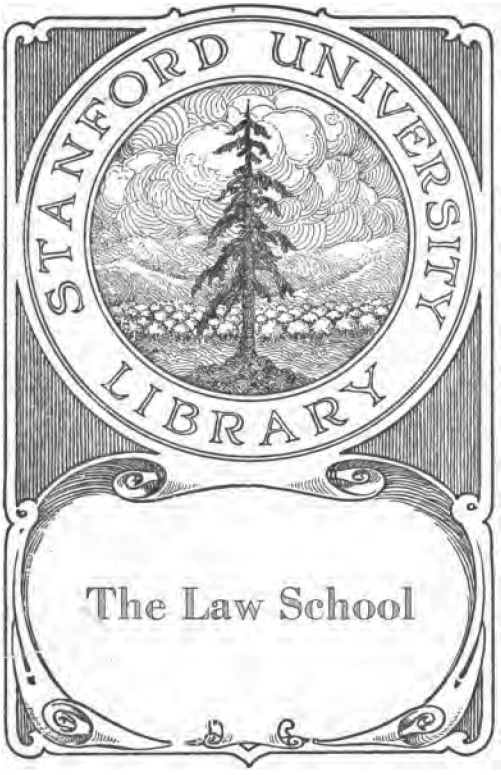

PRINCIPLES

OF

COMMON-LAW PLEADING

A BRIEF EXPLANATION OF THE DIFFERENT FORMS OF COMMON-LAW ACTIONS, AND A SUMMARY OF THE MOST IMPORTANT PRINCIPLES OF PLEADING THEREIN, WITH ILLUSTRATIONS TAKEN FROM THE CASES

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PREFACE.

THE principles of common-law pleading as they came into our law are worthy of special study. They constitute a subject of interest and importance alike to the lawyer who practices under a modern code system, and to him whose professional activity lies in some State where the old forms, though modified somewhat it may be by occasional statutory enactment or progressive court decision, still prevail.

No code has been able to abolish the principles of common-law pleading because they form the foundation upon which every code must build its own system. A code may call things by different names — as *complaint* for *declaration, answer* for *plea* — but the *things* remain the same, and, what is more to the point, the purpose for which the thing is used remains the same. Hence to know how to best make the thing serve its purpose one may still study with profit its origin and its use in the cases recorded in the home of its origin.

It is in fact the same with Pleading as with other subjects. Our whole system of law is the embodiment of the principles of the common law as found in the cases, and to the cases we must ever turn for light either as a direct aid to the administration of justice or as a means of understanding and applying some statutory restatement of principles first established by the courts.

Such enactment has perhaps ambitiously sought to simplify a principle of law by encasing it in exact language, but alas, has only succeeded in adding to the labor of application the task of interpretation, thus increasing the chance of error.

In a democracy such as ours the people are the source of the law, which evolves through the slow process of the decisions of courts and the more rapid process of the enactments of legislatures. When such enactments are confined to the prescribing of new, or the modifying of old rules relating to property or persons, they record and reflect the current state of society and thus serve a very useful purpose; but when they attempt to crystallize into a set form all existing rules governing property and person they merely complicate the situation, to the consternation of the lawyer who now finds himself removed one step further from the enlightening sources of the law and is compelled to take his light, as it were, from the original sources through a statutory screen, not always, be it said, of the clearest transmitting material.

From the earliest beginnings down to the time when our several States, with their separate and differing judicial systems, began to adapt and fit the common law to their respective needs we may study the system of pleading in its development through the cases and the English statutes, with the feeling that our knowledge thus acquired will be an asset of value in any jurisdiction.

To such study the student must add, in order to complete his equipment, a further study of cases and

statutes in the particular jurisdiction where he intends to practice.

It is not the aim of this treatise to carry the student beyond an understanding of the main principles of common-law pleading as they came to us in the beginning, and, except by way of illustration where original principles have been reasserted by modern decisions, little reference is made to modern cases.

The subject of common-law pleading has been treated fully, and in great detail, by Chitty. Other text writers, chief among them Stephen, have treated it less in detail, but more clearly. The works of all of these writers, however, are characterized by a greater fulness than is necessary, or even convenient, for the purposes of the student who expects to practice in this country. What seems to be required is a summary of the main principles of the subject — the principles whose influence is still felt in the various systems of pleading which prevail in the different States, without the mass of technical and local rules which encumbered the old English system. It is this need which the present work is intended, in some small measure, to meet.

The late Professor Ames, of the Harvard Law School, prepared, some years ago, a collection of cases upon the subject, which has been and is used in many Law Schools with satisfactory results. The selection and arrangement of the cases by Professor Ames has been so judicious and effective, and the use of a book, such as his collection of cases, so desirable in connection with a text-book, that I have, in the order of treatment of the principles covered by his cases, followed

in the main his arrangement and adopted the cases selected by him as illustrations. This matter is contained in Part II.

Part I. contains a brief explanation of the different forms of actions, to which the principles set forth in Part II. mainly relate. I know, in my own case, some explanation of this nature would have been a great help to a proper understanding of the cases. If the explanation given shall prove of assistance to any one else, it will have accomplished its purpose.

In conclusion, I wish to say that the present work is put forth only as a guide to the main principles of the subject of civil pleading and a help to the understanding of the cases which illustrate those principles, and in no sense as a complete treatise on the subject. Illustrations taken from the cases have been used to show the application of the principles set forth, and have been referenced for convenience both to Ames' Cases, where contained therein, and to the original reports.

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PRINCIPLES OF COMMON-LAW PLEADING.

PART I.

Forms of Actions and Declarations.

CHAPTER I.

INTRODUCTORY.

§ **1.** The word *Pleadings* in a broad sense and as used at the present time applies to the statements, written or oral, by which the parties to an action formally present the case to the court for trial.[1]

§ **2.** The principles of pleading are the rules which, in the development of the law of procedure in actions, have become established with reference to the form in which the parties shall state their respective versions of the matter in dispute between them, and with respect to the manner in which, and means by which, either party may take advantage of a failure on the part of the other to properly formulate his statements.

One may learn a rule of pleading, such as that a denial must not be made of an immaterial allegation,

[1] As early as 1677 we find "Pleadings" defined as including the "count" or declaration as well as to the subsequent statements of the parties.— *Euer, Doctrina Placitandi,* Preface.

but to apply the rule one must know what is an immaterial allegation. What is an immaterial allegation in one form of action may be a very material one in another.

Again, one may be told that there is no room for a plea in excuse in the action of *trover,* but to understand this rule one must know something about the form of action known as *trover,* as distinguished from *trespass,* or some other form of action in which he is told that a plea in excuse may be used. A general knowledge of the nature of the different forms of action is, therefore, essential to a proper understanding of the principles of pleading.

§ **3.** It is the plaintiff in the action who determines the form which the action shall take: he does it by the first pleading in the action, known as the *declaration,* a formal statement to the court of the facts upon which he deems he has the right to invoke the aid of the court against the defendant. He must take the responsibility of determining whether he has a cause of action, what relief he is entitled to, and what form of action will fit the case.

The proper determination of these questions is important to the plaintiff in drawing his declaration. A proper determination of the same questions is important to the defendant in deciding what steps to take in reference to the declaration. The declaration will be sufficient if it states a valid cause of action in the form which will give the plaintiff the relief to which the facts entitle him.

§ **4.** To determine whether or not the declaration in any given action, viewed in this light as a statement of the plaintiff's case, is sufficient, obviously requires something besides a knowledge of the principles of pleading. That *something* is a general knowledge of the rights and obligations of the individual as a member of civilized society subject to the common law, and of the different forms of action in which such rights and obligations are enforced. A study of the principles of pleading will not teach *when* a declaration is insufficient as a statement of the plaintiff's case, but only how to bring the matter before the court for action, if from his knowledge of substantive law the pleader has determined that the declaration *is* insufficient.

§ **5.** It often happens that the student takes up the study of common-law pleading before he has become familiar with the different branches of substantive law and the various forms of action which have arisen under the common-law system. It is perhaps necessary that this should be so, inasmuch as some knowledge of the different pleadings and their offices is essential to a proper understanding of the cases which are the main sources of the substantive law. It is therefore with a view to helping the student to more readily grasp the principles which govern the decisions of the various questions of pleading arising in the reported cases, that an explanation of the different forms of action, and of the necessary allegations in the declarations of each, is here introduced. The aim has been to present the matter in the briefest form consistent with clearness. The subject of the declaration in each form

of action has been taken up in connection with the explanation of such action, in preference to treating forms of action separately, as is usually done.

§ **6.** One may justly inquire before entering upon a study of the several forms of common-law actions referred to, wherein a knowledge of the distinction between the several forms will aid in *modern* practice.

The answer is that whatever form for the statement of his position modern statutory regulations may have imposed upon the party who, as plaintiff or defendant, seeks the aid of the Courts, the principles underlying the relief to which he is entitled must often be sought directly in cases which have "wended their toilsome way through the Courts by means of the old common-law forms." And even when the principles involved have been restated in statutory law it is more than likely the old cases will be resorted to for the purpose determining the proper meaning or application of the statutory provisions. Hence as there can be no escape from a resort to the cases, it is clear that they will be better understood and interpreted if there be a familiarity with the different forms in which they were cast.

§ **7.** The different forms of action were the outgrowth of the many and varied states of facts presented to courts by plaintiffs seeking redress against defendants. It became a convenience to designate similar causes of action — *i. e.,* causes of action where the plaintiffs based their rights to relief upon the same theory — by the same name. The result was a number of classes of actions, each with its separate name and

form of statement, in which classes were included all of the ordinary cases arising between litigants. But with the development of the law and the broadening of the field of actionable wrongs, cases were frequently presented which could not be brought within any one of the established classes of actions and yet the plaintiffs were clearly entitled to relief. The plaintiffs were therefore permitted to state the facts and demand the relief to which they deemed they were entitled, and these actions were termed *"Actions on the Case,"* or *"Actions of Trespass on the Case."* Later they became a class by themselves, known as *" Case,"* and an action was spoken of as being brought in *Case,* just as in *Trespass* or in Debt.

§ **8.** The different forms of common-law actions were:

I. Debt.
II. Detinue.
III. Covenant.
IV. Special Assumpsit.
V. General Assumpsit.
VI. Trespass.
VII. Trover.
VIII. Replevin.
IX. Case.
X. Ejectment.

It is interesting to note that there is a great difference in the statutory systems which have in most States superseded the old common-law classification of actions. Where in one an attempt will be made to preserve the distinctions, as in Alabama,[1] in another, as

[1] Alabama Code, 1907, § 5382 *et seq.* The statute even prescribes the forms for the complaint (same as *declaration*) in the several forms of action and subdivides both contract and tort actions into many different classes.

in our latest and most modern of state judicial systems, that in Arizona, we find all distinctions brushed aside, even that between law and equity,[1] and a complaint may combine without separate statement several different causes of action.

§ **9.** Before noticing separately the different forms of action and the declaration in each, it may be of assistance to call attention to an elementary principle upon which is based the theory of recovery in all actions alike. It is this: that to have a cause of action you must have (1) a right, (2) a wrong, *i. e.,* a violation of the right.

The most ancient and best definition of an action has been said to be that of the Mirror, "An action is nothing else but a lawful demand of right."[2] The natural classification of actions is accordingly that which rests upon a distinction between the rights sought to be redressed. It is this principle of classification which the author has adopted, and pursuant to it has divided the ten forms of action above given into two general divisions: (1) those based on acquired rights, treated of in Chapter II.; (2) those based on natural rights, treated of in Chapter III.

§ **10.** Actions are commonly divided, with respect to their subject-matter, into three classes, *Real, Per-*

[1] Revised Statutes of Arizona, § 425. "The complaint shall set forth clearly the names of the parties, a concise statement of the cause of action, without any distinction between suits at law and in equity and shall also state the nature of the relief which he demands."

[2] Mirror of Justices, ch. II, § 1.

sonal, and *Mixed.* *Real* actions are those in which the specific recovery of real property in some form is sought. *Personal* actions are those in which damages are sought for injuries to the person, to personal property, or to real property, or in which the specific recovery of personal property is sought. *Mixed* actions are those in which the specific recovery of real property is sought, together with damages.

Except from an historical point of view, a study of the old common-law *real* actions would be of little value, as they have long since ceased to be used, and there are no principles connected with them which have survived to influence the modern forms of procedure. The old writs of *right, entry, formedon,* and *dower* were the most common of these real actions.

The distinction between personal actions and mixed actions is of no importance; at the same time it is well to understand the meaning of the terms, as they are frequently met with. It will be seen by referring to the explanation of the objects of the various forms of action treated of, that all of them except the action of ejectment belong to the class known as *personal* actions. There is no applicability in the term, as they relate exclusively neither to personal property nor to the person.

§ 11. In all forms of action it is the office of the declaration to state the cause of action. This necessarily involves a statement of the right and of the wrong. To show that the cause of action belongs to the plaintiff it must appear that the right is the plaintiff's, and that the wrong by the defendant is a violation of that particular right. Examination of the declara-

tion in the different forms of action will prove in every instance that if the allegations reveal a right in the plaintiff, and a violation of that right by the defendant, the declaration is good in substance, and the rules laid down as to what allegations are necessary to show a good cause of action will be found to look toward that one end, namely, the statement of the right and its violation. Any other rules must relate only to matter of form. If this simple principle — so simple and elementary that it seems to scarcely need stating — be kept in mind, it will aid very materially to fix in the mind the rules relating to the declarations in the different forms of action, and to make them easy of application in any given case.

§ **12.** There were many technical rules, sometimes local to a particular court, and many of which are obsolete, which relate to different parts of the declaration, especially to the beginnings and endings. As these rules have nothing to do with the main principles of pleading, a statement of them could be of no value to the student, and might tend to confuse the subject. They are therefore omitted.

§ **13.** While it is not the purpose of the author to make the present work in any sense a book of forms, it may be helpful to set forth in full one example of a declaration (as well as of each of the other pleadings as they are taken up), in order to call attention to the different parts, and to distinguish between that which is merely formal and that which constitutes the substance of the declaration.

A declaration in any form of action began with a heading showing the court in which the action was brought and the date of the filing of the declaration, as:

	IN THE KING'S BENCH ON THE 5TH DAY OF JANUARY, 1840.
Next came the venue or name of the county in which the action was brought, as:	Middlesex, *ss.:*
Then came a statement of the names of the parties and attorneys, and of the form of action adopted, as:	JOHN DOE, by A. B., his attorney, complains of RICHARD ROE, who has been summoned to answer the said plaintiff of a plea of trespass.
Then came a statement of the facts upon which the action was based, necessarily varying with the circumstances of each case. This was the *substance* of the declaration — the part with which we are concerned in the different forms of actions:	For that the said RICHARD ROE heretofore to wit, on the 1st day of December in the year of our Lord 1839, with force and arms, made an assault upon the said plaintiff, and beat, wounded, and ill-treated him, so that his life was despaired of; and other wrongs to the said plaintiff did; against the peace of our said lord, the king.
Then came a statement of the amount of damages claimed:	To the damage of said plaintiff of £100. And, therefore, he brings his suit, etc.

§ **14.** In the reports the word "*profert*" frequently occurs in reference to the declaration as well as the word "*oyer.*" A plaintiff is said to "*make a profert*" in his declaration, or a defendant is said to "*crave oyer*" or "*demand oyer.*" In certain actions where

the plaintiff's claim appeared in the statement of the facts to be by virtue of a deed, or other writing, it was necessary for him to make an offer to bring the deed or other writing into court to exhibit to the court and to the defendant; or in the technical words of the time, to "*make a profert*" of it. The best illustration of this perhaps was in the case of an executor or administrator suing in his representative capacity. His right to maintain the action depending upon the letters of administration or letters testamentary, as the case might be, he was required to make a *profert* of them.[1] Similarly the defendant, if he was entitled to see a document referred to in the declaration and of which a profert was made, demanded the right to see it and was said to "*crave oyer*" or "*demand oyer*" of it. Oyer could not properly be demanded unless a profert had been made by the adversary.[2] A *profert,* if inserted as a part of the declaration, usually followed the statement of the amount of damages.

§ **15.** In the reports of the earlier cases the declaration will sometimes end with the words "*Pledges, etc.*" It was customary in some of the courts to require the declaration to name the "*Pledges*" — *i. e.,* the persons who stood as guarantors to the court that the plaintiff would prosecute his suit.[3] Hence a declaration would end with "Pledges { John Doe, / Richard Roe."

[1] Cope *v.* Lewyn Hobart, 38*a*.

[2] Erskine *v.* Townsend, 2 Mass. 494.

[3] "And these are pledges of prosecution, John Doe and Richard Roe," Hancocke *v.* Prowd, 1 Saunders, 328.

CHAPTER II.

ACTIONS BASED ON ACQUIRED RIGHTS.

SECTION I.— IN GENERAL.

§ **16.** Of the ten forms of common-law actions mentioned in the preceding chapter, the first five,— Debt, Detinue, Covenant, Special Assumpsit, and General Assumpsit,— in one sense form a group by themselves as distinguished from the last five forms: Trespass, Trover, Replevin, Case, and Ejectment.

The wrongs which are redressed in the former class of actions are those which are violations of special rights,— rights which exist because of special relations into which the parties have entered.

§ **17.** The basis of the action of Debt is the violation by the defendant of a right which exists because the plaintiff and defendant have placed themselves, by their acts, in the special relation of debtor and creditor. This right may be called an acquired right, to distinguish it from the rights, which every person possesses because he is a member of civilized society, and which may be called natural rights.

§ **18.** In Covenant the action is for violation of a similar acquired right; a right which has been acquired from the making of the covenant and which implies a special obligation on the part of the cove-

nantor, and not a general obligation on the part of all members of society.

§ **19.** In Detinue this feature is not quite so apparent; in fact, the tendency has been to class the action with that of Trover, and to treat the *detaining* in the former action as a tortious act similar to the *converting* in the latter.

It is conceived that the true theory of the action of detinue is that the detention is the violation of a special or acquired right. For, while it is true that one person has the natural right not to have his property interfered with by another, and that wrongful detention is an interference which would be a violation of this right, yet, viewed in this light, the wrongful act furnishes ground for an action of Trover, and not of Detinue.[1]

The same act may furnish grounds for an action of Detinue, but not unless it is viewed in another light, namely, as a detention of property which the defendant is under an obligation to deliver to the plaintiff, or, in other words, a failure to perform a special obligation,— a violation of a special right, which the plaintiff has acquired, not by reason of his simple ownership of the property, but by reason of the fact that there is a special relation between himself and the defendant, such as a bailment. The plaintiff owning or having the general right to the property which is lawfully in defendant's possession, has asserted that right in such a way — *e. g.,* by demand — as to acquire a special

[1] Kettle *v.* Bromsall, Willes' Rep. 120, where the distinction is noticed, and it is held that Trover and Detinue cannot be joined.

right to the immediate possession of the property, and to put upon the defendant a special obligation to deliver it to him. Hence the judgment in the action of Detinue is, in the alternative, for the recovery of the property or its value. The special obligation to deliver the property, similar to an obligation based on a promise and arising because of the special relation of the parties, is thus recognized and enforced. In fact, the action of Detinue has been brought upon a contract to deliver a specific chattel.[1] It seems clear, therefore, that Detinue is properly classed with the actions of Debt, Covenant, and Assumpsit.[2]

§ **20.** In Assumpsit, both Special and General, the right and corresponding obligation which form the basis of the action are clearly personal to the particular parties to the contract or transaction which gives rise to such right and obligation.

[1] Fitzherbert, Natura Brevium, p. 138.

[2] These forms of action are generally distinguished by the term actions *ex contractu*, as distinguished from the actions known as *ex delictu*, on the theory that the former are brought upon contract and the latter for a tort or wrong. The terms, however, are not strictly applicable, as the idea of contract in its usually understood sense does not necessarily enter into the action of Debt or that of Detinue, both of said actions many times being founded upon obligations arising from special relations between the parties other than contractual. Further, to say that an action is for a wrong does not distinguish it, as every action is for a wrong. The writer submits that the true basis of the distinction which undoubtedly does exist is that the one class of actions is for wrongs which are violations of original or natural rights,— rights which belong to one person as against all others; while the other class is for wrongs which are violations of special or acquired rights,— rights which one person has against some

Section II.— Debt.

§ **21.** Debt is one of the earliest actions known to the law.[1] It is based upon the theory that the defendant has something, usually a sum of money, which he is under obligation to deliver to the plaintiff by reason of something having been done by or between the parties which has caused the obligation to arise, and that, being under such obligation, the defendant detains this something, known as the *debt*. The plaintiff may have given the defendant goods in return for which the *debt* is due, or the defendant may have executed a bond under the terms of which the *debt* has arisen. Whatever the facts may be, the plaintiff in the action of *debt* is suing to recover something due to him, which the defendant should, but will not, deliver to him.[2] *Detention* is the essence of the action of Debt, as it is of the action of Detinue,[3] but in the former case it is the detention of something the title to which has not yet passed to the plaintiff, while in the latter it is the detention of a specific thing to which the plaintiff

other particular person or persons who have come into some special relation with him.

[1] Ivo de Stokes *v.* Richard Trint, A.D. 1200, Selden Society Publications, Select Civil Pleas, Vol. 1, Case 38.

[2] In Brikhed *v.* Wilson, Dyer 24 b, an action was brought in debt for twenty quarters of malt.

[3] Referring to the action, we find the phrase used, "plaintiff brought his action in the *debet and detinet*," *i. e., owes and detains*. Jevens *v.* Harridge, 1 Saund. 6. See also Wilson *v.* Hobday, 4 M. and S. 121, where it is held that a declaration in *debt* is good which simply alleges the detaining of the money and not the owing of it.

already has title. In the common-law declarations in *Debt* this theory of the wrongful detention, by the defendant, of something belonging to the plaintiff, is followed to its logical conclusion by the demand for damages for the detention of the *debt*.[1] The sum demanded as damages was nominal, but it illustrates clearly the theory of the action.

§ **22.** To show a good cause of action in Debt the declaration should contain, in accordance with the principle heretofore laid down:

(*a*) A statement of the right on the part of the plaintiff; (*b*) A statement of the wrong or violation of the right by the defendant. But the very idea of *debt* implies a right on the part of the plaintiff and a violation of the right by non-payment of the debt. If a debt is shown to exist, a *prima facie* cause of action is shown. It happens, therefore, that in this form of action the right and the wrong are stated together in the statement of the facts which show the debt to exist.

§ **23.** As the action of Debt is a very broad one, the statement of facts will differ with the varying character of the circumstances which have given rise

[1] Referring to the declaration in an action of Debt, we read: "although often required had not rendered the said 160*l* to the said Mary * * * and unjustly detained the same, wherefore she then said she was worse and *had damage to the value of* 20 *l*," and then we find "it was then considered by the Court that the said Mary should recover against the said Richard her said debt and her damage on occasion of the detention of that debt to sixty shillings." Hancocke *v.* Prowd, 1 Saund. 328, at p. 330 a.

to the debt. To enumerate the many different cases of debt would be beyond the scope of the present chapter. A few words, however, in reference to the most common instances of the action may be helpful.

§ **24.** *Debt on Simple Contract.*

We frequently find cases designated in the reports as "*Debt on simple contract.*" This means that the form of the action is in Debt, and that there has been a contract, oral or written, and express or implied, but not under seal, between the parties, which has created the debt. An action to recover money lent by the plaintiff to the defendant; money paid to the defendant's use; money had and received by the defendant to the plaintiff's use; for the price of goods sold and delivered, or of work, labor, and services, if brought in *Debt,* is included in the particular class known as *Debt on simple contract.*

Actions in debt for money lent, money had and received, etc., must not be confounded with what are known as the *common counts* for money lent, money had and received, etc. The latter belong to the class of actions called General Assumpsit and will be noticed hereafter.[1]

[1] Vaux *v.* Mainwaring: Fortescue 197. In this case plaintiff brings an action of debt, and alleges that the defendant bought of the plaintiff divers goods and merchandise for so much money as they should be worth, to be paid on request, and says in fact they were worth 437*l.* On demurrer the declaration would be bad.

"Debt is upon the contract or sale, but Indebitatus Assumpsit is an action on the promise, and lies only because of the promise; if you bring Indebitatus Assumpsit for 10*l.* for a horse sold,

In general it may be said that the distinguishing feature of the action of debt on simple contract is, that the debt for which the action is brought arises from some act of the plaintiff, such as something given to, or done by or on behalf of the plaintiff for, the defendant, in return for which the debt is due. The statement of the facts required in a declaration consists of the statement of this act on the part of the plaintiff, whether it be the performance of some service at the request of the defendant, the selling of goods, the loaning of money, or any one of the numerous other things which may have caused the debt.

§ **25.** *Debt on Specialties.*

An obligation to pay a sum of money — *i. e.*, a debt — could be created by a bond or other agreement under seal. Such a sealed instrument was known as a *Specialty*. In such a case a statement of the facts causing the debt included simply a statement of the existence of the bond or other instrument upon which the debt was founded. The debt arose from an act on the part of the defendant. He himself created the debt by his execution of the instrument out of which it arose.

§ **26.** *Debt on Records.*

An obligation to pay a sum of money might be created independently of any action of the parties, as

if it was sold for more or less, yet the plaintiff shall recover what it was sold for; but if debt be brought on that contract, if it come out to be more or less, the plaintiff cannot recover, for it is a *praecipe quod reddat* (so much money in particular)."

by a judgment of the court. The manner of its creation was immaterial, however; if it was an obligation to pay a sum of money, it was a *debt* and recoverable in the action of Debt. Hence, we have the class of debt actions known as *Debt on Records.* Here the statement of facts consisted of a statement of the judgment with sufficient detail to connect the defendant with the plaintiff in respect to the liability on the same.

§ **27.** *Debt on Statutes.*

Sometimes a statute imposed a penalty and a defendant found himself subject thereto. Again, the action of Debt was applicable, as the penalty was an obligation to pay a sum of money, and hence a *debt.*

Here it was necessary to refer to the statute which was relied upon and to state the facts which showed the defendant to have violated the same and to have made himself subject to the penalty.

§ **28.** In spite of the fact that a statement of the facts in debt is a statement both of the right and the wrong, we find the rule frequently laid down that the declaration should contain a statement of the breach or refusal to pay the debt.

The reason of this rule is not quite clear, as when sufficient facts have been alleged in the declaration to show that there is a debt, a *prima facie* cause of action has been made out. The legal meaning of the word *debt* is something due, something which should be paid by the defendant to the plaintiff; given the debt, and a *prima facie* cause of action exists to recover it. It was, however, customary to allege a refusal on the part

of the defendant to pay the debt.[1] The case of Goodchild *v.* Pledge [2] seems to show that the statement of the breach was a mere matter of form, and that it was not necessary to the substantial validity of the declaration.

Section III.— Detinue.

§ **29.** The action of Detinue was in respect to chattels what the action of debt was in respect to money. In debt a recovery of the sum of money due was the main object of the action. In detinue recovery of a specific chattel was the main object. The action of detinue was, perhaps, as early a crystallization of the common law as that of debt. At all events we find it

[1] See note, *ante*, p. 14.

[2] 1 M. & W. 363. Ames, Cases on Pleading, 37. The action was in Debt for £20 for goods sold and delivered. The second plea was that when the said sum of £20 became due and payable the defendant paid it. This plea concluded to the country, *i. e.*, requested a determination of the matter by the jury. The rule required a plea containing new matter to conclude with a *verification* (*post*, p. 103). By a special demurrer the question whether or not the plea should have ended with a verification, and hence whether or not it contained new affirmative matter, was raised. It was contended by counsel that the plea amounted to a denial of the refusal to pay, *i. e.*, the breach, and, therefore, properly concluded to the country. Baron Parke says: "Is the statement of the breach in debt anything more than a mere form? The moment the goods are delivered, is there not a cause of action, throwing the proof of its discharge on the defendant? If the breach is mere form, you cannot traverse it; then your plea is in discharge and ought to conclude with a verification." Again he says: "I think it will be found on looking into the cases that a statement of the breach is mere form; if so, the plea admits the debt and is a plea in confession and avoidance."

among the very earliest reported cases.[1] So identical were the two actions in the theory upon which recovery was allowed that they were frequently joined, and we have declarations which seek a recovery of a debt for goods sold and delivered, or in the event that the facts do not warrant the conclusion that there was a sale, then a recovery of the specific goods on the ground that the defendant is wrongfully detaining them.[2]

§ **30.** In the action of Detinue the plaintiff recovered the specific chattels, or in the event they could not be returned, their value, together with damages for their detention.

§ **31.** To show a good cause of action it is necessary for the declaration to contain:

(*a*). A statement of the plaintiff's right.

The chattels should be described with sufficient certainty for identification and their value be stated; it should be alleged that they belong to the plaintiff, that the defendant has possession of the chattels and acquired it lawfully, as by finding or bailment, but holds it subject to the plaintiff's superior right to immediate possession which has been asserted by a demand.[3] The facts will always show some special relation between the plaintiff and the defendant, such as that of bailor and bailee, by which the defendant has had, or is assumed to have had, a lawful posses-

[1] Maltravers *v.* Turberville, Selden Society Publications, Vol. 3, Case 8, 1200 A.D.

[2] 2 Saunders, 117 b; Dalston *v.* Janson, 5 Mod. 89, at p. 92.

[3] Kettle *v.* Bromsall, Willes' Rep. 120.

sion of the goods; that such lawful possession has terminated and that the plaintiff accordingly has the right to an immediate possession of the goods. The object of the allegation of value is that, in case the goods themselves cannot be returned, judgment may be rendered for their value.

(*b*). A statement of the wrong, or breach on the part of the defendant.

Having shown the plaintiff's right to the possession of the goods, the declaration should allege the wrongful act on the part of the defendant upon which the action is based,— *i. e.,* his refusal to deliver the chattels to the plaintiff.

Section IV.— Covenant.

§ **32.** The action of Covenant is what its name implies, an action based upon a covenant, or proimse under seal. The object of the action is to recover damages for breach of the covenant. The action is an exceedingly old one; it existed long before the action of assumpsit was allowed, and illustrates the importance which the early law attached to a sealed instrument. With the growth of the modern action of *assumpsit,* the idea of the importance of the seal disappeared and that of *consideration* took its place. The early idea, under which recovery was allowed for a breach of a promise, seems to have been that of undoubted intention on the part of the promisor to assume the liability, shown by his solemnly and deliberately putting the stamp of his individuality upon it

in the shape of his seal. The covenantor was liable, not because it was just that he should be liable, or because the covenantee had parted with anything on the faith of the covenant, but because he had deliberately, by his sealed writing, announced that he held himself liable. In the transition from this view of a promisor's liability to that which looks upon the consideration as the determining factor, it was sought to graft the idea of consideration upon the theory of recovery upon a sealed instrument, and the rule, or so-called *presumption of law,* was established, that in the case of a sealed instrument consideration would be conclusively presumed. The real fact of the matter was that there were two distinct grounds for holding a promisor liable upon his promise, either one of which was sufficient. One, and the earlier, because he deliberately intended to make himself liable and so indicated by the solemnity of the seal; the other, because he had received a consideration which it would be unjust to the promisee to allow him to keep unless he was held liable upon his promise.

§ **33.** To show a good cause of action in Covenant, it is necessary for the declaration to contain:

(*a*). A statement of the plaintiff's *right.* In this form of action the right of the plaintiff is shown by a statement of two things.

