action in himself, growing out of the same contract relied on by plaintiff. Such cross-demand is called a counter-claim.

249. The Counter-claim, Continued.—A counter-claim is a right of action existing in favor of a defendant and against a plaintiff, and arising out of the contract or transaction which is the foundation of the plaintiff's claim, or connected with the subject of the action. This definition embraces three classes of counter-demands; (1) those arising out of the *contract* upon which the plaintiff has based his action, (2) those arising out of the *transaction* upon which the action is based, and (3) those connected with the *subject of the action.* These three classes of counter-demands all bear a relation to the plaintiff's demand, and they are distinguished by the varying degrees of that relation. The counter-claim of the new procedure is of the nature of recoupment in the common-law procedure, but it is wider in its operation. By recoupment, a defendant could only reduce or defeat the plaintiff's recovery; he could not himself recover against the plaintiff. If the plaintiff wholly failed to establish his claim, there was nothing to recoup; and if the defendant's demand exceeded that of the plaintiff, he could

[1] Walker v. Ins. Co., 143 N. Y. 167.

not, by recoupment, recover the excess. But upon a counter-claim, the defendant may have affirmative relief, irrespective of the fate of the plaintiff's claim.[1] Counter-claim is broader than recoupment in that the counter-demand asserted by it may be an equitable right; and an equitable right may be so asserted when the plaintiff's demand is purely legal.[2]

A counter-claim is substantially a cross-action by the defendant against the plaintiff, based upon a right connected with the ground of the plaintiff's action, and upon which the defendant might maintain a separate action against the plaintiff; and when a counter-claim is pleaded, the defendant becomes, in respect thereof, an *actor*, and each party is at once a plaintiff and a defendant in the same action.[3] It follows, that the matter set up as a counter-claim must constitute, in substance and in form, a cause of action in favor of the defendant against the plaintiff;[4] and it must be such as the court wherein it is asserted would have jurisdiction of in an original action upon it.[5] A claim not yet due can not be set up as a cross-demand, because there is no right of action thereon.[6] If a demand of a character not proper for counter-claim be so asserted, the remedy is generally by demurrer.

250. Counter-claim — Same Contract. — A counter-claim of the first class can be pleaded only in an action

[1] By statute in New York, and by judicial limitation in Wisconsin, no counter-claim is to be allowed that does not, in some way, qualify, diminish, or defeat the plaintiff's recovery. N. Y. Code, 501; Dietrich v. Koch, 35 Wis. 618. This is in disregard of the principles upon which cross-demands are allowed to be asserted.

[2] Currie v. Cowles, 6 Bosw. 453; Morgan v. Spangler, 20 O. S. 38; Ry. Co. v. Ry. Co., 48 Barb. 355.

[3] Francis v. Edwards, 77 N. C. 271; Bruck v. Tucker, 42 Cal. 346.

[4] Bruck v. Tucker, 42 Cal. 346; Duer, J., in Vassear v. Livingston, 13 N. Y. 248. *Cf.* Bank v. Weyand, 30 O. S. 126.

[5] Cragin v. Lovell, 88 N. Y. 258; Mfg. Co. v. Colgate, 12 O. S. 344; Lyman v. Stanton, 40 Kan. 727.

[6] Martin v. Kunzmuller, 37 N. Y. 396; Wells v. Stewart, 3 Barb. 40; Walker v. McKay, 2 Met. (Ky.) 294. But see Morrow v. Bright, 20 Mo. 298; and Ky. Flour Co. v. Bank, 13 S. W. R. 910; where a claim against an insolvent assignor, not yet due, is allowed as an equitable set-off against the assigned claim.

founded on contract, and must be a right of action in favor of the defendant and against the plaintiff, arising out of the contract which is the foundation of the plaintiff's claim. So little difficulty will be experienced in determining whether the defendant's claim arises out of the contract upon which the plaintiff's claim is based, that this class of counter-claims may be disposed of by simply referring to a few illustrative cases.

In an action by lessor against lessee, to recover rent stipulated for in a lease, the lessee may set up a counter-claim for breach by the lessor, of any covenant of his contained in the lease.[1] In an action upon an implied agreement to pay for work done, a breach of the implied agreement that the work should be skillfully done, may be made the subject of a counter-claim for damages;[2] and so, if the work be done under an express contract.[3] In an action to recover the purchase price of property sold, breach of warranty, or fraud, may be pleaded as a counter-claim.[4] A counter-claim for breach of warranty arises out of the contract which is the foundation of the plaintiff's claim, and clearly falls within the class now under consideration; but a counter-claim for fraud more properly falls within the class next to be considered.

[1] Orton v. Noonan, 30 Wis. 611; Cook v. Soule, 56 N. Y. 420; Myers v. Burns, 35 N. Y. 269; Coleman v. Bunce, 37 Tex. 171; Mayor v. Mabie, 13 N. Y. 151; Com. v. Todd, 9 Bush, 708; Block v. Ebner, 54 Ind. 544; Green v. Bell, 3 Mo. App. 291.

[2] Eaton v. Woolly, 28 Wis. 628.

[3] Bishop v. Price, 24 Wis. 480. *Cf.* Moffet v. Sackett, 18 N. Y. 522, where proof that articles sold were not of the kind and quality contracted for was admitted under an allegation that the goods were not worth more than a named sum, being less than that sued for, and that such less sum had been paid. The court held that such claim was a mere defense, in diminution of the value of the goods, and that it was in no sense a counter-claim for damages. The articles sold were two chandeliers, to be put up in defendant's house. They were unskillfully put up; and on this ground, without questioning the intrinsic or market value of the articles, the defendant sought to reduce the plaintiff's claim. DENIO, J., in a dissenting opinion, suggests that this was a defense of new matter, to wit, the negligence of plaintiff in doing the work, and should have been so pleaded.

[4] Timmons v. Dunn, 4 O. S. 680; Howie v. Rea, 70 N. C. 579; Hoffa v. Hoffman, 33 Ind. 172; Dounce v. Dow, 57 N. Y. 16; Love v. Oldham, 22 Ind. 51.

251. Counter-claim — Same Transaction.—A counter-claim of the second class is one arising out of the transaction which is the foundation of the plaintiff's claim. Such counter-demand differs from one of the former class in this, that it may be asserted in an action not founded on contract, and that it need not itself arise out of contract. The term "transaction" is broader and more comprehensive than "contract." A contract is a transaction; but a transaction, while it may embrace a contract, may include its incidents as well, and it may relate to matters entirely in tort. The following cases will illustrate this class of counter-claims.

In an action on a bond to indemnify the plaintiff, a counter-claim for damages resulting from the fraud of plaintiff in obtaining the bond may be asserted.[1] In an action by mortgagee against mortgagor upon a note and mortgage given for the purchase-money for the premises mortgaged, the defendant may set up a counter-claim for damages by reason of the fraud of the mortgagee, in concealing from him material facts as to the situation and extent of the premises.[2] And in such action the mortgagor may set up, by way of counter-claim, an unpaid assessment on the land, being an incumbrance covenanted against in his deed from the mortgagee, and have the amount of it, with interest, deducted from the unpaid purchase-money;[3] or he may set up a counter-claim for damages for fraud practiced by plaintiff in the sale to defendant.[4] Where the action is for breach of contract of sale, the defendant may set up, as a counter-claim, a rescission of the contract on the ground of fraud or mistake.[5] In an action on a promissory note, a counter-claim may be interposed for the wrongful conversion of property pledged as collateral security for the payment of the note.[6] And where a note sued on was given for a balance found due on settlement, the defendant may, by way of counter-claim, show a mistake in the account.[7]

[1] Thompson v. Sanders, 118 N. Y. 252.
[2] Pierce v. Tiersch, 40 O. S. 168.
[3] Craig v. Heis, 30 O. S. 550.
[4] Allen v. Shackelton, 15 O. S. 145.
[5] Bruce v. Burr, 67 N. Y. 237.
[6] Ainsworth v. Bowen, 9 Wis. 348.
[7] Garrett v. Love, 89 N. C. 205.

In pleading a counter-claim of this class, it must be made to appear that it arose out of the same transaction out of which plaintiff's claim arose; but a general allegation that it did so arise is not sufficient, it must appear from facts stated.[1]

252. Counter-claim—Connected with Subject of Action.—Counter-claims of the third class are those connected with the subject of the action. As before stated, the three classes of counter-claims are distinguished by the varying degrees of their relation to the plaintiff's demand; and it will be seen that counter-demands of this third class bear a more remote relation to the plaintiff's action than do those of the other two classes. It is not necessary that a demand of the defendant against the plaintiff, to come within this class, shall be a demand growing out of contract, nor must it arise out of the transaction upon which the plaintiff's claim is based; it is requisite only that it shall be connected with the subject of the plaintiff's action.

The "subject of the action" means, in this connection, the thing in respect to which the plaintiff's right of action is asserted, whether it be specific property, a contract, a threatened or violated right, or other thing concerning which an action may be brought and litigation had.[2] Care must be taken not to confuse the "subject of the action" with the "subject-matter of the action."[3] There is some contrariety in the decisions, as to the meaning of the phrase under consideration, and as to what will bring a counter-demand into such relation to the subject of the action as to make it "connected" therewith; and the courts have not always clearly distinguished between counter-claims which arise out of the transaction on which the plaintiff's claim is founded, and those which are connected with the subject of the action.

In an action to restrain the use of a trade-mark, the defendant may, by counter-claim, assert his ownership thereof, and ask that the plaintiff be enjoined from using it. Such

[1] Brown v. Buckingham, 21 How. Pr. 190. *Cf.* Gilpin v. Wilson, 53 Ind. 443.

[2] Mfg. Co. v. Hall, 61 N. Y. 226; Cornelius v. Kessel, 58 Wis. 237. *Cf.* Simpkins v. Ry. Co., 20 S. C. 269.

[3] Ante, 181, note.

right asserted by the defendant is connected with the subject of the action.[1] So, in an action for freight, a counter-claim for loss occasioned by the wrongful delay of the carrier may be pleaded.[2] And in an action to recover goods, or to restrain their sale, the goods being the subject of the action, the defendant may, by counter-claim, allege property in the goods and ask damages for the plaintiff's interference therewith.[3] Where the plaintiff sued for injury to his boat, caused by a break in defendant's canal, the defendant was allowed to ask, by way of counter-claim, damages for the break in the canal caused by the plaintiff's negligence.[4] In an action by a lessor for rent, the tenant may assert a counter-claim for wrongful interference by the lessor with his enjoyment of the leased premises;[5] provided, however, that the interference amounts to an eviction, entire or partial. A mere trespass by the lessor is not a breach of the contract for the sole and uninterrupted use and enjoyment, and damages therefor may not be recouped or set off in an action for rent;[6] the rule being, that where the wrongful act of the lessor has deprived his lessee of the use and occupancy of the premises, in whole or in part, he is relieved from payment of rent, and may set up his eviction against a demand for the rent; but if he remains in full possession, he can not counter-claim for an act that simply renders the use less beneficial.[7] A lessee can not counter-claim for injury caused by change of the street grade, unless covered by a covenant in the lease.[8]

253. Cross-complaint.—The cross-demands which have been described as counter-claims are demands existing in favor of a defendant and against the plaintiff in the action. It is not the office of counter-claim to assert a right, or demand relief, against a co-defendant. In equity procedure, a

[1] Mfg. Co. v. Hall, 61 N. Y. 226.
[2] Elwell v. Skiddy, 77 N. Y. 282. *Cf.* Fisk v. Tank, 12 Wis. 276.
[3] Ashley v. Marshall, 29 N. Y. 494; Thompson v. Kessell, 30 N. Y. 383.
[4] McArthur v. Canal Co., 34 Wis. 139.
[5] Goebel v. Hough, 26 Minn. 252; Blair v. Claxton, 18 N. Y. 529; Morgan v. Smith, 5 Hun, 220; Tinsley v. Tinsley, 15 Mon. B. 458.
[6] Levy v. Bend, 1 E. D. Smith, 169; Boreel v. Lawton, 90 N. Y. 293; Bartlett v. Farrington, 120 Mass. 284.
[7] Dyett v. Pendleton, 8 Cow. 727; Edgerton v. Page, 20 N. Y. 281.
[8] Gallup v. Ry. Co., 65 N. Y. 1.

defendant might obtain relief against a co-defendant by filing a bill of his own, called a cross-bill. A similar practice obtains under the new procedure; and in some of the states express provision is made for a cross-complaint, whereby a defendant may ask relief against any of the other parties, touching the matters involved in the complaint.

The relief sought by cross-complaint must grow out of, or be connected with, the subject-matter of the action, or must affect property to which the original action relates;[1] new and distinct matters not connected with the original action can not be introduced by cross-complaint.

In an action on a written instrument, the defendant may, by cross-complaint, allege a mistake in the writing, and ask to have it reformed so as to show the real transaction between the parties. As written, the instrument may show a right of action in the plaintiff; as reformed, it may show that he has no such right. The writing being the best, and therefore the exclusive, evidence of the transaction, the true defense can not be proved until the instrument has been reformed; and for this reason, the defendant's cross-action for equitable relief should be first tried. In ejectment, if the plaintiff holds the legal title, and the defendant has an equity that entitles him to possession, he may assert his equity, which is a good defense without the aid of affirmative relief; but if he holds under a contract that entitles him to a conveyance from the plaintiff, but not to possession without such conveyance, he may, by cross-complaint, ask a decree for a conveyance, and thereby maintain his real defense—a right to remain in possession.[2]

Strictly, a cross-complaint should seek relief only against a co-defendant; and in analogy to the practice in equity, a cross-complaint should be separate and distinct from the answer. But it is common practice to assert a demand by a defendant for affirmative relief "by way of cross-complaint,"

[1] Hurd v. Case, 32 Ill. 45; Crisman v. Heiderer, 5 Colo. 589; Daniel v. Morrison, 6 Dana, 186; May v. Armstrong, 3 Marsh, J. J. 262; Cross v. Del Valle, 1 Wall. 5; Royse v. Reynolds, 10 Bush, 286; Crabtree v. Banks, 1 Met. (Ky.) 484: Harrison v. McCormick, 69 Cal. 616.

[2] Post, 257 et seq.

and to unite defenses and cross-demands, separately stated and entitled, in the same pleading; though matter that is purely defensive, and matter used only as ground for affirmative relief, ought not to be coupled in one statement.[1] Whether process should be issued on a cross-complaint, is a question of practice, and must depend upon the nature and the circumstances of the particular case, and may be governed by statute.[2]

254. Set-off Under the New Procedure.—The several cross-demands that have been considered, and that may be set up by way of counter-claim or by way of cross-complaint, must, in their nature, bear some relation to the plaintiff's action. There remains another class of cross-demands to be described. When the plaintiff's action is founded on contract, the defendant may set up against the plaintiff any right of action arising also out of contract, or ascertained by the decision of a court, and existing at the commencement of the action. Such right, so asserted, is termed a *set-off*. It differs from counter-claim and cross-complaint in that the right so asserted need not be in any way connected with, or bear any relation to, the plaintiff's claim. Both rights of action must arise out of contract, but need not arise from the same contract. In many of the states set-off is included under the term counter-claim, and the term set-off is not employed; but the use of this term is to be favored, because, from its etymological meaning, and by its use in equity, and in the English statutes, to designate a disconnected demand, it has come to impart a distinction that ought not to be lost sight of in our classification, and in our legal terminology.

The right of set-off is not limited to demands growing out of contract between the parties to the action; the defendant may set off a demand assigned to him by a third party, if assigned before the action is commenced. It is a general principle of law, that the assignment of a non-negotiable thing in action does not affect any right of set-off, or defense, existing at the time of the assignment, or before notice there-

[1] McMannus v. Smith, 53 Ind. 211.

[2] Tucker v. Ins. Co., 63 Mo. 588.

of. And the change in the practice, introduced by the new procedure, requiring the assignee of a right in action to sue thereon in his own name, has not affected the rights of the parties in this regard; the debtor may, now as before, in an action by an assignee, set up any defense or counter-demand existing against the original creditor at the time of the assignment, or acquired after the assignment, and before notice thereof.

But the assignment of a non-negotiable demand arising on contract, defeats a set-off of an independent cross-demand on which a right of action had not then accrued.[1] And this will be the effect of such assignment, though the assignee be at the time insolvent.[2] In an action by the assignee of a chose in action, the defendant can not, on a set-off that accrued against the assignor, have judgment against the plaintiff for any excess thereof.

Some courts have held that unliquidated damages, arising out of contract, may be the subject of set-off,[3] while others hold that set-off must be restricted to liquidated demands.[4] Perhaps the weight of authority, and the better reason, are in favor of allowing unliquidated damages to be made the subject of set-off, in the absence of statutory provision to the contrary.[5] A right of action founded purely in tort can not be pleaded as a set-off;[6] though where the defendant might, in an independent action, waive the tort and sue as upon contract, he may, in the same way, assert his demand by way of set-off.[7] In an action on contract, the defendant may in

[1] Fuller v. Steiglitz, 27 O. S. 355.

[2] Myers v. Davis, 22 N. Y. 489.

[3] Curtis v. Barnes, 30 Barb. 225; Parsons v. Sutton, 66 N. Y. 92; Bidwell v. Madison, 10 Minn. 13; Transp. Co. v. Boggiano, 52 Mo. 294; Stevens v. Able, 15 Kan. 584; Lignot v. Redding, 4 E. D. Smith, 285; Needham v. Pratt, 40 O. S. 186.

[4] Ricketson v. Richardson, 19 Cal. 330; Frick v. White, 57 N. Y. 103; Johnson v. Jones, 16 Mo. 494; Boyer v. Clark, 3 Neb. 161; Shropshire v. Conrad, 2 Met. (Ky.) 143.

[5] Swan Pl. 264; Pom. Rem. 798; Bliss Pl. 378, et seq.; Max. Pl. 547.

[6] Devries v. Warren, 82 N. C. 356; Bell v. Lesbini, 66 How. Pr. 385; Trotter v. Comrs., 90 N. C. 455; Shelly v. Varnarsdoll, 23 Ind. 543; VALENTINE, J., in Berry v. Carter, 19 Kan. 140; GANTT, J., in Boyer v. Clark, 3 Neb. 161.

[7] Brady v. Brennan, 25 Minn. 210.

this way assert a claim for property wrongfully converted by the plaintiff,[1] or for property tortiously taken,[2] or for pasturing plaintiff's cattle, where the liability arose from trespass.[3]

255. Equitable Set-offs.—There is a class of cross-demands available to a defendant only in equity, and known as "equitable set-offs." Such, for example, is the case of mutual credits based by each upon the fact of the other's indebtedness; or a joint demand against an insolvent plaintiff and another. In such cases, the manifest injustice of allowing full recovery to the plaintiff gives rise to an equity in the defendant to insist on a set-off, notwithstanding he has no such right at law.[4]

It has been held that where an insolvent debtor who makes an assignment for the benefit of creditors is indebted to a bank with which he has money on deposit, the bank may apply the deposits as a credit on its debt, although the debt had not matured at the time the assignment was made.[5] And where one entitled to share in the distribution of a trust fund, is indebted to the fund, and is insolvent, his indebtedness may, in equity, be set off against his distributive share; and the right of set-off will not be defeated by the assignment of his claim, though made before the amount of his indebtedness, or of his distributive share, is ascertained.[6] Where an insolvent creditor transfers an unmatured claim arising upon contract, and the debtor holds a similar claim against such insolvent assignor, then due, he may set it off against the assignee, after the maturity of his claim.[7] This rule is based upon considerations of equity, and is to protect him whose claim is due from the hardship of losing it while he is compelled to pay his own debt, assigned before due.[8]

[1] Gordon v. Bruner, 49 Mo. 570; Colt v. Stewart, 50 N. Y. 17.

[2] Eversole v. Moore, 3 Bush, 49; Haddix v. Wilson, 3 Bush, 523.

[3] Norden v. Jones, 33 Wis. 600.

[4] 2 Sto. Eq. Jur. 1435 to 1437b; Bisph. Eq. 327; Bliss Pl. 383; Baker v. Kinsey, 41 O. S. 403; Gay v. Gay, 10 Paige, 369; Lee v. Lee, 31 Ga. 26; Jeffries v. Evans, 6 B. Mon. 119; Bank v. Hemingray, 34 O. S. 381; Barbour v. Bank, 50 O. S. 90.

[5] Ky. Flour Co. v. Bank, 90 Ky. 225.

[6] King v. Armstrong, 50 O. S. 222.

[7] Armstrong v. Warner, 49 O. S. 376.

[8] Pom. Rem. 163.

A defendant, sued on his promissory note indorsed to the plaintiff after maturity, may, in equity, set off an overdue joint note made by the plaintiff and another, both of whom are insolvent. And if such joint note be at the time merged in a joint judgment against the makers, such judgment may be so set off.[1] The merger of the note in the judgment is not so perfect as to preclude the judgment creditor from asserting his demand as an equitable set-off. And it may be said that, generally, equity will enforce the right of set-off, so far as mutual demands equal each other, if they have grown out of the same or connected transactions, or if one formed a consideration for the other, and the party against whom the right is asserted is insolvent.

These equitable set-offs may be asserted under the new procedure, which has affected methods, but not rights.

256. General View of Cross-demands.—It is the policy of the new procedure to enable the parties to settle, in one action, all claims existing between them, so far as this may be done without inconvenience to the parties, or prejudice to their rights. The provisions for asserting a cross-demand—by way of counter-claim, cross-complaint, and set-off—confer a privilege, but do not impose an obligation. A defendant may, notwithstanding these provisions, withhold his cross-demand, and enforce it in a separate action; though in some jurisdictions he can not recover costs in a subsequent action thereon.

New matter may constitute both a defense and a counter-claim. In an action for breach of contract of employment, the defendant may allege the failure of plaintiff to perform his covenants under the contract of employment, (1) as a justification for plaintiff's discharge, and (2) as a ground of counter-claim for damages.[2] Such manifold use of the same facts should not obscure the distinction between defenses and counter-demands. The distinction is not lost; it simply inheres in the same set of facts. The same facts negative the plaintiff's right to recover, and at the same time show a

[1] Baker v. Kinsey, 41 O. S. 403. [2] Mfg. Co. v. Colgate, 12 O. S. 344, 355. *Cf.* Sarchet v. Sarchet, 2 Ohio, 320.

right of recovery in the defendant, and thus become both a shield and a weapon. This conjuncture of defense and counter-claim occurs most frequently in a class of defenses requiring some affirmative equitable relief to make them available. These will be treated of in the next three sections.

Sometimes a statement of facts is in form a counter-demand, though in effect only a defense; as, where the plaintiff sues on a claim assigned to him, and the defendant asserts a counter-demand against the assignor, that is available under the law, against the assignee. In such case the right of the defendant, called an equity, is defensive only, for it can be used only to reduce or extinguish the plaintiff's claim. The defendant could not maintain an independent action on it against the plaintiff, and he can not have judgment against the plaintiff for any excess thereof over his claim.[1]

An individual may not maintain an action against the State, without its consent; but when an individual is sued by the State, he may assert a counter-claim against the State. This is on the principle that he thereby seeks only to show that he does not owe the demand sued for; and accordingly, he can not recover for any excess of his claim over that asserted by the State.[2]

Generally, where a new party is necessary to a final decision upon the defendant's claim for affirmative relief, the codes provide for the bringing in of new parties, so that the defendant's claim may be fully and finally adjudicated in the one action.

257. Defenses Dependent on Affirmative Equitable Relief.—Sometimes a defendant must have affirmative equitable relief touching his defense, in order to make it available against the plaintiff's claim. For example, an action is brought upon a written contract, by the terms of which the defendant's liability is clear; but the part of the writing from which his liability arises was inserted by mistake or fraud. The real contract would not show such liability, but

[1] Ferreira v. Depew, 4 Abb. Pr. 248, 252. *Cf.* Walker v. Ins. Co., 143 N. Y. 167.

[2] Kentucky v. Todd, 9 Ky. 708.

the writing does; and upon the trial of an issue as to what were the terms of the contract, the writing itself is the best evidence. The defendant's real defense in such case is, that he did not make the promise sued on. But he can not deny that he made the writing; and the writing shows that he made the promise, and it is the exclusive evidence upon that point. It is evident that to make his real defense available, the defendant must first impugn the writing. This he may do by way of a cross-action, in the nature of a bill in equity, alleging the real contract, the mistake or the fraud in the writing, and asking that it be reformed so as to conform to the intention of the parties and express their real contract. Such demand of affirmative relief is not, of itself, a defense to the plaintiff's claim; it is simply to prepare the defendant to maintain and make available his real defense, *non assumsit*. Formerly, a defendant in such case was driven to an independent suit in equity to reform the writing; but under the new procedure, which authorizes a defendant to assert equitable cross-demands, as well as equitable defenses, he may have the affirmative relief, and assert his defense dependent thereon, in the same action.

258. Dependent Defenses, Continued.—In an action for the possession of property under a chattel mortgage, the defendant alleged a mistake in the mortgage, and averred that as it was intended to be drawn, the debt was not yet due; but he did not ask for a correction of the instrument. It was held that the defendant could not prove the mistake and have the same benefit as though the instrument had been reformed; that equity will aid in such case by reforming the instrument, not by giving effect to it without being reformed; and that when such equitable relief is not invoked, the instrument, as written, must have its proper legal effect.[1] The answer stated a good defense, but it was a *legal* defense, not *equitable*, and could not be made available upon the trial, without first reforming the mortgage; and in the absence of a prayer for reformation, there was no place for evidence to vary or contradict the writing. In an action for the conver-

[1] Follet v. Heath, 15 Wis. 601.

sion of crops, the answer alleged a reservation of the crops, and averred that by mistake in a conveyance by the defendant the reservation was omitted. The court said: "When a mistake in a deed or written instrument is relied on, the pleading should go further than in this case it did. It should have prayed affirmative relief; that the instrument be reformed so as to show the contract intended to be embodied in it, and that, when so reformed, it might be allowed as a bar to the suit, or to so much thereof as it would bar. This might be done by an answer in the nature of a cross-bill in equity."[1] In an action for breach of covenant against incumbrances, the alleged breach being an outstanding mortgage, the defendant may answer that the agreement excepted such mortgage from the operation of the covenant, and that the exception was, by mistake, omitted from the deed.[2] In such case the real defense is purely legal—the exception of the mortgage from the covenant. The alleged mistake is not in itself defensive, and is not any part of the defense, and is not necessary to a statement of the defense; it precludes proof of the real defense, and its correction is a prerequisite, not to the assertion, but to the proof, of the new matter in bar.

259. Dependent Defenses, Continued.—The kind of defense under consideration in the last two sections is of frequent occurrence in actions to obtain possession of real property, wherein it may be necessary to correct mistakes in the plaintiff's or the defendant's muniments of title, in order that the defendant's superior right may be made to appear by competent evidence. For example, the defendant may allege that the land in question was, by mistake, included in the plaintiff's deed, whether such deed be from the defendant, or from a former owner under whom both claim title; or he

[1] Conger v. Parker, 29 Ind. 380; King v. Ins. Co., 45 Ind. 43. *Cf.* Pitcher v. Hennessey, 48 N. Y. 415, 422.

[2] Haire v. Baker, 5 N. Y. 375. In this case the Court of Appeals suggested that such answer sets up only a defense, and does not entitle the defendant to affirmative equitable relief; a position which that court has since abandoned. Pitcher v. Hennessey, 48 N. Y 415, 422; Bartlett v. Judd, 21 N. Y. 200, 203.

may allege that the land was, by mistake, omitted from plaintiff's deed to him. In such cases the real defense is dependent, not for its assertion, but for its establishment, on the correction of the alleged mistake.[1]

In cases falling within the principle under consideration, the facts constituting a defense to the action, and those entitling the defendant to affirmative relief, should be separately stated, the latter by way of cross-complaint, the former as an answer; and the ground for affirmative relief should be first tried, because a decree upon that branch of the case, if for the defendant, will furnish him the evidence to support his defense, and if for the plaintiff, may virtually terminate the action.[2] In some cases the defense to the action may be triable to a jury, while the demand for affirmative equitable relief is always triable to the judge, sitting as chancellor. Again, evidence to contradict or vary the writing is neither competent nor relevant as to the defense to the plaintiff's action, but is admissible only in support of the defendant's cross-action.

260. Cross-demands, How Pleaded.—When a defendant seeks affirmative relief, he becomes, *quoad hoc*, a plaintiff,[3] and must state the facts constituting his right of action in the same manner and with the same degree of particularity

[1] It must be conceded that the courts have not, in all cases, consistently observed the distinction between defenses dependent upon affirmative equitable relief, and equitable defenses not so dependent. Hoppough v. Struble, 60 N. Y. 430; Collins v. Rogers, 63 Mo. 515. And Mr. Pomeroy, in his excellent work on Remedies, somewhat obscures the subject by failure to observe such distinction. Pom. Rem. 91 et seq., and cases cited. Some equitable rights of the defendant are defensive merely; some are both ground of defense and for affirmative relief; and some of the latter class can be made available only by first having the affirmative relief. Where an equitable right furnishes both a defense and ground for affirmative relief, the defendant *may* assert it as a defense merely, or he may assert it both as a defense and as ground for relief. But where, to make such right available as a defense, the defendant must first have affirmative equitable relief touching it, he *must* assert it both as a defense and as ground for affirmative relief. Bliss Pl. 348–351.

[2] Massie v. Stradford, 17 O. S. 596.

[3] Ewing v. Pattison, 35 Ind. 326, 330.

that would be requisite if he were stating them in a complaint,[1] except that he may refer to and adopt matters stated in the complaint.

In matter of substance, the pleading must show a right of action in the defendant and against the plaintiff, and it must, in addition, show that the demand so asserted comes within the jurisdiction of the court, and that it belongs to some one of the classes of counter-demands proper to be set up in the pending action. For example, a demand arising out of the transaction which is the foundation of the plaintiff's claim, and for that reason available as a counter-claim, should be shown, by facts stated, to have such relation to the plaintiff's claim; a general allegation that it so arose is not sufficient.[2] And a set-off, available because it accrued to the defendant before the action was commenced, must be shown to have so accrued;[3] a mere allegation that the plaintiff "is indebted," and that the sum claimed "is now due," is insufficient.[4]

In matter of form, the cross-demand should be stated separately from matters of mere defense; and even where the same facts constitute both a defense and a counter-claim, some authorities hold that they should be twice stated in separate divisions.[5] In no other way can their sufficiency in each aspect be separately questioned or determined. If matters of defense and matters of cross-demand are commingled in one statement, it is a defect of form, and if not remedied by motion will be treated as waived.[6] In order that the plaintiff may know what use the defendant intends to make of his alleged facts, he should in some way indicate his purpose to rely upon certain allegations for affirmative relief; and in most jurisdictions this is required,[7] though in some cases it

[1] Holgate v. Broome, 8 Minn. 243; Hill v. Butler, 6 O. S. 207.

[2] Brown v. Buckingham, 21 How. Pr. 190. *Cf.* Gilpin v. Wilson, 53 Ind. 443.

[3] Gregory v. Gregory, 89 Ind. 345; Rumsey v. Robinson, 58 Iowa, 225.

[4] Rice v. O'Connor, 10 Abb. Pr. 362; May v. Davidge, 44 Hun, 342.

[5] Campbell v. Routt, 42 Ind. 410, 415.

[6] Mfg. Co. v. Colgate, 12 O. S. 344.

[7] Bates v. Rosekrans, 37 N. Y. 409; McConihe v. Hollister, 19 Wis. 269; Hutchings v. Moore, 4 Met. (Ky.) 110; Wilder v. Boynton, 63 Barb. 547; McAbee v. Randall, 41 Cal. 136; Life Ass. Soc. v. Cuy-

is not.[1] The usual manner of designating a cross-demand is to entitle it a "cross-complaint," "counter-claim," or "set-off." In the absence of such designation, a prayer for affirmative relief has been held to indicate sufficiently the intention of the pleader.[2]

261. Joinder of Defenses.—The new procedure contemplates the filing of but one answer in an action, and authorizes the joinder therein of as many grounds of defense, counter-claim, and set-off, as the defendant may have, whether legal or equitable, or both. At common law, dilatory pleas must be pleaded at a preliminary stage of the action, and in due order;[3] and a plea in bar is a waiver of any objection that should be asserted *in limine* by a dilatory plea.[4] Under the new procedure, these defenses—dilatory and in bar—may all be joined in one answer,[5] and the plea in bar is not a waiver of the dilatory plea joined therewith. In case of such joinder, it is the better practice to try first the issue made upon the dilatory plea, for if this be decided for the defendant, there is neither occasion nor authority to try the issue involving the merits; though in some courts a contrary practice obtains, and the same verdict is required to respond to both issues, separately.

ler, 75 N. Y. 511, 514; Stowell v. Eldred, 39 Wis. 614.

[1] Gilpin v. Wilson, 53 Ind. 443; Holmes v. Richet, 56 Cal. 307.

[2] Wiswell v. The Cong. Ch., 14 O. S. 31. "The answer of a defendant may be treated as a cross-petition, and the proper relief granted under it, if it contain a prayer for judgment and the necessary averments to show his right to such relief, under the proceedings instituted against him, although he does not, in terms, denominate the paper he files, a cross-petition." Kloune v. Bradstreet, 7 O. S. 322.

[3] Ante, 59.

[4] Gould Pl. v. 13, 153; DeSobry v. Nicholson, 3 Wall. 420.

[5] Thompson v. Greenwood, 28 Ind. 327; Bond v. Wagner, 28 Ind. 462; Erb v. Perkins, 32 Ark. 428; Gardner v. Clark, 21 N. Y. 399; Sweet v. Tuttle, 14 N. Y. 465; Supervisors v. Van Stralen, 45 Wis. 6[illegible]; Freeman v. Carpenter, 17 Wis. 126; Little v. Harrington, 71 Mo. 390. *Contra*, Hopwood v. Patterson, 2 Ore. 49, holding that answers in the nature of pleas in abatement should now, as formerly, be pleaded and determined before answer to the merits is interposed; and that the provision as to joinder does not apply to defenses that can not be tried together. There is a statutory provision of like effect in Indiana. Dwiggins v. Clark, 94 Ind. 49: Rev. Stat. 365.

The codes make no limitation upon the joinder of defenses, except the implied limitation that inconsistent defenses shall not be joined. The rule in equity is, that a defendant may not set up two defenses so inconsistent that if the facts in one are true, those in the other must be untrue in point of fact.[1] Under the new procedure, there is some contrariety in the decisions,[2] but the rule established by the weight of authority, both in reason and in numbers, is in harmony with the rule in equity, that two defenses so inconsistent, in *point of fact*, that both can not be true, so that the establishment of one is the destruction of the other, can not be joined.

262. Joinder of Defenses, Continued.—In the application of the foregoing rule, the courts have distinguished between inconsistency arising from a direct contradiction of facts averred, and that inconsistency which arises by implication of law. For example, a defense of new matter involves an admission of the truth of the facts stated in the complaint; but this, as has been shown,[3] is only a logical admission of their truth, requisite for the introduction of new matter in defense, and not inconsistent with their falsity *in fact*, which may be asserted in a separate defense in the same answer. When a defendant can truthfully deny the allegations of the complaint, he is not required to admit them to be true in fact, as the condition upon which he may avail himself of new matter in defense. He may both deny and avoid,

[1] Hopper v. Hopper, 11 Paige, 46.

[2] Mr. Pomeroy says: "Assuming that the defenses are utterly inconsistent, the rule is established by an overwhelming weight of judicial authority, that, unless expressly prohibited by the statute, they may still be united in one answer." Pom. Rem. 722. He adds, however, that "a different rule prevails in a few states." With due deference to the learned author, he has overlooked the distinction between *contradictory facts*, and *logical inconsistency;* and has reached a conclusion that is not warranted, and that is not sustained by the cases which he cites to support him. It would be a reproach to our system of procedure if defendants were allowed to set up defenses *ad libitum*, without regard to whether they were true or false, consistent or inconsistent; and such license is not to be drawn from the language or spirit of the codes, and is not sanctioned by the weight of authority. Bliss Pl. 344; Max. Pl. 398; Boone Pl. 78; Swan Pl. 267.

[3] Ante, 235.

although the avoidance is a tacit admission of what is denied; otherwise, a defendant might be deprived of the right of full defense.[1]

The distinction between logical inconsistency, and inconsistency in fact, is well stated by a distinguished judge and author, in these words: "Some interpretation of the term 'consistent defenses' should be adopted that is consistent with the statute, and that will secure the right of full defense. That right will be secured if the consistency required be one of fact merely, and if two defenses are held to be inconsistent only when the proof of one necessarily disproves the other. Two statements are not inconsistent when both may be true. When one has paid a forged note, he may deny, not the existence of the paper, but that it was his promise; and he may also aver its payment. But under our system, the facts should be so set out that both defenses may be true. So, in slander, for charging one with being a thief, the defendant may deny the words, and add the *actio non* because the plaintiff stole a horse. Proving the larceny does not prove the speaking of the words. The logic of the justification might be held to admit the act justified, yet there is no inconsistency in the facts alleged." [2]

263. Joinder of Defenses, Continued.—Any denial, and any statement of fact, that will thwart the plaintiff's demand is a defense; and as many of these as may *in fact* co-exist, may be joined, notwithstanding the statement of one may involve a logical admission not consistent with another. But when two alleged grounds of defense are, in matter of fact, so plainly contradictory that the verification of one is the falsification of the other, they can not both be true, and can not both be necessary to a full defense; they are inconsistent in fact, and may not be joined.

In this connection it may be said that there is some authority, and much reason, for allowing a defendant to join inconsistent defenses, when, from the nature of the case, he is unable to determine before the trial, which is his true de-

[1] Siter v. Jewett, 33 Cal. 92.

[2] Per BLISS, J., in Nelson v. Brodhack, 44 Mo. 596.

fense. It is consistent with the spirit of the Reformed Procedure that a defendant having one or the other of two defenses, without the means of determining before the developments of the trial, which is his true defense, shall not be compelled, at his peril, to rely upon one and exclude the other.[1] In such case, to give the defendant the benefit of his real defense, he should be allowed to state the two defenses in the alternative, stating also the reason for so doing. There is the same reason for allowing such alternative statement of a defense, that there is for allowing an alternative statement of a right of action.[2] And the reason is accentuated where the embarrassment of the defendant results from some act of the plaintiff.

Where several defendants set up the same defense, they may join in one answer; and if all are united in interest, a verification by any one of them is sufficient. If a defense pleaded jointly is bad as to any one of those joining in it, it is bad as to all.[3] In an action upon a joint liability, the answer of one defendant, if in its nature joint, going to the validity of the plaintiff's joint demand, will inure to the benefit of all; [4] but not so, if the legal effect of the answer is to exonerate only the party answering.

264. Joinder of Defenses—Illustrative Cases.—The defendant, in ejectment, denied that plaintiff ever had title, and also alleged that if he ever had title, he had abandoned and forfeited it before defendant's entry. The trial court, regarding these defenses as inconsistent, required the defendant to elect upon which he would rely. The Supreme Court held that the inconsistency arose by implication of law, and not from any contradiction of facts averred, and reversed the trial court.[5] The same court afterward

[1] Bank v. Closson, 29 O. S. 78.

[2] Ante, 208.

[3] Black v. Richards, 95 Ind. 184; Morton v. Morton, 10 Iowa, 58.

[4] Sprague, Adm. v. Childs, 16 O. S. 107; Miller v. Longacre, 26 O. S. 291.

[5] Bell v. Brown, 22 Cal. 671. The answer in this case illustrates a common fault in pleading; to wit, the use of a denial and of evidential facts as separate defenses. The material matter was, that the plaintiff did not have title at the commencement of the action. Prior abandonment and forfeiture would, as evidence, sustain a denial of title. The answer should have been a de-

held that a defendant in ejectment may deny the title of the plaintiff, and also plead the statute of limitations.[1] In a similar case, the defendant denied that he was in possession, and also alleged that he was in possession as the agent and servant of another, who owned the property. These defenses were clearly inconsistent. The defense of new matter did not, by mere implication, admit the defendant's possession; it positively averred his possession, and sought to justify it. The denial of possession, and the assertion of rightful possession, is not a mere logical inconsistency, but a direct contradiction of facts. Both defenses can not be true in point of fact. But no objection was made in the trial court, on the ground of inconsistency; and the plaintiff having offered no evidence on the trial to show the defendant's possession, a judgment of nonsuit was entered, on motion of the defendant. The Supreme Court held that the nonsuit was proper, and said: "Though two defenses, separately pleaded, may be inconsistent, the plaintiff can not disregard them, or either of them, on the trial. A separate defense should not contain matters in themselves repugnant or inconsistent; but a defense, regarded as an entirety, is not to be disregarded merely because it is inconsistent with some other defense pleaded." [2]

265. Joinder of Defenses—Illustrative Cases, Continued.—In an action on a promissory note, the defendant may join a denial of the making of the note, with a plea of infancy; [3] or he may join a defense of payment, and a plea of the statute of limitations; [4] or a denial of the execution of the note, and want of consideration therefor.[5] In such cases, if one defense be true, the other is, of course, immaterial and

nial only; and the forfeiture, being an evidential fact, should not have been pleaded. The defense of new matter, containing only evidential matter admissible under a denial, was, in legal effect, the equivalent of a denial; and while this defense was not inconsistent with the denial, and did not present a case for election, it might have been *stricken out*, on motion for that purpose.

[1] Willson v. Cleaveland, 30 Cal. 192.

[2] Buhne v. Corbett, 43 Cal. 264.

[3] Mott v. Burnett, 2 E. D. Smith, 50.

[4] Conway v. Wharton, 13 Minn. 158.

[5] Pavey v. Pavey, 30 O. S. 600.

unnecessary; but the defenses are not inconsistent; both may be true, and both are necessary to a full defense. In a similar action, the defendant for a first defense denied the making of the note, and for a second defense he alleged that if the signature to the note was genuine, it was obtained by a cunningly devised scheme or trick. The trial court held these defenses to be inconsistent, and required the defendant to elect upon which he would rely. The Supreme Court, reversing the trial court, said: "The code contains no limitation upon the provision that the defendant may set forth as many grounds of defense as he may have, except the implied limitation contained in the requirement that pleadings shall be verified by oath. There is no provision requiring the several grounds of defense to be technically consistent with each other, or requiring an express admission of the truth of averments sought to be avoided by new matter. It is merely required that the answer shall be verified by oath. When two alleged grounds of defense plainly contradict each other, they are not susceptible of verification, because it is impossible for both to be true. The verification of one is the falsification of the other. In such case, the answer, though sworn to, is not 'verified,' and should, on motion, be stricken from the files, or the defendant be put to his election. Was there any such contradiction or irreconcilable repugnancy between the two defenses set up in this answer? We think not. Taken together, the two defenses amount to this: That the defendant is ignorant whether he signed the note or not; he does not believe he signed it, and therefore denies it; and says that if he did sign it, his signature was obtained by fraud, and without consideration."[1]

266. Joinder of Defenses—Illustrative Cases, Continued.—In an action for slander in charging perjury, the

[1] Bank v. Coulson, 29 O. S. 78. The defenses in this case were clearly inconsistent; both could not be true. The rational ground for the joinder, as intimated in the opinion of WELCH, C. J., is, that the defendant had one of two defenses, and had not the means of knowing, otherwise than from the developments to be made upon the trial, which of the two, in fact or in law, was his true defense.

defendant may both deny and justify; for it may be true that the plaintiff committed perjury, and that the defendant did not speak the words complained of; and both the denial and the justification are necessary to a full defense.[1] In an action for slander in charging larceny, the defendant in one defense denied the speaking, and in another he alleged that the words spoken referred to a trespass committed by the plaintiff, and not to a larceny. Here the answer of new matter expressly admitted the speaking, and was inconsistent with the denial. But the court sustained the answer, and refused to require the defendant to elect, on the ground that the facts alleged as new matter would, if proved, sustain the defense under the general traverse.[2]

In an action on a promissory note, a defendant who is surety may join defenses of usury, of extension of time, and of payment.[3] But a denial of the execution of an instrument, and an allegation that it was executed under duress, are inconsistent.[4] So are a denial and a tender;[5] and a denial of the taking of goods, and justification under process.[6]

Where inconsistent defenses are improperly joined, the remedy is by motion to require the defendant to elect upon which he will rely.

[1] Weston v. Lumley, 33 Ind. 486; Butler v. Wentworth, 9 How. Pr. 282.

[2] Hollenbeck v. Clow, 9 How. Pr. 289. The ruling in this case is of doubtful authority.

[3] Shed v. Augustine, 14 Kan. 282.

[4] Wright v. Bacheller, 16 Kan. 259.

[5] Livingston v. Harrison, 2 E. D. Smith, 197.

[6] Derby v. Gallup, 5 Minn. 119.

CHAPTER XVIII.

THE REPLY.

267. Nature of Reply, and When Necessary.—The chief object of pleadings subsequent to the complaint is, to present an issue. In the common-law procedure, the alternate pleadings were continued until an issue was evolved. In the new procedure, the only responsive pleading from the plaintiff is called a reply; and this, when made necessary by the nature of the answer, terminates the pleadings. If the answer contain only a denial, it will present an issue, and no reply is necessary. When the answer contains a defense of new matter, such defense does not make an issue, but diverts the contention from the facts in the complaint, which are thus confessed and avoided, to the new matter so pleaded in the answer, and calls for a reply.

The reply, like the answer, may be a denial, general or special, of all or any part of the new matter in the answer; or it may itself contain new matter in confession and avoidance; and it may contain both denials and new matter, separately stated.

The codes of the several states do not agree in regard to the necessity for a reply. In a few states, no reply is required or permitted; in some, none is required except to a counter-claim or set-off; and in some, a reply is required only when the defense of new matter is to be met by new matter in avoidance; while in others, all new matter in the answer, whether by way of defense or by way of cross-demand, must be replied to, either by denial or by new matter in avoidance. And an answer of new matter to a cross-complaint may be met by a reply from the defendant.

Every material allegation of the complaint not controverted by the answer, and every material allegation of new

matter in the answer not controverted by the reply, in states where a reply is necessary, is, as matter of pleading, and for the purposes of the action, to be taken as true. But new matter in the reply is to be deemed controverted, as by denial or avoidance, as the case may require. This is a logical necessity, arising from the arbitrary termination of the pleadings; for otherwise, a reply of new matter in avoidance would terminate the pleadings without an issue.

268. When Reply Not Necessary.—As stated in the last preceding section, a defense of denial does not require a reply, because it makes an issue upon the matters denied, and therefore terminates the pleadings as to such matters; while a defense of new matter must be met by a reply, or its material facts will be taken as admitted. This rule is plain, but its application is not always free from difficulty.

Where a defense is stated in the form of new matter, but comprises only evidential facts that are, in effect, only a traverse of the complaint, and that might be proved under a denial, it is not a defense of new matter, and does not require a reply;[1] and the facts so pleaded are not admitted by failure to reply. Where an answer contains an admission of a supposed allegation of the complaint not actually contained therein, such admission is not an allegation of new matter, and needs no reply.[2] In an action for goods sold and delivered, the defendant, in addition to a general denial, answered that the goods were sold to his wife, without his knowledge or consent, when she was wrongfully living apart from him. This was held to be an argumentative general denial, as all the facts alleged were evidential, and amounted only to a denial that the goods were sold to the defendant;[3] and it was held that the sustaining of a demurrer to the special defense was not error, because, as the facts therein alleged could all be proved under the defense of denial, the

[1] Corry v. Campbell, 25 O. S. 134; Simmons v. Green, 35 O. S. 104; Sylvis v. Sylvis, 11 Colo. 319; Riddle v. Parke, 12 Ind. 89; State v. Williams, 48 Mo. 210; Ferris v. Johnson, 27 Ind. 247; Netcott v. Porter, 19 Kan. 131; Thompson v. Thompson, 52 Cal. 154; Miller v. Brigham, 50 Cal. 615.

[2] Hoisington v. Armstrong, 22 Kan. 110.

[3] Day v. Wamsley, 33 Ind. 145.

defendant could not be prejudiced by the ruling on the demurrer.[1] Where the complaint in replevin alleged plaintiff's ownership and right to possession, and wrongful detention by the defendant, and the answer denied the detention, and alleged property in a stranger, it was held that the allegation of property in a stranger was an argumentative denial of property in the plaintiff, and needed no reply.[2] Property in a stranger was an evidential fact that would, as evidence, sustain a denial of property in plaintiff; and such denial would be the proper plea.

It may be stated as a general rule, that facts alleged in an answer, that might be proved under a denial of the averments of the complaint, and that are operative only because inconsistent with such averments, can amount to no more than a specific denial, and do not require a reply; but facts alleged in the answer, not inconsistent with those of the complaint, but constituting a defense or counter-claim, and that could not be proved under a specific denial, are new matter and require a reply.[3]

269. When Reply Not Necessary, Continued.—A very common fault in pleading is the combination of the general denial and a statement of facts equivalent thereto, either in the same defense, or in separate defenses. Where the plaintiff charged the defendant with doing an unlawful act to the injury of the plaintiff, the answer denied that the defendant did the act complained of, and alleged that a third person, naming him, did it. This was held to be a mere denial, not requiring a reply.[4] The allegation that another did the act complained of did not require a reply for several reasons. First, because the fact is purely evidential, and should not be pleaded; secondly, when pleaded it is argumentative, and as an argument it amounts only to a denial, for, to say that another did it, is only to say, by inference, that the plaintiff did not do it; and thirdly, it is immaterial. If the defendant

[1] *Cf.* Claypool v. Jaqua, 135 Ind. 499; Barnard v. Sherley, 135 Ind. 547.

[2] Riddle v. Parke, 12 Ind. 89.

[3] Mauldin v. Ball, 5 Mont. 96.

[4] Hoffman v. Gordon, 15 O. S. 211.

did not do the act, it is not material, as matter of pleading, to show who else did it. In an action to recover damages for the breach of a contract, averments in the answer setting up a different contract are immaterial, except as they operate to deny the making of the one sued on; they are not new matter, and they require no reply.[1]

Where a negative averment in the complaint is properly traversed by an affirmative allegation in the answer, such affirmative allegation, in form a statement of new matter, simply questions the statement of the complaint, and rests the contention upon it; it does not confess and avoid, and is not new matter requiring a reply. Where the complaint alleged that a certain assignment of a note and mortgage was without consideration, and for the purpose of collection only, and the answer alleged that it was upon a sale, and for a valuable consideration, it was held that the allegation in the answer was not new matter requiring a reply.[2] In an action on an attachment bond, the complaint alleged, *inter alia*, that the attachment had been abated by a judgment in the original action. The answer asserted that the original suit was still pending, by motion in arrest of judgment and for a new trial. It was held that this was, in effect, a mere denial of an allegation which the plaintiff must prove to make out his case; that it did not confess and avoid, and was not new matter requiring a reply.[3]

270. Counter-claim and Set-off in Reply.—As to whether a counter-claim or set-off in the answer may be met

[1] Simmons v. Green, 35 O. S. 104. Mr. Pomeroy, speaking of the fault of superadding to a general denial a special defense equivalent thereto, says: "It would seem as though the pleader, after he had written the brief general denial, could not be satisfied with its efficacy, and considered it necessary to add in separate divisions of the answer a further statement of the very facts which would constitute the defense, and which could all be proved under the general denial. This mode of pleading is faulty in the extreme; it has not a single reason in its favor, not an excuse for its existence; it overloads the record with superfluous matter, and produces confusion and uncertainty." Pom. Rem. 630.

[2] Engle v. Bugbee, 40 Minn. 492; Ferguson v. Tutt, 8 Kan. 370.

[3] State v. Williams, 48 Mo. 210, 212.

by a counter-claim or set-off in the reply, the authorities are not agreed. Perhaps the general rule may be said to be, that this may be done, provided the right set up in the reply is not a departure. This is on the ground that as to the cross-demand in the answer, the plaintiff is a defendant, and has the rights of a defendant, including the right of counter-claim and set-off.[1] And on the like ground, to wit, that the assertion of the cross-demand is a cross-action, it would seem, upon principle, that a set-off in reply may be one existing at the time defendant files his cross-demand, though not existing at the commencement of the action. But plaintiff can not, in reply to a set-off, assert a demand that he might have included in his complaint;[2] and it has been held that a cross-demand in the reply is available only as a defense, and that there can be no recovery for any excess thereof.[3]

It has been held that one having a note and an account against another may sue upon the note, and in a reply plead the account as a set-off against a set-off pleaded by the defendant;[4] and in an action on a joint and several contract, the plaintiff has been allowed, in reply to an individual counter-claim of one defendant, to set up a claim against such defendant as a set-off.[5] This was on the ground that the reply did not state a new cause of action, but simply a bar to the counter-claim.

271. Reply to Defense of Fraud.—When fraud is relied upon as a defense, it is new matter, to be specially pleaded, and must be met by reply. Generally, no reply but denial can be asserted against a defense of fraud. In a few instances, however, a charge of fraud may be met by confession and avoidance.

[1] Peden v. Mail, 118 Ind. 556; Cox v. Jordan, 86 Ill. 560; Galligan v. Fannan, 91 Mass. (9 Allen) 192; Mortland v. Holton, 44 Mo. 58; Miller v. Losee, 9 How. Pr. 356; House v. McKinney, 54 Ind. 240; Turner v. Simpson, 12 Ind. 413; Reilly v. Bucker, 16 Ind. 303; Curran v. Curran, 40 Ind. 473. *Contra*, Hill v. Roberts, 86 Ala. 523; Cohn v. Husson, 66 How. Pr. 150.

[2] Dawson v. Dillon, 26 Mo. 395.

[3] Cox v. Jordan, 86 Ill. 560.

[4] Blount v. Rick, 107 Ind. 238. But see Dawson v. Dillon, supra.

[5] Mortland v. Holton, 44 Mo. 58.

An indorsee of negotiable paper is, under certain conditions, protected against its original infirmities, including fraud in its procurement. To be so protected, he must be a "*bona fide* holder for value;" that is, he must have paid a consideration for the security, and must have taken the legal title thereto, before maturity, without notice of its infirmity. It has been suggested, that in pleading such fraud against an indorsee who sues on the instrument, it may be sufficient to allege only the original infirmity;[1] that such allegation of original invalidity destroys the title of the original holder, and, *prima facie*, the title of the indorsee, which reposes on that foundation; and that if the indorsee obtained the paper for value, and without notice, it is for him to allege these facts, which give him a new title notwithstanding the alleged infirmity of the instrument. These new facts, the one affirmative and the other negative, when alleged in the reply, would be new matter in avoidance; and if not connected with a denial, such reply would put the *onus probandi* upon the plaintiff.[2] But this suggestion is based upon a rule of evidence, and is at variance with the principles of pleading, which would seem to require that an averment of fraud should be coupled with such other facts as are legally requisite to make the defense available against the plaintiff. And such is believed to be the general, if not the uniform, practice.[3]

272. Reply to Defense of Fraud, Continued.—So, also a *defendant* may confess and avoid an allegation of fraud. Where a sale of goods is induced by the fraud of the purchaser, and there is actual and unconditional delivery, with

[1] Byles on Bills, 120–124; Bliss Pl. 395.

[2] 2 Gr. Ev. 172; 1 Dan. Neg. Instr. 166, 769a; Sperry v. Spaulding, 45 Cal. 544. The general rule is, that the transferee of negotiable paper is presumed to have taken it for value, before its dishonor, and in the regular course of business; and the burden is upon the maker to overcome this presumption. The exception stated in the text is based upon two reasons; (1) there is a presumption that the guilty payee transferred it in order that he might realize on it, in the name of a third person; and (2) the transferee knows how it came to his hands, and it is much easier for him than for the defendant to make proof of it.

[3] Lane v. Krekle, 22 Iowa, 399.

intent to pass the title, a subsequent *bona fide* purchaser for value will take the goods freed from the right of the original vendor to reclaim the goods.[1] In an action by the original vendor to reclaim the goods from such innocent purchaser, on the ground of fraud in the purchase from him, the defendant may, in avoidance of the allegation of fraud, allege his purchase from the fraudulent vendee in possession, for value, and without notice.

It is common practice, in alleging fraud in such cases, to add the averments of notice and want of consideration; but upon principle it would seem that such averments in the pleading impeaching the instrument in the one case, and the sale in the other, can have no office but to anticipate the defense, and that the facts of consideration and want of notice, being in the nature of estoppel, should be pleaded *in response* to the allegation of fraud which they are to meet and avoid. If it is proper in such cases to combine with the allegation of fraud, the affirmative allegation of notice, and the negative allegation of want of consideration, then a traverse of these allegations must be proper, and must be the only way to present an issue. But in such case there would be no affirmative assertion of consideration, and no averment of innocence; and yet these are the facts which protect the purchaser, and which he is bound to prove for his protection. That which a party is bound to maintain by proof, he must first assert by pleading.[2]

273. Departure in the Reply.—Departure in pleading is the dereliction of an antecedent ground of complaint, or of defense, for another that does not fortify the former.[3] This is forbidden, because, if the parties were allowed, at pleasure, to abandon the ground of complaint or defense first asserted, and to resort to another, the pleadings would be prolonged, the formation of an issue delayed, and the foundation of the action, or of the defense, might be entirely changed. At common law, departure may take place in any pleading

[1] Benj. on Sales, 433, and notes; Devoe v. Brandt, 53 N. Y. 462.

[2] Dan. Neg. Instr. 166, 769a; 2 Gr. Ev. 172.

[3] Ry. Co. v. Herr, 135 Ind. 591.

subsequent to the plea;[1] in code pleading, it can occur only in the reply.

The introduction of a new cause of action in the reply, as a ground of recovery, is a departure. It is not the province of a reply to introduce new causes of action; this can be done only by amendment of the complaint.[2] Where, in answer to a complaint for an accounting, and for judgment for the amount found due the plaintiff, the defendant alleges that the amount due the plaintiff has been ascertained by an award, and the plaintiff, in his reply, admits the submission and award, and asks judgment for the amount of the award, it is not a departure. The judgment in such case will rest upon the complaint and the answer, the reply being wholly unnecessary.[3] In an action against a corporation for damages for refusing to transfer stock on its books, the complaint alleging a general ownership, by plaintiff, a reply alleging a special ownership as pledgee was held not to be a departure.[4] In an action against a carrier for the value of a mule killed in transportation, the answer set up a counter-claim for the freight agreed on. The plaintiff replied, alleging injuries to other mules shipped at the same time. A demurrer to the reply was sustained because it was a departure, and because the plaintiff, having but a single right of action, could not divide it.[5] In an action by the assignee of notes, the answer alleged fraud of the payee in obtaining them, and want of consideration. The plaintiff replied, that after the assignment to him, and before maturity, the defendant obtained from him an extension of time, on a promise to pay them. This was held to be an avoidance, and not a departure.[6]

A new assignment[7] is not a departure; it is simply a restatement of the plaintiff's cause of action, describing more particularly what had before been described too generally, in order to remove the defendant's misconception.

Departure is a fault in matter of substance, and the remedy

[1] Ante, 119.
[2] Durbin v. Fisk, 16 O. S. 533.
[3] Benson v. Stein, 34 O. S. 294.
[4] Bank v. Richards, 74 Mo. 77.
[5] Mount v. Ry. Co., 2 Ky. Law Rep. 221.
[6] Brown v. Bank, 115 Ind. 572; House v. McKinney, 54 Ind. 240.
[7] Ante. 76.

is by demurrer for want of sufficient facts.[1] But if the parties go to trial without objection, judgment will not be arrested on account of a departure.[2]

274. Form of Reply.—The reply, as already stated, may be a denial, or a confession and avoidance, or both. If it contains both, or if it contains several denials of distinct and separate defenses, or if it contains several distinct and independent matters in avoidance, they should be separately stated therein; and each separate statement in the reply should designate clearly the part or parts of the answer to which it is to be applied.

An averment in a reply that the plaintiff can not admit or deny the allegations of the answer, but demands proof of the same, is not a traverse of the facts so alleged, and the defendant in such case will not, because of such reply, be called upon to sustain his averments by proof.[3]

A reply setting up only evidential facts inconsistent with the new matter to which it is addressed, may, if not objected to by motion, be treated as a denial.[4] A reply to the original answer is good as a reply to an amended answer, where the amendment only adds matter not requiring a reply;[5] and a reply to an answer will stand as a reply to the answer to an amended complaint, if, without objection, the parties so treat it.[6] And if a cause be tried as though a reply by way of

[1] Haas v. Shaw, 91 Ind. 384; Bank v. Hendrickson, 40 N. J. L. 52; Newcomb v. Weber, 1 C. S. C. Rep. 12, 14; McAroy v. Wright, 25 Ind. 22; Bearss v. Montgomery, 46 Ind. 544.

[2] Jordan v. James, 5 Ohio, 88; New v. Wamback, 42 Ind. 456; Philibert v. Burch, 4 Mo. App. 470; Mortland v. Holton, 44 Mo. 58.

[3] Building Ass'n v. Clark, 43 O. S. 427.

[4] Meredith v. Lackey, 14 Ind. 529. A defense or a reply containing only evidential facts is a clear violation of the plainest and soundest principles of pleading, and is amenable to a motion to strike out. But as the new procedure looks to substance rather than to form, there is a tendency, in some jurisdictions, to sustain such pleading, as against a demurrer, provided the evidential facts stated are in effect equivalent to a denial. Pom. Rem. 624–632, and cases cited. Such practice is illogical in theory, and most vicious in tendency, and ought everywhere to be discouraged.

[5] Leslie v. Leslie, 11 Abb. Pr. N. S. 311.

[6] Vaughan v. Howe, 20 Wis. 497.

traverse had been filed, when in fact none had been filed, the defendant will be taken to have waived the omission;[1] or it will be treated as having been filed;[2] or the court may, after verdict, allow it to be filed *nunc pro tunc*.[3]

[1] Henslee v. Cannefax, 49 Mo. 295; Meader v. Malcolm, 78 Mo. 550; Hopkins v. Cothran, 17 Kan. 173; Muldoon v. Blackwell, 84 N. Y. 646.

[2] McAllister v. Howell, 42 Ind. 15.

[3] Foley v. Alkire, 52 Mo. 317.

SUBDIVISION II.

THE IRREGULAR PARTS OF PLEADING.

275. Scope and Purpose of This Division.—When a question of fact is to be presented to a court for trial, it is of the first importance that the issue be real and material, and that it be so definite and certain that the trial may proceed with intelligence and dispatch, and that the decision shall be conclusive of the controversy. To these ends, the pleadings of fact should, as they proceed, be subjected to such tests and supervision as will avoid the production of an uncertain or immaterial issue. Such supervision is provided by means of motions, demurrers, and amendments. If a pleading of fact be defective in form, the adversary party may, by motion, require it to be reformed; if defective in substance, he may object to it by demurrer; and each party may, within certain restrictions, cure defects or mistakes in his own pleading by amendment thereof. These means for perfecting pleadings of fact, since they may or may not be resorted to in the production of an issue, may properly be termed the *irregular parts of pleading*.[1]

276. Formal Requirements.—A distinguishing merit of the reformed procedure is, that it subordinates requirements of form to requirements of substance. But there are two, and widely different, aspects of formal requirements in pleading. In one sense, the requirement of form relates to "those

[1] Speaking strictly, pleading consists only in alleging or denying matters of fact; therefore, in philological strictness, these collateral expedients—these means for perfecting pleadings of fact—should not be called pleadings. But inasmuch as they tend to the same end, the development of a material issue, and since their use, when employed, is inseparable from the pleadings proper, their classification as "irregular parts of pleading" affords such convenience and perspicuity of treatment as to justify this apparent laxity. See ante, 167.

technical or artificial modes of introducing and detailing the subject-matter pleaded, which have been established by usage." This is the sense in which the requirement obtained in the common-law procedure, where it grew into an arbitrary adherence to forms and precedents so refined and so verbose as very often to obscure, rather than to disclose, the real claims and defenses of the parties. In another sense, *form* is regarded as a security for *substance*, and not as a mere formulary. In this sense, matter of form becomes a means to be used for promoting the administration of justice, rather than a dominant authority to be conformed to. It is mainly in this subsidiary sense, and to the end that there may be regularity and dispatch, that irrelevant inquiries may be avoided, and that results may be certain and conclusive, that matter of form is involved in the new procedure.

CHAPTER XIX.

MOTIONS.

277. Motions and Orders Defined.—A motion is an application, oral or written, addressed to a court or a judge, by a party to an action or proceeding, or by one interested therein, asking the court or judge to make an order in such action or proceeding. An order is a direction of a court or a judge, made or entered in writing, in an action or proceeding. An order differs from a judgment, which is the final determination of the rights of the parties involved in the particular action. Judgment terminates the action, but orders are made during the progress of the action, and generally relate to some preliminary or collateral question.

A motion is a very common means for invoking the action of a court or judge, and may be employed by those having an interest in an action or proceeding, though not parties thereto. At common law, defects of form were the subject of special demurrer; but under the codes, such defects are to be corrected upon motion. Several matters, if connected with the same action, may be included in one motion. Some of the numerous instances in which the action of a court may be invoked by motion will be stated in the sections next following.

278. Motion to Strike from Files.—A pleading or other paper on file, that is so defective in form, or so improper in substance, that it ought not to be placed on file, or a pleading or paper placed on file without right to file it, may, on motion, be stricken from the files; and the court may, *sua sponte*, order such pleading or paper stricken from the files.

One not a party to an action has no right to file any paper therein, without leave of the court first obtained; and a party to an action has no right to file a paper therein, unless

within rule,[1] or upon leave of the court first obtained. But where a pleading has been filed out of rule, and without leave, a reviewing court will, in the absence of anything in the record showing the contrary, presume that leave to file had been given.[2] This is only treating the matter as the parties have treated it.

The court has control of its files and its records, and the object of an order striking pleadings or papers from the files is simply to disencumber the files and the records of the court of papers that are in themselves improper and objectionable, or that are improperly placed on file. A motion to strike from the files presents a question of propriety rather than of right, and is always addressed to the discretion of the court.

If a pleading is not subscribed, or is not verified, or if the verification is defective, or is made by one not authorized to make it, the pleading is subject to a motion to strike from the files;[3] and illegibility of a pleading is ground for such motion.[4] Where a pleading contains indecent and indecorous language, such as an averment that the allegations of the opposite party are "corruptly false," it may be stricken from the files until reformed.[5]

279. Motion to Strike from Files, Continued.—Where an objection to a pleading is based, not upon an irregularity connected with its filing, nor upon any matter pertaining to its form merely, but upon its alleged insufficiency in matter of substance, the objection must be taken by demurrer, and not by motion to strike from the files;[6] it is not the province of such motion to try the sufficiency of a pleading in matter of substance.[7] But where a pleading is, on bare inspection,

[1] In each jurisdiction, days are fixed, by statute or by rule of court, within which the several pleadings in a cause shall be filed. These are called "rule days;" and a party who fails to file a pleading on or before the rule day for such pleading is in *default*, and can thereafter file it only upon leave of the court.

[2] Goodman v. Gay, 15 Pa. St. 188.

[3] Fritz v. Barnes, 6 Neb. 435; Warner v. Warner, 11 Kan. 121; Pudney v. Burkhart, 62 Ind. 179.

[4] Downer v. Staines, 4 Wis. 372; Downer v. Staines, 5 Wis. 159.

[5] Mitchell v. Brown, 88 N. C. 156.

[6] Finch v. Finch, 10 O. S. 501.

[7] Walter v. Fowler, 85 N. Y. 621; McCammack v. McCammack, 86 Ind. 387.

and without argument or consideration, so clearly and palpably bad as to indicate bad faith in the pleader, it may be stricken from the files as frivolous.[1] An answer in an action on a promissory note, stating only that the note was "not outstanding against the defendant," and that "there is nothing due" on the note, should be stricken from the files.[2] An answer denying all the material allegations of the complaint, in manner and form as therein set forth, denies nothing, and is frivolous.[3] A demurrer interposed for a cause not named in the statute is frivolous;[4] and so is a second demurrer for the same cause, when the first had been overruled. An irrelevant pleading—one that has no substantial relation to the controversy—may be stricken from the files as frivolous. A sham pleading—one good in form, but false in fact, and pleaded in bad faith—may be stricken out on motion.[5] The essential test of a sham pleading is, that its falsity shall be clearly apparent; and it is generally held that this should appear from the pleading itself, or from the record, or from facts within the judicial knowledge of the court; though in some jurisdictions the common-law rule obtains, and on such motion affidavits may be used as to the *bona fides* of a defense.[6] To strike out an answer as sham, it must be false in the sense of being a mere pretense set up in bad faith, and without color of fact. The distinguishing characteristic of a sham defense is its apparent and undoubted falsity. It matters not whether it be affirmative or negative in form, or whether its scope be such as to involve all, or only a part, of the allegations of the complaint.[7] This power to strike sham pleadings from the files is indispensable to the protection and maintenance of the character of the court, and the proper ad-

[1] Bliss Pl. 421; Boone Pl. 253, 254. *Cf.* Improvement Co. v. Holway, 85 Wis. 344.

[2] Per WHITE, J., in Larimore v. Wells, 29 O. S. 13.

[3] Dole v. Burleigh, 1 Dakota, 227.

[4] Kenworthy v. Williams, 5 Ind. 375; McMahon v. Bridwell, 3 Mo. App. 572; Ferguson v. Troop, 16 Wis. 571.

[5] Bliss Pl. 422; Boone Pl. 252.

[6] Tyler's Steph. Pl. 385; Kay v. Whittaker, 44 N. Y. 565. *Cf.* Werk v. Christie, 9 O. C. C. 439.

[7] People v. McCumber, 18 N. Y. 315. *Cf.* Thompson v. Erie Ry. Co., 45 N. Y. 468; Wayland v. Tysen, 45 N. Y. 281.

ministration of justice; but care should be taken not to carry it beyond its proper limits, and not to exercise it where there is in fact an issue which the defendant is entitled to have tried.[1]

All motions should contain the title of the cause, so as to identify them with the action in which they are made. A motion to strike a paper from the files should state the ground of the motion, and may be in this form: The defendant moves the court to strike from the files the plaintiff's reply herein, for the reason that the same is not verified.

280. Motion to Strike Out.—The pleadings are to contain statements of operative facts, and denials thereof. Their object is, to bring the controversy before the court in such form as clearly to disclose the respective claims of the parties, to separate questions of law from questions of fact, to avoid inquiry concerning matters not disputed, or not material, and to expedite the trial of causes. Subsidiary to these ends a process of elimination is provided, whereby redundant, irrelevant, or immaterial matter may be stricken from a pleading of fact, on motion of the party prejudiced thereby. And scandalous matter, and obscene words, may be stricken from a pleading, on motion of a party, or by the court *sua sponte;* the court having inherent power to purify its own records.[2]

To have the pleadings encumbered with needless or improper allegations is not a mere scientific blemish, it is a great inconvenience and hindrance to procedure. One purpose of a motion to strike out, and a principal use made of it, is, to have the court determine, before the party responds to the pleading, whether the matter attacked by motion is to be involved in the subsequent pleadings, and in the trial of the cause. For example, if the complaint contain allegations which the defendant believes to be immaterial or irrelevant,—allegations which, if immaterial or irrelevant, do not require an answer, and can not be proved or relied upon in the trial,—he may, without waiting to have the matter decided upon

[1] Improvement Co. v. Holway, 85 Wis. 344.

[2] Mussina v. Clark, 17 Abb. Pr. 188; DUER, J., in Bowman v. Sheldon, 5 Sand. 657; Opdyke v. Marble, 18 Abb. Pr. 266.

objection to evidence at the trial, or in the charge to the jury, obtain a ruling of the court at once, upon his motion to strike out such allegations, and having obtained such ruling, the defendant is advised as to whether his answer must respond to such allegations, and both parties are advised as to whether they are to be involved in the trial.

281. Motion to Strike Out, Continued.—Matter that is redundant, irrelevant, or immaterial may be stricken out. Redundancy is excessive statement—superabundance, not merely of words, but of statement. Pleonasm is a fault of rhetoric, not of pleading Hence, mere prolixity or useless descriptive matter will seldom be stricken out as redundant;[1] though where the provisions of a charter were needlessly recited, they were stricken out as redundant.[2] Where an answer contains a general denial, and in addition thereto a statement of evidential facts amounting to an argumentative denial, the latter may be stricken out on motion;[3] it is redundant.

An allegation is irrelevant, when it does not relate to or affect the matter in controversy, and when it can in no way affect or assist the decision of the court. And matter alleged in a pleading is immaterial, when a denial thereof would present an immaterial issue, and when it could be stricken from the pleading without affecting its legal sufficiency or effect. Matter of argument may be stricken from a pleading as irrelevant;[4] and so may matter of evidence.[5] Evidential facts may be relevant to an *issue*, and so be admissible upon the trial; but they can not be relevant to the *formation of an issue*. A statement of the defendant's reason for pleading the statute of limitations may be stricken out;[6] it is both irrelevant and immaterial. In a cause of action for breach of warranty, an averment of *scienter* would be both immaterial and irrelevant. If a plaintiff in ejectment, after stating his

[1] Moffatt v. Pratt, 12 How. Pr. 48.

[2] Durch v. Chippewa Co., 60 Wis. 227.

[3] DeForrest v. Butler, 62 Iowa, 78.

[4] HARRIS, J., in Gould v. Williams, 9 How. Pr. 51.

[5] McCauley v. Long, 61 Tex. 74, Bowen v. Aubrey, 22 Cal. 566; Cathcart v. Peck, 11 Minn. 45.

[6] Nichols v. Briggs, 18 S. C. 473.

title, describe the sheriff's sale and deed to him, such description may be stricken out on motion.[1] Irrelevant matter in an answer, responsive to irrelevant matter in the complaint, may be stricken out on motion.[2]

282. Motion to Strike Out, Continued.—It is a general requirement that motions shall be specific in their object, and certain in their application; and a motion to strike out improper matter in a pleading must designate it with certainty.[3] This may be done by recapitulating the words to be stricken out, or, if the matter be long, by giving the words at the beginning and at the close thereof;[4] a reference to the page and lines of the pleading is not sufficient,[5] for these indications disappear when the pleading is copied into the record. Care should be taken not to include material and unobjectionable words in the matter asked to be stricken out, for in such case the whole motion must be denied.[6] The court should exercise its power under a motion to strike out, with reluctance and caution,[7] for if material matter be stricken out it will be error; while refusal to strike out will seldom be to the prejudice of any one.[8] If a party demur to or answer a pleading containing matter that might be stricken out on motion, he thereby waives the right to object by motion, unless leave of court be obtained.[9]

A motion to strike out may be in form as follows: The defendant moves the court to strike out of the complaint all that part thereof beginning with the words "And the plaintiff further says," and ending with the figures "1895," for the reason that the same is redundant and irrelevant.

283. Motion to Make Definite.—Each party has a right to know from his adversary, and with reasonable certainty,

[1] Warner v. Nelligar, 12 How. Pr. 402.

[2] Mayer Co. v. Goldenberg, 1 Ohio Nisi Prius Rep. 189. *Cf.* Pom. Rem. 578.

[3] Jackson v. Bowles, 67 Mo. 609.

[4] O'Connor v. Koch, 56 Mo. 253; Bryant v. Bryant, 2 Robt. 612; Pearce v. McIntyre, 29 Mo. 423; Blake v. Eldred, 18 How. Pr. 240.

[5] Robinson v. Rice, 20 Mo. 229; Patterson v. Hollister, 32 Mo. 478.

[6] White v. Allen, 3 Oreg. 103; Gilbert v. Loberg, 86 Wis. 661.

[7] Essex v. Ry. Co., 8 Hun, 361; St. John v. Griffith, 1 Abb. Pr. 39.

[8] Cate v. Gilman, 41 Iowa, 530.

[9] Russel v. Chambers, 31 Minn. 54.

what claim or defense he is required to meet, in order that he may prepare to meet it, and that he may not be taken by surprise at the trial; and when the statements of a pleading are so indefinite and uncertain that the precise nature of the claim or defense is not apparent, the court may, on motion, require them to be made definite and certain, by amendment of the pleading. A party is bound to disclose in his pleading all the operative facts upon which he relies, and is neither required nor allowed to display therein evidential facts. But all statements, whether of operative facts or of denials, should be so framed as to be clear and certain; and therefore such incidents, or closely related facts, as may be requisite to this end, should be stated also.[1] And when a pleading is, in any material matter, so ambiguous or indefinite as to render its meaning uncertain, and thereby to embarrass the adverse party, it may be corrected by motion to make it definite and certain in such particular.[2]

Where a complaint makes it uncertain whether the plaintiff relies upon an affirmance of a contract or a rescission thereof,[3] or whether the cause of action is in tort or in contract,[4] or whether he sues for an agreed price or for a *quantum meruit*,[5] he may be required, by motion, to make his complaint definite in such respect. Uncertainty as to time, when time is not a material element of the right asserted,[6] and uncertainty in an allegation of negligence,[7] are defects to be cured by motion to make definite. So, the allegation of a legal conclusion, as, that one holds the legal title to property in trust,[8] is vulnerable to a motion to make definite by stating the operative facts.

284. Motion to Make Definite, Continued.—An argumentative denial—that is, a statement of evidential facts

[1] Ante, 189, 190.

[2] Pa. Co. v. Sears, 136 Ind. 460.

[3] Faulks v. Kamp, 8 Jones & S. 70.

[4] Ladd v. Arkell, 5 Jones & S. 35; INGALLS, J., in Conoughty v. Nichols, 42 N. Y. 88.

[5] Gardner v. Locke, 2 Civ. Proc. 252; Dorr v. Mills, 3 Civ. Proc. 7.

[6] People v. Ryder, 12 N. Y. 433; Ry. Co. v. Shanklin, 94 Ind. 297.

[7] Penn. Co. v. Sedgwick, 59 Ind. 336; Turnp. Co. v. Humphrey, 59 Ind. 78; Ry. Co. v. Collarn, 73 Ind. 261.

[8] Horn v. Ludington, 28 Wis. 81.

which, *arguendo*, controvert the statement of the other side, is not a nullity,[1] and may not be demurrable,[2] but is subject to a motion to make definite, and, if accompanied by a general denial, may be stricken out as surplusage.[3] A negative pregnant, a denial which by implication admits a material part of what is apparently controverted, is evasive and ambiguous, and is therefore subject to a motion to make definite.

A pleading may be so uncertain and indefinite as to be subject to correction on motion, and yet be good as against a demurrer;[4] for indefiniteness is a defect of form, and not of substance. A defect, to be remedied by motion to make definite, must appear upon the face of the pleading;[5] matters *dehors* the record can not be considered;[6] and such defects must be remedied by motion, and not by excluding evidence at the trial.[7] A motion to make definite and certain must specify the particular deficiency to be remedied,[8] and may be in the form following: Now comes the plaintiff and moves the court to require the defendant to make his first defense to plaintiff's second cause of action definite and certain, by stating therein the facts whereby he claims said instrument "was fraudulently procured from him."

285. Motion to Separately State and Number.—A plaintiff having several distinct rights of action against the same person may, subject to certain restrictions, pursue them in one action, separately stating his causes of action.[9] If two or more causes that are not joinable are united, whether by separate statements or by one commingled statement, the fault is *misjoinder;* if two or more causes that are properly joinable are commingled in one statement, the fault is com-

[1] Simmons v. Green, 35 O. S. 104; Loeb v. Weis, 64 Ind. 285.

[2] Pom. Rem. 627, 632; Bank v. Hendrickson, 40 N. J. L. 52.

[3] Pom. Rem. 632; DeForrest v. Butler, 62 Iowa, 78.

[4] Ry. Co. v. Iron Co., 46 O. S. 44.

[5] Brown v. Ry. Co., 6 Abb. Pr. 237.

[6] Scofield v. Bank, 9 Neb. 316; Hopkins v. Hopkins, 28 Hun, 436.

[7] Kerr v. Hays, 35 N. Y. 331; Greenfield v. Ins. Co., 47 N. Y. 430; Ready v. Summer, 37 Wis. 265; Spies v. Roberts, 18 Jones & S. 301.

[8] Gilmore v. Norton, 10 Kan. 491.

[9] Ante, 195 et seq.

monly called *duplicity*. Misjoinder relates to the *fact* of the union, and is remediable by demurrer;[1] duplicity relates to the *form* of the union, and is remediable by motion to require the plaintiff to separately state and number his several causes of action.

A defendant may join in his answer as many grounds of defense, counter-claim, and set-off, as he may have, subject only to the requirement that they shall be separately stated and numbered, and that inconsistent defenses shall not be joined.[2] If inconsistent defenses are improperly joined, the remedy is by motion to require the defendant to elect upon which he will rely; if several defenses are commingled in one statement, the remedy is by motion to require the defendant to separately state and number his several defenses.

Whatever operative facts would, if stated by themselves, entitle the plaintiff to relief by action, constitute a right of action, and should be separately stated as a cause of action. And any denial, or any statement of operative facts, that will show that the plaintiff is not entitled to relief, or that will wholly or partly defeat his claim, is a defense, and should be separately stated as such. And each separate and distinct counter-demand should be separately stated. The requirement that separate and distinct causes of action, defenses, and counter-demands, when joined, shall be separately stated, is intended to facilitate the formation of issues, both in fact and in law; and though it is matter of form, and is waived if not corrected at the proper time and in the proper way, it is an important and valuable means for securing singleness, certainty, and precision in the issues.

286. Motion to Separately State and Number, Continued.—Material matter, though ill pleaded, may make a pleading double; for material matter, though insufficiently pleaded, may, if sufficient in substance, be the subject of a material issue. On the other hand, immaterial matter can not operate to make a pleading double, because no material issue can be made upon it. Accordingly, where allegations of new matter in an answer are without merit as matter of

[1] Post, 299. [2] Ante, 261–266.

defense, the proper remedy is a motion to strike out, and not a motion to separately state and number.[1] Where matter that in itself constitutes a ground of recovery or of defense is pleaded only as a necessary inducement to other matter, and it is apparent that the claim or defense is rested on the latter, and not on the former, the pleading is not double.[2] But if the matter so pleaded as inducement is not necessary for that purpose, it may itself become a ground of recovery or defense,[3] and should be subject to correction by motion to separately state and number.

It is a rule of common-law pleading, and applicable in code pleading, that no matters, however multifarious, will make a pleading double, if together they constitute but one connected proposition or entire point.[4] Thus, in an action for assault and imprisonment, the defendant may plead in avoidance that he arrested the plaintiff on suspicion of felony, and may set forth several circumstances of suspicion, each one of which would alone justify the arrest; for all the circumstances taken together amount to only one connected ground of suspicion, and constitute but one defense.

It seems that the refusal of a motion to require causes or defenses to be separated is not an error for which final judgment will be reversed, unless it appear that by such refusal the party complaining has been deprived of a substantial right.[5]

A motion to require causes or defenses to be separated need not specify the several causes or defenses, and may be in this form: The defendant moves the court to require the plaintiff to separately state and number his several causes of action.

287. Waiver of Formal Defects.—The general rule is, that where a pleading is insufficient in matter of substance, the defect is not waived by pleading over, or by going to

[1] Ridenour v. Mayo, 29 O. S. 138.

[2] Steph. Pl. 306; Raymond v. Sturges, 23 Conn. 134; Lord v. Tyler, 14 Pick. 156; Ross v. Mather, 51 N. Y. 108.

[3] Conaughty v. Nichols, 42 N. Y. 83.

[4] Steph. Pl. 307; Bliss Pl. 294.

[5] Bear v. Knowles, 36 O. S. 43; Goldburger v. Utley, 60 N. Y. 427. *Contra*, Pierce v. Bicknell, 11 Kan. 262.

trial without demurring, unless the defect be cured by allegations in a subsequent pleading. But the rule as to defects of form is different. These defects are corrected at the instance of the adverse party, and for his convenience; and if he answer or demur to a pleading, he thereby admits that he has not been inconvenienced or misled by any formal defect therein, and is held to have waived his right to have it corrected.[1]

Where a defendant in an action on a promissory note pleads, in general terms, that it "was and is wholly without consideration, and void," and the plaintiff does not move to make definite by requiring a statement of the facts on which the defense is based, he waives his right to object to the form of the defense; and any evidence is admissible on the trial that will tend to impeach or sustain the consideration.[2] Where two causes of action are properly joined, but are commingled in one statement, and the defendant, without objection by motion to separate them, answers both causes, and proceeds to trial, he waives the right to object to the duplicity.[3] Where a complaint based upon an appraisement alleges that an appraisement had been "duly and legally made," and the answer alleges only that "the appraisement was not duly and legally made," and the plaintiff proceeds to trial without moving to require the defendant to make his answer definite by stating in what respect the appraisement was not legal, the defect is waived.[4] Where the complaint of a corporation contained no averment of corporate existence, and no objection was made until after judgment, the defect was held to be waived.[5] Want of subscription or verification is a mere irregularity, which is waived by demurring or by pleading over;[6] the objection can not be raised on

[1] Garard v. Garard, 135 Ind. 15.

