A

TREATISE

ON THE

PARTIES TO ACTIONS,

THE

FORMS OF ACTIONS,

AND

ON PLEADING.

WITH A SECOND AND THIRD VOLUME,

CONTAINING

PRECEDENTS OF PLEADINGS.

IN THREE VOLUMES.

VOL. I.

BY J. CHITTY, ESQ.

OF THE MIDDLE TEMPLE.

THIRD AMERICAN FROM THE SECOND LONDON EDITION,

WITH CORRECTIONS AND ADDITIONS,

BY JOHN A. DUNLAP.

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1819.

Eastern District of Pennsylvania, to wit:

BE IT REMEMBERED, That on the fifteenth day of December, in the forty-third year of the Independence of the United States of America, [L.S.] A. D 1818, ISAAC RILEY, of the said district, hath deposited in this Office the Title of a Book, the right whereof he claims as Proprietor, in the words following, to wit:

"A Treatise on the Parties to Actions, the Forms of Actions, and on Pleading. With a second and third volume, containing Precedents of Pleadings. In three volumes. Vol. I. By J. Chitty, Esq. of the Middle Temple. Third American from the Second London Edition, with corrections and additions, by John A. Dunlap."

In conformity to the Act of the Congress of the United States, intituled "An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned." And also to the Act, entitled, "An Act supplementary to an Act, entitled, "An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies during the times therein mentioned;" and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

D. CALDWELL,
Clerk of the Eastern District of Pennsylvania.

A TREATISE ON PLEADING
Joseph Chitty

Herndon's Lincoln, pages 323-4.
Weik's The Real Lincoln, pages 105-6.

Lincoln's own copy, inscribed "Lincoln & Herndon" and with signature of W. H. Herndon, is now owned by the Hist. Soc. of Penn. at Philadelphia, Pennsylvania.

H. E. Barker

DEDICATION.

TO THE RIGHT HONOURABLE

THOMAS, LORD ERSKINE,

&c. &c. &c.

My Lord,

Having been encouraged by your Lordship to undertake the following treatise, I now humbly beg leave to dedicate to you the result of my labours, and at the same time to express the deep sense which I entertain of the many favours received from your kindness, and in particular, the most gratifying mark of confidence, which you conferred, by honouring me with the professional tuition of your son. I beg to subscribe myself, with the greatest gratitude and respect,

My Lord,
Your Lordship's
Most obliged and
Obedient servant,
JOSEPH CHITTY.

Temple, 1st November,
A. D. 1811.

ADVERTISEMENT

TO THE

SECOND EDITION.

THE favourable reception of the First Edition of this Work, has induced me to endeavour to render the present still more worthy of the attention of the Public.

In the *first* volume, the chapter on the "*Parties to Actions*," the heads of which are indexed under that title, will be found to contain information peculiarly important to every branch of the profession; and the general view of *Pleading* comprised in the other chapters, is as essential to the Solicitor, as to Gentlemen more immediately concerned in preparing the pleadings.

In the *second* volume, a great number of additional Precedents are introduced, particularly of *Notices of Actions*, *Affidavits to hold to Bail*, *Proceedings by Special Original*, *&c.* The great number of counts for *common debts* in assumpsit, will be found useful in practice, as they are applicable either in præcipes or common declarations in assumpsit, or debt, or as descriptions of debts in affidavits to hold to bail, or

in pleas and notices of set-off; and as the law relative to each declaration, plea, and replication, is stated in the notes to the more special precedents, they will also be found generally useful.

In this edition all the recent decisions are incorporated, and those mistakes which occurred in the first have been corrected. The contents of the work will appear from a perusal of the Preface to the First Edition, and from the indexes to both volumes, and the Analytical Table to the Second Volume.

1*st November*, 1811.

PREFACE

TO THE FIRST EDITION.

IN submitting this treatise to the public it may not be improper to prefix a short prospectus or analytical view of its contents, by which the reader may be enabled to judge, how far the subject proposed to be considered may be worthy of his attention.

Upon the *practice* of the courts of common law, there are already before the public several very able treatises; but there is no work of any magnitude which points out, the *Parties* to Actions, or the *Forms of them*, or the *Pleadings therein;* and the very frequent defeats, in actions and defences, occasioned by mistakes in these points, sufficiently evince the utility of a practical work upon the subject; I have therefore been induced to submit the following pages to the profession.

In the *first* chapter, which relates to *The Parties* to an action, I have endeavoured to point out who should be made the plaintiffs and who the defendants, as well in actions on contracts as for torts, and not only with reference to the interest and liability

of the original parties, and the number of them, and whether standing in the situation of agents, joint-tenants, tenants in common, or partners, and who are to join or be joined; but also where there has been an assignment of interest, or change of credit, or survivorship between several, or death of all the contracting parties, or bankruptcy, insolvency, or marriage. The consequences of mistakes in the proper parties, and how they are to be taken advantage of, and when they are aided, are also pointed out.

In the *second* chapter are considered the *Form and the Particular Applicability of each Action;* the pleadings, judgment and costs therein in general; the consequences of mistake; the *Joinder* of different *forms* and of different *rights* of action; the consequences of *Misjoinder;* and the *Election* of the best remedy, where the plaintiff has the choice of several. In considering each personal action, viz. assumpsit, debt, covenant, detinue, case, trover, replevin, trespass and ejectment, I have endeavoured to confine my observations to the cases, where the action is sustainable, or when it is preferable to another remedy, without inquiring into the nature of rights, or of injuries, which would have been foreign to the object of this treatise(*a*). I have, however, in one instance, thought

(*a*) In many works, under the title of a particular action we find the nature of *rights* considered; as for instance under the head "Assumpsit," after stating that it lies on a bill of exchange, we find the whole law upon bills of exchange is collected. This is

it advisable to depart from this plan, in order the better to explain the distinction between the action of *trespass*, and that of *trespass on the case;* and for this purpose, I have endeavoured to state the distinctions between torts committed in fact, or in legal consideration, with and without force, and between torts immediate and consequential, and how far the legality of the original act, or the defendant's intention, may affect the form of action, and the difference arising from the circumstance of the defendant's having acted under colour of process. The consequences of mistake in the form of action are also stated.

The *Joinder* of different *Forms* and of different *Rights* of action, and the consequences of mistake, are of the greatest importance to the success of a cause, and I have therefore with some minuteness pointed out the particular instances of *joinder* which may be most likely to arise in practice.

In various cases, the plaintiff has an *Election* of several different forms of action for the same injury, and a judicious choice is so material, that it may frequently enable the plaintiff to enforce his claim, which would be defeated or delayed by the adoption of a different course; I have therefore stated several lead-

not a convenient mode of arranging the subject in a *pleading* point of view, where the object of inquiry is merely the application of the form of action and not the right.

ing points, which may direct the pleader in his choice of the various remedies.

In the *third* chapter, a few *General Rules relating to Pleading* are collected, and pursuing the definition of pleading, (viz. a statement in a *logical and legal form* of the *facts* of which the courts are not bound *ex officio* to take notice,) I have first pointed out, *what facts* are necessary to be stated, distinguishing those of which the court will *ex officio* take notice, without their being shown in pleading; and secondly, *the mode* of stating those facts, with reference to certainty, and other particulars; and thirdly, I have considered the *rules of construction*, concluding the chapter with the division of the parts of pleading.

The *fourth* chapter relates to the form and requisites of *the Præcipe*, when the plaintiff proceeds by special original, and of *the Declaration* in personal actions; and with respect to the latter, are stated, first, the *general requisites*, and secondly, the *different parts*, and *more particular requisites*, whether in actions founded on contracts or for torts. In *assumpsit*, the appropriate special and common counts are fully examined, and the structure of declarations in *debt*, and *covenant*, is separately and distinctly considered.

Actions in form *ex delicto* are so multifarious, that I have thought it better to refer the reader to the precedents, and notes in the second volume, than to attempt, in the first, to point out the structure of the

declaration, in *each particular* case; I have however considered the *general rules* to be observed in framing declarations in actions for torts, and which will be found to relate to the statement of; 1st, the matter or *thing* affected, 2dly, the plaintiff's *right* or interest, 3dly, the *injury*, and 4thly, the resulting *damages*.

The utility of *Several Counts* in the same declaration and the forms thereof, are also treated of in this chapter, which concludes with a summary of the instances, in which different defects in a declaration will be aided.

The *Claim* of *Conusance*, statement of the defendant's *Appearance*, and *Defence*, the *Demand* of *Oyer*, and statement of a Deed upon it, and the different descriptions of *Imparlances*, being connected with pleading, are examined in the *fifth* Chapter.

In the remaining chapters are considered in their natural order—*Pleas to the Jurisdiction and in Abatement*, and the proceedings thereon; pleas in *Bar* to the action, and *Avowries*, and *Cognizances* in replevin; *Replications*, and *New Assignments*, and pleas in bar to avowries and cognizances in replevin; *Rejoinders*, and the *subsequent Pleadings; Issues*, *Repleaders*, *Pleas Puis Darrein Continuance; Demurrers* and *Joinders in Demurrer*, and this volume concludes with a copious Index of the contents.

As the principal object of the *first* Volume is directed to the statement of the *General Rules* affecting pleading, I have thought it advisable in a Second Volume, to give *Precedents of the Pleadings* most likely to occur in practice, with notes. The contents of this Second Volume, will appear from the *Analytical Table prefixed*, and from the *Index* at the end of that Volume.

The forms of Courts, (being the commencements and conclusions of declarations in each court, and in particular actions,) are incorporated in the present edition; but as the precedents of declarations on Bills of Exchange, Cheques and Promissory Notes, are printed in the appendix of my work on Bills of Exchange, they are not given at length in the Second Volume. The counts for common debts in all the cases which ordinarily occur in practice, are given on account of their great utility; the statement of the subject matter of the debt in these precedents, not only serving in declarations in assumpsit, but also in debt on simple contract, pleas and notices of set-off, and in affidavits to hold to bail.

In stating different *titles* to real property, and the *conveyances* and other means by which such titles have been acquired, the pleader frequently has very consi-

derable difficulty; I have therefore given a great variety of precedents under this head. With respect to other special counts, and to pleas, replications, rejoinders, &c. I have endeavoured to give one or more of the most usual precedents under each head, and have in general, in the notes, referred to the precedents which may be found in print. It was impracticable to give a precedent for every case which might occur, but those contained in this volume may be readily applied to the particular circumstances of each case, or at least may assist in the structure of other pleadings; and though the student may derive some assistance from this collection, yet he must not thereby be induced to refrain from taking, or at least analysing other pleadings, according to the course which his own judgment or that of a friend, more experienced, may suggest.

The utility of a work of this description must depend on the mode in which the subject is arranged, the correctness of the positions supported by legal decisions, the selection of the best authorities, and the facility of access, by means of a full and accurate index. To these points therefore I have endeavoured to pay attention, and besides the reports which I have consulted, the reader is frequently referred to the Digests and Elementary writers. Indeed it was impracticable to write on a subject upon which the authors alluded to had touched, without occasionally finding

some parts pre-occupied, and the matter so ably treated of as to leave it open to me, to do little more than enlarge upon, and arrange such parts of the subject according to my own plan. When this has occurred, I have considered that it would be the most candid mode of acknowledging the assistance I have derived from these works, and at the same time most useful to the profession, if in the notes I referred to those authors in addition to the reported decisions, sanctioning my own view of the subject by the weight of their authority.

The kindness of my friends has so engaged me in professional avocations, that I have with difficulty prepared this work for publication, and the various interruptions which I have experienced, must, I fear, have occasioned some inaccuracies, for which, however, I hope the candour of the reader will make allowance.

Temple, 7th November,
A. D. 1808.

A

PRACTICAL TREATISE

ON

PLEADING.

*CHAPTER I. [*1]

OF THE PARTIES TO AN ACTION.

THERE are no rules connected with the science of pleading so important as those which relate to the persons who are to be the parties to the action; for if there be any mistake in this respect, the plaintiff is, in general, compellable to abandon his suit and to proceed *de novo*, after having incurred great expense: when, with respect to most other objections, they do not thus affect the proceeding *ab initio*, and occasion comparatively but small expense. The general rule is, that the action should be brought in the name of the party whose *legal* right has been affected, against the party who committed the injury(*a*), or by or against their *personal* representatives; and *therefore a correct [*2] knowledge of *legal* rights, and of *wrongs* remediable at *law*, will, in general, direct by and against whom the action should be brought. But as in the application of this rule, difficulties frequently occur, and as there are many particular rules relating to the *joinder* of persons in actions, and to the *mode* in which, and the *time* when, a mistake of parties should be objected to or be rectified, it is advisable before we consider the form of the action, and the pleadings therein, to take a concise view of these rules, which I shall consider under two general heads. *First*, when the action is in *form*[1] *ex contractu*, and *secondly*, when it

(*a*) Dawes *v.* Peck, 8 T. R. 332.—Anderson *v.* Martindale, 1 East, 501.

(1) The following note was inserted, at this place, by Mr. Chitty, in the former edition of his work: "A plaintiff frequently has an election to proceed even for a breach of an express contract, either in *assumpsit* or in case: and where the latter form of action is adopted, many of the rules as to the parties to the action, do not apply. See *Govett* v. *Radnidge*, 3 *East*, 70. *Buddle* v. *Willson*, 6 *T. R.* 373. *Samuel* v. *Judin*, in error, 6 *East*, 333, 335; and therefore I have considered the

is in *form ex delicto;* and under each of these heads I shall state, *first*, who are to be the plaintiffs, and, *secondly*, who are to be the defendants.

I. IN ACTIONS IN FORM EX CONTRACTU.

The rules which direct who are to be the parties to an action in form *ex contractu*, whether as plaintiffs or defendants, are to be considered, *first*, as between the *original* parties to the contract, and *secondly*, where there has been a *change* of parties, interest, or liability. And under the *first* head, with reference to the interest or liability of the parties, as whether legally, or only beneficially interested, or acting merely as agents, or standing in the situation of joint-tenants, tenants in common, partners, &c. and in the case of several contracting parties, who must or may join, or be joined; and under the *second* head, where there has been an assignment of interest or change of credit—survivorship between several—*death—bankruptcy—insolvency—or marriage. We will consider these rules, *first*, as they relate to *the plaintiffs in an action.*

[*3]

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In general the action on a contract, whether express or implied, or whether by parol or under seal, or of record, must be brought in the name of the party in whom the *legal interest*, in such contract, is vested(*b*). Thus the action against a carrier for the loss of goods, must in general be brought in the name of the consignee, and not of the consignor(*c*), the law implying the contract by the carrier to have been made with the consignee, in whom the property in the goods was vested by the delivery to the carrier.[2] And though a covenant with

(*b*) Anderson *v.* Martindale, 1 East, 497.—Dawes v. Peck, 8 T. R. 332.—1 Saund. 153. note 1.—Thimblethorp *v.* Hardesty, 7 Mod. 116.—2 Saunders on U. and T. 222.—Doe d. Hodsden *v.* Staple, 2 T. R. 696.—Bauerman *v.* Radinius, 7 T. R. 664.—but see Smith *v.* Jameson, 5 T. R. 602, 3.

(*c*) Dawes *v.* Peck, 8 T. R. 330.—2 Saund. 47, k.—Bul. N. P 36.—Godfrey *v.* Furzo, 3 P. Wms. 186.—Dutton *v.* Solomonson, 3 B. & P. 584.—Brown and others *v.* Hodgson, 2 Campb. 36.

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following rules, in their relation to the form of the action, rather than to the subject matter of it." In a note to the second American edition, Mr. Day observes, that, "The decision in *Govett* v. *Radnidge*, has been overruled by two subsequent cases in the *Common Pleas*, *Powell* v. *Layton*, 2 *New Rep.* 365, and *Max* v. *Roberts et al.* 2 *New Rep.* 454, and by a very recent case in the *King's Bench*, *Weall* v *King*, *et al* 12 *East*, 452. In *Connecticut*, declarations in tort, stating the injury to have been effected by means of a contract, have been sustained. *Stoyell* v. *Westcott*, 2 *Day*, 418. *Bulkley* v. *Storer*, 2 *Day*, 531." Vide 2 *Esp. Dig.* 129. Post. 33. n. *y.* 75.

(2) Vide *Potter* v. *Lansing*, 1 *Johns. Rep.* 215. But where the bill of lading

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several persons be joint and several in the terms of it, yet if the legal interest and cause of action be joint, the action must be brought by all the covenantees: and on the other hand, if the interest and cause of action be several, the action may be brought by one only, though the covenant be in the terms of it only joint(*d*) And as a covenant to and with A, his executors, administrators, and assigns, and to and with B and her assigns, to pay an annuity to A, his executors, &c. during B's life, is a joint covenant to A and B, in which *they have a *joint legal* [*4] interest, although the *benefit* be for A only; therefore on the death of A, the right of action survives to B, and A's administrator cannot sue on the covenant, because the action follows the nature of the *legal* interest(*e*).

When a bond is made to A to pay him or a third person a sum of money for the *benefit* of the latter, the action must be brought in the name of A,[3] and the third person cannot even release the demand(*f*). And when a deed is made *inter partes*, (i. e. between A of the first part and B of the second part.) C, a stranger, cannot sue on a covenant therein though made for his benefit(*g*).[4] But when the deed is not *inter partes*, he may sue whether it be indented or not(*h*). And upon a single bond or deed poll, reciting that the obligor had received of A 40*l.*, for the use of C and D, equally to be divided, to be repaid at such a time as should be thought best for the profit of C and D, it was decided that C and D might maintain separate actions for their respective moieties(*i*). And when a contract not under seal, is made with A to pay B a sum of money, B may sustain an action[5] in his own name(*k*):

(*d*) 1 Saund. 153, & n. 1.

(*e*) Anderson v. Martindale, 1 East, 497. Rolls *v.* Yate, Yelv. 177.

(*f*) Offly *v.* Warde, 1 Lev. 235.—2 Inst. 673.—Gilby *v.* Copley, 3 Lev. 139. 3 B. & P. 149, n. a.—6 Vin. Ab. tit. Covenant, 374.—Scholey et al *v.* Mearns, 7 East, 148.—Com. Dig. tit. Covenant, A

(*g*) Gilby *v.* Copley, 3 Lev. 139.—3 B. & P. 149. n. a.—Salter *v.* Kidgley, Carth. 76.—2 Mod. Ca. 116.—2 Inst. 673.—Co. Lit. 231, a.

(*h*) Id. ibid. Com. Dig. tit. Covenant, A. 1.—& Cooker *v.* Child, 2 Lev. 74.—Greene *v.* Horne, 1 Salk. 197.

(*i*) Shaw *v.* Sherwood, Cro. El. 729.

(*k*) 3 B. & P. 149. n. a —Marchington *v.* Vernon, cited 1 B. & P. 101. n. c. B. N. P. 103, 4.—Dutton et ux. *v.* Poole, 2 Lev. 210.—S. C. 1 Ventr. 318.—S. C. Sir T Raym. 302.—Sir T. Jones, 102.—S. C.—Martyn *v.* Hind, Cowp. 437.—Cramlington *v.* Evans et al. 2 Ventr. 310. Israel *v.* Douglas, et al. 1 H. B. 239 —Surtees et al. *v.* Hubbard, 4 Esp. R. 204.—*acc.* 1 Vin. Ab. 333. to 337.—cited in 3 B. & P. 149.—Crow *v* Rogers, 1 Stra. 592.—Bourne *v.* Mason et al, 1 Ventr. 6.—1 Powel on Cont. 353.—B. N. P. 134. *cont.*

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stated, that the goods were shipped by the plaintiffs, and that the freight was paid by them, it was held, that there was such a privity of contract, as would sustain an action by the consignor, against the owner of the ship. *Joseph and others* v. *Knox*, 3 *Campb.* 320. Et vide *M'Intyre* v. *Bowne*, 1 *Johns. Rep.* 221. *Ludlow* v. *Bowne*, 1 *Johns. Rep.* 1.

(3) Vide *Sanford* v. *Sanford*, 2 *Day*, 559.

(4) Vide *Hornbeck* v. *Westbrook*, 9 *Johns. Rep.* 73. *Hornbeck* v. *Sleght*, 12 *Johns. Rep.* 199.

(5) Acc. *Felton* v. *Dickinson*, 10 *Mass. Rep.* 287. 290. *Schermerhorn* v. *Vanderheyden*, 1 *Johns. Rep.* 139.

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but if the promise had been to *pay A for the use of B, A is a trustee, and B, having no legal interest, cannot sue(*l*).

In general a mere *servant* or *agent*, with whom a contract is made on behalf of another, cannot support an action thereon (*m*) ;[6] and therefore where A agreed in writing to pay the rent of certain tolls, which he had hired, to the treasurer of certain commissioners, it was decided that no action for the rent could be supported in the name of the treasurer (*n*). But when an agent has any beneficial interest in the performance of the contract for commission, &c., as in the case of a factor, a broker (*o*), an auctioneer (*p*). a policy-broker whose name is on the policy (*q*),[7] or the captain of a ship for freight, he may sustain an action in his own name ;[8] in each of which cases, however, the principal or owner might sue (*r*).[9]

2dly, With reference to the *number* of plaintiffs; and who *must* join.

When the contract was made with *several*, whether it were under seal, or by parol, if their *legal interest* were *joint*, they must all, if living, join in an action in form *ex contractu*, for the breach of it, though

(*l*) Cramlington *v.* Evans et al., 2 Ventr. 310.—Evans *v.* Cramlington, Carth. 5. Offly *v.* Warde, 1 Lev. 235.—Company of Feltmakers *v.* Davis, 1 B. & P. 98.

(*m*) Pigott *v.* Thompson, 3 B. & P. 147.—Williams *v.* Millington, 1 H. B. 84.—Bloss *v.* Holman, Owen, 52.—Moores *v.* Hopper, 2 New. Rep. 411 a.

(*n*) Pigott *v.* Thompson, 3 B. & P. 147.

(*o*) Grove et al. *v.* Dubois, 1 T. R. 112.—Atkyns et al. *v.* Amber, 2 Esp. R 493.—Williams *v* Millington, 1 H. B. 82.—George *v.* Claggett et al. 7 T. R. 359—Johnson & others *v.* Hudson, 11 East. 180.

(*p*) Williams *v.* Millington, 1 H. B. 81.

(*q*) Park on Ins. 403.—Grove et al. *v.* Dubois, 1 T. R 114.

(*r*) Williams *v.* Millington, 1 H. B. 81.—George *v.* Claggett et al., 7 T. R. 359, 360. n. a.

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(6) Vide *Medway Cotton Manufactory* v. *Adams & another*, 10 *Mass. Rep.* 362. *Bogert* v. *De Bussy*, 6 *Johns. Rep* 94. *Gunn* v *Cantine*, 10 *Johns. Rep.* 387. *Jones* v. *Hart's Ex'rs* 1 *Hen. & Mun.* 470. *Gilmore* v. *Pope*, 5 *Mass. Rep.* 491. *Bainbridge* v. *Downie*, 6 *Mass. Rep.* 253. *Kinsey* v. *Hollingshead*, 1 *Penn.* 380. So, the trustees or committee, for conducting the affairs of an unincorporated company, cannot maintain an action in their own name. *Niven* v. *Spickerman*, 12 *Johns. Rep.* 401.

(7) Vide *Mellish & another* v. *Bell*, 15 *East's Rep.* 6, 7. *De Vignier* v. *Swanson*, 1 Bos. & Pull 346. n. *b*..

(8) An action in a promissory note given to the agent of a company, lies in the name of the agent, and his styling himself agent, &c. in his writ and declaration, was held to be merely descriptio personæ. *Buffum* v. *Chadwick*, 8 *Mass. Rep.* 103. So, where A for his own account and risk, carries on trade in the name of B, an action for goods sold, in the course of such trade, is properly brought in the name of B. *Alsop & others* v. *Caines*, 10 *Johns. Rep* 396. But where goods are purchased from a factor, scienter, with intent by the purchaser, to set off against the purchase, a demand which he may have against the factor, the principal may, in such case, as on a sale made immediately by himself, have a suit against the purchaser, at any time before payment to the factor. *Browne & others* v. *Robinson & Hartshorne*, 2 *Caine's Cas.* 341.

(9) Where money has been deposited by an agent, on the account of an unknown principal, an action to recover back the deposit, lies in the name of the

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the covenant or contract with them were in terms joint and several (*s*): *the reason assigned is, that when the interest is joint, if several were to be permitted to bring actions for one and the same cause, the court would be in doubt for which of them to give judgment (*t*); therefore where A declared upon an account stated with him, of monies due to him and a third person, after verdict judgment was arrested on the ground that the promise, whether express or implied, must, in point of law, be considered as made to all the persons whose debt it was, and therefore they all ought to have joined in the action (*u*). [*6]

But when the *legal* (*x*) interest and cause of action of the covenantees is *several*, each may sue separately for his particular damage, although the words of the covenant are joint only (*y*);[12] and in *case of a [*7]

(*s*) Eccleston et ux. *v.* Clipsham, 1 Saund. 153. & note 1.—Anderson *v.* Martindale, 1 East. 497, 501.—Hill *v.* Tucker, 1 Taunton. 7.—Townsend & another *v.* Neale, 2 Campb. 190. One of such parties may lawfully use the name of the other in the proceedings without his consent. Savile *v.* Roberts, 1 Lord Raym. 380.

(*t*) Per Lord Kenyon in Anderson *v.* Martindale, 1 East. 501.

(*u*) Thimblethorp *v.* Hardesty, 7 Mod. 116.—Rolls *v.* Yate, Yelv. 177.

(*x*) Anderson *v.* Martindale, 1 East. 497.—Camden *v.* Anderson, 5 T. R. 711.

(*y*) Eccleston et ux. *v.* Clipsham, 1 Saund. 153. 4. n. 1.—Anderson *v.* Martindale, 1 East. 497.—Shaw *v.* Sherwood, Cro. El. 729.—Wilkinson *v.* Lloyd, 2 Mod. 82. The instance put in 1 East. 501. will illustrate the distinction between *joint* and *several* interests.[10] If one by indenture demise Black acre to A, and White acre to B, and covenant with them and each of them (or according to 1 Saund. 153. n. 1. even omitting these words) that he is lawful owner of the said acres, then in respect of the several interests, the covenant[11] is made several; but if he demise to them the acres *jointly*, then these words are void; for a man by his covenant cannot, unless in respect of several interests, make it first joint and then several by those or the like words. In the case of written or other contracts, an express covenant or stipulation with *one* of several persons, though *jointly* interested, may give him alone a right of action, but in the case of contracts raised by implication of law, or in the case of purchases or other contracts with partners in the usual course of trade, the action must necessarily be in the name of all the *partners*, who are legally interested in the performance of the contract.—Graham et al. *v.* Robertson, 2 T. R. 282.

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principal. *The Duke of Norfolk* v. *Worthy*, 1 *Campb.* 337. *Vischer* v. *Yates*, 11 *Johns. Rep.* 23. *Yates* v. *Foot*, 12 *Johns. Rep.* 1. So, where a factor sells his principal's goods, the principal may, on notice to the buyer, before payment, not to pay the factor, sue the buyer in his own name. *Kelly* v. *Munson*, 7 *Mass. Rep.* 324. *Railton* v. *Hodgson*, 15 *East's Rep.* 67. A factor selling goods in his own name, and being alone known to the purchaser, may maintain an action for the price although he receives no del credere commission; but if there has been a communication between the principal and factor, by which the former agrees to consider the purchaser as his debtor, and takes steps for recovering the debt directly from him, the factor's right to sue is gone. *Sadler* v. *Leigh & another*, 4 *Campb.* 195. An action to recover back a wager in the event of a horse race. (under the acts of the State of New York to prevent horse racing and gaming) is properly brought by the person who made the bet, although he acted as the agent or depository of other persons. *Haywood* v. *Sheldon*, 13 *Johns. Rep.* 88. Et vide *Vischer* v. *Yates*, and *Yates* v. *Foot*, ubi sup. *Bell et al.* v. *Gilson*, 1 *Bos. & Pull.* 351. (10) Further as to the distinction between joint and several interests, vide *Southcote* v. *Hoare*, 3 *Taunt.* 87. (11) Vide *Phillips* v. *Bonsall*, 2 *Binney*, 138. 143. (12) Vide *Dunham* v. *Gillis*, 8 *Mass. Rep.* 462.

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joint interest, if two out of three parties have been paid their shares, the third may, in respect of such severance, sue alone for his proportion (*z*).[13]

In the case of a deed, if one or more of several obligees or covenantees, who ought when living to join, be dead, or did not seal the contract, that fact should be averred in the declaration at the suit of the others; or the defendant may crave *oyer*, and demur (*a*); but if the plaintiff be prepared to prove the death of the party, the omission of the statement of the death in the declaration would be no ground of nonsuit (*b*).

In all cases of contracts, if it appear upon the face of the pleadings that there are other obligees, covenantees, or parties to the contract, who ought to be, but are not joined in the action, it is fatal on demurrer (*c*), or on motion in arrest of judgment, or on error (*d*); and though the objection may not appear on the face of the pleadings, the defendant may avail himself of it either by plea in abatement (*e*), or as a ground of nonsuit on the trial upon the plea of general issue (*f*).[15]

[*8] However, when a *partner has withdrawn his name from the firm, although he may continue to receive part of the profits as a dormant

(*z*) Garret *v.* Taylor, 1 Esp. Ni. Pri. 117.

(*a*) Vernon et al. *v.* Jefferys, 2 Stra. 1146.—1 Saund. 291. f. 154. n. 1.—Scott *v.* Godwin, 1 B. & P. 74.

(*b*) Ditchburn *v.* Spracklin et al., 5 Esp. R. 32. and see Smith *v.* Barrow, 2 T. R. 476.—1 Saund. 153. n. 1. 291. f.

(*c*) Vernon et al. *v.* Jefferys, 2 Stra. 1146.—Anderson *v.* Martindale, 1 East. 497.—1 Saund. 153. n. 1. 291. f.—Scott *v.* Godwin, 1 B. & P. 67. 74.

(*d*) Id. ibid.

(*e*) Com. Dig. tit. Abatement, E. 12.

(*f*) 1 Saund. 153. n. 1. 291. f. g.—Leglise *v.* Champant, 2 Stra. 820. The good sense of this rule, which, as we shall see hereafter, does not prevail in the case of plaintiffs *in torts*, or of several *defendants*, has been questioned; but it is admitted to prevail. See 1 Saund. 291. f. g.—Scott *v.* Godwin, 1 B. & P. 73.—Addison *v.* Overend, 6 T. R. 770. In the case of co-executors the objection can only be taken advantage of by a plea in abatement—1 Saund. 291. g.—Rawlinson *v.* Shaw, 3 T. R. 558, and post 13. As the *omission* of a party is no ground of nonsuit in an action in form *ex delicto* (see Addison *v.* Overend, 6 T. R. 770.—Govett *v.* Radnidge et al., 3 East. 62. acc. sed quære, see Powell *v.* Layton, 2 New Rep. 365. Max *v.* Roberts et al. 2 New. Rep. 454. S. C. 12 East. 94.—Weall *v.* King and another, 12 East. 454.) it appears to be advisable where there is a doubt as to the number of the persons to be made plaintiffs, and when the declaration may be in case, to adopt that form of action.[14]

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(13) Vide *Austin* v. *Walsh*, 2 *Mass. Rep.* 401. *Baker* v. *Jewell*, 6 *Mass. Rep.* 460. Where several persons are engaged in a joint transaction, the proceeds of which are received by a third person, who promises to pay each partner his respective proportion, in an action against him by one of the partners for his proportion, he cannot object that there are others jointly concerned. *Bunn* v. *Morris & Wisner*, 3 *Caine's Rep.* 54. Vide etiam *Austin* v. *Walsh*, ubi supra. *Hall* v. *Leigh et al.* 8 *Cranch.* 50.

(14) *Vide ante*, p. 2. n. 1.

(15) Vide *Baker* v. *Jewell*, 6 *Mass. Rep.* 460. *Converse* v. *Symmes*, 10 *Mass. Rep.* 379. *Ziele & Becker*, v. *Campbell's Ex'rs.* 2 *Johns. Cas.* 384.

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partner, it is not a ground of nonsuit[16] that his name is not joined in the action (*g*); but where the name of a person is used in a firm, he must be a co-plaintiff, though he has no real interest (*h*).[17] When the objection appears on the face of the pleadings, it is sometimes advisable to demur in order to obtain costs, as each party pays his own costs when the judgment is arrested (*i*).[18]

Who *may* join.

At law as well as in equity,[19] the courts will not take cognizance of distinct and separate claims or liabilities of different persons in one suit, though standing in the same relative situation (*k*); and if *too many* persons be made plaintiffs, the action will fail; and if the legal interest of two or more be several, and there be no express contract with all, they must sue separately (*l*);[20] and therefore where A, B and C were appointed assignees under a commission of bankrupt, and A and B each paid half of the solicitor's bill, it was decided that A and B could not maintain a *joint* action against C, for his proportion of the money paid, but must each bring a separate action, and A and B having sued jointly, were nonsuited (*m*). But when the interest is jointly vested in several, they may and ought to join; thus *if A and B in the last case had borrowed the money which they paid on their *joint* credit, they might have joined in the action against C (*n*). So where A and B brought an action of assumpsit, and declared that their several cattle had been distrained, and that the defendant, in consideration of 10*l.* paid him by the plaintiffs, promised to procure the cattle to be re-delivered to them by such a time, and that he had not done so, after verdict for the plaintiffs it was objected, in arrest of judgment, that the plaintiffs ought to have brought several actions because the promise was not an entire, but a several promise made to each of the plaintiffs; but it was adjudged by Rolle, C. J., and two other judges against one, that the action was well brought jointly by A and B, for though the cattle which belonged to A ought to be restored to him and the other cattle to be restored to B,

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(*g*) Leveck *v.* Shaftoe, 2 Esp. Rep. 468. Stracy & others *v.* Deey, 7 T. R. 357. n.

(*h*) Guidon *v.* Robson, 2 Campb. 302.

(*i*) Cameron *v.* Reynolds, Cowp. 407.

(*k*) Per Ld. Kenyon, C. J. 1 East. 226, —7

(*l*) Brand et al. *v.* Boulcott, 3 B. & P. 235.—Osborne et al. *v.* Harper, 5 East. 225.—Graham et al. *v.* Robertson, 2 T. R. 282. 4.—Camden *v.* Anderson, 5 T. R. 711.—2 Saund. 116. n. 2.

(*m*) Brand et al. *v.* Boulcott, 3 B. & P. 235.—Graham et al. *v.* Robertson, 2 T. R. 282.

(*n*) Osborne et al. *v.* Harper, 5 East. 225.—Hill *v.* Tucker, 1 Taunton. 7.

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(16) Vide *Lloyd* v. *Archbowle*, 2 *Taunt.* 324. A dormant partner who is not privy to the contract, although he partake of the benefit of it, cannot be joined as a plaintiff. *Lloyd* v. *Archbowle*, ubi sup. *Mawman* v. *Gillett*, cited *ibid.*

(17) Vide *Teed* v. *Elworthy*, 14 *East's Rep.* 210.

(18) Vide *Pangburn* v. *Ramsay*, 11 *Johns. Rep.* 141.

(19) Vide *Wendell* v. *Van Rensselaer*, *Johns. Ch. Rep.* 350. *Wiser* v. *Blachly & others*, *Johns. Ch. Rep.* 438.

(20) Vide *Yates* v. *Foot*, 12 *Johns. Rep.* 1. *Hatch & Clap* v. *Brooks*, 2 *Mass. Rep.* 293.

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and so the thing to be performed was several and not joint, yet as the *contract and consideration were joint*, and it was not known how much the one gave, and how much the other, the action was well brought jointly (*o*). If process be sued out in the name of two plaintiffs, the declaration must not vary therefrom, nor can it be delivered in the name of one only (*p*).

Tenants in common may *join* or *sever* in an *action* on a contract relating to their estate, though they must *sever* in an *avowry* for *rent* and the demand must be *de una medietate* of the rent, and not of a sum of money generally, though it may be the exact moiety(*q*). Joint-tenants [*10] must, in all cases, join in *an action *ex contractu*(*r*). Parceners also must join in all actions concerning their estate, and if one of them die pending a real action it will abate, though it is otherwise in mere personal actions(*s*).

3dly. When the interest in the contract has been assigned.

When the party with whom a bond, simple contract, or other mere *personal* contract was made, has assigned his interest therein to a third person, the latter cannot, in general, sue in his own name, *personal* contracts being *choses in action*, which are not, in general, assignable at law, so as to give the assignee a right of action in his own name, but he must proceed in that of the assignor,[21] or if he be dead, in the name of his personal representative(*t*).[22] And in such case, though the assignor has become bankrupt, the action must be in his name and not in that of the assignee of such bankrupt, who can only sue upon contracts in which the bankrupt was beneficially interested(*u*). If, however, an express promise or contract to pay the debt, or perform the contract, be made to the assignee of the *chose* in action in consideration of forbearance, or in respect of any other *new* consideration, such assignee

(*o*) 1 Roll. Ab. 31. pl. 9.—Vaux et al. v. Steward, Sty. 156, 157.—Vaux et al. *v.* Draper, Sty. 203.—2 Saund. 116. b.

(*p*) Rogers *v.* Jenkins, 1 B. & P. 383.

(*q*) Bac. Ab. tit. Joint-tenants and tenants in common, K.—Harrison *v.* Bamby, 5 T. R. 249.—Kitchin et al *v.* Buckley, 1 Lev. 109.—Sir T. Raym. 80. S. C.—Kirkman against Newstead, Esp. N. P. 117.

(*r*) Co. Lit. 180 b.—Bac. Ab. tit. Joint-tenants, K.—Scott *v.* Godwin, 1 Bos. & P. 73.

(*s*) Vin. Ab. Parceners, T.—Middleton *v.* Croft, R. T. Hardw. 398, 9.

(*t*) Splidt and others *v.* Bowles and others, 10 East, 281.—Master *v* Miller, 4 T. R. 340, 1.—Johnson *v.* Collings, 1 East. 104.—Chitty on Bills, 5 to 10.—Bally *v.* Wells, 3 Wils. 27.—Forth et al *v.* Stanton, 1 Saund. 210.—Seddon *v.* Sinate, 13 East, 73. But a revived corporation may sue on a bond given to the corporation.—Colchester Corporation *v.* Seaber, 3 Bur. 1872, 3.—Scarborough Corporation *v.* Butler, 3 Lev. 237.—As to a church-warden suing, see 2 Stev. B. 559.

(*u*) Carpenter et al. *v.* Marnell, 3 B. & P. 40.—Arden *v.* Watkins, 3 East, 317.—Winch *v.* Keeley, 1 T. R. 619.

(21) The defendant cannot defeat the suit by showing a want of interest in the nominal plaintiff *Alsop & others* v. *Caines*, 10 *Johns. Rep.* 400 *Raymond* v. *Johnson*, 11 *Johns. Rep.* 488.

(22) Vide *Dawes* v. *Boylston*, 9 *Mass. Rep.* 337. In this case the assignee was himself the administrator of the assignor.

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may proceed in his own name, declaring upon such promise and new consideration(*v*):[23] and in the case of a negotiable *bill of exchange, promissory note,[24] or cheque on a banker, bail bond(*w*), or replevin bond(*x*), the assignee may by the custom of merchants in the first instance, and by express legislative provision in the latter, sue in his own name. And in the case of a covenant running with the *estate in land*, &c. an assignee of such estate should be the plaintiff,[25] for any breach of such covenant committed *after* he became legally entitled to the reversion, and this without even alleging or proving an attornment(*y*). And in such case the assignor cannot *distrain* for rent due *before* the assignment, nor can he *sue* for any *subsequent* breach(*z*).[26] And in the case of an assignment of a legal interest by operation of law, as in the instance of bankruptcy, to the assignees of a bankrupt or of an insolvent debtor, they should be the plaintiffs(*a*); but in the common case of a composition deed, the trustees can only sue in the name of the original creditor, in whom the legal interest in the contract still is vested(*b*).

4thly. When one of several obligees, &c. is dead.

When one or more of several obligees, covenantees, partners, or others, having a joint *legal* interest in the contract, dies, the action

(*v*) 1 Saund. 210. n. 1.—Oble *v.* Dittlesfield, 1 Ventr. 153, 4.—Innes *v.* Sir T. Wallace Dunlop, 8 T. R. 595.—Reynolds *v.* Prosser, Hard. 71.—Surtees et al. *v.* Hubbard, 4 Esp. Rep. 204.

(*w*) 4 Ann. c. 16. sect. 20.

(*x*) 11 Geo. 2. c. 19. s. 23.—Archer et al. *v.* Dudley et al., 1 B. & P. 381. n. a.

(*y*) Brudnel *v.* Roberts, 2 Wils. 143. Bac. Ab. tit. Covenant, E. 5. Tit. Debt. C.—1 Saund. 234. n. 4 241. b.—Moss *v.* Gallimore, Dougl. 279.—Cobb *v.* Carpenter, 2 Campb. 13 note. Vin. Ab. Covenant, K. 3.

(*z*) Beely *v.* Parry, 3 Lev. 154. 1 Saund. 241. c.—Gilb. Debt. 384.

(*a*) Post. 14, 5, 6.

(*b*) Ante, 10.

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(23) Vide *Crocker et ux.* v. *Whitney*, 10 *Mass. Rep.* 319. Where a person receives securities from A to dispose of the money to be received thereon, to certain specified purposes, and to hold the balance subject to the order of A, and the trust is accepted, the assignee of the balance may maintain an action for money had and received, against the trustee, the acceptance of the trust being equivalent to an express promise to the person, to whom A should direct the money, when received, to be paid. *Weston* v. *Barker*, 12 *Johns. Rep.* 276. Et vide *Neilson* v. *Blight*, 1 *Johns. Cas.* 205. *Crocker* v. *Whitney, ubi sup.*

(24) The indorsee of a promissory note given in Connecticut, where promissory notes are not negotiable, may, in the state of New York maintain an action in his own name against the maker; for the *lex loci contractus* does not govern as to the mode of enforcing the contract. *Lodge* v. *Phelps*, 1 *Johns. Cas.* 139. 2 *Caine's Cas. in error*, 321.

(25) So, an assignee of part may maintain an action *pro teneto*; and if the assignee has warranted the title or covenanted for the quiet enjoyment of his assignee, he may support an action for a breach, after the assignment, of covenants of warranty and quiet enjoyment, contained in the deed to himself. *Kane* v. *Sanger*, 14 *Johns. Rep.* 89. *Bickford* v. *Page*, 2 *Mass. Rep.* 460.

(26) If the assignment were made after the breach, no action can be brought by the assignee; for after the covenant is broken, it becomes a mere chose in action, and incapable of assignment. *Greenby & Kellogg* v *Wilcocks*, 2 *Johns. Rep.* 1. *Bickford* v. *Page*, 2 *Mass. Rep.* 455. *Marston* v. *Hobbs*, 2 *Mass. Rep.* 439.

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must be brought in the name of the survivor;[27] and the executor or administrator of the deceased cannot be *joined, nor can he sue separately,[28] though the deceased alone might be entitled to the *beneficial* interest in the contract, and the executor must resort to a court of equity, to obtain from the survivor the testator's share of the sum recovered(*c*): but if the interest of the covenantees were *several*, the executor of one of them may sue though the other be living(*d*). In an action at the suit of a surviving partner, he may include a debt due to him in his own separate right(*e*). In the case of a deed, we have seen that it is necessary to declare as surviving obligee, &c.(*f*); but in other cases, where the defendant cannot crave *oyer* and demur, it does not appear to be necessary to state the death of the deceased partner in the declaration, though it is more usual to do so(*g*).[29]

5thly. In the case of executors, or administrators, heirs, &c.

In the case of a mere *personal* contract, or of a covenant not running with the land, if it were made only with *one* person, and he be dead, the action for the breach of it must be brought in the name of his executor or administrator, in whom the legal interest in such contract is vested(*h*); and if it were made with *several* persons, though during the life of the survivor of them, we have seen, that the action must be brought in his name(*i*), yet upon his death, *his* executors or administrators *alone can sue, and the personal representatives of the partner who first died cannot be joined(*i*). If there be *several* executors or administrators, they ought all to join, though some be under the age of seventeen years, or have not proved the will, or have even refused before the Ordinary(*k*). If, however, only one of several executors or

[*13]

(*c*) Anderson *v.* Martindale, 1 East, 497.—Martin *v.* Crump, Salk. 444.—S. C. Lord Raym. 340.—S. C. Comb. 474.—Com. Dig. Merchants, D.—Vin. Ab. Partner, D.—Kemp *v.* Andrews, 1 Show. 188.—S. C. Carth. 170.—Ante, 4.

(*d*) 1 Saund. 153, n. 1.—Enys *v.* Donnithorne, Burr. 1197.—Shaw *v.* Sherwood, Cro. Eliz. 729.

(*e*) Hancock *v.* Haywood, 3 T. R. 433.—Slipper et al. *v.* Stidstone, 5 T. R. 493.—French *v.* Andrade, 6 T. R. 582.

(*f*) Ante, 7.—Scott *v.* Godwin, 1 B. & P. 74.

(*g*) Ditchburn *v.* Spracklin et al., 5 Esp. Rep. 32.—Hyat *v.* Hare, Comb 383.—Smith *v.* Barrow, 2 T. R. 477.—Spalding *v.* Mure, 6 T. R. 365.—Blackwell *v.* Ashton, Sty. 50.

(*h*) Brandon *v.* Pate, 2 H. B. 310.—Webb *v.* Russel, 3 T. R. 393.—Com. Dig. Covenant, B.

(*i*) Ante, 11.

(*k*) Hensloe's Case, 9 Co. 37.—Rawlinson *v.* Shaw, 3 T. R. 558.—1 Saund 291. g.—Foxwist et al. *v.* Tremaine, 2 Saund. 209. 212.—C. D. tit. Abatement, E. 13.—When one executor may sue the other, see Rawlinson *v.* Shaw, 3 T. R. 557.

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(27) Vide *Bernard* v. *Wilcox*, 2 *Johns. Cas.* 374.

(28) The administrator of a deceased partner cannot maintain an action for a partnership demand, notwithstanding an adjustment of all the concerns of the partnership between him and the survivor, in which it was agreed that the proceeds of such demand should be equally divided between them. *Peters* v. *Davis*, 7 *Mass. Rep.* 257. Vide ante, p. 7. n. 13.

(29) Sed vide *Holmes & Drake* v. *D'Camp*, 1 *Johns. Rep.* 34.

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administrators, bring an action either of debt or assumpsit or in tort, it is settled that the defendant can only take advantage of the nonjoinder of the co-executor or co-administrator by pleading in abatement after *oyer* of the probate or letters of administration, that the other executor or administrator therein mentioned is alive and not joined in the action(*l*). This, it is observable, is a material distinction between the effect of the nonjoinder of a party when he sues in *autre droit*, and when in his own right. In the latter case we have seen that the omission would be a cause of nonsuit(*m*). An executor may sue as such upon a contract made with him in that character, as for goods sold by him *as* executor, and in other cases when the sum to be recovered would be assets(*n*); but an executor cannot sue as such upon a penal statute(*o*).

In the case of a covenant or contract relating to and running with an *estate* in *land*, &c. of which the covenantee was seised in *fee*, the executor or *administrator should, under the 32 Hen. VIII. c. 37.[30] sue [*14] for a breach in the covenantee's lifetime, unless in the case of a joint-tenancy(*p*), and his heir(*q*) or devisee, though not named in the covenant with the lessor, &c. will respectively be the proper parties to sue for a breach of the covenant after the death of the lessor(*r*). Upon the death of a tenant for life, his executor is in different cases authorised to sue(*s*). If an executrix or administratrix marry, she and her husband should join for the breach of any personal contract made with the deceased (*t*); but if she sue alone, the defendant must plead in abatement(*u*), and when a bond or other contract is made to husband and wife as executrix he may sue alone(*v*).

(*l*) 1 Saund. 291. g.

(*m*) Ante, 7.

(*n*) Cowel et ux. v. Watts, 6 East, 405.

(*o*) Bastard *v.* Hancock, Carth. 361. Wortley *v.* Hirpingham, Cro. Eliz. 766. Com. Dig. Administration; B. 15.—Brandon *v.* Pate, 2 H. B. 311.

(*p*) Bac. Ab. tit. Debt, C. and tit. Heir, E.—32 Hen. 8. c. 37.—Vin. Ab. Covenant, K. 2. pl. 5.

(*q*) Lougher *v.* Williams, 2 Lev. 92. Bac. Ab. tit. Heir, E.

(*r*) Lougher v. Williams, 2 Lev. 92. Bac. Ab. tit. Covenant, E. 5.

(*s*) 32 Hen. 8. c. 37.—11 Geo. 2. c. 19. s. 15.

(*t*) Com. Dig. Baron and Feme, V.

(*u*) Milner *v.* Milnes, 3 T. R. 631.—1 Saund. 291, g.

(*v*) Ankerstein *v.* Clarke et al. 4 T. R. 616.—Yard *v.* Ellard, 1 Salk. 117.

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(30) See *Laws of New York, Sess.* 36. c. 63. s. 18. 1 R. L. 439., by which executors or administrators are authorised to bring an action of debt, or to distrain, for arrearages of rent in the lifetime of their testator or intestate. But independent of the provisions of the statute, an executor or administrator may have an action of covenant, on an express covenant in the lease, for the payment of rent in arrear at the death of the testator or intestate. *Van Rensselaer's Executors* v. *Platner's Executors*, 2 *Johns. Cas.* 17. Vide post. 37. n. 84. As to the general rule that the personal representative only shall have an action on a covenant broken in the lifetime of his testator or intestate, see *Com. Dig. Administration* (B. 13.) *Covenant* (B. 1.) *Hamilton & others* v. *Wilson*, 4 *Johns. Rep.* 72.

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When an executor dies after he has proved the will, his executor, or the executor of such executor, is the party to sue on the contract made with the original testator, and may declare without noticing the first executor (*w*); but an administrator of the first executor, or an executor of the first administrator cannot sue in that character, and in such case administration *de bonis non* must be obtained (*x*). An infant sole executor cannot sue till of full age (*y*). In a declaration by an administrator *de bonis non*, a count may be added on a promise to the first administrator (*z*).

[*15]

6thly. In the case of bankruptcy.

*In case of the bankruptcy of a person, who is beneficially, as well as legally interested in the performance of a contract made before the act of bankruptcy, the action should be brought in the name of his assignees (*a*);[31] or if before they are appointed, by the provisional assignee (*b*), and upon the removal of one of several assignees, unless it be followed up by an actual reassignment or release of such assignee to the remaining assignees, or by new assignment of the commissioners, the removed assignee should join in the action,[32] though in an action of trover the nonjoinder can only be pleaded in abatement (*c*), and a new assignee may sue upon a judgment recovered by the removed assignee (*d*). When an action is commenced in the name of the bankrupt before his act of bankruptcy, it does not abate, but the assignees may proceed in his name (*e*); and when a contract is made with a bankrupt after the commission, and before he obtains his certificate, he may sue, unless his assignees interfere (*f*).

When one of several partners becomes bankrupt, the action must be in the name of the solvent partner and the assignees of the bankrupt(*g*);

(*w*) Toller, 1st edit. 44. 26.

(*x*) Toller, 84.—Tingrey *v.* Brown, 1 B. & P. 310.

(*y*) 38 Geo. 3. c. 87.—Toller, 367.

(*z*) Hirst *v.* Smith, 7 T. R. 182.

(*a*) Eckhardt et al. *v.* Wilson, 8 T. R. 140.—Kitchen *v.* Bartsh, 7 East, 53. Brandon et al. *v.* Pate, 2 H Bla. 308. Smith et al. *v.* Coffin et ux, 2 H. Bla. 444.—Bristow *v* James, 7 T. R. 259. 13 Eliz. c. 7.—5 Geo. 2. c. 30.—Cullen, 175.—Smith et al. v. Goddard, 3 B & P. 467.—Carpenter et al. *v.* Marnell, 3 B. & P. 40.

(*b*) 5 Geo. 2. c. 30. s. 30, 31.

(*c*) Bloxam et al. *v.* Hubbard, 5 East, 407.

(*d*) De Cosson *v.* Vaughan, 10 East, 61.

(*e*) Hewit et al. *v.* Mantell, 2 Wils. 372.—Waugh *v.* Austen, 3 T. R. 437. Kitchen *v* Bartsh, 7 East, 64.

(*f*) Kitchen *v.* Bartsh, 7 East, 53. Eckhardt et al *v.* Wilson 8 T. R. 140. Silk *v.* Osborn, 1 Esp. Rep. 140.—Evans *v.* Brown, 1 Esp. Rep. 170.—Laroche et al. *v* Wakeman et al. Peake. 140.—Cullen. 412 to 416.

(*g*) Thomson and others *v.* Freere and others, 10 East, 418.

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(31) In the case of assignees appointed under the bankrupt law of a foreign country, the suit must be in the name of the bankrupt, and not of the foreign assignees. *Bird et al.* v. *Caritat*, 2 *Johns. Rep.* 342. So, the assignees under the insolvent law of another state, must, in the state of New York, sue in the name of the insolvent. *Raymond* v. *Johnson*, 11 *Johns. Rep.* 488.

(32) Vide *Van Valkenburgh & another*, v. *Elmendorf*, 13 *Johns. Rep.* 314.

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and in such case, if it be in the name of all the partners, the bankruptcy may be pleaded in bar (*h*).

When a contract is made with the assignees or their agent, after the bankruptcy, they *need not sue or declare in the character of assignees (*i*). The assignees of A, a bankrupt, and also of B, a bankrupt, under separate commissions, cannot in one action include a demand for a *joint* debt due from the defendant to both the bankrupts, and also separate debts due to each (*k*); but where the plaintiffs sued as assignees of A and B, and also as assignees of C, for a joint demand due to the three bankrupts, the declaration was held sufficient (*l*).[33] [*16]

The legal interest in the *chose* in action of the wife of the bankrupt is vested in the assignees (*m*). When a bankrupt, prior to his bankruptcy, has duly assigned his beneficial interest in a *chose* in action to a third person, the action must be in the name of such bankrupt, and not of the assignees (*n*). A bankrupt cannot maintain an action against his assignees, for his allowance under the statute (*o*).[34]

7thly, In the case of an insolvent debtor.

The legal interest of an insolvent debtor in a contract is, by the express provision of the different insolvent acts, vested in the persons to whom his estate is assigned by the clerk of the peace, and who are expressly empowered to sue (*p*). The decisions relative to a suit in the name of the assignees of a bankrupt, are in general applicable to the case of the assignees of an insolvent debtor.[35] The assignees of a person *discharged under the Lords' act are also authorized to sue (*o*). [*17]

A feme-covert cannot in any case *sue alone* unless her husband be

(*h*) Anon. 12 Mod. 446.—Eckhardt et al. *v.* Wilson, 8 T. R. 140.

(*i*) Evans et al. *v.* Mann, Cowp. 569. Maltby *v.* Christie, 1 Esp. R. 342.

(*k*) Hancock et al. *v* Haywood, 3 T. R. 433.—Smith et al. *v.* Goddard, 3 B. & P. 467.

(*l*) Streatfield et al. *v.* Halliday et al. 3 T. R. 779.—Smith et al. *v.* Goddard, 3 B & P. 469.

(*m*) Pringle *v.* Hodgson, 3 Vez. J. 619.—Miles *v.* Williams et ux. 1 P. Wm. 249.

(*n*) Carpenter et al. *v* Marnell, 3 B. & P. 40.—Arden *v.* Watkins, 3 East, 317.—Ante, 10.—Winch *v.* Keeley, 1 T. R 619.

(*o*) 5 Geo. 2. c. 30.—Groome, *v.* Potts, 1 Esp. R. 396.

(*p*) 41 Geo. 3. c. 70. s. 15.—44. G. 3. c. 108.—Arbuckle et al. *v.* Cowtan, 3 B. & P. 326.—Kinder et al. v. Paris, 2 H. Bla. 561.—Doe d. Whately *v.* Telling, 2 East, 257.

(*o*) 32 Geo. 2. c. 28.

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(33) The assignees under a joint commission against A and B, in suing on a separate contract, entered into with A, may describe themselves generally as the assignees of A, without noticing the name of B. *Stonehouse & another* v. *De Siloa*, 3 *Campb.* 399.

(34) Upon the death of an assignee under the late Bankrupt law of the United States, the right of action for a debt due to the bankrupt, vested in the executor of the assignee. *Richards & others* v. *The Maryland Insurance Company*, 8 *Cranch*, 84.

(35) Vide ante 15. n. 31.

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civiliter mortuus,[36] or transported for some crime (*q*). She *may* in all cases join in an action with her husband, when the cause of action would survive to her (*r*); or when she is the meritorious cause of action, and there has been an express contract with her; and she *must* join when the cause of action would necessarily survive to her.

As *choses* in action of the wife do not by the marriage vest absolutely in the husband until he reduce them into possession, in general he cannot sue alone, but must join with his wife in all actions upon bonds, and other personal contracts, made with the wife *before* the marriage, whether the breach were before or during the coverture, and also for rent or any other cause of action accruing before the marriage in respect of the real estate of the wife (*s*). There are indeed decisions and opinions which appear to militate against this rule (*t*); but the current of authorities seems fully to establish it, and it is observable that it pre-
[*18] vails also in equity and in cases of bankruptcy (*u*); *and that the rule is the same when the action is brought on a contract made by a feme

(*p*) A marriage *de facto* is sufficient; for the legality of a marriage cannot be tried in personal actions, except for Crim. Con., as it may in an appeal and in real actions. Norwood *v.* Stevenson et ux. Andr. 227, 8.—Birt, *v.* Barlow, Doug. 174.[37]

(*q*) Caudell *v.* Shaw, 4 T. R. 361.—Beard et ux. *v.* Webb et al., 2 B & P. 105.—Carrol *v.* Blencowe, 4 Esp. Rep. 27.—Selwyn N. P. 297 to 304.—Bac. Ab. Bar. & Feme. M.—Boggett *v.* Frier and another, 11 East, 301.—Chambers *v.* Donaldson & others, 9 East, 472.

(*r*) Dunstan *v.* Burwell, 1 Wils. 224. See cases infra.

(*s*) Milner et al. *v.* Milnes et al. 3 T. R. 631. 627, 8. Com. Dig. Bar. & Feme, V.—Bac. Ab. Bar. & Feme, K.—Fenner *v.* Plasket, Moor. 422. 1 Roll. Ab. 437, R. pl. 3.—Garforth *v.* Bradley, 2 Ves. 676, 7.—Bul. N. P 179.—Carr *v* Taylor, 10 Ves. J. 578.—Obrian *v.* Ram, 3 Mod. 186.—Willer et al. *v.* Baker, 2 Wils. 423.—Rose et ux. *v.* Bowler et al. 1 H. B. 109.

(*t*) Howell *v.* Maine, 3 Lev. 403.—Selw. N. P. 303.—Co. Lit. 351. a. n. 2. Mitchinson *v.* Hewson, 7 T. R. 349.—Oglander *v.* Baston, 1 Vern. 396.

(*u*) Clearke *v.* Lord Angier, 2 Freem. 160.—Bac. Ab. Bar. & Feme. K.—2 Montague. 129.—Cullen, 72.

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(36) A person sentenced to imprisonment, in the state prison, for life, is civiliter mortuus. *Deming's Case*, 10 *Johns. Rep.* 232. A divorce *a vinculo matrimonii* restores the woman to the condition of a feme sole. *Bac. Abr. Marriage and Divorce* (E) 3. In the state of New York a divorce a vinculo matrimonii may be obtained on account of adultery in either of the parties: and if granted on the application of the wife she is secured in the enjoyment of lands which she may be the owner of; or goods, chattels or choses in action, in her possession; (which were left with her by her husband, which she may have acquired by her own industry, or which may have been given her by devise or otherwise, or may have come to her, or to which she may have been entitled by the decease of any relative intestate;) at the time of pronouncing the decree; for which she may sue the defendant (the husband) in her own name. *Sess.* 36. *c.* 102. *s.* 6. 2 *R. L.* 199.

(37) Vide *Fenton* v. *Reed*, 4 *Johns. Rep.* 76. *Newburyport* v. *Boothbay*, 9 *Mass. Rep.* 414. *Wilson* v. *Mitchell*, 3 *Campb.* 393. *Coop. Eq. Plead.* 24. 30.

whilst sole, in which case the husband cannot be sued alone (*v*). And when the wife is executrix or administratrix, as her interest is in *autre droit*,[38] they must in general join in the action (*w*). But if in respect of a contract made to the wife whilst sole, the party thereto, after the marriage, give a bond to the husband and wife, or in respect of some new consideration, as forbearance, &c. make a parol promise to the husband and wife, they may join, or the husband may sue alone upon such new contract (*x*); and if such bond or parol promise were made to the husband alone, he alone should sue thereon, the wife not being privy to the contract (*y*); or he should join with the wife on the original contract in cases where it is not merged by a higher security; and the rule is the same when the feme is executrix or administratrix, though in the latter case it is said, that it should be averred in the declaration that she is still living (*z*).

In general, the wife cannot join in any action upon a contract made *during* the marriage, as for her work and labour, goods sold, or money lent by her during that time (*a*); for the husband is entitled to her earnings, and they shall not survive to her, but go to the personal representatives *of the husband, and she could have no property in the money lent or the goods sold (*b*). But when the wife can be considered as the *meritorious* cause of action, as if a bond or other contract under seal be made to her separately or with her husband (*c*), or in the case of her personal labour, &c. if there be an *express* promise to her, or to her and her husband, she may join with the husband, or he may sue [*19]

(*v*) Mitchinson *v.* Hewson, 7 T. R. 348.

(*w*) Vin. Ab. Bar. & Feme, Q. 22.—Com. Dig. Bar. & Feme, V.—2 Montague. 129.

(*x*) Ankerstein *v.* Clark et al. 4 T. R. 616.—Howell *v.* Maine, 3 Lev. 403. Yard *v.* Ellard, Carth. 462.—S. C. Ld. Raym. 368.—S. C. Salk. 117.—Hilliard *v.* Hambridge, Alleyn, 36.—Pratt et ux. *v.* Taylor, Cro. Eliz. 61.

(*y*) Lee *v.* Mynne et ux., Cro. Jac. 110.—S. C. Yelv. 84.—Yard *v.* Ellard, Ld. Raym. 368.—S. C. Salk. 117.—S. C. Carth. 462.—Forth et al. *v.* Stanton, 1 Saund. 210.

(*z*) Lee *v.* Mynne et ux., Cro. Jac. 110.—S. C. Yelv. 84.—Yard *v.* Ellard, Salk. 117.—S. C. Ld. Raym. 368.—Ankerstein *v.* Clarke et al. 4 T. R. 616.

(*a*) Bidgood *v.* Way et ux., 2 Bla. Rep. 1239.—Buckley *v.* Collier, 1 Salk. 114.—Com. Dig. Bar. & Feme, W.—Weller et al. *v.* Baker, 2 Wils. 424.—Chambers *v.* Donaldson & others, 9 East, 472.—Where the wife is separated from her husband, she may in some cases, without his concurrence, sue in his name, Chambers *v.* Donaldson & others, 9 East, 471.

(*b*) Id. ibid.—Abbot et ux. v. Blofield, Cro. Jac. 644.—Weller et al. *v.* Baker, 2 Wils. 424.—Bidgood *v.* Way et ux.—2 Bla. Rep. 1237.—Buckley et ux. *v.* Collier, Carth. 251.

(*c*) Alebury *v.* Walby, 1 Stra. 230.—Ankerstein *v.* Clarke et al., 4 Term Rep. 616.—Co. Litt. 351. a. n. 1.—Dunstan *v.* Burwell, 1 Wils. 224.—Selwyn's Ni. Pri. 310.—Hilliard *v.* Hambridge, Alleyn. 36.

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(38) So, where the wife is guardian in socage. *Byrne* v. *Van Hoesen*, 5 *Johns. Rep.* 66.

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alone (*d*); and it has been holden that she may be joined in all cases upon an express promise to her (*e*).[39] And a feme covert executrix must join in an action upon any implied promise in respect of the estate of the deceased, as if money, part of the assets of the testator, be received by a party after the coverture, in which case the husband cannot sue alone in assumpsit as for money had and received to his use, but he and his wife must join, and declare in the character of executrix (*f*), though we have seen that he may sue alone upon an express contract made with him in consideration of forbearance, &c. (*g*). For rent or other cause of action accruing during the marriage on a lease or demise, or other contract relating to the land, or other real property of the wife, whether such contract were made before or during the coverture, the husband and wife may join, or he may sue alone (*h*); and [*20] when a lease for years has been *granted to husband and wife, and the lessor evicts them, they may join, or the husband may sue alone (*i*); and in all actions for a profit, &c. accruing during coverture in right of the *real* estate of the wife, they may join,[40] or the husband may sue alone, as in debt for not setting out tithes payable to the wife (*k*). But in these, and indeed in all cases, if the wife be joined in the action, her interest must be expressly stated in the declaration,[41] and cannot be intended (*l*). The effect of joining the wife in an action when the husband might sue alone is, that if the husband die whilst it is pending, or after judgment, and before it is satisfied, the interest in the cause of action will survive to the wife, and not to the executors of the husband, though if he sued alone she would have had no interest (*m*). In the case of the *civil death* of the husband, or even where he has been transported for a term of years, the wife may sue alone upon any contract

(*d*) Hilliard *v.* Hambridge, Alleyn. 36.—Buckley *v.* Collier, 1 Salk. 114.—Rose et ux. *v.* Bowler et al., 1 H. B 108. 114.—Bidgood *v.* Way et ux., 2 Bla. R. 1237, 9, 1240.—Weller et al. *v.* Baker, 2 Wils. 424.—Com. Dig. Bar. & Feme, X.—Selwyn's N. P. 306. n. 15. 309.

(*e*) Pratt et ux. *v.* Taylor, Cro. El. 61.—Bac. Ab. Bar. & Feme, K.

(*f*) Anon. 1 Salk. 282.—Com. Dig. Bar. & Feme, V. & W.

(*g*) Ante, 18.

(*h*) Alebury *v.* Walby, Stra. 230.—Dunstan et ux. *v.* Burwell et al., 1 Wils. 224.—Blackborne et ux. *v.* Greaves et al., 2 Lev. 107.—Com. Dig. Bar. & Feme, X. V.

(*i*) Bro. Ab. Bar. & Feme, pl. 25.—Beaver *v.* Lane, 2 Mod. 217.—Bret *v.* Cumberland, Cro. Jac. 399.—S. C. 3. Bulstr. 164.

(*k*) Com. Dig. Bar. & Feme, X.—Weller et al. *v.* Baker, 2 Wils. 423, 4. Bret *v.* Cumberland, Cro. Jac. 399.

(*l*) Bidgood *v.* Way et ux., 2 Bla. Rep. 1236.

(*m*) Co. Lit. 351. a. n. 1.—Brashford *v.* Buckingham et ux., Cro. Jac. 77, 205.—Bidgood *v.* Way et ux., 2 Bla. R. 1236.

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(39) So, she may join in an action on a bond to husband and wife, conditioned for their joint and several maintenance. *Schoonmaker's Ex'rs.* v. *Elmendorf and another*, 10 *Johns. Rep.* 49.

(40) Acc. *Lewis* v. *Martin*, 1 *Day*, 263.

(41) Vide *Staley* v. *Barhite*, 2 *Caine's Rep.* 221.

made with her during that time, even though the term of transportation may have expired, if he have not returned to this country(*m*). But in the case of a feme sole trader, according to the custom of London, she can only sue and be sued in the city courts, and the husband must be joined for conformity(*n*). I. PLAINTIFFS.

If the *husband survive*(*o*), there is a material *distinction between chattels real and choses in action. The husband is entitled to the chattel real by survivorship, and to all rent, &c. accruing during the coverture; he is also entitled to all chattels given to the wife during the coverture in her own right(*p*), though not to her rights in *autre droit*(*q*). And choses in action, or contracts made with the wife before coverture, except arrears of rent(*r*), do not survive to the husband, and he must, to recover the same, sue as administrator of his wife(*s*).[42] And if pending an action by husband and wife for such chose in action, the wife die, the suit abates, but if they obtain judgment, he may, notwithstanding her subsequent death, issue execution, or support an action of debt on such judgment(*t*). [*21]

If the *wife survive*, she is entitled to all chattels real which her husband had in her right, and which he did not dispose of in his lifetime, and to arrears of rent, &c. becoming due during the coverture, and to all arrears of rent and other choses in action to which she was entitled before the coverture, and which the husband did not reduce into actual possession, and even to a debt due upon a judgment recovered by husband and wife, whether obtained for a debt due to the wife

(*m*) Carroll *v.* Blenrowe, 4 Esp. Rep. 27.—Beard et ux. *v.* Webb et al., 2 B. & P. 105.—Selwyr's N. P. 297 to 303.

(*n*) Beard & wife *v.* Webb et al., 2 B. & P. 98.—Caudell *v.* Shaw, 4 T. R. 361.

(*o*) As to the effect of survivorship in general, between baron and feme, see Bac. Ab. tit. Executors and Administrators. H. 4.—2 Bla. Com. 433. to 436.—Co. Lit. 351. a. n. 1.—Com. Dig. Bar. & Feme, F. 1. E. 2, 3. Z. (2 A).

(*p*) Com. Dig. Bar. & Feme, E. 2, 3. Z.—2 Bla. Com. 424.—Co. Lit. 351. a. n. 1.

(*q*) Id. ibid.—Ankerstein *v.* Clarke et al., 4 T. R. 616.—1 Roll. Ab. 889. pl. 10.—Hunks *v.* Alborough, Dyer, 331, a.

(*r*) 32 H. 8. c. 37. s. 3.

(*s*) Com. Dig. Bar. & Feme, E. 3. 2 Bla. Com. 435.—Obrian *v.* Ram, 3 Mod. 186.—Garforth *v.* Bradley, 2 Ves. 676.—Heard *v.* Stanford, R. T. Talb. 173.

(*t*) 3 Mod. 189. n. g. h.

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(42) Although the husband cannot sue for a debt due his wife, *dum sola*, after her death without obtaining letters of administration, yet the necessity of doing this has relation merely to the *mode*, and not to the *right* of reducing her *choses in action* into possession; the right to them resides in no other person; if he gain possession of them without suit, his title is as perfect as though he had taken out letters of administration; if he die without reducing them into possession, the right to them survives to his, and not the wife's representatives, and if any other person obtain the possession, he can hold only as trustee for the husband or his representatives. *Whitaker* v. *Whitaker*, 6 *Johns. Rep.* 112. *Co. Lit.* 351. a. n. 1.

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whilst sole(*u*), or upon a contract made with the wife during coverture where she is the *meritorious cause of action(*w*); she is also entitled to all rights of action in *autre droit* as executrix or administratrix(*x*); and in all these cases where the wife is joined in the action, if the husband die pending the suit, it will not abate, and the wife may proceed to judgment and execution,[43] the death of the husband being suggested upon the record(*y*). And when a feme executrix marries a debtor to the testator, the right of action is only suspended during the coverture, and if she survive she may in her character of executrix sue the executors of the husband(*z*).

The consequences of a mistake in the proper parties in the case of baron and feme, are, that when a married woman might be joined in the action with her husband, but sues alone, the objection can only be pleaded in abatement,[44] and not in bar, though the husband might sustain a writ of error(*a*); and if she marry pending the suit, her coverture must be pleaded *puis darein continuance*(*b*). But when a feme improperly sues alone, having no legal right of action whatever, she will be nonsuited(*c*); and if she improperly join in an action with her husband, who ought to sue alone, the plaintiff may demur(*d*), or the judgment will be arrested(*e*), or reversed on a writ of error(*f*). And if the husband sue alone, when the wife ought to be joined either in her own right, or in *autre droit*, *he will be nonsuited(*g*); or if the objection appear on the record, it will be fatal in arrest of judgment or on error(*h*).

[*23]

(*u*) Com. Dig. Bar. & Feme, F. 1.—2 Bla. C. 434.—Garforth *v.* Bradley, 2 Ves. 676.—Oglander *v.* Baston, 1 Vern. 396.

(*w*) Bidgood *v.* Way et ux., 2 Bla. Rep. 1239.—Brashford *v.* Buckingham et ux., Cro. Jac. 77. 205.—Co. Lit. 351. a. n. 1.—Oglander *v.* Baston, 1 Vern. 396.

(*x*) Ankerstein *v.* Clarke et al., 4 T. R. 616.—Com. Dig. Bar. & Feme, F. 1.

(*y*) 8 and 9 W. 3. c. 11. s. 7.—Middleton *v.* Croft, R. T. Hardw. 397 to 399.

(*z*) Crossman *v.* Reade, Cro. Eliz. 114.—Anonymous, 3 Atk. 726.

(*a*) Miner et al. *v.* Milnes et al., 3 T. R. 631.

(*b*) Bac. Ab. Abatement, G.

(*c*) Caudell *v.* Shaw, 4 T. R. 361.

(*d*) Buckley *v.* Collier, 1 Salk. 114.—Rose et ux. *v.* Bowler et al., 1 Hen. Bla. 108.—Weller et al. *v.* Baker, 2 Wils. 424.

(*e*) Abbot et ux. *v.* Blofield, Cro. Jac. 644.

(*f*) Bidgood *v.* Way et ux., 2 Bla. Rep. 1236.

(*g*) Anon., 1 Salk. 282.—Bac. Ab. Bar. & Feme, K.

(*h*) Alebury *v.* Walby, 1 Str. 229.—Wise *v.* Bellent, Cr. Jac. 442.

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(43) Vide *Schoonmaker's Executors* v. *Elmendorf*, 10 *Johns. Rep.* 49. *Vaughan* v. *Wilson*, 4 *Hen. & Mun.* 452.

(44) Vide *Newton* v. *Robinson*, *Tayl.* 72.

II. DEFENDANTS. 1st. As between the *original* parties; and with reference to the *liability* of the party.

THE action upon an *express* contract, must in general be brought against the party who made it either in person or by agent(*i*); but difficulties frequently occur in regard to *implied* contracts, which are created by law in respect of the existing debt or duty; in these the action should be against the person who is subject to the *legal liability*(*k*); therefore in an action against a captain of a troop, for goods furnished to the men during the time of his absence, and whilst another officer was in the actual command of it, and by whom the orders for subsistence were issued, and who received the subsistence-money from government, it was decided that the defendant being under no legal liability, and not having made any express contract, was not liable to the action, though he was still entitled to a profit upon the sum issued by government on account of the subsistence-money, and though the troops still continued under his military orders(*l*); and though in general the owner of a ship is liable for repairs ordered for him, or for his benefit, by his captain(*m*); yet where the legal title to a ship remained for a month after the sale thereof in the vendor, and during that time the captain by the direction *of the purchaser ordered repairs, it was decided that the vendor was not liable for the amount(*n*).[45] [*24]

Against agents.

When a person has contracted in the capacity of an *agent*, and that circumstance is known at the time to the person with whom he contracted, such agent is not in general liable to an action for the non-performance of the contract, even for a deceitful warranty(*o*), if he had authority[46] from his principal to make the contract(*p*); and when an

(*i*) Young et al. *v.* Brander et al., 8 East, 12.—James *v.* Jones et al., 3 Esp. C. N. P. 27.

(*k*) Kinder et al. *v.* Paris, 2 H. Bla. 563.—Jenkins *v.* Tucker, 1 H. Bla. 93. A person attainted or outlawed is liable to be sued though he cannot sue. Macdonald's case, Foster's Cr. L. 61.

(*l*) Myrtle *v.* Beaver, 1 East, 135.—Rice *v.* Chute, 1 East, 579.—Young et al. *v.* Brander et al., 8 East, 10.

(*m*) Young et al. *v.* Brander et al., 8 East, 10.—Frazer v. Marsh, 13 East, 238. S. C. 2 Campb. 517.—Stokes *v.* Carne and others, 2 Campb. 339.—Trewhella and another *v.* Rowe, 11 East, 435.

(*n*) Young et al. *v.* Brander et al., 8 East, 10. and see Frazer *v.* Marsh, 13 East, 238.—S. C. 2 Camb. 517. As to an action not being sustainable by a cestui que trust against his trustee, vide ante, 3, note b. and Sanders on U. & T. 222. Smith and others *v.* Jameson, 5 T. R. 602, 3.—Ex parte Apsey, 3 Bro. Ch. C. 265. When a commissioner or trustee under a navigation act is liable, see Horsley *v.* Bell and others, Ambl. 770.

(*o*) Johnson *v* Ogilby et al., 3 P. Wms. 278, 9.—Perkin *v.* Pawley, 1 Bla. R. 670.—Pond *v.* Underwood, 2 Ld. Raym. 1210.—Buller *v.* Harrison, Cowp. 565.—Sadler *v.* Evans, Burr. 1986.—Macbeath *v.* Haldimand, 1 T. R. 181.—Unwin *v.* Wolseley, 1 T. R. 674.—Greenway *v.* Hurd, 4 T. R. 553. Hanson *v.* Roberdeau, Peake, C. N. P. 120.—Bac. Ab. Action on Case, B.—Abbott, 1st Edit. 229.—[Part 2. c. 2. § 2.] Ward *v.* Felton, 1 East, 507.

(*p*) Johnson v. Ogilby, 3 P. Wms. 279.

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(45) Vide *Wendover & Hinton*, v. *Hogeboom & others*, 7 *Johns. Rep.* 308. *Hussey* v. *Allen & Allen*, 6 *Mass. Rep.* 163. In the last cited case neither the plaintiff nor the master, had notice of the previous transfer.

(46) Vide *Carew* v. *Otis*, 1 *Johns. Rep.* 418., 5 *Johns. Rep.* 255. n. *i. Passmore* v.

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attorney for and on the behalf of his client promises to pay money, he is not personally liable if he had authority from his client(*t*).[47] But if an agent covenant under seal for the act of another, though he describe himself in the deed as contracting for and on the part and behalf of such other person(*q*),[48] or if he accept a bill of exchange generally and not as agent,† he is personally liable, and may be sued(*r*), unless in the case of an agent contracting on the behalf of[49] government(*s*). So if a person acting as agent do not disclose his principal, or declare that he acts as agent, at the time of making the contract, he will be personally responsible(*t*);[50] and a master of a ship is in general liable for

(*p*) Johnson *v.* Ogilby et al., 3 P. Wms. 277.

(*q*) Appleton *v.* Binks, 5 East, 148.

(*r*) Thomas et al. *v.* Bishop, Stra. 955.—De Gaillon *v.* L'Aigle, 1 Bos. & Pul. 368.

(*s*) Macbeath *v.* Haldimand, 1 T. R. 172.—Unwin *v.* Wolseley, 1 T. R. 674. Myrtle *v.* Beaver, 1 East, 135.—Rice *v.* Chute, 1 East, 582.

(*t*) Hanson *v.* Roberdeau, Peake, C. N. P. 120.—Macbeath *v.* Haldimand, 1 T. R. 181.—George *v.* Clagett et al., 7 T. R. 359.—Simon *v.* Motivos, Burr. 1921.

Mott, 2 *Binney*, 201. *Bethune* v. *Neilson*, 2 *Caine's Rep.* 139. *Mann* v. *Chandler*, 9 *Mass. Rep.* 335. *Dusenbury* v. *Ellis*, 3 *Johns. Cas.* 70.

(47) An attorney is personally liable to a sheriff, and so, it would seem, to any other officer of the court, for his fees, as it is to be presumed that the credit was given to the attorney. *Adams* v. *Hopkins*, 5 *Johns. Rep.* 252. *Ousterhont* v. *Day*, 9 *Johns. Rep.* 114.

(48) Vide *White & others* v. *Skinner*, 13 *Johns. Rep* 307. *Tippets* v. *Walker & others*, 4 *Mass. Rep.* 595. *Cutter* v. *Whittemore*, 10 *Mass. Rep.* 447. *Meyer and another* v. *Barker*, 6 *Binney*, 228. *Sumner* v. *Williams*, 8 *Mass. Rep.* 162.

(†) The drawer of a note *as guardian* of another, was held personally liable. *Thatcher* v. *Dinsmore*, 5 *Mass. Rep.* 299. *Forster* v. *Fuller*, 6 *Mass. Rep.* 58. A covenant by an executor, as executor, and *not otherwise*, was held not to bind him personally. *Thayer* v. *Wendell*, *Rep. C. C. U. S. First Circ't.* 37.

(49) Vide *Bainbridge* v. *Downie*, 6 *Mass. Rep.* 257. *Jones* v. *Le Tombe*, 3 *Dall.* 384. So, the Secretary at war, taking a lease of a building, in Washington, for the use of the war office, was held not to be liable under a covenant contained in the lease. *Hodgson* v. *Dexter*, 1 *Cranch*, 345. But a public officer may render himself liable by his express promise. *Gill* v. *Brown*, 12 *Johns. Rep.* 385. The Supreme Court of the state of New York have decided, that an agent of government, known as such, is personally liable on a contract made by him on account of government, unless it appear, as well that he contracted in his official capacity, and on account of government, as that the other party gave the credit, and intended to look to government for compensation. *Sheffield* v. *Watson*, 3 *Caine's Rep.* 69. Sed vide *Walker* v. *Swartwout*, 12 *Johns. Rep.* 444. *Swift* v. *Hopkins*, 13 *Johns. Rep.* 313.

(50) If the seller of goods, knowing at the time that the buyer, though dealing with him in his own name, is in truth the agent of another, elect to give the credit to such agent, he cannot afterwards recover the value against the known principal: but if the principal be not known at the time of the purchase made by the agent, it seems that when discovered, the principal or the agent may be sued at the election of the seller; unless where by the usage of trade, the credit is understood to be confined to the agent so dealing; as particularly in the case

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necessaries furnished abroad(*u*), or in this *country, unless they were furnished upon the credit of the owners(*w*),[51] and he or the owners may be sued upon the bill of lading, or generally, for the loss of goods, unless there has been an express contract with the owners(*x*); and it seems that a policy broker alone can be sued for the premiums of insurance(*y*). There is also a material distinction between an action against an agent for the recovery of damages, for the non-performance of the contract, and an action to recover back a specific sum of money received by him; for when a contract has been rescinded, or a person has received money as agent of another who had no right thereto, and has not paid it over; an action may be sustained against the agent to recover the money,[52] and the mere passing of such money in account with his principal, without any new credit given to him, is not equivalent to a payment of the money to the principal: but in general, if the money be paid over before notice to retain it, the agent is not liable(*z*),[53] unless his receipt of the money was obviously illegal(*a*).[54] An auctioneer and stake-holder, who are considered as trustees for both parties, are bound to retain the money till one of them be clearly entitled to receive it; and if he unduly pay it over to either party not entitled to it, he will be liable to repay the deposit or stake(*b*).

Partners, tenants in common, &c. [*26]

At law one partner or tenant in common cannot in general sue his co-partner, or co-tenant in any action in *form ex contractu*(*c*), but must *proceed by action of account(*d*), or by bill in equity;† a rule founded

(*u*) Rich *v.* Coe et al., Cowp. 639.—Westerdell *v.* Dale, 7 T. R. 312.

(*w*) Abbott, 1st Edit. 95.—[Part 2. c. 3.]

(*x*) Boson *v.* Sandford, Carth. 58.—Bac. Ab. tit. Actions, B.

(*y*) 1 Marshall, 204.

(*z*) Buller *v.* Harrison, Cowp. 565.—Sadler *v.* Evans, Burr. 1986.—Pond *v.* Underwood, L. Ray. 1210.—Greenway *v.* Hurd, 4 T. R. 553.—Cary *v.* Webster, Stra. 480.—Bul. N. P. 133.—Bishop *v.* Eagle, 10 Mod. 23.—Jons *v.* Perchard et al., 2 Esp. Rep. 507.

(*a*) Townson *v.* Wilson and others, 1 Campb. 396.—Lovell *v.* Simpson, 3 Esp. Rep. 153.

(*b*) Burrough *v.* Skinner, Burr. 2639.

(*c*) Smith *v.* Barrow, 2 T. R. 478.—Mainwaring et al. *v.* Newman, 2 B. and P. 124.—Hesketh *v.* Blanchard et al., 4 East, 144.—Wilkinson *v.* Frasier, 4 Esp. Rep. 182.

(*d*) Bac. Ab. tit. Account.—Wheeler *v.* Horne, Willes, 208.

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of principals residing abroad. *Patterson & another* v. *Gaudasequi*, 15 *East's Rep.* 62. Et vide *Mauri* v. *Heffernan*, 13 *Johns. Rep.* 58.

(51) The plaintiff has his election to sue either the one or the other, unless there were a special promise from either, in which case the other is discharged. *Garnham* v. *Bennet*, *Str.* 816. *Farmer & another* v. *Davies*, 1 *Term Rep.* 108.

(52) Vide *Campbell* v. *Hall*, *Cowp.* 204. *Hardacre* v. *Stewart*, *5 Esp. Rep.* 103. *Hearsey* v. *Pruyn*, 7 *Johns. Rep.* 179. *Whitbread* v. *Brooksbank*, *Cowp.* 69.

(53) Vide *Carew* v. *Otis*, 1 *Johns. Rep.* 418.

(54) Or the payment was compulsory, and not made expressly for the use of the principal. *Ripley and others* v. *Gelston*, 9 *Johns. Rep.* 201. *Snowdon* v. *Davis*, 1 *Taunt.* 359.

(†) Vide *Niven* v. *Spickerman and Stever*, 12 *Johns. Rep.* 401. *Ozeas* v. *Johnson*, 1 *Binney*, 191.

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on the nature of the situation of the parties, the difficulty at law of adjusting complicated accounts between them, and the propriety, arising from the confidence reposed by the parties in each other, of their being examined upon oath, which can only be effected in a court of equity. Therefore in the case of a partnership, one partner cannot at law recover a sum of money received by the other on account of the firm, unless on a balance struck that sum is found to be due to him alone(*d*). And in assumpsit by A B and C against D, as one of the indorsers of a promissory note, drawn by E in favour of himself and of the said C and D, then in partnership, and by them indorsed to the plaintiffs, a plea in bar that C, one of the plaintiffs, is liable as an indorser, together with the defendant, was held good on special demurrer(*e*); and in an action by several as executors, a plea in bar that the promises were made by the defendants jointly with one of the plaintiffs is sufficient(*f*).[55] But if one of two or more partners expressly covenant or agree to account, &c. and neglect to do so, an action may be supported by the others(*g*); and if an account be stated, and one partner expressly promise to pay the balance appearing to be due to the other, the latter may sue at law(*h*);[56] and in the case of a personal chattel, or of trees severed from the land, if one of two or more joint-tenants or tenants in common, by [*27] the *sale thereof, convert the thing into money, the joint interest is determined, and each hath a separate interest for a sum certain, and may support money had and received[57] against the other(*i*); and one partner may maintain an action for money had and received, against the other partner for money received to the separate use of the former, and wrongfully carried to the partnership account(*k*); and a partner may recover money paid to his co-partner for the purpose of being paid over, as the plaintiff's liquidated share of a debt to their joint creditor, if it be not so applied, and the plaintiff be obliged to pay such joint creditor(*l*).[58] So one of several co-sureties in a bond, who has been obliged to pay more than his proportion, may recover against any

(*d*) Smith *v.* Barrow, 2 T. R. 478.

(*e*) Mainwaring et al. *v.* Newman, 2 B. and P. 120.

(*f*) 2 Bos. and Pul. 124. n. c.—1 Wentw. 17, 18.—When a co-executor has refused to act he may be sued, Rawlinson *v.* Shaw, 3 T. R. 557.

(*g*) Foster *v.* Alvanson, 2 T. R. 482. Thimblethorp *v.* Hardesty, 7 Mod. 116. Venning *v.* Leckie, 13 East, 8.

(*h*) Foster . Alvanson, 2 T. R. 482, 3.—Smith *v.* Barrow, 2 T. R. 478.

(*i*) Wheeler Horne, 1 Willes, 209. Martin *v.* Knowlbys, 8 T. R. 146.

(*k*) Smith *v.* Barrow, 2 T. R. 476.

(*l*) Wright *v.* Hunter, 1 East, 20.

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(55) Sed vide post. 29. n. 63.

(56) Vide *Casey* v. *Brush*, 2 *Caine's Rep.* 293. So, if one partner covenant to pay all debts due from the partnership, he is liable for a debt due from the partnership to one of the other co-partners. *Hobart* v. *Howard*, 9 *Mass. Rep.* 304.

(57) Vide *Selden* v. *Hickock*, 2 *Caine's Rep.* 166.

(58) Where one partner gives a promissory note to another partner, for the use of the firm, the payee may maintain an action in his own name. *Van Ness* v. *Forest*, 8 *Cranch*, 30.

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one of the others his proportion of the money paid under the bond(*m*).[59] And unless there be a partnership, one of several parties interested in profits may in general proceed at law against a person who has received his share:[60] thus if a sailor engage on a whaling voyage, and is to receive a certain proportion of the profits of the voyage in lieu of wages, when the cargo is sold, he may maintain an action for his wages against the captain, and shall not be considered as a partner(*n*); and when the agreement between two does not constitute a partnership as between themselves, but only an agreement in favour of one as a compensation for trouble and credit, he *may sue the other,[61] though as between third persons both might be liable as partners(*o*). [*28]

When there are *several parties*, if their contract were *joint* they should all be made defendants(*p*), and if one of them be dead, it is more proper to state in the declaration that the contract was made by him as well as by the survivor(*q*); it seems however that no advantage can be taken, though the declaration do not notice the deceased(*r*). A contract made by two partners to pay a sum of money to a third person equally, out of their own private funds, is a joint contract, and they should be jointly sued upon it(*s*);[62] but if A lease for years to B and C, rendering rent, and C assign his moiety to D, A may sue B and D jointly or severally, at his election, for rent in arrear(*t*): and where two

2ndly, With reference to the *number* of the defendants; and who *must* be joined.

(*m*) Cowell *v.* Edwards, 2 B. & P. 268.—Deering *v.* Earl of Winchelsea et al., 2 B. & P 270.—Child *v.* Morley, 8 T. R. 614.—Toussaint & others *v.* Martinant, 2 T. R. 100.

(*n*) Wilkinson *v.* Frasier, 4 Esp. Rep. 182.

(*o*) Hesketh *v.* Blanchard, et al., 4 East, 144.

(*p*) 1 Saund. 153. n. 1. 291. b. n. 4.

(*q*) 1 Saund. 291 n 2.—Blackwell *v.* Ashton, Styles. 50.—Spalding et al. *v.* Mure et al. 6 T. R. 365.—Smith *v.* Barrow, 2 T. R. 477, 8

(*r*) Hyat *v.* Hare, Comb. 383.—Ditchburn *v.* Spracklin et al., 5 Esp. Rep. 32. Smith *v.* Barrow, 2 T. R. 479.—Vin. Ab. Partner, D. *acc.*—Spalding et al. *v.* Mure et al., 6 T. R. 365.—Tissard *v.* Warcup, 2 Mod. 280. *contr.*

(*s*) Byers *v.* Dobey, 1 H. Bla. 236.

(*t*) Waldron *v.* Vicars et al., Palmer, 283.—2 Vin. Ab. 66, 7.—2 Saund. 182. n. 1.—Ipswich, Bailiffs, &c. of, *v.* Martin, Cro. Jac. 411.

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(59) Vide *The People* v. *Duncan*, 1 *Johns. Rep.* 311.

(60) As in the case of persons running a line of stages, where each has his separate portion of the road, and provides horses and carriages at his own expense and risk. *Wetmore and Cheeseborough* v. *Baker and Swan*, 9 *Johns. Rep.* 307.

(61) Vide *Muzzy* v. *Whitney & others*, 10 *Johns. Rep.* 228. *Dry* v. *Boswell*, 1 *Campb.* 329.

(62) A covenant in a lease to two persons, as tenants in common that the lessees shall pay the rent, is a joint covenant, notwithstanding their several interests. *Phillips* v. *Bonsall survivor, &c.* 2 *Binney*, 138. If a partner purchase goods for the partnership account, but on his individual credit, he may be sued alone. *Sylvester & another* v *Smith*, 9 *Mass. Rep.* 119. And if a partner raise money by way of discount, on a bill drawn by himself individually, the lender can resort to the partnership neither in an action on the bill, or on an implied assumpsit, although the proceeds of the bill were carried to the partnership ac-

II. DEFENDANTS. several tenants of a farm agreed with a succeeding tenant to refer certain matters in difference respecting the farm to arbitration, and jointly and severally promised to perform the award, and the arbitrators awarded that each of the two should pay a certain sum of money to the third, it was decided that they were liable to be sued jointly for the sums awarded to be paid by each, because by the terms of the agreement they had promised jointly as well as severally, which made each [*29] of them liable for the act of the *other(*u*). Parceners should before partition be jointly sued, though they be entitled to the estate by different descents(*w*).

With respect to the mode of taking advantage of the *omission* of a party who ought to be made a co-defendant, there is a material distinction between this case, and that of co-plaintiffs. We have seen that if a person who ought to join as plaintiff be omitted and the objection appear upon the pleadings, the defendant may demur, move in arrest of jndgment, or bring a writ of error; or if the objection do not appear on the pleadings, the plaintiff, except in the case of co-executors or co-administrators, will be nonsuited(*x*). But in the case of defendants, if a party be omitted, whether he be sued upon a personal contract, or as pernor of the profits of a real estate, as in debt for a rent charge(*y*), the objection can only be taken by plea in abatement[63] verified by affidavit(*z*), unless it appear on the face of the declaration, or some other pleading of the plaintiff, that the party omitted is *still living*, as well as that he

(*u*) Mansell *v.* Burredge et al., 7 T. R. 352.—2 Saund. 61. h. n. 2. These instances will suffice to shew when the action should be joint or several. To state all the cases upon this subject, would be to investigate the nature and properties of contracts, a pursuit foreign to this treatise.—As to when a contract is joint and when several, see Bac. Ab. tit. Obligation, 5 Vol. D. 4. & 7 Vol. Obligation, B.—And as to what constitutes a partnership, see Coope et al. *v.* Eyre et al., 1 H. B. 37.—Waugh *v.* Carver & others, 2 H. B. 235.—Saville *v.* Robertson et al., 4 T. R 720.—Hesketh *v.* Blanchard et al., 4 East, 144. & Watson on Partnership.[64]

(*w*) Vin. Ab. tit Actions, Joinder, D. d.—Parceners.—Middleton *v.* Croft, R. T. Hardw. 398, 9.

(*x*) *Ante* 7. and note g.

(*y*) 1 Saund. 284. n. 4.

(*z*) 1 Saund. 154. n. 1. 291. b. n. 4. &c.—Mitchell *v.* Tarbutt et al., 5 T. R. 651.—Wright *v.* Hunter, 1 East, 20. Saville *v.* Robertson et al., 4 T. R. 725. Abbot *v.* Smith, 2 Bla. R. 947.

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count. *Emly & others* v. *Lye*, 15 *East's Rep.* 7. But where a partner raises money for the use of the partnership by drawing bills of exchange upon the firm, although the partners are not jointly liable upon an unaccepted bill, yet they are jointly liable as for money lent, or money had and received. *Denton & others* v. *Rodie & another*, 3 *Campb.* 493. If one partner make a warranty in a sale, an action may be sustained against him, without joining his copartner. *Clark* v. *Holmes*, 3 *Johns. Rep.* 148.

(63) Vide *Ziele & Becker* v. *Campbell's Ex'rs.* 2 *Johns. Cas.* 382. *Converse* v. *Symmes*, 10 *Mass. Rep.* 377. 379. So, that the assumpsit was made by the defendant, and one of the plaintiffs jointly, must be pleaded in abatement. *Robinson* v. *Fisher*, 3 *Caine's Rep.* 99. Sed vide ante 26.

(64) Et vide *Guidon* v. *Robson*, 2 *Campb.* 302.

jointly contracted, in which case the defendant may demur, or move in arrest of judgment, or sustain a *writ of error(*a*). There is however this objection in the case of a joint contract to the non-joinder of one or one or more of the several parties liable, that if judgment be obtained against one, in a separate action against him on such contract, the plaintiff cannot afterwards proceed against the parties omitted, and consequently loses their security(*b*).

When the contract is several, as well as joint, the plaintiff is at liberty to proceed against the parties jointly, or each separately,[65] though their interest be joint(*c*). But if there be more than two parties to a joint and several contract, as where three obligors are jointly and severally bound, the plaintiff must either sue them all jointly, or each of them separately(*d*),[66] though if two only be improperly sued, the objection should be taken by plea in abatement, and is not a ground of nonsuit(*e*); and where parties are sued separately, the breach may be assigned in both (*f*), and a recovery,† and execution against the body of one, producing no actual satisfaction, will be no bar to an action against the other(*g*): and when the contract is joint and several, and the debt or demand considerable, it is most advisable to proceed separately; for if all the parties be joined, and one of them die after judgment, and

(*a*) 1 Saund. 291. b. &c. n. 4. 154, n. 1.—Scott *v.* Godwin, 1 Bos. & P. 73.—Churchill *v.* Gardner, 7 T. R. 596, 7.—In general a person is presumed to be living until it be proved that he is dead, unless seven years have elapsed since he was heard of, Wilson and others *v.* Hodges and another, 2 East, 313.—Doe d. George and wife *v.* Jesson, 6 East, 85.—1 Saund. 235. a. n. 8.—but this seems an exception, *sed quære*, see South *v.* Tanner and Jones, 2 Taunton, 256.

(*b*) Brown *v.* Wootton, Cro. Jac. 73, 4.—Com. Dig. Action, K. 4.

(*c*) 1 Saund. 153, n. 1.—Enys *v.* Donnithorne, 2 Burr. 1190.—Constable *v.* Cloberry, Poph. 161.

(*d*) Streatfield et al. *v.* Halliday et al., 3 T. R. 782.—Bac. Ab. Obligation, D. 4.—1 Saund. 291. e.—2 Vin. Ab. 68. pl. 7.

(*e*) 1 Saund. 291. e. South *v.* Tanner and Jones, 2 Taunton, 254.

(*f*) Lilly *v.* Hedges, 1 Stra. 553.—Enys *v.* Donnithorne, 2 Burr. 1197.

(*g*) Brown *v.* Wootton, Cro. Jac. 74. Higgins's Case, 6 Co. 45.—Claxton *v.* Swift, 3 Mod. 87.—S. C. 2 Show. 494.

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(65) Vide *Cutter* v. *Whittemore*, 10 *Mass. Rep.* 446. *Carter* v. *Carter*, 2 *Day*, 442.

(66) Vide *Meredith's Administratrix* v. *Duval*, 1 *Mun.* 79.* *Leftwich & others v. Berkely*, 1 *Hen. & Mun.* 61. But by the New York statute for the amendment of the law, sess. 36. c. 56. s. 14. 1 R. L. 521. it is enacted that all or any part of the obligors in a joint and several or several bond or recognizance may be joined in one action, and if the whole amount due shall not be levied in such suit, a further action may be brought against the residue of the obligors jointly or severally; but no more than the debt and damages due, with costs of suit, can be levied: the plaintiff may at any stage consolidate the suits; and where more than one suit is depending at the same time, on one bond, recognizance, promissory note or bill of exchange, he can recover costs in only one suit, except the costs of writs issued into several counties, against defendants residing in different counties.

† Vide *Sheehy* v. *Mandeville & Jamesson*, 6 *Cranch*, 265.

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before *execution, the remedy at law against the assets of the deceased is determined(*h*);[67] and in the case of the death of a surety, even a court of equity will not in all cases relieve(*i*), whereas if the plaintiff proceed separately, the executor of the deceased, as well as the survivor, continue severally liable at law(*k*).

Who *may* be joined.

It has already been observed that at law as well as in equity, the courts will not take cognizance of distinct and separate claims or liabilities of different persons in one suit, though standing in the same relative situations(*l*). And therefore in an action *ex contractu* against several, it must appear on the face of the pleadings, that their contract was joint, and that fact must also be proved on the trial; and if *too many* persons be made defendants, and the objection appear on the pleadings, either of the defendants may demur, move in arrest of judgment(*m*), or support a writ of error; and if the objection do not appear upon the pleadings, the plaintiff may be nonsuited upon the trial, if he fail in proving a joint contract(*n*):[68] for though in actions for *torts* one defendant may be found guilty, and the other acquitted; yet in actions for the breach of a *contract* whether it be framed in assumpsit, covenant, debt, or case, a verdict or judgment cannot in general be given in [*32] a joint action, against one defendant without the other(*o*); *and there-

(*h*) Com. Dig. Action, K. 4.—Bac. Ab. Obligation, D. 4. 5 Vol. and 7 Vol. tit. Obligation, B.

(*i*) Id. ibid.—Thomas *v.* Frazer, 3 Vez. Jun. 399.—Bishop *v.* Church, 2 Vez. Sen. 106.

(*k*) Enys *v.* Donnithorne, 2 Burr. 1190.

(*l*) Ante 8.—Birkley et al. *v.* Presgrave, 1 East, 226, 7.

(*m*) Mansell *v.* Burredge et al, 7 T. R. 352.

(*n*) Shirreff et al. *v.* Wilks et al., 1 East, 52.—Porter *v.* Harris, 1 Lev. 63. Jaques *v.* Whitcomb et al., 1 Esp. Rep. 363.—Bul. N. P. 129.—Coope et al. *v.* Eyre et al., 1 H. Bla. 37.—Powell *v.* Layton, 2 New Repts. 365.—Max *v.* Roberts et al., 2 New Rep. 454.—S. C. 12 East, 94.—Weall *v.* King & King, 12 East, 454.—Barton *v.* Hanson and others, 2 Taunt. 49.—Siffkin *v.* Walker and Rowlestone, 2 Campb. 308. The same rule prevails under a joint commission of bankruptcy. Cooke's Bkt. L. 6, 7.

(*o*) Porter *v.* Harris, 1 Lev 63.—Powell *v.* Layton, 2 New. Rep. 365.—Max *v.* Roberts et al., 2 New. Rep. 454. S. C. 12 East, 93.—Weall *v.* King and King, 12 East, 454.

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(67) Vide *Foster* v. *Hooper*, 2 *Mass. Rep.* 572. But by a statute passed 26th February, 1800, his assets are rendered liable in the hands of his executors or administrators. 3 *Laws Mass.* 69. And see the statute of the State of New York cited ante n. 66, which authorises the plaintiff to prosecute the action against all or any of the obligors to judgment and execution against the defendants, *and against their joint or separate property*, and in an action against the residue of the obligors, to prosecute the same to judgment and execution against the said residue, *and against their joint or separate property*.—Judgment was recovered against A one of two joint makers of a promissory note: the plaintiff brought an action afterwards against A and B the other maker, on the same note, and B pleaded, separately, the recovery against A; the plea was held bad. *Sheehy* v. *Mandeville & Jamesson*, 6 *Cranch*, 253.

(68) Vide *Jackson d. Haines & others* v. *Woods & others*, 5 *Johns. Rep.* 280, 281. *Tom* v. *Goodrich*, 2 *Johns. Rep.* 213. *Livingston's Ex'rs* v. *Tremper & others*, 11 *Johns. Rep.* 101. *Elmendorph* v. *Tappen and others*, 5 *Johns. Rep.* 176. *Burnham* v. *Webster*, 5 *Mass. Rep.* 270. post 74. n. 151.

fore in an action of assumpsit against three, two only of whom were liable to be sued, and the party not liable, together with one of those who was liable, suffered judgment by default, and the other party pleaded the general issue, a verdict was found for the defendants on the ground that the plaintiff having declared as upon a promise by three defendants, consequently to entitle himself to recover, he should have proved a promise, either express or implied, binding upon all the three(*h*): and where the plaintiff declared on a joint and several promissory note, against all the makers, jointly, and one of them, by his plea, admitted his handwriting to the note, but the other defendants pleaded non-assumpsit, the plaintiff was nonsuited for not proving the hand-writing of the defendant, who by his plea had so admitted it(*q*); and though a contract be proved to have been in *fact* made by all the defendants, yet if in point of *law* it is not obligatory either on the ground of infancy, coverture, &c. at the time it was entered into, the plaintiff would be nonsuited(*r*), and having commenced his action against too many parties, he could not avoid the objection by entering a *nolle prosequi* as to the infant or feme covert(*s*),[69] but must discontinue and commence a fresh action, omitting such parties; in which should the defendants plead the non-joinder of the infant or feme covert in abatement, the plaintiff may reply the infancy([70]) or coverture(*t*). But when one of the defendants is discharged from liability by matter *subsequent* to the *making of the contract, as by his bankruptcy and certificate, the failure on the trial as to him on such ground does not preclude the plaintiff from recovering against the other parties, and should he plead his certificate, a *nolle prosequi* as to him may be entered(*u*): and in debt on a penal statute at the suit of a common informer, or of the party aggrieved, for an offence which may be committed by several jointly, the plaintiff will succeed if he prove either of the defendants to be liable, for in this case the action, though in form *ex contractu*, is founded upon a tort(*w*);[71] so against executors, though the plaintiff may fail as to one, on the plea of *plene administravit*, he may recover against

[*33]

(*p*) Shirreff et al. *v.* Wilks et al., 1 East, 52.—Haunay *v.* Smith et al., 3 T. R. 662.—Porter *v.* Harris, 1 Lev. 63.

(*q*) Gray et al. *v.* Palmers et al., 1 Esp. Rep. 135.

(*r*) Chandler *v.* Parkes et al., 3 Esp. Rep. 76.—Vin. Ab. Action, D. d. pl. 8. Mex *v.* Roberts and others, 12 East, 89.

(*s*) Chandler *v.* Parkes et al., 3 Esp. Rep. 76.—Chiswell *v.* Ingham, 1 Wils. 89.—Tidd's Pract. 631.

(*t*) Chandler *v.* Parkes et al., 3 Esp. Rep 76.—Vin. Ab. tit. Actions, Joinder, D d. pl. 8.

(*u*) Chiswell *v.* Ingham, 1 Wils. 89.—1 Saund. 207. a. b.—Chandler *v.* Parkes et al., 3 Esp. Rep. 77.

(*w*) Bastard *v.* Hancock, Carth. 361. Barnard *v.* Gostling et al, 2 East, 569. S. C 1 New. Rep. 245.—Govett *v.* Radnidge et al., 3 East, 62.

(69) Vide contra *Hartness and another* v. *Thompson and others*, 5 *Johns. Rep.* 160. A plea in abatement that the defendant made the promise jointly with another, is supported by evidence that the promise was made by the defendant jointly with an infant. *Gibbs* v. *Merrill*, 3 *Taunt.* 307. *Burgess* v. *Merrill*, 4 *Taunt.* 468, 469.

(70) Acc. *Burgess* v. *Merrill*, 4 *Taunt.* 468.

(71) Vide *Burnham* v. *Webster*, 5 *Mass. Rep.* 270. post 74. n. 151.

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As the consequences of the joinder of *too many* defendants, in an action founded on a *contract*(*y*) are in general so important, it is advisable in cases where it is doubtful how many parties are liable, to proceed only against those defendants who are certainly liable, in which case we have seen the nonjoinder can only be taken advantage of by a plea in abatement(*z*). On process by bill or latitat in K. B. or on common process [*34] in C. P. not bailable, the *writ may be against four defendants, and the plaintiff may declare and proceed against each separately(*a*),[73] but on bailable process against several, the declaration must be against all(*b*).

3dly, In case of change of credit, and of covenants running with land, &c. In general in the case of a mere *personal* contract, the action for the breach of it cannot be brought against a person to whom the contracting party has assigned his interest, and the original party alone can be sued: thus if one demise cattle or goods, and the lessee covenant for himself and his assigns, at the end of the term to deliver such cattle or goods, and the lessee assign the cattle, &c. this covenant will not bind the assignee, for it is merely a thing in action in the personalty: and wants such privity as exists between the lessor and lessee of *real property* in respect of the reversion(*c*); and if two partners dissolve their partnership, and one of them covenant with the other that he will pay all the debts, a creditor must nevertheless sue both. There may however in some case be a *change of credit*, by agreement between the parties, so as to transfer the liability from the original contracting party to another, or to one only of the original parties(*d*); thus in the case of a tenancy from year to year, if the landlord accept another person as tenant in the room of the former tenant, without any surrender in writing, such acceptance may be a dispensation of any notice to quit, and [*35] the original tenant may *be discharged(*e*); and where two partners gave

(*x*) Tidd's Prac. 3d Edit. 901.—1 Saund. 207. a. b.

(*y*) According to the case of Govett & Radnidge, 3 East, 62. when the plaintiff declares in *case* for the breach of a contract, the defendant cannot plead in abatement that another person was liable, nor is it a ground of nonsuit that *too many* defendants were joined in the action; but see the cases in 2 New Rep. 365. 454. & 12 East, 94. 454. [Powell *v.* Layton, Max *v* Roberts & others; and Weall *v.* King & King;] from which it appears that this doctrine is questionable.[72]

(*z*) Ante, 29.

(*a*) Lewin *v.* Smith, 4 East, 589.—Staples et al. *v.* Ashley et al., 1 B. & P. 49.—Tidd's Prac. 80.

(*b*) Id. ibid.—Moss et al. *v.* Birch et al., 5 T. R. 722.—Tidd's Prac. 164.

(*c*) Bally *v.* Wells, 3 Wils. 27.—Saville *v.* Robertson et al. 4 T. R 720. 726.

(*d*) Anstey *v.* Marden, 1 New Rep. 124. 131.—Evans *v.* Drummond, 4 Esp. Rep. 91, 2.—Reed *v.* White et al., 5 Esp. Rep. 122.—Tapley *v.* Martens, 8 T. R. 451.—Wyatt *v.* Marquis of Hertford, 3 East, 147.—Barton *v.* Hanson & others, 2 Camp. 99.

(*e*) Sparrow *v.* Hawkes, 2 Esp. Rep. 505.

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(72) Vide ante 2. n. 1.

(73) Vide *Montgomery* v. *Hasbrouck*, 3 *Johns. Rep.* 538.

a joint bill of exchange for a partnership demand, and when the bill became due the holder took the separate bill of one, it was decided that the other was thereby discharged(*f*).[74] So if one take the security of the agent of the principal, with whom he dealt unknown to the principal, and give the agent a receipt as for the money due from the principal, in consequence of which the principal deals differently with his agent on the faith of such receipt, the principal is discharged, although the security fail, though if the principal were not prejudiced he would not be discharged(*g*). But where one of three joint covenantors gave a bill of exchange as a collateral security, not accepted in satisfaction of the debt, the judgment recovered on the bill was decided to be no bar to an action of covenant against the three(*h*). The consignor of goods may be primarily liable for the freight, but the consignee, if he accept the goods in pursuance of the usual bill of lading, may be sued for the same, unless it be known to the master of the ship that he acted only as agent for the consignor(*i*).

Upon a covenant running with the *land* which must concern real property or the estate therein(*k*), the assignee of the lessee is liable to an action for a breach of covenant after the assignment of the estate[75] to him(*l*), and though he have not taken possession(*m*); *but his liability ceases when he assigns his interest, though even purposely to an insolvent person(*n*). And if the covenant be merely collateral and personal, an assignee is not in any case liable, and the lessee alone can be sued(*o*).

[*36]

When there is an *express* covenant in a lease to pay rent or perform any other act, the original lessee, and his personal representatives having assets, are liable to an action of *covenant* during the lease, notwithstanding before the breach complained of, the interest in the lease may have been assigned, and though the lessee may have become

(*f*) Evans *v.* Drummond, 4 Esp. Rep. 91, 2.—Reed *v.* White et al., 5 Esp. Rep. 122. but see Barton *v.* Hanson and others, 2 Campb. 98, 9.

(*g*) Wyatt *v.* Marquis of Hertford, 3 East, 147.—Tapley *v.* Martens, 8 T. R. 451.—Waring and others *v.* Favenck and others, 1 Campb. 85.—Kymer and others *v.* Suwercropp, 1 Campb. 109.

(*h*) Drake *v.* Mitchell et al., 3 East, 251.—Tapley *v.* Martens, 8 T. R. 451.

(*i*) Abbott, 1st Edit. 229. [Part 3. c. 7. § 4.]—Ward *v.* Felton, 1 East, 507.

(*k*) Baily *v.* Wells, 3 Wils. 29.—Tatem *v* Chaplin, 2 H. B. 133.

(*l*) Bac. Ab. tit. Covt. E. 3, 4.—Bally *v.* Wells, 3 Wils. 25.—2 Saund. 304. n. 12.

(*m*) Woodfall, L. & T. 2d Edit. 113. Westerdell *v.* Dale, 7 T. R. 312.—Devereux *v.* Barlow, 2 Saund. 182.—Brewster *v.* Kitchell, 1 Salk. 198.—S. C. 1 Ld. Raym 322.—*acc.*—Eaton *v.* Jaques, Dougl. 455. *cont.*

(*n*) Taylor *v.* Shum et al., 1 B. & P. 21.—Bac. Ab. tit. Covt. E. 4.

(*o*) Bac. Ab. tit. Covt. E. 3, 4.—Bally *v.* Wells, 3 Wils. 25.—2 Saund. 304. n. 12.

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(74) So, the bond or obligation of one of the partners is an extinguishment of a debt from the partnership to the obligee. *Clement* v. *Brush*, 3 *Johns. Cas.* 180. *Tom* v. *Goodrich & others*, 2 *Johns. Rep.* 213.

(75) Vide *Pollard* v. *Shaeffer*, 1 *Dall.* 210.

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bankrupt, or an insolvent debtor, or the lessor or the assignee of the reversion may have accepted rent of the assignee(*p*).[76] But an action cannot be supported against those parties for a breach of a covenant *implied* by law, committed after acceptance of rent from the assignee(*q*); nor can the lessor after such acceptance of the assignee, maintain an action of *debt* against the lessee or his representatives even upon an express covenant(*r*).

An *underlessee*[77] who has not the whole of the lessee's interest assigned to him, cannot be sued by the original lessor, for any breach of covenant contained in the original lease(*s*), though for voluntary and not mere permissive waste[78] he would be liable to an action on the case(*t*).

[*37]

4thly, When one of several obligors, &c. is dead.

*In the case of a *joint* contract, if one of the parties die, his executor or administrator is at law discharged from liability,[79] and the survivor alone can be sued(*u*), and if the executor be sued, he may either plead the survivorship in bar, or give it in evidence under the general issue(*w*); but in equity the executor of the deceased party is liable,[80] unless in some instances of a surety(*x*):[81] and if the contract were *several*, or joint and several, the executor of the deceased may be sued

(*p*) 1 Saund. 241. n. 5.—Ludford *v.* Barber, 1 T. R 92.—Marks *v* Upton, 7 T. R. 305.—Mills *v.* Auriol, 1 H. B. 443.—S. C. 4 T. R. 94. 100.—Bac. Ab. tit. Covt. E. 4.—Boot *v.* Wilson & another, 8 East, 311. but see 49 Geo. 3. c. 121. s. 19.

(*q*) 1 Saund. 241. b.—Auriol *v.* Mills. 4 T. R. 98.—Anon. 1 Sid. 447.—Bachelour *v.* Gage, Sir W. Jones, 223.—Bret *v.* Cumberland, Cro. Jac. 523.

(*r*) Ludford *v.* Barber, 1 T. R. 92.—1 Saund. 241. n. 5.

(*s*) Holford & Hatch, Dougl. 183.

(*t*) Kinlyside *v.* Thornton et al., 2 Bla. Rep. 1111.

(*u*) Bac. Ab. Obligation, 5 Vol. D. 4. Vin. Ab. Obligation, P. 20.—Panton *v.* Tertenants of Hall, Carth. 105.—Enys *v.* Donnithorne, 2 Burr. 1196.

(*w*) Bostan *v.* Stanway, 5 East, 261.

(*x*) Bac. Ab. Obligation, 7 Vol.—Lane *v.* Williams, et al., 2 Vern. 277.—Thomas *v.* Frazer, 3 Ves. J. 399.—Bishop *v.* Church, 2 Ves. 105.

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(76) Vide *Kunckle* v. *Wynick*, 1 *Dall.* 305.

(77) A declaration in covenant for rent, against the assignee of a lessee, averring that the rent accrued subsequent to the assignment to the defendant, was due and owing to the plaintiff's testator, and still remains wholly in arrear, and unpaid to the defendant, states a breach in sufficient terms; and it is unnecessary to go further and say that the lessee had not paid it, for that was already implied in the averment that the defendant owed it. *Dubois's Executors* v. *Van Orden*, 6 *Johns. Rep.* 105.

(78) An action on the case does not lie for permissive waste. *Gibson* v. *Wells*, 1 *New Rep.* 290.

(79) Vide *Foster* v. *Hooper*, 2 *Mass. Rep.* 572. ante, 31. n. 67. *Atwell's Administrators* v. *Milton*, 4 *Hen. & Mun.* 253. *Chandler's Executors* v. *Neale's Executors*, 2 *Hen. and Mun.* 124. *Braxton's Adm'x.* v. *Hilyard*, 2 *Mun.* 49. *Simonds* v. *Center*, 6 *Mass. Rep.* 18.

(80) Vide *Jenkins* v. *De Groot*, 1 *Caine's Cas. in Err.* 122. *Lang and Whitaker* v. *Keppele*, 1 *Binney*, 123.

(81) Vide *Harrison* v. *Field*, 2 *Wash.* 136.

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at law in a separate action(*y*); but he cannot be sued jointly with the survivor, because one is to be charged *de bonis testatoris*, and the other *de bonis propriis*(*z*). It is usual though not necessary[82] to declare against the survivor as such, noticing the death of his co-obligee or co-partner(*a*); and in an action against such survivor a debt may be included, though it became due from him since the death of his partner(*b*); and when the survivor is sued for his own separate debt, he may set off a demand due to him as surviving partner(*c*).[83]

5thly, In the case of executors or administrators, heirs and devisees.

When the contracting party is dead, his *executor* or *administrator*, or in a case of a joint contract, the executor or administrator of the survivor, is the party to be made defendant; and covenant lies against executors in every case,[84] though they be not named, unless it be a covenant to *be performed by the testator in person, and which consequently the executor cannot perform(*d*). If a person intermeddle *as* executor with the estate of the deceased, he may in general be sued as executor *de son tort*, although there be a lawful executor(*e*), and in such case he is uniformly declared against as if he were a lawful executor, though the party died intestate, and he may be joined in the same action with the lawful executor,[85] though not with the lawful administrator(*f*): and if a stranger take away the goods of the deceased, if there be no lawful executor he also is liable to be sued as executor *de son tort*, though he claim them as his *own*(*g*); but if there be a lawful executor or administrator, the stranger cannot be sued as executor *de son tort*(*h*). No person can ever be sued as *administrator de son tort*.[86]

[*38]

(*y*) Enys *v.* Donnithorne, 2 Burr. 1190.

(*z*) Kemp *v.* Andrews, Carth. 171.—Hall et al. v. Huffam, 2 Lev. 228.—2 Vin. Ab. 67 70.

(*a*) Ante, 12.—1 Saund. 154. n. 1.

(*b*) Smith *v* Barrow, 2 T. R. 476.—French *v.* Andrade, 6 T. R. 582.

(*c*) Slipper et al. v. Stidstone, 5 T. R. 493.—S. C. 1 Esp. R. 47.

(*d*) Bally *v.* Wells, 3 Wils. 29.

(*e*) Read's Case, 5 Co. 34. a.

(*f*) 1 Saund. 265. n. 2.—Com. Dig. tit. Administrator, C. 3.—Toller. 369.

(*g*) Read's Case, 5 Co. 34.

(*h*) Read's Case, 5 Co. 34. a.

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(82) Thus, in an action of assumpsit for goods, which were sold to two partners, against the survivor, it is unnecessary to notice the survivorship. *Goelet* v. *M'Kinstry*, 1 *Johns. Cas.* 405.

(83) Vide *Hogg's Executors* v. *Ashe*, 1 *Hayw.* 477.

(84) Where there is an express covenant in a lease in fee for the payment of rent, the executors of the lessee are liable for the rent accruing subsequent to the testator's death, as far as they have assets, although the land has gone into the hands of the heir. *Executors of Van Rensselaer* v. *Executors of Platner*, 2 *Johns. Cas.* 17. But covenant does not in such case lie against them by the devisees of the grantor. *Devisees of Van Rensselaer* v. *Executors of Platner*, *Id.* 24.

(85) Though a person who is sued as executor de son tort, shall not defeat the suit, by taking out letters of administration pending the suit, because the suit was well commenced; yet such an administration will legitimate all intermediate acts ab initio; and justify a retainer. *Vaughan* v. *Brown*, *Str.* 1106. S. C. *Andr.* 328. *Curtis* v. *Vernon*, 3 *Term Rep* 587. *Battoon and another* v. *Owwacker*, 8 *Johns. Rep.* 126.

(86) At common law an action of account did not lie against an executor for

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If there be several executors they should all be sued, in case they have all administered and have assets, or the defendant may plead the non-joinder in abatement; but if one have not administered, or if no assets have come to his hands, he may be omitted(*i*). The plaintiff however when he sues all, will succeed if he recover against any one of the defendants, and the defendant who obtains a verdict will not be entitled to his costs(*k*), and as it may be advisable to take judgment of assets *quando*, &c. against such defendant, should he plead *plene administravit*, it is in general advisable to join all the *defendants who may [*39] be named as executors or administrators in the will or letters of administration. If a married woman be executrix, the husband must be joined in the action(*l*); and an infant sole executor cannot be sued till he be of full age(*m*), nor can an executor be sued as such for money lent to him(*n*), or upon a penal statute(*o*).

If the contract were under seal or of record, the *heir* of the party contracting is liable to an action for the breach of it, when expressly named in the contract, provided he have *legal* assets by descent from the obligor(*p*).[87] And if there be a *devisee*, (otherwise than for the payment of debts, or in pursuance of a marriage contract entered into before marriage,) he may be sued in an action of *debt*, for the breach of a contract of the testator under seal or of record, but the heir must be joined in the action; and an action of *covenant* cannot in any case be supported against a devisee, for a breach of contract in the time of the testator(*q*); and though the devisee be an infant, he cannot pray the parol to demur by reason of his nonage,[88] such privilege being

(*i*) Toller, 367.—As to plaintiff's executors, ante, 13.

(*k*) Tidd, 901. 1 Saund. 207. a.—Ante, 33.

(*l*) Mounson *v.* Bourn, Cro. Car. 519. Toller, 367.—Post. 43.

(*m*) 38 Geo. III. c. 87.—Toller, 367.

(*n*) Rose and wife *v.* Bowler & Read, 1 H. B 109.

(*o*) Bastard *v.* Hancock, Carth. 361. Wortley *v.* Hirpingham, Cro. Eliz. 766. Com. Dig. tit. Administrator, B. 15.

(*p*) Bac. Ab. tit. Heir and Ancestor, F.—Barber *v.* Fox, 2 Saund. 136.—Davy *v.* Pepys, Plowd. 439. 441.—2 Saund. 7. n. 4.

(*q*) 3 and 4 Wm. and Mary, c. 14.—Bac. Ab. tit. Heir and Ancestor, F.—Gawler v. Wade, 1 P. Wms. 99.—Wilson *v.* Knubley, 7 East, 128.

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want of privity, but such action is now given by statute 4 & 5 Ann. c. 16. (Laws N. Y. sess. 36. c. 75. s. 5. 1 R. L. 311.) against the executors or administrators of every guardian, bailiff, or receiver. *Litt.* § 125. *Co. Litt.* 90 b. F. N. B. 117. E. *Com. Dig. Accompt*, D.

(87) So, the heir of the heir is liable as far as he has assets by descent from the original obligor. *Walker's Executors* v. *Ellis and others*, 2 *Mun.* 88. In the state of New York heirs are liable on a simple contract or specialty, whether mentioned therein or not, in case the debtor died intestate seized of lands, &c. and the heirs of devisees in case he made a will. *Laws of N. Y.* sess. 36. c. 93. s. 1. 1 R. L. 316. *Etting & others* v. *Vanderlyn*, 4 *Johns. Rep.* 234.

(88) In the state of New York, in a personal action against either heirs or devisees, the parol shall not demur; but no execution shall issue within a year after rendition of judgment, sess. 36. c. 93. s. 6. 1 R. L. 318.

confined to an infant heir(*r*). But an equity of redemption is not assets at law, in respect of which an heir or devisee is chargeable, but the creditor must proceed in a court of equity(*s*). An heir or devisee having a legal estate, are liable to an action *for the breach of a covenant running with the land committed in their own time. If there be several heirs, as in the case of gavel-kind, or of parceners, they should all be joined, or the defendant may plead in abatement(*t*); and a devisee must be sued with the heir jointly, at law as well as in equity(*u*); though an executor cannot in any case be sued jointly with the heir(*w*). II. DEFENDANTS. [*40]

When the contracting party has become a bankrupt and has obtained his certificate, he is in general discharged from all debts due at the time of the act of bankruptcy(*x*), and by recent statutes(*y*), from debts due, at the date of the commission, or which could be proved;[89] and a certificate of discharge obtained in a foreign country is a bar to an action on a contract made there(*z*).[90] But if the debt be not then due, or not proveable under the commission, or be contingent, the bankrupt is not discharged(*a*); and as we have already seen, a lessee is liable for rent, or other breach of covenant committed after his bankruptcy, notwithstanding he may have obtained his certificate(*b*).[91] And when a debt is barred by the certificate, if the bankrupt afterwards promise to pay it, he may be sued; and it is sufficient in such case to declare upon the original consideration(*c*); and when a party becomes bankrupt after a prior bankruptcy or composition with his creditors, *if the estate under the last commission will not pay 15*s.* in the pound, the bankrupt may be sued in respect of his future effects, though his per- 6thly, In the case of bankruptcy. [*41]

(*r*) Plasket *v.* Beeby et al., 4 East, 485.

(*s*) 2 Saund. 7. n. 4.

(*t*) 2 Vin. Ab. 67.—Com. Dig. tit. Abatement, F. 9.

(*u*) 2 Saund. 7. n. 4.—Bac. Ab. Heir. Vin. Ab. Heir, Z. d.—see Warren *v.* Stawell, 2 Atk. 125.—Galton *v.* Hancock, 2 Atk. 433. why preferable to proceed in equity.

(*w*) 18 Edw. III. 4.—Com. Dig. Abatement, F. 10.—Vin. Ab. Actions, C. d. pl. 8.

(*x*) 5 Geo. II. c. 30. s. 7.—Bamford *v.* Burrell, 2 B. & P. 1.—Staines *v.* Planck, 8 T. R. 386.

(*y*) 46 Geo. III. c. 135. s. 2 and 4. 49 Geo. III. c. 121. see Stedman *v.* Martinnant, 12 East, 664.

(*z*) Potter et al. *v.* Brown, 5 East, 124.

(*a*) Id. ibid.—Cullen, 74.—Parslow *v.* Dearlove, 4 East, 438.

(*b*) 1 Saund. 241. n. 5.—*ante*, 36.

(*c*) Williams *v.* Dyde et al., Peake C. N. P. 68.—Trueman *v.* Fenton, Cowp. 544.—Besford *v.* Saunders, 2 Hen. Blac. 116.—3 B. & P. 250. in notes.

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(89) Costs on a judgment obtained before the discharge of an insolvent, although not taxed, are barred by the discharge. *Warne* v. *Constant*, 5 *Johns. Rep.* 135 Sed vide Cases cited m n. *b. Ibid.*

(90) Vide *Hicks* v. *Brown*, 12 *Johns. Rep.* 242. 4 *Johns. Rep.* 288. n. *b.*

(91) So, the discharge of an insolvent is no bar to an action, on an express covenant, brought to recover rent accruing subsequent to the insolvent's discharge. *Lansing* v. *Prendergast*, 9 *Johns. Rep.* 127.

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son will be protected by his certificate under the last bankruptcy(*d*); and in cases where the plaintiff has an election to declare as for a tort, the bankrupt is still liable(*e*).[92] Where there are several contracting parties, and one of them has become bankrupt, and has obtained his certificate, the action should be brought against the solvent partner; though if it be commenced against the two, and one of them plead his certificate in bar, a *nolle prosequi* may be entered(*f*); and if the bankrupt have not obtained his certificate he should be joined. The assignees of a bankrupt are not personally liable to be sued by any creditor, even in respect of the effects in their hands, but he must prove his debt, and accept the dividend payable to him†; and though after a dividend has been declared, an action might formerly be maintained against the assignees for the creditor's share, as money had and received by them for his use, this is altered by a late statute(*g*); nor can assignees be sued as such for goods sold to them(*h*): and in the case of a covenant running with the land, if the assignees of a lessee do not take possession of the estate, they will not be liable to the performance of the covenants(*i*), and if they take possession, they may nevertheless discharge themselves from future liability by assigning their interest in

[*42] the premises even to a pauper(*k*); and we have seen *that a bankrupt cannot maintain an action against his assignees, for his allowance under the statute 5 Geo. II. c. 30(*l*). An assignee however who is removed, and has assigned his interest to his co-assignees, may be sued by them(*m*).

7thly, In the case of an insolvent debtor.

As far as regards the *person* of an *insolvent debtor*, he is by his discharge under the respective insolvent debtor's acts protected from liability as to all debts due or growing due on the days mentioned in the respective acts(*n*); but he may be sued in respect of any effects acquired by him since his discharge(*o*). Where a person has been discharged under the *Lords' act*, an action of debt on the judgment ob-

(*d*) 5 Geo. II. c. 30. s. 9.—Jelfs *v.* Ballard, 1 B. and P. 467.

(*e*) Cullen. 102, 3. 391, 2.—Parker *v.* Norton, 6 T. R. 695. but see Forster and another *v.* Surtees & others, 12 East, 612.

(*f*) Noke et al. *v.* Ingham, 1 Wils. 89.

(*g*) Brown et al. *v.* Bullen, Doug. 407. 49 Geo. III. c. 121.

(*h*) Ridout et al. *v.* Brough, Cowp. 134, 5.

(*i*) Turner *v.* Richardson & another, 7 East, 335. 9.—Bourdillon *v.* Dalton et al., Peake C. N. P. 238.—S. C. Esp. R. 233.—Naish *v.* Tatlock & others, 2 H. B. 322.

(*k*) Taylor *v.* Shum et al., 1 B. & P. 21.

(*l*) Groome *v.* Potts et al., 1 Esp. Rep. 396.

(*m*) Smith et al. *v.* Jameson et al., Peake, C. N. P. 213.

(*n*) 41 Geo. III. c. 70. s. 34. 38.—44 Geo. III. c. 108. s. 63.—Billett *v.* M'Carthy, 2 East, 148.—Sharpe *v.* Iffgrave, 3 Bos. & Pul. 394.—Kinnaird et al. *v.* Barrow, 8 T. R. 49.

(*o*) Spalton et al. *v.* Moorhouse, 6 T. R. 366.—Bell *v* Saunderson, 8 East, 55. 44 Geo. III. c. 108. s. 63. see Lucas *v.* Winton, 2 Campb. 443.

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(92) Denied by Livingston, J. *Hatten* v. *Speyer*, 1 *Johns. Rep.* 41, 42.

† Vide *Peck* v. *Trustees of Randall*, 1 *Johns. Rep.* 165.

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tained against him cannot in general be supported, but execution must be issued(*t*). If however in either of these cases the debtor, after his discharge, promise to pay the debt, he may be sued and taken in execution upon such new contract, as in the case of a bankrupt(*q*).[93]

8thly, In case of marriage.

In general a feme covert cannot be sued alone at law(*r*); and when a feme sole who has entered into a contract marries(*s*), the husband and wife must in general be jointly sued,[94] though the husband state an account, and expressly promise to pay the debt or perform the contract(*t*). But if he in respect of some new consideration, as for forbearance, &c. expressly undertake in writing to pay the *debt, or perform the contract of the feme, he may be sued alone on such undertaking(*u*). And when rent becomes due, or there is a breach of covenant during coverture upon a lease to the feme whilst sole, the action may be against both, or against the husband alone(*w*); but the feme can in no case be sued upon a mere personal contract made during coverture(*x*),[95] though, after the death of the husband, she expressly promise to perform it(*y*); but covenant on the warranty in a fine, or on a covenant running with the land of the wife demised by her during the coverture, may be supported against her(*z*); and it is said that upon a lease to the husband and wife for her benefit, the action may be against both(*a*). And if the husband be *civiliter mortuus*, or even transported for a term of years, the wife may be sued alone upon a contract made by her during that time(*b*). In the case of a feme covert executrix or administratrix, she must be joined with the husband in an action on any personal contract of the deceased(*c*); but for rent due during the

[*43]

(*p*) 32 Geo. II. c. 28. s. 20.

(*q*) Ante, 40.

(*r*) Beard et ux. *v.* Webb et al., 2 B. & P. 105.—Caudell *v.* Shaw, 4 T. R. 363. Com. Dig. Pleader, 2 A. 1.

(*s*) A marriage in fact though not strictly legal is sufficient for this purpose, Norwood *v.* Stevenson et ux., Andr. 227, 8.—Ante, 17. n. q.

(*t*) Mitchinson *v.* Hewson, 7 T. R. 348.—Drue *v.* Thorn, Alleyn. 72.—Robinson *v.* Hardy, 1 Keb. 281.—Foster *v.* Allanson, 2 T. R. 480.—Obrian *v.* Ram, 3 Mod. 186.—Bac. Ab. Bar. & Feme, L.—Morris & wife *v.* Norfolk & another, 1 Taunton, 217.—Com. Dig. Pleader, 2 A. 1.

(*u*) Drue *v.* Thorn, Alleyn. 73.

(*w*) Anon. 6 Mod. 239.—1 Roll. Ab. 348. pl. 45. 50.—Thomp. Ent. 117.—Com. Dig. Bar. & Feme, Y.—White *v.* Cuyler, 6 T. R. 176.—Lake *v.* Smith, 1 New R. 174.

(*x*) Marshall *v.* Rutton, 8 T. R. 545. Beard et ux. *v.* Webb et al., 2 B. & P. 105.—Risley *v.* Stafford, Palm. 312.—Morris & wife *v.* Norfolk and another, 1 Taunton, 217.

(*y*) Lloyd *v.* Lee, 1 Stra. 94, 5.

(*z*) 2 Saund. 180, n. 9.

(*a*) 1 Roll. Ab. 348. L. 45. 50.—Bac. Ab. Bar. & Feme, L.

(*b*) 1 B. & P. 358, n. f.—Co. Lit. 133. a.—Beard et ux. *v.* Webb et al., 2 B. & P. 105.—Carroll *v.* Blencowe, 4 Esp. Rep. 27, 8.—Selw. N. P. 298, 9.

(*c*) Mounson *v.* Bourn, Cro. Car. c. 519.—Ante, 39.

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(93) Vide *Scouton v. Eislord*, 7 *Johns. Rep.* 36.

(94) Vide *Angel* v. *Felton*, 8 *Johns. Rep.* 149.

(95) Vide *Grasser & wife* v. *Eckart & wife*, 1 *Binney*, 575.

II. DEFENDANTS. coverture on a lease which the wife has as executrix, the husband may be sued alone(*d*).

When the *husband survives*, he is not liable to be sued in that character for any contract of the feme made before the coverture, unless [*44] judgment had been obtained against him and his wife before her death, and if she die before judgment the suit will abate(*e*); but if the husband neglect during her life, to reduce her choses in action into possession, the creditor may sue her administrator for debts due before her marriage(*f*), and for rent incurred during the coverture, or upon a judgment obtained against husband and wife, in case of her death, he may be sued alone(*g*).

In case the *wife survive*, she may be sued upon all her unsatisfied contracts made before coverture(*h*); but the bankruptcy and certificate of the husband will discharge her from all liability to satisfy debts which could have been proved under his commission; and if the husband and wife be sued jointly, his bankruptcy may be pleaded in bar(*i*).

If the husband be sued alone upon the contract of his wife before coverture, and the objection appear upon the face of the declaration, the defendant may demur, move in arrest of judgment, or bring a writ of error(*k*); and if the contract were mis-described as being that of the husband, the plaintiff would be nonsuited. But if the wife be sued alone upon her contract before marriage, she must plead her coverture in abatement, or bring *error coram nobis*, and the coverture in such case cannot be pleaded in bar or given in evidence upon the trial as the [*45] ground of nonsuit(*l*); and if she marry pending an action against her, it will not abate, but the plaintiff may proceed to execution without noticing the husband(*m*). But if a feme covert be sued upon her supposed contract made during coverture, she may in general plead the coverture in bar, or give it in evidence under the general issue, even in the case of a bond(*n*). And if the husband and wife be improperly

(*d*) Com. Dig. Bar. & Feme, Y.—Thomp. Ent. 117.

(*e*) Mitchinson *v.* Hewson, 7 T. R. 350.—Com. Dig. Bar. & Feme, 2. C.—Obrian *v.* Ram, 3 Mod. 186.—Heard *v.* Stanford, R. T. Talb. 173.—S. C. 3 P. Wms. 410.

(*f*) Heard *v.* Stanford, 3 P. Wms. 409.—S. C. R. T. Talb. 173.

(*g*) 3 Mod. 189. n. k.—Anon. 6 Mod. 239.—Com. Dig. Bar. & Feme, 2 B.

(*h*) Mitchinson *v.* Hewson, 7 T. R. 350.—Woodman *v.* Chapman, 1 Campb. 189.

(*i*) Miles *v.* Williams et ux., 1 P. Wms. 249.—Earl of Stafford *v.* Buckley, 2 Ves. 181.—Cullen, 392.

(*k*) Mitchinson *v.* Hewson, 7 T. R. 348.

(*l*) Milner et al. *v.* Milnes et al. 3 T. R. 631.—Haydon *v.* Miller, 2 Roll. Rep. 53.—Hayward *v.* Williams, Sty. 280.—Bac. Ab. Bar. & Feme, L.

(*m*) King et ux. *v.* Jones, 2 Stra. 811. Cooper *v* Hunchin, 4 East, 521.—Doyley *v.* White, Cro. Jac. 323.—Bac. Ab. Abatement. G

(*n*) James *v.* Fowkes, 12 Mod. 101. Linch *v.* Hooke, 1 Salk. 7.—Cole *v.* Delawn, 3 Keb. 228.—Bul. N. P. 172.—Yates *v.* Boen, 2 Stra. 1104.

sued jointly on a contract after marriage, the action will fail as to both(*o*).[96] II. DEFENDANTS.

II. IN ACTIONS IN FORM EX DELICTO.

The rules which direct who are to be the parties to an action in form *ex delicto*, whether as plaintiffs or defendants, may, as in actions in form *ex contractu*, be considered with reference, 1st, to the interest of the plaintiff in the matter affected, and the liability of the defendant; 2dly, the number of the parties, and who must or may join or be joined; 3dly, where there has been an assignment of interest, &c.; 4thly, in the case of survivorship; 5thly, where the party injured, or committing the injury, is dead; 6thly, in the case of bankruptcy or insolvency; and 7thly, in that of marriage.

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The action for a tort must in general be brought in the name of the party whose *legal* right has *been affected(*h*); and a *cestui que trust* or other person having only an equitable interest cannot in general sue in the courts of common law, against his trustee,[97] or even a third person(*q*) unless in cases where the action is against a wrong doer, and for an injury to the actual possession of the *cestui que trust*(*r*). Many of the rules and instances which have been stated in respect to the person to be made the plaintiff in actions in form *ex contractu* here also govern and are applicable(*s*). Actions in form *ex delicto* are for injuries to the absolute or relative rights of *persons*, or to *personal* or *real property*. [*46]

The action for an injury to the *absolute* rights of *persons*, as for assaults, batteries, wounding, injuries to the health, liberty and reputation, can only be brought in the name of the party immediately injured, and if he die the remedy determines. With respect to injuries to the *relative* rights of persons, the *husband* may sue alone for injuries which have occasioned loss or deprivation of the society of his wife or her as-

(*o*) Risley *v.* Stafford, Palm. 312.—Ante, 31. 43.

(*p*) Dawes *v.* Peck, 8 T. R. 330.

(*q*) 1 Saund on U. and T. 322, 3.—Goodtitle d. Jones *v.* Jones et al., 7 T. R. 47.—But see Smith & others *v.* Jameson, 5 T. R. 601. 603.

(*r*) Graham *v.* Peat, 1 East, 244.—2 Saund. 47. d.

(*s*) Ante, 3 to 5.

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(96) A count charging man and wife upon a joint assumption in consideration of money had and received by them to the plaintiff's use is bad. *Grasser & wife v. Eckart and wife*, 1 *Binney*, 575.

(97) It is now the settled law of the state of New York, that a mortgagor has the legal estate and seisin of the land until foreclosure, or entry by the mortgagee. *Sedgwick* v. *Hollenback*, 7 *Johns. Rep.* 380. And his wife may support a writ of dower to be endowed of the equity of redemption. *Hitchcock & wife* v. *Harrington*, 6 *Johns. Rep.* 295. *Collins* v. *Torry*, 7 *Johns. Rep.* 278. And although the mortgage is a sufficient title to enable the mortgagee to recover in ejectment, *Jackson* d. *Ferris* v. *Fuller*, 4 *Johns. Rep.* 215. yet the mortgagor may maintain trespass against the mortgagee, and to a plea of liberum tenementum by the latter may reply that the freehold was in himself. *Runyan* v. *Mersereau*, 11 *Johns. Rep.* 534.

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sistance in his domestic affairs, such as criminal conversation, or violent battery occasioning an illness of the wife for some time or expense in her cure; and in such action the husband may include a demand in trespass or case for an injury to his own person, or to his personal or real property; but if the battery or other act were not sufficiently injurious to prove the allegation *per quod consortium amisit*, or that the [*47] husband was put to expense, *he cannot sue alone, but the action must be in the name of the husband and wife for her personal suffering,[98] and in which case no demand for an injury to the husband, either by loss of the society of his wife, or expense in her cure, injury to her wearing apparel, or other cause of action in which the husband alone is in point of law interested, can in strictness be included(*t*). In the case of *master and servant*, the master may sue alone for the battery,[99] or debauching of his servant, though no relation, when there is evidence to prove a consequent loss of service(*u*); but if there be no evidence of such loss, an action cannot be supported in the name of the master, but the servant must sue alone for the battery; or where there was a promise of marriage, for the breach of such promise(*w*). A parent may perhaps sue in that character for the taking away of his child(*x*); but he cannot support an action for debauching his daughter, or beating his child, unless there be evidence to support the allegation *per quod servitium amisit*(*y*).[100] In cases of the battery of the wife, the daughter, or the servant, if there be any evidence sufficient to support an action in the name of the husband, parent or master, it is frequently most advisable to proceed accordingly, because in such action if the plaintiff recover less than 40*s*. damages he will be entitled to full costs(*z*). The wife, the child and the servant having no legal interest

(*t*) 3 Bla. Com. 140.—Russell et ux. *v.* Corne, 1 Salk. 119.

(*u*) Fores *v.* Wilson, Peake, C. N. P. 55.—Jones *v.* Brown et al., Peake's C. N. P. 233.—Dean *v.* Peel, 5 East, 45. 47.—3 Bla. C. 142.—Robert Mary's Case, 9 Co. 113.—James Osborne's Case, 10 Co. 130.

(*w*) Id. ibid.—3 Bla. C 142.—Robert Mary's Case, 9 Co. 113.—James Osborne's Case, 10 Co. 130.

(*x*) 3 Bla. Co. 141

(*y*) Dean *v.* Peel, 5 East, 45.

(*z*) Batchelor *v.* Bigg, 3 Wils. 319. Browne *v.* Gibbons, 1 Salk. 206.—S. C. 2 Ld. Raym. 831.

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(98) "Where the injury is done to both, as slander or battery of husband and wife, separate actions must be brought; one by the husband alone for the injury to him, and one by the husband and wife for the injury to her. If both causes of action are joined it is error. *Ebersoll* v. *Krug et ux.*, in error, 3 *Binn. 555. Cole et ux.* v. *Turner*, 6 *Mod.* 149."—Note by Mr. Day.

(99) This was law at the time of Bracton. 2 *Reeve's Hist. E. L.* 45.

(100) Contra *Martin* v. *Payne*, 9 *Johns. Rep.* 387. where it was held that the right of the parent to the services of his daughter, *under the age of twenty-one*, was sufficient to maintain the action without proof of an actual service. But where the daughter is above that age she must be in her father's service, so as to constitute in law and in fact, the relation of master and servant, in order to entitle her father to a suit for seducing her. *Nickleson* v. *Stryker*, 10 *Johns. Rep.* 115.

in the person or property of the husband, the parent or *master, cannot support an action for any injury to them(*a*).[101] [* 48]

The absolute or general owner of *personal* property having the right of immediate possession, may in general support an action for any injury thereto, though he have never had the actual possession, it being a rule of law that the *property* in personal chattels draws to it the *possession*(*b*). So, though at the time when the injury was committed, the goods were in the actual possession of a servant, carrier or other bailee, yet if the general owner had the right of immediate possession, the action may be in his name(*c*),[102] or it may be in the name of the person having actual possession, but only a special property, as by a factor, a carrier, a pawnbroker, or an agister of cattle, or against a stranger, by any person having the actual possession[103] at the time of the injury(*d*); but a mere servant having only the custody of goods, and not responsible over, cannot in general sue(*e*).[104] And though in the above instances the action may be brought by the general or special owners of goods against a stranger, yet both actions cannot be supported at the same time, and a judgment obtained by one is a bar to an action by the other(*f*). And when the general owner has not the right of immediate possession, as where he has demised goods for a term, he cannot maintain trespass or trover even against[105] a stranger(*g*); though if the injury were sufficient to affect his reversionary *interest, he may support a special action on the case(*h*); and a recovery in an action by the party having a possessory interest, would be no bar to an action for an injury to the reversionary interest(*i*). A landlord has in legal consideration the possession of timber, though not excepted in the lease, so that though it be cut down pending the term, if it be carried away, he [*49]

(*a*) 3 Bla. C. 143.—Russell et ux. *v.* Corne, 1 Salk. 119.

(*b*) 2 Saund. 47. a. n. 1.—Gordon *v.* Harper, 7 T. R. 12.—Flewellin et al. *v.* Rave, 1 Buls. 68, 9.

(*c*) 2 Saund. 47. b.—Gordon *v.* Harper, 7 T. R. 12.

(*d*) 2 Saund. 47. b. c. d.—2 Vin. Ab. 49.

(*e*) Bloss *v.* Holman, Owen, 52.—2 Saund. 47. a. b. c. d.

(*f*) 2 Saund. 47. e.—Flewellin et al. *v.* Rave, 1 Bulst. 68.—2 Vin. Ab. 49.

(*g*) Gordon *v.* Harper, 7 T. R. 9.—Bedingfield *v.* Onslow, 3 Lev. 209. but see Colwill *v.* Reeves, 2 Campb. 575.

(*h*) Gordon *v.* Harper, 7 T. R. 9.—Bedingfield *v.* Onslow, 3 Lev. 209.

(*i*) Bedingfield *v.* Onslow, 3 Lev. 209.

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(101) Vide 2 *Reeve's Hist. E. L* 45. 46.

(102) Vide *Thorp* v. *Burling*, 11 *Johns. Rep.* 285. *Smith* v. *Plomer & another*, 15 *East's Rep.* 607. *Bird* v. *Clark*, 3 Day, 272. *Williams* v. *Lewis*, *Ibid.* 498.

(103) So, possession of a ship under a transfer, void for non-compliance with the register acts, is a sufficient title aginst a stranger. *Sutton* v. *Buck*, 3 *Taunt.* 302. An officer who has seized goods under an execution may bring trespass or trover against a stranger for taking them away. *Barker & Knapp* v. *Miller*, 6 *Johns. Rep.* 195. *Gibbs* v. *Chase*, 10 *Mass. Rep.* 125.

(104) Vide *Ludden* v. *Leavitt*, 9 *Mass. Rep.* 104.

(105) Vide *Putnam* v. *Wylie*, 8 *Johns. Rep.* 432.

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may maintain trespass or trover, the interest of the lessee in the trees determining instantly they are cut down(*k*).

The person in possession of *real property corporeal*, whether lawfully or not, may sue for an injury committed by a stranger, or by any person who cannot establish a better title(*l*);[106] and in trespass to land, the person actually in possession, though a *cestui que trust*, should be the plaintiff and not the trustee; though in ejectment it is otherwise, and the demise must be in the name of the party legally entitled to the possession, although the beneficial interest may be in another(*m*). In the case of real property, there is not that constructive possession as in that of personalty, and the party entitled to possession cannot maintain trespass, unless he has had actual possession, though he have the freehold in law(*n*) A person having the *immediate* reversion or remainder in fee or in tail or for a less estate, may support an action on the case for waste, &c.[107] injurious to his estate(*o*); but he cannot sue [*51] in *trespass when the possession is lawfully in his tenant or other person(*p*).[108] The tenant may support trespass against a stranger for an injury to his possession, and the immediate reversioner may, at the same time, support an action on the case, if the injury were sufficient to prejudice his interest; and a recovery by one, will be no bar to an action by the other(*q*). When trees are excepted in a lease, the lessee

(*k*) Gordon *v.* Harper, 7 T. R. 13.—1 Saund. 322. n. 5.—Vin. Ab. Tresp. S. pl. 10.

(*l*) Graham *v.* Peat, 1 East, 244.—Lambert *v.* Strootlier, Willes, 221.—Harker et al. *v.* Birkbeck et al., 3 Burr. 1563.—Cary *v.* Holt, 2 Stra. 1238.—Thorn *v.* Shering, Cro. Car. 586.—Philpot *v.* Holmes, Peake, 67.

(*m*) Goodtitle d. Jones *v.* Jones et al., 7 T. R. 47. 50.

(*n*) Com. Dig. Tresp. B. 3.—See the next chapter.

(*o*) 2 Saund. 252. b.—Bedingfield *v.* Onslow, 3 Lev. 209.—Jesser *v.* Gifford, 4 Burr. 2141.—Com. Dig. Action, Case, Nuisance.

(*p*) Id. ibid.—Gordon *v.* Harper, 7 T. R. 9.

(*q*) Jesser *v.* Gifford, 4 Burr. 2141. Bedingfield *v.* Onslow, 3 Lev. 209.—Panton *v.* Isham, 3 Lev. 359, 360.—Com. Dig. Action, Case, Nuisance, B.

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(106) A guardian in socage may maintain trespass for an injury to the land of the ward. *Byrne & wife* v. *Van Hoesen*, 5 *Johns. Rep.* 66. But a person occupying land merely as a servant of the owner, and not as a tenant, cannot maintain an action. *Bertie* v. *Beaumont*, 16 *East's Rep.* 33. Vide ante, 46. n. 97.

(107) Vide *Provost and Scholars of Queen's College* v. *Hallett*, 14 *East's Rep.* 489. *Attersoll* v. *Stevens*, 1 *Taunt.* 190. 194, 195. 202, 203. ante, 36. n. 78.

(108) Vide *Campbell* v. *Arnold*, 1 *Johns. Rep.* 511. So, the lessor cannot maintain trespass against the sub-tenant at will of his lessee. *Tobey* v. *Webster*, 3 *Johns. Rep.* 468. At common law an action of waste could not be maintained against a tenant for life, except by him who had the immediate estate of inheritance expectant on the determination of the estate for life; but a statute of the state of New York gives an action of waste or trespass to any person seised in remainder or reversion, for an injury to the inheritance, notwithstanding any intervening estate for life or for years. Sess. 36. c. 56. s. 33. 1 R. L. 527. As to the construction of this section of the *act for the amendment of the law*, vide *Livingston* v. *Haywood*, 11 *Johns. Rep.* 429. *Wickham* v. *Freeman*, 12 *Johns. Rep.* 183.

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has no interest therein, and cannot sue even a stranger for cutting them down, though he might for the trespass to the land; and in such case the lessor may support trespass against the lessee or a stranger, if he either fell or damage them; but if there be no exception of the trees in the lease, the lessee has a particular interest therein, and may support trespass against the lessor or a stranger for an injury to them during the term: but the interest in the body of the trees remains in the lessor as part of his inheritance, and he may support an action on the case against a lessee or a stranger for any injury thereto, or even trover, if they be cut down and carried away(*r*). Most of these rules prevail also in the case of an injury to real property *incorporeal*, and if there be any injury to such right, an action may be supported, however small the damage: and therefore a commoner may maintain an action on the case for an injury done to the common, though his proportion of the damage be found to amount only to a farthing(*s*).

2dly, With reference to the *number* of the plaintiffs.

*When two or more persons are jointly entitled, or have a joint legal interest in the property affected, they must in general join in the action, or the defendant may plead in abatement; and though the interest be several, yet if the wrong complained of be an entire joint damage, the parties may join in the action;[109] but as the courts will not in one suit take cognizance of distinct and separate claims of different persons, therefore where the cause of action as well as the interest is several, each party injured must sue separately(*t*). [*51]

Therefore for injuries to the *person*, several parties cannot in general sue jointly, as for slander, battery, or false imprisonment of both, and each must bring a separate action(*u*);[110] but two partners in trade may join in an action for words spoken of them in the way of their trade(*w*); and joint-tenants or co-parceners may join in an action for slander of their title to the estate (*x*); and husband and wife may sue jointly for a malicious prosecution, and imprisonment of both, or the husband may sue alone(*y*); and it appears to be a general rule that two

(*r*) 1 Saund. 322. n. 5.—Gordon *v.* Harper, 7 T. R. 13.—Com. Dig. tit. Biens.—Ante, 49.

(*s*) Pindar *v.* Wadsworth, 2 East, 154.

(*t*) Ante, 8.—1 Saund. 291. g.—2 Saund. 116. n. 2.—Bac. Ab. Action, C. Weller et al. *v.* Baker, 2 Wils. 423.

(*u*) 2 Saund. 117. a.—2 Vin. Ab. 54. pl. 29. 33.—Bac. Ab. Action, C.

(*w*) Cooke et al. *v.* Batchelor, 3 B. & P 150.—Maitland et al. *v.* Goldney et al., 2 East, 426.

(*x*) 2 Saund. 117. a.

(*y*) Dalby *v.* Dorthall et ux., Cro. Car. 553.

(109) In an action of ejectment against one defendant for an entire lot of land, it was held that separate demises from several lessors, might be laid in the declaration, who might give in evidence their titles to distinct parts of the premises, in severalty, and recover accordingly. *Jackson* d. *Roman & others* v. *Sidney*, 12 *Johns. Rep.* 185.

(110) But in favour of liberty the law permits two to join in suing the writ *de homine replegiando*. F. N. B. 66. F.

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In actions for injuries to *personal property*, joint-tenants and tenants in common must join, or the defendant may plead in abatement(a):[112]

[*52] but *parties having several and distinct interests, cannot in general join; as if the goods of A and B, the separate property of each, be unlawfully distrained, they cannot join in replevin(b); and an *audita querela* in the joint names of the conusors of a statute staple, for levying several executions on their lands respectively, cannot be supported(c); nor can persons robbed on the highway, join in an action against the hundred, unless they were jointly interested in the property(d): but though the interests be several, yet if the injury occasion an entire joint damage to several, they may in some cases join(e); as where two persons were severally seised of two ancient mills, at one or other of which the defendant ought to have ground his corn, but neglected to grind at either, it was decided that both might join(f); and on the same principle it was holden that the dippers at Tunbridge Wells might join in an action against a person who exercised the business of a dipper, not being duly appointed(g); and where goods are bailed to two, and only one has the possession in fact, and a stranger carries them away, both may have detinue or trespass, or the one who had actual possession may sue alone(h).

In actions for injuries to *real* property, joint-tenants(i), and parce-

[*53] ners(k),[113] must join in real *as well as personal actions, or the non-joinder may be pleaded in abatement;[114] and if one of several joint-

(z) 2 Saund. 116. a.—Ward et al. *v.* Brampston, 3 Lev. 362.

(a) Bac. Ab. Joint-tenants, K.—Sedgworth *v.* Overend et al., 7 T. R. 279.—Bloxam et al. *v.* Hubbard, 5 East, 407.—Co. Lit. 198. a.

(b) Co. Lit. 145. b.

(c) Worsley et al. *v.* Charnock, Cro. Eliz. 473.—Farmer *v.* Downes, Noy. 1.

(d) Winterstoke Hundred's Case, Dyer, 370.—2 Saund. 116. a. 377. a.

(e) Coryton *v.* Lithebye, 2 Saund. 115.

(f) Coryton *v.* Lithebye, 2 Saund. 115, 6.

(g) Weller et al. *v.* Baker, 2 Wils. 423.—2 Saund. 116. n. 2.

(h) 2 Vin. Ab. 59.—Com. Dig. Abatement, E. 12.

(i) 2 Vin Ab. 59.—Bac. Ab. Joint-tenants, K.—Stowell's Case, Moore, 466, but see Doe d. Marsack & others *v.* Read, 12 East, 61.—Doe d. Clark & others *v.* Grant, 12 East, 221.

(k) Vin. Ab. tit. Parceners.—Stowell's Case, Moore, 466.—Doe d. Marsack & others *v.* Read, 12 East, 61.—Doe d. Clark & others *v.* Grant, 221.

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(111) Two purchasers of an estate cannot maintain a joint action for a false and fraudulent affirmation by the seller. *Baker* v. *Jewell*, 6 *Mass. Rep.* 460.

(112) Vide *Bradish* v. *Schenck*, 8 *Johns. Rep.* 151.

(113) Vide Contra *Doe* d. *Raper* v. *Lousdale*, 12 *East's Rep.* 39., and in Connecticut one, or any number of them may bring an action against a person who has no title. *Bush & others* v. *Bradley*, 4 *Day*, 298. *Sanford & others* v. *Button*, 4 *Day*, 310. Vide *Litt.* sec. 313.

(114) If four joint-tenants jointly demise from year to year, such of them as

tenants die pending a real action, it will abate, as the survivor is entitled to a different estate, but it is otherwise in personal and mixed actions(*l*).[115] Tenants in common must in general sever in real actions, unless in a *quare impedit*, and in ejectment a joint demise would be improper;[116] but in personal actions, as for a trespass or nuisance to their land, they may join, because in these actions, though their estates are several, yet the damages survive to all, and it would be unreasonable when the damage is thus entire, to bring several actions for a single trespass(*m*):[117] a tenant in common may however in general sue separately, as in ejectment for his undivided share, or in trespass for the *mesne* profits, or in debt for double value against a person who has held over after the expiration of his tenancy(*n*).

In actions in form *ex delicto*, if a party who ought to join be omitted, the objection can only be taken by plea in abatement, or by way of apportionment of the damages on the trial; and the defendant cannot, as in actions in form *ex contractu*, give in evidence the non-joinder, as the ground of nonsuit on the plea of the general issue, or demur, or move in arrest of judgment,[118] or support a writ of error, though it appear upon the face of the declaration, or other pleading of the plaintiff, that there is another party who ought *to have joined (*o*):[119] and if one of several part [*54]

(*l*) Middleton *v.* Croft, R. T. Hardw. 398.—Co. Lit. 188. 197.

(*m*) Bac. Ab. tit. Joint-tenants, K.—Cutting *v.* Derby, 2 Bla. Rep. 1077.—Harrison *v.* Barnby, 5 T. R. 246.—Stone et al. *v.* Bromwich, Yelv. 161.—Some *v.* Barwich, Cro. Jac. 231.—Culley *v.* Spearman, 2 Hen. Bla. 386.—Pullen *v.* Palmer, 5 Mod. 151.

(*n*) Harrison *v.* Barnby, 5 T. R. 246. Cutting *v.* Derby, 2 Bla. Rep. 1077.

(*o*) 1 Saund. 291. g.—Addison *v.* Overend, 6 T. R. 766.—Sedgworth *v.* Overend et al., 7 T. R. 279.—2 Saund. 117. a. 47. g.—Scott *v.* Godwin, 1 B. & P. 75.—Mainwaring et al. *v.* Newman, 2 B. & P. 123.—Bloxam et al. *v.* Hubbard, 5 East, 407. 420.

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give notice to quit may recover their several shares in ejectment on their several demises. *Doe* d. *Whayman* v. *Chaplin*, 3 *Taunt.* 120.

(115) Vide *Litt.* § 311, 312, 313.

(116) It has been held by the Supreme Court of the state of New York, that tenants in common might declare on a joint demise. *Jackson* d. *Van Denbergh & others* v. *Bradt*, 2 *Caine's Rep.* 169. The law is the same in Vermont. *Hicks et al.* v. *Rogers*, 4 *Cranch*, 165.

(117) Tenants in common shall join in detinue of charters. *Co. Lit.* 197. b. post. 54. And in case for the destruction of their charters or title deeds. *Daniels* v. *Daniels*, 7 *Mass. Rep.* 135. Vide *Litt.* § 315, 316. *Bradish* v. *Schenck*, 8 *Johns. Rep.* 151. That tenants in common must join in trespass quare clausum fregit, see *Austin & others* v. *Hall*, 13 *Johns. Rep.* 286.

(118) But in an action of replevin brought by one part owner of a chattel, after verdict for the plaintiff, the judgment was arrested: and the court took a distinction between this case, in which the judgment would be for a chattel, not capable in law, of severance, as well as for damages, and those actions in which damages only can be recovered. *Hart* v. *Fitzgerald*, 2 *Mass. Rep.* 509.

(119) Vide *Wheelwright* [illegible] *Depeyster*, 1 *Johns. Rep.* 471. *Brotherson & others* v. *Hodges & another*, 6 *J*[illegible]*ep.* 108. *Bradish* v. *Schenck*, 8 *Johns. Rep.* 151.

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owners of a chattel sue alone for a tort, and the defendant do not plead in abatement, the other part owners may afterwards sue alone for the injury to their undivided shares, and the defendant cannot plead in abatement of such action(*p*).

If however *too many* persons be made co-plaintiffs, the objection, if it appear on the record, may be taken advantage of either by demurrer, in arrest of judgment, or by writ of error(*q*); or if the objection do not appear on the face of the pleadings, it would be a ground of nonsuit on the trial, though if two tenants in common join in detinue of charters, it is said if one be nonsuit the other shall recover(*r*).[120]

3dly, When the interest in the property has been assigned.

We have already seen that choses in action *ex contractu*, are not in general assignable at law, so as to enable the assignee to sue in his own name(*s*); the same rule also prevails in the case of injuries *ex delicto*, either to the person, personal, or real property;† and therefore an heir cannot maintain an action for waste committed in the time of his ancestor, nor the grantee of a reversion for waste committed before the grant(*t*); though we have already seen that if a person have the immediate reversion or remainder in fee, in tail, or for life, or years, vested in him at the time of the waste committed, he may maintain an action *on the case for such injury to his estate(*u*). And a devisee may support an action for the continuance of a nuisance erected in the lifetime of the testator(*w*).

[55*]

4thly, When one of several parties interested is dead.

When one or more of several parties interested in the property at the time the injury was committed is dead, the action should be in the name of the survivor, and the executor or administrator of the deceased cannot be joined, nor can he sue separately; and therefore to an action of trover brought by the survivor of three partners in trade, it cannot be objected that the two deceased partners and the plaintiff were joint merchants, and consequently that in respect of the *lex mercatoria* the right of survivorship did not exist, for the legal right of action sur-

(*p*) Sedgworth *v.* Overend et al., 7 T. R. 279.—Stanley *v.* Ayles, 3 Keb. 444.—Bloxam et al. *v.* Hubbard, 5 East, 407.

(*q*) Cooke et al. *v.* Batchelor, 3 B. & P. 150.—2 Saund. 116. a.—Worsley et al. *v.* Charnock, Cro. Eliz. 473.

(*r*) Co. Lit. 197. b.

(*s*) Ante, 10.—but see Sir Thomas Palmer's Case, 5 Co. 24.

(*t*) 2 Saund. 252. a. n. 7.—2 Inst. 305.

(*u*) Ante, 49.—2 Saund. 252. b.

(*w*) Some *v.* Barwich, Cro. Jac. 231.

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(120) If the defendant, in an action for a tort, settle with one of the plaintiffs, he is still answerable to the others. *Baker* v. *Jewell*, 6 *Mass. Rep.* 460. That the rule is the same in actions ex contractu, vide ante, 7. But if one of the co-plaintiffs release the defendant, it is a complete bar to the action. *Austin and others* v. *Hall*, 13 *Johns Rep.* 286.

† But it has been held that the assignee of a bond might maintain trover for it, in his own name, against the obligor, who had got it into his possession and converted it. *Clowes* v. *Hawley*, 12 *Johns. Rep.* 484.

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vives, though the beneficial interest may not(*x*). At common law when an action had been commenced in the name of two or more persons and one of them died pending the suit, it abated; but now by the 8 and 9 Wm. III. c. II. s. 7 (*y*), it is enacted that "if there be two or more "plaintiffs or defendants, and one or more of them should die, if the "cause of such action shall survive to the surviving plaintiff or plain-"tiffs, or against the surviving defendant or defendants, the writ or "action shall not be thereby abated, but such death being suggested "upon the record, the action shall proceed at the suit of the surviving "plaintiff or plaintiffs against the surviving defendant or defend-"ants;"[121] and consequently since this statute if *one of several plain- [*56]
tiffs die pending a suit, and the cause of action would survive to the survivor, he may proceed in the action.

5thly, In case of the death of the party injured.

We have seen that the right of action for the breach of a *contract*, upon the death of either party, in general survives to, and against the executor or administrator of each(*z*); but in the case of *torts*, when the action must be in form *ex delicto*, for the recovery of damages, and the plea thereto not guilty. the rule at common law was otherwise, it being a maxim that *actio personalis moritur cum persona*(*a*); and we shall find that the statute 4 Edw. III. c. 7, has altered this rule only in its relation to *personal* property, and in favour of the personal representatives of the party injured; but if the action can be framed in form *ex contractu*, this rule does not apply. We will consider the rule as it now affects actions for injuries to the person, and to personal and real property.

In the case of injuries to the *person*, whether by assault, battery, false imprisonment, slander, or otherwise, if either the party who received or committed the injury die, no action can be supported either by or against the executors or other personal representatives(*b*); for the statute 4 Edw. III. c. 7. has made no alteration in the common law in this respect(*c*).

At common law in case of injuries to *personal *property*, if either [*57]
party died. in general no action could be supported, either by or against the personal representatives of the parties, where the action must have been in *form ex delicto* and the plea not guilty(*d*); but if any contract can be implied, as if the wrong doer converted the property into mo-

(*x*) Kemp *v.* Andrews, 1 Show. 188. S. C. Carth. 170.—Ante, 11, 12.

(*y*) See the cases 2 Saund. 72. i.—Middleton *v* Croft, R. T. Hardw. 395. Bac. Ab. Joint-tenants, K.

(*z*) Ante, 12.

(*a*) See the observations on this rule in general, 3 Bla. Com. 302.—1 Saund. 216, 7. n. 1.—Hambly et al. *v.* Froth, Cowp. 371 to 377—3 Woodd. 73.—Vin. Ab. tit. Executors, 123.—Com. Dig. Administrator, B. 13.

(*b*) 3 Bla. C. 302.

(*c*) 1 Saund. 217. n. 1.—Mason *v.* Dixon, Sir W. Jones, 174.

(*d*) Hambly et al. *v.* Trott, Cowp. 371 to 377.

(121) Vide *Laws of New York. Act for the amendment of the law*, s. 9. 1 R. L. 519.

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ney, or if the goods remain in specie in the hands of the executor of the wrong doer, at common law assumpsit for money had and received may be supported by or against the executors in the former case, and trover against the executors in the latter(*e*). And now by the statute 4 Edw. III. c. 7. intituled "Executors shall have an action of trespass "for a *wrong* done to their testator," and reciting "that in times past "executors have not had actions for a trespass done to their testators, "*as* of the goods and chattels of the same testators carried away in their "life, and so such trespassers have hitherto remained unpunished," it is enacted "that the executors in such cases shall have an action "against the trespassers, and recover their damages in like manner as "they, whose executors they be, should have had if they were in life;"[122] and this remedy is further extended to executors of executors(*f*), and to administrators(*g*). It has been well observed that the taking of goods and chattels was put in the statute merely as an instance, and not as restrictive to such injuries only, and that the term trespass must, with reference to the language of the times when the statute was [*58] passed, signify a wrong generally(*h*); and accordingly the statute *has been construed to extend to every description of injury to *personal* property by which it has been rendered *less beneficial* to the executor, whatever the form of action may be; so that an executor may support trespass or trover(*i*),[123] case for a false return to final process(*k*),[124] and case or debt for an escape, &c.[125] on final process(*l*); and though it has been doubted whether an executor can sue for an escape on mesne process in the lifetime of his testator(*m*), on principle it appears that

(*e*) Hambly et al. *v.* Trott, Cowp. 374.—Mason *v.* Davy, Latch. 168.

(*f*) 25 Edw. III. c. 5.

(*g*) 31 Edw. III. c. 11.

(*h*) Sale *v.* Bishop of Litchfield, Owen. 99.—Wilson *v.* Knubley, 7 East, 134. 6.—11 Vin. 125.—Mason *v.* Davy, Latch. 167.

(*i*) Mason *v.* Davy, Latch. 168.—Russel's case.—5 Co. 27. a.—Mason *v.* Dixon, Sir W. Jones, 174.

(*k*) Williams *v.* Cary, 4 Mod. 403.—S. C. 12 Mod. 71.

(*l*) Berwick *v.* Andrews, Lord Raym. 973.

(*m*) Mr. Justice Moreton's case, 1 Ventr. 30.—1 Rol. Ab. 912.—Mason *v.* Davy, Latch. 168.—Mason *v.* Dixon, Sir W. Jones, 173.—Williams *v.* Cary, 4 Mod. 404.—Spurstow *v.* Prince, Cro. Car. 297.—Vin. Ab Executors, P. pl. 2. *acc.*—Berwick *v.* Andrews, Lord Raym. 973.—Williams *v.* Cary, 12 Mod. 72.—S. C. 1 Salk. 12. *contra.*

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(122) Vide *Laws of N. Y.* sess. 36. c. 75. s. 6, 7. 1 R. L. 311, 312.

(123) Vide *Toule* v. *Lovet*, 6 *Mass. Rep.* 394. *Snider & Van Vechten* v. *Croy*, 2 *Johns. Rep.* 227.

(124) So, case against a sheriff for the default of his deputy in not returning an execution. *Paine* v. *Ulmer*, 7 *Mass. Rep.* 317.

(125) The executor of a sheriff cannot maintain an action on the case against the gaoler, for the escape of a prisoner committed to his custody by the testator. *Kain & others* v. *Ostrander*, 8 *Johns. Rep.* 207.

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he may(*n*); and he may support debt for not setting out tithes(*o*), or debt against an executor, suggesting a *devastavit* in the lifetime of the plaintiff's testator(*p*), or case against the sheriff for removing goods taken in execution, without paying the testator a year's rent(*q*); or an action of ejectment or *quare impedit*, for the disturbance of the testator(*r*).

But with respect to injuries to *real* property, if either party die, no action in *form ex delicto* can be supported either by or against their personal representatives; and though the statute 4 Edw. III. c. 7. might bear a more liberal construction, the decisions have confined its operation to injuries to personal property(*s*), *and therefore an executor cannot support an action of trespass *quare clausum fregit*,[126] or merely for cutting down trees, or other waste in the lifetime of his testator(*t*): and though in Emerson *v.* Emerson(*u*), it was holden that a declaration by an executor for mowing, cutting down, taking and carrying away corn might be supported, the allegation of the cutting down being considered merely as a description of the manner of taking away the corn, for which an action is sustainable by virtue of the statute, yet it was decided that if the declaration had been *quare clausum fregit, et blada asportavit*, it would have been insufficient; and that if the defendant had merely cut the corn and let it lie, no action could have been supported by the executor, or if the grass of the testator had been cut and carried away at the same time. We have seen however that an action may be supported by a devisee for the continuance of a nuisance erected in the lifetime of the testator(*w*).

[*59]

6thly, In case of bankruptcy, &c.

The statutes relating to bankrupts, pass to the assignees all rights of action, real as well as personal, and every species of right of which by any possibility profit could be made; for though rights of action are not assignable at common law, and the statutes use the expression "such "right, &c. as the bankrupt may lawfully depart withal," yet the policy of the bankrupt-law requires that such rights should be transferred as

(*n*) Sale *v.* Bishop of Litchfield, Owen. 99.—Wilson *v.* Knubley, 7 East, 134, 6.

(*o*) Mr. J. Moreton's case, 1 Ventr. 30.—Berwick *v.* Andrews, 1 Salk. 314. Holl *v.* Bradford, 1 Sid. 88.—Morton *v.* Hopkins et al., 1 Sid. 407.

(*p*) Berwick *v.* Andrews, 1 Salk. 314.

(*q*) Palgrave *v.* Windham, 1 Stra. 212.

(*r*) Vin. Ab. Executors, P. pl. 7.—Mason *v.* Davy, Latch. 168, 9.—Mason *v.* Dixon, Sir W. Jones, 175.—S. C Poph. 190.—Mr. J. Moreton's case, 1 Ventr. 30.

(*s*) 1 Saund. 207. n. 1.—Mason *v.* Dixon, Sir W. Jones, 174.—Mason *v.* Davy, Latch. 169.—Vin. Ab. Executors, P. 22, &c.

(*t*) Mason *v.* Dixon, Sir W. Jones, 174.—1 B. & P. 330, n. a.

(*u*) 1 Ventr. 187.—Emerson *v.* Annison, 2 Keb. 874.—Mason *v.* Dixon, Sir W. Jones, 177. 174.—Williams *v.* Breedon, 1 B. & P. 329.

(*w*) Ante, 55.

(126) Vide Contra *Griswold* v. *Brown*, 1 *Day*, 180.

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much as any other *species of property(*x*); and therefore the assignees of a bankrupt may support trover for a conversion before or after the bankruptcy(*y*), or debt to recover from the winner money lost at play, by the bankrupt before his bankruptcy(*z*). But for torts to the *person* of the bankrupt which are not the subject of property, as slander, &c., the assignees cannot sue(*a*), and in this case the bankrupt may support the action(*b*); and he may also sue in trover against a stranger for goods acquired by him after his bankruptcy(*c*), and he may support trover or trespass against his assignees if he were not liable to the commission(*d*).

7thly, In case of marriage.

The wife having no legal interest in the person or property of her husband, cannot in general join with him in any action for an injury thereto(*e*); except in an action for a joint malicious prosecution of both, in which they may join in respect of the injury to both, or the husband may sue alone(*f*).

For injuries to the person, personal, or real property of the wife committed *before* the marriage, when the cause of action would survive to the wife, she must join in the action, and if she die before judgment therein it will abate(*g*). But in detinue to recover personal [*61] chattels of the wife, *in the possession of the defendant before the marriage, it is said that the husband must sue alone, because the law transfers the property to him, and the wife has no interest(*h*); though in detinue for charters of the wife's inheritance they may join, on account of the continuing interest of the wife in the estate to which they relate(*i*).

When an injury is committed to the *person* of the wife *during coverture*, by battery, slander, &c. the wife cannot sue alone in any case(*k*) and the husband and wife must join, if the action be brought for the

(*x*) Cullen, 176.—Smith et al. *v.* Coffin et ux., 2 H. Bla. 444.

(*y*) Cullen, 418, 9. 420.—Bloxam et al. *v* Hubbard, 5 East, 407.

(*z*) Brandon et al. *v* Pate, 2 H. Bla. 308.

(*a*) Benson *v.* Flower, Sir W. Jones, 215.—Cullen, 177.

(*b*) Id. ibid.

(*c*) Webb *v.* Fox et al., 7 T. R. 391. Cullen, 414.

(*d*) Perkin *v.* Proctor et al., 2 Wils. 382.—Ex parte Nutt, 1 Atk. 102.—Cullen, 412. when not, see Donovan v. Duff, 9 East, 21.—M'Cullock *v.* Robinson, 2 New R. 352.[127]

(*e*) 3 Bla. Com. 143.—Newton et ux. *v.* Hatter, Ld. Raym. 1208.—Weller et al. *v.* Baker, 2 Wils. 424.—Coleman et ux. *v.* Harcourt, 1 Lev. 140.—1 Salk. 119. n. b.—Dalby *v.* Dorthal & wife, Sir Wm. Jones, 440.

(*f*) Dalby *v.* Dorthal & wife, Cro. Car. 553.—Com. Dig. Bar. & Feme, X.

(*g*) Milner et al. *v.* Milnes et al., 3 T. R. 627. 631.—Com Dig. Bar. & Feme, V.—Roll. Ab. 347. R. pl. 3.

(*h*) Bac Ab. tit. Detinue, A.—Bul. N. P. 50.—Nelthrop et ux. *v.* Anderson, 1 Salk. 114.—Sed vide Bern et ux. *v.* Mattaire, R. T. Hardw. 120.

(*i*) 1 Rol. Ab. 347. R. pl. 1.—Bac. Ab. Detinue, B.

(*k*) Boggett *v.* Frier and another, 11 East, 301.—Chambers *v.* Donaldson & others, 9 East, 471.

(127) Vide *Phillips Ev.* 275. 274. *Dunl. Ed.* n. *a.* *Ellis* v. *Slirley*, 3 *Campb.* 424.

personal suffering or injury to the wife, and the declaration ought to conclude to their damage, and not to that of the husband alone; for the damages will survive to the wife if the husband die before they are recovered(*l*); and care must be taken not to include in the declaration any statement of a cause of action, for which the husband alone[128] ought to sue(*m*). If the battery, &c. of the wife deprive the husband for any time of her company or assistance, or if she be maliciously indicted, and the husband be thereby put to expense, he may sue separately for such consequential injuries(*n*), and he may in the same action proceed for a battery or other injury to himself(*o*). And for words spoken of the wife not actionable of themselves, *but which occasion some special [*62] damage to the husband, he must sue alone(*o*).

With respect to personal property when the cause of action had only its inception before the marriage, but its completion afterwards, as in the case of trover before marriage, and conversion during it, or of rent due before marriage, and a rescue afterwards, the husband and wife may join or sever in trover or trespass(*p*), though not in detinue(*q*). But when the cause of action has its inception as well as completion after the marriage, the husband alone must sue, the legal interest in personalty being vested by the marriage in him(*r*); and therefore a declaration in trover at the suit of husband and wife should state that the wife was possessed before the marriage, and if it be stated that the husband and wife were possessed, the defendant may demur, for the possession of the wife is in law the possession of the husband, and so is the property(*s*); and the same rule prevails in replevin, though if the husband and wife join therein, and the defendant avow, though bad on demurrer, it will after verdict be intended that the taking was before

(*l*) Horton et ux. *v.* Byles, 1 Sid. 387. Newton et ux. *v.* Hatter, Ld. Raym.—1208—Com. Dig. Bar. & Feme, V.—Pleader, 2 A. 1.—3 Bla. C 140—Russel et ux. *v.* Corne, 1 Salk. 119.—Higgins *v.* Butcher, Yelv. 89.—Smith *v.* Sykes, Freem. 224.

(*m*) Russel et ux. *v.* Corne, 1 Salk. 119. Com. Dig. Pleader, 2 A. 1.

(*n*) 3 Bla. Com. 140.—Hyde *v.* Scissor, Cro. Jac. 538.—Dix *v.* Brookes, 1 Stra. 61.—Smith *v.* Hixon, 2 Stra. 977. Com. Dig. Bar. & Feme, W.

(*o*) Guy *v.* Livesey, Cro. Jac. 501.—Russel et ux. *v.* Corne, 1. Salk. 119.—Selwyn, N. P. 305. n. 14.—Year B. 9 Edw. 4. 51.

(*o*) Colman et ux. *v.* Harcourt, 1 Lev. 140.—Baldwin *v.* Flower, 3 Mod. 120. Russel et ux. *v.* Corne, 1 Salk. 119.

(*p*) 2 Saund. 47. g.—Nelthrop et ux. *v.* Anderson, Salk. 114.—Blackborne et ux. *v.* Greaves et al., 2 Lev. 107.—Fenner *v.* Plasket et al. Moor, 422. pl. 584. S. C. Cro. Eliz. 459.—Anon., Owen, 82.—Selwyn, N. P. 312. MS.—Com Dig. Bar. & Feme, X.—Bac. Ab. Bar. & Feme, K.

(*q*) Ante, 60, 1.—Bac. Ab. tit. Detinue.—Bul. N. P. 53.

(*r*) Burn et ux. *v.* Mattaire, R. T. Hardw. 119.—2 Saund. 47. g.—Arundel *v.* Short et ux., Cro. Eliz. 133.—Buckley *v.* Collier, Salk. 114.—Bidgood *v.* Way et ux., 2 Bla. R. 1236.—Selwyn, N. P. 307. 312. MS.—Wittingham v. Broderick, 7 Mod. 105.

(*s*) 2 Saund. 47. g.—Buckley *v.* Collier, 1 Salk. 114. Com. Dig. Pleader, 2 A. 1.

(128) Vide *Post.* 201. *Ebersoll* v. *Krug & wife*, 3 *Binney*, 555.

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the coverture, and that the plaintiffs then had a joint property(*t*); and though the wife may join in trespass for cutting down corn upon her [*63] land, yet she cannot *for carrying it away(*u*). However, a feme covert executrix may and ought to join with her husband, the declaration stating that she sues in *autre droit*(*w*). And there are some cases in which, though the produce of the wife's labour, &c. be the property of the husband, yet in respect of her being the meritorious cause of action, she may be joined, as in the case of the dippers at Tunbridge Wells(*x*).

In real actions for the recovery of the land of the wife, and in a writ of waste thereto, the husband and wife must join(*y*); a rule which, we have seen, obtains also in detinue of charters(*z*). But when the action is merely for the recovery of damages to the land, or other real property of the wife during the coverture, or for a tort which prejudices a remedy by husband and wife, as in the case of *quare impedit*, a rescue, &c. the husband may sue alone(*a*), or the wife may be joined(*b*), her interest in the land being stated in the declaration. But a demand for removal of personal property, as corn or grass when severed from the land, ought not in the latter case to be included, because as we have seen the entire interest in personalty is vested in the husband(*c*).[129]

[*64] *If the *husband survive*, he may support an action of trespass, &c. for any injury to the land of the wife committed during the coverture(*d*); but not an action merely for the battery of the wife, without stating special damage to himself; and in the latter case, if the wife die pending the action, it will abate(*e*). If the *wife survive*, any action for a tort committed to her or to her personal or real property before marriage, or to her person or real estate during the coverture, will survive to her(*f*); and she may include in one action trespasses to

(*t*) Serres et ux. v. Dodd, 2 New R. 405.—Burn et ux. *v.* Mattaire, R. T. Hardw. 119.—S. C. Str. 1015.—Com. Dig. Pleader, 3 K. 10.—Selwyn, N. P. 312.

(*u*) Weller et al. *v.* Baker, 2 Wils. 424.—Arundel *v.* Short et ux., Cro. Eliz. 133.—Russel et ux. *v.* Corne, Salk. 119.

(*w*) Buckley *v.* Collier, Salk. 114.—Wentw. Ex. 207.—Bro. Bar. & Feme, pl. 85.—Selwyn, N. P. 312. MS.

(*x*) Weller et al. *v.* Baker, 2 Wils. 414. 424.—Com. Dig. Bar. & Feme, X.

(*y*) Odill *v.* Tyrrell, 1 Bulstr. 21.—7 H. 4. 15. A.—3 H. 6. 53.—Com. Dig. Bar. & Feme, V.

(*z*) Ante, 61—1 Roll. Ab. 347. R. pl. 1.

(*a*) Bro. Bar. & Feme, pl. 28. 41. 16. Selwyn, N. P. 310, 311.—Com. Dig. Bar. & Feme, X.

(*b*) Id. ibid.—Weller et al. *v.* Baker, 2 Wils. 423, 4.—Bidgood *v.* Way et ux., 2 Bla. Rep. 1236.—Baker et ux. *v.* Brereman, Cro. Car. 418.—Tregmiell et ux. *v.* Reeve, Cro. Car. 437.—Com. Dig. Bar. & Feme, V. X. Pleader, 2 A. 1.

(*c*) Ante, 62, 3. n. u.—1 Salk. 119. n. b.

(*d*) Com. Dig. Bar. & Feme, Z.

(*e*) Smith v. Sykes, Freem. 225.—Higgins *v.* Butcher, Yelv. 89.

(*f*) Middleton *v.* Croft, R. T. Hardw. 398, 9.—Smith *v.* Sykes, Freem. 224.—Peters *v.* Rose, Palmer, 313.

(129) Husband and wife cannot maintain a joint action for a penalty given by statute. Semble. *Hill & wife* v. *Davis*, 4 *Mass. Rep.* 137.

her land, committed as well in the lifetime of her husband, as since his decease(*g*).

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The consequences of a mistake in the proper parties in the case of husband and wife, may be collected from the preceding observations, and seem to be nearly the same in actions in form *ex delicto*, as in those *ex contractu*(*h*). If the wife be improperly joined in the action, and the objection appear from the declaration, the defendant may in general demur, move in arrest of judgment, or support a writ of error(*i*), though we have seen that after verdict the mistake may be aided by intendment(*k*); and if the husband sue alone when the wife ought to join, either in her own right or in *autre droit*, he will be nonsuited; for though in general the non-joinder of plaintiffs in an action for a tort can only be pleaded in abatement(*l*), yet in those cases the party suing had some legal *interest in his own right, in the property affected, but the husband in the case of the battery, &c. of his wife, has received no personal injury unless a loss of her society or expense ensued(*m*). [*65]

II. DEFENDANTS. As between the *original* parties, and with reference to their *liability*.

In *personal* and *mixed* actions, in form *ex delicto*, the person committing the injury either by himself or his agent, is in general to be defendant; but *real* actions can only be supported against the claimant of the freehold(*n*). All *natural* persons are liable to be sued for their own tortious acts, unconnected with or in dis-affirmance of a contract; and therefore though an infant cannot in general be sued in an action in form *ex contractu*, unless for necessaries, he is liable for all torts committed by him, as for slander, assaults, and batteries, &c.(*o*); and also in detinue for goods delivered to him for a purpose which he has failed to perform, and which goods he refuses to return(*p*).[130] But a plaintiff cannot in general by changing his form of action, charge an infant for a breach of contract, as for the negligent or immoderate use of a horse, &c.(*q*); nor can he be a trespasser by prior or subsequent assent, but only by his own act(*r*). A married woman is liable for torts actually committed by her, though she cannot be a trespasser by prior

(*g*) Peters *v.* Rose, Palm. 313.—Com. Dig. tit. Bar. & Feme, 2 A.

(*h*) Ante, 22.—Milner et al. *v.* Milnes et al., 3 T. R. 631.

(*i*) Russel et ux. *v.* Corne, 1 Salk. 119.—Buckley *v.* Collier, 1 Salk. 114.—Bidgood *v.* Way et ux., 2 Bla. R. 1236.—Selwyn. N. P. 307.

(*k*) Ante, 62.

(*l*) Ante, 53.

(*m*) Smith *v.* Sykes, Freem. 225.—Higgins *v.* Butcher, Yelv. 89.—Russel et ux. *v.* Corne, 1 Salk. 119.

(*n*) Booth, 3, 28, 9.—Hunlock *v.* Petre, 3 Lev. 330.

(*o*) Jennings *v.* Rundall, 8 T. R. 336, 7.—Bac. Ab. Infancy, H.

(*p*) Mills *v.* Graham, 1 New Rep. 140.

(*q*) Jennings *v.* Rundall, 8 T. R. 335.

(*r*) Co. Lit. 180. b. n. 4.

(130) So, an infant is liable in trover, *Vasse* v. *Smith*, 6 *Cranch*, 231.

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(*s*) Id. ibid.—Post 67.

(*t*) Weaver *v.* Ward, Hob. 134.—Haycraft *v.* Creasy, 2 East, 104.—Bac. Ab. Trespass, G. Idiot, E.—2 Rol. Ab. 547. pl. 4. E.

(*u*) Russel et al. *v.* The Men of Devon, 2 T. R. 672.

(*w*) Doe d. Earl of Carlisle *v.* Woodman et al., 8 East, 229, 230.—Kyd. on Corp. 225. 22 Ass. pl. 67.—Bro Ab. Trespass, pl. 239.—Vin. Ab. Corporations, K. pl. 22. P. pl. 2. Q. pl. 15.—Bac. Ab. Corporations, E. 2, 5 Disseisin, B.—Harman *v.* Tappenden et al., 1 East, 555.

(*x*) Russel et al. *v.* The Men of Devon, 2 T. R 667.—Robert Mary's case, 9 Co. 112, b. 113.

(*y*) Groenvelt *v.* Burwell et al., 1 Salk. 306, 7.—Bushell's case, Vaugh. 138.—Bonnel *v.* Beighton et al., 5 T. R. 186.—Floyd *v.* Barker, 12 Co. 24.

(*z*) Sutton *v.* Johnstone, 1 T. R. 513. 4, 535.

(*a*) Sutton *v.* Johnstone, 1 T. R. 514, 535.

(*b*) Sutton *v.* Johnstone, 1 T. R. 493. 550. 784.

(*c*) Saund. on U. & T. 222.

(*d*) Heath *v.* Hubbard, 4 East, 121.—2 Saund. 47. f. g.—Holliday *v.* Camsell & White, 1 T. R. 658.—Co. Lit. 100.—Martyn *v.* Knowllys, 8 T. R. 145, 6.—Smith et al. *v.* Oriell, 1 East, 368.—Com. Dig. Estate, K. 8.