(1). A statement of the covenant. It is necessary to set forth either the whole instrument or that part of it which contains the covenant for breach of which damages are sought, being careful to allege that the

instrument is *under seal.*[1] The covenant is the basis of the special relation between the parties out of which the plaintiff's right arises.

(2). A statement of the performance or happening of any conditions precedent to the defendant's covenant. If the covenant is not conditional, then performance by the plaintiff need not be alleged, as consideration is no part of the theory of recovery.[2]

(*b*). A statement of the breach, or non-performance, on the part of the defendant.

Section V.— Special Assumpsit.

§ **34.** An action for breach of a contract not under seal was known, when it first came into use, as a species of an action on the case, "being an action of modern invention, to get rid of the *law wager.*"[3] Later it was separated from that general class of actions and formed a class by itself under the name of *Special Assumpsit.*

§ **35.** The recovery in this form of action is upon a promise; the basis of the plaintiff's right and the

[1] Moore *v.* Jones, 2 Ld. Raymond, 1536, where it was held that although on production of the instrument it appeared that it ended with the words "in witness whereof we have hereunto set our hands and seals," still the declaration was bad on demurrer, as it did not allege the fact of the sealing of the instrument.

[2] Horner *v.* Ashford, 3 Bing. 322. Action of Covenant. The plaintiff alleges a covenant by the defendant "for the consideration therein mentioned," to submit to certain restraints, and alleges as a breach that he did not submit, but exceeded his liberties. On demurrer it was argued that the declaration did not sufficiently allege a consideration. *Held*, that the declaration was good.

[3] Lawes, Pleading in Assumpsit, p. 520.

defendant's liability is the consideration for that promise. Unless a consideration is alleged and proved, the action must fail.[1]

§ **36.** The contract for breach of which a recovery is sought, may be in express terms and either oral or in writing, or may be implied from the acts of the parties,— *i. e., implied in fact.*

The contract implied in fact is in reality an express contract. Acts of the parties in dealing with each other may tell as plainly the terms of a contract between them as written or spoken words.

In any case, however, the consideration must always be present.

§ **37.** To show a good cause of action the declaration should contain:

(*a*). A statement of the plaintiff's right.

The right arises out of a special relation between the parties created by the contract which exists between

[1] The exception in the case of assumpsit upon a promissory note is no real exception; as the theory of recovery here is similar to that of the action of covenant; the bill or note is really a specialty, and, except in name, has always been treated as such by the courts. The practice of suing in assumpsit, where the essence of the action is *consideration*, upon a bill or note, led to many attempts to assimilate a bill or note to an ordinary contract with respect to consideration; attempts which only caused a confusion of ideas as to the real nature of this class of obligations. The plain truth is, that a bill or note is in the nature of a specialty; the defendant is liable, not because he has received a consideration, but because he has by his act in executing and delivering the bill or note declared himself to be liable, and the custom of merchants in such case holds him liable; no consideration need be alleged or proved.

them. The statement of the right, therefore, requires —

(1). A statement of a *valid contract.* This comprises a statement of a promise on the defendant's part and a *consideration* therefor, which may be either an *act* or a *promise* on the plaintiff's part.

If the consideration for the defendant's promise is an act on the plaintiff's part, such as the doing of some work or the delivering of some property, *i. e.,* if the contract is a *unilateral* [1] one, the performance of the consideration must be alleged, for *performance* is an essential part of the contract. Until the performance takes place there is no contract.

If, however, the consideration for the defendant's promise is another promise on the plaintiff's part, *i. e.,* the contract is a *bilateral* [2] one, then, to state a valid contract, all that need be alleged in the way of consideration is the making of the promise by the plaintiff, and not the performance of that which is promised.[3]

[1] This term has been very aptly applied to contracts of this character by Professor Langdell in his work on contracts. It is unilateral or one-sided, in the sense that before it exists at all as a *contract*, performance on the other side must be complete, as it is this very performance that converts it from a mere offer into a binding promise or contract. As a *contract*, therefore, it binds only one party, the other having already performed.

[2] This is also a term of Professor Langdell's to designate that other class of contracts which are two-sided in the sense that there are promises to be performed on both sides. Langdell, Summary of Contracts, p. 102.

[3] Holcroft *v.* French, Brownlow, p. 137, where it was held that "if the consideration be executory, then the Declaration ought to contain the time and place where it was made and after it ought to be averred *in facto* when it was performed or executed accordingly; but if it be by way of a reciprocal agreement, then

(2). A statement of the performance or happening, or of some good excuse for the non-performance or not happening of whatever is conditional to performance by the defendant of his promise.

The performance by the plaintiff of his promise may or may not be conditional to performance by the defendant. If it is, such performance must be alleged. Some other act on the part of the plaintiff, which he is not bound by his promise to perform, may be made by the contract a condition precedent to the defendant's promise. In such case performance of such act must be alleged. The defendant's promise may be conditional upon the happening of some event, or the doing of something by some third party. If so, the happening of the event or the doing of the act must be alleged. In short, after the statement of the contract, such facts must be alleged as will show that the plaintiff is not in fault and that the duty of performance rests on the defendant.

(*b*). A statement of the breach, *i. e.*, the failure of the defendant to do that which the plaintiff has shown a right to have him do.[1]

the plaintiff may count, that in consideration that he hath promised to do a thing for the defendant the defendant hath promised to do another thing for him, then he need not that the declaration contain time or place for the consideration or otherwise that it is performed and executed."

[1] The two following cases illustrate the difference between the two kinds of contracts as to the necessary allegations in the declarations:

Everard *v.* Hopkins. Action upon the case. (Assumpsit.) The plaintiff alleges in his declaration that the defendant, a surgeon, promised to cure the plaintiff's servant for the sum of five marks. Breach, that he failed to cure. The sufficiency of the

SECTION VI.— GENERAL ASSUMPSIT.

§ **38.** The theory of recovery in the forms of action classed under the head of General Assumpsit is the same as that in Special Assumpsit, namely, damages for breach of a promise. The promise, however, is a fictitious one. No real promise exists. As every promise to be binding must have a consideration, the consideration was found for this fictitious promise in the existence of the debt. It was, therefore, neither a real promise nor a real consideration; only a form which was seized upon to allow recovery in certain cases where it was not desired to use the action of *Debt.*

Wherever there was a debt the courts acted upon the theory that there was a promise to pay a sum of money equal to the debt, for breach of which an action could be maintained.

§ **39.** The several varieties, or *counts,* as they were known, of General Assumpsit, have been variously classified at different times and by different

declaration was called in question under a demurrer put in at a subsequent stage of the action. The court were of opinion that the declaration was bad because it did not allege a payment of the consideration.

Nichols *v.* Raynbred, Hobart, p. 88 b. "Nichols brought an assumpsit against Raynbred, declaring that in consideration that Nichols promised to deliver the defendant to his own use a cow, the defendant promised to deliver him fifty shillings. Demurrer. Adjudged for the plaintiff in both courts, that the plaintiff need not to aver the delivery of the cow because it is *promise* for *promise.*"

writers, but if there is any virtue in classification, the following will be found to accord with such reason as may lie at the bottom of it.

- General Assumpsit, or Common Counts.
  - Indebitatus Assumpsit, or Indebitatus Counts.
    - Money Counts (1).
    - Other Counts (2).
  - Quantum meruit.
  - Quantum valebant.

(1.)
- Money paid to the defendant's use.
- Money had and received.
- Money lent.
- Interest.
- Account stated.

(2). Any one of the numerous states of fact upon which a debt may be founded, the most common of which are:
- For use and occupation,
- For board and lodging,
- For goods sold and delivered,
- For goods bargained and sold,
- For work, labor, and services,
- For work, labor, and materials.

§ **40.** The reason for the division of the common counts into the three main heads seems to lie in the form in which the consideration and promise is stated.

In the indebitatus counts the obligation to pay was first alleged as a debt, and then the existence of the debt was made a consideration for the promise to pay a sum of money coextensive with the debt.

In the *Quantum meruit* and the *Quantum valebant* counts the subject-matter of the debt — *i. e.*, the fact that the plaintiff had performed work, sold and delivered goods, etc.— was alleged directly as a consideration for the promise to pay for them without first alleging that by reason of such matter a debt arose; and the promise was stated as a promise to pay in the case of a *Quantum meruit*, as much as the plaintiff deserved; in the case of the *Quantum valebant*, as much as the goods were worth. These two counts were similar and sometimes used interchangeably, though the former applied more properly to personal services than to other matter causing a debt.

The so-called money counts were only called such because they related exclusively to money transactions as the basis of the debt which formed a consideration for the supposed promise.

§ **41.** To show a good cause of action in General Assumpsit the declaration should contain:

(*a*). A statement of the plaintiff's right. The special relation between the parties out of which the plaintiff's right arises is really that of debtor and creditor. By a fiction, however, the plaintiff is allowed to recover upon a supposed promise. The statement of the plaintiff's right, therefore, includes two things:

(1). A statement of such facts as will show the existence of a debt due from the defendant to the plaintiff.

(2). A statement of the promise on the part of the defendant.

(*b*). A statement of the wrong, or breach on the part of the defendant.

§ **42.** The following forms will illustrate the manner of stating the consideration, promise, and breach in General Assumpsit, and also the difference between the indebitatus counts and other counts.

(Beginning as in form of declaration *ante,* p. 9, designating the action as "*trespass on the case on promises.*")

For that whereas the said John Doe was on the 5th day of January, 1840, in London indebted to the said Richard Roe in the sum of £50, lawful money, for divers goods, wares, and merchandise by the said Richard Roe, before that time, sold and delivered to said John Doe, and at his special instance and request, *and being so indebted he, the said John Doe, in consideration thereof,* afterwards, to wit: on the day and year last aforesaid, in London aforesaid, *undertook and then and there faithfully promised the said Richard Roe to pay him the said last-mentioned sum of money* when he, the said John Doe, should be hereunto afterwards requested; * nevertheless the said John Doe, not regarding his said promise and undertaking, hath not yet paid the said sum of money although often requested so to do by the said John Doe, and has wholly neglected and refused and still does neglect and refuse to pay said sum, to the damage of the said Richard Roe of £10, and therefore he brings his suit.

(Beginning as before.)

For that whereas on the 5th day of January, 1840, in London, *in consideration that the said Richard Roe, at the special instance and request of the said John Doe, had before that time sold and delivered divers goods,* wares, and merchandise to the said John Doe, *he, the said John Doe, undertook and then and there faithfully promised the said Richard Roe to pay him so much money as the said last-mentioned goods, wares, and merchandise were reasonably worth* when he, the said John Doe, should be thereunto afterwards requested. And the said Richard Roe avers that the said last-mentioned goods, wares, and merchandise at the time of the said sale and delivery thereof were reasonably worth the sum of £50 of lawful money in London, whereof the said John Doe afterwards, to wit, on the day and year last aforesaid, had notice.

(Conclusion same as in the above indebitatus count from the *.)

CHAPTER III.

ACTIONS BASED ON NATURAL RIGHTS.

SECTION I.— IN GENERAL.

§ **43.** The actions of Trespass, Trover, Replevin, Case, and Ejectment are alike in that they are used to redress similar wrongs, wrongs which are violations of original or natural rights. In this respect these actions differ from Debt, Covenant, Detinue, Special Assumpsit, and General Assumpsit, which, as explained in the preceding chapter, are based on secondary or acquired rights.

§ **44.** These original or natural rights are either personal rights or property rights. Every man has a right to personal security. Any violation of this right by interference with his person is a wrong for which he may have redress. Every man has a right to the free enjoyment and use of that which belongs to him, whether it be his family, his goods and chattels, or his land.

In one sense all are his property, and in this sense of the word property, his rights relating to them may be called property rights. A violation of any one of them is a wrong for which the person injured may sue in the courts for relief. At common law he may adopt one of the five forms of action above mentioned, according to the nature of the injury complained of, and the kind of relief which he wishes to secure.

§ **45.** In the actions of Trespass, Trover, and Case, as will be explained more fully hereafter, damages alone are sought, and usually for more or less direct injuries to person or property. It is significant, and somewhat illustrative of the state of society, that we find very few of these actions in the early reports compared with the large number involving questions relating to real estate.[1] The explanation of this is not difficult to find. It is certainly not because the rights of personal security and enjoyment of property, for violations of which these actions furnished the remedy, were unasserted, but because in the beginning of organized society men were much more prone to redress direct injuries to person or property with the sword than by resort to actions at law.

In further confirmation of this, such actions as we do find of this character are usually actions upon the case for the redress of indirect injuries not resultant upon direct forcible acts which would be likely to create hot blood.

§ **46.** The actions of Replevin and Ejectment are different from the other three of this class, Trespass, Trover, and Case, in the nature of the relief sought. Whereas in the latter damages is the object; in the

[1] In Mr. Baildon's introduction to Vol. III. of the Selden Society Publications (Vol. I. of the Select Civil Pleas), he says: "Personal actions are comparatively rare, though several will be found in this volume. I have paid particular attention to actions of this class, and have copied nearly all I found; so that their rarity in this volume will show what a very small proportion they bear to the mass of litigation concerning land."

former it is specific recovery: in Replevin, of chattels; and in Ejectment, of land.

Section II.— Trespass.

§ **47.** The form of action known as Trespass, takes its name from the wrongful act for which it furnishes a means of redress. The legal meaning of the word trespass is any *direct* physical interference with the person or property of another. A blow to the person, a taking of personal property, a going upon the land of another, are instances of trespass. Injury to the person or property may result from other acts, such as the putting of an obstruction in the highway, or the negligently kindling of fire upon one's own land which spreads to a neighbor's: these acts are wrongful acts — they are violations of rights just as much as direct acts are, but they are not trespasses, and to adopt the action of Trespass for their redress would at common law be fatal to a recovery.

§ **48.** For convenience in treating of the declaration in the action of Trespass, the action may be divided into two classes:

(*a*). Trespass for injury to the person.

(*b*). Trespass for injury to property.

§ **49.** To show a good cause of action in trespass for injury to the person, the declaration need contain only a statement of the wrongful act.

This is only an apparent exception to the general rule that in all forms of actions the declaration must contain a statement of the right and of the violation

of that right, or the *wrong*. A little reflection will show that a formal statement by the plaintiff of his right as a human being not to be injured would be absurd. This right is something which every person possesses, because of the fact that he is a person. It cannot be questioned by the court or controverted by the defendant. There is, therefore, no necessity of alleging it.

The action, however, is none the less based upon the possession of a right by the plaintiff and its violation by the defendant. The right does not need to be stated, because the court is already informed of it. A statement simply of the wrong is, therefore, all that is required.

§ **50.** In trespass for injury to property, the trespass complained of may be either to personal property or to real estate.

The right not to have one's property injured belongs to every one, but, given an injury or trespass, one must show that the property injured was his, in order to show that he is the wronged person, and the one entitled to recover. This is so whether it be personal or real property which is affected.

§ **51.** To show a good cause of action in trespass for injury to property real or personal, the declaration should contain:

(*a*). A statement that the property injured was the plaintiffs.[1] For the purposes of the action, legal own-

[1] Dannet *v.* Collingdell, 2 Shower 395; Burser *v.* Martin, Croke's Jac. 46. The latter case was as follows: Action of

ership is not necessary. Since the incidents of ownership, and among them the right not to have the property injured, *prima facie,* follow possession, possession was deemed sufficient.

The possession which gives one the right to recover for injury to personal property differs from that in the case of real property. In the former case the possession may be: (1), bare, naked possession uncoupled with right; (2), possession coupled with ownership; or, (3), ownership coupled with the right to immediate possession, designated frequently as constructive possession. In the case of real property, actual possession is necessary to support the action;[1] the ownership may or may not be in the plaintiff. The third case mentioned in respect to personal property, that of ownership coupled with the right of immediate possession, is not sufficient to support the action of trespass in respect to real property. The owner must first regain actual possession of the land.[2]

Trespass. The plaintiff alleges in his declaration the taking of a horse from the person of the plaintiff. Plea, not guilty. Verdict for plaintiff. Defendant moves in arrest of judgment, because the plaintiff does not allege that the horse was *his horse,* or that it was taken from the *plaintiff's possession.* Judgment for the defendant.

[1] Bedingfreed *v.* Onslow, 3 Lev. 209, where the principle is laid down that only the person who has the possession in fact of the real property to which an injury has been done, can maintain an action of trespass *quare clausum fregit;* one owning a reversionary interest might bring an action of *case* for the injury done, but not of *trespass.*

[2] It is not sufficient to regain possession after the trespass has been committed. In an action of trespass, *quare clausum fregit,* it appeared at time of trespass the premises were in occupation of L., the plaintiff's lessee. Plaintiff offered to show she re-

It will be seen that when the plaintiff has connected himself with the property by the necessary allegation of possession, the natural right which he possesses not to have his property injured attaches to the particular property in question. As the court is fully informed of the existence of this right there is no need of a formal statement of it, and there is nothing left for him to allege, but

(*b*). A statement of the wrongful act on the part of the defendant.

It has been thought somewhat singular that the action of trespass was allowed for injury to a man's servant, wife, or child, by which he lost their services or society. The explanation seems to be that they were regarded as property; that certain benefits resulted from their possession, and that a direct act of interference with them, which resulted in depriving a man of these benefits, was just as much a trespass as an act of interference with a man's horse, by which he was deprived of its use. The fact that the object injured in the case of the servant, for example, was a distinct personality separate and apart from the master, so that the same act which was a trespass to property from the master's standpoint, was also a trespass to the person from the servant's point of view, was im-

sumed possession of the premises after the trespass was committed, but before action, which was rejected by the Judge. *Held*, Evidence not admissible and that trespass is not maintainable by the person who comes into possession after the commission of the trespass. Pilgrim *v.* Southampton & Dorchester Ry. Co., 18 Law J. C. P. 330. A lessor cannot maintain an action of trespass Holmes *v.* Seely, 19 Wend. 507; Tobey *v.* Webster, 3 Johnson, 468.

material. And, when one considers it, there is really nothing particularly degrading to the family relations in this way of looking at the matter; for while we have in modern times eliminated most of the ideas which made man the absolute master over his household, we still must concede a certain analogy between one's right to the uninterrupted enjoyment of the society and services of the members of his household,[1] and his right to the enjoyment of the benefits which accrue from the possession of property. If a violation of this right, by direct act of interference, can be redressed by action of trespass in the one case, why not also in the other?[2]

Section III.— Trover.

§ **52.** The action known as *Trover* or *Conversion,* and sometimes as *Trover and Conversion,* has for a long time been one of the most common forms of actions adopted for redress of injuries to personal property whereby plaintiff is deprived of possession. The action was formerly one of the many actions included under the head of Trespass on the case, or Case.[3]

[1] Jones *v.* Brown, 1 Espinasse, 217.

[2] Where the benefits no longer existed, as in case of termination of the service or separation of the wife, the man could not show that anything that was *his* had been interfered with, and hence neither trespass nor case was maintainable. Wheedon *v.* Timbrell, 5 Durnf. & East, 357; Postlethwaite *v.* Parkes, 3 Burrows, 1878.

[3] In Small's Declarations, published in 1693, we find both the action of Trover and that of Assumpsit classed as Trespass on the case.

§ **53.** The peculiar facts which supported the action as an action on the case, were the losing of goods by the plaintiff, the finding by the defendant, and the subsequent wrongful converting of the goods by him to his own use. It will thus be noted that in its original form the gist of the action was the wrongful converting of the goods. The matter of the plaintiff having lost them was merely an incident; so was the fact of the defendant having found them. These facts made no difference in the wrongfulness of the act of the defendant in converting them to his own use. The act would have been just as wrongful and just as actionable if the plaintiff had placed the goods in the defendant's possession to keep for him and the defendant had converted them, or if the plaintiff, while retaining the ownership, had lost possession and the defendant had acquired it in any other way.

§ **54.** The reluctance to adopt new forms and the predisposition to follow the path already made safe by precedent, which has always been characteristic of courts and lawyers, coupled with the evident adaptability of this form of action to all cases of a wrongful exercise of dominion over personal property, led to its extension to all acts of interference with personal property where the plaintiff was deprived of possession. As thus broadened, the action became a separate form, and instead of being called an action of *trespass on the case for trover and conversion* (finding and converting), was known simply as an action of *Trover* or *Conversion.* The element of losing and finding remained for a long time as a formal allega-

tion in the declaration, though manifestly a pure fiction in the majority of cases.[1] As it did not have to be proven and could not be denied, no difficulty arose from this.

§ **55.** The use of the term conversion as descriptive of all the wrongful acts which were redressed by this form of action, and the practice of alleging the act, whatever the proof might show it to be, as a converting to the use of the defendant, led to some embarrassment. For example, the action of trover was adopted to recover damages for a converting by the defendant of the plaintiff's horse to his own use; the facts as proved would perhaps show that the defendant, having borrowed the plaintiff's horse, gave it to X, who rode it so hard that it died. This was anything but a converting by the defendant of the horse to his own use, at least in the original sense of the term. To meet this difficulty a rule came into existence which has ever since played an important part in the action of trover. It was to the effect that a wrongful refusal by the defendant to give up the property was conclusive evidence of his having converted it to his own use.[2] Thus, in the above instance, the plaintiff would demand the horse; the defendant

[1] 3 Bl. Comm. 152; 1 D'Anvers' Abridgment, 23; Isaak *v.* Clark, 2 Bulstrode, 306.

[2] "From a very early period it has been holden, that it is good evidence *prima facie* to prove a conversion, that the plaintiff require the defendant to deliver the goods, and he refused; and thereupon it shall be presumed he converted them to his own use." Chancellor of Oxford's Case, 10 Co. 56; Agar *v.* Lisle, Hutt. 10.

could not deliver it in response to the demand, nor could he show that his failure to deliver it was justifiable, as his act of parting with the horse was a wrongful one. He was, therefore, in the position of wrongfully refusing to deliver the property, and under the rule above referred to, the act of conversion was deemed proved.

§ **56.** This form of action, however, was destined to a broader field than those cases where there was an actual conversion or where there was a wrongful refusal, and a way was soon found to apply it to all actions where there was a wrongful act depriving plaintiff of the possession of the goods. It was by a gradual, but a very radical change, in the meaning of the term *conversion,* so as to include all acts of the kind referred to. The "converting of goods to the defendant's own use," became the exercising by the defendant of any "act of dominion" over the goods. This is the final development of the idea, and in this form it has been laid down repeatedly.

The common-law action of conversion became, therefore, a means of redress for a very large class of wrongful acts. The term conversion became a general term to designate these acts.

§ **57.** A great deal will be found in the reports about conversion being established by the proof of other wrongful acts affecting the property from which conversion will be conclusively presumed. This rule is generally applied to the case of a wrongful refusal

to deliver up the goods, mention of which has been made above. It is believed that since the scope of the action has been broadened in the manner in which it has, there is no reason or necessity for the invoking of this rule. There is, of course, a literal converting to one's own use, such as eating or wearing of the goods, as the case may be; such act is wrongful and actionable, and is one of the acts which will support the action of trover. There are other acts of interference with property, such as burning up another's property which happens to be in one's possession, or selling property which has been delivered to one as bailee, or taking property from the possession of another, or refusing to deliver up property which is demanded by the rightful owner, which are all just as wrongful and just as actionable as the literal conversion of property; but they are not conversion in its original sense, nor does it accomplish anything or tend to clearness to say that they are evidence of conversion,— they may be evidence and they may not be. Certainly there is no logical connection between burning property up and an intention to convert it to one's own use. And the refusal to deliver property to the owner is just as consistent with having lost it as having used it. It is only misleading in such cases to say that conversion is the ultimate thing to be proved and that such acts are conclusive evidence of it. In the broader sense in which the term conversion is used such acts are themselves *acts of conversion.* While they have been so denominated in the case of all the other acts which may now support this action, it is still custom-

ary to treat the demand and refusal as evidence of an imaginary conversion.[1]

§ **58.** To show a good cause of action in trover, the declaration should contain:

(*a*). A statement showing that the property belonged to the plaintiff. This is to so connect him with the property that it may appear that it is the plaintiff's right not to have his property interfered with which has been violated. The plaintiff may rely upon an actual possession or upon a right to an immediate possession. Either shows sufficiently the right of the plaintiff not to have the property interfered with.

As we have already seen (§ 54) it was formerly customary to allege the possession in the plaintiff, the losing by him, and the finding by the defendant, but the very earliest cases do not show that the allegation of losing and finding was ever held material.

(*b*). A statement of the wrongful act or conversion on the part of the defendant.

The gist of the act of conversion was its wrongfulness. An act of interference with the property of another which was justifiable was not *wrongful,* and therefore was not a *conversion.* Such an act might be a justifiable trespass, but there is no such thing as a justifiable conversion.

[1] In Baldwin *v.* Cole, 6 Mod. 212, Chief Justice Holt seems to have thought that this rule as to demand and refusal being evidence of conversion was superfluous, for he says that "the very denial of goods to him who has a right to demand them *is an actual conversion.*"

§ **59.** If this distinction be borne in mind the necessity and office of the demand and refusal about which so much is said in dealing with the action of trover, will be clearly understood. A proper statement of the conversion involves the statement of something besides the mere act of interference with the property. It requires the statement of such facts as will show the act to be wrongful. These facts are either: (1), that the act of interference was wrongful in the beginning, *i. e.,* was a direct interference with the possession, actual or constructive, of the plaintiff; or, (2), that the act of interference was a wrongful keeping of the property or refusal to give it up in response to a demand on the part of the plaintiff.

In the former case no demand and refusal is necessary to make the act wrongful, and, therefore, it need not be alleged. In the latter case the act which is wrongful is the refusal, and this is the act which is really the ground of action, though, as pointed out above, it is usually treated as evidence of a supposed converting of the property. As it is in reality the wrongful act, it must of necessity be alleged.

It will be observed that where the plaintiff relied upon *actual possession* as the basis of his right in the property which he claims has been violated, there is no room for the element of demand and refusal.[1] For the conversion here is always an original wrongful taking of, or interference with, the property.

[1] This is also true where the plaintiff relies upon what is known as *constructive* possession.

SECTION IV.— REPLEVIN.

§ **60.** The action of replevin was originally used as the remedy for an illegal distress.

Distress was the common-law successor of the old feudal remedy of forfeiture. Under the feudal system if a tenant failed in the various services which were required of him, such as attending the lord in time of war, or tilling the soil, or attending to the lord's courts in times of peace, the lord might claim forfeiture of the land.[1]

§ **61.** Under the common law, instead of the land itself being subject to forfeiture or seizure, the chattels of the tenant which were upon the land were subject to be seized or distrained by the lord for any failure by the tenant in respect to the incidents of his tenure.[2] The services required of the tenant which were incident to his tenure became reduced to certain fixed charges upon the land, such as rent, and the seizure by the lord of the tenant's chattels was usually for non-payment of rent or some like charge. This was designated a Distress. It was against the abuse of this power that the action of replevin was allowed as a remedy to the tenant.

The action of Replevin is supposed to have been devised by Glanvil, which would fix its origin as somewhere in the latter half of the twelfth century.

§ **62.** The purpose of the action of replevin, in its finally established form, was to restore immediately

[1] Gilbert, Replevin, p. 2.
[2] Hammond, Nisi Prius, p. 433.

to the tenant his chattels, so that he might proceed uninterruptedly with his husbandry, and also to give him damages for the wrongful seizure. The latter object, however, was subordinate, the recovery of the chattels being the real object of the action. The original proceedings in replevin were so peculiar, both by reason of their form and of the practice and rules relating to them, that it has rendered the action a somewhat difficult one to understand. It would be beyond the scope of this book to go into the mass of ancient law concerning replevin. It may be found in the references cited.[1]

§ **63.** There is, however, a certain feature of replevin in its early form which it is important to understand. This is that it was really a combination of two things: (1), the proceedings by which a specific recovery of the chattels was had; and, (2), the proceedings by which the legality of the seizure or distress was determined. By the first proceedings the tenant really accomplished all he desired,— *i. e.*, he got back his chattels. The second proceedings he probably would have preferred not to continue, but in them lay the protection to the lord in case he had rightfully distrained, since here the matter of the legality of the distress was determined. Hence as a condition of the tenant having the benefit of the first proceedings he was required to give security that he would proceed with the second. The form which the second took was

[1] Hammond, Nisi Prius, pp. 372–460; Gilbert, Replevin, Chapter 2.

that of an action for damages for an alleged illegal taking and detention.

§ **64.** Originally the proceedings for specific recovery were entirely separate from the action for damages. They were before it in point of time; until they were concluded, no process was served upon the defendant to appear in the action for damages. They were instituted by a writ which the plaintiff procured from the Court of Chancery, commanding the sheriff to seize and restore to him his chattels, as a condition of procuring which writ he was obliged to give security to prosecute an action to determine the right to the chattels and to return them to the defendant if he could not show that the seizure was illegal.[1] To this writ the sheriff made a return according to the facts, and if the return was to the effect that he was unable to replevy the chattels because he could not find them or because the defendant had sold or otherwise disposed of them, the plaintiff was entitled to various other writs for the purpose of accomplishing the object desired.[2] The final outcome of the whole matter was that the plaintiff either did or did not get back his chattels. Here ended the preliminary proceedings for the specific recovery of the chattels and at this point the action for damages began.[3] If the plaintiff had suc-

[1] This requirement as to security for the return of the chattels was not originally required, but was imposed by the statute of Westminster, 2, c. 2.

[2] Gilbert, Replevin, 80, 91, *et seq.*

[3] This distinction between the proceeding to recover actual possession of the goods and the action resulting from the proceeding was recognized by Chief Justice Willes in Pearson *v.*

ceeded in recovering his chattels, as he was under bond to prosecute an action, the only thing left for him to do was to proceed with it.

If, on the contrary, the sheriff had been unable to restore to him the chattels because of their destruction, sale, or concealment by the defendant, the plaintiff could still proceed with his action, and, as will be seen later, the full value of the chattels would be included in his damages.

§ **65.** The manner in which the plaintiff proceeded with his action was similar to that in any other action. The defendant was summoned into court [1] to answer the plaintiff's declaration, in which was set forth the facts constituting the plaintiff's cause of action for damages for the wrongful taking and detention, and to which reference will be made more fully hereafter.

Roberts, Willes' Reports, 668 (1755), where he says, p. 672, "There are two forms of replevins, one only to have the goods again which may be by plaint in the Sheriff's Court, or a mandatory writ to the Sheriff and another by way of action to recover damages," and was used by him as a ground of deciding the case. At that time, however, the two proceedings had become so amalgamated into one, and, in spite of the peculiar method of obtaining the principal relief at the commencement of the action, had been so long regarded as an action *in rem.*,— *i. e.*, for specific recovery,— that the authorities scarcely warranted Chief Justice Willes in using the distinction as the basis of his decision in the case. The case of Millard *v.* Caffin (2 Sir W. Blackstone, 1330), in 1778, and that of Fletcher *v.* Wilkins (6 East, 283), in 1805, show the way in which the different proceedings in replevin had all come to be regarded as parts of a single action *in rem.*

1 Gilbert, Replevin, pp. 83–85.

§ **66.** This method of proceeding by writ was found to be extremely cumbersome, and it was discovered that little was accomplished by the proceedings subsequent to the writ itself compared with the time and trouble involved. As a consequence, they gradually fell into disuse. By a statute,[1] it was then provided that upon an ordinary complaint, or "*plaint*," as it was called, to the sheriff and the giving of the necessary security, the sheriff could at once recover the chattels by issuing a precept to his bailiff to seize them. At the time of the seizure the *action* was also begun by the bailiff summoning the defendant to appear in court to answer the plaintiff's declaration.[2] It will thus be seen that the summary method of restoring the chattels to the plaintiff was practically incorporated into the action itself.