[2] Chamberlain v. Ry. Co., 15 O. S. 225; Larimore v. Wells, 29 O. S. 13. *Cf.* Bank v. Sherman, 33 N. Y. 69.

[3] McKinney v. McKinney, 8 O. S. 423; Truitt v. Baird, 12 Kan. 420; Cobb v. Ry. Co., 38 Iowa, 601. *Cf.* McCarthy v. Garraghty, 10 O. S. 438.

[4] Trustees v. Odlin, 8 O. S. 293.

[5] Spence v. Ins. Co., 40 O. S. 517.

[6] State v. Bath, 21 Kan. 583; State v. Chadwick, 10 Oreg. 423; Hughes v. Feeter, 18 Iowa, 142; Butler v. Church, 14 Bush, 540.

the trial,[1] nor for the first time in a reviewing court.[2] Want of capacity to sue, if not taken advantage of by demurrer or answer, is waived;[3] and the objection that there is a defect of parties,[4] or a misjoinder of parties,[5] or a misjoinder of causes of action,[6] must be taken advantage of by demurrer or answer, or the right to object for such cause will be waived. The use of initial letters instead of the full name of a party may be corrected by motion to make definite, but such defect is waived by answering to the merits.[7] Misnomer of a defendant corporation is waived by answering to the merits, and can not be made the ground of objection to the admission of testimony at the trial. Such error must be taken advantage of in the pleadings, and before answering to the merits.[8]

288. Waiver of Formal Defects, Continued.—Courts have sometimes gone a great length in the application of this rule. In an action on contract, the defendant pleaded a counter-claim for an independent tort. The plaintiff, instead of objecting to the counter-claim as improper, replied by general denial, and went to trial. The trial court excluded all evidence in support of the counter-claim. This was held to be error; for although the counter-claim was improper, and could not have been sustained if properly objected to,

[1] Schwarz v. Oppold, 74 N. Y. 307.

[2] Payne v. Flournoy, 29 Ark. 500.

[3] Pierrepont v. Lovelass, 4 Hun, 696; Hop v. Plummer, 14 O. S. 449; People v. Tel. Co., 31 Hun, 596; Jones v. Steele, 36 Mo. 324; Palmer v. Davis, 28 N. Y. 242; McNair v. Toler, 21 Minn. 175; Perkins v. Ingersoll, 1 Dill. 417; Haskins v. Alcott, 13 O. S. 210.

[4] Merritt v. Walsh, 32 N. Y. 685; Horstekote v. Menier, 50 Mo. 158; Butler v. Lawson, 72 Mo. 227; Blackeley v. LeDuc, 22 Minn. 476; Lowry v. Harris, 12 Minn. 255; Waits v. McClure, 10 Bush, 763; Davis v. Choteau, 32 Minn. 548; Dunn v. Ry. Co., 68 Mo. 268; Potter v. Ellice, 48 N. Y. 321; Walker v. Deaver, 79 Mo. 664.

[5] Long v. DeBevis, 31 Ark. 480; Tennant v. Pfister, 51 Cal. 511.

[6] James v. Wilder, 25 Minn. 305; Cloon v. Ins. Co., 1 Handy, 32; Blossom v. Barrett, 37 N. Y. 434; Field v. Hurst, 9 S. C. 277; Finley v. Hayes, 81 N. C. 368; Simpson v. Greeley, 8 Kan. 586; Jessup v. Bank, 14 Wis. 331; Cary v. Wheeler, 14 Wis. 281; Haverstock v. Trudel, 51 Cal. 431.

[7] Nichols v. Dobbins, 2 Mont. 540; Nelson v. Highland, 13 Cal. 74.

[8] School Dist. v. Griner, 8 Kan. 224.

the right to object had been waived, and the evidence should have been received.[1] In an action for flowing plaintiff's lands, the defendant alleged a user for more than twenty years, but did not aver that this user was adverse. The plaintiff, instead of demurring, replied a general denial; and on his objection, the trial court excluded all evidence in support of the alleged user. The reviewing court, admitting that the answer was demurrable for not averring the adverse character of the user, held that by replying and going to trial, the plaintiff had waived his right to object to it on that ground.[2] This was clearly a mistaken application of the rule. Insufficiency in matter of substance is not waived by failure to demur; and, if not cured by subsequent pleading, may be made the ground of objection to evidence on the trial.

It seems, that a party who has filed a meritorious motion is not in default so long as his motion is pending; but that a motion that is frivolous, and without merit, does not stand in the way of judgment by default.[3]

[1] Roback v. Powell, 36 Ind. 515.
[2] White v. Spencer, 14 N. Y. 247.
[3] Kellogg v. Churchill, 1 W. L. M. 45; Kinyon v. Palmer, 20 Iowa, 138.

CHAPTER XX.

DEMURRERS.

289. General Grounds for Demurrer.—The philosophy of the demurrer has heretofore been explained,[1] and the nature and office of demurrer at common law [2] and in equity [3] have been stated. The general object of the demurrer under the new procedure is the same as at common law; it questions the legal sufficiency of the pleading demurred to. A demurrer is not a pleading of fact; it neither alleges nor denies any fact; it is an objection on legal grounds, and questions the right to proceed, for the reason (1) that the court has not jurisdiction; or (2) that the pleadings do not present a fit question for litigation; or (3) that the incidents of parties, capacity, etc., do not make the occasion a proper one for invoking the action of the court.

The general provision of the codes is, that the defendant may demur to the complaint when it appears on its face, (1) that the court has not jurisdiction, or (2) that the facts stated do not constitute a cause of action, or (3) that the plaintiff has not legal capacity to sue, or (4) that another action for the same cause is pending between the same parties, or (5) that there is a defect of parties, plaintiff or defendant, or (6) that several causes of action are improperly joined. The plaintiff may demur to a counter-claim, a set-off, or a defense of new matter, on the ground that it is, on its face, insufficient in law; and the defendant may, on like ground, demur to a reply, or to any separate traverse or avoidance therein. When the defendant demands affirmative relief, the plaintiff may demur on grounds similar to those for demurrer to the complaint; and where a counter-claim asserts a demand of a character not proper to be so

[1] Ante, 35.
[2] Ante, 79.
[3] Ante, 156.

pleaded, the remedy is generally by demurrer. In a few states, misjoinder of parties plaintiff is made a ground for demurrer; and in one or two, a complaint is demurrable if the facts stated do not entitle the plaintiff to the particular relief demanded.[1]

The only grounds for demurrer, under the new procedure, are those specified by the codes of the several states;[2] and these must be consulted for particular guidance in matters of such detail and of such local importance as not to fall within the general purpose and plan of this work.

290. General and Special Demurrers.—At common law, demurrers are either general or special. The former relate to matters of substance, and need not assign any particular ground of objection; the latter relate to matters of form, and must point out the formal defect with particularity. Under the new procedure, mere defects of form, such as redundancy, uncertainty, and duplicity, are to be cured by motion, and not by demurrer. But most of the codes require the demurrer to specify the grounds of objection; and some of them provide that when a demurrer does not specify the grounds of objection, it shall be regarded as objecting only that the court has not jurisdiction, or that the facts stated are insufficient. While the distinct offices of the common-law demurrers are not retained in the new procedure, the distinct forms thereof are thus retained; and this analogy, the common usage, and convenience and perspicuity of treatment, are sufficient warrant for adopting the common-law designations, and calling that a general demurrer which assigns no particular ground of objection, and that a special demurrer which points out some particular defect.

291. General Demurrer—Want of Jurisdiction.—Jurisdiction is the power of the court to entertain an action, to hear and determine controversies therein, and to enforce its decision. To give jurisdiction the court must, by the constitution and the laws, have cognizance of the subject-

[1] Meyer v. Dubuque, 43 Iowa, 592; Iowa Code, 2648.

[2] DeWitt v. Swift, 3 How. Pr. 280; Beale v. Hayes, 5 Sand. 640; Harper v. Chamberlain, 11 Abb. Pr. 234.

matter of the action; the defendant must be before the court, either by voluntary appearance, or by service of process; and, in local actions, the subject of the action must be within the territorial jurisdiction of the court. The subject-matter of the action is the right asserted by the plaintiff, the ground upon which he demands the judgment of the court. Jurisdiction of the subject-matter is conferred only by the constitution and the law; and these, upon considerations of public policy, define and limit that jurisdiction.

Want of jurisdiction may be asserted by answer, or by demurrer. If it appears upon the face of the complaint that the court has not jurisdiction, the objection should be taken by demurrer; otherwise, the facts showing want of jurisdiction should be brought before the court by answer. If it appears from the complaint that the subject-matter of the action does not fall within the established cognizance of the court, the complaint is demurrable. If, for example, the consideration of the demand asserted belongs to the political department of the government, the judiciary would have no authority,[1] and demurrer for want of jurisdiction would be proper.

Exclusive cognizance of certain matters is sometimes given to courts of special jurisdiction, such as courts of probate; and some courts are, by their creation, given a limited jurisdiction, extending only to certain specified causes. The federal courts are of special and limited jurisdiction. The general government is of limited and enumerated powers, conferred upon it by the constitution. The judicial power is part of the constitutional grant of powers, and the federal courts are restricted to the cognizance of such matters as fall within the provisions of the constitution and the laws enacted thereunder. In courts of general jurisdiction, the right to entertain the action will be presumed, unless the want of jurisdiction appear from the complaint; but in courts of limited or special jurisdiction there is no such presumption, and the jurisdiction must affirmatively appear from the complaint.[2] And when jurisdiction is specially

[1] Cooley's Prin. Const. Law, 146. [2] Gilbert v. York, 111 N. Y. 544;

conferred by statute, whether upon a court of general or of inferior jurisdiction, the complaint must show that the case comes within the provisions of the statute.[1] The general rule, as sometimes stated, is, that "nothing shall be intended to be *without* the jurisdiction of a superior court, but that which specially appears to be so; and nothing shall be intended to be *within* the jurisdiction of an inferior court, but that which is so expressly alleged."

292. General Demurrer—Want of Jurisdiction, Continued.—In local actions, such as for the recovery of real property, or the foreclosure of a mortgage, it should appear that the subject of the action is within the territorial jurisdiction of the court whose action is invoked. But the complaint is subject to demurrer only when it affirmatively appears that the subject of the action is without the jurisdiction;[2] if the *locus* of the subject of the action simply does not appear, the complaint is subject to a motion to make definite, but not to demurrer.

If it appear from the complaint that the court has not jurisdiction of the person of the defendant, it is subject to a special demurrer for that cause; and upon demurrer for such cause, the court will look only to the pleading, and not to the return of process.[3] Want of jurisdiction of the person of the defendant may be waived; but want of jurisdiction of the subject, or of the subject-matter, can not be. If the defendant voluntarily appear, to contest the merits of the cause, whether by motion or by formal pleading, he thereby submits himself to the jurisdiction of the court.[4] Such appearance, even to question the jurisdiction of the court on ground other than want of jurisdiction of the person, is a

United States v. Clarke, 8 Pet. 436. *Cf.* May v. Parker, 29 Mass. 34; Woodman v. Saltonstal, 7 Cush. 183.

[1] Edmiston v. Edmiston, 2 Ohio, 251, *per curiam.*

[2] Powers v. Ames, 9 Minn. 178.

[3] Swan v. Iron Co., 58 Ga. 199. The return of process may be attacked by motion to set aside, or by motion to quash. A motion to set aside the return attacks the truth of the facts stated in the return, and must be supported by proof *aliunde;* a motion to quash the service attacks the sufficiency of the return, admitting it to be true.

[4] Harrington v. Heath, 15 Ohio, 483; Fee v. Iron Co., 13 O. S. 563.

submission of the person to its jurisdiction.[1] But appearance for the sole purpose of questioning the jurisdiction of the person is not a submission of the person to the jurisdiction.[2]

Demurrer for want of jurisdiction may be in this form: Defendant demurs to the complaint, for the reason that the court has not jurisdiction of the person of the defendant. [Or, of the subject-matter of the action; or, of the subject of the action.]

293. General Demurrer—Insufficiency of Facts.—Another ground of general demurrer to the complaint is, that it does not state facts sufficient to constitute a cause of action. If the statement of the complaint does not show a remedial right in the plaintiff, against the defendant, it will not authorize the interference of the court, and is fatally defective. A demurrer on this ground questions the legal sufficiency of the facts stated, and asks the judgment of the court thereon. Generally, therefore, a demurrer on this ground presents a question under the substantive law—Do the facts as stated, and the law as it is, authorize the action? For example, in an action for breach of contract, such demurrer to the complaint may question the competency of the parties to the contract, the sufficiency of the consideration, the legality of the agreement, the performance of a condition precedent, the privity of the parties to the action, or the breach of the obligation; for these are, by the substantive law, essential elements of a remedial right founded upon contract. Demurrer on this ground lies where the complaint omits any material fact,[3] where it fails to show any connection between the facts alleged and the demurrant,[4] or where it shows that the right of action has not yet accrued.[5] A complaint is not demurrable merely because the action is novel, and without precedent.[6]

[1] Handy v. Ins. Co., 37 O. S. 366.

[2] Smith v. Hoover, 39 O. S. 249.

[3] Harvester Co. v. Bartley, 94 Ind. 131; Leak v. Comrs., 64 N. C. 132.

[4] Sinclair v. Fitch, 3 E. D. Smith, 677; Am. B. H. Co. v. Gurnee, 44 Wis. 49.

[5] Hicks v. Branton, 21 Ark. 186; Harvey v. Chilton, 11 Cal. 114.

[6] Piper v. Hoard, 107 N. Y. 73; Muldowney v. Ry. Co., 42 Hun, 444; 23 Abb. N. C. 447, *in nota*.

It is the rule of common law, that where several plaintiffs allege a joint right, the joint right must be proved as alleged; and if not so proved, the action must fail as to all the plaintiffs. For example, if A. and B. sue as partners, for goods sold and delivered, and the proof should show that A. alone sold and delivered the goods, and that B. had no interest in the transaction, A. could not recover, for it would be a failure of proof. Following this common-law rule, and treating the alleged joint character of the right as essential and material, it is held in some cases that, in legal actions, though not in equity suits, where two or more plaintiffs allege a joint right, and the facts stated show a several right in one only, or a joint right in part only, the complaint is subject to demurrer for want of sufficient facts.[1]

294. General Demurrer—Insufficiency of Facts, Continued.—If such demurrer be interposed to an entire pleading containing two or more causes or defenses, it will be overruled if the pleading be found to contain one good cause or defense;[2] for the demurrant must stand upon his general proposition, and the court must pass upon the pleading as

[1] Bartges v. O'Neil, 13 O. S. 72; Masters v. Freeman, 17 O. S. 323; DeBolt v. Carter, 31 Ind. 355; Goodnight v. Goar, 30 Ind. 418; Berkshire v. Schultz, 25 Ind. 523; Lipperd v. Edwards, 39 Ind. 165; Estabrook v. Messersmith, 18 Wis. 545; Giraud v. Beach, 3 E. D. Smith, 337. These decisions have been criticised, and their authority questioned, on the ground that they ignore the equitable principles which should be applied to the civil action in all its phases. Pom. Rem. 213–215. *Cf.* Simar v. Canaday, 53 N. Y. 298; Viles v. Bangs, 36 Wis. 131, 139, 140; Tennant v. Pfister, 51 Cal. 511.

[2] Ry. Co. v. Vancant, 40 Ind. 233; McPhail v. Hyatt, 29 Iowa, 137; Modlin v. N. W. T. Co., 48 Ind. 492; Draining Co. v. Brown, 47 Ind. 19; Towell v. Pence, 47 Ind. 304; Davidson v. King, 47 Ind. 372; Wash. Tp. v. Bouney, 45 Ind. 77; Everett v. Waymire, 30 O. S. 308; Nichol v. McAllister, 52 Ind. 586; Roberts v. Johannas, 41 Wis. 616; Shroyer v. Richmond, 16 O. S. 455; Ry. Co. v. Hall, 26 O. S. 310; Dallas Co. v. Mackenzie, 94 U. S. 660; Lowe v. Burke, 79 Ga. 164; Plymouth v. Milner, 117 Ind. 324; Ry. Co. v. McLiney, 32 Mo. App. 166; Hale v. Bank, 49 N. Y. 626; Wright v. Smith, 81 Va. 777; Robrecht v. Marling, 29 W. Va. 765; Griffiths v. Henderson, 49 Cal. 566; Holbert v. Ry. Co., 38 Iowa, 315; Carson v. Cook, 50 Tex. 325; Strange v. Manning, 99 N. C. 165; Newlon v. Reitz, 31 W. Va. 483; Brake v. Payne, 137 Ind. 479.

an entirety, and can not overrule the demurrer as to one cause or defense, and sustain it as to another. And for the same reason, where a single count contains two or more causes of action, or defenses, a demurrer addressed to the entire count or statement should be overruled, if any one of the several causes or defenses is good.[1] The proper practice in such case is, to demur severally to each cause or defense, and if they are commingled in one statement, the better practice is, first to have them separated, by motion for that purpose. It has been held that where facts constituting but a single right of action, or a single defense, have been improperly divided, and stated and numbered as two or more separate causes of action or defenses, a general demurrer to each separate statement should be overruled, and the pleading sustained as one entire cause of action or defense,[2] treating the words and numerals distinguishing the separate statements as surplusage.

A party may demur to one or more of several causes or defenses, and answer or reply to the others. And it has been held that where several causes or defenses are embodied in one statement, a demurrer may nevertheless be directed to one, if that one may be distinctly designated;[3] for a substantial remedy ought not to be prevented by failure to ob-

[1] Newlon v. Reitz, 31 W. Va. 483; Wright v. Smith, 81 Va. 777.

[2] Everett v. Waymire, 30 O. S. 308; Hillman v. Hillman, 14 How. Pr. 456; Weeks v. Cornwall, 39 Hun, 643, 644; Norman v. Rogers, 29 Ark. 365; VALENTINE, J., in Andrews v. Alcorn, 13 Kan. 351. *Contra*, Mfg. Co. v. Beecher, 26 Hun, 49; Catlin v. Pedrick, 17 Wis. 88. The soundness of the former holdings may well be doubted. It is true that the separate statement of distinct causes or defenses is matter of form only, and may therefore be disregarded when improperly made. A verdict for the defendant on such answer would cure the defect, Shook v. Fulton, 4 Cow. 424; and the overruling of separate demurrers to the several causes in such complaint might not be error to the prejudice of the defendant. Andrews v. Alcorn, 13 Kan. 351. But when such separate statements are demurred to severally, the mistaken division is neither waived nor disregarded; the demurrant adopts and follows his adversary's division of facts; and it is a well settled rule that, on demurrer, each separate cause or defense must stand or fall by itself, and can not be aided by another. Bliss Pl. 121; Pom. Rem. 575.

[3] Wiles v. Suydam, 64 N. Y. 173; Wright v. Conner, 34 Iowa, 240.

serve a merely formal requirement, and a party should not be permitted to set up the defective form of his pleading to protect it from a demurrer directed against its substance. But the better practice is, to have the commingled causes or defenses first separated, upon motion for that purpose, and then to demur. It has been seen that if a defense pleaded jointly is bad as to one, it is bad as to all who join in it.[1] On the same principle, if two or more join in a demurrer, and it is overruled as to one, it will be overruled as to all.[2]

A demurrer for insufficiency of facts may be in this form: Defendant demurs to the complaint, for the reason that it does not state facts sufficient to constitute a cause of action. Or this is sufficient, generally: Defendant demurs to the complaint.

295. General Demurrer—Statute of Limitations.—At common law, a party may avail himself of the bar of the statute of limitations only by plea; in equity, by plea and by demurrer. In a few states, the common-law rule obtains, and the statute can be made available only by answer; but with these few exceptions, the equity rule has been adopted, and when a pleading asserting a demand shows affirmatively that the statutory period has elapsed, advantage may be taken of it by demurrer. In some states, the demurrer is required to be special, stating specifically the ground of objection; but the general rule is, that when a cause of action shows upon its face that it is vulnerable to the defense of the statute, a demurrer thereto on the ground that it does not state facts sufficient to constitute a cause of action, properly presents the defense of the statute.[3] This rule is well es-

[1] Ante, 263.

[2] McGonigal v. Colter, 32 Wis. 614; Webster v. Tibbitts, 19 Wis. 438; Holzman v. Hibben, 100 Ind. 338; Clark v. Lovering, 37 Minn. 120; Oakley v. Tugwell, 33 Hun, 357; Eldridge v. Bell, 12 How. Pr. 547; Dunn v. Gibson, 9 Neb. 513; Walker v. Popper, 2 Utah, 96. *Contra*, Crane v. Deming, 7 Conn. 387.

[3] Sturges v. Burton, 8 O. S. 215; Combs v. Watson, 32 O. S. 228; Seymore v. Ry. Co., 44 O. S. 12; Ilett v. Collins, 103 Ill. 74; Biays v. Roberts, 68 Md. 510; Merriam v. Miller, 22 Neb. 218; Hudson v. Wheeler, 34 Tex. 356; Hurley v. Cox, 9 Neb. 230; Young v. Whittenhall, 15 Kan. 579; Burnes v. Crane, 1 Utah, 179; Howell v. Howell, 15 Wis. 55; McArdle v. McArdle, 12

tablished by the authority of precedent, but it is indefensible upon principle. The statute of limitations affects the remedy, but not the right; the liability remains, and may sometimes be asserted in another jurisdiction. The statute does not assert itself, and does not affect the action, unless asserted by the defendant. The mere lapse of time does not affect the legal operation of the facts stated; it simply enables the defendant, if he choose, to exercise a privilege, and to thwart the action. If the complaint states a cause of action that is, on its face, subject to the defense of the statute, and is not otherwise faulty, it is a good complaint; it states facts sufficient to constitute a cause of action, and will support a judgment for the plaintiff.

The doctrine of the rule under consideration is, then, that before the demurrer is filed, the complaint states sufficient facts; but upon the filing of a demurrer, questioning only the sufficiency of these facts, they at once become insufficient. The error of this doctrine is, that it either makes the mere lapse of time vitiate the right asserted, which is beyond the purpose and effect of the statute; or it makes the demurrer operate as a defense, which is beyond the office of a demurrer. If it be said that a cause of action, on its face subject to the bar of the statute, is good if the statute is not asserted, because the statute is waived by not asserting it, then we have the anomaly of waiver validating that which is defective in substance.

It has been suggested, and within a jurisdiction where the bar of the statute is not a ground for special demurrer, that "the better practice undoubtedly is, to specifically state in the demurrer that the cause of action is barred."[1] This unguarded suggestion recognizes the unfitness of the general demurrer to assert the statutory bar, and illustrates the error of the doctrine under consideration. Such practice would introduce a ground of demurrer not provided in the statute; and such demurrer might, on motion, be stricken from the

Minn. 98. *Contra*, State v. Spencer, 79 Mo. 314; Hexter v. Clifford, 5 Col. 168; Brown v. Martin, 25 Cal. 82; Brennan v. Ford, 46 Cal. 7.

[1] Vore v. Woodford, 29 O. S. 245, 250; Seymour v. Ry. Co., 44 O. S. 12.

files of the court as frivolous.[1] Some confusion has doubtless arisen in this matter by regarding *lapse of time* as the thing that bars an action. It is not the lapse of time, but *the assertion thereof by the party otherwise liable*, that bars an action.[2]

296. Special Demurrer—Want of Capacity to Sue.—A ground of special demurrer to the complaint is, that the plaintiff has not legal capacity to sue. Such incapacity arises (1) where it affirmatively appears, in the body of the complaint, that the plaintiff is under some personal disability, such as infancy, lunacy, or coverture; and (2) where the plaintiff is an artificial person, or an association of persons, or sues in a representative character, and the right to sue in such relation does not affirmatively appear. The reason for this difference—that in one case demurrer will not lie unless incapacity affirmatively appear, and that in the other it will lie unless capacity affirmatively appear—is, that where the plaintiff is a natural person, and sues as an individual, his existence and his capacity to sue are presumed, and no statement thereof is needed; but where the plaintiff sues in some other capacity or relation, there is no such presumption, and qualifying statements are necessary.[3]

Where one sues in any representative capacity,—such as administrator, executor, guardian, trustee, receiver, or assignee in insolvency,—he should state the facts which legally operate to clothe him with such power. In an action by a corporation, its corporate existence must, subject to certain exceptions, be made to appear by proper allegation; and in an action by a partnership, the names of the partners should be stated in the title, and the fact of partnership should be alleged in the statement of the complaint. Where a partnership sues in its firm name, without disclosing the names of the partners, it must, by proper allegations, bring itself clearly within the statute authorizing suits in such name. If for want of qualifying facts, the legal capacity of the plaintiff to sue does not appear, a demurrer for this cause will lie. The

[1] Ante, 279.

[2] The nature of this statutory defense is more fully discussed in a subsequent chapter. Post, 336.

[3] Ante, 177.

requirements of the complaint in this regard have heretofore been fully stated, with illustrations and citations of authorities,[1] and need not be repeated here.

The objection that the plaintiff has not capacity to sue can be raised only by special demurrer, stating this specific ground; it can not arise on general demurrer.[2] If the incapacity exists in fact, but does not appear from the complaint, the objection must be taken by answer; and if not made by demurrer or by answer, the right to object is waived.[3] For example, if an infant sue, not by guardian or next friend, and the defendant does not object, by answer or demurrer, he can not otherwise object, and the infant may recover judgment in the action.[4] And the same is true where a married woman sues alone.[5] Where the complaint shows that prior to the bringing of the action the plaintiff had assigned the claim sued on, it is a defect that relates to the plaintiff's right of action, and not to his capacity to sue, and is not waived by failure to raise the objection by demurrer or answer.[6]

Demurrer on this ground may be in this form: Defendant demurs to the complaint for the reason that plaintiff has not legal capacity to sue.

297. Special Demurrer—Pendency of Another Action.—That there is another action pending between the same parties, for the same cause, is ground for special demurrer to the complaint, if it appear upon the face thereof; otherwise, the remedy is by answer. To make the pendency of a prior action a ground of objection, it must distinctly appear that the parties are the same, and that the same right of action is involved.[7] But if the former action is for relief not obtainable in the latter, demurrer will not lie;[8] the principle being,

[1] Ante, 180.

[2] People v. Crooks, 53 N. Y. 648; Ins. Co. v. Baldwin, 37 N. Y. 648; Vibert v. Frost, 3 Abb. Pr. 119.

[3] Palmer v. Davis, 28 N. Y. 242; Bulkley v. Iron Co., 77 Mo. 105; People v. Tel. Co., 31 Hun, 596; McNair v. Toler, 21 Minn. 175.

[4] Jones v. Steele, 36 Mo. 324.

[5] Hoffman v. Plummer, 14 O. S. 448.

[6] Buckingham v. Buckingham, 36 O. S. 68.

[7] Bourland v. Nixon, 27 Ark. 315; Dawson v. Vaughan, 42 Ind. 395; Sangster v. Butt, 17 Ind. 354.

[8] Haire v. Baker, 5 N. Y. 357. *Cf.* Hatch v. Spofford, 22 Conn. 485.

that if full relief can be had in the one action, another action would be vexatious, and may not be maintained. The pendency of a prior action in a court of the United States, or of another state, is not ground of objection; the creditor may pursue his debtor in different jurisdictions, but is entitled to only one satisfaction.[1]

If the pendency of another action is not taken advantage of by demurrer or by answer, the right to object is waived.[2] The objection can not be raised by motion.[3] Demurrer on this ground may be in the form following: The defendant demurs to the complaint for the reason that there is another action pending between the same parties, for the same cause.

298. Special Demurrer—Defect of Parties.—When it appears from the complaint that there is a defect of parties, plaintiff or defendant, the defendant may demur. Defect of parties means a deficiency, not an excess.[4] If there is such defect, not apparent from the complaint, it may be shown by answer; and the defect is waived, if not taken advantage of by demurrer or answer.[5] To warrant a demurrer for this cause, it must appear that the demurrant has an interest in having the omitted party joined, or that he is prejudiced by the non-joinder.[6] It is not requisite that it appear from the

[1] Burrows v. Miller, 5 How. Pr. 51; Cook v. Litchfield, 5 Sandf. 330; Sloan v. McDowell, 75 N. C. 29; DeArmond v. Bohn, 12 Ind. 607; Bowne v. Joy, 9 Johns. Rep. 221; Walsh v. Durkin, 12 Johns. Rep. 99.

[2] Bishop v. Bishop, 7 Robt. 194; Ripley, C. J., in Williams v. McGrade, 18 Minn. 88.

[3] Hornfager v. Hornfager, 6 How. Pr. 279.

[4] Peabody v. Ins. Co., 20 Barb. 339; Bennett v. Preston, 17 Ind. 291; Hill v. Marsh, 46 Ind. 218; Truesdell v. Rhodes, 26 Wis. 215; McKee v. Eaton, 26 Kan. 226; Lowry v. Jackson, 27 S. C. 318; Comp. Co. v. Ins. Co., 40 Wis. 373; Neil v. College, 31 O. S. 15.

[5] Lowry v. Harris, 12 Minn. 255; Rowe v. Baccigalluppi, 21 Cal. 633; Tenor v. Ry. Co., 50 Cal. 222; Conklin v. Barton, 43 Barb. 435; Albro v. Lawson, 17 Mon. B. 642; Bouton v. Orr, 51 Iowa, 473; Dreutzer v. Lawrence, 58 Wis. 594; Spencer v. Van Cott, 2 Utah, 337; Ins. Co. v. Gibson, 104 Ind. 336; Baldwin v. Canfield, 26 Minn. 43; Featherson v. Norris, 7 S. C. 472; Tarbox v. Gorman, 31 Minn. 62; Zabriskie v. Smith, 13 N. Y. 322.

[6] Newbould v. Warren, 14 Abb. Pr. 80; Littell v. Sayre, 7 Hun, 485; Stockwell v. Wager, 30 How. Pr. 271; Ry. Co. v. Schuyler, 17 N. Y. 592.

complaint that the omitted parties are living; it must not appear that they are dead.[1] As a general rule, if the controversy can be determined without prejudice to the rights of others, or by saving their rights, a demurrer for non-joinder will not lie; otherwise, the demurrer will be sustained.[2]

In an action for trespass upon lands held in common, if it appear from the complaint that some of the owners are not parties to the action, a demurrer for non-joinder will lie.[3] And in an action to recover damages for the conversion of a chattel, if the complaint show that the plaintiff is a joint owner with others, not parties, demurrer will lie.[4] Where one or more may sue or defend for themselves and others, on the ground of common interest, that the parties are very numerous, or that it is impracticable to bring them all before the court, a demurrer for non-joinder will not lie, if such reason for omission appear in the complaint.[5]

A general demurrer will not raise the objection of non-joinder; it should be specific, and should state whether the defect is of parties plaintiff or of parties defendant.[6] For example: The defendant demurs to the complaint, for the reason that there is a defect of parties plaintiff. Though in some cases it has been held that such demurrer should name or point out the omitted person or persons.[7]

299. Special Demurrer—Misjoinder of Causes.—It is ground for special demurrer to the complaint, that several causes of action are improperly joined. The codes of the several states provide for the joinder of causes of action; and the general rules to be gathered from these provisions have heretofore been stated.[8] When causes that are not joinable are united in one complaint, the fault is misjoinder, and is remediable by demurrer, if it appears from the complaint

[1] Porter v. Fletcher, 25 Minn. 493.

[2] Wallace v. Eaton, 5 How. Pr. 99; Snyder v. Voorhes, 7 Col. 296.

[3] Dupuy v. Strong, 37 N. Y. 372.

[4] Maxwell v. Pratt, 24 Hun, 448.

[5] Bronson v. Ins. Co., 85 N. C. 411; Hammond v. Hudson, etc., Co., 20 Barb. 378.

[6] Getty v. Hudson, etc., Co., 8 How. Pr. 177. *Cf.* Hulbert v. Young, 13 How. Pr. 413.

[7] Baker v. Hawkins, 29 Wis. 576; Skinner v. Stewart, 13 Abb. Pr. 442.

[8] Ante, 195 et seq.

itself; otherwise the remedy is by answer. Where several causes are commingled in one statement, the fault is duplicity, and is remediable by motion to separately state and number.[1] If causes not properly joinable are thus commingled, the defendant may, nevertheless, demur for the misjoinder;[2] though the better practice is, first to have the confused statement separated, so that the several causes may distinctly appear, and then to demur for the misjoinder. If a complaint contain several distinct statements, each purporting to be a separate cause of action, but together displaying only one right of action, demurrer for misjoinder will not lie.[3] To make misjoinder, the complaint must display a plurality of distinct rights to be enforced, or a plurality of distinct wrongs to be redressed, and these must be such as may not, under the provisions of the statute, be joined.[4] If, therefore, a complaint contains two counts, of kinds not joinable, one of which states a right of action, while the other does not, there is not a misjoinder.[5] And where several distinct grounds for the same recovery are stated, the complaint is not demurrable for misjoinder;[6] nor is a complaint stating a single right of recovery, based on one or the other of two grounds, separately stated;[7] though in such case, the complaint should state a sufficient reason for the use of alternative statements.[8] Where several kinds of relief are asked upon one cause of action, the prayer, though part of the complaint, is

[1] Ante, 285, 286.

[2] Wiles v. Suydam, 64 N. Y. 173; Wright v. Conner, 34 Iowa, 240; Zorn v. Zorn, 38 Hun, 67; Harris v. Eldridge, 5 Abb. N. C. 278.

[3] Hillman v. Hillman, 14 How. Pr. 456; Ward v. Ward, 5 Abb. Pr. N. S. 145; Polley v. Wilkisson, 5 Civ. Proc. 135; Everett v. Waymire, 30 O. S. 308; Tootle v. Wells, 39 Kan. 452; Bass v. Comstock, 38 N. Y. 21.

[4] Meyer v. Van Collem, 28 Barb. 230.

[5] Truesdell v. Rhodes, 26 Wis. 215; Bassett v. Warner, 23 Wis. 673, 689; Willard v. Reas, 26 Wis. 540, 544; Newman v. Smith, 77 Cal. 22; Bedford v. Barnes, 45 Hun, 253; Jenkins v. Thomason, 32 S. C. 254; S. M. Co. v. Wray, 28 S. C. 86; Hiles v. Johnson, 67 Wis. 517.

[6] Williams v. Lowe, 4 Neb. 382 Thompson v. Minford, 11 How. Pr. 273; Walters v. Ins. Co., 5 Hun, 343.

[7] Everett v. Conklin, 90 N. Y. 645; 24 Abb. N. C. 326, *in nota*. *Cf.* Kewaunee Co. v. Decker, 30 Wis. 624.

[8] Ante, 207.

not part of the cause of action, and there is no misjoinder. Matter of inducement, matter of aggravation, and facts to show special damages are collateral facts, and constitute neither duplicity nor misjoinder.

300. Special Demurrer—Misjoinder of Causes, Continued.—Demurrer for misjoinder is not available where the objection is that the court has not jurisdiction of one of several causes of action otherwise joinable. If, for example, the subject of one cause is lands located without the territorial jurisdiction of the court, and the subject of the other is within the jurisdiction, the remedy is a general demurrer to the one cause for want of jurisdiction, and not a special demurrer for misjoinder of causes.[1]

It is the general rule of practice, that when a misjoinder is found, upon demurrer or upon answer, the plaintiff will be required to elect upon which cause he will proceed; or he may divide the action, and file several complaints. Being a defect of form, misjoinder is waived if not objected to by demurrer or by answer.[2] The demurrer should be specific, and may be in this form: The defendant demurs to the complaint, for the reason that several causes of action are improperly joined therein.

301. Special Demurrer—Misjoinder of Parties.—By misjoinder of parties is meant an excess of parties. In many states this is not a ground for demurrer; in some, a misjoinder of parties plaintiff, and in a few, misjoinder of parties plaintiff or defendant, is ground for special demurrer, while in some cases it has been held that, in legal actions, if several plaintiffs assert a joint right, and the allegations of fact show a several right in one, or a joint right in part only, the complaint is subject to general demurrer for want of sufficient facts.[3] Where misjoinder of parties is not cause for demurrer, it has been held that a demurrer for want of sufficient facts as to supernum-

[1] Cook v. Chase, 3 Duer, 643; Dodge v. Colby, 108 N. Y. 445. For further illustration of misjoinder, see ante, 199 et seq.

[2] Berry v. Carter, 19 Kan. 135; McCarthy v. Garroghty, 10 O. S. 438; Cloon v. Ins. Co., 1 Handy, 32; Marius v. Bicknell, 10 Cal. 217; James v. Wilder, 25 Minn. 305.

[3] Ante, 293.

erary parties is proper;[1] and if the misjoinder is not apparent from the complaint, it may be shown in the answer.[2] In at least one state, misjoinder is regarded as mere matter of surplusage;[3] and the weight of authority is to the effect that failure to object by demurrer or answer is a waiver.[4]

302. Facts Admitted on Demurrer.—It is commonly said that a demurrer admits all facts that are well pleaded.[5] This is true in only a qualified sense. A demurrer questions only the legal sufficiency of the pleading demurred to; in determining the legal effect of a pleading, only such matters therein as are legally operative, and therefore properly pleaded, can be considered; and these matters are, for the sole purpose of determining their legal sufficiency, said to be admitted by the demurrer. Any matters pleaded that have no legal operation, and are hence not proper to be pleaded, are neither admitted nor denied; they are simply not involved in the consideration of the demurrer. In this sense, a demurrer admits the facts proper to be pleaded, or rather it assumes them to be true, for the purpose only of determining the legal question raised by the demurrer. There is no absolute admission, such as may be used in evidence; the admission is for the purpose of the demurrer, and not for the purpose of the action. In the consideration of a general demurrer, all relevant and material facts stated in the pleading demurred to are to be taken and considered as they are stated, even though they be informally alleged; but immaterial facts, legal conclusions, facts contrary to the court's judicial knowledge, and facts which the party pleading is estopped to assert, are not to be considered.

303. Demurrer Searches the Record.—In code pleading, as at common law,[6] a demurrer to any pleading after the first, involves the sufficiency, in matter of substance, of the prior pleadings; and the court, upon consideration of such

[1] Palmer v. Davis, 28 N. Y. 242; Rumsey v. Lake, 55 How. Pr. 340; Richtmeyer v. Richtmeyer, 50 Barb. 55.

[2] Canal Co. v. Snow, 49 Cal. 155.

[3] Burns v. Ashworth, 72 N. C. 496; Green v. Green, 69 N. C. 294.

[4] Gillam v. Sigman, 29 Cal. 637; Long v. DeBevois, 31 Ark. 480.

[5] Ante, 83.

[6] Ante, 85.

demurrer, will examine the whole record, and will give judgment against him who filed the first pleading that is insufficient in substance.[1] Formal defects in prior pleadings are not reached by demurrer to a subsequent pleading, because these are waived by pleading to the merits;[2] and it is only a general demurrer that searches the record, for a special demurrer is applicable only to the particular defect specified.[3]

Under this rule, a general demurrer to an answer reaches a complaint that shows a want of jurisdiction of the subject-matter, or of the subject of the action, or that does not state facts constituting a cause of action;[4] and a demurrer to a reply will reach an answer that is insufficient in substance.[5] And a demurrer to a reply to a cross-complaint, or a counter-claim, reaches the pleading so replied to.[6] In all such cases, the demurrer is in effect carried back, and sustained as a demurrer to such former defective pleading.[7] But a demurrer to an answer in abatement will not reach back to the complaint,[8] for such answers are not addressed to the complaint.

It has been held that a demurrer to an answer reaches a defect of substance in the complaint, notwithstanding a previous demurrer to the complaint had been overruled.[9] This is upon the ground that the filing of an answer to the

[1] Young v. Duhme & Co., 4 Met. (Ky.) 239; Martin v. McDonald, 14 Mon. B. 544; Bank v. Lockwood, 16 Ind. 306; Brown v. Tucker, 7 Colo. 30; Trott v. Sarchett, 10 O. S. 241; People v. Booth, 32 N. Y. 397; Hunt v. Bridge Co., 11 Kan. 412, 433; Scott v. State, 89 Ind. 368.

[2] Aurora City v. West, 7 Wall. 82.

[3] Stratton v. Allen, 7 Minn. 502: Hobbs v. Ry. Co., 12 Heisk. 526; Bank v. Hendrickson, 40 N. J. L. 52; McEwen v. Hussey, 23 Ind. 395; Allen v. Crofoot, 7 Cow. 46; Lipe v. Becker, 1 Den. 568; Tubbs v. Caswell, 8 Wend. 129; Brehen v. O'Donnell, 34 N. J. L. 408; People v. Booth, 32 N. Y. 397.

[4] Stratton v. Allen, 7 Minn. 502; Lockwood v. Bigelow, 11 Minn. 113; Trott v. Sarchett, 10 O. S. 241; Ferson v. Drew, 19 Wis. 225; Lawton v. Howe, 14 Wis. 241.

[5] Menifee v. Clark, 35 Ind. 304; Brook v. Irvine, 41 Ind. 430.

[6] Hillier v. Stewart, 26 O. S. 652.

[7] Wilhite v. Hamrick, 92 Ind. 594; WOOD, J., in Headington v. Neff, 7 Ohio, 229; OKEY, J., in Ry. Co. v. Mowatt, 35 O. S. 284.

[8] Price v. Ry. Co., 18 Ind. 137; Shaw v. Dutcher, 19 Wend. 216.

[9] Johnson v. Ry. Co., 16 Fla. 623; Cummins v Gray, 4 Stew. & Port. 207.

merits in such state of case is a waiver of the demurrer, which, in theory, is withdrawn to make place for the answer. Formerly, the demurrer was actually withdrawn, to avoid the entry of a judgment *quod recuperet* thereon.

304. Pleading Over Without Demurrer.—All formal defects in pleadings, whether such as may be corrected on motion, or such as may be corrected on demurrer, are waived by pleading to the merits;[1] but where a pleading is defective in substance, and therefore subject to a general demurrer, the defect is not waived by pleading over, or by going to trial without demurring, unless the defect be cured by pleading subsequent to the defect.[2] A demurrer admits the truth of all facts stated that are proper to be pleaded; but, *e converso*, it is not the effect of a pleading of fact to admit the sufficiency in law of facts adversely alleged in a prior pleading. The reason is, that the law is not variable; it is not to be pleaded, and it is not to be affected by allegation. If a pleading does not state a cause of action or a defense, there is no right or defense to be maintained by the proof; and proof without allegation does not avail. It follows, therefore, that where a pleading is insufficient in substance, the opposite party may, without demurring, generally avail himself of such insufficiency. He may do this in various ways, such as by objecting to the introduction of evidence at the trial,[3] by motion in arrest of judgment, by motion for judgment *non obstante veredicto*, or by writ of error. For example, suppose a plaintiff alleges that defendant promised to make him a gift of certain property, but on demand refused to deliver it, and asks judgment for its value; and suppose the defendant, instead of demurring, answers a denial of the alleged promise. The defendant may, upon trial, object to the introduction of evidence, and may move for instructions to the jury; he may, after verdict against him, move for a new trial, and in arrest of judgment;

[1] Grove v. Kansas, 75 Mo. 672; Sappington v. Ry. Co., 14 Mo. App. 86; School Dist. v. McIntire, 14 Neb. 46, 50.

[2] People v. Ry. Co., 42 N. Y. 283; Gray v. Ryle, 18 Jones & S. 198; 5 Civ. Proc. 387.

[3] Brown v. Galena, M. & S. Co., 32 Kan. 528.

and he may proceed in error. It must be borne in mind, however, that faults in pleading are sometimes cured by the subsequent pleadings, and they are sometimes aided by verdict.[1]

305. Pleading Over Without Demurrer, Continued.—Whether a party shall demur or plead to a defective pleading is sometimes a question of expediency. If the defect be one of form, it may be cured by amendment, if pointed out by motion or demurrer; and very often it may as well be waived by pleading over, unless some advantage is to be gained by the delay sometimes incident to amendment. If the defect be one of substance, it is well to consider whether it is a defect that is inherent in the case, or one that can be cured by amendment. If it be a defect that may be removed by amendment, it may sometimes be expedient to plead over, and to raise the legal objection at a later stage of the case, rather than to demur, and thus take the hazard of enlightening the adversary, and enabling him to fortify his case by amendment. On the other hand, the proverbial indulgence of courts in the way of amendments, and the fact that costs are allowed on the sustaining of a demurrer, and may or may not be allowed if the objection is first made at a later stage, are matters not to be overlooked.

It must be borne in mind in this connection that it is only where the pleading is wholly insufficient that objection to it may be asserted after pleading over. Parties are required to assert all objections as to form before they proceed to trial; and under the new procedure, contrary to the common-law rule, every reasonable intendment is to be made in favor of the pleading.

306. Pleading After Demurrer Overruled.—If a party file, at the same time, both a demurrer and a pleading of fact, addressed to the same cause or defense, he should be required to elect between the two incongruous issues he thereby presents;[2] and where a party has filed a demurrer to a pleading,

[1] Steph. Pl. 225.

[2] Canal Co. v. Webb, 9 Ohio, 136; Stocking v. Burnett, 10 Ohio, 137; Davis v. Hines, 6 O. S. 473; Spellman v. Weider, 5 How. Pr. 5; Fisher v. Scholte, 30 Iowa, 221. In this case it was held that filing an answer with a demurrer is a

and thereafter pleads thereto before his demurrer has been ruled upon, he waives the defect demurred to, if it is one that may be waived.[1]

When such demurrer has been erroneously overruled,and the demurrant wishes to take advantage of the error, he must rest upon his demurrer, and allow final judgment to be entered against him; for if he pleads to the insufficient pleading, he thereby waives all objection thereto, except for want of jurisdiction of the subject or of the subject-matter, and for want of sufficient facts.[2]

307. Pleading After Demurrer Overruled—Rationale of the Rule.—The rule stated in the last preceding section is upon the theory that the subsequent pleading of fact in response to the pleading demurred to is, by implication, an abandonment and withdrawal of the demurrer, which, in contemplation of law, ceases thereafter to be a part of the record. By the strict rule of the early common law, if defendant's demurrer to the declaration was overruled, the case stood with the facts of the declaration established, and judgment *quod recuperet* was entered thereon.[3] When, in later time, the courts permitted the defendant, on leave obtained, to plead to the declaration after his demurrer thereto had been overruled, he was required to withdraw his demurrer, and

waiver of the demurrer and of any ruling thereon; following the rule in the English Chancery practice.

[1] Gordon v. Culbertson, 51 Ind. 334; Morrison v. Fishell, 64 Ind. 117; Moss v. Printing Co., 64 Ind. 125; Calvin v. State, 12 O. S. 60; Vose v. Woodford, 29 O. S. 245; Pierce v. Minturn, 1 Cal. 470.

[2] Pottinger v. Garrison, 3 Neb. 221; Mitchell v. McCabe, 10 Ohio, 405; Richards v. Fanning, 5 Oreg. 356; Westphal v. Henney, 49 Iowa, 542; Smith v. Warren Co., 49 Iowa, 336; Hagely v. Hagely, 68 Cal. 348; Young v. Martin, 8 Wall. 354; Walker v. Kynett, 32 Iowa, 524; Finley v. Brown, 22 Iowa, 538; United States v. Boyd, 5 How. 29; Dupuis v. Thompson, 16 Fla. 69; Johnson v. Ry. Co. 16 Fla. 623; Ward v. Moorey, 1 Wash. Ter. 104; People v. Ry. Co., 42 N. Y. 283; Pittman v. Myrick, 16 Fla. 692; Farrar v. Triplett, 7 Neb. 237; Freas v. Englebrecht, 3 Col. 377; Stanbury v. Kerr, 6 Col. 28; Harral v. Gray, 10 Neb. 186; O'Donohue v. Hendrix, 13 Neb. 255; Fuggle v. Hobbs, 42 Mo. 537; Board Ed. v. Hackmann, 48 Mo. 243; Meyer v. Binkleman, 5 Col. 262; Tennant v. Pfister, 45 Cal. 270; Pickering v. Tel. Co., 47 Mo. 457; BIRCHARD, J., in Watson v. Brown, 14 Ohio, 473. *Cf.* Kitchen v. Loudenback, 48 O. S. 177.

[3] Ante, 86.

the case was treated thereafter as if no demurrer had been filed. Judgment on the demurrer was thereby avoided, and the demurrer did not become a part of the record. In modern practice, while the record shows the demurrer and the overruling thereof, it is, in legal contemplation, and practically, though not formally, abandoned and withdrawn; and a defendant who pleads to the merits after his demurrer to the complaint has been overruled can not, with the exceptions aforesaid, again avail himself of the same ground of objection to the complaint, by objection to evidence on the trial, by motion in arrest of judgment, or by assignment of error. In other words, he must elect to stand upon his demurrer and decline to plead further, or to abandon the ground of demurrer and rely upon his issue in fact.

308. Amending After Demurrer Sustained.—It has been held, generally, that if a party amend his pleading, after a demurrer thereto has been erroneously sustained, he waives the error.[1] This certainly is so, if by the amendment he abandons the original claim or defense.[2] But it has well been suggested, that if a party is thus driven to the necessity of amending an already sufficient pleading, and inserting therein needless allegations; and if his proof should sustain the necessary original averments, but should fail as to the needless averments brought in by the amendment; it would hardly be held that he had waived his objection to the erroneous ruling of the court upon the demurrer.[3]

[1] Hurd v. Smith, 5 Col. 233; Ayres v. Campbell, 3 Iowa, 582. Perkins v. Davis, 2 Mont. 474; *Cf.* Evans v. Gee, 11 Pet. 80. Pottenger v. Garrison, 3 Neb. 222;

[2] Bank v. Street, 16 O. S. 1.

[3] Bliss Pl. 417; Max. Pl. 380.

Sec. 99, 100, 101, 102, 103, 106.

CHAPTER XXI.

AMENDMENTS.

309. Origin and Nature of Amendments.—An amendment is the correction of some error or defect in the pleadings, process, or proceedings in a cause, made for the furtherance of justice. When the parties made their allegations *ore tenus*, in open court, they were allowed, by the judges, during this oral altercation, to correct and adjust their statements, and were not held strictly to their statements as originally made.[1] This indulgence has been continued, with some modifications and restrictions, to the present day. After the introduction of written pleadings, and when there was a tendency in the common-law courts to determine causes upon matters of mere form, amendments were provided for by a series of enactments, called *statutes of amendment and jeofails*, whereby any slip or error in matters of form might be amended by the pleader, or overlooked by the court.

The general doctrine of the common law is, that, independently of statute, the power is inherent in the court to allow amendments at any time before judgment, and even after judgment and during the term at which judgment is entered; for until the term is ended, the proceedings are in *fieri*, and subject to the control of the court. Amendments, however, being in furtherance of justice, are always to be limited by due consideration of the rights of the opposite party; and where he would be prejudiced, or exposed to unreasonable delay, by the amendment, it should not be allowed.

310. Nature of Amendments, Continued.—An amendment that is a substitute for the original pleading is an abandonment of the original, and only the amended pleading can

[1] Steph. Pl. 167.

thereafter be considered by the court;[1] though any admissions in the abandoned pleading may be used as evidence against the party.[2] But an amendment *to* a pleading, one that is in terms only an addition thereto, does not dispense with the original pleading, but is to be taken and considered in connection therewith.

The amendment of a complaint, if it amounts to a restatement of the original cause of action, relates back to the commencement of the action; so that an amended complaint is regarded as stating the right of action as it existed when the suit was commenced.[3] It has been held that by amendment of the complaint, a right of action not included in the original may be saved from the bar of the statute of limitations.[4] But upon principle, as well as by the weight of authority, when a complaint is amended by inserting a new cause of action, the action is not commenced as to such new cause until the amended complaint is filed;[5] nor is there *lis pendens* as to such new cause, before the amendment.

An exhibit attached to an original pleading must be attached to an amendment that supersedes the original.[6]

311. Amendments Under the Reformed Procedure.—The several codes make ample provision for the amendment of pleadings, to the end that actions may not be defeated on grounds that do not affect the merits of the controversy.[7] These provisions vary in some respects, but their substantial features are almost identical in the several codes. Amendments under the new procedure may be divided into two general classes—(1) those made of right, and (2) those

[1] Washer v. Bullitt Co., 110 U. S. 558, 561; State v. Simpkins, 77 Iowa, 676; Sands v. Calkins, 30 How. Pr. 1; Dunlap v. Robinson, 12 O. S. 530; Barber v. Reynolds, 33 Cal. 497.

[2] Iron Co. v. Harper, 41 O. S. 100; ROTHROCK, J., in State v. Simpkins, 77 Iowa, 676.

[3] Worley v. Moore, 97 Ind. 15; Ryan v. Ry. Co., 21 Kan. 365; Brown v. Min. Co., 32 Kan. 528; Blake v. Minkner, 136 Ind. 418.

[4] Ward v. Kalbfleisch, 21 How. Pr. 283. *Contra*, Blake v. Minkner, 136 Ind. 418.

[5] Anderson v. Mayers, 50 Cal. 525; Jeffers v. Cook, 58 Cal. 147; Sheldon v. Adams, 18 Abb. Pr. 405; Blake v. Minkner, 136 Ind. 418.

[6] Holdridge v. Sweet, 23 Ind. 118; McEwen v. Hussey, 23 Ind. 395.

[7] Gould v. Stafford, 101 Cal. 83.

made only upon leave of the court. The plaintiff may, without leave, amend his complaint at any time before answer is filed; but must serve notice thereof on the defendant, who shall have the same time to answer or demur thereto as to the original. Within a specified time, generally ten days, after demurrer is filed, the defective pleading may be amended without leave, on payment of costs since the filing thereof, and notice to the demurrant. The right to amend without leave can, it seems, be exercised but once as to the same pleading.[1]

When a demurrer is overruled, the demurrant may answer or reply, if the court is satisfied that he has a meritorious claim or defense, and that he did not demur for delay; and when a demurrer is sustained, the adverse party may amend, if the defect can be remedied by amendment. But the right to plead or to amend after a ruling upon the demurrer, being conditioned as aforesaid, can be exercised only upon leave of the court, based upon a finding, express or implied, that the condition exists. If, therefore, a complaint be adjudged insufficient on demurrer, and no leave to amend be asked, final judgment for costs may be entered against the plaintiff.[2]

312. Amendments Under the Codes, Continued.—The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case; or, when the amendment will not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved; and when an action or proceeding fails to conform to the provisions of the particular code, the court may generally permit the same to be made conformable thereto by amendment. And the court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings that does not affect the substantial rights of either party.

[1] Sands v. Calkins, 30 How. Pr. 1; White v. Mayor, 14 How. Pr. 495.

[2] Devoss v. Gray, 22 O. S. 159.

When there is a variance between the allegations of a party and his proofs upon the trial, if the disagreement is not material, and so has not misled the adverse party, the court may order the facts to be found according to the evidence, and may direct an amendment of the pleadings without costs; if it be made to appear to the court that the disagreement has misled the adverse party, to his prejudice, the variance is to be deemed material, and the court may order an amendment, and impose such terms as are just; but when the disagreement amounts to a failure of proof, the variance is fatal, and is not remediable by amendment.

The allowing and refusing of amendments, excepting those that may be made without leave, rests in the sound discretion of the court; and the exercise of this discretion will not be reviewed on error, unless there has been manifest abuse of the discretion, appearing from the record.[1] If a court has not jurisdiction before an amendment, it has none to allow the amendment.[2]

When either party amends his pleading, the adverse party has a right, *ipso facto*, to amend his pleading in response thereto[3] and when the court is satisfied, by affidavit or otherwise, that in consequence of an amendment the adverse party can not be ready for trial at the time fixed, the trial may be postponed, or the cause continued to another term.

313. What May be Done by Amendment.—Where a pleading is to be amended by striking out or by inserting an allegation, it should be done by filing a new pleading, or a statement of the amendment, designating the matter to be inserted or to be taken out, and not by mutilating the paper

[1] Clark v. Clark, 20 O. S. 128; Brock v. Bateman, 25 O. S. 609; Hedges v. Roach, 16 Neb. 673; White v. Culver, 10 Minn. 192; Dyer v. McPhee, 6 Colo. 174; Butler v. Paine, 8 Minn. 324; Ry. Co. v. Finney, 10 Wis. 388; Gillett v. Robins, 12 Wis. 319; Gilchrist v. Kitchen, 86 N. C. 20; Henry v. Cannon, 86 N. C. 24; Trumbo v. Finley, 18 S. C. 305; Harney v. Corcoran, 60 Cal. 314; Bowles v. Doble, 11 Oreg. 474; Gould v. Rumsey, 21 How. Pr. 97; Dennis v. Snell, 54 Barb. 411; Stanton v. Kenrick, 135 Ind. 382.

[2] Denton v. Danbury, 48 Conn. 368.

[3] Gill v. Young, 88 N. C. 58.

on file;[1] though where there is plainly a mere orthographical or clerical error, such as the use of a wrong date, or a wrong name or word, it is the prevailing practice either to disregard such mere oversight, or with the consent of the court, to correct it by erasure and interlineation.[2]

The weight of authority is to the effect that a party may not, by amendment of his pleading before trial, change the nature and scope of his action or defense; for this would not be an amendment of the original cause or defense, but the substitution of another therefor.[3] In an action to recover damages for flowing plaintiff's lands, he may not, by amendment of his complaint, charge the defendant, under the statute, for appropriating the land.[4] But in such action, an amendment claiming damages for injury to the crops on the land is permissible,[5] because it only enlarges the scope of recovery upon the same act declared on in the original complaint, and does not set up a new cause of action. And in an action for legal relief, an amendment asking for equitable relief also, both demands being based upon the facts originally stated, does not change the original ground of the action, and is allowable.[6] On appeal, the appellate court may not allow another cause of action, not within the jurisdiction of the lower court, to be substituted by amendment, unless by consent of all parties. An appeal confers on the appellate court jurisdiction of only the right of action asserted in the lower court.[7]

[1] Hill v. Supervisor, 10 O. S. 621. *Cf.* Schneider v. Hosier, 21 O. S. 98.

[2] Fitzpatrick v. Gebhart, 7 Kan. 35.

[3] Supervisors v. Decker, 34 Wis. 378; Rutledge v. Vanmeter, 8 Bush. 351; Ramirez v. Murray, 5 Cal. 222; Scovill v. Glassner, 79 Mo. 449; McKeighan v. Hopkins, 19 Neb. 33; Sweet v. Mitchell, 15 Wis. 641; Stevens v. Brooks, 23 Wis. 196; Givens v. Wheeler, 5 Colo. 598; Givens v. Wheeler, 6 Colo. 149. *Contra*, Robinson v. Willoughby, 67 N. C. 84; Mason v. Whitely, 4 Duer, 611; Deyo v. Morss, 144 N. Y. 216. *Cf.* Reeder v. Sayre, 70 N. Y. 180; Brown v. Leigh, 49 N. Y. 78.

[4] Newton v. Allis, 12 Wis. 378.

[5] Ry. Co. v. Pape, 73 Tex. 501.

[6] Getty v. Ry. Co., 6 How. Pr. 269.

[7] VanDyke v. Rule, 49 O. S. 530, 535. *Cf.* Deyo v. Morss, 144 N. Y. 216.

314. What Done by Amendment, Continued.—A plaintiff may not, by amendment before trial, change his action from one in tort to one in contract, or *vice versa*.[1] Perhaps the weight of authority is in favor of the right of a plaintiff, on leave obtained, to change a purely legal cause into an equitable cause.[2] Such leave has generally been given upon the trial, to conform the pleadings to the evidence; but never, except when justice and fairness require it. A plaintiff may, of right, amend his complaint by striking out a cause of action;[3] and a new cause of action or defense, not inconsistent with the original, may be added by amendment.[4] But facts occurring subsequent to the commencement of the action can not be set up by amendment; these can be brought into the record only by supplemental pleading.[5] Making new parties, *in invitum*, should be by amendment. The prayer for relief may be amended, for the prayer is not a part of the cause of action, and a change of the former does not affect the latter.[6] In an action for breach of promise made when the defendant was an infant, the plaintiff may amend by alleging ratification after he attained his majority.[7]

315. What Done by Amendment, Continued.—Courts, in the exercise of their discretion, will not, as a rule, give leave to assert, by amendment, what are called unconscionable defenses, such as the statute of limitations, or usury.[8]

[1] Supervisors v. Decker, 34 Wis. 378; Lumpkin v. Collier, 69 Mo. 170; Ramirez v. Murray, 5 Cal. 222; Hackett v. Bank, 57 Cal. 335; Lane v. Beam, 19 Barb. 51.

[2] Beck v. Allison, 56 N. Y. 366; Robinson v. Willoughby, 67 N. C. 84; Newell v. Newell, 14 Kan. 202; Barnes v. Ins. Co., 75 Iowa, 11; Esch v. Ins. Co., 78 Iowa, 334. *Cf.* Carmichael v. Argard, 52 Wis. 607; Kavanaugh v. O'Neill, 53 Wis. 101; Gray v. Brown, 15 How. Pr. 555.

[3] Watson v. Bushmore, 15 Abb. Pr. 51.

[4] McQueen v. Babcock, 22 How. Pr. 229; Williams v. Randon, 10 Tex. 74; McLane v. Paschal, 62 Tex. 102; Tiernan v. Woodruff, 5 McLean, 135. *Cf.* Brown v. Leigh, 49 N. Y. 78.

[5] Van Maren v. Johnson, 15 Cal. 308; McCaslan v. Latimer, 17 S. C. 123; Lampson v. McQueen, 15 How. Pr. 345.

[6] Getty v. Ry. Co., 6 How. Pr. 269; Reed v. Mayor, 97 N. Y. 620.

[7] Schreckengast v. Ealy, 16 Neb. 510.

[8] Sheets v. Baldwin's Admr. 12 Ohio, 120; Newsom's Adm. v. Ran, 18 Ohio, 240; Beach v. Bank, 3 Wend. 574; Jackson v. Varick, 2 Wend. 294; Plumer v. Clarke, 59 Wis. 646; Sagory v. Ry. Co., 21

Though there is a tendency, in some of the courts, to recede from this attitude toward such defenses, especially where there has been accidental default,[1] or where the defense is to be used as an instrument of justice, and not of strategy.

At the trial, pleadings may, on leave obtained, be amended to conform to the evidence, where there is a mere variance, and not a failure of proof. Where an action is on a contract, or on a certificate of indebtedness, an amendment alleging that the debt is due for services has been allowed at the trial,[2] being a change in the form of stating the right, rather than a change of the claim. So an amendment simply increasing the amount claimed ;[3] or alleging special damages ;[4] or asking damages instead of specific performance,[5] has in like manner been allowed at the trial. But such amendment should not be allowed to change a cause of action from one for equitable relief, to one in ejectment ; nor from a charge of fraud, to a demand on contract ;[6] nor from an action of trover and conversion, to one for fraud and deceit ;[7] nor from a claim of ownership, to an alleged lien,[8] for the claim of title is a waiver of any lien ; nor from an action on the case, to one on an express contract ;[9] and where a complaint for conversion contains an allegation waiving the tort, an amendment striking out the waiver should not be allowed on the trial.[10]

316. Amendments After Trial.—After trial, amendments

How. Pr. 455 ; Coit v. Skinner, 7 Cow. 401 ; Wolcott v. Farlan, 6 Hill, 227.

[1] Barnett v. Meyer, 10 Hun, 109 ; Gilchrist v. Gilchrist, 44 How. Pr. 317 ; Bank v. Bassett, 3 Abb. Pr. N. S. 359. *Cf.* Gourlay v. Hutton, 10 Wend. 595.

[2] Turnow v. Hochstadter, 7 Hun, 80 ; Steamship Co. v. Otis, 27 Hun, 452 ; Woolsey v. Trustees, 4 Abb. Ct. App. 639.

[3] Dakin v. Ins. Co., 13 Hun, 122 ; Knapp v. Roche, 62 N. Y. 614 ; Raleigh v. Cook, 60 Tex. 438 ; Hamilton v. Ry. Co., 13 Abb. Pr. N. S. 318.

[4] Miller v. Garling, 12 How. Pr. 203 ; Clemons v. Davis, 6 Thomp. & C. 523 ; Baldwin v. Nav. Co., 4 Daly, 314.

[5] Beck v. Allison, 56 N. Y. 366.

[6] People v. Dennison, 84 N. Y. 272.

[7] Parker v. Rodes, 79 Mo. 88.

[8] Hudson v. Swan, 83 N. Y. 552.

[9] Storrs v. Flint, 14 Jones & S. 498.

[10] Cushman v. Jewell, 7 Hun, 525.

are sparingly and cautiously allowed; and never, where the amendment will bring upon the record matters not involved in the trial. In an action on a void contract, the complaint may be so amended, after trial, as to claim on a *quantum meruit*;[1] and a vague and indefinite answer may be so amended as to conform to the proof;[2] and even after verdict and judgment, a defective prayer may be amended.[3] But a complaint can not be amended after trial by increasing the amount of damages claimed, except upon the granting of a new trial;[4] nor can it be amended in any way that will change the nature of the action.[5]

317. Supplemental Pleadings.—The pleadings, original and amended, are confined to facts existing at the commencement of the action. New facts relevant to the action, and material to the right or to the defense, may arise after the suit is begun; and in order that the parties may have the benefit of such new facts, and that the court may render its judgment upon the facts as they exist at the time of rendition, it is provided that parties may be allowed, on such terms as to notice and costs as the court may prescribe, to file a supplemental complaint, answer, or reply alleging material facts which occur subsequent to the commencement of the action. This is the only way to bring upon the record facts which occur pending the suit. Such facts can not, of right, be stated in an original answer or reply, and they can not be incorporated into an original pleading by amendment, because amendments, like original pleadings, can embrace only facts existing at the time the action is begun. A supplemental pleading is not, like pleas *puis darrein continuance*, a substitute for the original pleading; it is merely an *addendum*, and must therefore be consistent with, and in aid of, the original pleading;[6] though in some instances a supplemental

[1] Thomas v. Hatch, 53 Wis. 296.
[2] Trippe v. DuVal, 33 Ark. 811.
[3] Draper v. Moore, 2 Cin. Rep. 167; JOHNSON, J., in Culver v. Rogers, 33 O. S. 537.
[4] Pharis v. Gere, 31 Hun, 443; Decker v. Parsons, 11 Hun, 295; Bowman v. Earle, 3 Duer, 691.
[5] Andrews v. Bond, 16 Barb. 633; Nosser v. Corwin, 36 How. Pr. 540; Walter v. Bennett, 16 N. Y. 250.
[6] Tiffany v. Bowerman, 2 Hun,

answer may be solely relied upon, and it may sometimes be proper to file an *amended and supplemental* pleading.

A new and independent right of action can not be asserted by a supplemental complaint; [1] and if the original complaint does not state a right of action, its defects can not be remedied by a supplemental pleading,[2] for supplemental pleadings do not relate back, like amendments, to the commencement of the action. But supplemental facts, if they further develop the original right of action, or extend or vary the relief, are available by way of supplemental complaint, and in aid of the original complaint, even though they are such facts as would, by themselves, constitute a right of action.[3]

318. Supplemental Pleadings, Continued.—In replevin for sheep, a supplemental complaint may ask damages for increase in lambs, and for wool shorn,[4] these being in the nature of special damages; a supplemental complaint may allege the further circulation of the libel complained of; [5] and if, pending suit, a third person assume the liability of the defendant in respect to the matter in litigation, he may be made a party by supplemental complaint. [6]

In an action for divorce, a supplemental answer may allege the plaintiff's adultery pending suit; [7] and settlement after action brought may be so pleaded; [8] and so may payment, or

643; Slauson v. Englehart, 34 Barb. 198; Buchanan v. Comstock, 57 Barb. 582; SUTLIFF, J., in Gibbon v. Dougherty, 10 O. S. 365. *Cf.* Eckert v. Binkley, 134 Ind. 614.

[1] Tiffany v. Bowerman, 2 Hun, 643; Moon v. Johnson, 14 S. C. 434.

[2] Lowry v. Harris, 12 Minn. 255; Smith v. Smith, 22 Kan. 699; Muller v. Earle, 5 Jones & S. 388; Bostwick v. Meuck, 4 Daly, 68. *Cf.* Ervin v. Ry. Co., 28 Hun, 269.

[3] Latham v. Richards, 15 Hun, 129; Haddow v. Lundy, 59 N. Y. 320. In some actions for divorce, the plaintiff has been allowed to rely entirely upon grounds arising after the commencement of the action, and stated in a supplemental complaint. 2 Bish. on Mar. and Divorce, 319.

[4] Buckley v. Buckley, 12 Nev. 423.

[5] Corbin v. Knapp, 5 Hun, 197.

[6] Prouty v. Ry. Co., 85 N. Y. 272. *Cf.* Ervin v. Ry. Co, 28 Hun, 269.

[7] Strong v. Strong, 3 Robt. 669, 719; Burdell v. Burdell, 3 How. Pr. 216. Public policy forbids that the marriage relation shall be judicially dissolved, if, at the time of trial, there is in fact any valid reason for withholding such decree.

[8] Christy v. Perkins, 6 Daly, 237.

release, pending suit,[1] or any agreement affecting the action.[2] If the defendant acquire title to property in dispute, pending the action, he must, to avail himself of it, plead it by supplemental answer.[3] Additional installments of an obligation, falling due pending the action, can not be recovered therein without amendment or supplemental pleading.[4] But in an action to enforce a lien securing a series of notes, if the original complaint shows that the lien secures the notes yet to mature, and that the action is for a remedy on all notes maturing before final decree, neither amended nor supplemental pleading is requisite.[5]

The right to object to a supplemental complaint on the ground that it seeks to maintain the action upon facts occurring subsequent to the filing of the original complaint is waived if the defendant, without objecting, pleads to the merits and goes to trial.[6]

319. Supplemental Pleadings, Continued.—In a very few of the codes, supplemental pleadings are allowed to include newly discovered facts; that is, facts that existed at the commencement of the action, but were not known to the party at the time of filing his original pleading. This is a violation of the true theory of supplemental pleading. Newly discovered, but pre-existent, facts go to the party's original right, and should be incorporated into the original pleading by amendment thereof.

Supplemental pleadings, like most amendments, can be filed only on leave of the court; but since, without leave, there is neither opportunity nor right to plead supplemental facts, the leave to plead such facts, when they are both relevant and material, is a matter of right, and should always be given, unless the right has been forfeited by laches, or there

[1] Matthews v. Mfg. Co., 3 Robt. 711; Mitchell v. Allen, 25 Hun, 543; Jessup v. King, 4 Cal. 331.

[2] Hasbrouck v. Shuster, 4 Barb. 285.

[3] Kahn v. Min. Co., 2 Utah, 174; Moss v. Shear, 30 Cal. 467; McMinn v. O'Connor, 27 Cal. 246.

[4] Bank v. East Chester, 44 Hun, 537. *Cf.* Hamlin v. Race, 78 Ill. 422.

[5] Whiting v. Eichelberger, 16 Iowa, 422. *Cf.* Holly v. Graff, 29, Hun, 443.

[6] Pinch v. Anthony, 10 Allen, 470.

is other good reason to withhold it. It follows, that the discretion of the court in allowing or refusing supplemental pleadings is a sound judicial discretion, and not an arbitrary *sic volo;* and it is error to refuse the leave, unless the refusal rests upon reasonable and just grounds.[1]

If new facts, proper for a supplemental pleading, are asserted in an original pleading, or in an amendment thereof, and the adversary party responds thereto, or goes to trial, without objecting, the right to object is waived.[2] And if a paper styled "Supplemental Complaint" contain allegations proper only in an amended complaint, it is within the discretion of the court to treat it as an amendment.[3] It is not the name that gives force to a pleading, but its averments; in fact, it is a general rule, that the character of a pleading is to be determined from its averments, and not from the name given to it.

An amended or supplemental pleading, filed on leave, need not aver the leave of the court; this will otherwise appear of record.

[1] Holyoke v. Adams, 59 N. Y. 233; FOLGER, J., in Spear v. Mayor, 72 N. Y. 442.

[2] Howard v. Johnston, 82 N. Y. 271; Puffer v. Lucas, 101 N. C. 281; Pinch v. Anthony, 10 Allen, 470, 477.

[3] Cincinnati v. Cameron, 33 O. S. 336.

PART IV.

GENERAL RULES OF STATEMENT.

320. Scope and Divisions of This Part.—Having set forth, in Part III., the formal parts of pleading under the Reformed Procedure, and explained their structure, and their adaptation and use as instruments for the application of the substantive law to operative facts, we come now, according to the order of treatment proposed, to a consideration of the general rules to be observed in the use of the formal pleadings in a cause.

The entire law of pleading has been constructed in an effort to place questions for judicial determination properly and clearly before the tribunal that is to investigate and decide them. The use of the formal pleadings as means for the presentation of such questions is governed by a system of rules, drawn from the nature of legal rights and duties and the established laws of argument, and designed to promote the judicial inquiry, by the separation of complex questions into simple points, and by the avoidance of obscurity, prolixity, and confusion. These rules are in no degree arbitrary; they result from a judicious adaptation of the general laws of argument, to the judicial altercation.

The ultimate object of an action is, to procure the interposition of the court, as the depositary of the public force, for the maintenance of a legal right. The formal pleadings, both the regular and the irregular parts, are but means (1) for advising the court that there is occasion for judicial interposition, (2) to disclose and formulate any resulting contention, and (3) to determine the nature and scope of the trial. The first of these purposes involves matter of substance; the second involves matter of form; and the third relates to the proofs. Following this natural order, the gen-

eral rules of statement—those guiding principles applicable to pleadings in general—will be grouped and explained under these heads: (1) Rules Relating to Matters of Substance; (2) Rules Relating to Matters of Form; and (3) Rules Relating to the Proofs.

CHAPTER XXII.

RULES RELATING TO MATTERS OF SUBSTANCE.

321. Matter of Substance.—It is essential to every pleading asserting new matter, whether in the statement of a right of action or of a defense, that it contain, either by averment or by legal presumption dispensing with averment, every substantive fact requisite in law to the maintenance of the action or the defense. All such facts, essential to the right or the defense asserted, are matters of *substance;* and if any such fact be omitted, the claim or defense is defective, and such defect can not be supplied by evidence at the trial. On the other hand, an averment not requisite to the claim or defense in connection with which it is made is always a needless incumbrance, and may be misleading and vicious; for which reasons, the law prohibits the insertion of such averments.

Following this principle of discrimination, the rules of statement concerning matters of substance relate either to matters that should be stated, or to matters that should be excluded; the former having regard to the legal sufficiency of pleadings, the latter being designed to restrict the averments to matters legally requisite.

I. OF MATTERS TO BE STATED.

322. General Requisites of Complaint.—The complaint must contain a statement of operative facts which, under the substantive law, entitle the plaintiff to judicial interposition in his behalf and against the defendant. In other words, it must, by a statement of operative facts, display a right of action against the defendant, and in favor of the plaintiff. Ordinarily, a statement of investitive facts showing the plaintiff's primary right and the defendant's

corresponding duty, and of culpatory facts showing the delict of defendant, is all that is requisite to show a right of action; but when collateral facts are necessary to give effect to the substantive facts, they should be stated also. In addition to a statement of facts, both principal and collateral, showing a right of action, the complaint must show, by allegations, unless dispensed with by legal inference, that the court has jurisdiction, and that the parties have legal capacity to sue and to be sued.

These general requisites of a complaint are matters of substance, and are essential to the jurisdiction of the court, and the validity of its procedure. They are fully considered in a former chapter,[1] and need not be further considered here. It has also been shown that in some cases it is necessary only to state the facts showing the defendant's delict; that causes for equitable relief may require a fuller statement than those for purely legal relief; and that matter of inducement and matter of aggravation may be pleaded with less particularity than is requisite in stating that which is the gist of the claim or defense. But there are some essentials of a complaint, requisite only in particular instances, that are yet to be stated and explained. Some of these, it will be found, fall within the general requirements heretofore enumerated, while others are auxiliary thereto.

323. The Complaint Must Show Title.—It is a rule of pleading under the Reformed Procedure, as it was at common law, that where the plaintiff asserts a demand by virtue of his ownership of property, real or personal, he must allege his title thereto; and if he charges the defendant with a liability in respect of property, he must allege title in his adversary. In other words, the plaintiff must allege such title as will, in law, sustain the right asserted, or the liability charged.

In actions concerning real property, the requirements as to alleging title differ in the different actions. In actions for the recovery of real property, where the pleadings are not controlled by special statutory provisions, the complaint

[1] Ante, 177 et seq.

should state the facts that give the plaintiff a right of possession; to wit, that he is the owner in fee, or of some other estate that gives him right of possession. But in most of the states, the pleadings in such actions are regulated by statutes prescribing the requisite averments. That plaintiffs are the "owners in fee, as tenants in common, of the premises," has been held sufficient.[1] But an allegation that by virtue of a certain conveyance to plaintiff he became the owner of certain premises, is a conclusion of law.[2]

In trespass *quare clausum fregit*, the gist of the action being the injury to the possession,[3] the complaint must allege plaintiff's possession, actual or constructive, at the time of the trespass. It has been held, however, that where no one holds actual possession, an allegation of legal title in the plaintiff is sufficient in such case, because the legal title draws after it the possession;[4] but upon principle, ownership can show only a *right* of possession, and not the *fact* of possession. It is only in the absence of actual possession, that the title draws to it the possession; and this is by a mere legal fiction.[5] There can not be constructive possession of lands of which third parties are in actual adverse possession.[6]

324. Complaint Must Show Title, Continued.—In an action by a lessor against his lessee, or one who is privy to him, founded upon the lease, the complaint need not allege title in the plaintiff. This rule is a consequent of the familiar doctrine that a lessee, and his privies, are estopped from disputing the landlord's title. And where the action is between the lessor and the lessee, for breach of any of the conditions of the lease, the rule rests upon the additional ground that the action is upon the contract alone, and does not involve the title. But when the action is brought by the assignee of the reversion, or by the heir of the lessor, or by the executor of a termor, the complaint should state the title of the lessor to the demised premises, so that it may appear that

[1] Payne v. Treadwell, 16 Cal. 220.
[2] Turner v. White, 73 Cal. 299.
[3] Ante, 101.
[4] Ruggles v. Sand, 40 Mich. 559.
[5] *Cf.* ante, 101.
[6] Ruggles v. Sand, 40 Mich. 559.

the lessor had such estate as would legally entitle the plaintiff to maintain the action in the capacity in which he sues.[1] The reason for this distinction is, that the tenant, while estopped to deny his landlord's title, is not estopped to question the derivative title of the plaintiff;[2] and the title of the lessor is the source and substance of the plaintiff's derivative title. In this connection it may be stated, that where one claims as heir of another, he must state the facts of exclusive near relationship; the mere statement that he is such heir is a conclusion of law.[3]

In the common-law action of ejectment, the declaration alleges a demise from the plaintiff's lessor.[4] This is a literal compliance with the rule under consideration; and, besides, this title is expressly admitted by the real defendant, when substituted for the casual ejector. But the real title of the real plaintiff is not alleged; and this is because of the fictitious character of the action.

In an action for partition, the complaint should state the titles and interests of the co-tenants, plaintiff and defendant; but it is neither necessary nor proper to show any deraignment of the plaintiff's title.

In an action to remove a cloud and quiet title, it is generally necessary to allege both the legal title and possession in the plaintiff.

325. Complaint Must Show Title, Continued.—In actions concerning personal property, it is sufficient to allege simply that "the plaintiff is the owner" of certain goods and chattels, describing them;[5] or to say that they are the property "of the plaintiff."[6] At common law, ownership of personal property, except in trover, was alleged by following a description of the property with the words, "of the said plaintiff." In trover, the formal allegation was, that the plaintiff "was lawfully possessed, as of his own property, of

[1] Max. Pl. 89; Bliss Pl. 228; Evans Pl. 31.

[2] Big. on Estop. 536–538.

[3] Post, 343.

[4] Ante, 91.

[5] Souter v. Maguire, 78 Cal. 543; Phœnix Ins. Co. v. Stark, 120 Ind. 444; Strickland v. Fitzgerald, 7 Cush. 532.

[6] Pattison v. Adams, 7 Hill, 126.

certain goods and chattels," describing them.[1] The reason for this difference in phraseology was, that in trover the plaintiff must have a property, general or special, in the chattels; while in other actions, actual possession, or constructive possession with a general or special property, was sufficient.[2]

In actions on choses in action, if the complaint shows title in another,—as where plaintiff sues as the assignee of an account, or of a contract,—an allegation of ownership in the plaintiff is not enough, but the transfer must be alleged; otherwise, the title and the right of recovery will appear not to be in the plaintiff, but in another, and the complaint will be demurrable.[3] And in actions on negotiable instruments, where the plaintiff is not an original party to the instrument, the complaint must state the facts showing his derivative title thereto. The averment in such case, depending, of course, upon the negotiable form of the instrument, may be, that the payee indorsed, or assigned, or delivered, the instrument to the plaintiff. The statement that the note, "for value received, lawfully came to the possession of the plaintiff;"[4] or that plaintiff is the lawful owner and holder;[5] or that he is the *bona fide* owner and holder;[6] or that it became his property by purchase;[7] has been held sufficient when not objected to by motion to make definite.

The question has been raised, whether, when the title to a bill or note revests in one by whom it has before been indorsed, he may strike out his own and all subsequent indorsements, and plead his original title, without showing a retransfer to himself. The weight of authority is in favor of his right to do so;[8] though there is some conflict in the decisions, and, upon principle, it would seem that the right

[1] Steph. Pl. 121; Ante, 105.

[2] Bliss Pl. 230; Max. Pl. 88.

[3] Sinker v. Floyd, 104 Ind. 291; Thomas v. Desmond, 12 How. Pr. 321; Adams v. Holley, 12 How. Pr. 326; McNeil v. Commandery, 131 Pa. St. 339; s. c. 18 Atl. Rep. 899; Hollis v. Richardson, 79 Mass. 289.

[4] Lee v. Ainslie, 4 Abb. Pr. 463.

[5] Reeve v. Fraker, 32 Wis. 243.

[6] Holstein v. Rice, 15 How. Pr. 1.

[7] Prindle v. Caruthers, 15 N. Y. 425.

[8] 2 Dan. Neg. Instr. 1198, and cases cited.

should depend upon the character of the transfers from and to the plaintiff. Where his indorsement was "for collection" only, the right is clear.

326. When Complaint Must Show Privity.—Privity is a term applied to certain jural relations giving rise to primary rights and duties. When privity is essential to the primary right asserted, the complaint must show its existence; and failure to show it is a defect of substance. Where the right arises from privity in blood, the facts showing the exclusive near relationship must be stated; if privity in estate is relied upon, the complaint must show that which creates such privity, as, grant, lease, or assignment of lease; and, generally, where the injury complained of results from a breach of contract merely, the complaint must show privity of contract between the parties. It is a general rule that the assignment of a contract does not create privity between the obligor and the assignee; but under the new procedure, the assignee of a chose in action may sue thereon in his own name, notwithstanding the want of privity.

Where the injury complained of results from reliance on a false and fraudulent representation, made by the defendant to another, with the knowledge and intent that the injured person was to act upon the faith of it; or where the injury is the natural and necessary result of a wrongful act of the defendant, having no direct relation to the person injured, privity is not necessary to the maintenance of an action.

In order to adapt certain jural relations to the action of assumpsit, the common law superadded to the real operative facts the fiction of an implied promise to pay. This supplied the element of privity, and brought many cases, otherwise remediless, formally within the operation of assumpsit. This fiction was resorted to for the recovery of money paid, by mistake, to one not entitled to it; or to recover money obtained by fraud or duress; and where one's property had been tortiously taken and converted into money, he might waive the tort and sue for money had and received, alleging in his declaration a promise by the defendant to pay.[1] In

[1] See post, 415 et seq., where privity as an element of rights of action is more fully considered.

the light of the modern science of jurisprudence, disclosing the true foundation and elements of rights and obligations, and in the light of modern procedure, adapted to the diversified forms of jural relations, the allegation of a promise to pay in such cases is as clearly unnecessary as it would be untrue. The primary right in such cases arises *ex lege*, and the jural relation does not involve privity.[1]

327. When Consideration Must be Alleged.—A contract, to be valid in law, must be supported by a consideration; and where an action is founded upon a contract, the complaint must state the consideration for the promise or obligation sought to be enforced, unless the contract is of a kind which, under the substantive law, imports a consideration. *Ex nudo pacto non oritur actio.* Under the common law, deeds,—that is, contracts executed with the formality of a seal,—and negotiable instruments, import a consideration; and in an action on any such instrument it is not necessary, in the first instance, to allege or prove a consideration; but want of consideration is to be asserted as a defense. In most of the states, this rule of the common law obtains, both in the substantive law and in procedure; but in some states private seals have been either partly or entirely abolished by statute, and the foregoing rule, so far as it relates to sealed instruments, has been thereby modified.

