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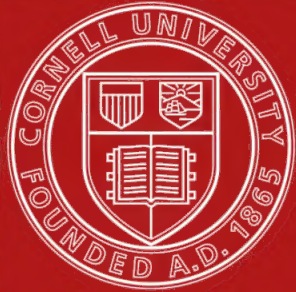
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INSTITUTES
OF
AMERICAN LAW.

BY
JOHN BOUVIER.

New Edition

BY DANIEL A. GLEASON.

In Societate civili, aut lex aut vis valet.—BACON.
Ce qui est bien classé, est à moitié su.—DUVAL.

IN TWO VOLUMES.

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INSTITUTES OF AMERICAN LAW.

FOURTH BOOK.

OF REMEDIES.

CHAPTER I.

PRECAUTIONS TO BE ADOPTED BEFORE THE COMMENCEMENT OF AN ACTION.

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2414. In the preceding books the rights of persons and the rights which they have over property have been discussed. It now remains for us to inquire what are the remedies which the law has provided to recompense those whose rights have been violated, and what protection it affords to prevent the violation of those rights.

2415. *Remedy* is a figurative expression, which signifies the means employed which the law has provided to enforce a right or to redress an injury. It is a maxim of law that there is no wrong without a remedy: *ubi jus ibi remedium*.¹ If a man has a right, he must have the means to vindicate and maintain it, and it is said that there is no right without a remedy; for, want of a right and want of a remedy are reciprocal: *lex semper dabit remedium*.² Remedies are very numerous, and may be variously classified. It is sometimes difficult to select the one which shall the best secure a right or redress a wrong. The mistake in selecting a remedy may cause unnecessary litigation or the total loss of a just claim.

There are many remedies which the law has put in the hands of the parties themselves, as will be fully explained hereafter; if, instead of adopting one of these, resort is had to litigation, it is evident that the expense and danger of such a course are unnecessarily incurred.*

The importance of selecting a proper remedy is made manifest by the following statement, copied from a celebrated text writer:³ "Recently, a common law barrister, very eminent for his legal attainments, sound opinions, and great practice, advised that there was no remedy whatever against a married woman who, having a considerable separate estate, had joined with her husband in a promissory note for 2500*l.* for a debt of her husband, because he was of opinion that the contract of a married woman is absolutely void, and referred to a decision to that effect, viz., *Marshal v. Rutton*,⁴ he not knowing, or forgetting, that in equity under such circumstances payment might have been enforced out of the separate estate. And afterward, a very eminent equity counsel equally erroneously advised in the same case that the remedy was only in equity, although it appeared upon the face of the case, as then stated, that after the death of her husband the wife had promised to pay in consideration of forbearance, and upon which promise she might have been arrested and sued at law. If the common law counsel had properly advised proceedings in equity, or if the equity counsel had advised proceedings by arrest at law upon the promise after the death of the husband, the whole debt would have been paid. But upon this latter opinion a bill in chancery was filed, and so much time elapsed before the decree that a great part of the property was dissipated, and the wife escaped with the residue into France, and the creditor thus wholly lost his debt, which would have been recovered if the proper proceedings had been adopted in the first or even second instance. This is one of the very numerous cases almost daily occurring illustrative of the consequences of the want of at least a general knowledge of every branch of law."

2416. When a party has been aggrieved, and is desirous of obtaining redress for the violation of his rights, he should adopt the best means to put himself completely in the right and to secure the evidence requisite to support his case. As most persons are ignorant of the means to be adopted to gain that end, the party should immediately apply to some professional man to aid him. The first thing to be considered, therefore, is the choice of a professional adviser or lawyer.

2417. Although a party may himself conduct a suit brought by or against him, yet experience proves that it is very dangerous for him to manage his own case, whatever may be his learning or qualities. He labors generally under such an excitement that it would be difficult to behave with that temperance and discretion so necessary in the proper management of a cause; be-

¹ *Johnstone v. Sutton*, 1 Term, 512; Coke, Litt. 197, b. See Bacon, Abr. *Actions in General*, B; 1 Chitty, Gen. Pr. part 1, c. 1.

² *Ashby v. White*, 2 Ld. Raym. 953; *Winsmore v. Greenbank*, Willes, 577. It is said it is to this maxim that the action of trespass on the case owes its origin.

³ 2 Chitty, Pract. 303 note

⁴ 8 Term, 545.

sides it is proper that he should not come in personal collision with the opponent, for this would produce many indiscreet acts which would be prejudicial to his cause.

The principal law agents in this country are, 1, officers known in the courts of common law by the name of attorneys, in courts of equity as solicitors, and in courts of admiralty as proctors, 2, counsellors, 3, notaries, 4, conveyancers.

2418. *An attorney at law* is an officer in a court of common law jurisdiction who has been admitted in such court to the practice of the law, after an examination as to his qualification, and is duly authorized to manage the cause of any client who may confide in him as his advocate.

Attorneys are not admitted to practice unless they have qualified themselves by previous study, and have undergone an examination according to the rules of the court; they are also required to be men of good moral character. In general, persons applying to be received as attorneys have had the benefit of a liberal education, but although this is a great advantage, yet it is not indispensably necessary, and many attorneys in this country have become highly distinguished who are self-made men. In modern times, a knowledge of the Latin and French languages, however imperfect, is sufficient, and the Greek may, in great measure, be dispensed with.

2419. The duties of an attorney, where the offices of attorney and counsellor are not separated, are to conduct the suit of his client through the courts and to take all proper and lawful measures to represent his case fully and fairly before the court and jury. It is not less his duty to advise him, in the preliminary stages of the cause, as to the best mode of a just settlement of it, either by compromise or otherwise when it can be done, and, if not, to direct him as to the best mode of securing his evidence and putting himself in the right when that depends upon himself.

2420. *Counsellors at law* or barristers in England form a separate class distinct from the attorneys, and no person is permitted to be both a counsellor and attorney. This was formerly the general rule in this country, but now no such distinction is made in the courts of the United States, nor probably in any of the state courts. Where the distinction is kept up it is the duty of the attorney to examine the case, collect all the facts, and make a clear brief of them, and of the points of law on which the case can be supported. This brief is submitted to counsel, and on it he relies for the true statement of the facts.

2421. It is the duty of the counsel to draft or review and correct the pleadings, to manage the cause in court on the trial, and during the whole course of the suit to apply the established principles of law to the exigencies of the case. He is not bound, as is sometimes vulgarly supposed, to take any unjust or unfair advantage for the purpose of overthrowing justice; on the contrary, he should always remember he is one of her ministers. In giving their advice to their clients and in the management of their causes, professional men have duties to perform to their clients, to the public, and to themselves. In such cases they have thrown upon them something which they owe to the fair administration of justice, as well as to the private interests of their employers. The interest propounded for them ought in their own apprehension to be just, or at least fairly disputable; and when such interests are propounded, they ought not to be pursued *per fas et nefas*.⁵ Still, however, counsel ought not to undertake in a doubtful case to be at once judge, jury, and arbitrator, and decide against a client who may have a just cause.

2422. In the selection of an attorney, solicitor, or proctor, it is essentially important to select not a mere lawyer, but a man of known high character as to

⁵ 1 Hagg. 222.

honor and honesty, as well as for his knowledge of all his professional duties, and also of adequate knowledge of the world, and a good negotiator—one who is disposed to avoid litigation, and above all, one who has not any connection with the expected adversary.

2423. There are men in the profession whose long established character for honor, honesty, and learning is so well known that it is not difficult to select from among them; but there are others who, though not so well known, are still deserving of patronage on account of their personal merit and learning. In the selection of these the following rules should be observed:

A purchaser should never employ on his behalf an attorney or solicitor who is concerned for the vendor of the estate; in such a case the attorney would be placed in a position unpleasant to himself of deciding between the conflicting interests of the parties, and it might become impracticable for him to act with honor toward both of his employers.

A *cestui que trust* should not select the trustee to act for him in a case relating to the trust property, though the trustee may be an attorney, for their interest might conflict with each other; and again, the interest of the attorney might be opposed to that of the trustee. Indeed, the attorney himself, feeling a just sense of delicacy, would not consent to act as attorney, and as such perform those acts which he was bound to do as trustee.

No attorney, solicitor, or counsel should be employed who has been concerned for the opposite party in any other suit or business by which he would be enabled to take advantage of facts previously communicated to him confidentially or incidentally, and which would be injurious to the latter. Nor can an attorney who has been employed by one of the parties give up his client and become concerned for the other; for, having obtained his client's secrets, he cannot lawfully make any use of them to his disadvantage, and if he attempts to do so, he will be restrained.⁶

2424. The selection and employment of an attorney or other professional man is called a retainer. Although it is not indispensably necessary that the retainer should be in writing, unless required by the other side, it is still very expedient.⁷ It is therefore highly proper, particularly when the client is a stranger, to require from him a written retainer, signed by himself; and, in order to avoid the insinuation that it was obtained by contrivance, it should be witnessed by one or more respectable persons. When there are several plaintiffs, it should be signed by all, and not by one for himself and others, especially if they are trustees or assignees of a bankrupt or insolvent. The retainer should also state whether it be given for a general or qualified authority.

The practice of obtaining a written retainer is for the advantage of both the attorney and the client. It is better for the attorney, because he gets rid of all difficulty about proving his retainer; and it is better for many clients, as it

⁶ *Chalmondeley v. Clinton*, 19 Ves. Ch. 261, 273. It is laid down in this country that an attorney will not be allowed to change sides in the same cause, though at different trials; but where an attorney in the course of other business has obtained a knowledge of matters connected with the suit in question, he will not be prevented from acting against the party through whose business he obtained such knowledge. *Price v. Grand Rapids R. R.*, 18 Ind. 137.

⁷ In Maryland and Maine the attorney need not have a warrant of attorney to appear. *Henck v. Todhunter*, 7 Harr. & J. Md. 275; *Penobscot Boom Co. v. Lamson*, 16 Me. 224; *Bridgton v. Bennett*, 23 Me. 420. In some states, as Pennsylvania and Illinois, a warrant of attorney to appear is not required, unless demanded by the other side. *Lynch v. Commonwealth*, 16 Serg. & R. Penn. 368; *Campbell v. Galbraith*, 5 Watts, Penn. 423. In general, the authority of an attorney is presumed unless something appears to the contrary. *Hayes v. Shattuck*, 21 Cal. 51, but when called in question is to be determined by the court. *Krause v. Hampton*, 11 Iowa, 457; *Commissioners v. Purdy*, 36 Barb. N. Y. 266.

puts them on their guard, and prevents them from being drawn into law suits without their own express direction.⁸

At the time of giving the retainer, it is usual for the client to pay a sum of money to the attorney for the purpose of insuring his services; this is called a retaining fee. When an attorney is thus employed, there is an implied contract, on his part, that he will use due diligence in the course of legal proceedings, but it is not an undertaking to obtain a judgment.⁹ He is bound to act with the most scrupulous honor, and to attend to the interest of his client only.¹⁰

2425. A *notary public* is an officer appointed in the several states under their respective constitutions and laws. These officers are common all over the continent of Europe, where they exercise much more power than they do in England.¹¹ Their acts have long, by common consent of merchants and courts of all nations, had peculiar weight and respect attached to them.¹²

2426. A *conveyancer* is one who makes it his business to draw deeds of conveyance of lands for others. These are not officers appointed by law, any one having the right to exercise that profession. It is usual for conveyancers to act as brokers for the seller. In these cases the conveyancer should examine with scrupulous exactness the title to the lands which are conveyed by his agency, and, if this be found good, that the estate is altogether unincumbered. In cases of doubt, he should always suggest to his employer to take the advice of counsel.

Conveyancers also act as brokers for the loan of money on real estate, secured by mortgage. In these cases, the same care should be observed that the title is good, and the property is clear of incumbrances.

For this purpose the conveyancer should make a brief of title, that is, an abridgment of all the patents, deeds, indentures, agreements, records, and papers relating to the estate.

⁸ Owen *v.* Ord, 3 Carr. & P. 349.

⁹ Gallaher *v.* Thompson, Wright, Ch. Ohio, 446; see Cox *v.* Livingston, 2 Watts & S. Penn. 103; Hogg *v.* Martin, Ril. So. C. 156; Wilson *v.* Russ, 20 Me. 421; Mardis *v.* Shackelford, 4 Ala. n. s. 493; Wilcox *v.* Plummer, 4 Pet. 172.

¹⁰ Galbraith *v.* Elder, 8 Watts, Penn. 81; Cleavinger *v.* Reimer, 3 Watts & S. Penn. 486.

¹¹ These officers were known among the Romans, but in Rome they were not at first invested with a public character. Originally, slaves, but afterward freemen, had tables in the forum, or public place, whose profession was to receive, *excipere*, the agreements of citizens who applied to them to reduce their contracts to writing. They were then called tabellions, from *tabula* or *tabella*, which in this sense meant those tables or plates covered with wax which were then used instead of paper. Tabellions differed from notaries in many respects; they had judicial jurisdiction in some cases, and from their judgments there were no appeals. Notaries were then the clerks or aiders of the tabellions; they received the agreements of parties, which they reduced to short notes, and, on this account, they were called notaries. These contracts were not binding until they were written *in extenso*, which was done by the tabellions. In after times, the notaries themselves wrote out at length these contracts, which was called engrossing. When thus engrossed, the contract was signed by the parties, when they could sign; if not, mention was made of that fact. As these contracts required to be proved in court in case of dispute, it became usual, and afterward it was required that they should be recorded on the public registers, in order to give them complete authenticity. Merlin, Répert. verbo Notaire, § 1; D'Alembert, Encycl. *Tabellion*; 6 Toullier, n. 211, note.

¹² Notaries are appointed by the states, and their powers and duties vary in the different states. Their general duties are to protest bills of exchange and promissory notes, to authenticate copies, to draw up protests in maritime matters, to attest deeds and administer oaths. By the act of Sept. 16, 1850, 9 Stat. 458, notaries may take acknowledgments and depositions, and administer oaths under the laws of the United States, or for the purposes of evidence in cases in the United States courts.

A protest of a bill by a notary is received as evidence in the courts of all civilized countries.

In making a brief of title, the practitioner should be careful to place every deed and other paper in chronological order. The date of each deed, the names of the parties, the description of the property, and all covenants affecting the estate, should be particularly inserted.

A vendor of an interest in realty ought to have his title investigated, abstracted, and evidence in proof of it ready to be produced and established before he sells, for if he sells with a confused title, or without being ready to produce deeds and vouchers, he must be at the expense of clearing it.¹³ He is bound, at his own expense, to furnish the purchaser with an abstract of his muniments, and deduce a clear title to the estate.¹⁴

2427. A prudent practitioner and professional adviser will, as soon as he has been employed in a case, obtain a correct statement of the facts; for this purpose he ought to put in writing all questions in the slightest degree connected with the case, not forgetting such as, if answered in the affirmative, would be most against his client; this is requisite, because many clients tell only the side of the case most favorable to themselves. These questions should all be answered fully in writing. Not satisfied with this examination, the attorney should read all papers connected with the case, and examine all the witnesses within his reach, and make memoranda of what they say.

2428. Being thus possessed of the facts, the attorney should make a *brief of the case*, that is, a detailed statement of the facts, and by that means ascertain what is wanting to support the plaintiff's case, when he acts for the plaintiff. When he is the attorney of the defendant, his brief should extend to all the pleadings, and also to the points of law or questions raised by the issue. Such a full brief should contain:

A statement of the names of the parties, and their residences and occupations, the character in which they sue and are sued, and wherefore they prosecute or resist the action.

The name of the court where the action is brought, the number and term of the action, and the names of the respective attorneys.

An extract of the docket entries.

A clear and distinct abridgment of all the pleadings.

A regular, chronological, and methodical statement of the facts in plain, common language.

A summary of the points or questions in issue, and of the proof which is to support the issues, mentioning specially the names of the witnesses by which the facts are to be proved, or if there be written evidence, an abstract of such evidence.

The personal character of the witnesses should be mentioned; whether their moral character is good, bad, or doubtful, whether they are naturally timid or over zealous, whether firm or wavering.

When known, the evidence of the opposite party, and such facts as are calculated to oppose, confute, or repel it.

Perspicuity and conciseness are the most desirable qualities of a brief, but when the facts are material they cannot be too numerous; when the argument is convincing and weighty it cannot be too extended.

2429. After having made a brief it is easy to perceive what is requisite to enable the plaintiff to make out his case, and what the defendant needs to

¹³ 1 Chitty, Pract. 304; Wilson v. Allen, 1 Jac. & W. Ch. 623, 624; Sugden, Vend. 294.

¹⁴ Sugden, Vend. 294. The rules of conveyancing are much simplified in this country by the system of recording deeds, which does not prevail in England. As the records are open to all, there is no implied obligation on the part of the seller to exhibit the state of his title to the purchaser. The examination of the title is made by the agent of the purchaser at his own expense or at that of the seller as may be agreed.

complete his defence. Before suit is brought, both parties may do many acts which will enable them, the one to maintain his action, and the other to establish his defence.

2430. It may be premised that, even before a cause of action arises, many acts may be done to entitle the plaintiff to recover after it has arisen, or which may defeat the plaintiff. A purchaser of personal goods should take possession of them, or, if they are in the hands of a third person, he should give notice to him that he has become the purchaser of them, and after such notice the possessor will part with them at his peril; for the same reason an assignee of a chose in action should give notice of the assignment to the debtor, and all securities for such a debt or chose in action should be required to be delivered to the assignee. The want of this precaution may subject the assignee to a loss, for until notice the assignor would be entitled to receive payment; or, if he assigned to another person who had no notice, he would be entitled to the chose in action if he gave the first notice in preference to the first assignee, and acquire a better equity.

2431. The purchaser of real estate should see that his title is clear and free from incumbrances, and place his deed upon record within the time prescribed by law. The deeds should also be delivered to the purchaser; for if the vendor should retain them and afterward sell to a third person who had no notice of the first sale, and the deed was not recorded, the latter would be entitled to the property if his deed was first recorded.

2432. When a party is bound to fulfil a condition precedent to entitle himself to the performance of a contract, he must be cautious to perform such condition.

2433. In some cases, in order to make a party responsible, notice must be given to him and a request that he should fulfil his engagement; for example, notice of non-payment of a bill of exchange must be given to an indorser to hold him responsible. As a general rule, whenever the defendant's liability to perform an act depends on another occurrence which is best known to the plaintiff, and of which the defendant is not bound to take notice, the plaintiff must prove that due notice was in fact given.¹⁵

2434. It is advisable, if not necessary, in many cases to give notice, make demands, and require explanations before action brought. Not unfrequently in such cases litigation may be avoided; but if it has to be resorted to, the party may so place himself in the right that on this account alone he will have the favorable ear of the court and jury, and in some cases he may throw the costs on the opposite party. When a man's wife, child, or apprentice is unlawfully detained by another, a demand for the restoration of them should be made.¹⁶ If goods have been illegally taken away, or wrongfully detained, it is proper to make a demand of them before action brought, unless they have been taken and held in such a manner as to amount to a conversion. Notice must be given to a sheriff not to sell the goods he has levied upon when they belong to another than the defendant.¹⁷ Before making an entry on the land of another to carry away your goods, a request should be made to him to deliver them to you.¹⁸ And before entering upon the land of another to abate a private nuisance, a request to remove it should first be made.¹⁹

2435. In anticipation of difficulties which may arise, it frequently becomes highly proper, if not indispensable, that notice should be given, and the want

¹⁵ *Lundie v. Robertson*, 7 East, 231.

¹⁶ *Fawcett v. Beaver*, 2 Lev. 63; *Winsmore v. Greenbank*, Willes, 582.

¹⁷ *Dean v. Whittaker*, 1 Carr. & P. 347.

¹⁸ *Anthony v. Hany*, 8 Bingh. 191.

¹⁹ *Lonsdale v. Nelson*, 2 Barnew. & C. 302, 311; *Winsmore v. Greenbank*, Willes, 583.

of it may render the party liable to an action which could not have been sustained against him if such notice had been given. The following are a few of the numerous cases of this class:

2436. When a wife has by her unlawful conduct induced her husband to withdraw from her the general authority with which the laws presumed he had invested her to purchase goods as his agent, he is bound in good faith to inform those who would be likely to trust her on his account that she has no longer any authority to buy on his credit. He should therefore give a public notice prohibiting third persons from trusting her on his credit, and it is advisable to give a private notice to such persons as have before sold to her on credit. Though when the wife has committed adultery such notice is not indispensable, yet it is always prudent to give it. This notice, whether general or special, will be of no avail if the husband has causelessly turned his wife away and refused her necessaries, if the wife buy nothing but necessaries.

But a son or a daughter has not the same authority to buy on the father's credit that the wife has to buy on that of her husband; if, therefore, the parent desires to withdraw the authority of his child, he should give private notice to such persons as may have before trusted him; a public notice is not requisite.

When an agent or servant has been authorized, expressly or by implication, to buy goods on credit of the principal, and the authority is withdrawn, notice of that fact should be given.

Upon the same principle, when two persons have been in partnership, the presumption of its continuance is sufficient to authorize a person to trust one of the partners in the name of the firm; and, when it has been dissolved, notice should be given specially to all persons who have before dealt with the partnership, and generally by public advertisement in the newspapers to all other persons.

2437. In cases of an expected suit on a contract, when the proposed defendant admits something to be due, care should be taken to make a lawful tender of it. A *tender* is an offer to perform an act which the party offering is bound to perform to the party to whom the offer is made. A tender may be made of money or of specific articles, and as the manner of making it is different, the two modes will be separately considered.

2438. To make a valid tender of money the following *requisites* are necessary:

It must be made by a person capable of paying; for if it be made by a stranger without the consent of the debtor, it will be insufficient.²⁰

It must be made to the creditor having capacity to receive it, or to his authorized agent.

The whole sum due must be offered; an offer of a greater sum, demanding change, is not a good tender; as, if a half eagle be tendered in payment of four dollars, demanding change of one dollar. But an offer of twenty eagles, when only fifteen were due, with a request to return the difference, has been held to be a good tender of fifteen eagles.²¹

An offer of the money must be made by producing it, and counting it in the presence of the creditor,²² unless the creditor states he will not receive it, because more is due to him, in which case its production may be dispensed with;²³

²⁰ Contrary to this general rule, it has been decided in Pennsylvania that a tender of money for an infant, by his uncle, is good, though not appointed guardian at the time of the tender. *Brown v. Dysinger*, 1 Rawle, Penn. 408.

²¹ *Bettershee v. Davis*, 3 Campb. 70; *Spigbey v. Hide*, 1 Campb. 181; see *Hubbard v. Chenango Bank*, 8 Cow. N. Y. 88.

²² *Fuller v. Little*, 7 N. H. 535.

²³ *Thomas v. Evans*, 10 East, 101; but see *Behaly v. Hatch*, Walk. Ch. Mich. 369.

but a mere dispute respecting the amount of the debt, without expressly dispensing with its production, will not excuse the omission.²⁴

The money tendered must be the lawful coin of the United States, or such foreign coin as is made current by law.²⁵ A note for so many dollars, "in gold and silver," must therefore be paid in money, and it cannot be satisfied by a tender of bullion, gold and silver bars, old spoons and rings, or indeed any thing but lawful coin.²⁶ But a tender in bank-notes, if not objected to on that account, will be good.²⁷ And a tender was held good when made by a check contained in a letter requesting a receipt in return, which the plaintiff sent back, demanding a larger sum, without objecting to the nature of the tender.²⁸

The tender should be made at the time agreed upon for the performance of the contract; if made afterward, it only goes in mitigation of damages, provided it be made before suit brought.²⁹ It must be made in day time, before the light is entirely gone.³⁰

The tender must be made to a person capable of receiving the money; when there are several joint obligees, the tender to one is a tender to all.³¹

The tender must be made at the place agreed upon for the payment; or if there be no place appointed for that purpose, a tender to the person is good.³²

The tender must be an unconditional and an unqualified offer to pay the money, because if the creditor were to accept it, the claim for the residue might be thereby prejudiced; therefore, a tender of a certain sum accompanied by a request of a receipt in full, or upon condition that it shall be received for the whole balance due, or that a particular document shall be given up or cancelled, is insufficient.³³

2439. *The effect of a tender* when properly made is to defeat the plaintiff in a suit which he may afterward bring; when the plaintiff has a direct cause of action, the only effect of a tender and refusal is to expose the plaintiff to the loss of interest and costs, if the defendant pleads the tender and brings the money into court.³⁴

The benefit of the tender will be lost, however, if at any time afterward a demand is made of the debtor to pay the debt, and he fails to pay, because the money tendered belongs, to a certain extent, though not in every particular, to the creditor;³⁵ and if the debtor has made use of it, he cannot plead that he tendered the money and has always been ready since, *en tout temps prist*, to pay it.³⁶ But in order to effect this destructive quality as to the tender, the de-

²⁴ *Dickinson v. Shee*, 4 Esp. 68.

²⁵ The most important constitutional question in regard to a legal tender is upon the acts of congress of July 11th, 1862, January 17th, 1863, March 3, 1863, 12 Stat. 532, 822, 710, commonly called the legal tender acts, by which the notes of the United States, or "greenbacks," were made a legal tender in payment of all debts, public and private. The acts have been sustained as constitutional. *Reynolds v. Bank*, 18 Ind. 467.

²⁶ *Hart v. Flynn*, 8 Dan. Ky. 190.

²⁷ *Williams v. Rorr*, 7 Mo. 556; *Noe v. Hodges*, 3 Humphr. Tenn. 162; *Seawell v. Henry*, 6 Ala. N. s. 226; *Ball v. Stanley*, 5 Yerg. Tenn. 199.

²⁸ 8 Dow, Parl. Cas. 442.

²⁹ 7 Taunt. 787.

³⁰ *Bacon, Abr. Tender*, D.

³¹ *Warder v. Arell*, 2 Wash. Va. 297.

³² *Slingerland v. Morse*, 8 Johns. N. Y. 476; *Litt. Sel. Cas. Ky.* 132. See *Hunter v. Le Conte*, 6 Cow. N. Y. 728.

³³ *Haxham v. Smith*, 2 Campb. 21; *Holton v. Brown*, 18 Vt. 224; *Glascott v. Day*, 5 Esp. 48; *Sanford v. Bulkley*, 30 Conn. 344.

³⁴ *Cornell v. Green*, 10 Serg. & R. Penn. 14; *Law v. Jackson*, 9 Cow. N. Y. 641; 5 Cow. N. Y. 248; *Raymond v. Bearnard*, 12 Johns. N. Y. 274.

³⁵ The money so far belongs to the creditor that the debtor has no right to use it, and such use of it, as deprives him of the opportunity of paying the creditor when he demands it, defeats the tender; yet it does not belong to the creditor so as to entitle him to the identical money, nor would it be his loss if it should be lost.

³⁶ *Marine Bank v. Rushmore*, 28 Ill. 463.

mand must be made at some seasonable time, for if it be made at an unseasonable hour, it will not avoid the effect of a tender.³⁷

2440. With regard to *the tender of specific articles*, it is a rule that they are to be tendered at some particular place, and not, as in the case of money, to the person of the creditor wherever found. When no place is expressly designated in the contract, the place of delivery is to be ascertained by the intent of the parties, to be collected from the nature of the case and its circumstances. If, for example, the contract is for the delivery of goods from the seller to the buyer on demand, the former being a manufacturer of such goods or a dealer in them, no place being particularly named, the manufactory or store of the seller will be considered as the place intended, and a tender there will be sufficient. The intent of the parties here is the guide. For the same reason, when the goods are at another place at the time of sale the intention must be presumed to be that the goods should be delivered there.

When the articles are cumbrous, and the place of delivery is not designated nor to be inferred from circumstances, the presumed intention is that they shall be delivered at such reasonable place as the creditor shall appoint; and if, upon being requested if within the state to appoint a place, he refuses or neglects so to do, or appoints an unreasonable place, the right of appointment passes to the debtor, who is bound to give notice to the creditor of such appointment, if practicable, and a proper tender of the goods will pass the title to the creditor, and the creditor will be absolved from the obligation.³⁸

With regard to the manner of tendering the goods it may be observed that when specific articles are tendered, if they are part of a larger quantity, they should be so designated and set apart that the creditor may see and know what is offered to be his own.³⁹ And when an offer of packages is made, those packages must be tendered under such circumstances that the person who is to pay for the goods shall have an opportunity afforded him, before he can be called upon to part with his money, of seeing that the goods presented for his acceptance are in reality those for which he has contracted.⁴⁰

We have seen that a tender of money must be made on the day it becomes due, and that, when made afterward, it goes only in mitigation of damages. The rule with regard to the time when a tender of specific articles must be made is different; if it be not made at the day, it cannot be made afterward.⁴¹

When stock is to be tendered, every thing must be done by the debtor to enable him to transfer it, but it is not absolutely requisite that it should be transferred.⁴²

2441. For the purpose of defending himself from an expected action on a contract, the defendant may in many cases before the commencement of the action purchase or obtain a negotiable bill or note upon which the expected plaintiff is indebted, and if sued afterward, he may avail himself of a set-off.

³⁷ *Tucker v. Buffum*, 16 Pick. Mass. 46.

³⁸ *Coke*, Litt. 210, b; *Aldrich v. Albee*, 1 Me. 120. See *Bixby v. Whitney*, 5 Me. 192; *Slingerland v. Morse*, 8 Johns. N. Y. 474. See before, 941-952.

³⁹ *Veazy v. Harmony*, 7 Me. 91.

⁴⁰ *Isherwood v. Whitmore*, 11 Mees. & W. Exch. 347.

⁴¹ *Day v. Lafferty*, 4 Ark. 450.

⁴² *Strange*, 504, 533, 579.

CHAPTER II.

REMEDIES WITHOUT ACTION.

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2442. *The remedies without legal assistance* may be divided into three classes: first, by the act of the party aggrieved, second, by the act of both parties, and, third, by operation of law.

2443. If there are two things diametrically opposed to each other, they are violence and law: *in societate civili aut lex aut vis valet*. The law rules every fact and every human action; it is present everywhere, and so exerts its salutary influence as to prevent force from intruding itself anywhere to do justice. Force can seldom be used except by the magistrate to attain the ends of the law. The rule *ne privatus sibi ipsi jus dicat* is, in the social state, not only a law, but a condition of existence.

There are some situations, however, where a party has not the time or opportunity to invoke the aid of the magistrate. In those rare exceptions, which prove the existence of the rule, the law has put a limited remedy in the hands of the party injured. He acts not in opposition, but under the sanction and in accordance with the law. There can be no law against the law.

The party aggrieved may remove or redress an injury by self-defence, and the defence of those related to him, by recaption and entry, by the removal of nuisances and other injuries, and by distress.

2444. The subject of *self-defence*, and of the defence of relations and of property, real and personal, has been fully considered elsewhere, so that here it is only necessary to refer to the subject.¹

2445. *Recaption* is the act of a person who has been deprived of the custody of another, to which he is legally entitled, by which he regains the peaceable custody of such person; or of the owner of personal or real property who has been deprived of his possession, by which he retakes the possession peaceably. It may be made of a person, of personal property, or of real estate. In every case it must be done peaceably, without occasioning a breach of the peace, or doing an injury to a third person who has not been guilty of the wrong.²

2446. *Recaption of a person* is the act by which one who has been unlaw-

¹ Before, 203.

² 2 Rolle, 55, 56, 208; 2 Rolle, Abr. 565.

fully deprived of the custody of another, to which he is lawfully entitled, regains the peaceable custody of such person.

The right of recaption of a person is confined to a husband in taking his wife; a parent, his child, when he has the lawful custody of such child; a guardian of the person, his ward; and, according to Blackstone, a master, his servant; but this must be only when the servant assents to the recaption, unless he is an apprentice bound to render services and stay with his master. In these cases the party injured may enter the house of the wrong doer, without a demand being first made, the outer door being open, and take and carry away the person wrongfully detained. He may also, for that purpose, enter the house of the person harboring, who was not concerned in the abduction, if he can do so peaceably, but a demand should be first made.³

But if the person attempting to make the recaption be resisted with force, his remedy is by an application to a court, or a judge, who will grant a writ of *habeas corpus* on behalf of the person having a right to the custody.

2447. *Recaption of personal property* is the act of the owner of chattels who has been deprived of his possession by which he retakes possession peaceably. For this purpose, when he has been dispossessed, he may in general justify the retaking them from the house and custody of the wrong doer, even without a previous request to redeliver them.⁴ But in this kind of recaption too much care cannot be observed to avoid any personal injury or breach of the peace.

When, on the contrary, the chattels have not been originally illegally seized, but are merely wrongfully detained, the owner must request a redelivery; nor can the owner without leave enter the house or land of a third person, not privy to the wrongful retainer, to take his goods out of it.⁵

If the property taken has been altered in its form, or improved without altering it into a different species, the owner may retake the whole.⁶

When goods are obtained of a purchaser by false and fraudulent pretences, no property passes, and the vendor may lawfully rescue and retake them, even by stratagem, wherever he can find them.⁷

In some cases the party injured has no remedy by action at law, and the right of recaption is the only one which avails him; as, where one of several joint tenants, or tenants in common, of a chattel, takes the exclusive possession of the property.⁸ But though the injured party has no remedy at law, yet, in some cases, equity will regulate the enjoyment of such joint property.

As to the extent of force which the owner of real estate may use, it is a rule that to justify an entry into the house or land of another to retake personal property, it must be shown that it was improperly taken away, or received, or detained, and placed by the wrong doer in his house or land; in this case an entry may be made without previous request.⁹ In all other cases, to entitle the owner to retake such property the owner can only justify *molliter manus*, nor can he without leave, as before observed, enter the house of a third person not privy to the wrongful detainer to take his goods, if they get there through his own default.¹⁰

Goods which have been obtained fraudulently under color of a contract may be retaken by the seller, because no title passed to the pretended purchaser. The seller may in like manner retake goods which he has sold without fraud,

³ See *Anthony v. Haney*, 8 Bingham, 186.

⁴ *Anon*, 3 Salk. 169; *Weaver v. Bush*, 8 Term, 78.

⁵ *Rolle*, Abr. 565; *Bacon*, Abr. *Trespas*, E; *Anthony v. Haney*, 8 Bingham, 186.

⁶ Before, 505.

⁷ *Earl of Bristol v. Willmore*, 1 Barnew. & C. 514; 2 Dowl. & R. 755.

⁸ *Cubitt v. Porter*, 8 Barnew. & C. 269.

⁹ *Crawford v. Hunter*, 8 Term, 18.

¹⁰ *Anthony v. Haney*, 8 Bingham, 186.

if they are *in transitu*, that is, if they have not arrived at their place of destination and the purchaser has become insolvent, and for this purpose he may use any means short of force.¹¹

The owner of a chattel has a right to take it into his possession, although he never possessed it before; as, where a man purchases a specific chattel, for example, the horse Napoleon, and he pays for him or tenders the price to the seller, if the seller refuses to deliver him he may take him, if he can do so peaceably; but if the sale be not of a specific chattel; as, if a man sell one hundred bushels of wheat to be taken out of a certain heap, the purchaser cannot justify taking it, because no property in the wheat passed to the buyer until the wheat was measured and separated from the mass.

2448. By *entry or re-entry of lands*, which is a kind of recaption; is meant the resumption or retaking possession of land which the party lately had. A celebrated writer¹² says that the owner of such land, after being disseised, if he cannot re-enter by fair means, may legally regain the possession thereof by force,¹³ unless he were put to the necessity of bringing his action by having neglected to re-enter in due time, that is, twenty years. But this dictum, unsupported by any authority, may well be questioned,¹⁴ for it is a universal principle that whenever a man has an opportunity to apply to the law for the redress of an injury, he is bound to invoke its aid and not take the remedy in his own hands, which might lead to a breach of the peace. If the owner enters by force, he may be indicted for a breach of the peace;¹⁵ but he will retain the lawful possession of his estate, and the original wrong doer cannot maintain a civil action for such regaining possession as far as regards any alleged injury to the house or land, or the expulsion,¹⁶ though he may maintain an action for any unnecessary personal injury which he may have sustained, or for any damage to his furniture which could have been avoided.¹⁷

2449. When discussing the remedy for a nuisance in a preceding title,¹⁸ we considered the right which any one who was annoyed by it had to remove it, and the remedy afforded by courts of equity will be considered under the head of equity.¹⁹

2450. A *distress* is defined to be the taking of a personal chattel without legal process from the possession of the wrong doer into the hands of the party aggrieved; as, a pledge for the redress of an injury, the performance of a duty, or the satisfaction of a demand.²⁰ The thing seized is also called a distress.

This remedy is coeval with the common law, and its origin appears to be concealed in the night of time. It probably was not fully established till some period during what are called the feudal times. When the feudal system prevailed in its fullest vigor, the reasons for which a distress can now be made were sufficient to cause a forfeiture of the feud. In the course of time this system of forfeiture was changed, and the law was mitigated so far that the lord

¹¹ *Lickbarrow v. Mason*, 2 Term, 75; *The Constantia*, 6 C. Rob. Adm. 324. See before, 959.

¹² *Hawkins*, P. C. B. 1, c. 28, n. 3, s. 1.

¹³ *Mussey v. Scott*, 32 Vt. 82.

¹⁴ See *Rex v. Scott*, 3 Burr, 1698; *King v. Wilson*, 8 Term, 357.

¹⁵ *Commonwealth v. Haley*, 4 All. Mass. 318.

¹⁶ *Winter v. Stevens*, 9 All. Mass. 526; *Krevet v. Meyer*, 24 Mo. 107; *Fuh v. Dean*, 26 Mo. 116.

¹⁷ It is a mooted question whether an excess of force renders the entry void *ab initio*, or merely gives a claim for damages. Many cases hold that, a forcible entry being proved, a writ of restitution must be awarded, whether the right of peaceable entry existed or not. *McCauley v. Weller*, 12 Cal. 500; *Beeler v. Cardwell*, 29 Mo. 72; *Tucker v. Phillips*, 2 Metc. Ky. 416.

¹⁸ Before, 2387.

¹⁹ Beyond, 3799.

²⁰ 3 Sharswood, Blackst. Comm. 6.

was entitled to seize the distress, and afterward to sell it. Though the law has been changed in this particular, still it is important to remember the origin of this remedy; for if it would be known in any given case whether at common law recourse may be had to a distress to enforce the duties connected with a tenure, we have only to ascertain whether, if the ancient law had continued unchanged, the tenement would have been forfeited by their non-observance. Although this rule is simple and easy of application, it may be well to illustrate it by one or two examples: If the landlord has aliened the seignory or reversion, he is no longer a party to the tenure, and therefore, as no forfeiture of the land can accrue to him, he cannot distrain, so that the distrainor must be entitled to the reversion when the distress is made; for the same reason, if he has accepted a new tenant, no distress can be taken for the arrears of rent due from the former one. It has, however, been held that if the tenant holds over, a distress may be made while he continues in possession.

2451. It is the opinion of the learned writer²¹ that this notion of distraining was derived from the civil law, which gave "the creditor the faculty of selling out of several pledges which were pledged to him that which he chose to pay the obligation or discharge the claim which was due to him;" the words of the Pandects, which he cites, are *creditoris arbitrio permittitur, ex pignoris sibi obligatis quibus velit distractis, ad suum commodum pervinere.*²² A considerable difference will easily be perceived between the Roman and our law on this subject. In the former the pignus and hypotheca were pledges delivered by the debtor, or taken by the creditor under particular stipulations; whereas the remedy of distress by the English law, which has been adopted with some ameliorations in many parts of the United States, of taking a pledge or security out of the hands of another for the satisfaction of a demand, exists without his consent.

2452. In some of the states of the Union the essential parts of the statute and common law of England have been adopted in relation to distresses. This is the case in Pennsylvania, New Jersey, Delaware, Indiana, Illinois, Maryland, and Virginia.²³ In Kentucky, Florida, Texas, and Georgia, and perhaps some other states, the right of distress exists, but it is placed under some wise restrictions; the landlord must make application to a judge or other officer designated by the law, make oath that the rent is due, and obtain a warrant from him, by virtue of which a distress is made by a sheriff or constable. In Massachusetts,²⁴ Alabama, Mississippi, North Carolina, New York, Tennessee, and Ohio the right of distress does not seem to exist;²⁵ and in North Carolina it has been judicially declared to be of no force in the state.²⁶ The remedy in Louisiana is not the same, but the law gives a lien in certain cases on the goods of the tenant, called the lessor's privilege.²⁷ In the New England states, where they attach property on original or mesne process, the law of distress for rent, as practiced in England, does not exist.²⁸

2453. A distress may be made for several purposes, but always to enforce an obligation either conventional or legal, or to prevent a wrong.

Cattle may be distrained damage feasant, but frequently the action of trespass is a preferable remedy. They cannot be so distrained by a person who has a

²¹ Gilbert, Distresses, 2.

²² Dig. 20, 5, 8. The creditor has the faculty of selling of several things which have been pledged to him that which he may choose to satisfy his claim.

²³ 3 Kent, Comm. 472, 4th ed.

²⁴ 4 Dane. Abr. c. 110, art. 3, p. 126.

²⁵ Guild v. Rogers, 8 Barb. N. Y. 502.

²⁶ Dalyleish v. Grandy, Cam. & N. No. C. 22; Deaver v. Rice, 4 Dev. & B. No. C. 431.

²⁷ La. Civ. Code, arts. 2675-2679.

²⁸ 3 Kent, Comm. 638, 10th ed.; 2 Dane, Abr. 451.

mere possession and not a legal title to the land. They must be taken while doing damage, and not after it is done, or while they are off the land. After they have been distrained the cattle must not be beaten, nor worked, nor used.²⁹

By virtue of sundry legislative acts which give that remedy, a distress may be made of goods for the purpose of enforcing a duty; as, to pay taxes.

The principal use of the remedy by distress is to enforce the payment of rent. In the discussion of the subject it will be convenient to consider the kinds of rent for which a distress may be made, the persons who may make it, the goods which may be distrained, the time when the distress may be made, where it may be made, the manner of making it and of disposing of the goods distrained, and the effect of a distress. But it must be remembered that this is the remedy at common law, and as it has been altered by the English statutes, varied in some points in perhaps most of the states of the Union.

2454. *A distress may in general be taken for any kind of rent in arrear, the detention of which beyond the day of payment is an injury to him who is entitled to receive it.*³⁰

The rent must be reserved out of a corporeal hereditament, and must be certain in its quantity, extent, and time of payment, or at least be capable of being reduced to a certainty.³¹ When the rent is a certain quantity of grain, the landlord may distrain for so many bushels in arrears and name the value, in order that, if the goods should not be replevied or the goods tendered, the officer may know what amount of money is to be raised by the sale, and in such case the tenant may tender the arrears in grain.³² And so where the rent may be reduced to a certainty; as when, on the demise of a grist mill, the lessee was to render one-third of the toll, it was held the lessor might distrain for the rent.³³

But when the rent is not certain and it cannot be reduced to a certainty, no distress can be made; as, where by the agreement the lessee was to pay no rent, and in lieu of it he was to make repairs;³⁴ or where the tenant agreed instead of rent to render "one-half part of all the grain of every kind, and of all the hemp, flax, potatoes, apples, fruit, and other produce of whatever kind that should be planted, raised, sown, or produced on or out of the demised premises," the landlord cannot perhaps distrain at all on account of the uncertainty.³⁵

2455. With respect to *the amount of the rent* for which the lessor may make a distress, it may be laid down as a general rule that whatever can properly be considered as a part of the rent may be distrained for, without considering the particular mode in which it is agreed to be paid; so that where a person entered into possession of certain premises, subject to the approbation of the landlord, which was afterward obtained by agreeing to pay rent in advance from the time he came into possession, it was determined in England that the landlord might distrain for the whole sum accrued before and after the agreement.³⁶

²⁹ 1 Chitty, Pract. 656-659.

³⁰ 3 Sharswood, Blackst. Comm. 6.

³¹ Coke, Litt. 96, a; Diller v. Roberts, 13 Serg. & R. Penn. 64; Wells v. Hornish, 3 Penn. 30.

³² Warren v. Forney, 13 Serg. & R. Penn. 52. See Jones v. Grundrim, 3 Watts & S. Penn. 531; Helvor v. Pott, 3 Penn. St. 179.

³³ Fry v. Jones, 2 Rawle, Penn. 11.

³⁴ Grier v. Cowan, Add. Penn. 347.

³⁵ Warren v. Forney, 13 Serg. & R. Penn. 52. But see Reinhart v. Olwine, 5 Watts & S. Penn. 157.

³⁶ Cowp. 784. In New York it was determined that an agreement that the rent should be paid in advance is a personal covenant on which an action lies, but not distress. 1 Johns. N. Y. 384. The supreme court of Pennsylvania declined to decide this point, as it was not necessarily before them. Diller v. Roberts, 13 Serg. & R. Penn. 60. See Martin's Appeal, 5 Watts & S. Penn. 221.

No distress can be made for interest on rent;³⁷ but it may be recovered from the tenant by action, unless under particular circumstances.³⁸

Nor can a distress be taken for a *nomine pœnæ*, unless a special power to distrain be annexed to it by deed.³⁹ By *nomine pœnæ* is meant the name of a penalty incurred by the lessee to the lessor for the non-payment of rent on the day appointed by the lease or agreement for its payment;⁴⁰ it is usually a gross sum of money, though it may be anything else appointed to be paid by the tenant to the réversioner, if the duties are in arrear, in addition to the duties themselves.⁴¹

2456. When the landlord is *sole owner* of the estate out of which the rent is payable to him, he may, of course, distrain in his own right. He must then have the right of reversion, for if he has parted with that, he has no title.⁴²

2457. *Joint tenants*, when convenient, should all join in making the distress; and this is the better way, as it removes difficulties which may afterward arise. Still, however, as they have, each of them, an estate in every part of the rent, each may distrain alone for the whole, although he must afterward account with his companions for their respective shares of the rent.⁴³

2458. *Tenants in common* do not, like joint tenants, hold by one title and by one right, but by different titles, and have several estates; one cannot, therefore, distrain for the whole of the rent, for if he did, he would distrain for that to which he has no title; each should, therefore, distrain separately for his share.⁴⁴ But when from necessity this cannot be done, as where the thing due is a horse, which is incapable of division, all the tenants in common must join in the distress.⁴⁵ Each tenant in common is entitled to receive from the lessee his proportion of the rent; and, therefore, when a person holding under two tenants in common paid the whole rent to one of them, after having received a notice to the contrary from the other, it was held the party who gave the notice might afterward distrain.⁴⁶

As tenants in common have no original privity of estate between them as to their respective shares, one may lease his part of the land to the other, rendering rent, for which a distress may be made; as, if the land had been demised to a stranger.⁴⁷

2459. At common law, in cases of distrainable rents, the distress was incident to the reversion, except in the case of a rent charge. And as in all cases where the wife has an estate of freehold only, or of freehold of inheritance, the immediate freehold of such lands in leases is not in the husband alone, but in the husband and wife, in right of the wife; when distress is made in respect of such reversion, it ought to be joint, as following the nature of their estate, whether the rent accrued before or after the coverture.⁴⁸

But where the reversion is a chattel real, as, if a woman be possessed of a term of twenty years, and before coverture makes a lease for ten years, the husband has a right during the coverture to vest this chattel in himself, by reducing it in a possession, and in that case, as the wife would have no right, he must alone distrain for the rent.

2460. *A tenant by the curtesy* has an estate of freehold in the lands of his wife, and in contemplation of law a reversion of all lands of the wife leased for years or lives, and may distrain at common law for rents reserved thereon.

³⁷ *Bantleon v. Smith*, 2 Binn. Penn. 146.

³⁸ *Obermyer v. Nichols*, 6 Binn. Penn. 159.

⁴⁰ 2 Litt. Ab. 221.

⁴² Before, 2450.

⁴⁴ Litt. s. 317.

⁴⁶ *Harrison v. Barnby*, 5 Term, 246.

⁴⁸ *Brooke, Abr. Avowry*, pl. 70.

⁸⁹ See Poph. 92.

⁴¹ *Hammond*, Nisi P. 411, 412.

⁴³ 3 Salk. 204.

⁴⁵ *Coke*, Litt. 197, a.

⁴⁷ *Brooke, Abr. Distress*, pl. 65.

The chattels real of the wife on her death vest absolutely in the husband; and if out of such chattel real a rent is payable, he alone is entitled to distrain.

2461. *A woman* may be endowed of rent as well as of land; if, therefore, a husband, tenant in fee, make a lease for years, reserving rent, and die, his widow shall be endowed of one-third part of the reversion by metes and bounds, together with a third part of the rent.⁴⁹ The rent in this case is apportioned by the act of law, and therefore if the widow be endowed of a third part of a rent in fee, she may distrain for that third part, and the heir shall have the right to distrain for the other part of the rent.⁵⁰

2462. *A tenant for life*, whether for his own life or that of another, has an estate of freehold, and when he makes a lease for years, reserving rent, he is entitled to distrain upon the lessee. It may here be remarked that, at common law, if a tenant for life made a lease for years, if he should so long live, at a certain rent payable quarterly, and died before the quarter-day, the tenant was discharged of that fraction of a quarter's rent by the act of God,⁵¹ for no one was entitled to recover it; but this was remedied by statute of 11 Geo. II, c. 19, s. 15, which gives an action to the executors or administrators of the tenant for life; and this equitable provision has been adopted in perhaps all the states of the Union.

2463. *The heir* when entitled to the reversion may distrain for rent arrear which becomes due after the ancestor's death; and in order to ascertain whether the rent became due before or after the death of the ancestor, we must recollect that the rent does not become due for this purpose until the last minute of the natural day; and if the ancestor die between sunset and midnight, the heir and not the executor shall have the rent.⁵² And if the rent be payable at one of two periods, at the choice of the lessee, and the lessor die between them, the rent being unpaid, it will go to the heir.⁵³

2464. *Devisees*, like heirs, may distrain in respect of their reversionary estate; for by a devise of the reversion the rent will pass with its incidents.⁵⁴

2465. *Trustees* in whom the legal estate is vested, as trustees of a married woman or assignees of an insolvent, may of course distrain in respect of their legal estates, in the same manner as if they were beneficially interested therein.

2466. *Guardians* may make leases of their ward's lands in their own names which will be good during the minority of the ward, and consequently, in respect of such leases, they possess the same powers of making distress as other persons granting leases in their own rights.⁵⁵

2467. In general, *goods found upon the premises* demised to a tenant are liable to be distrained by a landlord for rent, whether such goods belong in fact to the tenant or to other persons.⁵⁶ But such goods are sometimes privileged from distress, either absolutely or conditionally.

2468. *Goods* are absolutely privileged from distress for various reasons:

Because they are protected on account of the rights of their owners. Of this kind are the goods of a person who has some interest in the land, jointly

⁴⁹ Coke, Litt. 32, a.

⁵⁰ Brooke, Abr. *Avowry*, pl. 139.

⁵¹ Clunn's case, 10 Coke, 128.

⁵² 1 Saund. 287. For the purpose of making a re-entry, the rent is considered due at sunset. Comyn, Dig. *Rent*, D, 7; Bacon, Abr. *Rent*, I; Jackson v. Harrison, 17 Johns. N. Y. 66.

⁵³ Clunn's Case, 10 Coke, 128, b.

⁵⁴ Sacheverell v. Frogate, 1 Ventr. 161.

⁵⁵ Shopland v. Rydler, Croke, Jac. 55, 98.

⁵⁶ In some states this right is limited. In Texas, a distress can be made only on the crop which grew upon the land, and even that is restricted as to time. Dallam, Dig. of Laws of Texas, 199, 200.

with the distrainer, as those of a joint tenant, which, although found upon the land, are not subject to distress. The goods of a former tenant, rightfully on the land, cannot be distrained for another's rent; for example, a tenant at will, if quitting upon a notice from his landlord, is entitled to the emblements or growing crops; and, therefore, even after they are reaped, if they remain on the land for the purpose of husbandry, they cannot be distrained for rent due by the second tenant, and they are equally protected in the hands of his vendee.⁵⁷ The goods of an ambassador or other foreign minister who is protected by act of congress from all actions cannot be distrained.

Because no man can have property in them. As every thing which is distrained is presumed to be the property of the wrong doer, it follows that things in which no man can have an absolute and valuable property, as cats and dogs, and animals *feræ naturæ*, cannot be distrained; because in animals *feræ naturæ* there can be no property without possession, and as the property in them is lost with the loss of possession, they are incapable of being held as a pledge.⁵⁸ Yet if deer, which are of a wild nature, are kept in a private enclosure for the purpose of sale or profit, this so far changes their nature, by reducing them to a kind of stock or merchandise, that they may be distrained for rent.⁵⁹

Because they cannot be restored to the owner in the same plight in which they were taken; such as milk, fruit, and the like, which would be spoiled.⁶⁰

Because they are fixed to the freehold and make a part of it, or are constructively annexed to it. Things affixed or annexed to the freehold, as furnaces, windows, doors, and the like, cannot be distrained, because they are not personal chattels, but belong to the realty.⁶¹ And this rule extends to such things as are essentially a part of the freehold, although for a time separated from it, as a millstone removed to be picked; for this is a matter of necessity, and it remains in contemplation of law a part of the freehold.⁶² Deeds which relate to the realty would probably be also exempted from distress. Upon the same principle of annexation, grass, corn growing in the ground, and the like, could not be distrained, but the English statute of 11 Geo. II, c. 19, s. 8, the principles of which have been adopted, perhaps, in most of the states of the Union, enables the landlord or lessor to seize all sorts of grass, hops, fruits, roots, pulse, or other product whatsoever which shall be growing on any part of the premises demised as a distress for rent. It has, however, been held that the word product is confined to the products of a similar nature with those specified in the statute, to all of which the process of becoming ripe, and of being cut, gathered, made, and laid up when ripe, is incidental, and therefore does not extend to trees, shrubs, and plants growing in a nursery ground.⁶³

Because it is against the policy of law that they should be distrained. Goods are privileged in cases where the proprietor is either compelled from necessity to place his goods upon the land, or where he does so for commercial purposes. Natural justice would require that the goods of the defaulter only should be distrained to pay his rent. It is for this reason that goods placed upon the land as a matter of necessity are not liable to be distrained; such as the goods of a traveller at an inn, or goods placed upon the land of a neighbor to save them from fire, or in case of goods put on shore to save them from shipwreck. Again, the interests of the community require that commerce should be encouraged; for adventurers would not engage in speculations if the property embarked were

⁵⁷ *Eaton v. Southby*, Willes, 131.

⁵⁸ *Hammond*, Nisi P. 375.

⁵⁹ 3 Sharswood, Blackst. Comm. 7

⁶⁰ 3 Sharswood, Blackst. Comm. 9.

⁶¹ *Coke*, Litt. 47, b.

⁶² *Brooke*, Abr. *Distress*, pl. 23; *Gorton v. Faulkner*, 4 Term, 567.

⁶³ *Clark v. Gaskarth*, 8 Taunt. 431.

to be made liable for debts which they never contracted. Hence, goods landed at a wharf or deposited in a warehouse on storage cannot be distrained.⁶⁴ On the same principle it has been decided that the goods of a boarder are not liable to be distrained for rent due by the keeper of the boarding house,⁶⁵ unless used by the tenant with the boarder's consent.⁶⁶ Valuable things in the way of trade are not liable to distress; as, a horse standing in a smith's shop to be shod, or, as above stated, in a common inn; or cloth at a tailor's house to be made into a coat; or corn sent to a mill to be ground; for these are protected for the benefit of trade.⁶⁷

Because they are in the custody of the law; for the distrainer cannot lawfully take them in possession. Goods taken in execution cannot therefore be distrained; but goods which have been distrained and replevied are no longer in legal custody, and they may be distrained by another landlord for subsequent rent.⁶⁸

Because they are protected by some legislative enactment. In some states goods are protected from distress or execution to a certain amount; in others, certain tools, furniture, school books, and such other things as are deemed necessary to a poor family, are exempted from distress, execution, or sale.

2469. Having considered in the preceding section what goods are absolutely exempt from distress, it remains to be ascertained what *goods* are *conditionally privileged*. These may be distrained, but only under certain circumstances. They are:

Beasts of the plough, which are exempt if there be a sufficient distress besides on the land whence the rent issues.⁶⁹

Implements of trade; as, a loom in actual use, and there is a sufficient distress besides.⁷⁰

Other things in actual use; as, a horse on which a man is riding, an axe in the hands of a person cutting wood, and the like.⁷¹

2470. At common law, the distress must be made *during the continuance of the lease*, as the relation of lessor and lessee must exist at the time the distress is made; but it has been decided, contrary to this general rule, that a lessor may seize and distrain the goods of a tenant holding over.⁷² The distress cannot be made till the rent is due by the terms of the lease; as rent is not due, for this purpose, until the last minute of the natural day on which it is reserved, it follows that a distress for rent cannot be made on that day.⁷³ As a general rule, a previous demand is not necessary, although there is a clause in the lease that the lessor may distrain for rent, "being lawfully demanded,"⁷⁴ the making of the distress, like the commencement of an action, being a demand in such case. It is however advisable to make a demand. But where a lease provides for a special demand, as if the clause were that if the rent should

⁶⁴ *Brown v. Simms*, 17 Serg. & R. Penn. 138; *Himely v. Wyatt*, 1 Bay, So. C. 102; *Walker v. Johnson*, 4 McCord, So. C. 552; *Thompson v. Masheter*, 1 Bingham 283; *Francis v. Wyatt*, Burr. 1498, 1502; *Owen v. Boyle*, 22 Me. 47, where the meaning of warehouse is explained. See *Bevan v. Crooks*, 7 Watts & S. Penn. 452; *Elford v. Clark*, 2 Brev. So. C. 88.

⁶⁵ *Riddle v. Welden*, 5 Whart. Penn. 9.

⁶⁶ *Mathews v. Stone*, 1 Hill, N. Y. 565. See 5 Blackf. Ind. 489.

⁶⁷ 3 Sharswood, Blackst. Comm. 8; *Youngblood v. Lowry*, 2 McCord, So. C. 39. See *Hoskins v. Paul*, 4 Halst. N. J. 110.

⁶⁸ *Woglam v. Cowperthwaite*, 2 Dall. 68.

⁶⁹ *Coke*, Litt. 47, a; *Bacon*, Abr. *Distress*, B.

⁷⁰ *Simpson v. Hartopp*, Willes 517.

⁷¹ *Coke*, Litt. 47, a.

⁷² *Keilw.* 96. Before, **2450**. By the statute in Pennsylvania a landlord may distrain at any time after the termination of the term. *Moss' Appeal*, 35 Penn. St. 162.

⁷³ 1 Saund. 287; *Coke*, Litt. 476, n. 6.

⁷⁴ *Bacon*, Abr. *Rent*, I; *Bradby*, Dist. 124.

happen to be behind, it should be demanded at a particular place, not on the land, or be demanded of the person of the tenant, then such a special demand is requisite to support the distress.⁷⁵

2471. A distress for rent cannot be made during the night, but must be made in the day time; ⁷⁶ though a distress damage feasant may be made during the night.⁷⁷

2472. A distress may be taken either on the land or off the land.

2473. When a distress is taken for the arrears of a duty arising out of a tenure or charge upon land, it may be seized upon any part of the land out of which such duty issues, or on which it is chargeable, and the entire rent is chargeable on every part of the land; where, therefore, there is a lease of a tract of land, which is afterward held by several tenants, the lessor or landlord may distrain for the whole rent upon the land of any of them.⁷⁸ But the thing seized must be upon the land, and not merely attached to it by a rope; as, a barge floating in a river, attached to the leased premises by a rope, is not liable to distress.⁷⁹

It follows from the principle already laid down that if two separate pieces of land are let by two separate demises, although both are contained in one lease, a joint distress cannot be made for them, for this would be to make the rent of one issue out of the other.⁸⁰ But when lands lying in different counties are let together by one demise, at one entire rent, and it does not appear that the lands are not separate from each other, one distress may be made for the whole rent.⁸¹

When there is a house upon the leased premises the distress may be made in the house; an outer door or other inlet cannot be broken to make a distress, but if either be open, an inner door may be broken for the purpose, taking care, in all cases, first to make a demand, and also not unnecessarily, to do more damage than is requisite.⁸²

2474. At common law, when the duty arises out of a tenure, and the lord, coming to distrain, sees the beasts upon the land, and before he can seize them, the tenant drives them off, the lord may follow the cattle freshly into any place, even a public highway, to which they are driven, and there distrain them. This is on account of the fraud of the tenant, for, if the cattle go away of their own accord, he cannot pursue and take them.⁸³

The English statutes of Anne and George,⁸⁴ the principles of which have been incorporated in the laws of several states, provide that if any lessee shall fraudulently or clandestinely carry off his goods from the premises demised in order to prevent the landlord's distress, the landlord may, within thirty days afterward, distrain them as if they had continued on the premises, provided they be not sold within that time for a valuable consideration and without notice.

To bring a case within the act the removal must take place after the rent becomes due; it must be secret, and not made in open day, for a removal made openly cannot be said to be clandestine within the meaning of the act.⁸⁵ It has, however, been made a question whether goods are protected that were fraudulently removed the night before the rent became due.⁸⁶

⁷⁵ Bacon, Abr. *Rent*, I; Plowd. 69.

⁷⁷ Heyden *v.* Godsale, Palm. 280.

⁷⁹ 6 Bingham. 150.

⁸¹ Ld. Raym. 55; 12 Mod. 76.

⁸³ 11 Hen. VII, M. 11, p. 4.

⁸⁴ 8 Anne, c. 14, s. 2; 11 Geo. II, c. 19, s. 1 and 2. In Illinois a distress can be made only on goods within the county. *Uhl v. Dighton*, 25 Ill. 154.

⁸⁵ *Watson v. Maine*, 3 Esp. 15; *Grace v. Shively*, 12 Serg. & R. Penn. 217.

⁸⁶ *Furneaux v. Fotherby*, 4 Campb. 135.

⁷⁶ Coke, Litt. 142, a.

⁷⁸ Rolle, Abr. 617.

⁸⁰ Cas. temp. Hardw. 245.

⁸² Comb. 47; Cas. temp. Hard. 168.

Though the landlord may distrain upon the goods of a stranger on the demised premises, unless they are exempted for some of the causes above mentioned, because he is not required to make any discrimination between such goods and those of his tenant when the latter appears to be the owner,⁸⁷ yet the goods of a stranger are liable only while they are on the premises.⁸⁸

2475. As to *the manner of making a distress* we shall consider by whom the distress is to be made, the form of seizure, the quantity of goods to be taken, and the proceedings after the seizure.

2476. At common law a distress for rent may be made either by the person to whom it is due, or by a constable or other officer properly authorized by him as his bailiff, and the latter is the preferable mode. But in some of the states the laws require that the distress should be made by a public officer by virtue of a warrant issued by a magistrate.

If the distress be made without any authority from an officer, the lessor should properly authorize the bailiff to make the distress for him; for this purpose he should give him a written authority, or, as it is usually called, a warrant of distress; but a subsequent authority and recognition given by the party for whose use the distress is made is sufficient.⁸⁹

2477. When the bailiff is provided with the requisite authority to make a distress he should take the things subject to the distress, but he need not lay hands upon every individual chattel; upon entering the house he may take hold of a chair or any other thing, and declare that he seizes it in the name of all the goods within the dwelling.⁹⁰ He should declare that he takes them as a distress for the sum expressed in the warrant to be due by the tenant to the landlord, and that he takes them by virtue of such warrant, which warrant, if required, he ought to show;⁹¹ but although he does not declare the cause for which he makes the distress, yet it is not unlawful.⁹²

2478. A distress should be made for the *whole demand* at one time, and the landlord should not harass the debtor with repeated distresses. By the whole demand is meant that which has accrued due at a day of payment, and not the gross amount of several sums which have each become due at distinct days. For example, if rent is reserved quarterly and remains unpaid for a whole year, the arrears of each quarter are distinct demands, and separate distresses may be made for each.⁹³ But the lessor is not bound to make separate distresses, as for rent due on different demises.⁹⁴

When he distrains for the whole demand, but mistakes the value of the chattel taken, supposing it to be equal in value to the duty owing, when in fact it is not, he may distrain anew. In like manner he may make a new distress when he could not find a sufficiency of goods at the time of making the first.⁹⁵

2479. After the goods are seized the distrainer has several duties to perform. Among these are:

To make an inventory of the goods distrained upon, a copy of which should be delivered to the lessee, together with a notice of taking of such distress, with a statement of the cause of taking the same.

The distrainer may leave or impound the distress on the premises for the

⁸⁷ *Spencer v. McGowen*, 13 Wend. N. Y. 256; *Hionely v. Wyatt*, 1 Bay, So. C. 102; *Reeves v. McKenzie*, 1 Bail. So. C. 497. The separate property of the tenant's wife may be distrained. *Blanche v. Bradford*, 38 Penn. St. 344.

⁸⁸ *Adams v. La Comb*, 1 Dall. 440.

⁸⁹ *Hammond*, Nisi P. 382.

⁹⁰ *Dod v. Monger*, 6 Mod. 215.

⁹¹ 1 Leon. 50.

⁹² 45 Edw. III, E. 13, p. 19.

⁹³ 2 Edw. III, M. 10, p. 32; *Gilbert*, Distr. 65.

⁹⁴ See *Legg v. Strudwick*, 2 Salk. 414; *Birch v. Wright*, 1 Term, 380.

⁹⁵ *Bradby*, Distr.; *Gilbert*, Distr. 64.

time allowed by statute, but he becomes a trespasser afterward. As in many cases it is desirable for the sake of the tenant that the goods should not be sold as soon as the law permits, it is usual for him to sign an agreement or consent to their remaining on the premises for a longer time in the custody of the distrainer or of a person appointed by him for that purpose.

While in his possession the distrainer has no right to use or work the cattle distrained, unless it be for the owner's benefit; as, to milk a cow, or the like.⁹⁶

Before the goods are sold they must be appraised by such persons as the statute of the state directs in the manner pointed out by the act.

The next requisite is to give a lawful notice of the time and place of sale of the things distrained; after which, if they have not been replevied, they may be sold by the proper officer, who may apply the proceeds to the payment and satisfaction of the rent, and the expenses of the distress, appraisement, and sale. The overplus, if any, is to be returned to the tenant.

2480. When a distress is made the rent is satisfied to the value of the goods, unless they are returned to the lessee by mutual consent. And in case there has been a forfeiture of a lease, and rent has accrued since, a distress for such rent will be a waiver of the forfeiture.

2481. *The remedies by the act of both parties* are two in number, namely, accord and arbitration.

2482. *Accord* is the settlement of a dispute or the satisfaction of a claim by an executed agreement between the party injuring and the party injured.⁹⁷

2483. When there is but one party on each side, each must either by himself or his agent act and take part in the agreement for an accord and satisfaction. When there are several joint obligors or joint trespassers, and the accord and satisfaction is made by one of them, it is good and available as to all.⁹⁸ If, on the contrary, there are several joint claimants, and one of them in the name of the whole agrees to the accord and receives satisfaction, it will bind the rest though no authority appears from them.⁹⁹

2484. *The requisites of an accord* are the following:

The accord must be legal. An agreement to drop a criminal prosecution as a satisfaction for a larceny, the thief returning the goods and paying the owner damages, is void, and will be no bar to a future prosecution.

It must be advantageous to the party claiming the performance of a contract or damages for an injury; hence, restoring to the plaintiff his chattels or his land, of which the defendant has wrongfully dispossessed him, will not be a consideration to support a promise by the plaintiff not to sue him for those injuries.¹⁰⁰ In contracts for the payment of a sum of money the mere payment of a less sum will not be a good accord and satisfaction;¹⁰¹ but if the money was paid before it became due,¹⁰² or at a different place from that appointed for the payment, or, in case of a simple contract for a larger sum a negotiable security given for a less sum may be a good satisfaction. The acceptance of a collateral

⁹⁶ 5 Dane, Abr. 34.

⁹⁷ See generally, Bacon, Abr. *Accord*; Comyn, Dig. Pleader, 2 V. 8; 3 Chitty, Com. Law, 687 to 698; 2 Greenleaf, Ev. § 28.

⁹⁸ *Strang v. Holmes*, 7 Cow. N. Y. 224; *Ruble v. Turner*, 2 Hen. & M. Va. 38; *Dafresne v. Hutchinson*, 3 Taunt. 117; *Merchants' Bank v. Curtiss*, 37 Barb. N. Y. 317.

⁹⁹ *Wallace v. Kelsall*, 7 Mees. & W. Exch. 264.

¹⁰⁰ Bacon, Abr. *Accord*, A; *Perkins*, Conv. § 749; *Keeler v. Neal*, 2 Watts, Penn. 424.

¹⁰¹ *Booth v. Campbell*, 15 Md. 569; *Sullivan v. Finn*, 4 Greene, Iowa, 544; contra by statute, *Bisbee v. Ham*, 47 Me. 543. This rule holds where the contract is for the payment of a sum certain. A receipt for a less sum may be a good satisfaction where the sum is uncertain or in dispute. *Hall v. Smith*, 10 Iowa, 45. And in all cases a receipt and discharge is, *prima facie*, a good satisfaction. *Robbins Co. v. Brewer*, 48 Me. 481.

¹⁰² *Bowker v. Childs*, 3 All. Mass. 434; *Fenwick v. Phillips*, 3 Metc. Ky. 87.

thing of value, whenever and wherever delivered, is a good satisfaction; or a mutual agreement to discontinue two cross actions, acted on accordingly, will be a good accord.¹⁰³

It must be certain; hence, an agreement that the defendant shall relinquish the possession of a house in satisfaction of a claim is not valid unless it be also agreed at what time it shall be relinquished.¹⁰⁴

The defendant must be privy to the contract. If, therefore, the consideration for the promise not to sue proceeds from another, the defendant is a stranger to the agreement, and the circumstance that the promise was made to him will render the agreement of no avail. But if the accord has been made by authority of the defendant, it will be good, although the subject matter did not proceed from him; as, when the obligation or security of a third person who is *sui juris* is accepted in lieu of the claim, it is sufficient.¹⁰⁵

The accord must be executed, for till then it is no satisfaction. Whether an accord with a tender of satisfaction without acceptance is sufficient is a point upon which the authorities are not entirely agreed, as may be seen by a reference to the cases mentioned in the note.¹⁰⁶

2485. *An accord with a satisfaction lawfully made is a complete bar to a future action; it is a kind of payment of the debt. It is a species of sale by the debtor to the creditor, but it differs from it in this, that it is not valid until the delivery of the article by the debtor to the creditor; and there is no warranty in the thing given except perhaps the title, for in regard to this it cannot be doubted that if the debtor gave on an accord and satisfaction the goods of the creditor himself through a mistake, or of another person, there would be no satisfaction.*

2486. The second mode of settling disputes by the acts of both parties without a suit is by arbitration, of which, however, there are several kinds, some of them being made under a rule of court, as will be more fully explained hereafter.

An *arbitration* is a submission and reference of a matter in dispute concerning property, or in relation to a personal wrong, to the decision of one or more persons, called arbitrators, who are to render a judgment thereupon, called an award.

2487. *The submission is an agreement by which the parties name and appoint arbitrators to decide the matter in dispute between them, and bind themselves reciprocally to perform the award, or what shall be arbitrated.*

2488. As to its form the submission may be by parol, with mutual promises to perform the award; it may be by deed, containing a similar agreement, or by a rule of court, or by any other mode pointed out by statute.¹⁰⁷ It is usual in all cases to state within what time the arbitrators shall meet and that their award shall be delivered before a particular day.

¹⁰³ *Foster v. Trull*, 12 Johns. N. Y. 456; *Reid v. Hibbard*, 6 Wisc. 175. If the satisfaction entirely fails, the accord is not good. *Clark v. Bowen*, 22 How. 270.

¹⁰⁴ *Samford v. Cutliffe*, Yelv. 125.

¹⁰⁵ *Booth v. Smith*, 3 Wend. N. Y. 66; *Kearslake v. Morgan*, 5 Term, 513; *Gullen v. McGillicuddy*, 2 Dan. Ky. 90; *Wentworth v. Wentworth*, 5 N. H. 410.

¹⁰⁶ *Cumber v. Vane*, 1 Strange, 425; *Heathcote v. Crookshanks*, 2 Term, 24; *Lynn v. Bruce*, 2 H. Blackst. 317; *Clark v. Dinsmore*, 5 N. H. 136; *James v. David*, 5 Term, 141; *Coit v. Houston*, 3 Johns. Cas. N. Y. 249; *Russell v. Lytle*, 6 Wend. N. Y. 390; 1 Smith, Lead. Cas. 146; *Preston v. Grant*, 34 Vt. 201; *Blackburn v. Ormsby*, 41 Penn. St. 97; *Coquillard v. French*, 19 Ind. 274; *Mansur v. Keaton*, 46 Me. 346. The better opinion is that a tender is not sufficient to constitute a good accord and satisfaction.

¹⁰⁷ A submission need not be under seal unless required by statute. *White v. Fox*, 29 Conn. 570. In Illinois the submission under the statute must be sealed. *Hamilton v. Hamilton*, 27 Ill. 158.

2489. As to the matters referred, it is to be observed that the extent of the submission may be various, according to the pleasure of the parties; it may be of only one or of all civil matters in dispute, but no criminal matter can be referred.

When a case already in court is submitted to arbitration, the arbitrator may determine such additional matters as the court could allow to be brought in by amendment.¹⁰⁸ The arbitrator has the same power as the court.¹⁰⁹ Except under statutes costs cannot be awarded unless included in the submission.¹¹⁰

2490. A submission is somewhat similar to a compromise; by the former the parties select judges who are to decide how the parties are to settle their disputes; by the latter, the parties themselves become their own judges, and arrange the mode of settlement. In both, the parties may bind themselves under a penalty to fulfil the agreement.