§ **67.** This change in the method of proceeding resulted in the disappearance of a practice which prevailed of framing the declaration in replevin according to the result of the sheriff's efforts to seize the chattels and restore them to the plaintiff.

Under the old method of recovering the chattels in the proceeding by writ, if the sheriff was successful in restoring the goods to the plaintiff, the declaration in the action alleged the detention as a completed act, and was said to be in the *detinuit* (he detained). If the sheriff was not successful in restoring the chattels to the plaintiff, the declaration alleged the de-

[1] Statute of Marlbridge, c. 21.
[2] Gilbert, Replevin, p. 80.

tention as still continuing, and it was said to be in the *detinet* (he detains). In the one case the damages were limited to the injury suffered by the detention; in the other, they included also the value of the goods. If only a part of the goods were restored, the declaration was in the *detinuit* as to those which were restored, and in the *detinet* as to the rest.[1]

§ **68.** But with the new method of commencing the action for damages at once upon the institution of the proceedings by plaint to the sheriff, it must have happened frequently that the declaration was made out at the commencement of the proceeding, or at all events before the results of the sheriff's efforts to find and restore the goods could be known with certainty, and it became impracticable to observe this distinction between declaring in the *detinet* and in the *detinuit*. The declaration was therefore always made

1 In Small's Declarations, Replevin, p. 34, will be found an example of this, which appears to have been taken from the records of an actual case. As instances of this sort of declarations are rare, I quote this declaration in full:

"*ss.:* W. Burton, of L. Chaplain, and B. W. were summoned to answer unto J. J. of a Plea wherefore they took the Cattel of him the said J. J. and them unjustly detained against the sureties and pledges, etc. And whereupon the said J. J., by J. C., his attorney, complaineth that the said W. and B. the day, etc., in the year, etc., In the Town of H., in a certain place called ——, they took four score sheep of him the said John, and seventy sheep thereof they unjustly *detained* until, etc. And ten sheep residue thereof of the price of twenty shillings as yet unjustly *detain* against the sureties and pledges, etc. Whereupon he saith that he is the worse, and hath damage to the value of £20, and thereupon he bringeth his suit and prayeth that the said W. and B. may secure the delivery of the said 10 sheep unto him, etc."

out in the *detinuit,* but the damages recovered included the value of the chattels in case they were not restored to the plaintiff,[1] and for this purpose it was customary to allege their value.[2]

§ **69.** The distinction between the so-called action of replevin in the *detinuit* and that in the *detinet* was never anything but a distinction in form,[3] and when it became impracticable to make the distinction it became obsolete. The distinction has been noticed here more fully than it otherwise would have been, because an impression has seemed to prevail that there were at one time two different actions of replevin based upon it, in one of which, *i. e.,* in the *detinet,* damages only were sought.[4]

1 Fitzherbert, Natura Brevium, 69 L. and Note (C).

2 Stephen, Pleading, p. 43.

3 Hammond, Nisi Prius, pp. 460, 461.

4 Chitty, in his work on Pleading (5th Am. Ed., p. 145), refers to the action as of two sorts, one of which, that in the *detinet,* for the value of the goods and damages, he says is obsolete.

In Buller's Nisi Prius (p. 52), the action of Replevin in the detinet is treated as though it were an action commenced without the usual proceedings by writ or plaint, and it is compared, as to its advantages, with the action of Trespass. 1 Saunders, 347 b, note 2, is to the same effect.

In both Chitty and the note in 1 Saunders' Reports, the case of Petre *v.* Duke, Lutw. 1147, is cited as an authority upon the distinction between the supposed two forms of Replevin. But the case is no authority upon the point, as an examination will show.

In the English report of this case (Lutw., Nelson's Ed., 360), the *writ* is spoken of as being in the *detinet,* and the declaration or count as in the *detinuit.* It is said that an exception was taken for this cause, but as the parties by agreement amended their pleadings, the point was not passed upon. Then follows

§ **70.** No case of replevin can be found in the reports where the object was not the specific recovery of the chattels and which was not commenced by the proceeding, either by plaint or writ, to obtain such recovery.[1]

The statement of Chief-Justice Willes in the case of Pearson *v.* Roberts, which has been quoted (*ante*, p. 47, note 3), has been construed as meaning that there was an action of Replevin for damages only, different from the one which was instituted by the pro-

the statement, "but certainly it was a material objection, for in a Replevin in the detinet the plaintiff must recover the value of the goods and his damages for the taking; but if it is in the *detinuit*, that is in the preterperfect tense, it implies that the plaintiff hath his goods again; and therefore he shall only recover for the wrongful taking." An examination of the original report in Lutw. 1147, shows that the word *writ* refers to the *recital of the writ* contained at the beginning of the declaration, and that the substance of the objection therefore is that the allegation in the body of the declaration is inconsistent with the recital, the one showing that the goods are still detained by the defendant, and the other that they have been restored to the plaintiff by the sheriff. In this form the objection becomes intelligible, as an objection to the form of the declaration upon the theory that the court could not say what damages to award unless it was clear whether or not the plaintiff had succeeded in getting back the property. In the other form the objection is not intelligible, but only confusing, as it is no objection that the *writ* or *plaint* is in the *detinet* and the declaration or count in the *detinuit*. In fact the writ or plaint is always and rightly in the *detinet*, since the goods at that time are in the defendant's possession, and the declaration is as a matter of fact usually in the *detinuit*. This case is correctly cited in Gilbert, Replevin, p. 167, and in reality only confirms the explanation given in the text of the real nature of the distinction between Replevin in the *detinet* and in the *detinuit*.

1 Fletcher *v.* Wilkins, 6 East, 283.

ceedings for specific recovery. Lord Ellenborough, in Fletcher *v.* Wilkins (6 East, 283, at p. 286), so construes it, for he says: "And Lord Ch. J. Willes there distinguished between a replevin by plaint or mandatory writ to the sheriff, to have the goods again, and replevin by action to recover damages." He expresses the opinion, however, that the statement is not correct, and that there is no such action of replevin for damages only. It has already been explained that Willes probably had in mind the early distinction between the proceedings for the recovery of the chattels, which were preliminary to the action for damages for the seizure, and the action itself.

§ **71.** Although it is not the purpose of the writer in this part of the book to treat of pleadings subsequent to the declaration, yet in the action of replevin it is proper under this head to examine the first pleading on the part of the defendant which was frequently a declaration in fact though not in name.

Wherever the defendant claimed the right to the chattels, he set up his right and prayed for their return, and damages for their detention, in a pleading which was called the *avowry* or *cognizance*.[1] This was in every respect like a declaration and was so treated.[2] As will be seen later, the plaintiff pleaded to it as

[1] Where the defendant alleged a right in himself, by virtue of which he seized the goods, the pleading was called an *avowry;* where he alleged the right in another, by whose command he acted in making the seizure, the pleading was called a *cognizance* (or *conusance*, Trevilian *v.* Pyne, Salk. 107). Comyns' Digest, Title Pleader, 3 K. 13, 14.

[2] Coke, Littleton, 303 a (*h*); Bacon's Abridgment, Replevin A.

though he were a defendant. If the defendant claimed no right in the chattels, but denied the seizure, there was a regular plea, as in other actions, which he could put in, and this element of a cross action by avowry or cognizance did not enter into the action.

§ **72.** The origin and nature of replevin has been somewhat fully described. It has been seen that one of the peculiarities of it was the manner in which the plaintiff recovered his goods in the first instance before or at the very commencement of the action. This peculiarity survived through the various changes which the form of the action underwent, and has always been a distinctive feature of it. As a result, in this form of action there was no waiting for relief until the determination of a possible lengthy suit; no risk of a disposal of the chattels so that specific recovery would be impossible. Here was relief at the start, and of a very substantial kind. It is not to be wondered at that under these circumstances the lawyers and the courts found a way of extending the action to all cases of wrongful interference with personal property where specific recovery was desired. Just as the action of trover was extended beyond its original scope as a remedy for the wrongful conversion of goods which were found, so the action of replevin was extended beyond the cases of wrongful distress. As trover became a universal action for *damages* for any wrongful interference with personal property accompanied by loss of possession, so replevin became the universal action for the

specific recovery of personal property *wrongfully taken.*[1]

§ **73.** The advantage of the action of replevin over that of detinue is obvious. In detinue the property could be recovered only after the determination, and then only if it was still in the possession of the defendant; while in replevin the property could be secured at the very outset.

§ **74.** Replevin was never extended at common law beyond the case of an original wrongful taking of the goods from the possession of the plaintiff. An attempt was made to broaden the form of action so as to include all cases where detinue or trover could be brought.[2] This attempt was not successful, as it was thought to be an injustice to allow this summary method of regaining possession to be used in case the defendant had acquired possession by no wrongful act, but simply refused to acknowledge the right claimed by the plaintiff. The object of the action, as its origin and its subsequent use show, was to first put the parties *in statu quo,* and then determine their respective claims to the chattels.

[1] Hammond's Nisi Prius, 451.

[2] Mennie *v.* Blake, 6 E. & B. 843.

In re Wilsons, 1 Sch. & Lef. 320, note (*a*). In this case the nature of the action is so clearly put that it is worth while to quote the language of Lord Redesdale. Replevin "is merely meant to apply to this case, viz.: where A takes goods wrongfully from B. and B applies to have them redelivered to him, upon giving security, until it shall appear whether A has taken them rightfully. But if A be in possession of goods in which B claims a property, this is not the writ to try that right."

§ **75** As has been explained, the main relief, that of specific recovery, is secured in replevin, not by the final judgment, except so far as it may be a confirmation of the restoration of the goods to the plaintiff, but by the preliminary proceedings. In fact the form of relief which the declaration seeks is not specific recovery,[1] but damages for the wrongful taking and detention of the chattels.

§ **76.** To show a good cause of action in replevin the declaration should contain:

(*a*). A statement of the plaintiff's *right.*

To show the plaintiff's right, all that need be alleged is that the goods, specific recovery of which is sought, were in the plaintiff's possession at the time of the wrongful taking. The right not to have them interfered with being a natural right, follows as a matter of course, and need not be alleged.

(*b*). A statement of the violation of the right by the defendant,— *i. e.,* a statement of the wrongful taking and detention.

§ **77** From the original use of the action as a remedy for wrongful distress exclusively, it happened that it was necessary to allege the place in which the chattels were taken, for unless the chattels were taken on the land of the tenant, it was not a distress, and he could not have an action of replevin, but must resort to some other action for relief. This was, therefore, at

[1] Except possibly in the early history of the action when the custom of declaring in the *detinet* was in vogue. See declaration set forth in note 1 on p. 50.

that time, a matter of substance, as a denial of the seizure in the place alleged, if proved, was a good defense to the action. When the action was extended to cover other wrongful seizures besides wrongful distress, the reason for the requirement of an allegation of the place of seizure vanished. The allegation was, however, still held to be necessary, though only as a matter of form.

§ **78.** To show a good cause of action on the part of the defendant for a return of the chattels and damages, the avowry or cognizance should contain:

(*a*). A statement of the right upon which the defendant relies, whether it be in himself or in another by whose command he acted.

It will be observed that, as the chattels which are the subject of the action were admittedly in the plaintiff's possession at the start, and the defendant claims them under a distress; or to use a term which will cover all cases in which the action, as extended, was used,— a seizure,— he must show that seizure to have been legal. For, if he shows the seizure to have been legal his subsequent possession was lawful, and the chattels were his property, concerning which he had the natural right not to have them interfered with in any way. But as he cannot rely on possession as *prima facie* proof of ownership in himself, since, as said above, possession was at the start admittedly in the plaintiff, he must allege facts which will show a *right* of possession either in himself or the person by whose

command he made the seizure. If it is a case of *distress,* then he must set forth fully the facts as to the tenancy, rent in arrear, chattels being upon the leased property, and seizure. If it is a case other than distress, then he must set forth other facts,— *e. g.,* absolute ownership in himself,— which will show a right of immediate possession on his part at the time of the seizure.

(*b*). In theory, if the avowry or cognizance is a declaration, it should allege the wrongful act which is a violation of the right set forth. But the wrongful act, theoretically at least, is the taking of the chattels away from the defendant, and this is done under process, in the action itself, and is a part of the records of the case. The court would not intentionally allow its processes to be used to commit a wrongful act; but, until the determination of the question between the parties, it has no means of telling who has the right to the chattels, and deems it better that the parties should be placed *in statu quo,* even at the expense of a possible wrong, inasmuch as it can and does protect the defendant against any such possible wrong by requiring the plaintiff to give security in the manner already described. From the defendant's point of view, whatever the actual facts may be as to the justice of restoring the chattels to the plaintiff, the act of restoration is a violation of his right not to have his property interfered with — hence technically a wrongful act. But it can readily be seen that there is no necessity of, or propriety in, formally alleging as a wrong an act which has been committed by authority of the court itself.

§ **79.** A good example of a declaration in replevin is found in the case of Potter *v.* North, 1 Saunders' Rep. 346 g.

"Henry North, late of Mildenhall, in the said County, esquire, was summoned to answer John Potter of a plea wherefore he took a horse called a nag, of him the said John, and unjustly detained him against sureties and pledges, etc. And whereupon the said John, by Edward Coleman his attorney, complains that the said Henry, on the 18th day of June, in the 19th year of the reign of our said lord Charles the Second, now King of England, at Mildenhall aforesaid, in a certain place there, called the Fenn, took the said horse of him the said John, and unjustly detained him against sureties and pledges, until, etc.; wherefore he the said John says that he is worse and has damage to the value of 40*l*, and therefore he brings suit, etc."

Section V.— Case.

§ **80.** The form of action known as *Case,* in its comprehensive form, probably had its origin in a statute [1] which was enacted in the time of Edward the First (1285 A. D.),[2] and in which it was provided:

"And whensoever from henceforth it shall fortune in the Chancery that in one Case a Writ is found and in like Case falling under like Law and requiring like Remedy, is found none, the Clerks of the Chancery

[1] Statute of Westminster, 2, 13 Edw. I., c. 24.

[2] 4 Reeves' History of English Law, 430; 2 Blackstone Com. 51; 3 Wodd. 168.

shall agree in making the Writ; or the Plaintiffs may adjourn it until the next Parliament, and let the Cases be written in which they cannot agree, and let them refer themselves until the next Parliament, by Consent of men learned in the Law, a Writ shall be made, lest it might happen after that the Court should long time fail to minister Justice unto Complainants."

The intent of the statute was to allow the statement of any cause of action, for which there was no existing form, according to the facts in the particular case, thus furnishing a means for recovery in all cases where there was a wrong, but no established form or *writ* in which to sue.

§ **81.** Undoubtedly before this statute actions were allowed which were of the nature afterward known as Actions upon the Case.[1] Several actions of this sort are found among the Select Civil Pleas published by the Selden Society,[2] and show conclusively that the

[1] Kinneyside *v.* Thornton, 2 Blackstone Rep. 1113; Brotherton *v.* Wood, 3 B. & B. 62, 63.

[2] Selden Society Publications, Vol. III. Select Civil Pleas, Cases 7, 84, 86, 106.

Case 7 (1200 A.D.) is an example of boldness in framing new writs hardly to be expected on the part of the courts at that time. The case is really one of boycotting, and is perhaps the earliest of which we have any record.

Case 106 is of the same nature, and is interesting enough to be cited in full. It is as follows:

"Northhampton — Henry Cumin, put in the place of Gerard de Malquincy (a curious practice which prevailed at that time of allowing a plaintiff or defendant to substitute some one else in his place), who was summoned to show why he [Gerard] had hindered William Lupus from tilling his land, which he [William] deraigned (proved) by the assize (action to recover posses-

principle of framing new writs for new cases which, through the statute cited, subsequently produced the comprehensive action of case, was not unknown to the common law.

§ **82.** The tendency toward crystallization into set forms was strong enough to evolve two new and distinct forms from the general class, and, as we have seen,[1] it was not long before the actions of *Assumpsit* and *Trover* were recognized as separate from *Case.*

There was, however, a large general class of actions left, actions of so varied a character as to the facts upon which they were based, that they could not well be brought within any one or more forms. These are the actions which have, since the branching off of Assumpsit and Trover, constituted the class of actions known as *Case.*

§ **83.** Without attempting to specify the numerous instances where the action of case is applicable, it may be said that it includes all actions for damages for

sion of land) against the said Gerard, comes and concedes that William may till his land on account of the ejectment of said Gerard, and William remits to him the damages which he would have recovered by the [verdict of the] jury."

Case 86, Paxton *v.* Male, is another good example of an action on the case. It seems to combine the element which was afterward brought under the action of *conversion* with that which belonged strictly to *case.* The complaint was that the defendant "unjustly took his (plaintiff's) oxen and sold them at Waltham Fair, which oxen were worth five marks, so he says, and besides had troubled him in other ways, on account of which his land was untilled," to his damage of 20 marks."

[1] *Ante,* pp. 23, 38.

wrongful acts which do not fall within any of the other classes of actions, and that the wrongful acts are usually indirect or somewhat remote from the injuries resulting therefrom.[1] It is to be noted, too, that the wrongful acts are always violations of natural rights, and never of rights which arise from contract or other special relations.

§ **84.** As in the action of trespass, so in that of case, the injury for which redress is sought may be either to the person or to the property of the plaintiff.

If the injury is to the person, then the declaration to show a good cause of action need contain only —

A statement of the wrongful act on the part of the defendant.

The right which is violated by such wrongful act being an absolute or natural right, need not be stated. The same reasoning applies here as in *Trespass.* In alleging the wrongful act, however, it may be necesary to state somewhat fully the circumstances, in order to connect the act with the injury, as its cause. There is a certain class of cases where the defendant's act will be wrongful only if the plaintiff is in a proper legal position at the time of the act. In such cases it is necessary to allege facts showing the position of the plaintiff to be a proper one. Many cases of inju-

[1] The familiar example of the log thrown into the highway illustrates as well as any this characteristic of the action on the case. If the log hits and injures some one when it is thrown, trespass is the proper form of action to adopt. If some one coming along the road stumbles over it and is injured, the proper form of action is *Case.*

ries resulting from negligence are of this character. The plaintiff may be in a building, upon land, in an elevator or upon a train, or in any place where he has no right to be; if he suffers injury because the building is not safe, because of an uncovered pit upon the land, because the elevator is not guarded, or because of an accident to the train, he himself is to blame; he has, so to speak, violated his own right not to have his person injured. Therefore, the fact that the plaintiff is rightfully in the place where he suffers the injury is an element to show the act of the defendant to be a wrongful act as respects the plaintiff, and must, of course, be alleged in the declaration.

§ **85.** If the injury complained of is to the plaintiffs' property, the declaration, to show a good cause of action, should contain:

(*a*). A statement of such facts as will show that the plaintiff has some interest in the property, which may be the subject of injury. The word property here is used in the broad sense as including both chattels, real estate, choses in action, and anything which is of value, or from which plaintiff rightfully enjoys a benefit.

When the plaintiff's interest is once shown, his right not to have it injured is, of course, plain, and requires no formal statement.

(*b*). A statement of the wrongful act on the part of the defendant.

SECTION VI.— EJECTMENT.

§ **86.** The form of action known as *Ejectment* is a good illustration of the length to which the courts sometimes went in adapting established forms to new uses.[1]

The action was, in the beginning, an action of trespass brought by a person in possession of land under a lease for years, against one who entered upon the land and ejected him. It was known as the writ of *ejectione firmæ*.[2] The object was simply the recovery of damages. This relief, however, was inadequate, especially where the tenant had a long term, and the practice grew up of applying to a court of equity for relief — against the lessor for specific performance, against a stranger for an injunction restraining him from interfering with the tenant's possession. This carried a great deal of business into the equity courts from the courts of common law, and resulted in the latter adding to the relief by way of damages, given in the action of *ejectione firmæ*, relief by way of specific recovery.[3] Such relief was, however, never prayed

[1] In 3 Blackstone Com., p. 200 *et seq.*, will be found the history, in detail, of the action.

[2] The earliest recorded instance of the bringing of an action of this kind is said to be that in Year Book Trin. 44 Edw. III., 22, 26. Prior to this time there appears to have been an action known as *quare ejecit*, in which the lessee could recover the possession of his land and damages for the ouster, but only against his lessor or some one claiming under him. No remedy existed for the tenant against a stranger until the invention of the writ of *ejectione firmæ*. The distinction between the two actions is stated in Year Book 21 Edw. IV., 10, 30.

[3] Gilbert, Ejectment, pp. 3, 4. Gilbert fixes this innovation in the reign of Edward IV. (1460). Adams fixes the time as between 1455 and 1499. Adams, Ejectment, p. 9.

for in the declaration, and in form the action still remained an action of trespass for damages.

§ **87.** The trespass complained of was the ejection of the plaintiff from the possession of the premises. If the plaintiff had been on the premises as a mere intruder and had no interest in the premises which entitled him to possession, and, on the contrary, the defendant entered, ousted the plaintiff, and took possession himself, claiming to be entitled thereto, his act was not a wrongful one; at least not wrongful as far as the plaintiff was concerned, for it was no violation of any right of the plaintiff's; not of his right to the undisturbed enjoyment of his property, because it was not his; not of his right not to have his person interfered with, because he was wrongfully on another's land, and his right in that respect was subject to the right of the defendant to oust him with all necessary force. It resulted, therefore, that the plaintiff in the action was bound to allege and prove his right to the possession of the land, or his *title,* as it is generally called, in order to show that the defendant's act of ousting him was wrongful.

§ **88.** As the action was always brought by a lessee for years, the elements of his title consisted of a good title in his lessor, a lease to himself, and an entry under the lease. One would have supposed that under these circumstances the action was of a special nature, and not at all applicable to the case of a person who had never been in possession as a lessee or otherwise, but who wished to have his title

to land in the possession of another determined. Yet such were the resources of the lawyers that they found a way to utilize the action as a general means for the trial of title. The manner adopted was to have A, the claimant of the land, make a formal entry upon it (in the absence, or at all events without the knowledge, of the person really in possession), and execute a lease to B, some friend who accompanied him. B remained upon the land until X, the person actually in possession, returned or discovered him, and then considered himself ejected. An action was then brought in B's name against X. B's right depended upon the title of A, his landlord, and A's title to the land was thus determined. As B was a friend to A, if he succeeded, A had no difficulty in getting the possession.

§ **89.** The next step in the development of the action was to procure C, another friend of A's, to casually happen upon the land shortly after the making of the lease and eject B, instead of waiting for X to eject him. B then brought the action against C, and if X knew nothing about the proceedings, or they were intentionally concealed from him, he would be ousted from the premises under the judgment restoring them to B, without any chance to defend his right to them.[1] Therefore the rule was adopted, which was made use of afterward so effectively by Rolle, requiring C, the casual ejector, to notify X, the person in actual possession of the land, that an action had been brought against him for ejecting B from the land, and

[1] Adams, Ejectment, pp. 12, 13.

that as he (C) had no title he did not propose to defend it.[1] Upon this X could apply to the court and be made defendant, and the action would proceed between B and X.

§ **90.** Here the inventive genius of Rolle saw a chance to simplify things. Here was a chance to impose conditions upon X, who was an applicant to the court for a favor, to wit, to be allowed to come in and defend the action. X was, therefore, compelled to stipulate to admit on the trial the fact of the making of the lease from A to B, the entry and subsequent possession by B, and the ouster of B by C.[2] There was nothing left then to try but the title of B's lessor A. The lease, entry, and ouster had never been more than a hollow form; now as a result of this rule, they became a fiction pure and simple. Even the form was no longer observed, and it was customary to allege the lease to *John Doe,* entry by him and ouster by *Richard Roe,* fictitious names merely used for the purposes of the suit. In this form the action of ejectment has remained to the present time, wherever the common-law form prevails.

§ **91.** As has been said, the theory of the action is that of trespass[3] for forcibly ejecting plaintiff from

[1] For form of notice, see Gilbert, Ejectment, 191.

[2] Gilbert, Ejectment, p. 8.

[3] The action of ejectment is always treated as a *mixed* action, for the reason that the plaintiff recovers both possession and damages, though Stephen doubts the propriety in so calling it, as the declaration in form is merely for damages. Stephen, Pleading: Appendix, p. vii.

his land. The declaration conformed to this theory. To show a good cause of action in ejectment the declaration should contain:

(*a*). A statement of the plaintiff's rights. The action is really brought for a violation of both the plaintiff's right not to have his person interfered with, and the right to the undisturbed enjoyment of his property. The former needs no statement; the latter, however, will not appear to attach to the property which is the subject of the suit, until an allegation is made of such facts as will show that the property belonged to the plaintiff. These facts, since ejectment is always brought nominally by a lessee, are the title in the lessor (impliedly alleged by the allegation of the lease), the lease, and the entry and subsequent possession.

(*b*). A statement of the wrongful act on the part of the defendant.

The wrongful act is the *ouster,* and the declaration follows out the theory of the action by alleging it and praying damages therefor. Originally the damages were substantial in amount, but when the fiction which has been described was adopted, and the *real* defendant though not the nominal one was compelled to admit the ouster as a condition of being allowed to come in and defend the action, it was not deemed fair to give any substantial damages against him, and nominal damages only were allowed.

The plaintiff, if successful, could subsequently recover his damages for loss of the profits of the land during the defendant's wrongful occupation by another action known as an action of trespass for *mesne* profits.

PART II.

Pleadings Subsequent to the Declaration.

CHAPTER I.

DEMURRERS.

§ **92.** In an action at law the pleadings subsequent to the declaration seldom extended beyond the fourth stage. They were known respectively as the *Plea,* the *Replication,* the *Rejoinder* and the *Sur-rejoinder.* There were pleadings subsequent to the sur-rejoinder;[1] but it seldom, if ever, became necessary to use them, and they need not be noticed here. In addition to these four forms of pleadings, there was a method by which either party could answer the other's pleading at any stage, known as the *Demurrer.* This was an entirely different thing from any one of the pleadings above named, but in the general sense of the word pleadings may be classed as a pleading. The *Demurrer* will be treated of in this chapter.

§ **93.** When the plaintiff had set forth his cause of action in his declaration, in a manner which he deemed sufficient to entitle him to the relief sought, it was the defendant's turn to make some statement to the court

[1] The succeeding two are called the *Rebutter* and *Surrebutter.* Euer, Doctrina Placitandi, 1667, p. 1, Preface.

of his position with respect to the wrongful act charged against him. Two general methods of answering the declaration were open to him — the first, by way of a *demurrer;* the second, by way of a *plea.*

§ **94.** These two methods were entirely unlike in their nature and effect.

The demurrer was a pleading which could be used by either party at any stage of the pleadings, provided the other had not already used it, and provided issue in fact had not been joined.[1] The defendant could demur to the plaintiff's declaration. If he did not demur, but put in a plea, the plaintiff could demur to the *plea.* If the plaintiff did not demur, but put in a replication, the defendant could demur to the replication; and so on through the whole list of successive pleadings. But when a demurrer had been put in by either party, the pleadings were at an end, as there could be no demurrer or pleading to it.[2]

§ **95.** The effect of the demurrer was to raise a question of law upon the pleadings as they stood prior to the demurrer, which it was the province of the judge

[1] Calverac *v.* Pinkero, Prac. Reg. Com. Pleas, 156.

[2] Haiton *v.* Jeffreys, 10 Modern Rep. 280; Ames' Cases, 6.

In Euer, System of Pleading (1771), p. 187, we find the statement: "Also one may demur to a demurrer for the doubleness of it; but otherwise if he who might demur does not demur to it but joins in the demurrer." And in Regula Placitandi, 137 (2d Ed., 1694), we read: "A Demurrer is double when that he that doth demur doth assign in his demurrer (for cause of it) one Error in Fact and another Error in Law to be in the Plea upon which he demurs which ought not to be done in one Demurrer."

to decide. No issue of fact was raised, and the delay and expense incident to a jury trial were avoided.

§ **96.** The *plea,* on the other hand, was a pleading exclusively adapted to the use of a defendant, and was never used by the plaintiff except in the case of replevin, reference to the peculiar nature of which has already been made.[1] The effect of it was to raise an issue of fact or present new matters of fact to the court, which, unless the plaintiff stopped the course of the action by a demurrer, had to be determined upon a trial.

§ **97.** The office of the *demurrer* was to test the sufficiency of the preceding pleading in point of substance and form. Whenever either party detected a defect in the other's pleading, whether because (in the case of the declaration) it did not show a sufficient cause of action, or (in the case of the plea) an adequate defense, or because it was framed in an informal manner, an opportunity was presented to raise a question of law for the court to determine. The means adopted to bring the question before the court was the *demurrer.* The form of it was as follows:

In the ———— (name of court).
The — day of ——, in the year of our Lord ——.

Title of Action. } And the said defendant (or plaintiff), by ——, his attorney, says that the declaration (or plea) is not sufficient in law.

[1] *Ante,* p. 53.

The effect of this was as though the defendant had said: "Admitting everything the plaintiff has alleged in his declaration to be true, the facts do not show any cause of action against me, or he has alleged them in such an informal manner that he is not entitled to proceed with this action against me."

§ **98.** When either party had put in a demurrer, the only thing for the other to do was to put in a "*joinder in demurrer,*" as it was called. This was in the following form:

In the ———— (name of court).
The — day of ——, in the year of our Lord ——.

Title of Action. } And the plaintiff says that the declaration is sufficient in law.

The question as to the sufficiency of the pleading demurred to was thus presented to the court for a determination.

§ **99.** Originally, there was but one form of *demurrer.* The effect of it was to bring up all questions as to the sufficiency of the pleading both in form and substance. The rule was a harsh one; however, as a party was frequently thrown out of court upon some technical defect in his pleading, which, as he had no notice of the ground of the demurrer, he was not prepared to meet. It was therefore provided by statute,[1]

[1] 27 Eliz., Ch. V., § 1 (1585).

"That from henceforth (1585), after demurrer joined and entered in any action or suit in any court of record within this realm, the judges shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, defect, or want of form in any . . . . pleading, ... except those only which the party demurring shall specially and particularly set down and express, together with his demurrer."

§ **100.** As a result of this statute the *special demurrer* came into existence. It was the same as the old form, with the addition at the end of a statement of such defects in the form of the other's pleadings as the party demurring proposed to object to. The old form was still used where the party demurring desired to call in question the substance only of the pleading, but it was known as a *general demurrer,* to distinguish it from its statutory offshoot, the *special demurrer.*

§ **101.** There is also what is referred to in some of the books as a *Demurrer to the evidence.* With this we are not concerned in a discussion of the pleadings in an action or of those motions which have to do with the pleadings, such as the motions *in arrest of judgment, non obstante veredicto, etc.* The demurrer to the *evidence* is, as its name implies, a different sort of thing, and pertains to the evidence and not to the pleadings. It served a similar purpose, *i. e.,* it called in question the sufficiency of the evidence to establish the claim of the plaintiff or defence of the defendant admitting all the evidence to be true. It was the per-

cursor of the more modern motion to dismiss or motion to direct a verdict. It was not a pleading, nor did it relate to the pleadings.[1]

§ **102.** At common law the judgment given upon the demurrer was final, *i. e.*, it disposed of the action. If the demurrer was sustained and the pleading demurred to held insufficient, there was no opportunity for the defeated party to amend and go on with the action. If, on the contrary, the pleading was held good and the demurrer overruled, the party demurring was deemed to have had his chance in court, and as he had chosen to rely upon some defect in the other's pleading instead of answering the facts set forth, final judgment was given against him.[2] It is customary everywhere at the present time for the courts to allow an amendment in case a pleading is held to be bad on demurrer.