Whether, in a given case, there is a consideration, and whether a particular consideration is in law sufficient or insufficient, are questions that must concern the pleader, but their consideration does not properly belong to a work on procedure.

In an action by the indorsee of negotiable paper, or by the assignee of a non-negotiable contract, the complaint need not state the consideration for the transfer to plaintiff.[2] If the indorsee or assignee holds the legal title, and shows that there was a sufficient consideration between the original parties, it is of no consequence whether he obtained it

[1] Keener on Quasi-Contracts, *passim*.

[2] Dumont v. Williamson, 18 O. S. 515; Sheridan v. Mayor, 68 N. Y. 30; Cottle v. Cole, 20 Iowa, 481.

for, or without, consideration. One holding the legal title to a chose in action, by indorsement or assignment, though it be only for collection,[1] or as collateral security,[2] may sue thereon without alleging a consideration for the transfer to him. If the plaintiff has the right to receive the money, so that the defendant will be protected from another demand based upon the same claim, he is the real party in interest, and the defendant is not concerned as to the purpose or the nature of the transfer. As to anything beyond the *bona fides* of the holder, the defendant, who owes the debt, has no interest;[3] it is enough that he will be protected from a second recovery on the same demand.[4] This is the *ratio* of the rule.

328. When Consideration to be Alleged, Continued.— The presumption of sufficient consideration applies to every indorser of negotiable paper who is in the chain of title; and in an action against such indorser it is not necessary to allege a consideration for the indorsement.[5] But this presumption does not extend to one who is a stranger to the note, and who is not in the chain of title; therefore, in an action against a guarantor on a bill or note, a consideration for such collateral engagement must be alleged.[6]

Whether the defense of no consideration is available under a denial, or whether it must be specially pleaded, depends upon the character of the obligation sued upon. In an action on a contract that imports a consideration, it is not necessary that the plaintiff allege consideration, and the defendant

[1] Allen v. Brown, 44 N. Y. 228; Meeker v. Claghorn, 44 N. Y. 349; Eaton v. Alger, 47 N. Y. 345; Knight v. Ins. Co., 26 O. S. 664; Hardin v. Helton, 50 Ind. 319; Cottle v. Cole, 20 Iowa, 481–485; Allen v. Miller, 11 O. S. 374, 377; White v. Stanley, 29 O. S. 423; Beattie v. Lett, 28 Mo. 596. *Cf.* Hays v. Hathorn, 74 N. Y. 486–490; Curtis v. Sprague, 51 Cal. 239.

[2] Williams v. Norton, 3 Kan. 295; Wetmore v. San Francisco, 44 Cal. 294; Hilton v. Waring, 7 Wis. 492; White v. Phelps, 14 Minn. 27. *Cf.* Van Eman v. Stanchfield, 13 Minn. 75.

[3] City Bank v. Perkins, 29 N. Y. 554; Castua v. Sumner, 2 Minn. 44.

[4] Hays v. Hathorn, 74 N. Y. 486, and cases there cited.

[5] Dumont v. Williamson, 18 O. S. 515; Clay v. Edgerton, 19 O. S. 549.

[6] Greene v. Dodge, 2 Ohio, 430; Greenough v. Smead, 3 O. S. 415.

must plead the want of it. In an action where the plaintiff must allege consideration, a denial will make an issue and admit evidence as to the consideration.[1] Failure of consideration, when relied on, must be alleged. It is a fact occurring subsequent to the contract, and is new matter to be pleaded.[2]

No formal words are necessary in alleging consideration. If an instrument is pleaded by copy, and the copy recites a consideration, this is sufficient without direct allegation.[3] An allegation that "for a valuable consideration," defendant entered into the contract, is sufficient on demurrer,[4] though subject to motion to make definite. If the contract is of a kind to require a peculiar consideration, the requisite kind must be alleged.[5] If the consideration alleged is an executory agreement, this must be pleaded, and performance averred.[6]

329. Performance of Conditions.—When one party to a contract is thereby bound to do some act before the other party is obliged to perform his covenants, the doing of such act is a condition precedent; that is, performance of such act by the party so bound thereto must precede a right in him to have performance by the other party, or to complain of his non-performance. It follows, that where the right of plaintiff depends upon his performance of a condition precedent, he must aver performance, or its equivalent, in his complaint;[7]

[1] Dubois v. Hermance, 56 N. Y. 673; Butler v. Edgerton, 15 Ind. 15; Nixon v. Beard, 111 Ind. 137; Moore v. Boyd, 95 Ind. 134. *Cf.* Wheeler v. Billings, 38 N. Y. 263.

[2] Dubois v. Hermance, 56 N. Y. 673. *Contra*, Spies v. Roberts, 18 Jones & S. 301.

[3] Prindle v. Caruthers, 15 N. Y. 425; Leonard v. Sweetzer, 16 Ohio, 1; Meyer v. Hibsher, 47 N. Y. 265; Elmquist v. Markoe, 39 Minn. 494; Frank v. Irgens, 27 Minn. 43; Dickerson v. Derrickson, 39 Ill. 574.

[4] Bank v. Ins. Co., 72 Wis. 535. *Contra*, Marshall v. Aiken, 25 Vt. 328; Winne v. Col. Spr. Co., 3 Colo. 155.

[5] Ross v. Sagdbeer, 21 Wend. 166; Weller v. Hersee, 10 Hun. 431. *Cf.* Seaman v. Seaman, 12 Wend. 381; Dolcher v. Fry, 37 Barb. 152.

[6] Becker v. Sweetzer, 15 Minn. 427.

[7] Gould Pl. iv. 13; Webb v. Smith, 6 Colo. 365; Ferris v. Purdy, 10 Johns. 359; Wilcox v. Cohn, 5 Blatch. 346; Lightfoot v. Cole, 1 Wis. 26; Buford v. N. Y. Life Ins. Co., 5 Oreg. 334; Home Ins. Co. v. Duke, 43 Ind. 418.

for performance of such condition, or its legal equivalent, becomes a constituent part of the right of action. An averment of readiness at all times to perform is not sufficient, unless exonerating facts be added.[1] If excuse from performance is relied on, the plaintiff should aver his readiness to perform, and state the facts that relieved him from performance;[2] and where there are mutual conditions to be performed by both parties, at the same time, the plaintiff must allege either actual performance or a tender of performance,[3] unless tender is excused by facts which show that it would be nugatory. Thus, where plaintiff purchased land from the defendant, to be conveyed free from incumbrance at a certain date, and then to be paid for, a complaint for breach of the covenant to convey must allege payment, or tender of payment, of the purchase-money. But if in such case the land was incumbered, and the defendant could not free it from incumbrance, tender of payment is thereby excused, because it would be wholly nugatory.[4] When performance is thus excused, the exonerating facts should be pleaded.

It is not necessary for the plaintiff to refer, in his complaint, to any condition subsequent, annexed to the right which he asserts. The office of such condition is, not to create a right, but to qualify or defeat it; and since performance thereof would furnish matter of defense, it should be pleaded by the defendant.[5] In an action on a note payable to plaintiffs as trustees, in consideration that they will use the same only for the payment of the liabilities of a certain association, the complaint need not allege that the liabilities of the association have not been paid; nor that plaintiffs will apply the proceeds according to said provision. If the liabilities of the association have been paid, it is matter of defense;

[1] Walter v. Hartwig, 106 Ind. 123.

[2] Smith v. Brown, 17 Barb. 431; Cornwell v. Haight, 21 N. Y. 462.

[3] Williams v. Healey, 3 Denio, 363; Beecher v. Conradt, 13 N. Y. 108; Van Schaick v. Winne, 16 Barb. 89; Webb v. Smith, 6 Colo. 365; Sons of Temp. v. Brown, 9 Minn. 144; Lewis v. Davis, 21 Ark. 237; Sorrells v. McHenry, 38 Ark. 127.

[4] Karker v. Haverly, 50 Barb. 79; Read v. Lambert, 10 Abb. Pr. N. S. 428.

[5] Gould Pl. iv. 17.

and misapplication of the proceeds is not to be anticipated.[1] A provision in a fire-insurance policy that the insurer may, instead of paying for a loss in money, rebuild or replace the property destroyed, is in the nature of a condition subsequent, available only at the option of the insurer; and in an action to recover for a loss, it is not necessary that the plaintiff aver the refusal of the defendant to rebuild or replace the property destroyed.[2]

330. Time, Place, and Malice, when Material, Must be Alleged.—When a particular time is material to a right of action, it must be alleged, and alleged truly; and it must be proved as alleged. Where time is of the essence of a contract, it is material to a right of action thereon. The parties to any contract may, by express terms, make a particular time of the essence thereof. In the absence of such express provision, the court will look to the terms of the contract, the conduct of the parties, and the nature and scope of the transaction, to determine whether the parties intended the time named to be of the essence of their contract; the general rule being, that if a thing to be done at a specified time can as well be done at another time,—that is, if the substitution of another time will impose no loss or material inconvenience,—the time is not essential; but if the substitution of another time will work detriment, the time specified is of the essence. A more liberal rule in this regard obtains in equity than at law.[3] In an action against the drawer of a bill, or the indorser of a bill or note, the precise day of demand and notice is material to the right of action, and must be alleged with certainty; but in an action for trespass, or other tort, the date is not, as a rule, essential to the right of action, and may generally be laid as "on or about" a certain day; or it may be alleged under a *videlicet*, and any time may be proved. When a date is used as descriptive of a

[1] Cox v. Plough, 69 Ind. 311; Hammer v. Kaughman, 2 Bond, 1.

[2] Ins. Co. v. McGookey, 33 O. S. 555. The manner of pleading performance of conditions is considered in a subsequent chapter. Post, 372, 373.

[3] 3 Par. on Cont. 384*; Pol. Prin. of Cont. 443 et seq.

written instrument, it becomes material, and must be proved as stated.

So, also, where *place* is material to the right of action, or to the jurisdiction of the court, it must be alleged. In an action on a contract that designates a particular place where property is to be delivered and payment made, the complaint must aver readiness to pay or deliver at that place.[1] And in local actions, such as for the recovery of lands, or the foreclosure of a mortgage, it must appear from the averments of the complaint that the subject of the action is within the territorial jurisdiction of the court. Though a mere failure to show that the lands are within the jurisdiction does not render the complaint demurrable; demurrer for such cause will lie only where want of jurisdiction affirmatively appears.[2]

And where *malice* is an essential element of the delict, and hence is material to the right of action, it must be alleged. For example, in an action for malicious prosecution, the elements of the delict are, the prosecution, malice, and want of probable cause;[3] and the malice of the defendant must be alleged. In actions for libel and slander, while there is not entire uniformity in the holdings, the better opinion, both upon reason and authority, is, that malice is presumed, and need not be alleged in the complaint; though if the defendant answer that the words were privileged, the plaintiff may reply actual malice.[4]

331. When Demand Must be Alleged.—Demand of payment, or of delivery, is sometimes a prerequisite of the plaintiff's right, and sometimes of the defendant's delict, and in

[1] Clark v. Dales, 20 Barb. 42.

[2] Powers v. Ames, 9 Minn. 178.

[3] Post, 498.

[4] Post, 385, 494. The ground for dispensing with the allegation of malice is, that an allegation of the falsity of the defamatory words raises the implication of malice in speaking them. And some authorities go so far as to hold that the allegation of falsity may be dispensed with. Max. Pl. 209; Watchter v. Quenzer, 29. N. Y. 547; Fry v. Bennett, 5 Sandf. 54; Jarnigan v. Fleming, 43 Miss. 710. *Cf.* Hunt v. Bennett, 19 N. Y. 173. But it is suggested, that the presumption that the plaintiff had a good *reputation* does not require or warrant the implication that the words are false; for the reputation may be good, and yet the defamatory words be true. See character and reputation distinguished, post, 394 and note.

either case, the complaint must allege the demand. In an action against the maker of a promissory note, the defendant's engagement being absolute and unconditional, no demand is necessary either to the plaintiff's right or to the defendant's duty or delict; but in an action against an indorser, whose liability is conditioned upon demand and notice, both demand and notice must be alleged; and generally, where the defendant came lawfully into possession of plaintiff's personal property, demand is a prerequisite to the right to sue therefor. This subject is more fully considered in a subsequent chapter.[1]

332. Purchase for Value Without Notice.—When an equitable claim to property comes into competition with the legal ownership, the owner of the legal title may defend against the equity on the ground that he is a purchaser for value, and without notice. Purchase for value, without notice of an existing equity, is not a source of title, legal or equitable; it is a protection for the legal title against an equitable right. "Equitable title," though well authorized by usage, is really a misnomer. What is called an equitable title, or equitable ownership, is not strictly a title, but a mere personal right against the real owner, for a conveyance of the title, and enforceable in equity. This personal right against a former owner can be enforced against a subsequent purchaser of the legal title, only when he acquired his title with knowledge of the prior equity; and the law will imply notice, where no consideration has been paid.

It follows, that in an action to enforce an equity against one who has acquired the legal title, whether to land or chattels, the plaintiff must, in addition to the operative facts showing his equity, allege that the defendant had notice in fact of his equity, or that he did not pay value, and so had notice in law.

If the legal title to property has been transferred from A. to B., and from B. to C., in a suit by D. to charge the property with an equity in his favor against A., he must allege notice to both B. and C.; for if B. had notice, and C. had

[1] Post, 395.

not, his title is not subject to the equity; and so, if B. took without notice, he passed his unimpeachable title to C., even though C. had notice.[1]

In such cases, if the defendant traverse by denying notice and alleging payment of value, the *onus probandi* will be upon the plaintiff; for he can subject the defendant to his equity against another, only when it is shown, first by allegation, and then by proof, that the defendant is privy to the plaintiff's equity.[2] In the statement of such defense, the defendant must allege the seizin of his grantor, must deny notice of the plaintiff's claim prior to payment of consideration, and must allege consideration and its actual payment. Consideration secured to be paid is not sufficient.[3]

333. The Statute of Frauds.—It was a rule of the common law, that in pleading an act originally authorized by a statute requiring it to be in writing,—as in the case of a will of lands,—it must be alleged to have been in writing;[4] but where an act, valid at common law without a writing, is by statute required to be in writing,—as in the case of a promise to answer for the debt or default of another,—it is not necessary to allege that it was in writing, though it could be proved only by the writing.[5] This distinction rests upon the fact that in the one case the only authority for the act is the statute, which makes the writing a constituent part of the act, while in the other case the statute only regulates the mode of doing an act authorized and valid before the statute.

This rule of the common law is modified by this further distinction, that when the plaintiff relies upon an act required by statute to be evidenced by writing, he need not allege the writing, but when the defendant pleads such act, he must allege the writing. The plaintiff is excused from

[1] Lang. Eq. Pl. 185; Bisph. Prin. of Eq. 261–265, where the reason for the rule is stated. *Cf.* Kerr on Frauds, 369; Wallace v. Wilson, 30 Mo. 335; Weaver v. Barden, 49 N. Y. 286.

[2] Lang. Eq. Pl. 185. *Cf.* Harris v. Ingledew, 3 P. Wms. 91.

[3] Kerr on Frauds, 369; Bliss Pl. 395; Weaver v. Barden, 49 N. Y. 286.

[4] Tyler's Steph. Pl. 331; Duppa v. Mayo, 1 Saund. 276 e, note 2.

[5] Steph. Pl. 379; Duppa v. Mayo, 1 Saund. 276 e, note 2.

making this allegation on the ground that when he alleges the doing of the act, the law presumes that it was done according to law; the reason given for requiring the defendant to allege the writing is, that he shall not take away the plaintiff's action and not give him another on the agreement pleaded.[1]

The requirement here spoken of relates mainly to contracts required by the statute of frauds to be evidenced by writing; and the practice under the new procedure is not entirely uniform in this regard. It is the general rule in this country, that the plaintiff, in pleading a contract within the statute, whether his action be for legal or for equitable relief, is not required to allege compliance with the statute.[2] A learned judge has stated the rule in these words: "The statute of frauds has not altered the rules of pleading, in law or in equity. A declaration on a promise which, though oral only, was valid by the common law, may be declared on in the same manner since the statute as it might have been before. The writing is matter of proof, and not of allegation." [3]

334. Statute of Frauds, Continued.—As to the way in which the defendant may take advantage of the statute, there is some discrepancy in the decisions and in the practice. In some cases it has been held that non-compliance

[1] Steph. Pl. 380; Case v. Barber, Raym. 450; Duppa v. Mayo, 1 Saund. 275 d, note; 2 Salk. 519, anon.

[2] Marston v. Sweet, 66 N. Y. 206; Gardner v. Armstrong, 31 Mo. 535; McCann v. Pennie, 100 Cal. 547; Robbins v. Deverill, 20 Wis. 142; Y. M. C. Assn. v. Dubach, 82 Mo. 475; Pettit v. Hamlin, 43 Wis. 314; Price v. Weaver, 13 Gray, 273; Dayton v. Williams, 2 Doug. (Mich.) 31; Mullaly v. Holden, 123 Mass. 583; Carroway v. Anderson, 1 Humph. 61; Elting v. Vanderlin, 4 Johns. 237; Piercy v. Adams, 22 Ga. 109; Walker v. Richards, 39 N. H. 259; Brown v. Barnes, 6 Ala. 694; Cross v. Everts, 28 Tex. 523; Walsh v. Kattenburgh, 8 Minn. 99; Cranston v. Smith, 6 R. I. 231; Ecker v. Bohn, 45 Md. 278; Taylor v. Patterson, 5 Oreg. 121; Hubbell v. Courtney, 5 S. C. 87; McDonald v. M. V. H. Assn., 54 Cal. 210; First Nat. Bank v. Kinner, 1 Utah Ty. 100. *Contra* in some states, by statute; see Langford v. Freeman, 60 Ind. 46. *Cf.* Babcock v. Meek, 45 Iowa, 137; Smith v. Fah., 15 B. Mon. 443.

[3] Per METCALF, J., in Price v. Weaver, 13 Gray, 273.

with the statute is available only as a defense of new matter, to be specially pleaded; and that failure so to plead it is a waiver of its benefits.[1] But it has been held generally, that the general denial of the defendant, by placing the burden of proof upon the plaintiff, requires him to sustain the issue by competent evidence, and makes the statute available to the defendant by objection, at the trial, to oral evidence to prove a contract required by the statute to be in writing.[2] It has been held, though upon questionable grounds, that in such case the plaintiff may prove an oral contract, with collateral facts to validate it.[3] It has also been held, that under a denial of the making of the contract, the defendant may avail himself of the statute, even though he does not object to the evidence of an oral contract.[4] But the better opinion is, that when a contract, within the statute, is proved by parol evidence, without objection or exception, the right to

[1] Martin v. Blanchett, 77 Ala. 288; Brigham v. Carlisle, 78 Ala. 243; Huffman v. Ackley, 34 Mo. 277; Gordon v. Madden, 82 Mo. 193; Maybee v. Moore, 90 Mo. 340; The C. & W. Coal Co. v. Liddell, 69 Ill. 639; McClure v. Otrich, 118 Ill. 320; Bailey v. Irwin, 72 Ala. 505. *Cf.* Lawrence v. Chase, 54 Me. 196, 199.

[2] Wiswell v. Teft, 5 Kan. 263; Amberger v. Marvin, 4 E. D. Smith, 393; Morrison v. Baker, 81 N. C. 76; Bonham v. Craig, 80 N. C. 224; Birchell v. Neaster, 36 O. S. 331; Suman v. Springate, 67 Ind. 115; Blanck v. Little, 10 Reporter (N. Y.), 151; May v. Sloan, 101 U. S. 231; Allen v. Richard, 83 Mo. 55; Springer v. Kleinsorge, 83 Mo. 153; Reynolds v. Dunkirk & S. L. Ry. Co., 17 Barb. 613; Hotchkiss v. Ladd, 36 Vt. 593; s. c. 86 Am. Dec. 679; Talbot v. Bowen, 1 A. K. Marshall, 436; s. c. 10 Am. Dec. 747; Wynn v. Garland, 19 Ark. 23; s. c. 68 Am. Dec. 190; Billingslea v. Ward, 33 Md. 48; Ruggles v. Gatton, 50 Ill. 412; Buttemere v. Hayes, 5 M. & W. 456; Elliott v. Thomas, 3 M. & W. 170; Ontario Bk. v. Root, 3 Paige, 478; Hook v. Turner, 22 Mo. 333; Small v. Owings, 1 Md. Ch. Dec. 363; Trapnall v. Brown, 19 Ark. 39; Champlin v. Parish, 11 Paige, 405; Fountaine v. Bush, 40 Minn. 141; Gibbs v. Nash, 4 Barb. 449; Chickering v. Brooks, 61 Vt. 554. *Cf.* Taylor v. Merrill, 55 Ill. 52; Durant v. Rogers, 71 Ill. 121. *Contra*, Huffman v. Ackley, 34 Mo. 277; Gordon v. Madden, 82 Mo. 193; Maybee v. Moore, 90 Mo. 340; The C. & W. Coal Co. v. Liddell, 69 Ill. 639; McClure v. Otrich, 118 Ill. 320; Bailey v. Irwin, 72 Ala. 505; Martin v. Blanchett, 77 Ala. 288; Brigham v. Carlisle, 78 Ala. 243. *Cf.* Lawrence v. Chase, 54 Me. 196, 199.

[3] Brock v. Knower, 37 Hun, 609.

[4] Wynn v. Garland, 19 Ark. 23, 34. *Cf.* Reid v. Stevens, 120 Mass. 209.

invoke the statute is waived, and can not afterward be insisted upon.[1] Where the complaint contains only the common counts, and there is a general denial, the defendant may avail himself of the statute without having pleaded it. In such case, the defendant is not advised by the complaint that the plaintiff's demand is within the operation of the statute; and it will be time enough for him to plead the statute for his defense, when it is alleged against him that he has made a contract that comes within its purview.[2]

The defendant may also avail himself of the statute by answer; and where the answer admits, or does not deny, the contract sued on, it must specially plead the statute, to make it available to the defendant.[3] This is upon two grounds; (1) the contract being admitted, the plaintiff is not required to prove it, and (2) the defendant, by admitting the contract, is held to have waived the protection of the statute. *Nam quilibet potest renunciare juri pro se introducto.*

If the complaint affirmatively shows the contract to be within the statute, and to be oral, and does not allege any other sufficient authentication thereof, such as part performance,[4] or execution thereof,[5] the defendant may make the statute available by demurrer.[6]

[1] Nunez v. Morgan, 77 Cal. 427; The C. & W. Coal Co. v. Liddell, 69 Ill. 639. *Cf.* Lawrence v. Chase, 54 Me. 196.

[2] Durant v. Rogers, 71 Ill. 121; Per SCOTT, J., in Taylor v. Merrill, 55 Ill. 52.

[3] Duffy v. O'Donovan, 46 N. Y. 223; Alger v. Johnson, 4 Hun, 412; Burt v. Wilson, 28 Cal. 632; Gwynn v. McCauley, 32 Ark. 97; Osborne v. Endicott, 6 Cal. 149; Harris v. Knickerbacker, 5 Wend. 638. *Cf.* Marston v. Sweet, 66 N. Y. 206.

[4] Arguello v. Edinger, 10 Cal. 150.

[5] Shank v. Teeple, 33 Iowa, 189.

[6] Randall v. Howard, 2 Black, 585; Walker v. Locke, 5 Cush. 90; Linn Boyd T. W. Co. v. Terrill, 13 Bush, 463; Wentworth v. Wentworth, 2 Minn. 238; Howard v. Brower, 37 O. S. 402; Bolling v. Munchus, 65 Ala. 558; Barr v. O'Donnell, 76 Cal. 469; Cloud v. Greasley, 125 Ill. 313; Ahrend v. Odiorne, 118 Mass. 261; Krhon v. Blantz, 68 Ind. 277; Macy v. Childress, 2 Tenn. Ch. 438. *Aliter*, if such objection does not affirmatively appear. Sanborn v. Rodgers, 33 Fed. Rep. 851; Manning v. Pippen, 86 Ala. 357; Broder v. Conklin, 77 Cal. 330; Sherwood v. Saxton, 63 Mo. 78; Cozine v. Graham, 2 Paige, 177; Thomas v. Hammond, 47 Tex. 42.

335. Statute of Frauds, Continued.—The common-law rule, that when the defendant relies for his defense upon a contract that comes within the statute of frauds, he must allege that it is in writing, has been held to obtain under the Reformed Procedure.[1]

An answer pleading non-compliance with the statute as a defense should be clear and explicit to that end. Such answer should state the facts which show a non-compliance with the statute. An allegation "that the contract is void in law, and that the defendant is not bound to perform the same," is a mere legal conclusion, and is insufficient.[2]

So, an allegation that the contract "was never reduced to writing in any form," or that it was "a verbal contract";[3] an allegation that the contract was made on express condition that the plaintiff should execute and deliver an instrument in writing embodying a part of its terms, and had refused to do so;[4] and an allegation that no formal note of the agreement charged was made,[5] or that the contract was "not evidenced by writing,"[6] have been held not to entitle the defendant to the benefit of the statute. Where the answer to a bill for specific performance of a contract for the sale of land alleged that the writing produced was signed, not to acknowledge the agreement, but for another purpose, and concluded by submitting to the court whether it was "an agreement, such as is required by law and equity, to compel the defendant to make the sale and conveyance," the sufficiency of the allegation was doubted.[7]

[1] Max. Pl. 444; Reinheimer v. Carter, 31 O. S. 579. *Contra*, Tucker v. Edwards, 7 Colo. 209.

[2] Vaupell v. Woodward, 2 Sandf. Ch. 143.

[3] Battel v. Matol, 58 Vt. 271.

[4] Marston v. Swett, 66 N. Y. 206.

[5] Skinner v. McDonall, 2 DeG. & S. 265.

[6] Edelin v. Clarkson, 3 B. Mon. 31.

[7] Barry v. Coombe, 1 Pet. 649.

A Critique of the Foregoing Rules.—The rules stated in the last three sections, however much some of them may violate the general principles of pleading, are well established by the authority of precedent. But a critical examination of these rules, in the light of the general principles of pleading, and of the settled interpretation of the statute, will serve to elucidate

The form of statement requisite for asserting the defense of the statute will vary, according to the language of the

the principles, and will neither unsettle nor obscure the established rules.

While there is some discrepancy in the decisions, as to the meaning, the operation, and the effect of the statute of frauds, the courts have held, with comparative unanimity, that non-compliance with the statute does not render a contract void or illegal. The parties are at liberty to perform such contracts, and it is not the policy of the statute to discourage performance thereof. When a verbal contract, within the statute, has been fully executed, the rights and obligations of the parties are the same as though the statute had been complied with. Stone v. Dennison, 13 Pick. 1; Ryan v. Tomlinson, 39 Cal. 639; Lavery v. Turley, 6 Hurlst. & N. 239; Andrews v. Jones, 10 Ala. 400; Craig v. Vanpelt, 3 J. J. Marsh. 489; McCue v. Smith, 9 Minn. 252; Beal v. Brown, 13 Allen, 114; Shank v. Teeple, 33 Iowa, 189. And when so much of a contract as comes within the statute has been executed, its remaining stipulations are enforceable by action. Green v. Saddington, 7 El. & B. 503; Souch v. Strawbridge, 2 C. B. 814, per TINDAL, C. J.; Preble v. Baldwin, 6 Cush. 549; Page v. Monks, 5 Gray, 492; Eastham v. Anderson, 119 Mass. 526; Lavery v. Egan, 143 Mass. 389; Hodges v. Green, 28 Vt. 358; Worden v. Sharp, 56 Ill. 104; Allen v. Aguirre, 7 N. Y. 543. *Cf.* Tripp v. Bishop, 56 Pa. St. 424; King v. Smith, 33 Vt. 22. The right to recover money paid under a verbal contract within the statute, to recover property or its value when delivered under such contract, and to recover for services rendered under such contract, rests upon ground other than the validity of the contract. Such recovery is not for breach of contract; it rests upon the ground that the defendant has unjustly enriched himself at the plaintiff's expense. Browne on Stat. of Frauds, 118, 124; Keener on Quasi Contracts, 231, 277. So long as the parties to a parol contract, within the statute, recognize it and consent to it, the court can not voluntarily annul it, nor can a stranger complain of it. Dawson v. Ellis, 1 Jac. & W. 524; Cahill v. Bigelow, 18 Pick. 369; Clary v. Marshall, 5 B. Mon. 269; Jacob v. Smith, 5 J. J. Marsh. 380; Mitchell v. King, 77 Ill. 462; Brakefield v. Anderson, 87 Tenn. 206. In this last case, the court decreed specific performance of a parol contract for the sale of lands, for the reason that the parties agreed as to the terms of the contract, and neither relied upon the statute. *Cf.* Newton v. Swazey, 8 N. H. 9; Baker v. Hollobaugh, 15 Ark. 322. Where there has been a breach of an oral contract, and a memorandum thereafter made, an action may be maintained for the breach. Bird v. Munroe, 66 Me. 337. And an oral contract, within the statute when made, is actionable after the repeal of that part of the statute embracing it. Per DICKEY, J., in Work v. Cowhick, 81 Ill. 317. It has been held, also, that neither the *lex loci contractus* nor the *lex loci solutionis*, but the *lex fori*, controls; and that a contract not within the statute of the

particular statute, and the averments of the complaint; but the following will generally be a safe guide: "Neither the

place where made, or where it is to be executed, if within the statute of the place where it is sought to be enforced, is obnoxious to the defense of such statute. Sto. Confl. of Laws, 576, note; Leroux v. Brown, 12 C. B. 801; Kleeman v. Collins, 9 Bush, 460; Dacosta v. Davis, 24 N. J. L. 319; Brown on Stat. Frauds, 136; 2 Par. on Contr. 592. *Cf.* Downer v. Chesebrough, 36 Conn. 39; Turnow v. Hochstadter, 7 Hun, 80; Adams v. Clutterbuck, 10 Q. B. Div. 403. Judge Bliss seems to have fallen into error on this point. Bliss Pl. 355.

It clearly appears from the foregoing, that the statute affects, not the contract itself, but the remedy for its violation; that the statute does not operate *proprio vigore*, but only when asserted or insisted upon as a defense; and that a contract, legal and actionable before the statute, is legal and actionable since the statute, unless the party sought to be charged resorts to the statute. Keeping in mind these settled conclusions, how can some of the foregoing rules be consistently maintained? It would seem that the reason usually given for excusing the plaintiff from alleging compliance with the statute, to-wit, that the law presumes a written contract to be intended, is not the true reason. On such principle, a plaintiff should likewise be relieved from alleging consideration. The true reason is, that the writing required by the statute is not essential to the legal validity of the contract, and the making of such writing is therefore not an operative investitive fact, and should not be pleaded. The same considerations will show the somewhat fanciful distinction of the common-law rule requiring the defendant to allege compliance with the statute, when he pleads a contract within its operation, to be groundless and arbitrary.

If it were now an open question, it would be well worth considering whether, in view of the foregoing corollaries, and of the theory that the statute has made no change in the rules of pleading, a complaint that affirmatively shows the contract to be oral is not good on demurrer. That the contract is oral is neither an operative fact nor an evidential fact, but a collateral fact that will simply disqualify the plaintiff from making proof, *if the contract be denied.* But the demurrer admits the contract, and questions, not the plaintiff's ability to make proof, but the legal sufficiency of the operative facts alleged; and these, undisputed, show a right of action.

The rule authorizing a special plea of the statute, or rather of the facts showing non-compliance with it, is in disregard of the principle that only operative facts are to be pleaded. Answers of new matter in bar are either in excuse, or in discharge; and such plea is neither. Such plea is as if the defendant were to say: "It is true I made the contract as claimed by the plaintiff, but here is a circumstance, not essential to the validity of the contract, and neither in discharge thereof nor in excuse for breach thereof, but which, if insisted upon, will prevent the plaintiff from prov-

said contract, nor any memorandum or note thereof, was or is in writing, signed by the defendant, or by any person thereunto authorized by him, according to the statute in such case made and provided;" or, "Said contract, by its terms, was not to be performed within one year from the making thereof; and neither the said contract, nor any memorandum," etc.; or, "The contract in the complaint alleged was a special promise to answer for the debt of one K. R. to the plaintiff; and neither the said contract, nor any memorandum," etc.

336. The Statute of Limitations.—The statute of limitations, like the statute of frauds, is available by demurrer;[1] or by answer asserting the lapse of the statutory period as new matter in bar;[2] but, unlike the statute of frauds, it is not available under a denial.[3] One difference between the primary right, the right to performance of an obligation, and the remedial right, the right to enforce performance, is, that these rights originate at different times. The right to performance is coeval with the making of a contract, and operates anterior to the time for performance. The remedial right does not arise until there has been a breach of the contract; and then it is applied to enforce a pre-existing

ing the contract which I admit I made, and I do insist upon it." Such pleading, though sanctioned by the authority of precedent, is at variance with the principles of the science; and it may well be doubted whether such use of the statute subserves its real purpose, which is, to exclude oral testimony on the trial of an issue as to the existence or the terms of an alleged contract belonging to a designated class. It would seem that the only *logical* method of asserting the statute, if not the only one promotive of its object, is by objection to parol evidence in support of an issue as to the existence or the terms of a contract subject to its provisions.

[1] Ante, 295.

[2] *Cf.* ante, 236.

[3] Both statutes relate to the remedy; but the statute of frauds establishes a rule of evidence, and so is available without a special plea, by the exclusion of evidence under a denial; while the statute of limitations furnishes a bar to recovery, if insisted upon, and not being inconsistent with the plaintiff's demand, is not available under a mere denial. *Cf.* post, 382, for apparent exception to this rule, in actions for the recovery of real property, where title under the statute may be proved under a denial.

obligation. The statute of limitations operates only upon the remedy; it does not impair the obligation of a contract, or pay a debt, or create presumption of payment, but it becomes a statutory bar to recovery, when asserted and relied on.[1] The mere lapse of time does not affect either the primary right or the remedial right, and does not, of itself, bar an action. The statute does not operate *proprio vigore*, but only when asserted by the party otherwise liable. A demand that is vulnerable to this statutory defense may nevertheless be enforced, if the defense be not asserted; and a cause of action that is, on its face, within the operation of the statute is good, unless advantage be taken of such fact, by demurrer or by answer. In other words, the statute confers a *privilege* that may be asserted or waived; and it is waived, if not asserted.

In most of the states, the statute is available by demurrer, when the pleading asserting a demand shows affirmatively that the statutory period had elapsed before the commencement of the action, and does not allege any collateral fact to avoid the operation of the statute.[2] In some states, the demurrer must state specifically the ground of objection; but in most jurisdictions a general demurrer is sufficient.[3]

When the statement of a right of action shows that the statutory period in such case has elapsed, any collateral fact relied upon to prevent the bar of the statute—such as absence of the defendant, disability of the plaintiff, a new promise, or part payment—may be alleged, and the operation of the statute thereby avoided.[4] This rule, established by precedent, would seem to violate the rule, resting upon principle,

[1] Ang. on Lim. 22, and note.

[2] Smith v. Richmond, 19 Cal. 477; Kennedy v. Williams, 11 Minn. 314; Meyer v. Binkleman, 5 Colo. 262; Hanna v. Jeffersonville Ry. Co., 32 Ind. 113; Seymour v. P. C. & St. L. Ry. Co., 44 O. S. 12. *Cf.* Mills v. Rice, 3 Neb. 76; Huston v. Craighead, 23 O. S. 198; Sturges v. Burton, 8 O. S. 215; McArdle v. McArdle, 12 Minn. 98. *Contra*, by statute, Tarbox v. Supervisors, 34 Wis. 558; Sands v. St. John, 36 Barb. 628; Dezengremel v. Dezengremel, 24 Hun, 457.

[3] Ante, 295, and cases cited.

[4] Coles v. Kelsey, 2 Tex. 541; Combs v. Watson, 32 O. S. 228.

that the plaintiff should not anticipate a defense. But in no other way could such collateral fact, excepting a demand from the operation of the statute, be made available against a demurrer. It must be axiomatic in pleading, that any cognate fact requisite to make a complaint good against demurrer may rightly be alleged therein.

337. Statute of Limitations, Continued.—When the complaint is not open to demurrer, the statute is available by answer; but only by answer of new matter.[1] An answer of denial is a waiver of defense under the statute.[2] The reason for requiring the statute to be specially pleaded is, that it is essentially a confession and avoidance of the demand to which it is addressed.[3] Hence, a plea that the "supposed debt, if any such there be," did not accrue within the statutory period, is bad for not confessing the debt.[4]

The defense of the statute is a personal privilege, and is available only to the person sought to be charged, and to those in privity with him;[5] and others can not assert it for them.[6]

[1] Davenport v. Short, 17 Minn. 24; Merryman v. State, 5 Har. & Johns. 425; Robbins v. Harvey, 5 Conn. 335; Parker v. Irvine, 47 Ga. 405.

[2] McKinney v. McKinney, 8 O. S. 423; Towsley v. Moore, 30 O. S. 184; Parker v. Berry, 12 Kan. 351. See post, 382, where title by virtue of the statute may be proved under a denial.

[3] 7 Wait's Ac. & Def. 309; Margetts v. Bays, 4 Ad. & El. 489.

[4] Margetts v. Bays, 4 Ad. & El. 489.

[5] Dawson v. Callaway, 18 Ga. 573; Grattan v. Wiggins, 23 Cal. 16; Lord v. Morris, 18 Cal. 482. The rule of the common law, that lapse of time does not bar the right of the crown, *nullum tempus occurrit regi*, obtains in this country, in the absence of express statutory provision to the contrary. Lindsey v. Miller, 6 Pet. 666; Seeley v. Thomas, 31 O. S. 301, 308; Hill v. Josselyn, 13 S. & M. 597; Josselyn v. Stone, 28 Miss. 753. *Cf.* Fink v. O'Neill, 106 U. S. 272, 280; United States v. Knight, 14 Pet. 301, 315. But this doctrine, it has been held, applies only to the state at large, and not to its political subdivisions; County of St. Charles v. Powell, 22 Mo. 525; Lessee of Cin. v. Pres. Ch., 8 Ohio, 298; Armstrong v. Dalton, 4 Dev. 569; and only when the government is the real party in interest, and not a mere nominal party. United States v. Beebe, 127 U. S. 338; Miller v. State, 38 Ala. 600. This maxim rests

[6] Allen v. Smith, 129 U. S. 465; Waterman v. Sprague Mfg. Co., 14 R. I. 43; Smith v. Lincoln, 54 Vt. 382.

There is a well-settled distinction between a statutory limitation that affects only the remedy, and one that is made a part of the right itself. Where the limitation is part of the right conferred by the statute, a complaint under favor of such statute must show affirmatively that the action is brought within the prescribed time, and failing to show this it is open to demurrer.[1]

Where the statement of a demand shows that the statutory period has elapsed, and a new promise is pleaded for the purpose of avoiding the bar of the statute, the action is upon the original demand, and not upon the new promise.[2] This is necessarily so, for, as before stated, the statute does not, when operative, extinguish the right of action; and the new promise simply avoids its operation. Hence, when the statute is pleaded, the plaintiff may reply the new promise, and the reply will not be a departure.[3]

338. Statute of Limitations, Continued.—Following the maxim *conventio vincit legem*, the courts have held that parties may, by contract, fix a shorter time for the bringing of an action than that fixed by the statute.[4] And it has been held that, inasmuch as the statute is for the benefit of individuals, and not to secure general objects of policy or morals, its protection may be waived by an agreement not to assert it, provided the plaintiff has, pursuant to the agreement,

upon the ground that no laches shall be imputed to the sovereign, and not upon any notion of prerogative. It is a great principle of public policy, that the public interest shall not suffer by the laches of public officers. MATTHEWS, J., in Fink v. O'Neill, 106 U. S. 272.

[1] 7 Wait's Ac. & Def. 308; De Beauvoir v. Owen, 5 Exch. 166; Per BRINKERHOFF, J., in Davis v. Hines, 6 O. S. 473.

[2] Ang. on Lim. 288; Smith v. Richmond, 19 Cal. 476; Coffin v. Secor, 40 O. S. 637; Ilsley v. Jewett, 3 Met. 439; Leaper v. Tatton, 16 East, 420; Boyd v. Hurlbut, 41 Mo. 264; Upton v. Else, 12 Moore, 303; Little v. Blunt, 9 Pick. 488. *Contra*, Minter v. Broach, 6 Ga. 21; Sims v. Radcliffe, 3 Rich. (S. C.) 287; Coles v. Kelsey, 2 Tex. 541; Kampshall v. Goodman, 6 McLean, 189.

[3] Ang. on Lim. 288.

[4] Wolf v. W. U. Tel. Co., 62 Pa. St. 83; s. c. 1 Am. Rep. 387; Killips v. Put. Fire Ins. Co., 28 Wis. 472, holding that delay in bringing the suit, caused by acts of the defendant, should be added to the time so fixed by the contract. s. c. 9 Am. Rep. 506.

forborne to sue;[1] the agreement operating by way of estoppel.

The statute of limitations is *lex fori*, and not *lex loci contractus*. It is well settled that personal contracts are to have, everywhere, the same validity, interpretation, and obligatory force, that they have where they are made or are to be executed;[2] and it is equally well settled that remedies for the breach of contracts are governed by the law of the place where the action therefor is brought.[3] The limitation of actions being a matter of process and remedy, and not of right and obligation, and the right and obligation not being affected by the currency of the statute, it follows that the *lex fori* must determine whether the statute may be pleaded.[4] The statutes

[1] 2 Herm. on Estop. 825; Gaylord v. VanLoan, 15 Wend. 308; Utica Ins. Co. v. Bloodgood, 4 Wend. 652; Quick v. Corlies, 39 N. J. L. 11; Warren v. Walker, 23 Me. 453; Webber v. Williams College, 23 Pick. 302; Lade v. Trill, 6 Jur. 272. *Cf.* Cowart v. Perrine, 21 N. J. Eq. 101; Randon v. Toby, 11 How. 493; Hodgdon v. Chase, 29 Me. 47. *Contra*, Crane v. French, 38 Miss. 503, holding that the statute not only confers a privilege, but rests upon grounds of public policy, which would be contravened by enforcing such agreement. *Cf.* Dubois v. Campau, 37 Mich. 248.

[2] 2 Par. on Contr. 570, 571; Ang. on Lim. 64; Pearsall v. Dwight, 2 Mass. 84; Jones v. Jones, 18 Ala. 248.

[3] Ang. on Lim. 65; 2 Par. on Contr. 590; Sto. Confl. of Laws, 556; Jones v. Jones, 18 Ala. 248; Perry v. Lewis, 6 Fla. 555.

[4] Story Confl. of Laws, 576; Jones v. Jones, 18 Ala. 248; Sloan v. Waugh, 18 Iowa, 224; Nash v. Tupper, 1 Caines, 402; Perry v. Lewis, 6 Fla. 555; Leroy v. Crowninshield, 2 Mason, 151; Townsend v. Jemison, 9 How. 407; M'Elmoyle v. Cohen, 13 Pet. 312; Bulger v. Roche, 11 Pick. 36, where a debt was contracted in a foreign country, between subjects thereof, who resided there until the debt was barred by the law of that country, and then removed to Massachusetts, where an action was brought, and it was held, that the law of the forum could not be made available until the parties had resided in the commonwealth the prescribed statutory period. If the statute of the place where a contract is made should extinguish, not only the remedy, but the right and obligation, and declare the claim a nullity after the lapse of the prescribed period; and if the parties, after residing within such jurisdiction during the whole of that period, should remove to another state, whether the *lex loci contractus* could there be pleaded in extinguishment of the right and obligation, *quære*. Sto. Confl. of Laws, 582; Per Lord Brougham, in Don v. Lippman, 5 Clark & F. 16; Per Tindal, C. J., in Huber v. Steiner. 2 Bing. (N. C.) 202.

of some states provide that actions shall be barred therein, if they would be barred by the law of the state where the right of action arose. To make the foreign statute available in such case, both the statute and the facts which make it operative must be specially pleaded.[1]

The statute of limitations is regarded as a strict defense, and if omitted, the courts will not, as a rule, allow it to be asserted by amendment,[2] though there is a growing tendency to recede from this rule, and to allow the statute to be asserted by amendment;[3] especially where there has been accidental default, or where the statute is to be used as an instrument of justice, and not of mere strategy.[4]

The approved form for pleading the statute, at common law, was, *actio non accrevit infra* [*sex*] *annos*.[5] Under the new procedure there are no established forms of pleading; but this common-law form is sufficient in substance, and is generally adopted. It will, therefore, generally be sufficient to allege "that the right of action stated in the complaint did not accrue within years next before the commencement of this action." The defendant need not negative the exceptions in the statute; for these, if relied on, must be replied by the plaintiff.[6]

[1] Hoyt v. McNeil, 13 Minn. 390; Gillett v. Hill, 32 Iowa, 220. *Cf.* Whelan v. Kinsley, 26 O. S. 131; Headington v. Neff, 7 Ohio (Pt. 1), 229.

[2] Sheets v. Baldwin, 12 Ohio, 120: Newson v. Ran, 18 Ohio, 240; Beach v. Fulton Bank, 3 Wend. 574; Jackson v. Varick, 2 Wend. 294; Plumer v. Clarke, 59 Wis. 646; Sagory v. N. Y. & N. H. Ry. Co., 21 How. Pr. 455; Coit v. Skinner, 7 Cow. 401; Wolcott v. Farlan, 6 Hill, 227.

[3] Barnett v. Meyer, 10 Hun, 109; Gilchrist v. Gilchrist, 44 How. Pr. 317; Ellenger's Appeal, 114 Pa. St. 505; Mitchell v. Campbell, 14 Oreg. 454. In the last two cases, the court opened up a judgment to let the defendant assert the bar of the statute. *Cf.* Union Nat. Bank v. Bassett, 3 Abb. Pr. N. S. 359; Macqueen v. Babcock, 13 Abb. Pr. 268; Gourlay v. Hutton, 10 Wend. 595. An executor is not bound to plead the general statute, if he believes the claim a just one; Walter v. Radcliffe, 2 Des. (S. C.) 577; Leigh v. Smith, 3 Ired. Ch. 442; though he is bound to plead a statute which applies to him in that capacity. Gookin v. Sanborn, 3 N. H. 491.

[4] Pegram v. Stoltz, 67 N. C. 144.

[5] Steph. Pl. 393; Ang. on Lim. 287.

[6] Ford v. Babcock. 2 Sandf. 518;

339. Exceptions and Provisos Distinguished.—In actions under favor of a statute containing an exception, as distinguished from a proviso, the complaint should show affirmatively that the case does not fall within the exception.[1] A proviso, on the other hand, is matter of defense, and need not be negatived in the complaint. Exceptions and provisos are alike in this, that they both exempt something from the operation of the statute; they differ in this, that an exception exempts absolutely from the operation of the statute, while a proviso generally defeats the operation of the statute conditionally. The former is generally a part of the enacting clause, and is of general application; the latter is generally engrafted on a preceding enactment, and is added for the purpose of taking special cases out of a general class, or to guard against misinterpretation.[2]

The requirement that an exception must be negatived, though technical, is not arbitrary, and rests upon sound principle. An exception is an exemption so incorporated with the enacting clause as to enter into its identity, and the one can not be stated without the other; in other words, the adversary party can not be shown to be within the statute, unless it appear also that he is not within the exception. For example, if a statute provide that "no person shall do any work, except works of necessity, on Sunday; but this law shall not extend to those who conscientiously observe the seventh day of the week as the Sabbath," the language exempting works of necessity would be part of the description of the thing prohibited. It is as if the statute should, *in totidem verbis*, prohibit unnecessary labor on Sunday. The

Walker v. B. R. of Miss., 2 Eng. (Ark.) 503.

[1] Church v. Utica, etc., Ry. Co., 6 Barb. 313; Walker v. Johnson, 2 McLean, 92; Vavasour v. Ormrod, 6 B. & C. 430; Toledo, etc., Ry. Co., v. Pence, 68 Ill. 524; Spieres v. Parker, 1 T. R. 141; Hoffman v. Peters, 51 N. J. L. 244; Blasdell v. State, 5 Tex. App. 263; Foster v. Hazen, 12 Barb. 547; Brutton v. The State, 4 Ind. 602; Broom Max. 677; Steph Pl. (Heard's Ed.) 443. *Cf.* Faribault v. Hulett, 10 Minn. 30.

[2] Sedg. on Constr. of Stat. 50, 93; Suth. on Stat. Constr. 222; JOHNSON, J., in Waffle v. Goble, 53 Barb. 517, 522; STORY, J., in Minis v. United States, 15 Pet. 423, 445; State v. Stapp, 29 Iowa, 551.

statutory prohibition can not be stated, without stating the exception; and a violation of the statute can not be affirmed, without a negation of the exception. Not so as to the other exemption supposed. That is not descriptive of the thing prohibited, but is in the nature of a privilege or excuse, and need not be referred to in alleging a violation of the statute. It is matter of defense, to be shown by the other party.[1]

340. Foreign Laws Must be Pleaded.—Foreign laws are matters of fact, and the procedure incident to the ascertainment of them is governed accordingly. They must be alleged as facts, they must be proved by evidence, and the evidence weighed by the jury. The courts take judicial notice of public domestic statutes, and these need not be pleaded; but private legislative acts, like all foreign statutes, must be pleaded and proved.[2] The several states are, in this regard, foreign to each other; but the state courts will take judicial cognizance of the public acts of the United States,[3] and the courts of the United States will take like cognizance of the laws of the states and territories.[4] International law, being of universal application,[5] and the law merchant, so far as it is part of the general law of the land,[6] will be judicially noticed, and need not be pleaded; but the particular laws of a foreign state relating to commercial paper—such as

[1] Billigheimer v. State, 32 O. S. 435. *Cf.* Stanglein v. State, 17 O. S. 453; Hirn v. State, 1 O. S. 15; Fleming v. People, 27 N. Y. 329; Harris v. White, 81 N. Y. 532.

[2] Broad St. Hotel Co. v. Weaver, 57 Ala. 26; Ellis v. Eastman, 32 Cal. 447; Atchison, etc., Ry. Co. v. Blackshire, 10 Kan. 477; Proprietors v. Call, 1 Mass. 483; Timlow v. Phila., etc., Ry. Co., 99 Pa. St. 284; Hailes v. State, 9 Tex. App. 170; Horn v. Chicago, etc., Ry. Co., 38 Wis. 463. In some states the legislature has provided that private statutes shall be judicially noticed.

[3] Dickenson v. Breeden, 30 Ill. 279; Wright v. Hawkins, 28 Tex. 452; Papin v. Ryan, 32 Mo. 21; Dale v. Wilson, 16 Minn. 525; Mims v. Swartz, 37 Tex. 13; Bird v. Comm., 21 Gratt. 800; Montgomery v. Deeley, 3 Wis. 709, 712.

[4] Jasper v. Porter, 2 McLean, 579; Jones v. Hays, 4 McLean, 521; Smith v. Tallapoosa Co., 2 Woods, 574; Elwood v. Flannigan, 104 U. S. 562; Hinde v. Vattier, 5 Pet. 398. *Cf.* Owings v. Hull, 9 Pet. 607.

[5] The Scotia, 14 Wall. 170. *Cf.* Ocean Ins. Co. v. Francis, 2 Wend. 64; s. c. 19 Am. Dec. 549.

[6] Ereskine v. Murray, 2 Ld. Ray. 1542; Edie v. East India Co., 2 Burr. 1226, 1228.

the allowance of days of grace—must be alleged and proved.[1]

Courts, excepting those of the particular municipality, do not take judicial notice of municipal ordinances; and where such ordinance is relied upon, except in the municipal courts, it must be alleged and proved.[2] But where an action for the violation of a city ordinance is commenced and prosecuted to conviction and sentence before the police judge of such city, and is then appealed by the defendant to the district court, the latter court should take judicial notice both of the incorporation of the city and of the existence and substance of its ordinance involved.[3] The manner of pleading foreign laws will properly be considered in the next chapter.[4]

II. OF MATTERS NOT TO BE STATED.

341. Facts of which the Court will Take Judicial Notice.—In the presentation of causes of action and defenses, not only must the pleader be confined to a statement of operative facts as distinguished from evidential facts, and to statements and denials that are relevant and material, but there are some operative facts, both relevant and material, that need not be stated, because they come properly to the attention of the court and the parties, without being either pleaded or proved. There is a large class of facts that will be "judicially noticed" by the tribunal wherein an action in which they become material is pending. This judicial cognizance rests upon the expediency of dispensing with the allegation and proof of matters so well established as to be commonly known, and not to admit of controversy. A compre-

[1] Bowen v. Newell, 13 N. Y. 290.

[2] Mooney v. Kennett, 19 Mo. 551; Case v. Mobile, 30 Ala. 538; Napa v. Easterby, 61 Cal. 509; Chicago, etc., Ry. Co. v. Klauber, 9 Ill. App. 613: Garvin v. Wells, 8 Iowa, 286; Lucker v. Comm., 4 Bush, 440; Hassard v. Municipality, 7 La. Ann. 495; New Orleans v. Labatt, 33 La. Ann. 107; Winona v. Burke, 23 Minn. 254; State v. Oddle, 42 Mo. 210; Butler v. Robinson. 75 Mo. 192; Porter v. Waring, 69 N. Y. 250; Goodrich v. Brown, 30 Iowa, 291. *Cf.* Pomeroy v. Lappens, 9 Oreg. 363.

[3] Solomon v. Hughes, 24 Kan. 211.

[4] Post, 378.

hensive statement of the rule is, that "courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction."[1] Facts of which the court will take judicial notice are not to be pleaded, issue can not be joined upon them,[2] and no proof thereof can be required.[3] On demurrer, a pleading is to be read as if such matters were stated therein;[4] and an allegation contrary to a fact of which the court will take judicial notice is not admitted by demurrer.[5]

As stated in the last preceding section, state courts will take judicial notice of the public or general statutes of the state, of the public statutes of the United States, and of the law of nations. An act of the legislature incorporating a municipal corporation is a public act, and will be judicially noticed;[6] but where a town or city has been incorporated under a general statute, authorizing towns and cities to become incorporated by complying with certain conditions, the courts will not take judicial notice that such town or city has become incorporated under such law,[7] nor that it is of a particular class or grade.[8] Treaties, being public laws,

[1] 1 Greenl. Ev. 6. But the personal knowledge of the judge may not be the judicial knowledge of the court; and on the other hand, actual knowledge of the judge is not essential to his judicial cognizance of a fact. The judge may, when necessary, inform himself as to any proper subject of judicial notice; but this extra-judicial knowledge of a disputable fact will not dispense with allegation and proof thereof.

[2] Bd. Comrs. v. Burford, 93 Ind. 383; Atty. General v. Foote, 11 Wis. 14; s. c. 78 Am. Dec. 689; Cooke v. Tallman, 40 Iowa, 133; Perryman v. Greenville, 51 Ala. 507.

[3] Secrist v. Petty, 109 Ill. 188.

[4] Per EARL, J., in Walsh v. Trustees N. Y. & B. Bridge, 96 N. Y. 427.

[5] Cooke v. Tallman, 40 Iowa, 133; Atty. General v. Foot, 11 Wis. 14; Per Vice Chancellor, in Taylor v. Barclay, 2 Simons Ch. Rep. 213.

[6] Albrittin v. Huntsville, 60 Ala. 486; Perryman v. Greenville, 51 Ala. 507; Alderman v. Finley, 10 Ark. 423; People v. Potter, 35 Cal. 110; Stier v. Oskaloosa, 41 Iowa, 353; Prell v. McDonald, 7 Kan. 426; Hawthorne v. Hoboken, 32 N. J. L. 172; State v. Murfreesboro, 11 Humph. 217; Briggs v. Whipple, 7 Vt. 15; Janesville v. Milwaukee & Miss. Ry. Co., 7 Wis. 484; Alexander v. Milwaukee, 16 Wis. 247.

[7] Hopkins v. Kansas City, etc., Ry. Co., 79 Mo. 98; Temple v. State, 15 Tex. App. 304.

[8] Bolton v. Cleveland, 35 O. S. 319.

are judicially noticed;[1] and municipal ordinances, being laws of the particular municipality, are judicially noticed by the municipal courts.[2]

342. Facts Judicially Noticed, Continued.—The courts of a state will take judicial cognizance of the civil divisions within the state, as into counties and townships, created by law;[3] and will also take notice of the contiguity and relative positions of the counties of the state,[4] and of their boundaries so far as established and pointed out by statute.[5]

Courts will take judicial notice of the more obvious and unvarying events in the general course of nature, the great natural features of the world, the general geography of the country, the more notorious facts of general current history, the ordinary computations of time, and the coincidence of days of the week with days of the month, the existence, relations, symbols, and seals of civilized nations, the ordinary meaning of English words and phrases, and of abbreviations in common use, and of many other matters of common knowledge and general notoriety. There is some contrariety in the views taken by different courts, and no invariable rule

[1] Howard v. Moot, 64 N. Y. 262; Montgomery v. Duley, 3 Wis. 709, 712; United States v. Reynes, 9 How. 127; Baby v. Dubois, 1 Blackf. 255.

[2] State v. Leiber, 11 Iowa, 407; Conboy v. Iowa City, 2 Iowa, 90. *Cf.* City of Solomon v. Hughes, 24 Kan. 211, where it is held that on appeal of an action for the violation of a city ordinance, begun in the police court of the city, the appellate court will take judicial notice, not only of the ordinance, but of the corporate existence of the city.

[3] Dickenson v. Breeden, 30 Ill. 279; State v. Powers, 25 Conn. 48; Martin v. Martin, 51 Me. 366; Win. Lake Co. v. Young, 40 N. H. 420; People v. Smith, 1 Cal. 9; Brumagim v. Bradshaw, 39 Cal. 40; Wright v. Hawkins, 28 Tex. 452; Boston v. State, 5 Tex. App. 383; Louisville, etc., Ry. Co. v. Hixon, 101 Ind. 337.

[4] Wright v. Hawkins, 28 Tex. 452; Boston v. State, 5 Tex. App. 383.

[5] Terre Haute, etc., Ry. Co. v. Pierce, 95 Ind. 496; Indianapolis, etc., Ry. Co. v. Moore, 16 Ind. 43; Cooke v. Tallman, 40 Iowa, 133; State v. Jackson, 39 Me. 291; Wright v. Hawkins, 28 Tex. 452; Stephenson v. Doe, 8 Blackf. 508; Buckinghouse v. Gregg, 19 Ind. 401. *Cf.* Bond v. Perkins, 4 Heisk. 364.

can be laid down as to what matters of fact will be noticed without allegation and proof.[1]

343. The Law, and Legal Conclusions.—It has heretofore been shown that the law is not to be stated in any pleading; and the reasons for this exclusion have been given.[2] It remains only to illustrate and exemplify the rule, which, it will appear, is commonly violated by the blending of law and fact, or by the statement of legal conclusions drawn from facts not stated, rather than by the statement of abstract rules of law.

An allegation that one is the "heir," or the "sole heir," of another, when asserted as the ground of a claim, is a conclusion of law; the facts of exclusive near relationship should be stated, so that the legal relation may appear.[3] An allegation that one is "indebted" to another is a legal conclusion, and insufficient on demurrer, except where sanctioned by statute.[4] The same is true of an allegation that the defendant was "bound to repair," when made to show the liability sought to be enforced,[5] or that a certain sum is "due," when made as an assertion of the indebtedness sued on,[6] unless sanctioned by statute. But an averment in a complaint on a promissory note, that a certain sum "*is due* as principal and interest on said note," has been held equivalent to an averment that the note remains unpaid.[7] An allegation that it was "the duty of the defendant" to keep a certain place in safe condition;[8] that "the defendant was, by law, bound to fence its

[1] For a fuller and more detailed treatment of the topic, see 1 Greenl. Ev. 4–6 a; Wade on Notice, 1403–1417; 1 Whar. Civ. Ev. 276–340; 89 Am. Dec. 663–697, *nota;* Suth. on Stat. Constr. 293–306.

[2] Ante, 33, 184.

[3] Treasurer v. Hall, 3 Ohio, 225; Waldsmith v. Waldsmith, 2 Ohio, 156; Larne v. Hays, 7 Bush, 50.

[4] Millard v. Baldwin, 69 Mass. 484; Holgate v. Broome, 8 Minn. 243; Roeder v. Brown, 1 Wash. Ter. 112; Gray v. Kendall, 10 Abb. Pr. 66. *Cf.* Crane v. Lipscomb, 24 S. C. 430, 437.

[5] Casey v. Mann, 5 Abb. Pr. 91.

[6] Tooker v. Arnoux, 76 N. Y. 397; Tucker v. Lovejoy, 73 Wis. 66; Roberts v. Treadwell, 50 Cal. 520. *Contra*, Allen v. Patterson, 7 N. Y. 476.

[7] Downey v. Whittenberger, 60 Ind. 188.

[8] Samminis v. Wilhelm, 6 Ohio C. C. Rep. 565.

road;"[1] a general allegation of reasonable notice;[2] that certain property is by the law exempt, and not stating the circumstances requisite to exempt it;[3] that plaintiff's title by virtue of a tax sale is invalid because of irregularity in the notice of sale, and not stating the irregularity;[4] that the plaintiff "was entitled to the exclusive possession of the premises," without asserting other ground of title or of possession, in an action for interference with plaintiff's possession;[5] that one was "entitled to vote" at an election;[6] and that "defendant took the land subject to the mortgage;"[7] have been held to be mere conclusions of law.

An allegation that the plaintiff is not the real party in interest, or that some person other than the plaintiff is the real party in interest, is a violation of the rule under consideration. So, also, is an allegation that the defendant was induced to make the engagement sued on by fraud, or by coercion, or by duress.

In actions on negotiable instruments, an allegation that the plaintiff is not the *bona fide* holder is not sufficient. The facts showing the *male fides* should be stated.[8]

344. Conclusions of Law, Continued.—In an action to restrain destructive trespass, an allegation that the apprehended injury will be "irreparable" is a conclusion of law; facts should be stated, showing that such would be the character of the injury.[9] Where a complaint to enjoin the collection of a ditch assessment by sale of plaintiff's lands alleged that there had been no proper or legal notice of the proceedings before the commissioners, the allegation was held to be a mere legal conclusion.[10] It was pregnant with the

[1] B. & O. Ry. Co. v. Wilson, 31 O. S. 555.

[2] McCormick v. Tate, 20 Ill. 334; Cruger v. Hudson River Ry. Co., 12 N. Y. 190.

[3] Quinney v. Stockbridge, 33 Wis. 505.

[4] Webb v. Bidwell, 15 Minn. 479, 485.

[5] Garner v. McCullough, 48 Mo. 318; Sheridan v. Jackson, 72 N. Y. 170. *Cf.* Patterson v. Adams, 7 Hill, 126.

[6] Brown v. Phillips, 71 Wis. 239.

[7] Wormouth v. Hatch, 33 Cal. 121.

[8] 1 Dan. Neg. Instr. 770; Uther v. Rich, 10 Ad. & El. 784.

[9] Van Wert v. Wesbter, 31 O. S. 420.

[10] Harris v. Ross, Treas., 112 Ind. 314.

implication that there had been notice; and, until the contrary should appear, it must be presumed to have been such notice as the law required.

In a complaint for specific performance of a contract to convey, and where the plaintiff was, by the terms of the contract, to give notes and a mortgage for the purchase-money, the general allegation, "that he has offered, and has always been ready and willing to comply with his contract," is not sufficient. He should state the facts constituting what he says was an offer.[1] The averment that plaintiff is "lawfully enfranchised and the legal owner" of a certain bridge, without setting forth the facts on which the averment is based, is good on demurrer. The averment is not a conclusion of law, and the facts to sustain it are evidential.[2] It would seem, upon both principle and authority, that where a statute requires the doing of certain things as a condition precedent to the acquisition of a right or remedy conferred by the statute, a pleading asserting such right or pursuing such remedy should allege the doing of the several acts prescribed by the statute.[3]

345. Conclusions of Law, Continued.—As to whether the allegation that an act was "duly" done, without stating the particulars, is an allegation of fact, or of a legal conclusion, the authorities are not at one. Perhaps the general rule at common law and in equity is, that such allegation is a mere conclusion of law, and is insufficient on demurrer;[4]

[1] Hart v. McClellan, 41 Ala. 251.

[2] Bucki v. Cone, 25 Fla. 1.

[3] Oreg. Cent. Ry. Co. v. Scoggin, 3 Oreg. 161; Rhoda v. Alameda Co., 52 Cal. 350; Kechler v. Stumme, 36 N. Y. Sup. Ct. 337. *Contra*, McCorkle v. Herrmann, 22 N. Y. St. Rep. 519, holding that an allegation that due proceedings were taken by which mechanics' liens were filed, and not stating the several steps by which the liens were established, is not demurrable, because, while it alleges a conclusion of law, it is also a conclusion of fact. Whether the steps legally requisite have been taken, is a question of fact; whether the steps taken are legally sufficient, is a question of law. So the allegation as in this case, that due proceedings were taken, etc., embodies more of fact than would the allegation that liens were duly obtained.

[4] Gillett v. Fairchild, 4 Den. 80; Beach v. King, 17 Wend. 197; Sto. Eq. Pl. 251; Cruger v. Halliday, 11 Paige, 320; Trow City Directory v. Curtin, 36 Fed. Rep. 829; Rhoda v. Alameda Co., 52 Cal. 350. *Contra*,

but a contrary view has generally obtained under the new procedure. An allegation that the recognizance sued on was by the court adjudged forfeited, and the forfeiture "duly entered of record," and not stating that the surety was called, and required to bring in the body of his principal:[1] that plaintiff "duly protested in writing," and "duly appealed;"[2] that a mortgage was "duly assigned" to the plaintiff;[3] that plaintiff "duly assigned" a promissory note to defendant;[4] that certain taxes were "duly levied and assessed";[5] that a city ordinance was "duly passed";[6] that a certain surrogate of New Jersey had jurisdiction, and was "duly authorized" by the laws of that state to issue certain letters of administration;[7] that a certain corporation was "duly organized under the laws" of a certain state;[8] that the plaintiff was "duly appointed receiver;"[9] that the plaintiff was "duly sworn, and did take his corporal oath;"[10] and that the defendant had been "duly discharged;"[11] have been held to be sufficient in matter of substance. And an averment that a meeting was "duly convened," implies that it was regularly convened; and, if necessary to its regularity, that it was an adjourned meeting.[12] In an action to compel a county treasurer to levy and collect a tax voted to aid in building a railroad, an allegation that plaintiff had made the required proof of compliance with the conditions upon which the tax was to be paid, was held good on demurrer.[13] But in an action based on an application and affidavit made in a certain office, an allegation that plaintiff filed his "affidavit

Polly v. Saratoga, etc., Ry. Co., 9 Barb. 449. *Cf.* Burdett v. Greer, 8 Pick. 108; Sewall v. Valentine, 6 Pick. 276.

[1] Rubush v. State, 112 Ind. 107.

[2] Robertson v. Perkins, 129 U. S. 233.

[3] Barthol v. Blakin, 34 Iowa, 452.

[4] Hoag v. Mendenhall, 19 Minn. 335.

[5] Webb v. Bidwell, 15 Minn. 479.

[6] Becker v. Washington, 94 Mo. 375.

[7] Schluler v. Bow. Sav. Bank, 117 N. Y. 125.

[8] Smith v. Sewing Machine Co., 26 O. S. 562; Lorillard v. Clyde, 86 N. Y. 384.

[9] Cheyney v. Fisk, 22 How. Pr. 236.

[10] Burns v. People, 59 Barb. 531.

[11] Gibson v. People, 5 Hun, 542.

[12] People v. Walker, 23 Barb. 304.

[13] B. C. R. & M. Ry. Co. v. Stewart, 39 Iowa, 267.

and application in due form," was held to be the statement of a mere conclusion, and to be insufficient. The facts contained in the affidavit and application should have been stated, so that the court might see whether they were in "due form."[1] It has been held insufficient to aver that plaintiff was "duly appointed" administrator. That he was appointed, by somebody, or in some form, is a matter of fact; but whether he was "duly appointed," is a question of law.[2] But it would seem that such averment embodies so much of fact as to be good on demurrer, though amenable to motion to make definite. Where the complaint alleged, as the basis of the amount of rent sued for, an appraisement "duly and legally made," and the answer, instead of stating in what respect the appraisement was illegal, simply alleged that it "was not legally and duly made," it was held that while each pleading might have been subjected to a motion to make definite, there was so much of fact embodied in the allegation in the complaint, and such traverse thereof in the answer, as to make a material, though indefinite, issue; and no objection being urged until after verdict and judgment against the plaintiff, it was held that the right to object was waived.[3] A denial "that the plaintiff is a corporation duly organized," has been held not to raise an issue of fact.[4]

346. Conclusions of Law, Continued.—The line of demarkation between what are ultimate facts and what are conclusions of law is one not easy to be drawn in all cases. Ultimate facts are deduced from probative facts by a process of natural reasoning, while conclusions of law are drawn by a process of legal deduction. The result reached by a presumption of law may be a fact, equally with that reached by a deduction of fact from other and evidentiary facts; and the same fact may be reached by the one process or by the other. The difference is in the process, rather than in the result. Fraud, guilt, negligence, sanity, are all facts, but

[1] McEntee v. Cook, 76 Cal. 187.
[2] Beach v. King, 17 Wend. 197.
[3] Trustees, etc., v. Odlin, 8 O. S. 293.
[4] Oreg. Cent. Ry. Co. v. Scoggin, 3 Oreg. 161.

their existence in a given case may be deduced by a process of natural reasoning from other and cognate facts, or it may be inferred from certain facts, by fixed and arbitrary rules of law. We take certain facts *as evidence*, and find the ultimate fact proved; the law takes certain facts *as a basis*, and arbitrarily draws a conclusion therefrom.[1]

An allegation of a legal conclusion may contain an averment of fact that will make it good on demurrer; and it has generally been on this ground, and to avoid prolixity, that courts have sustained the allegation that an act was "duly" done.[2]

Whether a given statement is a fact, or a conclusion of law, may depend upon the use that is made of it, as shown by the context; for a proposition may, for one purpose, be a conclusion of fact, and good on demurrer, while for another purpose it is a conclusion of law, and not good on demurrer. For example, in an action for goods sold, an allegation of indebtedness is a conclusion of law; but in an action by a judgment creditor, to set aside a fraudulent conveyance, an allegation of indebtedness as the foundation of the judgment is matter of fact. That one is heir of another, if asserted as the ground of a demand, is a conclusion of law; *aliter*, if stated merely by way of designation. So, also, an allegation that A. is a creditor of B., if to designate him as belonging to a class, or as a reason for making him a party, is the statement of a fact; but if used as the assertion of a demand by A. against B., it becomes a conclusion of law.[3] An ultimate conclusion of fact—such as, that the defendant was negligent, or that he defrauded plaintiff—should not be alleged These are conclusions to be found, not to be alleged.[4]

The rule under consideration not only requires facts to be

[1] 1 Gr. Ev. 14–48; Burr. on Cir. Ev. 52; Per SEARLS, J., in Levins v. Rovegno, 71 Cal. 273.

[2] Hoag v. Mendenhall, 19 Minn. 335; Fowler v. N. Y. Indem. Ins. Co., 23 Barb. 143; People v. Walker, 23 Barb. 304; Trustees, etc., v. Odlin, 8 O. S. 293. *Cf.* Ready v. Sommer, 37 Wis. 265. *Contra*, Rhoda v. Alameda Co., 52 Cal. 250.

[3] Turner v. White, 73 Cal. 299. *Cf.* Levins v. Rovegno, 71 Cal. 273.

[4] Abb. Pl. Br. 262, and cases cited.

stated, to the exclusion of the law and legal conclusions, but it gives to them controlling effect; so that where a pleader states the operative facts which show his remedial right, he is not to be prejudiced by having erroneously denominated his title.[1] And a conclusion of fact is overcome by a statement of specific facts showing the conclusion to be a *non sequitur*. Thus, an allegation that one was agent for another is a sufficient allegation of agency, but if coupled with the constituent facts showing that the relation of principal and agent did not exist, no agency is alleged.[2] This is pursuant to the rule that in the construction of pleadings general averments must yield to the specific facts stated.[3]

The mere averment of a legal conclusion states no right or defense, calls for no responsive pleading, is not admitted by failure to deny,[4] or by pleading in avoidance,[5] and will not admit evidence or sustain a judgment. A party is not concluded by a mistaken averment of the law in his pleading; for such averment, not being called for, does not tend to mislead the opposite party.[6] Where only a legal conclusion is pleaded, the pleading is demurrable; but where sufficient facts are blended with legal conclusions, the remedy is by motion. If the objectionable matter may be separated from the other, it may be stricken out; otherwise, the motion should be to make definite and certain.

347. Evidential Facts Excluded.—That only the operative facts constituting the right of action or the defense shall be pleaded, and that evidential facts shall not be alleged, is an elementary principal of pleading; and its careful observance is indispensable to that brevity, simplicity, and clearness aimed at by the new procedure. To take the raw material of a transaction, and separate the operative facts from the probative matter, is a process that requires much care and discrimination. That the defendant told some one that

[1] Robinson v. Fitch, 26 O. S. 659, 664.

[2] Everett v. Drew, 129 Mass. 150.

[3] State v. Wenzel, 77 Ind. 428; Per ELLIOTT, C. J., in State v. Casteel, 110 Ind. 174, 187.

[4] Wormouth v. Hatch, 33 Cal. 121; Cutting v. Lincoln, 9 Abb. Pr. N. S. 436; Pom. Rem. 578.

[5] Alston v. Wilson, 44 Iowa, 130.

[6] Union Bank v. Bush, 36 N. Y. 361.

he was indebted to the plaintiff in the amount claimed, is an evidential fact. It could not create, or tend to create, a liability; and if alleged, it need not be traversed, for a denial of it would present an immaterial issue.[1] The act of an agent is the act of his principal—*qui facit per alium, facit per se;* hence the agent's authorized act should be alleged as the act of the principal. This is the ultimate issuable fact, the agency being a subordinate evidential fact. In alleging title, except where the title is derivative, or the matter is controlled by statute, the facts showing deraignment of title should not, as a general rule, be stated.[2] Ownership is the ultimate operative fact, and the facts showing source of title are evidential.[3] An allegation that certain persons were partners, is a statement of the ultimate operative fact;[4] the terms of the agreement, showing the formation of a partnership, are evidential facts. In an action to recover damages for breach of an agreement not to supply milk on a certain route for three years, a writing setting forth the agreement, and fixing a penalty of one thousand dollars for breach thereof, was offered in evidence, and was objected to on the ground that the action should have been brought thereon. The court overruled the objection, on the ground that the writing was only evidence; and that it was sufficient for the plaintiff to allege the contract and the breach, without the evidence.[5]

An answer stating evidential facts, all of which could be given in evidence under a denial, and which, if true, would sustain a denial, has generally been treated as equivalent to a denial, and held good on demurrer.[6] Such answer, though

[1] Wormouth v. Hatch, 33 Cal. 121.

[2] Siter v. Jewett, 33 Cal. 92. *Cf.* Gould Pl. iii. 22-24; Abb. Pl. Br. 356, 357.

[3] Ante, 323 et seq.

[4] Alpers v. Schamel, 75 Cal. 590; Per SENEY, J., in Deatrick v. Defiance, 1 Ohio C. C. Rep. 340. *Contra*, Groves v. Tallman, 8 Nev. 178. But see criticism of this case, Pom. Rem. 530, note.

[5] Tuttle v. Hannegan, 54 N. Y. 686.

[6] Judah v. University of Vincennes, 23 Ind. 272, 277; Clink v. Thurston, 47 Cal. 21, 29; Van Alstyne v. Norton, 1 Hun, 537. *Cf.* Waggoner v. Liston, 37 Ind. 357; Hostetter v. Auman, 119 Ind. 7; Hopkinson v. Shelton, 37 Ala. 306.

in the form of new matter in avoidence, is not such in substance, and therefore does not require a reply.[1] Being sustained on the ground that its averments amount to a denial, it is obvious that no reply thereto is needed.[2]

348. Some Operative Facts not to be Alleged.—The general rule is, that every operative fact requisite in law to the maintenance of an action or a defense must be alleged. But to this rule there are some exceptions. That which the law implies need not be alleged. In an action for slander, the plaintiff need not allege his good reputation;[3] and in an action for divorce, the good conduct of plaintiff need not be averred.[4] These investitive facts are presumed to exist. So, facts necessarily implied from other facts already stated need not be substantively alleged; as, where one pleads the conversion of one hundred dollars current coin of the United States, he need not otherwise aver its value.[5] And that which already appears in the pleading of the adversary party need not be again averred.[6]

A party must not anticipate and avoid a defense. In the charging part of a bill in equity, which supplied the office of a reply,[7] the plaintiff was allowed to do this. But at common law it was never allowable to allege that which would more properly come from the other side;[8] and the same rule

[1] Corry v. Campbell, 25 O. S. 134; Simmons v. Green, 35 O. S. 104; Netcott v. Porter, 19 Kan. 131; Riddle v. Parke, 12 Ind. 89; Ferris v. Johnson, 27 Ind. 247; State v. Williams, 48 Mo. 210; Sylvis v. Sylvis, 11 Colo. 319.

[2] But ought such pleading to be sustained? It is an averment of evidential facts; it is argumentative; and it violates the well established rule, that when a plea amounts to the general issue, or a general denial, it should be so pleaded. It presents the anomaly of a defense that is in form a confession and avoidance, while in effect it is a traverse; it encumbers the record with a mass of needless matter; it makes needless disclosure to the adversary; it limits the scope of the defendant's proof; and it refers the effect of evidential facts to the court in the first instance, instead of to the jury.

[3] Pom. Rem. 525; Steph. Pl. 367; Ante, 183. *Cf.* Hart v. Evans, 8 Pa. St. 21.

[4] Roe v. Roe, 14 Hun, 612.

[5] Gould Pl. iii. 4–6; Steph. Pl. 366; Abb. Pl. Br. 50, 51.

[6] Gould Pl. iii. 3.

[7] Ante, 149.

[8] Steph. Pl. 364; Gould Pl. iii. 56. HALE, C. J., said that to anticipate a defense is "like leaping before one comes to the stile." Bovy's Case, 1 Vent. 217.

of exclusion obtains under the new procedure.[1] In an action on contract, the plaintiff should not allege that the defendant was of full age; non-age, like coverture, insanity, fraud, or duress, is matter of defense.[2] In pleading a devise of lands, it is not necessary to allege that the devisor was of full age.[3] A plaintiff need not allege the performance of conditions subsequent.[4] In an action on a policy of insurance, the complaint need not allege that the defendant refuses to rebuild; such option being a condition subsequent, for the benefit of the defendant, and matter of defense.[5] So, also, a condition of defeasance in a contract need not be negatived by the plaintiff.[6] In an action by a foreign guardian, the statutory prerequisite that no domestic guardian has been appointed, need not be alleged.[7] So, it has been held that in an action for divorce, the statutory requirement that the plaintiff must be a resident of the county need not be averred.[8] In actions for negligence, contributory negligence need not, with a single exception, be negatived by the plaintiff.[9]

349. Some Operative Facts not to be Alleged, Continued.—In actions for the breach of contract, an averment of non-performance is not the avoidance of a defense, but the allegation of a breach, without which the delict of the defendant would not appear;[10] and this applies to an allegation of non-payment, notwithstanding the defense of payment is new matter in avoidance.[11] In an action for an unpaid

[1] Pom. Rem. 532, note 3; Claflin v. Taussig, 7 Hun, 223; Metrop. L. Ins. Co. v. Meeker, 85 N. Y. 614; Wilkinson v. Applegate, 64 Ind. 98; Canfield v. Tobias, 21 Cal. 349; Sands v. St. John, 36 Barb. 628.

[2] Tyler's Steph. Pl. 237; Gould Pl. iii. 56; Bliss Pl. 200.

[3] Steph. Pl. 365; Stowell v. Zouch, 1 Plow. 376.

[4] Hammer v. Kaufman, 2 Bond, 1.

[5] Union Ins. Co. v. McGookey, 33 O. S. 555; Howard F. & M. Ins. Co. v. Cornick, 24 Ill. 455.

[6] Del., etc., Ry. Co. v. Bowns, 36 N. Y. Superior Ct. 126; Bringham v. Leighty, 61 Ind. 524.

[7] Vincent v. Starks, 45 Wis. 458.

[8] Young v. Young, 18 Minn. 90.

[9] Post, 502.

[10] Gould Pl. iii. 56.

Wheeler, etc., Co. v. Worrall, 80 Ind. 297; Jolley v. Plant, 1 McArthur, 93; Roberts v. Treadwell, 50 Cal. 520. *Cf.* Wilkins v. Moore, 20 Kan. 538.

balance, a statement of payments credited is not the anticipation of a defense, but a material element of the plaintiff's claim.[1]

Some defenses, such as estoppel and tender, because they are regarded unfavorably, are required, it is said, to be pleaded with such particularity as to meet and remove, by anticipation, every possible answer of the adversary.[2]

The rule that material facts alleged and not denied are to be taken as admitted does not apply to facts alleged in violation of the rule forbidding the anticipation of a defense, for the plain reason that such facts, so alleged, are not material.[3] But some courts have held, that facts alleged in anticipation and avoidance of a defense are admitted if not traversed.[4] These holdings, based upon the theory that such practice will expedite procedure and avoid delay where there is no actual defense, are not only unsound in principle; they are false in theory, and vicious in tendency. To encourage anticipatory avoidance of defenses is to invite speculation, and to encumber the records with the avoidance of imaginary defenses.

Where facts are stated that ought not to be pleaded, the remedy is by motion to strike out; or they may be treated as surplusage, and simply disregarded.

[1] Quinn v. Lloyd, 41 N. Y. 349. *Cf.* McElwee v. Hutchinson, 10 S. C. 436.

[2] Steph. Pl. 366; Bliss Pl. 364.

[3] Canfield v. Tobias, 21 Cal. 349; Doyle v. Franklin, 48 Cal. 537.

[4] Bracket v. Wilkinson, 13 How. Pr. 102; People ex rel. Cornell v. Knox, 38 Hun, 236, 240; 25 Abb. N. C. 120, note.

CHAPTER XXIII.

RULES RELATING TO MATTERS OF FORM.

350. Matter of Form.—The law of pleading not only requires the statement of all substantive facts essential to the maintenance of the action or the defense, and excludes all other substantive matter, but, to facilitate the development of an issue, and to insure materiality, certainty, brevity, and truth in allegations, it imposes certain formal requirements. In the Reformed Procedure, rules relating to matters of form are subservient to those relating to matters of substance, and are designed to promote regularity and dispatch, to avoid irrelevant inquiries, and to insure certainty and conclusiveness in the results. These subsidiary rules relate, mainly, to the construction of pleadings, and to the manner of the statement.

I. THE CONSTRUCTION OF PLEADINGS.

351. Pleadings to be Liberally Construed.—It is a rule of the common law, that when a pleading is ambiguous or doubtful in meaning, so that two different meanings present themselves, that construction least favorable to the party so pleading shall be adopted.[1] Under this rule, —based upon the theory that the pleader states his case as favorably for his own side as the facts will warrant,—the courts came to construe every pleading most strongly against the pleader, and no presumption could be indulged in favor of any pleading. The application of this rule was somewhat modified, however, by the doctrine that, except as to pleas of estoppel and dilatory pleas, a pleading could not be regarded as ambiguous or obscure, if it be certain to a common intent; that is, "if it be clear enough

[1] Steph. Pl. 382, and note 2.

according to reasonable intendment or construction, though not worded with absolute precision." [1]

The general rule under the new procedure is, that the allegations of a pleading are to be liberally construed, with a view to substantial justice between the parties. Facts are to be stated in "ordinary and concise language," [2] and this language is to be taken according to its popular and ordinary meaning, and each averment is to be taken in its relations with other averments, and the meaning of each part is to be determined with reference to the entire pleading and its general theory; words and allegations are to be interpreted as in other writings—modified by their context, by their collocation, and by the general tenor of the entire pleading; [3] and general statements are to be controlled by the specific facts stated.[4]

352. Pleadings to be Liberally Construed, Continued.—Under favor of this rule, whatever is necessarily implied in, or is reasonably to be inferred from, an allegation, is to be taken as if directly averred.[5] This rule of construc-

[1] Steph. Pl. 384, and note 2.