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(131) An action on the case will lie against a corporation for the neglect of a corporate duty, as, for not repairing a creek as from time immemorial they had been used. *Mayor of Lynn* v. *Turner*, *Cowp.* 86. *Riddle* v. *Proprietors, &c.* 7 *Mass. Rep.* 169. *Townsend* v. *Susquehannah Turnpike Company*, 6 *Johns. Rep.* 90. *Steele* v. *W. Lock Company*, 2 *Johns. Rep.* 283. So, it will lie against them for the negligence of their subordinate agents, although not immediately employed by them. *Matthews* v. *West London Water Works Company*, 3 *Campb.* 403. Post 68 in notis.

(132) Vide *Yates* v. *Lansing*, 5 *Johns. Rep.* 282. S. C. 9 *Johns. Rep.* 395. *Briggs* v. *Wardwell*, 10 *Mass. Rep.* 356. *Phelps* v. *Sill*, 1 *Day*, 315. The following additional cases were here cited by Mr. Day in the former edition; *Book of Assize*, 27. Ed. 3 pl. 18. 21 Ed. 3 Hil. pl. 16. 9 Hen. 6. 60. pl. 9. 9 Ed. 4. 3. pl. 10. 21 Ed. 4. 67. pl. 49. *Stanf. P. C.* 173. *Aire* v. *Sedgwick*, 2 *Ro. Rep.* 199. *Hammond* v. *Howell*, 1 *Mod.* 184. S. C. 2 *Mod.* 218. *Miller* v. *Searl et al.* 2 *Bla. Rep.* 1145. *Mostyn* v. *Fabrigas*, *Cowp.* 172. Vide *Brodie* v. *Rutledge*, 2 *Bay*, 69.

(133) Vide *Webb* v. *Dunforth*, 1 *Day*, 301. *Litt.* § 323.

supported(*e*);[134] and one tenant in common of real property may support ejectment, or trespass for mesne profits against his co-tenant, when there has been an actual ouster(*f*), or case for waste to the land or trees(*g*).

*All persons who direct, or assist in committing, a trespass, or the conversion of personal property, are in general liable as principals, though not benefited by the act(*h*);[135] and therefore trover may be supported against a person who illegally makes a distress or seizes goods, though the same were taken by him in the character of bailiff for another, or as a custom-house officer, &c.(*i*)[136] And where several are concerned, they may be jointly sued,[137] whether they assented to the act before or after it was committed(*k*), unless the party be an infant or a feme covert, who we have seen, cannot be sued in respect of a subsequent assent(*l*). and no person can be guilty of a forcible entry by such assent(*m*). Nor can a pound-keeper be sued merely for receiving into the pound a distress illegally taken(*n*). If however a person sue out execution, and give a bond of indemnity to the sheriff to induce him to sell the goods of another, this is a sufficient interference to subject him to an action(*o*); so if he be in company with the sheriff's officer at the time of the execution(*p*); but the mere act by a stranger of making an inventory or drawing a notice of distress is not such an in-

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(*e*) Id. ibid.—Martyn *v.* Knowllys, 8 T. R. 145, 6.—Waterman *v.* Soper, 1 Ld Raym 737.

(*f*) Goodtitle *v.* Tombs, 3 Wils. 118.—R m. Ejectr. 191, &c. 443.

(*g*) Heath *v.* Hubbard, 4 East, 117. 121. Co. Litt. 200. b.—Martin *v.* Knowllys, 8 T. R. 145, 6.

(*h*) 2 Saund. 47. i.—Bul. N. P. 41.—Shipwick *v.* Blanchard, 6 T. R 300.—Menham *v.* Edmonson, 1 Bos. & Pul. 369.—Wara *v.* Haydon et al. 2 Esp. Rep. 553.—Fleuster *v.* Royle, 1 Camp. 187.

(*i*) Id. ibid.—Farebrother *v.* Ansley & another, 1 Camp. 343.

(*k*) Rafael *v.* Verelst, 2 Bla. Rep. 1055.—Britton *v.* Cole, 1 Salk. 409.—2 Rol. 555, l. 7.—Com. Dig. Trespass. C. 1.—Co. Lit. 180, b. n. 4.—Badkin *v.* Powell et al., Cowp. 478.—Barker *v.* Braham et al., 3 Wils. 377.—Lane. 90.

(*l*) Co. Lit. 180, b. n. 4. ante, 65.

(*m*) Id. ibid.

(*n*) Badkin *v.* Powell et al., Cowp. 476.

(*o*) Bul. N. P. 41.

(*p*) Menham *v.* Edmonson, 1 Bos. & Pul. 369.

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(134) Vide *St. John* v. *Standring*, 2 *Johns. Rep.* 468. So, if one co-tenant sell the thing holden in common, the other may bring trover against him. *Wilson & Gibbs* v. *Reed*, 3 *Johns. Rep.* 175. *Heath* v. *Hubbard*, 4 *East*, 110. Semble contra. One tenant in common may convert the chattel to its general and profitable use, although it change the form of the substance, as wheat into flour, a whale into oil, &c. without subjecting himself to an action by the other. *Fennings* v. *Lord Grenville*, 1 *Taunt.* 241. One tenant in common of real property cannot sue the other to recover possession of documents relative to their joint estate. *Clowes* v. *Hawley*, 12 *Johns. Rep.* 484.

(135) Vide *Thorp* v. *Burling*, 11 *Johns. Rep.* 285.

(136) Vide *Hoyt* v. *Gelston & Schenck*, 13 *Johns. Rep.* 141.

(137) Vide *Bishop* v. *Ely*, 9 *Johns. Rep.* 294. *Thorp* v. *Burling*, 11 *Johns. Rep.* 285.

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terference as will subject him to an action(*q*); and though trespass may be supported against a sheriff for his *bailiff's taking the goods of A under an execution against B(*r*), it cannot against the plaintiff in the action, unless he actually interfered or assented to the levy(*s*).

In some cases a party may be liable to be sued for a tort, though in fact he neither committed the act, nor assented to the commission of it. Thus a *master* or *principal* is liable to be sued for injuries occasioned by the *negligence* or *unskilfulness* of his servant or agent whilst in the course of his employ, though the act was obviously tortious ;[138] as if he laid lime in the street without any direction for that purpose from the principal(*t*) : so for the negligent driving of a carriage or navigating a ship(*u*);[139] or for a libel inserted in a newspaper of which the defendant was the proprietor(*w*); and the party in a cause is liable for any irregularity in the proceedings of his attorney(*x*). The principal is also liable not only for the acts of those immediately employed by him and by his steward or general agent, but even for the act of a subagent, however remote, if committed in the course of his service(*y*).† But a party is not liable for the act of another, unless the latter acted as his servant at the time when the injury was committed(*z*); and therefore a

(*q*) Wara *v.* Haydon et al., 2 Esp. Rep. 553.

(*r*) Sanderson *v.* Baker et al., 3 Wils. 309.

(*s*) Id. ibid. see a quære whether receipt of the money is an interference, 1 Montague, Bkpt. L. 476.

(*t*) M'Manus *v.* Crickett, 1 East, 106.—Morley *v.* Gaisford, 2 Hen. Bla. 442.—Sanderson *v.* Baker et al. 3 Wils. 317.—Bush *v.* Steinman, 1 Bos. & Pul. 404.—1 Bla. Com. 431.—Michael *v.* Alestree, 2 Lev. 172.—Anon. Ld. Raym. 739.—Lord Shandois *v.* Wye et al., Dyer. 238.—Boson *v.* Sandford, 3 Mod. 323.

(*u*) Id. ibid.—M'Manus *v.* Crickett, 1 East, 106.

(*w*) Bush *v.* Steinman, 1 Bos. & Pul. 409.

(*x*) Parsons *v.* Lloyd, 2 Bla. Rep 845.—S. C. 3 Wils. 341.—Barker *v.* Braham et al., 3 Wils. 368.

(*y*) Bush *v.* Steinman, 1 Bos. & Pul. 404 —Stone et al. *v.* Cartwright, 6 T. R. 411.

(*z*) M'Manus *v.* Crickett, 1 East, 106. Boucher *v.* Lawson, Rep. T. H. 87.

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(138) And although the master derive no advantage from the labour of the servant. *Gibson v. Inglis*, 4 *Campb.* 72.

(139) But an action will not lie against the master of a ship for negligence of the pilot; even, as it would seem if the master were on board at the time of the accident, for the pilot is master *pro hac vice*. *Snell & others* v. *Rich*, 1 *Johns. Rep.* 305. But the owner of the ship is in such case liable, although the pilot be appointed by public authority. *Bussy* v. *Donaldson*, 4 *Dall.* 206. *Fletcher* v. *Braddick*, 2 *New Rep.* 182. The captain of a public vessel is not liable for the act of one of his inferior officers, done at a time when he was not engaged in the direction and management of the vessel, as such inferior officer is not the servant of the captain. *Nicholson & another* v. *Mounsey & Symes*,, 15 *East's Rep.* 384.

† An action on the case may be maintained against an incorporated Water Works Company, where workmen employed by persons who contract with the Company to lay down pipes for conducting water through a public street do the work in a negligent manner, whereby an individual passing along the street receives an injury. *Matthews* v. *West London Water Works Company*, 3 *Campb.* 403.

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person who hires a post-chaise is not liable for the negligence of the driver, but the action must be against the *driver or the owner of the chaise and horses(*z*);[140] and if a servant or agent *wilfully* commit an injury to another, though he be at the time engaged in the business of the principal, yet the principal is not in general liable; as if a servant *wilfully* drive his master's carriage against another's, or ride or beat a distress taken *damage feasant*(*a*). However on principles of public policy, a sheriff is liable civilly for the trespass, extortion, or other wilful misconduct of his bailiff(*b*);[141] and inn-keepers and carriers are in the nature of insurers of the safety of personal property intrusted to their care(*c*). [*69]

The distinctions between the different liabilities of the owner of *animals* are important, particularly as they affect the form of the action. The owner of domestic or other animals not necessarily inclined to commit mischief, as dogs, horses, and oxen, is not liable for any injury committed by them to the person or personal property, unless it can be shown that he previouly had notice of the animal's mischievous propensity,[142] or that the injury was attributable to some other neglect on his part; it being in general necessary in an action for an injury committed by such animals to allege and prove the *scienter;* and though notice can be proved, yet the action must be *case*, and not *trespass*(*d*).† But if the owner himself acted illegally, *he may be liable, even as a trespasser, as where a person in company with his dog trespassed in a close through which there was no footpath, and the dog, without his concurrence, killed the plaintiff's deer(*e*). And if a person let loose or permit a dangerous animal to go at large, and mischief ensue, he is liable as a trespasser, the law in such cases presuming notice to the [*70]

(*z*) Dean *v.* Branthwaite, 5 Esp. Rep. 35. *acc.*—Bush *v.* Steinman, 1 B. & P. 409. *semb. contra.*

(*a*) M'Manus *v.* Crickett, 1 East, 106. Boucher *v.* Lawson, Rep. T. Hardw. 87.—Sanderson *v.* Baker et al., 3 Wils. 317.—Middleton *v.* Fowler et al., 1 Salk. 282.—2 Rol. Ab. 553.—1 Bla. Com. 431.

(*b*) Woodgate *v.* Knatchbull, 2 T. R. 154.—Sanderson *v.* Baker et al., 3 Wils. 317.—Brown *v.* Compton, 8 T. R. 431.

(*c*) Bennet *v.* Miller, 5 T. R. 273.—Forward *v.* Pittard, 1 T. R. 27.—Hyde et al. *v.* Trent Navigation Company, 5 T. R. 389.—Jones on Bailment, 104.—

(*d*) Mason *v.* Keeling, 12 Mod. 332. S. C. Ld. Raym. 608.—Anon. Dy. 25. pl. 162.—Boutton *v.* Banks, Cro. Car. 254.—Jenkins *v.* Turner, 2 Salk. 662.—Bac. Ab. Action Case, F.—Bayntine *v.* Sharp, Lutw. 90.—Peake, L. E. 291, 2. *post*, 2 Vol. 287, 288.

(*e*) Buckwith *v.* Shoredike et al., Burr. 2092.—Michael *v.* Alestree, 2 Lev. 172.

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(140) *Bishop* v. *Ely & others*, 9 *Johns. Rep.* 294.

(141) Vide *Hazard* v. *Israel*, 1 *Binney*, 240. *M'Intyre* v. *Trumbull*, 7 *Johns. Rep.* 35. *Blake* v. *Shaw*, 7 *Mass. Rep.* 505. *Parrot* v. *Mumford*, 2 *Esp Rep.* 585. *White* v. *Johnson*, 1 *Wash.* 159. *Moore's Adm'rs.* v. *Downey & another*, 3 *Hen. & Mun.* 127.

(142) Vide *Vrooman* v. *Lawyer*, 13 *Johns. Rep.* 339.

† What is sufficient notice to the owner of a dog accustomed to bite. See *Smith* v. *Pelah*, *Str.* 1264. *Beck* v. *Dyson*, 4 *Campb.* 198.

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The liability to an action in respect of *real* property, may be for *misfeazance* or *malfeazance*, as for obstructing ancient lights; or for *nonfeazance*, as for not repairing fences(*l*), private ways(*m*), watercourses, &c. In these cases the action should in general be against the occupier(*n*),[144] and not against the owner, if the premises were in the possession of his tenant, unless he covenanted to repair(*o*):[145] but if the owner, having erected a nuisance, demise the land, an action may be supported against him, though out of possession, for the continuance

(*f*) Leame *v.* Bray, 3 East, 595, 6. Mason *v.* Keeling, 12 Mod. 332.—Rex *v.* Huggins, Ld. Raym. 1583. Bac. Ab. Action, Case, F.

(*g*) Mason *v.* Keeling, 12 Mod. 335. S. C. Ld. Raym. 606.—Rex *v.* Huggins, 1583.—Anon., Dy. 25. pl. 162.—Vin. Ab. Fences, Trespass B. 20 Vol. MS. 424.—Miller *v.* Fandrye, Poph. 161.—Sir W. Jones, 131.—Miller *v.* Fawdry, Latch. 119.

(*h*) Boulston's Case, 5 Co. 105.—Hinsley *v.* Wilkinson, Cro. Car. 387.—Cooper *v.* Marshall, 1 Burr. 259.—Bac. Ab. Game.

(*i*) Earl of Manchester et al. *v.* Vale, 1 Saund. 27.

(*k*) Bro. Ab. Trespass, pl. 435.—2 Rol. Ab. 553.—M'Manus *v.* Crickett, 1 East, 107.

(*l*) Cheetham *v.* Hampson, 4 T. R. 318.

(*m*) Rider *v.* Smith, 3 T. R. 766.

(*n*) Cheetham *v.* Hampson, 4 T. R. 318.

(*o*) Payne *v.* Rogers, 2 Hen. Bla. 350.

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(143) Vide *Shepherd* v. *Hees*, 12 *Johns. Rep.* 433.

(144) Vide *Compton* v. *Richards*, 1 *Price's Exch. Rep.* 27.

(145) The defendant was the lessor of a house which the lessee had ceased to inhabit for the purpose of having it thoroughly repaired, which was done at the expense of the lessee, but under the superintendance of the defendant the lessor; it was held that an action on the case was properly brought against the lessor, for the negligence of his workmen, in leaving open the cellar door, whereby the plaintiff in the night fell in and hurt himself. *Leslie* v. *Pounds*, 4 *Taunt.* 649.

of it, for by the demise he affirmed such continuance(*h*); and every occupier is liable for the continuance of the nuisance on his land, &c. though erected by another, if he refuse to remove the same after notice(*q*).[146] When there are several owners or persons chargeable as joint-tenants or tenants in common, in respect of their real property, though the action be in form *ex delicto*, they should all be made defendants, or the party who is sued alone may plead in abatement(*r*).

Against an agent, &c.

It has been decided that trover cannot be supported against a *servant*, for an unlawful intermeddling *with the goods of another, by the command of his master, unless such intermeddling amount to a trespass, on the ground that it would be extremely inconvenient if a servant were bound, before he acted, to ascertain his master's right, though it was admitted that the command of a master to do an apparent wrong, would constitute no excuse(*s*); but this doctrine appears to have been overruled, and trover may be supported against a servant or agent, or any other person, who unlawfully converts goods to the use of another(*t*), and even against a custom-house officer, who seizes goods in that character(*u*);[147] and replevin or trespass may be supported against the principal, or the bailiff who made the distress by his command(*w*); and it is clear, that a servant cannot plead the command of his master or principal, to what in point of law is a trespass, though he might be ignorant of the merits(*x*). However, for deceit on the sale of goods, as for a false warranty, in general when the agent acted in pursuance of the direction of his principal, the action must be against the latter(*y*): nor can an action be supported against an attorney for a malicious arrest(*z*): and a servant or deputy cannot be charged as such, for a mere nonfeazance, but the action must be against the principal(*a*); but for misfeazance or malfeazance, an action may be supported *against a servant or deputy, though not in that character, but

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(*p*) Rosewell *v.* Prior, Salk. 460.—Cheetham *v.* Hampson, 4 T. R. 320.—Bush *v.* Steinman, 1 Bos. & Pul. 409.

(*q*) Com. Dig. Action Case, Nuisance, B.—*Post*, 2 Vol. 380.

(*r*) 1 Saund 291. e.—Mitchell *v.* Tarbutt et al., 5 T. R. 651.—*Post*, 76.

(*s*) Mires *v.* Solebay, 2 Mod. 242.—Lane *v.* Sir Robert Cotton, 12 Mod. 488.

(*t*) Perkins *v.* Smith, 1 Wils. 328.—Parker et al. *v.* Godin, 2 Stra. 813.—2 Saund. 47. i.—Bac. Ab. Trover, E.

(*u*) Tinkler *v.* Poole et al., 5 Burr. 2657.—S. C. 3 Wils. 146.—Shipwick *v.* Blanchard, 6 T. R. 300.

(*w*) 2 Rol. Ab. 431.

(*x*) Mires *v.* Solebay, 2 Mod. 244.—Sands *v.* Childs et al., 3 Lev. 352.—15 Vin. Ab. 316.—2 Vin. Ab. 61. pl. 3, 4.

(*y*) Com. Dig. Action Case for Deceit, B.—*Ante*, 24.

(*z*) Anon., 1 Mod. 209.—Rol. Ab. 95.—Bac. Ab. Action Case, B.—Barker *v.* Braham et al., 3 Wils. 379.—Gibson *v.* Mudford, 1 Rol. Rep. 409.

(*a*) Lane *v.* Cotton, 12 Mod. 488.—Cameron et al. *v.* Reynolds, Cowp. 403.

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(146) An action lies against the occupant of a house for not railing an area in front, whereby the plaintiff fell down and was hurt, although the area had previously, as long as could be remembered, been left open. *Coupland* v. *Hardingham*, 3 *Campb.* 398.

(147) Vide *Hoyt* v. *Gelston & Schenck*, 13 *Johns. Rep.* 141.

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as a wrong-doer. Thus if a bailiff who has a warrant from the sheriff to execute a writ, suffer his prisoner by *neglect* to escape, the action should be against the sheriff, and not against the bailiff; but if the bailiff *voluntarily* let the prisoner go at large, the action may be brought against the bailiff, for then he is a kind of wrong-doer or rescuer(*b*). In general, however, all actions for breach of duty of the office of sheriff, &c, must be brought against the high sheriff,[148] though for the default of the under-sheriff or bailiff(*c*). And no action is sustainable against an intermediate agent or steward, for damage occasioned by the negligence of a subagent, but the action must be against the principal, or the person who actually committed the injury(*d*).

2dly, With reference to the *number* of the parties.

There are some torts which in legal consideration may be committed by several, and for which a *joint* action may be supported against all the parties; but if in legal consideration several cannot concur in the act complained of, *separate* actions must be brought against each; thus a *joint* action may be brought against several for a malicious prosecution, an assault and battery, or for composing and publishing a libel(*e*),[149] for not setting out tithe(*f*), or for keeping a dog to kill game, not being qualified(*g*); but a joint action cannot be supported [*74] against two for verbal slander,[150] and there *ought to be separate actions against each(*h*); nor will debt on a penal statute lie against several for what in law is a separate offence in each, as against two proctors for not obtaining and entering their certificates(*i*), or against several for bribery(*k*).[151] And if a joint action of trespass be brought against several

(*b*) Lane *v.* Cotton, 12 Mod. 488.—S. C. 1 Salk. 18.—S. C. 1 Ld. Raym. 655. Anon., 1 Mod. 209.

(*c*) Cameron et al. *v.* Reynolds, Cowp. 403.—Laicock's Case, Latch. 187.—Woodgate *v.* Knatchbull, 2 T. R. 154.—Sanderson *v.* Baker et al., 2 Bla. Rep. 832.—Andrews *v.* Sharp, 2 Bla. Rep. 911.—Smith *v.* Hall, 2 Mod. 32.

(*d*) Stone et al. *v.* Cartwright, 6 T. R. 411.—Bush *v.* Steinman, 1 B. & P. 405. 410.—Cameron et al *v.* Reynolds, Cowp. 406.—Bromley *v.* Coxwell, 2 B. & P. 438.

(*e*) 2 Saund. 117 a.—Pencavin *v.* Trapping, Latch, 262.—Rex *v.* Benfield et al., 2 Burr. 985.—Bac. Ab. Actions in general, C.

(*f*) Bastard *v.* Hancock, Carth. 361. 2 Vin. Ab. 70, pl. 21.

(*g*) Hardiman *v.* Whitaker et al., 2 East, 573.

(*h*) Id. ibid.—Swinthin et ux. *v.* Vincent et ux., 2 Wils. 227.—Anon., Dyer, 19. a.—Chamberlaine *v.* Willmore, Palm. 313.—S. C. Cro. Jac. 647.—Sir Robert Stroud *v.* Roper et al., 1 Bulst. 15.—1 Rol. Ab. 781.—2 Vin. Ab. 64. pl. 27.

(*i*) Barnard *v.* Gostling et al., 1 New Rep. 245.—Hardyman *v.* Whitaker et al., 2 East, 574.

(*k*) Griffith v. Stratton and others, Judgment in Error in the House of Lords from the Exchequer in Ireland, 17th April, A. D. 1806.

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(148) Vide *White* v. *Johnson*, 1 *Wash.* 160, 161.

(149) Vide *Thomas* v. *Rumsey*, 6 *Johns. Rep.* 26.

(150) Vide *Thomas* v. *Rumsey*, 6 *Johns. Rep.* 32.

(151) If debt qui tam be sued against several, demanding a joint forfeiture, on a plea of nil debet, all the defendants ought to be found indebted, because the

persons, the plaintiff cannot declare for an assault and battery by one, and for the taking away of goods by the others, because these trespasses are of several natures(*l*). These rules, however, do not obtain in *Criminal* proceedings so as necessarily to defeat an indictment against several for distinct offences in separate counts, though the court have a discretionary power to quash the indictment, where inconvenience might arise from the joinder of many persons for different offences(*m*).

If several persons be made defendants jointly, where the tort could not in point of law be joint, they may demur, and if a verdict be taken against all, the judgment may be arrested or reversed on a writ of error(*n*); but the objection may be aided by the plaintiff's taking a verdict against one only(*o*); or if several damages be assessed against each, by entering a nolle prosequi as to one after the verdict and before judgment(*p*). In other cases,[152] where in point of law several persons may be jointly guilty *of the same offence, the joinder of more [*75] persons than were liable in a personal or mixed action in *form ex delicto*, constitutes no objection, and one of them may be acquitted, and a verdict taken against the others(*q*).[153] On the other hand, if several persons jointly commit a tort, the plaintiff in general has his election to sue all or any of the parties, because a tort is in its nature a separate act of each individual;[154] and therefore in actions in form *ex delicto*, as trespass, trover, or case for malfeazance, against one only for a tort committed by several, he cannot plead the non-joinder of the others in abatement or in bar, or give it in evidence, under the general issue; for a plea in abatement can only be adopted in those cases where regularly all the parties *must* be joined, and not where the plaintiff *may* join them all, or not, at his election(*r*). And even if it appear from

(*l*) 2 Saund. 117. a.—Cutsworth's case, Sty. 153.—Sedley *v.* Sutherland et al., 3 Esp. Rep. 202. 4.

(*m*) Rex *v.* Kingston et al., 8 East, 46, 7.

(*n*) Barnard *v.* Gostling et al., 1 New Rep. 245.—2 Saund. 117. b. n.—Bac. Ab. Actions in general, C.—1 Rol. Ab. 781.—Burcher *v.* Orchard, Sty. 349.

(*o*) Id. ibid.

(*p*) 1 Saund. 207. a.

(*q*) Govett *v.* Radnidge et al., 3 East, 62 Hardyman *v.* Whitaker et al., 2 East, 574.—Bac. Ab. Action of Qui Tam, D. 2 Rol. Ab. 707.—Lane, 19. 59.—Rex *v.* Hill, Cowp. 610.

(*r*) Id. ibid.—1 Saund. 291. d.—Mitchell *v.* Tarbutt et al, 5 T. R. 649.

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form of the action and plea is on a joint contract, although the debt arises from a tort. *Burnham* v. *Webster*, 5 *Mass. Rep.* 270.

(152) An action of ejectment was brought against five defendants, who entered into the consent rule jointly, and pleaded jointly. They severally possessed the premises in separate parts; and the jury having found each defendant separately guilty as to the part in his possession, and not guilty as to the residue, judgment was rendered accordingly. *Jackson* d. *Haines and others* v. *Woods and others*, 5 *Johns. Rep.* 278.

(153) Vide *Lansing* v. *Montgomery*, 2 *Johns. Rep.* 382. *Cooper and another* v. *South & others*, 4 *Taunt.* 802. *Jackson* d. *Haines & others* v. *Woods & others*, 5 *Johns. Rep.* 280, 281.

(154) Vide *Thomas v. Rumsey*, 6 *Johns. Rep.* 31. *Burnham* v. *Webster*, 5 *Mass. Rep.* 269, 270.

II. DEFENDANTS. the declaration or other pleadings, that the tort was jointly committed by the defendant and another person, no objection can be taken(*s*).[155] It has been considered that this rule applies not only in actions strictly for torts unconnected with contract, but also in actions in form *ex delicto*, though in effect for the breach of a contract, as in *case* against bailees for negligence(*t*); but the later decisions appear to render this doctrine very questionable(*u*).[156] There is a settled distinction between mere personal actions of tort, and such as concern *real* property; for [*76] if one tenant in common only, *be sued in trespass, trover, or case, for any thing respecting the land held in common, as for not setting out tithe, &c. he may plead the tenancy in common in abatement(*u*). And in an action of debt for money lost at play, the defendant may plead in abatement, that the money was due from others as well as from himself; such action, though given by statute;[157] being founded on contract(*w*). These distinctions between the effect of too many, or too few persons being made defendants in actions in form *ex contractu* and in those *ex delicto*, may in some cases render it advisable to adopt the latter form of action, when it is doubtful who should be made the defendants; and in an action on the case, trover, or replevin, no inconvenience can arise, because if one of the defendants be acquitted, he will not be entitled to costs(*x*); though in trespass it is otherwise, unless the judge certify that there was reasonable cause for making the acquitted person a defendant(*y*).[158] Where separate actions have been brought against several defendants for the same single act of trespass, the party against whom the last action was commenced may plead the pendency of the first in abatement(*z*).[159] A recovery against one of several parties to a joint tort frequently precludes the plaintiff from proceeding against any other party not included in such action(*a*);[160] thus in an

(*s*) 1 Saund. 291. d.

(*t*) Govett *v.* Radnidge et al., 3 East, 62. *acc.*—1 Saund 291, d.—Buddle *v.* Wilson, 6 T. R. 369. *contr.*

(*u*) See Powell *v.* Layton, 2 New Rep. 365.—Max *v.* Roberts and others, 454.—S. C. 12 East, 94.—Weall *v.* King and King, 454.

(*u*) 1 Saund. 291. e.—Mitchell *v.* Tarbutt et al., 5 T. R. 651.—Bristow *v.* James, 7 T. R. 257.—Bac. Ab. Joint-tenants, K.—Hardyman *v.* Whitaker et al., 2 East, 574.

(*w*) Bristow *v.* James, 7 T. R. 257.

(*x*) Dibben *v.* Cooke et al., 2 Stra. 1005.—Tidd, 900, 1.—*Ante*, 33.

(*y*) 8 & 9 Wm. 3. c. 11.—Tidd, 900, 1.

(*z*) Boyce *v.* Bayliffe, 1 Campb. 60, 1.

(*a*) Brown *v.* Wootton, Cro. Jac. 74. Com. Dig. Action, K. 4. L.—Martin *v.* Kennedy, 2 B. & P. 70, 1.—1 Saund. 207. a.

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(155) Vide *Rose* v. *Oliver*, 2 *Johns. Rep.* 365.

(156) Vide ante, 2 n. 1. 33. n. *y*.

(157) Vide *Hill & Wife* v. *Davis & others*, 4 *Mass. Rep.* 137. *Burnham* v. *Webster*, 5 *Mass. Rep.* 270.

(158) Acc. *Laws N. Y. sess.* 36. c. 96. s. 10. 1 *R. L* 345.

(159) Contra *Livington* v. *Bishop*, 1 *Johns. Rep.* 290.

(160) Vide *Warden* v. *Bailey*, 4 *Taunt.* 87, 88. acc. Where Lawrence J. says,

II. DEFENDANTS.

action against one for a battery or for taking away the plaintiff's posts, or destroying grass in a field where several persons are concerned, the recovery against one will *be a bar to an action against the others(a); [*77] and where the plaintiff had previously recovered in an action against his servant for quitting his service, it was decided that he could not also support an action against the person for seducing away such servant(b); and in these cases the court will in general on a summary application stay the proceedings in the second action, where it is manifest that the entire damages have been recovered in the first(c). But where the evidence and the damages in the two actions might be different, as where two persons on different occasions have published the same libel, separate actions may be supported against each(d).[161] So the recovery against one party in an action for criminal conversation is no bar to an action against another party(e).

3dly, Where the interest has been *assigned*, &c.

As in the case of a breach of covenant, so in that of torts, the assignee of an estate is not liable for an injury committed before he came to the estate; but if he continue a nuisance he may be sued for such continuance(f); though prior to the action, there should in some cases be a request and a neglect to abate the nuisance(g): and if a tenant for years erect a nuisance, and make an underlease to B an action lies against either(h); and if A take the goods of C, and B. take them from A, C may have his action against A or B at his election(i).[162]

(a) Broome *v.* Wootton, Yelv. 68.—Martin *v.* Kennedy, 2 B. & P. 71.—Bul. N. P. 20.

(b) Bird *v.* Randall, 3 Burr. 1345.—S. C. 1 Bla. Rep. 387.

(c) Martin *v.* Kennedy, 2 B. & P. 71.

(d) Martin *v.* Kennedy, 2 B. & P. 69.

(e) Greggson *v.* M'Taggart, 1 Campb. 415.

(f) Com. Dig. Action, Case Nuisance, B.—Moore *v.* Brown, Dyer. 320. Rosewell *v.* Prior, 2 Salk. 460.—Bush *v.* Steinman, 1 B. & P. 409.—*Ante*, 71.

(g) *Post*, 2 Vol. 380 n. *p.*

(h) Rosewell *v.* Prior, 2 Salk. 460.—Bush *v.* Steinman, 1 B. & P. 409.

(i) Bac. Ab. Actions, B.

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that two several actions could not be sustained against several for the same act of imprisonment. But in *Livingston* v. *Bishop & others*, 1 *Johns. Rep.* 290. it was held that separate actions might be brought against several joint trespassers, in each of which the plaintiff might proceed to judgment, and then should elect de melioribus damnis, and issue his execution against one of the defendants, which was a determination of his election, and precluded him from proceeding against the others, except for the costs in their respective suits. It seems that if a plaintiff discharge the action against one tort feazor on receiving satisfaction, that it is a discharge of the others. *Dufresne* v. *Hutchinson*, 3 *Taunt.* 117.

(161) Where B and C printers in partnership, publish jointly, a libel, and separate suits are brought against each, and a judgment is first obtained in the suit against C which is satisfied, that judgment and satisfaction may be pleaded in bar of the suit against B. *Thomas* v. *Rumsey*, 6 *Johns. Rep.* 26. In this case the doctrine in *Livingston* v. *Bishop & others*, ante n. 160, was confirmed, and applied to actions for libels.

(162) Vide *Bac. Ab.* Detinue (A). But it has been held, that if he elect to sue one, and recovers judgment against him, he cannot resort to the other although the judgment is unsatisfied. *Murrell* v. *Johnson's Admr.* 1 *Hen. & Mun.*

II. DEFENDANTS. 4thly, In case of the *death* of the wrongdoer.

At common law upon the *death* of the wrong-doer*, the remedy for wrongs *ex delicto*, and unconnected with contract, in general determines; and as the statute 4 Edw. III. c. 7. does not give any remedy *against* personal representatives, we shall find that few actions in form *ex delicto*, and in which the plea would be not guilty, can be supported against the executor or administrator of the party who committed the injury(*i*).[163] Many of the preceding observations on the rule *actio personalis moritur cum personâ*, in its relation to the death of plaintiffs, are equally applicable to the case of the death of the wrong-doer(*k*).

[*78]

For injuries to the *person*, if the wrong-doer die before judgment the remedy determines, and there is no instance of an action having been supported for such injuries, against his personal representatives(*l*). In general also no action in form *ex delicto*, as trover, case, or trespass, can be supported against an executor, for an injury to *personal property*, committed by his testator(*m*);[164] though if the testator converted the property into money, assumpsit lies against his executor; or if the property came in specie to the possession of the latter, trover would be sustainable against him though not in the character of executor(*n*). And though we have seen that debt may be supported *by* an executor for an escape on final process, it cannot *against* the executor of a sheriff or gaoler;[165] for though the action is not in form *ex delicto*, it is considered as founded on a tort, the negligence *of the deceased sheriff(*o*); but where a sheriff has levied money under an execution, and dies before he has paid it over, his executors may be sued either in debt or *scire facias* upon his return of *fieri feci*, or by action of assumpsit, as for money had and received(*p*). An action cannot be supported against an executor for a penalty forfeited by the testator under a penal statute(*q*); and though it has been holden that debt lies against an executor, for treble the value of tithes which his testator ought to have

[*79]

(*i*) Hambly et al. *v.* Trott, Cowp. 374. 377.—1 Saund. 216, n. 1.

(*k*) *Ante*, 56 to 59.

(*l*) Hambly et al. *v.* Trott, Cowp. 375. 1 Saund. 216. n.—Com. Dig. Administration, B. 15.

(*m*) Hambly *v.* Trott, Cowp. 371.—1 Saund. 216. a.—Com. Dig. Administration, B. 15.

(*n*) Hambly *v.* Trott, Cowp. 371, 4. 1 Saund. 216. a.

(*o*) *Ante* 58. Whiteacres *v.* Onsley, Dyer, 322. a.—Berwick *v.* Andrews, Ld. Raym. 973.—Com. Dig. Administration, B. 15.—Vin. Ab. Executor, H. a. pl. 1. 7. 20.

(*p*) Perkinson *v.* Gilford et al., Cro. Car. 539.—Cockram *v.* Welbye, 2 Show. 79.—Sheake *v.* Richards, 2 Show. 281. Gilb. Exec. 25.—Mildmay *v.* Smith et al. 2 Saund. 343.

(*q*) Com. Dig. Administration, B. 15.

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450. A delivers goods to B a common carrier, and, without the knowledge or consent of A, B delivers them to C, and C to D, who loses them. A may maintain an action on the custom against D. *Sanderson* v. *Lamberton*, 6 *Binney*, 129.

(163) Vide *Franklin* v. *Low & Swartwout*, 1 *Johns. Rep.* 396.

(164) Sed vide *Powell* v. *Layton*, 2 *New Rep.* 370, where Mansfield, Ch. J. seems to be of opinion that case would lie against the executor of a carrier, the foundation of the action being essentially contract.

(165) Vide *Martin* v. *Bradley*, 1 *Caine's Rep.* 124.

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set out, that decision has been doubted(*r*). At common law no executor was answerable for a devastavit by his testator(*s*); but by the statute 30 Car. II. c. 7. (explained and made perpetual by 4 & 5 W. & M. c. 24. s. 12.) "the executors or administrators of any executor or administrator, whether rightful or of his own wrong, who shall waste or "convert to his own use the estate of his testator or intestate, shall be "liable and chargeable in the same manner as their testator or intes-"tate would have been if they had been living."[166] So that since these statutes, if a judgment be obtained against an executor who afterwards dies, an action may now be brought against his executor or administrator upon the judgment, suggesting a devastavit by the first executor(*t*). But it has been considered that an executor *de son tort* of an *executor *de son tort* cannot be sued as such by virtue of these statutes(*u*). [*80]

For injuries to *real* property no action in form *ex delicto* can in general be supported against the personal representatives of the wrong-doer(*w*); though if trees, &c. be taken away and sold by the testator, assumpsit for money had and received lies against his executor(*x*), or trover if they remain in specie, and the executor refuse to restore them(*y*), and a court of equity will frequently afford relief against the executor of the wrong-doer, though at law the action *moritur cum personâ*(*z*); and therefore where a tenant for life cut down timber and died, relief was decreed against his executors in favour of the remainder-man(*a*); and there is an exception to the common law rule in the case of the executors of a deceased rector or vicar, &c. against whom the successor may support an action on the case for waste and dilapidations permitted by the deceased(*b*).

The statute 5 Geo. II. c. 30. only discharges a bankrupt from *debts*, and does not protect him from liability to actions for *torts*; as for as- 5thly, In the case of bankruptcy, &c.

(*r*) Hole *v.* Bradford, Sir T. Raym. 57.—Baily *v.* Birtles et al., Sir T. Raym. 72.—Vin. Ab. Executors, H. a pl. 21. 27.—Sollers *v.* Lawrence et ux., Willes, 421.

(*s*) Sir Bryan Tucke's Case, 3 Leon. 240.—Anon., 1 Ventr. 292.—Com. Dig. Administration, B. 15.

(*t*) Skelton *v.* Hawling, 1 Wils. 258. 1 Saund. 219. c. d.

(*u*) Hammond *v.* Gatliffe, Andr. 252. 254.—Hodges *v.* Waddington, 2 Ventr. 360. quære Wells *v.* Fydell & Betts, 10 East, 315.

(*w*) Compere *v.* Hicks et al., 7 T. R. 732.—1 Saund. 216. n. 1.—2 Saund. 252. a. n. 7.—Utterson *v.* Vernon et al., 3 T. R. 549.

(*x*) Utterson *v.* Vernon et al., 3 T. R. 549.—Hambly et al. *v.* Trott, Cowp. 373, 4.

(*y*) Hambly et al. *v.* Trott, Cowp. 373, 4.—Gordon *v.* Harper, 7 T. R. 13. 1 Saund. 216. a.

(*z*) Garth *v.* Cotton, 3 Atk. 557.—S. C. 1 Ves. 556, 557.—Hodges *v.* Waddington, 2 Ventr. 360.—Utterson *v.* Vernon et al., 3 T. R. 549.

(*a*) Compere *v.* Hicks et al., 7 T. R. 732.

(*b*) Jones *v.* Hill, 3 Lev. 268.—Radcliffe *v.* D'Oyley, 2 T. R. 637.—Sollers *v.* Lawrence et ux., Willes, 421.—3 Wood. 206, 7.

(166) Vide *Laws of N. Y. sess.* 36. c. 75. s. 8. 1 *R. L.* 312.

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sault and battery(*c*), slander(*d*), trespass for mesne profits(*e*), or trover(*f*), &c. unless the damages have been ascertained by verdict *before the bankruptcy(*f*); and when the plaintiff has an election to shape his action in different ways, either *ex contractu* or *ex delicto*, if he adopt the latter form of action, the certificate will be no bar(*g*);[167] as where the bankrupt unlawfully discounted a bill, and embezzled the money, though the plaintiff might have declared against him in assumpsit as for money had and received, in which case the certificate would have been a bar to the action, yet having declared in trover, it was decided that the certificate was no bar(*h*). The same rules affect the liability of a person discharged under an *insolvent* act.

6thly, In the cas of marriage.

Actions for torts committed by a woman *before* her marriage must be against husband and wife jointly(*i*);[168] and for torts committed by the wife *during* coverture, as for slander, assaults, &c. or for any forfeiture under a penal statute, they must also be jointly sued(*k*); and the plaintiff cannot in the same action proceed also for slander, assault, or other tort committed by the husband alone(*l*); nor can the husband and wife be sued jointly for the slander of both(*m*). But for assaults or other wrongs, in which two persons may concur, the husband and wife may be sued jointly, for the act of both, and the acquittal of the husband will not preclude the plaintiff from *recovering(*n*). Detinue, can only be supported against the husband(*o*). But if a woman convert goods before her marriage, or during it, without her husband, trover may be supported against her and her husband(*p*); and for a conversion by husband and wife, the action may be against him alone(*q*). A feme covert can only be sued for her own actual wrong or trespass, and cannot become a trespasser merely by her previous or subsequent assent

[82*]

(*c*) Goddard *v.* Vanderheyden, 3 Wils. 272.

(*d*) Longford *v.* Ellis, 1 Hen. Bla. 29.

(*e*) Goodtitle *v.* North & others, Doug. 584.—Gulliver *v.* Drinkwater, 2 T. R. 261.

(*f*) Parker *v.* Norton, 6 T. R. 695. Johnson *v.* Spiller, Dougl. 167.

(*f*) Longford *v.* Ellis, 1 H. Bla. 29. Cullen, 1st Edit. 112.

(*g*) Cullen, 1st Edit. 391, 2.

(*h*) Parker *v.* Norton, 6 T. R. 695.—Cullen, 113.—Johnson *v.* Spiller, Doug. 167.—7 Vin. 74.

(*i*) Bac. Ab. Bar. & Feme, L.

(*k*) Id. ibid.—1 Hawk. P. C. 3, 4.—Bac. Ab. Bar. & Feme, L.

(*l*) Swinthin et ux. *v.* Vincent, 2 Wils. 227.—Anon. Dyer, 19. a. pl. 112. Com. Dig. Bar & Feme, Y.

(*m*) Id. ibid.—Bac. Ab. Bar. & Feme, L.—Selwyn. N. P 315.—Ante, 73, 4.

(*n*) Anon. 1 Ventr. 93.—*acc.*—Drury *v.* Dennis, Yelv. 106.—S. C. 1 Brownl. 209.—Com. Dig. Bar. & Feme, Y. *contra.*

(*o*) Marshe's case, 1 Leon. 312.—Bac. Ab. tit. Detinue.

(*p*) 2 Saund. 47 h. i.—Marshe's case, 1 Leon. 312.—Draper *v.* Fulkes, Yelv 165.—Selwyn. N. P. 314.

(*q*) 2 Saund. 47. i.

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(167) Vide ante 41. n. 92.

(168) So, an action for slander by the wife, dum sola, will lie against husband and wife. *Hank & wife* v. *Harman & wife*, 5 *Binney*, 43.

during coverture(*r*); but she may be jointly sued with her husband for enticing away or harbouring the servant of another(*s*). In an action of trespass, &c. against husband and wife, for her tort before or during coverture, if she die before judgment, the suit will abate; but if the husband die or become bankrupt, her liability will continue(*t*). II. DEFENDANTS.

If the wife be sued alone, for her tort before or after marriage, she must plead her coverture in abatement, and cannot otherwise take advantage of it(*u*); but if the husband and wife be sued jointly for torts of which they could not in law be jointly guilty, as for the slander of both, if the objection appear on the face of the declaration the defendant may demur, move in arrest of judgment, or support error(*w*).

(*r*) Swinthin et ux. *v.* Vincent, 2 Wils. 227.—Co. Lit. 180. b. n. 4. 357. b. Ante, 67.

(*s*) Fawcett *v.* Beavres et ux., 2 Lev. 63.

(*t*) Middleton *v.* Croft, R. T. Hardw. 399.—Cullen. 392.

(*u*) Ante, 45. n. l.

(*w*) Swinthin et ux. *v.* Vincent, 2 Wils. 227.—Anon. Dyer. 19 a.

CHAPTER II. [83]

OF THE FORM OF ACTION.

IT is a general principle that if the law confer a *right*, it will also confer a *remedy* by *action*. When once the existence of the right is established, the courts will adapt a suitable remedy, except under particular circumstances where there are no *legal* grounds to proceed upon in a court of *law*(*x*). At a very early period specific forms of actions were provided for such injuries, as had then most usually occurred; and Bracton, observing on the original writs on which our actions are founded, declares them to be fixed and immutable, unless by authority of parliament(*y*). The ancient forms of actions are collected in *Registrum Brevium*, and were termed *brevia formata*, and upon which Fitzherbert's *Natura Brevium* is a comment(*z*). At common law also, though no form could be found in the Register, adapted to the nature of the plaintiff's case, yet he was at liberty to bring a special action on his own case, and writs were framed accordingly, which were termed *magistralia*(*a*); *but as the officers of the court were found reluctant in [*84] new cases to frame the proper remedy, the legislature thought fit to enforce the common law, and it was enacted by statute Westminster 2d(*c*), "that if 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 shall agree in "making the writ; or adjourn the plaintiffs until the next parliament, "and that the cases be written in which they cannot agree, and that "they shall refer such cases(*d*), until the next parliament; and by con-"sent 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

IN GENERAL.

(*x*) Per Ld. Kenyon, Ch. J. Birkley *v.* Presgrave, 1 East, 226.—3 Bla. Com. 123.—Ashby *v.* White et al., 1 Salk. 20.—S. C. 6 Mod. 54.—2 Atk. 392.

(*y*) 3 Bla. Com. 117.

(*z*) 3 Bla. Com. 183, 4.

(*a*) John Webb's Case, 8 Co. 47. b. 48. a.—Kinlyside *v.* Thornton et al., 2 Bla. Rep. 1113. 3 Woodd. 168.

(*c*) 13 Edward I. stat. 1. c. 24. See observations on this statute, 3 Bla. Com. 123. 183, 4.—3 Wood. 168. and Webb's case. 8 Co. 45. b. to 49. b.

(*d*) There appears a mistake in the Statute-book in the translation which is here corrected.

In General. "unto complainants."[1] To this statute the great encouragement and frequency of actions on the case is attributed; it has however been observed that it by no means follows, that because in cases unprovided for by the Register, the Statute of Westminster 2d, directs an action on the case to be framed, that such action did not subsist at common law(*e*).

Notwithstanding these provisions, it was once thought that the circumstance of an action being of the first impression, and unprecedented, constituted a conclusive objection against it; but this notion no
[*85] longer *prevails, for as we have seen, whenever the common law recognizes or creates a legal right, it will also confer a remedy:[2] and Lord Ch. J. Pratt, in answer to the objection of novelty, said, that he wished never to hear it urged again, for torts are infinitely various, not limited or confined, for there is nothing in nature that may not be an instrument of mischief, and the special action on the case was introduced, because the law will not suffer an injury without affording a remedy, and there must be new facts in every special action on the case(*e*): and in the case of Pasley *v.* Freeman(*f*), Mr. J. Ashhurst observed, that where cases are new in their *principle* it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the *instance*, and the only question is upon the application of a principle recognized by law, to such new case, it will be just as competent to courts of justice to apply the acknowledged principle to any case which may arise two centuries hence, as it was two centuries ago. However the novelty of an action may frequently be fairly urged as a strong *presumptive* argument against it, more particularly where the *right*, which is the foundation of the action, is admitted, but the mode of relief is the only matter in controversy(*h*).

When the prescribed form of action is to be found in the Register,
[*86] the proceeding should not *materially vary from it(*i*), unless in those cases where another form of action has long been sanctioned by usage(*k*); for the courts have considered it of the greatest importance to observe the boundaries of the different actions,[3] not only in respect of their being most logically framed, and best adapted to the nature of

(*e*) Per Blackstone, J.—Kinlyside *v.* Thornton et al., 2 Bla. Rep. 1113.

(*e*) Willes, 581. n. *a*.—Birkley *v.* Presgrave, 1 East, 226.—Bul. N. P. 79.

(*f*) 3 T. R. 63.

(*h*) Co. Litt. 81. b. n. 2. per Ashhurst, J.—Russel et al. *v.* The Men of Devon, 2 T. R. 673.—Barham *v.* Dennis, Cro. Eliz. 770.

(*i*) Bac. Ab. Abatement, H.

(*k*) Id. ibid.—Slade's Case, 4 Co. 94. b.—3 Wood Vin. Lect. 169. Post, 236. 2 Mod. Inst. 10. 3 Inst. Cl. 57. Reg. Pl. 276. Herne 461. Bac. Ab. Abatement, H.

(1) As to the origin and history of the action on the case, see further, 3 *Reeve's Hist. E. L.* 89. 93. 243, 244. 391. 397.

(2) Vide *Yates* v. *Joyce*, 11 *Johns. Rep.* 140.

(3) Vide *Vail* v. *Lewis & Livingston*, 4 *Johns. Rep.* 457, 458.

each particular case, but also in order that causes may not be brought into court confusedly, and immethodically, and that the record may at once clearly ascertain the matter in dispute; a regulation which, since the different legislative provisions respecting costs, (the right to which varies in different forms of actions,) has become of still greater importance(*l*).

Actions are from their subject matter distinguished into *real*, *personal*, and *mixed*(*m*). *Real* actions are for the recovery of real property only, and in which the plaintiff, then called the demandant, claims title to lands, tenements or hereditaments in fee-simple, fee-tail or for term of life, *such as writs of entry, right, formedon, dower. &c.(*n*). *Personal* actions are for the recovery of a debt, or damages for the breach of a contract, or a specific personal chattel, or a satisfaction in damages for some injury to the person, personal, or real property. In *mixed* actions, which partake of the nature of the other two, the plaintiff proceeds for the recovery of some real property, and also for damages for an injury thereto, as in the instance of an action of ejectment or of waste. I shall confine my observations to such *personal* and *mixed* actions as most frequently occur in practice. [*87]

Personal actions are in form *ex contractu* or *ex delicto*, or, in other words, are for breach of contract or for wrongs unconnected with contract. Those upon *contracts* are principally assumpsit, debt, covenant, and detinue(*o*); and those for *wrongs* are case, trover, detinue, replevin, and trespass *vi et armis*.[4] We will take a concise view of the nature and particular applicability of each of these respective remedies, and of the action of ejectment.

(*l*) Thus in Savignac *v.* Roome, 6 T. R. 129, 130. Lord Kenyon, C. J. said, "it is of importance that the boundaries between the different actions "should be preserved, and particularly "in cases of this kind; for if in an action of trespass the plaintiff recover "less than 40*s*. he is entitled to no "more costs than damages, whereas a "verdict with nominal damages only, "in an action on the case carries full "costs." And in Israel *v.* Douglas & another, 1 Hen. Bla. 243. Mr. J. Wilson said, "it is highly necessary that "the forms of actions should be kept "distinct." And in Turner et al. *v.* Hawkins et al., 1 Bos. & Pul. 476. Eyre, C. J. observed, that "undoubtedly we "ought to endeavour to preserve the "distinction of actions; and if it appear upon the pleadings, that actions "of a different nature have been mixed, that is a sufficient ground for arresting the judgment." And in Reynolds *v.* Clarke, 1 Stra. 635. the C. J. observed, "we must keep up the boundaries of actions, otherwise we shall "introduce the utmost confusion." See also Bourden *v.* Alloway, 11 Mod. 180. Haward *v.* Bankes, 2 Burr. 1114. 2 Saund. 47. b. 2 Inst. 434 Fitzg. 85.

(*m*) See the division of actions, 3 Bla. C. 117.—Bac. Ab. Actions in General, A.

(*n*) As to the various *Real* actions, see Co. Lit. 239. n. 1.—3 Bla. Com. Ch. 10.—Bac. Ab. Actions in General, A.

(*o*) The actions of account and annuity, though sometimes adopted, do not often occur in practice, and therefore I have not observed upon them.

(4) Vide *Tidd's Prac.* 1. 5.

[*88]

*I. ASSUMPSIT.

This action is so called from the word *assumpsit*, which, when the pleadings were in Latin, was always inserted in the declaration, as descriptive of the defendant's undertaking(*p*). It may be *defined* to be an action for the recovery of *damages* for the non-performance of a *parol* or *simple* contract, or in other words, a contract not under seal nor of record(*q*), circumstances, which distinguish this remedy from others; for the action of *debt* is, in legal consideration, for the recovery of a *debt eo nomine*, and *in numero*, and most frequently upon a deed(*r*); and the action of *covenant*, though for the recovery of damages, can only be supported upon a contract under *seal*. Assumpsit however is not sustainable, unless there have been an express *contract*, or unless the law will *imply* a contract. Though founded upon *contract*, this action, as distinguishable from the *brevia formata*, and falling within the provision of the Statute of Westminster, may be termed an action on the case(*s*); it is now however uniformly called an action of assumpsit, and when the term '*case*' is adopted in a statute, or otherwise, an action as for a tort, and in form *ex delicto* is usually intended, and not an action in form *ex contractu*(*t*).

[*89] * A minute inquiry into the *history* of this action would at this time be matter of curiosity, rather than of practical utility; the origin and progress of it may be collected from the reports and works referred to in the note(*u*); and from which it appears, that till Slade's case(*w*), a notion prevailed, that on a simple contract for a sum certain, or for any money demand, the action must be in debt; but it was holden in that case that the plaintiff had his election either to bring assumpsit or debt; however, from the manner in which the statute 3 James I. c. 8. is penned, it is probable the action of assumpsit was not then much in use: but afterwards it became very general(*x*), and it is certainly now

(*p*) The word "*undertook*" ought always to be inserted in the declaration, though the promise be founded on a legal liability, and though in evidence it would be implied. Bac. Ab. Assumpsit, F.

(*q*) Contracts are of *Record*, by *Specialty*, or by *Parol*; the term *Parol*, or *simple* contract signifies every contract not under seal nor of record, whether verbal or written, Rann et al. *v.* Hughes, 7 T. R, 351.[5]

(*r*) Rudder *v.* Price et al., 1 Hen. Bla. 554, 5. 551. B. N. P. 167.

(*s*) Bac. Ab. Assumpsit.—Gilb. C. P. 6.—Mast *v.* Goodson, 2 Bla. Rep. 850.

(*t*) Huddersfield Canal Company *v.* Buckley, 7 T. R. 36.

(*u*) Rudder *v.* Price, 1 Hen. Bla. 550 to 555.—Walker et al. *v.* Witter, Doug. 6, 7.—Slade's case, 4 Coke, 91 to 95. 3 Woodd. 168, 9. n. c.—Reeves, vol. 3 & 4.—1 Vin. Ab. 270.—Bro. Ab. Action sur le Case, pl. 7. 69. 72.—Fitz. N. B. 94. A. n. a. 145. G.—Barry *v.* Robinson, 1 New Rep. 295.—Mast *v.* Goodson, Bla. Rep. 850.

(*w*) 4 Co. 91 to 95. 44 Eliz.

(*x*) Per Buller, J.—Walker et al. *v.* Witter, Dougl. 6.

(5) Acc. *Ballard* v. *Walker*, 3 *Johns. Cas.* 60.

more frequently adopted for the recovery of money due on a simple contract, than the action of debt. From these cases it also appears(*y*), that though before Slade's case, an action on the case might be supported, as well for the nonfeazance of a contract, as for misfeazance or malfeazance in the performance of it, yet from the form of the writ in Fitzherbert(*z*), it may be collected that the remedy was not similar to our present action of assumpsit, but rather resembled the present form of a declaration in case for a tort(*a*).

The breach of all *parol* or *simple* contracts, whether verbal or written, or express or implied, or for *the payment of money, or for the performance or omission of any other act, is remediable by action of assumpsit. Thus it lies to recover *money* lent, paid, and had and received to the use of the plaintiff; and in some cases though the money have been received tortiously or by duress of the person or goods, it may be recovered in this form of action,[6] the law implying a contract in favour of the party entitled(*b*);[7] as against a person who has usurped an office, and received the known and accustomed fees of office, though mere gratuitous donations cannot be recovered in assumpsit(*c*); and where the goods of a trader after his act of bankruptcy are taken in execution, or otherwise disposed of without the concurrence of the assignees, they may wave the tort, and declare in assumpsit for money had and received, if the goods have been sold(*d*); so it lies to recover

[*90]

(*y*) Bro. Ab. tit. Auction sur le Case, pl. 7. 69. 72.—Fitz. Nat. Brev. 94. A. 145. G.—Bac. Ab. Assumpsit. C.

(*z*) Nat. Brev. 94. A.—3 Woodd. 169.—Mast *v.* Goodson, 2 Bla. Rep. 850.

(*a*) Rudder *v.* Price et al., 1 Hen. Bla. 550, 1.

(*b*) Lamine *v.* Dorrell, 2 Ld. Raym. 1216.—Hitchin *v.* Campbell, 2 Bla. Rep. 827.—S. C. 3 Wils. 304.—King *v.* Leith, 2 T. R. 144.—Lindon *v.* Hooper, Cowp. 419.—Bul. N. P. 131.—Parker *v.* Norton, 6 T. R. 695.—Astley *v.* Reynolds, 2 Stra. 916.—Irving *v.* Wilson et al., 4 T. R. 485.—Lovell *v.* Simpson, 3 Esp. Rep. 153.—Crockford *v.* Winter, 1 Campb. 124.—Bennett *v.* Farnell, 1 Campb. 130.—Lightly *v.* Clouston, 1 Taunton, 112.

(*c*) Boyter *v.* Dodsworth, 6 T. R. 681. Arris et al. *v.* Stukeley, 2 Mod. 260.—Rex *v.* Bishop of Chester, 1 T. R. 403. Lamine *v.* Dorrell, Ld. Raym. 1216.

(*d*) Id. ibid.—King *v.* Leith, 2 T. R. 145.—Hitchin *v.* Campbell, 3 Wils. 304. S. C. 2 Bla. Rep 827.—1 Montague, 476, 7.—Lightly *v.* Clouston, 1 Taunton, 112.

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(6) So, an action for money had and received lies against a collector, for money unlawfully demanded, and paid by the plaintiff to obtain a clearance for his vessel, which was refused until the money was paid. *Ripley* v. *Gelston*, 9 *Johns. Rep.* 201. So, it lies against a clerk of the District Court to recover money exacted *colore officii* from the plaintiff, as a condition of the redelivery of property which had been liberated from seizure. *Clinton* v. *Strong*, 9 *Johns. Rep.* 370. So, it has been held to lie against a deputy postmaster, to recover the excess of postage on a letter, beyond what was allowed by law. *Williams* v. *Dodd, Superior Court of Connecticut*, cited 2 *Day's Esp. Rep.* 154. n. 1. But in the case of a voluntary payment of money which the party could not have been compelled to pay, no action will lie to recover it back. *Hall* v. *Schultz*, 4 *Johns. Rep.* 240. and n. *a.* 2d ed. *ibid.* 1 *Esp. Dig.* 119.

(7) Vide *Dumond's Adm'r.* v. *Carpenter*, 3 *Johns. Rep.* 183.

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money paid by a bankrupt by way of fraudulent preference; but in these cases it is sometimes most advisable to declare in case or trover in order to avoid a set-off or mutual credit(*e*)[8]. In some cases also where money has been extorted by duress of goods, it may be recovered back in assumpsit(*f*). But the proprietor of cattle wrongfully distrained *damage feasant*, who has paid money for the purpose of having them

[*91] *redelivered to him, cannot recover back that money in this action because such mode of proceeding would impose great difficulties on the defendant, by not apprizing him of what he was to defend; and the law has provided specific remedies for trying the legality of a distress, viz. replevin, trespass, or trover(*g*). So this action lies to recover interest,[9] and money due on an account stated,[10] or for services and works of different descriptions, or for the sale, use, or hire of goods or of land, or other personal or real property, and upon bills of exchange, whether foreign or inland, cheques on bankers, promissory notes, policies of insurance on ships(*h*), or on lives, or against fire, when not under seal.

It lies also *specially* upon wagers(*i*), feigned issues(*k*), and awards, where the submission was not by deed(*l*): also, to recover money due on bye laws(*m*) foreign judgments(*n*),[11] or for legacies charged[12] on

(*e*) Smith et al. *v.* Hodgson, 4 T. R. 211.—But see Hunter *v.* Prinsep and others, 10 East, 378.—Thomason and others *v.* Frere and others, 10 East's Rep. 418.

(*f*) Astley *v.* Reynolds, 2 Stra. 915 Irving *v.* Wilson et al., 4 T. R. 485.—Bull, N. P. 132.

(*g*) Lindon *v.* Hooper, Cowp. 414.—Shipwick *v.* Blanchard, 6 T. Rep. 298.

(*h*) Post. 2 Vol. 111.

(*i*) Post. 2 Vol. 114.

(*k*) Post. 2 Vol. 116.

(*l*) Post. 2 Vol. 119.

(*m*) Feltmaker's Company *v.* Davis, Bos. & Pul. 98.

(*n*) Walker et al. *v.* Witter, Dougl. 1.—Messin *v.* Massarene et ux., 4 T. R. 493.—Henry *v.* Adey. 3 East, 221.—Hall *v.* Odber, 11 East, 124.

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(8) Vide *Billon* v. *Hyde*, 1 *Ves.* 329. S. C. 1 *Atk.* 126. *Hussey* v. *Fidell*, 12 *Mod.* 324. S. C. *Holt*, 95. *Philips* v. *Thompson*, 3 *Lev.* 191.

(9) Vide *Tucker* v. *Randall*, 2 *Mass. Rep.* 284. *Greenleaf* v. *Kellog*, *Mass. Rep.* 568. But after acceptance of the principal, an action will not lie for the interest. *Tillotson* v. *Preston*, 3 *Johns. Rep.* 229. *Johnston & Brannan*, 5 *Johns. Rep.* 268.

(10) But not on a running account. *Scott* v. *M'Intosh*, 2 *Campb.* 238.

(11) Vide *Hubbell* v. *Coudrey*, 5 *Johns. Rep.* 132. and n. *a. ibid.*

(12) Vide *Beecker* v. *Beecker*, 7 *Johns. Rep.* 99. which was an action of assumpsit against a devisee of land charged with a legacy; the devisee having entered on the land, and the executors assented to the legacy, it was held that he was liable on his express promise to pay the legatee: the court avoid giving an opinion, whether he would have been liable on an implied promise. There are circumstances however which may amount to an express promise; as where an annuity is charged by the will of the devisor upon the land devised, if the devisee has entered and actually paid part of the annuity, the legatee may maintain assumpsit for the residue. *Van Orden* v. *Van Orden*, 10 *Johns. Rep.* 30. See *Deeks* v. *Strutt*, 5 *Term Rep.* 690. Contra, and the observations of the court upon that case in 10 *Johns. Rep.* 31.

land(o), though debt is more usual in the last three instances; or for a specific legacy after the executor has assented,[13] but not otherwise(p), nor for a pecuniary legacy payable out of the general assets[14] of the testator(q). It may also be supported for money due for tithes, where there has been an agreement for a composition(r); but unless there have been such a *composition the only remedy is in a court of equity or in the Ecclesiastical courts, or in debt upon the statute 2 and 3 Edw. 6. c. 13. to recover the treble value of the tithe omitted to be set out, and which act extends only to prædial tithe(r). Assumpsit also lies for the amount of tolls and port duties(s), contributions to party walls(t), or canal calls(u), or on promises to pay money in consideration of forbearance to sue the defendant or a third person(w), or in consideration of services or works done, or goods sold to the defendant, or a third person at the defendant's request(x); and upon contracts to guarantee(y), indemnify(z), employ(a), or to serve and perform works(b), and against attornies and solicitors(c), wharfingers (d), surgeons(e), innkeepers(f), carriers and other bailees(g), for neglect or other breach of duty. Assumpsit is also the proper remedy for a breach of a promise to mar-

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[*92]

(o) Ewer v. Jones, 2 Salk. 415.—S. C. 6 Mod. 27.—S. C. Ld. Raym. 937.

(p) Doe d. Lord Say & Sele v. Guy, 3 East. 120.—S. C. 4 Esp. Rep. 154.—Hawkes et ux. v. Saunders, Cowp. 289.

(q) Id. ibid. Deeks et ux. v. Strutt, 5 T. R. 692.—Farish v. Wilson, Peake 73.—Bauerman et al. v. Radenius, 7 T. R. 567.—Rose et ux. v. Bowler et al., 1 Hen. Bla. 108.

(r) Post. 2 Vol. 53.—Bac. Ab. tit. Tithe, Y.—D. d.—Bul. N. P. 188 to 191.

(r) Post. 2 Vol. assumpsit. Bul. N. P. 188.

(s) Post. 2 Vol. 47.

(t) 14 G. 3. c. 78.—Peck v. Wood, 5 T. Rep. 130.—Beardmore v. Fox, 8 T. Rep. 214.—Langster v. Burkhead, 1 Bos. and Pul. 303.

(u) Huddersfield Canal Company v. Buckley, 7 T. Rep. 36.

(w) Post. 2 Vol. 121.

(x) Post. 2 Vol. 125.

(y) 1 Saund. 211. a.—Wain et al. v. Warlters, 5 East, 10.

(z) Post. 2 Vol. 127.—Goddard v. Vanderheyden, 3 Wils. 262.—Taylor v. Higgins, 3 East, 169.—Toussaint et al. v. Martinant, 2 T. R. 105.—Beard et ux. v. Webb et al., 2 Bos. & Pul. 98.—Cowell v. Edwards, 2 Bos. & Pul. 268.

(a) Post. 2 Vol. 131.—Hulle v. Heightman, 2 East, 145.—S. C. 4 Esp. Rep. 77.—Martyn v. Hind, Cowp. 437.

(b) Post. 2 Vol. 132.—Elsee et al. v. Gatward, 5 T. R. 143.

(c) Post. 2 Vol. 134, 5.

(d) Baker v. Liscoe, 7 T. R. 171.—Post. 2 Vol. 150.

(e) 1 Saund. 312. n. 2.—Slater v. Baker et al., 2 Wils. 359.

(f) Calye's case, 8 Co. 32.—Bennet v. Mellor, 5 T. R. 273.

(g) Post. 2 Vol. 142.

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(13) Assumpsit lies against an executor for a pecuniary legacy on his express promise in consideration of assets. *Atkins & ux.* v. *Hill* and *Hawkes & ux.* v. *Saunders, Cowp.* 284. 289 *Beecker* v. *Beecker, 7 Johns. Rep.* 103, 104. Opinion of Kent, Ch. J. *Clark and others* v. *Herring, 5 Binney,* 33. *Van Ordon* v. *Van Orden* 10 *Johns. Rep.* 31.

(14) But in the States of New York and Pennsylvania, actions at law against executors for legacies, are given by statute. *Laws N. Y. sess.* 36. c. 75. s. 19. 1 R. L. 314. *Dewitt and wife* v. *Schoonmaker and others,* 2 *Johns. Rep.* 243. *Wilson* v. *Wilson,* 3 *Binney,* 559.

I. Assumpsit. ry(*h*); and against a vendor for not delivering goods bought(*i*), or against the vendee for not accepting goods sold(*k*), or for not delivering a bill of exchange in payment for the same(*l*); upon an express [93*] warranty of the *goodness or quality of any personal chattel, either on the sale or exchange thereof(*m*), or upon an express or implied warranty as to the property therein(*n*); and by and against vendors and purchasers for not completing a contract of sale(*o*). So where there has been an express agreement not under seal between landlord and tenant, or where the law implies a contract on the part of the latter to manage the farm in a husband-like manner, this action may be sustained for the breach of such contract(*p*); though, where the tenant has been guilty of voluntary waste, it is usual to declare in case, unless there be also a money demand, which might be included in a declaration in assumpsit(*q*). And by the express provision of 11 Geo. 2. c. 19. s. 15. the executor of a tenant for life may, in this action, recover a proportion of rent up to the day of his testator's death.

When the peculiar remedy.

The action of assumpsit. is in general the only remedy against an executor or administrator, for the breach of a contract not under seal(*r*), and for the recovery of money payable by instalments,[15] where the whole debt is not due(*s*); for (unless in the court of exchequer, in which wager of law is not allowed)(*t*) *debt* is not in general sustainable against an executor, nor can that action be supported, unless the whole debt be due(*u*); also where the simple contract was for the payment of [*94] the debt of a third person, or collateral, as debt is *not sustainable, assumpsit is the only form of action(*w*); as at the suit of the payee or indorsee of a bill of exchange against the acceptor, or of the indorsee of

(*h*) Post. 2 Vol. 129.

(*i*) Post. 2 Vol. 138.

(*k*) Post. 2 Vol. 136.

(*l*) Post. 2 Vol. 124.—Price et al. *v.* Musson, 4 East, 147.—Dutton *v.* Solomonson, 3 Bos. and Pul. 582.

(*m*) Post. 2 Vol. 139 to 142.

(*n*) Post. 2 Vol. 139.—2 Bla. C. 451.—3 Id 160.—Furnis *v.* Leceister, Cro. Jac. 474.—1 Rol. Abr. 90.

(*o*) Post. 2 Vol. 168.

(*p*) Post. 2 Vol. 176.—Powley *v.* Walker, 5 T. R. 373.—Legh *v.* Hewitt, 4 East, 154.—Roe d. Jordan *v.* Ward, 1 Hen. Bla. 99.

(*q*) Id. ibid.—Govett *v.* Radnidge, 3 East, 70.

(*r*) Barry *v.* Robinson, 1 New Rep. 293.—Pinchon's case, 9 Co. 86. b.

(*s*) Rudder *v.* Price, 1 Hen. Bla. 547. Beckwith *v.* Nott, Cro. Jac. 504.—2 Saund. 303. n. 6.—Cooke *v.* Whorwood, 2 Saund. 337.—Peters *v.* Opie, 2 Saund. 350.—Tate *v.* Lewen, 374.—Fitzg. 302.—Com. Dig. Action F.—Walker's case, 3 Co. 22. a.

(*t*) 3 Bla. Com. 347.—Pinchon's case, 9 co. 88. a.

(*u*) Rudder *v.* Price et al., 1 Hen. Bla. 552.

(*w*) Anon. Hard. 486.—Com. Dig. Debt, B.—Burslow *v.* Baily, 2 Ld. Raym. 1040.—2 Saund. 62. b.

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(15) Vide *Tucker* v. *Randall*, 2 *Mass. Rep.* 283. Assumpsit lies on a promissory note by which the interest is payable annually although the principal is not yet payable. *Greenleaf* v. *Kellogg*, 2 *Mass. Rep.* 568. 284. *Cooley* v. *Rose*, 3 *Mass Rep.* 221.

a promissory note against the maker(*x*); and on an award to perform any act, except to pay money, assumpsit is the only remedy, unless the submission were by bond(*y*); and formerly it was thought that in an action of debt on simple contract, the precise sum stated to be due in the declaration, must be recovered, or that the plaintiff would be non-suited(*z*); and therefore at that time it was usual, when the amount of the debt was uncertain, to declare in assumpsit; but as this notion no longer prevails, and the plaintiff will recover, if he prove any sum to be due to him, though less than that stated in the declaration, it is no longer material in this respect, whether the plaintiff declare in assumpsit or debt(*a*). I. ASSUMPSIT

When a party has *a security of a higher nature*, he must found his action *thereon*, and as the law has prescribed different forms of action on different securities, assumpsit cannot in general be supported, when there has been an express contract under seal[16] or of record, but the party must proceed in debt or covenant where the contract is under seal,[17] or in debt or *scire facias* if it be of record, even though the debtor, after such contract were made, expressly promised[18] to perform it(*b*). But if the *deed be only executed by the plaintiff and not by the defendant, the action[19] must be assumpsit(*c*); and if there be an When it does not lie. [*95]

(*x*) Bishop *v.* Young, 2 Bos. and Pul. 78.—Webb *v.* Geddes, 1 Taunton, 540. and Chitty on Bills, 3d edit. 341.

(*y*) 2 Saund. 62. b. n. 5.

(*z*) 3 Bla. Com. 155.

(*a*) M'Quillin *v.* Cox, 1 Hen. Bla. 249.—Rudder *v.* Price et al., 1 Hen. Bla. 550.—Walker et al. *v.* Witter, Dougl. 6.—Grant *v.* Astle, Doug. 732.

(*b*) 1 Roll. Ab. 11. 517.—Benners *v.* Guyldley, Cro. Jac. 506.—Dartnal v. Morgan, Cro. Jac. 598.—Anon., Cowp. 129.—Bulstrode *v.* Gilburn, 2 Stra. 1027.—Bul. N. P. 128.—Toussaint et al. *v.* Martinant, 2 T. R. 105.—Green *v.* Harrington, Hutton, 34.—1 Vin. Ab. 278, pl. 20.—Atty et al. *v.* Parish et al., 1 New Rep. 108.—Walker & others *v.* Witter, Dougl. 5, 6. See the rule and exceptions, Randall *v.* Lynch, 12 East, 182, 3.—Hunter *v.* Prinsep & others, 10 East, 378.—Hall *v.* Odber, 11 East, 126. where there is a subsequent contract not under seal, assumpsit will sometimes lie, see White & others *v.* Parkin and others, 12 East, 578.—Randall *v.* Lynch, 12 East, 182, 3.

(*c*) Sutherland *v.* Lishnan, 3 Esp. Rep. 42.

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(16) Vide *Young* v. *Preston*, 4 *Cranch*, 239. In some cases where a party has covenanted to do an act, and failed in the performance, the covenantee has been allowed to recover back the consideration paid, in assumpsit. *Weaver* v. *Bentley*, 1 *Caine's Rep.* 47. *D'Utricht* v. *Melchor*, 1 *Dall.* 428. *Howes* v. *Barker*, 3 *Johns. Rep.* 509.

(17) Vide *Richards* v. *Killam*, 10 *Mass. Rep.* 243. 247.

(18) But it has been held that where there is a covenant to pay money, and part has been paid, assumpsit will lie on a promise to pay the balance. *Danforth* v. *Schoharie Turnp. Co.* 12 *Johns. Rep.* 227.

(19) Where land is conveyed by deed poll, and the grantee enters under the deed, certain duties being reserved to be performed, as no action lies against the grantee on the deed, the grantor may maintain assumpsit for the non-performance of the duties reserved. *Goodwin & another* v. *Gilbert & another*, 9 *Mass. Rep.* 510.

I. ASSUMPSIT. agreement by deed to let a house by words not amounting to an actual demise, the party may maintain assumpsit for use and occupation(*d*); and where on the separation of a husband and wife, he covenanted by deed with a trustee to pay an allowance for her separate maintenance, but made default, and the trustee provided the wife with necessaries, it was decided that he might support assumpsit on the common law obligation(*e*); and if the contract under seal be invalid, and there be any evidence upon which an implied contract can be raised, assumpsit may in some cases be supported(*f*); as where an annuity deed has been set aside, for some defect[20] in the memorial, &c (*g*); and where a feme covert, without authority from her husband, contracted with a servant by deed, the service having been performed, it was decided, that the servant might maintain assumpsit against the husband(*h*); and where in respect of a *new consideration*, there has been a *new* contract, to pay a debt, or perform a contract under seal, assumpsit may be supported(*i*); as on a promise to an assignee of a bond, to pay him in consideration of forbearance(*k*); or on a promise by an heir, having assets by descent, to pay the debt of his ancestor for the same consideration(*l*); or by *the debtor himself, in respect of any new consideration(*l*);[21] and though it has been decided that assumpsit cannot be supported against a party, on his undertaking to pay the debt and costs recovered against himself, in consideration that the plaintiff would stay execution(*m*), it is clear that such action might be supported on a similar undertaking made by a third person(*n*): so between partners, who

[*96]

(*d*) Elliott *v.* Rogers, 4 Esp. Rep. 59. when not, Kirtland *v.* Pounsett, 2 Taunton, 145.

(*e*) Nurse *v.* Craig, 2 New Rep. 148.

(*f*) Brown *v.* Benson, 3 East, 333. White *v.* Cuyler, 6 T. R. 176.—Scurfield *v.* Gowland, 6 East, 241.

(*g*) Id. ibid. see exceptions in Kerrison *v.* Cole et al., 8 East, 231.

(*h*) White *v.* Cuyler, 6 T. R. 176.

(*i*) White and others *v.* Parkin and others, 12 East. 578.

(*k*) 1 Saund. 210. n. 1.—Reynolds *v.* Prosser, Hardr. 71.—Johnson *v.* Collings, 1 East, 104.—Russel *v.* Haddock, 1 Lev. 188.—Innes *v.* Sir T. Wallace Dunlop, 8 T. R. 595.

(*l*) 1 Leon. 293.—2 Saund. 137. b.—Hunt *v.* Swain, Sir T. Raym. 128.—Barber *v.* Fox, 1 Ventr. 159.—Com. Dig. Action Assumpsit, B. 1.

(*l*) Brett *v.* Read, Cro. Car. 343.—Sturlyn *v.* Albany, Cro. Eliz. 67.—Palmer *v.* Stavely, 12 Mod. 511.—1 Vin. Ab. 272.—1 Rol. Ab. 8. pl. 6.—Bac. Ab. Assumpsit, A.

(*m*) Anon., Cowp. 128, 9.—Sed qu. Tanner *v.* Hague, 7 T. R. 421.

(*n*) Anon., Cowp. 129.—Reynolds *v.* Prosser, Hardr. 71.—Russel *v.* Haddock, 1 Lev. 188.

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(20) Vide *Shore* v. *Webb*, 1 *Term Rep.* 732. *Beauchamp* v. *Borrett*, *Peake's Cas.* 109. *Richards* v. *Borrett*, 3 *Esp. Rep.* 102.

(21) Where a tenant has held by lease with the usual covenants, and the lease expires, and the tenant still continues to hold the land with the consent and permission of the landlord, he shall hold subject to all the covenants contained in the expired lease, for the breach of any of which he may be sued in assumpsit; for the law raises the implied assumpsit of his continuing to hold on the same terms as he did by the lease. 1 *Esp. Dig.* 7.

have by deed covenanted to account with each other, and to pay over what shall appear to be due, if they state an account, and one expressly promise to pay the balance, assumpsit may be supported,[22] notwithstanding the deed(*o*); and where a contract under seal has afterwards been varied in the terms of it by a simple contract, such substituted agreement must be the subject of an action of assumpsit, and not of an action of covenant(*p*), and when freight is recoverable *pro rata itineris*, assumpsit, is the proper remedy and not covenant on the charter-party.

It is also a rule, that when a bond or other security, under seal or of record, has been accepted in *satisfaction* of a simple contract, the latter is *merged* in such higher security, and assumpsit is not sustainable(*q*), unless such new security be void on account of usury(*r*), or under the annuity act, &c. in which cases the party may proceed on the original simple contract[23] if *valid(*s*). So if an infant give a bond in a penalty [*97] for necessaries, the bond being voidable,[24] the creditor may proceed in assumpsit(*t*); and if after a secret act of bankruptcy, the bankrupt give a bond in satisfaction of a simple contract debt, it will not so far extinguish the simple contract as to preclude the creditor from petitioning thereon for a commission(*u*). And the acceptance by a landlord of a bond for rent, is no extinguishment, because the rent, issuing out of the realty, is a debt of a higher nature; though a judgment obtained on the bond would extinguish the demand for rent(*w*). The taking a *collateral* security of an higher nature, whether from the principal or a surety, does not preclude the creditor from suing the original debtor in assumpsit on the first contract(*x*); though judgment may have been obtained upon such collateral security(*y*),[25]

It was also a branch of this rule that assumpsit could not be supported for rent, &c. issuing out of real property, though not reserved by deed, unless an express promise to pay could be proved;[26] the de-

(*o*) Foster *v.* Allanson, 2 T. R. 483. Smith *v.* Barrow, 2 T. R. 478.

(*p*) Heard *v.* Wadham, 1 East, 630. Littler *v.* Holland, 3 T. R. 592.

(*q*) Acton *v.* Symon, Cro. Car. 415. Bac. Ab. Debt, G.

(*r*) 1 Saund. 295, a.—Pollard *v.* Scholey, Cro. Eliz. 20.—Scurfield *v.* Gowland, 6 East, 241.

(*s*) 1 Saund. 295. a.—Pollard *v.* Scholey, Cro. Eliz. 20.—Scurfield *v.* Gowland, 6 East, 241.

(*t*) Bul. N. P. 182.—Co. Lit. 172.—Ayliff *v.* Archdale, Cro. Eliz. 920.

(*u*) Bul. N. P. 182.—Ambrose *v.* Clendon, Stra. 1042.

(*w*) Bul. N. P. 112.—Blake's Case, 6 Co. 44.

(*x*) Hooper's Case, 2 Leon. 110.—White *v.* Cuyler, 6 T. Rep. 176, 7.

(*y*) Drake *v.* Mitchell et al., 3 East, 251.

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(22) Vide *Casey & Lawrence* v. *Brush*, 2 *Caine's Rep.* 296. Ante, 26. & n. 56. *ibid.*

(23) As to promise by the debtor after usurious securities have been destroyed, to repay principal and interest, vide *Barnes & others* v. *Hedley & another*, 2 *Taunt.* 184.

(24) Vide 1 *Campb.* 553. n.

(25) Vide *Norris* v. *Aylett*, 2 *Campb.* 330.

(26) Vide *Smith* v. *Stewart*, 6 *Johns. Rep.* 48.

I. Assumpsit. mand, in the technical phrase, *savouring of the realty*, and being recoverable by higher remedies as by debt or distress(*z*). The statute 11 Geo. 2d. c. 19. was passed to remedy the common law in this respect; [*98] since which, rent due *on a parol demise may be recovered by action of assumpsit or debt(*a*); and indeed, this notion seems no longer to prevail in any case(*b*).[27]

Though a *statute* may in some respects be considered as a specialty(*c*), yet assumpsit may be supported for money, &c. accruing due under the provisions thereof, unless another remedy be expressly given(*d*),[28] and an order of an inferior court of justice may be the subject of this action, if there be an express agreement to observe the same(*e*). This action is also sustainable upon the *judgment* of a foreign court,[29] which is not considered as a debt of record in this country(*f*), unless in the case of an Irish judgment since[30] the union(*g*). We have

(*z*) 1 Rol. Ab. 7.—Dartnal *v.* Morgan, Cro. Jac. 598.—Acton *v.* Symon, Cro. Car. 414.—Reade *v.* Johnson, Cro. Eliz. 242.—Johnson *v.* May, 3 Lev. 150.—Shuttleworth *v.* Garnett, 261.—3 Wooddes. 152, 3.—Freem. 234.—Grant *v.* Astle, Dougl. 729.—Co. Lit. 47. b.—83. a. n. 4.

(*a*) Bull *v.* Silby, 8 T. R. 327.—Wilkins *v.* Wingate, 6 T. R. 62.—King *v.* Fraser, 6 East, 348. when not, see Kirtland *v.* Pounsett, 2 Taunton, 145.

(*b*) Mayor of Nottingham *v.* Lambert, Willes, 111, 118.

(*c*) Jones *v.* Pope, 1 Saund. 37, 8.

(*d*) Bul. M. P. 129.—Rann *v.* Green, Cowp. 474.—Dougl. 10. n. 2.—The King *v.* Toms, Doug. 402.—Brown et al *v.* Bullen, 407.—Peck *v.* Wood, 5 T. R. 130. Com. Dig. tit. Action upon Statute.

(*e*) Smith *v.* Whalley et al., 2 Bos. and Pul. 484.

(*f*) Walker & others *v.* Witter, 1 Dougl. 4.—Hall *v.* Odber, 11 East, 124. when not, Buchanan *v.* Rucker, 1 Camp. 63.—Sadler *v.* Robins, 1 Camp. 253.

(*g*) Collins *v.* Ld. Matthew, 5 East, 474.

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(27) Vide *Eppes's Ex'rs.* v. *Cole & Wife*, 4 *Hen. & Mun.* 161. *Hayes* v. *Acre*, *Rep. Court of Conf.* 19. *Smith* v. *Sheriff of Charleston*, 1 *Bay*, 444. See also *Cummings* v. *Noyes*, 10 *Mass. Rep.* 433, where, after reversal of a judgment in favour of the demandant, who had entered into possession, it was held that the tenant might maintain assumpsit for the mesne profits.

(28) Assumpsit will not lie to recover back money won at play. *Billon* v. *Hyde*, 1 *Ves.* 330. S. C. 1 *Atk.* 128.

(29) Vide *Phillips's Ev.* 242, 243. *Buttrick & Wife* v. *Allen*, 8 *Mass. Rep.* 273. *Bissell* v. *Bridges*, 9 *Mass. Rep.* 464. *Hubbell* v. *Coudrey*, 5 *Johns. Rep.* 132.

(30) As to the effect of a judgment obtained in one of the United States, when made the subject of an action in another, (respecting which the courts in this country have varied essentially from one another, some, as the Supreme Court of New York, regarding it merely as a foreign judgment, and others allowing it greater weight,) see *Armstrong* v. *Carson's Ex'rs.*, 2 *Dall.* 302. *Bartlett* v. *Knight*, 1 *Mass Rep.* 401. *Bissell* v. *Briggs*, 9 *Mass. Rep.* 462. *Hitchcock & Fitch* v. *Aicken*, 1 *Caine's Rep.* 460. *Taylor* v. *Bryden*, 8 *Johns. Rep.* 173. *Hubbell* v. *Coudrey*, 5 *Johns. Rep.* 132. *Phillips's Ev. Duml. Ed.* 234. n. *Pawling & Wife* v. *Wilson & Smith*, 13 *Johns. Rep.* 192. But in *Mills* v. *Duryce*, in the Supreme Court of the U. S. 7 *Cranch*, 481., it was held that *nil debet* was not a good plea to an action of debt founded on the judgment of another state; because such judgment was conclusive between the parties, such being the effect to which it was entitled

already seen, that this action is not sustainable by a party against his *co-partner* to recover a proportion of profits, unless the accounts have been balanced(*h*); though in the case of a partnership in a single transaction, exceptions have been admitted(*i*); nor can this action be supported against a *corporation*,[31] which cannot contract by parol, unless in the case of promissory notes(*k*), and other contracts sanctioned by particular legislative provisions(*l*); but a corporation may be plaintiffs in this form of action(*m*).

*Where there has been an express contract, the party injured may [*99] sustain an action of assumpsit, though the breach amount to a trespass(*n*); but unless there have been such contract, or the law will under the circumstances imply a contract, the plaintiff must resort to another form of action; and therefore, assumpsit for use and occupation cannot be supported where the possession is adverse,[32] but the plaintiff must declare in ejectment or trespass(*o*); and though we have seen, that the plaintiff may in some cases waive the tort or trespass,[33] and declare in assumpsit for money had and received, or even for the work and labour of his apprentice(*p*), yet this action cannot in general be supported to recover back money paid for the release of cattle dis-

(*h*) Ante, 25, 6, 7.—Foster *v* Allanson, 2 T. R. 483.—Smith *v* Barrow, 2 T. R. 478.—Hesketh *v.* Blanchard et al., 4 East, 144.—Wilkinson *v.* Frazier, 4 Esp. Rep. 182.

(*i*) Ante, 25, 6, 7.—Wheeler *v.* Horne, Willes, 209.—Martin *v.* Knowlbys, 8 T. R. 146.

(*k*) 3 & 4 Ann, c. 9.

(*l*) 6 Vin. 137. pl. 49.—The King *v.* Inhabitants of Chipping Norton, 5 East, 239. 242.

(*m*) Barber Surgeons of London *v.* Pelson, 2 Lev. 252.—Dean & Chapter of Rochester *v* Pierce, 1 Campb. 466.

(*n*) Dickon *v.* Clifton, 2 Wils. 329.—Mast *v* Goodson, 3 Wils. 354.

(*o*) Birch *v.* Wright, 1 T. R. 386, 7. 378.—Lamine *v.* Dorrell, Ld. Raym. 1216.—Bac. Ab. Assumpsit, A.

(*p*) Ante, 90, 1.—Feltham et al. *v. v.* Terry et al., Loft. 208.—Lindon *v.* Hooper, Cowp. 419.—Parker *v.* Norton, 6 T. R. 695.—Bul. N. P. 133.—Hitchin *v.* Campbell, 2 Bla. Rep. 827.—S. C. 3 Wils 304.—King *v.* Leith, 2 T. R. 144.—Boyter *v.* Dodsworth, 6 T. R. 683.—Lightly *v.* Clouston, 1 Taunt. 112.

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in the state where rendered, and therefore it could only be denied by the plea of nul tiel record.

(31) But it has been decided in some late cases in this country, that assumpsit would lie against a corporation, even on an implied promise. *Danforth* v. *Schoharie Turnp. Co.*, 12 *Johns. Rep.* 227. *Bank of Columbia* v. *Patterson Adm'r.* in Sup. Court of U. S. 5 *Hall's L. J.* 489. cited 12 *Johns. Rep.* 231. S. C. 7 *Cranch*, 299. *Hayden and another* v. *Middlesex Turnp. Corporation*, 10 *Mass. Rep.* 397. *Dunn* v. *Rector, &c. of St. Andrew's Church*, 14 *Johns. Rep.* 118. A special action of assumpsit will lie against a bank for refusing to tranfer stock. *The King* v. *Bank of England*, 2 *Doug.* 524. *Shipley & others* v. *Mechanics' Bank*, 10 *Johns. Rep.* 484. See also *Gray* v. *Portland Bank*, 3 *Mass. Rep.* 364.

(32) Nor can it be supported against a person who has entered under a contract to purchase which he has refused to perform, but he should be sued for the mesne profits. *Smith* v. *Stewart*, 7 *Johns. Rep.* 46.

(33) Vide *Cummings & Wife* v. *Noyes*, 10 *Mass. Rep.* 435, 436.

I. Assumpsit. trained damage feasant, but the party must replevy or proceed by action of trespass or trover(*q*): the principle of which distinction is stated by Lord Mansfield in the case of Lindon *v.* Hooper(*r*).

The *declaration* in this action must invariably disclose the consideration upon which the contract was founded,[34] the contract itself, whether express or implied, and the breach thereof(*s*), and damages should be laid sufficient to cover the real amount. The most general *plea* is non-assumpsit, that the defendant did not undertake and pro-
[*100] mise, as alleged by the plaintiff, and under *which the defendant may give in evidence most matters of defence.

The *judgment* in favour of the plaintiff is that he recover a specified sum, assessed by a jury or on reference to the master, for his damages which he hath sustained by reason of the defendant's non-performance of his promises and undertakings, and for full *costs* of suit, to which the plaintiff is in all cases entitled in this action, though the damages recovered be under 40*s.*(*t*), unless the judge certify under the statute 43 Eliz. c. 6. The nature of the declaration, and the distinctions between special assumpsits and the general indebitatus count, and the other proceedings in this action, will be more fully stated hereafter.

II. DEBT.

Debt. The action is so called because it is in legal consideration for the recovery of a *debt eo nomine* and *in numero*;[35] and though damages are in general awarded for the detention of the debt, yet in most instances they are merely nominal, and are not, as in assumpsit and covenant, the principal object of the suit, and though this distinction may now be considered as merely technical, where the contract on which the action is founded is for the payment of money, yet in many instances we shall find it material to be attended to(*u*).

[*101] Debt is in some respects a more extensive remedy *for the recovery of money, than assumpsit or covenant, for it lies to recover money due upon legal liabilities(*w*), or upon simple contracts express or implied(*x*), whether verbal or written, and upon contracts under seal(*y*), or of record(*z*), and on statutes by a party grieved, or by a common in-

(*q*) Lindon *v.* Hooper, Cowp. 414.—Shipwick *v.* Blanchard, 6 T. R. 298.
(*r*) Cowp. 414.
(*s*) Bac. Ab. Assumpsit, F.
(*t*) Tidd's Prac. 880.
(*u*) Rudder *v.* Price et al., 1 Hen. Bla. 550.—Bul. Ni. Pri. 167.—Warner et al. *v.* Theobald, Cowp. 588.
(*w*) Speake *v.* Richards, Hob. 206.
(*x*) Speake *v.* Richards, Hob. 206.—Bul. Ni. Pri. 167.—Com. Dig. Debt, A. 9.
(*y*) Id. ibid.
(*z*) Id. ibid.

(34) Vide *Bailey & Bogert* v. *Freeman*, 4 *Johns. Rep.* 283.
(35) For the ancient law respecting this action, vide 1 *Reeve's Hist. E. L.* 158, 159. 2 *Reeve's Hist. E. L.* 252. 262. 329. 333. 3 *Reeve's Hist. E. L.* 58. 65.

former, whenever the demand is for a sum certain, or is capable of being readily reduced[36] to a certainty(*a*); as on a contract to pay so much per load for wood, the quantity of which was not then ascertained; or on a *quantum meruit*, for work, or to pay a proportion of the costs of a suit expected to be incurred(*b*), or to recover the treble value of tithes not set out according to the statute(*c*). But it is not sustainable when the demand is rather for unliquidated damages than for money(*d*), unless the performance of the contract were secured by a penalty, in which case debt may be supported for the penalty, and the real demand is to be ascertained according to the provisions of the 8 and 9 Wm. III. c. 11. Debt also lies in the *detinet*, for goods, as upon a contract to deliver a quantity of malt, which action differs from that of detinue in respect of the property in any specific goods not being necessarily vested in the plaintiff at the time the action is brought, which is essential in detinue(*e*).

*On *simple contracts* and *legal liabilities*(*f*), debt lies to recover money lent, paid, had and received, and due on an account stated(*g*), for interest due on the loan or forbearance of money(*h*), for work and labour, and a *quantum meruit* thereon(*i*), for fees(*k*), for goods sold, and a *quantum meruit* thereon(*l*), and for use and occupation[37] of houses or land, &c. on a demise not under seal(*m*), and for every duty created by common law or custom(*n*), as on a bill of exchange,[38] by the payee against the drawer, on the default of the acceptor, and on a promissory note by the payee against the maker;[39] but not by or against any other [*102]

(*a*) Bul. Ni. Pri. 167.—Sanders *v.* Marke, 3 Lev. 429.—Gammon *v.* Vernon, Sir T. Jones, 104.—Ingledew *v.* Cripps, Lord Raym. 814.—Hooper *v.* Shepherd, 2 Stra. 1089.—Walker et al. *v.* Witter, Dougl. 6.—Emery *v.* Fell, 2 T. R. 29.

(*b*) Sanders *v.* Marke, 3 Lev. 429.

(*c*) President and College of Physicians *v.* Salmon, Lord Raym. 682.—1 Roll. Ab. 598. pl. 19.

(*d*) Ante, note (*a*).—Purslow *v.* Baily, Lord Raym. 1040.—2 Saund. 62. b.

(*e*) Brikhead *v.* Wilson, Dyer. 24. b. Com. Dig. Debt, A. 5.—Bac. Ab. Debt, F.—3 Woodd. 103, 4.

(*f*) Ante, 101.

(*g*) Com. Dig. tit. Debt, A. 1 Roll. Abb. 593. pl. 25.—Speake *v.* Richards, Hob. 206.

(*h*) Herries *v.* Jamieson, 5 T. R. 553.

(*i*) Com. Dig. Debt, B.

(*k*) Bac. Ab. Debt, A.—1 Roll. Ab. 598.—Com. Dig. Pleader, 2. W. 11.

(*l*) Vaux *v.* Manwairing, Fortesc 197.—Emery *v.* Fell, 2 T. R. 28.

(*m*) Wilkins *v.* Wingate, 6 T. R. 62. King *v.* Fraser, 6 East, 348, and this on account of bail in error, is preferable to assumpsit. Tidd. 1077.

(*n*) Com. Dig. tit. Debt, A 9.—Speake *v.* Richards, Hob. 206.

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(36) So, where the plaintiff's land has been taken by a turnpike company in order to make their road, and the damages have been assessed according to the provisions of the act, debt will lie for the sum assessed, if no other specific remedy were provided by the act. *Bigelow* v. *Cambridge Turnp. Co.* 7 *Mass. Rep.* 202. *Gedney* v. *Inhabitants of Tewksbury*, 3 *Mass. Rep.* 309, 310.

(37) Vide 3 *Reeve's Hist. E. L.* 64.

(38) Vide 1 *Cranch*, Appendix 462. 465.

(39) It is said that, in Maryland, such an action cannot be sustained. *Lindo* v. *Gardner*, 1 *Cranch*, 343.

II. DEBT. collateral party(*o*); and for tolls, port duties and copyhold fines(*p*), and on an award to pay money, but not if it were to perform any other act, unless there were an arbitration bond, in which case the action must be brought thereon(*q*). It lies also on bye-laws(*r*), for fines and amerciaments(*s*) on English judgments not of record(*t*), and on foreign judgments(*u*).[40]

Debt lies also to recover money due, on any *specialty* or contract under seal to pay money(*v*), *as on single bonds(*w*), on charter-parties(*x*), on policies of insurance under[41] seal(*y*), and on bonds conditioned for the payment of money or for the performance of any other act by or against the parties thereto and their personal representatives(*z*); and against the heir of the obligor, if he be expressly named in the deed;[42] or against a devisee having legal assets(*a*); and by the sheriff or his assignee, on bail bonds(*b*), and replevin bonds(*c*); on leases for rent or penalties, as for ploughing up meadow, &c.(*d*); on annuity deeds(*e*), for rent charges against the pernor of the profits of the estate (*f*), and on mortgage deeds.

[*103]

This action also lies on *records*, as upon the *judgment* of a superior

(*o*) Webb *v.* Geddes, 1 Taunt. 540.—Bishop *v.* Young, 2 Bos. and Pul. 78. Chitty on Bills, 2d Edit. 303, 4.—Selw. N. Pri. 556.—2 Camp. 187. n. a.—Ante, 94.

(*p*) Com. Dig. tit. Debt, A, 9.

(*q*) 2 Saund. 62. n. 5.—Perry *v.* Nicholson, Burr. 278.—Foreland *v.* Marygold, Salk. 72.—S. C. Ld. Raym. 715. Dilley *v.* Polhill, Stra. 923.

(*r*) Feltmaker's Company *v.* Davis, 1 Bos. and Pul. 98.

(*s*) Earl of Lincoln *v.* Fisher, Cro. Eliz. 581.—Bul. Ni. Pri. 167.—Wyvill *v.* Shepherd, 1 Hen. Bla. 162.—Wicker *v.* Norris, Rep. T. Hard. 116.—Speake *v.* Richards, Hob. 206.

(*t*) 1 Saund. 92. n. 2.

(*u*) Henry *v.* Adey, 3 East, 221.—Walker et al. *v.* Witter, Dougl. 1.

(*v*) Hooper *v.* Shepherd, 2 Stra. 1089.

(*w*) Com. Dig. tit. Debt. A. 4.—Hooper *v.* Shepherd, Stra. 1089.

(*x*) Hooper *v.* Shepherd, Stra. 1089.

(*y*) Marshal on Ins. 680.—6 G. I. c. 18. s. 4.

(*z*) Com. Dig. tit. Debt, A. 4.—Post. 2 Vol. 195.

(*a*) Bac. Ab. tit. Heir, F.—Wilson *v.* Knubley, 7 East, 128.—Post. 2 Vol. 208.

(*b*) 4 & 5 Ann. c. 16.—Post. 2 Vol. 210.

(*c*) 11 G. II. c. 19.—Post. 2 Vol. 218.

(*d*) Com. Dig. tit. Debt. A. 5 B.—3 Bla. Com. 231.—Atty et al. *v.* Parish et al., 1 New Rep. 104—109.

(*e*) Post. 2 Vol. 224.

(*f*) Post. 2 Vol. 223. n. d.—Browne *v.* Pendlebury, Cro. Eliz. 268.—Brendloss *v.* Philips, Cro. Eliz. 895.—Com. Dig. Debt. A. 5.—Duppa *v.* Mayo, 1 Saund. 282. n. 1. 276.—Ld. Holt held that covenant would not lie against the assignee of the grantor.—Brewster *v.* Kitchin, 1 Ld. Raym. 322.—S. C. 1 Salk. 198.

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(40) Vide *Hubbell* v. *Coudrey*, 5 *Johns. Rep.* 132. Debt lies on the decree of a court of chancery, in another state, for the payment, by the defendant, of money only, without any acts to be done by the plaintiff. *Post & La Rue* v. *Neufie*, 3 *Caine's Rep.* 22.

(41) Judgment reversed where an action of assumpsit had been brought against an Insurance Company on a policy sealed with their corporate seal. *Marine Insurance Company of Alexandria* v. *Young*, 1 *Cranch*, 332.

(42) Ante 39. n. 87.

or inferior court of record(*g*), either generally, or against an executor or administrator suggesting a devastavit(*h*); and at common law debt was the only remedy after a year and a day had elapsed from the time when the judgment was recovered, though scire facias is now sustainable(*i*); where however the defendant has been in *execution on the [*104] judgment, and discharged with the plaintiff's concurrence, no action can be supported on the judgment(*k*); and where the defendant has been discharged out of custody under the Lord's act, debt is not sustainable(*l*); and an action upon a judgment has become less frequent since the statute 40 Geo. III. c. 46. s. 4, which precludes the plaintiff from recovering costs in an action on a judgment, unless the court or one of the judges thereof, shall otherwise direct. Debt is sometimes brought upon a recognizance of bail(*m*), but the remedy thereon is more frequently by *scire facias*, because in the latter the proceeding is more expeditious, and the bail have less opportunity of discharging themselves by rendering their principal(*n*). So debt lies upon a *statute merchant*, though not upon a statute staple, because the seal of the party is not affixed to the latter; but it lies on a recognizance in the *nature* of a *statute staple*, to which the seal of the conusor is affixed(*o*). It lies also on a *sheriff's return* of *fieri feci*, which is in the nature of a record(*p*).

Debt is frequently the remedy on *statutes* either at the suit of the party grieved, or of a common informer(*q*). In some cases it is given to the *party grieved*, by the express words of a statute, as for an escape[43] out of *execution(*r*); or against a tenant for double value for not [*105] quitting in pursuance of a notice to quit given him by his landlord(*s*); and if a statute prohibit the doing an act under a penalty or forfeiture to be paid to a party grieved, and do not prescribe any mode of recovery, it may be recovered in this form of action(*t*); as treble the value of tithes not duly set forth(*u*). Where a *penal* statute expressly gives

(*g*) Gilb. Debt. 391, 2.—Anon. Salk. 209.—Com. Dig. Debt. A. 2.—Selw. Ni. Pri. 626.

(*h*) Wheatly *v.* Lane, 1 Saund. 216. 218, 9. n. 7, 8.—Berwick *v.* Andrews, 6 Mod. 126.—Hope *v* Bague, 3 East, 2.

(*i*) Gilb. Debt. 393, 4.

(*k*) Vigers *v.* Aldrich, 4 Burr. 2482. Tanner *v.* Hague, 7 T. R. 420.

(*l*) 32 Geo. II. c. 28. s. 20.

(*m*) Post, 2 Vol. 227.—Gilb. Debt. 395.

(*n*) Tidd. 3d Edition. 237.

(*o*) 2 Saund. 69, 70. in notis.—Com. Dig. Debt. A. 3.

(*p*) Mildmay *v.* Smith, et al., 2 Saund. 343.—Cockram *v.* Welbye, 2 Show. 79. Speake *v.* Richards, Hob. 206.—Tidd. 933, 4.

(*q*) Com. Dig. Action on Statute, E. Bac. Ab. Debt. A.

(*r*) 1 Ric. II. c. 12.—Jones *v.* Pope, 1 Saund. 34, 5. 39.—Wheatly *v.* Lane, 1 Saund. 218.—Com. Dig. Debt. A.

(*s*) 4 Geo. 2. c. 28. s. 1.—Lake *v.* Smith, 1 New Rep. 174.—Post. 2 Vol. 234.

(*t*) 1 Rol. Ab. 598. pl. 18, 19.

(*u*) Id. ib.—President and College of Physicians, *v.* Salmon, 1 Lord Raym. 682.—Post. 2 Vol. 236.

(43) Post 141. n. 72.

II. DEBT. the whole or a part of a penalty to a *common informer*, and enables him generally to sue for the same, debt is sustainable(*v*); and he need not declare *qui tam* unless where a penalty is given for a contempt(*w*); but if there be no express provision enabling an informer to sue, debt cannot be supported in his name for the recovery of the penalty(*x*).

In some cases this action is the *peculiar* remedy, as against a lessee for an apportionment of rent, where he has been evicted from a part of the premises by a third person, though covenant is in such case sustainable against the assignee of the lessee(*y*). It is also the only remedy against a devisee of land, for a breach of covenant by the devisor(*z*).

Debt however, is not in any case sustainable unless the demand be for a sum certain, or for a pecuniary demand which can readily be re-
[*106] duced to a *certainty, as in the instances before enumerated(*a*): nor can it in general be supported on a simple contract against an executor, (unless in the court of exchequer)(*b*), or in those cases in which the testator, if living, could not have waged his law(*c*); though if the executor plead, and do not demur, he cannot afterwards object to the form of action(*d*). Nor can debt be supported for money payable by instalments, till the whole debt is due(*e*); though for rent payable quarterly, or otherwise, or for an annuity, or on a stipulation to pay 10*l.* on one day and 10*l.* on another, debt lies on each default(*f*); and even where one sum is payable by instalments, if the payment be secured by a penalty, debt is sustainable for such penalty on any default at common law as well as on the statute(*g*).[44] When the landlord has accepted rent from the assignee of a lessee, he cannot sustain debt against the lessee or his personal representative, but must proceed by action of covenant on the express contract(*h*); and debt is not sustainable on a collateral

(*v*) Com. Dig. Action Debt. E. 1. 2.

(*w*) Id. ib.—2 Saund. 374. n. 1, 2.—1 Saund. 136. n. 1.

(*x*) Fleming *v.* Baily, 5 East, 313, 5. Rex *v.* Malland, Stra. 828.

(*y*) Stevenson *v.* Lambard, 2 East, 579, 580.

(*z*) Wilson *v.* Knubley, 7 East, 12.

(*a*) Ante, 101.

(*b*) Barry *v.* Robinson, 1 New Rep. 293.—Norwood *v.* Read, Plowd. 182.—Pinchon's case, 9 Co. 86. b.—1 Saund. 68. n. 2.—Wheatly *v.* Lane, 1 Saund. 216.—Duppa *v.* Mayo, 1 Saund. 286.—2 Saund. 74. n. 2.—Ante, 93.

(*c*) 1 Saund. 216. a. n. 4.—Pinchon's case, 9 Co. 87. b.

(*d*) Norwood *v.* Read, Plowd. 182.—

(*e*) Rudder *v.* Price, 1 Hen. Bla. 554. 2 Saund. 303. n. 6.—Walker's case, 3 Co. 22. a.—Selwyn's N. P. 558, 9.—Ante, 93.

(*f*) Id. ibid.—Hunt's case, Owen. 42.—Bac. Ab. Debt. A. C.

(*g*) 8 & 9 Wm. III. c. 11, Bac. Ab. Debt. B.—Coates *v.* Hewit, 1 Wils. 80.—Com. Dig. Action F.

(*h*) Ante, 35. 6.—1 Saund. 241, n. 5. 2 Saund. 297, n. 1.—Dean & Chapter of Windsor *v.* Gover, 2 Saund. 303. n. 5. 306.—Devereaux *v* Barlow, 2. Saund. 181, 2.—Bac. Ab. Debt. D.—Com. Dig. Debt.

(44) It has been held that where the condition of a bond was for the payment of interest annually, and if the principal at a distant day, the interest might be recovered before the principal was due by an action of debt on the bond. *Sparks v. Garigues*, 1 *Binney*, 152.

contract, as on a promise to pay the debt of another in consideration of forbearance, &c.(*i*), nor against the indorser of a *bill or note, or by an [*107] indorsee against the acceptor(*k*).

Formerly when the trial by wager of law was in practice, the action of assumpsit was preferable to that of debt on simple contract(*l*); but although this mode of defence and trial is still in general in force when the debt is due on simple contract(*m*), and it may be adopted (except in the Exchequer, or when the creditor has become so by legal necessity,) as in the case of a debt to a gaoler or innkeeper, &c. for fees(*n*); yet it is now so much disused[45] that debt has of late become very frequent, and is preferable in some respects to the action of assumpsit, the judgment therein being final in the first instance, and not interlocutory as in assumpsit, and the defendant being in some cases compellable to find bail in error, though the judgment be by *nil dicit* or on demurrer(*o*). It was once thought that in an action of debt the plaintiff could not in any case recover less than the sum demanded(*p*); which notion greatly discouraged the action of debt on simple contract, because if the plaintiff could not, upon the *indebitatus* or *quantum meruit* count, prove that he was entitled to recover the precise sum alleged to be due, he was nonsuited. It is however now completely settled, that the plaintiff may, in debt on simple contract, prove and recover less than the sum stated to be due in his declaration(*q*);[46] *unless there be [*108] a variance in the description of a written instrument, or deed(*r*); for the difference is, that where debt is brought upon a covenant to pay a sum certain, a variance in the statement of the sum mentioned in the deed will vitiate; but where the deed relates to the matter of fact,

(*i*) Anon. Hardr. 486.—Com. Dig. Debt. B.—Bishop *v.* Young, 2 Bos. and Pul. 83.—Sands *v.* Trevillian, Cro. Car. 107. 193.—Bulcher *v.* Andrews, 1 Salk. 23.—Ante, 94.

(*k*) Bishop *v.* Young, 2 Bos. & Pul. 78.—Ante, 94.

(*l*) Bla. Com. 347.

(*m*) Id. ibid.—Barry *v.* Robinson, 1 New Rep. 293.

(*n*) 3 Bla. Com. 345, 6.—1 Saund. 216. a. n. 1.—Pinchon's Case, 9 Co. 87. b.

(*o*) 3 Jac. 1. c. 8.—Trier *v.* Bridgman, 2 East. 359. when not, see Webb *v.* Geddes, 1 Taunt. 540.

(*p*) 3 Bla. Com. 155.—Aylett *v.* Lowe, 2 Sir W. Bla. R. 1221.—Emery *v.* Fell, 2 T. R. 28.—Bul. N. P. 171.

(*q*) Rudder *v.* Price, 1 Hen. Bla. 550. M'Quillin *v.* Cox, 1 H. Black. 249.—Anon. 12 Mod. 72.—Walker et al. *v.* Witter, Dougl. 6.—Selw. N. P. 557.—Lord *v.* Houstoun, 11 East. 62.

(*r*) Ingledew *v.* Cripps, Ld. Raym. 816.—M'Quillin *v.* Cox, 1 Hen. Bla. 251.—1 Saund. 288. n. 1.

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(45) By the *act for the amendment of the law*, wager of law is abolished in every case except that of non summons in real actions. *Laws N. Y. sess.* 36. *c.* 56. *s.* 24. 1 *R. L.* 524.

(46) Where a penalty of double the value of a specific article, was given by statute to a common informer, it was held that the plaintiff might recover in debt less than the sum stated in the declaration. *Perrin* v. *Sikes*, 1 *Day's Rep.* 19.

II. DEBT. there, though the plaintiff demand more than is due, he may enter a *remittitur*(*s*).

The *declaration* in this action, if on *simple* contract, must show the consideration on which the contract was founded, precisely as in assumpsit(*t*); and should state either a legal liability, or an express *agreement*; though not a *promise* to pay the debt(*u*). But on *specialties*, or *records*, no consideration need be shown, unless where the performance of the consideration constitutes a condition precedent, when performance of such consideration must be averred; and where the action is founded on a deed, it must be declared upon, except in the instance of debt for rent(*w*). The *plea* of general issue to debt on simple contracts, or on statutes, or where the deed is only matter of inducement, is *nil debet*;[47] but in general, in debt on specialty, the plea denying the existence of the contract is *non est factum*(*x*); and to debt on record, *nul tiel record*; most other matters must be specially pleaded. The *judgment* in the plaintiff's favour, which at common law is final, in all cases is, that the plaintiff recover his debt, and in general, nominal
[*109] damages *for the detention thereof; and in cases under the 8 and 9 Will. III. c. 11. it is also awarded, that the plaintiff have execution for the damages sustained by the breach of a bond, conditioned for the performance of covenants; and the plaintiff, unless in some penal and other particular actions, is entitled to full *costs* of suit, although the damages recovered be under 40*s*.(*y*); unless the judge certify under the statute of Elizabeth. Where the action is for rent, or on a money bond, or on a written contract, for a sum certain, and the defendant suffers judgment by default, he must in general find bail in error(*z*); which frequently renders this action preferable to that of assumpsit or covenant.

III. COVENANT.

III. COVENANT. The rules respecting this action are few and simple; it is a remedy calculated for the recovery of *damages* for the breach of a *covenant* or contract under *seal*(*a*); whether such covenant be contained in a deed

(*s*) Per Holt, C. J., Ingledew *v.* Cripps, 2 Ld. Raym. 816.
(*t*) Post, 2 Vol. 185, &c.
(*u*) Emery *v.* Fell, 2 T. R. 28. 30.
(*w*) Atty et al. *v.* Parish et al., 1 New Rep. 104.—Post, 2 Vol. 195, &c.
(*x*) Warren *v.* Consett, 2 Ld. Raym. 1500.—Id. ibid.
(*y*) Tidd, 3 Edit. 880.
(*z*) Tidd. 1077 to 1079.
(*a*) Moore et ux. *v.* Jones, 2 Ld. Raym. 1536.—F. N. B. 145.—Benners *v.* Guyldley, Cro. Jac. 506.—Com. Dig. Pleader, 2 V. 2.—Covenant A. 1.

(47) Vide *Bullis* v. *Giddens*, 8 *Johns. Rep.* 82.

poll, or indenture(*b*); or be express or implied by law from the terms of the deed(*c*); or for the performance of something *in futuro*, or that something has been done(*d*); and in some cases, though it relate *to matter *in presenti*, as that the covenantor *hath* good title(*o*): though it is said, that in general covenant will not lie on a contract *in presenti*, as on a covenant to stand seised, or that a certain horse shall henceforth be the property of another(*p*). It would be foreign to the present inquiry, relating merely to the application of the remedy, to examine into the nature and description of the different covenants, which are to be found in the works referred to in the note(*q*). [*110]

Covenant is the usual remedy upon indentures of apprenticeship, against the master for not instructing his apprentice, or against the party who covenanted for the due service of such apprentice, but it will not lie against an infant apprentice, or where the binding was for less than seven years(*r*). It lies also on articles of agreement under seal, or deeds of separate maintenance(*s*); and on covenants in deeds of conveyance, &c. for good title, &c.(*t*); on charter-parties of affreightment(*u*); on policies of insurance under seal against fire, &c.(*x*); and on annuity and mortgage deeds; though debt in the last instances, is in general preferable when the demand is for money(*y*). It is also the usual remedy on leases at the suit of the *lessee, his executor or assignee against the lessor for the breach of a covenant for quiet enjoyment, &c. and by the lessor, &c. against the lessee, &c. for non-payment of rent, not repairing, &c.; and covenant appears in general to be a concurrent remedy with debt, for the recovery of any money demand, where there is an express or implied contract contained in the [*111]

(*b*) 1 Rol. Ab. 617. pl. 40.—Com. Dig. Covenant, A. 1.—Post, 111. as to bonds.

(*c*) Com. Dig. Cov. A. 2.

(*d*) Com. Dig. Cov. A. 1.—Sharington *v.* Strotton et al., Plowd. 308.—Randall *v.* Lynch, 12 East, 179, 182.—Seddon *v.* Senate, 13 East, 63. 71. 74. where see when a covenant is implied so as to make this the proper form of action.[48]

(*o*) 3 Woodd. 85, 6.—Browning *v.* Wright et al., 2 Bos. & Pul. 13.—2 Saund. 181. b.

(*p*) Sharington *v.* Strotton, Plowd. 308.—Finch, 49. b.—Com. Dig. Cov. A. 1.—Vin. Ab. Cov. A. pl. 6. G. 3.

(*q*) Selwyn's Ni. Pri. tit. Covenant. Com. Dig. Covenant, A. 2, 3, 4.—Bac. Ab. Covenant.

(*r*) Post, 2 Vol. 282. n. u.—Gylbert *v.* Fletcher, Cro. Car. 179.

(*s*) Nurse *v.* Craig, 2 New Rep. 148.

(*t*) Wotton *v.* Hele, 2 Saund. 175. 178. 181.—Browning *v.* Wright et al., 2 Bos. & Pul. 13.—Howes *v.* Brushfield, 3 East, 491.

(*u*) Beatson *v.* Schanck et al., 3 East, 233.—Atty et al. *v.* Parish et al., 1 New Rep. 104.—Randall *v* Lynch, 12 East, 179.—White and others *v.* Parkin and others, 12 East, 578-583.

(*x*) Worsley *v.* Wood et al., 6 T. R. 710.—2 Mars. 601. n. a. & 6 G. 1. c. 18.

(*y*) Post, 2 Vol. 225. n. k.

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(48) As to implied covenants of title or warranty, see *Frost & others* v. *Raymond*, 2 *Caine's Rep.* 188. *Kent* v. *Welch*, 7 *Johns. Rep.* 258.

III. COVENANT.

deed(z); and it has even been holden that an action of covenant is sustainable on a bond, though debt is now the usual remedy(a).

This action most frequently occurs on leases. At common law, upon the death of a lessor seised in fee, his heir might sue for a subsequent breach of a covenant running with the land, although not named in the lease(b); and the action of *debt* lay for the assignee of the reversion for *rent*, at common law(c); but no persons could formerly support an action of *covenant*, or take advantage of any covenant or condition, except such as were parties or privies thereto; and of course no grantee or assignee of any reversion or rent. To remedy this the statute[49] 32 Hen. VIII. c. 34., gives the assignee of a reversion the same remedies against the lessee, or his assignee, or their personal representatives upon covenants running with the land, as the lessor or his heir, or their successor, had at common law; and on the other hand, such assignee is liable by the statute to an action for a breach of covenant [*112] running *with the land, as the lessor &c. was at common law(d.)

Where the demand is for rent or any other liquidated sum, the lessor has an election to proceed in debt, or covenant against the *lessee*, unless he have accepted the assignee as his tenant, or the lessee have become bankrupt, in which case the action of debt is not in general sustainable; and the lessor can only sue the lessee after such assignment in covenant, and then only upon an *express* covenant, and not upon a covenant in *law*(e); and on the other hand, as a personal contract cannot be apportioned, therefore, where there has been an eviction from a part of the land, even by a stranger, the lessee cannot be sued in covenant, but only in debt, though a distress may be supported(f). With respect to the *assignee* of the lessee, the lessor may support debt or covenant at common law(g); and an assignee of a part of the premises may be sued in covenant(h); and it lies for an apportionment against the assignee of the lessee, in case of a partial evic-

(z) Com. Dig. Action, M. 4.—Seddon *v.* Senate, 13 East, 63. 71.—Randall *v.* Lynch, 12 East, 182.

(a) March *v.* Freeman, 3 Lev. 383. Norrice's Case, Hard. 178.—Whittey *v.* Loftus, 8 Mod. 190.—Branch *v.* Ewington, Dougl. 518.—Com. Dig. Action, 1 M. 4. Covenant, A. 2.—Vin. Ab. Cov. B. pl. 10.

(b) Lougher *v.* Williams, 2 Lev. 92. and see the concluding words of the 32 Hen. 8. c. 34. s. 1.

(c) 1 Saund. 241. c.

(d) 3 Bla. Com. 158.—See the observations on the statute Bac. Ab. Covenant, E. 5.—Vin. Ab. Covenant, K. 3. Ante, Chap. I. as to the parties to sue and be sued.

(e) Ante, 36.—1 Saund. 241. n. 5.—Ludford *v.* Barber, 1 T. R. 92.—Brett *v.* Cumberland, Cro. Jac. 523.—Cullen, 392, 3.

(f) Stevenson *v.* Lambard, 2 East, 575.

(g) 1 Saund. 241. c.—Walker's Case, 3 Co. 22. b.

(h) Sir Wm. Jones, 245.—Stevenson *v.* Lambard, 2 East, 580.

(49) Vide *Laws of N. Y. sess.* 36. *c.* 31. 1 *R. L.* 363.

tion by a stranger, though we have seen that it is not in such case sustainable against the lessee(*i*).

From the preceding observations, it appears that the action of covenant, being for the recovery of *damages* for the non-performance of a *contract under seal, differs very materially from the actions of assumpsit and debt; for assumpsit, though for the recovery of damages, is not in general sustainable where the contract was originally under seal, or where a deed has been taken in satisfaction(*k*); and though debt is sustainable upon a simple contract, a specialty, a record, or a statute, yet it lies only for the recovery of a sum of money *in numero*, and not where the damages are unliquidated and incapable of being reduced by averment to a certainty(*l*); and though, where the object of the action of covenant is the recovery of a money demand, the distinction between the terms, damages and money *in numero*, may not on first view appear substantial, yet we shall find it material to be attended to(*m*). [*113]

Covenant is the *peculiar* remedy for the non-performance of a contract under seal, where the damages are unliquidated, and depend in amount on the opinion of a jury, in which case we have seen that neither debt nor assumpsit can be supported(*n*). It is the proper remedy where an entire sum is by deed stipulated to be paid by insalments,[50] and the whole is not due, nor the payment secured by a penalty(*o*). And it is frequently more advisable to proceed in covenant, on a lease, &c. for general damages, than to declare in debt for a penalty, securing the performance *of a covenant; because, if the party elect to proceed for the penalty he is precluded from afterwards suing for general damages; and he cannot in case of further breaches recover more than the amount of the penalty, and in many cases before he can issue execution, he must proceed under the statute 8 and 9 Will. III. c. 11.; whereas if he proceed in covenant for every repeated breach, he may ultimately recover damages beyond the amount of the penalty(*p*) And where rent is due upon a lease, and there has also been another breach, as for not repairing, for which the plaintiff claims unliquidated damages, covenant is preferable to debt, because in the former, damages for the whole demand may be recovered. So where the grantor of an annuity has become a bankrupt, or an insolvent debtor, the grantee should proceed for arrears which became due after the insolvency, by action of [*114]

(*i*) Stevenson *v.* Lambard, 2 East, 575.

(*k*) Ante, 94 to 96.

(*l*) Ante, 100, 1. Bul. N. P. 167.

(*m*) Ante, 100.—*Rien in arrere* is a good plea in *debt* for rent, but not in *covenant*, because the latter action is for damages.—Warner et al. *v.* Theobald, Cowp. 588, 9.

(*n*) Ante, 94 to 101. 105.

(*o*) Ante, 106.—Com. Dig. Action, F.

(*p*) Bird *v.* Randall, Burr. 1351.—Robinson *v.* Bland, Burr. 1087.—Ingledew' *v.* Cripps, Ld. Raym. 814.—Cotterel *v.* Hooke, Dougl. 97.—Harrison *v.* Wright, 13 East, 347, 8.

(50) Vide *Co. Litt.* 292. b. *Bac. Abr.* Debt B.

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covenant on the annuity deed, and not by action of debt on the annuity bond, to which the bankruptcy and certificate would frequently be a bar(*q*).

On the other hand, covenant *cannot* in general be supported unless the contract were under *seal*, and when it is by parol, the plaintiff must proceed by action of assumpsit, &c.(*r*); unless by special custom in London and some other places(*s*); or against the lessee or patentee of
[*115] the crown, *when covenant may be supported, although he did not seal any counterpart of the lease, it being matter of record, and the lessee's acceptance of the demise being in such case as obligatory as an express covenant(*t*): so if a lease be made to A and B, and A only execute it, but B agree thereto, he may be sued jointly with A upon a covenant for rent running with the land(*u*). And this action may be supported, although the covenantee did not sign the indenture in which he was named a party(*w*); and, we have seen that in the case of a deed poll, a stranger to it may sue on a covenant therein, to pay him a sum of money, though it is otherwise in the case of a deed *inter partes*(*x*). Where a contract under seal has afterwards been varied in the terms of it by a subsequent parol contract, such substituted agreement must be the subject of an action of assumpsit, and not of covenant(*y*): and it has been holden that covenant cannot be supported against the assignee of the grantor of a rent charge, though debt is sustainable against the pernor of the profits(*z*). In some cases where the breach of a covenant is misfeazance, the party has an election to proceed by action of covenant, or by action on the case for the tort, as against a lessee, either during his term, or afterwards, for waste(*a*).

[*116] *The *declaration* in this action must state that the contract[51] was under seal(*b*); and should usually make a profert thereof, or show some excuse for the omission(*c*); it is not necessary to state the consideration of the defendant's covenant, unless the performance of it constituted a condition precedent, when such performance must be averred;

(*q*) Cullen, 92. 94. 392.—Cotterel *v.* Hooke, Dougl. 97.—Billet *v.* M'Carthy, 2 East, 151.

(*r*) Moore et ux. *v.* Jones, Ld. Raym. 1536.—Com. Dig. Pleader, 2 V. 2. Covenant, A. 1.—Fitz. N. B. G.

(*s*) Id. ibid.—Com. Dig. London, N. 1. tit. Covenant, A.—Vin. Ab. Covenant, A.

(*t*) Brett *v.* Cumberland, Cro. Jac. 399. 521.—Com. Dig. Covenant, A. 1.—Vin. Ab. Covenant, B. pl. 1.

(*u*) Co. Lit. 231. a.—2 Roll. Ab. 63. Com. Dig. Covenant, A. 1.

(*w*) Lucke *v.* Lucke, Lutw. 305.—Com. Dig. Covenant, A. 1.

(*x*) Com. Dig. Covenant, A. 1.—Ante, 4.

(*y*) Ante, 96.—Heard *v.* Wadham, 1 East, 630.—Littler et al. *v.* Holland, 3 T. R. 590.

(*z*) Brewster *v.* Kitchell, 1 Salk. 198. S. C. 1 Ld. Raym. 322.—Ante, 103.

(*a*) Kinlyside *v.* Thornton et al., 2 Bla. Rep. 1111.—Mast *v.* Goodson, 2 Bla. Rep. 848. *sed quære.*

(*b*) Ante, 109.—Moore et ux. *v.* Jones, 2 Ld. Raym. 1536.—Com. Dig. Pleader, 2 V. 2.

(*c*) Read *v.* Brookman, 3 T. R. 151.

(51) Vide *Van Santwood* v. *Sandford*, 12 *Johns. Rep.* 197.

and only so much of the deed and covenant should be set forth as is essential to the cause of action, and each may be stated according to the legal effect, though it is more usual to declare in the words of the deed; and the breach also may be in the negative of the covenant, generally, or according to the legal effect, and sometimes in the alternative; and several breaches may be assigned at common law(*d*); and damages being the object of the suit, should be laid sufficient to cover the real amount. III. COVENANT.

In covenant there is strictly no *plea*, which can be termed a general issue, for *non est factum* only puts in issue the fact of sealing the deed; and *non infregit conventionem*, and *nil debet* are insufficient pleas(*e*); and therefore, most matters of defence must be pleaded specially(*f*). The *judgment* in this action is, that the plaintiff recover a named sum for his *damages* which he hath sustained by reason of the breach or breaches of covenant, together with full costs of suit, to which the plaintiff is entitled, though the damages *recovered be under 40*s.*(*g*), [*117] unless the judge certify under the statute Eliz.(*h*). When the defendant suffers judgment by default, he is not bound in this action to put in bail in error, which circumstance renders the action of debt for rent or money due on a contract for a sum certain, preferable to covenant(*i*).

IV. DETINUE.*

The action of detinue is the only remedy by suit for the recovery of a personal chattel in specie, unless in those cases where the party can regain the possession by replevin: for in the actions of trespass and trover, for taking away or detaining goods, or in assumpsit for not de- IV. DETINUE.

(*d*) Post. 2 Vol. 247, 248.—Com. Dig. Pleader, 2 V. 2, 3.—Dummer *v.* Birch, Com. Rep. 146.

(*e*) Com. Dig. Pleader, 2 V. 4, &c.—Hodgson *v.* The East India Company, 8 T. R. 283.—Walsingham *v.* Comb, 1 Lev. 183.

(*f*) Com. Dig. Pleader, V. 4, &c.

(*g*) Tidd. 3d ed. 880,

(*h*) 43. Eliz. c. 6.—Tidd. 870.

(*i*) Tidd. 1077 to 1079.

* As debt and detinue may be joined in the same action, though the judgment is different, see Brownl. Red. 186. Gilb. C. P. 5.—2 Saund. 117. b. and as it has been generally stated that detinue is not sustainable when the goods came *tortiously* into the defendant's possession, (see 3 Bla. Com. 152, post. 119.) I have therefore considered this action under the head of actions *ex contractu*.[52]

(52) This is certainly confirmed by the history of the action, from which it will appear that detinue was originally no other than an action of debt in the detinet, instead of the debet. As to which, as well as the ancient law respecting this action, vide 2 *Reeve's Hist. E. L.* 261. 333. 336. 3 *Reeve's Hist. E. L.* 66. 74.

IV. Detinue. livering them, damages only can be recovered(*k*). This action may be considered, 1st, with reference to the nature of the thing to be recovered; 2dly, the plaintiff's interest therein; 3dly, the injury; 4thly, the pleadings; and 5thly, the judgment.

1st. For what property it lies. As the object of this action is the recovery of a specific chattel, the goods for which it is brought must be distinguishable from other *pro-
[118*] perty, and their identity ascertainable by some certain means: thus it lies for a horse, a cow, or money in a bag; but for money or corn, &c. not in a bag or chest or otherwise distinguishable from property of the same description, detinue cannot be supported(*k*). It lies upon a contract for not delivering a specific chattel in pursuance of a bailment or other contract(*l*); but, as to support this action, the property in some particular chattel must be vested in the plaintiff, assumpsit, or debt in the detinet, is the only remedy for the non-delivery of corn, &c. sold, where no specific corn was contracted for(*m*).

2ndly, the plaintiff's interest. A person who has the absolute or general property in goods, and the right to immediate possession, may support this action, although he has never had the actual possession; therefore an heir may maintain detinue for an heir loom; and if goods be delivered to A to deliver to B, the latter may support this action, the property being vested in him by the delivery to his use(*n*). But if the plaintiff have not the right to the immediate possession of the goods, and his interest be in reversion, he cannot support detinue, trover, or trespass(*o*). A person who has only a special property, as a bailee, &c. may also support this action, where he delivered the goods to the defendant, or they were taken out
[*119] of such bailee's custody(*p*). It is said that if a *person detain the goods of a woman, which came to his hands before her marriage, the husband alone must bring this action, because the property is in him alone at the time of the action brought(*q*).

3rdly, the injury. The gist of this action is the wrongful detainer, and not the original taking(*r*). It lies against any person who has the actual possession of the chattel, and who acquired it by lawful means, as either by bailment, delivery, or finding(*s*). It is a common doctrine in the books that this action cannot be supported, if the defendant took the goods *tortiously*(*t*),

(*k*) 3 Bla. Com. 146. 152.—Kettle *v.* Bromsall, Willes, 120.—Co. Lit. 296. b. Com. Dig. Detinue, A.

(*k*) Com. Dig. Detinue, B. C.—Co. Lit. 286. b.—3 Bla. Com. 152.—Isaack *v.* Clark, 2 Bulstr. 308.—Moore, 394. It does not lie for real property.—Coupledike *v.* Coupledike, Cro. Jac. 39.

(*l*) Fitz. N. B. 138.—Kettle *v.* Bromsall, Willes, 120.—3 Bla. Com. 152.

(*m*) 3 Wooddes, 104.—Brikhead *v.* Wilson, 1 Dyer, 24. b.

(*n*) 2 Saund. 47. a. n.—1 Bro. Ab. Detinue. pl. 30. 45.—1 Rol. Ab. 606.—Com. Dig. Detinue, A.

(*o*) Gordon *v.* Harper, 7 T. R. 9.

(*p*) Bro. Ab. Detinue.—2 Saund. 47. b. c. d.

(*q*) Bul. N. P. 50.—Ante, 60, 1.—sed. vide Bern et ux. *v.* Mattaire, R. T. Hardw. 120.

(*r*) 3 Bla. Com. 152.—Co. Lit. 286. b.

(*s*) Kettle *v.* Bromsall, Willes, 118.—Co. Lit. 286. b.—Fitz. Nat. Brev. 138. E.—Bac. Ab. Detinue, A.

(*t*) 6 Hen. 7. 9.—3 Bla. Com. 152.—Bro. Ab. Detinue, pl. 36. 53.—Com. Dig. Detinue, D.—Vin. Ab. Detinue, B. 2 pl. 5. Trespass, Y. pl. 12.—Bishop *v.* Viscountess Montague, Cro. Eliz. 824. Selw. Ni. Pri. Detinue.

an opinion which appears to be founded on the judgment of Brian, J. who held(*u*) that detinue could not in such case be supported; on this fallacious reasoning, that by the trespass the property of the plaintiff was divested, and that in order to support detinue, the property in the chattel must be vested in the plaintiff at the time of the commencement of his action(*w*); but it is observable that Vavisor, J. in the same case, was of a different opinion, and the notion that the property is changed by the trespass appears unfounded, for though a trespasser die possessed, the property is not thereby altered(*x*); and it has been decided that if goods, &c. taken away still continue in specie in the hands of the wrong doer or his executor, replevin or detinue, *may be supported by or against the executor(*y*): and though in pleading it is usual to state that the defendant acquired the goods by finding, yet that allegation is not traversable(*z*): and, as observed in Kettle *v.* Bromsall(*a*), if detinue could not be supported a person might be greatly injured, and have no adequate remedy; for in trover damages only can be recovered, and the thing detained may be of such a description that a judgment merely for damages would be an inadequate satisfaction(*b*). Detinue cannot be supported against a person who never had the possession of the goods; as against an executor on a bailment to the testator, unless the goods came to the possession of the executor(*c*); nor does it lie against a bailee, if before demand he lose them by accident(*d*); though if he wrongfully deliver the goods to another, he will continue liable(*e*). If goods be delivered to a feme before her marriage, and afterwards detained, the action may be brought against husband and wife(*f*); but if the bailment were to the husband and wife after marriage, it is said that the husband must be sued alone.(*g*)

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[*120]

With respect to the *pleadings* in this action, more certainty is necessary in the description of the chattels, than in an action of trover or replevin(*h*); but it is not necessary to state the *date of a deed(*i*); and if the action be brought for several articles, the value of each need not be stated separately in the declaration, though the jury should sever the value of each by their verdict(*k*). In the case of a special bailment, it is proper to declare, at least in one count, on the bailment(*l*), and to

The pleadings.

[*121]

(*u*) 6 Hen. 7. 9.

(*w*) 6 Hen. 7. 9.—Lord Kenyon, Ch. J. in M'Manus *v.* Cricket, 1 East, 107, 8. observed upon this doctrine of the property being altered by a trespass.

(*x*) Com. Dig. tit. Bien, E.

(*y*) Le Mason *v.* Dixon, Sir Wm. Jones, 173, 4.—1 Saund. 216. a.

(*z*) Doc. Plac. 124.—Bro. Ab. Detinue, pl. 50.—Mills *v.* Graham, 1 New Rep. 140. Jenk. 2 Cent. page 78.

(*a*) Willes, 120.

(*b*) See also Bishop *v.* Viscountess Montague, Cro. Eliz. 824.—Com. Dig. Action, M. 6.—27 Hen. 8. 22.—Vin. Ab. Detinue, D. 5. pl. 62.

(*c*) Bro. Detinue, 19.—Isaack *v.* Clark, 2 Bulstr. 308.

(*d*) Bro. Detinue, pl. 1. 33. 40.

(*e*) Id. Ibid. and pl. 2. 34.

(*f*) Co. Lit. 351. b.

(*g*) Isaack *v.* Clark, 2 Bulstr. 308.—38 Ed. III. fol. 1.

(*h*) 2 Saund. 74. a. b.—Co. Lit. 286. b.—Post. 2 Vol. 284.

(*i*) Alcorn *v.* Westbrook, 1 Wils. 116.

(*k*) Pawly *v.* Holly, 2 Bla. Rep. 853. Post. 2 Vol. 284.—Jenk. 2 Cent. 112.

(*l*) Mills *v.* Graham, 1 New Rep. 146.—Post. 2 Vol. 284.

IV. DETINUE. lay a special request(*m*); but in other cases, it is sufficient to declare upon the supposed finding, which we have seen is not traversable(*n*). The general issue in this action is *non detinet*, and under it the defendant may give in evidence a gift from the plaintiff, or any other defence which proves that the defendant doth not detain the plaintiff's goods; but the defendant must plead specially that the goods were pawned to him for money remaining unpaid(*o*).

The verdict and judgment.

The nature of this action requires that the *verdict* and judgment be such, that a specific remedy may be had for recovery of the goods detained, or a satisfaction in value for each several parcel, in case they, or either of them, cannot be returned; and therefore, where the action is for several chattels, the jury ought by their verdict to assess the value of each separately(*p*); and if the jury neglect to find the value, the omission cannot be supplied by writ of inquiry(*q*). The *judgment* is in [*122] the alternative, that the *plaintiff do recover the goods, or the value thereof, if he cannot have the goods themselves, and his damages for the detention, and his full costs of suit(*r*). This action is in most cases still subject to wager of law, on which account it was not much in use, till that mode of trial became obsolete, but now it is frequently adopted.

OF ACTIONS IN FORM EX DELICTO.

NATURE OF INJURIES EX DELICTO.

Personal actions in form *ex delicto*, and which are principally for the redress of wrongs unconnected with contract, are case, trover, detinue(*s*), replevin, and trespass *vi et armis*. *Mixed* actions are ejectment, waste, &c. Before we consider the application of these remedies, it is advisable to take a concise view of the nature of the different injuries *ex delicto*, because they in general govern the form of the action; thus if the injury be *forcible*, and occasioned *immediately* by the act of the defendant, *trespass vi et armis* is the proper remedy; but if the injury be not in legal contemplation, *forcible*, or not *direct* and *immediate* on the act done, but only *consequential*,[53] then the remedy is by *ac-*

(*m*) Kettle *v.* Bromsall, Willes, 120. Post. 2 Vol. 285.

(*n*) Mills *v.* Graham, 1 New Rep. 140.—Atkinson *v.* Baker, 4 T. R. 229. Kettle *v.* Bromsall, Willes, 120.

(*o*) Co. Lit. 283.

(*p*) Pawly *v.* Holly, 2 Bla. Rep. 854. 3 H. 6. 43. a. Jenk. 2 Cent. 112.

(*q*) Cheney's Case, 10 Co. 119. b.—Herbert *v.* Waters, Salk. 206.

(*r*) Peters *v.* Heyward, Cro. Jac. 682, 3.—Tidd's Forms, 302.—Townsend's judgment, 1 Book. 344. 2 Book, 82, 3, 4, 5.—Aston's Ent. 202.—2 Keilw. 64.

(*s*) We have already considered this action. which we have seen lies for non-delivery of goods according to a contract, and therefore it is unnecessary to give it further consideration.

(53) Vide *Roberts* v. *Read & others*, 16 *East's Rep.* 215.

tion on the case(*t*); and *there are other points relating to the nature of injuries, which, as they affect the form of the action, are material to be ascertained.

NATURE OF INJURIES EX DELICTO. [*123]

Injuries *ex delicto* are in legal consideration committed *with force*, as assaults and batteries, &c. or *without force*, as slander, &c.(*u*). They are also either *immediate and direct*, or *mediate and consequential*. It is frequently difficult to determine when the injury is to be considered forcible or not, and when immediate or consequential, and therefore whether trespass or case is the proper remedy(*w*).

When forcible or not.

Force is in legal consideration, of two descriptions, either *implied* by law or *actual*; force is *implied* in every trespass *quare clausum fregit*(*x*). The distinction is material, and is thus put in Salkeld: "If one enter into my ground, I must request him to depart, before I can lay hands on him, to turn him out; for every *impositio manuum* is an assault and battery, which cannot be justified upon the account of breaking the close *in law*, without a previous request to depart; the other is an *actual* force, as in burglary, as breaking open a door or gate, and in that case it is lawful to oppose force to force; and if one break down the gate, or come into my close *vi et armis*, I need not request him to be gone, but may lay hads on him immediately; so if one come forcibly and take away my goods, I may immediately oppose him, for *there is no time to make a request(*y*)."[54] In the case of false imprisonment also force is implied(*z*); and the same rule prevails where a wife, daughter, or servant have been enticed away or debauched, though in fact they consented, the law considering them incapable of consenting; and trespass may be supported, though case for the consequence of the wrong appears to be the more proper form of declaration(*a*). The *degree* of violence with which the act is done, is not material as far as regards the *form* of action, for if a log were put down in the most quiet way upon a man's foot, the action would be trespass; but if

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(*t*) Leame *v.* Bray, 3 East, 593. 600. Reynolds *v.* Clarke, Ld. Raym. 1399.—S. C. Stra. 634.—Morgan *v.* Hughes, 2 T. R. 231.—Day *v.* Edwards, 5 T. R. 649.—Ogle et al. *v.* Barnes et al., 8 T. R. 190.

(*u*) 3 Bla. Com. 118. 398, 9.

(*w*) Ante, 122. n. t.—Rogers *v.* Imbledon, 2 New Rep. 118, 9.—Ogle et al. *v.* Barnes et al., 8 T. R. 191.—Hayward *v.* Banks, 2 Burr. 1114.

(*x*) Green *v.* Goddard, 2 Salk. 641. Co. Lit. 257. b. 161. b. 162. a.—Lawe *v.* King, 1 Saund. 81. 1 Saund. 140. n. 4.—Weaver *v.* Bush, 8 T. R. 78.—The King *v.* Wilson et al., 8 T. R. 358.—Bac. Ab. tit. Trespass.

(*y*) Green *v.* Goddard, 2 Salk. 641.—Weaver *v.* Bush, 8 T. R. 78.—The King *v.* Wilson et al., 8 T. R. 357.

(*z*) Emmet *v.* Lyne, 1 New Rep. 255. 1 Selwyn's Ni. Pri. Addenda, 363.

(*a*) Tullidge *v.* Wade, 3 Wils. 18.—Fitz. N. B. 89, 90.—Weedon *v.* Timbrell, 5 T. R. 361.—Macfadzen *v.* Olivant, 6 East, 387.—3 Bla. Com. 140.—But see Woodward *v.* Walton, 2 New Rep. 476. and Selwyn, N. P. 12.

(54) In trespass *de bonis asportatis*, no actual force is necessary to be proved. *Gibbs* v. *Chase*, 10 *Mass. Rep.* 125.

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thrown into the road with whatever violence, and one *afterwards* fell over it, it would be case and not trespass(*b*). With respect to injuries to a right or property not *tangible*, such as reputation and health, and real property incorporeal, as a right of way, common, &c. as the matter or property injured cannot be affected immediately by any substance, the injuries thereto, however malevolent and however contrived, cannot be considered as committed with force(*c*); and in general a mere *nonfeazance* cannot be considered as forcible, for where there has been no act, there cannot be force, as in the case of a neglect to take away tithes(*d*), or a mere detention of goods without an unlawful taking(*e*); or *the neglect to repair the banks of a river whereby the plaintiff's land was overflowed(*f*), or neglect to redeliver a beast distrained damage feasant, when sufficient amends were tendered before the beast was impounded(*g*). When it is material to rely upon *actual* force in *pleading*, as in the case of a forcible entry, the words "*manu forti*," or "with strong hand," should be adopted(*h*); but in other cases the words "*vi et armis*," or with force and arms, are sufficient(*i*).

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When immediate or consequential.

An injury is considered as *immediate* when the act complained of *itself*, and not merely a *consequence* of that act, occasions the injury; thus if a blow be given by one to another,[55] or he drive a carriage and horses against him or his property(*k*), or if he pour water on another person or his land(*l*), or do any act thereon(*m*); or if a wild beast or other dangerous thing be turned out or put in motion, and mischief immediately ensue(*n*); or if a log be thrown into a highway, and in the act of throwing or falling, hit another, the injury is immediate, and trespass is the remedy(*o*): and where a lighted squib was thrown in a market-place, and afterwards thrown about by others in self-defence, and ultimately hurt the plaintiff, the injury was considered as the immediate act of the first thrower, and a trespass; the new direction and new force given to it by the other persons not being a new trespass,

(*b*) Per Le Blanc, J.—Leame *v.* Bray, 3 East, 602.—Reynolds *v.* Clarke, 1 Stra. 636.—Day *v.* Edwards, 5 T. R. 649.

(*c*) 3 Bla. Com. 122, 3.

(*d*) Turner et al. *v.* Hawkins et al., 1 Bos. & Pul. 476.—Shapcott *v.* Mugford, Ld. Raym. 188.

(*e*) 2 Saund. 47. k, l.

(*f*) Bro. Ab. Act. Sur le Case, pl. 36.—Fitz. N. B. 93.—Bac. Ab. Trespass, A.

(*g*) Six Carpenter's Case, 8 Co. 146.

(*h*) The King *v.* Wilson et al., 8 T. R. 357.—Weaver *v.* Bush, 8 T. R. 78.

(*i*) Id. ibid.—Ante, 123. n. x.—Jenk. Cent. 186.

(*k*) Leame *v.* Bray, 3 East, 593. 597. Covell *v.* Laming, 1 Campb. 497.—Lotan *v.* Cross, 2 Campb. 465.

(*l*) Reynolds *v.* Clarke, 2 Ld. Raym. 1403.

(*m*) Shapcott *v.* Mugford, 1 Ld. Raym. 188.

(*n*) Leame *v.* Bray, 3 East, 596.

(*o*) 1 Stra. 634.—Ante, 122.

(55) Vide *Taylor* v. *Rainbow*, 2 *Hen. & Mun.* 423.

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*but merely a continuation of the original force(*p*); and where the defendant driving his carriage on the wrong side of a road, when it was dark, by accident drove against the plaintiff's curricle, it was holden that the injury which the plaintiff had sustained, having been immediate from the act of driving by the defendant, the proper remedy was trespass(*q*).[56] [*126]

But where the damage or injury ensued not directly from the act complained of, it is termed *consequential* or mediate, and cannot amount to a trespass: thus in the instance just stated, if a log in the act of being thrown into the highway, hit another, the injury is immediate; but if after it has fallen, another tumble over it and be hurt, the injury is only consequential and the remedy should be case(*r*): so if a person pour water on my land, the injury is immediate; but if he stop up a water-course on his own land, or if he place a spout on his own building, in consequence of which water afterwards runs therefrom into my land, the injury is consequential, because the flowing of the rain water which was the immediate injury was not the wrongdoer's immediate act, but only the consequence thereof, and which will not render the act itself a trespass, or an immediate wrong(*s*).[57]

It is chiefly in actions for running down ships, that difficulties occur, because the force which occasions the injury is not in such case necessarily *the immediate act of the person steering, for the wind and [*127] waves may and generally do occasion the force, and the personal act of the party rather consists in putting the vessel in the way to be acted upon by the wind, and the injury might even have happened from the operation of the wind and tide counteracting his efforts(*u*). In the case of injuries arising from driving carriages or navigating ships, if the injury were immediate though occasioned by negligence, or if it be stated in the declaration to have been *wilfully* committed, or appear to have been so on the trial, the remedy must be trespass(*w*); but if the injury were merely attributable to negligence, the party injured has sometimes an election, either to treat the negligence of the defendant as the cause of action and to declare in case: or to consider the act

(*p*) Scott *v.* Shephard, 3 Wils. 403. S. C. 2 Bla. Rep. 892.—Ogle et al. *v.* Barnes et al., 8 T. R. 190.

(*q*) Leame *v.* Bray, 3 East, 593.—Rogers *v.* Imbleton, 2 New Rep. 117.—Covell *v.* Lanning, 1 Campb. 497.—Lotan *v.* Cross, 2 Campb. 465.—but see Huggett *v.* Montgomery, 2 New Rep. 446.

(*r*) Leame *v.* Bray, 3 East, 602.—Reynolds *v.* Clarke, 1 Stra. 636.—Day *v.* Edwards, 5 T. R. 649.

(*s*) Reynolds *v.* Clarke, Stra. 634, 5. S. C. Ld. Raym. 1399.—Haward *v.* Bankes, 2 Burr. 1114.

(*u*) Leame *v.* Bray, 3 East, 601. 3.—Ogle et al. *v.* Barnes et al., 8 T. R. 192. Turner et al. *v.* Hopkins et al., 1 Bos. & Pul. 476.

(*w*) Ogle et al. *v.* Barnes et al., 8 T. R. 188.—Leame *v.* Bray, 3 East, 601. Boucher *v.* Noidstrom, 1 Taunton, 569. Covell *v.* Leaming, 1 Campb. 497.—Lotan *v.* Cross, 2 Campb. 465.

(56) Vide *Taylor* v. *Rainbow*, 2 *Hen. & Mun.* 423.

(57) Vide *Adams* v. *Hemmeway*, 1 *Mass. Rep.* 145.

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itself as the injury, and to declare in trespass(*x*). In Scott *v.* Shepherd(*y*), Mr. J. Blackstone said, that a person may bring trespass for the immediate injury, and subjoin a *per quod* for the consequential damage, or case for the consequential damage, passing over the immediate injury; and in Pitts *v.* Gaince and another(*z*), where the declaration was in case, and stated that the plaintiff was master of a ship laden with corn ready to sail, and that the defendant seized the *ship and detained her, whereby the plaintiff was prevented from proceeding in his voyage, an exception was taken that the declaration should have been trespass, and several cases were cited; but Lord Holt observed, that in those cases, the plaintiff had a property in the thing taken, but here the ship was not the master's, but the owner's; the master only declared as a particular officer, and could only recover for his particular loss, yet he might have brought trespass, as a bailee of goods may, and declared upon his possession, which is sufficient to maintain trespass. Hence it appears that either trespass, or case, may sometimes be supported where there is *both an immediate* and also a *consequential* injury(*a*).[58]

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Legality of *original* act not material.

The *legality* or *illegality* of the *original* act is not in general the criterion whether the injury was immediate or consequential, or whether the remedy should be trespass or case(*b*); for a person may become an immediate trespasser *vi et armis*, even in the performance of a lawful act, if in the course of such performance he be guilty of neglect; as if he hurt another by accident, yet he is answerable in trespass *vi et armis*,[59] as for an immediate injury(*c*); so case will lie for doing an unlawful act, if the damage sustained thereby be not immediate but consequential(*d*); however, if the injury were *under regular process, as in the case of a malicious arrest, or prosecution, though such injury were forcible and immediate, yet the remedy must be case(*e*).[60]

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(*x*) Rogers *v.* Imbleton, 2 New Rep. 117.—Ogle et al. *v.* Barnes et al., 8 T. R. 188.—Leame *v.* Bray, 3 East, 601.—Turner et al. *v.* Hawkins et al., 1 Bos. & Pul. 472.—but see Covell *v.* Laming, 1 Campb. 497.—Lotan *v.* Cross, 2 Camp. 465.

(*y*) 2 Bla. Rep. 897.—Bourden *v.* Alloway, 11 Mod. 180.—Slade's Case, 4 Co. 94. b. 95.—Wheatly *v.* Stone, Hob. 180.—Anon., Sty. 99.—Turner et al. *v.* Hawkins et al., 1 Bos. & Pul. 475.—Haward *v.* Bankes, 2 Burr. 1113.—Pitts *v.* Gaince & Foresight, Salk. 10.

(*z*) 1 Salk. 10.

(*a*) 1 Salk. 10. n. a.—Sed vide Bourden *v.* Alloway, 11 Mod. 180, 1.—semb. contra.

(*b*) 1 Stra. 635. n. 2.—Leame *v.* Bray, 3 East, 601.—Scott *v.* Shepherd, 3 Wils. 409.—S. C. 2 Bla. Rep. 894.

(*c*) Id. ibid.—Scott *v.* Shepherd, 3 Wils. 411.—Underwood *v.* Hewson, 1 Str. 596.—27 Hen. VII. 28. a.

(*d*) Bourden *v.* Alloway, 11 Mod. 180.—Scott *v.* Shepherd, 3 Wils. 410, 1.—S. C. 2 Bla. Rep. 895.

(*e*) Belk *v.* Broadbent et ux., 3 T. R. 185.

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(58) Vide *Stultz* v. *Dickey*, 5 *Binney*, 288.

(59) Vide *Taylor* v. *Rainbow*, 2 *Hen. & Mun.* 423.

(60) But where a sheriff levies a fi. fa. after the return day, the proper action is trespass and not case. *Vail* v. *Lewis & Livingston*, 4 *Johns. Rep.* 450.

NATURE OF INJURIES EX DELICTO: Intent when material.

Nor is the *intent* or *design* of the wrong doer the criterion, as to the form of the remedy(*f*); for where the act occasioning an injury is unlawful, the intent of the wrong doer is immaterial(*g*); and it is clear, that the mind needs not concur in the act that occasions an injury to another, and if the act occasion an immediate injury, trespass is the proper remedy without reference to the intent(*h*); if however, in pleading, the injury be stated to have been committed wilfully, and in other respects it be uncertain whether it were immediate or consequential, the court will consider it as an immediate injury(*i*). There are many cases in the books, where the injury being direct and immediate, trespass has been holden to lie, though the injury were not intentional, as in Weaver v. Ward(*k*), where the defendant exercising in the trained bands and firing his musket, by accident hurt the plaintiff: and in Underwood v. Hewson(*l*), where one uncocking a gun, it went off, and accidently wounded a by-stander;[61] and if one turning round suddenly, were to knock another down, whom he did not see, without intending it, no doubt the *action should be trespass(*m*); and where a person [*130] accidentally drives a carriage against that of another, the injury is immediate, and trespass the remedy, though the defendant was no otherwise blameable than in driving on the wrong side of the road on a dark night(*n*). However, in favour of public officers, who are bound to obey the process of the courts, if a sheriff, after a secret act of bankruptcy committed by A, levy goods under an execution against him, he cannot be sued by the assignees in trespass but only in trover, because such public officers ought not to be made trespassers by relation(*o*): and in some other cases, though the intent may not be material to the form of action, it may decide whether any action be sustainable, as if the intent be felonious, when the civil remedy may be merged in the felony, or

(*f*) Sanderson *v.* Baker et al., 3 Wils. 309.—S. C. 2 Bla. Rep. 832.—Leame *v.* Bray, 3 East, 599. 601.

(*g*) The King *v.* Phillips, 6 East, 464. 473, 4.—Haycraft *v.* Creasy, 2 East, 107.—Wright *v.* Smith, 5 Esp. Rep. 214, 5.

(*h*) Per Ld. Kenyon, Ogle et al. *v.* Barnes et al. 8 T. R. 190.—Leame *v.* Bray, 3 East, 599. 601.—Covell *v.* Laming, 1 Campb. 497.—Lotan *v.* Cross, 3 Campb. 465.

(*i*) Leame *v.* Bray, 3 East, 595. 601. Ogle et al. *v.* Barnes et al., 8 T. R. 191. M'Manus *v.* Crickett, 1 East, 109.—Haward *v.* Bankes, 2 Burr, 1114.

(*k*) Hob. 134.

(*l*) 1 Str. 596.

(*m*) Per Ld. Ellenborough, and Lawrence, J. Leame *v.* Bray, 3 East, 595, 6.

(*n*) Leame *v.* Bray, 3 East, 593.—Covell *v.* Laming, 1 Campb. 497.—Lotan *v.* Cross, 2 Campb. 465.—Qu. Rogers *v.* Imbleton, 2 New Rep. 119.

(*o*) Cooper et al. *v.* Chitty et al. 1 Burr, 20.—Smith et al. v. Milles, 1 T. R. 480.—Bayly *v.* Bunning, 1 Lev. 173.

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(61) In *Taylor* v. *Rainbow*, 2 *Hen. & Mun.* 423. the defendant had negligently, but without any design to injure, discharged a gun, and wounded the plaintiff, who brought an action on the case: it was held that trespass was the proper remedy, and that it was immaterial whether the injury were committed wilfully or not.

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where words *primâ facie* slanderous were not spoken maliciously; and in some cases of involuntary trespasses to land, committed not by the party himself but by his cattle, a tender of amends may be pleaded(*p*).

For some *torts* which may *primâ facie* appear to be forcible and immediate, as for an excessive distress(*q*), or for driving a distress out of the county in which it was taken(*r*), or for injuries to personal or real property in reversion(*s*), or against a bailee of personal property *having an interest therein, and who has injured the same, but not destroyed it(*t*), an action on the case is the proper remedy: so though a master may be liable to compensate an immediate injury committed by his servant with force, yet the action against him must be case, though against the servant it should be trespass(*u*)[62].

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Summary of the principal points on which the form of action may depend.

From this concise view of the nature of injuries *ex delicto*, as well as from the following observations on the properties of each particular action, it may be collected, that there are *four* leading points to be attended to, in deciding what form of action should be adopted. *First*, the nature of the *matter or thing* affected; *secondly*, the plaintiff's *right* thereto; *thirdly*, the *means* by which the *injury* was effected; and, *fourthly*, the situation in which the defendant stood.

And *first*, the nature of the matter or thing affected; as whether it were substance or tangible, as the body, personal chattels, and real property corporeal; or not tangible, as health, reputation, and real property incorporeal. In the first instances as the property might be affected immediately by an injury committed with force, trespass, case, replevin, trover, or detinue, may or may not be sustainable, depending on the other three points, and the particular properties of each action(*w*); but in the latter instances, an action on the case is in general the only remedy, because the property could not be injured immediately by force.

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Secondly, the nature of the plaintiff's *right* to the matter or thing affected; as if in the person, whether it were absolute or relative, in the latter instance, case being sustainable, however forcible the injury; or if to personal or real property, whether it were in severalty or joint-tenancy, or in common, or in possession or reversion; in the last in-

(*p*) 21 Jac. 1. c. 16. s. 5.—Vin. Ab. Trespass, 542.—Basely *v.* Clarkson, 3 Lev. 37.

(*q*) 52 Hen. 3. c. 4.—3 Bla. Com. 12. Lynne *v.* Moody, 2 Stra. 851.—Hutchins *v.* Chambers et al., 1 Burr, 590.—Fitzgib. 85.

(*r*) Id. ibid.—2 Inst. 106.—Woodcroft *v.* Thompson, 3 Lev. 48.—Gimbart *v.* Pelah, 2 Stra. 1272.

(*s*) Ward *v.* Macauley et al., 4 T. R. 489.—Gordon *v.* Harper, 7 T. R. 9.—Com. Dig. Action on Case, Nuisance, B.

(*t*) Bac. Ab. Trespass, B.

(*u*) M'Manus *v.* Crickett, 1 East, 108.

(*w*) Replevin lies only for personal property, and not for taking part of the freehold, Niblet *v.* Smith, 4 T. R. 504.

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(62) "The principal cases which appear to have turned upon the distinction between trespass and case are collected, and classed according to their characteristic circumstances, in a note to *Huggett* v. *Montgomery*, 2 *New Rep.* 448. Day's edit." Note by Mr. Day.

stance, neither trespass, trover, replevin, nor detinue, could be supported, but only case(*x*). NATURE OF INJURIES EX DELICTO.

Thirdly, the *means* by which the *injury* was effected; as whether it were a commission or an omission, in the latter case, trespass is not in general sustainable(*y*); or with or without force, actual or implied, for if without force, case is in general the remedy(*z*); or immediate or consequential; in the latter case, trespass is not sustainable(*a*); or whether the injury were committed by the defendant himself, or by his agent or servant, or by his cattle, or property(*b*), or under colour of a distress for rent, &c. or of the process of a superior or inferior court.

Fourthly, the situation or character in which the defendant stood, as whether he were joint-tenant or tenant in common with the plaintiff(*c*); or whether there were any privity of contract between the plaintiff or defendant, in respect of the latter being tenant or bailee, when in general trespass cannot be supported(*d*). Keeping in view these important points, we will proceed to consider the *nature and particular applicability of the several actions in form *ex delicto*. [*133]

I. ACTION ON THE CASE.

I. ON THE CASE.

We have seen that this action is so termed, as distinguishing the remedy from the *brevia formata*(*e*). In its most comprehensive signification, it includes assumpsit as well as an action in form *ex delicto*; but at the present time, when an action on the case is mentioned, it is usually understood to mean an action in form *ex delicto*; and therefore, where a navigation act enacted that the company might sue for calls, &c. by action of debt, or *on the case*, it was holden that an action on the case in tort lay, though the defendant might thereby be deprived of the benefit of a set-off(*f*).

Actions on the case are founded on the common law, or upon acts of parliament, and lie generally to recover *damages* for *torts*, not committed with force actual or implied, or having been occasioned by force, where the matter affected was not tangible or the injury was not immediate but consequential, or where the interest in the property was only in reversion; in all which cases trespass is not sustainable(*g*). Torts of this nature are to the absolute or relative rights of *persons*,

(*x*) Gordon *v.* Harper, 7 T. R. 9.
(*y*) Ante, 124.
(*z*) Ante, 122, 3.
(*a*) Ante, 122. 125, 6.
(*b*) Ante, 13.
(*c*) Ante, 66.—2 Saund. 47. g.
(*d*) Post. 171.—Bac. Ab. Trespass, B.
(*e*) Ante, 83, 4, 5.
(*f*) Huddersfield Canal Company *v.* Buckley, 7 T. R. 36.
(*g*) Ward *v.* Macauley et al., 4 T. R. 489.—Gordon *v.* Harper, 7 T. R. 9.

I. ON THE CASE.

or to *personal property* in possession or reversion, or to *real* property, corporeal or incorporeal, in possession or reversion. These injuries may be either by *nonfeazance* or the omission of some act which the [*134] defendant *ought to perform; or by *misfeazance*, being the improper performance of some act which might lawfully be done; or by *malfeazance*, the doing what the defendant ought not to do; and these respective torts are commonly the performance or omission of some act contrary to the general obligation of the law, or the particular rights or duties of the parties, or of some express or implied contract between them. This action is not confined to injuries merely *ex delicto*, it is a concurrent remedy with assumpsit for many breaches of contract, not merely for the payment of money, whether the breach were *nonfeazance*, *misfeazance*, or *malfeazance*(*h*). Thus case lies upon an express agreement for obstructing the plaintiff in the enjoyment of an easement, of which the defendant stipulated that the plaintiff should have the benefit(*i*); and it is also a proper remedy against bailees for neglect in the care of goods(*k*); and it seems that it lies even for not accounting for the produce of bills delivered to the defendant to get discounted(*l*). If *assumpsit* be adopted, the contract or promise must be formally stated in the declaration; but in *case* it is otherwise, which circumstance constitutes the principal difference between the two forms of action(*m*). The judgment of Lord Ellenborough, Ch. J. in the case [*135] of Govett *v.* Radnidge(*n*), explains the *advantages arising in many instances from the adoption of the action on the case, in preference to the action of assumpsit, viz. "there is no inconvenience in suffering "the party to allege his gravamen as a breach of duty arising out of "an employment for hire, and to consider that breach of duty as tor- "tious negligence, instead of considering the same circumstances as "forming a breach of promise implied from the same consideration of "hire; by allowing it to be considered in either way, according as "the neglect of duty or the breach of promise is relied upon as the "injury, a multiplicity of actions is avoided; and the plaintiff, accord- "ing as the convenience of his case requires, frames his principal "count in such a manner, as either to join a count in trover therewith, "if he have another cause of action other than the action of assump- "sit, or to join with the assumpsit the common counts, if he have "another cause of action to which they are applicable(*o*)." Other ad-

(*h*) Bro. Ab. Action on Case, pl. 7. 69. 72.—Fitz. N. B. 94. a. 145. g.—Judin *v.* Samuel, 1 New Rep. 43.—S. C. 6 East, 335.—Mast *v.* Goodson. 3 Wils. 354.—Dickon *v.* Clifton, 2 Wils. 319.—Brown *v.* Dixon, 1 T. R. 274.

(*i*) Mast *v.* Goodson, 3 Wils. 348.

(*k*) Govett *v.* Radnidge et al., 3 East, 62.—Brown *v.* Dixon, 1 T. R. 274.

(*l*) Judin *v.* Samuel, 1 New Rep. 43. S. C. 6 East, 333.

(*m*) Supra, note (l).—Judin *v.* Samuel, 6 East, 335.

(*n*) 3 East, 70.

(*o*) Govett *v.* Radnidge, 3 East, 62. 70.—Judin *v.* Samuel, 6 East, 333. But the latter advantage does not always arise, see Powell *v.* Layton, 2 New Rep. 365.—Max *v.* Roberts et al., 2 New Rep. 454.—S. C. 12 East, 94.—Weall *v.* King & another, 12 East, 454. ante, 33. 75.

vantages may also sometimes ensue from the adoption of case instead of assumpsit, viz. that in the former action the defendant cannot always plead in abatement the non-joinder of other parties as defendants; and the plaintiff may frequently recover, if he prove one of several defendants to be liable, which he cannot do in an action of assumpsit(*o*).

To persons absolutely.

Case is the proper remedy for any injury to the *absolute rights of persons* not immediate but consequential; as for keeping mischievous animals *having notice of their propensity(*p*); or for special damage [*136] arising from a public nuisance(*q*);† but if the injury were immediate, as if the defendant incited his dog to bite another, or let loose a dangerous animal(*r*); or if in the act of throwing a log into a public street, it hurt the plaintiff(*s*); or if an injury be committed by cattle(*t*) to land, the action should be trespass. Also whenever an injury to a person is effected by *regular process* of a court of competent jurisdiction though maliciously adopted, case is the proper remedy, and trespass is not sustainable(*u*); as for a malicious arrest(*w*); or for malicious prosecution of a criminal charge before a magistrate or otherwise(*x*); and if the proceeding be malicious and unfounded, though it were instituted in a court having no jurisdiction, case may be supported or trespass(*y*); formerly it was usual, in these instances, where several persons combined in the prosecution, to proceed by writ of conspiracy, but the action on the case is now the usual remedy(*z*). If on the other hand, the proceeding *complained of were *irregular*, the [*137] remedy in general must be trespass;[63] and therefore, where a justice

(*o*) Govett *v.* Radnidge, 3 East, 62. 70.—Judin *v.* Samuel, 6 East, 333. But the latter advantage does not always arise, see Powell *v.* Layton, 2 New Rep. 365.—Max *v.* Roberts et al., 2 New Rep. 454.—S. C. 12 East, 94.—Weall *v.* King & another, 12 East, 454. ante, 33. 75.

(*p*) Ante, 69, 70. Post. 2 Vol. 287.

(*q*) Chichester *v.* Lethbridge, Willes, 71 to 74. and see note to the precedent in case for laying rubbish in a street. Post. 2 Vol. 289. and Butterfield *v.* Forrester, 11 East, 60. When not, see The King *v.* Bristol Dock Company, 12 East, 432.

† Injuries arising from keeping mischievous animals, and from public nuisances, also frequently affect *personal* property; and on the other hand, many of the wrongs hereafter enumerated as affecting personal property, may also affect persons, as negligence in riding horses, and driving carriages, &c.

(*r*) Ante, 70.

(*s*) Ante, 125, 6.

(*t*) Ante, 70.

(*u*) Belk *v.* Broadbent et ux., 3 T. R. 185.—Boot *v.* Cooper, 1 T. R. 535. Cooper et al. *v.* Booth, 3 Esp. Rep. 135. Waterer *v.* Freeman, Hob. 266.—Gyford *v.* Woodgate and another, 11 East, 297.—Wetherden *v.* Embden, 1 Campb. 295.—Post. 2 Vol. 291. n. m.

(*w*) Post. 2 Vol. 291.

(*x*) Post. 2 Vol. 297.

(*y*) Goslin *v.* Wilcock, 2 Wils. 302.

(*z*) Skinner *v.* Gunton & others, 1 Saund. 228. 230. n. 4.

(63) Ante, 129. n. Vide *Beaurain* v. *Sir William Scott*, 3 *Campb.* 388. which was an action on the case against the defendant, a judge of an ecclesiastical court, for excommunicating a party for refusing to obey an order which the court had no authority to make.

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of the peace maliciously and irregularly granted a warrant against a person for felony, without any information upon oath, it was decided that the remedy against the justice should have been trespass and not case(*a*); and though case may be supported for maliciously suing out a commission of bankruptcy(*b*), yet an action of trespass is also sustainable, because if the plaintiff were not subject to the bankrupt laws, the commissioners had no jurisdiction, in which case trespass is always sustainable if in other respects the injury were forcible and immediate(*c*). Case we have seen is also the proper remedy, where the right affected was not tangible, and consequently could not be affected by force, as reputation and health, the injuries to which are always remediable by action on the case; as libels, or verbal slander(*d*). It is also the only remedy against sheriffs, justices, or other officers acting ministerially and not judicially(*e*), for refusing bail(*f*), or to receive an examination upon the statute of hue and cry, &c.(*g*); and case lies against surgeons, agents, &c. for improper treatment, or for want of skill or care, though assumpsit is also sustainable(*h*).

To persons relatively. [*138]

Actions for injuries to the *relative* rights of persons, as for criminal conversation, *seducing or harbouring wives, debauching of daughters, enticing away or harbouring apprentices or servants, are properly in case(*i*); though it is usual in declarations for criminal conversation to state the injury to have been committed *vi et armis*, and *contra pacem*; and where the action is for an injury really committed with force, as by menacing, beating, or imprisoning wives, daughters, and servants, it is most proper to declare in trespass(*k*).

To personal property and for breach of contract.

For injuries to *personal* property not committed with force or not immediate,(*l*) or where the plaintiff's right thereto is in reversion(*m*); case is the proper remedy.[64] It lies against attornies or other agents

(*a*) Morgan *v.* Hughes, 2 T. R. 225.

(*b*) 1 Wils. 145.

(*c*) Perkins *v.* Proctor et al., 2 Wils. 282. 284.—Cullen's Bankrupt Law, 412, 3.

(*d*) Post. 2 Vol. 304.

(*e*) Com. Dig. Action Case, Misfeazance, A. 1. &c.

(*f*) 2 Saund. 61. c. d.—Osborn *v.* Gough, Bos. & Pul. 551.

(*g*) Green *v.* The Hundred of Buccle Church, 1 Leon. 323, 4.

(*h*) Seare *v.* Prentice, 8 East, 348.—Shiells et al. *v.* Blackburne, 1 Hen. Bla. 161.—Slater *v.* Baker et al., 2 Wils. 359.—3 Bla. Com. 122.—Reg. Brev. 105.

(*i*) See the reasons and the different precedents, post. 2 Vol. 313. 319. But see Woodward *v.* Walton, 2 New Rep. 476.

(*k*) See the precedents, post. 2 Vol. 421, 422.

(*l*) Ante, 122.

(*m*) Gordon *v.* Harper, 7 T. R. 9.

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(64) As, if the owner of a horse hire him to another for a certain time, and while the hirer is using the horse, the defendant drives against him and kills him, the owner's remedy is by action on the case and not trespass; this being in the nature of an injury to the plaintiff's reversion. *Hall* v. *Pickard*, 3 *Campb.* 187. But where the owner gratuitously permits another person to use the chattel, it is still constructively in his possession, and he may maintain trespass. *Lotan* v. *Cross*, 2 *Campb.* 464.

for neglect in the conduct of a cause, or other business,[65] or for not accounting for monies, &c. though it has been more usual to declare against them in assumpsit(*n*); and though we have seen that assumpsit is the usual remedy for neglect against bailees(*o*); as against carriers, wharfingers, and others, having the use or care of personal property; yet case is frequently a preferable remedy, as where it is doubtful how many persons ought to be sued, when by declaring in case, it has been holden that a plea in abatement for non-joinder may be avoided, and the joinder of too many defendants is no ground of non-suit, and if there be any evidence of a conversion, a count in trover may be added(*p*); it is also more usual to declare in case against an inn-keeper, than in *assumpsit(*q*). Formerly case was the usual remedy for a false warranty, or other misrepresentation on the sale of goods, &c.(*r*); but of late, it is more usual to declare in assumpsit, so as to join the count for money had and received(*s*); yet case may still be supported, and if there have been any actual fraud,[66] or it be doubtful how many persons should be made defendants, it is the preferable form of action,[67] especially as the *scienter*, though expressly stated in the declaration, needs not be proved(*t*); and for fraudulently representing a person fit to be trusted,[68] or for other deceit, where there has been no contract between the parties, case is the only remedy(*u*).[69] [*139]

We have seen that trespass may be supported against a person, even for accidentally driving his carriage against another's(*w*); but for the negligent driving of a servant, the master can only be sued in case(*x*);

(*n*) Samuel *v.* Judin, 6 East, 333.—S. C. 1 New Rep. 43.—Post. 2 Vol. 319.

(*o*) Ante, 92.—Post. 2 Vol. 319.

(*p*) Ante, 135.—Govett *v.* Radnidge et al., 3 East, 62. 70.—Post. 2 Vol. 271 to 276. But see Powell *v.* Layton, 2 New Rep. 365.—Max *v.* Roberts et al., 2 New Rep. 454.—S. C. 12 East, 94.—Weall *v.* King and others, 12 East, 454.

(*q*) Post. 2 Vol. 322.

(*r*) Stuart *v.* Wilkins, Dougl. 21.

(*s*) Post. 2 Vol. 100.

(*t*) Post. 2 Vol. 324. n. h.—Williamson *v.* Allison, 2 East, 446.

(*u*) Post. 2 Vol. 326.

(*w*) Ante, 129, 130.—Leame *v.* Bray, 3 East, 593.

(*x*) M'Manus *v.* Cricket, 1 East, 106. Brucker *v.* Fromont, 6 T. R. 659.—Morley *v.* Gaisford, 2 Hen. Bla. 442.—Post. 2 Vol. 329.

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(65) Vide *Taylor*, 62, 63. *Church & Demilt* v. *Mumford*, 11 *Johns. Rep.* 479.

(66) The plaintiff is not permitted to establish deceit and fraud, when he declares in assumpsit, on a warranty express or implied. *Evertson's Ex'rs.* v. *Miles*, 6 *Johns. Rep.* 138. *Pickering & others* v. *Dowson & others*, 4 *Taunt.* 786.

(67) Vide *Hallock* v. *Powell*, 2 *Caine's Rep.* 216.

(68) Vide *Upton* v. *Vail*, 6 *Johns. Rep.* 181. *Russell* v. *Clark's Ex'rs. & others*, 7 *Cranch*, 92.

(69) So, if on the gift of a chattel the donor affirm it to be his own, and the donee be afterwards evicted, case will lie. *Barney* v. *Dewey*, 13 *Johns. Rep.* 226. So, an action on the case lies for fraud, or a false affirmation in the sale of land, as where the land pretended to be sold has no real existence, notwithstanding any covenants in the deed. *Wardell* v. *Fosdick & Davis*, 13 *Johns. Rep.* 325. *Frost & others* v. *Raymond*, 2 *Caine's Rep.* 193. *Bostwick* v. *Lewis*, 1 *Day's Rep.* 250. *Monell & Weller* v. *Colden*, 13 *Johns. Rep.* 395.

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and even in the former instance, if the injury were really attributable to the negligence, and not to the wilful act of the driver, case might be supported(*y*); and it is clearly the proper remedy for an injury occasioned by negligence in navigating ships.(*z*)

Where a distress has been made for rent, and there was no rent due, [*140] an action of trespass or case may be supported on the statute of *William and Mary(*a*); and if the person making the distress turn the tenant out of possession, or continue in possession more than five days, trespass lies(*b*); so where a party taking a distress *damage feasant*, has been guilty of any irregularity,[70] rendering him a trespasser *ab initio* (*c*); but in the case of a distress for rent, if it were lawful in its inception, a subsequent irregularity will not render the party a trespasser *ab initio*, or subject him to an action of trespass or trover(*d*); and case is the proper remedy in these and most other instances of irregularity in the taking or sale or disposal of a distress(*e*). This action also lies for the rescue or pound-breach of cattle, or goods distrained for rent(*f*); or damage-feasant(*g*); or for the rescue of a person arrested on mesne process(*h*); and against sheriffs, &c. for escapes on mesne or final process(*i*); or for not arresting the debtor when he had an opportunity(*k*); and for a false return of *non est inventus* to mesne process(*l*); or of *nulla bona*, to a writ of *fi. fa.*(*m*); or for not levying under it when he had an opportunity(*n*); or for not taking a replevin bond; or for taking insufficient pledges in replevin(*o*); or for not assigning a bail bond(*p*).[71] For an escape on final process, it is most advisable to declare in debt, [*141] if the *caption of the original defendant can be clearly proved, because in debt the jury must give a verdict for the entire demand(*q*);[72] but if

(*y*) Rogers *v.* Imbleton, 2 New Rep. 117.—Huggett *v.* Montgomery, 2 New Rep. 446.—Ante, 127.

(*z*) Ogle et al. *v.* Barnes et al., 8 T. R. 188.—Leame *v.* Bray, 3 East, 599. Huggett *v.* Montgomery et al., 2 New Rep. 446.—Post. 2 Vol. 331. But see ante, 130.

(*a*) Post. 2 Vol. 333.

(*b*) Atherton *v.* Popplewell, 1 East, 139.—Winterbourne *v.* Morgan and others, 11 East, 395.—Messing *v.* Kemble, 2 Campb. 115.

(*c*) Six Carpenters Case, 8 Co. 146. Bac. Ab. Trespass, B.

(*d*) 11 Geo. 2. c. 19.—Wallace *v.* King et al., 1 Hen. Bla. 13.

(*e*) See the cases and precedents, post. 2 Vol 332. 343.

(*f*) 2 Vol 343.

(*g*) Post. 2 Vol. 345.

(*h*) Id. 347.

(*i*) Id. 349. 352.

(*k*) Id. 351.

(*l*) Id. 351.

(*m*) Id. 352.

(*n*) Id. 354.

(*o*) Id. 355. 359.

(*p*) Id. 360.

(*q*) Bonafous *v.* Walker, 2 T. R. 129. 1 Saund. 38. n. 2.

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(70) Vide *Sackrider* v. *M'Donald*, 10 *Johns. Rep.* 252. *Hopkins* v. *Hopkins*, *Id.* 369.

(71) So, trespass on the case lies against an officer, for levying a warrant for a fine, in an oppressive and unreasonable manner, with intent to vex, harrass, and oppress the party. *Rogers* v. *Brewster*, 5 *Johns. Rep.* 125.

(72) At common law the plaintiff had no remedy against the sheriff for an es-

it be doubtful whether a caption can be proved, the declaration should be in case, proceeding for the escape in one count, and in the second for not taking the defendant, when the sheriff had an opportunity(*r*); and the same observation applies, when it is doubtful whether a sheriff has levied under a writ of *fieri facias*, or where he has neglected to levy the whole amount. Case also lies for not delivering letters, &c.(*s*); and against a witness for not obeying a writ of subpœna(*t*); and for infringing the copyright of a book, print, single sheet of music, or other work(*u*); and for the infringement of a patent(*w*); and for injuries to any personal property in reversion, trespass, or trover, cannot be supported, case being the only remedy(*x*).

To real property.

With respect to injuries to *real property corporeal*, where the injury was immediate, and committed on land, &c. in the possession of the plaintiff, the remedy is trespass(*y*); but for non-feazance, as for not carrying away tithes(*z*); or where the injury is not immediate but consequential, as for placing a spout near the plaintiff's land, so that water afterwards ran thereon, or for causing water to run from the defendant's land to that of the plaintiff(*a*); or where the plaintiff's property

(*r*) Post. 2 Vol. 352.

(*s*) Rowning *v.* Goodchild, 3 Wils. 443.

(*t*) Pearson *v.* Iles, Dougl. 556. 561. Amey v. Long, 9 East, 473.—13 East, 17. n. b.

(*u*) Clementi *v.* Goulding, 11 East, 244.—Roworth *v.* Wilkes, 1 Campb. 94. 98.—Post. 2 Vol. 362.

(*w*) Post. 2 Vol. 366.

(*x*) Gordon *v.* Harper, 7 T. R. 9.

(*y*) Ante, 122, 3.—Shapcott *v.* Mugford, 1 Ld. Raym. 188.

(*z*) Shapcott *v.* Mugford, 1 Ld. Raym. 187.

(*a*) Ante, 126.—Reynolds *v.* Clarke. Stra. 634, 5.—S. C. Ld. Raym. 1399.—S. C. Fortesc. 212.—Haward *v.* Bankes, 2 Burr. 1114.

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cape, whether upon mesne process, or in execution, but by special action upon the case; but now by an equitable construction of *Weston*, 2. c. 11. an action of debt is given against sheriffs for escapes of prisoners in execution. *Bac. Abr.* Escape in Civil Cases, F. By the New York statute, sess. 36. c. 67. s. 19. 1 R. L. 425, sheriffs on an escape of a party in execution, are rendered answerable to the plaintiff for the debt and damages for which the party was arrested, and the plaintiff may recover the same with costs by action of debt. The common law remedy by action on the case is not taken away by the statute. In the action on the case, the jury may inquire what was lost by the escape, and give such damages as they suppose the party has sustained; but in the action of debt, every inquiry of that kind is improper, for the statute has fixed the extent of the sheriff's liability, that is, for the original debt and damages recovered. *Rawson* v. *Dole*, 2 *Johns. Rep.* 454. Under the statute, debt lies only for an escape, where the prisoner is in execution; and a prisoner is not in execution, until a writ of execution against the body has been issued and delivered to the sheriff, as the English practice of charging the debt in execution without the issuing of a ca. sa. has never been adopted in the state of New York. Debt therefore will not lie for the escape of a prisoner who has been surrrendered by his bail, he not being in execution by virtue of the surrender. *Van Slyck* v. *Hogeboom*, 6 *Johns. Rep.* 270. In the action of debt for an escape, interest is not recoverable. *Rawson* v. *Dole*, ubi sup.

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is only *in reversion(a), and not in possession, the action should be in case. Thus it lies for obstructing light or air through ancient windows[73] by any erection on the adjoining land(b); which action may be brought in the name of the tenant in possession, or of the person entitled to the immediate reversion, though the form of the declaration differs in the latter case(c); so it lies for any other nuisance to houses or lands in possession or to a decoy(d); and for injuries to watercourses where the plaintiff is not the owner of the soil, but is merely entitled to the use of the water(e); and by a reversioner against his tenant[74] or a stranger, for waste by cutting down trees not excepted in the lease, or any other act injurious to the reversion,[75] though the remedy by the tenant against a stranger would be trespass(f); and though assumpsit we have seen is the usual remedy against a tenant for not cultivating land, according to the course of good husbandry, or for not repairing &c.(g); yet for voluntary waste, and particularly where there has been any conversion of trees or other property, case may frequently be preferable(h); which it has been holden is a concurrent remedy with covenant where there has been voluntary waste(i); and it lies upon the custom of the realm against the personal representatives of a rector, &c. at the suit of the successor for dilapidations(k); and for not [*143] *repairing fences, whereby the plaintiff's cattle escaped from his land, or the cattle of the defendant got into the land of the plaintiff(l); for the latter injury however the plaintiff might support trespass or distrain the cattle damage feasant; and case is the peculiar remedy for nonfeazance, as not carrying away tithes(m).

We may remember that trespass cannot in general be supported,

(a) Com. Dig. Action Case, Nuisance, B.
(b) Post. 2 Vol. 378.
(c) Id. 383.
(d) Carrington v. Taylor, 11 East, 571.—Id. 580.
(e) Id. 384.
(f) Id. 390.—Goodright d. Peters v. Vivian, 8 East, 190.—Attersoll v. Stevens, 1 Taunton, 194.
(g) Ante, 93.—Post. 2 Vol. 392.
(h) Post. 2 Vol. 390.
(i) Kinlyside v. Thornton, 2 Bla. Rep. 1111.—Greene v. Cole, 2 Saund. 252. *Sed quære.*
(k) Post. 2 Vol. 392.
(l) Star v. Rookesby, 1 Salk. 335.—Post. 2 Vol. 394.
(m) Ante, 124. 141.—Post. 2 Vol. 396.

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(73) Occupier of one of two houses built nearly at the same time, and purchased of the same proprietor, may maintain a special action on the case, against the tenant of the other, for obstructing his window lights by adding to his own building, however short the previous period of enjoyment by the plaintiff; on the principle, that where a man sells a house, he shall not afterwards be permitted to disturb the rights that appertain to it, and what the original owner could not have done, neither could his lessee do. *Compton* v. *Richards, Price's Exch. Rep.* 27.

(74) Vide *Provost, &c. of Queen's College* v. *Hallett*, 14 *East's Rep.* 489. ante 50. n. 108. So, it lies against the assignee of a lessee. *Short* v. *Wilson & others*, 13 *Johns. Rep.* 33. 2 *Saund.* 252. a. c.

(75) But not for permissive waste. *Gibson* v. *Wells*, 1 *New Rep.* 290.

where the matter affected is not substantial, or the estate therein is *incorporeal*; case therefore is the proper remedy for disturbance of common of pasture, turbary or estovers(*n*); though if the plaintiff's cattle be chased off the common, trespass may be supported for such chasing, and that form of action may in some instances be advisable in order that the right may be fully stated on the record; so case lies for obstructing a private way(*o*); or the plaintiff's right to use a pew, the possession of which is supposed to be in the ordinary, and therefore trespass will not lie unless the plaintiff be actually turned out of possession(*p*). So case lies for disturbance, obstruction, or other injuries to offices, franchises, ferries, markets, tolls, or for not grinding at an ancient mill, &c.(*q*).

An action on the case is frequently given by the express provision of some *statute* to a party aggrieved(*r*); *and it has even been decided, [*144] that where a navigation act empowered the company to sue for calls, &c. by action of debt or on the case, that an action on the case in tort might be supported, though the defendant were thereby deprived of the means of availing himself of a set-off(*s*); and whenever a statute prohibits an injury to an individual, or enacts that he shall recover a penalty or damages for such injury, though the statute be silent as to the form of the remedy, this action may be supported(*t*); as on the statute 8 Ann, c. 14. at the suit of a landlord, against a sheriff, for taking goods under an execution, without paying a year's rent(*u*); and on the statute of Winton(*w*), at the suit of a party robbed, against the hundred; or upon the riot act(*x*); or on different statutes, relative to irregularities in making or disposing of a distress(*y*), &c.; in which and other instances case may be supported by implication(*z*); and if a statute give a remedy in the affirmative, without a negative expressed or implied, for a matter which was actionable by the common law, the

(*n*) Com. Dig. Action Case, Disturbance, A. 1.—Post. 2 Vol. 400. 404. If enclosed more than 20 years *case* will not lie, and the remedy is by *assize of common*.—Hawke *v.* Bacon, 2 Taunton, 156.—Creach *v.* Wilmot, 2 Taunton, 160.

(*o*) Com. Dig. Action Case, Disturbance, A. 2.—Post. 2 Vol. 405.

(*p*) Stocks *v.* Booth, 1 T. R. 430.

(*q*) Com. Dig. Action Case, Disturbance, and Action Case, Nuisance; and post. 2 Vol. 409.

(*r*) Com. Dig. tit. Action, upon Statute, A. F. and tit. Pleader, 2 S. 1 to 30.

(*s*) Huddersfield Canal Company *v.* Buckley, 7 T. R. 36.

(*t*) Ante, 143. n. r.—Case of the Marshalsea, 10 Co. 75 b.—2 Inst. 486. Ewer *v.* Jones, 2 Salk. 415.—S. C. 6 Mod. 26.

(*u*) Bristow *v.* Wright et al., Dougl. 665.

(*w*) 13 Edw. 1. st. 2. c. 1, 2.—Pinkney *v.* Inhabitants of East Hundred, 2 Saund. 374, 5.—Com. Dig. Pleader, 2 S. 1.

(*x*) 9 Geo. I. c. 22. s. 7.—Thurtell *v.* Mutford Hundred, 3 East, 400.—Hiles *v.* Shrewsbury Hundred, 3 East, 457.—Against the Parish, Thornhill *v.* Inhabitants of Huddersfield, 11 East, 349. &c. Against the Hundred, Grosvenor *v.* Inhabitants of St. Augustine, 12 East, 244.

(*y*) Post. 2 Vol. 332, &c.

(*z*) Or where the demand is for a sum certain, or for treble damages, &c. debt also may be supported, ante, 105. President & College of Physicians *v.* Salmon, Ld. Raym. 682.

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party may sue at common law,[76] as well upon the statute(*a*), but in some instances the common law remedy is altered by a statute, as by
[*145] the 43 Geo. 3. c. 141. which enacts that in all actions against any *justice of the peace for any conviction, &c. which may have been quashed, or for any matter done by him for carrying it into effect, the plaintiff shall not recover more than the sum levied under the conviction, and 2d. damages, unless it be expressly alleged in the declaration, which shall be in an action *on the case only*, that such acts were done maliciously and without any reasonable cause(*b*). We have seen that no action can be supported by a common informer, unless he be expressly authorisod to sue(*c*).

We may collect from the preceding observations, that the plaintiff frequently has an election either to proceed in an action on the case, or trespass, or assumpsit(*d*). There are advantages attending the adoption of an action on the case, instead of the other forms of action: thus, in an action on the case, the plaintiff is in general entitled to full costs, though he recover less than 40*s*. damages, whereas in some actions of trespass to the person or to land, if the damages be under 40*s*. the plaintiff is not entitled to full costs(*e*); so by declaring in case instead of assumpsit, a defendant may be precluded from availing himself of his bankruptcy[77] and certificate(*f*), or in some cases of a set-off, or of the circumstance of too few or too many persons being made[78] defendants(*g*); a count in trover may also be frequently added with advantage, and the pleadings being more concise in this action, are in general less expensive than those in the action of trespass. On the other
[*146] hand, there are some disadvantages *attending the action on the case, on account of the generality of the pleadings, and of the circumstance of the general issue being the usual plea, which puts the plaintiff on proof of the whole of the allegations in his declaration, and leaves the defendant at liberty to avail himself of any matter of defence at the trial, without apprizing the plaintiff by his plea of the circumstances on which it is founded. Thus where cattle of the defendant have trespassed in the plaintiff's land, in consequence of the defendant's neglect to repair his fences, the plaintiff has an election to proceed in case, or

(*a*) Com. Dig. Action upon Statute, C.