§ **103.** There was one exception to the rule that final judgment would be given on a demurrer. It was in the case of the plea in abatement. The plea in abatement was, as will be seen later,[3] a dilatory pleading, *i. e.*, it was interposed solely for purposes of delay. In case of a demurrer to a plea in abatement where the demurrer was overruled, the judgment given in favor of the defendant did not decide the case upon its merits, and the plaintiff was at liberty to pursue

[1] Euer, System of Pleading (1771), p. 185.

[2] State of Maine *v.* Peck, 60 Me. 498; Ames' Cases on Pleading, 19.

[3] *Post*, p. 95.

the action or bring another one later.[1] Therefore, in case the demurrer was sustained, the court did not give final judgment against the defendant. In such case the judgment was known as a judgment of *respondeat ouster* (let him answer over). Upon such judgment the defendant was at liberty to put in another plea.[2]

§ **104.** In the general sense of the word pleading, a demurrer may be said to be a pleading, for it is one of the means used by the parties to present the case to the court for determination.

A demurrer, however, is not a *plea.* It has been said to be "so far from being a *plea* that it is an excuse for not pleading."[3] A statute, therefore, which permits the defendant to put in several distinct *pleas,* does not authorize a party to put in a demurrer and a plea at the same time.[4] There is an obscure case in Jenkins' Century Cases, 133 (A. D. 1474),[5] in which the plaintiff seems to have put in both a replication and a demurrer to the plea, but it may be imperfectly reported, and may not have been the exception to the general rule which it appears.

[1] *Post,* p. 96.

[2] Walden *v.* Holman, 2 Lord Raymond, 1015; Ames' Cases, 5.

[3] Haiton *v.* Jeffreys, 10 Modern Rep. 280; Ames' Cases, 6. It will be observed that the word *pleading* here is used synonymously with *putting in a plea.*

[4] Statute of 4 Anne, Ch. XVI. § 1, construed in Haiton *v.* Jeffreys, *supra.*

[5] J. S. of Dale *v.* J. S. of Vale, Ames' Cases, 1.

Section I.— General Demurrers.

§ **105.** A general demurrer before the statute of 27 Elizabeth, as has already been observed, tested the sufficiency of a pleading both in *substance* and *form*. A good illustration of this is found in the case of J. S. of Dale *v.* J. S. of Vale,[1] which was in substance as follows:

A *v.* X. Trespass for taking the plaintiff's goods. X pleads that he (X) was possessed of the goods as his own until A took them and gave them to the plaintiff. A demurs generally to the plea. Judgment for A. The plea is bad. The statement that A took the goods and gave them to the plaintiff is no more than saying that the plaintiff took them, since A is in fact the plaintiff, and therefore amounts to nothing. The substance of the plea, therefore, is that the goods belonged to X, the defendant. It was held that this amounted to a general denial of the trespass, and hence the form of the plea should have been *not guilty*.

§ **106.** Since the statute referred to, the office of the general demurrer has been limited to matters of *substance* entirely. It has been shown in the preceding chapters what matters constitute the substance of the declaration in the various forms of actions. These matters all go to make up the cause of action, and if the cause of action is imperfectly made out by reason of the omission of any one or more of them, the result will be that the declaration will be held to be bad upon general demurrer.

[1] Jenkins' Century Cases, 133; Ames' Cases, 1.

§ **107.** As it is with the declaration, so it is with the subsequent pleadings. They must contain matters which, admitting them to be true, constitute a valid answer to the facts set up in the preceding pleading, otherwise they will be bad upon general demurrer.

§ **108.** But with matters of form the general demurrer, after the statute, had nothing to do. Matters which constituted evidence of the falsity of the facts set up in the preceding pleading, and which should have properly been brought in as evidence under a general denial of the wrongful act charged in the declaration, or a specific traverse or denial of some fact stated in the pleading, might be set out in full and no objection could be made to it under a general demurrer.

§ **109.** There was, however, one exception to this rule, and that was in the case of a plea in abatement. Even after the statute of 27 Elizabeth which resulted in limiting the use of general demurrers to matters of substance, the courts found a way to preserve its full scope in respect to the plea in abatement. It may have been because in the case of a plea in abatement judgment upon the demurrer was not final, and, therefore, an injustice, by reason of the party not being informed of the defect upon which his adversary intended to rely, was less likely to occur. Whatever may be the reason, the fact remains that the court did not apply the statute in the case of a demurrer to a plea in abatement. The case of Walden *v.* Holman [1] is an illustration in point.

[1] 2 Ld. Raymond, 1015; Ames' Cases, 5.

A *v.* X. The plaintiff describes the defendant in his declaration by the name of John. The defendant pleads in abatement that he was baptized by the name of Benjamin, and then referring to himself adds a denial, "That the same John was every known by the name of John." The plaintiff demurs generally. Plea held bad in form because of the addition of the unintelligible denial. Chief Justice Holt says: "Matters of form may be taken advantage of on a general demurrer when the plea only goes in abatement, for the statute of Elizabeth only means that matters of form in plea which goes to the action shall be helped on a general demurrer."

§ **110.** It has been said before that a general demurrer is an admission of the facts stated in the pleading demurred to. But the admission is solely for the purpose of determining whether the facts are sufficient in law, *i. e.,* constitute a good cause of action. The admission is not an admission for any other purpose, and, therefore, cannot be used as evidence, against the party demurring, in the same or any other action or proceeding. The nature of the admission is shown in the case of Barber *v.* Vincent.[1]

A *v.* X. Action of *Assumpsit* for a horse sold to X. X pleads infancy. A replies that the horse was a necessary. X demurs generally. It was urged on the defendant's part in the argument that an infant was only chargeable for such necessaries as meat, drink, etc. Demurrer overruled, and replication held good on the ground the demurrer admitted the horse to be a necessary. If the defendant had denied that the horse was a necessary, then the question of what articles

[1] Freeman, 531; Ames' Cases, 3.

came within the term necessaries would have been material, but as he had demurred there was no room for any argument on the point.

§ **111.** The admission of facts by a demurrer is subject to four qualifications which are generally recognized in the cases.

(1). A general demurrer does not admit what the court, as a court, knows to be impossible or knows to be untrue. This is for the reason that the court is assumed to be an intelligent body, conversant with the ordinary laws of nature and with all facts of a public nature.

A *v.* X. Action of *Trespass* for assault and battery. X pleads that A entered his land and broke and displaced stones thereupon, and to stop him, he, X, threw stones at him *gently,* and they fell upon him *gently.* General demurrer. Plea held to be bad; the court knows it to be impossible for stones to fall *gently,* although admitted by the demurrer.[1]

A *v.* X. Action for *Account* for £120 received by X, belonging to A. Plea that X never received the money on A's account. Upon the issue being tried by the jury it is found that X did receive the money. In the old action of account the practice was for the defendant to plead anew before the *auditory,* as it was called. The proceeding before the auditory or auditors was practically a second stage of the same action. X, in his plea before the auditory, again pleaded that he did not receive the money on A's account. A demurred generally. Plea bad; the demurrer does not confess the facts stated in the plea,

[1] Cole *v.* Maunder, 2 Rolles' Abridgment, 548; Ames' Cases, 2.

for the court know them to be untrue, the jury having found them such by its verdict.[1]

§ **112.** A distinction, however, is made between what the court as a judicial tribunal have knowledge of, and what the judge or judges may know in their private capacity. Although the judges, in their capacity as private citizens, may know certain facts stated in the pleadings to be untrue, still if the subject is one of which they cannot in their judicial capacity take notice, on a demurrer they will have to regard them as true.

A *v.* X. Action of Assumpsit on a bill of exchange. A, in his declaration, bases his right to recover upon an alleged special custom in London, which custom, in fact, does not exist, and the court happens to know it. X demurs to the declaration. Declaration held good on the ground that the custom is admitted by the demurrer. To understand this case, it should be noted that a court cannot take judicial notice of a *special local custom;* if it had been a general custom upon which A based his right to recovery, the court could have taken judicial notice of its existence.[2]

§ **113.** (2). A general demurrer does not admit a conclusion of law. It is not proper to allege in a pleading a conclusion of law. It is for the court to draw the necessary conclusions of law from the facts stated in the pleading and proved at the trial, nor can

1 Tresham *v.* Ford, Croke's Eliz. 830; Ames' Cases, 2.
2 Hodges *v.* Steward, 3 Salkeld, 68; Ames' Cases, 3.

conclusions of law be denied by the other party.[1] As it is improper, or at least superfluous, to allege a conclusion of law, and as it is no part of the cause of action or defense, it will not be deemed admitted upon demurrer.

A *v.* X. Action of *Assumpsit.* A alleges an agreement between X and Y, to submit certain matters between them relating to a partnership to arbitrators, in which agreement it was provided that X should pay such debts of the copartnership as the arbitrators should find to be due, but A shows no consideration between himself and X. He alleges an award by the arbitrators whereby X was ordered to pay him, A, $125, and that X "owes him $125, the sum so awarded by said arbitrators." X demurs. Declaration held bad, as it shows no valid contract between A and X. The allegation that X owes A the money is a conclusion of law, and is not admitted by the demurrer.[2]

Indictment *v.* X as X, *Esquire.* X pleads a misnomer in abatement; *i. e.,* that he has been indicted by a wrong title; that he is a *lord.* Replication that B petitioned the House of Lords to be tried by it as a lord, and that the petition was dismissed *according to the law of Parliament.* X demurs. Replication held bad. Whether or not the petition was dismissed *according to the law of Parliament* is a conclusion of law, and it is not admitted by the demurrer.[3]

§ **114.** (3). A general demurrer does not admit an immaterial allegation. If either party in his pleadings inserts allegations which are immaterial,— that is, are

[1] *Post*, p. 127.
[2] Millard *v.* Baldwin, 3 Gray, 484; Ames' Cases, 10.
[3] Rex *v.* Knollys, 1 Ld. Raymond, 10; Ames' Cases, 4.

not essential parts of the cause of action, or the defense, as the case may be,— he can have no benefit from such allegations, nor are they prejudicial to his adversary. He does not have to prove them, nor can his adversary deny them. It is held, therefore, that such allegations will not be admitted by a demurrer. The question can seldom become material, as there are few instances where it would make any difference whether or not they were deemed admitted.

There is one case, however, in which the matter has become important, and that is where the immaterial allegation is of some matter which may involve the application of a statute.

A *v.* X. Action of *Trespass, quare clausum fregit,* for $70 damages. A alleged in his declaration both possession and *ownership* of the land. X demurred. The declaration, for some reason which is not material to the point in question, was held insufficient and judgment given for X for $70. A appealed. X then moved to remand the case to the lower court, under a statute providing that actions were not appealable where the demand for damages did not exceed seventy dollars, and where no title was involved. It was contended on behalf of A that as *ownership* was alleged in the declaration and was *admitted by the demurrer,* title was involved. Motion granted, as the allegation of ownership was immaterial and was not admitted by the demurrer.[1]

§ **115.** (4). A general demurrer is not such an admission of the facts as to make them evidence against

[1] Scovill *v.* Seeley, 14 Conn. 238; Ames' Cases, 9.

the party demurring, in the same or in another action or proceeding.

A *v.* X. Action of *Assumpsit* for money had and received. Plea, that X had used the money for a particular purpose authorized by A. Formerly X had brought an action against A, in which he had alleged the fact of the application of the money for the same purpose. In the former action A had demurred. Upon the trial of the present action on behalf of X, it was proposed to read the proceedings in the former action as amounting to an admission by A of the facts relating to the application of the moneys. The evidence was excluded. Held, the demurrer did not admit the facts for any purpose except to test the sufficiency of the pleading demurred to.[1]

A *v.* X. Action brought on a covenant to keep a dam at a certain height. X pleads two pleas. On the first plea issue is joined, and upon the trial found for the plaintiff and damages given. To the second plea, which claimed a prescriptive right to overflow the lands of A, A demurs. X moves for a new trial on the ground that the facts in the second plea having been admitted by the demurrer, should have been considered by the jury in giving damages. The motion was denied.[2]

Section II.— Special Demurrers.

§ **116.** It has already been seen that as a result of the statute of 27 Elizabeth, Ch. V., S. 1, a new class of demurrers grew up known as Special Demurrers, and that after the statute formal defects in the

[1] Tompkins *v.* Ashby, Moody & Malkin, 32; Ames' Cases, 6.
[2] Stinson *v.* Gardiner, 33 Me. 94.

pleadings could only be taken advantage of by this kind of a demurrer. There is a statement by Holt, to the effect that there were special demurrers at common law, though the kind of special demurrer to which he seems to refer was one upon which "the party could take advantage of no other defect in the pleading but that which was specially assigned for cause of his demurring." [1] Since at common law, upon a general demurrer, a party could take advantage of all defects both in form and substance, it is not surprising that no cases of the use of the special demurrer are found.

§ **117.** The following cases illustrate the nature of a special demurrer as fixed by the statute referred to, and by the later statute of 4 Anne, Ch. XVI., S. 1, in respect to its calling in question only those matters of form which are definitely stated in the demurrer.

A *v.* X. Action of *Trespass, quare clausum fregit.* The declaration alleges a trespass upon a certain day in a certain close. X pleads that the trespass was committed at another day in another close. A demurs generally. The plea is bad in form, as it amounts to a denial of the trespass alleged, and should have been *not guilty,* but in order to take advantage of this defect A should have specially assigned it as the cause for his demurrer,— *i. e.,* should have put in a special demurrer.[2]

A *v.* X. Action of Replevin. X in his *cognizance* [3]

1 Anonymous, 3 Salkeld, 122; Ames' Cases, 17.

2 King *v.* Rotham, Freeman, 38; Ames' Cases, 16.

3 For explanation of this pleading in Replevin, see *ante,* p. 53.

says that he seized the goods for rent as bailiff of D; that the rent had been granted to one M, and, on his death, descended to another M, "as his cousin and heir, without showing how his cousin," and then traces it by grant and otherwise to D. A demurs generally. The question was whether the omission to show how the rent descended from one M to another M was a matter of form, which could only be taken advantage of by special demurrer, or a matter of substance. It was held that the *cognizance* was good, as the omission was a formal defect and could not be taken advantage of on a general demurrer.[1]

§ **118.** A special demurrer, in addition to calling in question such matters of form as are particularly stated, has also all of the advantages of a general demurrer.[2] It is held that "every special demurrer includes a general one."

A *v.* X. Action of *Debt* on a bond. X pleads full performance of the condition of the bond. A replies that X was treasurer of the State for a certain period, specifying it, and on certain days during said period X as treasurer received sums of money belonging to the State and did not account for any part of them. X put in a special demurrer to the replication. The court held that the special demurrer included a general demurrer, and that as the replication was good both in substance and form, final judgment could be entered for the plaintiff,[3] in the usual way as upon a general demurrer.

A *v.* X. Action of *Trespass, quare clausum fregit.* A alleges in his declaration both possession and *own-*

[1] Heard *v.* Baskerville, Hobart, 232; Ames' Cases, 13.
[2] Regula Placitandi (2d Ed., 1694), 137.
[3] State of Maine *v.* Peck, 60 Me. 498; Ames' Cases, 19.

ership. X as a plea puts in a denial of the *ownership,* which is good in form. A demurs, specially assigning as a cause some defect in form which does not in fact exist. Though the demurrer would be overruled as a special demurrer, nevertheless the demurrer is sustained and judgment given for A. This is because the special demurrer includes a general demurrer, and the plea being a denial of an immaterial allegation, is bad in substance.

§ **119.** The special demurrer at the present time plays very little part in the proceedings in an action, as it has almost everywhere been superseded by some other method of taking exception to formal defects in a pleading. It is customary, too, at the present time for the court to allow either party to amend any informality or technical defect in the pleading.

Statutory enactments provide various remedies in case of pleadings which are improperly drawn or which in any formal respect are objectionable. The most common of these are motions which may be made by the objecting party on notice to his adversary — such as a motion to strike out "irrelevant, redundant or scandalous matter;" [1] a motion to require a pleading to be made more definite and certain; [2] a motion to strike out a defense as sham [3] and the like.

[1] N. Y. Code of Civil Proc., § 545.
[2] *Id.*, § 546.
[3] *Id.*, § 538.

SECTION III.— EFFECT OF DEMURRER IN OPENING THE RECORD.

§ 120. There was a peculiarity about the demurrer which made it somewhat dangerous for a party to use unless he was perfectly sure that his own pleadings were properly drawn. This peculiarity was the effect which a demurrer had in opening the whole record, so that the court began with an examination of the declaration and took up successively each pleading with respect to its sufficiency, and then gave judgment against the party who had made the first mistake without regard to which one had put in the demurrer.[1]

A *v.* X. A brings an action of *Debt* on a bond as temporary administrator of L during the minority of the executor appointed by will, and alleges that such executor is not yet twenty-one. X pleads a plea which is insufficient in substance (the nature of the plea is not shown). A demurs. Judgment is given for the defendant, although his plea is bad, for the reason that A's declaration is also bad, and the demurrer opens the whole record. To understand why the declaration is bad in substance, it is necessary to know that the law, at the time of this case, was that temporary administration during minority of the regular executor ceased when the executor became seventeen. The plaintiff, therefore, by alleging that the executor was under twenty-one, did not show a right to bring the action. He should have alleged that the executor was under seventeen.[2]

[1] This principle is applicable today where the demurrer is used in systems of code pleading. Hasselbach *v.* Mount Sinai Hospital, 173 App. Div. (N. Y.) 89.

[2] Piggot's Case, 5 Reports, 29 a; Ames' Cases, 22.

A *v.* X. The action was in *Debt* on a bond, the condition of which was the payment of money on a certain day. X pleads payment of the money *before the day.* A replies that X did not pay *before the day.* X demurs. Judgment is given for the plaintiff. The first pleading which is insufficient is the plea, and although the replication is insufficient also, the judgment must be against the defendant on account of his bad plea. This case illustrates the technicality of the old law, which held that an allegation of the payment of money *before a certain day,* where the condition of the bond was payment *upon such day,* was not an allegation of performance of the condition. If X had pleaded payment on the day, and had shown in evidence payment before the day, it would have been held sufficient proof of the allegation.[1]

§ **121.** Where the record is opened by a demurrer, the court examines the pleading only for defects in substance. As defects in form could only be taken advantage of by means of a special demurrer, a party who did not demur specially to the pleading of his adversary was considered to have waived any informalities in the pleading, and had no further chance to take exception to such defects.

A *v.* X. Action of *Trespass, quare clausum fregit.* X pleads matters which amount to a denial of A's possession, and which should, therefore, have been pleaded under a specific denial of the possession. A replies by denying an immaterial allegation in the plea. X demurs specially. The first defect is on the part of the defendant in not pleading a specific denial of the possession, but this is only a formal defect, and,

[1] Anonymous, 2 Wilson, 150; Ames' Cases, 24.

therefore, cannot be noticed. The first defect in substance is in the replication. Judgment is, therefore, given for the defendant.

§ **122.** It has been said that a demurrer opens the whole record. This does not mean the whole record of the case, but only that portion which the demurrer terminates, and which, in reality, constitutes a separate and complete record by itself.

It often happens that there are several records in the same suit, one of which may terminate in an issue of fact to be tried by a jury; another in an issue of law to be decided by the court. The latter is the case where there is a demurrer.

To give a specific instance of this, there may, for example, be two pleas to a declaration;[1] to one of them the plaintiff may demur, and upon the other he may join issue; there are, then, two records for the court to determine the case upon. That they are entirely separate is shown by the fact that what is stated in the pleadings of one record cannot be introduced to affect judgment on the other.

A *v.* X. X sold out his business to A and agreed not to carry on the same business within a certain limit. A brings an action of *Assumpsit* for breach of the agreement by X in carrying on the same business within the prohibited locality. X pleads (1) that A did not perform his part of the agreement, but in such a manner as to make the plea bad in substance;

[1] Although at common law the defendant could put in but one plea, this rule was subsequently changed by statute. See *ante*, p. 75, note 4.

(2) as a set-off against anything A might recover, that A was indebted to the defendant in the sum of $500. A demurs to the first plea, and replies to the second that he became a bankrupt and had procured his discharge from his debts. Upon the argument upon the demurrer, X claims that the replication of bankruptcy made to the second plea shows that A had no right to bring the action, but that it should have been brought by his assignee; that as this appeared from the record, judgment on the demurrer must go against A. It was held, however, that the declaration, plea number one, and the demurrer constituted a separate record from the declaration, plea number two, and the replication, and that as the matter of bankruptcy appeared only in the second record, it would not affect the questions raised on demurrer. Littledale, J., says: "We must treat the count, plea, and replication, and the count, plea, and demurrer, as distinct records, and give judgment upon each without reference to the other." Judgment was given for the plaintiff on the demurrer.[1]

§ **123.** It is to be observed, however, that the fact of there being two separate records will not prevent the court from holding the declaration to be bad, if it appears upon the face of the declaration that it does not state a sufficient cause of action, and if one of the records terminates in a demurrer so that the record is opened. This is so even though the other record starting with the same declaration may have terminated with an issue of fact to be tried by the jury.

A *v.* X. Action of *Assumpsit* for certain instalments due upon stock subscribed for by X. The facts

[1] Davies *v.* Penton, 6 B. & C. 216; Ames' Cases, 28.

as alleged in the declaration were insufficient to constitute a cause of action. X pleads (1) non-assumpsit, upon which issue is joined; (2) that there is no such corporation as A. To the second plea A puts in a replication setting forth the act incorporating itself. X demurred to the replication. Judgment was given for X upon the ground that the declaration was bad in substance.[1]

§ **124.** There is one exception to the rule that a demurrer opens the whole record. This is in the case of a plea in abatement. Upon a demurrer to this kind of plea the sufficiency of the plea alone is considered. This exception may have resulted from the fact that the defendant, in case judgment went against him upon a demurrer to his plea in abatement, had a chance to answer the declaration a second time either by way of plea or demurrer, and was, therefore, deprived of no privilege by the demurrer being confined to his plea.

A *v.* X. Action upon the case for beer and wages. The cause of action was insufficiently set forth. X put in a plea in abatement which was insufficient in substance. A demurred. X insisted that the first fault or defect was in A's declaration, and that judgment should be given for him (X); but it was held that "The defendant shall not take advantage of mistakes in the declaration upon a plea in abatement; but if he would do that he must demur to the declaration. *Per quod a respondeas ouster* was awarded."[2]

[1] Auburn & Owasco Canal Co. *v.* Leitch, 4 Denio, 65; Ames' Cases, 31.

[2] Hastrop *v.* Hastings, 1 Salkeld, 212; Ames' Cases, 24.

§ **125.** Although a demurrer opens up the whole record, and the court examines all of the pleadings with a view to giving judgment in favor of the party who appears upon the allegations in the pleadings to be in the right, yet it will not give judgment for a plaintiff upon any claim or cause of action which does not appear in the plaintiff's declaration, even though it may appear in the subsequent pleading. The plaintiff is supposed to know his own cause of action and to allege that upon which he seeks a recovery.

A *v.* X. The action was upon a covenant to *abide by an award* and *not to hinder its being made,* but the breach alleged was simply *non-performance of the award.* X pleads that before the arbitrators made the award he revoked their authority (which, if true, would render the award void). A demurs, and claims judgment on the ground that X admits in his plea a breach of the covenant *not to hinder the award being made.* Judgment was given for X on the ground that A had not alleged as a cause of action the breach of the covenant not to hinder the award, but only of the covenant to abide by the award, and the plea was a good defense to the breach alleged.[1]

§ **126.** There is another seeming exception to the rule that a demurrer opens up the whole record.

The plaintiff might by a failure to take advantage of a defect in the defendant's pleadings put himself in a position where he could not claim the benefits of the rule that a demurrer opens the whole record. This was the case where an action was brought against several defendants and one of them failed to appear.

[1] Marsh *v.* Bulteel, 5 B. & Ald. 507; Ames' Cases, 26.

The proper course for the plaintiff in such a contingency was to apply for judgment against the party in default, and proceed with the action against those who appeared and pleaded. If the plaintiff did not do this he was said to have *made a discontinuance,* and could not demand judgment in case of any subsequent demurrer.

A *v.* X, Y, and Z. Action of Assumpsit. X and Y plead a debt of record due to them from A by way of set-off. Z does not appear. A replies, no such record, but fails to ask judgment by default against Z. X and Y demur. A insists that the first fault is in the plea, which is no answer to his demand against the three defendants, X, Y, and Z. Judgment, however, is given for the defendants X and Y, on the ground that A, having made a discontinuance, is practically out of court and cannot demand judgment.[1]

[1] Tippet *v.* May, 1 Bos. & P. 411; Ames' Cases, 25.

CHAPTER II.

DILATORY PLEAS.

§ **127.** The demurrer, it has been seen, was a method by which the defendant could avoid putting in an answer to the merits of the cause of action alleged against him, and obtain a determination of the suit solely upon the plaintiff's statement of the case. The real facts may or may not have constituted a good cause of action, and the defendant may or may not have had a good defense. These questions were immaterial. If the plaintiff had failed to make his cause of action appear upon the face of his declaration, or had drawn such declaration in an informal manner, the defendant, without going into the question of the real facts of the matter, could, by general or special demurrer, defeat the plaintiff's suit. But it was only for a fault which appeared upon the face of the declaration that the defendant could demur. If there were other mistakes which the plaintiff had made in the bringing of his action, or in his declaration, which did not appear upon the face of the declaration, the defendant could not take advantage of them by a demurrer.

§ **128.** There was a method, however, by which he could bring them to the attention of the court, namely, by the use of a *dilatory plea.*

The object of this plea was to put a stop to the particular action brought, either temporarily by having it

adjourned or suspended indefinitely, or permanently by having the declaration abated.

The effect from the plaintiff's standpoint was, in the case of a suspension of the action, that he could proceed with the suit at some future time, when the reason which constituted the ground of the dilatory plea had ceased to exist; in the case of the abatement of the action, that he could commence anew in the same court, or, if the ground of the plea was lack of jurisdiction, in another court which had jurisdiction.

§ **129.** It was characteristic of the dilatory plea that to have the benefit of it the defendant must use it at once. He could not put in a regular plea and then, discovering there existed ground for a dilatory plea, seek to take advantage of it at a later stage in the action. Where, for example, a plaintiff in his declaration described his name as *James,* and on the trial it appeared his name was *Jacob,* it was held that defendant was precluded from taking advantage of the misnomer on a motion in arrest of judgment.[1]

§ **130.** Dilatory pleas may be divided into three general classes, in respect to the effect which they have upon the disposition of the action: (1). Pleas to the jurisdiction of the court. (2). Pleas in suspension of the action. (3). Pleas in abatement.

§ **131.** (1). The plea to the jurisdiction of the court was in substance a statement that the plaintiff

[1] Aldredge *v.* Wood, Pract. Reg., p. 7.

had commenced his action in the wrong court, either because the court had no jurisdiction of the subject-matter of the action or of the parties thereto, and that on that account the defendant ought not to be compelled to plead. A judgment for the defendant upon a plea to the jurisdiction was a virtual ending of the suit, as far as the particular court in which it was brought was concerned.

§ **132.** (2). The plea in suspension was a plea which showed matter, such as the excommunication or outlawry of the plaintiff, by reason of which he was not entitled to prosecute the action at the time. A judgment for the defendant upon such a plea amounted practically to an adjournment of the case indefinitely. In the language of the time, it was that he "go quit without day," but the action was not abated, and upon an ending of the disability by pardon, the plaintiff could proceed with the action.[1]

§ **133.** (3). The term *plea in abatement* has been quite generally used as synonymous with the term *dilatory plea.*[2] This use of the term is inaccurate, as there is a very substantial difference between the *plea in abatement* and the other dilatory pleas. While the *plea to the jurisdiction,* if successful, disposes of the case entirely as far as the particular court is concerned, and the *plea in suspension* merely suspends the progress of the suit temporarily, the *plea in abatement* occupies a middle ground between the two. Its effect, if suc-

[1] Comyns' Digest, title Abatement, E. 7, 6.
[2] Ibid., B. 1.

cessful, is to dispose of the particular suit, but the plaintiff may commence anew upon the same cause of action in the same court, only being careful to avoid the mistake which caused the abating of his former suit.

§ **134.** The dilatory plea, it has been said above, set up new affirmative matter. It was held that to justify the court in acting upon such matter there must be some guarantee of its truth. Hence an affidavit of truth was required to be submitted with the dilatory plea, and if the defendant failed to accompany his plea with such affidavit of truth the plaintiff could disregard the plea and enter his judgment.[1]

§ **135.** Neither the plea to the jurisdiction nor the plea in suspension were so generally used as the plea in abatement. The last was at common law a very important plea.

The dilatory plea, while it provided a means, like the demurrer, by which the defendant could avoid answering to the cause of action set forth in the declaration, differed from the demurrer in several important features.

(*a*). It could be demurred to or pleaded to by the plaintiff. In itself it was a plea which set up new affirmative matter; and, though that matter did not relate to the merits of plaintiff's cause of action, it was material upon the question of whether or not the plaintiff's suit should be thrown out entirely from the

[1] Wilson *v.* Palmer, Practical Register of the Common Pleas, p. 4.

particular court in which the plaintiff had begun it, or suspended, or abated. Such matter could, therefore, be denied or answered by new matter on the plaintiff's part, or it could be demurred to.

(*b*). Judgment upon the dilatory plea was not final, as in the case of judgment upon a demurrer; it did not determine the case upon the merits. Mention has already been made of the fact that the plaintiff could, upon judgment against him upon a dilatory plea, either begin the action again in another court, proceed with it in the same court at a later date, or begin anew in the same court.[1] In the case of the demurrer he could do no one of these things, as judgment ended the case once for all.

§ **136.** Dilatory pleas, and more especially the class properly called *pleas in abatement,* seem to have been very widely used at common law. They must have been looked upon with great favor by the lawyers and with no very marked disfavor by the courts. It is often said that the rules respecting demurrers to dilatory pleas show that the courts sought to discourage the use of them,[2] but the manner in which the pleas were

[1] *Ante,* p. 95.

[2] The fact that the courts did not give final judgment against the defendant in case a demurrer to his plea in abatement was sustained, as they might have done if they had wished to discourage the plea, seems a stronger piece of evidence that the plea was looked upon with favor, than the fact that a general demurrer to a plea in abatement tested matters of form as well as of substance, is of the contrary assertion. In fact, since the courts allowed the defendant to plead again if his plea in abatement was held bad, there was no hardship at all in holding that a general

used, *and abused,* seems hardly to bear out this statement. It was not the courts, but the legislature, which was finally compelled to step in and limit their effect by statutory provision.[1] The modern attitude of courts is unfriendly to the use of this class of pleas.[2]

§ **137.** Besides the division of dilatory pleas into the three general classes above mentioned, each class may be subdivided with respect to the matter which is alleged as the ground of the plea, so that the whole classification will be as follows:

demurrer should cover both matters of substance and form. The statutory provision that a party demurring because of matters of form should specify the defects he relied upon, was enacted to relieve the hardship which often resulted from a *final judgment* being given against a party upon some technical point which he was not prepared to meet. As no final judgment was given *against the defendant* upon a plea in abatement there was no need for the application of the statutory provision.