2491. When there is but one party to the submission on each side they both must agree, but this need not be done in person; and sometimes they will be presumed to have given their consent when there is no evidence of it; for example, an attorney may refer a matter to arbitration without any special authority of his client,¹¹¹ so may selectmen of a town, who are its general agents,¹¹² or the agents of a town specially appointed to prosecute or defend a suit.¹¹³

2492. One who is appointed by law to manage the affairs of another may submit a matter in dispute between himself, in his character of guardian or trustee, and another.¹¹⁴

An administrator or executor submits to arbitration at his peril, but this rule is modified in some states by statute.¹¹⁵

2493. In order to submit to an arbitration the party must be *sui juris*; an infant cannot, therefore, make a valid submission to arbitration.¹¹⁶

2494. When there are several persons, either as plaintiffs or defendants, for example, partners who are jointly entitled or jointly bound, the submission of one for himself and his associates is good.¹¹⁷

2495. As *arbitrators* are judges between the parties, they must be *sui juris*; they ought to have no interest in the matter in dispute and be perfectly indifferent between the parties.¹¹⁸

An infant cannot, in general, be appointed an arbitrator, nor can a married woman fill that office; yet instances may be found where such a woman has been an arbitratix.¹¹⁹

The fact that the arbitrator is interested, or closely connected with the opposite party, will, in general, disqualify him to act; but if a person so situated should, either through inattention, or because of the high opinion entertained

¹⁰⁸ *Summer v. Brown*, 34 Vt. 194; *Cook v. Carpenter*, 34 Vt. 121; *Barksdale v. Greene*, 29 Ga. 418.

¹⁰⁹ *Plant v. Fleming*, 20 Cal. 92.

¹¹⁰ *Morrison v. Buchanan*, 32 Vt. 289.

¹¹¹ *Somers v. Balabrega*, 1 Dall. 164; *Holker v. Parker*, 7 Cranch, 436; *Talbot v. McGee*, 4 T. B. Monr. Ky. 377; *Buckland v. Conway*, 16 Mass. 396. But see *Alton v. Gilmanton*, 2 N. H. 488; *Haynes v. Wright*, 4 Hayw. Tenn. 65.

¹¹² *Boston v. Brazer*, 11 Mass. 449. But see *Griswold v. N. Stonington*, 5 Conn. 367.

¹¹³ *Schoff v. Bloomfield*, 8 Vt. 472.

¹¹⁴ *Weed v. Ellis*, 3 Caines, N. Y. 253; *Weston v. Stuart*, 11 Me. 326; *Hutchins v. Johnson*, 12 Conn. 376.

¹¹⁵ *Overly v. Overly*, 1 Metc. Ky. 117.

¹¹⁶ *Baker v. Lovett*, 6 Mass. 80; *Britton v. Williams*, 6 Munf. Va. 458.

¹¹⁷ *Wilcox v. Singleton*, Wright, Ch. Ohio, 420; *Southard v. Steele*, 3 T. B. Monr. Ky. 435.

¹¹⁸ An award will be set aside if the arbitrator avows an opinion before hearing the case. *Bowen v. Steere*, 6 R. I. 251; *Taber v. Jenny*, 1 Sprague, Dist. Ct. 315.

¹¹⁹ *Kyd, Awards*, 71.

of his integrity and judgment, be appointed an arbitrator, the party will not be allowed afterward to impeach the award on the ground of an improper appointment, unless such appointment was made under a mistake.¹²⁰ For if the interest of the arbitrator in the subject of reference, or his relationship to the opposite party, being unknown at the time of the nomination, arose, or were discovered subsequently, the party aggrieved would probably be relieved.¹²¹

The award should be made also by a man who is not infamous; an award made by a man convicted of perjury was set aside.¹²²

When there are several arbitrators it is usual to authorize them in the submission, in case of disagreement, to appoint another arbitrator, who is called an *umpire*. When this power is delegated it must be properly exercised, and not left to chance; as where the arbitrators, not being able to agree as to the person proper to be appointed, cast lots which of the arbitrators should have the nomination of the umpire; this was considered as an improper mode of nominating the umpire, and the court set aside the award.¹²³

Where there are several arbitrators they must all hear and decide upon the case, although the opinion of a majority may by the terms of submission be conclusive.¹²⁴

2496. The judgment of the arbitrators is called an *award*, and the paper on which the judgment is written bears the same name.¹²⁵ To make a good award it must have the following qualities: it must conform to the submission, it must be certain, it must be mutual, it must be possible, lawful, and reasonable, it must be final, it must be formal, and it must have some effect.

When there are several arbitrators the award must be made by all unless otherwise agreed,¹²⁶ and notice must be given to the parties of the rendering of the award.¹²⁷ The usual mode of publication is by giving a copy of the award to each party,¹²⁸ but this is not requisite in proceedings under the common law.¹²⁹

2497. The arbitrators being judges selected for a particular purpose and having no other jurisdiction than that given them by the submission, it is manifest that the award must be confined within the powers given to the arbitrators, because if their decision extends beyond such authority, this is an assumption of power not delegated, and which cannot, therefore, legally affect the parties.¹³⁰ But if the arbitrators transcend their authority, their award is not absolutely void, it is void only *pro tanto*, and if the void part does not affect the merit of the submission, the residue will be valid.¹³¹

¹²⁰ *Wilson v. Concord R. R.*, 3 All. Mass. 194; *Davis v. Forshee*, 34 Ala. N. S. 107.

¹²¹ See *Earle v. Stocker*, 2 Vern. Ch. 251.

¹²² *Parker v. Burroughs*, Colles, P. C. 257. So if the arbitrator is intoxicated at the hearing. *Smith v. Smith*, 28 Ill. 56.

¹²³ *Harris v. Mitchell*, 2 Vern. Ch. 485; *Wills v. Cooke*, 2 Barnew. & Ald. 218.

¹²⁴ *Sperry v. Ricker*, 4 All. Mass. 17.

¹²⁵ Comyn, Dig. *Arbitrament*, E; Bacon, Abr. *Arbitrament*, E; Kyd, Aw.; Caldwell, Arb.; 3 Viner, Abr. 52, 372; Watson, Arb.; 1 Saund. 326, n. 1, 2, and 3; Dane, Abr. c. 13.

¹²⁶ *Eames v. Eames*, 41 N. H. 177; *Smith v. Walden*, 26 Ga. 249.

¹²⁷ *Francis v. Ames*, 14 Ind. 251, contra in Illinois; *Denman v. Bayless*, 22 Ill. 300.

¹²⁸ *Plummer v. Morrill*, 48 Me. 184.

¹²⁹ *Carson v. Earlywine*, 14 Ind. 256.

¹³⁰ *Solomons v. McKinstry*, 13 Johns. N. Y. 27; *Bean v. Farnam*, 6 Pick. Mass. 269; *Black v. Hickey*, 48 Me. 545. The award is presumed to be within the term of the submission. *Hubbard v. Firman*, 29 Ill. 90; *Blair v. Wallace*, 21 Cal. 317. And it will not be set aside, although the arbitrators have exceeded their powers, unless the objecting party has been injured thereby. *Daniels v. Willis*, 7 Minn. 374.

¹³¹ *Taylor v. Nicholson*, 1 Hen. & M. Va. 67; 1 Rand. Va. 449; *McBride v. Hogan*, 1 Wend. N. Y. 326; *Clement v. Durgin*, 1 Me. 300; *Skellings v. Coolidge*, 14 Mass. 43; *Peters v. Pierce*, 8 Mass. 399; *Martin v. Williams*, 13 Johns. N. Y. 264; *Bacon v. Wilber*, 1 Cow. N. Y. 117. Thus, if the referee exceeds his authority in awarding costs, still the award is good as to the principal sum. *Hubbell v. Bissell*, 2 All. Mass. 196; *Garitee v. Carter*, 16 Md. 309.

When a time is prescribed within which the award must be made, it will not be valid if not made within that time.¹³²

When the submission is by agreement of the parties, either by parol, agreement, or by deed, the authority of the arbitrators may be revoked at any time before the making of the award, leaving the party who revokes liable to an action upon his agreement. The arbitrators then have no further authority, and an award made afterward is void, unless it has been provided otherwise in the submission.¹³³ And the death of either of the parties to a submission, before the award made, will at common law amount to a revocation.¹³⁴

When the submission is made a rule of court, it cannot be revoked by the parties,¹³⁵ nor is the death of either of them a revocation.¹³⁶

2498. *The award ought to be certain*, and it must be so expressed that no reasonable doubt can arise on the face of it as to the arbitrators' meaning, or the nature and extent of the duties imposed by it on the parties.¹³⁷ An example of such uncertainty may be found in the following cases: an award directing one party to bind himself in an obligation for the quiet enjoyment of lands without expressing in what sum the obligor should be bound.¹³⁸ Again, an award that one should give security to the other for the payment of a sum of money, or the performance of any particular act, when the kind of security is not specified.¹³⁹

But an award is sufficiently certain if its meaning can be ascertained and reduced to a certainty; as, where it directed that one of the parties should pay the costs of a suit without mentioning the amount, because the amount can be ascertained by taxation;¹⁴⁰ or where the sum awarded can be ascertained by reference to an account annexed to the award.¹⁴¹ The arbitrator need not find specially on each material question submitted to him. It is enough if he states a general conclusion which involves a finding on all the issues.¹⁴² An award which directs the payment of a certain sum annually to the plaintiff during his life is sufficiently certain.¹⁴³

2499. *An award must be mutual*, that is, it must affect both parties; when it gives satisfaction to one it must discharge the other, for otherwise it would be unjust. If, for example, the arbitrator should award to one of the parties fifty dollars, to be paid to him by the other, where a case of trespass had been submitted without saying for what this money is to be paid, the award would be void, because if the defendant paid it he would still be liable for the trespass; but if from the words of the award it appeared that the trespass was discharged, it would be good.¹⁴⁴ Another example will fully explain this mat-

¹³² *Smith v. Spencer*, 1 M'Cord, Ch. So. C. 93; *Bacon*, Abr. *Arbitrament*, D; *Mills v. Conner*, 1 Blackf. Ind. 7; *Hall v. Hall*, 3 Conn. 308; *Willard v. Bickford*, 39 N. H. 536. But the parties may extend the time by agreement. *Buntain v. Curtiss*, 27 Ill. 374.

¹³³ *McDougall v. Robertson*, 2 Younge & J. Exch. 11; 4 Bingh. 435; *Davis v. Maxwell*, 27 Ga. 368.

¹³⁴ *Edmunds v. Cox*, 3 Dougl. 406; *Cooper v. Johnson*, 2 Barnew. & Ald. 394.

¹³⁵ *Dexter v. Young*, 40 N. H. 130.

¹³⁶ *Bacon v. Crandon*, 15 Pick. Mass. 79.

¹³⁷ *Grier v. Grier*, 1 Dall. 173; *Purdy v. Delavan*, 1 Caines, N. Y. 304; *King v. Cook*, T. U. P. Charlt. Ga. 288; *Gonsales v. Deavens*, 2 Yeates, Penn. 539; *Hazeltine v. Smith*, 3 Vt. 535; *Barnet v. Gilson*, 3 Serg. & R. Penn. 340; *Jackson v. DeLong*, 9 Johns. N. Y. 43.

¹³⁸ *Rolle*, Abr. *Arbitrament*, Q, 4.

¹³⁹ *Bacon*, Abr. *Arbitrament*, E. See *Thomas v. Molier*, 3 Ohio, 267; *Lawrence v. Hodgson*, 1 Younge & J. Exch. 16; *Thornton v. Carson*, 7 Cranch, 596.

¹⁴⁰ *Macon v. Crump*, 1 Call; Va. 575; *Cargey v. Aitcheson*, 2 Barnew. & C. 170; 2 Bingh. 199; *Gudgell v. Pettigrew*, 26 Ill. 305.

¹⁴¹ *Farr v. Johnson*, 25 Ill. 522.

¹⁴² *Grant v. Morse*, 22 N. Y. 323; *Trustees v. Huston*, 12 Ind. 276.

¹⁴³ *Remelee v. Hall*, 31 Vt. 582.

¹⁴⁴ *Bacon*, Abr. *Arbitrament*, E, 3; *Rolle*, Abr. 253. But the rule that the award must

ter. Suppose that Peter and Paul submit all actions brought by Peter against Paul, and all actions by Paul against Peter, and the arbitrators find that Peter shall be discharged of all actions brought by Paul, without disposing of the other matters submitted to them, the award is void.¹⁴⁵

2500. *The award must be of a thing possible, lawful, and reasonable.*

An award that could not by any possibility be performed, as if it directed that the party should deliver a deed which it was proved had been burned and totally destroyed, or to pay money at a day past, would be clearly void; but if it directed a man to pay a certain sum of money which the defendant was not then able to pay, it would be good, because the defendant might become able to do so, either by making the money, or it might be given to him. Again, an award that a stranger, over whom the defendant has no power or control, shall do an act, is void, because the defendant cannot compel him.

The thing ordered to be done must be lawful, for the law will not compel any one to perform an act which it forbids to be done; an award that a man shall commit a felony or a trespass is therefore void, and it would be equally void if it directed something contrary to the policy of law; as, that Paul should marry Mary, because it is against public policy that marriages should be constrained.¹⁴⁶ And an award will be set aside if decided against the law or upon a mistaken view of the law.¹⁴⁷

The award must also be reasonable, for if it be of things nugatory in themselves, and offering no advantage to either of the parties, it cannot be enforced.¹⁴⁸

2501. *The award must be final,* that is, it must conclusively adjudicate of the matters submitted, or, at least, of so much as is decided upon; for as an award may be good for part only, it must be final as to that part.¹⁴⁹ Thus, when the arbitrators award a thing not submitted, with a reservation to themselves of a future power of judging of the matter, and they award a thing within the submission, this is good as to the matter within the submission, for as to that it is final and void as to the residue.¹⁵⁰

The ordinary provisions of the statutes as to arbitration of suits in court give to the award the same effect as a verdict of a jury, and render it liable to be reversed or modified for error in law or for such mistakes of fact as would allow a new trial in court.¹⁵¹ But the parties may expressly stipulate that no appeal shall be taken.¹⁵² If the award is set aside, the court proceeds as if there had been no arbitration.¹⁵³

If the arbitrators are authorized to decide all questions of law, their decision on the law, fairly and deliberately made, is conclusive.¹⁵⁴ The parties

be mutual is not so strictly applied now as formerly. *Harrell v. McAlexander*, 3 Rand. Va. 94. See *Weed v. Ellis*, 3 Caines, N. Y. 254; *Gordon v. Tucker*, 6 Me. 247; *Gaylord v. Gaylord*, 4 Day, Conn. 422; *Kunckle v. Kunckle*, 1 Dall. 364.

¹⁴⁵ Rolle, Abr. 253, pl. 2; *Schuyler v. Vandever*, 2 Caines, N. Y. 235.

¹⁴⁶ Rolle, Abr. 252; 1 Swanst. Ch. 55.

¹⁴⁷ *Fitch v. Archibald*, 5 Dutch. N. J. 160; *Grimes v. Blake*, 16 Ind. 160; *Prescott v. Fellows*, 41 N. H. 9.

¹⁴⁸ *Bacon*, Abr. *Arbitrament*, E, 5; *Young v. Shook*, 4 Rawle, Penn. 304; *Grier v. Grier*, 1 Dall. 173; *Sutton v. Horne*, 7 Serg. & R. Penn. 228; *Carnochan v. Christie*, 11 Wheat. 446. See *Comyn*, Dig. *Arbitrament*, E, 15; *King v. Cook*, T. U. P. Charlt. Ga. 289; *Archer v. Williamson*, 2 Harr. & G. Md. 67; *Pearce v. McIntyre*, 29 Mo. 423.

¹⁵⁰ *Palm*, 146; *Croke*, Jac. 315, 584; *Cromwell v. Owings*, 6 Harr. & J. Md. 10; *McCullough v. McCullough*, 12 Ind. 487.

¹⁵¹ *Farr v. Johnson*, 25 Ill. 522; *Roth v. Colvin*, 32 Vt. 125.

¹⁵² *Daniels v. Willis*, 7 Minn. 374; *Wynn v. Bellas*, 34 Penn. St. 160.

¹⁵³ *Smith v. Smith*, 28 Ill. 56.

¹⁵⁴ *White Mountains R. R. v. Beane*, 39 N. H. 107; *Austin v. Kimball*, 12 Cush. Mass. 485.

may make a collateral agreement in addition to the award without vitiating it.¹⁵⁵

2502. As to the *form*, the award may be by parol, that is, in writing, not by deed; or it may be by deed.¹⁵⁶ But it ought to conform as to this to the requisitions of the submission; or, if it be under the provisions of a statute, it must be made according to its direction.

2503. When the submission was by parol, with mutual promises to perform the award, *the remedy upon the award* is by an action of assumpsit, and in such action the award is conclusive.¹⁵⁷

When the submission was by deed, accompanied by an arbitration bond, which is a common bond, with a condition that the parties will abide by the award, in this case the remedy is by an action of debt for the penalty of the arbitration bond, or by an action of covenant upon the deed of submission.¹⁵⁸

When the submission was made by a rule of court, the remedy may be by attachment for contempt in not obeying the order of the court, or by execution upon the judgment entered up pursuant to the rule of court or to the statute.

If the submission was made by authority of a particular statute, the remedy which it provides must be pursued.

The award is in general conclusive, but it may be impeached for any material defect apparent upon its face, such as excess of power by the arbitrators, defect of execution of power by omitting to consider a matter submitted when such matter is important, or where a plain mistake of law has been made; as, where freight was allowed for a voyage where the ship had never broken ground.

Fraud in obtaining the submission or in procuring the award by the successful party or corruption in the arbitrators will of course vitiate the award.

When the submission was lawfully revoked, it is clear the arbitrators had no longer any power to make the award. This revocation may be in fact, or in law, as by death.

2504. *An award does not* so far affect property, real or personal, as to *transfer the title* to it by its mere force and operation. It is undisputed that when the award directs one to convey certain land to another, although an action will lie or an attachment may be granted in a proper case for not conveying the land, or equity will decree a specific performance of the award,¹⁵⁹ yet the land does not pass by the mere force of the award.¹⁶⁰

It has also been holden that a chattel does not pass by the award. All matters in difference between a landlord and tenant were submitted to arbitration; among other things it was awarded that the latter should deliver up to the former a stack of hay, then upon the premises, at a certain price to be paid for it by the landlord. The tenant refused to accept the money tendered, and would not deliver the hay, upon which the landlord brought an action of trover for it; the court held the action was not maintainable because the title to the hay did not pass by the mere force of the award.¹⁶¹

But though the title to the property does not pass by the mere force of the award, yet the parties may submit to arbitration a dispute respecting the right

¹⁵⁵ *Wynn v. Bellas*, 34 Penn. St. 160.

¹⁵⁶ Unless required by statute or by the form of the submission an award need not be under seal. *White v. Fox*, 29 Conn. 570.

¹⁵⁷ See *Tallis v. Sewell*, 3 Ohio, 513; *Swicard v. Wilson*, 2 Const. So. C. 218.

¹⁵⁸ Where an arbitration bond binds the principal to abide by the award, his sureties are liable if he fails to pay a sum awarded to be paid over, and no demand is necessary. *Washburne v. Lufkin*, 4 Minn. 466; *Plummer v. Morrill*, 48 Me. 184.

¹⁵⁹ *Philbrick v. Preble*, 18 Me. 255; *Pawling v. Johnson*, 6 Litt. Ky. 1; *Jones v. Boston Mill Corp.* 6 Pick. Mass. 148.

¹⁶⁰ *Denn v. Allen*, 1 Penn. 48; *Imlay v. Wikoff*, 1 South. N. J. 132.

¹⁶¹ *Hunter v. Rice*, 15 East, 100.

to certain property, real or personal, and the award will be conclusive between them.¹⁶²

2505. *The remedies* which are effected by operation of law are three in number, namely: retainer, remitter, and lien; they will be considered in order.

2506. *Retainer* is the act of withholding what one has in one's hands by virtue of some right. The subject will be considered by inquiring who may retain, against whom, on what claims, and what amount may be retained.

2507. *An executor or administrator has a right to retain* in certain cases for a debt due to him by the estate of a testator or intestate. In inquiring into this right it is natural to consider those cases where there is but one executor or administrator, and where there are several.

2508. *A sole executor* may retain in those cases where, if the debt, instead of being due to him, had been due to a stranger, such stranger might have sued the executor and recovered judgment; or where the administrator might, in the due administration of the estate, have lawfully paid the same.¹⁶³ He may, therefore, retain a debt due to himself,¹⁶⁴ or to himself in right of another,¹⁶⁵ or to another in trust for him;¹⁶⁶ the debt may also be retained when administration is committed to another for the use of the creditor, who is a lunatic or an infant.¹⁶⁷ An executor may retain before he has proved the will, and when he dies, after having intermeddled with the goods of the testator and before probate, his executor has the same power.¹⁶⁸

2509. *When there are several executors*, and one has a claim against the estate of the deceased, he may retain with or without the consent of his co-executors;¹⁶⁹ when there are several creditors among the executors of equal degree and the estate is insolvent, they are entitled to retain *pro rata*.¹⁷⁰

2510. The right of retainer may be exercised where the deceased was bound alone, where he was bound with others, and where the executor of the obligee is also executor of the obligor.

2511. Where the deceased was the sole obligor and the executor was his creditor, the latter has a clear right to retain.

2512. Where there are several debtors jointly and severally bound and one of them appoints the obligee his executor,¹⁷¹ or the obligee takes out letters of administration to his estate, the debt is immediately satisfied by way of retainer when the executor or administrator has sufficient assets. But in such case the other debtors will be liable to the executor, *qua* executor, to contribute to the payment of the debt, unless the testator was the actual debtor and the other obligors were his sureties.

2513. If the obligee make the executor or administrator of the obligor his own executor, it is a discharge of the debt if as executor or administrator of the debtor he has assets sufficient; but if he has fully administered, or if no assets of the debtor's estate have come to his hands, it is no discharge, for there is nothing for him to retain.

2514. *Of the claims the executor may retain*, we must consider their priority and their nature.

¹⁶² *Doe v. Rosser*, 3 East, 11; *Blanchard v. Murray*, 15 Vt. 548; *Shelton v. Alcox*, 11 Conn. 240; *Cox v. Jagger*, 2 Cow. N. Y. 638; *Whitney v. Holmes*, 15 Mass. 153; *Shepherd v. Ryers*, 15 Johns. N. Y. 497. See *Tevis v. Tevis*, 4 T. B. Monr. Ky. 47; *Evans v. McKinsay*, 6 Litt. Ky. 263.

¹⁶³ *Plumer v. Merchant*, 3 Burr. 1380.

¹⁶⁴ 3 Sharswood, Blackst. Comm. 18.

¹⁶⁵ *Plumer v. Merchant*, 3 Burr. 1380.

¹⁶⁶ *Cockcroft v. Black*, 2 P. Will. Ch. 298.

¹⁶⁷ *Franks v. Cooper*, 4 Ves. Ch. 763.

¹⁶⁸ *Croft v. Pyke*, 3 P. Will. Ch. 183; 11 Viner, Abr. 263.

¹⁶⁹ *Wentworth*, Off. Ex. 33.

¹⁷⁰ Bacon, Abr. *Executors*, A, 9.

¹⁷¹ Bacon, Abr. *Executors*, A, 9; Comyn, Dig. *Administration*, c. 1.

Nearly all systems of law give some debts a priority over others in the case of an insolvent estate; funeral expenses, physician's bill for the last sickness of the deceased, and some others, have a preference over others in perhaps all the states of the Union. It would be difficult to make a table showing the order of paying the debts of an insolvent estate in each state, and it would lead to no practical result.

An executor having a claim of a particular class cannot retain assets to pay himself to the injury of a creditor of a class having a preference over him; and the reason for this, independently of any statutory provision, is clear; he could not, by bringing a suit against himself, have obtained any advantage or recovered in prejudice of such a creditor.¹⁷² He may retain only where he has a superior claim or one of equal degree,¹⁷³ and in the latter case only *pro rata*.

In a case where two were jointly bound in a bond, one as principal and the other as surety, after which the principal died intestate and the surety took out administration to his estate, the bond being forfeited, the administrator paid the debt, it was held he could not retain as a specialty creditor because being a party to the bond it became his own debt,¹⁷⁴ and having paid it, he became a simple contract creditor and might retain as such.¹⁷⁵

As to the nature of the claim for which an executor may retain, it seems that damages which are in their nature arbitrary cannot be retained, because till judgment no man can foretell the amount; such as damages upon torts. But when the damages arise from a breach of a pecuniary contract there is a certain measure for them, and such damages may well be retained.

As the executor is not bound to plead the act of limitations against a just debt, the act shall not operate against him.¹⁷⁶

2515. The *extent* of the right of retainer depends upon the fact whether the estate is solvent or insolvent.

When the estate of the testator is solvent, the executor may of course retain the whole of the debt due to him, together with interest.

When the estate is insolvent, his right to retain is then limited by the rights of other creditors who are entitled to be paid as well as he. By the common law of England a creditor could gain an advantage by bringing a suit against the executor and obtaining the first judgment, and as the executor could not bring such a suit, he was allowed to retain the whole of his claim in preference to all other creditors, to compensate him for this want of capacity of suing himself.¹⁷⁷ In most of the states of this Union a more equitable mode of making payment in cases of insolvent estates has been adopted, and no one is allowed to gain an advantage by bringing a suit against the executor; it follows, therefore, that the executor can lose nothing by his want of capacity of suing himself, and the law gives him the right to retain that to which he would have been entitled if he had not been an executor, and no more. He may retain his debt *pro rata* with other creditors. Such is the case in Alabama, Connecticut, Illinois, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, Ohio, Pennsylvania, Rhode Island, South Carolina, and Vermont.¹⁷⁸ In some of the other states the common law right exists.

2516. *Remitter* takes place when he who has the true property, or *jus proprietatis*, in lands is out of possession, and has no right to enter without re-

¹⁷² Bacon, Abr. *Executors*, A, 9; Comyn, Dig. *Administration*, A, 9.

¹⁷³ 3 Sharswood, Blackst. Comm. 18; 11 Viner, Abr. 261.

¹⁷⁴ 11 Viner, Abr. 265. But see *Dorsheimer v. Bucher*, 7 Serg. & R. Penn. 9.

¹⁷⁵ Comyn, Dig. *Administration*, c. 2, n.

¹⁷⁶ 1 Maddock, Ch. Pr. 583.

¹⁷⁷ 3 Sharswood, Blackst. Comm. 18; 11 Viner, Abr. 261.

¹⁷⁸ Griffith, Reg. *Retainer*.

covering possession in an action, has afterward the freehold cast upon him by some subsequent and of course defective title; in this case he is remitted or put back by operation of law to his ancient and more certain title. This right of entry which he has gained by a bad title is, *ipso facto*, annexed to his own inherent good one, and the defeasible estate is utterly defeated and annulled by the instantaneous act of law without his participation or consent. For example, if a tenant in tail discontinue the estate by a conveyance in fee, afterward disseise the continuee or grantee, and die seised, his heir shall hold as heir in tail under the original title, and not under the title acquired by the disseisin. By the operation of law he is instantaneously remitted to his better title. The reason assigned for this is that being so remitted the owner has no means of asserting his title, because, being in possession, he cannot sue himself, and to prevent his loss the law places him in the same situation as if he had established his right by suit.

In order to enable the owner of the land to take advantage of this principle the title must be cast upon him by the law, as by descent; for if he undertakes to buy the subsequent estate or right of possession, he is considered as having waived his prior right, and he is not therefore remitted.¹⁷⁹

2517. A third mode of acquiring a remedy by operation of law is by *lien*. In its most extensive signification this term includes every case in which real or personal property is charged with the payment of any debt or duty, every such charge being denominated a lien on the property.¹⁸⁰ In a more limited sense, and in that in which it is here used, it is the right of detaining the property of another until some claim is satisfied.

Besides the liens which arise by operation of law, there are others created by the express contracts of the parties.

Liens may be considered as to their kinds, as to the manner of acquiring them, as to the claims on which they attach, as to the manner of losing them, and as to their effect.

2518. When a person has a right to retain property in respect of money or labor expended on such particular property, this is a *particular lien*. For example, where a tailor has made garments out of cloth delivered to him for the purpose, he is not bound to part with the clothes until his employer has paid him for his services; nor the ship carpenter with a ship which he has repaired; nor can an engraver be compelled to deliver the seal which he has engraved for another until his compensation has been paid.¹⁸¹

¹⁷⁹ 3 Sharswood, Blackst. Comm. 20.

¹⁸⁰ In this general sense a judgment obtained in a court of record is generally a lien upon real estate; an execution when put in the sheriff's hands, upon personal property. By statute many liens are created; as, for example, recognizances and other obligations of record are sometimes made liens; and persons furnishing materials, or doing work for the construction of a building, have a lien upon it by statute in several of the states of the Union. By the civil law this right existed: a person who furnished materials, or performed work on a building, had the privilege of hypothec. Dig. 20, 2, 1; Dig. 42, 6, 9, 1. The government has a lien for taxes, upon the real estate on which they have been assessed. A landlord has a lien on the goods of his tenant while on the premises for one year's rent, in preference to an execution creditor.

The liens which are here treated of, which may be called common law liens, being merely the right of retaining possession, are of course dependent on possession. Some equitable liens are dependent on possession, and some are not. Maritime liens do not arise from or depend upon possession at all. The principal statutory liens are judgment liens and liens of material men, and mechanics. A judgment lien exists in the states, except in New England, where it is replaced by attachment on mesne process. The mechanic's lien is regulated entirely by statute and exists in most, if not all, of the states. It does not depend on possession, but must be enforced in the method prescribed by the statutes.

¹⁸¹ 2 Rolle, Abr. 92; Blake v. Nicholson, 3 Maule & S. 167; Townsend v. Newell, 14 Pick. Mass. 332.

2519. A *general lien* is one which binds all the property of the debtor in the hands of his creditor; as, where an agent has advanced moneys at different times for his principal, he has a general lien on all the goods of the principal in his hands, and he need not part with them till he is fully paid. But the debt which has this binding operation on the goods of the principal must have been created in the course of the agency, and to this it will be strictly confined.¹⁸² In the same way bankers, insurance brokers, and attorneys at law have a lien on securities and papers which come into their hands respectively in the course of their business.¹⁸³

2520. Liens may also be divided into legal and equitable.

Legal liens are those which are recognized and may be enforced in a court of law.

Equitable liens are valid only in a court of equity. The lien which the vendor of real estate has on the estate sold for the purchase money remaining unpaid is a familiar example of an equitable lien.¹⁸⁴

2521. To create a lien, whether it be acquired by the agreement of the parties either express or implied, or by act or operation of law, the following are essential requisites:

The party from whom it is acquired should have the absolute property or ownership in the thing which is the subject of the lien, or at least a right to vest it; for unless he has such right he can give no right to the creditor to hold it, the owner having the sole authority to bind or to refuse to bind his property for the payment of a debt due by another.

Thus, a factor cannot pledge his principal's goods for his own debts;¹⁸⁵ and even where the delivery by one not the owner may create a particular lien, it does not necessarily give a general lien for a balance due from the owner.

The party claiming the lien must have an actual or constructive possession, with the assent, express or implied, of the party against whom the claim is made.¹⁸⁶

The lien should arise upon the agreement, express or implied, and not for a specific purpose inconsistent with the express terms or the clear intent of the contract.¹⁸⁷ Factors, for example, have a general lien for all claims arising from their agency upon all goods belonging to their principal in their possession which came to them as such. But should a horse, for example, be loaned by the principal to the agent for a particular purpose, the agent would have no lien upon it.¹⁸⁸

2522. When a man acquires the possession of goods belonging to another by

¹⁸² Story, Ag. § 376; Livermore, Ag. 38; Paley, Ag. by Lloyd, 140.

¹⁸³ Ex parte Nesbitt, 2 Schoales & L. Ch. Ir. 279; Ex parte Sterling, 16 Ves. Ch. 209; Olive v. Smith, 5 Taunt. 56; Spring v. So. Car. Ins. Co., 8 Wheat. 268; Story, Ag. § 381; Paley, Ag. by Lloyd, 81, 131.

¹⁸⁴ Mathews, Pres. 392. The extent to which a vendor's lien exists varies very much in the different states. In some of the states a practice exists of indorsing the receipt of the purchase money on the deed, and its absence is held to be notice to subsequent purchasers of the vendor's lien. Follett v. Reese, 20 Ohio, 546. See Taylor v. McKinney, 20 Cal. 618; Merritt v. Wells, 18 Ind. 171; Wickman v. Robinson, 14 Wisc. 493; Daughady v. Paine, 6 Minn. 443. The equitable mortgage made in England, by a deposit of the title deeds, can hardly exist under our system of registration.

¹⁸⁵ Van Amringe v. Peabody, 1 Mas. C. C. 440.

¹⁸⁶ 3 Chitty, Comm. Law, 547; Paley, Ag. by Lloyd, 137; Jordan v. James, 5 Ohio, 88.

¹⁸⁷ Most of the liens at common law exist by virtue of a usage so general as to be incorporated into all contracts of a certain kind. This is especially the case in bailments, and particularly in the case of innkeepers, warehousemen, common carriers, factors, and brokers, and pawnees. The lien which a ship owner has on the cargo for freight is a common law lien, which he has as a common carrier, and not a maritime lien. See the chapter on bailments.

¹⁸⁸ Jarvis v. Rogers, 15 Mass. 389.

finding, he has no lien on them for any expenses he has been put to in regard to them, except in one case; this is when goods are lost at sea.¹⁸⁹ For the purpose of encouraging commerce and to reward a man who runs considerable personal risks in saving such goods, the law allows the finder a compensation, known by the name of salvage,¹⁹⁰ and for this he has a lien. But when the finder of goods on land has been put to any expense in relation to them, although he has no lien for such expenses, he is not left without a remedy. He may bring a suit against the owner and recover the value of such expenses. The reason assigned for this is that if the rule were otherwise, ill-disposed persons might turn boats and vessels adrift, or horses or cattle into the road, and then take them up and refuse to give them up until they were paid their alleged expenses; and, therefore, the finder is required and the law has put upon him the burden to prove the quantum of his recompense to the satisfaction of the jury.¹⁹¹

2523. The lien cannot be acquired by obtaining possession of the goods tortiously; because, if for no other reason, no man can take advantage of his own wrong.¹⁹²

2524. The *debts or claims* for which liens properly attach, or which are to be secured by the lien, require several qualities, which will be separately considered.

In general, liens properly attach on liquidated demands, and not on those which sound only in damages, though, by express contract, they may attach even in such case; as, where the goods were to be held as an indemnity against a future contingent claim for damages.¹⁹³

The claim for which the lien is asserted must be due or owing to the party claiming it in his own right, and not merely as agent for a third person. It must be a debt or demand due from the very person for whose benefit the party is acting, and not from a third person, although the goods may have been claimed through him.¹⁹⁴

The claim may be a particular debt, or a general balance due to the creditor by the owner of the goods. By the custom of the trade, an agent may have a lien upon the property of his employer intrusted to him in the course of that trade, not only in respect of the management of that particular property, but for his general balance of accounts. To authorize a creditor to retain property under a claim of lien for a general balance, however, the usage of trade must be established to have been uniform and notorious, for although usages of trade enter into every contract, this is only where they are so notorious that they are presumed to be known to the party who is to be bound by them.

This general lien may also be created by the express or implied agreement of the parties; as, when a merchant gives notice that he will not receive any property for the purpose of his trade or business except on condition that he shall have a lien upon it, not only in respect to the charge arising upon the particular goods, but for the general balance of his account. In such cases all persons who after a knowledge of such notice deal with him must be presumed to have acquiesced in it, and they will be bound as if they had expressly agreed to the provisions of the notice.¹⁹⁵

¹⁸⁹ The finder of goods on land has a lien when the owner has offered a specific reward for the recovery. *Wentworth v. Day*, 3 Metc. Mass. 352.

¹⁹⁰ *Hartford v. Jones*, 2 Salk. 654; 1 Ld. Raym. 393; *Hamilton v. Davis*, 5 Burr, 2732; *Baring v. Day*, 8 East, 57.

¹⁹¹ *Nicholson v. Chapman*, 3 H. Blackst. 354.

¹⁹² *Lempriere v. Pasley*, 2 Term, 485; *Madden v. Kempster*. 1 Campb. 12.

¹⁹³ 3 Chitty, Com. Law, 548.

¹⁹⁴ *Paley, Ag. by Lloyd*, 132.

¹⁹⁵ *Kirkham v. Shallcross*, 6 Term, 14.

But when it is the duty of the party to receive the goods, and he cannot refuse without a violation of some rule of law, as in the case of a common carrier, it would perhaps be considered that he had no right to give such notice.¹⁹⁶

2525. *A lien may be lost* in several ways, the principal of which are the following:

It may be lost or waived by any act of the parties by which it may be surrendered or become inapplicable.

It may be lost by the payment of the debt which is a lien upon the goods, and the satisfaction of such debt by the creation of a new one may have that effect; as, where a creditor holds the note of the owner of the goods, and he has a lien in consequence of it, if the parties afterward renew the debt by the creditor's taking a bond, and he gives up the note with an agreement to cancel the old debt and create a new one, the lien on the goods will be lost.¹⁹⁷

In general, possession is not only essential to the creation, but also to the continuance of the lien; it may, therefore, be lost by voluntarily parting with the possession of the goods. But to this rule there are some exceptions; for example, when a factor by lawful authority sells the goods of his principal, and parts with the possession under the sale, and such sale is made for the benefit of the factor, or the goods are assigned or delivered to a third person by way of pledge or security to the extent of the factor's lien, it is in effect a continuance of the factor's possession, and the lien is therefore retained.

2526. In general, the right of the holder of the lien is confined to the mere right of retainer. By the express agreement of the parties, the creditor may sell the goods on which he has a lien, but unless there is an express or implied contract, the holder has no right to sell them for the debt due him. In special cases there may be an implied power to sell; as, where the goods are deposited to secure a loan of money which is to be returned on a certain day, or where a factor makes advances or incurs liabilities on account of the consignment.¹⁹⁸ In some cases where the lien would not confer a power to sell, a court of equity would decree a sale.¹⁹⁹ Courts of admiralty will decree a sale to satisfy maritime liens.²⁰⁰

¹⁹⁶ 6 Term, 14. See *Wright v. Snell*, 5 Barnw. & Ald. 350; *Oppenheim v. Russell*, 3 Bos. & P. 42; *Rushforth v. Hatfield*, 7 East, 224.

¹⁹⁷ Before, **801**.

¹⁹⁸ *Pothonier v. Dawson*, 1 Holt, 333; 3 Chitty, Com. Law, 551; 1 Livermore, Ag. 103.

¹⁹⁹ 1 Story, Eq. Jur. § 506; 2 Story, Eq. Jur. § 1216; Story, Ag. § 371.

²⁰⁰ *Abbott, Shipp.* part 3, c. 10, § 2; Story, Ag. § 371.

CHAPTER III.

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2527. *A court* is an incorporeal, political being, created for the purpose of administering justice judicially, and which requires for its existence the presence of the judges, or a competent number of them, and a clerk or prothonotary, at the time during which and at the place where it is by law authorized to be held, and the performance of some public act indicative of a design to perform the functions of a court. According to Lord Coke, a court is a place where justice is judicially administered.¹ This definition has not been adopted, because it is conceived that the court is not a place, but the judges and other officers, properly organized, form the court.

In another sense, the judges, the clerk or prothonotary, the attorneys, counsellors, solicitors or proctors, and ministerial officers, are said to constitute the court.² And sometimes the judges alone are called the court.

In another place we have considered the organization of the courts under

¹ Coke, Litt. 58, a.

² When treating of the choice of a professional man, a short sketch of the powers and duties of attorney and counsel was given. Before, 2418, 2420.

the constitution and laws of the United States, and of the state courts under the state constitutions. In this place it will be proper to take a view of their various kinds, and of their powers and jurisdictions. When considered as to their powers, they are of record and not of record; when compared to each other, they are supreme, superior, and inferior; when examined as to their original jurisdiction, they are civil or criminal; when viewed as to their territorial jurisdiction, they are central or local; and when divided as to their objects, they are courts of law, courts of equity, admiralty courts, and courts martial.

2528. By the common law, a *court of record* is one where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony, which rolls are called the records of the courts. In the United States the acts and proceedings of such courts are written in books kept for that purpose, or in papers kept on file in the offices of the clerks or prothonotaries. The test of a court of record is whether it has or has not the power to fine and imprison; a court which possesses that power is a court of record, all other courts are not of record.³ In this country, a court which does not possess common law jurisdiction, and a seal, and a clerk or prothonotary, for the purpose of engrossing and keeping its proceedings, would not be considered a court of record.

The act of congress to establish a uniform rule of naturalization, approved April 14, 1802, enacts that, for the purpose of admitting aliens to become citizens, any court of record in any individual state, having common law jurisdiction, and a seal, and a clerk or prothonotary, shall be considered a district court, within the meaning of that act.

2529. All courts which do not come within the definition of a court of record are courts not of record.

2530. Courts of record are divided into supreme or superior courts, and inferior courts.

2531. A *supreme court* is one having jurisdiction over all other courts. Such a court possesses in general appellate jurisdiction, either by writ of error or by appeal in other cases. The supreme or superior courts have their jurisdiction by the common law and by the constitution of the United States, or of the state where located. And this common law jurisdiction cannot be taken away without the express negative words of a statute, unless by irresistible implication.⁴

2532. A supreme court, in general, has no original jurisdiction, except what may be given to it by the constitution. Its principal powers are to supervise the acts and proceedings of the inferior tribunals. This is done by writ of error and by appeal.

By writ of error. When, in course of the trial in an inferior court of law, it is alleged that the lower court has committed an error, the party aggrieved

³ Bacon, *Abr. Courts*, D, 2. A court of record has been defined by a learned judge to be a judicial tribunal proceeding according to the course of the common law and exercising its functions independently of the person of the magistrate designated generally to hold it. *Ex parte Gladhill*, 8 Metc. Mass. 171.

Many courts of limited and special jurisdiction not proceeding according to the course of the common law, as probate courts, are not courts of record although they keep a permanent record. *Smith v. Rice*, 11 Mass. 507.

Courts of justices of the peace are not in general courts of record. *Mowry v. Cheesman*, 6 Gray, Mass. 515; *Wheaton v. Fellows*, 23 Wend. N. Y. 375; *Ellis v. White*, 25 Ala. N. S. 540; *Silver Lake Bank v. Harding*, 5 Ohio, 545; *Snyder v. Wise*, 10 Penn. St. 158.

⁴ *Commonwealth v. McCloskey*, 2 Rawle, Penn. 369; *Buckinhoffen v. Martin*, 3 Yeates, Penn. 479; *Commonwealth v. White*, 8 Pick. Mass. 435; *Murfree v. Leiper*, 1 Ov. Tenn. 1; *Overseers v. Smith*, 2 Serg. & R. Penn. 363; *Badger v. Towle*, 48 Me. 20.

has a right to remove the cause, in civil actions, without the consent of the opposite party, into the supreme court;⁵ for this purpose he sues out a writ of error from the supreme court, which writ commands the judges of the inferior court to send the record into the supreme court, there to be examined. The object of this writ is to correct an error of law, committed in the course of the proceedings, which is not amendable or cured at common law, or by some statute of amendment, or jeofails.⁶

The supreme court, being thus possessed of the cause, does not try it again upon the merits, and it is immaterial what may be the state of the facts. This proceeding is less a suit between the parties than between the judgment rendered in the court below and the law, for the supreme court does not try the cause between the parties, but judges the judgment. If the court below have obeyed all the requisitions of the law, their judgment, however wrong as to the facts, cannot be impeached, and it will be affirmed; and if they have violated the law, however correct their judgment may be as to the facts, it will be reversed. The reason of this is that the supreme court in cases of error does not try the facts.⁷

By appeal. An appeal in a civil suit is a proceeding unknown to the common law. It is authorized by statute in a variety of cases, and is regulated entirely by the provisions of the particular act; it cannot be extended beyond the plain and obvious import of the statute granting it.⁸

In cases of appeal the whole case is examined and tried as if it had not been tried before.⁹ But it is an essential criterion of appellate jurisdiction that it revises and corrects the proceedings below, and does not create a new cause.¹⁰

2533. All other tribunals than the supreme court are *inferior courts*.¹¹ These courts have in general original jurisdiction in cases both at law and in equity. Unlike a supreme or superior court, an inferior tribunal is a court of limited jurisdiction, and it must appear on the face of its proceedings that it has jurisdiction, or its proceedings will be void.¹²

2534. *The courts of civil jurisdiction* are those which are authorized by the common law or by the constitution or statute to decide upon all civil actions and disputes between persons in their private capacity, whether such matters relate to the persons of the parties or to their personal or real property.

These courts may act with or without a jury. The inferior courts of common law cannot try any thing, unless specially invested with that power by statute, without the aid of a jury, the constitution of the United States having secured that mode of trial. "In suits at common law where the value in controversy

⁵ Skipworth v. Hill, 2 Mass. 35; Drowne v. Stimpson, 2 Mass. 441.

⁶ Wall v. Wall, 2 Harr. & G. Md. 79; Chase v. Davis, 7 Vt. 476; Colley v. Latimer, 5 Serg. & R. Penn. 211. A writ of error in general does not lie to reverse the judgment of a court not of record. The remedy in such cases is by appeal or review. Fitzgerald v. Commonwealth, 5 All. Mass. 509. The writ cannot issue until after final judgment. Robinson v. Morgan, 32 Mo. 428; Beatty v. Hatcher, 13 Ohio, St. 115; Paine v. Chase, 14 Wisc. 653. The writ does not lie to review matters which were within the province of the judicial discretion of the inferior court. Norton v. Merchants' Co., 28 Ill. 313; Lovell v. Kelly, 48 Me. 263.

⁷ The writ of error has to a considerable extent been supplanted by other modes of reviewing a judgment, and in some states it does not appear to exist at all. Second Bank v. Upman, 14 Wisc. 596.

⁸ Street v. Francis, 3 Ohio, 277; Wetherbee v. Johnson, 14 Mass. 420; Murdock, Appellant, 7 Pick. Mass. 321.

⁹ See Dane, Abr. *Appeal*.

¹⁰ Marbury v. Madison, 1 Cranch, 137, 175; 3 Wheat. 600.

¹¹ U. S. Const. art. 3, s. 1.

¹² Kemp v. Kennedy, 5 Cranch, 172; Pet. C. C. 36; Turner v. Bank of America, 4 Dall. 11; Beebe v. Scheidt, 13 Ohio, St. 406; Godfrey v. Godfrey, 17 Ind. 6; Rowan v. Lamb, 4 Greene, Iowa, 468.

shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."¹³ But courts of equity always act without a jury.

2535. A *criminal court* is one established for the repression of crimes and for their punishment. The constitution and laws have secured to the citizen a trial in these courts by a jury, which is the greatest bulwark which liberty has ever interposed between tyranny and its victim.¹⁴

2536. *Jurisdiction* is a power constitutionally conferred upon a court, a single judge, or a magistrate to take cognizance and decide causes according to law and to carry their sentence into execution. The tract of land or district within which a court, judge, or magistrate has jurisdiction is called his territory, and his power in relation to his territory is called his territorial jurisdiction.

Those courts which extend over the whole of the territory which is governed by the same laws may be called central; as, the supreme court of the United States is a central court, because its jurisdiction extends over every part of the Union. In the same way the supreme court of each state is a central court within that state, because its powers extend over every part of the state.

The jurisdiction of some courts extends only over a part of the territory which is ruled by the same laws; these may be called local. Such are the circuit and district courts of the United States, because their jurisdiction extends only over particular parts of the country, called circuits or districts. So the courts of common pleas, parish courts, city courts, and other similar tribunals which have only a local authority may be called local courts.

2537. When *considered as to the object* of their jurisdiction, courts are divided into courts of common law, courts of equity, courts of admiralty, and courts martial.

2538. *Courts of common law* are established to protect legal rights and to redress legal injuries. The remedies for the redress of wrongs and for the enforcement of rights are distinguished into two classes: first, those which are administered in courts of common law, and, secondly, those which are administered in courts of equity. Rights which are recognized and protected, and wrongs which are redressed by the former courts are called legal rights and legal injuries. Rights which are to be obtained, and wrongs from which the party can be relieved only by courts of equity, are equitable rights and equitable wrongs. The former are said to be rights and wrongs at common law, and the remedies, therefore, are remedies at common law; the latter are said to be rights and wrongs in equity, and the remedies, therefore, are remedies in equity.

The courts of common law afford remedies by action whenever the plaintiff has a legal right, whether the equitable right be in him or in another.

2539. *Courts of equity* are those which have jurisdiction in cases where the parties have only equitable rights.¹⁵ It is not easy to trace their history and to determine how they originally obtained the jurisdiction they now exercise. Their authority and the extent of it have been subjects of much question, but time has firmly established them; and the limits of their jurisdiction seem to be in a great degree fixed and ascertained. In this country their authority is established by the constitution and statute law.¹⁶

¹³ U. S. Const. Amend. IX.

¹⁴ U. S. Const. Amend. VI.

¹⁵ 1 Story, Eq. Jur. Ch. 2; Mitford, Pl. Intr.; Cooper, Eq. Pl.

¹⁶ The following just remarks, showing the origin of the jurisdiction of courts of equity, are taken from a report made by a committee appointed by the Society for Promoting the Amendment of the Law, in England, "to inquire whether the principles of Law and

2540. The judge of a court of equity, sometimes called a court of chancery, bears the title of chancellor. The equitable jurisdiction, in some of the states, is, as in England, vested in a high court of chancery, and such courts are distinct from courts of law. But American courts of equity are, in some instances, distinct from those of law; in others the same tribunals exercise the jurisdiction both of courts of law and courts of equity, though their forms of proceedings are different in their two capacities, and in many of the states no distinction is recognized between law and equity.

The supreme court of the United States and the circuit courts are invested with general equity powers, and act either as courts of law or equity, according to the form of the process and the subject of adjudication. In some of the states, as in Virginia and South Carolina, the equity court is a distinct tribunal, having its appropriate judge or chancellor and other officers. In most of the states, the two jurisdictions centre in the same judicial officers, as in the courts of the United States.

The extent of equitable jurisdiction and proceedings varies very much in

Equity can be administered in the same court and by the same form of procedure; and in making such inquiry, to have regard to the provisions and operation of the New York Code." The committee say: "The Common Law of England is the work of a rude age, more anxious to protect the rights of the citizen from being overborne by the power of the barons, or undermined by the corruption of the judges, than to ascertain those rights clearly or to enforce them completely. Hence the Common Law has ever looked with jealousy on the transfer, and indeed on the existence of rights not accompanied by possession; it has sought, by means of trial by jury, to place the administration of the law in the hands of the people themselves, and it has fettered judicial discretion by enforcing technical rules incapable of expansion, and by prescribing a strict and unvarying judgment. As society advanced, such a state of things naturally produced much injustice. Many rights arose which the courts of law either totally ignored, or only partially recognized; and at length, toward the end of the fourteenth century, the evils arising from this illiberal system had reached such a pitch that the clerical chancellors, after the example of the prætors at Rome, assumed a jurisdiction, in cases of peculiar hardship, to mitigate the severity, to supply the defects, and to extend the remedies of the common law. The principles upon which the chancellor proceeded were drawn in part from the civil law and in part from abstract morality and justice; and he asserted his jurisdiction, not by interfering directly with the proceedings or judgments of the courts of common law, which would have provoked a dangerous and probably a successful resistance, but by personal influence exerted upon the litigants, whom he compelled, by the threat of punishment, to do whatever appeared to him upon the special circumstances of the individual case to be just, without reference to the maxims or the decisions of the courts of law. Thus did the ultimate power over property pass in a great measure from the courts of law, and thus was the duty of the legislature of adapting our jurisprudence to the emergencies of society as they arise virtually transferred to a court of equity. So long as this state of things continued, a division of the courts of law and equity seems to have been absolutely necessary, for a fusion of them would have been nothing less than a complete abrogation of the law, and the substitution for it of the arbitrary discretion of a judge. And it is in this sense, and with reference to this system, that the committee understand and acquiesce in the justice of the celebrated opinion of Lord Bacon: 'Omnino placet curiarum separatio; neque enim servabitur distinctio casuum si fiat commixtio jurisdictionum, sed arbitrium legem trahet.'

"At the present day this 'arbitrium' prevails no more in equity than at law. Precedent has superseded discretion—justice is no longer capable of being moulded in chancery with a view to relieving each individual wrong; for it has long been considered, and rightly considered, that any system of law thus administered, varying, as it must do, with the opinions of each successive judge, is little better than absolute tyranny; and the decrees of the chancellor, equally with the judgments of the common law judges, are now founded on general rules, the offspring of former decisions, and applicable alike to entire classes of cases. Indeed, equity for more than a century past has become a system as fixed, as defined, and as incapable of further expansion as the common law itself, against whose narrow principles it relieves. We have thus two systems of jurisprudence, of different origin and employing different methods of procedure; the principle of the one being to mitigate, correct, and assist the other, though it no longer possesses that flexibility and power of individualizing its relief which such an office would seem to require."

different states; it is ample in Connecticut, New Jersey, Maryland, Virginia, Massachusetts, and South Carolina.

2541. A court of equity has *jurisdiction* of equitable rights only. Courts of law, acting according to the strict principles of the common law, proceed according to certain prescribed forms, and render a general judgment for or against the plaintiff. There are many cases in which a simple judgment for either party, without qualifications or conditions, will not do entire justice, *ex æquo et bono*, to either party. Some modifications of the rights of both parties are required in such cases; some restraint on one side or the other; and some peculiar arrangements, either present or future, temporary or perpetual.

In cases of this kind, where the courts of law cannot grant the proper remedy or relief, a remedy may be had, in those states where equity is administered, by applying to the courts of equity or chancery; for these tribunals are not limited or confined in their modes of relief by such narrow regulations as govern courts of law, but grant relief to all parties, in cases where they have rights *ex æquo et bono*, and modify and fashion their relief according to circumstances.

2542. Courts of equity exercise jurisdiction in cases where a plain, adequate, and complete remedy cannot be had at law; that is, in common law courts.

The remedy at law must be plain, for if it be doubtful and obscure at law, equity will assert a jurisdiction.

If the remedy be not adequate at law, and it fall short of what the party is entitled to, this will give jurisdiction to a court of equity.

And if it be not complete at law, that is, reach the whole mischief and secure the rights of the parties, now and for ever, it will be a sufficient ground for the interference of a court of equity, which will grant complete relief.

2543. The jurisdiction of courts of equity is either concurrent, exclusive, or assistant.

Courts of equity exercise concurrent jurisdiction with courts of law in cases where the rights are purely of a legal nature, but where other and more efficient aid is required than a court of law can afford to meet the difficulties of the case and insure full redress.

Formerly in some of these courts of law all redress was refused, but now they grant it. In this manner jurisdiction having been once justly acquired, at a time when there was no such redress at law, it has been retained. The most common exercise of concurrent jurisdiction is in cases of account, accident, dower, fraud, mistake, partnership, and partition. This remedy is often more complete in equity than it is at law. In many of these cases, and especially in some cases of fraud, mistake, or accident, courts of law, not acting on equitable principles, do not and cannot afford any redress; in others they do, but not always in so perfect a manner.¹⁷

Equity exercises an exclusive jurisdiction in all cases of mere equitable rights, that is, such rights as are not recognized in courts of law. Most of the cases of trust and confidence fall under this head. Its exclusive jurisdiction is also exercised in granting special relief beyond the reach of the common law. It will grant injunctions to prevent waste, or irreparable injury, or to secure a settled right, or to prevent vexatious litigations, or to compel the restitution of title deeds. It will appoint receivers of property, where it is in danger of misapplication; compel the surrender of securities improperly obtained; prohibit a party from leaving the country in order to avoid a suit; restrain the undue exercise of a legal right against conscience and equity; decree the specific performance of contracts respecting real estates; supply, in many cases, the imper-

¹⁷ This subject will be more fully considered in Book V.

fect execution of instruments, and reform and alter them according to the real intention of the parties; grant relief in the case of lost deeds or securities; and in all cases in which its interference is asked, its general rule is, that he who asks equity must do equity.

Courts of equity are also assistant to the jurisdiction of courts of law in many cases when the latter have no like authority. A court of equity will remove legal impediments to the fair decision of a question depending at law. It will perpetuate the testimony of witnesses to rights and titles which are in danger of being lost before the matter can be tried; prevent a party from improperly setting up at a trial some title or claim which would be inequitable; compel a party to discover, on his oath, facts which he knows material to the rights of the other party, but which a court of law cannot compel such party to discover; provide for the safety of property in dispute, pending litigation; and counteract, control, or set aside fraudulent judgments.

2544. In the several states there are other courts, created under their respective constitutions or statutes, which, though not strictly courts of equity, possess many equitable powers; such as courts of probate, orphans' courts, surrogate courts, registers' courts. These, like regular courts of equity, administer justice without the aid of a jury.

2545. *Admiralty* is the name of a jurisdiction which takes cognizance of suits and actions which arise in consequence of acts done upon or relating to the sea; or, in other words, of all transactions and proceedings relative to commerce and navigation, and to damages and injuries upon the sea.¹⁸

In the great nations of Europe, the term "admiralty jurisdiction" is uniformly applied to courts exercising jurisdiction over maritime contracts and concerns. It is familiarly known among the jurists of Scotland, England, France, Holland, and Spain, as in the United States, and applied to their own courts, possessing substantially the same jurisdiction as did the English admiralty in the reign of Edward III.¹⁹

The constitution of the United States has delegated to the courts of the national government cognizance of "all causes of admiralty and maritime jurisdiction," and the act of September 24, 1789, c. 20, s. 9, has given the district court "cognizance of all civil causes of admiralty and maritime jurisdiction," including all seizures under the laws of imposts, navigation, or trade of the United States, where the seizures are made on waters navigable from the sea, by vessels of ten or more tons burden, within their respective districts, as upon the high seas, saving to suitors, in all cases, the right of a common law remedy when the common law is competent to give it.

Causes of this kind are to be tried by the district court, and not by a jury.²⁰

By the act of February 20, 1845, the district courts have the same jurisdiction in matters of contract and tort arising in regard to steamboats and vessels of twenty tons and upward employed on the lakes and navigable rivers that they have in regard to similar vessels within the maritime jurisdiction, saving however to the parties the right of trial by jury.

The admiralty jurisdiction expressly vested in the district court embraces, also, captures made within the jurisdictional limits of the United States. By the act of April 20, 1818, s. 7, the district court shall take cognizance of com-

¹⁸ *De Lovio v. Boit*, 2 Gall. C. C. 398; *The Jefferson*, 10 Wheat. 428; *Peyroux v. Howard*, 7 Pet. 324; *Thackarey v. The Farmer*, Gilp. Dist. Ct. 529.

¹⁹ *De Lovio v. Boit*, 2 Gall. C. C. 468. See Bacon, *Abr. Courts of Admiralty*; Merlin, *Répert.*

²⁰ *Croudson v. Leonard*, 4 Cranch, 438; *Yeaton v. United States*, 5 Cranch, 281; *Whelan v. United States*, 7 Cranch, 112; *Genesee Chief v. Fitzhugh*, 12 How. 460.

plaints, by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coast or shore thereof.

2546. A *court martial* is one authorized by the articles of war for the trial of all offences in the army or navy of the United States. The articles of war form a code for the government of the army.²¹

These courts are not permanent tribunals, but are appointed from time to time, as occasion requires. Article 64 directs that general courts martial may consist of any number of commissioned officers, from five to thirteen inclusively; but they shall not consist of less than thirteen when the number can be convened without manifest injury to the service. The decision of the commanding officer, who appoints the court, as to the number that can be convened without injury to the service is conclusive.²²

This is a court of limited authority; and to render its acts valid the court must appear to have acted within its jurisdiction.²³ Its powers extend over a person in the military service of the United States, but it has no jurisdiction over a citizen of the United States not employed in military service.²⁴

If the court have no jurisdiction of the person or subject matter on which they pass, their judgment is null, and the members of the court, and the officers who execute their judgments, are trespassers.²⁵ And if, having jurisdiction, they pass sentence against an individual without notice, it is void.²⁶

2547. The judiciary of the United States was established and exists by virtue of the following provisions contained in the third article of the constitution:

§ 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

§ 2. The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party;²⁷ to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects.

In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all other cases before mentioned the supreme court shall have

²¹ Act of April 10, 1806.

²² *Martin v. Mott*, 12 Wheat. 19.

²³ *Duffield v. Smith*, 3 Serg. & R. Penn. 590; *Fox v. Wood*, 1 Rawle, Penn. 143; *Brooks v. Adams*, 11 Pick. Mass. 442; 19 Johns. N. Y. 7.

²⁴ *Smith v. Shaw*, 12 Johns. N. Y. 257.

²⁵ *Wise v. Withers*, 3 Cranch, 331.

²⁶ *Meade v. Deputy Marshal*, 1 Brock. C. C. 324.

²⁷ No suit can be brought against the United States. *Cohens v. Virginia*, 6 Wheat. 411. Any person having a claim against the United States may by a petition suggest the same to a tribunal established at Washington, called the Court of Claims. Upon this, proceedings are had similar to a suit against the United States, and the decision of the Court is reported to Congress, who may pass suitable laws to carry the same into effect. Acts of Feby. 24, 1855, 10 Stat. 612; Aug. 6, 1856, 11 Stat. 30; March 3, 1863, 12 Stat. 765.

appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

By the amendments to the constitution, the following alterations have been made:

Art. 11. The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

In treating of the courts of the United States we shall consider, first, the central courts, and, next, the local courts.

2548. *The central courts* are the senate, when organized to try impeachments, and the supreme court. The territorial jurisdiction of these courts extends over the whole country.

2549. The constitution of the United States provides that *the senate* shall have the sole power to try all impeachments.²⁸ When sitting for that purpose the senators shall be on oath or affirmation. When the President of the United States is tried the chief justice shall preside, and no person shall be convicted without the concurrence of two-thirds of the members present.

It will be proper to consider the organization of this extraordinary tribunal and its jurisdiction.

2550. *Its organization* differs as it has or has not for trial the President of the United States. For the trial of an impeachment of the President of the United States the presence of the chief justice is required, and he presides over the court; in this case there must also be a quorum of members present. For all other impeachments it is sufficient if a quorum of senators be present.

2551. *The jurisdiction of the senate* as a court for the trial of impeachments extends to the following officers, namely: the President and Vice President, and all civil officers of the United States.²⁹

2552. The offences for which they may be impeached are treason, bribery, and other high crimes and misdemeanors.³⁰ The constitution defines treason as follows: "Treason against the United States shall consist only in levying war against them or in adhering to their enemies, giving them aid and comfort."³¹ Not having defined bribery, recourse must be had to the common law for its definition. The words "other high crimes and misdemeanors" not having been defined, recourse must be had to parliamentary practice and the common law in order to ascertain what they are.³²

2553. The constitution vests the judicial power of the United States in one *supreme court*, and in such inferior courts as congress may from time to time ordain and establish. We will consider, first, the organization of the supreme court; second, its jurisdiction.

2554. *The organization of the supreme court* requires us to consider the ap-

²⁸ U. S. Const. art. 1, s. 3. It is perhaps unnecessary to refer the reader to the impeachment and trial of Andrew Johnson, President of the United States, in 1868, as furnishing the most thorough discussion of the powers of the Senate sitting as a court of impeachment.

²⁹ U. S. Const. art. 2, s. 4. A member of congress is not a civil officer liable to impeachment. Blount's Trial, 22, 102, 1799.

³⁰ U. S. Const. art. 2, s. 4.

³¹ U. S. Const. art. 3, s. 3.

³² Story, Const. § 795. The question as to what constitutes an impeachable offence was most thoroughly discussed in the trial of President Johnson, and still remains, and perhaps must ever remain, undecided.

pointment of the judges, the number requisite to form a quorum, the officers of the court, the time when it is to be held, and the place where.

2555. *The judges of the supreme court* are appointed by the President of the United States, by and with the advice and consent of the senate.³³ They hold their offices during good behavior, and receive for their services a compensation which shall not be diminished during their continuance in office.³⁴ They consist of a chief justice and eight associate justices.³⁵

In case of vacancy or inability to act on the part of the chief justice, the senior justice acts as chief justice.³⁶

2556. *Six judges* are required to *form a quorum*;³⁷ but those attending on the day appointed for holding a session of the court, although less than six, have authority to adjourn the court from day to day for twenty days after the time appointed for the commencement of the session, unless six justices shall sooner attend, and the business shall not be continued over till the next session of the court until the expiration of the said twenty days. If, after the judges shall have assembled, on any day less than six shall assemble, the judge or judges so assembling shall have authority to adjourn the said court from day to day until a quorum shall attend, and, when expedient and proper, may adjourn the same without day.³⁸

2557. *The officers of this court* are:

A clerk, who is appointed by the court. His duties are to keep a record of all the judicial acts of the court, and to keep and preserve all the records and papers confided to his care; to make out writs and other process, to make exemplification of records and papers in his office, make out argument lists, and in general perform such other acts as the court may judicially direct to be done by him according to law.³⁹

Attorneys and counsellors, whose powers and duties have already been considered.⁴⁰ These are admitted to practice under certain rules and regulations established by the court.

A marshal, who is appointed by the court. His duties are to take charge of all property of the United States used by the court or its members, and to serve and execute all process and orders issuing out of the court or made by any justice thereof. He is authorized to appoint assistants and messengers.⁴¹

2558. The session of the court commences on the first Monday of December in each and every year.⁴² The first Monday of August in each year is appointed as a return day.⁴³

2559. The supreme court is holden at the city of Washington.⁴⁴ In case of a contagious sickness, the chief justice, or, in his absence, his senior associate, may direct in what other place the court shall be held, and the court shall accordingly be adjourned to such place.⁴⁵

³³ U. S. Const. art. 2, s. 2.

³⁴ U. S. Const. art. 3, s. 1. Any judge who has held his office for ten years and has attained the age of seventy years may resign and receive his full salary for the rest of his life. Act of Congr. April 10, 1869; 16 Stat. 44.

³⁵ Act of Congr. April 10, 1869; 16 Stat. 44. The number has been changed several times.

³⁶ Act of Congr. June 25, 1868; 15 Stat. 80.

³⁷ Act of Congr. April 10, 1869; 16 Stat. 44.

³⁸ Act of Congr. January 21, 1829; 4 Stat. 332.

³⁹ Act of Congr. September 24, 1789, s. 7; 1 Stat. 76.

⁴¹ Act of Congr. March 2, 1867; 14 Stat. 433. Before this law the duties of this office were performed by the marshal of the District of Columbia.

⁴² Acts of Congr. May 4, 1826; 4 Stat. 160; June 17, 1844; 5 Stat. 676.

⁴³ Act of April 29, 1802; 2 Stat. 156.

⁴⁴ Act of April 29, 1802; 2 Stat. 156.

⁴⁵ Act of February 25, 1799, s. 7.

2560. Before we proceed to consider the *jurisdiction of the supreme court*, let us inquire into the nature and meaning of the term jurisdiction. Jurisdiction is the power constitutionally conferred upon a court, a judge, or a magistrate to take cognizance of and decide causes according to law, and to carry their sentence, decree, or judgment into execution.⁴⁶ The tract of land over which such courts, judges, or magistrates have jurisdiction is called their territory, and the power in relation to this territory is called their territorial jurisdiction.

Jurisdiction is either civil, where the subject matter to be tried is not of a criminal nature, or criminal, where the court is to punish crimes. It is original when it is conferred on the court in the first instance; or appellate, which is when an appeal is given from the judgment of another court. It is concurrent when it may be entertained by several courts; in these cases of concurrent jurisdiction it is a rule that the court which is first seized of the cause shall try it to the exclusion of the other; exclusive when only one court has the right to determine or try the suit, action, or matter in dispute. Assistant jurisdiction is that which is afforded by a court of chancery in aid of a court of law; as, for example, by a bill of discovery.

It is the law which gives jurisdiction; the consent of parties cannot confer it in a matter which the law excludes.⁴⁷ But where the court has jurisdiction of the matter and of the person, and the defendant has some privilege which exempts him from the jurisdiction, he may waive the privilege.⁴⁸ A case will illustrate this rule: The circuit courts of the United States have no jurisdiction over ambassadors; if an ambassador should be tried in one of those courts, the whole proceeding may be avoided, although the defendant may have waived, expressly or by implication, his right of not being sued there. If, on the contrary, the defendant, who was subject to the jurisdiction and was entitled to a privilege which exempted him for a time from being sued there, should waive the right, the jurisdiction would attach; as, when a party attending court voluntarily appeared to the action and waived his privilege of exemption from being sued while attending court.

The jurisdiction of the supreme court is civil or criminal.

2561. *The civil jurisdiction* is either original or appellate.

2562. *The original jurisdiction of the supreme court* is given to that tribunal by the articles of the constitution already cited.⁴⁹

By act of congress⁵⁰ exclusive jurisdiction is vested in the supreme court of all controversies of a civil nature where a state is a party, except between a state and its citizens, and except, also, between a state and citizens of other states or aliens, in which latter case it shall have original but not exclusive jurisdiction.

In consequence of the decision of the case of *Chisholm v. Georgia*,⁵¹ where it was held that assumpsit might be maintained against a state by a citizen of a different state, the 11th article of the amendments of the constitution was adopted, that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of a foreign state."

By the same act of congress⁵² the supreme court shall have exclusively all

⁴⁶ *United States v. Arredento*, 6 Pet. 591; 9 Johns. N. Y. 239.

⁴⁷ *Lindsey v. McClelland*, 1 Bibb, Ky. 262; *Parker v. Munday*, Coxe, N. J. 70; *Folby v. The People*, 1 Ill. 31.

⁴⁸ *Overstreet v. Brown*, 4 M'Cord, So. C. 79.

⁴⁹ U. S. Const. art. 3.

⁵⁰ Act of Sept. 24, 1789, s. 13; 1 Stat. 80.

⁵² Act of Congr. September 24, 1789, s. 13; 1 Stat. 80.

⁵¹ 2 Dall. 419.

such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have or exercise consistently with the law of nations, and original but not exclusive jurisdiction of all suits brought by ambassadors or other public ministers, or in which a consul or vice consul shall be a party.

The trial of issues in fact in the supreme court in all actions at law against citizens of the United States shall be by jury.⁵³

The constitution establishes the supreme court and defines its jurisdiction. It enumerates the cases in which its jurisdiction is original and exclusive, and defines that which is appellate. Congress cannot, therefore, vest in the supreme court original jurisdiction in a case in which the constitution has clearly not given that court original jurisdiction; and affirmative words in the constitution, declaring in what cases the supreme court shall have original jurisdiction, must be construed negatively as to all other cases, or else the clause would be inoperative and useless.

In those cases where original jurisdiction is given to the supreme court, the judicial power of the United States cannot be exercised in its appellate form.⁵⁴ With the exception of those cases in which original jurisdiction is given to this court, there is none to which the judicial power extends from which the original jurisdiction of the inferior courts is excluded by the constitution.

2563. *The appellate jurisdiction* is vested in the supreme court by the constitution,⁵⁵ which provides that "in all other cases before mentioned the supreme court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the congress shall make." It exercises appellate jurisdiction in the following modes:

2564. *By writ of error from the final judgments of the circuit courts; of district courts, exercising the powers of circuit courts; and of the superior courts of the territories, exercising the powers of circuit courts in certain cases where the matter in dispute, exclusive of costs, shall exceed the sum or value of two thousand dollars.*⁵⁶ Of course no writ of error will lie when the sum or matter in controversy does not exceed two thousand dollars.⁵⁷

A writ of error lies to the circuit court in actions arising under the laws of the United States granting copy rights and patents, and in actions brought by the United States under the revenue laws, and actions against revenue officers without regard to the sum in controversy.⁵⁸

It was decided that a writ of error did not lie to the supreme court to reverse the judgment of a circuit court, in a civil action, by writ of error carried from the district court to the circuit court.⁵⁹ But this defect has since been remedied by act of congress,⁶⁰ by which it is enacted that writs of error shall lie to the supreme court from all judgments of a circuit court in like manner, and under the same regulations, as are provided by law for writs of error for judgments upon suits originally brought in the circuit court.

2565. The supreme court has jurisdiction of *appeals from the final decrees*

⁵³ Act of Congr. September 24, 1789, s. 13; 1 Stat. 80.

⁵⁴ *Osborn v. Bank of U. S.*, 9 Wheat. 738.

⁵⁵ U. S. Const. art. 3, s. 2.

⁵⁶ Act of Congr. March 3, 1803, s. 2; 2 Stat. 244. See the *San Pedro*, 2 Wheat. 132. This provision extends to cases in bankruptcy. Act of Congr. March 2, 1867, s. 9; 14 Stat. 520.

⁵⁷ *Durous Sean v. The United States*, 6 Cranch, 307, 314; see 5 Cranch, 13; 4 Cranch, 216; 3 Dall. 401.

⁵⁸ Acts of Congr. Feb. 18, 1861; 12 Stat. 130; May 31, 1844; 5 Stat. 658; March 27, 1868; 15 Stat. 44.

⁵⁹ *United States v. Goodwin*, 7 Cranch, 108.

⁶⁰ Act of Congr. July 4, 1840, s. 3; 5 Stat. 393.

of the *circuit courts*; of the district courts exercising the powers of circuit courts, and of the superior courts of territories exercising the powers of circuit courts in certain cases.

2566. The supreme court has also jurisdiction by *writ of error from* the final judgments and decrees of *the highest courts of a state* in the cases provided for by the judiciary act which enacts⁶¹ that a final judgment or decree in any suit, in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity, or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such their validity, or where any title, right, privilege, or immunity is claimed under the constitution or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the supreme court of the United States upon a writ of error, the citation being signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the supreme court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States, and the proceeding upon the reversal shall also be the same, except that the supreme court may, at their discretion, proceed to a final decision of the same, and award execution, or remand the same to an inferior court. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid than such as appears on the face of the record and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.

2567. The supreme court has also jurisdiction by certificate from the circuit court that the opinions of the judges are opposed on points stated, as provided for by the act of April 29, 1802, s. 6, in these words: "Whenever any question shall occur before a circuit court upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen shall, during the same term, upon the request of either party or their counsel, be stated under the direction of the judges, and certified under the seal of the court, to the supreme court at their next session to be held thereafter, and shall by the said court be finally decided. And the decision of the supreme court and their order in the premises shall be remitted to the circuit court, and be there entered of record, and shall have effect according to the nature of the said judgment and order: *Provided*, That nothing herein contained shall prevent the cause from proceeding if, in the opinion of the court, further proceedings can be had without prejudice to the merits: *And provided also*, That imprisonment shall not be allowed, nor punishment in any case be inflicted, where the judges of the said court are divided in opinion upon the question touching the said imprisonment or punishment."

When the case comes before the supreme court, the judges will consider no other matter than the principle or points on which the judges were divided.⁶²

⁶¹ Acts of Congr. September 24, 1789, s. 25; 1 Stat. 83; February 5, 1867; 14 Stat. 385.

⁶² *Wayman v. Southard*, 10 Wheat. 21; *Devereaux v. Marr*, 12 Wheat. 212.