(*b*) Massey *v.* Johnson, 12 East, 67.

(*c*) Ante, 105.—Fleming *v.* Bailey, 5 East, 313.

(*d*) Com. Dig. Action, M.

(*e*) Savignac *v.* Roome, 6 T. R. 129.

(*f*) Parker *v.* Norton, 6 T. R. 695.

(*g*) Huddersfield Canal Com. *v.* Buckley, 7 T. R. 36.—Govett *v.* Radnidge et al., 3 East, 70. but see Powell *v.* Layton, 2 New Rep. 365.—Max v. Roberts et al, 2 New Rep. 454.—S. C. 12 East, 94.—Weall *v.* King & another, 12 East, 454.

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(76) Acc. *Almy* v. *Harris*, 5 *Johns. Rep.* 175. *Farmer's Turnp. Company v. Coventry*, 10 *Johns. Rep.* 389. *Scidmore* v. *Smith*, 13 *Johns. Rep.* 322.

(77) Vide ante, 41. n. 92.

(78) Vide ante, 2. n. 1.

in trespass(*h*), or to distrain; if the real damage exceed 40*s*. so as to carry full costs, an action of trespass may be advisable in preference to an action on the case, in order that the trial may be upon some particular point in issue(*i*), narrowing the evidence more than in the action on the case; and it is not advisable to distrain, where the title to the *locus in quo* is doubtful, but the party should proceed by action of trespass, or on the case(*k*), and the same observations are applicable where a right of common is in dispute(*l*). I. On the case.

The *declaration* in an action on the case, ought not in general to state the injury to have been committed *vi et armis*, nor should it conclude *contra pacem*(*m*); in which respects it principally differs from the declaration in trespass. In other points the form of the declaration depends on the particular circumstances on which the action *is founded, [*147] and consequently there is greater variety in this than any other form of action. The leading rules will be stated when we inquire into the form of the declaration in general. The *plea* in this action is usually the general issue, not guilty; and under it (except in an action for slander and a few other instances) (*n*) any matter may be given in evidence, but the statute of limitations. The *judgment* is, that the plaintiff recover a sum of money, ascertained by a jury, for his damages sustained by the committing of the grievances complained of, and full *costs* of suit; to which the plaintiff is entitled, although he recover a verdict for less than 40*s*. damages(*o*); unless the judge certify under the stat. 43 Eliz. c. 6.(*p*), a circumstance which we have already observed frequently renders this action preferable to that of trespass.

II. TROVER.

The action of *trover* and *conversion* was in its origin an action of trespass on the case for recovery of damages against a person who had *found* goods and refused to deliver them on demand to the owner, but *converted* them to his own use; from which word *finding*(*q*), the remedy is called *an action of trover. The circumstance of the defendant not being at liberty to wage his law in this action, and the less degree of certainty requisite in describing the goods, gave it so considerable an advantage over the action of detinue, that by a fiction of law, actions of trover were at length permitted to be brought against any person who had in his possession, by any means whatever, the personal property of another, and sold them or used them without the [*148] II. Trover.

(*h*) Star *v.* Rookesby, 1 Salk. 335.
(*i*) 2 Saund. 284. d.
(*k*) 1 Saund. 346. e. n. 2.
(*l*) Id. ibid.
(*m*) Com. Dig. Action on Case, C. 3. 4. A.
(*n*) 1 Saund. 130. n. 1.—Smith *v.* Richardson, Willes, 20.
(*o*) Ante.—Savignac *v.* Roome, 6 T. R. 129.—Tidd's Prac. 3d edit. 880.
(*p*) Tidd, 870.
(*q*) Or *trouver*, in French.

II. Trover. consent of the owner, or refused to deliver them when demanded. The injury lies in the conversion, which is the gist of the action, and the fact of the finding or trover is now immaterial, and not traversable(*r*); and it is for the recovery of damages to the value of the thing converted, and not the thing itself, which can only be recovered by action of detinue or replevin(*s*). Lord Mansfield thus defined this action(*t*): "In "*form* it (i. e. the trover) is a fiction; in *substance* it is a remedy to "recover the value of personal chattels wrongfully converted by ano- "ther to his own use; the form supposes that the defendant might "have come lawfully by it, and if he did not, yet by bringing this "action, the plaintiff waves the trespass; no damages are recoverable "for the act of taking; all must be for the act of converting. This is "the tort or *maleficium*, and to entitle the plaintiff to recover, two "things are necessary: 1st, property in the plaintiff; 2dly, a wrongful [*149] "conversion by the *defendant." We will consider this action with reference, 1st, to the thing converted; 2dly, the plaintiff's right or property therein: and 3dly, the nature of the injury, and by whom committed.

1st. The property affected. This action is confined to the conversion of some *personal chattel*, and it does not lie for injuries to land or other real property, even by a severance of a part from the freehold, unless there be also an asportation; and trespass, or case where the interest in the property is in reversion, are the only remedies(*u*). But if after the severance from the freehold, as in the case of trees,[79] the property severed be taken away, or if coals dug in a pit be afterwards thrown out, trover may be supported(*w*). It lies for money, though it be not in a bag, or otherwise distinguishable from other coin, because the thing itself is not to be recovered in this action, but merely damages for the conversion(*x*), and where money has been paid by a debtor, in contemplation of his bankruptcy, by way of fraudulent preference to his creditor, it has been thought that the assignees should proceed for the recovery thereof in trover, or by bill in equity, and not by action of assumpsit, for money

(*r*) 3 Bla. Com. 152, 3.—Mills *v.* Graham, 1 New Rep. 140.—Bul. N. P. 32.—Rackham *v.* Jesup et al., 3 Wils. 336.

(*s*) Id. ibid.—Kettle *v.* Bromsall, Willes, 120.

(*t*) Cooper *v.* Chitty, 1 Burr. 31.—S. C. 1 Bla. Rep. 67, 8.

(*u*) Wood *v.* Smith, Cro. Jac. 129.—Mires *v.* Solebay, 2 Mod. 242.—Bul. N. P. 44.—Bac. Ab. Trover, B.—Nibblet *v.* Smith, 4 T. R. 504, 5.—Co. Lit. 145.—Hullock's Law of Costs, 64 to 90.

(*w*) Skidnes *v.* Huson, Noy, 125.—Sir W. Jones, 245.—Rackham *v.* Jesup et al., 3 Wils. 336.—Gordon *v.* Harper, 7 T. R. 13.—Com. Dig. Biens, H.—Bac. Ab. Trover, B.—Bul. N. P. 44.—Mires *v.* Solebay, 2 Mod. 244.

(*x*) Vin. Ab. Action Trover, K.—Bac. Ab. Trover, D.

(79) Vide *Davies* v. *Connop*, *Price's Exch. Rep.* 57. Trover lies against an outgoing tenant, for corn cut by him after the expiration of his term, though sown by him before that time, under the notion of being entitled to an away-going crop. *Davies* v. *Connop*, *Price's Exch. Rep.* 53.

had and received, because by adopting the latter form of action, they might enable the defendant to avail himself of his original debt as a set-off(*y*); but this seems incorrect(*z*). But *trover is preferable on this account, where the defendant has converted the produce of a bill, &c. and has become bankrupt, and obtained his certificate(*z*). In other respects, trover in general lies for the conversion of any personal property in which the plaintiff has a general or special property(*a*); but it does not lie for the conversion of a record, because a record is not private property; but it may be supported for the copy of a record, which is private property(*b*).[80] II. Trover. [*150]

In order to support this action, the plaintiff must at the time of the conversion have had a *property* in the chattel either *general* or *special*(*c*);[81] he must also have had the *actual possession* or the *right* to *immediate possession*,[82] and therefore where goods leased as furniture with a house, were wrongfully taken in execution by the sheriff, it was decided that the landlord could not maintain trover against the sheriff pending the lease, but should have declared specially in an action on the case(*d*); but a landlord has such an implied possession of timber wrongfully cut down during a lease as to enable him to support trover if it be removed(*e*). The person who has the absolute or general property in a personal chattel may support this action, although he has never had the actual possession; for it is a rule of law, that the general property of personal *chattels creates a constructive possession(*f*); [*151] 2dly, The plaintiff's interest.

(*y*) Smith et al. *v.* Hodson, 4 T. R. 211.—Nixon et al. *v.* Jenkins, 2 H. Bla. 135.

(*z*) Hunter *v.* Prinsep & others, 10 East, 378.—Thomason & others *v.* Frere & others, 10 East, 418.

(*z*) Parker *v.* Norton, 6 T. R. 695.

(*a*) For what it lies in general, see Com. Dig. Action, Case, Trover, C.—Bac. Ab. Trover, D.—Vin. Ab. Action, Trover, K.—Bul. N. P. 32 to 49.

(*b*) Jones *v.* Winckworth, Hardr. 111.

(*c*) 2 Saund. 47. a. n. 1.—Pyne *v.* Dor, 1 T. R. 56.

(*d*) Gordon *v.* Harper, 7 T. R. 9.—Bedingfield *v.* Onslow, 3 Lev. 209.

(*e*) Gordon *v.* Harper, 7 T. R. 13.—1 Saund. 322. n. 5.—Com. Dig. tit. Bien, H.—Evans *v.* Evans, 2 Campb. 491.

(*f*) 2 Saund. 47. a. n. 1.—Bac. Ab. Trover, C.—Rackham *v.* Jesup et al., 3 Wils. 336.

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(80) As to trover for the title deeds of an estate, bonds, bills of exchange, &c. see *Yea* v. *Field*, 2 *Term Rep.* 708. *Toule* v. *Lovett*, 6 *Mass. Rep.* 394. *Arnold* v. *Jeffreyson*, 2 *Salk.* 654. *Goggesley* v. *Cuthbert*, 2 *New Rep.* 170. *Benjamin* v. *Bank of England*, 3 *Campb* 417. *Mercer* v. *Jones*, *Id.* 477. *Todd* v. *Crookshanks*, 3 *Johns. Rep.* 432. *Murray* v. *Burling*, 10 *Johns. Rep.* 172. *Clowes* v. *Hawley*, 12 *Johns. Rep.* 484.

(81) When on a sale of goods the property vests in the purchaser so that he may maintain trover against the vender, see *Selw. N. P.* 1269, 1270. 2 *Esp. Dig.* 40 *Owenson* v. *Morse*, 7 *Term Rep.* 60 *Hanson & another* v. *Meyer*, 6 *East's Rep.* 614. *Whitehouse & others* v. *Frost & others*, 12 *East's Rep.* 614. *Austen* v. *Craven*, 4 *Taunt.* 644. Further as to the property in the plaintiff requisite to support this action, see *Hunter* v. *Rice*, 15 *East's Rep.* 100. *Heyl* v. *Burling*, 1 *Caine's Rep.* 14 *Hostler's Adm'rs.* v. *Skull*, *Taylor*, 152. *Floyd* v. *Day*, 3 *Mass. Rep.* 403.

(82) Vide *Smith* v. *Plomer*, 15 *East's Rep.* 607.

II. TROVER. and where a person has delivered goods to a carrier or other bailee, who has not the right to withhold the possession from the general owner, and so parted with the actual possession, yet he may maintain trover for a conversion by a stranger,[83] for the owner has still the possession in law against a wrong doer, and the carrier or other bailee is considered merely as his servant(*g*); and an executor or administrator is by legal construction possessed of the goods of the testator, or intestate from the time of his death(*h*). So a person, having a special property in the goods, may support trover against a stranger, who takes them out of his actual possession, as a sheriff(*i*),[84] a carrier(*k*), a factor, consignee, pawnee, or trustee, or an agister of cattle, or any other person who is responsible over to his principal(*l*); but a mere servant cannot support this action(*m*).[85] In general also a special property is sufficient to support trover against a stranger, who has no better title, and the bare possession of goods whether lawfully obtained or not, is *prima facie* evidence of property(*n*); and a party entitled to the temporary possession may support trover against the general owner(*o*). In general it has been considered that in the case of a special property, it must have been accompanied with possession[86] in order to support trover(*p*): [*152] but where the person having *such special property, has also an interest in the goods, there are exceptions; and therefore it was observed by Eyre, Ch. J.(*p*) that it is not true that in cases of special property the party must once have had possession in order to maintain trover; for a factor to whom goods have been consigned and who has never received them, may maintain such an action. However, without such absolute or special property, this action cannot be maintained; therefore as we have seen, trover cannot be supported by a party in a suit for a record(*q*), nor can a tenant in tail expectant on the determination

(*g*) Dewell *v.* Moxon & another, 1 Taunton, 391.—Gordon *v.* Harper, 7 T. R. 12.—2 Saund. 47. b.

(*h*) Gordon *v.* Harper, 7 T. R. 13—Hudson *v.* Hudson, Latch. 214.—2 Saund. 47. b. 47. k.

(*i*) Wilbraham *v.* Snow, 2 Saund. 47.

(*k*) 1 Roll. Ab 4.—Arnold *v.* Jefferson, 1 Ld. Raym. 276—Bul. Ni. Pri. 33.

(*l*) 2 Saund. 47. b.—Stirling *v.* Vaughan, 11 East, 626.

(*m*) Bloss *v.* Holman, Owen 52.—Waring *v.* Cox, 1 Campb. 369.

(*n*) 2 Saund. 47. c. and d.—Graham *v.* Peat, 1 East, 244.

(*o*) Roberts *v.* Wyatt, 2 Taunton, 268.

(*p*) Coxe et al. *v.* Harden et al., 4 East, 214.

(*p*) Fowler *v.* Downe, 1 Bos. and Pul. 47.—2 Saund. 47 d.—See Bac. Ab. Trover, C.—Craufurd *v.* Hunter, 8 T. R. 22. Quære, see Stirling & others *v.* Vaughan, 11 East, 626.

(*q*) Ante, 150.

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(83) Acc. *Thorp* v. *Burling and others*, 11 *Johns. Rep.* 285. Vide ante 77. n. 162.

(84) Vide *Barker & another* v. *Miller*, 6 *Johns. Rep.* 195. *Catlin* v. *Jackson*, 8 *Johns. Rep.* 548. *Hotchkiss* v. *M'Vickar*, 12 *Johns. Rep.* 403.

(85) Ante 48. *Ludden* v. *Leavitt*, 9 *Mass. Rep.* 104.

(86) Vide *Hotchkiss* v. *M'Vickar*, 12 *Johns. Rep.* 407. Thus a sheriff cannot maintain trover before he has levied on the goods; for until then they are not in his actual possession. *Hotchkiss* v. *M'Vickar*, 12 *Johns. Rep.* 403.

of an estate for life, without impeachment of waste, bring trover for timber which grew upon and was severed from the estate; for such a tenant for life has a right to the trees immediately, when they are cut down(*r*); and the plaintiff must not only prove that the goods which are the subject of the action are his property, but also that they were so when they were converted(*s*). In the case of a general as well as special property, the action may in most cases be brought either by the general or special owner, and judgment obtained by one is a bar to an action by the other(*t*).[87] II. TROVER.

With respect to the nature of the *injury*, we have already seen that a *conversion* is essential to the support of this action(*u*). It would be foreign to our present inquiry into the application *of the action of trover, to state minutely the different instances of conversions.(*w*) They may be either, 1st, by a *wrongful taking* a personal chattel; 2dly, by some other illegal assumption of ownership, or by illegally *using* or *misusing* it; or, 3dly, by a *wrongful detention*. 3dly, The injury. [*153]

The *wrongful taking* of the goods of another who has the right of immediate possession is of itself a conversion, and whenever trespass will lie for taking goods of the plaintiff wrongfully, trover will also lie(*x*): and if goods be wrongfully seized as a distress, though they be not removed from the place in which they were, yet trover may be supported, because the possession in point of law is changed by their being seized as a distress.(*y*) And this action may be supported after an acquittal of the defendant for the felonious taking of goods(*z*). In the case of a conversion by wrongful taking, it is not necessary to prove a demand and refusal(*a*).

So the *wrongful assumption of the property* and right of disposing of goods may be a conversion in itself, and render a demand and refusal unnecessary(*b*).[88] Thus a sale of a ship, which was afterwards lost at

(*r*) Pyne *v.* Dor, 1 T. R. 55.

(*s*) Horwood *v.* Smith, 2 T. R. 750.

(*t*) Ante, 48.

(*u*) Ante, 148.—2 Saund. 47. e.—Cooper et al. *v.* Chitty et al., 1 Burr, 31.—S. C. 1 Bla. Rep. 67, 8.

(*w*) See the instances, Bac. Ab. Trover, B.—2 Saund. 47. e.

(*x*) Rackham *v.* Jesup, 3 Wils. 332. Cooper *v.* Monke et al., Willes, 55.—2 Saund. 47. k.

(*y*) Cooper *v.* Monke et al., Willes, 56.

(*z*) Crosby *v.* Leng, 12 East, 409.

(*a*) Bruen *v.* Roe, 1 Sid. 264.—Baldwin *v.* Cole, 6 Mod. 212.—Bul. Ni. Pri. 44.

(*b*) Bloxam et al. *v.* Hubbard, 5 East, 407.—M'Combie *v.* Davies, 6 East, 540.

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(87) In this action the defendant may shew title in a stranger paramount to that of the plaintiff. *Kennedy* v. *Strong*, 14 *Johns Rep.* 132.

(88) Vide *Bristol* v. *Burt*, 7 *Johns. Rep.* 254. *Gibbs* v. *Chase*, 10 *Mass. Rep.* 128. An admission by the defendant that he had had the goods of the plaintiff, and that they were lost, is sufficient evidence of a conversion without shewing a demand and refusal. *La Place* v. *Aupoix*, 1 *Johns. Cas.* 406. Proof that the defendant promised to return the goods to the plaintiff, and that he had not returned them, is sufficient evidence of a conversion without shewing a demand and refusal. *Durell* v. *Mosher*, 8 *Johns. Rep.* 445.

II. TROVER. sea, made by the defendant, who claimed under a defective conveyance from a trader before his bankruptcy, is a sufficient conversion to enable the assignees of the bankrupt to maintain trover without shewing a demand and refusal(c): so where a person intrusted with the *goods of [*154] another, puts them into the hands of a third person, without orders, it is a conversion(c):[89] and where a carrier by mistake delivered goods to a wrong person, it was decided that trover might be supported, though it would have been otherwise had they been lost by accident(d): and if a person illegally make use of a thing found or delivered to him, it is a conversion in itself(e);[90] or if a bailee, merely to keep or carry, and having no beneficial interest, misuse a chattel intrusted to him(f); as if a carrier draw out part of the contents of a vessel, and fill it with water(g), or if a carrier or wharfinger break open a box containing goods, or sell them(h). So an irregularity in a distress taken damage feasant may amount to a conversion(i), though not in the case of a distress for rent, when trover cannot be supported(k): and we have seen that a party will be personally liable for a conversion to the use of another(l). But unless there be an illegal assumption of property, trover cannot in general be supported for a mere nonfeazance(m); and therefore if a carrier or other bailee by negligence lose goods intrusted to his care, the remedy in general must be case or assumpsit(n).[91]

In the preceding instances proof of the act of the defendant is sufficient without evidence of a *demand and refusal; but where the plaintiff is not prepared to prove some such actual assumption of property, trover cannot be supported without proof of a demand and refusal, or at least a neglect to deliver the goods(o); and where a trader, on the eve of his bankruptcy, made a collusive sale of his goods to the defendant,

[*155]

(c) Bloxam et al. v. Hubbard, 5 East, 407. 420.

(c) Syeds v. Hay, 4 T. R. 264. 260.

(d) Youl v. Harbottle, Peake, C. N. P. 49.—Ross v. Johnson et al., 5 Burr, 2825. see Dewell v. Moxon & another, 1 Taunton, 391.—Attersol v. Briant, 1 Campb. 409.—Smith v. Young, 1 Camp. 439.

(e) Mulgrave v. Ogden, Cro. Eliz. 219.

(f) Id. ibid.

(g) Richardson v. Atkinson, 1 Stra. 576.

(h) Anon. 2 Salk. 655.

(i) Bagshawe v. Goward, Cro. Jac. 148. Bac. Ab. Trover, B.

(k) Wallace v. King et al., 1 Hen. Bla. 13.

(l) Ante, 72.

(m) M'Combie v. Davies, 6 East, 540.

(n) Ross v. Johnson et al., 5 Burr, 2825.—2 Saund. 47. e.—Youl v. Harbottle, Peake, C. N. P. 49.

(o) Bul. Ni. Pri. 44.—2 Saund. 47. e. By whom demand may be made, May & another v. Harvey, 13 East, 197.—Smith v. Young, 1 Campb. 439.

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(89) As where a factor pledges the goods of his principal for his own debt. *Kennedy* v. *Strong*, 14 *Johns. Rep.* 128.

(90) Vide *Murray & Ogden* v. *Burling*, 10 *Johns. Rep.* 172.

(91) If a broker, being authorized to sell goods for a certain price, sell them at an inferior price, he is not liable in trover for the amount of the goods, but the proper remedy is case. *Dufresne* v. *Hutchinson*, 3 *Taunt.* 117. *Cairnes & Lord*, v. *Bleecker*, 12 *Johns. Rep.* 300.

it was decided that the assignees could not maintain trover without proving a demand and refusal(*p*). Such a demand and non-compliance are *prima facie* evidence of a conversion, and will induce a jury to find it, unless the defendant adduce evidence to negative the presumption, as that he being a carrier, &c. lost the goods by negligence, &c.(*q*). When it is doubtful whether the evidence will establish a conversion so as to support a count in trover, a count in case for negligence, &c. should be added, if there be any proof to support it(*r*). If there have been a conversion, trover lies, although the goods converted be afterwards restored to the owner, for the restoration only goes in mitigation of damages(*s*).[92]

In considering the *parties* to an action *ex delicto*, we have necessarily seen who are to sue and be sued in an action of trover either as between tenants in common, or husband and wife, &c.(*t*); and it is only necessary here to observe, that one joint-tenant or tenant in common or parcener cannot support trover against his co-tenant, *unless the [*156] latter have *destroyed* the chattel(*v*).

We have seen that for a wrongful taking in general, trover is a concurrent remedy with trespass(*w*); but the converse does not hold, for trover may often be brought where trespass cannot; as where goods are lent or delivered to another to keep, and he refuse to deliver them on demand, trespass does not lie, but the proper remedy is trover(*x*). So where the taking is lawful or excusable, trespass cannot be supported, and the action must be trover; as where a sheriff, after a secret act of bankruptcy, levies goods under an execution against the bankrupt(*y*).

The *declaration*(*z*) in this action should state that the plaintiff was possessed of the goods (avoiding repetition and unnecessary description) *as of his own property*, and that they came to the defendant's possession by *finding*; but the omission of the former words is not material after verdict(*a*): and the finding is not traversable(*b*). As the

(*p*) Nixon et al. *v.* Jenkins, 2 Hen. Bla. 135.

(*q*) Bul. Ni. Pri. Pri. 44.—2 Saund. 47. e.—Peake's Law of Evidence, 298.

(*r*) See the precedent, post. 2 Vol. 319.

(*s*) 2 Rol. Ab. 5. pl. 1.—Baldwin *v.* Cole, 6 Mod. 212.—Bul. Ni. Pri. 46.—Bac. Ab. Trover, D. Accord. A.

(*t*) Ante, 66, 82.

(*v*) Ante, 66.—Fennings & others *v.* Lord Grenville, 1 Taunton, 241.—Bul. N. P. 34.—2 Saund. 47. f. g.—Heath *v.* Hubbard, 4 East, 121.

(*w*) Ante, 153.

(*x*) Put et al. *v.* Rawsterne et al., Sir Tho. Raym. 472.—Lechmere *v.* Toplady, 2 Vent. 170.

(*y*) Cooper et al. *v.* Chitty et al., 1 Burr. 20.—Smith et al. *v.* Milles, 1 T. R. 475.—2 Saund. 47. k. l.

(*z*) See the precedents, Post. 2 Vol. 370. 377.

(*a*) Maynard *v.* Bassett, Moor, 691. Jones *v.* Winckworth, Hardr. 111.—Hudson *v.* Hudson, Latch. 214.—2 Saund. 47. k.

(*b*) Ante, 148.—Mills *v.* Graham, 1 New Rep. 140.

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(92) Vide *Murray* v. *Burling*, 10 *Johns. Rep.* 172. *Bristol* v. *Burt*, 7 *Johns. Rep.* 154. *Shotwell* v. *Wendover*, 1 *Johns. Rep.* 65.

II. TROVER. *conversion* is the gist of the action, it must necessarily be stated in the declaration. The usual *plea* is the general issue, not guilty of the premises(*c*): the points relating to the pleadings in this action will be [157*] more fully stated hereafter. *The *judgment* is for *damages* and *full costs*, to which the plaintiff is entitled, though he recover less than *forty shillings* damages(*d*), unless the judge certify under the statute of Elizabeth(*e*).

III. REPLEVIN(*a*).

III. REPLEVIN. Where goods have been illegally distrained, and in some other instances, the owner may regain possession by a writ of replevin out of Chancery, or (which is now most usual) by plaint or application to the sheriff, finding pledges to prosecute an action against the distrainer to try the legality of the distress; and that if the right be determined against the plaintiff, he will return the chattels;[93] and in the case of a distress for rent, also giving a bond, with two sureties, to the same effect(*b*).

The action of replevin, it is said, is of two sorts, in the *detinet*, or the *detinuit*: the former where goods are still detained by the person who took them, to recover the value thereof and damages; and the latter, as the word imports, when the goods have been delivered to the [*158] party(*c*). But the former is now obsolete, and according to *a late case, there does not appear, in any of the books, any proceeding in replevin which has not commenced by writ, requiring the sheriff to cause the goods of the plaintiff to be replevied to him, or by the plaint in the sheriff's court, the immediate process upon which, is a precept to replevy the goods of the party levying the plaint, both which modes of proceeding are *in rem*, *i. e.* to have the goods again(*d*); and therefore replevin is not an action within the statute 24 Geo. 2. c. 44. which

(*c*) Bul. N. P. 48.

(*d*) Brown *v.* Taylor, 3 Keb. 31.—Vin *v.* Philips, 1 Salk. 208.

(*e*) 43 Eliz. c. 6.

(*a*) From *re* and *plegiare*, Co Lit. 145. b.

(*b*) 3 Bla. Com. 147, 8.

(*c*) 1 Saund. 347. b. n. 2.—Bul. N. N. P. 52.—Pearson *v.* Roberts et al., Willes, 672.—Com. Dig. Pleader, 3 K. 10.

(*d*) Per Ld. Ellenborough, Ch. J.—Fletcher *v.* Wilkins et al., 6 East, 286.

(93) The action of replevin is grounded on a tortious taking, and it sounds in damages like an action of trespass, to which it is extremely analogous, if the sheriff has already made a return, and the plaintiff goes only for damages for the caption. *Hopkins* v. *Hopkins*, 10 *Johns. Rep.* 373.

III. REPLEVIN.

protects constables, &c. acting under a magistrate's warrant, from any action, until demand made or left at their usual place of abode, &c. by the party intending to bring such action(*e*). In the present action in the *detinuit*, the plaintiff can only recover damages for the taking of the goods, and for the detention till the time of the replevy, and not the value of the goods themselves(*f*). We will consider this action with reference, 1st, to the thing taken; 2dly, the property therein; and 3dly, the nature of the injury.

1st. The property affected.

Replevin can only be supported for taking a *personal chattel*, and not for an injury to matter affixed to the freehold, in which case the remedy should be trespass, or, if the interest be in reversion, case(*g*).

2dly, The plaintiff's interest.

To support replevin, the plaintiff must, at the time of the caption, have had either the *general property*, or a *special property*, as the bailee of goods, as a pawn, or to be used by him(*h*);[94] and several persons, having separate interests in the property distrained, cannot join in this action(*i*); but joint-tenants and tenants in common[95] may and should join(*k*); and if the cattle of a feme sole be taken, and she afterwards intermarry, the action of replevin should be in the name of the husband alone(*l*); and executors may have replevin of a taking *in vita testatoris*(*m*). The defendant cannot, however, under the general issue *non cepit*, dispute the plaintiff's property,[96] which must be denied by special plea(*n*). If the plaintiff has not the immediate right of possession, replevin cannot be supported, but the party must proceed by action on the case(*o*).

[*159]

3dly, The injury.

With respect to the nature of the *injury*, it is said that replevin lies only in one instance of an unlawful taking, that of a wrongful *distress*(*p*); but upon investigation it will appear that this action is not thus limited, and that if goods be taken illegally, though not as a distress, replevin may be supported(*q*);[97] though, as it has been observed, reple-

(*e*) Fletcher *v.* Wilkins et al., 6 East, 283.
(*f*) 1 Saund. 347. b. n. 2.—Petree *v.* Duke, Lutw. 1150, 1.
(*g*) Niblet *v.* Smith, 4 T. R. 504. Not for money, Moore, 394.
(*h*) Co. Lit. 145. b.
(*i*) Id. ibid. ante, 52.
(*k*) Bul. N. P. 53.—Ante, 51, 2.
(*l*) Ante, 62.—Bul. N. P. 53.
(*m*) Bul. N. P. 54.
(*n*) Id. ibid.
(*o*) Gordon *v.* Harper, 7 T. R. 9.
(*p*) 3 Bl. Com. 146.
(*q*) Ex parte Chamberlain, 1 Scholes & Lefroy, 320.—Shannon *v.* Shannon, 1

(94) But a deposit by a person who has himself no property in the goods, does not give the depositary any right to replevy them; and it seems very questionable, whether on a mere naked bailment for safe-keeping, the bailee can maintain replevin. *Harrison* v. *M'Intosh*, 1 *Johns. Rep.* 380.

(95) Vide *Hart* v. *Fitzgerald*, 2 *Mass. Rep.* 509, that replevin will not lie for part of a chattel. See also *ante*, 53. n. 118. S. C. *Gardner* v. *Dutch*, 9 *Mass. Rep.* 427.

(96) Nor will the court, under such issue, permit the defendant to give special matter in evidence in justification. *M'Furland* v. *Barker*, 1 *Mass. Rep.* 153.

(97) Acc. *Pangburn* v. *Patridge*, 7 *Johns. Rep.* 140. *Ilsley et al.* v. *Stubbs*, 5

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vin is now seldom brought but for distresses for rent, damage feasant, poor's rate, &c.(r). It may, certainly, be brought to try the legality of [*160] a distress for rent, provided *there were no sum whatever in arrear(s); but if any sum, however small, were due, and the distress were for a greater sum, or excessive, or otherwise irregular, the remedy must be by action on the case(t). Replevin lies also for an illegal distress taken damage feasant, and when the party in possession of the land has no title thereto, this action is preferable to trespass for seizing the cattle, in order to put in issue the title of the party distraining(v); so to try the legality of a distress for poor's rates(w), or for sewers' rates(x), or for a heriot, &c.(y). But if a superior court award an execution, it seems that no replevin lies for the goods taken by the sheriff by virtue of the execution;[98] and if any person should pretend to take out a replevin, the court would commit him for a contempt of their jurisdiction(z); and where goods are taken by way of levy, as for a penalty on a conviction under a statute, it is generally in the nature of an execution, and unless replevin be given by the statute, this action will not

Scholes & Lefroy, 324. Vin. Ab. Replevin, B. pl. 2.—Sir Wm. Jones, 173, 4.—6 Hen. 8. 8, 9.—Bishop v. Viscountess of Montague, Cro Eliz. 824.—Bishop & Jurdain v. Viscountess of Montague, Cro. Jac. 50.—Com. Dig. Action, M. 6. Co. Lit. 145. b.

(r) Com. Dig. Action, M. 6.

(s) 5 T. R. 248. n. c.—Cobb v. Bryan, 3 Bos. & Pul. 348.

(t) Ante, 140

(v) 1 Saund. 346. e. n. 2.

(w) Dewell v. Marshall, 3 Wils. 442. Herbert v. Waters, 1 Salk. 205.—Fletcher v. Wilkins et al., 6 East, 283. Milward v. Caffin, 2 Bla. Rep. 1330.—Hutchins v. Chambers et al., 1 Burr. 585.—Willes, 672. n. b.

(x) Pritchard v. Stephens, 6 T. R. 522.—Papillon v. Buckner et al., Hardr. 478.—Com. Dig. Pleader, K. 26.—Willes, 672. n. b.

(y) Bishop & Jurdain v. Viscountess Montague, Cro Jac. 50.

(z) Gilb. Repl. 161.—Willes, 672. n. b.—Winnard v. Foster, 2 Lutw. 1191. Aylesbury v. Harvey, 3 Lev. 204.—Rex v. Monkhouse, 2 Stra. 1184.

Mass. Rep. 283, 284. Replevin is in general a co-extensive remedy with trespass de bonis asportatis. *Pangburn* v. *Patridge*, 7 *Johns. Rep.* 143. *Thompson* v. *Button*, 14 *Johns. Rep.* 87.

(98) But it has been held, in Pennsylvania, that although replevin was prohibited by a statute of their legislature to be brought against a sheriff who has taken goods in execution, yet that after the sale, a person claiming property in the goods might maintain this action against the sheriff's vendee. *Shearick* v. *Huber*, 6 *Binney*, 2. In Massachusetts an action of replevin is allowed, by statute, to be brought for goods taken in execution, provided the plaintiff in replevin be not the debtor; but Parsons, Ch. J. observes, that this alteration of the common law has been productive of much practical inconvenience. *Ilsley et al.* v. *Stubbs*, 5 *Mass. Rep.* 280. 283 In a late case in the state of New York, it was held, that although the defendant in the execution could not himself maintain replevin, yet that the action might be brought by a third person against the sheriff: for, if an officer having an execution against A, undertake to execute it upon goods in the possession of B, he assumes upon himself the responsibility of showing that such goods were the property of A, and if he fail to do this, he is a trespasser by taking them. *Thompson* v. *Button*, 14 *Johns. Rep.* 84.

lie, the conviction being conclusive, and its legality not questionable in replevin(*a*); but where a special inferior jurisdiction is given to justices, &c. and they exceed it, in some cases replevin lies(*b*).

*In this action both the plaintiff and defendant are considered as actors, the defendant in respect of his having made the distress (being a claim of right, and the avowry in the nature of a declaration)(*c*), and the plaintiff in respect of his action; on which ground principally the distinctions between the pleadings in this action and in that of trespass depend(*d*). [*161]

The *declaration* in this action, which is local,[99] requires certainty in the description of the place[100] where the distress was taken(*e*); and the goods also must be described with certainty, though the same strictness does not prevail as formerly(*f*). Where the distress was taken for rent, a general *avowry* is given by statute(*g*);[101] but in avowries for distresses, taken damage feasant, more certainty is necessary than in a justification in trespass, as the defendant cannot, in the former, rely on mere possession of the *locus in quo*, but must state his title(*h*).[102] The plaintiff cannot *plead in bar de injuria* generally,[103] but must take issue upon some particular allegation in the avowry(*i*). The statute of Anne(*k*) provides that the plaintiff in replevin, in any court of record, may, with leave of the court, plead several pleas in bar,[104] which frequently renders this action preferable to trespass or any other action, in which the plaintiff can have but one replication *to each plea. The other particulars of the pleadings in this action will be stated hereafter. The *judgment* for the plaintiff is, that he recover his damages on occasion of the taking and unjustly detaining the cattle, &c.; together with *full* costs of suit, to which the plaintiff is entitled, though he recover less than 40s. damages, unless the judge certify under the 43 Eliz. Ch. 6. The judgment for the avowant, or person making cognizance, va- [*162]

(*a*) Fenton *v.* Boyle et al., 2 New Rep 399. Com. Dig. Action, M. 6.—Willes, 673. n. b.

(*b*) Willes, 672. n. b.

(*c*) English *v.* Burrell et al., 2 Wils. 260, 1.—1 Saund. 347. n. 7.—Lambert *v.* Strother, Willes, 221.

(*d*) 1 Saund. 347. c. n. 3.

(*e*) See the precedents, Post. 2 Vol. 411, 412

(*f*) 2 Saund. 74. b.

(*g*) 11 Geo. 2. c. 19 s. 22.—2 Saund. 284. c. n. 3.

(*h*) Hawkins *v.* Eckles et al., 2 Bos. & Pul. 359.—1 Saund. 347. n. 3

(*i*) Jones *v.* Kitchin, 1 Bos. & Pul. 76.

(*k*) 4 Anne. c. 16. s. 4.

(99) Vide *Robinson* v. *Mead*, 7 *Mass. Rep.* 353.

(100) Vide *Gardner* v. *Humphrey*. 10 *Johns. Rep.* 53.

(101) The provision in the statute 11 Geo. 2. c 19. s. 22. has never been adopted in the State of New York. *Harrison* v. *M'Intosh*, 1 *Johns. Rep.* 384.

(102) Acc. *Hopkins* v. *Hopkins*, 10 *Johns. Rep.* 369. So, at common law, where the defendant avows for rent arrear. *Harrison* v. *M'Intosh*, 1 *Johns. Rep.* 380.

(103) Acc. *Hopkins* v. *Hopkins*, 10 *Johns. Rep.* 369.

(104) See *Laws N. Y. Act for the amendment of the law.* 1 R. L. 519.

III. REPLEVIN. ries in differenl cases; it may be at common law *pro retorno habendo*, or founded on the statutes Hen. 8. or Car. 2.(z)[105]

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IV. TRESPASS. The term *trespass*[106] in its most extensive signification, includes every description of *wrong*(a), on which account an action on the case has been usually called "trespass on the case;" but technically, it signifies an injury committed *vi et armis*, the meaning of which words is explained in Co. Lit.(b). The action of *trespass* only lies for injuries committed with force, and generally only for such as are immediate(c). Force we have seen may be either actual or implied; and the distinctions between immediate and consequential injuries have already been considered(d). The words *contra pacem* should uniformly accompany [*163] the allegation of the injury, and in some cases are *material to the foundation of the action; thus an action of trespass to land not within our king's dominions, cannot be sustained(e), and it has been doubted whether trespass for an assault committed out of the king's dominions, as in France, can be supported(f); though as the fine, in strictness of law payable to the king for the violation of the public peace, is no longer regarded(g), and the words *contra pacem* are not traversable(h); it should seem that an action for such injury might be supported. The intention of the wrong doer is immaterial in this action(i), and where the defendant has been acquitted of a felony he may be sued for the trespass(j).[107]

(z) See the cases in 1 Saund. 195. n. 3.—2 Saund. 286. n. 5.

(a) Wilson *v.* Knubley, 7 East, 134, 5. Co. Lit. 57. a.

(b) 161. b.—3 Bla. Com. 118. 398, 9.

(c) Ante, 122, 3, 4, 5.

(d) Id. ibid.

(e) Doulson *v.* Matthews et al. 4 T. R. 503.—Rafael *v.* Verelst, 2 Bla. Rep. 1058.

(f) Mostyn *v.* Fabrigas, Cowp. 176. Rafael *v.* Verelst, 2 Bla. Rep. 1058.—Finch, L. 198.

(g) 3 Bla. Com. 118. 399.

(h) Com. Dig. Pleader, 3 M. 8.—Vin. Abr. Trespass, Q. a.

(i) Covell *v.* Laming, 1 Campb. 497. Lotan *v.* Cross, 2 Campb. 465.—Leame *v.* Bray, 3 East, 593. But see the cases cited 1 Campb. 499. note Rogers *v.* Imbleton, 2 New R. 117.

(j) Crosby *v.* Leng, 12 East, 409.

(105) See *Laws of N. Y. sess.* 11. c. 5. *s.* 11. 1 *R. L.* 95. *Loomis* v. *Tyler*, 4 *Day*, 141.

(106) As to the history of this action, vide 1 *Reeve's Hist. E. L.* 338. 2 *Reeve's Hist. E. L.* 263. 266. 340. 347. 3 *Reeve's Hist. E. L.* 84. 89.

(107) Acc. *Smith* v. *Weaver*, *Taylor*, 58. And see *Laws of N. Y. sess.* 36. c. 8. *s.* 20. 1 R. L. 499. by which it is provided that the right of action of the party injured shall in no case be deemed, taken, or adjudged to be merged in the felony, or in any manner affected thereby.

This action cannot be sustained where the wrong complained of was a *nonfeazance*, as for not carrying away tithes, &c.(*k*) or where the matter affected was not tangible, and consequently could not be immediately injured by force, as reputation, health, &c.(*l*); or where the right affected is incorporeal, as a right of common or way, &c.(*m*); or where the plaintiff's interest is in reversion, and not in possession(*n*); or where the injury was not immediate but consequential(*o*).—We will consider the particular applicability of this remedy to the different injuries committed by force to the person, personal or real property; and as there are material distinctions between the remedy for these injuries when committed, under colour of suit or *process, and when not, we will consider the action of trespass under the following heads:— [*164]

I. When it lies for injuries not committed under colour of legal proceedings, - - - - - - - - - - - - - - *pages* 164 *to* 183.
  1. For the parties own act, - - - - - - - - *pl.* 164 *to* 180.
    1. Injuries to the person, - - - - - - *pl.* 164 *to* 165.
    2. To personal property, - - - - - - *pl.* 165 *to* 173.
    3. To real property, - - - - - - - *pl.* 173 *to* 180.
  2. For the acts of others, and of cattle, &c. - - *pl.* 181 *to* 183.

II. When tresspass lies for injuries under colour of legal proceedings(*p*). - - - - - - - - - - - - - - - *pages* 183 *to* 187.

FIRST, FOR INJURIES NOT UNDER PROCESS.

1st. Injuries to the person.

Trespass is the only remedy for a menace to the plaintiff, attended with consequent damages(*q*), and for an illegal assault, battery, and wounding, or imprisonment, when not under colour of process(*r*). It lies also when the battery, imprisonment, &c. were in the first instance lawful, but the party by an unnecessary degree of violence became a trespasser *ab initio*(*s*);[108] and for a wrongful imprisonment after the process is determined(*t*), or for an assault after an acquittal for a felonious assault and stabbing(*u*). So it lies for an injury to the relative rights occasioned by force, as for menacing tenants, servants, &c. and beating, wounding, and imprisoning a wife or servant(*w*), whereby the landlord, master, or servant, hath sustained a loss; though the injury, the loss of service, &c. were consequential, and not immediate; and it

(*k*) Ante, 124.
(*l*) Ibid.
(*m*) Ibid.
(*n*) Ward *v.* Macauley et al., 4 T. 489.—Gordon *v.* Harper, 7 T. R. 9.
(*o*) Ante, 121. 125, 6.
(*p*) Belk *v.* Broadbent et ux., 3 T. R. 185.
(*q*) 3 Bla. Com. 120.
(*r*) Bourden *v.* Alloway, 11 Mod. 180, 1.
(*s*) Com. Dig. Trespass, C. 2.—Bac. Ab. Trespass, B.
(*t*) Withers *v.* Henley, Cro. Jac. 379.
(*u*) Crosby *v.* Leng, 12 East, 409.
(*w*) Robert Mary's case, 9 Co. 113. James Osborne's case, 10 Co. 130.

(108) Vide *Pease* v. *Burt*, 3 *Day*, 485.

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2dly, To personal property. The action of trespass in its application to injuries to *personal* property, may be considered with reference, 1st, to the nature of the *thing* affected; 2dly, the plaintiff's *right* thereto; 3dly, the nature of the *injury*; and 4thly, the *situation* in which the *defendant* stood, as whether tenant in common, bailee, &c.

And *first*, as to the *nature of the thing affected:* trespass lies for taking or injuring all inanimate personal property and all domicile and tame animals, as dogs and cats(*y*); and all animals usually marketable, as parrots, monkeys, &c. and in which case it is not necessary to shew in the pleadings that they have been reclaimed(*z*); but in the case of a hawk, pheasant, hare, rabbit, fish, or other animals *feræ naturæ*, and not generally merchandizable, it should be shewn in the pleadings that the same were reclaimed or dead, or at least that the plaintiff was *possessed* [*166] of them(*a*). So it lies in some cases for *taking animals *feræ naturæ*, and not reclaimed; as if a hare or rabbit be *killed* on the land of another, he having a local property *ratione soli* in such hare or rabbit, may support trespass for taking it, though the wrong doer did not enter on the land(*b*);[109] and if game be started on the land of A, and pursued

(*x*) Rigant *v.* Gallisard, 7 Mod. 81. Galizard *v.* Rigault, 2 Salk. 552.—Macfadzen *v.* Olivant, 6 East, 387.

(*y*) F. N. B. 89.—Macfadzen *v.* Olivant, 6 East, 387.

(*z*) Weedon *v.* Timbrel, 5 T. R. 361. Rigant *v.* Gallisard, 7 Mod. 81.—Galizard *v.* Rigault, 2 Salk. 552.—20 Vin. Ab. 470.

(*a*) Bac. Ab. Trespass, C. 1.—Tullidge *v.* Wade, 3 Wils. 18, 19.—Woodard *v.* Walton, 2 New Rep. 476.

(*x*) Bennet *v.* Allcott, 2 T. R. 167, 8. 20 Vin. Ab. 470.—Macfadzen *v.* Olivant, 6 East, 387.—Post. 2 vol. 313. 319. but see Woodward *v.* Walton, 2 New Rep. 476.

(*y*) Wright *v.* Ramscot, 1 Saund. 84. n. 2, 3.—F. N. B. 86.—Bro. Tresp. pl. 407.—Edwards *v.* Engleton, Hob. 283. Ireland *v.* Higgins, Cro. Eliz. 125.—Grymes *v.* Shack, Cro. Jac. 262.—Athill *v.* Corbet, *ib.* 463.—Dand *v.* Sexton, 3 T. R. 37, 8.—See Toller's Law of Executors, 1st Edit. 112, where the particulars of personal property are stated.—Com. Dig. Trespass, A. 1.

(*z*) Grymes *v.* Shack, Cro. Jac. 262.

(*a*) Grymes *v.* Shack, Cro. Jac. 262. Sutton *v.* Moody, 1 Ld. Raym. 251.—Pollexfin et al. *v.* Crispin, 1 Ventr. 122 Fines *v.* Spencer, Dyer, 306. b.—Child *v.* Greenhill, Cro. Car. 554.—Bac. Ab. Trespass, E. 1. and title Trover, D.—Toller, 113.

(*b*) Sutton *v.* Moody, 2 Salk. 556.—S. C. 1 Ld Raym. 251.—Godb. 123.—F. N. B. 87.—Keble *v.* Hickringill, 11 Mod. 74.

(109) It seems that the owner of land may, in like manner, have a property *ratione soli* in bees, although they have not been hived or reclaimed by him. *Gillett* v. *Mason*, 7 *Johns. Rep.* 16.

and killed on the land of B, A may support trespass for taking the hare, if *he* also pursued the same, for by the pursuit he prevented an abandonment of his local property(*c*);[110] the same rules obtain in the case of fish(*d*). In actions of trespass for taking or killing animals *feræ naturæ* not reclaimed, it is advisable in pleading to state also an entry on the plaintiff's land(*e*); and it is said that trespass for killing rabbits without complaining of such entry cannot be supported(*f*).

Secondly, with respect to the *plaintiff's interest in the property affected*, he must at the time when the injury was committed, have had an *actual* or a *constructive possession*(*g*),[111] and also a general or qualified *property* therein, which may be either, 1st, in the case of the absolute or general owner entitled to immediate possession; 2dly, the qualified owner coupled with an interest, and also entitled to immediate possession(*h*); 3dly, a bailee with a mere naked authority unaccompanied with any interest except as to remuneration for trouble, *&c. but [*167] who is in actual possession; or 4thly, actual possession though without the consent of the real owner and even adverse.

In the *first* instance the person who has the absolute or general property may support this action, although he has never had the actual possession, or although he has parted with his possession to a carrier, servant, &c. giving him only a bare authority to carry or keep, &c. not coupled[112] with an interest in the thing(*i*), it being a rule of law that the

(*c*) Godb. 123.—Sutton *v.* Moody, Salk. 556.—Keble *v.* Hickringill, 11 Mod. 75.—Bac. Ab. Trespass, E.—Trover, D.—Burns's Jus. tit. Game III. 2 Vol. 388 as to pidgeons.

(*d*) Child *v.* Greenhill, Cro. Car. 554.

(*e*) 43 Edw. III. p. 24. 2.—Sutton *v.* Moody, 1 Ld. Raym. 250.—S. C. 2 Salk. 556.—Child *v.* Greenhill, Cro Car. 554. Fitz. N. B. 86, 87. M. n. a., A.—Keble *v.* Hickringill, 11 Mod. 74.

(*f*) 43 Edw. 3 p. 24. 2.—Fitz. N. B. 87. A. c.—Child *v.* Greenhill, Cro. Car. 553, 4.

(*g*) Smith et al. *v.* Mills, 1 T. R. 480.—Ward *v.* Macauley et al., 4 T. R. 490.—Gordon *v.* Harper, 7 T. R. 9.

(*h*) Ante, 150, 1.—Fowler v. Down, 1 Bos. & Pul. 44.—Gordon *v.* Harper, 7 T. R. 9.

(*i*) Gordon *v.* Harper, 7 T. R. 12.

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(110) If A starts a hare in the ground of B, and hunts it into the ground of C, and kills or catches it there, the property is in A, the hunter, who may maintain trespass against C for taking away the hare. *Sutton* v. *Moody*, 1 *Ld. Raym.* 250. S. C. 2 *Salk.* 556. *Churchward* v. *Studdy*, 14 *East's Rep.* 249. Mere pursuit of a wild animal does not, independent of title *ratione soli*, vest any property in the pursuer: manucaption is not, however, necessary; it is sufficient if the pursuer have rendered it impossible for the animal to escape. *Pierson* v. *Post*, 3 *Caine's Rep.* 175.

(111) Vide *Putnam* v. *Wyley*, 8 *Johns. Rep.* 432. *Carter* v. *Simpson*, 7 *Johns. Rep* 535. Hence, if a vessel has been seized by an officer of the customs as forfeited to the United States, and is afterwards acquitted, the owner cannot maintain trespass for an injury intermediate between the seizure and acquittal, since he has neither the actual possession, or the right to reduce her into possession. *Van Brunt* v. *Schenck*, 11 *Johns. Rep.* 377.

(112) Vide *Putnam* v. *Wyley*, 8 *Johns. Rep.* 435. *Williams* v. *Lewis*, 3 *Day*, 498. *Thorp* v. *Burling & others*, 11 *Johns. Rep.* 285. *East's P. C.* 564, 565.

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general property of personal chattels *prima facie*, draws to it the possession(*k*).[113] And this rule holds by relation, as in case of executors and administrators, &c. who may support trespass for an injury to personal property committed after the death of the testator, or intestate, and before probate or administration(*l*); so may a legatee after the executor has assented to the legacy, for a trespass committed before such assent(*m*). But if the general owner part with his possession, and the bailee at the time when the injury was committed have a right exclusively to use the thing, the inference of possession is rebutted, and the right of possession being in reversion, the general owner cannot support trespass,[114] but only an action on the case, for an injury done by a stranger while the bailee's right continued(*n*). Nor can the general owner in such case support this action even against such bailee for a mere abuse; though if a bailee *destroy* the thing, trespass may be supported if the *injury were forcible. [*168] If, however, the general owner merely permit another gratuitously to use the chattel, such owner may sue a stranger for an injury done it while it was so used(*o*).

In the *second* case also, that of the bailee who has an authority coupled with an interest, trespass may perhaps be supported, though he never had actual possession, for any injury done during his interest(*p*), as in the case of a factor,[115] or consignee of goods in which he has an interest in respect of his commission, &c.(*q*). A tenant for years has a qualified property in trees whilst growing, but when cut down he cannot support trespass for carrying them away(*r*).

In the *third* instance, that of a bailee, &c. with a mere naked authority coupled only with an interest as to remuneration, he may also support this action for any injury done while he was in the actual possession of the thing, as a carrier, factor, pawnee, a sheriff, &c.(*s*)[116] but it is otherwise in the case of a mere servant(*t*).

(*k*) 2 Saund. 47. a. b. d.—Fisher *v.* Young, 2 Buls. 268.—Gordon *v.* Harper, 7 T. R. 9.—Smith et al. *v.* Milles, 1 T. R. 480.

(*l*) Id. ibid.—Smith et al. *v.* Milles, 1 T. R. 480. Bac. Ab. Executors, H. 1.—2 Saund. 47. k.

(*m*) Bro. Ab. Trespass, pl. 25.

(*n*) Ward *v.* Macauley et al., 4 T. R. 489.—Gordon *v.* Harper, 7 T. R. 9.—Bedingfield *v.* Onslow, 3 Lev. 209.

(*o*) Lotan *v.* Cross, 2 Campb. 464.

(*p*) Ante, 151. 3.—Fowler *v.* Down, 1 Bos. & Pul. 44.—2 Saund. 47. d.

(*q*) George *v.* Clagett et al., 7 T. R. 359.—Grove et al. *v.* Dubois, 1 T. R. 113.—Williams *v.* Millington, 1 Hen. Bla. 81.—Bul. N. P. 38.—Ante, 152.

(*r*) Evans *v.* Evans, 2 Campb. 491.

(*s*) 2 Saund. 47. b.—1 Rol. Ab. 551.

(*t*) Bloss *v.* Holman, Owen, 52.—3 Inst. 108.—2 Bla. Com. 396.—2 Saund. 47. b. c. d.

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(113) Vide *Bird & others* v. *Clark*, 3 *Day*, 272.

(114) Vide *Putnam* v. *Wyley*, 8 *Johns. Rep.* 432. *Van Brunt* v. *Schenck*, 11 *Johns Rep.* 385.

(115) Vide *Colwill* v. *Reeves*, 2 *Campb.* 575.

(116) Vide *Barker & Knapp* v. *Miller*, 6 *Johns. Rep.* 195. *Gibbs* v. *Chase*, 10 *Mass. Rep.* 125. Whether a depositary may maintain trespass. *Harrison* v.

An instance of the *fourth* description is the finder of any article, who may maintain trespass or trover against any person but the real owner(*u*); and even a person having an illegal possession may support this action against any person but the legal owner(*w*).

Assignees of a bankrupt, though they have a constructive possession from the time of the act of *bankruptcy, cannot support trespass against [*169] a sheriff or any other officer acting in obedience to the process of a court of competent jurisdiction for seizing goods after a secret act of bankruptcy, because such officers acting *bona fide* ought not for such act to be liable as trespassers, but ought to be sued in trover in which only the real value of the goods can be recovered(*u*).

As to the *third* point, *the nature of the injury*, it may be either by an unlawful taking of the personal chattel, or by abusing it whilst in the possession of the general owner, or of a person having a special property in it, as a bailee.

Trespass is a concurrent remedy with trover for most illegal *takings*(*a*). Thus even in the case of a distress for rent, where there has been an illegal taking, as for distraining when no rent was due, or taking implements of trade, or beasts of husbandry, when there was sufficiency of other property(*b*); or a horse while his rider was upon him(*c*); or if a distress be made, the outer door being shut, or if the party expel the tenant or continue in possession without leave, more than five days, trespass lies(*d*); for the statute II Geo. 2. c. 19,[117] which enacts that a party distraining for rent shall not be a trespasser *ab initio*(*e*), only relates to irregularities after a lawful taking(*f*).

This action also lies though there has been no[118] wrongful intent(*g*); as if a sheriff by mistake *take the goods of a wrong person(*h*), except [*170]

(*u*) 2 Saund. 47. d.

(*w*) Graham *v.* Peat, 1 East, 244.—Basset *v.* Maynard, Cro. Eliz. 819.—S. C. Moore 691, 2.—Rackham *v.* Jesup et al., 3 Wils. 332.—Woadson *v.* Nawton, 2 Stra. 777.—Brown *v.* Hedges, 1 Salk. 290.—2 Saund. 47. c. Sir T. Palmer's Case, 5 Co. 25. a.

(*u*) Smith *v.* Milles et al., 1 T. R. 480.—Letchmere et al. *v.* Thorowgood et al., 1 Show. 12.—Bayly *v.* Bunning, 1 Lev. 173.

(*a*) Rackham v. Jesup et al., 3 Wils. 336.

(*b*) F. N. B. 88.—Gorton et al. *v.* Falkner, 4 T. R. 565.—Hutchins *v.* Chambers et al., 1 Burr. 579.

(*c*) Storey *v.* Robinson et al., 6 T. R. 138.—Gorton et al. *v.* Falkner, 4 T. R. 569.

(*d*) Etherton *v.* Popplewell, 1 East, 139.—Winterbourne *v.* Morgan and others, 11 East, 395.—Messing *v.* Kemble, 2 Campb. 115. ante, 140.

(*e*) Wallace *v.* King et al., 1 Hen. Bla. 13.

(*f*) 1 Esp. Ni. Pri. 382, 3.

(*g*) Ante, 129.—Baseley *v.* Clarkson, 3 Lev. 37.—Covell *v.* Laming, 1 Campb. 497.

(*h*) Ante, 130.

M'Intosh, 1 *Johns. Rep.* 385. Bare possession is in general sufficient to support this action against a wrongdoer. *Hoyt* v. *Gelston & Schenck*, 13 *Johns. Rep.* 141. 561.

(117) Vide *Van Brunt & another* v. *Schenck*, 13 *Johns. Rep.* 417.

(118) Vide *Higginson et al.* v. *York*, 5 *Mass. Rep.* 341. *Colwill* v. *Reeves*, 2 *Campb.* 575.

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in the case of a levy under an execution after a secret act of bankruptcy, when trover only can be supported(*i*). If the sheriff or a stranger illegally take the goods of another in execution and sell and deliver them to a third person, trespass cannot be supported against the latter because they came to him without fault on his part(*k*); but if a second trespasser take goods out of the custody of the first trespasser, the owner may support trespass against such second taker,[119] his act not being excusable(*l*). This action may be supported against a bailee who has only a bare authority, as if a servant take goods of his master out of his shop and convert them(*m*);[120] but not against a bailee coupled with an interest unless he destroy the chattel(*n*); nor against a joint tenant or tenant in common for merely taking away and holding exclusively the property from his co-tenant(*o*), because each has an interest in the whole and a right to dispose thereof(*p*): but if the thing be *destroyed* trespass lies(*q*), and case may be supported for injuring the thing(*r*). A bailee of a chattel for a certain time coupled with an interest may support this action against the bailor for taking it away before the time(*s*), and it lies though after the illegal taking the *goods be restored(*t*). When the taking is unlawful, either the general owner or the bailee, if answerable over, may support trespass, but a recovery by one is a bar to an action by the other(*u*); and it will not lie for a refusal to deliver when the first taking was lawful, trover or detinue being in such case the only remedies(*v*).

[*171]

So trespass lies for any immediate injury to personal property occasioned by actual or implied force, though the wrong doer might not take away or dispose of the chattel, as for shooting or beating a dog or other live animal, or for hunting or chasing sheep, &c.(*w*), or for mixing water with wine(*x*). Or unintentionally running down a ship or a

(*i*) Smith et al. *v.* Milles, 1 T. R. 480, ante, 130. 168, 9.

(*k*) 2 Roll. Ab. 556, pl. 50.—Bro. Ab. Tresp. pl. 48.

(*l*) Wilbraham *v.* Snow, Sid. 438.

(*m*) Glosse *v.* Hayman, 1 Leon. 87.—Gumbleton *v.* Grafton, Cro. Eliz. 781. Countess of Shrewsbury's Case, 5 Co. 14, a.

(*n*) Ante, 154. post. 171, 172.

(*o*) Holliday *v.* Camsell et al., 1 T. R. 658.—Fox et al *v.* Hanbury et al., Cowp. 450.—2 Saund. 47, g.

(*p*) Graves *v.* Sawcer, 1 Lev. 29.—Martyn *v.* Knowlbys, 8 T. R. 145.—Co. Lit. 200, a.—Doe d. Fisher et ux. *v.* Prosser, Cowp. 217.—Heath *v.* Hubbard, 4 East, 121.

(*q*) Co. Litt. 200, a.—Ante, 66.

(*r*) Martyn *v.* Knowlbys, 8 T. R. 145. Waterman *v.* Soper, 1 Lord Raym. 737.

(*s*) Godbolt, 173—F. N. B. 86, n. a.

(*t*) Ante, 155.—Bro. Ab. Tresp. pl. 221.—2 Roll. Ab. 569, pl. 3—6.

(*u*) 2 Saund. 47, e.—Bro. Tresp. 67. 2 Roll. Ab. 569, P.—Ante, 152.

(*v*) Put et al. *v.* Rawstone et al., Sir T. Ray. 472.—Lechmere *v.* Toplady, 2 Vent. 170.—2 Saund. 47, k.

(*w*) Barnes, 452.—Dand *v.* Sexton, 3 T. R. 37.—Edwards *v.* Engleton, Hob. 283.—3 Bla. Com. 153.

(*x*) F. N. B. 88.

(119) Vide ante, 160. n. 98.

(120) Vide *East's P. C.* 564. et seq.

carriage(*y*). But it is said that for a mere battery of a horse not accompanied with special damage, no action can be supported(*z*).

It is said that if a bailee of a beast, &c. *kill* it, trespass cannot be supported but only case, because a general confidence has been reposed in him(*a*); but this appears to be erroneous, for though the act may not render the party a trespasser *ab initio*, yet he may be considered as a trespasser for the wrongful act itself(*b*); so case(*c*), or assumpsit for a breach of the implied contract may be supported(*d*); and it seems clear that if a *person be bailee, though coupled with a beneficial interest, as of sheep to feed his land, or of oxen to plough it(*dd*), and he kill or destroy them, trespass lies because his interest therein is thereby determined, the same as when a tenant at will cuts down trees(*e*) So one joint-tenant or tenant in common may support trespass against his cotenant when the chattel is *destroyed*, and even consider the defendant as guilty of entering the dove cote, the fishery, &c. and taking away the thing(*f*); but if the thing be not destroyed trespass does not lie against a bailee coupled with an interest, for abusing the chattel(*g*), because an interest and the right of possession still continue in the bailee, and a general owner has no immediate right of possession at the time the injury was committed, and trespass cannot be supported even against a stranger unless there be an immediate right of possession(*h*). Trespass will not lie for a loss or injury occasioned by a bailee's negligence, because it does not lie for any nonfeazance(*i*).

[*172]

In some instances trespass may also be supported for an injury committed to personal property whilst in the lawful adverse possession of the wrong doer, as where he has been guilty of an abuse which renders him a trespasser *ab initio*(*k*); this obtains in general whenever the person who *first acted with propriety under an authority or license given by *law* afterwards abuses it, in which case the taking as well as the real tortious act may be stated to be illegal, as in the Six Carpenters'

[*173]

(*y*) Covell *v.* Laming, 1 Campb. 497. Lotan *v.* Cross, 2 Campb. 465.—Leame *v.* Bray, 3 East, 593. but see Rogers *v.* Imbleton, 2 New R. 117.

(*z*) Slater *v.* Swann, 2 Stra. 872.—*Quære*, Barnes, 452.

(*a*) Bac. Ab. Trespass, G. 1.—Anon. Moore, 248.

(*b*) Co. Lit. 57. a.—Countess of Salop *v.* Crompton, Cro. Eliz. 777. 784.—Countess of Shrewsbury's Case, 5 Co. 14.—Bro. Tresp. pl. 295.—Glosse *v.* Hayman, 1 Leon. 87.—Lewis Bowles's Case, 11 Co. 82, a.

(*c*) Co. Lit. 57. a. n. 4.

(*d*) Countess of Salop *v.* Crompton, Cro. Eliz. 777. 784.

(*dd*) Co. Lit. 57, a.—Countess of Salop *v.* Crompton, Cro. El. 784.

(*e*) Gordon *v.* Harper, 7 T. R. 11.—Co. Lit. 57, a.—Countess of Salop *v.* Crompton, Cro. Eliz. 784.—Countess of Shrewsbury's Case, 5 Co. 14.—Lewis Bowles's Case, 11 Co. 82, a.—Lord Mounteagle *v.* Countess of Worcester, Dyer, 121. b. pl. 17.

(*f*) Co. Lit. 200. a. b.—2 Saund. 47. b. g.—Martyn *v.* Knowlbys, 8 T. R. 146.

(*g*) 2 Saund. 47. g.

(*h*) Gordon *v.* Harper, 7 T. R. 9.—Ward *v.* Macauley et al., 4 T. R. 489.

(*i*) Countess of Shrewsbury's Case, 5 Co. 14. a.—Ante, 124.

(*k*) Bac. Ab. Trespass, B. where the doctrine of a party becoming a trespasser *ab initio* is observed upon.

IV. TRESPASS. Case(*l*),[121] or for cutting nets lawfully taken damage feasant(*m*), or for working a horse, &c. distrained(*n*). But in the case of a distress for rent, we have seen that in general a party cannot become a trespasser *ab initio*, by an irregularity when the caption was lawful.[122]

3dly, to real property. Trespass is also the proper remedy to recover damages for an illegal entry upon, or an immediate injury to, *real property corporeal in the possession of the plaintiff*(*o*). This remedy in its application to injuries, to real property may be considered with reference, 1st, to the nature of the property affected, 2dly, to the plaintiff's right thereto, and 3dly, to the nature of the injury, and by whom committed.

1*st*, With respect to the *nature of the real property affected*, it must in general be something tangible and fixed, as a house, a room, outhouse, or other buildings, or land. Trespass may be supported for an injury to land, though not fenced from the property of others, and by the owner of the soil, &c. though it be an highway[123] or a public bridge, the term *close* being technical, and signifying the *interest* in the soil, and [*174] not merely a close or inclosure in the common *acceptation of that term(*q*).[124] It lies, however temporary the plaintiff's interest, and though it be merely in the profits of the soil, as *vesturæ terræ* or *herbagii pasturæ*(*r*),[125] *prima tonsura*(*s*), or free warren, &c.(*t*), if it be in ex-

(*l*) 8 Co. 146. b.

(*m*) Reynell *v.* Champernoon, Cro. Car. 228.

(*n*) Bagshaw *v.* Goward, Cro. Jac. 147.—Oxley *v.* Watts, 1 T. R. 12.

(*o*) Haward *v.* Bankes, Burr, 1114.—Harker et al. *v.* Birbeck et al., Burr, 1556.—The King *v.* Watson, 5 East, 485. 7.—Doe d. Foley & others *v.* Wilson, 11 East, 56.—Bac. Ab. Trespass, C. 3.—As to immediate and consequential injuries, see ante, 125 to 129.

(*q*) Doc. & St. 30.—Stammers *v.* Dixon, 7 East, 207.—Lade *v.* Shepherd, 2 Stra. 1004.—Harrison *v.* Parker et al., 6 East, 154.—Goodtitle d. Chester *v.* Alker et al., 1 Burr. 133.

(*r*) Co. Lit. 4. b.—The King *v.* Watson, 5 East, 480.—Crosby *v.* Wadsworth, 6 East, 606. 9.—Dyer, 285. pl. 40.—Bro. Tresp. pl. 279.—Welden *v.* Bridgewater, Moore, 302.—2 Rol. Ab. 552. pl. 8.—Dawtrie *v.* Dee, Palm. 47. Burt *v.* Moore, 5 T. R. 535.

(*s*) Stammers *v.* Dixon, 7 East, 200.

(*t*) Smith *v.* Kemp, 2 Salk. 637.

(121) Vide *Sackrider* v. *M'Donald*, 10 *Johns. Rep.* 253. *Hopkins* v. *Hopkins*, *Id.* 369. *Hazard* v. *Israel*, 1 *Binney*, 240. "In every case to be met with in the books, the Court, in considering who shall be deemed a trespasser *ab initio*, for the abuse of a legal trust, confine the action for such an act to those who were either the actors in the first taking, or to such as by the relation they stood in to the first takers, made themselves parties by their assent before or after the act. It would be palpably absurd to say, that a man totally unconcerned with the original caption of goods, shall, for an after act to those goods, be deemed to have originally taken them." Per Spencer, J. *Van Brunt* v. *Schenck*, 11 *Johns. Rep.* 382. Hence it was held, that where A, a custom house officer, having seized a vessel as forfeited, while the vessel was in his possession, permitted B (who was also a custom house officer, though no ways engaged in the original seizure) to make use of her, B could not be made a trespasser *ab initio*. *Van Brunt and another* v. *Schenck*, 11 *Johns Rep.* 377.

(122) See *Laws of N. Y. sess.* 36. *c.* 63. *s.* 10. 1 *R. L.* 436.

(123) Acc. *Cortelyon* v. *Van Brundt*, 2 *Johns. Rep.* 357. *Commonwealth* v. *Peters*, 2 *Mass. Rep.* 127.

(124) Vide *Van Rensselaer* v. *Van Rensselaer*, 9 *Johns. Rep.* 377.

(125) Vide *Stewart* v. *Doughty*, 9 *Johns. Rep.* 113.

clusion of others. So where a person contracted with the owner of a close for the purchase merely of a growing crop of grass there, it was decided that the purchaser had such an exclusive possession of the close, though for a limited purpose, that he might maintain trespass *quære clausum fregit* against any person entering the close, and taking the grass even with the assent of the owner(*u*);[126] so it lies for a trespass on a portion of a common field after an allotment, authorizing the feeding the same only for a certain time(*w*); so a person having an exclusive right to dig turves or coals, &c. may support trespass *quære clausum fregit* against another for digging and taking away turves, &c. therein, though others had common of pasture over the land(*x*); and if J. S. agree with the owner of the soil to plough, and sow it, and to give him (the owner) half the profits, J. S. may support trespass *quare clausum fregit* against a stranger, for treading down the corn(*y*).[127] But unless the plaintiff have an *exclusive interest, case is the only remedy, as if he had only a profit *a prendre*, as a right of common of pasture or common of piscary(*z*); and because the plaintiff hath not the exclusive possession of a pew, trespass cannot be supported even against a stranger for entering it(*a*); but the parson may support trespass against a person preaching in a church without his leave(*b*). [*175]

This action also lies for an injury to the plaintiff's land covered with water, but if the interest be merely in the water, case is the only remedy(*c*); and when the trespass is in the plaintiff's river, pond, &c. it is to be described as an entry on the plaintiff's close or land covered with water(*d*): or it may be for a pool(*e*), or that the defendant broke and

(*u*) Crosby *v.* Wadsworth, 6 East, 602.

(*w*) Welden *v.* Bridgewater, Cro. Eliz. 421.—Burt *v* Moore, 5 T. R. 335.

(*x*) Wilson *v.* Mackreth, 3 Burr, 1825.—Harker et al. *v.* Birkbeck et al., 3 Burr, 1560, 1, 2.—Crosby *v.* Wadsworth, 6 East, 606.

(*y*) Bul. N. P. 85.—Wilson *v.* Mackreth, Burr, 1827.—Co. Lit. 4. b. but see Hare et al. *v.* Celey, Cro. Eliz. 143, and Hitchcock *v.* Harvey, 3 Leon. 213.

(*z*) Welden *v.* Bridgewater, Cro. Eliz. 421.—Wilson *v.* Mackreth, Burr, 1827.—Smith *v.* Kemp, Salk. 637.—Br. Tresp. pl. 174.—2 Rol. 552. n. pl. 8.—Standing place, The King *v.* Inhabitants of Mellor, 2 East, 190.—Stocks *v.* Booth, 1 T. R 430.

(*a*) Stocks *v.* Booth, 1 T. R. 430.

(*b*) Anon. 12 Mod. 420.—Turton *v.* Reignolds, 12 Mod. 433.

(*c*) Challenor *v.* Thomas, Yelv. 143.

(*d*) Co. Lit. 4. b.—Challenor *v.* Thomas, Yelv. 143.

(*e*) Challenor *v.* Thomas, Yelv. 143. Co. Lit. 5. a. b.

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(126) So, a grantee of trees may maintain trespass quære clausum fregit against the owner of the soil for cutting them down. *Clap* v. *Draper*, 4 *Mass. Rep.* 266. So, it lies by a tenant at will, who, on the tenancy being put an end to, is entitled to the emblements. *Stewart* v *Doughty & others*, 9 *Johns. Rep.* 108. So, by a lessee for years who, on the expiration of the tenancy, is by the custom of the country entitled to an away-going crop. *Stultz* v. *Dickey*, 5 *Binney* 285.

(127) Or they may maintain a joint action. *Foote & Litchfield* v. *Colvin*, 3 *Johns. Rep.* 216.

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entered the several fishery of the plaintiff, &c. and fished therein for fish; but it is disputed whether it lies for fishing in a free fishery(*f*).

2*dly*, With respect to the plaintiff's right or interest in the property affected, we have given it a partial consideration in the preceding pages(*g*). The *gist* of this action is the injury to the possession and unless at the time the injury was committed, the plaintiff was in actual [*176] possession, trespass cannot be supported(*h*),[128] and though *the title may come in question, yet it is not essential to the action[129] that it should(*i*). Therefore a landlord cannot, during a subsisting lease, support trespass, but the action of trespass must be in the name of the tenant,[130] or the landlord must proceed in case, unless the injury was committed to trees or other property excepted in the lease, when the latter may support trespass *quare clausum fregit*(*k*).[131] Any possession is sufficient against a wrong doer[132] or a person who cannot make out a title *prima facie* entitling him to the possession(*l*). It therefore follows that a tenant for years(*m*), a lessee at will(*n*); and a tenant at sufferance(*o*), may support this action against a stranger or even against

(*f*) Smith *v.* Kemp, 2 Salk. 637.—Co. Lit. 126. b. note 7 to page 122. a.—Co. Lit. 4. b.—F. N. B. 88 G.—2 Bla. Com. 40.—Richardson et al. *v.* The Mayor, &c. of Orford, 2 Hen. Bla. 182. Child *v.* Greenhill, Cro. Car. 554.

(*g*) Ante, 173 to 175. And see in general Com. Dig. Trespass, B.—Vin. Ab. Entry, G. 4. Trespass H.

(*h*) The King *v.* Watson, 5 East, 485. 7.

(*i*) Lambert *v.* Stroother, Willes, 221. Graham *v.* Peat, 1 East, 244.

(*k*) Bro. Ab. Trespass, pl. 55.—1 Saund. 322. n. 5.—Gordon *v.* Harper, 7 T. R. 13.—Goodright d. Peters *v.* Vivian, 8 East, 190.—Bac. Ab. Trespass, C. 3.

(*l*) Graham *v.* Peat, 1 East, 244—Harker et al. *v.* Birkbeck et al., 3 Burr, 1563.—Cary *v.* Holt, 2 Strange, 1238.—Lambert *v.* Stroother, Willes, 221.—Chambers *v.* Donaldson & others, 11 East, 67.

(*m*) 2 Rol. Ab. 551.—Geary *v.* Bearcroft, Sid. 347.

(*n*) Id. ibid.

(*o*) Id. ibid.—Heydon *v.* Smith, 13 Coke, 69.—1 East, 245. note a.—Com. Dig. Trespass, B. 1.—1 Saund. 322. n. 5.

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(128) Acc. *Stuyvesant* v. *Tompkins & Dunham*, 9 *Johns. Rep.* 61. *Wickham* v. *Freeman*, 12 *Johns. Rep.* 183. *Van Brunt & another* v. *Schenck*, 11 *Johns Rep.* 385. *Yates* v. *Joyce*, 11 *Johns. Rep.* 140.

(129) Vide *Hyatt* v. *Wood*, 4 *Johns. Rep.* 157. A person having a legal right of entry on land, and entering by force, is not liable to an action of trespass. *Hyatt* v. *Wood*, 4 *Johns. Rep.* 150.

(130) Acc. *Campbell v. Arnold*, 1 *Johns. Rep.* 511. *Toby* v. *Webster*, 3 *Johns. Rep.* 468. Vide ante, p. 50. n. 108.

(131) So, if land be granted to A with a reservation of all mill-seats, and the grantor permit B to enter and erect a mill, the entry of B, and the erection of a mill, is a severance of the freehold, and renders the mill a distinct close; and B may maintain trespass against A, for pulling down the mill. *Van Rensselaer* v. *Van Rensselaer*, 9 *Johns. Rep.* 377. *Jackson d. Loux & others* v. *Buel*, *Id.* 299. But see *Torrance* v. *Erwin*, cited 5 *Binney*, 290.

(132) *Van Rensselaer* v. *Van Rensselaer*, 9 *Johns. Rep.* 381.

his landlord,[133] unless a right of entry be expressly or impliedly reserved(*t*).

There is a material distinction between personal and real property, as to the right of the owner; in the first case we have seen that the general property draws to it the possession, sufficient to enable the owner to support trespass, though he has never been in possession(*q*); but in the case of land and other real property, there is no such *constructive* possession,[134] and unless the plaintiff had the *actual possession* at the time when the *injury was committed, he cannot support this [*177] action(*r*). Thus before entry and actual possession, a person cannot maintain trespass though he hath the freehold in law; as a parson before induction(*s*), or a conusee of a fine(*t*), or a purchaser by lease and release, (though the statute executes the use)(*u*), or an heir(*w*), or a devisee against an abator(*x*), or a lessee for years before entry(*y*). But a disseisee may have it against a disseisor for the disseisin itself, because he was then in possession; but not for an injury after the disseisin(*z*), until he hath gained possession by re-entry, and then he may support this action for the intermediate damage;[135] for after the entry, the law, by a kind of *jus postliminii*, supposes the freehold to have all along continued in him(*a*); and after recovery in ejectment, this action may

(*p*) Anon. 11 Mod. 209.—Com. Dig. Biens, H.—Richard Liford's Case, 11 Co. 48.

(*q*) Ante, 150, 1.—2 Saund. 47. a.—Bul. N. P. 33.

(*r*) The King *v.* Watson, 5 East, 485. 7.—Bac. Ab. Trespass, C. 3.

(*s*) Vin. Ab. Entry, G. 4. & Trespass, S.—Bac. Ab. Leases, M.—Hare *v.* Bickley, Plowd. 528.

(*t*) Berry *v.* Goodman, 2 Leon, 147.

(*u*) Geary *v.* Bearcroft, Carter, 66.

(*w*) Browning *v.* Beston, Plowd. 142. Anon. 2 Mod. 7.

(*x*) Anon. 2 Mod. 7.

(*y*) Bac. Ab. Leases, M.—Browning *v.* Beston, Plowd 142.

(*z*) 2 Rol. Ab. 553.—3 Bla. Com. 210.

(*a*) Vin. Ab. Trespass, T.—Richard Liford's Case, 11 Co. 51 a.—3 Bla. Com. 210.—2 Rol. Ab. 554.—Bro. Tresp. pl. 35.—Holcomb *v.* Rawlins, Cro. Eliz. 540.—Com Dig. Tresp. B. 3.

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(133) It has been held that a tenant at sufferance cannot maintain trespass against his landlord. *Wilde* v. *Cantillon*, 1 *Johns. Cas.* 123. *Hyatt* v. *Wood*, 4 *Johns. Rep.* 150.

(134) Acc. *Campbell* v. *Arnold*, 1 *Johns. Rep.* 512. *Stultz* v. *Dickey*, 5 *Binney*, 290. But see *Van Brunt and another* v. *Schenck*, 11 *Johns. Rep.* 385, where Spencer, J. says, "We have carried the principle as to real property, further than has been done in England; and we allow the owner to maintain trespass without actual entry, on the principle that the possession follows the ownership, unless there be an adverse possession." See also *Wickham* v. *Foreman*, 12 *Johns. Rep.* 184. *Bush & others* v. *Bradley*, 4 *Day*, 306.

(135) Vide *Tobey* v. *Webster*, 3 *Johns. Rep.* 471. But trespass will not lie against a person coming in under the disseisor. *Liford's Case*, 11 *Rep.* 46. So where the defendant is put into possession under a writ of restitution, on an indictment for a forcible entry against the plaintiff, and the proceedings are afterwards quashed, and a re-restitution awarded, the plaintiff may maintain trespass against the defendant, but not against a person acting under license from him. *Case* v. *De Goes & others*, 3 *Caine's Rep.* 261. *Wickham* v. *Freeman*, 12 *Johns. Rep.* 184.

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be supported for mesne profits, though anterior to the time of the demise in the declaration[136] in ejectment(*b*), unless where a fine has been levied, in which cases trespass cannot be supported for an injury committed anterior to the entry to avoid the fine(*c*). A person having a mere incorporeal right, as of common of pasture, turbary, &c. cannot [*178] support trespass **quare clausum fregit* for treading down the grass growing upon the land upon which he has such right of common, &c. for although a commoner has a right to take such grass by the mouths of his commonable cattle, he is not to be considered as in possession of the land(*d*); and because a person having right to sit in a pew, has not the exclusive possession, he cannot support trespass, even against a stranger, the possession of the church being in the parson(*e*). But whenever there is an exclusive right, trespass may be supported, though the party has not the absolute right to the soil or the whole property therein(*f*); as if a person have an exclusive right to cut turf and peat, he may support trespass *quare clausum fregit*, and for cutting the turf(*g*); and it may be supported for a trespass in a portion of a common field after the allotment to the plaintiff(*h*).[137] If the plaintiff were in possession of the lands, &c. at the time when the injury was committed, the circumstance of his having quitted possession before the commencement of the action constitutes no objection(*i*).

With respect to the *nature* of *the injury* to *real property*, we have seen that trespass can only be supported when the injury was committed with force actual or implied, and immediate(*k*). It lies, how- [*179] ever unintentional the trespass, and though *the *locus in quo* were unenclosed, or the door of the house were open, if the entry were not for a justifiable purpose(*ii*); and even shooting at and killing game on another's land, though without an actual entry, is in law an entry(*kk*);

(*b*) Run. Eject. 442.—Aslin *v.* Parkin, 2 Burr. 666, 7.—Peake, L. E. 326.

(*c*) Compere *v.* Hicks et al., 7 T. R. 732, 3.—3 Bla. Com. 210, 211.

(*d*) Bro. Tresp. pl. 174.—2 Rol. Ab. 552. N. pl. 8.—Bac. Ab. Trespass, C. 3.—Wilson *v.* Mackreth, 3 Burr. 1825. Welden *v.* Bridgewater, Cro. Eliz. 421.

(*e*) Stocks *v.* Booth, 1 T. R. 430.

(*f*) Ante, 174.—Wilson *v.* Mackreth, 3 Burr. 1824.—The King *v.* Watson, 5 East, 485, 6, 7.—Welden *v.* Bridgewater, Cro. Eliz. 421.

(*g*) Wilson *v.* Mackreth, 3 Burr. 1824.

(*h*) Welden *v.* Bridgewater, Cro. Eliz. 421.—The King *v.* Watson, 5 East, 480, 5, 6, 7.

(*i*) Bac. Ab. Trespass, C. 3.

(*k*) Ante, 122. As to these injuries in general, see Com. Dig. Trespass, A. 2.—Bac. Ab. Trespass, F.

(*ii*) Ante, 173.—Bac. Ab. Trespass, F.—2 Roll. Ab. 555. pl. 15.

(*kk*) Keble *v.* Hickringill, 11 Mod. 74. 130.

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(136) Where the plaintiff proceeds for the mesne profits subsequent merely to the time of the demise laid in the declaration, the production of the judgment in ejectment, and the writ of possession executed are sufficient to entitle him to recover; but if he go for time before the demise, the defendant may controvert his title. 1 *Esp. Dig.* 505, 506. *Aslin* v. *Parkin*, *Burr. Rep.* 668. *Jackson* v. *Randall*, 11 *Johns. Rep.* 405.

(137) Vide *Stultz* v. *Dickey*, 5 *Binney*, 285. ante, 174. n. 126.

though in general when the injury is committed off the plaintiff's land, the remedy must be case(*l*); and a mere nonfeazance, as leaving tithe on land, we may remember is not sufficient to support trespass(*m*).

As to the person by and against whom this action may be supported, it seems that actual possession is necessary to support the action; and if the right of possession be in reversion, it clearly cannot be sustained.[138] Trespass lies against a mere tenant at will for pulling down a house, or cutting trees during the tenantcy at will,[139] the interest being thereby determined(*n*); but against a lessee for years trespass for cutting down trees does not lie,[140] and case in the nature of waste is the only remedy, unless the trees were excepted in the lease(*o*); though if he afterwards take the trees away, trespass or trover lies(*p*); and if the treef be excepted in the lease, and he cut them down, trepass *quare clausum fregit* lies for such cutting(*q*). And a tenant for years cannot support trespass against a stranger for carrying away trees cut down during his term(*r*)

*The proper remedy by one joint-tenant or tenant in common against the other who commits waste to the land or other property, as by cutting down trees unfit to be cut down, is an action on the case as for a nuisezance(*r*); but if one tenant in common disturb the other in possession, trespass *quare clausum fregit* may be supported; as if two be tenants in common of a folding, and one of them by force prevent the other from erecting hurdles, &c.(*s*); and though trespass does not lie against a tenant in common for taking the whole profits, yet if he drive out of the land any of the cattle of the other tenant in common, or hinder him from entering or occupying the land, an action of trespass *quare clausum fregit*, or an ejectment, may be supported(*t*). [*180]

Though the entry were lawful, yet by a *subsequent* abuse of an authority in *law* to enter, as to distrain, &c. (except for rent or poor's rates)(*u*), the party may become a trespasser *ab initio*(*w*);[141] and if an

(*l*) Haward *v* Bankes, 2 Burr. 1114. Keble *v.* Hickringill, 11 Mod. 74. 130. Ante, 126.

(*m*) Ante, 124.

(*n*) Countess of Salop v. Crompton, Cro. Eliz. 784.—Saunders's Case, 5 Co. 13. b.—Lewis Bowles's Case, 11 Co. 81. b. 82. a.—Co. Lit. 57. a.—Saville, 84.

(*o*) Aleyn, 83.—1 Saund. 322. n. 5.

(*p*) Id. ibid.—Gordon *v.* Harper, 7 T. R. 13.—Herlakenden's Case, 4 Co. 62.—Vin. Ab. Trespass, S. pl. 10.

(*q*) Bro. Trespass, pl. 55.—1 Saund. 322. n. 5.—Bac. Ab. Tresp. C. 3.

(*r*) Evans *v.* Evans, 2 Campb. 491.

(*r*) Martyn *v.* Knowlbys, 8 T. R. 145. Com. Dig. Estate, K. 8.

(*s*) Co. Lit. 200. b.

(*t*) Co. Lit. 199. b.—Goodtitle *v.* Toms, 3 Wils. 119.—Johnson *v.* Allen, 12 Mod. 657.

(*u*) Wallace *v.* King et al., 1 Hen. Bla. 13.

(*w*) Bac. Ab. Trespass, B.—Six Carpenters' Case, 8 Co. 146.—Reed *v.* Harrison, 2 Bla. Rep. 1218.—Clayt. 44.

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(138) Ante, 50. 176.

(139) Acc. *Phillips* v. *Covert*, 7 *Johns. Rep.* 1. *Suffern* v. *Townsend*, 9 *Johns. Rep.* 35. *Tobey* v. *Webster*, 3 *Johns. Rep.* 470.

(140) Ante, 50. n. 108.

(141) Vide *Adams* v *Freeman*, 12 *Johns. Rep.* 408.

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officer neglect to remove goods attached within a reasonable time and continue in possession, his entry becomes a trespass *ab initio*(*x*); so in the case of distress for rent if the party remain in possession more than five days(*y*), or turn the plaintiff's family out of possession(*z*). But in
[*181] case of an authority in *fact* to enter, an *abuse of such authority[142] will not in general subject the party to this action(*a*).[143]

In the immediately preceding pages we have considered when this action may be supported against a party for his own immediate act; in some cases it may be supported against a person *for the acts of another, and of cattle*, &c. Thus a party may be sued in respect of his *previous* consent or request that the trespass may be done: as if A command or request B to beat or impress C, or to take his goods, or to commit a trespass on his land, and B do it, this action lies as well against A as against B (*b*); as if A direct the sheriff to levy particular goods not the property of the defendant in the action(*c*). It may also be supported against a person, not being an infant or feme covert, who *afterwards assents* to a trespass[144] committed for his use or benefit(*d*), though not so as to subject him for a forcible entry(*e*): so for taking goods, even to subject the party assenting for an abuse of an authority in law as a trespasser *ab initio*(*f*).[145] But without such consent, trespass does not in general lie; as if A command his servant to do a lawful act, as to distrain the goods of B, and he wrongfully take the goods of C, A is not liable(*g*); the liability of a sheriff[146] being an exception(*h*); and
[*182] the mere acceptance of goods illegally taken by another, *does no al-

(*x*) Reed *v.* Harrison, 2 Bla. Rep. 1218.

(*y*) Griffin *v.* Scott, 2 Stra. 717.—Wallace *v.* King et al., 1 Hen. Bla. 13. Winterbourne *v.* Morgan & others, 11 East, 395.—Messing *v.* Kemble, 2 Campb. 115.—Ante, 140. 169.

(*z*) Etherton *v.* Popplewell, 1 East, 139.

(*a*) Lane, 90.—Bac. Ab. Trespass, B. Bennett *v.* Alcott, 2 T. R. 166.

(*b*) Ante, 67, 8.—Flewster *v.* Royle, 1 Campb. 187.—Rafael *v.* Verelst, 2 Bla. Rep. 1055.—Freeman *v.* Blewitt, Salk. 409.—4 Inst. 317.—Bac. Ab. Trespass, G.—Com. Dig. tit. Trespass, C. 1.

(*c*) 2 Rol. 553. l. 5. 10.

(*d*) Ante, 67.—Badkin *v.* Powell et al., Cowp. 478.—Barker *v.* Braham et al., 3 Wils. 377.

(*e*) 4 Inst. 317.—Co. Lit. 180. b. n. 4.

(*f*) Lane, 90.

(*g*) Sanderson *v.* Baker et al., 3 Wils. 312. 317.—M'Manus *v.* Crickett, 1 East, 108.—Ante, 68, 9.

(*h*) Ante, 67, 8.

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(142) Sed vide *Adams* v. *Freeman*, 12 *Johns. Rep.* 409. As to the distinction between the abuse of an authority in law and in fact, see further, *Van Brunt & another* v. *Schenck*, 13 *Johns. Rep.* 416.

(143) A person impounding cattle, taken damage-feasant, before the damages have been ascertained by two feme viewers, under the act, *sess.* 36. *c.* 35. *s.* 19. 2 *R. L.* 134., is a trespasser ab initio. *Pratt* v. *Petrie*, 2 *Johns. Rep.* 191. *Sackrider* v. *M'Donald*, 10 *Johns. Rep.* 253. *Hopkins* v. *Hopkins*, 10 *Johns. Rep.* 369.

(144) Vide *Smith* v. *Shaw*, 12 *Johns. Rep.* 257.

(145) Vide *Van Brunt & another* v. *Schenck*, 13 *Johns. Rep.* 414.

(146) Vide *Hazard* v. *Israel*, 1 *Binney*, 240.

ways furnish evidence of an assent(*i*); as if a pound-keeper receive goods illegally distrained(*k*). But in these cases, if the party after demand withhold the goods, trover may be supported against him. And as we have already seen, unless there be an actual consent to the trespass either before or after it was committed, even a master is not liable in an action of trespass for the act of his servant, though case may be supported against him in some instances, for injuries in respect of which the servant is liable in trespass(*l*).

We have already partially considered the liability of a person for the *acts of his cattle*(*m*). In those cases in which the defendant is not liable unless he had notice of the propensity of his cattle, as in the instance of a dog biting mankind, sheep, &c. or an unruly bull doing some injury, the remedy is in general by action on the case(*n*): so for the consequences of bringing an unruly horse into an improper place(*o*). But if the animal were naturally of the propensity to do the mischief complained of, as horses and cattle to trespass on land, though the owner had no notice in fact of their propensity, the remedy is trespass(*p*).

Trespass may also be supported for an injury *committed by animals [*183] *feræ naturæ*, or notoriously ferocious, and which have not been properly confined(*w*).

SECONDLY, UNDER COLOUR OF LEGAL PROCEEDINGS.

The application of the action of trespass to injuries committed under colour of a legal proceeding, may be considered under the seven following heads:

First, In general no action whatever can be supported for any act, however *erroneous*, if expressly sanctioned by the judgment or direction of one of the superior courts at Westminster, or even by an inferior magistrate, acting within the scope of his jurisdiction(*x*).[147] In the only exception to this rule, that of a judgment obtained by threats or undue influence, an action of trespass against the person guilty of

(*i*) 2 Rol. 555. l. 50.

(*k*) Badkin *v.* Powell et al., Cowp. 476.

(*l*) Ante, 131.—M'Manus *v.* Crickett, 1 East, 106.—2 Roll. 553. l. 25.—Boucher *v.* Noidstrom, 1 Taunton, 568.

(*m*) Ante, 69, 70.

(*n*) Id. ib.—Bayntine *v.* Sharp, Lutw. 90.—Boulton *v.* Banks, Cro. Car. 254. Mason *v.* Keeling, Ld. Raym. 608.—S. C. 12 Mod. 333.—Rex *v.* Huggins, Ld. Raym. 1583.—Dyer, 25. pl. 162.

(*o*) Anon. 1 Ventr. 295.

(*p*) Ante, 69, 70.—2 Rol. Ab. 568. N. L. 15.—3 Bla. Com. 211.—Mason *v.* Keeling, Ld. Raym. 608.—Rex *v.* Huggins, Ld. Raym. 1583.—Bac. Ab. Tresp. G. 2.

(*w*) Ante, 70.—Rex *v.* Huggins, Ld. Raym. 1583.—Leame *v.* Bray, 3 East, 595, 6.

(*x*) Strickland *v.* Ward, 7 T. R. 629. n. a.—Reynolds *v.* Kennedy, 1 Wils. 232. Johnstone *v.* Sutton, 1 T. R. 545.—Rafael *v.* Verelst et al., 2 Blac. Rep. 985.

(147) Vide *Hecker* v. *Jarret*, 3 *Binney*, 404. *Henderson & others* v. *Brown*, 1 *Caine's Rep.* 92.

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such conduct appears to be the proper remedy(*y*); and when in inferior courts the error in the proceeding is such as to render it an *excess* of jurisdiction, *trespass* may be supported for any thing done under such proceeding(*z*);[148] and in case of an error by a *ministerial* officer, this action may be supported, if the injury complained of was committed with force and immediate(*a*).

[*184] *Secondly*, When the court has *no jurisdiction* *over the subject matter, trespass is the proper form of action against all the parties[149] for any act, which, independently of the process, would be remediable by this action, or by trover, if goods have been taken(*b*); and it has been decided, that when the proceedings in the court, having no jurisdiction, are adopted by a party with an express malicious *intent*, though there be a demand recoverable elsewhere, an action on the case may be supported(*c*); or where the party maliciously and unduly issues a second *fieri facias*(*d*). Trespass is also the proper remedy, where an inferior court has jurisdiction over the subject matter, but is bound to adopt certain forms in its proceedings, from which it deviates, and whereby the proceedings are rendered *coram non judice*(*e*); but it lies not for arresting a person privileged either *personally* or *locally*, but case is the only remedy(*f*).[150]

(*y*) Johnstone *v.* Sutton, 1 T. R. 538. Rafael *v.* Verelst, 2 Bla. Rep. 1055.

(*z*) Davison et al. *v.* Gill, 1 East, 64. Sir William Jones, 178.—Martin *v.* Marshall et al., Hob. 63.—Weaver *v.* Clifford, 2 Bulst. 64.—Smith *v.* Boucher et al., Rep. temp. Hardw. 62 to 72.—Reynolds *v.* Kennedy, 1 Wils. 232.—Johnstone *v.* Sutton, 1 T. R. 545.

(*a*) Groenvelt *v.* Burwell et al., 1 Lord Raym. 471.—S. C. 1 Salk. 396.—Morgan *v.* Hughes, 2 T. R. 225.

(*b*) Ferry *v.* Huntington et al., Hardr. 483.

(*c*) Case of the Marshalsea, 10 Co. 76. a.—Smith *v.* Bouchier et al., 2 Stra. 993.—S. C. Rep. T. Hardw. 62. 69.—Ognel *v* Paston, 2 Leon. 84. 89.—Martin *v.* Marshal et al., Hob. 63.—Parsons *v.* Loyd, 3 Wils. 345.—Goslin *v.* Wilcock, 2 Wils. 302. 306.—Sed. vid. Morgan *v.* Hughes, 2 T. R. 225.

(*d*) Waterer *v.* Freeman, Hob. 205, 206.

(*e*) Sir Wm. Jones, 171.—Davison & another *v.* Gill, 1 East, 64.—Smith *v.* Boucher et al., Rep. temp. Hardw. 71. Martin *v.* Marshall et al., Hob. 63.—Weaver *v.* Clifford, 2 Bulst 64. As to the remedy where the conviction of a magistrate has been quashed, see 43 Geo 3. c. 141. and Massey *v.* Johnson. 12 East, 67.

(*f*) Case of the Marshalsea, 10 Co. 76. b.—Isabel Countess of Rutland's Case, 6 Co. 53 a.—Cameron *v.* Lightfoot, 2 Blac. Rep. 1190.—Tarlton *v.* Fisher et al., Dougl. 671.—Baker *v.* Braham et al., 3 Wils. 379.—Weaver *v.* Clifford, 2 Bulst. 64.—Anon. 1 Mod. 209.—Sir Wm. Jones, 171.

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(148) So, trespass lies against a justice of the peace, who issues a warrant on a conviction for a forcible entry, by which the party is turned out of possession, after the service of a certiorari. *Case* v. *Shepherd*, 2 *Johns. Cas.* 27.

(149) Vide *Wise* v. *Withers*, 3 *Cranch*, 331. *Smith* v. *Shaw*, 12 *Johns. Rep.* 257. In the latter case, the difference between a defect of jurisdiction as to the subject matter, and as to the person or place, is considered by the court; in the former instance, the officer being a trespasser, but not in the latter, unless the defect of jurisdiction appear on the process.

(150) But trespass has been held to lie against a justice of the peace, who is-

Thirdly, When a court has jurisdiction, but the proceeding is *defective*, as being irregular or void,[151] trespass against the attorney and plaintiff is in general the proper form of action(*g*); and in the case of Morgan and Hughes(*h*), it was decided, that an action on the case could not be sustained against a magistrate for issuing an irregular warrant, *though maliciously; and that the action should have been trespass(*i*); [*185] for in general no action can be supported against a magistrate, for any thing done by him in that capacity on the ground of malice(*j*);[152] and if there be an irregularity, that must be treated as such in an action of trespass. But with regard to a party issuing irregular process, there seems no reason why the person prejudiced should not be at liberty to support an action on the case against him where there was no cause of action, and the proceeding was malicious as well as irregular(*k*); for it would be allowing him to take advantage of his own wrong, to suffer him to turn the plaintiff round on such an objection, after he had in an action on the case proved the malicious and unfounded conduct of the defendant. By a late statute it is enacted that, where an action is brought against a magistrate after conviction quashed, it shall be in case(*l*), but this statute only applies where the conviction has been so quashed(*m*).

Fourthly, When the process has been *misapplied*, as when A or his goods be taken upon process against B, trespass is in general the only remedy(*n*);[153] or if there be a misnomer in the process, though it be executed on the person or goods of the party against whom it was in fact issued(*o*).[154]

Fifthly, When the process of a court has been *abused*(*p*), trespass against the sheriff and his *officer committing the abuse is the proper [*186]

(*g*) Parsons *v.* Loyd, 3 Wils. 341.—2 Bla. Rep. 845.

(*h*) 2 T. R. 225

(*i*) See also Hill *v.* Bateman et al., 2 Stra. 710.

(*j*) Johnstone *v.* Sutton, 1 T. R. 545. Reynolds *v.* Kennedy, 1 Wils. 232.

(*k*) Atwood *v.* Monger, Styles, 378. Goslin *v.* Wilcock, 2 Wils. 302. 306.—Waterer *v.* Freeman, Hob. 205. 266.

(*l*) 43 Geo. 3. c. 141.

(*m*) Massey *v.* Johnson, 12 East, 67.

(*n*) Sanderson *v.* Baker et al., 3 Wils. 309.—S. C. 2 Bla. Rep. 832.—Wale *v.* Hill, 1 Bulst. 149.—Coote *v.* Lightworth, Moor. 457.—Hardr. 322.

(*o*) Cole *v.* Hindson et al., 6 T. R. 234.—Shadgett *v.* Clipson, 8 East, 328.

(*p*) Woodgate *v.* Knatchbull, 2 T. R. 148.

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sued an execution against the body of a person privileged from imprisonment. *Percival* v. *Jones*, 2 *Johns. Cas.* 49. *Hess* v. *Morgan*, 3 *Johns. Cas.* 85. So, trespass lies against a party at whose instance a warrant is issued out of a justice's court against a person privileged from arrest. *Curry* v. *Pringle*, 11 *Johns. Rep.* 444.

(151) But if the process be erroneous or voidable only, trespass will not lie. *Reynolds* v. *Corp & Douglas*, 3 *Caine's Rep.* 267.

(152) Vide ante, 66. n. 132.

(153) So, the gaoler receiving and detaining a person arrested by mistake, instead of another, is liable in trespass. *Aaron* v. *Alexander & others*, 3 *Campb.* 35.

(154) Acc. *Wilks* v. *Lorck*, 2 *Taunt.* 399. *Scandover & others* v. *Warne*, 2 *Campb.* 270. But if the party himself occasioned the mistake, he cannot maintain the action. *Price* v. *Harwood*, 3 *Campb.* 108.

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action, if the conduct of the officer was in the first instance illegal, and an immediate injury to the body, personal or real property; as if the officer arrest out of the sheriff's bailiwick(*q*), or after the return day of the writ(*r*),[155] or if he break open an outer door, &c.(*s*). So though the conduct of the officer was in the first instance lawful, but he abused his authority, and thereby became a trespasser *ab initio*(*t*): and in some cases, though the abuse be merely a nonfeazance, trespass is the proper remedy, as if a sheriff neglect to return a bailable *latitat*(*u*), or to discharge the party out of custody when he ought to do so, as for fees not due(*w*).[156] These rules also hold as to the ministerial officers of courts of inferior jurisdiction, who abuse the trust reposed in them. However, in general, when the act complained of consists of a mere nonfeazance, as if the sheriff, or a magistrate, &c. improperly refuse bail, or to act, when they should do so, an action of trespass is not the proper remedy, but case(*x*).

Sixthly, When a ministerial officer proceeds *without warrant*, on the information of another, trespass, and not case, is the proper form of action against the informer, if the information turn out unfounded(*y*); and [187*] when an officer proceeds *without warrant and without foundation, upon his own apprehension, though there was probable cause, trespass is the proper form of action against him(*xx*).

Seventhly, But no person who acts upon a regular writ or warrant can be liable to this action, however malicious his conduct, but case for the malicious motive and proceeding is the only form of action(*yy*).

(*q*) Olliet *v.* Bessey, Sir T. Jones, 214.—Sanderson *v.* Baker et al., 2 Bla. Rep. 834.

(*r*) Parrot *v.* Mumford, 2 Esp. Rep. 585.

(*s*) Lee *v.* Gansel, Cowp. 1.—Ratcliffe *v.* Burton, 3 Bos. & Pul. 223.

(*t*) Bac. Ab. tit. Trespass, B.—Reid *v.* Harrison, 2 Blac. Rep. 1218.

(*u*) Com. Dig. tit. Return, F. 1.

(*w*) Smith *v.* Gibson, 1 Wils. 153.

(*x*) Ante, 137.—Osborn *v.* Gough, 3 Bos. & Pul. 551.—Green *v.* The Hundred of Bucclechurch, 1 Leon. 323.—Salmon *v.* Percival, Cro. Eliz. 196.—Parsons *v.* Loyd, 3 Wils. 342, 3.

(*y*) Stonehouse *v.* Elliot, 6 T. R 316. Samuel *v.* Payne et al., Dougl. 359.—Flewster *v.* Royle, 1 Camp. 187.

(*xx*) Groenvelt *v* Burwell et al., 1 Salk. 396.—S. C. 1 Lord Raym. 454.—Leglise *v* Champante, 2 Stra. 820.

(*yy*) Ante, 136.—Belk *v.* Broadbent et ux., 3 T. R. 185.—Boot *v.* Cooper, 1 T. R. 535; reported also in 3 Esp. Rep. 135.—Ratcliffe *v.* Burton, 3 Bos. & Pul. 225.—Stonehouse *v.* Elliot, 6 T. R. 315. Hal. P. C. 151.

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(155) Acc. *Stoyel* v. *Lawrence & Adams*, 3 *Day*, 1. *Vail* v. *Lewis & Livingston*, 4 *Johns. Rep.* 450. *Adams* v. *Freeman*, 9 *Johns. Rep.* 117. But the plaintiff or his attorney will not be liable unless the arrest were made by their direction, and an action on the case will not lie against them, for not countermanding the execution after the return day. *Vail* v. *Lewis*. *Adams* v. *Freeman*, ubi sup.

(156) Vide *Warne* v. *Constant*, 4 *Johns. Rep.* 32.

IV. TRESPASS. Pleadings, &c.

THE *declaration* in this action contains a concise statement of the injury complained of, whether to the person, personal or real property(*z*), and should allege that such injury was committed *vi et armis*(*a*), and *contra pacem*(*b*). The general issue is, not guilty of the trespasses as alleged by the plaintiff; and under it few matters of defence can be given in evidence, and consequently the pleadings in this action require much attention. In an action of trespass to the person, or to real property, if the damages recovered by verdict be under 40*s*. the plaintiff will in general recover no more *costs* than damages(*c*); but where the injury is to a personal chattel, it is otherwise(*d*). The *verdict* and *judgment* are for damages assessed by the jury, and for the costs.

*V. EJECTMENT.† [*188]

V. EJECTMENT.

This action lies for the recovery of the possession of real property, in which the lessor of the plaintiff has the legal interest, and a possessory right not barred by the statute of limitations(*zz*). Mere nominal damages and costs are recoverable in this action, and in order to complete the remedy for damages, when the possession has been long detained, an action of trespass for the *mesne profits* must be brought after the recovery in ejectment.[157] This action may be considered with reference, *first*, to the nature of the property or thing to be recovered; *secondly*, the right to such property; and, *thirdly*, to the nature of the ouster or injury.

1st. For what property it lies.‡

This action is in general only sustainable for the recovery of the possession of property, upon which an *entry* might in point of *fact* be made, and of which the sheriff could deliver actual possession;[158] therefore, it is not in general sustainable for the recovery of property which in legal consideration is not tangible, as for an advowson, a rent, common in gross, or other incorporeal heriditament, or a watercourse, &c.(*aa*); but

(*z*) See the precedents, post. 2 Vol. 417. 440.

(*a*) Post. 2 Vol. 417. 440.

(*b*) Id. ibid.

(*c*) Tidd Prac. 3d edit. 879, 880.

(*d*) Post. 2 Vol. 432. 436.

† See the History of this action in 3 Blac. Com. 302.[159] The nature of it, Goodtitle *v.* Tombs, 3 Wils. 120.—Aslin *v.* Parkin, 2 Burr. 667, 8.—Selwyn's Ni. Pri. 722 to 784.—Run. Ejectment.

(*zz*) Goodtitle d. Jones *v.* Jones et al., 7 T. R. 47. 50.—Aslin *v.* Parkin, 2 Burr. 668.—Doe d. Da Costa *v.* Wharton et al., 8 T. R. 2.

‡ For what an ejectment lies, and the description, see Run. Eject. 121 to 136. Selwyn's Ni. Pri. 727 to 730.—Post. 2 vol. 441. 442.

(*aa*) 3 Bla. Com. 206.—Challenor *v.* Thomas, Yelv. 143.—Run. Eject. 121 to 136.

(157) Vide *Cummings & Wife* v. *Noyes*, 10 *Mass. Rep.* 435.

(158) Vide *Jackson* d. *Loux & others* v. *Buel*, 9 *Johns. Rep.* 298.

(159) Vide etiam 4 *Reeve's Hist. E. L.* 165. 170.

V. EJECTMENT. [*189] it lies for common appendant or appurtenant, if *demanded with the land in respect of which it is claimed, for the sheriff, by giving possession of the land, gives possession of the common(*b*); an ejectment also lies for tithe, by the statute of 32 Hen. 8. c. 7. s. 7.(*c*); it is, therefore, necessary to describe the nature of the property in the pleadings, and the word "tenement" is too general(*d*); and when common is to be recovered, it must be described as appendant or appurtenant(*e*); and if a watercourse be sought to be recovered, it must be described as land covered with water(*f*).[160]

2dly, The title thereto. With respect to the title, a party having a right of entry, whether his title be in fee-simple, fee-tail, in copyhold, or for life, or years, may support an ejectment; but the right of possession must be of some duration, and exclusive, and therefore, an ejectment cannot be supported for a standing place, &c. or where a party has merely a license to use land, &c.(*g*).

The general rule governing this action is, that the plaintiff must recover upon the *strength of his own title*, and of course he cannot, in general, found his claim upon the insufficiency of the defendants(*h*); for possession gives the defendant a right against every person who cannot shew a sufficient title, and the party who would change the pos- [*190] session must therefore first establish a *legal title(*i*); in which case an equitable title would be no bar to the plaintiff's recovery(*j*);[161] and this rule prevails, even if a stranger who has no colour of title should evict a person who has been in quiet possession short of *twenty* years, but who has not a strict legal title(*k*); but a lessee whose tenancy is

(*b*) Newman *v.* Holdmyfast, 1 Stra. 54.—Baker *v.* Roe, Rep. temp. Hardw. 127.—Bul. N. Pri. 99.

(*c*) 3 Bla. Com. 206.—Bul. Ni. Pri. 99.—2 Saund. 304. n. 12.

(*d*) Doe d. Bradshaw *v.* Plowman, 1 East, 441.—Vice *v.* Burton, 2 Stra. 891. post. 2 Vol. 441. n. e.

(*e*) Newman *v.* Holdmyfast, 1 Stra. 54.

(*f*) Challenor *v.* Thomas, Yelv. 143. Co. Lit. 4. b.

(*g*) Ante, 175.—The King *v.* The Inhabitants of Mellor, 2 East, 190.—Goodtitle d. Miller *v.* Wilson & others, 11 East, 345.

(*h*) Martin d. Tregonwell *v.* Strachan and others, 5 T. R. 110. n. a.—Graham *v.* Peat, 1 East, 246.

(*i*) Roe d. Haldane et al. *v.* Harvey, 4 Burr. 2487.—Graham *v.* Peat, 1 East, 246.—Run. Ejectm. 15.—Martin d. Tregonwell *v.* Strachan, 5 T. R. 110.—Doe d. Hodsden *v.* Staple, 2 T. R. 684.—Goodtitle d. Jones *v.* Jones, 7 T. R. 47.

(*j*) Doe d. Shewen *v.* Wroot, 5 East, 139.—Goodtitle d. Miller *v.* Wilson & others, 11 East, 334.

(*k*) Doe d. Crisp *v.* Barber, 2 T. R. 749.—Graham *v.* Peat, 1 East, 246.—Frogmorton d. Fleming *v.* Scott, 2 East,

(160) A reservation in a deed, if a right for the grantor to erect and occupy a mill-dam, is such a tenement as may be recovered in ejectment. *Jackson* d. *Loux & others* v. *Buel*, 9 *Johns. Rep.* 298.

(161) Acc. *Jackson* d. *Smith & Boone* v. *Pierce*, 2 *Johns. Rep.* 221. *Jackson* d. *Whitbeck & Gardeniere* v. *Deyo*, 3 *Johns. Rep.* 417. *Jackson* d. *Potter* v. *Sisson*, 2 *Johns. Cas.* 321. *Goodtitle* d. *Estwick* v. *Way*, 1 *Term Rep.* 735. *Doe* d. *Eberall* v. *Lowe*, 1 *H. Black. Rep.* 447.

determined, will not in general be permitted to dispute his lessor's title(*l*). The lessor of the plaintiff must also have a strict *legal* right; and a mere equitable interest is not sufficient to support this action; and the doctrine that the legal estate cannot be set up at law by a trustee against his *cestui que trust*, no longer prevails(*m*); and a party cannot recover in ejectment on an equitable title(*n*);[162] though where trustees *ought* to convey to the beneficial owner, it will be left to the jury to presume that they have conveyed accordingly; or where the beneficial occupation of an estate by the possessor, under an equitable title, induces a probability that there has been a conveyance *of the [*191] legal estate to such possessor(*o*); but when the facts of the case preclude such presumption, the party having only the equitable interest, cannot prevail in a court of law(*p*).

The lessor of the plaintiff must also in this action have the *right of possession* at the time of the demise laid in the declaration and at the commencement of the action(*q*); and, therefore, the doctrine which

469. Sed quære, for it is clear, that trespass would lie in such case against a stranger, Graham *v.* Peat, 1 East, 244: and according to Allan against Rivington, 2 Saund. 111. priority of possession alone gives a good title to the lessor of the plaintiff against the defendant and all the world, except the person who has a better title. In the case of personal property it is clear that a person having possession, though without any title, may support trespass, detinue, or trover, against a stranger who takes away the property; see 2 Saund. 47. c. And it seems better policy to protect the quiet possession of land against any person but the real owner, than to encourage a struggle for the possession by a party having no colour of title.†

(*l*) Driver d. Oxenden et al. v. Lawrence, 2 Bla. Rep. 1259.—Barwick *v.* Thompson & others, 7 T. R. 488.—Cooke *v* Loxley, 5 T. R. 4. Sed vide England d. Syburn *v.* Slade, 4 T. R. 683.—Peake, L. E. 13.—2 Campb. 13. in notes.

(*m*) Doe d. Shewen *v.* Wroot et al., 5 East, 138.

(*n*) Doe d. Bowerman *v.* Sybourn, 7 T. R. 3.—Doe d. Jones *v.* Jones et al., 7 T. R. 49.—Roe d. Reade *v.* Reade, 8 T. R. 122.—Keene d. Lord Byron et al. *v.* Deardon et al., 8 East, 248. 263.

(*o*) Id. ibid.

(*p*) Id. ibid.

(*q*) Doe d. Da Costa *v.* Wharton et al., 8 T. R. 2.—Goodtitle d. Jones *v.* Jones et al., 7 T. R. 47.—Doe d. Whately *v.* Telling, 2 East, 257.—Holdfast d. Woellams *v.* Clapham, 1 T. R. 600.—Right d. Lewis & others *v.* Beard, 13 East, 210.—Blackbourn *v.* Lassels, Cro. Eliz. 800.

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(162) Vide *Jackson* d. *Potter & others* v. *Sisson*, 2 *Johns. Cas.* 321. *Jackson* d. *Simmons & others* v. *Chase*, 2 *Johns. Rep.* 84. *Jackson* d. *Smith* v. *Pierce*, *Id.* 226.

† In *Smith* d. *Teller* v. *Lorillard*, 10 *Johns. Rep.* 338, it was held that a prior possession short of twenty years under a claim or assertion of right, will prevail over a subsequent possession of less than twenty years, when no other evidence of title appears on either side; but that it was to be understood that the prior possession of the plaintiff had not been voluntarily relinquished without the animu revertendi, (as is frequently the case with possessions taken by *squatters*,) and that the subsequent possession of the defendants was acquired by mere entry without any lawful right. And see *Bateman* v. *Allen*, *Cro. Eliz.* 437. *Jackson* d. *Murray & Bowen* v. *Hazen*, 2 *Johns. Rep.* 22. *Jackson* d. *Duncan & others* v. *Harder*, 4 *Johns. Rep.* 202. *The People* v. *Leonard*, 11 *Johns. Rep.* 504.

V. EJECTMENT.

formerly prevailed, that a mortgagee might maintain an ejectment to get into the receipt of the rents and profits, without giving a notice to quit, though a tenant under a demise anterior to the mortgage be in possession, is now exploded(*r*); and a remainder man, or reversioner, cannot support this action whilst the right of possession is in another:[163] nor can it be sustained where the right of entry of him who is entitled to the estate is taken away(*s*), either by twenty years' advere possession(*t*), or in some cases by a descent, from a person who made the ouster, to his heir, in which case, if the disseisor had five years' quiet possession, a writ of entry must be resorted to(*u*); or by a discontinuance(*v*), in which case frequently the remedy for the issue in tail is only by a writ of formedon(*w*).

An *actual* entry is not in general necessary for the support of this action,[164] as it is in trespass; but to avoid a fine it must be made(*x*); [*192] and in many cases though not absolutely necessary an entry *is advisable; thus an ejectment may be brought even after *twenty years'* adverse possession, if there has been an actual entry within the twenty years,[165] and the ejectment be brought within a year after such entry(*y*); and trespass will not lie for mesne profits, which accrued before an actual entry made to avoid a fine(*z*).

3dly. The injury.

This action is only sustainable for what in fact, or in point of law, amounted to an *ouster* or dispossession of the lessor of the plaintiff(*a*), and it is necessary that the possession should be adverse or illegal at the time of the supposed demise; laid in the declaration in ejectment(*b*); for if there be no ouster, or the defendant be not in possession at the time of the bringing of the action, it will fail(*c*);[166] and in such case the plaintiff should proceed by action of trespass. An actual ouster may be by driving cattle out of the land, or by not suffering the

(*r*) Id. ibid.—Run. Eject. 109.—Thunder d. Weaver *v.* Belcher, 3 East, 449.

(*s*) 3 Bla. Com. 206. 171.—Run. Eject. 234. 242.—Bul. N. Pri. 99.—Doe d. Cooke et ux. *v.* Danvers, 7 East, 319.

(*t*) 21 Jac. 1. c. 16.—Doe d. Cooke et ux. *v.* Danvers, 7 East, 299.

(*u*) 3 Bla. Com. 176. 206.—Run Eject. 42. supra, note s.

(*v*) Supra, note s.—Selwyn Ni. Pri. 758 to 761.

(*w*) 1 Saund. 319. a. 261. n. 3.—Run. Eject. 42.—3 Bla. Com. 206.—Bul. Ni. Pri. 99.

(*x*) 1 Saund. 319. b. 261. n. 3.

(*y*) 1 Saund. 319. c.

(*z*) Compere *v.* Hicks et al., 7 T. R. 727.—1 Saund. 319. b.

(*a*) 3 Bla. Com. 199.

(*b*) Right d. Lewis & others *v.* Beard, 13 East, 210. 212.—Doe d. Foley and others *v.* Wilson, 11 East, 56.

(*c*) Goodtitle d. Balch *v* Rich et al., 7 T. R. 327.—Fenn d Blanchard *v.* Wood, 1 Bos. & Pul. 573.

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(163) Vide *Jackson* d. *Hardenbergh & others* v. *Schoonmaker*, 4 *Johns. Rep.* 390. *Hall's Lessee* v. *Vandegrift & others*, 3 *Binney*, 374.

(164) Vide *Jackson* d. *Brouck* v. *Crysler*, 1 *Johns. Cas.* 125.

(165) But such entry must be for the purpose of taking possession. *Jackson* d. *Hardenbergh & others* v. *Schoonmaker*, 4 *Johns. Rep.* 390.

(166) Acc. *Jackson* d. *Clowes* v. *Hakes*, 2 *Caine's Rep.* 335.

party to occupy it; and in such case, even one tenant in common may support an ejectment against his co-tenant,[167] but in general the mere perception of all the profits by the latter will not amount to an ouster(*d*).

The requisites of the *declaration* in this action are pointed out in the second volume(*e*). The count or counts should be on the demise of the person entitled to the *legal* estate, and to the *right of possession*, at the time of the supposed demise(*f*), and the premises must be described with certainty(*g*).

*If the defendant appear, he must by the terms of the consent rule *plead* only the general issue, though he may by leave of the court plead to the jurisdiction(*gg*). The *damages* we have seen are merely nominal, and it is usual to remit them, in order to recover a real compensation in an action of trespass for the mesne profits.[168] Full *costs* are recoverable, but when the judgment is against the casual ejector, by the default of the party in possession, the only mode of recovering the costs is by the action of trespass for the mesne profits,[169] which much resembles the common action of trespass, and the particular properties of which are stated in the work referred to in the note(*h*). The *judgment* is that the plaintiff do recover his term, (or terms according to the number of demises in the declaration,) of and in the tenements, and (unless the damages be remitted as is most usual) the damages assessed by the jury with the costs of increase. [*193]

(*d*) Run. Eject. 191.—Co. Lit. 199. b.—Effect of consent rule, Doe d. White *v.* Cuff, 1 Campb. 173.† Sed quære, see Right d. Lewis & others *v.* Beard, 13 East, 212.

(*e*) Post. 2 Vol. 441, &c.

(*f*) Goodtitle d. Jones *v.* Jones et al., 7 T. R. 47.—Doe d. Shewen *v.* Wroot et al., 5 East, 132.

(*g*) Post. 2 Vol. 441, 442.

(*gg*) Denn d. Wroot *v.* Fenn, 8 T. R. 474.—Williams d. Johnson *v.* Keen et al., 1 Bla. Rep. 197.

(*h*) Run. Eject. 438 to 446.—Post. 2 Vol. 435.

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(167) Vide *Burnitz's Lessee* v. *Casey*, 7 *Cranch*, 456.

† In ejectment between tenants in common, in order to avoid the effect of the confession of ouster, in the consent rule, (which excuses the plaintiff from proving an actual ouster,) the defendant should enter into the consent rule *specially*, that is, as to the lease and entry only. *Oates* d. *Wigfall* v. *Brydon et al.*, 3 *Burr. Rep.* 1895. *Doe* d. *White* v. *Cuff*, 1 *Campb.* 173. *Doe* d. *Gigner* v. *Roe*, 2 *Taunt.* 397. *Jackson* d. *Denniston & others* v. *Denniston*, 4 *Johns. Rep.* 311. *Languedyck & wife* v. *Burhans*, 11 *Johns. Rep.* 461.

(168) But the entry of the remittitur damna is mere form, and the want of it will not preclude the party from bringing an action for the mesne profits. *Van Allen* v. *Rogers*, 1 *Johns. Cas.* 281.

(169) Vide *Baron* v. *Abeel*, 3 *Johns. Rep.* 483.

CONSEQUENCES OF MISTAKE IN FORM OF ACTION.

CONSEQUENCES OF MISTAKE IN FORM OF ACTION.

We have already seen that the courts consider it of great importance, that the boundaries between the different actions should be preserved(*i*); and the consequences of a mistake in the application of the remedy are very material(*j*). When the objection to the form of the action is substantial, and appears upon the face of the declaration, it [*194] may be *taken by demurrer, or by motion in arrest of judgment, or by writ of error(*k*). Thus where the plaintiff in an action on the case, stated that the defendant *wilfully* drove his coach and horses against the plaintiff's carriage, the court arrested the judgment, on the ground that it appeared from such allegation that the action should have been trespass and not case(*l*). When the defendant demurs he is entitled to costs, but not so upon a motion in arrest of judgment,[170] or writ of error,[171] and consequently where delay is not desired by the defendant, it is preferable to demur, in order to obtain costs. The cases are contradictory upon the question, whether a substantial objection to the form of action is a ground of nonsuit(*m*) [172] In a case where it appeared upon the face of the declaration, that the action should have been brought against the sheriff, and not against the under-sheriff, after verdict upon a rule to show cause why a nonsuit should not be entered, Lord Mansfield observed, that if the court should order a nonsuit to be entered, the plaintiff must pay the defendant his costs, but that if the judgment was arrested, each party must pay his own costs; but that as it appeared upon the declaration in that case, that the defendant might have demurred, and thereby have avoided the costs of the subsequent proceedings, the court would arrest the judgment, and not permit a nonsuit to be entered(*n*); but in a recent case it was held

(*i*) Ante, 86.—Savignac *v.* Roome, 6 T. R. 129.

(*j*) The court will not allow the parties, even by agreement, to try a point, in an improper action, Ker *v.* Osborne, 9 East, 381.—Hawkins *v.* Bailey, 4 T. R 681.

(*k*) Turner et al. *v.* Hawkins et al., 1 Bos. & Pul. 476.—Savignac *v.* Roome, 6 T. R. 125.—Cameron et al. *v.* Reynolds, Cowp. 407. Formerly it was the ground of a plea in abatement, post. 442.

(*l*) Savignac *v.* Roome, 6 T. R. 125. Ogle et al. *v.* Barnes et al., 8 T. R. 188. M'Manus *v.* Crickett, 1 East, 109.

(*m*) Cameron et al. *v* Reynolds, Cowp. 407.—Lindon *v.* Hooper, Cowp. 414.—Sadler *v.* Robins, 1 Campb. 256.

(*n*) Cameron et al. *v.* Reynolds, Cowp. 407.

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(170) Vide *Pangburn* v. *Ramsay*, 11 *Johns. Rep.* 141.

(171) In the state of New York, a late statute has given costs on the reversal of a judgment. *Sess.* 36. *c.* 96. *s.* 13. 1 *R. L.* 346.

(172) The plaintiff cannot be nonsuited on account of a defect in his declaration. *Van Vechten* v. *Graves*, 4 *Johns. Rep.* 403. And on a motion for a new trial, the defendant cannot object to the form of the action. *Smith* v. *Elder*, 3 *Johns. Rep.* 105.

otherwise(*o*). When *the objection to the form of action *does not* appear on the face of the pleadings, it can only be taken as a ground of nonsuit, in which case the defendant will be entitled to his costs(*oo*); thus where the action was in assumpsit for money had and received, and it appeared on the trial, that the plaintiff should have declared in another form of action, yet as the objection was not apparent on the face of the declaration, and consequently the defendant could not demur, or avail himself of it otherwise than on the trial, it was decided that the plaintiff was properly nonsuited(*p*). CONSEQUENCES OF MISTAKE IN FORM OF ACTION. [*195]

If by either of these means the plaintiff fail in his action, and judgment be given against him for that reason, and not upon the merits, he is at liberty to commence a fresh action,[173] and the defendant cannot plead in bar the proceedings in the first ineffectual suit(*q*). Thus if the plaintiff by mistake bring trespass instead of trover, and judgment be given against him on that account, the defendant cannot plead it in bar to an action of trover brought afterwards against him(*r*); and if the plaintiff mis-state his cause of action, and the defendant demur, the plaintiff is certainly not precluded from commencing a fresh action, and may reply to a plea in bar of the judgment on demurrer, that the same was not obtained on the merits(*s*); but if the defendant plead, and the plaintiff take issue, and a verdict be found for the defendant, the plaintiff will be estopped from bringing a fresh action; or if he *demur to the plea in bar, and such plea be sufficient, in that case also [*196] no second action can be commenced(*rr*); but if the plea were not sufficient, and the judgment against the plaintiff was on the defect in his declaration, the former judgment against him will be no bar(*ss*).

OF JOINDER OF ACTIONS.†

Where the plaintiff has two causes of action, which may be joined in one action, he ought so to proceed, and if he bring two actions, he may OF JOINDER OF ACTIONS.

(*o*) Sadler *v.* Robins, 1 Campb 256.

(*oo*) Cameron *v.* Reynolds, Cowp. 407.—Lindon *v.* Hooper, Cowp. 414.

(*p*) Lindon *v.* Hooper, Cowp. 414. to 419.

(*q*) 2 Saund. 47. l.—Kitchen et al. *v.* Campbell, 3 Wils. 309.

(*r*) Id. ibid.

(*s*) Lampen *v.* Kedgewin, 1 Mod. 207.—Vin. Ab. Judgment, Q. 4.—Bla. Rep. 831.

(*rr*) Lampen *v.* Kedgewin, 1 Mod. 207.—Vin. Ab. tit. Judgment, Q. 4.

(*ss*) Lampen *v.* Kedgewin, 1 Mod. 207.—Vin. Ab. Judgment, Q. 4. pl. 3.

† The joinder of several *persons* in a suit has already been considered. As to joinder of actions in general, see 2 Saund. 117. b. to 117. e.—Tidd Prac. 3d edit. 10 to 13.—Com. Dig. Action, G.—

(173) Vide *Benton* v. *Duffy, Rep. Court of Conf.* 98. *Com. Dig.* Action (L. 4.) *Phillips' Ev.* 235.

OF JOINDER OF ACTIONS.

be compelled to consolidate them, and to pay the costs of the application(*t*).[174] It is, therefore, material to ascertain, when several demands may be included in the same action. This may be considered with reference to, *first*, the joinder of different *forms* of action; *secondly*, of different *rights* of action; and, *thirdly*, the consequences of misjoinder.

1st, Joinder of different *forms* of action.

The joinder in action depends on the *form* of the action, rather than on the *subject matter* of it; thus in an action against a carrier, if the plaintiff declare in assumpsit he cannot join a count in trover, as he may if he declare against him in case, for the joinder depends on the

[*197] *form*[175] *of the action(*u*); and if a cause of action, which ought to be laid in assumpsit, be improperly laid in case, and joined with a count in trover, no objection can be taken with effect on the ground of misjoinder, but only the particular defective count should be demurred to(*v*). The result of the authorities is stated to be, that when the *same plea* may be pleaded, and the *same judgment* given on all the counts of the declaration, or when the *counts* are of the *same nature*, and the *same judgment* is to be given on them all, though the pleas be different, as in the case of debt upon bond and on simple contract, they may be joined(*w*). By this rule we may decide in general what forms of action may be joined in the same declaration.

In actions in *form ex contractu*, the plaintiff may join as many different counts as he has causes of action in assumpsit; so also in covenant, debt, account, annuity, or *scire facias*(*x*). So debt on bond, or other specialty, may be joined in the same action with debt on judgment, or on simple contract, or for an amerciament;[176] so may debt and detinue, though in these cases the pleas are different, and in the latter the judgment also varies(*y*); which joinder has probably been allowed. because the practice is sanctioned by the entries in the *Registrum Brevium*(*z*).

[*198] *But where the defendant would, on bringing error on a judgment in debt founded on a specialty, be compellable to find bail in error in pursuance of the 3 Jac. 1. c. 8. it is not advisable to join a count in debt on

Bac. Ab. Actions in General, C.—2 Vin. Ab. 38. tit. Actions, Joinder, U. c.—Gilb. C. P. 5, 6, 7.

(*t*) Cecil *v.* Brigges, 2 T. R. 639.—Tidd's Prac. 3d Edit. 556.

(*u*) Per Buller, J.—Brown *v.* Dixon, 1 T. R. 277.—And see the judgment of Lord Ellenborough, Ch. J. in Govett *v.* Radnidge et al., 3 East, 70. and ante, 135.

(*v*) Samuel *v.* Judin, 6 East, 335, 6. S. C. 1 New Rep. 45.

(*w*) 2 Saund. 117. c.—Brown *v.* Dixon, 1 T. R. 276, 7.—Bac. Ab. Actions in General, C.—Com. Dig. Action, G.

(*x*) Bac. Ab. Actions in General, C. Com. Dig. Actions, G.—2 Vin. Ab. 42. 45, 46.

(*y*) 2 Saund. 117. b.—The Duke of Bedford *v.* Alcock, 1 Wils. 252.

(*z*) Gilb. C. P. 5, 6, 7.—Bac. Ab. Actions in General, C.

(174) Vide *Thompson* v. *Shepherd*, 9 *Johns. Rep.* 262.

(175) But see *Hallock* v. *Powell*, 2 *Caine's Rep.* 216.

(176) So, debt on simple contract and on judgment may be joined. *The Union Cotton Manufactory* v. *Lobdell & another*, 13 *Johns. Rep.* 462.

simple contract, the judgment on which would not require bail in error(*a*): so several counts may be joined in one action on a penal statute, for different penalties of a similar nature, as for several acts of bribery(*b*).

So in actions in *form ex delicto*, several distinct trespasses may be joined in the same declaration(*c*), and several causes of action in case may be joined with trover(*d*); thus case against a common carrier, or for immoderately riding a horse, or for disturbing the plaintiff in his right of common, or for hindering him from landing goods upon a yard of the defendant contrary to agreement between them, or for not returning to the plaintiff a spaniel delivered to the defendant, to be tried and returned in a reasonable time, but keeping and detaining the same from the plaintiff, may be joined in one action and with a count in trover(*e*). So in replevin the plaintiff may in the same declaration count of several takings on different days, and at different places in the same county(*f*). And the plaintiff may join trespass with a count for a battery of his servant *per quod servitium amisit*, or for debauching his *servant(*g*), or tres- [*199]
pass and rescue(*h*) [177] though the loss of service, and consequence of the rescue, have been considered to be properly the subjects of an action on the case(*i*); however, if these injuries be joined, they should be stated to have been committed *vi et armis*.

But in order to prevent the confusion which might ensue, if different forms of action, requiring different pleas and different judgments, were allowed to be joined in one action, it is a general rule, that actions in form *ex contractu* cannot be joined with those in form *ex delicto*. Thus assumpsit, and an action on the case, as for a tort, cannot be joined(*j*),[178] nor assumpsit with trover(*k*), nor trover with detinue(*l*).

(*a*) Frier *v.* Bridgman, 2 East, 359. Tidd's Prac. 3d edit. 1079.

(*b*) Holland *v.* Bothmar, 4 T. R. 229. Young et al. *v.* The King, 3 T. R. 103. 2 Vin. Ab. 44. pl. 49.

(*c*) 2 Saund. 117. b.—Buckmere's Case, 8 Co. 87. b.—2 Vin. Ab. 38, &c. Heath's Max. 7.

(*d*) Id. ibid.—Brown *v.* Dixon, 1 T. R. 277.

(*e*) Id. ibid.

(*f*) Fitz. N. B. 68. n. a.—Bull. Ni. Pri. 54.—2 Vin. Ab 41.

(*g*) Alleyn, 9.—Bac. Ab. Actions in General, C.—Tullidge *v.* Wade, 3 Wils. 18. Heath's Max. 7.

(*h*) Sharpe *v.* Bechenowe, 2 Lutw. 1249.—Allways *v.* Broom, Lord Raym. 83.—Tidd. Prac. 3d edit. 11. n. u.

(*i*) Post. 2 Vol. 315. 343. 345, 346. but see Woodward *v.* Walton, 2 New Rep. 476. ante, 138.

(*j*) Brown *v.* Dixon, 1 T. R. 276, 7. Denison *v.* Ralphson, 1 Vent. 366.—Willet *v.* Tidy, Carth. 189.

(*k*) Holms *v.* Taylor, 2 Lev. 101.—Bage *v.* Bromnel, 3 Lev. 99.—Dalston *v.* Janson, 1 Salk. 10.—Mast *v.* Goodson, 3 Wils. 354.—Samuel *v.* Judin, 6 East, 336.

(*l*) Kettle *v.* Bromsall, Willes, 118.

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(177) Acc. *Baker* v. *Dumbolton*, 10 *Johns Rep.* 240.

(178) Acc. *Stoyel* v. *Westcott*, 2 *Day*, 418 *Wilson* v. *Marsh*, 1 *Johns. Rep.* 503. *Church & Demilt* v. *Mumford*, 11 *Johns. Rep.* 480 But see *Hallock* v. *Powell*, 2 *Caine's Rep.* 216. Contra. Where a declaration contained several counts, in each of which the gravamen stated was a tortious breach of the defendant's duty as an

OF JOINDER OF ACTIONS.

And with the above exceptions, counts in one species of action cannot be joined with counts in another; as assumpsit, covenant, debt, or account with each other(*m*), nor trespass with case, for they are actions of distinct natures, and the judgments are different, that in trespass being in strictness *quod capiatur*, and that in case *quod sit in misericordia*(*n*). In criminal proceedings, the joinder of different offences in an [*200] indictment does not render the proceeding defective, *though it is matter of discretion in the court, on motion to quash an indictment so framed(*o*).

2dly, Joinder of several *rights* of action, or *liabilities*.

Where the same form of action may be adopted for several distinct injuries, the plaintiff may in general proceed for all in one action, though the several rights affected were derived from different titles; but a person cannot in the same action join a demand in his own right, and a demand as representative of another or *in autre droit*, nor demands against a person on his own liability, and on his liability in his representative capacity(*p*). The points which usually occur in practice, may be considered as they arise in actions by and against partners, husband and wife, assignees of a bankrupt, executors and administrators, and heirs and devisees.

In actions by or against several persons, whether *ex contractu* or *ex delicto*, all the causes of action must be stated to be joint. Thus a person cannot bring a joint action against two, and state in one part of the declaration that one of them assaulted and beat him, and in another part that the other took away his goods, for the trespasses are of several natures, and against several persons, and they cannot plead to this declaration(*q*). But in the case of a survivor of several contracting parties, a demand by or against him as survivor, may be joined with a demand due in his own right(*r*).

[*201] *We have already considered in what actions a *husband and wife* ought to join, or be joined(*s*); and it is here only necessary to observe that when the wife is co-plaintiff in an action *ex contractu*, no cause of action can be included unless it be founded on a contract with the feme before marriage, or she be the meritorious cause of action, and her in-

(*m*) Bac. Ab. Actions in General, C.

(*n*) Courtney *v.* Collet, 1 Lord Raym. 272, 3.—2 Saund. 117. e.

(*o*) The King *v.* Kingston et al., 8 East, 46, 7.—Young et al. *v.* The King, 3 T. R. 103.

(*p*) Bac. Ab. Actions in General, C. 2 Vin. Ab. 62.—Com. Dig. Actions, G.

(*q*) 2 Saund. 117. a.—Cutsworth's Case, Sty. 153, 4.—Drummond *v.* Dorant et al., 4 T. R. 360.

(*r*) Hancock et al. *v.* Haywood, 3 T. R. 433.—Slipper & others *v.* Stidstone, 5 T. R. 403.—S. C. 1 Esp. Rep. 47. French *v.* Andrade, 6 T. R. 582.

(*s*) Ante, 17. 42. 60. and 81.

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attorney, as well as of the implied promise arising from an employment for hire; it was held that as each count contained allegations sufficient to support it, either in tort or assumpsit, they were not incompatible, and might be joined in the same declaration. *Church & Demilt* v. *Mumford*, 11 *Johns. Rep.* 479.

terest must expressly appear[179] on the face of every count(*t*). And in an action in form *ex delicto* for a personal injury, if the wife be joined, the declaration must proceed only for torts to her individually, and not for such wrongs as only affect the husband(*u*).[180] And for torts to the person or personal property, if she be joined, the nature of her interest therein must be expressly stated(*v*). And an action on the case cannot be supported against the husband and wife, for words spoken by both(*w*). OF JOINDER OF ACTIONS.

The *assignees* of A a bankrupt, and also of B a bankrupt, under separate commissions, cannot recover in the same action a joint debt due from the defendant to both the bankrupts, and also separate debts due to each, and if in such an action, the jury have assessed the damages severally on the separate counts, the court will arrest the judgment on those counts, which demand the debts due to each bankrupt separately(*x*). But where the plaintiffs sued as assignees of A and B, and also as assignees of C, for a joint *demand due to all the bankrupts, the declaration was holden good on a motion in arrest of judgment(*y*). If there have been any promise to the assignees, or cause of action since the act of bankruptcy, care must be taken to insert some count in the declaration adapted to such demand; and where two partners became bankrupts, and the defendant between the two acts of bankruptcy, illegally received money, and the assignees of the two partners, in their action to recover it, declared only for money had and received to the use of the two partners before they became bankrupts, and in another count for money had and received to the use of the plaintiffs as assignees, it was decided, that the plaintiffs could not recover, because they should have declared in one count for money had and received to the use of the partner who last became bankrupt, and of the plaintiffs as assignees(*z*). [*202]

A plaintiff cannot join in the same action a demand *as executor*, with another in his own right(*a*). The contradiction and doubts in the different cases to be met with in the books upon this point are merely in the application of the rule(*b*). In the late case of Cowell v. Watts(*c*),

(*t*) Ante, 20.—Bidgood *v.* Way et ux., 2 Bla. Rep. 1236.

(*u*) Ante, 61.

(*v*) Ante, 62.

(*w*) Bac. Ab. Actions in General, C. Swithin et ux. *v.* Vincent et ux., 2 Wils. 227.

(*x*) Hancock et al. *v.* Haywood, 3 T. R. 433.

(*y*) Streatfield et al. *v.* Halliday et al., 3 T. R. 779.

(*z*) Smith et al. *v.* Goddard, 3 Bos. & Pul. 465.

(*a*) King et al. *v.* Thorn et al., 1 T. R. 489.—2 Saund. 117. d.—Petrie et al. *v.* Hannay, 3 T. R. 659.—Cockerill et ux. *v.* Kynaston, 4 T. R. 277.—Bac. Ab. Actions in General, C.

(*b*) See the cases, 2 Saund. 117. d.—Cowell et ux. *v.* Watts, 6 East, 405.

(*c*) 6 East, 405. and see Thompson & wife *v.* Stent, 1 Taunt. 322.

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(179) Vide *Staley* v. *Barhite*, 2 *Caine's Rep.* 221.

(180) So, slander of husband and wife cannot be joined in the same action. *Ebersol* v. *Krug*, 3 *Binney*, 555.

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it was decided, that a count upon a promise to the plaintiff *as* administratrix, for goods sold and delivered by her *as* such, after the death of the intestate, may be joined with a count upon *an account stated with her *as administratrix*, because *the damages and costs* when recovered would be assets, and Lord Ellenborough, Ch. J. expressed a wish, that the rule laid down in Bull v. Palmer(*d*) had been abided by, viz. that *where the money, when recovered, would be assets, the executor may declare for it in his representative character;* and Grose, J. observed, that the best line to adopt in determining whether counts may be joined, is to consider whether the sum when recovered would be assets; and Lawrence, J. observed, "that the reason why promises made to a plaintiff in his own right cannot be joined with promises to him in his representative character is, because the funds, to which the money and costs to be recovered are to be applied, or out of which the costs are to be paid, are different, and that it appeared to him, that those cases in which the rule had been laid down, that counts may be joined, whenever the money recovered under them would be assets, afford the best guide. The question of costs is a matter of very different consideration, on which many of the contrary decisions have proceeded. The reason why an executor suing in his representative character, shall not be liable to costs if he fail, is, because he is supposed not to be cognizant of the contracts made by his testator; but as he must be cognizant of all contracts made by himself personally, though in his representative character, and as he might declare upon *them in his own right, there is no reason why he should be exempt from costs, in case he fail in his action;" and Le Blanc, J. said, "the plain and intelligible line is, that the counts may be joined whenever the money when recovered would be assets." It is therefore clear, that an executor or administrator, may declare as such for money paid by him in that character, and may join such count with counts on promises to the testator or intestate(*e*). So money had and received by the defendant to the use of the plaintiff as executor (*f*), and an account stated with him as executor, of monies due and owing to the testator(*g*), or to the plaintiff as executor(*h*), may be joined with counts on promises to the testator or intestate. And where the plaintiff declared as executor upon a bill of exchange indorsed to him in that character, it was holden sufficient(*i*), though in another case it was decided, that an executor cannot join a count upon a bond given to his testator, and a count upon a bond given to him as executor, in the same action(*j*). Where six years have

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(*d*) 2 Lev. 165.

(*e*) Ord *v.* Fenwick, 3 East, 104.

(*f*) Petrie and another *v* Hannay, 3 T. R. 659.—Foxwist et al. *v.* Tremaine, 2 Saund. 207, 8.

(*g*) Henshall *v.* Roberts et al., 5 East, 150.—Cowell and wife *v.* Watts, 6 East, 406.—King et al. *v.* Thom et al. 1 T. R. 487.—Thompson & wife *v.* Stent, 1 Taunton, 322.

(*h*) Cowell & wife *v.* Watts, 6 East, 406.—Thompson & wife *v.* Stent, 1 Taunton, 322.—acc. Nicolas *v.* Killigrew, 1 Lord Raym. 437.—2 Saund. 117. d.—semb. cont.

(*i*) King et al. *v.* Thom et al. 1 T. R. 487.—Cowell & wife *v.* Watts, 6 East, 410. 413.—2 Vin. Ab. 48. pl. 9.

(*j*) Hosier et al. *v.* Lord Arundel, 3 Bos. and Pul. 7.—Sed vide King et al. *v.* Thom et al., 1 T. R. 487.—Cowell & wife *v.* Watts, 6 East, 405.

elapsed since the death of the testator, or intestate, or it may on any other account be material for the plaintiff to avail himself of a promise or acknowledgment since the death, counts should be introduced in the declaration, on promises to the executor *in that character(*k*), for otherwise, such promise or acknowledgment, cannot be given in evidence(*l*).[181] In every count stating debts or promises to the executor or administrator in that character, the word "*as*" executor, &c. must be inserted(*m*). [*205]

So in an action *against* an executor, a count cannot be introduced, which would charge him personally, for the judgment in the one case would be *de bonis testatoris*, and in the other *de bonis propriis*(*n*); and therefore a count for money lent to or had and received by an executor as such, is not sustainable(*o*).[182] But in an action of covenant against an executor, the plaintiff may join a breach by the testator and a breach since his decease(*p*); and an account stated by the defendant *as* executor or administrator, of monies due from the testator or intestate may be supported,[183] and may be joined with counts upon promises by the

(*k*) See the form, post. 2. Vol. 96.

(*l*) Sarell *v.* Wine, 3 East, 409.—Hickman et al. *v.* Walker, Willes, 29.

(*m*) Henshall *v.* Roberts et al., 5 East, 150.—But see Curtis *v.* Davis, 2 Lev. 110—2 Vin. Ab. 47. pl. 6. 48. pl. 9.—Brigden *v.* Parkes et al., 2 Bos. & Pul. 424.

(*n*) 2 Saund. 117. d.—Herrenden *v.* Palmer, Hob. 88.—Hull et al. *v.* Huffam, 2 Lev. 228—2 Vin. 45. pl. 52. 47. pl. 5.

(*o*) 2 Saund. 117. d.—Jennings *v.* Newman, 4 T. R. 347.—Rose et ux. *v.* Bowler et al., 1 Hen. Bla. 108.

(*p*) Wilson *v.* Wigg & another, 10 East, 313.

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(181) Acc. *Jones & others* v. *More*, 5 *Binney*, 573.

(182) And a declaration containing a count on a promise by the defendant's testator, and a count on a promise by the defendants, *as executors as aforesaid*, for work and labour done at *their* request, is bad on general demurrer. *Myer & others* v. *Cole & Niven*, 12 *Johns. Rep.* 349.

(183) It has been held that a declaration stating that the defendant's testator was indebted to the plaintiff, in a certain sum for money lent and advanced, and that the testator being so indebted in his lifetime, the defendant, afterwards as such executor, after the death of the testator, promised, &c.; was good. And Spencer, J. in delivering the opinion of the court, says; "The counsel seemed to suppose, that the judgment on this count would be de bonis propriis, and that the executor would, in this mode of declaring, be prevented from pleading plene administravit. If such would be the consequence, then I should hold the objection to be valid; but according to the cases of *Secor* v. *Atkinson*, (1 *H. Bl.* 102.) and of *Executors of Hughes* v. *Hughes*, (7 *Bro. P. C.* 550. & 2 *Saund.* 117. *e.* note 4.) the judgment will be *de bonis testatoris*, and this mode of declaring is adopted merely to save the statute of limitations; consequently the defendant is not prevented from making any defence under such a form of declaring, which he might have made, had the declaration stated the promise of the testator, and his liability only" *Whitaker* v. *Whitaker*, 6 *Johns. Rep.* 112. And promises by the defendant as executor or administrator, as well as by his testator or intestate, to pay for work and labour done for, or goods sold and delivered to the intestate, may be joined in the same declaration, and a count charging a promise by the

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testator or intestate, and this is the common mode of declaring against executors and administrators, to save the statute of limitations(*q*); and though it has been considered that a count upon an account stated by an executor as such, of monies due and owing from *him* in that character, cannot be joined with counts on promises by the testator, on the ground that such account stated makes the executor personally [*206] *liable(*qq*), yet it is submitted that such an account would not make the executor personally liable,[184] and as it has been decided that an account stated *with* an executor of monies due and owing to *him* as such, may be joined with counts on promises to the testator, it is presumed that this question would now meet with a different decision(*r*). Whenever an executor, &c. is sued, upon promises by him in that character, the words "*as* executor," &c. must be inserted in each count(*s*).

3dly, Consequences of misjoinder.

The consequences of a misjoinder are more important than the circumstance of a particular count being defective, for in the case of misjoinder, however perfect the counts may respectively be in themselves, the declaration will be bad on a general demurrer, or in arrest of judgment, or upon error(*t*); and the plaintiff cannot, if the declaration be demurred to, aid the mistake by entering a *nolle prosequi*, so as to prevent the operation of the demurrer(*u*), though the court will in general give the plaintiff leave to amend by striking out some of the counts on payment of costs(*v*). In some cases, however, a misjoinder may [*207] be aided by intendment after verdict(*w*), *and by taking separate damages, or by entering a *remittit damna*, the misjoinder may be aided(*x*); though it is said, that if assumpsit and trover be joined, and there be a verdict for the defendant on the count in trover, that does not cure the declaration(*y*).

(*q*) 2 Saund. 117. e.—Secar *v.* Atkinson, 1 Hen. Blac. 102.—Forrest's Rep. Exchequer, 98. where an actual account has not been stated by the defendant executor, add counts as post. 2 Vol. 100, 1.

(*qq*) Rose et ux. *v.* Bowler et al., 1 Hen. Bla. 108. 114.—2 Saund. 117. d. Tidd. Prac. 3d edit. 12.—Brigden *v.* Parkes et al., 2 Bos. & Pul. 424.

(*r*) Forrest's Rep. Exch. 98.—Cowell & wife *v.* Watts, 6 East, 405 to 412.—Wilson *v.* Wigg & another, 10 East, 313.

(*s*) Brigden *v.* Parkes et al., 2 Bos. & Pul. 424.—Ante, 205.

(*t*) Brigden *v.* Parkes et al., 2 Bos. & Pul. 424.—Jennings *v.* Newman, 4 T. R. 347.—Rose et ux. *v.* Bowler et al., 1 Hen. Bla. 108.

(*u*) Rose et ux. *v.* Bowler et al., 1 Hen. Bla. 110, 111. 3, 4.—Drummond *v.* Dorant, 4 T. R. 360.—Tidd Prac. 3d edit. 630.—1 Saund. 207. c.

(*v*) Jennings *v.* Newman, 4 T. R. 348.

(*w*) Curtis *v.* Davis, 2 Lev. 110.—Com. Dig. Action, G.—2 Vin. Ab. 47 pl. 6.

(*x*) Tate *v.* Whiting, 11 Mod. 196.—2 Vin. Ab. 43. pl. 9.—Hancock et al. *v.* Haywood, 3 T. R. 433.

(*y*) 2 Saund. 117. d. sed vid. supra.

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testator or intestate in his lifetime, and after his death, by the defendant, his *executor or administrator, as aforesaid,* is good. *Carter* v. *Phelps's Administrator* 8 *Johns. Rep.* 440.

(184) Vide n. 183. supra.

OF THE ELECTION OF ACTIONS.

Of election of actions.

In considering the application of each particular action, we have seen that the party injured, frequently has an election of several remedies for the same injury(*z*). As the due exercise of this election is of great importance, it may be useful concisely to state the principal points which direct the choice of several remedies. And these may be with reference to, 1st, The nature of the plaintiff's right or interest in the matter affected. 2dly, The security of bail, and the process. 3dly, The number of the parties to the action. 4thly, The number of the causes of action, and the joinder thereof in one suit. 5thly, The nature of the defence, and whether it be advisable to compel the defendant to plead specially. 6thly, The venue, or place of trial. 7thly, The evidence to be adduced by the plaintiff or defendant. 8thly, The *costs. [*208] 9thly, The judgment and execution. And, 10thly, Bail in error.

1st, A strict legal title is essential to the support of some remedies, but in others the plaintiff's bare possession of the property affected is sufficient. Where the title of the plaintiff may be doubtful, it is in general advisable to adopt the latter description of remedy. Thus an action of trespass to real property may be supported against a stranger, by any person in the actual possession, though he have no title, but in ejectment the lessor of the plaintiff must recover on the strength of[185] his own legal title(*a*); and therefore where the title of the party injured is doubtful, the action should be trespass; and as the defendant in replevin for a distress taken damage feasant, must in his avowry or cognizance state, and if denied, prove a title to the *locus in quo*, in fee or tail, in himself, or some person from whom he derives his title, an action of trespass is preferable to a distress, where the title of the occupier of the land may be doubtful(*b*). On the other hand, where the party interested can clearly establish a title in himself, or in his trustee, and yet it may be doubtful in which particular person the legal title may be vested, a distress, or an action of ejectment, where there has been an ouster, may be advisable, because in replevin brought for the distress, there may be several avowries upon different titles, and in ejectment there may be several counts on demises by different parties.

(*z*) Com. Dig. Action, M.—Watson *v.* Norbury, Styles, 4.—Co. Lit. 145. a. Kinlyside *v.* Thornton et al., 2 Bla. Rep. 1112.

(*a*) Graham *v.* Peat, 1 East. 244. 246.

(*b*) 1 Saund. 346. e. n. 2.—Lambert *v.* Stroother, Willes, 221.

(185) Ante, 190. in notis.

OF ELECTION OF ACTIONS.

[*209] *2dly, In actions in form *ex delicto*, as in *case* and *trespass*, the defendant cannot be arrested without a special order of the court or a judge, and it is not usual to grant such order, except where there has been an outrageous battery, or the defendant is about to quit the kingdom(*c*); and therefore in cases where it may be material to have the security of bail, the action should, if possible, be framed either in trover or in assumpsit for money had and received, adding such other special counts as may be advisable under the circumstances of each particular case(*d*). Where however the defendant has been already arrested, the form of action must correspond with the affidavit to hold to bail and the *ac-etiam* part of the latitat or other process, for otherwise, if the cause of action exceed 40*l.*(*e*), the defendant will be entitled to his discharge out of custody on filing common bail(*f*). But this will be the only consequence, for the court will not on this account set aside the proceedings[186] against the defendant for irregularity.(*g*)

3dly, In an action in form *ex contractu* we have seen that if a person who ought to be made *co-plaintiff* be omitted, it is a ground of non-suit(*h*), except in the case of persons suing in *autre droit*, as co-executors or co-assignees(*i*); whereas in actions in form *ex delicto*, the non-

[*210] joinder of a party who *should have been a co-plaintiff, can only be pleaded in abatement(*j*); and consequently, the latter form of action is in many instances preferable. We have also seen that the joinder of too many *defendants* in an action in form *ex contractu*, is a ground of non-suit(*k*), and that the omission of a person who ought to be made a defendant, may be pleaded in abatement(*l*); but that in actions in form *ex delicto*, the omission of a party jointly concerned in committing the injury, cannot in general be pleaded in abatement, and that when the offence may in point of law have been committed by several, the joinder of too many defendants will be no ground of objection(*m*); and therefore, where it may be doubtful how many persons should be made defendants, it is advisable to declare in case, &c. in preference to an action of assumpsit(*n*). So a distress for a rent-charge is frequently

(*c*) Tidd's Prac. 3d edit. 151.

(*d*) Govett *v.* Radnidge et al. 3 East, 70.

(*e*) Lockwood *v.* Hill, 1 Hen. Bla. 310.—2 Saund. 52. a.

(*f*) Tetherington *v.* Golding, 7 T. R. 80.—Wilcks *v.* Adcock, 8 T. R. 27.—Turing *v.* Jones, 5 T. R. 402.—Davison *v.* Frost, 2 East, 305.—Lockwood *v.* Hill, 1 Hen. Bla. 310.

(*g*) Spalding et al. *v.* Mure et al. 6 T. R. 363.

(*h*) Ante, 7.

(*i*) Id. ibid. n. g.—Smith et al. *v.* Goddard, 3 Bos. & Pul. 465.

(*j*) Ante, 53.

(*k*) Ante, 31.

(*l*) Ante, 29.

(*m*) Ante, 75.

(*n*) Govett *v.* Radnidge et al., 3 East, 62 to 70.

(186) Contra *Rogers* v. *Rogers*, 4 *Johns. Rep.* 485.

preferable to an action, because in the latter, all the pernors of the estate charged with the payment, must be joined(o).

4thly, Where the plaintiff has several demands, recoverable in different forms of action, he may and frequently ought to proceed for the whole in one(p). Thus a party may declare specially against a bailee for neglect, either in assumpsit or in case; if he have also a money demand against the bailee, due on simple *contract, he should declare for [*211] both causes of action in assumpsit; but if instead of the money demand, he have a distinct cause of action in trover, the declaration should be in case, in order to avoid the expense of two actions(q). So for a money demand, due on a simple contract, the plaintiff in general has an option to declare, either in assumpsit or debt; if there be also another demand of an unliquidated nature, founded on a simple contract, it is then proper to declare in assumpsit, for both causes of action; but if there be no unliquidated demand, or if part of the demand be due on specialty, debt may be preferable.

5thly, By a judicious choice of the remedy, the defendant may be frequently precluded from availing himself of a defence, which he might otherwise establish. Thus in assumpsit against a person, who has been a bankrupt, for money had and received by him before his bankruptcy, however tortiously, his certificate would be a sufficient bar, but by declaring in trover, he will be deprived of such defence(r). And where goods have been sold by a person in contemplation of bankruptcy by way of fraudulent preference to a creditor, the remedy by the assignees should be trover, and not assumpsit as for goods sold and delivered, because in the latter form of action, the defendant might avail himself of the debt from the bankrupt, as a set-off(s). The *election [*212] of the form of action, is also frequently material, in order to compel the defendant, either to take issue upon some particular allegation in the declaration, instead of putting the plaintiff to prove the whole of his case, or to compel the defendant to plead his ground of defence specially(t). Thus in covenant for rent, the defendant must plead to some particular allegation, and there is no general issue, but in debt on a lease he may plead *nil debet*, and thereby compel the plaintiff to prove the whole of his declaration(u). So trespass is in general preferable to case, because in the latter, under the general issue, the defendant may not only dispute the plaintiff's statement of his cause of action, but may give in evidence most matters of defence, but which he must plead specially in trespass(v); and detinue is in some cases preferable to trover, in order to compel the defendant to plead his lien specially.(w).

(o) Co. Lit. 162. b.—1 Saund. 282. n. 1. and 284, n. 3 and 4.

(p) Cecil v. Brigges, 2 T. R. 659, ante, 196.

(q) Govett v. Radnidge et al., 3 East, 70.

(r) Parker v. Norton, 6 T. R. 695.—Ante, 145.

(s) Smith et al. v. Hodson, 4 T. R. 211.—Nixon et al. v. Jenkins, 2 Hen. Bla. 135. When not, see Hunter v. Prinsep & others, 10 East, 378.—Thomason & others v. Frere & others, 10 East, 418.

(t) Ante, 145.

(u) Warren v. Consett, Ld. Raym. 1500.

(v) Ante, 145, 6.

(w) Ante, 121.

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6thly, In some cases, there may be two or more actions in effect for the same injury, the one local, and the other transitory. Thus *debt* for rent, by the assignee or devisee of the lessor, against the lessee, is local, and must be laid in the county where the estate lies(*x*); but in *covenant*, at the suit of the same parties, upon an express covenant for the payment of rent, &c. the venue is transitory(*y*); and consequently the latter form of action should be adopted, where it may be advisable to try the cause out of the county where the estate is situate.

[*213] *7thly, The evidence must also be attended to in the election of actions; thus it is frequently more convenient that the action should be trespass than case, because if it be laid in trespass, no nice points can arise upon the evidence, by which the plaintiff may be turned round upon the form of the action, as there may in many instances, if case be brought(*yy*).

8thly, In actions in form *ex contractu*, the plaintiff is in general entitled to full costs, though he recover less than 40*s*. damages, it having been decided, that the 22 and 23 Car. 2. ch. 9. does not extend to actions of assumpsit, debt, detinue, or covenant(*z*); and therefore, it is not in general material, so far as respects the costs, which of these forms of actions be adopted. But in *trespass* for injuries to the person, or to real property, if the plantiff recover less than 40*s*. damages, he is not entitled to more costs than damages, and therefore for such injuries when practicable, it is frequently advisable to declare in case or trover, in which full costs are usually recoverable(*a*). So an action on the case may frequently be preferable to an action of trespass against several defendants, because in trespass, if one defendant be acquitted, he may be entitled to costs, which he is not in an action on the case.

9thly, The action of debt is in general preferable to assumpsit or covenant, because the judgment therein by *nil dicit*, &c. is final, and execution may be taken out immediately, without the expense and de-
[*214] lay of a writ of inquiry, which is usually necessary *in assumpsit or covenant(*b*); and it is better to proceed in debt, on an award, than on the arbitration bond, because in case of judgment by default on the latter, a writ of inquiry is necessary, under the 8th and 9th William 3. c. 11.(*c*).

10thly, In an action of debt upon a money bond, or for rent, or upon any specific contract, the 3 Jac. 1. c. 8. compels a defendant who brings error upon a judgment by *nil dicit*, &c. to find bail in error(*d*); but in any other form of action, as covenant or assumpsit, no bail in error is

(*x*) Thursby & others *v.* Plant, 1 Saund. 238. 241.—Sir W. Jones, 53.
(*y*) Id. ibid.
(*yy*) Leame *v.* Bray, 3 East, 600.
(*z*) Tidd's Prac. 3d edit. 879, 880.
(*a*) Savignac *v.* Roome, 6 T. R. 129, 130.—Tidd's Prac. 3d edit. 880.
(*b*) Ante, 107.
(*c*) Post. 2 vol. 188. n. u.
(*d*) Hukesley *v.* Harrison, 1 Rol. Rep. 436.—Tidd, 4th edit. 1077.

required, unless the error be brought after verdict;[187] therefore debt for rent, or upon a mortgage deed, &c. is preferable to covenant or assumpsit; and on a judgment in replevin in the King's Bench, a writ of error must be brought in parliament(*e*). OF ELECTION OF ACTIONS. [*214]

The circumstance of a party having elected one of several remedies by *action*, will not in general preclude him from abandoning such suit, and after having duly discontinued it, he may adopt any other remedy. But in the case of a *distress*, if the cattle escape, the party distraining cannot sue for the rent, or trespass, unless it be shewn, that the escape was wholly without his default(*f*).

(*e*) Tidd's Prac. 3d edit. 1075 to 1080.

(*f*) Vasper *v.* Eddows, 1 Salk. 248. S. C. 1 Ld. Raym. 719.

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(187) By the statute of the state of New York, *sess.* 24. *c.* 25. *s.* 2. no writ of error "brought to reverse any judgment given in any personal action," is a stay of execution, unless bail in error be put in.

CHAPTER III. [*215]

OF PLEADING IN GENERAL.†

PLEADING is the statement in a logical and *legal form*, of the *facts*, which constitute the plaintiff's cause of action, or the defendant's ground of defence; it is the formal mode of alleging that on the record, which would be the support, or the defence of the party in evidence(*a*). It is, as observed by Mr. Justice Buller(*b*), one of the first principles of pleading, that there is only occasion to state *facts*, which must be done for the purpose of informing the court, whose duty it is to declare the *law* arising upon those facts, and of apprizing the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse it. The observations of Lord Chief Justice De Grey on the structure of an indictment, are very forcible, and equally applicable *to [*216] the pleadings in civil actions, "the charge must contain such a description of the crime, that the defendant may know, what crime it is which he is called upon to answer, that the jury may appear to be warranted in their conclusion of "guilty" or "not guilty" upon the premises delivered to them, and that the court may see such a definite crime, that they may apply the punishment which the law prescribes. The certainty essential to the charge, consists of two parts, the *matter* to

† I forbear in this practical treatise to observe, upon the history of pleading, or to notice the many observations in the books, upon the utility thereof; they are to be found in Mr. Lawes's Treatise on Pleading, 1 to 33, and a tract entitled a Summary of Pleading, 1 to 7.‡

(*a*) Per Buller, J. Read *v.* Brookman, 3 T. R. 159.—Hotham et al. *v.* The East India Company, Dougl. 278. And see the observations in Com. Dig. Pleader, A.—Bac. Ab. Pleas and Pleading, and the judgment of Lord Chief Justice De Grey, in Rex *v.* Horne, Cowp. 682, 3, &c. as to the general nature and object of pleading.

(*b*) The King *v.* The Mayor, &c. of Lyme Regis, Dougl. 159.

‡ "I entertain a decided opinion, that the established principles of pleading, which compose what is called its science, are rational, concise, luminous, and admirably adapted to the investigation of truth, and ought consequently to be very carefully touched by the hand of innovation." Per Kent, Ch. J. 1 *Johns. Rep.* 471. As to the history of pleading, vide 2 *Reeves's Hist. E. L.* 264. 267. 339. 344. 349. 3 *Reeves's Hist. E. L.* 59. 61. 423. 443. 461. 469.

be charged, and the *manner* of charging it(*c*)." Hence the science of special pleading may be considered under two heads, 1st, The *facts* necessary to be stated, and 2dly, The *form* of the statement; and these, together with some general rules of construction, and the division of pleadings, we will consider in the present chapter.

I. THE FACTS NECESSARY TO BE STATED.

I. THE FACTS NECESSARY TO BE STATED.

In general, whatever circumstances are necessary to constitute the cause of complaint, or the ground of defence, must be stated in the pleadings, and all beyond is surplusage(*d*);[1] facts only are to be stated, and not arguments or inferences, or matter of law(*e*). There are some [217*] facts of such a public or general nature, that the *courts *ex officio* take notice of them, and which consequently ought not to be stated in pleading(*ee*); and therefore, it is advisable to consider a few of the principal rules as to the facts of which the courts will *ex officio* take notice.

1st, Facts of which the court will *ex officio* take notice should not be stated.

The courts will *ex officio* take notice when the *King* came to the throne(*f*), and of the king's proclamations(*g*); and consequently, those facts need not be alleged in pleading; but private orders of council are not considered as matters of law, or of such public nature, as to render it incumbent on the judges *ex officio* to take notice of them(*h*). The courts are also bound to take notice of all the privileges of the crown(*i*).

The time of holding every *Parliament*, and the prorogations and sessions thereof(*j*), and also where any parliament sat will be taken

(*c*) Rex *v.* Horne, Cowp. 682, 3.

(*d*) Rex *v.* Horne, Cowp. 683.—Bellasis *v.* Burbriche, 1 Ld. Raym. 171.

(*e*) Rex *v.* Horne, Cowp. 684.—Dowland *v.* Slade et ux., 5 East, 275.—Com. Dig. Pleader, C. 78.—Bourne *v.* Taylor, 10 East, 205.

(*ee*) Fitch *v.* Rawling & others, 2 Hen. Bla. 398.

(*f*) Holman *v.* Burrow, 2 Ld. Raym. 794. 791.

(*g*) Wells *v.* Williams, 1 Ld. Raym. 282.—but see Van Omeron *v.* Dowick & others, 2 Campb. 44. whence it appears that the proclamation will be required to be proved by the Gazette. As to declaration of war, see Dolder *v.* Lord Huntingfield, 11 Ves. J. 292.

(*h*) 2 Lil. Prac. Reg. 303.

(*i*) Elderton's Case, Ld. Raym. 980.

(*j*) Birt *v.* Rothwell, 1 Ld. Raym. 343.—Partridge *v.* Strange et al., Plowd. 77.—Egerton's Case, Moore, 551.—The King *v.* Wilde, 1 Lev. 296.—Sed vide, Spring *v.* Eve, 2 Mod. 240.—Bac. Ab. Statute, L. 5.

(1) Vide *Tucker* v. *Randall*, 2 *Mass. Rep.* 283.

notice of judicially(*k*), and therefore, neither of these facts should be stated in pleading, and if either be misstated, even in pleading a private act, not before the court, the pleading will be defective on demurrer, or in the case of a private act, on the plea of *nul tiel* record, or any other plea, putting in issue the whole of the facts stated in the declaration(*l*); but the mistake may be aided by verdict(*m*). The courts will also take judicial notice of the course of *proceedings, in either house of parliament(*n*), but not of the journals of either house(*o*), which must be stated in pleading, and proved in evidence(*p*). [*218]

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Public Statutes, and the facts which they ascertain, must be noticed by the courts, without their being stated in pleading(*q*),[2] and it is only necessary to state facts, which will appear to the court, to be affected by the statute(*r*), concluding in general with an express reference to the statute, as by the words "contrary to the form of the statute, &c."; and in the case of a public statute, it is not advisable to recite any part of it, for a mis-recital,[3] with a conclusion, "contrary to the form of the statute *aforesaid*," would be fatal(*s*). Where a statute has been recently made, it is said to be necessary to allege, that the facts took place after the passing of the act(*t*). But the courts will not *ex officio* take notice of *Private Acts* of Parliament, and consequently such parts of them as may be material to the action or defence, must be stated[4] in pleading(*u*); and this in the first instance(*v*), and a mis-recital of a private act, can only be taken advantage of by plea of *nul tiel* record,

(*k*) Birt *v.* Rothwell, 1 Ld. Raym. 210. 343.

(*l*) Id. ibid.—Rann *v.* Green, Cowp. 474.

(*m*) Spring *v.* Eve, 2 Mod. 240.

(*n*) Lake *v.* King, 1 Saund. 131.—Astley *v.* Young, Burr. 811.

(*o*) Rex et Reg. *v.* Knollys, 1 Lord Raym. 15.

(*p*) Jones *v.* Randall, Cowp. 17.—The King *v.* Lord George Gordon, Dougl. 590.

(*q*) 1 Bla. Com. 85, 6.—Dougl. 97. n. 12.—Bac. Ab. tit. Statute, L.—Smith *v.* Cattel, 2 Wils. 376.—Wheeler *v.* Horne, Willes, 210.

(*r*) Spieres *v.* Parker, 1 T. R. 145.—Com. Dig. Pleader, C. 76.—Lane, 71.

(*s*) Platt *v.* Hill, Ld. Raym. 382.—Boyce *v.* Whitaker, Dougl. 97.—King *v.* Marsack, 6 T. R. 776.—Bac. Ab. Statute, L. 5.

(*t*) 1 Saund. 309, n. 5.

(*u*) 1 Bla. Com. 86.—Platt *v.* Hill, Lord Raym. 381, 2.—Boyce *v.* Whitaker, Dougl. 97.—Egerton's Case, Moore, 551.—The King *v.* Wilde, 1 Lev. 296. Bac. Ab. Statutes, L.

(*v*) Carth. 306.

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(2) Vide *Dive* v. *Maningham*, *Plowd.* 65.

(3) Vide *Murray* v. *Fitzpatrick*, 3 *Caine's Rep.* 41. A mis-recital in the title of a public statute, in a part which does not alter the sense, and when its date is truly set forth, is not a cause for arresting judgment after verdict, nor can it be assigned as error. *Murray* v. *Fitzpatrick*, 3 *Caine's Rep.* 38. 41.

(4) A defendant who relies on the statute of another state, must set it forth in his plea; that the court may see whether the proceedings stated in the plea were authorised by the statute: the general allegation, that the proceedings were pursuant to the statute, is not sufficient. *Walker* v. *Maxwell*, 1 *Mass. Rep.* 104.

I. THE FACTS NECESSARY TO BE STATED.

or in assumpsit, *under the general issue(*u*), though we have seen, that if the time or place of holding the parliament be mis-stated, it is a ground of demurrer(*w*).

[*219] The courts are also bound to take notice of all *Common Law Rights*, and *Duties*, and of *General Customs*, and consequently these ought not to be stated in pleading(*x*). Thus if in a return to a mandamus to restore a burgess of a corporation, it be stated that the party was removed by the corporate body at large, it is unnecessary to aver, that the power of removal is vested in them, because the courts will take notice *ex officio*, that by intendment of law, such power exists in the body at large, unless it be made appear that it was vested by charter, or otherwise, in a select part of the corporation(*y*); and it has been well observed, that in an action against a common carrier or innkeeper for the loss of goods, &c. which is a liability founded on the common law or custom of the realm,[5] it is not only unnecessary but improper to recite such custom, because it tends to confound the distinction between special customs, which ought to be pleaded, and the general customs of the realm, of which the courts are bound to take notice, without pleading(*z*). So it is not only unnecessary, but improper, in a declaration [*220] on a bill of *exchange, to set out the custom of merchants, because it is part of the law of the land(*a*).

So the courts will *ex officio* notice the *Ecclesiastical*(*b*), *Civil*, and *Marine Laws*,(*c*), without any statement of them in pleading, and if there be any mis-statement of such laws, or of facts affected by them, the pleading will be held insufficient(*d*); thus where an administrator *durante minore ætate*, in his declaration averred that the infant was within the age of twenty-one years, the declaration was holden bad, because the court would take notice that by the ecclesiastical law, such administration ceased at the age of seventeen, and perhaps the executor was

(*u*) Bac. Ab. Statutes, L. 5.—Platt *v.* Hill, Ld. Raym. 381—Rann *v.* Green, Cowp. 474.

(*w*) Ante, 217.—Rann *v.* Green, Cowp. 474.

(*x*) The King *v.* The Mayor & Burgesses of Lyme Regis, Dougl. 149.—Soper *v.* Dible, Ld. Raym. 175.—Ereskine *v.* Murray, Ld. Raym. 1542.—Carter *v.* Dowrish, Carth. 83.—Williams *v.* Williams, Carth. 269.—Co. Lit. 89, a. n. 7.

(*y*) The King *v.* The Mayor & Burgesses of Lyme Regis, Dougl. 149.—Company of Feltmakers *v.* Davis, 1 Bos. & Pul. 100.—Com. Dig. Pleader, C. 78.

(*z*) Co. Lit. 89, a n. 7.

(*a*) Pinkney *v.* Hall, Ld. Raym. 175. Ereskine *v.* Murray, 1542.—Carter *v.* Dourish, Carth. 83.

(*b*) Bro. Quare Impedit. pl. 12.—March. 205.—1 Rol. Ab. 526—Pigot *v.* Gascoyn, Cro. Eliz. 602.—S. C. 5 Co. 29.—Atkinson *v.* Cornish, Ld. Raym. 338—S. C. Carth. 446.—S. C. 5 Mod. 395.—S. C. Comb. 475.—S. C. 12 Mod. 194.—The King *v.* The Chancellor, &c. of Cambridge, Ld. Raym. 1334.

(*c*) Chandler *v.* Grieves, 2 Hen. Bla. 606, n. a.

(*d*) Supra, note b.

(5) Which are synonymous. *Co. Lit.* 110. b.

of the age of eighteen, though not twenty-one as alleged in the declaration(*e*).

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Such of the *Customs of Gavelkind* and *Borough English*, as are of the essence of the tenure, as the course of descent, need not be stated specially in pleading, nor should be prescribed for, because the common law takes notice of them, and it is sufficient to state in the pleading, that the land is of the custom of gavelkind, and subject thereto; but in regard to other customs, though incident to these tenures, they must be stated(*f*). *And the courts will not *ex officio* take notice of any *Particular Local Customs*(*g*), nor of the customs of London, except where they have been certified by the recorder, to either of the courts of record(*h*), without which there must be either a plea or an affidavit of the custom(*i*). Thus where a defendant pleaded, that his debt was attached in London by one of the plaintiff's creditors, it was decided, that the court could not take notice of the custom of foreign attachment, because it was not pleaded, and consequently, that the plea was bad(*j*); but on a writ of error from the inferior court, the custom will be noticed(*k*). Nor will the courts *ex officio* take notice of *Foreign Laws*,[6] or of the laws of our *Plantations*, and consequently they must in general be stated in pleading(*l*). [*221]

The courts take notice of the *Days of the Week*, &c. on which particular days fall, and the almanack is part of the law of the land, having been established by different statutes(*m*), and if there be a mis-statement it will be fatal(*n*); therefore, where a writ of inquiry was stated in pleading to have been executed on the 15th of June, which was a Sun-

(*e*) Id. ibid.—Pigot's Case, 5 Co. 29, a.—Atkinson *v.* Cornish, Ld. Raym. 338.—but note this was before the statute 38 Geo. 3. c. 87.

(*f*) Co. Lit. 175, b. n. 4.—Clements *v.* Scundamore, Ld. Raym. 1025.—1 Bla. Com. 76.—Launder *v.* Brooks et al., Cro Car. 561.—Wiseman *v.* Cotton, 1 Lev. 79.—2 Bla. Com. 82, 3, 4.

(*g*) Spink *v.* Tenant, 1 Rol. Rep. 106. see Kingsmill & another *v.* Bull and another, 9 East, 185.

(*h*) Argyle *v.* Hunt, Stra. 187.—Hartop *v.* Hoare et al. Stra. 1187.—Blacquiere et al. *v.* Hawkins, Dougl. 378. 380.—Driver *v.* Driver, Andr. 304.—1 Bla. Com. 76.

(*i*) Driver *v.* Driver, Andr. 304.—Hartop *v.* Hoare et al., Stra. 1187.—S. C. 3 Atk. 44.

(*j*) Spink *v.* Tenant, 1 Rol Rep. 106. Co. Ent. 139. b.—1 Saund. 66. n. 1.—Sed quære, the custom having been certified, Blacquiere et al. *v.* Hawkins, Dougl. 378.

(*k*) Blacquiere et al. *v.* Hawkins, Dou. 380.—Redham *v.* Waters, Salk. 269.

(*l*) Collet et al. *v.* Ld. Keith, 2 East, 273, 4.—Mostyn *v.* Fabrigas, Cowp. 174. 161.—Wey *v.* Tally, 6 Mod. 194, 5. S. C. Salk. 651.—Robinson *v.* Bland, Burr. 1077.—Boucher *v.* Lawson, Rep. T. Hardw. 85.—Hunter et al. *v.* Potts, 4 T. R. 192.

(*m*) 2 & 3 Ed. 6. c. 1.—5 & 6 Ed. 6. c. 1.—1 Eliz. c. 2.

(*n*) Brough *v.* Parkings, 2 Ld. Raym. 994.—S. C. 6 Mod. 81.—The Queen *v.* Dyer, S. C. Salk. 181.—Harvey *v.* Broad and Davies *v.* Satter, 626.

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(6) Ante, 218. n. 4.

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day, the proceeding was held *defective(o); and where the defendant justified an arrest under process, from an inferior court, which he stated to be held every Friday, and the process appeared by the pleading to [*222] have been dated the 7th of August, which was Saturday, upon demurrer it was held bad(p). So the court will take notice, what number of days there are in each month(q), and in leap year, and of the moveable feasts(r), and of the *Terms*, as to their commencement and conclusion, whether moveable or not,(s), and if process be stated to have been issued on a day in vacation and that the court was then sitting, the pleading will be bad on demurrer(t).

The *Division of England* into counties, will also be noticed by the court *ex officio*, but not that of particular liberties, which must be stated in pleading(u), and though the courts will notice provinces and dioceses, they will not any particular place within each province or diocese, excepting that where the court sits(v). So the courts will take judicial notice of what towns are incorporated, and of the extent of ports, and of the river Thames, &c.(w).

The courts will *ex officio* take notice of the *meaning of English Words* [*223] and terms of art, *according to their ordinary acceptation, however vulgar and peculiar to a particular county or place, and consequently the meaning of such terms need not in general be averred(x), unless the intendment of law be otherwise(y): thus in an action on the warranty of a carroom, it was held not necessary to aver what a carroom was, because it was a phrase then well known in London(z). So in an action for words spoken in England, which are slanderous according to the phrase of the country in which they were uttered, though the court may not in fact know what they signify, it is not necessary to aver their signification, for the judges themselves will take notice of English words in any county(a). The courts will also take notice of the names and quantity of legal weights and measures(b), and of time according to

(o) Hoyle *v.* Ld. Cornwallis, Fortes. 373.—S. C. Stra. 387.

(p) Smith *v.* Boucher & others, Rep. T. Hardw. 62.—Pugh *v.* Robinson, 1 T. R. 116.

(q) 1 Rol. Ab. 524, C. pl. 4.

(r) Brough *v.* Perkins, 6 Mod. 81.—S. C. Ld. Raym. 994.—Harvey *v.* Broad, Salk. 626. The calendar by which the courts go is that annexed to the Common Prayer Book, Brough *v.* Perkins, 6 Mod. 81.

(s) Pugh *v.* Robinson, 1 Term Rep. 116.—Brasfield *v.* Lee, Ld. Raym. 329. Austin *v.* Bewley, Cro. Ja. 548.—Dobson *v.* Bell, 2 Lev. 176.—Bul. N. P. 137. Thomson *v.* Southwell, 12 Mod. 647. Sed vid. Ramsey *v.* Michel, Latch. 11. Michel *v.* Ramsey, Latch. 118.—Champion *v.* Skipweth, 1 Sid. 307.—1 Rol. Ab. 524.—Fish *v.* Broket, Dyer, 181.

(t) Hart *v.* Weston, 5 Burr. 2586.—Belk *v.* Broadbent et ux., 3 T. R. 184. 1 Saund. 300. b. n. 7.

(u) 2 Inst. 557.—March. 124.

(v) Adams *v.* Terretenants of Savage, Ld. Raym. 854.—The King *v.* Sympson, 1379.—S. C. Stra. 609.—Mellor *v.* Barber, 3 T. R. 387.

(w) Fazackerley *v.* Wiltshire, Stra. 469.—Rouse *v.* Bardin et al., 1 Hen. Bla. 356, 7.

(x) 1 Rol. Ab. 86. 525.

(y) Hockin *v.* Cooke, 4 T. R. 314.

(z) 1 Rol. Ab. 525.—6 Vin. Ab. 492.

(a) 1 Rol. Ab. 86.—1 Vin. Ab. 531. 1 Saund. 242. n. 1.

(b) 1 Rol. Ab. 525.

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ordinary expressions(*c*). But if the intendment of law be different to the statement in the pleading, the meaning of the term must be stated, and therefore it was decided, that proof that the defendant agreed to sell so many bushels according to a particular measure, will not support an allegation in a declaration, to sell so many bushels generally, because bushels without any other explanation, signify the legal statute measure of a Winchester bushel(*d*).

Every court is bound to take judicial notice *of its own *course of Proceedings*(*e*),[7] and of those of the other superior courts(*f*); and therefore in these cases, it is not necessary in pleading, to allege any usage or prescription, in support of such proceeding(*g*). So where upon a motion in arrest of judgment, because the declaration had not shewn out of what court a writ of latitat was issued, the court said, that there being no writ properly called a latitat, but what issues out of the King's Bench, the declaration was sufficient(*h*). [*224]

The superior courts will also notice the *Privileges they confer on their Officers*(*i*), and therefore, though in a plea of privilege, it is usual to state the custom of the court, privileging attorneys, &c. such statement appears unnecessary. In Ogle v. Norcliffe, Holt, Ch. J. said, that the privilege claimed by the defendant, was due to the clerks of the Common Pleas of common right, of which the court of King's Bench would take notice(*j*). In one case where the customary privilege was mispleaded, it being urged for the defendant, that the courts would take notice of the privilege and reject as surplusage the custom which was pleaded, the court said, that whatever they would have done, had it stood indifferent, they could not take notice of a privilege, *expressly contrary to what the defendant had stated(*k*). But this decision seems questionable(*l*). [*225]

So the courts at Westminster will notice *Courts of General Jurisdiction*, and the course of proceedings therein, as that there is a court of Exchequer in Wales, and the course of proceedings there, and they will also notice the jurisdiction of the courts of the Counties Pala-

(*c*) 1 Rol. Ab. 525.—Holman *v.* Burrow, Ld. Raym. 794.

(*d*) Hockin *v.* Cooke, 4 T. R. 314.

(*e*) Pugh *v.* Robinson, 1 T. R. 118.—Dobson *v.* Bell, 2 Lev. 176.—Throckmerton *v.* Tracey, Plowd. 163.—Spink *v.* Tenant, 1 Rol. Rep. 106.—Astley v. Younge, Burr. 811.

(*f*) Lane's Case, 2 Co. Rep. 16.—Worlich *v.* Massey, Cro. Jac. 67, 8.—Spink v. Tenant, 1 Rol. Rep. 106.—Sir Wm. Jones, 417.—Ld Mounson et ux. *v.* Bourn, Cro. Carr. 527.

(*g*) Lane's Case, 2 Co. Rep. 16.—Year Book, 2 Rich. 3, page 9, pl. 21.

(*h*) Odes *v.* Clerk, Ld Raym. 397.

(*i*) Ogle *v.* Norcliffe, Ld. Raym. 869. Dillon *v.* Harper, 898.

(*j*) Ogle *v.* Norcliffe, Ld. Raym. 869.—Stokes *v.* Mason, 9 East, 424.—Chatland *v.* Thornely, 12 East, 544.

(*k*) Dillon *v.* Harpur, Ld. Raym. 899.

(*l*) Stokes *v.* Mason, 9 East, 424.—Carrett *v.* Smallpage and others, 339. Chatland *v.* Thorneley, 12 East, 544.

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(7) The practice of the Court is pleadable where the very merits of the case depend upon it. *Dudlew v. Watchorn & Thibault*, 16 *East's Rep.* 39.

I. THE FACTS NECESSARY TO BE STATED.

tine(*m*). But it has been decided, that the courts are not bound to take notice who were or are the judges of another court at Westminster, though perhaps they ought to take notice of the judges of their own court(*n*); and therefore where the authority of a judge may be material to the action or defence, it should be expressly stated in pleading(*o*), and in pleading a fine the names of the judges and their authority should be stated(*p*).

The superior courts will not *ex officio* take notice of the customs, laws, or proceedings of *Inferior Courts* of *limited jurisdiction*(*q*), unless when reviewing their judgments upon a writ of error, when for the purposes of justice they must necessarily notice them(*r*). In a return to a writ of *habeas corpus*, inferior courts must in their return set forth the law or custom of the place by which they justify their commitment, otherwise the court is *not bound to take notice of it, but on a writ of error, it is otherwise(*rr*).

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2dly, Where the law presumes a fact it need not be stated.

Where the law presumes a fact, it need not be stated in pleading, and as it is an intendment of law, that a person is innocent of fraud, or any other imputation affecting his reputation, the party insisting upon the contrary, must state it in pleading(*s*). Thus in an action for words, as for saying a man is a thief, the plaintiff has no occasion to aver that he is not a thief; and in an action on the case for maliciously suing out a commission of bankrupt, it is not necessary to state in the declaration, that the plaintiff was not indebted to the defendant, or that he never committed an act of bankruptcy(*t*); and it is a rule applicable in some cases to pleading, that where the law presumes the affirmative of any fact, the negative of such fact must be proved by the party averring it in pleading. So where any act is required to be done by a person, the omission of which would make him guilty of a criminal neglect of duty, the law presumes the affirmative, and throws the burthen of proving the negative[8] on the party who insists on it(*u*). And as observed by Lord Coke, necessary circumstances implied by law need not be expressed, as in the plea of a feoffment of a manor, livery and attornment are implied; and in pleading the assignment of land for dower, it is

(*m*) Tregany *v.* Fletcher, 1 Lord Raym. 154.—Peacock *v.* Bell et al., 1 Saund. 73.—S. C. 1 Sid. 331.—The Case of Elderton et al., 6 Mod. 74.—Broughton *v.* Randall, Cro. Eliz. 502, 3.—Griffith *v.* Jenkins, Cro. Car. 179.

(*n*) Hook *v.* Shipp, Andr. 74.—Weightman *v.* Mullens, Stra. 1226.

(*o*) Id. ibid.

(*p*) 2 Saund. 175. n. 2.

(*q*) Spink *v.* Tenant, 1 Rol. Rep. 105. The King *v.* The Chancellor, &c. of Cambridge, Ld Raym. 1334.—Broughton *v.* Randall, Cro. Eliz. 502.—Redham *v.* Waters, Salk. 269.

(*r*) Griffith *v.* Jenkins, Cro. Car. 179. Spink *v.* Tenant, 1 Rol. Rep. 105.

(*rr*) Redham *v.* Waters, Salk 269.

(*s*) Co. Lit. 78. b.—Heath's Maxims, 207 to 212.

(*t*) Chapman v. Pickersgill, 2 Wils. 147.

(*u*) Williams *v.* The East India Company, 3 East, 192.

(8) Vide *Phillips' Ev.* 151. *The King* v. *Hawkins*, 10 *East's Rep.* 216. *Rex* v. *Thomas Rogers*, 2 *Campb.* 654.

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not necessary to say, that it was by metes and bounds, for it shall be intended a lawful assignment; so in pleading *a surrender, the re-entry of the lessor need not be stated, for it shall be intended; so where it is pleaded, that the sheriff made his warrant, it is unnecessary to say, that it was under his seal, for it could not be his warrant, if it were not; so if a person plead that he is heir to A, he need not say either, that A is dead, or that he had no son(*v*); and in pleading an acceptance by a corporation of an assignee of the lessee as tenant, it is not necessary to show, that the acceptance was by deed, for an acceptance being pleaded, every thing that would render it a good acceptance is implied(*w*).[9] But great care must be taken in the application of this rule, to ascertain that the *law* intends the fact proposed to be omitted; thus in pleading a devise of land, it must be stated to have been in writing, though in point of law, it could not otherwise be a will(*x*); and it is said, that when the defendant pleads, that another person promised to be answerable to the plaintiff for the debt, in lieu of the defendant, it must be shewn to have been in writing, pursuant to the statute against frauds, as that it may appear to be such a contract as the plaintiff could enforce(*y*).[10] So in justifying under a writ, warrant, &c. it is not sufficient to allege generally that the defendant committed the act complained of by virtue of a certain writ, or other warrant directed to him, but he must set it forth specially(*z*). In these cases, the law does not intend *the validity of the will, the promise, or the process.

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3dly, A party need not state a fact, which is more properly to be stated by the other side.

It is also a general rule of pleading, that matter which should come more properly from the other side, need not be stated(*a*),[11] unless in some instances of pleas not favoured by the courts, as a plea of alien enemy(*b*). Thus in an action of debt on a bond conditioned that B should remit all monies received for C to C, or pay the same to him or

(*v*) 2 Saund. 305. n. 13.