[2] The requirement that facts shall be stated "in ordinary and concise language" has sometimes been regarded as a relaxation in the matter of clearness and perspicuity, and as adapting the art of pleading to the unskilled and illiterate. There could hardly be a greater mistake. The requirement is a step in the opposition direction. "Ordinary and concise language" is peculiarly free from uncertainty, in statements about the ordinary affairs of life. The earlier English judges adhered with great strictness to exact expressions and literal meanings. This induced lawyers to multiply words and phrases, in a vain attempt to make their meaning clear and certain, and led to a fullness of phraseology, and a profusion of specification, that often tended to obscure the meaning. The fact is, that when we attempt, by multiplying words and specifications, to free our statements from possible misapprehension, we oftener render them liable to a wrong interpretation. A distinguished writer on Legal Hermeneutics has said: "We do not arrive at great perspicuity [of statement] by going beyond a certain limit. . . . The more we strive, in a document, to go beyond plain clearness and perspicuity, the more we increase the chances of sinister interpretation." Lieb. Herm. 22.

[3] Pom. Rem. 546; Swan Pl. 131.

[4] State v. Wenzel, 77 Ind. 428; ELLIOTT, C. J., in State v. Casteel, 110 Ind. 174, 187.

[5] Wagoner v. Wilson, 108 Ind. 210; Milliken v. W. U. Tel. Co., 110 N. Y. 403; Marie v. Garrison, 83 N. Y. 14; Sac County v. Hobbs, 72 Iowa, 69.

tion, while it abrogates the common-law rule that a pleading is to be construed most strongly against the pleader, does not require a leaning in his favor. Words are not to be forced out of their natural meaning; they are to receive a fair and reasonable interpretation, with a view to the purposes of him who used them.[1] The allegations are to be considered as referring to the conditions existing at the time of the commencement of the action, the same as if filed at that time, unless otherwise stated.[2] A pleader may not, under favor of this rule, throw upon his adversary the hazard of correctly interpreting allegations of doubtful and uncertain meaning.[3] Nor does this rule exclude the use of technical terms peculiar to a trade or profession; and when such terms are employed, they are to have their technical meaning, unless the context shows they were used in some other sense.[4]

In the application of this canon of construction, it must be borne in mind that it relates to matter of form, and in no way dispenses with the fundamental requisites of a pleading;[5] and that it is designed to save the rights of parties, and to promote substantial justice, and not to encourage laxity of statement on the one hand, or careless oversight on the other hand. If language is ambiguous, or the meaning obscure, it should be amended on motion to make definite; for this rule of construction will be indulged with greater latitude on the trial,[6] or after judgment,[7] than before issue.

In the construction of a pleading, surplusage is to be disregarded. Superfluous matter may be stricken out on mo-

[1] Story, J., in Lawrence v. McCalmont, 2 How. 444, 449; Ryan v. Jacques, 103 Cal. 280; Crist v. Burlingame, 62 Barb. 351, 355. *Cf.* Callahan v. Loughran, 102 Cal. 476; Ry. Co. v. McDaniel, 134 Ind. 166.

[2] McCormick v. Blossom, 40 Iowa, 256; Townshend v. Norris, 7 Hun, 239; Brown v. The Galena M. & S. Co., 32 Kan. 528.

[3] Ridder v. Whitlock, 12 How. Pr. 212; Clark v. Dillon, 97 N. Y. 370; Isaacs v. Holland, 4 Wash. 54; State v. Casteel, 110 Ind. 174, 187.

[4] Robinson v. Greenville, 42 O. S. 625.

[5] Clark v. Dillon, 97 N. Y. 370; Spear v. Downing, 12 Abb. Pr. 437; s. c. 34 Barb. 522.

[6] Hazelton v. Union Bank, 32 Wis. 34, 43.

[7] Shahan v. Tallman, 39 Kan. 185, 187.

tion, but its presence does not vitiate that which is in itself valid and material. *Utile per inutile non vitiatur.* But an unnecessary detail of circumstances may be so connected with material matter as to be inseparable from it; in which case the whole may be traversed, and must then be proved as alleged. And where the language of a pleading will fairly admit of a construction that will sustain it as against a demurrer, it should, in the absence of a motion to make definite, be so construed.[1]

353. Liberal Construction—Illustrative Cases.—Where the complaint on a promissory note alleged that the defendant was liable both as indorser and as guarantor, but did not allege a consideration to support the guaranty, or demand and notice to fix the liability as indorser, it was held, on demurrer, that inasmuch as indorsement imports a consideration, such implied consideration, would, under the liberal construction authorized by the code, and in the absence of a motion to make definite, sustain the contract of guaranty.[2] The allegation that defendant refused to cut plaintiff's wheat, "as defendant had agreed and contracted," was held to be a sufficient averment of a contract; the word "as" being used as the equivalent of "which."[3] But in an action on a contract that could be awarded only to the lowest bidder, an allegation that it was awarded to plaintiff "as" the lowest bidder is not enough, for it might be evasive. The allegation might be literally true, and yet the plaintiff not in point of fact be the lowest bidder.[4] Such allegation relates to the defendant, and states how it regarded the bid; whereas it should relate to the bid, and affirm that it was the lowest. In an action by the assignee of a bankrupt corporation to charge shareholders, an allegation that three classes of shares had been fraudulently issued, but not stat-

[1] Ry. Co. v. Iron Co., 46 O. S. 44.

[2] Clay v. Edgerton, 19 O. S. 549. This case is of doubtful authority. It makes the mere implication of a consideration do the office of an expressed consideration, and transports it from one contract to another for that purpose.

[3] Kelly v. Peterson, 9 Neb. 77.

[4] Nash v. City of St. Paul, 8 Minn. 143, 159.

ing of which defendant's were, it was held that it must be assumed that they were of the class least open to objection.[1] An allegation can not be stronger than its weakest aspect.

A complaint setting out a copy of the defendant's contract sued on, reciting that " for value received " he " promised to pay," etc., but not otherwise alleging a consideration, and stating that " the contract is the property of plaintiff by purchase," but not stating from whom purchased, was sustained on demurrer.[2] And an allegation that a thing in action was assigned, implies, on demurrer, that the assignment was so made as to be valid.[3]

354. The General Theory of a Pleading.—A pleading should be construed with reference to the general theory upon which it proceeds ; and a pleading should not be uncertain as to which of two or more theories is relied upon.

It is a general rule of construction, that the character and effect of a pleading are to be determined by reference to the substance of its averments, and not by reference to its form, or to the name or designation given it by the pleader.[4] But this rule is resorted to, only when the ends of justice require it, and when it will not give the pleader an unjust advantage, or embarrass his adversary ;[5] and it can never obtain when it does violence to the general theory upon which the pleading is constructed. " It is a well-settled rule of pleading, that a paragraph of complaint or answer, if good at all, must be good on the theory upon which it is pleaded." [6]

[1] Foreman v. Bigelow, 7 Cent. L. J. 430.

[2] Prindle v. Caruthers, 15 N. Y. 425. For further applications of the rule requiring liberal construction, see Robson v. Comstock, 8 Wis. 372 ; Saulsbury v. Alexander, 50 Mo. 142 ; Ball v. Fulton, 31 Ark. 379 ; Kalckhoff v. Zoehrlaut, 40 Wis. 427.

[3] Gunderson v. Thomas, 8 Wis. 406.

[4] Klonne v. Bradstreet, 7 O. S. 322; Wiswell v. Cong. Ch. of Cin., 14 O. S. 31 ; Springer v. Dwyer, 50 N. Y. 19 ; Burnside v. Grand Trunk Ry. Co., 47 N. H. 554 ; McClanahan v. Williams, 136 Ind. 30.

[5] McAbee v. Randall, 41 Cal. 136 ; Baker v. Ludlam, 118 Ind. 87.

[6] Per OLDS, J., in Colglazier v. Colglazier, 117 Ind. 460 ; Baker v. Ludlam, 118 Ind. 87 ; Boone Pl. 272 ; Balue v. Taylor, 136 Ind. 368 ; Ry. Co. v. Barnes, 137 Ind. 307 ; Powder Co. v. Hildebrand, 137 Ind. 462.

Where the defendant calls his answer a "counter-claim," and the case is tried on that theory, he will not be permitted, in a reviewing court, to call it, for the first time, a "cross-complaint," in order to obtain a review of an order denying his motion for judgment on the pleadings.[1] A complaint framed on the theory that it is a bill to review a judgment, and found to be insufficient as such, can not be sustained as an application to be relieved from the judgment on the ground of mistake or inadvertence. It must stand or fall, on the theory originally adopted.[2] A denial incorporated with a plea of the statute of limitations, and intended simply to make way for the defense of the statute, can not itself be relied upon as a defense of denial. Such defense must be upheld, if at all, on the theory upon which it was pleaded; and that is, as a defense of new matter.[3] So, in general, a pleading must be sustained, if at all, for the purpose for which it was originally intended, and upon the theory on which it was drafted, and not on some other theory; for to hold otherwise, would enable a party to make an elastic pleading, changeable to meet the exigencies of his case.[4]

If a pleading makes it uncertain as to which of two theories the pleader relies upon, the fault should be corrected by motion; it is not ground for the exclusion of evidence.[5]

II. THE MANNER OF STATEMENT.

355. Scope of this Subdivision.—In setting forth the

[1] McAbee v. Randall, 41 Cal. 136.

[2] Baker v. Ludlam, 118 Ind. 87.

[3] Colglazier v. Colglazier, 117 Ind. 460.

[4] W. U. Tel. Co. v. Reed, 96 Ind. 195, 199; Johnston v. Greist, 85 Ind. 503; W. U. Tel. Co. v. Young, 93 Ind. 118; Mescall v. Tully, 91 Ind. 96. This adherence to the theory of a pleading is the same in principle as the rule against departure in pleading.

[5] Springer v. Dwyer, 50 N. Y. 19; Com. Bank v. Pfeiffer, 108 N. Y. 242, 246. Each party has the right to adopt his own theory as to the meaning and effect of the pleadings, and he may introduce evidence that is relevant upon any rational view of the pleadings, though it be irrelevant upon the theory of the pleadings maintained by the other side. Thompson v. Franks, 37 Pa. St. 327; Mariner v. Smith, 7 Baxter, 423. And where evidence, competent on one theory, but incompetent on another, is introduced, it is the duty of the court to instruct the jury in reference to the consideration and application thereof. Mariner v. Smith, *supra*.

formal parts of the complaint, in Part III., the manner of the statement of facts is fully considered so far as relates to that particular pleading. It is there shown that the statement of facts constituting the cause of action is to be "in ordinary and concise language," that there is no prescribed order in which they are to be set forth, that, subject to certain rules and restrictions, several causes of action may be joined in one complaint, that when so joined they should be separately stated and consecutively numbered, that a plaintiff may state two or more distinct grounds for a single recovery, that in some cases he may make a duplicate statement of one right of action, and that he may demand and have several kinds of relief on one cause of action.[1] It is here proposed to consider those rules pertaining to the manner of stating operative facts generally, and which are applicable to the pleadings in general.

356. Facts to be Stated Issuably.—The formal pleadings in an action are for these three purposes: (1) To show to the court that there is, *prima facie*, occasion for judicial interposition; (2) to disclose and formulate any resulting contention *inter partes;* and (3) to predefine the nature and scope of the trial. To promote the second of these purposes, and facilitate the production of an issue, all traversable facts are required to be stated issuably; that is, in such direct and positive form that the adverse party may traverse them.[2] Allegations, whether made upon personal knowledge, or upon information and belief, should be direct and positive, in order to avoid confused and immaterial issues. Such statements as, "Plaintiff is informed and believes, and so charges the fact to be," are immaterial and redundant, and should be stricken out.[3] There is no requirement that facts are to be stated from personal cognizance alone, and there is neither reason nor authority for designating those stated on information and belief. One has as good right to rely upon facts which he is informed and believes are true, as upon those personally known to him; and whether he makes the allegation upon

[1] Ante, 193 et seq.

[2] Gould Pl. iii. 28, 42–50.

[3] Truscott v. Dole, 7 How. Pr. 221.

the one ground or the other, is not material. Less particularity is required, both at common law and under the codes, in the statement of matter of inducement and matter of aggravation, than in the statement of facts that are of the gist of a cause of action or a defense; for as to some matters of inducement, and as to all matters of aggravation, no traverse can be taken.[1] But as to all material allegations,—those essential to the claim or defense,—the rule under consideration is applicable.

357. Facts to be Stated Issuably, Continued.—Under this rule, pleadings must not be by way of recital, but must be direct and positive in form. In a complaint for assault and battery, the allegation should be, that "the defendant made an assault;" not, that "whereas the defendant made an assault." The latter statement asserts nothing, and a traverse of it will not make an issue.[2] And an alternative, or a hypothetical statement, is equally objectionable. An allegation that the defendant wrote and published, *or* caused to be written and published, a certain libel, does not positively charge the doing of either; and the statement that *if* the plaintiff is the owner of a certain note, it was obtained by fraud, does not positively allege fraud.[3] In an action to recover a balance due for goods sold and delivered, an answer that "if the plaintiff ever sold any goods to the defendant, they were sold on credit, and not to be paid for in nine years from the day of sale," is hypothetical; it neither denies the sale, nor alleges an unexpired credit.[4] A hypothetical form of statement has been allowed, where the party could not have certain knowledge of the facts. Thus, an answer that, if plaintiff's lands were flooded, the statute of limitations had run, has been sanctioned.[5]

[1] Ante, 192.

[2] Steph. Pl. 390; Bliss Pl. 318.

[3] Steph. Pl. 390; The King v. Brereton, 8 Mod. 328; McMurray v. Gifford, 5 How. Pr. 14; Zeidler v. Johnson, 38 Wis. 335; Ladd v. Ramsby, 10 Oreg. 207. *Cf.* Dovan v. Dinsmore, 33 Barb. 86.

[4] Hamilton v. Hough, 13 How. Pr. 14.

[5] Zeidler v. Johnson, 38 Wis. 335; Brown v. Ryckman, 12 How. Pr. 313. But these cases violate an important principle, and must be of doubtful authority. The statute of limitations is a defense of new matter, and the plea must give

The statement of a fact by mere inference violates this rule. The statement that "when the slanderous words were spoken by defendant," does not allege that defendant spoke the words.[1] That a contract was awarded to the defendant "as" the lowest bidder, does not aver that he was the lowest bidder;[2] and that one became indebted for services rendered, does not aver that services were rendered.[3] A denial that is a mere inference from facts stated,—as, where a defendant states certain facts, and then adds, "and defendant therefore denies," etc.,—is held not to be a good denial.[4] But a fact stated inferentially, and not objected to, is good after judgment.[5] The statement that "one F., the daughter of plaintiff, was," etc., avers that F. was the plaintiff's daughter, being equivalent to "one F., who is the daughter," etc.[6]

In an action to annul a former judgment, a denial, in the complaint, that various steps were ever taken in the former action, is not equivalent to an averment that the steps were not taken.[7]

Material facts pleaded under a *videlicet*, for the purpose of rendering a general statement specific, may be traversed, notwithstanding its indirect form of statement.[8]

In a complaint alleging that a person, "being of unsound mind, and incompetent to manage herself or her affairs, in consequence of the influence exerted over her" by another, executed certain conveyances; the issuable fact is "the influence exerted over her," and not the "being of unsound mind."[9] The ground of such action is the exertion of influence.

color. The hypothetical statement does not give color, and hence vitiates the plea. The answer in such case should refer to the plaintiff's claim as the "alleged," or the "supposed," right of action. Ante, 240, and cases cited.

[1] Roberts v. Lovell, 38 Wis. 211.

[2] Nash v. St. Paul, 8 Minn. 143, 159.

[3] Holgate v. Broome, 8 Minn. 209.

[4] Wright v. Schmidt, 47 Iowa, 233. *Sed quære:* If the facts stated are evidential, and would support the denial, it is faulty in form, but good in substance. See next section.

[5] Hill v. Haskin, 51 Cal. 175.

[6] Parker v. Monteith, 7 Oreg. 277.

[7] Smith v. Nelson, 62 N. Y. 286.

[8] Gould Pl. iii. 35–42.

[9] Valentine v. Lunt, 115 N. Y. 496.

358. Argumentative Statements.—Both facts and denials must be stated in an absolute form, and not left to be gathered by inference and argument.[1] An allegation that upon measurement of a certain distance it was found to be ten yards, is argumentative as to the distance. The fact absolutely alleged is the measurement; and that may have been false.[2] In trespass for taking and carrying away the plaintiff's plow, a plea that the plaintiff never had a plow is bad. As an argument, it warrants the inference that the defendant is not guilty; but a plea of not guilty can be asserted only by denial.[3]

In an action on an indemnity bond, the complaint alleging several breaches, and the payment of several sums by the plaintiff, an answer averring repayment of all that the plaintiff has paid and expended, is argumentative. Such answer avers, in effect, payment of whatever the plaintiff may be able to prove he had expended; whereas it should be addressed to the sums claimed in the complaint, and should confess and avoid.[4] In an action for a balance due for goods sold and delivered, an answer denying that the plaintiff "ever sold to the defendant any goods that had not been paid for by the defendant," neither denies the sale and delivery, nor alleges payment.[5]

359. Argumentative Statements, Continued.—A statement of facts simply giving a different version, or setting up what is claimed to be the real transaction, since it affirms facts inconsistent with those alleged by the other party, is an argumentative denial. In an action on an alleged promise to do a certain thing, the answer alleged that the terms of the promise were not those stated in the complaint, and set out the terms as claimed by the defendant. A general demurrer to this answer was overruled, on the ground that, although an

[1] Steph. Pl. 386; Gould Pl. iii. 28–30; Thompson v. Munger, 15 Tex. 523; Spencer v. Southwick, 9 Johns, 313; Supply Ditch Co. v. Elliott, 10 Colo. 327; s. c. 3 Am. St. Rep. 586. *Cf.* Morris v. Thomas, 57 Ind. 316; DeForrest v. Butler, 62 Iowa, 78.

[2] Steph. Pl. 387.

[3] Steph. Pl. 387.

[4] Hart v. Meeker, 1 Sandf. 623.

[5] Hamilton v. Hough, 13 How. Pr. 14.

argumentative denial, it contained facts constituting a defense.[1] Under a like state of pleadings, in an action to recover for services rendered, it was held that the plaintiff might recover on the contract set up by the defendant, if sustained by the evidence.[2] Such recovery was upheld, to avoid the delay and expense of another suit, and because it did justice between the parties, after a full and fair trial, notwithstanding the irregularity in the pleadings.

Argumentativeness, being a fault of form, and not of substance, is to be corrected on motion;[3] it does not subject a pleading to demurrer,[4] unless the facts, however stated, are insufficient in substance and effect.[5] The general rule is, that where evidential facts are pleaded, which could be proved under a denial, and which, if proved, would support a denial, they may, in the absence of a motion, be treated as a denial;[6] and such pleading, whether answer or reply, is not subject to demurrer, because it is not a statement of new matter, but merely a denial.[7] And for the same reason, such denial in an answer does not require a reply.[8]

360. Two Affirmatives and Two Negatives.—An issue of fact can properly be made only by an affirmance on one side, and a denial on the other. If the plaintiff's allegation be in the affirmative, a traverse thereof, to present a good issue, must be in the negative; and, *e converso*, if the plaintiff's allegation be in the negative, it should be met by an affirmative.[9] An allegation that a person is dead should be traversed by a denial that he is dead, and not by an affirmance that he is alive.[10] An allegation that a person died seized in fee, should not be traversed by alleging that he died

[1] Loeb v. Weis, 64 Ind. 285.

[2] Cook v. Smith, 54 Iowa, 636.

[3] Bank v. Hendrickson, 40 N. J. L. 52.

[4] Davis v. Bonar, 15 Iowa, 171.

[5] Arthur v. Brooks, 14 Barb. 533; Hunter v. Powell, 15 How. Pr. 221.

[6] Pom. Rem. 624, 625; Ante, 268.

[7] Pom. Rem. 627; Nelson Lumber Co. v. Pelan, 34 Minn. 243; Ketcham v. Zerega, 1 E. D. Smith, 553.

[8] Ante, 268.

[9] Steph. Pl. 408; Fortescue v. Holt, 1 Ventris, 213; s. c. Ames' Cases on Pl. 134. *Cf.* Kenchin v. Knight, 1 Wils. 253; Per COLTMAN, J., in Muntz v. Foster, 6 M. & G. 745; Frisch v. Caler, 21 Cal. 71.

[10] Gould Pl. vii. 32; Ames' Cases on Pl. 134.

seized in tail; though at common law a denial might be added under the *absque hoc*.[1] If the complaint allege that the defendant failed to do a certain act, he should traverse by an affirmative allegation, that he did the act; an allegation that he did not fail to do the act would not be a good traverse.[2]

It is true, that two affirmative statements may be repugnant to each other, and that the denial of a negative proposition is the affirmance of its opposite; but the formal defect of such combinations is, that the one does not confess and avoid, and the other denies only by way of inference or argument.

Where the complaint alleged that a certain assignment of a note and mortgage was without consideration, and for the purpose of collection only, and the answer alleged that it was upon a sale, and for a valuable consideration, it was held that this was an affirmative traverse of the negative averment of the complaint, and was not new matter requiring a reply.[3] The allegation of want of probable cause, in actions for malicious prosecution, and of the absence of negligence in plaintiff, when such averment is requisite; and the pleas of infancy, and of the statute of limitations, are instances of negative averments that should be traversed by an affirmative allegation.

The fault of traversing an affirmative by an affirmative, or a negative by a negative, is matter of form, and not of substance, and is remediable by motion, and not by demurrer, and is waived by pleading over. In an action by the grantor against the grantee, to foreclose a purchase-money mortgage, the defendant pleaded that "the plaintiff was not seized in fee," etc., negativing successively all the covenants in his deed. The plaintiff, instead of alleging that he was seized, etc., simply denied "that he was not seized," etc., and in this way met each of the negative allegations of the answer. A demurrer for insufficiency was overruled, on the ground that the reply, though defective in form, was good in substance,

[1] Steph. Pl. 388.
[2] Steph. Pl. 389.
[3] Engle v. Bugbee, 40 Minn. 492. *Cf.* Frisch v. Caler, 21 Cal. 71.

and should have been attacked by motion, and not by demurrer.[1]

361. Negatives Pregnant.—A very common fault in pleading is the denial of some particular averment in such form as to impliedly admit a part of what is apparently controverted. Such evasive and ambiguous form of denial is called a negative pregnant,[2] because it is an express denial, pregnant with an implied admission. This fault comes from framing a denial in the same words used in the allegation denied, and arises mainly in two instances. The first is where the allegation traversed is that of a single fact with some qualifying words added, and the traverse is *in ipsis verbis*. For example, if a complaint allege that on the first day of June, plaintiff sold and delivered to defendant one horse, and the answer deny "that on the first day of June plaintiff sold and delivered to defendant one horse," the denial is pregnant with the implied admission that on some other day there was the sale and delivery alleged, and only the alleged date is traversed. The other instance is where two or more facts are stated conjunctively, and the denial is in the same words. For example, if a complaint allege that the defendant "wrongfully and forcibly" entered, a denial that he "wrongfully *and* forcibly" entered, admits the entry, and denies only the force *or* the wrongfulness, and makes it uncertain which of these is controverted.[3] But where several facts are stated conjunctively, and all of them, taken together, are essential to constitute a material allegation, a conjunctive denial is good on demurrer;[4] because the concurrence of all the several facts is requisite to make any of them operative, and the conjunctive denial negatives such concurrence.

The fault in a negative pregnant is, generally, that of ambiguity and uncertainty. If a plaintiff charge that defendant negligently kept a fire, whereby the plaintiff's house was

[1] Flanders v. McVickar, 7 Wis. 372.

[2] Ante, 135.

[3] Steph. Pl. 385, and App. note 67; Gould Pl. vi. 29–36; Bliss Pl. 332; Pom. Rem. 618–623.

[4] Miller v. Tobin, 18 Fed. Rep. 609, 614.

burned, and the defendant answer that the plaintiff's house was not burned by the defendant's negligence in keeping his fire, such traverse would have two intendments—one, that the house was not burned ; the other, that it was burned, but not by reason of defendant's negligence; and the plaintiff could not know upon which of the two matters the contention would be rested.

362. Negatives Pregnant, Continued.—In an action for damages caused by the negligence of defendant in leaving open and unguarded a ditch in the highway, the complaint alleged that the plaintiff fell into the ditch "without any fault or want of care on his part." The answer denied "that the plaintiff, without any fault or want of care on his part, did fall therein." It was held that this denial put in issue, both the falling into the ditch, and the exercise of care by the plaintiff.[1] In the opinion, the court refers to and follows the case of Lawrence v. Williams, decided by the same court, but not reported, wherein the plaintiff sought to recover real estate from his lessee, on the ground that he had broken his covenant not to underlet without the consent of the lessor. The defendant answered, denying that "in violation of the said covenant, and without the consent of plaintiff, he had underlet the said premises ;" and it was held that the denial, though a negative pregnant, put in issue the subletting.[2]

While the negative pregnant is a vicious form of pleading, and its use is everywhere condemned, it can not be said that a denial in such form never makes a material issue. It is always vulnerable to a motion, and sometimes to demurrer, depending upon its form and scope. Upon principle, if the

[1] Wall v. Water Works Co., 18 N. Y. 119. This case is criticised in Baird v. Clark, 12 O. S. 87, 91.

[2] Where an answer contains a negative pregnant, and the plaintiff goes to trial without availing himself of a motion to make definite, it is good practice to construe the ambiguous denial most strongly against him. But to hold that a denial that one did a thing under the particular circumstances charged, or in the particular way charged, is a denial that he did it at all, is to disregard the commonest principles of literary interpretation. It is to remove by construction, the qualifying words from a qualified statement, and to expand a restricted denial beyond both its letter and its spirit.

admission implied in the denial is such as will maintain the allegation which it attempts to traverse, the fault is one of substance, and may be taken advantage of by demurrer; but if, notwithstanding the implied admission, there is a denial of material matter, the fault is one of form, and should be corrected by motion.[1]

363. The Plea of Payment.—The authorities are not at one as to whether payment is a defense of new matter, to be specially pleaded, or whether it may be proved under a general denial. Proof of payment has been admitted under a general denial, where the complaint alleged that a certain sum was due,[2] where it alleged the indebtedness generally, not stating the facts which created it,[3] and even where the allegation of non-payment in the complaint was necessary to a statement of the right of action.[4] In some cases, an allegation of payment has been held to be a traverse of non-payment alleged by the plaintiff, and therefore not requiring a reply to make an issue.[5] In Indiana, and elsewhere generally, payment is held to be a defense of new matter, that must be pleaded in order to be available.[6] In an action to

[1] Ante, 284. The denial was held insufficient in substance, in Lynd v. Picket, 7 Minn. 184; Finley v. Quirk, 9 Minn. 194; Pottgieser v. Dorn, 16 Minn. 204; Morgan v. Booth, 13 Bush, 480; Harden v. Atch. & Neb. Ry. Co., 4 Neb. 521; Leroux v. Murdock, 51 Cal. 541; Larney v. Mooney, 50 Cal. 610; Scoville v. Barney, 4 Neb. 288; Moser v. Jenkins, 5 Neb. 447; Robbins v. Lincoln, 12 Wis. 1; Woodworth v. Knowlton, 22 Cal. 162; Fitch v. Bunch, 30 Cal. 208; Reed v. Calderwood, 32 Cal. 109; Coal Co. v. Sanita. Assn., 7 Utah, 158; Natl. Bank v. Meerwaldt, 8 Wash. 630; Breckinridge v. Am. Cent. Ins. Co., 87 Mo. 62; Stewart v. Budd, 7 Mont. 573; Sheldon, Hoyt & Co. v. Middleton, 10 Iowa, 17; James v. McPhee, 9 Colo. 486; Richardson v. Smith, 29 Cal. 529; Frasier v. Williams, 15 Minn. 288. *Cf.* Baird v. Clark, 12 O. S. 87, 91, per BRINKERHOFF, J. *Contra*, Bradbury v. Cronise, 46 Cal. 287; Wall v. Water Works Co., 18 N. Y. 119; Schaetzel v. G. F. M. Ins. Co., 22 Wis. 412; McMurphy v. Walker, 20 Minn. 382; Kay v. Whittaker, 44 N. Y. 565; Harris v. Shoutz, 1 Mont. 212; First Nat. Bank, etc., v. Hogan, 47 Mo. 472.

[2] Wetmore v. San Francisco, 44 Cal. 294, 299; Davany v. Eggenhoff, 43 Cal. 395, 397.

[3] Morley v. Smith, 4 Kan. 183; Parker v. Hays, 7 Kan. 412.

[4] Knapp v. Roche, 94 N. Y. 329.

[5] Frisch v. Caler, 21 Cal. 71; VanGieson v. VanGieson, 10 N. Y. 316; McArdle v. McArdle, 12 Minn. 98. *Cf.* Stevens v. Thompson, 5 Kan. 305.

[6] Hubler v. Pullen, 9 Ind. 273;

recover a balance due, it has generally been held that payments may be proved under a general denial, because the claim and the denial as to a balance necessarily involve an inquiry as to payments.[1]

These diverse holdings may not be reconcilable upon principle. It can not be maintained, upon principle, that payment is always a defense of new matter, or, perhaps, that it may not, sometimes, be proved under a denial. Where non-payment is not alleged in the complaint, or, if alleged, is not necessary as an element of the cause of action stated, payment is a defense of new matter, to be pleaded in confession and avoidance. But where the complaint necessarily alleges non-payment as the delict of the defendant, and hence an indispensable element of the cause of action, an allegation of payment by the defendant is simply an affirmative traverse of such negative averment, and makes an issue. In such case, the allegation of non-payment is not anticipating a defense, for it is a requisite part of the plaintiff's cause of action; and the allegation of payment is not new matter, for it does not confess and avoid. No reply is needed, for the reason that the assertion of payment is not new matter; besides, a reply would only be a needless repetition of the denial already made.

The proper way to plead payment, whether by way of confession and avoidance, or by way of traverse, is to assert it affirmatively. But under the rule that the denial of a negative averment is a defect of form, and not of substance,[2] it might not be error, though a practice not to be tolerated, to admit evidence of payment, under a denial of alleged non-payment.

Payment made pending the action can be asserted only as new matter, and by means of a supplemental pleading.[3]

Baker v. Kistler, 13 Ind. 63; Knapp v. Bunals, 37 Wis. 135; Mohr v. Barnes, 4 Colo. 350; Fewster v. Goddard, 25 O. S. 276; Everett v. Lockwood, 8 Hun, 356.

[1] Quin v. Lloyd, 41 N. Y. 349; White v. Smith, 46 N. Y. 418; McElwee v. Hutchinson, 10 S. C. 436. *Contra*, McKyring v. Bull, 16 N. Y. 297.

[2] Ante, 360.

[3] Hall v. Olney, 65 Barb. 27; Jessup v. King, 4 Cal. 331. *Cf.* Hegler v. Eddy, 53 Cal. 597, as to ten-

364. Denial for Want of Knowledge or Information.— All material facts alleged in a complaint, or in an answer of new matter, and not traversed by the adversary party, are, for the purposes of the action, admitted by him to be true;[1] and nearly all the codes require the pleadings, both of fact and of denial, to be verified upon oath. The object of these requirements is, to compel the admission of what can not conscientiously be denied, and to limit the contention to such statements and denials as the parties are willing to swear to. Under these restrictions, a party may allege only such facts as he believes to exist, and he may deny such as he does not believe. But it may sometimes be, that a party, from want of knowledge or information, is not able to form a belief as to the truth or falsity of a fact alleged against him, and so is unable conscientiously to deny it; and yet it would obviously be unfair to him, and not in the interest of justice, to impose upon him the same consequences as if he had such belief, and voluntarily chose not to controvert the matter alleged against him. We have seen that in such case a party may not answer that he can not admit the facts alleged against him, and that he calls upon his adversary for proof.[2]

For the protection of one who is thus unable to form a belief respecting facts alleged against him, he is allowed to put them in issue by simply denying that he has knowledge or information concerning them sufficient to form a belief.[3] In some states, this right is secured by statute; in others, it is held to exist without statute. A traverse made under favor of this rule must deny both knowledge and information. Denial of "knowledge sufficient to form a belief," or of in-

der pending the action; Mitchell v. Allen, 25 Hun, 543.

[1] Ante, 234.

[2] Ante, 230; Bently v. Dorcas, 11 O. S. 398; Bldg. Assn. v. Clark, 43 O. S. 427; Sheldon, Hoyt & Co. v. Middleton, 10 Iowa, 17.

[3] Treadwell v. Comrs., 11 O. S. 183; Jackson Sharp Co. v. Holland, 14 Fla. 384; Carr v. Bosworth, 68 Iowa, 669; Maxim v. Wedge, 69 Wis. 547; Grocers' Bank v. O'Rorke 6 Hun, 18; Meehan v. Savings Bk., 5 Hun, 439; F. & M. Bank v. Bd. of Ald., 75 N. C. 45; Sherman v. Osborn, 8 Oreg. 66; Ninde v. Oskaloosa, 55 Iowa, 207. Neuberger v. Webb, 24 Hun, 347, where the answer was verified by the attorney.

formation, omitting the word "knowledge," is not sufficient.[1]

Upon principle, it would seem that the proper form for such traverse would be, that the party has not knowledge or information concerning the facts stated by his adversary sufficient to form a belief as to their truth, and he therefore denies the same. Without a denial of the facts, there is no traverse thereof, except where the statute arbitrarily makes a mere denial of knowledge or information operate as a traverse. But the weight of authority seems not to require such denial of the facts;[2] and in some cases, the addition of a denial has been criticised as inconsistent with the averment of inability to form a belief.[3]

A party may not traverse by denial of knowledge or information, where the facts traversed are such that he must necessarily know whether they are true or false,[4] or where they are presumed to be within his knowledge.[5]

365. Written Instruments, How Pleaded.—When a written instrument is to be pleaded, whether as the ground of an action, or as a defense, it is important to determine whether the pleader should state only the substance of the instrument, or should set out its terms in *hæc verba*. The common-law rule requires such instrument to be stated accord-

[1] Humphreys v. Call, 9 Cal. 59; Elton v. Markham, 20 Barb. 343; Heye v. Bolles, 33 How. Pr. 266; Robbins v. Lincoln, 12 Wis. 1; Hastings v. Gevynn, 12 Wis. 672; Mead v. Day, 54 Miss. 58; Sayre v. Cushing, 7 Abb. Pr. 371; Terrill v. Jennings, 1 Met. (Ky.) 450; Manny v. French, 23 Iowa, 250; Claflin v. Reese, 54 Iowa, 544; Greer v. Covington, 83 Ky. 410; Ketcham v. Zerega, 1 E. D. Smith, 553; James v. McPhee, 9 Colo. 486. *Cf.* Gas Co. v. San Francisco, 9 Cal. 453; Curtis v. Richards, 9 Cal. 33; Naftzger v. Gregg, 99 Cal. 83.

[2] Meehan v. Savings Bank, 5 Hun, 439; Sackett v. Havens, 7 Abb. Pr. 371, note; Flood v. Reynolds, 13 How. Pr. 112; The Holladay Case, 27 Fed. Rep. 830, 841; Claflin v. Reese, 54 Iowa, 544. *Contra*, Treadwell v. Comrs., 11 O. S. 183. *Cf.* Natl. Bank v. Meerwaldt, 8 Wash. 630.

[3] The Holladay Case, 27 Fed. Rep. 830; Flood v. Reynolds, 13 How. Pr. 112.

[4] Ketcham v. Zerega, 1 E. D. Smith, 553; Collart v. Fisk, 38 Wis. 238; Edwards v. Lent, 8 How. Pr. 28.

[5] Fales v. Hicks, 12 How. Pr. 153; Beebe v. Marvin, 17 Abb. Pr. 194; Wing v. Dugan, 8 Bush, 583; Goodell v. Blumer, 41 Wis. 436.

ing to its legal effect, and not according to its terms or form ;[1] that is, its legal substance, as distinguished from its literal substance, is to be stated, and this only so far as may be material to the cause or defense. But this requirement does not, in all cases, prohibit the employment of the very words of the instrument.[2]

The Reformed Procedure, following the common-law rule, and adhering also to the fundamental doctrine that only operative facts, and neither the law nor the evidential facts, are to be stated, requires such instrument to be pleaded according to its legal effect.[3] And yet, in some instances, where the language of the instrument is itself a concise statement of its legal substance and effect, its exact words may be used,[4] so far as may be necessary to display a right of action thereon. But when the exact words of the instrument are so employed in the complaint, only so much thereof as will show the primary right of the plaintiff and the correlative duty of the defendant should be stated.[5] This is all that can be material to the action ; and this, with an allegation of the breach or delict, will disclose the remedial right, and constitute the cause of action.

If the action or defense will necessarily involve the construction of some part of the instrument pleaded, such part thereof may properly be set out in *ipsissimis verbis*, so as to bring it at once upon the record and to the attention of the court; and when, in stating a right of action or a defense founded upon a written instrument, it becomes necessary to set out substantially the whole of it, the entire instrument is

[1] 1 Chit. Pl. 305 ; Steph. Pl. 390 ; Gould Pl. iii. 174.

[2] 1 Chit. Pl. 306 ; United States v. Morris, 10 Wheat. 246.

[3] Joseph v. Holt, 37 Cal. 250 ; Jones v. Louderman, 39 Mo. 287 ; Bateson v. Clark, 37 Mo. 31.

[4] Bliss Pl. 158 ; Maxwell Pl. 78 ; Boone Pl. 135 ; Swan Pl. 198 ; Joseph v. Holt, 37 Cal. 250 ; Stoddard v. Treadwell, 26 Cal. 294 ; Murdock v. Brooks, 38 Cal. 596 ; Budd v. Kramer, 14 Kan. 101 ; Prindle v Caruthers, 15 N. Y. 425 ; Slack v. Heath, 4 E. D. Smith, 95, 109. *Cf.* Crawford v. Satterfield, 27 O. S. 421.

[5] Dorrington v. Meyer, 8 Neb. 211 ; Estes v. Farnham, 11 Minn. 312 ; D. H. & I. Ry. Co. v. Forbes, 30 Mich. 165 ; Rollins v. Lumber Co., 21 Minn. 5 ; Henry v. Cleland, 14 Johns. 400.

sometimes allowed to be copied into the pleading, accompanied by allegations of its execution, performance of conditions, and the breaches complained of.[1]

366. Written Instruments, Continued.—The general doctrine of the Reformed Procedure, resting upon both principle and authority, is, that written instruments, other than those for the unconditional payment of money only, should not be made a part of the pleading; and where an instrument contains provisions not involved in the action, and not relevant thereto, and is copied into the pleading, or otherwise made part thereof, the irrelevant matter, or the entire copy, should, on motion, be stricken out, so as to disencumber the pleading, and secure certainty and materiality in the issue.[2] To illustrate the foregoing rules, in an action for rent, a lease, containing numerous stipulations other than a promise to pay rent, should not be made part of the complaint; and in an action for breach of one among several covenants in a deed, the entire deed should not be set out in the complaint. But in such action, after alleging that, by deed duly executed and delivered, the defendant sold and conveyed to the plaintiff certain lands, it would not be improper to state that by the deed the defendant entered into a covenant in the words following, and then to copy the covenant upon which the action is founded, provided the language of the covenant is so concise and definite as to make its legal substance identical with its literal substance; for this would be a concise and definite statement of a material operative fact, and of nothing more.

The reason for the common-law rule requiring a written instrument to be stated according to its legal effect, and not according to its terms or form, seems to have been, that since such instrument must ultimately be considered according to its legal effect, to plead it in terms or form only, would be an indirect and circuitous method of allegation.[3] But the true ground for the rule is, that the writing is matter of

[1] Swan Pl. 199.

[2] Swan Pl. 197. *Cf.* Crawford v. Satterfield, 27 O. S. 421, 425.

[3] Steph. Pl. 390.

evidence, and therefore ought not to be pleaded; while the operative facts—the facts that should be pleaded, are those *evidenced* by the writing. The operative facts are, that the parties have *agreed* thus and thus; not that they have *written* thus and thus. If a contract rest in parol, it is to be pleaded by stating the substance and effect of the agreement; not by setting out what each party said, for that is only the evidence of the agreement. The principle of pleading is not changed, if what is said by the parties is said in writing.[1]

From what has been said, it will be seen that to plead a written instrument, other than for the unconditional payment of money only, by setting out its exact words, is a clear violation of a general principle, and should be sanctioned only in exceptional cases; and where such method of pleading will, by introducing irrelevant matter, obscure the precise nature of the claim or defense, or materially encumber the record, it should not be permitted.

367. Short Forms of Complaint.—Some of the codes provide for short forms of complaint in certain actions, by prescribing what statements shall be sufficient to constitute a cause of action therein, or how certain requisite facts may be averred. It is provided, in some states, that in an action, counter-claim, or set-off, founded upon an account, or upon an instrument for the unconditional payment of money only, it shall be sufficient for the party to set out a copy of the account or instrument, with its credits and indorsements, and to state that there is due to him thereon, from the adverse party, a specified sum, which he claims, with interest.

These provisions are in direct conflict with the general requirement that the complaint shall contain a statement of operative facts constituting a right of action, to the exclusion of argument and of legal conclusion, and are indefensible upon any ground but that of convenience and brevity. For the plaintiff to set out a copy of the defendant's promise to a third person, and to assert that he claims a specified

[1] In Petersen v. Ochs, 40 Iowa, 530, it was held that where the complaint alleges the contract sued on to be oral, evidence of a written contract is not admissible; and this is so, even if the written instrument be lost. But this decision must be of doubtful authority.

amount, due him thereon from the defendant, may to some extent advise the defendant of the nature of the demand against him, but it does not show to the court, by facts stated, that there is cause for judicial interposition. There is no allegation that the defendant executed the instrument, or that he promised to pay to the payee named therein; there is no allegation of consideration, of title in the plaintiff, or of breach by non-payment. It is clear, however, that these statutory provisions dispense with all allegations in a complaint, except those specified, and that these are arbitrarily made sufficient.

368. Short Forms of Complaint, Continued.—Difficulty was experienced in adapting the authorized defenses to a complaint framed under favor of these provisions; for the answer, unlike the complaint, can receive no aid from this exceptional statutory provision, and must contain only denials or statements of new matter;[1] and what is not alleged by the plaintiff can not be denied by the defendant, and the denial of an allegation that is a mere legal conclusion makes an immaterial issue. The courts ingeniously avoided this difficulty, by holding that the statements prescribed by the statute imply and import all that it would otherwise be necessary to allege. And this construction—though it does violence to the true spirit of the Reformed Procedure, and gives to plain language a most recondite, rather than its obvious, meaning—is perhaps justified by the legislative intent, that such prescribed statement shall be and constitute a cause of action, and by the necessity for adapting such statement to the only authorized forms of defense.

It is accordingly held, that the setting out of a copy of an account for goods is an implied allegation of the sale and delivery of each item thereof, and that the prices affixed are their value; and in like manner, setting out a copy of an instrument for the payment of money is an implied allegation of the making and delivery of such instrument, a consideration therefor, and of the terms and stipulations therein.[2]

[1] Day, J., in Sargent v. Ry. Co., 32 O. S. 449.

[2] Swan Pl. 188; Bliss Pl. 307. *Cf.* Gould Pl. iii. 19, note 5.

And the statement that a specified sum is due the plaintiff from the defendant, on the account or instrument so copied, is equivalent to alleging that the plaintiff owns the demand, by some legal means of deriving title thereto,[1] and that it is due and unpaid.[2] Every fact thus averred by implication may be traversed as if it were expressly alleged;[3] for it is to this end that the implications are indulged as to the averments of the complaint.

An arbitrary rule, so out of harmony with the scientific theory of the reformed system, ought to be applied only where the case falls clearly within its express provisions; and the courts have so restricted the application of the provision under consideration. It will not be extended to a case of mutual promises, embracing stipulations other than for the payment of money; nor will it be applied to unilateral contracts of the same character. An instrument that requires something to be done, or some contingency other than the mere lapse of time, to happen before the promise to pay becomes absolute, such as a guaranty, or a promise to pay upon the delivery of goods, does not fall within the rule; and in such cases, the conditional or modifying facts must be stated.[4] An account, to come within the rule, must be composed of items that are the proper subject of account.[5]

A complaint under favor of this rule must contain all the matter specified by the statute; and if, in a case within the statute, such averments do not show the remedial right of the plaintiff against the defendant, the other requisite facts must be averred.[6]

[1] Sargent v. S. & I. Ry. Co., 32 O. S. 449; Prindle v. Caruthers, 15 N. Y. 425, 429; Meyer v. Hibsher, 47 N. Y. 269. *Cf.* Tisen v. Hanford, 31 O. S. 193.

[2] Mayes v. Goldsmith, 58 Ind. 94; Johnson v. Kilgore, 39 Ind. 147.

[3] Swan Pl. 188.

[4] Tooker v. Arnoux, 76 N. Y. 397.

[5] Swan Pl. 183.

[6] Bliss Pl. 306; Tisen v. Hanford, 31 O. S. 193. *Cf.* Sargent v. S. & I. Ry. Co., 32 O. S. 449. It has been said that the giving of a copy of the indorsements on negotiable paper is, by such statute, made the equivalent of the special averments otherwise required to show the rights of a *bona fide* indorsee before maturity. Per McIlvaine, J., in Tisen v. Hanford, *supra*.

369. Use of the Common Counts.—In the common-law procedure, there are certain modifications of the action of assumpsit, called the "common counts."[1] These forms are much used at common law, on account of their brevity and convenience. The declaration in the common counts relies upon an implied promise, and states legal conclusions, and the legal effect of operative facts, instead of the facts themselves; and it sometimes conceals, rather than discloses, the real facts relied upon for relief. For example, in indebitatus assumpsit, for money had and received, the allegation that the defendant was indebted to the plaintiff for money had and received by him to the plaintiff's use, might relate to a contract, to a tort, to a mistake, or to a fraud; and any of these might be proved on the trial.

Notwithstanding the unscientific character of the common counts, their use is permitted in many, perhaps in most, of the states that have adopted the Reformed Procedure.[2] In many of the codes, provision is made, as explained in the last two preceding sections, for the use of short forms of complaint in actions found on an account, or on an instrument for the unconditional payment of money. In such cases, the statement must include a copy of the account or instrument sued on—a requirement that does not pertain to the common counts.

In a large class of cases, such as for the recovery of money paid to the wrong person by mistake, or obtained by duress or fraud, where the primary right arises *ex lege*, and not *ex contractu*, a complaint substantially in the form of a declaration in indebitatus assumpsit for money had and received has been held sufficient in substance.[3] In such case, since there is no privity, and no necessity for the fiction of a promise, the allegation of a promise to pay is not necessary. A like form of complaint has been sustained in an action for goods sold

[1] Ante, 97, 98.

[2] Boone Pl. 150, 171, 195; Pom. Rem. 542–544; Bliss Pl. 156, 157, 298, 299; Swan Pl. 176–180. *Cf.* Brown v. Board of Ed., 103 Cal. 531.

[3] McNutt v. Kaufman, 26 O. S. 127; Am. Nat. Bk. v. Wheelock, 45 N. Y. Superior Ct. 205; Grannis v. Hooker, 29 Wis. 65; Ball v. Fulton Co., 31 Ark. 379.

and delivered;[1] and for money paid and expended for the use and benefit of defendant, and at his instance and request;[2] and for work and labor performed by plaintiff for defendant, and at his request.[3] Where, by reason of sickness, there is partial non-performance of a contract for personal services, and payment was to be made at its completion, at an agreed rate per day, recovery for the work done can be had only on a *quantum meruit*, and not on the contract.[4] And where an express contract has been fully performed, except payment by the defendant, the plaintiff may, under the new procedure as under the old, sue on an implied assumpsit instead of the express promise to pay, using the common count on a *quantum meruit*.[5] The proof, on the trial, of the agreed price is held not to make a variance, but the stipulated price becomes the *quantum meruit* in the case.[6]

This authorized use of the common counts has been criticised as a violation of the requirement that the cause of action shall be a plain statement of the operative facts; and the practice has been condemned by some writers.[7] It must be borne in mind, however, that pleading is only a means to an end, and that principle may sometimes yield to convenience, without detriment to the principle.

370. Attaching Copy of Instrument Sued on.—At common law, when either party claims or justifies under a

[1] Allen v. Patterson, 7 N. Y. 476; Abadie v. Carrillo, 32 Cal. 172; Kerstatter v. Raymond, 10 Ind. 199; Magee v. Kast, 49 Cal. 141; Meagher v. Morgan, 3 Kan. 372.

[2] DeWitt v. Porter, 13 Cal. 171; Meagher v. Morgan, 3 Kan. 372.

[3] Pavisich v. Bean, 48 Cal. 364; Carroll v. Paul, 16 Mo. 226; Wilkins v. Stidger, 22 Cal. 231.

[4] Green v. Gilbert, 21 Wis. 395.

[5] Farron v. Sherwood, 17 N. Y. 227; Hosley v. Black, 28 N. Y. 438; Hurst v. Litchfield, 39 N. Y. 377; Stout v. St. L. Tribune Co., 52 Mo. 342; Brown v. Perry, 14 Ind. 32; Emslie v. Leavenworth, 20 Kan. 562; Friermuth v. Friermuth, 46 Cal. 42. *Cf.* Woolen Mills Co. v. Titus, 35 O. S. 253. *Contra*, Bond v. Corbett, 2 Minn. 248.

[6] Fells v. Vestvali, 2 Keyes, 152. *Cf.* Sussdorf v. Schmidt, 55 N. Y. 319, 324.

[7] Bond v. Corbett, 2 Minn. 248. Bowen v. Emerson, 3 Oreg. 452. "In all these rulings concerning the use of the common counts, the courts have overlooked the fundamental conception of the reformed pleading, and have abandoned its essential principles." Pom. Rem. 544.

deed, he is required to produce it in court simultaneously with the pleading in which it is asserted. This was called making *profert* of the instrument. When the pleadings were oral, this was an actual production in court; but in modern practice, it consists in a formal allegation that he shows the deed in court. The practical uses of making profert seem to be, that it enables the court to inspect the instrument, and entitles the opposite party to demand *oyer* of it; that is, to hear it read, in order that he might make answer thereto.[1]

A like requirement is found in many of the codes, to the effect that when the action, counter-claim, or set-off is founded on an account, or on a written instrument as evidence of indebtedness, a copy thereof must be attached to and filed with the pleading; and if not so attached and filed, a sufficient reason for the omission—such as its loss or destruction, or the other party's possession of it—must be stated in the pleading.[2] In some of the codes this requirement is extended to all instruments that are the foundation of the action, or of the cross-demand.

This requirement, whatever its scope, relates only to instruments that are the foundation of the action, or of a cross-demand therein. It does not relate to instruments on which a mere defense is founded, nor to such as are mere matters of evidence in the action. Letters testamentary, being mere evidence of authority, need not be so attached.[3] In an action to replevy chattels, under a mortgage thereof, the chattel mortgage need not be attached.[4] Whether this requirement is applicable in an action on a foreign judgment is not entirely clear, but the weight of authority seems to be to the effect that the requirement relates only to instruments of

[1] Gould Pl. viii. 32–64; Steph. Pl. 159, 426; Evans Pl. 20–22.

[2] Sargent v. S. & I. Ry. Co., 32 O. S. 449; Larimore v. Wells, 29 O. S. 13; Ryan v. Bank of Neb., 10 Neb. 524; Bk. of Com. v. Hoeber, 8 Mo. App. 171; Boots v. Canine, 58 Ind. 450. *Cf.* Hook v. Murdock, 38 Mo. 224; Dull v. Bricker, 76 Pa. St. 255.

[3] Stilwell v. Adams, 29 Ark. 346; Bright v. Currie, 5 Sandf. 433; Welles v. Webster, 9 How. Pr. 251.

[4] Smith v. McLean, 24 Iowa, 322.

which the original could be filed, and that therefore a foreign judgment is not included.[1] An answer pleading a judgment in bar need not attach a copy;[2] it is pleaded as mere defense, and is matter of evidence. In an action on a forfeited recognizance, the recognizance is the foundation of the action, and a copy thereof should be attached; the order of forfeiture is mere evidence, and a copy thereof need not be attached.[3] In an action to recover on a subscription to stock, a copy of the subscription should be attached.[4] Where a sheriff justifies under a writ, he need not attach a copy of the writ;[5] his answer is a mere defense, and the writ is evidence. For like reason, in trespass, an answer that the plaintiff had conveyed the property to the defendant need not attach a copy of the deed;[6] and in an action against the owner of property, for leaving an excavation unguarded, an answer alleging that a builder was in exclusive possession and control, need not, it seems, attach a copy of the building contract.[7] But a counter-claim for breach of covenants of title has its foundation in the deed, and must attach a copy thereof.[8]

371. Attaching Copy, Continued.—In complying with the requirement to attach and file a copy, the paper so filed should in some way be identified, so that the court may know that it is the paper relied on as the foundation of the particular action.[9] It is common practice to refer to the copy in the pleading; thus, "a copy of which, marked 'Exhibit A,' is hereto attached and herewith filed." All that is requisite is, that it be identified, for no paper identifies itself.[10] Where

[1] Lytle v. Lytle, 37 Ind. 281; Hinkle v. Reid, 43 Ind. 390; Morrison v. Fishel, 64 Ind. 177; Judds v. Dean, 2 Disney, 210. *Cf.* Med. Coll. v. Newton, 2 Handy, 163. *Contra*, Burns v. Simpson, 9 Kan. 658; Eller v. Lacy, 137 Ind. 436.

[2] Morrison v. Fishel, 64 Ind. 177. *Contra*, Lee v. Keister, 11 Iowa, 480.

[3] Rheinhart v. State, 14 Kan. 318. *Cf.* Calvin v. State, 12 O. S. 66.

[4] Hudson v. Plank Rd. Co., 4 G. Gr. 152. *Contra*, Workman v. Campbell, 46 Mo. 305.

[5] Kingsbury v. Buchanan, 11 Iowa, 387.

[6] Taylor v. Cedar Rapids, etc., Ry. Co., 25 Iowa, 371.

[7] Ryan v. Curran, 64 Ind. 345.

[8] Patton v. Camplin, 63 Ind. 512; Nosler v. Hunt, 18 Iowa, 212.

[9] Peoria, etc., Ins. Co. v. Walser, 22 Ind. 73.

[10] Whitworth v. Malcomb, 82 Ind. 454; Wall v. Galvin, 80 Ind.

the same exhibit is to be furnished in connection with several causes of action, one copy is sufficient, if referred to in each cause of action;[1] and a cross-complaint need not attach a copy, if one is attached to, or contained in, the complaint.[2]

Where a short form of complaint is used, and the instrument copied therein is one of which a copy is required to be attached and filed, or where the entire instrument is otherwise embodied in the pleading, the copy so embodied in the pleading is a sufficient compliance with the requirement under consideration, and another copy need not be attached.[3] But where a copy of the instrument is not requisite in a statement of the cause of action, it is bad practice to incorporate a copy merely as a compliance with the requirement to attach and file a copy;[4] for the requirement to attach and file a copy does not, ordinarily, make such copy a part of the pleading.[5]

A copy, when attached as an exhibit, being intended for the information of the adverse party, and not constituting a part of the pleading, can not be looked to on demurrer,[6] except in those jurisdictions wherein the exhibit is properly made a part of the pleading. The omission of the exhibit,

449. *Cf.* Rogers v. State, 78 Ind. 329. Strictly, the identification should be upon the paper attached; for any reference thereto in the pleading is out of place.

[1] Maxwell v. Brooks, 54 Ind. 98; Scotten v. Randolph, 96 Ind. 581. *Cf.* School Tp. v. Citizens' Bk., 81 Ind. 515; Hochstedler v. Hochstedler, 108 Ind. 506.

[2] Coe v. Lindley, 32 Iowa, 437; Pattison v. Vaughan, 40 Ind. 253. *Contra*, Campbell v. Routt, 42 Ind. 410.

[3] Benjamin v. Delahay, 3 Ill. 574; Lamson v. Falls, 6 Ind. 309; Adams v. Dale, 29 Ind. 273.

[4] Crawford v. Satterfield, 27 O. S. 421; McCampbell v. Vastine, 10 Iowa, 538.

[5] Larimore v. Wells, 29 O. S. 13; Phillips v. Evans, 64 Mo. 17; C. & F. Ry. Co. v. Parks, 32 Ark. 131.

[6] Pearsons v. Lee, 2 Ill. 193; Curry v. Lackey, 35 Mo. 389; Baker v. Berry, 37 Mo. 306; Bogardus v. Trial, 2 Ill. 63; Gage v. Lewis, 68 Ill. 604; Hooker v. Galligher, 6 Fla. 351; Watkins v. Brunt, 53 Ind. 208; Nathan v. Lewis, 1 Handy, 239; Los Angeles v. Signoret, 50 Cal. 298. *Cf.* Buckner v. Davis, 29 Ark. 444; Hartford Ins. Co. v. Kahn (Wyo.), 34 Pac. Rep. 895. *Contra*, Ward v. Clay, 82 Cal. 502; Furgison v. State, 4 G. Greene, 302; Wesy v. Hayes, 104 Ind. 251; Burton v. White, 1 Bush, 9; Blossom v. Ball, 32 Ind. 115. *Cf.* McDonough v. Kans, 75 Ind. 181.

except when it would necessarily be a part of the pleading, is not ground for demurrer, but may be remedied by motion;[1] and is waived, if not objected to at the proper time.[2]

372. Performance of Conditions Precedent.—When performance of a condition precedent is essential to the right of a party, performance thereof, or its legal equivalent, must be alleged.[3] At common law it was necessary to set out all the facts that went to show the performance; showing the time, place, and manner thereof.[4] Under this requirement many subtle distinctions grew up in relation to express and implied conditions, and the subject became one of much perplexity and embarrassment. To avoid the inconvenient prolixity and the perplexing distinctions, incident to this requirement, the codes have generally provided that in pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part to be performed. This privilege of pleading *performavit omnia* is sustained by the principle that a more general form of allegation is allowable where the allegations from the other side must reduce the pleading to certainty.[5]

The general allegation provided for by the codes becomes the equivalent, in legal effect, of the specific allegations required by the common law, and embraces both express and implied conditions, whether in oral or written contracts. The prevailing view seems to be, that this statutory provision applies only to conditions contained in contracts, and not to conditions imposed by law.[6]

[1] Calvin v State, 12 O. S. 60, 66; Andrews v. Alcorn, 13 Kan. 351; Burns v. Simpson, 9 Kan. 658; Egan v. Tewksbury, 32 Ark. 43; Lash v. Christie, 4 Neb. 262; Mulhollan v. Scoggin, 8 Neb. 202. *Contra*, where the code makes the copy a part of the record. Seawright v. Coffman, 24 Ind. 414; O. & M. R. Co. v. Nickless, 71 Ind. 271; Per KINGMAN, C. J., in Burns v. Simpson, 9 Kan. 658, 663.

[2] Kingsbury v. Buchanan, 11 Iowa, 387; Scott v. Zartman, 61 Ind. 328; Andrews v. Alcorn, 13 Kan. 351; Oyler v. Scankan, 33 O. S. 308. *Cf.* Peterson v. Allen, 12 Iowa, 366.

[3] Ante, 329.

[4] Steph. Pl. 356.

[5] Steph. Pl. 370.

[6] Bliss Pl. 302; Rhoda v. Alameda Co., 52 Cal. 350; Graham v. Machado, 6 Duer, 514. *Contra*,

In alleging performance of conditions precedent, the better course is to use substantially the language of the statute. It has been held sufficient to allege that "plaintiffs did duly perform all and singular the conditions aforesaid on their part to be performed;"[1] or that "plaintiff has fully performed all the terms and conditions of said contract to be done and performed by him in accordance therewith."[2] But an allegation that such contract "has been a valid and subsisting contract ever since the date of its execution, and still is valid and binding" on the party, is not a sufficient averment of such performance;[3] nor is an averment that "the whole of said sum is now due."[4] And if the pleading shows affirmatively that the condition has not been performed, a general averment of performance will have no operation.[5]

373. Performance of Conditions Precedent, Continued. —Where a purchaser of goods sues for damages for their non-delivery, he must show that he was ready and willing to receive and pay for them as delivered; and denial of the making of the contract sued on does not relieve him from this requirement.[6] Omission of an averment of performance from the complaint may be cured by averments in subsequent pleadings.[7] In an action to recover the agreed price for constructing a building, it is not sufficient to allege full performance of the contract, except where the same was, by the consent of defendant, altered and waived. The terms of the contract as modified should be pleaded, and then performance thereof alleged; or if an excuse or waiver is relied upon, the facts constituting it should be pleaded.[8] Under an averment of performance, a waiver of performance, or an excuse for non-performance, can not be shown,[9] without amendment

Gay v. Paine, 5 How. Pr. 107. *Cf.* Adams v. Sherrill, 14 How. Pr. 297.

[1] Crawford v. Satterfield, 27 O. S. 421. *Cf.* Union Ins. Co. v. McGookey, 33 O. S. 555, 561.

[2] Andreas v. Holcombe, 22 Minn. 339.

[3] Phillips v. Phillips, 14 O. S. 308.

[4] Doyle v. Ins. Co., 44 Cal. 264.

[5] Home Ins. Co. v. Lindsey, 26 O. S. 348, 356.

[6] Simons v. Green, 35 O. S. 104.

[7] Dayton Ins. Co. v. Kelly, 24 O. S. 345, 357.

[8] Smith v. Brown, 17 Barb. 431.

[9] Lumbert v. Palmer, 29 Iowa, 104; Livesey v. Hotel, 5 Neb. 50; Oakley v. Morton, 11 N. Y. 26; Mehurin v. Stone, 37 O. S. 49.

of the pleadings, which may be allowed, in the discretion of the court.[1]

A party is not required to adopt the brief general averment of performance. He may disregard this statutory privilege, and plead the specific facts showing performance; but he must then plead with the fullness and certainty required at common law.[2]

If the defendant relies upon the fact that any or all of the conditions have not been performed, he should traverse the general averment of performance by a denial, and a statement of the particulars wherein the plaintiff has failed to perform.[3] Such enumeration of particulars is necessary to make the issue definite, and is not new matter, but a qualification of the denial, and does not call for a reply, or relieve the plaintiff of the burden of proof.[4] Such entire answer amounts only to a denial. A mere denial in such case, without specification of particulars, would, no doubt, be good on demurrer,[5] but vulnerable to a motion to make definite.

374. Pleading Judgments.—The judgment of a court may be the ground of an action, it may be asserted as a set-off, or it may be pleaded in bar. When a judgment is asserted, it must appear that it is valid and in force. To be valid, a judgment must be given by a competent tribunal, and on a proper occasion; in other words, it must appear that it was given by a court having jurisdiction to render the judgment pleaded. The requisites to such validity are, (1) that the court giving the judgment had, by the law, cognizance of the subject-matter of the action, (2) that it had, by service of process or by appearance, jurisdiction of the proper parties, (3) that its action had been invoked by adequate pleadings, and (4) that the judgment has not been reversed, modified, or satisfied; and in pleading a judgment, these requisites to

[1] Hosley v. Black, 28 N. Y. 438. *Cf.* Livesey v. Hotel, 5 Neb. 50.

[2] Home Ins. Co. v. Duke, 43 Ind. 418. *Cf.* Hatch v. Peet, 23 Barb. 575.

[3] Mehurin v. Stone, 37 O. S. 49, 59; Preston v. Roberts, 12 Bush, 582.

[4] Mehurin v. Stone, 37 O. S. 49, 59.

[5] Daniels v. Andes Ins. Co., 2 Mon. Ty. 78; Nathan v. Lewis, 1 Handy, 239, 243.

its validity must be alleged, except so far as such allegations are dispensed with by legal presumptions, or by statutory provisions.

As to jurisdiction of the subject-matter, there is a distinction between courts of general jurisdiction and those of limited and special jurisdiction. As to a court of general jurisdiction, there is a presumption that it had right to entertain the action, and in pleading the judgment of such court, it is not necessary to allege the facts showing jurisdiction of either subject-matter or person, nor to set forth the proceedings.[1] It is sufficient in this regard, if it appear that the court was of general jurisdiction. Averring that the judgment was rendered by the "Supreme Court in Equity for the State of New York," sufficiently shows that the court was of general jurisdiction.[2] In pleading a judgment of a court of limited or special jurisdiction, there is no such presumption, and the jurisdiction, both of subject-matter and of person, must be made to appear by allegation;[3] and the same is true where the jurisdiction is specially conferred by statute, whether the court be of general or of inferior jurisdiction.[4]

Where the jurisdiction depends upon the nature of the cause of action, the court may look behind the judgment pleaded as the cause of action, to see the nature of the demand on which it was rendered; for while technically the judgment merges the demand, the nature of a demand is not changed by recovering judgment upon it.[5]

[1] Freeman on Judgm. 452; Dodge v. Coffin, 15 Kan. 277; Butcher v. Bank of Brownsville, 2 Kan. 70; Phelps v. Duffy, 11 Nev. 80; Bruckman v. Taussig, 7 Colo. 561; Reid v. Boyd, 13 Tex. 241. It seems that this presumption applies to the judgments of such courts in sister states. Rugers v. Odell, 39 N. H. 452; Specklemeyer v. Dailey, 23 Neb. 101; s. c. 8 Am. St. Rep. 119; Jarvis v. Robinson, 21 Wis. 523; Tenney v. Townsend, 9 Blatchf. 274.

[2] Pennington v. Gibson, 16 How. 65.

[3] Freeman on Judgm. 454; Gilbert v. York, 111 N. Y. 544: United States v. Clarke, 8 Pet. 436; Turner v. Roby, 3 N. Y. 193; Sheldon v. Hopkins, 7 Wend. 435.

[4] Kellam v. Toms, 38 Wis. 592. *Cf.* Loop v. Gould, 25 Hun, 387; Edmiston v. Edmiston, 2 Ohio, 251, *per curiam*.

[5] Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 292; Betts v. Bagley, 12 Pick. 572; Clark v. Rowling, 3 N. Y. 216.

375. Pleading Judgments, Continued.—The codes have generally provided that in pleading a judgment, or other determination of a court, or of an officer of special jurisdiction, it shall be sufficient to state that such judgment or determination "was duly given or made." A pleading under favor of such provision should use the words of the statute, or words of equivalent import.[1] The word "duly" seems to be essential.[2] An averment that "judgment was rendered,"[3] or that "a judgment was entered,"[4] is not sufficient; but an allegation that plaintiff recovered a judgment against defendant, and that it was duly docketed, has been held sufficient.[5]

It has been suggested that this provision of the codes does not apply to foreign judgments of courts of special or limited jurisdiction;[6] but the soundness of such discrimination has well been questioned.[7] It does apply to the pleading of a judgment of a court of the United States,[8] and it is the better opinion that it applies to the judgments of courts of sister states.[9]

If a former judgment be pleaded in bar, the defendant must, in addition to showing its validity, allege that it was rendered in an action between the same parties, and wherein the same right of action was asserted and determined.[10] If the parties are not the same, privity must be shown.[11] Upon principle, a former adjudication can not be proved under a

[1] Hunt v. Dutcher, 13 How. Pr. 538; Edwards v. Hellings, 99 Cal. 214; Lee v. Terbell, 33 Fed. Rep. 850; Roys v. Lull, 9 Wis. 324; Young v. Wright, 52 Cal. 407. *Cf.* Culligan v. Studebaker, 67 Mo. 372.

[2] Hunt v. Dutcher, 13 How. Pr. 538. *Contra*, Warfield v. Gardner's Admr., 79 Ky. 583.

[3] Young v. Wright, 52 Cal. 407.

[4] Hunt v. Dutcher, 13 How. Pr. 538.

[5] Pierstoff v. Jorges, 86 Wis. 128.

[6] McLaughlin v. Nichols, 13 Abb. Pr. 244.

[7] Max. Pl. 90; Etz v. Wheeler 23 Mo. App. 449.

[8] Laidley v. Cummings, 83 Ky. 606. *Cf.* Cutting v. Massa, 15 N. Y. St. Rep. 316.

[9] Etz v. Wheeler, 23 Mo. App. 449; Kronberg v. Elder, 18 Kan. 150. *Cf.* Lee v. Terbell, 33 Fed. Rep. 850; Ault v. Zehering, 38 Ind. 429, 433; Archer v. Romaine, 14 Wis. 375.

[10] Heatherly v. Hadley, 2 Oreg. 269.

[11] Brandt v. Albers, 6 Neb. 504; Goddard v. Benson, 15 Abb. Pr. 191.

denial, and should be specially pleaded as new matter;[1] but it has been held that a former recovery may be proved under a denial, the difference being that it is not conclusive as an estoppel, when not pleaded.[2]

It is not necessary to allege that a judgment sued on remains in force, for it is presumed to continue in force until the contrary appears.[3]

376. Pleading an Implied Promise.—The superaddition of the fiction of a promise, to the operative facts in certain jural relations, in order to bring them within the formal requirements of the action of assumpsit, and the consequent appellation of "implied contracts," have heretofore been explained.[4] Whether, under the reformed system, which has abolished forms of action, and which professes to dispense with fictions, a cause of action on what is commonly termed an implied contract should allege a promise to pay, is a question of practical importance, and one that hardly admits of a categorical answer, either upon authority, or upon principle. It would seem that since the necessity that gave rise to the fiction no longer exists, the use of the fiction should cease; for "fictions of law hold only in respect of the ends and purposes for which they were invented."[5] And while this rational view has generally obtained in our courts,[6] there is some confusion in the practice, resulting mostly from failure

[1] Cane v. Crafts, 53 Cal. 135; Fanning v. Hib. Ins. Co., 37 O. S. 344; Hendricks v. Decker, 35 Barb. 298; Norris v. Amos, 15 Ind. 365; Ransom v. Stanbery, 22 Iowa, 334; Brazil v. Isham, 12 N. Y. 9, 17; Lockwood v. Wildman, 13 Ohio, 430.

[2] Meiss v. Gill, 44 O. S. 253, and cases there cited; Mussey v. White, 58 Vt. 45.

[3] Campbell v. Cross, 39 Ind. 155; Blake v. Burley, 9 Iowa, 592; Masterson v. Matthews, 60 Ala. 260; *In re* Baird, 84 Cal. 95.

[4] Ante, 95.

[5] Lord MANSFIELD, in Morris v. Pugh, 3 Burr. 1243.

[6] Pom. Rem. 538 et seq.; Bliss Pl. 151 et seq.; Max. Pl. 85; Poly v. Williams, 101 Cal. 648; Wills v. Wills, 34 Ind. 106; Farron v. Sherwood, 17 N. Y. 227, 230; Cropsey v. Sweeney, 27 Barb. 310, 312; De La Guerra v. Newhall, 55 Cal. 21; Per RAY, J., in Gwaltney v. Cannon, 31 Ind. 227, 228; Higgins v. Germaine, 1 Mont. 230. *Contra*, Booth v. Farmers & Mechanics' Nat. Bk., 65 Barb. 457; Per SMITH, J., in Bird v. Mayer, 8 Wis. 362, 367.

to distinguish between what may properly be called "implied contracts," and a class of obligations imposed by law, in the absence of promissory intention.

Contract rights and obligations arise only from the intention of the parties; and this intention may be expressed in words, or it may be inferred from conduct. In the one case, the intention to create a right and impose a duty is shown by the words employed; in the other, it is symbolized by acts and circumstances. For example, if A. sells to B. a horse, for one hundred dollars, to be paid in thirty days, there is an express contract to pay a fixed sum, at a stated time; but if B. says to a merchant, "Send a barrel of your best flour to my house," and the merchant sends it, B. has promised to pay the fair value of the flour, on delivery, though not a word was spoken about it. The intention is as clear in the one case as in the other; the difference being that, in the former instance, the intention of the parties is manifested by words, while in the latter it is to be inferred from their conduct. In both instances the obligation is promissory, and the jural relation is contractual. An allegation that B. promised to pay for the flour would rest in fact, and not in fiction.

If B. should tortiously take possession of the merchant's flour, he would be legally liable, either in damages for the tort, or in assumpsit for the value of the property, regardless of the tort; but his liability would in no sense be promissory, for there was no intention to pay, either express or implied. The liability of a husband or a father for necessaries, the obligation of one to return money paid to him under mistake, or obtained by duress or fraud, and the many instances of right to recover on the ground that one should not be allowed to enrich himself unjustly at the expense of another, are examples of right and duty arising *ex lege*, and from circumstances that exclude any idea of contractual intention.[1]

[1] The Roman law distinguished these obligations from implied contracts, and designated them as quasi-contracts. Sir Henry Maine, speaking of this distinction in the Roman law, says: "It has been usual with English critics to identify the quasi-contracts with *implied* contracts, but this is an error, for implied contracts are true contracts, which quasi-contracts are not. In implied contracts, acts

377. Pleading an Implied Promise, Continued.— There is no difference in principle between an express contract and an implied contract. The *aggregatio mentium* exists in both, and the obligation in each arises from promissory intention. The difference is in the kind of evidence by which the undertaking in the one instance and in the other is to be proved; and a cause of action on either should allege the promise of the defendant to pay. For example, in the supposed sale of flour, the plaintiff should allege that he sold and delivered to defendant a barrel of flour, of the value of so much, which the defendant promised to pay on delivery.[1] But in the statement of a right of action arising purely *ex lege*, and where the circumstances do not give rise to the inference of a promissory intention, no promise should be alleged.

Under the new procedure, as under the old, one injured by tort may, in certain cases, have his election to sue in tort, for damages, or in contract, for the value of the property.[2] To entitle a plaintiff to waive the tort, and sue in contract, the

and circumstances are the symbols of the same ingredients which are symbolized, in express contracts, by words; and whether a man employs one set of symbols or the other must be a matter of indifference so far as concerns the theory of agreement. But a quasi-contract is not a contract at all. The commonest sample of the class is the relation subsisting between two persons, one of whom has paid money to the other through mistake. The law, consulting the interests of morality, imposes an obligation on the receiver to refund, but the very nature of the transaction indicates that it is not a contract, inasmuch as the convention, the most essential ingredient of Contract, is wanting. This word "quasi," prefixed to a term of Roman Law, implies that the conception to which it serves as an index is connected with the conception with which the comparison is instituted by a strong superficial analogy or resemblance. It does not denote that the two conceptions are the same, or that they belong to the same genus." Maine's Ancient Law, 332. *Cf.* Keener on Quasi-Contracts, 3–25; 1 Add. on Contr. 30, 31; Hol. Jur. (5th ed.) 232, and note 4.

[1] Swan Pl. 174–176. In an action for breach of engagement to marry, the complaint must allege the defendant's promise; but an express promise need not be proved. Proof of a common intent, mutually accepted, is enough; and this may be inferred from relevant conduct, declarations, and circumstances.

[2] Steph. Pl. 52 et seq.

tort-feasor must have unjustly enriched himself by his tortious act. Impoverishment of the plaintiff is not alone sufficient.[1] One who assaults and beats another could not be sued in assumpsit, but one who steals and sells another's goods could be. The injured party suing in assumpsit is said to waive the tort; but strictly speaking, he does not. He waives damages for the tort, and elects to sue for the value, or the proceeds, of his property. The tort must nevertheless be proved, to sustain the action.[2]

Courts have differed as to the way in which, under the new procedure, the plaintiff shall indicate his election to sue for the value, and not for damages. Under the old procedure, this was indicated by the form of action employed; but since these forms, and their distinguishing phraseology, have been abolished, some other means must be resorted to. Perhaps the only logical means consistent with the theory of the new procedure is, to indicate such election in the prayer for relief, by designating the amount demanded as the *value* of the property, instead of *damages* sustained. This is what the election really is, and this is one of the offices of the prayer for relief.[3]

378. Sundry Formal Averments.—An act done by an agent should, ordinarily, be alleged as the act of the principal. *Qui facit per alium, facit per se.* And such allegation is proper even when the act could be done only by an agent,[4] as in the case of a corporation. But the statement that an act was done through an agent is not improper;[5] and when

[1] Patterson v. Prior, 18 Ind. 440; Tightmyer v. Mongold, 20 Kan. 90; Fauson v. Linsley, 20 Kan. 235; Nat'l Trust Co. v. Gleason, 77 N. Y. 400; N. Y. Guar. Co. v. Gleason, 78 N. Y. 503; Powell v. Reese, 7 A. & E. 426; Hambly v. Trott, Cow. 372.

[2] Huffman v. Hughlett, 11 Lea, 549; Per NICHOLSON, C. J., in Kirkman v. Philips, 7 Heisk. 222, 224. *Contra*, Edwards v. Albrecht, 42 Mo. App. 502.

[3] Ante, 221; Pom. Rem. 573, 580; Gillett v. Freganza, 13 Wis. 472; Lowber v. Connit, 36 Wis. 176; Per WELCH, C. J., in Corry v. Gaynor, 21 O. S. 277; O'Brien v. Fitzgerald, 143 N. Y. 377.

[4] Hoosac Min. & Mill. Co. v. Donat, 10 Colo. 529; Weide v. Porter, 22 Minn. 429; Burnham v. Milwaukee, 69 Wis. 379; McNees v. Mo. Pac. Ry. Co., 22 Mo. App. 224.

[5] St. John v. Griffith, 1 Abb. Pr. 39.

necessary, to fairly advise the adversary, a party may be required to designate the agent or officer.[1]

In pleading a public highway, it is sufficient to allege that it is a public highway, without showing how it became so.[2] This is the ultimate operative fact; and besides, the facts creating the highway are as well known to the defendant as to the plaintiff, and are evidential in their nature. But one claiming a private way should allege title.[3]

In pleading a fee simple, it is only necessary to allege that the party is seized in fee, or is the owner in fee, without stating when or how the estate was created.[4] Ownership is the ultimate fact to be alleged.[5]

In pleading a private statute, it must be specially alleged and set forth,[6] except in those states where it is by statute made sufficient, in pleading a private statute, or a right derived therefrom, to refer to such statute by its title and the day of its passage. But to bring a case within the provisions of a public statute,—except, perhaps, an action to recover a statutory penalty,—it is only necessary to allege the facts which make a case within the statute;[7] though where a statute, upon certain conditions, confers a right, or gives a remedy, unknown to the common law, a party asserting such right, or availing himself of such remedy, must, in his pleading, bring himself or his case clearly within the statute.[8]

In pleading a foreign statute, so much thereof as is relied upon should be copied into the pleading,[9] so as to put it in

[1] Webster v. Cont. Ins. Co., 67 Iowa, 393.

[2] Aspindall v. Brown, 3 Durnf. & East, 265; Kerr v. Hays, 35 N. Y. 336.

[3] Per SMITH, J., in Kerr v. Hays, 35 N. Y. 336.

[4] Gould Pl. iii. 22; Knight v. McDonald, 37 Ind. 463; Per RIDDLE, J., in McMannus v. Smith, 53 Ind. 211.

[5] Souter v. Maguire, 78 Cal. 543; Phœnix Ins. Co. v. Stark, 120 Ind. 444.

[6] P. C. & St. L. Ry. Co. v. Moore, 33 O. S. 384; Turnpike Co. v. Sears, 7 Conn. 86; Abb. Pl. Br. 348.

[7] Shaw v. Tobias, 3 N. Y. 188; Reed v. Northfield, 30 Mass. 94; Brown v. Harmon, 21 Barb. 508; Abb. Pl. Br. 340.

[8] Kechler v. Stumme, 36 N. Y. Superior Ct. 337.

[9] Swank v. Hufnagle, 111 Ind. 453; Milligan v. State, 86 Ind. 553; Bank of Commerce v. Fuqua, 11 Mont. 285.

the power of the court to interpret and construe the statute. An averment that a certain act was done according to the laws of a foreign state is not sufficient.[1] And in pleading a city ordinance, it must be set forth as any other fact of which the courts do not take judicial notice; a mere reference to it by number, title, and date of enactment is not sufficient.[2]

[1] Holmes v. Broughton, 10 Wend. 75; Bank v. Hendrickson, 40 N. J. L. 52. *Contra*, Tank Line Co. v. Collier, 148 Ill. 259.

[2] Pomeroy v. Lappeus, 9 Oreg. 363.

CHAPTER XXIV.

RULES RELATING TO THE PROOFS.

379. The Proofs are Confined to the Allegations.— One object of the pleadings in a cause is to disclose the respective claims of the parties, and the resulting issues. The trial is to ascertain the truth in respect to the matters put in controversy by the pleadings. The evidence is to elucidate the matters of fact in controversy, and must be confined thereto, and the judgment must be *secundum allegata et probata*.[1] Entire agreement of proofs and allegations is not always practicable, or even necessary; and the degrees of disagreement are distinguished as immaterial variance, material variance, and failure of proof.[2] These distinctions relate to the effect of evidence, rather than to its relevancy, but they accentuate the importance of constructing the pleadings with reference to the admission of proper evidence, and the exclusion of improper evidence.

The rules of pleading that affect the admission and exclusion of evidence mainly relate either to what facts may be proved under a denial, or to what facts must be alleged in order that

[1] There is, in practice, an apparent expansion of this rule, when facts not in issue, but relevant to the issue, or explanatory of such relevant facts, are allowed to be proved, and when evidence is introduced to meet other evidence. It frequently happens that testimony offered during the trial gives importance and materiality to some fact that has no direct bearing upon the issue. Questions of time, place, identity, motive, provocation, locality, reputation, and other collateral facts, may in this way become material by reason of the state of the evidence, and be properly the subjects of proof. But this expansion of the rule, dictated and regulated by necessity, experience, and prudence, affects only the degree in which probative facts may relate to the issue; and does not embrace facts that do not, directly or indirectly, tend to elucidate the questions evolved by the pleadings.

[2] Post, 520.

they may be proved; and this natural division will be observed in the further consideration of the subject.

380. Defensive Facts, Whether Evidential or Operative.—Whether a particular defensive fact is evidential, and may be proved under a denial, or whether it is an operative fact, to be pleaded as new matter in order that it may be proved, is a question that involves a consideration of the nature and effect of the defenses of denial and of new matter; and it may sometimes depend upon the form and scope of the complaint.

A denial, whether general or special, simply asserts the untruth of the allegations to which it is addressed. If in an answer, it casts upon the plaintiff the burden of proving all the material allegations denied, and entitles the defendant, after the introduction of evidence by the plaintiff, to introduce evidence to disprove the facts so denied. Such evidence may be negative or affirmative in character, but it must, in its effect, tend to disprove the material facts denied. Any affirmative fact that is inconsistent with the facts denied may therefore be proved under such denial, because the proof of the one is the disproof of the other.

A defense of new matter is the statement of some additional and cognate fact, not inconsistent with the facts already alleged, and which, without antagonizing those facts, shows they do not operate to give the plaintiff a remedial right against the defendant.

Facts that are not inconsistent with the plaintiff's facts, and that will not tend to defeat his facts alleged, may not be proved under a denial, however much such facts might tend to defeat the plaintiff's right arising from his facts alleged; and facts that are inconsistent with those alleged by the plaintiff can not be pleaded as new matter, for such plea does not question the plaintiff's facts *alleged*, but only the apparent right arising from them. In other words, a defense of denial challenges the plaintiff's *facts* alleged, while a defense of new matter challenges only the *effect* of those facts.

It follows, that facts which are defensive because inconsistent with the plaintiff's facts alleged, are evidential facts, and may be proved under a denial, for they support the

denial; but facts that are consistent with those alleged by the plaintiff, and that are defensive because, when considered in connection with the plaintiff's facts, they show that he has not the right that would arise from the facts by him alleged, are operative facts, and must be pleaded before they can be proved. If a defensive fact, and those alleged by the adversary, may co-exist, the former is an operative fact, and must be pleaded; if they can not co-exist, the defensive fact may be proved under a denial—it is a mere negation. Stated in other form, the plaintiff does not allege the defendant's liability, but facts which show his liability; and the defendant may predicate his non-liability upon the falsity of the plaintiff's facts, or upon new facts which admit the plaintiff's facts and avoid the liability. If a given defensive fact will show the falsity of the plaintiff's facts, it is an evidential fact, to be proved under a denial; but if it will show non-liability notwithstanding the plaintiff's facts, it is an operative fact, that must be pleaded in order to be available.

I. WHAT MAY BE PROVED UNDER A DENIAL.

381. The Issues Under a Denial.—A special denial puts in issue the particular averment or averments traversed, and a general denial puts in issue all the issuable averments of the complaint; that is, all averments that are essential to the maintenance of the plaintiff's action. These are all that the plaintiff must prove, and they are all that the defendant may controvert.[1] Under such denial, the defendant may introduce evidence (1) to controvert the plaintiff's evidence, (2) to disprove his facts alleged, or (3) to prove other and inconsistent facts.[2] Such evidence tends to overthrow the plaintiff's *facts* alleged, and not simply to destroy their *effect*. Under the general issue at common law, much latitude was formerly given, and the defendant was allowed to prove any

[1] Bliss Pl. 327–329, 352; Max. Pl. 392; Pom. Rem. 642, 667, 668; Adams Exp. Co. v. Darnell, 31 Ind. 20; A. & N. Ry. Co. v. Washburn, 5 Neb. 124.