2568. The judiciary act⁶³ authorizes the supreme court to admit to *bail* in criminal cases, and it was decided that the court had power to issue writs of *habeas corpus* in such cases, and that this jurisdiction was not original, but appellate. It is the revision of the decision of an inferior court, by which a citizen has been committed to prison.⁶⁴

The courts of the United States have power to issue writs of *habeas corpus* when any person is restrained of liberty in violation of the constitution or of any treaty or law of the United States, and from the final decision of a circuit court in the matter an appeal may be taken to the supreme court.⁶⁵

2569. By the judiciary act⁶⁶ the supreme court is authorized to issue writs of prohibition. A *writ of prohibition* is one issued by a superior court, directed to the judges and parties of a suit in an inferior court, commanding them to cease from the prosecution of the same upon a suggestion that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court.⁶⁷ The writ of prohibition may also be issued when, having jurisdiction, the inferior court has attempted to proceed by rules differing from those which ought to be observed;⁶⁸ or when, by the exercise of its jurisdiction, the inferior court would defeat a legal right.⁶⁹

The act of congress gives power to the supreme court to issue writs of prohibition to the district courts when proceeding as courts of admiralty and maritime jurisdiction; and such prohibition lies to the district court to stay proceedings before sentence when that court entertains a jurisdiction not granted by the law of nations, or constitution or laws of the United States.⁷⁰

2570. The judiciary act⁷¹ gives further power to the supreme court to issue *writs of mandamus*. *Mandamus* is the name of a writ, the principal word of which, when the proceedings were in Latin, was *mandamus*, we command. It is a command issuing in the name of the sovereign authority from a superior court having jurisdiction, and is directed to some person, corporation, or court within the jurisdiction of the superior court, requiring them to do some particular thing therein specified which appertains to their office and duty, and which the superior court has previously determined, or at least supposes, to be consonant to right and justice.

The act so often cited gives this court the power to issue writs of *mandamus* in cases warranted by the principles and usages of law to any court or person appointed, holding office under the authority of the United States. The issuing of a *mandamus* to courts is the exercise of appellate jurisdiction, and therefore constitutionally vested in the supreme court; but a *mandamus* directed to a public officer belongs to original jurisdiction, and by the constitution the exercise of original jurisdiction by the supreme court is restricted to certain specified cases which do not comprehend a *mandamus*. That part of the section which gives power to the supreme court to issue writs of *mandamus* to "persons holding office under the authority of the United States" is not warranted by the constitution, and is void.⁷²

⁶³ Act of Congr. September 24, 1789, s. 33; 1 Stat. 83.

⁶⁴ *Ex parte Bollman*, 4 Cranch, 75; see *Ex parte Kearney*, 7 Wheat. 38; 3 Pet. 193.

⁶⁵ Act of Congr. February 5, 1867; 14 Stat. 385.

⁶⁶ Act of Congr. September 24, 1789, s. 13; 1 Stat. 80.

⁶⁷ 3 Sharswood, Blackst. Comm. 112; Comyn, Dig.; Bacon, Abr.; Saund. Index; Viner, Abr.

⁶⁸ Buller, Nisi P. 219.

⁶⁹ 2 Chitty, Pract. 355.

⁷⁰ *United States v. Peters*, 3 Dall. 121.

⁷¹ Act of Congr. September 24, 1789, s. 13; 1 Stat. 80.

⁷² *Marbury v. Madison*, 1 Cranch, 175. See 3 Dall. 42; 9 Wheat. 529.

2571. *The criminal jurisdiction of the supreme court* is derived from the constitution and the act so often cited,⁷³ which gives the supreme court exclusive jurisdiction of suits and proceedings against ambassadors or other public ministers, or their domestics, as a court of law can have consistently with the law of nations. But it must be remembered that the act of April 30, 1790, ss. 25 and 26, declares void any writ or process whereby the person of any ambassador or other public minister, their domestic or domestic servants, may be arrested or imprisoned.

2572. *The local courts of the United States* have jurisdiction only over a limited territory, some larger, and others smaller; they are circuit courts; district courts; and territorial courts.

2573. In treating of *the circuit courts* it will be convenient to consider, first, their organization, and, second, their jurisdiction.

2574. *The organization of the circuit courts* will be best shown by considering in order the circuits, the judges, the officers of the courts, the time and place of holding the courts, and the removal of causes.

2575. *The circuit courts* are the principal inferior courts established by congress. There are nine circuit courts, which have jurisdiction respectively over their own circuits, as follows, to wit:

The first circuit is composed of the districts of Rhode Island, Massachusetts, New Hampshire, and Maine.⁷⁴

The second circuit of the districts of Vermont, Connecticut, and New York.⁷⁵

The third circuit of the districts of Pennsylvania, Delaware, and New Jersey.⁷⁶

The fourth circuit of the districts of Maryland, West Virginia, Virginia, North Carolina, and South Carolina.

The fifth circuit of the districts of Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas.

The sixth circuit of the districts of Ohio, Michigan, Kentucky, and Tennessee.

The seventh circuit of the districts of Indiana, Illinois, and Wisconsin.

The eighth circuit of the districts of Minnesota, Iowa, Missouri, Kansas, and Arkansas.

The ninth circuit of the districts of California, Oregon, and Nevada.⁷⁷

2576. From time to time, as new states have been admitted, they have in many cases been made judicial districts without being attached to any circuit, and the district judge has been authorized to hold circuit courts. All acts for this purpose, however, have been temporary, and all the states are now included in the nine circuits above given.

2577. In the District of Columbia a supreme court is established, consisting of a chief justice and three associate justices. The judges of this court hold terms as circuit courts and district courts, and have the same jurisdiction as the circuit courts.⁷⁸ From a final judgment or decree an appeal or writ of error lies to the supreme court of the United States,

2578. The supreme court of the District of Columbia has a special jurisdiction in connection with the Patent Office. When the application for a patent

⁷³ Act of Congr. September 24, 1789, s. 13; 1 Stat. 80.

⁷⁴ Acts of Congr. March 30, 1820; 3 Stat. 554; July 23, 1866; 14 Stat. 209.

⁷⁵ Acts of Congr. March 3, 1837; 5 Stat. 176; July 23, 1866; 14 Stat. 209.

⁷⁶ Act of Congr. July 23, 1866; 14 Stat. 209.

⁷⁷ Act of Congr. July 23, 1866; 14 Stat. 209. The number and boundaries of the circuits have been changed from time to time as new states have been admitted.

⁷⁸ Acts of Feb. 27, 1801; 2 Stat. 105; March 3, 1863; 12 Stat. 762.

has been rejected by the commissioner of patents, the applicant may appeal to this court.⁷⁹

2579. The chief justice and the associate justices of the supreme court of the United States are allotted among the circuits by order of the court; and whenever a new allotment shall be required or found expedient by reason of alteration of one or more circuits, or of the new appointment of a chief justice or associate justice, or otherwise, it shall be the duty of the court to make the same, and if a new allotment shall become necessary at any other time than during the term, such allotment shall be made by the chief justice, and shall be binding until the next term, and until a new allotment by the court.⁸⁰

The judges of the supreme court are not appointed as circuit court judges, or, in other words, have no distinct commission for that purpose; but practice and acquiescence under it for many years were held to afford an answer against this objection to their authority to act, when made in the year 1803, and to have fixed the construction of the judicial system. The court deemed the contemporary exposition to be of the most forcible nature, and considered the question at rest and not to be disturbed.⁸¹

2580. For each of the nine circuits a circuit judge is appointed who shall reside in his circuit, with the same power and jurisdiction therein as the justice of the supreme court allotted to the circuit. The circuit courts are held by the justice of the supreme court allotted to the circuit, by the circuit judge, or by the district judge sitting alone, or by any two of them. The justice of the supreme court presides when he sits, and in his absence the circuit judge. Such courts may be held at the same time in different districts, and cases may be heard and tried by each of the judges holding any such court sitting apart, by direction of the presiding justice or judge, who shall designate the business to be done by each.

It is the duty of the chief justice and of each justice of the supreme court to attend at least one term of the circuit court in each district of his circuit during every period of two years.⁸²

2581. In case a vacancy exists by the death of the justice of the supreme court allotted to the circuit and of the circuit judge, the district judge may hold the circuit court alone, but he cannot sit upon a writ of error from a decision in the district court. And when he sits as associate judge in the circuit court, he gives no opinion in errors and appeals from the district court, but the decision is to be made by the presiding justice.⁸³

2582. There are various *officers* attached to the circuit courts, the principal of whom are:

The clerk. This officer is appointed by the circuit judge.⁸⁴ His duties are to issue writs, make and keep all the records of the court.

Attorneys, who have the usual powers of attorney. They are admitted on motion after having been admitted in other courts for a certain length of time, according to the rules of the respective courts. This being a court of law and equity, and it being an appellate tribunal, the persons appointed to conduct the business of suitors therein are designated under the various appellations of at-

⁷⁹ Acts of Congr. March 3, 1839, § 11; 5 Stat. 354; Aug. 30, 1852; 10 Stat. 75; March 3, 1863, § 3; 12 Stat. 762.

⁸⁰ Act of Congr. March 2, 1817; 14 Stat. 433.

⁸¹ *Stuart v. Laird*, 1 Cranch, 308.

⁸² Act of Congr. April 10, 1869; 16 Stat. 44.

⁸³ Act of Congr. April 29, 1802, s. 5; 2 Stat. 159. See *Pollard v. Dwight*, 4 Cranch, 428; *United States v. Lancaster*, 5 Wheat, 434.

⁸⁴ Act of Congr. April 10, 1869; 16 Stat. 44.

torneys, counsellors, advocates, solicitors, and proctors. The offices of proctor and advocate are derived from the civil and canon law, and are used in admiralty proceedings as corresponding with attorney and counsellor in proceedings at law; in equity proceedings they bear the names of solicitor and counsellor.

The district attorney is an officer appointed by the president, by and with the consent of senate. His duty is to prosecute, in the district for which he is appointed, all delinquents for crimes and offences cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except in the supreme court in the district in which that court shall be holden.⁸⁵

The marshal of the district where the court sits is the ministerial officer of the circuit court.

A crier and tipstaves are sometimes appointed to make proclamations and keep order.

2583. A circuit court is held twice a year in each district of the circuits, the time and place of holding the court being established by various statutes, by both judges, or by one only if the other does not attend. If the day established for the beginning of the term happens to be Sunday, the court is held on the next day.⁸⁶

By sundry acts of congress it is provided :

That a circuit court may be adjourned from day to day by one of its judges, or, if none are present, by the marshal of the district, until a quorum be convened.⁸⁷

That when it shall happen that no judge of the supreme court attends within four days after the time appointed by law for the commencement of the session, a circuit court may be adjourned to the next stated term by the judge of the district court, or, in the case of his absence also, by the marshal of the district.⁸⁸

That when only one of the judges directed to hold the circuit court shall attend, such circuit court may be held by the judge so attending.⁸⁹

2584. To prevent the inconveniences which might happen in certain cases, the act of congress of March 2, 1809, imposes certain duties on the circuit judge when the district judge is unable to hold a district court.

If the disability of the district judge terminates in his death, the circuit judge must remand the certified causes to the district court.⁹⁰

By the act of March 3, 1821, s. 1, it is directed that in all suits and actions in any district court of the United States in which it shall appear that the judge of such court is any ways concerned in interest, or has been of counsel for either party, or is so related to or connected with either party as to render it improper for him in his opinion to sit on the trial of such suit or action, it shall be the duty of such judge, on application of either party, to cause the fact to be entered on the records of the court, and also an order that an authenticated copy thereof, with all the proceedings in such suit or action, shall be forthwith certified to the next circuit court of the district; and if there be no circuit court in such district, to the next circuit court in the state; and if there be no circuit court in such state, to the most convenient circuit court in an adjacent state; which circuit court shall, upon such record being filed with the clerk thereof, take cognizance thereof in the like manner as if such suit or action had been originally commenced in that court, and shall proceed to hear and determine

⁸⁵ Acts of Congr. September 24, 1789, s. 35; 1 Stat. 92; May 15, 1820; 3 Stat. 582.

⁸⁶ Acts of Sept. 24, 1789; 1 Stat. 74; April 29, 1802; 2 Stat. 158.

⁸⁷ Act of September 24, 1789, s. 6.

⁸⁸ Act of May 9, 1794.

⁸⁹ Act of April 29, 1802, s. 4.

⁹⁰ Ex parte United States, 1 Gall. C. C. 337.

the same accordingly; and the jurisdiction of such circuit court shall extend to all such cases so removed as were cognizable in the district court from which the same was removed.

And by the act of February 28, 1839, s. 8, it is enacted that in all suits and actions in any circuit court of the United States in which it shall appear that both the judges thereof or the judge thereof who is solely competent by law to try the same shall be any ways concerned in interest therein, or shall have been of counsel for either party, or is or are so related to or connected with either party as to render it improper for him or them in his or their opinion to sit in the trial of such suit or action, it shall be the duty of such judge or judges, on application of either party, to cause the fact to be entered on the records of the court, and also to make an order that an authenticated copy thereof, with all the proceedings in such suit or action, shall be forthwith certified to the most convenient circuit court in the next adjacent state, or in the next adjacent circuit; which circuit court shall, upon such record and order being filed with the clerk thereof, take cognizance thereof in the same manner as if such suit or action had been rightfully and originally commenced therein, and shall proceed to hear and determine the same accordingly; and the proper process for the due execution of the judgment or decree rendered therein shall run into and may be executed in the district where such judgment or decree was rendered, and also into the district from which such suit or action was removed.

2585. The circuit courts are courts of limited *jurisdiction*, and, like all other courts where the jurisdiction is limited, the presumption of law is that a case is not within their jurisdiction unless the contrary appears.⁹¹ And in all cases the jurisdiction of the court must appear from the record, *per se*, strictly considered.⁹² The usual way is to state the names of the parties thus: "A B, a citizen of the state of Ohio, against C D, a citizen of the state of Georgia."⁹³

The jurisdiction of the circuit courts is either civil or criminal.

2586. *The civil jurisdiction* is either at law or in equity.

2587. *The jurisdiction at law* is exercised in four ways: 1, it is original; 2, by appeal; 3, by removal of causes from state courts; 4, by mandamus.

2588. *The original jurisdiction* of the circuit courts at law may be considered, first, as to the matter in controversy; second, with regard to the parties litigant.

2589. To give original jurisdiction to the circuit court *the matter in dispute* must exceed five hundred dollars.⁹⁴ The test as to the amount is not the result of the verdict, but the amount claimed in the declaration; as, for example, in actions to recover damages for torts, the sum laid in the declaration is the criterion as to the matter in dispute.⁹⁵ So in an action of covenant on an instrument under seal containing a penalty less than five hundred dollars, the court has jurisdiction if the declaration demand more than that sum.⁹⁶

In ejectment the value of the land should appear in the declaration;⁹⁷ but though the jury do not find the value of the land in dispute, yet, if evidence be given on the trial that the value exceeds five hundred dollars, it is sufficient to fix the jurisdiction; or the court may ascertain its value by affidavits.⁹⁸

⁹¹ *Turner v. Bank of North America*, 4 Dall. 11; *Wood v. Mann*, 1 Sumn. C. C. 580; *Griswold v. Sedgwick*, 1 Wend. N. Y. 131; *McCormick v. Sullivant*, 10 Wheat. 192; *Postmaster Gen. v. Stockton*, 12 Pet. 584.

⁹² *Fisher v. Cockerell*, 5 Pet. 248; *Lessee of Reed v. Marsh*, 13 Pet. 153.

⁹³ *Wood v. Wagnon*, 2 Cranch, 1.

⁹⁴ Act of September 24, 1789, s. 11.

⁹⁵ *Hulscamp v. Teel*, 2 Dall. 356; *Gordon v. Longest*, 16 Pet. 97.

⁹⁶ *Martin v. Taylor*, 1 Wash. C. C. 1.

⁹⁷ *Lessee of Lanning v. Dolph*, 4 Wash. C. C. 624; *Liter v. Green*, 8 Cranch, 220.

⁹⁸ *Den v. Wright*, 1 Pet. C. C. 73.

When the matter in dispute arises out of a local injury for which a local action must be brought in order to give the circuit court jurisdiction, it must be brought in the district where the lands lie.⁹⁹

2590. By act of congress jurisdiction is given to the circuit courts in cases where actions are brought to recover damages for the violation of patent and copy rights, without fixing any amount as to limit, or as to the character of the parties.

2591. The circuit courts have jurisdiction in cases arising under the patent and copy right laws. All actions, suits, controversies, and cases arising under any law of the United States, granting or confirming to authors or inventors the exclusive right to their writings, inventions, or discoveries, shall be originally cognizable as well in equity as at law by the circuit courts of the United States, or any district court having the powers and jurisdiction of a circuit court; which courts shall have power, upon bill in equity filed by any party aggrieved, in any such case, to grant injunctions according to the course and principles of courts of equity, to prevent the violation of the rights of any inventor as secured to him by any law of the United States, on such terms and conditions as said courts may deem reasonable; *Provided, however,* That from all judgments and decrees from any such court rendered in the premises a writ of error or appeal, as the case may require, shall lie, at the instance of either party, to the supreme court of the United States in the same manner and under the same circumstances as is now provided by law in other judgments and decrees of such circuit court, without regard to the sum or value in controversy in the action.¹⁰⁰

2592. In general, the circuit court has no original jurisdiction of suits for penalties and forfeitures arising under the laws of the United States nor in admiralty cases.

2593. The circuit court has *jurisdiction over the parties* in the following cases: when the United States is a party, in suits between citizens of different states, in suits where an alien is a party, when an assignee is plaintiff, and when the defendant is served with process within the territorial jurisdiction of the court.

2594. When the sum in controversy exceeds, besides costs, the sum of five hundred dollars, *the United States* may sue on all contracts in the circuit court;¹⁰¹ but, in cases of penalties, the action must be in the district court unless the law gives express jurisdiction to the circuit court.¹⁰²

The act of March 3, 1815, s. 4, vests in the circuit court jurisdiction concurrently with the district court of all suits at common law where any officer of the United States sues under the authority of an act of congress; as, where the postmaster general sues under an act of congress for debts or balances due to the general post-office.¹⁰³

The circuit court has jurisdiction on a bill of equity, filed by the United States against the debtor of their debtor, they claiming a priority under the act of March 2, 1798, s. 65, though the law of the state where the suit is brought permits a creditor to proceed against the debtor of his debtor by a peculiar process at law.¹⁰⁴

⁹⁹ 4 Hall, Law Journ. 78.

¹⁰⁰ Acts of Congr. February 15, 1819; 3 Stat. 481; July 4, 1836, § 17; 5 Stat. 124; February 18, 1861; 12 Stat. 130.

¹⁰¹ *Evans qui tam v. Ballen*, 4 Dall. 342.

¹⁰² *Evans v. Ballen*, 4 Dall. 342.

¹⁰³ *Postmaster General v. Early*, 12 Wheat. 146; see *Dox v. The Postmaster General*, 1 Pet. 318; *Southwick v. The Postmaster General*, 2 Pet. 447.

¹⁰⁴ *United States v. Howland*, 4 Wheat. 108.

No suit can be brought against the United States; consequently, the circuit courts have no jurisdiction in such cases.

2595. The judiciary act¹⁰⁵ gives jurisdiction to the circuit court in suits of a civil nature when the matter in dispute exceeds five hundred dollars in value, besides costs, between a citizen of a state where the suit is brought and the citizen of another state; one of the parties must therefore be a citizen of the state where the suit is brought, for when neither of the parties is a citizen of such state, the court has no jurisdiction.¹⁰⁶

The act requires that the parties shall be citizens, and it must appear on the record that they are such.¹⁰⁷ This citizenship means a residence or domicile in a particular state by one who is a citizen of the United States. This must be not merely a temporary but a permanent domicile.¹⁰⁸ And when there are several plaintiffs or defendants, they must all be competent to sue and be sued in a circuit court; otherwise that court has no jurisdiction.¹⁰⁹

To give the court jurisdiction in cases between citizens of the United States the parties must be citizens of a state or states; the District of Columbia¹¹⁰ and the territories of the United States not being considered as states for this purpose.¹¹¹

2596. The eleventh section of the judiciary act¹¹² vests jurisdiction in the circuit court over all suits of a civil nature *where an alien is a party*; but these general words must be restricted by the provisions in the constitution which give jurisdiction in controversies between a state, or the citizens of a state, and foreign states, their citizens or subjects; the statute cannot extend the jurisdiction beyond the limits of the constitution.¹¹³ The record must show that the party is an alien.¹¹⁴

When both parties are aliens the circuit court has no jurisdiction.¹¹⁵

An alien who holds lands under a special law of the state where he is resident may maintain an action in relation to those lands in the circuit court.

2597. When the plaintiff sues on a right of action which has been assigned to him, to give the circuit court jurisdiction the assignor of the contract must have been entitled to sue in the circuit court, if no assignment had been made; but to this general rule there is an exception in the case of bills of exchange;¹¹⁶ the obvious policy of which is to prevent any thing which might impede their circulation.¹¹⁷

2598. As to the nature of the assignment, it has been held that where a note was payable to A B or bearer, the bearer might sue in the circuit court if prop-

¹⁰⁵ Act of Congr. September 24, 1789, s. 11; 1 Stat. 78. For the purposes of this act a corporation is a citizen of the state by which it is created. *Marshall v. Baltimore R. R.*, 16 How. 314; *Lafayette Ins. Co. v. French*, 18 How. 404.

¹⁰⁶ *Shute v. Davis*, Pet. C. C. 431; *Wood v. Mann*, 1 Sumn. C. C. 581; *White v. Sumner*, 1 Mas. C. C. 520; *Kitchen v. Sullivan*, 4 Wash. C. C. 84.

¹⁰⁷ *Wood v. Wagon*, 2 Cranch, 1; 1 Cranch, 343; *Turner v. Enrille*, 4 Dall. 8; *Cartlett v. Pacific Ins. Co.*, Paine, C. C. 594. An averment on the record that the parties are "of," or are "inhabitants" or "residents" of different states is not sufficient. The record must allege that they are citizens of different states.

¹⁰⁸ *Reed v. Bertrand*, 4 Wash. C. C. 516; *Cartlett v. Pacific Ins. Co.*, 1 Paine, C. C. 594; *Rabauld v. DeWolf*, 1 Paine, C. C. 580; *Knox v. Greenleaf*, 4 Dall. 360.

¹⁰⁹ *Strawbridge v. Curtis*, 3 Cranch, 267; but see *Shute v. Davis*, Pet. C. C. 431.

¹¹⁰ *Hepburn v. Elzey*, 2 Cranch, 448.

¹¹¹ *New Orleans v. Winter*, 1 Wheat. 91; *Prescott's Lessee v. Fairfield*, 1 Pet. 14.

¹¹² Act of September 24, 1789, s. 11; 1 Stat. 78.

¹¹³ *Mossman v. Higginson*, 4 Dall. 11.

¹¹⁴ *Turner v. Enrille*, 4 Dall. 7; *Micharlson v. Denison*, 3 Day, Conn. 294.

¹¹⁵ *Montaret v. Murray*, 4 Cranch, 46; 4 Dall. 420, note; *Piquignot v. Pennsylvania R. R.*, 16 How. 104.

¹¹⁶ Act of September 24, 1789, s. 11; 1 Stat. 78.

¹¹⁷ *Bullard v. Bell*, 1 Mas. C. C. 251.

erly qualified, without showing A B to be a fictitious person, or competent to have prosecuted the suit.¹¹⁸ Assignees by operation of law, as where an insolvent estate is vested in them by law, are embraced by the provisions as assignees in deed.¹¹⁹

2599. With regard to the nature of the claim assigned, the act is not confined to negotiable paper; equitable as well as legal assignments are included. The assignee of an open account is precluded as much as the assignee of a deed.

It is said that this section of the act of congress has no application to the conveyance of lands from a citizen of one state to a citizen of another state. The grantee in such case may, in general, maintain his action in the circuit court, when otherwise properly qualified, to try the title to such lands.¹²⁰ But the sale must have been made *bona fide*, and not for the mere purpose of enabling the nominal purchaser to bring a suit; in case the sale is fictitious, the court will strike off the case from the record.¹²¹

2600. The act¹²² further provides that no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought, before either of the said courts, against an inhabitant of the United States, by original process, in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ.

A citizen of one state may be sued in another under this act, if the process be served upon him in the latter;¹²³ but, in such case, the plaintiff must be a citizen of the state where the suit is brought or an alien.¹²⁴

This clause respecting the not being served with process out of the district in which the defendant resides is the grant of a personal privilege, and not a restriction of the jurisdiction of the court. Being nothing but a privilege, it may be waived, either expressly or by implication, as by entering an appearance.¹²⁵ But if the defendant appear and put in a plea, claiming the benefit of the privilege, it is no waiver.¹²⁶

2601. *The appellate jurisdiction of the circuit court* may be exercised by means of writs of error; appeals from the district court; certiorari; and procedendo.

2602. This court has jurisdiction to issue writs of error to the district court, on judgments of that court in civil causes, at common law, but not in admiralty or maritime causes.¹²⁷

The eleventh section of the judiciary act¹²⁸ provides that the circuit court shall have appellate jurisdiction from the district courts under the regulations and restrictions therein provided.

By the twenty-second section final decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined, and reversed or affirmed in a circuit court holden in the same district upon a writ of error, whereto shall be annexed and returned therewith at the day and place therein mentioned an authenticated transcript of the record and assignment of errors, and prayer for reversal, with a citation to the adverse party, signed by the judge of such dis-

¹¹⁸ *Bank of Kentucky v. Wistar*, 2 Pet. 318.

¹¹⁹ *Sere v. Pitot*, 6 Cranch, 332.

¹²⁰ *Briggs v. French*, 2 Sumn. C. C. 252.

¹²¹ *Maxfield's Lessee v. Levy*, 4 Dall. 330.

¹²² Act of September 24, 1789, s. 11; 1 Stat. 78.

¹²³ *McMicken v. Webb*, 11 Pet. 25.

¹²⁵ *Logan v. Patrick*, 5 Cranch, 288.

¹²⁷ *United States v. Wonson*, 1 Gall. C. C. 5.

¹²⁸ Act of September 24, 1789, s. 11; 1 Stat. 78.

¹²⁴ *Shute v. Davis*, Pet. C. C. 431.

¹²⁶ *Harrison v. Rowan*, Pet. C. C. 449.

strict court or a justice of the supreme court, the adverse party having at least twenty days' notice. But there shall be no reversal on such writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court or for any error in fact. Writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of; or, in case the person entitled to such writ of error be an infant, *non compos mentis*, or imprisoned, then within five years, as aforesaid, exclusive of the time of such disability. And every justice or judge signing a citation or any writ of error as aforesaid shall take good and sufficient security that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs, if he fail to make his plea good.

The district judge cannot sit in the circuit court on a writ of error to the district court.¹²⁹

2603. Appeals from the district to the circuit court take place generally in civil causes of admiralty or maritime jurisdiction.

By the act of March 3, 1803, it is enacted that from all final judgments or decrees in any of the district courts of the United States an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of fifty dollars, shall be allowed to the circuit court next to be holden in the district where such final judgment or judgments, decree or decrees, shall be rendered; and the circuit courts are thereby authorized and required to hear and determine such appeals.

2604. Although no act of congress authorizes the circuit court to issue a certiorari to the district court for the removal of a cause, yet if the cause be so removed, and instead of taking advantage of the irregularity in proper time and in a proper manner, the defendant makes the defence and pleads to issue, he thereby waives the objection, and the suit will be considered as an original one in the circuit court, made so by consent of parties.¹³⁰

2605. The circuit court may issue a writ of procedendo to the district court.

2606. Actions may be removed from a state court into the circuit court in two cases: when the matter in dispute exceeds five hundred dollars, exclusive of costs, and when parties claim title to land under grants of different states.

2607. The twelfth section of the judiciary act¹³¹ provides in certain cases the right of removing a suit instituted in a state court to the circuit court of the district. It is enacted by that law that if a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court, and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next circuit court to be held in the district where the suit is pending, and offer good and sufficient security for his entering in such court on the first day of its session, copies of the said process against him, and also for his then appearing and entering special bail in the cause, if special bail was originally required therein, it shall then be the duty of the state court to accept the surety and proceed no further in the cause. And any bail that may have been originally taken shall be discharged. And the said copies being entered as aforesaid in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by orig-

¹²⁹ United States v. Lancaster, 5 Wheat. 434.

¹³⁰ Patterson v. United States, 2 Wheat. 221.

¹³¹ Act of September 24, 1789, s. 12.

inal process. And any attachment of the goods or estate of the defendant, by the original process, shall hold the goods or estate so attached to answer the final judgment in the same manner as by the laws of such state they would have been holden to answer final judgment had it been rendered by the circuit court in which the suit commenced.

2608. The constitution¹³² extends the judicial power to controversies between citizens of the same state claiming lands under grants of different states; and by a clause of the 12th section of the judiciary act it is enacted, that if, in any action commenced in a state court, the title of land be concerned, and the parties are citizens of the same state, and the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, the sum or value being made to appear to the satisfaction of the court, either party before the trial shall state to the court, and make affidavit if it require it, that he claims and shall rely upon a right or title to the land, under grant from a state other than that in which the suit is pending, and produce the original grant or an exemplification of it, except where the loss of records shall put it out of his power, and shall move that the adverse party inform the court whether he claims a right of title to the land under a grant from the state in which the suit is pending, the said adverse party shall give such information, otherwise not be allowed to plead such grant, or give it in evidence upon the trial; and if he informs that he does claim under any such grant, the party claiming under the grant first mentioned may then, on motion, remove the cause for trial to the next circuit court to be holden in such district. But if he is the defendant, he shall do it under the same regulations as in the before mentioned case of the removal of a cause into such court by an alien. And neither party removing the cause shall be allowed to plead, or give evidence of any other title than that by him stated as aforesaid as the ground of his claim.¹³³

Application for removal must be made during the term at which the defendant enters his appearance.¹³⁴ If a state court agree to consider the petition to remove the cause as filed of the preceding term, yet, if the circuit court see by the record that it was not filed till a subsequent term, they will not permit the cause to be docketed.¹³⁵ It will be in time, however, if the petition be filed at the time of putting in bail;¹³⁶ and a defendant in ejectment may file his petition when he is let in to defend.¹³⁷

In chancery, when the defendant wishes to remove his suit, he must file his petition when he enters an appearance.¹³⁸

Where a suit or prosecution shall be commenced in a court of any state against any officer of the United States, or other person, for, or on account of, any act done under the revenue laws of the United States, or under color thereof, or for, or on account of, any right authority or title set up or claimed by such officer, or other person, under any such law of the United States, such action may be removed to the circuit court, and the proceedings in the state court shall be stayed, and if the defendant has been arrested, the circuit court shall issue a habeas corpus.¹³⁹

If any suit is commenced in any state court against any officer, or other per-

¹³² U. S. Const. art. 3, s. 2.

¹³³ See 9 Cranch, 292; 2 Wheat. 378.

¹³⁴ *Gibson v. Johnson*, Pet. C. C. 44; *Eastin v. Ruckér*, 1 J. J. Marsh. Ky. 232.

¹³⁵ Pet. C. C. 44; *Ward v. Arredondo*, Paine, C. C. 410; but see *Gelston v. Johnson*, 2 Penn. 625.

¹³⁶ *Redmond v. Russell*, 12 Johns. N. Y. 153; *Arjo v. Monteiro*, 1 Caines, N. Y. 248; *Bird v. Murray*, *Colem*. N. Y. 58.

¹³⁷ *Jackson v. Stiles*, 4 Johns. N. Y. 493.

¹³⁸ *Livingston v. Gibbons*, 4 Johns. Ch. N. Y. 94.

¹³⁹ Act of Congr. March 2, 1833; 4 Stat. 633.

son, for any arrest or acts done by him during the rebellion of 1861, by virtue or under color of any authority derived from, or exercised by or under the president of the United States, or any act of congress, such suit may be removed to the circuit court.¹⁴⁰

If a suit is brought in any state court in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, and the matter in dispute exceeds five hundred dollars, such citizen of another state, whether plaintiff or defendant, may remove the suit to the circuit court, if he files an affidavit stating that he believes that from prejudice or local influence he will not be able to obtain justice in such state court.¹⁴¹

2609. The power of the circuit court to issue a *mandamus* is confined exclusively to cases in which it may be necessary for the exercise of such a jurisdiction already existing; as, for example, if the court below refuse to proceed to judgment, then a *mandamus*, in the nature of a *procedendo*, may issue.¹⁴² After a state court had refused to permit the removal of a cause on petition, the circuit court issued a *mandamus* to transfer the cause.

The circuit court may issue writs of habeas corpus when any person is restrained of his liberty in violation of the constitution, treaties, or laws of the United States.¹⁴³

2610. Circuit courts are vested with *equity jurisdiction* in certain cases. The judiciary act of 1789, s. 11, gives original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, between certain parties therein mentioned.

The act of April 15, 1819, s. 1, further extends the equitable powers of this court; it enacts "that the circuit court of the United States shall have original cognizance, as well in equity as at law, of all actions, suits, controversies, and cases arising under any law of the United States, granting or confirming to authors or inventors the exclusive right to their respective writings, inventions, and discoveries, and upon any bill in equity, filed by any party aggrieved, in such cases, shall have authority to grant injunctions according to the course and principles of courts of equity, to prevent the violation of the rights of any authors or inventors, secured to them by any laws of the United States, on such terms and conditions as the said courts may deem fit and reasonable: *Provided, however,* that from all judgments and decrees of any circuit courts rendered in the premises a writ of error or appeal, as the case may require, shall lie to the supreme court of the United States, in the same manner and under the same circumstances as is now provided by law in other judgments and decrees of such circuit court."

And the act of August 23, 1842, s. 5, declares that the district courts as courts of admiralty, and the circuit courts as courts of equity, shall be deemed always open for the purpose of filing libels, bills, petitions, answers, pleas, and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings whatever, preparatory to the hearing of all causes pending therein upon their merits. And it shall be competent for any judge of the court, upon reasonable notice to the parties, in the clerk's office, or at chambers, and in vacation as well as in term, to make and direct, and award all such pro-

¹⁴⁰ Acts of Congr. March 3, 1863; 12 Stat. 755; May 11, 1866; 14 Stat. 46; January 22, 1869; 15 Stat. 267.

¹⁴¹ Act of Congr. March 2, 1867; 14 Stat. 558.

¹⁴² *M'Intire v. Wood*, 7 Cranch, 504; *M'Clung v. Silliman*, 6 Wheat. 598.

¹⁴³ Act of February 5, 1867; 14 Stat. 385.

cess, commissions, and interlocutory orders, rules, and other proceedings, whenever the same are not grantable, of course, according to the rules and practice of the court.

2611. The judiciary act, section 11, gives the circuit courts *exclusive cognizance of all crimes* and offences cognizable under the authority of the United States, except where that act otherwise provides or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein. The jurisdiction of the circuit court in criminal cases is confined to offences committed within the district for which those courts respectively sit when they are committed on land.

Although the national courts are to look to the common law in the absence of statutory provisions for the rules to guide them in the exercise of their functions in criminal as in civil cases, it is to the statutes of the United States alone that they must have recourse to determine what constitutes an offence against the United States. The general government has no unwritten criminal code to which resort can be had as a source of jurisdiction.¹⁴⁴

2612. In treating of *the district courts of the United States*, the same division which was made in considering the circuit courts will here be adopted by taking a view of their organization and their jurisdiction.

2613. The United States are divided into districts, in each of which is a court, called the district court, which is to consist of one judge, who is to reside in the district for which he is appointed, and to hold annually four sessions.¹⁴⁵ By subsequent acts of congress the number of annual sessions in particular districts is sometimes more, sometimes less, and they are to be held at various places in the same district. The supreme court of the District of Columbia exercises the functions of a district court in that district.¹⁴⁶

2614. The judge of the district court appoints a clerk for said court, whose duties are to issue writs and all other process, keep the records, and generally to perform the duties of a clerk of the court.¹⁴⁷

By the third section of the act of March 2, 1809, it is enacted that in case the district judge in any district is unable to discharge his duties as by the said act is provided, the district clerk of such district shall be authorized and empowered, by leave or order of the circuit judge of the circuit in which such district is included, to take, during such disability of the district judge, all examinations and depositions of witnesses, and to make all necessary rules and orders preparatory to the final hearing of all causes of admiralty and maritime jurisdiction.

2615. The marshal of the district is the ministerial officer who is to carry into execution the judgments, decrees, and orders of said district court.

2616. The persons admitted to conduct the business of suitors in the district court are designated by various appellations, of attorneys, counsellors, proctors, and advocates, in the same way that they are in the circuit courts.

2617. The district attorney is the officer who, on behalf of the United States, prosecutes all claims due to the United States, and for all offences committed in violation of the national laws.

2618. *The jurisdiction of the district court* is either civil or criminal.

2619. *The civil jurisdiction* of these courts extends to admiralty and maritime causes; to cases of seizure on land under the laws of the United States, and in suits for penalties and forfeitures incurred under those laws; to cases in

¹⁴⁴ *Ex parte Bollman*, 4 Cranch, 75; *United States v. Coolidge*, 1 Wheat. 415; *United States v. Bevans*, 3 Wheat. 336; *United States v. Hudson*, 7 Cranch, 32.

¹⁴⁵ Act of Congr. September 24, 1789, s. 3; 1 Stat. 73.

¹⁴⁶ *Before*; **2577**.

¹⁴⁷ Acts of Congr. September 24, 1789, s. 7; 1 Stat. 76; April 10, 1869; 16 Stat. 44.

which an alien sues for a tort in violation of the laws of nations, or of a treaty of the United States; to suits instituted by the United States; to actions by and against consuls, and to certain cases in equity.

2620. The original *admiralty and maritime jurisdiction* of the district courts is exclusive, and is either ordinary or extraordinary.

2621. *The ordinary jurisdiction in admiralty* comprehends prize suits, cases of salvage, actions for torts, and actions on maritime contracts, such as seamen's wages, pilotage, bottomry, ransom, materials, and the like.

2622. The act of September 24, 1789, s. 9, vests in the district courts as full jurisdiction of all *prize causes* as the admiralty of England; and this jurisdiction is an ordinary inherent branch of the powers of the court of admiralty, whether considered as prize courts or instance courts.¹⁴⁸

The act marks out not only the general jurisdiction of the district courts, but also that of the several courts in relation to each other in case of seizure on the waters of the United States or elsewhere.

When the seizure is made in the waters of one district, the court of that district has exclusive jurisdiction, though the offence may have been committed out of that district.

When the seizure is made on the high seas, the jurisdiction is in the court of the district where the property is brought.

2623. Under the constitution and laws this court has exclusive original cognizance in *cases of salvage*; and, as a consequence, it has the power to determine to whom the residue of the property belongs after deducting the salvage.¹⁴⁹

2624. By the delegation of jurisdiction to the district court in all admiralty and maritime causes, it has jurisdiction over all *cases of torts* or injuries committed upon the high seas, and in ports and harbors within the ebb and flow of the tide.¹⁵⁰ The following are examples: the district court, as a court of admiralty, may redress personal wrongs committed on a passenger on the high seas by the master of a vessel, whether those wrongs were by direct force or consequential injuries;¹⁵¹ and the owners as well as the captain of the vessel are liable for an unlawful capture made by him.¹⁵² A father, whose minor son has been tortiously abducted on a voyage on the high seas, may sue in the admiralty in the nature of an action *per quod*, etc., also for wages earned by such son in maritime service.¹⁵³ This court has also jurisdiction of petitory suits to reinstate the owners of vessels who have been displaced from their possession.¹⁵⁴

2625. The fourth class of remedies in the admiralty, under its ordinary jurisdiction, is by suit on *maritime contracts*. This court has jurisdiction concurrent with the common law, over all maritime contracts, wheresoever the same

¹⁴⁸ *Glass v. The Betsey*, 3 Dall. 6; *The Emulous*, 1 Gall. C. C. 563. The English court of admiralty is divided into two distinct tribunals; the one having generally all jurisdiction of admiralty, except in prize cases, is called the instance court; the other, acting under a special commission, distinct from the commission given to judges of admiralty, to enable the judge, in time of war, to assume the jurisdiction of prizes, and called a prize court. *Browne, Civ. & Adm. Law*, Ch. 4 and 5.

¹⁴⁹ *M'Donough v. Dannery*, 3 Dall. 183.

¹⁵⁰ *Martin v. Hunter's Lessee*, 1 Wheat. 304; *The Amiable Nancy*, 3 Wheat. 546; *De Lovio v. Boit*, 2 Gall. C. C. 398; *Plummer v. Webb*, 4 Mas. C. C. 380; *Waring v. Clarke*, 5 How. 441. The district court has the same jurisdiction in cases arising upon the lakes, on vessels passing between different states. Act of 1845; 5 Stat. 726; *Genessee Chief v. Fitzhugh*, 12 How. 443.

¹⁵¹ *Chamberlain v. Chandler*, 3 Mas. C. C. 242.

¹⁵² *Dean v. Angus, Bee*, Adm. 369, 378.

¹⁵³ *Plummer v. Webb*, 4 Mas. C. C. 380.

¹⁵⁴ *The Tilton*, 5 Mas. C. C. 465.

may be made or executed, or whatsoever be the form of the contract.¹⁵⁵ But contracts regulated by the common law are excluded from the jurisdiction of the admiralty by the seventh amendment to the constitution.¹⁵⁶

The maritime contracts over which the admiralty has jurisdiction are those which relate to the business, commerce, or navigation of the sea; such as charter parties, affreightments, marine loans and hypothecations, contracts for maritime service in building, repairing, supplying, and navigating ships; contracts and quasi contracts respecting averages, contributions, and jettisons; contracts relating to marine insurance; and those between part owners of ships. But unless a contract be essentially maritime, the jurisdiction does not attach.¹⁵⁷

It is not indispensable that the services on which suit is brought should have been performed at sea; the jurisdiction of the admiralty attaches when the services are performed on a ship in port where the tide ebbs and flows.¹⁵⁸ Seamen employed on board of steamboats and lighters engaged in trade or commerce on tide-water are within the admiralty jurisdiction;¹⁵⁹ wages may, therefore, be recovered in the admiralty by the pilot, deck-hands, engineer, and firemen on board of a steamboat;¹⁶⁰ but unless the services of those employed contribute in navigating the vessel, or to its preservation, they cannot sue for their wages in the admiralty; musicians on board of a vessel, who are hired and employed as such, cannot, therefore, enforce a payment of their wages by a suit *in rem* in the admiralty.¹⁶¹

2626. *The extraordinary jurisdiction in admiralty* is vested in the district court by various acts of congress: in cases under the laws of imposts, navigation, or trade of the United States, and in cases of captures within the territorial limits of the United States.

2627. It is enacted by the judiciary act, section ninth, that the district court shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all *seizures under laws of impost*, navigation, or trade of the United States, when the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, when the common law is competent to give it.

Cases of this kind are properly civil causes of admiralty and maritime jurisdiction and cognizable in the admiralty, and the court is to decide them without the aid of a jury.

The process does not touch the person of the offender; the proceeding is in the nature of a libel *in rem*.¹⁶²

It is the place of seizure, and not the committing of the offence, that gives jurisdiction to the court;¹⁶³ for, until there has been a seizure, the forum cannot be ascertained.¹⁶⁴

2628. The admiralty jurisdiction expressly vested in the district court em-

¹⁵⁵ *De Lovio v. Boit*, 2 Gall. C. C. 398; *Zane v. The President*, 4 Wash. C. C. 453; *The Mary, Paine*, C. C. 671; *Davis v. Brig, Gilp. Dist. Ct.* 477.

¹⁵⁶ *Bains v. The James, Baldw. C. C.* 544.

¹⁵⁷ *The Jefferson*, 10 Wheat. 428; *Thackarey v. The Farmer, Gilp. Dist. Ct.* 529.

¹⁵⁸ *The Jefferson*, 10 Wheat. 428; *Peyroux v. Howard*, 7 Pet. 324.

¹⁵⁹ *Thackarey v. Farmer of Salem, Gilp. Dist. Ct.* 532; *Wilson v. The Steamboat Ohio, Gilp. Dist. Ct.* 505.

¹⁶⁰ *Wilson v. The Ohio, Gilp. Dist. Ct.* 505.

¹⁶¹ *Turner v. Boat Superior, Gilp. Dist. Ct.* 516.

¹⁶² *United States v. La Vengeance*, 3 Dall. 297; *The Samuel*, 1 Wheat. 9.

¹⁶³ *United States v. The Betsy and Charlotte*, 4 Cranch, 443; *Keene v. The United States*, 5 Cranch, 304.

¹⁶⁴ *The Brig Ann*, 9 Cranch, 289.

braces also *captures* made *within the jurisdictional limits of the United States*. The court is authorized to take cognizance of complaints, by whomsoever instituted, in case of captures made within the waters of the United States, or within a marine league of the coasts and shores thereof.¹⁶⁵

2629. The civil jurisdiction of the district court extends to *seizures on land* under the laws of the United States, and in suits for penalties and forfeitures incurred under those laws. The act gives the court exclusive original cognizance of all seizures made on land, and such waters of the United States which are not navigable by vessels of ten or more tons burden, within their respective districts, and of all suits for penalties and forfeitures as are incurred under the laws of the United States.¹⁶⁶

In all cases of seizure made on land the court sits as a court of common law, and its jurisdiction is entirely distinct from that exercised in cases of seizure on waters navigable by vessels of ten tons burden and upward.¹⁶⁷ Seizures of this kind are triable by jury; they are not cases of admiralty and maritime jurisdiction.¹⁶⁸

2630. The district court is also vested with jurisdiction concurrent with the courts of the several states, or the circuit court, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or of a treaty of the United States.¹⁶⁹ But unless the case be in the admiralty, the suit of such alien must be against a citizen of a state; for, by the constitution, an alien's right to sue is restricted to that case.

2631. Jurisdiction is given to the district court to have cognizance concurrent with the courts of the several states, and the circuit court of all suits at common law, where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars.¹⁷⁰ And by a subsequent act¹⁷¹ cognizance is given to it concurrent with the courts and magistrates of the several states, and the circuit courts of the United States, of all suits at common law, where the United States, or any officer thereof, under the authority of any act of congress, sue, although the debt, claim, or other matter in dispute shall not amount to one hundred dollars. These last words do not confine the jurisdiction given by this act to one hundred dollars, but prevent it from stopping at that sum; and, consequently, suits for sums over one hundred dollars are cognizable in the district, circuit, and state courts, and before magistrates, in the cases here mentioned.

By virtue of this act, these tribunals have jurisdiction over suits brought by the postmaster general for debts and balances due to the general post office.¹⁷²

2632. This court has jurisdiction *by or against consuls* and vice-consuls, exclusively of the courts of the several states, except for offences where other punishment than whipping not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is inflicted.

For offences above this description formerly the circuit court only had jurisdiction in cases of consuls.¹⁷³ But by the act of August 23, 1842, the district

¹⁶⁵ Act of Congr. April 20, 1818, s. 7; 3 Stat. 447.

¹⁶⁶ Act of Congr. September 24, 1789, s. 9; 1 Stat. 76.

¹⁶⁷ 8 Wheat. 395.

¹⁶⁸ *United States v. The Betsy and Charlotte*, 4 Cranch, 443.

¹⁶⁹ Act of September 24, 1789, s. 9; 1 Stat. 76.

¹⁷⁰ Act of September 24, 1789, s. 9; 1 Stat. 76.

¹⁷¹ Act of March 3, 1815, s. 4; 3 Stat. 245. See *United States v. Greene*, 4 Mas. C. C. 427.

¹⁷² *Postmaster General v. Early*, 12 Wheat. 147; *Southwick v. Postmaster General*, 2 Pet. 447.

¹⁷³ 5 Serg. & R. Penn. 545.

courts have concurrent jurisdiction with the circuit courts of all crimes and offences against the United States, the punishment of which is not capital. And by a late act¹⁷⁴ the punishment of whipping is abolished.

2633. By the first section of the act of February 13, 1807, the judges of the district courts of the United States shall have as full power to grant writs of injunction to operate within their respective districts as is now exercised by any of the judges of the supreme court of the United States under the same rules, regulations, and restrictions as are prescribed by the several acts of congress establishing the judiciary of the United States, any law to the contrary notwithstanding; *Provided*, that the same shall not, unless so ordered by the circuit court, continue longer than to the circuit court next ensuing; nor shall an injunction be issued by a district judge in any case where the party has had a reasonable time to apply to the circuit court for the writ.

2634. An injunction may be issued by the district judge under the act of March 3, 1820, §§ 4, 5, where proceedings have taken place by warrant and distress against a debtor to the United States or his sureties, subject by § 6 to appeal to the circuit court from the decision of such district judge in refusing or dissolving the injunction, if such appeal be allowed by a justice of the supreme court. On which, with an exception as to the necessity of an answer on the part of the United States, the proceedings are to be as in other cases.

2635. The judiciary act vests authority in the judges of the district court to grant writs of *habeas corpus* for the purpose of inquiry into the cause of commitment.

2636. Other acts give them power to issue writs, take depositions, make rules, and the like. The acts of congress already treated of, relating to the privilege of not being sued out of the district of which the defendant is an inhabitant or in which he is found, restricting suits by assignees, and various other provisions, apply to the district court as well as to the circuit court.

2637. By the ninth section of the judiciary act the trial of issues in fact in the district courts in all causes, except causes of admiralty and maritime jurisdiction, shall be by jury.

2638. By the act of August 23, 1842, s. 3, it is enacted that the district courts of the United States shall have concurrent jurisdiction with the circuit courts of all crimes and offences against the United States, the punishment of which is not capital.

2639. By the Bankrupt Law¹⁷⁵ the district courts are constituted *courts of bankruptcy*, and are always open for this purpose. The circuit courts exercise a general supervision over the district courts. In each congressional district a register in bankruptcy is appointed who makes adjudication in bankruptcy, holds the meetings, audits and passes the accounts, and, in general, transacts all the business which is uncontested. From his decision an appeal may be taken to the district court, and thence to the circuit court. The discharge of the bankrupt is granted by the judge of the district court.

2640. *The courts of the organized territories* of the United States are established by the acts of congress establishing such territories. The courts thus established are generally the same in all the territories. In each of them there are:

A supreme court, composed of a chief justice and a number of associate justices, who have an appellate jurisdiction and a general supervision of all the other courts in the territory. The court appoint their own clerk and admit

¹⁷⁴ Act of February 28, 1839, s. 5.

¹⁷⁵ Act of March 2, 1867, Ch. 176; 14 Stat. 517.

attorneys and counsellors to practice. The marshal of the territory executes the mandates of the court.

The territory is divided into districts, and in each district there is a court called the district court. A clerk is appointed by the court, and attorneys and counsellors are admitted. The marshal executes their process. The court in each district is held by one of the judges of the supreme court.

The district courts have the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States. Writs of error and appeals from the final decisions of the said courts in all such cases may be made to the supreme court of the territory.

These courts exercise jurisdiction in all cases under the laws of the territorial legislature.

Besides these there are probate courts for proving last wills and granting letters of administration on the estates of persons deceased.

Jurisdiction is also given in certain cases to justices of the peace.

2641. Besides the courts of the United States established by the national constitution, each state has an independent judiciary, over which the United States have no power, with the exception of the power of removing certain cases from the state courts into the circuit courts of the United States, and the supervisory jurisdiction of the supreme court of the United States in cases involving constitutional questions. The state courts are all established by their respective constitutions with definite powers.

A review of the judicial system of each state could only give an abstract of the several constitutions. This can best be studied by reading the constitutions themselves, which are accessible to every one.

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 - 2727. For what causes they may be sued.
 - 2729. When one of several obligors is dead.
 - 2730. When there has been a change of credit and where covenants run with the land.
 - 2732. When the obligor is bankrupt.
 - 2733. When the obligor is insolvent.
 - 2734. When a corporation is defendant.
- 2735-2788. Parties to actions *ex delicto*.
- 2735-2766. Plaintiffs in actions *ex delicto*.
- 2736-2745. What interest is required.
- 2738-2741. Injuries by positive misfeasance.
 - 2738. Injuries to the person and personal rights.
 - 2739. Injuries to property.
 - 2741. Injuries to the relative rights.
 - 2742. Injuries by breach of public duty.
 - 2743. Injuries from the omission of a private obligation.
 - 2744. When the plaintiff may sue *ex contractu* or *ex delicto*.
 - 2745. Actions given by statute.
 - 2746. When the interest has been assigned.
- 2747-2753. The number of plaintiffs.
- 2748-2751. Injuries to several persons by positive misfeasance.
 - 2749. Injuries to the person and personal rights.
 - 2750. Injuries to the joint property of several persons.
 - 2751. Injuries to the relative rights of several persons.
 - 2752. Injuries arising from neglect of public duty.
 - 2753. Consequences of a non-joinder or mis-joinder.
- 2754-2757. When the injured party is dead.
 - 2755. Injuries to the person.
 - 2756. Injuries to personal property.
 - 2757. Injuries to real property.
 - 2758. When one of several persons injured is dead.
- 2759-2766. When a married woman may be joined.
 - 2760. Injuries committed before coverture.
 - 2761. Injuries committed during coverture.
 - 2764. Injuries to the wife in *alieno jure*.
 - 2765. When the husband or wife dies.
- 2767-2788. Defendants in action *ex delicto*.
- 2767-2775. Liabilities between the original parties.
- 2768-2772. Positive wrongs.
 - 2769. Injuries to the person and personal rights.
 - 2772. Injuries to property.
 - 2773. Liabilities for a breach of public duty.
 - 2774. Liabilities from neglect of a private obligation.
 - 2775. Liabilities from a breach of contract.
 - 2776. When the interest has been assigned.

- 2777-2781. The number of persons liable for an injury.
 2778. Joint liabilities for common injuries.
 2780. Joint liabilities for neglect of public duty.
 2781. Joint liabilities for neglect of a private obligation.
 2782. When the wrong doer is dead.
 2787. When the wrong doer marries.

2642. *Actions* are sometimes divided into criminal and civil. A *criminal action* is a prosecution in a competent court of justice, in the name of the government, against one or more individuals, who are accused of having committed a crime. This does not belong to our subject.

2643. A *civil action* is one prosecuted for the recovery of a right or the redress of an injury. It is a legal demand of one's right in a court of justice, in the form prescribed by law, or it is a suit given by law for the recovery of what is due.¹ The term action includes the whole course of legal proceedings to obtain the redress for a civil injury. Until judgment the proceeding is properly called an action, but not after, and, therefore, a release of all actions is regularly no bar to an execution.²

The term suit is sometimes used instead of action. Under the judiciary act of 1789 the word suit applies to any proceeding in a court of justice in which the plaintiff pursues, in such court, the remedy which the law affords him; in this sense an application for a prohibition is, therefore, a suit.³

A distinction is sometimes made by applying the term action to proceedings at law, and suit to those in equity; thus we say, an action at law and a suit in equity.

Actions differ as they have for their object the recovery of land, without damages, when they are called real actions; when they are instituted to recover some specific article of personal property, wrongfully withheld from the plaintiff by the defendant, or a compensation in money for an injury sustained, which compensation is technically called damages, they are then called personal actions. When the object of the action is the recovery of real estate and damages for the illegal detention, they are denominated mixed actions.

2644. *Real actions* are those brought for the specific recovery of lands, tenements, or hereditaments.⁴ They are called *droitural* when the plaintiff, in these actions called the *demandant*, seeks to recover the property; or *possessory* when he endeavors to recover the possession.⁵ Real actions are writs of right; writs of entry; and writs ancestral.

By these actions, formerly, all disputes concerning real estates were decided, but now they are pretty generally laid aside in practice, on account of the great nicety required in their management, and the inconvenient length of their process, a much more expeditious method of trying titles having been introduced by other actions, personal and mixed.

2645. *Personal actions* are those brought for the specific recovery of goods and chattels, or for damages, or other redress for breach of contract, or other injuries of every description, the specific recovery of lands, tenements, or hereditaments only excepted. Considered as to their cause, personal actions are *ex contractu*, or arising out of contracts, and *ex delicto*, or to redress some wrong

¹ Coke, Litt. 285; 3 Sharswood, Blackst. Comm. 116.

² Coke, Litt. 289, a.

³ 2 Pet. 449. In its most extended sense the word suit includes not only a civil action, but also a criminal prosecution; as, an indictment, an information, and a conviction before a magistrate. Hammond, Nisi P. 270. See Stephen, Plead. 427.

⁴ Stephen, Plead. 3.

⁵ Finch, Law, 257.

or injury; as to the place where they are to be tried, they are local or transitory; and as to the object pursued, they are *in personam* or *in rem*.

2646. *An action ex contractu* is one which arises on a contract, and is brought for the recovery of damages, or of a thing which belongs to the plaintiff. These actions are account, assumpsit, covenant, debt, and detinue. In Connecticut and Vermont there is an action used, which is peculiar to those states, called an action of book debt.⁶

2647. Personal actions, in form *ex delicto*, which are principally for the redress of wrongs and injuries unconnected with contract, are case, trover, detinue, replevin, and trespass.

2648. A *local action* is one in which the venue must still be laid in the county in which the cause of action actually arose. The present locality of action is founded, in some cases, on common law principles, and, in others, on positive enactments of statute law. Those which continue local by the common law are:

All actions in which the subject or thing to be recovered is in its nature local. Of this class are real actions, actions of waste, when brought on the statute of Gloucester, to recover with damages the place wasted, or the *locus in quo*, and actions of ejectment. All these are local, because they are brought to recover the seisin or possession of lands or tenements, which are local subjects.

Various actions, which do not seek the direct recovery of lands and tenements, are also local by the common law, because they arise out of some local subject, or are in violation of some local right or interest. Within this class of cases are many actions in which only pecuniary damages are recoverable; such are the common law actions of waste and trespass *quare clausum freigit*; and so are trespass on the case, for injuries affecting things real; as, nuisances to houses or lands; disturbance of right of way; obstruction or diversion of water courses, and the like.⁷ The action of replevin also, though it lies for damages only, and does not arise out of any violation of a local right, is nevertheless local.⁸ The reason of its locality is the necessity of giving a local description of the taking complained of.⁹

2649. *Transitory actions* are those personal actions which seek nothing more than the recovery of money or personal chattels, whether they sound in contract or in tort;¹⁰ because actions of this kind are, in most instances, founded on the violation of rights which, in contemplation of law, have no locality. And it is true, as a general position, that actions *ex delicto*, in which a mere personalty is recoverable, are, by the common law, transitory, except when founded upon, or arising out of, some local subject.¹¹

The venue in a transitory action may be laid in any county which the plaintiff may prefer.¹²

2650. *An action in personam* is one where the proceedings are against the person in contradistinction to those which are against specific things or *in rem*.

An action in rem is one instituted against the thing in contradistinction to personal actions, which are said to be *in personam*.

⁶ In New York, Louisiana, California, Massachusetts, Missouri, Nevada, Minnesota, Kansas, Indiana, Wisconsin, Ohio, Oregon, Iowa, Kentucky, Tennessee, Georgia, and perhaps some other states, the forms of actions mentioned in the text have been abolished. The more simple division of actions on contracts, and actions to redress injuries, has been adopted.

⁷ Gould, Plead. c. 3, § 105; 1 Chitty, Plead. 271.

⁸ 1 Saund. 347, note 1. But in Pennsylvania replevin is a transitory action. *Powell v. Smith*, 2 Watts, Penn. 126.

⁹ Gould, Plead, c. 3, § 111.

¹¹ Gould, Plead. c. 3, § 112.

¹² Bacon, Abr. *Actions Local*, A (a).

¹⁰ Comyn, Dig. *Actions*, N, 12.

One of the most striking diversities between actions *in personam* and actions *in rem* is, that the former follow the person liable, and the latter follow the thing which is their object, without reference to the person of the possessor.¹³

Courts of admiralty enforce the performance of a contract by seizing into their custody the very object of hypothecation; for, in these cases, the parties may be not personally bound, and the proceedings confined to the thing in specie.¹⁴

There are cases, however, when the remedy is either *in personam* or *in rem*, at the choice of the plaintiff. Seamen, for example, may proceed against the ship or cargo for their wages, and this is the most expeditious mode; or they may proceed against the master and owners.¹⁵

2651. *Mixed actions* are such as have the characteristics, in some degree, of both real and personal actions, and, therefore, are properly reducible to neither of them, being brought for the specific recovery of land, tenements, or hereditaments, and for damages sustained for injury in respect to such property.¹⁶

Of this kind are ejectment and waste.

2652. The plaintiff, called in civil law the *actor* and in Scotch law the pursuer, is the party invoking the assistance of the court to enforce some right or administer the remedy. The defendant in civil law *sues*, and in the Scotch law the defendant is the party against whom the proceedings are directed. Having examined the constitutions and powers of the court and the general nature of actions, it will be natural, now, to inquire into the qualities or rights which persons have to bring action and who may defend them.

2653. Those persons who institute actions for the recovery of their rights, and those against whom they are instituted, are called *parties to actions*. In the different forms of actions a variety of names is applied to the party suing and the party proceeded against. In personal and mixed actions at common law the former is called the plaintiff, the latter the defendant. In real actions we have demandant and tenant, in admiralty, libellant and respondent, or where the proceeding is *in rem*, the claimant, in proceedings for divorce, libellant and respondent, in equity, plaintiff or complainant and defendant, in criminal proceedings, the king, people, state, or commonwealth and prisoner, the prosecutor being the party on whose complaint the proceedings are instituted, in appeals, appellant and respondent, on writs of error, plaintiff in error and defendant in error as distinguished from plaintiff below and defendant below, in certiorari, relator and defendant, in Scotch law, pursuer and defender, in civil law, *actor* and *reus*. The term parties includes all persons who are directly interested in the subject matter in issue, who have a right to control the proceedings, make a defence or appeal from the judgment. Persons not having these rights are regarded as strangers to the cause.¹⁷

2564. It is evident that no one can recover in an action if he has no right, and no recovery can be had against one who is not bound by his obligation or liable for a wrong. The party who institutes an action must therefore have a right, and he against whom it is instituted must be liable to the plaintiff. It is of the utmost importance, then, in bringing actions to have proper parties; for, however just and meritorious the cause of action may be, if a mistake has been made in the selection of wrong persons either as plaintiffs or defendants, or by

¹³ *La Vengeance*, 3 Dall. 297.

¹⁴ 2 Browne, Civ. and Adm. Law, 98.

¹⁵ 4 Burr. 1944; 2 Browne, Civ. and Adm. Law, 396.

¹⁶ Coke, Litt. 284; Stephen, Plead. 3; Comyn, Dig. *Actions*, D, 4.

¹⁷ 20 How. St. Tr. 538, n.

including too many or too few persons as parties, the plaintiff may in general be defeated.¹⁸

2655. Actions are naturally divided into those which arise upon contracts and those which do not, but accrue to the plaintiff from some wrong or injury committed by the defendant.

We shall consider, then, first, the subject of parties to actions arising upon contracts, and, second, the subject of parties to actions arising from injuries and wrongs for which the defendant is responsible unconnected with contracts, and in each case first of the plaintiffs in such actions and next of the defendants.

2656. It will be convenient to consider successively how and by whom an action should be brought between the original parties, when there is but one plaintiff; when there are several plaintiffs; when the plaintiff, if a woman, has been married since the making of the contract; when one or more of the obligees who had a joint interest is dead; when the sole obligee, or, if there are more than one, when all the obligees, are dead; when the contract has been assigned voluntarily; when the obligee has become bankrupt or insolvent; when the plaintiff is a foreign government; and when the plaintiff is a corporation.

2657. In general, as civil actions are brought to repair some loss sustained, the party to whose use the fruits of the suit are to be appropriated and whose interests have in fact been impaired should complain.¹⁹ This is perhaps the case in actions *ex delicto*, but the rule is not universal with regard to breaches of contract. In making a choice of a party plaintiff the suitor should be guided by considering, not whose losses are to be repaired, but with whom the agreement has been made, for he alone can enforce the performance and complain when the contract has been broken. The suit must be brought in the name of the party in whom the legal interest in such contract is vested; for courts of law consider only legal rights, and courts of equity are guided by other rules when a question about an equitable right arises by which they supersede legal rules.

2658. Hence no action at law lies by the *cestui que trust* against the trustee, and the latter may set up the legal estate against the former;²⁰ for where there are two kinds of estates in different persons, the one equitable and the other legal, the person having the equitable estate must call in aid the legal estate before he can recover in a court of law.²¹ When, therefore, a bond is given to Peter in trust for Paul, the former must sue thereon, although the latter has an equity to use his name.²² But when there is no trust, and the obligation is made with one agreeing to pay money to another, as, when a promise not under seal was with A to pay B a sum of money, the latter may sustain an action.²³

¹⁸ *Morse v. Chase*, 4 Watts, Penn. 456; *McIntosh v. Long*, 1 Penn. 274; *Conolly v. Cottle*, 1 Ill. 286; *Baker v. Jewell*, 6 Mass. 460; *Dob v. Halsey*, 16 Johns. N. Y. 34; *Ehle v. Purdy*, 6 Wend. N. Y. 629.

¹⁹ *Barbour*, Part. 22; *Hammond*, Part. 32.

²⁰ *Milcham v. Eicke*, 3 Mees. & W. Exch. 407; *Pardoe v. Price*, 6 *id.* 458; *Doe v. Wroot*, 5 East, 137. In Pennsylvania, however, a *cestui que trust* may maintain ejectment; and where the action proceeds upon some ground beyond the relation between the parties, as, where a trustee admits a balance of money due, an action at law may be maintained by the *cestui que trust* against him. *Roper v. Holland*, 4 Nev. & M. 668; 3 Ad. & E. 99; 1 Harr. & W. 167.

²¹ *Doe d. Shewen, v. Wroot*, 5 East, 137.

²² *Offley v. Warde*, 1 Lev. 235; *Saunders v. Filley*, 12 Pick. Mass. 554; *Watson v. Cambridge*, 15 Mass. 286; *Weathers v. Ray*, 4 Dan. Ky. 474.

²³ 1 *Chitty*, Plead. 4; 3 Bos. & P. 149, n. a; *Felton v. Dickinson*, 10 Mass. 287; *Cabot v. Haggins*, 3 Pick. Mass. 83. In New York, every action must be prosecuted in the name of the party in interest, except in the cases of an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, without joining with him the persons for whose benefit the suit is brought. Code of Procedure, §§ 91, 93.

2659. It is a rule that when a deed is *inter partes*, a stranger cannot sue upon a covenant therein, though for his benefit.²⁴ Every deed is in one sense *inter partes*, since none can be valid to which there are not proper sides or parties. But this expression has a technical sense, in which alone it is here used; it means an agreement professing in the outset, and before the stipulations are introduced, to be made between such and such persons. When the deed is not *inter partes*, he may sue whether it be indented or not.²⁵

2660. When a man covenants with two or more persons, using words which *prima facie* import a joint covenant, but which nevertheless admit of being construed severally, there, if the interest and cause of action of each of the covenantees appears on the face of the deed to be several, the words will be taken disjunctively, and the covenant will be construed to be a several covenant with each, and each covenantee may bring an action for his several damages;²⁶ therefore, when a covenant, though joint in its terms, was for the payment of an annuity to each of two persons, it was held that the interests of the covenantees were several, and that they should sue separately on the covenant.²⁷

2661. When an action is brought on a simple contract, whether oral or written, the plaintiff should be the person from whom the consideration actually moved.²⁸ And when there are several parties, and both the consideration and the beneficial interest are several, then the contract is several to each. Where, therefore, three gave a bond binding themselves, jointly and severally, to indemnify another, and two paid the damnification, it was held they could not join in suing the third for contribution.²⁹ But although the consideration has moved separately from each, still if the legal interest is joint, the legal right is in all, and they must be joined as plaintiffs.³⁰ In such case any one of the obligees, payees, or the assignee of one of them, may sue in the name of all without their consent.³¹

When a note was made payable to A or B, it was held that A might maintain an action in his own name.³²

2662. Tenants in common of land are in general entitled to the rent, each for his share, so that each may make a separate distress or maintain a separate action.³³ But where they have made a joint demise, unless the rent has been reserved to each for his share separately, they must join in an action for its recovery.³⁴

2663. When the contract is entered into by an agent, the principal has, in

²⁴ Coke, Litt. 231; *Spencer v. Field*, 10 Wend. N. Y. 87; *Tyler v. McLean*, 10 *id.* 374.

²⁵ 1 Chitty, Plead. 4. Before, 2008.

²⁶ *Lane v. Drinkwater*, 1 *Crompt. M. & R. Exch.* 612.

²⁷ *Withers v. Bircham*, 3 *Barnew. & C.* 254; 8 *Mod.* 166.

²⁸ *Crow v. Rogers*, 1 *Strange*, 592. See *Archer v. Dunn*, 2 *Watts & S. Penn.* 237; *Union India Rubber Co. v. Tomlinson*, 11 *N. Y.* 364.

²⁹ *Kelby v. Steel*, 5 *Esp.* 194; *Brand v. Boulcott*, 3 *Bos. & P.* 235; *Lombard v. Cobb*, 14 *Me.* 222; *Boggs v. Custin*, 10 *Serg. & R. Penn.* 211; *Graham v. Green*, 4 *Hayw. Tenn.* 188; *Williams v. Alley*, *Cooke, Dist. Ct.* 257; *Vaughan v. Campbell*, *Mart. & Y. Tenn.* 63; *Gould v. Gould*, 6 *Wend. N. Y.* 263; 8 *Cow. N. Y.* 168; *Doremus v. Selden*, 19 *Johns. N. Y.* 213. In a case where the sureties paid the debt jointly, by giving a joint note, they were allowed to join in an action against the principal. *Appleton v. Bascom*, 3 *Metc. Mass.* 169; *Chandler v. Brainard*, 14 *Pick. Mass.* 285. In Ohio, by a statute, when a joint judgment is recovered against sureties, they must join in an action for reimbursement. *Litter v. Horsey*, 2 *Ohio*, 209.

³⁰ 1 *Rolle, Abr.* 31, pl. 9; *Bacon, Abr. Pleas*, B, 2, § 1, *Bouvier*, ed.

³¹ *Wright v. McLemore*, 10 *Yerg. Tenn.* 235. See *Gray v. Wilson*, 1 *Meigs, Tenn.* 394.

³² 2 *McLean, C. C.* 139.

³³ *Harrison v. Barnby*, 5 *Term*, 246; *Comyn, Dig. Abatement*, E, 10; *Martin v. Crompe*, 1 *Ld. Raym.* 340; *Powis v. Smith*, 5 *Barnew. & Ald.* 851. And they may join in actions of covenant which are purely personal. *Barbour*, Part. 32. And see 4 *Bingh. N. C.* 781.

³⁴ *Comyn, Dig. Abatement*, E, 10.

general, alone the right to sue.³⁵ But where an agent for the sale of goods contracts in his own name and as a principal, the general rule is that the action on such contract may be maintained, either in the name of the party by whom the contract was made, and who was, therefore, privy to it, or of the party on whose behalf and for whose benefit it was made; the former suing in respect of his privity and the latter of his interest.³⁶

In such a case the right of suit vested in the agent is subject to the right of interference of the undisclosed principal; and if the defendant has acquired a right of set-off against the agent with whom he dealt without knowing the principal, he can claim that right against the principal in the same way as if the agent had been the plaintiff on the record.³⁷

When the contract by the agent is made by deed, and he is nominally a party to it, though in reality as agent for another, he alone can sue thereon.³⁸

2664. The consignee of goods is considered as the owner of them, subject to the right of the vendor or consignor to stop them *in transitu*, and an action against a carrier for the loss of them must, in general, be brought in the name of the consignee, and not of the consignor,³⁹ except under special circumstances.⁴⁰

2665. An infant may sue on a contract entered into with him, but he must sue either by guardian or *prochein ami*, who are to appear for him; a *prochein ami*, however, is not a party to the suit, but simply a person appointed by the court to look after the interests of the infant and to manage the case for him.⁴¹

2666. A person *non compos mentis* may maintain an action, which should be brought in his own name, and not in that of his committee.⁴²

2667. When one of the parties who has a legal right to sue has been ascertained, it must then be considered whether others are not equally concerned in the estimation of law; for it is a rule that when the contract was made with several, whether it was under seal or by parol, if their legal interests were joint, they must all, if living, join in the action for the breach of the contract.⁴³

All the partners of a firm must join as plaintiffs for the breach of a contract made with the partnership by third persons, because they are all jointly interested. And even where goods belonging to a firm were sold by one of the partners in

³⁵ *Scrimshire v. Alderton*, Strange, 1182; *Moores v. Hopper*, 2 Bos. & P. 511; *Buckbee v. Brown*, 21 Wend. N. Y. 110. And the principal may sue, though the agency was not disclosed. *Tainter v. Prendergast*, 3 Hill, N. Y. 72; *Van Liew v. Byrnes*, 1 Hilt, N. Y. 133, subject to set-off of claims against the agent; *Moore v. Clementson*, 2 Campb. 22; *Warner v. McKay*, 1 Mees. & W. Exch. 591; *Mitchell v. Bristol*, 10 Wend. N. Y. 492; *Hozan v. Shorb*, 24 *id.* 458.

³⁶ *Sargent v. Morris*, 3 Barnew. & Ald. 380; *Sims v. Bond*, 5 *id.* 393; *Sykes v. Giles*, 5 Mees. & W. Exch. 650.

³⁷ *George v. Clagget*, 7 Term, 359; *Carr v. Hinchliff*, 4 Barnew. & C. 547.

³⁸ See *Shack v. Anthony*, 1 Maule & S. 573; *Berkeley v. Hardy*, 5 Barnew. & C. 355; *Gibson v. Winter*, 5 Barnew. & Ad. 96.

³⁹ *Dawes v. Beck*, 8 Term, 330; *Fragano v. Long*, 4 Barnew. & C. 219; *Dutton v. Solomonson*, 3 Bos. & P. 582; *Grant v. Newton*, 1 E. D. Smith, N. Y. 95; *Ogden v. Coddington*, 2 *id.* 317.

⁴⁰ *Joseph v. Knox*, 3 Campb. 320. See *McIntyre v. Browne*, 1 Johns. N. Y. 221; *Ludlow v. Bowne*, 1 Johns. N. Y. 1; *Evans v. Nichols*, 4 Scott, N. R. 43.

⁴¹ *Sinclair v. Sinclair*, 13 Mees. & W. Exch. 640.