(*w*) Dean, &c. of Windsor *v.* Gover, 2 Saund. 305.

(*x*) 1 Saund. 276. a. n. 2.—Post. 2 Vol. Title Pleader, 280, 281.

(*y*) Id. ibid.

(*z*) 1 Saund. 298. n. 1.

(*a*) Com. Dig. Pleader, C. 81.—2 Saund. 62. b.—Cassares *v.* Bell, 8 T. R. 167.—Chapman *v.* Pickersgill, 2 Wils. 147.—The King *v.* Holland, 5 T. R. 615.—Gale and others *v.* Reed, 8 East, 80.

(*b*) Cassares *v.* Bell, 8 T. R. 167.

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(9) In covenant for rent due on a lease, against the assignee of the lessee, the plaintiff need not aver, that the lessee had not paid the rent: it is sufficient if he states that the rent accrued subsequent to the assignment to the defendant, and that the same was due and owing to the plaintiff, and wholly in arrear and unpaid; for it is implied in the averment, that the defendant owed it. *Executors of Dubois* v. *Van Orden*, 6 *Johns. Rep.* 105. Vide etiam, *Stott* v. *Stott and Pilling*, 16 *East's Rep.* 343.

(10) Vide post. 237.

(11) Vide post. 330. *Salman* v. *Bradshaw*, *Cro. Jac.* 304. *Barton* v. *Webb & another*, 8 *Term Rep.* 459. 463. *Shum et al.* v. *Farrington*, 1 *Bos. & Pul.* 640. S. C. 8 *Term Rep* 463. *Post-master-general* v. *Cockran*, 2 *Johns. Rep.* 415, 416. *Hughes* v. *Smith & Miller*, 5 *Johns. Rep.* 168. *Willcocks* v. *Nicholls*, *Price's Exch. Rep.* 109.

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his order, as should be directed, it is sufficient to state a nonpayment to C, and it is not necessary in a replication to a plea of general performance, to allege any order given by C, for if any had been given, it should be shown by the defendant(*c*). So in assumpsit on a contract to transfer stock to the plaintiff, or his order on request, the plaintiff stated a request, and averred, that the defendant had not transferred; and on an objection being taken that the plaintiff should have averred that the defendant had not paid to the plaintiff's order, it was overruled, because the averment of payment to such order, ought to come from the other side(*d*); and if the plaintiff allege a condition subsequent to his estate, he need not aver performance, but the breach must be shown by the defendant; and matter in defeazance of the action need not be stated; and wherever there is a circumstance, the omission of which is to defeat the plaintiff's right of action *prima facie* well found-
[*229] ed, whether *called by the name of a proviso, or a condition subsequent, it must in its nature be a matter of defence, and ought to be shown in pleading by the opposite party(*e*). In pleading upon statutes, where there is an exception in the enacting clause, the plaintiff must show that the defendant is not within the exception, but if there be an exception in a subsequent clause, that is matter of defence, and the other party must show it to exempt himself from the penalty(*f*).[12] In debt on an award, the plaintiff need not set forth more of it than what makes for him, and if there be any thing by way of condition precedent to the payment of the money, it is said, that the defendant must set it out in pleading(*g*);[13] but in debt upon a bond to perform an award, it is necessary to set forth the whole award in the replication(*h*).

4thly, Statements of legal fictions, &c.

Though the general rule is that facts only are to be stated, yet there are some instances in which the statement in the pleading is correct, though it does not accord with the real facts, the law allowing a fiction; as in the action of ejectment, in which the statement of the demise to the nominal plaintiff is fictitious(*i*). So in trover or detinue, the usual allegation that the defendant found the goods, rarely accords

(*c*) The Irish Society *v.* Needham, 1 T. R. 485.

(*d*) Mitchell *v.* Broughton, Ld. Raym. 673.—Marks *v.* Marriott, Ld. Raym. 114.—Freeman *v.* Bernard, Ld. Raym. 247.—Anon., Ld. Raym. 989.

(*e*) Per Ashhurst, J.—Hotham et al. *v.* The East India Company, 1 T. R. 645, 6.—Com. Dig. Pleader, C. 81.

(*f*) Spieres *v.* Parker, 1 T. R. 144, 5.—Bac. Ab. Statute, L.—The King *v.* Pratten, 6 T. R. 559.—Rex *v.* Jarvis, 1 East, 646, 7.

(*g*) 2 Saund. 62. b.

(*h*) Id. ibid.

(*i*) Aslin *v.* Parkin, 2 Burr. 667, 8.

(12) Acc. *Jones* v. *Axen*, 1 *Ld. Raym.* 120. *Rex* v. *Ford*, *Str.* 555. *Rex* v. *Bryan*, *Id.* 1101. *Sheldon* v. *Clark*, 1 *Johns. Rep.* 513. *Bennet & Bennet* v. *Hurd*, 3 *Johns. Rep.* 438. *Teel* v. *Fonda*, 4 *Johns. Rep.* 304. *Hart* v. *Cleis*, 8 *Johns. Rep.* 41 *Smith* v. *United States*, *Rep. C. C. U. S First Circt.*, 261. 1 *Saund.* 262. *b.* *Donelly* v. *Vandenbergh*, 3 *Johns. Rep.* 41, 42

(13) Acc. *M'Kinstry* v. *Solomons*, 2 *Johns. Rep.* 57. *Perry* v. *Nicholson*, *Burr. Rep.* 278. And see *Lewis et ux.* v. *Lark & Hunt*, *Plowd.* 410.

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with the facts(*j*); and where the number, quantity, species, or value of a thing, need not be proved precisely as laid, it is usual *to state a greater number, than really was the case, in order to admit of greater latitude in evidence; but except in these, and a few other instances, where it may be consistent with the justice of the case, the pleading matter known to the party to be untrue, is in general censured(*k*). [*230]

5thly, Of duplicity.

At common law it was a general rule, equally affecting declarations, pleas, replications, &c. that the pleading must not be *double*, that is, that no single count or plea, should state two or more facts, either of which would of itself, independently of the other,[14] constitute a sufficient ground of action or defence;[15] a rule founded on the principle, that it would be unnecessary and vexatious to put the opposite party to litigate and prove two points, when one would be sufficient to establish the matter in issue(*l*). Thus at common law in a declaration upon a bond, the plaintiff could not assign two breaches of the condition,[16] because the bond was forfeited by one breach, which was sufficient to support his action, though in covenant several breaches of different covenants might be stated(*m*). So in a plea of outlawry, the defendant cannot state several outlawries, because one would be sufficient to defeat the action(*n*); and on the same ground there cannot be a demurrer and a plea to the same part of a declaration or plea, *&c.(*o*) By different statutes the common law has been altered in regard to declarations on bonds and for penalties(*p*), and to several distinct pleas and avowries, and pleas in bar thereto(*q*); but the common law rule still affects each plea taken separately.[17] The rules as to duplicity will be more fully stated hereafter, when we consider the particular qualities of each part of pleading. [*231]

6thly, Objections to unnecessary statements.

The statement of immaterial or irrelevant matter or allegations, is not only censured as creating unnecessary expense(*r*), but also frequently affords an advantage to the opposite party, either as a ground

(*j*) Ante, 148.—Mills *v.* Graham, 1 New Rep. 140.

(*k*) Bac. Ab. Pleader, G. 4.—Solomons *v.* Lyon, 1 East, 372.

(*l*) Co. Lit. 304. a.—Com. Dig. Pleader, C. 33. E. 2.—Bac. Ab. Pleas, K. 2, 3.—Heath's Maxims, 134.

(*m*) Com. Dig. Pleader, C. 33.—Humphreys *v.* Bethily, 2 Vent. 198.—Saunders *v.* Crawley, 1 Rol. 112.—1 Saund. 58, n. 1.—Heath's Maxims, 135.

(*n*) Trevelian *v.* Seccomb, Carth. 9.

(*o*) Bac. Ab. Pleas, K. 3.

(*p*) 8 & 9 W. 3. c. 11. s. 8.—1 Saund. 58. n. 1.

(*q*) 4 Ann. c. 16.

(*r*) Dundas *v.* Ld. Weymouth, Cowp. 665.—Price *v.* Fletcher et al., Cowp. 727.—Bristow *v.* Wright, Dougl. 668, 9.

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(14) Vide *Currie & Whitney* v. *Henry*, 2 *Johns. Rep.* 433. 437.

(15) But in *Cheetham* v. *Tillotson*, 5 *Johns. Rep* 240. where two distinct causes of action were stated in what was, in form, one count, the Court of Errors chose to consider them as separate counts, and reversed the judgment because entire damages had been assessed.

(16) Vide post. 330. & n. 127. *ibid.*

(17) Vide *King* v. *Harrison*, 15 *East's Rep.* 615.

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of variance, or as rendering it incumbent on the party pleading to adduce more evidence than would otherwise have been necessary; and therefore, it is of the greatest importance in pleading to avoid any unnecessary statement of facts, as well as prolixity in the statement of those which may be necessary(*s*). Thus where a party takes upon himself to state in any pleading a substantive averment, or to allege a precise estate, which he is not bound to do, if they are material and bear on the question, he gives the other side an advantage of traversing them ;[18] as if an avowry damage feasant, in which it is sufficient to state that the close was the party's *freehold*, if he unnecessarily state a seisin in fee, though a less estate would suffice, and the other side traverse the allegation, it must *be proved as stated(*t*). So if in an action on the case against the sheriff, for levying under an execution against the tenant, without paying the landlord a year's rent, if the plaintiff, though unnecessarily, profess to set out the terms of the tenancy as to the time of payment of rent, &c. and mis-describe them, the variance will be fatal,[19] and contracts in particular must be accurately stated(*u*). The instances of variances will be more fully stated in the next chapter.

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7thly, Superfluity and repugnancy.

If, however, the matter unnecessarily stated, be wholly foreign and impertinent to the cause, so that no allegation whatever on the subject was necessary, it will be rejected as surplusage, and it need not be proved, nor will it vitiate,[20] it being a maxim, that *utile per inutile non vitiatur*(*v*); except where by the unnecessary allegation, the plaintiff

(*s*) 2 Saund. 206, 7. n. 22.—Bristow *v.* Wright, Dougl. 668.—1 Saund. 233. n. 2.—2 Saund. 366. n. 1.

(*t*) Id. ibid.

(*u*) Miles *v.* Sheward, 8 East, 9.—Bristow *v.* Wright, Dougl. 665. to 669. See post. as to variances.

(*v*) Kellner *v.* LeMesurier, 4 East, 400.—Gilb. C. P. 131, 2.—Com. Dig. Pleader, C. 28.—Bac. Ab. Pleas, I. 4. Co. Lit. 303. b.—2 Saund. 306. n. 14.—Wigley *v.* Jones, 5 East, 444.—Heath's Max. 4.

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(18) Vide *Turner* v. *Eyles*, 3 *Bos. & Pul.* 456. *Phillips' Ev.* 158. Post. 304. *Smith* v. *Casey*, 3 *Campb.* 461. *Peppin* v. *Solomons*, 5 *Term Rep.* 497, 498.

(19) So, if in an action on a promissory note, not negotiable, but expressed to be *for value received*, (which is prima facie evidence of consideration,) the plaintiff unnecessarily set forth the particulars in which the value consisted, he is bound to prove them precisely as laid. *Jerome* v. *Whitney*, 7 *Johns. Rep.* 321. So, in an indictment for stopping the mail, a contract with the post-master-general to transport the mail was alleged, and it was held that the contract must be proved, although the indictment might have been good without such an allegation. *United States* v. *Porter*, 3 *Day*, 283. So, in an indictment for burglary, in the house of J. D. *with intent to steal the goods of J. W.*, and it appeared in evidence that no such person had any goods in the house, but that the name of J. W. was put by mistake for J. D., the judges held that it was material to state truly the property of the goods, and on account of this variance the prisoner was acquitted. *Jenks's Case*, *East's P. C.* 514. *Phillips' Ev.* 160.

(20) Vide *Thomas* v. *Roosa*, 7 *Johns. Rep.* 462. *Woodford* v. *Webster*, 3 *Day*, 472. *Tucker* v. *Randall*, 2 *Mass. Rep.* 283. *Chapman* v. *Smith*, 13 *Johns. Rep.* 80.

shows that he has no cause of action(*w*). Thus in trespass for driving cattle, where the defendant justified, that he was lawfully possessed of the close, and took the cattle damage feasant therein, and the plaintiff replied specially title in another, and that he entered by his command, and unnecessarily gave colour to the defendant, it was decided that this did not render the replication insufficient, because the introduction of unnecessary words of form, will not vitiate the rest of a replication which is good(*x*). As observed by Lord Mansfield, "the *distinction is be- [*233]
"tween that which may be rejected as surplusage, which might be "struck out on motion, and what cannot; when the declaration contains "impertinent matter, foreign to the cause, and which the master on a "reference to him, would strike out, that will be rejected by the "court, and need not be proved;[21] but if the very ground of the ac- "tion be mis-stated, that will be fatal, for then the case declared on, "is different from that which is proved, and the plaintiff must recover "*secundum allegata et probata;* the distinction is between immaterial "and impertinent averments, the former must be proved because re- "lative to the point in question"(*y*).[22]

I. THE FACTS NECESSARY TO BE STATED.

So though the superfluous allegation be *repugnant* to what was before alleged, it is void and will be rejected, and whatever is redundant, and which need not have been put into the sentence, and contradicting what was *before* alleged, will not in general vitiate the pleading(*z*); for per Holt, Ch. J. where matter is nonsense, by being contradictory, and repugnant to something precedent, there the precedent matter which is sense, shall not be defeated by the repugnancy which follows, but that which is contradictory shall be rejected; as in ejectment, where the declaration is of a demise the *second* of January, and that the defendant *postea scilicet* on the *first* of January, ejected him, here the *scilicet* may be rejected as being expressly contrary to the *postea* and *the pre- [*234]
cedent matter(*a*). But a material allegation, sensible and consistent in the place where it occurs, and not repugnant to any *antecedent* matter, cannot be rejected, merely on account of there occurring *afterwards* in the same pleading another allegation inconsistent with the former, and which latter allegation cannot itself be rejected(*b*); and if by the rejec-

(*w*) Com. Dig. Pleader, C. 29.—Bac. Ab. Pleas, I. 4.

(*x*) Per Lawrence, J., Taylor *v.* Eastwood, 1 East, 219.

(*y*) Per Ld. Mansfield, Bristow *v.* Wright, Dougl. 667.—Winn *v.* White, 2 Bla. Rep. 842.—Kellner *v.* Le Mesurier, 4 East, 400.

(*z*) Gilb. C. P. 131, 2.—Co. Lit. 303. b.—Buckley *v.* Kenyon, 10 East, 142.

(*a*) The King *v.* Stevens & Agnew, 5 East, 255.—Wyat *v.* Aland, 1 Salk. 324, 5.

(*b*) The King *v.* Stevens & Agnew, 5 East, 254.

(21) Vide *Allaire* v. *Ouland*, 2 *Johns. Cas.* 52.

(22) Vide *Williamson* v. *Allison*, 2 *East's Rep.* 451, 452. *Wilson* v. *Codman's Ex'r.*, 3 *Cranch*, 193. *Livingston et al.* v. *Swanwick*, 2 *Dall.* 300. *Peter v. Cocke*, 1 *Wash.* 257. *Phillips' Ev.* 158, 159. post. 304.

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tion of the repugnant matter, the pleading would be left without an allegation of time, or other material matter, though in some instances the pleading might be aided by verdict, yet it would be defective on special demurrer(*c*). And when by the introduction of superfluous matter, it appears that the defendant had no cause of action, it is fatal; as if in an action on the case for a disturbance, in which possession is a sufficient title for the plaintiff, if he shew a title, and it appear insufficient, the declaration is bad(*d*). So if in a plea of privilege as an attorney of the Common Pleas, the customary privilege be improperly stated, though it might have been omitted, being matter of law judicially taken notice of, it was held that the court will not reject the statement of the custom as surplusage, but will give judgment against the plea(*e*).

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*II. THE MODE OF STATING THE FACTS.

II. MODE OF STATING FACTS.

Having considered *what facts* are to be stated in pleading, we have now to consider *the mode of such statement.* The facts which constitute the cause of action, or ground of defence, should be stated logically in their natural order; as on the part of the plaintiff, his right, the injury, and the consequent damage, and these with certainty, precision, and brevity(*f*). With regard to the language to be adopted, as observed by Lord Ch. J. De Grey, there are cases, where a direct and positive averment is necessary to be made in specific terms, as where the law has affixed and appropriated technical terms to describe a crime, as in murder, burglary, and others, so in trespass, the words *vi et armis* and *contra pacem* are necessary; but except in particular cases, where precise technical expressions are required to be used, there is no rule of law that other words should be employed, than such as are in ordinary use(*g*). Thus though in a declaration for slander, it is usual to state that the words were "maliciously" spoken, the word "falsely" has been held to be sufficiently expressive of a malicious intent(*h*). However, where there has been a long established form of pleading, applicable to the facts of the particular case, it should in general, for the

[*236] sake of certainty and uniformity, be adopted, and *the courts censure

(*c*) Gilb. C. P. 132, 3.—Buckley *v.* Kenyon, 10 East, 142.

(*d*) Dorne *v.* Cashford, 1 Salk. 363. Crouther *v.* Oldfield, 1 Salk. 365.—Com. Dig. Pleader, C. 29.

(*e*) Dillon *v.* Harper, Lord Raym. 898.—Ante, 224. but see Carlett *v.* Smallpage & others, 9 East, 339.—Stokes *v.* Mason, 9 East, 424.

(*f*) Bristow *v.* Wright, Dougl. 666, 7 Sir Wm. Jones, 4 Vol. p. 34. 4to. edit.

(*g*) Rex *v.* Horne, Cowp. 683.—The King *v.* Stevens & Agnew, 5 East, 259, 260.—The King *v.* Airey, 2 East, 33.—Allan *v.* The Hundred of Kirton, 2 Bla Rep. 843.

(*h*) 1 Saund. 242. a. n. 2.

any unnecessary deviation from it(*i*); and as observed by Lord Coke, it is safer to follow good precedents, for *nihil simul inventum est, et perfectum*(*k*). II. MODE OF STATING FACTS.

The principal rule, as to the mode of stating the facts is, that they must be set forth with *certainty*(*l*);[23] by which term is signified, a clear and distinct statement of the facts, which constitute the cause of action, or ground of defence, so that they may be understood, by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who are to give judgment(*m*).

In Dovaston and Payne(*n*), Mr. Justice Buller observed, that certainty or precision in pleading, has been stated by Lord Coke to be of three sorts, viz. 1st, certainty to a common intent; 2dly, to a certain intent in general; 3dly, to a certain intent in every particular; and that though these distinctions had been treated as a jargon of words without meaning, they had long been made, and ought not altogether to be departed from.

By certainty to a *common intent*, is to be understood, that when words are used, which will bear a natural sense, and also an artificial one, or one to be made out by argument or inference, the natural sense shall prevail, it is simply a rule of construction, *and not of addition, common [*237] intent cannot add to a sentence words which are omitted. This description of certainty is sufficient in a plea in bar(*kk*)[24]. It is of the lowest degree, and yet we shall find, that in some instances, a statement which would suffice in a declaration, will not in a plea; thus in a declaration on a contract, to pay the debt of a third person, it is not necessary to shew that it was in writing,[25] but it is otherwise in a plea(*ll*);

(*i*) Co. Lit. 303. a. b.—1 Hale C. L. 301, 2.—King *v.* Fraser, 6 East, 351, 2, 3.—And see ante, 85, 6.—8 Co. 48. b.

(*k*) Co. Lit. 230. a.

(*l*) Rex *v.* Horne, Cowp. 682.—Slade *v.* Drake, Hob. 295.—It was observed by Lord C. J. De Grey, in Rex v. Horne, Cowp. 682. that we have no precise idea of the signification of the term "certainty," which is as indefinite in itself as any word that can be used.

(*m*) Rex *v.* Horne, Cowp. 682.—Com. Dig. Pleader, C. 17.—Co. Lit. 303.—Ward *v.* Harris, 2 Bos. & Pul. 267. and see the reason, Andrews & others *v.* Whitehead & another, 13 East, 107.

(*n*) 2 H. Bla. 530.—Woolnoth *v.* Meadows, 5 East, 467.—The King *v.* Stevens & Agnew, 5 East, 257. 259.—The King *v.* The Mayor, &c. of Lyme Regis, Dougl. 158.

(*kk*) Dovaston *v.* Payne, 2 Hen. Bla. 530.—Rex *v.* Horne, Cowp. 682.—The King *v.* The Mayor, &c. of Lyme Regis, Dougl. 158.—1 Saund. 49. n. 1.—Long's Case, 5 Co. 121.—Co. Lit. 303. a.—Com. Dig. Pleader, C. 17.—Elwis *v.* Lambe, 6 Mod. 117.—Heath's Max. 3.

(*ll*) 1 Saund. 276. a. n. 2.

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(23) Vide *Carpenter* v. *Alexander*, 9 *Johns. Rep.* 291. *Ward* v. *Clark*, 2 *Johns. Rep.* 12. *Jacobs* v. *Nelson*, 3 *Taunton*, 423.

(24) Acc. *Spencer* v. *Southwick*, 9 *Johns. Rep.* 314.

(25) Vide ante 227. *Elting & others* v. *Vanderlyn*, 4 *Johns. Rep.* 237. *Ibid.* 239. n. *a*. The contract is required to be stated more precisely in a plea of usury, than in a declaration in a qui tam suit, because the facts are within the defendant's knowledge. *Lawrence* v. *Kines*, 10 *Johns. Rep.* 142.

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and in a plea, the statement of a deed by way of recital "*testatum existit*," instead of a direct allegation, is insufficient, though it is otherwise in a declaration(*m*).

Certainty to a *certain intent in general* is a greater degree of certainty than the last, and means what upon a fair and reasonable construction may be called certain, without recurring to possible facts[26] which do not appear, and is what is required in declarations,[27] replications, and indictments in the charge or accusation, and in returns to writs of mandamus(*n*); the charge we have seen, must contain such a description of the crime, &c. that without intending any thing but what appears, the defendant may know what he is to answer, and what is intended to be proved, in order that the jury may be warranted in their verdict, and the court in the judgment they are to give(*o*).

[*238] The third degree of certainty, is that which *precludes all argument, inference, or presumption against the party pleading(*oo*), and as it has been well expressed, is that technical accuracy, which is not liable to the most subtle and scrupulous objection, so that it is not merely a rule of construction, but of addition; for when this certainty is necessary, the party must not only state the facts of his case, in the most precise way, but add to them such facts, as shew, that they are not to be controverted, and as it were, anticipate the case of his adversary(*p*). It has been said, that this description of certainty has been rejected in all cases, as partaking of too much subtlety(*q*); however, Buller, J. expressed a different opinion, and it appears, that it obtains in the case of estoppels(*r*), and in pleas, which are not favoured in law, such as the plea of alien enemy, in which it must be stated, not only that the plaintiff is an alien, but that he came to England without letters of safe conduct[28] from our King(*s*).

The application of the rules as to the necessary certainty in the various parts of pleadings, will be better considered, when the qualities of the declaration, and other parts of pleading are stated. It must be

(*m*) 1 Saund. 274. n. 1.

(*n*) The King *v.* The Mayor, &c. of Lyme Regis, 1 Dougl. 159.—1 Saund. 49. n. 1.—Heath's Max. 3.

(*o*) Rex *v.* Horne, Cowp. 682.

(*oo*) Co. Lit. 352. b.—The King *v.* The Mayor, &c. of Lyme Regis, Dougl. 159.

(*p*) Lawes on Pleading, 54, 55.

(*q*) Rex *v.* Horne, Cowp. 682.

(*r*) Dovaston *v.* Payne, 2 Hen. Bla. 530.—The King *v.* The Mayor, &c. of Lyme Regis, Dougl. 159.—Com. Dig. Estoppel, E. 4.—Co. Lit. 352. b.

(*s*) Casseres *v.* Bell, 8 T. R. 167.

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(26) Vide *Spencer* v. *Southwick*, 9 *Johns. Rep.* 317.

(27) Sed vide *Hildreth* v. *Becker & Harvey*, 2 *Johns. Cas.* 339, where it is said that in a declaration, certainty to a common intent is sufficient; *Rex* v. *Horne*, *Cowp.* 682. is cited, which authority however establishes directly the reverse. And see *Coffin* v. *Coffin*, 2 *Mass. Rep.* 363, per Parsons, Ch. J., that certainty to a common intent is sufficient.

(28) Vide *Clarke* v. *Morey*, 10 *Johns. Rep.* 70. That this allegation is not alone sufficient vide *Id. ibid. Russel* v. *Skipwith*, 6 *Binney*, 247. post. vol. 2. 473. n.

confessed that it is frequently difficult in practice to apply the rules to cases which occur. II. MODE OF STATING FACTS.

Less certainty is requisite, when the law presumes, that the knowledge of the facts is *peculiarly* in the opposite party(*t*); because the principal *object of pleading is, to state facts of which the other party [*239] is not supposed to be cognizant; and therefore, where in an action on the case for not repairing a private road leading through the defendant's ground, the declaration stated that the defendant, by reason of his possession, ought to have repaired, &c. on general demurrer it was objected that it did not shew by what right or obligation the defendant was bound to repair, and that he was not bound of common right merely as an occupier, but the court held that the declaration was sufficient, and Buller, J. said, the distinction is between cases, where the plaintiff lays a charge upon the right of the defendant, and where the defendant himself prescribes in right of his own estate; in the former case the plaintiff is presumed to be ignorant of the defendant's title, and cannot therefore plead it, but in the latter, the defendant knowing his own estate, in right of which he claims a privilege, must set forth such estate(*tt*).[29] So less certainty is required, and general words are sufficient, where it is to be presumed, that the party pleading is not acquainted with the minute circumstances; thus, where a person's house is burnt, general words are sufficient in the description of the loss, because he is not presumed to be able to set forth with certainty the goods destroyed(*u*); but in a declaration on the statute of hue and cry, the plaintiff must state the particulars of his goods taken(*v*).

*It is also a rule in pleading, that in general, where a subject com- [*240] prehends multiplicity of matter, there, in order to avoid prolixity, the law allows general pleading(*vv*);[30] but as there are many instances in which this rule does not apply, especially in justifications of slander,

(*t*) Andrews & others *v.* Whitehead & another, 13 East, 112.

(*tt*) Rider *v.* Smith, 3 T. R. 767.—Com. Dig. Pleader, C. 26. 42.—Co. Lit. 304.—Andrews & others *v.* Whitehead and another, 13 East, 112.

(*u*) Prior *v.* Tufts, 1 Keb. 825.—Partridge *v.* Strange et al., Plowd. 85.—Barbe *v.* Parker, 1 Hen. Bla. 284.—Sed vide Pinkney *v.* The Inhabitants of East Hundred, 2 Saund. 379.

(*v*) Pinkney *v.* The Inhabitants of East Hundred, 2 Saund. 379.

(*vv*) 2 Saund. 113. n. 1. 411. n. 4.—Barton et al. *v.* Webb et al., 8 T. R. 462.—1 Saund. 116, 7. n. 1.—Bac. Ab. Pleas, I. 3.—Com. Dig. Pleader, C. 42. E. 26. 2 V. 13.—Co. Lit. 303. b. 304.

(29) In an action against the surety on an administration bond, it is sufficient for the plaintiff to state that goods, chattels and sums of money to a large amount, to wit, the amount of, &c. had come into the hands of the administrator, which he had converted to his own use; the creditor not being presumed to know precisely what assets the administrator had, and this fact lying more properly in the knowledge of the defendant. *The People* v. *Dunlap*, 13 *Johns. Rep.* 437.

(30) Vide *Hughes* v. *Smith & Miller*, 5 *Johns. Rep.* 173. So, in declaring on a policy of insurance on specified goods, it is sufficient to aver that *divers goods* were put on board. *De Symons* v. *Johneton*, 2 *New Rep.* 77.

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and in pleas of performance, we will hereafter consider the rule, in its application to the particular parts of pleading.

When the facts are not really stated with sufficient certainty, the introduction of the word "*certain*" is of no avail(*w*); thus a declaration in debt for a sum of money forfeited "by virtue of a certain bye law," or for money due "on a certain bond," without stating it, is insufficient(*x*); so a special declaration in assumpsit for wages in consideration that the plaintiff would go "a certain voyage," without stating it(*y*); so where the declaration stated, that in consideration that the plaintiff had sold to the defendant a "certain horse" of the plaintiff, at and for "a certain quantity of certain oil," to be delivered within "a certain time," which had elapsed, though it was holden to be aided by verdict, it would have been bad on demurrer(*z*); and a justification in trespass "by virtue of a certain writ, &c." but not setting it forth, is insufficient(*a*).[31] So the words "duly," "lawfully," "sufficient," &c. [*241] without showing the *matter of fact, are seldom of avail in pleading(*b*);[32] though in some cases the statement that the defendant "unlawfully" or "unjustly," &c. did the wrong complained of, without showing the particular acts, may be sufficient to designate that to be a crime or injury, which might otherwise stand indifferent; as in an action on the case for unlawfully procuring a wife to leave her husband(*c*).

III. RULES OF CONSTRUCTION.

III. RULES OF CONSTRUCTION.

It is a maxim in pleading that every thing shall be taken most strongly against the party pleading(*d*), or rather, that if the meaning of the

(*w*) *See the cases infra*, & Andrews & others *v.* Whitehead & another, 13 East, 102.—Blakey *v.* Dixon et al., 2 Bos. & Pul. 323.—Moore, 467.—Rex *v.* Richardson, 1 Burr. 540.—The King *v.* the Mayor & Burgesses of Lyme Regis, Dougl. 180.

(*x*) The Company of Feltmakers *v.* Davis, 1 Bos. & Pul. 100. 102.

(*y*) White *v.* Wilson, 2 Bos. & Pul. 120.

(*z*) Ward *v.* Harris, 2 Bos. & Pul. 265.

(*a*) 1 Saund. 298, n. 8.—Ante, 227.

(*b*) Case of the Abbot of Strata Marcella, 9 Co. 25. a.—Rex *v.* Richardson, 1 Burr. 540.—The King *v.* the Mayor and Burgesses of Lyme Regis, Dougl. 180.

(*c*) Winsmore *v.* Greenbank, Willes, 584.

(*d*) 1 Saund. 259. n. 8.—De Symonds *v.* Shedden, 2 Bos. & Pul. 155.—Earl of Kerry *v.* Baxter et al., 4 East, 343.

(31) Sed vide *Bennet* v. *The Executors of Pixley*, 7 *Johns. Rep.* 249.

(32) So, in false imprisonment, the defendant attempted to justify the arrest

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words be equivocal, they shall be construed most strongly against the party pleading them(*e*); for it is to be intended, that every person states his case as favourably to himself as possible(*f*). But in applying this maxim, the other rules must be kept in view, and particularly those relating to the facts, of which the courts will *ex officio* take notice, without their being stated in pleading(*g*); and the maxim itself must be received with some qualification, for the language of the pleading is to have a reasonable intendment and construction(*h*);[33] and where an expression is capable *of different meanings, that shall be taken which [*242] will support the declaration, &c. and not the other, which would defeat it(*i*).

But the matter must be *capable* of different meanings, for the court cannot, in order to support the proceeding, in which the particular term occurs, arbitrarily give it a meaning against which the use, habits, and understanding of mankind, would plainly revolt.[34]. But if it *be clearly capable* of different meanings, it does not appear to clash with any rule of construction, applied even to criminal proceedings, to construe it in that sense, in which the party framing the charge must be understood to have used it, if he intended that his charge should be consistent with itself(*j*). Every indictment, &c. ought to contain a complete description of such facts and circumstances as constitute the crime, &c. without inconsistency or repugnancy; but except in particular cases where precise technical expressions are required to be used, there is no rule that other words shall be employed than such as are in ordinary use, or that in indictments or other pleadings a dif-

(*e*) Per Buller, J.—Dovaston *v.* Payne, 2 Hen. Bla. 530.

(*f*) Co. Lit. 303. b.

(*g*) Ante, 217 to 229.—As to rule of reddendo singula singulis, see Rex *v.* Jones, 2 Campb. 139.

(*h*) Com. Dig. Pleader, C. 25.—Cotes *v.* Wade, 1 Lev. 190.—Amherst *v.* Skynner, 12 East, 263.

(*i*) Wyat *v.* Aland, 1 Salk. 325.—The King *v.* Stevens et al., 5 East, 257. Amherst *v* Skynner, 12 East, 270. As to the effect of "prædictus" & "idem," and construction of them, see Woodford & wife *v.* Ashley, 11 East, 513.

(*j*) Per Ld. Ellenborough, Ch. J. The King *v.* Stevens et al., 5 East, 257, and id. Woolnoth *v.* Meadows, 463.

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on a suspicion of forgery, and stated in his plea that the plaintiff was *suspiciously* possessed of a note, and disposed of it in a *suspicious manner*, and in a *suspicious manner* left England and went to Scotland: the plea was held too general, and that the causes of suspicion ought to have been set forth in certainty. *Mure* v. *Kaye & another*, 4 *Taunt.* 34.

(33) Vide *Hastings* v. *Wood & Curtis*, 13 *Johns. Rep.* 482.

(34) And this is the rule in regard to actions for words, either spoken or written, that the court is to understand them according to their ordinary acceptation among mankind. *Backus* v. *Richardson*, 5 *Johns. Rep.* 584. *Woolnoth* v. *Meadows*, 5 *East's Rep.* 463. *Roberts* v. *Camden*, 9 *East's Rep.* 93. *Respublica* v. *De Longchamps*, 1 *Dallas*, 114. *Rue* v. *Mitchell*, 2 *Dall.* 59. *Brown* v. *Lamberton*, 2 *Binney*, 37. *Pelton* v. *Ward*, 3 *Caine's Rep.* 76. But still the meaning of the words must be unequivocal. *Harrison* v. *Stratton*, 4 *Esp. Rep.* 218.

III. RULES OF CONSTRUCTION.

ferent sense is to be put upon them than what they bear in ordinary acceptation; and if, where the sense may be ambiguous, it is sufficiently marked by the context or other means in what sense they are intended to be used, no objection can be made on the ground of *repugnancy*, which only exists where a sense is annexed to words which [*243] is either absolutely inconsistent *therewith, or being apparently so, is not accompanied by any thing to explain or define them. If the sense be clear, nice exceptions ought not to be regarded(*k*). It is also a rule relating to the mode of stating facts, and the form of the pleading on either side, that the court are *ex officio* bound after verdict to give such judgment as appears upon the whole record to be proper, without regard to the issues found or confessed, or to any imperfection in the prayer of judgment on either side(*l*);[35] and on the same ground we shall hereafter see that when there is a demurrer to a plea, replication, &c. if the prior pleading be defective in substance, judgment will be given against the party pleading it.

IV. DIVISION OF PLEADINGS.

IV. DIVISION OF PLEADINGS.

The *parts* of pleading have been considered as arrangeable under two heads; *first*, the regular, being those which occur in the ordinary course of a suit; and *secondly*, the irregular, or collateral, being those which are occasioned by mistakes in the pleadings on either side(*m*).

The *regular* parts are, 1st, The *declaration* or count. 2dly, The *plea*, which is either to the jurisdiction of the court, or suspending the ac- [*244] tion, as in the case of parol demurrer, or in *abatement, or in bar of the action(*n*), or in replevin, an avowry or cognizance. 3dly, The *replication*, and in case of an evasive plea, a *new assignment*, or in replevin the *plea in bar* to the avowry or cognizance. 4thly, The *rejoinder*, or in replevin, the replication to the plea in bar. 5thly, The *sur-rejoinder*, being in replevin, the rejoinder. 6thly, The *rebutter*. 7thly,

(*k*) Per Ld. Ellenborough, Ch. J.—The King *v.* Stevens et al., 5 East, 259, 260.—The King *v.* Airey, 2 East, 33.

(*l*) Le Bret *v.* Papillon, 4 East, 502. Charnley *v.* Winstanley et ux., 5 East, 270, 1.

(*m*) Vin. Ab. Pleas and Pleading, C.

(*n*) Id. ib.—Bac. Ab. Pleas & Pleading, A.

(35) Vide *Havens* v. *Bush*, 2 *Johns. Rep.* 387. *King* v. *Harrison*, 15 *East's Rep.* 614, 615. post. 331, 332.

The *sur-rebutter*(*o*), and 8thly, *Pleas puis darrein continuance*, where the matter of defence arises *pending* the suit. IV. DIVISION OF PLEADINGS. [*244]

The *irregular*, or *collateral* parts of pleading, are stated to be(*p*), *Demurrers* to any part of the pleadings above mentioned. 2dly, *Demurrers to Evidence* given at trials. 3dly, *Bills of Exceptions*. 4thly, *Pleas* in *scire facias*. And 5thly, *Pleas* in *error*(*q*). The particular nature of each of these parts of pleading, together with the *claim of conusance*, *demand of oyer*, and *imparlances*, &c. will be considered in the following chapters.

(*o*) Vin. Ab. Pleas and Pleading, C. Bac. Ab. Pleas and Pleading, A.

(*p*) Vin. Ab. Pleas and Pleading, C.

(*q*) Id. ibid.

CHAPTER IX.

OF THE PLEADING AND DECLARATION.

*CHAPTER IV.

OF THE PRÆCIPE AND DECLARATION.

WHEN the plaintiff commences his action by *special original* writ (which when the action is for a money demand amounting to 50*l.*, is in general advisable, in order to prevent the delay occasioned by a writ of error in the Exchequer chamber)(*a*), it is usual for the pleader, particularly in special actions of assumpsit, to frame what is termed the *præcipe* for such writ, which præcipe is delivered to the filazer, who thereupon issues a *capias* in the first instance, keeping the præcipe as instructions for the original, which is not in fact issued, unless it become necessary, in consequence of a writ of error, upon a judgment by default(*b*). The form of the præcipe in *assumpsit*, except in its commencement and conclusion, is precisely similar to the declaration, setting forth the time, place, and other circumstances, which constitute the cause of action, with the same particularity(*c*); but in an action of *trespass*, (which however is rarely commenced by original,) though the trespasses *are set out at length with the same number of counts as in a declaration, yet time, number, quantities, and value, are not particularized in the præcipe(*d*). [*246]

In the *commencement* of the *præcipe* in *assumpsit*(*e*), which is not to be intituled of any court or term, the *venue* should be laid in the county in which the action is intended to be tried, not being one of the counties Palatine, into which an original writ does not run(*f*); if the defendant cannot be found in that county, a *testatum capias* must be issued into the county where he may be; for though, laying the venue in the declaration in a county different to that in the original, is not an irregula-

(*a*) Redman *v.* Edolph, 1 Sid. 424.—Trye. 6.—Gilb. K. B. 319.—R. M. 23 Geo. 3.—Tidd's Prac. 3d edit. 94, 95.

(*b*) Tidd's Prac. 3d edit. 96, 7.

(*c*) Lil. Ent. 90. see post. 2 Vol. 7.

(*d*) Lil. Ent. 539.

(*e*) The form of a præcipe in assumpsit is as follows - - - - - - - (to wit) If A. B. make you secure, &c. then put by gages and safe pledges, C. D. late of - - - - - - merchant, (*or* "*yeoman*," &c. *according to the fact,*) and E. F. late *of the same place,* merchant, that they be before us on - - - - - - - - (*a general return day*), wheresoever we shall then be in England, to shew, For that whereas, &c. (*here set forth the cause of action precisely as in a declaration, and conclude as follows :*) to the damage of the said A. B. of *l.* - - - - - - - - as it is said, &c. see post. 2 Vol. 7.

(*f*) Cove *v.* Heaton, 1 Taunton, 120.

OF THE PRÆCIPE.

rity of which the defendant himself can take advantage, yet his bail will by the practice of the court of K. B. be thereby discharged(*g*).[1] The *names* of all the parties must also be correctly stated, and the statute of *additions* requires, "that in original writs, the estate or degree, or "mystery of the defendants, and the towns, hamlets, or places and "counties in which they were, or be, or in which they be, or were con-"versant," shall be inserted(*h*). Under this statute, the plaintiff may describe the defendant, either by his addition of degree, or mystery; [*247] and therefore, where the defendant is described *by the addition of gentleman or yeoman, he cannot plead that he was a merchant, &c. or *vice versa*(*hh*); and the plaintiff has his election to describe the defendant, either of the place of his abode, at the time of the issuing of the writ, or of any place which he had formerly frequented(*i*). When the defendant is described by an *alias dictus* the addition should be after the first name (*j*);[2] and where there are several defendants, the addition of each is usually described separately; but in an action against husband and wife, no addition of the latter is necessary(*k*). In proceedings to Outlawry and in Indictments these points are still material, and indeed should in all cases be attended to by the pleader in framing the præcipe; but as oyer of the writ cannot now be craved, and as it is unnecessary to insert the defendant's addition of place or degree in any declaration(*l*), no advantage can be taken in pleading of a mistake of the addition in the præcipe or original, unless the misaddition be unnecessarily inserted in the declaration, in which case, it might be open to the defendant, to plead in abatement(*m*). The præcipe must require the sheriff to have the defendant in court, on a general and not a special return day, and in the King's Bench, not at Westminster, but generally, wheresoever the King shall then be in England(*n*). In actions of debt [*248] *and covenant, the præcipe and *capias* thereon, as framed by the pleader, contain only a general complaint, without expressing the particulars of the cause of action(*o*).[3]

(*g*) Yates *v.* Plaxton, 3 Lev. 235. post. 249.—R. E. 2 G. 2. a.

(*h*) 1 Hen. 5. c. 5. See the form, post. 2 Vol. 7.

(*hh*) Smith *v.* Mason, Ld. Raym. 1541.—Horspoole *v.* Harrison, 1 Stra. 556.—S. C. 2 Stra. 816.

(*i*) Cortisos *v.* Munoz, 2 Stra. 924.—Barnes, 162.—Draycote *v.* Curzon, 1 Lutw. 40.

(*j*) Leach, C. L. 469.—1 Saund. 14. n. 1.

(*k*) Bac. Ab. Misnomer, B. 4.

(*l*) Gray et al. *v.* Sidneff, 3 Bos. and Pul. 395.

(*m*) Murray *v.* Hubbart, 1 Bos. and Pul. 648.—1 Saund. 318. a. n. 3.—2 Saund. 209. a. n. 1.

(*n*) Tidd's Prac. 100.—Shuttleworth *v.* Pilkington, Stra 1155.

(*o*) See the forms in *Debt*, Tidd's Forms, 31. 45.—Imp. Prac. K. B. 7th edit. 591.—6th edit. 537.—and in *Covenant*, Tidd's Forms, 31. 45.

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(1) Vide *Tidd's Prac.* 242, 243.

(2) Vide *Reid* v. *Lord*, 3 *Johns. Rep.* 118.

(3) As to the form of the original writ in assumpsit against a Corporation, see *Lynch* v. *The Mechanic's Bank*, 13 *Johns. Rep.* 127.

OF THE DECLARATION.

The declaration is a specification, in a methodical and legal form of the circumstances, which constitute the plaintiff's cause of action(*p*). It may be considered with reference, 1st, to those general requisites or qualities, which govern the whole declaration; and 2dly, to its form and particular parts and requisites.

I. THE GENERAL REQUISITES.

I. General requisites.

The general requisites or qualities of a declaration are, 1st, that it correspond with the process(*q*), and in bailable actions with the *ac etiam* and affidavit to hold to bail; 2dly, that it contain a statement of all the facts necessary in point of law to sustain the action, and no more(*r*); and 3dly, that these circumstances be set forth with certainty and truth(*s*).

1st, Should correspond with process.

Regularly the declaration should correspond with the process; but as according to the *present practice of the courts, oyer of the writ cannot be craved, and a variance between the writ and declaration, cannot in any case be pleaded in abatement(*t*); and as there are several instances in [*249] which the court will not set aside the proceedings, on account of a variance between the writ and declaration(*u*), many of the older decisions are no longer applicable in practice. In the King's Bench, when the proceedings are by special original, we have seen that the venue must be laid in the county into which the original was issued, or in bailable cases the bail will be discharged(*v*); but in the Common Pleas the bail would not be discharged by such variance(*w*), and where an outlawry has been reversed, the plaintiff may in C. P. declare in any county(*x*). We will consider how far, according to the present practice of the courts, the declaration must correspond with the process, or the *ac etiam* and *affidavit* to hold to bail, with respect to, 1st, the *names* of the parties to the action; 2dly, the *number* of such parties; 3dly, the *character* or *right* in which they sue, or are sued; 4thly, the *cause* and *form* of action; and under each of these heads, the consequences of a deviation from the process.

1st, With respect to the *names of the parties*, when bailable or com-

(*p*) Co. Lit. 17. a. 303. a.—Bac. Ab. Pleas, B.—Com. Dig. Pleader, C. 7.—Heath's Maxims, 1, 2.

(*q*) Com. Dig. Pleader, C. 13.

(*r*) Co. Lit. 303. a.—Partridge *v.* trange et al., Plowd. 84.—Buckley *v.* Thomas, Plowd. 122.

(*s*) Id. ibid.

(*t*) 1 Saund. 318. a.—Gray et al. *v.* Sidneff, 3 Bos. & Pul. 395.—Spalding et al. *v.* Mure et al., 6 T. R. 364.

(*u*) Spalding et al. *v.* Mure et al., 6 T. R. 364.

(*v*) Ante, 246. Tidd. 4th edit. 366.

(*w*) Imp. Prac. C. P. 159, 160.—R. H. 22 Geo. 3. C. P.

(*x*) Whitwick *v.* Hovenden, 3 Lev. 245.—Imp. C. P. 612.

I. GENERAL REQUISITES.

mon process in the King's Bench or Common Pleas has been issued against the defendant by a wrong name, if he appear in such name he will be estopped from pleading in abatement, and the declaration may [*250] be conformable to the writ(*y*);[4] *and if he appear by his right name, the plaintiff may declare against him by such name, stating that he was arrested or served with process by the other, in which case the defendant cannot plead the misnomer in the writ in abatement(*w*). It has been decided in the King's Bench, that on process not bailable, if the defendant do not appear, the plaintiff cannot rectify the mistake by appearing for him in his *right* name, according to the statute(*x*); or by appearing for him in the name by which he was sued and declaring against him by his right name(*y*); though if the plaintiff were to appear for the defendant, in the name by which he is sued, this would warrant him in proceeding to judgment and execution(*z*); but it has been decided in the Common Pleas, that even in bailable process, an arrest of a person by the name of Weston, and declaration *de bene esse* against him, as Wason sued by the name of Weston, was regular(*a*); and it has been since determined in the King's Bench, that if a defendant be served with process by a wrong christian name, and afterwards the plaintiff enter an appearance for him, and serve him with notice of declaration by his right name, and proceed to judgment and execution, the court will not set aside the proceeding for irregularity, merely on the ground that the defendant never appeared, because he ought to have pleaded such misnomer in abatement(*b*); and it has been [*251] decided, that *where process has been issued against a defendant by a wrong name, such misnomer may be cured by amending the writ, if there be any thing to amend by, and then declaring against the defendant by his right name; as where the defendant is properly named in

(*y*) Smithson *v.* Smith, Willes, 461. Barnes, 94.—Stroud *v.* Lady Gerrard, 1 Salk. 8.—Doo *v.* Butcher, 3 T. R. 611. Hole *v.* Finch, 2 Wils. 393.—Bac. Ab. tit. Pleas, I. 11.—Tidd's Prac. 582. n. i. *acc.*—Benson *v.* Derby, Ld. Raym. 249. *cont.*

(*w*) Doo *v.* Butcher, 3 T. R. 611.—Murray *v.* Hubbart, 1 Bos. & Pul. 645. Hole *v.* Finch, 2 Wils. 293.—Clark *v.* Baker, 13 East, 273.

(*x*) Doo *v.* Butcher, 3 T. R. 611.—Dring *v.* Dickenson, 11 East, 225, 6.

(*y*) Delancy *v.* Cannon, 10 East, 328. Dring *v.* Dickenson, 11 East, 225, 6.

(*z*) Crawford *v.* Satchwell, 2 Stra. 1218.—Cole *v.* Hindson et al., 6 T. R. 234 to 236.

(*a*) Symmers *v.* Wason, 1 Bos. and Pul. 105.

(*b*) Oakley *v.* Giles, 3 East, 167. But it is observed in the notes, that it did not appear in what name the plaintiff *entered the appearance.* It turned on the waver of the irregularity.—Delancy v. Cannon, 10 East, 328.—Dring *v.* Dickenson, 11 East, 225, 6.

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(4) If a person enter into a bond by a wrong christian name, and be sued on such bond, he should be sued by the name in the bond, and a declaration against him by his right name, stating that he by the wrong name executed the bond, is bad, and the defendant may avail himself of this objection under the plea of non est factum. *Gould & others* v. *Barnes*, 3 *Taunt.* 504.

I. GENERAL REQUISITES.

the affidavit to hold to bail, but is mistaken in the process(*b*). If there be reason to doubt the defendant's name, it may be advisable either to wait till the defendant has appeared, and to declare in chief, or to declare *de bene esse*, with an alias, and it has been held, that a declaration against a defendant, by the name of "Jonathan otherwise John Soans," is sufficient(*c*).[5] If the plaintiff, not being aware of the real name of the defendant, declare against him by his wrong name, and he plead the misnomer in abatement, it is not necessary to enter a *cassetur*, for the court will give the plaintiff leave to amend, even in proceedings against a prisoner(*d*), unless previous to the application, the debt has been tendered. Where there has been a misnomer in the writ, care must be taken on the part of the defendant, not to wave the objection(*e*); and it is said, that he may move before appearance,[6] to set aside the proceedings for irregularity(*f*), or where he has been arrested on bailable process, he may support an action of trespass for the false imprisonment(*g*).[7]

Where the name of the *plaintiff* has been mistaken in the process, it is advisable, as in the case of a defendant, to state, that "A. B. (the real name) at whose suit, by the name of E. B., *C. D. was served with process," or "arrested in this suit, complains of the said C. D. being, &c.(*h*);" for if the plaintiff's misnomer be continued in the declaration, the defendant may plead it in abatement, though he cannot in bar even in the case of the name of a corporation(*i*).[8] [*252]

2dly, With respect to the declaration corresponding with the process in the *number* of the parties, it has been held that if a writ be sued

(*b*) Stevenson *v.* Danvers, 2 Bos. & Pul. 109.

(*c*) Scott *v.* Soans, 3 East, 111.

(*d*) Owens *v.* Dubois, 7 T. R. 698.

(*e*) See the mode of appearance, and of giving the bail bond, Tidd's Prac. 3d Edit. 582. n. 1.

(*f*) Murray *v.* Hubbart, 1 Bos. and Pul. 647.

(*g*) Shadgett *v.* Clipson, 8 East, 328. Tidd's Prac. 582. n. i.

(*h*) Murray *v.* Hubbart, 1 Bos. and Pul. 647.

(*i*) Mayor, &c. of Stafford *v.* Bolton, 1 Bos. & Pul. 40.—3 Anstr. 935.

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(5) If the surname of the obligor in the body of a bond, varies by a slight mis-spelling, producing scarce any change in the pronunciation from that in the subscription, he may be sued by the name subscribed alone, without an alias dictus. *Meredith* v. *Hinsdale*, 2 *Caine's Rep.* 362.

(6) Vide *Menzies* v. *Rodrigues & others*, *Price's Exch. Rep.* 92.

(7) Vide *Scandover & others* v. *Warne*, 2 *Campb.* 270. But the court will not discharge the defendant on motion, unless he will undertake to bring no action. *Wilks* v. *Lorch*, 2 *Taunt.* 399. Where there is only an inaccuracy in the spelling, so that the name is still idem sonans, the court will not discharge the defendant. *Ahitbol* v. *Benedittо*, 2 *Taunt.* 401.

(8) Vide *Medway Cotton Manufactory* v. *Adams & another*, 10 *Mass. Rep.* 360. 362. 363. Where a deed is made to a corporation, by a name varying from the true name, the plaintiffs may sue in their true name, and aver in the declaration that the defendant made the deed to them, by the name mentioned in the deed. *New York African Society* v. *Varick & others*, 13 *Johns. Rep.* 38.

I. GENERAL REQUISITES.

out in the name of one *plaintiff*, the declaration in chief must not vary, and if it be delivered in the name of two plaintiffs, the proceeding will be set aside for irregularity(*j*). But in the King's Bench, where the defendant has appeared to process at the suit of two, one of them may declare alone by the bye, for he will be considered as a stranger(*k*); and though the plaintiff in the original action, must declare in chief, before he can declare by the bye(*l*), any other person may declare by the bye, before the delivery of a declaration in chief(*m*); and in an action at the suit of the husband alone, a declaration may be delivered by the bye at the suit of himself and feme, and *vice versa*, though it is otherwise in the Common Pleas(*n*).

Process by bill or latitat not bailable in the King's Bench, or common process in the Common Pleas, may be against four *defendants*, and the plaintiff may declare thereon separately[9] against each(*o*); but on bailable process against several, *the declaration must be against all jointly, or the declaration will be set aside for irregularity(*p*).[10]

[*253]

3dly, Upon common process, not bailable, and which does not specify the *character or right* in which the plaintiff sues, he may declare *qui tam*, or as executor, or administrator, or assignee, or in any other special character, for this does not tend to enlarge, but to narrow the demand which the defendant was called upon to answer(*q*); and it has been decided, that though the plaintiff may style himself executor, (not stating himself to *sue as* executor) or give himself any other superfluous description in the process, and declare otherwise, this will not be irregular, because the demand is still the same(*r*).[11] But where the process is to answer the plaintiff in a special character or right, he cannot declare generally, and if he do the variance will be fatal, and

(*j*) Rogers *v.* Jenkins, 1 Bos. & Pul. 383.

(*k*) Sulgard *v.* Harris, Burr. 2180.

(*l*) Delves *v.* Strange, 6 T. R. 158.—Tetherington *v.* Golding, 7 T. R. 80.

(*m*) Col. Philip's Case, 1 Cromp. 100.

(*n*) Barnes, 337.—1 Sel. Prac. chap. 6. s. 1. B. 3.

(*o*) Lewin *v.* Smith, 4 East, 589.—Spencer *v.* Scott, 1 Bos. & Pul. 19.—Stables et al. *v.* Ashley et al., 1 Bos. & Pul. 49.—Holland *v.* Johnson, 4 T. R. 695.—Tidd's Prac. 80.

(*p*) Id ibid.—Moss et al. *v.* Birch et al., 5 T. R. 722.—Tidd's Prac. 164.—How to act when one of the defendants cannot be arrested or served with process, see Sel. Prac. 1 vol. chap. 6. sect. 1. E.—Imp. Prac. K. B. 6th edit. 545.—7 edit. 599.—Edwards *v.* Carter et al., 1 Stra. 473.

(*q*) The Weaver's Company *v.* Forrest, Stra. 1232.—Lloyd *v.* Williams, 2 Bla. Rep. 722.—S. C. 3 Wils. 141.—Canning *v.* Davis, Burr. 2417.—1 Bos. & Pul. 383. n. b.

(*r*) Lloyd *v.* Williams, 2 Bla. Rep. 722.—1 Bos. & Pul. 383. n. b.

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(9) And in the Supreme Court of the State of New York, the plaintiff may join any number of defendants in a process not bailable, and declare against them severally, or against some omitting the others. *Montgomery* v. *Hasbrouck & others*, 3 *Johns. Rep.* 530.

(10) Acc. *Chapman* v. *Eland & another*, 2 *New Rep.* 82. Vide post. 263. 290.

(11) Vide *Woodford* v. *Webster*, 3 *Day*, 472.

I. GENERAL REQUISITES.

the court will set aside the proceedings(*s*); as if the process be *qui tam*(*t*), or *as* executor(*u*), or *as* assignee of a bankrupt(*v*), the declaration can only be in the same character, and in the latter cases where the action is bailable, the court will discharge the defendant out of custody, on filing common *bail(*w*); and where the process is bailable, [*254] to answer the plaintiff in his own right, and he declare as executor, the court will order a common appearance to be entered, leaving the plaintiff, however, at liberty to proceed upon his declaration(*x*). It seems, that if the process be general in the body of it, a variation in the declaration from the *ac etiam* part, or from the affidavit to hold to bail, is only a ground for discharging the defendant on common bail, and not for setting aside the proceedings for irregularity(*y*).

4thly, Upon common process, by bill in the King's Bench, or upon a *capias* or original *quare clausum fregit* in the Common Pleas, the plaintiff may declare *in any cause of action* whatever, though the writ in each case is in trespass(*z*). But in bailable actions, the declaration must correspond with the *cause* and the *form* of action in the affidavit, and the *ac etiam* part of the latitat, or other process,[12] for otherwise the defendant will be discharged out of custody, on filing common bail(*a*); but this will be the only consequence, for the court will not in such case set aside the proceedings for irregularity(*b*).[13] And a variance in the amount of the debt, between the *ac etiam* part of the latitat and the declaration, is not even a ground for discharging the defendant on common bail(*c*); and where the sum *sworn to is under [*255] 40*l.*, a variance between the form of action in the *ac etiam* and the declaration, is not material(*cc*). When the proceeding has been by *special original*, the plaintiff should declare in chief, for the same cause of action expressed in the writ, and in bailable cases, if there be a variance between it and the declaration, the defendant will be discharged on

(*s*) Ante, note q.

(*t*) Canning *v.* Davis, Burr. 2417.—2 Stra. 1232. n. 1.

(*u*) Douglas et al. *v.* Irlam, 8 T. R. 416.—Rogers *v.* Jenkins, 1 Bos. & Pul. 383.—Hally *v.* Tipping, 3 Wils. 61.

(*v*) 1 Tidd's Prac. 3d edit. 403. n. g.

(*w*) Douglas et al. *v.* Irlam, 8 T. R. 416.

(*x*) Hally *v.* Tipping, 3 Wils. 61.

(*y*) Spalding et al. *v.* Mure et al., 6 T. R. 363.—Lloyd *v.* Williams, 3 Wils. 141.—Hally *v.* Tippings, 3 Wils. 61.—Douglas et al. *v.* Irlam, 8 T. R. 416.

(*z*) Foster *v.* Bonner, Cowp. 455.—R. E. 15 Geo. 2. reg. 1.

(*a*) Tetherington *v.* Golding, 7 T. R. 80.—Wilks *v.* Adcock, 8 T. R. 27.—Foster *v.* Bonner, Cowp. 455.—Lockwood *v.* Hill, 1 Hen. Bla. 310.

(*b*) Spalding et al. *v.* Mure et al., 6 T. R. 363.—Hole *v.* Finch, 2 Wils. 393. Ante, 209.

(*c*) Turing *v.* Jones, 5 T. R. 402.—Sed vid. Davison *v.* Frost, 2 East, 305.

(*cc*) Lockwood *v* Hill, 1 Hen. Bla. 310.—2 Saund. 52. a.

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(12) Vide *Rogers* v. *Rogers*, 4 *Johns. Rep.* 485.

(13) But in *Rogers* v. *Rogers*, 4 *Johns. Rep.* 485, where the ac etiam was in assumpsit, and the declaration in account, the proceedings were set aside for irregularity.

I. GENERAL REQUISITES.

entering a common appearance(*d*); but the proceedings will not be set aside, merely on account of a variance in the cause of action, and therefore, the only consequence of the mistake is, that the plaintiff loses the security of the bail(*e*).

2dly, The declaration must state all the facts essential to the support of the action.

The declaration must allege all the circumstances necessary for the support of the action, and contain a full, regular, and methodical statement of the injury which the plaintiff has sustained,[14] with the time and place, and other circumstances, with such precision, certainty, and clearness, that the defendant knowing what he is called upon to answer,[15] may be able to plead a direct and unequivocal plea, and that the jury may be enabled to give a complete verdict upon the issue, and that the court, consistently with the rules of law, may give a certain and distinct judgment upon the premises(*f*). The general rules as to what facts must be stated, have been considered in the preceding chapter(*g*), as well as the inconveniences which may arise from the *statement of superfluous or unnecessary matter(*h*). The requisites of the declaration in each particular case so much depend upon circumstances, that any general observations in this place upon the structure of a declaration would be but of little utility.

[*256]

3dly, Of the certainty required in a declaration(*i*).

We have already considered the different degrees of certainty required in pleading, and we have seen, that the certainty necessary in a declaration, is to a certain intent in general(*j*), which should pervade the whole declaration, and is particularly required in setting forth the parties, time, place, and other circumstances necessary to maintain the action(*k*).

1st, It must be stated with certainty who are the *parties* to the suit(*l*); and therefore, a declaration by or against "C D and company," not being a corporation,[16] is insufficient(*m*); but where there are several plaintiffs or defendants, whose names have been once described, it is sufficient afterwards to adopt the words, "plaintiffs" or "defendants," without again enumerating all the names(*n*); but this is not usual in

(*d*) Turing *v.* Jones, 5 T. R. 402.—R. H. 8 Car. 1.

(*e*) Spalding et al. *v.* Mure et al., 6 T. R. 363.—Hole *v.* Finch, 2 Wils. 393. Tidd, 4th edit. 393.

(*f*) Rex *v.* Horne, Cowp. 682.—The King *v.* Nield et al., 6 East, 422, 3.—The King *v.* Holland, 5 T. R. 623.—Vin. Ab. Declarations.

(*g*) Ante, 216 to 229.

(*h*) Ante, 231 to 234.

(*i*) Ante, 236 to 241.

(*j*) Ante, 237.—Partridge *v.* Strange et all., Plowd. 84.—Co. Lit. 303. a.—Marshall *v.* Birkenshaw, 1 New Rep. 173.

(*k*) Com. Dig. Pleader, C. 18. to C. 27.—Tidd's Prac. 3d edit. 405.

(*l*) Com. Dig Pleader, C. 18.—Dean & Chapter of Rochester *v.* Pierce, 1 Campb. 466. as to a declaration by a corporation.

(*m*) The King *v.* Harrison et al., 1 T. R. 508.

(*n*) Meeke *v.* Oxlade et al., 1 New Rep. 289.

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(14) Vide *Pelton* v. *Ward*, 3 *Caine's Rep.* 77. *Carpenter* v. *Alexander*, 9 *Johns. Rep.* 291. *Roget* v. *Merritt & Clapp*, 2 *Caine's Rep.* 120.

(15) Vide *Coffin* v. *Coffin*, 2 *Mass. Rep.* 363.

(16) Acc. *Bentley & others* v. *Smith & others*, 3 *Caine's Rep.* 170.

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practice, unless the parties be very numerous. We have seen, when the declaration may vary from the process, in the name of the defendant, or may describe him with the *alias dictus*(o). If the plaintiff's name, even in the *case of a corporation, be mistaken, the objection [*257] can only be taken by plea in abatement(p). In declarations upon contracts, it should be expressly stated by and with whom the contract was made(q); and where there are two or more persons of the same name, they should be distinguished from each other by the insertion of some appropriate allegation, as "the now plaintiff," or "the defendant in this suit," or "the said E. F. deceased," &c.(r); in general, however, the omission in this respect will be aided by intendment, particularly upon a general demurrer, or after verdict(s). But where the plaintiff's name has by mistake been inserted, instead of the defendant's, or *vice versa*, the declaration will be bad upon special demurrer(t); though it is aided by *verdict*, or upon general demurrer, by the statutes of jeofails(u); but it has been decided that these statutes do not extend to the names of third persons(v). When the debt arose on record or specialty, it was formerly usual to state, as well in the writ as declaration, the defendant's description in the record or specialty, under an *alias dictus*, but this is no longer the practice(w).

2dly, The declaration in personal actions must in general state a *time* when every material or *traversable fact happened,[17] and when a venue [*258] is necessary, time must also be mentioned(x). The precise time, however, is not material,[18] even in criminal cases (y), unless it constitute a material part of the contract, &c. declared upon, or where the date, &c. of a written contract or record is averred(z), or in ejectment, in which the demise must be stated to have been made after the title of the lessor of the plaintiff[19] and his right of entry accrued(a). Thus in assumpsit

(o) Ante, 249 to 252.

(p) Mayor, &c. of Stafford *v.* Bolton, 1 Bos. & Pul. 40.—3 Anstr. 935.

(q) Sheer *v.* Brown, Ld. Raym. 899. Com. Dig. Action Case Assumpsit, H. 3.—Pleader, C. 18.

(r) Connor *v.* Connor, 2 Wils. 386.—Pollard *v.* Lock, Cro. Eliz. 267.—Com. Dig. Pleader, C. 18.

(s) Id. ib.—Marshall *v.* Birkenshaw 1 New Rep. 172.

(t) Morgan *v.* Sargent, 1 Bos. & Pul. 59.—Harvey *v.* Stokes, Willes, 8.

(u) 16 & 17 Car. 2. c. 8.—4 Ann. c. 16. —Com. Dig. Action Case Assumpsit, H. 3.—Harvey *v.* Stokes, Willes, 5.

(v) Harvey *v.* Stokes, Willes, 8, 9.

(w) 1 Saund. 14. n. 1.

(x) Per Buller, J. The King *v.* Holland, 5 T. R. 620. 624, 5.—Com. Dig. Pleader, C. 19.—Colthirst *v.* Bejushin, Plowd. 24.

(y) Id. ib.—1 Saund. 24. n. 1.—Co. Lit. 283. a.—2 Saund. 5. n. 3. 295. n. 2. —Hawk. Pl. C. 2. Ch. 25. S. 81.

(z) Pope *v.* Foster, 4 T. R. 590.—Stafford *v.* Forcer, 10 Mod. 313.—2 Campb. 307, 8. note.

(a) Doe d. Whately *v.* Telling, 2 East, 257.

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(17) Vide *Denison & others* v. *Richardson*, 14 *East's Rep.* 300, 301. *Phillips' Ev.* 164.

(18) Vide *Phillips' Ev.* 164. *The United States* v. *Vigol*, 2 *Dallas*, 346. *Cheetham* v. *Lewis*, 3 *Johns. Rep.* 43. *Tiffany* v. *Driggs*, 13 *Johns. Rep.* 253.

(19) Vide *Van Alen* v. *Rogers*, 1 *Johns. Cas.* 283.

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upon a parol contract, the day upon which it is made being alleged only for form, the plaintiff is at liberty to prove a contract express or implied, at any other time(*b*); though in stating the date of a promissory note or deed, or in describing an usurious or other contract, relating to time, it must be truly stated(*c*).[20] A deed, however, may be stated in pleading, to have been made on a day different from that on which it bears date, though in such case, the words "bearing date," &c. should be omitted(*d*). So in trespass the time is not material(*e*), and where several trespasses are stated to have been committed, on divers days and times, between a particular day and the commencement of the action, the plaintiff is at liberty to prove a single act of trespass, anterior [259*] *to the first day, though he cannot give in evidence repeated acts of trespass, unless committed during the time stated in the declaration(*f*). When in one continued sentence, or in several sentences connected by the conjunction "and," several facts are stated, the time though only once alleged will apply to each fact; as in trespass that the defendant on, &c. at, &c. made an assault on the plaintiff, *and* took and carried away a bag(*g*). And it is said, that in averring the performance of a contract, it is not necessary to state any particular day, unless time be material(*h*), and to a negative matter, no time need be alleged(*i*). In framing the declaration, care must be taken that no part of the cause of action, or damages resulting from the injury, appear to have accrued after the time, to which the declaration by its title refers, for otherwise it will be subject to a demurrer(*j*)[21] and where it is positively and expressly averred in the declaration, that the plaintiff has sustained damage from a cause, subsequent to the commencement of the action, or previous to the plaintiff's having any right of action, and the jury give entire damages, judgment will be arrested; but where the cause of action is properly laid, and the other matter either comes under a *scilicet*, or is [*260] void, insensible or impossible, and *therefore it cannot be intended that the jury ever had it under their consideration, the plaintiff will be en-

(*b*) Matthews *v.* Spicer, 2 Stra. 806. Stafford *v.* Forcer, 10 Mod. 313.

(*c*) Id. ib.—Tate *v.* Wellings, 3 T. R. 531.

(*d*) Hall *v.* Cazenove, 4 East, 477.

(*e*) Co. Lit. 283. a.

(*f*) Post. 2 Vol. 424. 429.

(*g*) Taylor *v.* Welsted, Cro. Jac. 443. Moyle *v.* Ewer, Cro. Jac. 262.—Webb *v.* Turner, Andr. 251.—Com. Dig. Pleader, C. 19.—Garret *v.* Johnson, 1 Ld. Raym. 576.—Sir W. Jones, 66.

(*h*) Shandois *v.* Simpson, Cro. Eliz. 880.

(*i*) The King *v.* Holland, 5 T. R. 616. Colthirst *v.* Bejushin, Plowd. 24. a.—Com. Dig. Pleader, C. 19.

(*j*) 2 Saund. 291. c. n. 1.

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(20) Vide *Harris* v. *Hudson*, 4 *Esp. Rep.* 152.

(21) Acc. *Lowry* v. *Lawrence*, 1 *Caine's Rep.* 69. *Cheetham* v. *Lewis*, 3 *Johns. Rep.* 42. *Waring* v. *Yates*, 10 *Johns. Rep.* 119. And the mistake is not cured by verdict. *Ward* v. *Honeywood*, *Doug.* 61. *Cheetham* v. *Lewis*, 3 *Johns. Rep.* 44. Post. 265. Contra, *Bemis* v. *Faxon*, 4 *Mass. Rep.* 263.

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titled to judgment(*k*).[22] After verdict, judgment will not be stayed or reversed, for a mistake of the day, month, or year, in any declaration, &c. where the right time in the same, or any preceding writ, &c. is once alleged(*l*),[23] and this provision is now extended to judgments by confession, *nil dicit*, &c. in courts of record(*m*), and in penal actions(*n*).

3d, It is also essential to the declaration, that a *place* be alleged,[24] where every fact material and traversable occurred(*o*). I shall postpone the consideration of this requisite, till I state the doctrine of venues.

4th, It is still more material, that certainty and accuracy be observed in the more substantial parts of the declaration, which state the cause of action itself. Thus in assumpsit, the consideration of the contract and the contract itself must be fully stated, and, therefore, in the instance before mentioned, a declaration stating that in consideration that the plaintiff had sold to the defendant a certain horse at and for "a certain quantity of oil," not specifying the quantity, is insufficient(*p*). So a declaration in debt on "a certain bond," without stating the particulars, is not sufficiently certain(*q*); and a declaration in trespass for taking fish, &c. or divers goods and chattels, without *specifying the number [*261] or quality, is too general(*r*).[25] So a declaration in ejectment for "a tenement," not shewing of what description(*s*). On the other hand, we have seen that the declaration should contain no unnecessary statement, nor prolixity in the statement of those facts which must be alleged(*t*). The application of these several rules will be better considered, when we examine the particular parts of the declaration. It may here suffice to observe, that the want of sufficient certainty, is generally aided by verdict at common law(*u*), or even by the defendant's pleading to the declaration(*v*), or by demurring to the whole, where only a part of the count is bad(*w*).

(*k*) 2 Saund. 171. c.—Com. Dig. Pleader, C. 19.—And ante, 233, 234.

(*l*) 16 and 17 Car. 2. c. 8.—Com. Dig. Pleader, C. 19.

(*m*) 4 Ann. c. 16.

(*n*) 4 Geo. 2. c. 26.—Myddelton *v.* Wynn, Willes, 600.

(*o*) The King *v.* Holland, 5 T. R. 620.

(*p*) Ante, 240.

(*q*) Id. ibid.—Andrews & others *v.* Whitehead & another, 13 East, 102.

(*r*) Com. Dig. Pleader, C. 21.

(*s*) Doe d. Bradshaw *v.* Plowman, 1 East, 441.—Goodtitle d. Wright *v.* Otway, 8 East, 357.

(*t*) Ante, 231 to 233.—Moore, 467.

(*u*) Ward *v.* Harris, 2 Bos. & Pul. 265.—Marshall *v.* Birkenshaw, 1 New Rep. 172.—2 Saund. 74. b.—1 Saund. 228. a.

(*v*) 2 Saund. 74. b.

(*w*) Pinkney *v.* The Inhabitants of East Hundred, 2 Saund. 379, 380.—Com. Dig. Pleader, C. 32.

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(22) Vide *Buckley* v. *Kenyon*, 10 *East's Rep.* 139.

(23) Vide *Allaire* v. *Ouland*, 2 *Johns. Cas.* 56.

(24) Vide *Denison & others* v. *Richardson*, 14 *East's Rep.* 300, 301. *Gardner* v. *Humphrey*, 10 *Johns. Rep.* 53.

(25) A declaration stating that the plaintiff was owner and legal possessor of 2000 dollars worth of personal property, was held bad, after verdict. *Phelps* v. *Sill*, 1 *Day's Rep.* 315.

II. ITS PARTS AND PARTICULAR REQUISITES.

The parts of a declaration are, 1st, The title of the court and term. 2*dly*, The venue. 3*dly*, The commencement. 4*thly*, The statement of the cause of action. 5*thly*, Several counts. 6*thly*, The conclusion. And 7*thly*, The profert and pledges.

1st, The title of the court and term.

In the King's Bench, when the proceedings are by bill, the declaration is entitled with the name of the prothonotary, or chief clerk, now "Markham and Le Blanc," for enrolling pleas in civil causes, depending between party and *party, on the plea side of the court, and particularly by bill(*x*). When the proceedings are by original, the declaration is usually entitled, "In the King's Bench;" and in the Common Pleas and Exchequer, the name of the court is superscribed, as in a declaration by original, in the King's Bench.

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Of what term.

The title of the *term*, with reference to the ancient proceedings *ore tenus*, is to be considered as a statement or memorandum of the time, when the plaintiff comes into court, and alleges his cause of complaint(*y*); and as this could only be in term time, when the defendant was in court, consequently a declaration must in general be entitled in term, though by the present practice of the courts, a bill may be filed in vacation, against a member of parliament, an attorney,[26] or a prisoner, with a special memorandum of the preceding term(*z*). The declaration by bill, should regularly be entitled of, or on a day after that when bail has been filed, or an appearance entered, because the bill of which it is a copy, cannot be filed until the bail is put in, which alone in the King's Bench gives the court jurisdiction, and when by reference to the practice of declaring *ore tenus*, the defendant was in court, to hear the cause of complaint(*a*); unless in the case of a declaration *de bene esse*. Therefore, if there be two defendants, and one of them cannot be served or arrested on the first process, *and he be brought into court upon another writ, returnable in a subsequent term, the declaration should be entitled of the last term(*b*); and where one of several defendants has been outlawed, the declaration must be entitled

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(*x*) Tidd's Prac. 3d edit. 30.

(*y*) Pugh *v.* Robinson, 1 T. R. 116.

(*z*) Dodsworth *v.* Bowen, 5 T. R. 325. Heron et al. *v.* Edwards, 8 T. R. 643. 2 Saund. 1. n. 1.

(*a*) Tatlow *v* Batement, 2 Lev. 13. S. C. 1 Ventr. 135.—Dobson *v.* Bell, 2 Lev. 176.—Com. Dig. Pleader, C. 8.—Southose *v.* Allen, Rep. T. H. 141.—Tidd's Prac. 3d edit. 291. 367.—Dobson *v.* Herne et al., 1 Bos. & Pul. 367.—8 T. R. 456. Tidd, 4th edit. 217.

(*b*) Symonds *v.* Parmenter et al., 1 Wils. 78.—Storks *v.* Herbert, 1 Wils. 242.

(26) Vide *Sabin* v. *Wood*, 10 *Johns. Rep.* 218.

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after such outlawry is complete(*c*); and where a sole defendant cannot be served or arrested on process returnable in one term, and an alias returnable in the next be issued, the declaration may be entitled of the last term(*d*). In these cases, however, the plaintiff cannot upon a declaration in chief give in evidence a cause of action, arising after the first term(*e*); but a declaration by the bye, not being founded on the original process, may be entitled of the second term, and the plaintiff therein may give in evidence a cause of action, arising after the first(*f*).

Special title when proper.

It has been the practice, when the cause of action would admit, to entitle the declaration (whether by bill or original) *generally* of the term in which the writ is returnable; but when the proceeding is by bill or latitat in K. B. it is advisable to entitle the declaration specially, of the day on which it is filed or deliverd, so as to admit of proof of a new cause of action, or of a promise or acknowledgment, after the issuing of the process, and after the first day of term, which would entitle the plaintiff to recover, even in bailable process, and which could not be proved, were it not for such special memorandum(*g*); *and such special title [*264] may also be advisable in declaring in the Common Pleas(*h*). Where the cause or right of action, whether by bill or original, accrues after the first day in full term, such special memorandum is indispensably necessary, for a general title relates to the first day in full term(*i*),[27] unless there be some proceeding of record to refer it to a subsequent day, as in a declaration of *scire facias*, which need not be entitled specially(*j*). Thus if a bill of exchange become due, or a bail bond be assigned, or letters of administration be granted to the plaintiff, after the first day of the term, a special title is necessary(*k*); and where a latitat was sued out against bail, returnable on the 20th of November, and the declaration was entitled against them on the 16th, and in the pleadings subsequent to the declaration, the proceedings appeared on the record, the declaration was held bad on demurrer, on the ground that it should have been entitled after the return day of the latitat(*l*). A special memorandum is also frequently advisable, in order to avoid the necessity of producing the writ(*m*); and when there has been a

(*c*) Coutanche *v.* Le Ruez, 1 East, 133.—Symonds *v.* Parmenter et al., 1 Wils. 78.

(*d*) Smith *v* Muller, 3 T. R. 627.

(*e*) Smith *v.* Muller, 3 T. R. 624.

(*f*) Smith *v.* Muller, 3 T. R. 627.

(*g*) Swancoff *v.* Westgarth, 4 East, 75.—Best *v.* Wilding, 7 T. R. 4.—Post. 2 Vol. 12. n. a.

(*h*) Davis *v.* Owen et al., 1 Bos. and Pul. 343.—Lee *v.* Clarke, 2 East, 335. Post. 2 Vol. 17. n. k.

(*i*) Pugh *v.* Robinson, 1 T. R. 116. 1 Saund. 40. n. 1.—Venables *v.* Daffe, Carth. 113.—Ward *v.* Gansell, 2 Bla. R. 735.

(*j*) Ward *v.* Gansell, 2 Bla. R. 735. S. C. 3 Wils. 154.—In Dobson *v.* Bell, 2 Lev. 176. the court searched for the bill.—See also Tatlow *v.* Batement, Id. 13.—Anon., 1 Vent. 264.—Pugh *v.* Robinson, 1 T. R. 117, 118.

(*k*) Supra, n. i.—Anderson *v.* Martindale, 1 East, 499.

(*l*) Shivers *v.* Brooks, 8 T. R. 629. n. b.

(*m*) 2 Saund. 1. c. d.—Hardyman *v.* Whitaker et al., 2 East, 574.

(27) Vide *Sabin* v. *Wood*, 10 *Johns. Rep.* 219. Ante, 259. n. 21.

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continued trespass or damage, the declaration should be entitled as late as possible(*n*). Where, however, the cause of action was stated to have accrued on the first *day of the term, it was held on special demurrer that the declaration might be entitled of the term generally, because formerly, when the pleadings were *ore tenus*, the plaintiff could not declare till the actual sitting of the court, and the cause of action might have accrued before such sitting(*o*).

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Consequences of mistake.

When on the face of the declaration entitled generally of the term, it appears that the cause of action accrued after the first day thereof, the defendant may demur(*p*), or may move in arrest of judgment, or bring a writ of error(*q*);[28] the court, however, will, even after error brought, give leave to amend on payment of costs(*r*); and indeed it has been holden, that if after verdict, it be made appear upon motion in arrest of judgment, that the bill was filed and declaration delivered *after* the cause of action accrued, the plaintiff is entitled to judgment without any amendment, for though the declaration being general, relates *prima facie* to the first day of the term, yet the bill being filed on a subsequent day all the subsequent proceedings relate thereto, by the course of the court of which, if error be brought, the court will *ex officio* take notice(*s*): so upon a motion in arrest of judgment, the general title was aided, by referring to the time of filing bail(*t*); and in another case it was held, that after verdict, the only course was to *allege diminution(*u*). Therefore, though it is more usual to file a new bill and amend by it(*v*), or to submit to the reversal of the judgment of the court, in which case no costs are payable, yet it may be questionable if in any case this objection can be taken with effect in arrest of judgment, or even by error, unless it appear upon an investigation of the proceedings, that in *fact* the bill was filed, or by original the suit commenced, or in an inferior court the plaint filed, anterior to the cause of action, in which case it will be ground of error(*w*). By

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(*n*) 2 Saund. 171. c.

(*o*) Pugh *v.* Robinson, 1 T. R. 116.

(*p*) Pugh *v.* Robinson, 1 T. R. 116.

(*q*) Dickinson v. Plaisted, 7 T. R. 474.

(*r*) Dickinson *v.* Plaisted, 7 T. R. 474.—Guy et ux. *v.* Kitchiner et al., 2 Stra. 1271.—Hay et ux. *v.* Kitchin et ux., 1 Wils. 171.—Tidd's Prac. 3d edit. 295.

(*s*) Dobson *v.* Bell, 2 Lev. 176.—Sawen *v.* Hulbert, 3 Salk. 9.—Pugh *v.* Robinson, 1 T. R. 118.—Anon., 1 Vent. 264.—Lidcot *v.* Backwel, 1 Sid. 373. Prodger's Case, 1 Sid. 432.—Bul. N. P. 137.—Tidd's Prac. 3d edit. 295.—Ante, 223, 4, 5.

(*t*) Tatlow *v.* Batement, 2 Lev. 13. Dobson *v.* Bell, 2 Lev. 176.—Anon., 1 Vent. 135.—Bul. N. P. 137, 8.—Venables *v.* Daffe, Carth. 114, 5.—Tidd's Prac. 3d edit. 295.

(*u*) Cook *v.* Darbison, Carth. 288, 9. Dobson *v.* Bell, 2 Lev. 176.

(*v*) Tidd, 295.

(*w*) Venables *v.* Daffe, Carth. 113. Bul. N. P. 137.—Webb *v.* Turner, Andr. 250.—Ward and Honeywood, 19 Vol. MS. 397.—Dickinson *v.* Plaisted, 7 T. R. 474.—Run. Ej. 210. 217.

(28) Ante, 259. n. 21.

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an express provision(*x*), these objections are aided in the court of Common Pleas at Lancaster. And in trespass, with a continuance after the term of which the declaration was entitled, the court refused to arrest the judgment(*y*). In the modern action of ejectment the declaration delivered to the party in possession, being in the nature of process, is entitled of the preceding term, though the demise be laid on a subsequent day, for if he appear, he accepts a declaration entitled of the subsequent term, and if he do not appear, he being no party to the suit against the casual ejector, cannot take any advantage of the seeming objection(*z*).

Where the proceedings are entered with a general memorandum, and the cause of action appears *in evidence* to have arisen after the first day of the term, the plaintiff will be nonsuited, unless he produce the writ, and thereby show, *that it was really sued out subsequent to the [*267] cause of action(*a*); and where in a similar case, the fact complained of was admitted by the defendant's plea of *son assault demesne*, the court held it to be well enough, for the plaintiff need not give any evidence on this plea, unless to aggravate damages, and the court will not nonsuit him, because it is amendable by a new bill(*b*). When the declaration is improperly entitled, the plaintiff may on payment of costs obtain an amendment, even after error brought(*c*). It may also be amended at the instance of the defendant, if necessary for his defence; thus where the declaration is entitled of the term generally, and the defendant pleads *plene administravit*(*d*), or a tender made before the exhibiting of the bill, upon which he would give in evidence an administration of assets, or tender made between the first day of term and the day of suing out the writ, he should either call upon the plaintiff to entitle his declaration properly(*e*), or plead *the fiction* of the court specially,[29] without calling upon the plaintiff to alter his declaration, or produce the writ on the trial(*f*).

Immediately after the title of the declaration follows the statement Secondly, the venue.

(*x*) 39 and 40 Geo. 3. c. 105.

(*y*) Webb *v.* Turner, Andr. 250.

(*z*) Post. 2 Vol. 441. n. b. Run. Eject. 208, 9.—217.

(*a*) 2 Saund. 1. n. 1.—Morris *v.* Pugh et al., Burr. 1241.—S. C. 1 Bla. R. 312. Bul. N. P. 137.—Tidd's Prac. 3d edit. 294.

(*b*) Guy et ux. *v.* Kitchiner et al., 2 Stra. 1271.—Hay et ux. *v.* Kitchiner et ux., 1 Wils. 171.

(*c*) Symonds *v.* Parmenter et al., 1 Wils. 78.—Dickinson *v.* Plaisted, 7 T. R. 474.—Coutanche *v.* Le Ruez, 1 East, 133.—Shivers *v.* Brooks, 8 T. R. 629. n. b.—Tidd's Prac. 3d edit. 295.—Ante, 265.

(*d*) Southose *v.* Allen, Rep. T. Hardw. 141.—Man *v.* Adams, 1 Sid. 432.—Tidd's Prac. 3d edit. 294.

(*e*) Rolfe *v.* Norden, 4 Esp. Rep. 72. 2 Saund. 1. n. 1.—Smith *v.* Key, 1 Stra. 638.—Wynne *v.* Wynne, 1 Wils. 39.—Thompson *v.* Marshall, 1 Wils. 304.—Foster *v.* Bonner, Cowp. 456.—Tidd's Prac. 3d edit. 294. 369.

(*f*) Morris *v.* Pugh et al., 3 Burr. 1241.—Tidd's Prac. 3d edit. 294.—Rolfe *v.* Norden, 4 Esp. Rep. 72.

(29) Vide *Dudlow* v. *Watchorn & Thibault*, 16 *East's Rep.* 39.

II. Its parts. Secondly, the venue.

in the margin of the *venue* or county in which the facts are alleged to have *occurred, and in which the cause is to be tried. The doctrine of venues is explained and elucidated by Lord Mansfield in the case of Fabrigas *v.* Mnstyn(*g*), and in the note in Co. Lit. 125. a. n. 1. "There "is a *substantial* and a *formal* distinction *as* to the *locality of trials*. The "*substantial* distinction with regard to matters arising *within the realm*, "is where the proceeding is *in rem*, and where the effect of the judg- "ment could not be had, if it were laid in a wrong place, as in the "case of ejectments, where possession is to be delivered by the sheriff "of the county, and as trials in England are in particular counties, "and the officers are county officers, the judgment could not have ef- "fect if the action were not laid in the proper county(*h*). So with "regard to matters that arise *out of the realm* there is also a substantial "distinction of locality, for there are some cases that arise out of the "realm, which ought not to be tried any where but in the country "where they arise; as if two persons fight in France, and both hap- "pening casually to be here, one should bring an action of assault "against the other, it might be a doubt whether such an action could "be maintained here; because, though it is not a criminal prosecution, "it must be laid to be against the peace of the king, but the breach "of the peace is merely local, *though the trespass against the person "is transitory(*i*). So if an action were brought, relative to an estate "in a foreign country, where the question was a matter of title only, "and not of damages, there might be a solid distinction of locality(*j*).

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"The *formal* distinction arises from the *mode* of trial; for trials in "England being by jury, and the kingdom being divided into counties, "and each county considered as a separate district or principality, it is "absolutely necessary that there should be some county, where the "action is brought in particular, that there may be a process to "the sheriff of that county to bring a jury from thence to try it(*k*). "This matter of form goes to all cases that arise abroad; but the law "makes a distinction between transitory and local actions. If the mat- "ter which is the cause of a transitory action, arise within the realm, "it may be laid in any county, the place not being material; as if an "imprisonment be in Middlesex, it may be laid in Surrey, and though "proved to be done in Middlesex, it does not at all prevent the plain- "tiff from recovering damages. The place of transitory actions is "never material, except where by particular acts of parliament it is "made so; as in the case of church-wardens and constables, and other

(*g*) Cowp. 176, 7.—And as to venues in general, see Com. Dig. Action, N. and title Pleader, C. 20.—Bac. Ab. Action, Local and Transitory, A.—Vin. Ab. Trial, H. a. 2, &c. and title Place. Calvin's Case, 7 Co. 3.

(*h*) The Mayor, &c. of London, *v.* Cole, 7 T. R. 587, 8.—Post. 283.

(*i*) *Sed quære* the *contra pacem* is not traversable, see Rafael *v.* Verelst, 2 Bla. Rep. 1058. Vin. Ab. *contra pacem*.

(*j*) Shelling *v.* Farmer, 1 Stra. 646. Doulson *v.* Matthews et al., 4 T. R. 503.—*Sed quære* if there be no court of judicature to resort to abroad.—Id. ibid.—The King *v.* Johnson, 6 East, 599.

(*k*) Co. Lit. 125. a b.

" cases which require the action to be brought in the proper county. II.
" The parties upon sufficient ground have an opportunity of applying Its parts. Secondly, the venue.
" to the court in time *to change the venue, but if they go to trial
" without it, that is no objection. So all actions of a transitory nature [*270]
" that arise abroad, may be laid as happening in an English county;
" but there are occasions which make it absolutely necessary to state
" in the declaration that the cause of action really happened abroad;
" as in the case of specialies, where the date must be set forth, if the
" declaration state a specialty to have been made at Westminster in
" Middlesex, and upon producing the deed, it bear date at Bengal,
" the action is gone, because it is such a variance between the deed
" and the declaration as makes it appear to be a different instrument;[30]
" but the law has in that case invented a fiction, and has said, the party
" shall first set out the description truly, and then give a venue only
" for form, and for the sake of trial by a videlicet in the county of
" Middlesex, or any other county." From these observations it appears, that the points as to venues may be considered practically with reference, 1st, to where, or in what county the venue is to be laid, 2dly, how, and in what parts of the declaration it is to be stated, and 3dly, the consequences of mistake, and when they are aided.

1st, The venue is either *local* or *transitory;* if local, it must be laid, and the cause be tried in the county in which the injury was really committed, or the defendant may demur when the objection appears on the record(*l*), or the plaintiff will be nonsuited on the trial(*m*); but if transitory, the venue may be laid, and the cause tried in any county(*n*), *subject to its being changed by the court in some cases, if not [*271]
laid in the county where the cause of action really arose. We will consider, when the venue is local or transitory at common law, and when it is local by statute.

When the cause of action could only have arisen in a particular When the venue is local.
place or county, it is *local*, and the venue must be laid therein. As in real actions, waste, *quare impedit* or ejectment, for the recovery of the seisin or possession of land, or other real property(*o*). So actions though merely for damages, occasioned by injuries to real property, are local; as trespass, or case for nuisances(*p*), or waste, &c. to houses, lands, water-courses, right of common, ways, or other real property, unless there were some contract between the parties on which to

(*l*) 1 Wils. 165.

(*m*) Bruckshaw *v.* Hopkins, Cowp. 410.—Bla. R. 1053.

(*n*) 1 Saund. 74. n.—Gilb. C. P. 84.

(*o*) Doulson *v.* Matthews, 4 T. R. 504.—The Mayor, &c. of Berwick *v.* Ewart, 2 Bla. Rep. 1070.—Com. Dig. Action N.—The Mayor, &c. of London *v.* Cole, 7 T. R. 587, 8.—Mostyn *v.* Fabrigas, Cowp. 176.—Calvin's Case, 7 Co. 2 B.—Bac. Ab. Actions, Local and Transitory, A.—Mirsey & Irwell Navigation Company, *v.* Douglas et al., 2 East, 498, 9.

(*p*) Warren *v.* Webb, 1 Taunton, 379.

(30) Vide *Alder* v. *Griner*, 13 *Johns. Rep.* 450.

II. ITS PARTS. Secondly, the venue.

ground the action(*q*);[31] and if the land, &c. be out of this kingdom, the plaintiff has no remedy in the English courts, if there be a court of justice to resort to where the land was situate(*r*); and when the parties consent with leave of the court to try a local action in another county, such consent should appear upon the record(*s*). Where, however, an injury has been committed in one county to land, &c. situate in another, or whenever the action is founded upon two or more material *facts which took place in different counties,[32] the venue may be laid in either(*t*).

[*272]

In an action of debt, or in *scire facias* on a recognizance of bail by bill, and in an action of debt on a judgment of a court of record, the venue must be laid in the county where the record is;[33] as in Middlesex, upon the judgment or recognizance of either of the superior courts at Westminster(*u*); and in *scire facias* on a recognizance of bail by *original* in K. B., the venue may be laid in Middlesex, though all the previous proceedings were in another county(*v*).[34] Upon a recognizance of bail in C. P. the venue may, in *scire facias*, be in the county where the bail piece was taken, or in Middlesex(*w*). But a *scire facias* on a judgment, being only a continuation of the former suit, and not an original proceeding, must be laid in the county where the venue was first laid,[35] the defendants being supposed to reside in that county(*x*). It has been supposed that when the action is at the suit of an administrator, who has obtained administration in a peculiar diocese, the venue should be laid within the same, though a mistake in the last

(*q*) Id. ibid.

(*r*) Doulson *v.* Matthews et al., 4 T. R. 503.—Shelling *v.* Farmer, 1 Stra. 646.—Mostyn *v.* Fabrigas, Cowp. 180. The King *v.* Johnson, 6 East, 598, 9.

(*s*) Co. Lit. 125. b. 126. a. n. 1.—Viscount Clare *v.* Lynch, Sir T. Raym. 372.—Edwards *v.* Crowe, 1 Rol. Rep. 28.—Com. Dig. Action, N. 11.—Mayor &c. of Bristol *v.* Procter, 1 Wils. 298. Tidd's Prac. 3d edit. 549.

(*t*) Pope *v.* Davis, 2 Taunt. 252. overruled S. C. 2 Campb. 266.—Calvin's Case, 7 Co. 1.—Archeboll *v.* Borrell, 3 Leon. 141.—Scott *v.* Brest, 2 T. R. 238.—The Mayor, &c. of London *v.* Cole et al., 7 T. R. 583.—Com. Dig. Action, N. 3. 11.

(*u*) Tidd, 1035.—Vin. Ab. Trial, H. a. 2. pl. 17.—Hall *v.* Winckfield, Hob. 196.

(*v*) Coxeter *v.* Burke et al., 5 East, 461.

(*w*) 5 East, 462. n. b.—Tidd, 1035.

(*x*) Tidd, 1035. n. v.

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(31) Replevin must be brought in the county in which the distress was taken. Ante, 161. In *Lewis* v. *Martin*, 1 *Day*, 263, it was held that an action of account, for the rents and profits of land, might be brought in a different county from that in which the lands lie.

(32) Vide *Bogert & Lewis* v. *Hildreth*, 1 *Caine's Rep.* 2. *Marshall* v. *Hosmer*, 3 *Mass. Rep.* 23.

(33) Acc. *Barnes* v. *Kenyon*, 2 *Johns. Cas.* 381.

(34) Debt on bail bond is transitory, though the action must in general be brought in the same court as the original suit. Post. vol. 2. 210. n. a. c.

(35) Acc. *M'Gill* v. *Perrigo & others*, 9 *Johns. Rep.* 239.

II. Its parts. Secondly, the venue.

case could only be taken advantage of by special demurrer(*y*); but this is not demurrable(*z*). Debt for the arrears of a rent-charge against the pernor of the profits not being the original grantor is local, the defendant being chargeable in respect of *his possession, and not on the contract(*v*). And it has been decided, that an action for breach of a custom or bye law of a town is local, but that debt on a charter is not(*w*). [*273]

When the venue is transitory.

In all actions for injuries *ex delicto* to the *person* or to *personal* property, the venue is in general transitory, and may be laid in any county, though committed out of the jurisdiction of our courts(*x*), or of the king's dominions(*yy*);[36] and this even in actions against a member of parliament, &c.(*zz*). Thus actions for assaults, batteries, and false imprisonment(*a*), and for words and libels(*b*), even for setting up a defamatory mark on the plaintiff's house(*c*), and for taking away or injuring personal property(*d*), and for escapes[37] and false returns(*e*), and upon bail bonds(*f*), are transitory.[38] In general also actions founded upon *contracts* are transitory, though made, and even stipulated to be performed out of the kingdom, for *debitum et contractus sunt nullius loci*(*g*). Thus account, assumpsit, and covenant between the original

(*y*) Mellor *v.* Barber, 3 T. R. 387.—Pyne *v.* Erle, 8 T. R. 407.

(*z*) Selw. N. P. 786.—1 Rol. Ab. 908. G. pl. 4.—Yeomans *v.* Bradshaw, Carth. 373

(*v*) Pine *v.* The Countess of Leicester, Hob. 37.—Vin. Ab. tit. Trial, H. a. 2 pl. 16.

(*w*) The Mayor, &c. of Berwick *v.* Swart, 2 Bla. Rep. 1068.

(*x*) Mostyn *v.* Fabrigas, Cowp. 161. Com. Dig tit. Action, N. 12.

(*yy*) Id. ibid.—Rafael *v.* Verelst, 2 Bla. Rep. 1058.—*Sed quære*, Mostyn *v.* Fabrigas, Cowp. 176.

(*zz*) Bloxam et al. *v.* Surtees et al., 4 East, 162, 3.

(*a*) Mostyn *v.* Fabrigas, Cowp. 161. Co. Lit. 282.

(*b*) Pinkney *v.* Collins, 1 T. R. 571.

(*c*) Jefferies *v.* Duncombe, 11 East, 227.—2 Campb. 3 S. C.

(*d*) Com. Dig. Action, N. 12.—Heathcoat's Case, Salk. 670.—Vin. Ab. Trial, H. a. 2. pl. 12.—Smith & another *v.* Milles, 1 T. R. 479.

(*e*) Griffith *v.* Walker, 1 Wils. 336. Heathcoat's Case, Salk. 670.—The King *v.* The Mayor, &c. of Newcastle, 1 East, 114.

(*f*) Gregson *v.* Heather, Fort. 366, S. C. Stra. 727.—S. C. Lord Raym. 1455.

(*g*) Com. Dig. Action, N. 12.—Peacock *v.* Bell & Kendal, 1 Saund. 74. 1 Saund. 241. b.—Mostyn *v.* Fabrigas, Cowp. 180.—Dutch West India Company *v.* Van Moses, 1 Stra. 612.

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(36) Acc. *Glen* v. *Hodges*, 9 *Johns. Rep.* 67. So, an action will lie, here, for a trespass committed on board of a foreign vessel, on the high seas, where both parties are foreigners; but it rests in the sound discretion of the court to exercise jurisdiction or not according to the circumstances of the case: and where an action was brought for an assault and battery committed on board of a British vessel, on the high seas, by a seaman against the master, both parties being British subjects, and intending to return to their own country at the completion of the voyage, the Court refused to take cognizance of the cause, but left the injured party to seek redress in the courts of his own country. *Gardner* v. *Thomas*, 14 *Johns. Rep.* 134

(37) Vide *Bogert & Lewis* v. *Hildreth*, 1 *Caine's Rep.* 1. 3, 4.

(38) So, case against sheriff, for refusing to assign a bail bond, is transitory.

II. Its parts. Secondly, the venue.

parties to the deed, and debt, and detinue, are in general transitory,[39] subject to the courts changing the venue in some cases(*h*). The necessity that in *a bailable action by original in the King's Bench, the [*274] venue do not vary from the original writ, must also be kept in view(*hh*). In those transitory actions also in which the court will change the venue on the defendant's application, and where the plaintiff might wish to bring it back again to the county where it was first laid, upon the usual undertaking to give material evidence in that county, it is necessary to lay the venue in the first instance in the county in which such material evidence can be given(*i*).

The venue in actions on leases.

In an action upon a *lease* for non-payment of rent or other breach of covenant, when the action is founded on the *privity of contract*, it is *transitory*, and the venue may be laid in any county; but when the action is founded on the *privity of estate*, it is *local*, and the venue must be laid in the county where the estate lies(*j*). These points may be considered as they arise; 1st, Between the *original parties* to the lease; 2dly, In the case of an alienation of the estate of the *lessor;* and 3dly, Where the estate of the *lessee* has been assigned.

1st, in an action of debt or covenant by the *lessor* against the *lessee*, or by the *lessee* against the *lessor*, the action being founded on the mere *privity of contract*, is *transitory*, and though the land lie abroad, the action may be brought in England(*k*); and debt in the detinet only, by [*275] the lessor against the executor of the lessee, is *transitory; but if the action against the executor be in the debet and detinet, he being charged as assignee, the venue is local(*l*).

2dly, An action of *covenant* by the *assignee of the reversion* against the lessee, or by the lessee against the assignee of the reversion, upon an express covenant contained in the lease, and running with the estate

(*h*) Gilb. C. P. 84.—1 Saund. 74. n. 2.—When the court will change the venue, see Tidd's Prac. 3d ed. 543 to 556. ch. xxvi. unless the assignment took place in another county.—The Mayor, &c. of London *v.* Cole & others, 7 Term Rep. 583.

(*hh*) Ante, 246. 249.

(*i*) Price et al. *v.* Woodburne, 6 East, 433, 4.

(*j*) As to the four different descriptions of privities, and in general how far they affect the venue, see the argument in Webb *v.* Russell, 3 T. R. 394. Walker's Case, 3 Co. 23.—and Thursby et al. *v.* Plant, 1 Saund. 237 to 242, and the notes 5 & 6.

(*k*) 1 Saund. 241. b. n. 6.—Calvin's Case, 7 Co. 2. a.—Patterson *v.* Scott, 2 Stra. 776.—Way *v.* Yally, 2 Salk. 651. S. C. 6 Mod. 194.—Stevenson *v.* Lambard, 2 East, 579.—Bac. Ab. tit. Actions Local & Transitory, A.—Beely *v.* Parry, 3 Lev. 154.

(*l*) Gilb. C. P. 91.—Gilb. Debt, 403. Cormel v. Lisset, 2 Lev. 80.—Vin. Ab. tit. Trial, H. a. 2. pl. 22.

Foster v. *Baldwin*, 2 *Mass. Rep.* 569. So, for neglecting to attach goods under writ of attachment. *Marshall* v. *Hosmer*, 3 *Mass. Rep.* 23.

(39) So, assumpsit or debt for use and occupation are transitory. *Corporation of New York* v. *Dawson*, 2 *Johns. Cas.* 335. *Low* v. *Hallett*, 2 *Caine's Rep.* 374. *Egler* v. *Marsden*, 5 *Taunt.* 25. *King* v. *Fraser*, 6 *East's Rep.* 352, 353.

in the land, is transitory by the operation of 32 Hen. 8. c. 33.(*m*),[40] which transfers the privity of contract with respect to such covenants, to and against the assignee of the lessor, in the same plight as the lessor had them against the lessee, or the lessee against the lessor(*n*). But in *debt* by the assignee(*o*) or devisee(*p*) of the lessor against the lessee, which is sustainable at common law, and is founded on the privity of estate, the action is local.[41]

3dly, If an action of debt or covenant be brought by the lessor(*q*), or his personal representatives(*r*), or by the grantee of the reversion(*s*) against the assignee of the lessee,[42] or in an action of debt against the executor of the lessee in the debet and detinet(*t*), the venue is local, and *must be laid in the county where the land lies(*u*); and if the land [*276] be out of England, no action can be supported in this country(*v*). The action at the suit of the lessor against the assignee of the lessee was given by the common law, and was local in respect of the *privity* of *estate*, the privity of contract being destroyed by the assignment; and the assignee of the reversion must also sue the assignee of the term in the county where the land lies, because the statute 32 Hen. 8. transfers the privity of contract to the assignee in the *same manner* as the lessor had it(*w*). For the same reason, covenant *by* the assignee of the *lessee* against the lessor, or the grantee of the reversion, is local, for it lies at the common law, in respect of the privity of estate, which is always local(*x*).

(*m*) Thursby et al. *v.* Plant, 1 Saund. 237. 241. b. n. 6.—Barker *v.* Dormer. Carth. 183.—Thrale *v.* Cornwall, 1 Wils. 165.—Webb *v.* Russell, 3 T. R. 394.—Barker *v.* Dormer, 1 Show. 199. Vin. Ab. Trial, H. a. pl. 20.—Privies in blood, as the heir of lessor, might sue in covenant at common law, Webb *v.* Russel, 3 T. R. 395.

(*n*) Id. ibid.—Thursby et al. *v.* Plant, 1 Saund. 237. 241. b. n. 6.—Webb *v.* Russel, 3 T. R. 401, 2.

(*o*) Thursby et al. *v.* Plant, 1 Saund. 238. 241. c. n. 6.—Bord *v.* Cudmore, Cro. Car. 183.—Thrale *v.* Cornwall, 1 Wils. 165.—Vin. Ab. Trial, H. a. 2. pl. 20.

(*p*) Sir W. Jones, 53.—Vin. Ab. Trial, H. a. 2.—Latch. 271.

(*q*) Stevenson *v.* Lambard, 2 East, 579, 580.—Barker *v.* Dormer, Carth. 182.—S. C. 1 Show. 190. 199.—Wey *v.* Yally, 6 Mod. 194.—The Mayor, &c. of London *v.* Cole et al., 7 T. R. 583.—

(*r*) Smith *v.* Wayt, Latch. 197.

(*s*) 1 Saund. 241 c. n. 6.—The Mayor, &c. of London *v* Cole et al., 7 T. R. 583.—Stevenson *v.* Lambard, 2 East, 580.—Barker *v* Dormer, 1 Show. 190, 199.—S. C. Carth. 182.—S. C. 3 Mod. 336.—S. C. 1 Salk. 80.

(*t*) Supra note, 1.—Thredneedle *v.* Lineham, 3 Keb. 375.

(*u*) Stevenson *v.* Lambard, 2 East, 580.

(*v*) Barker *v.* Dormer, 1 Show. 190. 199.—Bac. Ab. Actions Local & Transitory, A. and see Doulson *v.* Matthews, 4 T. R. 503.—Ante, 269. n. j.

(*w*) 1 Saund. 241. c.—Barker *v.* Dormer, 1 Show. 199.

(*x*) Spencer's Case, 5 Co. 17. a.—F. N. B. 146.—1 Saund. 241. c. n. 6.

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(40) Vide the corresponding statute, *sess.* 36 *c.* 31. *s.* 12. *Laws N. Y.* 1 *R. L.* 363. and by *s.* 3. the provisions of the act are extended to grants in fee reserving rent.

(41) Vide *Corporation of New York* v. *Dawson*, 2 *Johns. Cas.* 335.

(42) Vide *Corporation of New York* v. *Dawson*, 2 *Johns. Cas.* 335.

II. ITS PARTS. Secondly, the venue. Venue when local by statute.

The statute 21 Jac. 1. c. 4. s. 2.(*y*) enacts, that in "all informations, "declarations, &c. for any offence against any *penal statute*, whether "on the behalf of the king or any other person, the offence shall be "laid, and alleged to have been committed, in the county where such "offence was in truth committed and not elsewhere, or the defendant, "upon the general issue, shall be found not guilty;"[43] and in a penal action for the omission of a local duty, prescribed by a statute, the venue is local(*z*). Lord Holt's opinion appears to have been, that this statute [*277] extended to *subsequent* statutes(*a*), but from *several decisions(*b*), and from the circumstance of the legislature having introduced an express similar clause in subsequent penal acts, passed even in the same session as the above statute, this opinion appears to be erroneous(*c*).[44] It therefore follows, that in penal actions, founded on statutes passed *since* the 21st James I. c. 4. the venue is transitory, as at common law, unless otherwise directed by the particular act, as in the case of usury, &c.[45] Upon the common law principle, where there are two material facts to constitute the offence against a penal statute, and one happened in one county, and the other in another county, the venue may be laid in either(*d*); as where an usurious contract has been made in London, and the usurious interest taken in Middlesex, or *vice versa*(*e*); and this statute does not affect a remedy given to the party grieved.

Some actions against particular persons, which would otherwise be transitory, must, by different statutes, be laid in the county where the facts were committed, or the plaintiff will be nonsuited; as actions upon the *case* or *trespass* against *justices of the peace*, mayors, or bailiffs of cities or towns corporate, headboroughs, port-reves, *constables*,

(*y*) And see 31 Eliz. c. 5.

(*z*) Butterfield *v.* Windle et al., 4 East, 393.

(*a*) Rex *v.* Gall, Lord Raym. 373.—Parker's Rep. 186.—Selwyn's Ni. Pri. 664. n. 130.—Bul. Ni. Pri. 106.—Tidd's Practice, 3 ed. 374.

(*b*) Parker's Rep. 186.—French *v.* Cockran, Andr. 25.—S. C. 2 Stra. 1081. Rex *v.* Gaul, 1 Salk. 372, 3.—S. C. Carth. 465.—S. C. Lord Raym. 370.—Anon., 5 Mod. 425.—Com. Dig. tit. Action, N. 10.—Bac. Ab. tit. Action, *qui tam*, C.—1 Saund. 312. c. in the notes; and see the construction on the 3d Jac. 1. c. 8.—Trier *v.* Bridgman, 2 East, 359.—2 Campb. 266, 7. in notes.—3 Anstr. 871.—And Selwyn's Ni. Pri. 664. n. 130.

(*c*) See 21 Jac. 1. c. 17.—12 Ann, stat. 2. c. 16.—French *v.* Cockran, Andr. 25.—12 Mod. 223.—Anstr. 871.

(*d*) See cases next note, and Pope *v.* Davis, 2 Taunton, 252.

(*e*) Scott *v.* Brest, 2 T. R. 238.—Calvin's Case, 7 Co. 1.—Mayor, &c. of London *v.* Cole et al., 7 T. R. 583.—Scurry *v.* Freeman, 2 Bos. & Pul. 381, Ante, 271, 2.

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(43) And the statute of the state of New York, *sess.* 11. *c.* 9. *s.* 2. 1 *R. L.* 99. is to the same effect.

(44) The statute of the state of New York, cited above, speaks of actions to be commenced on any penal statute, made *or to be made*, and consequently is prospective.

(45) The New York statute above referred to, expressly excepts actions concerning usury, maintenance, extortion, &c.

tithing-men, church-wardens, &c. or *other* persons acting in their aid and assistance, or by their command, for any thing done in their official *capacity(*e*):[46] and actions against any person for any thing done by him as an officer of the *Excise*(*f*), or *Customs*(*g*), or against any other person acting in his aid, in execution or by reason of his office. And by the statute 42 Geo. 3. c. 85. s. 6. the provisions of the statute 21 Jac. 1. c. 12, with regard to the venue, &c. are extended to all persons having, holding, or exercising, or being employed in *any public employment*, or any office, station, or capacity, either civil or military, either in or out of the kingdom; and who under and by virtue, and in pursuance of any act, or acts of parliament, &c. have by virtue of any such employment, &c. power or authority to commit persons to safe custody: And all such persons having such power and authority as aforesaid, shall have and be entitled to all the privileges, benefits, and advantages, given by the provisions of the said act, as fully and effectually to all intents and purposes, as if they had been specially named therein. Provided always, that when any action, bill, plaint or suit, upon the case, trespass, battery, or false imprisonment, shall be brought against any such person as is in this act described as aforesaid, in this kingdom, for or upon any act, matter or thing done out of the kingdom, it shall be lawful for the plaintiff bringing the same, to lay such act, matter or thing to have been done in Westminster, or in any county where the person against whom any such action, bill, plaint, or suit shall be brought, shall then reside. But the venue in an action against a constable, &c. for an act not done in the execution of his office, may be laid in any county(*h*).

[*278]

*So actions against persons acting under the acts relating to *Highways*(*i*), or *Turnpikes*(*j*), or the *Militia*(*k*), and various other acts are local by express provision. And so by the Welch judicature act, if a transitory cause of action arising in Wales, be brought in any court out of Wales, and the venue be laid out of the principality, and the plaintiff do not recover 10*l*. a judgment of nonsuit may be entered against him(*l*).

[*279]

The venue is thus stated in the *margin* of the declaration, "Middlesex, to wit(*m*)." Such venue in the margin will aid but not preju-

Mode of stating the venue.

(*e*) 21 Jac. 1. c. 12. s. 5.

(*f*) 23 Geo. 3. c. 70. s. 34.

(*g*) 24 Geo. 3. sess. 2. c. 47. s. 35. and see 28 Geo. 3. c. 37. s. 23.

(*h*) Anon., 1 Stra. 446.—Money et al. *v.* Leach, 3 Burr. 1742.—Alcok *v.* Andrews, 2 Esp. Rep. 542.—Postlethwaite *v.* Gibson et al., 3 Esp. Rep. 226. Daniel *v.* Wilson, 5 T. R. 1, 2.—Evans *v.* Atkins, 4 T. R. 555.

(*i*) 13 Geo. 3. c. 78. s. 81.

(*j*) 13 Geo. 3. c. 84. s. 85.

(*k*) 42 G. 3. c. 90. s. 178.

(*l*) 13 Geo. 3. c. 51.—Davis *v.* Jones, 1 New Rep. 267.

(*m*) Lord Hardwicke was of opinion that the word *ff*, in the margin of the declaration, was not originally meant to signify the county, but was only a denotation of each section or paragraph in the Record.—Jodderel *v.* Cowell, Cas. T. Hardw. 344.—In indictments, the words "to wit" are frequently omitted.

(46) Et vide *Laws N. Y. sess.* 24. *c.* 47. *s.* 1. 1 *R. L.* 155.

II. ITS PART. Secondly, the venue.

dice, and in *civil* cases, if the name of a *place only*, and no county, or a wrong county be stated in the body of the declaration, it will suffice, because the place is always construed to refer to the county in the margin,[47] though another county has been mentioned; and on the other hand, where the proper venue is laid in the body of the declaration, the county in the margin will not vitiate it(*n*). But in *criminal* cases the rule is more strict, and though the county in the margin, when *expressly* referred to, is sufficient, yet it must either be named in the body, or so *expressly* referred to in all cases(*o*).

[*280] In stating in the body of the declaration the venue or place where the facts have occurred, it is *usual to name a parish, town, or hamlet, or other known place, (not being a *hundred*) as well as the county(*nn*). In London it was formerly necessary and is still the practice to state some parish and ward, though in other places a city or town without naming any particular parish, was always holden sufficient(*oo*). In *criminal* cases it is still necessary to name some parish or town, &c. as well as the county, and the statement in an indictment that a party committed perjury at Guildhall in London is insufficient(*p*). But in *civil* actions in the superior courts, as the jury is no longer *de vicineto*, the statement of a county alone may be sufficient(*q*), unless where a local description is necessary, as in replevin, &c.(*r*). And this even on *penal* statutes(*s*), unless part of the penalty be given to the poor of the parish in which the offence was committed, when the name of the parish is material(*t*); and where a parish is named, so much strictness does not prevail as formerly. Thus in trespass *quare clausum fregit*, where the *locus in quo* was stated to be in the parish of A. it is sufficient to prove it to be a reputed parish, though strictly it be only a hamlet(*u*).

(*n*) Warren *v.* Webb, 1 Taunt. 379. 1 Saund. 308. n. 1.—Sutton *v.* Fenn, 3 Wils. 339.—S. C. 2 Bla. Rep. 847.—Jodderel *v* Cowell, Rep. T. Hardw. 343.—Barnes, 483.—Com. Dig. Pleader, C. 20.—Meller *v.* Barber, 3 T. R. 387.

(*o*) 1 Saund. 308. n. 1.—2 Nolan's Poor Law, 144.—The King *v.* The Inhabitants of Moor Critchel, 2 East, 66.

(*nn*) Co. Lit. 125. a. n. 2.

(*oo*) Clison *v.* Proctor, Cro. Jac. 307. Leach, C. L. 930.—4 Hawk. 46. s. 83.

(*p*) Leach, C. L. 928.—Co. Lit. 125. b. n. 2.

(*q*) Co. Lit. 125. b. n. 2.—Vin. Ab. Trial, H. a. 6.—Mersey & Irwell Navigation Company *v.* Douglas et al., 2 East, 501.—Forth *v.* Harrison, Cro. Eliz. 732.—1 Saund. 8. a.—Ilderton *v.* Ilderton, 2 Hen. Bla. 161.—Remington *v.* Taylor, Lutw. 237.

(*r*) Mersey & Irwell Navigation Company *v.* Douglas et al., 2 East, 501.—1 Saund. 347. n. 1.

(*s*) Co. Lit. 125. b.—24 Geo. 2. c. 18. Clark *v.* Taylor, 3 Esp. Rep. 219.—2 Saund. 376. n. 9.—Willes, 599. n. a.

(*t*) Clark *v.* Taylor, 3 Esp. Rep. 219.

(*u*) Jefferies *v.* Duncombe, 2 Campb. 5. and see Doe d. Tollet *v.* Salter, 13 East, 9.—Goodtitle d. Pinsent *v.* Lammiman, 2 Campb. 274.—Kirtland *v.* Pounsett, 1 Taunton, 570.

(47) Vide *Slate* v. *Post*, 9 *Johns. Rep.* 81. *Turberville* v. *Long*, 3 *Hen. and Mun.* 312.

II. ITS PARTS. Secondly, the venue.

In *Inferior* courts, unless in the courts of the counties palatine and a few other courts, it is necessary, in addition to the statement of the county as a venue, to aver that every material fact took place within the *jurisdiction of the court: as in assumpsit, as well that the promise or contract was made, and that the goods were sold, or the money had and received, &c. *within the jurisdiction* of the court,[48] and if the allegation be omitted, the declaration will be insufficient, even after verdict(*u*); but as to such matters as are stated only in aggravation of damages, and might be omitted, it is not necessary to allege that the same arose within the jurisdiction(*v*). [*281]

When a transitory matter has occurred *abroad*, it may in general be stated to have taken place in any English county, without noticing the place where it really happened; but if the real place abroad be stated, (which it is said is necessary when a deed or bill of exchange or other instrument bears date there,) it should be shown under a *scilicet*, that it happened in an English county, as for instance, "in Minorca, to wit, "at Westminster, in the county of Middlesex"(*w*).[49] And this is advisable even in cases of bills of exchange drawn in this country, and dated at a particular place(*x*). In stating a matter of record, no venue seems necessary, as the record must be presumed to be where the court is(*y*); but in pleading an Irish judgment, it may be otherwise(*z*).

In general the venue should be laid *distinctly to every material* traversable fact(*a*), and formerly the omission was considered fatal on the trial, though *issue were taken upon another point(*a*). But even in a local action, as in case for an injury to a water-course, no precise local [*282]

(*u*) 1 Saund. 74. n. 1.—Trevor *v.* Wall, 1 T. R. 151.—Bentley *v.* Donnelly, 8 T. R. 127.—Bourn *v.* Carrington, Cro. Jac. 502.—Horton et al. *v.* Beekman et al., 6 T. R. 764.

(*v*) 1 Saund. 74. n. 1.—Bac. Ab. Pleas, E 1.

(*w*) Mostyn *v.* Fabrigas, Cowp. 170. 177, 8.—Ante, 270.—Neale et al *v.* De Garay, 7 T. R. 243.—1 Saund. 74. n. 2.—The King *v.* Holland, 5 T. R. 616.

(*x*) Chitty on Bills of Exchange, 2d edit. 322. n. c.

(*y*) Glyn *v.* Smith, 1 Vent. 46.

(*z*) Collins *v.* Matthew, 5 East, 473.

(*a*) Com. Dig. tit. Pleader, C. 20.—The King *v.* Holland, 5 T. R. 620.—Ante, 258.—2 Hal. P. C. 179. and this still seems necessary to avoid a special demurrer,—Bowdell *v.* Parsons, 10 East, 364, 5, 6.—The King *v.* Hazell, 13 East, 142. but see the observations of Mr Justice Le Blanc on Ilderton *v.* Ilderton.—Bowdell *v.* Parsons, 10 East, 365, 6.

(*a*) Barnes *v* Smith, 2 Leon. 22.

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(48) Vide *Murray* v. *Fitzpatrick*, 3 *Caine's Rep.* 41. *Wetmore & Cheesebrough* v. *Baker & Swan*, 9 *Johns. Rep.* 307. *Evans* v. *Munkley & another*, 4 *Taunt.* 48. *Shepherd* v. *Boyce*, 2 *Johns. Rep.* 447. *Briggs* v. *Nantucket Bank*, 5 *Mass. Rep.* 95. *Turberville* v. *Long*, 3 *Hen. & Mun.* 309. *Shipherd* v. *Boyce*, 2 *Johns. Rep.* 447.

(49) But in a late case, Lord Ellenborough held, that it was unnecessary to state the place where a foreign bill of exchange was drawn, and that if dated at *Paris*, it might be alleged in the declaration to have been made in *London*, and there would be no variance. *Howriet & another* v. *Morris*, 3 *Campb.* 304.

II. Its parts. Secondly, the venue.

description of the nuisance complained of is necessary, and provided the county be properly stated, it is sufficient, except in replevin(*b*). And where there are several facts, yet if the sentences in which they are stated, are coupled with the conjunction "*and*," the first venue will apply to all the facts(*c*). So the *performance* of a contract will be inferred to have been at the place where it was entered into(*d*), though it is usual to repeat the venue to each averment(*e*). No venue, however, needs be laid to matter of inducement, when *not traversable*, and which consequently cannot be *tried*(*f*), nor is a venue necessary in general to a negative allegation(*g*).

Where a parish is merely stated as *a venue*, the cause of action, though proved to have arisen in a different place, will sustain the declaration(*h*); as in debt on the game laws, or in an action of hue and cry against the hundred(*i*); but when part of a penalty is given to the poor of the parish, the name of the parish is matter of substance, and the offence must necessarily be laid and proved to have taken place therein(*k*). So in an action, though not local, if the situation of land, [*283] or other real property, be described, though *unnecessarily, to be situate in a particular parish or place, the plaintiff will fail on the trial if there be a material mistake(*j*).[50] But if a fact be stated to have occurred "at or near" a particular place, the mistake may not be so material(*kk*). And when it is doubtful whether the place where a navigation, &c. is alleged to lie, is stated in the declaration as a venue, or as

(*b*) Mersey and Irwell Navigation Company *v.* Douglas, 2 East, 503.—Post. 2 vol. 411. n. e.—Sed quære, see Co. Lit. 125. b.

(*c*) 1 Saund. 229. n. 2.—Taylor *v.* Welsted, Cro. Jac. 443.—De Symonds *v.* Shedden, 2 Bos. & Pul. 156, 7.—Com. Dig. tit. Pleader, C. 20.—Preston *v.* Mercer, Hard. 61.—Remington *v.* Tayler, Lutw. 237.—Ante, 259.—2 Hal. P. C. 179.

(*d*) Shandois *v.* Simpson, Cro. Eliz. 380.—Com. Dig. tit. Pleader, C. 20.

(*e*) Com. Dig. tit. Pleader, C. 20.

(*f*) Wrotesly *v.* Adams, Plowd. 191. Com. Dig. tit. Pleader, C. 20.

(*g*) Ante, 259. n. i.—The King *v.* Holland, 5 T. R. 616.

(*h*) Mersey & Irwell Navigation Company *v.* Douglas et al., 2 East, 503.

(*i*) Id. ibid.—Clark *v.* Taylor, 3 Esp. Rep. 219.—2 Saund. 376. n. 9.

(*k*) Id. ibid.—Peake's L. E. 199.

(*j*) Wilson *v.* Clark, 1 Esp. Rep. 273. Wilson *v.* Gilbert, 2 Bos. & Pul. 281. Goodwin *v.* Blackman, 3 Lev. 334.—Regina *v.* The Inhabitants of Barking, Salk. 452.—Bac. Ab. Trespass, K.—Boddy *v.* Smith, Stra. 595.—King *v.* Fraser, 6 East, 352.—Jefferies *v* Duncombe, 11 East, 226.—So if in ejectment the premises be entirely described as situate in the *united* parishes, &c. Goodtitle d. Pinsent *v.* Lammiman, 2 Campb. 274. What is not a material misnomer of the parish, &c see Doe d. Tollet *v.* Salter, 13 East, 9.—Kirtland *v.* Pounsett, 1 Taunton, 570.—2 Camp. 5. in notes, & Post. 2 Vol. 38. note (*m*).

(*kk*) Peake's L. Evid. 139.—Drewry *v.* Twiss & another, 4 T. R. 558. 561.—Burbige *v.* Jakes, 1 Bos. & Pul. 225.

(50) Acc. *Guest* v. *Caumont*, 3 *Campb.* 235. And see further upon this subject, *Phillips' Ev.* 165, 166. *Fowles* v. *Miller*, 3 *Taunt.* 140. *Williams* v. *Burgess*, 3 *Taunt.* 127.

a local description, it will be referred merely to the venue, and need not be proved to be at such place(*l*). The mode of describing the place or venue in trespass, replevin, and other particular actions, is stated in the notes to the several precedents in such actions(*m*).

Consequences of mistake of venue, & when aided.

At common law, if it appeared *upon the record* that the contract or cause of action arose in a county different from that in which the venue was laid, it was error(*n*). But by 16 and 17 Car. 2. c. 8. "after verdict, judgment shall not be stayed or reversed, for that there is no right venue, so as the cause were tried by a jury of the proper county, or place where the action is laid;"[51] and this statute extends not only to those cases where there is a wrong venue in the proper county, but also to those where the cause has been improperly tried in a wrong county, and whether the objection appear on the record or not(*o*). And the stat. 4 Ann. c. 16. s. 2. *extends this provision to a judgment by confession *nil dicit*, or *non sum informatus*(*p*).[52] And the same provision is extended to penal actions by the 4 Geo. 2. c. 26(*q*). But as *inferior* courts not of record, are not included in these acts, a declaration in the county court, omitting the necessary allegation as to the subject matter of the action having arisen within the jurisdiction, will still be insufficient, even after verdict(*r*). Hence it follows, that even in local and penal actions in the *superior* courts, the only modes of objecting to the venue are by demurrer(*s*), or at the trial as a ground of nonsuit(*t*) except in the action of ejectment, in which also a difficulty would arise with respect to the execution, because the sheriff of one county cannot deliver the possession of land in another(*u*). In *local* actions, if the venue be laid in the wrong county, and the objection appear upon the record, it is clear that the defendant may *demur*(*v*); and if it do not appear on record, may, under the general

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(*l*) Mersey and Irwell Navigation Company *v.* Douglas, 2 East, 497.—Jefferies *v.* Duncombe, 11 East, 226. 229.—S. C. 2 Campb. 3. 5.

(*m*) Post. 2 Vol. 411. 415. 442. 38.—1 Saund. 347. n. 1.

(*n*) Com. Dig. tit. Action, N. 6.—1 Saund. 74. n. 2.

(*o*) 1 Saund. 247. n. 3.—The Mayor, &c. of London *v.* Cole et al., 7 T. R. 583.—Stevenson *v.* Lambard, 2 East, 580.—2 Saund. 5 e. in notes.

(*p*) Howes *v.* Haslewood, 2 Com. Rep. 555.—Barnes, 483.—Kenington *v.* Tayler, Lutw. 237.

(*q*) Myddelton *v.* Wynne, Willes, 599. 601.—Tidd's Prac. 3d edit 839, 840.—But see Butterfield *v.* Windle et al., 4 East, 387, 8. where the *verdict* was set aside, though no objection taken at Nisi Prius, ante, 280. n. s. t.

(*r*) Ante, 280.—Trevor *v.* Wall, 1 T. R. 151.—1 Saund. 74. n. 1.

(*s*) Thrale *v.* Cornwall, 1 Wils. 165.

(*t*) The Mayor, &c. of London, *v.* Cole et al., 7 T. R. 588.—Stevenson *v.* Lambard, 2 East, 580.—Bruckshaw *v.* Hopkins, Cowp. 410.—Santler *v.* Heard, 2 Bla. Rep. 1033.

(*u*) The Mayor, &c. of London *v.* Cole et al., 7 T. R 587, 8.—Mostyn *v.* Fabrigas, Cowp. 170 —Ante, 261.

(*v*) 1 Saund. 241. c.—Barker *v.* Dormer, Carth. 182.—The Mayor, &c. of London *v.* Cole et al., 7 T. R. 588.—The Mayor, &c. of Berwick *v.* Ewart,

(51) Vide *Laws N. Y. sess.* 11. *c.* 32. *s.* 6. p. 120. *s.* 8. p. 121. *s.* 11. p. 122.

(52) Vide *Bowdell* v. *Parsons*, 10 *East's Rep.* 359.

II. ITS PARTS. Secondly, the venue.

issue, avail himself of the objection at the trial as the *ground of nonsuit*(*w*); as in trespass or ejectment, on the plea of not guilty(*x*), or in replevin, on the plea of *non cepit*(*y*). And even in transitory actions [*285] an unnecessary precise description of local situation may, *if erroneous, be fatal on the trial(*z*); though where the description is rather by way of venue it will be otherwise(*a*). And if *a local description, or venue, when necessary, be omitted*, it is not matter of nonsuit, but of demurrer,[53] or arrest of judgment(*b*); and by pleading over to the merits any formal defect in the venue is aided(*c*); and in *transitory* actions the omission of a venue is aided at common law by a judgment *by default*, because the defendant thereby admits that there is nothing to try(*d*), and any objection to the mode in which the venue is stated must be taken by demurrer(*e*).[54]

Thirdly, the commencement.

What is termed the *commencement* of the declaration follows the venue in the margin, and precedes the more *circumstantial statement* of the *cause* of *action*. It contains a statement, 1*st*, Of the names of the parties to the suit, and if they sue or be sued in another right, or in a political capacity, (as executors, assignees, or *qui tam*, &c.) of the character or right in respect of which they are parties to the suit. 2*dly*, Of the *mode* in which the defendant has been *brought into court*, and 3*dly*, A brief recital of the *form of action* to be proceeded in; the latter is, however, superfluous in proceedings by bill(*f*). It is obvious that, independently of express regulation or precedent, some introduction to the substantial statement of the cause of action would be necessary, and the commencement adopted in practice is useful, as pointing out that the defendant is duly in court to answer the complaint, and concisely [*286] intimating the character *in which the parties sue or are sued, and the nature of the action, by which the parties interested in the pleadings

2 Bla. R. 1070.—Mellor *v.* Barber, 3 T. R. 387.—Thrale *v.* Cornwall, 1 Wils. 165.

(*w*) Supra, n. t.—Anon. 1 Sid. 287.

(*x*) Id. ibid.—Boddy *v.* Smith, Stra. 595.

(*y*) 1 Saund. 347. n. 1.—Post. 2 Vol. 411. n. e. *accord.*—2 Gilb. Rep. 166.—Walton *v.* Kersop et al., 2 Wils. 355. *semb. contra.*

(*z*) Ante, 283. n. j.

(*a*) Ante, 283. n. l.

(*b*) Mersey & Irwell Navigation Company *v.* Douglas et al., 2 East, 499.—Walton *v.* Kerson et al., 2 Wils. 354.—Post. 2 Vol. 411.

(*c*) Purslow *v.* Baily, 2 Lord Raym. 1039.—Bold *v.* Molineux, Dyer, 15. a.—Com. Dig. Pleader, 85.—Mellor *v.* Barber, 3 T. R. 387.—Post. 2 Vol. 411.

(*d*) Remington *v.* Tayler, Lutw. 237. Shandois *v.* Simpson, Cro. Eliz. 880.

(*e*) Mellor *v.* Barber, 3 T. R. 387.

(*f*) Lord *v.* Houstoun, 11 East, 65.

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(53) Vide *Briggs* v. *Nantucket Bank*, 5 *Mass. Rep.* 94.

(54) Vide *Briggs* v. *Nantucket Bank*, 5 *Mass. Rep.* 94. *Gilbert & another* v. *Nantucket Bank*, *Id.* 97. Where, in a declaration on an instrument in writing, no venue is stated in the body of the declaration, but only in the margin, and no place is alleged at which the instrument was executed, it is no variance if the instrument produced in evidence bear date at a different place from that in which the venue is laid. *Alder* v. *Griner*, 13 *Johns. Rep.* 449.

are enabled more readily to direct their attention to the subsequent parts of the declaration(*d*).

When the *defendant* has been arrested or served with process by a *wrong name*, the plaintiff may, after the defendant has appeared in his right name, declare accordingly(*e*). In such case in the King's Bench it is usual to state the fact thus, "—to wit, A B complains of C D, "*arrested* (or, if not bailable, "*served* with process,") by the name "of E F, being in the custody, &c." And in the court of C. P. the declaration runs, "C D *arrested* by the name of E F, was attached to "answer A B of a plea," &c. and in each court in all subsequent parts of the declaration, the real name only is to be inserted. The words *arrested* or *served with process* appear to be preferable to the word *sued*(*f*). If the *plaintiff's* name be mistaken in the process, the mistake may be aided in like manner(*g*). It is not necessary in any case to state in the declaration the addition of the defendant, either of place or degree, for the statute of additions does not extend to declarations(*h*).

In the *King's Bench* in actions by *bill*, against a person not privileged, whether he be in the *actual* or *supposed* custody of the marshal, the declaration, (except in Middlesex when the *allegation, as to the supposed custody, is unnecessary(*i*), begins by stating "—to wit, A B "complains of C D being in the custody of the marshal of the marshal-"sea of our lord the King, before the King himself, of a plea of tres-"pass on the case, &c.(*j*) *(or as the form of action may be.)* For that "whereas," &c.(*k*); and a bill against an actual prisoner in the custody of the marshal, filed in vacation as of the preceding term, contains a special memorandum(*l*). It was enacted by the 4 and 5 William and Mary, c. 21. s. 3. that "in all declarations against a *prisoner* detained "in prison by virtue of any writ or process to be issued out of the *Court* "*of King's Bench*, it shall be alleged *in custody of what sheriff*, bailiff, "or steward of any franchise, such prisoner shall be at the time of "such declaration, by virtue of the process of the said court, at the "suit of the plaintiffs; which allegation shall be as good and effectual "as if such prisoner were in the custody of the marshal." This statute

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(*d*) 1 Saund. 318. n. 3.—The Dean & Chapter of Bristol *v.* Guyse, 1 Saund. 111, 112.—Savignac *v.* Roome, 6 T. R. 130.

(*e*) Ante, 250.—Oakley *v.* Giles, 3 East, 167. When the plaintiff cannot so declare, see Delancy *v.* Cannon, 10 East, 328.—Doo *v.* Butcher, 3 T. R. 611. *cont.*—Tidd, 582.—Symmers *v.* Wason, 1 Bos. & Pul. 105.—Murray *v.* Hubbart, 1 Bos. & Pul. 647, 8.

(*f*) Murray *v.* Hubbart, 1 Bos. & Pul. 647.

(*g*) Ante, 251.—Stafford *v.* Bolton, 1 Bos. & Pul. 40.—3 Anstr. 935.

(*h*) Gray et al. *v.* Sidneff, 3 Bos. and Pul. 395.—Com. Dig. Pleader, C. 9.—Brown *v.* Jacobs, 2 Esp. Rep. 727.—Ante, 247.

(*i*) Newdigate *v.* Auncel, Dyer, 118. a.

(*j*) But these latter words are unnecessary.—Lord *v.* Houstoun, 11 East, 65.

(*k*) Gray et al. *v.* Sidneff, 3 Bos. & Pul. 399.—Com. Dig. tit. Pleader, C. 8. see the form, Post, 2 Vol. 12.

(*l*) Ante, 262.—Heron et al. *v.* Edwards, 8 T. R. 643.—2 Saund. 1. n. 1. See the form, Post. 2 Vol. 14.

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does not extend to proceedings by *original*, or in the Common Pleas, or Exchequer, and therefore the above allegation is only necessary when the plaintiff proceeds upon a bill of Middlesex, or latitat, or by attachment of privilege; and if the cause of action be not bailable, the same plaintiff, or a third person, may in K. B. proceed against the prisoner as if he were at large(*m*). In cases within the act, if the declaration show that the defendant was in custody of the sheriff but *not [*288] at whose suit the defendant may be discharged out of custody, or may demur generally(*mm*).

In the *King's Bench* by *original*, the commencement of the declaration, with the exception of the name of the court at the top, is in general similar to that in the *Common Pleas* against persons not privileged; and which in assumpsit, case, and trover, runs as follows, "—to wit, "C D was attached to answer A B of a plea of trespass on the case, "&c. *(or as the form of action may be)* and thereupon the said A B, "by E F his attorney, complains for that whereas, &c."(*n*). The defendant's addition of abode or degree, ought not to be inserted(*o*), and the statement that the plaintiff complains by more than one attorney, would be improper(*p*). And in the Common Pleas, or by original in K. B., it would be incorrect to begin the declaration with a *queritur*, as in the King's Bench by bill(*q*).

With respect to the first part of this form, it is observable that in actions of *assumpsit*, *case*, *trespass*, *ejectment*, &c. where the original was an *attachment*, the commencement or the declaration should state, that the defendant was *attached;* and in actions of account, covenant, debt, detinue, annuity, and replevin, where the original is a *summons*, the declaration should state, that the defendant was *summoned* to answer(*r*). But formerly when the declaration stated that the defendant was *summoned*, instead of attached, or *vice versa*, the defendant could [*289] not demur without craving *oyer of the original. and setting it forth in order to show that it did not warrant the declaration(*s*); and as the defendant cannot now have oyer of the writ, this technical objection is no longer available(*t*). And in general the recital, or reference to the writ, in the commencement of the declaration, is not considered as any part of the declaration, and consequently a mistake therein is no ground of demurrer(*u*).

(*m*) Imp. K. B. 618, 6th edit.—Tidd's Prac. 3d edit 311.—Robertson *v.* Douglas, 1 T. R. 192. See the form, Post. 2 Vol. 14, 15.

(*mm*) Williams *v.* Wills, 1 Wils. 119. Morris et al. *v.* Watkins, 2 Lord Raym. 1362.—Com. Dig. tit. Pleader, C. 8.—See 2 Vol. 14.

(*n*) 1 Saund. 318. a.—2 Saund. 1. n. 1. See 2 Vol. 7, 8, 9.

(*o*) Ante, 247. 286. n. h.

(*p*) Bunn v. Guy, 4 East, 195.

(*q*) Com. Dig. tit. Pleader, C. 11.

(*r*) Com. Dig. tit. Pleader, C. 12. Post. 2 Vol. 7, 8, 9, 10.

(*s*) 1 Saund. 318. a.—M'Quillin *v.* Cox, 1 Hen. Bla. 250.—Helliott *v.* Selby, Lord Raym. 903.

(*t*) 1 Saund. 318. a.—Boats *v.* Edwards, Dougl. 228.—Murray *v.* Hubbart, 1 Bos. & Pul. 646.

(*u*) Sutton *v.* Fenn, 2 Bla. Rep. 848. Helliott *v.* Selby, Lord Raym. 903.—M'Quillin *v.* Cox, 1 Hen. Bla. 250.—Lord *v.* Houstoun, 11 East, 62. 65.—Andrew, 23, 4.

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Anciently it was the practice in all actions founded on an original writ, to repeat the whole writ and cause of action in the commencement of the declaration(*v*); and it is said that when the pleadings were *ore tenus*, the writ being returned, and the parties having appeared, the countor read the writ to the court, and then mentioned the time, place, and circumstances, and the particular damage accrued to the plaintiff; and if a material variance appeared between the writ and declaration, the defendant might have taken advantage of it, either by motion in arrest of judgment, writ of error, plea in abatement, or demurrer(*w*). But this practice was altered in some actions by a rule of the court of C. P. A. D. 1654, by which it was ordered that, in future, declarations in actions *on the case*, and *on general statutes*, other than debt, should not repeat the original writ, but only the *nature of the action*, as that the defendant was attached to answer the plaintiff in a plea of trespass on the case, or in a plea of trespass *and contempt [*290] against the form of the statute(*vv*). And though it is still the practice in a declaration in *trespass vi et armis* in the Common Pleas, to set forth the supposed writ(*ww*), it would probably now be deemed sufficient merely to state, that the defendant was attached to answer the plaintiff "in a plea of trespass;" at least this was held sufficient on a general demurrer, as long ago as the 2d of Wm. and Mary(*x*); and now it would probably be held good on special demurrer, for this short recital is intended only as an intimation to the court of the nature of the action(*y*).

When it may be doubtful from the other parts of the declaration, what was the intended form of action, the statement in the memorandum may be decisive(*z*); and when in trespass, the supposed writ is recited, it is considered as part of the declaration, so that if it contain the words *vi et armis*, it will aid the omission in the count part(*a*). The omission in the Common Pleas of the words, "and thereupon the said "A B by E F, his attorney complains," &c. though untechnical, is not demurrable(*b*). Where one of several defendants has been outlawed upon an original writ in either of the courts, the declaration should in

(*v*) But this was not necessary in proceedings by bill, see Lord *v.* Houstoun, 11 East, 65.

(*w*) Dobson *v.* Herne et al., 1 Bos. & Pul. 367.—Gilb. C. P. 47.—Hole *v.* Finch, 2 Wils. 394.—1 Saund. 318. n. 3.—Com. Dig. Pleader, C. 12.

(*vv*) 1 Saund. 318. n. 3.—Whitworth *v* The Inhabitants of Grimshoe, 2 Wils. 105.—2 Saund. 376. n. 6. Com. Dig. Action on Case, C. 2.—Dobson *v.* Herne et al., 1 Bos. & Pul. 367.—11 East, 64. n. c.

(*ww*) See the forms, post. 2 Vol. 18.

(*x*) Lambert *v.* Thurston, Carth. 108.

(*y*) 1 Saund. 318. n. 3.—Com. Dig. tit. Pleader, C. 9. 11, 12.

(*z*) Savignac *v.* Roome, 6 T. R. 130.

(*a*) Daile *v.* Coates, Lutw. 1509.—Com. Dig. tit. Pleader, C. 12.—Franklin *v.* Reeve, 2 Stra. 1023.

(*b*) Dobson *v.* Herne et al., 1 Bos. & Pul. 366.

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the commencement state the outlawry in the particular suit(c).[55] And where one of several plaintiffs or defendants dies *after the issuing of

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(c) Saunderson et al. v. Hudson, 3 East, 144.—Symonds v. Parmenter et al., 1 Wils. 78.—Coutanche v. Le Ruez, 1 East, 133.—See the form, Vol. 2. page 8.

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(55) At common law, when the plaintiff sues two or more defendants on a joint obligation, and all cannot be arrested, it is necessary to proceed to outlawry against such as cannot be brought into court; for the plaintiff cannot declare against those who have been arrested, until he has outlawed the others, which must be suggested in the declaration; and we have seen that it is not at the option of the plaintiff to bring his action against some of those who are jointly liable to him on a contract, but that all the joint obligors must be named in the process. In the state of New York these difficulties are obviated by the 13th sect. of the act for the amendment of the law, 1 R. L. 521, which provides, "that all persons jointly indebted to any other person upon any joint obligation, contract, or matter whatsoever, for which remedy might be had at law against such debtors, in case all were taken by process issued out of any court of this state, shall be answerable to their creditors separately for such debts, that is to say: the creditor or creditors of such debtors may issue process against them in the manner now in use; and in case any of such joint debtors be taken and brought into court, he or they so taken and brought into court, shall answer to the plaintiff, and in case judgment shall pass for the plaintiff, he shall have his judgment and execution against such of them as were brought into court, and against the other joint debtors named in the process, in the same manner as if they had all been taken and brought into court by virtue of such process; but it shall not be lawful to issue or execute any such execution against the body, or against the lands or goods, the sole property of any person not brought into court." This mode of proceeding does not apply to actions of trespass; *Rose* v. *Oliver & others*, 2 *Johns. Rep.* 368. Nor to actions against devisees, taking as tenants in common under a will, for a debt of their testator. *Jackson* d. *Potan* v. *Hoag*, 6 *Johns. Rep.* 59. The declaration in an action against joint debtors should state which of them were brought into court, and which not; *Hildreth* v. *Beeker & Harvey*, 2 *Johns. Cas.* 339. And the defendant brought into court cannot avail himself of a defence personal to the defendant not found, as infancy. *Van Bramer & others* v. *Cooper & another*, 2 *Johns. Rep.* 279. Judgment is to be entered against all the defendants in the same manner, as if all had appeared, and, such being the regular form of the judgment, if an action be brought upon it by the defendant not arrested in the original suit, he cannot plead nul tiel record. *Dando* v. *Doll & Tremper*, 2 *Johns. Rep.* 87. In an action on a judgment, the defendant, who had not appeared to the original action, pleaded nul tiel record, and that he had not been arrested in the former suit: the pleas were held bad. The court in giving their opinion say; "What defence might be made to the merits, by the defendant who was not taken in the first suit, is another question, not necessarily arising upon this record. Perhaps he might set up any defence, which he might in his distinct, individual capacity, have made in the original suit. But it is not now necessary, and therefore we do not give any definitive opinion upon the point. *Bank of Columbia* v. *Newcomb*, 6 *Johns. Rep.* 98. Et vide *Ballon* v. *Hurlbert*, 1 *Johns. Rep.* 62. *Hutchins & Cary* v. *Fitch*, 4 *Johns. Rep.* 222.

the writ, and before declaration, the commencement should suggest such death(*d*).

II. ITS PARTS. Thirdly, the commencement.

In the Exchequer, the commencement, after stating the title of the court and term, runs thus:—"to wit, A B, a debtor of our Lord the "King, cometh before the Barons of his Majesty's Exchequer, on ... "the ... day of ... (*the return day of the process*) in this same term "by E F his attorney, and complains by bill against C D, present here "in court the same day, of a plea of trespass on the case, &c. For "that whereas, &c."

In suits by infants, or by or against assignees, executors, attorneys, &c. the commencement varies from the above forms. Infants are stated to sue by guardian,[56] or *prochein ami*(*e*). The representative character of assignees[57] and executors should be stated in the commencement, though it will suffice if it appear in the other parts of the declaration(*f*); and in actions of *debt* by or against executors or administrators, in that character, the words "*owes to*," must be omitted[58] in the commencement(*g*); but assignees of a bankrupt may sue in the *debet* and *detinet*(*h*). An executor *de son tort* is stated to be executor of the last will and testament of the deceased, the same as against a rightful executor(*i*). In actions by or against attorneys, peers, and members of parliament, their privilege as such is stated in the introduction(*j*). *The various forms are so numerous, that I have here only mentioned those which most frequently occur in practice(*k*). [*292]

Fourthly, the cause of action.

The statement of the cause of action, in which all the requisites of certainty, which we have already considered, must be observed, necessarily varies, according to the circumstances of each particular case, and the form of action, whether in assumpsit, debt, covenant, detinue,

(*d*) 8 & 9 Wm. 3. c. 11. s. 7.—Far *v.* Denn, 1 Burr. 363.—See the form, post. 2 Vol. 15, 16.

(*e*) 2 Saund. 117. f. n. 1. See the form, post. 2 Vol. 32. when he is liable for costs.—Finley *v.* Jowle, 13 East, 6.

(*f*) The Dean and Chapter of Bristol *v.* Guyse, 1 Saund. 111, 112. n. 2.

(*g*) Com. Dig. tit. Pleader, 2 D. 1, 2.—W. 8.—1 Saund. 1. n. 1. 112. n. 1. Hope *v.* Bague et al., 3 East, 2.

(*h*) Winter et al. *v.* Kretchman, 2 T. R. 46.

(*i*) 1 Saund. 265. n. 2.

(*j*) 2 Saund. 1. n. 1.—Dodsworth *v.* Bowen, 5 T. R. 325.—Hosier et al. *v.* Lord Arundel, 3 Bos. & Pul. 7. See the form, post. 2 Vol. 33.

(*k*) See the various forms, post. 2 Vol. 12 to 35.

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(56) As to infants suing by guardian ad litem, and the history of suits by prochein ami, vide *Harg. Co. Litt.* l. 2. n. 220.

(57) Assignees under a joint commission against A & B, suing for a separate debt to A, may describe themselves as assignees of A without noticing B. *Stonehouse & another* v. *De Silva*, 3 *Campb.* 399, 400.

(58) But where the plaintiff is entitled to charge the defendant de bonis propriis, as on a suggestion of a devastavit, those words "owes to" must be inserted, for if he declare in the detinet only, the judgment must be de bonis testatoris. *Hope* v. *Bague & Thompson*, 3 *East's Rep.* 6. *Spotswood* v. *Price*, 3 *Hen. & Mun.* 123. 126.

II. ITS PARTS. Fourthly, the cause of action. 1. In Assumpsit.

case, trover, replevin, or trespass, the nature and general applicability of which actions have already been considered.

In *Assumpsit*, the statement of the cause of action is either *special* or *general*. The forms of such *special counts* in assumpsit, as most frequently occur in practice, are given in the second volume. We will first consider the rules to be observed in the structure of such *special* counts(*l*); in which six points are principally to be attended to, viz. 1*st*, The inducement. 2*dly*, The consideration of the contract. 3*dly*, The contract itself. 4*thly*, The necessary averments. 5*thly*, The breach. And, 6*thly*, The damages.

Inducement.

An *Inducement*, in an action of assumpsit, is in the nature of a preamble, stating the circumstances under which the contract was made. A formal inducement does not appear to be in any case necessary in pleading, it would be sufficient if the subject matter of the inducement were alleged in any other part of the declaration; but it is useful in composition, in order to avoid in the description of the consideration, or of the contract, a variety of facts, the statement of which in one [*293] *continued sentence of great length, might be scarcely intelligible. Thus in an action on a wager on a horse-race, it is usual to begin the declaration with an inducement of the expected race(*ll*). So in assumpsit upon an award, the existing differences between the parties are concisely stated(*m*); and on a contract to pay money upon a consideration of forbearance, the declaration begins by stating the debt forborne, and the proceedings that were stayed(*n*). But where the mere statement of the consideration and promise will be sufficiently intelligible, without any prefatory allegation, they are to be set forth without any inducement, as in declarations upon bills of exchange, &c. which should proceed at once to state the consideration or contract, without any preamble of the custom of merchants, which ought not to be set forth(*o*).

It is said that as the office of an inducement is explanatory, it does not require exact certainty(*p*); and where an agreement with a third person is stated only as an inducement to the defendant's promise, which is the principal cause of the action, it is in general sufficient to state such agreement without certainty of name, place, or person(*q*); and this is the rule in the statement of matter, which merely consti- [*294] tutes an executed or past consideration(*r*). Thus in *declaring upon

(*l*) A special count will frequently avoid a set-off. Colson et alt. *v.* Welsh, 1 Esp. Rep. 380.

(*ll*) Post. 2 Vol. 114.

(*m*) Id. 119.

(*n*) Id. 121. to 123. So in an action against a wharfinger, Id. 150.—A carrier, Id. 155.—A coach-owner, Id. 157. or a captain of a ship, Id. 159. their respective characters are usually stated by way of inducement.

(*o*) Ante, 219.

(*p*) Tidd's Prac. 3d edit. 381. cites Com. Dig. Pleader, C. 31.—Andrews & others *v.* Whitehead & another, 13 East, 116.

(*q*) Alsope *v.* Sytwell, Yelv. 17.

(*r*) Id ibid.—Riggs *v.* Bullingham, Cro. Eliz. 715.—Bishop of Salisbury's Case, 10 Co. 59. b.—Com. Dig. Pleader, C. 31. 43.—E. 10. 18.—Andrews & others *v.* Whitehead & another, 13 East, 105. 116.

a promise to pay money in consideration of the forbearance of a preceding debt, though some cause of action must be alleged, it is not necessary to state the particular cause or subject matter of the debt, or the time when, or place where, it was contracted(*r*); and in an action for negligence, against an attorney who has been employed to sue another, it is not necessary or advisable to state in an inducement, that such other person was indebted(*s*); but where the inducement disclosing a past consideration also professes to state some matter material to be ascertained with certainty, it must be stated with precision and particularity(*t*). In general, every allegation in an inducement, which is material, and not impertinent and foreign to the cause, and which consequently cannot be rejected as surplusage, must be proved as alleged, and consequently great attention to the facts is necessary in framing the inducement, and care must be taken not to insert any unnecessary allegation(*u*). Thus in the case just mentioned against an attorney, where the declaration stated that E. F. was indebted to the plaintiff, and that the plaintiff employed the defendant to sue her, it being proved that E F was a feme covert at the time the supposed debt accrued, and consequently not in point of law indebted, the plaintiff was nonsuited, though the declaration might have been sufficient without stating that the third person was indebted(*v*). Where, however, the matter unnecessarily stated in the inducement *is wholly impertinent, and might be struck out as surplusage, there are some cases in which a failure in proof of such statement would not be material(*vv*). [*295]

Consideration.

In declaring upon a contract not under seal, it is uniformly necessary to state the *Consideration* upon which it was founded(*w*).[59] Upon bills of exchange and promissory notes, and some other legal liabilities, the mere statement of the liability which constitutes the consideration is sufficient; but in other cases of simple contracts the consideration should be formally and expressly stated, whatever may be the form of action(*x*). The consideration, as stated, must always corres-

(*r*) Woolaston *v.* Webb, Hob. 18.—Post. 2 Vol. 121. n. u.

(*s*) Lee *v.* Ayrton, Peake, C. N. P. 119.

(*t*) Andrews & others *v.* Whitehead & another, 13 East, 102.

(*u*) Ante, 231, 2.—Bristow v. Wright et al., Dougl. 667.—Lee *v.* Ayrton, Peake, C. N. P. 119.—Peppin *v.* Solomons, 5 T. R. 498.—Gwinet *v.* Philips et al., 3 T. R. 646.—Turner *v.* Eyles, 3 B. & P. 463.

(*v*) Lee *v.* Ayrton, Peake, C. N. P. 119.

(*vv*) Winn *v.* White, 2 Bla. Rep. 840. Bristow *v.* Wright et al., Dougl. 667.—Peppin *v.* Solomons, 5 T. R. 498.—Gwinet *v.* Philips et al., 3 T. R. 646.

(*w*) Com. Dig. Action Assumpsit, H. 3.—Mitchinson *v.* Hewson, 7 T. R. 348. to 351.—Elsee et al. *v.* Gatward, 5 T. R. 143.—Clarke *v.* Gray et al., 6 East, 568.—Miles *v.* Sheward, 8 East, 9.—1 Saund. 211. n. 2.—Bul. N. P. 146, 7.

(*x*) Bishop *v.* Young, 2 Bos. & Pul. 79.—Remington *v.* Tayler, Lutw. 237.

(59) Vide *Burnet* v. *Bisco*, 4 *Johns. Rep.* 235. *Powell* v. *Brown*, 3 *Johns. Rep.* 100. *Bailey & Bogert* v. *Freeman*, 4 *Johns. Rep.* 280. *Lansing* v. *M'Killip*, 3 *Caine's Rep.* 288.

II. ITS PARTS. Fourthly, the cause of action.

pond with the facts of the case,[60] and be sufficient in law to support the promise as laid, and be co-extensive therewith(*y*); and therefore a declaration against the husband alone, on his mere promise, without any new consideration, to pay the debt of his wife contracted by her before the marriage, was upon motion in arrest of judgment held insufficient, because to support such action against the husband alone, some new consideration, such as forbearance, should have been alleged(*z*). The whole of the consideration of the defendant's contract must also in general be stated, and if any part of an entire consideration, or of a consideration consisting of several things, be omitted, the [*296] plaintiff will fail upon the trial on the ground of variance(*a*).[61] *It is however sufficient, in general, to state so much of any contract, consisting of several distinct parts and collateral provisions, as contains the entire consideration for the act, and the entire act which is to be done in virtue of such consideration; and the rest of the contract, which only respects the liquidation of damages, after a right to them has accrued by a breach of the contract, is matter proper to be given in evidence to the jury in reduction of damages,[62] but not necessary to be shown to the court in the first instance, on the face of the record(*b*). Where a part of consideration, or one of several considerations, is frivolous and void, it is sufficient to notice only the valid consideration, though, if stated, it will not vitiate the declaration(*c*); but no mode of pleading can enable the plaintiff to recover where part of an executory consideration was illegal(*d*).

The statement of the various points relating to the sufficiency of

(*y*) Jones *v.* Ashburnham et ux., 4 East, 464, 5.—Mitchinson v. Hewson, 7 T. R. 348.—King *v.* Robinson, Cro. Eliz. 79.—Morris & wife *v.* Norfolk & another, 1 Taunton, 212.—Williamson *v.* Clements, 1 Taunton, 523.—Marshall *v.* Birkenshaw, 1 New R. 172.—Jones & another *v.* Mars & another, 2 Camp. 307.

(*z*) Mitchinson *v.* Hewson, 7 T. R. 348.

(*a*) Clarke *v.* Gray et al., 6 East, 568. Miles *v.* Sheward, 8 East, 7. 9.—King *v.* Robinson, Cro. Eliz. 79.—Bul. N. P. 147.—Leeds *v.* Burrows, 12 East, 1.—Andrews & others *v.* Whitehead & another, 13 East, 102.—Symonds *v.* Carr, 1 Campb. 362.

(*b*) Per Ld. Ellenborough, Clarke *v.* Gray et al., 6 East, 570.—Miles *v.* Sheward, 8 East, 7.

(*c*) Bradburne *v.* Bradburne, & Boyle *v.* Bagshaw, Cro. Eliz. 149.—Coulston *v.* Carr, Cro. Eliz. 848.—Best *v.* Jolly, 1 Sid. 38.—Crisp *v.* Gamel, Cro. Jac. 128.—Barber *v.* Blackhouse et al., Peake, C. N. P. 62.—Robinson *v.* Bland, 2 Burr. 1082.—Bul. N. P. 147.

(*d*) Featherstone *v.* Hutchinson, Cro. Eliz. 200.—Morris *v.* Chapman, Sir T. Jones, 24.—1 Saund. 66. n. 1.—Best *v.* Jolly, 1 Sid. 38.—Jackson *v.* Warwick, 7 T. R. 121.

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(60) Where the declaration alleged an undertaking in consideration of a contract entered into by the plaintiff to *build* a ship, and the evidence was of a contract to *finish* a ship partly built, it was held that the variance was fatal. *Smith* v *Barker*, 3 *Day's Rep.* 312. Vide post. 308. n. 88.

(61) Vide *Lansing* v. *M'Killip*, 3 *Caine's Rep.* 286.

(62) Vide *Barney* v. *Dewey*, 13 *Johns. Rep.* 226. *Phillips' Ev.* 160, 161.

considerations, would be foreign to a treatise of this nature. So far as regards pleading, considerations are, 1*st*, *Executed*, or something done, or past, at the time of the making of the defendant's contract; 2*dly*, *Executory*, or something thereafter to be done, or forborne; 3*dly*, *Concurrent*, as in the case of mutual promises; and, 4*thly*, *Continuing*, as in the instance of contracts between landlord and tenant.

In pleading an *executed* consideration, less certainty, in general, is required in the statement of *the subject matter of it, than in describing an executory consideration(*d*); but it should be shown, that such executed consideration arose at the defendant's request,[63] though such request may in some cases be implied[64] in evidence(*e*). [*297]

The consideration, when *executory*, must be stated with more certainty; and therefore in an action for wages, &c. in consideration that the plaintiff would proceed on a certain voyage, the particular voyage must be stated(*f*).[65] The distinction as to the different degrees of certainty required in the statement of an executed, or executory consideration, probably proceeds on the ground that in the latter case the performance of the consideration on the part of the plaintiff, in general constitutes a condition precedent, upon which the plaintiff's right of action depends(*g*).

A *concurrent* consideration occurs in the case of mutual promises, which are a third species of considerations, partaking of the nature of the preceding two. The plaintiff's *promise* is *executed*, but the *thing* which he has engaged to perform is *executory*, as in promises to mar-

(*d*) Andrews & others *v.* Whitehead & another, 13 East, 105. 116, 7.

(*e*) 1 Saund. 264. n. 1.—Hayes *v.* Warren, 2 Strange, 933.—Pillans et al. *v.* Van Mierop et al., 3 Burr. 1671.—Bac. Ab. Assumpsit, D.—3 Bos. & Pul. 249. n. a.

(*f*) White *v.* Wilson, 2 Bos. & Pul. 116. 120.—Ward *v.* Harris, 2 Bos. & Pul. 265.—Andrews & others *v.* Whitehead & another, 13 East, 102.—Mordant *v.* Walden, Yelv. 110.—Com. Dig. Action, Assumpsit, H. 3.—Bac. Ab. Assumpsit, F.

(*g*) Willes, 157. a.—Pordage *v.* Cole, 1 Saund. 320.—Tidd, 381 to 386. 3 ed.

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(63) The law relating to past or executed considerations, is fully discussed in the opinion of Kent, J. in *Livingston* v. *Rogers*, 1 *Caine's Rep.* 583. where it is held, in conformity to the case of *Hayes* v. *Warren*, *Str.* 933. (cited in n. e.) that a promise laid to have been made, afterwards, on the same day with the consideration, is a nudum pactum. See also, *Comstock* v. *Smith*, 7 *Johns Rep.* 87. *Hicks* v. *Burhaus & others*, 10 *Johns. Rep.* 243. *Everts & Allen* v. *Adams*, 12 *Johns. Rep.* 352. *Mitchell* v. *Bell*, *Taylor*, 61. *Frear* v. *Hardenbergh*, 5 *Johns. Rep.* 272. *Robertson* v. *Bethune & Boorman*, 3 *Johns. Rep.* 350.

(64) As, from the beneficial nature of the act performed by the defendant. *Hicks* v. *Burhaus & others*, 10 *Johns. Rep.* 243. *Livingston* v. *Rogers*, 1 *Caine's Rep.* 585, 586. *Comstock* v. *Smith*, 7 *Johns. Rep.* 88.

(65) Where the performance of the act to be done on the part of the plaintiff is the consideration of the act to be done by the defendant, the declaration states that if the plaintiff would do a certain act, the defendant promised, and then avers performance: and it is not necessary to allege that the plaintiff promised. 10 *Mass. Rep.* 230. 237, 238. post. 2 Vol. 121. 123.

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ry, to submit to an award, on wagers, &c. The promises of each party must in general be concurrent or obligatory on both at the same time,[66] to render the promise of either binding, and must be so stated in pleading(*h*). And in these cases it is not *always necessary to aver [*298] performance of the thing stipulated to be done,[67] the plaintiff's *agreement* to perform being a sufficient consideration(*i*), unless the *performance* of one act be the consideration of the performance of the other, in which case an averment of *performance*, or *readiness* to perform, is in general necessary, even in the case of mutual promises(*j*), as upon mutual promises to marry, and bargains to sell and accept goods(*k*).[68]

In the case of a *continuing* consideration, the declaration generally states, that in consideration that the defendant had become and was tenant to the plaintiff of certain land, &c. he undertook, during the continuance of the tenancy, to repair, &c. and the declaration then avers the continuance of the tenancy, and the breach(*l*).

Where no consideration, or an insufficient or illegal consideration, is stated, the defendant may either demur, or move in arrest of judgment, or support a writ of error(*m*). But after verdict, a defective, informal, or uncertain statement of a consideration, not apparently illegal, may be aided(*n*); and where the consideration is untruly stated, or a part thereof is omitted, the objection can only be taken on the trial as a ground of nonsuit(*o*).

The contract. [*299]

After stating the consideration, the *Contract* itself is usually alleged, and this must be set *forth in some part of the declaration, either in the words in which it was made, or according to the *legal effect*,[69] and

(*h*) Paine *v.* Cave, 3 T. R. 148.—Cooke *v.* Oxley, 3 T. R. 653.—Clayton *v.* Jennings, Bla. Rep 706.—Kingston *v.* Phelps, Peake, C. N. P. 228.—Nichols *v.* Rainbred, Hob. 88.—Callonel *v.* Briggs, Salk. 112.—Wain et al. *v.* Warlters, 5 East, 16.

(*i*) Martindale *v.* Fisher, 1 Wils. 88. Bach *v.* Owen, 5 T. R. 409.—Thorpe *v.* Thorpe, 1 Ld. Raym. 664.—S. C. 1 Salk. 171.

(*j*) Callonel *v.* Briggs, 1 Salk. 112. Thorpe *v* Thorpe, Salk. 171.—S. C. 1 Ld. Raym. 665.—Campbell *v.* Jones, 6 T. R. 570.—Morton *v.* Lamb, 7 T. R. 125.

(*k*) Rawson et al. *v.* Johnson, 1 East, 203.

(*l*) Powley *v.* Walker, 5 T. R. 373.—Legh v. Hewitt, 4 East, 154.—Pearle *v.* Edwards, Leon, 102.—Pearle *v.* Unger, Cro. Eliz. 94.—Riggs *v.* Bullingham, Cro. Eliz. 715.—Sidenham *v.* Worlington, 2 Leon, 224.—Winn *v.* White, 2 Bla. Rep. 842.

(*m*) Jones *v.* Ashburnham et ux., 4 East, 455.—Mitchinson *v.* Hewson, 7 T. R. 348.

(*n*) Jones *v.* Ashburnham et ux., 4 East, 464.—Ward *v.* Harris, 2 Bos. & Pul. 265.

(*o*) King *v.* Robinson, Cro. Eliz. 79. Clarke *v.* Gray & others, 6 East, 564. 3 T. R. 67. n. a.

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(66) Vide *Livingston* v. *Rogers*, 1 *Caine's Rep.* 583. *Tucker* v. *Woods*, 12 *Johns. Rep.* 190. *Keep & Hale* v. *Goodrich*, *Id.* 397.

(67) Vide *Close* v. *Miller*, 10 *Johns. Rep.* 90.

(68) Vide *Porter* v. *Rose*, 12 *Johns. Rep.* 209.

(69) Vide *Lent & another* v. *Padelford*, 10 *Mass. Rep.* 230.

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if there be a *variance*, it will be fatal(*p*). It has been decided, that where the contract is founded upon a legal liability, and implied, it is sufficient to state such liability, without alleging formally that the defendant promised[70] as in assumpsit on a bill of exchange(*q*);[71] but it is more correct in pleading, in all cases to state that the defendant, *super se assumpsit*, or words to that effect; for the law does not create a promise in any case in pleading, though it may afford sufficient evidence to justify a jury in finding a promise(*r*).[72] The contract itself should not only be stated, but it should expressly be alleged, by and to whom it was made(*s*); though the omission may in some cases be aided, especially after verdict; and the promise will be intended to have been made to the party from whom the consideration proceeded(*t*). On a promise to A to pay B a sum of money, if the action be at the suit of B, it is said that the promise should be laid as having been made to B(*u*). In stating the consideration we have seen that it is necessary to set forth the whole(*v*); but in stating the contract itself, though it might be improper to say that the defendant *inter alia promisit*(*w*), it is sufficient merely to state the parts of the promise, *the breach of which is complained of;[73] and it is not necessary to [*300] state in the declaration other parts, not qualifying or varying in any respect those the breach of which is complained of(*x*). As where the plaintiff declared that in consideration of his redelivery to the defendant of an unsound horse, which he had before then sold to the plaintiff,

(*p*) King *v.* Pippet, 1 T. R. 240.—Bristow *v.* Wright et al., Dougl. 669. Longchamp v. Kenny, Dougl. 138.—Peppin *v.* Solomons, 5 T. R. 498.—Drewry *v.* Twiss et al., 4 T. R. 560.

(*q*) Elsee et al. *v.* Gatward, 5 T. R. 145.—Starkey *v.* Cheeseman, 1 Salk. 128.—S. C. Carth. 509. but see Morris & wife *v.* Norfolk & another, 1 Taunton, 217.

(*r*) Morris & wife *v.* Norfolk & another, 1 Taunt. 217.—Bac. Ab. Assumpsit, F.—Com. Dig. Action, Assumpsit, H. 3.—2 Hen. Bla. 563. n. a.—Starke *v.* Cheeseman, 1 Ld. Raym. 538.

(*s*) Ante, 257.

(*t*) Com Dig. Action of Assumpsit, A. 5.—Remington *v.* Tayler, Lutw. 238. Ante, 257. 261.—Ward *v.* Harris, 2 Bos. & Pul. 265.

(*u*) Feltmaker's Company *v.* Davis, 1 Bos. & Pul. 102.

(*v*) Ante, 295, 6.

(*w*) Aleyn. 5.—Tempest *v.* Rawling, 13 East, 20.

(*x*) Miles *v.* Sheward, 8 East, 7.—Clarke *v.* Gray et al., 6 East, 567.

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(70) It has been held that a declaration stating an agreement between the parties, without alleging any promise, was good, after verdict. *Mountford et al.* v. *Horton*, 2 *New Rep.* 62. *Avery* v. *The Inhabitants of Tyringham*, 3 *Mass. Rep.* 160. But in *Cook* v. *Simms*, 2 *Call*, 39. it was held that a declaration reciting a written agreement and alleging a breach, without stating an express assumpsit, was ill.

(71) So, in assumpsit by the bearer of a note payable to bearer. *Dole* v. *Weeks*, 4 *Mass. Rep.* 451. Vide 2 *New Rep.* 63. n. a.

(72) In assumpsit on an award, a promise must be alleged; but the defect is cured by verdict. *Kingsley* v. *Bill*, 9 *Mass. Rep.* 198.

(73) Vide *Cotterill* v. *Cuff & others*, 4 *Taunt.* 285. 287.

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the defendant promised to deliver to him another horse which should be worth 80*l.*, and be a young horse, and then alleged a breach in both these respects, the declaration was held sufficient, though the proof was not only of a promise that the second horse should be worth 80*l.*, and be a young horse, but also of a warranty that it was sound, and never been in harness(*y*).

The judgment of Lord Ellenborough, in the case of Clarke v. Grey(*z*), elucidates this doctrine: "It is no more necessary to state "every part of an agreement, not under seal, each part making a dis- "tinct contract, than it is of an agreement under seal. It is sufficient "in either case to state so much of each as constitutes that contract, "the breach of which is complained of, and which prescribes the duty "to be performed, and the time, manner, and other circumstances of "its performance; with this difference only, that in the case of an "agreement not under seal, the consideration must be stated, and no "part of the entire consideration, for any promise contained in the "agreement, can be omitted(*a*).

"It is sufficient to state in the declaration so much of any contract, [*301] "consisting of several distinct *parts and collateral provisions; as con- "tains the entire consideration for the act, and the entire act which is "to be done in virtue of such consideration;[74] and the rest of the con- "tract which only respects the liquidation of damages, after a right to "them has accrued by a breach of the contract, is matter proper to be "given in evidence to the jury in reduction of damages, but not ne- "cessary to be shown to the court in the first instance on the face of "the record. Therefore assumpsit may be maintained in the common "form of declaring against a carrier for the loss of goods which were "of above 5*l.* value, and were not in fact paid for accordingly, although "it were part of the contract proved by general notice fixed up in the "carrier's office, and presumed to be known and assented to by the "plaintiff, that the carrier would not be accountable for more than 5*l.* "for goods, unles entered as such, and paid for accordingly(*b*). There "are a great variety of agreements, not under seal, containing detailed "provisions, regulating prices of labour, rates of hire, times and "manner of performance, adjustment of differences, &c. which it "may not be necessary to set forth"(*c*).

So any proviso or condition in the contract, which goes merely in defeasance of it, needs not be stated, for this ought to come from the

(*y*) Miles *v.* Sheward, 8 East, 7.

(*z*) 6 East, 567.—Tempest v. Rawling, 13 East, 18. 20.—Leeds *v.* Burrows, 12 East, 1.—Howell *v.* Richards, 11 East, 633.

(*a*) And see Miles *v.* Sheward, 8 East, 7.—Bristow *v.* Wright et al., Dougl. 667.—1 Saund. 233. n. 2.

(*b*) Clarke *v.* Gray et al., 6 East, 564.

(*c*) Per Lord Ellenborough, Clarke *v.* Gray et al., 6 East, 568.—Tempest *v.* Rawlings, 13 East, 20.

(74) Vide *Phillips' Ev.* 160, 161.

other side,[75] unless it qualifies the contract(*d*); but if such proviso or condition constitute a condition precedent, or if there be any other matter which qualifies *the contract, or goes in discharge of the liability of the defendant, it must be stated(*e*). [*302]

A contract in the alternative must not be stated as an absolute contract, though the option were in the party pleading(*f*);[76] and it may be advisable where goods have been sold on credit to be paid for by a bill of exchange to be accepted by the vendee, to state such contract specially, and the breach, even after the expiration of the limited credit(*g*); and such statement is clearly necessary, when the action is brought for not accepting the bill before the credit has elapsed(*h*).

Upon a written contract it is usual to follow the words of the contract, where they are concise and intelligible, and if the legal effect be doubtful, this is the safer course. The plaintiff, however, is not bound to set forth even the material parts in letters and words. It will be sufficient to state the substance and legal effect,[77] which is shorter, and not liable to misrecitals and literal mistakes(*i*); and as the courts discountenance any unnecessary prolixity in pleading, it is advisable to adopt the latter course, where the recitals, &c. may be long. Thus in declaring in covenant upon a lease, &c. it is in general advisable not to set out the premises *per nomen*, as in the lease, but to state "that "the plaintiff demised to the defendant certain premises particularly "mentioned and described in the said indenture, except as therein is "excepted, to hold the same for a certain term *therein mentioned, [*303] "yielding and paying the rent of *l.*——, payable on, &c." and then to state the novenant for payment of the rent, the entry of the defendant, and the breach in not paying the rent due; or if the action be for the breach of any other covenants, the plaintiff, if he state the rent at all, which is unnecessary, should say concisely, "at a certain rent payable "as in the said indenture is mentioned," and then set forth those covenants, and the breach of them. And where the plaintiff in covenant on a mortgage deed set out the premises, which were numerous, Lord

(*d*) 1 Saund. 233. n. 2.—Elliott *v.* Blake, 1 Lev. 88.—Hotham et al. *v.* The East India Company, 1 T. R. 645. Ante, 300.—Leeds *v.* Burrows, 12 East, 1.—Howell *v.* Richards, 11 East, 633.

(*e*) Hotham et al. *v.* The East India Company, 1 T. R. 645.—Clarke *v.* Gray et al., 6 East, 570.—Miles *v.* Sheward, 8 East, 8.—Tempest *v.* Rawling, 13 East, 20.—Leeds *v.* Burrows, 12 East, 1.—Howell *v.* Richards, 11 East, 633. Ante, 300.

(*f*) Penny *v.* Porter, 2 East, 2.—2 Bos. & Pul. 119. n. a.—Tate *v.* Wellings, 3 T. R 531.—Miles *v.* Sheward, 8 East, 8.

(*g*) Dutton *v.* Solomonson, 3 Bos. & Pul. 582.—Mussen *v.* Price et al., 4 East, 147.—Hoskins & another *v.* Duperoy, 9 East, 498.

(*h*) Id. ibid.

(*i*) Bristow *v.* Wright et al., Dougl. 667.—1 Saund. 233. n. 2.—Sacheverell *v.* Froggatt, 2 Saund. 366. 305. b. n. 13.

(75) Ante, 228.

(76) Vide post. 304. n. 79.

(77) Vide *Lent & another* v. *Padelford*, 10 *Mass. Rep.* 230.

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Mansfield said, that though he was told that it was the usual practice, he thought it a disgrace to the profession and to the court, and said that the court would animadvert upon any future instance of putting parties to the enormous expense of setting out deeds at length, or superfluous parts of them(*j*). The statement of the contract should in strictness be positive, and not by way of recital, as by a *testatum existit;* but this will suffice in a declaration, though it would be insufficient in a plea(*k*). Where the contract must have been in writing under the statute of frauds, yet it is not necessary in a declaration to show that fact,[78] though it is otherwise in a plea(*l*). The contract should be stated with certainty, but an omission in this respect may be aided by verdict(*m*).

Variance(*n*). [*304]

From the preceding observations it may be collected, *that if the consideration or the contract proved in evidence vary from that stated in the pleadings, the plaintiff will be nonsuited(*nn*).[79] A trivial variation in setting out a contract, a record, or any written instrument, is fatal, because it does not appear that the contract given in evidence is that on which the plaintiff declares, it is matter of description(*o*).[80] The

(*j*) Dundas *v.* Lord Weymouth, Cowp. 665.—Price *v.* Fletcher et al. Cowp. 727. 1 Saund. 233. n. 2.—2 Saund. 305. n. 13. 366. n.—Bristow *v.* Wright et al., Dougl. 667.

(*k*) 1 Saund. 274. n. 1.—Cooker *v.* Child, 2 Lev. 75.—S. C. 3 Keb. 94.—6 Vin. Ab. 461.—Dobson v. Herne et al., 1 Bos. & Pul. 376.

(*l*) 1 Saund. 211. a. n. 2.—Kellner *v.* Le Mesurier, 4 East. 400.

(*m*) Ward *v.* Harris, 2 B. & P. 265. Ante, 261.

(*n*) As to variances in general, see Pitt *v.* Green, 9 East, 188.—Hands *v.* Burton, 9 East, 349.—Woodford & wife *v.* Ashley, 11 East, 514.—Philipson & another *v.* Mangles, 11 East, 516.—Howard *v.* Richards, 11 East, 633. 639. Vin. Ab. Variance, Com. Dig. Obligation, B. 4.—Warre *v.* Harbin, 2 Hen. Bla. 113.—The King *v.* Bullock, 1 Taunt. 71.—Bowditch *v.* Mawley, 1 Campb. 195.—Goodes *v.* Wheatley, 1 Campb. 231.—Martin & another v. Goble, 1 Campb. 320.—Rex *v.* Mary Ann Taylor, 1 Campb. 404.—Brooke *v.* Middleton, 1 Campb. 445.—Rex *v.* Plestow, 1 Campb. 494.—Jones and another *v.* Mars and another, 2 Campb. 306.—Keys *v.* Heseltine & another, 2 Campb. 604.

(*nn*) King *v.* Pippet, 1 T. R. 240. per Buller, J.—Whaley *v.* Pagot, 2 Bos. and Pul. 51.—White *v.* Wilson, 2 Bos. and Pul. 119.—Penny *v.* Porter, 2 East, 4.—Dougl. 669. n. 138.—Peppin *v.* Solomons, 5 T. R. 498.—Drewry *v.* Twiss et al., 4 T. R. 560.—Bul. Ni. Pri. 145. Witherington *v.* Buckland, Rep. T. Hardw. 309.

(*o*) Id. ib.—Drewry *v.* Twiss et al., 4 T. R. 560.—Jones v. Givin, Gilb. Cases, L. and E. 229.

(78) Vide *Nelson* v. *Dubois*, 13 *Johns. Rep.* 177. *Anonymous*, 2 *Salk.* 519. *Williams* v. *Leper*, *Burr. Rep.* 1890. 1 *Esp. Dig.* 168. *Miller* v. *Drake*, 1 *Caine's Rep.* 45. *Elting & others* v. *Vanderlyn*, 4 *Johns. Rep.* 237.

(79) Vide *Snell & others* v. *Moses & others*, 1 *Johns. Rep.* 105. *Allaire* v. *Ouland*, 2 *Johns. Cas.* 55. *Perry* v. *Aaron*, 1 *Johns. Rep.* 133. Ante 232. and n. 19. *ibid. Phillips' Ev. Dunl. Ed.* 160, 161. and n. a. *ibid. Pool* v. *Court*, 4 *Taunt.* 700. So, contract in the alternative ought to be stated alternatively, and not as an absolute contract to do one of the things stipulated only. *Penny* v. *Porter*, 2 *East's Rep.* 2. *Cooke* v. *Munstone*, 1 *New Rep.* 351. Ante, 302.

(80) The words value received in a promissory note, are words of description,

leading case upon the subject of variances, in the statement of *contracts*, is that of Bristow v. Wright and another(*p*), where in an action against the sheriff for taking goods under a *fieri facias*, without leaving a year's rent, the declaration stated, that the person against whom the *fieri facias* was issued, held certain tenements, as tenant to the plaintiff under a demise, at the yearly rent of ——— *l.*, payable *by four quarterly payments*, but on the trial it was proved, that there was *no stipulation as to the time of payment of the rent*, upon which the plaintiff was nonsuited. And Lord Mansfield, on a motion for a new trial, gave judgment to the following effect: "It certainly was not necessary to allege "that part of the lease which related to the *time of* payment, in order "to maintain the action; but since it had been alleged, it was necessary "to prove it. The distinction is between that which may be rejected "as *surplusage* (which might have been struck out on motion) and "what cannot.[81] Where the declaration contains *impertinent matter* "*foreign to the cause*, and which the master, on a reference to him, "would strike out (irrelevant covenants *for instance), that will be [*305] "rejected by the court, and need not be proved. But if the very "ground of the action be mis-stated, as where you undertake to recite "that part of a deed on which the action is founded, and it is mis-re-"cited, that will be fatal; for then the case declared on is different "from that which is proved, and you must recover *secundum allegata* "*et probata*. This distinction will reconcile all the cases. If this "doctrine were highly detrimental, and setting it right would be at-"tended with no mischief, as it is only a mode of practice, it might "deserve consideration; but I believe it stands right, and upon the "best footing, for it may prevent the stuffing of declarations with un-"necessary matter, because of the danger of failing in the proof, and "may lead pleaders to confine themselves to state the legal effect." In Savage against Smith(*q*), De Grey, C. J. proceeded upon the distinction between *material* and *impertinent* averments, and said, that the former must be proved, because *relative* to the point in question, but that the latter need not; and Lord Mansfield approved of this distinction(*r*). Lord Kenyon, in Gwinnett *v.* Philips(*s*), said, "that there was no doubt that if the plaintiff professed to set out his *title* he must set it out correctly(*t*). So where a *contract* is to be stated *in a decla- [*306]

(*p*) Dougl. 665.—Leery *v* Goodson, 4 T. R. 687.—Churchill *v.* Wilkins, 1 T. R. 447.—Miles *v.* Sheward, 8 East, 9.

(*q*) 2 Bla. Rep. 1104.

(*r*) Bristow v. Wright and another, Dougl. 667.

(*s*) 3 T. R 645.—Rogers & others v. Allen, 1 Campb. 313.

(*t*) Savage *v.* Smith, 2 Bla. Rep. 1104.—2 Saund. 206. a. n. 22. n. 24. acc.—In Winn *v.* White, 2 Bla. Rep. 842. and Alebury *v.* Walby, 1 Stra. 229, 230. the averment of title was *imperti-*

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and if omitted in the declaration, the variance will be fatal. *Saxton & Hutcheson v. Johnson*, 10 *Johns. Rep.* 418.

(81) Ante, 233.

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ration, unless it be truly stated, the plaintiff cannot recover; but it is now contended, that *in every case* the facts alleged by the plaintiff must be strictly proved. otherwise he must be nonsuited; but the rule can never be carried to such extent; the doctrine in Bristow *v.* Wright, must be confined to *contracts*; good sense will reconcile all the authorities. If the plaintiff allege any thing, which forms *a constituent part of his title*, he must set it out correctly." And Mr. J. Buller, observed, "that the case of Bristow and Wright was not an authority beyond the cases of *contracts*, for a contract is entire in its nature, and must be proved as laid; and that perhaps the rule laid down in that case would be found to extend to all cases of *records and written contracts.*"[82]

In Peppin *v.* Solomons(*u*). Mr. J. Buller observed, "that the case of Bristow and Wright had been sometimes doubted, but that he was still of opinion that it was rightly decided; that in order to entitle the plaintiff to maintain that action, it was *necessary* for him to show that he was the landlord, it being an action against the sheriff for taking the lessee's goods without leaving a year's rent; and to show that the plaintiff was the landlord, *he was obliged to set forth a contract* between himself and the tenant; now *contracts* are in their nature entire, and in pleadings they must be stated accurately; but as the evidence in that case did not accord with the contract stated in the declaration, [*307] and which was the *foundation of the action, it was properly determined that a judgment of nonsuit should be entered." And with respect to what statements are necessary to be proved, the rule seems to be, that if the whole of the statement may be struck out, without destroying the plaintiff's right of action, it is not necessary to prove it; but otherwise, if the whole cannot be struck out, without getting rid of a part essential to the cause of action; for then, though the averment be *more particular* than it need have been, the whole must be proved, or the plaintiff cannot recover(*v*).[83] It may be collected from the above autho-

nent, as it was unnecessary to show *any* title. In Dougl. 668. the editor states that the word material in 2 Bla. Rep. 1104, is a mistake in the press, and should have been immaterial, but see Winn *v.* White, 2 Bla. R. 842.

(*u*) 5 T. R. 496.

(*v*) Williamson *v.* Allison, 2 East, 452.—Mersey & Irwell Navigation Company *v.* Douglas et al., 2 East, 502.—Kellner *v.* Le Mesurier, 4 East, 400.—Savage *v.* Smith, 2 Bla. Rep. 1104.

(82) The contract stated was for the purchase of a certain quantity of hemp, *to wit, eight tons*, and the contract proved was for the purchase of *about* eight tons, the exact amount not being known at the time of making the contract, but being ascertained before the action was brought: it was held that the variance was immaterial. *Gludstone* v. *Neale*, 13 *East's Rep* 410. A variance is immaterial when it does not change the nature of the contract, which must receive the same legal construction whether the words be in, or out of the declaration. *Ferguson* v. *Harwood*, 7 *Cranch*, 408.

(83) If in an action on a promissory note, the plaintiff unnecessarily specifies wherein the *value received* consisted, he must prove it as laid. *Jerome* v. *Whitney*, 7 *Johns. Rep.* 321. In an indictment for stopping the mail, a contract with

rities, that whenever a contract is described, a variance will be equally fatal, whatever may be the form of action, whether upon the contract itself, or upon some collateral matter, or in an action in form *ex delicto*(*w*). If a contract be described according to its legal effect, it will in general be sufficient, though it may vary from the precise words of the contract;[84] but a variance, however small in setting out the names, &c. in a bill or note, is fatal; and therefore where a note given by the name of *Shirtliff* and others, was described in the declaration as made by *Shutliff* and others, the plaintiff was nonsuited(*x*).[85] And where the contract stated on the record is *even by legal intendment* different from that proved in evidence, the variance will be fatal; thus where the declaration stated a contract to deliver 400 *bushels* of oats, the *plaintiff [*308] was nonsuited on proof that the bushels were not to be *Winchester* measure(*xx*).

Where the consideration or contract or other matter alleged is material and traversable, the stating it under a *scilicet*[86] will not avoid the consequences of a variance(*y*), and it will be considered as a sufficient positive statement(*z*);[87] and on the other hand it has been decided that the omission of a scilicet will not render an immaterial averment material to be proved as stated, even in a criminal proceeding(*a*), unless some positive allegation be adopted, as the words "and no more"(*b*).[88]

(*w*) Bristow *v.* Wright & another, Dougl. 667.—Ditchburn *v.* Spracklin & others, 5 Esp. Rep. 3.—Weall *v.* King & King, 12 East, 452.

(*x*) Gordon *v.* Austin & others, 4 T. R. 611.—Whitwell *v.* Bennet, 3 Bos. & Pul. 559.—N. B. The octavo edition of the 4 T. R. does not state the case correctly, but the first folio edition does.

(*xx*) Hockin *v.* Cooke, 4 T. R. 314.—Doe d. Spicer *v.* Lea, 11 East, 314.

(*y*) Grimwood *v.* Barrit, 6 T. R. 462. 2 Bos. & Pul. 118. n. a.—1 Saund. 170. n. 2.—2 Saund. 291. a. b. c.—Hayman *v.* Rogers, 1 Stra. 233.—The King *v.* The Mayor, &c. of York, 5 T. R. 71.—Pope *v.* Foster, 4 T. R. 591.—Symmons *v.* Knox, 3 T. R. 68.—Rex v. Pollman and others, 2 Campb. 231.

(*z*) 2 Saund. 291. a.—Hayman v. Rogers, 1 Stra. 233.

(*a*) The King *v.* Gillham, 6 T. R. 265.—Gwinnett *v.* Phillips et al., 3 T. R. 643. 5.—Rex *v.* Pollman and others, 2 Campb. 231.—Myers *v.* Kent, 2 New Rep. 464.—sed vide Symmons *v.* Knox, 3 T. R. 68.

(*b*) Symmons *v.* Knox, 3 T. R. 68.—

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the post-master-general to transport the mail, was alleged, and it was held that the contract must be proved, although the indictment might have been good without such an allegation. *United States* v. *Porter*, 3 *Day's Rep.* 283. But see *Wilson* v. *Codman's Exr.* 3 *Cranch*, 209

(84) Vide *De Forest* v. *Brainerd*, 2 *Day's Rep.* 528. *Beers* v. *Botsford*, 3 *Day's Rep.* 159. *Rodman & others* v. *Forman*, 8 *Johns Rep.* 26. *Page* v. *Woods*, 9 *Johns. Rep.* 82. *Ferguson* v. *Harwood*, 7 *Cranch*, 413.

(85) Vide *Whitlock* v. *Ramsey's Admx.* 2 *Mun.* 510.

(86) Vide *Brown* v. *Sayce*, 4 *Taunt.* 321.

(87) So, times and sums, if material, must be proved, although laid under a scilicet. *Vail* v. *Lewis & Livingston*, 4 *Johns. Rep.* 450. *Phillips' Ev.* 163. n.

(88) As the cases on the subject of variance are very numerous, it may not be improper to collect a few additional ones, without, however, stating the point

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An *averment* signifies a positive statement of facts in opposition to argument or inference(*c*); and when the obligation on the defendant to perform his contract depended on any event which *would not other-

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2 Saund. 206. a. It has indeed been said by counsel in argument, and as obiter dicta in many of the cases referred to in the note (y) supra, and by some very accurate elementary writers, that the omission of a scilicet or videlicet will frequently render it material to prove precisely as stated, matter which would not otherwise be material, and that it is therefore necessary to state sums, time & place, though immaterial under a scilicet, in order to avoid the consequences of a variance. See 2 Saund. 291. c. n. 1.—Peake's Law of Evid. 2d ed. 196, 7. But with deference, it is presumed on the authority of the case in 6 T. R 265. and upon the principle on which the other decisions are founded, and from the doctrine of venues in transitory actions, ante, 269. 282. and from the circumstances of time and place being in general immaterial to be proved as stated, even in an indictment—(see 4 Hawk. 7 ed. 46, 7—2 Hale's Pl. Cr. 179, 180.—2 Inst. 318.)—that the omission of a scilicet will not render it material to prove precisely as stated, matter which is immaterial. As to the nature and use of a scilicet in general, see The King *v.* Stevens et al., 5 East, 252. 2 Saund. 291. n. 1.