[1] The statute of 3 & 4 William IV., c. 42, s. 11, abolished a very large class of pleas in abatement, to wit, those of *misnomer in abatement;* section 8 of the same statute greatly limited the use of the plea in abatement for non-joinder of parties defendant.

[2] Scheeline *v.* Mosher, 158 Pac. 222.

- Dilatory Pleas.
  - (1). Pleas to the jurisdiction of the court
    - (A). On account of the subject matter of the action.
    - (B). On account of the parties to the suit.
      - (*a*) Plaintiff.
      - (*b*). Defendant.
  - (2). Pleas in suspension of the action.
    - (A). On account of temporary disability of the plaintiff.
    - (B). On account of temporary disability of defendant.
  - (3). Pleas in abatement.
    - (A). On account of disability of the parties.
      - (*a*) Plaintiff.
      - (*b*). Defendant.
    - (B). On account of defects in the count or declaration.
    - (C). On account of defects in the writ.
      - (*a*). In the form of the writ.
      - (*b*). In the action of the writ.

§ **138.** Some of the more common matters which were made the ground of pleas in abatement were: (1) the non-existence of the plaintiff, as where he was a fictitious person; (2) the death of the plaintiff; (3) the non-joinder of a necessary party; (4) a misnomer of the plaintiff or the defendant in the writ or declaration; (5) the pendency of another action for the same cause.[1]

[1] Acts required by statutes as conditions of maintaining actions are often the grounds of the modern pleas in abatement, *e. g.*, the filing of a copy of its certificate by a corporation. Cal. Savings & Loan Soc. *v.* Harris, 111 Cal. 133. It is to be noted that the principles established by the Common-Law System of pleading are

§ **139.** There was one rule which was applied to all pleas in abatement, and that was that the plea must furnish the plaintiff with materials for avoiding in another action the mistake which was made the ground of the plea. Thus, if the plea was for the reason that the plaintiff had not joined a necessary party, it was essential for the plea to name such party; if for a misnomer, it was necessary for the plea to give the correct name.

§ **140.** The following is an example of a plea in abatement for a misnomer:

In the Common Pleas,

—— Term, 5 George IV.

John Smith, sued by the name of Henry Smith, ats. James Jones.

And John Smith, against whom the said James Jones hath issued his said writ, and declared thereon, by the name of Henry Smith, comes and says that he is named and called by the name of John Smith, and by that name and surname hath always since the time of his nativity hitherto been named and called; without this that he the said John Smith now is or ever was named or called by the name of Henry, as by the said writ and declaration thereon founded is supposed. And this he the said John Smith is ready to verify, wherefore he prays judgment of the said writ and declaration thereon founded, and that the same may be quashed, etc.

still enforced wherever the courts have to deal with this sort of plea.

CHAPTER III.

PLEAS BY WAY OF CONFESSION AND AVOIDANCE

§ **141.** If a defendant decided that there were no defects in the declaration which would be ground for a demurrer, and if he knew of no reason which would be good cause for a dilatory plea, or if, having put in such a plea, he had been unsuccessful, then it was necessary for him to put in a plea which would answer the cause of action alleged against him. Such a plea was known as a *plea in bar.*

There were two classes of pleas in bar which were open to him: (1) pleas by way of confession and avoidance; (2) pleas by way of traverse.

§ **142.** The plea by way of confession and avoidance is what its name implies — *i. e.,* a plea which confesses the truth of the facts alleged in the declaration and seeks to avoid the consequences of them by alleging other facts which show that the defendant should not be held liable. These new facts constituted what was known as affirmative matter, and hence the pleas of this sort are frequently called affirmative pleas.

§ **143.** A plea by way of traverse was in its nature a denial of some one fact or of all the facts set up in the plaintiff's declaration. The word traverse is synonymous with the word denial. This class of pleas will be noticed more fully in the fourth chapter. A

good illustration of the form of a plea by way of confession and avoidance is shown by the following:

(Plea of infancy to an action of debt.)

"And the said X, by ——, his attorney, comes and defends the wrong and injury, when, etc., and says that he ought not to be charged with the said debt by virtue of the said supposed contract. Because, he says, that he, the said X, at the time of the making of the said supposed contract in the said declaration mentioned, was an infant within the age of twenty-one years, to wit, of the age of —— years, to wit, at, etc., aforesaid; *and this he the said X is ready to verify:* wherefore he prays judgment if he ought to be charged with the said debt, by virtue of the said supposed contract, etc."

§ **144.** It will be noticed that the plea concludes with the words, "and this he the said X is ready to verify." This conclusion was known as a verification. All pleas by way of confession and avoidance must conclude in this manner.[1] An omission of this verification would be a defect in form which could be taken advantage of by a special demurrer.

§ **145.** It was in early times the practice for the defendant to confess the facts alleged in the declaration by a formal admission of them at the beginning of his plea. Later it was held that an implied confession was sufficient. It is doubtful if a formal confession was ever necessary to the substantial validity of the

[1] Goodchild *v.* Pledge, 1 M. & W. 363; Ames' Cases, 37.

plea. In the following case it was treated as a formal defect only:

A *v.* X. Action of Debt upon a simple contract. X pleads that he was discharged under the Insolvent Debtors' Act "from the debts and causes of action *if any,* and each and every of them." A demurs, specially assigning for a cause that the plea does not confess the cause of action. The plea was held to be bad in form, and judgment given for the plaintiff.[1]

§ **146.** It was, however, finally established that no confession of the facts, direct or indirect, is necessary in a plea by way of confession and avoidance, upon the theory that whatever a party does not deny, he admits, for the purposes of the action at least.

A *v.* X. Action of Trespass for assault and battery. X pleads that "*if any* hurt or damage happened or was occasioned" to A, it was by reason of X necessarily defending himself. Special demurrer, assigning for a cause that the plea does not sufficiently confess the assault and battery. It was held that the plea was a sufficient confession, and judgment given for defendant.[2]

§ **147.** At the present time it is customary, in a plea by way of confession and avoidance, to state simply the facts which the defendant relies upon to relieve him from responsibility for the act alleged in the declaration as the plaintiff's cause of action. The form of the plea is therefore a statement of the facts, with an offer to verify them. If the plea is demurred to, the

[1] Gould *v.* Lasbury, 1 C. M. & R. 254; Ames' Cases, 34.
[2] Wise *v.* Hodsall, 11 A. & E. 816; Ames' Cases, 59.

court will assume that the facts stated in the declaration are true, as they are not denied by the plea, and will determine whether the facts stated in the plea constitute a good defense.

§ **148.** Pleas by way of confession and avoidance are of two kinds:

(1). Pleas in discharge.

(2). Pleas in excuse.

The distinction between the two kinds is expressed in their names.

Section I.— Pleas in Discharge.

§ **149.** A plea in discharge is one which not only admits the facts stated in the declaration to be true, but also that the plaintiff at one time had a good cause of action against the defendant upon such facts, and then alleges new matter which shows that the cause of action no longer exists. This new matter is called matter in discharge.

§ **150.** The most common forms of pleas in discharge are the following:

(1). Pleas of payment,[1] — *i. e.*, that the defendant has paid the debt or sum of money sued for.

(2). Pleas of release.[2] Founded upon a release claimed to have been given by the plaintiff to the defendant.

[1] Goodchild *v.* Pledge, 1 M. & W. 363; Ames' Cases, 37.

[2] Brooks *v.* Stewart, 9 A. & E. 854.

(3). Plea of bankruptcy.[1] A special plea founded upon the provision for the discharge of the debtor, usually contained in bankruptcy or insolvency statutes.

(4). Plea of statute of limitations.[2] A plea founded upon the statute requiring actions to be brought within a certain time.

Section II.— Pleas in Excuse.

§ **151.** A plea in excuse confesses the facts stated in the declaration to be true, and then alleges other facts which, together with the facts stated in the declaration, show that the cause of action, which the plaintiff has alleged, does not exist.

§ **152.** Pleas in excuse cannot be divided into regular classes, as the matter set up necessarily varies according to the state of facts in each case. The use of this plea, however, differs somewhat in the different forms of actions, and it will be well to examine it with respect to each.

§ **153.** In general it may be said that the plea in excuse, in each form of action in which it is used, admits such statements of fact as form the substance of the declaration.

(*a*). *Special Assumpsit.*

§ **154.** In special assumpsit a plea in excuse admits the contract,— *i. e.*, the promise and consideration, and

[1] Gould *v.* Lasbury, 1 C. M. & R. 254; Ames' Cases, 34.
[2] Eavestaff *v.* Russell, 10 M. & W. 365; Ames' Cases, 38.

also the breach, in the form in which these matters are alleged in the declaration, and then sets up facts which show that the breach was not wrongful, and that there is no cause of action in favor of the plaintiff and no liability on the part of the defendant therefor.

§ **155.** For example, a collateral agreement or stipulation by which the defendant limited his liability for breach of a contract to a certain time or to a certain amount may be set up by a plea in excuse.

A *v.* X. Action of assumpsit on a warranty of the soundness of a horse sold by X to A. A in his declaration alleges the warranty and the breach thereof, in that the horse was not sound. X pleads that the horse was sold at auction subject to certain rules, one of which was that the seller should be relieved of all liability on a warranty unless notice of unsoundness was given before noon of the day after the sale. Special demurrer, assigning for cause that the plea amounts to a general denial of the contract, since it shows that the contract was not as stated in the declaration, and should have been pleaded under *non assumpsit*. The plea is held good, for the reason that it states a collateral agreement or stipulation.[1]

§ **156.** It is sometimes difficult to distinguish between a collateral agreement and matter which constitutes a part of the principal agreement. This does not, however, belong strictly to the subject of pleading. When the pleader has determined whether certain matter is a collateral stipulation or is a part of the

[1] Smart *v.* Hyde, 8 M. & W. 723; Ames' Cases, 42.

principal agreement, he may then, in drawing his plea, apply the rule that, if it is a collateral stipulation, it may be pleaded in excuse, as shown by the above illustration, while if it is a part of the principal agreement, it cannot be pleaded in excuse. The following is an illustration of the latter proposition:

A *v.* X. Action of assumpsit, upon an agreement by X to carry goods safely. X pleads in excuse an express condition in the contract to the effect that A was to walk behind the cart and watch the goods, and that A refused to do so. Special demurrer, assigning for cause that the plea amounts to a general denial of the contract alleged in the declaration, and that *non assumpsit* should have been pleaded. The plea is held bad upon the ground assigned.[1]

§ **157.** Where a defendant wishes to show that some part of the contract affecting his liability,— for example, a condition precedent,— has been omitted in the statement of the contract in the declaration, or that the real contract between himself and the plaintiff is different in any other respect from that stated in the declaration, he cannot set it up as matter in excuse.

A *v.* X. Action of assumpsit. A alleges in his declaration that X agreed to buy from him a certain lease of a farm and to pay for the fixtures, manure, etc., left on the farm; that same were worth £1000, and that X refused to pay. X pleads that the actual agreement was that A, on receipt of the payment for the lease, was to execute and deliver an assignment of same and put plaintiff in possession, which he failed

[1] Brind *v.* Dale, 2 M. & W. 775; Ames' Cases, 40.

to do. Special demurrer on the ground plea amounts to *non assumpsit.* The plea is bad for the cause assigned.[1]

§ **158.** If the defendant wishes to show that there was no consideration for the contract alleged in the declaration, it is clear that he cannot set it up by a plea in excuse; for a statement that there was no consideration is practically a denial of the existence of a contract.

A *v.* X. Action of assumpsit. A alleges in his declaration that X, in consideration that A would employ C as a collecting clerk, guaranteed the honesty of C to the extent of £500; that A employed C, who stole a large amount of money; that X had notice thereof, but had refused to pay A. X pleads that A had already hired C *before* X guaranteed C's honesty. Special demurrer. The plea is bad, as it amounts to *non assumpsit.* If A had hired C before X promised, there was no consideration for the promise, and hence no contract.[2]

(*b*). *General Assumpsit.*

§ **159.** In the action of general assumpsit a plea in excuse admits the facts which show the existence of a debt, the implied promise based on such debt, and the breach or non-payment of the debt, and then sets

[1] Nash *v.* Breeze, 11 M. & W. 352. In this case, Parke, B., says: "I think the plea is bad; for it certainly qualifies the contract stated in the declaration, and introduces a new condition into it, and therefore amounts to the general issue." See, also, Sieveking *v.* Dutton, 3 C. B. 331.

[2] Lyall *v.* Higgins, 4 Q. B. 528; Ames' Cases, 46.

up other facts which show that the non-payment of the debt was justifiable, and that the defendant is not liable therefor.

§ **160.** If the defendant wishes to set up as a defense that the facts alleged in the declaration to constitute the debt are not true,— for example, where the work done by the plaintiff was not what the defendant requested,— he cannot plead this in excuse.

A *v.* X. Action of *indebitatus assumpsit* for work done by A for X in fixing a chimney. X pleads that the understanding was that A was to do the work in such a manner as to prevent the chimney from smoking, which he has not done. Special demurrer, assigning for cause that the plea amounts to a denial of the debt. The plea is bad for the cause assigned. It is in effect a denial that A did the work requested, and if this were so no debt arose.[1]

§ **161.** It has been seen [2] that, in the form of action known as general assumpsit, the plaintiff recovers upon a promise, which the law implies, to pay a debt which is shown by the facts alleged in the declaration to exist. It is laid down as a rule that the law will not imply a promise until it is needed, and that as a result of this rule, in a case where credit is given, there is no implied promise until the credit expires. Hence, where the defendant wishes to set up, for example, that the goods, for the price of which the suit is brought, were sold to him upon credit, and that the credit has not expired,

[1] Hayselden *v.* Staff, 5 A. & E. 153; Ames' Cases, 50.

[2] *Ante*, p. 27.

he cannot do it by a plea in excuse, as it amounts to a denial of the implied promise.

A *v.* X. For goods sold and delivered. X alleges as a defense "that the goods were sold on a credit of four months, which term had not expired at the time the action was commenced." This plea is equivalent to a general denial and would be bad on special demurrer.[1]

§ **162.** Where the defendant wishes to show that the contract was not as alleged by plaintiff, but was a special one, he should not plead in excuse, for he is in effect denying the implied promise and may show the special contract under the general issue.

A *v.* X. For money paid out to the use of the defendant. X pleads that he entered into a contract with A by which the money paid out was to be paid under certain conditions which had not been complied with. The plea is bad as amounting to the general issue.[2]

(c). Debt.

§ **163.** In the action of debt, a plea in excuse admits the subject-matter of the debt, whether it be the sale of goods or the performance of work at the request of the defendant, a bond, a statute, or a judgment, and then sets up matter which shows that the defendant's failure to pay the debt is justifiable.

[1] Claflin *v.* Baere, 28 Hun, 204.

[2] Morgan *v.* Pebrer, 4 Scott, 230. Tindal, C. J., at p. 243: "What is that in effect but saying that the parties had entered into a special contract at variance with the implied contract declared upon; non-assumpsit would put in issue all the facts from which the promise alleged might be implied by law."

§ **164.** A debt being a sum of money owing from the defendant to the plaintiff, it exists as soon as that is given or done upon which it is founded. Thus, if goods are delivered to the defendant by the plaintiff at the defendant's request, a debt exists immediately upon the delivery, although a credit is given for their payment. So, if a bond is executed by the defendant, conditioned for the performance of work or the payment of a sum of money upon a certain day, a debt exists immediately upon the execution and delivery of the bond. In the former case the plaintiff cannot bring an action upon the debt at once because of the agreement as to credit, and in the latter case the defendant will not be liable, in an action in debt, until the time is up for the performance of the condition. In both cases, if an action is begun by the plaintiff, the defendant will have a good defense, not in the denial of the debt, but in justifying its non-payment by pleading in excuse that credit has not expired, or that the time for performance of the condition has not expired.

§ **165.** It will be noticed that in respect to the pleading of credit not expired as a defense to the plaintiff's claim, the action of debt differs from the action of general assumpsit.

(*d*). *Trespass.*

§ **166.** In the action of trespass for injury to the person, a plea in excuse admits the commission of the act alleged, and sets up matter to show that the defendant was justified in committing the act; for example,

in trespass for assault and battery, that he did it in self-defense.[1]

§ **167.** In the action of trespass for injury to property, personal or real, a plea in excuse admits the possession of the property to be in the plaintiff as alleged in the declaration, and the commission of the act of interference upon which the plaintiff bases his cause of action, and then sets up matter to show that the defendant's act was rightful.

This matter is usually something which shows that the defendant had an interest in the property, to which the plaintiff's possession was subject, so that the defendant had the right to deal with the property as he pleased; or something which shows that, although the plaintiff's possession of the property was rightful, still the defendant's act of interference was justified by the circumstances which attended it.

§ **168.** The most common plea in excuse where the injury complained of is to the person, is that of self-defense, known technically as *son assault demesne* (his own assault first).

A *v.* X. Action of trespass for assault and battery. X pleads that at the time of the injury complained of in the declaration, the plaintiff A assaulted the defendant X, wherefore X defended himself as he lawfully might, and that if A suffered any injury, the same was occasioned by reason of A's assault upon X. Special demurrer, assigning for cause that the plea amounts to

[1] Wise *v.* Hodsall, 11 A. & E. 816; Ames' Cases, 59.

a denial of the commission of the act by X. The matter is correctly pleaded in excuse.[1]

§ **169.** Where the injury complained of is to personal property, perhaps the most common plea in excuse is *ownership* in the defendant. If the defendant is the absolute owner of the goods, he has the right to the immediate possession of them, and any act of interference with them, although they may be in the actual possession of the plaintiff, is rightful.

§ **170.** Where the injury complained of is to real property, a common plea in excuse is that technically known as the plea of *liberum tenementum,— i. e.,* that the property is the defendant's own *freehold.*

§ **171.** It sometimes happens that the defendant wishes to show, as matter of defense, that the alleged trespass was committed by him involuntarily. In such case he is virtually in the position of denying the commission of the act by himself as a responsible being. He is only the instrument used by some one else in the commission of the wrongful act. Where the defendant relies upon such a defense as this, he cannot set it up in excuse.

In the case, of which the next illustration is a synopsis, it is said: "If A takes the hand of B and with it strikes C, A is the trespasser and not B," and the court, by its decision upon the facts before it, evidently approved this statement. If B had been sued in trespass, he should have pleaded not guilty.

[1] Wise *v.* Hodsall, 11 A. & E. 816; Ames' Cases, 59.

§ **172.** If the defendant wishes to show that the act, alleged as a trespass committed by him, was some act over which he had no control and could not have prevented, he cannot plead in excuse, for an act, which he cannot control or prevent, is not his act.

A *v.* X. Action of trespass for assault and battery. X pleads that his horse ran away without any fault of his, that he was unable to stop him, and that he ran into the plaintiff against his will. Special demurrer. The plea is bad, as it amounts to a denial of the commission of the trespass, and *not guilty* should have been pleaded.[1]

§ **173.** Sometimes several acts of trespass are alleged in a declaration as the ground of the action. In such a case a plea in excuse must justify all of the acts or it will be bad upon demurrer. This is upon the principle that, as a plea in excuse is a confession of such acts as it does not justify, the plaintiff's cause of action is admitted, and he is entitled to judgment.

A *v.* X. Action of trespass *quare clausum fregit.* A alleges in his declaration that X, together with certain cattle, broke into A's close and trod down the grass, etc. X pleads in excuse that he went upon the land to look after the cattle by command of his master, who had a right of common in said land. General demurrer. The plea is bad, for, while it admits the trespass by means of the cattle as well as that committed by X, it justifies only the trespass committed by X.[2]

[1] Gibbons *v.* Pepper, 1 Ld. Raymond, 387; Ames' Cases, 58.
[2] Earl of Manchester *v.* Vale, 1 Saunders, 27; Ames' Cases, 56.

(*e*). *Trover.*

§ **174.** The nature of the action of Trover has already been explained.[1] It has been seen that an essential part of the cause of action alleged in the declaration is the wrongfulness of the defendant's act, and that, unless the plaintiff can prove the act to be wrongful, it does not amount to a conversion. It results from this that, in this action, there is no room for a plea in excuse. To admit the conversion would be to admit the wrongfulness of the act, and the defendant cannot consistently admit the act to be wrongful and then go on to excuse it.

A *v.* X. Action of Trover brought by A, as assignee of Y, a bankrupt, for the conversion of goods possessed by Y before his bankruptcy. X pleads that he recovered a judgment against Y, and the goods were seized by the sheriff under his judgment at his request. Special demurrer. The plea is bad, as it sets up matter which tends to show that the act of X was not wrongful. This amounts to a denial of the conversion, and X should have pleaded *not guilty.*[2]

§ **175.** The matters of defense which can be set up by the defendant in an action of trover can really consist of but two classes — those which show that the defendant's act was not wrongful, and those which show that the plaintiff had no possession, or right of possession, of the goods. It will sometimes happen that the same facts may show that the act of the defendant was

[1] *Ante*, page 38.

[2] Young *v.* Cooper, 6 Exchequer, 259; Ames' Cases, 63.

not wrongful, and also that the plaintiff had no possession, or right of possession, in the goods.[1] The last illustration shows that matters of the former class cannot be pleaded in excuse, and it is equally true that matters which show that the plaintiff has no possession, or right of possession, cannot be pleaded in excuse.

A *v.* X. Action of Trover for certain goods. X pleads in excuse that the goods were left with him to secure the payment of a sum of money for board furnished by him to A. Special demurrer. The plea is bad, as it amounts to a denial of A's right of possession, and X should have pleaded a specific traverse of the possession or right of possession.[2]

§ **176.** The plea in discharge is as available in the action of Trover as in any other action, for this plea always admits the wrongful acts alleged and the plaintiff's cause of action thereon, but shows that the action no longer exists.

(*f*). *Detinue.*

§ **177.** In the action of detinue a plea in excuse would admit the plaintiff's right of possession and the detaining of the goods by the defendant. By detaining is meant, not the passive act of keeping the goods where no right to their possession has been asserted by the plaintiff, but a positive act of detention where the circumstances are such that there is an obligation on the part of the defendant to deliver them up.[3]

[1] *Post*, page 143-144.

[2] Dorrington *v.* Carter, 1 Exchequer, 566; Ames' Cases, 61.

[3] Clements *v.* Flight, 16 M. & W. 42; Ames' Cases, 66. Pol.

It would therefore seem that there was little room in the action of detinue for a plea in excuse.

§ **178.** The right of possession on the part of the plaintiff is the basis of the action. Matter which shows a right to detain the goods on the part of the defendant is practically a denial of the plaintiff's right of possession, and in such case a plea of *not possessed* should be used. The authorities, however, hold that where the defendant claims a lien on the goods he must plead it in excuse.[1]

§ **179.** Where the defendant relies for his defense upon the fact that he offered to give the goods up to the plaintiff, he cannot plead it in excuse. If he offered to give the goods up when the plaintiff demanded them, he did not detain them. The matter, therefore, is in no sense an excuse for a detention on the defendant's part.

lock, C. B., in the opinion, says, referring to several definitions of the word detention: "We are satisfied that the last (that the defendant holds the goods and prevents the plaintiff from having the possession of them) is the true meaning of the word detain; if it meant the mere keeping possession, not adverse, how could such a possession form the ground of an action? If it meant that the defendant had omitted, and still omitted, to be active in bringing the goods to the plaintiff, the action could not be maintained without showing an obligation by contract to do so. We have no doubt, therefore, that the detention complained of is an adverse detention."

[1] Mason *v.* Farnell, 12 M. & W. 674. The case of Lane *v.* Tewson, 1 Gale & D. 584; Ames' Cases, 112,— which held that a lien could be given in evidence under a plea that the goods were not the goods of the plaintiff,— although correct in principle, does not represent the law.

A *v.* X. Action of Detinue. A alleges in his declaration that X detained certain papers belonging to A. X pleads that he tendered the papers to A. A demurs specially, assigning for a cause that the plea amounts to a denial of the detention. The plea is bad for the cause assigned. X should have pleaded that he did not detain the goods, the technical plea for which is *non detinet.*[1]

(*g*). *Replevin.*

§ **180.** In the action of Replevin there is strictly no plea by way of confession and avoidance in excuse. The avowry or cognizance has some of the characteristics of this plea; it confesses the taking, and justifies it by showing the defendant's right to the chattels; but it is more like a declaration than a plea, and, upon the facts showing the defendant's right, prays for affirmative relief. There was one case, however, where the plea in excuse was said to be allowable: when the defendant relied upon the fact that the property in the chattels was in himself or in a stranger at the time of the seizure, he was permitted to plead this fact in a plea by way of confession and avoidance.[2] It was usual, however, to plead this matter by a plea in abatement. This defense really formed the ground of a claim for the return of the chattels, and a prayer for such relief was added,[3] so that it appears to have been more like the avowry in its similarity to a declaration, than like a plea.

[1] *Post*, page 136.
[2] Buller's Nisi Prius, 54.
[3] Chitty, Pleading, 1044.

(*h*). *Case.*

§ **181.** In the action on the case, for the same reason as in the action of trover and that of detinue, the plea in excuse plays an unimportant part. As has been shown, the substance of the declaration consists of a statement of such facts as are sufficient to show the plaintiff's right in respect to the subject of the action, sometimes called the *inducement,* and a statement of the wrongful acts committed by the defendant. A plea in excuse, if used, would admit the substance of the declaration; if that is admitted the defendant has practically confessed the wrong and precluded himself from any defense, except matter in discharge.

§ **182.** Most of the facts which, generally speaking, may be regarded as excusing or justifying the alleged wrongful acts are really matters which show that the acts are not wrongful and may be shown in evidence, as will be seen later, under the plea of not guilty.

§ **183.** There is one case, however, where the plea in excuse is available to the defendant. This is in an action upon a case for slander or libel. Where the defendant proposes to defend the action by proving the truth of the slanderous or libellous words, he may set it up by plea in excuse. In fact, to avail himself of this defense it is the generally accepted rule that he must set it up by plea in excuse.[1]

[1] If the action for libel or slander is an action upon the case and the rule be applied that the *general issue* is a denial of all material allegations which make up the statement of the wrong,

§ **184.** A notion formerly prevailed that it was a good justification or plea in excuse to an action of slander or libel, that the defendant had spoken or written the words complained of as the words of another. This, however, is not good law, and a plea in excuse, alleging such matter as a justification, will be held bad in substance upon a general demurrer.

A *v.* X. Action upon the case for slander. A alleges in his declaration that X maliciously said and published concerning A that A had been arrested. X pleads that the same time that he said that A had been arrested, he also said he had been told so by W. A demurs generally. The plea is bad in substance, as it contains no proper excuse.[1]

§ **185.** In an action upon the case for malicious prosecution, the fact that the defendant had reasonable and probable cause for the prosecution of the plaintiff

then there would seem to be no logical reason why the Courts should have excepted from the denial the allegation of falsity. Yet the actions of libel and slander are two of the earliest forms of *case*, and it may well be there had begun to crystallize about them technical rules which had their origin not in the logic of the situation but in the convenience of the pleader, the Court or the Jury in trying the issues. Perhaps there were deemed to be enough separate issues which could be availed of under the plea of *not guilty* (the defendant under it might show not only that he did not make the libellous statement, but any excuse such as that it was a privileged communication) and that it would simplify the trial if the parties and the court might know by the pleadings in case the defendant proposed to prove the truth of the words. Thus we see a rule of convenience grafted upon the system of pleading at the expense of consistency. Yet the results in this case cannot be said to be bad.

[1] McPherson *v.* Daniels, 10 B. & C. 263; Ames' Cases, 69.

cannot be pleaded in excuse. In this action, the gist of the wrongful act alleged is its maliciousness; and maliciousness, in legal contemplation, is lack of reasonable and probable cause. Therefore to allege reasonable and probable cause is to deny the wrongful act which is the basis of the action, and it is in no sense matter in excuse.

A *v.* X. Action upon the case for malicious prosecution. X pleads two pleas: (1) not guilty; (2) that it is true that he caused the indictment to be brought against A, but that he had reasonable and probable cause. A moves to strike out the second plea. The motion is granted, as the second plea amounts to the same as the first, and the existence of reasonable and probable cause can be shown in evidence under the first plea.[1]

§ **186.** In an action upon the case for damages occasioned by negligence, the defendant cannot set up contributory negligence upon the part of the plaintiff by a plea in excuse. If the plaintiff was guilty of contributory negligence, the defendant's negligence is not in contemplation of law the cause of the injury to the plaintiff, and therefore not a wrongful act as far as the plaintiff is concerned. It does not, therefore, in any sense excuse or justify the wrongful act alleged as the basis of the action.

A *v.* X. Action upon the case. A alleges in his declaration that X negligently ran its train into the train upon which A was travelling, whereby A was injured. X pleads that A's injury was caused by neg-

1 Cotton *v.* Browne, 3 A. & E. 312; Ames' Cases, 71.

ligence on the part of the managers of A's train. Special demurrer, assigning for cause that the plea is an argumentative denial of the wrongful act. The plea is held bad for the cause assigned. X should have pleaded *not guilty*.[1]

§ **187.** In an action upon the case against a common carrier for the loss of goods entrusted to his care, if the defendant wishes to show, as a defense, that the goods were accepted by him subject to certain conditions which were not complied with, he is virtually denying the bailment as it is alleged in the declaration. Now the bailment is the basis of the plaintiff's right to sue the defendant for the wrongful act or omission which has resulted in injury to, or loss of, the goods. It connects the plaintiff with the goods of which the defendant has actual and rightful possession, in such a way as to show that he has an interest which can be the subject of injury, and concerning which he can assert his general right to the undisturbed enjoyment of his property. Such matter as this, or any matter which tends to show that the plaintiff is not connected with the property in such a way as to bring an action concerning it, must be given in evidence under a plea denying the bailment, and cannot be pleaded in excuse.

A *v.* X. Action upon the case. A alleges in his declaration that he delivered to X, a common carrier, certain goods to be carried to Dublin, and alleges that X did not safely carry the goods, but by its negligence lost them. X pleads that it gave notice to A that it

[1] **Bridge *v.* Grand Junction Ry. Co., 3 M. & W. 244; Ames' Cases, 73.**

would not be responsible for the loss of goods unless the contents were declared at the time of delivery; that A failed to declare the contents, and that X therefore never became responsible for the safety of the goods. Special demurrer, assigning for cause that the plea was an argumentative denial of the bailment. Judgment is given for the plaintiff. The plea should have been a traverse of the bailment and not, as it was, in the form of a plea in excuse.[1]

(*i*). *Ejectment.*

§ **188.** It has already been explained[2] that in the action of ejectment, the real defendant was only permitted to come in and defend the action upon certain conditions, one of which was that he should plead the general issue — *i. e., not guilty* — and on the trial admit everything except the plaintiff's title. It resulted from this that there was no room in this action for any plea in excuse.[3]

[1] Crouch *v.* London & N. W. Ry. Co., 7 Exchequer, 705; Ames' Cases, 75.

[2] *Ante*, page 67.

[3] By leave of the court, the defendant was sometimes permitted to put in a dilatory plea to the jurisdiction of the court. Adams on Ejectment, 241.