⁴² *Cooks v. Darson*, Hob. 215; *Thorn v. Coward*, 2 Sid. 124; *McKillip v. McKillip*, 8 Barb. N. Y. 552. And see 7 Dowl. 22. There is a difference between lunatics and idiots, viz.: that an idiot, being incapable of appointing an attorney, must appear in person, and any one appearing as next friend (*prochein ami*) may be allowed to prosecute his suit for him; a lunatic may appear in person or by attorney, and must appear as any other person; if an infant, by guardian; otherwise, in person or by attorney. Broom, Part. 85.

⁴³ 1 Saund. 153; *Yelv.* 177; *Anderson v. Martindale*, 1 East, 497; *Thimblethorpe v. Hardesty*, 7 Mod. 116; *Sweigart v. Berk*, 8 Serg. & R. Penn. 308; *Moody v. Sewall*, 14 Me. 295; *Haskell v. Jones*, 24 Me. 222; *Coster v. New York R. R.* 6 Du. N. Y. 43.

his own name, all must join in an action for the price of them.⁴⁴ In considering who are entitled to sue on such contract, reference must be had to the time when it was made, for subsequently admitted partners should not be joined, even though under an agreement to share in the profits and losses from a period antecedent to the contract.⁴⁵

A nominal partner need not be joined in suing on a contract to which he was a stranger;⁴⁶ but it is necessary to show distinctly that he had no interest either in the partnership or in the particular transaction.⁴⁷

With regard to a dormant partner, he may be joined or not at the election of the ostensible partner,⁴⁸ when the purchaser or defendant dealt with the latter.⁴⁹

Joint tenants being seised *per my et per tout*, and deriving by one and the same title, must sue jointly on their joint lease, and must join in debt and avowry for rent.⁵⁰

Tenants in common may join or sever in an action on a contract relating to their estate,⁵¹ though they must sever in an avowry for rent.⁵²

When a contract is made with several persons jointly and severally to them all, either all must join or only one must sue; if, for example, the contract were to pay to A, B, and C three hundred dollars, or to each of them one hundred dollars, either of the payees might sue for his share of one hundred, but two of them could not bring a joint action to recover two hundred dollars.⁵³

2668. In suits upon covenants, if the interest is joint, all must join, even though terms of severalty are used.⁵⁴ Where the instrument is by its terms expressly and positively joint, the covenantees must join in action upon the covenant, although as between themselves the interest is several.⁵⁵ Where the language of the covenant is capable of being so construed it is taken to be joint or several, according to the interest of the covenantees.⁵⁶

2669. At common law, the effect of *marriage* is to merge the separate existence of the wife, during coverture, into that of her husband, and to vest in him a right to the rents and profits of his wife's real estate, the interest in her chattels real, and the power of disposing of them, except by will; the right of reducing into possession her chattels real and her choses in action, and an absolute property in the rest of her personal estate in possession; and where prop-

⁴⁴ *Halliday v. Doggett*, 6 Pick. Mass. 359. But see contra, *Glancy v. French*, 1 Blackf. Ind. 353.

⁴⁵ *Wilsford v. Wood*, 1 Esp. 183. The test is, who were the parties to the contract? And so, where a partner contracts apparently on his own account, but really on account of the firm, he may sue alone, or the firm may sue, adopting him as the agent of the firm. *Arden v. Tucker*, 4 Barnew. & Ald. 815; *Skinner v. Stocks*, 4 *id.* 437; *Bowden v. Howell*, 4 Scott, N. R. 331. See, for limitations, *Brandon v. Hubbard*, 2 Brod. & B. 11; *Lucas v. Delacom*, 1 Maule & S. 249.

⁴⁶ *Kell v. Nainby*, 10 Barnew. & C. 20; *Glossop v. Coleman*, 1 Stark. 25.

⁴⁷ *Tood v. Elworthy*, 14 East, 210.

⁴⁸ *Leveck v. Shaftoe*, 2 Esp. 268; *Wilkes v. Clark*, 1 Dev. No. C. 178; *Shropshire v. Sheppard*, 3 Ala. N. S. 733; *Wilson v. Wallace*, 8 Serg. & R. Penn. 55; *Morton v. Webb*, 7 Vt. 123; *Mitchell v. Dall*, 2 Harr. & G. Md. 159; *Warner v. Griswold*, 8 Wend. N. Y. 666. And see *Guidon v. Robson*, 2 Campb. 302.

⁴⁹ *Lord v. Baldwin*, 6 Pick. Mass. 348.

⁵⁰ Bacon, Abr. *Joint Tenants*, K; Comyn, Dig. *Abatement*, E. So joint tenants and tenants in common of a chattel must sue to recover the value of a chattel. 8 Mo. 522; *Gray v. Wilson*, 1 Meigs, Tenn. 394; 19 Johns. N. Y. 219.

⁵¹ Bacon, Abr. *Joint Tenants*, K; Coke, Litt. 180; *Porter v. Bleiler*, 17 Barb. N. Y. 149.

⁵² Broom, Part. 26; Comyn, Dig. *Abatement*, E, 10.

⁵³ Broom, Part. § 23; *Southcote v. Hoare*, 3 Taunt. 90; 9 Barnew. & C. 538.

⁵⁴ 3 Barnew. & C. 353; 10 *id.* 413; *Scott v. Godwin*, 1 Bos. & P. 67.

⁵⁵ Broom, Part. 8, b.

⁵⁶ 14 Mees. & W. Exch. 573; *Lane v. Drinkwater*, 1 Crompt. M. & R. Exch. 612; *Barbour*, Part. 33.

erty, real or personal, falls to the wife during the coverture, the husband acquires a similar right therein.

While the marriage subsists the wife can bring no suit without the husband's consent, for this reason, if no other, that he will be liable for the costs in case of failure.

To have this effect the marriage must subsist *de jure*; proof of the existence of that relation will be inferred in all civil cases, save one, from its appearing to be so. To entitle himself to recover an action for criminal conversation the husband must prove his marriage with the woman by direct testimony.

It should be born in mind that in many if not all the states, the legal status of married women is something very different from that existing at common law. In some states all power of the husband over suits, in which at common law the wife must be joined, is taken away. It would occupy more space than the plan of this work warrants to give the statutes of the various states. It is enough to say that the tendency seems to be to give married women the rights of *femmes sole* in suits relating to their own property, and to make everything which they acquire, either by purchase or inheritance, their own.

2670. *The causes for which the husband and wife must join* are those in which the wife claims in her own right, *in suo jure*; and where she claims in the right of others, *in alieno jure*.

In suing for causes which accrued to the wife in her own right before the coverture, she must invariably be joined.⁵⁷

For a cause of action arising during the coverture, where it accrued to her alone and in her own right, she must be joined. And where a cause of action has arisen during the coverture, and it confers a right which will, when reduced to possession, belong jointly to the husband and wife, she must join in the suit for it. When the wife is the meritorious cause of action, as if a bond or other contract under seal be made to her alone, (or to her and her husband jointly,) or in the case of her personal labor, if there is an express promise to her, (or to her and her husband,) she must be joined with her husband.⁵⁸ They must sue jointly on a breach of a covenant running with the land of which they are joint assignees.⁵⁹

2671. *The causes in alieno jure*, as those mentioned under the last division, arise either before or during coverture.

For causes of action which arose *in alieno jure* before coverture the wife must in all cases be joined.

When the cause of action has arisen during the coverture, she may be joined or not, according to circumstances. In general, when the wife is executrix or administratrix, as her interest is in *auter droit*, they must join in the actions; as, if a debtor to the estate has paid the debt to a third person to pay to the wife, she must be joined in suing the receiver to recover it. But had it been paid under the husband's authority he must have sued alone.⁶⁰

2672. *The husband must sue alone* when a cause of action, in which the wife does not share, arises during the coverture. In general, the wife cannot join in any action upon a contract made during coverture, as for work and labor, money lent, or goods sold by her during that time; and the husband may sue alone for the breach of contracts, in which, though in terms they have been made

⁵⁷ *Morse v. Earle*, 13 Wend. N. Y. 271; *Hopkins v. Lozan*, 5 Mees. & W. Exch. 241; *Ramsey v. George*, 1 Maule & S. 180; *McNeillage v. Holloway*, 1 Barnew. & Ald. 218. In debt for rent due before coverture. *Brockton v. Evans, Croke*, Eliz. 700; *Decker v. Livingston*, 15 Johns. N. Y. 479. The wife can be joined only where she has an interest which would survive. *Staley v. Barhite*, 2 Caines, N. Y. 221; *Little v. Keyes*, 24 Vt. 118.

⁵⁸ *Mitchinson v. Hawson*, 7 Term, 348.

⁵⁹ *Middlemore v. Goodale, Croke*, Car. 503.

⁶⁰ *Anon.* 1 Salk. 282.

with the wife as well as the husband, she does not share; as, for a promise by her debtor to pay the sum owing at a certain day, in consideration of forbearance of the husband.⁶¹ And when the husband appointed an attorney to receive money due upon his wife's chose in action, and the attorney actually received the money, the husband alone must sue the attorney, and the wife cannot be joined in the action.⁶²

2673. *The wife may sue alone* when the husband is *civiliter mortuus*, or has abandoned the country for so long a time that the law raises a presumption of his death; but his absence for only five years without being heard from is not sufficient to enable the wife to sue alone.⁶³

2674. When a cause of action, shared by husband and wife, has arisen during the coverture, if the right it confers will, when reduced to possession, belong wholly to the husband, he may either sue for it by himself or jointly with his wife. The husband may, therefore, sue by himself or jointly with his wife, for the breach during coverture of simple agreements with the wife *dum sola*; for the breach of one given to her during coverture, and in which she is legally interested; for the breach of deeds made with her before marriage or since; for arrears of rent, or breach of covenants, annexed to a reversion granted to both; or to a lease by both of the wife's land.

In a case where an action by a woman for a breach of promise of marriage was compromised by the plaintiff's attorney, and he, not knowing that she was then married to another person, and the defendant being also ignorant of such marriage, took a note payable to her in her maiden name, it was held the husband might alone maintain an action on the note, without joining his wife.⁶⁴

2675. *When the husband survives the wife* he is entitled to her chattels real by the right of survivorship, and also to all rents and profits accruing from her estate during the coverture; he is also entitled to all chattels given to the wife in her own right during the coverture. To entitle himself to the choses in action of the wife which have not been reduced to possession, the husband must, at common law, become the administrator of his wife, and recover them in that capacity.

2676. *When the wife survives*, she becomes entitled immediately to all her rights *in suo jure* and *in alieno jure*.

She is entitled *in suo jure* to rights which accrued to her before the marriage and which remain unsatisfied, and to rights accruing after marriage.

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 which she was entitled to before the coverture, and which the husband did not reduce to possession.

The wife will be entitled to all the rent accruing from a demise of her lands made by herself and husband during the coverture, but she is not bound to confirm such lease. When she joins her husband in making a lease of her lands, the lease will be good during the coverture, but she may disaffirm such lease on again becoming *sui juris*. If, however, she once acknowledges that the lease was made with her free will by confirming it expressly or by implication, as, by receiving rent due since the dissolution of the marriage, she cannot retract it. The wife is also entitled to a judgment which was obtained in the joint names of her husband and herself, whether obtained for a debt due to the

⁶¹ *Ankerstein v. Clark*, 4 Term, 616; *Willis v. Nurse*, 1 Ad. & E. 65, 72; *Nurse v. Willis*, 4 Barnew. & Ad. 739.

⁶² *Hill v. Boyer*, 17 Vt. 190.

⁶³ *Tucker v. Scott*, 2 Penn. 955.

⁶⁴ *Templeton v. Crum*, 5 Me. 417.

wife while sole or upon a contract made with her during coverture when she was the meritorious cause of action.⁶⁵

As the husband had no actual interest in the property which the wife held *in alieno jure*, it follows that causes of action for such property necessarily remain to her after his death.

2677. When a suit is instituted by a single woman, or by her and others, and while it is pending she marries, the suit abates.⁶⁶

2678. When a suit is brought by husband and wife in right of the wife, and *lite pendente*, the husband dies, it will not abate, and the wife may proceed to judgment and execution, the death of the husband being suggested upon the record.

2679. It will be convenient to treat of the rights and powers of *executors and administrators* separately, and first of executors. It is evident that none but such as are rightful executors can maintain a suit, for no one may take advantage of his own wrongful act.

2680. As to their kinds, executors are *absolute* when appointed without any condition whatever by the will of the testator; these have the right to bring suits on all the mere personal contracts of the deceased not running with the land when he was the sole party to the contract. When he was one of several obligees, the suit is to be brought by the surviving obligee, and, in case of his death, by the executor of the survivor, and the personal representatives of the partner who first died are not to be joined with him.⁶⁷

2681. A *conditional or limited executor* is one who is appointed for a limited time or for a special purpose; as, where he is appointed until the testator's son shall arrive at full age. He has similar rights during the time in which he may serve as an absolute executor, and a suit brought by him does not abate.⁶⁸

2682. When there is but *one executor* appointed, he has the whole management of the estate, and he brings suit in his own name as executor.

When there are *several executors*, they must all join in the action, because the whole as a unit represent the testator. But their non-joinder can only be taken advantage of in abatement after oyer of the probate and letters testamentary by pleading that the executor therein named is alive and not joined in the action.⁶⁹

2683. When there is a single executor and he dies testate, at common law his executor continues the representative character, and so he is the executor of the first testator; the appointment is considered not that of the last, but of the first testator, who, by creating the other his representative, impliedly gave him authority to continue that character in any one he should appoint by his own will. This principle has been changed in several states, and on the death of the first testator administration *de bonis non, cum testamento annexo*, is granted.

If there are two executors, and they assent, on the death of one of them the whole representation remains with the other, and at his death the effect is the same as if he had been sole. And though the surviving executor may at first have refused, he may upon that event take upon him the execution of the will.

2684. An *executor de son tort* is a stranger who has taken upon himself without any just authority to act as executor.⁷⁰ As this interference is of his own motion, he obviously cannot maintain an action in this assumed capacity, since no man may take advantage of his own wrong. There is also the further technical reason that an executor must make profert of the letters testamentary and probate, and having none, of course he cannot do so.

⁶⁵ Comyn, Dig. *Baron & Feme*, F, 1; *Bidgood v. Wray*, 2 W. Blackst. 1239.

⁶⁶ 1 Chitty, Plead. 437.

⁶⁷ 1 Chitty, Plead. 22.

⁶⁸ *Taynton v. Hathaway*, 3 Bos. & P. 26; *Delafield v. Parish*, 4 Bradf. Surr. N. Y. 24.

⁶⁹ 1 Saund. 291, g.

⁷⁰ 2 Blackstone, Comm. 507.

There is a case of wrongful intervention which differs somewhat from that which renders a party executor *de son tort*, namely, where probate is granted to a forged will. But in this case till probate is avoided by the proper tribunal it is unimpeachable, and even when avoided transactions under it stand good.⁷¹

2685. To charge a person as executor *de non tort* the interference must be unlawful, for claiming or even taking goods under a claim of title,⁷² or doing mere acts of humanity, such as locking up the property, attending to the funeral, feeding cattle, etc., without more will not have this effect.

2686. The interference must be by acts of ownership; such as taking goods, cancelling a bond, paying debts, and the like.⁷³ A mere trespass over land is not sufficient.

2687. The acts must be not only unlawful and acts of ownership, but they must be done before probate or administration granted, for otherwise such acts would be a trespass or other injury to the rightful executor.⁷⁴

2688. Administration may be rightful or wrongful. *Administrators* may be either absolute and unlimited, or conditional or limited. The death of a sole administrator terminates his administration, but the principle of survivorship applies in case of the death of one of several joint administrators. The executor of the survivor is not, however, entitled to complete the administration.

2689. An unlimited *absolute administrator* has the full power and authority to claim all the personal property of the intestate, and to bring suits for its recovery.

As to *conditional* or limited administrations, the rules which govern in cases of conditional executorship generally apply to these cases.

2690. When *one administrator* only has been appointed, he fully represents the intestate.

When there are *several*, they must all join in bringing suits; and if one of them dies, the action must be in the name of the survivor.

2691. Owing to the community of interest, no action at law lies by an administrator against his co-administrator; the remedy is in equity.⁷⁵

2692. An administrator's authority to sue is not recognized beyond the jurisdiction by which administration is granted.⁷⁶ He may sue on a promissory note payable to the intestate or bearer, for this does not involve any recognition of his character.⁷⁷ And by statutory provision a foreign administration is in some states sufficient upon complying with specified requirements.⁷⁸

2693. When an administrator is sole and he dies, administration *de bonis non* must be granted to another.⁷⁹ When one of several administrators dies, the administration vests in the survivors.

2694. The title of the administrator does not exist until the grant of administration. Upon such grant, however, it relates back to the death of the intestate, and thus he may sue upon a contract intermediately made.⁸⁰ This relation is to be restricted to personal property.⁸¹

⁷¹ *Allen v. Dundas*, 3 Term, 125.

⁷² *Claussen v. Lafrenz*, 4 Greene, Iowa, 224.

⁷³ *Bennett v. Ives*, 30 Conn. 329; *De la Guerra v. Packard*, 17 Cal. 182; *Gleaton v. Lewis*, 24 Ga. 209.

⁷⁴ See *Barasien v. Odem*, 17 Ark. 122; *Walworth v. Ballard*, 12 La. Ann. 245.

⁷⁵ *Moffatt v. Van Millingen*, 2 Bos. & P. 124, n; *Whitney v. Coapman*, 39 Barb. N. Y. 482.

⁷⁶ See *Taylor v. Barron*, 35 N. H. 484.

⁷⁷ *Robinson v. Crandall*, 9 Wend. N. Y. 425.

⁷⁸ *Karrick v. Pratt*, 4 Greene, Iowa, 144; *Greasons v. Davis*, 9 Iowa, 219; *Succession of Davis*, 12 La. Ann. 399.

⁷⁹ *Elliott v. Kemp*, 7 Mees. & W. Exch. 306.

⁸⁰ *Foster v. Bates*, 12 Mees. & W. Exch. 226; *Maraman v. Trunnell*, 3 Metc. Ky. 146.

⁸¹ *Lane v. Thompson*, 43 N. H. 320.

2695. An administration is *wrongful* and voidable when granted to an improper person; but until revoked in such case, it is valid. So, also, when a will is afterward proved.⁸² It is a nullity when it is granted to the estate of a man who is alive.⁸³ So, too, where the court granting it has no jurisdiction.⁸⁴

The acts of a wrongful administrator are wholly void, and he can, therefore, bring no action. There cannot be an administrator of his own wrong.

2696. When several persons have a joint legal interest in a contract, not running with the land, and they are all living, they must join in an action for the breach of it. When one of them is dead, then the survivors must sue, and the executor of the deceased cannot be joined with them; in such case the declaration, and indeed the writ, ought to show the fact of the death.

In the case of a joint contract, the executor of the deceased cannot sue, although the beneficial interest was in his testator.⁸⁵ But when the interest of the obligees is several, the executor of the deceased may maintain an action for the share which was due or owing to his testator. It has been holden that where a contract was made to three who had a joint interest, and two of them were paid their shares, the third might afterward sue alone for his proportion; ⁸⁶ in such case the executor would, upon principle, have the right to sue for such share. The reason why such suit can be maintained is, that the parties have agreed to sever the contract, and make what was a joint a several agreement.

2697. When the contract is assignable at law, *the assignee* should sue in his own name. In general, a simple or merely personal contract, being a mere chose in action, is not assignable at law; but for the promotion of commerce, many such contracts may be so assigned, such as bills of exchange, promissory notes for the payment of money, and, by statute, bonds for the payment of money, mortgages, bail bonds, and replevin bonds, so as to convey to the assignee the right to sue in his own name. And covenants running with the land pass with the tenure, though not made with assigns.

2698. Though not assignable at law, most choses in action are assignable in equity, and the assignee may sue on them in the name of the assignor for his own use without the consent of the assignor; but in these cases the defendant, in general, has a right to set off any equitable claim he had against the assignor at the time he first had notice of the assignment.

2699. For a breach of a covenant running with an estate in land, an assignee of such estate must be the plaintiff for any breach committed after the assignment, and this without proving any attornment, but the assignee is not entitled to maintain an action for any breach before the assignment.

2700. When the reversion has been assigned in several parts, or when it descends to several heirs, each is entitled to his proportion of the rent, and may maintain a separate action upon it.

2701. When a party to a contract becomes *bankrupt*, or is discharged under the insolvent laws, all his estate is assigned by operation of law, and vested in assignees. Unlike voluntary assignees of choses in actions not assignable at law, they in all cases are entitled to the legal right to sue on a contract made by the bankrupt or insolvents in their own names.

2702. To entitle a *foreign government* to sue in its own name it must have been recognized by the government of the United States.⁸⁷

⁸² Patton's Appeal, 31 Penn. St. 495; Bulkley v. Redmond, 2 Bradf. Surr. N. Y. 281.

⁸³ Jochumsen v. Suffolk Savings Bank, 3 All. Mass. 87; Moore v. Smith, 11 Rich. So. C. 569.

⁸⁴ Langworthy v. Baker, 23 Ill. 484.

⁸⁵ Peters v. Davis, 7 Mass. 257.

⁸⁶ Garret v. Taylor, 1 Esp. 117; Baker v. Jewell, 6 Mass. 460; Austin v. Walsh, 2 Mass. 401; Beach v. Hotchkiss, 2 Conn. 697.

⁸⁷ Gelston v. Hoyt, 3 Wheat. 324; Story, Eq. Pl. § 55.

2703. A corporation may sue in its corporate name on all contracts made in its behalf by its officers or agents;⁸⁸ and if a mistake has been made in its name in making the contract, it may sue in its true name,⁸⁹ and it can sue only in the name and style given to it by law.⁹⁰

In general, a corporation chartered by the laws of one state can sue in the courts of another.⁹¹

A corporation aggregate, being in its corporate capacity a citizen, can sue in the courts of the United States a citizen of another state than the one in which it is located.⁹²

Two corporations may join in an action to recover a joint claim; as, where money was deposited in a bank to their joint names.⁹³ But although they may be tenants in common, if they can maintain each a separate action, they cannot join.⁹⁴

2704. The subject of *defendants in actions ex contractu* will be treated in the same order as that of plaintiffs, and we will consider who are to be defendants, when the action is between the original parties, when there are several liable, when a female obligor is married, in the case of executors and administrators, when one of several obligors is dead, when there has been a change of credit, and when covenants run with the land, and when the obligor is bankrupt, insolvent, or a corporation.

2705. At law, we have seen, a party cannot sue who has a mere equitable right; to entitle him to an action he must have a legal right. In order to sustain an action against a defendant; he must, therefore, be subject to a legal liability. A *cestui que trust* cannot, as such, sustain an action at law against his trustee; his remedy is in equity unless otherwise provided for by the statutes of the states where the suit is brought, except, indeed, where the trustee has settled an account and the law raises from that act a promise to pay.⁹⁵

2706. The party upon an *express contract* is he by whom it was concluded, and this, though the contract inured to another's advantage, and the suit must in general be brought against him, whether it was made by him personally or by his agent.

The agent, when it clearly appears that he acted within the scope of his authority, and entered into the obligation or engagement in the name of his principal, is not liable on such contract. But where he concealed his principal and acted in his own name, or where he entered into a personal obligation and engaged to fulfil the contract himself, as, where he accepted a bill of exchange

⁸⁸ *Bowen v. Morris*, 2 Taunt. 374; *Binney v. Plumley*, 5 Vt. 500; *Bradley v. Richardson*, 23 *id.* 720; *Delaware Cor. v. Irick*, 3 Zab. N. J. 321; *Bradley v. Richardson*, 2 Blatchf. C. C. 343; *St. Andrew's Co. v. Mitchell*, 4 Fla. 200. And even where a note has been made payable to the cashier, treasurer, or other officer, the suit may be in the name of the corporation if proper averments of interest are made. *Commercial Bank v. French*, 21 Pick. Mass. 486; *Leonardsville Bank v. Willard*, 25 N. Y. 574.

⁸⁹ *Middleton v. McCormick*, 2 Penn. 500; *Hagerstown Turnpike v. Creeger*, 5 Harr. & J. Md. 122; *Alloway's Creek v. String*, 5 Halst. N. J. 323; *Berks and Dauphin Co. v. Myers*, 6 Serg. & R. Penn. 16.

⁹⁰ *Porter v. Neckervis*, 4 Rand. Va. 359; *Bank of Commerce v. Mudd*, 32 Mo. 218; *Campbell v. Brunk*, 25 Ill. 225. Where there has been a change of name it should sue in its new name with proper averments. *Groux's, etc., Co. v. Cooper*, 8 C. B. N. s. 800; *Griffin v. Macaulay*, 7 Gratt. Va. 476.

⁹¹ *Louisville R. R. v. Letson*, 2 How. 558; *Marshall v. Baltimore R. R.* 16 *id.* 314; *Lafayette Ins. Co. v. French*, 18 *id.* 404; see *Bank of Augusta v. Earle*, 13 Pet. 519; *Waterville Mfg. Co. v. Bryan*, 14 Barb. N. Y. 182; *Bank v. Simonton*, 2 Tex. 531; *Cumberland Co. v. Hoffman Co.* 30 Barb. N. Y. 159.

⁹² *Hope Ins. Co. v. Boardman*, 5 Cranch, 57; *Bank of U. S. v. Deveaux*, 5 Cranch, 61.

⁹³ *Sharon Canal Co. v. Fulton Bank*, 7 Wend. N. Y. 412. See *Ohio R. R. v. Wheeler*, 1 Black, 286.

⁹⁴ *Rehoboth and Seekonk v. Hunt*, 1 Pick. Mass. 228.

⁹⁵ *Bartlett v. Dimond*, 14 Mees. & W. Exch. 407.

generally in his own name,⁹⁶ he is liable, except in the case of a person acting in the capacity of agent for the government.⁹⁷

An exception to this general rule is the case where the master of a ship contracts for necessaries for his ship; he and his owners are both liable if the necessaries were furnished abroad or in this country, unless furnished on the credit of the owners; and he or his owners are liable upon a bill of lading, or for a loss of goods, unless the contract was made, not by the master, but the owners themselves.⁹⁸

2707. Upon *implied contracts* the party is equally liable as upon an express agreement.

The consignor or shipper of goods is liable for the freight, and may, therefore, be sued for it, unless he stipulates to the contrary.⁹⁹

And the consignee may become liable by receiving the goods under a claim by the carrier to hold him for the freight. The mere receipt of goods by him, however, is only evidence from which, if uncontradicted, the jury may find an agreement to pay freight, and this agreement is a new cause of action, distinct from that implied from the shipment of the goods.¹⁰⁰

But if the consignee refuse, he will not be liable, unless upon some other ground than the mere shipment.¹⁰¹

And in the same way the indorsee of a bill of lading may become liable by accepting the goods;¹⁰² but this he must do as a principal, for in neither of these cases will the person who accepts the goods be liable if he declares at the time of the acceptance that he acts as an agent.¹⁰³

2708. The law raises a contract whenever any one obtains possession of another's property and unjustly detains it, whether he took it from the owner himself or from a third person, and whether he knew at the time that it belonged to another or not; as, where A took the goods of B and sold them to C, B may sue A or C, at his choice, for goods sold.¹⁰⁴

2709. The party to a *deed*, whether it be made by himself or his agent, is in general responsible, as on a simple contract. But if the contract be made by an agent, and he covenants for the acts of another, though he describes himself as agent, he will be personally liable; as, where he covenants in this form, "I, A, agent and attorney in fact of B, do hereby covenant with C," for here the covenant is not that of B, the principal, but of A, the agent or attorney.

2710. In an action founded on a *judgment*, the defendant in the action in which judgment was recovered must, if living, be made defendant.

2711. *Where there are more obligors than one* the liability may be joint, or joint and several, or several, according to the terms of the contract. If the obligation be joint, all must be joined as defendants.¹⁰⁵ If joint and several, the plaintiff may proceed at his election against all jointly, or against the parties severally.¹⁰⁶ He cannot proceed against a part of the obligors jointly.¹⁰⁷ And

⁹⁶ Thomas v. Bishop, Strange, 955.

⁹⁷ Hodgson v. Dexter, 1 Cranch, 345.

⁹⁸ Bason v. Sandford, Carth. 58.

⁹⁹ Moore v. Wilson, 1 Term, 659; Domett v. Beckford, 5 Barnew. & Ad. 521; Strong v. Hart, 6 Barnew. & C. 160; Wooster v. Tarr, 8 All. Mass. 270; Barker v. Havens, 17 Johns. N. Y. 23.

¹⁰⁰ Saunders v. Vanzeller, 4 Q. B. 260; Young v. Möller, 5 Ell. & B. 755; Cock v. Taylor, 13 East, 399; Blanchard v. Page, 8 Gray, Mass. 291; Wooster v. Tarr, 8 All. Mass. 270. See Trask v. Duval, 4 Wash. C. C. 181.

¹⁰¹ Christy v. Row, 1 Taunt. 300.

¹⁰² Cock v. Taylor, 2 Campb. 587, 13 East, 399.

¹⁰³ 1 East, 507.

¹⁰⁴ Clarke v. Shee, Cowp. 197.

¹⁰⁵ Broom, Part. 111; Cabell v. Vaughan, 1 Wms. Saund. 291, b, n (4); Lee v. Nixon, 1 Ad. & E. 207. See Regina v. Dean, 12 Mees. & W. Exch. 39.

¹⁰⁶ Ecclestier v. Clipsham, 1 Wms. Saund. 154, n (1); 1 Pet. 73; Lee v. Nixon, 1 Ad. & E. 207. See Haight v. Langham, 3 Lev. 303.

¹⁰⁷ 3 Term, 782.

having elected to proceed jointly he is bound by his election, and cannot have several judgments.¹⁰⁸ Where one of the parties is dead his representatives are not to be joined.¹⁰⁹ And a discharge in bankruptcy is in England good reason for not joining a party jointly bound.¹¹⁰

2712. The question, whether the obligation is joint, several, or joint and several, is to be determined from the character of the obligation, and not from the nature of the interest of the parties in the subject matter, or the manner of entering into the obligation. Thus, an obligation may be joint when incurred at first by one, and others afterward join. The form of expression used, however, may be material, as terms indicating an express intention may make a contract several which would otherwise be joint.¹¹¹

2713. As instances of implied joint contract the following cases may be mentioned: where several persons, as a club, dine at a tavern, they are jointly chargeable with the entire reckoning, and not merely each for his share.¹¹² And where two employ an attorney to sue out a writ there is an implied joint contract that they will pay him his fees.¹¹³ But there may be an implied several contract made by many under certain circumstances.¹¹⁴ On all implied contracts by a firm or partnership all the partners must be sued.

2714. The rules in relation to express joint contracts are the same with independent contracts under seal. A man will not be held to be a party to a deed whose name is introduced into it as a co-contractor unless he sealed and delivered it, for the execution of it by his companion without authority is not binding on him. A joint delivery does not make that a joint deed which in its terms is several, or *vice versa*.¹¹⁵

2715. When a judgment has been rendered against two or more the liability is always joint, and the original demand which is merged in it will make no difference, whether it was joint or not.¹¹⁶ But a distinction must be observed between a judgment rendered on a right which becomes merged and a judgment in *scire facias*, which is a mere award of execution. In the latter case the original right is not merged; therefore, when a judgment in *scire facias* has been given against two bail on their recognizance, debt lies afterward against one only, since it is sued on the recognizance, not on the judgment.¹¹⁷

2716. When, by the terms of the contract, the contractors are only severally bound, they cannot be joined in the same action, though the parties may stand in the same relative situations.¹¹⁸ It must, therefore, appear upon the face of the proceedings in an action *ex contractu* that their contract was joint, and the fact must be proved on the trial. If too many persons are joined and the action cannot be supported as to some of them, it will fail as to the whole; when such defect appears upon the pleadings, the defendants may take advantage of it by demurrer, motion in arrest of judgment, or by writ of error; and when it does not appear and the plaintiff cannot sustain his allegation by proof, he will be nonsuited upon the trial.

When one of several defendants is not liable in point of law, as in the case of an infant or married woman, and he is included with those who are sued, the plaintiff will be nonsuited, because the contract at the time it was entered into was

¹⁰⁸ *Stearns v. Aguirre*, 6 Cal. 176. See *Judson v. Gibbons*, 5 Wend. N. Y. 224.

¹⁰⁹ *Engs v. Dorrinthorne*, 2 Burr. 1196; *Whelpdale's Case*, 1 Coke, 519; *Calder v. Rutherford*, 3 Brod. & B. 302; *Voorhis v. Baxter*, 18 Barb. N. Y. 592.

¹¹⁰ *Broom*, Part. 121. See **2716**.

¹¹¹ *Lee v. Nixon*, 1 Ad. & E. 201.

¹¹² *Foster v. Taylor*, 3 Campb. 49. See *Wathen v. Sandys*, 2 Campb. 640.

¹¹³ *Ld. Raym.* 127.

¹¹⁴ *Brown v. Loyle*, 3 Campb. 51.

¹¹⁵ 2 Rolle, Abr. 148, 149.

¹¹⁶ *King v. Hoare*, 13 Mees. & W. Exch. 506.

¹¹⁷ *Williams v. Green*, 8 Mod. 295; *Gee v. Fane*, 1 Lev. 225.

¹¹⁸ *Berkley v. Presgrave*, 1 East, 226.

not binding on them ; but if one of the defendants, having been liable, becomes discharged by some after act, as, by bankruptcy, the plaintiff may enter a *nolle prosequi* as to him. When the action is brought only against the persons who are responsible in point of law, and the defendants plead in abatement the non-joinder of such a person, as an infant or a feme covert, the plaintiff may reply the infancy or coverture.

2717. By her *marriage* the legal existence of a married woman is merged in that of her husband, so that she cannot defend any action brought against her on her contract, and when a suit is brought against her alone, she must plead her coverture. When she marries pending an action against her, the suit does not abate, but goes on as if nothing had happened, for she shall not be able to defeat the plaintiff by her own act.

The law, by the effect of statutes in the several states, is so various, and, on many points, unsettled, that it would be impossible within the limits which can be allowed to the subject in accordance with the general plan of this work to state accurately the present condition of the law in the different states. It seems better, therefore, to give the rules under the common law, referring the reader to the statutes and decisions of the particular states. The general effect of these statutes is to render the married woman capable of controlling her own property for her own benefit free from the interference and control of her husband, empowering her to make contracts with reference thereto, and subjecting her to suit independently of him.

It will be convenient to consider when the husband and wife must be joined, when the husband may be sued alone, when the wife must be sued alone, when the husband and wife may be joined or not at the election of the plaintiff, and who is to be sued in case of the death of the husband or wife.

2718. Where the wife entered into a several contract, *dum sola*, she and her husband must be joined in an action for a breach of it ; and where she is a joint obligee with others, she and her husband must be joined in actions for the breach of such joint contract. As the wife can make no valid contract during the coverture without her husband's authority, it follows that she cannot be joined with her husband as a defendant in an action on such contract.

For causes *in alieno jure* where the wife alone represents the estate from which they are due, she must be joined as co-defendant.

2719. *The husband must be sued alone* when the wife cannot be considered either in person or property as creating the cause of action, as in the case of a mere personal contract during coverture, even when made exclusively for her benefit ; as when, in consequence of the misconduct of her husband, the wife is compelled to buy goods which are within the meaning of necessaries of life ; the husband is liable in those cases, although he may have given notice to the tradesmen not to trust her.

The term necessaries is not confined to the mere necessities of life, but includes such ornaments and superfluities of dress as are usually worn by women of the rank and appearance of the defendant's wife, or rather that which he allows her to assume.¹¹⁹ But in case the wife is in fault, as, if she goes away with an adulterer, the husband will not be liable.

2720. *The wife may be sued alone* upon her own contracts made *dum sola* when the husband is *civiliter mortuus*, for otherwise the creditor would have no remedy.

2721. *The husband and wife may be joined* in a case where the contract was made by the wife before the coverture, although the husband may afterward, upon a new consideration, as forbearance, have agreed to pay the debt, and he

¹¹⁹ Waithman v. Wakefield, 1 Campb. 120.

may be sued alone upon such new promise.¹²⁰ And when rent becomes due by the wife on a lease made to her, or there is a breach of covenant during the coverture, the action may be against both, or the husband alone.¹²¹

2722. The responsibility of the husband for the wife's debts continues only during the coverture, and, therefore, when the husband survives, he is not liable to be sued in that character for any contract of the feme before coverture. But if judgment has once been obtained against the husband and wife jointly during coverture, the husband will be responsible on that, and he may be sued alone. He may be sued alone also for rent on a lease to the wife, incurred during the coverture.¹²²

When the husband has neglected to collect her choses in action during the coverture, they belong to the administrator of the wife, and he may be sued for a debt by her before the marriage.¹²³

2723. When the wife survives, she may be sued upon all her unsatisfied contracts made before coverture. But although they may not have been paid, yet, if they have been discharged by the bankruptcy and certificate of the husband when they could have been proved under the commission, she will be discharged from all liability on account of such debts.¹²⁴

2724. *Executors and administrators* are liable to suit as such upon all contracts and covenants of the deceased broken during his lifetime, and upon such as did not call for the exercise of personal qualities broken after his death.

2725. We have seen who may sue as executors and administrators when they have claims as such against others. Those same persons may in general be sued upon the breach of contract of the deceased.

2726. All persons named as executors in the will may be sued jointly, whether they have all administered or not; ¹²⁵ or at the choice of the plaintiff those who have not interfered may be omitted. All who have administered must be sued jointly, but a mistake or omission in this respect can be objected to only by a plea in abatement. And if the testator has appointed several executors, some to administer one part of his estate and others to manage another, although with regard to each other they are perfectly separate and independent, yet *quoad* creditors, they are to be considered but as one, and may all be jointly sued.¹²⁶ An executor *de son tort*, who became so before probate, may be sued jointly with the rightful executor, but not an administrator.

When there are several administrators they must all be sued, or the defendant may plead in abatement.

2727. Executors and administrators may be sued on all simple contracts broken by him whom they represent,¹²⁷ and they are bound to perform those unbroken when they have assets, unless they are of an entirely personal nature; as, where the deceased had undertaken to paint a picture or teach an apprentice.¹²⁸ But if the thing to be done may be accomplished by the executor as well as by the testator, the executor is bound to fulfil the contract if he has

¹²⁰ *Drue v. Thorn*, All. 73.

¹²¹ Comyn, Dig. *Baron & Feme*, Y.

¹²² 3 Mod. 189, n, k; Comyn, Dig. *Baron & Feme*, 2 B.

¹²³ *Heard v. Stanford*, 3 P. Will. Ch. 409.

¹²⁴ *Miles v. Williams*, 1 P. Will. Ch. 249.

¹²⁵ But see *Moore v. Willett*, 2 Hilt. N. Y. 522; *Owen v. Walker*, 26 Ga. 347.

¹²⁶ *Croke*, Car. 293.

¹²⁷ *Burd v. McGregor*, 2 Grant, Cas. Penn. 353; *Green v. Creighton*, 23 How. 90; *Brewster v. Sterrett*, 32 Penn. St. 115; *McDaniel v. Parks*, 19 Ark. 671; *Wall v. Kellogg*, 16 N. Y. 335. See *Duke v. Ferebee*, 4 Jones, No. C. 10; *Hannum v. Curtis*, 13 Ind. 206; *Moulton v. Wendell*, 37 N. H. 406; *Chouteau v. Snyder*, 21 N. Y. 179; *Lusk v. Anderson*, 1 Metc. Ky. 426; *Granjang v. Merkle*, 22 Ill. 249.

¹²⁸ *McGill v. McGill*, 2 Metc. Ky. 258.

assets; as, where the testator agreed to build a house by a certain day and he died before the day, his executor may build it. In like manner, although the executor cannot teach an apprentice, yet, if the master dies, the executor may procure some one to teach him; where the engagement was to teach him or cause him to be taught, it is the duty of the executor to cause him to be taught, and to fulfil other covenants toward him if he has assets.

2728. An executor is liable for breach of covenants annexed to an estate in one way when the breach occurred before the estate passed to him, that is, in the lifetime of the testator, and in another when it happened afterward.

In the first case the executor is liable for a breach of the covenant generally to the extent of the assets in hands applicable to such claim, because, had the executor lived, his personal estate must have repaired it, and that is equally chargeable in the hands of his representative, who is in law the same person with himself.

When a term with covenants annexed to the land passes to the executor, and he enters, he must perform them so far as the after profits of the land extend, for by law these are to be applied in fulfilling them, and not in the discharge of other demands against the testator, though of a higher nature. His liability is in general restricted to the assets he has in his hands, and if sued as assignee, he may plead the actual state of the case.¹²⁹ His peculiar liability depends upon his retaining possession, for when he assigns the term to another he is liable only as having general assets, as if he had never entered.

2729. When the obligors were bound by a joint contract and *one of them dies*, his executor or administrator is discharged at law from all liability, and the survivor alone can be sued.¹³⁰ And if the deceased was a mere surety, his executors are not generally liable even in equity.¹³¹

If the contract were several, or joint and several, the executor of the deceased may be sued in a separate action, but he cannot be sued jointly with the survivor, because, if for no other reason, the executor is to be charged *de bonis testatoris* and the survivor *de bonis propriis*, and the judgment could not be so rendered.

2730. The action for the breach of a mere personal contract must be brought against the contracting party, and not the one to whom he has assigned his interest, because there exists no privity between such plaintiff and the assignee; as, if one demise goods, and the lessee covenant for himself and his assigns to deliver the goods at the end of the term, and, before that time, assigns the goods to a third person, the assignee cannot be sued by the lessor for want of privity.

But when, by the agreement of the parties, there has been a *change of credit*, so as to transfer the liability from the original contracting party to another, or to only one of several obligors, then a separate action may be brought upon this new engagement.

2731. When a *covenant running with the land* has been assigned, as, for example, where a lease, in which there is a covenant to pay rent, has been assigned by the lessee, the assignee is liable for all the rent which may thereafter accrue while he retains the lease.¹³² But his liability ceases when he assigns his in-

¹²⁹ *Billinghurst v. Spearman*, 1 Salk. 297; *Remnant v. Bremridge*, 8 Taunt. 191; 2 J. B. Moore, 94.

¹³⁰ Bacon, *Abr. Obligation*, D, 4; Viner, *Abr. Obligation*, P, 20; *Postan v. Stanway*, 5 East, 261. But in Pennsylvania it was held that after the survivor was discharged as an insolvent an action might be maintained against the executor of the deceased.

¹³¹ *Weaver v. Shryock*, 6 Serg. & R. Penn. 262. See 2 Whart. Penn. 362; 2 Browne, Penn. 31.

¹³² Bacon, *Abr. Covenant*, E, 3, 4.

terest, though even purposely to an insolvent person,¹³³ because he is liable only in respect of the estate.

On an express covenant in a lease to pay rent, or to perform any other act, the covenantor and his personal representatives, having assets, are liable to an action of covenant during the lease, although they may have assigned their interest before any breach, because this is a personal covenant. And this liability remains, although the lessor or covenantee may have accepted rent from the assignee.¹³⁴ But a distinction must be observed: when the covenant of the lessee is only implied, and the lessor has accepted rent of the assignee, his right of action against the lessee is gone.¹³⁵ And an action of debt cannot be maintained against the lessee after assignment of the lease by him and acceptance of rent from the lessee, even upon his express covenant, the proper action being covenant.¹³⁶

2732. When the sole contracting party has been discharged as a *bankrupt* and obtained his certificate, he is in general discharged from all debts due at the time of the bankruptcy, which could have been proved under the commission. But if the plaintiff can declare for a tort, the bankrupt is still liable.¹³⁷ And a bankrupt's discharge is not a bar to a proceeding *in rem* to enforce a mechanic's lien.¹³⁸

When there is a joint debt and one of the debtors has been discharged as a bankrupt, the action may be brought against the solvent partner, though if commenced against both, upon a plea of the certificate in bar, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the other.¹³⁹

2733. Under the *insolvent* laws a discharge of the debtor operated generally to release him from all liability to future suits founded on debts, including contract debts and judgment debts, though the judgment was founded on a tort.

In most of the states having insolvent laws the effect of a discharge in insolvency is the same as a discharge in bankruptcy upon all matters over which the state giving the discharge has jurisdiction.¹⁴⁰

2734. A corporation when liable to an action must be sued in its true name.¹⁴¹

It may be sued upon its express contracts, whether under seal or not, though formerly it required the solemnity of a seal to bind the corporation.¹⁴² The ancient rule that a corporation can make a contract only by its corporate seal has been changed,¹⁴³ and now an action of assumpsit lies against a corporation aggregate, upon an express or implied promise.¹⁴⁴ The rule now appears to be the same in England. "If the corporation have helped themselves to another man's money," says a learned judge, "it would be absurd to say they must bind themselves under seal to return it."¹⁴⁵

¹³³ Bacon, Abr. *Covenant*, E, 4.

¹³⁴ 1 Saund. 241, note 5; *Kunckle v. Wynick*, 1 Dall. 305.

¹³⁵ 1 Saund. 241, b.

¹³⁶ 1 Saund. 241, n. 5.

¹³⁷ *Parker v. Norton*, 6 Term, 695; *Williamson v. Dickens*, 5 Ired. No. C. 259. But see contra, *Hatten v. Speyer*, 1 Johns. N. Y. 41; *Forster v. Surtees*, 12 East, 612.

¹³⁸ *McCullough v. Caldwell*, 5 Ark. 237.

¹³⁹ *Noke v. Ingham*, 1 Wils. 89.

¹⁴⁰ See before, 1563, 1564.

¹⁴¹ *Minot v. Curtis*, 7 Mass. 441; *Bank of Utica v. Smalley*, 2 Cow. N. Y. 778; *Porter v. Nockervis*, 4 Rand. Va. 359.

¹⁴² 1 Blackstone, Comm. 475; Bacon, Abr. *Corporations*, D.

¹⁴³ *Chestnut Hill Turnpike v. Rutter*, 4 Serg. & R. Penn. 16; *Bank of U. S. v. Dandridge*, 12 Wheat. 64; *Mott v. Hicks*, 1 Cow. N. Y. 513; 6 Serg. & R. Penn. 16.

¹⁴⁴ *Baptist Church v. Mulford*, 3 Halst. N. J. 182; *North Whitehall v. South Whitehall*, 3 Serg. & R. Penn. 117; *Canal Company v. Knapp*, 9 Pet. 541; *Fleckner v. U. S. Bank*, 8 Wheat. 357; *White v. Westport Man. Co.* 1 Pick. Mass. 215; *White v. Derby Fishing Co.* 2 Conn. 260; Bacon, Abr. *Corporations*, D, Bouvier, ed.

¹⁴⁵ Per Lord Denman, C. J., *Hall v. Mayor of Swansea*, 5 Q. B. 547.

2735. We now come to the consideration of who are to be made *parties*, plaintiff or defendant, in *actions ex delicto*, that is, actions which are founded on some wrong or injury. It will be convenient to observe the same order as in treating of actions *ex contractu*, and to consider the interest required in the plaintiff to maintain an action; the effect of an assignment of the interest; the number of persons interested; the effect of the death of the sole party injured; the effect of the death of one of several parties injured; and the joinder of married women.

2736. Civil actions are brought to repair some loss sustained; the party to whose use the fruits of the suit are to be appropriated, and whose interests have been impaired, should therefore be made the plaintiffs. In general, the action must be in the name of the party whose legal right has been affected, and one having only an equitable interest cannot, in general, sue in a court of common law.

It is to be observed, however, that actions may be brought for injuries affecting the possessory right of the plaintiff, although the legal ownership may be in another party. Thus, a *cestui que trust* in possession of land may sue for an injury to his possession.¹⁴⁶ And a bailee for hire in possession of personal property may have his action for a wrong done, and so in many other cases.

2737. The numerous injuries which affect a man's interest, and for which the law gives an action, may be classed into those by positive misfeasance; those which arise from a breach of public duty; those which are the effect of omission of some private obligation; those where the party injured may sue in form *ex contractu* or *ex delicto*; and those which are remedied by particular statutes.

2738. *Injuries by positive misfeasance* are to the person or personal rights; to property; or to the relative rights.

An injury to the absolute rights of a person may consist of an assault, a battery, menace, imprisonment, doing an injury by letting loose a dangerous animal, or erecting a nuisance and impairing one's health, by wrongs to his reputation, as by libel or slander, and by malicious prosecution. In all these cases but little difficulty attends the choice of suitors. The party who has received the injury must be made plaintiff, and he who has committed it, defendant.

2739. *The wrongs to property* for which an action will lie are trespass, obstructing incorporeal rights, deceit on sales, misrepresenting another's circumstances, slander of title, rescue, excessive or irregular distress, and impairing property bailed or on a lease. It is not always easy in these cases to say by whom the action should be brought. Examples may be found in the following cases:

2740. When the right of a pew is disturbed the proprietor, and not the parson or the trustees of the church, ought to be the plaintiff.¹⁴⁷

When the injury complained of is to the possession, the party entitled to the possession must bring suit; when it is to the reversion, the reversioner must be plaintiff; for example, a man enters on land leased by A to B, and cuts down trees, rendering the property less valuable; A may bring an action for the injury he has sustained, and B may institute an action of trespass for the wrong to his possession.¹⁴⁸

The form of action in the particular case is of course determined by the general rules.¹⁴⁹

When goods are sent to order by a carrier, the carrier, though not named by the vendee, receives them as his agent, and so the property is vested in the ven-

¹⁴⁶ 2 Wms. Saund. 47, d.

¹⁴⁷ *Frances v. Ley*, Croke, Jac. 366.

¹⁴⁸ *Queen's College v. Hallett*, 14 East, 439.

¹⁴⁹ *Butcher v. Butcher*, 7 Barnew. & C. 402; *Holmes v. Wilson*, 10 Ad. & E. 503; *Young v. Hickens*, 6 Q. B. 606; *Putnam v. Wyley*, 8 Johns. N. Y. 432; *Polk v. Coffin*, 9 Cal. 56.

dee on delivery to the carrier; and for any injury to the goods while in the carrier's hands the vendee must sue.¹⁵⁰

The indorsement of a bill of lading without consideration does not transfer its contents; hence such an indorsement to an agent, that he may receive the goods mentioned in it, does not entitle him to bring trover for them in his own name.¹⁵¹

2741. When an *injury* has been committed to the relative rights the superior may maintain an action for a wrong to the inferior, but not *vice versa*; for example, when one has committed a battery upon the wife, or had criminal connection with her, the husband may have an action against the wrong doer. But if an assault and battery be committed upon the husband, or a woman has had a criminal connection with him, the wife has no remedy. So a man may have an action for the seduction of his child or servant, and for violence or threats toward him, or for enticing him away; the child or servant, on the contrary, can have no action for any of these acts against the father or master.

2742. Certain persons are required by their situation to perform a variety of acts toward others, for the breach or non-performance of which an action accrues to the party who is injured thereby. Such are false returns of writs, or neglect to execute them; unlawfully to permit a rescue or the escape of a prisoner; a sheriff taking insufficient pledges, or none, when required by law to take them; the refusal by a common carrier to take a passenger when he has ability, and the fee is properly tendered or paid; neglect or refusal to receive goods by such carrier, or injuring them after having received them; the refusal by an innkeeper to receive a guest when he has room; the unskilful treatment of diseases by surgeons; and the sale of unwholesome provisions by victuallers.

2743. The person injured may maintain an action against one who commits waste contrary to his duty as tenant of the land, or neglects to repair a division fence which he is bound to keep up, or for using his property in any way to the detriment or injury of his neighbor.

2744. There are some cases where the plaintiff may at his choice sue for a breach of contract, as to the form of action, but no further, as well *ex delicto* as *ex contractu*; thus for negligence in an attorney, case or assumpsit lies, and the same for a breach of warranty, or where a party having hired a horse for a particular journey goes another, and does an injury to him, killing him, for example. In these cases the plaintiff cannot change the liability of the parties by merely adopting a different form of action; a single case will illustrate this rule. An infant hired a horse to go on a particular journey and went another, and by unskilful treatment killed him; he was sued for the tort, but the plaintiff was not allowed to recover, because the cause of action arose out of a contract.¹⁵² But an infant was held liable in trover, although the goods were delivered to him under a contract, and although they were not converted actually to his own use.¹⁵³

2745. In general, the party to whom an *action* is given under a remedial statute is marked out by its provisions, and he is usually the person injured, and, in that case, it is immaterial whether he has the legal or the equitable right to property on account of which the remedy is given.¹⁵⁴

When an action is given by the statute to any one who will sue for the same, the party who brings the first suit has a right to maintain his action. In such case,

¹⁵⁰ Dutton v. Solomonson, 3 Bos. & P. 582.

¹⁵¹ See Coxe v. Harden, 4 East, 241; Blanchard v. Page, 8 Gray, Mass. 291; Ogden v. Coddington, 2 E. D. Smith, N. Y. 317.

¹⁵² Penrose v. Curren, 3 Rawle, Penn. 351. See 25 Wend. N. Y. 399; 15 Me. 233; Wilt v. Welsh, 6 Watts, Penn. 9.

¹⁵³ Vasse v. Smith, 6 Cranch, 226.

¹⁵⁴ Pritchit v. Waldron, 5 Term, 14.

when the penalty is to be recovered partly for the benefit of the informer, and partly for the use of the government, the suit instituted for its recovery is called an action *qui tam*.

2746. It will be remembered that rights of action, arising *ex contractu*, cannot be assigned, except under special circumstances or in particular cases; the same rule holds as to actions arising *ex delicto*, whether the injury be to the person, personal or real property. But sometimes there is a transfer in fact, and, at other times, only in appearance, of the property relating to which the action arises; in these cases it is not always easy to make a proper choice of suitors.

When incorporeal real property is granted, the grantee's right and possessory title are coeval, both being conferred by the instrument of conveyance; any tort, therefore, committed after the grant, is an injury to the grantee, upon which he may have an action. But when the real property granted is corporeal, his possession is not united to his rights until he has entered upon the land, either in fact or in contemplation of law. And if, between the time of the grant and of his taking possession, an injury is committed against the premises, the grantor, and not the grantee, will be the proper person to bring the suit, because bare possession is not title sufficient to redress a possessory injury.

The absolute owner of personal property, when entitled to the possession, is in law considered as if actually possessed, although in fact he may not be so, according to the maxim that absolute property in the personalty draws to it the possession;¹⁵⁵ and in such case he is the proper person to bring the action.

It has been said formerly that there was an exception to this rule in a case where goods were consigned to a factor.¹⁵⁶ This can, however, hardly be considered true, at least when so broadly stated, for the owner of goods may maintain an action for injury done them when in transit to a factor or other consignee.¹⁵⁷ And where the factor is a mere agent his possession may be regarded as that of the general owner, and a suit for a tort can be maintained by the latter.¹⁵⁸

2747. When an injury is done to property belonging to two or more joint owners, they must in general join in an action for damages.¹⁵⁹ Where there is an entire joint damage, they may join though their interests be several.¹⁶⁰ But where the interest and damage are several, though only one chattel may have been injured, or though the injuries may have been inflicted at the same time and by the same act, the parties must sever.¹⁶¹

2748. *An injury to several persons by positive misfeasance* may be either to the person and personal rights; to property; or to the relative rights.

2749. When two persons are beaten with the same stroke, the act by which they are injured is one; but as the consequences of the act, and not the act itself, must be redressed, the injury is several, and the two cannot bring a joint action, because one does not share in the suffering of the other. And so if two are slandered by the same speech, as "You, Peter and Paul, murdered John," or

¹⁵⁵ 2 Saund. 47, a, n. 1; Bacon, Abr. *Trover*, C.

¹⁵⁶ *Fowler v. Down*, 1 Bos. & P. 44.

¹⁵⁷ *Blanchard v. Page*, 8 Gray, Mass. 291; before, **2707**.

¹⁵⁸ *Aiken v. Buck*, 1 Wend. N. Y. 466; *Root v. Chandler*, 10 *id.* 110.

¹⁵⁹ *Sedgworth v. Overend*, 7 Term, 279; *Jackson v. Sidney*, 12 Johns. N. Y. 185; *Glover v. Austin*, 6 Pick. Mass. 209; *Boobier v. Boobier*, 39 Me. 406; *Oliver v. Walsh*, 6 Cal. 456.

¹⁶⁰ *Coryton v. Lithebye*, 2 Wms. Saund. 115; *Weller v. Baker*, 2 Wils. 423; *Knight v. Lagh*, 4 Bingham 589; *Brandon v. Scott*, 40 Eng. L. & Eq. 105; *Peck v. Elver*, 3 Sandf. N. Y. 126; *Chandler v. Howland*, 7 Gray, Mass. 348.

¹⁶¹ Dig. 191; *Bradley v. Blair*, 17 Barb. N. Y. 480; *Brandon v. Scott*, 40 Eng. L. & Eq. 105.

where several are unlawfully imprisoned by the same act, each must bring his separate action.

2750. When several persons are possessed jointly of real or personal property as joint tenants, tenants in common, or bare occupants, they are jointly aggrieved by a trespass or other injury to it. Thus it was held that tenants in common¹⁶² are jointly injured by disturbing an incorporeal hereditament annexed to their land, upon the same principle that they are so to the land itself.¹⁶³ And, in the somewhat celebrated case of the Dippers at Tunbridge Wells,¹⁶⁴ it was held that persons who had separate rights, but were entitled to joint profits, might maintain a joint action against one who caused a damage to those profits.¹⁶⁵ When partners are slandered in their trade, the injury is joint, because the means of acquiring property is the object impaired, and in those means all the partners are concerned. If, in addition to the general damages, one of the partners has sustained special damages, he may bring a separate action.

2751. When two or more persons stand in the same relation toward another, and one has an action against a third person for an injury to his relative rights, the rest may join with him in such action; as, where a servant, who was jointly engaged to several masters, was beaten, and all the masters have suffered loss, they may join, because all share the damages occasioned. But if the servant was in their separate employment, the actions are several.¹⁶⁶

2752. When an injury arises from the *neglect of a public duty*, as for permitting an escape, if the party escaped was a prisoner at the suit of several jointly, all are jointly aggrieved, since the damage is common to all. So where two church wardens sued a mandamus to an officer to swear them in, and, on his making a false return, joined in an action against him, the joinder was held right, though it was objected that the office of one not being the office of the other, neither was the injury done to one done to the other. But the court held that the injury was joint, because the false return had rendered useless a writ sued at their joint expense.¹⁶⁷

2753. When a party who ought to have been joined as plaintiff is omitted in an action *ex delicto*, the objection can be taken only by plea in abatement, or by way of apportionment of the damages on the trial. In an action of this nature, the defendant cannot, as in actions *ex contractu*, give evidence of the non-joinder for the purpose of defeating the action.¹⁶⁸ And if one of several part owners of a chattel sue alone for a tort, and recover damages, this will be no bar to a suit by the other; for, in the first action, the defendant ought to have pleaded the non-joinder in abatement.¹⁶⁹

When too many persons are joined as plaintiffs, and the objection appears on the record, it may be taken advantage of by demurrer, in arrest of judgment, or writ of error; if it do not appear on the record, the mistake may be a ground of non-suit on the trial, for the plaintiffs do not prove a right to what they claim, as some of them have no right at all.¹⁷⁰

2754. In case of contracts *where the party* who had a cause of action *dies*, his personal representatives have in general the right to sue and recover what was owing to him; but in the case of torts, when the action must be in form *ex delicto*, and the plea not guilty, the rule at common law was otherwise, it being a maxim that a personal action dies with the person: *actio personalis moritur cum persona*. But the meaning of this rule must be somewhat restricted. In

¹⁶² Keilw. 55, Case n. 2.

¹⁶⁴ Weller v. Baker, 2 Wils. 423.

¹⁶⁶ Hammond, Part. 46.

¹⁶⁷ Ward v. Brampton, 3 Lev. 362; 3 Salk. 202.

¹⁶⁸ 1 Saund. 291, g.

¹⁷⁰ Coke, Litt. 197, b.

¹⁶³ Hamon v. White, W. Jones, 142.

¹⁶⁵ See Coryton v. Lithebye, 2 Saund. 112.

¹⁶⁹ Sedgworth v. Overend, 7 Term, 279.

a large and extended sense, all actions, except those for the recovery of real property, may be called personal; this is not the meaning of the maxim. It extends to all wrongs attended with actual force, whether they affect the person or property; and to all injuries to the person only, without actual force.

2755. *When the wrong is altogether personal*, as where the deceased has been injured by assault, battery, false imprisonment, libel, slander, or otherwise, no action can be supported by his personal representatives. This rule appears to have been adopted for the purpose of preventing actions where the principal object would have been the gratification of revengeful feelings. Though a promise of marriage may be considered as a contract, yet it is so far personal that no action can be maintained by the executor of the promisee for a breach of it,¹⁷¹ unless perhaps the testator sustained special damages.¹⁷²

2756. Where the *injury* was done to *personal property*, and either the wrong doer or the party injured died, at common law there was no remedy by or against the personal representative, when the action must have been in form *ex delicto*, and the plea not guilty.¹⁷³ But if any contract can be implied, the executor of the injured party may bring a suit and recover damages; as, if the wrong doer convert goods into money, an action of *assumpsit* may be brought against him by the executor.¹⁷⁴

By statute of the English king 4 Edw. III, c. 7, an action is given to an executor for an injury done to the personal property of his testator in his lifetime; and this right was extended to the executor of an executor, by statute of 25 Edw. III, c. 5; and by the 31 Edw. III, c. 11, administrators have the same remedy as executors. The principles of these statutes have been adopted by our courts as a part of the common law.

2757. No personal representative can support an action arising *ex delicto* for any *injury to real property*, for the statutes just mentioned have been confined in their operation to injuries to personal property. An executor cannot, therefore, maintain an action of trespass *quare clausum fregit*,¹⁷⁵ nor merely for cutting down trees, or committing other waste in the lifetime of the testator.¹⁷⁶

2758. When several persons were jointly interested in the property injured, and *one of them is dead*, the action ought to be in the name of the survivor, and the executor of the deceased cannot be joined, nor can he sue separately.

If one of several plaintiffs in an action, in form *ex delicto*, dies pending the action, the suit does not abate, and the survivor may prosecute it to judgment.¹⁷⁷

2759. For an injury to the person or personal property of her husband, *the wife* cannot sue alone, nor can she join him, for she has no legal interest in either.¹⁷⁸ She may join him, it is true, when they have been jointly maliciously prosecuted, but this is because she herself had rights which were invaded; but in this case the husband, if he will, may sue alone.¹⁷⁹

2760. For *injuries committed before marriage*, either to the person, personal or real property of the wife, when the cause of action would survive to the wife, she must join in the action.

¹⁷¹ Chamberlain v. Williamson, 2 M. & S. 408. See Latimore v. Simmons, 13 Serg. & R. Penn. 183; Stebbins v. Palmer, 1 Pick. Mass. 71.

¹⁷² Latimore v. Simmons, 13 Serg. & R. Penn. 185.

¹⁷³ Pitts v. Hale, 3 Mass. 321; Stetson v. Kempton, 13 Mass. 272; Wilbur v. Gilmore, 21 Pick. Mass. 200.

¹⁷⁴ Middleton v. Robinson, 1 Bay, So. C. 58.

¹⁷⁵ In Connecticut a contrary rule has been adopted. Griswold v. Brown, 1 Day, Conn. 180.

¹⁷⁶ Mason v. Dixon, W. Jones, 174.

¹⁷⁷ 2 Saund. 72, i; Rex v. Collector of Customs, 2 Maule & S. 225.

¹⁷⁸ Arundel v. Short, Croke, Eliz. 133; Ayling v. Whicher, 6 Ad. & E. 259.

¹⁷⁹ Comyn, Dig. *Baron et Feme*, X.

For injuries committed before coverture to the property of the wife, held by her *in alieno jure*, the wife must always be joined; as, for a trespass to property held by the wife as executrix, when committed before marriage.

2761. When a *wrong* is committed against the person of the wife *during coverture*, as by beating her person, or slandering her reputation, or by a malicious prosecution, she cannot sue alone, the suit must be by herself and her husband, for in that case the right to damages will survive to the wife. But when the injury to the wife deprives the husband for any time of her company or assistance, or if she be maliciously indicted or imprisoned, and the husband is put to expense on those accounts, he may bring a separate action in his own name for these consequential injuries, which are, indeed, wrongs done to himself alone,¹⁸⁰ and for this reason he may, in the same action, proceed for a battery committed upon himself. And whenever, on account of an injury to the wife, he has sustained special damages, he may bring a separate action.

2762. For an injury during coverture to the wife's personal property not reduced to possession, in fact or in law, by the husband, the husband and the wife must join; and so in an action for disturbing a private office or employment filled by the wife alone.¹⁸¹

When the wrong committed toward the wife's property had its inception before marriage, but was consummated after, the husband and wife may join, or the husband may sue alone; as, in case of trover before marriage and conversion afterward, or of rent due before marriage and a rescue afterward. For the same reason, it is the better opinion that the wife must be joined in replevin for her goods taken while sole, though it is said in this case the husband may sue alone.¹⁸²

2763. For the recovery of the land of the wife, and in a writ of waste to it, the husband and wife must join. But when the action is merely for the recovery of damages to the land during coverture, the husband may sue alone, or the wife may be joined.¹⁸³

2764. When a *feme covert* sues *in auter droit*, as, for example, as executrix, she and her husband must join.¹⁸⁴

2765. When the wife dies the surviving husband may maintain an action for an injury to the land of the wife committed during the coverture.¹⁸⁵ But his remedy for injuries to her person does not survive.¹⁸⁶

2766. When the husband dies and the wife survives, any action for a tort committed to her, or to her personal or real property before marriage, or to her personal or real estate during the coverture, will survive to her.

2767. In considering the matter of *defendants in actions ex delicto*, it is convenient to consider liabilities as between the original parties, in case of assignment, the number of persons liable, the effect of the death of the wrong doer, and the effect of the marriage of the wrong doer.

The injuries committed by an individual may be classified as positive wrongs or common injuries, injuries arising from a breach of public duty, injuries which are the effect of an omission of some private obligation, and injuries consequent upon a breach of contract.

¹⁸⁰ *Rogers v. Smith*, 17 Ind. 323; *Tibb v. Brown*, 2 Grant, Cas. Penn. 39; *Johnson v. Dicken*, 25 Mo. 580; *McKinney v. Western Stage Co.* 4 Iowa, 420; *Gazynski v. Colburn*, 11 Cush. Mass. 10.

¹⁸¹ *Weller v. Baker*, 2 Wils. 423.

¹⁸² *Watterman v. Matteson*, 4 R. I. 539. It is even held that in replevin for goods of the wife, taken during coverture, the husband and wife should join. *Brown v. Fifield*, 4 Mich. 322.

¹⁸³ *Bellars v. McGinnis*, 17 Ind. 64.

¹⁸⁴ *Wentworth*, Off. Ex. 207; *Buckley v. Collier*, Salk. 114.

¹⁸⁵ *Comyn*, Dig. *Baron & Feme*, Z. ¹⁸⁶ See *Long v. Morrison*, 14 Ind. 99.

2768. *Positive wrongs* may be either to the person, or personal rights, or to property. All natural persons who have legal capacity to sue are liable to be sued for tortious acts unconnected with or in disaffirmance of a contract; and, therefore, an infant may be sued like an adult for torts committed by him, as for slanders, assaults, batteries, trespasses, and the like. But a slave, who is not in general considered a person, but a thing, cannot be sued for a tort, as an action against him would be wholly fruitless, and though his master may in some cases be liable for the injury he has committed to property, he cannot be made responsible for his slander.

2769. The person doing the injury is the party liable, and whether he commits the wrong by his own hands or those of another, he is the one who does the injury, for he who acts by another acts himself: *qui facit per alium facit per se*.¹⁸⁷ But there are some cases where it is not so easy to make a choice of parties; as, when one man causes an injury to another at the instigation of a third person, or where the injury arises from executing an authority in law, whether the same be real or fictitious.

2770. When without intention one man prejudices another by his wrongful act at the suggestion of a third; if he had the choice whether to interfere or not, he has no excuse; if, therefore, a servant by the command of his master injures another man, the latter may maintain an action against him.¹⁸⁸ But to render him thus responsible, he must be active in doing the mischief, and not be a mere instrument in the hands of another, for he cannot be said to commit an injury if he had no knowledge of it. A servant who should carry a sealed libellous letter to a printer to be published, not knowing its contents, would not be guilty of the publication of the libel; and a servant who delivers to the sheriff an illegal writ inclosed in a letter, not knowing its contents, is not answerable to him against whom it is executed.¹⁸⁹ But when the agent knew, or ought to have known, that he was forwarding the illegal affair, he is liable, though he may not have been the immediate actor in the matter; as, where an attorney at the request of his client issued an illegal writ, for example, an execution before he had a judgment.¹⁹⁰

A master or principal is liable, in some cases, for the acts of his servant or agent, although he did not know anything about them; he is answerable for their negligence or unskilfulness while acting in the course of his employ.¹⁹¹ But he is not answerable for the injury if the servant at the time wilfully committed it on his own account; as, if he wilfully drove his carriage against another.¹⁹² An exception to this rule is made on the ground of public policy in

¹⁸⁷ *Gilbert v. Beach*, 5 Bosw. N. Y. 445. Some cases of much nicety arise where torts are committed by persons employed in acts which are to be beneficial to an owner of real estate, in distinguishing whether the party committing the tort is the servant or agent of the owner or of an intermediate contractor. See *Gilbert v. Beach*, 5 Bosw. N. Y. 445; *Hilliard v. Richardson*, 3 Gray, Mass. 349; *Stone v. Codman*, 15 Pick. Mass. 297; *Lowell v. Boston Railroad*, 23 *id.* 24; *Blake v. Ferris*, 1 N. Y. 48; *Stevens v. Armstrong*, 2 *id.* 435; *Batty v. Duxbury*, 24 Vt. 155; *Wiswall v. Brinson*, 10 Ired. No. C. 554; *De Forrest v. Wright*, 2 Mich. 368; *Leshner v. Wabash Nav. Co.*, 14 Ill. 85; *Cincinnati v. Stone*, 5 Ohio St. 38; *Clark v. Vermont R. R. Co.*, 28 Vt. 103; *Bush v. Steinman*, 1 Bos. & P. 404; *Burgess v. Gray*, 1 C. B. 578; *Peachey v. Rowland*, 13 *id.* 182.

¹⁸⁸ *Bennett v. Ives*, 30 Conn. 329.

¹⁸⁹ *Coles v. Wright*, 4 Taunt. 198.

¹⁹⁰ See *Barker v. Braham*, 3 Wils. 368.

¹⁹¹ *Scammon v. Chicago*, 25 Ill. 424; *Althorpe v. Wolfe*, 22 N. Y. 355; *Wolfe v. Merseureau*, 4 Du. N. Y. 473; *Luttrell v. Hazen*, 3 Sneed, Term, 20. See *Sloan v. State*, 8 Ind. 310.

¹⁹² *Weldon v. Harlem R. R. Co.*, 5 Bosw. N. Y. 576; *Snodgrass v. Bradley*, 2 Grant, Cas. Penn. 43; *Wesson v. Seaboard, etc., R. R. Co.*, 4 Jones, No. C. 379; *Lyons v. Martin*, 8 Ad. & E. 512; *Lamb v. Palk*, 9 Carr. & P. 629; *McManus v. Crickett*, 1 East, 106.

relation to sheriffs, innkeepers, and common carriers, who are responsible for their agents.¹⁹³

When an injury has been committed by an animal, the owner will be responsible if he knew of the animal's evil propensity and the injury has happened through his fault.¹⁹⁴

2771. When an injury arises from the execution of an authority in law, the wrong doer is liable, whether it be caused by executing a lawful writ in an unlawful manner, an illegal writ, from acting upon a groundless complaint, receiving as an officer a person as a prisoner who has been illegally taken, or aiding a legal authority.

An officer who executes a lawful writ in an unlawful way, though innocently, under the direction of his superior, will be liable for the injurious act;¹⁹⁵ and if the plaintiff directed the manner of executing it, he will also be responsible.¹⁹⁶

The execution of the process of a court having jurisdiction of the parties and matter on which it is founded, and regular on its face, may be justified by an officer, because, although such process may be void, he is not allowed to judge of that, and may be punished for contempt if he do not execute it.¹⁹⁷ But the plaintiff and his attorney are liable.¹⁹⁸

A justice of the peace who causes one to be arrested criminally, when he has jurisdiction, will be safe if it does not appear that he acted knowingly in violation of law; as, where he issued a warrant of arrest without a previous oath. But although his process may be illegal, it will justify the constable, who cannot inquire into its illegality if the magistrate had jurisdiction.¹⁹⁹

A jailer will be responsible for a false imprisonment, and may be sued for it if it appear upon the commitment that it is illegal.²⁰⁰

The sheriff may, in the execution of a lawful writ, call to his assistance the *posse comitatus*, that is, the aid of such citizens as may be requisite to enable him to execute such writ.²⁰¹ And in such case, although the sheriff may be acting without authority, yet it would seem that any person obeying his command, unless aware of that fact, will be protected.

2772. An action lies against one who commits a trespass or any *injury to personal property*, or for appropriating it to the party's use, as in the case of trover and conversion. And in all cases where he would be liable to an action for a trespass committed by his agent or servant to the person of another, he will be responsible for their acts, when committing an injury to the personal property of the plaintiff.

¹⁹³ *Weed v. Panama R. R. Co.*, 17 N. Y. 362. See *Hibbard v. New York, etc., R. R. Co.*, 15 N. Y. 455; *Blackwall v. Wiswall*, 24 Barb. N. Y. 355.

¹⁹⁴ By the Roman law, when the master was sued for a wrong committed by his slave, or the owner for a trespass committed by his animal, he might abandon them to the person injured, and thereby save himself from further responsibility. Inst. 4, 9; Dig. 9, 1; Ib. 21, 1, 40. Similar provisions have been adopted in Louisiana. La. Code, Art. 180, 181, 2301.

¹⁹⁵ *Everett v. Herrin*, 48 Me. 537; *Ewings v. Walker*, 9 Gray, Mass. 95; *Gilleland v. Rhoades*, 34 Penn. St. 187.

¹⁹⁶ See *Menham v. Edmonson*, 1 Bos. & P. 369.

¹⁹⁷ *Mower v. Stickney*, 5 Minn. 397; *Dwinnells v. Boynton*, 3 All. Mass. 310; *Neth v. Crofut*, 30 Conn. 580; *Brainard v. Head*, 15 La. Ann. 489; *Bogert v. Phelps*, 14 Wisc. 88; *Slomer v. People*, 25 Ill. 70. So where the statute under which a warrant was issued was subsequently repealed. *Robinson v. Barrows*, 48 Me. 186.