(*c*) Rex *v.* Horne, Cowp. 683, 4.—Bac. Ab. Pleas, B.

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decided in each, and arrange them under distinct heads, in order that all which relate to any particular branch of the subject may be presented to the reader at one view.

1. Variance in proof of record. *Rodman & others* v. *Forman*, 8 *Johns. Rep.* 26. *Page* v. *Woods*, 9 *Johns. Rep.* 82. *Brooks* v. *Bemiss*, 8 *Johns. Rep.* 455.

2. Of writs, executions, &c. *Green* v. *Rennett*, 1 *Term Rep.* 656. *Bissel* v. *Kip*, 5 *Johns. Rep.* 89. *Byne* v. *Moore*, 5 *Taunt.* 187. *Beers* v. *Botsford*, 3 *Day*, 159.

3. Proceedings in Chancery. *Thompson* v. *Jameson*, 1 *Cranch*, 283.

4. Grants, leases, bonds and other instruments under seal. *Tempany* v. *Burnaud*, 4 *Campb.* 20. *Middleton* v. *Sandford*, *Id.* 34. *Phillips & Butler* v. *Rose*, 8 *Johns. Rep.* 392. *Franklin & others* v. *Talmadge*, 5 *Johns. Rep.* 84. *Gordon & others* v. *Brown's Ex'r.* 3 *Hen. & Mun.* 219. *Adams* v. *Spear*, 1 *Hayw.* 215. *State* v. *Street*, *Taylor*, 128. *Evans* v. *Smith*, 1 *Wash.* 172. *M'Williams* v. *Willis*, *Id.* 199. *Drummond* v. *Crutcher*, 2 *Wash.* 218. *James* v. *Walruth*, 8 *Johns. Rep.* 410.

5. Policy of Insurance. *Cohen* v. *Hannam*, 5 *Taunt.* 101.

6. Bills of Exchange and Promissory Notes. *Roche* v. *Campbell*, 3 *Campb.* 247. *Hodge* v. *Fillis & others*, *Id.* 463. *Pease & another* v. *Morgan*, 7 *Johns. Rep.* 468. *Wilmot* v. *Monson*, 4 *Day*, 114. *Saxton & Hutcheson* v. *Johnston*, 10 *Johns. Rep.* 418. *Wood* v. *Bulkley*, 13 *Johns. Rep.* 486. *Sheehy* v. *Mandeville*, 7 *Cranch*, 208.

7. Other simple contracts. *Crawford & others* v. *Morrell*, 8 *Johns. Rep.* 253. *Smith* v. *Barker*, 3 *Day*, 312. *Harringtou & others* v. *Macmorris*, 5 *Taunt.* 228. *Baylies & another* v. *Fettyplace & another*, 7 *Mass. Rep.* 325. *Drake* v. *Watson*, 4 *Day*, 37. *Burnham* v. *Webster*, 5 *Mass. Rep.* 270. *Alexander* v. *Harris*, 4 *Cranch*, 299.

8. In name of corporation. *The People* v. *Runkel*, 9 *Johns. Rep.* 47. *Gilbert & another* v. *Nantucket Bank*, 5 *Mass. Rep.* 98. *Medway Cotton Manufactory* v. *Adams & another*, 10 *Mass. Rep.* 360.

9. In name of place. *Phillips' Ev.* 165, 166.

10. Other cases of variance. *Lewis* v. *Few*, 5 *Johns. Rep.* 1. *Southwick* v. *Stevens*, 10 *Johns. Rep.* 443. *De Forest* v. *Brainerd*, 2 *Day*, 628.

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wise appear from the declaration to have occurred, it is obvious that an averment of such event is essential to a logical statement of the cause of action, and should precede the statement of the defendant's breach. Such averments in a special action of assumpsit usually are, 1*st*, of the *performance* or excuse for non-performance of a condition precedent; 2*dly*, of the defendant's *notice* of such performance; and 3*dly*, of the defendant's having been *requested* to perform his contract(*d*).

When the consideration of the defendant's contract was *executed* or past at the time of making the contract, and his performance was not to depend on any subsequent event or other circumstance essential to the action, the declaration should proceed at once from the statement of the contract to the breach, without any intermediate averments, as in a count on an indebitatus assumpsit, &c.(*e*). But when the consideration of the defendant's contract was *executory*, or his performance was to depend on some act to be done or forborne by the plaintiff, or on some other event, the plaintiff must aver the fulfilment of such condition precedent, whether it were in the affirmative or negative, or to be performed or observed by him or by the defendant, or by any other person,[89] or must show some excuse for the non-performance(*f*). And in the case of reciprocal covenants constituting *mutual conditions* to *be performed *at the same time*, the plaintiff must aver performance [*310]
or a readiness to perform his part of the contract(*g*). Thus in declaring on a promise to pay a sum of money in consideration that the plaintiff would execute a release, the declaration must aver that such release was executed or tendered(*h*).[90] So on a promise to pay money in consideration of forbearance by the plaintiff, the declaration must aver such forbearance(*i*); and in actions for not delivering goods sold, the plaintiff must in general aver a readiness on his part to pay the price, &c.(*k*)[91] But where an estate or interest passed or vested immediately

(*d*) Rex *v.* Horne, Cowp. 683, 4, and as to averments of performance of conditions precedent, and of notice and request in general, see Com. Dig. Pleader, C. 50, &c.—1 Saund. 235. n. 8.—Bac. Ab. Pleas and Pleading.

(*e*) Post. 2 Vol. 35. 141, 2.

(*f*) Ughtred's Case, 7 Co. 10. a.—Com. Dig. Pleader, C. 51, 52.—Jones et al. *v.* Barkley, Dougl. 686.—Hotham et al. *v.* The East India Company, 1 T. R. 638.

(*g*) Id. ibid.—Rawson et al. *v.* Johnson, 1 East, 203.

(*h*) Collins *v.* Gibbs, 2 Burr. 899.—Smith *v.* Wilson, 8 East, 437.

(*i*) Com. Dig. Pleader, C. 52.—Post. 2 Vol. 121, 2.

(*k*) Rawson et al. *v.* Johnson, 1 East, 203.—Post. 2 Vol. 138.

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(89) Vide *Dodge* v. *Coddington*, 3 *Johns. Rep.* 146. *Jennings* v. *Camp*, 13 *Johns. Rep.* 94. *M'Millan* v. *Vandeslip*, 12 *Johns. Rep.* 165. *Faxon* v. *Mansfield and Holbrook*, 2 *Mass. Rep.* 147. *Ferris* v. *Purdy & Whitney*, 10 *Johns. Rep.* 359. *Wright* v. *Tuttle*, 4 *Day*, 322. *Wilt & Green* v. *Ogden*, 13 *Johns. Rep.* 57. *Thorpe* v. *White & others*, 13 *Johns. Rep.* 53.

(90) Vide *Smith et al.* v. *Woodhouse*, 2 *New Rep.* 233. *Miller* v. *Drake*, 1 *Caine's Rep.* 45. *Green* v. *Reynolds*, 2 *Johns. Rep.* 207.

(91) Vide *Porter* v. *Rose*, 12 *Johns. Rep.* 209. *West* v. *Emmons*, 5 *Johns. Rep.* 179.

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in the plaintiff, and was to be defeated by a condition *subsequent* or matter ex post facto whether in tthe affirmative or negative, or to be performed by the plaintiff or defendant or by any other person, performance of that matter need not be averred(*l*); as if a grant of an annuity were till the plaintiff should be advanced to a benefice, he need not say that he is not yet advanced(*m*).

As observed by Lord Mansfield, in delivering his judgment in Kingston *v.* Preston(*n*), "there are three kinds of covenants: 1*st*, such as are called *mutual* and *independent*, where either party may recover damages from the other for the injury he may have received by [*311] a breach of the covenants *in his favour, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. 2*dly*, There are covenants which are *conditions dependent* on each other; in which the performance of one depends on the prior performance of the other, and therefore till this prior condition be performed the other party is not liable to an action on his covenant. 3*dly*, There is also a third sort of covenants which are *mutual conditions* to be performed at *the same time;* and in these if one party was ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act.—The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties, and however transposed they may be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance. In the case before the court it would be the greatest injustice if the plaintiff should prevail: the essence of the agreement was that the defendant should not trust to the personal security of the plaintiff, but before he delivered up his stock and business, should have good security for the payment of the money; the giving such security therefore must necessarily be a condition precedent."

There are no precise technical words in a deed or other contract to make a stipulation a condition precedent or subsequent, neither does it depend on the circumstance whether the clause is placed prior or poste- [*312] rior in the deed, so that it operates *as a proviso or covenant, for the same words have been construed to operate as either the one or the other,[92]

(*l*) Ughtred's case, 7 Co. 10 a.—Cornish *v.* Bolitho, Willes, 145, 6.

(*m*) Id. Colthirst *v.* Bejushin, Plow. Com. 25. b.—30. a.—32. b.—Hotham & another *v.* The East India Company, 1 T. R. 645.—Wood & others *v.* Worsley, 2 H. Bla. 579.

(*n*) Dougl. 690, 1.—and see the note in Willes, 157. n. a.—1 Saund. 320. n. 4.—2 Saund. 108. n. 3. 352. n. 1.—Tidd's Prac. 3d. ed. 382 to 386.—Rawson et al. *v.* Johnson, 1 East, 203.—Com. Dig. Pleader, C. 50 to C. 68. as to conditions precedent and averments of performance in general.

(92) Vide *Barnes* v. *Madan*, 2 *Johns. Rep.* 148. *Cunningham & another* v. *Morrell*, 10 *Johns. Rep.* 205. *Smith et al.* v. *Woodhouse*, 2 *New Rep.* 240.

according to the nature of the transaction(*o*). The contradiction in the determinations has arisen not from a denial, but from a misapplication of this principle in the particular instance(*p*).

The words by which conditions precedent are usually created are, *for*(*q*), in *consideration* of, *ita quod*(*r*), *proinde*(*s*), &c.—In general if the agreement be that one party shall do an act, and that *for the doing thereof* the other shall pay a sum of money, the doing of the act is a condition precedent to the payment, and the party who is to pay shall not be compelled to part with his money till the thing be performed.[93] If there be a condition precedent, however improbable the thing may be, it must be complied with, or the right which was to attach on its being performed does not vest(*t*); as if the condition be that A shall enfeoff B, and A do all in his power to perform the condition, and B will not receive livery of seisin, it is clear that the right which was to depend on the performance of that condition did not arise. And if a person undertake for the act of a stranger, the cases are uniform to show that such act must be performed(*u*). And on this principle, where by the proposals of the Phœnix insurance company against fire it was stipulated that persons insured, *should in case of loss by fire, [*313] procure a certificate of the minister, &c. of the parish, importing that they knew the character of the assured, and believed that he had really sustained the loss without fraud, it was held that the procuring of such a certificate was a condition precedent to the right of the assured to recover, and that although it was found by verdict, that the minister, &c. wrongfully refused to sign the certificate, yet as it was not averred in the declaration that the certificate was actually obtained, the judgment was arrested.

Some rules have been collected, by which to discover the intention of the parties and to ascertain when performance or excuse of performance by the plaintiff is necessary to be averred in the declaration(*y*); and *1st*, where a day was appointed for payment by the defendant, of

(*o*) Per Ashhurst, J.—Hotham and another *v.* The East India Company, 1 T. R. 645.—Campbell *v.* Jones, 6 T. R. 570.—Porter *v.* Shephard, 6 T. R. 668. Morton *v.* Lamb, 7 T. R. 130.—Rawson et al. *v.* Johnson, 1 East, 203.

(*p*) 1 Saund. 320. a.—Willes, Rep. 157. n. a.

(*q*) Jones et al. *v.* Barkley, Dougl. 688.—1 Saund. 320. n. 4.—Willes, 157. n. a.—Tidd's Prac. 3 ed. 383.—Lock *v.* Wright, 1 Stra. 569.—Peters *v.* Opie, 1 Vent. 177. 214.—2 Saund. 350. S. C.

(*r*) Feltham *v.* Cudworth, 2 Lord Raym. 766.

(*s*) Jones et al. *v.* Barkley, Dougl. 688.—Mucklestone *v.* Thomas, Willes, 149.

(*t*) Worsley *v.* Wood et al., 6 T. R. 719.

(*u*) Per Lord Kenyon, C. J. and Lawrence, J., Worsley *v.* Wood et al. 6 T. R. 719. 722.

(*y*) 1 Saund. 320. n. 4.—Tidd's Prac. 3d edit. 385.

(93) Vide *Dodge* v. *Coddington*, 3 *Johns Rep.* 146. *Cunningham & another* v. *Morrell*, 10 *Johns. Rep.* 203. *Green* v. *Reynolds*, 2 *Johns. Rep.* 207. *Jones* v. *Gardner*, 10 *Johns. Rep.* 266.

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money or part of it, or for his doing any other act, and such day was to happen *before* the thing which was the consideration of the defendant's contract was to be performed, an action may be brought for the money or for not doing such other act before performance by the plaintiff;[94] for it appears that the defendant relied upon his remedy and did not intend to make the plaintiff's performance[95] a condition precedent(*z*). 2*dly*, But when a day was appointed for the performance of the defendant's contract, and such day was to happen after the time [*314] when *the consideration of the defendant's contract was to be performed, in such case in general no action can be supported, until the plaintiff has performed his act, and such performance must be averred(*a*). 3*dly*, That where the plaintiff's covenant or stipulation constituted only *a part* of the consideration of the defendant's contract, and the defendant has actually received a partial benefit, and the breach on the part of the plaintiff might be compensated in damages, an action may be supported against the defendant, without averring performance by the plaintiff(*b*);[96] for where a party has received a part

(*z*) See the cases referred to in 1 Saund. 320. n. 4.—Martindale *v* Fisher, 1 Wils. 88.

(*a*) 1 Saund. 320. b.

(*b*) 1 Saund. 320. b.—The Duke of St. Albans *v.* Shore, 1 Hen. Bla. 273.—Campbell *v.* Jones, 6 T. R. 572.—Havelock *v.* Geddes and others, 10 East, 555. 563.—Davidson *v.* Gwynne, 12 East, 389.—Champion *v.* Short, 1 Camp. 53.

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(94) Vide *Cunningham & another* v. *Morrell*, 10 *Johns. Rep.* 204. *Barruso* v. *Madan*, 2 *Johns. Rep.* 145. 2 *H. Black. Rep.* 392. In *Terry & another* v. *Dunize*, 2 *H. Black. Rep.* 389. it was held that if A agree to finish a piece of work for B, by a certain day, part of which is to be paid by instalments, as the work progressed, and the residue on the completion of it, A may maintain an action for the entire consideration without averring performance; and this rule was adopted by the Supreme Court of the state of New York in *Seers* v. *Fowler*, 2 *Johns. Rep.* 272. *Havens* v. *Bush*, *Id.* 387. *Wilcox* v. *Ten Eyck*, 5 *Johns Rep.* 78. But these cases were over-ruled in *Cunningham & another* v. *Morrell*, 10 *Johns. Rep.* 203. where the agreement being to pay the plaintiff a certain sum for completing the whole of the work, to be paid in instalments as the work progressed, it was held that if the plaintiff went for the whole of the consideration money, he must aver a performance of the whole work, or if for a ratable part of the money, he must show a ratable performance. Cases of this kind are clearly distinguishable from those in which the day of payment was *fixed before* the performance of the consideration on the part of the defendant; for here either the whole or some part of the work was to be done, before the whole or any part of the price could be demanded. And if, as in *Wilcox* v. *Ten Eyck*, ubi sup. part is to be paid at *specified times*, and the residue on the delivery of the deed, or other act to be performed by the defendant, and the covenants as far as regards the prior payments are undoubtedly independent, yet it does not therefore follow that the covenant for paying the residue must also be independent.

(95) Vide *Smith et al.* v. *Woodhouse*, 2 *New Rep.* 233.

(96) Acc. *Bennet* v. *Executors of Pixley*, 7 *Johns. Rep.* 249. *Oberneyer* v. *Nichols*, 6 *Binney*, 159. In the last cited case the jury were allowed to deduct from the sum covenanted to be paid by the defendant to the plaintiff, an equiva-

of the consideration for his agreement, it would be unjust that because he has not had the whole he should enjoy that part without paying or doing any thing for it, and therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damage he may have sustained in not having received the whole consideration. In these cases, however, it seems necessary to aver in the declaration performance of at least a part of that which the plaintiff covenanted to do, or that the defendant has otherwise received a partial benefit(*c*). 4*thly*, But where the mutual covenants constitute the *whole* consideration on both sides, they are mutual conditions, the one precedent to the other,[97] and the plaintiff must aver performance on his part(*d*). 5*thly*, Where two acts are to be done at *the same time*, as where A covenants or agrees to convey an estate or to deliver goods to B on *a named day or generally, and in consideration thereof, B covenants [*315] to pay A a sum of money on the same day, or generally; neither can maintain an action without showing performance of, or an offer to perform, or at least a readiness to perform, his part, though it is not certain which of them was obliged to do the first act;[98] and this rule particularly applies to contracts of sale(*e*). 6*thly*, Where there are mutual promises and agreements, yet if one thing be the consideration for the other, there the plaintiff's performance must in general be averred(*f*). But there are some cases in which it has been decided, that where it appears that the defendant relied rather on the plaintiff's *agreement* to perform his act than his actual performance of it, it is not necessary to aver[99] his performance(*g*). 7*thly*, It is said that where the participle "doing," "performing," &c. is prefixed to a covenant by another person, it is a mutual covenant, and not a condition precedent(*h*).

In point of form an averment may be in any words amounting to an express allegation(*i*); as that the plaintiff *avers*, or *in fact saith*, or Form of averment.

(*c*) 1 Saund. 320. c.—Ritchie *v.* Atkinson, 10 East, 295.

(*d*) 1 Saund. 320. n. 4.

(*e*) 1 Saund. 320. n. 4.—2 Saund. 352. n. 3. & 108. n. 3.—Rawson et al. *v.* Johnson, 1 East, 203.

(*f*) Thorpe *v.* Thorpe, 1 Salk. 171. S. C. 1 Lord Raym. 665.—Campbell *v.* Jones, 6 T. R. 570.—Morton *v.* Lamb, 7 T. R. 125.—2 Saund. 352. n. 3.—Bach *v.* Owen, 5 T. R. 409.

(*g*) Martindale *v.* Fisher, 1 Wils. 88. Bach *v.* Owen, 5 T. R. 409.—Anon., 1 Lev. 87.—Com. Dig. Plead. C. 54.—Smith et al. *v.* Woodhouse, 2 New R. 233.

(*h*) Boone *v.* Eyre, 2 Bla. Rep. 1313. Mucklestone *v.* Thomas, Willes, 146. Thomas *v.* Cadwallader, Willes, 496.

(*i*) 1 Saund. 117. n. 4.—Com. Dig. Plead. C. 77.—As to the manner of making an averment, see Rex *v.* Horne,

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lent for the injury sustained, by the latter not performing the covenants on his part.

(97) Vide *Barruso* v. *Madan*, 2 *Johns. Rep.* 145.

(98) Vide *Green* v. *Reynolds*, 2 *Johns. Rep.* 207. *Porter* v. *Rose*, 12 *Johns. Rep.* 209.

(99) Vide *Close* v. *Miller*, 10 *Johns. Rep.* 90. *Jones* v. *Gardner*, 10 *Johns. Rep.* 266.

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although, or *because*, or *with this that*, or *being*, &c.; and where it is necessary to aver the life of a person in pleading, it has been held sufficient if it appear by implication that the *life continues(*j*). So if it be stated that A was seised in fee and died, and that the land descended [*316] to B as his son and heir, this was held a sufficient averment that A died seised(*k*).[100] It is not unusual in declarations on mutual promises, and in covenant between landlord and tenant, to aver that the plaintiff hath performed all things on his part to be performed, but this is unnecessary(*l*); though it may after verdict aid the omission of an averment of plaintiff's performance of a particular act(*m*).

Where it is necessary on the part of the plaintiff to aver *performance*, it must be shown to have been according to the *intent* of the contract, for it is not sufficient to pursue the words if the intent be not also performed; as on a promise in consideration that the plaintiff would cause A to come to be bound to the defendant for 20*l*., it is not sufficient to aver that the plaintiff caused A to come to be bound, but it ought to be also alleged that A was bound(*n*). And an *exact performance* must also be stated, as on a promise in consideration that the plaintiff would procure the loan of 20*l*. for one year, it is not sufficient to allege that he procured a part at one time and a part at another, for he ought to procure the whole for the whole year(*o*): and performance ought to be shown with such certainty, that the court may judge whether the [*317] intent of the covenant has been duly fulfilled, *as in consideration that the plaintiff would acquit A of a debt, it is not sufficient to say that he acquitted him, without showing how, viz. by deed(*p*): but if the plaintiff show a certain and exact performance, it is frequently sufficient to state it in general terms, without alleging particularly how he performed; as on a promise to pay so much as the plaintiff should expend for the officers of the army in such a suit, an averment that he spent so much is sufficient, without showing for what officers in particular(*q*).[101] And there are some instances where the thing agreed to be

Cowp. 683, 4.—1 Saund. 117. n. 4.—Eaton *v.* Southby, Willes, 134.—Mead *v.* Robinson, Willes, 427.

(*j*) 1 Saund. 235. n. 8.—2 Saund. 61. n. 9.

(*k*) 2 Saund. 61. g. n. 9.

(*l*) 1 Saund. 235. n. 5.

(*m*) Thorpe *v.* Thorpe, Lutw. 253.—Prideaux v. Rawlins, Sir T. Jones, 125. Com. Dig. Pleader, C. 61.

(*n*) Com. Dig. Pleader, C. 58.—Gurnons *v.* Hodges, Yelv. 11.

(*o*) Com. Dig. Pleader, C. 59.—Dorrington v. East, Yelv. 87.

(*p*) Leneret *v.* Rivet, Cro. Jac. 503. Com. Dig. Pleader, C. 60.—King *v.* Hobs, Cro. Eliz. 914.—Prideaux *v.* Rawlins, Sir T. Jones, 125.

(*q*) Com. Dig. Pleader, C. 61.

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(100) So, if it be stated that the defendant gave evidence on the trial of a cause, that is a sufficient averment that he had notice of the pendency of the suit. *Barney* v. *Dewey*, 13 *Johns. Rep.* 224.

(101) In a case in Connecticut, where the plaintiff averred generally that he had kept and performed all the covenants in the indenture on his part to be performed, it was held not only sufficient, but the most proper form: and that the

done by the plaintiff having been substantially performed, though not in the exact manner, nor with all the circumstances mentioned, it was considered as a sufficient performance(*r*); as where the condition was to enfeoff, a conveyance by lease and release was held sufficient(*s*): so where the condition was to deliver the will of the testator, and the plaintiff delivered letters testamentary(*t*). Where the condition precedent was in the disjunctive, the averment of performance must be framed accordingly and not in the conjunctive(*u*).[102]

In averring an *excuse* of performance by the plaintiff, he must state his readiness to perform the act, and the particular circumstances which constitute such excuse; and therefore where the declaration stated that arbitrators *could not* make their award without showing the special cause which prevented them, it was held insufficient(*w*). In stating* an excuse for non-performance of a condition precedent, the plaintiff must, in general, show that the defendant either *prevented* the performance, or rendered it unnecessary to do the prior act, by his *neglect* or by his *discharging* the plaintiff from performance(*ww*). The performance of a condition precedent may also be excused by the *absence* of the defendant if his presence were necessary for the plaintiff's performance, or by his *neglect* to do the first act, if it were incumbent on him to perform it(*x*). It may also be excused in some cases by the defendant's not giving *notice* to the plaintiff(*y*). [*318]

Where the respective acts to be done by the plaintiff and defendant were *mutual*, and were to be performed at the *same time*, the plaintiff should aver his *readiness* to perform *his* part, and either state that the defendant neglected to attend when necessary, or refused to perform his part, or discharged the plaintiff from his performance(*z*).[103] Thus,

(*r*) Worsley *v.* Wood et al., 6 T. R. 722.

(*s*) Co. Lit. 207. a.

(*t*) 1 Roll. Ab. 426. pl. 4.

(*u*) Burgess *v.* Brazier, 1 Stra. 594.

(*w*) Coppin *v.* Hurnard, 2 Saund. 129. 132.

(*ww*) Hotham & another *v.* The East India Company, 1 T. R. 638.—Jones et al. *v.* Barkley, Dougl. 684. 687-8.—Co. Lit. 206. b.

(*x*) 1 Roll. Ab. 457, 8.—Morton *v.* Lamb, 7 T. R. 131.

(*y*) 1 Roll. Ab. 457, 8.—Co. Lit. 207. a.

(*z*) Jones et al. *v.* Barkley, Dougl. 684.—Rawson et al. *v.* Johnson, 1 East, 203.—2 Saund. 352. n. 3.

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distinction was that where the act involved in it a question of law, viz. whether it was done as the law directed, the quo modo must be pointed out; but where it is a mere matter of fact, a general averment of performance is the most proper. *Wright* v. *Tuttle*, 4 *Day*, 313.

(102) Where several things are to be done by the plaintiff, precedent to the performance of the defendant's part of the agreement, it is necessary for the plaintiff to aver performance of all the things to be done by him; but if the performance of a part be not averred, and it appear by the defendant's plea, that the part in question was performed, the defect in the declaration is cured. *Zerger* v. *Sailer*, 6 *Binney*, 24.

(103) Vide *Miller* v. *Drake*, 1 *Caine's Rep.* 45. *Porter* v. *Rose*, 12 *Johns. Rep.* 209.

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where the defendant stipulated to pay a sum of money on the plaintiff's assigning to him a certain equity of redemption, and the declaration averred that the plaintiff was ready and willing, and offered to assign, and tendered a draft of an assignment to the defendant for his approbation, and offered to execute and deliver, and would have executed and delivered such assignment to the defendant, but that he absolutely *discharged* the plaintiff from executing the same or any assignment whatever, and had *not paid the money, such declaration was on demurrer held sufficient(*a*). So in an action for the non-delivery of goods, which the defendant had undertaken to deliver on request at a certain price, it is sufficient for the plaintiff in his declaration, without alleging an actual tender of the price, to aver such request, and that he was ready and willing to receive the goods, and to pay for them according to the terms of the sale, and that the defendant had notice of such readiness, but refused to deliver them(*b*); or if the defendant did not attend at the appointed place, such non-attendance should be stated, which would render an averment of request unnecessary(*c*)[104]

[*319]

Consequences of mistake.

The omission of the averment of the performance of a condition precedent, or of an excuse for the non-performance, is fatal on demurrer, or in case of judgment by default(*d*); but after verdict the omission may in some cases be aided by the common law intendment, that every thing may be presumed to have been proved which was necessary to sustain the action;[105] for a verdict will cure a case defectively stated(*e*); but where the non-performance of the condition precedent, is admitted by the pleadings, a verdict will not aid the defect(*f*).

Notice.

It is frequently necessary, particularly in special actions of assumpsit, to aver that the defendant *had notice of* some fact or facts previously *stated; and a great variety of the instances where such averment is necessary are collected in the books referred to in the note(*g*); and

[*320]

(*a*) Jones *v.* Barkley, Dougl. 684, 5.

(*b*) Rawson et al. *v.* Johnson, 1 East, 203.

(*c*) Morton v. Lamb, 7 T. R. 129. 131.

(*d*) Collins *v.* Gibbs, 2 Burr. 899.—2 Saund. 352. n. 3.

(*e*) Rawson et al. *v.* Johnson, 1 East, 209, 210.—2 Saund. 352. n. 3.—Collins *v.* Gibbs, 2 Burr. 900.—Dougl. 687. n. g. & h.—1 Saund. 228. n. 1. Sed vide Rushton *v.* Aspinall, Dougl. 679.—Leneret *v.* Rivet, Cro. Jac. 503.

(*f*) Worsley *v.* Wood et al., 6 T. R. 710.

(*g*) As to averring *notice*, see Com. Dig. tit. Pleader, C. 73, 74, 5.—Vin. Ab. Notice.—Harris *v.* Ferrand, Hardr. 42.—The King *v.* Holland, 5 T. R. 621. 4.

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(104) Where the power to perform a covenant on the part of the plaintiff, depends on an act previously to be done on the part of the defendant, it is unnecessary for the plaintiff to aver a tender and refusal, but an averment of a readiness to perform is sufficient: as, where A covenants to convey, and B covenants to execute a bond and mortgage for the land, in an action by B against A, it is sufficient for the plaintiff to aver his readiness to perform. *West* v. *Emmons*, 5 *Johns. Rep.* 179. Vide *Robbins* v. *Luce*, 4 *Mass. Rep.* 474.

(105) Vide *Rucker & another* v. *Green*, 15 *East's Rep* 290, 291. *Owens* v. *Morehouse*, 1 *Johns. Rep.* 276, 277. *Leffingwell & Pierpoint* v. *White*, 1 *Johns. Cas.* 99. *Bayard* v. *Malcolm*, 2 *Johns. Rep.* 571. post. 402.

from these it appears, that when the matter alleged in the pleading is to be considered as lying more properly in the knowledge of the plaintiff than of the defendant, then the declaration ought to state that the defendant had notice thereof;[106] as where the defendant promised to give the plaintiff as much for a commodity as another person had given or should give him for the like, or to pay the plaintiff what damages he had sustained by a battery, or to pay the plaintiff his costs of suit(*h*): and in a declaration against the drawer or indorsee of a bill of exchange, it is material to aver notice of non-payment by the acceptor, or some excuse for the neglect(*i*).[107] But where the matter does not lie more properly in the knowledge of the plaintiff than of the defendant, notice need not be averred(*j*).[108] Therefore if the defendant contracted to do a thing, on the performance of an act by a *stranger*, notice need not be averred, for it lies in the defendant's knowledge as much as the plaintiff's, and he ought to take notice at his peril(*k*);[109] and though it is usual in practice, in a declaration in debt upon an award, and in the replication in debt on bond, conditioned *for performance of an award, [*321]
to aver that the defendant had notice of the award, such averment is unnecessary, because the defendant ought to take notice of the award, unless it was expressly provided in the submission that the award should be notified to the parties, when notice must be alleged(*l*).

So if upon a treaty of marriage a promise be made by a third person to pay the feme 100*l.* after the death of the husband, it is not necessary, in an action upon this promise, to aver that the defendant had notice of the death; and in a declaration on a promise to pay a sum of money at the full age of an infant, notice of his attaining that age need not be alleged, because it is as notorious to the one as to the other(*m*). On the same principle, if a man be bound to another to indemnify him against the acts of a third person, no notice of those acts is necessary to be alleged(*n*); and in an action on a promissory note by the indorsee

(*h*) 2 Saund. 62. a. n. 4.—Henning's Case, Cro. Jac. 432.—Harris *v.* Ferrand, Hardr. 42.—Com. Dig. tit. Pleader, C. 73.—The King *v.* Holland, 5 T. R. 621. 624.—Smith *v.* ———, 11 Mod. 48.

(*i*) Rushton *v.* Aspinall, Dougl. 679, 680.—Bristow et al. *v.* Waddington et al., 2 New R. 355.

(*j*) 1 Saund. 117. n. 2.—2 Saund. 62. a. n. 4.—Freem. Rep. 285.

(*k*) Com. Dig. Pleader, C. 75.

(*l*) 2 Saund. 62. a. n. 4.—Harris *v.* Ferrand, Hardr. 42.—Com. Dig. Pleader, C. 75.—The King *v.* Holland, 5 T. R. 621. 624.

(*m*) Harris *v.* Ferrand, Hardr. 42.—Smith *v.* ———, 11 Mod. 48.

(*n*) Cutler et al. *v.* Southern et al., 1 Saund. 116.

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(106) Vide *Lent & another* v. *Padelford*, 10 *Mass. Rep.* 238.

(107) Vide *Slacum* v. *Pomery*, 6 *Cranch*, 221.

(108) Vide *Lent & another* v. *Padelford*, 10 *Mass. Rep.* 230. 238.

(109) So, where the defendant has undertaken as a guaranty for A B, it is unnecessary to aver notice to the defendant of a failure of performance on the part of A B. *Williams* v. *Granger*, 4 *Day*, 444. *Lent & another* v. *Padelford*, 10 *Mass. Rep.* 230. 238.

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against the drawer, notice of the indorsement need not be averred(*o*); and if the defendant's promise were to pay on the performance of a certain act, even by the plaintiff himself to the defendant, or a stranger, there are cases in which it has been decided that notice of the act need not be averred, because by the terms of the contract the defendant engaged to take notice of it at his peril; as if the defendant contracted to pay on the marriage of the obligee with B(*p*); and in the case of a pre-
[*322] cedent condition to be performed by the plaintiff to the defendant *in person, notice of the plaintiff's performance need not be averred, because it is implied(*q*).

Where notice is necessary, it ought to appear that it was given in due time, and to a proper person(*r*); but where a special request is averred, notice will sometimes be presumed(*s*); and the absconding of the party or other circumstances may be stated as an excuse for the want of notice(*t*). The omission of an averment of notice when necessary, will be fatal on demurrer, or judgment by default(*u*); but may be aided by a verdict(*x*),[110] unless in an action against the drawer of a bill, when the omission of the averment of notice of non-payment by the acceptor is fatal even after verdict(*y*).[111]

Request.

Whenever it is essential to the cause of action, that the plaintiff should have *requested* the defendant to perform his contract, such *request* must be stated in the declaration, and proved(*z*). It has been observed, that if it had been held that a request were essential in all cases, many vexatious actions might be avoided, but there are a variety of instances in which it is settled that no request is necessary anterior to the action, and consequently need not be stated in pleading(*a*); thus where the declaration is upon a contract to pay a *precedent* debt,[112] as in the case for the common counts for goods sold, work and labour,

(*o*) Reynolds *v.* Davies, 1 Bos. & Pul. 625.

(*p*) Selby *v.* Wilkinson, 2 Bulstr. 254.—Com. Dig. Pleader, C. 75.

(*q*) Com. Dig. Pleader, C. 75.

(*r*) Id. ibid. C. 74.

(*s*) Bradley *v.* Toder, Cro. Jac. 228, 9.—Reynolds *v.* Davies, 1 B. & P. 626. Alfrey *v.* Blackamore, 3 Bulstr. 326, 7.

(*t*) Chitty on Bills, 2d edit. 345. n. i.—Nurse *v.* Frampton, 1 Salk. 214.—Vin. Ab. Notice, A. 2.

(*u*) Henning's Case, Cro. Jac. 432.

(*x*) Palgrave *v.* Windham, 1 Stra. 214.—1 Saund. 228. a.

(*y*) Rushton *v.* Aspinall, Dougl. 679.

(*z*) As to requests in general, see Com. Dig. Pleader, C. 69 to 73.—1 Saund. 33. n. 2.—Wallis *v.* Scott, 1 Stra. 88.—Bokenham *v.* Thacker, 2 Ventr. 75.—Butchers' Company *v.* Bullock, 3 Bos. & Pul. 438.

(*a*) Morgan *v.* Sargent, 1 B. & P. 59, 60.—Capp *v.* Lancaster, Cro. Eliz. 548. Post.—Chitty on Bills, 2d edit. 183, 4.

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(110) Vide *Spencer* v. *Overton*, 1 *Day's Rep.* 183.

(111) A general averment in a declaration on a bill of exchange, "of all which said premises the defendants afterwards, &c. had notice," is sufficient. *Boot & Bentley* v. *Franklin*, 3 *Johns Rep.* 207.

(112) Vide *Ernst* v. *Bartle*, 1 *Johns. Cas.* 319.

money lent, &c. no request need be stated or *proved(*b*); and though formerly a distinction was made between a promise to pay a precedent debt, and one to become due on a subsequent event, that distinction is now over-ruled; thus where the declaration stated that the defendant in consideration that the plaintiff *would* make him a set of sails worth 45*l.* promised to pay so much for them on request, it was decided that no request to pay was necessary to be stated, because on the making the sails the money immediately became due, and that the case before the court differed from those where the payment is to be to a third person, or where an award directs a request(*c*); and though a distinction was formerly taken between a promise by the defendant to pay a debt, originally his own, and that of a third person, that distinction has been since overruled(*d*). And in these cases it appears to be immaterial whether or not the defendant's contract were expressly laid to be to perform the same on request(*e*). So where the defendant was to perform the first act, a request need not be stated(*f*).[113] [*323]

But when by the express or implied terms of the contract, it was incumbent on the plaintiff, before the commencement of his action, to request the defendant to perform his contract, such request being as it were a condition precedent,[114] must be averred(*g*). Thus in an action for not delivering a horse, &c. sold by the defendant to the plaintiff, or for not finding *timber for repairs, the declaration should allege a special request to deliver the same(*gg*). So if the contract were to deliver up a bond to be cancelled on request(*h*), or if an award directed the defendant to perform some act on request(*i*), or if the defendant con- [*324]

(*b*) Birks *v.* Trippet, 1 Saund. 33. & id. n. 2.—Bul. N. P. 151.

(*c*) Wallis *v.* Scott, 1 Stra. 88.—Bokenham *v.* Thacker, 2 Ventr. 75.—Hill *v.* Wade, Cro. Jac. 523.

(*d*) Wallis *v.* Scott, 1 Stra. 89.—Hill *v.* Wade, Cro. Jac. 523.

(*e*) Wallis *v.* Scott, 1 Stra. 88.—Birks *v.* Trippet, 1 Saund. 33.—Capp v. Lancaster, Cro. Eliz. 548. *acc.*—Hill *v.* Wade, Cro. Jac. 523.—Silman *v.* King et al., Cro. Jac. 183.—Sackford v. Philips, Owen, 109.—Devenly *v.* Welbore, Cro. Eliz. 85. *contra.*

(*f*) Bristow et al. *v.* Waddington et al., 2 New Rep. 355.

(*g*) Com. Dig. Pleader, C. 69.—Phillips *v.* Fielding, 2 H. Bla. 131.—Birks *v.* Trippet, 1 Saund. 32, 3.—Bach *v.* Owen, 5 T. R. 409.—Peck *v.* Methold, 3 Bulstr. 297.

(*gg*) Bach *v.* Owen, 5 T. R. 409.—Lowe *v.* Kirby, Sir W. Jones, 56.—Rawson et al. *v.* Johnson, 1 East, 204. Com. Dig. Pleader, C. 69.

(*h*) Peck *v.* Methold, 3 Bulstr. 297.

(*i*) Birks *v.* Trippet, 1 Saund. 32.

(113) Where the promise was to do a certain act, or pay a sum of money, and the defendant had not done the act, a special request to pay the money need not be alleged. *Lent & another* v. *Padelford*, 10 *Mass. Rep.* 230. In an action on a promissory note for a certain sum payable in goods of one description, or of another, at the election of the promissee within eight days after date, it was held unnecessary for the plaintiff to aver an election or notice thereof to the defendant, who became liable immediately on the expiration of the eight days. *Townsend* v. *Wells*, 3 *Day's Rep.* 327.

(114) Vide *Ernst* v. *Bartle*, 1 *Johns. Cas.* 327.

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tracted as surety to pay the debt of a third person on request, in these cases the request must be alleged and proved(*j*), or there must be some allegation to dispense with it(*k*).

In point of *form* there are in *pleading* two descriptions of requests, the one termed a *special request*, stating by whom, and the time and place when it was made, the other the *licet sæpius requisitus*, or "although often requested so to do." When an actual request is essential to the support of the action, a special request must be stated, and it must be shown by and to whom the same was made, and the time and place of making it, in order that the court may judge whether the request were sufficient(*l*); and the omission of such special request has been holden bad on a general demurrer(*m*): and it has even been decided, that it would not be aided by verdict(*n*); but from the principle deducible from other cases, and a recent decision, it should seem that a verdict would at common law aid the defect(*o*), and that the objection
[*325] must now be taken by special demurrer(*p*)[115] The *licet *sæpius requisitus*, or "although often requested so to do," without stating the time and place of request, though usually inserted in the common breach to the money counts, is of no avail in pleading, and the omission of it will in no case vitiate the declaration(*oo*); and therefore where, in a declaration upon a note payable four months after date, it was objected in error that the request to pay the money in the note, was laid in the common breach at the end of the declaration to have been upon the same day and year aforesaid, which was the date of the note, and four months before it became due, it was adjudged upon a writ of error that there was no occasion to lay any request at all, for the bringing the action was a request in law(*pp*).

(*j*) Batesby *v.* Brooksbeck, Cro. Jac. 500.—Sackford *v.* Philips, Owen, 109. 1 Saund. 33. n. 2.—Sed vide Wallis *v.* Scott, 1 Stra. 88, 9.

(*k*) Bowdell *v.* Parsons, 10 East, 359. 361.

(*l*) Wallis *v.* Scott, 1 Stra. 89.—Com. Dig. Pleader, C. 69, 70, &c.—Birks *v.* Trippet, 1 Saund. 33.—Bach *v.* Owen, 5 T. R. 409.

(*m*) Bach *v.* Owen, 5 T. R. 409.

(*n*) Peck v. Methold, 3 Buls. 299.—Devenley *v.* Welbore, Cro. Eliz. 85.—Lowe *v.* Kirby, Sir W. Jones, 56.—1 Saund. 33. n. 2.—Com. Dig. Pleader, C. 69.

(*o*) Wallis *v.* Scott, 1 Stra. 89.—Palgrave *v.* Windham, 1 Stra. 214.—Frampton *v.* Coulson, 1 Wils. 33.—Mackmardo *v.* Smith et al., 7 T. R. 522. 1 Saund. 228. n. 1.—Bowdell *v.* Parsons, 10 East, 359.

(*p*) Bowdell *v.* Parsons, 10 East, 359.

(*oo*) Philips *v.* Fielding, 2 Hen. Bla. 131.—Morgan *v.* Sargent, 1 Bos. & Pul. 59, 60.—Buckley *v.* Thomas, Plowd. 128. b.—Harris *v.* Ferrand, Hardr. 38.

(*pp*) Frampton *v.* Coulson, 1 Wils. 33. Morgan *v.* Sargent, 1 Bos. & Pul. 59, 60.

(115) In an action against the indorser of a promissory note, the omission of a special demand of payment of the maker, in the declaration, is aided by verdict: and the general allegation, *although often requested*, is then sufficient, admitting that it would be ill on demurrer. *Leffingwell & Pierpoint* v. *White*, 1 *Johns. Cas.* 100.

The *breach* of the contract being essential to the cause of action, must in all cases be stated in the declaration(*q*). When the special count in assumpsit is merely for a money demand, and other common counts are subjoined, the usual breach in the conclusion of the declaration stating the request to pay to have been after the money on the special count was due, will suffice; and in declarations on bills of exchange and promissory notes, it is not usual to state any other breach than that at the end of the common counts(*r*). But when the breach is not merely the non-payment of money, it is usually stated in each special count. The breach must *obviously be governed by the nature [*326] of the stipulation. It should be assigned in the words of the contract, either negatively or affirmatively,[116] or in words which are co-extensive with the import and effect of it(*t*).[117] Where the contract was specific, to do or forbear some particular act, it is in general sufficient to assign the breach in the words of the contract: thus, if the contract were to show a sufficient record, it is enough to allege that the defendant did not show a sufficient record, though issue cannot be joined upon it, because sufficiency of matter of record cannot be tried by a jury; but the defendant, on such breach assigned, may plead that he showed such a record, and upon demurrer the court will judge whether it be sufficient(*u*). So in covenant by an apprentice for not finding victuals and other necessaries in the words of the contract is sufficient (*v*); and a breach in the words of the covenant, for not repairing without enumerating the particular dilapidations, will suffice(*w*). And in general if a breach be assigned in words containing the sense and substance of the contract, though they are not in the precise words of such contract, it is sufficient(*x*); as if the defendant's promise were to guarantee the payment of the debt of a third person, a breach that the defendant did not pay the debt will suffice(*y*): so if a policy insured a ship against the barratry of the captain, and the breach *is as- [*327] signed that the ship was lost by the fraud of the captain, it is sufficient(*z*).

(*q*) Com. Dig. Pleader, C. 44, &c.

(*r*) Frampton *v.* Coulson, 1 Wils. 33.

(*t*) Com. Dig. Pleader, C. 45, 46, 47, 48, 49.—Id. 2. V. 2.—2 Saund. 181. b. c.

(*u*) Hayford *v.* Reve, Yelv. 39, 40.—Com. Dig. Pleader, C. 45.

(*v*) Broctor *v.* Burdett, 3 Lev. 170.

(*w*) Lee v. Johnson, Lutw. 329.

(*x*) Com. Dig. Pleader, C. 46.—Seddon *v.* Senate, 13 East, 63.

(*y*) Baxter *v.* Jackson, 1 Sid. 178.—2 Rol. 738. l. 15.

(*z*) Knight *v.* Cambridge, 1 Stra. 581.

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(116) But a mere negation of the words of the covenant must necessarily in itself amount to a breach, otherwise it will be insufficient. *Julliand* v. *Burgott & another*, 11 *Johns. Rep.* 6. See the cases cited in the next note, as to what is a sufficient assignment.

(117) It is enough that the words of the assignment show, unequivocally, a substantial breach. *Fletcher* v. *Peck*, 6 *Cranch*, 127. See further as to assigning breaches. *Hughes* v. *Smith & Miller*, 5 *Johns. Rep.* 168. *Smith & others* v.

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If the contract were in the *disjunctive*, the breach ought to be assigned that the defendant did not do the one act or the other; as on a promise to deliver a horse by a particular day, or pay a sum of money(*a*); and if a covenant be "that the defendant and his executors and assigns should repair," a breach for not repairing, ought not to be in the conjunctive(*b*). But in assigning the breach of a covenant or contract to pay or "*cause to be paid*" a sum of money, it is sufficient to say that the defendant did not pay, omitting the disjunctive words, for he who causes to pay, pays(*c*); and a breach that the defendant did not pay several persons is sufficient, without adding the words, or either of them(*d*). A distinction has been taken between a contract to perform a thing *to* a man or his assigns, and *by* a man or his assigns; and that if a thing be to be done *by* a man or his assigns, the breach must be in the disjunctive, that it was not done by him or his assigns; but that where a thing is to be done *to* a man or his assigns, it is sufficient to assign for breach that it was not done to him(*e*); but there appears to be no foundation for this distinction, and where the action is between [*328] the original parties to the contract, as no assignment will be presumed, it will be sufficient to state that the defendant did not perform the act to the plaintiff, without mentioning the *assignee or heir(*f*); but if the action be by or against an assignee, heir, or executor, the breach should then be in the disjunctive;[118] and a declaration by husband and wife, or by an administrator, merely stating that the defendant did not pay before the marriage, or that he did not pay since the death, would be bad on demurrer, though aided by verdict(*g*).

If the breach vary from the *sense* and *substance* of the contract, and be either more limited or larger than the covenant, it will be insufficient(*h*); as in covenant to repair a fence, except on the west side thereof, a breach that the defendant did not repair the fence, without showing that the want of repair was in other parts of the fence than on the west, is bad on demurrer, though aided by verdict(*i*). So if the covenant were for quiet enjoyment, without *lawful* disturbance, a breach merely stating that the plaintiff was disturbed is insufficient, for it should be that he was *legitimo modo* disturbed in the words of the covenant, or otherwise the plaintiff should show by whom he was dis-

(*a*) Wright *v.* Johnson, 1 Sid. 440. Gibbons *v.* Northcott, 1 Sid. 447.—Anon., Hardr. 320.—Com. Dig. Pleader, C.—Alebury *v.* Walby, 1 Stra. 231. Ante, 45.

(*b*) Colt *v.* How, Cro. Eliz. 348.—Gyse *v.* Ellis, 1 Stra. 228.

(*c*) Alebury *v.* Walby, 1 Stra. 231. 1 Saund. 235. n. 6.

(*d*) Id. ibid.

(*e*) Smith *v.* Sharp, 1 Salk. 139.—S. C. 5 Mod. 133.

(*f*) Gyse *v.* Ellis, 1 Stra. 228.

(*g*) Elstow *v.* Thorowgood, 1 Lord Raym. 284.—Hornsey *v.* Dimocke, 1 Ventr. 119.—2 Rich. C. P. 293.

(*h*) Anon., Sir T. Jones, 125.

(*i*) Com. Dig. tit. Pleader, C. 47.

Jansen, 8 *Johns. Rep.* 146. *Sedgwick* v. *Hollenback*, 7 *Johns. Rep.* 376. *Craghill* v. *Page*, 2 *Hen. & Mun.* 446. *Bender* v. *Fromberger*, 4 *Dall.* 436.

(118) Sed vide *Dubois's Ex'rs* v. *Van Orden*, 6 *Johns. Rep.* 105. ante, 36. n. (77.)

turbed, and how(*k*).[119] So where the declaration is upon a covenant for good title. it should be shown that the person evicting had a lawful title[120] before, or at the time of the date of the grant to the plaintiff, and an averment that he had a lawful title, without this qualification, is too general and bad after verdict, for it will be intended that the title of the person entering is *derived from the plaintiff himself. But it [*329] seems, that the plaintiff is under no necessity of setting out the title of the person who entered upon him, because he is a stranger to it, it being considered sufficient to allege generally, that he had a lawful title before, or at the time of the lease or conveyance to the plaintiff(*kk*).[121]

On the other hand it is injudicious, unnecessarily to *narrow* the breach. Thus where the breach of covenant was assigned, that the defendant had not used a farm in a husbandlike manner, but on the contrary had committed *waste*, it was held that the plaintiff could not give evidence of the defendant's using the farm in an unhusbandlike manner, if such misconduct did not amount to waste, though on the former words of the breach such evidence would have been admissible(*l*).

The breach in general should be certain and express, and a general statement, that the defendant has not performed his agreement or promise, is bad on demurrer, though aided by verdict(*m*).[122] A distinction has been taken with regard to the degree of certainty between an action on a bond conditioned for the performance of covenants, and an action of covenant(*n*); however, no such distinction now prevails(*o*); and where to debt on bond conditioned that one B. R. should account for and pay over to the plaintiffs as treasurers of a charity, such voluntary contributions as he should collect for the use of the charity, the defendants *pleaded general performance, and the plaintiffs replied, [*330] that B. R. had received divers sums amounting to a large sum, viz. 100*l.* from divers persons for divers voluntary contributions for the use of the said charity, which he had not accounted for or paid over, &c. it was held on special demurrer, that the replication was sufficiently

(*k*) 2 Saund. 181. b.—Com. Dig. Pleader, C. 47. 49.

(*kk*) 2 Saund. 181. n. 10.—Com. Dig. Pleader, C. 47. 49.

(*l*) Harris *v.* Mantle, 3 T. R. 307.—Radford *v.* M'Intosh, 3 T. R. 637.

(*m*) Com. Dig. Pleader, C. 48.—Knight *v.* Keech, Skin. 344.—S. C. 4 Mod. 188.—S. C. 3 Lev. 319.

(*n*) Farrow *v.* Chevalier, 1 Salk. 139. French *v.* Pierce, 1 Lev. 94.

(*o*) See Shum et al. *v.* Farrington, 1 Bos. & Pul. 642.

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(119) Vide *Greenby & Kellogg* v. *Wilcocks*, 2 *Johns. Rep* 1.

(120) Vide *Folliard* v. *Wallace*, 2 *Johns. Rep.* 395.

(121) Id. ibid.

(122) Vide *Smith* v. *Walker*, 1 *Wash.* 135. In *Syme* v. *Griffen*, 4 *Hen. & Mun.* 277. it was held that a breach commencing with "*whereas*," and continuing by way of recital to the end, without any direct averment, was bad on general demurrer.

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certain(*p*);[123] for it is a general rule in pleading, that where any matter tends to great prolixity, a concise manner of pleading it may be admitted:[124] and where the breach lies more in the defendant's than the plaintiff's knowledge, less particularity is required(*q*).[125]

By the common law, in an action of covenant, the plaintiff was at liberty to assign breaches of each of the covenants in the indenture, &c. in order to increase the damages(*r*); but in an action upon a bond, the plaintiff could assign only one breach of the condition, for if he assigned several breaches the declaration was bad for duplicity,[126] because the bond was forfeited by the breach of one covenant as much as of several covenants(*s*); but now by statute(*t*), the plaintiff is at liberty to assign several breaches of the condition of a bond,[127] and it is frequently expedient to state the same in the declaration(*u*). Still, however, two breaches of the same specific stipulation cannot be assigned in one count(*v*); though where the defendant's contract was general, [*331] as by a tenant to observe the due course of husbandry, *the declaration may state various breaches of good husbandry(*w*). Where several breaches of the condition of a bond are assigned under the statute, it is usual to allege that they are assigned by virtue or in pursuance of the statute, but this seems unnecessary,[128] the statute being a public law, and the assignment of several breaches a matter of right without the leave of the court(*x*).

In point of form it is usual in assumpsit to introduce the statement

(*p*) Barton & another *v.* Webb and another, 8 T. R. 463.—Shum et al. *v.* Farrington, 1 Bos. & Pul. 640.

(*q*) Barton & another *v.* Webb and another, 8 T. R. 462.—Parkes *v.* Middleton, 1 Lutw. 421.—Gale & others *v.* Reed, 8 East, 80.

(*r*) Munser's Case, 2 Co. 4. a.—1 Saund. 58. n. 1.

(*s*) 1 Saund. 58. n. 1.—Com. Dig. Pleader, C. 33.

(*t*) 8 & 9 W. 3. c. 11.

(*u*) 1 Saund. 58. n. 1.—2 Saund. 187. n. 2.—See the forms, 2 Vol. 197 to 203.

(*v*) Com. Dig. Pleader, C. 33.

(*w*) Legh *v.* Hewitt, 4 East, 154.—2 Vol. 178, 9.

(*x*) Com. Dig. Pleader, 2. V. 2.—Duke of St. Albans *v.* Shore, 1 Hen. Bla. 275. 278.—Ryley *v.* Parkhurst, 1 Wils. 219.—Symmers et al. *v.* Regem, Cowp. 500, 1.—Bartholomew *v.* Ireland, Andr. 108.—Tombs *v.* Painter, 13 East, 3.

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(123) Vide *Hughes* v. *Smith*, 5 *Johns. Rep.* 168. When the breach assigned was that the defendant as under sheriff had collected monies to the amount of 1000 dollars, which he had refused to account for and pay, and it was held sufficient. Vide *Post-master-general U. S.* v. *Cochran*, 2 *Johns. Rep.* 415. and cases cited ante, 326. n. 117.

(124) Vide ante, 240.

(125) Vide *Willcocks* v. *Nicholls*, *Price's Exch. Rep.* 109.

(126) Vide *Taft* v. *Brewster & others*, 9 *Johns. Rep.* 335.

(127) For the performance of covenants or other collateral matter, but not when for the payment of money only. *Taft* v. *Brewster & others*, 9 *Johns. Rep.* 334 Et vide *Post-master-general U. S.* v. *Cochran*, 2 *Johns. Rep.* 415. *Munro* v. *Allaire*, 2 *Caine's Rep.* 328.

(128) Acc. *Munro* v. *Allaire*, 2 *Caine's Rep.* 329.

of the particular breach, with the allegation that the defendant contriving and fraudulently intending, craftily and subtly to deceive and defraud the plaintiff, neglected and refused to perform, or performed the particular act, contrary to the previous stipulation. But this introduction is unnecessary, the gist of the action of assumpsit being the injury sustained by the plaintiff by the privation of his right, without relation to the defendant's fraud(*y*). And in declarations against a peer the imputation of fraud should be omitted(*z*).

The insufficiency of the breach will in general be aided by a verdict by the common law intendment that it is not to be presumed that either the judge would direct the jury to give, or that the jury would have given the verdict without sufficient proof of the breach of contract(*a*);[129] and *therefore, where in an action against husband and wife, on the [*332] covenant of the feme whilst sole to perform an award, it appeared that the award was made after the marriage, which was a legal revocation of the arbitrator's authority, and consequently the breach was improperly assigned in the non-performance of such award, it was decided that the plaintiff was entitled to recover, because it appeared that the feme had broken her covenant by the very act of marriage, which though a different breach to that assigned, was sufficient after verdict to support the declaration(*b*). We have, however, seen, that in some instances a defective statement of a breach, as of a covenant for quiet enjoyment, will be fatal even after verdict(*c*).[130]

Damages.

Such *damages* as may be presumed *necessarily* to result from the breach of contract, need not be stated in the declaration;[131] but in other cases it is necessary to state the damage arising from the breach of contract, specially and circumstantially, in order to apprize the defendant of the facts intended to be proved, or the plaintiff will not be permitted to give evidence of such damage on the trial(*d*). And in some cases where the plaintiff seeks to recover damages, he must declare

(*y*) The Bailiffs, &c. of Tewkesbury *v.* Diston, 6 East, 443.

(*z*) Imp. K. B. 6th ed. 526.

(*a*) Prideaux *v.* Rawlins, Sir T. Jones, 125.—Harmon *v.* Owden, 1 Salk. 140.—Knight *v.* Keech, 4 Mod. 189.—S. C. Skinner, 344.—Charnley *v.* Winstanley et ux., 5 East, 270, 1.—Com. Dig. Pleader, C. 48.—1 Saund. 228. n. 1.

(*b*) Charnley *v.* Winstanley et ux., 5 East, 270, 1.

(*c*) 2 Saund. 181. n. 10.—and see Wright *v.* Johnson, 1 Sid. 440. ante, 328. sed quære.

(*d*) As to damages in general, see Vin. Ab. tit. Damages, and Sayer's Law of Damages. And see post. as to the statement of damages in actions for *torts*.

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(129) Vide *Thomas* v. *Roosa*, 7 *Johns. Rep.* 461.

(130) Where it appeared from the plaintiff's own showing, that the breach alleged could not have taken place before the action was brought, it was held bad after verdict. *Gordon* v. *Kennedy*, 2 *Binney*, 287.

(131) The damages sustained are matter of evidence, and need not be alleged, nor are they scarcely ever stated, but in a general manner. *Barruso* v. *Madan*, 2 *Johns. Rep.* 149.

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specially, though he might have recovered the principal part of his demand under a common count: thus in an action against the vendor of an estate, for not making a good title to or conveying the same, only the deposit money can be recovered *under the count for money [*333] had and received, and if the purchaser proceed for interest and expenses, he must declare specially, stating such expenses, and the loss arising from the not having the use of the deposit money, &c.(*e*); and where a sum is named as a penalty, damages beyond the amount may be recovered(*f*). The damages should be stated according to the facts of the case, but no inconvenience will arise from the statement being larger than the proof:[132] thus in a declaration on a policy of insurance stating a total loss, a partial loss may be recovered(*g*). In stating the damages care must be taken that no part thereof appears to have accrued after the time to which the declaration by its title refers;[133] for though the mistake could not be taken advantage of by demurrer, yet after a general verdict it would be fatal, unless the damages were laid under a scilicet(*h*).

Common counts.

The *Common Counts* in *assumpsit* are frequently sufficient without any special count; and even where the declaration contains a special count, it is in general advisable to insert one or more of the common counts; for though it is a rule, that when there was an express contract the plaintiff cannot resort to an implied one(*i*),[134] yet he may, in many cases, recover on the common count, though there was a special

(*e*) See Camfield *v.* Gilbert, 4 Esp. Rep. 223.—Walker *v.* Constable, 1 Bos. & Pul. 306.—Flureaux *v.* Thornhill, 2 Bla. Rep. 1078.—Post. 2 Vol. 163, 4.

(*f*) Harrison *v.* Wright, 13 East, 343.

(*g*) Gardiner *v.* Croasdale, 2 Burr. 904.—S. C. 1 Bla. Rep. 198.—Marshall on Insurance, 629.—Sayer on Damages, 45.

(*h*) 2 Saund. 171. n. 1.—Carter *v.* Calthorpe, 3 Lev. 345. ante, 259.

(*i*) Toussaint et al. *v.* Martinnant, 2 T. R. 105.—Martin *v.* Court, 5 T. R. 640.—Buckler *v.* Buttivant et al., 3 East, 78. 80. 85.—Cutler *v.* Powel, 6 T. R. 325.—Alves *v.* Hodgson, 7 T. R. 243.—Weaver *v.* Borroughs, 1 Stra. 648. Pepper *v.* Burland, Peake, 103.—Wennall *v.* Adney, 3 Bos. & Pul. 247.—Clarke *v.* Gray et al., 6 East, 569.—There is no distinction in pleading between an express and implied promise.

(132) Where the plaintiff claims more damages than on the face of his declaration appear to be due, it will not vitiate especially after verdict, for the amount of the damages being ascertained by the jury, it is to be presumed they were assessed according to the proof. *Executors of Van Rensselaer* v. *Executors of Platner*, 2 *Johns. Cas.* 18.

(133) Vide *Gordon* v. *Kennedy*, 2 *Binney*, 287.

(134) Vide *Richardson* v. *Smith*, 8 *Johns. Rep.* 439.

agreement, provided it has been executed(*ii*);[135] *and such a count may frequently save a verdict, where the evidence may vary from the special count; thus if the plaintiff declare specially as having built a house according to an agreement, if he fail to prove that he has built it pursuant to the agreement, he may still, in some cases, recover on the common count for the work and labour actually done(*j*).[136] And where a promissory note, upon an improper stamp, has been taken in payment of a debt, the plaintiff will be at liberty to resort to the common counts appropriate to the debt(*k*). But where the demand is founded upon a written agreement, which ought to be, but is not, stamped, the plaintiff will not be permitted, in evidence, to resort to an implied contract, in order to avoid the production of such express agreement(*l*). [*334]

Common counts in an action of assumpsit are founded on express or implied promises, to pay *money* in consideration of a *precedent debt*, and are of four descriptions: 1*st*, The *indebitatus assumpsit*; 2*dly*, The *quantum meruit*; 3*dly*, The *quantum valebant*; and 4*thly*, The account stated.

The *indebitatus assumpsit* count(*m*) states, that "the defendant, on "the ——— day of ——— at ——— in the county of ———(*n*), was

(*ii*) Neal & others *v.* Viney, 1 Camp. 471.—Leeds *v.* Burrows, 12 East, 1.—Griffith *v.* Young, 12 East, 513. and post.

(*j*) Per Sir J. Mansfield, Cooke *v.* Munstone, 1 New Rep. 355.—Bul. Ni. Pri. 139.—Payne *v.* Bacomb. Dougl. 651.—Leeds *v.* Burrows, 12 East, 1.—Griffith *v.* Young, 12 East, 513.

(*k*) Farr *v.* Price, 1 East, 58.—Mowbray *v* Fleming, 11 East, 285.

(*l*) White *v.* Wilson, 2 Bos. & Pul. 118.—Brewer *v.* Palmer, 3 Esp. Rep. 213.—Hodges *v* Drakeford, 1 New Rep. 273. acc.—Alves *v.* Hodgson, 7 T. R. 241. contra.

(*m*) See the form, 2 Vol. 35. and as to the definition of the term *indebitatus assumpsit*, see ante.

(*n*) The time and place are not material in the common counts, but when there is a special count on a bill of exchange, &c. preceding the common counts, it is usual and proper in the first common count to lay the day after the bill was due, or other special cause of action was complete; and in the subsequent counts in breach to refer to the *last* mentioned day. Frampton *v.* Coulson, 1 Wils. 33.

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(135) Indebitatus assumpsit will lie to recover the stipulated price due on a special contract, not under seal, where the contract has been completely executed; and it is not in such case necessary to declare upon the special agreement. *Bank of Columbia* v. *Patterson's Adm'r.*, 7 *Cranch*, 299. *Felton* v. *Dickinson*, 10 *Mass R.p.* 287.

(136) Where a party declares on a special contract, seeking to recover thereon, but fails in his right so to do altogether, he may recover on a general count, if the case be such that, supposing there had been no special contract, he might still have recovered for money paid, or for work and labour done. *Cooke* v. *Munstone*, 1 *New Rep.* 355. *Tuttle* v. *Mayo*, 7 *Johns. Rep.* 132. *Linningdale* v. *Livingston*, 10 *Johns. Rep.* 136. *Keyes* v. *Stone*, 5 *Mass. Rep.* 391. And although the plaintiff may resort to the general counts without having attempted to prove the special agreement, yet in no case can he recover on the general counts where the special agreement continues in force. *Linningdale* v. *Livingston* 10 *Johns. Rep.* 37. *Raymond & others* v. *Bearnard*, 12 *Johns. Rep.* 274. *Wilt & Green* v. *Ogden*, 13 *Johns. Rep.* 56. *Jennings* v. *Camp*, *Id.* 94.

II. ITS PARTS. Fourthly, the cause of action.

" indebted to *the plaintiff in a named sum of money, for real property
" or goods sold, or for personal services, or for money lent, paid, or
" had and received, or for interest, or for some other pre-existing debt
" on simple contract, incurred at the defendant's request; and that
[*335] " being so indebted, the defendant in consideration thereof afterwards,
" to wit, on the day and year aforesaid, at ——— aforesaid, in the
" county aforesaid, undertook and faithfully promised the plaintiff to
" pay him the said sum of money, when he, the said defendant, should
" be thereunto afterwards requested."

The *quantum meruit* count, instead of stating that the defendant was indebted to the plaintiff in a certain sum of money for work, &c. as in the *indebitatus* count, states, " and whereas also afterwards, to wit, on, " &c. aforesaid, at, &c. aforesaid, in consideration that the plaintiff, at the " request of thedefendant, had sold and delivered, &c. *(stating the subject " matter of the debt according to the fact, and usually as in the indebita- " tus count,)* he the said defendant undertook to pay the plaintiff so much " money as he therefore *reasonably deserved* to have ; and the count then " avers, that the plaintiff deserved to have a named sum, whereof the " defendant afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, had " notice."

The *quantum valebant* count is, in general, confined to the *sale of goods*, and instead of the *quantum meruit*, states, that " the defendant
[*336] " promised to pay so much as the goods *were *reasonably worth*;" and concludes with a corresponding averment, that they were reasonably worth a named sum, and that the defendant had notice thereof. In other respects this count is similar to the *quantum meruit*.

The *account stated*, alleges, that " the defendant on, &c. aforesaid, " at, &c. aforesaid, accounted with the plaintiff of and concerning divers " sums of money before then due from the defendant to the plaintiff, " and then in arrear and unpaid, and that upon such accounting, the " defendant was found to be in arrear to the plaintiff in a named sum, " and that being so found in arrear and indebted, the defendant in con- " sideration thereof undertook and faithfully promised the plaintiff to " pay him the same on request."

Upon these counts the *common breach* is " Yet the said defendant, " not regarding his said promises and undertakings, but contriving, " and craftily and subtly intending to deceive and defraud the said " plaintiff in that respect(*n*), hath not (although often requested so to " do)(*o*), as yet paid the said sums of money, or any part thereof, but " hath wholly neglected and refused, and still neglects and refuses so " to do, to the plaintiff's damage of a named sum, and therefore he " brings his suit, &c." which breach necessarily varies in actions by and against surviving partners, husband and wife, executors and assignees, &c.(*p*).

(*n*) Ante, 331.

(*o*) The printed forms generally contain a special request, but this is unnecessary.—Frampton *v.* Coulson, 1 Wils. 33.

(*p*) See ante, 328. and 2 Vol. 84 to 109.

Formerly these general counts for work, goods sold, &c. were not in use; and Lord Holt is stated *to have said, that he was a bold man who first ventured on them; but they are now much more frequent than the special counts, where the action is for any money-demand(q). It is not necessary to state the particular work done.[137] or goods sold, &c. for the only reason why the plaintiff is bound to show in what respect the defendant is indebted, is, that it may appear to the court that it is not a debt of record or specialty, but only on simple contract; and any general words, by which that may appear, are sufficient(r); and unnecessary statements, such as the local situation of the premises in a count for use and occupation, should be avoided, as a variance might be fatal(s). Several distinct debts or contracts may be included in one count of this description, and the plaintiff will succeed *pro tanto*, though he only prove one of such contracts(t).[138] And under an *indebitatus* count the plaintiff may recover what may be due to him, although no specific price or sum was agreed upon; and therefore it has been observed, that the *quantum meruit* and *quantum valebant* counts are in no case necessary, and should in many cases be omitted to prevent unnecessary prolixity and expense(u); and it is settled, that under a *quantum meruit* count the plaintiff cannot recover if the goods were sold, &c. at a certain price(v). In each of these counts, except *that for money had and received, and the account stated, it is necessary to allege that the consideration of the debt was performed at the defendant's *request*, though such request may in some cases be implied[139] in evidence(x); and it must also be stated that the defendant promised to pay a specific sum or so much as the plaintiff reasonably deserved,

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(q) Hayes v. Warren, 2 Stra. 933.—1 Saund. 269. n. 2.—2 Saund. 122. a. n. 2. 350. n. 2. 374. n. 1.—Fitzg. 302.—Com. Dig. tit. Assumpsit, H. 3.

(r) 2 Saund. 350 n. 2.—Tate v. Lewen, 2 Saund. 373.—Fowk v Pinsack, 2 Lev. 153.—Hibbert v. Courthope, Carth. 276.—Anon., 2 Wils. 20.—Russell v. Collins, 1 Mod. 8.—S. C. 1 Sid. 425.—Bac. Ab. tit. Assumpsit, F.—Story v. Atkins, Ld. Raym. 1429, 1430.—Palmer v. Stavely, 12 Mod. 511.—By special custom even the cause of the debt need not be shown.—Story v. Atkins, 2 Stra. 720.—1 Saund. 68. n. 2.

(s) Wilson v. Clark, 1 Esp. R. 273. Ditchburn v. Spracklin et al., 5 Esp. Rep. 31, 32.—King v. Fraser, 6 East, 348. 351.

(t) 2 Saund. 122. n. 2.—Rooke v. Rooke, Cro. Jac. 245.—S. C. Yelv. 175. 1 Brownl. Ent. 71.—Dowsland v. Thompson, 2 Bla. Rep. 910.—The Attorney General v. Hatton, Bunb. 262. *see the form*, post. 2 Vol. 82.

(u) 2 Saund. 122. a. n. 2.—Sed vide 3 Bla. Com. 295.

(v) Weaver v. Borroughs, 1 Stra. 648.

(x) 1 Saund. 264. n. 1.—Atkins et al. v. Banwell et al., 2 East, 506.—Hayes v. Warren, 2 Stra. 933.—Pillans et al. v. Van Mierop, 3 Burr. 1674.—Wennall v. Adney, 3 Bos. & Pul. 247.

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(137) Vide *Edwards* v. *Nicholls*, 3 *Day's Rep.* 16.

(138) Acc. *Bailey & Bogert* v. *Freeman*, 4 *Johns. Rep.* 280. But a demand *for certain lands sold and conveyed*, is too general, and cannot be joined with the common counts. *Nelson* v. *Swan*, 13 *Johns. Rep.* 483.

(139) Ante, 297.

II. Its parts. Fourthly, the cause of action.

averring in the latter case what sum is due(*y*). As the common counts are so useful in practice, it may be advisable concisely to consider the particular applicability of each.

The common counts relating to *real property* are for the price of a freehold, copyhold, or leasehold estate, &c. sold and conveyed to the defendant, where there has been no contract under seal for the payment of the price(*z*); and in these counts, and in that for use and occupation of land, &c. (which is given by statute 11th Geo. 2. c. 19.[140] where the demise was not by deed) it is not necessary to state the local situation of the premises(*a*). And if the demise were to the defendant, a count in the common form is sufficient, although he did not occupy the premises himself, but merely by his under-tenant(*b*).

Where *goods* have been sold and actually delivered to the defendant, though under a special agreement, and even where the price has been settled by third persons, it is in general sufficient to declare on the indebitatus count, provided the contract was to pay in money, and the credit be expired(*c*). So this count is sufficient where goods have [*339] been delivered *on the terms of sale or return and not returned in a reasonable time(*b*). But where the contract was to pay for goods partly in money and partly by delivery of other goods in exchange(*c*), or to pay by accepting a bill of exchange, and the whole credit is not elapsed, it is necessary to declare specially(*d*). So on a collateral undertaking to pay the debt of a third person, the contract must be specially stated(*e*); and it is usual where the defendant has refused to accept goods purchased, to declare specially(*f*); and at least a count for goods bargained and sold omitting the statement of the delivery should be added,

(*y*) Blakey *v.* Dixon et al., 2 Bos. & Pul. 321.

(*z*) Post. 2 Vol. 37, 38. a corporation aggregate may support it.—Dean & Chapter of Rochester *v.* Pierce, 1 Camph. 466.

(*a*) King *v.* Fraser, 6 East, 348.—Kirtland *v.* Pounsett, 1 Taunt. 570.—Wilson *v.* Clark, 1 Esp. Rep. 273.—Burbige *v.* Jakes, 1 Bos. & Pul. 225. post. 2 Vol. 37, 8.

(*b*) Bull *v* Sibbs, 8 T. R. 327.

(*c*) Barbe *v.* Parker, 1 Hen. Bla. 287. Fitzg. 302.—Poulter *v.* Killingbeck, 1 Bos. & Pul. 397.—Brooke et al. *v.* White, 1 New Rep. 330.—Swancott v. Westgarth, 4 East, 75.—Mussen *v.* Price et al., 4 East, 147.—Leeds *v.* Burrows, 12 East, 1.

(*b*) Bayley *v.* Gouldsmith, Peake, C. N. P. 56.

(*c*) Barbe *v.* Parker, 1 Hen Bla. 287. post. 2 Vol. 123.

(*d*) Ante, 302.—Hoskins & another *v.* Duperoy, 9 East, 498. post. 2 Vol. 124. Interest may be recovered under the common count.—Marshall & another *v.* Poole & another, 13 East, 98.

(*e*) 1 Saund. 211. a. b.—Post. 2 Vol. 125, 6.—Mines *v.* Sculthorpe, 2 Camp. 215.

(*f*) Post. 2 Vol. 136.

(140) In *Egler* v. *Marsden*, *5 Taunt.* 25, which was an action of debt for use and occupation, Gibbs, J. says :—"This is not an action on the statute 11 G. 2. c. 19. The meaning of that act was, you may bring an action upon the case, and although it shall appear that there was a contract under a certain rent reserved, yet you shall recover a reasonable compensation for the use of that which you go for."

which may suffice although the goods have been stopped in transitu(*g*); but where the sale was to the defendant, and the delivery to a third person at his request, the statement that the sale and delivery were to the defendant, being according to the legal effect, will suffice(*h*). This count however is not sustainable when at the time of the sale the property was part of the realty, as trees or fixtures, although the defendant may afterwards have severed them(*i*).

With respect to debts for *work and labour* or other personal services, it is a rule that, however special the agreement was, yet if it was not under seal, and the terms of it have been performed on the plaintiff's part, and the remuneration was to be in money, it is not necessary to declare specially, and *the common indebitatus count is sufficient(*ii*).[141] But if the contract has not been executed by the plaintiff, although the defendant prevented his performance, the declaration must be special(*k*). Where the demand is for wages, fees, or work and labour in particular professions, &c. it is usual to insert a count, stating concisely the nature of the service, &c.(*l*), but the common count for work and labour is in general sufficient(*m*).[142]

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(*g*) Chaplin *v.* Rogers, 1 East, 194. Dunmore *v.* Taylor, Peake, C. N. P. 41.—Owenson *v.* Morse, 7 T. R. 67.—Kymer et al. *v.* Suwercropp, 1 Campb. 109. Post. 2 Vol. 52.

(*h*) Bull *v.* Sibbs, 8 T. R. 328.—Ambrose *v.* Rowe, 2 Show. 410.—Bull. N. P. 136.—Ramsden *v.* Ambrose, 1 Stra. 127.—Stephenson *v.* Hardy, 3 Wils. 389.

(*i*) Nutt *v.* Butler, 5 Esp. Rep. 176. Leeds *v.* Burrows, 12 East, 1.—Knowles & others *v.* Michel & others, 13 East, 249.

(*ii*) Fitzgib. 302.—Alcorn *v.* Westbrook, 1 Wils. 117.—Bul. N. P. 139.—Poulter *v.* Killingbeck, 1 Bos. & Pul. 397.—Giles et al. *v.* Edwards, 7 T. R. 181.—Mussen *v.* Price et al., 4 East, 147.—Atty et al. *v.* Parish et al., 1 New Rep. 104.—Cooke v. Munstone, 1d. 355. Clarke *v.* Gray et al., 6 East, 569.—Brooke et al. *v.* White, 1 New Rep. 330. Blakey *v.* Dixon et al., 2 Bos. & Pul. 323.

(*k*) Hulle *v.* Heightman, 2 East, 145. Barbe *v.* Parker, 1 Hen. Bla. 287.—Mussen *v.* Price et al., 4 East, 147.—Brooke et al. *v.* White, 1 New Rep. 330.

(*l*) Fowk *v.* [illegible]nsacke, 2 Lev. 153.—Hibbert *v.* Courthope, Carth. 276.—Russell *v.* Collins, 1 Mod. 8.—S. C. 1 Sid. 425.

(*m*) Anon., 2 Wils. 20.—Meeke *v.* Oxlade, 1 New R. 289.—2 Saund. 350. n. 2.—Tate *v.* Lewen, 2 Saund. 373.

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(141) Acc. *Felton* v. *Dickinson*, 10 *Mass. Rep.* 287. 290.

(142) Under a general count in indebitatus assumpsit, for *work, labour and materials*, the plaintiff may recover for attendance as a farrier, and the medicines administered by the plaintiff may be considered *materials* employed by him in and about the business of the defendant. *Clark* v. *Mumford*, 3 *Campb.* 37. To this case the reporter has added the following note:—"I have thought that this decision may be of some use to the profession, although the point was not before thought doubtful among gentleman at the bar. But in cases of this sort it is not unusual to find at least *ten* counts in the declaration—*two* for work and labour as a farrier, &c.—*two* for work and labour generally—*two* for goods sold and delivered—and the *four money counts*, not omitting *money lent*, which can never be of any use except where there is the specific contract of the lending and borrowing

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Money lent to the defendant himself may be recovered under the common count for *money lent*, though delivered to another person at his request(*n*); but if money be lent to a third person, at the defendant's request, and both be liable to repay the money, the one on the loan and the other in respect of his collateral engagement, which must be in writing, the count against the latter must be special(*o*).

The count for *money paid* is proper where money has been paid at the express request of the defendant, and in some cases even without such request(*p*);[143] though the request should always be stated in pleading(*q*). But where the sum which the plaintiff has paid is in the nature of costs, or cannot be considered as strictly paid for the use of the defendant(*r*); or where the plaintiff has not actually made a payment [*341] in money, but has merely been obliged to give *security,[144] or his goods have been sold under a distress, the declaration must be special for not indemnifying, &c.(*s*).

Where money has been received by the defendant which *ex equo et bono*, ought to be paid over to the plaintiff, the general rule is that it may be recovered by the plaintiff, under the count for *money had and received to his use*(*t*). In general to sustain such count, the *defendant himself*(*u*) must actually have received *money*(*v*),[145] and this at the time for the use of the plaintiff, for a chose in action is not assignable(*w*).

(*n*) Bull *v.* Sibbs, 8 T. R. 328.

(*o*) 1 Saund. 211. a. b.—Butcher v. Andrews, 1 Salk. 23.—S. C. Carth. 446. Marriott *v.* Lester, 2 Wils. 141.—Stephenson *v.* Hardy, 3 Wils. 388.—S. C. 2 Bla. Rep. 872.—Matson et al. *v.* Wharam, 2 T. R. 81.

(*p*) Exall *v.* Partridge et al., 8 T. R. 310.—Child *v.* Morley, 8 T. R. 614.

(*q*) 1 Saund. 264 n. 1.

(*r*) Spurrier *v.* Elderton, 5 Esp. Rep. 3.—Camfield *v.* Gilbert, 4 Esp. R. 223. Child *v.* Morley, 8 T. R. 610.—Smith et al. *v.* Nissen et al., 1 T. R. 269.—Chater *v.* Beckett, 7 T. R. 204.—Cowley *v.* Dunlop et al., 7 T. R. 576.—Symmonds *v.* Parminter et al., 1 Wils. 188.

(*s*) Taylor *v.* Higgins, 3 East, 169. Moore *v.* Pyrke, 11 East, 52.

(*t*) Straton *v.* Rastall et al., 2 T. R. 370.—Moses *v.* Macferlan, 2 Burr. 1012. Johnson *v.* Johnson, 3 Bos. & Pul. 169. Griffith *v.* Young, 12 East, 513.

(*u*) Ker *v.* Osborne, 9 East, 378.—Robson *v.* Hall, Peake, C. N. P. 128.—Levy v. Haw, 1 Taunton, 65.—Duncan *v.* Skipwith, 2 Campb. 68, 9.

(*v*) Nightingal et al. *v.* Davisme, 5 Burr. 2589.—Jones *v.* Brinley, 1 East, 3.—Weston *v.* Downes, Dougl. 23.—Leery *v.* Goodson, 4 T. R. 687.

(*w*) Johnson & another *v.* Collings, 1 East, 103, 4.—Whitwell *v.* Bennet, 3 B. & P. 559.—Waynam *v.* Bend, 1 Campb. 175.

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of money.—If a declaration contains *general* and *special* counts for work and labour, the court on motion will order one set to be struck out as superfluous. *Meeke* v. *Oxlade*, 1 *New Rep.* 289."

(143) Vide *Riggs* v. *Lindsay*, 7 *Cranch*, 500.

(144) Acc. *Cumming* v. *Hackley*, 8 *Johns. Rep.* 202. Unless that security be a negotiable instrument. *Id.* 8 *Johns. Rep.* 206. *Barclay & Proctor* v. *Gooch*, 2 *Esp Rep.* 571.

(145) Vide *Beardsley* v. *Root*, 11 *Johns. Rep.* 464. *Hantz* v. *Sealy*, 6 *Binney*, 409.

II. ITS PARTS. Fourthly, the cause of action.

But sometimes, where the property is saleable, the receipt of money will be presumed, till the contrary be proved(*x*); and where a stakeholder received country bank-notes as money, it was held that the amount might be recovered under this count(*y*).[146] In pleading, the money must be stated to have been received to the use of the person who at the time of the receipt, and not merely at the time of the action, was legally entitled to it(*z*). This count is sustainable in some cases, where money has been received tortiously without any colour of contract,[147] or under pretence of a contract not performed by the defendant; although in general a party is not at liberty to declare in an action in form *ex contractu*, where there has been no contract express or implied(*a*). Thus assignees of a bankrupt may declare for money had and received, against a *creditor who has levied his debt by *fi. fa.* after [*342] the act of bankruptcy(*yy*); and they may declare in assumpsit for money paid by way of fraudulent preference, anterior to the act of bankruptcy(*zz*). But this rule is so far qualified that the courts will not allow a colourable title to land, &c. to be tried under this form of action, but the plaintiff must declare in tort(*aa*).

Where a payment has been made on a contract which has been put an end to, as where, either by the terms of the contract it was left in the plaintiff's power to rescind it, and he does so, or where the defendant afterwards assents to its being rescinded, this count may be supported;[148] but if the contract continue open, as it is technically termed, he can only recover damages, and must declare specially(*b*); and where a horse or goods warranted sound or of a certain quality, turn out to be otherwise, the vendee must in general sue on the warranty,

(*x*) The King *v.* the Mayor, &c. of Lyme Regis, Dougl. 138.—Leery v. Goodson, 4 T. R. 687.—Straton *v.* Rastall et al., 2 T. R 370.—Israel *v.* Douglas et al., 1 Hen. Bla. 239.—Surtees et al. *v.* Hubbard, 4 Esp. Rep. 204.—Whitwell *v.* Bennet, 3 Bos. & Pul. 539. Johnson & another *v.* Collings, 1 East, 104.—Taylor *v.* Higgins, 13 East, 171.

(*y*) Pickard v. Bankes, 3 East, 20.

(*z*) Smith et al. *v.* Goddard, 3 Bos. & Pul. 465.

(*a*) Ante, 90.—Birch *v.* Wright, 1 T. R. 386.—Snowdon *v.* Davis, 1 Taunton, 359.

(*yy*) Hitchin *v.* Campbell, 2 Bla. Rep. 827.—S. C. 3 Wils. 304.—King *v.* Leith, 2 T. R. 144.—Bul. N. P. 131.—Parker v. Norton, 6 T. R. 695.—Boyter *v.* Dodsworth, 6 T. R. 683.

(*zz*) Hunter v. Prinsep & others, 10 East, 378.—Thomason & others *v.* Frere & others, 10 East, 418. Ante, 149.—Trover has been thought to be the proper remedy.—Smith et al. *v.* Hodson, 4 T. R. 211.—Foxcraft *v.* Devonshire, 1 Bla. Rep. 194.

(*aa*) Lindon *v.* Hooper, Cowp. 419. Shipwick *v.* Blanchard, 6 T. R. 298.—Astley v. Reynolds, 2 Stra. 915.—Philips & others *v.* Hunter & others, 2 H. Bl. 408.

(*b*) Towers *v.* Barrett, 1 T. R. 133. Masters *v.* Marriott, 3 Lev. 364.—Hunt *v.* Silk, 5 East, 449.—Cooke *v.* Munstone, 1 New. R. 351.

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(146) Vide etiam *Beardsley* v. *Root*, 11 *Johns. Rep.* 464.

(147) Vide *Ripley* v. *Gelston*, 9 *Johns Rep.* 201. *Clinton* v. *Strong*, *Id.* 370.

(148) Vide *Gillet* v. *Maynard*, 5 *Johns. Rep.* 85.

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or special contract, and cannot maintain assumpsit for money had and received to recover back the price or a part of it(*c*); but where a term of years is purchased, and the title turns out to be defective, and no conveyance has been made, the deposit is recoverable under the common count(*d*); and where some act is to be done by each party, under a special agreement, and the defendant by his neglect prevents the [*343] plaintiff from carrying the contract into execution, the plaintiff *may recover back any money he has paid under it, as received to his use; but in these cases, if the plaintiff has received benefit in part from the original contract, he should declare specially(*e*). Under this count only the sum really received can be recovered without interest,[149] and therefore, if the plaintiff proceed for interest, or for expenses incurred in investigating the title to an estate, he must declare specially(*f*).

It is advisable in all declarations in assumpsit for the recovery of a money demand, excepting against an infant, who cannot state an account, to insert a count an *an account stated*(*g*). The acknowledgment, by the defendant, that a sum certain is due, creates an implied promise to pay the amount, and it is not necessary to set forth the subject matter of the original debt(*h*); nor is the sum alleged to be due material(*i*); nor is it necessary that the defendant's admission should relate to more than one item or transaction(*k*). Where arbitrators award a

(*c*) Payne *v.* Whale, 7 East, 274. 279.—Towers *v.* Barrett, 1 T. R. 136. Fielder *v.* Starkin, 1 H. Bla. 19.—Curtis *v.* Hannay, 3 Esp. Rep. 84.—Grimaldi *v.* White, 4 Esp. Rep. 96.—Farrer *v.* Nightingal, 2 Esp. Rep. 639.—Fortune *v.* Lingham, 2 Campb. 416, 7.

(*d*) Cripps *v.* Reade, 6 T. R. 606.—Johnson *v.* Johnson, 3 Bos. & Pul. 166. Hanson *v.* Roberdeaux, Peake, 120.—Burrough *v.* Skinner, 5 Burr. 2639.—Farrer *v.* Nightingal, 2 Esp. Rep. 639.

(*e*) Vickris *v.* Hare, 1 New R. 260. Cooke *v.* Munstone, 1 New R. 351. 354. Hunt *v.* Silk, 5 East, 449.—Payne *v.* Whale, 7 East, 274.

(*f*) Walker *v.* Constable, 1 Bos. & Pul. 306.—Flureaux *v.* Thornhill, 2 Sir W. Bla. 1078.—Camfield *v.* Gilbert, 4 Esp. Rep. 223.—De Bernales *v.* Fuller & others, 2 Campb. 426.

(*g*) Milward *v.* Ingraham, 2 Mod. 44.—Trueman *v.* Hurst, 1 T. R. 42. What is evidence of an acount stated, see Peacock *v.* Harris, 10 East, 104.—Hall *v.* Odber, 11 East, 118. 124.—Knowles & others *v.* Michel & another, 13 East, 249.—Sinclair *v.* Charles Philipe M. de France, 2 B. & P. 363.

(*h*) Milward *v.* Ingraham, 2 Mod. 44.—Foster *v.* Allanson, 2 T. R. 480.

(*i*) Rolls *v.* Barnes, 1 Bla. Rep. 65. S. C. 1 Burr. 9.

(*k*) Knowles & others *v.* Michel & another, 13 East, 249.

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(149) Contra *Pease* v. *Barber*, 3 *Caine's Rep.* 266. In that case, Kent, Ch. J. delivering the opinion of the court, says:—"The action for money had and received, is an equitable action, and the party must show that he has equity and conscience on his side. The rule in equity is to allow interest in many cases for money had and received.—There may be cases in which the defendant ought to refund the principal merely, and there may be other cases in which he ought *ex æquo et bono*, to refund the principal with interest. Each case will depend upon the justice and equity arising out of its peculiar circumstances, to be disclosed at the trial."

sum of money to be due, it may be recovered under this count, unless the submission was by bond(*l*). II. ITS PARTS. Fourthly, the cause of action.

We have seen that in actions by or against executors, administrators, &c. where six years have elapsed since the death of the testator or intestate, &c., or if it be on any other account material for the plaintiff to avail himself of a promise or acknowledgment since the death, &c. counts should be added on promises to or by the executor, &c. in that character, for otherwise such promise or acknowledgment *cannot be [*344] given in evidence(*m*); and this set of counts usually follows the common breach at the end of the first set of counts(*n*).

IN DEBT.

We have already considered when the *action* of *Debt* may be supported(*a*). In framing the declaration in this action, the general requisites and qualities which have already been pointed out must be observed(*b*). The particular parts may be considered under the same arrangement as in assumpsit(*c*); and most of the rules to be observed in framing declarations in that form of action equally govern in the action of debt, and therefore it will only be necessary to point out the distinctions.

The title of the court and term, and the venue, have already been considered(*d*). The *commencement* of the declaration preceding the statement of the cause of action, is similar to that in assumpsit(*e*), except in the description of the form of action, and which may be omitted(*f*). In the Common Pleas, or when the action is by original, it states that the defendant was *summoned*, not attached, to answer the plaintiff(*g*). The debt demanded should regularly be the aggregate of all the sums alleged to be due in the different counts; but a mistake in this respect, whether more or less, will not be a cause of demurrer, nor is it necessary to prove that the debt amounted precisely to the sum stated to be due(*h*). In general, the declaration should be in the *debet* and *detinet*; but in actions by and against executors *and administra- [*345] tors, it should be in the *detinet* only, except in an action upon a judg-

(*l*) Keen *v.* Batshore, 1 Esp. R. 194. Tidd's Prac. 4 edit. 743.—Kingston *v.* Phelps, Peake, C. N. P. 227.—Pearson & others *v.* Henry, 5 T. R. 6. but see Bailey *v.* Lechmere, 1 Esp. Rep. 377.

(*m*) Ante, 204, 5.—Hirst *v.* Smith, 7 T. R. 182.

(*n*) See the forms, post. 2. Vol. 85 to 102.

(*a*) Ante, 100 to 109.

(*b*) Ante, 248 to 261.

(*c*) Ante, 261.

(*d*) Ante, 261 to 285.

(*e*) Ante, 285 to 292. See the form, post. 2 Vol. 13.

(*f*) Lord *v.* Houstoun, 11 East, 62.

(*g*) Ante, 288. post. 2 Vol. 9 & 17.

(*h*) Lord *v.* Houston, 11 East, 62.—M'Quillin *v.* Cox, 1 Hen. Bla. 249.—Ante, 107, 8.—See the forms, 2 Vol. 184.

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ment recovered against an executor suggesting a *devastavit*, when the *debet* and *detinet* is proper(*h*).[150]

The mode of stating the *cause of action* varies as in assumpsit, according to the nature of the contract or matter declared on; which we have seen may be a simple contract, a specialty, a record, or a statute(*i*). In debt on *simple contract*, express or implied, to pay money in consideration of a precedent debt or duty, the *subject matter* of the debt is to be described precisely as in the common counts in assumpsit(*j*); but in point of *form*, the *indebitatus*, and *quantum meruit* or *valebant* counts, differ from those in assumpsit. The *indebitatus* count states, that the defendant on, &c. at, &c. was indebted to the plaintiff in a named sum of money for goods sold, or for work and labour, &c. precisely as in assumpsit; and it is not necessary to set forth the nature of the debt with more precision than in that action(*k*); but in this *indebitatus* count, no *promise* is stated as in assumpsit(*l*); and though it has been usual to conclude each count with the allegation, that "by reason of the said sum of money being unpaid, an action had accrued to the plaintiff to demand and have the same from the defendant, being parcel of the money above demanded," yet that allegation is unnecessary, and the usual breach at the end of the declaration will suffice(*m*); [*346] and the distinction is stated to be, that whenever the debt *arises merely by the judgment or obligation, &c. and not from any thing *dehors*, a non-performance of the obligation is to be laid, and the conclusion is to be with the breach *ad damnum;* but that where the debt arises not by the obligation alone, but also by some matter *dehors* stated in the declaration, there the count should conclude *per quod actio accrevit*, &c. as in debt on a lease for rent(*mm*). The *quantum meruit* and *quantum valebant* counts resemble those in assumpsit, except that the words "agreed to pay" are usually inserted, instead of "promised to pay;" and that such counts in general conclude with the same allegation *per quod actio accrevit*, &c. as the *indebitatus* count(*n*). The mode of framing the declaration in debt on legal liabilities, on awards, and for escapes, &c. are pointed out in the notes to the precedents in the second volume(*o*).

In debt founded upon a *specialty*, the deed must in general be stated(*p*). The declaration usually proceeds immediately from the com-

(*h*) Post. 2 Vol. 184.—Bac. Ab. Debt, F.—Hope *v.* Bague et al., 3 East, 2.—Com. Dig. Pleader, 2 W. 8.

(*i*) Ante, 101 to 105.

(*j*) See the cases, Com. Dig. Pleader, 2 W. 11.

(*k*) Emery *v.* Fell, 2 T. R. 28.—Post. 2 Vol. 185.

(*l*) Id. ibid.—Palmer *v.* Stavely, 12 Mod 511.

(*m*) Post. 2 Vol. 185. 187. in the notes.—Gilb. Debt, 414.

(*mm*) Gilb. Debt, 415.

(*n*) Post. 2 Vol. 185, &c.—Gilb. Debt, 414.

(*o*) Post. 2 Vol. 188 to 194.—Ante, 102.—See also Com. Dig. Pleader, 2 W. 11.

(*p*) Atty & another *v.* Parish & another, 1 New R. 104.

(150) Vide ante, 291. *Sportwood* v. *Price*, 3 *Hen. & Mun.* 123.

mencement to the statement of the defendant's contract, without any intermediate inducement or statement of the consideration upon which the contract was founded(*q*); for in general the circumstances under which the deed was made are immaterial, and a consideration is seldom essential, or at least it is to be presumed(*r*).[151] It is principally on this account that the declaration in debt or covenant on a specialty differs from that in assumpsit. Thus in debt upon a bond, the declaration states "that the defendant, on, &c. at, &c. by *his certain writing [*347] obligatory, sealed with his seal, and now shown to the court here, acknowledged himself to be held and firmly bound to the plaintiff in the sum of ———*l.* to be paid to the plaintiff," and then states the breach in the non-payment of that sum. So in debt or covenant upon a lease, by the lessor against the lessee, it is not necessary to set forth the lessor's title to the lands demised; but the declaration merely alleges "that the plaintiff, on, &c. at, &c. by a certain indenture made between him and the defendant, with a profert thereof, demised, &c.;" and in this case, if the title be unnecessarily set forth, it will in general be considered as an impertinent allegation, and may be rejected as surplusage(*rr*). But in an action of debt or covenant on a lease at the suit of the assignee of the reversion, or of the heir of the lessor, or by an executor of a termor for rent, which became due after the death of the testator, the declaration must state the title of the lessor to the demised premises, in order that it may appear that he had such an estate in the reversion as might be legally vested in the plaintiff in the character in which he sues(*s*); and this even where the estate of the plaintiff is derived from the king or a corporation(*t*). Such title is usually shown by way of *inducement* preceding the statement of the lease; as when the action is at the suit of an heir, by alleging that the lessor was seised of the premises in his demesne as of fee(*u*); or when the estate demised is copyhold, by showing that fact, and that the lessor was seised at the will of the lord, according to the *custom of the [*348

(*q*) See the cases, Com. Dig. Pleader, 2 W. 9.

(*r*) Sharington *v.* Strotton, Plowd. 308.—Fallowes *v.* Taylor, 7 T. R. 477. Bunn *v.* Guy, 4 East, 200.—1 Fonbl. 347.

(*rr*) Alebury *v.* Walby, 1 Str. 230, 231.—1 Saund. 233. n. 2.

(*s*) 1 Saund. 233. n. 2.—Alebury *v.* Walby, 1 Str. 230.—Parker et al. *v.* Manning, 7 T. R. 538.—Com. Dig. Pleader, C. 36.—Gilb Debt, 410.

(*t*) 1 Saund. 187. n. 1. The omission of the statement of the lessor's title is said to be aided by verdict. Lewis *v.* Weeks, 1 Show. 71.

(*u*) Sackeverell *v.* Froggatt, 2 Saund. 361.—Walton *v.* Waterhouse, 416.—Post. 2 Vol. 249, 250.

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(151) The want or failure of consideration, is not sufficient at law to avoid a specialty; and a false representation or warranty, whether in writing or by parol, as to the quality of property sold, cannot be pleaded in discharge of a bond given for the consideration. *Vrooman* v. *Phelps*, 2 *Johns. Rep.* 177. *Dorlan* v. *Sarmnis*, *Id.* 177. n. *Dorr* v. *Munsell*, 13 *Johns. Rep.* 430.

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manor(*v*); or where the plaintiff claims as assignee of a term, or as executor of the lessor for rent, &c. due since his death, by stating that the lessor, at the time of making the lease, was possessed of the demised premises for the residue of a certain term of years, &c.(*w*). In these cases the lessee and his assignee being estopped by the deed from denying the lessor's title generally, cannot plead *nil habuit*, or traverse the entire inducement, but admitting by his plea that the lessor had *some* legal interest in the premises, he may show that he was entitled to a *different* estate, and thereby in effect traverse the plaintiff's derivative title(*x*).

The time and place of making the contract should be stated as in assumpsit, and it must in general appear that such *contract* was by *deed*, except in debt for rent on a demise, which is the only instance where a deed may be adduced in evidence in support of a count not mentioning it(*y*). It must also appear that the contract was under *seal*;[152] but there are some technical words, such as *indenture*, *deed* or *writing obligatory*, which of themselves import that the instrument was sealed, and which will suffice(*z*);[153] and the omission of the statement that the instrument was under seal, will be aided if the defendant by his plea admit that the writing was sealed(*a*). The delivery of the deed, though essential to its validity, need not be stated in pleading(*b*); and though dated on a particular day, a deed may be stated in pleading to have been made on another day(*c*).

*349] *The *profert in curiam* of the deed, or the excuse for the omission, usually follows the statement of the time and place of making the deed, and of the parties thereto, and precedes the statement of the defendant's contract(*d*). Such profert is usually in the following words:—"which said writing obligatory, (or indenture, &c.) sealed with the "seal of the said defendant, the said plaintiff now brings here into "court, the date whereof is the day and year aforesaid(*e*);" and the excuse for the omission of a profert being traversable is to be stated

(*v*) Post. 2 Vol. 255 to 257.

(*w*) Post. 2 Vol. 254.—Parker et al. *v.* Manning, 7 T. R. 538.—See the various modes of stating different titles, and the nature of the estate, and how acquired, post. 2 Vol. 249 to 282.

(*x*) Post. 2 Vol. 548.—Parker et al. *v.* Manning, 7 T. R. 538, 539.

(*y*) Atty and another *v.* Parish and another, 1 New Rep. 104.—1 Saund. 276. n. 1, 2.—Salmon *v.* Smith, 1 Saund. 202.—2 Saund. 297. n. 1.

(*z*) 1 Saund. 290. n. 1. 320. n. 3.—Com. Dig. tit. Fait.

(*a*) Id. ibid.—Moore et ux. *v.* Jones, Ld. Raym. 1536. 1541.—Courtney *v.* Greenville, Cro. Car. 209.

(*b*) 1 Saund. 291. n. 1.

(*c*) Hall *v.* Cazenove, 4 East, 477.

(*d*) As to proferts in general, see Com. Dig. Pleader, O. P.—1 Saund. 9. n. 1.

(*e*) Post. 2 Vol. 195, 6.

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(152) Acc. *Van Santwood & another* v. *Sandford*, 12 *Johns. Rep.* 197. As to the law respecting seals, vide *Warren* v. *Lynch*, 5 *Johns. Rep.* 239. *Phillips' Ev. Dunl. Ed.* 361. n. a. 5 *Johns. Rep.* 247. n. b.

(153) Vide *Van Santwood & another* v. *Sandford*, 12 *Johns. Rep.* 198.

according to the fact, as either that the deed has been lost or destroyed by accident, or that it is in the possession of the defendant, &c. and that therefore the plaintiff cannot produce the same to the court(*f*).[154] In declaring upon a bill of exchange, or other simple contract, no profert is made; but in pleading a deed it is in general necessary, in order that the court may judge of the sufficiency of the deed(*g*); but when the deed operates under the statute of uses, as a lease and release, or a covenant to stand seised to uses, a profert is unnecessary(*h*). So in the case of a feoffment; because the estate passes by livery of seisin, and the statute against frauds, which requires that the livery should be accompanied by some instrument in writing, has not altered the form of pleading(*i*). So when the deed is stated only as inducement(*j*), or *where the plaintiff has no right to the possession of it, or of the counterpart(*k*), a profert is unnecessary; and it has been held that the assignees of a bankrupt obligee need not make a profert of the bond(*l*); and an award, though under seal, not being a specialty, need not be pleaded with a profert(*m*).[155]

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When a profert or an excuse for the omission was unnecessary, the statement of it will be considered as surplusage, and will not entitle the defendant to oyer(*n*). And oyer of a private act of parliament, or of a record, as of letters patent enrolled in Chancery, cannot be claimed though pleaded with a profert(*o*). But where a profert or an excuse for the want of it is necessary, if the plaintiff profess to produce the deed when he is not prepared to do so, the defendant is entitled to oyer, and if he plead *non est factum*, the plaintiff will be nonsuited on the trial, as it will not be sufficient in such case to prove that the deed was lost or destroyed, or in the defendant's possession(*p*);[156] and therefore, if

(*f*) Read *v.* Brookman, 3 T. R. 151. Bolton *v.* The Bishop of Carlisle et al. 2 Hen. Bla. 259.—Post. 2 Vol. 197.—Hawley *v.* Peacock and another, 2 Campb. 557.—Hendy & others *v.* Stephenson & others, 10 East, 55.

(*g*) Leyfield's Case, 10 Co. 92. b.—Master et al. *v.* Miller, 4 T. R. 338.—Com. Dig. Pleader, O. 1, &c. where a variety of instances are collected, in which a profert is or is not necessary.

(*h*) Banfill *v.* Leigh et al., 8 T. R. 573.—1 Saund. 9 n. 1.—Whitfield *v.* Fausset, 1 Vez. 394.—Onslow *v.* Smith, 2 Bos. & Pul. 387.—Bolton *v.* The Bishop of Carlisle et al., 2 Hen. Bla. 262.—Read *v.* Brookman, 3 T. R. 156. Post. 2 Vol. 268, 9.

(*i*) Id. ibid.—Read *v.* Brookman, 3 T. R. 156.—Banfill *v.* Leigh et al., 8 T. R. 573.—1 Saund. 276. n. 1, 2.—Post. 2 Vol. 263.

(*j*) Banfill *v.* Leigh et al., 8 T. R. 573.—Com. Dig. Pleader, O. 15.

(*k*) 1 Saund. 9. a. n. 1.—Whitfield *v.* Fausset, 1 Vez. 394.

(*l*) Gray *v.* Fielder, Cro. Car. 209.

(*m*) 2 Saund. 62. *b.* n. 5.

(*n*) Moris's Case, 2 Salk. 497.

(*o*) The King *v.* Amery, 1 T. R. 149. 1 Saund. 9. b. n. 1.

(*p*) Smith & others *v.* Woodward, 4 East, 585.—Beckford *v.* Jackson, 1 Esp. Rep. 337.

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(154) Vide *Phillips' Ev.* 348. *Cutts* v. *United States, Galison's Rep.* 69.

(155) Acc. *Weed* v. *Ellis*, 3 *Caine's Rep.* 256.

(156) Vide *Phillips' Ev.* 348.

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the plaintiff be not prepared to produce the deed on oyer being claimed, or at the trial, and has inadvertently pleaded the deed with a profert, the declaration must be amended, and the circumstances to excuse the profert should be stated(*q*). However, the omission of a profert, when necessary, can only be taken advantage of by special demurrer(*r*).

In general the declaration proceeds immediately from the profert to [*351] the statement of the defendant's *contract without disclosing the *consideration* upon which it was founded, which is not in general essential to the validity of a deed(*s*). But in pleading a conveyance under the statute of uses, it is necessary to state that a *valuable* consideration was paid(*t*), or that there was a *good* consideration, as in the instance of a covenant to stand seised to uses made in respect of relationship, &c.(*u*); in which cases, if the statement of the consideration be omitted, the declaration will be bad on special demurrer(*v*). So when an act to be done by the plaintiff was the consideration of the defendant's covenant, and constituted a condition precedent, it is necessary to show such consideration as well as the performance of it(*w*).

In stating the *contract* by deed, either in debt or covenant, the rules which we have considered in the action of assumpsit in general apply. The defendant's contract should in strictness be set forth in positive terms, and not with the *testatum existet*, or that it was witnessed, &c.; but this will suffice in a declaration, though not in a plea or avowry in which the operation of the deed or instrument must be expressly averred, and not by way of recital or argument(*x*). The deed must be pleaded according to its legal operation; and where a title by conveyance, in which are the words give, grant, release, confirm, bargain, sell, &c. is pleaded, the party should rely on one of those words, or at least should only [*352] adopt such of them as have the same *operation(*y*). We have already seen that the contract should be set forth, either in the precise words, or according to the legal effect, and that no covenants or matter unconnected with the cause of action should be stated(*z*); on the other hand a variance will frequently be fatal(*a*), and any matter which qualifies the contract must be stated, or the plaintiff will be nonsuited on the plea of *non est factum*(*b*).

After stating the covenants it is usual, though unnecessary, to *refer*

(*q*) Id. ibid.—1 Saund. 9. a. n. 1.

(*r*) 4 & 5 Ann. c. 16.—Com. Dig. Pleader, S. 17.

(*s*) Ante, 346.

(*t*) Post. 2 Vol. 268, 9.

(*u*) Post. 2 Vol. 266.

(*v*) Bolton *v.* the Bishop of Carlisle et al., 2 Hen. Bla. 259. 261.—2 Saund. 12. n. 20.—Sargent *v.* Read, 2 Stra. 1229.—2 Saund. on Uses, 53.

(*w*) 2 Saund 352. b.—Clarke *v.* Gray et al., 6 E st, 568.—Littler *v.* Holland, 3 T. R. 590.—Ante, 309 to 319.

(*x*) 1 Saund. 274. n. 1.—Moore et ux. *v.* Jones, Ld. Raym. 1539.—2 Saund. 319. n. 5.

(*y*) 2 Saund. 97. (b.) n. 2.—Co. Lit. 49. a. n. 1.—Musgrave v. Cave et al., Willes, 319.—Roe d. Earl of Berkeley *v.* The Archbishop of York, 6 East, 105.

(*z*) Ante, 298 to 303.

(*a*) Pitt *v.* Green, 9 East, 188.

(*b*) Howell *v.* Richards, 11 East, 633.

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to the indenture, and in actions on leases to state the *lessee's entry* on the demised premises(*c*); and when the action is between the original parties to the contract, the declaration then proceeds immediately to the averments of the plaintiff's performance of the conditions precedent when necessary, and to the breach. But when the declaration is by or against a person who was not a party to the original contract, and particularly in actions upon leases, the statement of the derivative title of the plaintiff or the defendant precedes the breach. Thus, when an action is brought by the heir of the lessor, the death of his ancestor, and the descent to the plaintiff as heir is shown(*d*). And when the plaintiff claims as assignee of the reversion by lease and release, or other conveyance, the operative part must be set forth(*e*). In an action brought by the assignee of a term, all the mesne assignments of the term, down to himself, should be stated; for he being privy to them, shall not be allowed to plead generally that the estate of the *lessee [*353] of and in the demised premises came to him by assignment; but when the action is brought *against* the assignee of a lessee, such general form of pleading is sufficient, because the plaintiff is a stranger to the defendant's title, and therefore cannot set it out particularly.[157] It is not, however, sufficient in the latter case to allege that the *tenements* came to the defendant by assignment; but it must be shown that he is assignee of the *term*, for otherwise it might be an assignment of another estate than the term of the lessee. The usual form is—"that *all* "the said estate, right, title, and interest of the said E. F. (the lessee) "of, in, and to the said demised premises with the appurtenances, af- "terwards, to wit, on, &c. at, &c. aforesaid, by assignment thereof then "and there duly made, came to and vested in the said defendant"(*dd*). An heir may be sued, either generally as heir, without showing how he became so, or may be declared against as assignee, upon a covenant running with the land(*ee*). And an executor may be sued in the *debet* and *detinet* as assignee, for rent which became due after the death of his testator(*f*). The mode of declaring by and against persons suing or being sued, in a derivative character, is pointed out in the various precedents in the second volume(*g*). In some cases of debt on specialty, it may be necessary to aver the performance by the plaintiff of a condition *precedent, or that some other circumstance has taken [*354] place which entitles the plaintiff to the payment of the debt; but in general the declaration proceeds at once to the usual breach.

(*c*) Post. 2 Vol. 243.
(*d*) Post. 2 Vol. 262.
(*e*) Post. 2 Vol 266, 7.
(*dd*) 1 Saund. 112. b. n. 1.—Post. 2 Vol. 246.
(*ee*) Denham *v.* Stephenson, 1 Salk. 355.—Derisley et al. *v.* Custance, 4 T. R. 75.
(*f*) Buckley *v.* Pirk, 1 Salk. 317.—Derisley et al. *v.* Custance, 4 T. R. 75.
(*g*) On bonds by or against particular persons, *post.* 2 Vol. 203 to 207. Against an heir or devisee, ibid. 208, 9.—On various titles, 249 to 281.

(157) Vide *Folliard* v. *Wallace*, 2 *Johns. Rep.* 402.

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We have seen that debt is the promer remedy on *Records*, as recognizances of bail, statutes merchant, recognizances in the nature of a statute staple, and on judgments(*a*). The validity of these cannot in pleading be impeached or affected by any supposed defect or illegality in the transaction on which they were founded, nor can there be any allegation against the validity of a record(*b*), and consequently it is not necessary to state the circumstances or consideration on which the record was founded. In debt upon a *Recognizance of bail*, it must be stated with certainty, following the description in the entry of the recognizance, and should set forth in what court and at whose suit, and for what sum or cause the defendant became bail(*c*): and in pleading a statute staple, it should be shown to have been by writing obligatory or under seal(*d*). Formerly, in an action upon a *Judgment*, it was usual to set forth in the declaration the whole of the proceedings in the former suit, but this is no longer the practice(*e*), and it is sufficient to state shortly, "that heretofore, to wit, in such a term in such a court then holden at Westminster, &c. the plaintiff by the consideration and judgment of that court, recovered against the defendant the sum of [*355] *——— *l.* which was adjudged by the said court to the plaintiff for his damages which he had sustained, as well by reason of the non-performance by the said defendant of certain promises and undertakings made by him to the plaintiff, as for his costs and charges by him about his suit in that behalf expended;" or if the judgment were in debt, the form varies accordingly: and this concise mode is sufficient even in an inferior court not of record;[158] and it is not necessary to set out the cause of action, or that the defendant became indebted within the jurisdiction of the court(*f*). It is however necessary in debt upon a judgment in the courts at Westminster, to show with certainty the term and parties, and the sum recovered; and it is said, that if the declaration be on a judgment in the Common Pleas, it should be stated before what judges it was recovered(*g*); and this is frequently necessary in debt on a judgment in an inferior court, in which case, the names of the suitors who were the judges should be stated; but the omission will be aided by verdict(*h*). Care must be taken that there

(*a*) Ante, 103, 4.

(*b*) Hayward *v.* Ribbans, 4 East, 311.—Horsey *v.* Daniel, 2 Lev. 161.—Gilb. on U. & T. 109.—Gilb. Debt, 412. Moses *v.* Macferlan, Burr. 1007.—Drake *v.* Mitchel et al., 3 East, 258.—Erving and others *v.* Peters, 3 T. R. 689.

(*c*) Park *v.* Yerbury, 1 Wils. 284.—Post. 2 Vol. 227 to 231.—Com. Dig. Pleader, 2 W. 10.

(*d*) Goldsmith *v.* Sydner, Cro. Car. 363.—Com. Dig. Pleader, 2 W. 10.

(*e*) Murray *v.* Wilson, 1 Wils. 318.

(*f*) Murray *v.* Wilson, 1 Wils. 316.—1 Saund. 92. n. 2.—Post. 2 Vol. 232, 3. Com. Dig. Pleader, 2 W. 12.—Lewis *v.* Weeks, Carth. 85, 6.—Thomp. Ent. 118.—Bently *v.* Donnelly, 8 T. R. 127.

(*g*) Com. Dig. Pleader, 2 W. 12. but see the usual form, post. 2 Vol. 232.

(*h*) Id. ibid.—Lewis *v.* Weeks, Carth. 86.—The King *v.* Stevenson et al., 2 East, 362.

(158) Vide post. 515. n. 84.

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be no variance in the statement of the judgment, which in the case of a record we have already seen is in general fatal(*i*); thus, if there be a judgment for 388*l.* 0*s.* 1*d.* and debt be brought on it as for 388*l.* recovered, omitting the penny, it is a variance,[159] and cannot be cured by a remittitur of the penny(*j*). *In debt upon a judgment, or other matter of record, unless when it is stated as inducement, it is necessary after showing the matter of record, to refer to it by the *prout patet per recordum*(*k*). But the omission will be aided unless the defendant demur specially(*l*). It is usual also to allege that the judgment still remains in full force and effect; and that the plaintiff has not obtained execution or satisfaction thereof, but this allegation is unnecessary(*m*). [*356]

In debt on a *Statute* at the suit of a party grieved, or by an informer, where the whole of the penalty is given to him, the *commencement* is the same as in debt on a contract; but where a part of the penalty is given to the informer, and the king, or the poor of the parish, &c. the commencement and other parts of the declaration usually state that the plaintiff sues *qui tam*, &c. though this is not necessary, unless there has been a contempt of the king(*n*). In a declaration on a public statute, it is not necessary or advisable to state the title or year of the reign when the statute was passed, or to recite any part of the act: and if it be unnecessarily stated any material variance will be fatal, particularly if the declaration conclude against the form of the statute *aforesaid*(*o*). It is material however in all cases that the *offence or act charged to have been committed or omitted by the defendant, appear to have been within the provision of the statute, and all circumstances necessary to support the action must be alleged,[160] and the conclusion with *contra formam statuti* will not aid the omission(*p*). If, however, this be stated [*357]

(*i*) Ante, 306.—Philipson & another *v.* Mangles, 11 East, 516.—Powdick *v.* Lyon, ib. 565.

(*j*) Coy *v.* Hymas, 2 Stra. 1171.—Purcell *v.* Macnamara. 9 East, 157.—Phillips *v.* Eamer et al., 1 Esp. Rep. 356.

(*k*) Gilb. Debt, 412.—Morse *v.* James et al., Willes, 127. in which Waites *v.* Briggs, Salk. 565. referred to in Com. Dig. Pleader, 2 W. 12. is corrected.

(*l*) 4 Ann, c. 16. s. 1. and see Powdick *v.* Lyon, 11 East, 565.

(*m*) 1 Saund. 330. n. 4.—Sed vide Com. Dig. Pleader, 2 W. 12.

(*n*) Com. Dig. Action on Statute, E. 1.—The King *v* Lovet, 7 T. R. 152.—1 Saund. 136. n. 1.—2 Saund. 374. n. 1. As to pleadings in general on statutes, see Com. Dig. Pleader, C. 76.—Bac. Ab. tit. Statute.—1 Saund. 135. n. 3.—2 Saund. 377. b. n. 12.

(*o*) Ante, 218.—Com. Dig. Action on Statute, H. 1.—2 Saund. 374. n. 2.—King *v.* Marsack, 6 T. R. 776.—Lee *v.* Clarke, 2 East, 341.

(*p*) 1 Saund. 135. n. 3.—Bennet *v.* Talbot, 1 Salk. 212.—Com. Dig. Action Statute, A. 3.—Pleader, C. 76.—Daman *v.* Marrett, 1 Taunton, 128.—Lee *v.* Cass, 1 Taunt. 511.—Barnard *v.* Gostling & Gostling, 1 New Rep. 245.

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(159) Vide *Bissel* v. *Kip*, 5 *Johns. Rep.* 89.

(160) Vide *Burnham* v. *Webster*, 5 *Mass. Rep.* 270. *Bigelow* v. *Johnson*, 13 *Johns. Rep.* 428. *Hassenfrats* v. *Kelly*, 13 *Johns. Rep.* 468.

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in effect, it will suffice; and therefore a declaration for feloniously setting fire to two stacks of oats is sufficient, though the words of the act are unlawfully and maliciously(*q*). Where a person is exempt from a penalty under certain circumstances by a proviso in a statute, and not in the body of it, the plaintiff need not state that the defendant is not within the exemptions, for that is merely matter of defence to be shown by the defendant;[161] but where the exception is contained in the enacting clause, it must be negatived in the declaration(*r*); but in a declaration on the game laws, it is not necessary to negative the particular qualifications, though it is otherwise in an information(*s*). When an act of parliament which has been recently passed, enacts that if a party commit an offence after a named day, he shall be liable to a penalty, it is usual to aver that the offence was committed after that day; but when the act has been long passed, such averment is not necessary(*t*). It is usual also when the particular statute limits the time within which the
[*358] action should be brought, to aver that the offence was *committed within such time; but this also does not seem material(*u*).

Where the act or omission was not an offence at common law, it is necessary in all cases to conclude against the form of the statute or statutes(*v*), or to show at least that the declaration is founded on the statute by introducing the words *de placito transgressionis et contemptus contra formam statuti*(*w*). And the words "whereby and according to the form of the statute," will not suffice when the action is founded on two statutes(*x*). In the latter case, the conclusion should be against the form of the statutes(*y*). Where, however, a statute refers to a former act, and adopts and continues the provisions of it, the declaration should conclude only against the form of the statute(*z*).[162] So, where an offence is prohibited by several statutes, if only one is the foundation of the action, and the others are explanatory or restrictive, it is proper to conclude against the form of the statute in the singular number(*a*). The omission of the words "against the form of the sta-

(*q*) Allen *v.* The Hundred of Kirton, 3 Wils. 318.—S. C. 2 Bla. Rep. 842.—The King *v.* Stevens, 5 East, 244.

(*r*) Spieres *v.* Parker, 1 T. R. 144, 5.—Whitwicke *v.* Osborton, 1 Lev. 26. Com. Dig. Action Statute.

(*s*) Id. ibid.—The King *v.* Stone, 1 East, 639.

(*t*) 1 Saund. 309. n. 5. and see Fitzgib. 136. Bac. Ab. Usury, K. 209.

(*u*) Lee *v.* Clarke, 2 East, 340.—The King *v.* Stevenson et al., 2 East, 362.

(*v*) Lee *v.* Clarke, 2 East, 339.—1 Saund. 135. n. 3.—The King *v.* Southerton, 6 East, 140.—Earl of Clanricarde *v.* Stokes, 7 East, 516.

(*w*) Lee *v.* Clarke, 2 East, 341.

(*x*) Lee *v.* Clarke, 2 East, 340.

(*y*) Id. ibid.—Ridley *v.* Bell, Lutw. 212.—4 Hawk. 71.—Com. Dig. Action Statute, H.

(*z*) Ridley v. Bell, 1 Lutw. 212.—1 Saund. 135. n. 3.—2 Saund. 377 n. 12. Earl of Clanricarde *v.* Stokes, 7 East, 516.

(*a*) Andrew *v.* Hundred of Lewkner, Yelv. 116.—2 Saund. 377. n. 12.

(161) Ante, 229.

(162) Vide *Haywood* v. *Sheldon*, 13 *Johns. Rep.* 88.

tute," or "statutes," when proper to be inserted, is fatal even after verdict(*b*). In general, however, there is no difference as to the doctrine of amending at common law between penal and other actions(*c*); and the statute 4 Geo. 2. c. 26. extends the provisions *of the statute of Jeofails to penal actions(*e*); and it had before been determined, that the 32 Hen. 8. c. 30. extended to penal actions(*f*). It is usual, in addition to the statement *contra formam statuti*, and of the consequent forfeiture of the penalty to allege that "by means of the premises, and by force of the statute in such case made and provided, an action hath accrued to the said plaintiff to demand and have the said penalty of ——— *l.*," &c. but this appears unnecessary; and even assuming it to be requisite, yet a count for a penalty on the statute 5 Ann, stating that a defendant kept a snare to kill game "against the form of the statute in such case made and provided, and by reason whereof and by force of the statute in such case made and provided an action hath accrued," &c. is sufficient; for the first-mentioned statute refers to the 5th Ann, c. 14. creating the offence and giving the penalty; and the last-mentioned statute refers to the 2d Geo. 3. c. 19. by which the whole penalty is given to the common informer, the half only of which had been given to him by an intervening statute(*g*). [*359]

As the action of debt is merely for a money demand, the *breach* or cause of action complained of must necessarily proceed only for the non-payment of the money previously alleged to be payable; and such breach is nearly similar, whether the action be in debt on simple contract, specialty, record, or statute, and is usually as follows—"Yet "the said defendant, although often requested so to do, hath not as yet "paid the said sum of —— *l.*(*h*) above demanded, *or any part thereof "to the said plaintiff (or if *qui tam*, &c. to our said Lord the King, "and to the said ——— who sues as aforesaid) but hath hitherto "wholly neglected and refused so to do. To the damage of the plain- "tiff of ——— *l.* and therefore he brings his suit," &c.[163] The damages in debt are in general merely nominal, and not as in assumpsit, the principal object of the suit, and therefore a small sum, as 10*l.*, is [*360]

(*b*) Lee *v.* Clarke, 2 East, 333.—Myddelton *v.* Wynne, Willes, 599.

(*c*) 1 Saund. 250. d—Philips *v.* Smith, 1 Stra. 137.—Wynne *v.* Middleton, 2 Stra. 1227.—Anon., 1 Wils. 256.—Bennet *v.* Smith, 1 Burr. 402.

(*e*) Myddelton *v.* Wynne, Willes, 601.

(*f*) Sedgwicke *v* Richardson, 3 Lev. 375.—Philips v. Smith, 1 Stra. 136.—Wynne *v.* Middleton, 2 Stra 1227.—Richards *v.* Brown, Dougl. 115.

(*g*) Earl of Clanricarde *v.* Stokes, 7 East, 516.

(*h*) This is to be the sum named in the commencement of the declaration, being the aggregate of all the sums stated to be due in the different counts.

(163) It seems that a declaration in debt on bond assigning breaches under the statute, may conclude as in covenant. *Gale & Stanley* v. *Obrian*, 12 *Johns. Rep.* 216. S. C. 13 *Johns. Rep.* 189.

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usually inserted(*i*), and in action by a common informer, as he is not entitled to damages, no damages should be inserted(*j*).

IN COVENANT.

As the action of *Covenant* can in general only be supported on a deed(*a*), there is less variety in the declarations in this action than in that of debt, and therefore but few observations will here be necessary, as most of the rules to be observed in framing a declaration in assumpsit or debt, equally govern in framing the declaration in this action(*b*). The *Commencement* of the declaration in the King's Bench, by bill, varies only from the form in assumpsit and debt in the description of the plea or form of action, which is "of a plea of breach of covenant;" but in the King's Bench by original, and in the Common Pleas it states that "the defendant was summoned to answer the plaintiff of a plea, that he keep the covenant made by him with the plaintiff, according to the force, form, and *effect of a certain indenture made between them, &c. and thereupon the said plaintiff, by E F his attorney, complains, for that whereas, &c.;" and this form varies when the action is by or against the assignee of the reversion, or an heir, &c.(*c*). We have already seen that an *Inducement* is not in general necessary in this action, unless by or against a person claiming or being sued in a derivative character, as at the suit of the heir at law, or of the assignee of the lessor(*d*); nor is a *Consideration* necessary to be stated, unless it constitute a condition precedent, or unless a conveyance operating under the statute of uses be pleaded(*e*). We have seen that after stating the time and place of making the *Deed* and the parties thereto, a *Profert* of the deed or an excuse for the omission is usually necessary(*f*); and in setting out the defendant's *Contract*, no unnecessary matter should be stated, a rule which particularly prevails, and should be observed in practice, in declaring upon a lease or a mortgage deed(*g*). In declaring on a lease, it is usual to refer thereto, and to state the lessee's entry and the plaintiff's general performance, but these are unnecessary(*h*): the mode of stating a derivative title or liability(*i*), and of *averring* performance by a plaintiff of a condition precedent, and the defendant's notice thereof, and his *breach* of covenant have already been considered(*j*). It is usual after stating the

[*361]

(*i*) Ante, 100.

(*j*) Frederic *v.* Lookup, 4 Burr. 2021. Cuming v. Sibly, 4 Burr. 2490.

(*a*) Ante, 109 to 117.

(*b*) As to the action of covenant in general, see ante, 109 to 117.

(*c*) Post. 2 Vol. 10. 18.

(*d*) Ante, 346, 7.

(*e*) Ante, 351.

(*f*) Ante, 350.

(*g*) Post. 2 Vol. 242. n. i. 176. n. f.

(*h*) Post. 2 Vol. 243.

(*i*) Ante, 352, 3.

(*j*) Ante, 325, &c.—See the forms, post. 2 Vol. 247.

breaches of covenant, to *conclude* by alleging—"And so the said plain- II. ITS PARTS. Fourthly, the cause of action.
"tiff in fact saith, that the said defendant, although often requested so
"to *do, hath not kept his said covenant, but hath broken the same, [*362]
"&c.:" but this is mere form, and is superfluous repetition(*k*); *Damages* being the principal object in this action(*l*), should be laid sufficiently large to cover the real demand.

IN ACTIONS IN FORM EX DELICTO.

Actions in form *ex delicto*, are case, trover, detinue, replevin, trespass, and ejectment; the applicability of which remedies has already been considered(*a*). The particular mode of framing declaration in these actions is stated in the precedents and notes in the second volume; but there are some *general* rules which it will be proper here to consider, and which relate principally to the *statement*—1st, of the *matter* or *thing* affected—2dly, of the plaintiff's *right* thereto—3dly, of the *injury*—and 4thly, of the *damages*.

1st. Statement of the *matter* or *thing* affected.

The property or thing affected should be described with certainty, and in such terms as are commonly used in the law: thus a way ought not to be described as a passage(*b*); and as the term "tenement" includes incorporeal as well as corporeal hereditaments, it ought not to be adopted in stating the premises in ejectment or trespass, which in general lie only for corporeal hereditaments(*c*). The term "close" is proper, though the land be not enclosed, as it imports in law the interest in the soil(*d*). In actions for taking away or injuring personal property, the goods or cattle ought to be described with certainty,[164] stating the *number and value(*dd*); but less certainty is required in trover than in detinue, because in the former action, damages only are recovered, but in the latter, the goods themselves: and indeed, it was the observation of Lord Hardwicke, that as the plaintiff may, in an action for a tort, recover if he prove any part of his case, the doctrine as to [*363]

(*k*) 1 Saund. 235. a. n. 7.—Post. 2 Vol. 244.

(*l*) Harrison *v.* Wright, 13 East, 343.

(*a*) Ante, 122 to 193.

(*b*) Alban *v.* Brounsall, Yelv. 163.

(*c*) Post. 2 Vol.—Doe d. Bradshaw *v.* Plowman, 1 East, 441.—Goodtitle d. Wright *v.* Otway, 8 East, 357.—Strode *v.* Byrt, 4 Mod. 418. 423.—Vice *v.* Burton, 2 Stra. 891.

(*d*) Doc. & St. 30.—Stammers *v.* Dixon, 7 East, 207.—Vin. Ab. tit. Fences.

(*dd*) See the assigned reason. Keeble *v.* Hickringill, 11 East, 576. 578. stating animate property as goods and chattels will suffice, Year Book, 17 Edw. 3. p. 41.

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(164) Vide *The People* v. *Dunlap*, 13 *Johns. Rep.* 446.

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certainty in the enumeration of the property, appears to be of little utility(*c*). In trover and other actions, where the plaintiff is entitled to recover, though he do not prove the whole of his allegation, it is usual to state a conversion, &c. of a larger quantity of goods than was perhaps really converted, so as to afford greater latitude in evidence, avoiding however any unnecessary description or repetition(*f*); but in other cases, and particularly in prescriptions, it is advisable not to state a right to more than is sufficient to sustain the action(*g*); thus in a declaration for disturbance of tolls, where the plaintiff's market was erected by charter, it is the safest way not to state all the words used in the charter respecting tolls, stallage, &c. but only those which are the subject matter of contest(*h*); and in claiming a right of common, or a way, &c. a more extensive right should not be stated than is essential to the support of the action(*i*);[165] and though in an *action of trespass *quare clausum fregit*, it is fsequently advisable to state the name of the close or its abuttals, in order to avoid the necessity for a new assignment in case the defendant should plead *liberum tenementum*; yet if there be any doubt as to the description, such particularity should be avoided(*ii*).

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2dly, statement of the plaintiff's *right* or *interest*.

In regard to the *plaintiff's right or interest* in the matter or thing affected, it may be independent of any particular obligation on the defendant; or it may be an interest in the performance by the defendant of some *particular* duty, founded either on contract between the parties, or on the obligation of law, arising out of the defendant's particular situation.—Where the *law* gives a *general* right, as for all persons to fish in a public navigable river, it is improper to state such public right or to prescribe, and it will suffice to show that such a particular place was a public navigable river, and that the defendant prevented the plaintiff from fishing, &c.(*j*). And whenever the right of the plaintiff is *implied by law*, as the absolute rights of persons, it is unnecessary to state the same; as in actions for assault and battery, false imprisonment, words, or libels, when actionable in them-

(*e*) Bern et ux. *v.* Mattaire, Rep. T. Hardw. 121.—2 Saund. 74. b.—Gilb. L. & E 229.—Post. 2 Vol 370. and see Run. Rject. 125.—Gilb. Repl. 159.

(*f*) 2 Saund. 74. b.—Bern et ux. *v.* Mattaire, Rep. T Hardw. 121.—Barnes, 335.—Philips *v.* Fielding, 2 Hen. Bla. 131.—2 Saund. 379. n. 13.

(*g*) The Bailiffs, Burgesses, &c. of Tewkesbury *v.* Bricknell, 1 Taunton, 142.—Morewood v. Wood & another, 4 T. R. 160.—Pring v. Henley, Bul. Ni. Pri. 59. As to variances in description, Goodwin v. Blackman, 3 Lev. 334.—Denn d. Burges *v.* Purvis et al., 1 Burr. 326.—Ablett *v.* Skinner, Sid. 229.

(*h*) 2 Saund. 172. n. 1.

(*i*) Brook *v.* Willet, 2 Hen. Bla. 234. Vin. Ab. Prescription, W.—Heriot *v.* Stuart, 1 Esp Rep. 437.

(*ii*) Bul. Ni. Pri. 89.—Stevens *v.* Whistler, 11 East, 51.—Post. 2 Vol. 434.

(*j*) Ward w. Creswell, Willes, 268. Vin. Ab. Prescription, U.—Tenant *v.* Goldwin, Ld. Raym. 1091.

(165) Vide *Rogers & others* v. *Allen*, 1 *Campb.* 313. *Id.* 315. n. *a*.

selves, and malicious prosecutions, in which it is sufficient to allege the injury, without any inducement of the right of personal security, &c. though it is usual in actions for slander to begin the declaration with a statement of the plaintiff's good character(*k*). But where the law does not imply the right to the matter or thing affected, it must be stated either *generally* or *specially*(*l*). *Thus in a declaration for slander, affecting a person in the way of his trade,[166] the particular trade must be shown by way of inducement(*m*). And in an action for an injury to the relative rights of persons, the relation of husband(*n*) or master(*o*), in respect of which the plaintiff was injured must be stated. So in actions for taking away, detaining, or injuring personal property, it must be shown that the goods, &c. were the plaintiff's, either by the words "of the plaintiff," or that "he was possessed of the goods, &c." or the omission will be fatal even after verdict, the objection being the want of title, and not a title defectively stated(*p*); and where the plaintiff's interest in personal property is reversionary, his right must be described accordingly(*q*); but if the defendant by his plea admit the plaintiff's property, the defect will be aided(*r*). [*365]

In actions of *trespass* to *houses*, *land*, &c. the possession of the plaintiff ought to be stated, or some words equivalent(*s*), as the words "of the plaintiff," which, as possession is *prima facie* sufficient against a wrong doer, will suffice(*t*). In *other* personal actions for injuries to *real* property, corporeal or incorporeal, it was formerly usual to state the plaintiff's title *specially*, as that he was *seised in his demesne as of fee*, of a house, mill, &c. and was entitled by *prescription*, or *grant, &c. to the right of common, way, water-course, or other right affected(*tt*); but it is now fully settled, that in a personal action against a *wrong doer*, for the recovery of damages, and not the land itself, it is sufficient to state in the declaration, that the plaintiff was *possessed* of a house or land, &c. and that *by reason of such possession*, he was entitled to the common of pasture, way, or other right, in the exer- [*366]

(*k*) Post. 2 Vol. 304 n. s.

(*l*) Com. Dig. Plead. C. 34.

(*m*) 1 Saund. 242. a. n. 3.—2 Saund. 307. n. 1.—Morris *v.* Langdale, 2 Bos. & Pul. 284.—Post. 2 Vol. 305. n. w.

(*n*) Post. 2 Vol. 313, 4.

(*o*) Post. 2 Vol. 315, 6, 7.

(*p*) See the precedents, post. 2 Vol. 320 to 380.—2 Saund. 379. n. 13.—Fontleroy v. Aylmer, 1 Ld. Raym. 239. Franklyn *v.* Reeves, Rep. T. Hardw. 118.—S. C. 2 Str. 1023.—Daile *v.* Coates, 2 Lutw. 1509.—Com. Dig. Pleader, 3 M. 9.—Burser *v.* Martin, Cro. Jac. 46. Joce *v.* Mills, 2 Salk. 640.—S. C. 2 Ld. Raym. 890.

(*q*) Post. 2 Vol. 377.

(*r*) Brooke *v.* Brooke et al., 1 Sid. 184.

(*s*) Com. Dig. Pleader, 3 M. 9.

(*t*) Willamore *v.* Bamforde, 2 Bulst. 288.—Graham *v.* Peat, 1 East, 244.—Com. Dig. Pleader, 3 M. 9.

(*tt*) See the cases in Com. Dig. Pleader, C. 34 to C. 38.—2 Saund. 113. a. n. 1.—And precedents referred to, 1 Saund. 346. n. 2.

(166) So, in declaration for slander of an attorney there must be a colloquium of his profession. *Gilbert* v. *Field*, 3 *Caine's Rep.* 329.

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cise of which he has been disturbed(*u*). And though a distinction has been taken between a declaration against a wrong doer, and against the *owner of the soil*(*v*); and it was thought, that in the latter case the plaintiff's title by grant, &c. must be specially stated, because it might be qualified by some condition precedent, the performance of which ought to be shown(*w*); yet it appears sufficient in both cases to *declare* generally on the plaintiff's possession, though in a *plea* it is necessary to state the seisin in fee, and prescriptive right or grant(*x*). If however, the right of common, way or watercourse, &c. be not appurtenant to the house, land, &c. and the plaintiff be entitled thereto by agreement or license, the allegation, "by reason of the possession, &c." [*367] would be improper(*y*). *And where a *reversioner* sues for an injury to houses, land, &c. in possession of his tenant, his interest must be described accordingly, though it is sufficient to allege generally that the lands were in possession of the third person, as tenant to the plaintiff, without stating a seisin in fee, &c.(*z*). In an action on the case for obstructing *ancient lights*, the declaration usually states that the plaintiff, at the time of committing the grievances complained of, was lawfully possessed of a messuage, situate, &c. wherein there of right were and ought to be certain windows, through which the light and air ought to have entered the messuage, and then states the injury; and this is sufficient without alleging that the windows were ancient(*a*). So if the declaration be for diverting a *watercourse* from the plaintiff's mill, his possession of the mill should be concisely stated, and that *by reason thereof*, he ought to have had the use and benefit of the watercourse; without stating that it was an ancient mill, or disclosing the grounds upon which the right to the water is claimed(*b*). And in an action for a disturbance of a *right of common*(*c*), or *way*(*d*), or of a *seat*

(*u*) Com. Dig. Pleader, C. 39.—And tit. Action Case Disturbance, B.—2 Saund. 113 a. n 1.—2 Saund. 172. a. n. 1.—Rider *v.* Smith, 3 T. R. 766.—Blissett *v.* Hart, Willes, 508.—Drake *v.* Wiglesworth, Willes. 654.—1 Saund. 346. n. 2.—6 East, 438. n. a.—See precedents, post. 2 Vol. 400, &c.—10 Co. 59. b.

(*v*) See Strode *v.* Birt, 4 Mod. 421. Vernon *v.* Goodrich, 1 Stra. 5.—Greenhow *v.* Ilsley et al., Willes, 619.—Waring *v.* Griffith et al., 1 Burr. 440.—Grimstead *v.* Marlow, 4 T. R. 718.—Tidd's Prac. 4 ed 386.—Stocks *v.* Booth, 1 T. R. 431.

(*w*) Waring *v.* Griffith et al., 1 Burr. 443, 4.

(*x*) Rider *v.* Smith, 3 T. R. 766.—2 Saund. 113. a. n. 1. and cases there collected, and see the precedents, Blockley *v.* Slater, Lutw. 119, 120.—1 Barnard, K. B. 432.—6 East, 438. n. a.—Norris *v.* Baker, 1 Rol. Rep. 394.—Cary *v.* Bacchus, 1 Show. 18, 19.—Winford *v.* Wollaston, 3 Lev. 266.—Grimstead *v.* Marlow, 4 T. R. 719.

(*y*) Fentiman *v.* Smith, 4 East, 107. The Bailiff's, &c. of Tewkesbury *v.* Diston, 6 East, 438.—Post. 2 Vol. 400.

(*z*) Post. 2 Vol. 383. when not, see Martin & another *v.* Goble, 1 Campb. 320.

(*a*) Post. 2 Vol. 378.—Symonds *v.* Seabourne, Cro. Car. 325.—Cary *v.* Bacchus, 1 Show. 17, 18.

(*b*) Post. 2 Vol. 384.—Sly *v.* Mordant, 1 Leon. 247.—Palm. 290.—Nulmes *v.* Hoblethwayte, 3 Lev. 133.—Fentiman *v.* Smith, 4 East, 107.

(*c*) See Post. 2 Vol. 400 to 404.—Strode *v.* Birt, 4 Mod. 418.—1 Saund. 346. n. 2.—Comberb. 370.

(*d*) Post. 2 Vol. 404.

in a *new*(*e*), the declaration states the possession of a house, or land, &c. and *that by reason thereof* the plaintiff was entitled to the right, in the exercise of which he has been disturbed. The same mode of declaring is sufficient in actions for *disturbance or subtraction of *tolls*(*f*), *ferries*(*g*), and *offices*(*h*). And where a corporation brings an action for any due, it is sufficient to state in a *declaration*, though it is otherwise in a plea, that it is an ancient borough, and that the burgesses thereof are, and for divers years have been, a body politic, in the name of the mayor, &c. without setting out the name of incorporation, or any title to the duty; for the declaration being founded upon their possession, there is no necessity to state a title to the thing(*i*). However, though it is not necessary in these actions for damages to lay a title in the declaration by grant or prescription, &c. yet the title or consideration must be *proved* on the trial(*j*). [*368]

Where the plaintiff's right consists in an *obligation on the defendant to observe some particular duty*, the declaration must state the nature of *such duty*, which we have seen may be founded either on a *contract* between the parties, or on the obligation of law, arising out of the defendant's *particular* character or situation. When the declaration is for the breach of an express or implied *contract*, and proceeds for *nonfeazance* the consideration of the contract must be stated either in terms or in substance(*k*). But when it is for a *misfeazance* or *malfeazance*, no consideration need be *stated(*l*); and when it is founded on the obligation of *law*, unconnected with any contract between the parties, it is sufficient to state very concisely the circumstances which gave rise to the defendant's particular duty or liability; as in actions against sheriffs, carriers, innkeepers, &c.(*m*). Where the defendant is liable of *common* right, as to repair a wall for preventing damage to his neighbour, according to the maxim *sic utere tuo ut alienam non lædas*, it was always considered sufficient to state that the defendant was *possessed* of a certain close, &c. and that by reason thereof he was bound to repair, [*369]

(*e*) Post. 2 Vol. 408.

(*f*) 2 Saund. 113 a. 172. n. 1.—6 East, 438. n. a.—Drake *v.* Wiglesworth, Willes, 654.—Escot *v.* Lawreny, Owen, 109.—Dent v. Oliver, Cro. Jac. 43.—Post 2 Vol. 404

(*g*) Blissett *v.* Hart, Willes, 508.—2 Saund. 114. n. 172. n. 1.

(*h*) The Bishop of Salisbury's Case, 10 Co. 59. b.—Ferrer *v.* Johnson, Cro. Eliz. 336.—8 Wentw. Ind. 58.—Morg. Prec. 345. 347.—Strode *v.* Birt, 4 Mod. 422.

(*i*) 1 Saund. 340. n. 2.—Escot *v.* Lawreny, Owen, 109.—Dent *v.* Oliver, Cro. Jac. 43. 123.—Chapman *v.* Flexman, 2 Ventr. 291.—The Bailiffs, Burgesses, &c. of Tewkesbury *v.* Diston, 6 East, 438.—What a variance, Dean & Chapter of Rochester *v.* Pierce, 1 Camph. 466.—The Mayor, &c. of Carlisle *v.* Blamire & Tyson, 8 East, 487.

(*j*) 2 Saund. 114. c.—Strode *v.* Birt, 4 Mod. 421. 424.—1 Saund. 346. n. 2.

(*k*) Elsee et al. *v.* Gatward, 5 T. R. 143.—Mast *v.* Goodson, 3 Wils. 348.—Post. 2 Vol. 275.—Max *v.* Roberts and others, 12 East, 94.

(*l*) Id. ibid.—Govett *v.* Radnidge & others, 3 East, 62.—Samuel v. Judin, 6 East, 332.—Coggs *v.* Bernard, 2 Ld. Raym. 909.—Max *v.* Roberts & others, 12 East, 89.—Post. 2 Vol. 323, 4.

(*m*) Elsee et al. *v.* Gatward, 5 T. R. 149, 150.—1 Saund. 312. c. n. 2.—Max *v.* Roberts and others, 12 East, 89.

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&c. without showing the particular ground of the defendant's liability(*n*); but where a charge was imposed on another *against common* right, as owner of the soil or terre-tenant, it was formerly thought that the plaintiff ought to disclose the particular grounds on which the defendant's liability was founded(*o*); as in an action for not repairing a fence, or for not keeping a bull or a boar, &c.(*p*). But it is now settled that there is no foundation for this distinction; and in the case of Rider and Smith(*q*), where an action was brought for the defendant's not repairing a private road leading through his close, it was held sufficient to allege that the defendant *as occupier* of the close ought to have repaired it, and Mr. Justice Buller stated the distinction to be between *the [*370] case where the *plaintiff* in his *declaration* lays a charge on the right of the defendant, and where the *defendant* in his *plea* prescribes in right of his own estate; in the former case the plaintiff is presumed to be ignorant of the defendant's estate, and therefore need not state it, but in the latter the defendant knowing his own estate, in right of which he claims a privilege, must set it forth(*r*).

In an action on the case, founded on an express or implied *contract*, as against an attorney, agent, carrier, inn-keeper, or other bailee, for negligence, &c. the declaration must state the contract and the duty or consideration on which it is founded(*s*), and it usually begins with a statement of the particular profession, or situation of the defendant, and his consequent duty or liability(*t*). In an action for the breach of a warranty the contract of sale is stated(*u*); and in a declaration by a landlord against his tenant, for not cultivating according to good husbandry, or for not repairing, or for waste, &c. the relative situation of tenant is concisely stated(*v*).

Declarations for non-observance of the *general obligation* of law may be either for the consequences of the negligent driving of carriages, &c.(*w*), or navigating ships(*x*), or for not removing a nuisance from the defendant's land(*y*), or against the late rector or vicar, or his executor or administrator, on the custom of the realm for dilapidations(*z*), or against the occupier of land for not repairing a fence or the bank of [*371] a river, &c.(*a*), *or for not repairing a way over his land(*aa*), or against the proprietor of tithes for not taking them away(*b*). In these cases it is sufficient to state concisely the defendant's possession of the person-

(*n*) Tenant *v.* Goldwin, 6 Mod. 311. S. C. 1 Salk. 22. 360.—S. C. Ld. Raym. 1090.—Post. 2 Vol. 380, 1.—Rider *v.* Smith, 3 T. R. 766.

(*o*) Ante, 366.

(*p*) Star *v.* Rookesby, 1 Salk. 335, 6. Waples *v.* Basset, 4 Mod. 241.

(*q*) 3 T. R. 766.—Blockley *v.* Slater, Lutw. 119.—Grimstead *v.* Marlowe, 4 T. R. 718.

(*r*) 2 Saund. 113. n. 1.—172. a. n. 1. Ante, 366.

(*s*) Max *v.* Roberts and others, 12 East, 89.

(*t*) Post. 2 Vol. 319, 320, &c.

(*u*) Post. 2 Vol. 324.

(*v*) Post. 2 Vol. 392.

(*w*) Post. 2 Vol. 329.

(*x*) Post. 2 Vol. 331.

(*y*) Post. 2 Vol. 379, &c.

(*z*) Post. 2 Vol. 392.

(*a*) Post. 2 Vol. 394. 387.

(*aa*) Rider *v.* Smith, 3 T. R. 766.—Blockley *v.* Slater, Lutw. 119.

(*b*) Post. 2 Vol. 396.

al or real property, and his consequent obligation, the non-observance of which is complained of(*c*).

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Declarations for the breach of a *duty* to which the defendant was subject, in respect of his *particular character* or *situation*, are against carriers or inn-keepers for refusing to carry goods, or to receive a guest, or for the loss of goods; or against sheriffs and other public officers for escapes on mesne(*d*) or final process(*e*), or for not arresting a debtor when the defendant had an opportunity(*f*), for false returns, &c. to mesne or final process(*g*), for not taking a replevin bond, or for taking insufficient pledges(*h*), or for not assigning a bail bond(*i*). In these cases the particular situation of the defendant from which his duty arises should be concisely stated(*j*).

Hence it appears that it is seldom necessary, in a declaration for a tort, to state the plaintiff's title or the defendant's liability *specially*(*k*), and therefore we will postpone the consideration of the manner in which a right by *custom*, *prescription*, or *grant*, &c. should be claimed, till we examine the structure of pleas, in which the title is usually to be stated with particularity.

*The consequences of a *variance* in actions *in form ex contractu*, [*372] have already been considered, and we have seen that the general rule is, that if the whole of an averment or allegation may be struck out without destroying the plaintiff's right of action, it is not necessary to prove it; but that if the whole cannot be struck out without getting rid of a part essential to the cause of action, then, though the averment be more particular than it need have been, the whole must be proved, or the plaintiff cannot recover(*kk*). Thus where in an action against a tenant for bad husbandry the declaration stated that the defendant was tenant to the plaintiff's father, and that the lands descended to the plaintiff in fee; and it was proved that the same were devised to the plaintiff in tail, the variance was held immaterial, and the court said that the true rule is, that on the general issue in an action on the case, all material averments are denied and put in issue, but nothing else; and that the estate of the plaintiff was not a material averment, and

(*c*) Post. 2 Vol. 396.

(*d*) Post. 2 Vol. 347, 8, &c.

(*e*) Id.

(*f*) Id.

(*g*) Id.

(*h*) Id.

(*i*) Id.

(*j*) Max *v.* Roberts & others, 12 East, 89.

(*k*) In quare impedit, and other real actions, it is otherwise. Bul. N. P. 122. Com. Dig. Pl. 3. I. 5. See the modes of stating different titles, post. 2 Vol. 249 to 382.

(*kk*) Ante, 303 to 308.—Williamson *v.* Allison, 2 East, 452.—Turner *v.* Eyles, 3 Bos. & Pul. 458 to 464.—Alebury *v.* Walby, 1 Stra. 229 to 232.—2 Saund. 206. n. 22. 207. n. 24.—Woodford & wife *v.* Ashley, 11 East, 508.—In an action on the case, where a bond was stated to have been made by Ld. V. *Gave*, and that produced was Gage, the court held the mistake immaterial. Alcorn *v.* Westbrook, 1 Wils. 115, 6. As to the distinction between variance in describing torts and contracts, see 1 Salk. 11. in notes.—Purcel *v.* Macnamara, 9 East, 157. As to variance in local description, see Jefferies *v* Duncombe, 11 East, 226.—2 Campb. 3. S. C.

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might have been rejected in toto as surplusage(*l*). And if the plaintiff unnecessarily make a title to common of pasture, or a way, &c. it has been decided that he need not prove the *same title* as that stated in *his declaration(*m*). So if the plaintiff prove a part of his declaration, he [*373] will in general be entitled to recover, for there is a material distinction between actions upon contracts and on torts; in an action founded on a contract the plaintiff must prove it as laid, whatever may be the form of action(*n*); but upon a tort, which is often aggravated with many particulars, it is not necessary to prove the whole case, and though the plaintiff fail in many of the particulars, yet if he prove so much of it as leaves him a good cause of action[167] he shall recover(*o*). It is however advisable to avoid unnecessary particularity, as where the plaintiff, in an action for a libel, declared that he had *duly* taken the degree of doctor of physic, it was held that he must prove that he had legally become physician(*p*); so where in an action for an escape, it is unnecessarily stated that the writ was indorsed for bail, by virtue of an affidavit of debt affiled of record, such affidavit must be produced(*q*). And where by the unnecessary statement of a title it appears that the plaintiff has no cause of action, it will be fatal; thus in an action against a disturber, in which mere possession is a sufficient title for the plaintiff, yet if he show a title, and it appear insufficient, the de- [*374] claration is bad(*r*). However where a title is unnecessarily *stated by way of *inducement* to the action it needs not be alleged precisely; as in an action on the case for a nuisance, if the plaintiff allege that he was possessed for a term of years, it is sufficient without showing the commencement of the term(*rr*).

(*l*) Winn *v.* White, 2 Bla. Rep. 840. Willamore *v.* Bamforde, 2 Bulstr. 288. Alebury *v.* Walby, 1 Stra. 230.—Com. Dig. Pleader, C. 39.

(*m*) 1 Saund. 346. n. 2.—Bul. N. P. 76.—Strode *v.* Birt, 4 Mod. 422. 424. Willamore *v.* Bamforde, 2 Bulstr. 288. Com. Dig. Pleader, C. 39.

(*n*) Weall *v.* King & King, 12 East, 452. 454.

(*o*) Gilb. C. L. & E. 229.—Bern et ux. *v.* Mattaire, Rep. T. Hardw. 121.—2 Saund. 74. b. 207. n. 24.—Ferty *v.* Imber, 6 East, 434.—1 Salk. 11. in notes.—Sed vide Heriot *v.* Stewart, 1 Esp. Rep. 437 as to proof of all the words, see Maitland & others *v.* Goldney and another, 2 East, 438. and see Carrett *v.* Smallpage & others, 9 East, 339. 343, 4.—and as to variance in a prescription, Fitch *v.* Rawling and others, 2 Hen. Bla. 397.

(*p*) Moises *v.* Thornton, 8 T. R. 308. And see Heriot *v.* Stewart, 1 Esp. Rep. 437.

(*q*) Webb *v.* Herne et al., 1 Bos. & Pul. 280.

(*r*) 1 Saund. 346. a. n. 2.—Com. Dig. Pleader, C. 29.—Dorne *v.* Cashford, 1 Salk. 363.—Crowther *v.* Oldfield, Ld. Raym. 1230.—Grimstead *v.* Marlowe, 4 T. R. 717.—Sed vide Strode *v.* Birt, 4 Mod. 422.—Alebury *v.* Walby, 1 Stra. 230.

(*rr*) Com. Dig. Pleader, C. 43.—Strode *v.* Birt, 4 Mod. 422. 4.

(167) Vide *Cheetham* v. *Tillotson*, 5 *Johns. Rep.* 430.

II. ITS PARTS. Fourthly, the cause of action. 3dly. Statement of the injury.

Injuries ex delicto are either committed with or without force(*s*), and are immediate or consequential(*t*); they may also arise from malfeazance, misfeazance, or nonfeazance(*u*). In declarations in trespass, which lies only for wrongs immediate and committed with force, the injury is stated without any inducement of the defendant's motive or intent, or of the circumstances under which the injury was committed, and the declaration immediately after the usual commencement in the King's Bench runs: "*For that* the said defendant on the ——— day of ———, A. D. ——— *with force and arms*, &c. made an assault on the said plaintiff, to wit, at ———, in the county of ———, and then and there, &c. (*describing the injury according to the facts, with any special damage that may have accrued, and concluding as follows:*) and other wrongs, to the said plaintiff, then and there did, *against the peace* of our said lord the king, and to the damage of the plaintiff of *l.* ———, and therefore he brings his suit, &c.(*v*)." In the Common Pleas the declaration varies in form, and usually recites the supposed writ(*w*). The injury in trespass should be stated directly and positively, and not by way of recital, and therefore *a declaration "For [*375] that *whereas*," or "*wherefore*" the defendant did the act complained of, is bad on special demurrer(*x*),[168] and was formerly holden to be so in arrest of judgment, but now it may be amended at any time before or after judgment by a right bill, the time of filing which the court will not inquire into(*y*);[169] and in the Common Pleas, when the supposed writ is recited, the mistake is aided, and will not be a ground even of special demurrer(*z*). In the statement of these injuries the words "with force and arms," or *vi et armis, should be adopted*(*a*),[170] though

(*s*) Ante, 123.

(*t*) Ante, 125.

(*u*) Ante, 134.

(*v*) See the forms and notes, post. 2 Vol. 414, &c.

(*w*) See the forms, post. 2 Vol. 416, &c.

(*x*) Hore *v.* Chapman, 2 Salk. 636.—Amyon *v.* Shore, 1 Stra. 621.—Goodright *v.* Johnson, Andr. 282.—Com. Dig. Pleader, C. 86.—Post. 2 Vol. 414.

(*y*) Wilder *v.* Handy, 2 Str. 1151.—Marshal *v.* Riggs, 2 Stra. 1162.

(*z*) Douglas v. Hall, 1 Wils. 99.—White *v.* Shaw, 2 Wils. 203.—Goodright *v.* Johnson, Andr. 282.—Barnes, 452. Com. Dig. Pleader, C. 86.—S. P. ruled in Howard and Ramsbottom, C. P. Easter Term, 1810. Smith, Attorney.

(*a*) Com. Dig. Pleader, 3 M. 7.—Lawe *v.* King, 1 Saund. 81, 82. n. 1. 140. n. 4.—Jenk. Cent. 186.

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(168) Vide *Collier* v. *Moulton*, 7 *Johns. Rep.* 111. *Coffin* v. *Coffin*, 2 *Mass. Rep.* 364.

(169) In *Collier* v. *Moulton*, 7 *Johns. Rep.* 109. & *Coffin* v. *Coffin*, 2 *Mass. Rep.* 358, it was held that the "*whereas*" might after verdict be rejected as surplusage. But in *Hord's Ex'r.* v. *Dishman*, 2 *Hen. & Mun.* 595. *Moore's Adm'r.* v. *Downey & another*, 3 *Hen. & Mun.* 127, it was held that *quod cum* was bad on general demurrer, and was not cured by verdict. Vide 3 *Hen. & Mun.* 278. note. So, in *Lomax* v. *Hord*, 3 *Hen. & Mun.* 271, which was an action on the case for champerty, a declaration commencing with *quod cum*, was held bad on general demurrer. Vide *Marsteller & others* v. *M'Clean*, 7 *Cranch*, 158.

(170) Vide 2 *Reeve's Hist. E. L.* 265.

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the only mode of taking advantage of the omission is a special demurrer(*b*): and in the Common Pleas, when the words appear in the recital of the supposed writ, and not in the count part, it is sufficient(*c*); and in one case Lord Holt said that these words might be omitted(*d*); and there is an express legislative provision to this effect in regard to indictments(*e*). The conclusion of the declaration in trespass or ejectment, for these forcible injuries should also be "*contra pacem regis*," though they are mere words of form and not traversable(*f*)[171] the omission of that allegation will however be aided if not specially demurred [*376] *to(*ff*); and in the Common Pleas if the words appear in the recital of the supposed writ that will suffice(*g*).

In *actions on the case*, when the act or nonfeazance complained of was not *prima facie* actionable, it is in general necessary to state not only the injury complained of, but also the circumstances under which it was committed; as, that the defendant *well knowing* the mischievous propensity of his dog, or having been *requested* to remove a nuisance erected by another, *maliciously* or fraudulently contriving and *intending*, &c. (stating a bad intent corresponding with the wrongful act complained of) *committed* or *permitted* the act complained of.

In some actions the *scienter* being material, must be *alleged* and *proved*; as in a declaration for keeping a dog used to bite mankind or sheep, &c.(*h*), or for enticing away a servant or apprentice(*i*), or for falsely representing a third person fit to be trusted, though in the latter case the word "fraudulently" might be sufficient(*k*). But in an action for debauching a wife or servant, it is not necessary to allege or prove that the defendant knew that the female was the wife or servant of the plaintiff(*l*). And in an action upon an express warranty, the scienter [*377] need not be alleged, nor if stated need it be *proved(*m*). In a decla-

(*b*) 4 & 5 Ann. c. 16. s. 1.

(*c*) Com. Dig. Pleader, 3 M. 7.

(*d*) Day *v.* Muskett, Ld. Raym. 985. Vin. Ab. Trespass, Q. a. 5.

(*e*) 37 Hen. 8. c. 8.—Crown Cir. Comp. 123.—4 Hawk. Pl. C. 55, 6.

(*f*) Rafael *v.* Verelst, 2 Bla. Rep. 1058.—Day *v.* Muskett, 2 Salk. 640, 1. Com. Dig. Pleader, 3 M. 8.—Vin. Ab. tit. Contra Pacem, & tit. Trespass, Q. a. 5.—Though there is no longer any judgment for the fine, (see Linsey *v.* Clerk, 1 Salk. 54.—3 Bla. Com. 118, 9. 398, 9.—2 Sel. Prac. 641.—Day *v.* Muskett, 2 Ld. Raym. 985.—Vin. Ab. Trespass, Q. a. 5.) yet Lord Holt, in Day *v.* Muskett, 2 Lord Raym. 985. said, the words must not be omitted; see also the above cases; and yet in some cases *cessante ratione cessat et ipsa lex*, as in the case of Pledges.—Read *v.* Brookman, 3 T. R. 157.—Ilderton *v.* Ilderton, 2 Hen. Bla. 161.

(*ff*) 4 & 5 Ann. c. 16.

(*g*) Com. Dig. Pleader, 3 M. 8.

(*h*) Post. 2 Vol. 288. n. h. and cases there referred to.

(*i*) Post. 2 Vol. 317. n. y.

(*k*) Post. 2 Vol. 326. n. k.—Winsmore *v.* Greenbank, Willes, 584.

(*l*) Post. 2 Vol. 313. n. r. 315. n. s.

(*m*) Williamson v. Allison, 2 East, 446.

(171) Vide *Gardner* v. *Thomas*, 14 *Johns. Rep.* 134.

ration against the mere continuer of a nuisance, it is advisable to state, that he was *requested* to move it(*n*).

We have already seen how far the defendant's *motive* or *intent* affects the *form* of the action; and that in general, when the act occasioning damage is in itself unlawful without any other extrinsic circumstance, the intent of the wrongdoer is immaterial in point of law, though it may enhance the damages(*o*); as observed by Lord Kenyon, there is a distinction between answering *civiliter et criminaliter* for acts injurious to others; in the latter case the maxim applies, *actus non facit reum nisi mens sit rea:* but it is otherwise in civil actions, where the intent is in general immaterial if the act were injurious to another(*p*). Lord Ellenborough's observations in the case of the King *v.* Phillips(*q*), in regard to indictments elucidate this doctrine: "If any particular bad "intention accompanying the act be necessary to constitute it a crime, "such intention should be laid in the indictment. In many cases the "allegation of intent is a merely formal one; being no more than the "result and inference which the law draws from the act itself, and "which therefore requires no proof but what the act itself supplies. "But where the act is indifferent in itself, the intent with which it was "done then becomes material, and requires, as any other substantive "*matter of fact does, specific allegation and proof." In an action for [*378] the consequences of a public nuisance, it is not usual to state any undue intent on the part of the defendant(*r*). So in an action on the case for pirating the plaintiff's copyright in a book, it is sufficient to state that the defendant published and sold the spurious copies, without alleging or proving any intention on the part of the defendant to pirate the copyright or injure the sale of the plaintiff's book(*s*); and in an action on a statute, as on the black act against the hundred, it is sufficient to follow the words of the act, and on that particular statute it was held unnecessary to state that the stack of oats and barn were unlawfully, or wilfully and maliciously set on fire(*t*). If, however, a malicious or wrongful intent be unnecessarily stated, it need not be proved(*u*); and where there is evidence to prove the allegation, it may be advisable, in aggravation of the damages, to state the defendant's malicious intent(*v*).

In stating the defendant's intent or motive, when necessary, the language, as in all other parts of pleading, should correspond with the

(*n*) Winsmore v. Greenbank, Willes, 583.—Post. 2 Vol. 380.

(*o*) Ante, 129, 130.

(*p*) Per Kenyon, Ch. J.—Haycraft *v.* Creasy, 2 East, 104.—The other judges differed from his lordship, but only in the *application* of this principle to the particular case. As to the materiality of a bad intent, see the observations in the Bailiffs, &c. of Tewksbury *v.* Diston, 6 East, 438, and in the King *v.* Philips, id. 464.

(*q*) 6 East, 473, 4.—And see Crown C. C. 126.

(*r*) Post. 2 Vol. 288, 9.

(*s*) Roworth *v.* Wilkes, 1 Campbell's Ni. Pri. 94. 98.—Post. 2 Vol. 364, 5.

(*t*) Allan *v.* The Hundred of Kirton, 2 Bla. Rep. 842.—Crown C. C. 126.

(*u*) Williamson *v.* Allison, 2 East, 446.

(*v*) On same principle, as stated in 4 Hawk. P. C. 56.

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real or probable facts of the particular case. In an action for a malicious arrest for a pretended debt, it is usual to state, "that the defendant wrongfully and unjustly contriving and intending to imprison, "harass, oppress, and injure the plaintiff, falsely and maliciously [*379] "caused the writ to be issued, and the arrest made, &c."(*w*); and *in a declaration for a malicious prosecution of a criminal charge, injurious, as well to the character as to the liberty of the plaintiff, the intent to prejudice the character is also stated(*x*). So in actions for verbal or written slander, the malicious intent to injure the plaintiff in his character, and if the words relate to his trade, in such trade, should be stated(*y*); but where from the nature of the injury there is no evidence that the defendant's motive was malice, as in an action for debauching a daughter or servant, that word should be omitted(*z*). And where the injury is the breach of a contract express or implied; as for a false warranty, or against a carrier, bailee, &c. the declaration usually states the deceit or breach of contract, without any allegation of malice(*a*). So in actions against officers, &c. for the non-observance of a public duty, (unless malice be essential, as in an action against a returning officer of a borough for refusing a vote at an election, &c.)(*b*) the breach of duty, and intention to deceive or injure the plaintiff, are stated, without alleging any other undue intent, as in an action against the sheriff for an escape, &c.(*c*).

When it is material to show an undue motive or intent it is seldom necessary, in a civil action, to state it in *terms*, it is sufficient if it be *substantially* shown. Thus in an action against a returning officer, for refusing a vote at an election, though a bad intent is necessary to the [*380] support of the action, yet the word *wrongfully* intending *to deprive the plaintiff, &c. is sufficiently indicative of a *malicious* intent(*d*). So in a declaration for slander, though it is usual to state that the defendant *maliciously* published the scandal, yet the word *falsely* alone is sufficient(*e*); so in an action for harbouring the plaintiff's wife, though the mere statement of the harbouring might be insufficient, because it is lawful in some instances for the wife to leave her husband, yet the words *unlawfully* and *unjustly* harboured, &c. will sufficiently designate the defendant's conduct to have been illegal(*f*).

With regard to the statement of the *injury itself*, it is frequently sufficient to describe it generally, without setting out the particulars of the defendant's misconduct; thus, in an action on the case, for in-

(*w*) Post. 2 Vol. 291.

(*x*) Post. 2 Vol. 298. 302.

(*y*) Post. 2 Vol. 306.

(*z*) Post. 2 Vol. 315.

(*a*) Post. 2 Vol. 324. 319.

(*b*) Harman *v.* Tappenden & others, 1 East, 555. 563. 568. n. a.

(*c*) Post. 2 Vol. 350.

(*d*) Harman *v.* Tappenden & others, 1 East, 563. 567. see the observations on the words "*malitiose*," and "*sine rationabili* or *probabili causa*.—Jones *v.* Givin, Gilb. Cas. L. & E. 190, &c.—and, as to the word *frandulently*, The Bailiffs, &c. of Tewkesbury *v.* Diston, 6 East, 445, &c.

(*e*) 1 Saund. 242. a. n. 2.—From the want of probable cause, malice may be and most usually is implied.—Johnston *v.* Sutton, 1 T. R. 545.

(*f*) Winsmore *v.* Greenbank, Willes, 584.

ducing the plaintiff's wife to continue absent, it is sufficient to state that the defendant unlawfully and unjustly persuaded, procured, and enticed the wife to continue absent, by means of which persuasion she did continue absent, &c. whereby the plaintiff lost her society; without setting forth the means of persuasion used by the defendant(*g*). So in actions for diverting water from a stream, or for disturbance of a right of common, way, &c. it is sufficient to allege a diversion or disturbance generally without showing the particular mode(*h*), unless *in [*381] an action against the lord, in which case it is said that a particular surcharge ought to be shown(*e*). And in an action on the case against a master, for the negligence of his servant, it has been decided that the negligence may be stated as that of the master, without noticing the servant; but as the object of pleading is to apprize the opposite party of the facts, it is more correct to state them truly(*f*).

The mode of framing declarations for *written* and *verbal* slander, is pointed out in the precedents and notes in the 2d volume(*gg*). Where the slander is *prima facie* actionable, as for calling a person directly a *thief*, or stating that he was guilty of *perjury*, &c. a declaration stating the defendant's malicious intent, and the slander concerning the plaintiff, is sufficient without any prefatory *inducement;* but where the words do not naturally and *per se* convey the meaning the plaintiff would wish to assign to them, or are ambiguous and equivocal, and require explanation, by reference to some extrinsic matter to show that they were actionable, it must not only be stated that such matter existed, but also that the words were spoken of and concerning it(*h*). In such case *four* distinct positive allegations are in general necessary; as in a declaration for accusing a person of having been *forsworn* in an *Answer* in *Chancery*(*i*), *first*, the fact of such answer upon oath, *secondly*, a colloquium or speaking *by the defendant of and concerning, or with [*382] reference to such answer, *thirdly*, the words themselves, and *fourthly*,

(*g*) Winsmore *v.* Greenbank, Willes, 577.—The King *v.* Fuller, 1 Bos. & Pul. 180.—Anon., Ld. Raym. 452.—Anon., 3 Leon. 13.

(*h*) Anon., 3 Leon. 13.—Anon., Ld. Raym. 452.—Com. Dig. Actions Case Disturbance, B.—1 Saund. 346. a.—Post. 2 Vol. 401, &c.

(*e*) 1 Saund. 346. a.—Post. 2 Vol. 401, 2.

(*f*) Brucker *v.* Fromont, 6 T. R. 659.—M'Manus *v.* Crickett, 1 East, 110.

(*gg*) Pages 303 to 313.

(*h*) Hawkes *v.* Hawkey, 8 East, 431. Roberts *v.* Camden, 9 East, 93.—Post. 2 Vol. 303 to 313. in notes.

(*i*) The term *forsworn* is not in itself actionable.—Holt *v.* Scholefield, 6 T. R. 691.—Hawkes *v.* Hawkey, 8 East, 427.—Roberts *v.* Camden, 9 East, 93.[172]

(172) So, to say that the plaintiff has sworn false, or taken a false oath, is not actionable; *Vaughan* v. *Havens*, 8 *Johns. Rep.* 109. Without a colloquium of its being in a cause pending in a court of competent jurisdiction, and on a point material to the issue. *Niven* v. *Munn*, 13 *Johns. Rep.* 48. *Hopkins* v. *Beedle*, *Caine's Rep.* 347. *Ward* v. *Clark*, 2 *Johns. Rep.* 10. *M'Claughry* v. *Wetmore*, *Johns. Rep.* 82. *Chapman* v. *Smith*, 13 *Johns. Rep.* 68.

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the inuendo that the defendant meant by those words to impute perjury to the plaintiff in such his answer, and the omission of the colloquium will not in this case be aided even by a verdict(*j*); the same rule in general prevails in regard to slander injurious to a person in his trade, profession, &c.(*k*);[173] but the general inducement of good character or innocence of the particular charge is unnecessary, because the law presumes innocence of a crime till the contrary be established(*l*).[174] The slanderous words should be stated as they were uttered, and proof of words spoken in the third person will not support a count for words spoken in the second, and *vice versa*(*m*);[175] nor will words spoken by way of interrogation support a charge of words spoken affirmatively(*n*). However the addition or omission of a word will not prejudice unless it alter the sense(*o*); and the plaintiff need not prove all the words laid, though he must prove such of them as will be sufficient to sustain his action, and it will not suffice to prove equivalent expressions(*p*).[176] Where some of the words were not actionable, yet if spoken at the same time as the actionable words, they may all be stated [*383] in one count; but if words not actionable be stated by *themselves in a distinct count, and entire damages be given, judgment will be arrested(*q*);[177] and words not actionable may be given in evidence in aggravation of damages though not stated in the declaration(*r*);[178] and it

(*j*) Hawkes *v.* Hawkey, 8 East, 430, 431.—Post. 2 Vol. 303 to 313.—and 1 Saund. 242. in notes.

(*k*) Post. 2 Vol. 305. n. u.

(*l*) Ante, 226.—Post. 2 Vol. 304. n. s.

(*m*) The King *v.* Berry, 4 T. R. 217. Bul. N. P. 5.—Post. 2 Vol. 312. n. k.

(*n*) Barnes *v.* Holloway, 8 T. R. 150.

(*o*) Bul. N. P. 6.—Nelson *v.* Dixie, Rep. T. Hardw. 305, 6.

(*p*) Maitland *v.* Goldney, 2 East, 438.—Jones v. Givin, Gilb. L. & E. 229. 2 Saund. 74. b.—1 Salk. 11. in notes.—Nelson *v.* Dixie, Rep. T. Hardw. 305, 6. The King *v.* Berry, 4 T. R. 217.—Bul. N. P. 5.—Rex *v.* Leefe, 2 Campb. 134.

(*q*) James Osborne's Case, 10 Co. 131. a.—2 Saund. 307. a. n. 1.—Onslow *v.* Horne, 3 Wils. 185.—Vin. Ab. Damages, Q.

(*r*) Mead *v.* Daubigny, Peake's C. N. P. 125.—Charlter *v.* Barret, Peake's C. N. P. 22.—Lee *v.* Huson, Peake's C. N. P. 166.—Bul. N. P. 7.—Cook *v.* Field, 3 Esp. Rep. 133, 4.

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(173) Vide *Linsey* v. *Smith*, 7 *Johns. Rep.* 359.

(174) Vide *Coleman* v. *Southwicke*, 9 *Johns. Rep.* 48, 49.

(175) Vide *Miller* v. *Miller*, 8 *Johns. Rep.* 75. Contra, *Tracey* v. *Harkins*, 1 *Binney*, 395. n.

(176) It is sufficient if the plaintiff prove the substance of the words. *Phillips' Ev.* 154. *Ward* v. *Clark*, 2 *Johns. Rep.* 12. And it has been held that a declaration, charging that the defendant spoke certain words, *in substance as follows*—was good. *Kennedy* v. *Lowry*, 1 *Binney*, 393. If the words laid are that the plaintiff stole the goods of A, they will not be supported by proof that the defendant said that he stole the goods of B; or if it be charged that the defendant said that the plaintiff conspired with B, C & D, it will not be sufficient to prove that the defendant said that the plaintiff conspired with B & C: these being distinct offences. *Johnston* v. *Tate*, 6 *Binney*, 121.

(177) Vide *Cheetham* v. *Tillotson*, 5 *Johns. Rep.* 430.

(178) Vide *Thomas* v. *Croswell*, 7 *Johns. Rep.* 270, 271.

has even been decided that words actionable in themselves, though not stated in the pleadings, may be proved in order to show *quo animo*, the defendant spoke the words declared upon(*s*). An *inuendo* "as he (meaning the said plaintiff,)" is only explanatory of some matter already expressed, it serves to apply the slander to the precedent matter, but cannot *add* or *enlarge*, *extend*, or *change* the sense of the previous words, and as already stated, the matter to which it alludes must always appear from the antecedent parts of the declaration(*t*);[179] but when the new matter stated in an inuendo is not necessary to support the action it may be rejected as surplusage(*u*).[180]

The statement of the *time* of committing injuries *ex delicto* is seldom material, it may be proved to have been committed either on a day anterior or subsequent to that stated in the declaration(*v*); and in an action on the case for a malicious prosecution it is not necessary for the plaintiff to prove the exact day of his acquittal as laid in the declaration, so that it appears to have been before the action brought, and *therefore a variance between the day laid, and the day of trial mentioned in the record produced to prove the acquittal, is not material, the day not being laid in the declaration as part of the description of such record of acquittal, but if it had been so laid, or if the plaintiff affect to state the teste or return of process and misdescribe it, the mistake would be fatal(*vv*). Where the injury was capable of being committed on several days, as in trespass to land, it may be described as having been committed on such a day and on divers other days and times between that day and the exhibiting of the plaintiff's bill, or the commencement of the suit;[181] and in such case the first day should be laid anterior to the first injurious act, because the plaintiff would not be permitted to give in evidence repeated acts of trespass, unless committed during the time laid in his declaration, though he might recover as to a single trespass committed anterior to the first day(*w*).[182] But where the act complained of was single in its nature, as an assault, it

[*384]

(*s*) Id. ibid. and the cases referred to in Thompson *v.* Bernard, Campb. Ni. Pri. 48, 9.

(*t*) 1 Saund. 243. n. 4.—Hawkes *v.* Hawkey, 8 East, 430, 1.—Roberts *v.* Camden, 9 East, 95.—Anon., Gilb. L. & E. 116, 117.—Post. 2 Vol. 308. n. q.

(*u*) Roberts *v.* Camden, 9 East, 95.

(*v*) Post. 2 Vol. 287. 293. Co. Lit. 283. a.—1 Saund. 24. n. 1.—2 Saund. 295. n. 2.

(*vv*) Purcell *v.* Macnamara, 9 East, 157.—Woodford & wife *v.* Ashley, 11 East, 508.—S. C. 2 Campb. 193.

(*w*) Post. 2 Vol. 414.

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(179) Vide *Pelton* v. *Ward*, 3 *Caine's Rep.* 76. *Thomas* v. *Croswell*, 7 *Johns. Rep.* 271. *Van Vechten* v. *Hopkins*, 5 *Johns. Rep.* 211. *Vaughan* v. *Havens*, 8 *Johns. Rep.* 109.

(180) Vide *Thomas* v. *Croswell*, 7 *Johns. Rep.* 272.

(181) Vide *Burnham* v. *Webster*, 5 *Mass. Rep.* 266. 269.

(182) Vide *Phillips' Ev.* 134.

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would be demurrable to state that it was committed on divers days and times(*x*).[183]

The *place* is only material in local actions, and where the situation of the land, houses, &c. is particularly described, as in trespass and replevin.[184] In transitory actions we have seen that it may be sufficient, in general, merely to state that the injury was committed in the county at large, though it is advisable to follow the usual course of stating a [*385] town or parish in the county(*y*): and *though the action is local, yet it is not necessary to give a local description to the nuisance in an action for diverting the water of a navigation(*z*); a plaintiff in such an action may indeed make it necessary to prove the gravamen in a particular place, by giving it a specific local situation; as by alleging the nuisance to be standing and being at a certain place particularly described; but in general such particularity is not necessary and ought to be avoided(*a*). However in trespass to land it may still be proper to state the parish or place where the land is situate(*b*); and in replevin the particular place where the distress was made should be stated, and it will not suffice merely to name the parish(*c*).[185]

4thly, The statement of the damages.

In actions for torts, the damages resulting from the injury, are frequently, and in some cases necessarily, stated, in addition to the usual conclusion of the declaration, *ad damnum*, &c. Damages are termed general or special. *General* damages are such as the law *implies* to have accrued from the wrong complained of. *Special* damages are such as *really* took place, and are not implied by law, and are either superadded to general damages arising from an act injurious in

(*x*) Id. ibid.—English *v.* Purser, 6 East, 395.—Macfadzen *v.* Olivant, 6 East, 391.

(*y*) Ante, 279 to 285.

(*z*) Mersey & Irwell Navigation Co. *v.* Douglas et al., 2 East, 497.—Jefferies *v.* Duncombe, 11 East, 226.

(*a*) Mersey & Irwell Navigation Co. *v.* Douglas et al., 2 East, 502.—Jefferies *v.* Duncombe, 11 East, 226.—Fatal misdescription "in the united parishes of, &c." Goodtitle d. Pinsent *v.* Lammiman, 2 Campb. 274.—Ante, 279 to 285.

(*b*) Co. Lit. 125. b. n. 2.

(*c*) Post. 2 Vol. 411. n. l.

(183) Contra *Burgess* v. *Freelove*, 2 *Bos. & Pul.* 425. *Phillips' Ev.* 134. The words *then* afterwards continuing his said assault, were held not to be within the technical meaning of a continuando, and were good at least after verdict. *Blurm* v. *Swift*, 2 *Mass. Rep.* 50.

(184) If a trespass be committed in a township which before action brought is subdivided, the trespass may be laid in the original township. *Renaudet* v *Crockery*, 1 *Caine's Rep.* 167.

(185) Ante, 161.

itself, as where some particular loss arises from the uttering of slanderous words actionable in themselves, or are such as arise from an act indifferent and not actionable in itself but injurious only in its consequences, as where words become actionable only by reason of special damage ensuing. It has been held that the special damage must be a legal and natural *consequence arising from the tort, and not a mere [*386] wrongful act of a third person(*a*), or a remote consequence, as the loss of a lieutenancy by imprisonment(*b*). It does not appear necessary to state the former description of damages in the declaration, because presumptions of law are not in general to be pleaded(*c*). Therefore, though it is usual, in an action on the case for calling the plaintiff a thief, to state that by reason of the speaking of the words the plaintiff's character was injured, yet that statement appears unnecessary, because it is an intendment of law that the plaintiff was injured by the speaking of such words(*d*).

But when the law does not necessarily imply that the plaintiff sustained damage by the act complained of, it is essential to the validity of the declaration that the resulting damage should be shown with particularity; as in an action by a master for beating his servant, or by a commoner for surcharging a common, in which the allegations *per quod servitium amisit*, or *per quod proficium communiæ suæ habere non potuit* are material(*e*).[186] So in an action for words not actionable in themselves, but becoming so only in respect of particular damage(*f*). And whenever the damages sustained do not necessarily arise from the act complained of, and consequently are not *implied* by law, in order to prevent the surprise on the defendant which might otherwise ensue on the trial, the plaintiff must in general state the particular damage which he has sustained, or he will not be permitted to give evidence of it(*g*). Thus in an action of trespass and false imprisonment, *where [*387] the plaintiff offered to give in evidence, that during his imprisonment he was stinted in his allowance of food, he was not permitted to do so because that fact was not stated in his declaration(*h*), and in a similar action it was held that the plaintiff could not give evidence of his health being injured, unless specially stated(*i*). So in trespass for taking a horse, nothing can be given in evidence but what is expressed in the

(*a*) Vicars *v.* Wilcocks, 8 East, 1.—Morris *v.* Langdale, 2 B. & P. 289.

(*b*) Boyce *v.* Bayliffe, 1 Campb. 58. 60.

(*c*) Ante, 226.

(*d*) Lowe *v.* Harwood, Sir W. Jones, 196.—1 Saund. 243. b. n. 5.

(*e*) Robert Mary's Case, 9 Co. 113. a.—1 Saund. 346. a. b. n. 2.—Pindar *v.* Wadsworth, 2 East, 154.

(*f*) 1 Saund. 243. n. 5.—Lowe *v.* Harwood, Sir Wm. Jones, 196.—Moore *v.* Meagher, 1 Taunt. 39.

(*g*) See the rule in *assumpsit*, ante, 332.—Hartley *v.* Herring, 8 T. R. 133.

(*h*) Lowden *v.* Goodrick, Peake, C. N. P. 46.

(*i*) Pettit *v.* Addington, Peake, C. N. P. 62.

(186) Vide *Monell & Weller* v. *Colden*, 13 *Johns. Rep.* 403.

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declaration(*k*), and if money be paid in order to regain possession, such payment should be alleged as special damage(*l*). So in an action for defamation, whether the words are actionable in themselves or not, yet the plaintiff will not be permitted to give evidence of any particular loss or injury, unless it be stated specially in his declaration(*m*). If an action be brought for words not in themselves actionable, and the plaintiff does not prove the special damage laid in the declaration he will be nonsuited, because the special damage is in such case the gist of the action; but where the words are of themselves actionable, the jury must find for the plaintiff, though no special damage be proved(*n*). Words, though actionable in themselves, and not stated in the declaration, may, we have seen, be given in evidence to show the malice of the defendant, but the jury ought not to give damages for such words(*o*).

[*388] In trespass the declaration concludes "and *other wrongs to the said plaintiff then and there did, against the peace, &c.;"[187] and under this allegation of *alia enormia*, some matters may be given in evidence in aggravation of damages, though not specified in any other part of the declaration(*p*). Thus in trespass for breaking and entering a house, the plaintiff may in aggravation of damages give in evidence the debauching of his daughter, or the battery of his servants under the general allegation *alia enormia*, &c.(*q*), or this matter may be stated specially(*r*),[188] but he cannot under the *alia enormia* give in evidence the loss of service or any other matter which would of itself bear an action, for if it would, it should be stated specially; and therefore in trespass *quare clausum fregit*, the plaintiff would not under the above general allegation be permitted to give evidence of the defendant's taking away a horse, &c.(*s*).

The particular damage in respect of which the plaintiff proceeds, must be the *legal* and *natural* consequence of the words spoken, and not an illegal consequence(*t*); and extra costs are not recoverable as special damage(*u*); and therefore in an action for words it is not suffi-

(*k*) Sippora *v.* Basset, 1 Sid. 225.—Vin. Ab. Evidence, T. b. 6.—Holt, 700.

(*l*) Lindon *v.* Hooper, Cowp. 418.

(*m*) 1 Saund. 243. n. 5.

(*n*) 1 Saund. 243. n. 5.—Bul. Ni. Pri. 6.—Lowe *v.* Harwood, Sir Wm. Jones, 196.—Morris *v.* Langdale, 2 Bos. & Pul. 284.

(*o*) Thompson *v.* Bernard, 1 Campbell's Ni. Pri. 49.—Ante, 383.

(*p*) Bul. Ni. Pri. 89.—Holt's Rep. 699, 700.

(*q*) Id. ibid.—Russel *v.* Corn, 6 Mod. 127.

(*r*) Id. ibid.

(*s*) Bul. Ni. Pri. 89.—Holt, 700.—Sippora *v.* Basset, 1 Sid. 225.—Newman *v.* Smith et al., 2 Salk. 643.—Dix *v.* Brookes, 1 Stra. 61.

(*t*) Vicars *v.* Wilcox, 8 East, 3.—Morris *v.* Langdale, 2 Bos. & Pul. 289. Ante, 386.

(*u*) Hathaway *v.* Barrow et al., 1 Campbell's Ni. Pri. Rep. 151, 2.

(187) Vide 2 *Reeve's Hist. E. L.* 265.

(188) A declaration in trespass for entering the plaintiff's house, taking his goods and terrifying and falsely imprisoning his wife, was held good after verdict, and that the injury to the wife should be taken as matter of aggravation only. *Heminway v, Saxton & others*, 3 *Mass. Rep.* 222.

cient special damage to allege or prove a mere wrongful act of a third person induced by the slander; as that the third person dismissed the plaintiff from his employ before the end of the time for which he was hired; so if in consequence of the words spoken, other persons afterwards assembled *and seized the plaintiff and beat him, or if the plaintiff sustained damage in consequence of the refusal of any persons to perform their lawful contracts with him, such conduct of the third persons cannot be stated as special damage, because it may be compensated in actions brought by the plaintiff against them, and the law supposes that in such actions the plaintiff would receive a full indemnity(*u*); but, if the evidence will support the allegation, it may in some cases be stated that the defendant procured the third person to commit the injury, though such person might also be liable to an action(*v*). [*389]

The special damage must be particularised in the declaration, in order that the defendant may be enabled to meet the charge if it be false, and if it be not so stated it cannot be given in evidence, and if the action be not sustainable independently of special damage, the declaration would be bad on demurrer or in arrest of judgment(*w*); and, therefore, a declaration by a victualler for calling his wife a whore, "whereby *several* customers left his house," without naming any in particular, is too general, and no evidence of particular customers leaving the house will be admissible(*x*). So in a declaration for slander of title to an estate whereby the plaintiff *lost the sale* of it(*y*), or for slandering a single woman, by saying she was with child and had miscarried, in consequence of which she lost *several* suitors, &c. *is insufficient(*z*). But in an action for consequential damages arising from slander imputing incontinence to the plaintiff, it is sufficient to state "that he was employed to preach to a dissenting congregation at a "certain licensed chapel, situate, &c. and that he derived considerable "profit for his preaching there, and that by reason of the scandal, "*persons* frequenting the chapel had refused to permit him to preach "there, and had discontinued giving him the profits which they usually "had, and otherwise would have given," without saying who those persons were, or by what authority they excluded him(*a*). In stating the damages care must be taken that no part of it appear to have accrued after the commencement of the action, though if it be laid under a *videlicet* it will be aided by verdict(*b*). [*390]

(*u*) Jones *v.* Brinley, 8 East, 1. 3.—Morris v. Langdale, 2 Bos. & Pul. 289. Ante, 386.

(*v*) Fortesc. 211.—1 Mod. 215.

(*w*) 1 Saund. 243. n. 5.—See the precedent, post. 2 Vol. 310. n. y.—Hartley *v.* Herring, 8 T. R. 132, 3.

(*x*) Bul. N. P. 7.—1 Saund. 243. n. 5.—1 Rol. Ab. 58.

(*y*) Lowe *v.* Harwood, Sir W. Jones, 196.

(*z*) Hartley *v.* Herring, 8 T. R. 132. Barnes *v.* Prudlin, 1 Sid. 396.—1 Vent. 4. S. C.—Hunt *v.* Jones, Cro. Jac. 499. What sufficient, Moore *v.* Meagher, 1 Taunton, 39.

(*a*) Hartley *v.* Herring, 8 T. R. 130.

(*b*) Hambleton *v.* Veere, 2 Saund. 169. 171. b.—Vin. Ab. Damages, Q. R.

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HAVING ascertained the mode of stating the cause of action in general, the points relating to *several counts* in the same declaration are next to be considered. The rules as to the *joinder* of different *forms* and *causes* of action have already been treated of(*c*), and it is here only necessary to inquire into the statement of the *same* cause of action in different counts.