[2] Boone Pl. 65; Bliss Pl. 352; Pom. Rem. 671; Milbank v. Jones, 141 N. Y. 340; Roemer v. Striker, 142 N. Y. 134.

facts tending to show that plaintiff had no right of action at the commencement of the suit; and facts constituting a defense of new matter were frequently allowed to be proved under this scope given to the general issue.[1] This wide range of evidence under the general issue led to constant surprises at the trial, and the evil was finally remedied in England by statute, and by rules of court made thereunder.

Uncertainty in the mind of the pleader as to the issues made by a general denial, and as to what may be proved thereunder, and failure to distinguish defensive evidential facts from defensive operative facts, have led to the reprehensible practice of combining with the general denial a statement of evidential facts equivalent to the denial—facts that could all be proved under the denial. The superaddition of such facts does not affect the issue, or shift the burden of proof, or have any bearing upon the admissibility of evidence.

382. Denial of Ownership.—It has been shown, that when the plaintiff asserts a claim by virtue of his ownership of property, he must allege title thereto; and in some cases he may allege his ownership generally, while in others he must state the facts showing such ownership.[2] Where the plaintiff's allegation of ownership is general, not stating the facts creating title, a denial will admit any competent evidence tending to disprove plaintiff's averment of ownership; such as fraud,[3] ownership of the defendant,[4] or of a third person.[5] And in such case, an allegation by the defendant that

[1] Steph. Pl. 229–240; Bliss Pl. 324; Pom. Rem. 645–656; Gould Pl. vi. 38–48.

[2] Ante, 323 *et seq.*

[3] Bailey v. Swain, 45 O. S. 657; Eureka I. & S. Wks. v. Bresnahan, 66 Mich. 489; s. c. 33 N. W. Rep. 834; Stern A. & C. Co. v. Mason, 16 Mo. App. 473; Young v. Glascock, 79 Mo. 574; Johnson v. Oswald, 38 Minn. 550; Merrill v. Wedgwood, 25 Neb. 283; s. c. 41 N. W. Rep. 149; Wager v. Ide, 14 Barb. 468; Avory v. Mead, 12 N. Y. St. Rep. 749; Mather v. Hutchinson, 25 Wis. 27; Lain v. Shepardson, 23 Wis. 224, 228. *Cf.* Miles v. Lingerman, 24 Ind. 385.

[4] Marshall v. Shafter, 32 Cal. 176; Bruck v. Tucker, 42 Cal. 346; Foye v. Patch, 132 Mass. 105; Stanbach v. Rexford, 2 Mont. 565; Per Downey, J., in Kennedy v. Shaw, 38 Ind. 474.

[5] Schulenberg v. Harriman, 21 Wall. 44, 59; Driscoll v. Dun-

the property belongs to a third person would not be new matter, but the statement of an evidential fact equivalent to a denial of plaintiff's ownership.[1] But where the plaintiff states the facts upon which his ownership depends, a general denial, since it denies only these facts, will not admit evidence to disprove ownership otherwise than by controverting the particular facts alleged.[2]

In actions for the recovery of real property, in jurisdictions where there is no statutory requirement to the contrary, a title acquired by adverse possession for the period fixed by the statute of limitations may be proved under a denial of plaintiff's title. The reason for this rule is, that such continued possession under the statute gives the adverse occupant an absolute title, and proof thereof negatives the plaintiff's allegations as completely as would the introduction of a conveyance from the plaintiff to the defendant.[3] This is an apparent exception to the general rule that the statute of limitations must be pleaded in order to be available as a defense. But it is more apparent than real. It is not the statute that is relied on, but the matured fruit of the statute —ownership of the property. The lapse of time defeats the title, not merely the remedy; and is asserted in denial of ownership, not in confession and avoidance.

383. Proof under Denials—Illustrative Cases.—In an action for goods sold and delivered, the defendant may, under a denial, show that the goods were sold and delivered to his wife, who had no authority to act for him;[4] or that the

woodsy, 7 Mont. 394; s. c. 16 Pac. Rep. 726; Griffin v. L. I. Ry. Co., 101 N. Y. 348.

[1] Per CROKER, J., in Woodworth v. Knowlton, 22 Cal. 164, 169. *Cf.* Sparks v. Heritage, 45 Ind. 66; Davis v. Warfield, 38 Ind. 461; Thompson v. Sweetser, 43 Ind. 312; Pulliam v. Burlingame, 81 Mo. 111; Jones v. Rahilly, 16 Minn. 320, 325. *Contra*, Dyson v. Ream, 9 Iowa, 51; Patterson v. Clark, 20 Iowa, 429.

[2] Abb. Pl. Br. 942; Per GILFILLAN, C. J., in Johnson v. Oswald, 38 Minn. 550, 552.

[3] Ang. on Lim. 380, note 1; School Dist. v. Benson, 31 Me. 384; Kyser v. Cannon, 29 O. S. 359; Rhodes v. Gunn, 35 O. S. 387; Nelson v. Brodhack, 44 Mo. 596; Bledsoe v. Simms, 53 Mo. 305, 307.

[4] Day v. Wamsley, 33 Ind. 145. *Cf.* Hier v. Grant, 47 N. Y. 278, where defendant was allowed, after

person who made the sale was himself the owner of the goods and not agent for the plaintiff, for this contradicts the allegation of a sale by the plaintiff.[1] In an action on a written contract to which certain incidents are attached by custom, the custom need not be pleaded ;[2] and under denial of a contract, a custom or general course of business incident to the contract may be proved.[3] Parol proof of the custom does not contradict or vary the real contract, for by implication the usage is annexed to the writing.[4] Under a denial, the defendant may not show that the plaintiff is not the real party in interest, and therefore not entitled to sue. The facts showing want of right to sue are new matter, to be pleaded.[5] In an action upon a *quantum meruit* for work and labor, a denial puts in issue the value of the work, and the defendant may prove any facts tending to show its value —such as negligence, or unskillfulness.[6]

"The whole question there is, how much ought the plaintiff to have; and proof of defects in his work is a direct answer to the question."[7] Under a denial in such action the

plaintiff had shown a sale to defendant's agent, to prove a prior revocation of the agency, with plaintiff's knowledge. But this was directly meeting the plaintiff's evidence, and only indirectly controverting his allegations. Ante, 379, note.

[1] Hawkins v. Borland, 14 Cal. 413 : Ferguson v. Ramsey, 41 Ind. 511, 513.

[2] Lowe v. Lehman, 15 O. S. 179 ; Templeman v. Riddle, 1 Harr. 522 ; Stultz v. Dickey, 5 Binn. 285. *Cf.* Goldsmith v. Sawyer, 46 Cal. 209.

[3] Miller v. Ins. Co. of N. A., 1 Abb. N. C. 470.

[4] Lowe v. Lehman, 15 O. S. 179. *Cf.* Anson on Contr. 248 ; Reynolds on Ev. 70 ; 2 Par. on Contr. 543 ; Lawson on Usages, 112.

[5] Shafer v. Bronenberg, 42 Ind. 89, 90 ; Cottle v. Cole, 20 Iowa, 481 ; Smith v. Hall, 67 N. Y. 48 ; Hereth v. Smith, 33 Ind. 514 ; Brett v. Univ. Soc. 63 Barb. 610. *Contra*, Wetmore v. San Francisco, 44 Cal. 294. It would seem, upon principle, that when the right to sue is denied by reason of some fact consistent with those alleged by the plaintiff—as that he had assigned the claim, such fact should be pleaded ; but that a defensive fact inconsistent with those stated by the plaintiff—as, that he never owned the claim, should be admitted under a denial.

[6] Raymond v. Richardson, 4 E. D. Smith, 171, as to services of a mechanic. *Cf.* Bridges v. Paige, 13 Cal. 640, as to services of an attorney.

[7] Per WARDEN, J., in Wellsville v. Geisse, 3 O. S. 333, 340.

defendant may, it is said, prove a special agreement as to compensation, or that the services were rendered gratuitously.[1]

In an action to recover possession of chattels, the complaint alleging property in plaintiff, and the answer being a general denial, the trial court excluded evidence offered by defendant to show that plaintiff was not the owner. The reviewing court held the evidence admissible, because the allegation of ownership was denied, and this evidence would support the donial.[2] To a complaint on a judgment recovered in another state, the defendant pleaded (1) a general denial, (2) *nul tiel record*. The second defense was stricken out on motion, because it was embraced within the first, and could be proved under it.[3]

It will be seen from the foregoing, that the office of the general denial, so far as it affects the proofs, is twofold: (1) it casts upon the plaintiff the burden of proving all the material facts constituting his cause of action; and (2) it authorizes the defendant to disprove those averments, and to controvert the plaintiff's evidence; and this he may do by negative testimony, or by proof of evidential facts inconsistent with the plaintiff's facts alleged.

II. DEFENSIVE FACTS THAT MUST BE ALLEGED IN ORDER TO BE PROVED.

384. The Defense of New Matter.—The defense of new matter does not controvert, either in terms or in effect, the facts stated by the plaintiff. It states other facts consistent with the plaintiff's facts, but which operate to defeat the plaintiff's right arising from his facts alone. Such defense proceeds upon the admission, express or tacit, that the issuable facts stated in the complaint are true; it controverts no facts, makes no issue, and it calls for a reply. A fact

[1] Schermerhorn v. Van Allen, 18 Barb. 29.

[2] Caldwell v. Briggerman, 4 Minn. 190; Northrup v. Miss. Valley Ins. Co., 47 Mo. 435, 444, per WAGNER, J.: "The defendant, by merely answering the allegation in the plaintiff's petition, can try only such questions of fact as are necessary to sustain the plaintiff's case."

[3] Westcott v. Brown, 13 Ind. 83.

that is inconsistent with those stated in the complaint, may, if competent and relevant, be proved in support of a denial, but it should not be pleaded; and if pleaded, it is not a defense of new matter, and does not call for a reply.

In an action on an attachment bond, wherein the petition set out the bond, and alleged as a breach thereof that the defendant had failed to prosecute his attachment suit, and that the attachment had been abated by judgment, the defendant answered denying the breach, and alleging that the attachment suit was still pending by motion in arrest of judgment and for a new trial. It was held, that the allegation of the pendency of the attachment suit was, in effect, a mere negation of the plaintiff's averment of breach of the bond, that it could be proved under the denial contained in the answer, that it did not give color, and was not new matter calling for a reply.[1] The statement of a different version of the transaction is not a defense of new matter, because it does not admit the plaintiff's facts, and therefore does not "give color."[2] Facts so stated are not admitted by failure to reply, and they do not change the burden of proof.

The statement of evidential facts inconsistent with those stated in the complaint, and a statement of a different version of the transaction, contradictory of the plaintiff's facts, since they show, *arguendo*, that the plaintiff's statements are untrue, have generally been treated as the equivalent of a denial, and held good on demurrer.[3] But such pleading of evidential facts is a flagrant violation of elementary principles, and ought not to be tolerated.[4]

385. Defenses to be Alleged—Illustrative Cases.— Under the foregoing rule that defensive facts consistent with

[1] State v. Williams, 48 Mo. 210.

[2] Simmons v. Green, 35 O. S. 104.

[3] Pom. Rem. 624, 627; Clink v. Thurston, 47 Cal. 21, 29; Judah v. University, etc., 23 Ind. 272, 277; Van Alstyne v. Norton, 1 Hun, 537. *Cf.* Waggoner v. Liston, 37 Ind. 357; B. & O. Ry. Co. v. Walker, 45 O. S. 577; Homire v. Rodgers, 74 Iowa, 395; Hostetter v. Auman, 119 Ind. 7; Hopkinson v. Sholton, 37 Ala. 306. *Contra*, McDonald v. Flour Mills Co., 31 Fed. Rep. 577, 579.

[4] Ante, 269, where the evils of such practice are pointed out.

the issuable facts in the complaint are new matter, and must be alleged, in order that they may be proved, it is held, that facts in justification must always be pleaded. This is plainly requisite, for a defense of justification in no wise controverts the facts alleged by the plaintiff, but excuses or relieves the defendant from liability on account thereof. In actions for defamation of reputation, if the truth of the words spoken or written be relied on in justification, it must be pleaded. And this is so, where the plaintiff has alleged the falsity of the words; for such negative allegation can be traversed only by an affirmative.[1] It is true, that a general denial, and a plea in justification, would each show that the plaintiff never had a right of action; but the one shows this by controverting the plaintiff's facts, while the other shows it by admitting these, and bringing upon the record other and correlated facts to obviate their effect.

As to whether facts in mitigation of damages should be pleaded, the authorities are not agreed. It was formerly the rule at common law that the defense, whether by denial or by avoidance, should answer the whole declaration; and a partial defense was not allowed or recognized.[2] Under this rigid requirement, which was in later time relaxed, a defendant could avail himself of facts in mitigation, only by pleading the general issue, or a special plea answering the whole complaint; and under this full defense, mitigating facts were admitted in evidence. In this country, some courts, adhering to the common-law rule, have held that mitigating circumstances are not to be pleaded, but may be proved under the general denial.[3] But the weight of authority, as well as the spirit and theory of the new procedure, which authorizes

[1] Wachter v. Quenzer, 29 N. Y. 547; Fry v. Bennett, 5 Sandf. 54; Jarnigan v. Fleming, 43 Miss. 710. These cases hold the allegation of falsity to be needless, and not traversable. Ante, 330, and note.

[2] Ante, 75.

[3] Smith v. Lisher, 23 Ind. 500, 502; Allison v. Nanson, 41 Ind. 154, 157, 158; Harter v. Crill, 33 Barb. 283; Muser v. Lewis, 14 Abb. N. C. 333; Dunlap v. Snyder, 17 Barb. 561; Button v. McCauley, 5 Abb. Pr. N. S. 29; Travis v. Barger, 24 Barb. 614; Jarnigan v. Fleming, 43 Miss. 710; Haywood v. Foster, 16 Ohio, 88; Duval v. Davey, 32 O. S. 604.

the pleading of partial defenses,[1] is to the effect that facts in mitigation should be pleaded.[2] It ought here to be stated, however, that the requirement to plead facts in mitigation should obtain only when such facts are essentially new matter. It does not exclude proof of mitigating facts to meet and modify the evidential *facts* offered by the other side. In actions for libel or slander, the codes in some states authorize the proof of mitigating circumstances without special plea.

Where a defendant admits the facts of the transaction stated by the plaintiff, but insists that the same is illegal and void by reason of some fact not stated by the plaintiff, his defense is new matter, and must be pleaded. In an action against a city, on a contract made with certain officers of the municipality, the defensive fact that in the making of the contract the officers did not proceed according to the statute conferring the power and prescribing the way in which it shall be exercised, is new matter, and must be pleaded, in order that it may be proved.[3] In an action on a contract of sale, the defensive fact that it was entered into on Sunday, in violation of a statute that makes it void, is new matter to be pleaded.[4] So, the defensive fact that the demand is for

[1] Ante, 233.

[2] McKyring v. Bull, 16 N. Y. 297; Foland v. Johnson, 16 Abb. Pr. 235, 239; Beckett v. Lawrence, 7 Abb. Pr. N. S. 403, 405; Bradner v. Faulkner, 93 N. Y. 515; United States v. Ordway, 30 Fed. Rep. 30; Renan v. Williams, 41 Iowa, 680.

[3] Nash v. St. Paul, 11 Minn. 110, 113. "It may be laid down as a general rule of pleading, that a defendant who admits the *facts* alleged, but wishes to avoid their effect, should affirmatively set up the special matters on which he relies as an avoidance. In this case the answer admits a contract *in fact* with the plaintiff, but denies its legal validity, and sets up the matters which show it void." Per WILSON, C. J. There was no reply, and the court held that by failure to reply the new matter in defense was admitted to be true.

[4] Finley v. Quirk, 9 Minn. 179. The answer was a denial, and the defendant offered to prove that the contract was entered into on Sunday. The court, per WILSON, C. J., says: "We hold, therefore, (1) that an answer merely by way of denial raises an issue only on the *facts* alleged in the complaint; (2) that the denial of the sale in this case only raised an issue on the sale in point of fact, and not on the question of the legality of such sale; (3) that all matters in confession and avoidance showing the contract sued upon to be either void or voidable must be affirmatively pleaded."

liquors sold contrary to law,[1] or that the contract sued on is in restraint of trade,[2] is a defense of new matter and should be pleaded.

386. Defenses to be Alleged—Illustrative Cases, Continued.—Want of consideration is a defensive fact that may be available under a general denial, or by special plea, according to the averments of the complaint. In an action on a contract or an instrument that imports a consideration, the plaintiff need not allege consideration, and the defendant must plead the want of it, to admit proof of the fact; but where the plaintiff must and does allege a consideration, a denial puts it in issue, and admits the proof. Failure of consideration is a defensive fact consistent with both the presumption of consideration and the allegation thereof, and when relied on as a defense, must be pleaded.[3]

All matters in abatement of the action, such as misnomer, present want of capacity to sue, defect of parties, pendency of another action, if they do not appear in the complaint, must be pleaded, in order to be available; they can not be proved under a denial.[4] And the defense that the action was commenced before a right of action had accrued on the demand sued on must be pleaded; it can not be proved under a denial.[5]

Upon principle, and by the decided weight of authority, an estoppel *in pais*, when relied on as a defense, must be pleaded, if there is opportunity to plead it, and can not be given in evidence under a denial.[6] If there has not been

[1] Denten v. Logan, 3 Met. (Ky.) 434.

[3] Prost v. More, 40 Cal. 347.

[3] See ante, 328, and cases cited.

[4] Pom. Rem. 698, 711, and cases cited.

[5] Hagan v. Burch, 8 Iowa, 309; Smith v. Holmes, 19 N. Y. 271. *Contra*, Landis v. Morrissey, 69 Cal. 83; s. c. 22 Reporter, 263. This case holds that under the general denial in an action for goods sold and delivered, the defendant may show an unexpired credit. The case is inherently weak, it violates general principles, and is of no authority.

[6] Wood v. Ostram, 29 Ind. 177; Johnson v. Stelwagen, 67 Mich. 10, 14; Hanson v. Chiatovich, 13 Nev. 395; Rugh v. Ottenheimer, 6 Oreg. 231; Gill v. Rice, 13 Wis. 549; Clarke v. Huber, 25 Cal. 593; Dale v. Turner, 34 Mich. 405; Bray v. Marshall, 75 Mo. 327; Warder v. Baldwin, 51 Wis. 450; Burlington,

opportunity to plead the estoppel, it may be proved without having been pleaded. There may be such want of opportunity where the estoppel is in bar of new matter set up in a reply, or in an answer, where no reply is allowed, and where it is to meet some fact introduced in evidence, but not pleaded.[1]

An equitable defense to a legal demand is always new matter, and must be pleaded, in order that it may be proved.[2] And a tender of payment or of performance, whether a full defense or only partial, can not be shown under a denial, but must be pleaded,[3] and pleaded with certainty; and where tender of payment is relied upon, the plea must show not only the proffer of the money, but that the tender has been maintained. A tender does not bar the debt; it stops interest, and prevents judgment for costs.

The rules for determining when the defense of non-compliance with the statute of frauds, the defense of the statute of limitations, and the defense of payment must be pleaded in order to be available, have heretofore been stated; and the rules for determining when facts showing special damages must be alleged, will be hereafter stated. In an action on a written contract, by the terms of which the defendant's liability appears, but the part that shows his liability was inserted by fraud or mistake, or the part of the real contract that would exonerate him was omitted by like fraud or mistake, the defendent's defense is dependent, not for its assertion, but for its proof, upon affirmative equitable relief reforming the contract. To admit proof of the fraud or mistake in such case, the defendant must impugn the writing, by alleging the error and asking its correction. The fraud or mistake could not be proved under a mere denial.

etc., Ry. Co. v. Harris, 8 Neb. 140; Davis v. Davis, 26 Cal. 23; Etcheborne v. Ayzerais, 45 Cal. 121; Remillard v. Prescott, 8 Oreg. 37. *Contra*, Caldwell v. Auger, 4 Minn. 156.

[1] Dyer v. Scalmanini, 69 Cal. 637; Gans v. St. Paul Ins. Co., 43 Wis. 108; Isaacs v. Clark, 12 Vt. 692; Perkins v. Walker, 19 Vt. 144; Shelton v. Alcox, 11 Conn. 240.

[2] Ante, 239.

[3] Bliss Pl. 364; Max. Pl. 517; Helger v. Addy, 53 Cal. 597; Sidenberg v. Ely, 90 N. Y. 257, 266.

Uncertainty in the mind of the pleader as to what defensive facts may be proved under a denial, and what must be pleaded in order to be proved, has led to the common fault of superadding to the general denial a defense in the form of a defense of new matter, but containing only evidential facts equivalent to a denial, and all of which could be proved under the defense of denial; and sometimes the defensive evidential facts and the denial are commingled in one defense. Such practice is not only a violation of the plainest principles of pleading; it leads to the greatest uncertainty and confusion, and is in the highest degree reprehensible.

PART V.

APPLICATION OF PRINCIPLES.

387. Scope and Divisions of this Part.—The ultimate end of procedure, speaking comprehensively, is the conservation of rights ; its immediate purpose, speaking discriminately, is the application of substantive law to operative facts. Having set forth and explained the formal pleadings, and the general rules by which they are to be constructed and adapted in the conduct of procedure, it is proposed now to furnish some practical guidance for the application of the general principles of pleading to particular instances of actual or threatened violence to private rights. This is the ultimate object toward which all that precedes has tended, and to which it is designed to be subservient. It is at this decisive juncture—the application of legal principles to the actual affairs of life—that the lawyer meets his greatest difficulty ; and it is by judicious discrimination at this critical point that the careful lawyer lays the foundation for his ultimate triumph.

When we come to apply the substantive law to an actual combination of circumstances, through the intervention of a court, at the suit of one party against another, a series of progressive steps are to be taken, and some questions of practical importance and of serious consequence must, at the outset, be considered and determined. These preliminary considerations involve inquiries (1) as to whether there is a right of action, (2) as to what persons should be parties to the action, (3) as to the court that may properly take cognizance thereof, and (4) as to the substantive law that must be applied to the facts in the case.

CHAPTER XXV.

DISCOVERING A RIGHT OF ACTION.

I. ACTIONS FOUNDED ON RIGHTS AND DELICTS.

388. Composition of Remedial Rights.—An action is a proceeding in a court of justice to procure its interposition to protect a right, or to obtain a remedy for its invasion. Primary rights are either *in rem*, or *in personam;* the former availing against persons generally, the latter availing against some determinate person or persons. A remedial right, or right of action, arises from an infringement, actual or threatened, of a primary right, and is always, and necessarily, a right against a determinate person; to wit, the person who owes the positive duty imposed by a right *in personam*, or one who has violated, or threatens to violate, the negative duty imposed by a right *in rem*. Therefore, to determine whether a person has a right of action, and if so, against whom, we must determine whether a primary right of such person has been violated or threatened by the actionable wrong of some other person or persons.

Private rights, from their nature, their variety, and their number, are susceptible of only a very general classification. Culpatory acts that will infringe or impair a private right are even more numerous, more varied, and less capable of predescription. If all rights, and all possible invasions thereof, could be defined and catalogued, it would not be difficult to determine whether, in a particular instance, an actionable wrong has been done. But the facts and circumstances that give rise to litigation generally come into existence from unexpected conduct or events; and from a confused mass, the operative facts—investitive, divestitive, and culpatory—are to be gathered and differentiated, and resulting rights

and liabilities determined. To conduct this discriminating investigation, this legal diagnosis, and thereby to find out whether there is a right of action, the pleader must be able to distinguish operative facts from evidential facts, and to determine from the operative facts whether a legal right has been impaired, by an actionable wrong.

389. Damnum and Injuria Distinguished.—It is not uncommon, in the consideration of facts for the purpose of determining whether there is a right of action, to give undue weight to the circumstances of inconvenience and loss. It is these alone that the *party* contemplates and complains of. But it must here be borne in mind that it is not the purpose of the substantive law to punish wrong-doers; nor is it the purpose of civil actions to compensate for all inconvenience and loss; it is their purpose, primarily, to protect legal rights. The proper inquiry at the outset, then, is, whether a right recognized by the law has been invaded, or is threatened. And here it must be premised, that there is a clear distinction between cases new in principle, and those new only in the instance. That a cause of action is novel, and without precedent, furnishes no ground of objection, provided the right asserted, and the wrong complained of, are within recognized principles of the law. A case may not be within the limits of any adjudged case, or of any precise authority, and yet be clearly within recognized legal principles, and hence cognizable by the courts.[1]

The ultimate object of the law is, the conservation of legal rights, and compensation in damages is only a subordinate end, resorted to for the promotion of the law's general purpose—the protection of rights. It follows, as a logical sequence, that a loss, to be remediable by action, must result from the unathorized impairment of a legal right, and that where there is no recognized right, there can be no actionable wrong; and it follows, as a practical result, that one may sustain loss by the act of another, and yet have no right to compen-

[1] Broom's Max. 193; Per PECKHAM, J., in Piper v. Hoard, 107 N. Y. 73; Per PRATT, J., in Muldowner v. M. & E. R. Co., 42 Hun, 444, 447.

sation by means of an action.[1] In other words, to give one a right of action for loss sustained by the act of another, there must be both actual loss, and legal injury.

Not only must the loss sustained result from the invasion of a recognized legal right, but the interference therewith, the act or omission complained of, must be wrongful; for if loss be sustained by reason of an act or omission that is not legally wrongful, the loss is *damnum absque injuria*, and is not remediable by action. On the other hand, one can not sustain an action against another who has done a wrongful act, unless he has thereby sustained legal damage. Such act would not be legally wrongful, because not legally hurtful.

It is clear, therefore, that to give rise to an actionable right and an actionable liability, there must be both legal damage and legal wrong—*damnum cum injuria*.

390. Damnum absque Injuria—Illustrative Cases.—If, by fair competition, one man interfere with another's business and occasion him loss of trade, the latter has no right of action, because, though he has suffered damage, there has been no legal injury. His full legal right to carry on business is qualified by the equal right of every other person to engage in the same business; and this qualified right has not been encroached upon. His loss is *damnum absque injuria*.[2]

If one, while doing what is lawful, and in the exercise of due care, injure another by pure accident, the latter is remediless, because no legal right has been violated. The right of personal security, in its totality, is only to enjoy such personal safety as the exercise of reasonable care by others will afford. If, for example, one's horse should be frightened by some sudden noise, and become unmanageable, and run against a person, or another horse, and do injury, the driver of the frightened horse, if not negligent in the premises, would not be liable in damages.[3]

[1] Ante, 27.

[2] Rogers v. Dutt, 13 Moore P. C. C. 207, 241.

[3] Gibbons v. Pepper, 1 Ld. Raym. 38; Brown v. Kendall, 6 Cush. 292; Wakeman v. Robinson, 1 Bing. 213. But some of the cases make a distinction between accidents

Injuries inflicted from necessity are, as a rule, not actionable. If a lighted firework be by accident thrown into a coach full of people, and they throw it out in necessary self-defense, a bystander who is unintentionally struck and injured has no right of action against the persons who so threw it against him. The act, being necessary in self-defense, was not wrongful, and invaded no legal right of the bystander.[1] So, if a boat be overloaded with merchandise, a passenger may, in case of necessity, throw overboard sufficient of the goods to afford safety for himself and fellow passengers.[2] And if the highway be impassable, a traveler may, of necessity, pass over the adjoining land.[3]

If, after a will has been made, devising property, a third person induce the testator, by false and fraudulent representations, to revoke it, the person named as devisee will have no right of action against such third person, because the revocation merely deprived him of an expected gratuity, and did not interfere with any legal right.[4] A creditor has no right of action against one who induces the debtor not to pay, or an officer not to collect a demand placed in his hands for collection.[5] And it is said that one who is prevented from attaching property, by the fraudulent representations of the owner, or of his agent, has sustained no legal damage, though another attachment should intervene, and the debt be lost;[6] *aliter*, if the attachment had been levied. and then lost by reason of the deceit. In the one case, only an intention to attach was frustrated; in the other, an acquired lien was lost. The loss of the debt is too remote.

from acts that are involuntary, and from those done voluntarily. *Cf.* Nichols v. Marsland, 10 Ex. L. R. 255; Marshall v. Welwood, 9 Vroom, 339; s. c. 20 Am. Rep. 394.

[1] Scott v. Shepherd, 2 W. Black. 892; Richer v. Freeman, 50 N. H. 420; s. c. 9 Am. Rep. 267. *Cf.* Guille v. Swan, 19 Johns. 381; s. c. 10 Am. Dec. 234.

[2] Mouse's Case, 12 Coke's Rep. 63.

[3] 3 Kent Com. 424.

[4] Hutchins v. Hutchins, 7 Hill, 104. *Cf.* Kimball v. Harmon, 34 Md. 407; s. c. 6 Am. Rep. 340; Knights Templar, etc., Co. v. Gravett, 49 Ill. App. 252.

[5] Platt v. Potts, 13 Ired. 455.

[6] Bradley v. Fuller, 118 Mass. 239. *Cf.* Lamb v. Stone, 11 Pick. 527; Wellington v. Small, 3 Cush. 145.

In the foregoing, and in like cases, the loss is irreparable by action, because the orbit of the legal right has not been impinged upon.[1]

391. Right of Action without Appreciable Loss.— Damage, in legal contemplation, does not always involve pecuniary loss. Every injury to a legal right imports a damage, and will sustain an action, though there be no pecuniary loss. The reason is, that the primary object of the law, and of procedure, is to maintain legal rights; and it is the wrongful invasion of such right, and not the consequent loss, that makes the occasion for legal interference. The awarding of compensation in damages is only a means to an end, and the awarding of only nominal damages, where no actual loss has been sustained, fully subserves the purpose and end of the law. In some instances, where a legal right has actually been invaded, an action may be maintained before there has been time for actual loss to ensue; as, where a watercourse has been diverted from the plaintiff's lands, or where the eaves of a house have been projected over his lands.[2] An action may be maintained by an elector against an officer who wrongfully refuses to receive his vote, notwithstanding the candidates for whom he wished to vote were in fact elected. In such case there can be no actual pecuniary loss, but the elector's legal right has been infringed, and he has, in legal contemplation, been damnified.[3]

Every legal injury imports a damage; and where there is both damage and injury, the law gives a remedy by action, unless the infringement of right be so trifling as to fall within the maxim *de minimis non curat lex;* a maxim intended to discourage useless and malicious litigation.[4] An action will lie for trespass upon land, without actual damage; for other-

[1] Ante, 27.

[2] Ang. Lim. 300; 1 Suth. Dam. 766; Wood Nuis. 97.

[3] Ashby v. White, 2 Ld. Raym. 938; Jeffries v. Ankeny, 11 Ohio, 372. *Cf.* Blair v. Rigley, 41 Mo. 93.

[4] This maxim has a very limited application, and has reference to the inconsiderableness of the injury, rather than to the amount of damage occasioned. Paul v. Slason, 22 Vt. 231; Williams v. Mostyn, 4 M. & W. 145; Fullam v. Stearns, 30 Vt. 443; Wood v. Wand, 3 Exch. 748; Sampson v. Hodinott, 1 Com. B. N. S. 590.

wise, continued encroachments might ripen into a legal right.[1] And when there is a clear legal injury, an action will lie, even though the plaintiff be in fact benefited by the act of the defendant complained of.[2]

Where a telegraph company negligently delays the delivery of a message directing the purchase of a quantity of wheat, to be delivered at a stated time, an action may be maintained, and nominal damages recovered, notwithstanding the fact that the delay saved the sender from loss that he would otherwise have suffered by reason of fluctuation in the price of wheat in the interim.[3] Where a banker, having sufficient funds of his depositor, wrongfully refuses to cash the latter's check, he is liable to an action by the depositor, though he sustained no actual loss by reason of the refusal.[4]

It will be seen from the foregoing illustrative cases, that the law, regarding the infringement of a right, rather than the pecuniary consequences of the infringement, will give an action where there is a wrongful violation of a recognized legal right, whether actual loss ensue or not. In other words, where there is a legal right of the plaintiff, and a delict of the defendant, an action may be maintained, and nominal damages at least may be recovered. It must here be observed, however, that there is an exceptional class of cases, to be considered hereafter, in which actual damage is an essential element of the right of action, and in which there is no infringement of a right, unless actual damage result from the act complained of.[5]

392. Personal Injuries—Death—Assault.—The right of personal security consists in uninterrupted enjoyment of one's life, person, health, and reputation; and it imposes upon all others the duty not to destroy or imperil the life,

[1] Williams v. Esling, 4 Barr, 486; s. c. 45 Am. Dec. 710.

[2] Francis v. Schoellkopf, 53 N. Y. 152. *Cf.* Stowell v. Lincoln, 11 Gray, 434; Munroe v. Stickney, 48 Me. 462; Monroe v. Gates, 48 Me. 463; Champion v. Vincent, 20 Tex. 811.

[3] Hibbard v. W. U. Tel. Co., 33 Wis. 558.

[4] Marzetti v. Williams, 1 B. & Ad. 415; Rolin v. Steward, 14 C. B. 595. *Cf.* Cumming v. Shand, 5 H. & N. 95.

[5] Post, 426.

not to injure or annoy the person, not to injure or endanger the health, and not to defame the reputation.

Strange as it may appear, the common law gave no action for an injury resulting in death. Lord Ellenborough once said, that "the death of a human being can not be complained of as an injury." [1]

The reason for this denial of an action was, that by the death, the matter became a public offense, and the private injury was thereby drowned and lost.[2] But in England, and in most of the states, it is provided by statute, that an action may be maintained by the executor or administrator of the deceased, for the benefit of the widow and next of kin, or for the benefit of the estate of the decedent, where the circumstances of the injury are such that, if death had not ensued, the person injured could have maintained an action for damages in respect thereof. These statutes have no extra-territorial operation; and where an action is brought in one state for an injury done in another state, or in a foreign country, it must be alleged and proved that the law of such state or country is the same in this regard as the law of the forum.[3] And any defense that would have been available in an action brought by the injured person,—such as his contributory negligence, or that the injury resulted from the negligence of a fellow-servant, or of an independent contractor,—is equally available in an action brought by his personal representative.

Not every inconvenience or injury to the person is an invasion of the right of personal security. An assault, or a battery, if by an accountable person, and without excuse or justification, invades such right, and may be redressed by action. Personal violence used in justifiable defense of one's

[1] Cooley on Torts, 14, 15; Baker v. Bolton, 1 Camp. 493; Carry v. Company, 1 Cush. 475. Per COLE, J., in Shearman v. West. Stage Co., 24 Iowa, 515, 543. *Cf.* Green v. Hudson R. Ry. Co., 2 Keyes, 294; Hyatt v. Adams, 16 Mich. 180; Eden v. L. & F. Ry. Co., 14 B. Mon. 165.

[2] Higgins v. Butcher, Yelv. 89; Shields v. Yonge, 15 Ga. 349. *Contra*, Hyatt v. Adams, 16 Mich. 180.

[3] Whitford v. Company, 23 N. Y. 465; Maher v. Norwich Co., 45 Barb. 226; Selma Co. v. Lacy, 43 Ga. 461; Nashville Co. v. Elkin, 6 Cold. 582; Shedd v. Moran, 10 Ill. App. 618.

person, property, relative or friend, if not excessive, is not actionable.[1] Parents, and persons *in loco parentis*, may lawfully use reasonable and moderate violence as a means of correction.[2]

393. Liability for Injuries to Health.—The law very properly, and necessarily, makes a wide distinction between injury to health, and mere personal discomfort. It is apparent that many personal discomforts and inconveniences must be borne by those living in densely populated districts; and the modes of life, and the tastes and sensibilities of individuals, differ so much, that the law must adopt some standard by which to determine when there is such interference with health and comfort as to invade the right of personal security, and confer a right of action. The law has accordingly adopted, as the standard or measure of the primary right, that degree of comfort and convenience ordinarily enjoyed by persons of ordinary tastes and susceptibilities. What inconvenience or annoyance will materially interfere with the ordinary comforts of human existence, depends much upon the place where, and the circumstances under which, the thing complained of occurs. One who lives in a town or city voluntarily subjects himself to the annoyance, and to the detriment to health, necessarily resulting from the business properly carried on in his locality. He may not expect the air to be as fresh and pure as if no business were carried on in his vicinity, and he may not complain of noises and noxious gases, so long as they do not interfere with the ordinary comforts of life in such towns.

Where plaintiff sought to enjoin the owners of a horse railroad from running their cars on Sunday, on the ground that they were thereby deprived of the enjoyment of the day as a time for rest and religious exercise, relief was refused, on the ground that religious meditation and devotional exercises resulted from sentiments that were not universal, but peculiar to individuals, and that the disturbance com-

[1] Leward v. Basely, 1 Ld. Raym. 62; Hill v. Rogers, 2 Clarke, 67.

[2] Fitzgerald v. Northcote, 4 Fost. & F. 656; Cooper v. McJunkin, 4 Ind. 290. *Cf.* Winterburn v. Brooks, 2 Car. & K. 16.

plained of was not a privation of ordinary comforts. The court said: "Noises which disturb sleep, noxious gases, sickening smells, corrupted waters, and the like, usually affect the mass of the community in one and the same way, . . . and can be judged of by their probable effect on health and comfort, and in this way damages may be perceived and estimated. Not so of that which only affects thought or meditation."[1] Where one church member sued a brother member for disturbing him during services by making loud noises in singing, reading, and talking, the court said: "The alleged injury is not the ground of an action. There is no damage to the plaintiff's property, health, reputation, or person. He is disturbed by noises, in listening to a sermon. Could an action be maintained by every person whose mind or feelings were disturbed in listening to a discourse, by the noises of others, the field of litigation would be extended beyond endurance. The injury, moreover, is not of a temporal nature; it is altogether of a spiritual character, for which no action at law lies."[2]

394. Injuries to Reputation—Libel and Slander.—The law regards one's good reputation as a thing of value, and for the wrongful defamation thereof, an action for damages may be maintained. But not all injuries to reputation are remediable by action. In a large class of cases, where the words spoken or written are not actionable *per se*, if the party can not allege and prove some special damage, he is without remedy, however much his reputation may have suffered. There may be injury to one's feelings, and indirectly to his reputation, but injury that can not be estimated in dollars and cents. In such cases, the loss is *damnum absque injuria*.

It is reputation, and not character,[3] to which the law

[1] Sparhawk v. Ry. Co., 54 Pa. St. 401, 428.

[2] Owen v. Henman, 1 Watts & S. 548; State v. Linkhan, 69 N. C. 214. *Cf.* Bap. Ch. v. S. & T. Ry. Co., 5 Barb. 79, where the defendant was held liable for making such noises as greatly depreciated the value of plaintiff's property, and rendered it unfit for a place of worship.

[3] A man's character is made up of his real qualities, and depends upon what he really is; his reputation is the general estimate of his character, and depends upon what

attaches value in such cases, and which it undertakes to protect. Hence, defamatory words, to be actionable, must affect his reputation; and to do this, they must be communicated to other persons, and must be understood by them. Therefore, defamatory words uttered in the presence and hearing of only the person speaking and the person spoken of, can not affect reputation, and are not actionable, because there has been no publication of the words, and the person's legal right —that which the law recognizes and protects—has not been invaded.[1] For the same reason, defamatory words spoken in the presence and hearing of others, but in a foreign language, and not understood by any who heard them, are not actionable.[2]

Defamatory words, to be actionable, must be false, and must be alleged to be false. The truth of the charge complained of is a good defense.[3] This is said to be on the theory that a person has no legal right to a false reputation.[4]

395. Requisites Preliminary to Remedial Right.—It has heretofore been shown that where the right of a plaintiff depends upon his performance of a condition precedent, a remedial right does not accrue until he performs, or tenders performance, of such condition; and that in his complaint in such case, the plaintiff must allege performance, or tender of performance, or he must state facts that relieved him from performance.[5] The performance of a condition precedent, or a legal equivalent to performance, is a prerequisite to the accruing of the remedial right.

So, demand, or notice, may be a prerequisite to the exist-

others think of him. So, one may have a good reputation, and a bad character; or he may have a good character, and a bad reputation. Calumny may injure his reputation, but not his character.

[1] Sheffill v. Van Densen, 13 Gray, 304; Broderick v. James, 3 Daly, 481; Phillips v. Jansen, 2 Esp. 624; Lyle v. Clason, 1 Caines, 581; Force v. Warren, 15 Com. B. N. S. 808; Per STRONG, J., in Terwilliger v. Wands, 17 N. Y. 54, 63.

[2] BIGELOW, J., in Sheffill v. Van Densen, 13 Gray, 304. *Cf.* Wheeler & Appleton's Case, Godb. 340; Desmond v. Brown, 33 Iowa, 13.

[3] Foss v. Hildreth, 10 Allen, 76; King v. Root, 4 Wend. 113. *Cf.* Van Aukin v. Westfall, 14 Johns. 233.

[4] Big. on Torts, 50.

[5] Ante, 329.

ence of a right of action. One may have a right to money or property in the hands of another, and yet not be entitled to sue for it. The reason is, that his right is only a primary right; that no delict could be affirmed of him who is in possession. It is a general rule, subject to but few exceptions, that where one is lawfully in possession of the money or property of another, he is not liable to action unless there has been demand, and refusal to deliver.[1] Where a sheriff has money in his hands, collected on execution, he is not liable to an action therefor by the execution creditor, until after demand and refusal to pay over.[2] The money belongs to the creditor, and he has a right to receive it from the sheriff. But this is a primary right only, and it is not invaded by the sheriff, until, upon demand, he refuses to pay over. The sheriff received the money lawfully, and may rightfully retain it until called for; and until demand and refusal to pay, there is no delict of the sheriff, to complete the remedial right of the creditor.

Upon principle, the finder of lost property, having it in his custody, is not liable to an action by the owner to recover the property or its value, until after demand thereof and refusal to deliver.[3] The owner of lost property has not lost his title thereto, though he has parted with the possession. But the finder who takes the property into his custody infringes no right of the owner; no culpatory fact could be affirmed of him, and hence no right of action against him could be stated.

[1] A like rule applies, and for like reason, as to the running of interest on the money of another that is received by mistake. 1 Suth. on Dam. 621; 3 Par. on Contr. 102; 2d St. Passenger Ry. Co. v. City of Philadelphia, 51 Pa. St. 465. *Cf.* Sibley v. Pine Co., 31 Minn. 201; Boston & Sandwich Glass Co. v. City of Boston, 4 Met. 181; Dodge v. Perkins, 9 Pick. 368.

[2] State v. Newman's Exr., 2 O. S. 567; Keithler v. Foster, 22 O. S. 27.

[3] In trover, the declaration alleged a demand, a refusal to deliver, and a conversion; in detinue, demand and refusal were alleged; and in replevin, at common law, the taking was the culpatory fact. In Shaffer v. McKee, 19 O. S. 526, to recover money honestly received by defendant on plaintiff's draft, there was demand and refusal before action brought. *Cf.* Severin v. Keppel, 4 Esp. 156; Big. on Torts, 201; 2 Kent Com. 356; 2 Wait Ac. & Def. 235; Smith's Right & Law, 192. In some of the states, the rights of the finder of lost property are regulated by statute.

But if, upon demand by the owner, the finder, having no right to retain the property on any ground, refuses to deliver it, a right of action accrues. The primary right of the owner, and this delict of the finder, give rise to a remedial right.[1] Of course demand can be necessary only where the adverse possession is lawful. A thief may be sued without demand, for the asportation is a culpatory fact. And actual conversion by one lawfully in possession of another's property would dispense with demand, for the tort would itself terminate the right. Demand will be presumed after the lapse of the time limited for bringing an action, and the statute of limitations will then begin to run.[2]

396. Considerations of Public Policy.—At the very base of law and its administration lies the principle embodied in the maxim *salus populi suprema lex*—the welfare of the people is the highest law. One may not lawfully do, or obligate himself to do, that which tends against the public good; and the courts will not uphold a transaction when it will tend to the prejudice of the general welfare. Indeed, it is the first duty of the courts to look to the welfare of the people, and not to enforce any engagement when it would be inimical thereto. And it matters not that the particular transaction is free from corrupt motive, or that in fact no public detriment will follow in the particular instance; the law looks only to the general tendency of such transactions.[3] In determining whether a given state of facts confers a right of action, or will furnish a defense, the inquiry whether the transaction involved is consistent with, or repugnant to, public policy, should never be overlooked.

Among the contracts that will not be enforced, because against public policy, are the following: Contracts affecting the administration of justice, the public service, personal

[1] The finder of a lost chattel is entitled to indemnity for his necessary and reasonable expenses incurred on account thereof, but it seems that he has no lien on the chattel therefor. 2 Kent Com. 356; 2 Wait Ac. & Def. 234.

[2] Keithler v. Foster, 22 O. S. 27; Ang. on Lim. 96.

[3] Holladay v. Patterson, 5 Oreg. 177, 180; Richardson v. Crandall, 48 N. Y. 348, 362.

liberty, the domestic relations, or commercial freedom; contracts impairing legal rights, or promotive of crime, immorality, dishonesty, gambling, and prostitution.[1]

397. Actions to Declare a Right, or to Prevent an Injury.—In actions for legal relief, the remedial right is displayed by a brief and simple statement of facts showing the primary right of plaintiff, and the defendant's wrongful invasion thereof; and the operative facts to be considered in determining whether in a given case, there is a right to legal relief, are comparatively few. But in actions for equitable relief, not only the operative facts, but the rights and delicts as well, are sometimes very numerous and complex. In determining the primary rights and duties of parties in equity, there must very often be an adjustment of opposing claims; and the decree to be obtained in equity may be as complex and involved as are the rights and delicts of the parties, awarding partial relief to different parties, providing for future contingencies, or restraining threatened wrongful acts, and sometimes only ascertaining and declaring the primary rights of the parties litigant. The English courts, not infrequently, it is said, entertain actions simply to ascertain and declare the primary rights of parties, where neither compensatory nor preventive relief is sought; the policy of the law being to allow parties to a controversy to have a question of right thus predetermined, so that they may govern themselves accordingly.[2] But American courts, with rare exceptions, decline to entertain such actions.

Where a legacy to a college was payable in two years, provided the college performed certain conditions within one year, the parties, in an agreed case brought within the year, asked the court to determine whether certain admitted facts amounted to a performance of the conditions, and if not, what further acts were required. The action was dismissed, on the ground that the case disclosed no controversy between the parties, and that the question whether the conditions

[1] For a full and exhaustive treatment of this subject, see Greenhood on Public Policy, *passim*; also, Hughes' Technology of Law, 176–183.

[2] 23 Abb. N. C. 447, note.

had been performed could not be the subject of judicial controversy, until the two years had expired.[1]

It has been held, that after loss under a fire insurance, a pledgee of the policy may maintain an action in equity against the insurance company and the insured, to restrain the company from paying the insured, and to establish the right of the plaintiff to recover whatever may be payable under the policy, leaving the liability of the company to be determined in a subsequent action at law. This was on the equitable ground that the circumstances of the pledgor were such that the payment to him would imperil the plaintiff's rights.[2] An action in equity will lie to ascertain and fix the boundaries between adjacent parcels of land when they have become confused or obscure, and when there is some peculiar equity attaching to the controversy, even though neither party is at fault, and no delict can be averred.[3]

398. Actions to Declare a Right, or to Prevent an Injury, Continued.—A surety who apprehends loss from the delay of the creditor to enforce payment by the principal, may, by a bill *quia timet*, compel the debtor to discharge the obligation; or he may, in like manner, compel the creditor to enforce payment by the debtor, and thus protect himself from prospective injury.[4] And actions may be maintained in equity to quiet title, to direct a trustee, and to enjoin a threatened injury. So that it can not be said that the actual invasion of a right is always a prerequisite to the maintenance of an action; on the contrary, an action will sometimes be entertained simply to guard against probable or prospective injury, and to preserve existing rights from imminent or contingent violations.[5] The principle upon which such actions are entertained is, that one whose rights are threatened or questioned ought to be allowed to have the menace to his

[1] Hobart College v. Fitzhugh, 27 N. Y. 130; s. c. 23 Abb. N. C. 448, *in nota*.

[2] Mahr v. Bartlett, 53 Hun, 388; s. c. 23 Abb. N. C. 436.

[3] Boyd v. Dowie, 65 Barb. 237; Wolf v. Scarborough, 2 O. S. 361; 3 Pom. Eq. Jur. 1384; 1 Sto. Eq. Jur. 621.

[4] 1 Wait Ac. & Def. 656, and cases cited; 3 Pom. Eq. Jur. 1417; Brandt on Suretyship, 223.

[5] Bisph. Prin. of Eq. 568; Pom. Rem. 522.

rights dispelled at once, rather than be compelled to suffer them to hang over him until actual loss should result. In no other way can such rights be fully protected.[1]

It may here be added, that when one party to a contract has renounced it, the other may at once maintain an action thereon, although the time fixed for performance has not passed.[2] For example, if a date is fixed for the performance of a marriage contract, and before that date one of the parties refuses to perform the contract at any time, the other may at once sue for the breach of the promise.[3] And if one of the parties marry another, and so put it out of his or her power to fulfill the contract, a right of action at once accrues; and no request to marry need be made or alleged.[4]

II. THE SUBSTANTIVE LAW THAT IS APPLICABLE.

399. The Laws that may Govern in Particular Cases. —Facts are made operative by law; and to determine whether certain operative facts confer a right of action, they must be considered with reference to the substantive law that is properly to be applied to them. Generally, the law of the state having jurisdiction to make the application—the *lex fori*—is to be applied; but as rights may subsist outside of the state or country whose laws originally gave them validity, and as courts will generally enforce such rights, it follows that effect will sometimes be given to a law other than that of the forum. And in cases governed by the *lex fori*, the question may arise whether, when there has been a change in the law, the operation of the facts, as well as the conduct of the procedure, is to be governed by the new law, or by the old.

The inhabitants of a municipal corporation are subject to

[1] Ante, 1.

[2] Bayne v. Morris, 1 Wall. 97; McCormick v. Basal, 46 Iowa, 235; Hochster v. De La Tour, 2 E. & B. 678; D. & B. S. Ry. Co. v. Xenos, 13 C. B. (N. S.) 825; Lovelock v. Franklyn, 8 Q. B. 371; Short v. Stone, 8 Q. B. 358. *Cf.* Maud v. Maud, 33 O. S. 147, 149.

[3] Burtis v. Thompson, 42 N. Y. 246; s. c. 1 Am. Rep. 516; Holloway v. Griffith, 32 Iowa, 409; s. c. 7 Am. Rep. 208; Frost v. Knight, L. R. 7 Ex. 111.

[4] Short v. Stone, 8 Q. B. 358; Lovelock v. Franklyn, 8 Q. B. 371; Clements v. Moore, 11 Ala. 35; King v. Kesey, 2 Ind. 402.

the ordinances of the municipality, to the statutes of the state, and to the laws enacted by congress; and in the consideration of the affairs of citizens of the municipality, it may be necessary to determine by which set of enactments the rights of the individual are to be determined in the particular instance.

The law by which the rights and obligations of parties are to be determined, when other than that of the forum, may be that of the country or state in which one or the other is domiciled—the *lex domicilii*, or in which the thing in question is situated—the *lex loci rei sitæ*, or in which a particular contract was made—the *lex loci contractus*, or in which a contract was so be performed—the *lex loci solutionis*.[1]

400. The Lex Domicilii.—A man's domicile is where he has his fixed and permanent home, to which, when absent, he has the intention of returning. It differs from residence, which may be transient in its nature. A residence becomes

[1] The substantive law enters into, and is an element of, vested rights, and a change thereof does not impair such right; but the right to a particular remedy, not being a vested right, may, as a rule, be affected or lost by a change of the law of procedure. A vested right of action rests upon the substantive law, and may not be arbitrarily interfered with by a change of the law. Cooley's Const. Lim. 358*–362*. But a law changing procedure applies thereafter as well to actions pending when the statute was passed, as to those subsequently commenced, unless the former are specially excepted. Lazarus v. Ry. Co., 145 N. Y. 581. "The court can not, under guise of an amendment or repeal of a statute, cut off any substantial right of a party to have his case decided on the merits according to the law of the land. But it would be a very inconvenient rule, tending to great confusion, if a rule of practice existing when an action is commenced attached itself to the substance of the right in litigation so that it could not be changed, or that a law changing procedure should be held inapplicable to subsequent proceedings in pending actions unless in terms made applicable thereto. It is the right of a party to have his case heard and decided in the orderly course of legal procedure, but he has no right to demand that the procedure prescribed when the action was commenced should remain unchanged. He prosecutes his action subject to the power of the legislature, in matters of practice, to abrogate rules existing when his action was brought, or to make additional rules." Per ANDREWS, C. J., in Lazarus v. Ry. Co., *supra*. *Cf.* State ex rel. v. Helmes, 136 Ind. 122. See, also, 4 Thomp. on Corp. 5437, and cases cited.

a domicile when it is taken up *animo manendi*. Two things must concur, to make domicile; the fact of residence, and the intention to make it the home of the person. One who goes abroad *animo revertendi* does not change his domicile; the fact of residence is changed, but not the intent that distinguishes domicile. A man may have more than one residence —he may reside a part of the time in the city, and a part of the time in the country; but he can have only one domicile.[1]

The capacity to make testamentary disposition of personal property, as well as the formalities to be observed in the making thereof,[2] is governed by the law of the testator's domicile, not at the time of making the will, but at the time of his death.[3] And the personal property of an intestate will pass according to the law of his domicile at the time of his death, regardless of the actual *situs* of the property.[4] Upon domicile depend many civil and political rights and obligations; such as, the right of suffrage, the right to relief under the poor laws, the obligation to pay taxes, and to perform military service.

Domicile is an essential jurisdictional fact in actions for divorce. Each state has the right to determine the status—the social and domestic condition—of persons domiciled within its territory.[5] "The law of the place of the actual *bona fide* domicile of the parties gives jurisdiction to the proper courts to decree a divorce for any cause allowed by the local law, without reference to the law of the place of the marriage, or the place where the offense for which the divorce was

[1] See, as to domicile generally, 1 Par. on Contr. 578–582; Sto. Confl. Laws, 41, 44; 2 Wait Ac. & Def. 626–648; 5 Am. & Eng. Encyc. 857.

[2] Carey's Appeal, 75 Pa. St. 201; Dupuy v. Wurtz, 53 N. Y. 556; Moultrie v. Hunt, 23 N. Y. 394; Grattan v. Appleton, 3 Story, 755; Perin v. McMichen, 15 La. Ann. 154; Rue High's Appeal, 2 Doug. 515. *Cf.* Holmes v. Remson, 4 Johns. Ch. 460, 469; Harrison v. Nixon, 9 Pet. 483, 505.

[3] Sto. Confl. Laws, 473; Nat v. Coons, 10 Mo. 543; Moultrie v. Hunt, 23 N. Y. 394; Dupuy v. Wurtz, 53 N. Y. 556; Damwert v. Osborn, 141 N. Y. 564.

[4] Sto. Confl. Laws, 481; Vroom v. Van Horne, 10 Paige, 549; Leach v. Pillsbury, 15 N. H. 137; Parsons v. Lyman, 20 N. Y. 103.

[5] Strader v. Graham, 10 How. 82; Cheever v. Wilson, 9 Wall. 108; BOYNTON, C. J., in Van Fossen v. State, 37 O. S. 317.

allowed was committed." [1] It follows, that the courts of a state or country have not jurisdiction to grant a divorce for any cause, if neither party has an actual *bona fide* domicile within its territory.[2] It is not necessary that both parties be domiciled within the state; it is sufficient if either be so domiciled.[3] But where neither party is domiciled within the state whose court decrees a divorce, the decree is, beyond the limits of such state, a nullity.[4]

401. The Lex Loci Rei Sitæ.—In the conveyance of real estate, the formal requirements of the law of the place where the land is situated must be observed, in the absence of a statute to the contrary. Where a married woman, between eighteen and twenty-one years of age, domiciled in a state where the age of majority is fixed at twenty-one years, there joins with her husband in the execution of a mortgage on lands in a state where the age of majority is eighteen years, the mortgage is valid; her capacity to execute it being governed by the law of the *situs*, and not by the law of her domicile.[5] So, a mortgage executed by a married woman as surety, was held invalid, because prohibited by the law of the *situs*, though authorized by the law of her domicile.[6]

Where a mortgage is given in one state, to secure a loan payable in another state, a question may arise as to which law is applicable. The test in such case seems to be, that if the mortgage is a mere collateral security, the money being employed in another state, and under other laws, the law of such state applies; [7] but if the money is employed on the

[1] Sto. Confl. Laws, 230 a; Harrison v. Harrison, 19 Ala. 499; Harding v. Alden, 9 Me. 140; People v. Dawell, 25 Mich. 247. Maguire v. Maguire, 7 Dana, 181;; Cheever v. Wilson, 9 Wall. 108.

[2] Shannon v. Shannon, 4 Allen, 134; Leith v. Leith, 39 N. H. 20; House v. House, 25 Ga. 473; People v. Dawell, 25 Mich. 247; Harding v. Alden, 9 Me. 140; Pawling v. Bird, 13 Johns. 192.

[3] Wright v. Wright, 24 Mich. 180. *Cf.* Beard v. Beard, 21 Ind. 321.

[4] Van Fossen v. State, 37 O. S. 317; Sewell v. Sewell, 122 Mass. 156; Hoffman v. Hoffman, 46 N. Y. 30; Hood v. State, 56 Ind. 263; People v. Dowell, 25 Mich. 247; Litowich v. Litowich, 19 Kan. 451.

[5] Sell v. Miller, 11 O. S. 331.

[6] Swank v. Hufnagle, 111 Ind. 453. *Cf.* Hill v. Pine River Bk., 45 N. H. 300.

[7] De Wolf v. Johnson, 10 Wheat.

land mortgaged, then the law of the *situs* will obtain.[1] A mortgage on land, securing a note for borrowed money, dated in the state where the land was situated, but made payable in another state, was held to be a mere incident of the loan; and the transaction being usurious by the law of the latter state, the mortgage was held void.[2] In another case, the court refused to enforce a mortgage given to secure a contract in another state, because the contract was opposed to the policy of the laws of the state where the land was situated.[3]

402. The Lex Loci Contractus.—In the absence of clearly expressed intention to the contrary, the general rule is, that contracts are to be governed as to their nature, their validity, and their interpretation, by the law of the place where made.[4] But what is to be deemed the place of a contract is sometimes a question of the greatest difficulty. A contract is made when the parties thereto have agreed; but one may express his assent in New York, and the other in New Orleans. And a contract may be made in one place, to be performed in another; and it may be the subject of an action in still another place.

There has been much discussion as to whether the marriage contract should be governed by the *lex domicilii*, or by the *lex loci contractus;* but the prevailing doctrine is, that, unless controlled by local statute, a marriage valid by the law of the place where it is celebrated is valid everywhere. And this is so, though a marriage of the parties would be invalid if entered into in the place of their domicile, and though contracted in express evasion of the law of their domicile.[5]

383; Newman v. Kerson, 10 Wis. 333; Kennedy v. Knight, 21 Wis. 340; Atwater v. Walker, 1 C. E. Green, 42.

[1] Wharton Confl. Laws, 510; Arnold v. Potter, 22 Iowa, 194; Chapman v. Robinson, 6 Paige, 627; Goddard v. Sawyer, 9 Allen, 78; Pine v. Smith, 11 Gray, 38.

[2] Sands v. Smith, 1 Neb. 108. *Cf.* Cope v. Alden, 53 Barb. 350; Chase v. Dow, 47 N. H. 405.

[3] Flag v. Baldwin, 11 Stew. 219.

[4] Liverpool, etc., Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 453; Ang. on Lim. 64; 1 Dan. Neg. Instr. 867.

[5] Bish. on Mar. & Div. 355; 2 Par. on Contr. 593; 2 Wait Ac. & Def. 644.

It may be said to be a general rule that a contract valid under the law of the place where made, is valid everywhere; and, *e converso*, a contract that is illegal and void where made, is void everywhere. This recognition of the laws of another state or country is a mere matter of courtesy and policy. Such laws have no extraterritorial force, *proprio vigore;* and their recognition in particular cases, as the *lex loci contractus*, being a matter of comity only, will not be extended to contracts that would violate sound morals, or the law of God, or the general policy of the state or country where they are sought to be enforced. If a promissory note be made in one state, and payable in another, and the legal rate of interest is different in the two states, it seems that either rate may be contracted for.[1] But if no interest be expressed, the question whether it shall bear interest, and if so, at what rate, is to be determined by the law of the place where payable.[2]

Where a servant is injured by negligence, within the state where the contract of employment was made, and where all the services were to be performed, and sues his employer in another state, the laws of the former state will control as to whether the circumstances give a right of action.[3] And where a passenger is being carried on a railroad gratuitously, under a contract whereby he assumed all risk of injury from negligence, and is injured within the state where the contract was made, and by the laws of which it is valid, such contract will be enforced, and will prevent his recovery, in an action brought in another state, even though by the law of the forum such contract would be void.[4]

403. The Lex Loci Solutionis.—When a contract is entered into in one place, to be performed in another, the law of the former place governs, generally, as to the nature and validity of the engagement, but the law of the latter place

[1] 2 Par. on Contr. 583, 584, and cases cited.

Campbell v. Nichols, 33 N. J. 81; Austin v. Imus, 23 Vt. 286; Chase v. Dow, 47 N. H. 405; Hunt v. Hall, 37 Ala. 702; Peck v. Mayo, 14 Vt. 33. *Cf.* Kopelke v. Kopelke, 112 Ind. 435.

[3] Alexander v. Pa. Ry. Co., 48 O. S. 623.

[4] Knowlton v. Erie Ry. Co., 19 O. S. 260.

governs as to the performance. This is because, when the parties to a contract designate a particular place for performance, it is fair to assume that the executory parts of the contract were made with reference to the law of such place.[1] Whether days of grace are allowable on a negotiable instrument is determined by the *lex loci solutionis*;[2] and the formalities of presentment, protest, and notice are governed by the same law.[3] And, as we have seen, the rate of interest recoverable where no rate is specified, is controlled by the same law.

404. The Lex Fori Governs the Remedy.—The remedies for breach of contract must be pursued according to the law of the place where action is brought. The courts are open to both citizens and strangers, for the enforcement of rights arising under both domestic and foreign contracts, but the procedure must follow the local law and practice.

It has heretofore been shown that the time within which an action must be brought, to avoid the defense of the statute of limitations, is governed by the *lex fori*, except in those jurisdictions where, by special statutory provision, the earlier bar of the statute where the right of action arose may be pleaded;[4] and even then it is only by favor of the *lex fori* that the foreign law may be asserted.

The question as to who may sue and be sued, the form of action to be employed, the defenses that may be asserted, the competency of witnesses and of evidence, the kind of judgment, and the manner of enforcing it, are all to be governed by the law of the forum, except so far as under the law some of these may be, and in fact are, controlled by the terms of the contract itself.[5]

[1] 1 Dan. Neg. Instr. 879–881, and cases cited.

[2] Cribb v. Adams, 13 Gray, 597; Bowen v. Newell, 13 N. Y. 290.

[3] Pierce v. Indseth, 106 U. S. 546; Todd v. Neal, 49 Ala. 266; Wooley v. Lyon, 117 Ill. 244.

[4] Ante, 338.

[5] 1 Dan. Neg. Instr. 882–892; 2 Par. on Contr. 588–592; Ang. or Lim. 65. *Cf.*, as to Statute of Frauds, ante, 335, note.

III. PROXIMATE AND REMOTE CAUSES OF INJURY.

405. The Law Regards only the Proximate Cause.—The statement of a right of action must not only show that the defendant has committed a legal wrong, and that the plaintiff has sustained a legal injury; it must appear also that the wrong complained of is the proximate cause of the injury sought to be redressed.[1] The *injuria* and the *damnum* must stand in the immediate relation of cause and effect; there must be a natural or necessary connection between them; and this, whether the injury arise from non-feasance, from mis-feasance, or from mal-feasance. If A. break his contract with B., or do other legal wrong to B., the result may be more hurtful to C. than to B. But C. can not, in general, maintain an action against A.; because, in the one case, he was not privy to the contract, and in the other case, although he suffered the *damnum*, it was B. who suffered the *injuria*. The delict of A. would be the remote cause of C.'s damage.

The doctrine of causation, considered both metaphysically and practically, is of the profoundest difficulty. Every cause may be said to lead to an infinite sequence of effects. Scarcely an event can occur that is insulated and independent. Metaphysically considered, every event is the effect of some cause, or combination of causes, and in its turn becomes the cause of ensuing consequences, more or less immediate or remote. But it is evident that the author of the initial cause can not be made civilly responsible for all the effects in the series. The law, therefore, having regard to the rights and duties of all persons, in the ordinary affairs of actual life, has adopted the practical rule, of regarding only the *proximate* cause of the event that is the subject of inquiry. *In jure, causa proxima, non remota, spectatur.* But, as will appear, there are some apparent modifications of this rule.

406. Proximate Causes—Breach of Contract.—The general rule is, that for injury resulting from breach of con-

[1] Dawe v. Morris, 149 Mass. 188, Bradley v. Fuller, 118 Mass. 239; 191; Lamb v. Stone, 11 Pick. 527; Scott v. Shepherd, 2 W. Black. 892.

tract merely, no action, whether *ex contractu* or *ex delicto*, can be maintained, except by those who are parties or privies to the contract. Thus, if A. sell B. a horse, knowing it is to be used in a livery, and to be let for hire, and warrant it to be kind and safe, when in fact it is vicious and unmanageable, he would not be liable, on his warranty, to one who hired the horse from B., and who sustained injuries resulting from the viciousness of the horse. So, if a smith shoe a horse defectively, in consequence of which the horse falls and injures one who is riding it, and who had procured it from the owner for that purpose, the smith is not liable to the person injured.[1] And where the Postmaster General made a contract with A. to provide a coach to carry the mail along a certain route, and B., under contract with A., furnished horses to draw the coach, and employed C. to drive them, and the coach, by reason of its defective construction, broke down and injured C., it was held that he had no right of action against A., because there was no privity of contract between them.[2]

Where a railway company furnished a crane for the use of its customers in unloading freight, which they were bound to unload at their own expense, and a person called in temporarily to assist a consignee in unloading freight, was killed, in consequence of a defect in the crane known to the company, it was held that his personal representatives had no right of action against the company, whatever may have been its obligation to the consignee himself.[3] And where a railway company contracted with the owner of a quarry to furnish cars on his side-track, for the transportation of stone, and an employe of the quarry-owner was injured by reason of defective brakes on one of the cars, it was held that the employe had no right of action against the railway company,

[1] Mayne on Dam. 83, note. Such cases rest upon both remoteness of injury and want of privity. Post, 413. *Cf.* Cameron v. Mount, 86 Wis. 477, an interesting but unsatisfactory case.

[2] Winterbottom v. Wright, 10 M. & W. 109.

[3] Blakemore v. Bristol Ry. Co., 8 El. & Bl. 1035.

because the company did not owe him any duty under the contract, and had no control over him.[1]

407. Proximate Causes—Breach of Contract, Continued.—Where the lessor of a store-room agreed with his lessee to construct therein cornices, shelvings, and fixtures, in a secure, safe, and proper manner; and the fixtures so put up were unsafe and insecure from want of sufficient fastenings to the walls of the building, all of which was known to the lessor; and a customer of the lessee, while properly in the room, was injured by the falling of the shelvings, it was held that the customer had no right of action against the lessor.[2] This decision was based upon the grounds (1) that the customer had no interest in the contract, or in the breach of it; (2) that it did not appear that there was design on the part of the lessor to injure any one, nor was there such recklessness as to be the equivalent of such design; and (3) that the lessor could not be held liable on the ground that the noxious structure was a nuisance for which he was responsible.

The reasons for refusing an action under a contract, for injury to one not a party to the contract, are thus stated in two cases: "If we were to hold that plaintiff could sue in such case, there is no point at which such actions would stop. The only safe rule is, to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty."[3] And again: "The object of parties inserting in their contracts specific undertakings . . . is, to create an obligation *inter sese*. These engagements and undertakings must necessarily be subject to modification and waiver by the contracting parties. If third persons can acquire a right in a contract, in the nature of a duty to have it performed as contracted for, the parties will be deprived of control over their

[1] Roddy v. Mo. Pac. Ry. Co., 104 Mo. 234.

[2] Burdick v. Cheadle, 26 O. S. 393; Collis v. Selden, 3 C. P. Law Rep. 495; Longmeid v. Holliday, 6 Exch. 761; Losee v. Clute, 51 N. Y. 494; Curtain v. Somerset, 140 Pa. St. 70. *Cf.* Bailey v. Gas Co., 4 O. C. C. Rep. 471. *Contra*, Cook v. Dry Dock Co., 1 Hilton, 436.

[3] Per ALDERSON, B., in Winterbottom v. Wright, 10 M. & W. 109, 115.

own contracts."[1] To these prudential reasons, it may be added, that in such cases there is no causal connection between the negligence complained of and the injury sustained. The person injured reposed no confidence in the person complained of, and the latter accepted no confidence of the former; an independent human agency was interposed, the negligence became the remote cause of the injury, and there was no jural relation between the parties. A gas company, under a contract with the plaintiff to supply a service pipe from their main to the metre on his premises, laid a defective pipe, from which the gas escaped. The plaintiff engaged a gas-fitter to lay pipes from the metre over his premises; and a workman, sent by the gas-fitter to do the work, negligently took a lighted candle to find where the gas escaped. An explosion resulted, and the company was held liable for the injury to the premises.[2] The gas-fitter was regarded as an independent workman, with whose negligence plaintiff was not chargeable; and so the causal connection between the company's negligence and the plaintiff's injury was unbroken. This is perhaps an extreme view, but it clearly distinguishes this case from the preceding cases.

408. Proximate Causes—Acts Wrongful per se.— But where an act is in itself unlawful, the wrong-doer is liable to any person sustaining injury that is the natural and necessary result of the wrongful act.[3] In such case, no privity is requisite, except such as grows out of the unlawful act. Where a father purchased a gun for the use of his son, and the seller, knowing it was to be used by the son, falsely warranted it to have been made by a particular maker, and to be well made, he was held liable in tort, at the suit of the son who, while using the gun, was injured by its explosion.[4] But where B., the owner of a flock of sheep, known by him

[1] Per DEPUE, J., in Marvin Safe Co. v. Ward, 46 N. J. L. 19, 24.

[2] Burrows v. March, etc., Gas Co., 39 L. J. Exch. 33; S. C. L. R. 5 Exch. 67. *Cf.* Lannen v. Albany Gas L. Co., 44 N. Y. 459.

[3] Myers v. Malcolm, 6 Hill, 292; Vandenburgh v. Truax, 4 Den. 464; Scott v. Shepard, 2 W. Black. 892. *Cf.* Guille v. Swan, 19 Johns. 381.

[4] Langridge v. Levy, 2 M. & W. 519. *Cf.* Fultz v. Wycoff, 25 Ind. 321.

to have a contagious disease, though apparently sound, by falsely representing them to be sound, sold them to A., acting as the known agent of C., who, as B. knew, intended to mingle them with other sheep then owned by C.; and C., having so commingled them, sold the entire flock to A., neither A. nor C. then knowing of the disease, and A. suffered further damage from the continued spread of the disease; it was held that A. could not maintain an action against B., because the representations were not made to A. to induce him to act upon them in any matter affecting his own interests.[1] Where A. had agreed to bring certain animals for sale and delivery to B., at a specified place; and C., by falsely representing to B. that A. had abandoned the contract, procured B. to supply himself by purchase of like animals from C.; it was held that A. had a right of action against C., for his expenses and loss of time in bringing the animals to B., and in otherwise disposing of them.[2]

Where A. wrongfully threw a lighted squib into a crowd, and it was knocked from hand to hand until it struck B. in the face, and exploded, injuring him, A. was held liable to B., on the ground that his act was unlawful, wanton, and dangerous, and he must be held to have intended the natural and probable consequences of his voluntary act. The original throwing was the direct cause of the injury, because the throwing by the intermediate persons, in self-defense, was but a continuation of A.'s act.[3] One who negligently sets a fire is liable, it would seem, for all buildings destroyed or injured by the same continuous conflagration.[4]

[1] Wells v. Cook, 16 O. S. 67. *Cf.* McCracken v. West, 17 Ohio, 16.

[2] Benton v. Pratt, 2 Wend. 385.

[3] Scott v. Shepherd, 2 W. Bl. 892.

[4] Kellogg v. Chicago, etc., Ry. Co., 26 Wis. 223; Hart v. Western Ry. Co., 13 Met. 99; Milwaukee, etc., Ry. Co. v. Kellogg, 94 U. S. 469; Higgins v. Dewey, 107 Mass. 494; Fent v. Toledo, etc., Ry. Co., 59 Ill. 349; Webb v. Rome, etc., Ry. Co., 49 N. Y. 420; Penn. Ry. Co. v. Hope, 80 Pa. St. 373; St. J., etc., Ry. Co. v. Chase, 11 Kan. 47; Atchison, etc., Ry. Co. v. Bales, 16 Kan. 252; Atchison, etc., Ry. Co. v. Stanford, 12 Kan. 354; Annapolis Co. v. Gantt, 39 Md. 115; Scott v. Shepherd, 2 W. Bl. 892; Cleveland v. G. T. Ry. Co., 42 Vt. 449; Field v. N. Y. C. Ry. Co., 32 N. Y. 339; Webb v. R. W. & O. Ry. Co., 3 Lans. 453. *Cf.* Ins. Co.

409. Proximate and Remote Causes, Continued.— The law imposes upon one who deals in articles that are dangerous in their character a duty to persons who do not deal directly with him in relation to such articles. The public safety requires, and the law demands, that he shall see to it that through no negligence of his in keeping, handling, and disposing of such articles, shall injury ensue to another; and for breach of this public duty, he is liable in damages. A druggist, by his servant, negligently sold laudanum, a deadly poison, as and for tincture of rhubarb, a well-known and harmless medicine, to one who procured it for the purpose of administering it, and who did administer it, to his servant, who died from its effects; and it was held that the druggist was liable in an action brought by the administrator of the deceased person, notwithstanding there was no privity of contract between the decedent and the druggist.[1] A., knowing naphtha to be a dangerous explosive, sold some of it to a customer, knowing that he intended to retail it to his customers for illuminating purposes. A.'s vendee, ignorant of its explosive qualities, sold some of it to B., who, in like ignorance, used it in his lamp. It exploded and injured B. and his property; and it was held that B. had a right of action against A., although there was no privity of contract between them.[2] A druggist who carelessly labels a deadly poison as a harmless medicine, and sends it so labeled into the market, is liable to one who, without fault on his part, is thereby misled and is injured by using it; and this, although the medicine had, in this form, passed through several intermediate agencies.[3] In such case, whatever may be the circuit of events, the law will look only to the corrupt beginning, according to the maxim, *dolus circuitu non purgatur*.[4]

v. Tweed, 7 Wall. 44; Powell v. Deveney, 3 Cush. 300; Lynch v. Nurdin, 41 Eng. C. L. 422. *Contra*, Penn. Ry. Co. v. Kerr, 62 Pa. St. 353; Ryan v. N. Y. C. Ry. Co., 35 N. Y. 210.

[1] Norton v. Sewell, 106 Mass. 143; Davis v. Guarnieri, 45 O. S. 470; Thomas v. Winchester, 6 N. Y. 397.

[2] Wellington v. Kerosene Oil Co., 104 Mass. 64.

[3] Thomas v. Winchester, 6 N. Y. 397. *Cf.* Davis v. Guarnieri, 45 O. S. 492.

[4] Cooley on Torts, 75.

But where an article in itself harmless, but dangerous in combination with some other substance, is sold by one who does not know that it is to be used in such combination, the seller is not liable to one who purchases the article from the original vendee, and is injured while using it in such combination, even though, by mistake of the original vendor, the article actually sold is different from that intended to be sold.[1] The reason for such exemption from liability is, that the defendant owed the plaintiff no duty imposed either by contract or by law. There was no fraud or false representation in the sale, and, the article sold being in itself harmless, there was no duty of care or caution imposed upon the seller.

410. Proximate and Remote Causes, Continued.— Where the declaration alleged that the defendant negligently sold and delivered gunpowder to the plaintiff, a boy eight years old, known to defendant to have no knowledge or experience as to the use of gunpowder, and to be an unfit person to be intrusted with it, and that the child exploded it and was thereby burned, the declaration was held good on demurrer.[2] But upon the trial of the case, it appeared that the boy had taken the powder home, and had there put it in the custody of his parents. After several days, the boy's mother gave him some of the powder, which he exploded with her knowledge. This was done a second time, when the injury complained of occurred. It was thereupon held, that there was no right of recovery, because there was no necessary or natural connection between the sale and the injury, and the sale, though negligent and wrongful, was not the proximate cause of the injury.[3] In other words, the intervention of an independent agency broke the causal con-

[1] Davidson v. Nichols, 11 Allen, 514.

[2] Carter v. Towne, 98 Mass. 567. This holding was on the ground that one who negligently uses a dangerous article, or causes or authorizes its use by another, under such circumstances that he has reason to know that it is likely to produce injury, is responsible for the natural and probable consequences of his act to any person not himself in fault. The liability does not rest upon privity of contract, but on the duty of every one so to use his own as not to injure the person or the property of another.

[3] Carter v. Towne, 103 Mass. 507.

nection, and the wrongful sale became the remote, and hence the irresponsible, cause of the injury.

Where a horse, drawing an omnibus in the street, fell about the middle of the street, and in its struggles to get up fell repeatedly, until it went over a declivity at the side of the street, where there was no railing, it was held that a passenger in the omnibus could not recover from the city for injury sustained, because the proximate and efficient cause of the injury was the fall of the horse, and this was not due to the negligence of the city in not providing a railing.[1]

Where the defendant negligently left his horse and cart unattended in the street, and the plaintiff, a child seven years old, got upon the cart in play, and another child incautiously led the horse on, and the plaintiff was thereby thrown down and hurt, the defendant was held liable. His negligent act was the proximate cause, for there was no intervening responsible agency to arrest causation; and the concurrence of the natural indiscretion of the children with the defendant's negligence ought not to relieve him from liability.[2]

411. Proximate and Remote Causes, Continued.—One who is placed in sudden peril by the wrongful act of another, is not chargeable with contributory negligence by acting erroneously in a reasonable endeavor to extricate himself. Where a passenger in a coach, in an accident for which the proprietor was responsible, leaped from the coach and thereby broke his arm, it was held, that if the leaping from the coach was, under the circumstances, a reasonable precaution, the proprietor was liable, though it turned out that the passenger might have retained his seat in safety.[3] The leaping was the proximate, but not the efficient, cause of the injury.

[1] Herr v. Lebanon, 149 Pa. St. 222.

[2] Lynch v. Nurdin, 1 Ad. & Ell. N. S. 29.

[3] Ingalls v. Bills, 9 Met. 1; Jones v. Boyce, 1 Stark. 493; Frink v. Potter, 17 Ill. 406; Buel v. N. Y., etc., Ry. Co., 31 N. Y. 314; S. W. Ry. Co. v. Paulk, 24 Ga. 356; Wilson v. N. P. Ry. Co., 26 Minn. 278; Twomley v. C. P. N., etc., Ry. Co., 69 N. Y. 158; Stokes v. Saltenstall, 13 Pet. 181. *Cf.* McKinney v. Neil, 1 McLean, 540; Oliver v. La Valle, 36 Wis. 592; Filer v. N. Y. C. Ry. Co., 49 N. Y. 47. But this rule

Where one is lawfully driving on a highway, and under apprehension of imminent peril by the near approach of his carriage to a defect in the highway, leaps from his carriage, and is thereby injured, it becomes a question of fact as to whether, in leaping, he exercised reasonable care under all the circumstances.[1] If he did, such act, though the immediate cause of his injury, does not, it seems, stand in the way of recovery; if he did not, his negligent act contributing to his injury, should prevent recovery. But where, on account of a defect in the highway which the defendant was bound to repair, the plaintiff turned into adjoining land, and there drove into a hole in the bottom of a pond, and was thrown from his wagon and injured, it was held that the defendant was not liable. The proximate cause of the injury was the hole in the pond, and not the defect in the highway. The plaintiff never reached the defect in the highway. He avoided it, and after he had turned from the highway, and was on land which nobody was bound to keep in safe condition for travel—when he was using this land at his own peril, he encountered the efficient cause of his injury.[2]

412. Proximate and Remote Causes, Continued.—A defect in the highway of a city frightened a team of horses, and they ran away. After running fifty rods, they ran against plaintiff in the highway, and injured him. Held, that he could not recover from the city because there was too great a difference, both in distance and in causation, to make the defect in the highway the proximate cause of the injury.[3]

will not be applied where the danger is only a danger to property, and one that has been apprehended, or should have been apprehended for days prior to the event; Brown v. Brooks, 85 Wis. 290; nor where the injured person, voluntarily or negligently, put himself in a perilous position; Berg v. Milwaukee, 83 Wis. 599.

[1] Lund v. Tyngsboro, 11 Cush. 563, 565.

[2] Tisdale v. Norton, 8 Met. 388.

[3] Marble v. Worcester, 4 Gray, 395. In this case, Justice THOMAS, in a dissenting opinion, says: "In determining what is the true cause of a given result, where two or more causes seem to conspire, the reasonable inquiry is, not which is the nearest in place or time, but whether one is not the efficient procuring cause, and the other but incidental. We are to seek the efficient, predominating cause, and not merely that which was in ac-

But the authority of this case is weakened, not only by a well reasoned dissenting opinion therein, but by a later case in the same court, wherein the defendant negligently drove his sled against another, causing the horses attached thereto to run away; and in their flight, after turning into another street, they ran over the plaintiff and his sleigh, injuring both. The defendant was held liable; the court saying: "There can be no doubt that the negligent management of horses, in the public streets of a city, is so far a culpable act that any party injured thereby is entitled to redress. Whoever drives a horse in a thoroughfare, owes the duty of due care to the community, or to all persons whom his negligence may expose to injury.[1]

Where a fair association permitted teams to be driven around the race-track after the races were over, and the driver of a team of young horses whipped them into running away, and they ran off the track, and injured a visitor, it was held, that the injury was not the direct or natural consequence of the permission to use the track, but was caused, proximately, by the act of the driver, and that the association was not liable.[2]

413. Proximate and Remote Causes, Continued.— Where the defendant had libeled a singer in the plaintiff's oratorio, by reason whereof she was deterred from singing, for fear of being badly received, it was held that the damage to the plaintiff was not sufficiently connected with the act of the defendant to sustain the action; and the plaintiff's loss was, as to the defendant, *damnum absque injuria*. The refusal to sing, it was suggested, might have proceeded from groundless apprehension, or from mere caprice.[3] A stronger

tivity at the consummation of the accident or loss." This case is perplexingly near the line between proximate and remote causes; and it shows how dim and shadowy the region of this dividing line may sometimes be.

[1] McDonald v. Snelling, 14 Allen, 290. In this case it was suggested that it differs from Marble v. Worcester, *supra*, in that the last named case was to enforce a statutory liability of towns for injuries resulting from defects in highways; while McDonald v. Snelling was to enforce a common-law liability.

[2] Barton v. Agricul. Soc., 83 Wis. 19.

[3] Ashley v. Harrison, 1 Esp.

case was where the defendant so beat and disabled an actor as to prevent him from performing his engagement with the plaintiff; and it was held that the resulting loss to the plaintiff was too remote to give him a right of action against the defendant.[1] These two cases came under criticism in a sebsequent action in which the manager of a theater sued the manager of a rival theater for enticing and procuring a singer to break her engagement with plaintiff. On demurrer to the declaration, the court held that the action was for maliciously procuring a breach of contract, and sustained the action.[2] Here was an invasion of a legal right—a wrongful interference with the plaintiff's servant; and there were both *damnum* and *injuria*. The fact that the plaintiff had also a right of action against the singer herself could not shield the defendant from liability.

Where one sustains a contract relation with another, and suffers loss by a third person's wrongful act with reference to such other party. he is remediless, unless such wrongful act is willful and intended to injure him. For example, where one has contracted to support all the paupers of a town, in sickness and in health, for a specified time, and for a specified price, he has no right of action against another who assaults and beats one of the paupers and thereby increases the expense of supporting him.[3] And one who is, by contract, entitled to the entire product of a manufacturing company, has no right of action against a wrong-doer who, by trespass, stops the company's machinery, and prevents it from furnishing so much under its contract as it otherwise would have furnished.[4]

414. Proximate and Remote Causes, Continued.—The intervening act of an independent voluntary agency does not arrest causation and relieve the first wrong-doer, if the intervening act is one that might reasonably be expected to follow.