¹⁹⁸ *Barker v. Braham*, 3 Wils. 368; *Young v. Bircher*, 31 Mo. 136; *McNeeley v. Hunton*, 30 *id.* 332; *Gibson v. Chillicothe Bank*, 11 Ohio St. 311.

¹⁹⁹ *Outlaw v. Davis*, 27 Ill. 467; *Hetfield v. Tousley*, 3 Iowa, 584; *Keniston v. Little*, 21 N. H. 318. See *La Roe v. Roesser*, 8 Mich. 537.

²⁰⁰ Or if the court has no jurisdiction. *Patterson v. Prior*, 18 Ind. 440.

²⁰¹ *Viner*, Abr. *Sheriff*, B.

With respect to real property a man may be sued for his misfeasance or malfeasance, as for obstructing ancient lights, neglect to repair fences, private ways, etc., when he is bound so to do. Such actions may be against the occupier of the premises, and not the owner of the land, unless he covenanted to repair.²⁰²

2773. When an injury arises in consequence of the *neglect of a public duty*, the person who filled the office in question is the party who is alone to be sued, for the duty was imposed upon him alone. But it is here to be observed that a judicial officer while acting within his jurisdiction is not liable to any action for any apparent neglect of his duty, nor for any mistake he may commit in the execution of his office.

A ministerial officer, who is one acting by the authority of his superior, may be sued for the abuse of the authority given him; and he is generally responsible for the acts of his deputies.

2774. When a party is required by the situation in which he is placed to perform certain things, and he neglects to do so, by which an injury accrues to the plaintiff, he may in general bring an action for the redress of the wrong. The following cases exemplify this rule:

When premises are wasted, the party liable is he who stood in the relation of tenant to the plaintiff at the time. If, therefore, Primus lease to Secundus, and Secundus demise to Tertius, who wastes the tenement, case in the nature of waste lies by Primus against Secundus, not against Tertius; because Primus' action being for a breach of private duty connected with a tenure, and no tenure subsisting between Primus and Tertius, no duty is owing from one to the other. If, however, Tertius' misfeasance is commissive, and not permissive, waste, Primus may sue him for injuring his reversionary estate, unless he has already sued or is suing Secundus.²⁰³

The occupant of a close, the owner of which is bound to maintain the fence which divides it from another, is liable to the neighboring landholder for damages sustained in consequence of the fence going to decay, whatever agreement he may have made with a third person about repairing it.²⁰⁴

A person in possession of premises upon which a nuisance has been placed is liable, whether he raised it or not.²⁰⁵

2775. A common carrier and an innkeeper are insurers for the safety of the goods intrusted to them, and are, therefore, liable for any neglect or misconduct by which an injury accrues to them; and if they employ persons to assist them, they are responsible for their acts. A carrier, for example, must deliver the goods to their address; if he forward them by a porter, the latter is his agent, and he is liable for his acts, unless there is an express or implied agreement that he may do so.²⁰⁶

2776. It is a common principle of justice that no one can be answerable for an injury, unless it has been committed by his express or implied command, or by his own act. The *assignee* of an estate is not liable, therefore, for a nuisance, committed upon it before he became the owner; but if he continue the nuisance he may be sued for such continuance. In such case, however, there should be a request to remove the nuisance.²⁰⁷

²⁰² *Payne v. Rogers*, 2 H. Blackst. 350. See *Bell v. Josselyn*, 3 Gray, Mass. 309.

²⁰³ See *Berry v. Heard*, Croke, Car. 242; *Cudlop v. Rundall*, 4 Mod. 9.

²⁰⁴ *Payne v. Rogers*, 2 H. Blackst. 349.

²⁰⁵ *Tenant v. Goldwin*, 1 Salk. 360. See *McDonough v. Gilman*, 3 All. Mass. 264; *Caldwell v. Gale*, 11 Mich. 77; *Brown v. Illius*, 27 Conn. 84; *Beckwith v. Griswold*, 29 Barb. N. Y. 291; *Owings v. Jones*, 9 Md. 108; *Draper v. Sperring*, 11 C. B. n. s. 113.

²⁰⁶ *Hyde v. The Trent and Mersey Nav. Company*, 5 Term, 396.

²⁰⁷ *Comyn*, Dig. *Nuisance*, B; *Caldwell v. Gale*, 11 Mich. 77; *Hubbard v. Russell*, 24 Barb. N. Y. 404; *Beavers v. Trimmer*, 1 Dutch, N. J. 97; *Brown v. Cayuga*, etc. R. R. Co., 12 N. Y. 486.

2777. *Joint liabilities* may arise for common injuries, for neglect of public duty, and for neglect of private obligations.

2778. *When several persons join in an offence* or injury, they may generally be sued jointly, or any number less than the whole may be sued, or each one may be sued separately.²⁰⁸ Each is liable for himself, because the entire damages sustained were occasioned by each, each sanctioning the acts of the others, so that by suing one alone, he is not charged beyond his just proportion. Any number less than the whole may be sued, because each is answerable for his companion's acts. Thus a joint action may be brought against several for an assault and battery, or for composing and publishing a libel.²⁰⁹

But to this rule that for a joint injury a joint action may be brought, there is an exception, namely, that no joint action can be maintained for a joint slander; this exception seems to proceed upon the ground that each man's slander is his own, and it cannot by any means be considered that of another. Although this exception appears to be fully established, yet it is difficult to see the reason of it; when one of several trespassers gives the blow, he is considered as acting for the others, and, if they acted jointly, they may be jointly sued; why not consider the speaker, when acting in concert with others, as the actor for the whole in uttering the words? The blow is no more that of the person who did not give it than the words are the words of him who only united with the other in an agreement that they should be spoken. In either case, upon principle, the maxim, *qui facit per alium facit per se*, ought to have its force. Such, however, is not the law.

2779. There is a distinction between mere personal actions for torts and such as concern real property. If a tenant in common be sued for a tort, for any thing respecting the land held in common, he may plead the tenancy in common in abatement.²¹⁰

2780. When several officers join in their *neglect of a public duty*, or in doing an injurious act, for which they may be sued, they may be sued jointly or severally.²¹¹ And if carriers act together as partners, and injure a customer by neglecting their duty, as by losing his goods in their charge, they must be sued jointly.²¹²

2781. When the injury results from the *neglect of a private obligation*, as to repair a dividing fence, the rule, as far as respects strangers, seems to be that all occupying the land charged with the repair, whether as tenants or bare occupants, are liable jointly, each may be sued separately, or any number less than the whole may be made joint defendants, because a stranger cannot know the state of the property. So if a nuisance be upon the land, and the owner sells it, after which the nuisance is continued, the former owner and the purchaser may be jointly sued.²¹³

2782. We have seen that when the injured party dies, it is a general rule that no action can be maintained by his executors for the mere personal injury done to him, the maxim in such cases being *actio personalis moritur cum persona*. The same rule prevails *when the wrong doer dies*; in general, no action lies against his personal representatives.

2783. If the wrong doer dies before judgment, there is no remedy for any

²⁰⁸ *Williams v. Sheldon*, 10 Wend. N. Y. 654.

²⁰⁹ 2 Saund. 117, a; Bacon, *Abr. Actions in General*, C; *Harris v. Huntington*, 2 Tyl. Vt. 129.

²¹⁰ *Low v. Mumford*, 14 Johns. N. Y. 426; *Sumner v. Tileston*, 4 Pick. Mass. 309. See *Converse v. Symmes*, 10 Mass. 378.

²¹¹ *Rich Sir Peter v. Pilkinton*, Carth. 171.

²¹² *Buddle v. Wilson*, 6 Term, 369.

²¹³ *Hammond*, Part. 88.

injury done to the person of the plaintiff; nor can an action be maintained against the executors of one who has broken his promise to marry.

2784. For an injury committed by a testator to personal property, no action can in general be sustained against his executor; though if the testator converted the property into money, assumpsit may be maintained against the executor; and if the property remains in specie in the hands of the latter, trover would lie against him, but not in his character of executor.

2785. When the injury is against real property, no action will in general lie against the executor of the wrong doer; though if trees or other parts of the freehold be taken or converted into money, assumpsit will lie against the personal representatives; or if the trees remain in specie, trover may be maintained against him.²¹⁴

2786. When there are several wrong doers and one dies, the action may be brought against the survivor, or any number of them the plaintiff may select, or against one only.

2787. *The marriage of a woman* changes her rights and liabilities so far that she cannot alone enforce the former, nor can she alone be sued for the latter; in general, her husband must be joined in actions by and against her.²¹⁵

2788. When she commits a tort before marriage, the action must be against the husband and wife jointly.²¹⁶ For torts committed by her during the coverture, as for slander, battery, and the like, the husband and wife must be joined;²¹⁷ but they cannot be sued jointly for the slander uttered by both of them, because she cannot be made responsible for the slander uttered by her husband.

When the tort is joint, and she could be sued if she were a common person, then the action may be against them both jointly; as, where the husband and wife committed an assault and battery;²¹⁸ or in such case the husband may be sued alone. Trover may be supported against husband and wife for a conversion of goods before marriage,²¹⁹ and for a conversion by husband and wife, the husband may be sued alone.²²⁰

²¹⁴ *Hambly v. Trott*, Cowp. 373; 1 Saund. 216, a.

²¹⁵ *Jillson v. Wilbur*, 41 N. H. 106.

²¹⁶ *Bacon*, Abr. *Baron & Feme*, L; *Hauk v. Harman*, 5 Binn. Penn. 43.

²¹⁷ *Matthews v. Fiestel*, 2 E. D. Smith, N. Y. 90; *Corn v. Brazelton*, 2 Swan, Tenn. 273; *Austin v. Wilson*, 4 Cush. Mass. 273; *Roadcap v. Sipe*, 6 Gratt, Va. 213.

²¹⁸ *Roadcap v. Sipe*, 6 Gratt. Va. 213.

²¹⁹ 2 Saund. 47 h, i.

²²⁰ 2 Saund. 47 i.

CHAPTER V.

PROCESS AND APPEARANCE.

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 - 2809. The attachment.
 - 2814. The appearance.

2789. We have seen that when a legal right has been invaded the plaintiff is entitled to his remedy, for the redress of the injury, by an action; and having ascertained who are the persons who must be made both plaintiffs and defendants, our task now will be to consider the proceedings which usually take place in an action or suit at law. In the discussion of this subject it will be necessary to inquire what is the proper form of the process; what is an appearance; into the pleadings; the declaration; the defence; the pleas; the replications; the rejoinder and subsequent pleadings; the demurrers; the nature of a case stated; the trial; the arrest of judgment, new trial; the judgment; the proceedings in the nature of appeals; and the execution of the judgment.

2790. The writ or judicial means by which a defendant is brought in or called upon to answer to the complaint of the plaintiff is called *process*. It is so called because it proceeds, or issues forth, in order to bring the defendant into court, to answer the charge preferred against him.¹

2791. According to the English law, the king is theoretically the fountain of all justice, and he is represented in chancery by the lord chancellor. Before the courts can have any jurisdiction a writ must be issued out of chancery in the king's name, by which the defendant is commanded to satisfy the plaintiff, or else to appear in a court of law therein named and answer for his default; this is called the original writ, and is required to give the law court jurisdiction of the case; it is a species of commission authorizing such a court to try the cause. All the writs which are issued between the return of the original, until judgment has been obtained, are called *mesne* writs; and all which issue afterward are denominated final writs.

The original writ is issued under the great seal and tested, that is, it concludes

¹ United States *v.* Noah, 1 Paine, C. C. 368.

with an attesting clause in the name of the king himself, "witness ourself." All the other writs in the cause bear *teste* in the name of the chief justice, and these last writs are called judicial writs, by way of distinction from the original one obtained out of chancery.

In modern practice the original writ is frequently dispensed with by means of a fiction, and a proceeding by bill is substituted.²

2792. In the United States, the original writ, as in England, is generally dispensed with, the constitutions of the several states giving power to issue writs, so that with us, what are called the mesne writs in England are here original writs, and we have also final writs, into which two kinds all our writs are divided, there being no mesne or middle writs as in England.

The several constitutions of the states have provided the mode of issuing writs and process. They are generally issued in the name of "the commonwealth," "the people," or "the state," as the constitution requires. These writs must be in writing or printing, signed by the clerk or prothonotary of the court, or in the name of, and attested by, the presiding judge, and sealed with the seal of the court.³ They must be directed to the officer by whom they are to be served,⁴ and should be dated,⁵ and state the time when they are to be returned, which is called the return day.⁶

There must be a proper description of the plaintiff,⁷ of the defendant,⁸ and of the cause of action.⁹

2793. The usual mode of suing out a writ of process is by filing a *præcipe* with the clerk or prothonotary. The *præcipe* is a brief written order, requiring that officer to issue a writ therein named, containing the names of the plaintiff and the defendant, and stating for what action. It is made by the attorney of the plaintiff in general, but it may be made by the plaintiff himself. On the receipt of the *præcipe* the clerk or prothonotary makes out the writ, which is handed to the plaintiff.¹⁰ This writ is delivered to the proper ministerial officer to be executed. When these writs issue out of the courts of the United States, they are directed to the marshal; when out of the state courts, to the sheriff.

In some of the states provision is made by statute requiring writs sued out

² Stephen, Pl. 54.

³ State v. Dozier, 2 Speers, So. C. 211. The seal is essential, and the want of it cannot be cured by amendment. Foss v. Isett, 4 Greene, Iowa, 78; Churchill v. Marsh, 4 E. D. Smith, N. Y. 369; Williams v. Vanmetre, 19 Ill. 293; but see Johnston v. Hamburger, 13 Wisc. 175.

⁴ Wood v. Ross, 11 Mass. 271. The omission of the proper direction is not fatal. Parker v. Barker, 43 N. H. 35.

⁵ Smith v. Winthrop, 1 Ala. 378.

⁶ Stating the return day in the wrong term is fatal. Rigsbee v. Bowler, 17 Ind. 167; Hildreth v. Hough, 20 Ill. 331.

⁷ It seems that naming the plaintiff by initials merely is sufficient. Sistersmans v. Field, 9 Gray, Mass. 331.

⁸ In general, under the statute provisions, much less certainty is required in describing the defendant by his exact name than the plaintiff. But there must be a description which can be made certain. Thus describing the defendants as "heirs of A. B." is insufficient. Reynolds v. May, 4 Greene, Iowa, 283; see Smith v. Morris, 29 Ga. 339; Graham v. Roberts, 1 Head, Tenn. 56.

⁹ Moody v. Taylor, 12 Iowa, 71.

¹⁰ This practice is not universal. In some of the states the writs are filled up by the attorney. Slater v. Carter, 35 Ala. N. S. 679. Under the New York code the action is commenced by service of a copy of the petition or complaint with a summons signed by the plaintiff's attorney without process from the court unless an arrest or attachment is desired. And in most of the states where the action is commenced by writ the use of the *præcipe* is unknown, or unusual. The writs are commonly issued in blank by the clerk, and filled up by the attorney.

by non-resident plaintiffs to be indorsed by a resident of the state, who thereupon becomes liable for the costs if the defendant prevails.¹¹ The indorsement is made by putting a signature on the back of the writ, and is in practice usually made by the attorney. The words, "from the office of A. B.," are a good indorsement.¹²

2794. On the receipt of the writ the ministerial officer is required to serve it according to its exigency, and make a return of it to the court, with a statement indorsed upon it, setting forth what he has done; this statement is also called the return.

In the service of the writ the sheriff or marshal has the right, when resisted, to call the *posse comitatus*, that is, the aid of such individuals as will enable him to execute it according to its exigency and the commands of the law. But with respect to writs which issue, in the first instance, to arrest in civil suits, the sheriff is not bound to take the *posse comitatus* to assist him in the execution of them; though he may, if he pleases, on forcible resistance to the execution of the process.¹³ Before the sheriff uses any force, however, he ought to make a demand, for force ought to follow, not precede, the commands of the law.

2795. The effect of the sheriff's return is different when it regards himself and when it affects others. It is conclusive against him and he cannot gainsay it;¹⁴ and when it is in his favor, as a return to a *fieri facias*, setting forth a valid excuse for not having sold goods, such as that they were destroyed by fire, or that the proceedings were stayed by a judge's orders, or the like, it is *prima facie* evidence of the fact in his favor.¹⁵ As between the parties to the suit, the return cannot be traversed, it being conclusive.¹⁶ If false, the sheriff is liable to an action for making a false return.¹⁷

The sheriff is allowed to amend his return in certain cases, but never when manifest injustice will be done to either of the parties; and he may be compelled to make a sufficient return by attachment for contempt when he neglects or refuses to make it upon or after the return day.

2796. *The usual processes* to bring a party into court so that judgment may be rendered against him are, the summons, the *capias*, and the attachment.

2797. In form, *the summons* is a writ commanding the sheriff to summon, that is, notify, the defendant, if within his jurisdiction, commonly called his bailiwick, to appear in court on a certain day to answer the charge of the plaintiff.¹⁸ It may be issued at any time during term time or in vacation, but it is usually tested, that is, dated, as of a day during term, for it is presumed to have been issued by the immediate order of the court, as was probably the case in former times,¹⁹ and it is made returnable on the first day of the next term, which, as has been observed, is the general return day; and the term to which the defendant is required to appear is called the appearance term.

The act of notifying the defendant that a summons has been issued against

¹¹ *Scruton v. Deming*, 36 N. H. 432.

¹² *Wheeler v. Lynde*, 1 All. Mass. 402.

¹³ 2 Inst. 193; 3 Inst. 161.

¹⁴ *Hustick v. Allen*, Cox. N. J. 168; *Murrell v. Smith*, 3 Dan. Ky. 462; *Blue v. Commonwealth*, 2 J. J. Marsh. Ky. 26; *Commonwealth v. Fuqua*, 3 Litt. Ky. 41.

¹⁵ *Browning v. Harford*, 7 Hill, N. Y. 120; *Polley v. Lenox Iron Works*, 4 All. Mass. 329; *Foster v. Dryfus*, 16 Ind. 158; *Kingsbury v. Buchanan*, 11 Iowa, 387.

¹⁶ *Wilson v. Hurst*, 1 Pet. C. C. 441; *Diller v. Roberts*, 13 Serg. & R. Penn. 60; *Bott v. Burnell*, 11 Mass. 163; *Whitaker v. Sumner*, 7 Pick. Mass. 551; *Lawrence v. Pond*, 17 Mass. 433; *Reeves v. Reeves*, 33 Mo. 28; *Tullis v. Brawley*, 3 Minn. 277; but see *Owens v. Ranstead*, 22 Ill. 161.

¹⁷ *Stenson v. Snow*, 13 Me. 263.

¹⁸ 22 Viner, Abr. 42.

¹⁹ Considerable diversity appears to exist as to the date of writs; in some of the states they are tested, or dated, on the day they issue, whether the same be in term or vacation.

him is performed by reading the summons to him by the sheriff or his deputy, or by delivering him a copy of the writ; the former is called personal service of the writ, and the latter a service by copy.²⁰ This service may be made at any time after the writ comes into the hands of the sheriff, and not later than the day fixed by statute, which may be the return day or a certain time before. The sheriff is bound in this, as in every other case, to use due diligence in the execution of his writ; if he knows that the defendant is within his territorial jurisdiction, and he neglects to serve the writ, and he returns that he could not find the defendant he will be liable for all consequential damages.

After having served the summons, it is his duty to return it to the court whence it issued, with what he has done. If the defendant has been served, he returns it "served." If, on the contrary, he has not been able to find him, his return is *non est inventus*, usually abbreviated "N. E. I.," that the defendant could not be found within his jurisdiction.

When the return of *non est inventus* has been made, the plaintiff may issue a second summons, returnable at another term, which is called an *alias* summons; if this should also be returned *non est inventus*, a third may be issued, which is called a *pluries* summons; and if a fourth or fifth summons should be wanted, they are denominated respectively second *pluries* summons, third *pluries* summons, and so on, numbering each future pluries in the order they are issued, until one has been served, and the proceedings go on as if the defendant had been summoned on the first writ.²¹

In some of the states, if, after summons has been issued, the defendant removes into another county in the same state, a writ may be issued directed to the sheriff of the county to which the defendant has removed, commanding him to summon the defendant to appear in the court whence the summons has been issued; this is called a *testatum* summons, differing from the common summons only in stating the fact of such removal.²²

2798. *The capias*, or more properly the *capias ad respondendum*, is a writ commanding the sheriff to take the body of the defendant and have him before the court to answer the charge of the plaintiff. It is called a *capias ad respondendum*, or a writ of arrest to answer, to distinguish it from the *capias ad satisfaciendum*, commonly abbreviated *ca. sa.*, which is a writ of arrest to satisfy; this last is issued only after judgment, and is the most astringent writ of execution. The *capias ad respondendum* may be issued in term time, or in vacation, and, like a summons, it may be tested either during some day of the term, which is called the *teste* day, or at the time it is issued in vacation, as is provided for by the statute of the state. Let us now inquire against whom it may be issued; for what causes; how it is to be executed; what is to be done after the arrest; and as to the return of the writ.

2799. When a proper cause of action exists, a *capias* may be issued in general against all persons; but there are many cases where it would be injurious to the public interest that certain persons should be arrested in a civil action, and although, in our free country, we have abolished all personal privileges, yet

²⁰ Where the defendant has a usual place of residence in the jurisdiction, the service may under the statutes of many of the states be made by leaving the summons or copy at such place of residence. *Feasel v. Cooper*, 15 La. Ann. 462; *Miller v. Mills*, 29 Ill. 431; *Sturgis v. Fay*, 16 Ind. 429.

²¹ 3 Sharswood, Blackst. Comm. 283.

²² Walker, Intr. 516; 3 Sharswood, Blackst. Comm. 283. Under the practice stated in the text, where the defendant resides out of the county, it is usual to issue the *testatum* summons in the first instance to avoid the loss of a term. But in many of the states writs are directed to any sheriff and run throughout the state. Where the defendant resides out of the state, service is sometimes made under statute provisions by advertisement in a newspaper under an order of court.

where the public good requires it, privileges will be allowed, not indeed to the individual, but to the situation in which he is found. These privileges are either general and absolute, or limited and qualified.²³

2800. *Those who are absolutely exempted from arrest* may be divided into the following classes:

Ambassadors and their servants, when the debt or duty for which they are sued has been contracted by the latter since they entered into the service of such ambassador.

Bankrupts, who have been finally discharged, for any debt which might have been proved by the creditor under the bankrupt proceedings.

Insolvent debtors, for any debt which was due or owing at the time of the insolvent's discharge.

Executors and administrators, when sued in their representative character.²⁴

In some states women are exempt from arrest for any debt contracted by them.²⁵

2801. The classes of *persons* who are *exempted from arrest* in civil cases, for a *limited time*, are the following:

Members of congress. This privilege is not only that of the member, but also that of his constituents, and of the house of which he is a member; and every man is bound to know and take notice of this privilege.²⁶ The same privilege is extended to the members of the different state legislatures in their own state. The time during which this privilege exists includes all the session of congress, or in case of the members of the state legislatures, during the session of their body, and a reasonable time for going to and returning from the seat of government.²⁷

Electors, under the constitution and laws of the United States, or of any state, are protected from arrest for any civil cause, while in the performance of their duty as such, and *eundo, morando, et redeundo*, that is, in going, staying at, or returning from an election.

Militia men, while in the performance of military duty,²⁸ and sailors and soldiers in the service of the United States, or of the state, and *eundo, morando, et redeundo*.

All persons who, either necessarily or of right, are attending in any court or forum of justice, whether as judge, attorney, juror, party interested, or witness, and *eundo, morando, et redeundo*.²⁹

2802. A *capias* can be issued only in cases where the plaintiff is *entitled to bail*, and cannot, as a summons, be issued of course where the plaintiff has a

²³ A distinction is to be made between persons against whom a *capias* cannot issue and those against whom it cannot be served. In some of the states a *capias* is joined with a summons or attachment, but no arrest is made except by special direction. As a general rule it may be stated that a *capias* issued against persons absolutely exempt from arrest, or against a corporation which it is physically impossible to arrest, is bad, and will be abated. But a *capias* issued against persons having only limited privileges which they may waive is not void. An arrest under it will be a trespass and illegal, but it may be served without arrest if such provision is made by statute, and the effect of such service is governed by other rules.

²⁴ But see *Fitzsimmons v. Salomon*, 2 Binn. Penn. 440.

²⁵ *Hatheway v. Jones*, 20 Ark. 109. In some of the states the defendant cannot be arrested for debt, unless there is strong presumption of fraud first established, for any contract the defendant may have entered into.

²⁶ *Jefferson*, Man. § 3; *Comyn*, Dig. *Parliament*, D, 17.

²⁷ *Story*, Const. §§ 856 to 862.

²⁸ This privilege does not extend out of the state. *Manchester v. Manchester*, 6 R. I. 127.

²⁹ *Hammerskold v. Rose*, 7 Jones, No. C. 629; *Henegar v. Spangler*, 29 Ga. 217; *Wood v. Neale*, 5 Gray, Mass. 538; see *Page v. Randall*, 6 Cal. 32.

cause of action. This is regulated by the local laws; in some of the states a defendant may be held to bail in all cases of debt; in others he can be held to bail only where a *prima facie* case of concealment of property is made to appear. Generally he may be arrested for his torts, either upon an affidavit of the cause of action being previously made, or upon its being made to appear after the arrest; in this latter case the arrest is made at the risk of the plaintiff. And if a defendant be arrested, and upon an investigation it afterward appear that the arrest has been improperly made, either the writ will be quashed, that is, annulled, or the defendant will be discharged on common bail, that is, by entering an appearance. This common bail is a formal entry of fictitious sureties in the proper office of the court. It is in the same form as special bail, but differs from it in this, that the sureties are fictitious persons, as, John Doe and Richard Roe.³⁰

2803. *The service* of this writ is made by arresting the defendant; by arrest is meant the detention of the defendant by the officer who is required to execute the writ, so that he has the defendant in his power and the latter submits to him. To constitute an arrest it is usual to seize or touch the person of the defendant, and that is certainly the safest mode to pursue,³¹ yet it has been held that no manual touching of the body or force is requisite when the defendant is within the power of the officer and submits to his authority;³² as, if the bailiff come into the room and tell the defendant he arrests him and locks the door.³³ But an arrest cannot be made by words only.

Once in the power of the officer, if the defendant escape, he may be retaken, and for this purpose the officer is justified in breaking not only an inner, but an outer door. Before his arrest the officer cannot break an outer door in order to effect it;³⁴ after his arrest and escape he may break such a door, not, however, until a demand has been made to open it; for the law, ever anxious to preserve the peace, will permit no violence unless it is impossible to avoid it. But this privilege of protecting the outer inlet from being broken in a civil case is limited to the house of the defendant alone, and will not screen the house of another where the defendant, with the owner's consent, flies for protection from a civil process.³⁵

2804. When the defendant has been arrested and he is in custody, he must put in bail or be imprisoned. This leads us to consider the nature and kinds of bail.

2805. We have seen that common bail consists in the formal entry on the record of fictitious names in order to enter an appearance. The object of the arrest being to compel an appearance, the defendant is required upon his arrest either to go to prison or to give a bail bond to the sheriff, conditioned that he will appear; this the sheriff is authorized, or indeed required, to take with sufficient sureties; this species of bail is called *bail below*, or *bail to the sheriff*. If the defendant do not appear according to the condition of the bond, the plaintiff is entitled to rule the sheriff to bring the body into court, or to take an assignment of the bail bond and sue the defendant and his sureties upon that instrument.

³⁰ Stephen, Pl. 56, 7; Graham, Pract. 155; Highmore, Bail, 13.

³¹ 3 Sharswood, Blackst. Comm. 288; Huntingdon v. Blaisdell, 3 N. H. 318. It is an arrest if the officer lay his hands on a person with the intention of arresting him, though he do not succeed in stopping and holding him. Whitehead v. Keyes, 3 All. Mass. 495.

³² Gold v. Bissell, 1 Wend. N. Y. 215; Courtoy v. Dozier, 20 Ga. 369.

³³ Williams v. Jones, Cas. temp. Hardw. 301; 4 Bos. & P. 211; Buller, Nisi. P. 82; Strout v. Gooch, 8 Me. 127.

³⁴ F. Moore, 917, p. 668; Cooke's Case, W. Jones, 429.

³⁵ Semayne's Case, 5 Coke, 93. See Still v. Wilson, Wright, Ohio, 505.

On failure to give a sufficient bail bond, the sheriff may commit the defendant to prison.

2806. By *special bail* is understood a recognizance entered in the case, in which the defendant and his sureties become bound in double the amount of the claim, with a condition that if the plaintiff shall recover in the suit, the defendant shall either pay the judgment and costs, or surrender himself to the sheriff, or that his sureties will do it for him. This is entering bail to the action, and is equivalent to an appearance. It is called special because it particularly states what the sureties are bound to do, and it is called *bail above* to distinguish it from bail below, or bail to the sheriff.

After special bail has been entered, the plaintiff may object to their sufficiency, when the sureties are required to justify, that is, show that they are of pecuniary ability to pay the plaintiff's demand.

2807. The meaning of the word bail is to deliver, and the defendant is presumed to have been delivered into the custody of the sureties. If the sureties become dissatisfied, they may obtain a certificate from the clerk or prothonotary of the court that they became bail for the defendant, which certificate, called a bail piece, when formally made under the seal of the court, is evidence of that fact, and authorizes the securities, also called the bail, to arrest the defendant and commit him to prison in discharge of their obligation or recognizance, and entitles them to have an *exoneratur*, or an entry made on the record that the defendant has been so surrendered or committed to prison, which, when lawfully made, discharges them.

2808. *The return of the capias* must be made according to the facts; if the writ has been served, the defendant has been arrested, the return is simply *cepi corpus*; if the defendant has been discharged on bail, *cepi corpus* and bail bond, or C. C. B. B. If the defendant could not be found, *non est inventus*, and if found and he is sick, *cepi corpus et languidus*,³⁶ and if he has been rescued, the sheriff may return that fact.

2809. *An attachment*, as a civil proceeding, is a writ issued by a court of competent jurisdiction, commanding the sheriff, or other proper officer, to seize any property, credit, or right belonging to the defendant, in whose hands soever the same may be found, to satisfy the demand which the plaintiff has against him.

This writ always issues before judgment, and its object is to compel an appearance of the defendant; in this respect it differs from an execution, and it is unlike it in another respect, that the property attached cannot be sold without another process.

In some of the states this process can be issued only against absconding debtors, or those who conceal themselves, so that a summons or *capias* cannot reach them;³⁷ in others it is issued in the first instance, so that the property attached may respond to the exigency of the writ, and satisfy the judgment.³⁸

³⁶ See, for a form of this return, 3 Chitty, Gen. Pr. 249, n.

³⁷ *Ross v. Clark*, 32 Mo. 296. In Iowa against non-residents. *Wiltse v. Stearns*, 13 Iowa, 282. The plaintiff is generally in these states required to give a bond to pay all damages arising from the attachment if he does not maintain his action.

In New York, by virtue of the new code of procedure, a summons may be issued against a non-resident, which is to be served by a publication in the public newspapers, and by mailing a copy of it, directed to the defendant's place of residence, when known. It issues only when it is made to appear that the defendant is a resident of the state or has property therein. The defendant may come in and make defence at any time before judgment; and if, after judgment, he satisfies the court he had no notice before judgment, he may make a defence at any time within one year after notice of the judgment, or within seven years after its rendition.

³⁸ In Minnesota in all actions for the "recovery of money." Minn. Comp. St. §§ 142, 144; *Morrison v. Lovejoy*, 6 Minn. 183.

When the property attached is a chose in action a new party is introduced; the person who is indebted is called the garnishee, who is so denominated because he has notice of the attachment. From the time the garnishee has notice of the attachment he is bound to keep the property in his hands, to answer the plaintiff's claim, until the attachment is dissolved, or he is otherwise discharged.³⁹

2810. The attachments assume different forms, according to the provisions of the laws of the different states. In Pennsylvania there are two kinds of attachments, namely, the foreign, which is a proceeding by a creditor against the property of his debtor, when the latter is out of the jurisdiction of the state, and is not an inhabitant of the same. The object of this process is in the first instance to compel an appearance by the debtor, though his property thus attached may be made eventually liable for the plaintiff's claim. This attachment is for the sole benefit of the plaintiff. The other form is the domestic attachment, which may be issued against any debtor being an inhabitant of the commonwealth when he has absconded from the place of his usual abode. Under this proceeding the goods attached are to be divided among the creditors of the defendant *pro rata*.

2811. By the code of practice of Louisiana an attachment in the hands of third persons is declared to be a mandate which a creditor obtains from a competent officer, commanding the seizure of any property, credit, or right belonging to his debtor, in whatever hands it may be found, to satisfy the demand which he intends to bring against him. A creditor may obtain such attachment of the property of his debtor in the following cases:

When such debtor is about leaving permanently the state, without there being a possibility, in the ordinary course of judicial proceedings, of obtaining any judgment against him previous to his departure, or even when such debtor has already left the state never again to return.

When such debtor resides out of the state.

When he conceals himself to avoid being cited and forced to answer to the suit intended to be brought against him.⁴⁰

2812. By the local laws of some of the New England states, particularly of the states of Massachusetts, New Hampshire, and Maine, personal property and real estate may be attached upon original process to respond to the exigency of the writ and satisfy the judgment.⁴¹ In such case it is a common practice for

³⁹ The garnishee process arises from the custom of London, and is known in New England as the trustee process. It may be used against a resident or non-resident defendant. The attaching plaintiff acquires no greater rights against the garnishee than the defendant had. But one who holds personal property conveyed to him in fraud of creditors, he being a party to the fraud, has been held as trustee. *Blodgett v. Chaplin*, 48 Me. 322. This decision is somewhat at variance with the general current of authorities, which hold that the demand must be a clear legal demand for which the defendant might maintain an action at law against the garnishee. *Baltimore R. R. v. Wheeler*, 18 Md. 372; *Burton v. Warren*, 11 Iowa, 166.

The liability of the garnishee is established by his answer under oath or by other proof. In some states his answers to interrogatories are conclusive. *Chase v. North*, 4 Minn. 381; *Meeke v. Sanders*, 6 Iowa, 61. Executors may be garnisheed for legacies. *Lorenz v. King*, 38 Penn. St. 93, but not for debts due from the testator, nor can persons deriving their authority from the law and obliged to execute it according to the law. *Taylor v. Gillean*, 23 Tex. 308. Service of process on the garnishee is a valid attachment of the property in his hands, and constitutes a lien on it until properly dissolved. It continues in general until judgment, and after judgment against the defendant, satisfaction can be made out of the property so attached. Such satisfaction is a defence to any future action of the defendant against the garnishee. *Webster v. Lowell*, 2 All. Mass. 123; *Gunn v. Howell*, 35 Ala. N. S. 144.

⁴⁰ La. Code, art. 239, 240. See *Harris v. Dennie*, 3 Pet. 292; *Blanchard v. Cole*, 8 La. 153.

⁴¹ The process of attachment at common law was only to compel the appearance of the

the officer to bail the goods attached to some person, who is usually a friend to the debtor, upon an express or implied agreement on his part to have them forthcoming on demand, or in time to respond to the judgment when the execution thereon shall be issued.⁴²

2813. In most of the states where the writ of attachment to compel an appearance is in use, the defendant may at any time before judgment dissolve the attachment by entering special bail to the action; in which case the property attached is released from the operation of the writ, and the suit goes on as if a *capias* had been issued and special bail had been entered.⁴³

2814. The object of all the writs issued in commencing an action is to compel the *appearance* of the defendant. At the same time the plaintiff also *appears*, and then the pleadings commence.⁴⁴

In former times in England, from which country we have derived so much of our law, the parties actually appeared in court in term time, on the return day of the writ, for all the pleadings and proceedings took place in court in term, and never in vacation. This appearance in court was either by the defendant himself, or by his attorney, but always in open court.

The parties being both in court personally, or represented by their attorneys, then made their several allegations before the judges, and the court received information as to the nature of the plaintiff's claim and the defendant's defence, which was then called the *loquela*, and these allegations, on either side, have since acquired the denomination of pleading or pleadings.

In modern practice the appearance of the parties is no longer by actual presence in court, either by themselves or their attorneys; but still such an appearance is supposed, and exists in contemplation of law. When the defendant has not been arrested, an appearance is effected on the part of the defendant by making certain formal entries in the proper office of the court, expressing his appearance, as by the attorney's writing his name on the margin of the docket opposite that of the defendant. When the defendant has been arrested under a *capias*, the entry of special bail to the action is considered an appearance.⁴⁵ No

defendant, and when he had appeared the attachment was dissolved. There was no lien on the goods to secure the debt. But the attachment in New England is now for the sole purpose of securing the payment of the debt. The defendant, having been served with process, may appear or not; if he does not, he is defaulted. But the attachment constitutes a lien on the goods for the payment of the claim sued on, which may be enforced by execution.

⁴² Story, Bailm. § 124. The person receiving the goods is known as the receiptor, and his possession is regarded as the possession of the officer, and does not discharge the lien of the attachment. In many states, the defendant may retain the property upon executing a bond that the property shall be "forthcoming" when called for. In this case also the lien of the attachment still continues. *Bill v. Western River Co.*, 3 Metc. Ky. 558; *Rutledge v. Corbin*, 10 Ohio, St. 478; *Paul v. Arnold*, 12 Ind. 197; *Hyman v. Seaman*, 33 Miss. 185; contra *Austin v. Burgett*, 10 Iowa, 302.

⁴³ A bond to dissolve an attachment under this provision discharges the lien on the property. *Schuyler v. Sylvester*, 4 Dutch. N. J. 487.

⁴⁴ At common law if the defendant did not appear, the plaintiff could proceed no further in the action, as in criminal cases no trial could be had if the prisoner refused to plead. He might resort to successive attachments or arrests until he overcame the defendant's contumacy, but he could not get judgment without an appearance. By statute 5 Geo. II, c. 27, if the defendant fails to appear, the plaintiff upon affidavit of service of process may enter a common appearance and proceed with the trial. An appearance may be general or special. A special appearance is made for certain special purposes, as for the purpose of pleading to the jurisdiction, misnomer, want of service of process, or in abatement generally. A general appearance is a waiver of such objections. *Lawrence v. Bassett*, 5 All. Mass. 140; *Brady v. Richardson*, 18 Ind. 1; *Lowe v. Stringham*, 14 Wisc. 222; *Frink v. Whicher*, 4 Greene, Iowa, 382; *Payne v. Farmers' Bank*, 29 Conn. 415; *Abbott v. Semple*, 25 Ill. 107; *Schenley v. Commonwealth*, 36 Penn. St. 29.

⁴⁵ Filing an answer is an appearance. *Hayes v. Shattuck*, 21 Cal. 51; or moving for a

formality is requisite on the part of the plaintiff to express his appearance; upon the appearance of the defendant, as above described, both parties are considered as in court.

All persons may appear in person, and there are some classes who cannot appear by attorney, but must appear in person. These are persons who are not *sui juris*, and therefore have no capacity to appoint an attorney; as, infants, who must appear personally or by guardian; married women, when sued alone, must appear in person, when sued with their husbands, the husband appoints the attorney for both; and idiots, who having no capacity to appoint an attorney must appear in person, unless they have been placed under the care of a committee; in this last case, the committee may appear for the idiot.

When the defendant appears by attorney, there ought regularly, and there is always supposed to be, a warrant in writing executed by the defendant for that purpose.⁴⁶

The neglect to enter an appearance within four days after the return day, which time is called the *quarto die post*, will entitle the plaintiff to take a judgment for want of an appearance, unless the rules or the practice of the court have provided some other course.

continuance; *Stockdale v. Buckingham*, 11 Iowa, 45; filing a demurrer; *Knight v. Low*, 15 Ind. 374; making a motion in the cause; *Tallman v. McCarty*, 11 Wisc. 401; but there must be some entry of record; *Scott v. Hull*, 14 Ind. 136.

⁴⁶ See before, 2424.

CHAPTER VI.

THE DECLARATION.

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2815. The parties being both in court, the next step to be taken is to plead. By *pleading* is meant 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 record which would be the support or the defence of the party in evidence. In a general sense, it is what either party to a suit at law alleges for himself in a court, with respect to the subject matter of the cause, and the mode in which it is carried on, including the demand which is made by the plaintiff; but in strictness it is no more than setting forth those facts or arguments which show the justice or legal sufficiency of the plaintiff's demand, and the defendant's defence, without including the statement of the demand itself, which is contained in the declaration or count.¹

Formerly, these pleadings were delivered orally or in open court, but now they are drawn up in writing, and the attorneys of the opposite parties mutually deliver them to each other out of court, or file them in the proper office of the court.

The science of pleading was designed to render the facts of each party's case plain and intelligible, and to bring the matter in dispute between them to judgment.² It is, as has been well observed, admirably calculated for analyzing a cause, and extracting, like the roots of an equation, the true points in dispute, and referring them with simplicity to the court and jury.³

2816. The parts of pleading have been classified under two heads, the regular, or those which occur in the ordinary course of an action, and the irregular, or collateral, being those which are occasioned by mistakes in the pleadings on either side.

2817. *The regular pleadings* are the declaration or count, which is a narrative of the plaintiff's cause of action;⁴ the plea, which is an answer to the declar-

¹ Bacon, *Abr. Pleas and Pleading*.

² Stephen, Pl. 1.

³ 1 Hale, Com. Law, 301, n. In this and the following chapters, the reader is to bear in mind the changes which have taken place and are still going on in the rules of pleading. The most important changes are noticed in the note at the end of chapter 8.

⁴ In the states which have adopted the New York code the first pleading is called the complaint or petition, the second, the answer.

ation, and states the ground of the defendant's defence; it is either to the jurisdiction of the court or suspending the action, as in the case of a parol demurrer, or in abatement, or in bar to the action, or in replevin, an avowry, and cognizance; the replication, which is an answer to some matters alleged in the plea, and in case of an evasive plea, a new assignment, or in replevin, the plea in bar to the avowry and cognizance; the rejoinder, or in replevin, the replication to the plea in bar; the sur-rejoinder, which in replevin is the rejoinder; the rebutter; the sur-rebutter; and pleas puis darrein continuance, when the matter of defence arises pending the suit.

2818. *The irregular* or collateral parts of pleading are: the demurrer to any part of the pleadings above mentioned, demurrer to evidence given at the trial, bills of exceptions, pleas in *scire facias*, and pleas in error.⁵

2819. The parties being in court, the next step taken in the cause is to ascertain by the pleadings of record what is the cause of their dispute. The natural course is for the plaintiff to state the ground of his complaint; this is done by his declaration.

A *declaration*, anciently called a tale, and now known by the name of *narratio*, or usually abbreviated *narr.* or count, is a specification in a methodical and legal form of the circumstances which constitute the plaintiff's cause of action.⁶ Though declaration be the general term, yet in real actions it is more properly called a count.⁷ But this word count has still another meaning. It is derived from the French word *conte*, which signifies a narrative or tale, and though used in the old books as synonymous with declaration, yet this distinction must be now observed: when the plaintiff's complaint embraces only a single cause of action and he makes only one statement of it, that statement is called, indifferently, a declaration or count, though the former is the more usual term; but when the suit embraces two or more causes of action, (each of which of course requires a different statement,) or when the plaintiff makes two or more different statements of one and the same cause of action, each several statement is called a count, and all collectively a declaration.

The declaration in an action at law answers to the bill in chancery, the libel of the civilians, and the allegation of the ecclesiastical courts. It may be considered with regard to those general requisites or qualities which govern the whole declaration, to its form, particular parts and requisites.

2820. *The general requisites of a declaration* are that it must correspond with the writ, that it state all the principal facts, and that it be certain and true.

2821. The first general requisite of a declaration is that *it must correspond with the process*, first, as to the names of the parties to the action;⁸ second, with regard to the number of parties, for if a writ is issued in the name of one plaintiff and the declaration is in the names of several, it will be irregular;⁹ third, when the plaintiff sues in one character, for example, as executor, he cannot declare generally, though if he merely styles himself executor without stating that he sues as executor, he may do so, because in this last case the demand is still the same;¹⁰ fourth, as to the cause of action; for example, if the cause of

⁵ Viner, *Abr. Pleas and Pleadings*, C.

⁶ 1 Chitty, Pl. 248; Bacon, *Abr. Pleas*, B; Comyn, *Dig. Pleader*, C, 7; Stephen, Pl. 36; Coke, *Litt.* 17, a; 3 Blackstone, *Comm.* 293; Gould, *Pl. c.* 4, § 1.

⁷ Stephen, Pl. 36.

⁸ *Fitch v. Heise*, Cheves, So. C. 185. But where the process describes the defendant under a wrong name and he appears in his right one, he may be declared against by the latter. *Willard v. Missani*, 1 Cow. N. Y. 37; *Donnelly v. Foote*, 19 Wend. N. Y. 148.

⁹ *Rogers v. Jenkins*, 1 Bos. & P. 383.

¹⁰ *Rogers v. Jenkins*, 1 Bos. & P. 383, note b.

action in the writ be debt and in the declaration be assumpsit, or *vice versa*, the variation will be fatal, even after verdict.¹¹

But in general, the variance between the writ and declaration can be taken advantage of only by plea in abatement or by special demurrer.¹²

2822. The second general requisite of the declaration is that it shall contain a *statement of all the facts* necessary in point of law to sustain the action, and no more;¹³ for the plaintiff can recover only *secundum allegata et probata*, the allegation and the proof must be the same; he can, therefore, prove no material fact which the declaration does not allege.

The declaration must show a title, or right of action, in the plaintiff at the time of bringing the suit; if it fail in this, it is insufficient to warrant a judgment in the plaintiff's favor, for no subsequent allegation will entitle him to recover. He must recover upon the grounds on which he places his claim in the declaration, or not at all.¹⁴

If the declaration shows that the plaintiff had no cause of action when the suit was commenced, as, if he declare upon a promissory note which was not then due, he cannot recover; for the plaintiff cannot recover for any matter accruing after the commencement of the suit except interest on demands carrying interest, that being recoverable up to the time of judgment under the name of damages.

Every thing connected with the gist of the action, or that without which it cannot be supported; all averments of any material facts; all conditions precedent, when the right of recovery depends upon them; and a request, when one is required to support the action, must be stated in the declaration.¹⁵

2823. The circumstances must be stated with *certainty and truth*. The certainty necessary in a declaration is to a certain intent in general, which should pervade the whole declaration, and is particularly required in setting forth the parties, the time, the place, and the subject matter.

2824. It must be stated with certainty who are the *parties* to the cause, and therefore a declaration by or against "A B and Company," not being a corporation, is insufficient.¹⁶

¹¹ *Stamps v. Graves*, 4 Hawks, No. C. 102.

¹² *Sargent v. Haynes*, 2 Hill, So. C. 585; *Haney v. Townsend*, 1 M'Cord, So. C. 206; *Young v. Grey*, 1 *id.* 211. It is held in Alabama that where such a variance is not noticed in the pleading, the court may grant a new trial, but cannot order a nonsuit or discontinuance. *Palmer v. Lesne*, 3 Ala. N. S. 741.

¹³ *Coke*, Litt. 303, a.

¹⁴ *Bacon*, Abr. *Pleas*, B, 1.

¹⁵ A declaration is good if it contains all that is necessary for the plaintiff to prove under a plea of the general issue, in order to entitle him to recover. *Beardsley v. Southmayd*, 2 Green, N. J. 534. All material facts are to be stated, but facts which are merely evidence are not to be stated. *State v. Leonard*, 6 Blackf. Ind. 163.

Where a foreign law is relied on to support an action it must be pleaded in the declaration, and so much of it as is material set out. *Palfrey v. Portland R. R.*, 4 All. Mass. 55; *Blecht v. Harris*, 4 Minn. 504; *Carey v. Cincinnati R. R.*, 5 Iowa, 357.

¹⁶ *Comyn*, Dig. *Pleader*, C, 18. *Revis v. Lamme*, 3 Mo. 207; *Burns v. Hall*, 2 Penn. 984. There is of course no difficulty in stating the plaintiff's name exactly, and his name must be used without regard to any assumed partnership or corporation name under which he carries on business. *Walthormfechtel v. Dobyms*, 32 Mo. 310. So proceedings in the name of "the estate of" are improper. *Estate of Columbus v. Monti*, 6 Minn. 568. In actions at law the legal party in interest must be plaintiff or defendant, without regard to equitable interests, subject of course to statutes requiring the suit to be in the name of the real party in interest. *Marsh v. Astoria Lodge*, 27 Ill. 421.

Where the defendants have entered into contracts under an assumed business name, it is often a matter of difficulty to ascertain their names, and the statutes by some of the states provide that a partnership or association may be sued in the name of the firm or association, the names of the members being supplied when discovered. So if the defendant's full name is not known, he may be partially described, a sufficient description being given for the purpose of identification.

2825. In personal actions, the declaration must in general state a *time* when every material or traversable fact happened, and when a venue is required, time must also be mentioned.¹⁷ But unless time constitute a material part of the contract declared upon, as where the date of a written contract or record is averred, or, in ejectment, in which the demise must be stated to have been made after the title of the lessor of the plaintiff and his right of entry accrued, the precise time is not in general material. In these cases, therefore, the pleader may assign any time he pleases to any given fact, and prove another, for time is then not traversable. This option is, however, subject to certain restrictions.

If the pleader does not wish to be held to prove strictly the time laid in his declaration, he should lay it under a *videlicet*. The office of the *videlicet* is to show that the party does not mean to prove the precise time, or, in transitory action, the precise place; this is done by putting the words "to wit," or "that is to say;" for example, "And the said C D, afterward, to wit, on the day of 1851," etc.

He should not lay a time intrinsically impossible, or inconsistent with the fact to which it relates; for a time so laid would in general be ground of demurrer; but when such a time is laid to a fact not traversable, though the statement of time be impossible or inconsistent, it will do no harm, upon the principle that *utile per inutile non vitiatur*.

There are instances where time forms a material point in the merits of the cause; and in these cases, if a traverse be taken, the time laid is of the substance of the issue, and must be strictly proved, and its being laid under a *videlicet* makes no difference. In cases of usury, time is of material importance, because upon that depends whether it exists or not; thus where the declaration stated a usurious contract, made on the 21st day of December, 1774, for giving the day of payment of a certain sum to the 23d day of December, 1776, and the proof was that the contract was made the 23d day of December, 1774, giving the day of payment for two years, it was held that the verdict must be for the defendant.¹⁸

2826. The third particular in which certainty in pleading is required is that of *place*. The consideration of this subject will be postponed till we come to treat of the venue, when discussing the several parts of a declaration.¹⁹

2827. The next general particular which must be stated with certainty is the *subject matter* of the suit, and it embraces all the material facts which constitute the cause of action. This comprehends, according to the nature of the case, the contract declared upon, and the breach of it; or the wrong complained of, and its injurious consequences; or the property sought to be recovered, or in respect to which the alleged damages and injury have been done. But the requisite certainty relates only to the manner in which these particulars ought to be stated. When the facts necessary to be stated are known, they can be easily laid with certainty, which consists merely in alleging them so distinctly and explicitly as to exclude all ambiguity. It is not easy to say what degree of certainty is requisite in setting out the subject matter.²⁰ This will be more fully considered in the sequel.

¹⁷ The King *v.* Holland, 5 Term, 620; Stephen, Pl. 311, 312.

¹⁸ Carlisle *v.* Trears, Cowp. 671; Gould, Pl. c. 3, § 66; Stephen, Pl. 313. If a material allegation is laid under a *videlicet*, it must be proved exactly as laid. Ladue *v.* Ladue, 16 Vt. 189.

¹⁹ In an action under statutes against a railroad for injury to cattle, the place where the accident occurred must be stated. Quick *v.* Hannibal R. R., 31 Mo. 399. So in an action for causing death, it is a necessary averment that the railroad was used in the state and county where the death took place. Chicago R. R. *v.* Morris, 26 Ill. 400; see Indianapolis R. R. *v.* Moore, 16 Ind. 43.

²⁰ 1 Chitty, Pl. 260, 261; Stephen, Pl. 342.

2828. The several *parts of a declaration* are: the title of the court and term, the venue, the commencement, the statement of the cause of action, the several counts, the conclusion, and the profert and pledges.

2829. It must appear by the declaration in what court it has been filed; this is done by simply heading the declaration with the name of the court, as, "In the Supreme Court for the Eastern District of Pennsylvania."

The pleadings, it will be remembered, were formerly *ore tenus*, and the title of the term with reference to the ancient proceeding is to be considered as a statement or memorandum of the time when the plaintiff comes into court and alleges his cause of complaint; and as this could only be in term time, when the defendant was in court, consequently the declaration must be entitled in term.²¹

2830. *The venue* is the place from which the jury are to come who are to try the issue.²² The statement of the venue follows in the margin, after the title of the declaration.

According to the former constitution of trial by jury, the particularity of place was rendered absolutely essential in all issues which were to be decided by a jury, because the jury consisted of witnesses or of persons who were in some measure cognizant of their own knowledge of the matter in dispute. They were of course generally to be summoned from the particular place or neighborhood where the fact happened;²³ and in order to know into what county the *venire facias*, or writ which commanded the sheriff to summon the jurors, should be directed, and to enable the sheriff to execute the writ, it was required that the issue, and, therefore, the pleadings out of which it arose, should show particularly what that place or neighborhood was.²⁴ This place was called the venue or visne, from vicinetum, or neighborhood, and the statement in the pleadings obtained the same name; and to allege a place was said to lay the venue. It was then the practice to summon the jurors from the immediate neighborhood where the facts to be tried arose, and, therefore, the venue was laid in the parish, town, or hamlet, as well as the county. But when the jurors were taken from the body of the county, and they were no longer witnesses, it was sufficient to lay the venue in the county.

In the subsequent pleadings, the plea, the replication, and so forth, the venue must be laid to each affirmative traversable allegation, as in the declaration, according to the principles already stated, until issue joined.

Another rule relating to the venue is that it must be laid truly. Formerly the venue was of course laid where the facts arose, and it was for this reason that written contracts bore date at a certain place.²⁵ But when, in consequence of the changes in the constitution of juries, the reason ceased to operate, the courts began to distinguish between cases in which the truth of the venue was material and those in which it was not so. A difference was now perceived between local and transitory actions, the nature of which has already been explained.²⁶

In local actions the plaintiff must lay the venue in the action truly; in a transitory one he may lay it in any county that he pleases.²⁷

²¹ It is not absolutely essential that the declaration should be entitled of any particular term. *Evans v. Bridges*, 13 Ala. 348.

²² Gould, Pl. c. 3, § 102; Stephen, Pl. 398; Archbold, Civ. Pl. 86.

²³ Harg. Co. Litt. 125, a, n. (1).

²⁴ *Fabrigas v. Mustyn*, Cowp. 176, 7; 2 H. Blackst. 161.

²⁵ Gilbert, Civ. Act. 84.

²⁶ Before, 2648, 2649.

²⁷ In England at common law the cause of action arose in transitory actions upon the plaintiff's suing out his writ, and of course within the county in which he sued it out. This rule was adopted in this country, and the plaintiff might lay his venue and bring his writ in any county. This caused vexation to the defendant, as he was often sued in remote counties. The jurisdiction of the court was, in a measure, dependent on the venue. But

2831. *The commencement of the declaration* is that part which follows the venue in the margin and precedes the circumstantial statement of the cause of action. It contains a statement, first, of the names of the parties to the suit, and if they sue or are sued in another right, or in a political capacity, for example, as executors, assignees, and the like, the character of right in which they sue must be stated; second, of the mode in which the defendant was brought into court; as, "C D was attached or summoned," as the case may be; third, a brief recital of the form of action to be proceeded in. The following is the formula in assumpsit in such cases: "C D was summoned [or attached, when the defendant has been holden to bail] to answer A B of a plea of trespass on the case upon promises," etc.²⁸ Of course the form must vary with the different forms of actions.

2832. Certainty in *the statement of the cause of action* is of the utmost importance; but this statement necessarily varies, according to the circumstances of each particular case and the form of action. These will be briefly and separately considered.

2833. *The statement of the cause of action in assumpsit* is either special or general.

2834. The rules to be observed in the structure of *special counts* may be reduced to six: those which relate to the inducement; to the consideration of the contract; to the contract itself; to the requisite averments; to the breach; and to the damages.

2835. *Inducement* is the statement of matter which is introductory to the principal subject of the declaration, and which is necessary to explain or elucidate it; such matter as is not introductory nor requisite to elucidate the substance or gist of the action, nor is collaterally applicable to it, is not inducement, but surplusage. The inducement is in the nature of a preamble, and is useful in making intelligible the statement of the facts in the declaration; for example, 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.²⁹ The allegations in an inducement, when material, must be proved; when immaterial, they may be rejected as surplusage.

2836. It is generally necessary to state upon what *consideration* the contract upon which the action is brought is founded, unless it be on a contract which is presumed by the law to be founded on a valuable consideration, as upon a bill of exchange or a promissory note; but in other simple contracts the consideration must be stated, whatever may be the form of action. The consideration, as stated, must always correspond with the facts of the case, and be sufficient, in law, to support the promise as laid, and be coextensive with it.³⁰

now in many if not all of the states, the jurisdiction of the courts is by statute made to depend upon the residence of the parties, being limited to the county in which both or one live or do business. The substantial fact therefore is such residence; and this being alleged, the jurisdiction is fixed, and the necessity of alleging any place for the arising of the cause of action is done away with. No special allegation of venue is made now in pleading, and the allegations which take its place are decided by reference to the statutes and rules of court.

Under the old system, for instance, a declaration would allege that the defendant made his promissory note in the said county of Suffolk (the venue) to wit at New York, (the place where the note was actually made and dated.) But under the modern systems the place of making the note, being immaterial, would not be alleged at all.

²⁸ Stephen, Pl. 47.

²⁹ 1 Chitty, Pl. 293; Stephen, Pl. 257; Gould, Pl. c. 3, § 9; Lawes, Pl. 66, 67; Bacon, Abr. *Pleas*, l. 2; 14 Viner, Abr. 405; 20 *id.* 345.

³⁰ Jones v. Ashburnham, 4 East, 464; Moore v. Ross, 7 N. H. 528; Wills v. Kempt, 17 Cal. 98. The consideration must be stated under the New York code. Spear v. Downing, 34 Barb. N. Y. 522. But not in Iowa, in a suit on a written contract of guaranty. Iowa,

2837. Next to the statement of the consideration, *the contract* itself is usually alleged, and this must be done by setting it forth in some part of the declaration, either in the words in which it was made or according to its legal effect, and if there be a variance, it will be fatal.³¹ It must be stated or described as it operates or takes effect in law, although such statement or description should vary, literally or in form, from the matter of fact to be shown in evidence. 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; as, in *assumpsit* on a bill of exchange.³² It is, however, more correct in all cases to state that the defendant undertook, *super se assumpsit*, or words to that effect.

2838. In stating the consideration, the whole of it must be mentioned, and it must be set forth in the declaration;³³ but in stating the contract, it is sufficient merely to state the parts of the promise the breach of which is complained of; and it is not requisite to state in the declaration other parts not qualifying or varying in any respect those the breach of which is complained of.³⁴

When a contract is in the alternative, it must not be stated as an absolute contract, though the option may be in the party pleading.

On a contract in writing, the words of the contract must be pursued, when they are concise and intelligible, and when their effect is doubtful; that is the better course; but the plaintiff is not required to set forth, even the material parts in letters and words; the statement of the substance and legal effect will be sufficient.³⁵

When there is a variance between the declaration and the proof, that is, a disagreement or difference between them, its effect will be fatal when the variance is in relation to something material; but when it relates merely to a matter of form, or an immaterial matter, it will not be so regarded.³⁶

2839. By *averment* is meant a positive statement of facts in opposition to argument or inference.³⁷ Lord Coke says, averments are twofold, namely, general and particular.

2840. A *general averment* is that which is at the conclusion of an offer to make good, or prove, whole pleas containing new affirmative matter, (but this sort of averment applies only to pleas, replications, and subsequent pleadings; for counts in *avowry*, which are in the nature of counts, need not be averred,) the form of such averments being *et hoc paratus est verificare*.

Code, § 975; *Henderson v. Booth*, 11 Iowa, 212. In *assumpsit* on a warranty of chattels, it is sufficient to aver a sale at and for a certain price, without specifying the amount actually paid. *M'Millan v. Theaker*, 12 Ohio, 24.

³¹ *King v. Pippet*, 1 Term, 240; *Andrews v. Williams*, 11 Conn. 326; *Dorr v. Fenno*, 12 Pick. Mass. 521; *Churchill v. Merchants' Bank*, 19 Pick. Mass. 532; *Lent v. Padelford*, 10 Mass. 230.

³² *Elsee v. Gatward*, 5 Term, 145. Enough must be stated to show a legal liability. Thus in a suit against a warehouseman for non-delivery, the plaintiff must allege that the goods belonged to him or that the defendant was under an obligation to deliver them to him. *Thurber v. Jones*, 14 Wisc. 16. It is sufficient to state facts from which the law implies a promise. *Jordan Co. v. Morley*, 23 N. Y. 552; *contra Wingo v. Brown*, 12 Rich. So. C. 279. Omission to state that the defendant promised is cured by judgment. *Hoard v. Little*, 7 Mich. 468.

³³ *Brooke v. Lowrie*, 1 Nev. & M. 342.

³⁴ *Miles v. Sheward*, 8 East, 7; *Clarke v. Grey*, 6 East, 567.

³⁵ *Dorr v. Fenno*, 12 Pick. Mass. 521; *Lent v. Padelford*, 10 Mass. 230; *Andrews v. Williams*, 11 Conn. 326. If the contract is such as is required by the Statute of Frauds to be in writing, it is not necessary to annex a copy or aver that it is in writing. *Booker v. Ray*, 17 Ind. 522; *Price v. Weaver*, 13 Gray, Mass. 272; *Rigby v. Norwood*, 34 Ala. n. s. 129; *Walker v. Richards*, 39 N. H. 259; *Doggett v. Patterson*, 18 Tex. 158. It seems to be otherwise under the New York code. *Wentworth v. Wentworth*, 2 Minn. 277.

³⁶ *Savage v. Smith*, 2 W. Blackst. 1104; *Ferguson v. Harwood*, 7 Cranch. 408; *Harrison v. Weaver*, 11 Ala. 542.

³⁷ *Rex v. Horne*, Cowp. 683, 684.

2841. *Particular averments* are assurances of the truth of particular facts, as, where the life of tenant, or tenant in tail, is averred; and in these, says Lord Coke, *et hoc*, etc., are not used. Again, in a particular averment the party merely protests and avows the truth of the fact or facts averred, but in general averments he makes an offer to prove and make good by evidence what he asserts.

2842. Considered with regard to their effect, averments may be classed into *material and immaterial averments*. An averment is material when it is of the gist of the action, when the action cannot be supported without it; an immaterial averment is the statement of unnecessary particulars in connection with, and as descriptive of, what is material.³⁸ A distinction was formerly made between immaterial and impertinent averments; the former must in many cases have been proved, as in the following case: In an action brought on the statute of 8 Anne, c. 14, § 1, by a landlord against a sheriff, for taking in execution and removing from the demised premises the goods of the tenant without leaving effects to satisfy a year's rent, the declaration stated the demise, which it described as reserving a certain annual rent, "payable by four even and equal quarterly payments," etc. On the trial a parol demise was proved, and it appeared there was no stipulation with regard to the time or times of paying the rent; and for this cause the plaintiff was non-suited. Because, though it was confessedly unnecessary to state the time or times of payment in the declaration, and though this statement was immaterial, yet, as it was indispensably requisite to allege a contract reserving rent, and it had been stated as a whole contract, it must be proved.³⁹ An impertinent averment was one which was irrelevant and foreign to the cause and which might have been struck out as surplusage, as it need not have been proved.

In modern times this distinction between immaterial and impertinent averments has been considered as untenable, and the two terms are treated as being synonymous. A more correct distinction has been made between immaterial or impertinent averments and unnecessary averments. The former are those which need not be alleged, nor proved if alleged; the latter consist of matter which need not be alleged, but, being alleged, must be proved.⁴⁰

2843. Averments must contain not only matter, but *form*. General averments are always in the same form. The most common form of making particular averments is in express and direct words, for example: And the party avers, or in fact saith, or although, or because, or with this or that, or being, etc. But they need not be in such words, for any words which necessarily imply the matter intended to be averred are sufficient.

2844. *An averment is required* when the obligation of the defendant to perform his contract depends on an event which would not otherwise appear from the declaration to have occurred; for without an averment of such an event there would be no logical statement of the cause of action. In a special action of assumpsit these averments usually relate to the performance or the excuse for the non-performance of a condition precedent, to the defendant's notice of such performance, and to the defendant's having been requested to perform his contract.

2845. When the consideration of the defendant's contract was executory, or his performance was to depend upon some act to be done or forborne by the

³⁸ Gould, Pl. c. 3, § 185.

³⁹ *Bristow v. Wright*, Dougl. 665. See 1 Chitty, Pl. 304; Gould, Pl. c. 3, § 186; *Savage v. Smith*, 2 W. Blackst. 1101, 1104.

⁴⁰ *Williamson v. Allison*, 2 East, 446; *Twiss v. Baldwin*, 9 Conn. 292; *Parton v. Holland*, 17 Johns. N. Y. 92; *Fowles v. Miller*, 3 Taunt. 137; *Goodpaster v. Porter*, 11 Iowa, 161.

plaintiff, or on some other event, before the plaintiff can be entitled to sue he must have performed such precedent condition; for on such performance his right vests, unless he has a good cause for non-performance, and he must therefore aver in his declaration that 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, has actually been performed, or he must show some excuse for the non-performance. And when there are mutual conditions to be performed at the same time, the plaintiff must aver the performance or the readiness to perform his part of the contract.⁴¹

2846. The rule as to *notice* appears to be this: when the matter alleged in the pleading is considered as lying more properly in the knowledge of the plaintiff than that of the defendant, then the declaration ought to state that the defendant had notice of it; but when the matter does not lie more properly in the knowledge of the plaintiff than that of the defendant, notice need not be averred.⁴² Notice of the non-payment of a bill of exchange must be averred, because that fact is more properly within the knowledge of the plaintiff than of the defendant; but if the defendant contracted to do a thing on the performance of an act by a stranger, notice need not be averred; for whether the stranger has performed the act lies as much in the defendant's as in the plaintiff's knowledge, and he ought to take notice at his peril.⁴³

2847. A request must be stated in the declaration and proved upon trial, whenever it is essential to the cause of action that the plaintiff should have requested the defendant to perform his contract; as, in an action for not delivering a horse sold by defendant to the plaintiff, it is requisite to aver a special request before action brought, or there must be some allegation to dispense with it.⁴⁴

There are two forms of pleading a request, the special and the general. The former must state by whom, and the time when, and the place where, it was made; and when a 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, so as to enable the court to judge whether the request was sufficient.⁴⁵ The latter, commonly called the *licet scæpius requisitus*, or "although often requested so to do," without stating the time and place of request, though usually inserted in the breach to the money counts, is unnecessary, and the want of it will not vitiate the declaration.⁴⁶

2848. That part of the declaration in which the violation of the defendant's contract is stated is called the *breach*; this must in all cases be stated in the declaration, because it is the essential cause of action; when there has been no breach, there is no cause of action.

In assumpsit, it is usual to introduce the statement of the particular breach,

⁴¹ *Joslyn v. Taylor*, 33 Vt. 470; *Basye v. Ambrose*, 32 Mo. 484; *Funk v. Hough*, 29 Ill. 145. It is not always sufficient that a declaration on a contract with concurrent covenants avers readiness to perform in the words of the covenant; it must aver a readiness to perform according to the legal effect thereof. *Washington v. Ogden*, 1 Black, 450.

⁴² *Hillsborough v. Londonderry*, 43 N. H. 451. In an action against a town for injury caused by a defective way, the plaintiff need not aver that he gave notice to the selectmen of the injury and his intention to claim satisfaction therefor, as required by statute, as such notice is no part of the cause of action. *Kent v. Lincoln*, 32 Vt. 591.

⁴³ *Hodsden v. Harridge*, 2 Saund. 62, a, n. 4; *Cutler v. Southern*, 1 Saund. 117, n. 2; Comyn, Dig. *Pleader*, C, 75.

⁴⁴ *Bowdill v. Parsons*, 10 East, 359.

⁴⁵ *Whitton v. Whitton*, 38 N. H. 127; *Baker v. Fuller*, 21 Pick. Mass. 318.

⁴⁶ *Dyer v. Rich*, 1 Metc. Mass. 180. Where, from the nature of the agreement, a special demand is necessary, but not averred in the declaration, such omission will be cured by verdict, and the *scæpius requisitus* be held sufficient. *Rodgers v. Love*, 2 Humphr. Tenn. 417.

with the allegation that the defendant, contriving and fraudulently intending, craftily and subtly, to deceive the plaintiff, neglected and refused to perform, or did perform the particular act, contrary to his previous stipulation or agreement. The breach must obviously be governed by the nature of the engagement; it ought to be assigned in the words of the contract, either negatively or affirmatively, or in words which are coextensive with its import and effect.⁴⁷

When the contract is in the disjunctive, as on a promise to deliver a horse by a particular day, or pay a sum of money, the breach ought to be assigned that the defendant did not do the one nor the other.⁴⁸

2849. The breach should not vary from the sense and substance of the contract, and should be neither more limited nor larger than the covenant; and care should be taken not unnecessarily to narrow it, for in this last case the plaintiff may be required to prove more than would have otherwise been required; for example, where a breach of covenant was assigned that the defendant had not used a farm in a husband-like manner, but on the contrary had committed waste, it was held that the plaintiff could not give in evidence the defendant's using the farm in an unhusband-like manner, if such misconduct did not amount to waste, though if the latter part of the breach had been omitted, the evidence would have been admissible.

2850. In personal and mixed actions, but not in penal actions, for obvious reasons, the declaration must allege, in conclusion, that the injury is to the *damage* of the plaintiff, and must specify the amount of damage.⁴⁹

In personal actions there is a distinction between those which sound in damages and those that do not; but in either of these cases, it is equally the practice to lay damages. There is, however, this difference, that in the former case damages are the main object of the suit, and are, therefore, always laid high enough to cover the whole demand; but in the latter, the liquidated debt, or the chattel demanded, being the main object, damages are claimed in respect to the detention only of such debt or chattel, and are, therefore, laid in a small sum.

The plaintiff cannot recover greater damages than he has laid or claimed in his declaration.⁵⁰

2851. *The common counts* are certain general counts, not founded on any special contract, which are introduced in a declaration for the purpose of preventing a defeat of a just right by the accidental variance of the evidence. These, in an action of assumpsit, are founded on express or implied promises to pay money in consideration of a precedent debt, and are, therefore, called *money counts*; they are of four descriptions: the *indebitatus* assumpsit; the *quantum*

⁴⁷ Comyn, Dig. *Pleader*, C, 45-49; *Wotton v. Hele*, 2 Saund. 181, b. c. Thus in a petition to recover the price of land sold, an averment, after setting forth the contract, that the plaintiff demanded payment in accordance with defendant's bid, which payment defendant refused to make, is a sufficient statement of the breach. *Gardner v. Armstrong*, 31 Mo. 535. It is not necessary that a breach should be set out in the words of the contract, but such words must be used as show that they cannot be true unless the contract is broken. *Moxley v. Moxley*, 2 Metc. Ky. 309.

⁴⁸ Comyn, Dig. *Pleader*, C.

⁴⁹ Comyn, Dig. *Pleader*, C. 84; 10 Coke, 116, b. Thus a breach of covenant may be sufficiently averred negatively in the words of the covenant, but unless damages are also alleged, the plaintiff can recover only nominal damages. *Jordan v. Blackmore*, 20 Ind. 419; *Olmstead v. Burke*, 25 Ill. 86. A general claim for damages for breach of contract will cover the damages which follow as of course from such breach, but all special damage must be specially alleged. *Hill v. Smith*, 32 Vt. 433; *Warner v. Bacon*, 8 Gray, Mass. 397; *Bristol Co. v. Gridley*, 28 Conn. 201; *Smith v. Whitaker*, 23 Ill. 367.

⁵⁰ Comyn, Dig. *Pleader*, C, 84; *Viner*, Abr. *Damages*, R; *Tettee v. Prescott*, 3 Miss. 686; *Crabb v. Nashville Bank*, 6 Yerg. Tenn. 333; *Maupin v. Tripplett*, 5 Miss. 422; *Hayton v. Hope*, 3 Mo. 53; *Rives v. Kumler*, 27 Ill. 291.

meruit; the *quantum valebant*; and the account stated. There are other counts in *assumpsit* which are general in their form and are sometimes called common counts; these are for money lent, money paid, and for money had and received.

2852. The *indebitatus assumpsit* is that species of action of *assumpsit* in which the plaintiff alleges in his declaration, first a debt, and then a promise in consideration of the debt, that the defendant, being indebted, promised the plaintiff to pay him. The promise so laid is generally an implied one only.⁵¹

2853. There is a striking conformity between the action of *indebitatus assumpsit* and the *pactum constitutæ pecuniæ* of the civil law. This latter was an agreement by which a debtor agreed to pay his creditor what was due to him; whence there arose a new obligation, which did not destroy the former, by which he was already bound, but which was accessory to it; and by this multiplicity of obligations the right of the creditor was strengthened.⁵² The *pactum constitutæ pecuniæ* was a mere accessory obligation, and consisted in a promise to pay a subsisting debt, whether natural or civil, made in such a manner as not to extinguish the preceding obligation; it was introduced by the prætor to obviate some formal difficulties. The *indebitatus assumpsit* was invented to obviate a similar difficulty. To an action of debt, wager of law might have been opposed as a bar, but it could not to an action of *indebitatus assumpsit*.⁵³

2854. When a person employs another to do work for him without any agreement as to his compensation, the law implies a promise from the employer to the workman that he will pay him for his services as much as he deserves or merits. In such case the plaintiff may suggest in his declaration that the defendant promised to pay him as much as he reasonably deserved, and then he avers that his trouble was worth such a sum of money, which the defendant has omitted to pay. This is called an action on a *quantum meruit*.⁵⁴ When there is an express condition for a stipulated amount and mode of compensation for services, the plaintiff cannot abandon the contract and resort to an action for a *quantum meruit* on an implied *assumpsit*.