A declaration may consist of as many counts as the case requires, and the jury may assess entire or distinct damages on all the [*391] counts(*d*);[189] and it is usual, particularly in assumpsit, debt on *simple contract, and actions on the case, to set forth the plaintiff's cause of action in various shapes in different counts, so that if the plaintiff fail in the proof of one count he may succeed on another(*e*). The variations should be substantial, for if the different counts be so similar that the same evidence would support each, the court would on application refer it to the master for examination, and to strike out the redundant counts,[190] and in gross cases, direct the costs to be paid by the attorney(*f*); but under the restriction of avoiding as much as possible any unnecessary increase of the costs, it is advisable, when the case will admit, to state in various counts the facts in different ways corresponding with the evidence which may probably be adduced, and such counts are in general progressively more brief and concise; and this is particularly necessary in special assumpsits, where there is a doubt either as to the consideration or the terms of the contract, or the mode in which the plaintiff performed his part, or the defendant violated his. Thus in a special action of assumpsit for a breach of promise of marriage, if the defendant promised to marry upon a particular day, the first count is framed accordingly, but for fear the plaintiff should not be able to prove such particular promise, it is usual, where the evidence may probably support the allegation, to add a count to marry on request, another to marry in a reasonable time, and another to marry [*392] generally(*g*). So in declaring on a contract to *deliver goods, &c. sold, if the stipulation was to deliver within a specified time, and at a particular place, the first count is to be adapted to such facts, and the second to deliver on request or generally, and the third within a reasonable time(*h*); and it is frequently advisable to declare in different counts, the one on an executory, the other on an executed considera-

(*c*) Ante, 196 to 207.

(*d*) Per de Grey, Ch. J.—Onslow *v.* Horne, 3 Wils. 185.

(*e*) 3 Bla. Com. 295.

(*f*) Meeke *v.* Oxlade et al., 1 New Rep. 289.—Wilkins *v.* Perry & Salter, Rep. T. Hardw. 129.—The practice as to striking out superfluous counts is so fully stated in Tidd's Prac. 3d ed. 559. 4th ed. 552. that any further observations upon that point are here unnecessary.

(*g*) Post. 2 Vol. 129.

(*h*) Post. 2 Vol. 138.

(189) Vide *Neal* v. *Lewis*, 2 *Bay*. 206.

(190) By the rules of the Supreme Court of the state of New York, the plaintiff is allowed in the taxation of costs, for only one count for each distinct cause of action.

tion, the first to admit of evidence of the defendant's stipulation at the time of the inception of the contract, the other of subsequent admissions or promises. And we have seen that in an action at the suit of an executor or administrator it is frequently necessary to add a set of counts on promises to the plaintiff in his representative capacity, in order to admit of evidence of a promise or acknowledgment to the plaintiff to take the case out of the statute of limitations(*i*). It is proper also to add such *common* counts as may be applicable to any part of the plaintiff's case(*j*), and after the indebitatus count for work and labour or goods sold, &c. it is usual to add a *quantum meruit* or *valebant* count(*k*), though the latter we have seen may now be considered as unnecessary(*l*). In *debt* on simple contracts, legal liabilities, and penal statutes, it may frequently be advisable to vary the statement of the cause of action in different counts. But in *debt* on specialties and records, and in *covenant*, as such written evidence cannot, if due care be taken, vary from the statement in the declaration, one count will in general *suffice; and it is not advisable in an action of debt, in cases [*393] where bail in error would be required, to add a common count which would deprive the plaintiff of that security(*ll*). But in an action on a deed, of which a profert or an excuse for it may be necessary, if it be doubtful whether the deed be in the possession of the defendant, or be lost or destroyed, it may be proper to declare in one count, stating the deed to be in the possession of the defendant, and in another that it is lost(*m*).

In declarations for *torts*, several counts for the same cause of action are also frequently advisable, particularly in actions for words, which are usually stated in different ways, and sometimes with different innuendoes, so as to meet the probable evidence(*n*). In trespass, if there have been two or more assaults, it is proper to insert as many counts as there were assaults, in order to avoid the prolixity of making a new assignment, which might be necessary where there have been more assaults than there are counts(*o*); and if there be only one count, and the plaintiff fail in proving one battery, he cannot give in evidence another assault, as he might do if there had been two counts(*p*). So in trespass *quare clausum fregit*, if there have been any asportation of personal property, it is usual to insert two counts, in the first charging an injury to the land and taking the goods there, which is in its nature local and must be proved as laid, and in the second declaring merely for the asportation of the goods, which is transitory, *and may be sup- [*394]

(*i*) Ante, 204, 5.—See the form, post. 2 Vol. 96.

(*j*) Ante, 333 to 343.

(*k*) 3 Bla. Com. 295.

(*l*) Ante, 337.—2 Saund. 122. a.

(*ll*) Webb *v.* Geddes, 1 Taunton, 540. Trier *v.* Bridgman, 2 East, 359.

(*m*) Smith et al. *v.* Woodward, 4 East, 585.—Beckford *v.* Jackson, 1 Esp. Rep. 337.—Post. 2 Vol. 197.

(*n*) Post. 2 Vol. 312. n. k.—In replevin, see 2 Saunders, Addenda, Vin. Ab. Decl. Q.

(*o*) 1 Saund. 299. n. 6.—Smith et al. *v.* Milles, 1 T. R. 479.—Post. 2 Vol.

(*p*) Stante *v.* Pricket, 1 Campb. 473.

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ported though the taking be proved elsewhere(*p*). And where there has been an *asportation* of personal property, (which in the case of roots, earth, or other matter *affixed* to the *freehold*, must be an actual *carrying away* from the land where the same was dug, &c. and not a mere conveyance of it to another part of the premises where the same was dug)(*q*), it is expedient to insert the common asportavit count(*r*). If however a declaration in trespass contain two counts, and the defendant plead not guilty to the first, and suffer judgment by default as to the other, and on the trial the plaintiff only proves one act of trespass, to which the second count is applicable, he is not entitled to a verdict on the first(*s*).

In the adoption of several counts care must be taken that there be no misjoinder(*t*). The jury may indeed assess entire or distinct damages on each of the counts(*u*). If *distinct* damages be assessed, judgment may be given upon either of the counts,[191] but if the jury find *entire* damages on all the counts, the judgment must be entire, in which case if one of the counts be insufficient, judgment will be arrested or a writ of error be sustainable(*v*),[192] and the judgment will be arrested in *toto*, and no *venire de novo* awarded(*w*).[193] In case, there-

(*p*) Smith et al. *v.* Milles, Per Buller, J. 1 T. R. 479. and see Stead *v.* Gamble, 7 East, 325.

(*q*) Hullock. 76.

(*r*) Hullock. 74 to 84.—and see Stead *v.* Gamble, 7 East, 325—and post. 2 Vol. 426. as to the costs.

(*s*) Compere *v.* Hicks et al., 7 T. R. 727.

(*t*) As to misjoinder, ante, 196. criterion, Thompson & wife *v.* Stent, 1 Taunt. 322.

(*u*) Ante, 390.

(*v*) Onslow *v.* Horne, 3 Wils. 185.—2 Saund. 171. b.—Grant *v.* Astle, Dougl. 722. 730.

(*w*) Id. ibid.

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(191) Vide *Burnham* v. *Webster*, 5 *Mass. Rep.* 269. And the plaintiff may enter a nolle prosequi as to the insufficient count. *Livingston* v. *Executors of Livingston*, 3 *Johns. Rep.* 189.

(192) Vide *Backus* v. *Richardson*, 5 *Johns. Rep.* 476. *Cheetham* v. *Tillotson*, *Id.* 435. *Bayard* v. *Malcolm*, 2 *Johns. Rep.* 573. *Ex'rs. of Van Rensselaer* v. *Ex'rs. of Platner*, 2 *Johns. Cas.* 18. 21. 23. *Hopkins* v. *Beedle*, 1 *Caine's Rep.* 349. *Vaughan* v. *Havens*, 8 *Johns. Rep.* 110. *Benson* v. *Swift*, 2 *Mass. Rep.* 53. Contra *Neal* v. *Lewis*, 2 *Bay*, 204. *Neilson* v. *Emerson*, 2 *Bay*, 439. Where in an action of covenant, several breaches were alleged, and a discharge pleaded as to part, on which the defendant had judgment on demurrer, and issue taken as to the residue, and a general verdict for the plaintiff, it was intended that the verdict was for such breaches only, as were not covered by the special plea. *Eastman* v. *Chapman*, 1 *Day*, 30.

(193) But in *Hopkins* v. *Beedle*, 1 *Caine's Rep.* 347. where judgment was arrested on account of entire damages having been given, some of the counts in the declaration being bad, the court said that the plaintiff, on application might have been entitled to a venire de novo, on payment of costs. And in another case, *Lyle* v. *Ciason*, 1 *Caine's Rep.* 581, where judgment went by default, the court held that the plaintiff was entitled to a writ of inquiry de novo on payment of costs. Et vide *Livingston* v. *Rogers*, 1 *Caine's Rep.* 588.

fore, there be an insufficient count, if the mistake be discovered before verdict, it is expedient to strike it out by *leave of the judge, or to enter a *nolle prosequi* as to such count; or at the trial to take a verdict only on the sufficient counts; however, where a general verdict has been taken and evidence given only on the good counts, the court will [*395] permit the verdict to be *amended* by the judge's notes,[194] so where it appears by the judge's notes that the jury calculated the damages on evidence applicable to the good counts only, the court will amend the verdict by entering it on those counts, though evidence was given applicable to the bad count also(*x*). And where judgment has been given on demurrer or by *nil dicit*, in favour of the plaintiff, he may, after entering judgment for himself upon the whole declaration, upon discovering any error in one of the counts, wave his judgment on that count and enter it for the defendant(*y*).[195]

The *costs* also are to be attended to in adding several counts. Where the plaintiff obtains a verdict only upon one of several counts or issues, whether in the King's Bench or Common Pleas, he is only entitled to the costs relating to the trial of such issue; and the defendant is not allowed the costs of the counts found for him, though upon supposed causes of action different from that in respect of which the plaintiff recovered(*z*); and the same rule has prevailed where a defendant has succeeded on a demurrer as to part of the plaintiff's demand, and *the [*396] plaintiff has obtained a verdict as to the residue, in which case no costs are allowed to the defendant in respect of the demurrer(*a*); but if there be two distinct causes of action in two separate counts, and as to one the defendant suffers judgment by default, and as to the other takes issue, and obtains a verdict, he is entitled to judgment for his costs on the latter count, notwithstanding the plaintiff is entitled to judgment and costs on the first count(*b*). Where the plaintiff in different counts varies the statement of the *same* cause of action for fear of a variance and nonsuit on the trial, and succeeds upon one, it seems reasonable that he should not be punished with the payment of costs in respect of such other of the counts as he may not be able to prove; but where

(*x*) 2 Saund. 171. b.—Grant *v.* Astle, Dougl. 730.

(*y*) Spicer *v.* Teasdale, 2 Bos. & Pul. 49.

(*z*) Pinson *v.* Lee, 2 Bos. & Pul. 334. Poston *v.* Stanway, 5 East, 261.—In Tidd's Prac. 4th edit. 874. n. d. and Poston *v.* Stanway, 5 East, 263. the practice of the Common Pleas is stated otherwise, but the case 2 Bos. & Pul. 334. appears to have escaped observation.

(*a*) Poston *v.* Stanway, 5 East, 261. Tidd's Prac. 4th edit. 876.

(*b*) Day *v.* Hanks, 3 T. R. 654.—Braithwaite *v.* Bradford, 6 T. R. 602, 3.

(194) Acc. *Union Turnpike Company* v. *Jenkins*, 1 *Caine's Rep.* 381. Et vide *Stafford* v. *Green*, 1 *Johns. Rep.* 505. *Ex'rs. of Van Rensselaer* v. *Ex'rs. of Platner*, 2 *Johns. Cas.* 17. *Roe* v. *Crutchfield*, 1 *Hen & Mun.* 365.

(195) Contra *Backus* v. *Richardson*, 5 *Johns. Rep.* 476.

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he unnecessarily and without foundation proceeds in the same declaration in different counts for *distinct* causes of action, it might be more reasonable to allow the defendant the costs of such improper counts, and of the evidence which the defendant adduced to negative them(*c*); but the practice appears to be that the defendant is not in either case entitled to costs(*d*).

In framing a second or subsequent count for the same cause of action, care should be taken to avoid any unnecessary repetition of the same matter, and by an inducement in the first count, applying any matter to the following counts, and by referring concisely in the sub- [*397] sequent *counts to such inducement, much unnecessary prolixity may be avoided, and this is usual in actions for words, and proper to be attended to in all cases(*e*). But unless the second count expressly refers to the first, no defect therein will be aided by the preceding count, for though both counts are in the same declaration, yet they are as distinct as if they were in separate declarations, and consequently they must independently contain all necessary allegations, or the latter count must expressly refer to the former(*f*).[196] The commencement of a second count, "And whereas also," &c. is sufficiently positive(*g*). In order to avoid any objection as to duplicity it is advisable to insert in the second count for the same cause of action, the word "other" goods, &c.(*h*); but after verdict the court will not intend the goods, &c. mentioned in the second count to be the same as those in the first, unless it be expressly so stated(*i*).

Sixthly, the conclusion.

The declaration in personal and mixed actions should *conclude* to the *damage* of the plaintiff(*j*); unless in *scire facias* and in penal actions

(*c*) See Lord Eldon's observations in Pinson *v.* Lee, 2 Bos. & Pul. 335. and Lord Kenyon's in Braithwaite *v.* Bradford, 6 T. R. 601.

(*d*) Pinson *v.* Lee, 2 Bos. & Pul. 335.—Poston *v.* Stanway, 5 East, 261.

(*e*) See the observations per Mr. Justice Lawrence, Stiles *v.* Nokes, 7 East, 506. and Phillips *v.* Fielding, 2 Hen. Bla. 131, 2.—Tindall *v.* Moore, 2 Wils. 114, 5.—See precedents Crown Cir. Ass. 114.—Post. 2 Vol. 305. 309. id. n. u. t.—And see Barnes *v.* May, Cro. Eliz. 240.—And as to libels, Baldwin *v.* Elphinston, 2 Bla. Rep. 1038.

(*f*) Bac. Ab. Pleas and Pleading, B. 1.

(*g*) Post. 2 Vol. 308. n. t.

(*h*) Hart *v.* Langfitt, 2 Lord Raym. 842.—7 Mod. 148. S. C.—Com. Dig. Pleader, C. 33.—Sed vide West *v.* Troles, Salk. 213.

(*i*) West *v.* Troles, Salk. 213.—Bac. Ab. Pleas, B. 1.—Vin. Ab. Decl.

(*j*) Com. Dig. Pleader, C. 84.—Robert Pilford's Case, 10 Co. 116. b. 117. a. b.

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(196) A count which is bad cannot be referred to, to help out another count. *Nelson* v. *Swan*, 13 *Johns Rep.* 483.

II. ITS PARTS. Sixthly, the conclusion.

at the suit of a common informer; in the latter case, as the plaintiff's right to the penalty did *not accrue till the bringing of the action, and he cannot have sustained any damage by a previous detention of the penalty, it is not proper to conclude *ad damnum*(*k*). In an action by husband and wife for a battery, &c. of the wife, or whenever the wife is properly joined in the action, the declaration should conclude *ad damdum ipsorum*(*l*); and when the plaintiff sues as executor, administrator, or assignee of a bankrupt, it is usual to state that he was injured *as* such executor, &c.[197] In debt the object of the action being to recover a sum of money *eo nomine* the damages are generally nominal(*m*). But in assumpsit, covenant, case, replevin, trespass, and other actions for the recovery of *damages*, the sum in the conclusion of the declaration must be sufficient to cover the real demand(*n*); for in general the plaintiff cannot recover greater damages than he has declared for, and laid in the conclusion of his declaration(*o*); and if judgment be given for more it is error, and a court of error cannot reduce the sum to the amount stated in the declaration(*p*). If therefore, the verdict be for more than the damages laid in the declaration, a remittitur should be entered as to the surplus, before judgment.[198] The jury, however, may give a verdict for as much as is declared for, and also give costs separately, which costs may afterwards be increased by *the court, though such damages and costs might together exceed the damages laid in the declaration(*r*). It is usual in practice to state a sum sufficient to cover the real demand, with interest up to the time of final judgment, taking care in actions by original, on account of the fine, not to lay the damages unnecessarily high, and in such action by original the declaration ought not in strictness to vary from the writ in the amount of the damages; but in proceeding by bill a variance in the amount of the damages between the *ac etiam* part of the latitat and the declaration, is not material(*s*).

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In point of *form* the usual conclusion in the *King's Bench*, is, "to "the damage of the said A. B. of ——— *l.*, and therefore he brings "his suit," &c. In the *Common Pleas* the conclusion is, "Wherefore "the said A. B. saith that he is injured and hath sustained damage to "the value (or "amount") of ——— *l.*, and therefore he brings his

(*k*) Frederick *v.* Lookup, 4 Burr. 2021. Cuming *v.* Silby, 4 Burr. 2490.

(*l*) Com. Dig. Pleader, C. 84.—Id. 2. a. 1.—Buckley *v.* Collier, 1 Salk. 114. Post. 2 Vol. 421.

(*m*) Ante, 100.

(*n*) Bolton *v.* Lee, 2 Lev. 57.

(*o*) Robert Pilford's Case, 10 Co. 117. a. b.—Vin. Ab. Damages, R.—Com. Dig. Pleader, C. 84.

(*p*) Id. ibid.—Bonner *v.* Charlton, 5 East, 142.

(*r*) Vin. Ab. Damages, R. pl. 9, 10, 11.—Robert Pilford's Case, 10 Co. 117. a. b.

(*s*) Turing *v.* Jones, 5 T. R. 402.—Ante, 254.

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(197) But this is unnecessary. *Martin & another* v. *Smith*, 5 *Binney*, 16. 21.

(198) Vide *Burger* v. *Kortright*, 4 *Johns. Rep.* 415.

II. ITS PARTS. Sixthly, the conclusion.

" suit," &c. In the *Exchequer*, the form runs, " To the damage of " the said A. B. of ——— *l.*, whereby he is the less able to satisfy our " said Lord the King the debts which he owes his said Majesty at his " Exchequer, and therefore he brings his suit," &c. By the above words *suit* or *secta* (*a sequendo*) were anciently understood the witnesses or followers of the plaintiff, for in former times the law would not put the defendant to the trouble of answering the charge till the [*400] plaintiff had made out at *least a probable case. But the actual production of the suit, the secta or followers is now antiquated, though the form of it still continues(*t*). In actions against *attorneys* and other officers of the court, the declaration should conclude *unde petit remedium* instead of bringing suit(*u*); but an inaccurate conclusion in this case is no cause of demurrer(*v*); however in one case on a special demurrer the court, for the sake of keeping up the old established form of " prays relief, &c." proposed an amendment without payment of costs(*x*). When the action is by bill against a member of the House of Commons, the *bill* concludes with a prayer of process to be made to the plaintiff, according to the statute, &c.

7thly, the profert and pledges.

In an action at the suit of an executor or administrator, immediately after the conclusion to the damage, &c. and before the pledges, a *profert* of the letters testamentary, or letters of administration should be made(*y*);[199] but in *scire facias* the profert may be either in the middle or at the end of the declaration(*z*); and in an action on a note indorsed to the plaintiff by an administrator, no profert is necessary, because the plaintiff is not entitled to the custody of the letters of administration, which, however, must be proved on the trial(*a*); and the omission of the profert is now aided unless the defendant demur specially for the defect(*b*).

[*401] *At the end of the declaration in the King's Bench, by bill, it is usual to add the plaintiff's common *Pledges to prosecute*, John Doe and Richard Roe(*c*). But in proceedings by original and in the Common Pleas, pledges are supposed to have been found in the first instance before the defendant was summoned, and therefore they are not to be stated at the end of the declaration unless in proceedings against attorneys, &c.(*d*); and in an action at the suit of the King, the Queen, or an infant, pledges were not at any time necessary(*e*); and as they have long

(*t*) 3 Bla. Com. 295.—Gilb. C. P. 48.

(*u*) Gilb. C. P. 49.

(*v*) Beer v. Alleyn, Andr. 247.—Barnes, 3.

(*x*) Spencer et al. *v.* Thomlinson, Barnes, 167.

(*y*) Bac. Ab. tit. Executor, C. Dougl. 5. in notes.

(*z*) Bosworth *v.* Ridgley, Carth. 69.

(*a*) Stone *v.* Rawlinson et al., Willes, 560.

(*b*) 4 Ann. c. 16. s. 1.

(*c*) 3 Bla. Com. 295.—Co. Lit. 161. a. n. 4.—Com. Dig. Pleader, C. 16.

(*d*) Summary on Pleading, 42.—Littlehales *v.* Bosanquett, Barnes, 163.

(*e*) Beecker's Case, 8 Co. 61.—Goodwin *v.* Moore, Cro. Car. 161.—Co. Lit. 133. a.—Sir W. Jones, 177.

(199) In Connecticut it is not common to make profert of letters testamentary. *Champlin* v. *Tilley & Tilley*, 3 *Day's Rep.* 305.

II. ITS PARTS. Seventhly, the profert and pledges: Defects when aided.

ceased to be real(*f*), the statement of them is now unnecessary, and the omission cannot be taken advantage of, even by special demurrer,[200] because *cessante ratione cessat et ipsa lex*(*g*).

If the defendant instead of demurring pleads to the declaration, many defects therein, and particularly those which are not substantial, will be aided at *common* law, either by the plea or by a verdict for the plaintiff(*h*). Many of the instances have been stated when considering the different parts of the declaration; the general rule appears to be that if the declaration be defective *in point of form, as wanting time, [*402] place, or other circumstances, it may be aided by a demurrer(*hh*); or by the *plea*(*i*);[201] and in some instances even in matters of substance(*k*);[202] thus in an action of trespass for taking goods, not stating them to be the property of the plaintiff, the defect will be aided if the defendant by his plea admit the plaintiff's property(*l*).[203] After *verdict* if the issue joined be such as necessarily to require, on the trial, proof of the facts defectively or imperfectly stated, or omitted, and without which it is not to be presumed that the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfec-

(*f*) 3 Bla. Com. 295.—Co. Lit. 161. a. n. 4.

(*g*) Reed *v.* Brookman, 3 T. R. 157, 8.—Littlehales *v.* Bosanquett, Barnes, 163.—Ilderton *v.* Ilderton, 2 Hen. Bla. 161.—Summary on pleading, 43. and yet it was enacted by the statute 4 Ann. c. 16. s. 1. that no advantage shall be taken of the omission of pledges, *unless assigned specially, as cause of demurrer*, thereby admitting the omission to be then an existing objection, and since that statute leave has been given to amend, see Watson *v.* Richardson, 1 Wils. 226.—How *v.* Denin, 2 Wils. 142. Umfreville *v* Lock, Rep. T. H. 315.—Fortes. 330.—Littlehales *v.* Bosanquett, Barnes, 163.—Young *v.* Young, Palmer, 518.

(*h*) Com. Dig. Pleader, C. 85. 87. and the cases there collected.

(*hh*) Ante.

(*i*) Com. Dig. Pleader, C. 85. 87.—Brooke *v.* Brooke et al., 1 Sid. 184.—Norwood *v.* Read, Plowd. 182.—Dr. Benham's Case, 8 Co. 120. b. ante.

(*k*) Brooke *v.* Brooke et al., 1 Sid. 184.—Norwood *v.* Read, Plowd. 182. and see the cases collected in Com. Dig. Pleader, C. 85.—Ante, 261.—But see Dr. Benham's Case, 8 Co. 120. b.

(*l*) Brooke *v.* Brooke et al., 1 Sid. 184.

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(200) Acc. *Baker* v. *Philips*, 4 *Johns Rep.* 190.

(201) So, in trespass de bonis asportatis, omission to state the value of the chattels is cured by plea. *Newcomb & others* v. *Ramer*, 2 *Johns. Rep.* 421. n. post. 2 vol. 424. *Spear* v. *Bicknell*, 5 *Mass. Rep.* 132. *Turberville* v. *Long*, 3 *Hen. & Mun.* 312.

(202) So, where several acts are to be performed on the part of the plaintiff, as a condition precedent, and he does not aver performance of all, if it appear by the plea that the act omitted to be stated was in fact performed, the defect is cured. *Zerger* v. *Sailer*, 6 *Binney*, 24.

(203) A declaration not showing a cause of action cannot be made good by the plea; as in slander, charging words not actionable, without any colloquium to direct their meaning, the insufficiency of the declaration is not cured by the defendant's justifying the words. *Pelton* v. *Ward*, 3 *Caine's Rep.* 73. Per Spencer, J. But see the opinion of Spencer, J. in *Vaughan* v. *Havens*, 8 *Johns. Rep.* 109.

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tion, or omission, is cured by the *verdict* at *common law*(*m*).[204] In short the court will infer almost any thing after verdict(*n*); and want of certainty in the description of the consideration, or of the contract itself, will be thereby aided(*o*); but this rule must be taken with some qualifications which will hereafter be more fully stated(*p*), and the defects aided by different *statutes* will also then be considered.

(*m*) 1 Saund. 228. a. note 1. and cases there collected.—Mackmurdo et al. *v.* Smith et al., 7 T. R. 522. Tidd, Prac. 4th ed.

(*n*) Per Lord Eldon, Da Costa *v.* Clarke, 2 Bos. & Pul. 259.

(*o*) Ward *v.* Harris, 2 Bos. & Pul. 265.

(*p*) Da Costa v. Clarke, 2 Bos. & Pul. 259.—1 Saund. 228. n. 1.

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(204) Vide *Rucker & another* v. *Green*, 15 *East's Rep.* 290. *Leffingwell & Pierpoint* v. *White*, 1 *Johns. Cas.* 100. *Allaire* v. *Ouland*, 2 *Johns. Cas.* 56. *Owens* v. *Morehouse*, 1 *Johns. Rep.* 276. *Bayard* v. *Malcolm & Malcolm*, 1 *Johns. Rep.* 470. S. C. 2 *Johns. Rep.* 571. *Stilson* v. *Tobey*, 2 *Mass. Rep.* 521. *Bemis* v. *Faxon*, 4 *Mass. Rep.* 263. *Spencer* v. *Overton*, 1 *Day's Rep.* 183. *Bender* v. *Fromberger*, 4 *Dallas*, 439. *Woodford's Heir* v. *Pendleton*, 1 *Hen. & Mun.* 303. *Turberville* v. *Long*, 3 *Hen. & Mun.* 309. *Pangburn* v. *Ramsay*, 11 *Johns. Rep.* 143. *Chapman* v. *Smith*, 13 *Johns. Rep.* 81.

*CHAPTER V.

[*403]

OF THE CLAIM OF CONUSANCE, APPEARANCE AND DEFENCE, OYER, AND IMPARLANCES.

BEFORE we consider the different pleas in personal actions it may be proper in this chapter to examine a few points relating to the claim of Conusance, Appearance and Defence, Oyer, and Imparlances.

I. CLAIM OF CONUSANCE.

The claim of conusance(*a*) is defined to be an intervention by a third person, demanding judicature in the cause against the plaintiff, who has chosen to commence his action out of the claimant's court(*b*). It is a question of jurisdiction between the two courts(*c*), and not between the plaintiff and defendant, as in the case of a plea to the jurisdiction, and therefore it must be demanded by the party entitled to conusance, or by his representative, and not by the defendant or his attorney(*d*). A plea to the jurisdiction *must be pleaded in person, but a claim of [*404] conusance may be made by attorney(*e*). Hence the consideration of this claim might, on first view, appear foreign to a treatise of this nature; but as it is frequently made at the instigation of the defendant, and affects the pleadings, it is proper to be concisely inquired into. This claim, when made upon the courts at Westminster, is not encouraged, and therefore the greatest accuracy must be observed in

(*a*) As to conusanee in general, see Gilb. C. P. 192, &c.—1 Sellon. Ch. 7.—Tidd, Ch. 27.—Vin. Ab. Conusance.—Com. Dig. Courts, P.—Bac. Ab. Courts, D. 3.—3 Bla. Com. 298.—As it is stated, that the claim of conusance should be made *before defence*, see 3 Bla. Com. 298. I have considered the nature of such claim anterior to defence and imparlance, oyer, and pleas to the jurisdiction, and in abatement.

(*b*) Leasingby *v.* Smith, 2 Wils. 409. See the precedents in Rast. Ent. 128.—Welles *v.* Trahern et al., Willes, 233. Leasingby *v.* Smith, 2 Wils. 406.—Williams v. Brickenden, 11 East, 543.

(*c*) Pern *v.* Manners, Fortes. Rep. 157.—5 Vin. Ab. 588, 9. S. C.

(*d*) Pern *v.* Manners, Fortes. Rep. 157.—5 Vin. Ab. 588, 9. 593. 596. 600. Taylor *v.* Reignolds, 12 Mod. 666.

(*e*) Leasingby *v.* Smith, 2 Wils. 410. 5 Vin. Ab. 599.

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the time and manner of making it(*f*). It may be considered with reference, 1*st*, To the several sorts of inferior jurisdictions; 2*dly*, To the actions in which conusance may be claimed; and 3*dly*, To the time and manner of claiming it.

According to the various decisions collected in Viner's Abridgment(*g*), there are *three* sorts of *inferior* jurisdictions. The *first* is by grant *tenere placita*, which is of the lowest description, and is merely a *concurrent* jurisdiction, and can neither be claimed nor pleaded; and where priority of suit gives one court the preference(*h*). The *second* is by grant *habere cognitionem placitorum*. and this must be limited as to place, and being intended for the benefit of the lord, may be claimed by him, though it cannot be pleaded by the defendant to the jurisdiction. The *third* is by grant *habere cognitionem placitorum*, *with exclusive words*, as where the king grants to a city that the inhabitants [*405] shall be sued within the city *and *not elsewhere*, and this may follow the person, and need not be confined to any place, and being an exempt jurisdiction may be either claimed by the lord or pleaded by the defendant to the jurisdiction; but even in the latter case, the proceedings in the superior courts must be objected to in the first instance by claim of conusance or plea to the jurisdiction(*i*). Hence, it is a general rule that where the defendant is at liberty to plead to the jurisdiction of the court, the lord of the franchise may claim conusance, but not *vice versa*(*j*). Where two persons claim conusance, it is to be granted to him who first demanded it, and the right of the parties claiming conusance, must be tried in another action between them(*k*).

The privilege of claiming conusance is confined to courts of *record*, unless in the case of ancient demesne(*l*); and to *local* actions(*m*); except where the defendant is a member of the university of Oxford or Cambridge(*n*); it is also confined to such actions as were *in esse* at the time of the grant(*o*); and does not extend to those created since by act of parliament, except where a common law action is given against a person by another name, as debt against an administrator(*p*). Neither

(*f*) See the reason, Leasingby *v.* Smith, 2 Wils. 408, 9.—Welles *v.* Trahern et al., Willes, Rep. 237, 8.

(*g*) Tit. Conusance, 5 Vol. 569.—See also Com. Dig. Courts, P.—Bac. Ab. Courts, D.—Pern *v.* Manners, Fortes, Rep. 156.

(*h*) Id. ibid.—Case of University of Cambridge, 10 Mod. 126.—Castle *v.* Lichfield, Hardr. 509—Hampton *v.* Phillips, Palm. 456.—Crosse *v.* Smith, 12 Mod. 643.

(*i*) Id. ibid.—Chapman *v.* Mattison, Andr. 198.—In some cases the jurisdiction of the courts at Westminster is in effect taken away by different statutes, and in such case the objection may be pleaded in bar, or given in evidence under the general issue.—See Parker *v.* Elding, 1 East, 352.—The King *v.* Johnson, 6 East, 583.

(*j*) Gilb. C. P. 193.

(*k*) 5 Vin. Ab. 599.

(*l*) Gilb. C. P. 191, 2.—2 Inst. 140.—Welles *v.* Trahern et al., Willes, 239. Dowland *v.* Slade et ux., 5 East, 284.

(*m*) 4 Inst. 213.—Bishop of Ely's Case, 1 Sid. 103.

(*n*) Gilb. C. P. 193.—Bac. Ab. 102. Wood. Ins. 521, 2.—Williams *v.* Brickenden, 11 East, 543.

(*o*) 14 Hen. 4. 20. B.

(*p*) Id.—22 Ed. 4. 22.

will this privilege be *allowed, where the court claiming conusance, cannot give remedy(*q*), and when there would consequently be a failure of justice(*r*); as in replevin, because if the plaintiff be nonsuited, a second deliverance should be granted, which the franchise cannot issue(*s*); nor in quare impedit, because the inferior court cannot send a writ to the bishop(*t*); nor in waste; or where the lord is a party and the plea is to be holden before himself(*u*); or where the defendant is a stranger who hath nothing within the franchise(*v*); or where the *plaintiff* is a privileged person, as an attorney or officer of the court(*w*); and it also seems that the court cannot grant conusance in part(*x*); though upon a plea in abatement, the writ may abate as to a part(*y*). Conusance may however be claimed, where the defendant is in the actual custody of the marshal(*z*). [*406]

With respect to the *time* when conusance should be claimed, it should be after the defendant has appeared, because till then there is no cause in court, and the defendant might counterplead the conusance(*a*). It is said that it should be before full defence(*b*), and according to the *entries, it is to be made before any defence, immediately after the statement of the defendant's appearance(*c*), and it is an established rule of law, "that it must be claimed in the first instance or at "the first day(*d*)," and consequently it should be made before imparlance(*e*): though in general where a declaration is delivered in vacation as of the preceding term, the claim of conusance may be entered on the first day of the following term, as of the preceding term(*f*). Where the writ discloses the particulars of the cause of action, it appears to have been considered as legal notice, to the lord, &c. of the invasion of his jurisdiction, so as to make it incumbent on him to [*407

(*q*) Draper *v.* Crowther, Ventr. 363.

(*r*) Id. ibid.—Castle *v.* Lichfield, Hard. 507.

(*s*) 2 Inst. 140.

(*t*) Bac. Ab. tit. Courts, D. 3.

(*u*) 8 Hen. 6. 18, 19, 20, 21.—Day *v.* Savadge, Hob. 87.—See the singular argument, 3 Bla. Com. n. d. 299.

(*v*) 1 Rol. Ab. 493. pl. 16. b. 48.—22 Ass. 83.

(*w*) Welles *v.* Trahern et al., Willes, 233.—Lord Anderson's Case, 3 Leon. 149.—Anon. Lit. Rep. 304.—Vells *v.* Trehern, Barnes, 346.—5 Vin. Ab. 590. S. C.—Id. 592. *acc.* Bendl. 33. *contra*, nor where the *defendant* is an attorney, see 5 Vin. Ab. 572.—1 Rol. Ab. 489. *acc.* 5 Vin. Ab 594. *contra*.

(*x*) 5 Vin. Ab. 597.—1 Rol. 495.

(*y*) 2 Saund. 209, 210. in notis.—Powell *v.* Fullerton et al., 2 Bos. & Pul. 420.—Smith *v.* Gibson, R. T. Hardw. 273.

(*z*) Jones v. Bodinner, 1 Salk. 2.—Gilb. C. P. 195.—Bro. Ab. *Conusance*, 50.

(*a*) Gilb. C. P. 196.—Wild *v.* Villers, Comb. 319.—Browne *v.* Renoward, 12 East, 12.

(*b*) 3 Bla. Com. 298.—But see 5 Vin. Ab. 597.—1 Rol. Ab. 495.

(*c*) Rast. Ent. 128.—Leasingby *v.* Smith, 2 Wils. 410.

(*d*) Rex *v.* Agar et al., 5 Burr. 2823. Woodcocke *v.* Brooke, Rep. T. Hardw. 241.—Leasingby *v.* Smith, 2 Wils. 411. Welles *v.* Trahern et al., Willes, 233.

(*e*) Id. ibid.—Leasingby *v.* Smith, 2 Wils. 411.—Welles *v.* Trahern et al., Willes, 233.—3 Bla. Com. 298.—Case of University of Cambridge, 10 Mod. 127.—Pern *v.* Manners, Fortes. 157.

(*f*) Leasingby *v.* Smith, 2 Wils. 411, 412.—Browne *v.* Renoward, 12 East, 18.

I. CLAIM OF CONUSANCE.

claim conusance on the very first day the defendant hath in court, even upon the return day of the writ; but when the writ does not disclose the precise cause of action, then it is sufficient to make the claim on the first day given upon the declaration(*g*).

In point of *form*(*h*), conusance may be claimed by the lord of the franchise, or by his bailiff or attorney(*i*) If it be claimed by attorney, the warrant of attorney must be produced in court and filed(*j*). The *grant* of conusance must also be produced(*k*), or an exemplification of [*408] it under *the great seal(*l*), and if the grant was before time of memory, an allowance must be shown in the King's Bench, or before justices in Eyre, or confirmation by patent(*m*) and it cannot be claimed by prescription(*n*). Upon a claim made by the University of Cambridge(*o*), there must, in addition to the grant, be an exemplification of the private statute confirming it(*p*), together with an affidavit of the defendant's residence(*q*). The claim itself must be entered upon a roll(*r*). It being a demand of something *quod sibi debetur*, it must be perfectly entered upon record, and must state every thing that is to take away the general jurisdiction of the superior court, and *the whole ought to be set forth with all the proceedings in the cause in the superior court* till the instant of making the claim, and after stating the proceedings the entry runs thus: "And the said defendant by E. F. his attorney "comes," (*but the defendant says no more nor makes any defence, and then the entry proceeds as follows*) "and hereupon comes ——— chan- "cellor of the University of Oxford, by G. H. his attorney, to demand, "claim, prosecute and defend his liberties and privileges thereof, that "is to say, to have the conusance of the plea aforesaid, because he "saith, &c." (*setting out with great precision all the circumstances on which the claim is founded, and concluding thus:*) "and the said chan- [*409] "cellor demands his liberties and privileges aforesaid, according *to

(*g*) Rex *v.* Agar et al., 5 Burr. 2823. Leasingby *v.* Smith, 2 Wils. 413.—Case of University of Cambridge, 10 Mod. 127.

(*h*) Com. Dig. tit. Courts, P. 3.—Rast. Ent. 128. See the form, Williams *v.* Brickenden, 11 East, 543.—Browne *v.* Renoward, 12 East, 12.

(*i*) Bro. Ab. tit. Conusance, 50.—Crosse *v.* Smith, 12 Mod. 644.—Taylor *v.* Reignolds, 12 Mod. 666.—*See the entry*, Rast. Ent. 128.—Welles *v.* Trahern et al., Willes, 234.

(*j*) See the form, Welles *v.* Trahern et al., Willes, 233, 4.—Hampton *v.* Phillips, Palm. 456.—Bishop of Ely's Case, 1 Sid. 103.—Neal *v.* Deucton, 1 Lev. 89.—Leasingby *v.* Smith, 2 Wils. 406.

(*k*) Crosse *v.* Smith, 12 Mod. 644.—Kendrick *v.* Kynaston, 1 Bla. Rep. 454.

(*l*) Rex *v.* Agar et al., 5 Burr. 2820.

(*m*) Keilw. 189, 190.—Bishop of Ely's Case, 1 Sid. 103.—Foster *v.* Milton, 1 Salk. 183.—S. C. 1 Ld. Raym. 427, 8. 475.—Gilb. C. P. 195. but see Bro. Ab. tit. Conusance, 51.

(*n*) Com. Dig. tit. Courts, P. 3.

(*o*) Case of University of Cambridge, 10 Mod. 126.—Kendrick *v.* Kynaston, 1 Bla. Rep. 454.

(*p*) 13 Eliz. c. 29.—Leasingby *v.* Smith, 2 Wils. 412.

(*q*) Boot *v.* Graham, 1 Barn. K. B. 49. 65.—Paternoster *v.* Graham, 2 Stra. 810.—Hays *v.* Long, 2 Wils. 311.—Kendrick *v.* Kynaston, 1 Bla. Rep. 454. Rex *v.* Agar et al., 5 Burr. 2820.

(*r*) Wild *v.* Villers, Comb. 319.—Boot *v.* Graham, 1 Barn. K. B. 65.—Paternoster *v.* Graham, 2 Stra. 810.

"the form and effect of the letters patent aforesaid, and the confirmation aforesaid, in this plea between the parties aforesaid, here in the court of our said lord the king now depending, to be allowed to him, *as heretofore hath been allowed*(*s*)," though the latter words are not necessary, where the franchise is given by act of parliament(*t*).

The claim of conusance, if insufficient in form or substance, may be demurred to, or the facts therein alleged may be traversed by the plaintiff(*u*). If the claim be disallowed on demurrer, the judgment, after the usual entry of *curia advisare vult*, and giving day to hear judgment, as well to the plaintiff and person claiming conusance as to the defendant, is, that the matter aforesaid by the party claiming conusance in manner and form aforesaid alleged, is not sufficient in law, therefore it is considered that the said, &c. (the person claiming conusance) have not his aforesaid liberty in his said plea mentioned, and it is commanded by the said court, as well to the said, &c. (the person claiming conusance) as to the said defendant, that to the writ and count aforesaid, the said defendant do answer, &c. and thereupon the said defendant defends the wrong and injury when, &c. and prays leave to imparle, &c., and the pleadings proceed as usual(*v*).

If the claim be allowed, a day is given upon the roll, for the lord of the franchise to hold his court, and the parties are commanded to be there *on that day(*vv*). But the record still remains in the court [*410] above; and a transcript only is sent down to the court below(*w*), in order that if justice be not done there, as if the defendant be a stranger, and has nothing within the franchise, by which he can be summoned, or if the judge refuse to do justice, the plaintiff may have a *resummons* upon the record in the court above(*x*), the cause assigned in which resummons may be traversed by the party, who originally claimed conusance; and if found for him, the cause will be remanded; but if found *against* him, the parties go on in the superior court, from the period or situation in which the cause was at the allowance of the claim, just as if such claim had never been allowed(*y*). And if a resummons issue, upon failure of right in a franchise, the lord of the franchise shall never afterwards have conusance of that plea(*z*).

(*s*) Per Wilmot, C. J.—Leasingby *v.* Smith, 2 Wils. 409, 410.—Rast. 128.—Welles *v.* Trahern et al., Willes. 234.

(*t*) Id. ibid.

(*u*) Leasingby *v.* Smith, 2 Wils. 410. Wild *v.* Villers, Comb. 319.—Rast. Ent. 129.

(*v*) Rast. 128.

(*vv*) Rast. Ent. 129.—Leasingby *v.* Smith, 2 Wils. 411.—Cross *v.* Smith, 2 Ld. Raym. 836, 7.—12 Mod. 644.—S. C. 3 Salk. 79. S. C.

(*w*) Id.—Anon. Jenk. 31.—5 Vin. Ab. 599.

(*x*) Leasingby *v.* Smith, 2 Wils. 411. Cross *v.* Smith, 12 Mod. 644.—Castle *v.* Lichfield, Hard. 507.—But see 5 Vin. Abr. tit. Conusance, 589.—Case of University of Cambridge, 10 Mod. 127.

(*y*) Leasingby *v.* Smith, 2 Wils. 411. 6 Vin. Ab. 3, 4.

(*z*) The Case of the Abbot of St. Edmondsbury, Jenk. 34.—5 Vin. Ab. 576. 588.

II. APPEARANCE AND DEFENCE.

BEFORE we inquire into the qualities and parts of the various pleas in personal actions, it is advisable to consider the statement of the defendant's *appearance;* of his *defence;* of the demand of *oyer;* and of *imparlances;* which when they occur in pleading, usually precede the statement of the subject matter of the defence. The language of the plea, and of the entry on the record of these allegations is thus: "And [*411] "the said C. D. (*the defendant*) by E. F. his attorney, *comes* *and *de-* "*fends* the *wrong* (or in trespass "force") and injury, when, &c. and "craves *oyer* of the said writing obligatory, and it is read to him, &c. "he also craves *oyer* of the condition of the said writing obligatory, "and it is read to him in these words: The condition, &c. (*setting out the* "*condition verbatim*). Which being read and heard, the said C. D. prays "leave to imparl to the said declaration until ——— next after —— and "it is granted to him, and the same day is given to the said A. B. (*the* "*plaintiff*) here, &c. At which day, to wit, on ——— next after ——— "at Westminster aforesaid, come as well the said A. B. as the said "C. D. by their respective attorneys aforesaid; and the said C. D. "saith that the said A. B. ought not to have or maintain his aforesaid "action thereof against him, because he saith that, &c. (*stating the* "*ground of defence*)"(*s*).

The above "*venit*," is the statement on record of the defendant's appearance in court, and is said to be necessary to make him a party to the suit, because *dicit* without *venit* might be *ore tenus*(*t*). It has, however, been decided that the word *venit* is no part of the plea, so that if defence be made without it, it is good, for the defendant's making defence shows him to be in court, and makes him a party to the plea, particularly where he appears to be *in custodia*(*u*). When the defendant pleads in a different name to that in which he is sued, whe- [*412] ther in abatement or in *bar, the statement of his appearance must not be, "and the *said* C. D. comes," &c. but should be "and C. D. (the "real name) against whom the said A. B. hath exhibited his said bill "by the name of E. D. by ——— his attorney, comes and defends," &c.(*v*). In general the appearance may be stated to have been in person or by attorney, according to the fact, but in an action against a feme covert sued alone, it must be alleged that she appeared in person(*w*); and an infant must plead by guardian,[1] and not by attorney

(*s*) See the form, 3 Bla. Com. Appendix, No. 3.

(*t*) Stevens *v.* Squire, Skin. 582.—Gilb. C. P. 186.—Bac. Ab. Pleas, D. Com. Dig. Abatement, I. 16.—Walford *v.* Savil, Lutw. 8, 9.—Co. Lit. 127. b.

(*u*) Stephens *v.* Arthur, Salk 544.—Stevens *v.* Squire, Skin. 582.—Com. Dig. Abatement, I. 16.

(*v*) Jackson *v.* Ford, 3 Wils. 413.—Roberts *v.* Moon, 5 T. R. 487.—3 Went. 210.—Willes, 41. n. c.—2 Saund. 209. b. n. 1.

(*w*) 2 Saund. 209. c.—Post. 2 Vol. 455.

(1) Vide *Mockey* v. *Grey*, 2 *Johns. Rep.* 192. And if an infant defend by attorney, he may bring a writ of error coram vobis to reverse the judgment. *Dewitt* v. *Post*, 11 *Johns. Rep.* 460.

or *prochein amy*(*x*). And in pleas to the jurisdiction, the appearance must be in person(*y*). And though several attorneys in partnership may be retained by the defendant, he can only plead by one, and not in the name of the firm(*z*), and the plea should be in the name of the attorney who appeared(*a*).

After the statement of the appearance follows the *defence*, which is defined to be the denial of the truth or validity of the complaint, and does not signify a justification. It is a general assertion that the plaintiff has no ground of action, which assertion is afterwards extended and maintained in the plea(*b*). This is so essential in pleading, that formerly if no defence were made, though the plea were in other respects sufficient, judgment was given against the defendant(*c*). *In *scire facias*, however, no defence is made(*cc*); and it is not necessary in a plea of ancient demesne(*d*), or to the jurisdiction of an inferior court having no jurisdiction of the matter, though it is otherwise when the plea relates rather to the person than to the subject matter of the action(*e*). Where, however, an attorney of the Common Pleas was sued in the King's Bench, and pleaded his privilege without a defence, it was held sufficient(*f*). Defence is of two descriptions, first, *half* defence which is as follows, "*venit et defendit vim et injuriam et dicit*," &c. or secondly, *full* defence, "*venit et defendit vim et injuriam quando*," &c. (meaning "*quando et ubi curia consideravit*," or when and where it shall behove him), "*et damna et quicquid quod ipse defendere debet et dicit*," &c.(*g*). In strictness the words "*quando*," &c. ought not to be added when only half defence is to be made, and after the words "*venit et defendit vim et injuriam*," the subject matter of the plea should immediately be stated(*h*). It has, however, now become the practice in all cases, whether half or full defence be intended, to state it as follows: "And the said C. D. by ——— his attorney, comes "and defends the *wrong* (or in trespass *force*) and injury, *when*, &c. "and says," which will be considered only as half defence in cases where *such a defence should be made, and as full defence when the latter is necessary(*i*). If full defence were made expressly by the

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(*x*) 2 Saund. 117. f. n. 1.—Ib. 212. a. n. 4.—Post. 2 Vol. 456.

(*y*) 2 Saund. 209. b. c.

(*z*) Bunn *v.* Guy, 4 East, 195.

(*a*) Margerem *v.* Makilwaine, 2 New Rep. 509.

(*b*) 3 Bla. Com. 296.—Co. Lit. 127. b.—As to defence in general, see the same references and Bac. Ab. Pleas, D. and Wilkes *v.* Williams, 8 T. R. 631.

(*c*) Co. Lit. 127. b.—Bac. Ab. Pleas, D.—Alexander v. Mawman, Willes, 41.—But see Stevens *v.* Squire, Skin. 582.

(*cc*) North *v.* Hoyle, 3 Lev. 182.

(*d*) North v. Hoyle, 3 Lev. 182.—Britton *v.* Gradon, Lord Raym. 117.

(*e*) Bac. Ab. Pleas, D.

(*f*) Kirkham *v.* Wheeley, 1 Salk. 30.—Bac. Ab. Pleas, D.

(*g*) Co. Lit. 127. b.—Bac. Ab. Pleas, D.—Rast. Ent. 652.—Alexander *v.* Mawman, Willes, 41.—Gilb. C. P. 188.—Wilkes *v.* Williams, 8 T. R. 633.—See the forms, 3 Bla. Com. Appendix, No. 3.—Post. 2 Vol. 455.

(*h*) Gilb. C. P. 188.—Wilkes v. Williams, 8 T. R. 632.—3 Bos. & Pul. 9. n. a.

(*i*) Wilkes *v.* Williams, 8 T. R. 633. Alexander *v.* Mawman, Willes, 41.—Hosier et al. *v.* Lord Arundel, 3 Bos. & Pul. 9.—2 Saund. 209. c.

II. APPEARANCE AND DEFENCE.

words "when and where it shall behove him," and "the damages "and whatever else he ought to defend," the defendant would be precluded from pleading to the jurisdiction or in abatement, for by defending *when and where* it shall behove him, the defendant acknowledges the jurisdiction of the court, and by defending the *damages* he waives all exceptions to the person of the plaintiff(*j*). Want of defence being only matter of form, the omission is aided on a general demurrer(*k*).

III. OF OYER.

The statement in a plea of *oyer* and of the deed follow the defence and precede the entry of imparlance(*a*). It is a prayer or petition, that the party may *hear* read to him the deed, &c. stated in the pleadings of the opposite party, and which deed is by intendment of law in court, when it is pleaded with a profert(*b*).[2]

If the plaintiff in his declaration *necessarily* make a *profert* of any deed, probate, letters of administration, &c. the defendant *may* pray [*415] oyer, which cannot in such case be refused by the *court(*c*); and if the deed be lost or destroyed, the plaintiff should declare accordingly, whereby the defendant would be precluded from praying oyer(*d*); but if a profert be *unnecessarily* made, the defendant must plead without oyer(*e*), though if it be craved and given, he has a right to make use

(*j*) 2 Saund. 209. c.—3 Bla. Com. 297, 8.—Co. Lit. 127. b.—Bac. Ab. Pleas, D.

(*k*) Hole *v.* Burgoigne, 3 Salk. 271.

(*a*) Ante, 411. but see an instance of oyer after imparlance, Jevens *v.* Harridge et ux., 1 Saund. 3.—Cabell *v.* Vaughan, 1 Saund. 289.

(*b*) 3 Bla. Com. 299.—Anon., 3 Salk. 119.—Roberts v. Arthur, 12 Mod. 599. Bac. Ab. Pleas, I. 12, 13.—Jevens v. Harridge, 1 Sid. 308. *acc.*—Simpson *v.* Garside, Lutw. 1644. *contra.*—The practice relative to the demand of oyer has been so fully considered in the works referred to in this note, that it will be sufficient here to confine our attention to such points as relate to pleading.—Tidd's Prac. 3 edit. 526 to 531. 4 edit. 518 to 523.—1 Sell. Prac. 285 to 291.—Jevens *v.* Harridge et ux., 1 Saund. 9.—Com. Dig. Pleader, P.

(*c*) Soresby *v.* Sparrow, 2 Stra. 1186. Reed *v.* Brookman, 3 T. R. 151.—As to when a profert is necessary, see ante, 348 to 350.

(*d*) Ante, 350.

(*e*) Morris's Case, 2 Salk. 497.—The King *v.* Amery, 1 T. R. 149, 150. Ante, 350.

(2) Where oyer of a deed pleaded with profert is not prayed, no part of the deed will be noticed by the Court, but that which the plaintiff has declared on. *Bender* v. *Fromberger*, 4 *Dall.* 436.

of it(*f*). Oyer was formerly allowed of the original writ in order to demur or plead in abatement for any insufficiency or variance between the writ and declaration; but this practice was altered by rule of court, and if the defendant demand oyer of the writ, the plaintiff may proceed as if no such demand had been made(*g*), nor is oyer demandable of a record(*h*); and as it cannot be granted of any deed, &c. which is not presumed to have been brought into court(*i*), the defendant cannot in an action upon a bond conditioned for performance of covenants in another deed crave oyer of such deed, but he and not the plaintiff must show it, or the counterpart with a profert or an excuse for the omission, though the court might compel the plaintiff to give the defendant a copy to enable him to plead(*j*); if, however, oyer be improperly craved and the deed be stated upon it, the defect in the plea will be aided on a general demurrer(*k*). If the defence be founded upon any objection to the form of the bond, as where a bail *bond has been [*416] given to the sheriff, but not by his name of office; and the defect do not appear on the face of the declaration, oyer *must* be craved, and after setting forth the bond, the defendant may demur(*kk*). And in an action at the suit of an administratrix, the defendant should crave oyer, and set out the letters of administration, if he wish to avail himself of any variance in the statement of them in the declaration(*l*). So if in the declaration, any part of a deed qualifying or rendering the defendant's contract dissimilar to that stated, be omitted or mis-stated by the plaintiff, the proper mode is for the defendant to pray oyer, and after setting out the deed in *hæc verba*, to demur(*m*).[3] And in pleading payment or performance of the condition of a *bond*, the defendant should

(*f*) Jeffery *v.* White, Dougl. 476.—1 Saund. 317. n. 2.

(*g*) R. T. 19 Geo. 3.—Boats *v.* Edwards, Dougl. 227, 8.—Gray et al. *v.* Sidneff, 3 Bos. & Pul. 398, 9.—1 Bos. & Pul. 646. n. b.

(*h*) Cremer v. Wickett, 1 Ld. Raym. 550.—Theobald v. Long, 1 Ld. Raym. 347.—Jeffery v. White, Dougl. 476.—King *v.* Amery, 1 T. R. 149.

(*i*) Longmore *v.* Rogers, Willes, 390.

(*j*) Jevens *v.* Harridge & wife, 1 Saund. 9, 10. n. 1.—Cook *v.* Remington, 6 Mod. 237.—Aleyn. 72.—Anon., 1 Sid. 50.—Lewes *v.* Ball, 1 Sid. 97.—Tapscott *v.* Wooldridge, 1 Sid. 425.—Bac. Ab. Pleas, I. 12.—See the precedents, post. 2 Vol. 530.—Gainsford *v.* Griffith, 1 Saund. 52. & id. 10. n. 1.

(*k*) Id. ibid.

(*kk*) Sheriffs of Middlesex *v.* Barnes, Ld. Raym. 1135.—2 Saund. 60. n. 3. 366. n. 1.—Samuel *v.* Evans, 2 T. R. 575.—Bac. Ab. Pleas, I. 12.

(*l*) Gerrard *v.* Early, 2 Wils. 413.

(*m*) 2 Saund. 366. n. 1.

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(3) So, in debt on award, if it be mis-stated in the declaration, the defendant cannot take advantage of the error by pleading no award, but must crave oyer and demur. *James* v. *Walruth*, 8 *Johns. Rep.* 410. Ut semble. Sed quære; for an award under seal need not be pleaded with profert, and the insertion of a profert will not entitle to oyer. Ante, 350.

III. OF OYER.

set forth the condition after craving oyer(*n*).[4] But it is necessary in an action on a bond or deed, conditioned for the performance of covenants in *another* deed, for the defendant in his plea of performance, to show such deed without craving oyer(*o*).

Where either the plaintiff or the defendant omits in pleading any material part of an indenture, &c. which *he* is bound to state, the only way by which the other party can relieve himself is by praying oyer of the indenture, &c. and setting it out in *hæc verba;* for he cannot plead, [*417] *that by the said indenture, it was further agreed, &c.(*p*).[5]

To deny oyer, when it ought to be granted, is error, and, in such case, the party, making the claim, should move the court to have it entered on record, which is in the nature of a plea, and the plaintiff may counterplead the right to oyer, or strike out the rest of the pleading following the oyer and demur(*q*); upon which the judgment of the court is either that the defendant have oyer, or that he answer without it(*r*). On the latter judgment the defendant may bring a writ of error, for to deny oyer when it ought to be granted is error, but not *e converso*(*s*).

Oyer having been granted, the defendant (unless in pleading performance of the condition of a bond,) may, in his plea, set forth the deed on oyer, or not, at his election, for he has a right to see whether the plaintiff is in a situation to sue, and may afterwards plead *non est factum*, or any other plea, without stating the oyer(*t*). If he do not set forth the indenture on oyer, it seems that he cannot plead, "that by the said indenture it was further agreed, &c."(*u*). And if it be mate-

(*n*) Post. 2 Vol. 529.——*v.* Klatch, 3 Keb. 708.—In Lill. Prac. Reg. tit. Oyer, it is said, that the defendant may plead, if he please, without oyer; for he may take upon himself to remember the bond without hearing it; but see Smith *v.* Boucher, Hutt. Rep. 33. Prisland *v.* Cooper, 1 Keb. 513.—1 Saund. 317. n. 2.—Com. Dig. Pleader, 2 W. 33.—Vin. Ab. Oyer, D.

(*o*) Ante, post. 2 Vol 530.—1 Saund. 10. n. 1.—Com. Dig. Pleader, 2 W. 33. Cook *v.* Remington, 6 Mod. 237.

(*p*) 1 Saund. 317. n. 2.—Stibbs *v.* Clough, 1 Stra. 227.

(*q*) 1 Saund. 9. b. n. 1.—Bac. Ab. Pleas, I.—Longuil *v.* The Hundred of Isleworth, 2 Salk. 498.—S. C. 2 Ld. Raym. 970.—S. C. 6 Mod. 28.—Mayor, &c of London *v.* Gorrey, 2 Lev. 142.

(*r*) Id. ibid.—Mayor, &c. of London *v.* Gorrey, 2 Lev. 142.—Longuil *v.* The Hundred of Isleworth, 6 Mod. 28.

(*s*) 1 Saund. 9. b. n. 1.—Tidd's Prac. 4th edit. 522.—Bac. Ab. Pleas, I. 12.

(*t*) The Weavers' Company *v.* Forrest et al., 2 Stra. 1241.—Simmons *v.* Parmenter et al., 1 Wils. 97.—The Weavers' Company *v.* Ware, Barnes, 327

(*u*) 1 Saund. 317. n. 2.——*v.* Clatch, 3 Keb. 708.—Smith *v.* Boucher, Hutt. 33.—Prisland *v.* Cooper, 1 Keb. 513.—Ante.

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(4) And the omission is fatal on writ of error. *United States* v. *Arthur & Patterson*, 5 *Cranch*, 257.

(5) Oyer of a deed of which profert is made in the first count of a declaration, does not make it part of the record so as to apply to the other counts. *Hughes* v. *Moore*, 7 *Cranch*, 176.

rial for the plaintiff to show the indenture, he may pray an enrolment, and so make it part of his replication(*v*). If the oyer be stated, the *plea should, in strictness, be entitled of the same term as the declaration, for in contemplation of law, the deed, unless denied, is in court only during the term in which it is pleaded, and is afterwards in the custody of the party to whom it belongs, and, therefore, oyer of such deed ought not, in pleading, to be stated to have been demanded in a subsequent term(*w*); and consequently not after a general imparlance(*x*). But oyer may be craved after a special imparlance to another day in the same term(*y*); and there are precedents where oyer has been craved after the statement of an imparlance(*z*); and where the plaintiff declares in vacation, before the essoign day of the following term, perhaps with analogy to the claim of conusance and pleas in abatement, a plea stating the claim of oyer may be entitled of a term subsequent to the declaration with a special imparlance, or, which may be most advisable, may be entitled generally of the preceding term(*a*). If the defendant assume to set out the whole of the deed or condition of a bond on oyer, the whole should be stated with all recitals *verbatim et literatim;* and if the defendant do not set forth the whole, or state it untruly, the plaintiff may sign judgment as for want of a plea(*b*); or may, by his replication, pray that *the deed be enrolled, and set it forth and demur, for by craving oyer the defendant undertakes to set out the whole(*c*); but in pleading to a bond conditioned for the performance of covenants in *another* deed distinct from that set out on oyer, though the party must state the indenture truly, or subject his plea to a demurrer, and the practice is to set forth the whole deed(*d*), it may perhaps suffice to state the substance of the deed, and those covenants only which he has engaged to perform, averring that the indenture contains no other covenants on his part(*e*), or perhaps even

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(*v*) The Weavers' Company *v.* Forrest et al., 2 Stra. 1241.—Simmons *v.* Parmenter et al., 1 Wils. 97.—1 Saund. 9. b. n. 1. *acc.*—The Weavers' Company *v.* Ware, Barnes, 327. *Contra.*

(*w*) Wymark's Case, 5 Co. 74. b.—The King *v.* Amery, 1 T. R. 149.—Simpson *v.* Garside, 2 Lutw. 1644.

(*x*) 2 Saund. 2. n. 2.—Vin. Ab. Oyer, F.—Bac. Ab. Pleas, I. 12.—Mayor, &c. of London *v.* Gorrey, 2 Lev. 142.—S. C. Freem. 400.—Player *v.* Barnadiston, 1 Keb. 32.—City of London *v.* Goree, 3 Keb. 480. 491.—Longvill *v* The Hundred of Thistleworth, 6 Mod. 28. see the form 3 Bla. Com. Appendix, No. 3. *acc.*—Longvill *v.* The Hundred of Thistleworth, 2 Ld. Raym. 970. *Contra.*—And see the precedents, Jevens *v.* Harridge & wife, 1 Saund. 3.—Cabell *v.* Vaughan, 1 Saund. 289.

(*y*) Anon., 12 Mod. 99.—Anon., 2 Show. 310.

(*z*) Jevens *v.* Harridge et ux., 1 Saund. 3.—Cabell *v.* Vaughan, 1 Saund. 289.

(*a*) Leasingby *v.* Smith, 2 Wils. 411, 412.—Jennings et al. *v.* Webb, 1 T. R. 278.—7 T. R. 447. n. d.—2 Saund. 2. n. 2.—Ante, 407.

(*b*) 1 Saund. 9. b. n. 1.—Wallace *v.* Duchess of Cumberland, 4 T. R. 370. Slater *v.* Horne, Tidd's Prac. 3d edit. 506.—4 edit. 497.

(*c*) Com. Dig. Pleader, P. 1.—Ferguson & others *v.* Mackreth, 4 T. R. 371. n. b.—1 Saund. 9. b. n. 1.

(*d*) Jevens *v.* Harridge & wife, 1 Saund. 9.—Earl of Kerry *v.* Baxter et al., 4 East, 344, 5.

(*e*) 1 Saund. 317. n. 2.

III. OF OYER.

an allegation that the indenture contains no negative or disjunctive covenants, with an averment of general performance, would be sufficient(*f*); and the plaintiff might pray oyer, and set it forth if untruly stated(*g*).

When oyer is prayed of a bond and the condition, it is usual in practice not to set forth the bond, but to say "and it is read to him, &c." and then to pray oyer of the condition, and set it forth in *hæc verba*, but the bond ought to be entered at large as well as the condition, if the terms of the obligatory part be material to the defence(*h*); so, if it be material to the plaintiff that the penal part of the bond be set forth, he may in his replication pray that it may be enrolled, and set it forth(*i*). If no use is intended to be made of the bond, there is no need to pray [*420] oyer of *it at all, or to enter any such prayer, but it is sufficient to pray oyer of the condition only(*ii*), for the bond and condition are considered as distinct, the bond being complete without the condition, therefore there may be oyer of one without the other(*k*), and praying oyer of one does not entitle the party to oyer of the other, but it must be demanded of both if material to the defence(*l*). If the deed, &c. be set forth on oyer, the court must adjudge upon it as parcel of the record,[6] though it were not strictly demandable at the time of granting it(*m*). And if it thereby appear to the court that the defendant has pleaded a false plea, the court will give judgment for the plaintiff upon a demurrer to the plea(*n*): so on the other hand, the defendant by craving oyer and setting it out in his plea, may sometimes aid a defect in the declaration, as where the declaration was upon a certain writing, and the defendant by praying oyer, *conditiones scripti obligatorii prædicti* admitted it to be a bond(*o*).

(*f*) Earl of Kerry *v.* Baxter and others, 4 East, 340. 344. n. 1.—See the precedent, post. 2 Vol. 531.

(*g*) 1 Saund. 9. b. n. 1. 317. n. 2.

(*h*) Sheriffs of Middlesex *v.* Bamer, Lord Raym. 1135.—Ante, 415, 6.

(*i*) Abney et al. *v.* White, Carth. 301, 2.—Blewet *v.* Appleby, 1 Lutw. 680. 686.—1 Saund. 9. b. n. 1.

(*ii*) Lib. Plac. 209. pl. 220.—1 Saund. 9. b. n. 1.

(*k*) 1 Saund. 9. b. n. 1. 209. n. 2.

(*l*) Cook *v.* Remington, 6 Mod. 237. 1 Saund. 9. b. n. 1.

(*m*) Smith *v.* Yeomans, 1 Saund. 316, 7.—Anon., 3 Salk. 119.—Gage *v.* Acton, Carth. 513.—Longvill *v.* The Hundred of Thistleworth, 6 Mod. 27. Jeffery *v.* White, Dougl. 476.

(*n*) Jevens *v.* Harridge & wife, 1 Saund. 9. 317. n. 2.—Anon., 3 Salk. 119.

(*o*) Moore et ux. *v.* Jones, Ld. Raym. 1541.—Courtney *v.* Greenville, Cro. Car. 209.

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(6) Vide *Cooke* v. *Graham's Adm'r.* 3 *Cranch*, 234.

IV. IMPARLANCES.

IV IMPARLANCES

The term *imparlance* or *licentia loquendi* in its most general signification, means time given by the court to either party to answer the pleading of his opponent as either to plead, reply, rejoin, &c. and is said to be nothing else but the continuance of the cause till a further day(*p*). But the *more common signification of the term is time to [*421] plead(*q*). In making up the issue joined between the parties, and in which all the proceedings are necessarily stated, an entry of an imparlance between the declaration and plea is frequent and sometimes necessary(*r*); but it is not usual in framing a plea or replication separately to state an imparlance, unless some new matter has arisen since the former pleading, when it may be proper(*s*).

Imparlances are of three descriptions: 1st, a common or general imparlance; 2dly, a special imparlance, and 3dly, a general special imparlance(*t*). The *first* is without saving to the defendant any exception against the writ, jurisdiction, &c. and is always to a subsequent term(*u*). In making up the issue, we have seen that the entry of such an imparlance, may be necessary in order to continue the cause in court(*x*); but in framing *a plea, such an entry of imparlance is [*422] not necessary unless where the matter of defence has arisen after the declaration(*y*). In general, pleas in bar are entitled of the term of which they are pleaded without reference to the title of the declaration, and as a plea of tender may be after such an imparlance, the plea may be entitled of a term subsequent to the declaration, though it is said to be more correct to entitle it of the same term as the declara-

(*p*) Bac. Ab. Pleas, G.—See Com. Dig. Pleader, D. and id. ibid. 1 Sel. Prac. Ch. 7. Sect. 3. 2 Saund. 1. n. 2. as to the nature of imparlances in general. In Doct. Plac. Tit. Imparlance, it is thus defined, "*imparlance est quando ipse defendens petit licentiam interloquendi, scilicet, quant le defendant desire le cour de doner a luy temps de pleader al suit ou action que est commence vers luy.*" Before declaration the continuance is by *dies datus prece partium;* after declaration and before issue joined, by imparlance; after issue joined and before verdict, by *vicecomes non misit breve;* and after verdict or demurrer by *curia advisari vult.*

(*q*) 2 Saund. 1. n. 2.—Anon., 2 Shower, 310.—Barnes, 346.

(*r*) 2 Saund. 1. n. 2.—Wymark's Case, 5 Co. 75. b. Tidd's Prac. 4 ed. 618.

(*s*) See the form in a *plea, post.* 2 Vol. 453. and in a *replication,* ibid. After *issue,* any new matter must be pleaded *puis darrein continuance.* See Precedents, post. 2 Vol. 724.

(*t*) Grant *v.* Lord Sondes, 2 Bla. Rep. 1095, 6. and as to the different kinds of imparlances, and when and how granted, and what may or may not be done after each, see 2 Saund. 1. n. 2.—Tidd's Prac. 4 edit. 406.

(*u*) Longvill *v.* The Hundred of Thistleworth, 6 Mod. 28.—2 Saund. 2. n. 2. See the forms, post. 2 Vol. 452.

(*x*) Supra, n. r.

(*y*) Post. 2 Vol. 452, 3.

IV IMPARLANCES

tion(z). After the entry of such a general imparlance, the defendant may plead *in bar* of the action, but not in *abatement* or to the *jurisdiction* of the court: and therefore, when, by the practice of the court, the defendant is at liberty to plead in abatement in a term subsequent to the declaration (as occurs where the process is returnable on the last return of the term, or even before, when the plaintiff has neglected to deliver or file his declaration four days exclusive, before the end of the term, or has neglected to declare before the essoign day of that term,) the defendant must plead such plea in abatement either of the same term as the declaration, or of the subsequent term with a special imparlance; and if it be pleaded of the latter, the plaintiff may sign judgment as for want of a plea(a).

A *special imparlance* is with a saving of all exceptions to the writ, bill, or count, and after this imparlance the defendant may plead in abate-
[*423] ment(b), but not to the jurisdiction of the court, *unless founded on a *personal* privilege, as that of an attorney, &c.(c). In cases where the defendant is entitled to a special imparlance, it is in the Common Pleas granted of course by the prothonotary upon an application to him, within the first four days of the term subsequent to that of the declaration, but in the King's Bench it is said to be grantable only by leave of the court obtained by a side bar rule(d). In both courts the special imparlance must be stated in the plea, when it is entitled of the term subsequent to the declaration(e).

The *third* description of imparlance, usually denominated a *general special* imparlance, is with a saving of all exceptions whatsoever(f), and can only be obtained by an application to the court on motion within the first four days of the next term after the declaration; and it is in the discretion of the court, governed by the particular circumstances of the case, to grant it or not, and they will not grant it in order to enable the defendant to plead to the jurisdiction if he has appeared by attorney; the prothonotary has no power to grant this description of imparlance, and a plea under a grant by him would be a nullity, and the plaintiff might sign judgment, or at least a respondeas ouste might be awarded(g). This imparlance having been obtained, the de-
[*424] fendant *may not only plead in abatement of the writ or count, but also personal privilege(h). In point of form this imparlance is simila to the last, with the exception of the words "*saving to himself all a*

(z) 2 Saund. 1. n. 2.—Kilwick *v.* Maidman, Burr. 59.—Tidd's Prac. 4 ed. 408.

(a) 2 Saund. 1. n. 2.—Doughty *v.* Lascelles, 4 T. R. 520.—Buddle *v.* Wilson, 6 T. R. 369.—7 T. R. 447. n. d.

(b) Gawen *v.* Surby, 1 Lutw. 6. & Bac. Ab. Pleas, C. 4.—Grant *v.* Lord Sondes, 2 Bla. Rep. 1095.

(c) Clapham *v.* Lenthall, Hard.—365.—Bac. Ab. Pleas, C. 4.

(d) Grant *v.* Lord Sondes, 2 Bla. Rep. 1094.—2 Saund. 1. n. 2.—R. E. 5 An

(e) Doughty *v.* Lascelles, 4 T. 520, 1.—Buddle *v.* Wilson, 6 T. 369.—Blackmore *v.* Fleming, 7 T. 443. in which Brewster *v.* Capper, Bla. Rep. 51.—S. C. 1 Wils. 261. we overruled. See the precedent, post Vol. 452, 3, 4.—2 Saund. 1. n. 2.

(f) See the form, post. 2 Vol. 45

(g) 2 Saund. 1. n. 2.

(h) Id. ibid.—Neave *v.* Nelson, Lev. 54.

vantages and exceptions whatsoever," and sometimes in addition to those words the following are added: "*as well to the writ and declaration as to the jurisdiction of this court*;"(*i*) but the first is the better form. IV. IMPARLANCES

If the defendant plead to the jurisdiction, or to the disability of the plaintiff, or defendant, to sue, or be sued, after a general imparlance, or to the jurisdiction after a special imparlance, the plaintiff may in general either sign judgment or apply to the court to set aside the plea, or he may demur to it, or allege the imparlance in his replication by way of estoppel: but if the plaintiff, instead of taking any of these advantages, reply to the special matter of the plea, the fault is aided(*k*).

(*i*) Grant *v.* Lord Sondes, 2 Bla. Rep. 1094.—2 Saund. 1. n. 2.

(*k*) 2 Saund. 1. n. 2.—Tidd, 4 ed. 408.

*CHAPTER VI.

OP PLEAS TO THE JURISDICTION, AND IN ABATEMENT, AND THE PROCEEDINGS THEREON.

THE law has prescribed and settled the order of pleading which the defendant is to pursue, viz. Order of pleading.

- 1st. *To the jurisdiction of the Court;*
- 2dly. *To the disability, &c. of the person.*
  - 1st. *Of the plaintiff;*
  - 2dly. *Of the defendant.*
- 3dly. *To the Count or Declaration;*
- 4thly. *To the writ.*
  - 1st. *To the form of the writ.*
    - 1st. *Matter apparent on the face of it.*
    - 2dly. *Matter dehors.*
  - 2dly. *To the action of the writ.*
- 5thly. *To the action itself in bar thereof(a).*[1]

This it is said is the natural order of pleading, because each subsequent plea admits that there is no foundation for the former, as when he defendant pleads to the person of the plaintiff, he admits the jurisdiction of the court, for it would be nugatory to plead that defence in a

(a) Per Lord Holt, Ch. J., Longueville *v.* the Inhabitants of Thistleworth, Ld. Raym. 970.—Cadman *v.* Grendon, Latch. 178.—Co Lit. 303 & 304.—Gilb. C. P. 49.—Doc. Plac. in preface. Com. Dig. Abatement, C.

(1) The order of pleading does not appear to have varied much from this scheme, even at the earliest periods of the law. 1 *Reeve's Hist. E. L.* 451. 2 *Reeve's Hist. E. L.* 266.

II. ORDER OF PLEADING.

court *which has no jurisdiction(*b*), and when the defendant pleads to the count, he admits that the plaintiff is able to sue him and the defendant to be sued; and when the defendant pleads to the form of the writ, he admits the form of the count, and after a plea in bar to the action, the defendant cannot plead in abatement, unless for matter arising after the commencement of the suit(*c*).

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If this order of pleading be inverted, the defendant will be precluded from pleading any matter prior in point of order(*d*). And this is material, for though it is said that after a judgment of respondeas ouster there can be no plea in abatement, because if it were allowed, there would be no end of such pleas(*e*); yet this must be understood of pleas in abatement in the same degree as popish recusancy and outlawry(*f*), which are both to the person, for the defendant may plead to the person of the plaintiff, and if that be overruled, he might afterwards, if in time, plead to the form of the writ(*g*).

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*I. OF PLEAS TO THE JURISDICTION.

I. PLEAS TO THE JURISDICTION.

Pleas of this description, though in effect they abate the writ, ye differ from pleas in abatement, principally in three points, viz. tha they must be pleaded in person, and only half defence should be made and they should conclude *si curia cognoscere velit*, and not *quod bill cassetur*(*h*). Objections even to the jurisdiction of the superior court may in some cases be taken under the general issue, but in gener

(*b*) In *inferior* courts, however, this does not obtain, for if such court have not jurisdiction over the subject matter, it will be a ground of nonsuit on the trial, Trevor *v.* Wall, 1 T. R. 151. And if there be a total want of jurisdiction in any of the courts in England, the matter may be pleaded in bar or given in evidence under the general issue, even in an action in the superior courts at Westminster.—The King *v.* Johnson, 6 East, 583.—Parker *v.* Elding, 1 East, 352.—Bac. Ab. Pleas, E. 1.—and see post.

(*c*) Gilb. C. P. 50.—Com. Dig. Abatement, C.—I. 23, 24.

(*d*) Co. Lit. 303.—Com. Dig. Abatement, C.—Doct. Plac. Preface.

(*e*) Bac. Ab. Abatement, O.—Gil C. P. 186.—Creswell et al. v. Vaugha 2 Saund. 401.—Anon. 12 Mod. 230.

(*f*) Anon., Hetl. 126.

(*g*) Com. Dig. Abatement, I. 3, 4. Bac. Ab. Pleas, K. 1.

(*h*) Bac. Ab. Pleas, E. 2. & ti Abatement, Bowyer *v.* Cook, 5 Mc 146.—Powers *v.* Coot, 1 Salk. 298.- Bla. Com. 301.—As to pleas to the risdiction in general, see claim of nusance, ante 403 to 410.—Com. D Abatement, D.—Bac. Ab. Pleas, and Courts, D. & Gilb. C. P. 187 197.

I. PLEAS TO THE JURISDICTION.

they must be pleaded.[2] In all transitory actions, and in local actions arising in England or Wales, if there be no plea to the jurisdiction, the courts at Westminster may in general hold plea thereof(*i*); though it has been doubted whether when an assault was committed in France or elsewhere out of the king's dominions an action can be supported even in the courts at Westminster(*j*), and where a trespass has been committed to lands in a foreign country, no action can be sustained in the English courts, unless there be no court which could afford redress in the country where the cause of action arose(*k*). And where a court has no jurisdiction at common law, or it has been taken away by act of parliament, such want of jurisdiction may be pleaded in **bar*, or [*428] be given in evidence under the general issue, and is not properly the subject of a plea in abatement(*l*). And it has been recently decided, that where a public statute for erecting a court of inferior jurisdiction enacts, that no action for any debt not amounting to forty shillings, &c. and recoverable by that act, shall be brought against any person residing within the jurisdiction, &c. such statute is a defence upon the general issue to a party, bringing himself within it, who is sued in the superior courts(*m*). In other cases the statutes giving a peculiar jurisdiction require that it shall be pleaded in bar, in case the parties claiming the privilege shall be sued elsewhere; and others direct that a suggestion shall be entered on the roll. The methods pointed out by the respective statutes must be strictly pursued(*n*).

In most of the *inferior* courts the want of jurisdiction is fatal to the suit without any plea stating the objection, for the cause of action must be alleged to have arisen within the jurisdiction, or a writ of false judgment may be supported; and if the fact be so alleged but not proved, the plaintiff ought to be nonsuited on the general issue; and if the inferior court admit the jurisdiction, a bill of exceptions may be tendered, or a prohibition issued(*o*). In these cases, however, the defendant may plead to the jurisdiction, which seems to be the [*429] safer course(*p*).

(*i*) Chapman *v.* Mattison, Andr. 198, Wood. 193.—Bac. Ab. Pleas, E. 1.

(*j*) Mostyn *v.* Fabrigas, Cowp. 176. but see ante, 269. n. i.

(*k*) Doulson *v.* Matthews et al., 4 T. R. 503. Ante, 269. n. j.—The King v. Johnson, 6 East, 583. 599.

(*l*) The King *v.* Johnson, 6 East, 583.—Parker *v.* Elding, 1 East, 352.—Doulson *v.* Matthews & another, 4 T. R. 503.

(*m*) Parker *v.* Elding, 1 East, 352.

(*n*) Per Lord Kenyon, Parker v. Elding, 1 East, 354.—See the observation on several of the statutes, and the mode of proceedings, in Tidd's Prac. 3d edit. 872 to 877. 4 edit. 856 to 860.

(*o*) Gilb. C. P. 188, 9.—Bac. Ab. Pleas, E. 1. Courts, D. 4.—1 Saund. 98. n. 1.

(*p*) Bac. Ab. Courts, D. 4.—See the

(2) It may be shown under the general issue, that there is no court in the country which has jurisdiction of the cause. *Rea* v. *Hayden*, 3 *Mass. Rep.* 124. *Anthon* v. *Fisher*, *Doug.* 650. n. 132. Ante, 426. n. *b*. Sed vide, *Smith* v. *Elder*, 1 *Johns. Rep.* 113.

I. PLEAS TO THE JURISDICTION.

We have already seen that the defendant can only plead to the jurisdiction where the grant to the inferior court was *habere cognitionem placitorum* with exclusive words *et non alibi*. In this case the plea cannot be in bar. At common law there was a distinction between a *foreign* plea and a plea to the *jurisdiction*. A foreign plea was, where the action was carried out of the county or place where the venue was laid(*q*). Ancient demesne and all pleas of privilege are pleas to the jurisdiction, and not foreign pleas(*r*). It was always necessary before the statute of Ann, to verify a foreign plea by affidavit, but not a plea to the jurisdiction(*s*).

Pleas to the jurisdiction, when the objection cannot be otherwise taken, are either in *local* or *transitory* actions. The defendant may in *local* actions plead to the jurisdiction when the cause of action accrued in a jurisdiction where *breve domini regis non currit*(*t*). Therefore he may plead that the lands are ancient demesne, holden of the king's [*430] manor(*u*), or that the cause of action *arose in Wales(*w*), but since the Welsh judicature act this plea has not been so frequent(*x*). So it may be pleaded that the cause of action arose in a county palatine(*y*), or in the cinque ports(*z*), or in London(*a*), or any other exclusive jurisdiction(*b*); but Ely is not an exempt jurisdiction, though the bishop may demand conusance(*c*). It has been held that it may be pleaded in a local action that the lands are out of the realm(*d*); but as this might be pleaded in bar, or be given in evidence under the general issue, it

precedents of plea and replication, 1 Went. 51. 60. 69. 78. & 1 Wentw. Index. Lil. Ent. 475.—See forms, post. 2 Vol. 457.

(*q*) 1 Saund. 98. n. 1.—Chumley *v.* Broom, Carth. 402. Vin. Ab. tit. Foreign Plea. See the precedent, Lil. Ent. 475.

(*r*) Vin. Ab. tit. Foreign Pleas, A. 11.—Cholmondley *v.* Broom, 5 Mod. 335.

(*s*) 1 Saund. 98. n. 1—Cholmondley *v.* Broom, Carth. 402.—S. C. 5 Mod. 335. Vin. Abr. Foreign Pleas.

(*t*) Bac. Ab. Courts, D. 3.—Gilb. C. P. 191.—Lampley et al. *v.* Thomas et. al., 1 Wils. 206.—Grant *v.* Bagge et al., 3 East, 128.

(*u*) Doe d. Morton *v.* Roe, 10 East, 523. Com. Dig. Abatement, D. 1.—Goodright *v.* Shuffil, Lord Raym. 1418. Baker *v.* Wich, 1 Salk. 56.—*See the precedents* in Herne, 351.—Rast. Ent. 101.—Thomp Ent. 2.—Mod. Ent. 249. 3 Inst. C. 8, 9.—Hans. 108.—1 Wentw. 51. and see other forms and replications, 1 Went. Index.

(*w*) Com. Dig. Abatement, D. 2.—Lampley et al. *v.* Thomas et al., 1 Wils. 193.—Penry *v.* Jones, Dougl. 213.—*See the precedents*, 1 Went. 45. 49. 68. Lampley et al. *v.* Thomas et al., 1 Wils. 193.

(*x*) 13 Geo. 3. c. 51.—Davis *v.* Jones, 1 New Rep. 267.—Evans *v.* Jones, 6 T. R. 500.

(*y*) Com. Dig. Abatement, D. 2.—*See the precedents*, Rast. Ent. 419.—Herne, 7.—3 Inst. Cl. 14.—1 Wentw. 49.

(*z*) Com. Dig. Abatement, D. 3.—4 Inst. 224.—Jenk. 190.—Keilw. 88.—See the precedent, Bro. Red. 475. & 1 Wentw. Index.

(*a*) Anon., 3 Leon. 148.

(*b*) Bro. Ab. Conusance, 52.—Williams d. Johnson *v.* Keen, 1 Bla. Rep. 197.—See precedents, 1 Wentw. Index.

(*c*) Cotton *v.* Johnson, Carth. 109.—S. C. Salk. 183.—Grant *v.* Bagge et al. 3 East, 128. 138.

(*d*) Barker *v.* Dormer, Show. 191.—S. C. 1 Salk. 80.—Com. Dig. Abatement, D. 3.

I. PLEAS TO THE JURISDICTION.

is unnecessary to plead such matter in abatement(*e*). In *ejectment* the real defendant being obliged on appearing to enter into the consent rule and to plead the general issue, can only plead to the jurisdiction with leave of the court(*f*).

In all *transitory* actions the courts at Westminster have jurisdiction unless taken away by particular acts of parliament(*g*), and with the exception in favor of the universities of Oxford and Cambridge(*h*), unless the plaintiff by his declaration shows that the action accrued in an exclusive *jurisdiction, no objection, to that of the superior courts [*431] can be taken(*i*); and if the declaration disclose the fact, still the defendant cannot demur or move in arrest of judgment, but must plead to the jurisdiction(*j*); and it is said that there are no pleas to the jurisdiction of the courts at Westminster in transitory actions, unless the plaintiff by his declaration admits that the cause of action accrued in a county palatine; it is however presumed that these cases are only put as instances, and that if it appeared on the face of the declaration that the cause of action arose in any other exempt jurisdiction, a plea to the jurisdiction might be pleaded(*k*). Some pleas in abatement arising from *privilege of person* may be classed under pleas to the jurisdiction, in respect of their affecting the jurisdiction of the court, and concluding whether the court ought to have further conusance of the suit(*l*); as where an attorney or officer of a particular court, a tinner, or scholar of the universities, is sued out of the proper court(*m*).[3]

Where a person is wrongfully sued in an *inferior* court, he must tender his plea to the jurisdiction *in propria persona sedente curia*,

(*e*) The King *v.* Johnson, 6 East, 583.—Doulson *v.* Matthews & another, 4 T. R. 503.—Ante, 428.

(*f*) Williams d. Johnson *v.* Keen, Bla. Rep. 197.—Hatch *v.* Cannon, 3 Wils. 51.—Doe d. Duchess of Hamilton *v.* Robinson et al., 2 Stra. 1120.—Doe d. Wroot *v.* Fenn, 8 T. R. 474.

(*g*) Bac. Ab. Courts, D. 3. see the different statutes referred to, ante, 428. n. n.

(*h*) Bac. Ab. Courts, D. 3.—Gilb. C. P. 191.—Wood. Inst. 520.—Vin. Ab. tit. University, K.

(*i*) 4 Inst. 213.—Bishop of Ely's Case, 1 Sid. 103.—Gilb. C. P. 191.—Bac. Ab. Courts, D. 3.

(*j*) Jennings *v.* Hawkin, Carth. 11. Davis *v.* Stringer, 354.—Bac. Ab. Court, D. 3.—Gilb. C. P. 191.—Davis *v.* Speed, 5 Mod. 144.

(*k*) See Lampley et al. *v.* Thomas et al., 1 Wils. 193. See the precedents in transitory actions, Lampley et al. *v.* Thomas et al., 1 Wils. 193.—1 Wentw. 45. 49. 68.

(*l*) See the precedents, Wilkes *v.* Williams, 8 T. R. 631.—Com. Dig. Abatement, D. 4.—Bac. Ab. tit. Abatement, C. tit. Pleas, E. 2.—Wentworth *v.* Squib, Lutw. 45.—Camfield *v.* Warren, Lutw. 639.—22 Vin. 9.—Hixon *v.* Binns, 3 T. R. 186.—Bowyer *v.* Cook, 5 Mod. 146.—Gilb. C. P. 208, 9.—Cholmondley *v.* Broom, 5 Mod. 335.—Chatland *v.* Thornley, 12 East, 544.

(*m*) See the precedent, post. 2 Vol. 458.

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(3) Vide *King* v. *Coit*, 4 *Day*, 134. An attorney sued jointly with another, cannot avail himself of his privilege. *Tiffany* v. *Driggs & Lynch*, 13 *Johns. Rep.* 252.

I. PLEAS TO THE JURISDICTION.

and make oath of the truth thereof; and if the inferior court will not accept his plea, he may have *a prohibition from one of the common law courts at Westminster, or in vacation from the court of Chancery(*m*). In the *superior* courts a plea to the jurisdiction must be pleaded within four days after declaration(*n*), and generally before imparlance(*o*), it should be entitled of the same term as the declaration(*p*), must be pleaded in person and not by attorney, because the latter would admit the jurisdiction of the court(*q*), and for the same reason full defence ought not to be made but only half defence, though the words "*when*, &c." will suffice(*r*). After stating the appearance and defence, the plea may proceed at once to show the defect of jurisdiction without any prayer, *si curia cognoscere velit*, &c.(*s*).

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In all pleas to the jurisdiction of the *superior* courts it must be shown that there is another court in which effectual justice may be administered,[4] for if there be no other mode of trial, &c. that alone would give the superior courts jurisdiction(*t*). In transitory actions it must be averred in the plea either that the defendant dwells in the county palatine, or that he has sufficient goods and chattels there by which he may be attached, *otherwise the plea cannot be allowed, lest a failure of justice should ensue(*u*). But in a plea to the jurisdiction of an *inferior* court it is sufficient to allege that the cause of action accrued out of its jurisdiction, without showing the jurisdiction to which the plaintiff should have resorted(*v*). These pleas should *conclude* with a prayer, "*si curia cognoscere velit*," or "*respondere non debet*," and not "*quod billa vel breve cassetur*(*w*)." The former is the most usual conclu-

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(*m*) 1 Saund. 98. n. 1.—Sparks *v.* Wood, 6 Mod. 146.—Bac. Ab. Pleas, E. tit. Courts, D. 4. title Pleas, E. 1. Ante, 428.

(*n*) Denn d. Wroot *v.* Fenn, 8 T. R. 474.—Com. Dig. Abatement, D. 9.

(*o*) Ante, 422. Com. Dig. Abatement, D. 9.—Gilb. C. P. 187.—Bac. Ab. Pleas, E. 2.

(*p*) Ante, 422.

(*q*) 2 Saund. 209. c.—Gilb. C. P. 187. Bac. Ab. tit. Abatement, A.—tit. Pleas, &c. 2.—Wilkes *v.* Williams, 8 T. R. 631.

(*r*) Ante, 413.—2 Saund. 209. c.

(*s*) See the forms, Rast. Ent. 101. 419.—Herne. 351.—Lampley et al. *v.* Thomas et al., 1 Wils. 193. and ante, 430; but see the precedent, Wilkes *v.* Williams, 8 T. R. 631.

(*t*) The King *v.* Johnson, 6 East, 598. 600.—Mostyn *v.* Fabrigas, Cowp. 172.—Davis *v.* Stringer, Carth. 355.—Anon., 3 Leon. 148.—Doulson *v.* Matthews & another, 4 T. R. 503.—4 Inst. 213.—Bac. Ab. Abatement, A. tit. Courts, D. 3.

(*u*) Davis *v.* Stringer, Carth. 355.—See the precedents, ante, 430.

(*v*) The King *v.* Johnson, 6 East, 600, 601. and see the precedents, 1 Went. 51. 60, 61. 78.—Post. 2 Vol. 457.

(*w*) Bac. Ab. Pleas, E. 2.—Cudman *v.* Grendon, Latch. 178.—Bowyer *v.* Cook, 5 Mod. 146. Bro. Jurisdiction, pl. 17.—Foxwist et al. *v.* Tumaine, 2 Saund. 209.—Rast. Ent. 101. 419.—Herne, 351.—Lampley et al. *v.* Thomas et al., 1 Wils. 193.—Wentworth *v.*

(4) Vide *Lawrence* v. *Smith & Russel*, 5 *Mass. Rep.* 362. *Rea* v. *Hayden*, 3 *Mass. Rep.* 24.

sion when the subject matter of the plea relates to the cause of action, and the *respondere non debet* seems proper where the objection to the jurisdiction is a personal privilege(*x*). If the plea were to conclude in bar to the action, the jurisdiction would thereby in general be admitted(*y*). I. PLEAS TO THE JURISDICTION.

In support of a plea to the jurisdiction there must in general be an *affidavit* of the truth of its contents(*z*). And where ancient demesne is pleaded, the affidavit must state that the lands are holden of a manor which is ancient demesne, that there is a court of ancient demesne regularly holden, and that the lessor of the plaintiff has a freehold interest(*a*).

To the plea of ancient demesne the plaintiff may *reply* that the land is pleadable at common *law and traverse that the manor is ancient demesne, or he may reply without a traverse(*b*). The replication to pleas to the jurisdiction in general, commences with a statement that the writ ought not to be quashed, or that the court ought not to be ousted of their jurisdiction, because, &c.(*c*), and concludes to the country if the replication merely deny the subject matter of the plea(*d*). Where the plaintiff demurs to the plea, he states that he is not bound to answer the plea, and that the same is not sufficient to prevent the court from having conusance of the action(*e*); the language of the joinder in demurrer corresponds with that of the demurrer(*f*). The judgment in these cases is, that the writ shall abate, or *respondeat ouster*(*g*). [*434]

II. OF PLEAS IN ABATEMENT.

Whenever the subject matter of the plea or defence is that the plaintiff cannot maintain *any* action *at any time* in respect of the supposed cause of action, it may, and usually should be pleaded in *bar;* II. OF PLEAS IN ABATEMENT.

Squib, Lutw. 45.—Camfield *v.* Warren, Lutw. 639.—2 Rich. C. P. 10.—Lil. Ent. 9.

(*x*) Id. ibid. But the plea of an attorney sued by latitat in his own court, may conclude *si curia cognoscere velit.* Chatland *v.* Thornley, 12 East, 544.

(*y*) Vin. Ab. Courts, Jurisdiction, N. a.

(*z*) 4 Ann. c. 16. s. 11.—Bac. Ab. Courts, D. 4. post.

(*a*) Doe d. Rust v. Roe, 2 Burr. 1046.

(*b*) Com. Dig. Abatement, D. 1.

(*c*) Thomp. Ent. 2.—Rast. Ent. 101. Clift. Ent. 17.

(*d*) Id. ibid.

(*e*) Rast. Ent. 419.—Lampley et al. *v.* Thomas et al., 1 Wils. 194.

(*f*) Id. ibid.

(*g*) Vin. Ab. Court Jurisdiction, N. a.—Com. Dig. Abatement, I. 14.

II. OF PLEAS IN ABATEMENT.

but matter which merely defeats the present proceeding, and does not show that the plaintiff is for ever concluded, should in general be pleaded in *abatement*(*a*). There are however some matters which may be pleaded in abatement or bar; as in replevin for goods, the defendant may plead *property in himself or in a stranger,[5] either in abatement or in bar(*b*). So outlawry for felony, alien enemy,[6] and attainder, where the cause of action is thereby forfeited, may be pleaded in abatement or in bar(*c*); and when the defendant has omitted to plead in abatement in due time, he must then plead in bar(*d*); but where the plaintiff's disability merely *suspends* the right of action and does not destroy it, it can only be pleaded in abatement, and the plea should conclude *si responderi debeat quousque*, &c. and when the disability is removed the suit will proceed(*e*). Pleas in abatement we have already seen are divided into those relating

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1*st. To the disability of the person.*
1*st. Of the plaintiff;*
2*dly. Of the defendant.*
2*dly. To the count or declaration.*

3*dly. To the writ.*
1*st. To the form of the writ:*
1*st. Matter apparent on the face of it.*
2*dly. Matter dehors.*
2*dly. To the action of the writ.*

I. RELATING TO THE PERSON.

Pleas to the *disability of the plaintiff* shewing that he is incapable of commencing or continuing his suit, either deny his existence, as that he or one of several plaintiffs at the time of the commencement of the suit was a *fictitious* person(*f*)or *dead(*g*); and where a sole plaintiff

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(*a*) Evans v. Stevens, 4 T. R. 227. Bac. Ab. Abatement, N.—Com. Dig. Abatement, B.

(*b*) Presgrave *v.* Saunders, 1 Salk. 5.—Post. 2 Vol. 558.

(*c*) Bac. Ab. Abatement, N.—Com. Dig. Abatement, K.—Co. Lit. 128. b. 129. b—Facquire *v.* Kynaston, Lord Raym. 1249.—Bro. V. M. 252.—Gilb. C. P. 200.—A. defendant cannot plead his own attainder. Forster, Cr. L. 61, 2, 3.

(*d*) Bac. Ab. Pleas, C. 3.

(*e*) Copley *v.* Delaunoy, Ld. Raym. 1056.—Lady Faulkland *v.* Stanion, 12 Mod. 400.—Le Bret *v.* Papillon, 4 East, 504.

(*f*) Com. Dig. Abatement, E. 16.—Bac. Ab. Abatement, F.—Anon., 1 Wils. 302.—Gilb. C. P. 248.—*See the precedents*, Ast. Ent. 10.—3 Inst. Cl. 89.—1 Wentw. 50. and Index, 11.

(*g*) Ast. Ent. 8.—3 Inst. Cl. 75, &c. 1 Wentw. Ind. 11.—Bac. Ab. Abatement, L.—Com. Dig. Abatement, E. 17.

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(5) Vide *Ilsley et al.* v. *Stubbs*, 5 *Mass. Rep.* 285. *Harrison* v. *M'Intosh*, 1 *Johns. Rep.* 380.

(6) Vide *Bell* v. *Chapman*, 10 *Johns. Rep.* 183. But whether pleaded in abatement or in bar, it is only a temporary disability. *Ibid.*

dies pending the suit, such death may be pleaded in abatement(*h*);[7] but in the case of several plaintiffs or defendants the death of one does not abate the suit if the cause of action survive for or against the survivors(*i*): so the defendant may plead in abatement, that the plaintiff is an alien enemy(*j*), attainted of treason or felony(*k*), outlawed upon mesne or final process(*l*), under a premunire(*m*), or excommunicated(*n*), or that the plaintiff (unless he sue with others as executor) is an infant, and has declared by attorney(*o*);[8] and this is the proper mode of taking advantage of the objection in the case of plaintiffs(*p*); but bankruptcy of the plaintiff pending the suit does not abate it(*q*). When a *feme covert* has no interest whatever in the subject matter of the action, and consequently ought not to be made a party, and she sues either with or without her husband, the *plaintiff will be nonsuited on [*437] the general issue(*r*); but where the feme was interested before or during her coverture in the subject matter of the action, and might join with the husband, but sues alone, her coverture can only be pleaded in abatement, and cannot be given in evidence under the general issue, or pleaded in bar; at least this rule obtains in actions for torts(*s*): and if the plaintiff take husband after suing out the writ and

(*h*) Bac. Ab. Abatement, F.—Com. Dig. Abatement, H. 32, 3.

(*i*) Id. ibid. 8 & 9 W. 3. c. 11. s. 7. 2 Saund. 72. i.—Bac. Ab. Abatement, F. When not in bar with another plea, Truckenbrodt *v.* Payne, 12 East, 206.

(*j*) Com. Dig. Abatement, E. 4.—Bac. Ab. Abatement, B. 3.—1 Doct. Plac. 8.—*See the forms*, 3 Inst. Cl. 16. Oppenheimer *v.* Levy, 2 Stra. 1082.—Pie *v.* Cooper, Ld. Raym. 1243.—Wells *v.* Williams, Lutw. 34.—1 Wentw. Index, 8.—Gilb. C. P. 205.—*See the precedents*, in bar, post. 2 Vol. 473, 4.

(*k*) Bisse *v.* Harecourt, Carth. 137, 8.—Com. Dig. Abatement, E. 3.—See the form, 1 Wentw. 7.

(*l*) Gilb. C. P. 196, 7.—C. D. Abatement, E. 2.—Bac. Ab. Abatement, B. 1.—See the form, Gawen *v.* Surby, Lutw. 6.—Ford *v.* Edgecomb et al., Lutw. 1529.—3 Inst. Cl. 23.—1 Wentw. Index, 7.—Nowlan v. Geddes, 1 East, 634.

(*m*) Co. Lit. 129. b.—C. D. Abatement, E. 6.

(*n*) Bradley *v.* Glynne, Lutw. 17.—3 Inst. Cl. 18.—Baker *v.* Gough, Cro. Jac. 82.—Bac. Ab. Abatement, B. 2.—1 Wentw. Index.—Gilb. C. P. 202.

(*o*) Br. R. 475. 466.—3 Inst. Cl. 55. 19.—Clift. 11.—1 Mod. Ent. 20.—1 Wentw. 58.—Index, 10. See the form, 2 Saund. 209. a.

(*p*) 2 Saund. 212. a. n. 5.

(*q*) Hewit et al. *v.* Mantell, 2 Wils. 374.—Kretchman *v.* Beyer, 1 T. R. 463.—Waugh *v.* Austen, 3 T. R. 437.

(*r*) Ante, 22.—Caudell *v.* Shaw, 4 T. R. 361.—Buckley *v.* Collier, 1 Salk. 114.—Rose et ux. *v.* Bowler et al., 1 Hen. Bla. 108.—Abbot et ux. *v.* Blofield, Cro. Jac. 644.—Bidgood *v.* Way et ux. 2 Bla. Rep. 1236.

(*s*) Milner et al. *v.* Milnes et al., 3 T. R. 631.—Morgan *v.* Painter, 6 T. R. 265.—Com. Dig. Abatement, E. 6. H. 42.—Lee *v.* Maddox, 1 Leon, 169.—See the form, post. 2 Vol. 462.—1 Wentw. 47. and Index, 9.—Bogget *v.* Frier and another, 11 East, 301.

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(7) But the death of the lessor in ejectment does not abate the suit. *Frier & Cooper* v. *Jackson*, 8 *Johns. Rep.* 495.

(8) Vide *Schermerhorn* v. *Jenkins*, 7 *Johns Rep.* 373.

I. RELATING TO THE PERSON.

before the declaration, the defendant cannot give the coverture in evidence under the general issue, but must plead it in abatement(*t*), as matter arising before plea or pending the suit, or *puis darrein continuance* if after issue joined(*v*).

Pleas in abatement to the person of the *defendant* are coverture, and infancy when the parol shall demur. *Coverture* at the time when the supposed contract was entered into may be pleaded in bar or given in evidence under the general issue *non assumpsit* or *non est factum*(*u*), but where the objection does not go to the liability of the feme, but is merely that the husband ought to have been sued jointly with her, as where since entering into the contract or committing the tort she has married, she must when sued alone plead her coverture in abate-
[*438] ment, and aver that her husband is living(*w*): and if *the defendant marry after the commencement of the suit, such coverture cannot be pleaded even in abatement(*x*). *Infancy* may be pleaded in abatement in an action upon a specialty when the defendant is sued as heir on the obligation of his ancestor, in which case the parol shall *demur*, or proceedings be stayed till he comes of age(*y*); and this privilege does not extend to an infant devisee(*z*).[9] To the plea of coverture the plaintiff cannot reply that the defendant lives apart from her husband, and has a separate maintenance, secured to her by deed; for whilst the relation of marriage subsists, and she and her husband are living in this kingdom, she cannot be sued alone(*a*); but where the husband is *civiliter mortuus*, or has been transported, or is an alien residing abroad, the facts may be replied(*b*).

II. RELATING TO THE COUNT, &C.

Pleas in abatement *to the count* could only be pleaded in actions by original writ. The first act of the parties after appearance and admission of the jurisdiction of the court over the subject matter of the cause, and of the ability of the plaintiff to sue, and the defendant to be

(*t*) Morgan *v.* Painter, 6 T. R. 265.

(*v*) Le Bret *v.* Papillon, 4 East, 502.

(*u*) James *v.* Fowks, 12 Mod. 101. Marshal *v.* Rutton, 8 T. R. 545.—See the precedents in bar, post. 2 Vol. 473.

(*w*) Milner et al. *v.* Milnes et al., 3 T. R. 627. Bac. Ab. Abatement, G.—C. D. Abatement, F. 2.—Coan *v.* Bowles et al. Carth. 124.—Deering *v.* Moore, Cro. El. 554.—See the form, post. 2 Vol. 462.—3 Inst. Cl. 71.—1 Wentw. Index, 13.—The form in Bartilot *v.* Burton, 1 Lutw. 23. is bad, see post. 2 Vol. 462.

(*x*) Bac. Ab. Abatement, G.—King et ux. *v.* Jones, 2 Stra. 811.—S. C. Ld. Raym. 1525. *et vide* Anon., Loft. 27.

(*y*) Com. Dig. tit. Infant, D.—Plasket *v.* Beeby et al., 4 East, 485.—Derisley et al. *v.* Custance, 4 T. R. 77.—See the form, post. 2 Vol. 520.—Rast. 360. 362. 379.—Bro. Red. 195.—Plasket *v.* Becby et al., 4 East, 485.—Lil. Ent. 3.

(*z*) Plasket *v.* Beeby et al., 4 East, 485.

(*a*) Marshall *v.* Rutton, 8 Term Rep. 545.

(*b*) Selwyn's Ni. Pri. 297 to 303.

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(9) It has been held, in Connecticut, that the privilege of the defendant as a member of the legislature was pleadable in abatement. *King* v. *Coit*, 4 *Day's Rep.* 129.

sued, is the declaration or count, after which formerly the defendant might demand oyer of the writ, and then the same being set forth on the roll, if there were any variance between the count and the writ, or between the writ and a record, specialty, &c. mentioned in the count, the defendant might plead such variance in abatement or demur, move in arrest *of judgment or sustain error(*c*). But as a variance between [*439] the writ and count could in no case be pleaded without craving oyer of the writ(*d*), and the defendant cannot now have such oyer, such variance or defect is no longer pleadable in abatement, and if it be, the plaintiff may sign judgment or move the court to set it aside(*e*), nor will the court set aside the proceeding in respect of the variance(*f*).

II. RELATING TO THE COUNT, &c.

Pleas in *abatement to the writ or bill* are so termed rather from their *effect* than from their being strictly such pleas, for as oyer of the writ can no longer be craved, no objection can be taken by plea to matter which is merely contained in the *writ*(*g*); but if the mistake in the writ be carried also into the declaration, or rather if the declaration which is presumed to correspond with the writ or bill, be incorrect in respect of some extrinsic matter, it is then open to the defendant to plead in abatement to the writ or bill(*h*), and there is no plea to the *declaration* alone but in bar(*i*). Pleas in abatement of the writ or bill are to the *form* or to the *action* thereof(*j*): those of the first description were formerly either matter apparent on the face of the writ or bill(*k*), or matter dehors(*l*). Formerly a defect in the form of the writ apparent on the face of it, as repugnancy, variance from the record, specialty, &c. want of sufficient *time, between the teste and return(*kk*), [*440] or in actions by original, the omission or mistake in the writ of the defendant's addition(*ll*), either of estate, degree, mystery, or place of abode(*m*), were pleadable in abatement; but as oyer of the writ can no longer be had, an omission of the defendant's addition, which is not necessary to be stated in a *declaration*, can in no case be pleaded in abatement; and if it be, the plaintiff may sign judgment or apply to the court to set the plea aside(*n*).

III. RELATING TO THE WRIT.

(*c*) Hole *v.* Finch, 2 Wils. 394.—Com. Dig. Abatement, G. 8.—3 Inst. Cl. 62.—Reg. Pl. 277, 8.

(*d*) Hole *v.* Finch, 2 Wils. 394, 5.

(*e*) Murray *v* Hubbart, 1 Bos. & Pul. 646, 7.—Gray et al. *v.* Sidneff, 3 Bos. & Pul. 395.—Deshons *v.* Head, 7 East, 383.

(*f*) Hole *v.* Finch, 2 Wils. 393.—Oakley *v.* Giles, 3 East, 167.—Ante, 249.

(*g*) Gray et al. *v.* Sidneff, 3 Bos. & Pul. 399.—Murray *v.* Hubbart, 1 B. & Pul. 645, 647, 8.

(*h*) Murray *v.* Hubbart, 1 B. & P. 648.—Johnson *v.* Altham, 10 Mod. 210, 211.

(*i*) Johnson v. Altham, 10 Mod. 210. 2 Saund. 209. d.

(*j*) Com. Dig. Abatement, H. 1. 17.

(*k*) Com. Dig. Abatement, H. 1.

(*l*) Com. Dig. Abatement, H. 17.

(*kk*) Naers *v.* Countess of Huntington, 1 Lutw. 25.—3 Inst. Cl. 49. 54. 65, &c.

(*ll*) 1 Hen. 5. C. 5.—3 Inst. Cl. 92.—Lil. Ent. 5.—2 Rich C. P. 5. 8.—Horspoole *v.* Harrison, 1 Stra. 556.—Smith *v.* Mason, Ld. Raym. 1541.—2 Inst. 668.

(*m*) Gray et al. *v.* Sidneff, 3 Bos. & Pul. 395.

(*n*) 1 Saund. 318. n. 3.—Gray et al. v. Sidneff, 3 B. & P. 395.—Deshons v. Head, 7 East, 383.

III. RELATING TO THE WRIT.

Pleas in abatement to the *form* of the writ are therefore now principally for matter *dehors*(*o*), existing at the time of suing out the writ or arising afterwards(*p*), such as misnomer of the plaintiff or defendant in christian or surname. It was once doubted if a mistake of the *plaintiff's* christian or surname were not ground of nonsuit, but it is now settled that the mistake must be pleaded in abatement even in the case of a corporation(*q*),[10] and this objection cannot be pleaded unless the misnomer also appear in the declaration(*r*), for the plaintiff may declare in his right name though the name be mistaken in the process. Misnomer(*s*) of the *defendant* must also be pleaded in abatement(*t*);[11] and [*441] if the *christian names be reversed in order, as Richard John instead of John Richard, that may be pleaded(*tt*), and a person sued as an attorney may plead that he is not an attorney(*v*).[12] But misnomer of another defendant cannot be pleaded by his companion(*u*); and if the declaration be against the defendant in his right name, though variant from that in the writ, he cannot plead in abatement(*w*). The consequences of a

(*o*) Com. Dig. Abatement, H. 17, &c. Gilb. C. P. 51.

(*p*) Com. Dig. Abatement, H. 17. 32.

(*q*) Mayor, &c. of Stafford *v.* Bolton, 1 Bos. & Pul. 40.—3 Anstr. 935.—Com. Dig. Abatement, E. 18, 19, 20, 21.—3 Vin. 312.—Bac. Ab. Abatement, D.—*See the precedents*, Post. 2 Vol. 464.—Lil. Ent. 4.—Bowen *v.* Shapcott, 1 East, 542.

(*r*) Murray *v.* Hubbart, 1 Bos. & Pul. 645.

(*s*) Shakpear for Shakespeare is a misnomer pleadable, The King *v.* Shakespeare, 10 East, 83.

(*t*) Bac. Ab. Abatement, D.—Misnomer, F.—Com. Dig. Abatement, F. 17, 18. & The Clerk of Taunton Market *v.* Kimberley, 2 Bla. Rep. 120.—*See the forms*, Post. 2 Vol. 464, 5, 6.—Anon., Lutw. 10.—Lil. Ent. 6.—2 Rich. Prac. 4.

(*tt*) Jones *v.* Macquillin, 5 T. R. 195.

(*v*) 1 Went. 6. Prac. Reg. 8.

(*u*) Shovel *v.* Evance, Lutw. 36.

(*w*) Murray *v.* Hubbart, 1 B. & P. 645.—Oakley *v.* Giles, 3 East, 167.—Ante, 250.

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(10) Vide *Medway Cotton Manufactory* v. *Adams & another*, 10 *Mass. Rep.* 360. Ante, 252. n. 8.

(11) So, a corporation defendant cannot take advantage on a misnomer, in arrest of judgment, but must plead it in abatement. *Gilbert & another* v. *Nantucket Bank*, 5 *Mass. Rep.* 97.

(12) A defendant cannot plead in abatement because of an alias dictus subjoined to his name. *Reid* v. *Lord*, 4 *Johns. Rep.* 118. Where a name appears to be a foreign one, a variance of a letter which, according to the pronunciation of that language, does not vary the sound, is not a misnomer, as *Petris* for *Petrie*. *Petrie* v. *Woodworth*, 3 *Caine's Rep.* 219. As to idem sonans, see further *The King* v. *Shakespeare*, 10 *East's Rep.* 83. *Dickinson* v. *Bowes & others*, 16 *East's Rep.* 110. *Ahitbol* v. *Beniditto*, 2 *Taunt.* 400. An initial letter between the Christian and surname of the party, is no part of the name, and the omission of it is not a misnomer or variance. *Franklin & others* v. *Talmadge*, 5 *Johns. Rep.* 84. The plaintiff may reply that the defendant is known as well by one name as the other. *Petrie* v. *Woodworth*, 3 *Caine's Rep.* 219. post. 455. *Gould & others* v. *Barnes*, 3 *Taunt.* 505. An *administrator* sued as *executor* may plead the intestacy and granting letters of administration, in abatement. *Rattoon & another* v. *Overcuker*, 8 *Johns. Rep.* 126. ante, 38. n. 85.

misnomer of the defendant have already been stated(*x*); in addition to which it may be collected that the proper course for the defendant to pursue, in order to take advantage of a misnomer in the process, is to move before appearance to set aside the mesne process for irregularity(*y*).

III. RELATING TO THE WRIT.

Other pleas to the *form of the writ* are, that the plaintiffs or defendants suing or being sued as husband and wife are not married(*z*), or that one of the plaintiffs or defendants was fictitious or dead at the time of the issuing the writ(*a*), or any other plea for want of proper parties(*b*), as that there are other joint contractors, &c.(*c*), other executors(*d*), or administrators(*e*), or other persons(*f*), not joined, who ought to be made parties to the suit. The plea in abatement of nonjoinder must aver that the party *omitted is still living(*g*).[13] We have already seen, [*442] when considering the parties to the action, that in actions on contracts the nonjoinder of a party who ought to be made *co-plaintiff*, will in general be the ground of nonsuit, and need not, though it may be, pleaded in abatement(*h*); but that in the case of executors, or assignees of a bankrupt and others suing *jure representationis*, the omission can only be pleaded in abatement(*i*), and that the nonjoinder of a person who ought to be made a co-plaintiff in an action *in form, ex delicto, as case, trover, trespass*, &c. can only be pleaded in abatement(*j*); and that with regard to the defendants, the omission of a joint contractor must be pleaded in abatement(*k*), and that in actions for torts, no advantage can in general be taken of the nonjoinder of a defendant(*l*). Pleas by attorneys sued in their own court by improper process, as by a latitat in the King's Bench, or by a common capias in the Common Pleas, instead of a bill against them as such attorneys, may also be classed under pleas in abatement to the form of the writ(*m*).

(*x*) Tidd's Prac. 3d ed. 582. n. i. and 4th ed. 573. n. k.

(*y*) Murray v. Hubbart, 1 Bos. & Pul. 647.—Sed qu. Oakley *v.* Giles, 3 East, 167.

(*z*) Com. Dig. Abatement, E. 6.—3 Inst. Cl. 69.—1 Went. Index, 12.

(*a*) Doct. Plac. 12.—Bac. Ab. Abatement, L.

(*b*) Ante, Chap. I. Parties to the Action, *per totem*.

(*c*) *See the precedents*, Post. 2 Vol. 463, 4.

(*d*) Com. Dig. Abatement, E. 8. F. 4. &c. 3 Inst. Cl. 51.—Rast. 325. a.—1 Wentw. 9.—Reg. 140.—Swallow *v.* Emberson, 1 Lev. 161.—S. C. 1 Sid. 242.

(*e*) 3 Instr. Cl. 53.—Rast. 324.

(*f*) 3 Inst. Cl. 53. 119.—Sayer *v.* Chaytor, 1 Lutw. 696.—Nowlan *v.* Geddes, 1 East, 634.—1 Wentw. 10, 11.—Index, 12.

(*g*) 1 Saund. 291. a. n. 2

(*h*) Ante, 7.

(*i*) Ante, 7. 13.—2 Saund. 291. g.—Smith et al. *v.* Goddard, 3 Bos. & Pul. 465.

(*j*) Ante, 53.

(*k*) Ante, 29.

(*l*) Ante, 75, 6.—Govett *v.* Radnidge, 3 East, 62. *Sed vide*, Powell *v.* Layton, 2 New Rep. 365.

(*m*) See Post. 2 Vol. 460, 1.—Chatland *v.* Thornley, 12 East, 544.

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(13) The parties not joined should be particularly set forth and described, so as to enable the plaintiff to make a better writ. *Wadsworth* v. *Woodford*, 1 *Day's Rep.* 28.

III. RELATING TO THE WRIT.

Pleas in abatement to the *action* of the writ, are, that the action is misconceived, as that it is in case when it ought to have been in trespass(*n*), or that it was prematurely brought(*o*): but as these matters are the ground of demurrer or nonsuit, it is now very unusual to plead [*443] them in abatement(*h*); and in the King's *Bench by bill the writ may be issued before the cause of action accrued(*oo*). It may also be pleaded, that there is another action depending for the same trespass(*pp*), or other cause of action, in the same, or in any other superior court at Westminster(*q*),[14] but the pendency of another suit in the sheriff's or other inferior court, it is said cannot be pleaded(*r*).[15] In general, the pendency of a former action must be pleaded in abatement, but in a penal action, at the suit of a common informer, the priority of a pending suit for the same penalty, in the name of a third person, may be pleaded in bar, because the party who first sues is entitled to the penalty(*s*). In the latter case, the plea, when the two suits were commenced in the same term, should shew the precise day or time when the prior suit was commenced(*t*). The plaintiff cannot, after a plea in abatement of the pendency of a prior suit, avoid the effect of the plea, by discontinuing the first action which was pending at the time of the plea.(*v*).[16]

(*n*) 3 Inst. Cl. 120, &c.—C. D. Abatement, G. 5.

(*o*) Com Dig. Abatement, G. 6. tit. Action, E.—Marshal *v.* Burnet, Lutw. 8. 13.—3 Inst. Cl. 56.—Fortes. 334.—Clift. Ent. 10. 18, 19.—Sed qu.—Facquire *v.* Kynaston, Ld. Raym. 1249.

(*p*) See the instances of misjoinder, 2 Saund. 210. a.

(*oo*) Swancott *v.* Westgarth, 4 East, 75.—Ante.

(*pp*) Boyce *v.* Bayliffe, 1 Campb. 60, 1.

(*q*) Com. Dig. Abatement, H. 24.—Bac. Ab. Abatement, M.—*See the precedent*, Post. 2 Vol. 466.

(*r*) Sparry's Case, 5 Co. 62.—White *v.* Willis, 2 Wils. 87.—Fitzgib. 313.—Bac. Ab. Abatement, M.—Com. Dig. Abatement, H. 24.—Seers *v.* Turner, 2 Lord Raym. 1102.—*Sed quære*, if it were alleged, that the *inferior* court had jurisdiction, Fitzgib. 314.

(*s*) Sayer's Rept. s. 216. and Post. 2 Vol. 537.

(*t*) Combe *v.* Pitt, 3 Burr. 1423.—S. C. 1 Bla. Rep. 437.—Hutchinson *v.* Thomas, 2 Lev. 141.—Jackson *v.* Gisling, 2 Stra. 1169.

(*v*) Knight's Case, 1 Salk. 329.—S. C. 2 Lord Raym. 1014.—Doctr. Pl. 11.

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(14) A writ of error pending may be pleaded in abatement of a suit upon the judgment. *Jenkins* v. *Pepoon*, 2 *Johns. Cas.* 312. A suit subsequently commenced can never be pleaded in abatement. *Renner & Bussard* v. *Marshall*, *Wheaton*, 215.

(15) An action pending in a foreign court, or in the court of another of the United States, or in the court of the United States in another circuit and district, cannot be pleaded in abatement. *Bowne & Seymour* v. *Joy*, 9 *Johns. Rep.* 221. *Walsh & Gallaghar* v. *Durkin & others*, 12 *Johns. Rep.* 99. But a foreign attachment pending in another state, at the suit of a third person against the subject matter of the action, may be pleaded in abatement. *Embree* v. *Hanna*, 5 *Johns. Rep.* 101. *Bowne* v. *Joy*, 9 *Johns. Rep.* 221.

(16) Contra *Marston* v. *Lawrence & Dayton*, 1 *Johns. Cas.* 397. In *Commonwealth* v. *Churchill*, 5 *Mass. Rep.* 174. it was held that the plaintiff could not reply a nonsuit in the former action.

It will now be proper to consider the *effect*, *qualities*, and *form* of these dilatory pleas. A writ is divisible, and may be abated in part and remain good as to the residue; and the defendant may plead in abatement to part, and demur or plead in bar to the residue of the writ or declaration; the settled rule being, that if the plaintiff in his action brought either upon a general writ, such as debt, detinue, account, or the like, or on a certain and particular one, as assumpsit, *trespass, [*444] case, &c. demands two or more things, and it appears from his own shewing that he cannot have an action or better writ for one of them, the writ shall not abate in the whole, but stand for so much as is good, but if it appear upon his own shewing, that he has a cause of action for all the things demanded, but the writ is not proper for one of them, and that he might have another in another form for that, then the whole writ shall abate(*u*). Formerly it was the practice to plead in abatement, when upon the face of the plaintiff's declaration it appeared that a part of the plaintiff's cause of action was not well founded, but now it is most usual to demur to the whole declaration if there be a misjoinder, or if there be no misjoinder then only to the defective part(*w*). Where the matter goes only to defeat a part of the plaintiff's cause of action, the plea in abatement should be confined to that part, and if the defendant were to plead to the whole his plea would be defective(*x*); but if a plea in abatement contain matter which goes only in part abatement of the writ, and conclude with a prayer that the whole writ may be abated, the court may abate so much of the writ as the matter pleaded applies to, if there be a plea to the other parts of the declaration(*y*).

QUALITIES AND FORM.

As these pleas delay the trial of the merits of the action, the greatest accuracy and precision are required in framing them(*z*); they should be certain to every intent, and be pleaded without any repugnancy(*zz*), [*445] and must in general give the plaintiff a better writ or bill, and therefore a plea of misnomer in the christian name, must state what is the defendant's surname(*a*). This is the true criterion to distinguish a plea in abatement from a plea in bar(*b*); and where the subject matter of the plea tends to shew that the plaintiff cannot maintain *any* action, it should be pleaded in bar and not in abatement(*c*); therefore where the

(*u*) Godfrey's Case, 11 Co. 45. b.—Duppa v. Mayo, 1 Saund. 285.—Smith v. Gibson, Rep. T. H. 273.—Powell v. Fullerton et al., 2 Bos. & Pul. 420.—but see 2 Saund. 210. in notes and 210. d. and 1 Saund. 285. n. 7.

(*w*) See the cases, 2 Saund. 210. in notes.

(*x*) Herries v. Jamieson, 5 T. R. 557.

(*y*) Powell v. Fullerton, 2 Bos. & Pul. 420.—2 Saund. 210. d.

(*z*) Hixon v. Binns, 3 T. R. 186.—Alexander v. Mawman, Willes, 42.—Grant v. Lord Sondes, 2 Bla. Rep. 1096. 2 Saund. 209. b. n. 1.—Com. Dig. Abatement, I. 11.

(*zz*) Co. Lit. 303.—Baker v. Goush, Cro. Jac. 82.—Cheetham v. Sleigh, 3 Lev. 67.—Hixon v. Binns, 3 T. R. 186. Alexander v. Mawman, Willes, 42.

(*a*) Haworth v. Spraggs, 8 T. R. 515, 6.—Bac. Ab. Misnomer, F.

(*b*) Thompson v. Collier, Brownl. 139.—1 Saund. 274. n. 3. 284. n. 4.—Mainwaring et al. v. Newman, 2 Bos. & Pul. 125.—Evans v. Stevens, 4 T. R. 227.—The King v. Johnson, 6 East, 600. Com. Dig. Abatement, I. 1, 2.

(*c*) Evans v. Stevens, 4 T. R. 227.

QUALITIES AND FORM.

action is by an administrator, stating a grant of administration from a bishop of a peculiar diocese, a plea *of bona notabilia* should be in bar and not in abatement, because it shews that the plaintiff has no right to sue at all in the character of administrator(*d*). Great accuracy is also necessary in the form of the plea as to the commencement and conclusion, which it is said make the plea(*e*), and a plea which concluded with praying judgment "if" (instead of "of"), the plaintiff's bill was held bad on demurrer, though the words "and that the same may be quashed" were also added(*f*).

The general rule which prevails in pleading is, that a mere prayer of judgment, without pointing out the appropriate judgment, is sufficient, because the facts being shewn, the court are bound to pronounce
[*446] *the proper judgment(*g*); and upon that principle it has been held, that if a plea which contains matter in *bar* of an action conclude in *abatement*, it is a plea in bar notwithstanding the conclusion and final judgment shall be given upon it, for if the plaintiff have no cause of action he can have no writ(*h*). But the anxiety of the courts to discourage dilatory pleas has induced them to depart from this rule, in regard to the effect of the beginning or conclusion of such pleas(*i*); and if a plea which contains matter only in *abatement* conclude in *bar* and is found against the defendant, it is a plea in bar,[17] and final judgment may be given, because, by praying judgment, if the plaintiff shall *maintain his action*, the defendant admits the writ to be good(*j*). So a plea which *begins* in *bar*, though it contains matter in *abatement* and *concludes* in abatement, is a plea in bar and final judgment *may* be given(*k*).[18] It is not necessary in a plea in abatement to state any venue for the facts

(*d*) 1 Saund. 274. n. 3.

(*e*) Cadman *v.* Grendon, Latch. 178. 2 Saund. 209. c. d.—Crosse *v.* Bilson, 2 Ld. Raym. 1019.—The King *v.* Shakespeare, 10 East, 87. But see the entries referred to, in Hixon *v.* Binns, 3 T. R. 186.

(*f*) Hixon *v.* Binns, 3 T. R. 185.

(*g*) Le Bret *v.* Papillon, 4 East, 502. 9.—1 Saund. 97. n. 1.—but see the argument in Hixon *v.* Binns, 3 T. R. 186.

(*h*) 2 Saund. 209. c.—36 H. 6. c. 18.

(*i*) The King v. Shakespeare, 10 East, 87.

(*j*) Nowlan *v.* Geddes, 1 East, 636. 2 Saund. 209. d.—Crosse *v.* Bilson, Ld. Raym. 1018, 9.—Slaney v. Slaney, Ld. Raym. 694.

(*k*) 2 Saund. 209. note c, d.—Bac. Ab. tit. Abatement, P.—Slaney *v.* Slaney, 1 Ld. Raym. 694.—The King *v.* Shakespeare, 10 East, 87, 8.

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(17) Vide *Jenkins* v. *Pepoon*, 2 *Johns. Cas.* 312. *Executors of Schoonmaker* v. *Elmendorf*, 10 *Johns. Rep.* 49.

(18) But if matter which ought to be pleaded in abatement be pleaded in the form of a bar, the plaintiff may treat it as a plea in abatement, by proceeding to judgment for want of a plea, if it be not verified by affidavit. *Robinson & Hartshorne* v. *Fisher*, 3 *Caine's Rep.* 99, 100. And if there has been an order for the defendant to plead issuably, such plea is not a compliance with the order, and the plaintiff may treat it as a nullity. *Davis* v. *Grainger*, 3 *Johns. Rep.* 259. The plaintiff may demur to the plea either in bar or abatement. Post. 457.

therein averred, because they shall be tried where the action is laid(*l*); and if it be pleaded that another person who ought to have been sued with the defendant, is alive, to wit, in Spain, it is mere surplusage and will be considered as pleaded without any venue(*m*). *Duplicity* in a plea of this description is as objectionable as in a plea in bar, and therefore the *defendant cannot plead two outlawries or or two excommunications in abatement, for one would be sufficient to abate the writ(*mm*); but misnomer of christian and surname may be pleaded in one plea(*n*). The court will not permit a defendant to plead at the same time in abatement and in bar to the *same* matter, as *non est factum* and coverture of the plaintiff since making the bond(*o*); but in some cases the defendant may plead in abatement to one part, and either in abatement or bar to the other part of the same declaration(*p*); and in an action against two defendants, each may plead distinct matter in abatement of the same suit(*q*), or one may plead in abatement and the other in bar(*r*).

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The *form* of a plea in abatement may be more particularly considered under the following heads, 1st, as to the title of the term; 2dly, the commencement; 3dly, the body or subject matter; and 4thly, the conclusion.

With respect to the *title of the term*, as pleas to the jurisdiction of the court and in abatement, ought to be pleaded before a *general imparlance*, and within four days *inclusive*, after the delivery or filing, and notice of the declaration(*s*), such pleas should in general be pleaded of the term in which the writ was returnable, unless the declaration be delivered or filed in vacation, or so late in the term that the defendant is not bound to plead to it of that term, in which cases the defendant may within the first four days inclusive of *the next term plead to *the jurisdiction of the court*, or in abatement, intitling, however, his plea of the preceding term(*t*), or he may plead to the jurisdiction as of the second term with a *general special imparlance*, which is with a saving of all advantages and exceptions whatsoever(*v*), or he may plead in *abatement* in the second term with a special imparlance, which is a saving of all exceptions to the writ, bill, or count(*u*). If either of these pleas be intitled of a subsequent term to the declaration, and without the proper special imparlance, the plaintiff may either sign judgment(*w*), or apply

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(*l*) Neale et al. v. De Garay et al., 7 T. R. 243.—1 Saund. 8. a.—Bac. Ab. tit. Abatement, P.

(*m*) Id. ibid.

(*mm*) Bac. Ab. tit. Abatement, P.

(*n*) Read *v.* Matteur, Rep. T. Hardw. 286, 7.—Bac. Ab. Misnomer, F.

(*o*) Holt *v.* Mabberly, Rep. T. H. 135.

(*p*) Com. Dig. Abatement, I. 5.—Ante, 443.

(*q*) Id. I. 6.

(*r*) Id. I. 7.

(*s*) Ante, 422.

(*t*) Ante, 422, &c.—7 T. R. 447. note d.—Anon., 1 Salk. 367.—Gilb. K. B. 344.

(*v*) Ante, 422.—Com. Dig. Abatement, I. 19.—Saund. 1. n. 2.—See the form of the entry, post. 2 Vol. 454.

(*u*) Ante, 424.—Bac. Ab. tit. Abatement, C.—2 Saund. 1. n. 2.—See the form of the entry, post. 2 Vol. 453.—Com. Dig. Abatement, I. 20.—2 Saund. 1. n. 2.

(*w*) Doughty *v.* Lascelles, 4 T. R. 520.—7 T. R. 447. n. d.—2 Saund. 1. n. 2.

QUALITIES AND FORM.

to the court by motion to set it aside(*x*), or he may demur to it(*y*), or allege the imparlance in his replication by way of estoppel(*z*); but if the plaintiff reply to the plea instead of demurring or alleging the estoppel, the fault is aided(*a*).

The *commencement* of these pleas may be considered, 1st, as to the statement of the appearance, either in person or by attorney, 2dly, the nature of the defence, and 3dly, the prayer that the bill or writ be quashed, &c.

Pleas of misnomer must not begin with the words "and *the said* C. [*449] D. sued by the name of *E. D." or "and *he* against whom the plaintiff hath exhibited his bill by the name of E. D. &c." for that would be repugnant(*b*). Pleas to the jurisdiction must be pleaded in person, because the appointment of an attorney of the court admits its jurisdiction(*c*); but pleas in abatement in general may be pleaded by attorney, because the jurisdiction of the court in the latter case is not disputed(*d*). The principle to be extracted from the cases is stated to be, that a defendant cannot plead by attorney in those cases where the doing so would contradict the import of the warrant of attorney(*e*). It appears advisable to frame pleas of misnomer as if pleaded in person and not by attorney, though there are decisions that the plaintiff cannot demur on account of a mistake in this respect, but should refuse to accept the plea(*f*); coverture also should be pleaded in person(*g*), and where an infant pleads it must be by guardian and not by attorney or prochein amy(*h*).

The nature of *defence* has already been stated(*i*); pleas to the jurisdiction and in abatement should be after half and before full defence(*j*). It is advisable to make the former defence, though it seems questionable, whether the plaintiff could demur for the omission, or object otherwise than by refusing to accept the plea(*k*).

[*450] *Pleas to the jurisdiction and personal privilege to be sued in another court, usually *commence* without any prayer of judgment, and *conclude*, "and this he, the said plaintiff, is ready to verify, wherefore he "prays judgment, if the said court of our said lord the king, here will or

(*x*) Buddle *v.* Wilson, 6 T. R. 373.

(*y*) Buddle *v.* Wilson, 6 T. R. 369. Brewster *v.* Capper, 1 Wils. 261.—Onslow *v.* Smith, 2 Bos. & Pul. 384.—3 Inst. Cl. 40.—2 Saund. 1. n. 2.

(*z*) 2 Saund. 1. n. 2.—See the form of estoppel, Bartilot *v.* Burton, 1 Lutw. 23.—1 Wentw. Index, 13.—3 Inst. Cl. 39.—Clift. 18. pl. 46.—19. pl. 50.—20. pl. 53, 4.

(*a*) 2 Saund. 1. n. 2.—Dacres *v.* Duncomb, 1 Vent. 236.

(*b*) Ante, 411, 2.—Roberts *v.* Moon, 5 T. R. 487.—Haworth *v.* Spraggs, 8 T. R. 515.—Jackson *v.* Ford, 3 Wils. 413.

(*c*) Ante, 412.—2 Saund. 209. b. c.—Summary on Pleading, 51.

(*d*) Ante, 412.—Foxwist & others *v.* Tumaine, 2 Saund. 209.

(*e*) Summary on Pleading, 50, &c.

(*f*) 2 Saund. 209. b. c.—Cremer *v.* Wicket, 1 Ld. Raym. 509.—Summary on Pleading, 50, 1.

(*g*) 2 Saund. 209. c.

(*h*) Ante, 412.—See the precedent, post. 2 Vol. 472.

(*i*) Ante, 412 to 414.

(*j*) Ante, 414.

(*k*) Com. Dig. Abatement, I. 16.—Stevens *v.* Squire, Skin. 582.—Ante, 412.

"ought to take cognizance of the said plea," or "whether he ought to "be compelled to answer"(*l*); but sometimes these pleas commence also with a similar prayer(*m*). QUALITIES AND FORM.

In pleading to the *person* of the plaintiff or defendant, in respect of *disability* to sue or be sued, and not merely on account of the nonjoinder of another party, the plea should conclude with a prayer, "if the "plaintiff ought to be answered," or "whether the defendant ought to "be compelled to answer"(*n*); and these pleas frequently begin with a similar prayer, as alien enemy, &c (*o*), and a plea of this description concluding to the writ would be bad(*p*); but pleas of coverture of the plaintiff or defendant, as the objection goes rather to the nonjoinder of the husband than to the disability of the feme, conclude to the writ or bill(*q*). If the defendant plead that the plaintiff is excommunicated, or any other *temporary* disability, the plea should conclude with praying that the suit may remain without day until, &c.(*r*); and where *death [*451] of the plaintiff, since the issuing of the writ, is pleaded, it should conclude, if the court will *further* proceed, &c.(*s*).

Where the defendant pleads in abatement to the *writ*, for matter *apparent* on the face of it, it is said that he should begin, as well as conclude, his plea, by "*praying judgment of the writ, and that the same may "be quashed*(*t*)." But where the plea is for matter *dehors*, as misnomer, &c. the plea should only conclude with that prayer(*v*). The courts having now established a rule, that oyer of the writ cannot be allowed(*u*), a variance between the writ and count, or declaration, can be no longer pleaded, and many of the decisions in the books as to the form of the plea, are no longer applicable, and now in general a plea in abatement of the writ, may be both of the writ and declaration, and it must be so where it is intended to plead in abatement only of part of the writ, and the cause of abatement arises only on some of the counts

(*l*) 2 Saund. 209. d.—Com. Dig. Abatement, I. 12.—Bac. Ab. Abatement, P.—Chatland *v.* Thornley, 12 East, 544.—Ante, 433.

(*m*) See the precedent, Wilkes *v.* Williams, 8 T. R. 631.—Post. 2 Vol. 461.

(*n*) 2 Saund. 9. n. 10. 209. d.—Cadman *v.* Grendon, Latch. 178.—Lil. Ent. 1.

(*o*) Lil. Ent. 1.—Powis *v.* Williams, Lutw. 1601.—Ast. Ent. 11.

(*p*) Com. Dig. Abatement, I. 12.

(*q*) Post. 2 Vol. 462, 3.—Lil. Ent. 1, 123.—Ast. Ent. 9.—3 Inst. Cl. 70.—1 Wentw. 47.

(*r*) Lady Faulkland *v.* Stanion, 12 Mod. 400.—Lord Stanton et al. *v.* Pierpont, 3 Lev. 208—Bradley *v.* Glynne, Lutw. 19.—Curwen *v.* Fletcher, 1 Stra. 521.—3 Inst. Cl. 18.—2 Saund. 210. n. See The King *v.* Shakespeare, 10 East, 86.

(*s*) Com. Dig. Abatement, I. 12.—Hallowes *v.* Lucy, 3 Lev. 120.—Le Bret *v.* Papillon, 4 East, 502.—2 Saund. 209. d.

(*t*) 2 Saund. 209. a. n. 1. 209. d.—Com. Dig. Abatement, I. 12.—Lutw. 11. pl. 4.—Slanney *v.* Slanney, 12 Mod. 525.

(*v*) Id. ibid.—The King *v.* Shakespeare, 10 East, 87.

(*u*) 1 Bos. & Pul. 646 n. b.—1 Saund. 318. n.—Spalding et al. *v.* Mure et al., 6 T. R. 364.—See the propriety of this regulation questioned in Gray et al. *v.* Sidneff, 3 Bos. & Pul. 399.—Deshons *v.* Head, 7 East, 384.

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in the declaration(*w*). If the action be by *bill*, the plea should conclude by praying judgment of the bill, and not of the declaration only, which is a conclusion in bar(*x*); it may, however, be of the bill and declaration(*y*), and *if a plea in abatement to the writ were to conclude, if the defendant ought to answer to the said bill, it is insufficient(*z*).[19]

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AFFIDAVIT OF TRUTH.

At common law when the defendant pleaded a *foreign* plea, the nature of which has already been stated(*a*), he was obliged to make oath of the truth of it, but this was not necessary in the case of a plea to the jurisdiction or any plea in abatement(*b*). But now by 4 Ann. c. 16. sect. 11. "*no dilatory* plea shall be received in any court of *record*, unless the party offering such plea do, by affidavit, prove the truth thereof, or shew some probable matter to the court to induce them to believe that the fact of such dilatory plea is true."[20] This statute extends to criminal as well as civil cases(*c*), and not only to pleas in abatement but to *all dilatory* pleas, which if found untrue would not determine the action, and are only in delay of it, as aid prayer, in a real action(*d*), or a plea in *scire facias* against ter-tenants, that there is another ter-tenant not named, though these pleas are not strictly in abatement(*e*). But such pleas in bar as are usually termed sham pleas, are not dilatory pleas within the meaning of this statute; and an affidavit is not necessary in all cases, for the statute extends only to such matters as are dehors the record, and not to such matters as will appear to the court on inspection of their own proceedings(*f*), *as the want of addition in an original writ when that matter was pleadable in abatement(*g*), or privilege as an attorney of the same court, to be sued by bill(*h*);[21] because in the first instance the defect in the writ is apparent on the face of it, and in the latter, the court, by examination of their own record,

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(*w*) 2 Saund. 210. c.

(*x*) 2 Saund. 209. d.—Lee *v.* Barnes, 5 Mod. 144.—12 Mod. 133. S. C.—Johnson *v.* Altham, 10 Mod. 192 210, 1.

(*y*) Tidd's Prac. 4th edit. 577.—Post. 2 Vol. 462, 3.—Com. Dig. Abatement, I. 12.

(*z*) 2 Saund. 209. d.—Bowyer *v.* Cook, 5 Mod. 146.—S. C. 1 Salk. 297, 8.—3 Blac. Com. 303. Com. Dig. Abatement, I. 12.—The King *v.* Shakespeare, 10 East, 87.

(*a*) Ante, 429.—1 Saund. 98. n. 1.

(*b*) 1 Saund. 98. n. 1.—Cholmondley *v.* Broom, Carth. 402.—S. C. 5 Mod. 335. Anon., Styles, 435.

(*c*) Rex *v.* Grainger, 3 Burr. 1617.

(*d*) Onslow *v.* Smith, 2 Bos. & Pul. 384.—2 Saund. 210. e.

(*e*) 2 Saund. 210. e.

(*f*) Gray et al. *v.* Sidneff, 3 Bos. & Pul. 397.—Prac. Reg. 5.—Hughes *v.* Alvarez, Lord Raym. 1409.—Sayer's Rep. 293.

(*g*) Hughes *v.* Alvarez, Ld. Raym. 1409.—Prac. Reg. 5.

(*h*) Claridge, gent. one, &c. ats. Macdougal, Trin. Term, 47 Geo. 3. K. B.—Gray et al. *v.* Sidneff, 3 Bos. & Pul. 397.—But see Stiles *v.* Mead, 2 Stra. 738. and Com. Dig. Abatement, D. 6. If the plea be untrue, or the defendant has ceased to be an attorney, the plea may be set aside, Prac. Reg. 8.

(19) Vide *Ilsley et al.* v. *Stubbs*, 5 *Mass. Rep.* 280.

(20) Vide *Laws of N. Y. Sess.* 36. *c.* 56. *s.* 23. 1 *R. L.* 524.

(21) Vide *Brooks* v. *Patterson*, 1 *Johns. Cas.* 328.

may ascertain the truth of the plea: but where the defendant pleaded after *oyer* of the original, that it was not returned, the court set aside the plea for want of an affidavit(*i*). The affidavit may be made by the defendant or a third person(*j*), and before the declaration is actually filed or delivered(*k*), it must be properly intituled in the cause(*l*), and be positive as to the truth of every fact contained in the plea, and should leave nothing to be collected by inference(*m*); it should be stated that the plea is true in substance and fact, and not merely that the plea is a true plea(*n*); and if there be no affidavit, or it be defective in any particular, the plaintiff may treat the plea as a nullity, and sign judgment(*o*), or move the court to set it aside(*p*).[22] AFFIDAVIT OF TRUTH.

*Where misnomer either of the plaintiff or defendant is *truly* pleaded, the plaintiff may *amend* his declaration, and need not enter a *cassetur billa* or "*breve*"(*q*); but where the nonjoinder of one of several defendants is pleaded, the plaintiff cannot amend, but must enter a *cassetur*, and commence a fresh action(*r*). And when the plea is true, and the plaintiff is not at liberty to amend, he should enter his *cassetur* before he commences a fresh action, for otherwise the defendant may plead in abatement the pendency of the first action(*s*). If the plea be untrue, in fact, the plaintiff should *reply*; or if it be insufficient in point of law, he may *demur*, and in some cases *sign judgment*, as for want of a plea(*t*); though if the plea be merely defective in form, the plaintiff should demur(*u*). And where the defendant has appeared in the name by which he was sued, such appearance may be replied by way of *estoppel*(*v*). When the plea consists of matter of fact, which the plaintiff denies, the replication may begin without any allegation, that the writ or bill ought not be quashed(*w*): it must not be as to a plea in bar(*x*), REPLICATIONS AND OTHER PROCEEDINGS. [*454]

(*i*) Sherman *v.* Alvarez, 1 Stra. 639. Hughes *v.* Alvarez, 2 Ld Raym. 1409.

(*j*) Lumley *v.* Foster, Barnes, 344. Prac. Reg. 6.

(*k*) Lang *v.* Comber, 4 East, 348.—Hopkinson v. Henry & another, 13 East, 170.

(*l*) Bac. Ab. Abatement, O.—Rex *v.* Jones, 2 Stra. 1161.—Clixby *v.* Dinas, Barnes, 348.

(*m*) Sayer's Rep. 293.

(*n*) Onslow *v.* Booth, 2 Stra. 705.—See the precedents, Lil. Ent. 1. and post. 2 Vol. 459. 465.

(*o*) 2 Saund. 210. e.—Jennings et al. *v.* Webb, 1 T. R. 277.—Brandon *v.* Payne, 1 T. R. 689.—Harbord *v.* Perrigal, 5 T. R. 210.—Hutchinson *v.* Brown, 7 T. R. 298.

(*p*) Pether et al. *v.* Shelton, 1 Stra. 638.—Sayer's Rep. 19. 293.—Rex *v.* Grainger, 3 Burr. 1617.

(*q*) Owens *v.* Dubois, 7 T. R. 698.—3 Anstr. 935.—Mayor, &c. of Stafford *v.* Bolton, 1 Bos. & Pul. 40. It is the practice not to permit such amendment if the defendant has *previously* made a tender.

(*r*) See the form, post. 2 Vol. 639.

(*s*) Ante, 443. n. v.—Bac. Ab. Abatement, M.

(*t*) Gray et al. *v.* Sidneff, 3 Bos. & Pul. 395.

(*u*) Hixon *v.* Binns, 3 T. R. 185.

(*v*) Post. 2 Vol. 639.—Meredith *v.* Hodges, 2 New Rep. 453.

(*w*) Sabine *v.* Johnstone, 1 Bos. & Pul. 61.

(*x*) Carter *v.* Davis, Carth. 187.—

(22) Vide *Robinson & Hartshorne* v. *Fisher*, 3 *Caine's Rep.* 99.

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because that would be a discontinuance, but should conclude to the country; and which is proper where to a plea of *misnomer the plaintiff replies, that the defendant is known as well by the one name as the
[*455] other(*y*): there are, however, precedents in which the plaintiff has concluded with a formal traverse and verification(*z*); and when this is adopted, it was laid down by Lord *Holt*, that the plaintiff ought to pray damages, because if it be found against the defendant, the jury must assess the plaintiff's damages, and final judgment is to be given; but where the plaintiff confesses the defendant's plea, and avoids it by other new matter, he should not pray damages, but must maintain his writ(*a*). If a replication to a plea in abatement of the *writ*, begin "that the said "declaration," ought not to be quashed, but conclude properly, it is sufficient; for such words may be rejected as surplusage; and it is not necessary in the beginning of the replication to say, that the writ ought not to be quashed; for in favour of the plaintiff the court will give judgment according to the fact, without reference to the prayer of the judgment(*b*). If an issue in fact be joined upon the replication, and found for the plaintiff, the jury should assess the damages, and the judgment is peremptory for the delay, *quod recuperet*, and not *quod respondeat*(*c*); and the same rule prevails in indictments for misdemeanours, though in cases of felony in *favorem vitæ* it is otherwise(*d*).[23]

[*456] *If the plaintiff *demur*(*e*), it does not appear to be necessary to assign any special causes, for it has been decided on the statute of Elizabeth, (the language of which is similar to that of the statute of 4 Ann. c. 16.) that the statute only applies to pleas in bar(*f*): however it appears most advisable to demur specially, where the plea is merely informal(*g*).

Com. Dig, Abatement, I. 15.—Sabine *v.* Johnstone, 1 Bos. & Pul. 61.—*Aliter* if the plea commence or conclude improperly in bar.—Bac. Ab. Abatement, 8.—Com. Dig. Abatement, I. 15.

(*y*) Sabine *v.* Johnstone, 1 Bos. & Pul. 60.—Bowen v. Shapcott, 1 East, 542.—2 Wils. 367. See the precedents, Post. 2 Vol.—1 Wentw.

(*z*) Lil. Ent. 1, 2.—Co. Ent. 160

(*a*) 2 Saund. 211 n. 3.—Bisse *v.* Harcourt, 3 Mod. 281.—Bonner *v.* Hall, 1 Ld. Raym. 338.—Medina *v.* Stoughton 1 Ld. Raym. 594.—Crosse *v.* Bilson, 2 Ld. Raym. 1022.—Bac. Ab. Abatement, P.—Com. Dig. Abatement, I. 12. See the precedents, 1 Wentw.

(*b*) Sabine *v.* Johnstone, 1 Bos. and Pul. 60.

(*c*) Bowen *v.* Shapcott, 1 East, 544. Eichorn *v.* Le Maitre, 2 Wils. 368.—Com. Dig. Abatement, I. 14, 15.—Bac. Ab. Abatement, P.—2 Saund. 210. n. 3. Gilb. C. P. 53.

(*d*) The King *v.* Gibson, 8 East, 107.

(*e*) See the precedents referred to in 2 Saund. 210. n. 2.—Post. 2 Vol. 727. 730. and joinder thereto, idem.

(*f*) Walden *v.* Holman, 2 Ld. Raym. 1015.—and see Thomee *v.* Lloyd, 1 Ld. Raym. 337.—S. C. 1 Salk. 194.—Tidd's Prac. 4th ed. 885.

(*g*) Hixon *v.* Binns, 3 T. R. 186.

(23) Where an issue of nul tiel record on a plea in abatement is found for the plaintiff, the judgment is quod respondeat ouster. *Marston* v. *Lawrence & Dayton*, 1 *Johns. Cas.* 397. And so where the trial is by inspection, judgment for the plaintiff is that defendant respondeat ouster. *Amcots* v. *Amcots*, 1 *Lev.* 163. *Com. Dig. Abatement*, (I. 14.)

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Where the plea properly commences and concludes, as in abatement, but is insufficient in some other respect, the demurrer should pray judgment that the writ or bill may be adjudged good, and that the defendant may answer further thereto, or merely with the latter words, and should not conclude with a prayer of damages; for the plaintiff ought not to conclude in bar, but only affirm his writ(*h*). So where the plaintiff *replies* to a plea in abatement, and the defendant demurs to the replication, the plaintiff should not conclude his joinder in demurrer with a prayer of judgment of his debt or damages, but should merely pray that the defendant may answer over(*i*). And where the plaintiff demurred to a plea in abatement, as in bar, praying judgment and damages, and the defendant joined as in bar, it was held to be a discontinuance, because the demurrer in bar was no answer to the plea in abatement, and a discontinuance of part is a discontinuance of the whole(*j*): the plaintiff, however, may amend, and the mistake would be aided by a *verdict(*k*). But where the plea in abatement improperly commences or concludes, as a plea in bar, the plaintiff may demur either in bar or abatement; and if he adopt the former, which is most advisable, he may conclude his demurrer as in bar, and with a prayer of damages, and the judgment will be final(*l*). On the argument of a demurrer to a plea in abatement, or to a replication thereto, the defendant cannot take any objection to the declaration, for nothing but the writ is then in question(*m*), unless where matter is pleaded in abatement which might be pleaded in bar(*n*). [*457]

If there be judgment for the plaintiff on *demurrer* to a plea in abatement, or a replication thereto, the judgment is in general only interlocutory, *quod respondeat ouster*(*o*). Where, however, a plea containing matter which can only be pleaded in abatement, improperly commences or concludes in bar, the judgment on demurrer may be final(*p*): and the same rule prevails where matter in abatement is pleaded after the last continuance(*q*); and if there be judgment of *respondeat ouster*, no other plea in abatement will be allowed(*r*).

(*h*) 2 Saund. 210. g.

(*i*) Anon., 1 Wils. 302.—2 Saund. 210. g. 210. n. 3.

(*j*) Carter *v.* Davis, Show. 255.—S. C. Carth. 187.—S. C. 1 Salk. 218.—Bowen *v.* Shapcott, 1 East, 542.—2 Saund. 210. g.

(*k*) Anon., 1 Wils. 302.—Combe *v.* Talbot, 1 Salk. 218.

(*l*) Bac. Ab. Abatement, P.—Com. Dig. Abatement, I. 15.

(*m*) Hastrop *v.* Hastings, Salk. 212. Bellasyse *v.* Hester, Lutw. 1592.—Rich *v.* Pilkington, Carth. 172.—Bullythorpe *v.* Turner, Willes. 478.—Bac. Ab. Abatement, P.—Com. Dig. Abatement, I. 14.

(*n*) Powis *v.* Williams, Lutw. 1604. Com. Dig. Abatement, I. 14.

(*o*) 2 Saund. 210. n. 3.—Com. Dig. Abatement. I. 14.—Bowen *v* Shapcott, 1 East, 544.—Eichorn v. Le Maitre, 2 Wils. 367.—See the forms, Tidd's Forms, 298.—10 Went. 61.

(*p*) Nowlan *v.* Geddes, 1 East, 636. Wallis *v.* Savil, Lutw. 41.—Com. Dig. Abatement, I. 15.—Bac. Ab. Abatement, P. As to the judgment in general, see The King *v.* Shakespeare, 10 East, 87.

(*q*) Com. Dig. Abatement, I. 15.

(*r*) Bac. Ab. tit. Abatement, O.—Com. Dig. Abatement, I. 3.—Creswell et al. *v.* Vaughan, 2 Saund. 40, 41.

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The judgment for the *defendant* on a plea in *abatement, whether it be on an issue in fact or in law, is, that the writ or bill be quashed(*s*); or if a temporary disability or privilege be pleaded, that the plaint remain without day until, &c.(*t*). If the plaintiff succeed on demurrer to a plea in abatement, and the judgment is interlocutory, *respondeat ouster*, there is no judgment for *costs*, because the statute of *Gloucester* only gives costs where damages are recovered(*u*); but when the defendant's plea is on issue found to be untrue, the judgment is final, and the plaintiff will recover costs(*v*). If the plaintiff enter a *cassetur billa* or *brevè*, he is not liable to costs(*w*). On an issue found for the defendant, he is entitled to costs, but not if he succeed on demurrer(*x*).

(*s*) Bac. Ab. Abatement, P.—Gilb. C. P. 52.—See the precedents, 10 Wentw. Ind. 61.

(*t*) Bradley *v.* Glynne, Lutw. 19.—Clift. 3.—2 Saund. 210.

(*u*) Garland *v.* Exton, Ld. Raym. 992.—S. C. 1 Salk. 194.—Tidd's Forms, 292.—Tidd's Prac. 4th edit. 846., &c.

(*v*) Id. ibid.

(*w*) Id. ibid.—Tidd's Prac. 4th edit. 623.—Hullock, 131.

(*x*) Garland *v.* Exton, Ld. Raym. 992.—S. C. 1 Salk. 194.—Hullock, 131. Tidd's Prac. 4th edit. 885.

*CHAPTER VII. [*459]

OF PLEAS IN BAR.

PLEAS in *bar* deny that the plaintiff has *any* cause of action(*a*), and do not, like pleas in abatement, give a better writ(*b*); they either conclude the plaintiff by matter of estoppel, which however rarely occurs in a plea(*c*), or shew that the plaintiff never had any cause of action; or admitting that he had, insist that it is determined by some subsequent matter. They are also either to the whole or to a part of the declaration; and where there is only a defence to a part, it is in general advisable, on account of costs, to confine the plea to that part(*d*). We have seen that pleading is in general a mere statement of *facts*(*e*), and pleas in bar state the various *defences*, of which, under the circumstances of each particular case, the defendant is at liberty to avail himself in a court of *law*. Matter of *defence in equity(*f*),[1] or merely founded on [*460] the practice of the court, is not in general pleadable(*g*),[2] and therefore

(*a*) See the definition, Co. Lit. 303. b.—Heath's Maxims, and Ferrer's Case, 6 Co. 7.

(*b*) Ante, 445.

(*c*) Bac. Ab. Pleas, I. 11.—5 Hen. 7. 14.—Zouch *v.* Bamfield, 1 Leon, 77.—Anon., Sav. 86. As pleading matter of estoppel more frequently occurs in replications and subsequent proceeding, the points relating to it will be hereafter considered.

(*d*) Postan *v.* Stanway, 5 East, 261. Stead *v.* Gamble, 7 East, 325.

(*e*) Ante, 215.

(*f*) Scholey et al. *v.* Mearns, 7 East, 153.—Braddick *v.* Thompson, 8 East, 344.—O'Kelly *v.* Sparkes, 10 East, 377.

(*g*) Sampson v. Brown et al., 2 East, 442.—Scholey et al. *v.* Mearns, 7 East, 153.—Hayward v. Ribbans, 4 East, 311.—Tidd's Prac. 4th edition, 1022.—Wright *v.* Walmsley, 2 Campb. 396.

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(1) Vide *Trent Navigation Company* v. *Harley*, 10 *East's Rep.* 38. 40. post. 553. n.

(2) See further, *Dudlow* v. *Watchorn & Thibault*, 16 *East's Rep.* 39. ante, 224.

bail cannot plead that the principal is a bankrupt, and has obtained his certificate(*h*). It would be foreign to the purpose of this treatise to attempt to state all the various defences in personal actions; those which most usually occur in practice are given in their natural order, in the following analytical tables(*i*); and the mode in which they should be taken advantage of are afterwards more fully stated.

(*h*) Donnelly *v.* Dunn, 2 Bos. & Pul. 45.—Scholey et al. *v.* Mearns, 7 East, 153, 4.

(*i*) See also Com. Dig. Pleader, as to the different defences and pleas in each particular action.

*The Defences to Actions on Contracts not under Seal. [*461]

- 1st. Deny that there ever was cause of action.
  - 1st. Deny that a sufficient contract was made.
    - 1st. That no contract was in fact made.
    - 2dly. Defendant incapable to contract.
      - 1st. Infancy.
      - 2dly. Lunacy, Drunkenness, &c.
      - 3dly. Coverture.
      - 4thly. Duress.
    - 3dly. Insufficiency, or illegality of the consideration, or made under a mistake or fraud.
    - 4thly. The act stipulated to be done illegal or impossible.
    - 5thly. The form of the contract insufficient under statute of frauds, or not duly stamped, &c.
  - 2dly. Admit a sufficient contract, but shew that before breach there was—
    - 1st. A release.
    - 2dly. Parol discharge.
    - 3dly. Alteration in terms of contract by consent.
    - 4thly. Non-performance by plaintiff of a condition precedent, alteration, &c.
    - 5thly. Performance, payment, &c.
    - 6thly. Contract become illegal or impossible to perform.
- 2dly. Admit there once was cause of action, but avoid it by subsequent or other matter.
  - 1st. Disability of the plaintiff to sue.
    - 1st. Alien enemy.
    - 2dly. Attainted.
    - 3dly. Outlaw.
    - 4thly. A bankrupt, insolvent debtor, &c.
  - 2dly. Defendant not liable.
    - 1st. A certificated bankrupt.
    - 2dly. An insolvent debtor.
  - 3dly. Debt recoverable only in a court of conscience.
  - 4thly. Cause of action discharged.
    - 1st. By payment.
    - 2dly. Accord and satisfaction.
    - 3dly. Foreign attachment.
    - 4thly. Tender.
    - 5thly. Account stated, and a negotiable security given.
    - 6thly. Arbitrament.
    - 7thly. Former recovery.
    - 8thly. Higher security given.
    - 9thly. A release.
    - 10thly. Statute of limitations.
    - 11thly. Set off.
  - 5thly. Pleas by executors, &c.

[*462] ***The Defences to Actions on Contracts under Seal.***

- 1st. Deny that there ever was cause of action.
  - 1st. No deed in fact made, or that it was delivered as an escrow.
  - 2dly. Deed invalid.
    - 1st. Defendant's incapacity to contract.
      - 1st. Infancy.
      - 2dly. Lunacy.
      - 3dly. Coverture.
      - 4thly. Duress.
    - 2dly. Illegality of consideration or contract.
    - 3dly. Deed obtained by fraud, &c.
    - 4thly. Contract, impossible to perform.
  - 3dly. Admitting that the deed was originally valid, excuse of performance.
    - 1st. Erasure, alteration, &c.
    - 2dly. Deed become impossible to perform.
    - 3dly. Become illegal to perform.
    - 4thly. Non-performance by the plaintiff of a condition precedent.
    - 5thly. Non-damnificatus, no award, &c.
  - 4thly. Performance in pursuance of the deed.
    - 1st. Solvit ad diem.
    - 2dly. Performance, &c.
- 2dly. Admit that plaintiff once had cause of action, but avoid it by subsequent or other matter.
  - 1st. Disability of plaintiff to sue.
    - 1st. Alien enemy.
    - 2dly. Outlaw.
    - 3dly. Bankrupt, insolvent debtor, &c.
  - 2dly. Defendant not liable.
    - 1st. A certificated bankrupt.
    - 2dly. A insolvent debtor.
  - 3dly. Cause of action discharged.
    - 1st. By payment post diem.
    - 2dly. Accord and satisfaction.
    - 3dly. Foreign attachment.
    - 4thly. Tender.
    - 5thly. Arbitrament.
    - 6thly. Former recovery.
    - 7thly. Release.
    - 8thly. Presumptive limitations.
    - 9thly. Set-off.
  - 4thly. Pleas by executors, heirs, devisees, &c.

*The Defences to Proceedings on a Record. [*463]

- 1st. On Judgments.
  - 1st. Deny there ever was cause of action, nul tiel record.
  - 2dly. Admit there once was cause of action.
    - 1st. Disability of plaintiff.
    - 2dly. Defendant not liable to be sued.
      Discharge under Lord's act, &c.
  - 3dly. Matter in discharge.
    - 1st. Payment,
    - 2dly. Release.
    - 3dly. Levied by fieri facias.
    - 4thly. By elegit.
    - 5thly. By ca sa.
    - 6thly. Plene administravit.
    - 7thly. Implied limitations.
- 2dly. On Recognizances of bail.
  - 1st. Deny that there ever was cause of action.
    - 1st. Nul tiel record of judgment or recognizance.
    - 2dly. No ca. sa.
    - 3dly. Death of principal.
    - 4thly. Render of principal.
    - 5thly. Error, supersedeas, &c.
  - 2dly. Admit that there once was cause of action.
    - 1st. Disability of plaintiff to sue.
    - 2dly. Defendant discharged by bankruptcy, &c.
    - 3dly. Matter in discharge.
      - 1st. Payment,
      - 2dly. Release to principal or bail.
      - 3dly. Fi. fa.
      - 4thly. Elegit.
      - 5thly. Ca. sa. &c.

The Defences to Actions on Statutes.

- 1st. Denial of the fact.
  Nil debet.
  Not guilty.
- 2dly. Prior suit depending for the same offence.
- 3dly. Former recovery for the same offence.

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*The Defences in Actions for Torts.

- 1st. Deny that plaintiff ever had cause of action.
  - 1st. Deny that defendant was guilty of the tort complained of.
    - 1st. In case of trover, not guilty of the premises.
    - 2dly. In detinue, non detinet.
    - 3dly. In replevin, non cepit, or cepit in alio loco, or property in defendant or a stranger.
    - 4thly. In trespass, not guilty of the trespasses.
    - 5thly. In ejectment, not guilty of the trespass and ejectment.
  - 2dly. Justify the act.
    - 1st. In case.
      The words were true.
    - 2dly. In replevin.
      Avowries and cognizances for rents, damage-feasant, &c. (see the pleas in 2 Vol. Analytical table.)
    - 3dly. In trespass.
      - 1st. To persons.
        Son assault demesne, &c. (see the pleas in 2 Vol. Analytical table.)
      - 2dly. To personal property.
        Distresses damage-feasant, &c. (see the pleas in 2 Vol. Analytical table.)
      - 3dly. To real property.
        Liberum tenementum, rights of common, ways, &c. (see the pleas in 2 Vol. Analytical table.)
  - 3dly. Excuse the act.
    - 1st. In case.
      That another person uttered the words, and defendant only repeated them.
    - 2dly. In trespass.
      Amicable contest.
      Inevitable necessity.
      Escape of cattle by defect of fences, &c.
      Chasing sheep intermixed with the plaintiff's, &c. &c.
- 2dly. Admit that plaintiff once had cause of action, but insist that it is discharged by
  - 1st. Accord and satisfaction.
  - 2dly. Arbitrament.
  - 3dly. Tender of amends for an involuntary trespass.
  - 4thly. Former recovery.
  - 5thly. Distress for the same cause.
  - 6thly. Release.
  - 7thly. Statute of limitations, &c.

*From these divisions we may perceive, that pleas in bar as well in actions on contracts as for torts, are of two descriptions: first, they *deny* that the plaintiff *ever* had the cause of action complained of: or secondly, they *admit* that he *once had* the cause of action, but insist that it *no longer exists*, either on account of *his* having become an alien enemy, an outlaw, a bankrupt, insolvent debtor, &c. or in respect of the *defendant's* being protected by his certificate under the bankrupt laws, or by being an insolvent debtor, or in respect of the cause of action having been *discharged* or satisfied. GENERAL OBSERVATIONS. [*465]

In the ancient course of pleading, there appear to have been three descriptions of pleas in bar, by one of which the above defences were to be taken advantage of—1st. The *general issue*.—2dly. A denial of a *particular* allegation in the declaration. And 3dly. A special plea of *new matter not apparent* on the face of the declaration. *General issues*, it is said, were framed in words calculated to deny the *whole of the facts* alleged in the declaration(*j*), and are proper and in general necessary when the defence merely denies the plaintiff's allegation, and refers the matter in dispute to the *jury*, who are the proper judges, whether or not the *fact* complained of was committed(*k*). In *assumpsit* almost every matter may be given in evidence on the general issue *non assumpsit*, on the ground, it is said, that as the action is founded on the contract, and the *injury* is the *non-performance* of it, evidence which disaffirms the obligation of the contract *at the time when the action was commenced*, goes to the gist *of the action(*l*). In *debt* on simple contract also, under the plea of *nil debet* the defendant was at liberty to prove most matters, which evinced that there was no existing debt(*m*); but in debt or covenant founded on a *deed*, on account of the solemnity of the instrument under seal(*n*), and which, in general, must be dissolved *eo ligamine quo ligatur*, the plea of *non est factum* merely put in issue the existence of the deed, and the defendant was not at liberty to plead *nil debet*, unless where the deed was mere inducement to the action, and the debt accrued by subsequent enjoyment, &c.(*o*). In *case* or *trover*, under the *general issue*, "*not guilty of the premises*," almost any matter of defence might be given in evidence, though any plea admitting the plaintiff's property, and the act committed, but justifying it, might be pleaded(*p*). In *replevin*, the general issue, *non cepit modo et forma*, merely puts in issue the act complained of, as stated in the declaration. In *trespass*, whether to the person, personal property, or real property, the general issue is, *not guilty*(*q*). In injuries to the *absolute* rights of persons, this only puts in issue the act complained of; but in injuries to the *relative* rights and to personal and real property, it puts in issue the existence of the *right* as well as the *commission* of the act complain- [*466]

(*j*) Gilb. C. P. 57. 63, 4.
(*k*) Gilb. C. P. 63.
(*l*) Gilb. C. P. 65.—Darby *v.* Boucher, Salk. 279.—Burrows *v.* Jemino, 2 Stra. 733.—Madox *v.* Eden, 1 B. & P. 481.
(*m*) Gilb. C. P. 58.
(*n*) Sharington *v.* Strotton, Plowd. 308.
(*o*) Gilb. C. P. 57, 8. 61, 2.
(*p*) Gilb. C. P. 64, 5.
(*q*) Gilb. C. P. 57.

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ed of, though in the two latter cases possession will be sufficient against the defendant, unless he can shew a better title.

[*467] Formerly it was not unusual, even in actions of *assumpsit, for the defendant to deny a *particular allegation in the declaration*, instead of pleading the general issue which denied the whole(*r*); and it is said that this was permitted, in order to bring a *single* point to issue, and that if the jury gave a corrupt verdict, they might be more easily attainted, which was not so readily done on a *general issue*, where the matter was more complicated(*s*); thus in *assumpsit* it was usual to traverse in particular the consideration of the contract, &c. or the contract itself, or the plaintiff's performance of a condition precedent, &c.; but *in assumpsit* this practice is now obsolete. In debt for rent due by deed, the defendant may still plead *non est factum*, or nothing in arrear; or if not by deed, *non dimisit*, or nothing in arrear; though these points might be given in evidence under the plea of *nil debet*(*t*).

From the history of our ancient law, it appears that in all personal actions the defendant was at *liberty* to shew specially to the court matters of defence, not merely consisting in a *denial* of a material part of the plaintiff's declaration, but introductory of *new matter not apparent* therein(*u*); such as coverture, infancy, &c. which though they are in effect negations of the plaintiff's declaration, yet being matters of *law*, as to their sufficiency in defence, were considered as properly referrible to the *court* in the first instance(*v*), though, if traversed, the existence in *fact of such defence was then properly to be tried by a jury(*x*).

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So in general whatever ground of defence rendered the fact complained of lawful, being matter of *justification*, was to be shewn to the court, as a license, &c. because the court are judges what is the law, and how far the fact, if done, was lawful, and the jury are only to find the existence of the fact. Formerly the general issue was seldom pleaded, except when the party meant wholly to deny the charge alleged against him, and when he meant to distinguish away or palliate the charge, it was usual to set forth the particular facts in a special plea, which was originally intended to apprize the court and the adverse party of the nature and circumstances of the defence, and to keep the law and the fact distinct. But the courts have of late, in some instances, and the legislature in many more, permitted the general issue to be pleaded, and have allowed special matter to be given in evidence under it, at the trial.[3] And it has been observed, that though it should

(*r*) Gilb. C. P. 60, 1. Doct. Pl. 203.
(*s*) Gilb. C. P. 61. 139. 148.—Kirle *v.* Lee, 3 Leon, 66.
(*t*) Gilb. C. P. 61, 2.
(*u*) Gilb. C. P. 62. 66.
(*v*) Gilb. C. P. 62. 66.—Hussey v. Jacob, Ld. Raym. 88.
(*x*) Id. ibid.

(3) In the state of New York, any special matter may be given in evidence under the general issue, if notice of the matter so intended to be given in evidence have accompanied the plea. *Sess.* 36. c. 56. s. 1. 1 *R. L.* 515. But in

seem much confusion and uncertainty would follow from so great a relaxation of the strictness anciently observed, yet that experience has shewn it to be otherwise, especially with the aid of a new trial, in case either party be unfairly surprised by the other(*y*). GENERAL OBSERVATIONS.

We will proceed to consider the *present practice*, as to pleading the general issue, or a special *plea in each personal action. And *first*, the several pleas in personal actions, and where the general issue is sufficient, and when the plea must be special, or may be either general or special. And *secondly*, the qualities and forms of the different pleas, and other points relating thereto. [*469]

I. OF THE SEVERAL PLEAS.

The general issue in an action of ASSUMPSIT—is "*that the defendant* "*did not undertake or promise in manner and form as the plaintiff hath* "*complained against him, and of this the defendant puts himself upon the* "*country*, &c."(*z*). Considering the language of this plea, it might perhaps seem, on first view, that the defendant by it only denies the fact of his having made the promise; as however the definition of a contract not under seal is "an agreement founded on a sufficient and IN ASSUMPSIT.

(*y*) 3 Bla. Com. 305, 6.—*sed vide* Taylor *v.* Eastwood, 1 East, 217.—Hussey *v.* Jacob, Ld. Raym. 88.

(*z*) See the precedents, post. Vol. 471.—Com. Dig. Pleader, 2 G. 1.—Not guilty is bad on demurrer, but is aided by verdict.—Marsham *v.* Gibbs, Stra. 1022.

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covenant in which there is no general issue, there can be no notice: and for the same reason notice of special matter cannot be given in an action on a judgment or recognisance. *Service* v. *Heermance*, 1 *Johns. Rep.* 92. *Bullis* v. *Giddons & Brown*, 8 *Johns. Rep.* 83. *Beadle* v. *Hopkins*, 3 *Caine's Rep.* 150. Such notice forms no part of the record; an admission in it does not excuse the plaintiff from proving the matters charged in his declaration, and it will not help a defect in the declaration. *Vaughan* v. *Havens*, 8 *Johns. Rep.* 109. See further *Raymond* v. *Smith*, 13 *Johns. Rep.* 329. *Shephard* v. *Merrill*, 13 *Johns. Rep.* 475. *Lawrence* v. *Kines*, 10 *Johns. Rep.* 142. *Kane* v. *Sanger*, 14 *Johns. Rep.* 89.

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"legal consideration, to do some legal act, or to omit the doing an act "the performance of which the law does not enjoin," the above plea, by denying the contract, in effect puts in issue every part of the above definition, viz. the *agreement*, to constitute which, the defendant must have been in a situation competent to contract, and consequently infancy, coverture, and duress, or any other defence shewing either an incompetency to contract, or that the defendant had not the free exercise of his will, are properly put in issue by this plea; it is obvious also that the *sufficiency* and *legality* of the *consideration*, and of the *act to be done*
[*470] *or omitted*, are fairly put in issue by this plea; but the allegation "*modo* "*& forma*" does not put in issue the form of the count, but only the substance of the promise, for which reason the plaintiff may give in evidence a contract different from that mentioned in the declaration, in time or place when immaterial though not a contract different in substance(*a*).

When the defendant insists that no such contract, as that stated in the declaration, was in fact made, he *must* plead the *general issue*(*b*). Under this plea also he may give in evidence various matters of defence, which in effect admit that a contract was made, but deny that it was or is obligatory upon the defendant, as that another person ought to have been made co-plaintiff(*c*);[4] also the defendant's incapacity to contract; as that at the time the supposed contract was entered into, the defendant was an infant(*d*),[5] a lunatic(*e*),[6] or drunk(*f*),[7] or a feme covert;

(*a*) Gilb. C. P. 51.—Co. Lit. 282. b. Vin. Ab. title, Modo et Forma.

(*b*) Com. Dig. Pleader, 2 G.

(*c*) Ante, 7. n. g.

(*d*) 1 Bos. & Pul. 481. n. a.—Darby *v.* Boucher, 1 Salk. 279.

(*e*) Yates *v.* Boen, 2 Stra. 1104.—2 Bl. C. 292.—1 Fonbl. 46, 7. n. b. 49. n. 9. *acc.*—Fonbl. 45 to 72.—Co. Lit. 2. b. n. 12. 247. a. b.—Powel on Contr. 20. 23. Bac. Ab. Idiots, F. *contr.*

(*f*) 2 Stra. 1104. n.—Bul. Ni. Pri. 172.

(4) Vide *Baker v. Jewell*, 6 *Mass. Rep.* 460. *Converse* v. *Symmes*, 10 *Mass. Rep.* 377. Or that the contract was made with one of the plaintiffs alone. *Wilsford et alt.* v. *Wood*, 1 *Esp. Rep.* 178. Or that it was not made by all the defendants against whom the action is brought. *Tom* v. *Goodrich & others*, 2 *Johns. Rep.* 213.

(5) Vide *Wailing* v. *Toll*, 9 *Johns. Rep.* 389. *Stansbury* v. *Marks*, 4 *Dallas*, 130. *Vasse* v. *Smith*, 6 *Cranch*, 231. One co-defendant cannot give in evidence the infancy of the other, the plea of infancy being a personal privilege of which the party alone can avail himself. *Van Bramer & others* v. *Cooper & another*, 2 *Johns. Rep.* 279. But infancy of the plaintiff must be pleaded in abatement. *Schermerhorn* v. *Jenkins*, 7 *Johns. Rep.* 373.

(6) Vide 3 *Day*, 90. 100. *Webster* v. *Woodford*, in which it was held that a man might show that he was non compos mentis in avoidance of his deed. S. P. per Lord Mansfield, *Chamberlain of London* v. *Evans*, *App. to Black. Com. Letters to Mr. J. Blackstone*, *Philadelphia*, 1773. p. 149.

(7) Vide *Pitt* v. *Smith*, 3 *Campb.* 33. But it seems that the intoxication must have arisen by the contrivance of the plaintiff. *Johnson* v. *Medlicott*, 3 *P. Wms.* 130.

but coverture which has taken place since the making of the contract must be pleaded in abatement(*g*), so the defendant may give in evidence that he was under duress(*h*); and the want of sufficient or legal consideration for the contract, or illegality in the contract itself, may be given in evidence under this plea; as gaming(*i*), usury(*j*),[8] &c. or that the plaintiff was *an alien enemy(*k*), or that the contract was void by the [*471] statute against frauds(*l*). So a release or parol discharge before breach(*m*), or an alteration in the terms of the contract(*n*), or non-performance by the plaintiff of a condition precedent, or that the contract was performed by payment, &c.(*o*), or that it afterwards became illegal or impossible to perform, may when they constitute a sufficient defence, be given in evidence under this plea(*p*).[9]

These defences shew that the plaintiff *never* had any cause of action. Formerly matters in *discharge*, which admit that once there was cause of action, must uniformly have been pleaded specially(*q*); afterwards a distinction was made between express and implied *assumpsits:* in the former these matters were required to be pleaded, but not in the latter(*r*); at length, however, they were allowed to be given in evidence under the general issue(*s*); therefore, under the plea of *non-assumpsit*, the defendant may give in evidence that the plaintiff is a bankrupt(*t*), or where a *feme covert* suing alone has no interest in the contract, her coverture; but not that the plaintiff is *covert* where she would have a

(*g*) Id. ibid.—Cole *v.* Delacon, 3 Keb. 228.—James *v.* Fowks, 12 Mod. 101.—Milner et al. *v.* Milnes et al., 3 T. R. 627.—Ante, 437.

(*h*) Whelpdale's Case, 5 Co. 119.—1 Saund. 103. a.

(*i*) Hussey *v.* Jacob, 1 Ld. Raym. 87.—S. C. 1 Salk. 344.—S. C. Carth. 356.—S. C. 5 Mod. 170.—S. C. 12 Mod. 97.—Com. Dig. Pleader, 2 G. 8.

(*j*) Lord Bernard *v.* Saul, 1 Stra. 498.—Com. Dig. Pleader, 2 G. 7.

(*k*) Dougl. 649. n. 152.—Brandon *v.* Nesbitt, 6 T. R. 24.—Gamba et al. v. Le Mesurier, 4 East, 407. 410.—Ex parte Boussmaker, 13 Ves. 72.

(*l*) 29 Car. 2. c. 3.

(*m*) Com. Dig. Pleader, 2 G. &c.—and tit. Action, Assumpsit, G.—Scott & others *v.* Lifford, 1 Campb. 249.

(*n*) Hodgson *v.* The East India Company, 8 T. R. 280.

(*o*) Brown *v.* Cornish, Ld. Raym. 217.—Paramore *v.* Johnson, Ld. Raym. 566.—S. C. 12 Mod. 376.—Hutton *v.* Morse, 1 Salk. 394.—Com. Dig. Pleader, 2 G. 10. 15.

(*p*) Hadley *v.* Clarke et al., 8 T. R. 263.—Co. Lit. 206. a.—Elmes *v.* Wills, 1 Hen. Bla. 65.

(*q*) Paramore *v* Johnson, 1 Ld. Raym. 566.—S. C. 12 Mod. 376.—Tidd's Prac. 4th ed. 588. n. u.

(*r*) Vin. Ab. Evidence, z. a.—Brook *v.* Smith, 1 Salk. 280.—Gilb. C. P. 65.

(*s*) Brown *v.* Cornish, 1 Ld. Raym. 217.—Paramore *v.* Johnson, 1 Ld. Raym. 566.—S. C. 12 Mod. 376.

(*t*) Webb *v.* Fox et al., 7 T. R. 396. Bul. N. P. 15. 3.—Donnelly *v.* Dunn, 1 B. & P. 448.

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(8) Vide *Cuyler* v. *Robinson*, 3 *Day*, 68. *Levy* v. *Gadsby*, 3 *Cranch*, 180. *Bird & others* v. *Pierpoint*, 1 *Johns. Rep.* 124.

(9) So, the defendant may show under the general issue that he offered to perform his part of the contract, but was prevented by the plaintiff. *Wilt & Green* v. *Ogden*, 13 *Johns. Rep.* 56.

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right to join in the action, which in such case must in general be pleaded in abatement(*u*).

[*472] *So also payment(*v*);[10] accord and satisfaction(*w*);[11] a promissory note, or other negotiable security given for the debt, and remaining in the hands of a third person, or otherwise outstanding(*x*); foreign attachment(*y*); arbitrament(*z*); former recovery for the same cause(*a*);[12] a higher security given(*b*); and a release(*c*)[13] may be given in evidence under the plea of *non-assumpsit*, although there is also a special plea, in which the ground of defence may not have been correctly stated.

Hence it may be collected, that under the general issue, any matter which shews that the plaintiff *never* had cause of action, may be given in evidence, and also that under that plea most matters in *discharge* of the action, which shew that at the time of the commencement of the suit the plaintiff had no subsisting cause of action, may be taken advantage of.[14] As the object of pleading is to apprize the adverse party of the ground of defence, in order that he may be prepared to contest it, and may not be taken by surprise(*d*); it may appear singular, that under the general issue, which in terms only denies a valid contract, the defendant should be permitted to avail himself of a ground of defence which admits a valid contract, but insists that it has been per-
[*473] formed, or or that there is an excuse for the non-performance *of it, or that it has been discharged; it is, as observed by Lord *Holt*, a practice which has crept in improperly, but is now perhaps, too settled to be

(*u*) Caudell *v.* Shaw, 4 T. R. 364.—Milner et al. *v.* Milnes et al., 3 T. R. 627, ante, 437.

(*v*) Brown v. Cornish, Ld. Raym. 217.

(*w*) Paramore *v.* Johnson, 1 Lord Raym. 566.—S. C. 12 Mod. 376.—Fitch *v.* Sutton, 5 East, 230.—Martin *v.* Thornton, 4 Esp. Cas. Ni. Pri. 181.—Bac. Ab. tit. Accord. Com. Dig. tit. Accord.

(*x*) Rearslake et al. *v.* Morgan, 5 T. R. 513.—Bul. Ni. Pri. 182.

(*y*) Savage's Case, 1 Salk. 291.—Brook *v.* Smith, 280.—1 Saund. 67. a. n.—M'Daniel et al. v. Hughes, 3 East, 367. 378.—Langston *v.* Boylston, 2 Ves. Jun. 106.—Com. Dig. Attachment, A.—and tit. Pleader, 2 G. 5.

(*z*) Allen *v.* Harris, 1 Ld Raym. 122. Bac. Ab. Arbitrament, G.

(*a*) Burrows *v.* Jemino, 2 Stra. 733. 1 Saund. 92. n. 2.

(*b*) Drake *v.* Mitchell et al., 3 East, 258.—Com. Dig. Pleader, 2 G. 12.—Ante, 96.

(*c*) Miller v. Aris, 3 Esp. Rep. 234. Sullivan *v.* Montague, Dougl. 106.—Gilb. C. P. 64.—Hawley *v.* Peacock & another, 2 Campb. 557, 8.—Scott & others *v.* Lifford, 1 Campb. 249.

(*d*) Ante, 215.

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(10) Vide *Brennan* v. *Egan*, 4 *Taunt.* 165. Although the payment were made after the commencement of the suit if before trial. *Bird* v. *Randall*, 3 *Burr. Rep.* 1345. *Baylies and another* v. *Fettyplace & another*, 7 *Mass. Rep.* 325.

(11) Vide *Bird & others* v. *Caritat*, 2 *Johns. Rep.* 346.

(12) Vide *Young et al.* v. *Black*, 7 *Cranch*, 565.

(13) Vide *Brennan* v. *Egan*, 4 *Taunt.* 165.

(14) Vide *Wilt & Green* v. *Ogden*, 13 *Johns. Rep.* 57, 58. *Bird & others* v. *Pierpoint*, 1 *Johns. Rep.* 124. *Young et al.* v. *Black*, 7 *Cranch*, 567.

altered(*e*). It has been attempted to be justified, on the ground that the gist of the action is the fraud of the defendant, in not performing the contract, and that therefore whatever shews there is no fraud, is properly in issue under the plea of *non-assumpsit*; but this does not appear to accord with the logical precision which usually prevails in pleading(*f*).[15] IN ASSUMPSIT.

There are, however, some defences which either *must* or *should* be pleaded specially; thus, though we have seen that under the general issue it may be given in evidence, that at the time the contract was made the plaintiff was an *alien enemy*(*g*): yet if the disability accrued by war, after the contract was made, the same should be pleaded specially(*h*). So outlawry of the plaintiff must be pleaded in abatement, if the cause of action be not forfeited(*i*), and the defendant must plead that he is a certificated bankrupt(*j*), or a discharged insolvent debtor(*k*). So a tender(*l*), or a set-off(*m*), (unless in an action at the suit of assignees)(*n*), and the statute of limitations(*o*),[16] cannot be given in evidence under the *general issue, though in an action of assumpsit, unless the [*474] subject matter of set-off accrued by reason of a penalty contained in a bond, or specialty, the defendant has the option of pleading or giving notice of set-off(*oo*).[17] With respect to defences under the courts of

(*e*) Paramore *v.* Johnson, 12 Mod. 377.—S. C. Ld. Raym. 566.—Brown *v.* Cornish, Ld. Raym. 217.

(*f*) Gilb. C. P. 65.—3 Bla. Com. 305, 6.—Ante, 465, 6. 468.

(*g*) Ante, 470.—Truckenbrodt *v.* Payne, 12 East, 206.—Ex parte Boussmaker, 13 Ves. 71, 2.

(*h*) See the precedent, post. 2 Vol. 473, 4.—Casseres *v.* Bell, 8 T. R. 166. Brandon *v.* Nesbitt, 6 T. R. 24.—1 Bos. & Pul. 222. n.—Thyatt *v.* Young, 2 Bos. & Pul. 72.—Feron *v.* Ladd, 2 Bla. Rep. 1326.—Le Bret *v.* Papillon, 4 East, 504, &c.

(*i*) Com. Dig. Pleader, 2 G. 4.

(*j*) Gowland *v.* Warren, 1 Campb. 363.—Stedman *v.* Martinnant, 12 East, 664.—See the precedent, post. 2 Vol. 474, 5.—5 Geo. 2. c. 30. s. 7.—Charlton *v.* King, 4 T. R. 156.—Miles *v.* Williams et ux., 1 P. Wm. 258, 9.—S. C. 10 Mod. 160. 247.—Jelss *v.* Ballard, 1 Bos. & Pul. 467.—Pitcher *v.* Martin, 3 Bos. & Pul. 171.—Leigh *v.* Monteiro, 6 T. R. 496.

(*k*) See the precedent, post. 2 Vol. 479.—Com. Dig. Pleader, 2 G. 16.

(*l*) See the precedent, post. 2 Vol. 480.—1 Saund. 33. n. 2.

(*m*) See the precedents, post. 2 Vol. 488 to 491.—2 Geo. 2. c. 22. s. 13.—8 Geo. 2. c. 24.

(*n*) Grove & another *v.* Dubois, 1 T. R. 115.—5 Geo. 2 c. 30.

(*o*) See the precedents, post. 2 Vol. 497, 498.—1 Saund. 283. n. 2.—2 Saund. 63. b. c.—1 Selwyn's Ni. Pri. 149. note 87.

(*oo*) Montague L. Set-off, 40 to 47.

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(15) Sir J. Mansfield observes, that "it is an extraordinary thing, that nil debet expresses the sum of the general issue in assumpsit, much better than non assumpsit. For upon non assumpsit may be given in evidence a release, or payment, or any thing that shows that there was no cause of action at the time of the action brought; although the form of the issue is, that the defendant did not undertake, whereas the truth may be that he has undertaken and has performed:" *Brennan* v. *Egan*, 4 *Taunt.* 165.

(16) Vide 1 *Cranch*, Appendix, 465.

(17) In the state of New York, notice of set-off may be given with the general

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conscience acts, some must be pleaded; others may either be pleaded or given in evidence under the general issue; and others must be taken advantage of by entering a suggestion, which may be traversed or demurred to(*p*).

The defendant is at *liberty* to plead any matter which does not amount to the general issue, and which admits, that in fact a contract was made, but insists that it was void or voidable either on account of the defendant's infancy(*q*); lunacy, coverture(*r*); duress, &c.; or, that the plaintiff was an alien enemy at the time the contract was made(*s*); or for want of sufficient consideration; or on account of illegality therein, or in the act to be done; as usury, gaming, &c.; or because the contract was void under the statute against frauds(*t*). So a release before breach(*u*), and performance(*v*) or payment(*w*),[18] may be pleaded; though we have seen that all these matters may be given in evidence under the general issue. So all matters in *discharge* of the action may be pleaded specially. If the plaintiff's bankruptcy, which we have seen [*475] may be given in evidence under the general issue, be pleaded *specially, all the circumstances shewing the sufficiency of the proceedings under the bankruptcy, must be stated in the plea(*x*).[19] Accord and satisfaction(*y*), foreign attachment, release(*z*), arbitrament(*a*), former recovery(*b*), or that a negotiable or higher security was given for the debt(*c*), are seldom pleaded unless for the purpose of delay, but it is usual to plead coverture; and it is in general advisable to plead infancy

(*p*) See the precedent, post. 2 Vol. 496.—Tidd's Prac. 4th ed. 859, 860.—Taylor *v.* Blair, 3 T. R. 452.

(*q*) See the precedent, post. 2 Vol. 472.

(*r*) See the precedent, post. 2 Vol. 472.

(*s*) Dougl. 649. n.

(*t*) Read v. Nash, 1 Wils. 305.

(*u*) Com. Dig. Pleader, 2 G. 13, 14.

(*v*) Com. Dig. Pleader, 2 G. 15.

(*w*) Hatton *v.* Morse, 1 Salk. 394.—S. C. Ld. Raym. 787.—Com. D. Pleader, 2 G. 10.

(*x*) Brown v. Cornish, 1 Ld. Raym. 217.—Paramore *v.* Johnson, 1 Lord Raym. 566.—S. C. 12 Mod. 376.—Donnelly *v.* Dunn, 1 Bos. & Pul. 448.—Webb *v* Fox et al., 7 T. R. 396.

(*y*) See the precedent, post. 2 Vol. 482.

(*z*) Com. Dig. Pleader, 2 G. 14.—Post. 2 Vol. 487.

(*a*) See the precedent, post. 2 Vol. 484.

(*b*) See the precedent, post. 2 Vol. 486.