48. *Cf.* Crain v. Petrie, 6 Hill, 522; Butler v. Kent, 19 John. 223.

[1] Taylor v. Neri, 1 Esp. 386. On the ground, it seems, that the actor was not the plaintiff's servant.

[2] Lumley v. Gye, 2 El. & Bl. 216.

[3] Anthony v. Slaid, 11 Met. 290. *Cf.* Lumley v. Gye, 2 El. & Bl. 216.

[4] Dale v. Grant, 34 N. J. L. 142.

Thus, if A. negligently leaves his horse unhitched in a street, and it runs away, and as it runs people rush toward it endeavoring to stop it, and cause it to turn from its course and come in contact with the horse and buggy of B., doing injury thereto, B. has a right of action against A.[1] And where a lumber dealer negligently piled some timbers so near a passage-way that the wheel of a customer's wagon casually caught a projecting timber and threw the whole pile upon another customer, and injured him, the negligence of the lumber dealer was held to be the proximate cause of the injury.[2] In such cases, while the injury would not have ensued, but for the intervening act, the intervening act is one that might reasonably be expected to follow from the negligence, and hence does not arrest causation; and the negligence is the efficient cause of the injury. But if the intervening act is one not likely to follow the original negligence, it will, in general, be regarded as the proximate cause of the injury. Where the defendant contracted to tow plaintiff's barge and cargo, by means of a steam-tug, from Bay City, Michigan, to Buffalo, New York, and voluntarily and needlessly delayed during the voyage, so that after the delay, the barge and cargo were lost in a storm that would not have been encountered but for the delay, it was held that the defendant was not liable. This was on the ground that the loss by storm was not a consequence of the delay in such sense as to give the two events any natural or necessary connection. At the time of the delay, it was no more likely that it would imperil the barge, than that it would avoid peril; in fact, if the delay had been prolonged, and the default of the defendant therefore greater, the peril would have been avoided. The storm was the proximate, and the delay the remote cause of the loss.[3]

[1] Griggs v. Fleckenstein, 14 Minn. 81; Scott v. Shepherd, 2 W. Black. 892. *Cf.* Lynch v. Nurdin, 1 Ad. & Ell. N. S. 29.

[2] Pastene v. Adams, 49 Cal. 87; Powell v. Deveney, 3 Cush. 300.

[3] Daniels v. Ballantine, 23 O. S. 532; Carter v. Towne, 103 Mass. 507; Proctor v. Jennings, 6 Nev. 83; Tutein v. Hurley, 98 Mass. 211. *Cf.* Parker v. Cohoes, 10 Hun, 531; Clark v. Chambers, 3 Q. B. Div. 327; Doggett v. Richmond, etc., Ry. Co., 78 N. C. 305.

From the foregoing authorities it will be seen that the intervention of acts and events between the wrongful cause and the injurious consequence does not necessarily avoid liability. "The test is to be found, not in the number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the injurious consequence. So long as it affirmatively appears that the mischief is attributable to the negligence, as a result that might reasonably have been foreseen as probable, the legal liability continues." [1] Even the act of the injured person may be the more immediate cause of his injury, but if reasonably induced by the prior misconduct of the defendant, and without fault of the plaintiff, the act of the defendant remains the efficient and responsible cause. But where the act complained of causes injury only by reason of the intervention of unusual, extraordinary, and predominating circumstances, there can, in general, be no liability.[2]

IV. PRIVITY AS AN ELEMENT OF RIGHTS OF ACTION.

415. The Doctrine of Privity in Procedure.—The term privity denotes, in general, mutual or successive relationship to the same rights of property; and privies are distributed into several classes, according to the manner of this relationship. There are privies in estate, as donor and donee, lessor and lessee; privies in blood, as ancestor and heir; privies in representation, as testator and executor; privies in law, where the law, without privity of blood or estate, casts property upon another, as by escheat; privies in respect to contract; and privies on account of estate and contract together. Privity of contract is the jural relation which subsists between two contracting parties. A lessee, from the nature of his covenants, is related to his lessor by both privity of contract and privity of estate. He may, by assignment, destroy his

[1] Per FOSTER, J., in McDonald v. Snelling, 14 Allen, 292, 296.

[2] For further treatment of the subject of proximate and remote causes, see Wood's Mayne on Damages, sec. 51–84; 1 Suth. on Dam. pp. 21–74; Weeks' Dam. Abs. Inj., *passim;* 2 Thomp. on Neg. pp. 1063–1101.

privity of estate, leaving the privity of contract subsisting; for he would remain liable on his covenants, notwithstanding the assignment of his lease.

In procedure, the term privity has a threefold application. (1) The admissions of one person may be competent evidence against another who stands in privity with him, on the ground that the two are identified in interest; (2) one may be estopped by that which bound him to whom he is privy; and (3) one may acquire a right, or incur an obligation, by privity with another.[1]

416. Privity of Contract—When Necessary.—It was a rule of the common law that before one may complain of another for breach of contract, there must be some direct contractual relation, or privity, between them; and this, with only a few exceptions, is a requirement of the law to-day.

If A. sell to B. a horse to be used in a livery, and let for hire, and warrant it to be gentle, kind, and steady, when in fact it is vicious and unmanageable, A. would be liable to B. for damages sustained by him because of the viciousness of the horse;[2] but he would not be liable to C., who hired the horse from B. and was injured because of its viciousness, for there would be no privity between A. and C. So, likewise, if a blacksmith shoe a horse defectively, in consequence of which the horse falls and injures its rider, who procured it from the owner, the smith is not liable for the injury, because there is no privity between him and the injured person, and he owed him no duty, private or public, in the premises. The general rule is, that where injury results from a breach of contract merely, no action, whether *ex contractu* or *ex delicto*, can be maintained, except by those who are privy to the contract. In the cases just supposed there is no right *ex contractu*, for want of privity, and there is no right *ex delicto*, because the injury is too remote.[3]

417. Privity of Contract—When not Necessary.—Where one makes a false and fraudulent representation to

[1] Ante, 326.

[2] *Cf.* Cameron v. Mount, 86 Wis. 477.

[3] Ante, 406.

another, with the knowledge and intent that it is to be acted upon by a third person, he is liable to such third person, who acts upon the representation and is injured, if the injury be the immediate and not the remote consequence of such representation.

In all cases where an act is itself unlawful, the doer of it is liable to any person sustaining injury therefrom, as a natural and necessary result thereof. In such case, no privity is necessary to the maintenance of the action.

Where a dealer in drugs and medicines carelessly labels a deadly poison as a harmless medicine, and sends it so labeled into the market, he is liable to all persons, who, without fault on their part, are injured by using it as such medicine, in consequence of the false label.[1] The liability of the dealer in such case arises, not out of any contract or direct privity between the dealer and the person injured, but out of the duty which the law imposes upon him to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug with such label may have passed through many intermediate sales before it reached the hands of the person injured. There is a maxim that "fraud is not purged by circuity;" and this is true of any wrongful act whose influence must naturally, and without the interposition of any extraordinary event, produce injury to some one; and it matters not in such case what may be the circuit of intervening ordinary events.[2] But the courts have been careful to restrict the application of this rule within safe and reasonable limits. Its application to one who deals in deadly poisons, is upon the ground that he owes a duty to persons who do not deal directly with him. The public safety against fatal consequences from negligence in keeping and disposing of such articles is a consideration to which no dealer may safely close his eyes. An imperative social duty requires him to use such precautions as will be likely to avoid injury to those who may, in the ordinary

[1] Thomas v. Winchester, 6 N. Y. 397.

[2] Cooley on Torts, 75.

course of events, be exposed to the dangers incident to the traffic in poisonous drugs.[1]

418. Assignment, and Tort, Create no Privity.—At common law, third persons could not, as a rule, become entitled, by the contract itself, to demand the performance of any duty under the contract; though they might, by representation, or by assignment, become entitled to exercise the rights of a party thereto. But at common law the benefit of a contract could not be so assigned as to enable the assignee to sue thereon in his own name; and the principal reason was, the want of privity between the assignee and the obligor. Under the new procedure, an action is to be prosecuted in the name of the real party in interest; and the assignee of a chose in action may sue thereon in his own name, notwithstanding the want of privity.

As between the acceptor of a bill of exchange, or the maker of a promissory note, and an indorsee thereof, there is privity created by the terms of the contract, although the indorsee is not named therein. The rights of an acceptor *supra* protest rest upon other ground.[2]

The jural relation between a *tort feasor* and the injured party is not that of privity. Most torts are independent of contract; and torts arising out of contract do not arise from express provisions thereof, but from the breach of an implied duty arising out of, and incident to, the contract. Thus, a surgeon is liable in tort for negligence in the performance of an express contract for skilled services; negligence in such case being a breach of the implied duty to exercise reasonable care and skill in the performance of his contract.[3]

419. Fiction of a Promise, to Adapt Certain Remedial Rights to Assumpsit.—At an early period of procedure, recovery was denied in some instances, because, for

[1] OWEN, C. J., in Davis v. Guarnieri, 45 O. S. 470. For cases illustrating this doctrine, see ante, 409, 410.

[2] Byles on bills, 271; 1 Dan. Neg. Instr. 526.

[3] 1 Add. on Torts (Wood's Ed.), 27, note; Emigh v. Ft. W. & C. Ry. Co., 4 Biss. 114. *Cf.* Pa. Ry. Co. v. Peoples, 31 O. S. 537, 543.

want of privity between the parties, there was no form of action applicable to the case. In the course of time, however, the action of assumpsit was applied to some such cases, by superadding to the operative facts the fiction of an implied promise to pay. The addition of this fictitious promise supplied the element of privity, and brought such cases formally within the operation of assumpsit.[1] The common counts, or "money counts," as they are sometimes called, were employed for this purpose. In cases where money had been paid to the wrong person by mistake, or where one had, by duress or fraud, obtained the money of another, the person in justice and equity entitled to the money could recover it in an action of indebitatus assumpsit for money had and received. In such action, the plaintiff alleged that on a certain day the defendant "was indebted to the plaintiff in the sum of dollars, for so much money by the defendant before that time had and received, to and for the use of the said plaintiff; and, being so indebted, he, in consideration thereof, afterward, to wit, on the day and year aforesaid, *undertook and faithfully promised* the said plaintiff to pay him the said sum," etc.[2]

This action was in this way extended to cases where one has tortiously obtained another's property and converted it into money. In such case, the owner is allowed, if title to real estate is not involved,[3] to waive the tort, and sue for money had and received;[4] and in some jurisdictions, he is allowed to waive the tort and sue for the value of the prop-

[1] Ante, 95, 326; Steph. Pl. 53, 54.

[2] Steph. Pl. 86, *in nota*, and 120.

[3] King v. Mason, 42 Ill. 223; Pickman v. Trinity Ch., 123 Mass. 1 (*semble*).

[4] Huffman v. Hughlett, 11 Lea, 549; Lamine v. Dorrell, 2 Ld. Raym. 1216; Young v. Marshall, 8 Bing. 43; Powell v. Rees, 7 A. & E. 426; Thornton v. Strauss, 79 Ala. 164; Hudson v. Gilliland, 25 Ark. 100; Staat v. Evans, 35 Ill. 455; Leighton v. Preston, 9 Gill. 201; Gilmore v. Wilbur, 12 Pick. 120; Knapp v. Hobbs, 50 N. H. 476; Budd v. Hiler, 3 Dutch. 43; Comstock v. Hier, 73 N. Y. 269; Olive v. Olive, 95 N. C. 485; Hall v. Peckham, 8 R. I. 370; Thompson v. Thompson, 5 W. Va. 190; Longchamp v. Kenny, 1 Doug. 137; Hill v. Perrott, 3 Taun. 274. *Cf.* Hambly v. Trott, Cowp. 371; Lightly v. Clouston, 1 Taun. 112; Foster v. Stewart, 3 Mau. & Sel. 191.

erty, as for money had and received to and for his use, when there has not been a sale by the tort feasor.[1]

Thus, by arbitrary substitution of a promise to pay, the element of privity, indispensable in the common-law action of assumpsit, was supplied, and a remedial form based upon privity of contract, was applied to a jural relation entirely wanting such privity. In such relations, the primary right arises *ex lege*, and not *ex contractu;* and under the modern procedure there is no occasion for the fiction of a promise, which was formerly used to supply the element of privity, and thus adapt the case to the formal requirements of assumpsit. The right of action does not, and never did, rest upon the fact or fiction of privity. It is enough that the defendant has that which, *ex æquo et bono*, belongs to the plaintiff, and which it is against conscience for the defendant to keep.[2]

420. Action by Stranger for whose Benefit Contract Made.—The right to sue without privity has been carried a step further, and it has been held generally that where a promise is made, on a valid consideration, to one for the benefit of another, he for whose benefit it is made, being the real party in interest, may bring an action against the promisor for its breach.[3] Thus, where A. loaned money to B., upon

[1] Steph. Pl. 54; Russell v. Bell, 10 M. & W. 340; Lehmann v. Schmidt, 87 Cal. 15; Newton Mfg. Co. v. White, 53 Ga. 395; Ry. Co. v. Chew, 67 Ill. 378; Morford v. White, 53 Ind. 547; Fanson v. Linsley, 20 Kan. 235; Aldine Mfg. Co. v. Barnard, 84 Mich. 632; Evans v. Miller, 58 Miss. 120; Goodwin v. Girffis, 88 N. Y. 629; Logan v. Wallis, 76 N. C. 416; Kirkman v. Philips, 7 Heisk. 222; Ferrill v. Mooney, 33 Tex. 219; Walker v. Duncan, 68 Wis. 624. *Cf.* McDonald v. Peacemaker, 5 W. Va. 439. *Contra*, Strother v. Butler, 17 Ala. 733; Bowman v. Browning, 17 Ark. 599; Hutton v. Wetherald, 5 Harr. 38; Andr. Co. v. Metcalf, 65 Me. 40; Jones v. Hoar, 5 Pick. 285; Sandeen v. Ry. Co., 79 Mo. 278; Smith v. Smith, 43 N. H. 536; Bethlehem Bor. v. Ins. Co., 81 Pa. St. 445; Schweizer v. Weiber, 6 Rich. L. 159; Winchell v. Noyes, 23 Vt. 303. On principle it would seem that such action should be maintainable, for there is both loss to the plaintiff and enrichment of the defendant. Keener's Quasi-Contracts, 160–165, 192.

[2] Ella v. A. M. U. Express Co., 29 Wis. 611; Buel v. Boughton, 2 Den. 91.

[3] Steph. Pl. 32; Davis v. Callo-

his promise to pay it to C., to whom A. was indebted, it was held that C. could recover the money from B.[1] And where a conveyance of land recited that, as part of the purchase-price, the grantee assumed payment of an existing mortgage upon the land, it was held that the mortgagee might maintain a personal action against the grantee.[2] Where a railway company contracted with an express company to carry its express matter and its express messengers, it was held, that a messenger who was injured by the negligence of the railway company, might maintain an action upon the contract, which was regarded as made for his benefit.[3]

Under some circumstances, the agreement to pay to a third party will be implied as a fact. As, where a debtor remitted money to his creditor, with directions to pay a certain sum to a third party, and apply the residue upon his own claim, and he to whom the money was sent kept all of it, he was held liable to the third party, on the ground that by the receipt of the money without objection to the directions, he had assented to and assumed the obligation therewith imposed.[4] So, if a testator charge his devisee with the payment of debts and legacies, the devisee, if he accepts the gift, takes it charged with the duty, and is liable for such debts or legacies, in an action by the creditor or legatee,[5] on his implied undertaking to pay.

way, 30 Ind. 112; Miller v. Billingsly, 41 Ind. 489; Devol v. McIntosh, 23 Ind. 529; Dunlap v. McNeil, 35 Ind. 316; Durham v. Bischof, 47 Ind. 211; Meyer v. Lowell, 44 Mo. 328; Rogers v. Gosnell, 51 Mo. 466; Cress v. Blodgett, 64 Mo. 449; Cubberly v. Cubberly, 33 N. J. Eq. 82, 591; Coster v. Mayor, 43 N. Y. 399; Van Schiack v. Ry. Co., 38 N. Y. 346; THURMAN, C. J., in Thompson v. Thompson, 4 O. S. 333; Emmitt v. Brophy, 42 O. S. 82; Rice v. Savery, 22 Iowa, 470. *Contra*, Butterfield v. Hartshorn, 7 N. H. 345; Mellen v. Whipple, 1 Gray, 317.

[1] Lawrence v. Fox, 20 N. Y. 268,

[2] Burr v. Beers, 24 N. Y. 257. This was put upon the ground that the grantee's undertaking was a collateral security acquired by the mortgagor, and inured by equitable subrogation to the benefit of the mortgagee. Brewer v. Maurer, 38 O. S. 543. *Cf.* Gifford v. Corrigan, 117 N. Y. 257; Per PECKHAM, J., in Townsend v. Rackham, 143 N. Y. 516.

[3] U. P. Ry. Co. v. Kelly, 35 Pac. Rep. 923.

[4] Hall v. Marston, 17 Mass. 575; Carnegie v. Morrison, 2 Met. 381; Brewer v. Dyer, 7 Cush. 337.

[5] Gridley v. Gridley, 24 N. Y. 130; McLachlan v. McLachlan, 9

There is a tendency in the later decisions to limit the application of the foregoing rule to cases where there is a liability of the promisee to him for whose benefit the promise is made. The owner of a farm conveyed it to his wife, in consideration of her promise that after his death she would pay a certain sum to a third person, to whom the grantor was at no time indebted. She died without having paid any part of the amount, and in an action by the third person against her administratrix, it was held that he could not recover, because there was no liability of the husband to the plaintiff.[1] Such distinction would seem to rest upon the principle that a promise can not be enforced by one as to whom it is a mere gratuity.

421. One can not be Made a Debtor by Contract against his Will.—There is a well-defined distinction between making a promisor liable to some one other than his promisee, and making one liable for that which he never promised to any person. The instances of contractual obligation in which one may be made to pay to a third person, are cases in which he had voluntarily assumed the particular obligation. The instances are numerous in which one may become liable *quasi ex contractu;* that is, he may incur an obligation that may be enforced as if it had a contractual origin; but one can not be made a debtor *by contract*, unless he consents, voluntarily or impliedly, to the liability; though when he has incurred such liability, it may sometimes be enforced by persons other than the promisee. Every one has the right to determine with whom he will contract; though he may not have like control as to who may enforce his contractual obligation. One can not be made liable for work done for him, unless done at his request, or under circumstances from which the law is said to imply a promise to pay for it. In an action to recover for ice delivered to the de-

Paige, 534; Lord v. Lord, 22 Conn. 595; Olmstead v. Brush, 27 Conn. 530.

[1] Coleman v. Hiler, 85 Hun, 547; Townsend v. Rackham, 143 N. Y. 516; Linneman v. Moross, 98 Mich. 178; s. c. 39 Am. St. Rep. 528. and note; Jefferson v. Asch, 53 Minn. 446. *Cf.* 1 Eng. Ruling Cases, 705 and notes; 13 Albany L. J. 362.

fendant, it appeared that the defendant had expressly refused to take ice from the plaintiff, and had supposed the delivery to be by another company; and it was held that there was no right of recovery, because the defendant had not consented to the liability sought to be imposed,[1] and there could be no other ground upon which to rest a liability. Where an order for goods is sent to a dealer, and one who had bought out the dealer fills the order, without giving the purchaser notice of the change, there is, it seems, no right of recovery.[2] An agreement to purchase goods from a manufacturer, implies that they are to be of his manufacture, and does not authorize him to fill an order with goods made by others, though of the same quality.[3]

The liability of husband or father, for necessaries furnished to wife or child, would seem to be an exception to the rule just stated; for such liability may arise when the necessaries are furnished not only without his knowledge, but against his command. But this liability does not originate in contract. It is true that the civil law treated such liability as arising *quasi ex contractu*, and the common law, to adapt it to the action of assumpsit, superadded the fiction of an implied promise; but strictly, such liability arises *ex lege*, and is based upon the legal obligation to support, which belongs to those relations.[4]

422. Privity between Landlord and Tenant.—As between lessor and lessee, there is privity, both of estate and of contract; and the assignee of a term comes into such relation with the lessor as to give rise to privity of estate between them; and the same is true as to the lessee and the grantee

[1] Boston Ice Co. v. Potter, 123 Mass. 28.

[2] Boulton v. Jones, 2 H. & N. Exch. 564; 27 L. J. R. 117. In this case, the defendant had a set-off against the person from whom he ordered, and the goods had been consumed before the defendant knew the plaintiff furnished them. *Sed quære:* If the recipient consumed them after notice as to who furnished them, would he not be liable? *Cf.* Devlin v. Mayor, 63 N. Y. 8; Coleman v. Wooley, 10 B. Mon. 320.

[3] Johnson v. Raylton, 7 Q. B. Div. 438; Cunningham v. Judson, 30 Hun, 63.

[4] Keener on Quasi-Contracts, 22, 23.

of the reversion.[1] Even where the lease contains a covenant against assignment, an assignee, if he enter and enjoy the premises, will stand in privity with the lessor; for such covenant being for the benefit of the lessor, he may waive it and treat the assignment as valid.[2] But the privity of contract, being a personal privity, extends only to the persons of the lessor and the lessee.[3] And if the lessee underlet,—that is, sublease the premises for part of the term,—no privity between the original lessor and the sublessee is created thereby.[4] The sublessee takes part of the lessee's estate, and not part of the original lessor's. In such cases, both of assignment and of subletting, the contract liability of the original lessee remains, and he may be sued for the rent. In case of assignment, both the lessee and the assignee are liable,—the former on his contract, and the latter because of privity of estate,—and the lessor may pursue either or both, at his election;[5] though he can have, of course, but one satisfaction.

As between the owner of premises and one who wrongfully enters and occupies adversely, there is no privity, either of estate or of contract; the relation of landlord and tenant does not exist, no liability as upon contract is created by law, and the owner can not recover rent as for use and occupation.[6] An additional reason for this is, that at common law, the action to enforce a *quasi contractual* obligation was assumpsit,

[1] Taylor's Landlord & Tenant, 436.

[2] Blake v. Sanderson, 1 Gray, 332.

[3] Sutliff v. Atwood, 15 O. S. 186, 194; Tay. L. & T. 436.

[4] Holford v. Hatch, 1 Doug. 183. And it is held, that where the lessee leases a part of the premises for the whole time, this also is a subletting, and not an assignment. Fulton v. Stuart, 2 Ohio, 216. *Contra*, Cox v. Fenwick, 4 Bibb. (Ky.) 538.

[5] Sutliff v. Atwood, 15 O. S. 186.

[6] Edmonson v. Kite, 43 Mo. 176; Tew v. Jones, 13 M. & W. 12; Stringfellow v. Curry, 76 Ala. 394; Stockett v. Watkins, 2 G. & J. 326; Central Mills Co. v. Hart, 124 Mass. 123; Lockwood v. Thunder Bay Co., 42 Mich. 536; Henderson v. Detroit, 61 Mich. 378; Crosby v. Horne Co., 45 Minn. 249; Bank v. Aull, 80 Mo. 199; Dixon v. Ahern, 19 Nev. 422; Preston v. Hawley, 101 N. Y. 586; Collyer v. Collyer, 113 N. Y. 442; Smith v. Stewart, 6 Johns. 46. *Cf.* Little v. Martin, 3 Wend. 219; Smith v. Wooding, 20 Ala. 324; Gould v. Thompson, 4 Met. 224; Clough v. Hosford, 6 N. H. 231.

while debt was the exclusive remedy for rent reserved;[1] debt being regarded as a higher remedy than assumpsit, and a plaintiff being required always to pursue his highest remedy.[2] So, also, rent received by such wrongful occupant can not be recovered in an action for money had and received,[3] because the title to real property can not be tried in such action.

V. DAMAGE AS AN ELEMENT OF RIGHTS OF ACTION.

423. Damages Defined and Classified.—Damage is the pecuniary indemnity, obtainable by action, for the infringement of a right. Not all injury may be repaired by action. Some injuries are so trifling as to fall within the operation of the maxim *de minimis non curat lex.* For example, where an officer attaches a quantity of hay, and uses the debtor's pitchfork in removing it, returning the pitchfork to the place where he found it, no action will lie. To give an action for an infringement so trifling, would be at once harsh and pedantic.[4]

And however great and obvious the injury may be, damages may be recovered only when a recognized legal right has been invaded.[5] An action will not lie for the pulling down of a house when necessary to arrest the progress of a fire in a densely built city;[6] nor for passing over adjacent lands when the highway has been suddenly rendered impassable.[7] In such cases no legal right is invaded, for the private right of property is subject to such incidental burdens for the public good. *Salus populi suprema lex.*[8] So, too, if the owner of lands adjoining the lands of another whereon is erected a palatial residence, erect upon his lands a cheap and

[1] Ante, 93.

[2] Keener on Quasi-Contr. 192.

[3] Clarence v. Marshall, 2 C. & M. 495; Lockard v. Barton, 78 Ala. 189; King v. Mason, 42 Ill. 223.

[4] Week's Dam. Abs. Inj. 11; Paul v. Sloson, 22 Vt. 231; Broom's Max. 142.

[5] Steph. Pl. 29, 30.

[6] Field v. City, 39 Iowa, 575. *Cf.* Mitchell v. Harmony, 13 How. 115; Russell v. Mayor, 2 Den. 461; Mayor v. Lord, 17 Wend. 285.

[7] 3 Kent Com. 424; Per Lord MANSFIELD, in Taylor v. Whitehead, 2 Doug. 749.

[8] Br. Max. 2; Week's Dam. Abs. Inj. 14.

unsightly building, which greatly impairs the value of his neighbor's property, no action will lie. The reason is, that no legal right of the neighbor is infringed; and the loss in fact sustained is *absque injuria*.[1]

Damages are nominal, compensatory, or punitive. Every violation of a recognized legal right—unless it be so trifling that the law will not regard it—imports some damage, and in the absence of actual loss the law gives nominal damages, to protect the right. Compensatory damages are those given to compensate for actual loss sustained. Punitive damages are given as a punishment and as a restraint, for the benefit of the community.

Compensatory damages are either general or special; and it is with this division, hereafter to be explained, that the rules of pleading are mainly concerned.

424. General Damages not to be Pleaded—The Ad Damnum.—At common law, the declaration, in actions sounding in damages, was required to lay damages—that is, to allege that the wrong complained of was to the damage of the plaintiff, in an amount specified. This formal part of the declaration was called the *ad damnum*.[2]

The Reformed Procedure requires the complaint to contain a demand for the relief claimed. In most cases, this statement of the relief demanded answers as well the purpose of the *ad damnum* at common law, though the formal and concise statement of the *ad damnum* is generally retained in practice. The amount so stated limits the plaintiff's recovery, whether upon default or upon trial; though a verdict in excess thereof may be cured by a *remittitur damnum*, which is a formal release of such excess, or by leave to amend the complaint and increase the damages laid.[3]

Under a general allegation of damages, the plaintiff may prove and may recover only *general damages*—that is, such as naturally and necessarily result from the acts or omissions complained of.

[1] Wood on Nuisances, 880; Barnes v. Hathorn, 54 Me. 124.

[2] Steph. Pl. 417. 418, and notes.

[3] 1 Suth. Dam. 761; Steph. Pl. 418, note 1.

Where the facts stated involve a legal injury, whether the action be in contract or in tort, a general averment of damages, stating the gross amount, is sufficient, and no special statement of the damages is necessary. The reason is, that what the law implies from facts stated need not be alleged; and as the law implies general damages from a breach of contract or from a tort, such implied result need not be alleged. But as there is no legal inference as to the amount of the damages, the amount only should be stated.

In an action for assault and battery, with a general prayer damages for a permanent injury, the natural and necessary consequences of the unlawful act, may be recovered without being specially pleaded.[1]

425. Special Damages Must be Alleged.—A plaintiff may be entitled to damages different from, or in addition to, those general damages which the law implies; he may have suffered injury which, though the natural consequence, is not the necessary consequence, of the wrong complained of, and for which he can not recover under an *ad damnum*. In such case, in order that the court may be advised as to the scope of the action, and to give the defendant notice of what will be subjects of proof at the trial, the facts out of which such special damages arise are required to be specially pleaded in the complaint.[2]

Special damages arise mainly from tort, though they sometimes arise from breach of contract. In an action by the purchaser of a chattel, for failure to deliver according to contract, the consequent failure of the purchaser to fulfill a contract of resale at an advanced price, can not be shown,—in a case where the lost profts may properly enter into the damages,[3]—unless specially pleaded.[4] Where the seller of a flock of sheep affected by a contagious disease falsely represents them to be sound, and the purchaser, relying upon such representation, turns them in with other sheep,

[1] Stevenson v. Morris, 37 O. S. 11.

[2] Steph. Pl. 417, note 2; 1 Suth. Dam. 763; Mayne Dam. 751; 2 Add. on Torts, 1339; Boone Pl. 18, 140.

[3] Benj. on Sales, 876; Hadley v. Baxendale, 9 Ex. 341; Booth v. Mill Co., 60 N. Y. 487.

[4] Boone Pl. 140. *Cf.* Booth v. Mill Co., 60 N. Y. 487.

whereby the disease is communicated to them, the injury from such communication of the disease, while it is the natural consequence, it is not the necessary consequence, of the false representation, and must be specially pleaded in an action to recover therefor.[1]

In actions for personal injury, the plaintiff may, under an *ad damnum*, recover for physical pain, mental suffering, and loss of time from its disabling effects, because these are among the natural and necessary effects of the act of the tort-feasor. But loss of earnings in a special employment, and expenses incurred for medical aid, except, perhaps, in case of very serious injury, must be specially alleged, in order to be included in an assessment of damages.[2]

Where the purchaser of a cable, relying upon a warranty, attached an anchor to the cable, and both cable and anchor were lost by reason of a defect in the cable, covered by the warranty, the loss of the cable is matter of general damage, and may be proved under an *ad damnum;* but the loss of the anchor is matter of special damage, and must be specially pleaded.[3]

426. Damages the Gist of the Action.—There are some acts, not in themselves actionable, but which result in actual injury, for which the law gives a remedy by action. In such cases, the act complained of being one from which no injury will be inferred as a natural or necessary result, actual injury must be alleged; otherwise, no invasion of a primary right will appear. Where damage necessarily results from the act complained of, the tortious act is the gist of the action; but where the act is not in itself actionable, the resulting damage becomes the gist of the action, and must therefore be alleged with convenient particularity. Cases of this kind often arise from such use of one's property as causes injury to the property of another, in violation of the maxim *sic utere tuo ut*

[1] Wilcox v. McCoy, 21 O. S. 655; Packard v. Slack, 32 Vt. 9.

[2] Tomlinson v. Derby, 43 Conn. 562; Taylor v. Monroe, 43 Conn. 36; Baldwin v. W. R. R. Corp., 4 Gray, 333; Folsom v. Underhill, 36 Vt. 580; Curtis v. R. R., 18 N. Y. 534; Wright v. Compton, 53 Ind. 337; 1 Suth. Dam. 776.

[3] Borradaile v. Brunton, 2 Moore, 582.

alienum non lædas. In the case of a public nuisance, since the law does not imply damage to any particular individual from the public offense, the plaintiff must set out the special damage resulting to him therefrom.[1] The reason is, that such averment is necessary to show the infringement of a private right. But for a private nuisance, such as turning the course of an ancient stream, so that it no longer flows through plaintiff's lands, or projecting the eaves of a building over the lands of plaintiff, it is an intendment of the law that injury results.[2] In other words, each of these acts—diverting the stream in the one case, and overhanging the lands in the other—is of itself an invasion of a recognized legal right, and the law gives an action to protect the right, whether actual injury has resulted or not.

427. Damages the Gist of the Action, Continued.—In an action for slander, if the words spoken are not actionable *per se*, there must be actual injury as the basis of an action, and such damage, being the gist of the action, must be specially alleged and proved. If the words are actionable *per se*, the law imputes damage, so that the mere allegation of the speaking of the words imports the invasion of the right of personal security; but if the defamatory words are not actionable *per se*, what the law would otherwise imply must be made to appear by allegation.[3]

From what has been stated, it will be seen that special damages, whether of the gist of the action, or only collateral thereto, can not be the subject of proof or of recovery, unless specially pleaded.

As a general rule, it is not necessary to the sufficiency of a complaint that it state the particular items of damage, though in some cases such particularity of statement may be required, upon motion, in order to fully advise the defendant as to what he is expected to meet upon the trial.[4]

[1] 1 Suth. Dam. 766; Per COULTER, J., in Hart v. Evans, 8 Pa. St. 13, 21.

[2] Wood on Nuisances, 97; 1 Suth. Dam. 766; Hart v. Evans, 8 Pa. St. 13; Frye v. Prentice, 14 L. J. (N. S.) 298.

[3] Steph. Pl. 125, *in nota;* Hoag v. Hatch, 23 Conn. 590.

[4] Mayne Dam. 750.

As to whether facts in aggravation of damages—facts which tend to increase the amount of damages, but do not affect the right of action—should be especially pleaded in order to be the subject of proof, the prevailing rule seems to be this: If such facts are not a part of the tortious act complained of, and are separable from the manner of doing such act, they should be stated; otherwise they need not be stated, for the statement of the tortious act, without the attending circumstances, authorizes proof of all that fairly enters into such act as constitutent parts thereof. As to facts in mitigation of damages, the theory of the new procedure, as well as the weight of authority, seems to require them to be pleaded, only when they are so related to the case as to be essentially new matter.[1]

428. When Indemnified Party may Sue.—In actions against guarantors, indemnitors, sureties, co-obligors, and the like, a right of action does not arise until the party complaining has been damnified. *Actio non datur non damnificato.* Damnification is that which causes a loss or damage. For example, one is damnified when he has paid the debt of another; and generally, he is damnified whenever he becomes liable to be sued for the debt of another.

Express contracts for indemnity vary in their scope and terms, and the authorities are not uniform as to the construction and effect of such agreements. Generally, where the undertaking is in terms to save one harmless from some consequence, there is no right of action until the promisee has suffered actual loss or injury from the cause against which the indemnity is given.[2] In such case, damages are generally

[1] Ante, 385, and cases there cited. *Cf.* Boone Pl. 76.

[2] Aberdeen v. Blackmar, 6 Hill, 324; Coe v. Rankin, 5 McLean, 354; Little v. Little, 13 Pick. 426; Crippen v. Thompson, 6 Barb. 532; Conner v. Bean, 43 N. H. 202; Lott v. Mitchell, 32 Cal. 23; Hall v. Cresswell, 12 Gill & J. 38; Lyman v. Lull, 4 N. H. 495; Jeffers v. Johnson, 21 N. J. L. 73; Weller v. Eames, 15 Minn. 461; Gennings v. Norton, 35 Me. 308; Ewing v. Reilly, 34 Mo. 113; Douglass v. Clark, 14 John. 177; Hussey v. Collins, 30 Me. 190; Scott v. Tyler, 14 Barb. 202; Jones v. Childs, 8 Nev. 121. *Cf.* Wicker v. Hoppock, 6 Wall. 94; Gardner v. Cleveland, 9 Pick. 336; Chace v. Hinman, 8 Wend. 452; Abeles v. Cohen, 8 Kan. 180. *Contra*, Churchill v.

regarded as the gist of the action, and actual injury must be alleged, and *non damnificatus* is a proper plea.[1] But where the contract is for more than more indemnity, as where one undertakes, by an original agreement, to pay another's debt, the promisee is damnified whenever the promisor makes default in payment. The right of the promisee under such contract is, to have his debt paid; not merely to be indemnified in continued delinquency to his creditor. So, generally, where the undertaking is to do some act for the benefit of the promisee, as well as to indemnify and save him harmless from the consequences of non-performance, the promisee is damnified, and has a right of action, whenever the promisor fails to perform the act promised;[2] and the amount of the recovery is generally held to be the full amount of payment or injury to which the promisee is thus exposed.[3]

429. When Indemnfied Party may Sue, Continued.— Where, in part payment for property purchased by the defendant from the plaintiff, the vendee agreed to assume certain indebtedness of the vendor, and to save him harmless therefrom, and a creditor thereafter sued the vendor on a debt included in the agreement, it was held that the vendor could maintain an action on the agreement without alleging payment by him, and that he could recover the full amount of the debt.[4] Where land was conveyed, "subject to mortgages

Hunt, 3 Den. 326; Conkey v. Hopkins, 17 John. 113.

[1] 1 Saund. 117, note 1; Holland v. Malken, 2 Wils. 126; Cox v. Joseph, 5 T. R. 307; Archer v. Archer, 8 Grat. 539; Holmes v. Rhodes, 1 Bos. & P. 640, note a.

[2] Lathrop v. Atwood, 21 Conn. 116; Stout v. Folger, 34 Iowa, 71; s. c. 11 Am. Rep. 138; In re Negus, 7 Wend. 499; Port v. Jackson, 17 John. 239; Thomas v. Allen, 1 Hill, 145; Churchill v. Hunt, 3 Den. 321; Redfield v. Haight, 27 Conn. 31; Wilson v. Stilwell, 9 O. S. 467; Crofoot v. Moore, 4 Vt. 204; Ham v. Hill, 29 Mo. 280; Dye v. Mann, 10 Mich. 291; Holmes v. Rhodes, 1 Bos. & P. 638; Furnas v. Durgin, 119 Mass. 500; s. c. 20 Am. Rep. 341.

[3] Stout v. Folger, 34 Iowa, 71; s. c. 11 Am. Rep. 138; Lathrop v. Atwood, 21 Conn. 116; Ex parte Negus, 7 Wend. 499; Port v. Jackson, 17 John. 239; Crofoot v. Moore, 4 Vt. 204; Ham v. Hill, 29 Mo. 280; Wilson v. Stilwell, 9 O. S. 467; Furnas v. Durgin, 119 Mass. 500; s. c. 20 Am. Rep. 341; 2 Suth. Dam. 610 et seq.

[4] Stout v. Folger, 34 Iowa, 71; s. c. 7 Am. Rep. 138.

amounting to $6,500, which the grantee hereby assumes to pay," it was held that upon default of the grantee as to one of the mortgages, the grantor had a right of action, without having himself paid the debt, and that he could recover the amount of the mortgage and interest.[1] Where a retiring member of a firm took from his partner a bond with surety, conditioned for the payment of the firm debts, the obligee may, upon condition broken, and without having himself paid any of the debts, maintain an action on the bond, and recover the amount of the debts remaining unpaid.[2]

In such actions, if the plaintiff has not himself paid the debt, it is proper practice to make the original creditor a party, so that the court may direct the application of the amount recovered to the discharge of the debt, and thus save the defendant obligor from a second payment, at the suit of the original creditor.[3]

VI. DIVESTITIVE AND EXCULPATORY FACTS.

430. Considering Both Sides of a Case.—In determining whether a given state of facts gives rise to a right of action, due consideration should be given to facts that are in their nature divestitive or exculpatory—such operative facts as, if pleaded by the adversary, would constitute a defense of new matter. Such facts are not always voluntarily disclosed by the client, are sometimes not known to him, and are oftentimes difficult to discover. Of this nature are, the acquiescence of the injured party, his contributory negligence, a waiver of his rights, the intervention of an independent agency, former adjudication, estoppel, and so forth.

431. Immunity of the State from Suit.—It is an elementary principle that the State can not, *in invitum*, be subjected to an action at the suit of an individual. This immunity is accorded to sovereignty generally,[4] and is recog-

[1] Furnas v. Durgin, 119 Mass. 500; s. c. 20 Am. Rep. 341.

[2] Wilson v. Stilwell, 9 O. S. 467.

[3] 2 Suth. on Dam. 615; Wilson v. Stilwell, 9 O. S. 467.

[4] Hans v. Louisiana, 134 U. S. 1. *Cf.* De Saussure v. Gaillard, 127 U. S. 216; Clark v. Barnard, 108 U. S. 436.

nized by the constitution of the United States.[1] But the immunity is a personal privilege, and may be waived at the pleasure of the State. This it may do by act of the legislature authorizing a suit against it, in which case it may attach any conditions;[2] or by voluntarily appearing in an action against it;[3] or by intervening in an action.[4] While an individual may not maintain an action against the State, without its consent, he may, when sued by the State, assert a counter-claim against it; but he can use his counter-demand only as a defense, and can not recover judgment for any excess thereof over the claim of the State.[5]

This immunity of the State is transferred to municipal corporations, and to quasi-municipal corporations, such as counties and townships, when in the exercise of public or governmental duties. The doctrine is, that when a city or town exercises a power, or discharges a duty, which is public or governmental in its character, and which is for the benefit of the general public, it simply acts as an agency of the State, and is no more liable than the State would be, unless expressly made so by statute; but in the exercise of a power or duty conferred for the local advantage of the municipality and its inhabitants, it is liable in damages for injury resulting from negligent performance.[6] In the one case, the municipal body exercises the duties of sovereignty, delegated to it by the State, for the more efficient government of a locality; in the other case, it exercises a power, conferred for its own benefit. The duties in one instance are public, and are superimposed; in the other, they are quasi-private, and are voluntarily accepted and exercised.[7]

[1] U. S. Const., Amendment XI.; Hans v. Louisiana, 134 U. S. 1, 12.

[2] De Saussure v. Gaillard, 127 U. S. 216.

[3] Clark v. Barnard, 108 U. S. 436.

[4] Clark v. Barnard, 108 U. S. 436.

[5] Kentucky v. Todd, 9 Ky. 708.

[6] Tiedeman Munic. Corp. 324, 325, 333; 2 Dill. Munic. Corp. 997; 2 Thomp. on Neg. 734; Per RANNEY, J., in Dayton v. Pease, 4 O. S. 80, 99.

[7] This immunity has been extended to cases where damages result from the defective *plan* of a public work, as distinguished from a defective *execution* thereof—the former resulting from error of judgment, the latter from want of skill and care. 2 Thomp. on Neg. 735; Springfield v. Spence, 39 O. S.

432. Acquiescence of the Injured Party.—It is a general principle of the law, embodied in the maxim *volenti non fit injuria*, that no one can maintain an action for a loss, if he has consented to the act that occasions his loss.[1] The cases illustrating the application of this principle are numerous and varied; and while it is generally a complete bar to recovery, it sometimes works only a mitigation of damages. Money paid voluntarily, with knowledge that the payee is not entitled to it, can not be recovered; for the only ground upon which recovery could be asked—that the payee was not entitled—was known and acquiesced in. Where an insurance company voluntarily paid money on a policy which it believed at the time of payment had been procured by fraud, it was held that the money so paid could not be recovered. The company had consented to the very state of facts on which it based its demand.[2] But if money be paid under a mistake as to a material fact, and payment induced by such mistake, this rule does not apply, for there is no consent to the state of facts upon which recovery is sought. Not so, generally, where the mistake is as to the law. *Ignorantia facti excusat —ignorantia legis neminem excusat.*

It is by reason of the maxim *volenti non fit injuria* that a seduced woman can not recover for her seduction,[3] or for disease contracted from illicit intercourse.[4] Nor can the husband maintain an action for the seduction of his wife, or the father for the seduction of his daughter, if he voluntarily

665, 669; Fair v. Philadelphia, 88 Pa. St. 309. And it is not the policy of governments to indemnify persons for loss sustained, either from want of proper laws, or from the inadequate enforcement of laws made to secure the property of individuals; though in some states, municipal corporations are, by statute, made liable for loss occasioned by the unrestrained violence of a mob. Per GHOLSON, J., in College v. Cleveland, 12 O. S. 377.

[1] Bro. Max. 268; Tech. of Law, 225; 1 Wait Ac. & Def. 146.

[2] Frambers v. Risk, 2 Ill. App. 499; Windbiel v. Carroll, 16 Hun, 101.

[3] 5 Wait Ac. & Def. 662; Tech. of Law, 225; Woodward v. Anderson, 9 Bush, 624; Hamilton v. Lomax, 26 Barb. 615. In some states, however, such action is authorized by statute.

[4] Hegarty v. Shine, 7 Cent. L. J. 291. See, also, 8 Cent. L. J. 111; Cooley on Torts, 510–514; 1 Thomp. on Neg. 115.

permitted the act; and if not consenting, his co-operating misconduct or negligence will go in mitigation.[1]

433. Acquiescence of Injured Party, Continued.—In an action by a passenger wrongfully ejected from a railroad train, it appeared that the plaintiff, knowing that the established rates of the company were in excess of those allowed by law, took passage, intending not to pay the excessive fare, expecting to be ejected, and intending, if ejected, to sue the company in order to make money out of the transaction. It was held that he could recover only compensatory damages. The expulsion he complained of was sought and expected; and "to the willing mind there is no injury."[2]

After an actionable wrong has been committed, it is the duty of the injured party to make reasonable efforts to prevent its increase. If by a timely and reasonable outlay of money or labor, further loss may be averted or diminished, he must so protect himself; and for injury resulting from his failure to use such reasonable precaution, he can not recover.[3] For example, if one wrongfully break another's window, the cost of repairing the window is the measure of damage; and if the owner neglect to repair the window, and his furniture should be injured by the consequent exposure, such remote loss must fall upon him.

Where persons fight by agreement, it has been almost uniformly held, that, notwithstanding the act of each is unlawful, and is consented to by the other, the injured party may maintain an action for damages;[4] but the fact that the parties fought by agreement may be shown in mitigation.[5] This apparent anomaly rests upon the importance which the law attaches to the public peace, and to the right of personal

[1] 5 Wait Ac. & Def. 663; Week's Dam. Absq. Inj. 37–39; 2 Add. on Torts, 1279.

[2] C. H. & D. Ry. Co. v. Cole, 29 O. S. 126.

[3] Clark v. Locomotive Works, 32 Mich. 348; Lawson v. Price, 45 Md. 123; Pierce on Railroads, 272–3, and note.

[4] Cooley on Torts, 163; Barholt v. Wright, 45 O. S. 177; Bell v. Hausley, 3 Jones N. C. 131; Stout v. Wren, 1 Hawks, 420; Adams v. Waggoner, 33 Ind. 531; Shay v. Thompson, 59 Wis. 540; s. c. 48 Am. Rep. 538.

[5] 2 Green. on Ev. 85; Barholt v. Wright, 45 O. S. 177; Adams v. Waggoner, 33 Ind. 531.

security. The maxim, *volenti non fit injuria*, gives way to one of superior importance—*salus populi suprema lex*. Upon like principle of public policy, one who, in self-defense, unnecessarily injures his assailant, is liable therefor; and the contributory negligence of the plaintiff does not prevent a recovery for an injury willfully and purposely committed.

434. Waiver of One's Rights.—The exercise of a private right is optional with the person of inherence; but the performance of a duty is compulsory upon the person of incidence. One may forego the benefit of a right that concerns only himself, because to do so will not interfere with the right of any other person.[1] A waiver is the intentional relinquishment of a known right. It is voluntary, and implies an election to dispense with something of value, or forego some advantage which the party might, at his option, have insisted upon.[2]

A waiver, to be operative, must be supported by a consideration, or the conduct relied on as a waiver must be such as to estop the party from insisting upon performance of the duty.[3] A right can be waived, only where it might be insisted upon. Therefore, if one be required by the terms of his contract to bring his action thereon within a limited time, no act of his, after the expiration of such time, will constitute a waiver of objection as to time.[4] A waiver by one entitled to the performance of a duty by another is not a performance of a duty, but an excuse for non-performance; and when relied upon, should be specially pleaded.[5]

It has been held that where judgment is prematurely entered, as upon a note before due, it is a mere irregularity, not affecting the jurisdiction, and may be waived. And where

[1] Mayer v. Ry. Co., 143 N. Y. 1. *Aliter*, if other persons have an interest in the right, or would be prejudiced by a waiver. For example, an insolvent debtor may not waive a right to property or money, to the prejudice of his creditors.

[2] Warren v. Crane, 50 Mich. 300; Hoxie v. Home Ins. Co., 32 Conn. 21: Lewis v. Phœnix Ins. Co., 44 Conn. 72; Livesy v. Hotel Co., 5 Neb. 50.

[3] Ripley v. Ætna Ins. Co., 30 N. Y. 136.

[4] Killips v. Ins. Co., 28 Wis. 472, 482; s. c. 9 Am. Rep. 506, 511.

[5] Mehurin v. Stone, 37 O. S. 49; Palmer v. Sawyer, 114 Mass. 1.

such judgment is entered upon a warrant of attorney authorizing a release of all errors, and the record shows such release, the irregularity is waived.[1]

435. The Contributory Negligence of Plaintiff.—In actions for injury resulting from the negligence of the defendant, the plaintiff can not recover, if his own negligence contributed to the injury. This rule rests upon the maxim considered in the last preceding section—*volenti non fit injuria*. To constitute such contributory negligence, two elements must concur. There must be (1) a want of ordinary care on the part of the plaintiff, and (2) there must be a proximate connection between such want of care and the injury complained of. When these two elements concur, the negligence of the plaintiff becomes in law a co-operative cause of his injury, and prevents recovery; for the reason that, otherwise, the plaintiff might obtain from another, compensation for injury self-imposed. To make the negligence of plaintiff a proximate cause of his injury, and a bar to recovery, it must be such that but for it he would not have been injured.[2] If the plaintiff's negligence has placed him in danger, but if, by the exercise of ordinary care under the circumstances, the defendant can avoid injury to the plaintiff, notwithstanding his negligence, he must do so, and is liable if he does not. In other words, it is the duty of each to use reasonable care to avoid injury to the other, and it is the duty of each to use reasonable care to avoid injury from the other's negligence.[3]

Where the injury complained of is the result of a wanton or willful act, the plaintiff's negligence, though it contribute proximately to the injury, does not stand in the way of recovery.[4] A child is held to the exercise of only such care as a

[1] Bank v. Milwaukee, etc., Mills, 84 Wis. 23.

[2] In such case, the negligence of the injured party is only a remote cause of the injury, and that of the other party is the proximate cause. Kerwhacker v. C. C. & C. Ry. Co., 3 O. S. 172; Railway Co. v. Kassen, 49 O. S. 230.

[3] For a full statement of the law of contributory negligence, see 2 Thomp. on Neg. 1104–1216; 6 Wait, Ac. & Def. 583–601; 1 Shear. & Redf. on Neg. 61; 4 Am. & Eng. Encyc. of Law, 15.

[4] Brownell v. Flagler, 5 Hill, 282. *Cf.* Maumus v. Champion, 40 Cal. 121; Carroll v. Minn. Val. Ry. Co., 13 Minn. 30; Griggs v. Fleckenstein, 14 Minn. 81; N. J. Exp. Co.

child of such age is capable of; and a child of such tender years as not to be capable of exercising any care for its safety can not be charged with contributory negligence; though in some jurisdictions, the negligence of the parent, if present and exercising control over the child, will be imputed to it.

It is not negligence *per se* for one to risk his own safety in an attempt to rescue another from impending danger. If the rescuer has rashly and unnecessarily exposed himself to danger, he can not recover for injuries thus brought upon himself; but if, under the circumstances, the attempt, though perilous, was not rash or imprudent, the injury will be attributed to the one who wrongfully imperiled the person sought to be rescued; and in such case, the rescuer should not be charged with the consequences of error of judgment resulting from the excitement and confusion of the moment.[1]

436. Intervention of an Independent Agency.—The intervention of an independent act of a third person between the wrongful act complained of and the injury sustained, which independent act is the immediate cause of the injury, breaks the causal connection, and there can be no recovery, unless from the person whose act so intervened.[2] Where the defendant unlawfully sold liquor to plaintiff's husband, whereby he became intoxicated, and insulted another, who stabbed and killed him, it was held that the act of defendant was only the remote cause of the death, and that he was not liable.[3]

It is a well settled principle of the law of agency, that the principal is liable to third persons for the torts of his agent, including willful wrongs, if committed within the scope and course of the employment.[4] The principal selects his own agent, invests him with authority, and has the right to control him. It is this right of control that creates, and that measures, the responsibility of the principal for the wrongful

v. Nichols, 33 N. J. L. 434, 439; Wynn v. Allard, 5 Watts & S. 524.

[1] Pa. Ry. Co. v. Langendorf, 48 O. S. 316.

[2] Whar. on Neg. 134; 2 Thomp. on Neg. 1089; Dam. Absq. Inj. 131.

[3] Shugart v. Egan, 83 Ill. 56; S. C. 4 Reporter, 3.

[4] Mech. on Agency, 732–744.

acts of the agent. Therefore, where an employer has not this right of control, he is not, and in justice ought not to be, responsible for an act that he had neither power nor right to control. Where an independent contractor undertakes to accomplish a certain result for his employer, and is not subject to the control or direction of the employer as to the means or manner of doing the work, the employer can not be made liable for injury resulting from the act of the contractor; provided (1) that the thing to be done is not in itself unlawful, and (2) that it is something from which, if properly done, no injury can result to third persons.[1]

Where a railroad company contracted with another to build its entire road, not retaining the right to direct or control the manner of doing the work, the company is not liable to a third person for injury resulting from the negligence of the contractor in doing the work.[2]

When one, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.[3]

437. Payment by a Stranger—not Defensive.—Performance of the acts to which the person of incidence is obliged discharges him, of course, from the obligation. But performance by a stranger does not, ordinarily, operate to discharge the obligor. In the Roman law, payment of a debt by a stranger, even without the debtor's knowledge, extinguished the debt.[4] And it has been held in this country that

[1] Mech. on Agency, 747, 748. *Cf.* Ry. Co. v. Morey, 47 O. S. 207, 216.

[2] Hughes v. C. & S. Ry. Co., 39 O. S. 461; McCafferty v. S. D., etc., Ry. Co., 61 N. Y. 178; s. c. 19 Am. Rep. 267; Tibbetts v. Knox, etc., Ry. Co., 62 Me. 437; Cunningham v. International Ry. Co., 51 Tex. 503; s. c. 32 Am. Rep. 632; Bailey v. T. & B. Ry. Co., 57 Vt. 252; s. c. 52 Am. Rep. 129. *Contra*, Stone v. Cheshire Ry. Co., 19 N. H. 427; s. c. 51 Am. Dec. 192. *Cf.*, where the contract prescribed the manner of doing the work, Carman v. S. & I. Ry. Co., 4 O. S. 399; Tiffin v. McCormack, 34 O. S. 638.

[3] Per ALLEN, J., in Oakley v. Morton, 11 N. Y. 25, and cases cited.

[4] Hol. Jur. (5th ed.) 268, and note 3.

payment by a stranger, if received *as payment* of the debt, will extinguish the demand.[1]

The prevailing doctrine, both in this country and in England, is, that where one has two separate and independent rights of action, against different persons, to repair the same injury, payment by one, or recovery from one, can not be pleaded in bar of an action at law against the other.[2] If property, insured against fire, be burned by the negligence of a railway company, the owner has a right of action against the railway company, for its negligence, and against the insurance company, on its contract. The one is in tort, the other in contract; and payment by the insurance company of the full value of the property, will not bar an action against the railway company.[3] As to the railway company, payment by the insurance company was *res inter alios acta*, and for that reason was not available to the defendant; it was a fact that did not belong to the group of facts that fixed the jural relations of the plaintiff and defendant, and for that reason could not be pleaded as a defense of new matter.

In an action of trespass against one who, as sheriff, had wrongfully seized the plaintiff's goods under an attachment, the fact that the goods had been burned while in the defendant's possession, and the value thereof paid to the plaintiff under a policy of insurance, was held not to be available to the defendant, either in bar or in mitigation.[4] In deciding this case, Judge Cooley said: "It certainly strikes one, at first, as somewhat anomalous, that a party should be in a position to legally recover of two different parties the full value of goods which he has lost; but we think the law warrants it in the present case, and that the defendant suffers no wrong by it. He is found to be a wrong-doer in seizing the goods, and he can not relieve himself from respon-

[1] Harrison v. Hicks, 1 Port. (Ala.) 423.

[2] 1 Suth. on Dam. 242; Mayne on Dam. 114; Jones v. Broadhurst, 9 C. B. 173; Hol. Jur. (5th ed.) 268, and note 3; Ante, 236. *Cf.* Drinkwater v. Dinsmore, 50 N. Y. 390.

[3] Cunningham v. E. & T. H. Ry. Co., 102 Ind. 478; s. c. 20 Reporter, 428; Yates v. Whyte, 4 Bing. N. C. 272; Weber v. M. & E. Ry. Co., 35 N. J. L. 409; Hayward v. Cain, 105 Mass. 213.

[4] Perrott v. Shearer, 17 Mich. 48.

sibility to account for their full value except by restoring them. He has no concern with any contract the plaintiff may have with any other party in regard to the goods, and his rights or liabilities can neither be increased nor diminished by the fact that such contract exists. He has no equities as against the plaintiff which can entitle him, under any circumstances, to an assignment of the plaintiff's policies of insurance. The accidental destruction of the goods in his hands was one of the risks he ran when the trespass was committed, and we do not see how the law can relieve him from the consequences. If the owner, under such circumstances, keeps his interest insured, he can not be held to pay the money expended for that purpose for the interest of the trespasser. He already has a right of action for the full value of the goods, and he does not give that away by taking a contract of insurance. For the latter he pays an equivalent in the premium, and is therefore entitled to the benefit of it, if any benefit shall result."

In some cases it has been held, upon the equitable principle of subrogation, that the insurance company is entitled, as against the insured, to be reimbursed out of the amount recovered as damages.[1]

In an action to recover damages for an injury causing death, it was held that the receipt of money on a policy of insurance on the life of the deceased could not be shown for the purpose of reducing the amount of recovery.[2] Where one is injured by assault and battery, he may recover, as part of his damages, the amount of a surgeon's bill, although before the trial, but after suit brought, it had been paid by the township trustees, to whom the plaintiff was under no legal liability to refund the amount.[3] And in an action for physical injury caused by negligence, the defendant may not show, in mitigation of damages, that the plaintiff's employer continued the plaintiff's wages during the time of his dis-

[1] Weber v. M. & E. Ry. Co., 35 N. J. L. 409.

[2] Sherlock v. Alling, Admr., 44 Ind. 184.

[3] Klein v. Thompson, 19 O. S. 569.

ability.[1] But in a like action, it was held that after the plaintiff had testified to the loss of wages as an item of damages, the defendant was entitled to ask him, in cross-examination, if his employer had not paid his wages during the time he was sick.[2]

VII. DISTINGUISHING RIGHTS OF ACTION.

438. Rule for Distinguishing Separate Rights of Action.—A complaint should contain a separate cause of action for each right of action disclosed by the facts therein stated; and whatever facts would, if stated by themselves, entitle one to relief by action, constitute a right of action, and should be separately stated as one cause of action. In determining whether a given statement of operative facts, investitive and culpatory, discloses but one right of action or more than one, it is necessary only to determine whether more than one primary right has been invaded, or whether there has been more than one invasion of a single primary right. Leaving out of consideration the nature or kinds of relief sought, if but one right, however comprehensive, is asserted, and if but one delict, however complex, is complained of, but one right of action is disclosed. If the facts disclose more than one distinct primary right of the plaintiff, and invasion thereof by the defendant, whether by one delict or by several; or if there are so disclosed two or more distinct invasions by the defendant, of a single primary right of the plaintiff, more than one right of action is disclosed, and these should be separately stated. This is a plain and simple test for the differentiation of causes of action.

[1] O. & M. Ry. Co. v. Dickerson, 59 Ind. 317.

[2] Drinkwater v. Dinsmore, 80 N. Y. 390. The court ingeniously distinguish this case from the class of cases referred to above; holding that the proof of payment of wages was not in mitigation of damages actually sustained, but was simply to show that the plaintiff had not in fact suffered the damage he was claiming. And in an action by a married woman to recover damages for a personal injury, it was held that she could not recover the physician's and nurse's bills as items of damages, because she was not primarily liable for them. Moody v. Osgood, 50 Barb. 628.

Whatever facts would, if stated by themselves, entitle one to relief by action should be stated as a separate cause of action. In actions for legal relief, the cause of action rests so completely upon the operative issuable facts, that if any one of them be denied, and not sustained by proof, recovery is thereby defeated.[1] And in such actions a cause of action is double, if the denial of any one material operative fact in it will not controvert the whole claim asserted.[2]

Sometimes the same facts may be a requisite part of each of several causes of action; and sometimes one entire cause of action may be a necessary part of another. Such cases are to be distinguished from those in which a given state of facts will authorize more than one relief. In the latter class of cases there should be but one cause of action; in the former, more than one.

439. Separate Rights of Actions—Illustrative Cases.— In an action to remove a nuisance, for damages, and for injunction, it was held that there was but one cause of action.[3] Several reliefs were demanded, but only one right, and one delict were stated. Where one tenant in common sued his co-tenant for specific performance of his contract to convey, or for partition, a single cause of action was held to be proper, and the order of the trial court, requiring the plaintiff to elect the action to be prosecuted, was reversed, on the ground that the defendant has nothing to do with the form of the relief demanded, and that where the facts stated may constitute either of two actions, which of the two is the proper one is to be determined on the trial.[4] But here were two rights, one based upon contract, the other upon ownership in common; and there were two delicts, one a breach of contract, the other a failure or inability to effect voluntary partition. It was not a case where the same facts constitute either of two actions. For specific performance, the contract must be stated, and plaintiff's ownership of a moiety need not be stated; while for partition, the ownership must

[1] Pom. Rem. 527.

[2] Per CAMPBELL, J., in People v. Ry. Co., 12 Mich. 389.

[3] Davis v. Lambertson, 56 Barb. 480.

[4] Hall v. Hall, 38 How. Pr. 97.

be stated, and a statement of the contract would be surplusage. So that a statement of facts that would authorize the relief of specific performance would not authorize partition, and *vice versa*. Clearly there were two rights of action, and these should not be made available in a single cause of action.

An action for specific performance of a contract to convey land, and praying damages, if, for sufficient reason, performance could not be decreed, involves but a single right and a single delict, and requires but one cause of action. The prayer for alternative relief does not affect the cause of action.[1] An action for false representations in the sale of diseased sheep, and for injury to other sheep, caused by communication of the disease to them, states but one cause of action.[2] The communication of the disease is only a circumstance showing special damage.[3] A complaint for malicious prosecution, alleging that defendant made an affidavit charging plaintiff with forgery, caused a warrant to issue thereon, testified against plaintiff before the magistrate, appeared before the grand jury and procured an indictment against him, whereon he was tried, acquitted, and discharged, contains but a single cause of action, with special acts of wrong and damage.[4]

Where a debtor conveys land in fraud of creditors, and the title has passed by different deeds to different persons, all may be joined as defendants in an action to set aside the deeds, because they all have a common interest in respect of the fraud; and the complaint in such case should contain but one cause of action.[5]

440. Separate Rights of Action—Illustrative Cases, Continued.—A mare and colt went upon a railroad track at the same time and place, and both ran on the track before an approaching train. The colt was struck and killed, and about thirty rods from where this occurred the mare was struck and injured. The owner of both animals sued the

[1] Henry v. McKittrick, 42 Kan. 485.
[2] Wilcox v. McCoy, 21 O. S. 655.
[3] Packard v. Slack, 32 Vt. 9.
[4] Schenck v. Butsch, 32 Ind. 338.
[5] Rinehart v. Long, 95 Mo. 396.

railroad company for the value of the colt, and recovered judgment, which was paid by the company. The mare afterward died from the injuries so received, and in an action to recover her value, the company pleaded the former recovery in bar, on the theory that there was but one right of action, and that hence there could be but one recovery. It was held that these were separate and independent rights of action; that they might be enforced in the same action, or in separate actions; and that the first recovery did not bar a recovery in the second action.[1] The court recognized the rule that there can be but one satisfaction for a tort, but held that these injuries were so separated, in distance and in time, as to be separate and distinct acts of negligence, and to furnish distinct rights of recovery.

Where one tenant in common of land casts a cloud upon the title of his co-tenant, and by the same fraudulent act attempts to deprive him of his interest in partnership assets, the latter has two rights of action against such wrong-doer. He may have the cloud upon his title removed, by an action for that purpose; and he may thereafter maintain an action to compel an accounting for the partnership assets, the partnership having ceased, and its debts having been paid.[2] In such case there is but one tortious act, but it invades two separate and independent primary rights.

441. Separate Rights of Action—Illustrative Cases, Continued.—Where the defendant so negligently managed his steamboat as to run down plaintiff's sailboat, and injured the plaintiff and the boat, it was held that as the plaintiff could not divide the tort and have two actions, one for injury to the person, and the other for injury to the property, he may not make two causes of action in one suit.[3] An action for negligently driving against and injuring the plaintiff and his horse and carriage was held to embrace but one right of action.[4] These cases are clearly wrong upon principle. Two

[1] Ry. Co. v. Scammon, 41 Kan. 521.

[2] Holloway v. Holloway, 99 Mo. 305.

[3] Bennet v. Hood, 1 Allen, 47; Trask v. Ry. Co., 2 Allen, 331; Doran v. Cohen, 147 Mass. 342.

[4] Howe v. Peckham, 10 Barb. 656.

distinct rights—the right of personal security and the right of property—were here invaded by a single delict, which gave rise to two remedial rights. In asserting one of these, ownership of property and injury thereto must be alleged and proved; in asserting the other, injury to the person must be alleged and proved; and different rules of damage govern the measure of recovery for the two injuries.

Upon a state of facts precisely like those last stated, the plaintiff sued and recovered for the injury to his carriage, and afterward sued for the injury to his person. Held, by the English Court of Appeal, that the former recovery was not a bar to the latter action, for the reason that the injury to the property and the injury to the person, although occasioned by the same wrongful act, are infringements of different rights, and therefore give rise to distinct rights of action. In the opinion, the court say: "The question is, whether there are two causes [rights] of action; if there is but one, the present suit is not maintainable. . . . The owner of property has a right to have it kept free from damage. The plaintiff has brought the present action on the ground that he has been injured in his person. He has the right to be unmolested in all his bodily powers. The collision with the defendant's van did not give rise to only one cause [right] of action. The plaintiff sustained bodily injuries, he was injured in a distinct right, and became entitled to sue upon a cause of action distinct from the cause of action in respect of the damage to his goods; therefore, the plaintiff is at liberty to maintain the present action.[1]

Where husband and wife were at the same time injured by the same negligent act of a street railway company, a recovery by the husband for the injury to his person was held not to bar a subsequent action by him to recover for the loss of the society and the services of his wife, caused by the injury to her person, and for expenses in effecting her cure.[2]

[1] Brunsden v. Humphrey, 14 Q. B. D. 141. (A. D. 1884.)

[2] Skoglund v. Minn. St. Ry. Co., 45 Minn. 330. *Cf.* Newbury v. C. & P. R. Ry. Co., 25 Vt. 377. *Contra*, C. H. & D. Ry. Co. v. Chester, 57 Ind. 297.

There was but one tortious act of the defendant, tut it invaded separate and distinct rights of the plaintiff.

These contrary holdings, apparently the result of different views as to what constitutes a right of action, really result from the controlling application of different principles in the determination of the same question. Some courts, guided only by the doctrine that a single tort may not be divided and made the ground of two actions, have held that where only one tortious act is complained of, only one action can be maintained, and only one cause of action stated. These courts have lost sight of the constituent elements of a right of action, and of the reasons for stating causes of action separately.

442. Separate Rights of Action—Illustrative Cases, Continued.—In an action for injury to the person by negligence of the defendant, allegations of loss of services, and incurring of expenses for medicine, etc., are only in aggravation, and are properly included in a single cause of action.[1] Allegations that the defendant unlawfully broke and entered plaintiff's dwelling, and removed the roof, whereby his property and family were exposed, and he was made sick, state but a single cause of action, with circumstances of special damage; and in such case, if the trespass, which is the gist of the action, be not proved, there can be no recovery on account of any of the alleged consequential damages.[2] But allegations that the defendant broke and entered plaintiff's mill, seized and dragged him out, and beat and wounded him, make the personal injury, not a mere appendage of the trespass, but a substantive cause of action, for which there may be recovery, even though the entry of the mill be justified.[3] This is clearly so, for the personal injury is not stated as a consequence of the trespass, as in the last preceding case, but as the immediate result of a separate act of the defendant. Two distinct rights being invaded, by separate and distinct wrongful acts, there should be two causes of action.

[1] Ry. Co. v. Chester, 57 Ind. 297.
[2] Brown v. Lake, 29 O. S. 64.
[3] Wright v. Chandler, 4 Bibb, [illegible]

Distinct libels, published at different times, in the same paper, are distinct invasions of the same right, and each should be stated in a separate cause of action ;[1] and the same is true of slanderous words spoken at different times, although the same words are spoken each time ;[2] but defamatory charges of distinct offenses, spoken at the same time, have been held to constitute but a single right of action.[3]

443. Disparting a Right of Action.—It is a well-settled doctrine that a judgment concludes the rights of the parties in respect to the right of action on which it is rendered ; and this, whether the suit embrace the whole, or only part, of the demand constituting such right of action. It results from this principle, that an entire claim, whether founded upon contract or upon tort, can not be divided and made the basis of several actions ; and if several actions be brought on the different parts of an entire demand, the pendency of one may be pleaded in abatement in another, and judgment on the merits in one may be pleaded in bar in another. In such case, the original demand, in its totality, is merged in the judgment—*transit in rem judicatam*.[4] Some illustrations of the application of this rule will show its practical importance.

Where there are several breaches of several and distinct covenants contained in the same instrument, and suit is brought on some of the breaches, and pending such action another is commenced on other breaches existing when the former action was begun, the former action may be pleaded in abatement of the latter action ;[5] because the several claims already due under one contract are deemed one entire demand or right of action.[6]

Where labor is performed, at various times, under one

[1] Fleischman v. Bennett, 87 N. Y. 231.

[2] Swinney v. Nave, 22 Ind. 178.

[3] Cracraft v. Cochran, 16 Iowa, 301 ; Swinney v. Nave, 22 Ind. 178.

[4] " A plaintiff may not split up an entire cause of action, so as to maintain two suits upon it ; if he do so, a recovery in one suit, though for less than the whole demand, is a bar to the second." 1 Ch. Pl. 199, note ; Freeman on Judgments, 238.

[5] Bendernagle v. Cocks, 19 Wend. 207.

[6] Freeman on Judgments, 240.

entire contract, and recovery by action is had for a part thereof, a second action for the residue can not be maintained, even on clear proof that no evidence as to such residue was offered in the first action.[1]

444. Disparting a Right of Action, Continued.—As a general rule, where a contract calls for the doing of something that involves numerous conditions and requirements,—such as the construction of a building, or of a machine,—several breaches thereof, being a violation of the general right to have the contract performed, become a single demand *in solido*, and constitute but a single right of action. Thus, in a complaint on a contract to construct a building, allegations of failure in point of time, of defects in materials, in construction, and in workmanship, are properly embodied in a single cause of action.[2] So, also, where several assessments are made on a stockholder, in payment of his subscription, each call, as made, is a distinct and separate demand, and constitutes, when due and unpaid, a right of action; but after several calls have been made, and are due and unpaid, they are in the nature of an account made at several times, and all the items taken together, constitute a single indebtedness on one contract, and should be embodied in one cause of action.[3]

"Where there is an account for goods sold or labor performed, where money has been lent to or paid for the use of a party at different times, or several items of claim spring in any way from contract, whether one only or separate rights of action exist, will depend upon whether the case is covered by one or by separate contracts. The several items may have their origin in one contract, as on an agreement to sell

[1] Logan v. Caffrey, 30 Pa. St. 196. Of course, if one holds several distinct demands against the same person, he may recover on one, and then on another, in separate actions. Thus, a recovery of damages for the wrongful dismissal of the plaintiff from defendant's service, was held not to bar a subsequent action for wages earned during the service. Perry v. Dickerson, 85 N. Y. 345.

[2] Comrs. v. Plumb, 20 Kan. 147; Madge v. Puig, 12 Hun, 15; Fisk v. Tank, 12 Wis. 276; Roehring v. Huebschmann, 34 Wis. 185; Wilcox v. Cohn, 5 Blatch. 346.

[3] Hotel Co. v. Sigement, 53 Mo. 176.

and deliver goods, or perform work, or advance money; and usually, in the case of a running account, it may be fairly implied that it is in pursuance of an agreement that an account may be opened and continued, either for a definite period, or at the pleasure of one or both of the parties. But there must be either an express contract, or the circumstances must be such as to raise an implied contract, embracing all the items, to make them, where they arise at different times, a single or entire demand or right of action."[1] In the case from which the foregoing is quoted, the business of the plaintiff consisted of two branches, kept, and designed to be kept, entirely distinct. The defendant made an account in each branch, one of which was concluded before the other was opened; and there was no express contract connecting the two accounts, nor did the circumstances warrant the presumption of a contract so connecting them. It was held that the accounts constituted two several rights of action.[2]

445. Disparting a Right of Action, Continued.— Where one covenanted, in 1822, to furnish a continuous supply of water for the mill of another, and totally failed to perform his covenant after 1826, the mill-owner brought an action in 1835, and recovered the damages sustained by him up to that time. In a subsequent action for damages sustained after 1835, the former recovery was held to be a bar.[3] The total breach in 1826 put an end to the contract, and gave the plaintiff a right of action for an equivalent in damages. He obtained such equivalent, or should have obtained it, in the former suit; and to allow a second recovery would be to split an entire right of action.

Where an entire demand arising from tort is dissevered, and judgment recovered for a part thereof, the entire demand is, in like manner, *res judicata*. The rule is said to be with-

[1] Per STRONG, J., in Secor v. Sturgis, 16 N. Y. 548.

[2] Secor v. Sturgis, 16 N. Y. 554. *Cf.* Nathans v. Hope, 77 N. Y. 420; Courson v. Courson, 19 O. S. 454; holding that the statute of limitations begins to run against each item of an account from its date, because a right of action then accrues thereon. See, also, Ang. Lim. 274.

[3] Fish v. Folley, 6 Hill, 54. *Cf.* Stein v. Rose, 17 O. S. 471; James v. Allen County, 44 O. S. 226.

out exception, that if several chattels are taken by one tortious act, and the owner recovers judgment for part of the property so taken, whether in trespass, in trover, or in replevin, such judgment merges the entire demand, and is a bar to a subsequent action.[1]

446. Disparting a Right of Action, Continued.—If a fire be started from a locomotive engine, by the actionable negligence of its owner, all damages resulting therefrom to one person must be recovered in one action, although the fire be communicated to two tracts of land situated a considerable distance from each other.[2] The fact that damages are not apparent when the first action is tried does not form an exception to the rule.[3] Thus, where defendant had wrongfully made an excavation into plaintiff's coal mine, through which water flowed, a recovery for making the aperture was held to bar a subsequent action for damages occasioned by the flowing of water through the aperture into the mine.[4] So, also, where a plaintiff recovered judgment for assault and battery, and thereafter parts of his skull came out, and he sought to recover for such effects of the assault, it was held that the former recovery was a bar.[5]

Where an entire demand has been severed and a judgment for part of it is pleaded in bar of a second action for the residue, such plea has been regarded with disfavor, unless asserted at the earliest opportunity. Where four monthly installments of rent were due and unpaid, and the landlord brought two actions at the same time, in a justice's court, each for two months' rent, the defendant appeared and defended in both actions, without objecting to the severance. The plaintiff recovered judgment in both cases, and the defendant paid the judgment for the earlier months, appealed the other case, and

[1] Freeman on Judgments, 241; Union Ry. Co. v. Traube, 59 Mo. 355; O'Neal v. Brown, 21 Ala. 482; McCaffrey v. Carter, 125 Mass. 330; Farrington v. Payne, 15 Johns. 432.

[2] Knowlton v. Ry. Co., 147 Mass. 606.

[3] Fowle v. New Haven, 107 Mass. 352; Clegg v. Dearden, 12 Q. B. 576.

[4] Clegg v. Dearden, 12 Q. B. 576.

[5] Fetter v. Beale, 1 Salk. 11. *Cf.* Whitney v. Clarendon, 18 Vt. 252; s. c. 46 Am. Dec. 150.

in the appellate court pleaded the satisfied judgment in bar. This defense was held insufficient, on the ground that "when a defense is purely technical, the conduct of the party presenting it should be scrutinized, and if it does not appear that he set it up at his first opportunity, it ought not afterward to avail him."[1]

447. Continuous and Recurring Injuries.—As a rule, judgments relate to the situation of the parties at the commencement of the action; and in personal actions, damages are generally allowed only to that date. If the injury sued for be continuing, but not permanent, subsequent loss must be compensated in subsequent actions, brought after the loss has been sustained;[2] if the injury, though continuing, be permanent in character, it must be fully compensated in one action, and one recovery bars a subsequent action for subsequent loss.[3]

Injury caused by a nuisance may be of two kinds—that produced by the act, and that resulting from a continuance of the nuisance. He who creates a nuisance is under a continuing obligation to abate it. Therefore only the damage done at the date of the commencement of the action can be compensated in that suit. In a second action, the material inquiry is, whether the damages on which it is based are attributable to the original act, or to the continuing of the state of facts produced by that act. In the latter case, a new right has arisen, and a new action will lie.[4] Where the nuisance is of a permanent character, and is necessarily and continuously injurious, the whole damage is an original injury, and may be at once compensated. The damage caused by the building of a railroad is of this character. But if the continuance will not necessarily be injurious, the injury to be compensated in a suit is what has then been suffered. Thus, if an obstruction be built that will cause damage only in time

[1] Fox v. Althorp, 40 O. S. 322.

[2] Sedg. on Dam. 154, 155; Canal v. Wright, 1 Zab. 469; Powers v. Ware, 4 Pick. 105; Brewster v. Sussex Ry. Co., 11 Vroom, 57.

[3] Stodghill v. B. & Q. Ry. Co., 53 Iowa, 341; 3 Suth. on Dam. 372; Marble v. Keyes, 9 Gray, 221.

[4] Freeman on Judgments, 242.

of floods in a stream, each recurring damage gives a new right of action.

448. Election of Remedies.—Sometimes a right of action will entitle the plaintiff to either of two remedies; in which case he may pursue the one or the other, as he may elect.[1] Under the new procedure, as under the old, one injured by a tort that enriches the tort-feasor may elect to sue in tort, for the damages, or he may waive damages for the tort, and sue in contract, for the value, or the proceeds, of the property.[2] This right of election arises where personal property has been wrongfully converted;[3] where there is a contract, and also a legal duty incident thereto, as in the case of common carriers, or of professional men;[4] where money has been obtained by false representations;[5] and where goods have been sold on a credit obtained by fraudulent representations.[6]

In some cases the plaintiff may have a right of election between a remedy at law and a remedy in equity. For example, where the vendor of lands refuses to convey, the vendee may have the equitable relief of specific performance, or the legal relief in damages.[7]

Where a contractor is, by the wrongful act of the other contracting party, prevented from completing his work, he may elect to sue for damages for a breach of the contract, or he may sue for the value of the work he has already done.[8] So, also, an employe wrongfully discharged during his term

[1] Steph. Pl. 52–60.

[2] Ante, 95, 326, 377, 419.

[3] Ante, 419, and cases cited.

[4] Pa. Ry. Co. v. Peoples, 31 O. S. 537; Emigh v. Ry. Co., 4 Biss. 114; Church v. Mumford, 11 Johns. 479. *Cf.* Campbell v. Perkins, 8 N. Y. 430; Brown v. Treat. 1 Hill, 225.

[5] Byxbie v. Wood, 24 N. Y. 607. *Cf.* Union Bk. v. Mott, 27 N. Y. 633.

[6] Wiggins v. Sickel, 33 How. Pr. 174. *Cf.* Nat. Trust Co. v. Gleason, 77 N. Y. 400. Or the seller may rescind the sale, and replevy the goods. Farley v. Lincoln, 51 N. H. 577; Hall v. Gillmore, 40 Me. 578; Hennequin v. Naylor, 24 N. Y. 139; Bell v. Ellis, 33 Cal. 620. *Cf.* Talcott v. Henderson, 31 O. S. 162.

[7] 3 Wait Ac. & Def. 178; Per HITCHCOCK, J., in Howard v. Babcock, 7 Ohio, Pt. 2, 73, 81. *Cf.* Currier v. Rosebrooks, 48 Vt. 34.

[8] Chamberlin v. Scott, 33 Vt. 80; Rogers v. Parham, 8 Ga. 190; Merrill v. Ry. Co., 16 Wend. 586; McCullough v. Baker, 47 Mo. 401; Fitzgerald v. Hayward, 50 Mo. 516. *Cf.* Clendennen v. Paulsel, 3 Mo. 230.

of employment may sue for damages for the breach of contract, or he may sue on a *quantum meruit*;[1] and it has been held that such discharged employe, if he remain willing and ready to render service, may recover the stipulated wages, as if he had continued in the employment;[2] but this right to sue for unearned wages, resting upon the doctrine of constructive service, has been rejected in many of the more recent cases.[3]

One prevented, by sickness, from completing his contract for personal services can recover on a *quantum meruit* for the work done; but he can not recover on the contract.[4] The complaint in such case need not allege the non-performance and the excuse; these are matters for reply.[5]

It has been held an action *ex contractu* to recover money paid by a bank to defendant, and by him had and received to the use of plaintiff, is an election to ratify the payment, and precludes a subsequent action to recover the money from the bank on the ground that its payment was unauthorized.[6]

In a cause that may be appealed, the defeated party may sometimes have a choice between an appeal and a review in error. In such case, he may not prosecute both appeal and error, either concurrently or successively; and the election to pursue the one is a waiver of the right to pursue the other.[7]

[1] Knutson v. Knapp, 35 Wis. 86.

[2] Gandell v. Pontigny, 4 Camp. 375; Strauss v. Meertief, 64 Ala. 299; Bowman v. Holladay, 3 Oreg. 182; Bliss Pl. 17.

[3] Wood's Mayne on Dam., sec. 280; Wood's Master and Servant, 246; Howard v. Daly, 61 N. Y. 362; Per ERLE, J., in Goodman v. Pocock, 15 Ad. & Ell. (N. S.) 576; James v. Allen Co., 44 O. S. 226, and cases cited; Willoughby v. Thomas, 24 Gratt. 522; Miller v. Goddard, 34 Me. 102.

[4] Green v. Gilbert, 21 Wis. 395.

[5] Wolfe v. Howes, 20 N. Y. 197.

[6] Crook v. Bank, 83 Wis. 31. For the choice of remedies by the vendor and by the vendee of personal property, see post, 476.

[7] To prosecute both appeal and error, would be vexatious, and would be taking two chances at once. As plaintiff in error, the party would complain of a judgment which, by the appeal, had been vacated or suspended. Elliott's App. Proc. 149, 530; Ins Co. v. Routledge, 7 Ind. 25. *Cf.* Bartges v. O'Neil, 13 O. S. 72; Schweickhart v. Stuewe, 75 Wis. 157; Nau v. Gobrecht, 8 O. C. Cl. 518.

The choice between remedies is usually to be determined by considerations of expediency. For example, one remedy may be subject to the bar of the statute of limitations, while the other would not be; replevin of goods, or specific performance, may be a more available remedy than a judgment for money, because of the insolvency of the defendant, or because of his right to exemptions from execution; and where a tort-feasor has sold property for more than its value, an action for money had and received might be preferable to an action in tort.

CHAPTER XXVI.

THE PARTIES TO AN ACTION.

449. Parties, Privies, and Strangers.—Having differentiated the facts of a given transaction, and having determined, pursuant to the rules and suggestions hereinbefore given, that a right of action exists, the next preliminary inquiry in the bringing of an action will be as to what persons should be made parties thereto.

With reference to an action, persons are parties, privies, or strangers. Parties are those who have a right to participate in the proceedings—to assert a demand or make defense, to introduce testimony, and to appeal from the decision. Privies are those who are bound by the proceedings in an action because of their successive relationship to the subject of the action.[1] Those who are neither parties nor privies, are strangers to the action. Parties are always bound by the proceedings in the action; and privies are so bound to the same extent as are the parties with whom they are in privity. The general rule is, that strangers to an action are not bound by the proceedings or judgment therein; but to this rule there are some apparent exceptions. (1) The records of judicial proceedings are conclusive proof, *inter omnes*, that what is therein recorded actually took place. (2) Judgments declaratory of the status of a person or thing are in like manner generally conclusive as to such status.[2]

Those who, as plaintiffs, commence an action, *ipso facto* become parties; and those named in the complaint as defendants become parties when brought into court by service, or by voluntary appearance. Pending the action, others may, by order of the court, become parties, or be made parties.

[1] Ante, 415.

[2] Big. on Estop. 150; Best on Ev. 590; Reyn. on Ev. 34, 35.