CHAPTER IV.

PLEAS BY WAY OF TRAVERSE

SECTION I.— GENERAL REQUISITES.

§ **189.** The word traverse has been used heretofore, although no explanation has been given of its meaning. It is synonymous with the word denial. Where the defendant intends to rely for his defense upon the fact that the allegations contained in the declaration as to the subject-matter of the action are untrue, he must put in the plea known as a traverse. The traverse must meet the particular allegations which the pleader expects to prove untrue.

§ **190.** Before taking up in detail the different kinds of traverses, of which there are many, several general principles applicable to all traverses should be noticed.

(1). Traverses are usually negative in form, though they may be expressed in affirmative terms, as when opposed to preceding negative allegations, *e. g.,* replication by way of traverse to a plea of the statute of limitations.

§ **191.** (2). It may be laid down as a rule that traverses must be expressed in terms of *direct* denial, and not be indirect or argumentative in character. The statement of facts, which are inconsistent with the truth of an allegation in the preceding pleading, is

an indirect denial of such allegation. This is what is known as an argumentative denial. A traverse framed in this way will be bad on special demurrer. There is one exception to this rule, in the special traverse, which will be explained later.

§ **192.** (3). Traverses must always end with what is known as a tender of issue; that is, an expression in formal terms of the traversing party's willingness for a trial by the jury of the matter denied. This is called concluding "to the country." The following form illustrates the manner in which a traverse is drawn:

In the King's Bench,
—— Term, 5th George IV.

John Doe ads. Richard Roe.

And the said John Doe, by ———, his attorney, comes and defends the force and injury when, etc., and saith 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 Richard Roe hath above thereof complained against him. And of this he, the said John Doe, puts himself upon the country, etc.

§ **193.** (4). When a traverse, in a proper form, is put in by either party, the other, if he does not demur, *must join issue,— i. e.,* he must state his willingness also to go before the jury with the matter. This is spoken of technically as a joinder of issue. Neither another traverse, nor matter by way of confession and avoidance, can be pleaded to a traverse.

§ **194.** (5). A traverse must always be confined to allegations of fact contained in the pleading of the opposite party. A conclusion of law, or as it is sometimes known, matter of law, cannot be traversed.

A *v.* X. Action of case for slander. A alleges in his declaration that X called A a "false thief," to his great damage. X traverses that A was "damnified" by the words spoken. General demurrer. The plea is bad. It is a conclusion of law that one is injured by being charged with a crime. It is a principle in the law of slander and libel, that words charging another with a crime are actionable *per se,* and no damages need be proved.[1]

A *v.* X. Action of replevin for taking cattle. X avows the taking, and says that she leased and re-leased certain land to A (an old method of conveying land), reserving rent and power of distress, *by virtue of which said lease and re-lease A became seised in fee,* and that X distrained for rent in arrear. A denies that he entered and was *seised in fee by virtue of the lease and re-lease.* General demurrer. The plea is bad; the seisin resulting from a lease and re-lease is a conclusion of law.[2]

A *v.* X. Action of replevin for taking goods. X *avows* the taking of the goods as the property of M. A in his *plea*[3] alleges a prior taking, by himself as sheriff, *by virtue of a writ* issued against M. X in his replication denies that A lawfully held the goods *by virtue of the writ.* General demurrer. The replica- is bad, as it denies a conclusion of law.[4]

[1] Russell's Case, Dyer, 26 b, pl. 171; Ames' Cases, 77.
[2] Grills v. Mannell, Willes, 378; Ames' Cases, 86.
[3] Note the usual names of the pleadings postponed one stage.
[4] Foshay *v.* Riche, 2 Hill, 247; Ames' Cases, 89.

§ **195.** (6). Matters of fact which are immaterial to the substance of a pleading cannot be traversed.

A *v.* X. Action of ejectment. X claims under copy granted in 1602. A replies that *his* title is under copy granted June 1, 1601. X for rejoinder traverses that the Queen granted to A on *June* 1, 1601, General demurrer. Rejoinder held bad, as putting in issue an immaterial point, namely, the exact day when the copy was granted.[1]

A *v.* X. Action of trespass for assault and battery. X pleads he, *at the command* of the sheriff, helped him to defend himself against A. A traverses the command. General demurrer. The plea is bad, as a traverse of an immaterial point. X had a right to help the sheriff without his command.[2]

A *v.* X. Action of detinue. X traverses the *delivery* of the goods to him. General demurrer. The plea is bad; the delivery is immaterial.[3]

§ **196.** (7). It sometimes happened that matter, which constituted a good plea in excuse, apparently formed a traverse, because of the fact that the plaintiff alleged in his declaration immaterial facts which were contradictory to the facts contained in the plea. The ingenious point was then raised that the plea was a traverse of immaterial matter, and therefore bad, but the courts were prompt to hold that a party could not, by inserting in his pleadings allegations which were not

[1] Lane *v.* Alexander, Cro. Jac. 202; Ames' Cases, 79.

[2] Bridgewater *v.* Bythway, 3 Lev. 113; Ames' Cases, 82.

[3] Walker *v.* Jones, 2 Cr. & M. 672; Ames' Cases, 89.

necessary, turn a plea otherwise good into one that was bad on demurrer.[4]

A *v.* X. Action of debt against X as sheriff for allowing debtor to escape (a sheriff was *prima facie*

[4] A recent example of the application of this principle, but on a motion to strike out instead of on demurrer, may be found in the case of De St. Aubin *v.* Guenther, 232 Fed. 411 (U. S. Dist. Court). The motion was to strike out a traverse contained in a reply to a counterclaim set up in the defendant's answer. The traverse was of an allegation that the defendant had no knowledge and gave no consent to the plaintiff's conduct which was made the basis of the counterclaim. As it was an allegation which negatived a defense which the reply set up, or as the court called it, an "anticipatory traverse," it was out of place and immaterial so far as the declaration was concerned. The reply in excuse was a good reply in excuse and the addition of a specific traverse of this immaterial allegation, it was held, did not make the reply objectionable; the court therefore refused to strike out the specific traverse of this immaterial allegation.

The court, per Learned Hand, J., says: A difficulty faces a pleader, however, when the opposite party has already incorporated a traverse of a possible plea in avoidance in his own pleading — "leapt before he came to the stile." If he leaves unanswered such an assertion, though it is not really an allegation at all (*i. e.*, a material allegation?), he hazards it being taken as such; indeed, he might strike it out, for it has no proper place in the first pleading. However, being placed in this position through the fault of the first pleader it surely serves to convenience if he be allowed to couple a traverse of this anticipatory traverse along with the plea which the anticipatory traverse has denied. Pullen *v.* Seaboard Trading Co., 165 App. Div. 117. The result is indeed amorphous and racks the soul of a conscientious pleader, because there is strictly no place for a traverse in a plea (in excuse?) at law at all, at least where the original pleading is not alternative or double. Courts do not, however, value so much as formerly their logical integrity, and if the result be convenient, no harm is done."

liable on the escape of a debtor). A alleges in his declaration that X let him escape voluntarily. X pleads that he re-took him upon fresh pursuit. Special demurrer, because the plea amounts to a traverse of the voluntary escape. The plea is a good plea *in excuse;* the allegation of voluntary escape was immaterial, and the fact that A alleged it in his declaration, and that it was contradictory to the matter in plea, will not turn a good plea in excuse into a bad traverse.[1]

A *v.* X. Action of assumpsit. A alleges X *was of full age.* X pleads he was an infant. Special demurrer, assigning for cause that the plea is a traverse of immaterial matter. The plea is good; it is no traverse, for reasons stated above.

§ **197.** (8). In the statement of the facts constituting his cause of action or defense, a party sometimes so mingles material with immaterial matter that it is impossible to separate them. In such case a traverse may of necessity cover both, and will not on this account be bad on demurrer.

A *v.* X. Action of replevin for taking cattle. X, as bailiff, acknowledges the taking, and says he took them *damage-feasant* in the freehold of L. A pleads he was *seized in fee* of a close adjoining L's close, and had right of common in L's close. X denies that A was *seised in fee* of the adjoining close. General demurrer. The replication is good. Seisin in fee is immaterial, but since A has not alleged possession, except by the allegation of seisin in fee, the whole may be traversed.[2]

§ **198.** (9). A party traversing, must not by his traverse compel his opponent to prove more than would

[1] Sir Ralph Bovy's Case, 1 Vent. 217; Ames' Cases, 81.

[2] Sir Francis Leke's Case, Dyer, 365, pl. 32; Ames' Cases, 78.

otherwise be necessary in order to sustain his case. A traverse of an exact sum where proof of a part is sufficient to sustain the cause of action or defense, is an illustration of this.

A *v.* X. Action of debt on a bond; conditioned for the payment of £1,550. X pleads part of the sum, to wit, £1,500, was won in gaming. (If *any* part was won in this way the bond would be void.) A traverses that £1,500 was won in gaming. General demurrer. The replication is bad; X cannot join issue without proving more than is necessary to defend himself.[1]

The same principle is applicable where one traverses in the conjunctive instead of the disjunctive.

A *v.* X. Action of *Assumpsit* on a policy of insurance. A alleges that certain property insured by X, consisting of ship and tackle and other furniture, were lost. X traverses that the ship *and* tackle *and* other furniture were lost. General demurrer. The plea is bad. A cannot join issue without proving that everything was lost; whereas, if he proves part he is entitled to recover.[2]

In an action upon a covenant for quiet enjoyment, it has been sought to apply this rule to a traverse of the "ouster *de praemissis.*" But such a traverse is good, because it does not compel the plaintiff to prove an ouster from the *whole* premises.

A *v.* X. Action of covenant upon a covenant for quiet enjoyment, contained in a deed. A alleges X ousted him from the premises. X denies that he ousted him from the premises. General demurrer.

[1] Colburne *v.* Stockdale, 1 Strange, 493; Ames' Cases, 85.
[2] Goram *v.* Sweeting, 2 Saunders, 205; Ames' Cases, 79.

The plea is good, as A may join issue and support his case by proving an ouster from any part.[1]

§ **199.** (10). A traverse must not be taken to matter not in the other party's pleading, but may to what is necessarily implied in it.

A *v.* X. Action of replevin for taking cattle. X avows he was seised of the *locus in quo* and took the cattle damage-feasant. A traverses that X was *sole seised,— i. e.,* seised alone. General demurrer. A's plea is good, for the seisin claimed in the avowry, as no one else is mentioned as jointly seised with A, necessarily means *sole* seisin.[2]

Section II.— Classification of Traverses.

§ **200.** Pleadings by way of traverse are divided into several classes, according to their scope and the manner in which they are framed.

As there are pleas by way of traverse (or denial), so there are replications by way of traverse, rejoinders by way of traverse, etc. Traverses include all pleadings by way of denial, whether made by the defendant or the plaintiff. There are, however, particular forms of traverses designated by different names, some of which may be used only as pleas, and one which is available only as a replication. The following classification will exhibit the principal forms of traverses and those in most common use, and also by which party to the action each may be used:

[1] White *v.* Bodinam, 2 Salk. 629; Ames' Cases, 84.
[2] Gilbert *v.* Parker, 2 Salk. 629; Ames' Cases, 85.

- **Traverses**
  - **General Issue** — Pleas. Available only for defendant.
    - Non assumpsit
    - Nil debet or Nunquam indebitatus
    - Non detinet
    - Non cepit
    - Not guilty
  - **Specific Traverse** — Available to either party at any stage of the pleadings.
  - **Special Traverse** — Available to either party at any stage of the pleadings.
  - **Replication *de Injuria*** — Available to the plaintiff only as a replication.

SECTION III.— GENERAL ISSUE AND SPECIFIC TRAVERSES.

§ **201.** The *general issue* is the term applied to the most general form of traverse used as a plea in the different forms of actions. It is known by different names in the various forms of actions in which it is used, as *non assumpsit* in contract, *not guilty* in trespass.

A *specific traverse* is one which denies specifically some one particular allegation in the pleading of the opposite party. Specific traverses, of course, differ according to the nature of the actions in which they are used, and the allegations which are denied by them.

While the general issue is used only as a plea, specific traverses are available to either party, in answer to any affirmative pleading of the opposite party. It will be convenient to take up the general issue and spe-

cific traverses together, in connection with each different form of action.

(*a*). *Action of Special Assumpsit.*

§ **202.** In special assumpsit the general issue takes the form of *non assumpsit.*

It is rather curious that the traverse *non assumpsit* should ever have acquired the name of general issue. Since the action of assumpsit was originally an action on the case, the stating of the contract seems simply to have been the statement of the plaintiff's right,— *i. e.,* the *inducement;* while the statement of the breach was a statement of the wrongful act by the defendant. One would expect, then, on the analogy of other actions, to find the term *general issue* applied to a traverse of the breach, while the traverse of anything in the inducement — the consideration or promise —would assume the form of a regular *specific traverse.*

§ **203.** The effect of *non assumpsit* is to deny the contract *as set forth in the declaration.*

Hence, when the defendant relies upon the fact that he made no promise at all, that he did not make the promise alleged in the declaration, that there was no consideration for his promise, or that the consideration was different from that alleged, he must plead *non assumpsit.*[1]

§ **204.** The plea of *non assumpsit* puts in issue only the *material* allegations of the inducement and

[1] Lyall *v.* Higgins, 4 Q. B. 528; Ames' Cases, 46, *ante,* p. 109; Sieveking *v* Dutton, 3 C. B. 331; Ames' Cases, 48; *ante,* p. 109.

will not raise any issue upon averments which are not necessary.[1]

A *v.* X. Declaration alleges X held a certain farm under an agreement, made with A's father, to leave the farm in as good condition as he found it, that on the death of A's father the farm descended to A *in fee,* that X did not leave the farm in as good condition as he found it. Plea General Issue. After verdict for A, X moved to set it aside on the ground A failed to prove the farm descended to him *in fee,* the evidence showing it descended *in tail.* Motion denied as the allegation as to the fee was immaterial.[2]

§ **205.** It is well settled that, under the plea of *non assumpsit,* the defendant may take advantage of an omission by the plaintiff to state conditions precedent.[3]

The reason for this is that the defendant can truly deny the contract; can say that the contract alleged is *not* the contract which he made; that he made a contract with conditions, whereas the one alleged is absolute. It would seem, on principle, that this reason is as strong in the case of conditions subsequent as conditions precedent, and it is submitted that the weight of authority decidedly supports this view.[4]

[1] Lawes, Pleading in Assumpsit, p. 35.

[2] Winn *v.* White, 2 Blac, 840.

[3] Brind *v.* Dale, 2 M. & W. 775; Ames' Cases, 40; *ante,* p. 108.

[4] Conditions subsequent *in* the contract must be distinguished from stipulations collateral to it, such as that in Smart *v.* Hyde, *ante,* p. 107. The former are meant here, and have been more appropriately called "conditions subsequent in form, precedent in effect." They are subsequent, in that the burden is on the defendant to prove them, to relieve himself from a *prima facie* liability. They are precedent, however, to the existence in fact of the liability.

A *v.* X. Action of *Assumpsit.* A in his declaration alleges an agreement by which A was to serve X, and X to employ A, as a commercial traveler for one year. Plea, *non assumpsit.* Under this plea X can show that there was a special custom understood to be attached to all such contracts, by which either party could determine it by giving three months' notice.[1]

A *v.* X. Action of *Assumpsit* on an agreement by X to carry certain goods safely. Plea, *non assumpsit.* Evidence that there was a special condition in the agreement, "fire and robbery excepted," is admissible, and will support this plea.[2]

§ **206.** The plea of *non assumpsit* does not deny the breach.

A *v.* X. Action of *Assumpsit.* A alleges a warranty of soundness of a horse sold by X to A, and alleges as a breach the unsoundness of the horse. Plea, *non assumpsit.* X, under the plea, cannot show that the horse was, in fact, sound. He should have denied the breach specifically.[3]

§ **207.** In special assumpsit the specific traverses which may be used as pleas are:

(*a*). A denial of performance on the plaintiff's part of his side of the contract, or of the performance, existence, or happening of conditions precedent.

A *v.* X. Action of *Assumpsit.* A alleges in his declaration an agreement by X to buy, and by A to

[1] Metzner *v.* Bolton, 9 Exchequer, 518; Ames' Cases, 93.

[2] Latham *v.* Rutley, 3 D. & R. 211. See also 4 Campbell, 20; 12 A. & E. 668; 11 C. B. N. S. 369.

[3] Smith *v.* Parsons, 8 C. & P. 199; Ames' Cases, 91.

sell, the right to certain music which A, as composer, had composed. Plea, *non assumpsit.* Under his plea X cannot show that A did not compose and had no right to the music. He should have traversed specifically that A had any right in the music as composer. The possession by A of such right was a condition precedent to A's ability to perform and to X's liability.[1]

(*b*). A denial of the breach on the defendant's part.[2]

(*b*). *Action of General Assumpsit.*

§ **208.** The general issue in this form of assumpsit, as in special assumpsit, is *non assumpsit.*

The theory of the action of general assumpsit is the same as that of special assumpsit, namely, recovery on a promise contained in a contract. The scope of the plea is, therefore, the same,— *i. e.,* it denies the contract. And, since the contract in this form of action is made up of a debt, which is deemed the consideration, and an *implied* promise, the effect of *non assumpsit* is to deny both the debt and the implied promise.

§ **209.** Hence, under the general issue, the defendant may show that the facts were not such as to constitute a debt, or that the *law has never raised an implied promise.* The latter is the case where goods were sold, or work done, on a credit which has not expired, and also where there has been a special contract with certain conditions, which have not been complied with by the plaintiff.

[1] De Pinna *v.* Polhill, 8 C. & P. 78; Ames' Cases, 92.
[2] Smith *v.* Parsons, 8 C. & P. 199; Ames' Cases, 91.

A *v.* X. Action of *general assumpsit* for goods sold and delivered. X wishes to show that the goods were paid for immediately on delivery. He must plead *non assumpsit.* The facts were not such as to constitute a debt.[1]

A *v.* X. Action of *general assumpsit* for goods sold and delivered. X wishes to show that the goods were sold upon credit, which has not expired. He must plead *non assumpsit,* as the law will not raise an implied promise until it is needed; hence, not until credit expires.[2]

A *v.* X. Action of *general assumpsit* for goods bargained and sold. X wishes to set up that the goods were sold under a special written contract, with conditions which have not been complied with by A. X may show this under *non assumpsit,* for the law will raise no implied promise under such circumstances.[3]

§ **210.** The only occasion for the use of a specific traverse as a plea to a declaration in general assumpsit is in denial of the breach, and in such case, it is conceived, a denial of the breach would amount to a plea of payment. This results from the fact that the only promise which the law will imply is one for the payment of money, and it is upon such a promise that the action is always based.

[1] Bussey *v.* Barnett, 9 M. & W. 312; Ames' Cases, 98. The case has been treated as *indebitatus assumpsit* for the purposes of the illustration, though in fact it was in debt.

Hayselden *v.* Staff, 5 A. & E. 153; Ames' Cases, 50. See *ante,* p. 110.

[2] Broomfield *v.* Smith, 3 M. & W. 542; Ames' Cases, 97. Treated as *indebitatus assumpsit* for purpose of illustration.

[3] Gardner *v.* Alexander, 3 Dowling, 146; Ames' Cases, 97.

(*c*). *Action of Debt.*

§ **211.** The general issue in the action of debt was originally *nil debet,* but after the Hilary Rules was *nunquam indebitatus.* Its effect is simply to deny the *debt.*

Under the general issue the defendant may show payment made on delivery, for, in that case, it is held no debt ever arises.[1]

But where the defendant relies on credit not expired, or conditions not performed by the plaintiff, he cannot show them under *nunquam indebitatus,* but must plead in excuse.

A *v.* X. Action of Debt for goods sold. Plea, *nunquam indebitatus.* X wishes to show that the goods were sold on credit and that the credit has not expired. He should have pleaded it affirmatively, *i. e.,* in excuse; for a debt arises the moment the goods are delivered.

§ **212.** Though the breach is a necessary allegation in a declaration in debt on simple contract, it is a point of form only and cannot be traversed by the defendant. It would seem, therefore, that in this action no room is left for a specific traverse to the declaration.[2]

[1] Bussey *v.* Barnett, 9 M. & W. 312; Ames' Cases, 98. While this action was brought in the form of *general assumpsit,* it is authority for the point, that where goods are paid for on delivery no *debt* arises, hence, if the action had been in *debt,* and the defense was payment on delivery, the general issue, *i. e., nunquam indebitatus,* would have been the proper plea.

[2] Goodchild *v.* Pledge, 1 M. & W. 363; Ames' Cases, 37; *ante,* pp. 18-19.

(*d*). *Action of Trespass.*

§ **213.** The general issue in trespass takes the form of *not guilty*. Its effect is to deny merely the *act* of trespass alleged in the declaration. It does not deny the wrongfulness of the act, as a direct act of interference with property or person is a technical trespass even though justifiable.

§ **214.** The defendant may show under *not guilty* that the act alleged was not committed, or that he, the defendant, did not commit it.

A *v.* X. Action of trespass, assault and battery. Plea, *not guilty*. Under this plea X may show that his horse ran away with him, so that he could not control it, and ran into the plaintiff, for in such case it was not his act.[1]

A *v.* X. Action of trespass *quare clausum fregit*. X pleads that C pushed him by force across A's close. Special demurrer. The plea is bad as it amounts to *not guilty*.

§ **215.** Other matters, such as contributory negligence, self-defense, defendant's own close, etc., cannot be shown under *not guilty*, but must be pleaded in excuse.

A *v.* X. Action of trespass for running into A's carriage and killing one of his horses. Plea, *not guilty*. X cannot show, under this plea, that the collision between them was the result of A's negligence.[2]

[1] Gibbons *v.* Pepper, 1 Ld. R'm'd, 387.

[2] Knapp *v.* Salsbury, 2 Campbell, 500; Ames' Cases, 100.

§ **216.** It has been seen that the action of trespass may be brought either for injury to the plaintiff's person or his property.[1]

If brought for injury to the plaintiff's person, there seems to be no room for a specific traverse to the declaration. The acts of the defendant are the only necessary allegations in point of substance, and the *general issue* covers them.

§ **217.** Where the action is for injury to the plaintiff's property, personal or real, the allegation of possession is necessary, and the *specific traverse* is used to deny the plaintiff's possession of the goods or close, as the case may be; being usually called "*not possessed*" in the former case and "*not the close of the plaintiff*" in the latter. These traverses deny simply the *possession* of the plaintiff, not his *right of possession.* This is so because actual possession is sufficient to maintain the action.

A *v.* X. Action of trespass for injury to A's horse. Plea, that A was not possessed of the horse. X cannot show, under this plea, that the horse was a borrowed horse at the time of the injury to it.

A *v.* X. Action of trespass *quare clausum fregit.* Plea, the close in the declaration mentioned is not A's close. X cannot show that M had a right to the possession of the close and commanded him to enter.[2]

[1] *Ante,* p. 34.

[2] Jones *v.* Chapman, 18 L. J. Exch. 456; Ames' Cases, 103, *contra;* but see Slocombe *v.* Lyall, 6 Exch. 119; Heath *v.* Milward, 2 Bing. N. C. 98, and *dicta* Squires *v.* Seward, 16 How. Pr. 478; Patterson *v.* Clark, 20 Iowa, 429. The reasoning

§ **218.** In an action of trespass for loss of service (see *ante,* p. 36), since the allegation of the relation of master and servant corresponded to that of *possession* where the injury complained of was to the plaintiff's goods, *i. e.,* since it was matter of inducement, if the defendant wished to show that the relation did not exist, it was necessary for him to traverse it specifically.

A *v.* X. Action of trespass for injury to A's servant, M, whereby he lost her service. Plea, that M was not the servant of A. Special demurrer, assigning for cause that the plea amounts to *not guilty.* The plea is good; the matter could not be shown under *not guilty,* which denies merely the act of injury.[1]

upon which Jones *v.* Chapman and similar cases may be supported is as follows: the moment the rightful owner, in person or by a servant, enters upon the land, the *actual possession* revests, and the plaintiff becomes a mere trespasser. Hence the defendant, in showing his right of possession or that of his master, is virtually denying the plaintiff's actual possession. The fallacy of this reasoning is that it proceeds upon the idea that *any act,* however trifling, will amount to an entry and revest the possession in the defendant. But an entry is an act of some magnitude, and while *any act,* be it the stretching of an arm over, or the stepping of one foot on the land, is a trespass, such act will not amount to a common-law entry. Until, therefore, the act is of sufficient magnitude to constitute an entry, possession will not revest, and showing that the defendant entered as rightful owner does not deny the plaintiff's possession at the time of the trespass. Hence, while a good defense under *liberum tenementum,* it cannot be shown under *not possessed.* The only way to avoid this conclusion is to adopt the doctrine of relation and say that the entry, and hence the revesting, relates back to the time of the first act. But will the court adopt a fiction for the mere purpose of allowing the defendant to plead a certain sort of plea?

[1] Torrence *v.* Gibbons, 5 Q. B. 297; Ames' Cases, 100.

(*e*). *Action of Trover.*

§ **219.** The general issue in the action of trover takes the form of *not guilty.*

Its effect is to deny the wrongful act alleged as a conversion; *i. e.,* it not only denies the *act,* but also that it was wrongful. It will be observed that all matters which, if the form of action were *trespass,* would be properly pleaded by a plea in excuse, may in the action of trover be shown as evidence under the plea *not guilty.*

A *v.* X. Action of trover. Plea, *not guilty.* X may show that he took the goods, as sheriff, under a writ.[1]

A *v.* X. Action of trover against X as bailee of A's goods. X pleads that before the demand and refusal the goods were accidentally destroyed by fire. Special demurrer. The plea is bad; the matter shows the conversion was not *wrongful,* and should have been pleaded under the plea *not guilty.*

A *v.* X. Action of trover. Plea, *not guilty.* X may show that A gave the goods to M as bailee, with power to lend them; that X borrowed them from M and returned them to M before the demand.

§ **220.** Matters in excuse, which show the act was not *wrongful,* must be carefully distinguished from matters which affect the plaintiff's *possession or right of possession.* The allegation of possession or right of possession connects the plaintiff with the goods in such a manner as to show that the act of conversion is a

[1] Young *v.* Cooper, 6 Exchequer, 259; Ames' Cases, 63.

violation of a right belonging to the plaintiff, and forms what is called matter of inducement.

The plea of not guilty does not deny (and, not denying, impliedly admits) the allegation of *actual possession* or *right of possession,* whichever the plaintiff may have seen fit to rely upon in his declaration.

A *v.* X. Action of trover. Plea, *not guilty.* X cannot show a lien upon the goods, nor that A stole the goods from M, nor that A held the goods as bailee for X. These are all matters affecting possession or right of possession.

§ **221.** The important specific traverse to the delaration in trover is *not possessed,* which has the double effect of denying either the *posession* or *right of possession,* accordingly as the plaintiff relies on the one or the other.

This is obviously just, since the defendant cannot tell upon which the plaintiff intends to rely until evidence is introduced. The allegation of the possession in the declaration is usually in such terms that either *actual possession* or *right of possession,* if proved, will support it.

§ **222.** Anything affecting the plaintiff's possession or right of possession must be shown under *not possessed,* as, for example, a lien.

A *v.* X. Action of trover for a certain deed. Plea, *not possessed.* X may show that A deposited the deed with him as security for money advanced, and that the money has not been paid back.[1]

[1] Owen *v.* Knight, 4 Bing. N. C. 54; Ames' Cases, 105; White *v.* Teale, 9 L. J. R. Q. B. 377; Ames' Cases, 108; Dorrington *v.* Carter, 1 Exch. 566; Ames' Cases, 61.

§ **223.** The plea *not possessed* does not deny (and, not denying, impliedly admits) the act of conversion alleged. Hence, under it nothing with regard to the *wrongful* act can be shown.

A *v.* X. Action of trover, alleging that X, as bailee, refused to give the goods up. Plea, *not possessed.* X may show that A never bailed the goods to him or that A has no right over them, but cannot show that he, X, did not refuse to give the goods up.

§ **224.** In those cases where the plaintiff can prove *actual possession,* and the defendant has some good excuse for the taking of the goods, it would seem to be necessary for him to plead both *not possessed* and *not guilty* in order to protect himself fully, as the following illustration will show.

A *v.* X. Action of trover. X wishes to show that M stole the goods from him and gave them to A, and he, X, took them from A. A may rely upon his actual possession. If he does, X could not support a plea of *not possessed,* and he would have no other defense, since *not possessed* admits the wrongful act alleged as a conversion. *Not guilty* would be necessary then, in order that X might show that the taking was not wrongful, if A relies upon *actual* possession. But if X pleads *not guilty* alone, A would immediately conclude to rely upon his *right of possession,* which X could not dispute, since *not guilty* admits the plaintiff's possession or right of possession, as he chooses to rely upon the one or the other.

§ **225.** In those cases where the plaintiff can rely only upon his *right of possession,* as where the defendant holds the goods as a bailee, and refuses to give them

up to the plaintiff, who is the rightful owner, a single plea is sufficient to protect the defendant.

(*f*). *Action of Detinue.*

§ **226.** The general issue in the action of detinue takes the form of *non detinet.* Its effect is to deny the positive act of detention alleged in the declaration. Under it matters which excuse such detention cannot be shown.

If the defendant has offered to give the goods up, though they still remain in his possession, he cannot be said to *detain* them.

A *v.* X. Action of detinue. X pleads that the goods came into his possession as a pledge for money advanced, that the money was paid, and that he offered to give the goods up. Special demurrer. The plea is bad, as it amounts to *non detinet.*[1]

§ **227.** The only important specific traverse to the declaration in detinue is *not possessed.* Its effect is to deny the plaintiff's right of possession, *i. e.,* the inducement. Under it anything affecting that right may be shown, *except a lien,* which must be pleaded in excuse, though on principle it ought to be allowed to be shown under *not possessed.*[2]

A *v.* X. Action of detinue for a promissory note. Plea, *non detinet.* X cannot show that A assigned the note to M, and that X, as servant of M, holds the note. He can show this under *not possessed.*[3]

[1] Clements *v.* Flight, 8 L. T. 166; Ames' Cases, 66.
[2] *Ante,* p. 118.
[3] Richards *v.* Frankum, 6 M. & W. 420; Ames' Cases, 110.

(*g*). *Action of Replevin.*

§ **228.** It has already been seen[1] that in the action of Replevin, if the defendant claims that the seizure of the chattels was a rightful one, his answer to the declaration is in the nature of a cross-declaration, and is called an *avowry* or *cognizance.*

If, however, he does not wish to justify the seizure, but to deny it, his answer to the declaration takes the ordinary form of a *plea.* In Replevin, as in the other forms of action, there is what is known as the *general issue.* It is called *non cepit,* and its effect is to deny the *actual taking in the place alleged,* and to constructively admit the plaintiff's possession.