(*c*) See the precedent, post. 2 Vol. 482.

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issue in all cases. *Sess.* 36. *c.* 56. *s.* 1. 1 *R. L.* 515. And it has been said that a set-off could be taken advantage of, there, in no other manner. *Caines* v. *Brisbane & others*, 13 *Johns. Rep.* 23, 24.

(18) In a plea of payment it is sufficient to allege that the defendant paid the plaintiff the several sums of money in the declaration mentioned, without stating that the plaintiff accepted the money in satisfaction. *Chew* v. *Woolley*, 7 *Johns. Rep.* 399.

(19) A surety may plead that the plaintiff being requested by the defendant to collect the money of the principal, neglected to do so, whereby the debt, as against the principal, was lost. *Pain* v. *Packard*, 13 *Johns. Rep.* 174.

specially, because the plaintiff will thereby be compelled to reply only one of several answers which he might have to the defence, viz. either that the defendant was of age, or that the goods, &c. were necessaries, or that he confirmed the contract when he came of age; on either of which the plaintiff at his election might rely at the trial in answer to the defence of infancy, if the general issue alone were pleaded. So it is often more advisable to plead a set-off than to give notice of it, for if pleaded the plaintiff cannot reply double, but must rely on one answer alone, and in a country cause by pleading it the trouble and expense of proving the service of the notice may be saved. Indeed the principal use of a special plea is, that in general it narrows the evidence to be adduced on the trial.

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The action of DEBT we have seen is, 1st, on simple contracts and legal liabilities; 2dly, on specialties; 3dly, on records; and 4thly, on statutes.

IN DEBT.

*In debt on *simple contract* or legal liabilities, or for an escape, &c.(*d*), the general issue is *nil debet; "that the defendant doth not owe the said "sum above demanded, or any part thereof, in manner and form as the "plaintiff hath above complained against him,"*(*e*); or in the case of executors or administrators "*doth not detain*," and if *non-assumpsit* be pleaded, the plaintiff may sign judgment(*f*).[20] The language of this plea puts in issue the existence of the debt at the time of bringing the action, and consequently any matter may be given in evidence under this plea, which shews that nothing was due at that time, as performance or a release, or other matter in discharge of the action(*g*). It has even been held that as the plea of *nil debet* is in the present tense, the statute of limitations may be given in evidence under the general issue(*h*);[21] but this doctrine seems questionable, and the practice is to plead the statute in debt as well as *assumpsit*(*i*), and a tender must be pleaded specially(*j*); and a set-off must, as in assumpsit, be either pleaded or notice thereof given.

[*476]

(*d*) Waites *v.* Briggs, Salk. 565.—Pope *v.* Jones, 1 Saund. 38.

(*e*) See the precedent, post. 2 Vol. 507.

(*f*) Perry *v.* Fisher, 6 East, 549.—Bac. Ab. Pleas, I.

(*g*) Com. Dig. Pleader, 2 W. 16.—Paramore *v.* Johnson, 1 Lord Raym. 556.—S. C. 12 Mod. 376.—Draper *v.* Glassop, 1 Ld. Raym. 153. *acc.*—Gilb. Debt. 434. 443. *semb. contr.*

(*h*) Anon., 1 Salk. 278.—Draper *v.* Glassop, 1 Ld. Raym. 153.—1 Saund. 283. n. 2.—Com. Dig. Pleader, 2 W. 16.—2 Saund. 63. a.

(*i*) 1 Saund. 283. n. 2.—2 Saund. 63. n. 6.—Peake, L. Ev. 2d ed. 271.—Mr. J. Lawrence's opinion in Lee *v.* Clarke, 2 East, 336. has been considered as supporting the decision in Draper *v.* Glassop, 1 Ld. Raym. 153.; but note, his observation applied only to *penal* actions, in which the statute may be given in evidence under the general issue. 2 Saund. 63. b. c. n. 6.—*See the precedent*, post. 2 Vol. 518.

(*j*) See the precedent, post. 2 Vol. 508.

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(20) Acc. *Brennan* v. *Egan*, 4 *Taunt.* 164.

(21) Vide *Lindo* v. *Gardner*, 1 *Cranch*, 343. *Id.* Appendix, 465.

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[*477] In debt on a *specialty* there is a material distinction between those cases in which the deed is *only inducement to the action, and matter of fact the foundation of it, and those in which the deed itself is the foundation, and the fact merely inducement. In the former case, as in debt for rent due on an indenture of lease, though the plaintiff has declared setting out the indenture, yet as the fact of the subsequent occupation gives the right to the sum demanded, and is the foundation of the action, and the lease is mere inducement, the defendant may plead *nil debet*(*k*):[22] and for the same reason this plea is proper in debt for an escape(*l*),[23] or on a *devastavit* against an executor(*m*):[24] the judgment in these actions being merely inducement, and the escape or *devastavit* the foundation of the action(*n*). The plea of *nil debet* in these cases puts the plaintiff on proof of the whole of the allegations in the declaration, and under it he may give in evidence an eviction(*o*), payment, or a release, &c. as on a plea of *nil debet* to debt on simple contract; but in debt for rent on an indenture of lease, the defendant cannot, under the plea of *nil debet*, give in evidence that the plaintiff had *no estate* in the tenements; because if he had pleaded that specially, the plaintiff might have replied the indenture, and estopped him(*p*). In debt for rent on a parol lease, *non dimisit* may be pleaded(*q*), but not in debt for rent on an indenture, even by an assignee of the lease(*r*). And *rien en*

[*478] *arrere*, *it is said, is not a sufficient plea, without concluding *and issent nil debet*(*s*); and it is optional in the defendant either to *plead* an eviction, or to give it in evidence upon *nil debet*, though in covenant he must plead it(*t*).

When the deed is the foundation of the action, although extrinsic facts are mixed with it, the defendant must plead *non est factum*, and

(*k*) Gilb. C. P. 62.—Warren v. Consett, Ld. Raym. 1500.—Atly et al. *v.* Parish et al., 1 New Rep. 104.—1 Saund. 276. n. 1, 2.—Salmon *v.* Smith, 1 Saund. 202. 211.—2 Saund. 297. n. 1.

(*l*) Waites *v.* Briggs, 2 Salk. 565.—1 Saund. 38. n. 3.

(*m*) Wheatley *v.* Lane, 1 Saund. 219. Carth. 2.

(*n*) Id. ibid.—Com. Dig. Pleader, 2 W. 16.—2 Saund. 344. n. 2.—1 Saund. 218. n. 4. 219. n. 7.

(*o*) 1 Saund. 204. n. 2.

(*p*) Trevivan *v.* Lawrence et al., 1 Salk. 277.—Blake *v.* Foster, 8 T. R. 487.—From the case in 5 T. R. 4.—Syllivan *v.* Stradling, 2 Wils. 208. 213. it appears that the tenant is estopped from disputing the title, though the demise was by parol.

(*q*) Gilb. Debt, 438.

(*r*) Id. 436.—See the cases and arguments, Taylor *v.* Needham, 2 Taunt 278, &c.

(*s*) Id. 440. cites Bro. tit. Debt, 113. Keilw. 153.—bnt see Warner et al. *v.* Theobald, Cowp. 588. and the precedent, post. 2 Vol. 534.

(*t*) 1 Saund. 204. n. 2.—See the precedent, post. 2 Vol. 534.

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(22) Vide *Bullis* v. *Giddens*, 8 *Johns. Rep.* 83.

(23) Vide *Minton* v. *Woodworth & Ferris*, 11 *Johns. Rep.* 474.

(24) Vide *Bullis* v. *Giddens*, 8 *Johns. Rep.* 83.

nil debet is not a sufficient plea(*u*):[25] as in debt for a penalty on articles of agreement(*v*), or on a bail bond(*w*), or on a bond setting out the condition and breach(*x*). And if in these cases *nil debet* be pleaded, the plaintiff should demur, for if he do not, he will have to prove every allegation in his declaration, and the defendant will be at liberty to avail himself of any ground of defence which in general may be taken advantage of under the latter plea(*y*).

In *debt on bond* or *other specialty*, when the deed is the foundation of the action, the plea of *non est factum* is proper,[26] either when the plaintiff's *profert* cannot be proved as stated(*z*), or the deed was not executed, or not duly stamped(*a*), or varies from the declaration either by a mistatement, or even on account of a covenant, constituting a condition precedent not having been stated(*b*). But he must plead in abatement that another co-obligor *ought to be joined(*d*). And the defendant [*479] may give in evidence under the plea of *non est factum*, that the deed was delivered to a third person as an *escrow*, (though it is more usual to plead the fact) (*e*); or that it was *void* at common law *ab initio*(*f*), as that it was obtained by fraud(*g*),[27] or made by a married *woman*(*h*),[28] or

(*u*) 1 Saund. 38. n. 3.—2 Saund. 187. a. n. 2.—Warren *v.* Consett, Ld. Raym. 1500. The instance of debt for rent seems to be an exception.

(*v*) Id. ibid.—Warren *v.* Consett, 2 Ld. Raym. 1500.—S. C. 2 Stra. 778.—S. C. 1 Barnard, K. B. 15.—S. C. 8 Mod. 107. 323. 382.

(*w*) Id. ibid.—Fortesc. 363. 367.—2 Saund. 187. a.

(*x*) 2 Saund. 187. a. n. 2.

(*y*) Rawlins et al. *v.* Danvers, 5 Esp. Rep. 38.—2 Saund. 187. a. n. 2.—2 Wils. 10.

(*z*) Smith et al. *v.* Woodworth, 4 East, 585.—Com. Dig. Pleader, 2 W. 18.

(*a*) Robinson *v.* Drybrough, 6 T. R. 317.

(*b*) Howell *v.* Richards, 11 East, 633.—Goldie *v.* Shuttleworth, 1 Camp. 70.—Com. Dig. Pleader, 2 W. 18.

(*d*) Ante, 29. Co. Lit. 283. a.

(*e*) See the precedent, post. 2 Vol. 510.—Stoytes *v.* Pearson, 4 Esp. Rep. 255.—Bushell *v.* Pasmore, 6 Mod. 217. Gifford *v.* Perkins, 1 Sid. 450.—Watts *v.* Rosewell, 1 Salk. 274.—2 Rol. Ab. 683.—Twyford *v.* Bernard, T. Raym. 197.—Com. D. Pleader, 2 W. 18.—Coare *v.* Giblett, 4 East, 94.

(*f*) Whelpdale's Case, 5 Co. 119.—Collins *v.* Blantern, 2 Wils. 341. 347.

(*g*) Lambert v. Atkins & another, 2 Campb. 272, 3.—See the precedent, post. 2 Vol. 511.

(*h*) Com. Dig. Pleader, 2 W. 18.—

(25) Vide *Minton* v. *Woodworth & Ferris*, 11 *Johns. Rep.* 476. But the plaintiff must demur, and cannot object to it after verdict. *Meyer* v. *M'Lean*, 1 *Johns. Rep.* 509. S. C. 2 *Johns Rep.* 183. *Bullis* v. *Giddens & Brown*, 8 *Johns. Rep.* 83.

(26) This plea only puts the deed in issue, and the plaintiff need not prove the other averments in his declaration. *Gardner* v. *Gardner*, 10 *Johns. Rep.* 47. post. 482.

(27) As that a different instrument was substituted instead of the one which the defendant supposed he was executing. *Van Valkenburg* v. *Rouk*, 12 *Johns. Rep.* 337. So, the defendant may give in evidence under non est factum, that he was made to sign the instrument when so drunk as not to know what he did. *Phillips' Ev.* 128. *Pitt* v. *Smith*, 3 *Campb.* 33. Ante, 470. u. *Dorr* v. *Munsell*, 13 *Johns. Rep.* 430.

(28) Contra, *Marine Ins. Co. of Alexandria* v. *Hodgson*, 6 *Cranch*, 219. per Livingston, J.

IN DEBT. a lunatic(*i*), &c.;[29] or that it became void after it was made, and before the commencement of the action(*j*), by erasure, alteration, addition, &c.(*k*). But matter which shews that the deed was merely *voidable*(*l*) on account of infancy(*m*)[30] or duress(*n*), or that it was *void by act of parliament*(*o*) in respect of usury(*p*), gaming(*q*), &c.; or that a bail bond was not made according to the 23 Hen. VI. c. 9, must in general be pleaded. In the case of a bail bond indeed, if it appear upon the face of the declaration that the bond has been made contrary to the provisions of the statute, the defendant may demur or move in arrest of
[*480] judgment after verdict upon a plea of *non est factum*(*r*). *But the defendant in an action on a bail bond cannot under the plea of *non est factum* take advantage of the objection that the action is brought in the wrong court(*rr*). And a specialty cannot in general be avoided by usury, &c. appearing merely in evidence, or on the face of the condition, but the facts must be pleaded specially, and the defendant cannot demur(*s*). The defendant must also plead specially payment of a bond, &c.[31] either on, or after(*t*) the day, and where no interest has been paid

James v. Fowks, 12 Mod. 101.—Cole *v.* Delacon, 2 Keb. 228.—2 Stra. 1104. n.

(*i*) Yates *v.* Boen, Stra. 1104.—Thompson *v.* Leach, 2 Salk. 675.—Beverly's Case, 4 Co. 123.—S. C. Lord Raym. 315. ante.

(*j*) Whelpdale's Case, 5 Co. 119. b. acc.—Anon., Sav. 71. *semb. contr.*

(*k*) Matthewson's Case, 5 Co. 23.—Whelpdale's Case, 5 Co. 119. b.—B. N. P. 172.—Co. Lit. 35. b. n. 6, 7. 225. b.—Harpur's Case, 11 Co. 27, 8.

(*l*) Whelpdale's Case, 5 Co. 119. b. Gilb Debt, 437.—Thompson *v.* Leach, 2 Salk. 675.—S. C. 1 Ld. Raym. 315.

(*m*) Darby *v.* Boucher, 1 Salk. 279. Zouch d. Abbot et. al. *v.* Parsons, 3 Burr. 1805. 1794.—2 Inst. 473.—post. 2 Vol. 514.

(*n*) Whelpdale's Case, 5 Co. 119. b. 2 Inst. 482, 3.—Com. Dig. Pleader, 2 W. 19, 20.—Bac. Ab. Pleader, G. 3. tit. Duress, D. Bul. Ni. Pri. 171.—9 Vin. 322.—2 Saund. 155. n. 4.—Post. 2 Vol. 512.

(*o*) Whelpdale's Case, 5 Co. 119. b. 2 Saund. 155. a. n. 4.—Paxton & others *v.* Popham & M'Arthur, 9 East, 408. 416.—Wigg & another *v.* Shuttleworth, 13 East, 87.

(*p*) Lord Bernard *v.* Saul, 1 Stra. 498.—Com. Dig. Pleader, 2 W. 23.—Post. 2 Vol. 515.

(*q*) Com. Dig. Pleader, 2 W. 26.—Mazzinghi *v.* Stephenson, 1 Campb. 291.

(*r*) 1 Saund. 161. n. 1.—Samuel *v.* Evans, 2 T. R. 569.—2 Saund. 60. n. 3.

(*rr*) Wright *v.* Walmsley, 2 Campb. 396.

(*s*) 1 Saund. 295. b.

(*t*) 4 Ann. c. 16.—Post. 2 Vol. 522.

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(29) Vide ante, 470. n. 6.

(30) Vide *Marine Ins. Co. of Alexandria* v. *Hodgson*, 6 *Cranch*, 219.

(31) In Pennsylvania, matters that show fraud or want of consideration, may be given in evidence under a plea of payment, notice being given to the adverse party. *Baring* v. *Shippen*, 2 *Binney*, 154. Upon the plea of payment to debt on bond, it is competent for the defendant to give in evidence, that wheat was delivered to the plaintiff on account of the bond, at a certain price; and that the defendant assigned sundry debts to the plaintiff, part of which were collected by the plaintiff, and part lost by his indulgence or negligence. *Buddicum* v. *Kirk*, 3 *Cranch*, 293.

on the bond after the time mentioned in the condition, and there is no other circumstance to negative the presumption of payment on that day, arising from twenty years having elapsed, then the plea may be *solvit ad diem*, but otherwise it should be *solvit post diem*(*u*). So performance,[32] or any matter in excuse of it, as *non damnificatus* to a bond of indemnity(*v*);[33] no award to an arbitration bond, or to a bail bond, no process to arrest the defendant, &c.(*w*); and matters in *discharge* of the action, as a tender, set-off(*x*), accord and satisfaction before breach(*y*),[34] former recovery, release, and foreign attachment(*z*), must be pleaded in this action. IN DEBT.

In debt or *scire facias* on a *record*, when the record is the foundation of the action and not merely inducement, the plea of *nil debet* is insufficient and bad on demurrer(*a*),[35] and *nul tiel record* is the proper *pleas [*481] where there is either no record, or where there is a variance in the statement of it(*b*);[36] but as this plea merely puts in issue the existence of the record as stated, any matter in discharge must be pleaded, such as payment, which is given by the 4th Ann. c. 16. and accord and satisfaction is not a sufficient plea(*c*); and as it is a maxim in law, that there

(*u*) Moreland *v.* Bennett, 1 Stra. 652.—And see Hudson *v.* Stalwood et al., Rep. T. Hardw. 133. as to these pleas in general.

(*v*) 1 Bos. & Pul. 640. n. a.—Kaye *v.* Waghorne, 1 Taunton, 428.—Post. 2 Vol. 528, 9.

(*w*) Say. 116.

(*x*) 8 Geo. 2. c. 24. s. 5.—Bul. Ni. Pri. 179.—Hutchinson *v.* Sturges, Willes, 262. 3.

(*y*) This is no plea to debt on a money bond, &c. See Scholey et al. *v.* Mearns, 7 East, 150.—Com. Dig. Accord and Satisfaction.

(*z*) 1 Saund. 67. a. n. 1.—Co. Ent. 139. b. 142. a.—Lib. Plac. 160. pl. 113. 2 Lib. Intrat. 164.—Anon., 2 Show. 374. M'Daniel *v.* Hughes, 3 East, 378.

(*a*) Ante, 478.—Mildmay *v.* Smith et al. 2 Saund. 344.—Jones *v.* Pope, 1 Saund. 38.—Solomons *v.* Lyon, 1 East, 372.—2 Wilson, 10.

(*b*) Com. Dig. Pleader, 2 W. 13. & Tit. Record, C.—Coy *v.* Hymas, Stra. 1171.—1 Saund. 92. n. 3. Gilb. Debt, 444.—Marsh *v.* Cutler, 3 Mod. 41.

(*c*) Drake *v.* Mitchell et al., 3 East, 251.—Scholey et al. *v.* Mearns, 7 East, 150.

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(32) Vide 2 Vol. 198.

(33) To an action of debt for the penalty of a bond given to a sheriff, as security for the liberties of the gaol, non damnificatus is not a good plea. *Woods* v. *Rowan & Coon*, 5 *Johns. Rep.* 42. But nil debet is. *Minton* v. *Woodworth & Ferris*, 11 *Johns. Rep.* 474. *Bullis* v. *Giddens & Brown*, 8 *Johns. Rep.* 82. ante, 477.

(34) An assignment of debts and balances of account cannot be pleaded as an accord and satisfaction to an action of debt on a bond. *Buddicum* v. *Kirk*, 3 *Cranch*, 293.

(35) Vide *Bullis* v. *Giddens & Brown*, 8 *Johns. Rep.* 83. The plaintiff may treat such plea as a nullity, but if he take issue upon it and go to trial, he cannot object to it on motion in arrest of judgment. *Rush* v. *Cobbett*, 2 *Johns. Cas.* 256. *Felter* v. *Mulliner*, 2 *Johns. Rep.* 181.

(36) As to the proper plea in an action on the judgment of a court in another state, vide *Phillips' Ev. Dunlap's Ed.* 254. n. (*a*). ante, 98. n. (30). Vide *Mills* v. *Duryee*, 7 *Cranch*, 484.

In debt. can be no averment in pleading against the validity of a record, though there may be against its operation, therefore no matter of defence can be pleaded which existed anterior to the recovery of the judgment(*d*)[37] but the defendant may plead a release(*e*), or that the debt was levied by a fi. fa.(*f*) or elegit(*g*), or ca. sa.(*h*). An executor may plead *plene administravit*(*i*), or to debt on a judgment suggesting a devastavit, he may plead not guilty(*j*); and a discharge under the lord's act, is an effectual bar to an action of debt on a judgment(*k*). The pleadings in debt or *scire facias* on a recognizance of bail, have already been sufficiently pointed out(*l*).

In debt upon *statute*, *nil debet* is the proper plea,[38] though not guilty would in some cases suffice(*m*). The statute of limitations may in [*482] such action be given in evidence under the general *issue(*n*); but a former recovery by another person, cannot(*o*).

In covenant. In COVENANT there is strictly no *general* issue, for the plea of *non est factum*, only puts the deed in issue[39] as in debt on a specialty(*p*), and not the breach of covenant or any other matter of defence; and a plea of *non infregit conventionem* is bad on demurrer, though it would be aided after verdict(*q*), and *rien in arrear* is also a bad plea in this action(*r*). The defendant must therefore plead specially every matter which it would be necessary to plead in debt on a bond or other specialty(*s*), as that the deed was voidable, by infancy,[40] or illegality of the consideration; however under the plea of *non est factum*, the defendant may on the trial avail himself of a variance in the statement of the deed either

(*d*) Ante, 354.

(*e*) Bac. Ab. Tit. Release.

(*f*) 4 Leon, 194.—Rooken *v.* Wilmor, Sav. 123.—Vesey *v.* Harris et ux., Cro. Car. 328.—Clift. 675.

(*g*) Dyer, 299. b.—Glascock *v.* Morgan, 1 Lev. 92.

(*h*) Off. Brev. 300.—Scott *v.* Peacock, 1 Salk. 271.—Wentworth *v.* Squib, Lutw. 641.

(*i*) Richards *v.* Newton, 1 Ld. Raym. 3.—S. C. 4 Mod. 296.—S. C. Salk. 296. S. C. Skin. 565.—Hope *v.* Bague et al., 3 East, 2.

(*j*) Coppin *v.* Carter, 1 T. R. 462.

(*k*) 32 Geo. 1. c. 28. s. 20.

(*l*) Tidd's Prac. 3d edit. 1044. 4th edit. 1021, 2.

(*m*) Coppin *v.* Carter, 1 T. R. 462. Bac. Ab. Pleas, I.—Com. Dig. Pleader, 2 S. 11, 17.—See the precedent, post. 2 Vol. 507.

(*n*) 2 Saund. 63. b.—Lee *v.* Clarke, 2 East, 336.

(*o*) Bredon *v.* Harman, Stra. 701.—Bac. Ab. Action, qui tam, D.—See the precedents, post. 2 Vol. 538.

(*p*) Ante, 478, 9.

(*q*) Hodgson *v.* The East India Company, 8 T. R. 278.—Walsingham *v.* Comb, 1 Lev. 183.—S. C. 1 Sid. 289.—Com. Dig. Pleader, 2 V. 5.—Pitt *v.* Russel, 3 Lev. 19.

(*r*) Warren et al. *v.* Theobald, Cowp. 588.—Post 2 Vol. 534.

(*s*) Com. Dig. Pleader, 2 V. 4, &c.

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(37) The rule is the same, whether the judgment were obtained by confession, or default, or upon plea. *Mac Farland* v. *Irwin*, 8 *Johns. Rep.* 77.

(38) Vide *Burnham* v. *Webster*, 5 *Mass. Rep.* 270. *Stilson* v. *Toby*, 2 *Mass. Rep.* 521, 522.

(39) Vide *Kane* v. *Sanger*, 14 *Johns. Rep.* 89.

(40) Vide *Marine Ins. Co. of Alexandria* v. *Hodgson*, 6 *Cranch*, 219.

in respect of a mistatement, or of the omission of a covenant qualifying the contract(*t*); and this although the defendant has agreed to admit on the trial the due execution of the deed(*u*); and if the plaintiff omit to state a condition precedent, the defendant may crave oyer, and set out the deed and demur(*v*). In an action of covenant upon a lease, for the breach of a covenant running with the land, if the plaintiff claim as heir, devisee, or assignee, &c. of the lessor, the defendant may traverse the derivative title of the plaintiff, or admitting that the lessor had some legal estate in *the premises, at the time of the demise, the defendant may plead that such lessor was seised, &c. of a different estate from that stated in the declaration, and thereby shew that the derivative title of the plaintiff does not exist; but the defendant is estopped from denying generally, that the lessor was seised as stated in the declaration(*tt*); the defendant must also plead specially performance of the covenant(*uu*);[41] or excuse of performance, as by eviction(*vv*), or by non-performance by the plaintiff of a condition precedent(*w*), or by a surrender of the lease, &c.(*x*); or admitting the breach to have been committed, the defendant must plead specially that he is discharged(*y*); as by his bankruptcy, if the action be for a money demand due before the act of bankruptcy(*z*), or by accord and satisfaction after breach(*a*); arbitrament(*b*), former recovery, foreign attachment, set-off, release, &c.(*c*)

IN COVENANT.

[*483]

In an action of ACCOUNT, there is no general issue. The defendant may plead infancy(*d*), and when sued as bailiff or receiver in fact, he may plead that he was not bailiff or receiver(*e*); but when sued as te-

IN ACCOUNT.

(*t*) Pitt *v.* Green, 9 East, 188.—Vernon et al. *v.* Jefferys, Stra. 1146.—Howell *v.* Richards, 11 East, 639.

(*u*) Goldie *v.* Shuttleworth, 1 Camp. 70.

(*v*) Com. Dig. Pleader, 2 V. 3, 4.—Howell *v.* Richards, 11 East, 639.

(*tt*) Blake *v.* Foster, 8 T. R. 487.—Palmer *v.* Ekins, 2 Stra. 817.—Goram *v.* Sweeting, 2 Saund. 207. 418. n.—Andrew *v.* Pearce, 1 New Rep. 160.—See the precedents, post. 2 Vol. 548.

(*uu*) Com. Dig. Pleader, 2 V. 13.—Bul. N. P. 165.—Shum et al. *v.* Farrington, 1 B. and Pul. 640.—See the precedents, Post. 2 Vol. 544.

(*vv*) 1 Saund. 204. n. 2.—Wotton *v.* Hele, 2 Saund. 176.—Stevenson *v.* Lambard, 2 East, 576. Post. 2 Vol. 534.

(*w*) Glazebrook *v.* Woodrow, 8 T. Rep. 366. Post. 2 Vol. 532, 3.

(*x*) Thursby et al. *v.* Plant, 1 Saund. 235.

(*y*) Com. Dig. Pleader, 2 V. 8.

(*z*) Charlton *v.* King, 4 T. R. 156.

(*a*) Kaye *v.* Waghorne, 1 Taunton, 428.

(*b*) Peytoe's Case, 9 Co. 79.—Com. Dig. Pleader, 2 V. 8, 9.

(*c*) Com. Dig. Pleader, 2 V. 8, &c.—Ante, 480.

(*d*) Bac. Ab. Accompt, E.—Com. Dig. Accompt, E. 5.

(*e*) Id. ibid.

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(41) Where the plaintiff assigns a particular breach, a general plea of performance, in the words of the covenant, is bad on general demurrer: as, where the covenant was to convey a farm, and the plaintiff assigns for breach, that before executing the conveyance, the defendant removed from the premises a cider-mill which was annexed to the freehold, the defendant must answer particularly the breach assigned. *Bradley* v. *Osterhoudt*, 13 *Johns. Rep.* 404.

IN ACCOUNT. nant in common, under the statute 4 Ann. c. 16. if the declaration be
[*484] properly framed, a plea that the defendant is not bailiff or *receiver would be insufficient(*ee*): and if the defendant means to deny the plaintiff's claim, he should traverse the tenancy in common. The defendant may also plead that he hath accounted, or a release, arbitrament, bond given in satisfaction, and the statute of limitations(*f*); but other matters, which admit that the defendant was once chargeable and accountable, cannot in general be pleaded in bar to the action, but must be pleaded before the auditors(*g*).

IN DETINUE. In DETINUE the general issue is, *non detinet*(*h*), which puts in issue the facts of the plaintiff's property or possession, and the defendant's withholding the chattels, but under this plea the defendant cannot shew that the goods or other chattels were pledged to him, but must plead it specially; he may however give in evidence a gift from the plaintiff or any other fact to prove that the property in the chattels is not the plaintiff's(*i*).

BY OR AGAINST EXECUTORS, &c. In each of these actions, when brought by an *executor or administrator*, the defendant may not only avail himself of either of the before-mentioned defences, but may in some cases deny the plaintiff's representative character.[42] Where letters of administration have been obtained in an inferior diocese, the defendant may plead in bar that there were *bona notabilia*, or may give that fact in evidence under the plea of *ne unques* executor(*j*). In an action against an executor or administra-
[*485] tor(*k*), the defendant may, in addition to any *of the before-mentioned defences, plead *ne unques* executor(*l*) or administrator(*m*),[43] or that no assets have come to his hands(*n*), and he must specially, *plene administravit* or *plene administravit præter* a sum not sufficient to satisfy debts of higher nature, as bonds outstanding, or judgments recovered against the deceased, or the defendant, by third persons(*o*),[44] or *plene administravit*

(*ee*) Wheeler *v.* Horne, Willes, 208.
(*f*) Bac. Ab. Accompt, E.—Com. Dig. Accompt, E. 4, 5, 6.
(*g*) Id. ibid. Godfrey *v.* Saunders, 3 Wils. 73.
(*h*) See the form, Post. 2 Vol. 543.
(*i*) Co. Lit. 283. a.—See the several pleas.—Com. Dig. Pleader, 2 X. 3.
(*j*) 1 Saund. 274. n. 3.
(*k*) See the pleadings in general, Com. Dig. Pleader, 2 D. 2.
(*l*) Com. Dig. Pleader, 2 D. 7.—Post. 2 Vol. 498.
(*m*) Post. 2 Vol. 499.—Com. Dig. Pleader, 2 D. 7. 13.
(*n*) Com. Dig. Pleader, 2 D. 7.
(*o*) 1 Saund. 330 to 336. *in notis*, Com. Dig. Pleader, 2 D. 9.—Lady Wil-

(42) But unless the plaintiff's right to sue as executor or administrator, be put in issue by the defendant's plea, it will be deemed to have been admitted. *M'Kimm et al.* v. *Riddle*, 2 *Dallas*, 100. *Champlin* v. *Tilley & Tilley*, 3 *Day's Rep.* 303.

(43) In *Jewett* v. *Jewett*, 5 *Mass. Rep.* 275, although it was decided that it was a good plea in bar, by the law of Massachusetts, for an administrator, that he had been removed from office since the commencement of the suit against him, yet it was admitted, that by the common law, a determination of his power pending the action, did not defeat it.

(44) Vide *Douglas* v. *Satterlee*, 11 *Johns. Rep.* 16.

travit except a sum ready to be paid to the plaintiff(*h*); and the defendant cannot avail himself of either of those defences, under the general issue(*q*); but under the general plea of *plene administravit*, an executor or administrator, may give in evidence a retainer for a debt due to himself, though it is in general advisable to plead it(*r*). Where the executor or administrator has no ground on which to dispute the plaintiff's debt, it is in general advisable not to deny it(*s*); for if he do and the plaintiff on the trial succeeds in proving his demand, the defendant will be liable to costs, although he may succeed on the plea of *plene administravit*(*t*).[45]

BY OR AGAINST AN EXECUTOR, &c.

In an action against an *heir* or *devisee*(*u*), the defendant may not only plead any matter which might have been pleaded by the ancestor or devisor, but may also either deny the character in which he is sued: or admitting it, may plead that he has *nothing by descent* or by *devise*, either generally(*v*) or specially, viz. that he has nothing *but a reversion after an estate for life or years(*tt*), or that he has paid debts of an equal or superior degree, to the amount of the assets descended or devised, or that he *retains* the assets to satisfy his own debt, of equal or superior degree, or debts of a superior degree, due to third persons(*uu*). The *heir*, if an *infant*, may also pray that the parol may demur, till he is of full age(*vv*).

AGAINST AN HEIR OR DEVISEE.

[*486]

The *general issue* in an action on the CASE is, "*that the defendant is* "*not guilty of the premises* (*or* "grievances"), *above laid to his charge*, "*in manner and form as the said plaintiff hath above thereof complained* "*against him, and of this he puts himself upon the country*, &c." In *trespass* it is similar, except that the word "*force*" is substituted for "*wrong*," in the commencement, and "*trespasses*," for "*premises*" or "*grievances*."

IN CASE.

It was held by Lord Mansfield(*w*), that "there is an essential difference between actions of trespass, and actions on the case. The former are actions *stricti juris*, and therefore a former recovery, release, or sa-

son *v.* Wigg and another, 10 East, 313: Wills *v.* Fydell and Betts, ib. 315.—Post. 2 Vol. 499 to 506.

(*p*) Post. 2 Vol. 500.

(*q*) Co. Lit. 283. a.

(*r*) Co. Lit. 283. a.—1 Saund. 333. n. 5.—Post. 2 Vol. 548.

(*s*) Dearne *v.* Grimp et al. 2 Bla. Rep. 1275. Post. 2 Vol. 499. n. a.

(*t*) Hindsley *v.* Russell, 12 East, 232.

(*u*) See the pleadings in general, Com. Dig. Pleader, 2 E.

(*v*) Com. Dig. Pleader, 2 E. 3.—Post. 2 Vol. 521.

(*tt*) Com. Dig. Pleader, 2 E. 3.

(*uu*) Com. Dig. Pleader, 2 E. 3.

(*vv*) Com. Dig. Pleader, 2 E. 3.—Post. 2 Vol. 520.

(*w*) Bird *v.* Randall, 3 Burr. 1353.—1 Black. Rep. 388. S. C.—Barker *v.* Dixon, 1 Wils. 45.—2 Saund. 155. a. n. 4. Sed quære the ground of distinction.

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(45) In debt or assumpsit against an executor, the plea of non est factum or non assumpsit is admission of a will of which the defendant is executor; but it is otherwise where the action is for a demand on which the testator was not himself liable; as for a legacy. *Hantz* v. *Sealy*, 6 *Binney*, 405.

IN CASE. tisfaction, cannot be given in evidence, but must be *pleaded*, but an action on the case is founded upon the mere justice and conscience of the plaintiff's case, and in the nature of a bill in equity, and in effect is so; and therefore a former recovery, release, or satisfaction, need not be pleaded, but may be given in evidence;[46] for whatever will, in equity and conscience according to the existing circumstances, preclude the plaintiff from recovering, may in *case* be given in evidence by the de-
[*487] fendant, because the plaintiff *must recover upon the justice and conscience of his case and on that only." In an action therefore on the case, under the plea of not guilty, the defendant may not only put the plaintiff upon proof of the whole charge, contained in the declaration, but may give in evidence any justification or excuse of it, or shew a former recovery, release, or satisfaction(*y*); thus in an action for a malicious indictment, or arrest in a civil action, the defendant may, under the general issue shew that there was sufficient or probable cause for the proceeding complained of(*z*); and this is now more usual, though formerly a special plea was adopted(*a*); so in case for obstructing ancient lights, a custom of London to build on an ancient foundation to any height, may be given in evidence by the defendant(*b*); and though a license must be pleaded in trespass, yet it is the practice to admit it in evidence in an action on the case(*c*). But in an action for *words* or a *libel*, the defendant cannot under the general issue give in evidence the *truth* of the words even in mitigation of damages, but must justify specially(*d*),[47] which plea should not in general be put on the record, unless the defendant be satisfied that he can support it in evidence, because if pleaded unsuccessfully, it would probably materially increase the damages, though it would not make any difference in the costs(*e*). But where
[*488] the defence is, that the *libel or words, were published or spoken not in the malicious sense imputed by the declaration, but in an innocent sense, or upon an occasion which warranted the publication, this may be given in evidence under the general issue, because it proves that the

(*y*) Id. ibid.—Birch *v.* Wilson, 2 Mod. 276.—Newton *v.* Creswick, 3 Mod. 166.—Anon. Com. Rep. 273.—Bradley *v.* Windham, 1 Wils. 44.—Brown *v.* Best, 175.—2 Saund. 155. a.

(*z*) Newton *v.* Creswick, 3 Mod. 166.

(*a*) Webb *v.* Welles, 1 Rol. Rep. 438.

(*b*) Anon. Com. Rep. 273.—Bradley *v.* Windham, 1 Wils. 45. Brown *v.* Best, 175.—Birch *v.* Wilson, 2 Mod. 274.

(*c*) Winter *v.* Brockwell, 8 East, 308.—Smith *v.* Feverell, 2 Mod. 6, 7.

(*d*) See the precedents, post. 2 Vol. 551 to 555.—1 Saund. 130. n. 1.—Smith *v.* Richardson, Willes. 20.—Underwood *v.* Parks, 2 Stra. 1200.—Curry *v.* Walter, 1 Bos. & Pul. 525.—2 Bos. & Pul. 225. n. a.—J'Anson *v.* Stuart, 1 T. R. 748.—Com. D. Pleader, 2 L.—Selw. N. P. 1047. 1167. but he may prove a common report in mitigation, as shewing no actual malice. Earl of Leicester *v.* Walton, 2 Campb. 251.

(*e*) Halford *v.* Smith, 4 East, 567.

(46) Vide *Jones* v. *Scriven*, 8 *Johns. Rep.* 453.

(47) Vide *Sheppard* v. *Merrill*, 13 *Johns. Rep.* 475.

defendant is not guilty of the *malicious* slander charged in the declaration; as if the words were spoken by the defendant as counsel, and were pertinent to the matter in question(*d*), or were written or spoken in confidence, and without malice, as when a master honestly and fairly gives the character of a servant to one who asks his character, under pretence of hiring him(*e*), or if the words were innocently read as a story out of a history(*f*), or were spoken through concern, or in a sense not defamatory(*g*); or the defendant may plead these matters; but it is now more usual to give them in evidence under the general issue(*h*). It is proper however to plead specially that the defendant only repeated the slander uttered originally by a third person(*i*).[48] By the statute 8 and 9 William III. c. 27. s. 6. it was enacted, that no retaking on fresh pursuit shall be given in evidence on the trial of any issue, in any action of escape, against the marshal, &c. unless the same shall be specially pleaded, nor shall any special plea be received or allowed, unless oath be first made in writing by the defendant, and filed in the proper office, that the prisoner for whose escape such action is brought, did escape, without his consent, privity, or knowledge(*ii*).[49] In general [*489] when the defence consists of matter of law, though the defendant is at liberty to give the matter in evidence under the general issue, he may plead it specially(*j*); and this is frequently advisable when there is no

(*d*) 1 Saund. 130. n. 1.—Brook *v.* Montague, Cro. Jac. 90.—Earl of Shrewsbury *v.* Stanhop, Pop. 69.—Selwn. N. P. 1047. 1167.

(*e*) Bul. N. P. 8.—Weatherston *v.* Hawkins, 1 T. R. 110.—Curry *v.* Walter, 1 Bos. & Pul. 525.

(*f*) Brook *v.* Montague, Cro. Jac. 1.

(*g*) Lord Cromwell's Case, 4 Co. 12.—Poph. 66. S. C.

(*h*) 1 Saund. 130. n. 1.—Earl of Leicester *v.* Walter, 2 Campb. 251.

(*i*) Davis *v.* Lewis, 7 T. Rep. 17.—Maitland et al. *v.* Goldney, 2 East, 426.—Post. 2 Vol. 554. and see another instance where a special plea may be advisable. Curry *v.* Walter, 1 B. & P. 525.

(*ii*) Bonafons *v.* Walker, 2 T. R. 126.—Tilden *v.* Palfriman, 3 Salk. 150. How to plead, Chambers *v.* Jones, 11 East, 406.

(*j*) Birch *v.* Wilson, 2 Mod. 274. 6. Newton *v.* Creswick, 3 Mod. 166.—Anon. Com. Rep. 273.—Bradley *v.* Windham, 1 Wils. 44.—Brown *v.* Best, 1 Wils. 175.—Doc. Pl. 203.—Pain *v.* Rochester et al. Cro. Eliz. 871.

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(48) It has been held that such plea was not admissible in an action for a libel. Cole v. *Lyon*, 10 *Johns. Rep.* 447, where the cases of *Davis* v. *Lewis*, & *Maitland* v. *Goldney*, were considered, and the application of the rule to written slander was denied, and Kent, Ch. J. observes, that it may well be questioned, whether even this rule as to slanderous words ought not to depend upon the quo animo with which the words, with the name of the author, are repeated. In the case of *The Earl of Leicester* v. *Walter*, 2 *Campb* 251, which was an action for a libel, Sir James Mansfield, C. J. allowed general suspicion and report to be given in evidence under the general issue.

(49) Vide *Laws N. Y. sess.* 36. *c.* 67. *s.* 23. to the same effect; with the addition of permitting the special matter to be given in evidence under a notice for that purpose, annexed to the general issue.

IN CASE. fact disputed, but only a point of law, which may be decided upon demurrer or on a writ of error, or where the plaintiff by his replication, would be compelled to admit one or more material facts in the plea, and would not be at liberty to reply *de injuria*, and consequently the defendant's proof rendered less difficult(*k*); thus in trover for a dog, the defendant may plead that E. F. was seised in fee and lord of a certain manor, and that he by warrant, appointed the defendant game-keeper, and that such warrant was duly entered with the clerk of the peace, and that a certain person not qualified by law to kill game, was using the dog for the destruction of game, wherefore the defendant took him, &c.; to which plea the plaintiff could not reply *de injuria*, generally, because that would put in issue the seisin in fee, and the warrant(*l*). So in case for an injury to a right of common, the defendant may plead as a justification, a right of common by grant to himself, or that he acted as servant to the owner of the soil seised in fee, and thereby materially lessen the evidence, which he would otherwise have to adduce on the trial(*m*).

[*490] *The statute of limitations is not guilty within *two* years, in an action for *verbal* slander *actionable in itself*(*n*), or within six years in any other action on the case(*o*); as for criminal conversation or debauching a daughter, &c.(*p*), and the statute must in this action be specially pleaded(*q*).

IN TROVER. In TROVER the general issue is *not guilty*, and it is not usual in this action to plead any other plea[50] except the statute of limitations, and a release, and the bankruptcy of the plaintiff may be given in evidence under the general issue(*r*). The defendant however is at *liberty* to plead specially any thing which admits the property in the plaintiff, and the conversion, but justifies the latter(*s*); also the statute of limitations(*t*), and a former recovery, &c.(*u*); but the bankruptcy of the plaintiff ought not to be pleaded(*v*).

(*k*) Birch *v.* Wilson, 2 Mod. 277.—Vernon *v.* Goodrich, 1 Stra. 5.—Jones *v.* Kitchen, 1 Bos. & Pul. 80.—Archbishop of Canterbury *v.* Kemp, Cro. Eliz. 539.—Taylor *v.* Eastwood, 1 East, 217.—Miles *v.* Williams et ux. 1 P. W. 258, 9.

(*l*) Wingfield *v.* Stratford et al. 1 Wils. 315.—Archbishop of Canterbury *v.* Kemp, Cro. Eliz. 539.—Jones *v.* Kitchin, 1 Bos. & Pul. 80.—Taylor *v.* Eastwood, 1 East, 217.

(*m*) Birch *v.* Wilson, 2 Mod. 274. 7.—Archbishop of Canterbury *v.* Kemp, Cro. Eliz. 539.—Greenhow *v.* Ilsley et al. Willes. 619, 620.—Vernon *v.* Goodrich, 1 Stra. 5.

(*n*) Sanders *v.* Edwards, 1 Sid. 95.—Sir W. Jones, 196.

(*o*) 21 Jac. 1. c. 16. s. 3.

(*p*) Post. 2 Vol. 313. n. r. 550.

(*q*) Cowper *v.* Towers, 1 Lutw. 99.—2 Saund. 63. n. 6.

(*r*) Webb *v.* Fox et al. 7 T. R. 391.

(*s*) Strode *v.* Birt, 4 Mod. 424.—Vernon *v.* Goodrich, 1 Stra. 5.—Com. Dig. Pleader, E. 14.—Archbishop of Canterbury *v.* Kemp, Cro. Eliz. 539.—Ante, 489. The case in 2 Lord Raym. 868. is erroneous as to this point.

(*t*) Cowper *v.* Towers, 1 Lutw. 99.

(*u*) Lechmere *v.* Toplady, 1 Show. 146.

(*v*) Webb *v.* Fox et al. 7 T. R. 391. 396.

(50) Vide *Kennedy* v. *Strong*, 10 *Johns. Rep.* 291.

The general issue in REPLEVIN is *non cepit modo et forma*, by which the defendant puts in issue, not only the taking, but also the taking in the place mentioned in the declaration(*w*). But the defendant cannot have a return of the cattle under this plea, and therefore if he want a return, he should plead that he took the cattle in some other place, describing it, and traverse the place laid in the declaration, and in order to have return, should avow or make cognizance,[51] stating the cause for which he distrained(*x*); but if the defendant ever had the cattle in the place stated in the declaration, in leading them to the *pound, though he took them elsewhere, he should avow accordingly(*y*). Where the distress is for poor's rates, the defendant may plead not guilty, and give the cause of taking in evidence(*z*); and a general plea is given by statute, where a distress is taken for sewers rates(*a*), or under the bankrupt laws(*b*). But the defendant must avow or make cognizance with more particularity under a distress for rent(*c*),[52] rent charge(*d*) or damage feasant(*e*). And though the statute 11 Geo. 2. c. 19. sect. 22.[53] gives a general avowry in cases of distresses, for rent service, &c.(*f*); it is still advisable in some cases to set out the title specially, in order that a traverse of a particular part of it may be taken, and that the parties may proceed to trial upon some particular point in issue(*g*); and this statute does not extend to avowries for heriot custom or for a rent charge(*h*).

OF AVOWRIES, &c. IN REPLEVIN.

[*491]

In TRESPASS, whether to the *person*, *personal* or *real property*, the defendant may under the general issue, give in evidence any matter which directly controverts the truth of any allegations, which the plaintiff on such general issue will be bound to prove(*i*), and no person is

IN TRESPASS.

(*w*) See the precedent, post. 2 Vol. 556.—Johnson *v.* Wollyer, 1 Stra. 507.—Anon. 2 Mod. 199.—1 Saund. 347. n. 1.—Gilb. Replev. 166.—Walton *v.* Kersop et al. 2 Wils. 355.

(*x*) 1 Saund. 347. n. 1.—Post. 2 Vol. 558.

(*y*) Post. 2 Vol. 559.

(*z*) 43 Eliz. c. 2. s. 19.—See the precedent, post. 2 Vol. 563.—Co. Lit. 283. a.

(*a*) 23 Hen. 8 c. 5. s. 19.

(*b*) 1 Jac. 1. c. 5. s. 16.

(*c*) 11 Geo. 2. c. 19. s. 22.—2 Saund. 284. d.—1 Saund. 347. n. 6.

(*d*) Leominster Canal Company *v.* Cowell et al. 1 Bos. & Pul. 213.—Bulpit *v.* Clarke, 1 New. Rep. 56.

(*e*) Hawkins *v.* Eckles, 2 Bos & Pul. 359.—2 Saund. 284. d.—Potter *v.* North, 1 Saund. 347.—See precedents, post. 2 Vol. 564, 5, 6.

(*f*) See the forms, post. 2 Vol. 560 to 562. As to distinction between an avowry and a justification in replevin, see Marriot *v.* Shaw, Comyns, Rep. 274.—Vin. Ab. Disclaimer, 503.

(*g*) 2 Saund. 284. d.

(*h*) Lloyd *v.* Winton, 2 Wils. 28.—2 Saund. 168. a. b.—Leominster Canal Company *v.* Cowell et al. 1 Bos. & Pul. 213.

(*i*) 2 Saund. 159. n. 10.

(51) The plea of property in a stranger, which may be pleaded either in abatement or in bar, entitles the party to a return without an avowry. *Harrison* v. *M'Intosh*, 1 *Johns. Rep.* 380. 384.

(52) Vide *Shepherd* v. *Boyce*, 2 *Johns. Rep.* 446.

(53) This statute has not been adopted in the state of New York. *Harrison* v. *M'Intosh*, 1 *Johns. Rep.* 384.

In trespass. bound to justify who is not, *prima facie*, a trespasser(*k*); thus the plea of not guilty, is proper in trespass to *persons*, if the defendant committed no assault, battery, or imprisonment, &c.; and in trespass to *per-*
[*492] *sonal* property, if the plaintiff had *no property in the goods, or the defendant were not guilty of the taking, &c.(*f*); and in trespass to real property this plea not only puts in issue the fact of the trespass, &c. but also the title,[54] whether freehold or possessory, in the defendant or a person under whom he claims, may be given in evidence under it,[55] which matters shew *prima facie*, that the right of possession, which is necessary in trespass, is not in the plaintiff, but in the defendant or the party under whom he justifies(*g*). But where the act would at common law *prima facie* appear to be a trespass, any matter of justification or excuse, or done by virtue of a warrant or authority, must in general be specially pleaded(*h*).[56] And therefore even where the defendant did the act at the request of the plaintiff(*i*), or where the injury was occasioned by the plaintiff's own default(*j*), these matters of defence must be specially pleaded. If a plea of justification consist of two facts, each of which would, when separately pleaded, amount to a good defence, it will, unless in the case of pleas of prescription, sufficiently support the justification, if one of these facts be found by the jury(*kk*).

Thus in trespass to *persons*, *non assault demesne*(*l*), moderate correction(*m*), *molliter manus imposuit* to preserve the peace(*n*), or a justification in defence of the possession of real or personal property(*o*), or by
[*493] *authority of law without process, either as an individual(*nn*), or as an officer, or in aid of him(*oo*); or under civil process, either mesne or

(*k*) Badkin *v.* Powell et al. Cowp. 478.

(*f*) Badkin *v.* Powell et al. Cowp. 478.

(*g*) Argent *v.* Durrant, 8 T. R. 403.—Dodd *v.* Kiffin, 7 T. R. 354.—Lambert *v.* Stroother, Willes. 222.

(*h*) Milman *v.* Dolwell, 2 Campb. 378, 9.—Knapp *v.* Salsbury, 2 Campb. 500.—Co. Lit. 282. b. 283. a.—Le Caux *v.* Eden, Doug. 611.—2 Rol. Ab. 682.—Hallet *v.* Birt, 12 Mod. 120.—1 Saund. 298. n. 1.—Com. Dig. Pleader, E. 15, 16, 17.

(*i*) Milman *v.* Dolwell, 2 Campb. 378, 9.

(*j*) Knapp *v.* Salsbury, 2 Campb. 500.

(*kk*) Spilsbury *v.* Micklethwaite, 1 Taunt. 146. Jenk. 4 Cent. 184.

(*l*) Gregory et ux. *v.* Hill, 8 T. R. 299.—Lawe *v.* King, 1 Saund. 77. 296. n. 1.

(*m*) Watson *v.* Christie, 2 Bos. & Pul. 224.—Post. 2 Vol. 576.

(*n*) Post. 2 Vol. 574. 576.

(*o*) Weaver *v.* Bush, 8 T. R. 78.—Gregory et ux. *v.* Hill, 8 T. R. 299.—Johns *v.* Whitley et al. 3 Wils. 71.—Post. 2 Vol. 578. 581.

(*nn*) Smith *v.* Edge, 6 T. R. 562.—Post. 2 Vol. 581. 586.

(*oo*) Hawe *v.* Planner, 1 Saund. 10.—Lawe *v.* King, 1 Saund. 79. id. ibid.

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(54) Vide *Hyatt* v. *Wood*, 4 *Johns. Rep.* 152. *Phillips's Ev.* 129. *Monmoi* v. *Rogers*, 1 *Mass. Rep.* 160.

(55) But not property in a stranger by whose order the defendant entered. *Philpot* v. *Holmes*, *Peake's Cas.* 67.

(56) Vide *Butterworth* v. *Soper*, 13 *Johns. Rep.* 443. *Gelston & Schenck* v. *Hoyt*, 13 *Johns. Rep.* 579.

final(*p*), of superior(*q*), or inferior or foreign courts, must be pleaded specially(*r*);[57] for whoever imprisons another (except in some cases under particular statutes hereafter noticed), must justify himself by pleading, and shew specially to the court that the imprisonment was lawful.[58] This is a positive rule of law, in order to prevent surprise on the plaintiff, at the trial, by the defendant then assigning various reasons and causes of imprisoning the plaintiff, of which he had no notice, and which consequently he could not be prepared to meet at the trial on the plea of not guilty, on fair and equal terms with respect to the evidence and proof of facts(*s*). But if a person touch another in conversation or in joke, or otherwise without intent to insult him, no special plea is necessary(*t*).

In trespass to *personal* property, a seizure as an heriot service may be given in evidence under the general issue(*u*); but in general matters which admit the plaintiff's property, as well as the seizure, &c. must be pleaded(*v*); as a justification for cutting ropes or killing dogs(*w*), or taking guns, &c.(*x*), or even the license of the plaintiff to do the act complained of(*y*), or that it was occasioned by his *own negligence(*yy*). A distress for *rent* when made on the demised premises, may be given in evidence under the general issue(*z*), but if made *off* the demised premises, as on a common, or under a fraudulent removal, the defence must be specially pleaded(*a*);[59] and a distress, or seizure

[*494]

(*p*) Barker *v.* Braham et al. 3 Wils. 370.—1 Saund. 298. n. 1.—Post. 2 Vol. 586. 595.

(*q*) Id. ibid.

(*r*) Collett et al. *v.* Lord Keith, 2 East, 260. 274.

(*s*) Co. Lit. 282. b. 283. a.—Barker *v.* Braham et al. 3 Wils. 370, 1.

(*t*) Williams *v.* Jones and others, Rep. T. Hardw. 301.—1 Selwyn. 42.

(*u*) Peter *v.* Knoll, Cro. Eliz. 32.—2 Saund. 168. a. b.

(*v*) Com. Dig. Pleader, 3 M. 25.

(*w*) Right *v.* Ramscott, 1 Saund. 84. —Keck *v.* Halstead, 2 Lutw. 1494.—Com. Dig. Pleader, 3 M. 33.—Boucher *v.* Noidstrom, 1 Taunton, 570.—Du Bort v. Beresford, 2 Campb. 511.

(*x*) Com. Dig. Pleader, 3 M. 25, &c.

(*y*) Milman *v.* Dolwell, 2 Campb. 378, 9.

(*yy*) Knapp *v.* Salsbury, 2 Campb. 500.

(*z*) 11 Geo. 2. c. 19. s. 21.

(*a*) Vaughan *v.* Davis, 1 Esp. Rep. 257.

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(57) Vide *Butterworth* v. *Soper*, 13 *Johns. Rep.* 443.

(58) Where the ground on which it is attempted to make the defendant liable is, his having on delivering process to an officer, directed him to arrest and imprison the plaintiff, he may show under the general issue that the arrest and imprisonment were not a consequence of his instructions to the officer, but in pursuance of a competent and paramount authority: for if the arrest and imprisonment were the effect of any other cause than the instructions he gave the officer, he was, emphatically, not guilty, and it was not a case for justification. *Herrick* v. *Manly*, 1 *Caine's Rep.* 252.

(59) Acc. *Furneaux* v. *Fotherby & Clarke*, 4 *Campb.* 136.

IN TRESPASS. for tolls(*b*), stallage at a fair, &c.(*c*), under a bye law(*d*), or for damage feasant, by the occupier(*e*), or a commoner(*f*), or other matter of justification, with or without process, must be pleaded specially(*g*).[60]

We have seen that in trespass to *real property*, a freehold or mere possessory right in the defendant, may be given in evidence under the general issue(*h*); but it has been held that the defendant cannot justify under the general issue, cutting the posts and rails of the plaintiff, though erected upon the defendant's land, there being no question raised as to the property remaining in the plaintiff(*i*); and it is usual and frequently advisable to plead *liberum tenementum*,[61] either in order to compel the plaintiff to new assign, setting out the abuttels(*j*), or in case he claims as tenant to the defendant, or to the person on whose behalf the supposed trespass was committed, to compel him to set forth
[*495] such tenancy, *which the defendant in his rejoinder may insist has been determined by notice to quit, &c.; and *liberum tenementum* is a good plea to trespass in a several or free fishery, the owner of the soil being *prima facie* owner of the fishery(*k*). An excuse of the trespass, on account of a defect of fences, which the plaintiff was bound to re-

(*b*) Vinkensterne *v.* Ebden, Lord Raym. 384. S. C. Carth. 357.—Mayor of Yarmouth *v.* Eaton, 3 Burr. 1402.—Bennington *v.* Taylor, & Wilkes *v.* Kirby, Lutw. 1519.—8 Wentw. 124.—Post. 2 Vol. 595.

(*c*) Bodle *v.* Wilkins, 3 Lev. 224. 227.

(*d*) Kirk *v.* Nowell et al. 1 T. R. 118.—Lamb *v* Mills, 4 Mod. 377.

(*e*) Stemel *v.* Hogg, 1 Saund. 221.—White *v.* Stubbs, 2 Saund. 294.—Post. 2 Vol. 595.

(*f*) Cope *v.* Marshall et al. 2 Wils. 51.—Hoddesdon *v.* Gresil, Yelv 104.—Anon. 3 Wils. 126.—Atkinson *v.* Teasdale, 3 Wils. 291.—Potter *v.* North, 1 Saund. 346.

(*g*) Milman *v.* Dolwell, 2 Campb. 378, 9.—Knapp *v.* Salsbury, 2 Campb. 500.

(*h*) Ante, 491.—Dodd *v.* Kiffin, 7 T. R. 354.—Argent *v.* Durrant, 8 T. R. 403.—Bartholemew *v.* Ireland, Andr. 108.—Lambert *v.* Stroother, Willes 222.

(*i*) Welsh *v.* Nash, 8 East, 404. sed quære, see Argent *v.* Durrant, 8 T. R. 403. Even if a tenant in agriculture, let in or affix any thing to the freehold it becomes part thereof, and the property of the lessor; should it not, *a fortiori*, be so as to a trespasser?

(*j*) Stevens *v.* Whistler, 11 East, 51.—Chambers *v.* Donaldson and others, 11 East, 72.—1 Saund. 299. b.—where see observations on this plea.

(*k*) 18 Edw. 4. 4.—Co. Lit. 127. a. notes.—Post. 2 Vol. 609.

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(60) An officer of the revenue, seizing goods as forfeited, and causing them to be libelled and tried, has but two pleas in justification at the suit of the owner; a condemnation, or an acquittal with certificate of probable cause. *Gelston & Schenck* v. *Hoyt*, 13 *Johns. Rep.* 579. 561.

(61) Where the plaintiff alleged several trespasses in several closes, at different times, and the defendant pleaded that the several closes were one and the same close, and that it was his freehold, it was held bad, and that the defendant should have justified as to all the closes, or have denied the trespasses as to all the closes, except one, and justified as to that. *Nevins* v. *Keeler*, 6 *Johns. Rep.* 63.

pair(*l*), and a license from the plaintiff(*m*), and a justification under a rent-charge, or in respect of any *easement*, or incorporeal right(*n*), as *common* of fishery(*o*); or of pasture(*p*); or of turbary(*q*); and a right of *way* either public(*s*) or private(*t*), and whether by grant(*u*), will(*v*), prescription(*w*), custom, or of necessity(*y*), must be pleaded. So the defendant must plead an entry by authority of law without process, as that the *locus in quo* was an inn(*z*), or that the defendant entered to demand payment of his debt(*a*); or to prevent murder(*b*); or by virtue of process(*c*), criminal or *civil, of a superior(*d*) or inferior court(*e*), under mesne process, as a latitat, &c.(*f*), or under final process, as a fi. fa.(*g*), elegit &c. And in trespass to land, where a removal of personal property is also alleged, the plea should, as to the personal property, be special, and shew possession of some land, &c. and justify the removal, &c. damage feasant, &c.(*i*). IN TRESPASS. [*496]

In all actions of trespass, whether to the person, personal, or real property, matters in *discharge* of the action must be pleaded(*j*); as record and satisfaction(*k*), arbitrament(*ll*), release(*mm*), former recovery(*nn*), tender of sufficient amends(*oo*), and the statute of limitations,

(*l*) Co. Lit. 283.—Poole *v.* Longueville, 2 Saund. 285.—Post. 2 Vol. 605.

(*m*) Ante, 487.—Milman *v.* Dolwell, 2 Campb. 379.—Bennet *v.* Alcott, 2 T. R. 168.—Stukely *v* Butler, Hob. 175.—Gilb. C P. 63. Vin. Ab. License.—Com. Dig. Pleader, 3 M. 35. Post. 2 Vol. 608.—but see 21 Hen. 7. 28. pl. 5.

(*n*) Per Lord Loughbro', Rouse *v.* Bardin et al., 1 Hen. Bla. 352.—2 Saund. 402. n. 1.—Co. Lit. 283.—Hawkins *v.* Wallis, 2 Wils. 173.—Com. Dig. Pleader, E. 15.

(*o*) Com. Dig. Piscary.—Post. 2 Vol. 611.

(*p*) Earl of Manchester et al. *v.* Vale, 1 Saund. 25.—Mellor *v.* Spateman, 340.—Mellor *v.* Walker, 2 Saund. 2.

(*q*) Peppin *v.* Shakespear et al., 6 T. R. 748.

(*s*) Rouse *v.* Bardin et al., 1 Hen. Bla. 352.—Bolt *v.* Stennett, 8 T. R. 606.—2 Saund. 158. c. n. 4 & 6.—Post. 2 Vol. 619.

(*t*) Id. ibid.—Post. 2 Vol. 621. 628.

(*u*) Birch *v.* Wilson, 2 Mod. 274.—Campbell *v.* Wilson, 3 East, 294.

(*v*) Whalley *v.* Thompson et al., 1 Bos. & Pul. 371.—1 Saund. 323. n. 6.

(*w*) Martin *v.* Vallance, 1 East, 350. Wright *v.* Rattray, 1 East, 377. 381.—Whalley *v.* Thompson et al., 1 B. & P. 371.—1 Saund. 322. n. 6.—as to pleading a prescription in general and failure in proof of a part, see Waring *v.* Griffiths et al., 1 Burr. 442.

(*y*) Pomfret *v.* Recroft, 1 Saund. 323.—Howton *v.* Frearson, 8 T. R. 50.—Dutton *v.* Taylor, Lutw. 1487.—Post. 2 Vol. 625.

(*z*) Com. Dig. Pleader, 3 M. 35.

(*a*) Id. ibid. Holdringshaw *v.* Rag, Cro. Eliz. 876.

(*b*) Handcock *v.* Baker et al., 2 Bos. & Pul. 260.

(*c*) 1 Saund. 298. n. 1.

(*d*) Ratcliffe *v.* Burton, 3 Bos. & Pul. 223.

(*e*) Crowther *v.* Ramsbottom et al., 7 T. R. 655.—Dennis *v.* Rowls et al., Lutw. 914.

(*f*) Ratcliffe *v.* Burton, 3 Bos. & Pul. 223.—Post. 2 Vol. 630.

(*g*) Post. 2 Vol 632. 636.

(*i*) Welch *v.* Nash, 8 East, 404.—Willes. 222. n. b.

(*j*) Bird *v.* Randall, 3 Burr. 1353. S. C.—1 Bla. Rep. 388.—Barker *v.* Dixon, 1 Wils. 45.—Ante, 485.

(*k*) Bird *v.* Randall, 3 Burr. 1353.

(*ll*) Post. 2 Vol. 484. 569.

(*mm*) Bird *v.* Randall, 3 Burr. 1353.

(*nn*) Id. ibid.

(*oo*) 21 Jac. 1. c. 16.—Com. Dig. Pleader, 3 M. 36.—Vin. Ab. Trespass, S. a 542.—Basely *v.* Clarkson, 3 Lev. 37. Post. 2 Vol. 569.

In trespass: which in trespass to persons, is, that the defendant was not guilty within four years, and in trespass to personal or real property within six years(*p*).

In an action against a *justice of the peace, mayor, constable, churchwarden, and other peace officers, or any other acting in their aid and assistance, or by their command,* for any thing done by them, by virtue or reason of their office, the general issue may be pleaded, and the special matter given in evidence(*q*); and there is a similar provision in the highway(*r*), turnpike(*s*), militia and assessed tax acts, and in various other statutes in protection of persons acting in the execution of their [*497] office, *or others in aid of them.[62] It is also a general rule at common law, that matters in mitigation of damages, &c. which cannot be specially pleaded, may be given in evidence under the general issue(*t*).

In ejectment. In EJECTMENT, a defendant, when he appears, is compelled to enter into the consent rule, and to plead the *general issue*, consequently in this action no special plea can be adopted; we have seen, however, that the court will in some cases on special application permit the defendant to plead to the jurisdiction(*u*).

Of pleading the general issue, or a special plea in general. From the above instances and observations, it may be collected, that any matter of defence which denies what the plaintiff would on the general issue be bound to prove in the first instance, in support of his action, may and ought to be given in evidence under that plea(*a*);[63] but that any ground of defence, which admits the facts alleged in the declaration, but avoids the action by matter which the plaintiff would not be bound to prove or dispute in the first instance, on the general issue, may be pleaded specially(*b*). Thus in an action of assumpsit, matter which shews that no such contract was made cannot be pleaded, but matter which admits that such a contract was made, but shews that

(*p*) 21 Jac. 1. c. 16. s. 3.—Macfadzen *v.* Olivant, 6 East, 390.

(*q*) 21 Jac. 1. c. 12. s. 5.—Co. Lit. 283.

(*r*) 13 Geo. 3. c. 78.

(*s*) 13 Geo. 3. c. 84.

(*t*) Co. Lit. 283. a.—Watson *v.* Christie, 2 Bos. & P. 225.

(*u*) Ante, 430.

(*a*) Gibbons *v.* Pepper, 4 Mod. 405. S. C.—Ld. Raym. 38.—3 Bla. Com. 309.

(*b*) Hussey *v.* Jacob, Ld. Raym. 88, 9.

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(62) The party at whose instance process, either civil or criminal, issued, if he voluntarily assisted the officer in executing it, may protect himself under the general issue. *Nathan* v. *Cohen*, 3 *Campb.* 257. But if he merely delivered it to the officer and directed him to arrest the plaintiff, he must plead the special matter as in other cases. *Herrick* v. *Manly*, 1 *Caine's Rep.* 252.

(63) Vide *Kennedy* v. *Strong*, 10 *Johns. Rep.* 289. 291.

it is not binding in point of law, in respect of coverture, infancy, &c. may be pleaded. So in trespass for taking personal property, the defendant cannot plead *property* in a *stranger* or in *himself*(*c*), *because that goes to contradict the evidence which the plaintiff must on the general issue adduce in support of his action(*d*). [*498]

OF PLEADING THE GENERAL ISSUE, OR A SPECIAL PLEA IN GENERAL.

Where the defence consists of *matter of fact*, amounting to a denial of the allegation which the plaintiff must prove in support of his declaration, the general issue must be pleaded, or it would be a good cause of *special* demurrer, that the plea amounts to the general issue(*e*),[64] though there are cases in which it has been adjudged, that it being in the discretion of the court, when a plea amounting to the general issue shall be allowed, the plaintiff ought not to demur, but should move the court, for a rule to shew cause why the general issue ought not to be entered(*f*);[65] so an entire plea is good, though to part of the declaration it amount only to the general issue(*g*). The grounds on which pleas amounting to the general issue are objected to, are, that they tend to unnecessary prolixity and expense, and draw to the examination of the court what is proper to be determined by a jury(*h*).

But as we have just seen in many cases where the defence consists of matter of *law*, the defendant *may either plead it specially or give it in evidence under the general issue(*i*), and in all actions the defendant may plead any matter which shews why the action does not lie, and which being matter of law is proper to be shewn to the court(*k*); as in assumpsit, infancy, payment, &c. In these cases, from the nature of the defence, the plaintiff has an *implied colour* of action, bad indeed in

Implied colour. [*499]

(*c*) Hussey *v.* Jacob, Ld. Raym. 88, 9.—Wildman *v.* Norton, 1 Ventr. 249. S. C.—2 Lev. 92.—Chapman *v.* Thumblethorp, Cro. Eliz. 329.

(*d*) Bac. Ab. Pleas, G. 3.—Com. Dig. Pleader, E. 13, 14.

(*e*) 3 Bla. Com. 309.—Com. Dig. Pleader, E. 13, 14.—Bac. Ab. Pleas, G. 3.—The King *v.* Johnson, 6 East, 597.—Boot *v.* Wilson and another, 8 East, 313, 4.—Doctor Leyfield's Case, 10 Co. 95. a.—Lynner *v.* Wood, Cro. Car. 157.—Ward *v.* Blunt, Cro. Eliz. 147.—Green and others *v.* Pope, Ld. Raym. 125. this was formerly ground of error, but was aided by 32 Hen. 8. c. 30.—1 Saund. 228. c. what is matter of law, see Dawes *v.* Papworth, Willes. 410.—An argumentative plea amounting to general issue, bad on demurrer, The King *v.* Johnson, 6 East, 597.

(*f*) Warner *v.* Wainsford, Hob. 127.—Ward *v.* Blunt, 1 Leon. 178.—Allen's Case, 2 Rol. Rep. 140.—Com. Dig. Pleader, G. 14.—See also Doct. Pla. 204.—Co. Lit. 303. b.

(*g*) Thomas *v.* Nichols, 3 Lev. 40.

(*h*) Bac. Ab. Pleas, G. 3. Gilb. C. P. 61.—Com. Dig. Pleader, E. 13.—Warner *v.* Wainsford, Hob. 127.

(*i*) C. D. Pleader, E. 14.—Bac. Ab. Pleas, G. 3. what is matter of law, Dawes *v.* Papworth, Willes. 410.

(*k*) Bac. Ab. Pleas, G. 3.—Gilb. C. P. 62. 66.

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(64) Vide *Kennedy* v. *Strong*, 10 *Johns. Rep.* 289. So, in an action upon a joint promissory note, a plea that it was the separate note of the defendant, is bad upon special demurrer, as amounting to the general issue. *Van Ness* v. *Forrest*, 8 *Cranch*, 30.

(65) Vide *Whittelsey* v. *Wolcott*, 2 *Day's Rep.* 431.

Of colour. point of law, if the facts pleaded be true, but which is properly referred to the decision of the court(*l*). So a plea in trover, that A. was possessed, and lost the goods, that B. found them, and gave them to the plaintiff who lost them, and that the defendant found them, and by the command of A. converted them, was held sufficient, because it gave an implied colour by confessing the *possession and property* in the plaintiff against all but the lawful owner(*m*).

So without giving express colour, the defendant may plead in trespass or trover, that he was possessed of the goods, but not saying that they were his own, and sold them in market overt to the defendant, or that B. took them *de quodam ignoto*, and waved them within the defendant's manor, wherefore he took them: because such plea gives an implied colour, and does not deny but that the property was in the plain-
[*500] tiff; and the defendant is not bound to shew expressly in *whom it was(*n*). So in trespass for taking corn, the defendant may plead that he took them as tythe or as wreck, without giving express colour(*o*). The plea of *liberum tenementum* may also be considered as giving implied colour(*p*), for it admits that in point of *fact*, the plaintiff may have been in possession of the *locus in quo*, (which, as in the case of personal property *prima facie*, entitles the plaintiff to maintain trespass against all the world, but the rightful owner)(*r*), but insists that in point of law, such possession is unlawful(*s*). So, in trespass to lands, if the defendant claim under a demise from the plaintiff, express colour need not be given(*t*); however, the unnecessary addition of colour appears to be no ground of demurrer, for the introduction of superfluous words of form will not vitiate(*u*).

Of express colour. But where, from the nature of the defence, the plaintiff would have no implied colour of action, the defendant cannot plead specially any matter, which controverts what the plaintiff would on the general issue be bound to prove, without giving *express colour*(*x*); thus, in an action

(*l*) Tidd, 600.

(*m*) Rockwood *v.* Feaser, Cro. El. 262.—Archbishop of Canterbury *v.* Kemp, Cro. Eliz. 539.—Dr. Leyfield's Case, 10 Co. 90. b.—Com. Dig. Pleader, E. 14. *acc.*—Bellamy *v.* Balthrop, Lat. 185.—Ward *v.* Blunt, 1 Leo. 178. *semb. contra.*

(*n*) Doctor Leyfield's Case, 10 Co. 90. b.

(*o*) Doctor Leyfield's Case, 10 Co. 88. a. &c.—Reg. Plac. 304.

(*p*) Dodd *v.* Kyffin, 7 T. R. 354.—Argent *v.* Durrant, 8 T. R. 403.

(*r*) Rockwood *v.* Feaser, Cro. El. 262.—Graham *v.* Peat, 1 East, 244.

(*s*) As to this plea, see 1 Saund. 299. c.

(*t*) Hatton *v.* Morse, 3 Salk. 273.

(*u*) Taylor *v.* Eastwood, 1 East, 219.

(*x*) Pearle *v.* Bridges, 2 Saund. 401.—Doctor Leyfield's Case, 10 Co. 88. &c.—Dinham *v.* Becket, Cro. Eliz. 70.—Argent *v.* Durrant, 8 T. R. 406. As to colour in pleading in general, see Doctor Leyfield's Case, 10 Co. 88. &c.—Taylor *v.* Eastwood, 1 East, 215.—Bla. Com. 309.—Reg. Plac. 303.—Doct. Pla. Colour, Doct. and Student, lib. 2. c. 53.—Hatton *v.* Morse, 3 Salk. 273.—Bac. Ab. Pleas, I. 8.[66]

(66) Et vide 3 *Reeve's Hist. E. L.* 24, 25, 26. 438—443.

of trespass to land, if the defendant plead a possessory title under a de- OF COLOUR.
mise from a third *person; this plea, shewing that the right of posses- [*501]
sion is in the defendant, would, without giving express colour, amount to the general issue(*y*), for it goes to deny that the trespass was committed in the plaintiff's close, and shews the right of possession in the defendant; but if the defendant, after stating his own title, supposes, as is usual, that the plaintiff entered upon his possession under colour of a former deed of feoffment without livery, or of a charter of demise made before the demise to the defendant, and that the defendant re-entered, this creates a question of law for the decision of the court, and by that means prevents the plea from amounting to the general issue, and being matter of supposal, it is not traversable(*z*); so in trespass for taking goods, if the defendant plead that a third person was possessed of them, *as of his own proper goods*, and sold them in market overt to the defendant, the defendant must give colour for his plea, alleging that A. was possessed as of his own property, amounts to a denial that the plaintiff had any property in them, and therefore gives no colour of action; and the colour usually given in such cases, is, that the defendant bailed the goods to a stranger, who delivered them to the plaintiff from whom the defendant took them(*a*).

Every *express colour*, it is said, ought to have four qualities; *first*, it Form of colour.
ought to be a matter of title doubtful to a jury, as where the defend-
ant pleads that the plaintiff claiming by colour of a deed of *feoffment, [*502]
&c. that is sufficient, for it is a doubt to lay gents, if land shall pass by deed only without livery; *secondly*, that colour as such ought to have continuance, although it wants effect, as if the defendant give colour by colour of a deed of demise to the plaintiff for the life of J. S. who it appears, by the pleadings, was dead before the trespass, this is not sufficient, because the colour doth not continue; but the defendant may well deny the effect of it, viz. that the plaintiff claims by colour of a deed of demise to him for his life; whereas nothing passed thereby; therefore, there is a difference between the continuance of the colour and the effect of it; *thirdly*, it ought to be such a colour as, if it were of effect would maintain the nature of the action, as in an assize, colour of a freehold ought to be given, &c.; *fourthly*, colour ought to be given by the first conveyance, otherwise all the conveyance before, is waved(*b*); and therefore where the defendant derived a title to himself by divers mesne conveyances, and gave colour to the plaintiff, by one who was last named in the conveyance, this was held insufficient, and that he should have given colour by him who was first named in the convey-

(*y*) Pearle *v.* Bridges, 2 Saund. 401.—Dodd *v.* Kyffin, 7 T. R. 354.—Argent *v.* Durrant, 8 T. R. 406.—Taylor *v.* Eastwood, 1 East, 215.—Com. Dig. Pleader, 3 M. 40, 1.

(*z*) Taylor *v.* Eastwood, 1 East, 213. 215.—Hatton *v.* Morse, 3 Salk. 273.

(*a*) Doctor Leyfield's Case, 10 Co. 90. b.

(*b*) As to colour in general, see Doctor Leyfield's Case, 10 Co. 91. b.—Doctr. Pla. tit. Colour, 72. &c.—Bac. Ab. Pleas, I. 8.—Com. Dig. Pleader, 3 M. 40, 1.

OF COLOUR. ance(*c*): and in giving colour under a feoffment, the word charter or deed must not be omitted(*d*). The omission of express colour, when necessary will be aided by the replication(*e*), and though it was formerly otherwise(*f*), it will now as a matter of form be aided upon general
[*503] *demurrer(*ff*), and the want of giving colour is aided after verdict by 32 Hen. VIII. c. 30,(*g*).

WHEN TO PLEAD SPECIALLY. Although the defendant may be at liberty to give his ground of defence in evidence under the general issue, there are, as we have seen in the instance of the plea of infancy, *liberum tenementum*, &c. many cases in which it may be most expedient to plead specially, in order either to compel the plaintiff, in his replication, to admit some of the facts stated in the plea, and thereby to narrow the defendant's evidence, or to compel the plaintiff to disclose his title, &c. and thereby narrow the ground on which he might rest his case on the trial. It would be foreign to the object of this treatise to attempt to enumerate all the various instances in which it may be advisable or not to plead specially. In some cases where a justification is pleaded it may be advisable not to plead the general issue, thus in trespass *quare clausum fregit*, if the plaintiff's possession cannot be disputed, and the defendant rely upon a right of way, it is better not to plead the general issue, in order that the defendant's counsel may begin at the trial, and that thereby, in case the plaintiff examines any witnesses in chief, the defendant's counsel may have the advantage of the reply. On the other hand, in an action for assault and battery, it is not advisable to plead specially, justifying the battery, if there be the least doubt of establishing the justification, for where a battery is not admitted by the plea the judge must certify to give the plaintiff his full costs, if he obtain a verdict for damages less
[*504] *than 40*s.*; but where the defendant by his plea admits a battery, and it is found against him, no certificate is necessary(*h*); so in trespass *quare clausum fregit* if the defendant plead a license or other justification which does not make title to the land to the whole of the trespasses, and it be found against him, the plaintiff is entitled to full costs, without a certificate, though he do not recover 40*s.* damages(*i*);[67] and the special plea should therefore in these cases be confined merely to such trespasses as the defendant can certainly justify(*k*); however, in slander, though the defendant justify, and it be found against him, yet

(*c*) Allen's Case, 2 Rol. Rep. 140.
(*d*) Id. ibid.
(*e*) Ashmead *v.* Ranger, Ld. Raym. 551, 2.
(*f*) Id. ibid.
(*ff*) Ante, 498. & 4 Ann. c. 16. s. 1. —Bowdell *v.* Parsons, 10 East, 363.
(*g*) 1 Saund. 228. c.
(*h*) Smith *v.* Edge, 6 T. R. 564.—Tidd's Prac. 4th edit. 866.
(*i*) Peddell *v.* Kiddle, 7 T. R. 660.—Roe d. West *v.* Davis, 7 East, 325.—Tidd's Prac. 4th edit. 867.
(*k*) Vivian *v.* Blake and others, 11 East, 263.

(67) As to costs in trespass quare clausum fregit, see *Crane* v. *Comstock*, and *Jackson* v. *Randall*, 11 *Johns. Rep.* 404, 405.

if the damages be under 40*s.* the plaintiff cannot recover more costs than damages(*l*); in the latter action, therefore, there is no objection to a special plea on the ground of costs, though it is not advisable to justify on the ground that the words are true, unless the plea can be supported by indisputable evidence, because such a justification when ineffectual, will in general materially enhance the damages. WHEN TO PLEAD SPECIALLY.

Care should be taken to plead in the first instance every matter of defence of which the defendant would not be at liberty to avail himself under the general issue; for though the court will in general give the defendant leave to add or alter a plea, where the justice of the case requires it, yet this will be only on payment of costs incurred by his mistake; and if the cause should proceed to trial, and be found against the defendant on account of *the omission of one or more grounds of defence, he will in general be precluded for ever from taking advantage thereof, unless in some cases by *audita querela*, or error in fact *coram nobis*(*ll*); and as it is a rule of pleading that a departure will not be allowed, the defendant cannot rectify the omission of a ground of defence by his rejoinder; this frequently occurs in debt on an arbitration bond, in which if the defendant merely plead no award, he puts the plaintiff to reply, setting out an award, and the defendant cannot rejoin that it was insufficient, or that he performed it, &c.* [68] All defences should be pleaded. [*505]

It is very usual, for the purpose of delay, to plead what is termed a *sham plea;* this practice, though it still prevails, is discountenanced by the courts(*m*), and difficult questions of law ought not to be pleaded for this purpose(*n*), and though the replication to such a plea may be insufficient, the court will give leave to amend without payment of costs(*o*); therefore in the adoption of these pleas, in instances which may be warranted by the practice of the bar, care should be taken to plead those which, though calculated to obtain time, are concise and usual, and not calculated to create unnecessary expense, or intricacy.[69] In framing a special plea it is also necessary to consider whether the defendant is under terms of pleading issuably, which signifies a plea in chief to the merits(*p*) upon which the plaintiff may take issue and go to Of sham and issuable pleas.

(*l*) Halford *v.* Smith, 4 East, 567.

(*ll*) Tidd, 3d edit. 1047, 8. and *id.* Index *audita querela*.—Turner *v.* Davies, 2 Saund. 137 to 150.

* But see Fisher *v.* Pimbley, 11 East, 188.

(*m*) Bac. Ab. Pleas, G. 4.—Solomons *v.* Lyon, 1 East, 372.

(*n*) Charles and another v. Marsden, 1 Taunt. 224.—Blewitt *v.* Marsden, 10 East, 237.

(*o*) Id. ibid.

(*p*) Pitcher *v.* Martin, 3 Bos. & Pul. 171.—Tidd's Prac. 4th edit. 418.

(68) Acc. *Barlow* v. *Todd*, 3 *Johns. Rep.* 367. *Munro* v. *Allaire*, 2 *Caine's Rep.* 320. And see *Fowler & Green* v. *Clark*, 3 *Day*, 231.

(69) In *Pierce* v. *Blake*, 2 *Salk.* 515. Holt, C. J. says, that if an attorney puts in a false plea to delay justice, he breaks his oath, and may be fined for putting a deceit upon the court.

OF SHAM AND ISSUABLE PLEAS.

trial(*q*), or a demurrer for some defect in substance(*r*).[70] A plea *in abatement is not an issuable plea(*rr*),[71] nor a plea of alien enemy(*s*), nor an untrue plea of judgment recovered(*t*); but a true plea that a bail bond was taken for ease and favour(*u*), and a tender(*v*), and the statute of limitations(*w*), and a plea though informal(*x*) are issuable pleas. When the defendant, being under the terms of pleading issuably, pleads a sham plea, or demurs for want of form, judgment may be signed(*y*); and where several pleas are pleaded, one of which is not issuable, it will vitiate all the others(*z*),[72] and where the defendant being under an order to plead issuably, puts in a sham demurrer to some of the counts, and pleads issuably to the rest, judgment by *nil dicit* as to the whole may be signed(*a*); where, however, it is doubtful whether the plea be issuable, the safer course in term time is to move the court to set it aside(*b*).[73]

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II. OF THE QUALITIES OF PLEAS IN BAR.

THERE are some *general qualities*, which affect all pleas in bar, and some *rules* which prevail *in the construction* of them, which it is advisable to consider before we inquire *into the *form*. The *general qualities* of a plea in bar, are, 1st, That it be adapted to the nature and form of the action, and also be conformable to the count. 2dly, That it answer all which it assumes to answer, and no more. 3dly, In the case

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(*q*) Berry *v.* Anderson, 7 T. R. 530.—Wagstaff *v.* Long, Barnes. 263.—Foster *v.* Snow, 2 Burr. 782.

(*r*) Gray *v.* Ashton, 3 Burr. 1788.—Bell *v.* Da Costa, 2 B. & P. 446.—Tidd's Prac. 4th edit. 418, 9.

(*rr*) Kilwick *v.* Maidman, 1 Burr. 59.—Wagstaff *v.* Long, Barnes. 263.

(*s*) Simeon *v.* Thompson, 8 T. R. 71.

(*t*) Heron *v.* Heron, 1 Bla. Rep. 376.

(*u*) Dearden *v.* Holden, 1 Burr. 605.

(*v*) Kilwick *v.* Maidman, 1 Burr. 59.

(*w*) Rucker et al. *v.* Hannay, 3 T. R. 124.—Maddocks *v.* Holmes et al., 1 B. & P. 228.—Willet *v.* Atterton, 1 Bla. Rep. 35.—Stadholme *v.* Hodgson, 2 T. R. 390.

(*x*) Baily *v.* Edwards, Rep. T. Hardw. 179.—Thellusson *v.* Smith, 5 T. R. 152.

(*y*) Tidd, 3d edit. 429. n. c. 4th edit. 419.

(*z*) Waterfall *v.* Glode, 3 T. R. 305.

(*a*) Cuming *v.* Sharland, 1 East, 411.

(*b*) Kilwick *v.* Maidman, 1 Burr. 59.—Stadholme *v.* Hodgson, 2 T. R. 390.—Berry *v.* Anderson, 7 T. R. 530.

(70) Vide *Syme* v. *Griffin*, 4 *Hen. & Mum.* 277.

(71) So, a plea of another action pending is not an issuable plea. *Davis* v. *Grainger*, 3 *Johns. Rep.* 259.

(72) Vide *Davis* v. *Grainger*, 3 *Johns. Rep.* 259.

(73) Sed vide *Falls* v. *Stickney*, 3 *Johns. Rep.* 541.

of a special plea, that it confess or admit the fact. 4thly, That it be single. 5thly, Certain. 6thly, Direct and positive, and not argumentative. 7thly, Capable of trial; and, 8thly, True. II. QUALITIES.

1st, Every plea in bar must be adapted to the nature of the action and conformable to the count(*a*);[74] and therefore in an action against husband and wife for words spoken by the wife, a plea that "they" are not guilty, instead of "she," is improper(*b*). We have already seen what are the appropriate general issues, and special pleas in each action. If the defendant plead a plea not adapted to the nature of the action, as *nil debet* in assumpsit(*c*), or non assumpsit in debt(*d*), the plaintiff may treat it as a nullity and sign judgment; so if not guilty be pleaded in assumpsit, the plaintiff may demur, though it would be aided by verdict(*e*); but the plea of not guilty in an action of debt on a penal statute is not such a nullity as will warrant the plaintiff in signing judgment(*f*); and where the plea though informal goes to the substance of the action, as *nil debet* to debt on bond, the plaintiff should demur and not sign judgment(*g*); and in general where the defendant pleads an improper plea, the safer course is to demur or move the court to set it *aside(*gg*).[75] The plea must not only be adapted to the nature of the action, but also be conformable to the count: thus if an assignee of a bankrupt declare, that the defendant was indebted to the bankrupt, and promised the plaintiff as assignee to pay him, the defendant cannot [*508] plead that the cause of action did not accrue to the *bankrupt* within six years, because the plea does not answer the promise in the declaration, and precludes the plaintiff from proving a promise to himself, and is therefore bad on demurrer(*h*); and in debt *qui tam* a plea that the defendant doth not owe to the plaintiff alone is insufficient, though if it

1st. Conformable to the action and count.

(*a*) Co. Lit. 303. a. 285. b.—Bac. Ab. Pleas, I. per tot.—Bawles *v.* Norris, 1 Rol. Rep. 216.

(*b*) Bawles *v.* Norris, 1 Rol. Rep. 216.

(*c*) Stafford *v.* Little, Barnes. 257. *acc.*—Baily *v.* Edwards, Rep. T. H. 179. *semb. cont.*

(*d*) Perry *v.* Fisher, 6 East, 549.

(*e*) Marsham *v.* Gibbs, 2 Stra. 1022.—Bac. Ab. Pleas, I. 1.

(*f*) Coppin *v.* Carter, 1 T. R. 462.—Buckler *v.* Rawlins, 3 Bos. & Pul. 111. Macdonnell *v.* Macdonnell, 3 B & P. 174.—Com. Dig. Pleader, 2 S. 11. 17.

(*g*) Thellusson *v.* Smith, 5 T. R. 152.—Rawlins et al. *v.* Danvers, 5 Esp. C. N. P. 38.—Ante, 506. n. x.

(*gg*) Kilwick *v.* Maidman, 1 Burr. 59.—Stadholme *v.* Hodgson, 2 T. R. 390.—Berry *v.* Anderson, 7 T. R. 530.—Baily *v.* Edwards, Rep. T. Hardw. 179.—Thellusson *v.* Smith, 5. T. R. 152.

(*h*) Skinner *v.* Rebow, 2 Stra. 919.—Kinder et al. *v.* Paris, 2 Hen. Bla. 561.—2 Saund. 63. d.—Bawles *v.* Norris, 1 Rol. Rep. 216.

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(74) Vide *Chew* v. *Woolley*, 7 *Johns. Rep.* 402.

(75) But in *Falls* v. *Stickney*, 3 *Johns. Rep.* 541. the court say, that if a plea is bad or frivolous, the plaintiff ought either to demur to it, or treat it as a nullity, and enter a default without any application to the court.

II. Qualities.

had been *nil debet* generally, it would have sufficed(*i*). So it is a rule, that if to a transitory action the defendant plead any matter which is itself transitory, he is obliged to lay it at the *place* mentioned in the declaration(*j*); but if the justification be local, the defendant must plead it in the county or parish where the matter arose, and conclude with a traverse of having been guilty elsewhere(*k*); and at common law, the cause must have been tried there, and not in the county where the action was laid, otherwise it was error, though this, as far as regards the trial, no longer obtains, the action being uniformly tried in the county [*509] where the venue is laid in the declaration(*l*). So *when the *time* is not material, it is a rule that the plea should follow the day in the declaration, and if it be material to vary from it, the plea should conclude with a traverse(*m*). Where, however, there is no ground to intend the contrary, the plea will be considered as conformable to the count: thus in assumpsit against an executor on the promise of his testator, the defendant pleaded that *he* did not undertake, and it was objected that it did not appear by the plea who did not assume, but it was adjudged that it shall be intended the testator, as there was no count in the declaration, on a promise by the executor(*n*).

2dly, Must answer all it assumes to answer, and no more.

2dly, It is a rule that every plea must answer the whole declaration or count, or rather all that it assumes in the introductory part to answer, and no more(*o*).[76] If a plea begin only as an answer to part, and is in truth but an answer to part, the plaintiff cannot demur, but must take his judgment, for the part unanswered as by *nil dicit;* and if he demur or plead over, the whole action is discontinued(*p*); and it is frequently judicious to plead only to part, or to admit a part of the cause of action, in order to avoid the costs of the trial of such matter(*q*). So if the plea profess to answer only a part, but afterwards answers more, it has been

(*i*) Scot *v.* Lawes, Hob. 327, 8—Reg. Plac. 302.—Bac. Ab. Action qui tam, D.—Post. 2 Vol. 508. n. e.

(*j*) 1 Saund. 247. n. 1. 8. a. n. 2. 85. n. 4.—2 Saund. 5. n. 3.—Com. Dig. Pleader, E. 4.—C. 20. and tit. Action, N. 5. 12.—Vin. Ab. Trial, M. a.

(*k*) Id. ibid.—Lawe *v.* King, 1 Saund. 78. 82. n. 3.—2 Saund. 5. n. 3.

(*l*) Id. ibid.—Sed qu. 1 Saund. 98. n. 1.

(*m*) Hawe *v.* Planner, 1 Saund. 14.—Lawe *v.* King, 1 Saund. 78, 9. 82. n. 3.—2 Saund. 5. n. 3.—Com. Dig. Pleader, E. 4.

(*n*) Browning *v.* Litton, 1 Lev. 184.—Baker's Case, Latch. 125.

(*o*) Co. Lit. 303. a.—Com. Dig. Pleader, E. 1. 36.—1 Saund. 28. n. 1, 2, 3.—Gray *v.* Pindar, 2 Bos. & Pul. 427.—Macdonnell *v.* Macdonnell, 3 Bos. & Pul. 174.

(*p*) 1 Saund. 28. n. 1, 2, 3.—Bullythorpe *v.* Turner, Willes. 480.—Harvey *v.* Richards, 1 Hen. Bla. 645.—Tippet et al. *v.* May et al., 1 Bos. & Pul. 411.—However at any time during the same term, the plaintiff may rectify his mistake by taking judgment, Wosdward *v* Robinson, Stra. 303.

(*q*) Benton *v.* Robart, 2 East, 88.

(76) Vide *Nevins* v. *Keeler*, 6 *Johns. Rep.* 63. *Riggs* v. *Denniston*, 3 *Johns. Cas.* 198. *Fletcher* v. *Peck*, 6 *Cranch.* 126. *Barnard* v. *Duthy*, 5 *Taunt.* 27. *Spencer* v. *Southwick*, 11 *Johns. Rep.* 583. 587.

held that the plaintiff *should not demur, but should take his judgment for the part not mentioned in the beginning of the plea(r). But if a plea profess in its commencement to answer more than it afterwards answers, the whole plea is bad,[77] and the plaintiff may demur(s); as if in trespass the defendant assume in the introductory part of his plea to justify an assault, battery, and *wounding*, and afterwards merely shews that by virtue of a writ he *arrested* the plaintiff, but shews no excuse as to the *wounding*(t); but these rules should be understood with this qualification, that the part of the declaration which is professed to be, but is not answered by the plea is material and the gist of the action; for where any thing is inserted in the declaration, merely as matter of *aggravation*, the plea need not answer or justify that, and the answering the matter which is the gist of the action will suffice(u). A general charge ought to be answered in every part, but it is said to be sufficient to answer a collateral issue in the words of the plaintiff(v); thus in an action of waste in cutting twenty trees, the defendant ought to plead, that he did not cut the said trees *or either of them*, or the traverse would be too large, but in debt on an obligation, that he shall do no waste, and the breach is assigned that he cut twenty oaks, it is sufficient to plead that he did not cut the said twenty oaks *modo et forma*(w); and a plea in bar to an avowry *for rent for 120*l.* that the said 120*l.* were not due, without saying any part thereof, is bad on demurrer(ww). The points on this subject will be more fully stated, when we consider the nature of traverses.

II. QUALITIES. [*510] [*511]

3dly, Every special plea of justification states circumstances which either excuse the fact complained of or shew it to be lawful; it must therefore admit or confess such fact, otherwise it is not a justification, but a denial of the fact, and amounts to the general issue(x):[78] and therefore in trespass, for an assault and battery, where the defendant pleaded that he was riding a horse in the king's highway, and that his horse being frightened, ran away with him, and that the plaintiff was desired to go out of the way and did not, and the horse ran upon the

3dly, Must confess the facts pleaded to.

(r) Woodward v. Robinson, 1 Stra. 503.—1 Saund. 28. n. 2. *acc.* but see Gray v. Pindar, 2 Bos. & Pul. 427.

(s) 1 Saund. 28. n. 1, 2, 3. 296. n. 1.—Cooper v. Monke et al., Willes. 55.—See post.

(t) 1 Saund. 296. n. 1.—Gregory et ux. v. Hill, 8 T. R. 299.

(u) Taylor v. Cole & another, 1 Hen. Bla. 555. S. C. 3 T. R. 297.—Monpriatt v. Smith & another, 2 Campb. 175.—1 Saund. 28. n. 3.—Dye v. Leatherdale et al., 3 Wils. 20.—Com. Dig. Pleader, E. 1.

(v) Robsert v. Andrews et al., Cro. Eliz. 84.—Manners v. Postan, 3 Bos. & Pul. 348.—Com. Dig. Pleader, G. 15.

(w) Robsert v. Andrews et al., Cro. Eliz. 84.—Newhall v. Barnard, Yelv. 225.

(ww) Cobb v. Bryan, 3 Bos. & Pul. 348.

(x) Taylor v. Cole, 3 T. R. 298.—Holler v. Bush, 1 Salk. 394. S. C.—Carth. 380.—1 Saund. 28. n.; and 14. n. 3.

(77) Vide *Nevins* v. *Keeler*, 6 *Johns. Rep.* 63.

(78) Ante, 497, 498. *Kennedy* v. *Strong*, 10 *Johns. Rep.* 289. 291.

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plaintiff, against the defendant's will: on demurrer the plaintiff had judgment, because the defendant had assumed to justify the battery, and yet had not confessed that which amounted to a battery by himself; for if the horse ran away against the will of the rider, it could not be said with any colour of reason to be a battery in the rider, and it was admitted by the court that if the defendant had pleaded not guilty, this matter might have acquitted him upon evidence(*y*).

4thly, Must be single.

4thly, Every plea must in general be single, and if it contain two matters, either of which would bar the action and require *several* answers, it will in general be subject to a *special* demurrer for duplicity;[79] [*512] as if several outlawries, *or if moderate correction and a release, &c. be stated in one plea, as either of these would defeat the action, the plea would be considered double(*z*). But the defendant is not precluded from introducing several matters into his plea if they be constituent parts of the same entire defence, and form one connected proposition(*a*),[80] or be alleged as inducement to, or as a consequence of, another fact(*b*); thus in detinue at the suit of a feme, the defendant pleaded that after bailment of the goods to him by the plaintiff, she married E. F. and that during such marriage, E. F. released to him all actions, it was objected that the plea was double, viz. property in the husband by the intermarriage and a release by him; but it was resolved not to be double because he could not plead the release without shewing the marriage(*c*).[81] And at common law, the defendant may plead to a part of the declaration one ground of defence, and to another part a different ground(*d*): and this in inferior courts not of record, is the only

(*y*) Gibbon *v.* Pepper, Salk. 637. S. C.—Ld. Raym. 38.—Scott *v.* Shepherd, 3 Wils. 411.

(*z*) Co. Lit. 304. a.—Bac. Ab. Pleas, K. 1, 2.—Com. Dig. Pleader, E. 2.—Trethewy *v.* Ackland, 2 Saund. 49, 50.—Browning *v.* Beston, Pl. Com. 140. a.

(*a*) Bolts *v.* Parvis, 2 Bl. Rep. 1022. 1028.—Robinson *v.* Rayley, 1 Burr. 316. 318.—Spilsbury *v.* Micklethwaite, 1 Taunton, 146.

(*b*) Com. Dig. Pleader, E. 2.

(*c*) Dame Audley's Case, Moor. 25. Pl. 85.—Dalis. 30. Pl. 9.

(*d*) Bac. Ab. Pleas, K. 1.—Co. Lit. 304. a.

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(79) Vide *Kennedy* v. *Strong*, 10 *Johns. Rep.* 289.

(80) Vide *Strong & Udall* v. *Smith*, 3 *Caine's Rep.* 162. *Cooper* v. *Heermance*, 3 *Johns. Rep.* 318. *Patcher* v. *Sprague*, 2 *Johns. Rep.* 462. *Thomas* v. *Rumsay*, 6 *Johns. Rep.* 33

(81) To a declaration in debt against a sheriff for an escape, the defendant pleaded an involuntary escape, and the return of the prisoner into custody before suit brought, and also that the prisoner was discharged under the act for the relief of debtors, with respect to the imprisonment of their persons; and the plea was held good. The defendant could not have pleaded the involuntary escape, and return before suit brought, without also alleging that the prisoner was at the time of the plea pleaded in his custody. And if he had relied solely on the discharge, then at the trial he might have been surprised, and charged for the escape. So that both facts were necessarily blended in his defence, and went to one point, viz. an escape for which he was not responsible. *Currie & Whitney* v. *Henry*, 2 *Johns. Rep.* 433.

course to be adopted(*e*); and at common law one defendant may plead one matter in bar, and the other defendant another matter(*f*), or the defendant may plead in abatement to part, and in bar to other part, and may demur to the residue(*g*). The rule that a plea must be single also precludes the defendant from pleading and demurring to the same fact, the duplicity *in which case would draw the matter to a different [*513] inquiry, the demurrer to be tried by the court, and the fact by a jury(*h*). So a plea confessing and avoiding and also traversing the same point, is in the nature of a double plea(*i*). An executor, however, may and ought to plead several judgments, &c. outstanding(*j*); and in a plea of set-off the defendant may rely on a debt on record, and a debt on simple contract, though one will create an issue of law, and the other an issue of fact(*k*). The statute of Ann. allowing double pleas(*l*), the particular effect of which will hereafter be considered, does not appear to aid a duplicity in one and the same plea, though it allows of different grounds of defence, being stated in different pleas. Duplicity must be objected to by special demurrer, and the particular duplicity must be distinctly[82] pointed out(*m*), and if the plaintiff do not demur, he must reply to both material parts of the plea(*n*).

5thly, Must be certain.

A plea in bar must also be *certain*(*o*). We have already attempted to define the different degrees of certainty in pleading, and to shew the application of each, and we have seen that it is a general rule, that the minor degree of certainty, viz. that to a *common intent*, is sufficient in a plea in bar(*p*); there however appear to be some instances in which greater certainty is necessary in a plea than in a declaration; thus in a declaration *on a promise to pay the debt of another, in consideration [*514] of forbearance, it is not necessary to shew that the promise was in writing, according to the statute against frauds, but it is otherwise in a plea(*q*). So we have seen that in a declaration, claiming a right of way or other easement, it is sufficient to state that the plaintiff by virtue of his *possession* of a messuage, &c. is entitled to such easement without setting forth the particulars of the plaintiff's title, but in a plea justify-

(*e*) See the form, Greene *v.* Jones, 1 Saund. 296.

(*f*) Com. Dig. Pleader, E. 2.

(*g*) Ante, 447.

(*h*) Richard Liford's Case, 11 Co. 52.—Bac. Ab. Pleas, N.

(*i*) Denney *v.* Mazey, 2 Ventr. 212. Bradburne *v.* Kennerdale, 3 Mod. 318. Co. Ent. 504.

(*j*) 1 Saund. 337. a.

(*k*) Solomons *v.* Lyon, 1 East, 372.

(*l*) 4 Ann. c. 16.

(*m*) 1 Saund. 337. n. 3.—Doctr. Plac. 147.—Bac. Ab. Pleas, K. 1.—Com. Dig. Pleader, E. 2.—Griffiths *v.* Eyles, 1 Bos. & Pul. 415, 6.

(*n*) Bolton *v.* Cannon, 1 Vent. 272.

(*o*) Com. Dig. Pleader, E. 5.—C. 41. E. 7, 8, 9, 10, 11. *per totum*.

(*p*) Ante, 237.—Com. Dig. Pleader, E. 7. C. 17.—1 Saund. 49. n. 1. 346. n. 2.

(*q*) 1 Saund. 276. n. 2.—Case *v.* Barber, Sir T. Raym. 450.—Anon., 2 Salk. 519.—The Dean, &c. of Windsor *v.* Gover, 2 Saund. 297, 8.—Bac. Ab. Agreements, C. qu. 2 Saund. 180. b.

(82) Vide *Currie & Whitney* v. *Henry*, 2 *Johns. Rep.* 433. post. 646.

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ing an entry into land, &c. in respect of such easement it is necessary to set forth the right by prescription or grant, &c.(*r*). And in trespass where the defendant justifies under a writ, warrant, precept, or any other authority whatever, he must set it forth particularly in his plea, and it is not sufficient to allege, generally, that he committed the act complained of by virtue of a certain writ or warrant directed to him, but he must set it forth specially,[83] and the defendant ought further to aver in his plea, that he has substantially pursued such authority(*s*); and a justification in trespass "as servant" must also state that the act was done "by the command" of the principal(*t*). So in a declaration on a deed whether in debt or covenant, it is sufficient to say *testatum existit*, but in pleas and avowries, the deed being the substance of the answer, the operation of the deed or instrument must be expressly averred, and not stated by way of recital or *argument(*u*); but the mis-statement will be aided by verdict or general demurrer(*v*), and where the defendant states his right only as *inducement* or conveyance, so much certainty is not required; thus it is sufficient to allege in a plea that the defendant is *possessed* of a close, from which his cattle escaped into the plaintiff's land, through the defect of a fence which the latter ought to have repaired(*w*). In some cases the law allows *general* pleading for avoiding prolixity and tediousness(*x*).[84] The certainty or generality which is required in pleading depends on the nature of the subject matter(*y*), and this has given rise to the distinction between negative

[*515]

(*r*) Ante, 366.—Rider *v.* Smith, 3 T. R. 768.—Grimstead *v.* Marlow, 4 T. R. 719.

(*s*) Co. Lit. 283. a.—1 Saund. 298. n. 1.

(*t*) Chubb and Mallock, Hil. T. 51 Geo. 3. K. B.

(*u*) 1 Saund. 274. n. 1.—Moore et ux. *v.* Jones, Ld. Raym. 1539.—Blunt *v.* Whitacre, 1 Leon. 242.—Com. Dig. Pleader, E. 3.—Bac. Ab. Pleas, I. 5.

(*v*) Id. ibid.

(*w*) 1 Saund. 346. n. 2.

(*x*) Co. Lit. 303. b.—Bac. Ab. Pleas, I. 3.—Barton et al. *v.* Webb et al., 8 T. R. 462.—Shum et al. *v.* Farrington, 1 Bos. & Pul. 640.

(*y*) Id. ibid.

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(83) Vide *Stoyell* v. *Westcott*, 2 *Day's Rep.* 418. *Cruger* v. *Cropsey*, 3 *Johns. Rep.* 242. A plea by a defendant who had been discharged under the act for the relief of debtors, with respect to the imprisonment of their persons, *that he had been discharged out of custody by due course of law*, is bad. *Currie & Whitney* v. *Henry*, 2 *Johns. Rep.* 433.

(84) Vide *Postmaster General U. S.* v. *Cochran*, 2 *Johns. Rep.* 415, 416. *Hughes* v. *Smith & Miller*, 5 *Johns. Rep.* 168. *Frary* v. *Dakin*, 7 *Johns. Rep.* 79. In setting forth the proceedings of an inferior court or magistrate (for instance, in pleading the discharge of an insolvent debtor,) it is only necessary to set forth so much as was sufficient to give the court or magistrate jurisdiction, and then to state that *taliter processum est*, such proceedings were thereupon had, that a certain judgment was rendered, (or that the defendant was discharged from his debts) *Service* v. *Heermance*, 1 *Johns. Rep.* 91. *Peebles* v. *Kittle*, 2 *Johns. Rep.* 363. *Frary* v. *Dakin*, 7 *Johns. Rep.* 75. *Cantillon* v. *Graves*, 8 *Johns. Rep.* 472. Ante, 355. *Cruger* v. *Cropsey*, 3 *Johns. Rep.* 242.

and affirmative pleas(*z*); if the defendant be bound to perform all the covenants of an indenture, if they be all in the affirmative, he may plead performance thereof generally, and is not obliged to exhibit to the court a performance of each of them, for this would overload the proceedings, when only one of the covenants might be in controversy between the parties(*a*); but if any be in the negative, the defendant must plead specially to each of them, and generally to the affirmative covenants, for a negative cannot be performed, and we have seen that the plea of *non infregit conventionem* is not sufficient(*b*), though in the latter case the mispleading will *be aided on a general demurrer(*c*); so where the [*516] covenant is to do some act of record(*d*), or any matter of law, as to convey, discharge an obligation, ratify or confirm, &c. performance must be pleaded specially, because being a matter of law to be performed, it ought to be exhibited to the court who are judges of the law, to see if it be well performed, and not to a jury who are judges only of the fact(*e*); and general pleading is not allowed in actions of slander; and therefore where a defendant pleaded that the plaintiff had been illegally connected with a gang of swindlers, and had been guilty of defrauding divers persons, without stating any names, the plea was held bad on demurrer(*f*); and in pleas in trespass in particular, the facts justifying every part of the matter which the plea professes to answer must be stated with great precision, as if a *wounding* be justified under a latitat, the attempt to rescue or other resistance must be fully stated(*g*); and if an officer justify breaking an inner door of a house, in order to search for and arrest a party, it must be alleged that he demanded the key, or that no one was present, of whom such demand could be made, and it is not sufficient to say, that the door was locked, so that without breaking open the same the defendant could not enter, without alleging the particular circumstances which rendered the breaking necessary(*h*): so in pleading *matters in excuse all the circumstances should be shewn(*i*).[85] [*517] Necessary circumstances will however in general be intended in a plea, as if a feoffment be pleaded, livery need not be alleged, for it shall be intended(*k*), and it is not requisite to have so much certainty in pleading a matter which is only conveyance or inducement(*l*), or for matter in the negative(*m*).

(*z*) Id. ibid.—Show. Parl. Cas. 97.

(*a*) Id. ibid.

(*b*) Id. ibid.—Hodgson *v.* The East India Company, 8 T. R. 280.—Taylor *v.* Needham, 2 Taunton, 278.

(*c*) Id. ibid.

(*d*) Id. ibid.

(*e*) Id. ibid.

(*f*) J'Anson *v.* Stewart, 1 T. R. 748.

(*g*) 1 Saund. 296. n. 1.—Gregory et ux. *v.* Hill, 8 T. R. 299.

(*h*) Ratcliffe *v.* Burton, 3 Bos. & Pul. 223.—Sed vide Sprigg *v.* Neal, 3 Lev. 92.

(*i*) Bac. Ab. Trespass, I.

(*k*) Com. Dig. Pleader, E. 9.

(*l*) Com. Dig. Pleader, E. 10.—1 Saund 346. n. 2.

(*m*) Com. Dig. Pleader, E. 11.

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(85) Vide *The King* v. *The Inhabitants of Bridekirk*, 11 *East's Rep.* 304.

II. QUALITIES.

With regard to the *certainty* required in a plea in the statement of the *time* and *place* when and where material facts have happened, we have already seen that the time and place mentioned in the declaration must be adhered to, unless it be necessary for the defence to vary therefrom(*n*). Matter of discharge as a release, &c. must be shewn to have taken place after the trespass, &c.(*o*), and at common law in pleading payment of a bond, &c. it was necessary to shew that it was made on the day, &c.(*p*). Unless a particular place be material to the defence, it does not appear to be necessary to state any place where the facts happened;[86] for though a distinction was formerly taken between a plea in abatement and a plea in bar, a venue is now unnecessary in both(*q*). The doctrine of venues was clearly and correctly stated by Eyre, C. J. in Ilderton *v.* Ilderton(*r*), who said, "that as defendants, [*518] with respect to transitory matters, are obliged to lay the venue *in their pleas, in the place laid in the declaration, and since the statute 4 Ann. c. 16. s. 6. has directed that the jury shall come *de corpore comitatus*, the law of venues will be found to be very substantially altered, and to lie in a narrow compass, and the distinction between laying no venue at all in a plea, and being obliged to lay the same venue as in the declaration will be a distinction without a difference; and the principle now is, that the place laid in the declaration draws to it the trial of every thing that is transitory, and it should seem that neither forms of pleading nor ancient rules of pleading established on a different principle ought now to prevail"(*s*).

6thly, Must be direct and positive, and not argumentative.

6thly, We have already seen that pleading is a statement of *facts*, and not a statement of argument, it is therefore a rule that a plea should be direct and positive, and not by way of rehearsal, reasoning, or argument[87] which would tend to create unnecessary prolixity and expense(*t*), and deeds and other matters should be pleaded according to their legal operation, though differing from the words(*u*); thus if *scire facias* be brought against a parson for the arrears of an annuity recovered against him, and he plead that before the writ brought he had resigned into the hands of the ordinary, who accepted thereof, this plea is argumentative, for he should have pleaded directly that he was not

(*n*) Ante, 508, 9.

(*o*) Wimbish *v.* Talbois, Plowd. 46.

(*p*) Fulmerston *v.* Stewart, Plowd. 104.—Com. Dig. Pleader, E. 6.

(*q*) 1 Saund. 8. n. 2. *acc.*—Vin. Ab. Trial, a. pl. 20.—Com. Dig. Pleader, C. 20.—Adams *v.* Hatcher, Lutw. 1466. *contr.*

(*r*) 2 Hen. Bla. 161.

(*s*) 1 Saund. 8. n. 2.

(*t*) Ante, 216.—Co. Lit. 303. a. 304. a.—Com. Dig. Pleader, E. 3.—The King *v.* Johnson, 6 East, 597.—Slade *v.* Drake, Hob. 295.

(*u*) 2 Saund. 97. b. n. 2.—Bac. Ab. Pleas, I. 7.

(86) Acc. *Thomas* v. *Rumsey*, 6 *Johns. Rep.* 33, 34. *Furman* v. *Haskin*, 2 *Caine's Rep.* 373.

(87) Vide *Fletcher* v. *Peck*, 6 *Cranch*, 126. *Spencer* v. *Southwick*, 9 *Johns. Rep.* 313.

*parson on the day of the writ brought, instead of merely pleading facts from which that conclusion was to be drawn(*v*); so a surrender by operation of law should be pleaded as a surrender, and not merely circumstantially; thus, if a surrender be by acceptance of a new lease, it is not sufficient to say that the lessee being possessed by a former lease the lessor demised to him, but the plea should be that the lessee surrendered, and then that the lessor demised, or that the lessor entered and demised(*w*). An argumentative plea is aided after verdict, and upon a general demurrer(*x*).[88] It is said that there is this sort of affinity between an argumentative plea and a negative pregnant, that as the latter is a negative pregnant with an affirmative, so the former is an affirmative pregnant with a negative, and that the cure for both is in most cases to add or at least to substitute a direct denial of the substance and gist of the declaration or plea which is to be answered(*y*). [*519]

7thly, Every plea should be so pleaded as to be *capable of trial*, and therefore must consist of matter of *fact*, the *existence* of which may be tried by a *jury* on an issue, or its *sufficiency* as a defence may be determined by the *court* upon *demurrer*;[89] or of matter of *record*, which is triable by the record itself(*z*); and if fact be improperly complicated with matter of law, so that it cannot be tried by the court or jury, the plea is *bad, as if the defendant plead that A. *lawfully* enjoyed the goods of felons, it will be bad, for the jury cannot determine whether he *lawfully* enjoyed, nor the court whether he in *fact* enjoyed, and the plea should have stated the particular facts and title by virtue of which A. did enjoy(*a*). So if the condition of a bond be, that he will shew a *sufficient* discharge of an annuity, it is bad if he plead that he shewed a *sufficient* discharge, for the jury cannot try whether it is sufficient, and he ought to have shewn what discharge he gave, in order that the court might judge whether it was sufficient(*b*); but where the effect of the words represent a matter triable, it is sufficient, though according to the precise words it be not triable, as in covenant for quiet enjoyment, free from arrears of rent, a plea that he delivered money to the plaintiff with *intent* that he should therewith discharge the arrears, will be sufficient though the intent is not triable, for it is equivalent to the allegation that the defendant delivered the money to pay(*c*). A defect in this respect in a plea may be aided by the plaintiff's taking issue, upon a

7thly, Must be capable of trial.

[*520]

(*v*) 2 Anders. 179, 180.—Bac. Ab. Pleas, I. 5.

(*w*) Com. Dig. Surrender, N.

(*x*) Com. Dig. Pleader, E. 3.—Alleyn, 48.—2 Saund. 319. n. 6.

(*y*) 3 Reeve's Hist. 435.—Bac. Ab. Pleas, I. 6.

(*z*) Co. Lit. 303. b.—Com. Dig. Pleader, E. 34.—The case of the Abbot of Strata Marcella, 9 Co. 24. b. 25. a.

(*a*) The case of the Abbot of Strata Marcella, 9 Co. 25.

(*b*) The case of the Abbot of Strata Marcella, 9 Co. 25. a. *et vide* Martin and others *v.* Smith, 6 East, 561, 2.

(*c*) Griffith *v.* Harrison, 4 Mod. 249.

(88) Vide *Spencer* v. *Southwick*, 9 *Johns. Rep.* 313.

(89) Vide *Frary* v. *Dakin*, 7 *Johns. Rep.* 78.

II. QUALITIES. triable point, but if he should take issue upon an immaterial matter it might be necessary to award a repleader.

8thly, Must be true. 8thly, Every plea should be true and capable of proof, for as it has been quaintly said, truth is the goodness and virtue of pleading, as certainty is the grace and beauty of it, and if it appear judicially to the court on the defendant's own shewing, that he hath pleaded a false plea [*521] *this is a good cause of demurrer(*d*); as where the defendant pleaded to debt upon bond conditioned for performance of covenants contained in an indenture, which he pleads with a profert, that there were no covenants contained in the indenture, and upon oyer by the plaintiff, it appeared that the deed did contain divers covenants on the part of the defendant, the plea on demurrer was held insufficient(*e*). Sham pleading was, as we have already seen, formerly considered a very culpable abuse of the justice of the court, and was set aside with costs, and the parties concerned in it were censured and otherwise punished according to the discretion of the court(*f*); by the modern practice, however, many false or sham pleas, though they delay the cause, are allowed, but they are not encouraged(*g*).[90]

RULES OF CONSTRUCTION, &c. The rules which prevail in the *construction* and allowance of a plea in bar are, 1st, that it is to be construed most strongly against the defendant; 2dly, that a general plea if bad in part, is bad for the whole; and 3dly, that surplusage will not in general vitiate.

1st, Construction against the plea. 1st, As it is a natural presumption that the party pleading will state his case as favourably for himself as possible, and that if he do not state it with all its legal circumstances it is not in fact favourable to him, it is [*522] a rule of construction that a plea which *has two intendments shall be taken most strongly against the defendant(*i*); therefore in trespass if the defendant plead a release without saying at what time it was made, it shall be intended to have been made before the trespass was commit-

(*d*) Slade *v.* Drake, Hob. 295.—Bac. Ab. Pleas, G. 4.—Johnston *v.* Alston, 1 Campb. Ni. Pri. 176.—Hole *v.* Finch, 2 Wils. 394.

(*e*) Smith *v.* Yeomans, 1 Saund. 316, 7.—1 Saund. 9. b. n. 1.

(*f*) Ante, 505.—Bac. Ab. Pleas, G. 4.—Hole *v.* Finch, 2 Wils. 394.

(*g*) Ante, 505.—Johnston *v.* Alston, 1 Campb. Ni. Pri. 176.—Anon., Salk. 517.

(*i*) Com. Dig. Pleader, E. 6.—Co. Lit. 303. b.—Colthirst *v.* Bejushin, Plowd. 29. and Wimbish *v.* Tailbois, Plowd. 46.—Ante, 241, 2.

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(90) That each plea must be complete in itself, vide post. 543. n. (110).

ted(*k*); so at common law, if to a bond the defendant plead payment, it shall be intended to have been made after the day appointed for payment, if he do not aver it to be otherwise; and in pleading a promise by a third person to pay the debt of another, it must be stated to have been in writing(*l*). But this intendment in construction does not obtain where it would be inconsistent with another part of the plea(*m*); and there are some cases in which matters are implied in favour of the plea; thus it is said by Lord Coke, that all necessary circumstances implied by law need not be expressed, as in the plea of a feoffment of a manor, livery and attornment are implied(*n*); so where it is pleaded that land was assigned for dower, it is not necessary to say it was by metes and bounds, for it shall be intended a lawful assignment, which is by metes and bounds(*o*); and where a surrender of a lease for years is pleaded, and that it was agreed to by the lessor, it is not necessary to say that he entered, for it shall be intended, and it is not usual to plead a re-entry upon a surrender, any more than it is to plead livery upon a feoffment(*p*); so where it is pleaded that a sheriff made *his warrant, it is unnecessary to say that it was under his seal, for it could not be his warrant if it were not(*q*). So if a man plead that he is heir to A. he need not say either that A. is dead, or had no son(*r*). Rules of construction, &c. [*523]

2dly, If an entire plea be bad in part, it is insufficient for the whole(*s*). We have already in part considered this doctrine, in considering that a plea must contain an answer to all it assumes to answer(*t*). In assumpsit on several promises in different counts, if the defendant plead the statute of limitations to the whole, and it is a bad plea as to one of the counts, it will also be insufficient as to the residue(*u*);[91] and in an action against an executor or administrator if the defendant plead several judgments, recovered against *himself* in that character, and that he has not sufficient to satisfy them, if the plea be bad, or false, or avoided, as to one of the judgments, it will be bad for the whole; but if the judgments pleaded had been against the *testator*, it would be otherwise(*v*).[92] 2dly, Bad in part, bad in whole.

(*k*) Wimbish *v.* Tailbois, Plowd. 46.

(*l*) Ante, 303.—1 Saund. 276. a.

(*m*) The Bishop of Salisbury's Case, 10 Co. 59. b. Ante, 241.

(*n*) Co. Lit. 303. b.—S. P.—Ferrers et al. *v.* Wignal, Cro. Eliz. 401.

(*o*) Com. Dig. Pleader, E. 9.

(*p*) Peto *v.* Pemberton, Cro. Car. 101.

(*q*) The Sheriffs of Norwich *v.* Bradshaw, Cro. Eliz. 53.—Sheffield's Case, Palm. 357. S. P.

(*r*) Dal. 67.—Holland *v.* Franklin, 1 Leon. 184.—2 Saund. 305. b. n 13.

(*s*) C. D. Pleader, E. 36.—Duffield *v.* Scott et al., 3 T. R. 376.—Macdonnell *v.* Macdonnell, 3 Bos. & Pul. 174.—1 Saund. 337. n. 1.—Ridout et al. *v.* Brough, Cowp. 133.

(*t*) Ante, 509.

(*u*) Webb *v.* Martin, 1 Lev. 48.

(*v*) 1 Saund. 337. b.—Pease *v.* Naylor et ux., 5 T. R. 80.—Cox et al. *v.* Joseph, 307.

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(91) Vide *Perkins* v. *Burbank*, 2 *Mass. Rep.* 81.

(92) Acc. *Douglas* v. *Satterlee & others*, 11 *Johns. Rep.* 16. The plaintiff should demur specially to the judgments which are badly pleaded, and traverse the residue. *Ibid.*

Rules of construction, &c.

In one case, however, it was held that if one of the judgments pleaded was against the testator and a third person, and the defendant does not shew that the testator survived, without which the executor is not chargeable, the plea is bad for the whole(*w*); but the propriety of this decision was questioned by Lord Vaughan(*x*). So if several persons join in one plea, if it be bad for one, it is also bad for the *others(*y*); the extent of this rule will be considered under the head of pleading by several defendants(*z*). The statement of several debts in a plea of set-off is an exception, and if one of such debts be insufficient, the plaintiff must not demur generally(*a*); and in trespass, if a plea of justification consist of two facts, each of which would, when separately pleaded, amount to a good defence, it will sufficiently support the justification if one of these facts be found by the jury(*b*).

[*524]

3dly, Surplusage and repugnancy.

3dly, The rules with regard to surplusage and unnecessary allegations in a declaration also prevail in general with respect to pleas and every other part of pleading(*c*); and if either party, plaintiff or defendant, allege more than is necessary to introduce new matter, repugnant and contradictory to what went before, in any point *not material*, this will not vitiate the pleadings, according to the maxim, *utile per inutile non vitiatur*; and such redundant or repugnant part shall be rejected, especially after a verdict(*d*). Thus if the defendant in replevin make conusance as bailiff to A. administrator of B., where A. might have distrained in his own right, the words "administrator of B." shall be rejected as surplusage(*e*). There is, however, considerable danger in surplusage in the statement of *material* matter; for where a party takes upon himself to state in any pleading a substantive averment, or alleges a precise estate, which he is not bound to do, if they be *material* and bear on the question, he gives the other side the advantage of traversing it; thus in *Leake's case(*ee*), it was necessary that the plaintiff should shew that he had some right to put his cattle into the close against which the defendant was bound to repair the fence, but a *seisin in fee* was not necessary to give that right for a term for life or years or even an estate at will, or right of common, or the owner's license would have conferred that right(*f*); the plaintiff however thought proper to allege, that the right he had arose from a *seisin in fee*, therefore the defendant was at liberty to deny that right, as much as any other right which the plaintiff might have had to put his cattle into the close. So in another case(*g*), the ground of the plaintiff's action was, that the defendant would not permit him to cut down the remaining 200 trees:

[*525]

(*w*) 2 Saund. 50, 51. n. 4.—1 Saund. 337. n. 1.

(*x*) 1 Saund. 337. a.

(*y*) Duffield *v.* Scott et al., 3 T. R. 377.

(*z*) Post. 545 1 Saund. 28. n. 2.

(*a*) Dowsland *v.* Thompson et al., 2 Bla. Rep. 910.

(*b*) Spilsbury *v.* Micklethwaite, 1 Taunton, 146.

(*c*) Ante, 232 to 234.

(*d*) Bac. Ab. Pleas, I. 4.—Com. Dig. Pleader, E. 12.—Co. Lit. 303. b.—2 Saund. 305, 6. n. 14.—Dakin's Case, id. 291.

(*e*) Brown *v.* Dunnery, Hob. 208.

(*ee*) Dyer, 365.—2 Saund. 206. a. n. 21, 22. 207. n. 24.

(*f*) 1 Saund. 346. n. 2.

(*g*) Tatem et al. *v.* Perient, Yelv. 195

in order to shew that so many trees were left standing in the wood, he stated, that at the time of the agreement, he had cut down *only* 800 trees, and though it was not necessary for him to have stated that precise number, but having done so, and the number that was left being material to shew the damage which the plaintiff had sustained by the defendant's refusal to permit him to cut them down, he gave the defendant an advantage of traversing it(*h*). It seems therefore that a too precise or particular statement of material matter may be taken advantage of upon the trial of a traverse thereof, but in general not by demurrer, as the objection does not appear upon the record, but depends upon the *evidence, except where it is repugnant or contrary to matter precedent(*i*), and though such repugnancy may not in some cases be aided by verdict(*j*), yet if it appear that a verdict was given on another part of the plea, the mistake will be aided(*k*). RULES OF CONSTRUCTION, &c. [*526]

III. OF THE FORMS AND PARTS OF PLEAS IN BAR.

THE forms of the various pleas in bar, which usually occur in practice in particular actions are given in the following volume, but there are some rules which govern the structure of pleas in general, which it may be advisable here to inquire into. The parts of a plea in bar may be considered with reference to

1st. The title of the court in which it is pleaded.
2dly. The title of the term.
3dly. The names of the parties in the margin.
4thly. The commencement; which includes the statement of
  1st. The name of the defendant;
  2dly. The appearance;
  3dly. The defence;
  4thly. The *actio non*, being either a general or partial denial of the right of action.
5thly. The body; which may contain
  1st. Inducement.
  2dly. Protestation.
  3dly. The ground of defence.
  4thly. *Quæ est eadem.*
  5thly. Traverse.
6thly. The conclusion.

(*h*) 2 Saund. 207. n. 24.—206. n. 23. Williamson *v.* Allison, 2 East, 452.
(*i*) Co. Lit. 303. b.
(*j*) Bac. Ab. Pleas, I. 4.
(*k*) Id. ibid.

II. FORM AND PARTS. *These will appear from the following form:

[*527] In the King's Bench.

Roe ats. Doe. } *Michaelmas Term*, 49 *Geo.* III.

And the *said* Richard by E. F. his attorney, (or "in his own proper person,") *comes* and *defends* the wrong, or in trespass, "force,") and injury *when*, &c. and says that the said John ought not to have or maintain his aforesaid action thereof against him, because he says that, &c.; (*here follows the ground of defence, and occasionally an inducement, protestation, or traverse is inserted, and the plea then concludes, if to the contrary as follows:*) And of this he, the said Richard, puts himself upon the country, &c.; or if the conclusion be with a verification, the form is thus: "and this he, the said Richard, is ready to verify, wherefore he prays judgment, if the said John ought to have or maintain his aforesaid action thereof against him, &c." We will consider each part separately.

1st, Title of the court. It is usual at the head of the plea to state *in what court* it is pleaded, as "in the King's Bench," or, "in the Common Pleas," or, "in the Exchequer," &c.(*b*) But it is apprehended that the omission would not be material, and that the plea would be considered as having reference to the declaration, which must necessarily have been in the same court as the plea.

2dly, Title of term. With respect to the *title of the term*(*c*), pleas to *the jurisdiction, or in abatement, must, as we have seen, in general be entitled of the same [*528] term as the declaration(*d*); but pleas in bar may be, and usually are entitled of the term of which they are pleaded, which is frequently subsequent to that of which the declaration is entitled(*e*), and where matter of defence has arisen after the first day of the term, the plea should be entitled specially of a subsequent day(*f*).

3dly, The names of the parties. *The names of the parties in the margin* do not strictly constitute any part of the plea. The sirnames only are usually inserted, and that of the defendant precedes the plaintiff's, as, "Roe ats. Doe,"(*g*). They should correspond with the names in the declaration, or if the defendant plead in abatement or bar, by another name to that in the declaration, the difference should be specified in the margin, thus, "C. D. sued by the name of E. D. ats. A. B."(*h*) It has been recently decided, that it is sufficient in a *qui tam* action to entitle the plea of *nil debet* with the names of the parties as above, without the addition of *qui tam*, &c. to the plaintiff's name(*i*).

(*b*) See the forms, post. 2 Vol. 469, 470, 471, &c.

(*c*) See the form, post. 2 Vol. 469. 471, &c.

(*d*) Ante, 447, 8.

(*e*) Bac. Ab. Pleas, C. 2.—2 Saund. 1. f. 2. a. b. c. d.

(*f*) Post. 2 Vol. 469.—And see also a suggestion after Imparlance, post. 2 Vol. 453, 4.

(*g*) Post. 2 Vol. 455.

(*h*) Post. 2 Vol. 455. 462, 63.

(*i*) Dale *v.* Beer, 7 East, 333.—Post 2 Vol. 507.

III. FORM AND PARTS. 4thly, The commencement.

With respect to the *commencement*, and first the *name* of the defendant, we have already seen that when the defendant pleads misnomer in abatement, a plea commencing with the words, "And the *said* Richard, sued by the name of Robert," or thus, "and *he* against whom the *plaintiff hath exhibited his bill by the name of J. S." &c. is insufficient(*j*). A plea in bar, also commencing in the same manner, would be bad on demurrer(*k*); and therefore when the defendant is sued by a wrong name, and wishes to defend in his right name, his plea should begin thus: "And C. D. against whom the said A. B. hath exhibited his bill by the name of E. D. comes and defends the wrong and injury when, &c."(*l*). [*529]

After the names of the parties in the margin, the defendant's *appearance* and *defence* (*venit et defendit vim et injuriam*) are to be stated; some observations have already been made on these parts of pleading(*m*). The appearance may in general be stated to have been either in *person* or by *attorney*, for a defendant is still at liberty to appear and defend in person, and this is usual in an action against an attorney or prisoner(*n*); and as a feme covert, when sued alone, is incapable of appointing an attorney, she should defend in person(*o*); an idiot also should appear in person, and it is said that any one who can make a better defence, shall be admitted to defend for him; but a lunatic, or one who becomes *non compos mentis*, must appear by guardian, if he be within age, and by attorney if of full age(*p*). An infant must plead by guardian, and not *by attorney[93] or *prochein amy*(*q*), and if he, whether in the case of a sole or several defendants, plead by attorney,[94] it would be error(*r*),[95] and therefore the plaintiff must take out a summons to compel him to appear by guardian, and to alter his plea, or for leave to do it for him(*s*). A plea by a corporation aggregate, which is incapable of a personal appearance, must purport to be by attorney(*t*). In a plea by husband and wife, it is stated that they appear by their attorney(*u*). The plea should also be in the name of an attorney of the [*530]

(*j*) Ante, 455, 6.—Post. 2 Vol. 455. Roberts *v.* Moore, 5 T. R. 487.—Haworth *v.* Spraggs, 8 T. R. 515.

(*k*) Jackson *v.* Ford, 3 Wils. 413.

(*l*) Post. 2 Vol. 455.—3 Went. 210.

(*m*) Ante, 413, 414.

(*n*) Sayer, 217.

(*o*) Co. Lit. 125. b.—2 Inst. 390.—F. N. B. 27.—2 Saund. 209. c.—Ante, 412. See the form, post. 2 Vol. 455. 473.

(*p*) Id. ibid.—Beverly's Case, 4 Co. 124. b.—2 Saund. 333. n. 4.—Bac. Ab. Idiots and Lunatics.

(*q*) Ante, 412.—2 Saund. 117. f. n. 1.—Hesketh *v.* Lee et al., 2 Saund. 95, 96. n. 2.—Post. 2 Vol. 455. 472.

(*r*) 2 Saund. 212. n. 4.

(*s*) Shipman *v.* Stevens, 2 Wils. 50. 2 Saund. 117. f.

(*t*) Bro. Ab. Corporation, 28.—Co. Lit. 66. b.—Com. Dig. Pleader, 2 B. 2.

(*u*) Foxwist & others *v.* Tremaine, 2 Saund. 213.—Com. Dig. Pleader, 2 A. Post. 2 Vol. 455.

(93) Vide *Morkey* v. *Grey*, 2 *Johns. Rep.* 192. *Dewitt* v. *Post*, 11 *Johns. Rep.* 460.

(94) Whether the plaintiff may enter a nolle prosequi as to the infant, vide ante, 32.

(95) Vide *Dewitt* v. *Post*, 11 *Johns. Rep.* 460.

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proper court(*v*); and of the attorney by whom the defendant appeared, unless there has been an order to change, or the plaintiff may in these cases sign judgment(*w*); but though the appearance has been entered in the name of an agent to a country attorney, the plea may be in the name of the principal attorney(*x*); it ought not, however, where there are several attorneys in partnership, to be in the name of the firm, but only in the name of one of them(*y*) We have already stated the signification of the term *defence*, its nature, and the form of it in a plea in bar(*z*). Every plea in bar should begin with the defence(*a*); and it should seem that if the defendant plead only to part, and confess the [*531] residue, the defence should be confined to the *part intended to be pleaded to, and not cover the whole(*aa*).

In a plea of the general issue, or other plea in bar to the whole declaration, which merely denies what is alleged in the declaration, and does not introduce any new matter, it is not usual to insert the allegation, "that the plaintiff ought not to have or maintain his aforesaid action against the defendant," but after stating the defendant's appearance, and his defence, the plea immediately denies the matter stated in the declaration, and concludes to the country(*b*). But special pleas, after stating the appearance and defence, begin with this allegation, *actio non habere debet*(*c*), which always alludes to the commencement of the action, and not to the time of the plea(*d*), and payment of the debt after action brought is therefore no defence(*e*).[96] In debt on a bond, if the defendant, by his plea, deny the validity of the deed, or if an heir plead *rien per descent*, the defendant should say *onerari non debet*, and not *actio non*(*f*), and in this case the plea should describe the deed as a *writing*, or supposed writing obligatory, and should not admit that it is a deed(*g*). In replevin, if the defendant say he well *avows*, instead of well *acknowledges* the caption, no objection can be taken(*h*). When the matter of

(*v*) Turner *v.* Williams, Barnes, 259.

(*w*) Margerem *v.* Mackilwaine, 2 New Rep. 509.

(*x*) Buckler *v.* Rawlins, 3 Bos. & Pul. 111.—Moore *v.* Hodgson, Barnes, 239.

(*y*) Bunn *v.* Guy, 4 East, 195.

(*z*) Ante, 412. And see further, Hampson *v.* Bill, 3 Lev. 240.—Com. Dig. Abatement, I. 16.

(*a*) C. D. Pleader, E. 27.—3 Bos. & Pul. 9. n. a.—Co. Lit. 127. b.—Ante, 412 to 414.

(*aa*) Com. Dig. Pleader, E. 27.

(*b*) Brown *v.* Cornish, Salk. 516. See the form, post. 2 Vol. 471.

(*c*) Medina *v.* Stoughton, Salk. 211. post. 2 Vol. 469.

(*d*) Evans *v.* Prosser, 3 T. R. 186.—Le Bret *v.* Papillon, 4 East, 502.

(*e*) Toms *v.* Powell, 7 East, 536.—Page *v.* Wiple, 3 East, 316.

(*f*) 1 Saund. 290. n. 3.—Brown *v.* Cornish, Ld. Raym. 217.—S. C. 2 Salk. 516.—Post. 2 Vol. 510. n. s.

(*g*) Cospey *v.* Turner, Cro. Eliz. 800.—1 Saund. 290. n. 3. 291. n. 1.—Moore *v.* Jones, Ld. Raym. 1541.—Post. 2 Vol. 510.—Com. Dig. Pleader, E. 27.

(*h*) Wheadon *v.* Sugg, Cro. Jac. 373.—1 Saund. 347. c. n. 4.

(96) Sed vide ante, 472. n.

defence arose before the commencement of the suit, *actio non*, &c. is generally the proper commencement; but no matter *of defence arising after action brought, can properly be pleaded generally, but ought to be pleaded in bar of the *further* maintenance of the suit(*h*), and if the matter of defence arise after issue joined, it must be pleaded *puis darrien continuance(i)*;[97] and if it arise after trial, an *audita querela* is the only remedy.[98] In an action against husband and wife, both must defend and join in the plea, or the plaintiff should demur, or there shall be a repleader, although the action be merely for the tort of the wife(*j*). Where the plea is only to a part of the declaration, it must not cover the whole declaration, but must ascertain the part to which it is applied, or the plaintiff may demur(*k*); thus in assumpsit on several promises, if the defendant plead *quoad*, all except 4*l. non assumpsit*, and a tender of the 4*l.*, and does not show as to which promise the tender was made, it is insufficient(*l*); so in debt for rent against the assignee of a term, if he plead *nil debet*, as to 20*l.*, part of the rent, and as to the residue that he assigned over the term, he must show when the 20*l.*, became due(*m*). The mode of pleading in these cases is thus: "And the said C. D. by E. F. his attorney, comes and defends the wrong and injury, when, &c." and as to the said first count of the said declaration, (*or if in covenant*, "*as to the said supposed breach of covenant first above assigned*," *or if in trespass, "*as to the breaking and entering*, &c.") enumerating the particular trespasses mentioned in the declaration, and intended to be justified)(*mm*), "*the said C. D. says that the said A. B. ought not to have or maintain his aforesaid action thereof against him, because he says that*, &c.(*n*); and at common law, before the statute of Ann. which introduced several pleas, it was usual, particularly in actions of trespass, for the defendant to plead as to the force and arms, and whatever else is against the peace of the king, not guilty, and as to the residue of the supposed trespasses, a justification(*o*). In

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(*h*) Le Bret *v.* Papillon, 4 East, 502.—Post. 2 Vol. 469.—Tower *v.* Cameron & Kennedy, 6 East, 414.—but pleas of plene administravit and bankruptcy constitute an exception, Harris *v.* James, 9 East, 82.

(*i*) Id. ibid.—Post. 2 Vol. 724.

(*j*) Com. Dig. Pleader, 2 A. 3.—Tampion *v.* Newson et ux., Cro. Jac. 288.

(*k*) Com. Dig. Pleader, E. 27.—Kighly *v.* Bulkly, 1 Sid. 338.—Swinburne *v.* Ogle, Lut. 241.—Macdonnell *v.* Macdonnell, 3 Bos. & Pul. 174.

(*l*) Swinburne *v.* Ogle, Lutw. 241.—See the proper form, post. 2 Vol. 479.

(*m*) Kighly v. Bulkly, 1 Sid. 338.

(*mm*) As to the effect of this on the replication in trespass, see Monprivatt *v.* Smith and another, 2 Campb. 175.

(*n*) See the form, post. 2 Vol. 470. 578, &c.

(*o*) See the entries, Hawe *v.* Planner, 1 Saund. 10.—Earl of Manchester *v.* Vale, 1 Saund. 24.—Wright *v.* Ramscot, 1 Saund. 82.—Greene *v.* Jones, 1 Saund. 296.—Post. 2 Vol. 568.

(97) Vide *Cobb* v. *Curtiss*, 8 *Johns. Rep.* 470.

(98) It is usual, however, to grant the same relief on motion as the party might have obtained by audita querela. *Baker* v. *Judges of Ulster*, 4 *Johns. Rep.* 191. and see n. (*b*) 2d ed. *ibid.*

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actions of trespass to personal or real property, containing several counts, varying the statement of the injury to the same personal chattels, or the same closes, it is usual, in order to save the expense of several distinct pleas to each count, to render the plea applicable to all the counts; in this case the trespasses complained of in the different counts, and which are intended to be justified, are first enumerated in the introductory part of the plea, and then follows the statement of *actio non*, &c. and it is then alleged that the close and grass, &c. mentioned in the first count, and the close and grass, &c. mentioned in the last count, at the several times when, &c. were the same close and grass, &c. and not other or different, and that the seizing and taking, &c. mentioned in the first count, and the seizing and taking, &c. mentioned in the last count, are [*534] the same, and not other or different(*p*). But *these allegations are traversable, and it may be questionable whether this mode of pleading can in strictness be supported(*q*); but where it is certain that the different counts are for the same trespass, it may be advisable, in order to save expense, to risk this concise mode of pleading.

5thly, The body of the pleas.

With respect to the *body of the plea*, which states the *substance of the defence*, it must necessarily depend on the circumstances of each particular case. The forms of those pleas which usually occur in practice, are given in the second volume, and the qualities as to certainty of time, place, and other circumstances, have already been considered. As a *protestando*(*r*) and a *formal traverse*(*s*) more frequently occur in replications, we will postpone the particular consideration of them till that part of the work. In point of form in trespass and other actions, when the plea necessarily states the trespass to have been committed at some other time or place than that laid in the declaration, it is proper, immediately preceding the conclusion of the plea, to allege that the supposed trespasses mentioned in the plea, are the same as those whereof the plaintiff hath complained, which allegation is usually termed *quæ est* [*535] *eadem*,[99] and in that case the *plea also concludes with a traverse of having been guilty at any other time or place, or the plaintiff may demur(*rr*). But when it is unnecessary, and consequently improper to

(*p*) See the forms, Pleader's Asst. 401.—Post. 2 Vol. 605, 606.—9 Wentw. 47. 57. And see Sheldon *v.* Clipshaw, Sir Tho. Raymond, 449. where a plea of this nature was held sufficient, but see Freeston *v.* Standford et al., Cro. Eliz. 355.—Freeston *v.* Crouch, Cro. Eliz. 493.—1 Saund. 299. c.—Vin. Ab. Trespass, U. a. 4. pl. 9. from which it appears that after a plaintiff has new assigned another close, the defendant cannot plead that they are one and the same. In every second count, the closes, &c. are stated to be *other* closes, &c. ante, 397.

(*q*) Taylor *v.* Herbert, See Freem. 367. Bac. Ab. Usury, 209.

(*r*) Com. Dig. Pleader, N.—Post. Vol. 692.

(*s*) Com. Dig. Pleader, G. 1. &c.—Post. 2 Vol. 698.

(*rr*) Com. Dig. Pleader, E. 31.—Bate-

(99) Vide *Nevins* v. *Keeler*, 6 *Johns. Rep.* 63. ante, 494. n. (61).

vary from the time or place laid in the declaration, the *quæ est eadem* need not be inserted(*ss*); and in that case if a traverse were added, the plea would be demurrable(*t*), though if the traverse were defective, it would be rejected as surplusage(*u*).

6thly, The conclusion.

Every plea in bar must have its proper *conclusion*(*v*), which is either to the country, or with a verification, and the latter is either of matter of fact, or of matter of record. An avowry, or cognizance in replevin, in which the defendant is an actor, is an exception to this rule, and need not have any conclusion(*w*). In an action against husband and wife both should join in the concluding part of the plea(*x*).

When there is a complete issue between the parties, viz. a direct affirmative and negative, the plea should *conclude to the country*(*y*); as when the general issue is pleaded, or where the defendant simply denies some material fact alleged in the declaration,[100] as where the plaintiff declares in assumpsit on an award, and the defendant pleads no such award, the plea must conclude to the country(*z*). And this conclusion seems *proper, although the plea unnecessarily contains a formal traverse(*a*); and a plea in bar of *rien in arrear* to an avowry for rent, should so conclude(*b*); and this rule equally prevails whether the affirmative be first in the pleading, and the negative subsequent or *vice versâ*(*c*), Lord Holt having declared that there is no distinction in this respect; and therefore, though the negative be asserted by the plaintiff, and the affirmative by the defendant, as where the plaintiff, in his declaration, alleges a breach in non-payment of a sum of money on a particular day, or in not repairing, &c. and the defendant pleads *solvit ad diem*, or that he did repair, the plea should conclude to the country; but in debt on bond, if the declaration be general, and no particular breach be assigned, a plea of performance of the condition, must con-

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man *v.* Woodcock, Cro. Jac. 372.—2 Saund. 5. n. 3.—See the form, post. 2 Vol. 579. 600.—Mostyn *v.* Fabrigas, Cowp. 162.—Greene *v.* Jones, 1 Saund. 297.

(*ss*) King et ux. *v.* Tebbart, Skin. 387. S. C. Carth. 281.—Com. Dig. Pleader, E. 31.

(*t*) 2 Saund. 5. n. 3.—Com. Dig. Pleader, E. 31.

(*u*) Green *v.* Goddard, Salk. 641, 2.

(*v*) Com. Dig. Pleader, E. 28, &c.—Co. Lit. 303. b.

(*w*) 1 Saund. 348. n. 7.—Co. Lit. 303. a.—Brett *v.* Rigden, Plowd. Com. 342. Throckmerton *v.* Tracey, Plowd. Com. 163. a.

(*x*) Com. Dig. Pleader, 2 A. 3.—Watkinson et ux. *v.* Turnor, Cro. Car. 594.

(*y*) 1 Saund. 103. n. 1.—Com. Dig. Pleader, E. 32.

(*z*) Com. Dig. Pleader, E. 32.—2 Saund. 337. n. 1.—Roberts *v.* Marriett, 2 Saund. 188.—and 1 Saund. 103. n. 1.

(*a*) 1 Saund. 103. b.—Com. Dig. Pleader, E. 33.

(*b*) Horne *v.* Lewin, Ld. Raym. 641. Post. 2 Vol. 679.

(*c*) Skinner *v.* Kilby, Carth. 88, 9.—Com. Dig. Pleader, E. 32.

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(100) Vide *Manhattan Company* v. *Miller*, 2 *Caine's Rep.* 60. *Snyder & others* v. *Croy*, 2 *Johns. Rep.* 428.

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clude with a verification(*d*). So where a plea puts in issue matter of fact as well as matter of record, it should conclude to the country,[101] as if it be alleged in a declaration, that the plaintiff procured letters patent, and the defendant plead that the plaintiff did not procure, because the procurement is the principal point in issue; so if the issuing of a fieri facias and a levy under it be put in issue(*e*). And if a plea conclude with a special negative to the affirmative in the declaration, it should conclude to the country, as for instance in debt on a bond, the [*537] allegation in the declaration of the making of the bond, includes *the allegation of the delivery as a deed; and therefore, if the defendant plead that he delivered the deed as an escrow, he may conclude to the country(*f*). But where there is not a direct negative and affirmative, the plea need not so conclude, as if in debt on a bond to account, the declaration allege that the defendant received 20*l.* for which he did not account, and the defendant plead that he accounted in manner following, viz. that he was robbed of it, and gave notice to the plaintiff, this plea giving colour to the plaintiff, and referring the sufficiency of the mode of accounting to the court, may conclude with a verification(*g*). And where the declaration is founded on matter of record which is traversed in the plea, it should not in general conclude to the country, but should allege that there is no such record, and usually concludes with a verification, and prayer of judgment, *si actio*, &c.(*h*); but a verification appears to be unnecessary in this case, as the plea is in the negative(*i*), and if an action of debt be brought here, on a judgment in Ireland, the plea of *nul tiel record* must conclude to the country(*k*).

It is an established rule in pleading, that whenever *new matter* is introduced on either side, the pleading must *conclude with a verification, or averment*, in order that the other party may [*538] *have an opportunity of answering it(*q*).[102] The usual verification of a plea containing matter of *fact* runs thus, "and this the said defendant is ready to verify, wherefore he prays judgment, if the said plaintiff ought to have or maintain

(*d*) Id. ibid.

(*e*) Clerk *v.* Hoskins, 3 Mod. 79.—Com. Dig. Pleader, E. 32.—Sayer's Rep. 208. 299.

(*f*) Watts *v.* Rosewell, 1 Salk. 274. Stoytes *v.* Pearson, 4 Esp. Rep. 255.—Com. Dig. Pleader, E. 32.—Post. 2 Vol. 510.

(*g*) Vere *v.* Smith, 2 Lev. 5.—Com. Dig. Pleader, E. 32.

(*h*) Post. 2 Vol. 496.—Sandford *v.* Rogers, 2 Wils. 114.—Lil. Entr. 182. 404. 473.

(*i*) Fortes. 339.—Com. Dig. Pleader, E. 29.—Fanshaw *v.* Morrison, Salk. 520.

(*k*) Collins *v.* Lord Matthew, 5 East, 473.—S. C. 2 Smith's Rep. 25.

(*q*) 1 Saund. 103. n. 1. and cases there cited.—Com. Dig. Pleader, E. 33.

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(101) Vide *Lytle* v. *Lee*, 5 *Johns. Rep.* 112. *Thomas* v. *Rumsey*, 6 *Johns. Rep.* 26.

(102) Vide *Hord's Ex'r.* v. *Dishman*, 2 *Hen. & Mun.* 600. *Smith* v. *Walker*, 1 *Wash.* 135. *Service* v. *Heermame*, 1 *Johns. Rep.* 91.

his aforesaid action thereof against him," &c.(*r*); and if the word *certify* be inserted instead of *verify*, no advantage can be taken of the mistake(*s*). An avowry, we have seen, does not require any conclusion(*t*), and a plea of bankruptcy, though introductory of new matter, should conclude to the country(*u*), and where one of several facts in a declaration is denied with a formal traverse the plea may conclude with a verification, or to the country(*v*).[103] If matter of *record* be pleaded as a judgment recovered, for the same demand, &c. the plea should conclude with a *prout patet per recordum*, and a verification by the record, and if several records be pleaded, they should be respectively verified(*w*); but if matter of fact as well as matter of record, be put in issue, the trial may be by jury, and the plea may conclude to the country(*x*). To a *scire facias* upon a recognizance against bail in error, if the defendant plead that the judgment is pending and not determined, he need not conclude *prout patet*, &c. the plea being in the negative(*z*).

[*539] *Where the plea contains a verification, it generally concludes *with a prayer of judgment* in favour of the defendant, which is termed the *demand or petition* of the plea(*a*), as "wherefore the defendant prays "judgment if the said plaintiff ought to have or maintain his aforesaid "action thereof against him, &c." This prayer ought to correspond with, and be founded on the premises in the plea; and therefore matter of defence arising after the commencement of the suit should be concluded with a prayer as to the *further* maintenance of the suit(*b*); so a plea in abatement which contains matter in part abatement of the writ, should strictly be pleaded accordingly(*c*); but a mistake in these cases (with the exception formerly noticed in pleas in abatement)(*d*), will not vitiate, and the court will *ex officio* give judgment in favour of the defendant, according to the substance of the plea without reference to its conclusion(*e*). In an action of debt the defendant in pleading a tender ought to conclude his plea, by praying judgment if the plaintiff ought

(*r*) See the form, post. 2 Vol. 470.
(*s*) Harvey *v.* Stokes, Willes, 6.
(*t*) Ante, 535. 1 Saund. 348. n. 7.
(*u*) Miles *v.* Williams et ux., 1 P. Wms. 258, 9.—S. C. 10 Mod. 160. 247. Fortes. 334.—Barnes, 330.—Charlton *v.* King, 4 T. R. 156.—Pitcher *v.* Martin, 3 Bos. & Pul. 171.
(*v*) Hayman *v.* Gerrard, 1 Saund. 103.—Com. Dig. Pleader, E. 33.
(*w*) Com. Dig. Pleader, E. 29.—Morse *v.* James et al., Willes, 126.—See the forms, post. 2 Vol. 486.
(*x*) Sayer, 208. 301.—Peter *v.* Stafford, Hob. 244.—Ante, 536.
(*z*) Fanshaw *v.* Morrison, 2 Salk. 520.
(*a*) Powell *v.* Fullerton et al., 2 Bos. & Pul. 423.—2 Saund. 210. d.—Le Bret *v.* Papillon, 4 East, 502.
(*b*) Le Bret *v.* Papillon, 4 East, 502.
(*c*) Powell *v.* Fullerton et al., 2 Bos. & Pul. 420.
(*d*) Ante, 445, 6.
(*e*) Le Bret *v.* Papillon, 4 East, 502. 509.—Powell *v.* Fullerton, 2 B. & P. 420.—Dive *v.* Maningham, Plowd. 66. 2 Saund. 210. d.

(103) Vide *Lyttle* v. *Lee*, 5 *Johns. Rep.* 112. *Thomas* v. *Rumsey*, 6 *Johns. Rep.* 26.

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to have or maintain his action to recover *any* damages against him; for in this action, the debt is the principal, and the damages are only accessary: but in assumpsit the damages are the principal, and therefore in pleading a tender in that action, the defendant ought to conclude his plea with a prayer of judgment, if the plaintiff ought to have or maintain his action, to recover any more or greater damages than the sum [*540] tendered, or any damages *by reason of the non-payment thereof(*f*). In pleading matter of estoppel, the defendant in the conclusion of his plea should rely on it(*g*).

It was enacted by the statute of 4 Ann. c. 16. s. 1.[104] "that no advan- "tage or exception shall be taken of, or for the want of averment of *hoc* "*paratus est verificare*, or *hoc paratus est verificare per recordum*; or "of or for not alleging *prout patet per recordum*, or any other matter "of like nature, except the same shall be specially and particularly set "down, and shewn for cause of demurrer." Since this statute, a wrong or defective conclusion, either to the country or with a verification, &c. can only be objected to by special demurrer(*h*).

OF SEVERAL PLEAS.

We have already seen, when considering the qualities of a plea in bar at common law, and which still govern in the formation of each plea, taken separately, that it must be single, and that duplicity will render it insufficient, and that the defendant could not plead several defences to the same part of a declaration(*i*): but now it is enacted by the statute 4 Ann. c. 16. s. 4 & 5.[105] "that it shall be lawful for any defend- ant or tenant in any action or suit, or for any plaintiff in replevin, in any court of record, with the leave of the same court, to plead as many several matters thereto, as he shall think necessary for his defence; provided nevertheless that if any such matter shall, upon a demurrer [*541] *joined, be judged insufficient, costs shall be given at the discretion of the court, or if a verdict shall be found, upon any issue in the said cause, for the plaintiff or demandant, costs shall be also given in like manner; unless the judge who tried the said issue, shall certify that the

(*f*) Giles *v.* Hart, 2 Salk. 622, 3.—S. C. 1 Lord Raym. 254.—Shelley *v.* Wright, Willes, 13.

(*g*) Co. Lit. 303. b.—Com. Dig. Pleader, E. 31. Estoppel, E.—Dal. 68. 1 Saund. 325. n. 4.—Shelley *v.* Wright, Willes, 13.

(*h*) 2 Saund. 190. n. 5. Com. Dig. Pleader, E. 29 32, 33.

(*i*) Ante, 512, 3.

(104) See *Laws of N. Y. sess.* 11. *c.* 32. *s.* 6 1 *R. L.* 120.

(105) See *Laws of N. Y. sess.* 36. *c.* 56. *s.* 10. 1 *R. L.* 519.

said defendant or tenant, or plaintiff in replevin, had a probable cause to plead such matter, which upon the said issue shall be found against him. Provided also, that nothing in this act shall extend to any writ, declaration, or suit of appeal of felony, &c. or to any writ, bill, action, or information upon any *penal* statute"(*k*). OF SEVERAL PLEAS.

The liberty to plead several pleas is confined to courts of record, and therefore if in the county court, the defendant plead two or more pleas, the plaintiff may demur for duplicity. And in courts of record, the defendant cannot plead non assumpsit(*l*), or *non est factum*(*m*), to the whole declaration, and a tender as to part;[106] for one of these pleas goes to deny that the plaintiff ever had any cause of action, and the other partially admits it; and the defendant will not be allowed to plead non assumpsit, and the stock-jobbing act(*n*), or non assumpsit, and alien enemy(*o*). Nor can the defendant plead several matters which require different trials, as in dower, *ne unques accouple en loyal matrimonie*, and *ne unques seisie que dower*(*p*),[107] for the first matter is triable by the bishop, and the other by a *jury, and if the former be found against the [*542] defendant, the judge cannot certify that he had a probable cause of pleading it. Nor is the king bound by this statute; and where he is plaintiff, the defendant cannot plead double without leave of the Attorney-General(*q*). Nor does this statute extend to any action or information upon a penal statute(*r*). But with these exceptions the defendant may in different pleas plead as many different grounds of defence as may be thought necessary, though they may appear to be contradictory or inconsistent(*s*), as in trespass, not guilty, a justification, and accord and satisfaction, &c.[108] When, however, such pleas would create un-

(*k*) The construction and practice upon this statute will be found in Comyn's Digest, title Pleader, E. 2. and Tidd's Practice, 4th edit. 601 to 609.

(*l*) Maclellan *v.* Howard, 4 T. R. 194.

(*m*) Jenkins *v.* Edwards, 5 T. R. 97.

(*n*) Shaw *v.* Everett, 1 Bos. & Pul. 222.

(*o*) Id. n. (*a*).—Thyatt *v.* Young, 2 Bos. & Pul. 72.—Truckenbrodt *v.* Payne, 12 East, 206.—Shombeck *v.* De La Cour, 10 East, 326.

(*p*) Anderson *v.* Anderson, 2 Blac. Rep. 1157.—Hillier *v.* Fletcher, 1207.

(*q*) The King *v.* The Archbishop of York et al., Willes, 533.—Forrest's Rep. Exchequer, 57. A. D. 1801.

(*r*) Morgan *v.* Luckup, 2 Stra. 1044. S. C. Rep. T. Hard. 262.—Heyrick *v.* Foster, 4 T. R. 701.—The King *v.* Richardson, 9 East, 469.

(*s*) See the instances, Com. Dig. Pleader, E. 2.

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(106) And non est factum, and a tender to the whole declaration cannot be pleaded together. *Orgill* v. *Kimshead*, 4 *Taunt.* 459. Payment at the day and payment before the day cannot be pleaded together. *Thayer* v. *Rogers*, 1 *Johns. Cas.* 152.

(107) So, nul tiel record, and nil debet or payment, cannot be pleaded together. *Le Conte* v. *Pendleton*, 1 *Johns. Cas.* 104. S. C. *Coleman*, 72. *Carnes* v. *Duncan*, *Coleman*, 35. Sed vide post. 549, 550.

(108) So non est factum and a discharge by bankruptcy. *Atkinson* v. *Atkinson*,

OF SEVERAL PLEAS.

just delay, the court will sometimes rescind the rule to plead double, and compel the defendant to rely on one of his pleas(*t*).[109]

When several pleas are pleaded under this statute, the second and subsequent pleas should in strictness, in the introductory part of each, state that it is pleaded "*by leave of the court first had and obtained*," but the omission, though intechnical and an irregularity, appears to be no cause of demurrer(*u*); and if in fact no leave has been obtained, or it has been improperly obtained, the proper course is either to sign judgment, or to apply to the court to strike out one of the pleas(*v*). Where there are several pleas, it is advisable, in order to avoid prolixity and expense, if practicable, to refer, in subsequent pleas, to a [*543] statement of the same matter *in a preceding plea, the same as in the case of several counts in the declaration(*vv*); but one plea cannot be taken advantage of to help or vitiate another, for every plea must stand or fall by itself, unless expressly referred to by an appropriate allegation(*w*).[110]

OF PLEAS BY SEVERAL DEFENDANTS.

In general when the defence is in its nature joint, *several defendants* may join in the same plea, or they may sever; and one defendant may

(*t*) Rama Chitty *v.* Hume, 13 East, 255.

(*u*) Bartholomew *v.* Ireland, Andr. 108.—Ryley *v.* Parkhurst et al, 1 Wils. 219.—Symmers et al. *v.* Regem, Cowp. 500, 501.—Sed vid. Duke of St. Albans *v.* Shore, 1 H. B. 275. 278.

(*v*) Id. ibid.—Tidd, Prac. 4th edit. 605.—Griffiths *v.* Eyles, 1 Bos. & Pul. 415.

(*vv*) Ante, 396.—Grills *v.* Mannell et al., Willes, 380.

(*w*) Grills *v.* Mannell et al., Willes, 380.

Str. 871. *Philips* v. *Wood et al.*, *Str.* 1000. Non est factum and usury. *Lechmere* v. *Rice*, 2 *Bos. & Pul.* 12. The general issue, and the statute of limitations. *Da Costa* v. *Carteret et al.*, *Str.* 889. In trespass, a license and justification. *Bac. Abr. Pleas* (K. 3.) In debt for rent upon a parol demise, nil habuit in tenementis, and non dimisit. *Ibid.* Non assumpsit and infancy. *Wilson* v. *Ames*, 5 *Taunt.* 340. Non tenure, nothing in arrear and infancy. *Ibid.* In replevin, non cepit and property in the defendant. *Shuter* v. *Page*, 11 *Johns. Rep.* 196. So, non cepit, property in a stranger and liberum tenementum. *Barnes*, 364. In debt for rent, a tender and eviction. *Cary* v. *Jenkings*, *Str.* 496.

(109) In the Supreme Court of Massachusetts, a motion for leave to plead double to a writ of error was denied, the court doubting whether the statute allowing double pleading extended to writs of error. *Parker* v. *Gilson*, 1 *Mass. Rep.* 230.

(110) Pleas pleaded under leave of the court must contain in each of them, sufficient matter in law to bar the plaintiff's action, and they cannot be made to depend on facts stated in other pleas. *Currie & Whitney* v. *Henry*, 2 *Johns. Rep.* 437. *Sevey* v. *Blacklin & others*, 2 *Mass. Rep.* 543.

plead in abatement, another in bar, and the other may demur(*x*); except in an action against husband and wife, when the husband must join in the plea with his wife(*y*). And by way of defence two may join, although the subject matter of their plea be several, as in an *audita querela*(*z*), and though their different defences may be inconsistent(*a*); and in trespass against two for a battery, they may jointly plead that the plaintiff assaulted them, and that they in self-defence beat the plaintiff, or they may sever(*b*); or they may jointly plead that they were servants of N. and committed the assault in his defence; so where two justify an arrest by joint warrant(*c*), and one of several defendants may plead not guilty, and the other a justification, as his servant, for one defendant cannot by pleading oust the other of his defence(*d*). Joint-tenants and co-parceners must join in an avowry, and a cognizance as their bailiff should be for the entire rent(*e*); but tenants in *common must sever, [*544] and the avowry of each must be *de unâ medietate* of the whole rent, and not of a certain sum which amounts to a moiety; and when the action is against one of several tenants in common, he avows for his own proportion, and makes cognizance as bailiff of his companion for the residue(*dd*); or he may avow only for his undivided share of the rent(*ee*); and if the action of replevin be against two tenants in common, they should join, one avowing and the other as his bailiff making cognizance for an undivided moiety of the rent, and then the one who first made cognizance avowing in his own right, and the other who first avowed making cognizance as his bailiff for the other undivided moiety(*f*); and if three tenants in common distrain thirty beasts, it is said they should each avow separately for ten(*g*); and one tenant in common cannot avow alone, for taking cattle damage feasant, but he ought also to make cognizance as bailiff of his companion(*h*). And where two persons are defendants in replevin they cannot make several avowries in their own right for distinct matters; thus if one avow for rent-service, and the other for rent-charge, both the avowries shall abate, for the court would be in doubt to which of them return should be awarded(*i*). Several persons having several estates, cannot join in prescribing, because the

OF PLEAS BY SEVERAL DEFENDANTS.

(*x*) 2 Vin. Ab. 75.—Tit. Action, Joinder, H. D.—Com. Dig. Pleader, E. 35.

(*y*) Com. Dig. Pleader, 2 A. 3.—Watsen *v.* Thorpe et ux., Cro. Jac. 239. Tampion *v.* Newson et ux., Cro. Jac. 288.

(*z*) Worsley et al. *v.* Charnock, Cro. Eliz. 473.

(*a*) Fitch *v.* Rawling & others, 2 Hen. Bla. 397.—2 Mod. 67.

(*b*) 2 Vin. Ab. 76. pl. 14.

(*c*) 2 Vin. Ab. 76. pl. 15, 16.

(*d*) 2 Mod. 67.

(*e*) Bac. Ab. Joint-tenant, K.—Replevin, K.—Harrison *v.* Barnby, 5 T. R. 246.—Kitchen *v.* Buckley, 1 Lev. 109.—S. C. Sir T. Raym. 80.

(*dd*) Id. ibid. post. 2 Vol. 562. n. x. 2 Vin. Ab. 59. pl. 27.

(*ee*) Harrison *v.* Barnby, 5 T. R. 246. Culley *v.* Spearman, 2 Hen. Bla. 387.

(*f*) Pullen *v.* Palmer, 3 Salk. 207. Harrison *v.* Barnby, 5 T. R. 247.

(*g*) Id. ibid.—Co. Lit. sect. 314. 317.

(*h*) Culley *v.* Spearman, 2 Hen. Bla. 386.

(*i*) Slingsby's Case, 5 Co. 19. a.—Tey's Case, 5 Co. 38. b.

OF PLEAS BY SEVERAL DEFENDANTS.

prescription of one does not concern the other(*k*); though an *exception has been allowed where two persons commit a joint trespass(*l*).

[*545] So personal defences, as coverture, infancy, &c. should be pleaded separately; and one of several defendants may justify by command of another defendant, who pleads not guilty, or suffers judgment by default, for his act shall not take away the ground of defence from his servant(*m*).

If two defendants join in a plea, which is sufficient for one, but not for the other, the plea is bad as to both,[111] for the court cannot sever it and say that one is guilty, and that the other is not, when they all put themselves on the same terms(*n*). Thus it has been held that if an officer plead separately under a writ of *fi. fa.* or other process, he need not state the judgment on which the writ was founded; but if he join in the plea with the plaintiff in the former action, and the judgment be not stated, the plea will be bad as to both the defendants, unless the plaintiff in the former suit justify merely in aid of the officer(*o*); but this rule does not apply where the objection to the plea is merely on account of surplusage(*p*); and if several executors join in the same plea of *plene administravit*, each will only be liable to pay the assets found by the jury to be in his own hands, though it is more usual for

[*546] each executor *to plead separately(*q*). If the defendants join in the plea, and it is in the singular number, it will be bad on demurrer(*r*). The plaintiff may, in an action *in form ex delicto*, enter a *nolle prosequi* as to one(*s*); but in actions *in form ex contractu*, unless the defence be merely in the personal discharge of one, a *nolle prosequi* cannot be entered(*t*). If the defendants plead severally, the plaintiff may demur to one plea, and join issue on the other(*u*),[112] and may in an action *ex delicto* afterwards enter a *nolle prosequi* on the demurrer, and proceed

(*k*) 2 Vin. Ab. 56. pl. 47. 76. pl. 18. Sed vide Potter *v.* North, 1 Saund. 348. Chitty's Game Laws, 1087.

(*l*) 2 Vin. Ab. 76. pl. 18.—Ante, 9. n. o.—Sed quære.

(*m*) Wine *v.* Rider et al., 2 Mod. 67.

(*n*) 1 Saund. 28. n. 2.—Duffield *v.* Scott et al., 3 T. R. 376, 7.—Philips *v.* Biron et al., Stra. 509.—Smith *v.* Bouchier et al., 994.—Middleton *v.* Price, 1184.—Parsons *v.* Loyd, 3 Wils. 344. Grant *v.* Bagge et al, 3 East, 132, 3. Collett et al. *v.* Lord Keith, 2 East, 263.

(*o*) Id. ibid.—Collett et al. *v.* Lord Keith, 2 East, 263-270.—Grant *v.* Bagge et al., 3 East, 132, 3. 142.—Barker *v.* Braham et al., 3 Wilson, 376.

(*p*) Duffield *v.* Scott et al., 3 T. R. 377.

(*q*) 1 Saund. 336. n. 10.

(*r*) Ford *v.* Edgecomb et al., Lutw. 1531.—C. D. Pleader, E. 35.

(*s*) Greeves *v.* Rolls, Salk. 457.—Tidd's Prac. 4th edit. 622.

(*t*) Noke et al. *v.* Sugham, 1 Wils. 89.—Chandler *v.* Parkes et al., 3 Esp. Rep. 76.—Ante, 32.

(*u*) Walsh *v.* Bishop, Cro. Car. 239. 243.—Parker *v.* Lawrence et al., Hob. 70.—Com. Dig. Pleader, E. 35.—Tidd's Prac. 4th edit. 790.

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(111) Vide *Moors* v. *Parker et al.*, 3 *Mass. Rep.* 310. 312. *Schermerhorn & others* v. *Tripp*, 2 *Caine's Rep.* 108. *Marsteller & others* v. *M'Clean*, 7 *Cranch*, 158.

(112) Vide *Lansing* v. *Montgomery*, 2 *Johns. Rep.* 382.

against the other(*v*), or if several issues are joined, he may enter a *nolle prosequi* to one before or after judgment(*w*).

OF PLEAS BY SEVERAL DEFENDANTS.

As a defective declaration may be aided at common law by the plea or by a verdict(*x*), so *a defective plea may be aided* in some cases by the replication or verdict; and the statute of Jeofails and that for the amendment of the law, also aid many mistakes after verdict or judgment(*y*). Thus an informal plea in bar may be aided by the *replication*, as if in debt on bond to make an estate to A., the defendant pleads that he enfeoffed another to the use of A. (which is not sufficient without shewing that A. was a party, or had the deed,) yet if *the plaintiff reply that [*547] he did not enfeoff, this aids the bar(*z*); so if the defendant plead an award without sufficient certainty, and the plaintiff make a replication which imports the award to have been made, it aids the uncertainty of the bar(*a*). But a plea which is substantially and altogether bad will not be aided by the replication(*b*); as if the defendant plead an accord, and does not shew satisfaction, and the replication denies the agreement, this does not aid the bar(*c*). A *verdict* also will frequently aid a defective plea, as if in a plea stating a right of common for cattle levant and couchant, the defendant afterwards omit to allege that the cattle which he put on the *locus in quo* were levant and couchant, and issue be taken upon the prescriptive right, and it be found for the defendant, the omission of the allegation that the cattle were levant and couchant, though bad on demurrer, will be aided by verdict(*d*); but if in pleading a right of common, it be too generally described as to its commencement and determination, it would be insufficient even after verdict(*e*).

Defects when aided.

(*v*) Id. ibid. When not, see Drummond *v.* Dorant et al., 4 T. R. 360.—1 Saund. 285. n. 5.

(*w*) Id. ibid.

(*x*) Ante, 401. When to sign judgment, Hopgood *v.* Wright and others, 2 New Rep. 188.

(*y*) Com. Dig. Pleader, E. 37, 38, 39. Vin. Ab. tit. Replication.—4 Ann. c. 16. 1 Saund. 228. a. n. 1.

(*z*) Stutfield *v.* Somerset, Cro. Eliz. 825.

(*a*) Com. Dig. Pleader, E. 37.

(*b*) The City of London's Case, 8 Co. 120. b.—Anon., 2 Wilson, 150.

(*c*) Com. Dig. Pleader, E. 37.

(*d*) Corbyson *v.* Pearson, Cro. Eliz. 458.—Com. Dig. Pleader, E. 58.

(*e*) Da Costa *v.* Clarke, 2 Bos. & Pul. 257.

*CHAPTER VIII. [*548]

OF REPLICATIONS.

IF, when the defendant has pleaded, the plaintiff perceive that he cannot support his action to any extent, he should either obtain leave to discontinue(*a*); or he may enter a *nolle prosequi* as to the whole or a part of the cause of action(*b*),[1] unless there has been a demurrer for misjoinder(*c*); and if where there are several defendants in an action for a tort, or in an action *ex contractu*, where the plea of one of the defendants is merely in his personal discharge, as bankruptcy, &c. the plaintiff may enter a *nolle prosequi* as to him(*d*). So where *plene administravit* has been pleaded the plaintiff may take judgment of *assets in futuro*(*e*); or to a plea of the insolvent debtor's act, he may take judgment for his demand to be levied against the defendant's future effects(*f*). The points relating to *discontinuing*(*g*), and entering a *nolle prosequi*(*h*), are principally matters of practice, and have already been fully treated of, we will therefore proceed to the *consideration of replications, which answer the defendant's pleas. [*549]

General observations.

As the replication is in general governed by the plea, and most frequently denies it, the pleader has not often much difficulty in deciding what replication he should adopt. When the plea properly concludes to the *country*, the plaintiff cannot in general reply, otherwise than by

(*a*) Tidd's Prac. 4th edit. 617.—Id. 620, 1.

(*b*) See the precedent, Post. 2 Vol. 643.

(*c*) Rose et ux. *v.* Bowler et al., 1 Hen. Bla. 108.—1 Saund. 285. n. 5.

(*d*) Ante, 32.—Tidd's Prac. 4th ed. 622.

(*e*) See the precedent, Post. 2 Vol. 659, 60.

(*f*) Buxton & another *v.* Mardin, 1 T. R. 81. See the precedent, Post. 2 Vol. 644.

(*g*) Tidd, 3d edit. 626 to 629. 4th edit. 617 to 620.—2 Saund. 73. n. 1.

(*h*) Tidd, 3d edit. 629 to 633. 4th edit. 620 to 623.—1 Saund. 207. n. 2.

(1) Vide *Hughes* v. *Moore*, 7 *Cranch*, 176.

GENERAL OBSERVATIONS.

adding what is termed the *similiter*(*i*); but when the plea concludes with a verification, the replication may either, *first*, conclude the defendant by matter of *estoppel;* or, *secondly*, may *deny* the truth of the matter alleged in the plea, either in whole or in part; or, *thirdly*, may *confess and avoid* the plea; or, *fourthly*, in the case of an evasive plea, may *new assign* the cause of action. And though at common law a replication cannot be double or contain two or more answers to the same plea, and the statute 4 Ann. c. 16. does not extend to replications (except in the instance of a plea in bar to an avowry in replevin, which is in the nature of a replication,) yet the plaintiff in many cases has an *election* of different replications, thus if infancy be pleaded in assumpsit, the plaintiff may reply either that the defendant was of age, or that the goods, &c. were necessaries, or that the defendant after he came of age ratified and confirmed the promise, or he may reply as to part of his demand, that it was for necessaries, to other part that the defendant was of full age at the time of the contract, and to other part, that he confirmed it, after he came of age. So if an executor or administrator plead several judgments outstanding, and no assets *ultra*, the plaintiff may
[*550] reply as to one of *the judgments, *nul tiel record*, and to another that it was obtained or kept on foot by fraud(*h*). So if a set-off on a recognizance and also on simple contract be pleaded, the plaintiff may reply as to the recognizance *nul tiel record*, and as to the residue of the plea *nil debet*(*ii*). And if a tender be pleaded, the plaintiff may either deny the tender or its sufficiency, or may reply a request before or after the tender, or that a writ was previously issued(*j*). And in the case of a set-off the plaintiff may either deny the existence of the debt, or may reply the statute of limitations. And if the statute of limitations be pleaded, the plaintiff may reply either that the defendant did undertake, or that the cause of action did accrue, within six years, in the negative of the words of the plea, or that the accounts were between merchants, or that the writ was issued within six years. In short, in almost every action the plaintiff has frequently the choice of several replications.

We will consider the points relating to replications under the following divisions:

(*i*) Com. Dig. Pleader, R. 1.

(*h*) 1 Saund. 337. b. n. 2.—Aston *v.* Sherman, 1 Salk. 298.—1 Lord Raym. 263. S. C.

(*ii*) Solomons *v.* Lyon, 1 East, 369.

(*j*) 1 Saund. 33. n. 2.

I. The several replications which usually occur in practice, GENERAL OBSERVATIONS.
- 1st. In assumpsit.
- 2dly. In debt.
- 3dly. In covenant.
- 4thly. In detinue.
- 5thly. In actions against executors and heirs.
- 6thly. In case.
- 7thly. In trover.
- 8thly. Pleas in bar in replevin.
- 9thly. Replications in trespass.

II. Their form and parts.

III. Their qualities.

*I. OF THE SEVERAL REPLICATIONS. [*551]

In ASSUMPSIT, if the defendant has pleaded infancy in bar, the plaintiff may, if the plea were untrue, reply, denying the fact(*k*), or if true he may reply that the goods mentioned in some of the counts of the declaration to have been sold to the defendant were necessaries, which fact will not be intended unless alleged, and that the money mentioned in the count for money paid was paid in the purchase of necessaries for the defendant, and may enter a *nolle prosequi* as to the counts for money lent, had and received, and upon an account stated(*l*); or he may reply to the whole or part, that the defendant ratified and confirmed the promises after he came of age(*m*). But to a plea in bar of coverture at the time the promises were made, the plaintiff can only deny the fact, or reply some matter which shows that at the time the defendant was competent to contract, as that her husband then was *civiliter mortuus*; and he cannot reply that she had a separate maintenance, secured to her by deed(*n*), and therefore there is seldom any answer to this plea. When alien enemy has been pleaded, the *plaintiff may either deny [*552] the fact, or if true may reply a license, &c. to reside in this country(*o*); and when a discharge under the insolvent debtors or lords act is pleaded, the replication may either deny the fact(*p*), or reply that the discharge was obtained by fraud(*q*), or in the former case, the plaintiff may IN ASSUMPSIT.

(*k*) Post. 2 Vol. 642.—Cl. Asst. 76.

(*l*) Howard *v.* Jennison, 1 Salk. 223. Post. 2 Vol. 642.—Joe *v.* Chester, Cro. Jac. 560.—Trueman *v.* Hirst, 1 T. R. 40.—Com. Dig. Pleader, 2 W. 22.

(*m*) Post. 2 Vol. 643.—Borthwick *v.* Carruthers, 1 T. R. 648.

(*n*) Marshall *v.* Rutton, 8 T. R. 545.

(*o*) 43 Geo. 3. c. 155.

(*p*) 3 Went. 200. 199.—and id. Index xx.

(*q*) 41 Geo. 3. c. 70. s. 38. 56.—44 Geo. 3. c. 108, &c.

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admit the plea and take judgment for his demand, to be levied of the future effects(*r*). If gaming, usury, or any other illegality in the consideration or contract be pleaded, the plaintiff may reply, that the contract was made upon a good and legal consideration, and not upon the supposed unlawful consideration mentioned in the plea(*s*). To a plea of tender, the replication may either deny the tender generally(*t*), or state that the writ was previously issued(*u*), or a writ with continuances(*v*); but if the plea state that the tender was made before the commencement of the suit, instead of exhibiting the bill, then there appears no necessity to reply the writ, and it would be sufficient to produce it in evidence; or the plaintiff may reply a prior(*w*) or subsequent(*x*) demand, or admitting the tender, may proceed to trial on the plea of *non assumpsit* when he is prepared to prove that more was due [*553] than the *sum tendered(*y*). The replication to a plea of accord and satisfaction, may either deny the delivery of the chattel in satisfaction, or protesting against that fact, may deny the acceptance(*z*): and if an award be pleaded, the plaintiff may either deny the submission, or the award, or may set out the whole award, and if bad in point of law, may demur(*a*). If a former recovery for the same debt, or a plea of set-off on a recognizance be pleaded, the replication is *nul tiel record*(*b*): and to a plea of judgment recovered, the plaintiff may new assign that his action is for the breach of different promises(*c*);[2] or to a plea of *release*, he may reply *non est factum*(*d*), or that it was obtained by duress or fraud(*e*), and it is in general unnecessary to state the particulars of fraud(*f*);[3] or to a plea of release by a third person, the plain-

(*r*) Post. 2 Vol. 644.—Buxton et al. *v.* Mardin, 1 T. R. 81.—Com. Dig. Pleader, 2 G. 16.

(*s*) Com. Dig. Pleader, 2 W. 23.—Hedges *v.* Sandon, 2 T. R. 439.—1 Saund. 103. b. n. 3.—Post. 2 Vol. 663.—3 Wentw. 104. 108. and id. Index, v.

(*t*) Post. 2 Vol. 644.

(*u*) Id. 645.

(*v*) Id. 646.

(*w*) Id. 648.

(*x*) Id. 649.—Spybey *v.* Hide, 1 Campb. 181.

(*y*) Post. 2 Vol. 649.

(*z*) Post. 2 Vol. 650, see 3 Wentw. Index, vi. vii. x.

(*a*) 2 Vol. 650.—3 Wentw. Index, viii.

(*b*) Post. 2 Vol. 650, 1, 2.

(*c*) Post. 2 Vol. 700.

(*d*) Post. 2 Vol. 651.

(*e*) Post. 2 Vol. 651.—Wentw. Index, xii.

(*f*) Meriel Tresham's Case, 9 Co. 110.

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(2) Vide *Snider & Van Vechten* v. *Croy*, 9 *Johns. Rep.* 327. where it was held that the plaintiff might avoid the effect of the former judgment, by replying that he was prevented by the court from proceeding for one of the causes of action mentioned in his declaration, and which was the subject of the present suit.

(3) It has been held in the Supreme Court of the State of New York, that to a plea of a release or payment, the plaintiff may reply that, previous to the execution of the release or to the payment, he had assigned the bond to A. B. of which the plaintiff had notice. *Andrews* v. *Bucker*, 1 *Johns. Cas.* 411. *Littlefield v. Storey*, 3 *Johns. Rep.* 425. *Raymond* v. *Squire*, 11 *Johns. Rep.* 47. It is laid down however as a general rule, that matter of defence in equity cannot be

tiff may reply *ne relessa pas*(*g*). To a plea of set-off on simple contract, the plaintiff may reply *nil debet*(*h*), or the statute of limitations(*i*), or any matter which a defendant in an action might plead; but if the set-off be on a specialty or judgment, or other matter of record, such replication would be insufficient, and the plaintiff should reply *non est factum*, *nul tiel record*, or payment, &c.(*j*), and as the statute 4 Ann. c. 16. *does not extend to replications, and the statutes which give the plea of set-off do not specify how the plaintiff is to reply, it should seem that the plaintiff cannot reply several distinct answers to a plea of set-off. When the court of conscience act has been pleaded, the plaintiff may deny the residence of the defendant within the jurisdiction, or may allege that more than 40*s.* &c. was due(*k*). When the statute of limitations has been pleaded, either that the defendant did not undertake, or that the cause of action did not accrue, within six years before the exhibiting of the plaintiff's bill, and the plaintiff can prove a promise or acknowledgment within that time, the replication may deny the plea generally, and conclude to the country(*l*); but if the time of issuing the first writ in the action be material, it should be replied specially, as in the case of a tender, and if continued process be stated, the return of the first must be shown(*m*); but this does not seem necessary when the plea states "before the commencement of the suit," instead of "the exhibiting the bill," though a special replication is in general advisable, because it may reduce the proof to be adduced by the plaintiff on the trial; the replication may also be that the plaintiff or the defendant was

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(*g*) Richardson *v.* Pistel, 2 Buls. 55.
(*h*) Post. 2 Vol. 645. 652.
(*i*) Post. 2 Vol. 653.
(*j*) Solomons *v.* Lyon, 1 East, 369. 3 Wentw. Index, xiv.
(*k*) Post. 2 Vol. 653.—3 Wentw. Index, xviii.
(*l*) Post. 2 Vol. 653, 4.—When an acknowledgment is of no avail, see Boydell *v.* Drummond, 2 Campb. 160.
(*m*) Post. 2 Vol. 654.

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pleaded. Ante, 459, 460. and the English courts have never gone further than to set aside the plea on an application to their equitable jurisdiction. *Legh* v. *Legh*, 1 *Bos. & Pul.* 447. *Alner* v. *George*, 1 *Campb.* 393. And they will not permit a bond debt assigned to the defendant by another person, to whom and for whose use it was originally given, to be pleaded by way of set-off. *Wake* v. *Tinkler*, 16 *East's Rep.* 36. But it has been frequently held in this country, that a debt may be the subject of a set-off, for which the party could not have maintained an action in his own name. *Tuttle* v. *Bebee*, 8 *Johns. Rep.* 152. *Winchester* v. *Hackley*, 2 *Cranch*, 342. *Admr's. of Compty* v. *Alken*, 2 *Bay*, 483. *Caines* v. *Brisban & another*, 13 *Johns. Rep.* 9. The case of *Winch* v. *Keeley*, 1 *Term Rep.* 619, fully supports our practice of permitting an assignment to be replied: that was an action of assumpsit; the defendant pleaded the bankruptcy of the plaintiff; the plaintiff replied that before his bankruptcy he assigned the debt to J. S., and averred that the writ was sued out in the name of the plaintiff, for and on the behalf of J. S.: this replication was held good on demurrer. The Supreme Court of the United States, in a late case, fully confirmed the doctrine, that the equitable rights of a third person, not party to the record, might be replied to as legal bar. *Welch* v. *Mandeville*, *Wheaton*, 233.

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abroad when the cause of action accrued, and that the action was commenced within six years after his first return(*n*);[4] and any other circumstance *which brings the case within either of the exceptions mentioned in the statute, should be replied(*o*).[5]

[*555]

IN DEBT.

In actions of DEBT on *simple* contract, the replications are substantially the same as in the action of assumpsit. If to debt on a *specialty*, fraud or duress be pleaded, the plaintiff may reply that it was duly or freely obtained(*p*), or he denies the plea of infancy(*q*), or to a plea of usury, gaming, &c. traverses the illegality of the contract(*r*); and replications to a plea of tender, resemble those in assumpsit(*s*); and to a plea of set-off to debt on bond, the replication may either deny the subject matter of the defendant's set-off, or allege that more was due on the bond than the sum mentioned in the plea(*t*). The only replication to a plea of *solvit ad* or *post diem* is a denial of the payment(*u*); and if to debt on an annuity bond or deed, it be pleaded that no memorial was enrolled containing the names of the witnesses, &c. the replication sets out the memorial verbatim, and states it was duly enrolled(*v*). If to debt on an arbitration bond, the defendant pleads that no award was made, the replication must set forth the whole award, though this is not necessary in debt on an award(*w*), and a breach of the award must also be assigned(*x*). If to debt on a bail bond by the assignee of the sheriff, the defendant has pleaded ease and *favour, the plaintiff should reply, stating that it was duly executed, and deny the ease and favour(*y*); or if the action be in the name of the sheriff, and the bond is not set forth in the plea, the plaintiff should pray that the bond may be enrolled, and then set it out, and state that he was sheriff, &c. and the arrest of the defendant, and that the bond was made to the plaintiff as sheriff, and

[*556]

(*n*) Post. 2 Vol. 655.

(*o*) See the instances, Post. 2 Vol. 655.—3 Wentw. Index, xx. &c.

(*p*) Com. Dig. Pleader, 2 W. 19, 20. Post. 2 Vol. 662.

(*q*) Post. 2 Vol. 663.

(*r*) Post. 2 Vol. 663.

(*s*) Post. 2 Vol. 663, 4.

(*t*) Symmons *v.* Knox, 3 T. R. 65.—Post. 2 Vol. 664.

(*u*) Post. 2 Vol. 665.

(*v*) Post. 2 Vol. 665.

(*w*) Post. 2 Vol. 666.—2 Saund. 62. b. n. 5.

(*x*) 1 Saund. 103. n. 1.—n. 4.—Smith *v.* Yeomans, 1 Saund. 317.—Post. 2 Vol. 667.

(*y*) Post. 2 Vol. 667.—Lenthall *v.* Cooke, 1 Saund. 159.—Com. Dig. Pleader, 2 W. 25.

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(4) In an action for a breach of a contract in making a turnpike road, the defendants pleaded the statute of limitations: the plaintiffs replied fraud and deceit in the execution of the work, and that the action was commenced within six years after the discovery of the fraud: the court held that fraud might be replied to a plea of the statute, which did not become a bar until six years after the fraud was discovered, and accordingly that the replication was good. *First Massachusetts Turnpike Corporation* v. *Field & others*, 3 *Mass. Rep.* 201.

(5) In an action by joint plaintiffs, a replication to a plea of the statute of limitations. must avoid the effect of the bar as to all the plaintiffs; for it seems to be a settled rule that all must be competent to sue, otherwise the action cannot be supported. *Marsteller & others* v. *M'Clean*, 7 *Cranch*, 156.

traverse the ease and favour(*z*). If to debt on a bastardy or indemnity bond, the defendant plead *non damnificatus*, the plaintiff must reply specially, setting forth how he was damnified(*a*); and to a plea of performance to debt on a bond to account or perform covenants mentioned in the condition, or in another deed, the breach must be stated, and these replications should conclude with a verification(*b*). The statute 8 and 9th Wm. III. c. 11. s. 8.[6] enables the plaintiff, and in many cases makes it necessary to assign in the replication several breaches of the condition(*c*), and in assigning which, it is not necessary to state in terms that the breaches are so assigned according to the form of the statute(*d*). The assignment of a breach was also necessary, at common law, where the defendant pleaded performance, though it was otherwise when he pleaded a collateral matter as a release(*e*). To a plea of *nul tiel record* in debt on a record, the replication must state that there is such record, and conclude *prout patet per recordum*, with a prayer that it may be inspected, *&c.(*ee*). And if to debt on a recognizance of bail, the defendant has pleaded no *ca. sa.* against the principal, the replication must state the *ca. sa.* and conclude with a verification(*f*), and if the defendant has pleaded the death of the principal, before the return of a *ca. sa.* the writ and return must be replied, and it must be averred that the principal was then living(*g*). Where to debt on *statutes*, the defendant has pleaded a prior action depending, on a compromise by rule of court, &c. the plaintiff may traverse the fact, or reply *per fraudem*(*h*). IN DEBT. [*557]

In COVENANT as the declaration states the breach, and the pleas usually deny them, and conclude to the country, a special replication seldom occurs(*i*). IN COVENANT.