One person may sue or be sued alone, or several may join as plaintiffs or as defendants; sometimes one may sue or defend for himself and others; and a person may sue or be sued in a representative capacity. With but few exceptions, all persons may sue and may be sued; and as the law undertakes to protect all legal rights, and to redress all legal injuries, it follows, as a general rule, that an action should be brought by him whose legal right has been violated or is threatened, and against him who violated it or who threatens it. In other words, the general rule is, that the person of inherence should be plaintiff; and if the right involved is *in personam*, the person of incidence should be defendant, or if the right is *in rem*, he who invades or threatens it should be defendant. It will be seen that the rules relating to the parties to an action, excepting a very few adopted for convenience and economy, are drawn from the substantive law creating rights and imposing obligations.

I. OF PARTIES PLAINTIFF.

450. Plaintiffs in Actions ex Contractu.—Except when otherwise provided by statute, the general rule of the Reformed Procedure is, that actions must be brought in the name of the real party in interest. When an action on contract concerns only the original parties to the contract, it will not be difficult to determine who should be the plaintiff. At common law, no one could sue for the breach of a contract who was not a party thereto, and hence an action on contract, whether express or implied, had to be brought in the name of him who held the legal interest.[1] This requirement compelled the assignee of a chose in action to sue thereon in the name of his assignor. But this requirement, which resulted from the doctrine of privity,[2] was more formal than real;[3] for though the assignment of a contract does not make the assignee a party to the contract, it does entitle him, *sub modo*, to the rights of a party thereto. But under the modern rule,

[1] 1 Chit. Pl. 2; Alton v. Midland Ry. Co., 19 C. B., N. S., 213.

[2] Ante, 418.

[3] Steph. Pl. 30, 31.

the assignee of a chose in action that is legally assignable[1] should sue thereon in his own name.[2]

The legal title to negotiable paper payable to order can be transferred only by indorsement; but one may become the equitable owner thereof without indorsement,[3] and as such equitable owner he may sue thereon in his own name, because he is the real party in interest.[4] So, also, one who holds the legal title to such paper, by indorsement thereof, though it be only for collection, or as collateral security, may sue thereon in his own name; for, having the legal title, and being entitled to receive the money, he is the real party in interest.[5]

An assignment of part of an entire demand is void at law, unless made with the consent of the debtor.[6] At common law, the assignee of part of an entire demand could not recover on it, without alleging and proving that it was made with the consent of the debtor. Under the modern procedure, the practice is not entirely uniform; but the prevailing rule seems to be, that the allegation of the debtor's consent may be dispensed with, by making the other part-owner a

[1] The distinction between rights in action that are assignable and those that are not assignable belongs to the substantive law, and not to pleading; for the codes do not create any new right of action, nor make that assignable which was not before assignable.

[2] Mills v. Murry, 1 Neb. 327; Canefox v. Anderson, 22 Mo. 347; Schnier v. Fay, 12 Kan. 184; Knadler v. Sharp, 36 Iowa, 232, 235; Long v. Heinrich, 46 Mo. 603; Lytle v. Lytle, 2 Met. (Ky.) 127; Wheatley v. Strobe, 12 Cal. 92, 98.

[3] 1 Dan. Neg. Instr. 664 a, 741.

Williams v. Norton, 3 Kan. 295; Pease v. Rush, 2 Minn. 107; White v. Phelps, 14 Minn. 27; Hancock v. Ritchie, 11 Ind. 48. "The effect of our new code of practice, in abolishing the distinctions between law and equity, is, to allow the assignee of a chose in action to bring a suit in his own name in cases where, by the common law, no assignment would be recognized. In this respect, the rules of equity are to prevail, and the assignee may sue in his own name." Per GAMBLE, J., in Walker v. Mauro, 18 Mo. 564, 565. "The party beneficially interested, though he may not have the legal title, may sue in his own name. This may not precisely accord with the line of decisions under other codes, but we think it liberal and right, and conducive to the practical attainment of justice." Per DILLON, J., in Cottle v. Cole, 20 Iowa, 481, 486.

[4] Ante, 327, and cases cited.

[5] Mandeville v. Welch, 5 Wheat. 288; Bisph. Prin. Eq. 166.

party, so as to save the obligor from liability to two actions on the one demand.[1]

451. Plaintiffs in Actions ex Contractu, Continued.— An infant has the same right to sue that an adult has, though, as matter of form, his action should be by his next friend. But the father of an infant, being entitled to his services and his earnings, is the proper plaintiff in an action to recover such earnings, unless he has emancipated the child; in which case the infant should sue.[2]

Liability for malpractice, though it is usually an incident of contract, is not dependent on privity of contract, and the injured person may maintain an action, though the employment was by a parent or friend.[3] The right invaded in such case is not strictly a contract right.

Where a promise is made, on a valid consideration, to one for the benefit of another, the one for whose benefit it is made is the real party in interest, and he may, in his own name, subject to some qualifications, bring an action for its breach.[4]

The authorized act of an agent is, in law, the act of his principal. *Qui facit per alium, facit per se.*[5] Therefore, the principal, and not the agent, is the proper person to sue on an obligation made to an agent as such. And this is so as to public agents, as well as to private agents; for when a public agent acts by legal authority, and within the line of his duty, his contracts are public and not personal.[6]

It is sometimes provided by statute that the trustee of an express trust, one with whom a contract is made for the

[1] Grain v. Aldrich, 28 Cal. 514; Lapping v. Duffy, 47 Ind. 51. Whether, in such case, the assignor and his assignee of part of the demand are joint owners, and may be joined as plaintiffs, or whether one of them should be made a defendant, *quære*. See 21 Cal. 152. As to whether a bank check is an assignment, *pro tanto*, of the fund on which it is drawn, see 2 Dan. Neg. Instr. 1638, 1643, and cases cited; 3 Pom. Eq. Jur. 1284; Ry. Co. v. Bank, 53 O. S.

[2] 1 Chit. Pl. 2, note 1.

[3] Norton v. Sewall, 106 Mass. 143; Thomas v. Winchester, 6 N. Y. 397.

[4] Ante, 420, and cases cited. See, also, Coleman v. Whitney, 20 Atl. Rep. 322. *Cf.* Townsend v. Backham, 143 N. Y. 516.

[5] 1 Chit. Pl. 34 a.

[6] Comrs. Canal Fund v. Perry, 5 Ohio, 57, 64.

benefit of another, or one expressly authorized by statute, may bring an action without joining with him the person for whose benefit the action is prosecuted. Under favor of such statute, one to whom a note is made payable in trust for others may sue on it without joining them.[1] And where a mortgage is made to one in trust for the owners of the notes thereby secured, he may in like manner sue thereon without joining them, even though the trust relation does not appear on the face of the instrument.[2] And the holders of the notes being the real parties in interest, may bring the action.[3]

452. Plaintiffs in Actions ex Delicto.—In actions founded upon tort, the general rule is, that he who has sustained the injury is the real party in interest, and should bring the action. In case of injury to, or conversion of, personal property, owned by one, and rightfully in the possession of another, each may be entitled to an action—the one for injury to his possessory right, the other on account of his reversionary interest.[4] One in possession of land as tenant may sue for a trespass on the land so far as it is an injury to his rights; and the landlord, while generally he can not sue for trespass, may yet maintain an action for injury that is of a permanent character, affecting his estate.[5] But if the land be in the possession of one as the mere servant or agent of the owner, the latter is regarded as in actual possession, and he alone can sue.

For personal injury to a servant, he may sue, for the violation of his right of personal security; and if the injury results in loss of services to the master, he too has a right of action, for the violation of his proprietary right to the services. For the seduction of a servant, resulting in loss of services to the master, he has, for like reason, a right of action for such loss; but the servant, by consenting, is deprived of remedy. *Volenti non fit injuria.*[6]

[1] Scantlin v. Allison, 12 Kan. 85; Nicolay v. Fritschee, 40 Mo. 67; Wolcott v. Standley, 62 Ind. 198.

[2] Hays v. Gas. Co., 29 O. S. 330.

[3] Ettlinger v. Ry. Co., 142 N. Y. 189.

[4] 1 Chit. Pl. 62; Mech. on Agency, 765.

[5] 1 Chit. Pl. 62, 63; 1 Add. on Torts, 195.

[6] Paul v. Frazier, 3 Mass. 71; Broom Max. 268.

Only a few of the rights arising from torts are assignable so as to authorize the assignee to sue thereon ; the general rule being, that a right of action for injury to property survives to the personal representatives, and is assignable, while the right to redress for a personal wrong—whether to person or to reputation—dies with the death of the person, and is not assignable. This general rule, to which there are few exceptions, practically makes the assignability of a right of action for tort depend upon whether the right is such as would survive to the personal representatives of the injured person.[1]

II. OF PARTIES DEFENDANT.

453. Some General Considerations.—In determining who should be made parties to an action, it must be borne in mind (1) that the presence of necessary parties is essential to the jurisdiction of the court,[2] and (2) that only parties and their privies will be concluded by the judgment;[3] and in determining who should be made defendants, the distinction between *necessary* parties and *proper* parties should not be overlooked. One who has, or claims, an interest in the controversy adverse to the plaintiff, is a necessary party; while one whose presence is requisite only to a full and complete determination of the questions involved, is a proper party. The distinction between necessary parties and proper parties is well illustrated by an action to foreclose an equity of redemption, explained in the next succeeding section.

In actions on express contracts, the agreement itself desig-

[1] 3 Pom. Eq. Jur. 1275; Tyson v. McGuineas, 25 Wis. 656; Byxbie v. Wood, 24 N. Y. 607; Zabriskie v. Smith, 13 N. Y. 322; McMahon v. Allen, 35 N. Y. 403. In most of the states, the abatement of actions and of rights of action is regulated by statute.

[2] Post, 463, 464.

[3] It has been held, however, that persons who in fact control the proceedings, though not parties of record, are as much bound as if named as parties in the record. Courts will look beyond the nominal parties, and hold those concluded who conducted, directed, and controlled the proceedings. Lovejoy v. Murray, 3 Wall. 1, 18; Bachelder v. Brown, 47 Mich. 366, 370; Palmer v. Hayes, 112 Ind. 289; Stoddard v. Thompson, 31 Iowa, 82.

nates the parties to the action; he who assumed the obligation, though not beneficially interested, is the party to be made defendant. But in actions to recover for torts, others than the person who did the wrongful act may be liable, and may be made defendants. A master may be liable for the tortious act of his servant; the keeper of animals may be liable for certain of their acts; and one may be liable for the tortious act of another, by his ratification thereof. With a few exceptions, infants are not liable on their contracts; but with a few exceptions they are liable for their torts. Executors are liable on the contracts of their testators; but they are, in general, not liable for their torts. One who ought to be a party plaintiff, but who refuses to join in bringing the action, may be made a defendant; and one may be made a defendant for the purpose of obtaining affirmative relief against him, or simply to cut off some pretended right which he asserts; and besides the original parties to an action, others may be brought in while it is pending.

"The general rule as to parties in chancery is, that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. But there are qualifications to this rule arising out of public policy and the necessities of particular cases. The true distinction appears to be as follows: first, where a party will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule; second, where a person is interested in the controversy, but will not be directly affected by the decree made in his absence he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree without him if he can be reached; third, where he is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter which may be conveniently settled by the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant."[1]

[1] Per BRADLEY, J., in Williams v. Bankhead, 19 Wall. 563. *Cf.* Hughes Tech. of Law, 234.

The codes of procedure have, in the main, adopted the equity theory as to parties, with a view to avoid circuity of actions and multiplicity of suits.

454. Parties Defendant in Particular Cases.—In an action for the specific performance of a contract for the conveyance of land, there are ordinarily two things to be affected by the decree—the purchase-money, and the title to the land; and all persons having a legal interest in either of these should be parties to the action. If no third person has, or claims to have, an interest in the property, and if the parties to the contract are living, they are the only persons to be made parties to the action. If either of the parties to the contract be dead, the heir or devisee succeeds to his interest in the land, and the personal representative becomes entitled to the purchase-money if unpaid. If such action be brought by the personal representative of a deceased vendor, his heirs or devisees, if they refuse to join as plaintiffs, should be made defendants.[1] And in such case, if the vendee be dead, the action should be against both his heirs or devisees and his personal representative.[2] On the other hand, if the action be against the vendor, and the vendee be dead, the heirs or devisees of the latter, having succeeded to his equitable rights, are the proper parties plaintiff;[3] and if the vendor be dead, his heirs or devisees, having succeeded to the legal title, should be defendants.[4]

In a suit to foreclose a mortgagor's equity of redemption, whether by strict foreclosure or by judicial sale, the only necessary parties defendant are those interested in the equity of redemption—the mortgagor, his heir, devisee, grantee, or assignee. Other mortgagees and lien-holders are proper, but not necessary, parties. Any mortgagee, be his lien senior, junior, or intermediate, may foreclose without making other lien-holders parties. In such case, the rights of those not

[1] Sto. Eq. Pl. 160, 177; Mitchell v. Shell, 49 Miss. 118; Roberts v. Marchant, 1 Hare, 547.

[2] Sto. Eq. Pl. 160; Townsend v. Campernowne, 9 Price, 130.

[3] Buck v. Buck, 11 Paige, 170.

[4] Sto. Eq. Pl. 177; Morgan v. Morgan, 2 Wheat. 290; Judd v. Mosely, 30 Iowa, 423; Moore v. Murrah, 40 Ala. 573; Potter v. Ellice, 48 N. Y. 321.

made parties would not be affected; and a purchaser at judicial sale would take the land subject to their rights.[1] But the proper practice is, to make all other lien-holders parties defendant, in order that the sale may be of the whole title, free from incumbrance.[2] A mortgagor who has conveyed away his equity of redemption has no interest in a suit to foreclose, and is not a necessary party,[3] unless he is also the debtor, and the plaintiff seeks judgment against him in the same action.[4] The assignor of a claim for work done or money paid out is not a necessary party to an action thereon by the assignee.[5]

III. OF THE JOINDER OF PARTIES.

455. The Common-law Rules.—Under the common law, if a right of action is in two or more persons jointly, they should join as plaintiffs in an action thereon. This is so because, (1) one person ought not to sue alone for the whole of that whereof he is entitled to only a moiety, and (2) one who is liable ought not to be subjected more than once for one and the same entire cause.[6] And where a primary right has been violated by the joint act or default of two or more, if the remedy be by action *ex contractu*, the wrong-doers should all be joined as defendants; if the action be in form *ex delicto*, the wrong-doers may or may not be joined as defendants, at the option of the plaintiff. The reason for this distinction is, that in contracts, if the obligation be joint, the liability can not be otherwise than joint, for a contract with two or more jointly is not a contract with each or with any of them severally;[7] but where wrong-doers join in a tortious act, the act

[1] Sto. Eq. Pl. 193; Anson v. Anson, 20 Iowa, 55; Newcomb v. Dewey, 27 Iowa, 381; Childs v. Childs, 10 O. S. 339; Stewart v. Johnson, 30 O. S. 24; Holliger v. Bates, 43 O. S. 437.

[2] 4 Kent Com. 184–5. *Cf.* Wright v. Bundy, 11 Ind. 398; Jacobie v. Mickle, 144 N. Y. 237.

[3] Jones v. Lapham, 15 Kan. 540; Johnson v. Monell, 13 Iowa, 300; Semple v. Lee, 13 Iowa, 304; Delaplaine v. Lewis, 19 Wis. 476.

[4] In some jurisdictions, the joinder of the debtor in such case, and for such purpose, is authorized by statute.

[5] Gunderson v. Thomas, 87 Wis. 406.

[6] Gould Pl. iv. 56.

[7] Steph. Pl. 36.

of each is, in law, the act of all, and the acts of all are the acts of each.[1] Parties plaintiff have not such choice as to joinder or severance, because a right, unlike a liability, can not be joint and several.[2]

Upon the death of one of joint obligees, the action must be by the survivors; and if all die, the action must be by the personal representative of the last survivor.[3] If one of joint obligors die, the liability passes to the survivors, and on the death of all, it passes to the representatives of the last survivor.[4] The remedy at common law for non-joinder and for misjoinder is by demurrer, by plea in abatement, by nonsuit, by arrest of judgment, or by writ of error, according to the circumstances of the case.[5]

456. Joinder of Parties under the Reformed Procedure.—The new procedure has not annulled, but has materially modified, the rules of the common law as to the joinder of parties. Those rules were mainly drawn from the substantive law creating rights and obligations, and fixing their character as joint, or as several, or as joint and several. The like rules of the modern procedure are drawn from the same source;[6] and the modifications that have been made result mainly from the union of legal and equitable rights and defenses in one action, and from the consequent adoption of some of the broader rules of the equity procedure.

The codes generally provide, that all persons having an

[1] Gould Pl. iv. 66. Torts are in their nature several. and the joinder of tort-feasors is allowed because the law makes each liable for the acts of all, done in furtherance of the common design. 6 Wait's Ac. & Def. 110; 2 Add. on Torts, 1321; Ayer v. Ashmead, 31 Conn. 447.

[2] Slingsby's Case, 5 Rep. 19; Eccleston v. Clipsham, 1 Wm. Saund. 153; Petrie v. Bury, 3 B. & C. 353; Scott v. Godwin, 1 B. & P. 67, 71; Foley v. Addenbroke, 4 Q. B. 197; Keightley v. Watson, 3 Exch. 721, 723, 726.

[3] 1 Chit. Pl. 19, 67; Dicey on Parties, 149; Callison v. Little, 2 Porter, 89.

[4] Dicey on Parties, 255; 1 Chit. Pl. 50.

[5] Steph. Pl. 48–51; 1 Chit. Pl. 13, 66, 86, 452. Mr. Andrews, in his edition of Stephen on Pleading, has added a chapter on "The Joinder of Parties," which is a very full and clear treatment of the subject. See pages 26–51.

[6] *Cf.* Steph. Pl. 35.

interest in the subject of the action, and in obtaining the relief demanded, may, with certain specified exceptions, be joined as plaintiffs; that those who are united in interest must be joined, as plaintiffs or as defendants; and that any one who has, or claims, an interest in the controversy adverse to the plaintiff, or who is a requisite party to a complete determination or settlement of the question involved therein, may be made a defendant.

It will be seen from these provisions that persons *united* in interest *must* be joined, while those having an interest in the subject of the action, and in obtaining the relief demanded, *may* be joined. Persons *united* in interest are such as have a *joint* interest; and these must be joined, because they are necessary parties. But persons not jointly interested may have a common interest in the subject of the action, and in the relief sought; and these, though not necessary parties, may be joined as plaintiffs. But they must, to be joinable, be interested both in the subject of the action, and in the relief demanded; and where there is not such community of interest, there can not be joinder. While persons, to join as plaintiffs, must have a joint interest, or a common interest, all that is requisite to the joinder of a person as defendant, is, that he have or claim an interest in the controversy, or that he be a requisite party to a complete determination of the matters involved.

It is generally provided in the codes, that one who should be joined as a plaintiff, but who will not consent to such joinder, may be made a defendant, and the reason therefor stated in the complaint. This rule is adopted from the practice in equity. The rule at common law was, that a necessary plaintiff could be joined as plaintiff, against his protest.[1]

457. Joinder of Parties—Illustrative Cases.—Where there were three obligees in an injunction bond, and there was a breach of the bond that interfered with separate and distinct rights of the obligees, it was held they might properly join in an action on the bond.[2] The action was not for

[1] Steph. Pl. 44–47.

[2] Loomis v. Brown, 16 Barb. 325.

the infringement of the distinct and disconnected rights of the plaintiffs, but for the breach of the bond; and in this, and in the relief demanded, they had a community of interest. In an action on a forthcoming attachment undertaking, it was held that subsequent attaching creditors, though not named in the undertaking, might be joined as plaintiffs, because of their common interest in the proceeds of the goods attached.[1] The several owners of separate tracts of land illegally charged with an assessment may properly join in an action to restrain the collection of the assessment.[2] Such parties own separate properties to be affected by the assessment; but they have a common interest in the subject of the action, and in the relief demanded. The cases are numerous in which a joinder of plaintiffs has been allowed, on the ground of community of interest in the thing complained of, and in the relief sought.[3] But it is not enough that persons are all interested in the legal question involved;[4] they must have a common interest in the thing complained of, and in the remedy sought.

Where two railway companies use the same track, they may be joined as defendants at the suit of a passenger injured in a collision caused by the negligence of both companies.[5] An assignee for the benefit of creditors may, in one action, enjoin several execution creditors from selling property assigned to him, and levied on by them.[6] There can not be joint liability for slander,[7] for defamatory words can not be jointly uttered; *aliter* as to libel.[8]

It has been held, under the new procedure, that one firm

[1] Rutledge v. Corbin, 10 O. S. 478.

[2] Glen v. Waddell, 23 O. S. 605; Upington v. Oviatt, 24 O. S. 232.

[3] Tate v. O. & M. Ry. Co., 10 Ind. 174; Foot v. Bronson, 4 Lans. 47, 52; Pettibone v. Hamilton, 40 Wis. 402; Lutes v. Briggs, 5 Hun, 67. *Contra*, Schultz v. Winter, 7 Nev. 130; Fleming v. Mershon, 36 Iowa, 413.

[4] Peck v. School Dist., 21 Wis. 516; Barnes v. Beloit, 19 Wis. 93, 94. *Cf.* W. & K. Bridge Co. v. Wyandotte, 10 Kan. 326.

[5] Colegrove v. Ry. Co., 20 N. Y. 492.

[6] Oliphant v. Mansfield, 36 Ark. 191. *Cf.* Hillman v. Newington, 57 Cal. 56.

[7] Webb v. Cecil, 9 B. Mon. 198.

[8] Thomas v. Rumsey, 6 Johns. 26, 32.

may sue another firm, in an action for legal relief, although the two firms have a common member; and that it is not necessary to resort to the equitable relief of an accounting.[1]

458. One Person may Sue or Defend for all Interested.—The codes provide that "when the question is one of a common or general interest of many persons, or when the parties are very numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." This rule is adopted from the equity practice, and is founded on convenience. Of course, one person can not, under favor of this rule, represent others, unless he and they could properly be joined as plaintiffs or defendants, as the case may be;[2] and the requisite facts to show both the right of joinder and the right of representation should be averred.[3]

This provision, which applies as well to legal as to equitable actions,[4] embraces two classes of cases; (1) where many persons have a common interest, and (2) where the parties are very numerous. To bring a case within the former class, the persons interested need not be so numerous as to make the inconvenience of joinder a reason for allowing part to represent all; but to bring a case within the latter class, the pleading must show that the parties are so numerous as to render it impracticable to bring them all in;[5] it has been held in one case that twenty was not a sufficient number;[6] in another, that thirty-five was not;[7] and in another, that forty was insufficient.[8] But where it was alleged that the parties interested were "more than forty in number,"[9] or that they were "about one thousand" in number,[10] it was held sufficient.

[1] Cole v. Reynolds, 18 N. Y. 74. *Cf.* 1 Pom. Eq. Jur. 189.

[2] Reid v. The Evergreens, 21 How. Pr. 319, 321; Adair v. New River Co., 11 Vesey, 444; Story's Eq. Pl. 123.

[3] Bardstown, etc., Ry. Co. v. Metcalf, 4 Met. (Ky.) 199, 204.

[4] Platt v. Colvin, 50 O. S. 703.

[5] Bardstown Ry. Co. v. Metcalf, 4 Met. (Ky.) 199, 204.

[6] Harrison v. Stewardson, 2 Hare, 530.

[7] Kirk v. Young, 2 Abb. Pr. 453.

[8] Brainerd v. Bertram, 5 Abb. N. C. 102.

[9] Taylor v. Salmon, 4 M. & C. (18 Eng. Ch.) 134.

[10] Platt v. Colvin, 50 O. S. 703.

The provision under consideration is applicable in actions by heirs, to set aside a deed or will of their ancestor;[1] to actions by distributees or legatees, for an accounting;[2] to actions by voluntary unincorporated associations;[3] to actions by several lot-owners, to enjoin the collection of an illegal assessment;[4] and in actions by tax-payers,[5] by pew-holders,[6] by policy-holders,[7] and by creditors to set aside fraudulent conveyances.[8]

Persons thus represented are not thereby made parties to the action, though they are "in a sense deemed to be before the court."[9] If they come in and share the expenses or the fruits of the action, or if, after reasonable notice, they fail to come in, they will be bound by the judgment rendered.[10]

459. Change of Parties Pending Suit.—The abatement of actions by the death or disability of a party, is regulated by statute in the different states, and no general rule can be drawn from them. Where it is found that a complete determination of the controversy can not be had without the presence of other parties, the codes generally provide that the court may cause them to be brought in; and this may be done at any stage of the action, even after appeal.[11] Where a suit is properly brought in the name of a public officer, the expiration of his term of office will neither abate nor discontinue the action, because the proceeding is in fact at the suit of the public, represented by the officer.[12]

The right of third persons to intervene is limited, generally,

[1] Hendrix v. Money, 1 Bush, 306.

[2] McKenzie v. L'Amoureux, 11 Barb. 516, where the number represented by the plaintiff was three; Towner v. Tooley, 38 Barb. 598; Hallett v. Hallett, 2 Paige, 15, 21.

[3] Sto. Eq. Pl. 97, 107 et seq.; Platt v. Colvin, 50 O. S. 703.

[4] Upington v. Oviatt, 24 O. S. 232.

[5] Lynch v. Eastern, etc., Co., 57 Wis. 430.

[6] Milligan v. Mitchell, 3 Myl. & Cr. 72, 84.

[7] Luling v. Ins. Co., 45 Barb. 510.

[8] 1 Dan. Ch. Pl. 235.

[9] Sto. Eq. Pl. 99; Adair v. New River Co., 11 Vesey, 444.

[10] Sto. Eq. Pl. 99, 106; Barker v. Walters, 8 Beav. 92; Per DIXON, C. J., in Stevens v. Brooks, 22 Wis. 695, 703–4; Per WALWORTH, Ch., in Hallett v. Hallett, 2 Paige, 19.

[11] Shaver v. Brainard, 29 Barb. 25.

[12] Bridge Co. v. Mayer, 31 O. S. 317, 323.

to actions for the recovery of real or personal property. In such actions, a person claiming an interest in the property may, on his application, have leave to become a party. For example, in a suit for specific performance of a contract to convey land, a third person, alleging paramount title in himself, may be allowed to intervene.[1] But in a suit to partition land among the heirs and devisees of a deceased owner, a judgment creditor of the decedent[2] has not such interest as to warrant his intervention.

The statutory remedy of interpleader sometimes brings a new party into a pending action. Interpleader in equity is by original bill for relief.[3] It is the proper remedy where two or more persons each claim the same debt or duty from the plaintiff, and he seeks the judgment of the court as to which of the claimants is entitled. In such case, the plaintiff must stand as a mere stakeholder, and must be indifferent as to the rights or the success of the several claimants. He must, in his bill, admit his liability to one or another of the defendants, must assert his ignorance as to which has the legal or equitable right, must offer to bring the money or thing into court, or to obey the order of the court in reference thereto, and must make affidavit that there is no collusion between him and any other party.[4] The prayer of the bill is in substance, that the defendants be required to interplead, and that the court may determine to which of them the plaintiff shall render that which he admits he owes.[5]

By statutes in nearly all the states, this right of interpleader is given to a defendant in certain actions, both legal and equitable. Under favor of such statute, the defendant may, before answer, represent, by affidavit, that a third party, without collusion with him, makes claim to the subject of the action, and that the defendant is ready to pay or do, as the court may direct. Thereupon, the court may order such

[1] Carter v. Mills, 30 Mo. 432. *Cf.* Baker v. Riley, 16 Ind. 479.

[2] Waring v. Waring, 3 Abb. Pr. 246.

[3] Ante, 151, 152.

[4] The court requires such affidavit as a means to prevent abuse of its jurisdiction.

[5] 3 Pom. Eq. Jur. 1320–1329; Bisph. Prin. Eq. 419–422; Barton's Suit in Eq. 70, 71. For forms of bill, see Lube's Eq. Pl. 399–403.

third party to appear and assert or relinquish his claim; and the defendant, upon complying with the order of the court touching the subject of the action, is discharged from further liability to either claimant. It will readily be seen that this summary remedy by statute is merely cumulative, and does not at all impair the equitable remedy; and such is the almost uniform holding.[1]

460. Modes of Objecting as to Parties.—All the codes of procedure make a defect of parties, whether plaintiff or defendant, a ground of demurrer by the defendant, if such defect appear from the complaint; otherwise, the non-joinder is to be taken advantage of by dilatory answer showing the defect.[2] Defect of parties means too few, not too many; and it relates to necessary parties, and not to proper parties.

An excess of parties may, in some states, be taken advantage of by demurrer. In some states misjoinder of parties plaintiff is ground for demurrer, while in some a misjoinder of parties plaintiff or defendant may be taken advantage of by demurrer.[3] Where there is a misjoinder of defendants, apparent from the complaint, the supernumerary parties may demur on the ground that, as to them, the facts stated do not constitute a cause of action.[4]

[1] Interpleader in equity is not to avoid the risk of two recoveries, but to avoid the vexation of two or more suits in respect of one liability. It is of the essence of the proceeding, that the plaintiff is liable to only one of the several claimants. He can neither ask nor have any specific relief; and he can have no concern with the result of the contention which he invites, for in any event he will be freed from their opposing demands.

[2] Ante, 237, 298. The latter section relates to demurrer for non-joinder, and cities the authorities.

[3] Ante, 301, and cases cited.

[4] Lewis v. Williams, 3 Minn. 151; Nichols v. Drew, 94 N. Y. 22; Palmer v. Davis, 28 N. Y. 242; Rumsey v. Lake, 55 How. Pr. 340.

CHAPTER XXVII.

THE JURISDICTION OF THE COURT.

461. Jurisdiction Defined.—Since a remedial right may not be enforced everywhere, and because the judgment of a court without jurisdiction is a nullity, the selection of the proper forum in which to institute an action is a preliminary consideration of the first importance.

Jurisdiction is the power of a court or tribunal to entertain an action, to hear and determine controversies therein, and to enforce its decision. Jurisdiction is original or appellate, general or limited, exclusive or concurrent, and territorial. It is *original*, when the court may entertain the action in the first instance; it is *appellate*, when the action may be entertained only on appeal from the judgment of another court. *General* jurisdiction extends over a great variety of causes, while *limited* jurisdiction extends only to certain specified causes. Jurisdiction is *exclusive*, when the action may be brought in only one particular court; it is *concurrent*, when the action may be entertained by one court, or by another, at the option of the plaintiff. *Territorial* jurisdiction is the geographical limit within which a court may act.

Three things are essential to the exercise of jurisdiction in any case: First, the court must have cognizance of the subject-matter of the action; secondly, the proper parties must be before the court; and thirdly, the action of the court must be invoked by proper pleadings.[1]

462. Cognizance of the Subject-matter.—The subject-matter of an action is the right asserted by the plaintiff, and

[1] Steph Pl. 136, note 2; Munday v. Vail, 5 Vroom (N. J.), 418. *Cf.* Reynolds v. Stockton, 140 U. S. 254; Cooper v. Reynolds, 10 Wall. 308. For the distinction between courts of limited jurisdiction and those of general jurisdiction, see ante, 374, 375.

upon which he demands the judgment of the court. For example, the right, in ejectment, to obtain possession of the land; in assumpsit, to recover on a promise; in equity, to have foreclosure, or specific performance.[1] It is this that characterizes the action, and this must fall within the established cognizance of the court; that is, the court must, by the constitution and the laws, have cognizance of the class of cases to which the one to be entertained belongs.

Jurisdiction of the subject-matter is conferred only by the constitution and the laws.[2] It can not be conferred by the consent of the parties;[3] nor can it be abridged by an agreement of parties. The right to administer justice can neither be controlled nor curtailed by an arrangement between the parties.[4] And the legislature can not subsequently validate a judicial act that is void for want of jurisdiction of the subject-matter.[5]

Where jurisdiction depends upon the amount involved, the criterion is the amount stated in the body of the complaint, and not that stated in the prayer for relief, if these differ.[6] And where jurisdiction depends upon the existence of some extrinsic fact, such fact must be alleged in the complaint.[7]

[1] Jacobson v. Miller, 41 Mich. 93; Per MILLER, J., in Cooper v. Reynolds, 10 Wall. 308, 316. For the distinction between the *subject* of an action, and the *subject-matter* thereof, see ante, 181, note.

[2] "By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred." MILLER, J., in Cooper v. Reynolds, 10 Wall. 308, 316.

[3] Gilliland v. Sellers, 2 O. S. 223. *Cf.* Mex. Ry. Co. v. Davidson, 157 U. S. 201.

[4] Watts v. Boom Co., 47 Mich. 540.

[5] Maxwell v. Goetschins, 11 Vroom, 383.

[6] Lee v. Watson, 1 Wall. 337; Shacker v. Ins. Co., 93 U. S. 241.

[7] Ante, 181. The Roman law distinguished *jurisdiction* from what it termed the *competency* of a tribunal; meaning by competency, the right which a tribunal has to exercise in a particular case, the jurisdiction belonging to it. Incompetency could be waived by the consent of the parties, but want of jurisdiction could not be so waived. Mack. Rom. Law (5th Ed.), 337.

463. The Parties Must be in Court.—In the selection of the forum in which to bring an action, regard must be had, not only to its jurisdiction of the subject-matter, but to its right and power to acquire jurisdiction of the defendant; the maxim being, *actor sequitur forum rei*—a plaintiff follows the court of the defendant. The judgment of a court pronounced against one without hearing him, or giving him opportunity to be heard, is not a judicial determination of his rights, and does not conclude him.

Jurisdiction of the defendant may be acquired (1) by his voluntary appearance and submission to the court, or (2) by service of process upon him; and a voluntary appearance may be (1) a general appearance, which is a waiver of process, and confers jurisdiction of the person, or (2) a special or qualified appearance, which is for some special purpose only, and does not confer jurisdiction of the person.[1] While consent of parties can not confer jurisdiction of the subject-matter, jurisdiction of the parties may be acquired by consent. The doctrine is, that consent will not confer jurisdiction where the court could not legally acquire it without consent; in other words, parties may waive their rights, and consent to what is legally within the power of the court, but they can not confer power upon the court. An appearance of the defendant for the purpose of contesting the merits of the cause, whether by motion or by formal pleading, is a waiver of all objection to the jurisdiction of the court over the person of the defendant, whether he intended such waiver or not. Thus, where the defendant, after the filing of a complaint, files a motion to strike from the files all papers in the action, for irregularities and defects;[2] or moves to have the cause dismissed on the ground that the court has not jurisdiction of the subject-matter of the action, and his motion is overruled,[3] it is a voluntary appearance, equivalent to service of process. But if a defendant appears in a cause

[1] Steph. Pl. 104, note 2.

[2] Maholm v. Marshall, 29 O. S. 171. *Cf.* Handy v. Ins. Co., 37 N. Y. 463.

[3] Elliott v. Lawhead, 43 O. S. 611. *Cf.* Sentenis v. Ladew, 140 O. S. 366.

for the sole purpose of objecting to the jurisdiction of the court over his person, and only makes such objection, he does not thereby submit himself to the jurisdiction of the court.[1]

464. Parties Must be in Court, Continued.—The right to object to the jurisdiction of the person of the defendant is waived by his voluntary appearance for any purpose other than to object to the jurisdiction of the court on that ground.[2] Even the filing of a motion objecting to the jurisdiction on the ground that the right of action arose in another state, is a submission of the person to the jurisdiction of the court,[3] But objection to jurisdiction of the subject, or of the subject-matter, of the action is not waived by the voluntary appearance of the defendant.[4]

A defendant may voluntarily submit himself to the jurisdiction of the court even after judgment. If a defendant file a motion, to vacate the judgment for want of jurisdiction of his person, and then consent to a dismissal of his motion;[5] or cause an undertaking for stay of execution to be given;[6] or appear in court and give notice of appeal;[7] he gives the court jurisdiction of his person. When a defendant invokes the action of the court, without questioning its jurisdiction, he thereby enters an appearance and submits to its jurisdiction of his person.[8] And this he may do so long as the case is pending—that is, during the time within which any further procedural act may be done therein.

Jurisdiction of the defendant *in invitum* can be acquired only by service of notice, actual or constructive, pursuant to the requirements of the statute. And when a writ is returned

[1] Smith v. Hoover, 39 O. S. 249; Reed v. Chilson, 142 N. Y. 152.

[2] Burdette v. Corgan, 26 Kan. 102; Meixell v, Kirkpatrick, 29 Kan. 679. And this rule applies as well to a corporation, and even to a foreign corporation, as to an individual. Pease v. Ry. Co., 10 Daly, 459; McCormick v. Ry. Co., 49 N. Y. 303; Handy v. Ins. Co., 37 O. S. 366; Harriett v. Ry. Co., 2 Hilt. 262.

[3] Handy v. Ins. Co., 37 O. S. 366

[4] People v. Ry. Co., 42 N. Y. 283; Gray v. Ryle, 18 Jones & S. 198; Harriott v. Ry. Co., 2 Hilt. 262.

[5] Marsden v. Soper, 11 O. S. 503.

[6] Shafer v. Hockheimer, 36 O. S. 215.

[7] Fee v. Iron Co., 13 O. S. 563.

[8] Mason v. Alexander, 44 O. S. 318.

without service, *alias* writs may be issued, until the defendant is summoned.

465. Must be Proper Pleadings.—It is not sufficient for the rightful exercise of jurisdiction, that the court have cognizance of the subject-matter and have the proper parties before it. In addition to these requisites, the action of the court must be invoked by the methods established by law for judicial procedure.[1]

Before jurisdiction can be affirmed to exist, it must appear, (1) that the law has given the tribunal capacity to entertain the complaint; (2) that such complaint has actually been conferred; and (3) that the person so complained of has been properly brought before the tribunal to answer to such complaint. When these jurisdictional requisites appear, the jurisdiction has attached, and the cause is *coram judice*. The decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred; and whether determined rightly or wrongly, is immaterial to the validity of the final judgment, when brought collaterally in question.[2]

As a court may not exercise its powers *ex mero motu*, so it may not exercise them except as invoked and authorized by the pleadings.[3]

[1] "To bring a cause before a court, competent to adjudicate it, it is not only necessary that the parties should be in *in jus vocatio*, —cited or summoned in a manner required by the law of procedure, —but a case must also be made, or stated, affecting the party against whom relief is asked." Per MINSHALL, J., in Spoors v. Coen, 44 O. S. 497, 502.

[2] Sheldon v. Newton, 3 O. S. 494.

[3] Steph. Pl. 28; Spoors v. Coen, 44 O. S. 497. A judgment that is not responsive to the issues presented by the pleadings is rendered without jurisdiction. The constitutional provision, that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," does not forbid inquiry, in the courts of the state to which the judgment is presented, as to the jurisdiction of the foreign court over the person and the subject-matter; Thompson v. Whitman, 18 Wall. 457; nor does it preclude inquiry as to whether the judgment so rendered was so far responsive to the issues tendered by the pleadings as to be a proper exercise of jurisdiction on the part of the court rendering it. Reynolds v. Stockton, 140 U. S. 254. *Cf.* Waterman v. Lawrence, 19 Cal. 210; Munday v. Vail, 34 N. J. L. 418. It has been held, that where parties, on appeal from a justice of the peace, proceed, upon the tran-

466. Must be Proper Pleadings, Continued.—A judgment rendered on a case not *stated* is *coram non judice*, though rendered by a court having jurisdiction of the subject-matter and of the parties. A court may not, simply because A. and B. are parties to a pending suit, decide some matter in which they are interested, but which is not involved in the pending litigation. For example, a mortgage may not be foreclosed upon pleadings in replevin, nor title quieted in an action for slander. In an action to foreclose a mortgage, the complaint alleged that one S., a defendant, had, or claimed, some interest in the property. He did not answer, and the decree purported to bar him of all right in the premises. In fact, S. held a senior mortgage, and in a subsequent action to foreclose his mortgage, it was held that the former decree adjudicated nothing as to him. The complaint alleged nothing against the validity of his claim, and he was not called upon to defend. He had the right, so far as advised by the complaint, to assume that the action would proceed upon the theory that he had a lien paramount to that of the plaintiff, and that his rights were not to be affected by the proceedings; and the complaint did not, by any proper allegation, invoke the action of the court as to the right or claim of S.[1] There was undoubted jurisdiction of the subject, of the subject-matter, and of the person; but the pleadings did not warrant the decree that was entered.

467. Must be Proper Pleadings, Continued.—A complainant alleged that he had loaned money on a promise of mortgage security, and that the land so to be mortgaged to him had been, by the borrower, fraudulently conveyed to another in trust for himself and wife for life, with remainder to his children. The prayer of the complaint was, that the trust be

script of the justice, and without pleadings, to trial, verdict, and judgment, the judgment will not be reversed on error. Hallam v. Jacks, 11 O. S. 692. In such case, the court having jurisdiction by the appeal, the want of pleadings was a mere irregularity, partly supplied by the transcript of the magistrate. And yet the decision is contrary to principle, and is of doubtful authority.

[1] Strobe v. Downer, 13 Wis. 11; Lewis v. Smith, 9 N. Y. 502; Spoors v. Coen, 44 O. S. 497; Laughlin v. Vogelsong, 5 O. C. C. Rep. 407.

declared void with respect to the claim of complainant. The decree adjudged the conveyance in trust to be invalid, not only so far as to let in the claim of the complaining creditor, but as between the trustee and the beneficiaries as well. The validity of this decree being afterward drawn in question collaterally, it was held, that so far as it exceeded the prayer of the complaint it was beyond the jurisdiction of the court, and was invalid; that the complainant had no standing to ask such decree, and the court had no authority to make it, because not moved thereto by the pleadings.[1]

Under a statute providing that when, in an action on a joint obligation, it is made to appear, by testimony, that one of the defendants signed the obligation as surety for his co-defendant, this fact shall be certified in the judgment, and the property of the principal debtor shall then be exhausted before property of the surety may be taken in execution, each of two joint obligors and co-defendants filed a paper purporting to be an answer, and alleging that he was surety and the other principal. The court found, "upon the issues joined between the defendants," that B. was surety, and C. principal. In a subsequent action for contribution, it was held, that the former finding had only the effect prescribed by the statute, that it might have been made without pleadings; that the supposed pleadings were not authorized, and they conferred upon the court no jurisdiction other than that conferred by the statute without pleadings; that the supposed issue joined in the case did not change the effect of the finding therein; and that in the action for contribution the relation of the parties to the obligation originally sued on was an open question.[2]

This jurisdictional requisite has not often received judicial consideration; but it rests upon the soundest principles of logic and of justice. A judgment upon something outside of the issue would conclude the parties upon a matter concerning which they had not been heard; and yet it is upon the ground that the parties have been heard, or have had an

[1] Munday v. Vail, 5 Vroom, 418. [2] Gatch v. Simkins, 25 O. S. 89.

opportunity to be heard, that the law gives conclusive effect to matters once adjudicated.

468. Actions Local and Transitory.—The common-law distinction between local and transitory actions does not generally obtain in this country; yet it by no means follows that a remedial right is capable of being enforced everywhere. Some actions are local, because of the nature of the subject of the action. An action for the recovery, or the partition of real property can be entertained only by a court within whose territorial jurisdiction the property is situate; for no other court can deal with the subject of the action. But personal actions, whether they arise *ex delicto* or *ex contractu*, are, in general, transitory in their nature, because they are founded on the violation of rights which, in legal contemplation, have no locality. *Debitum et contractus sunt nullius loci.*

Some actions—as for a statutory penalty, on an official bond, or for neglect of official duty—are, by statute, required to be brought "in the county where the cause of action or some part thereof arose." This is not a technical use of the term "cause of action,"[1] and is generally held to mean where *the cause of liability* arose.[2] A provision that an action against a railway company may be brought in any county through or into which its road passes, relates only to jurisdiction of the person, and does not render the action local. It is not necessary that the complaint in such case allege the *locus* of the road; and a voluntary appearance in an action brought in another county gives the court jurisdiction.[3]

469. Want of Jurisdiction.—It is a fatal objection to the jurisdiction of any court, that it has not cognizance of the subject-matter of the action; that is, that the nature of the action is such as the court is, under no circumstances, competent to entertain. In such case, a plea to the jurisdiction is not necessary. The cause may be dismissed on motion, or the court may, without plea, motion, or demurrer, dismiss it *sua sponte;* for the whole proceedings would be *coram non judice*, and void.[4]

[1] *Cf.* ante, 30, 31.
[2] Veeder v. Baker, 83 N. Y. 156.
[3] Ry. Co. v. Morey, 47 O. S. 207.
[4] Gould Pl. v. 25; Wildman v.

There is a material distinction, however, between want of jurisdiction, and error in the exercise of jurisdiction. In the one case, the whole proceedings are *coram non judice*, and void; in the other case, the judgment can not be impugned collaterally, and is valid until reversed in a proceeding directly attacking it.[1] When a court has jurisdiction, it is invested with power to determine the rights of the parties, and no irregularity or error in the exercise of such power can prevent its judgment from operating upon such matters as fall within the legitimate scope of its adjudication; but when a court acts without having jurisdiction, its exercise of authority is wholly usurped, and its judgment is the exercise of arbitrary power, under the forms, but without the sanction, of law.

Jurisdiction of the subject-matter depends, as a rule, upon the allegations, and not upon the facts. When a plaintiff alleges facts showing that he has a right of action, and the law has given the tribunal the power to entertain such cause, it should proceed—having first obtained jurisdiction of the defendant—to determine the truth or falsity of the complaint. It is not the truth of the allegations that confers jurisdiction in the first instance, for the court must have jurisdiction, before it can determine their truth, or take any advance step. Jurisdiction of the subject-matter is, therefore, properly determinable at the commencement, and not at the conclusion, of the inquiry;[2] and the test is, primarily, whether the court has power, under the allegations of the complaint, to enter upon an inquiry as to the right asserted.[3]

In a court of general and unlimited jurisdiction, it is not necessary to allege facts showing its jurisdiction. But in a court of limited, or of special, jurisdiction, its jurisdiction must be shown by allegations.[4]

Rider, 23 Conn. 172; Stoughton v. Mott, 13 Vt. 175; Gormley v. McIntosh, 22 Barb. 271.

[1] Gray v Bowles, 74 Mo. 419.

[2] Vanfleet's Coll. Attack, 60.

[3] Vanfleet's Coll. Attack, 61; Spoors v. Coen, 44 O. S. 497, 502. *Cf.* McGregor v. Morrow, 40 Kan. 730; Edwards v. Griffiths, 48 O. S. 464.

[4] Ante, 374; Steph. Pl. 136, note 2; Buddecke v. Ziegenhein, 122 Mo. 239; Brownfield v. Weicht, 9 Ind. 394. The presumption of jurisdiction, in a court of general jurisdiction, seems to include not only

When jurisdiction depends on "the amount in controversy," this is fixed by the amount *claimed*.[1] It has been held, but with more justice than logic, that where a court has assumed to act under lawful authority, an objection to its jurisdiction, made after trial, comes too late.[2]

470. How Want of Jurisdiction taken Advantage of.— Want of jurisdiction may be taken advantage of by motion— as where the defendant questions the pretended service of process,[3] or by demurrer if the ground appears from the complaint,[4] or by answer, if the ground does not so appear.[5] An inquiry as to the jurisdiction of the court may be made at any stage of the case; and when made, it must be considered and determined, for any further movement would be the exercise of jurisdiction.[6] And if a court has not jurisdiction before an amendment, it has none to allow the amendment to be made.[7] Any personal exemption from liability to an action must, to be made available, be taken advantage of by objection interposed before pleading to the merits.[8]

the subject-matter, and parties, but the subject of the action as well. Godfrey v. Godfrey, 17 Ind. 6; where it was held that a complaint for partition, in such court, need not show that the lands are within the county where the suit is brought.

[1] Wagner v. Nagel, 33 Minn. 348.

[2] Ry. Co. v. Power, 119 Ind. 269; Ry. Co. v. Heaton, 137 Ind. 1. In this last case, HOWARD, C. J., says, that to object for the first time, after losing the suit, is saying, in effect, "There is jurisdiction if I win, but not if I lose."

[3] Ante, 292, note.

[4] Ante, 291, 292.

[5] Ante, 237.

[6] Rhode Island v. Mass., 12 Pet. 657; Per BARTLEY, C. J., in Thompson v. Morton, 2 O. S. 26, 28.

[7] Denton v. Danbury, 48 Conn. 368.

[8] Thompson v. Morton, 2 O. S. 26. *Cf.* Smith v. Curtis, 7 Cal. 584; Bohn v. Devlin, 28 Mo. 319; Hall v. Mobley, 13 Ga. 318; Whyte v. Gibbes, 20 How. 541.

CHAPTER XXVIII.

ACTIONS AND DEFENSES.

471. Classification of Actions.—The new procedure abolished the distinction between actions at law, and suits in equity; discarded the use of "forms of action" as these were known to the common law, and substituted a single civil action for all cases, whether the right involved, or the relief demanded, be in its nature legal or equitable.[1] The distinctions abolished were formal; inherent differences remain. Considering the nature of the right involved, and of the remedy obtainable, actions are susceptible of various divisions and classifications.

There are inherent differences between legal rights and equitable rights, and between legal relief and equitable relief; and these have not been abolished. Amalgamation of legal and equitable rights, or of legal and equitable reliefs, was neither attempted nor intended; but the actions to enforce these rights, and to obtain these reliefs, have been unified, so that both kinds of rights may be asserted, and both kinds of relief obtained, not only in the one form of action, but in the same action;[2] and actions may now, as formerly, be distinguished as legal or equitable in their nature.

The common-law division of personal actions into those for the breach of a contract—*ex contractu*, and those for wrongs not connected with contract—*ex delicto*, marked a distinction as to the nature of the primary right involved; the former relating, in the main, to rights *in personam*, and the latter to rights *in rem*.[3]

In equitable actions, the reliefs afforded are, (1) ancillary and provisional, (2) preventive, and (3) final.[4] Actions

[1] Ante, 49, 161–163.
[2] Ante, 163.
[3] Ante, 87.
[4] Ante, 139.

are sometimes distinguished as local, and transitory; the former embracing suits that must, on account of the *locus* of some essential fact, be brought within a certain county or district; the latter embracing suits that may be brought wherever jurisdiction of the defendant may be obtained.[1] And, when only the character of the procedure is referred to, actions are sometimes distinguished as plenary and summary; the former being those in which the requisite proceedings are full and formal; the latter being those in which the requisite proceedings are brief and informal. Actions are likewise distinguished as *in rem*, and *in personam;* the former term designating proceedings instituted against a specific *thing*, and the latter term designating proceedings that are against the *person*.

This chapter is designed only to illustrate the application of the principles of pleading to operative facts; and neither scientific classification nor exhaustive treatment will be attempted. Only a few of the actions of most frequent occurrence will be noticed; and these will, for convenience, be arranged under three subdivisions; to wit, (1) actions on contracts, (2) actions for torts, and (3) actions for equitable relief. Some forms of pleadings are inserted, but, as stated in the introduction, these are merely as studies, and by way of illustration, and not as precedents.

I. ACTIONS FOR BREACH OF CONTRACT.

472. Account.—An account is a detailed statement of mutual demands in the nature of debt and credit between persons, arising out of contract, or out of some fiduciary relation.[2] To constitute an account, it is not necessary that the items be entered in an account-book;[3] but the items must be proper subjects of entries in an account-book—such as goods sold and delivered, work and labor performed.[4] The term "account" usually imports a general course of dealing, and

[1] Steph. Pl. 330; Ante, 128, 330, 468.

[2] McWilliams v. Allan, 45 Mo. 573; Stringham v. Supervisors, 24 Wis. 594. *Cf.* Trapnall v. Hill, 31 Ark. 345.

[3] Black v. Chesser, 12 O. S. 621.

[4] Dallas v. Fernan, 25 O. S. 635, 637.

has been held not to apply to an isolated transaction resting upon special contract.[1]

An account, due and unpaid, or a balance due thereon, may be the subject of an action in favor of the creditor, or his assignee, against the debtor. The law regards the several items in the general course of dealings as unified, so as to constitute but a single demand, on which an action may be brought.[2] In such action, the primary right of the plaintiff is the right to have the debt paid; and the non-payment is the delict. But the primary right and obligation arise, not from the account, but from the transactions evidenced by the account; and a cause of action thereon should, as in other cases, state the operative facts; to wit, the sale, the value, and non-payment. But, regarding the account as an entirety and as constituting a single demand, the creditor is authorized to make it the ground of his action; and the complaint should therefore assert the account, rather than the transactions which it embodies.[3]

COMPLAINT ON ACCOUNT.

Plaintiff, in a general course of dealing with defendant, sold and delivered to him the goods and merchandise specified in the following account, and at the several dates therein stated: [Here state the items, with date and value of each.] The amount affixed to each item is the reasonable value thereof, and the aggregate value is $, no part of which has been paid, and for which, with interest from , plaintiff prays judgment against defendant.[4]

Most of the codes authorize a short complaint on an account,[5] which may be in the form following:

SHORT COMPLAINT ON ACCOUNT.

There is due plaintiff, from defendant, on an account of which the following is a copy, [Here copy the account, with all credits.] the sum

[1] McCamant v. Batsell, 59 Tex. 363.

[2] Waffle v. Short, 25 Kan. 503.

[3] Waffle v. Short, 25 Kan. 503; Tootle v. Wells, 39 Kan. 452.

[4] All pleadings should, of course, be entitled, subscribed, and verified. Ante, 170, 171, 176, 223, 224. As to the requirement that a copy of the account shall be attached to and filed with the pleading, see ante, 370, 371.

[5] Ante, 367, 368.

of dollars, which plaintiff claims, with interest from the day of , and for which, with interest as aforesaid, he prays judgment against defendant.

473. Account Stated.—An account stated is the settlement of an account between parties, whereby a balance in favor of one of them is ascertained and agreed to. It may involve mutual accounts, or but one account. The conversion of an open account, or accounts, into an account stated, is a transaction whereby the parties mutually assent to an ascertained sum as the true balance due from one to the other.

The stating of an account is not the making of a new contract, and therefore does not create an estoppel, or stop the running of the statute of limitations;[1] though it is conclusive upon the parties, unless impeached for fraud or mistake; and when fraud or mistake is claimed, it must be specially alleged,[2] and the burden is upon the party asserting it.[3]

The common-law courts, regarding such ascertainment of the state of accounts between the parties as creating an implied promise to pay the ascertained balance, made the breach of such implied promise a new ground of action, in assumpsit; the common count, *insimul computasset*, being the appropriate remedy. The requisite allegations in such action were, that the defendant accounted with the plaintiff, and was then found to be in arrears to him, a named sum, which he then promised to pay, but has not paid.[4]

474. Account Stated, Continued.—An account stated is still regarded as constituting a ground of action; though under the new procedure it is neither necessary nor proper to allege a promise to pay, it being sufficient to allege the facts from which the duty to pay arises.[5] To recover on an account

[1] Chace v. Trafford, 116 Mass. 529; s. c. 17 Am. Rep. 171. *Cf.* Coffee v. Williams, 103 Cal. 550, 556; Throop v. Sherwood, 4 Gilm. (Ill.) 92.

[2] Barker v. Hoff, 52 How. Pr. 382; Warner v. Myrick, 16 Minn. 91; Nourse v. Prime, 7 Johns. Ch. 69.

[3] McKinster v. Hitchcock, 19 Neb. 100; Warner v. Myrick, 16 Minn. 91.

[4] Ante, 98.

[5] Mackey v. Auer, 8 Hun, 180; Bouslog v. Garrett, 39 Ind. 338; Heinrick v. England, 34 Minn. 395.

stated, it must be declared upon as such. It is not proper to annex a copy of the account; the action being on the settlement, and not on the account.[1] If the original transactions be relied upon in the complaint, they are open to proof and disproof, notwithstanding the settlement;[2] and if the account stated be pleaded, the original transaction can not be relied on, upon failure to prove the account stated.[3]

The statement that an account, a copy of which is given, was left with the defendant, and after a considerable time was returned by him, without objection, does not allege an account stated.[4] Such facts are evidential; and while they may, as evidence, warrant the inference of assent to the account,[5] and might support an averment of account stated, they do not, when pleaded, amount to such averment.

The operative facts in an action on account stated are; (1) the accounting and its result, and (2) non-payment; and these may be stated in this form:—

COMPLAINT ON ACCOUNT STATED.

On the day of , plaintiff and defendant stated an account between themselves, whereby there was found to be due, from defendant to plaintiff, a balance of dollars, no part of which has been paid, and for which, with interest from said date, plaintiff prays judgment against defendant.

The defendant may, by answer, deny the alleged settlement, or the alleged result; or he may allege fraud, mistake, or payment. If the settlement has been put in writing, it may sometimes be necessary that the defendant first have affirmative equitable relief, in order to make a defense of fraud or mistake available.[6]

475. Breaches of Contract for Services.—At common law, the recovery for services rendered under contract was by

[1] Buehler v. Reed, 11 Iowa, 182.

[2] Packet Co. v. Platt, 22 Minn. 413; McCormick H. M. Co. v. Wilson, 39 Minn. 467; Greenfield v. Ins. Co., 47 N. Y. 430.

[3] Saville v. Ins. Co., 8 Mont. 419; Volkening v. DeGraaf, 81 N. Y. 268.

[4] Brown v. Kimmel, 67 Mo. 430.

[5] Stenton v. Jerome, 54 N. Y. 480.

[6] Ante, 257–259.

indebitatus assumpsit, or *quantum meruit*.[1] There is authority for the use of these common counts under the new procedure, notwithstanding their unscientific character.[2]

Where the contract has been fully performed by the employe, the elements of a cause of action are, (1) the contract, (2) the rendition of the services thereunder, (3) the value, if not agreed on, and (4) non-payment.

COMPLAINT FOR AGREED PRICE OF SERVICES.

Plaintiff worked for defendant, as a clerk in his store, for five consecutive months beginning on the day of , 1895, under a contract theretofore made, whereby defendant promised plaintiff to pay him for such service, at the rate of $40 per month. He has paid thereon $75, leaving due and unpaid the sum of one hundred and twenty-five dollars, for which amount, with interest from , plaintiff prays judgment against defendant.

Where services are rendered without express agreement as to the price, the law imposes an obligation to pay the reasonable value thereof, and the complaint in an action therefor may be in this form:—

COMPLAINT FOR VALUE OF SERVICES.

Plaintiff, at the request of defendant, worked for him, in the capacity of household servant, from October 1, 1893, to October 1, 1895. Said services were reasonably worth $4 per week, aggregating four hundred and sixteen dollars, no part of which has been paid, and for which, with interest from , plaintiff prays judgment against defendant.

If an employe refuse to perform his agreement to serve, the employer has a right of action for damages, and a complaint in an action therefor should allege the contract, the breach, and the damage. If an employer refuse to allow the employe to perform any service, the latter has a right of action, the elements of which are, the contract, readiness of plaintiff to perform, the breach, and the damage. Where an employe is wrongfully discharged during his term of employment, he may elect to treat the contract as abandoned, and sue for damages for the breach of contract, or on a *quantum*

[1] Ante, 97.

[2] Ante, 369, and cases cited.

meruit;[1] or he may hold the contract still in force, and, subject to certain conditions, sue for wages as they become due.[2] And one prevented, by sickness, from completing his contract for personal services may recover on a *quantum meruit.*[3]

476. Sales of Personal Property.—A variety of remedial rights grow out of sales of personal property. Where the vendee refuses to receive and pay for the property, the vendor has an election of remedies. He may, if title to specific property has passed, treat the property as belonging to the vendee, and either sue for the entire price, or, resell the property for the vendee, credit him with the net proceeds, and sue for the balance; or he may treat the sale as abandoned, retain the property as his own, and sue the vendee for the excess of the contract price over the market value of the property.[4]

If the vendor refuses to deliver the property to the vendee, he too has a choice of remedies. He may, if title to specific property has passed, and having paid or tendered payment, replevy the property; or he may treat the sale as abandoned, recover the consideration, if paid, and damages, if the market value of the property exceeds the contract price.[5] And in some exceptional cases, the purchaser may have equitable relief by specific performance.[6]

COMPLAINT FOR PRICE OF PROPERTY SOLD.

On the day of , plaintiff sold and delivered to defendant one horse, for the agreed price of $250, to be paid in thirty days thereafter. Said time has elapsed, and only $40 of said sum has been paid. Wherefore, plaintiff prays judgment against defendant for two hundred and ten dollars, with interest from the day of .

[1] Ante, 448; Knutson v. Knapp, 35 Wis. 86. *Cf.* Weed v. Burt, 78 N. Y. 191; Mackubin v. Clarkson, 5 Minn. 247; Allen v. Murray, 87 Wis. 41; Beers v. Kuehn, 84 Wis. 33.

[2] Bowman v. Holladay, 3 Oreg. 182. *Contra*, Weed v. Burt, 78 N. Y. 191.

[3] Green v. Gilbert, 21 Wis. 395. *Cf.* Wolfe v. Howes, 20 N. Y. 197.

[4] Benj. on Sales, 788, and cases cited; Dustan v. McAndrew, 44 N. Y. 72; Shawhan v. Van Nest, 25 O. S. 490; Hayden v. Demets, 53 N. Y. 426; Brocklen v. Smeallie, 140 N. Y. 70.

[5] Benj. on Sales, 870, 883.

[6] Benj. on Sales, 884; 3 Pom. Eq. Jur. 1402, and notes.

If the property has not been delivered, the vendor, in an action for the price, must allege tender, or his readiness to deliver; and if the purchaser sues for damages for non-delivery, he must allege readiness to receive and pay.[1] The want of such averment is not obviated by a denial of the sale.[2]

COMPLAINT FOR REFUSAL TO DELIVER.

On the day of , defendant sold to plaintiff five hundred bushels of wheat, to be by him delivered to plaintiff, at , on the day of , for which plaintiff agreed to pay defendant, upon such delivery, the sum of $300. At the time and place aforesaid, plaintiff was ready and prepared to pay said sum, and to receive said wheat, but defendant failed so to deliver the same, or any part thereof. At the said time and place for delivery, the said wheat was reasonably worth $400. Wherefore, plaintiff prays judgment against defendant for one hundred dollars, with interest from the said day of .

477. Negotiable Promissory Notes.—A negotiable promissory note imports a consideration, and in an action thereon, no consideration for the note need be alleged; and a plaintiff holding the legal title thereto by indorsement need not allege a consideration for the indorsement.[3] Such instrument may be pleaded by stating its legal substance, or by stating its literal substance.[4] A complaint by the payee of a negotiable note displays a remedial right when it shows the making and delivery of the note, its terms, its maturity, and non-payment.

COMPLAINT BY PAYEE OF PROMISSORY NOTE.

On the day of , defendant made and delivered to plaintiff his promissory note of that date, whereby he promised to pay to plaintiff, or order, dollars, three months after date, no part of which has been paid, and for which sum, with interest from , plaintiff prays judgment against defendant.

In an action by an indorsee of a promissory note, the complaint, to show a legal right of action against the maker,

[1] Benj. on Sales, 677; Metz v. Albrecht, 52 Ill. 491; Simmons v. Green, 35 O. S. 104.

[2] Grandy v. McCleese, 2 Jones (N. C. L.), 142; Momry v. Kirk, 19 O. S. 375, 383.

[3] Ante, 327, and cases cited.

[4] Ante, 365, and cases cited.

must further allege indorsement by the payee to the plaintiff; and to show such right against the indorser, it must allege presentment, demand, non-payment, and notice, unless protest has been waived. Some courts, regarding demand and notice as a condition precedent, and within the operation of the statute authorizing a brief averment of performance of such condition,[1] have held it sufficient to allege simply that payment was duly demanded, and the note duly protested.[2] But the weight of authority is to the effect that such statute relates only to conditions in contracts, and not to conditions prescribed by law, and that the allegations to charge an indorser must be specific.[3]

COMPLAINT BY INDORSEE AGAINST INDORSER.

On the day of , one A. B. made and delivered to defendant his promissory note of that date, whereby he promised to pay to defendant, or order, dollars, sixty days after date; and on the day of , said defendant duly indorsed and delivered said note to plaintiff. On the day of , plaintiff duly presented said note to said A. B., and demanded payment thereof, which was refused; of all which plaintiff gave defendant due notice. No part of said note has been paid; wherefore, plaintiff prays judgment against defendant for said sum of dollars, with interest from the day of .

Some of the codes provide that one or more of the persons severally liable on an instrument may be included as defendants in an action thereon. Under favor of this provision, the maker and the indorser of a promissory note may be joined as defendants in an action on the note, although their obligations are several. In such action, the complaint must state, in one cause of action, facts to charge the maker, and facts to charge the indorser.[4]

The short forms of complaint authorized by some of the codes apply to actions on promissory notes.[5]

[1] Ante, 372.

[2] Gay v. Payne, 5 How. Pr. 107; Adams v. Sherrill, 14 How. Pr. 297.

[3] Dye v. Dye, 11 Cal. 163; Himmelman v. Danos, 35 Cal. 441; Graham v. Machado, 6 Duer, 514; Cook v. Warren, 88 N. Y. 37; Rhoda v. Almeda Co., 52 Cal. 350.

[4] Spellman v. Weider, 5 How. Pr. 5.

[5] Ante, 367, 368.

478. Promissory Notes—Defenses.—In the hands of the original payee, a negotiable promissory note is subject to any defense that would defeat recovery on contracts generally, and all matters affecting its original validity may, in an action between the original parties, be inquired into. But a *bona fide* transferee of the legal title thereto, for value, before dishonor, takes it exempt from many of the infirmities that would invalidate it in the hands of the payee.

In pleading an original infirmity in an action by an indorsee, the answer should, it seems, state not only the facts that would invalidate the instrument in the hands of the payee, but, in addition thereto, the facts that make the original infirmity available against the indorsee—such as, notice, want of consideration for the transfer, or transfer after maturity.[1]

A defense of payment, whether pleaded by way of traverse, or by way of confession and avoidance, should be asserted affirmatively.[2]

479. Judgments as Grounds of Action and of Defense.—When judgment is entered for a demand sued on, the original demand passes *in rem judicatam*, and is said to be merged in the judgment. For this reason, every judgment is, for most purposes, to be regarded as creating a new obligation; and this is the effect of a judgment, whether the obligation merged therein arose *ex contractu*, *ex delicto*, or *ex lege*.[3] Hence, a final judgment becomes a right of action as soon as it is rendered; and the judgment creditor, or his assignee, may sue thereon, even though the judgment could be enforced by execution.[4] Actions on domestic judgments that may be

[1] Ante, 271.

[2] Ante, 363.

[3] 7 Wait Ac. and Def. 323; Freem. on Judg. 231; Hol. on Jur. (5th ed.) 285. Judgments are sometimes called "contracts of record." 1 Par. on Contr. 7. This designation is unfortunate, for it suggests that the right and obligation of a judgment arise from agreement; whereas they are really imposed upon the parties *ab extra*. Anson on Contr. (2d Am. ed.) 8. The obligation of a judgment is not contractual, but the remedial right arising therefrom is *quasi ex contractu*.

[4] Headley v. Roby, 6 Ohio, 521; Clark v. Goodwin, 14 Mass. 237; Linton v. Hurley, 114 Mass. 76; Simpson v. Cochran, 23 Iowa, 81; Ives v. Finch, 28 Conn. 112.

enforced by execution are not favored; and in some states a statutory limitation has been imposed upon the exercise of this common-law right.

It is a familiar principle that judgment against one of joint obligors will bar a subsequent action against the others. This is because the judgment merges the entire demand.[1] But judgment against one of joint trespassers does not merge the entire right of action, because the liability of joint trespassers is in its nature several. If a demand that is entire be split, and judgment obtained for part of it, the judgment is a bar to another action on the other part of the demand, because the whole claim is merged in the judgment. But care must be taken to distinguish between a single demand, and several demands. For example, if one be wrongfully dismissed from the service of another, he may maintain successive actions—one for damages for the wrongful dismissal, and another for wages earned and unpaid.[2] This would not be a dissevering of a single demand, for the plaintiff would have two distinct rights of action; and might join them in one action, or enforce them by separate suits.

480. Judgments—Foreign.—A foreign judgment can be enforced only by action. The tribunals of one country are not bound to enforce a judgment rendered in a foreign country, unless there are reciprocal treaties to that effect. But in countries where the common law obtains, a foreign judgment will be enforced, not because of any treaty, nor by virtue of any statute, but upon the principle that "where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained."[3] And since the right to enforce

[1] In Sheehy v. Mandeville, 6 Cranch, 253, MARSHALL, C. J., held that a judgment against one of the makers of a joint note did not merge the note as to the other maker. But this decision has rarely been assented to, has been doubted and criticised in England, and has been overruled by the same court that pronounced it. Mason v. Eldred, 6 Wall. 231.

[2] Perry v. Dickerson, 85 N. Y. 345.

[3] Per PARKE, B., in Williams v. Jones, 13 M. & W. 628, 633. *Cf.* Godard v. Gray, L. R., 6 Q. B. 139, 148.

a foreign judgment by action rests upon this principle, it follows, that whatever will negative the existence of such legal obligation, or excuse the defendant from performance of it, must be a defense to an action thereon. It may therefore be shown in defense, that the foreign court did not have jurisdiction of the subject-matter, or of the person of the defendant.[1]

As to whether the foreign judgment is conclusive upon the merits, the authorities are not agreed. Some are to the effect that when a foreign judgment is asserted as the foundation of an action, it is only *prima facie* evidence of indebtedness;[2] but that when asserted as a defense, it is conclusive.[3] It is believed, however, that the tendency of modern authorities is, to regard foreign judgments as equally conclusive on the merits, whether asserted as a cause of action, or as a defense.[4] It matters not that the original demand would not be enforced by the court called upon to enforce the judgment.[5]

481. Judgments—Inter-state Comity.—The constitution of the United States provides, that "full faith and credit shall be given in each state, to the public acts, records, and judicial proceedings of every other state; and the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."[6] Under this provision, which converts a rule of comity into a rule of constitutional obligation, the faith and credit to which the judgment of a court in one state is en-

[1] 2 Par. on Contr. 609; Sto. on Confl. of Laws, 547; Kerr v. Kerr, 41 N. Y. 272; Mowry v. Chase, 100 Mass. 79; Carleton v. Bickford, 13 Gray, 591.

[2] Sto. Confl. of Laws, 607; Andrews v. Herriot, 4 Cow. 508, 523, note; Hall v. Odber, 11 East, 118; Robertson v. Sturth, 5 Q. B. 941; 2 Kent Com. 120. *Cf.* Monroe v. Douglass, 4 Sandf. Ch. 126, 181.

[3] Sto. on Confl. of Laws, 598.

[4] Freem. on Judg. 597; Rankin v. Goddard, 55 Me. 389; Konitzky v. Meyer, 49 N. Y. 571; Low v. Mussey, 41 Vt. 393; 2 Kent Com. 120, note a. But see 12 Eng. and Am. Encyc. of Law, 147 n, and note, where it is asserted (1) that the foreign judgment does not merge the original ground of action, and (2) that consequently the plaintiff may sue either on his foreign judgment, or on his original right of action.

[5] Freem. on Judg. 217.

[6] Const. Art. IV. sec. 1.

titled in the courts of another state is the same faith and credit to which it is entitled in the state where rendered.[1] It may, like a foreign judgment, be impeached for want of jurisdiction in the court rendering it,[2] or because not responsive to the pleadings.[3] A discharge of the judgment may, of course, be shown; and the statute of limitations of the state where the action is brought will be available, if the limitation is not so unreasonable as, in effect, to preclude a remedy altogether.[4]

482. Judgments—Inter-state Comity, Continued.—Under the authority of the constitution, congress enacted that the records and judicial proceedings of the courts of any state or territory shall be proved and admitted in any other court within the United States "by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form."[5] It has been held, that a justice's judgment, though within the constitutional provision, when proved, is not within the congressional enactment as to the manner of proof.[6] Only a court of record can authenticate its records and proceedings in the manner provided by the act of congress—by the certificate of the clerk, the seal of the court, if it has a seal, and by the certificate of the judge, chief justice, or presiding magis-

[1] Mills v. Duryea, 7 Cranch, 481; Hampton v. McConnell, 3 Wheat. 234.

[2] Harris v. Hardeman, 14 How. 334; Galpin v. Page, 18 Wall. 350; Grover & B. M. Co. v. Radcliffe, 137 U. S. 287. Some cases hold that where the foreign record shows affirmatively the existence of jurisdictional facts, it can not be controverted in the tribunals of another state. 4 Wait Ac. & Def. 192, and cases cited. But the weight of authority, as well as reason and principle, authorizes an inquiry into the jurisdiction of the court that rendered the original judgment. Otherwise, the constitutional provision would give to judgments more force abroad than at home. Pennywit v. Foote, 27 O. S. 600, and authorities cited.

[3] Reynolds v. Stockton, 11 Sup. Ct. Rep. 773; Tex. & P. Ry. Co. v. So. Pac. Ry. Co., 137 U. S. 48.

[4] Jacquette v. Hugunon, 2 McLean, 129; Christmas v. Russell, 5 Wall. 290.

[5] 1 U. S. Rev. Stat. 905.

[6] Silver Lake Bk. v. Harding, 5 Ohio, 545; Snyder v. Wise, 10 Barr, 157; Robinson v. Prescott, 4 N. H. 450. *Cf.* Taylor v. Barron, 10 Foster, 78.

trate. An action may be maintained on the judgment of a justice in another state, but his judgment must be authenticated in some other way. This is usually done by the certificate of the justice, and that of the clerk of his county, under his official seal.

483. Judgments as Defenses.—It is a firmly established doctrine, that a matter once adjudicated, by a court of competent jurisdiction, can not again be drawn in question between the same parties or their privies. *Res judicata pro veritate accepitur.*[1] This doctrine rests upon principles of expediency, of justice, and of public policy; it operates upon parties and their privies; and it applies to an entire right of action, or to particular facts adjudicated. To make a judgment a bar to a subsequent action on the same right of action, it must appear that the former suit was determined upon its merits.[2] A judgment by confession, by consent, or upon default, is as conclusive as one rendered after a trial.[3] A judgment on demurrer, if it involves the merits of the case, is conclusive as to the matter so adjudicated;[4] *aliter*, if the demurrer be sustained because of the omission of some essential allegation in a pleading, and which is supplied in the second suit.[5] A judgment, to be conclusive as to either of the parties litigant, must be conclusive upon both.[6] And where

[1] Hugh's Technology of Law, 60; Broom's Max. 327–351; 6 Wait Ac. & Def. 767–812.

[2] Foster v. Busteed, 100 Mass. 409; Rose v. Hawley, 141 N. Y. 366; Jamaica Pond, etc., Co. v. Chandler, 121 Mass. 1; Verhein v. Schultz, 57 Mo. 326; Gay v. Stancell, 76 N. C. 369; Peterson v. Nehf, 80 Ill. 25; Houston v. Musgrove, 35 Tex. 594; Loudenback v. Collins, 4 O. S. 251; Holland v. Hatch, 15 O. S. 464; Wilcox v. Lee, 26 How. 418. Extrinsic evidence is admissible to show the ground of the judgment. Marcellus v. Countryman, 65 Barb. 201; Bottorff v. Wise, 53 Ind. 32; Miles v. Caldwell, 2 Wall. 35; Sawyer v. Woodbury, 7 Gray, 499; Paine v. Ins. Co., 12 R. I. 44.

[3] Mining Co. v. Mining Co., 157 U. S. 683.

[4] Wilson v. Ray, 24 Ind. 156; Ferguson v. Carter, 8 Ga. 524; Gray v. Gray, 34 Ga. 499; Robinson v. Howard, 5 Cal. 428; Perkins v. Moore, 16 Ala. 17; Bouchaud v. Dias, 3 Denio, 238; Gould Pl. ix. 43–46.

[5] Gould v. Evansville, etc., Ry. Co., 91 U. S. 526; Nickelson v. Ingram, 24 Tex. 630. *Cf.* Stevens v. Dunbar, 1 Blackf. 56; Stowell v. Chamberlain, 60 N. Y. 272.

[6] Nelson v. Brown, 144 N. Y. 384.

one has been defeated in his action, by reason of his neglect to perform some preliminary act necessary to perfect his right of action, such as the giving of notice, the judgment is not a bar to another action begun after the performance of the requisite preliminary act.[1] The former adjudication was not upon the merits; and, besides, the new action is on a different state of facts. It is like defeat in an action on a promissory note, brought before the note is due.

484. Judgments as Defenses, Continued.—A judgment of discontinuance,[2] or of nonsuit,[3] is not a bar to another action; nor is a judgment of dismissal, unless it be entered upon the merits.[4]

The doctrine of *res judicata* is sometimes said to embrace matters not in fact decided, but which might have been decided in the former case.[5] But this application of the doctrine must be limited to only such matters as might have been asserted *as a defense* in the former action, and which, if considered in the subsequent suit, would involve an inquiry into the merits of the former judgment.[6] Such matters are regarded as necessarily involved in the former suit. In an action on a note, whereon the defendant had made payments, he neither pleaded nor offered to prove the payments; it was held that he could not, in a new action, recover the amount of such payments.[7] In an action to recover the price of goods

[1] Rose v. Hawley, 141 N. Y. 366.

[2] Hull v. Blake, 13 Mass. 153, 155; Miller v. Mans, 28 Ind. 194; Delany v. Reade, 4 Iowa, 292; Gillilan v. Spratt, 41 How. Pr. 27.

[3] Jay v. Carthage, 48 Me. 353; Holland v. Hatch, 15 O. S. 464; Eaton v. George, 40 N. H. 258; Audubon v. Excelsior Ins. Co., 27 N. Y. 216; Wade v. Howard, 8 Pick. 353.

[4] Loudenback v. Collins, 4 O. S. 251; Crews v. Cleghorn, 13 Ind. 438; Wheeler v. Buckman, 51 N. Y. 391; Porter v. Vaughn, 26 Vt. 624; Sayles v. Tibbitts, 5 R. I. 79; Hughes v. United States, 4 Wall. 232; Van Vliet v. Olin, 1 Nev. 495. Judgment of dismissal, entered on plaintiff's own motion, and without the consent of the defendant, is not a bar to another action. Moore v. McSleeper, 102 Cal. 276.

[5] Wells on Res Judicata, 248; 6 Wait Ac. & Def. 786; Hites v. Irvine's Adm., 13 O. S. 283; Stanton v. Kenrick, 135 Ind. 382.

[6] 6 Wait's Ac. & Def, 786, and cases cited; Bell v. McColloch, 31 O. S. 397; White v. Lockwood, 39 O. S. 141. *Cf.* Martin v. Roney, 41 O. S. 141.

[7] Swensen v. Cresop, 28 O. S. 668.

sold and delivered, the defendant pleaded payment; but having lost his receipt, he failed to maintain his defense, and the plaintiff took judgment. After paying this judgment, he found his receipt, and sued to recover the money he had twice paid. He was defeated in this second action, on the ground of former adjudication.[1]

485. Judgments—How Pleaded.—In pleading a judgment, it is not necessary to aver any of the anterior proceedings on which it is based, for as to these the parties are concluded by the judgment;[2] and the judgment need not be set out in *hæc verba*, but may be pleaded by its legal effect;[3] nor need it be averred that the judgment remains in force, for this is presumed.[4] If the judgment asserted be that of a court of general jurisdiction, no jurisdictional fact need be stated; *aliter*, if it be the judgment of an inferior court.[5]

Where the judgment of an inferior domestic tribunal is pleaded, the court will take judicial notice of the law conferring jurisdiction, and it will be necessary only to allege the facts to warrant the assumption of jurisdiction over the parties; but where the judgment of an inferior foreign tribunal is pleaded, the allegations must show jurisdiction of both parties and subject-matter.[6] The general issue in an action on a judgment is *nul tiel record*. This plea questions the existence of the judgment, and is for impeachment of the record.[7] A defense requiring evidence *de hors* the record must be specially pleaded. A plea to the jurisdiction of a court of general jurisdiction must state the facts showing want of authority to render the judgment; and a plea to the jurisdiction of the person must negative every means by which such jurisdiction may be acquired.[8] A denial of resi-

[1] Marriott v. Hampton, 7 T. R. 269.

[2] Freeman on Judgm. 450.

[3] Cent. Bk. v. Veasy, 14 Ark. 671; Ante, 365, 366.

[4] Ante, 375.

[5] 1 Chit. Pl. 354; Ante, 374, and cases cited.

[6] Freem. on Judgm. 454.

[7] Freem. on Judgm. 459; Van Fleet's Coll. Attack, 526; 12 Encyc. of Law, 149 c.

[8] Barkman v. Hopkins, 6 Eng. 157; Struble v. Malone, 3 Clarke, 586; Price v. Ward, 25 N. J. L. 225; Freem. on Judgm. 455; 12 Encyc. of Law, 149 c, note.

dence within the state is not sufficient; absence from the state must be alleged.[1]

486. Pleading Judgments, Continued.—To be available in bar, and as an estoppel, a judgment must be pleaded, if there is opportunity to plead it.[2] Where there is opportunity to plead a former adjudication, and it is not pleaded, but is introduced in evidence under a denial, it is not conclusive, and other evidence may be introduced to show the truth as to the matter so claimed to have been adjudicated.[3]

The reason for the rule that a former adjudication, if relied upon as a bar, should be pleaded, is, that such former adjudication is new matter, and should, like other defenses of new matter, be pleaded, so that the court may, as matter of law, determine as to its effect and sufficiency. But when the matter to which the former adjudication applies is distinctly alleged by one party, and the other party takes issue on the fact, instead of pleading the estoppel, the jury are at liberty to find the truth as to such issue.

COMPLAINT ON DOMESTIC JUDGMENT OF COURT OF GENERAL JURISDICTION.

At the October Term, 1895, of the Court of Common Pleas of County, Ohio, to wit, on the day of , plaintiff recovered a judgment of said court against defendant for the sum of dollars, no part of which has been paid, and for which, with interest from plaintiff prays judgment against defendant.

COMPLAINT ON FOREIGN JUDGMENT.

At the October Term, 1895, of the Circuit Court of the County of Cook, in the State of Illinois, to wit, on the day of , in an action therein pending, wherein this plaintiff was plaintiff, and this

[1] Wilson v. Jackson, 10 Mo. 330.

[2] Lockwood v. Wildman, 13 Ohio, 430; Meiss v. Gill, 44 O. S. 253; Lyon v. Talmadge, 14 Johns. 501; Van Orman v. Spafford, 16 Iowa, 186; Krekeler v. Ritter, 62 N. Y. 372; Redmond v. Coffin, 2 Dev. Eq. 437; Fanning v. Ins. Co., 37 O. S. 344; Hendricks v. Deeker, 35 Barb. 298; Brady v. Murphy, 19 Ind. 258; Adkins v. Hudson, 19 Ind. 392; Piercy v. Sabin, 10 Cal. 22; s. c. 70 Am. Dec. 692.

[3] Reynolds v. Stanbury, 20 Ohio, 344; Meiss v. Gill, 44 O. S. 253; 1 Gr. Ev. 531; Vooght v. Winch, 2 Barn. & Ald. 662; Picquet v. McKay, 2 Blackf. 465.

defendant was defendant, plaintiff recovered a judgment of said court against defendant for $ damages, and $ costs, no part of which has been paid. Said Circuit Court was then a court of general jurisdiction, and at the date aforesaid it had jurisdiction of the defendant by personal service of its process.

Wherefore, plaintiff prays judgment against defendant for said aggregate sum of dollars, with interest from .

487. Breach of Promise to Marry.—In an engagement to marry, the consideration for the promise of each is the promise of the other. The law distinguishes between "an agreement made upon consideration of marriage," and an agreement *to marry;* and it is accordingly held that a contract to marry need not be in writing,[1] unless "not to be performed within the space of one year from the making thereof."[2] It is against public policy to compel specific performance of a contract to marry,[3] so the only remedy is an action for damages;[4] and the promise is so far of a personal nature, that it has generally been held that the right of action for breach thereof abates with the death of either party.[5]

The complaint must allege the mutual promise of the parties, and the failure, refusal, or incapacity of the defendant to perform the contract. If the promise of the defendant be upon condition, and the condition be reasonable and valid, performance of the condition must be alleged. And, the contract being executory, the plaintiff must allege his or her readiness and willingness to marry the defendant.[6] If, before the date fixed for the marriage, one of the parties renounce the contract, or marry another, a right of action accrues at once.[7]

[1] Cork v. Baker, 1 Stra. 34; Harrison v. Cage, 1 Ld. Raym. 386; Short v. Stotts, 58 Ind. 29.

[2] Nichols v. Weaver, 7 Kan. 373; Derby v. Phelps, 2 N. H. 515. *Cf.* Lawrence v. Cook, 56 Me. 187.

[3] Cheyney v. Arnold, 15 N. Y. 345.