An allegation that the plaintiff "charged" a certain sum for his services is not an allegation that his services were worth that sum, and does not admit proof of a claim for that or for any amount.⁵⁵

2855. When goods are sold without specifying any price, the law implies a promise from the buyer to the seller that he will pay him for them as much as they are worth. The plaintiff in such case suggests in his declaration that he sold goods to the defendant, that he "promised to pay him as much as the goods were reasonably worth, and then avers that they were worth so much, that the defendant had notice thereof, and that he refused to pay for the same." This count differs from the *quantum meruit* in this, that the *quantum valebant* is confined to *goods*; in most other respects they are similar.

2856. An action of *assumpsit* upon an *account stated* may be maintained

⁵¹ 1 Chitty, Pl. 334; 3 Reeves, Hist. C. L.; Yelv. 21, 70; Bacon, Abr. *Assumpsit*, G. This is the proper form on an executed contract when nothing remains but the payment of money by the defendant; or it may be used when a special contract has been waived or rescinded and the plaintiff sues for the value of his part performance. But it cannot be used when a special contract is still in force and executory. And it is to be observed that if this count is used in suing on an executed contract, the damages are to be governed by the contract, and cannot be assessed as *quantum meruit* or *valebant*, otherwise if the contract is waived or rescinded.

⁵² Pothier, Obl. 457.

⁵³ 4 Coke, 91, 94. See 3 Wood. 168, 169, note c; 1 Viner, Abr. 270; Brooke, Abr. *Action sur le case*, pl. 7, 69, 72; 6 Toullier, Dr. Civ. Fr. n. 388, 396; Inst. 4, 6, 9; Dig. 13, 5; Code, 4, 18; Nov. 115, c. 6.

⁵⁴ 2 Blackstone, Comm. 162, 163; 2 Phillipps, Ev. 82; 1 Viner, Abr. 346.

⁵⁵ *Farrington v. Wright*, 1 Minn. 241.

when there has been a settlement of their accounts between the parties and a balance struck in favor of one of them. A count on an account stated is almost invariably inserted in a declaration in *assumpsit* for the recovery of a pecuniary demand. It is in general advisable to insert such a count unless the action is against persons who are incapable in law to state an account. It is not necessary to set out the subject matter of the original debt.⁵⁶

The usual form of a declaration on an account stated alleges that "the defendant on, etc., aforesaid, at, etc., aforesaid, accounted with the plaintiff of and concerning divers sums of money before then due by 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 certain named sum, and that being so found in arrear and indebted, the defendant, in consideration thereof, undertook and faithfully promised the plaintiff to pay him the same on request."⁵⁷

2857. A *breach of the money counts* must be stated in order to show the plaintiff's right to sue. Upon these counts the common breach is in general terms according to this formula: "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, hath not (although often requested so to do) as yet paid the said sums of money, or any part thereof, but has wholly neglected and refused, and still neglects and refuses so to do, to the damage of the plaintiff in the sum of dollars, and therefore he brings his suit, etc." This breach necessarily varies in actions by and against partners, husband and wife, executors, etc.

These allegations of deceits, craftiness, subtlety, and fraud, though usual, do not seem to be essential in such a breach.

2858. *Money lent* may be recovered under the common count for money lent, charging that the defendant promised to pay the plaintiff for money lent. To recover the plaintiff must prove that the defendant received the money, but it is not indispensable that it should have been originally lent; if, for example, the money had been advanced upon a special contract which had been abandoned and rescinded, and which cannot be enforced, the law raises an implied promise from the person who holds the money to pay it back as money lent.

2859. When one advances money for the use of another, with his consent or at his express request, although he be not benefited by the transaction,⁵⁸ the creditor may recover in an action of *assumpsit*, declaring for *money paid* for the defendant. But one cannot by a voluntary payment of another's debt without his consent, express or implied, make himself a creditor of that other.⁵⁹ *Assumpsit* for money paid will not lie where property, not money, has been paid or received;⁶⁰ nor can money which has been paid to the defendant, either for a just, legal, or equitable claim, although it could not have been enforced at law, be recovered back as money paid. This rule appears to be the same in the civil law; for, according to that system, the payment to one of what is not due to

⁵⁶ *Milward v. Ingraham*, 2 Mod. 44; *Buelder v. Reed*, 11 Iowa, 182.

⁵⁷ A count now in common use in some states is the account annexed. It differs from the account stated, in that no acceptance or agreement to the account need be shown. It takes the place to some extent of account render; when the sum sued on includes a number of items on one or both sides, an account is annexed to the declaration or a bill of particulars or specification of items is filed, and this now forms one of the common counts in *assumpsit*. Upon this auditors are usually appointed under the rules of court, as in the old action of account vender.

⁵⁸ *Hassinger v. Solms*, 5 Serg. & R. Penn. 9; *Addison*, Contr. 226.

⁵⁹ *Richardson v. McRay*, 1 Const. So. C. 472; *Ransselaer Glass Factory v. Reid*, 5 Cow. N. Y. 603; *Weakley v. Braham*, 3 Ala. 500.

⁶⁰ *Morrison v. Berkey*, 7 Serg. & R. Penn. 246, 14 *id.* 179. But see *Ainslie v. Wilson*, 7 Cow. N. Y. 662; *Pearson v. Parker*, 3 N. H. 366; *McLellan v. Crofton*, 6 Me. 333.

him, *indebiti solutio*, if made through any mistake in fact or even in law, entitles him who made the payment to an action against the receiver for repayment *condictio indebiti*. This action does not lie if the sum paid was due *ex equitate*, or by natural obligation, or if he who made it knew that nothing was due, for *qui consulto dat quod non debebat præsūmatur donare*.⁶¹

The form of declaring is "for money paid by the plaintiff for the use of the defendant, at his request."⁶²

2860. A count for *money had and received* is generally introduced in an action of assumpsit when money has been received by the defendant, which, *ex equo et bono*, ought to be paid over to the plaintiff. This count has been likened to a bill in equity, and it will be sustained whenever the defendant himself has actually received money for the use of the plaintiff, or which in equity and good conscience he ought to pay over to him.⁶³ The thing received must either originally have been money or that which the parties have agreed to treat as such, or which may fairly be inferred to be money.⁶⁴ The plaintiff may waive all tort, trespass, and damages, and claim only money which the defendant has actually received. But this claim of the plaintiff is subject to any legal or equitable lien the defendant has upon it.⁶⁵ This count may be maintained where the money was delivered to the defendant for a particular purpose, to which he refused to apply it;⁶⁶ or where the defendant obtained the money from the plaintiff by fraud or false pretenses;⁶⁷ or where the money was obtained by duress, extortion, or imposition;⁶⁸ or upon an illegal contract, if the plaintiff was not *in pari delicto* with the defendant.⁶⁹

2861. *The statement of the cause of action in debt* will be next considered. We have already considered the requisities of a declaration with regard to the title of the court and term, the venue and the commencement, which apply generally to actions of debt as well as to actions of assumpsit. It will not be necessary now to reconsider these same matters.

2862. The debt demanded should be clearly described, and it ought to be the aggregate of all the sums alleged to be due in the different counts. In general, the declaration should be in the *debet* and *detinet*; that is, it ought to state that the defendant owes and unjustly detains the debt or thing in question.¹ It is so brought between the original contracting parties. But to this rule there is one exception, the writ must be in the *detinet* only, even between the original parties, when the action is instituted for the recovery of goods or chattels, as a horse, a ship, and the like, for it cannot be said a man owes a horse or a ship, but only that he detains them.⁷⁰

The declaration should be in the *detinet* only when the defendant does not owe, but unjustly detains from the plaintiff the debt or thing for which the action is brought; this is the form of an action by an executor, because the debt

⁶¹ Dig. 12, 6; Code, 4, 5. Money paid with full knowledge can be recovered back only when there has been duress or compulsion of some kind. *Beckwith v. Frisbie*, 32 Vt. 559; *Sandford v. New York*, 33 Barb. N. Y. 147; *Baker v. Cincinnati*, 11 Ohio St. 534.

⁶² *Alexander v. Vane*, 1 Mees. & W. Exch. 511.

⁶³ *Lockwood v. Kelsea*, 41 N. H. 185.

⁶⁴ As to what shall be considered money, see *Pickard v. Bankes*, 13 East, 20; *Lowndes v. Anderson*, 13 East, N. Y. 130; *Mason v. Waite*, 17 Mass. 560; *Gilchrist v. Cunningham*, 8 Wend. N. Y. 311; *Arms v. Ashley*, 4 Pick. Mass. 71; *Floyd v. Day*, 3 Mass. 405; *Andrew v. Robinson*, 3 Campb. 199.

⁶⁵ *Eddy v. Smith*, 13 Wend. N. Y. 488; *Clift v. Stockdon*, 4 Litt. Ky. 217.

⁶⁶ *De Bernales v. Fuller*, 14 East, 590, n.

⁶⁷ *Bliss v. Thompson*, 4 Mass. 488; *Lyon v. Annable*, 4 Conn. 350; *Hasser v. Willis*, 1 Salk. 28.

⁶⁸ *Morgan v. Palmer*, 2 Barnw. & C. 729.

⁶⁹ 1 Stephen, Pl. 335.

⁷⁰ 3 Blackstone, Comm. 153, 154; *Bacon, Abr. Debt, F*; 1 Lilly, Reg. 543.

or duty is not due to him, but it is unjustly detained from him.⁷¹ Against an executor, when he is personally responsible, the declaration should be in the *debet* and *detinet*;⁷² when he is not personally liable, the declaration ought to be in the *detinet* only.

2863. Debt lies for a sum certain, whether it have been ascertained by the agreement of the contracting parties or by judgment, or by statute; as, when this remedy is given for a penalty, or for the escape of a judgment debtor.

2864. When the action is on a *simple contract*, the declaration must state the consideration of the agreement precisely as an *assumpsit*, and it should state either a legal liability or an express agreement, though not a promise to pay the debt. The formula is as follows: "For that the said defendant on, etc., was indebted to the plaintiff in _____ dollars, for, [here state what the debt is for, as in *assumpsit*,] which moneys were to be paid to the plaintiff upon request; whereby and by reason of the non-payment thereof an action hath accrued to the plaintiff, to demand and have from the said defendant the sums aforesaid, amounting in all to the sum of _____ dollars, yet the said defendant hath not paid the same," etc.

2865. When the action is founded on a *specialty* the deed must in general be stated. No inducement or statement of the consideration is required, because the consideration is presumed. But when the plaintiff claims as assignee, as in the case of a reversion, he must show by way of inducement how his title to the action arose.

It must appear that the contract was under seal, but there are certain technical words which import a contract under seal; as, indenture, deed, or writing obligatory.

2866. When the plaintiff declares on a deed, or the defendant pleads a deed, he must do it with a *profert in curia*, by declaring or pleading that he "brings here into court the said writing obligatory," or other deed. The object of this is to enable the court to inspect the instrument pleaded, the construction and legal effect of which is matter of law, and also to entitle the adverse party to oyer of it;⁷³ but this must be understood with this restriction, that one who pleads a deed of any kind, without making title under it, is not bound to make a *profert* of it.⁷⁴

To the above rule, that he who declares on or pleads a deed, and makes title under it, must make a *profert* of it, there are several exceptions.

A stranger to a deed may in general plead it and make title under it without a *profert*.⁷⁵

He who claims by operation of law under a deed to another may plead the deed without a *profert*.

When the deed is in the hands of the opposite party, or destroyed by him, a *profert* need not be made.

When it has been lost or destroyed by time or casualty no *profert* is necessary.

When the deed is in the care of a public officer, as a public record, or, in general, when the party pleading has no right to the custody of the deed.

In all these cases, to excuse the want of a *profert* the special facts which bring the case within the exception should be alleged in the party's pleading.⁷⁶

2867. When the action is brought on a *record*, it is in general sufficient to follow the words of the record; as, in the case of an action on a recognizance of bail, the declaration should follow the description in the entry of the recogni-

⁷¹ *Jevens v. Harridge*, 1 Saund. 1.

⁷² Bacon, Abr. *Debt*, F.

⁷³ 10 Coke, 92, f; 1 Chitty, Pl. 414; 1 Archbold, Pr. 194.

⁷⁴ Gould, Pl. c. 7, part 2, § 47.

⁷⁵ Comyn, Dig. *Pleader*, O, 8.

⁷⁶ Lawes, Pl. 96; *Jevens v. Harridge*, 1 Saund. 9, a, note; Gould, Pl. c. 8, part 2; Stephen, Pl. 86, 88, 439, 441.

zance, and should set forth in what court, and at whose suit, and for what sum or cause the defendant became bail.⁷⁷

In declaring upon a judgment it is sufficient to state "that heretofore, to wit, in such a term, in such a court, then holden at _____, the plaintiff, by the consideration and judgment of that court, recovered against the defendant the sum of _____ dollars, 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, the said plaintiff, as for his costs and charges by him about his suit in that behalf expended."⁷⁸

When the judgment is in debt the form of the declaration varies accordingly.

2868. When an action of debt is brought on a *statute* at the suit of the party grieved, or by an informer, and the whole of the penalty is given to him, the commencement is the same as debt on a contract; but when the penalty is given to the government or to a body of men, as, the guardians of the poor, the commencement and other parts of the declaration usually state that the plaintiff sues *qui tam*, etc.; that is, that he sues for himself as well as for the government, etc.⁷⁹ The offence or act charged must be stated to have been committed or omitted by the defendant, and it must appear to have been within the provisions of the statute, and all the circumstances necessary to support the action must be alleged; for the conclusion *contra formam statuti* will not aid the omission.⁸⁰

2869. *The breach in debt* is nearly the same whether the action be in debt on a simple contract, specialty, record, or statute. The usual formula is: "Yet the said defendant, although often requested so to do,⁸¹ hath not as yet paid the said sum of _____ dollars above demanded, or any part thereof, to the plaintiff,⁸² but hath hitherto wholly neglected and refused so to do, to the damage of the said plaintiff _____ dollars, and therefore he brings his suit," etc.

The damages in debt are merely nominal, and a small sum only is inserted, and when the action is by a common informer, who is not entitled to damages, none should be claimed.

2870. *The action of covenant* is brought on a deed. After stating the commencement, the declaration passes to the inducement, when that is required; but that is seldom the case unless the action is by or against a person claiming or being sued in a derivative right, as at the suit of an heir or assignee. A consideration need not be stated unless it is a condition precedent, or unless a conveyance operating under the statute of uses be pleaded. A profert of the deed or an excuse for the omission is required, as in debt on a specialty. No unnecessary matter should be stated in setting out the contract. The averment by

⁷⁷ Comyn, Dig. *Pleader*, 2 W, 10. In an action upon a recognizance entered into upon an application by one arrested on execution, to take the poor debtor's oath, the declaration need not aver affirmatively that the execution has not been paid. *Webber v. Davis*, 5 All. Mass. 393. The breach must be set out with a *prout patet per recordum*. *Philbrick v. Buxton*, 43 N. H. 462.

⁷⁸ If the judgment has been assigned, the assignment must be set forth. *Brookshire v. Lomax*, 20 Ind. 512.

⁷⁹ *Espinasse*, Pen. act 5, 6; 1 *Viner*, Abr. 197; Comyn, Dig. *Action on Statute*, E; *Croncher v. Collins*, 1 Saund. 136, n. 1.

⁸⁰ *King v. Dickenson*, 1 Saund. 135, note 3. It must conclude "against the form of the statute," or by words of similar import. *United States v. Babson, Ware*, Dist. Ct. 450; *Jones v. Vanzandt*, 2 M'Lean, C. C. 611; *Hobbs v. Staples*, 19 Me. 219. But see *Burnell v. Dodge*, 33 Vt. 462.

⁸¹ It is necessary to allege a demand, but the omission to do so is cured by verdict. *Lusk v. Cassell*, 25 Ill. 209.

⁸² When the action is *qui tam*, the form, instead of "to the plaintiff," should be "to the said commonwealth, and to the said _____, who sues as aforesaid."

the plaintiff of a condition precedent must be made as in other cases, and the breach must be stated as already mentioned. The conclusion is mere matter of form, and if left out the omission would not be fatal. The damages, being the principal object of the action, must be laid in a sum sufficiently high to cover the whole demand of the plaintiff.

2871. When we come to discuss the different kinds of *actions in form ex delicto*, some of the rules relating to each as to the form of the declaration will be considered. This will enable us now to pass over this part of the subject by examining only those rules connected with the statement and which relate to the matter or thing affected, the plaintiff's right to it, the injury or wrong committed, and the damages sustained.

2872. In describing *the matter or thing affected* the pleader should use such terms in his declaration as are usually employed in law. The word tenement, we may remember, is any thing which may be holden, and it includes incorporeal as well as corporeal hereditaments; it is properly used in stating the premises in ejectment and trespass. The term close imports an interest in the soil, and not merely an enclosed field; and the word way is more technical than passage.⁸³

2873. When the declaration alleges any injury to goods and chattels, it is a general rule that their quality, quantity, and value or price be stated. For example, in an action of trespass for breaking the plaintiff's close and taking away his fish without showing the number or nature of the fish, the declaration was held to be defective.⁸⁴ With respect to value it should be specified in reference to the current coin of the United States; as, "divers, to wit, two looking-glasses of great value, to wit, of the value of one hundred dollars, lawful money of the United States."⁸⁵

But this rule is not so strictly construed but that sometimes it admits the specification of quality and quantity in a loose and general way. A declaration in trover for two packs of flax and two packs of hemp, without setting out the weight and quantity of a pack, was held good after verdict;⁸⁶ and, upon the same principle, a declaration in trover for a library of books, without expressing what they were, has been allowed.⁸⁷

The evidence to support a declaration as to quantity and value need not exactly support the allegations contained in the declaration, and a variance between them is not fatal, for in these cases the plaintiff recovers according to his proof. But a verdict cannot, in general, be obtained for a larger quantity or value than is alleged.

The allegation with regard to quality must, in general, be strictly proved as laid.

2874. *The plaintiff's right* or interest in the thing affected ought to be clearly stated. It may arise from some particular duty of the defendant, or it may be implied by law, as the absolute rights of persons, or it may be a general right given by law; in these two last cases it is necessary to state such a right in the

⁸³ In trespass *quare clausum* it is not necessary for the plaintiff to describe his close by boundaries, or even by name. *Palmer v. Tuttle*, 39 N. H. 486.

⁸⁴ 5 Coke, 34, b. See 7 Taunt. 642.

⁸⁵ In pleading, the term value is applied to inanimate things, price to animated beings. 2 Lilly, Abr. 629. A declaration in detinue is bad on general demurrer, if it do not aver the value of the property; but in trespass or trover the averment of value is merely matter of form. *Hawkins v. Johnson*, 3 Blackf. Ind. 46.

⁸⁶ *Taylor v. Wells*, 2 Saund. 74, n. (1); *Thornton v. Bernard*, 2 Ld. Raym. 991.

⁸⁷ A declaration in trespass, for breaking the plaintiff's close and taking and cutting away his grain, grass, etc., is sufficient, without alleging the quantity and value of each article. *Van Dyk v. Dodd*, 1 Halst. N. J. 129.

declaration. In trespass to houses it is in general sufficient to state the possession of the plaintiff.⁸⁸

When the right of the plaintiff consists in an obligation on the part of the defendant to observe some particular duty, the declaration must state the nature of such duty.

If the plaintiff's right arise from a breach of duty in respect of the defendant's particular character or situation, the particular situation of the defendant must be stated; as, in an action against a common carrier, the declaration must state the particular situation of the defendant as such.

2875. The declaration for *injuries ex delicto* varies according to the circumstances, whether the wrong has been committed with force and the injury is immediate, or whether it is consequential; and, again, whether it arose from malfeasance, misfeasance, or non-feasance.

When the injury has been committed with force and is immediate, as in trespass, it is stated in the declaration, without any inducement of the defendant's motive or intent, or the circumstances under which the injury was committed. In the statement of these injuries the words *vi et armis* should be adopted; and the conclusion in trespass, or other forcible injury, is against the peace of the commonwealth.⁸⁹

In the declaration in an action on the case, when the injury is not immediate and with force, and the act or non-feasance complained of was not *prima facie* actionable, not only the injury but the circumstances under which it was committed ought to be stated; as, that the defendant, well knowing the mischievous propensity of his dog, permitted him to go at large.⁹⁰

The intent or motive of the defendant in committing the act in question is seldom necessary, but when it can be proved it is advisable, in aggravation of the damages, to state the defendant's malicious intent; this is sufficiently done if it be substantially shown in general terms as wrongfully intending, and in action for a libel it is usual to charge that the defendant maliciously published it, but the word falsely is sufficient.

In actions of slander it is usual, in order to show the meaning of the words used, to explain this meaning by means of an *innuendo*, as "he, (meaning the plaintiff.)" The use of the innuendo is only explanatory of some matter expressed; it serves to apply the slander to the precedent matter, but cannot add, enlarge, extend, or change the sense of the previous words, and the matter to which it alludes must always appear from the antecedent parts of the declaration.⁹¹

The time when the injury was committed is seldom material,⁹² and the place need be stated only in local actions; as, in trespass to land, and in replevin.

⁸⁸ Cowenhoven v. Brooklyn, 38 Barb. N. Y. 9; Reed v. Price, 30 Mo. 442; Beach v. Livergood, 15 Ind. 496.

⁸⁹ The omission of the words force and arms is only a formal defect, of which advantage can be taken only by special demurrer. Griffin v. Gilbert, 28 Conn. 493.

⁹⁰ Chiles v. Drake, 2 Metc. Ky. 146. If negligence on the part of the plaintiff can be pleaded in defence, the declaration must allege due care on the part of the plaintiff, as well as want of care on the part of the defendant. Buzzell v. Laconia Co., 48 Me. 113. A general allegation of the duty of care in all similar cases is sufficient, without alleging a particular duty in the case at issue. Norwich v. Breed, 30 Conn. 535; Macey v. Titcombe, 19 Ind. 135. But the allegation of a duty is insufficient, unless the facts necessary to raise a duty are alleged. McCune v. Norwich Co., 30 Conn. 521; Butler v. State, 17 Ind. 450. The allegation that the defendant "falsely and fraudulently represented" is a sufficient allegation of the *scienter*. Thomas v. Beebe, 25 N. Y. 244.

⁹¹ Mix v. Woodward, 12 Conn. 262; Lindsey v. Smith, 7 Johns. N. Y. 359; Bowdish v. Peckham, 1 N. Chipm. Vt. 146; Caldwell v. Abbey, Hard. Ky. 529; Watts v. Greenleaf, 2 Dev. No. C. 115; see Weir v. Hoss, 6 Ala. N. S. 881.

⁹² Knapp v. Slocumb, 9 Gray, Mass. 73.

In transitory actions the injury may be charged to have been committed in the county where the action is brought.

When a trespass was of a continuous nature, or continually repeated, it was formerly the custom to allege the injury to have been committed by continuation from one day to another, (called laying the action with a *continuando*,) to prevent the necessity of bringing a multiplicity of suits. The object is now accomplished by alleging divers trespasses to have been committed between certain days.⁹³ In this form the time becomes material, although under some codes acts before the time alleged may be proved, if the defendant has not been misled.⁹⁴

2876. In actions for torts it is sometimes proper to state, in addition to the conclusion of the declaration *ad damnum*, etc., the damages resulting from the injury. These damages are either general, that is, such as the law implies, or special, or such as really took place, and which are not implied by law. When the act is injurious in itself, and the plaintiff has sustained both general and special damages, the latter are superadded to the former.⁹⁵

On the contrary, when the law does not necessarily imply that the plaintiff has sustained damages by the act complained of, the declaration should show the resulting damages with particularity; as, when a master sues for beating his servant, the allegation *per quod servitium amisit* is material.⁹⁶

A declaration in trespass concludes, generally, with an *alia enormia* "and other wrongs to the said plaintiff, then and there did against the peace," etc.⁹⁷ Under this allegation some matters may be given in evidence in aggravation of damages, though not specified in other parts of the declaration.⁹⁸ For a trespass in entering a house the plaintiff may, therefore, give in evidence as aggravation that the defendant debauched his daughter.⁹⁹

The damages which the plaintiff claims must be the legal and natural consequences of the act of the defendant, for in considering a breach of a contract, an injury, or a crime, the law looks to the immediate and not to any remote cause.¹⁰⁰ Therefore, in action for words it is not sufficient special damages to allege and prove a mere wrongful act of a third person, induced by the slander; as, that a number of persons seized the plaintiff, in consequence of the slander, and beat him.

2877. The next matter to be considered is, how far *several counts* may be joined when the cause of action is the same.¹⁰¹

It may be laid down as a general rule that several counts may be joined to which the same plea may be pleaded, and on which the same judgment may be given. A count in tort cannot be joined with a count in contract.¹⁰²

⁹³ Cheswell v. Chapman, 42 N. H. 47.

⁹⁴ Dubois v. Beaver, 25 N. Y. 123.

⁹⁵ Peckham v. Holman, 11 Pick. Mass. 484.

⁹⁶ Squier v. Gould, 14 Wend. N. Y. 159; Ryerson v. Marseillis, 1 Harr. Del. 450. And evidence of damages of a different character from that alleged is inadmissible. Roberts v. Hyde, 15 La. Ann. 51; Fuller v. Bowker, 11 Mich. 204.

⁹⁷ A judgment in trover cannot be supported unless there is a claim for damages. Sterling v. Garritee, 18 Md. 468. But a conclusion "to the great damage" is enough, without stating the amount of the damage. Mattingly v. Darwin, 23 Ill. 618.

⁹⁸ Buller, Nisi P. 89; Bacon, Abr. *Trespass*, I. If circumstances are alleged in aggravation of damages which are not proper to be proved, still, after verdict it will be presumed that damages were properly assessed, and such improper allegations will be rejected as surplusage. Richards v. Farnham, 13 Pick. Mass. 431.

⁹⁹ Russell v. Corn, 6 Mod. 127.

¹⁰⁰ Bacon, Max. Reg. 1; Bacon, Abr. *Damages*, E.

¹⁰¹ In many of the modern codes the joinder of counts is expressly provided for, and must follow the statute. Under the New York code it would seem that the cause of action must be stated at large and singly, and no joinder of counts exists. Provision is made for the joinder of different causes of action.

¹⁰² Howe v. Cook, 21 Wend. N. Y. 29; Rodley v. Roop, 6 Blackf. Ind. 158.

2878. In every case the plaintiff has a right to insert in his declaration as many counts as he pleases; but as each count purports, upon its face, to disclose a distinct right of action, unconnected with that stated in any other count, each one must in itself be single.¹⁰³

One object proposed in inserting two or more counts in one declaration when there is, in fact, but one cause of action, is, in some cases, to guard against the danger of an insufficient statement of the cause, where a doubt exists as to the legal sufficiency of one or another of two different modes of declaring; but the more usual end of inserting more than one count in such case is to accommodate the statement of the cause, as far as may be, to the possible state of the proof on trial, or to guard against the hazard of the proof's varying materially from the statement of the cause of action, so that if one of several counts be not adapted to the evidence some other may be so.¹⁰⁴

2879. In *assumpsit* it is usual to put several counts in the same declaration; for example, on a suit upon a promissory note a count is inserted on the note, and then the money counts follow, namely, a count for money lent, for money had and received, for money paid. And in a declaration on a contract to deliver goods sold, if the agreement was to deliver within a certain time and at a particular place, the first count is adapted to such facts, the second to deliver on request, and the third within a reasonable time. It is frequently advisable to declare in different counts, the one on an executory and the other on an executed consideration; the first to admit evidence of the defendant's agreement at the time of making the contract, the other of subsequent admissions or promises.¹⁰⁵

2880. In *debt* on specialties and records and in *covenant* one count is in general sufficient, because the evidence does not vary from the statement in the declaration; and in actions on a deed a profert of the deed is requisite, or an excuse must be stated for not making it. But in *debt* on simple contract, legal liabilities, and penal statutes it is frequently advisable to state the cause of action under several counts.¹⁰⁶

2881. In actions for *torts* it is also advisable to state the same cause of action under several counts in different ways, and in actions for slander with innuendoes, so as to meet the probable evidence.¹⁰⁷

A count for malpractice by a surgeon may be joined with a count alleging that the operator maliciously pretended that the operation would be beneficial, with a view to defraud the plaintiff of his money.¹⁰⁸ A count in case against the sheriff for negligently executing a writ may be joined with one in trover for the value of the goods.¹⁰⁹ A count in *debt* for the statute penalty for cutting trees may be joined with *debt* for the value of the trees carried away.¹¹⁰

2882. The first count should fully state a complete cause of action. In framing the subsequent counts for the same cause care should be taken to avoid unnecessary repetition of the same matter; by a proper inducement in the first count and concise reference in the subsequent to such inducement, much unnecessary

¹⁰³ Each count must be good by itself. *Leabo v. Detrick*, 18 Ind. 414.

¹⁰⁴ Gould, Pl. c. 4, § 4; Stephen, Pl. 279; Doctr. Pl. 178; Dane, Abr. *Index*.

¹⁰⁵ *Kirkpatrick v. Bethany*, 1 Ala. N. S. 201.

¹⁰⁶ Counts in *debt* on a specialty and on a simple contract may be joined. *Van Deusen v. Blum*, 18 Pick. Mass. 229; *Eib v. Pindall*, 5 Leigh, Va. 109; *Brown v. Warnock*, 5 Dan. Ky. 492.

¹⁰⁷ In actions for *torts* it is proper to join counts for trespass *quare clausum* and *de bonis asportatis*. *Bishop v. Baker*, 19 Pick. Mass. 517; case and trover, *Horsley v. Branch*, 1 Humphr. Tenn. 199; trespass *quare clausum* and assault and battery, *Arnold v. Maudlin*, 6 Blackf. Ind. 187.

¹⁰⁸ *Cadwell v. Farwell*, 28 Ill. 438.

¹⁰⁹ *Patterson v. Anderson*, 40 Penn. St. 359.

¹¹⁰ *Elder v. Hilsheim*, 35 Miss. 231.

prolixity will be avoided.¹¹¹ The second and subsequent counts may commence with the words, "And whereas also," which are sufficiently positive.¹¹²

2883. If any one of the counts in a declaration be proved, although no evidence is given as to the others, the plaintiff is entitled to a verdict and judgment upon it unless it be radically insufficient in law. And when more than one count is proved, the jury may assess entire or distinct damages on each. If distinct damages are assessed, judgment may be given upon either of the counts; 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 in law, the judgment may be arrested *in toto*, or a writ of error is sustainable.¹¹³ When the defect is discovered before verdict, it is expedient to apply to the court for leave to strike out such defective count, or to amend, or to enter a *nolle prosequi* to such count, or at the trial to take a verdict only on the sufficient counts.¹¹⁴

2884. There are some actions where the object is to recover damages, and in others no damages can be recovered; a certain amount of damages should be laid or claimed, and the consequences of laying too little may sometimes embarrass the plaintiff; the damages should be laid according to a particular form; these will be severally considered.

2885. No damages should be laid in real actions. In personal and mixed actions the declaration should conclude to the damage, *ad damnum*: but to this there are exceptions. In *scire facias* upon a record, which is an action merely to obtain an execution on an ascertained right of record, and in a penal action at the suit of a common informer, no damages should be laid; in the latter case the plaintiff's right to the penalty did not accrue until the bringing of the suit, and therefore he could have sustained no damage.

In assumpsit, covenant, case, replevin, and trespass the object of the action is to recover damages. Although in debt that be not the principal object of the suit, still damages are recoverable.

2886. In those cases where the principal object of the action is to recover damages, the amount laid in the declaration should be sufficient to cover the real demand; for, as we have seen,¹¹⁵ the plaintiff cannot recover greater damages than he has declared for and laid in the conclusion of his declaration; though when he left a blank for the damages, it was held good after the verdict, as in that case the blank in the declaration was supplied by the writ.¹¹⁶

When the verdict is greater than the amount laid in the declaration, a *remittitur* should be entered for the surplus before judgment; that is, a formal entry should be made on the record by which the plaintiff abates or remits the excess of damages found by the jury beyond the sum laid in the declaration.¹¹⁷

In debt it is usual to lay the damages in such a sum as will cover the interest, because the damages are merely nominal, the object of the action being to recover a sum of money *eo nomine* and in *numero*.¹¹⁸

¹¹¹ *Stiles v. Nokes*, 7 East, 506. In an action for a penalty under a statute, each count must show by itself or by reference to other counts what statute has been violated, and setting forth the statutes in full in the first count, and referring to them in the subsequent counts as "said statutes," is insufficient. *Crawford v. New Jersey Co.*, 4 Dutch. N. J. 479.

¹¹² *Hart v. Langfitt*, 2 Ld. Raym. 842; Comyn, Dig. *Pleader*, C, 33.

¹¹³ *Needham v. McAuley*, 13 Vt. 68; *Keirle v. Shriver*, 11 Gill & J. Md. 405; *Walker v. Sargeant*, 11 Vt. 327; *Dryden v. Dryden*, 9 Pick. Mass. 546; *Stevenson v. Hayden*, 2 Mass. 406; *Barnes v. Hurd*, 11 Mass. 50; *State v. Bean*, 19 Vt. 530.

¹¹⁴ 1 Chitty, Pl. 295. A misjoinder of counts may be taken advantage of on demurrer or writ of error. *Pell v. Lovett*, 19 Wend. N. Y. 546; or in arrest of judgment. *Rodley v. Roop*, 6 Blackf. Ind. 158.

¹¹⁵ Before, 2884.

¹¹⁶ *Proctor v. Crozier*, 6 B. Monr. Ky. 268.

¹¹⁷ *Duppa v. Mayo*, 1 Saund. 285, n. 6; *Fury v. Stone*, 2 Dall. Penn. 184.

¹¹⁸ *Rudder v. Price*, 1 H. Blackst. 550; *Warner v. Theobald*, Cowp. 588.

2887. The form of the conclusion is, "And therefore he brings his suit," etc. In ancient times the plaintiff was required to establish the truth of his declaration in the first instance before it was called into question by the pleadings by the simultaneous production of his *secta*; that is, a number of persons as witnesses to confirm his allegations.¹¹⁹ The practice of thus producing a *secta* gave rise to the very ancient formula almost invariably used at the conclusion of a declaration; as, entered of record, "and thereupon he brings his suit," etc., *et inde producit sectam*, and though the actual production has for many centuries, even in England, fallen into disuse, the formula still remains. The count in a writ of right never concluded with the ordinary production of suit, nor did the count in dower.¹²⁰

2888. We have seen when a *profert* is necessary when the action is founded on a deed of record; a *profert* is also required in other cases, and it usually follows immediately after the conclusion to the damages. This occurs in cases brought by executors or administrators; in order to show their title to sue they must make a *profert* of the letters testamentary or letters of administration, which are the foundation of their authority. In a *scire facias* the *profert* may be made in the middle or at the end of the declaration. The omission of a *profert* is now aided, unless the defendant demur specially for the defect.¹²¹

2889. It is not usual to insert *pledges* to prosecute. Anciently it was necessary to find pledges or sureties to prosecute a suit, and the names of the pledges were added at the foot of the declaration; but in the course of time it became unnecessary to find such pledges, because the plaintiff was no longer liable to be amerced, *pro falsa clamore*, and the pledges were merely nominal persons, and now John Doe and Richard Roe are the universal pledges; but they may be omitted altogether¹²² or inserted at any time before judgment.¹²³ In case the plaintiff neglects to deliver or file his declaration within the time prescribed by law or the rules of the court, or is guilty of other delays or defaults, he is adjudged not to follow his suit or his remedy as he ought to do, and thereupon a non suit or *non prosequitur* is entered, and he is said to be *non pros'd.* For suffering this *non pros* the plaintiff was formerly liable to be amerced to the king for making a false complaint, and to pay costs to the defendant.¹²⁴

2890. Having pointed out the general requisites and the several parts of a declaration, it only remains to be observed that many defects in it may be cured by the acts of the defendant. This is the case particularly with those which are merely formal and not substantial; these may be aided either by a plea or by a verdict for the plaintiff.¹²⁵ After verdict, when the issue joined absolutely required on the trial proof of the facts defectively or improperly stated or omitted, and without which it cannot be presumed the judge would have directed the jury to give, or that the jury would have given the verdict, such defect, imperfection, or omission is cured by the verdict at common law.

¹¹⁹ Bracton, 214, a.

¹²⁰ 3 Blackstone, Comm. 395; Gilbert, Civ. Act. 48; Stephen, Pl. 427; 1 Chitty, Pl. 399.

¹²¹ *Profert* and *oyer* are abolished in England by the Common Law Procedure Act, 15 & 16 Vict. c. 76. In most of the United States *profert* has been abolished, and any written instrument relied on must be set out in the pleading either wholly or such part as is relied on.

¹²² Archbold, Civ. Pl. 171; Tidd, Pract. 455; Beardsley v. Southmayd, 2 Green, N. J. 534. Under the modern codes, pledges of prosecution are not in general required, and when required they are real, not nominal. Where the plaintiff is a non-resident, he is sometimes required to furnish security for costs; this is done by having his writ indorsed by a sufficient resident.

¹²³ Baker v. Phillips, 4 Johns. N. Y. 190.

¹²⁴ 3 Sharswood, Blackst. Comm. 295, 296.

¹²⁵ Comyn, Dig. *Pleader*, C, 85, 87.

CHAPTER VII.

PLEAS.

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2891. The plaintiff having stated his claim in his declaration, his opponent is now bound to set up his defence. By *defence* is meant the denial of the truth or validity of the complaint, and not a justification. It is a general assertion that the plaintiff has no ground of action, which assertion is afterward extended and maintained in the plea.¹ It is somewhat similar to the *contestatio litis* of the civil law, though the *contestatio litis* is rather the joinder of issue than a defence.²

Defence is of two descriptions, first, half defence, which is as follows: “*venit et defendit vim et injuriam, et dicit*,” etc.; or, second, full defence, “*venit et defendit vim et injuriam, et dicit*,” etc., (meaning “*quando et ubi curia consideravit*,” or, when and where it shall behoove him,) “*et damna et quicquid quod ipse defendere debet et dicit*,” etc.³ In strictness, the words *quando*, etc., ought not to be added when only half defence is made, and after the words “*venit et defendit vim et injuriam*,” the subject matter of the plea should be immediately stated.⁴

It has now become the practice in all cases, whether full defence or half defence be intended, to state it as follows: “And the said A B, by C D, his attorney, comes and defends the wrong (or in trespass, force) and injury when, etc., and says,” which will be considered only as half defence where such defence should be made, and as full defence when the latter is necessary.⁵

If full defence were made expressly by the words “when and where it shall behoove 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 behoove him, the defendant acknowledges the jurisdiction of the court, and by defending the damages, he waives all objections to the person of the plaintiff.⁶

Although, formerly, defence was a matter of substance it is now only a matter of form, and the omission of it is aided by general demurrer.⁷

¹ 3 Sharswood, Blackst. Comm. 296; Coke, Litt. 127.

² See 2 Brown, Civ. and Adm. Law, 358, n. 21; Code of Pr. of Louisiana, art. 357; Code 3, 9, 1; Dig. 5, 1, 14, 1; Code 2, 59, 2.

³ Coke, Litt. 127, b; Bacon, Abr. *Pleas*, D.

⁴ Gilbert, Civ. Act. 188; 3 Bos. & P. 9, n. a.

⁵ Wilkes v. Williams, 8 Term, 633; Willis, 41; 2 Saund. 209, c; 3 Bos. & P. 9.

⁶ 2 Saund. 209, c; Bacon, Abr. *Pleas*, D; 3 Blackstone, Comm. 297, 298.

⁷ Hole v. Burgoigne, 3 Salk. 271. It is apprehended that in no state is it now of the slightest consequence whether the defendant commences his plea with the formula given in the text or not, or which he uses; and in the states which have adopted codes of practice neither of these forms is in use.

2892. *Imparlance*, from the French *parler*, to speak, 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, etc., and it is said to be nothing but the continuance of the cause till a further day.⁸ But the more common signification of the term is time to plead.⁹

Formerly the parties were allowed time to speak or confer together, so that they might endeavor to settle the matter in dispute. Now, time for pleading is allowed in most cases by general rules of practice, without any formal entry of an imparlance.

2893. Imparlanes are of three kinds, a common or general imparlance; a special imparlance; and a general special imparlance.

A *general imparlance* is the entry of a general prayer and allowance of time to plead till the next term, without reserving to the defendant the benefit of any exception, so that after such general imparlance the defendant cannot object to the jurisdiction of the court, nor plead any matter in abatement. This kind of imparlance is always from one term to another.

A *special imparlance* reserves to the defendant all exceptions to the writ, bill, or count, and after it the defendant may plead in abatement, though not to the jurisdiction of the court, because by praying an imparlance he admits its jurisdiction.

A *general special imparlance* contains a saving of all exceptions whatsoever, so that the defendant after this may plead not only in abatement, but also plead a plea which affects the jurisdiction of the court, as a privilege. He cannot plead a tender, and that he always was ready to pay, because, by craving time, he admits he is not ready, and so falsifies his plea.¹⁰ The last two kinds of imparlanes are, it seems, sometimes from one day to another in the same term.

When, after an imparlance, the defendant pleads any thing which the imparlance waives or falsifies, the plaintiff may sign judgment as for want of a plea, or apply to the court to set it aside, or demur, or finally specially reply the imparlance, by way of estoppel, that is, by showing in the replication that the defendant is precluded, by his own act appearing upon the record, from availing himself of the matter alleged in his plea.¹¹

2894. When an action is founded on a deed, pleaded with a *profert in curia*, as before explained, the defendant is entitled, upon demanding it, to oyer of the instrument, the original meaning of which is to hear it read. *Oyer*, then, is a prayer or petition to the court that the party may hear read to him the deed, stated in the pleadings of the opposite party, for such deed is by intendment of

⁸ Bacon, Abr. *Pleas*, C.

¹⁰ Tidd, Pract. 418, 419.

¹¹ Tidd, Pract. 419; 1 Chitty, Pl. 420, 424; Bacon, Abr. *Pleas*, C; Comyn, Dig. *Pleader*, D; 1 Sellon, Pract. 265; Gould, Pl. c. 2, §§ 16, 20; Stephen, Pl. 90. In modern practice, the term imparlance is rarely used, and in most of the states the step taken by the defendant at this stage is an appearance. Under the statutes and rules of court the defendant must appear or enter an appearance within a certain time, either after the service of process or after the beginning of the return term or the entry of the action. The plea, answer, or demurrer, must be filed within a fixed time after the appearance, unless for cause shown upon motion the court allow further time, in which case the action may be continued to the next term. A general appearance has this effect of a general imparlance, that after it the defendant cannot plead in abatement. A special appearance is entered when the defendant intends to plead in abatement or other dilatory pleas. A general appearance is made by an entry of the name of the defendant or his attorney on the docket, or by filing his pleading, or in some states by filing an affidavit, that the defendant is advised and believes he has a good defence, and intends to bring the cause to trial. This is called an affidavit of merits or of defence. A special appearance may be by entry on the docket, or by filing a plea.

A general appearance waives all defects in the process. *Free v. Haworth*, 19 Ind. 404; *Hayes v. Shattuck*, 21 Cal. 51; *State v. Doane*, 14 Wisc. 483. All defects in the service. *Lawrence v. Bassett*, 5 All. Mass. 140; *Ringle v. Bickle*, 17 Ind. 325.

law in court, when pleaded with a profert. The origin of this sort of pleading, we are told, is that in ancient times the generality of defendants were themselves incapable of reading.¹² By the modern practice, a compliance with the demand of oyer is to furnish the attorney of the opposite party with a copy of the deed, or file it in the proper office.

Oyer is demandable in all actions, real, personal, and mixed.

Though formerly oyer was demandable of the writ and of records, as well as of deeds, now it is not granted of a record or of the original writ, and can be had only in cases of deeds, probates, letters of administration, etc., of which profert is made on the other side. Oyer never was demandable of private writings not under seal.¹³

When the party is not bound to plead the specialty or instrument with a profert, as in the case of a promissory note, and he pleads it with one, such profert is mere surplusage, and the court will not compel him to give oyer of it. And if profert be omitted when it ought to have been made, the adversary cannot have oyer, but must demur.

Oyer is allowed to enable the party to plead with a full understanding of his case, and therefore he has a right to it whenever a profert is properly made; and the refusal of oyer in such case is error, though it is not error to grant oyer where it is not demandable of right. For the ordering of oyer is supposed to have been no prejudice to the party giving it; but the refusal of it is presumed to have been injurious to him who demanded it, as he is supposed to have been unable to plead advantageously without it.¹⁴

2895. A *plea* is the defendant's answer, by matter of fact, to the plaintiff's declaration. It is distinguished from a demurrer, which opposes matter of law to the declaration.¹⁵

Pleas are divided into pleas dilatory, or those which delay the plaintiff's remedy, not by questioning the cause of action, but the propriety of the suit, or the mode in which the remedy is sought; or peremptory, which deny the plaintiff's cause of action. Pleas were thus divided in imitation of the division of exceptions in the civil law. *Exceptiones aut perpetuæ sunt, aut temporales et dilatoricæ.*¹⁶

Subordinate to this there is another division; they are either to the jurisdiction of the court, in suspension of the writ, in abatement of the writ, or in bar to the action. The first three belong to the dilatory class, the last is of the peremptory kind.¹⁷

The most natural order of pleading is that established by law, and which the defendant must pursue, to wit: first, to the jurisdiction of the court; second, to the disabilities of the parties; third, to the count or declaration; fourth, to the writ.

This appears to be the natural order of pleading, because each subsequent plea admits that there is no foundation for the former. But although this is the order generally adopted in the United States, yet it is not universal, for the want of jurisdiction may be taken advantage of at any stage of the case.

These various kinds of pleas will be separately considered; and for that purpose this chapter will treat first of dilatory pleas, and, second, of pleas in bar.¹⁸

¹² 2 Sharswood, Blackst. Comm. 299; Stephen, Pl. 87.

¹³ Gatton v. Dimmitt, 27 Ill. 400; Mississippi R. R. v. Cross, 20 Ark. 443.

¹⁴ The doctrine of *profert* has no place under the New York code. Livingstone v. White, 30 Barb. N. Y. 72.

¹⁵ Stephen, Pl. 62.

¹⁶ Dig. 44, 1, 3.

¹⁷ Stephen, Pl. 63; 1 Chitty, Pl. 425; Lawes, Pl. 36.

¹⁸ A plea jointly pleaded by several for one of whom it is good, but bad for the others, is bad as to all; otherwise where the plea is several. Clark v. Lathrop, 33 Vt. 140; Morton v. Morton, 10 Iowa, 58.

2896. Pleas which have obtained the name of *dilatory pleas* are, to the jurisdiction, in suspension of the action, and in abatement.

2897. A *plea to the jurisdiction* is one which denies that the court has jurisdiction of the cause.¹⁹ Such a plea, though in effect it abates the writ, yet differs from a plea in abatement, principally in three points: 1, it must be pleaded in person; 2, only half defence must be made; 3, it should include *si curia cognoscere velit*, if the court will have further cognizance of the said plea.²⁰ A plea to the jurisdiction is not properly a plea in abatement, because the court do not abate the writ, nor give any judgment for costs, but merely dismiss the case.²¹

These pleas will be considered with regard to the cases in which they are allowed, the mode of pleading them, and the time when they must be pleaded.

2898. Pleas to the jurisdiction may arise from various causes: from the privilege of the defendant, by which he is exempted from liability to suits, from the fact that the cause of action arose out of the territorial jurisdiction of the court, and from a want of power in the court to take cognizance of the subject matter of the suit.

2899. Some persons are *privileged* from suits of every kind; of course the courts have no jurisdiction in such cases, and the case must be dismissed upon the plea of privilege being established. Ambassadors cannot be sued, and the act of congress, besides punishing all persons who may have been active in procuring any writ against them, declares any writ or process sued out against any ambassador received by the President of the United States to be void;²² and the consent of the defendant cannot give the court jurisdiction.²³

Members of congress are also privileged from suits while attending to their duties in congress, or going to and returning from the same; this privilege is not only their own and that of their constituents, but also of the house of which they are members.²⁴

When the privilege is merely personal, it must be asserted seasonably, or it is waived.

2900. Courts are divided into those of general and those of special or limited jurisdiction. The first have cognizance of all transitory actions wherever the cause may have accrued, because all actions of that kind in general follow the person of the defendant.²⁵

To the latter, or courts whose jurisdiction extends only to causes of action actually arising within certain local limits, it is a good plea to the jurisdiction as well in transitory as in local actions that the cause of action did not accrue

¹⁹ Bacon, *Abr. Pleas*, E, 1, 2; Gould, *Pl. c. 5*, § 13; Stephen, *Pl. 63*; 1 Chitty, *Pl. 427*; Archbold, *Civ. Pl. 290*.

²⁰ Stephen, *Pl. 393*.

²¹ Bacon, *Abr. Pleas*, E, 1. A motion to dismiss can be sustained only where the want of jurisdiction is apparent on the face of the writ. For defects not so apparent the defendant must plead in abatement. *Badger v. Towle*, 48 Me. 20; *Ames v. Winsor*, 19 Pick. Mass. 247. And costs may now be awarded upon the abatement for want of jurisdiction as well as for any other cause.

²² Act of Congr., April 30, 1790, § 25; 1 Stat. 117. See before, **2800**.

²³ *United States v. Benner*, *Baldw. C. C. 240*.

²⁴ *Jefferson*, *Man. § 3*; *Story*, *Const. §§ 856 to 862*. See before, **2801**.

²⁵ At common law, the jurisdiction of the courts depended upon a personal service of process upon the defendant, and his appearance in court. The object of the process was merely to compel appearance. It followed, therefore, that any court of general jurisdiction, which had by means of process compelled an appearance, had full jurisdiction in transitory actions. But as we have seen, (before, **2830**, note,) jurisdiction is now by statutes made to depend upon the residence of the parties, and if the residence is such as not to confer jurisdiction, this fact may be pleaded in abatement. If it is apparent on the record, the court will dismiss the action on motion, or *ex officio* without motion.

within those limits.²⁶ In these last cases, however, it is not necessary to plead to the jurisdiction, for the exception may be taken advantage of under the general issue.²⁷

But even courts of general jurisdiction have no authority to try cases of a local nature arising in a foreign jurisdiction, or in any place where the process of the court cannot run,²⁸ and the defendant may plead to the jurisdiction. It seems, however, that where a local action not requiring a judgment *in rem*, as trespass *quare clausum fregit*, for an injury to land lying in a foreign country, is brought, even in a superior court, exception may be taken to the jurisdiction under the general issue.²⁹

2901. When the court has no cognizance over *the subject matter* of the suit, it is fatal to its jurisdiction, for it cannot under any circumstances undertake to try it, because it is not competent; as, if an action should be brought in the circuit court of the United States to recover a less sum than five hundred dollars, or if a cause exclusively of admiralty jurisdiction should be brought in a court of common law. In these cases it is not requisite to plead to the jurisdiction, for the court would dismiss the cause on motion, or, even without motion, *ex officio*, for the whole proceeding would be *coram non iudice* and utterly void.³⁰

2902. A difference must be observed between a plea to the jurisdiction in a court of limited and one of general jurisdiction. In pleading in a court of the first class it is only necessary to plead negatively, that is, to show by proper allegations that the court has no jurisdiction; in pleading in a court of general jurisdiction, on the contrary, it is requisite, both at law and in equity, not only to show that the court has not jurisdiction, but also to designate specially some other court which has it. But this rule does not apply when the court has no jurisdiction of the subject matter.

The plea to the jurisdiction must be signed by the defendant in person; for if it be signed by attorney, it is presumed he did so by leave of court, and the asking leave is tacitly admitting the jurisdiction. But such implied admission cannot aid the jurisdiction except in cases in which the objection must be taken, if at all, by plea to the jurisdiction, and can be taken in no other way.³¹

It has already been observed that the plea must conclude "if the court will have further cognizance of the said plea."³²

2903. The plea to the jurisdiction must be the first act of the defendant in court. It must therefore be before a general or even a special imparlance; for if in a case of this kind the defendant refers any other question than that of its jurisdiction, of which it must of necessity judge, he admits the jurisdiction, and having so admitted it, he cannot afterward deny it.³³

²⁶ In regard to these courts, every vital fact tending to confer jurisdiction must be apparent on the face of the record, and will not be presumed. *Rowan v. Lamb*, 4 Greene, Iowa, 468; *Clark v. Norton*, 6 Minn. 412. A plea to the jurisdiction of a superior court must clearly and specifically aver a want of it, as its jurisdiction is to be presumed. *Diblee v. Davison*, 25 Ill. 436.

²⁷ Bacon, Abr. *Pleas*, E, 1. A plea alleging jurisdiction as to two of four defendants is bad. *Lester v. Stevens*, 29 Ill. 155.

²⁸ Bacon, Abr. *Pleas*, E, 1.

²⁹ 10 Coke, 68, 76, b.

³⁰ *Black v. Black*, 34 Penn. St. 354. Consent may give a court jurisdiction of the parties, but not of the subject matter. *Brady v. Richardson*, 18 Ind. 1; *New Albany R. R. v. Wilson*, 16 Ind. 402.

³¹ Bacon, Abr. *Pleas*, E, 2; Lawes, Pl. 91; Bacon, Abr. *Abatement*, A. A motion to dismiss for want of jurisdiction is not technically a plea to the jurisdiction, and may be made by an attorney. *Nye v. Liscomb*, 21 Pick. Mass. 263.

³² Bacon, Abr. *Pleas*, E, 1; *Mosely v. Hunter*, 3 Ired. No. 543. If it offers to verify and concludes to the country, it is bad. *Elmer v. M'Kenzie*, 5 Ala. N. S. 617.

³³ Coke, Litt. 127, b; *The Bee, Ware*, Dist. Ct. 332. This of course does not apply where

A plea to the jurisdiction and a plea in abatement are repugnant, and if they are filed at the same time, the latter supersedes the former.³⁴ So if a plea in abatement and a plea in bar are filed together.³⁵

2904. A *plea in suspension of the action* is one which shows some ground for not proceeding in the suit at the present period, and prays that the pleading may be stayed until that ground be removed. Of this class, which is very small even in England, is the *parol demurrer*, which, when an action of debt is brought against an infant heir for a debt of the ancestor, or a real action against the infant, is a suggestion of the non-age of the infant, and a prayer that the proceedings may be stayed till he is of full age, when it is said the *parol demurs*.³⁶ This plea, it is believed, is unknown in this country.

2905. A *plea in abatement of the writ* is one which shows some ground for abating or quashing the original writ, and makes a prayer to that effect. One of the cardinal rules relating to pleas in abatement is that the plea must give the plaintiff a better writ; for unless the defendant can do this, the plaintiff could not be certain of bringing another suit correctly.³⁷ Indeed, this is the criterion between a plea in abatement and a plea in bar.

The various grounds for which a writ may be abated relate either to the disability of the plaintiff, to the disability of the defendant, to the count or declaration, or to the writ.

2906. Pleas to the disability of the person do not strictly fall within the definition of pleas in abatement, for they do not pray "that the writ be quashed," but pray judgment "if the plaintiff ought to be answered." They are, however, classed among pleas in abatement.

Pleas to *the disability of the plaintiff* must relate to the time of commencing or continuing his suit, and either deny his existence, as that he or one of several plaintiffs at the commencement of the suit was a fictitious person, or dead;³⁸ and when a sole plaintiff dies pending the suit, his death may be pleaded in abatement; but by statute it is provided in several states, and perhaps in most of them, that his personal representatives shall be substituted; in case one of several plaintiffs dies, the action, in general, abates at common law, for by joining in the suit they assert a joint right of recovery, which, as such, is destroyed by the death of either of them; but this last rule is qualified to some extent as to personal actions, which admit of summons and severance, and in which an entire indivisible thing is to be recovered; for in such actions, after one of the plaintiffs has been summoned and severed, he ceases to be a party, and the other becomes the sole plaintiff, prosecuting for the whole amount or matter in demand, and, therefore, if the severed plaintiff dies pending the action, his death has no effect upon the suit.³⁹

It may be pleaded that the plaintiff is an alien enemy, for such a person can-

there is no jurisdiction over the subject matter. In that case all the proceedings are void, and the objection may be suggested at any time. *Eberly v. Moore*, 24 How. 147.

³⁴ *Sherwood v. Stevenson*, 25 Conn. 431.

³⁵ *Preston v. Simons*, 1 Rich. So. C. 262. And in this case the plea in abatement need not be replied to. *Dean v. M'Kinstry*, 11 Miss. 213.

³⁶ 3 Sharswood, Blackst. Comm. 300; Stephen, Pl. 64. Parol signifies in French, speech, in Latin, *loquela*, which was the most ancient appellation of pleading. Stephen, Pl. 29.

³⁷ *Fink v. Maples*, 15 Ind. 297.

³⁸ Comyn, Dig. *Abatement*, E, 16, 17; Bacon, Abr. *Abatement*, L.

³⁹ Bacon, Abr. *Abatement*, F. Summons and severance is a proceeding to separate one of several persons, who is a co-plaintiff, from the rest; this takes place when one of such persons neglects or refuses to appear. He may then be summoned to appear, etc., and if he refuses to join in prosecuting the suit, he is separated from it by a judgment of severance, or, as it is technically called, *ad sequendum solum*. See Bacon, Abr. *Summons and Severance*, F; Brooke, Abr. *Summons and Severance*; Archbold, Civ. Pl. 59; Coke, Litt. 139; Wentworth, Off. Ex. 96, 104.

not maintain an action while he so remains. When the husband sues alone in cases where his wife ought to be joined, the defendant may plead in abatement. When a woman marries pending a suit brought by her, she renders herself unable to proceed any further, and the writ must abate at common law; but in some states, Connecticut and Massachusetts for example, if a *feme sole* plaintiff marries, *pendente lite*, her husband is authorized by statute to appear, suggest the marriage upon the record, and then jointly with her proceed in the suit.

If one of several having joint rights sues alone, the non-joinder of the others must be pleaded in abatement if the defendant means to take advantage of it.⁴⁰

2907. Pleas in abatement *to the person of the defendant* are various, and relate to:

The misnomer of the defendant, and when this takes place, the writ must abate.⁴¹ But the defendant must be careful in such case not to admit by his plea or otherwise on the record that he is sued by his right name, or in a name by which he is known; when, therefore, the defendant pleads, "And the said C D comes and defends," he admits he is the person sued; his plea should commence, "And A B, against whom the plaintiff has sued out his writ by the name of C D," etc.

When there are several defendants they must all be named in full, describing each of them; and when sued as partners, they cannot be sued by the name of the firm; as, A B and Co.

The coverture of the defendant may be pleaded in abatement when a *feme covert* is sued without her husband; and, as she is incapable of appointing an attorney, she must plead this matter in person.⁴² But when the husband is *civiliter mortuus*, or is an alien enemy residing abroad, this matter may be replied, and she will be considered as *feme sole*.⁴³ The marriage of a *feme sole* defendant does not abate the writ, it being unreasonable that the defendant by her own act should defeat the action of the plaintiff.

The death of a sole defendant at common law abated the suit; but that evil is remedied in all of the states by statutes which provide the substitution of personal representatives. And by the statute of 17 Car. II, c. 28, it is enacted that the death of either party "between verdict and judgment shall not be alleged for error, so as judgment shall be entered within two terms after such verdict."⁴⁴ By the statute 8 and 9 W. III, c. 2, §§ 6 and 7, it is enacted "that if there be two or more plaintiffs or defendants and one of them should die, if the cause of such action should survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ of 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 defendants."

The only question that can arise now in such a case is whether the cause of action survives. Actions on contracts survive in general, but to this there are exceptions; as, where the contract was to be performed personally by the party

⁴⁰ *Hobbs v. Hatch*, 48 Me. 55; *White v. Brooks*, 43 N. H. 402; *Roop v. Seaton*, 4 Greene, Iowa, 252. Held *contra* that non-joinder of plaintiffs may be taken advantage of in arrest of judgment under a plea of the general issue. *Farni v. Tesson*, 1 Black, 309.

⁴¹ *Miller v. Stettiner*, 7 Bosw. N. Y. 692. Under the statutes of the various states allowing amendments, a writ will not generally abate if the defendant is named so that he can be identified. An unimportant mistake will not be regarded. If the misnomer has caused doubt in the defendant's mind whether he is the party intended, yet upon his appearance the plaintiff will be allowed to amend upon proper terms, so that the defendant will not be prejudiced. *Chadsey v. McCreery*, 27 Ill. 253; *Adams v. Wiggin*, 42 N. H. 553.

⁴² *Foxtwist v. Tremaine*, 2 Saund. 209, c. n. 1.

⁴³ Comyn, Dig. *Abatement*, F, 2; Gould, Pl. c. 5, § 86; 1 Chitty, Pl. 438.

⁴⁴ Bacon, Abr. *Abatement*, F.

deceased, or where the injury done by the breach was merely the personal suffering of the deceased, as in case of breach of promise of marriage.⁴⁵ In regard to torts the rule varies. Actions to recover specific goods, as *detinue* and *replevin*, survive. So also in general do actions for injuries done to the personal property of the deceased. Actions for injury to the person do not in general survive. But by statutes the executor may now sue for injuries causing the death of the testator, if of such a nature that the testator would have had a cause of action. Where the defendant dies, the general rule is that the action survives if he has acquired a gain by his wrong doing. But this is not universal.

2908. There is no *plea to the declaration* alone but in bar.⁴⁶ Formerly the defendant might demand *oyer* of the writ, and then, the same being set forth, if there was any variance between the writ and the count, or between the record, specially mentioned in the count, the defendant might plead such variance or demur, move an arrest of judgment or sustain a writ of error; but as *oyer* of the writ cannot be now demanded, such variance is no longer pleadable in abatement.⁴⁷

2909. *Pleas in abatement of the writ* have been greatly abridged, because *oyer* of the writ is no longer demandable, and it is only when an error is carried into the declaration that advantage can be taken of it. There are pleas in abatement of the writ which do not require an examination of the writ itself. For example, if in the declaration one only of two joint contractors is named defendant, this is sufficient to show that the same non-joinder exists in the writ; for as the variance between the writ and the declaration is a fault, the defendant is entitled to assume that they agree with each other, and he may consequently, without producing the writ, plead this non-joinder as certainly existing in this latter instrument. In all cases where no *oyer* is necessary, pleas in abatement of the writ may still be pleaded.⁴⁸

These pleas are to the writ and to the action of the writ.

2910. *Pleas to the form of the writ* were formerly pleaded for matters apparent upon the face of the writ, such as variance from the record, specialty, and the like; but as *oyer* can no longer be had, now pleas in abatement to the form of the writ are principally for matter *dehors*, existing at the time of suing out the writ, or arising afterward, such as misnomer of the plaintiff or defendant in the Christian or surname.⁴⁹ Pleas to the form of the writ may also be pleaded when persons suing or being sued as husband and wife are not married; or one of the plaintiffs or defendants was a fictitious person, or dead at the time of suing the writ, or when other persons who are not sued ought to have been joined.⁵⁰

2911. *A plea to the action of the writ* is one which shows that the action is misconceived, or that it is in one form when it ought to be in another, as where

⁴⁵ *Smith v. Sherman*, 4 Cush. Mass. 408.

⁴⁶ 2 Saund. 209, d; *Johnson v. Altham*, 10 Mod. 210.

⁴⁷ 1 Chitty, Pl. 439. In New Jersey, a defendant may avail himself of such variance, either by *oyer* and plea or by a motion to set aside the proceedings for irregularity. *Bank of New Brunswick v. Arrowsmith*, 4 Halst. N. J. 284. In South Carolina, by special demurrer. *Young v. Grey*, 1 M'Cord, So. C. 211.

⁴⁸ Under our systems of serving a writ by copy a material variance between the original and the copy may be pleaded in abatement of the writ. *Gould v. Smith*, 30 Conn. 88. But it will not be abated if the variance is not calculated to mislead. *Union Co. v. Shepherd*, 2 Hill, N. Y. 413. And, in general, any defect in the service of the writ which is not repugnant to the return of the officer may be pleaded in abatement of the writ, provided the defendant has not waived such defect by a general appearance. If the matter pleaded is repugnant to the return of the officer, the writ will not abate, but the defendant is remitted to his remedy against the officer for a false return.

⁴⁹ Comyn, Dig. *Abatement*, H, 17.

⁵⁰ Comyn, Dig. *Abatement*, E. H.

case is brought when trespass is the proper remedy; or it may be pleaded to a second action for the same cause, pending the first.⁵¹ In penal actions, however, when two actions are brought for the same cause, the plea is in bar, because the party who first sues is entitled to the penalty.⁵²

The pendency of a suit in a foreign court cannot be pleaded in abatement.⁵³

2912. Care must be taken that pleas have their proper *forms*, for although it is a general rule that a mere prayer of judgment, without pointing out the appropriate judgment, is sufficient, because, the facts being shown to the court, it is bound to pronounce the proper judgment;⁵⁴ yet if the plea contain matter in bar of the action, and concludes in abatement, it is a plea in bar, and judgment shall be given upon it; for if the plaintiff can have no cause of action, he can have no writ.⁵⁵ But to discourage dilatory pleas, the courts have departed from this rule in regard to the effect of the beginning and conclusion of such pleas.

A plea which contains matter only in abatement, concludes in bar, and is found against the defendant, is a plea in bar, 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.⁵⁶ And when a plea begins in bar, though it contains matter in abatement, and concludes in abatement,⁵⁷ it is a plea in bar, and final judgment may be given.

2913. As to the title of the term, these pleas must in general be entitled of the term to which the action is brought, and before the defendant has done anything to admit the jurisdiction of the court, or the right of the plaintiff to sue.

2914. The commencement of these pleas may be considered as to the statement of the appearance, the nature of the defence, and the prayer.

Pleas of misnomer should not admit that the defendant has been properly sued in his proper name, as, "And the said C D, sued by the name of E D." Here, by using the word said, he admits he is the same person. The form should be, "And C D, sued by the name of E D."⁵⁸

The nature of defence has already been stated.⁵⁹

Pleas to the jurisdiction 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 here will or ought to take cognizance of the said plea."⁶⁰

A plea to the person of the plaintiff or defendant, in respect to the disability to sue or be sued, and not on account of misjoinder of one party, ought to conclude with a prayer, "if the plaintiff ought to be answered."

The plea in abatement of the writ, for matter apparent on the face of it, should begin and conclude by "praying judgment of the writ, and that the same be quashed." But where the plea is for matter de hors, as misnomer, the plea should conclude with that prayer.⁶¹

⁵¹ *Prosser v. Chapman*, 29 Conn. 515.

⁵² *Combe v. Pitt*, 3 Burr. 1423.

⁵³ *Bradley v. Bank*, 20 Ind. 528; *Wurtz v. Hart*, 13 Iowa, 515; *Wood v. Lake*, 13 Wisc. 84; *Cox v. Mitchell*, 7 C. B. N. s. 55.

⁵⁴ *Pitt v. Knight*, 1 Saund. 97, n. 1.

⁵⁵ *Foxtwist v. Tremaine*, 2 Saund. 209, c; *Casey v. Cleveland*, 16 Ala. 445. So a plea commencing in bar and concluding in abatement is to be considered a plea in bar; and if it contain no sufficient matter in bar, it may be demurred to as a plea in bar. *Hargis v. Ayres*, 8 Yerg. Tenn. 467; *Lowe v. Blair*, 6 Blackf. Ind. 282.

⁵⁶ 2 Saund. 209, d.

⁵⁷ 2 Saund. 209, c and d.

⁵⁸ 2 Saund. 1, n. 2.

⁵⁹ Before, 2891.

⁶⁰ 2 Saund. 209, d; *Bacon, Abr. Abatement, P*; *Comyn, Dig. Abatement, I, 12*.

⁶¹ 1 Saund. 318, n.

2915. An affidavit of the truth of the facts stated in all dilatory pleas must accompany them.⁶²

2916. A writ being divisible may be abated in part and remain good for the residue. The defendant may plead to part in abatement, and demur or plead in bar to the residue of the writ or declaration. When the matter contained in the plea goes to defeat only a part of the plaintiff's cause of action, the plea in abatement should be confined to that part; a plea to the whole would be defective.⁶³ But when the matter goes only in part in abatement of the writ, and concludes with a prayer that the whole may be abated, the court may abate so much of the writ as the matter pleaded applies to, if there be a plea to other parts of the declaration.⁶⁴

Great accuracy is required in framing dilatory pleas;⁶⁵ they must be certain to every intent,⁶⁶ be pleaded without repugnancy, and must in general give the plaintiff a better writ, for this is the true criterion between a plea in abatement and a plea in bar. The commencement and conclusion of the plea should be correctly stated, otherwise the plaintiff may demur; where a plea concluded praying judgment if instead of of, the plea was held bad on demurrer, though the words, "and that the same may be quashed," were also added.

A plea in abatement speaks ordinarily of the time when it is pleaded, and not of the commencement of the suit.⁶⁷

2917. After the defendant has pleaded a dilatory plea the plaintiff may consider whether he can sustain his suit or not; if he cannot deny the truth of the matter alleged, and it is sufficient in law to quash the writ, he may enter a *cas-setur breve*; that is, pray that the writ may be quashed to the intent that he may sue out a better one against the defendant.

Although the plaintiff cannot tacitly abandon part of his demand, or his proceedings against one of several defendants without discontinuing the whole suit, yet in some cases he may, by entering an express agreement or acknowledgment on record not further to prosecute his suit as to the whole or part only of the cause of action, or if there be several causes of action⁶⁸ or defendants, as to some or one of them, and proceed as to the rest.⁶⁹ This acknowledgment or agreement is called a *nolle prosequi*.

In civil cases a *nolle prosequi* is considered, not in the nature of a *retraxit*, as was formerly supposed, but only an agreement not to proceed against some of the defendants, or as to part of the suit.⁷⁰ A *nolle prosequi* is now held to be no bar to a future action for the same cause, except in those cases where from the nature of the action judgment and execution against one is a satisfaction of all the damages sustained by the plaintiff.⁷¹

If the plaintiff is satisfied he can never recover, he may enter a *retraxit*, or a withdrawal of his suit. It is called a *retraxit* from the fact that this was the principal word used when the proceedings were in Latin.

A *retraxit* differs from a *non-suit*, the former being the act of the plaintiff himself, for it cannot be entered even by an attorney,⁷² while the latter takes

⁶² A plea to the jurisdiction need not be verified. *Howe v. Thayer*, 24 Ill. 246. But pleas in abatement must be, and that absolutely and not on belief merely. *King v. Haines*, 23 Ill. 340. An oath is, however, required to a plea to the jurisdiction where the want of jurisdiction does not appear on the face of the record. *Ludwick v. Bechamire*, 15 Ind. 198.

⁶³ *Harries v. Jamison*, 5 Term, 557.

⁶⁴ 2 Saund. 210, d.

⁶⁵ *Getchell v. Boyd*, 44 Me. 482.

⁶⁶ *Ellis v. Ellis*, 4 R. I. 110; *Belden v. Laing*, 8 Mich. 500.

⁶⁷ *Barker v. Remick*, 43 N. H. 235.

⁶⁸ 7 Wend. N. Y. 301.

⁶⁹ 1 Pet. 80.

⁷⁰ 1 Saund. 207, note (2), and the authorities there cited.

⁷¹ *Cooper v. Tiffin*, 3 Term, 511; *Cooke v. Berry*, 1 Wils. 98.

⁷² 8 Coke, 58; 3 Salk. 245.

place in consequence of the neglect of the plaintiff. A *retraxit* also differs from a *nolle prosequi*; the effect of a *retraxit* is a bar to all actions of a similar nature;⁷³ a *nolle prosequi* is not a bar even in a criminal prosecution.

If the pendency of another action is pleaded, the plaintiff may discontinue the first action and reply such discontinuance.⁷⁴

2918. If after a full examination the plaintiff declines to suffer a non-suit, enter a *nolle prosequi* or a *retraxit*, he may either demur, reply, sign judgment for want of a sufficient plea, or in some cases he may amend either at common law or by virtue of a statute.

When the plea is untrue in fact the plaintiff should reply, and the replication may begin without any allegation that the writ ought not to be quashed; it must not be as to a plea in bar, because that would be a discontinuance, but should conclude to the country. 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 that the plaintiff recover, *quod recuperet*, and not that he answer over *quod respondeat*.⁷⁵

When the plaintiff demurs he is not required to assign any special cause, though it is safest to demur specially. In general, the judgment on the demurrer in favor of the plaintiff to a plea in abatement or to a replication to such plea is only interlocutory, that the defendant answer over *quod respondeat oster*.⁷⁶ But when a plea containing matter which can be pleaded only in abatement improperly commences or concludes in bar, the judgment or demurrer may be final.⁷⁷ It is a rule that when the judgment is *respondeat oster* no other plea in abatement will be allowed.⁷⁸ When the judgment on a plea in abatement is for the defendant, it is that the writ or bill be quashed; or if a temporary disability or privilege be pleaded, that the plaintiff remain without day, until, etc.⁷⁹

A judgment may be signed by the plaintiff, as for want of a plea, in some cases where the plea is defective in substance; when the plea is defective in form the plaintiff should demur.⁸⁰

When a misnomer has taken place, either of the plaintiff or defendant, and this is pleaded in abatement, the plaintiff may amend his declaration, and need not enter a *cassetur breve*. But when there is a non-joinder of one of several defendants, and this matter is pleaded, the plaintiff cannot amend, and must enter a *cassetur* before he commences a new action, or at least before the replication of *nul tiel record* to a plea in such new action of *autre action pendant*.⁸¹

2919. When no dilatory plea has been offered, or if any, or all which the law allows, have been pleaded and overruled as insufficient, the defendant may then plead to the action; for no judgment can be rendered against him until

⁷³ Bacon, Abr. *Non-suit*, A; Evans v. M'Mahan, 1 Ala. N. s. 45. But the dismissal of a case stated does not amount to a *retraxit*, and is no bar to a future suit for the same cause of action. Hoffman v. Porter, 2 Brock. C. C. 156. If one of several plaintiffs in an action of tort enters a *retraxit*, the court will strike his name out and suffer the other plaintiffs to proceed. Wilkinson v. Gilchrist, 5 Ired. No. C. 228.

⁷⁴ Averill v. Patterson, 10 N. Y. 500.

⁷⁵ Comyn, Dig. *Abatement*, I, 14, 15; Bacon, Abr. *Abatement*, P; 2 Saund. 210, n. 3; Chase v. Deming, 42 N. H. 274; Mineral Point R. R. v. Keep, 22 Ill. 9.