A *v.* X. Action of replevin. Plea, *non cepit.* X cannot show that the goods did not belong to A, for *non cepit* does not put the ownership of the property in issue. If A proves an actual seizure of the goods by X, it is sufficient, and no proof of property or possession need be given.[2]

§ **229.** Under the plea of *non cepit,* the defendant may show, not only that he did not take the goods, but also that he did not take them in *the place* alleged. This is because the allegation of the place of the seizure is an essential part of the wrongful act which is the basis of the action.[3]

§ **230.** If the defendant puts in an *avowry* or *cognizance,* as it is in form like a declaration, it is so

[1] *Ante,* p. 53.
[2] Dover *v.* Rawlings, 2 Moo. & R. 544; Ames' Cases, 113.
[3] *Ante,* p. 56.

treated with relation to the subsequent pleadings. The pleading by which the plaintiff answers the avowry or cognizance is called a *plea.* This he must frame, of course, according to the nature of his case. When the defendant has distrained for rent, and, in his avowry, has alleged the lease to the plaintiff and rent in arrear, the traverse *rien en arrere* (nothing in arrear) denies simply that rent is due, *admitting the lease to be as the defendant has alleged.* Hence, if the defendant has alleged rent payable quarterly, the plaintiff cannot, under this traverse, show that it was payable half-yearly.

A *v.* X. Action of replevin. X, in his avowry, alleges a lease to A, in which rent is payable quarterly, and alleges rent in arrear. Plea, no rent in arrear. A cannot show that the rent was payable half-yearly; the traverse impliedly admits the lease in the terms stated.[1]

§ **231.** Specific traverses to the declaration are unusual, though not impossible, in the action of replevin; the reason is, that the defendant usually not only wishes to defend himself, but also to get a return of the goods, and to do the latter he must put in an avowry or cognizance.

§ **232.** To the avowry or cognizance specific traverses are common, and take their usual place among other pleas, being used wherever the plaintiff wishes to deny some single material allegation. The plea *rien en arrere,* above mentioned, though sometimes regarded

[1] Hill *v.* Wright, 2 Esp. 669; Ames' Cases, 113.

as in the nature of the general issue, seems to be merely a specific traverse of a fact in the avowry which forms part of the matter showing the defendant's right to the chattels.

(*h*). *Action of Case.*

§ **233.** The general issue, in actions on the case, takes the form of *not guilty*. It operates "as a denial only of the breach of duty or *wrongful* act alleged to have been committed by the defendant, and not of the facts stated in the inducement." The matters which form the inducement are those which show the plaintiff's right with respect to the subject of the action, the right of which he claims the defendant's act is a violation. Such matter is not denied by the plea *not guilty*.

A *v.* X. Action of case. Declaration alleges A was entitled to be taxed, and that X wrongfully omitted to insert her name in the tax list, which prevented her from getting a license to sell beer. Plea, that A was not entitled to be assessed. Under this plea A does not have to show that she was prevented from obtaining a license by X's act,— *i. e.*, that it was wrongful,— in order to recover. In order to put this in issue, X should have pleaded *not guilty*.[1]

§ **234.** In the action of *Case*, as in that of trover, since wrongfulness is the essence of the act complained of, matters which show that the act is justifiable may be shown under *not guilty;* but matters in excuse which may be shown under *not guilty* are only such as tend to

[1] Perring *v.* Harris, 2 Moo. & R. 5; Ames' Cases, 120.

show that the act was not wrongful, *admitting the inducement to be true.* Hence, here, as in trover, matters in excuse must be carefully distinguished from matters denying the plaintiff's right as it is set forth in the inducement.

§ **235.** (1). Thus in *case* for wrongfully diverting water, *not guilty* does not put in issue the plaintiff's right to have the water flow to his mill.

A *v.* X. Action of case. Declaration alleges A is possessed of a mill and has a right to the water of a certain stream; that X wrongfully diverted the water away from the mill. Plea, *not guilty.* A proves the act of diverting the water, but does not show a right to use it. A need not prove his right. It is a part of the inducement and *not guilty* admits it.[1]

§ **236.** (2). In *case* for the defendant's dogs injuring the plaintiff's cattle, the *scienter* — knowledge on the defendant's part of the ferocious character of his dogs — is put in issue by *not guilty,* since it is no part of the inducement, but one of the elements of the wrongful act on the defendant's part.

A *v.* X. Action of case. Declaration alleges X wrongfully kept dogs, knowing them to be ferocious; which dogs killed A's cattle. Plea, *not guilty.* A must prove the *scienter* in order to recover.[2]

§ **237.** (3). In *case* for deceit, no inducement is necessary (for every one has a right not to be deceived),

[1] Frankum *v.* Earl of Falmouth, 2 A. & E. 452; Ames' Cases, 114.

[2] Thomas *v.* Morgan, 2 C. M. & R. 496; Ames' Cases, 116.

and *not guilty* denies all the material allegations in the declaration.

A *v.* X. Action of case for deceit in the warranty of a horse. Plea, *not guilty.* X may show that he made no such warranty, or that the horse was in fact sound.[1]

§ **238.** (4). In *case* for libel, *not guilty* seems to deny not only all material allegations in the declaration, but to go even further, and, upon the theory that the declaration *negatives* every excuse, it is allowable, under this plea, to show that the defendant had some excuse for the act, as that it was a privileged communication. But there is one material allegation, that of falsity, which, under the rule which has grown up, is admitted, and cannot be negatived by the plea of *not guilty.* To justify on the ground of truth of the words alleged to be libellous, defendant must plead by way of excuse.[2]

A *v.* X. Action of case for libel contained in a letter. Plea, *not guilty.* X may show that the letter was a privileged communication.[3]

§ **239.** (5). In *case* for erecting something which results in some injury to the plaintiff's premises, as, for example, a nuisance, *not guilty* denies both the act of erecting and the injurious consequences; for the injurious consequences are what make the act wrongful.

[1] Spencer *v.* Dawson, 1 Moo. & R. 552; Ames' Cases, 118.

[2] O'Malley v. Ill. Publishing & Printing Co., 194 Ill. App. 544, at p. 556. See *ante,* p. 120.

[3] Lillie *v.* Price, 5 A. & E. 645; Ames' Cases, 119.

A *v.* X. Action of case. Declaration alleges M is in possession of premises as tenant of A, that X owns land adjoining, and wrongfully erected a cesspool which polluted the water in A's well. Plea, *not guilty.* X may show that the water in the well was not polluted by the cesspool.[1]

§ **240.** In *case,* specific traverses are used to deny such allegations in the inducement as are material. Wherever the plaintiff is required to expressly state facts to show his right, for the violation of which he claims to bring the action, the defendant can deny only the material allegations in the statement of that right by means of specific traverses.

A *v.* X Action of case. Declaration alleges a judgment was recovered against one M; a writ issued to X, as sheriff, to levy on M's goods; that M had goods subject to the writ; that X falsely made return that M had no goods subject to the writ. Plea, *not guilty.* X cannot show that M had no goods. He should have traversed specifically that M had goods subject to the writ, for it is part of the inducement, one of the facts tending to show a duty on X's part toward A, for the violation of which duty the action is brought.[2]

§ **241.** Where the plaintiff alleges, in his inducement, matter which is immaterial, but which negatives matter which the defendant wishes to show to prove the act was not done by him, the defendant, under a plea of *not guilty,* may still show this, and need not

[1] Norton *v.* Scholefield, 9 M. & W. 665; Ames' Cases, 128.
[2] Lewis *v.* Alcock, 3 M. & W. 188; Ames' Cases, 121.

traverse specifically the allegation in the inducement; since, *as a part of the inducement,* it was entirely immaterial.

A *v.* X. Action of case. Declaration alleges that A was possessed of a horse which his servant was riding; *that* X *was possessed of a horse and cart which were under his direction;* that X so carelessly drove his horse and cart that the cart ran into A's horse and injured it. Plea, *not guilty.* X may show that he was not driving the horse and cart at the time of the accident, and need not traverse specifically that the horse and cart were under his direction.[1]

§ **242.** In *case* for malicious prosecution, since the plaintiff, by the law as it stands, is required to allege the conclusion of the prosecution which he claims to have been malicious, as a part of the inducement, the defendant, in order to deny it, must traverse specifically.[2]

On principle, it would seem that this allegation of the conclusion of the previous suit forms no part of the inducement or statement of the plaintiff's right, since every one has a right not to be prosecuted maliciously.

It seems rather to be a sort of a condition to the maintenance of the action for malicious prosecution, but it is a condition which the defendant should have the burden of proving unfulfilled. He should plead affirmatively the non-fulfilment of it. The plea would

[1] The case of Tavernour *v.* Little, 5 B. N. C. 678; Ames' Cases, 125, is *contra,* but does not represent the weight of authority.

[2] Watkins *v.* Lee, 5 M. & W. 270; Ames' Cases, 123.

then be a peculiar sort of a plea, something akin to a plea in abatement, merely going to the prevention of the *present* maintenance of the suit.

Section IV.— Special Traverses.

§ **243.** The object of the special traverse was to enable the party putting it in to place upon the record, and thus bring directly before the court, facts which otherwise he could not have brought in at all, or, at least, not until he introduced them as evidence.[1]

To accomplish this object the special traverse consists of two parts: (1) What is known as the inducement; (2) what is commonly called the *absque hoc* clause.

§ **244.** (1). Heretofore the word *inducement* has been used as designating a part of the declaration. What is known as the *inducement* of the special traverse is a different thing. As a part of the special traverse, the inducement is the means by which the object of the traverse is accomplished. It is in its nature an indirect denial; *i. e.*, a denial by means of introducing new facts which necessarily contradict the allegations in the pleading of the opposite party. This, however, by itself would violate the rule that a traverse must be direct in its terms. To remedy this, or, as it is sometimes expressed, "to cure the argumentativeness of the inducement," it is necessary to add the second part of the special traverse, namely:

[1] For a good illustration of the proper use of a special traverse, see Beckham *v.* Knight, 4 Bing. N. C. 243.

§ **245.** (2). "That peculiar and barbarous formula," the *absque hoc* clause, which, in its nature, is a direct denial of the same allegation that the inducement denies indirectly.

A *v.* X, as administrator of J. S. A brings a writ of *scire facias* against X. X pleads that before administration granted to A, administration was granted to J. N., who is still alive. A replies that J. N. died. Special demurrer. Plea, argumentative as it stands. An *absque hoc* clause, namely, "*absque hoc* that J. N. is still alive," would have cured it. Illustrates well the subtle niceness of the old pleading.[1]

The words *absque hoc quod,* however, are not absolutely necessary to a special traverse; *et non* will do.[2]

§ **246.** The special traverse, it seems, originally concluded with a verification on account of the new affirmative matter which it contained; but since the Hilary Rules (1834)[3] it must conclude to the country, *i. e.,* tender issue.

§ **247.** If, then, the special traverse is good in all its parts, and tenders issue properly, or though the inducement is bad in substance or form, if the *absque hoc* clause is good, it cannot be pleaded to; the opposing party must either join issue or demur.

A *v.* X. Action of trespass *quare clausum fregit.* X pleads *liberum tenementum,* that the freehold was

[1] Fortescue *v.* Holt, 1 Vent. 213; Ames' Cases, 134.

[2] Bennett *v.* Filkins, 1 Saunders' 20; Ames' Cases, 131.

[3] These rules considerably changed the form and scope of a number of the old common-law pleadings, in England.

in J. S., who commanded him to enter. A replies, a lease *at will* from J. S., *absque hoc* that J. S. commanded X to enter. X rejoins that J. S. did command him to enter, *absque hoc* that J. S. leased to A at will. Demurrer. A's replication would have been bad on special demurrer, because the inducement contains matter entirely irrelevant, and does not deny, indirectly, the same thing which the *absque hoc* clause denies directly; (matter in the inducement immaterial, because the entry of another, by command of the landlord, terminates a lease at will). Instead of joining issue or demurring, X pleads in his turn a special traverse, thus violating the rule that there can be no traverse upon a traverse. Hence, on demurrer, A will have judgment.[1]

§ **248.** But if the *absque hoc* clause is bad in substance,— if it denies immaterial matter for example, then it may be passed by without notice, and the inducement, since it tenders no issue, may be pleaded to,— traversed or confessed and avoided.

A *v.* X. Action of trespass for fishing in A's fishery in Orford Haven. Plea, that Orford Haven is an arm of the sea (if so, *prima facie* subjects would have the right of free fishing, and what follows is immaterial), in which every subject has the right of free fishing. Replication. Confesses it is an arm of the sea, but alleges an exclusive right in A by prescription, to fish there; *absque hoc* that every subject has the right of free fishing. Rejoinder, that Orford Haven hath been immemorially an arm of the sea, in which every subject has a right of free fishing; *absque hoc* that A has a prescriptive right. Demurrer. The replication, framed as a special traverse, would have been bad on

[1] Thorn *v.* Shering, Cro. Car. 586; Ames' Cases, 130.

special demurrer, because the inducement is matter in confession and avoidance. The inducement, however, being good in substance, though the *absque hoc* clause is bad, the whole traverse is good on general demurrer. Since the *absque hoc* clause denies immaterial matter, the inducement could be pleaded to. The rejoinder is a good special traverse, denying, both directly and indirectly, A's prescriptive right. Judgment for X.[1]

§ **249.** The inducement must always be of the nature of an *indirect* denial. If direct, there is no room left for the *absque hoc* clause. Hence, if the inducement is a direct denial, or sets forth matter in confession and avoidance, the special traverse will be bad in form.

A *v.* X. Action of *audita querela* (a common-law writ). A alleges he is under bond to X to pay certain sums on certain days to M, that he was prepared to pay it at the proper place, and offered, but that M was not there. Plea, that M was there and A was not; *absque hoc* that A offered the sum. Special demurrer. The plea is bad; it contains a direct denial as an inducement; the *absque hoc* clause is a traverse of immaterial matter. The plea would have been good without the *absque hoc* clause.[2]

A *v.* X. Action of replevin. Avowry, that M was seised and made a lease to X for a year, and that X took A's cattle damage feasant. Plea, that before the lease to X, M made a lease to A, which had not terminated; *absque hoc* that M made a lease to X. Special demurer. The plea is bad; the inducement contains matter in confession and avoidance.[3]

[1] Mayor, etc., *v.* Richardson, 2 H. Bl. 182; Ames' Cases, 138.
[2] Huish *v.* Phillips, Cro. Eliz. 754; Ames' Cases, 130.
[3] Anon., 3 Salk. 353; Ames' Cases, 135.

§ **250.** The matter contained in the inducement which is in contradiction of the allegation which it is wished to deny, must not be coupled with matter which is in avoidance of it. In such case the inducement would be regarded as a plea in confession and avoidance and the whole pleading would be bad as a special traverse.

A *v.* X. Action of covenant for non-payment of rent. The declaration alleges that M was seised in fee of the land in 1716, and then leased to X with covenant to pay rent; that X entered and continued possessed; that M assigned the reversion to A; that rent is due. Plea, that one J. S. was seised in fee, and conveyed the land to M *for life;* that M made a lease to X; that M afterward conveyed the reversion to A; and that M *died* soon after, *absque hoc* that A was seised of the reversion, as A declares. Special demurrer. The plea is bad, because the inducement contains matter in confession and avoidance; namely, that M's (the landlord's) estate had determined, as well as an indirect denial of the title.[1]

§ **251.** The second part of the special traverse, namely, the *absque hoc* clause, must always be in the form of a direct denial, for it is this clause which is supposed to cure the indirectness of the first part. In addition to this it must deny directly the *same* matter denied indirectly by the inducement.

[1] Palmer *v.* Ekins, 2 Ld. R'm'd, 1550; Ames' Cases, 136. The illustration is put by the court in this case, and it is said that the plea would be good as a special traverse. The point, however, does not seem to be well considered, as the plea apparently contains both matter in confession and avoidance and in denial.

If it fails in either of these two requirements, the special traverse will be bad in form.

The following two rules may be laid down with respect to the sufficiency of special traverses on demurrer.

§ **252.** (1). If either the inducement or the *absque hoc* clause is bad in form, the whole special traverse will be held bad on special demurrer.[1]

(2). If either the inducement or *absque hoc* clause is good in substance, on general demurrer, the whole special traverse will be held good.

§ **253.** A special traverse cannot be used as a substitute for the general issue, and if so used will be held bad on demurrer.

A *v.* X. A alleges a contract by X to pay A £10 per annum if he, A, married the daughter of J. S., and that he married her. X pleads he promised on condition that if J. S. gave to his daughter £1000 as a marriage portion then he, X, would pay the annuity "without this that the defendant promised as stated in the declaration." Plea bad on demurrer as amounting to the general issue.[2]

§ **254.** Similarly the special traverse cannot be used in place of the traverse *rien en arrere,* which is sometimes spoken of as the general issue to the avowry in the action of replevin.

[1] Anon., 3 Salk. 353; Ames' Cases, 135.
[2] Barrett *v.* Barrett, 2 Rol. 350.

A *v.* X. Action of replevin. X makes conusance that the seizure was for rent in arrear. A pleads that the taking was of X's own wrong; *absque hoc* that rent was in arrear. Special demurrer. The plea is bad; it amounts to the traverse *rien en arrere,* which is the regular traverse to an avowry or conusance where the plaintiff wishes to deny that rent was in arrear.[1]

Section V.— Replication de Injuria.

§ **255.** The *replication de injuria* is a traverse of more general nature than the specific traverse, being used to deny, in general terms, the defendant's plea. Its fuller form is *de injuria sua propria absque tali causa* (of his own wrong without such cause). As its name indicates, this traverse can only be used by the plaintiff as a replication.[2]

Under the common-law system of pleading, a defendant could put in but one plea to the declaration of the plaintiff. A statute passed in the time of Anne (4 Anne, c. xvi., § 1) provided that the defendant might, "with the leave of the same court, plead as many several matters thereto as he shall think necessary for his defense." To meet this added advantage given to the defendant, the *replication de injuria* was originated, by which the plaintiff, in *certain forms of action* and in certain cases, was allowed to put in issue several material allegations in the defendant's plea.

§ **256.** The forms of action to which this replication was confined were trespass, trespass on the case,

[1] Horn *v.* Lewin, 2 Salk. 583; Ames' Cases, 135.

[2] Except in replevin, where, if used, it was called a *plea.*

replevin, and assumpsit. Again, the use of the replication in these forms of action was limited to cases where the plea consisted of a plea by way of confession and avoidance *in excuse*. Where the plea was the general issue, a specific traverse, or a plea by way of confession and avoidance *in discharge*, the replication could not be used.

A *v.* X. Action of trespass for seizing salt. X in his plea sets forth an act laying a duty on salt, and alleges that the salt was about to be exported without being weighed, and he (X) seized it, as an officer. Replication *de injuria*. A proper replication, as the plea is in excuse. This case shows that the statement in Crogate's Case,[1] that *de injuria* cannot be pleaded where the defendant justifies by authority of law, is erroneous.[2]

A *v.* X. Action of replevin for taking goods. Avowry, that X, as collector, seized the goods for non-payment of taxes. Plea, traverse *de injuria*. Special demurrer. The plea is good. This case established that the traverse *de injuria* could be used in replevin as a plea to an avowry or cognizance.[3]

A *v.* X. Action of assumpsit on a promissory note. Plea, that the note was obtained by fraud, of which A was aware. Replication, *de injuria*. Special demurrer. The replication is good. This case established that *de injuria* could be used in assumpsit.[4]

§ **257.** This traverse *de injuria* cannot be used where the plea consists of —

[1] 8 Reports, 66; Ames' Cases, 143.
[2] Chance *v.* Weeden, 2 Salk. 628; Ames' Cases, 146.
[3] Selby *v.* Bardons, 3 B. & Ad. 2; Ames' Cases, 155.
[4] Isaac *v.* Farrar, 1 M. & W. 65; Ames' Cases, 173.

(*a*). Matter of title or interest in land, as where, to an action of trespass *quare clausum,* the defendant pleads, in justification, that the land was his freehold; *i. e., liberum tenementum.* The great importance attached to a trial of title to land accounts for this. A specific traverse was regarded as necessary to put it in issue.

A *v.* X. Action of trespass for driving A's cattle. Plea, that M, the lord of the manor, granted a parcel of land in fee to D, that the right of common in adjoining land went with the said parcel; that A's cattle came upon the adjoining land; that X, by the command of D, drove them out. Replication, *de injuria.* The replication is bad; it extends to the whole plea, and thus puts in issue title.[1]

(*b*). Matters of record.

A *v.* X. Action of trespass for false imprisonment. X justifies by virtue of a writ, issued out of a court of record. Replication, *de injuria.* Held, bad on demurrer.[2]

(*c*). Where the defendant derives authority for the act alleged, either directly or indirectly, from the plaintiff.

A *v.* X. Action of trespass *quare clausum fregit.* Plea that X entered by the invitation of A. Replication, *de injuria.* Special demurrer. Replication improper.[3]

§ **258.** The replication *de injuria* will not put in issue immaterial matter. If there is immaterial matter contained in the plea, and a replication *de injuria*

[1] Crogate's Case, 8 Reports, 66; Ames' Cases, 143.
[2] Fursden *v.* Weeks, 3 Lev. 65; Ames' Cases, 145.
[3] Comyns' Dig. Pleader, F. 22.

is put in, it will extend only to the material allegations in the plea.

A *v.* X. Action of trespass, assault and battery. Plea, that X *was seised of the rectory of D in fee;* that X injured A in defense of his tithe of corn, which A was about to carry away. Replication, *de injuria.* Special demurrer. Replication good, for it will not put in issue title, since the allegation of title was immaterial.[1]

A *v.* X. Action of trespass for assault and battery. Plea, that A was the apprentice of X and conducted himself improperly, wherefore X *moderately* chastised him. Replication, *de injuria.* Issue joined. A cannot show, under this replication, that X used excessive violence. *Prima facie* X had the right to chastise A, and the excess should have been replied affirmatively by A. The allegation of moderateness in the plea was immaterial.[2]

§ **259.** Nor can the replication *de injuria* be used where the plea of the defendant amounts to a traverse.

A *v.* X. Action of case for malicious prosecution. Plea, that A was indebted to X, and became a bankrupt, wherefore X sued out a commission of bankruptcy. Replication, *de injuria.* Special demurrer. The plea amounts to *not guilty,* as it is a denial of the *wrongful* prosecution; *de injuria* should not have been used.[3]

A *v.* X. Action of assumpsit on a bill of exchange. Plea, that X accepted in blank, and consented that A should draw the bill, payable at two months, yet A made it payable one month after date. Replication, *de in-*

[1] Taylor *v.* Markham, Cro. Jac. 224; Ames' Cases, 145.
[2] Penn *v.* Ward, 2 C. M. & R. 338; Ames' Cases, 170.
[3] O'brien *v.* Saxon, 2 B. & C. 908; Ames' Cases, 153.

juria. Special demurrer. Replication improperly used. The plea amounts to *non assumpsit.*[1]

§ **260.** Nor can the replication *de injuria* be used where the defendant puts in a plea of set-off, for a set-off is not matter in excuse, but is a cross-demand made by the defendant.

A *v.* X. Action of debt, goods sold and delivered. Plea, that A was an undisclosed principal, and sold the goods through M, and that a debt was due from M to X. Replication, *de injuria.* Special demurrer. Replication improperly used. Plea, not in excuse.[2]

§ **261.** The replication *de injuria* extends, when used, to the whole of the defendant's plea, and puts in issue all the material allegations in it.[3] But the plaintiff may expressly *except and admit* those parts to which he does not wish the traverse to apply, and then it will apply only to the remainder. This the plaintiff usually does when part of the plea is matter to which *de injuria* is inadmissible.

A *v.* X. Action of assumpsit on a contract by which X, the owner of the ship, agreed to allow A to perform the duties of second mate, and pay him therefor, alleging a refusal by X to allow him to perform his duties. Plea, that on the voyage M, the captain, died, and S, by his right as first mate, assumed the duties of captain, and that A was guilty of mutiny. Replication. True it is that S exercised the duties of captain, as in the plea mentioned, but *de injuria* as to the residue of the plea. A, having admitted S's capacity as captain, cannot show that it was limited; *de injuria* applies only to the mutiny.[4]

[1] Fisher *v.* Wood, 4 Dowl. N. S. 54; Ames' Cases, 177.
[2] Salter *v.* Purchell, 1 Q. B. 197; Ames' Cases, 178.
[3] Crogate's Case, 8 Rep. 66; Ames' Cases, 143.
[4] Penno *v.* Bennett, 3 Gale & Dav. 54.

CHAPTER V.

DUPLICITY.

§ **262.** One of the main objects of the system of pleading which prevailed at common law was to present the case to the jury in as simple a form as possible. The idea was that the minds of the jury must not be perplexed by numerous issues, but that the case must go before them upon a single question of fact. The rule against duplicity was one of the means by which this end was accomplished. It was held that a pleading was defective which was double — *i. e.,* which contained more than a single cause of action or defense.[1]

Where a declaration stated two or more distinct grounds to support the same claim, or where a plea, replication, or rejoinder contained two or more distinct answers to the matter alleged in the preceding pleading, the rule against duplicity was violated. The defect could be taken advantage of by a special demurrer.

A *v.* X. Action of assumpsit. The declaration alleges an agreement by X to pay one hundred dollars for a horse, in consideration of A's agreement to sell it to him, with alternative conditions, either that the horse should be delivered by such a day, or that A should break him to harness. A alleges that he broke

1 While several causes of action may, under the modern systems of pleading, be joined, each must be in a separate count. If in a single count two causes of action are alleged, a declaration is bad on special demurrer. Cohen *v.* Home Ins. Co., 95 Atl. 912 (Del.).

the horse to harness, and delivered him by the required day, and alleges as a breach that X refused to pay him the $100. Special demurrer. The declaration is double; the performance of either condition precedent would have given him a right of action.

A *v.* X. Action of debt upon a bond, with condition to abide by an award if the award was made and delivered by such a day. Plea, no award made or delivered by the day. Special demurrer. Plea, double; a single denial, either of the making or of the delivering of the award, would have sufficed to defeat the declaration.[1]

A *v.* X. Action of debt on a bond. Condition, the payment by X of a certain sum at two fixed days. Plea, that X paid accordingly. Replication, that X has not paid accordingly. Replication, double; a denial of payment at one day would have sustained A's case.[2]

A *v.* X. Action of *indebitatus assumpsit.* The declaration alleges X was the drawer of a bill of exchange on M; that A was the holder; that the bill was presented for acceptance, and dishonored; that the bill was presented later for payment, and dishonored; of all of which X had notice; and, in consideration of the premises, promised to pay A the amount of the bill on request. Special demurrer, for duplicity. The declaration was held good. On the view that the liability of the drawer arises absolutely upon the first dishonor, it would seem that the declaration is double; for, then, either dishonor *without the other* would furnish a ground for the implied promise.[3]

[1] Anon., Brooke's Abr., Title, Double Plea, pl. 90; Ames' Cases, 185.

[2] Saunders *v.* Crawley, 1 Rolle, 112; Ames' Cases, 186.

[3] Galway *v.* Rose, 6 M. & W. 291; Ames' Cases, 204.

A *v.* X. Action of assumpsit on a bill of exchange. Plea, that X accepted the bill while he was an infant, and left it blank as to date; that A altered the bill by inserting a date as if given after X became of age; that X never assented to it. Special demurrer, for duplicity. The plea is good. It amounts simply to a plea of infancy.[1]

§ **263.** As a rule of common-law pleading this rule against duplicity, it is conceived, is without exception.

It has been said[2] that a defense pleaded as a "necessary inducement" to another defense will not operate to make a pleading double. There is no foundation for this alleged exception. Dame Audley's case,[3] which is cited as the authority for it, does not support it. The case was one of detinue brought by Dame Audley, a married woman; the defendant pleaded the marriage of the plaintiff to Lord Audley after the bailment, and a release by him. In no case could this matter constitute more than a single defense; for —

(*a*). If the detainer took place *after* the marriage, the marriage was a complete and the only defense; the allegation of release was immaterial as against the plaintiff; for, upon marriage, the property in the goods passed to the husband, and no right of action ever vested in the plaintiff.

(*b*). If the detainer took place *before* marriage, the marriage itself was no defense, since, at the time of the marriage, Dame Audley possessed simply a chose

[1] Harrison *v.* Cotgreave, 5 D. & L. 169; Ames' Cases, 204.
[2] Stephens, Pleading, 260.
[3] Moore, 25; Ames' Cases, 185.

in action, and if the husband had not reduced the chose in action into possession, or released it, it would still remain in the plaintiff. The release, therefore, was the only defense.

It will be seen, therefore, that in no case can the plea amount to more than a *single* defense, and there is no ground for the alleged exception.

§ **264.** It is sometimes stated that a replication containing two distinct averments will not be bad for duplicity if the defendant cannot tender issue upon both without departing from his plea, thus seemingly presenting an exception to the general rule. The fact is, however, that in such a case one of the averments will always be mere surplusage, and the replication could thus in no way be double.

A *v.* X. Action of debt on a bond. The condition of the bond was that X should pay A forty pounds a year as long as X should enjoy a certain office. Plea, that the office was granted for three lives, and so long X enjoyed it, and paid the forty pounds yearly so long. Replication, that X enjoyed the office longer, and that he had not paid the money for that longer time. Special demurrer, for duplicity. Replication not double. The second allegation is surplusage.[1]

§ **265.** Duplicity is a formal defect, and must be taken advantage of by special demurrer.[2] Hence, a pleading bad for duplicity, once pleaded to, cannot be

[1] Gaile *v.* Betts, 3 Salk. 142; Ames' Cases, 186.

[2] Euer, Doctrina Placitandi (1667), 118; Saunders *v.* Crawley, 1 Rolles, 112.

afterward challenged on that ground, and is said to be cured.

A *v.* X. Action of debt on a penal bill (an obligation similar to a bond, but differing from it in that plaintiff was required to allege the non-performance of conditions, instead of defendant alleging their performance). The condition was that X should pay ten shillings on June 11, ten shillings on July 10, etc. A alleges that X did not pay the sums *upon the several days.* Plea, that X paid ten shillings on June 11. Replication, that X did not pay it. Demurrer. The declaration is double; the allegation of a single default in payment would have been sufficient, but it is too late for X to take advantage of this, and, as the plea is bad in substance, A has judgment.[1]

§ **266.** Mere surplusage will not make a pleading double.

A *v.* X. Action of trespass *quare clausum fregit.* Plea, that X has right of common in the close for his cattle, and that the trespassing cattle were commonable cattle. Replication denies (1) that the cattle were X's own cattle; (2) that they were levant and couchant; (3) that they were commonable cattle. Special demurrer, for duplicity. The replication is good; the allegations that the cattle were X's cattle, levant and couchant, etc., are unnecessary, as they are implied in the allegation of commonability; hence the denials of them in the replication are mere surplusage; the denial of commonability is sufficient.[2]

A *v.* X. Action of debt on a promissory note. The declaration alleges that X made his note to A payable

1 Humphreys *v.* Bethily, 2 Vent. 198, 222; Ames' Cases, 187.
2 Robinson *v.* Rayley, 1 Burrow, 316; Ames' Cases, 188.

March 25, 1845, and, the note falling due, X promised to pay A the amount on request. Special demurrer for duplicity. The latter part of the declaration is mere surplusage. A promise to do what one is already bound to do is void.[1]

A *v.* X. Action of debt. Plea in abatement, that the writ "at the time it was put into the officer's hands for service, and at the time when it was served, contained no count or declaration." Special demurrer, for duplicity. The plea is good; the first allegation is surplusage; if the writ contained a count at the time it *was served,* it was good.[2]

§ **267.** Matter which is good in substance, although pleaded in the wrong form, will render a pleading double.