[4] Wightman v. Coates, 15 Mass. 1.

[5] Grubb v. Sult, 32 Gratt. 203; Wade v. Kalbfleish, 58 N. Y. 282; Stebbins v. Palmer, 1 Pick. 71; Smith v. Sherman, 4 Cush. 408. *Contra*, Shuler v. Millsaps, 71 N. C. 297.

[6] Graham v. Martin, 64 Ind. 567.

[7] Ante, 398, and cases cited.

COMPLAINT FOR BREACH OF PROMISE TO MARRY.

On the day of , plaintiff and defendant each promised to marry the other, within a reasonable time thereafter. Plaintiff has ever since been willing and ready to marry defendant, who, although such reasonable time has elapsed, neglects and refuses to marry plaintiff, to her damage dollars, for which sum she prays judgment against him.

The defenses to such actions are numerous. Infancy is a good defense,[1] though it has frequently been held that an infant may maintain the action.[2]

488. Common Carriers of Goods.—A common carrier is one who, as a regular business, undertakes, for hire, to carry the goods of such as choose to employ him. Such carrier is bound to receive, within reasonable limitations and conditions, all goods offered to him for transportation; and he is generally liable to an action for refusal, unless he rejected the goods for want of room, or because they were dangerous, or in an unfit condition for transportation, or would subject him to unreasonable loss or inconvenience.

The responsibility of a common carrier of goods begins with the delivery of the goods to him,[3] and ends with delivery thereof by him.[4]

In an action for the value of goods lost by a common carrier, the complaint should allege that the defendant was a common carrier, and should state the contract, the plaintiff's ownership of the goods, and their delivery to the defendant—which facts show the primary right and duty,—and it should allege the non-delivery by the defendant, which is the delict.

[1] Bush v. Wick, 31 O. S. 521; Warwick v. Cooper, 5 Sneed, 659; Cannon v. Alsbury, 1 A. K. Marsh. 56.

[2] Willard v. Stone, 7 Cow. 22; Hunt v. Peake, 5 Cow. 475. *Contra*, Pool v. Pratt, 1 D. Chip. (Vt.) 252.

[3] Merriam v. Ry. Co., 20 Conn. 354; Green v. Ry. Co., 38 Iowa, 100; Ry. Co. v. Barrett, 36 O. S. 448.

[4] Golden v. Manning, 3 Wils. 429; s. c. 2 W. Bl. 916; Ins. Co. v. Ry. Co., 144 N. Y. 200; Gibson v. Culver, 17 Wend. 305; Fisk v. Newton, 1 Denio, 45. *Cf.* Adams v. Blankenstein, 2 Cal. 413.

COMPLAINT FOR GOODS LOST BY A COMMON CARRIER.

On the day of , plaintiff delivered to defendant, who was then a common carrier, the following goods of the plaintiff, to wit, [Here describe the goods.] which goods the defendant agreed, for a consideration to be paid him by plaintiff, to carry from to , and there to deliver them for plaintiff to . The defendant failed so to carry or deliver said goods, and the same were wholly lost to plaintiff, to his damage dollars, for which sum, with interest from he prays judgment against defendant.

489. Common Carriers of Passengers.—The general rule is, that a common carrier of passengers must carry all persons who offer themselves for passage;[1] though he may reject one because he is an unfit person,[2] or refuses to pay fare,[3] or refuses obedience to any reasonable regulations; and he may, for want of room, reject any applicant.

Such carrier is liable for wrongfully refusing to carry, for wrongfully ejecting a passenger, for failure or refusal to carry to the agreed destination, for carrying beyond the agreed destination, for loss of baggage, and for injury to the person resulting from the negligence or incompetency of himself or agent.

A common carrier is not liable for loss or injury occasioned by the act of God, or of the public enemy. He may, by contract, and within certain restrictions, enlarge or limit his liability. But a stipulation exempting from liability for loss or injury due to the negligence of himself or his servant, has, in this country, generally been held invalid.[4]

Where injury results to a passenger, from the negligence of a common carrier, he may, at his election, sue upon the contract, or in tort; for there is an implied contract on the

[1] Bennett v. Dutton, 10 N. H. 481; Per ANDREWS, J., in Barney v. Steamboat Co., 67 N. Y. 301, 302; Ry. Co. v. Acres, 108 Ind. 548.

[2] Jencks v. Coleman, 2 Sumn. 221.

[3] Day v. Owen, 5 Mich. 520; Elmore v. Sands, 54 N. Y. 512; Ry. Co. v. Skillman, 39 O. S. 444.

[4] 2 Par. on Contr. 259, note 1, and cases there cited. But the agreement of one who receives a pass as a pure gratuity, that he assumes all risk of injury, whether caused by negligence or otherwise, has generally been held valid. Griswold v. Ry. Co., 53 Conn. 371; Quinby v. Ry. Co., 150 Mass. 365. *Contra*, Ry. Co. v. McGown, 65 Tex. 640.

part of the carrier to do that with which he is intrusted, with integrity, diligence, and skill.[1]

II. ACTIONS FOR TORTS.

490. Actions for Torts.—A tort, as distinguished from breach of contract, is a breach of duty fixed by law; as distinguished from crime, it is a wrong redressible by action for damages, instead of by public prosecution and punishment.[2] Torts are, generally speaking, independent of contract, and arise from violations of rights *in rem*, as distinguished from rights *in personam*. But if a contract imposes a legal duty, as incident to the contract, the neglect of such duty is a tort founded on contract. A tort arising out of contract does not arise from a breach of its express provisions, but from breach of an implied duty arising out of, and incident to, the contract. Thus, a professional man—a surgeon, an attorney, an architect—is liable, in tort, for unskillfulness or negligence in the rendition of services under employment. The contract for skilled services raises the implied duty, and its breach is a tort.[3]

To make an act tortious it must be legally wrongful as to the party complaining; that is, it must injure him in some recognized legal right. It frequently happens that the lawful exercise of a legal right by one person will operate to the detriment of another, without impinging upon his legal right, and hence without being actionable.[4]

491. Replevin of Property.—At common law, replevin lay only where there had been a wrongful taking.[5] Under the codes, the action lies for wrongful detention of property, whether the taking was wrongful or rightful. The gist of the modern action is said to be the wrongful detention. But there can not be wrongful detention from plaintiff, unless

[1] Ry. Co. v. People, 31 O. S. 537; 2 Gr. Ev. 208. *Cf.* Hall v. Cheney, 36 N. H. 26; Wiggin v. Ry. Co., 120 Mass. 201.

[2] Big. on Torts, 3.

[3] 1 Add. on Torts, 27, note; Ry. Co. v. Peoples, 31 O. S. 537.

[4] Ante, 27. *Cf.* Young v. Hichens, 6 Q. B. 606; Town. Slander and Libel, 91, and note.

[5] Ante, 106.

he is entitled to possession. Hence, the primary right is the right of possession, and the defendant's delict is the wrongful detention; and the complaint should disclose these constituent elements. But the right of possession is a resultant right, arising by operation of law, from other facts. One may be entitled to possession as owner, as bailee, as mortgagee, and these operative facts should be stated. An allegation that the plaintiff is entitled to the possession is a conclusion of law, and is not sufficient.[1]

The complaint should contain a description of the property sufficient for identification.[2]

Where the original jurisdiction of the court depends upon the value of the property sought to be recovered, the question has arisen whether this means an ascertained value, or an alleged value; and it may be said that the general rule, resting upon both precedent and reason, makes the alleged value the test. Where value is made a jurisdictional fact, it should, like all other jurisdictional facts, be made to appear *in limine;* and where an allegation of value is a jurisdictional requisite, it is material only as to jurisdiction, and is not, *quoad hoc*, issuable;[3] though so far as it affects the recovery of damages in the action, the value of the property is properly the subject of proof.[4]

492. Replevin of Property, Continued.—Where the defendant came rightfully into possession of the property, the action is usually called replevin in the *detinet*, and the complaint must allege demand and refusal; otherwise there is no wrongful detention, and hence no remedial right.[5] But

[1] Pattison v. Adams, 7 Hill, 126; S. C. 42 Am. Dec. 59. *Cf.* Robinson v. Fitch, 26 O. S. 659; Garner v. McCullough, 48 Mo. 318.

[2] Hames v. Robinson, 44 Ark. 308; Pierce v. Langdon, 2 Idaho, 878.

[3] Brunaugh v. Worley, 6 O. S. 597; Chilson v. Jennison, 60 Mich. 235; Addison v. Burt, 74 Mich. 730. *Cf.* Wells on Repl. 680.

[4] Ry. Co. v. Packet Co., 38 Iowa, 377; Reilly v. Ringland, 39 Iowa, 106; Woodruff v. Cook, 25 Barb. 505. *Cf.* Tulley v. Harloe, 35 Cal. 306; Bales v. Scott, 26 Ind. 202.

[5] Ante, 331, 395; Campbell v. Jones, 38 Cal. 507; Stratton v. Allen, 7 Minn. 409; Conner v. Comstock, 17 Ind. 90; Newman v. Jenne, 47 Me. 520; Gilchrist v. Moore, 7 Iowa, 9. *Cf.* Smith v. McLean, 24 Iowa, 322; Stone v. Bird, 16 Kan. 488; Prime v. Cobb,

where the action is to recover property tortiously taken, called replevin in the *cepit*, no demand is necessary.

COMPLAINT IN REPLEVIN.

Plaintiff is the owner of one Singer Sewing Machine, No. , of the value of $, and as such owner is entitled to the immediate possession thereof. Defendant wrongfully detains said property from plaintiff, and has so detained it since , to the damage of plaintiff $. Wherefore, plaintiff prays judgment against defendant for the recovery of said property, and for dollars, his damages so as aforesaid sustained.

A general denial puts in issue all the essential averments of the complaint, puts the burden of proving them upon the plaintiff, and admits evidence by the defendant (1) to controvert the plaintiff's evidence, (2) to disprove his allegations, and (3) to prove other and inconsistent facts. Under such denial, the defendant may prove his right to possession,[1] or that he as an officer levied on the property at the suit of a creditor of him from whom the plaintiff obtained it in fraud of creditors,[2] or he may show title in a stranger.[3]

In a case where replevin is the proper remedy, if the specific property can not be recovered, the action may proceed for the recovery of damage, which would be the value of the property, plus the value of its use while wrongfully detained.[4]

493. Libel and Slander.—Slander is oral defamation; libel is defamation by writing, printing, or representation. The primary right in such cases is a right *in rem*—the right to security of reputation or good name from the arts of detraction and slander;[5] and the corresponding duty is, to forbear to publish defamation of another.

63 Me. 200; Homan v. Laboo, 1 Neb. 210; Millspaugh v. Mitchell, 8 Barb. 333.

[1] Lindsay v. Wyatt, 1 Idaho, 738.

[2] Bailey v. Swain, 45 O. S. 657; Holmberg v. Dean, 21 Kan. 73; Snook v. Davis, 6 Mich. 156.

[3] Branch v. Wiseman, 51 Ind. 1; Griffin v. Ry. Co., 101 N. Y. 348.

[4] Fitzhugh v. Wiman, 9 N. Y. 559; Rawark v. Lee, 14 Ark. 425; Anderson v. Tyson, 14 Miss. 244; Kehoe v. Rounds, 69 Ill. 351; Bales v. Scott, 26 Ind. 202; Jetton v. Smead, 29 Ark. 372. *Cf.* Berthold v. Fox, 21 Minn. 51. The statutory requirement of affidavit before the issuing of process, and of an undertaking before delivery of the property, are matters of practice, and do not pertain to pleading.

[5] Ante, 19, 394; 1 Bl. Com. 134.

Actionable words are, (1) those actionable *per se*, that is, without allegation or proof of actual damages, and (2) those actionable only in respect of some actual consequential damage. As a general rule, where the immediate and natural tendency of the words is to cause damage, they are actionable *per se*. Such are, words imputing the commission of an indictable crime, such as murder, forgery, perjury, larceny; charging one with having a contagious or infectious disease of a disgraceful kind, such as leprosy, or a venereal disease; charging one holding an office of profit, with unfitness, either as to morals, or as to qualifications; or charging want of capacity or integrity in the conduct of a profession or business.

To render words actionable *per se*, on the ground that they impute criminality, they must charge an indictable offense, and one that involves a high degree of moral turpitude, or that would subject the offender to infamous punishment. Charging one to be a deserter is not actionable *per se*, because the offense charged is cognizable only by a court-martial, and is not indictable.[1] And charges of assault and battery, of fighting, of refusing to aid an officer, of keeping a ferry without license, and the like, are not actionable *per se*; for while such offenses are indictable, they do not imply such degree of moral depravity as will render them actionable *per se*.[2]

Charging one with having a loathsome disease is actionable *per se*, because the natural and inevitable tendency would be to exclude him from the society, the favor and countenance, of other persons. Hence, such charges in the past tense—as, to say of a woman, "She has had the pox"—are not actionable *per se*.[3]

An imputation of corruption in office, to be actionable *per se*, must relate to the person's official occupation,[4] and he must be in the exercise of the duties of the office at the time of the publication of the defamatory words;[5] for otherwise,

[1] Hollingsworth v. Shaw, 19 O. S. 430; s. c. 2 Am. Rep. 411.

[2] Per BOWEN, J., in Dial v. Holter, 6 O. S. 228, 242.

[3] Carslake v. Mapledoram, 2 T. R. 473.

[4] Van Tassel v. Capron, 1 Denio, 250; Ireland v. McGarvish, 1 Sandf. 155; Kinney v. Nash, 3 Comst. 177.

[5] Bellamy v. Burch, 16 M. & W. 590; Gallway v. Marshall, 9 Ex. 294.

the publication of the words could not tend to injure him in his official occupation. And the same restrictions apply to words impugning one's capacity or integrity in the conduct of a business or profession. To falsely charge a physician with incontinence, not connected with his professional conduct, is not action able *per se;*[1] but to say of a physician's treatment of a particular case, "He killed the child by giving it too much calomel," is actionable.[2]

494. Libel and Slander, Continued.—Defamatory words not actionable *per se* may be actionable, if special damages result as the natural and direct, or reasonable consequence of the publication of the words.[3] And in such case, the special damages must be alleged and proved; and where it is not impracticable, the complaint must set forth in what way the damages resulted from the speaking of the words. It is not sufficient to allege simply that the plaintiff has sustained special damages.[4]

Malice, in law or in fact, is an essential ingredient; but whether malice is to be alleged in the complaint, is a question upon which the authorities are not agreed. The general rule, perhaps, is, that the allegation of falsity raises an implication of malice, and dispenses with the allegation. This would doubtless be true where the words spoken are actionable *per se;* though the authorities do not seem to make this distinction.[5] And the charge must be false, and must be alleged to be false.[6] The truth of the charge complained of is a good defense, even if the words were spoken

[1] Ayre v. Craven, 2 Ad. & E. 7; Gallway v. Marshall, 9 Ex. 294.

[2] Johnson v. Robertson, 8 Port. 486; Tutty v. Alewin, 11 Mod. 221.

[3] Vicars v. Wilcocks, 8 East, 1; Wilson v. Runyon, Wright, 651; Moody v. Baker, 5 Cowen, 351; Terwilliger v. Wands, 17 N. Y. 54; Knight v. Gibbs, 1 Ad. & El. 43; Birch v. Benton, 26 Mo. 153.

[4] Wetherell v. Clerkson, 12 Mod. 597; Johnson v. Robertson, 8 Porter, 486; Hallock v. Miller, 2 Barb. 630; Cook v. Cook, 100 Mass. 194; Pollard v. Lyon, 91 U. S. 225; Bassell v. Elmore, 48 N. Y. 561; Strauss v. Meyer, 48 Ill. 385. *Cf.* Martin v. Henrickson, 2 Ld. Raym. 1007.

[5] Ante, 330, and note.

[6] Ante, 330.

maliciously.[1] This is said to be on the theory that a person has no legal right to a false reputation.[2]

Some statements of matter that would otherwise be actionable defamation, are privileged on account of their nature and of the occasion on which they are made. Words spoken in legislative proceedings; words spoken or written in judicial proceedings, if relevant and pertinent to the matter under consideration, and if the court has, or may reasonably be supposed to have, jurisdiction; information given to an officer, to procure legal protection or redress; words spoken at a public meeting, on the question under consideration, if believed to be true, and if free from malice; *bona fide* answers to confidential inquiries, if the inquirer has an interest in the subject of inquiry; and proceedings before a church for the discipline of members, if pertinent to the matter under consideration, are thus privileged.

495. Libel and Slander, Continued.—As the primary right in such cases—the right to the uninterrupted enjoyment of one's reputation—is one available alike to all persons, the complaint need not state the facts from which the primary right and duty arise;[3] and the usual averment, that plaintiff, at the time of the acts complained of, sustained a good name and reputation, is unnecessary, for the law presumes the plaintiff's reputation to be good.[4]

The words actually used, and not merely their import, should be set out; though obscene and indecent language may sometimes be omitted, and a description thereof be inserted. Foreign words should be set out, with an English translation; and it must be alleged that they were understood by those who heard them.[5] And it must appear that

[1] Van Aukin v. Westfall, 14 Johns. 233; Foss v. Hildreth, 10 Allen, 76; King v. Root, 4 Wend. 113.

[2] Bigelow on Torts, 50; Ante, 330, *in nota*.

[3] Ante, 183.

[4] 1 Hilliard on Torts, 63; Blakeslee v. Hughes, 50 O. S. 490, wherein it was held to be error to allow the plaintiff to sustain his needless averment of good character. *Contra*, 3 Suth. Dam. 655; Shroyer v. Miller, 3 W. Va. 158.

[5] Zeig v. Ort, 3 Pin. (Wis.) 30; Kerschbaugher v. Slusser, 12 Ind. 453; Wormouth v. Crainer, 3 Wend. 394.

slanderous words spoken were heard by others, that they were false, and that they were spoken maliciously.[1] Sometimes the colloquium must be set out, or innuendo resorted to, in order to show the understood meaning of the words and that they referred to the plaintiff. In some states it is provided by statute that it shall be sufficient to state simply that the defamatory matter was published or spoken of the plaintiff. The same words, spoken at different times, constitute several rights of action; but distinct defamatory charges, spoken at the same time, have been held to constitute but one right of action.[2]

COMPLAINT FOR SLANDER.

On the day of , the defendant, in the presence and hearing of divers persons, maliciously spoke of and concerning this plaintiff, these false and malicious words, to wit: [Here set out the words.] To the damage of plaintiff in the sum of dollars, for which he prays judgment against the defendant.

COMPLAINT FOR LIBEL.

(ILLUSTRATING USE OF INNUENDO.)

The defendant, with malicious intent to injure plaintiff, on the day of , wrote and published, and caused to be written and published, of and concerning plaintiff, in a certain newspaper called " ," printed and published at , and having a large circulation in said county of , wherein plaintiff then and theretofore resided, a certain false and malicious libel, in the words and figures following: "We [meaning the residents of said county] have in our county [meaning said county of] one A. B., [meaning this plaintiff] who is " etc.; [copying in full the libelous matter.] To the damage of plaintiff dollars, for which he prays judgment against defendant.

496. Libel and Slander, Continued.—The answer may be a denial, or a justification. If the defendant justify, he must allege the particulars showing the truth of the charge;[3] for the truth of the charge can not be proved under a denial.[4] And the justification must be as broad as the charge com-

[1] Ante, 394, and cases cited.

[2] Ante, 442, and cases cited.

[3] Robinson v. Hatch, 55 How. Pr. 55; Sunman v. Brewin, 52 Ind. 140; Watchter v. Quenzer, 29 N. Y. 547; Tilson v. Clark, 45 Barb. 178. *Cf.* Boaz v. Fate, 43 Ind. 60.

[4] Duval v. Davey, 32 O. S. 604; Boaz v. Fate, 43 Ind. 60; Manning v. Clement, 7 Bing. 367; Brickett

plained of.[1] Where the charge is the commission of a crime, an answer in justification must state the facts that constitute such crime.[2] But where the charge complained of is specific, such as the doing of a particular act, it has been held sufficient to aver generally the truth of the charge.[3]

It seems that a general denial and a justification are not inconsistent, and that they may be joined, in separate defenses, in the same answer.[4]

497. Malicious Prosecution.—A groundless prosecution, begun maliciously and without probable cause, is a wrongful invasion of the right of personal security, and may be redressed by an action for damages.[5] The right of personal security does not exempt persons from groundless prosecutions; on the contrary, an innocent man may rightly be subjected to a prosecution, if there is probable cause to believe him guilty. In other words, the right of personal security, in its totality, is subject to the right of any one to institute a prosecution grounded upon probable cause.[6]

The action for malicious prosecution is given for the institution of a false charge, maliciously, and without probable cause. In order to show that the charge was false, the prosecution complained of must be ended, and must have terminated favorably to the person prosecuted. The want of probable cause is the absence of facts and circumstances that would induce a man of ordinary intelligence and caution to believe the charge to be true. The malice that is made an element of this action is malice in fact, as distinguished from malice in law.[7]

v. Davis, 21 Pick. 404; Kay v. Fredrigal, 3 Pa. St. 221; Jarnigan v. Fleming, 43 Miss. 710.

[1] Whittemore v. Weiss, 33 Mich. 348; Palmer v. Smith, 21 Minn. 419; Downey v. Dillon, 52 Ind. 442; Ante, 75; Davis v. Matthews, 2 Ohio, 257; Steele v. Phillips, 10 Humph. 461.

[2] Spooner v. Keeler, 51 N. Y. 527; Downy v. Dillon, 52 Ind. 442; Billings v. Waller, 28 How. Pr. 97. *Cf.* Thompson v. Barkley, 27 Pa. St. 263.

[3] VanWyck v. Guthrie, 4 Duer, 268.

[4] Weston v. Lumley, 33 Ind. 486; Harper v. Harper, 10 Bush, 447; Horton v. Banner, 6 Bush, 596; Murphy v. Carter, 1 Utah, 17.

[5] Steph. Pl. 126, *in nota.*

[6] Ante, 13.

[7] The prosecution of a groundless civil action, with malice, and with-

498. Malicious Prosecution, Continued.—As the primary right invaded is one belonging, alike to all persons,[1] only the facts constituting the delict should be stated in the complaint; to wit, the institution and conduct of the prosecution, its termination in favor of the plaintiff, the want of probable cause, and the existence of malice.[2] In alleging want of probable cause, it is sufficient to aver simply that the prosecution was without reasonable or probable cause. This may be said to be the statement of a conclusion, rather than the facts to warrant it. But the plaintiff can not be more specific; and besides, it is not the statement of a conclusion. It is not the want of probable cause that the plaintiff complains of, but being subjected to a groundless prosecution. This is the culpatory fact; and the malice and the want of probable cause are simply characterizations of this fact, to make it culpatory.[3] The want of probable cause is a negation, not based on facts but upon the absence of facts.[4]

out probable cause, does not, generally, constitute a ground of action for malicious prosecution, unless there has been arrest of the person, seizure of property, or some special injury. Tomlinson v. Warner, 9 Ohio, 103; Bitz v. Meyer, 40 N. J. L. 252; Eberly v. Rupp. 90 Pa. St. 259; Woods v. Finnell, 13 Bush, 628; Marbourg v. Smith, 11 Kan. 554; Clossen v. Staples, 1 Am. Rep. 316. *Cf.* Willard v. Holmes, 142 N. Y. 492; Ferguson v. Arnow, 142 N. Y. 580.

[1] Ante, 183.

[2] Where probable cause is found to exist, no amount of malice will entitle the plaintiff to recover. Lacey v. Porter, 103 Cal. 597.

[3] It has been held that the institution of a criminal prosecution for the sole purpose of collecting a debt shows both malice and want of probable cause. Leuck v. Heisler, 87 Wis. 644. But the prosecution so instituted must have terminated in plaintiff's favor, to make it a ground of action.

[4] Lavender v. Hudgens, 32 Ark. 763. There are cases holding that the complaint should set out facts showing the absence of probable cause; but they are mostly cases of but little weight. Pangburn v. Bull, 1 Wend. 345, is frequently cited as an authority for this requirement. But no question of pleading was there involved. The trial court had submitted both the law and the facts to the jury; and the reviewing court held, that while want of probable cause is a mixed question of law and fact, yet, inasmuch as the jury made no mistake as to the law, there was no available error. In Reynolds v. Kennedy, 1 Wilson, 232 (1784), the Court of King's Bench held that it was not enough for the plaintiff to say simply that the charge was preferred *sine causa*. But the case was in fact decided on the ground

COMPLAINT FOR MALICIOUS PROSECUTION.

On the day of , the defendant, maliciously and without probable cause, induced and procured the grand jurors of the Court of Common Pleas of County, Ohio, upon information and testimony by him for that purpose furnished to them, to find and present to the said court, at its term, an indictment against plaintiff, charging him with [Here state the offense charged.] And defendant, at the said term of said court, maliciously, and without probable cause therefor, procured said indictment to be prosecuted, and the plaintiff to be tried on the said charge.

Upon the said trial, to wit, on the day of , plaintiff was duly acquitted of said charge, and the said prosecution was then and there terminated.

By reason of said prosecution, plaintiff has been damaged in the sum of $, expended for counsel to defend him against said charge, and he has been otherwise injured in business and in his reputation, in the sum of $.

Wherefore plaintiff prays judgment against defendant for the sum of dollars.

499. Malicious Prosecution, Continued.—Some authorities hold that the plaintiff's averment of want of probable cause is traversed by a denial;[1] this is on the ground that the defendant may, under a denial, offer evidence to disprove any fact which the plaintiff must, in the first instance, prove to maintain his action. Other authorities hold that such averment is not traversed by a mere denial, and that the facts showing probable cause should be set out.[2]

Upon principle, the plaintiff's negative averment of want

that the declaration showed no malice, and not on the insufficiency of the other averment.

[1] Bliss Pl. 328; Pom. Rem. 680; Benedict v. Seymour, 6 How. Pr. 298; Rost v. Harris, 12 Abb. Pr. 446; Radde v. Ruckgaber, 3 Duer, 684; Simpson v. McArthur, 16 Abb. Pr. 302 (n.); Levy v. Brannan, 39 Cal. 485; Trogden v. Deckard, 45 Ind. 572. Proof that the defendant acted under the advice of counsel, after full disclosure, has been admitted under a denial, on the ground that it is directly responsive to the plaintiff's evidence to show want of probable cause. Levy v. Brannan, 39 Cal. 485. This is correct, if we assume that the defendant's denial of the plaintiff's negation makes an issue for the admission of any evidence. White v. Tucker, 16 O. S. 468.

[2] Brown v. Connelly, 5 Blackf. 390; Blachford v. Dod, 2 B. & Ad. 179; Morris v. Corson, 7 Cow. 281; Hunter v. Mathis, 40 Ind. 356; Mure v. Kaye, 4 Taunt. 34; Scheer v. Keown, 34 Wis. 349.

of probable cause should be traversed by an affirmative statement that the defendant had reasonable ground for the prosecution. A traverse by denial would be the use of two negatives, and is forbidden, because argumentative.[1] A statement of facts showing probable cause would be faulty, because it would not give color.[2] The defendant does not confess and avoid the plaintiff's allegation, but controverts it. His contention must therefore be by a traverse of the plaintiff's allegation. New facts alleged to support such contention would be facts inconsistent with the plaintiff's averment; whereas, facts proper to be alleged as a defense of new matter must be consistent with the allegations of the complaint.[3] The facts that would show probable cause for instituting the prosecution are evidential facts, admissible under an affirmative traverse of the plaintiff's negative averment.

The defendant may allege, in mitigation, facts tending to show that what he did was done without malice.[4]

ANSWER IN MALICIOUS PROSECUTION.

First Defense.

When the defendant did the several things stated in the complaint, he had reasonable and probable cause to believe, and did believe, that the plaintiff was guilty of the said offense so charged.

Second Defense.

Defendant admits that he did the several acts in the complaint alleged to have been done by him, and he denies all other facts therein alleged.

500. Negligence as a Ground of Action and of Defense.—Negligence may be defined as the conjunction of inadvertence and of some act or omission resulting in injury. If one adverts not to a given act, and by reason thereof omits the act; or, if he adverts not to the probable consequences of an act, and by reason thereof does the act; or, if he adverts both to the act and to its probable consequences, but in a manner so careless as to misconceive the act or its probable consequences, and by reason of such

[1] Ante, 360.
[2] Ante, 240.
[3] Ante, 236, 380.
[4] Bradner v. Faulkner, 93 N. Y. 515.

inattention, does, or omits, the act; such act or omission, conjoined with the inadvertence, if injury ensue, constitutes negligence.[1] And if the injury results to one entitled to the exercise of greater care by the other, the negligence is actionable.[2]

From the foregoing analysis it will appear that the term negligence denotes the inadvertence from which the act or omission ensues; and only connotes the act or omission; and that while the term imports the want of requisite care, it does not state or import any act or omission. It is plain, therefore, that to allege negligence, the act or omission must be stated, and it must be alleged that it was negligently done or omitted;[3] and to make it culpable negligence, it must appear that legal injury resulted.[4] It may therefore be stated, as a general proposition, that to allege negligence as a ground of recovery, facts should be stated showing a relation between plaintiff and defendant that entitled the former to the exercise of care by the latter; the act or omission complained of should be stated, and it should be characterized as negligent; and the resulting injury should be alleged. These are, ordinarily, the operative facts showing a right of action for negligence.[5]

To allege simply that defendant ran his wagon into plaintiff's wagon, does not state a wrongful act; the act should be characterized as negligent. And to allege simply that defendant negligently injured plaintiff is not sufficient, for it states neither an act nor an omission. Some specific act or omission should be stated, and it should be alleged that it was negligently done or omitted.[6] It is neither necessary nor proper to state all the facts that show the act or omission complained of to be negligent.[7]

[1] 1 Aus. Jur. 667, 668.

[2] Sweeny v. Ry. Co., 10 Allen, 368, 372.

[3] Crane v. Ry. Co., 87 Mo. 588; Ry. Co. v. Dunlap, 29 Ind. 426; Ry. Co. v. Harwood, 90 Ill. 425.

[4] Per COOLEY, J., in Macomber v. Nichols, 34 Mich. 212.

[5] Faris v. Hoberg, 134 Ind. 269.

[6] Ry. Co. v. Harwood, 90 Ill. 425; Ry. Co. v. Chester, 57 Ind. 297.

[7] Davis v. Guarnieri, 45 O. S. 471, 485, and cases cited; McCauley v. Davidson, 10 Minn. 418; Grinde v. Ry. Co., 42 Iowa, 376; Commrs., etc. v. Huffman, 134 Ind. 1; Ry.

501. Negligence, Continued.—Negligence is the want of ordinary care—that care which persons of common sense and common prudence ordinarily exercise in like employments, under like circumstances. Ordinary care has an *absolute* and a *relative* signification. The *standard* is absolute,—such care as prudent persons are accustomed to exercise in such case; the *degree* is relative,—depending upon the circumstances of the particular case. Circumstances of peculiar peril require a greater *amount* of care. The degree of care is increased, but the standard is the same; it is ordinary care, under the particular circumstances. And whether such care has been exercised or omitted in a given case is to be determined, not from the absolute requirements of the occasion, but from all the circumstances, viewed in the light of ordinary prudence;[1] for the full orbit of the primary right in such cases is, such security as the exercise of reasonable care by the defendant would afford. Ordinarily, therefore, the question whether there is negligence in a given exigency is compounded of law and fact, and is for the jury, under instructions.[2] This is always so, where the facts established or conceded are such that different conclusions might fairly be drawn therefrom.[3] But in some instances the law has fixed the act or the omission that will constitute negligence. In such cases, since the precise measure of duty is determinate,—the same under all circumstances,—the court may pronounce a given act or omission to be negligence *per se*.[4] In such cases, since the law characterizes the particular act or omission, it is not necessary to characterize it by allegation. In the nature of things, the tendency is, both by legislation and by adjudication, to make the law more and more specific,

Co. v. Berkey, 136 Ind. 181. *Cf.* House v. Meyer, 100 Cal. 592; Haynes v. Trenton, 123 Mo. 326; where it is held that a general allegation of negligence is sufficient as against an objection first raised upon appeal.

[1] Ry. Co. v. Brigham, 29 O. S. 378; Shear. & Redf. Neg. 10, note 2.

[2] Shear. & Redf. Neg. 10, note 2; Ry. Co. v. Klauber, 9 Ill. App. 613.

[3] Ry. Co. v. Grames, 136 Ind. 39; Salladay v. Dodgeville, 85 Wis. 318.

[4] Dyer v. Ry. Co., 34 Mo. 127; Ry. Co. v. Crawford, 24 O. S. 631; Burdick v. Worrall, 4 Barb. 596.

and to increase the instances in which the duty is determinate.[1] But notwithstanding this tendency, the task of distinguishing the law and the facts in negligence is, and must remain, one of the greatest difficulty. The old lawyers called it a "perylous chose."[2]

502. Contributory Negligence.—It is the general rule, founded upon the maxim *volenti non fit injuria*, and subject to some modifications, that where one person is injured by the concurring negligence of himself and another, his contributing negligence deprives him of remedy against the other. The authorities differ as to the way in which contributory negligence of the plaintiff is to be asserted in the action. Perhaps the numerical weight of authority sanctions the admission of the defense under a denial; and this is on the ground that the averment in the complaint, that the defendant's negligence caused the injury complained of, imports the freedom of the plaintiff from concurring negligence, and the denial traverses this implication.[3] But upon reason and principle, it would seem that contributory negligence is an affirmative defense, to be pleaded as new matter, and to be proved by the defendant. And this view is supported by good authority.[4] The plaintiff is not required, with a single exception soon to be stated, to allege his freedom from contributing negligence;[5] because, (1) the presumption that

[1] 4 Harv. L. Review, 169, 170.

[2] As to when negligence is a question of law, and when a question of fact, see Saumby v. Rochester, 145 N. Y. 81; Bogart v. Ry. Co., 145 N. Y. 283; Scaggs v. President, etc., 145 N. Y. 201; Kennedy v. Ry. Co., 145 N. Y. 288; Sisco v. Ry. Co., 145 N. Y. 296; Walsh v. Ry. Co., 145 N. Y. 310; Ry. Co. v. Murphy, 50 O. S. 135.

[3] Jones v. Ry. Co., 42 Wis. 306; Power Co. v. Eastman, 20 Minn. 277, 307; Ry. Co. v. Rutherford, 29 Ind. 82; Turnpike Co. v. Baldwin, 57 Ind. 86. *Cf.* Barholt v. Wright, 45 O. S. 182. But where there is evidence tending to show plaintiff's contributory negligence, it is error to instruct the jury that the law presumes that the plaintiff was exercising ordinary care at the time of his injury. Haynes v. Trenton, 123 Mo. 326.

[4] Cram v. Ry. Co., 87 Mo. 588; Ry. Co. v. Dunlap, 29 Ind. 426; Ry. Co. v. Washburn, 5 Neb. 117, 123.

[5] Thompson v. Ry. Co., 51 Mo. 190; Lee v. Troy C. G. L. Co., 98 N. Y. 115; Yik Hon v. Water Works, 65 Cal. 619; Robinson v. Ry. Co., 48 Cal. 409.

he exercised care dispenses with such allegation, and (2) the fact of plaintiff's contributory negligence is new matter, and to negative it in the complaint would be to anticipate a defense.

503. Contributory Negligence, Continued.—When contributory negligence is pleaded as a defense, it must be alleged in the same manner that negligence must be alleged as a ground of recovery—the act or omission must be stated, must be characterized as negligent, and must be shown to have contributed to the injury complained of. In an action against a railway company for the negligent killing of a horse, the defendant answered that the horse was killed without negligence or fault on the part of the defendant, and because of the gross negligence of the plaintiff. It was held that the particular act or omission of the plaintiff constituting his negligence should have been stated, and that for want thereof the answer was bad on demurrer.[1]

It has been held, and on sound principle, that where the necessary averments of the complaint in an action for negligence suggest the inference that the plaintiff may have been guilty of contributory negligence, he should negative such inference.[2]

COMPLAINT FOR NEGLIGENCE.

On the day of , plaintiff was driving his horse and carriage on and along the public highway at , and defendant was at the same time driving his horse and carriage on and along the same highway, when the defendant so negligently drove and managed his said horse and carriage, that by reason of his said negligence, and without fault or negligence on the part of plaintiff, defendant's carriage struck, broke, and injured plaintiff's carriage, to the damage of plaintiff dollars, for which sum he prays judgment against defendant.

[1] Ry. Co. v. Dunlap, 29 Ind. 426.

[2] Ry. Co. v. Nolthenius, 40 O. S. 376. *Cf.* Robinson v. Gary, 28 O. S. 241; Ry. Co. v. Whitacre, 35 O. S. 627. It has been held, that to bar an action for injury received from the use of defective machinery, on the ground that the employe assumed the risk of such injury, he must not only have known of the defect, but the danger arising therefrom must have been known or reasonably apprehended by him. Lee v. Ry. Co., 101 Cal. 118.

III. ACTIONS FOR EQUITABLE RELIEF.

504. Specific Performance.—An action to enforce performance of a contract to convey lands, a proceeding of frequent occurrence, is well adapted for illustrating the equitable remedy of performance in specie. The ground for enforcing specific performance is, that nothing else will supply the place of that for which the party of inherence contracted;[1] but the primary right and duty in such relations, in equity as well as in law, rest upon the contract sought to be enforced. The granting of relief by way of specific performance is largely in the discretion of the court, and where it is granted without violating any fixed rule of equity the discretion is not reviewable.[2]

The complaint in such case should show a valid contract, and should allege performance of, or an offer and readiness to perform, all precedent conditions;[3] unless it appear that the defendant has repudiated the contract.[4] If the complaint shows the contract to be oral, and therefore amenable to the defense of the statute of frauds, some other sufficient authentication thereof—such as part performance—should, to evade demurrer, be alleged.[5]

The parties, necessary and proper, to such action, have heretofore been considered.[6] It may here be added, however, that where the action is by the vendee, and the vendor has made a subsequent contract to convey, the second vendee should be made a defendant.[7] And in such case, a subsequent grantee of the vendor, with notice of the plaintiff's rights, is a proper party, and a decree may be had against him.[8] So,

[1] 1 Aus. Jur. 486.

[2] Dunckel v. Dunckel, 141 N. Y. 427.

[3] Jenks v. Parsons, 2 Hun, 667; Frixen v. Castro, 58 Cal. 442; Chess' Appeal, 4 Pa. St. 52; s. c. 45 Am. Dec. 668.

[4] Brown v. Eaton, 21 Minn. 409; Brock v. Hidy, 13 O. S. 306; Deichmann v. Deichmann, 49 Mo. 107; Martin v. Merritt, 57 Ind. 34; Gray v. Dougherty, 25 Cal. 266. *Cf.* ante, 329.

[5] Green v. Jones, 76 Me. 563. *Cf.* Marie v. Garrison, 13 Abb. N. C. 215, 321; Hart v. McClellan, 41 Ala. 251; Ante, 334.

[6] Ante, 454.

[7] Cassady v. Scallen, 15 Iowa, 93; Fullerton v. McCurdy, 4 Lans. 132.

[8] Laverty v. Moore, 33 N. Y. 658; St. Paul Div. v. Brown, 9 Minn.

one who holds a deed in escrow, and refuses to deliver it, is a proper party defendant.[1] And it seems that mortgage and judgment lien-holders may be made defendants.[2]

COMPLAINT FOR SPECIFIC PERFORMANCE.

(VENDEE AGAINST VENDOR.)

On the day of , plaintiff and defendant entered into a contract, whereby the defendant, being then the owner in fee of [Here describe the land.] agreed to convey said lands to plaintiff, by a good and sufficient deed of warranty, to be by him delivered to plaintiff on the day of ; in consideration whereof, plaintiff agreed to pay to defendant, as consideration for said lands, on the delivery of such deed, the sum of $.

On said day of , plaintiff duly tendered to defendant the said sum of $, and demanded such deed; but defendant then refused to deliver to plaintiff such conveyance.

Plaintiff has all the time been ready and willing to pay said purchase-money; and he now brings said sum of $ into court for defendant.

Wherefore, plaintiff prays that defendant be decreed to convey said lands to plaintiff by a good and sufficient deed of warranty.[3]

505. Creditors' Bills.—The equitable remedy by creditors' bill is to reach property of a debtor that can not be reached by execution. This remedy had its origin in the limited scope of the common-law writ of execution, which was confined in its operation to legal interests; and is resorted to for the purpose of reaching property that is of such character that it can not be taken on execution.

As this is an auxiliary remedy, based upon the inefficiency of legal process, it is, as a general rule, incumbent upon the plaintiff to show that he has exhausted his legal remedy. This is generally done by showing that he has obtained a judg-

157; Gregg v. Hamilton, 12 Kan. 333; Keegan v. Williams, 22 Iowa, 378. *Cf.* Hunter v. Bales, 24 Ind. 299.

[1] Davis v. Henry, 4 W. Va. 571.

[2] Seager v. Burns, 4 Minn. 141, 145; McCombs v. Howard, 18 O. S. 422, 436. *Cf.* Agard v. Valencia, 39 Cal. 292; Chapman v. West, 17 N. Y. 125.

[3] This form contains no specific facts to show the inadequacy of the legal remedy in damages. Where land is the subject of the contract sought to be enforced, the inadequacy of the legal remedy is well settled, and need not be alleged. 3 Pom. Eq. Jur. 1402, and cases cited.

ment, and that execution thereon has been returned *nulla bona*. A complaint in such action to reach property not liable to seizure upon execution must allege, (1) that plaintiff's demand is in judgment, whereon execution may issue against both personal and real property; (2) that execution issued thereon has been returned unsatisfied for want of such property subject to levy; and (3) that defendant has property applicable to the satisfaction of the judgment, through the instrumentality of a court of equity.[1]

A creditor at large can not impeach, in equity, a conveyance for fraud. This is elementary. The possibility that the plaintiff may get judgment on his claim will not suffice, Courts of equity are not tribunals for the establishment or collection of ordinary demands; and until judgment has been recovered, the creditor has no right to come into a court of equity to interfere with or control the property of his debtor.[2]

506. Creditors' Bills, Continued.—In such proceeding, various kinds of property, such as choses in action, stocks, money, rights under contract, judgments, property in the possession of another, and equitable interests in real estate, may be subjected to the payment of the judgment. The salary of an officer,[3] royalty due on books sold,[4] and a vendor's lien for purchase-money,[5] may be so applied. And in some of the states, property that has been conveyed away in fraud of creditors may be reached by this action.

[1] 2 Kent Com. 443, note e; 2 Sto. Eq. Jur. 1216 b, note 1; High on Injunctions, 250, note 4; Bisph. Prin. of Eq., 525–527; 3 Pom. Eq. Jur. 1415; Tappan v. Evans, 11 N. H. 311; Miller v. Miller, 7 Hun, 208.

[2] Bldg. Assn. v. Childs, 86 Wis. 292, 295. *Cf.* Slagle v. Hoover, 137 Ind. 314. A creditor seeking to charge a stockholder under the statute, must allege all the facts upon which the liability depends. He must allege performance of conditions precedent, or must aver facts which, in law, excuse their performance. Ordinarily, he should aver judgment, and execution returned *nulla bona;* but where there has been a sequestration of the property of the corporation, and a receiver appointed, and an injunction restraining creditors from suing the corporation, the creditor is excused from making said allegations. Hunting v. Blun, 143 N. Y. 511; Hirshfield v. Bopp, 145 N. Y. 84.

[3] Newark v. Funk, 15 O. S. 462.

[4] Lord v. Harte, 118 Mass. 271.

[5] Edwards v. Edwards, 24 O. S. 402.

One judgment creditor may maintain such action, or several may join as plaintiffs, or one may sue on behalf of himself and others similarly situated.[1] If property in the hands of a third person is sought to be subjected, both he and the judgment debtor must be made defendants.[2] A receiver may maintain a creditor's bill;[3] and when necessary, the court will appoint a receiver to take charge of property taken in the action.[4]

COMPLAINT BY CREDITOR TO REACH EQUITABLE ASSETS.

On the day of , plaintiff, by the consideration of the Court of Common Pleas of , obtained a judgment against the defendant C. D. for the sum of $, debt, and $, costs, which is wholly unpaid. On the day of , plaintiff caused an execution to issue on said judgment, which was duly returned wholly unsatisfied, for want of property, real or personal, whereon to levy. The said defendant R. S. is indebted to said C. D. in a sum unknown to plaintiff.

Wherefore, plaintiff prays that said defendant R. S. be required to answer herein, disclosing the amount and character of his said indebtedness to C. D., and that sufficient thereof to satisfy said judgment, with interest, and the costs herein, be subjected to the payment thereof.

507. Foreclosure of Mortgages.—A mortgage of real estate is usually given to secure the payment of a debt, or the performance of some obligation, and the tendency in modern times is, to treat such mortgage as a security incident to the debt or obligation; hence it is generally held that, although the mortgage is not negotiable, the legal transfer of a note, and the delivery of a mortgage securing it, without assignment of the mortgage, transfers the mortgage as an incident of

[1] Kerr v. Blodgett, 48 N. Y. 62; Doherty v. Holliday, 137 Ind. 282. *Cf.* Terry v. Calnan, 4 S. C. 508; Baines v. W. C. L. Co., 104 Cal. 1. *Contra*, Myers v. Fenn, 5 Wall. 207.

[2] Miller v. Hall, 70 N. Y. 250.

[3] Miller v. McKenzie, 29 N. J. Eq. 291.

[4] Bishp. Prin. of Eq. 527; High no Receivers, 399. In some of the states, where a proceeding in aid of execution, is provided for judgment creditors, the issuing and return of an execution is not required; and it is sufficient to allege only that the debtor has no property subject to execution. This shows that an execution would be fruitless, and, besides, is the allegation of a fact instead of the evidence thereof.

the note ; [1] and where several notes secured by the same mortgage are transferred to different persons, the transfers operate as assignments *pro tanto* of the mortgage, and the notes are to be paid from the proceeds of a sale in foreclosure, in the order of their maturity,[2] unless this order is varied by agreement.

An action to foreclose a mortgagor's equity of redemption is local, and must be brought in a court within whose territorial jurisdiction the land is situate, because otherwise the court could not deal with the subject of the action.[3]

Joint mortgagees, or joint assignees of a mortgage, must join as plaintiffs ; [4] but the several assignees of several notes secured by one mortgage can not join as plaintiffs, though they should all be made parties.[5] Where the mortgagee is trustee for the holders of notes or bonds secured by the mortgage, he is a proper party plaintiff ; [6] and the bond-holders, being represented by the mortgagee, are neither necessary nor proper parties ; [7] though the bond-holders, being the real parties in interest, may sue, or one may sue for himself and the others.[8] If the mortgagee be dead, his administrator, and not his heir, is the proper party plaintiff, because the interest is personalty.[9]

508. Foreclosure of Mortgages, Continued.—The only necessary parties defendant are, the mortgagor, or his heirs, devisees, grantee, or assignee ; for these are the only persons interested in the equity that is to be foreclosed.[10] Other

[1] Paine v. French, 4 Ohio, 318. Since a mortgage is not negotiable, the assignee thereof takes it subject to the equities between the original parties. Rapps v. Gottlieb, 142 N. Y. 164.

[2] Winters v. Bank, 33 O. S. 250 ; Rankin v. Major, 9 Iowa, 297.

[3] Ante, 468.

[4] Woodward v. Wood, 19 Ala. 213 ; Noyes v. Sawyer, 3 Vt. 160 ; Wing v. Davis, 7 Greenl. 31. *Cf.* Stucker v. Stucker, 3 J. J. Marsh. 301.

[5] Swenson v. Plow Co., 14 Kan. 387 ; Rankin v. Major, 9 Iowa, 297 ; Pettibone v. Edwards, 15 Wis. 95.

[6] Hays v. Gas Light Co., 29 O. S. 330.

[7] Poe v. Ry. Co., 10 O. S. 372.

[8] Ettlinger v. Ry. Co., 142 N. Y. 189. *Cf.* Reed v. The Evergreens, 21 How. Pr. 319 ; Blair v. Shelby, etc., Assn., 28 Ind. 175.

[9] McArthur v. Franklin, 16 O. S. 193, 206.

[10] Lennox v. Reed, 12 Kan. 223. *Cf.* Hall v. Nelson, 23 Barb. 88 ; Cord v. Hirsch, 17 Wis. 403 ; Britton v. Hunt, 9 Kan. 228 ; Simms v.

lien-holders should be made defendants, so that the purchaser may acquire the complete title, free from incumbrances. But these are not necessary parties, and may be omitted; in which case the land would be sold subject to their rights.[1] A mortgagor who has conveyed away his equity of redemption is not a necessary party to an action of foreclosure, wherein no other relief is asked.[2] But if judgment for the debt is asked in the same action, as may be done in some states, the mortgagor, if the debtor, or his administrator, if he be dead, must, of course, be made a defendant.

It has generally been held that one claiming title adversely to the mortgagor is not a proper party, for the reason that a court of equity can not adjudicate adverse titles in such action.[3] The wife of the mortgagor, if she has either dower or a right to redeem, should be made a party.[4] A grantee of the mortgagor, who assumes the mortgage as part of the purchase-price of the land, is not only a necessary defendant, but may be subjected to a personal judgment.[5]

The right to join in one action, a demand for personal judgment and for a decree of foreclosure, separately stated, has already been fully considered.[6] As between the original parties to a mortgage, record thereof is not necessary; but

Richardson, 32 Ark. 297; Renshaw v. Taylor, 7 Oreg. 315.

[1] Ante, 454. *Cf.* Morris v. Wheeler, 45 N. Y. 708, holding a subsequent incumbrancer to be a necessary party. Mr. Pomeroy says this case is so clearly erroneous that it can only be regarded as an inadvertence. Pom. Rem. 336, *in nota*.

[2] Drury v. Clark, 16 How. Pr. 424; Delaplaine v. Lewis, 19 Wis. 476; Stevens v. Campbell, 21 Ind. 471; Williams v. Meeker, 29 Iowa, 292, 294.

Croghan v. Spence, 53 Cal. 15; Pelton v. Farmin, 18 Wis. 222; Brundage v. Miss. Soc., 60 Barb. 204; Palmer v. Yager, 20 Wis. 91, 103; Bank v. Thompson, 55 N. Y. 7; Wilkinson v. Green, 34 Mich. 221; Banning v. Bradford, 21 Minn. 308; Rathbone v. Hooney, 58 N. Y. 463; Dial v. Reynolds, 96 U. S. 340. *Contra*, Bradley v. Parkhurst, 20 Kan. 462.

[4] Chambers v. Nicholson, 30 Ind. 349; McArthur v. Franklin, 15 O. S. 485. *Cf.* Ketchem v. Shaw, 28 O. S. 503; Etheridge v. Vernoy, 71 N. C. 184, 186.

[5] Ante, 420; Bailey v. Lee, 14 Hun, 524; Semple v. Lee, 13 Iowa, 304. *Cf.* Johnson v. Monell, 13 Iowa, 300; Tanguay v. Felthousen, 45 Wis. 30, 33.

[6] Ante, 215, 216.

if other lien-holders are made parties, the complaint should state the date of the record of plaintiff's mortgage. The requirement to file with the complaint a copy of the instrument on which the claim is founded,[1] does not, ordinarily, apply to mortgages.

COMPLAINT ON NOTE AND MORTGAGE.

First Cause of Action.

On the day of , defendant C. D. made and delivered to plaintiff his promissory note of that date, whereby he promised to pay to plaintiff, or order, dollars, months after date, no part of which has been paid.

Second Cause of Action.

Plaintiff makes the allegations of said first cause of action part hereof, and further says: At the time said defendant C. D. so delivered said note, and to secure the payment thereof, he executed and delivered to plaintiff his mortgage deed, conveying to plaintiff, his heirs and assigns, certain lands, situate in said county, and described as follows: [Here describe the premises.] Said conveyance was upon condition, therein written, that if the defendant should pay said note when due, the said conveyance should thereupon be void; otherwise, to remain in force.

On the day of , at o'clock A. M., plaintiff delivered said mortgage to the Recorder of said county, at his office therein, for record; and the same was thereafter duly recorded.

Said defendant R. S. claims to have a lien upon said premises; but if he has such lien, it is subordinate and inferior to plaintiff's said claim.

Plaintiff prays judgment against said defendant C. D. for said sum of dollars, with interest from ; he prays a decree for the sale of said lands according to law, and the application of the proceeds to the payment of such judgment; he prays that the said pretended lien of said defendant R. S. be adjudged to be subordinate and inferior to the said lien of plaintiff; and he prays for such other relief as he may be found entitled to.

509. Reformation of Instruments.—The reformation of instruments by decree is the exercise of a remedial right recognized only in equity. The occasions for the exercise of this equitable remedy generally arise from mistake or fraud. Reformation is a very delicate remedy; much more so than rescission or cancellation. To *reform* an instrument, and give it full force in its modified form, is a much more important exercise of judicial power, than simply to cancel and set it aside. Therefore, he who seeks to rectify an instrument

[1] Ante, 370.

on the ground of mistake must establish, most clearly and satisfactorily, that the alleged intention to which he asks it to be conformed, continued concurrently, in the minds of all the parties, down to the time of its execution.[1] If there has been mistake on one side only, the utmost relief, if any can be had, is rescission, not reformation.[2] Of course, the case is very different where there has been fraud. And it has been held that where there is mistake on one side, and fraud on the other, reformation may be had.[3] But where a contract sought to be reformed is oral, and is within the statute of frauds, a plea of the statute is a bar to the action.[4] It has been held that there must be a demand for a correction of a mistake, before an action to reform can be maintained;[5] and while this is not a uniform requirement, it rests upon the principle that without demand and refusal, there is no delict of the defendant.

The joinder in one action, of a cause of action to reform an instrument and a cause of action to enforce it, has heretofore been fully considered.[6]

510. Reformation of Instruments, Continued.—A complaint for the reformation of a contract must show that the plaintiff has performed all his precedent obligations, if there are such;[7] it must state the true agreement in its terms, and not merely in legal effect;[8] it must point out clearly the mistake; and if relief is sought against a third person, whose rights have intervened, it must allege that he had actual knowledge of the mistake at the time he intervened.[9] Inasmuch as reformation relates to an injury remediable only in equity, the complaint need not allege the want of adequate remedy at law.

[1] Bisph. Prin. of Eq. 469.

[2] Douglass v. Grant, 12 Ill. App. 273; Bellows v. Stone, 14 N. H. 175, 202; Cooper v. Ins. Co., 14 Wright (Pa.), 299.

[3] Wells v. Yates, 44 N. Y. 525; Hitchens v. Pettingill, 58 N. H. 386.

[4] Glass v. Hulbert, 102 Mass. 31.

[5] Lambkin v. Reese, 7 Ala. 170; Axtel v. Chase, 77 Ind. 74; Popijoy v. Miller, 133 Ind. 19.

[6] Ante, 212–214.

[7] Conaway v. Gore, 21 Kan. 725.

[8] Stephens v. Murton, 6 Oreg. 193.

[9] Easter v. Severin, 64 Ind. 375; Strang v. Beach, 11 O. S. 283. *Cf.* Van Thornily v. Peters, 26 O. S. 471.

COMPLAINT TO REFORM A DEED.

On the day of , the defendant, in consideration of $ sold to plaintiff the following premises : [Here describe the premises correctly.]

On the same day, and for the purpose of conveying said premises to plaintiff, defendant executed and delivered to plaintiff a deed, which both plaintiff and defendant intended should convey, and which they both believed did convey, the said premises so sold as aforesaid; whereas, by the mutual mistake of plaintiff and defendant, the description written in said deed was this : [Here insert the erroneous description, as in the deed.] On discovering said mistake, plaintiff requested defendant to correct the same, which he refused to do.

Wherefore, plaintiff prays that the said deed may be reformed, so as to describe said premises properly ; and he prays for such other relief in the premises as he may be found entitled to.

CHAPTER XXIX.

OCCASIONAL INCIDENTS OF PROCEDURE.

511. Scope and Purpose of this Chapter.—There are some incidents, of occasional occurrence, by which the regular order of procedure may be varied,[1] and which, though they relate more to practice than to pleading, are indispensable to a full treatment of the latter; and these, to avoid frequent digressions in an orderly treatment of principles, are grouped in this final chapter.

512. The Pendency of an Action.—It is sometimes important to determine at what point of time an action is to be deemed commenced. The solution of this question may be necessary in order to determine when the jurisdiction of the court attached, or when the proceeding became *lis pendens*, or whether the bar of the statute of limitations is available; and it may in like manner become important to determine when the pendency of an action ceases, so that a judgment therein has become *res judicata*, or may be admitted in evidence. These inquiries as to the pendency of an action do not admit of direct and categorical answers. Generally speaking, it may be said that the jurisdiction of the court attaches to the defendant, upon his voluntary and unqualified appearance, or when he has been legally served with summons; and this, without regard to defects in the complaint.[2] And, generally, there is *lis pendens* as to the subject of the action, from the date of such appearance,[3] or of such service of process, or of constructive service by publication.[4]

[1] Steph. Pl. 154.

[2] Per MASON, C. J., in Johnson v. Jones, 2 Neb. 126.

[3] Brundage v. Briggs, 25 O. S. 652.

[4] Bennett v. Williams, 5 Ohio, 461.

It has been held that the pendency of an action continues until the time for appeal has expired, unless judgment therein has been sooner satisfied; and that during such pendency of the action a judgment therein, being liable to reversal on appeal, is not *res judicata*, and is not admissible in evidence to prove the facts therein recited.[1]

513. Agreed Cases.—The codes generally provide that the parties to a controversy that might be the subject of a civil action, may make and present a case by agreement. This is done by presenting to the court a statement, in writing, of the operative facts upon which the parties rely, for relief and for defense, and asking the judgment of the court thereon. In such case, there are neither pleadings nor process, nor is there any controversy as to the facts; the only contention being as to the legal operation of the facts stated.

To insure good faith, and to prevent the submission of feigned controversies, it must appear, by affidavit of one of the parties,[2] that the controversy is real, and that the proceeding is in good faith, to determine the rights of the parties. Such affidavit is held to be requisite to give the court jurisdiction without pleadings.[3]

In such cases, neither a motion for a new trial, nor a bill of exceptions, is requisite to a review thereof in error.[4] This is so, for the plain reasons, that (1) the facts, being agreed to, would be the same on a new trial as on the former, and (2) there would be nothing to be brought upon the record by a bill of exceptions. An exception to the decision of the court is all that is requisite in such case for a review in error.[5]

[1] *In re* Blythe, 99 Cal. 472.

[2] An attorney may not make the affidavit. Bloomfield v. Ketcham, 95 N. Y. 657. Where the State, or a corporation is a party, there must be an exception to the rule requiring the affidavit of a party. State v. Coghlen, 86 Ind. 404.

[3] Sharpe v. Sharpe, 27 Ind. 507, 508; Myers v. Lawyer, 99 Ind. 237; Plainfield v. Plainfield, 67 Wis. 525. *Cf.* Donald v. St. Louis, etc., Co., 52 Iowa, 411.

[4] Brown v. Mott, 22 O. S. 149; State v. Board, 66 Ind. 216; Lofton v. Moore, 83 Ind. 112.

[5] Warrick, etc., Co. v. Hougland, 90 Ind. 115, 117; Fisher v. Purdue, 48 Ind. 323.

514. Agreed Cases, Continued.—An agreed case is very different from an agreement as to the facts in a case. An agreed case dispenses with pleadings, while an agreed statement of facts dispenses with evidence, but not with pleadings. In the latter case, both a motion for a new trial and a bill of exceptions are requisite for a review in error, while in the former they are not. The object of an agreed case is, to enable parties to submit for adjudication a real controversy as to the legal operation of undisputed facts, by a short and convenient mode, without resort to legal process or formal pleadings.[1] The statement should contain only operative facts, as distinguished from evidential facts ;[2] for the court will not, in such case, determine any question of fact.[3] The facts must be such, and the manner of statement must be such, that the court may, by judgment or decree, determine and adjudicate the rights of the parties. It is at least doubtful whether any amendment or correction of the statement in such case can be allowed, unless it be to correct an error brought about by fraud or pure accident.[4]

515. Lost Pleadings and Writs.—Pleadings being essential to the formation of an issue, and to the trial of a cause, if an original pleading be lost, or be withheld by any person, the court may, upon motion, order a copy thereof to be substituted; and this power of the court is usually extended, by statute, to the substitution of copies for lost or destroyed writs, reports, verdicts, bills of exceptions, orders, entries, and other proceedings in an action. Where a copy has been so substituted for a lost pleading, and the original is afterward found, the copy should be stricken from the files, so

[1] Ry. Co. v. Perry Co., 30 O. S. 120 ; Steamship Co. v. Voorhis, 104 N. Y. 525 ; Williams v. Rochester, 2 Lans. 169 ; Day v. Day, 100 Ind. 460, 462.

[2] Powers v. Prov. Inst., 122 Mass. 443.

[3] Clark v. Wise, 46 N. Y. 612 ; Smith v. Cudworth, 24 Pick. 196 ; Wood v. Squires, 60 N. Y. 191 ; Dickinson v. Dickey, 76 N. Y. 602.

[4] State v. Coghlen, 86 Ind. 404, 413. It has been said of this case, that it "must be regarded as an unusual one, and the rule asserted, one that can not be successfully invoked, except in the strongest and clearest cases of excusable and unavoidable mistake." Elliotts' App. Proc. 231, and notes.

that the record may not be needlessly incumbered with both papers.[1]

516. Demurer to Evidence.—In the trial of a cause to a jury, after the party having the burden of proof upon the issue has introduced his evidence; the adversary party may demur to the evidence; that is, he may demand the judgment of the court upon the facts shown by the evidence, just as a party may, by demurrer to a pleading, demand the judgment of the court upon the facts therein pleaded.[2] Such demurrer concedes the truth of all the facts in issue which the evidence tends to prove, and, like a demurrer to a pleading, presents an issue in law. The *relevancy* of evidence to a given issue—that is, whether it tends to prove or disprove the issue—is matter of law, and is to be determined by the court; but the *weight* of evidence—that is, whether it is sufficient to prove or disprove a fact in issue—is matter of fact, to be determined by the jury. Hence, upon demurrer to evidence, the court may not weigh the evidence, for that would be usurping the province of the jury; and if there is evidence tending, in any appreciable degree, to prove the facts which it was offered to sustain, the demurrer must be overruled.[3] The evidence, to warrant the overruling of a demurrer, must, of course, tend to prove each material fact in issue.

At common law, upon demurrer to evidence the jury was discharged; and if the demurrer was wrongly overruled, it was error, remediable by bill of exceptions and writ of error.[4] But under the modern procedure, it is the prevailing practice for the demurrant, upon the overruling of his demurrer, to

[1] Sweet v. Brown, 61 Iowa, 669. It has been held, that where parties, in an appellate court, proceed to trial, verdict, and judgment, without pleadings, the judgment will not be reversed on error. Hallam v. Jacks, 11 O. S. 692. In such case, the court having jurisdiction by the appeal, the want of pleadings was a mere irregularity. Ante, 465, note.

[2] Steph. Pl. 180; Gould Pl. ix. 47.

[3] Milburn v. Phillips, 136 Ind. 680; Dick v. Ry. Co., 38 O. S. 389. But in some jurisdictions, a demurrer to evidence will be sustained, if the evidence would not, on motion for a new trial, sustain a verdict for the party who introduced it.

[4] Gould Pl. ix. 73, 74.

introduce his evidence; and when he does this, he can not avail himself of an exception to the overruling of the demurrer.[1]

In the modern practice, this interception of the trial is variously denominated. It may be by demurrer to the evidence, by motion to direct a verdict for the defendant, or by motion to arrest the testimony from the jury, and render judgment against the party who introduced it. But whatever the mode, it involves an admission of all the facts which the evidence tends to prove, and presents only a question of law, as to whether each fact in issue, and indispensable to a recovery, has been supported by some evidence.[2]

517. Special Verdict.—The verdict of a jury may be either *general* or *special.* A general verdict is simply a finding "for the plaintiff," or "for the defendant;" and where damages are awarded, the amount thereof as found is added. A special verdict is a statement of the facts in issue found by the jury, from the evidence. In the one case, the jury makes the application of the law to the facts as found, and presents the result of such finding and such application; in the other case, the court is to make the application of the law to the facts as found.

The history of the common law shows a strife between the judges and the juries as to whether the finding of a special verdict should be optional with the jury, or whether it should be under the control of the judge; but it finally became a settled rule of procedure that the jury might, at its option, find a special, instead of a general, verdict.[3] In such case, the jury, after setting out the facts as found, concluded their verdict as follows: "that they 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 opinion

[1] Ins. Co. v. Crandal, 120 U. S. 527; Robertson v. Perkins, 129 U. S. 233.

[2] A motion for judgment on the pleadings is in effect a demurrer to the pleading of the adverse party; and the ruling thereon can be reviewed only on appeal from the judgment, and not on refusal of motion for new trial. Evans v. Paige, 102 Cal. 132, and cases cited.

[3] 4 Harv. Law Rev. 165–6; Steph. Pl. 180; Mayor v. Clarke, 3 A. & E. 506.

that the issue is proved for the plaintiff, they find for the plaintiff accordingly, and assess the damages at but if the court shall be of an opposite opinion, then *vice versa*." [1]

518. Special Verdict, Continued.—The prevailing practice in modern times is, to subject the jury to the direction of the court, and to require the special verdict in addition to, and not in lieu of, a general verdict; and when the special finding of facts is inconsistent with the general verdict, the former controls the latter, and judgment should be entered accordingly.[2] The special verdict is generally in the form of answers to interrogatories submitted to the jury; and in some jurisdictions it is the right of either party to request a special verdict upon any issue, or as to any material fact involved. Interrogatories submitted for a special verdict should be limited to the material operative facts, as distinguished from mere evidential facts.[3] For example, where the question whether the defendant was guilty of any negligence that was the proximate cause of the injury is submitted to the jury for a special verdict, a question requiring the jury to state in what that negligence consisted is properly refused, as calling for mere evidential facts.[4]

The right to demand special findings, and the control of a general verdict by such findings, are valuable aids and safeguards in the administration of justice. The general verdict of a jury is the result of its finding of facts and of its application of the law to the facts so found; in other words, a general verdict is the statement of a *conclusion*, based upon facts not stated, and upon an application of law that is not disclosed. There may be error in the finding of facts, or in the application of the law, or in both, and yet neither mistake is disclosed. A special verdict discloses the facts found, and not mere conclusions reached, and leaves the application of the law to the court, where it properly belongs.

[1] Steph. Pl. 180.
[2] Cox v. Delmas, 99 Cal. 104.
[3] Ohlweiler v. Lohmann, 88 Wis. 75.
[4] McCoy v. St. Ry. Co., 88 Wis. 56.

519. Withdrawing a Juror.—It was a practice at common law, and the practice obtains in many of the states, when the plaintiff was taken by surprise, to allow him to withdraw a juror. This works a continuance of the case, and is a means whereby the plaintiff may recede from a conclusion of the trial. The withdrawal of a juror is subject to the discretion of the court, and should be at the cost of the party asking it.[1]

520. Of Variance.—A variance is a disagreement between the allegations and the proof. A variance in mere matter of form, or as to matter not material, will be disregarded, or may be amended. The variance between "First National Bank of Crawfordsville, Indiana," and "First National Bank of Crawfordsville," is amendable on the trial, and will not be regarded in a reviewing court.[2] A variance in some matter that is, in point of law, essential to the claim asserted, is fatal to the party from whose evidence it arises; for a party must recover, if at all, upon the demand asserted in his pleading, and not upon some other that may be developed in his proofs.[3] For example, if fraud is alleged as the basis of an action, a recovery may not be had on proof of a right of action on contract, even though the facts proved would, in an action based thereon, warrant a recovery.[4] And equity will not relieve on ground not stated in the complaint.[5]

Variance most frequently arises in actions for defamation. An allegation that the defendant said that "L. is pregnant and gone seven months with child," is not sustained by proof that he said "have you heard anything about L.'s being pregnant by Dr. ?"[6]

An immaterial variance may be disregarded. A material variance may, in the discretion of the court, be cured by amendment of the pleading, upon terms. A complete failure of proof is not amendable. An allegation that defendant killed plaintiff's cow, and proof that the defendant fatally

[1] Steph. Pl. 336, note; Scholfield v. Settley, 31 Ill. 515; Walcott v. Studebaker, 34 Fed. Rep. 8.

[2] Sayers v. Bank, 89 Ind. 230.

[3] Reed v. Norton, 99 Cal. 617.

[4] Truesdell v. Bourke, 145 N. Y. 612.

[5] Cox v. Esteb, 68 Mo. 110.

[6] Long v. Fleming, 2 Miles, 104.

wounded her, and that plaintiff himself killed her, is not a fatal variance.[1] A variance that does not amount to complete failure of proof is waived, if no objection be made on that ground in the trial court.[2] An objection that the judgment exceeds the *ad damnum* of the complaint can not be raised for the first time in the reviewing court.[3]

521. Judgment non Obstante Veredicto.—The party obtaining a verdict is not always entitled to judgment thereon Sometimes the insufficiency of the pleadings, or the immateriality of the issue, is not observed, or objection on such ground is not made, until after trial and verdict; and where the defect is one not aided by verdict, the defeated party may, in some cases, prevent a judgment on the verdict.

By the common law, where the defendant has pleaded in bar, in confession and avoidance, and it is discovered, after verdict for the defendant, that his plea is bad in substance, the plaintiff may move for judgment *non obstante veredicto;* that is, that judgment be entered in his favor, without regard to the verdict the theory being, that if the plea is bad in law, the verdict, which only finds it true in point of fact, does not authorize a judgment for the defendant.[4] And at common law, judgment *non obstante* can be given only for the plaintiff; the corresponding remedy for the defendant being to move for arrest of judgment.[5] But under the modern practice, it would seem that a motion for judgment irrespective of the verdict is available to the defendant also;[6] as when the complaint does not state a cause of action, or when the issue tried is upon an immaterial matter. Upon such motion, the court can look only to the pleadings; an admission made during the trial can not be regarded.[7]

522. Arrest of Judgment.—Where there is error, ap-

[1] Ry. Co. v. Ireland, 19 Kan. 405.

[2] Merrill v. Elliott, 55 Ill. App. 34; Hess v. Rosenthal, 55 Ill. App. 324; Ry. Co. v. Byrum, 153 Ill. 131.

[3] Grand Lodge, etc., v. Jesse, 50 Ill. App. 101.

[4] Steph. Pl. 186.

[5] Smith v. Smith, 4 Wend. 468; Schermerhorn v. Schermerhorn, 5 Wend. 513; Buckingham v. McCracken, 2 O. S. 287.

[6] Tootle v. Clifton, 22 O. S. 247. *Cf.* Trimble v. Doty, 16 O. S. 118, 128.

[7] Challen v. Cincinnati, 40 O. S. 113.

pearing on the face of the record, which vitiates the proceedings, the unsuccessful party may, after verdict, move in arrest of judgment; that is, that judgment be arrested or withheld because of such error. Generally speaking, judgment will not be arrested for errors of mere form, but for errors of substance only; and these must arise upon some part of the record.[1]

"When we say that a judgment should be arrested if the petition fails to show a cause of action, we speak of substantial, and not of formal omissions. The latter are supplied by intendment, and will be presumed, after verdict, to have been proved. But when the petition shows that the plaintiff has no cause of action, then the verdict should be treated as a nullity."[2]

It has been held that a motion in arrest of judgment precludes a motion for a new trial.[3] But such holding is illogical, for a motion in arrest is based upon the pleadings, while a motion for a new trial generally brings in review matters pertaining to the trial.

523. Motion for New Trial.—A new trial is a re-trial, in the same court, of an issue in fact. The verdict of the jury, the report of the referee, or the decision of the court, is vacated, and the cause tried *de novo*. A new trial is to be had upon motion of the party aggrieved, setting forth specifically the grounds upon which he assails the verdict, or decision.

The grounds upon which a new trial may be granted are specified by statute, and generally embrace the following:— Irregularity in the proceedings of the court, jury, or prevailing party, whereby the complaining party was prevented from having a fair trial; misconduct of the jury, or of the prevailing party; accident or surprise that could not be guarded against; that the verdict or decision is contrary to the evidence, or to the law; error of law occurring at

[1] Steph. Pl. 185. *Cf.* Hamilton v. Hamilton, 16 O. S. 428.

[2] Per BLISS, J., in Saulsbury v. Alexander, 50 Mo. 142, 144.

[3] Cin., etc., Co. v. Case, 122 Ind. 310.

the trial, such as misdirection to the jury, or the admission or rejection of evidence contrary to law, and excepted to at the time; newly discovered evidence, material to the party, and which he could not, with reasonable diligence, have discovered and produced at the trial; and that the damages awarded are excessive.

The office of a motion for new trial is, to bring before the trial court its rulings upon the trial, in order that it may review them, and correct such as are found to be erroneous and to the prejudice of the complaining party; and it may also present some questions—such as the mistake or misconduct of the jury—for original consideration by the court. The overruling of a motion for new trial is a proper specification in an assignment of errors in a reviewing court; and, as a general rule, an error proper to be included in such motion must be so included, to be available in the reviewing court.[1] Rulings upon the pleadings, since they do not pertain to the trial, are not proper to be assigned as grounds for a new trial.[2]

524. Appellate Procedure.—The modes for obtaining a review heretofore considered—to wit, by motion for judgment *non obstante veredicto*, by motion in arrest of judgment, and by motion for new trial—relate to a review by the court of original jurisdiction. There are, in addition, two modes of review in a higher court generally provided for in certain classes of cases; and these are, by appeal, and by proceedings in error.

An appeal is the removal of a cause, or of some distinct part thereof, to another court to be again tried in that court. Strictly speaking, the proceeding on appeal is a re-trial of the cause or part thereof appealed, and not a review of the proceedings in the lower court.[3] The right of appeal arises

[1] Elliott's App. Proc. 347, 351, 831.

[2] Rogers v. Rogers, 78 Ga. 688; Gibson v. Garreker, 82 Ga. 46; Patterson v. Scot. Am. Co., 107 Ind. 497; Irwin v. Smith, 72 Ind. 482; Hunter v. Fitzmaurice, 102 Ind. 449.

[3] In some of the states, the term "appeal" is applied to a review in error, as well as to the removal of a cause for re-trial upon the issues. But appeal is of civil-law origin, and removes the entire cause, for *re-trial*, both as to facts and law;

only from constitutional or statutory provision; and being a remedial right, it may be modified or lost, by amendment or appeal of the statute conferring the right.

The requisites for effecting an appeal are, generally, the giving of notice of intention to appeal, and the giving of a bond, conditioned that the appellant will prosecute his appeal without delay, and will perform the judgment of the appellate court. The appeal deprives the lower court of further jurisdiction as to the matter appealed, and vacates the judgment, and also the rulings on demurrer entered by such court;[1] and, if the lower court did not have jurisdiction of the subject-matter of the action, the higher court can not acquire jurisdiction by the appeal.

525. Review in Error.—At common law, the unsuccessful party might, after judgment, sue out a writ of error, which was a writ issued by a court of competent jurisdiction, directed to the judges of the court in which the judgment was given, commanding them to send the record to another court, in order that some alleged error of law therein might be corrected.[2] Under the modern procedure, such review for the correction of errors of law is obtained by an action in error, commenced by the filing of a complaint in error in the reviewing court, and the service of a summons on the defendant in error. In such new action, the reviewing court is limited to an examination of matters of law, appearing upon the face of the record, and presented to the court by assignments of error in the complaint in error.

While an action in error is to bring before the reviewing

while a proceeding in error is of common-law origin, and is for a *review* of questions of law only. Wiscart v. Dauchy, 3 Dallas, 327.

[1] Wanzer v. Self, 30 O. S. 378.

[2] Steph. Pl. 201–207, and notes. There was also a writ of error *coram nobis* or *coram vobis*, which was to bring into the issue some omitted matter of fact, which affects the validity of the judgment; such as that the defendant who appeared by attorney and not by guardian, was under age. The writ of error *coram nobis* was not intended to authorize the court to review and revise its opinions, but to enable it to recall some adjudication made in ignorance of some fact which, if before the court, would have prevented the judgment, and which, without fault of the party, was not presented. Freeman on Judgments, 94.

court only alleged mistakes in law, the sufficiency of the evidence may be made the subject of review, by motion for new trial, exception to the overruling thereof, and a bill of exceptions. In this way, the evidence is brought into the record, and the question of its sufficiency is presented by the alleged error of law in overruling the motion for new trial.[1]

An action in error differs from appeal, in that the former is a new proceeding,[2] while the latter is but a continuation of the same case from one court to another.[3] This distinction will account for the difference in some of the incidents of the two proceedings. In case of appeal, the parties are brought into the appellate court by the appeal, while in a proceeding in error, service of process is necessary, unless that be waived and appearance voluntarily entered; appeal vacates or suspends the judgment below, while an action in error does not, and execution may issue thereon, unless a stay is obtained by the giving of a supersedeas bond; on appeal proper, the cause is tried *de novo*, and judgment rendered without regard to the questions considered or the judgment rendered below,[4] while a court of errors ordinarily either affirms or reverses the judgment below, though it may sometimes enter such judgment as it finds should have been entered below, and sometimes it may remand the cause to the inferior court for further proceedings.

526. Error must be Prejudicial.—Not all errors are available to the party against whom they are committed. To make an erroneous decision or ruling so available, it must (1) be prejudicial to the party complaining, (2) he must object to it in the trial court, and (3) he must, as a rule, save the question by an exception.

Where a wrong decision denies or impairs a remedial right, or a meritorious defense, it is, with few exceptions, prejudicial; but where it affects only matters of procedure, it is sometimes, though not always, a harmless error. The court will not presume prejudice from the fact of error, nor is it

[1] Freeman on Judgments, 347.
[2] Bank v. Jenkins, 104 Ill. 143.
[3] Ante, 524.
[4] Seymour v. Shea, 62 Iowa, 708.

requisite that actual injury be certainly shown; it is sufficient if it appear, from the record, that the error complained of was probably prejudicial. Where there is error in matters of procedure, but a right result is nevertheless reached, the error is harmless.[1] For example, if the court should proceed upon its own knowledge of a foreign law, instead of requiring proof thereof, the error has been held not to be prejudicial, unless it appear that the court was mistaken as to the foreign law.[2] And where the trial judge submitted the construction of a written instrument to the jury, and the jury placed the true construction upon it, the error was held to be harmless.[3] But there must be exceptions to the rule that a right result renders error in procedure harmless. It has been suggested that to deny a trial by jury, in a case where the parties are entitled to a jury trial, would be available error, even though it appear that a right conclusion was reached.[4]

527. Objections and Exceptions.—It is not enough that error be prejudicial to the party complaining; he must, to make it available, object to the erroneous ruling or decision, in the trial court, and he must except thereto.

The office of an objection is, (1) to present to the trial court the specific grounds upon which the party asks a ruling in his favor, or opposes one that is against him; and (2) to present to the reviewing court the precise points upon which the lower court ruled.

The office of an exception is, to give notice to the trial court and to the adverse party, of the intention of the exceptor to reserve the question made by the ruling and the objection, for future consideration in a reviewing court. If an objection is not followed by an exception, the objection is waived, and the ruling objected to can not be made the subject of review. This requirement of objection and exception, to lay the ground for complaint in error, is but common fairness to the court and to the adverse party; it accent-

[1] Logansport v. Shirk, 129 Ind. 352; Martineau v. Steele, 14 Wis. 272; Coal Co. v. Schaefer, 135 Ill. 210.

[2] State v. Rood, 12 Vt. 396.

[3] Martineau v. Steele, 14 Wis. 272.

[4] Elliott's App. Proc. 634.

uates the importance of the decision objected to, and invites a second thought as to whether it may be erroneous.

Where the sustaining of an objection to a question asked a witness is assigned as error, the record should disclose what answer was expected; otherwise, it will not appear whether the exclusion, though erroneous, was prejudicial.[1] And, for reasons heretofore stated, such disclosure should be made in the trial court, at the time the exception is taken. But where a witness is rejected *as incompetent to testify*, the party need not state what he expected to prove by him; for the ground of exclusion is wholly irrespective of the subject-matter of his testimony, and if erroneous, is prejudicial.[2]

Some rulings, to be reviewable in a court of error, must first be presented to the trial court for review. This is generally done by a motion for a new trial.[3]

528. Bill of Exceptions.—The examination in a court of error is limited to matters that appear in the record of the lower court. Therefore, to obtain consideration of any ruling of the lower court, it must not only be duly excepted to, and assigned as error, but the ruling itself must appear in the record of the lower court, filed with the complaint in error; it can be brought to the attention of the reviewing court in no other way.

Some matters—such as the pleadings, return of summons, rulings on demurrers, verdicts, judgments and decrees—always and necessarily appear upon the record; but some parts of the procedure, particularly the incidents of the trial, do not enter into the record proper, and when any of these extrinsic matters are to be presented to a court of error, they must, for that purpose, be brought upon the record by a bill of exceptions.

A bill of exceptions is a statement in writing, signed by the judge who tried the cause, setting forth the rulings and decisions excepted to, and sometimes such collateral facts as

[1] Bolen v. State, 26 O. S. 371; Bean v. Green, 33 O. S. 444; Gandolfo v. State, 11 O. S. 114. But this rule does not ordinarily apply to the exclusion of questions on cross-examination. Martin v. Elden, 32 O. S. 282.

[2] Wolf v. Powner, 30 O. S. 472. *Cf.* Hollister v. Reznor, 9 O. S. 1.

[3] Ante, 523.

are necessary to disclose the materiality of the matters excepted to. The sole office of a bill of exceptions is, to bring upon the record, and make part thereof, extrinsic matters that would not otherwise enter into the record, in order that these may be exhibited to a reviewing court.[1] Parts of the procedure that do not properly belong to the record, can not be brought to the attention of the reviewing court by putting them in the record without a bill of exceptions. For example, the charge of the court to the jury is not properly a part of the record in a case, and exceptions thereto can not be made available by simply spreading the charge and the exceptions upon the record. They must be set out in a bill of exceptions, and this made a part of the record by order of the court; but the bill need not be copied into the record-books.

529. Entries Nunc pro Tunc.—It sometimes happens that an order made, or a judgment rendered, or other thing done in the progress of a case, and that should be entered upon the record, is inadvertently omitted therefrom. To cure such omission, the court may, upon motion, make what is called an entry *nunc pro tunc;* that is, the court may cause to be made *now*, an entry that shall have the same legal force and effect as if made at the time when it should have been made. The power of the court to correct such omissions in this way rests upon the maxim *actus curiæ reminem gravabit* —an act of the court shall prejudice no one.

This incident of procedure is corrective, and not creative. It is to supply omitted evidence of an existing fact, and not to supply an omitted fact; the theory being that the ruling involved was actually made, but not entered of record. The ruling of a court is a judicial act; the entry thereof is purely ministerial, and may be done at any time without affecting the validity of the judicial act. In such case, the thing then done may be now recorded, and with the same effect, *inter partes*, as if then recorded. The making of entries *nunc pro tunc* is to prevent injustice to a party; and though the exercise of this power rests in the discretion of the court, it

[1] Young v. Martin, 8 Wall. 354, 357; Gavin v. State, 56 Ind. 51.

should not be withheld where the facts show a proper occasion for it.

Such order is to be obtained upon motion, and notice to the adverse party.[1] It is a summary proceeding, and not a trial, though, of course, the application must be sustained by evidence. Parol evidence is generally held admissible, though it is doubtful if, by itself, such evidence is sufficient.[2] Some entry or memorandum, made by the court, and authorized or required by law, is the evidence generally relied upon.

The period within which an entry *nunc pro tunc* may be made, seems not to be limited.[3] Such entries being in furtherance of justice, will not be made where third persons have acquired rights, without notice of the facts omitted from the record.[4]

[1] Ellis v. Keller, 82 Ind. 524; Gray v. Robinson, 90 Ind. 527.

[2] Conway v. Day, 92 Ind. 422; Fletcher v. Coombs, 58 Mo. 430; Freeman on Judgm. 63; Elliott's App. Proc. 213. *Cf.* Metcalf v. Metcalf, 19 Ala. 319; Hegeler v. Henckell, 27 Cal. 491.

[3] Fuller v. Stebbins, 49 Iowa, 376; Donne v. Lewis, 11 Ves. 601.

[4] Galpin v. Fishburne, 3 McCord, 22; s. c. 15 Am. Dec. 614. *Cf.* Hays v. Miller, 1 Wash. Ter. 163; Jordan v. Petty, 5 Fla. 326; McCormick v. Wheeler, 36 Ill. 114; Graham v. Lynn, 4 B. Mon. 18; Acklen v. Acklen, 45 Ala. 609.

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