⁷⁶ 2 Saund. 210, n. 3. The writ will abate if a co-defendant set forth in the writ has not been served with process, although he is within the jurisdiction. Curtis v. Baldwin, 42 N. H. 398.

⁷⁷ Bacon, Abr. *Abatement*, P.

⁷⁸ Houck v. Scott, 17 Ala. 169.

⁷⁹ A demurrer should not be filed to a defective plea to the jurisdiction; the proper course is to set down the plea for hearing, when its sufficiency will be considered. Lester v. Stevens, 29 Ill. 155.

⁸⁰ Gray v. Sidneff, 3 Bos. & P. 395; Hixon v. Binns, 3 Term, 185.

⁸¹ Graham, Pr. 98; Bouvier, Law. Dict. *Lis Pendens*.

he has been required to answer, and has had an opportunity to contest the merits or grounds of the suit; and these he is not bound to answer until he has exhausted or waived his right to interpose all dilatory exceptions. By pleading in bar to the action the defendant waives all dilatory pleas of which he could have taken advantage before so pleading in bar, though he does not waive a right to plead to matters which may afterward accrue.⁸² By denying the cause of action itself he tacitly admits the mode in which the remedy is pursued to be correct.

Pleas in bar will be considered as to their nature, as to their kinds, as to their qualities, their construction, and their form.

2920. A *plea in bar* to the action is one which shows some ground for defeating the action, and contains a prayer to that effect. Such a plea is unlike a dilatory plea, because it impugns the right of action altogether instead of merely diverting the proceedings to another jurisdiction, or suspending them, or abating the particular writ; it is a conclusive answer to the action. Such a plea must, in general, deny all, or some essential part of the averments of facts in the declaration, or, admitting them to be true, allege new facts which obviate or repel their legal effect. In the first case, in the language of pleading, the defendant is said to traverse the matter of the declaration; in the latter to confess and avoid it; pleas of this kind are, therefore, divided into pleas by way of traverse, and pleas by way of confession and avoidance.⁸³

2921. Pleas in bar are also classed into two other kinds: the general issue and special pleas in bar.

2922. *The general issue* denies in direct terms the whole declaration; as in personal actions where the defendant pleads *nil debet*, that he owes the plaintiff nothing; or *non culpabilis*, that he is not guilty of the facts alleged in the whole declaration; or in real actions, where the defendant pleads *nul tort*, no wrong done; or *nul disseisin*, no disseisin committed. These pleas and the like are called general issues; by importing an absolute and general denial of all matters alleged in the declaration, they at once put them all in issue.

Formerly, the general issue was seldom pleaded, except when the defendant meant wholly to deny the charge against him; for when he meant to avoid and justify the charge, it was usual for him to set forth the particular ground of his defence as a special plea, which appears to have been necessary to appraise the court and the plaintiff of the particular nature and circumstances of the defendant's case, and was originally intended to keep the law and the facts distinct. And, even now, it is an invariable rule that every defence which cannot be specially pleaded may be given in evidence at the trial upon the general issue, so that the defendant is in many cases obliged to plead the particular circumstances of his defence specially, and cannot give them in evidence on that general plea. But the science of special pleading having been frequently perverted to the purpose of chicane and delay, the courts have in some instances,

⁸² *Brown v. Illius*, 27 Conn. 84. After filing plea in bar the defendants on motion were allowed to withdraw this plea, and to plead in abatement that the plaintiffs had falsely alleged themselves to be citizens of a different state from the defendants, and therefore the United States court had no jurisdiction, and this plea being sustained, the plaintiff's petition was dismissed. *Eberly v. Moore*, 24 How. 147. It is held in Massachusetts that the court cannot allow an answer in abatement after an answer on the merits. *Hastings v. Bolton*, 1 All. Mass. 529.

⁸³ Most of the modern codes have abolished special pleading. Where the general issue is used all special matters of defence may be in general set up by filing a specification. But in many states the answer has taken the place of all pleas in bar, and in this the defendant denies all material facts which he intends to traverse, and sets up all new matters which he intends to plead in avoidance. The answer should be as full and complete as a special plea at common law. *Ayrault v. Chamberlain*, 33 Barb. N. Y. 229.

and the legislature in others, permitted the general issue to be pleaded, and special matter to be given in evidence under it at the trial, which at once includes the facts, the equity, and the law of the case.⁸⁴ In a writ of right the general issue is called the *mise*.

As a general rule, the defendant is not allowed to plead specially such facts as amount to a total denial of the charge made against him, and may be given in evidence under the general issue, which, in such cases, must be pleaded.⁸⁵ But in many instances, where the defence consists of matter of law, the defendant may plead it specially, or give it in evidence under the general issue.⁸⁶

2923. *Special pleas in bar* are very various, according to the circumstances of the defendant's case; as, in personal actions the defendant may plead any special matter in denial, avoidance, discharge, excuse, or justification of the matter alleged in the declaration, and which destroys the plaintiff's action; or he may plead any matter which estops or precludes him from averring or insisting on any matter relied upon by the plaintiff in his declaration.

These special pleas either deny the facts stated in the declaration, confess and avoid them, are in discharge, in excuse, in justification, or in estoppel.

2924. When a special plea denies the facts stated in the declaration, it is usually called a *special traverse*. All pleas in denial are generally traverses, for the meaning of this word is a denial; and, therefore, in pleading to traverse is to deny or controvert any thing which is alleged in the declaration, plea, replication, rejoinder, sur-rejoinder, or other pleading. But special traverses are not the only pleas which may properly be called special pleas in denial of the declaration, for the defendant may in his plea allege new matter in contradiction to what is expressly stated in the declaration, or what is necessary to support it, though not expressly mentioned in it; as, in an action on an arbitration bond, (that is, a bond given by a party to perform an award of arbitrators to be made of some matter left to their arbitration,) if the plaintiff declares, as he may, upon the penal part of the bond merely, without setting forth the condition of it, the defendant, after craving oyer of the condition, may set it forth in his plea and plead *nullum fecerunt arbitrium*, or that the arbitrators made no award.

2925. *Pleas in confession and avoidance* are pleas which confess the matters contained in the declaration and avoid their effect by some new matter, which shows that the plaintiff is not entitled to maintain his action; as, by admitting the contract declared upon and showing that it is void or voidable on account of the want of ability of one of the parties to make it, as, by coverture, or infancy, or the like; or by the mode in which the contract was executed, as by duress; or that it was contrary to law, as being against some statute which makes it void; for these circumstances are sufficient to defeat the plaintiff's claim.⁸⁷

2926. *Pleas in discharge* are distinguished from those in avoidance. They are such as admit the demand, but instead of avoiding its payment or satisfac-

⁸⁴ 3 Blackstone, Comm. 305, b; 2 Greenleaf, Ev. § 9.

⁸⁵ 3 Blackstone, Comm. 309.

⁸⁶ Under the various codes of late years adopted by the several states there is no general issue technically so called. The defendant may plead a general denial of the whole declaration or complaint, and under this may prove any thing which tends to controvert any of the material allegations of the declaration. *Moorman v. Barton*, 16 Ind. 206; *Caldwell v. Bruggerman*, 4 Minn. 270; *Caldwell v. Gall*, 11 Mich. 77; *Hawkins v. Borland*, 14 Cal. 412. Other matter, such as want of consideration of a promissory note, must be specially pleaded. *Bingham v. Kimball*, 17 Ind. 396.

⁸⁷ Want of consideration must be specially pleaded. *Frybarger v. Cockefair*, 17 Ind. 404; or fraud, *Jenkins v. Long*, 19 Ind. 28. A plea of fraud should allege a scienter, and the defendant's reliance on the false representations. *White v. Watkins*, 23 Ill. 480; *O'Donald v. Evansville R. R.*, 14 Ind. 259.

tion, show that it has been discharged by some matter of fact or of law ; as, by having been already paid or settled by the rendition of an award or judgment, or that the plaintiff has released the defendant, though he may not have given up his right, or that he cannot recover because of the defendant's right of set-off. So the defendant may avail himself of the discharge of the plaintiff's claim by matter of law, as alienage, or the bankruptcy of the plaintiff, or his having been himself discharged from the contract by bankruptcy, or its being too late to sue him by reason of the statute of limitations.⁸⁸

2927. *Pleas in excuse* also admit the demand or complaint stated in the declaration, and excuse the non-compliance with the plaintiff's claim or the commission of the acts of which he complains on account of the defendant's having done all in his power to satisfy the former, or not having been the culpable author of the latter. The following are examples of pleas in excuse :

A tender and refusal. Where the defendant tenders to the plaintiff what is due to him and the plaintiff refuses to accept it and afterward brings a suit for its recovery, the defendant in his plea may acknowledge the debt and plead the tender, adding that he has always been and is still ready to pay it ; this is called a plea of tender and *toujours et uncore prist*, and, on payment of the money into court, if the issue is found for him, the defendant will be exonerated from costs and the plaintiff made justly liable for them.

Self-defence. When an action is brought for an assault and battery, the defendant may plead that the plaintiff assaulted him first, which obliged him to defend himself, and that if any harm happened to the plaintiff from such defence, the same was occasioned by his own assault first made upon the defendant. This is called a plea of *son assault demesne*. In like manner he may plead that the assault was committed in defence of those whom he had a right to defend on account of his relative position ; as, in defence of his wife, children, or servants.

The defendant may also plead that he has not performed a contract because he has been prevented by the plaintiff from fulfilling his engagement.

In actions of trespass, he may plead that the injury occurred from inevitable accident, and without any fault in him.

2928. *Pleas in justification* differ from pleas in excuse. In the latter the defendant relies upon the plaintiff's conduct as his apology for his doing or not doing the act in question ; in pleas of justification, on the contrary, the defendant professes purposely to have done the acts of which the plaintiff complains, not on account of his negligent or culpable conduct, but in order to exercise that right which he insists in point of law he might exercise, and in the exercise of which he conceives himself not merely excused but justified. The grounds of such justification seem to consist principally of matter of title, or interest in or respecting land, or matter of authority, mediately or immediately derived from the plaintiff, or the general operation of law from the particular circumstances of the case.⁸⁹

2929. In form, a plea of justification must show the authority under which the defendant acted,⁹⁰ in order that the court, who are alone the judges of the

⁸⁸ Hammond, Nisi P. 118, 119. Arbitrament and award must be pleaded specially. *Yingling v. Kohlhass*, 18 Md. 148 ; *Brown v. Perry*, 14 Ind. 32. A plea of payment or of accord and satisfaction must show to whom payment or satisfaction was made. *Nill v. Comparet*, 15 Ind. 243. If a verbal release is pleaded the terms and consideration must be set out that the court may judge of its validity. *Hosier v. Eliason*, 14 Ind. 523.

⁸⁹ Justification must be specially pleaded under the modern codes as well as at common law. *Glazer v. Clift*, 10 Cal. 303 ; *Tomlinson v. Darnall*, 2 Head, Tenn. 538 ; *Briggs v. Mason*, 31 Vt. 433.

⁹⁰ Coke, Litt. 283, a.

law, may decide on its sufficiency, and also that the plaintiff may know of its existence, and answer it if he can. The defendant is therefore required to set forth the instrument by which the authority was conferred, such as a writ or the like, and also its direction, to show that the defendant was authorized to execute it,⁹¹ and out of what court, and whence it emanated.⁹² And a justification under it, showing it has been returned, must aver the fact with a *prout patet per recordum*, that is, with an averment that such matter appears of record; which matter would be improper in a case where the defendant only alleged that the writ was sued out, because it is not a record until it is filed.⁹³

2930. A *plea in estoppel* is a preclusion in law which prevents a man from alleging or denying a fact in consequence of his own previous act, allegation, or denial of a contrary tenor.⁹⁴ Lord Coke says, "An estoppel is when a man is concluded by his own act or acceptance to say the truth."⁹⁵ And Blackstone⁹⁶ defines "an estoppel to be a special plea in bar, which happens when a man has done an act, or executed some deed, which estops or precludes him from averring anything to the contrary."

A plea of this kind, like a plea in avoidance of the declaration, always advances new matter; but it differs from the latter in this, that instead of confessing or avoiding the plaintiff's allegations, it neither admits nor denies them, merely relying on the estoppel, and, after stating the previous act, allegation, or denial of the opposite party, prays judgment if he shall be received or admitted to aver contrary to what he before did or said.

2931. An estoppel may arise either from matter of record, from the deed of the party, or from matter in pais, that is, matter of fact.

Any confession or admission made in pleading in a court of record, whether it be express or implied, from pleading over without a traverse, will for ever preclude the party from afterward contesting the same fact in any subsequent suit with his adversary.⁹⁷ This is called an estoppel by matter of record.

As an instance of estoppel by deed may be mentioned the case of a bond re-

⁹¹ *Watkins v. West*, Ld. Raym. 1530; *De Forest v. Swan*, 4 Greene, Iowa, 357; *Wheeler v. McCorrissen*, 24 Ill. 40.

⁹² *Gray v. Hart*, Salk. 517. If it emanated from a court of limited jurisdiction, the facts on which the jurisdiction is grounded must be set out in detail. *Roys v. Lull*, 9 Wisc. 324.

⁹³ *Brigstock v. Stanion*, Ld. Raym. 108. Mr. Hammond, in his excellent work on *Nisi Prius*, gives the reason why a *prout patet* is necessary. He says: "The defendant, we will suppose, concludes his pleading with a general verification, the effect of which is, that he will establish the allegations comprised in his plea to the satisfaction of a jury. This averment embraces every part of a plea, so that if it contains matter of record, the defendant has affirmed that he will submit the question, whether or not the record exists, to a jury; but this mode of proceeding is improper, inasmuch as that question must be decided by the court; therefore, he must single out the matter of record from the mass of the other allegations, and aver it with a *prout patet*, thereby affirming in effect that he will establish its existence by inspection of the court. The same rule will be observed in all other pleadings; and with regard to a count or declaration, the conclusion, 'and therefore he brings his suit,' is, in substance, that he brings his witnesses to prove the truth of its contents; and as their testimony is not competent to establish a record, matters of that description must be averred here with a *prout patet*, the same as in other pleadings. However, the omission of the averment in any case can only be objected to by demurring specially, because the opposite party may, notwithstanding, reply *nul tiel record*, and so is not inconvenienced by the omission." Hammond, *Nisi P.* 115.

If the time for the return of the writ has elapsed, the plea should aver such return, or sufficient cause for not returning. *Shippen v. Curry*, 3 Metc. Ky. 184; *Slomer v. People*, 25 Ill. 70.

If the time has not elapsed, of course the writ itself unreturned is sufficient. *Kingsbury v. Buchanan*, 11 Iowa, 387

⁹⁴ Stephen, Pl. 239.

⁹⁶ 3 Blackstone, Comm. 308.

⁹⁵ Coke, Litt. 352, a.

⁹⁷ Comyn, Dig. *Estoppel*, A, 1.

citing a certain fact; the party executing that bond will be precluded from afterward denying in any action brought upon that instrument the fact so recited.

An example of an estoppel by matter *in pais* occurs when one man has accepted rent of another; he will be estopped from afterward denying in any action with that person that he was at the time of such acceptance his tenant.⁹⁸

2932. Every estoppel ought to be reciprocal, that is, to bind both parties; and this is the reason that regularly a stranger shall neither take advantage of nor be bound by an estoppel. But privies in blood, privies in estate, and privies in law are bound by and may take advantage of estoppels.

2933. There is a plea in bar which does not strictly fall under either of these denominations, called a *special issue*. It differs from a special plea in bar in this, that the latter is, universally, a plea advancing new matter, whereas the plea called the special issue never advances such matter, but merely denies some material allegation, the denial of which is in effect a denial of the entire cause of action.

These several pleas are called indifferently pleas to the action, pleas in bar, or pleas in chief.

2934. Besides the general issue and special pleas there is another kind, known by the name of *sham pleas*. These are pleas known to be false, and are put in merely for the purpose of delay; as, judgment recovered, that is, a plea that judgment has already been recovered for the same cause of action. These pleas are generally discouraged by the courts, and are treated as nullities.¹⁰⁰

An *issuable plea* is one which goes in chief to the merits, upon which the plaintiff may take issue and go to trial; or a demurrer for some defect in substance.

2935. One of the principal rules relating to pleas by confession and avoidance is, that they must give *color*. By color is meant an apparent or *prima facie* right. The meaning of the rule that every plea in confession and avoidance must give color is, that it must admit an apparent right in the opposite party, and, therefore, rely on some new matter, by which that apparent right is defeated. An example will render this familiar. Suppose that an action is brought for the breach of a covenant, and the declaration fully states it, to this declaration the defendant pleads a release; the tendency of this plea is to admit an apparent right in the plaintiff, namely, that the defendant did, as alleged in the declaration, execute the deed on which the action is founded, and breach therein contained, and would, therefore, *prima facie*, be chargeable with damages on that ground; but shows new matter not before disclosed, by which that apparent right is done away, namely, that the plaintiff discharged him by executing to him a release. But suppose, again, that the plaintiff should reply that the release was obtained by duress; here he would admit that the defendant had, *prima facie*, a good defence, namely, that the release was executed as alleged in the plea, and that, therefore, the defendant would be apparently discharged; but he relies on new matter by which the effect of the plea is avoided, namely,

⁹⁸ Comyn, Dig. *Estoppel*, A, 3. As to the necessity of pleading an estoppel *in pais*, see *Hawley v. Middlebrook*, 28 Conn. 527. It must be pleaded under the code in Wisconsin. *Gill v. Rice*, 13 Wisc. 549; but not in Minnesota, *Caldwell v. Auger*, 4 Minn. 217. In trespass whatever admissions as to his own or to the plaintiff's title the defendant may make in his special pleas, they have no effect as estoppels *in pais*, and do not estop him from putting the plaintiff to full proof of his title under the general issue. *Child v. Allen*, 33 Vt. 476.

⁹⁹ *Hempstead v. Easton*, 33 Mo. 142; *Schuhman v. Garratt*, 16 Cal. 100.

¹⁰⁰ *Briggs v. Bergen*, 23 N. Y. 162; *Gostorfs v. Taaffe*, 18 Cal. 385; *Morton v. Jackson*, 2 Minn. 219.

that the release was obtained by duress. The plea in this case would give color to the declaration, and the replication to the plea.

But let it be supposed that the plaintiff had replied that the release was executed by him, but to another person and not to the defendant, it is evident he would not admit the apparent validity of the release, and the replication would be informal as wanting color, because if the release were not to the defendant, there would not exist an apparent defence, requiring the allegation of new matter to avoid it, and the plaintiff might have traversed the plea by denying that the deed stated in the plea was his deed.

The color incident to all regular pleadings in confession and avoidance is called implied color, to distinguish it from another kind, which, though now unusual, is still sometimes inserted in the pleadings, and which is known by the name of express color. The term is usually applied to this latter kind. Color in this sense is defined to be a feigned matter, pleaded by the defendant in an action of trespass, from which a plaintiff seems to have a good cause of action, whereas he has in truth only an appearance or color of cause.¹⁰¹

Express color was used for the purpose of enabling a party to spread out his title upon the record; when the plea wanted implied color then the pleader gave an express one by inserting a fictitious allegation of some colorable title in the plaintiff, which he at the same time avoided by showing a better title in the defendant.¹⁰²

2936. The qualities which express color ought to have are said to be—

It ought to be matter of title doubtful to a jury; as, where the defendant pleads that the plaintiff claiming by a deed of feoffment that is sufficient, for it is a doubt for men unlearned in the law if land ought to pass by deed or by livery.

Color, as such, ought to have continuance, although it wants effect; as, if a defendant give color by color of a deed of demise to the plaintiff for the life of another, who, it appears by the pleadings, was dead before the trespass; this is not sufficient, because the color does not continue, but the defendant may well deny the effect of it, namely, that the plaintiff claims by color of a deed of demise to him for life, whereas nothing passed by it, therefore there is a difference between the continuance of color and the effect of it.

The color ought to be such that if it were of effect it would maintain the nature of the action; as, in an action of assize, color of a freehold ought to be given.

Color ought to be given by the first conveyance, otherwise the conveyance before will be waived; and, therefore, where the defendant derived title to himself, by divers mesne conveyances, and gave color to the plaintiff by one who was last named in the conveyance, this was held insufficient; he should have given color by him who was first named in the conveyance.¹⁰³ In giving color under a feoffment the word charter or deed must be used.¹⁰⁴

2937. *The qualities of pleas in bar* will be understood by considering successively the adaptation of the plea to the nature of the action, and of its conformity to the count; what the plea must answer; what a plea in justification must confess; the singleness of the plea; the certainty of the plea; direct, positive, and argumentative pleas; the capacity of the matter pleaded to be tried; and the truth of the plea.

2938. A plea in bar, it has already been stated, is an answer to the merits

¹⁰¹ Bacon, Abr. *Trespass*, I, 4.

¹⁰² Stephen, Pl. 225; Brown, Entr. 343, for a form of the plea.

¹⁰³ Allen's Case, 2 Rolle, 140. See, as to color, *Leyfield's Case*, 10 Coke, 91; Doct. Pl. tit. Color, 72; Bacon, Abr. *Pleas*, I, 8; Comyn, Dig. *Pleader*, 3, M, 40; Stephen, Pl. 220; Lawes, Pl. 126.

¹⁰⁴ Allen's Case, 2 Rolle, 140.

of the complaint, and always goes in denial of the alleged right of action. It must, therefore, be *adapted to the nature of the action and conformable to the count*. A plea which does not so conform may be treated as a nullity; as, where to an action of assumpsit the plea is *nil debet*, or *non assumpsit* in debt.

The plea must not only be adapted to the nature of the action, but it should be conformable to the count; where, therefore, an assignee of a bankrupt declared that the defendant was indebted to the bankrupt and promised the plaintiff as assignee to pay him, and the defendant pleaded that the cause of action did not accrue to the bankrupt within six years, this plea was held bad on demurrer, because the plea did not answer the promise in the declaration and precluded the plaintiff from proving a promise to himself.¹⁰⁵

2939. Every *plea must answer* all it assumes in the introductory part to answer, and no more. When the plea begins only as an answer to part, the plaintiff cannot demur generally; his course is to take judgment by *nil dicit* for the part not answered.¹⁰⁶ But if the plea profess at its commencement to answer more than it afterward answers, the whole plea is bad and the plaintiff may demur; as, where in trespass the defendant assumes in the introductory part of his plea to justify the assault, battery, and wounding, and afterward merely shows that by virtue of a writ he arrested the plaintiff, but shows no excuse for the wounding.¹⁰⁷ But if the part professed to be answered, which is not, is mere matter of aggravation, the plea need not justify that, and the answer of the matter, which is the gist of the action, will suffice.

2940. When the defendant undertakes to justify an act, he must necessarily admit the facts to be true. Every special plea of justification must, therefore, state circumstances which either excuse the facts complained of or show them to be lawful.¹⁰⁸

2941. Pleas are either single or double; that is, the defendant may rely upon a single ground or plead several matters in his defence. At common law the defendant could only have pleaded one single matter to the whole declaration. This often abridged the justice of the defence and caused perplexity and inartificial pleading, the party endeavoring to crowd as much reasoning as he could in his plea, however intricate, repugnant, or contradictory he might be by so doing. But when the declaration consisted of several parts, the defendant might have pleaded several matters to the different parts; as, not guilty to part of the declaration, and to another part a justification or a release; and when there were several defendants, each of them might have pleaded a single matter to the whole, or several matters to different parts of the declaration. To remedy the inconveniences of the common law the statute for the amendment of the law was enacted,¹⁰⁹ by virtue of which the defendant or tenant in any action or suit, or any plaintiff in replevin, in any court of record, may, with the leave of the said court, plead as many several matters thereto as he shall

¹⁰⁵ 2 Saund. 63, d.

¹⁰⁶ Lawes, Pl. 135, 136; Comyn, Dig. *Pleader*, E, 1; Wells v. Mason, 4 Ill. 38; Wallace v. Bear River Co., 18 Cal. 461; Miller v. Rigney, 16 Ind. 327. Thus the defence of usury goes only to a part of the cause of action, and if answered to the whole, the answer is bad. Webb v. Deitch, 17 Ind. 521.

¹⁰⁷ 1 Saund. 28, n. 1, 2, 3; 296, n. 1; Postmaster v. Reeder, 4 Wash. C. C. 678; Nevins v. Keeler, 6 Johns. N. Y. 65; Van Ness v. Hamilton, 19 Johns. N. Y. 349. If the plea merely denies an immaterial fact and is clearly frivolous, the plaintiff will on motion be allowed judgment, as by default. Lund v. Seamen's Bank, 37 Barb. N. Y. 129.

¹⁰⁸ Gibbon v. Pepper, Salk. 637; Scott v. Shepherd, 3 Wils. 411; 1 Saund. 13, 14, n. 3; 28, n. 1; Stephen, Pl. 219; Blood v. Adams, 33 Vt. 52. In trover, the defendant answered, first, by general denial; second, by admission and justification. It was held that the general denial was controlled by the admission. Derby v. Gallup, 5 Minn. 119.

¹⁰⁹ 4 Anne, c. 16, s. 4, 5.

think necessary for his defence.¹¹⁰ But the statute does not appear to aid duplicity in the same plea.

When several pleas are pleaded in virtue of the statute, in bar to one and the same thing or demand, each of them operates and is treated as if it were pleaded alone; each must stand or fall by itself;¹¹¹ no one of them can have the effect of dispensing with the proof of what is denied by another.

Duplicity must be objected to by special demurrer, and the particular duplicity must be particularly pointed out, and if the plaintiff do not demur, he must reply to both material parts of the plea.¹¹²

2942. By *certainty* in pleading is meant a clear and distinct statement of the facts which constitute the cause of action or ground of defence, so that they can 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 the judgment. Lord Coke states certainty to be of three sorts: certainty to a common intent, certainty to a certain intent in general, and certainty to a certain intent in particular.¹¹³

2943. By certainty to a common intent is to be understood that when the words are used which will bear a natural sense and also an artificial one, or one to be made out by argument and inference, the natural sense shall prevail; it is simply a rule of construction, not of addition. Common intent cannot add to a sentence words which were omitted.

2944. Certainty to a certain intent in general is a greater certainty than the last, and means what upon a fair and reasonable construction may be called certain without recurring to possible facts which do not appear.¹¹⁴

2945. Certainty to a certain intent in particular is that which precludes all argument, inference, or presumption against the party pleading, and is that technical accuracy which is not liable to the most subtle and scrupulous objections, so that it is not merely a rule of construction, but of addition; for when this certainty is requisite, the party must not only state the facts of the case in the most precise way, but add to them such as show that they are not to be controverted, and, as it were, anticipate the case of his adversary.¹¹⁵

2946. A plea 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; for although many matters may be alleged in a declaration by way of recital, or with a *quod cum*, that form must never be used in a plea. And if a plea be positive and direct in the form of its lan-

¹¹⁰ Chitty, Pl. 512; 1 Saund. 337, a; Bacon, Abr. *Pleas*, K, 1; Comyn, Dig. *Pleader*, E, 2, 5; C, 41; Gould, Pl. c. 8, part 1, §§ 18, 25. The modern codes which have followed the New York system do not allow inconsistent pleas. *Derby v. Gallup*, 5 Minn. 119; *Coble v. McDaniel*, 33 Mo. 363.

¹¹¹ *Grills v. Mannell*, Willes, 380; *Kirk v. Nowell*, 1 Term, 125; *Rogers v. Old*, 5 Serg. & R. Penn. 411.

¹¹² *State v. Brown*, 34 Miss. 688; *State v. Mississippi R. R.*, 20 Ark. 495; *Prenatt v. Runyon*, 12 Ind. 174. A plea is not double which denies a part and justifies the rest. *Parker v. Parker*, 17 Pick. Mass. 236. The plea is double only when the defendant pleads several matters each of which constitutes a full defence. He may plead different defences to different parts, or he may plead several facts, all of which are necessary to make up one defence. If the failure of any one of the matters pleaded invalidates the defence, the plea is single. And if one of several defences is not well pleaded, the plea will not be held double. *Thompson v. Oskamp*, 19 Ind. 399.

¹¹³ In the case of *Dovaston v. Payne*, 2 H. Blackst. 530, Buller, J., said he remembered to have heard Mr. Justice Aston treat these distinctions as a jargon of words without meaning; they have, however, long been made, and cannot altogether be departed from.

¹¹⁴ *Spencer v. Southwick*, 9 Johns. N. Y. 317. See 1 Saund. 49, n. 1; *The King v. Lyme Regis*, 1 Dougl. 159.

¹¹⁵ See *Oystead v. Shed*, 12 Mass. 506.

guage, yet if the substance be by way of argument, it is bad ; as, if an action be brought for not delivering up an indenture by which it is stated that Titius granted a manor, it is no plea that Titius did not grant the manor, for it is no answer to the declaration except by way of argument. So in an action of trespass for taking and carrying away the plaintiff's goods, the defendant pleaded the plaintiff never had any goods ; this appears to be an infallible argument that the plaintiff is not guilty, and yet is no plea.¹¹⁶

2947. It is a branch of this rule against argumentativeness that two affirmatives do not make a good issue,¹¹⁷ because the traverse by the second affirmative is argumentative in its nature ; as, if it be alleged by the defendant that a party died seised in fee and the plaintiff allege that he died seised in tail, this is not a good issue, because the latter allegation amounts to a denial of the seisin in fee, but denies it by inference and argument only. This doctrine that two affirmatives do not make a good issue is not taken so strictly, however, but that in some cases the issue will be good if there be a sufficient negative and affirmative in effect, though in the form of words there be a double affirmative ; as, if the defendant plead that he was born in France, and the plaintiff that he was born in England, this is said to be a good issue.¹¹⁸

2948. *Every plea should be pleaded so as to be capable of trial ;* it must, therefore, consist of matter of fact, the existence of which may be tried by a jury on the issue ; or, if it contain matter of law, its sufficiency as a defence may be determined by the court as on demurrer, or by the record itself if it consist of matter of record ; and if in the same plea matter of fact be so mixed with matter of law that they cannot be separated to be tried by the jury or the judge, the plea will be bad.¹¹⁹

2949. As the facts stated in the plea must be proved before the jury when issue is taken upon them, it follows that to be successful as a matter of defence they must not only be true, but capable of proof ; and if it appear judicially to the court on the defendant's own showing that he has pleaded a false plea, this is good cause of demurrer ; as, where an action of debt was brought upon a bond conditioned for the performance of covenants contained in an indenture, and the defendant pleaded 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 was held insufficient.¹²⁰

2950. The general rules which prevail in *the construction of pleas in bar* are : that they be most strongly construed against the defendant ; that a general plea, when bad in part, is bad for the whole ; and that surplusage will not in general vitiate.

2951. The defendant is bound so to state his plea that it will be clearly understood ; and, as he is presumed to state it as favorably for himself as possible, when it has two intendments it is construed against the pleader by adopting that which is most against his interest ; as, if to an action on a bond the defendant plead payment, it shall be intended to have been made after the day

¹¹⁶ Doct. Pl. 41 ; Dy. 43. An argumentative answer is not demurrable ; the remedy is by a motion to strike it out and cause a simple denial to be substituted. *Williams v. Port*, 14 Ind. 569. Formerly it was ground for special demurrer. *Hurt v. Purvis*, 5 Blackf. Ind. 557.

¹¹⁷ Comyn, Dig. *Pleader*, R. 3 ; Coke, Litt. 126, a.

¹¹⁸ Tomlin v. Burlace, 1 Wils. 6. See Coke, Litt. 126, a.

¹¹⁹ The case of the Abbot of Strata Marcella, 9 Coke, 25 ; Lawes, Pl. 138 ; Gould, Pl. c. 6, § 97 ; 1 Chitty, Pl. 520.

¹²⁰ *Smith v. Yeomans*, 1 Saund. 316. See *Coxe v. Higbee*, 6 Halst. N. J. 695 ; *Tucker v. Ladd*, 4 Cow. N. Y. 47 ; *Brewster v. Bostwick*, 6 *id.* 34 ; *Oakley v. Devoe*, 12 Wend. N. Y. 196 ; *Henderson v. Reed*, 1 Blackf. Ind. 347.

appointed for the payment if it do not aver it to be otherwise; but this intention does not obtain if inconsistent with some other part of the plea.¹²¹

2952. When a plea is entire it is a unit; if bad in part, it is of course insufficient for the whole; as, when there are several counts to a declaration, and the defendant pleads the act of limitation to the whole, and it is bad in part, the plea will be insufficient as to the residue.¹²² So if several persons join in a plea, and it is bad as to one, it will not avail for the others.¹²³

2953. *Surplusage* in pleading is a superfluous and useless statement of matter wholly foreign and impertinent to the cause. In general, *surplusagium non nocet*, according to the maxim, *utile per inutile non vitiatur*; therefore, if a man in his declaration, plea, etc., make mention of a thing which need not be stated, but the matter set forth is grammatically right and perfectly sensible, no advantage can be taken on demurrer. In such case the unnecessary matter will be rejected by the court, and the pleadings will be considered as if it were struck out, or had never been inserted.¹²⁴

When, by an unnecessary allegation, the plaintiff shows that he has no cause of action, or the defendant that he has no defence, the opposite party may demur. But as the parties, both plaintiff and defendant, are bound to state their cases formally, if the surplusage be not grammatically right, or it be absurd in sense, or so unintelligible that no sense can be given to it, the adversary may take advantage of the defect on special demurrer.¹²⁵

If the party allege a material matter with an unnecessary detail of circumstances, and the essential and non-essential parts of a statement are in their nature so as to be incapable of separation, the opposite party may include in his traverse the whole matter alleged; and as it is an established rule that the evidence must correspond with the allegations, it follows that the party who has pleaded such unnecessary matter will be required to prove it, and thus he is required to sustain an increased burden of proof, and incurs greater danger of failure at the trial. For example, if in justifying the taking of cattle damage feasant, in which case it is sufficient to allege that they were doing damage to his freehold, he should state a seisin in fee, which is traversed, he must prove a seisin in fee.¹²⁶

2954. *Repugnancy* is where the material facts stated in a declaration, or other pleading, are inconsistent one with another. When the repugnancy relates to a material point it may be taken advantage of by general demurrer; but when it is on some immaterial matter it is a fault of form only, and no advantage can be taken of the defect but by special demurrer.¹²⁷

2955. A plea may be considered under six principal divisions or parts. These refer to the title of the court, the title of the term, the names of the parties, the commencement, the body or substance of the plea, and the conclusion.

2956. At the head of the plea it is usual to state in what court it is pleaded; as, "in the supreme court," or "in the court of common pleas."

2957. Pleas to the jurisdiction, or in abatement, must in general be entitled of the same term as the declaration; and though pleas in bar are also entitled

¹²¹ *Beach v. Bay State Co.*, 30 Barb. N. Y. 433; *Green v. Covillaud*, 10 Cal. 317; *Covington v. Powell*, 2 Metc. Ky. 227; *Bartlett v. Prescott*, 41 N. H. 493.

¹²² *Webb v. Martin*, 1 Lev. 48.

¹²³ 1 Saund. 28, n. 1; *Morton v. Morton*, 10 Iowa, 58.

¹²⁴ *Hall v. Spaulding*, 42 N. H. 259; *Green v. Palmer*, 15 Cal. 411; *Goodpaster v. Porter*, 11 Iowa, 161; *Westcott v. Brown*, 13 Ind. 83; *Kottwitz v. Bagby*, 16 Tex. 656.

¹²⁵ *Gilbert*, Civ. Act. 132; *Lawes*, Pl. 64.

¹²⁶ *Dy*, 365; *Stephen*, Pl. 261; 2 Saund. 206, a, n. 22; 1 *Smith*, Lead. Cas. 328, note; 1 *Greenleaf*, Ev. § 51; 1 *Chitty*, Pl. 524; *Boyce v. Cheshire R. R.*, 42 N. H. 97.

¹²⁷ *Wood v. Harrell*, 14 La. Ann. 61; *State v. Mississippi R. R.*, 20 Ark. 495.

of the same term, yet they may be entitled of the term of which they are pleaded; and when the matter of defence has arisen since the first day of the term, the plea should be entitled specially of a subsequent day.

2958. *The names of the parties* in the margin are not indispensable to a plea; the surnames only are commonly inserted, and that of the defendant is the first stated, as "Roe ats. Doe." These usually correspond with the names in the declaration; or if the defendant plead by another name than that in the declaration, the difference should be shown in the margin; as, "C D, sued by the name of E F, ats. A B."

2959. *The commencement of the plea* contains the name of the defendant, the appearance, the defence, and the *actio non*.

2960. When the defendant pleads a misnomer, care must be taken that he do not by his plea admit that he was sued by his right name; as, "and the said John, sued by the name of James," for by using the word said he admits he is the person sued by the name of James. The plea should have commenced as follows: "and John, sued by the name of James."

2961. After the names of the parties, the appearance and defence should be stated; comes and defends, (*venit et defendit vim et injuriam*.) We have seen when the defendant must appear in person and when he may appear by attorney; ¹²⁸ this may be so stated in the plea.

2962. The defence, it has already been stated, is full defence or half defence, and its form has been explained. Every plea in bar should begin with a defence; and when the plaintiff pleads only to part, and confesses the residue, the defence should be confined to the part intended to be pleaded to, and it ought not to cover the whole charge in the declaration. ¹²⁹

2963. After stating the appearance and defence, a special plea in bar should begin with this allegation, "that the said plaintiff ought not to have and maintain his aforesaid action thereof against him," *actionem non habere debet*. This is technically termed the *actio non*. ¹³⁰ It always alludes to the time of the commencement of the action, and not to the time of the plea. ¹³¹

When the defendant admits that there was once a good cause of action, which he avoids by matter of discharge, *ex post facto*, he should say *actionem non*; but when the matter of the plea shows that there never was a good cause of action, the defendant should say he ought not to be charged, or, *onerari non debet*. When the matter of defence arose before the commencement of the action, *actio non*, etc., is in general the proper commencement; but no matter of defence arising after suit brought can be pleaded generally, but ought to be pleaded in bar of the further maintenance of the suit; and if such matter arise after issue joined, it must be pleaded *puis darrein continuance*; and if after trial, an *audita querela* is the only remedy. ¹³²

In pleading matters in estoppel, it is usual for the defendant at the beginning of his plea to say that the plaintiff ought not to be admitted to allege the fact or facts on which he relies, and which he is precluded from asserting or proving by reason of his having done some act inconsistent with them, instead of saying *actionem non*, or *onerari non*. ¹³³

¹²⁸ Before, 2814.

¹²⁹ Comyn, Dig. *Pleader*, E, 27.

¹³⁰ 1 Chitty, Pl. 531; Stephen, Pl. 394. This formal assertion is unnecessary. *Stafford v. Anders*, 8 Fla. 34.

¹³¹ It is reported in Dougl. 112 that Lord Mansfield said *actionem non* in every case goes to the time of pleading, and not to the commencement of the action; the doctrine has since been overruled. *Evans v. Prosser*, 3 Term, 186; *Le Bret v. Papillon*, 4 East, 502.

¹³² But it is now usual to grant relief on motion. See Bouvier, Law Dict. *Audita querela*; beyond, 3318, n.

¹³³ Lawes, Pl. 140, 141.

2964. *The body or substance of the plea* consists of the inducement, the protestation, the ground of defence, *quæ est eadem*, and the traverse.

When examining the nature of a declaration we considered the use and form of an inducement; and the qualities as to certainty of time, place, and other circumstances have been the subject of our consideration in this chapter. The *protestando* and traverse will be postponed until the subject of replication comes to be discussed.

The ground of defence, or body of the plea, which states the substance of such defence must necessarily depend upon the circumstances of each case; these should be stated with clearness, certainty, and by appropriate words, a quality which in pleading is called neatness.¹³⁴

When, in point of form, in trespass, or other actions, the plea necessarily states the trespass to have been committed at some other time and 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 of which the plaintiff has complained. This allegation is usually termed *quæ est eadem transgressio*, and in that case the plea concludes with a traverse of having been guilty at any other time or place, or the plaintiff may demur. The form is as follows: "Which are the same assaulting, beating, and ill-treating, the said John in the said declaration mentioned, and whereof the said John hath above thereof complained against the said James."¹³⁵

2965. A plea in bar should have a proper *conclusion*; this may be either to the country or with a verification.

2966. When the plea of the defendant tenders an issue to be tried, the formula is called a *conclusion to the country*. The conclusion is in the following words when the issue is tendered by the defendant: "And the said C D puts himself upon the country."¹³⁶ When it is tendered by the plaintiff the formula is as follows: "And this the said A B prays may be inquired of by the country." It is held, however, there is no material difference between these two modes of expression.¹³⁷

The plea should conclude to the country when there is a complete issue between the parties; as, where the general issue is pleaded, or where the defendant simply denies some of the material facts alleged in the declaration. When there is an affirmative on one side and a negative on the other, the conclusion should be to the country; and so it is though the affirmative and negative be not in express words, but only tantamount thereto.¹³⁸

¹³⁴ Lawes, Pl. 62.

¹³⁵ See 1 Saund. 208, n. 2; 2 Saund. 5, a, n. 3; Gould, Pl. c. 3, § 79; Archbold, Civ. Pl. 219.

¹³⁶ That is, upon trial by jury of the country, of or concerning the matter which is put in issue.

¹³⁷ 10 Mod. 166. A plea concluding with a verification, which ought to conclude to the country, will be struck out on motion. *Copperthwait v. Dummer*, 3 Harr. Del. 258.

¹³⁸ *Everitt v. Bartlett*, 1 Spenc. N. J. 117; *Carthrae v. Clarke*, 5 Leigh, Va. 268; 2 Saund. 189; Coke, Litt. 126, a; 1 Saund. 103; 1 Chitty, Pl. 592. There is "much contradiction to be met with in the books, respecting the solution of the general question, When shall a pleading conclude to the country and when with a verification?" says Mr. Hammond; "it may not be unsuitable to bestow a few reflections on it, in this place, and examine, with some minuteness, the principles upon which the adoption of either form is founded.

"When a fact is asserted in an action, and the question whether it be true or false submitted to the jury, their answer terminates the cause, in favor of the one party or the other; so that the whole merits of both the plaintiff's and the defendant's case are bound up in the truth or falsehood of the affirmation. Again: when a party concludes his pleading with a form of words, 'and of this he puts himself upon the country,' or, 'and this he prays may be inquired of by the country,' he puts the question to the jury, whether the

2967. When new matter is introduced on either side, the plea must *conclude with a verification* or averment, in order that the other party may have an opportunity of answering it.¹³⁹ The usual verification of a plea containing matter of fact is in these words: "And this he is ready to verify," etc.¹⁴⁰ In one instance, however, new matter need not conclude with a verification, and then the pleader may pray judgment without it; for example, when the matter pleaded is a negative.¹⁴¹ The reason of this is evident: a negative requires no proof, and it would therefore be impertinent and nugatory for the pleader who pleads a negative matter to declare his readiness to prove it.

When the special plea contains a verification it is usual for the defendant at the conclusion to pray judgment if the plaintiff ought to have or maintain his action against the defendant, which is called the demand or petition of the plea. General issues and such like pleas are not concluded with prayer of judgment, but generally conclude by the defendant's putting himself upon the country. However, this rule is not without exception. When an action is founded on matter of record, in which case the general issue is *nul tiel record*, that there is no such record, the plea must not conclude to the country like other general issues, but with an offer to verify the plea by the record, which, being

fact asserted by his pleading be or be not as he has affirmed it; whereas, if the conclusion is, 'and this he is ready to verify,' he in terms declares to his opponent that he will prove his assertion, provided he is willing to stake the issue of the cause upon the single question, whether it be true or false; in the one case, he leaves his antagonist an option, in the other, he does not. Now, whenever the one party may admit the truth of his adversary's affirmation, and disclose another fact that destroys the effect and conclusiveness which it would otherwise produce, it is obvious that the adversary cannot place the issue of the cause upon the single question of its truth or falsehood, and in such case, therefore, he cannot conclude his pleading to the country. Whilst, on the other hand, if no answer can be given to the affirmation; if it cannot be confessed and avoided; but if the merits of the cause necessarily rest upon and are involved in its truth or falsehood,—such conclusion will be, under the limitations hereafter mentioned, the appropriate form.

"To illustrate this: suppose the defendant pleads infancy to a declaration in assumpsit for money lent; if he has promised to pay the amount since he came of age, the plaintiff may reply the fact, and thereby cut down the defence. Now, if the plea is concluded to the country, the cause must be decided in favor of the one party or the other, as the defendant happens to have been an infant or an adult at the time the original contract was concluded, and the plaintiff is thereby prevented disclosing the fact upon which the real merits of the case depend; hence the plea of infancy must conclude with a verification. But suppose, for the sake of argument, that a promise given by an infant to repay a loan is void; a plea of infancy to an action thereon might, for any thing that has yet appeared, conclude to the jury, because the defence cannot, in any way, be gotten rid of; and as the conclusion subjects the plaintiff to no inconvenience, he has no ground of objection. There is, however, a formal rule of pleading, that two negatives or two affirmatives cannot make an issue, but only an affirmative and a negative combined; because in the two former cases, the averment of the one party does not contradict that of the other in direct and positive terms, but only in an argumentative way; therefore, the plea of infancy in the case last supposed should conclude with a verification; not to give the plaintiff an opportunity of avoiding its effect, but that the issue between him and the defendant may, for form's sake, be taken by a direct traverse, hence comes the maxim, that all general issues must conclude to the country, because, in the first place, their effect cannot be avoided, and in the second, they directly negative the facts affirmed by the declaration.

"Upon the whole, therefore, the rule, applicable alike to all cases, will be this: where a pleading cannot be avoided, but the merits of the cause necessarily rest upon and are involved in the truth or falsehood of the facts therein disclosed, it will conclude to the country, provided it is a negative when the pleading which it answers is an affirmative, and an affirmative when the latter is a negative; if either of these essentials is wanting, the pleading will conclude with a verification." Hammond, Nisi P. 97.

¹³⁹ Hayman v. Gerrard, 1 Saund. 103, n. 1; Comyn, Dig. *Pleader*, E; Curry v. Stephenson, Carth. 337; Cowper v. Towers, 1 Lutw. 101; Filewood v. Popplewell, 2 Wils. 66; Chandler v. Roberts, Dougl. 60; Henderson v. Withy, 2 Term, 576.

¹⁴⁰ See Lawes, Pl. 144; 1 Chitty, Pl. 537, 616; Willes, 5; 3 Sharswood, Blackst. Comm. 309.

¹⁴¹ Harvey v. Stokes, Willes, 5.

matter of law, ought to be produced or proved, not before the jury, but the judge.¹⁴²

Every plea ought to conclude in the manner in which it is to be tried, for this reason: a plea to the writ should conclude with reference to the writ, a common plea in bar, to the action; and in a plea of matter of estoppel the defendant ought to conclude with relying upon the estoppel, *et sic de similibus*.¹⁴³

¹⁴² Lawes, Pl. 148.

¹⁴³ Coke, Litt. 303, b. A plea, concluding to the country, when it should conclude with a verification, is defective in form merely; and such a defect, under the statute of amendments in Rhode Island, will not warrant a judgment upon demurrer against the defendants, but the court will order the conclusion to be amended. *Brown v. Foster*, 6 R. I. 564.

CHAPTER VIII.

THE REPLICATION AND SUBSEQUENT PLEADINGS.

- 2968–2996. Replications.
 - 2969. General nature of replications.
- 2970–2989. The form of the replication.
 - 2971. The title of the court and term.
- 2972–2989. Replication to a plea containing new matter.
 - 2973. The commencement of the replication.
- 2974–2988. The body of the replication.
 - 2975. Replication by matter of estoppel.
- 2976–2986. The denial of the plea.
 - 2977. Denial of the whole plea, or *de injurid.*
- 2978–2985. Denial of part of the plea.
 - 2979. What facts ought to be traversed or denied.
- 2980–2985. The modes of special denial.
 - 2981. The nature and kinds of protestations.
 - 2984. The nature of a traverse.
 - 2985. The kinds of traverses.
 - 2986. Denying the effect of the plea and showing a particular breach.
 - 2987. Replication by confession and avoidance.
 - 2988. A new assignment.
 - 2989. The conclusion of the replication.
- 2990–2996. The qualities of a replication.
 - 2991. It must answer the plea.
 - 2992. It must conform to the declaration.
 - 2995. It must be certain.
 - 2996. It must be single.
 - 2997. Subsequent pleadings.
 - 2998. Rejoinders.
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- 3000–3015. Issues.
 - 3001–3004. The qualities of issues.
 - 3002. They must be upon an affirmative and negative.
 - 3003. They must be on a single and certain point.
 - 3004. They must be on a material point.
 - 3005–3014. The kinds of issues.
 - 3006. Material issues.
 - 3007. Immaterial issues.
 - 3008. Issues in law.
 - 3009. Issues in fact.
 - 3011. Formal and informal issue.
 - 3013. Actual issues.
 - 3014. Feigned issues.
 - 3015. How issues are procured.
 - 3016. Repleaders.
 - 3017. Judgment *non obstante verdicto.*
- 3018–3022. Pleas *puis darrein continuance.*
 - 3019. When allowed.

3020. When they must be pleaded.
 3021. Effect of pleas *puis darrein continuance*.
 3022. Form of a plea *puis darrein continuance*.
 3023-3030. Demurrers.
 3024-3026. The form of demurrers.
 3025. General demurrers.
 3026. Special demurrers.
 3027. What pleadings are demurrable.
 3028. The effect of a demurrer.
 3029. The judgment on a demurrer.
 3031. A case stated.
 3031, n. Modern codes of pleading.

2968. Having considered the nature, form, and qualities of pleas in bar, the next matter to be discussed is the nature, form, and qualities of replications. A *replication* is the plaintiff's answer to the defendant's plea.

2969. When the defendant has pleaded and exhibited his defence, the plaintiff should consider whether it is or is not sufficient in law to defeat the action. If he believes that he cannot support his action, he should either obtain leave to discontinue, or he may enter a *nolle prosequi* as to the whole or a part of the cause of action, unless there has been a demurrer for a misjoinder; if, on the contrary, he finds he can maintain his action, he must reply to the plea of the defendant.¹

The replication is in general governed by the plea. When the latter concludes to the country, the plaintiff must in general reply by adding a *similiter*; that is, he must also submit the matter to be tried by a jury, without adding any new matter to it, and must stand or fall by his declaration.² In such case he merely replies that as the defendant has put himself upon the country, he, the plaintiff, does so likewise, or the like. Hence this sort of replication is called the *similiter*, that having been the effective word when the proceedings were in Latin.³

When the defendant's plea does not conclude to the country, nor with a verification, as, when the plaintiff declares on a judgment or other matter of record, and the defendant pleads *nul tiel record*, as that plea does not conclude to the country, though it contains a direct denial of the matter contained in the declaration, the plaintiff in his replication affirms the existence of the record, and concludes by praying an inspection of it, if it be a record remaining in the said court in which the action is brought; or by giving a day to produce it, if it be a record of a different court.

When the plea of the defendant does not amount to an issue or direct contradiction of the declaration, but is collateral to it, the plaintiff may plead again and reply to the defendant's plea, either by taking issue upon a special traverse taken in the plea, or by directly denying or traversing the plea, or by alleging some new matter in contradiction of the matter contained in it, or by confessing and avoiding it by some new circumstance or distinction consistent with the declaration, or by concluding the defendant from pleading the matter contained in the plea by some matter of estoppel.⁴

¹ A replication to a plea waives a demurrer, and a replication which does not rely on an estoppel waives it. *Warner v. Bledsoe*, 4 Dan. Ky. 73.

² In some states, as in Pennsylvania, the plaintiff may add new counts to his declaration, even on trial; but this is allowed by statute.

³ 1 Chitty, Pl. 549; Archbold, Civ. Pl. 250.

⁴ Under the new codes adopted in many of the states the replication remains in name though its function is somewhat altered. In general a replication is needed only where new matter is pleaded in the answer. If the answer only operates as a traverse of the

2970. Having considered in the last section the general nature of a replication to a plea concluding to the country, and to a plea of *nul tiel record*, there remain now to be discussed the general rules with regard to *the form of a replication*.

2971. It is usual to entitle a replication in the court and of the term of which it is pleaded, and the names of the parties are stated in the margin thus: "A B against C D." When 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, it should be suggested and a special imparlance may be stated in the replication.

2972. *The replication to a plea containing new matter* and a verification may be considered with reference to the commencement, to the body or substance of the replication, and to the conclusion.

2973. *The commencement of the replication* to a defendant's plea concluding with a verification contains a general denial of the effect of the defendant's plea, and begins with an allegation technically termed the *precludi non*. It is usually in the following form: "And the said A B, as to the plea of the said C D, by him first 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 the aforesaid action thereof against the said C D, because he says that," etc.

The rule that a plea in the commencement should be confined to that part which is intended to be answered equally applies to a replication. When the body of the replication, therefore, contains an answer only to a part of the plea, the commencement should recite that part intended to be answered; for should the commencement assume to answer the whole plea, and the body contain an answer only to part, the whole replication will be insufficient, and so *vice versa*.⁵

2974. *The body of the replication* contains matter of estoppel, a denial of the plea, a confession and avoidance of the plea, or a new assignment.

2975. When the plaintiff can reply *matter of estoppel*, and such matter does not appear in the declaration or any anterior pleading, the replication should set it forth, and for this purpose care must be observed to have the proper commencement and conclusion. If the matter appear in the pleadings, the plaintiff may demur to the plea.⁶

2976. The replication may directly deny or traverse the truth of the plea, either in whole or in part, when it neither concludes the defendant by matter of estoppel nor confesses and avoids the plea. The denial is either to the whole plea, or *de injuriâ*, etc.; to part of the plea; or to the effect of the plea, and showing a particular breach.

2977. When the action is founded on a contract and in replevin, the replication denies the facts, or one of the facts alleged in the plea, in express words. *A replication de injuriâ*, which will be explained directly, till lately could not be replied in such cases.⁷

facts stated in the declaration, no replication is needed, but issue is joined, the plaintiff maintaining the facts set up in his declaration, and the defendant denying them. And new matter may be set up which operates only as a traverse. In such case no replication is filed. But if new matter is set up, which operates by way of confession and avoidance, then the plaintiff must reply and join issue on such new matter. *Fristh v. Caler*, 21 Cal. 71.

⁵ *Manchester v. Vale*, 1 Saund. 28, n. 3.

⁶ If a replication has the substance, but not the peculiar commencement and conclusion of a pleading by way of estoppel, it will be held good on general demurrer. *Cecil v. Early*, 10 Gratt. Va. 198.

⁷ *Coffin v. Bassett*, 2 Pick. Mass. 351.

But in actions for torts, as trespass, or an action on the case for slander, a replication containing a general denial of the whole plea frequently occurs; it is called a replication *de injuriâ suâ propriâ absque tali causâ*, or *de son tort demesne sans tiel cause*.⁸ This replication puts in issue, and compels the defendant to prove every material allegation in his plea, and it is, therefore, frequently advantageous to the plaintiff to adopt it, when by the rules of pleading it is allowed. Though *de injuriâ* puts in issue the whole of the defence contained in the plea,⁹ yet this rule is subject to an exception, that if the plea state some authority in law, which, *primâ facie*, would be a justification of the acts complained of, the plaintiff will not be allowed, under *de injuriâ*, to show an abuse of that authority, so as to convert the defendant into a tortfeasor *ab initio*.¹⁰

The import of this replication is to insist that the defendant committed the act complained of from a motive and impulse altogether different from that insisted on in the plea. For example, if the defendant has justified a battery under a writ of *capias*, having averred, as he must do, that the arrest was made by virtue of the writ, the plaintiff may reply *de injuriâ suâ propriâ absque tali causâ*, that the defendant did the act of his own wrong, without the cause by him alleged. This replication, then, has the effect of denying the alleged motive contained in the plea, and to insist that the defendant acted from another, which was unlawful, and not in consequence of the one insisted upon in the plea.¹¹

The replication *de injuriâ* is allowed only when the plea consists merely of matter in excuse for a tort or injury committed.¹² It can never be insisted on as giving a right.¹³

But in England, where the extent of the general issue has been confined in actions on contracts, and special pleas have become common in *assumpsit*, it has become desirable that the plaintiff, who has but one replication, should put in issue the several allegations which the special pleas were found to contain, for unless he could do this he would labor under the hardship of being frequently compelled to admit the greater part of an entirely false story. It became important, therefore, to ascertain whether *de injuriâ* could be replied to cases of this description; and after numerous cases which were presented for adjudication it was finally settled that *de injuriâ* may be replied in *assumpsit* when the plea consists of matters of excuse.¹⁴

The form of the replication is "*precludi non*, because he says that the said defendant at the same time when, etc., of his own wrong, and without the cause by him in his said second plea alleged, committed the said trespass in the introductory part of that plea, in manner and form as the said plaintiff hath

⁸ Crogate's Case, 8 Coke, 67.

⁹ 5 Barnew. & Ald. 420; Barnes v. Hunt, 11 East, 451; 10 Bingh. 157.

¹⁰ See Smith, Lead. Cas. 53 to 61; Sampson v. Henry, 11 Pick. Mass. 379. There is considerable variance on this point, and the English cases support the statement in the text. And it is undoubtedly true that this replication is insufficient where the plaintiff wishes to set up some new act not identified with the cause of action set up in the declaration; this must be replied specially, being in the nature of a novel assignment. Thus if the plaintiff declares against a sheriff for trespass, he cannot under a reply of *de injuriâ* show merely a special abuse of authority not set up in the declaration. But for an assault by one in authority, no special replication is necessary to a plea of *moderate castigavit*, for this puts in issue the whole matter. Hannen v. Edes, 15 Mass. 351.

¹¹ Stephen, Pl. 186; Lawes, Pl. 151; 2 Chitty, Pl. 523, 642; Hammond, Nisi P. 120, 121; Archbold, Civ. Pl. 264; Comyn, Dig. *Pleader*, F, 19.

¹² See Hammond, Nisi P. 120-126; Coburn v. Hopkins, 4 Wend. N. Y. 577.

¹³ Plumb v. McCrea, 12 Johns. N. Y. 491.

¹⁴ 3 Crompt. M. & R. Exch. 65; 2 Bingh. N. c. 579; 4 Dowl. 647.

above in his said declaration complained against the said defendant, and this the said plaintiff prays may be inquired of by the country," etc.¹⁵

2978. In those cases where the plaintiff cannot reply *de injuriâ* to the whole plea, but must deny some particular fact or facts, he is obliged to ascertain what facts he ought to deny and the mode of denying them.

2979. It is a general rule that a party may traverse or deny any material allegation in his opponent's pleadings, although it may have been unnecessary to have stated it precisely as laid; but when the allegation is not material it cannot be traversed.

2980. *The modes of traversing facts* by the replication are, by the plaintiff protesting some fact or facts, denying the other, and concluding to the country; by at once denying the particular fact intended to be put in issue, and concluding to the country; and by formally traversing a particular fact, and concluding with a verification.

2981. As the replication must be single when the plea of the defendant, or indeed, 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 stated in the declaration, the plaintiff may protest the delivery in satisfaction, and reply that he did not accept the wine in satisfaction.¹⁶

A *protestation*, or, as it is called in pleading, a *protestando*, has been defined to be a saving to the party who takes it from being concluded by any matter alleged or objected against him upon which he cannot join issue. It is only an exclusion of a conclusion, for it merely prevents the effects of such allegations in another action.¹⁷

Matter on which issue may be joined, whether it be the gist of the action, plea, replication, or other pleading, cannot be taken by protestation;¹⁸ although a man may take by protestation matter that he cannot plead; as, in an action for taking goods of the value of one hundred dollars, the defendant may make a protestation that they were not worth more than fifty dollars. It is obvious that a protestation repugnant to or inconsistent with the gist of the plea, etc., cannot be of any benefit to the party making it.¹⁹

It is also idle and superfluous to make protestation of the same thing that is traversed by the plea, or of any matter of fact which must depend upon another fact protested against; as, that Peter made no will, and that he made no executor.²⁰

Protestations are of two kinds:

When a man pleads any thing which he dares not directly affirm, or cannot plead without making his plea double; as, if conveying to himself by his plea a title to land, the defendant ought to plead divers descents from several persons, but he dares not affirm that they were all seised at the time of their death;

¹⁵ 1 Chitty, Pl. 585. A replication which sets out with a *precludi non* as to the second and third counts, where the plea is to the whole declaration, is defective. *Slocumb v. Holmes*, 2 Miss. 139. A replication *de injuriâ* wrongly pleaded must be demurred to; the defect is cured by verdict.

¹⁶ Bacon, Abr. *Accord*, C; Stephen, Pl. 236. To an action for work and labor the defendant pleaded a submission and award. The replication, after protesting against the submission, traversed the award, and it was held that the submission was admitted by the replication. *Stipp v. Washington Co.*, 5 Blackf. Ind. 16.

¹⁷ Plowd. 276, b; Finch, Law, 359, 366; Lawes, Pl. 141; 1 Chitty, Pl. 590; Stephen, Pl. 235.

¹⁸ Plowd. 276, b.

²⁰ Plowd. 276, b.

¹⁹ Brooke, Abr. *Protestation*, Pl. 1, 5.

or, although he could do so, it would make his plea double to allege two descents when one descent would be a sufficient bar; then the defendant ought to plead and allege the matter by introducing the word "protesting;" thus protesting that such an one died seised, etc., and this the adverse party cannot traverse.

The other sort of protestation is when a person is to answer two matters, and yet he can only plead to one of them; then in the beginning of his plea or replication he may say "protesting," or "not acknowledging any such part of the matter to be true," and add, "but for his plea (or replication) in this behalf," etc.; and so take issue, or traverse, or plead to the other part of the matter; and by this he is not concluded by any of the rest of the matter which he has by protestation so denied, but may afterward take issue upon it.²¹

The common way of making a protestando is in these words: "Because protesting that," etc., excluding such matters of the adversary's pleading as are intended to be excluded in the protestando if it be matter of fact; or if it be against the legal sufficiency of his pleading, "Because protesting that the plea by him above pleaded in bar, or by way of reply, or rejoinder, as the case may be, is wholly insufficient in law."

No answer is necessary to a protestando, because it is never to be tried in the action in which it is made, but of such as is excluded from any manner of consideration in that action.²²

2982. A second kind of replication is that which at once denies the particular fact intended to be put in issue, and concludes to the country without any preamble and without any formal traverse. On account of its conciseness it is frequently adopted in practice.

2983. When, in a replication or other pleading, it is necessary to show title in the plaintiff or to introduce new matter inconsistent with that stated by the other party,²³ or when there are two affirmatives which do not impliedly negative each other, or a confession and avoidance by argument only, a traverse is necessary, for otherwise the pleadings would run to infinite prolixity.²⁴

2984. Before proceeding to the further discussion of this subject it will be proper to inquire into *the nature and use of a traverse*. The word traverse, in pleading, signifies to deny or controvert any thing which is alleged in the declaration, plea, replication or other pleadings;²⁵ there is no real distinction between traverses and denials; they are substantially the same. However, a traverse in the strict technical meaning and the more ordinary acceptation of the term signifies a direct denial in formal words, "without this, that," etc.²⁶

All issues are traverses, although all traverses cannot be said to be issues, and the difference is this; issues are where one or more facts are affirmed on one side, and directly and merely denied upon the other.

It is a general rule that when a traverse is well tendered on one side it must be accepted on the other, and hence it follows that there cannot be a traverse upon traverse if the first traverse be material. But in cases where the first is immaterial there may be a traverse upon a traverse;²⁷ and when the plaintiff might be ousted of some right or liberty the law allows him, there may

²¹ Holdipp *v.* Otway, 2 Saund. 103, a, n. 1. See 1 Chitty, Pl. 534; Archbold, Civ. Pl. 245; Comyn, Dig. *Pleader*, N; Viner, Abr.; Stephen, Pl. 235.

²² Lawes, Pl. 143. Protestations are no longer allowed. 3 Sharswood, Blackst. Comm. 312.

²³ Comyn, Dig. *Pleader*, F, 12, G, 3.

²⁴ Bennett *v.* Filkins, 1 Saund. 22, n. 2; Comyn, Dig. *Pleader*, G; Bacon, Abr. *Pleadings*, H.

²⁵ Lawes, Pl. 116, 117.

²⁶ Summary of Pleadings, 75; 1 Chitty, Pl. 576, n. a.

²⁷ Gould, Pl. c. 7, § 43.

be a traverse upon a traverse, although the first traverse include what is material.²⁸

A traverse upon a traverse is one growing out of the same point or subject matter as is embraced in a preceding traverse on the other side; as, where the defendant pleads title under a devise from Paul, alleging that he died seised in fee, the plaintiff replies that Paul died seised in tail, *absque hoc* that he died seised in fee with a verification, the defendant cannot then rejoin that Paul died seised in fee, *absque hoc* that he died seised in tail, but must join the plaintiff's traverse by re-affirming that Paul died seised in fee, as alleged in the plea, and conclude to the country; for both traverses would go to the same point, namely, whether or not Paul died seised in fee, the only material point in controversy, and to the determination of which the first traverse is precisely adapted.²⁹

2985. Traverses may be divided into three kinds:

A *general traverse* is one preceded by a general inducement, and denying in general terms all that is last before alleged on the opposite side, instead of pursuing the words of the allegations which it denies. Of this sort of traverse the replication *de injuriâ*, in answer to a justification, is an example.³⁰

Special pleas in denial of the declaration are usually called *special traverses*. A special technical traverse begins in most cases with the words *absque hoc*, (without this,) which words in pleading are a technical form of negation.³¹ It is a general rule that every matter which is of the substance or gist of the plaintiff's action or the defendant's defence, or is material to it, is traversable; but matters of inducement, and such as are not material to the action or defence, cannot be traversed. It is also a general rule that a special traverse must have a proper and sufficient inducement; for if there be no inducement to a special traverse, the issue will be a negative pregnant, by which term is meant such negative expression in pleading as may imply or carry within it an affirmative. This is faulty, because the meaning of such form of expression is ambiguous; for example, in trespass for entering the plaintiff's house the defendant pleaded that the plaintiff's daughter had licensed him to do so, and that he entered by that license. The plaintiff replied that he did not enter by her license. This was considered a negative pregnant, and it was held that the plaintiff should have pleaded the entry by itself, or the license by itself, and not both together.³²

It may be observed that this form of traverse may imply and carry within it that the license was given, though the defendant did not enter by that license. It is therefore in the language of pleading said to be pregnant with the admission, namely, that a license was given; at the same time, the license is not expressly admitted, and the effect, therefore, is to leave it in doubt whether the plaintiff means to deny the license, or that the defendant entered by virtue of that license. It is this ambiguity which appears to constitute the fault.³³

This rule against a negative pregnant appears, in modern times at least, to have received no very strict construction; for many cases have occurred in

²⁸ Gould, Pl. c. 7, § 44; Comyn, Dig. *Pleader*, G, 18; Bacon, Abr. *Pleas*, H, 4.

²⁹ Gould, Pl. c. 7, § 42; 1 Chitty, Pl. 597.

³⁰ Bacon, Abr. *Pleas*, H, 1; Stephen, Pl. 171.

³¹ Lawes, Pl. 116 to 120. These words, "without this," are calculated to convey the most pointed denial, by putting, as it were, the matter denied out of the plea; but any other words which are equipollent or equivalent, and import an express denial or exclusion of the matter intended to be traversed, are sufficient. A traverse, by the words *et non*, is therefore good; as, if a party pleads that Peter was taken into custody by a warrant returnable one day, and not by a warrant returnable another day, it is a good traverse of his having been taken on a warrant returnable on the latter day.

³² *Myn v. Cole*, Croke, Jac. 87; *Briggs v. Mason*, 31 Vt. 433; *Charleston Co. v. Willey*, 16 Ind. 34.

³³ Style, Pr. Reg.; Stephen, Pl. 381; Gould, Pl. c. 6, §§ 29-37.

which, upon various grounds of distinction from the general rule, that form of expression has been considered free from objection.³⁴

A traverse commencing with the words, "without this," is special, because when it thus commences the inducement and the negation are regularly both special; the former consisting of new matter, and the latter pursuing, in general, the words of the allegation traversed, or at least those of them which are material. For example, if the defendant pleads title to land in himself by alleging that Peter devised the land to him, and then died seised in fee, and the plaintiff replies that Peter died seised in fee intestate, and alleges title in himself as heir of Peter without this, that Peter devised the land to the defendant, the traverse is special. Here the allegation of Peter's intestacy, etc., forms the special inducement, and the *absque hoc*, with what follows it, is a special denial of the alleged devise; that is, a denial of it in the terms of the allegation.

After traversing any allegation in the pleading of the adversary it is usual to say, "in manner and form as he has in his declaration, plea, or replication, etc., in that behalf alleged," which is as much as to include in the traverse not only the mere fact opposed to it, but that in the manner and form in which it is stated by the other party; thus, in the case before mentioned of traversing the party's title by devise, the defendant probably said without this that the ancestor devised *modo et forma*, etc., as the above form may have been concisely expressed in the language of the old entries when the proceedings were in Latin. These words, however, only put in issue the substantial statement of the manner of the fact traversed, and do not extend to the time, place, or other circumstances attending it, if they were not originally material and necessary to be proved as laid.³⁵

A special traverse must not conclude to the country, but with a verification.

The third kind of traverse is called a *common traverse*. This kind differs from those commonly called traverses, principally in this, that it is preceded by no inducement, general or special; it is taken without an *absque hoc*, or any similar words, and is simply a direct denial of the adverse allegations in common language, and always concludes to the country. It can be used only when an inducement is not requisite, that is, when the party traversing has no need to allege any new matter. This traverse derives its name, it is presumed, from the fact that common language is used, and that it is more informal than the other traverses.

2986. It is frequently proper in a replication, without confessing and avoiding the plea, to deny its effect, and show a particular breach of the contract declared upon; this occurs often in debt on bond, conditioned to perform covenants and the like. When the defendant pleads matter in excuse which admits of non-performance, it is sufficient if the plaintiff denies the plea, and he need not assign a breach in his replication; it must be remembered, however, that this rule does not apply to an action brought upon an award, which stands upon a particular ground. But in other cases, when the defendant has pleaded performance, the replication must state the breach with particularity, and it should conclude with a verification, so that the defendant may have an opportunity of answering it.³⁶

2987. The replication may, in the next place, admit, either in words or in effect, the fact alleged in the plea, and avoid the effect of it by stating new matter. This replication is common in practice; as, where infancy is pleaded,

³⁴ Comyn, Dig. *Pleader*, R, 6; Stephen, Pl. 383; Lawes, Pl. 114.

³⁵ Bacon, Abr. *Pleas*, G, 1; Lawes, Pl. 120. See Stephen, Pl. 213; Gould, Pl. c. 6, § 22; Dane, Abr. Index; Bouvier, Law Dict. *Traverse*; Bacon, Abr. *Verdict*, P.; Viner, Abr. *Traverse*.

³⁶ Comyn, Dig. *Pleader*, F, 14, 15.

the plaintiff may reply that the goods were for necessaries, or that the defendant, after he came of lawful age, ratified and confirmed the promise.

In form it is usual 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," etc.

When the replication completely confesses and avoids the defendant's plea it must not conclude with a traverse; in such case there is no occasion to give color to the defendant in this replication; still, as it introduces new matter, it must conclude with a verification, so that the defendant may have an opportunity of answering it.³⁷

2988. When the plaintiff's declaration is conceived in general terms, or when, from the nature of the action, it is so framed as to be capable of covering several injuries, the defendant may not be sufficiently guided by the declaration to the true cause of complaint, and is, therefore, led to answer a different matter from that which the plaintiff had in view. For example, it may happen that the plaintiff has been twice assaulted by the defendant, and one of the assaults is justifiable, it being in self-defence, while the other may have been committed without legal excuse. Supposing the plaintiff to bring an action for the latter; from the generality of the statement in the declaration the defendant is not informed to which of the two assaults the plaintiff means to refer. The defendant may, therefore, suppose, or affect to suppose, that the first is the assault intended, and will plead *son assault demesne*. This plea the plaintiff cannot safely traverse, because an assault was committed by the defendant under the circumstances of excuse here alleged; the defendant would have a right under issue joined upon such traverse to prove the circumstances, and to presume that such assault, and no other, was the cause of action. The plaintiff, therefore, in the supposed case not being able safely to traverse, and having no ground either for demurrer or for pleading in confession and avoidance, has no cause, but by a new pleading, to correct the mistake occasioned by the generality of the declaration, and to declare that he has brought his action not for the first, but for the second injury or assault; and this is called a *new* or *novel assignment*.³⁸

A new assignment is said to be in the nature of a new declaration;³⁹ it seems, however, more properly considered, as a repetition of the declaration,⁴⁰ differing only in this, that it distinguishes the true ground of complaint as being different from that which is covered by the plea. Being in the nature of a new or repeated declaration, it is consequently to be framed with as much certainty or specification of circumstances as the declaration itself. In some cases, indeed, it should be even more particular.⁴¹

As the object of a new assignment is to correct a mistake occasioned by the generality of the declaration, it always occurs in answer to a plea, and is, therefore, in the nature of a replication. It is not used in any other part of the pleading.

A new assignment may be made in most actions whether in form *ex contractu* or *ex delicto*, but it most frequently happens in trespass. In replevin, as the plaintiff must show the place with certainty where the taking was, it is said there can be no new assignment as to the place.⁴²

³⁷ Hayman v. Gerrard, 1 Saund. 103, n.

³⁸ See the form of a replication by way of new assignment, in Stephen, Pl. 243.

³⁹ Bacon, Abr. *Trespass*, I, 4, 2; Greene v. Jones, 1 Saund. 299, c.

⁴⁰ 1 Chitty, Pl. 602.

⁴¹ Stephen, Pl. 245; Bacon, Abr. *Trespass*, I, 4.

⁴² Corkley v. Pgrave, Freem. 238.

Several new assignments may occur in the same series of pleading. Thus, in the example above mentioned, if it be supposed that three distinct assaults had been committed, two of which were justifiable, the defendant might plead as above to the declaration, and then, by way of plea to the new assignment, he might again justify, in the same manner, another assault; upon which it would be necessary for the plaintiff to new assign a third, and this upon the first principle by which the first new assignment was required.⁴³

As the new assignment introduces new matter, its conclusion must be with a verification in order that the defendant may have an opportunity of answering it.