A *v.* X. An action of assumpsit on a bill of exchange. Plea, that X was imprisoned, and accepted the bill under duress; that he never received any consideration for the acceptance. Special demurrer, for duplicity. The plea is double; the second part is a separate defense; it is ill-pleaded, as it amounts to *non assumpsit.* (The court treated it thus, and the principle, as far as the rule against duplicity is concerned, is correct; in reality, the second part is no defense, as a bill or note requires no consideration.)[3]

§ **268.** Where a defense is made up of a number of separate allegations, each material to the defense, a traverse of a single allegation, if sustained by the proof, will break down the whole defense; hence, a replication

[1] Shepherd *v.* Shepherd, 3 D. & L. 199; Ames' Cases, 202.
[2] Rathbone *v.* Rathbone, 5 Pick. 221; Ames' Cases, 207.
[3] Stephens *v.* Underwood, 4 Bing. N. C. 655; Ames' Cases, 192.

traversing more than one will be bad for duplicity. The case of Saunders *v.* Crawley [1] presents an illustration of this.

§ **269.** Where a replication *de injuria* is pleaded to a plea which contains two distinct defenses, and which would clearly be bad for duplicity, the replication is not double; for it must be construed as a separate traverse to each defense.

A *v.* X. Action of assumpsit against an acceptor of a bill of exchange. Plea, that X accepted for the accommodation of M, and that, when the bill became due, M delivered to A another bill in payment (which would be one complete defense); that A agreed with M not to sue upon the bill which X had accepted. (Such an agreement discharges an accommodation acceptor, and would be a second defense.) Replication, *de injuria.* Special demurrer, assigning for cause that the replication is double. The plea is clearly double; but A replies instead of demurring, and the replication must be considered as a separate traverse to each defense, and hence not double.[2]

[1] 1 Rolle, 112; Ames' Cases, 186; *ante*, p. 166.
[2] Reynolds *v.* Blackburn, 7 A. & E. 161; Ames' Cases, 161.

CHAPTER VI.

DEPARTURE.

§ **270.** A *departure* is a shifting of position by one of the parties to an action in his pleadings; an abandonment of the ground first taken by the declaration or plea for another in a subsequent pleading. Neither party is permitted to depart in this way from the ground which he first takes in his pleading, "for this is to Say and Unsay which the law doth not allow and Pleas must be plain and certain."[1] If he does, the *departure* will be fatal to his pleading.

A *v.* X. Action of debt on a bond. The condition of the bond was that X, the lessee, at every cutting of wood, should make a fence. Plea, that X had not felled any wood. Replication, that X felled two acres of wood and did not make any fence. Rejoinder, that X made a fence. Demurrer. The rejoinder is bad, as it contains an entirely different defense from that contained in the plea and is a departure from the plea.[2]

A *v.* X. Action of debt on a bond. The condition of the bond was that X should save A harmless from the cost of bringing up a certain child. Plea, that A

[1] Regula Placitandi, p. 111, and at p. 112 the following succinct rule: "So such party must take heed of the ordering of the matter of his pleading lest his Replication vary and differ from his Count or his Rejoinder from his Bar: For this is not sufferable, and is called a Departure in Pleading when the Second Plea doth contain matter not pursuant to the former and which does not fortifie the same."

[2] Anon., Dyer, 253, pl. 101; Ames' Cases, 208.

was not burdened with such expense. Replication, that A, for a month, provided maintenance for the child. Rejoinder, that X offered to support it, but A refused to let him. Demurrer. The rejoinder is a departure from the plea, and bad on that account.[1]

A *v.* X. Action of replevin for taking *goods and chattels,* to wit, one lime-kiln. Avowry, that the taking was for rent in arrear. Plea, that the lime-kiln was affixed to the freehold, and, by law, was exempt from distress for rent. Demurrer. The plea is a departure from the declaration, which treated the lime-kiln as a chattel, and is bad on that account.[2]

A *v.* X. Action of debt on a bond. The condition of the bond was performance of certain covenants. Plea, performance of the covenants. Replication, that one covenant was for the payment of rent; and that £10 was in arrear on a certain day. Rejoinder, that X tendered the rent to A, and A refused it. Demurrer. The rejoinder is a departure from the plea, and bad on that account.[3]

§ **271.** Departure is a fault which may be taken advantage of on general demurrer.

Where the departure is from the declaration, *i. e.,* in the replication, it seems proper to regard it as a defect in substance; for, if the plaintiff recovers at all, he must always recover on the cause of action as stated in the declaration. When, therefore, he abandons his declaration and states a new cause of action in the replication, it is evident judgment cannot be given for

[1] Richards *v.* Hodges, 2 Saunders' 83; Ames' Cases, 210.
[2] Niblet *v.* Smith, 4 T. R. 504; Ames' Cases, 214.
[3] Winchelsea *v.* Higden, 2 Barnardiston, 193; Ames' Cases, 213.

him; on the face of the record, he has abandoned his declaration, and cannot claim judgment; a general demurrer opens up the whole record, hence departure from the declaration is rightly held fatal on general demurrer.

§ **272.** When, however, the departure is from the plea, *i. e.*, in the rejoinder, there seems to be no valid reason for holding the defendant's pleadings bad on general demurrer; no reason, in fact, why the defendant should not answer the matter in the replication by a new defense. However, the rule is well settled that, if he does, the rejoinder will be bad on *general* demurrer, although, if a defect at all, it is obviously but a fault in form.

§ **273.** Where the declaration is made up wholly of irrelevant matter, and discloses no cause of action, a replication stating a good cause of action will be a departure.

A *v.* X. Action of assumpsit. The declaration alleges that X promised to give A $100, and states as a breach that he did not give it, but states no consideration. Plea, that X was an infant when he made the promise. Replication, that X made the promise in consideration that A would furnish him with meat and groceries, and that A had furnished them. Demurrer. The replication is a departure from the declaration, which showed no binding promise for want of a consideration.

It is not, in cases like the above, necessary to apply the rule against departure. In fact, it is scarcely ac-

curate to do so. There is really no departure in such a case, for there is no abandoning of a previous ground. The true reason why judgment goes against the plaintiff is that no cause of action has been stated in his declaration, and it is, therefore, bad on general demurrer, whether that demurrer comes after the declaration or after the replication.

§ **274.** Where the declaration is framed in contract, and the replication sets forth matter which might sustain an action of tort, there is a departure.

A *v.* X. Action of debt for goods sold and delivered. Plea, that X was an infant at the time of contracting the debt. Replication, that X fraudulently represented to A that he was of full age, and thereby obtained the goods. Demurrer. The replication is a departure from the declaration; it discloses matter for an action of tort.[1]

§ **275**. Where the plaintiff relies upon a common-law right, and the defendant sets up a *prima facie* defense,— *e. g.,* act of Parliament,— the plaintiff can, of course, reply any matters which tend to remove the defense, and support his claim on the ground taken in the declaration.

A *v.* X. Action of case. The declaration alleges that X built an embankment on his land, which caused water to flow down against A's house and damaged it. Plea, that the embankment was built by X under an act of Parliament. Replication, that the flow of water was caused by the negligent way in which the embank-

[1] Bartlett *v.* Wells, 1 B. & S. 836; Ames Cases, 222.

ment was built. Demurrer. Replication is no departure.[1]

§ **276.** In general, it may be said that where the subsequent pleading merely supports and fortifies the preceding pleading of the same party, there will be no departure.

A *v.* X. Action of covenant on an agreement by X to serve A as an apprentice. Plea, infancy. Replication, that by the custom of London infants can bind themselves as apprentices. Demurrer. There is no departure here, and the replication is good; it shows that the agreement sued on is binding.[2]

A *v.* X. Action of debt on a bond. The condition of the bond was the performance of a covenant to account to A for all moneys received by X. Plea, covenant performed. Replication, that on a certain day £26 came into X's possession, for which he has not accounted. Rejoinder, that certain burglars broke in the counting-house and stole it, and this X told A. Demurrer. No departure; the rejoinder confirms the statement in the plea that X performed his covenant to account.[3]

A *v.* X. Action of debt on a bond. The condition of the bond was that X was to save A harmless from liability to pay for any tonnage of coal due to M. Plea, that A was not damnified. Replication, that M distrained for tonnage due him. Rejoinder, that nothing was due M for tonnage. Demurrer. No departure; if nothing was in fact due M, A was under no liability

[1] Brine *v.* Great Western Ry. Co., 2 B. & S. 402; Ames' Cases, 224.

[2] Mole *v.* Wallis, 1 Lev. 81; Ames' Cases, 204.

[3] Vere *v.* Smith, 2 Lev. 5; Ames' Cases, 211.

to pay him, and the condition of the bond was not broken; the rejoinder merely fortifies the plea.[1]

§ **277.** Where a party in a subsequent pleading changes a point, which was immaterial in his former pleading, there will be no departure. In a somewhat contradictory form, the rule has been stated thus: Departure from an immaterial averment is no *departure*. The meaning is, that it is not such a departure as will render the pleading bad.

A *v.* X. Action of *indebitatus assumpsit,* for goods sold on Jan. 16, 1706. Plea, statute of limitations, that the action did not accrue within six years. Replication, setting forth that the suit was commenced on Jan. 23, 1713, and alleging that the cause of action arose within six years before. Demurrer. There is no departure, though the replication shows that goods must have been sold on a different date from that stated in the declaration; the allegation of the exact date is immaterial.[2]

A *v.* X. Action of trover. The declaration alleges that A was "lawfully possessed of the goods as of *his own property.*" Plea, X, as sheriff, took the goods in execution. Replication, that M deposited the goods with A for repairs, and that A had a lien on them for work and labor. Demurrer. No departure. Allegation of *property* immaterial.[3]

[1] Owen *v.* Reynolds, Fortescue, 341; Ames' Cases, 213.
[2] Cole *v.* Hawkins, 1 Strange, 21; Ames' Cases, 212.
[3] Legg *v.* Evans 6 M. & W. 36; Ames' Cases, 220.

CHAPTER VII.

NEW ASSIGNMENT.

§ **278.** The rule which required a new assignment in certain cases was another of the rules of common-law pleading directed to the simplification of the issues.

Where the plaintiff's declaration was framed in terms so general, that the defendant might presumably be in some doubt as to the plaintiff's cause of complaint, he was permitted to misconceive (though in legal contemplation unwittingly) the claim of the plaintiff, and to apply his plea to a different matter from that which the plaintiff had in view; the plaintiff was then compelled to *new assign* — *i. e.,* state more definitely his cause of complaint. An able treatment of new assignment will be found in Justice Blackstone's opinion in the case of Martin *v.* Kesterton.[1]

§ **279.** A new assignment can be used only by the plaintiff, and by him only in his replication. It is in the nature of a new declaration, stating that the defendant has not, in his plea, rightly understood, or answered to, the cause of action which the plaintiff meant to urge, and stating in more definite terms just what that cause of action is. The pleadings then proceed as if there had been no such misunderstanding between the parties

[1] 2 Bl. 1089; Ames' Cases, 234.

§ **280.** A new assignment, being in the nature of a declaration, does not in any sense admit the matter stated in the defendant's plea to be true, but merely passes it over in silence.

A *v.* X. Action of trespass for breaking and entering A's house. Plea, that M held a house under lease from X; that a year's rent was in arrear; that, to prevent X from distraining, M carried his goods to A's house; that X entered under a search warrant. Replication, new assignment that A declares for a trespass upon another and different part of the day. X pleads the same defense as before. Replication, *de injuria.* X proves that he entered as stated in the plea, but gives no proof of the lease to M, nor of rent in arrears, claiming these facts are admitted by the *new assignment.* X must prove these facts the same as if there had been no new assignment.[1]

§ **281.** If the declaration alleges but a single act on the part of the defendant, the plaintiff cannot both reply to the defendant's plea and also new assign.

A *v.* X. Action of trespass *quare clausum fregit.* Plea, that X had a right of way over the close. Replication, traversing the right of way and new assignment, that the trespass complained of was *extra viam.* Special demurrer. The replication is bad. "Either the plaintiff should not have traversed or not new assigned. It was at his option which to do." [2]

§ **282.** When the single act alleged is stated in definite terms, so as to make it plain to the defendant

[1] Norman *v.* Westcombe, 6 L. J. R. Ex. 164; Ames' Cases, 246.

[2] Spencer *v.* Bemis, 46 Vermont, 29; *contra*, Loweth *v.* Smith, 2 M. & W. 582, per Parke, B.; Ames' Cases, 259.

just what is meant, the plaintiff cannot new assign, unless he states another and a different cause of action, and that would be a departure.

A *v.* X. Action of trespass for stopping A's cart on Oct. 17, 1815. Plea, that A was wrongly taking turf from M's close, and that X, as servant, stopped him. Replication, *de injuria* and *new assignment,* that the trespass complained of was on another day. New assignment improper; the plea answers the single act alleged.[1]

§ **283.** Where the plaintiff has alleged several acts on the part of the defendant, and the defendant in his plea has answered some of them, but missed others, the plaintiff may plead to those which the defendant has answered, and new assign as to the rest.

A *v.* X. Action of trespass, alleging several different trespasses. Plea, that the alleged trespasses were committed in Crable House, Black Acre, and White Acre, and that they are all X's freehold. Replication, traversing that Crable House and Black Acre are X's freehold, and *new assignment* that one of the trespasses complained of was committed in another place and not in White Acre. Demurrer. Replication good.[2]

§ **284.** Where the act alleged is one divisible in time, and the defendant has only answered to a part of it, the plaintiff may reply to that part, and new assign as to the remaining part.

A *v.* X. Action of trespass for breaking and entering A's house and staying four days. Plea, a justifi-

[1] Taylor *v.* Smith, 7 Taunton, 156; Ames' Cases, 238.
[2] Prettyman *v.* Lawrence, Cro. Eliz. 812; Ames' Cases, 233.

cation by leave and license of A to take certain goods. Replication, traversing leave and license and *new assignment,* that A declared for the staying in for three days longer than was necessary to take said goods. Special demurrer. Replication good.[1]

§ **285.** Where the plaintiff has the opportunity to both reply and new assign to the defendant's plea, if he does not new assign, but simply takes issue on the plea, he will be confined, in his proof, to those acts, or that part of the act, to which the defendant has correctly pleaded.

A *v.* X. Action of trespass for breaking and entering A's house, staying therein three weeks, and carrying off goods. Plea, (1) not guilty; (2) as to breaking and entering and staying in twenty-four hours, and carrying off goods, a justification under a writ. Replication, *de injuria.* X proved his justification, but it appeared he continued in the house more than twenty-four hours; and A claimed, on this proof, he was entitled to judgment for the trespass beyond twenty-four hours. A is not entitled to judgment; he should have *new assigned* as to the excess.[2]

A *v.* X. Action of debt for £73 for work, labor, and materials. Plea, that the work was done and materials provided under a certain contract; that A agreed to accept a certain sum in payment; that X paid it. Replication, traversing that A received the sum of money in full payment, as in the plea mentioned. A wishes to give evidence of extra work outside of the contract. A cannot do it, he should have *new assigned.*[3]

[1] Loweth *v.* Smith, 12 M. & W. 582; Ames' Cases, 257.
[2] Monprivatt *v.* Smith, 2 Campbell, 175; Ames' Cases, 235.
[3] Rogers *v.* Custance, 1 Q. B. 77; Ames' Cases, 251.

§ **286.** Wherever issue is taken upon the plea, if the defendant can prove it as *he* meant it, even though the plaintiff had an entirely different idea, the proof will be sufficient to support the plea, and the plaintiff will not be allowed to show that the plea is no answer to what he meant in his declaration, for in such case he should have new assigned.

A *v.* X. Action of trespass for breaking and entering A's close, called the Fold-yard. Plea, that said close is X's freehold. Replication, traversing the plea. It appeared that A had a close called Fold-yard, and that a trespass had been committed therein, and that X also had a close called Fold-yard in the same parish. X should have judgment, for he has proved his plea. Held *contra,* but decision seems wrong on principle.[1]

A *v.* X. Action of debt for £10 for goods sold and delivered, and £10 for work and labor. Plea, that X paid A a large sum of money in full satisfaction of the debt. Replication, traversing the plea. X proves a payment of a sum larger than the debt claimed, but A shows that the work amounted to more than was paid, and there is a balance due. X is entitled to judgment; he has proved payment of the debt to which he applied his plea. Decision *contra,* but erroneous.[2]

A *v.* X. Action of trespass for breaking and entering A's close and tearing down his fences. Plea, that there was a public foot-path over the close; that A obstructed it, and X pulled down the obstruction. Replication, traversing the plea. X proves public way

[1] Cocker *v.* Crompton, 1 B. & C. 489; Ames' Cases, 239.

[2] Freeman *v.* Crafts, 4 M. & W. 4; Ames' Cases, 250; but see Austin *v.* Morse, 8 Wend. 476; Ellet *v.* Pullen, 7 Halst. 357; Collum *v.* Andrews, 6 Watts, 516; Palmer *v.* Tuttle, 39 N. H. 488.

over the land from east to west. A admitted such footpath, but offered to prove X went over the land in a different way: to do this A should have new assigned. X has proved his plea and is entitled to judgment.[1]

§ **287.** The case of Monkman *v.* Shepherdson[2] involves a consideration of both the rule as to duplicity and the rule as to new assignment. A declared in debt against X for £10 for wages. X pleaded that A had forfeited his wages, according to the agreement between them, by voluntarily becoming drunk. A replied that X had discharged him from such forfeiture, and *new assigned* that £7 of the £10 became due after said drunkenness. There was a special demurrer for duplicity. Held, that the replication was good, the new assignment being proper. It would seem, however, that the new assignment amounts simply to a traverse, as to £7, of the forfeiture mentioned in the plea, and hence is bad in form; but since the replication of discharge must be construed as applying only to the remaining £3, there is no *duplicity* in the replication.

[1] Huddart *v.* Rigby, 5 L. R. Q. B. 139; Ames' Cases, 260.
[2] 11 A. & E. 411; Ames' Cases, 255.

CHAPAER VIII.

MOTIONS BASED ON THE PLEADINGS.

SECTION I.— ARREST OF JUDGMENT.

§ **288.** It often happens that a verdict is found for the plaintiff on pleadings which the defendant thinks insufficient in substance. It being too late to bring the question of their validity before the court by demurrer, the means adopted by the defendant to accomplish the same object is what is known as a *motion in arrest of judgment.* Like a demurrer, such a motion opens the whole record; and, if it appears on its face that the pleadings of the plaintiff are bad *in substance,* judgment will be arrested.

A *v.* X. A alleges in his declaration that X promised to sell and deliver to A 266 hogsheads of tobacco at a certain price if A would agree to purchase them and would give notice thereof to the defendant before the hour of four in the afternoon; that A did agree to purchase and gave notice before four o'clock. After verdict for A, X moved in arrest of judgment on the ground the declaration stated no consideration. The declaration is bad in substance, as the promise alleged as the consideration is subsequent in time to the promise of X, and judgment will be arrested.[1]

§ **289.** Where a defect in substance is cured by allegations in the answering pleading, the action of the

[1] Cooke *v.* Oxley, 3 D. & E. 653; Livingston *v.* Rogers, 1 Caines, 583.

court will be the same on motion in arrest of judgment as it would be on demurrer — *i. e.,* it will refuse to allow advantage to be taken of the defect, and judgment will not be arrested.

A *v.* X. Action of trespass. The declaration alleges the taking of *a* hook, but does not say *A's* hook, nor that it was in A's possession. Plea, that X had a right of way over A's land; that he was passing there, and took the hook *out of A's hands* to prevent A from injuring him. Replication, traverse of the right of way. Issue joined. Verdict for A. Judgment will not be arrested, for the omission to allege possession is cured by the allegation in the plea.[1]

§ **290.** Formerly, it was customary to arrest judgment on a merely *formal* defect; but, since the various statutes, known as statutes of jeofails, some error in substance must appear.

When judgment is arrested, the case stops where it is, each party pays his own costs, and the plaintiff, if he wishes to prosecute the suit, must begin anew.

§ **291.** Where the declaration contains several counts, some of which are bad in substance, while others present a sufficient cause of action, and the jury give a general verdict, with general damages, for the plaintiff, a motion in arrest of judgment will not be granted. In such case the plaintiff is entitled to judgment on the good counts, and the error is one that the jury have made in not specifying upon what counts the verdict was given. It is not just, therefore, to

[1] Brooke *v.* Brooke, Siderfin, 184; Ames' Cases, 266.

compel the plaintiff to begin his suit anew. A *venire de novo,* which simply summons a new jury, will, however, be awarded.[1]

§ **292.** Where the plaintiff in his replication traverses an immaterial point in the plea, and, upon issue being taken thereon, obtains a verdict, judgment will not be arrested, but a *repleader* will be awarded.

There is no reason, on principle, why, in such a case, judgment should not be arrested. The reason given is that the plaintiff may have a better answer to the plea, and ought to have a chance to bring it forward. But, if the traverse had been demurred to, judgment would have been given for the defendant without regard to any better answer which the plaintiff might have; and why, in the case of arrest of judgment, should such a consideration come in? The fact that the plaintiff did *not* bring forward a better answer to the plea is, in the eyes of the law, a sufficient acknowledgment that he has none.

A *v.* X. Action of assumpsit for money had and received. Plea, that A and M were partners; that with A's consent M dealt with certain goods as his own property; that the goods were left with X to be sold; that it was agreed between M and X that X, out of the proceeds, should reimburse himself for money lent to M. Replication, traversing that A permitted M to deal with the property as his own. Issue joined. Verdict for A. Though the issue is immaterial, judgment will not be arrested, but a repleader awarded.[2]

1 Leach *v.* Thomas, 2 M. & W. 427; Ames' Cases, 266.
2 Gordon *v.* Ellis, 7 M. & G. 607; Ames' Cases, 268.

§ **293.** In general, errors in *form* are no ground for arresting judgment. There is one case, however, which stands upon a peculiar footing. This is the action of debt on a bond conditioned for the performance of an award. Where the plea is in excuse, "No award made," and the replication sets forth an award, but assigns no breach, the replication is defective.[1] It has been shown that the assignment of a breach is necessary in the replication. Now, whether it be said that its omission is a defect in substance, or merely in form, it certainly can be taken advantage of on a motion in arrest of judgment. If it be regarded as an error in substance, it causes no exception to the rule that judgment will be arrested only for an error in substance; but it certainly is rather an anomalous state of affairs to say that an allegation which cannot be traversed is matter of substance. If it be regarded as an error in form, it causes a most striking exception to the rule above stated.

Section II.— Non-Obstante Veredicto.

§ **294.** Where a party thinks that, on the pleadings, he is entitled to immediate judgment, though a verdict has been given for his opponent, he moves for judgment *non-obstante veredicto* (notwithstanding the verdict).

§ **295.** The cases show the motion to have been made almost universally by the plaintiff; but it is

[1] Barrett *v.* Fletcher, Cro. Jac. 220; Ames' Cases, 265.

probable that either party may obtain judgment *non-obstante.*[1] There certainly seems to be no good reason why, if the defendant has set forth a good defense, and the plaintiff's replication confesses, but does not avoid it, he should not have judgment *non-obstante.* If either party may have judgment *non-obstante,* there seems to be no occasion for the motion in arrest of judgment; for the defendant has a much better expedient in the motion for judgment *non-obstante.*

§ **296.** The idea which gave rise to this motion was that, where the defendant confessed the plaintiff's cause of action, and gave no sufficient avoidance, there, whatever immaterial issue may have been joined and found for the defendant, the plaintiff was entitled in justice to the judgment.

A *v.* X. Action of case for slander. Plea, confesses the speaking of the words, and alleges an insufficient excuse. Replication, traverses the excuse. Verdict for A. X moves for an arrest of judgment. Though the traverse is immaterial, judgment will not be arrested, but will be for A on the confession in X's plea.[2]

§ **297.** The motion was originally granted only where the defendant *expressly confessed,* in the plea upon which the plaintiff sought judgment *non-obstante,* the plaintiff's cause of action, and gave no good avoidance.

[1] 14 Am. L. R. 494.

[2] Lacy *v.* Reynolds, Cro. Eliz. 214; Ames' Cases, 275.

A *v.* X. Action of assumpsit on a promissory note. Declaration alleges X made the note, and delivered it to M; that it was forfeited to the king; and that the king gave it to A. Plea, that the said note became due in M's hands, and the cause of action did not accrue within the six years next before the bringing of the action. Replication, traversing the plea. Verdict for X. A is entitled to judgment *non-obstante veredicto.* The king is not subject to the statute of limitations, and X has not alleged that six years have expired, exclusive of the time the king held the note.[1]

§ **298.** The scope of the motion was gradually extended to embrace those cases where the defendant, in any one of his pleas, confessed the cause of action, though there was no express confession in the plea upon which verdict had been given for the defendant, and upon which the plaintiff sought judgment *non-obstante.*

A *v.* X. Action of case for libel. X pleads several pleas setting up the truth as a justification. Replication, *de injuria.* Verdict for A on one plea and for X on the rest, but the issues on the latter were immaterial. Though some of the pleas did not confess the cause of action, A is entitled to judgment *non-obstante* upon these pleas, since the plea which raised a material issue and upon which verdict was in his favor was a sufficient confession.[2]

§ **299.** Then to cases where the plaintiff had obtained the verdict on some material traverse, while the defendant had succeeded on the immaterial issue.

[1] Lambert *v.* Taylor, 4 B. & C. 138; Ames' Cases, 276. See, also, Filliene *v.* Armstrong, 7 A. & E. 557.

[2] Goodburne *v.* Bowman, 9 Bing. 532; Ames' Cases, 278.

A *v.* X. Action of case for disobedience to a subpœna, refusing to appear as a witness in A's behalf. Plea, several traverses of material matter upon which A had a verdict, and a traverse that A had *a good cause of action* (conclusion of law), upon which X had a verdict. A is entitled to judgment *non-obstante.*[1]

§ **300.** On principle, the courts should have gone one step farther, and given judgment *non-obstante veredicto,* where there was a single immaterial traverse to the declaration upon which the defendant had obtained a verdict; for, what a party does not deny, he admits; and therefore, on the face of the pleadings, the action stands confessed, with no good avoidance. But the courts refused to take this final step.[2]

Section III.— Repleader.

§ **301.** Where the parties proceeded to trial upon some immaterial point raised by the form of the pleadings, and a verdict of the jury upon such point was had, the court was unable to award judgment for either party. The merits of the controversy were still undetermined. To remedy the situation the court awarded what was called a *repleader.*[3]

[1] Couling *v.* Coxe, 6 D. & L. 399; Ames' Cases, 283.

[2] Duke of Rutland *v.* Bagshawe, 19 L. J. R. Q. B. 284; Ames' Cases, 286.

[3] Euer, System of Pleading, 413. "For if by misconduct or inadvertance of the pleaders the issue be joined on a fact totally immaterial or insufficient to determine the right, so that the court, upon finding, cannot know for whom judgment ought to be given."

A *v.* X, as executor. Assumpsit. A alleges the testator promised, etc. X pleads that *he* (the executor) made no such promise. On issue joined, the verdict is for X. Repleader will be awarded, as the verdict is upon an immaterial issue.[1]

§ **302.** Either party may move that a *repleader* be awarded, or the court may award it without motion. If awarded, its effect is to compel the parties to begin their pleadings anew at the stage where the first immaterial pleading was placed on the record, and each party pays his own costs.[2] A repleader will be awarded only after verdict, and then ony in *certain* cases where the parties have gone to trial on an immaterial issue; *i. e.,* not in *all* cases of immaterial issue. Two further illustrations may be given where the relief was considered proper.

A. *v.* X. Action of debt for rent. Plea, that before the rent became due X assigned the term to M, of which A had notice. Replication, traversing notice. Verdict for X. Repleader awarded. The issue of notice is immaterial. Nothing discharges X except an agreement by A to the assignment. It would seem that A was entitled to judgment *non-obstante veredicto* had he moved it, unless the plea stated such agreement.[3]

A *v.* X. Action in a bond conditioned for the payment of money on or before December 5th. X pleads payment on December 5th. Replication traversing that the money was "paid on that day." Verdict for

[1] Anonymous, 2 Vent. 196.

[2] Staple *v.* Heydon, Modern, 1; Ames' Cases, 293.

[3] Sergeant *v.* Fairfax, 1 Lev. 32; Ames' Cases, 290; Witts v. Polehampton, 3 Salk. 305; Ames' Cases, 292.

A. Repleader awarded because the issue was immaterial. Payment *before* the day would have been a performance of the condition.[1]

§ **302.** When it is said that repleader will not be awarded in every case of immaterial issue, it is meant, to quote from Lord Mansfield's opinion, "that when the finding upon it does not *determine the right* the court *ought* to award a repleader, *unless* it appears from the whole record that no *manner* of *pleading* the matter could have availed."[2]

§ **303.** The courts will be very sure that the issue is immaterial before awarding a repleader.

A *v.* X. Action of trespass *quare clausum fregit,* and for taking three cows. Plea, that X leased the close to M, and entered and took the cows as a distress for rent in arrear. Replication, traversing that the cows were levant and couchant. Verdict for A. A repleader will not be granted, for levancy and couchancy might be material if X chased the cows on to the land liable to his distress, for then he could only take them damage-feasant, and levancy and couchancy would be material.[3]

§ **304.** It is difficult to understand what occasion either party had for moving for a repleader, since it would seem (on principle, at least) that a better expedient was always open to him. The following analysis will illustrate what is meant:

[1] Tryon *v.* Carter, 2 Strange, 994.
[2] Rex *v.* Phillips, 1 Burrows, 293, at p. 301.
[3] Kempe *v.* Crews, 1 Ld. Rmd. 167; Ames' Cases, 291.

Action of assumpsit by A v. *X.*

(I). Suppose the declaration states no valid cause of action; that the plea is an immaterial traverse; and that —

(*a*). Verdict is for A. X may then have an arrest of judgment, and there is certainly no occasion for a repleader.

(*b*). Verdict is for X. X then is entitled to judgment on the verdict. A can have nothing, for on the face of the pleadings no cause of action appears.

(II.). Suppose the declaration states a valid cause of action; that —

(1). The plea is an immaterial traverse, and that —

*(*a*). Verdict is for A. Then, on principle, A should have judgment on the verdict.

(*b*). Verdict is for X. Then, on principle, A should have judgment *non-obstante veredicto:* but such is not the law, and here seems to be the first occasion for a repleader.

(2). The plea confesses but does *not* avoid the cause of action; that the replication is an immaterial trav-

(*a*). Verdict is for A. Then A is entitled to judgment on the verdict, for even if —

erse; and that —

(*b*). Verdict is for X, A can have judgment *non-obstante veredicto.* Hence, there is no occasion for a repleader here.

(3). The plea confesses and avoids the cause of action; that the replication is an immaterial traverse, and that —

(*a*). Verdict is for A. Then, on principle, X should have judgment *non-obstante veredicto,* and may, at least, have an arrest of judgment.

*(*b*). Verdict is for X. Then, certainly, X should have judgment on the verdict.

There seems to be but one case, then, where a repleader is appropriate, and that simply because the courts have refused to go as far as they, on principle, might have gone in the giving of judgment *non-obstante veredicto.* If we adopt Chief Justice Tindal's view that "a repleader is rather the *act of the court,* where it sees that justice cannot be done without adopting that course," [1] we can easily conceive of the courts, in two other cases (see starred cases above), awarding a repleader on the ground that the party may have a better defense.

[1] Gordon *v.* Ellis, 7 M. & G. 607.

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