In actions whether of assumpsit, debt, or covenant, against an EXECUTOR or ADMINISTRATOR, to the plea of *ne unques* executor, the plaintiff may re-assert the fact(*j*), and to the plea of *plene administravit*, if untrue, the plaintiff should reply that at the time of the exhibiting the bill, or the commencement of the suit, the defendant had assets(*k*), or if assets have come to his hands since the commencement of the suit and before the plea(*l*), or if at the time the defendant first had no- IN ACTIONS AGAINST EXECUTORS, &c.

(*z*) Blewet *v.* Appleby, 1 Lutw. 680. 685.—2 Saund. 60. a. note 3.

(*a*) Post. 2 Vol. 668.

(*b*) Post. 2 Vol. 669, 70.—Cornwallis *v.* Savery, 2 Burr. 774.—Hayman *v.* Gerrard, 1 Saund. 101, 2.

(*c*) Post. 2 Vol. 670.—1 Saund. 58. n. 1.—2 Saund. 187. a. n. 2.

(*d*) Tombs *v.* Painter, 13 East, 3.

(*e*) Fletcher *v.* Hennington, 2 Burr. 944.

(*ee*) Com. Dig. Pleader, 2 W. 13.—Post. 2 Vol. 673.

(*f*) Henderson *v.* Withy et al., 2 T. R. 576.—Post. 2 Vol. 674.

(*g*) Post. 2 Vol. 675.

(*h*) Post. 2 Vol. 675.

(*i*) See the precedents, post. 2 Vol. 676.—5 Wentw. Index, cii. to cxliv.

(*j*) Post. 2 Vol. 655.

(*k*) Post. 2 Vol. 655.

(*l*) Post. 2 Vol. 657.—Mara *v.* Quin, 6 T. R. 10.—3 Wentw. 221.

(6) This statute has not been adopted in Massachusetts, *Sevey* v. *Blacklin & others*, 2 *Mass. Rep.* 542. See further post. Vol. 2. 197, 198.

IN ACTIONS AGAINST EXECUTORS, &c.

tice of the action he had assets, but unduly administered them afterwards, these facts may be replied specially(*m*): so if the plea was *plene administravit* except a sum not sufficient to satisfy bonds or judgments, [*558] *outstanding, the plaintiff may reply that the defendant has assets *ultra*(*n*), or that the judgments mentioned in the plea were obtained by fraud and covin(*o*), or suffered fraudulently for more than was due(*p*), or that the bond pleaded as an outstanding debt is satisfied, and kept on foot by fraud(*q*); but if the plaintiff cannot deny the plea of *plene administravit*, he should pray judgment of assets *quando acciderint*, either generally or specially; as, "which after satisfying the moneys due on the outstanding judgments, bonds, &c. mentioned in the defendant's plea shall come to the defendant's hands as executor, &c. to be administered(*r*)," or if *plene administravit præter* a sum acknowledged to be in hand has been pleaded, the plaintiff should pray and take judgment *pro tanto*, and of assets *quando acciderint* as to the residue, in case the plea be true. If the defendant has pleaded the general issue, or any other plea denying the plaintiff's right of action, he must proceed to trial thereon, and on the prayer of judgment of assets, *quando*, &c. there is a stay of judgment, till the determination of the issue; but where the debt has not been denied, and the defendant has merely pleaded *plene administravit* or other plea on which the plaintiff prays judgment of assets *quando acciderint*, there should be an entry of that judgment immediately, and an award of an inquiry to ascertain the [*559] amount of the plaintiff's demand, unless the defendant has *by *cognovit* confessed the same in order to save the expense of an inquiry(*s*).

In debt against an HEIR on the bond of his ancestor, to a plea of parol demurrer, the plaintiff may deny or confess the plea(*t*); and to a plea of *rien per descent* the plaintiff may reply either that the defendant had such assets at the time of the commencement of the suit(*u*), or that he had them between that time and the death of his ancestor(*v*),[7] or if *riens præter* a reversion be pleaded, the plaintiff may take judgment, &c. *cum acciderint*(*w*).

IN CASE.

In an ACTION ON THE CASE for a libel or verbal slander, the general replication *de injuria* is sufficient to a plea of justification when untrue(*x*); unless the plea allege that the plaintiff committed perjury in

(*m*) Post. 2 Vol. 656.
(*n*) Post. 2 Vol. 656.
(*o*) Post. 2 Vol. 657.
(*p*) Pease *v.* Naylor et ux., 5 T. R. 82.—Post. 2 Vol. 658.
(*q*) Post. 2 Vol. 659.—Com. Dig. Pleader, 2 D. 9.
(*r*) Com. Dig. Pleader, 2 D. 9.—Post. 2 Vol. 560, 1.
(*s*) Post. 2 Vol. 659, 60, 1.
(*t*) Post. 2 Vol. 664.—Com. Dig. Pleader, 2 E. 4.
(*u*) Post. 2 Vol. 664.—Com. Dig. Pleader, 2 E. 4.
(*v*) Post. 2 Vol. 664, 5.—Com. Dig. Pleader, 2 E. 4.—Redshaw *v.* Hester, 5 Mod. 122, 3.
(*w*) Com. Dig. Pleader, E. 4, 5.
(*x*) 1 Saund. 244. n. 7.—Com. Dig. Pleader, 2 L. 4.—Post. 2 Vol. 676.

(7) And the replication in this case may conclude with a verification. *Labagh & wife* v. *Cantine & others*, 13 *Johns. Rep.* 272.

a court of record, when this general replication would be improper, In case.
because it would refer the matter of record to be tried by the jury(*y*); so if in an action on the case for slander of title, if the defendant has pleaded that he spoke them in defence of his own title, the replication *de injuria* is incorrect, though good after verdict(*z*). But if the plea be true, the plaintiff may reply, that after the commission of the crime, and before the speaking, he was pardoned(*a*). To a plea by a sheriff in an action for an escape, that the escape was negligent, *and that the [*560] party was retaken on fresh suit, the plaintiff may reply, that the escape was voluntary, or allege that the party was not after the retaking kept in safe custody(*aa*); and if an accord and satisfaction, or the statute of limitations has been pleaded in this action, or in trover, the replications will resemble those in assumpsit(*b*).

In REPLEVIN the plaintiff cannot reply *de injuria*(*c*);[8] but by the sta- Pleas in bar
tute 4 Ann. c. 16. he may in general, with leave of the court, plead in replevin.
several *pleas in bar*. If the defendant has pleaded *cepit in alio loco*, with an avowry or cognizance for a return, the plaintiff cannot traverse any matter in the avowry or cognizance, but must take issue on the traverse of the place, or amend his declaration; but if the defendant *had* them in the place mentioned in the declaration, though he took them elsewhere, the plaintiff may safely take issue(*d*); and to any cognizance the plaintiff may traverse the defendant's having been bailiff, concluding to the country(*e*).

To an avowry or cognizance for *rent*, the plaintiff may in one plea in bar deny the demise or tenancy(*f*), and in another, that any part of the rent was in arrear(*g*),[9] concluding each to the country(*h*); or he may

(*y*) *Moor* v. *Savage*, 2 Leon. 81.—Parker *v.* Burton, 102.—Com. Dig. Pleader, F. 20.

(*z*) Earl of Northumberland *v.* Byrt, Cro. Jac. 163, 4.

(*a*) Dan. 163.—Cuddington *v.* Wilkins, Moore, 863. 872.

(*aa*) Griffiths *v.* Eyles, 1 Bos. & Pul. 413. 6, 7.—1 Saund. 35. n. 1.—Bonafons *v.* Walker, 2 T. R. 127.—White *v.* Jones, 5 East, 293.—see Chambers *v.* Jones, 11 East, 406.

(*b*) Ante, 554.

(*c*) Finch Law. 396.—Jones *v.* Kitchin, 1 Bos. & Pul. 76.—2 Saund. 284. c. n. 3.

(*d*) 1 Saund. 347. n. 1.—Post. 2 Vol. 560. n. 1.—Ast. Ent. 475, and as to the pleas in bar connected with the *place*, see 1 Saund. 347. n. 1.—Com. Dig. Pleader, 3 K. 11 to 29.

(*e*) Post. 2 Vol. 680.—Horne *v.* Lewin, Ld. Raym. 641.—Com. Dig. Pleader, K. 14.

(*f*) Post. 2 Vol. 679.—Com. Dig. Pleader, 3 K. 16. 20.

(*g*) Post. 2 Vol. 679.—Com. Dig. Pleader, 3 K. 16. 20.

(*h*) Horne *v.* Lewin, Ld. Raym. 641. 1 Saund. 103. b.

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(8) Vide *Hopkins* v. *Hopkins*, 10 *Johns. Rep.* 369. But if pleaded, it can only be taken advantage of by demurrer. *Ibid.* *Lytle* v. *Lee & Ruggles*, 5 *Johns. Rep.* 112. post. 585.

(9) A plea of no rent in arrear is an admission of the demise and of the title of the defendant, as laid in the avowry. *Alexander* v. *Harris*, 4 *Cranch*, 299. *Hill* v. *Wright*, 2 *Esp. Rep.* 669. Hence the advantage of also pleading non dimisit.

PLEAS IN BAR IN REPLEVIN. [*561] plead *payment of rent to a ground landlord, or of land or property-tax, though he cannot avail himself of any other set-off(*i*); eviction is also a good plea in bar(*j*). But since the statute 11 Geo. 2. c. 19. when the defendant avails himself of the general avowry, the plaintiff cannot in terms plead *nil habuit in tenementis*, though he may traverse the tenancy, which if the avowant claims under a derivative title and has never received rent, will put such title in issue(*k*); so where the plaintiff admits the tenancy, and that part of the rent was in arrear, he may plead *rien en arrear* as to part, and a tender of the residue(*l*).

To an avowry or cognizance by a freeholder, or a copyholder or his tenant, for a *distress damage feasant*, the plaintiff may deny his title, and conclude to the country, or state his own title specially, and conclude with a traverse, though the former seems preferable(*m*): so the plaintiff may in his plea in bar, state a demise to him from the defendant(*n*), or a right of common in the *locus in quo*, either as a freeholder or copyholder, or as his tenant(*o*), prescribing, if by a freeholder(*p*), or if by a copyholder, alleging a custom within the manor, either for all copyholders within the manor, or for the tenant of the defendant's land in [*562] particular(*q*); or where a copyholder claims common *or other profit in the soil of a stranger, which is not parcel of the manor, he must prescribe in the name of the lord, viz. that the lord of the manor and his ancestors, and all those whose estate he hath, have immemorially had common, &c. in the *locus in quo* for themselves and their customary tenants(*r*); or the plaintiff may plead in bar a right of way(*s*); or in excuse for the cattle having been in the *locus in quo*, he may plead defect of fences, which the defendant ought to have repaired(*t*); so admitting that the cattle trespassed in the *locus in quo*, the plaintiff may traverse that the distress was whilst the cattle were *damage feasant*(*u*); or may plead a tender before the impounding(*v*); and it should seem that in

(*i*) Sapsford *v.* Fletcher, 4 T. R. 511. Bradbury *v.* Wright, Dougl. 624, 5.—Post. 2 Vol. 680.

(*j*) Post. 2 Vol. 682.

(*k*) Syllivan *v.* Stradling, 2 Wils. 208.—Cooke *v.* Loxley, 5 T. R. 4.—2 Saund. 284. d.—Bulpit *v.* Clarke, 1 New Rep. 56.

(*l*) Post. 2 Vol. 681.—Clift. Ent. 646. Com. Dig. Pleader, 3 K. 20.

(*m*) Post. 2 Vol. 682.—2 Saund. 206. a. n. 22.—1 Saund. 103. b.—Archer's Case, 1 Co. 63, 4.

(*n*) Post. 2 Vol. 683.

(*o*) Post. 2 Vol. 686.—Com. Dig. Pleader, 3 K. 24.

(*p*) Id. ibid.—Com. Dig. Pleader, 3 K. 24.—1 Saund. 348. n. 10.

(*q*) Id. ibid.—1 Saund. 348. n. 8. 11.

(*r*) 1 Saund. 349. n. 11.—Com. Dig. Pleader, 3 K. 24.

(*s*) Com. Dig. Pleader, 3 K. 25.—Post. 2 Vol. 619 to 627.

(*t*) Post. 2 Vol. 683.—2 Saund. 284. c. 285. n. 4. 289. n. 7.—Dovaston *v.* Payne, 2 Hen. Bla. 527.

(*u*) Clement *v.* Milner et al., 3 Esp. Rep. 95.

(*v*) Post. 2 Vol. 687.—Com. Dig. Pleader, 3 K. 23.—Bul. N. P. 60.—Allen *v.* Bayley, Lutw. 1596.—Anscomb *v.* Shore, 1 Campb. 285.

Non tenure, nothing in arrear and infancy allowed to be pleaded together. *Wilson* v. *Arnes*, 5 *Taunt.* 340.

the case of a distress *damage feasant*, the plaintiff might plead in bar, that the avowant, after making the distress, used the cattle, or otherwise became a trespasser *ab initio*(*w*).[10] PLEAS IN BAR IN REPLEVIN.

In *trespass to persons*, if the defendant has pleaded *son assault demesne*, and self-defence, or defence of a father, mother, son, &c. or any other plea merely in excuse[11] of an injury to the person, and not a justification under process of a court of record, the replication, *de injuria*, or *de son tort demesne*, is in general proper if the plea be wholly untrue(*x*); and this general replication will suffice, though title be *alleged as inducement; as if to a declaration for an assault and battery, the defendant plead that he was possessed, (or according to some cases, seised in fee)(*xx*) of a close, and had cut his corn, and that the plaintiff came to take it away, and the defendant, in defence thereof, assaulted the plaintiff, *de son tort* is a good replication(*y*). But if the plea be true, and the plaintiff did in fact commit what in point of law amounted to the first assault, the plaintiff must reply specially; as if the plaintiff did in fact make the first assault in defence of his father, son, &c. or to turn the defendant out of his house, whereupon the defendant assaulted and beat the plaintiff, this answer to the plea must be replied specially(*z*); and it is said that if the defendant's battery was outrageous, or more than was necessary for self-defence, that matter should be so replied(*a*). And matter in aggravation or an excess must be new assigned(*b*). So if there be only one count in the declaration, and the defendant has pleaded *son assault*, and there have been two distinct assaults, one excusable and the other not, the plaintiff should not reply, but should new assign another assault(*c*); but if there be several counts in the declaration, equal REPLICATIONS IN TRESPASS. [*563]

(*w*) Com. Dig. Pleader, 3 K. 20.—Bac. Ab. Trespass, B. *sed quære; aliter* in the case of a distress for rent, see 11 Geo. 2. c. 19.

(*x*) Post. 2 Vol. 689.—Com. Dig. Pleader, F. 18.—Taylor *v.* Markham, Cro. Jac. 224.—S. C. Yelv. 157.—Cooper *v.* Monke et al., Willes, 54.—Cockerill *v.* Armstrong et al., Willes, 101.—Jones *v.* Kitchin, 1 Bos. & Pul. 80.

(*xx*) Post. 564. n. j.—Sed quære, see Cockerill *v.* Armstrong et al., Willes, 100, 1.

(*y*) Com. Dig. Pleader, F. 21. id. 18. 2 Saund. 295. b. n. 1.

(*z*) Post. 2 Vol. 690.—King et ux. *v.* Phippard, Carth. 280.—S. C. Skin. 387. Lewerd et ux. *v.* Basilee, 1 Salk. 407. And see Sayre *v.* The Earl of Rochford, 2 Bla. Rep. 1165.

(*a*) *Semble* King et ux. *v.* Tebbart, Skin. 387.—Rowe & wife *v.* Tuttle & others, Willes, 17.—1 Selw. Ni. Pri. 42. n. 9.—Sed quære, if not sufficient, to reply *de injuria*.—Gilb. C. P. 154.—Weaver *v.* Bush, 8 T. R. 81.

(*b*) Monprivatt *v.* Smith & another, 2 Campb. 176, 7.—Warrall *v.* Clare, 2 Campb. 629.—Cheesley *v.* Barnes and others, 10 East, 73.

(*c*) Post. 2 Vol. 701.—1 Saund. 299. n. 6.

(10) Acc. *Hopkins* v. *Hopkins*, 10 *Johns. Rep.* 369.

(11) That the general replication de injuria is good only when the defendant pleads matter in excuse, see *Lytle* v. *Lee*, 5 *Johns. Rep.* 112. *Hyatt* v. *Wood*, 4 *Johns. Rep.* 150. *Plumb* v. *M'Crea & others*, 12 *Johns. Rep.* 491. *Strong & Udall* v. *Smith*, 3 *Caine's Rep.* 164.

In trespass. to the number of assaults, this would be unnecessary and improper(*d*).

[*564] So if the defendant has pleaded *molliter manus imposuit*, *in defence of the possession of his close, the plaintiff, if he claim a right of way, must reply it specially(*dd*). And where the justification is under a writ, warrant, or other process of a court of record, the plaintiff cannot reply *de injuria* generally, putting the whole of the plea in issue(*e*), but must, according to the facts of each particular case, either deny the issuing of the writ, or the making of the warrant(*f*), or protest the writ or warrant, and reply *de injuria*, as to the residue(*g*); or if the parties have been guilty of any illegal conduct, as undue violence, or an imprisonment before the issuing, or after the return of the writ, the plaintiff should new assign(*h*).

In trespass to *personal* property, where the defendant has in his plea merely justified *in his own right*, the *chasing* cattle, or *removing* personal property from a close, &c. whereof he was *possessed*, the plaintiff may reply, *de injuria* generally(*i*); and it appears to have been considered that this replication would also suffice, where, in a similar plea, it is stated that the defendant was seised in fee(*j*). But if the defendant has justified as servant of another(*k*), or under a distress for rent(*l*), or the *taking* and *impounding*, and not merely the *chasing* of cattle, &c.(*m*), this replication will not suffice. And in cases where this ge-

[*565] neral replication might not be bad on demurrer, *it may, nevertheless, be advisable, and in some cases necessary to reply specially, as if there be two tenants in common, and one bring trespass against the other for taking his cattle, to which the defendant pleads that he took them *damage feasant*; in this case it seems that the plaintiff ought to reply specially, that he was tenant in common with the defendant, and so shew that he was not a trespasser(*mm*). If the justification be under a *fieri facias*, or other process, the replication must not be *de injuria* generally, but must state the particular answer to the plea as in the case of trespass to persons(*n*). Where the answer to the plea *confesses* and avoids it, the replication should be special; thus the plaintiff ought to reply his right of common, or defect of fences, to a plea of a *distress*

(*d*) Id. ibid.

(*dd*) Post. 2 Vol. 691.

(*e*) Crogate's Case, 8 Co. 67. a.—Com. Dig. Pleader, F. 19, 20.

(*f*) 1 Saund. 299. b.

(*g*) Post. 2 Vol. 692.

(*h*) Post. 2 Vol. 701.—1 Saund. 299. n. 6.—Searle *v.* Darford, Lutw. 1436.—King et ux. *v.* Tebbart, Skin. 387.—Com. Dig. Pleader, 3 M. 16.—Atkinson *v.* Matteson et al., 2 T. R. 172.

(*i*) Taylor *v.* Eastwood, 1 East, 212. Post. 2 Vol. 693.

(*j*) Taylor *v.* Eastwood, 1 East, 212. Taylor *v.* Markham, Yelv. 157.—S. C. 1 Brownl. 215.—Com. Dig. Pleader, F. 21.—2 Saund. 295. b. n. 1.—Sed vide Cockerill *v.* Armstrong et al., Willes, 103.—Jones *v.* Kitchin, 1 Bos. & Pul. 80.—Chancey *v.* Win et al., 12 Mod. 582. and post.

(*k*) Cockerill *v.* Armstrong et al., Willes, 99.—Jones *v.* Kitchin, 1 Bos. & Pul. 80.

(*l*) Cooper *v.* Monke et al., Willes, 52.

(*m*) Cockerill *v.* Armstrong et al., Willes, 101, 2.—Taylor *v.* Markham, Cro. Jac. 225.

(*mm*) Taylor *v.* Eastwood, 1 East, 218.

(*n*) Ante, 564.

damage feasant(*o*); or he may shew that the plaintiff converted such distress to his own use or abused it(*p*). IN TRESPASS.

In trespass to *real property*, the plaintiff may to the plea of *liberum tenementum* reply according to the facts, in either of four ways.[12] 1st, If the name or abuttals of the close have been so minutely stated in the declaration that there can be no question what close was alluded to, and the plaintiff's title is inconsistent with the defendant's, as if the plaintiff insist that the *locus in quo* is his freehold or the freehold of another person, then the replication should deny the defendant's title, by replying that it is the plaintiff's, or the third person's freehold, and not the defendant's, and should conclude to the country, or the replication may merely deny that the close is the defendant's freehold, which latter mode is proper where the plaintiff is not entitled to the freehold (*pp*); *or, 2dly, if the plaintiff derive title under the defendant, then he must [*566] not traverse his plea, but confessing the defendant's title, must reply the lease or some other title under him, concluding with a verification(*q*); or 3dly, if the plaintiff has a middle case, and neither derives a title under the defendant, nor has a title inconsistent with the defendant's, he may reply that before the defendant had any thing in the premises another person was seised, and made a lease for years to a person, under whom the plaintiff claims, stating his derivative title, without either expressly confessing or denying the defendant's plea, but concluding with a verification(*r*); or, 4thly, if the declaration be general without naming the *locus in quo*, or the abuttals, and there be any reason to apprehend that the defendant has any land in the same parish, the plaintiff must new assign, setting out the *locus in quo* with more particularity(*s*).

It was formerly considered that if the defendant justified as servant or bailiff of a freeholder or termor, the plaintiff could not traverse the defendant's authority, because he would leave unanswered the other parts of the plea, and thereby admit that another person is entitled to the possession; though if both parties claimed under the same person, the command was always considered as traversable(*t*); but now it is set-

(*o*) Post. 2 Vol. 695.

(*p*) Dye *v.* Leatherdale et al., 3 Wils. 26.—Gargrave v. Smith, 1 Salk. 221.—Bagshawe *v.* Goward, Cro. Jac. 147.—Post. 2 Vol. 695.

(*pp*) Lambert *v.* Strother, Willes, 225.—Post. 2 Vol. 695.

(*q*) Lambert *v.* Strother, Willes, 225. Post. 2 Vol. 696.

(*r*) Lambert *v.* Strother, Willes, 225, 6.

(*s*) 1 Saund. 299. b. c.—Com. Dig. Pleader, 3 M. 34.—Goodright d. Balch *v.* Rich et al., 7 T. R. 335.—Helvis *v.* Lamb, 2 Salk. 453.—S. C. 6 Mod. 119. Lambert *v.* Strother, Willes, 223.—*acc.* Dyer, 23. pl. 147. *cont.*

(*t*) Graham *v.* Peat, 1 East, 245.—Thorn *v.* Shering, Cro. Car. 586.—Read's Case, 6 Co. 24. a.—Trevillian *v.* Pyne, Salk. 107.—1 Saund. 347. c. n. 4.

(12) To a plea of liberum tenementum the plaintiff cannot reply de injuria sua propria. *Hyatt* v. *Wood*, 4 *Johns. Rep.* 150.

IN TRESPASS. tled that the plaintiff may in all cases take issue upon the fact of the defendant's having been authorised to commit the trespass(*u*). If the de-
[*567] fendant, in his plea, *has relied on a promissory title derived from the *seisin in fee* of a stranger, the plaintiff cannot take issue on the matter stated by way of colour, but may deny the demise, &c. to the defendant, without shewing any title in himself(*uu*); or if the plaintiff deny the title of the party under whom the colour is given, he should shew his own title, and traverse that stated by the defendant(*v*); and if the plaintiff insist that the defendant's tenancy has been determined by a notice to quit, or a surrender, or forfeiture, &c. he should reply that matter specially(*w*). To a plea of *license*, the plaintiff may reply generally, that the defendant of his own wrong, and without the supposed license committed the trespasses, concluding to the country(*x*), or, as it has been considered, if the plaintiff did license the defendant to commit some acts, then he should reply a revocation, or new assign that he brought his action for other different trespasses(*y*); but it seems that if the license only extended to some of the trespasses, and that other trespasses were committed at different times, and not covered in evidence by the license, then the general replication *de injuria* will suffice(*z*).

To a plea of escape of cattle through *defect of fences*, which the plaintiff ought to have repaired, it is said that as the plea contains mere matter of excuse, the plaintiff may reply *de injuria*(*a*), or he may deny in particular the obligation to repair, or the defect of the fences, or the
[*568] defendant's right to *put the cattle in the close, adjoining the *locus in quo* concluding to the country (*aa*); but he should reply specially, that the defendant turned the cattle into the *locus in quo*, or that they were unruly, and conclude with a verification(*b*).

To a plea claiming a *right of common*, the plaintiff cannot reply *de injuria*(*c*), but must either deny the *seisin in fee*, or other title to the estate, as appurtenant to which the defendant claims his right, or may deny the right of common, as stated in the plea(*d*), or that the cattle were the defendant's own commonable cattle, levant and couchant upon the premises(*e*), concluding to the country, and not with a formal tra-

(*u*) Chambers *v.* Donaldson, 11 East, 65.—Lee *v.* ——, 1 Rol. Rep. 46.

(*uu*) Cary *v.* Holt, 2 Stra. 1238.—Goslin *v.* Williams, Fortes. 378.—Fenner *v.* Fisher, Poph. 1, 2.

(*v*) Fenner *v.* Fisher, Poph. 2.—Com. Dig. Pleader, F. 13.—Bourne *v.* Taylor, 10 East, 189.

(*w*) Taunton *v.* Costar, 7 T. R. 431. White *v.* Stubbs, 1 Lev. 307.

(*x*) Barnes *v.* Hunt, 11 East, 451.—Post. 2 Vol. 696.—1 Saund. 103. b.

(*y*) 1 Saund. 300. a.—2 Saund. 5. end of note 3.

(*z*) Barnes *v.* Hunt, 11 East, 451.

(*a*) Cooper *v.* Monke et al., Willes, 54.—Rast. Ent. 621. a.—Com. Dig. Pleader, 3 M. 29.

(*aa*) 1 Saund. 103. b.—Com. Dig. Pleader, 3 M. 29.—Post. 2 Vol. 697.

(*b*) Post. 2 Vol. 697.—Clarke *v.* Johnson et al., Lutw. 1358, 9.—Com. Dig. Pleader, 3 M. 29.—Rast. Ent. 621. a.

(*c*) Crogate's Case, 8 Co. 67. a.—Cockerill *v.* Armstrong et al., Willes, 101.

(*d*) Post. 2 Vol. 698.

(*e*) Robinson *v.* Rayley, 1 Burr. 320. Willes, 100. n. c.—Bul. N. P. 93.—Crogate's Case, 8 Co. 67. b.

verse(*f*); though it is said that in the latter case, where the defendant has turned on his own commonable cattle, as well as other cattle, the plaintiff should new assign, stating that he brought his action for depasturing the common with other cattle, and ought not to traverse the levancy and couchancy(*g*). The plaintiff may also reply an approvement(*h*). IN TRESPASS.

If a public or private way be pleaded, the plaintiff may deny the way, and conclude to the country, and he may also new assign(*i*); or to a plea of a private way, the defendant's title may be denied(*k*), and the plaintiff may, under such replication, *give in evidence an order of justices [*569] on an inclosure act, and award thereon, whereby the public or private way has been stopped(*l*); but where the plaintiff cannot deny the plea, and only insists that the defendant trespassed out of the way, or was guilty of unnecessary damage in removing an obstruction, or actually converted the materials to his own use, in order to save unnecessary expense, the plaintiff should not deny the right of way, but should merely new assign *extra viam*, &c. The replication to pleas justifying a trespass to real property, under *process* of courts of record, are similar to those in trespass to persons, in which we have seen that the plaintiff cannot, in general, put in issue the whole of the matters in the plea, by replying *de injuria*(*m*).

The replications to pleas in trespass of matters *in discharge*, in general resemble those in assumpsit; thus, if a release be pleaded, the replication may be *non est factum*, or that it was obtained by fraud(*n*), or to a plea of accord and satisfaction, the plaintiff may deny the accord, or state that it was for another trespass, with a traverse of the acceptance in satisfaction of the trespass complained of, or he may allege that the defendant was guilty after the accord(*o*); and to a plea of a distress for the same trespass, he may reply that the cattle died in the pound(*p*), or to a plea of tender, that no tender was made, or that it was insufficient(*q*); and to a plea of the statute of *limitations, the plaintiff may [*570] reply a writ or any other matter, of which he could avail himself in the action of assumpsit(*r*).

(*f*) 1 Saund. 103. b.—Post. 2 Vol. 699.
(*g*) 1 Saund. 346. d.
(*h*) Post. 2 Vol. 699.
(*i*) 1 Saund. 103. b.—Post. 2 Vol. 699.
(*k*) Post. 2 Vol. 699, 700.
(*l*) Davison et al. *v.* Gill, 1 East. 64. Selw. Ni. Pri. 1255.
(*m*) Ante, 364.
(*n*) Com. Dig. Pleader, 3 M. 12.
(*o*) Com. Dig. Pleader, 3 M. 13.—Sed quære of the plaintiff ought not in such case to *new assign*, see post. and 2 Vol. 700.
(*p*) Vasper *v.* Eddows, 1 Salk. 248.
(*q*) Tho. Ent. 304.—Post. 2 Vol. 645.—Com. Dig. Pleader, 3 M. 36.
(*r*) Ante, 554.

II. OF THE FORMS AND PARTS OF REPLICATIONS.

TITLE, &c.

A replication is usually *intitled* in the *court*, and of the *term* of which it is pleaded, and the *names* of the *plaintiff* and *defendant* are stated in the *margin* thus: "A. B. against C. D."(*a*); and where any new matter is stated in the replication which occurred pending the suit, as the death of one of several plaintiffs or defendants between the plea and replication, this should be *suggested*, and a *special imparlance* may be stated at the head of the replication(*b*).

TO A PLEA CONCLUDING TO THE COUNTRY.

When the plea concludes to the *country*, the replication consists either of the common or special *similiter*; the first is, "and the said "plaintiff doth the like," and the latter is thus, "and the said plaintiff "as to the said pleas of the said defendant by him first and secondly "above pleaded, and whereof he hath put himself upon the country doth "the like;" and the plaintiff must join issue or demur, and cannot reply any new matter when a plea concludes to the country(*c*). If in the *similiter* there be any mistake in the names, the defendant may demur, but where to an issue tendered by the plaintiff, the defendant has added the *similiter* by the plaintiff's name, or the plaintiff has joined it by the defendant's name, this defect *will be aided after verdict, there being an affirmative and negative before; it was once indeed held, that the want of a *similiter* was not aided or amendable after verdict, and where in the *similiter* the defendant's name was put instead of the plaintiff's, the Chief Justice dismissed the jury, conceiving he had no commission to try the issue; but in a subsequent case, where a similar mistake was made, the court after trial of the issue, refused to arrest the judgment, and at length the *similiter* wss allowed to be inserted after verdict, instead of the &c. upon three grounds; first, that it was an omission of the clerk; secondly, that it was implied in the &c. added to the last pleading; and thirdly, that by amending, the court only made that right which the defendant himself understood to be so, by his going down to trial(*cc*); so where, to a rejoinder concluding with a verification, the plaintiff instead of taking issue, and concluding to the country, added the *similiter*, and took down the record to trial, and the defendant obtained a verdict, the court would not grant a new trial, but amended the record(*d*).

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TO A PLEA OF NUL TIEL RECORD, OR STATING A RECORD.

We have seen that a plea of *nul tiel record*, concludes with an averment and prayer of judgment *si actio*, &c. unless in the case of a judgment in Ireland(*e*). If the plea deny a record in the *same* court, the re-

(*a*) See the precedent, post. 2 Vol. 641, 2.

(*b*) See the forms, post. 2 Vol. 641, 2.

(*c*) Com. Dig. Pleader, R. 1.—Co. Lit. 126. a.—Courleen's Case, Hob. 271.

(*cc*) 2 Saund. 319. n. 6.—Com. Dig. Pleader, B. 11, 12, &c.

(*d*) Grundy *v.* Mell, 1 New Rep. 28.

(*e*) Ante, 537.—Sandford *v.* Rogers, 2 Wils. 114.—Collins *v.* Lord Matthew, 5 East, 473.

plication thereto should re-assert the existence of the record, and conclude with a prayer that it may be viewed and inspected by the court, and a day is given to the *parties(*f*); and when the record of *another* court is denied, the replication re-asserts it, and a day is given to the plaintiff to bring it in(*g*). When the *defendant* has pleaded a record of the *same* court, the replication denying it, concludes with a verification, and a day is given to the parties to hear judgment(*h*); and where the defendant has pleaded a record of *another* court, the replication of *nul tiel record* may either conclude by giving the defendant a day to bring it in(*i*), or with an averment and prayer of the debt and damages, &c.(*j*); in the former case the issue is complete upon the replication, but in the latter there should be a rejoinder re-asserting the existence of the record(*k*), and therefore the first form, as being the most concise, is obviously preferable. Where matter of fact as well as matter of record, is properly put in issue, the replication may conclude to the country(*l*).

TO A PLEA OF NUL TIEL RECORD, &c.

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The replication to a plea containing new matter, and consequently concluding with a verification, may be considered with reference, 1st, to the *commencement;* 2dly, the *body;* and 3dly, the *conclusion*. The commencement of the replication in such case contains a general denial of the effect of the defendant's plea; the body shews the ground on which that denial is founded; and the conclusion, is either to the country or to the record, if it merely deny the plea; or if the replication contain new matter, it should conclude *with a verification and a prayer that judgment may be awarded in the plaintiff's favour(*ll*).

TO A SPECIAL PLEA CONCLUDING WITH A VERIFICATION.

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1st, The *commencement* of the replication, when matter of estoppel is replied, after stating the title of the court and term and the names of the parties in the margin, is thus: "And the said plaintiff saith that the said defendant ought not to be admitted in his said plea to aver that, &c." (*stating fully the matter alleged in the plea, which the replication afterwards shews the defendant is estopped from relying on*) "because he saith that, &c." (*stating the matter of estoppel*)(*m*).

I. THE COMMENCEMENT.

When the replication *denies*, or *confesses and avoids* the plea, it *commences* with an allegation technically termed the *precludi non*, and which is as follows: "And the said A. B. as to the said plea of the said C. D. by him secondly above pleaded, says that he, the said A. B. by reason of any thing by the said C. D. in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the

(*f*) Post. 2 Vol. 651.—Clerke et ux. *v.* Scroggs, 2 Lutw. 1514.—Herne, 278. Newberry *v.* Strudwicke, Barnes, 336.

(*g*) Post. 2 Vol. 652.—Moor *v.* Garret, 2 Salk. 566.—3 Bla. Com. 330, 1.

(*h*) Post. 2 Vol. 651.—See the practice, Tidd's Prac. 4th edit. 678, 9.

(*i*) See post. 2 Vol. 652.

(*j*) Sandford *v.* Rogers, 2 Wils. 113. S. C. Barnes, 161.

(*k*) Tidd's Prac. 4th edit. 679.

(*l*) Sayer, 208. 299.

(*ll*) De La Rue *v.* Stewart, 2 New Rep. 363.

(*m*) See the form, post. 2 Vol. 641. Outram *v.* Morewood et al., 3 East, 348.—Shelley *v.* Wright, Willes, 10.—Incledon et al. *v.* Burges, Carth. 66, 7. Took *v.* Glascock, 1 Saund. 257. 276. n. 1. 325. n. 1.—Wilkins *v.* Wingate, 6 T. R. 62.

I. THE COMMENCEMENT.

said C. D., because he says that, &c.(*n*)" When the body of the replication only contains an answer to a *part* of the plea, the *commencement* should recite or specify that part intended to be answered, for should the commencement assume to answer the whole plea, but the body only contain an answer to part, the whole replication will be insufficient, and so *vice versa*(*o*); in this case the form may *run thus: "And the said A. B. as to so much of the said plea of the said C. D. by him secondly above pleaded, as relates to the said supposed recognizance in that plea mentioned, says that he ought not to be barred from having or maintaining his aforesaid action thereof against him, because he says that, &c." (*stating the answer to such part of the plea, and with the proper conclusion thereto,*) and the answer to the other part of the plea commence as follows: "and the said A. B. as to the residue of the said plea saith *precludi non*, &c. because," &c.(*p*). On the other hand, when the matter to be replied is equally an answer to several pleas, it is proper, in order to avoid expense, to answer all the pleas in one replication(*q*), and the replication *de injuriis suis propriis, absque tali causa* to two several justifications by different defendants in the same action, was held sufficient(*r*); in these cases the commencement should apply to and profess to answer all the pleas. So where to a plea of judgments outstanding, the plaintiff replies that each is fraudulent, he may conclude with one verification(*s*).

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II. THE BODY.

With respect to the *body* of the replication, we have seen that it contains, either, 1st, matter of estoppel, 2dly, a denial of the plea, 3dly, a confession and avoidance of it, or 4thly, in the case of an evasive plea, a new assignment. We will consider each of these in the same order.

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1st, Estoppel.

*1st. As to the matter of *estoppel*(*t*): When it appears on the face of the declaration, the plaintiff may demur to the plea(*u*); as in covenant by the lessor or the assignee of the reversion, if the defendant plead *nil habuit* or generally that the lessor was not seised in fee, without shew-

(*n*) Gardner *v.* Jessop, 2 Wils. 42.—If the plea was in bar of the *further* maintenance of the suit, the replication should be framed accordingly, Le Bret *v.* Papillon, 4 East, 502, 3.

(*o*) 1 Saund. 28. n. 3.—Hancock *v.* Proud, 1 Saund. 377, 8.—Com. Dig. Pleader, F. 25.—Swinburne *v.* Ogle, Lutw. 241.—Gray *v.* Findar, 2 Bos. & Pul. 427.—Summary on Pleading, 72. Le Bret *v.* Papillon, 4 East, 503, 4.

(*p*) Hancocke *v.* Proud, 1 Saund. 337, 8.—See the forms, post. 2 Vol. 643. 653.—Swinburne *v.* Ogle, Lutw. 241.—Com. Dig. Pleader, F. 4.

(*q*) See the form in 8 Wentw. 5.—English *v.* Pellitary et al., 1 Leon. 124. Curtis *v.* Bateman, 1 Sid. 39.—Middleton *v.* Cheseman, Yelv. 65.—Com. Dig. Pleader, F. 4 & 24.—Summary on Pleading, 71, 2.—Sed vide The Queen *v.* The Bishop of Canterbury et al., 1 Leon. 139. as to a demurrer.

(*r*) Ibid.—English *v.* Pellitary et al., 1 Leon. 124.—S. C. Cro. Eliz. 139.—Curtis *v.* Bateman, 1 Sid. 39.

(*s*) 1 Saund. 338. n. 5.—Parker *v.* Atfield, 1 Salk. 312.—Aston *v.* Sherman, 1 Salk. 298.

(*t*) As to estoppels in general, see Com. Dig. Estoppel.—Summary, 103, 4.

(*u*) 1 Saund. 326. n. 4.—Palmer *v.* Ekins, 2 Stra. 817.—Parker et al. *v.* Manning, 7 T. R. 537.—Blake *v.* Foster, 8 T. R. 487.—Shelley *v.* Wright, Willes, 13.—Taylor *v.* Needham, 2 Taunton, 278.

ing that he was seised of *any* estate in the demised tenements(*v*); but if the matter of estoppel do not appear from the interior pleading, the replication should set it forth, and have the proper commencement and conclusion; as in debt or assumpsit for rent, without setting forth the indenture, if before the 11 Geo. 2. c. 19. the defendant pleaded *nil habuit tenementis*, the plaintiff was bound to reply the indenture, and conclude *unde petit judicium* if the defendant should be admitted to plead the plea against his own acceptance of the lease by indenture, for if the plaintiff replied that he had a sufficient estate to make the demise, he lost the benefit of the estoppel(*w*); but this is altered by the above-mentioned statute, and now the plaintiff might demur to such a plea(*x*); so if it be recited in the condition of a bond, that a fact exists, the estoppel on the party executing it, may be replied(*y*); and where the matter has been tried upon a particular issue in *trespass, and found [*576] by the jury, such finding may be replied as an estoppel(*yy*).[13] As a species of estoppel it may be proper here to notice that if in debt on a bond, conditioned for the performance of covenants, the defendant falsely plead that there were no covenants in the indenture on his part, the plaintiff may reply setting out the indenture containing such covenants and demur(*z*).

The second description of replication is, that which neither concludes the defendant by matter of estoppel, nor confesses and avoids the plea, but *denies or traverses the truth thereof, either in part or in whole*(*a*). 2dly, Denial of the plea.

(*v*) Id. ibid.—Andrew *v.* Pearce, 1 New Rep. 160.—2 Saund. 207. a. 418. n. 1.—Post. 2 Vol. 548.

(*w*) 1 Saund. 325, 6. n. 4. and 276. n. 1.—Outram *v.* Morewood et ux., 3 East, 346.—2 Rich. C. P. 440.

(*x*) Cooke *v.* Loxley, 5 T. R. 4.—Lewis *v.* Willis, 1 Wils. 314.

(*y*) 1 Saund. 325. n. 4. and 215. n. 2. Wilkins *v.* Wingate, 6 T. R. 62.—Shelley *v.* Wright, Willes, 9.

(*yy*) Outram *v.* Morewood, 3 East, 346. and see the precedents in trespass for mesne profits, where to a plea of title, the recovery in ejectment was replied. 2 Rich. C. P. 444.

(*z*) Smith *v.* Yeomans, 1 Saund. 316, 317, and Pordage *v.* Cole, 1 Saund. 319.

(*a*) The nature, language, and form of a *traverse*, will presently be more particularly considered; it is proper however here to observe, that any replication, &c. denying the matter alleged in the prior pleadings, is in its more extensive signification a *traverse*, and there is no real distinction between *traverses* and *denials*, they are the same in substance, Lambert *v.* Strother, (Willes, Rep. 224.) However, a *traverse* in the strict *technical* meaning, and more ordinary acceptation of the term, signifies a direct denial in the formal words, "WITHOUT THIS, THAT, &c." of a material fact in the preceding pleading, whether declaration, plea, replication, &c. and is in general prefaced by a formal inducement, (Summary on Pleading, 75.) This formal mode of denial, is still frequently adopted in the action of trespass, but it is rarely if

(13) Where the tenant in a writ of entry, demanding a freehold, pleaded the general issue, it was held that he had thereby admitted in the record, that he was tenant of the freehold; and was therefore estopped from proving that he was tenant at will only. *Kelleran* v. *Brown*, 4 *Mass. Rep.* 443.

II. THE BODY. 2dly, Denial of the plea.

It will be proper to consider the nature of these replications, under the following heads:

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- 1st. *A Denial of the *whole* plea, or *de injuria*, &c.
  - 1st. When allowed, or not proper, or not advisable.
  - 2dly. The form of such replication.
- 2dly. A Denial of only *part* of the plea.
  - 1st. Of what fact.
  - 2dly. The mode of such special denial.
- 3dly. A denial, and stating a particular breach, &c.

It is necessary to premise as a general rule, that it is the first object of pleading, to bring the point in dispute between the parties at as early a stage of the cause as possible, to a single issue or point which is not multifarious or complex(*b*); and therefore the issue must, in general, be single(*c*).[14] But this single *point* may consist of several *facts*, if they be dependent and connected(*d*),[15] and therefore where in trespass, the defendant justified under a right of common, and the plaintiff in his replication traversed, "that the cattle were the defendant's own cattle, and that they were levant and couchant upon the premises, and commonable cattle," the replication was on a special demurrer, assigning for cause that it was multifarious, holden to be good(*e*). So according to the first resolution in Crogate's case, to a justification under proceedings in the admiralty court, hundred court, or county court, or any other court, which is not of record, *de injuriâ suâ propriâ* is good, all being matter of fact and making but one cause or justification(*f*). Indeed in some cases the traverse or denial must consist of more than

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one fact, for it is another rule *that in a traverse the plaintiff cannot narrow the title set up by the defendant(*ee*). And indeed according to some modern cases, it should seem that the mere circumstance of a replication putting in issue several material facts, is not the ground on which it is in general objectionable(*ff*). We will now proceed to

ever requisite, and should not be unnecessarily adopted, as it certainly, by requiring a rejoinder, repeating the matter in the plea, tends to unnecessary delay, prolixity, and expense in the pleadings. See the learned observations of Mr. Serjt. Williams, in 1 Saund. 103. in notis, and Horne *v.* Lewin, Ld. Raym. 641.—Robinson *v.* Rayley, 1 Burr. 320.—As to the nature of a traverse in general, see Summary on Pleading, 75 to 80.

(*b*) Bell *v.* Wardell et al., Willes, 204.—Cooper *v.* Monke et al., Willes, 54.—Taylor *v.* Eastwood, 1 East, 217. Robinson *v.* Rayley, 1 Burr. 320.—Summary, 77.

(*c*) Id. ibid.

(*d*) Robinson *v.* Rayley, 1 Burr, 320. Willes, 100. n. c.—Bul. N. P. 93.—Crogate's Case, 8 Co. 67. b.

(*e*) Id. ibid.

(*f*) Id. ibid.—Willes, 101. n. c.

(*ee*) Morewood *v.* Wood et al., 4 T. R. 157.—Summary, 78.

(*ff*) Jones *v.* Kitchin, 1 Bos. & Pul.

(14) Vide *Rogers* v. *Burk*, 10 *Johns. Rep.* 400.

(15) Vide *Strong* v. *Smith*, 3 *Caine's Rep.* 160.

consider the particular instances, when a general denial of the whole plea is or is not allowed, or may not be proper or advisable.

II. THE BODY. 2dly, Denial of the plea.

In actions on contracts and in replevin, the replication denies the fact or one of the facts alleged in the plea in express words(*g*) But in trespass, and in actions on the case for slander, a replication, containing a *general denial of the whole plea*, frequently occurs, and is termed a replication *de injuriâ sua propria absque tali causâ*, or "*de son tort demesne sans tiel cause*"(*h*). This replication puts in issue, and compels the defendant to prove every material allegation in his plea(*i*), and therefore it is frequently advantageous to the plaintiff to adopt it, when by the rules of pleading it is permitted.

First, General denial when allowed or not proper or advisable.

In general, when the defendant's plea consists merely of matter of *excuse*, and not of matter of right or interest inconsistent with or affecting the right, the infringement of which is complained of in *the declaration, whether it relate to the person, personal property, or real property, the general replication *de injuriâ* is sufficient(*k*). And in these cases when a title is stated merely as *inducement* to the defence, the plaintiff need not answer or particularly deny it, because it is merely *collateral* to the matter in dispute, which constitutes the difference between a case, in which the plaintiff makes title by his declaration to any thing, and the defendant in his plea denies it or claims an *interest* therein, affecting the same, when he must reply specially(*l*). Thus in an action for an assault, if the defendant plead *son assault demesne*, or that he arrested the plaintiff upon hue and cry levied(*m*), or the plea be moderate, correction of a servant for his neglect of service, the general replication *de injuria* is sufficient(*n*); and though such excuse for the personal injury may be stated in the plea to depend on the possession of land or personal property, as if the defendant plead, that the plaintiff entered upon his possession, and that therefore the defendant *molliter manus imposuit* to remove him(*o*), or if the plea be that the defendant was *seised*, &c. as rector, and that the tithes were severed, and that the

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80.—B. N. P. 93.—Sed vide Cockerill *v.* Armstrong et al., Willes, 100.—Robinson *v* Rayley, 1 Burr. 320.—Summary, 77.—Crogate's Case, 8 Co. 67. b.

(*g*) In replevin, the replication, *de injuria*, never occurs. Finch. Law. 396. Ante, 560.

(*h*) Com. Dig Pleader, F. 18. Crogate's Case, 8 Co. 67. Most of the points relating to this replication, are collected in Crogate's Case, 8 Co. 67. Cockerell *v.* Armstrong, Willes, 99.—Doc. Plac. 1 Vol. 113 to 115. and Com. Dig. tit. Pleader, F. 18, &c.—Jones *v.* Kitchin, 1 Bos. & Pul. 79, 80.—Finch. Law. 395, 6.

(*i*) Com. Dig. Pleader, F. 18 to 24. Crogate's Case, 8 Co. 67. a.—Cockerell *v.* Armstrong, Willes, 100.

(*k*) Crogate's Case, 8 Co. 67. a.—Com. Dig. Pleader, F. 18, &c.—Doct. Plac. 113 to 115.—Jones *v.* Kitchin, 1 Bos. & Pul. 80.—Taylor *v.* Eastwood, 1 East, 212. 214. 218.

(*l*) Taylor *v.* Markham, Yelv. 157.—S. C. Cro. Jac. 225.—Cockerill *v.* Armstrong et al., Willes, 102, 3.—Com. Dig. Pleader, F. 20, 21.

(*m*) Crogate's Case, 8 Co. 67. a.—1 Saund. 244. a. n. 7.

(*n*) Gilb. C. P. 154.—Cockerill *v.* Armstrong, Willes, 102.

(*o*) Hall *v.* Gerrard, Lat. 128. 221: Com. Dig. Pleader, F. 18.—Chauncey *v.* Win, 12 Mod. 582.

II. THE BODY. 2dly, Denial of the plea

plaintiff endeavoured to carry them away, and that the defendant in defence of his tithes, *molliter manus imposuit*, &c. in these cases this general *replication is sufficient, and the plaintiff need not answer the defendant's title, because the plaintiff by his action claims nothing in the soil or corn, but only damages for the battery, which is merely *collateral* to the title, and which is stated merely as inducement(*p*). However in a recent case it seems to have been considered that where the *excuse* arises in part out of the *seisin in fee* of another, then *de injuria* is insufficient(*q*). So in trespass to *personal* property, if the defendant merely justify the chasing cattle or removing goods from off land, of which he was possessed, the general replication will suffice(*r*); and in trespass to real property, if the defendant in his plea do not claim any interest therein, or easement over the same, the replication *de injuria* is sufficient; as if in trespass for pulling down a building, the defendant without claiming any interest therein, plead that he removed it as being a nuisance on his land, this general replication will suffice(*s*); so if in trespass to land with cattle, the defendant plead, that the plaintiff's fences were out of repair, whereby the defendant's cattle escaped into the plaintiff's close, this plea consisting merely of matter of excuse, and claiming no interest in the land, may it is said be answered by the general replication(*t*); and though it is stated as a general rule, that where the defence rests upon an authority of law, the replication *must be special(*u*), yet this as a general position is inaccurate(*v*); for if the defendant justify as constable and without warrant taking the plaintiff for a breach of the peace; or as a vagrant or lunatic(*w*); or under a public act of parliament, or under a right for all persons given by the common law(*x*); or if in false imprisonment, the defendant justify by process, out of the admiralty, hundred, or county court, or other court not of record, the general replication is sufficient, all being matter of fact, and making but one cause(*y*), and the instance of an entry to view waste, proceeds on a special reason(*z*).

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But if in any case the defendant justify by *warrant* of a justice of the peace(*a*), or as *servant of another or by his command*, the replication must be special and must admit or protest the warrant or commandment, and reply *de injuria absque residuo causæ*, or take issue simply on

(*p*) Taylor *v.* Markham, Yelv. 157. S. C. Cro. Jac. 224, 5.—Com. Dig. Pleader, F. 18.

(*q*) Ante, 563, 4.—Jones *v.* Kitchin, 1 Bos. & Pul. 80. and see Cockerill *v.* Armstrong, Willes, 102. and 103.—Chauncey *v.* Win, 12 Mod. 582.—The Archbishop of Canterbury *v.* Kemp, Cro. Eliz. 539, 540.—The King *v.* Hopper, Cro. Jac. 598.

(*r*) Ante, 564.

(*s*) Summary, 81, 2.

(*t*) Ante, 567.

(*u*) Crogate's Case, 8 Co. 67. b.

(*v*) Chauncey *v.* Win, 12 Mod. 582.

(*w*) Com. Dig. Pleader, F. 18.—Chauncey *v* Win, 12 Mod. 582.

(*x*) Chauncey *v.* Win, 12 Mod. 580, 1.—Jones *v.* Kitchin, 1 Bos. & Pul. 77.—Summary, 81.—*Acc* Tidd's Prac. 3d edit. 635. & Crogate's Case, 8 Co. 67. b. *contr.*

(*y*) Com. Dig. Pleader, F. 19.—Chauncey *v.* Win, 12 Mod. 582.—Crogate's Case, 8 Co. 67. a.—Doct. Plac. 114.

(*z*) Chauncey *v.* Win, 12 Mod. 582.

(*a*) Chauncey *v.* Win, 12 Mod. 582, 3.

the warrant or commandment(*b*). So when by the defendant's plea any authority or power is mediately or immediately derived from the plaintiff, there, although no interest be claimed, the plaintiff ought to answer it specially, and shall not reply *de injuria* generally(*c*), as if he justify by virtue of *the lease, or license, or command, of the plaintiff(*d*). [*582] So when the defendant in his plea claims in his own right, or as lessee or servant of another any right to, or interest in, the person(*e*), personal property(*f*), or real property(*g*), for a supposed injury to which the plaintiff has declared, or any right of way(*h*), common(*i*), or other easement, &c.(*j*), or rent issuing out of the land claimed in the declaration(*k*); or if the plea contain matter of record not stated merely as inducement(*l*), and of which a jury cannot be competent judges, as if the sheriff or his officer justify under process of a court of record(*m*), or if the defendant justify under a warrant of a justice of the peace(*n*), or under a particular custom of a manor(*o*), or in some cases by authority of law, as to view waste(*p*); in these cases the replication *de injuria* is improper(*q*), and the plaintiff must either deny the title, easement, warrant, &c. in particular(*r*), or admitting, or in some cases protesting *those matters, must reply that the defendant committed the trespasses [*583] of his own wrong, and without *the residue* of the cause alleged by the defendant; in which case it will not be incumbent on the defendant to prove either of those matters. And where matter of record is denied,

(*b*) Id. ibid.—Crogate's Case, 8 Co. 67. b. 67. a.—Gray et ux. *v.* Hart, Lutw. 1459.—Doc. Pl. 113, 114.—Jones *v.* Kitchin, 1 Bos. & Pul. 76.—Com. Dig. Pleader, F.—Cockerill *v.* Armstrong, Willes, 100, 1.—2 Saund. 295. b. n. 1. 2 Bro. Ab. tit. *de son tort demesne*, pl. 13. 15.

(*c*) Crogate's Case, 8 Co. 67, 8.—Jones *v.* Kitchin, 1 Bos. & Pul. 80.—Com. Dig. Pleader, F. 22.

(*d*) Com. Dig. Pleader, F. 22.—Summary, 83.—Bro. Ab. tit. *de son tort*, pl. 30.—Cotsworth *v.* Bettison, Ld. Raym. 104, 5.

(*e*) Cockerill *v.* Armstrong, Willes, 102.

(*f*) Taylor *v.* Markham, Yelv. 157. S. C. Cro. Jac. 225.—The Archbishop of Canterbury *v.* Kemp, Cro. Eliz. 539.

(*g*) Crogate's Case, 8 Co. 67. a.—Jones *v.* Kitchin, 1 Bos. & Pul. 79, 80. Cooper *v.* Monke, Willes, 52.—Cockerill *v.* Armstrong, Willes, 99. 101, 2. Doctr. Plac. 114.—Com. Dig. Pleader, F. 21, &c.

(*h*) Id. ibid.—Jones *v.* Kitchin, 1 Bos. & Pul. 79.

(*i*) Id. ibid.

(*j*) Id. ibid.

(*k*) Crogate's Case, 8 Co. 67. a.—Jones *v.* Kitchin, 1 Bos. & Pul. 76.—Cooper *v.* Monke, Willes, 52.—Com. Dig. Pleader, F. 21.

(*l*) Willes, 103. n. a.—Com. Dig. Pleader, F. 19, 20.—Moor *v.* Savage, 2 Leon. 81.

(*m*) Crogate's Case, 8 Co. 67. a.—Doct. Plac. 114.—Com. Dig. Pleader, F. 20.—Webb *v.* Beale, Hardr. 6.—Chauncey *v.* Win, 12 Mod. 580, 1, 2.

(*n*) Chauncey *v.* Win, 12 Mod. 582, 3.—Doct. Plac. 113.

(*o*) Com. Dig. Pleader, F. 20.—Banks *v.* Parker, Hob. 76.—Wells *v.* Cotterell, 3 Lev. 49.—Crogate's Case, 8 Co. 67. a.—Bell *v.* Wardell, Willes, 202.

(*p*) Crogate's Case, 8 Co. 67. b.—Com. Dig. Pleader, F. 23.—Chauncey *v.* Win, 12 Mod. 582.

(*q*) See all the above cases, and Crogate's Case, 8 Co. 67.—Jones *v.* Kitchin, 1 Bos. & Pul. 79, 80.—Doctr. Pl. 114.—Com. Dig. Pleader, F. 20, &c.

(*r*) Gray et ux. *v.* Hart, Lutw. 1459.

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the replication should not be *de injuria*, &c. with a traverse of the record, but should be merely *nul tiel record*(*s*).

Thus where in trespass for taking the plaintiff's servant, the defendant pleaded that the father of the person taken, held of the defendant by knight's service, and died seised, and that the person taken being under age, the defendant seised him as his ward, the general replication *de injuria* was held insufficient, the plea claiming an interest in the person claimed by the plaintiff in his declaration(*t*). So if in trespass for taking goods, trees, &c. the defendant plead that he took them as tithe or as a distress for rent, or as damage feasant shewing title thereto, the general replication will be improper(*u*); though by the statute of sewers, and as to distresses for poor rates, exceptions are introduced; and where in a justification of *taking* cattle, damage feasant, the defendant sets out a title, and does not rely merely on possession, the replication should be special(*v*); the other instances are already sufficiently enumerated. It also seems that though the plea *claim no *interest* in the property mentioned in the plaintiff's declaration, but merely contains matter of *excuse*, yet that where such matter of excuse arises in part out of the *seisin in fee* of another, it is not advisable to reply *de injuria*, because that replication is only allowed where in the plea an excuse is offered to *personal* injuries, and not even then if it relate to any *interest* in land, which would make part of the issue(*w*). there being a distinction in this respect between a plea relying merely on *possession* as inducement, and where an interest is pleaded by way of title(*x*).

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There are also many cases, in which, though the replication *de injuria*, might not be objectionable upon demurrer, still it will not be proper to adopt it, and it may be necessary in effect to confess and avoid the plea, as in the instance before mentioned(*y*); and in an action of false imprisonment, where the defendant justifies the commitment as a magistrate for a bailable offence, in consequence of an information upon oath, the plaintiff under the general replication *de injuria sua propria*, &c. cannot give in evidence a tender and refusal of bail, but ought to

(*s*) Adney *v.* Vernon, 3 Lev. 243, 4. Gray *v.* Hart, Lutw. 1459.

(*t*) Cockerill *v.* Armstrong, Willes, 102—Taylor *v.* Markham, Yelv. 158—S. C. 1 Brown, 215. Com. Dig. Pleader, F. 21.

(*u*) Ante, 564, 5—Taylor *v.* Markham, Cro. Jac. 225.—S. C. Yelv. 157.—The Archbishop of Canterbury *v.* Kemp, Cro. Eliz. 539.—Com. Dig. Pleader, F. 21.—Jones *v.* Kitchin, 1 Bos. & Pul. 76.—Cooper *v.* Monke, Willes, 52.—Cockerill v. Armstrong, Willes, 99.

(*v*) Ante, 564, 5.—White *v.* Stubbs, 1 Lev. 307.—Com. Dig. Pleader, F. 21.

(*w*) Jones *v.* Kitchin, 1 Bos. & Pul. 80.—Cockerill *v.* Armstrong, Willes, 102, 3.—The King *v.* Hopper, Cro. Jac. 598.—Horne *v.* Lewin, Ld. Raym. 640. Chauncey *v.* Win, 12 Mod. 582.—The Archbishop of Canterbury *v.* Kemp, Cro. Eliz. 539, 540.—Taylor *v.* Markham, Yelv. 157. observed upon in Cockerill *v.* Armstrong, Willes, 101.—White *v.* Stubbs, 2 Saund. 294.

(*x*) Skevill *v.* Avery, Cro. Car. 139. Serle *v.* Darford, Ld. Raym. 120.—Langford *v.* Webber, Carth. 10.

(*y*) Ante, 565.

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reply that matter specially(*z*). So in other cases where it may not be absolutely necessary to reply specially, it may be advisable so to do, in order to narrow the plaintiff's evidence, and to compel the defendant to admit a part of his title(*a*).

*Where *de injuria* is improperly replied, the defendant may demur generally, but the defect will be aided after verdict(*b*).[16] [*585]

Form of general denial, de injuria, &c.

In point of *form* the general replication *de injuria*, or *de son tort demesne*, would be defective, unless the words *absque tali causa* be added, though the omission would be aided by verdict(*c*). The usual language of this replication is, "*precludi non*, because he says that the said defendant as the said times when, &c. of his own wrong, and *without the cause* by him in his said second plea alleged, committed the said trespasses in the introductory part of that plea mentioned, *in manner and form* as the said plaintiff hath above in his said declaration complained against the said defendant, and this he the said plaintiff prays may be inquired of by the country, &c." which is uniformly the conclusion of such a replication. The word *cause*, which means without the matter of excuse alleged, though in the singular number, puts in issue all the facts in the plea, which constitute but one cause(*d*); and if such a replication be adopted, as we have seen it may, in answer to two or more pleas by different defendants, the *tali causa* will suffice, *reddendo singula singulis*(*e*), and the words *modo et forma*, only put in issue material allegations in the plea(*f*).

Secondly, denial of only *part* of the plea.

When the plaintiff is not at liberty to reply *de injuria* to the whole plea, but must deny *some *particular* fact or facts, it is *first* to be considered *what fact* he may deny; and *secondly*, the *form* of such denial(*g*). [*586]

1st, What fact may be traversed or denied.

1st, A party may traverse or deny any *material* allegation in his opponent's pleading, although it might have been unnecessary to state it so *precisely* as laid; but where the allegation is not material, it cannot be traversed; as if in an avowry, it be stated that the defendant was seised in fee, though it would have been sufficient to have alleged that the close was his freehold, the seisin in fee may be traversed(*h*); and a

(*z*) Sayre *v.* Earl of Rochford, 2 Bla. Rep. 1165.

(*a*) Bell *v.* Wardell & Cummin, Willes, 204.—Cooper *v.* Monke & others, Willes, 54.—Taylor *v.* Eastwood, 1 East, 217.

(*b*) Com. Dig. Pleader, F. 24.—Banks *v.* Parker, Hob. 76.—Collins *v.* Walker, Sir T. Raym. 50.

(*c*) Com. Dig. Pleader, F. 24.—The King *v.* Hopper, Cro. Jac. 599. Gilb. C. P. 153.—Burton *v.* Chapman, 1 Sid. 341.—Rodoway *v.* Lowder et al., Lutw. 1384.

(*d*) Crogate's Case, 8 Co. 67.—Barnes *v.* Hunt, 11 East, 451. 455.

(*e*) English *v.* Pellitary et al., 1 Leon. 124.—S. C. Cro. Eliz. 139.—Curtis *v.* Bateman, 1 Sid. 39.—Ante, 574.

(*f*) Ante, 470.—Gilb. C. P. 51.

(*g*) As to traverses in general, Com. Dig. Pleader, G.

(*h*) 2 Saund. 207. notes 21, 22. 24. Com. Dig. Pleader, Q.—See 2 Saund. 175. n. 1.

(16) Vide ante, 560. n. (8.)

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material fact may be denied, though laid under a *videlicet*(*i*); and whatever is necessarily understood, intended or implied, is traversable as much as if it were expressly alleged(*j*), but matter not before stated, or necessarily implied, is not traversable(*k*). In replevin and trespass to personal chattels, if the defendant justify as bailiff, or by the command of another, his authority might always be traversed, and though in trespass to real property it was formerly considered otherwise, the command is also now traversable(*l*); and when a party appears on the face of the pleadings to be estopped from denying a fact, if he were to traverse it, his pleading would be demurrable(*m*); and if time, place, or any other circumstance, when not material, be traversed, the opposite party may demur on the ground *that the pleadings amount to a negative pregnant(*n*); as if in a plea it be stated that on such a day, and at such a place, the plaintiff demised the *locus in quo* to the defendant, as the time and place are immaterial, the replication denying the demise should not put them in issue(*o*); and in general the intent or *virtute cujus*, as "*by virtue* of the said warrant, &c." ought not to be put in issue(*p*); nor is matter of law or legal inference, in general, traversable(*q*); as if to a plea stating a public right of fishery, in an arm of the sea, the plaintiff reply a prescriptive right of sole and several fishery, he should not traverse the public right, because it is an inference or intendment of law that the public have a right to fish in an arm of the sea(*q*); the traverse should also be on some affirmative matter, and not put in issue a negative allegation; thus if a plea state a request to deliver an abstract and a refusal, a replication that the plaintiff did *not neglect* and refuse to deliver such abstract, would be insufficient(*r*). The traverse also must not be *too large*, thus to an avowry for 20*l.* arrears of rent, the plea in bar must be that no part of it is in arrear, and if it were merely that the said sum of 20*l.* is not in arrear, without saying "or any part thereof," *it would be demurrable(*s*); but where to a declaration against a rector for not carrying away

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(*i*) 1 Saund. 170. n. 2.

(*j*) 2 Saund. 10. n. 14.—Chambers *v.* Jones, 11 East, 406.—Meriton *v.* Briggs, 1 Ld. Raym. 39.

(*k*) 1 Saund. 312. n. 4.

(*l*) Chambers *v.* Donaldson and others, 11 East, 65.—1 Saund. 347. c. n. 4.—1 East, 245. n. c.—Thorn *v.* Shering, Cro. Car. 586.—Willes, 100. n. b.—Ante, 566.

(*m*) Palmer *v.* Ekins, Stra. 817.—Blake *v.* Foster, 8 T. R. 487.—Parker & others *v.* Manning, 7 T. R. 533.—Ante, 575.

(*n*) Com. Dig. Pleader, G. 12. R. 7, 8, 9.—Bennet *v.* Holbech, 2 Saund. 318. Osborne *v.* Rogers, 1 Saund. 268.

(*o*) Id. ibid. and Com. Dig. Pleader, C. 2.—Bennet *v.* Holbech, 2 Saund. 314. 319. n. 6.

(*p*) Com. Dig. Pleader, 7.—Grenville *v.* The College of Physicians, 12 Mod. 387.—1 Saund. 23. n. 5. 299. n. 3. Grills *v.* Mannell & others, Willes, 380.

(*q*) Richardson *v.* The Mayor, &c. of Orford, 2 Hen. Bla. 182.—S. C. 5 T. R. 367. where 4 T. R. 439. was reversed.—2 Saund. 159. a. 161. n. 11.—1 Saund. 23. n. 5.—Com. Dig. Pleader, G. 5.—See 3 Wils. 234.

(*r*) Martin *v.* Smith, 6 East, 556, 7.

(*s*) Cobb *v.* Bryan, 3 Bos. & Pul. 348.—Com. Dig. Pleader, G. 12. 15.—2 Saund. 207. n. 24.—Osborne *v.* Rogers, 1 Saund. 268.; the reason, 269. n. 2.

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tithe, the defendant pleaded that the close was surrounded with ditches, and that the ditches, ways, *and* passages were so filled with water, that the defendant could not carry off his tithes. a replication that the ditches, ways, *and* passages were not so, was held sufficient on demurrer, though in the copulative, because the plea is one entire matter of excuse, and the defendant relies on the whole, and not on each particular's being impassable(*t*); so a replication to a plea, claiming right of common, traversing "that the cattle were the defendant's own cattle, and that they were levant and couchant upon the premises, and commonable cattle" was held sufficient, because, though issue must be taken upon a single point, it is not necessary that such single point should consist only of a single fact, and the point of defence was the cattle in question, being entitled to common(*u*); so to a plea prescribing for tolls, and also to distrain for the same, the replication may deny both prescriptions. On the other hand the traverse must not be *too narrow*, so as to prejudice the defence(*v*); thus, if in an action of trespass in a common called A., the defendant pleads that A. and B. commons lie open to each other, and then prescribes for a right in both commons, the plaintiff must traverse the entire prescription(*w*); but with this *exception, a party is not bound to traverse more than one fact; as in trespass, if the defendant justify under a prescriptive right to a duty and the like right to distrain for it, a replication traversing the duty without denying the right to distrain is sufficient(*x*).

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2dly, Modes of special denial.

Replications denying a *particular* fact or facts, are in point of *form* of *three* descriptions; *first*, the plaintiff protests some fact or facts, and denies the other, concluding to the country; or *secondly*, he at once denies the particular fact intended to be put in issue and concludes to the country; or *thirdly*, formally traverses a particular fact, and concludes with a verification.

1st, When the pleading of either party contains several matters, and the opposite party is not at liberty to put the whole in issue, he may *protest* against one or more facts, and deny the other; as if in assumpsit the defendant plead an accord and satisfaction, as that he delivered to the plaintiff, and the latter accepted, a pipe of wine in satisfaction of the promises mentioned in the declaration, the plaintiff may protest the delivery in satisfaction, and reply that he did not accept the wine in satisfaction(*y*); or in trespass, where the defendant in his plea has justified an arrest and wounding under a writ and warrant, the plaintiff may protest the writ and warrant, and reply *de injuria sua propria absque residuo causæ*(*z*), or may protest one fact, and traverse another(*a*); and if to a plea of *performance of several matters in the condition of a bond, the plaintiff mean only to insist on the breach of one, he may

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(*t*) South *v.* Jones, 1 Stra. 245.
(*u*) Robinson *v.* Rayley, 1 Burr. 317. Dunstan *v.* Tresider, 5 T. R. 2, 3.
(*v*) Com. Dig. Pleader, G. 16.
(*w*) Morewood *v.* Wood, 4 T. R. 157.—1 Saund. 269. n. 1.—Id. ibid.
(*x*) Griffith *v.* Williams, 1 Wils. 338.
(*y*) 3 Wentw. 135.—Bac. Ab. Accord, C.
(*z*) Robinson *v.* Rayley, 1 Burr. 320. Post. 2 Vol. 692.
(*a*) Fenner *v.* Fisher, Poph. 1.

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protest the performance of the others(*b*). This is termed a *protestation*, and its only possible use is, that in case the party making it succeeds in the point to be tried, he thereby saves to himself the liberty of disputing in *any other* suit, the truth of the allegation which is protested against(*c*). It is wholly unavailable in the particular suit in which it is adopted, for the allegation protested against, is in effect admitted in that suit, so that no evidence need be adduced in support of it, and it is of no service in any other action, if the issue be found against the party making it, unless it be of matter which could not be pleaded, or on which issue could not be joined, and then the party protesting will not be concluded, though the issue be found against him(*d*). It is said that matter which is the ground of the suit, or upon which issue might be taken, cannot be protested,[17] as in detinue by the executor of A. the defendant cannot protest that A. did not make the plaintiff his executor, for it is the ground of the suit, and utterly destroys the plaintiff's action(*e*). It is also a rule that a protestation which is repugnant to, or [*591] inconsistent with the *plea, is inartificial and improper(*f*). In these cases the replication should either admit the part of the plea which is not disputed, by saying, "true it is that, &c." or should at once deny the matter intended to be tried, though the latter mode, as being the most concise, appears preferable, for whatever is not traversed is in effect admitted. However, a repugnant or inconsistent or idle or superfluous protestation does not vitiate the plea, though it be shewn for cause of demurrer, for the intent of a protestation is that the party may not be concluded in *another* action(*g*). Hence it appears that a protestation is in general an unnecessary form(*h*), and the replication may at once deny the fact intended to be put in issue, as in the next description of replications(*i*); and though it is not unusual, when it is doubtful whether a plea is sufficient in law, to protest the sufficiency of it in the beginning of the replication, yet this occasions unnecessary expense, for without such protestation, the plaintiff would afterwards be

(*b*) Dauntsey *v.* Southwell, Dyer, 184. a.

(*c*) 2 Saund. 103. n. 1.—Com. Dig. Pleader, N.—Doc. Plac. 295.—Co. Lit. 124. b.—Graysbrook *v.* Fox, Plowd. 276.

(*d*) 2 Saund. 103. n. 1.—Com. Dig. Pleader, N.—Bro. Ab. tit. Protestation.—Finch. L. 359.—Graysbrook *v.* Fox, Plowd. 276.—Co. Lit. 124. b.

(*e*) Com. Dig. Pleader, N.—2 Saund. 103. n. 1.—Graysbrook *v.* Fox, Plowd. 276.—Doc. Plac. 296.—Yelding *v.* Fay, Moor, 355, 6.—The Case of Langforth Bridge, Cro. Car. 365.—Godfrey *v.* Saunders, 3 Wils. 109. 116.—Sed quære; see the cases in 2 Saund. 103. n. 1. in which there are instances of protestation of matter, upon which issue might have been taken.

(*f*) 2 Saund. 103. n. 1.—Bro. Ab. Protestation, 1. 5.—Graysbrook *v.* Fox, Plowd. 276.

(*g*) Com. Dig. Pleader, N.—2 Saund. 103. b. n. 1.

(*h*) Crispe *v.* Belwood, 3 Lev. 425.

(*i*) See the form, Manby *v.* Long, 3 Lev. 105.

(17) Vide *Snyder* v. *Croy*, 2 *Johns. Rep.* 227.

equally at liberty to object to the plea by motion in arrest of judgment, writ of error, &c. In point of form, the proper place in which to introduce a protestation in a plea, is immediately after the words *actio non*, &c.(*j*); and in a replication, after the words *precludi non*, &c.(*k*).

*2nd, The second description of replication, *at once denying the particular fact intended to be put in issue, and concluding to the country*, without any preamble, and without a formal traverse, most frequently occurs in practice, and on account of its conciseness, should, when practicable, be adopted. In assumpsit and other actions on contracts, when the plaintiff denies, and does not confess and avoid the plea, this replication is frequent; as that the defendant was not an infant(*l*), or that no tender was made, &c.(*m*); so to a plea of accord and satisfaction, the plaintiff may without any protestation, reply either that the defendant did not deliver the pipe of wine in satisfaction, or that the plaintiff did not accept the same in satisfaction(*n*). So in actions *in form ex delicto*, in general when the plaintiff denies any allegation in the plea, the better and shorter method is directly to deny the fact, without a formal traverse, and to conclude *to the country*(*o*)[18]. Thus if the defendant has pleaded defect of fences, or a prescriptive right of common or of way, or a license, instead of inducing the replication, with a repetition of the declaration, as by saying that the defendant of his own wrong committed the trespasses or other matters complained of, and then adding a formal traverse, and concluding with a verification, (in which case there must be a rejoinder re-asserting the matter of the plea, although there has already been an affirmative and negative,) the *proper way is to say *precludi non*, because, &c. at once and immediately denying the defect of fences, or the obligation to repair, or the prescriptive right of common, or way, or the license, and concluding to the country(*p*). It must be admitted that it is every day's practice in these cases to reply with a formal traverse and verification, but it is a practice tending to unnecessary repetition, and useless expense, and it may be hoped that the observations of the learned editor of Saunders's Reports(*q*) will have the effect of altering the practice which was reprobated even in the time of William III.(*r*) and in the reign of Geo. II. was considered by the court as an antiquated mode of pleading, tending to unnecessary prolixity, and was said to have been altered of late(*s*). In this descrip-

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(*j*) Graysbrook *v.* Fox, Plowd. 276. 2 Saund. 103. n. 1.—See the forms, Graysbrook *v.* Fox, Plowd. 276.—Com. Dig. Pleader, N.

(*k*) See the forms, Post. 2 Vol. 692. 3 Wentw. 135.

(*l*) Post. 2 Vol. 643.

(*m*) Id. 645.

(*n*) Post. 2 Vol. 650.—Lil. Ent. 105, 6.

(*o*) 1 Saund. 103. b.

(*p*) 1 Saund. 103. b.—Robinson *v.* Rayley, Burr. 320.—See the forms, Post. 2 Vol. 696. 699.

(*q*) 1 Saund. 103. b.

(*r*) Horne v. Lewin, 1 Lord Raym. 641.

(*s*) Robinson *v.* Rayley, 1 Burr. 320.

(18) Vide *Snyder & others* v. *Croy*, 2 *Johns. Rep.* 428.

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tion of replication, care must be taken, not to attempt to put in issue any immaterial matter(*t*).

3dly, A *formal traverse* of the matter alleged in the plea, and concluding with a verification, is rarely necessary; for we have just seen that when the plaintiff is at liberty, without introducing any new matter, to deny that alleged in the plea, he may and indeed should concisely deny it, and conclude to the country; *but when it is necessary in the replication, or other pleading, to shew a title in the plaintiff, or to introduce new matter inconsistent with that stated by the other party*(*b*), or where there are two affirmatives, which do not impliedly negative each [*594] other, or a confession and avoidance by *argument only, a *traverse is necessary*, for otherwise pleadings would run to infinite prolixity(*c*)[19]. Thus where the defendant alleges *seisin* in A. from whom he claims, the plaintiff cannot in his replication allege *seisin* in B. from whom he claims, without either traversing, or confessing and avoiding, the seisin alleged by the defendant(*d*): so where in replevin the defendant avowed as for a distress damage feasant, and the plaintiff pleaded in bar a right of common in *six* acres of land, alleging that the *locus in quo* was parcel thereof, and the defendant replied that the plaintiff *formerly had* common in forty acres, whereof the said six acres were and are parcel and all lying open together, and that the plaintiff before the distress purchased two acres, parcel of the said forty acres, whereby the right of common became extinguished, as this replication did not confess and avoid the plea in bar it was held bad for not traversing the right of common in six acres only(*e*): so if a custom be pleaded, another custom repugnant to it cannot be replied without a traverse, but a custom or matter consistent with it may(*f*)[20]. In real actions, and in *quare impedit*, the plaintiff, (then called the demandant,) must frequently state a title in his replication inconsistent with that of the defendant,

(*t*) Ante, 586, 7.

(*b*) When necessary to show a title in a replication, Com. Dig. Pleader, F. 13. G. 3.

(*c*) Kenchin *v.* Knight, 1 Wils. 253. 1 Saund. 22. n. 2—As to when a traverse is necessary in general, see Com. Dig. Pleader, G. 1 to 22.—Bac. Ab. Pleas and Pleading, H.—Thrale *v.* The Bishop of London, 1 Hen. Bla. 376 to 412.

(*d*) Herring *v.* Blacklow, Cro. Eliz. 30.—Baker *v.* Blackman, Cro. Jac. 682. Helier *v.* Whitier, Cro. Eliz. 651.—S. C. 6 Co. 25. b.—Dyer, 312. b. pl. 90.—Com. Dig. Pleader, G. 2, 3.

(*e*) Kimpton *v.* Bellamye, 1 Leon. 43, 4.—Com. Dig. Pleader, G. 2.

(*f*) Kenchin *v.* Knight, 1 Wils. 253. Bac. Ab. Pleas and Pleading, H.

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(19) Vide *Bindon* v. *Robinson*, 1 *Johns. Rep.* 516.

(20) In trespass quare clausum fregit the defendant pleaded that the locus in quo was part of a public highway, and that the plaintiff had wrongfully incumbered it with a gate; the plaintiff replied a prescription in those whose estate he hath, to maintain a gate on the highway: it was held that he need not traverse the highway, or the wrongful incumbering it with a gate. *Spear* v. *Bicknell*, 5 *Mass. Rep.* 125.

in which case a traverse is necessary(*g*); *but in personal actions it is not in general necessary to state a title in the replication, when the defendant by his plea admits the plaintiff to be in *possession*, which is sufficient against a wrong doer(*h*); as if in trespass *quare clausum fregit*, the defendant plead that E. F. was seised in fee of the *locus in quo*, and enfeoffed G. H. who thereby became seised, and being so seised enfeoffed the defendant, by which he became seised until the plaintiff, claiming by colour of a prior deed of feoffment made by E. F. by which nothing passed, entered, &c. here the plaintiff may well traverse the feoffment supposed to have been made by E. F. to G. H. without making title, because the defendant admits the plaintiff to be in possession by virtue of what amounts to an estate at will, but if the plaintiff were to traverse the title of E. F. then he must state his own title and conclude with a traverse(*i*).

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When a formal traverse is adopted, it ought to be introduced with a proper title, or *inducement*(*k*). Where no new matter is stated in the replication, and a formal traverse is adopted, (though, as we have seen, unnecessarily,) it is usual in trespass, after the words *precludi non*, &c. to induce the traverse with the allegation, "that the defendant of his own wrong committed the trespasses complained of, in manner and form as the plaintiff hath complained against the defendant, *without this, that*, &c." denying the right of common, or way, &c. as stated *in the plea, and concluding with a verification(*l*); but where *new matter* is to be stated as inducement to the traverse, it must appear to be sufficient in substance to defeat the opposite party's allegation, and if a defective title be shewn, the inducement will be bad, though in stating it, so much certainty does not appear to be requisite, as in other parts of pleading, because it is seldom traversable,[21] the other party being in general compellable in his rejoinder or other pleading, to adhere to his own allegation, which has been traversed(*m*). The usual words of the *beginning* of a traverse are, "without this, that, &c." (*absque hoc*); but any words amounting to a denial of the allegation of the other party are sufficient, as, "*et non*, &c."(*n*). The traverse must neither be *too large* nor *too narrow*(*o*); and though it is in general in the negative of the words of the plea, yet time and place, or other matter when immaterial

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(*g*) Fenner *v.* Fisher, Cro. Eliz. 288. Knight *v.* Lodge, Cro. Eliz. 671.—Com. Dig. Pleader, F. 13.—Com. Dig. Pleader, 3 I. 10.

(*h*) Id. ibid.

(*i*) See the case in Popham, 1, 2.

(*k*) Com. Dig. Pleader, G. 20.

(*l*) See the precedent, Rast. Ent. 522, 3.—Co. Ent. 565. We have just seen that a formal traverse is not necessary in this case.

(*m*) Com. Dig. Pleader, G. 20.—When not, see id. G. 17, 18.—1 Saund. 22. n. 2.

(*n*) Com. Dig. Pleader, G. 1.

(*o*) As to this, see Chambers *v.* Jones, 11 East, 407. 410, 411.—Merit-on *v.* Briggs, 1 Ld. Raym. 39.

(21) Vide *Fowler* v. *Clark*, 3 *Day*, 231.

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must not be included(*p*); the words *in manner and form*, as the defendant hath in his said plea above alleged, may be added, for they only put in issue matter of substance(*q*). The *conclusion* must in general be with a verification, unless where no new matter is stated by way of inducement, or where the traverse comprises the whole matter of the [*597] plea, in which case it may be *to the country(*qq*). It is a general rule that there cannot be a traverse after a traverse where the first was material, and of matter necessarily alleged(*r*); as if the plaintiff has declared on a seisin in fee in B. who granted, &c. and the defendant shews a seisin *jur autre vie*, and traverses the seisin in fee, the plaintiff cannot waive such traverse, and traverse that he was seised *jur autre vie*, for this would be a departure from and desertion of his prior allegation, and the parties are not to go on *ad infinitum*(*s*). In some cases, however, a traverse may be taken after a former apt and pertinent one; as where in a transitory action, there is a special local justification with a traverse of the place laid in the declaration, the plaintiff may either join in the defendant's traverse, or traverse the special justification, for in this case the place laid in the declaration being immaterial, the plaintiff is not bound by it(*t*); and the same rule prevails where time or any other immaterial matter alleged in the declaration, is traversed in the plea(*v*). And if a traverse be of matter immaterial, or of an inference of law, or not to the substance and point of the action, the other party may either demur specially, or may pass it by, and tender another [*598] *traverse(*u*); and the King is allowed to take a traverse after a traverse, where his title appears by office or other matter of record; though if it do not so appear, such second traverse cannot be taken(*w*). A *defect* in a traverse can only be taken advantage of, by special demurrer; and therefore it was decided that where the inducement to a traverse confesses and avoids the other party's title, the traverse though idle and bad on special demurrer, is aided upon a general demurrer(*x*), and an

(*p*) Ante, 586, 7.—Bac. Ab. Pleas & Pleadings, H. 5.

(*q*) Nevil *v.* Cook, 2 Leon. 5.—Harris *v.* Ferrand, Hardr. 39.—Com. Dig. Pleader, G. 1.

(*qq*) Smith *v.* Dovers, 1 Saund. 103. a. b.—Dougl. 428.

(*r*) Com. Dig. Pleader, G. 17.—The King *v.* The Bishop of Worcester, Vaughan, 62.—Thrale *v.* The Bishop of London, 1 Hen. Bla. 376 to 412.—and see the reasons, Mayor of Orford *v.* Richardson, 4 T. R. 439. though the *decision* was reversed in 5 T. R. 367.—2 Hen. Bla. 182.

(*s*) Id ibid.

(*t*) 1 Saund. 22. n. 2.—Com. Dig. Pleader, G. 18.—Bac. Ab. Pleas, H. 4. Searle *v.* Darford, Lutw. 1438.—Thrale *v.* The Bishop of London, 1 Hen. Bla. 403.—The Mayor of Orford *v.* Richardson, 4 T. R. 439, 440. reversed see 5 T. R. 367.—2 Hen. Bla. 182.

(*v*) Id. ibid.

(*u*) Richardson *v.* The Mayor of Orford, 2 Hen. Bla. 186.—1 Saund. 22. n. 2.—Com. Dig. Pleader, G. 19.—Bac. Ab. Pleas, H. 4.—Thrale *v.* The Bishop of London, 1 Hen. Bla. 402, 3.

(*w*) The King *v.* The Bishop of Worcester, Vaughan, 62.—Com. Dig. Pleader, G. 17. 19.

(*x*) 1 Saund. 207. n. 5. 22. n. 2.—Com. Dig. Pleader, G. 22.

immaterial traverse(*y*), or the want of a traverse when necessary, is aided upon a general demurrer, and by verdict or pleading over(*z*).

II. THE BODY. 2dly, Denial of the plea. Thirdly, A denial, and stating a breach.

With respect to a replication *denying the effect of the plea, and shewing a particular breach*, without confessing and avoiding the plea, it most frequently occurs in debt on a bond conditioned to perform covenants, &c.(*a*). The rule is, that in all cases (except in the case of an award which stands upon a particular ground), when the defendant pleads matter of excuse, which admits a non-performance, it is sufficient if the plaintiff deny the plea, and he need not assign a breach in his replication; but it is otherwise, where the defendant has pleaded performance(*b*); in the latter case to a plea of general performance of the condition of the bond, the replication must state the breach with *particularity, and should conclude with a verification, in order that [*599] the defendant may have an opportunity of answering it(*c*); and in debt on a bond conditioned for the performance of an award, if the defendant has pleaded no award, the replication must state the whole of the award *verbatim* and also assign a breach(*d*); and in the case of bonds affected by the 8th and 9th Wm. III. c. II. s. 8. the plaintiff should state in his replication, or suggest, in case *non est factum* be pleaded, all the breaches of the bond, &c. on which he means to rely(*e*).

3dly, Confession and avoidance of the plea.

The third description of replication admits, either in words or in effect, the fact alleged in the plea, and avoids the effect of it by stating *new matter*; and this replication frequently occurs in practice; thus if infancy be pleaded, the plaintiff may reply that the goods were necessaries, or that the defendant after he came of age ratified and confirmed the promise(*f*); or in replevin, to an avowry by a freeholder for a distress damage feasant, the plaintiff may plead in bar a demise to him from the defendant(*g*); or in trespass, where the defendant has pleaded *son assault demesne*, the plaintiff admitting that he made the first assault, may reply shewing that it was justifiable(*h*); so to a plea justifying under a warrant upon an information for treasonable practices, for which *offence the plaintiff had been admitted to bail by the Chief [*600] Justice of the King's Bench, the plaintiff should confess and avoid the plea by replying a tender and refusal of bail(*i*); and to a plea of *liberum tenementum*, the plaintiff may, as in replevin, reply a demise from

(*y*) 1 Saund. 14. n. 2.—4 Ann. c. 16. s. 1.

(*z*) Com. Dig. Pleader, G. 22.—1 Saund. 14. n. 2.

(*a*) Com. Dig. Pleader, F. 14, 15.

(*b*) Shelley *v.* Wright, Willes, 12, 13.

(*c*) Cornwallis *v.* Savery, 2 Burr. 774.—Hayman *v.* Gerrard, 1 Saund. 101, 102.—Post. 2 Vol. 622, 3.—Com. Dig. Pleader, F. 14, 15.

(*d*) Post. 2 Vol. 619.—Shelley *v.* Wright, Willes, 12.—2 Saund. 62. b. n. 5.—Forcland *v.* Marygold, 1 Salk. 72.—Perry *v.* Nicholson, 1 Burr. 281. Smith *v.* Yeomans, 1 Saund. 317. 103, n. 1 & 4.

(*e*) See 1 Saund. 58. n. 1.—2 Saund. 187. a. n. 2.—De La Rue *v.* Stewart, 2 New Rep. 362.

(*f*) Post. 2 Vol. 644.

(*g*) Post. 2 Vol. 683.

(*h*) Post. 2 Vol. 690.—Warrall *v.* Clare, 2 Campb. 629.

(*i*) Ante, 563.—Sayre *v.* Earl of Rochford, 2 Bla. Rep. 1165.

II. THE BODY. 3dly, Confession and avoidance of the plea.

the defendant(*k*), or from some person seised of the estate before the defendant had or claimed to have any interest in the *locus in quo*(*l*); or if the defendant has justified under a demise, he may shew a notice to quit, or to a justification under a distress damage feasant, may reply a subsequent conversion(*m*).

In replications of this description it is necessary that the material parts of the defendant's title be admitted either in terms or in effect(*n*); and it is not unusual to admit the material facts alleged in the defendant's plea, in express terms, by stating after the words *precludi non*, "that although true it is that the said demise was made to the said defendant, as in his said plea is alleged, yet for replication in this behalf, the said plaintiff in fact saith that, &c.;" but where the plaintiff in the subsequent part of his replication claims immediately from the defendant, or states generally, "that before the defendant had any thing in the *locus in quo*, &c." this form appears unnecessary(*o*); though it may be advisable to adopt it, when the plaintiff claims title from a party al-
[*601] leged to have been seised in fee prior to the party *under whom the defendant claimed(*p*). When the replication completely confesses and avoids the defendant's plea, it should not conclude with a traverse(*q*), and there is no occasion to give colour to the defendant in this replication(*r*); though as it introduces new matter, it must conclude with a verification, in order that the defendant may have an opportunity of answering it(*s*). A replication of this nature must confess as well as avoid the effect of the defendant's plea, and if the plaintiff rely on some excess, as an imprisonment under colour of process after a voluntary escape, this matter should be new assigned, and not replied(*t*); for a *replication* must always state matter which entitles the plaintiff to his action for the *same* trespasses which are mentioned in and attempted to be justified by the plea, of which description are replications of new matter shewing that the plaintiff is a trespasser *ab initio*(*v*); but when the plaintiff relies on trespasses *different* from those pleaded to, he must *new assign*(*u*).

4thly, New assignments.

The *fourth* description of replication, if it may be so termed, is a *new assignment*(*w*). Though a replication must not *depart* from any

(*k*) Post. 2 Vol. 696.—Lambert *v.* Strother, Willes, 225.—Taylor *v.* Eastwood, 1 East, 212.

(*l*) Lambert *v.* Strother, Willes, 225. Dyer, 171. b. pl. 8, 9.

(*m*) Dye v. Leatherdale et al., 3 Wils. 20.

(*n*) Dyer, 171. b. pl. 8, 9.—Sir Wm. Jones, 352.

(*o*) Id. ibid. Post. 2 Vol. 696.—Taylor *v.* Eastwood, 1 East, 212, 3.

(*p*) Id. ibid.—Sir Wm. Jones, 352.

(*q*) 1 Saund. 22.—Jefferson *v.* Morton & others, 2 Saund. 28.—Com. Dig. Pleader, 2 G. 3.

(*r*) Taylor *v.* Eastwood, 1 East, 212.

(*s*) 1 Saund. 103. *in notis.*

(*t*) Scott *v.* Dixon et al., 2 Wils. 3, 4.—Atkinson *v.* Matteson, 2 T. R. 172.

(*v*) 1 Saund. 300. a.—Dye *v.* Leatherdale et al., 3 Wils. 20.—Taylor *v.* Cole, 3 T. R. 297, 8.—S. C. 1 Hen. Bla. 560, 1.

(*u*) Scott *v.* Dixon et al., 2 Wils. 4.

(*w*) As to new assignments in general, see 1 Saund. 299. n. 6.—Vin. Ab. tit. Trespass, U. a. 4. & tit. Novel Assignment.—Bac. Ab. Trespass, I. 4. 2. Com. Dig. Pleader, 3 M. 34.—see the forms, post. 2 Vol. 700. 705.

material allegation in the declaration, yet where there is an *evasive* plea, either as to the whole or a part of the cause of action, the plaintiff may avoid the effect of it by **restating* the injury for which he meant to declare with *more particularity* and certainty, consistently however with the more general complaint in the declaration; and this is termed a *new* or *novel assignment*, and may be either as to time, place, or any other circumstance, when *material*(*x*). It is frequently necessary, in order that the defendant may have notice of the real ground upon which the plaintiff proceeds(*y*); and when from the nature of the action, as in trespass *quare clausum fregit*, the declaration is so framed as to be capable of covering several injuries, committed at different times, or in different parts of a close, &c. the plaintiff may frequently reply, not only denying the right of common, or way, &c. stated in the plea, but also new assigning trespasses committed at different times or in different parts of the close, to those mentioned in the plea(*z*). But where the nature of the act complained of is *single*, or the plea does not at all meet the declaration, or the plaintiff does not mean to dispute it, as if it justify a trespass in some other place of the same name, or a different assault to that intended to be complained of, the plaintiff should in that case merely new assign, without traversing any part of the plea(*a*). And where the plea covers all the trespasses mentioned in the declaration it may frequently be improper to new assign(*b*). A new assignment may be made in most actions, whether in *form ex contractu* or *ex delicto*(*c*), but it more frequently occurs in trespass; *and in replevin, as the plaintiff must shew the place in certain where the taking was, it is said that there can be no new assignment, as to the place(*cc*). If to an action of *assumpsit* for goods sold, the defendant has pleaded a judgment recovered, and in fact the plaintiff has obtained a judgment in another action, though for different goods and causes of action, the plaintiff ought not to reply *nul tiel record*, but should new assign that his present action is brought for the non-performance of other and different promises(*d*)[22]. So if in *case* for the publication of a libel, without mentioning the particular person to whom it was published, the defendant has pleaded that he published it lawfully, as to members of a committee of the house of commons, and

II. THE BODY. 4thly, New assignments. [*602] [*603]

(*x*) 3 Bla. Com. 311.—Monprivatt *v.* Smith & another, 2 Campb. 176, 7.

(*y*) Taylor *v.* Cole, 1 Hen. Bla. 560. 562.

(*z*) 1 Saund. 300. *in notis*.—Monprivatt *v.* Smith & another, 2 Campb. 175. Cheasley *v.* Barnes & others, 10 East, 73.—Barnes *v.* Hunt, 11 East, 451.

(*a*) 1 Saund. 300. a.—Cheasley *v.* Barnes & others, 10 East, 80.—Chambers *v.* Jones, 11 East, 408.—Barnes *v.* Hunt, 11 East, 451.

(*b*) Barnes *v.* Hunt, 11 East, 454.

(*c*) Vin. Ab. Novel Assignment, pl. 4, 5.—Bac. Ab. Trespass, I. 4. 2.

(*cc*) Corkley *v.* Pagrave, Freem. 238.

(*d*) Post. 2 Vol. 700.—Seddon *v.* Tutop, 6 T. R. 607.—3 Wentw. 151.

(22) Vide *Snyder & Van Vechten* v. *Croy*, 2 *Johns. Rep.* 227.

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the plaintiff proceeds for a publication to other persons not members of the committee, he should reply or rather new assign such illegal publication(*e*). So in an action for an escape, if the defendant plead a negligent escape and voluntary return, the plaintiff should new assign a subsequent escape(*f*); and if in case for disturbance of a right of common, by cutting turves, the defendant plead that he cut the turves as servant of the lord of the manor, the plaintiff may new assign that the defendant cut other turves for sale, and not for the use of the lord(*g*). It is a general rule that where the defendant has committed *several* trespasses, either upon the person, personal property or real property [*604] of another, some of which were justifiable *and others not, and the action is brought for those trespasses which were not justifiable, but the defendant by his plea answers those only which were, then the plaintiff should new assign(*h*). Thus in an action of trespass, if there have been two assaults, the one justifiable and the other not, and the declaration only contains one count for an assault, and the defendant pleads *son assault demesne*, the plaintiff should new assign the illegal assault(*i*); but if there are as many counts as there were assaults, &c. and some of them cannot be justified, the plaintiff may prove those without a new assignment; and it would often be injudicious in such case to new assign; for where the declaration contains just as many counts as are equal to the number of assaults, &c. as where there have been two assaults, &c. and there are two counts, and the defendant pleads the general issue to the whole declaration, and a justification to one of the counts, the plaintiff had better put the justification in issue, and in case the defendant proves it, give evidence of the second assault upon the second count, than make a new assignment; for if the plaintiff fail in the proof of the allegation in the new assignment, he cannot afterwards have recourse to the second count, because by the new assignment he acknowledges that one of the assaults, &c. is justified, and has therefore abandoned one count, and relies upon the as- [*605] sault, &c. in the new assignment, therefore *he cannot avail himself of one and the same act of assault, &c. both on the new assignment and on the second count; but if the plaintiff can prove two assaults, &c. besides that which he has waved, he might do so upon the second count(*j*). So if in answer to a plea justifying under process, &c. the plaintiff rely on an assault, &c. *before* the issuing of the writ, &c. or *after* the return of it, or after the defendant was discharged by the plaintiff in the original action, or after a voluntary escape, that matter

(*e*) Lake *v.* King, 1 Saund. 133.—Monprivatt *v.* Smith & another, 2 Campb. 175.

(*f*) Griffiths *v.* Eyles, 1 Bos. & Pul. 413.—Chambers *v.* Jones, 11 East, 408.

(*g*) Greenhow *v.* Ilsley, Willes, 619, 620.

(*h*) 1 Saund. 299. a. n. 6. When not, see Barnes *v.* Hunt, 11 East, 454.

(*i*) 1 Saund. 299. a. n. 6.—2 Saund. 5. note 3. at conclusion.—Anon.—2 Ld. Raym. 1015.—Bul. Ni. Pri. 17.—Rundle *v.* Webb, 1 Esp. Rep. 38.—Elwis *v.* Lombe, 6 Mod. 117.—1 Selwyn Ni. Pri. 46. *acc.*—Thornton *v.* Lyster, Cro. Car. 514, 5. *contra*, not law.

(*j*) 1 Saund. 299. n. b. note 6.—Atkinson *v.* Matteson, 2 Term Rep. 177.

should be new assigned(*k*),[23] and if the answer to a plea of *son assault demesne* be that the defendant was guilty of an immoderate battery, more than was necessary in self-defence, it may be put on the record(*l*); and it has been not unusual in these cases to deny the subject matter of justification, and also to new assign, though this mode of pleading is objectionable for duplicity(*m*).

In actions of trespass to *personal* property, as there may have been two takings, or two injuries committed to the same property, consequently there may be a new assignment(*n*); and if in trespass for taking personal property, the defendant by his plea making a local justification, the plaintiff may new assign(*o*); as where to trespass for taking away the plaintiff's oaks, the defendant *pleaded that the oaks were [*606] standing in a certain close called A. situate in the manor of O. the freehold of B. who felled them, and justifies taking them away by the command of B., it was held that the plaintiff might new assign that the oaks were growing in the plaintiff's close within the manor of W., and were other oaks, &c. than those mentioned in the plea, and in these transitory actions, not only the place but the time may be made material by the plea, and then the plaintiff must new assign the trespass at another time(*oo*). So in an action for breaking and entering the plaintiff's house, or land, or felling his timber, or taking away his goods, if the defendant plead a *license*, which the plaintiff had revoked before any of the trespasses were committed, or which was confined to some particular act, and the defendant exceeded it, the plaintiff must state the revocation or excess in a new assignment(*p*); but if more trespasses were committed than were licensed, the general replication denying the plea will suffice(*q*).

In trespass to *real property* if the declaration does not state the name or abuttals of the close, &c. with such precision as to avoid the possibility of the defendant's having a close, &c. in the same parish of a similar description, and the defendant has pleaded *liberum tenementum*,

(*k*) Green *v.* Jones, 1 Saund. 299. and id. 299. n. 6.—See the precedents and law, Scott *v.* Dixon et al., 2 Wils. 4.—Atkinson *v.* Matteson, 2 T. R. 172. Cheasley *v.* Barnes & others, 10 East, 79.—And post. 2 Vol. 701.

(*l*) Willes Rep. 17. n. b. sed quære if it should not be by replication, instead of new assignment, because it shows the defendant a trespasser ab initio, 1 Saund. 300. a.—Taylor *v.* Cole, 3 T. R. 292.—S. C. 1 Hen. Bla. 560.

(*m*) Cheasley *v.* Barnes & others, 10 East, 79. 81.

(*n*) Elwis v. Lombe, 6 Mod. 120.—Vin. Ab. Trespass, U. a. 4. pl. 22.—Bac. Ab. Trespass, I. 4. 2.

(*o*) 1 Saund. 300. a.—Bul. Ni. Pri. 92.—Batt *v.* Bradley, Cro. Jac. 141.—Cockley *v.* Pagrave, Freem. 238.—Coke *v.* Evans, Salk. 453.—Coke *v.* Evans, 6 Mod. 120.—Bodyam *v.* Smith, Gould. 191.—Vin. Ab. tit. Trespass, U. a. 4. pl. 16. tit. Novel Assignment, A. pl. 9.

(*oo*) Id. ibid.—Anon., 2 Ld. Raym. 1015.—Bridgwater *v.* Bythway, Lev. 110, 111.

(*p*) 1 Saund. 300. a.—2 Saund. 5. conclusion of note 3.

(*q*) Barnes *v.* Hunt, 11 East, 451.

(23) Vide *Oakley* v. *Davis*, 16 *East's Rep.* 82.

II. THE BODY. 4thly, New assignments.

without describing the close, the plaintiff should new assign[24] and not take issue on the plea, for if he were, he would fail upon the trial, if the defendant *could shew that any close in the parish or place stated [*607] in the declaration was his freehold(*q*). But where the plaintiff and defendant agree as to the close, the plaintiff cannot new assign a trespass *out of it*, for that would be a departure from his declaration(*r*). If the defendant professing to answer the whole declaration, does in reality justify only part of the trespass for which the action is brought, the plaintiff must new assign as to the residue, and if he doubt the truth of the justification should also reply to it; for it is necessary in many cases to traverse, or otherwise answer the plea, and also to new assign; as where the defendant pleaded, that the house mentioned in the declaration was called C. House, and one of the closes Black Acre, and the other White Acre, and that they were his freehold: the plaintiff traversed that C. House and Black Acre were the defendant's freehold, and new assigned the trespass in twenty acres, other than White Acre, and it was objected that the new assignment was a waiver of the former pleadings as to all, and therefore the plaintiff ought not to have traversed; but the court held it proper, for as the defendant had pleaded to some of the places, in which the plaintiff intended to lay the trespass, the plaintiff was at liberty to answer that part, and the defendant should not waive the plea and plead to all *de novo*(*s*). So [*608] *where an action was brought for fishing in the river T. being the plaintiff's fishery, and the trespass intended by the declaration is for fishing to the extent of two miles and upwards; if the defendant plead that he is seised in fee of ten acres adjoining the river, and prescribes for a free fishery in the river, along the sides of the ten acres, the plaintiff ought not merely to traverse the prescription, and go to issue upon it, because at the trial he would not be permitted to give evidence of any act of fishing by the defendant either above or below the ten acres, for the question would be confined to the prescription only; but the plaintiff should also new assign, and state that the trespass complained of was not only for fishing in the river adjoining the ten acres, but also above and below, and then the defendant will be under the necessity of giving some answer to the whole trespass; and it has been observed that in this case without a new assignment, the plaintiff would run great risk of being tricked, for otherwise if the prescription were found for the defendant the latter would succeed in the action, though

(*q*) Cheasley *v.* Barnes & others, 10 East, 80—Stevens *v.* Whistler, 11 East, 51, 2.—Hawke *v.* Bacon, 2 Taunt. 156. Helvis *v.* Lamb, 2 Salk. 453.—S. C. 6 Mod. 119.—Lambert *v.* Strother, Willes, 223.—Martin *v.* Kesterton, 2 Bla. Rep. 1089.—Goodright d. Balch *v.* Rich, 7 T. R. 335.—1 Saund. 299. b. c. Atherton *v.* Prichard, E. 43 Geo. III. Com. Dig. Pleader 3 M. 34. *acc.*—Dyer, 23. pl. 147. *contr.*

(*r*) 1 Saund. 300. n.

(*s*) Prettyman *v.* Lawrence, Cro. Eliz. 812.—1 Saund. 300. n. 6.

(24) So, if the plaintiff declare in trespass generally, and the defendant plead liberum tenementum, setting out the close with metes and bounds, the plaintiff should new assign. *Hallock* v. *Robinson*, 2 *Caine's Rep.* 233.

guilty of almost the whole trespass, for which the action was brought(*t*). So where a right of way is claimed, which is disputed by the owner of the close, and the defendant has committed trespasses in other parts, besides those over which he claims the way, if the defendant plead the right of way the plaintiff must traverse it, and further state in a new assignment that the defendant *committed trespasses in other parts of [*609] the close(*u*). So where in trespass, a grant of a way, or of common, has been pleaded, if the defendant has used the way, &c. in a different manner from what he was entitled to do under the grant, the plaintiff must new assign(*w*); thus if to trespass *quare clausum fregit* with cattle, the defendant has prescribed for commonable cattle levant and couchant, and has pleaded that the cattle mentioned in the declaration were such cattle, and in truth the defendant has put on such cattle, and also other cattle not levant and couchant, the plaintiff should new assign, stating that he brought his action for depasturing the common with other cattle, and should not traverse the levancy and couchancy(*x*).

There are some replications which rather partake of the nature of new assignments than are properly and strictly so; as where the defendant has abused an authority or license which the law gives him, by which he became a trespasser *ab initio*, and then if he plead such license or authority the plaintiff may reply such abuse(*y*). Many of the replications confessing and avoiding the action, which have been considered, are of this nature(*z*). By new assigning the plaintiff may frequently obtain full costs, which otherwise he would not recover; thus on a plea of not guilty to a new assignment of *extra viam*, the plaintiff, though he should obtain a verdict for less than forty shillings damages, is entitled to full costs without a judge's *certificate unless the way [*610] pleaded was set forth by metes and bounds(*zz*), but where the defendant suffers judgment by default to the new assignment, and succeeds on the issues taken on his pleas, he is entitled to the general costs of the trial(*a*).

In point of *form* there are two modes of *introducing* the matter new assigned. If the plaintiff traverse the plea as well as new assigns, after framing the replication to the plea, as in ordinary cases, the form runs thus(*b*), "And the said plaintiff further saith, that he exhibited his bill against the said defendant, and brought his action thereupon *not only* for the said several trespasses in the said second plea mentioned, and therein attempted to be justified, *but also* for that the said defendant on, &c. at, &c." (stating the matter new assigned)(*c*); but if the

(*t*) 1 Saund. 300. w.

(*u*) 1 Saund. 300. a. n.

(*w*) 1 Saund. 300 a.

(*x*) 1 Saund. 346. d. sed quære.—See ante, 568.

(*y*) 1 Saund. 300. a.—Six Carpenters' Case, 8 Co. 146.—Dye *v.* Leatherdale et al., 3 Wils. 20.—Taylor *v.* Cole, 3 T. R. 292.—S. C. 1 Hen. Bla. 555.—Goundry *v.* Feltham, 1 T. R. 338.

(*z*) Ante, 601.

(*zz*) Tidd's Prac. 3d edit. 885.—4 edit. 867, 8.—Martin *v.* Vallance, 1 East. 351.

(*a*) Thornton *v.* Williamson, 13 East, 191.

(*b*) See the forms, post. 2 Vol. 704.

(*c*) Post. 2 Vol. 704—1 Saund. 300. n.

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plaintiff *merely* new assigns, then the form is thus, "And as to the said plea of the said defendant by him secondly above pleaded, the said plaintiff saith, that he by reason of any thing by the said defendant therein alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said defendant, because he saith, that he exhibited his bill against the said defendant, and brought his suit thereupon, *not for* the said supposed trespasses, in the introductory part of the said second plea mentioned, *but for* that the said defendant on, &c. at, &c. (stating the matter new assigned)(*d*). A new assignment being in the nature of a new declaration, should be equally [*611] certain as to time, place, *and other circumstances(*dd*), and it must not be negatively that the trespasses mentioned in the plea were not the same as those for which the plaintiff complained, but some other trespasses must be shewn(*e*). If the new assignment be in *another close or place*, the plaintiff should give the place a name, or otherwise describe it with some certainty(*f*), and which on not guilty thereto, must be proved as stated(*g*); and if it be in the *same close*, it is said the particular spot should be set forth in such a manner, as that a plain difference may be perceived between the place so new assigned and that mentioned in the plea(*h*); but where a right of way is pleaded it is usual to new assign *extra viam*, without shewing in what particular part of the *locus in quo*(*i*).

When the defendant justifies under a right of common, or way, &c. at particular times of the year, or in particular parts of the close, &c. the plaintiff may new assign, that the trespasses were committed, "*at other times, and on other occasions, and for other and different purposes than those mentioned in the plea;*" or that the defendant "in a greater degree and with more force and violence than was necessary for re- [*612] moving *the supposed obstructions to the said supposed way, &c. cut down the gates," &c.(*k*). The matter new assigned must be consistent with the declaration, and not varying from or more extensive than the trespasses therein enumerated(*l*), or those which the defendant has in his plea professed to answer; for a new assignment is merely to avoid the effect of the plea, which can only operate upon the trespasses there-

(*d*) See the forms, post. 2 Vol. 701. Thoroughgood's Case, 2 Co. 6. a.—Baldwin's Case, 2 Co. 18. b—1 Saund. 300. a.

(*dd*) Com. Dig. Pleader, 3 M. 34.—Vin. Ab. Trespass, U. a. 4. pl. 13.—Bac. Ab. Trespass, I. 4. 2.—Dyer, 264. a. pl. 39.

(*e*) Sprigg *v.* Neal, 3 Lev. 92.—Post. 2 Vol. 701.

(*f*) 1 Saund. 299. c.—Vin. Ab. tit. Novel Assignment, A. Bro. Tresp. 203. See the form, post. 2 Vol. 703.—Thoroughgood's Case, 2 Co. 6. a.—Baldwin's Case, 2 Co. 18. b.—2 Anders. 103.—Benl. and Dal. 177.

(*g*) Com. Dig. Pleader, 3. M. 34.—Vin. Ab. Trespass, U. a. 4. pl. 12, &c. Bul. N. P. 89.—Smith *v.* Milles, 1 Term Rep. 479.

(*h*) Id. ibid.—Vin. Ab. Trespass, U. a. 4. pl. 3.

(*i*) Post. 2 Vol. 704.—Sed vid. Vin. Ab. Trespass, U. a. 4. pl. 3.

(*k*) See the forms, post. 2 Vol. 704, 705.

(*l*) Vin. Ab. Trespass, U. a. 4. pl. 19.—Avis *v.* Gennie et al., Win. 65.—4 Leon 15, 16.—Cheasley *v.* Barnes & others, 10 East, 79. 81.

by admitted(*m*). It should also only be of *material* matter, and therefore if the plea set up a right of way, or common, &c. at *all times* of the year, the new assignment should not be that the defendant "at other times, &c." time in that case being immaterial; and in an action of trespass against several, if some of the defendants suffer judgment by default and the others plead a justification, the new assignment should be as to all the defendants, and not merely to those who have pleaded, for that would be a departure(*n*).

The *conclusion* of a new assignment must be with a verification, in order that the defendant may have an opportunity of answering it(*o*), and after stating the matter newly assigned, the form usually is thus, "and which said trespasses above newly assigned, are other and different trespasses than the said trespasses in the said second plea mentioned, and therein attempted to be justified; wherefore, inasmuch "as the said defendant hath not answered the said trespasses above [*613] "newly assigned, the said plaintiff prays judgment, and his damages "by him sustained on occasion of the committing thereof to be adjudged to him, &c."(*oo*): and though with respect to the latter part of this conclusion it has been said that it would be more correct, if it were to stop at the words, "*et hoc paratus est verificare*," without praying judgment, against the defendant for not answering the trespasses newly assigned, when it was impossible he should answer it before it was alleged(*p*); yet it may be observed that matter newly assigned is always considered as having been already stated in the declaration, and consequently the defendant might have answered it.

A new assignment being, as already observed, in the nature of a new declaration, and dismissing the previous pleading from consideration, so far as respects the matter newly assigned, the defendant should plead to it precisely as to a declaration(*q*), either by denying the matter new assigned, by the plea of not guilty, &c.(*r*)[25] or by answering it by a special plea of matter of justification(*s*), and he may plead several pleas(*t*); and as the plaintiff avers that the trespasses new assigned are other and different to those mentioned in the plea, he waives or abandons the trespasses which the defendant has justified, and it is not necessary to plead over again to the new assignment, any matter of jus-

(*m*) Cheasley *v.* Barnes & others, 10 East, 80.

(*n*) Holland *v.* Drake, 2 Leon. 199. Com. Dig. Pleader, F. 11.

(*o*) Bac. Ab. Trespass, I. 4. 2.—Hustler *v.* Raines, Lutw. 1401.—1 Saund. 103. n. 1.

(*oo*) See the form, Thoroughgood's Case, 2 Co. 6. a.—Baldwin's Case, 2 Co. 18. b. Rast. Ent. 608.—Post. 2 Vol. 701. and 9 Wentw. Index, cxxiv.

(*p*) Cockley *v.* Pagrave, Freem. 238.

(*q*) Bodyam *v.* Smith, Goulds. 191. S. C. Moore, 540.—S. C. Cro. Eliz. 590.

(*r*) See the form, post. 2 Vol. 722. Bro. Ab. tit. Trespass, pl. 359.

(*s*) Bro. Ab. tit. Trespass, pl. 168. 203. 359.

(*t*) Bac. Ab. Trespass, I. 4. 2.

(25) Vide *Pratt* v. *Groome*, 15 *East's Rep.* 235.

II. THE BODY. 4thly, New assignments.

tification *necessarily covered by the plea; as if common of pasture at all times of the year be pleaded, and the plaintiff new assigns that the defendant entered at other times(*u*); and therefore the defendant cannot [*614] plead to the new assignment, that the place(*v*), or trespass, &c. mentioned therein, is the same as that mentioned in the plea, and if in truth they are the same, the defendant should plead not guilty, and take advantage of it in evidence, as the plaintiff would be estopped from proving any trespass in the same place, &c.(*w*); and for the same reason the defendant cannot justify at a different place, and traverse the place mentioned in the new assignment(*x*); and when the plaintiff traverses the plea, as well as new assigns, the defendant cannot as to the matter answered in the plea, plead new matter, but must stand by his plea(*y*). When the defendant has no answer to the new assignment, the proper course is to suffer judgment by default thereto, in order to entitle the defendant to the general costs of the cause(*z*).

Replication to plea to a new assignment.

To the plea or pleas to the new assignment, the plaintiff should *reply* precisely as to pleas to a declaration, and if the plea be such as would require a new assignment if pleaded, to a declaration, the plaintiff should again new assign to such plea(*a*).

III. THE CONCLUSION.

The *conclusion* of replications in particular *instances has already been pointed out(*zz*); and it may here suffice to observe that when a [*615] replication denies the whole of the defendant's plea, containing matter of fact, it should conclude to the country thus: "and this he the said plaintiff prays may be inquired of by the country, &c."(*aa*); and it is an established rule applicable to every part of pleading, subsequent to the declaration, that when there is an affirmative on one side, and a negative on the other, or *vice versâ*, the conclusion should be to the country,[26] although the affirmative and negative be not in express

(*u*) Bodyam *v.* Smith, Goulds. 191. S. C. Moore, 540.—S. C. Cro. Eliz. 590. and see the cases in next note.

(*v*) Moore, 460.—Jenk. 6th Cent. 265.

(*w*) Supra, note u.—Vin. Ab. Trespass, U. a. 4. pl. 9, 10.—Bac. Ab. Trespass, I. 4. 2.—1 Saund. 299. c.—Freeston *v.* Standford, Cro. Eliz. 855.—Freeston *v.* Crouch, Cro. Eliz. 493.—14 Hen. 8. 4. pl. 3.—Bro. Tresp. 168.—27 Hen. 8. 7. pl. 21.—Bro. Tresp. 3.

(*x*) Bro. Ab. Trespass, pl. 168.—Vin. Ab. Trespass, U. a. 4. pl. 9, 10. 15.

(*y*) Prettyman *v.* Lawrence, Cro. Eliz. 812.—Bac. Ab. Trespass, I. 4. 2.

(*z*) Thornton *v.* Williamson, 13 East, 191.

(*a*) 1 Saund. 299. c.—See the precedents referred to in 9 Wentw. Index, Thoroughgood's Case, 2 Co. 6. & Post. 2 Vol. 723.

(*zz*) Ante, and see as to the conclusion in general, Com. Dig. Pleader, F. 5.

(*aa*) 1 Saund. 103. n.—Robinson *v.* Rayley, 1 Burr. 316.—Trapaud *v.* Mercer, 2 Burr. 1022.—Boyce *v.* Whitaker, Dougl. 94.—Smith et al. *v.* Dovers, Dougl. 428.—Hedges *v.* Sandon, 2 T. R. 442, 3.

(26) Vide *Labagh & wife* v. *Cantine & others*, 13 *Johns. Rep.* 274. ante, 559. n. (7.) *Bindon* v. *Robinson*, 1 *Johns. Rep.* 516.

III. THE CONCLUSION.

words, but only tantamount thereto(*b*); and it may also be laid down as a safe rule that where a defendant cannot take any new or other issue in his rejoinder, than the matter he had before pleaded, without a departure from his plea, or where the issue on the rejoinder would be the same in substance as on the plea, the plaintiff should conclude to the country(*c*); and it is not material in this case whether the replication contain a formal traverse, for where a traverse comprises *the whole* matter of the plea, the replication may still conclude to the country(*d*)[27]. This conclusion is also proper where a particular fact is selected and denied, without any inducement or formal traverse(*e*); but the plaintiff is still *at liberty, where he only denies one of several facts, and [*616] not the whole substance of the plea, to commence his replication with an inducement, and formally to traverse the particular fact, and conclude with a verification, though this, as already observed, tends to unnecessary prolixity, delay and expense(*f*); and when this form is adopted, the conclusion should be with an averment and prayer of damages or of the debt and damages(*g*). It is a general rule that when new matter is alleged in the replication, it should conclude with an averment, in order to give the defendant an opportunity of answering it(*h*), and an appropriate *prayer of judgment* for debt and damages, or damages only, according to the form of action, and the subject matter of dispute, and not merely *unde petit judicium* if he *actione precludi debet.* But when the defendant would not be at liberty to traverse or answer the new matter without a departure, the replication may notwithstanding the introduction of new matter conclude to the country; as if to debt on an award, the defendant plead *nul agard*, and the plaintiff reply an award, and set forth a breach, it is said that he may conclude to the country(*i*), though a conclusion with a verification is most usual(*k*).

(*b*) 1 Saund. 103. n.—De La Rue *v.* Stewart, 2 New Rep. 363.

(*c*) 1 Saund. 103. b.—and see the reason, Roberts *v.* Marriett, 2 Saund. 189, 190.

(*d*) Haywood *v.* Davies et el., 1 Salk. 4.—1 Saund. 103. a. b.

(*e*) Hedges *v.* Sandon, 2 T. R 349. Haywood *v.* Davies et al., 1 Salk. 4.—Horne *v.* Lewin, 1 Ld. Raym. 641.—1 Saund. 103. a. b.—Sayer, 234.

(*f*) Id. ibid.—Hedges *v.* Sandon, 2 T. R. 442, 3.—Robinson *v.* Rayley. 1 Burr. 320, 1.—Baynham *v.* Matthews, 2 Stra. 871.—Sandford *v.* Rogers, 2 Wils. 113.—Smith et al. *v.* Dovers, Dougl. 428.

(*g*) Id. ibid. Sayer. 234.—Haywood *v.* Davies et al., 1 Salk. 4.—Robinson *v.* Rayley, 1 Burr. 319.—Hedges *v.* Sandon, 2 T. R. 442, 3.

(*h*) De La Rue *v.* Stewart, 2 New Rep. 363, 4.—1 Saund. 103. n. 1. 327. n. 1.—2 Saund. 63. g.—Curry *v.* Stephenson, Carth. 337.—S. C. 4 Mod. 376.—Cowper *v.* Towers, 1 Lutw. 101.—Filewood *v.* Popplewell et al., 2 Wils. 66. Chandler *v.* Roberts et al., Dougl. 60. Henderson *v.* Withy, 2 T. R. 576.—as to conclusion of matter when in negative, Harvey *v.* Stokes, Willes, 6.

(*i*) 1 Saund. 327. n. 1. cites Seal *v.* Crowe, 3 Lev. 165.

(*k*) Post. 2 Vol. 668.

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(27) Vide *Manhattan Company* v. *Miller*, 2 *Caine's Rep.* 60. *Snider* v. *Croy*, 2 *Johns. Rep.* 428. *Patcher* v. *Sprague*, *Id.* 452. *Bindon* v. *Robinson*, 1 *Johns. Rep.* 516.

II. THE CONCLUSION. [*617] Where matter of *estoppel is replied, the plaintiff should rely on it, or he will lose the benefit of it(*l*), and it is usual to conclude the replication in that case, with a verification and prayer of judgment, if the defendant ought to be admitted or received against his own acknowledgment, &c. to plead his plea(*m*); but in this, and indeed all other replications, it is sufficient after the proper verification to pray judgment generally, without pointing out the appropriate judgment(*n*); and where the word "*certify*" was by mistake inserted instead of "*verify*," the court appeared to consider the replication sufficient(*o*), and unless assigned specially as cause of demurrer, a defect in the conclusion of a replication is aided(*p*).

III. THE QUALITIES OF A REPLICATION.

THE *qualities* of a replication, in a great measure resemble those of a plea(*a*), and are: *first*, that it must answer so much of the plea as it professes to answer, and that if bad in part it is bad for the whole. *Secondly*, that it must be conformable to, and not depart from the count. *Thirdly*, that like a plea, it should be certain, direct and positive, and not argumentative, and also that it be triable; and *Fourthly*, that it must be single.

I. MUST ANSWER THE PLEA. [*618] *1*st*, We have already seen the consequences of a discontinuance where the defendant has omitted to plead to a part of the plaintiff's demand, or has professedly pleaded to more or less than the plaintiff proceeds for, or where one of the defendants has not pleaded at all, and the conduct which the plaintiff should then adopt, has been pointed out(*b*). A replication also should answer so much of the plea which it professes to answer,[28] or it will be a discontinuance(*c*); and it is a rule that an entire replication bad in part is bad for the whole;[29] as if to

(*l*) 1 Saund. 325. n. 4.—Liford's Case, 1 Co. 52. a.

(*m*) Post. 2 Vol. 641.—Shelley *v.* Wright, Willes, 11. 13.

(*n*) Shelley *v.* Wright, Willes, 13.—1 Saund. 97. n.—Le Bret *v.* Papillon, 4 East, 502. 509.

(*o*) Harvey *v.* Stokes, Willes, 6, 7.

(*p*) 16 & 17 Car. 2. c. 8.—4 Ann. c. 16. s. 1.—1 Saund. 99. n. 2.

(*a*) Ante, 506 to 521.

(*b*) Ante, 509, 510. and see Com. Dig. Pleader, F. 4.—W. 1, 2, 3.—Tippet et al. *v.* May et al., 1 Bos. & Pul. 411.

(*c*) Com. Dig. Pleader, F. 4. W. 2. Hancocke *v.* Proud, 1 Saund. 338.

(28) Vide *Marsteller & others* v. *M'Clean*, 7 *Cranch*, 156.

(29) Vide *Martin & others* v. *Williams*, 13 *Johns. Rep.* 268. post. 644. n.

a plea of the statute of limitations to two counts of a declaration, the plaintiff should reply that the accounts were between the plaintiff and defendant as merchants, if this replication should be bad as to one of the counts it is bad also as to the other(*d*); but this rule does not apply where the matter objected to is merely surplusage(*e*); and where a defendant, executor or administrator, has pleaded several judgments outstanding, it would be a sufficient answer to the whole plea to deny the validity of one of the judgments(*f*). The replications must answer the plea directly and not argumentatively(*g*).

I. MUST ANSWER THE PLEA.

2ndly, It is also a settled rule that the replication must not *depart* from the allegations in the declaration in any *material* matter, a rule which equally affects rejoinders and subsequent pleadings.[30] A *departure* in pleading is said to be when a party quits or departs from the case or defence which he has first made, and has *recourse to another, [*619] and may occur in a replication, rejoinder, or other subsequent pleading; it is when his replication or rejoinder contains matter not pursuant to the declaration or plea, and which does not support and fortify it(*gg*). A departure in pleading is not allowed, because the record would by such means be spun into endless prolixity, for if it were permitted, he who has departed from and relinquished his first plea, might in every different stage of the cause resort to a second, third, or even further defence, and thereby pleading would become infinite(*h*); and if parties were permitted to wander from fact to fact, forsaking one to set up another, no issue could be joined, nor could there be any termination of the suit(*i*). A departure may be either in the substance of the action or defence, or the law on which it is founded(*j*); as if a declaration be founded on the common law, and the replication attempt to maintain it by a special custom, or act of parliament(*k*); so if in replevin for taking the plaintiff's goods and chattels, to wit, a lime-kiln, the defendant avows under a distress for rent, and the plaintiff pleads in bar that the lime-kiln was affixed to the freehold: this is a departure, the declaration being for goods and chattels, and the plea in bar stating the property to be part of the freehold(*l*). So where in assumpsit by an

II. MUST NOT DEPART FROM DECLARATION, &c.

(*d*) Com. Dig. Pleader, F. 25.—Duffield *v.* Scott, 3 T. R. 376.—1 Saund. 28. n. 3.—Webber *v.* Tivill, 2 Saund. 127.

(*e*) Id. ibid.—Duffield *v.* Scott, 3 T. R. 374. 377.—Taylor *v.* Eastwood, 1 East. 219.

(*f*) 1 Saund. 337. b. n. 2.

(*g*) Bourne *v.* Taylor, 10 East, 205.

(*gg*) 2 Saund. 84. a. n. 1.—Co. Lit. 304. a.—Palmer *v.* Stone et al., 2 Wils. 98.

(*h*) 2 Saund. 84. a. n. 1.

(*i*) Summary on Pleading, 92.

(*j*) Co. Lit. 304. a.—2 Saund. 84. a.

(*k*) Co. Lit. 304. a.—Com. Dig. Pleader, F. 7, 8.—Carth. 306.

(*l*) Niblet *v.* Smith, 4 T. R. 504—2 Saund. 84. b.

(30) Vide *Sterns & others* v. *Patterson & others*, 14 *Johns. Rep.* 132. *Munro* v. *Allaire*, 2 *Caine's Rep.* 320. *Barlow* v. *Todd*, 3 *Johns. Rep.* 367. *Spencer* v. *Southwick*, 10 *Johns. Rep.* 259.

II. MUST NOT DEPART FROM DECLARATION, &c

executor on several promises, which were all laid to have been made to the testator, to which the defendant pleaded the statute of limitations, and the plaintiff replied a subsequent promise to himself, the replication was *held to be a departure, and therefore bad(*ll*); a variety of other instances are collected in the Digests(*m*).

[*620]

But a departure more frequently occurs in a *rejoinder*(*n*); thus, if in an action of debt on an arbitration bond, the defendant plead that no award was made, and the plaintiff in his replication, sets out an award, and assigns a breach, it has been held that the defendant cannot rejoin that an award was not tendered, or that it was void on account of some extrinsic fact(*o*), or that the defendant hath performed or been ready to perform it(*p*).[31] However, the award being set out by the plaintiff in his replication, and the defect appearing on the face of it, the defendant may demur, though he could not avail himself of any extrinsic fact(*q*). Or if the plaintiff set it out partially the defendant may set out the whole and then demur(*r*). So in an action of debt on bond, conditioned for the payment of an annuity, if the defendant plead no such memorial as the statute requires, and the plaintiff replies that there was a memorial which contained the names of the parties, &c. and the consideration for which the annuity was granted, and the defendant rejoins that the consideration is untruly alleged in the memorial to have been paid to both obligors, for that one of them did not receive any part of it; this rejoinder, stating a new fact, is bad, as being a departure from the plea(*s*). So in an action of debt on bond, *conditioned for performance of covenants, if the defendant plead performance, and the plaintiff reply and assign a breach, the defendant cannot rejoin any matter in excuse of performance(*rr*). So, where in trespass for impounding the plaintiff's mare, the defendant pleaded that she was doing damage to the King in his forest of Waltham, and the plaintiff replied a right of common in the forest, and the defendant rejoined that the mare was mangy, and doing damage, and that therefore he took and impounded her: this was

[*621]

(*ll*) 2 Saund. 63. g. 84. c.—Hickman *v.* Walker, Willes, 29.—Dean *v.* Crane, 1 Salk. 28.—S. C. 6 Mod. 309.—Dean of Marlborough's Executors *v.* Widmore, 2 Stra. 890.—Sarell *v.* Wine, 3 East, 409.

(*m*) Com. Dig. Pleader, F. 6, 7, 8, 9, &c.

(*n*) See id. ibid. for the instances of a defective rejoinder, and 2 Saund. 83, 84. n. 1.—Roberts *v.* Mariett, 2 Saund. 188.—1 Saund. 117. n. 3. 346. c.

(*o*) House *v.* Launder, 1 Lev. 85.—Morgan *v.* Man, 1 Lev. 127.—Garrett *v.* Weedon, 1 Lev. 133—Harding *v.* Holmes, 1 Wils. 122.—Praed *v.* The Duchess of Cumberland, 4 T. R. 585. but see Fisher *v.* Pimbley, 11 East, 188.

(*p*) Butcher *v.* Whiting, 1 Sid. 10.

(*q*) Foreland *v.* Marygold, 1 Salk. 72.—1 Saund. 103. n. 1.—2 Saund. 62. b. n. 5.—Fisher *v.* Pimbley, 11 East, 188.

(*r*) Fisher *v.* Pimbley, 11 East, 188.

(*s*) Praed *v.* The Duchess of Cumberland, 4 T. R. 585.—S. C. 2 Hen. Bla. 280.

(*rr*) 2 Saund. 84. c.—Co. Lit. 304. a. Com. Dig. Pleader, F. 6, &c.

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(31) So, he cannot rejoin that the award was not final. *Barlow* v. *Todd*, 3 *Johns. Rep.* 363.

held to be a departure from the plea, because the plea was that the mare was doing a *private* trespass to the king in his forest, and that therefore the defendant impounded her, but the rejoinder is that the mare was mangy, which is a common nuisance(*s*). And where in trespass for impounding the plaintiff's ox, the defendant justified the taking *damage feasant*, and the plaintiff entitled himself to common of pasture for one ox in the place in which, &c., and the defendant rejoined that the plaintiff had surcharged the common with that ox, it was adjudged that the rejoinder was a departure from the plea, because there is a great difference between damage feasant and a surcharge of common, and the surcharge should have been pleaded at first(*t*).

But matter which maintains and fortifies the declaration or plea, is not a departure(*u*), as *in trespass for taking a horse, if the defendant [*622] justify for a *distress damage feasant*, the plaintiff may reply that the defendant afterwards used the horse, which shews that he was a trespasser, *ab initio*(*v*). So if to debt on bond to indemnify the plaintiff from tonnage due to A., the defendant plead *non damnificatus*, and the plaintiff replies that A. distrained for the said tonnage, and the defendant rejoins that nothing was due to A. for tonnage, this is not a departure(*w*); and if the plaintiff vary in his replication from his count, or the defendant in his rejoinder from his plea, in time, place, or other matter, when immaterial, it is not a departure; as if in a declaration, a promise be stated to have been made twenty years ago, and when the defendant pleads the statute of limitations, the plaintiff replies that the defendant did undertake within six years; this is not a departure, because in this case the statement of the time in the declaration was immaterial(*x*). So if in trespass for an assault at H. if the defendant pleads *mollitur manus imposuit* to remove the plaintiff from his close at A., and the plaintiff replies that he had a way over that close, it is not a departure; for in transitory actions, the venue in the declaration is immaterial(*y*). In the case of a deed or a promissory note, though there are *dicta* to the contrary(*z*); and though the plaintiff cannot vary from an express statement of the *date* *of a written instrument, yet he may reply, or [*623] shew in evidence that it was really *made* on a day different to the date(*a*); and where a bill or note is stated in the declaration to have been made on a day which appears to have been above six years before the commencement of the suit, a subsequent promise or acknowledgment within six years may be shewn in evidence under a replication to the plea

(*s*) Palmer *v.* Stone et al., 2 Wils. 96.—2 Saund. 84. b.

(*t*) Countess of Arran *v.* Crispe, 1 Salk. 221.—Ellis *v.* Rowles, Willes, 638.—2 Saund. 84. c.

(*u*) Com. Dig. Pleader, F. 11.

(*v*) Id. ibid.—Gargrave *v.* Smith, 1 Salk. 221.—Dye *v.* Leatherdale et al., 3 Wils. 20.—Bagshawe *v.* Goward, Cro. Jac. 148.

(*w*) Fortes. 341.—Com. Dig. Pleader, F. 11.

(*x*) Com. Dig. Pleader, F. 11.

(*y*) Id. ibid.—Primer *v.* Philips, 1 Salk. 222.—Serle *v.* Darford, 1 Lord Raym. 120.

(*z*) See the cases cited in Tidd's Practice, 4th edit. 630, 1.

(*a*) Hall *v.* Cazenove, 4 East, 477.

II. MUST NOT DEPART FROM DECLARATION, &c.

of the statute of limitations(*b*). But where time or place, or any other circumstance is *material*, the plaintiff cannot, as we have seen, vary from his previous statement of it(*c*); though where matter of defence has arisen *pending* the suit, it may be pleaded *puis darrien continuance*, *relicta verificatione* of the former plea; and if in an action against a person as executor, he plead a retainer for a debt due to himself, and the plaintiff reply that he was only *executor de son tort*, the defendant may, by way of plea *puis darrien continuance*, rejoin that he has since obtained letters of administration(*d*).

The only mode of taking advantage of a departure is by demurrer, which may be either general[32] or special(*e*); and if the defendant or the plaintiff, instead of demurring, take issue upon the replication or the rejoinder, containing a departure, and it be found against him, the court will not arrest the judgment(*f*).

III. THE CERTAINTY, &c. REQUISITE.

[*624]

*3*dly*, Another quality essential to a replication is *certainty*, and it is said that more is requisite in a replication than a declaration, though certainty to a common intent is in general sufficient(*g*). Where the replication is only to a *part* of the plea, the part alluded to should be ascertained with certainty, as if in assumpsit on several promises, the defendant has pleaded infancy, and the plaintiff replies that part of the goods were for necessary food, and part for clothes, it is said to be insufficient if he do not shew what part was for the one and what for the other(*h*). In general, also, when material to the action, time, place, and other circumstances must be stated with the same certainty and precision as in the previous pleadings; but where time or place is immaterial, it should seem with analogy to pleas in bar, that as the time and place mentioned in the declaration, must when immaterial be adhered to, no repetition of either would be necessary(*i*); we have seen that where particularity in pleading would tend to great prolixity, a general allegation is allowed, on which principle it is settled that in debt on a bond to account for all moneys, &c. which the defendant or a third person should receive in the course of a certain employment, it

(*b*) The case in 10 Mod. 312. is not law, and what was said in Stra. 22 & 806. as to a promissory note, was extrajudicial.

(*c*) Ante, 622.

(*d*) Vaughan *v.* Browne, 2 Stra. 1106.

(*e*) 2 Saund. 84. d.—Palmer *v.* Stone et al., 2 Wils. 96. Quære if it ought not to be a special demurrer, Com. Dig. Pleader, F. 10.—1 Saund. 117. n. 3.

(*f*) Lee *v.* Raynes, Sir T. Raym. 86.—2 Saund. 84. d.

(*g*) Com. Dig. Pleader, F. 17.—Amherst *v.* Skynner, 12 East, 263.

(*h*) Swinburne *v.* Ogle, Lutw. 241. Com. Dig. Pleader, F. 4.—Ante, 573, 4.

(*i*) Ilderton *v.* Ilderton, See 2 Hen. Bla. 161.—1 Saund. 8. a.—Ante, 517, 8.

(32) The Supreme Court of the state of New York has decidcd, that departure was fatal on general demurrer. *Sterns & others* v. *Patterson & others*, 14 *Johns. Rep.* 132. *Munro* v. *Allaire*, 2 *Caine's Rep.* 320. 329. *Spencer* v. *Southwick*, 10 *Johns. Rep.* 259.

is sufficient to assign the breach generally, that divers sums of money were received from divers persons, &c. without naming from whom in particular(*j*)[33].

III. THE CERTAINTY, &c. REQUISITE.

*4*thly*, The replication must not be *double*, or in other words contain two answers to the same plea(*k*)[34]; a reason has been assigned that the plaintiff ought not to perplex the court with two matters, to attempt to inveigle their judgment, and that if two issues were permitted to be joined upon two several traverses on the plaintiff's replication, and one should be found for the plaintiff, and the other for the defendant, the court would not know for whom to give judgment, whether for the plaintiff or the defendant(*l*); and the court will not give leave to reply double, under the statute 4 Ann. c. 16.(*m*); though under that statute the plaintiff *in replevin* may, with leave of the court, plead several pleas in bar to an avowry or cognisance(*n*). But a replication may frequently put in issue several facts, where they amount to only one connected proposition(*o*)[35]: and as we have already seen, a replication may contain several distinct answers to different parts of a plea divisible in its nature(*p*); as where infancy has been pleaded to a declaration consisting of several counts, the plaintiff may reply as to part of the demand, that it was for necessaries, to other part that the defendant was of full age at the time the contract was made, and to other part that he confirmed it after he came of age(*q*). So if an executor or administrator plead several judgments outstanding and no assets *ultra*, the plaintiff may reply as to one of the judgments *nul tiel record*, *and to another that it was obtained and kept on foot by fraud(*r*). In an action of debt on bond, conditioned for performance of covenants, the plaintiff may, and indeed ought by the statute 8 and 9 Wm. III. c. 11. s. 8. to assign as many breaches in his replication, as he proceeds for,[36] and it need not be shewn that this is done by virtue of the statute(*s*). And to a plea of set-off, consisting of several demands upon judgment or recog-

IV. MUST BE SINGLE.

[*625]

[*626]

(*j*) Barton *v.* Webb, 8 T. R. 463.—Shum et al. *v.* Farrington, 1 Bos. & Pul. 640.

(*k*) Cheasley *v.* Barnes, 10 East, 73. Com. Dig. Pleader, F. 16.—Humphreys *v.* Churchman, Rep. T. Hardw. 289.

(*l*) Trethewy *v.* Ackland, 2 Saund. 49, 50.

(*m*) Fortes. 335.—Whitby *v.* Chapman, Barnes, 364.

(*n*) Vollum *v.* Simpson, 2 Bos. and Pul. 368.—Da Costa *v.* Clarke, 2 B. & P. 376.

(*o*) Robinson *v.* Rayley, 1 Burr. 317. Ante, 577 and 588.—Humphreys *v.* Churchman, Rep. T. Hardw. 289.

(*p*) Ante, 549. 551.

(*q*) Id. ibid.

(*r*) 1 Saund. 337. b. n. 2.—Ashton *v.* Sherman, 1 Ld. Raym. 263.—S. C. 1 Salk. 298.

(*s*) Tombs *v.* Painter, 13 East, 1, 2, 3.—Post. 2 Vol. 669.

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(33) Vide ante, 330.

(34) Vide *Service* v. *Heermance*, 2 *Johns. Rep.* 96. *Cooper* v. *Heermance*, 3 *Johns. Rep.* 315.

(35) Vide *Strong & others* v. *Smith*, 3 *Caine's Rep.* 160.

(36) Vide *Sevey* v. *Blacklin & others*, 2 *Mass. Rep.* 542.

IV. MUST BE SINGLE.

nisance, and simple contract, the plaintiff in his replication should give several answers, viz. as to the judgment or recognisance *nul tiel record*, and as to the simple contract, that he was not indebted(*t*); or he may reply as to a part, the statute of limitations(*u*); and duplicity in a replication is aided, unless the defendant demur specially, pointing out the particular defect(*v*).

(*t*) Solomons *v.* Lyon, 1 East, 369.; see the precedent, Post. 2 Vol. 653.

(*u*) Post. 2 Vol. 653.

(*v*) 27 Eliz. c. 5.—4 Ann. c. 16. s. 1. 1 Saund. 337. b. n. 3.—Doc. Pla. 147.—Cheasley *v.* Barnes & others, 10 East, 81.

*CHAPTER IX.

[*627]

OF REJOINDERS AND THE SUBSEQUENT PLEADINGS; ISSUES, REPLEADERS, AND PLEAS PUIS DARREIN CONTINUANCE; AND OF DEMURRERS AND JOINDERS IN DEMURRER.

OF REJOINDERS.

A REJOINDER is the defendant's answer to the replication(*a*), and is governed by the same rules as those which affect pleas(*b*); with this additional quality, that it must support and not depart from the plea(*c*); it must also be single, and the court cannot give leave to the defendant to rejoin several matters, for the statute of Ann. does not extend to rejoinders(*d*); hence it may suffice to refer to the preceding pages, and to the forms which are given in the second volume.

FORM AND REQUISITES OF.

When a replication, or a plea in bar in replevin, concludes *to the country*, the defendant can only demur or add the common similiter, which is, "And the said defendant doth the like." And where there are several replications, particularly when some conclude to the country, and others with a verification, it may be, "And the said defendant as "to the said replications of the said plaintiff, to the said second and third "pleas of him the said defendant, and which the said plaintiff, hath [*628] "prayed may be inquired of by the country, doth the like(*e*)." But the plaintiff is at liberty to add the similiter, it being a rule that in all special pleadings, where the plaintiff takes issue upon the defendant's pleading or traverses the same, or demurs, so that the defendant is not at liberty to allege any new matter, the plaintiff may add the similiter or joinder in demurrer, and make up the paper book without giving a rule to rejoin(*f*); but otherwise a rule must be given, unless the defendant be bound, by a judge's order, to rejoin gratis, and in the latter case the plaintiff ought to add the similiter, and not to give a rule to

(*a*) Com. Dig. Pleader, H.

(*b*) Ante, 506 to 526.—Co. Lit. 303. b.

(*c*) Ante, 618 to 623. as to the points relating to a departure, and Roberts *v.* Marriett, 2 Saund. 189, 190.—Com. Dig. Pleader, F. 6. to F. 11.

(*d*) Warren *v.* Ivie, Stra. 908.

(*e*) See the forms, post. 2 Vol. 706.

(*f*) Rule Trin. 1 Geo. 2. n. a.—The King *v.* Johnson, 6 East, 586.—1 Sel. Prac. Chap. IX. sect. 1.—Boone *v.* Eyre, 1 Hen. Bla. 254.—Imp. Prac. C. P. 358.

FORM AND REQUISITES OF.

rejoin(*g*); and where the plaintiff adds the similiter the defendant may strike it out, and demur to the replication, which is the usual course when the defendant has no merits, and wishes to obtain time(*h*). The consequences of a defect in, or omission of, a similiter, have already been considered(*i*).

When the replication concludes with a *verification*, the rejoinder usually denies it, and concludes to the country, "and of this he the said "defendant puts himself upon the country, &c." But when the rejoinder introduces any new matter, it must, as in the case of a plea or replication, conclude with a verification, in order that the plaintiff may [*629] have an opportunity *of answering it(*k*). If the defendant deny several matters alleged in the replication, the rejoinder may conclude to the country, without putting the matters in issue severally and distinctly; thus, if to a plea of infancy the plaintiff has replied, that a part of the goods were necessary clothing, and the residue necessary food, a general denial in the rejoinder concluding to the country will suffice(*l*).

SURREJOINDERS, &c.

Surrejoinders, *Rebutters*, and *Surrebutters*, seldom occur in pleading(*m*); it may suffice to observe, that they are governed by the same rules as those to which the previous pleading of the party adopting them is subject, and the forms which most frequently occur in practice are given in the second volume(*m*).

OF ISSUES.

From the preceding observations on the different parts of pleading, particularly those relating to traverses, we may collect what points may be put in *issue*; as however the parties respectively may be disinclined to demur or otherwise to object to their opponent's pleading, it may be advisable to consider on what *issue* the parties may venture to go on to trial, so as to obtain the judgment of the court, and to avoid the necessity of a *repleader*, on account of the issue having been upon *immaterial matter*.

An *issue* is defined to be a single, certain, and material point, issuing [*630] out of the allegations or *pleadings of the plaintiff and defendant(*n*); though in common acceptation it signifies the *entry* of the pleadings(*o*);

(*g*) Wye *v.* Fisher, 3 Bos. & Pul. 443.

(*h*) Tidd's Prac. 4th edit. 667.—Imp. C. P. 358.—1 Sel. Prac. IX. s. 1.

(*i*) Ante, 570, 1.

(*k*) Ante, 537, 8. 615.—1 Saund. 103. n. 1.—See the forms, post. 2 Vol. 707. 713.

(*l*) Swinburne *v.* Ogle, Lutw. 241.—Com. Dig. Pleader, H.

(*m*) See these heads in Com. Dig. Pleader, I. K. L.

(*n*) Co. Lit. 126. a.—As to *issues* in general, see Com. Dig. Pleader, R.—Bac. Ab. Pleas, M.

(*o*) As to the form of such entry, see Tidd's Prac. 4th edit. 655, &c. as to the language of this entry, it is said

and the term issue is proper where only one plea has been pleaded, though to several counts, and issue is joined upon such plea(*p*). An issue should in general be upon an *affirmative and a negative*, and not upon two affirmatives; as if the defendant plead that A. is living, and the plaintiff reply that he is dead, it is more formal, though not absolutely necessary, also to deny that he is living(*q*); nor should the issue be on two negatives(*r*); thus if the defendant plead that he requested the plaintiff to deliver an abstract of his title, but that the plaintiff did not when so requested deliver such abstract, but neglected and refused so to do; the plaintiff cannot reply that he did not neglect and refuse to deliver such abstract, but should reply either denying the request, or affirmatively that he did deliver the abstract(*s*); but it is not necessary that the negative and affirmative should be in precise words(*t*); and it will suffice, though there be two affirmatives, if the second is so contrary to the first that it cannot in any degree be true; as if *duress* of imprisonment be pleaded to a bond, it is a good replication, that the defendant was at large at *his own disposal, and executed the bond of [*631] his own free will and not for fear of imprisonment(*tt*). An issue should also be upon a *single and certain point*(*v*); but it is not necessary that such point should consist of a single fact, and therefore if the defendant in trespass justify under a right of common, and the replication traverses that the cattle were the defendant's own, and levant and couchant, and commonable cattle, it is not multifarious, for all these circumstances are requisite to the point of defence(*u*). The issue also should not be on a negative pregnant(*w*), but it may be upon a disjunctive(*x*). In some cases the plaintiff may incorporate in the traverse or issue more than was alleged in the plea(*y*).

REQUISITES OF THEM.

The principal quality of an issue is, that it must be upon a *material* point(*z*); an *informal* issue is, where a *material* allegation is traversed in an *improper* or *inartificial manner*(*a*);[1] and this and the other preced-

that the acts of a court ought to be in the *present* tense, as "*præceptum est*," not "*præceptum fuit*," but the acts of the party may be in the preter-perfect tense, as "*venit et protulit hic in curia quondam querelam suam*," and the continuances are in the preterperfect tense, as "*venerunt*," not "*veniunt*," Hall *v.* Clarke, 1 Mod. 81.—2 Saund. 393. n. 1.—Rex *v.* Roberts, 1 Stra. 608. but see The King *v.* Hall, 1 T. R. 320.

(*p*) The King *v.* Jones, Peake, C. N. P. 37.

(*q*) Com. Dig. Pleader, R. 3.

(*r*) Id. ibid.—Hodgson *a.* The East India Company, 8 T. R. 280.—Bac. Ab. Pleas, I. 3.

(*s*) Martin *v.* Smith, 6 East, 557.

(*t*) Co. Lit. 126.

(*tt*) Tomlin *v.* Purlis, 2 Stra. 1177.—S. C. 1 Wils. 6.

(*v*) Com. Dig. Pleader, R. 4.

(*u*) Robinson *v.* Rayley, 1 Burr. 316.

(*w*) See the instance of *negatives pregnant*, Com. Dig. Pleader, R. 5, 6. Bac. Ab. Pleas, I. 6.—It must be objected to by demurrer, id. ibid.—2 Saund. 319. n. 6.

(*x*) Com. Dig. Pleader, R. 7.

(*y*) Chambers *v.* Jones, 11 East, 410.

(*z*) Com. Dig. Pleader, R. 8.

(*a*) Lovelace *v.* Grimsden, Cro. Eliz.

(1) Vide *Winstandley* v. *Head*, 3 *Taunt.* 237.

REQUISITES OF THEM.

ing mistakes are aided by verdict by the 32 Hen. c. 30(*b*);[2] but a verdict does not help an *immaterial* issue(*c*),[3] which is, where a material allegation in the pleadings is not traversed, but an issue is taken on some other point,[4] which, though found by verdict, will not determine the merits of the cause, and would leave the court at a loss for which [*632] of the parties *to give judgment(*cc*);[5] as where in debt on bond, conditioned for the payment of 60*l.* on the 25th of June, the defendant pleaded payment on the 20th of June, according to the form and effect of the condition, and issue was joined, and the verdict found that he did not pay 60*l.* on the 20th, it was held that the plaintiff should not have judgment, for the issue was out of the matter of the condition, and therefore void, and the money might have been paid on the 25th though it was not paid on the 20th, so that it did not appear that the condition was broken, and it is not aided by the abovementioned statute(*d*); so where in an action of assumpsit against an administratrix, on promises of the intestate, she pleaded that *she* (instead of the intestate) did not promise, after verdict a repleader was awarded(*e*): so where in an action of debt against a lessee for years, the defendant pleaded that before the rent became due, he assigned the term to a third person, of which the plaintiff had notice, and issue was joined on the notice, which being altogether immaterial, a repleader was awarded(*f*).

OF REPLEADERS.

When the *issue is immaterial*, the court will award a *Repleader* if it will be the means of effecting substantial justice between the parties, but not otherwise(*g*);[6] the following rules as to Repleaders, were laid down in [*633] the case of **Staple and Haydon*(*i*); *first*, that at common law, a replea-

227.—Serjeant *v.* Fairfax, 1 Lev. 32.—Jones *v.* Bodinner, Carth. 371.—Peck *v.* Hill, 2 Mod. 137.

(*b*) Gilb. C. P. 147.—2 Saund. 319. n. 6.

(*c*) Id. ibid.—2 Saund. 319. a. n. 6.

(*cc*) 2 Saund. 319. n. 6.—Gilb. C. P. 147.—Serjeant *v.* Fairfax, 1 Lev. 32.—See the instances, Com. Dig. Pleader, R. 18.

(*d*) Holmes *v.* Broket, Cro. Jac. 434. Tryon *v.* Carter, Stra. 994.—2 Saund. 319. b. n. 6.

(*e*) Anon., 2 Vent. 196.

(*f*) Serjeant *v.* Fairfax, 1 Lev. 32.

(*g*) 2 Saund. 319. b. n. 6.—Staple v. Hayden, 2 Salk. 579.—S. C. 6 Mod. 1. S. C. 2 Ld. Raym. 922.—S. C. 3 Salk. 121.—Symmers et al. *v.* Regem, Cowp. 489 See proceedings in Chitty on Game Laws, 966.

(*i*) 2 Salk. 579. As to a *Repleader* in general, Com. Dig. Pleader, R. 18. Bac Ab. Pleas, M.—Doc. Plac. tit. Repleader. Tidd's Prac. 4th edit. 812. See the forms there referred to, and Jeffreson *v.* Morton, 2 Saund. 20.

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(2) Vide *Cobb* v. *Bryan*, 3 *Bos. & Pul.* 348. 352.

(3) Vide *Cobb* v. *Bryan*, 3 *Bos. & Pul.* 352.

(4) Vide *Strong & Udall* v. *Smith*, 3 *Caine's Rep.* 163.

(5) Vide *Stafford* v. *Corporation of Albany*, 6 *Johns. Rep.* 1.

(6) Vide *Stafford* v. *Corporation of Albany*, 6 *Johns. Rep.* 1. *Terrel* v. *Page's Admr.*, 3 *Hen. & Mun.* 118. *Taylor* v. *Huston*, *Id.* 161. *Cobb* v. *Bryan*, 3 *Bos. & Pul.* 353. *Havens* v. *Bush*, 2 *Johns. Rep.* 388, 389. *Bac. Abr. Pleas*, (M. 1.)

der was allowed before trial, because a verdict did not cure an immaterial issue, but now a repleader ought not to be allowed till after trial, in any case where the fault of the issue might be helped by the verdict, or by the statute of Jeofails(*k*); *secondly*, that if a repleader be denied, where it should be granted, or *vice versa*, it is error; *thirdly*, that the judgment of repleader is general, *quod partes replacitent*, and the parties must begin again at the first fault which occasioned the immaterial issue(*l*): thus, if the declaration be insufficient, and the bar and replication are also bad, the parties must begin *de novo*;[7] but if the bar be good, and the replication ill. at the replication(*m*);[8] *fourthly*, no costs are allowed on either side(*n*); *fifthly*, that a repleader cannot be awarded, after a default at *nisi prius*; to which may be added, that in general a repleader cannot be awarded after a demurrer[9] or writ of error, without the consent of the parties, but only after issue joined(*o*); where, however, there is a bad bar, and a bad replication, it is said that a repleader may be awarded upon a demurrer(*p*); a repleader *also will not be awarded, where the court can give judgment on the whole record(*q*), and it is not grantable in favour of the person, who made the first fault in pleading(*r*).[10] When necessary, &c.

[*634]

The distinction between a repleader and a judgment *non obstante veredicto* is this: that where the plea is good in form, though not in fact, or in other words, if it contain a defective title, or ground of defence by which it is apparent to the court, upon the defendant's own showing, that in *any* way of putting it, he can have no merits, and the issue joined thereon be found for him, there, as the awarding of a repleader could not mend the case, the court, for the sake of the plaintiff, will at once give judgment *non obstante veredicto;* but where the defect is not so much in the title, as in the *manner of stating it*, and the issue

(*k*) Bac. Ab. Pleas, M.—Com. Dig. Pleader, R. 18.—Cobb *v.* Bryan, 3 Bos. & Pul. 352. But where the point put in issue is *altogether* immaterial, and could not be *modified* by the verdict, because collateral to the merits, it would be otherwise.

(*l*) Kempe *v.* Crews, 1 Lord Raym. 169.

(*m*) Cox *v.* Mellish, 3 Keb. 664.

(*n*) Anon., 2 Vent. 196.—Lickbarrow *v.* Mason, 6 T. R. 131.—Noble *v.* Lancaster, Barnes, 125.—Da Costa *v.* Clarke, 2 Bos. & Pul. 376.

(*o*) Witts *v.* Polehampton, 3 Salk. 306.

(*p*) *Semb.* Grills *v.* Ridgeway, Cro. Eliz. 318.—1 Andr. 167. sed quære.

(*q*) Parnham & others *v.* Pacey & others, Willes, 532, 3.

(*r*) Kempe v. Crews, 1 Ld. Raym. 170.—Webster *v.* Bannister, Dougl. 396.—Taylor *v.* Whitehead, 747.—Tidd's Prac. 4th edit. 813. *sed quære.*

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(7) Sed vide, *Smith* v. *Walker*, 1 *Wash.* 135, 136., where the court says, "When we are seeking for a good foundation upon which to erect future pleadings, and find all defective, including the declaration itself, the uncertainty cannot be cured:" and therefore the court of appeals in giving the judgment, that ought to have been given in the court below, ordered the suit to be dismissed.

(8) Vide *Stevens* v. *Taliaferro*, 1 *Wash.* 155.

(9) Vide *Perkins* v. *Burbank*, 2 *Mass. Rep.* 81.

(10) Vide *Kirtley* v. *Deck*, 3 *Hen. & Mun.* 388.

When necessary, &c.

joined thereon is immaterial, so that the court know not for whom to give judgment, whether for the plaintiff or defendant, there for their own sake they will award a repleader; a judgment therefore *non obstante veredicto*, is always upon the *merits*, and never granted but in a very clear case; a repleader is upon the *form* and manner of pleading(*s*).

Of pleas puis darrein continuance.†

[*635]

When matter of defence has arisen after the commencement of the suit, it cannot be pleaded *in bar of the action *generally*, but must, when it has arisen before plea or continuance, be pleaded as to the *further* maintenance of the suit(*t*); and when it has arisen after issue joined, *puis darrein continuance*.[11] The instances of a defendant having obtained his certificate as a bankrupt pending the suit, and before plea(*u*), and of an executor pleading judgments obtained against him after the issuing of the writ, are exceptions(*v*)

If any matter of defence has arisen after an issue in fact, or a joinder in demurrer(*w*), it may be pleaded by the defendant; as that the plaintiff has given him a release; or has been outlawed or excommunicated(*x*); or that there has been an award made on a reference after issue joined(*y*); and it may be advisable so to plead the defendant's bankruptcy, when he has obtained his certificate, after issue joined(*z*); and where the plaintiff has become bankrupt after issue joined, and the assignees dissent to his proceeding in the suit, it may be advisable to

(*s*) Tidd's Prac. 4th edit. 813, 4.—Bac. Ab. Pleas, M.—Com. Dig. Pleader, R. 18.

† As to these pleas in general, see Bac. Ab. Pleas, Q.—Com. Dig. Abatement. I. 24. 34.—Doct. Plac. 297.—Bul. Ni. Pri. 309. and see the precedent, Post. 2 Vol. 724.

(*t*) Le Bret *v.* Papillon, 4 East, 507. Ante, 531, 2.—Rainbow *v.* Worrall et al., Lutw 1178.—Com. Dig. Abatement, I. 24.

(*u*) Harris *v.* James, 9 East, 82.

(*v*) Le Bret *v.* Papillon, 4 East, 507, 8.—Harris *v.* James, 9 East, 84.

(*w*) Stoner *v.* Gibson, Hob. 81.—Com. Dig. Abatement, *I.* 24. *acc.*—Sparkes *v.* Croftes, Ld. Raym. 266.—Martin *v.* Wyvill, Stra. 493. *contr.*—See Com. Dig. Abatement, I. 24.

(*x*) Bul. N. P. 309.—See the form, Post. 2 Vol. 724.

(*y*) Storey *v.* Bloxam, 2 Esp. Rep. 504.

(*z*) In Harris *v.* James, 9 East, 82. the doctrine in Tower *v.* Cameron, 6 East, 413. and Lindo *v.* Simpson, 2 Smith's Reports, 659. appears to have been qualified; but still if a certificate has been obtained after issue joined, it may be advisable to plead specially *puis darrein continuance*.—See MS. Mr. J. Ashhurst's Paper Books, 24 Vol. 154.

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(11) Such matter cannot be given in evidence at the trial. *Jackson* d. *Colden* v. *Rich*, 7 *Johns. Rep.* 194.

plead it(*a*).[12] So it may be pleaded in abatement that a feme plaintiff has married *since the last continuance(*b*); or in an action by an administrator that the plaintiff's letters of administration have been revoked(*c*): so a defendant sued as executor *de son tort*, may plead that he has obtained letters of administration, so as to support a previous plea of retainer in the character of executor(*d*). Pleas of this kind are either in abatement or in bar(*e*); and if any thing happen pending the suit, which would in effect abate it, this may be pleaded *puis darrein continuance*, though there has been a plea in bar; because the latter plea only waves all matters in abatement, which existed at the time of pleading, and not matter which arose afterwards; but if matter in abatement be pleaded *puis darrein continuance*, the judgment, if against the defendant, will be peremptory, as well on demurrer as on trial(*f*).[13] A plea *puis darrein continuance* is not a departure from, but is a waver of the first plea, and no advantage can afterwards be taken of it(*g*). WHEN NECESSARY, &c. [*636]

With respect to the *time* when matter of this description is to be pleaded, it appears that if the ground of defence arose after plea, or after issue joined, and before the return of the *venire facias*, it should be pleaded in *bank*(*h*);[14] and where the defendant, after pleading, obtained his *certificate as a bankrupt, and then pleaded it in bank, as a matter which had arisen after the last continuance, but in fact another continuance had intervened between the certificate and plea; the court permitted him to plead it *nunc pro tunc*, on payment of costs(*i*);[15] but TIME AND MODE OF PLEADING THEM. [*637]

(*a*) Kitchen *v.* Bartsch, 7 East, 53. Tidd's Prac. 4th edit. 761.

(*b*) Bro. Ab. tit. Continuance, pl. 57. Bul. Ni Pri. 310.

(*c*) Bul. Ni. Pri. 309.—Com. Dig. Abatement, I. 24.

(*d*) Vaughan *v.* Brown, 2 Stra. 1106. 1 Saund. 265. n. 2.

(*e*) Com. Dig. Abatement, I. 24.

(*f*) Gilb. C. P. 105.—Alleyn, 66.—Freem. 252.—Vaughan *v.* Brown, 2 Stra. 1105, 6.

(*g*) Barber *v.* Palmer, 1 Salk 178.—Vaughan *v.* Brown, 2 Stra. 1105.—Stoner *v* Gibson, Hob 81.

(*h*) See Com. Dig. Abatement, I. 24. Willoughby *v.* Watkins, 2 Smith's Rep. 396.—See the form, post. 2 Vol. 724.

(*i*) Willoughby *v.* Watkins, 2 Smith's Rep. 396 See a plea, 2 Vol. 154. Mr. J. Ashhurst's Paper Books.

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(12) Accord and satisfaction may be pleaded puis darrein continuance. *Watkinson* v. *Inglesby & Stokes*. 5 *Johns. Rep.* 392. When two actions are brought for the same cause, satisfaction of the judgment in one suit may be pleaded puis darrein continuance to the other suit. *Bourne* v. *Joy*, 9 *Johns. Rep.* 221.

(13) Acc. *Renner & Bussard* v. *Marshall*, 1 *Wheaton*, 215.

(14) Such a plea may be pleaded at nisi prius, although there has been time to plead it in bank since the last continuance; and it is not discretionary with the judge at nisi prius to reject it. *Prince & others* v. *Nicholson*, 5 *Taunt.* 333. *Broome* v. *Beardsley*, 3 *Caine's Rep.* 173.

(15) Vide *Morgan & Smith* v. *Dyer*, 9 *Johns. Rep.* 255. *Merchants' Bank* v. *Moore*, 2 *Johns. Rep.* 294. It is in the discretion of the court to receive the plea or not, even after more than one continuance has intervened, and this discretion will be governed by circumstances extrinsic, and which cannot appear on the face of the plea. *Morgan & Smith* v. *Dyer*, 10 *Johns. Rep.* 161.

TIME AND MODE OF PLEADING THEM.

matters which have arisen after the trial, and before the day in bank, cannot be so pleaded; and though it may after the jury have gone from the bar, yet it cannot after they have given their verdict(*j*).[16]

Great certainty is requisite in pleas of this description(*k*); and it is not sufficient to say generally, that after the last continuance such a thing happened, but the day of the continuance must be shewn, and also the time and place must be alleged where the matter of defence arose(*l*). The forms of the plea, whether pleaded in bank or at the assizes, are given in the second volume(*m*). The plea, when it contains matter in abatement, concludes by praying judgment of the writ, and that the same may be quashed(*n*); or if the writ is abated *de facto*, by praying judgment if the court will further proceed(*o*). In bar the conclusion of the plea is, that the plaintiff ought not further to maintain his action, and not that the former inquest should not be taken, because it [*638] is a substantive bar of itself, in lieu of the *former, and consequently must be pleaded to the action(*p*).

Pleas after the last continuance must be verified, *on oath*, before they are allowed, whether pleaded in bank, or at nisi prius(*q*); and they cannot be amended after the assizes are over(*r*); nor can there be more than one plea *puis darrein continuance*(*s*). But if a plea *puis darrein continuance* be filed and verified on oath, the court cannot set it aside on motion, but are bound to receive it(*t*). When a plea *puis darrein continuance* is put in at the assizes, the plaintiff is not to reply to it there, for the judge has no power to accept of a replication, nor to try it;[17] but ought to return the plea as parcel of the record of nisi

(*j*) Doctr. Plac. 177.—Bul. Ni. Pri. 310.—Vanbrynen *v.* Wilson, 9 East, 321.—Com. Dig. Abatement, I. 34.

(*k*) Doctr. Plac. 297.—Ewer *v.* Moile, Yelv. 141.—Hawkins *v.* Moor, Cro. Jac. 261.—Freem. 112.—Campion *v.* Baker, 2 Lutw. 1143.—Peirce *v.* Paxton, 2 Salk. 519.—Paris *v.* Salkeld, 2 Wils. 139.—Co. Ent. 517. b.—Rast. Ent. 549.

(*l*) Id. ibid.—Bul. Ni. Pri. 309.—24 Vol. 154. Mr. J. Ashhurst's Paper Books.

(*m*) Post. 2 Vol. 724. and see Bul. Ni. Pri. 310.—Co. Ent. 517.—Rast. Ent. 549.

(*n*) Gilb. C. P. 105.—Campion *v.* Baker, 2 Lutw. 1143.

(*o*) Hallowes *v.* Lucy, 3 Lev. 120.—Bul. Ni. Pri. 311.

(*p*) Cockaine *v.* Witnam, Cro. El. 49.—Campion *v.* Baker, 2 Lutw. 1143. Bul. Ni. Pri. 310.

(*q*) Freem. 252.—Martin *v.* Wyvill, 1 Stra. 493.—Willoughby *v.* Watkins, 2 Smith's Rep. 396.

(*r*) Bac. Ab. Pleas, Q.—Moore *v.* Hawkins, Yelv. 181.—Freem. 252.—Bul. Ni. Pri. 309. But see Lindo *v.* Simpson, 2 Smith's Rep. 659.

(*s*) Bro. Abr. tit. Continuance, pl. 5. 41.—Jenk. 159. pl. 2.—Gilb. C. P. 105.

(*t*) Paris *v.* Salkeld, 2 Wils. 137.—Lovell *v.* Eastaff, 3 T. R. 554.

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(16) But an insolvent has been allowed to plead his discharge even after verdict. *Mechanics' Bank* v. *Hazard*, 9 *Johns. Rep.* 392.

(17) When pleaded at nisi prius, a copy of it need not be then served. *Jackson* d. *Barhydt* v. *Clow*, 13 *Johns. Rep.* 157.

prius; and if the plaintiff demur, it cannot be argued there(*v*). Where the plea *puis darrein continuance* is certified on the back of the postea, and the plaintiff demurs, if the defendant on the expiration of a rule given for him to join in demurrer, neglect to do so, the plaintiff may sign judgment(*u*). TIME AND MODE OF PLEADING THEM

OF DEMURRERS(*a*).

WHEN the declaration, plea, or replication, &c. appears on the face of it, and without reference to extrinsic matter to be defective, either in substance *or form, the opposite party may in general *demur*(*aa*), which has been defined to be a declaration that the party demurring will "go no further," because the other has not shewn sufficient matter against him(*b*). Where the pleading is defective in substance, it is in general advisable to demur, because the party succeeding thereon is entitled to costs; but where the judgment is arrested(*c*), or reversed on a writ of error(*d*), no costs are recoverable. When the objection is a defect in matter of form, a special demurrer is still permitted; for, as observed by Lord Hobart, "the statute of Elizabeth requiring a special demurrer, does not utterly reject form for that would be destructive of the law, as a science, but it only requires that the defect in form be discovered, and not used as a secret snare to entrap(*e*);" and it was observed by Eyre, Chief Justice, that "infinite mischief has been produced by the facility of the courts in overlooking errors in form: it encourages carelessness, and places ignorance too much upon a footing with knowledge amongst those who practise the drawing of pleadings(*f*)." Where however there are merits to be tried, it is in practice more liberal not to demur for a mere mistake in form. OF DEMURRERS WHEN PROPER. [*639]

Demurrers are either *General* or *Special; general* when no particular cause is alleged; *special* when the particular imperfection is pointed out, and insisted upon, as the ground of demurrer; the former will WHEN GENERAL OR SPECIAL.

(*v*) Com. Dig. Abatement, I. 24. It may be amended, see Mr. J. Ashhurst's Paper Books, 24 Vol. 154.

(*u*) Bac. Ab. Pleas, Q.—Bul. Ni. Prius, 311.

(*a*) As to Demurrers in general, see Bac. Ab. tit. Pleas, N.—Com. Dig. Pleader, Q.—Saund. Rep. Index to Notes, tit. Demurrers.

(*aa*) Moore, 551.

(*b*) Johnson *v.* Lee, 5 Mod. 132.—Co. Lit. 71. b.

(*c*) Cameron et al. *v.* Reynolds, Cowp. 407.

(*d*) Wyvill *v.* Stapleton, 1 Stra. 617.

(*e*) Heard *v.* Baskerville, Hob. 232. 1 Saund. 337. n. 3.

(*f*) Morgan *v.* Sargent, 1 Bos. & Pul. 59.

WHEN GENERAL OR SPECIAL.

suffice when the pleading is defective in *substance*, and the latter is requisite where the objection is only to the *form* of pleading(*g*).[18] *At common law a special demurrer was not necessary, except in the case of duplicity(*gg*), and the party was at liberty on a general demurrer to take advantage of any objection, however trifling(*h*); to remedy which the 27 Eliz. c. 5. after *reciting* "that excessive charges and expenses, "and great delay and hindrance of justice, hath grown in actions and "suits between the subjects of this realm, by reason that upon some "small mistaking, or want of form in pleading, judgments are often re- "versed by writs of error, and oftentimes upon demurrers in law given "otherwise than the matter in law, and the very right of the cause doth "require, whereby the parties are constrained either utterly to lose "their right, or else after long time and great trouble and expenses, "to renew again their suits," *enacted*, "that from thenceforth, after "demurrer joined and entered in any action or suit in any court of *re- "cord* within this realm, the judges shall proceed and give judgment "according as the very right of the cause and matter in law shall ap- "pear unto them, without regarding *any imperfection, defect, or want of "form, in any writ, return, plaint, declaration, or other pleading*, process "or course of proceeding whatsoever, except those only which the "party demurring shall specially and particularly set down and ex- "press, together with his demurrer, and that no judgment to be given "shall be reversed by any writ of error for any such imperfection, de- "fect, or want of form, as is aforesaid, except such only as is before "excepted."

[*640]

[*641] The chief difficulty that arose in the construction *of this statute, was the distinguishing between what was matter of form, and matter of substance, and many defects which are now deemed mere form, were held not to be aided by this statute, such as the omission of the words *vi et armis contra pacem*, &c.(*i*). To remedy this the 4 Ann. c. 16. directs, "that where any demurrer shall be 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, omission, or defect*, in any writ, return, plaint, *decla- "ration and other pleading*, process, or course of proceedings whatso- "ever, *except those only which the party demurring shall specially and "particularly set down and express, together with his demurrer, as causes "of the same*, notwithstanding that such imperfection, omission, or de- "fect, might have heretofore been taken to be *matter of substance, and*

(*g*) Bac. Ab. Tit. Pleas, N. 5.—Co. Lit. 72. a.

(*gg*) Powdick *v.* Lyon, 11 East, 565.

(*h*) Anon., 3 Salk. 122.

(*i*) Com. Dig. Pleader, 3 M. 7.—Bac. Ab. Pleas, N 6.—1 Saund. 81. n. 1.—Heard *v.* Baskerville, Hob. 233.—Anon., Sav. 88.

(18) Vide *Snyder* v. *Croy*, 2 *Johns. Rep.* 428.

" *not aided by above-mentioned statute*, so as sufficient matter appear in the said pleadings, upon which the court may give judgment according to the very right of the cause;" and it goes on to provide, "that no advantage or exception shall be taken of or for an immaterial traverse, or of or for the default of entering pledges upon any bill or declaration, or of or for the default of alleging the bringing into court any bond, bill, indenture, or other deed whatsoever mentioned *in the [*642] declaration or other pleadings, or of or for the default of alleging of the bringing into court letters testamentary, or letters of administration, or of or for the omission of *vi et armis*, *contra pacem*, or either of them, or of or for the want of averment of *hoc paratus est verificare*, or *hoc paratus est verificare per recordum;* or of or for not alleging *prout patet per recordum;* but the court shall give judgment according to the very right of the cause as aforesaid, without regarding any such imperfections, omissions, and defects, *or any other matter of like nature*(*j*), except the same shall be *specially* and particularly set down and *shewn for cause of demurrer*." It was provided by the seventh section, that the act should not extend to proceedings upon any *penal statute;* but this was altered by the 4th Geo. II. c. 26. s. 4.(*k*). When general or special.

Since these statutes, the party on a *general demurrer* can only take advantage of defects in *substance;*[19] and therefore, if the defect objected to be not clearly of that nature, it is safest to demur specially, in which case the party may not only take advantage of those particularly pointed out, but also of any substantial defect, though not specified(*l*).[20] But where the defendant is under terms of pleading issuably, no formal defect can be assigned as cause of demurrer, either to the whole or a part of the declaration or replication, and if it be, the plaintiff *may sign [*643] judgment(*m*); but the defendant may demur where there is a substantial defect affecting the merits of the case(*n*).[21]

A demurrer is either to *the whole or a part* of a *declaration;* and if there be several counts, or in covenant several breaches, some of which are sufficient and the others not, or one count which may be bad in part, the defendant should only demur to the latter; for if he were to demur to the whole declaration, the court would give judgment against him(*o*);[22] and this rule equally applies to one count, part of which is Where only to a part of the pleading.

(*j*) See observations as to extent of these words, Bolton *v.* the Bishop of Carlisle, 2 Hen. Bla. 262.—Bowdell *v.* Parsons, 10 East, 359.

(*k*) Myddelton *v.* Wynn, Willes, 601. Tidd's Prac. 4th ed. 822.

(*l*) 1 Saund. 337. b n. 3.—Tidd's Prac. 4th edit. 641.—2 Wils. 10.

(*m*) Berry *v.* Anderson, 7 T. R. 530. Cuming *v.* Sparland, 1 East, 411.—Ante, 506.—Tidd's Prac. 3d edit. 429. 4th edit. 419, 420.

(*n*) Id. ibid.—Dewey *v.* Sopp, Stra. 1185.

(*o*) Powdick *v.* Lyon, 11 East, 565. Com. Dig. Pleader, Q 3. 5.—Duppa *v.*

(19) Vide *Hord's Ex'r.* v. *Dishman*, 2 *Hen. & Mun.* 600.

(20) Vide *Burnet* v. *Bisco*, 4 *John's. Rep.* 235.

(21) Vide *Syme* v. *Griffen*, 4 *Hen. & Mun.* 277.

(22) Vide *Seddon* v. *Senate*, 13 *East's Rep.* 76, 77. *Ward* v. *Sackrider*, 3

WHERE ONLY TO PART OF THE PLEADING.

sufficient and the residue is not, when the matters are divisible in their nature; as if a plaintiff declare for taking his money and also certain goods, without shewing that the goods were his property, the count will be good as to the money, and if the defendant demur generally to the whole, the plaintiff will have judgment(*h*):[23] but where there is a misjoinder either of parties or causes of action, the demurrer should be to the whole(*q*). And if a *plea*, *avowry*, or *replication*, each of which we have seen is entire, be bad in part, it is bad for the whole(*r*); and in that case the demurrer should be to the whole plea or replication(*s*), or it will be a discontinuance(*t*); except in the case of a plea of set-off, two parts of which are considered as similar *to two counts in a declaration, and if one part be good, a general demurrer to the whole will be bad(*u*).[24]

[*644]

When may demur though the objection does not appear on the face of the pleadings.

In general a party cannot demur, unless the objection appear on the *face of the preceding pleadings*(*v*); but in some cases, where the plaintiff in his declaration partially states a deed which is defective, or contains matter qualifying the part stated, the defendant may crave oyer of the deed, and set forth the whole, thereby making it part of the declaration, and then demur either in respect of the defect in the deed, or

Mayo, 1 Saund. 286. and id. note 9.—2 Saund. 379, 380. n. 14.—Duke of Bedford *v.* Alcock, 1 Wils. 248.—Judin *v.* Samuel, 1 New Rep. 43.

(*p*) Pinkney *v.* The Inhabitants of East Hundred, 2 Saund. 379.—Benbridge *v.* Day, 1 Salk. 218.—2 Saund. 171. a. n. 1.—Horn *v.* Chandler, 1 Mod. 271.—See the form, Dean, &c. of Bristol *v.* Guyse, 1 Saund. 108, 9.

(*q*) Jennings *v.* Newman, 4 T. R. 547.—Ante, 206.—2 Saund 210. a.

(*r*) Ante, 523, 4. 618.—Earl of Manchester *v.* Vale, 1 Saund. 28. and id. n. 2.—Duppa *v.* Mayo, 1 Saund. 286.—337. n. 7.—Parker *v* Atfield, 1 Salk. 312.—Trueman *v.* Hurst, 1 T. R. 40.—Duffield *v.* Scott, 3 T. R. 374.

(*s*) See an exception in an avowry, Duppa *v.* Mayo, 1 Saund. 286.

(*t*) Com. Dig. Pleader, Q. 3.

(*u*) Dowsland *v.* Thompson et al., 2 Bla. Rep. 910,

(*v*) Moore, 551.—See the forms and notes, Sacheverell *v.* Froggatt, 2 Saund. 364 to 367.—Com. Dig. Pleader, Q 3. The case, ante, 281, 8. and Williams *v.* Wills, 1 Wils. 119. may prima facie appear to be an exception, but there even the objection appeared on the face of the proceedings, as it was shown that the defendant was a prisoner in custody of the sheriff.

Caine's Rep. 265. *Roe* v. *Crutchfield*, 1 *Hen. & Mun.* 361. *Whitney* v. *Crosby*, 3 *Caine's Rep.* 89. *Buckus* v. *Richardson*, 5 *Johns. Rep.* 476. *Kingsley* v. *Bill & another*, 9 *Mass Rep.* 199, 200. *Martin & others* v. *Williams*, 13 *Johns. Rep.* 264. *Monell & Weller* v *Colden*, 13 *Johns. Rep.* 402. *Adams* v. *Willoughby*, 6 *Johns. Rep.* 65. So, if the defendant plead several pleas, all of which are demurred to, if one be good, judgment must be given for the defendant. *Sevey* v. *Blacklin & others*, 2 *Mass Rep.* 541. *Harrison* v. *M'Intosh*, 1 *Johns. Rep.* 385.

(23) So, in a plea of outstanding judgments by an executor or administrator, where some of the judgments are well and the others badly pleaded, the plaintiff should demur only to those which are insufficiently pleaded, and traverse the residue. *Douglas* v. *Satterlee*, 11 *Johns. Rep.* 16.

(24) And where breaches are assigned in the replication, if one be bad, it does not vitiate the others. *Martin & others* v. *Williams*, 13 *Johns. Rep.* 264.

the improper manner in which the plaintiff has stated it, and this is the proper course, when upon oyer it would appear that a bail bond is defective(*w*). So a deed untruly stated in a plea, being set out upon oyer by the plaintiff, becomes part of the plea, and if it thereby appear that the plea is false, the plaintiff need not shew any matter of fact in his replication to maintain his action, but may demur(*x*); for it is a general rule that an indenture set out upon oyer becomes part of the preceding plea(*y*).

WHEN MAY DEMUR THOUGH THE OBJECTION DOES NOT APPEAR ON THE FACE OF THE PLEADINGS.

In point of *form* no precise words are necessary in a demurrer, and a plea which is in substance a demurrer, though very informal, will be considered as such(*z*); and it is a general rule *that there cannot be a demurrer to a demurrer(*a*). The usual form of a *general* demurrer to a *declaration*, after stating the title of the court and term, and the names of the parties in the margin, and the defence as in the commencement of a plea(*b*), alleges that the declaration and the matters therein contained and as therein stated, are not sufficient in law to enable the plaintiff to support his action, and concludes with a verification and an appropriate prayer of judgment; though a verification is unnecessary(*c*); or if the demurrer be to a particular count or breach, it is qualified accordingly(*d*). A general demurrer to a *plea in abatement*, states, that it is not sufficient to quash the bill or writ, and prays judgment that the defendant may answer over or further to the declaration(*e*). To a *plea in bar* the demurrer is *quia placitum, &c. materiaque in eodem contenta minus sufficiens in lege existit, &c. unde pro defectu sufficientis placiti, &c. petit judicium, &c.* either for damages, or for debt and damages, &c. according to the nature of the action(*f*). If the demurrer be to a *replication*, *rejoinder*, &c. after stating that the same and the matters therein contained are not sufficient in law, it concludes with a prayer of judgment either against or for the plaintiff, according to the situation of the party demurring(*g*). If the demurrer be *special*, the assignment of the *causes of demurrer* are usually introduced at the end of the general demurrer *in the following words: "And the said ——— accord- [*646]
"ing to the form of the statute in such case made and provided(*h*), "states and shews to the court here the following causes of demurrer "to the said declaration, (or to the said *first count* of the said declara- "tion," or "to the said *breach of covenant* first above assigned," or "to

Forms of demurrer.

[*645]

(*w*) 2 Saund. 60. *in notis*. See the exceptions, and when the facts must be pleaded, ante, 479, 480. and 1 Saund. 295. b.

(*x*) Smith *v.* Yeomans, 1 Saund. 316, 7.

(*y*) Smith *v.* Yeomans, 1 Saund. 317.

(*z*) Leaves *v.* Bernard, 5 Mod. 131. Dinghurst *v.* Batt et al., 3 Lev. 222.—2 Saund. 129. n. 6.—Earl of Leicester *v.* Haydon, Plowd. 400.—as to the form, in general, Com. Dig. Pleader, Q. 3.

(*a*) Bac, Ab. Pleas, N. 2.—Campbell *v.* St. John, Salk. 219.

(*b*) As ante, 527, 8, 9, and see the form, post. 2 Vol. 726.

(*c*) Co. Lit. 71. b.—Stacy *v.* Carter, 1 Leon. 24.—Post. 2 Vol. 726.

(*d*) Post. 2 Vol. 726.

(*e*) Post. 2 Vol. 727.

(*f*) Co. Lit. 71. b.—Post. 2 Vol. 727, 728

(*g*) Post. 2 Vol. 728, 729.

(*h*) 4 Ann. c. 16.

FORMS OF DEMURRER.

" the said *plea*, &c.")(*i*); and it is usual after stating the causes of demurrer to conclude, " and also for that the said declaration (or first " count," or " plea," or " replication,") is in other respects uncertain, " informal, and insufficient;" but these latter words are wholly unavailable, for when it is necessary to demur *specially*, it is not sufficient that the demurrer be *quia caret forma*, but it must be shewn specially in what point in particular the form is defective, and as it has been said, the statutes oblige the party demurring to lay his finger upon the very point(*j*); and therefore a demurrer for duplicity *quia duplex est et caret forma*, is not sufficient, and it should shew in what the duplicity consists(*k*); and after the passing of the statute of Elizabeth, a rule was made, that " upon " demurrers, the causes shall be specially assigned and not involved " with general unapplied expressions of " double," " negative pregnant," " uncertain," " wanting form," *and the like;* but shall shew " specially wherein, in order that the other party may as the cause shall [*647] " require, either join in *demurrer or amend, or discontinue his action(*l*)." If the plaintiff demur to a plea in abatement, as if it had been a plea in bar, it will be a discontinuance(*m*); and a demurrer to such plea should conclude with praying judgment that the writ or bill may be adjudged good, and that the defendant may answer further or over thereto(*n*).

When the court will give judgment against the first defective pleading.

A party should not demur unless he be certain that his own previous pleading is substantially correct, for it is an established rule that upon the argument of a demurrer, the court will, notwithstanding the defect of the pleading demurred to, give judgment against the party, whose pleading was first defective in *substance*;[25] as if the plea which is demurred to be bad, the defendant may avail himself of a substantial defect in the declaration(*o*).[26] But this rule does not apply where the ob-

(*i*) Post. 2 Vol. 726.

(*j*) Com. Dig. Pleader, Q. 9.—Heard *v.* Baskerville, Hob. 232.—Per Holt, C. J.—Lamplough *v.* Shortridge, 1 Salk. 219.—1 Saund. 160. n. 1. 337. n. 3.

(*k*) Cheasley *v.* Barnes & others, 10 East, 79.—Ryley *v.* Parkhurst et al., 1 Wils. 219.—Lamplough *v.* Shortridge, 1 Salk. 219.—1 Saund. 160. n. 1. 337. n. 3.—Lambert *v.* Strother, Willes, 220. Doctr. Plac. 147.

(*l*) Rule, Mich. T. A. D. 1654. sect. 17.—Lambert *v.* Strother, Willes, 220.

(*m*) Carter *v.* ———, 1 Salk. 218.—Ante, 456.

(*n*) 2 Saund. 210. g. n. 2. Ante, 456.

(*o*) 1 Saund. 119. n. 7.—1 Saund. 285 n. 5.—Foster *v.* Jackson, Hob. 56.—Bullythorpe *v.* Turner, Willes, 476.—Anon., 2 Wils. 150.

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(25) Vide *Hord's Ex'r.* v. *Dishman*, 2 *Hen. & Mun.* 602. *Smith* v. *Walker*, 1 *Wash.* 135. *Stevens* v. *Taliaferro*, 1 *Wash.* 155. *Patcher* v. *Sprague*, 2 *Johns. Rep.* 465. *Bennet* v. *Irwin*, 3 *Johns. Rep.* 366. *United States* v. *Arthen*, 5 *Cranch*, 257. *Smith* v. *Wilson*, 8 *East's Rep.* 442. *Barruso* v. *Madan*, 2 *Johns. Rep.* 149. *Gelston* v. *Burr*, 11 *Johns. Rep.* 482. *Spencer* v. *Southwick*, *Id.* 583. 587. If the declaration contain two counts, one good and one bad, and the defendant plead a plea which goes to the whole cause of action, to which the plaintiff demurs, the latter is, notwithstanding his having committed the first fault in pleading, entitled to judgment on the count which is good. *Ward* v. *Sackrider*, 3 *Caine's Rep.* 263.

(26) The rule is the same whether the demurrer be general or special. *Cooke* v. *Graham's Adm'r.*, 3 *Cranch*, 235.

jection to the preceding pleading is merely a defect *in form*, and such as would be aided on a general demurrer, by the statute of Elizabeth or Ann., or at common law; and by pleading over many defects in form are aided(*p*); and we have seen that upon a demurrer to a plea in abatement, no objection can be taken to the form of the declaration(*q*).

When the court will give judgment against the first defective pleading.

If the plaintiff or the defendant *join in demurrer*, the joinder concisely contradicts the demurrer, by stating that the declaration (or the plea, &c.) and the matters therein contained, *in manner and form as stated, are sufficient in law to bar the action, if the demurrer be to a declaration, or to quash the bill or writ if in abatement, or to preclude the plaintiff from maintaining his action if to a plea in bar, and usually offers to verify the declaration or plea, and concludes with a prayer of judgment, though the latter seems unnecessary(*r*). A joinder in demurrer to a replication to a plea in abatement, should not conclude with praying judgment for debt and damages, for to conclude in chief in such case would be a discontinuance, and the plaintiff should pray judgment that the defendant may answer over(*s*); but if the defendant has demurred to a declaration, and concluded his demurrer, as in abatement, the plaintiff may join in bar and shall have judgment accordingly(*t*). The points relating to amendments, and the general rules as to when defects in pleading are aided, have already been partially considered, and are so fully treated of in the books of practice that any further observations upon them in this treatise are unnecessary.

Joinder in demurrer.

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(*p*) Bushell *v.* Lechmore, 1 Lord Raym. 369, 370.—Mattravers *v.* Fosset et al., 3 Wils. 297.—Bullythorpe *v.* Turner, Willes, 476.—Hart *v.* Weston, 5 Burr. 2588.—Stutfield v. Somerset, Cro. Eliz. 825.—Com. Dig. Pleader, E. 37.

(*q*) Ante, 457.—Kealing *v.* Irish, Lutw. 592.—Routh et ux. *v.* Weddell, Lutw. 1667.—Powis *v.* Loyd, Lutw. 1604.

(*r*) Co. Lit. 71. b.—French *v.* Watson, 2 Wils. 74.—See the forms, post. 2 Vol. 730, 731.

(*s*) 2 Saund. 210. g.

(*t*) Dinghurst *v.* Batt et al., 3 Lev. 223.

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