The new assignment is in the nature of a new declaration, and the defendant is required to plead to it precisely as to a declaration; and as the plaintiff avers that the new assigned trespasses are other and different from those in the plea, he waives those which the defendant has justified, and it is not necessary to plead over again to the new assignment any matter of justification necessarily covered by the first plea.⁴⁴

The plaintiff may reply precisely as to pleas to a declaration; and if the plea be such as to require a new assignment, the plaintiff should again new assign.⁴⁵

2989. The general rules which relate to *the conclusion of a replication* are, that when it wholly denies the defendant's plea, consisting of matter of fact, it should conclude to the country.⁴⁶ And when there is an affirmation on one side, and a negative denial on the other, the replication, as indeed all other pleading in such case, must conclude to the country, although the affirmative and negative be not in express words, but tantamount thereto. When new matter is alleged in a replication it should conclude with an averment in order to give the defendant an opportunity of answering it, and an appropriate prayer of judgment for debt, or damages only, according to the form of action.⁴⁷

2990. Many of the rules which apply to the qualities of pleas are alike applicable to *the qualities of replications*. A replication must answer so much of the plea as it professes to answer, and if it be bad in part, it is bad for the whole, be conformable to, and not depart from the count, be like a plea, certain, direct, and positive, and not argumentative, and also triable, and be single.

2991. To prevent a chasm or interruption in the pleadings, which in law is called a *discontinuance*, it is a rule that every pleading must answer the whole of what is adversely alleged.⁴⁸ A replication must, therefore, answer so much of the plea which it professes to answer, or it will be a discontinuance. It is a rule, also, that if an entire replication be bad in part, it is bad for the whole; as, if to 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 defendants as merchants; if this replication be bad as to one of the counts, it is bad as to the other; but this rule does not apply when the matter objected to is mere surplusage.⁴⁹

⁴³ 1 Chitty, Pl. 614; *Greene v. Jones*, 1 Saund. 299, c.

⁴⁴ Bacon, Abr. *Trespass*, I, 4, 2.

⁴⁵ *Greene v. Jones*, 1 Saund. 299, c; 9 Wentworth, Pl. Index; 2 Chitty, Pl. 723.

⁴⁶ The proper form is, "this he prays may be inquired of by the country." *Hartwell v. Hemmenway*, 7 Pick. Mass. 117. Where a plea consists solely of matter of record, *e. g.*, "there is no such judgment," the replication should reassert the record, and pray that it may be inspected by the court; to conclude to the country is erroneous. *Share v. Becker*, 8 Serg. & R. Penn. 239. A replication to a plea affirming diligence should negative the diligence and conclude to the country. *Walker v. Johnson*, 2 M'Lean, C. C. 92.

⁴⁷ *Hampshire Bank v. Billings*, 17 Pick. Mass. 87; *Commissioners v. Brevard*, 1 Brev. So. C. 11.

⁴⁸ Comyn, Dig. *Pleader*, E, 1, F, 4; *Manchester v. Vale*, 1 Saund. 28, n. 3.

⁴⁹ Comyn, Dig. *Pleader*, F, 25.

2992. The replication must not depart from the declaration in any material matter; this rule equally affects rejoinders and subsequent pleadings. A *departure*, in pleading, takes place when a party quits or departs from the case or defence which he has first made, and has recourse to another.⁵⁰ The following will illustrate what is a departure in a replication: in assumpsit the plaintiffs, as executors, declared on several promises alleged to have been made to the testator in his lifetime; the defendant pleaded that she did not promise within six years before the obtaining of the original writ of the plaintiffs: to this the plaintiffs replied that within six years before they obtained the original writ the letters testamentary were granted to them, whereby the action accrued to them, the said plaintiffs, within six years. This was held to be a departure, because in the declaration they had laid the promise to the testator, but, in the replication, alleged the right of action to accrue to themselves as executors.⁵¹

A departure in pleading is never allowed, for the record would by such means be spun out into endless prolixity; he who had departed from and relinquished his first plea might resort to a second, third, fourth, or even a fortieth defence; pleading would by such means become infinite. He who had a bad cause would never be brought to issue, and he who had a good one would never obtain the end of his suit.⁵²

Departures more frequently happen in rejoinders than in replications; they may take place in all pleadings subsequent to the plea.

2993. A distinction must be observed between a departure and those cases where matter is pleaded which maintains the previous pleadings; as, in trespass for taking a horse, if the defendant plead he took him for a distress damage feasant, the plaintiff may reply that the defendant afterward used the horse, which shows that he was a trespasser *ab initio*.⁵³

2994. The only way to take advantage of a departure is by demurrer; and if, instead of demurring, the party plead over, and take issue upon the pleading containing the departure, and it is found against him, the verdict will not be disturbed on this account, if the matter pleaded by way of departure is a sufficient answer, in substance, to what is pleaded by the opposite party; that is, if it would have been sufficient if pleaded in the first instance.⁵⁴

2995. *Certainty* in a replication is as requisite as in a declaration or a plea, though certainty to a common intent is in general sufficient. When the replication is only to a part of the plea, the part alluded to must be pointed out with certainty.

2996. It is a rule that the replication must not contain two answers to the same plea, or be double. It ought to be *single*, because the plaintiff ought not

⁵⁰ Coke, Litt. 304, a; Richards v. Hodges, 2 Saund. 84, a, n. 1; 1 Chitty, Pl. 619; Stephen, Pl. 405, 406; Haley v. M'Pherson, 3 Humphr. Tenn. 104; M'Aden v. Gibson, 5 Ala. N. S. 341.

⁵¹ Hickman v. Walker, Willes, 27. It is a departure where the defendant pleads the statute of limitations, and the plaintiff replies fraud. Allen v. Mayson, 3 Brev. So. C. 207, or in debt on a note where the plea was no consideration, the reply set up a consideration, and the rejoinder set up a partial failure of consideration. Kilgore v. Powers, 5 Blackf. Ind. 22; see also Yeatman v. Cullen, 5 Blackf. Ind. 240; Burtch v. State, 17 Ind. 506; Moore v. Stevens, 42 N. H. 404; Joslyn v. Taylor, 33 Vt. 470.

⁵² Summary on Pl. 92; Bacon, Abr. *Pleas*, L; Viner, Abr. *Departure*; Richards v. Hodges, 2 Saund. 84, a, n. 1.

⁵³ Comyn, Dig. *Pleader*, F, 11. So in a suit to foreclose a mortgage of real estate the defendant answered that the plaintiff had realized from personal property enough to pay the entire debt; reply that the proceeds of personal property had been used to pay other debts. Martin v. Davis, 15 Ind. 478.

⁵⁴ Richards v. Hodges, 2 Saund. 84, d; Lee v. Raynes, T. Raym. 86; 1 Lilly, Abr. 444; Tappan v. Harwood, 2 Speers, So. C. 536.

to perplex the court with two matters; for 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, the plaintiff or defendant.⁵⁵ But a replication may frequently put in issue several facts where they amount to only one connected proposition.⁵⁶

When the plea is divisible in its nature, a replication may contain several distinct answers to its different parts; as, where infancy is pleaded to a declaration consisting of several counts, the plaintiff may reply as to part of the demand that it was for necessities, to another part that the defendant was of full age when the contract was made, and to another part that he confirmed it after he came of age.⁵⁷

2997. *The subsequent pleadings* after the replication are known as rejoinders, sur-rejoinders, rebutters, and sur-rebutters.

2998. When the replication has been by way of traverse, it must have tendered an issue; or, if the plaintiff has demurred, an issue in law has been tendered, and in either case the result has been the joinder of issue upon the same principles as above explained with respect to the plea, so that no farther pleading on the part of the defendant is requisite except to join in the issue. But when the replication is in confession and avoidance, the defendant may then in his turn either demur, or by pleading, traverse, or confess, and avoid the replication; this answer of the defendant to the plaintiff's replication is called a *rejoinder*.

The general requisites of a rejoinder are that it be triable, not double, but single, certain, direct and positive and not argumentative, not repugnant nor insensible, conformable to, and not a departure from, the plea. These rules have been sufficiently considered in treating of previous pleadings.

When the replication concludes with a verification, the rejoinder usually denies it and concludes to the country, "and of this the said defendant puts himself upon the country," etc. But when it introduces new matter it must conclude with a verification, for the same reason that such a conclusion is required in a plea or verification, namely, that the plaintiff may have an opportunity of answering it. When the defendant denies several matters alleged in the replication, the rejoinder may conclude to the country without putting the matters in issue severally and distinctly; for example, if to a plea of infancy the plaintiff has replied that a part of the goods sold to the defendant were necessary clothing and the residue necessary food, a general denial concluding to the country will be sufficient.⁵⁸

2999. The order and denominations of the alternate allegations of facts or pleadings throughout the whole series are as follows: *declaration, plea, replication, rejoinder*, which have been considered; *sur-rejoinder, rebutter, and sur-rebutter*. After sur-rebutter the pleadings have no distinctive names, for beyond that stage they are seldom extended.

These last pleadings, sur-rejoinder, rebutter, and sur-rebutter, are governed by

⁵⁵ *Berry v. Cahanan*, 2 Halst. N. J. 77; *Downer v. Rowell*, 26 Vt. 397.

⁵⁶ *Humphrey v. Churchman*, Cas. temp. Hardw. 289; *Robinson v. Bailey*, 1 Burr. 317; Lawes, Pl. 153.

⁵⁷ 1 Chitty, Pl. 549, 550. Where there are several distinct facts stated in a special replication to a plea, which do not constitute distinct answers to the plea, yet all tend to make out the defence set up, it does not make the replication demurrable for duplicity. *Pilcher v. Hart*, 1 Humphr. Tenn. 524.

The plaintiff may make a single replication to several pleas, as all containing the same matter, but in this case the replication must be good as to each plea singly. *Lapham v. Briggs*, 27 Vt. 26.

⁵⁸ Comyn, Dig. *Pleader*, H.

the same rules as those to which the previous pleadings of the party adopting them are subject.

At any stage of these pleadings, when the party will not demur, the other course is to accept the tendered issue of fact, and also the mode of trial which the traverse proposes; and this is done in the case of trial by jury, by a set form of words, called a joinder in issue, or a *similiter*, by which the pleader recites that the opposite party "hath put himself upon the country," and then he avers that "he doth the like."⁵⁹

3000. It is of importance before joining issue to consider whether the issue tendered is such that 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 replender, on account of the issue having been taken on an immaterial matter.

An issue in pleading is defined to be a single, certain, and material point, arising out of the allegations or pleadings of the parties, by which some specific matter is affirmed on the one side and denied on the other. This result being attained, the parties are said to be at issue, *ad exitum*, that is, at the end of their pleadings. The term issue signifies, also, in common parlance, the entry of the pleadings; but it is proper when only one plea has been pleaded, though to several counts, and issue is joined upon such plea. Issues may be considered with regard to their qualities; their kinds; and the manner of procuring them.

3001. Issues should be, in general, upon an affirmative and a negative; single, and upon a certain point; and upon a material point.

3002. An issue should, in general, be upon an affirmative and a negative, and not upon two affirmatives; as, if the defendant plead that Peter is living, and the plaintiff reply that he is dead, it is more formal, though not indispensable, to deny that he is living; nor should the issue be on two negatives.⁶⁰

3003. It is a rule that the issue must be upon a single and certain point; but it is not necessary that such point should consist of a single fact; the issue should not be on a negative pregnant, which we have seen is a fault in pleading,⁶¹ but it may be upon a disjunctive.⁶²

3004. The issue must be upon a material point, because that is the only thing to be tried, for when the issue is immaterial it cannot decide the question in dispute between the parties; as, when a material allegation in the pleadings is not traversed, but an issue is taken on some other point which, though found by the verdict, will not determine the merits of the cause, and will leave the court at a loss for which of the parties to give judgment.⁶³ The following is an example: when in an action of *assumpsit* against an administratrix, on promises of the intestate, she pleads that she, instead of the intestate, did not promise; after verdict a replender was awarded.⁶⁴

3005. When considered as to their effect, issues are material and immaterial; when examined as to the mode by which they are to be tried, they are issues in law and issues in fact, when, as to their regularity, they are formal and informal, and when, as to the mode by which they are produced, they are actual or feigned.

⁵⁹ Stephen, Pl. 76.

⁶⁰ Bacon, Abr. *Pleas*, I, 3; Comyn, Dig. *Pleader*, R, 3; *Martin v. Smith*, 6 East, 557. It will be noticed, especially under the modern codes, that no issue is raised except by an absolute denial of the facts set up by the opposite party. Thus a general denial of indebtedness is a denial of a conclusion of law, and not of any fact, and raises no issue. *Freeman v. Curran*, 1 Minn. 169; *Wells v. McPike*, 21 Cal. 215.

⁶¹ See before, **2985**, and Comyn, Dig. *Pleader*, R, 5, 6; Bacon, Abr. *Pleas*, I, 6. Thus in trover a denial that the plaintiff "was the owner and lawfully in possession of the property" raises no material issue. *Kuhland v. Sedgwick*, 17 Cal. 123.

⁶² Comyn, Dig. *Pleader*, R, 7.

⁶³ *Bennett v. Holbech*, 2 Saund. 319, n. 6; Comyn, Dig. *Pleader*, R, 18.

⁶⁴ Anon. 2 Ventr. 196.

3006. Issues are *material* when properly formed on some material point which will decide the question in dispute between the parties; as, where the plaintiff declares in assumpsit on a promissory note, and the defendant pleads *non assumpsit* on which issue is joined.

3007. *Immaterial issues* are those which are predicated on some immaterial fact which, though found by the verdict, will not determine the merits of the cause, and would leave the court at a loss how to give judgment; as, where to an action of debt on bond, conditioned for the payment of one hundred and fifty dollars at a certain day, the defendant pleads the payment of one hundred dollars, according to the form of the condition, and the plaintiff, instead of demurring, tenders issue upon such payment, it is manifest that, whether the issue be found for the plaintiff or the defendant, it will remain equally uncertain whether the plaintiff is entitled or not to maintain his action; for in an action for the penalty of a bond, conditioned to pay a certain sum, the only material question is whether the exact sum were paid or not, and a payment in part is a question beside the legal merits.⁶⁵

3008. *An issue in law* is one which admits all the facts and rests simply on a question of law. It is said to consist of a single point, but by this it must not be understood that such issue involves necessarily only a single rule or principle of law, or that it brings into question the legal sufficiency of a single fact only. It is meant that such an issue reduces the whole controversy to the single question whether the facts confessed by the issue are sufficient in law to maintain the action or defence of the party who alleges them.

3009. *An issue in fact* is one in which the parties disagree as to the existence of such facts, one affirming they exist, the other denying it. By the common law every issue in fact, subject to some exceptions noticed below, must consist of a direct affirmative allegation on the one side and a direct negative on the other.⁶⁶ But it has been holden that where the defendant pleaded that he was born in France and the plaintiff replied that he was born in England, it was sufficient to form a good issue.⁶⁷ In this case it will be observed there were two affirmatives, and the ground upon which the issue was holden to be good is that the second affirmative is so contrary to the first that the first cannot in any degree be true, if the last is not false.

The exceptions above mentioned to the rule that a direct affirmative and a direct negative are required are the following:

The general issue upon a writ of right is formed by two affirmatives: the demandant, on the one side, avers that he has a greater right than the tenant, and on the other side the tenant claims to have a greater right than the demandant. This, which in personal actions is called an issue, is here called the *mise*.

In an action of dower the count merely demands the third part of the acres of land, etc., as the dower of the demandant of the endowment of A B, heretofore the husband, etc., and the general issue is that A B was not seised of such estate, etc., and that he could not endow the demandant thereof, etc.⁶⁸ This mode of negation, instead of being direct, is merely argumentative, and argumentativeness is not generally allowed in pleading.

3010. Issues in fact are divided into general issues, special issues, and common issues.

The nature of the *general issue* was considered when discussing the several

⁶⁵ Hob. 113; 5 Taunt. 386; Stearns v. Stearns, 32 Vt. 678; Garland v. Davis, 4 How. 131.

⁶⁶ Coke, Litt. 126, a; Bacon, Abr. *Pleas*, G, 1.

⁶⁷ Tomlin v. Burlace, 1 Wils. 6; Tomlin v. Purlis, 2 Strange, 1177.

⁶⁸ Dennis v. Dennis, 2 Saund. 329, 330.

kinds of pleas in bar.⁶⁹ It is not requisite here to re-examine the subject, but only to say that the general issue denies in direct terms the whole declaration.

The *special issue* is when the defendant takes issue upon any one substantial part of the declaration and rests the weight of his case upon it; he is said to take a special issue in contradistinction to the general issue, which denies and puts in issue the whole declaration.⁷⁰

Common issue is the name given to that which is formed on the single plea of *non est factum*, when pleaded to an action of covenant broken. This is so called because to an action of covenant broken there can properly be no general issue, since the plea *non est factum*, which denies the deed only and not the breach, does not put the whole declaration in issue.⁷¹

3011. A *formal issue* is one which is formed according to the rules required by law in a proper and artificial manner.

3012. An *informal issue* is one which arises when a material allegation is traversed in an improper or inartificial manner;⁷² the defect of such an issue is cured by verdict.⁷³

3013. An *actual issue* is one formed in an action brought in the regular manner for the purpose of trying a question of right between the parties.

3014. A *feigned issue* is one directed by a court, generally by a court exercising equitable powers, for the purpose of trying before a jury a matter in dispute between the parties. When in a court of equity any matter of fact is strongly contested, the court usually directs the matter to be tried by a jury.

But as no jury is summoned to attend this court, the fact is usually directed to be tried in a court of law upon a feigned issue; for this purpose an action is brought in which the plaintiff by a fiction declares that he laid a wager for a sum of money with the defendant, for example, that a certain paper is the last will and testament of Paul, then avers that it is his will, and therefore demands the money; the defendant admits the wager, but avers that it is not the will of Paul, and thereupon that issue is joined which is directed out of chancery to be tried; and thus the verdict of the jurors at law determines the fact in a court of equity.

These feigned issues are also frequently used in courts of law, by consent of parties, to determine some disputed rights without the formality of pleading, and by this practice much time and expense are saved in the decision of a cause. But in all these cases the consent of the court must be previously obtained. To attempt the trial of a feigned issue, or fictitious action, on a pretended wager, where the parties have no rights, for the purpose of obtaining the opinion of the court on an abstract point of law, is a contempt of court, for which the parties and their attorneys may be punished.⁷⁴

3015. To accelerate the pleadings of the parties, the courts have adopted

⁶⁹ Before, 2922.

⁷⁰ Comyn, Dig. *Pleader*, R, 1, 2.

⁷¹ 1 Chitty, Pl. 482; Lawes, Pl. 113.

⁷² Bacon, Abr. *Pleas*, G, 2, N, 5; Bennet v. Holbech, 2 Saund. 319, a, n. 6.

⁷³ Stat. 32, H. VIII, c. 30.

⁷⁴ Henkin v. Guerss, 12 East, 248; Cas. temp. Hardw. 237; see Fletcher v. Peck, 6 Cranch, 147. Technical feigned issues have never been in common use in this country. The courts of equity, under the statutes and rules of court, here exercise the power of framing issues and sending them to a jury. The fiction of a wager and suit thereon is not in use. This was necessary in England, as the court of chancery could not summon a jury. In some states cases in equity are tried at *nisi prius* before a jury if the parties desire, and in many states all cases are tried by jury. See on this point Black v. Shreve, 2 Beasl. N. J. 455; Dunn v. Dunn, 11 Mich. 284; Franklin v. Greene, 2 All. Mass. 519; Curtis v. Sutter, 15 Cal. 259; White v. Hampton, 10 Iowa, 238; Gill v. Rice, 13 Wisc. 549; Johnston v. Piper, 4 Minn. 192.

certain general rules, by which the parties are required to put in their several pleadings within stated times, and in some states statutory provisions require them so to plead; on failure to plead as required the court render judgment against the party in default. If, for example, the plaintiff fail to file his declaration, reply to the plea of his antagonist, etc., after being notified that a rule has been taken requiring him to file the declaration, replication, etc., then judgment of nonsuit is given against him. If the defendant in like manner, upon a similar notice, neglect to plead, rejoin, etc., judgment is rendered against him for the plaintiff's claim, which judgment is, in general, only interlocutory.

3016. When an immaterial issue has been formed the court will order the parties to plead *de novo*, for the purpose of obtaining a better issue; this is called a *repleader*.

The motion for a repleader is made when, on an examination of the record, the unsuccessful party conceives the issue joined was an immaterial issue, or such as is not proper to decide the action. In such cases, therefore, the court, not knowing for whom to give judgment, will award a repleader.⁷⁵

When a repleader is granted the parties must begin to replead at the first fault. If the declaration, plea, and replication be all bad, the parties must begin *de novo*; if the declaration be good, and the plea and replication be both bad, the repleader must be as to both; but if the declaration and plea be both good, and the replication only be bad, the parties replead from the replication only.⁷⁶

3017. A *judgment non obstante veredicto* is one rendered in favor of the plaintiff, without regard to the verdict obtained by the defendant. The difference between a repleader and a *judgment non obstante veredicto* is this, that where a 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 when the defect is not so much in the title as in the manner of stating it, and the issue 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 sakes, they will award a repleader; a *judgment non obstante veredicto* is always upon the merits, and never granted but in a clear case; a repleader is upon the form and manner of pleading.⁷⁷

3018. A *plea puis darrein continuance*, or since the last continuance, is one which has arisen upon a fact which has happened since the last continuance of the cause, and after issue was joined. It is proper to consider in what cases such pleas are allowed; the time when they must be pleaded; their effects; and their form.

3019. Pleas of this kind are in abatement or in bar, like other pleas.⁷⁸ Though in general the defendant can regularly plead but once, after which, if there be an issue or demurrer, the cause is to be determined upon it, inasmuch as there can be but one verdict in the cause, yet, if any new matter happens

⁷⁵ *Gerrish v. Train*, 3 Pick. Mass. 124. The party committing the first fault in pleading is not entitled to a repleader, though the verdict against him be on an immaterial issue. *Andre v. Johnson*, 6 Blackf. Ind. 375; *Bledsoe v. Chouning*, 1 Humphr. Tenn. 85.

⁷⁶ See *Staples v. Haydon*, 2 Salk. 579, for several rules as to repleaders. See Lawes, Pl. 175; Stephen, Pl. 119.

⁷⁷ Comyn, Dig. *Pleader*, R, 18; Bacon. Abr. *Pleas*, M; 18 Viner, Abr. 567; Archbold, Civ. Pl. 358.

⁷⁸ Lawes, Pl. 173; Brooke, Abr. *Continuance*, Pl. 57; Buller, Nisi P. 310.

pending the writ, he may plead it, notwithstanding a former plea, provided it be pleaded since the last continuance.

When the matter of defence has arisen since the commencement of the suit, and before issue joined, it cannot be pleaded in bar to the action generally, but must, when it has arisen before plea or continuance, be pleaded as to the farther maintenance of the suit.⁷⁹ When such matter has arisen after issue joined, it must be pleaded *puis darrein continuance*.

The usual matters pleaded *puis darrein continuance* are matters in abatement which have arisen since last continuance, as the marriage of a feme plaintiff; and this may be pleaded after a plea in bar, because the pleading of the latter waives only such matters in abatement as then existed; or they may be in bar; as, a release, or the discharge of the defendant as a bankrupt.⁸⁰

3020. Formerly there were formal adjournments or continuances of the proceedings in a suit for certain purposes from one term to another, and during the interval the parties were, of course, out of court. When any matter arose which was a ground of defence since the last continuance, the defendant was allowed to plead it, which allowance was an exception to the general rule that the defendant can plead but one plea of one kind or class. By the modern practice the parties are, from the day when by the ancient practice a continuance would be entered, supposed to be out of court, and the plaintiff is suspended until the day arrives to which, by the ancient practice, the continuance would extend; at that day the defendant is entitled, if any new matter of defence has arisen in the interval, to plead, according to the ancient practice, *puis darrein continuance*, before the next continuance.⁸¹

A plea *puis darrein continuance* may be pleaded after the jury are gone from the bar, but not after they have given their verdict.⁸²

3021. This plea is not a departure from, but is a waiver of, the first plea, so that no advantage can afterward be taken of it;⁸³ and to prevent the plaintiff being delayed *ad infinitum*, it is said there can be but one plea *puis darrein continuance*; for, if a second were allowed, there is no reason why a third, or any unlimited number, should not be permitted.⁸⁴

3022. A plea of this kind must be certain, for it is not sufficient to say that since the last continuance such a thing happened, but the day of the continuance must be shown, and also the time and place must be alleged where the matter of defence arose.⁸⁵ When pleaded in abatement, the plea begins and concludes like those in abatement which are put in at first to the declaration. A plea in bar, pleaded *puis darrein continuance*, begins by saying that the plaintiff ought not farther to maintain his action against the defendant, and not that the former inquest should not be taken against him; because it is a substantive plea of itself, and comes in place of one previously pleaded; conse-

⁷⁹ *Hendrickson v. Hutchinson*, 5 Dutch. N. J. 180; *Allen v. Newberry*, 8 Iowa, 65; *Rowell v. Hayden*, 40 Me. 582.

⁸⁰ *Smithwick v. Ward*, 7 Jones, No. C. 64.

⁸¹ *Tilton v. Morgaridge*, 12 Ohio St. 98.

⁸² *Lawes*, Pl. 174. It is held in Massachusetts that a new answer may be filed after verdict, but before judgment. *Lewis v. Shattuck*, 4 Gray, Mass. 572; *Gardner v. Way*, 8 Gray, Mass. 191.

⁸³ *Lincoln v. Thrall*, 26 Vt. 304; *Adams v. Filer*, 7 Wisc. 306. Under the New York code a supplemental answer takes the place of this plea; and while such an answer does not necessarily waive the former one, yet, where before the code the new defence would have required a plea *puis darrein continuance*, the court will require a waiver of the former answer before granting leave to file such supplemental answer. *Bate v. Fellowes*, 4 Bosw. N. Y. 638.

⁸⁴ *Gilbert*, Civ. Act. 105; *Brooke*, Abr. *Continuance*, Pl. 5, 41; *Lawes*, Pl. 174.

⁸⁵ *Lawes*, Pl. 174; 1 *Chitty*, Pl. 638. See the form of a plea *puis darrein continuance*, *Stephen*, Pl. 82.

quently it ought to be concluded with prayer of judgment if the plaintiff ought further to maintain his action. The plaintiff's replication should begin with saying that he, by reason of any thing alleged by the defendant in his plea, ought not to be barred from further maintaining it. In other respects these pleas and the pleadings upon them are governed by the same rules of pleading as prevail in other cases, save that the facts stated in the plea must be verified on oath or affirmation of the defendant.⁸⁶

3023. *Demurrer*, from the Latin *demorari*, or from the old French *demorrer*, to wait or stay, in pleading, imports, according to its etymology, that the party will remain and not proceed with the pleadings, because no sufficient statement has been made on the other side, but will wait the judgment of the court whether he is bound to answer.

A demurrer may be taken by either party at any stage of pleading before issue is joined. It may be for insufficiency, either in substance or in form; that is, it may be either on the ground that the case shown by the opposite party is essentially insufficient, or on the ground that it is stated in an inartificial manner, for the law requires in every plea, and all other pleadings, two things, the one that there be matter sufficient, the other that it be deduced and expressed according to the forms of law; and if either of these be wanting, it is cause of demurrer.⁸⁷

3024. Demurrers are, as in their nature, so in their *forms*, of two kinds: they are general or special.

3025. A *general demurrer* is one which excepts to the sufficiency of some previous pleading in general terms without showing specifically the nature of the objection; and such demurrer is sufficient when the objection is on matter of substance.⁸⁸

It cannot be taken to a declaration which contains special and common counts.⁸⁹ It lies where the declaration shows that there is one jointly liable who is not made defendant.⁹⁰

3026. A *special demurrer* is one which excepts to the sufficiency of the pleadings on the opposite side, and shows specifically the nature of the objection and the particular ground of exception: "And the said C D, according to the form of the statute in such case made and provided, states, and shows to the court here, the following causes of demurrer to the said declaration, that is to say, that no day or time is alleged in the said declaration at which the said causes of action, or any of them, are supposed to have accrued," etc.⁹¹

A special demurrer is necessary when the objection to the pleading turns on matter of form only; that is, where, notwithstanding such objections, enough appears to entitle the opposite party to judgment as far as relates to the merits of the cause. For by two statutes,⁹² passed with a view to the discouragement of merely formal objections, it is provided in nearly the same terms that the

⁸⁶ Henry v. Porter, 29 Ala. N. S. 619.

⁸⁷ Where there are several parties, a demurrer, good only as to one if taken separately, is bad as to all if taken jointly. Teter v. Hinders, 19 Ind. 93; Bennett v. Preston, 17 Ind. 291. Thus the objection that some of several defendants have no interest and are improperly joined cannot be taken by demurrer by all. Gancelier v. Foret, 4 Minn. 13.

⁸⁸ 1 Chitty, Pl. 639; Lawes, Pl. 167; Coke, Litt. 72, a; Bacon, Abr. Pleas, N, 5; Stephen, Pl. 61, where there is a form. Phelps v. Owens, 11 Cal. 22; Morrow v. Lawrence, 7 Wisc. 574. Under many of the modern codes the causes for demurrer are enumerated by the statutes, and in such case the demurrer must assign some cause enumerated. Tenbrook v. Brown, 17 Ind. 410. A general demurrer to a declaration is bad if the declaration state substantially a good cause of action, however defectively. Boynton v. Tidwell, 19 Tex. 118.

⁸⁹ Barber v. Whitney, 29 Ill. 439.

⁹¹ See Stephen, Pl. 62, for a form.

⁹⁰ Kent v. Holliday, 17 Md. 387.

⁹² 27 Eliz. c. 5, and 4 Anne, c. 16.

judges "shall give judgment according to the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect, or want of form, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer, as the causes of the same."

Since the passage of these statutes, therefore, no mere matter of form can be objected to on a general demurrer, but the demurrer must be in the special form, and the objection specially stated. On the other hand, however, it may be observed that on a special demurrer the party may on the argument take advantage, not only of the particular faults which his demurrer specifies, but also of all objections in substance, or regarding the very right of the cause, as the statute expresses it, as do not require within the statute to be particularly set down. It follows, therefore, that unless the objection be clearly of the substantial kind, it is the safer course in all cases to demur specially.⁹³ Yet where a general demurrer is plainly sufficient, it is more usually adopted in practice, because the effect of the special form being to apprise the opposite party more distinctly of the nature of the objection, it is attended with the inconvenience of enabling him to prepare to maintain his pleading by argument or of leading him to apply earlier to amend.

With respect to the degree of particularity with which under the statutes the special demurrer must assign the ground of objection, it may be observed that it is not sufficient to object in general terms that the pleadings are "uncertain, defective, and informal," or the like, but it is necessary to show in what respect they are uncertain, defective, and informal.⁹⁴

3027. The demurrer may be either to the whole or to a part of the declaration; and when there are several counts, or in covenant several breaches, some of which are sufficient and others are not, or one count is bad in part, the defendant should demur only to the latter; for if he were to demur to the whole declaration, some of which was good, the judgment must be given against him; and this rule applies with equal force to one count, part of which is sufficient and the residue is not, when the matters are divisible in their nature.⁹⁵ But where there is a misjoinder either of parties or causes of action, the demurrer should be to the whole.⁹⁶

3028. With respect to *the effect of a demurrer*, it is a rule that a demurrer admits all such matters of fact as are sufficiently pleaded.⁹⁷ But although it admits the facts well pleaded, with a view to a determination of their legal sufficiency, it is strictly confined to this office, and cannot be used as an instrument of evidence on an issue in fact.⁹⁸ It is also a rule that a demurrer when taken must be accepted by the opposite party, for there can be no demurrer to a demurrer, because the first is sufficient, notwithstanding any inaccuracy in its form, to bring the record before the court for adjudication.

The party whose pleading is opposed by a demurrer is bound formally to ac-

⁹³ The demurrer must be special for duplicity. *Franey v. True*, 26 Ill. 184; or because a material averment is alleged argumentatively. *Woodward v. French*, 31 Vt. 337.

⁹⁴ *Lenthall v. Cooke*, 1 Saund. 161, n. 1; *Hancock v. Prowd*, 1 Saund. 337, b, n. 3; *Stephen*, Pl. 159, 161; *Mercer v. Watson*, 1 Watts, Penn. 346; *Cole v. Porter*, 4 Greene, Iowa, 510; *Buell v. Warner*, 33 Vt. 570; *Gaines v. Walker*, 16 Ind. 361; *Crouch v. Crouch*, 9 Iowa, 269; *Pogue v. Clark*, 25 Ill. 351.

⁹⁵ *Rodgers v. Brazeale*, 34 Ala. n. s. 512; *McKay v. Fribele*, 8 Fla. 21; *Bristow v. Lane*, 21 Ill. 194; *Weaver v. Conger*, 10 Cal. 233; *Perdicaris v. Trenton Co.*, 5 Dutch. N. J. 367; *Jarvis v. Worrick*, 10 Iowa, 29.

⁹⁶ *Foxtwist v. Tremaine*, 2 Saund. 210, a; *Fankboner v. Fankboner*, 20 Ind. 62; *Bougher v. Scobey*, 16 Ind. 151.

⁹⁷ *Bacon*, Abr. *Pleas*, N, 3; *Comyn*, Dig. Q, 5; *Postmaster General v. Ustick*, 4 Wash. C. C. 347; *Hartford Bank v. Green*, 11 Iowa, 476.

⁹⁸ *Pease v. Phelps*, 10 Conn. 62.

cept the issue in law which it tenders, by the formula called a joinder in demurrer.⁹⁹

3029. In giving a *judgment on a demurrer* the court will consider the whole record, and give judgment for the party who, on the whole, is entitled to it.¹⁰⁰ For example, on a demurrer to the replication, if the court think the replication bad, but perceive a substantial error in the plea, they will give judgment, not for the defendant, but for the plaintiff, provided the declaration be good;¹⁰¹ if the declaration in such cases be also bad in substance, upon the same principle the judgment will be given for the defendant; for when judgment is to be given, whether the issue be in law or fact, and whether the cause have proceeded to an issue or not, the court is always to examine the whole record, and adjudge for the plaintiff or defendant, according to the legal right as it may on the whole appear.¹⁰²

The judgment may be against the party whose demurrer is overruled on the whole cause of action, or he may be allowed to plead over, *respondeat ouster*, upon terms.¹⁰³

3030. This rule is, however, subject to the following exceptions:

If the plaintiff demur to a plea in abatement, and the court decide against the plea, they will give judgment of *respondeat ouster*, without regard to any defect in the declaration.¹⁰⁴

The court will not look back into the record to adjudge according to apparent right in the plaintiff, unless the plaintiff have himself put his action upon that ground.¹⁰⁵

In examining the whole record, to adjudge according to the apparent right, the court will consider the right in matter of substance, and not in respect of mere form, such as should have been the subject of a special demurrer.¹⁰⁶

3031. In connection with the pleadings may be mentioned an anomalous kind of proceeding, which partakes something of the nature of an agreement, and also of pleadings. It is an agreement in writing, known as a *case stated*, between the plaintiff and defendant, that the facts in dispute between them are as there agreed upon and mentioned. It must contain what are admitted facts, and not merely evidence of facts.¹⁰⁷

The facts being thus ascertained, it is left to the court to decide for which party is the law. When there is no agreement to the contrary, the judgment of the court below is final, and no writ of error can be had upon it.¹⁰⁸ When it is desired to have the judgment of the court in the last resort it is usual to introduce a clause in the case that it shall be considered in the nature of a special verdict. In that case a writ of error lies upon the judgment which may be rendered upon it.

⁹⁹ See form, Stephen, Pl. 76.

¹⁰⁰ Comyn, Dig. *Pleader*, M, 1, 2; Bacon, Abr. *Pleas*, N. 3.

¹⁰¹ Anon. 2 Wils. 150; *Gelston v. Burr*, 11 Johns. N. Y. 482; *Township v. Johnston*, 20 Ind. 280; *Lawton v. Howe*, 14 Wisc. 241; *Trott v. Surchett*, 10 Ohio, St. 241; *Loomis v. Yale*, 1 Minn. 175; *Dilley v. Roman*, 17 Md. 337.

¹⁰² This rule does not hold under the code in some of the states. *Gano v. Gilruth*, 4 Greene, Iowa, 453; *Henley v. Bush*, 33 Ala. n. s. 636.

In Minnesota only an objection to the jurisdiction, and that the facts set forth are insufficient to constitute a cause of action, are saved to the defendant on a demurrer to the answer, all others being waived by answering. *Stratton v. Allen*, 7 Minn. 502.

¹⁰³ *Tefft v. McNoah*, 9 Mich. 201; *Bridge v. Livingston*, 11 Iowa, 57.

¹⁰⁴ *Balasye v. Hester*, Lutw. 1592; *Hastrop v. Hastings*, 1 Salk. 212; *Carth. 172*; *Price v. Grand Rapids R. R.*, 18 Ind. 137.

¹⁰⁵ *Marsh v. Bultrel*, 5 Barnew. & Ald. 507, 511.

¹⁰⁶ Bacon, Abr. *Pleas*, N, 2.

¹⁰⁷ *Diehl v. Ihrie*, 3 Whart. Penn. 143. The filing of an agreed case is an abandonment of the pleadings. *Hamilton v. Cook County*, 5 Ill. 519.

¹⁰⁸ *Dane*, Abr. c. 137, a, 4, n. § 7.

A writ of error will also lie to the judgment which may have been rendered upon such a case, when the parties have agreed to it, although it may not have been agreed to consider the case as a special verdict.¹⁰⁹

The case when thus stated is put by either of the parties upon the argument list, which is a collection of all cases where only questions of law are to be decided; and after it has been argued before the judges, they give their decision, with their reasons for it, and judgment is entered for the plaintiff or defendant, as the law or right seems in the opinion of the court to be in favor of the one side or of the other.¹¹⁰

¹⁰⁹ Fuller v. Trevor, 8 Serg. & R. Penn. 529.

¹¹⁰ In the last few years great and radical changes have taken place in the forms of actions and the system of pleading. In the majority of the states it may safely be said that special pleading no longer exists. The laws of logic upon which special pleading depends must for ever remain the same, but the system has proved too cumbersome and inefficient to attain the object at which it aimed; and the simplification of the issues, which was reached in theory, is reached only with great delay and expense in practice. No rules of pleading can be laid down which apply to all the states, and it is impossible in this work to state the details of the various systems. Only a general outline of the changes can be given.

In those states in which the least change has taken place, the pleadings almost never extend beyond the replication. In lieu of special pleas, the general issue is used with specifications of defence. The action of account is not in general use, the same result being reached by the appointment of auditors in an action of assumpsit or in equity.

The changes which have been made may be reduced to two systems.

The first of these is used in Massachusetts and other states, and a statement of the Massachusetts system will serve to show the general plan. The supreme court, acting as a court of chancery, has full equity jurisdiction, the pleadings in equity remaining as formerly, but being shortened and simplified. Real actions are still in use, and titles are tried by a simple writ of entry, counting on the demandant's seisin. In some states trespass is used to try title. Ejectment has, in general, gone out of use.

In place of the old forms of personal actions a new division has been made, and personal actions are divided into contract, tort, and replevin. Actions of contract include those formerly known as assumpsit, covenant, and debt, except for penalties. Actions of tort include trespass, trespass on the case, trover, and all actions for penalties. In an action of contract, all the causes included under this head may be joined, and in the same way with actions of tort, and if it is doubtful to which class an action belongs, contract and tort may be joined.

The declaration must state the name of the action, whether tort, contract, or replevin, and the substantial facts constituting the cause of action. No averment need be made which the law does not require to be proved. The only pleading by the defendant is the answer in abatement, answer, or demurrer. The answer, which takes the place of all special pleas, must admit or deny all the substantive facts set up in the declaration. Replications are not in use, except in special cases. Forms of pleading are prescribed by statute which are short and simple. For instance, the following for goods sold:

A B }
v. }
C D } *Middlesex Sup. Ct., Plaintiff's Declaration.*

And the plaintiff says the defendant owes him dollars for goods sold by the plaintiff to the defendant. (A bill of particulars is to be filed.)

Answer.

And the defendant comes and answers as follows, viz.: as to the first ten items of the plaintiff's bill of particulars, upon his personal knowledge he denies that the plaintiff sold and delivered the same to the defendant.

As to the eleventh item, upon his personal knowledge he denies that the price was to be more than ten dollars.

The states of Tennessee and Georgia have systems resembling that in use in Massachusetts. The code of Tennessee has the following provisions:

"§ 2746. All contracts may be sued on in the same form of action.

"§ 2747. All wrongs and injuries to the property and person in which money only is demanded as damages may be redressed by an action on the facts of the case. Penal actions may be brought in the same form.

"§ 2748. Whenever the facts of the case entitle the plaintiff to sue for breach of con-

tract, or at his election for the wrong and injury, he may join statements of his cause of action in both forms, or either."

Specific personal property is recovered by replevin or detinue. Real property is recovered by ejectment or by action for forcible or wrongful entry and detainer.

The code of Georgia retains the practice in equity, and the change of the division between real and personal actions is more nominal than real. Its principal provisions are:

"§ 3187. All distinctions of actions into real, personal, and mixed, are abolished. An action may be against the person or against property, or both."

"§ 3196. All claims arising *ex contractu* between the same parties may be joined in the same action; and all claims arising *ex delicto* may in like manner be joined. The defendant may also set up as a defence all claims against the plaintiff of a similar nature with the plaintiff's demand."

"§ 3270. No special pleadings shall be admitted at law in the superior courts, and every case shall go to the jury and be tried upon the petition, process, and answer alone."

But the most radical changes have been made by the New York system, which was adopted in that state in 1848 and has been extensively copied. In this system, all the distinctions between forms of action and between law and equity are abolished, and an attempt is made to construct a system anew. Its character will be best understood by a statement of the principal provisions. References are made to the Code, 8th ed., 1864, the original numbers of the sections being placed in brackets.

§ 1. [1] Remedies in the courts of justice are divided into, 1. actions; 2. special proceedings.

§ 2. [2] An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence.

§ 3. [3] Every other remedy is a special proceeding.

§ 4. [4] Actions are of two kinds, 1. civil; 2. criminal.

§ 69. [62] The distinction between actions at law and suits in equity and the forms of all such actions are abolished; and there shall be in this state, hereafter, but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action.

§ 111. [91] Every action must be prosecuted in the name of the real party in interest except executors, administrators and trustees of an express trust.

§ 140. [118] All the forms of pleading heretofore existing are abolished; and hereafter the forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed by this act.

§ 142. [120] The complaint shall contain—

1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the plaintiff desires the trial to be had, and the names of the parties to the action, plaintiff and defendant.

2. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition.

3. A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated.

§ 143. [121] The only pleading on the part of the defendant is either a demurrer or an answer.

§ 144. [122] The defendant may demur to the complaint when it shall appear upon the face thereof either, 1. That the court has no jurisdiction of the person of the defendant or the subject of the action; or, 2. That the plaintiff has not legal capacity to sue; or, 3. That there is another cause of action pending between the same parties for the same cause; or, 4. That there is a defect of parties, plaintiff or defendant; or, 5. That several causes of action have been improperly united; or, 6. That the complaint does not state facts sufficient to constitute a cause of action.

§ 149. [128] The answer of the defendant must contain, 1. A general or specific denial of each material allegation of the complaint controverted by the defendant; or of any knowledge or information thereof sufficient to form a belief; 2. A statement of any new matter constituting a defence or counter-claim in ordinary and concise language without repetition.

§ 167. [143] The plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of, 1. The same transaction or transactions connected with the same subject of action; 2. Contract, express or implied; or, 3. Injuries, with or without force, to person or property, or either; or, 4. Injuries to character; or, 5. Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same; or, 6. Claims to recover personal property, with or without damages for the withholding thereof; or, 7. Claims against a trustee by virtue of a contract,

or by operation of law. If any new matter is pleaded in the answer, the plaintiff may reply or demur.

Actions are commenced by the service of a summons signed by the plaintiff or his attorney, and served by the sheriff or any disinterested party. Instead of replevin, the plaintiff makes a claim for the delivery of the property, with an affidavit of the facts, and files a bond with the sheriff, upon which the sheriff causes a delivery of the property.

Codes similar to that of New York have been adopted in Wisconsin, Ohio, Missouri, Nevada, Minnesota, Kansas, Indiana, and California. In Iowa, Oregon, and Kentucky, a modified form exists, in which suits in equity are still recognized.

The effect of the New York code is that the pleadings become less formal and technical, but at the same time longer, and in their general form resemble the pleadings in equity. It does not, and no system can put an end to technical rules. It requires a statement of the facts in defence, and thus necessarily puts an end to pleading double. The action not being in any technical form, there is of course no joinder of counts.

These important changes are to be borne in mind in reading the text, which of course can apply to the old systems only.

CHAPTER IX.

THE TRIAL.

- 3033. The nature and kinds of trial.
- 3034. The trial by jury.
- 3035. The trial list.
- 3036. Excuses for not going to trial.
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 - 3049. The statement of the plaintiff's claim.
 - 3050. The statement of the evidence. .
 - 3051. The statement of the points of law.
 - 3052. The anticipation of the defence.

3032. By *trial* is meant the examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause for the purpose of determining such issue.¹

The matters in this chapter will be discussed under the following heads: the nature and kinds of trials, the trial list, the jury, and the opening of the case.

3033. When the cause has been brought to an issue, as above stated, the next step is to bring it to trial, so that a final judgment may be had upon it. If it be an issue in law, the trial is by the court. The case is then put on the argument list, and is decided by the judges alone, without the intervention of a jury; and the court also decides cases where the action is alleged to be founded upon a record, and the defendant has pleaded, *nul tiel record*, that there is no such record; whether such record exist or not is a question of fact, but it is a matter of law whether, if it do exist, it is sufficient in point of law to maintain the action of the plaintiff, so that, in truth, this is a question of law rather than of fact. But when the issue arises on a question of fact, it is to be tried by the court and a jury. For this purpose, the cause is ordered upon the trial list, agreeably to the provisions of the local statutes and the rules of the different courts. This list is a collection of cases which are at issue in matters of fact, and which are to be submitted to a trial before a court and jury.

Formerly, there were several kinds of trials in England, some of which have

¹ *Curtis v. Colston*, 4 Mas. C. C. 232.

been abandoned even in that country, and were never practiced in this; these are trial by witnesses, by inspection, by certificate, by wager of battle, and by wager of law.²

3034. *The trial by jury*, almost the only one for deciding issues in fact, has long received the unanimous panegyrics of the common lawyers as being the best safeguard of liberty, particularly in criminal cases; it is the greatest safety of a prisoner when there is much excitement, either as to the person to be tried, or on account of the accusation which is brought against him.

In many instances juries have been the bulwark of safety against the attacks of power.³ Jurors have been represented as being "twelve invisible judges, whom the eye of the corrupter cannot see, and the influence of the powerful cannot reach, for they are nowhere to be found until the moment when the balance of justice being placed in their hands, they hear, weigh, determine, pronounce, and immediately disappear, and are lost in the crowd of their fellow citizens."⁴ Too much reliance cannot be placed upon this institution in criminal cases, and particularly in those which assume somewhat of a political character.

But although this high praise is justly deserved in criminal cases, this institution has been thought by some as not the best calculated to arrive at truth in civil actions.

It cannot be denied that many issues are presented for decision to juries who are entirely incompetent to comprehend them, and perhaps no judge or lawyer of much experience can be found who has not sometimes been shocked at the rendition of a verdict. This imperfection has been somewhat removed by the exercise in certain cases of the remedial power of granting a new trial.

Whatever its imperfections may be, the trial by jury seems to be firmly seated in the affections of the people, and will not probably be abandoned. By the constitution of the United States, it is secured and made to extend "to all suits at common law where the value in controversy shall exceed twenty dollars;"⁵ and most of the state constitutions contain provisions that it shall remain as heretofore and be inviolate.

The right to a trial by jury is confined to proceedings in courts of common law, where legal rights, as distinguished from equitable, are decided upon.⁶

3035. *The trial list*, it has been observed, is a collection of cases which are at issue and ready for trial. These are taken up in the order in which they are on the list, and, unless for a lawful cause shown to the court, they will be ordered for trial.

3036. *The usual excuses alleged for not going on to trial* are:

Because the cause has been improperly put upon the list in violation of law or the rules of the court, as if it be not at issue.⁷

Because there has been some fraud or artifice used to deprive the opposite party of some legal advantage to which he was entitled.⁸

Because some material piece of evidence or a material witness cannot be had, after having used all lawful means to procure the same. In the case of an absent witness it must be shown that his testimony is important, and that every

² See Bouvier, Law Dict. *Trial*.

³ Livingston, Rep. on a Penal Code, 13; 3 Story, Const. § 1773.

⁴ Duponceau, Address at the opening of the Law Academy at Philadelphia.

⁵ U. S. Const. Amend. 7. The amount in controversy is decided by the *ad damnum*. *Trees v. Rushworth*, 9 Gray, Mass. 47.

⁶ *Stilwell v. Kellogg*, 14 Wisc. 461; *Plimpton v. Somerset*, 33 Vt. 283; *Heyneman v. Blake*, 19 Cal. 579; *Isom v. Mississippi R. R.*, 36 Miss. 300; *Fire Department v. Harrison*, 2 Hilt. N. Y. 455; *Dronberger v. Reed*, 11 Ind. 420.

⁷ *Stratton v. Henderson*. 26 Ill. 68.

⁸ A continuance will be granted for surprise. *Davis v. Millaudon*, 14 La. Ann. 808.

effort has been used by the party wanting his evidence to secure it; for this purpose a writ issued by the clerk or prothonotary of the court, under its express or implied authority, directed to the witness, commanding him to appear at the time and place of trial to testify, must be procured. It is called a *subpœna*. The party wanting the witness must have made an effort, within the time prescribed by the rules of court, to serve it upon the witness; or if the party knew the witness was going away, he should have taken his deposition under a rule of court, or a commission after he had gone. If he has neglected to take these necessary steps, the absence of the witness will not avail him. The law requires in all these cases that the party should use due diligence, and his neglect ought not to delay his adversary.⁹

Because a commission to take depositions has been issued and is outstanding.¹⁰

Because the counsel employed by the party applying for a continuance cannot attend on account of sickness or other sufficient cause.¹¹

3037. The court in all these cases exercises a sound discretion, and will never force a party to a trial, who has used due diligence, and when, by compelling him to trial, injustice may be done.¹²

When a sufficient cause is shown, which must always be under oath or affirmation,¹³ either of the party himself or of some other person, the cause will be continued till the next term, a *continuance* being necessary at each term to keep the cause in court; but this continuance is seldom formally made, the causes being supposed to be continued without order of the court for that purpose.

If no lawful cause for a continuance be shown, but a temporary delay is required, the case may be put at the foot of the list, to be called again in its turn, or it may be left open, that is, in a condition to be taken up as soon as a short absence of counsel or a witness shall cease, or a temporary cause of delay has been removed.

When there is no cause for such delay nor for a continuance till the next term, the case will be ordered for trial.

3038. *The proceedings in the course of the trial* are the calling of the jury, the opening of the case, the evidence, non-suit, signing bills of exceptions, demurrer to evidence, arguments of counsel, charging the jury, and rendering a verdict.

3039. By *jury* is understood a body of twelve men, selected according to

⁹ Barnum v. Adams, 31 Mo. 532; Griffin v. Polhemus, 20 Cal. 180; Knowlton v. Smith, 17 Ind. 508. A promise by the witness to attend is no excuse for not serving him with a subpœna. Moore v. Goelitz, 27 Ill. 18; State v. Cross, 12 Iowa, 66; Mackubin v. Clarkson, 5 Minn. 247.

The party applying for a continuance must state what he expects the absent witness to testify, that the court may judge of its materiality. The opposite party may admit that the witness would so testify, in which case the continuance is refused and the trial goes on, such admission going to the jury as part of the evidence. State v. Mooney, 10 Iowa, 506.

In Missouri, however, to warrant the refusal of a continuance, the opposite party must not only admit that the witness would so testify, but that his testimony is true. Murphy v. Murphy, 31 Mo. 322.

¹⁰ Cole v. Strafford, 12 Iowa, 345.

¹¹ When an unexpected change of counsel takes place a continuance will be granted, that the new counsel may become acquainted with the case. Graves v. Rayle, 19 Ind. 83.

¹² The granting or refusal of a continuance is, in general, within the discretion of the court, and from its decision no error or appeal lies, unless there has been a clear abuse of discretion. Holt v. State, 10 Ohio, St. 691; Holbrook v. Wilson, 4 Bosw. N. Y. 64; Childs v. Heaton, 11 Iowa, 271; Griffin v. Polhemus, 20 Cal. 180; Carpenter v. Meyers, 32 Mo. 213; Fowler v. Buckner, 23 Tex. 84; Pitts v. Gilman, 1 Head, Tenn. 549. But see Cochran v. Dodd, 16 Ind. 476; Bishop Colony v. Edgerton, 26 Ill. 54.

¹³ Cleveland v. Hughes, 12 Ind. 512.

law, for the purpose of deciding some controversy or issue on a matter of fact.¹⁴ The individuals of which the jury is composed are called jurors; they are so denominated because they were formerly sworn to try the matters in issue. They still bear the same name, although many are now affirmed instead of being sworn.

In civil cases the jury never decide a question of law. They are merely to find the facts, and the court apply the law to them when so ascertained.

The origin of juries is hid in the night of time. It is highly probable that this institution was not always what it is now. From the earliest times, even before regularly organized constitutions were established, when disputes arose men must have been selected to decide them; these were generally the most ancient personages, or the neighbors, the equals or peers of the contesting parties. These tribunals were common among the people of the north of Europe, who invaded the southern kingdoms and states of that portion of the globe. Being found convenient, they were adopted by the nations invaded and substituted in the place of the ancient tribunals in Germany, France, England, and Italy. In most of these countries they disappeared by degrees, except in England. In that country trial by jury was established soon after the Norman conquest, and the institution was improved from time to time to what it is now. In the United States the mode of selecting juries and the institution itself have been greatly improved so as to secure a fair and impartial body of men, from whom the twelve jurors who are impanelled in any particular case are to be chosen.¹⁵

The principal qualifications of jurors are,

That they be *sui juris*,

Of full age,

Good and lawful men, that is, not of an infamous character, for a man whose oath could not be received as a witness, cannot be a juror,

Citizens of the United States,

Residents of the district, county, or other territory, over which the court has jurisdiction.

3040. The jurors for the trial of civil cases are selected by officers designated by the statutes of each state; they are generally taken from among the electors for public officers in such numbers as the laws require.

A writ, called a *venire facias*, directed to the sheriff, commanding him to summon a certain number of jurors, is delivered to that officer in sufficient time to cause to be drawn the names of jurors, which are put into a box. By virtue of this writ he draws, with such officers as are authorized to act with him in this matter, the requisite number of jurors, summons them to attend court at the time appointed for holding a term, and returns the *venire* to the court whence it issued, together with a list of the jurors summoned, which list is called the

¹⁴ A jury *ex vi termini* means twelve men. *Turns v. Commonwealth*, 6 Metc. Mass. 231. And the privilege of trial by jury secured by the constitution means a trial by twelve men. *Vaughan v. Scade*, 30 Mo. 600. In some case a jury of a less number is summoned by the sheriff; as, to assess damages for laying out highways. This is known as a sheriff's jury. 3 Sharswood, Blackst. Comm. 258. A grand jury consists of not less than twelve, or more than twenty-four. A special jury is one selected by the parties alternately striking off one from a panel of forty-eight until twelve are left. This is allowed by statute in some states. *Whitehead v. State*, 10 Ohio, St. 449.

¹⁵ Morin claims the institution of trial by jury to be of French origin. He says, "En remontant à l'ordre judiciaire des Grecs et des Romains, ainsi qu'aux institutions des peuples du Nord, on y découvre des germes de cette juridiction, appliquées aux contestations civiles; mais de toutes les nations modernes, la France peut revendiquer l'honneur d'avoir, la première consacré le jugement d'un accusé par ses pairs, (pares.) Cette institution, encore bien imparfaite, avait été transplantée en Angleterre lors de la conquête de ce pays par les Normands." *Dictionnaire du Droit Criminel*, voce, Jureés—Jury.

array, because the jurors summoned to attend court are arrayed or arranged on the panel; this latter word, signifying a schedule or roll, contains the names of the jurors summoned by virtue of the writ of *venire facias*, and annexed to that writ.¹⁶

If from any cause there are not enough jurymen present to proceed with the trials, the court may order a new *venire* to summon in additional jurors, or may order the sheriff to summon a sufficient number of the bystanders (*tales de circumstantibus*) to complete the panel.¹⁷ Those summoned in the last manner are commonly called *talesmen*. The talesmen are summoned only for the single case then next to be tried. A new *venire* should be issued, if required, for the other cases.

3041. At this stage of the cause, after the *venire* has been returned, and before any juror has been selected to try the particular case, either party may object to the whole panel or array of jurors;¹⁸ this objection or exception thus made to the jurors is called a *challenge to the array*. The principal causes for making this challenge are, that there has been some fraud, or some illegal act in drawing or returning the panel, for which the whole is vitiated. When the causes of the challenge are established by evidence to the satisfaction of the court, the whole array is set aside, and no trial can be had until another panel has been returned.

But when no motion has been made to set aside the array, and the party has done no act by which he waives his right to insist upon such a course, as by objecting to a particular juror who may be called to try his case, then the clerk of the court draws from a box, where all the names of the jurors have been put in separate slips of paper, the names of twelve of them. Each party has a right to challenge two or such other number as may be authorized by the local statutes without assigning any reason whatever, and as many of the others as he has a lawful reason for objecting to; this is called a challenge to the polls. Those challenges which may be made without assigning any reason are called peremptory challenges; those made for some legal reason are challenges for cause.

3042. A *challenge to the polls* is an objection made separately to each jurymen as he is about to be sworn. Challenges to the polls, like those to the array, are either principal or to the favor.

The juror must be challenged before he is sworn, and an objection taken after verdict is too late.¹⁹

3043. *Principal challenges* are made on various grounds:

Propter defectum, that is, on account of some personal objection, as alienage, infancy, old age, or the want of those qualifications required by the constitution or legislative enactments.

Propter affectum, because of some personal, or actual partiality in the jury-

¹⁶ See Coke, Litt. 158, b. Where the officer charged with the duty of summoning the jury is interested in the case, the jury should be summoned by some other person. *Pacheco v. Hunsacker*, 14 Cal. 120.

¹⁷ *Wallace v. Columbia*, 48 Me. 436.

¹⁸ *State v. Welch*, 33 Mo. 33; *People v. Moice*, 15 Cal. 329. A challenge to the array must be to the whole panel, and is not good if the objection only applies to a part. *Conkey v. Northern Bank*, 6 Wisc. 447. Where a jury was claimed, none having been summoned, and the court ordered twelve bystanders to be summoned, the party objected to this unusual method, and then challenged some for cause, it was held a good jury. *Suttle v. Batie*, 1 Iowa, 141.

¹⁹ *Steele v. Malony*, 1 Minn. 347; *Pittsfield v. Barnstead*, 40 N. H. 477. Thus where a juror lived out of the county, this objection comes too late after verdict, it being presumed that the party was informed of the objection and waived it. *Mt. Desert v. Cranberry Isles*, 46 Me. 411.

man who is made the subject of the objection; on this ground a juror may be objected to if he is related to the opposite party within the ninth degree, or is so connected by affinity; this is supposed to bias the juror's mind, and is a presumption of partiality.²⁰ One who has expressed a wish as to the result of the trial,²¹ or who has the smallest interest in the matter to be tried, may be challenged for this cause.

The third ground for challenging to the polls is *propter delictum*, or the incompetency of the juror on the ground of infamy.

3044. *Challenges to the polls for favor* may be made when, although the juror is not so evidently partial that his supposed bias will be sufficient to authorize a principal challenge, yet there are reasonable grounds to suppose that he will act under some undue influence and prejudice. The causes for such challenges are manifestly very numerous, and depend on a variety of circumstances. The fact to be ascertained is whether the juror is altogether indifferent as he stands unsworn, because, even unconsciously to himself, he may be swayed to one side. The line which separates the cause for principal challenges and for challenges to the favor is not distinctly marked.²²

3045. After the jurors have been selected to the number of twelve, they are then to be sworn or affirmed. This is done by the clerk or prothonotary of the court, or one of his deputies, administering an oath or affirmation to each juror. The form of this oath or affirmation varies in different states according to the provisions contained in the statute, but it is generally "to try the issue joined between the parties, and a true verdict give according to the evidence." This oath or affirmation, it must be observed, is one of those promissory obligations which are binding only on the conscience, and the violation of which cannot be punished as perjury.²³

The pleadings should be all in and the issue joined before the jury is sworn.²⁴ In some states the practice prevails of swearing the jury at the beginning of the term to try all cases brought before them, and they are not sworn at the beginning of each case.

3046. The right of a party in opening the case and the manner of making the opening will be the next subject.

3047. By opening a case is meant the act of beginning or first addressing the jury and stating the facts of the case. *The right of opening* is of great importance, because the party who begins will, if his opponent give any evidence, have the general reply or last word to the jury, a privilege which powerful counsel can usually exercise with great advantage. The general rule is that the party who alleges the affirmative of any proposition or issue in fact should prove it, because a negative does not in general admit of the simple and direct proof of which an affirmative is capable; and therefore, the party who has to maintain or prove the only affirmative or all the affirmatives must begin to give the evidence, for until that is done the opposite party is not bound to answer. Yet, cases may arise where it is more easy to prove the negative; as, if a defendant plead in abatement that another party contracted jointly with him and that he ought to have been joined, and the plaintiff reply that the contract was not so

²⁰ *Denn v. Clark*, Coxe, N. J. 446; *McLellan v. Crofton*, 6 Me. 307; *Bank v. Hart*, 3 Day, Conn. 491; *Schorn v. Williams*, 6 Jones, No. C. 575; *Martin v. Mitchell*, 28 Ga. 382.

²¹ 4 Hargr. St. Tr. 748; Bacon, Abr. *Juries*, E, 5; *White v. Moses*, 11 Cal. 68.

²² Coke, Litt. 147, 157, a; Bacon, Abr. *Juries*, E, 5; Bouvier, Law Dict. *Challenge*. Such a challenge may be made where the juror has set on a trial involving the same or a similar state of facts. But it seems that in this case the court cannot, before the case is tried, know that the facts are the same. *Algier v. Maria*, 14 Cal. 167.

²³ Objections to the manner of swearing come too late on appeal. *Looper v. Bell*, 1 Head, Tenn. 373.

²⁴ *Cole v. Swan*, 4 Greene, Iowa, 32; *Hoot v. Spade*, 20 Ind. 326.

jointly made, he might be able to prove the negative by producing and proving the defendant's separate undertaking to pay. It is an established rule that when the *onus probandi*, or burden of the proof of all the issues, is on the defendant, he is entitled to begin.²⁵

But when there is one affirmative issue for the plaintiff to prove and several other affirmative issues for the defendant to prove, then the plaintiff has the preference.²⁶

3048. In order to open his case to the court and jury understandingly the counsel should be fully acquainted with the full extent of the plaintiff's claim and the circumstances under which it is made, and of its justice and reasonableness; should know at least the outline of the evidence by which the case is to be supported; should be well acquainted with the legal grounds and authority in favor of the claim, or of the proposed evidence; and should anticipate the expected defence, when that can be done, and be able to state the grounds on which it is futile, either in law or justice, and the reason why it ought to fail.

3049. In making *the statement of the plaintiff's claim* the counsel should state all the facts which the form of the declaration has embraced, because if he omit some of them, besides the charge of unfairness to which such course might subject the counsel, it might mislead the judge, whose attention would not be particularly directed to such facts as had been omitted; but also it might subject the party to some inconvenience, as he would not be allowed to state a new claim or to prove it with a view to obtain a verdict for more than he originally claimed.²⁷

3050. In *stating the evidence* which he expects to give the counsel ought to be very careful not to be too positive as to the proof which he will make; for although he may himself have examined the witnesses, perhaps on an examination in court there will be discrepancies between their statements to him and an examination under the more impressive obligation of an oath in open court. A contrary course will render him liable to the observations of the opposite counsel, who will not fail to point out such discrepancies. When, however, a piece of evidence is positively certain, as, where the same point will be supported by several respectable witnesses or by a written document, the opening counsel ought to press such evidence upon the court and jury. In doing this

²⁵ In England there are some exceptions to this general rule, in actions for libel, slander, malicious prosecutions, and other actions for injuries to the person, in which cases the plaintiff has a right to begin and conclude, although there may be affirmative pleas. It is deemed but fair and reasonable that in such cases the plaintiff who brings an action should be heard first to state his complaint. *Carter v. Jones*, 6 Carr. & P. 64; 1 Mood. & R. 281. And in Arkansas, in an action on a penal bond the plaintiff has a right to open and close, although affirmative pleas have been filed. *Sullivant v. Rearden*, 5 Ark. 140.

The general rule which allows the party holding the affirmative to open and close is enforced in most of the states. *Harvey v. Ellithorpe*, 26 Ill. 418; *Beatly v. Hatcher*, 13 Ohio St. 115; *Yingling v. Hesson*, 16 Md. 112; *Tipton v. Triplett*, 1 Metc. Ky. 570; *Chesley v. Chesley*, 37 N. H. 229; *Mason v. Croom*, 24 Ga. 211.

In Missouri, Iowa, and Wisconsin, the rule is the same, but it rests in the discretion of the court, and a refusal to the party alleging the affirmative is no ground for error or reversal of judgment. *Reichard v. Manhattan Ins. Co.*, 31 Mo. 518; *Smith v. Coopers*, 9 Iowa, 376; *Marshall v. Wells*, 7 Wisc. 1. In New York, for such refusal a new trial will be granted. *Ayrault v. Chamberlain*, 33 Barb. N. Y. 229. In Indiana, the code, § 326, gives this right to the party alleging the affirmative, and the court cannot take it away. *Ashing v. Miles*, 16 Ind. 329. In Missouri, a party contesting the validity of a will has the right to open, but not in Ohio. *Farrell v. Brennan*, 32 Mo. 328; *Banning v. Banning*, 12 Ohio, St. 437. On an application for a mandamus the party showing cause has this right. *People v. Treasurer*, 8 Mich. 392.

²⁶ *Jackson v. Hesketh*, 2 Stark. 521; *Cotton v. James*, 1 Mood. & M. 279.

²⁷ *Patterson v. Zacheriah*, 1 Stark. 72; *Penson v. Lee*, 2 Bos. & P. 332.

the counsel will abstain from making any comments on the evidence, and merely state that he will produce it for the consideration of the jury.

3051. In *stating a point of law* by anticipation the counsel will have to observe a great deal of caution, for he may inadvertently suggest to the court or to his opponent an objection against his case which did not occur to them, and he might betray a want of confidence in his case. But when the point must arise, the counsel may by way of anticipation induce the judge to take a favorable view of the point, and by a concise allusion, rather than by a regular argument, endeavor to satisfy the judge in favor of his client.

3052. The counsel should *anticipate the course of defence* which may probably be adopted by the opposite party ; whether he will probably rely on some legal objection, either as to the law or the facts of the case, or whether, relying upon his speech to the jury, he will refrain from giving any evidence, and thereby entitle himself to the conclusion. The opening must therefore depend in a great measure on the circumstances of each case. If it is expected that the defendant will give no evidence and rely upon some legal objection, it is advisable for the plaintiff's counsel to anticipate, argue against, and condemn all such objections as being founded in neither law nor justice.

With regard to the facts it is unnecessary to anticipate what will be proved by the other side, because these may be stated before giving the rebutting testimony.

CHAPTER X.

THE NATURE AND OBJECT OF EVIDENCE.

- 3053. Preliminary observations.
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 - 3078. When admissible in evidence.
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 - 3084, a. The effect of admissions.
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 - 3087. Indirect confessions.
 - 3088. Relevant and irrelevant evidence.
- 3089-3093. The object of evidence.
 - 3090. The substance of the issue must be proved.
 - 3091. The evidence must be confined to the issue.
 - 3092. The affirmative of the issue must be proved.

3053. The court and jury being in possession of the statement of the facts and of the law of the plaintiff's case, supposing him to be entitled to the opening, the next step is to prove it according to the rules established for ascertaining the truth of the facts or by evidence. It is not within the compass of a work like the present to enter into all the niceties and distinctions of the law of evidence, or what may be submitted to the jury in order to establish the truth; a mere synopsis of the law upon this subject will be attempted.

Various definitions have been given of evidence. It is that which makes clear or ascertains the very fact or point in issue,¹ or it is whatever is lawfully

¹ 3 Sharswood, Blackst. Comm. 367.

exhibited to a court and jury, by which any matter of fact, the truth of which is submitted to investigation, is established or disproved.²

This word, and the words proof, testimony, and witness are sometimes used indifferently, or as synonymous; but they are very different, and will not be used in the same sense by any who are not guilty of negligence or carelessness. By evidence is meant what establishes the truth; proof is the effect of evidence; testimony is the statement of a witness made under oath or affirmation; and witness is a person who testifies or gives evidence of facts known to him. By the word truth, which is to be established by the evidence, is meant the actual state of things at the time spoken of.

By competent evidence is meant that which the law authorizes, and the very nature of the thing to be proved requires. Credible evidence is that which may be believed and which has the appearance of being a statement of the truth; by incredible evidence is meant what is lawfully produced as evidence, but which is not deserving of credit or belief; as, if a man were to swear he saw a horse flying, in this case he must be supposed to want to impose upon the court and jury, or that there was some delusion in his mind. Satisfactory evidence is what is sufficient to induce a belief that the thing is true; in other words, it is credible evidence. Cumulative evidence is that which goes to prove the same point which has been established by some other evidence; as, if an attempt be made to prove a fact by the admission of the party, evidence of another verbal admission of the same fact is cumulative; but evidence of other circumstances tending to establish the fact is not.³ Direct evidence is that which proves precisely the fact in question; indirect evidence is that which does not prove the fact in question, but proves another, the certainty of which may lead to discover the truth of the one sought. This induction may be necessary and infallible; for example, a question arises whether the defendant signed a certain paper or performed a certain act upon such a day in Philadelphia; if it be strictly proved beyond a doubt that upon that day he was in England, the evidence, although indirect, will be conclusive. But on the other hand, the induction which arises from indirect proof may be only probable, and then only a stronger or weaker presumption will be the result.

3054. The object of all inquiry is truth, and the intention of the law is to adopt the best means of terminating disputes among the people, and to base their happiness on law and justice; it seeks the best means of discovering the truth, and for this purpose it has established certain rules to guide the magistrate in its discovery.

With regard to things which pass or happen out of our observation which can become the object of a legal inquiry, we can have no certain knowledge; we have no conscious certainty of their existence, and we must have recourse to others in order to acquire any idea of them. These means are the senses; the testimony of men, whether in writing or not; and analogy or induction, which are so useful in jurisprudence.

But all these means may deceive us, and often do so; still, when they are directed by a right reason, although they do not bear the infallible mark or characteristic of truth, yet they often lead us to its discovery. They sometimes produce convictions as strong as consciousness; and for this reason this strong persuasion has been called moral evidence in opposition to demonstration, which has been denominated mathematical evidence.

However deceptive these means of ascertaining truth may be, we cannot do

² Bacon, Abr. *Evidence, in pr.*; 1 Greenleaf, Ev. § 1; 1 Phillipps, Ev. 1; Wills, Cir. Ev. 2; 1 Starkie, Ev. 8; 8 Toullier, Dr. Civ. Fr. n. 2; Domat, 1, 3, t. 6, *in pr.*

³ Parker v. Hardy, 24 Pick. Mass. 246.

without them. They are indispensable in all the sciences, and particularly in civil life, and we must constantly have recourse to them. The certainty, or at least probability, of which they assure us when well considered, are such that we cannot withhold our assent to them without imprudence, if not folly. And if these means which nature has furnished us sometimes fail, it is generally owing to the precipitation of our judgments.

Every thing that can be done to prevent these errors has been provided by the law by establishing rules which shall guide the magistrate called upon to decide upon the rights of his fellow citizens.

It is a general rule, applicable to all species of evidence, that the proof of facts derives its force from other known facts, from which we conclude that those which are unknown are true; either by drawing a consequence of a cause from its effect, or of an effect from its cause, or from the connection which one thing has with another. Thus, all the art of the human mind, all the prudence and experience of the judges, consists in drawing from a known fact a certain consequence which makes known a doubtful fact.⁴

The subject of evidence will be divided into two branches: under the first will be considered the nature, the object of evidence, the instruments by which truth is established, and the effect of evidence; the manner of giving evidence will be discussed under the second.

3055. Evidence will be considered with reference to its nature, its object, the instruments by which facts are established, and its effect.

3056. *Evidence, considered as to its nature,* is primary, secondary, positive, circumstantial or presumptive, hearsay, admitted, confessed, relevant, and irrelevant.

3057. *Primary evidence* is the best of which the case in its nature is susceptible; the term is opposed to secondary evidence, which supposes some other or primary evidence behind. The rule that the best evidence shall be required does not demand the greatest amount of evidence which can possibly be given of any fact; its object is to exclude from the case any evidence which supposes better evidence in the possession of the party; for that better evidence may be withheld because it would prove facts differently from what the secondary would establish. This rule, then, excludes only that evidence which indicates the existence of more original sources of information; but when there is no substitution of evidence, but simply a selection of weaker instead of stronger proof of the same nature, it is not required that the party should supply all the proof capable of being produced. For example, when a written contract has been entered into, and the object is to prove what it was, it is requisite to produce the original writing, if it is to be obtained, and, in that case, no copy or inferior evidence will be received. But, being produced, its execution may be proved by only one of two attesting witnesses.

3058. To this general rule there are several exceptions.

As it refers to the quality rather than the quantity of the evidence, it is plain, as before observed, that the fullest proof every case admits of is not requisite; if, therefore, there are several eye-witnesses to a fact, it may be sufficiently proved by one only, and the evidence of a bystander is admissible to prove where lines were run in a private survey, though the surveyor be living.⁵

It is not always requisite, when the matter to be proved has been reduced to writing, that the writing should be produced; as, if the narrative of a fact to be proved has been committed to writing, it may yet be proved by parol. A receipt for the payment of money, for example, will not exclude parol evidence

⁴ See 2 D'Augesseau, Plaidoyer 23^e, p. 351; Pardessus, ed.

⁵ Richardson v. Milburn, 17 Md. 67.

of payment.⁶ But this exception does not extend to those cases where the law requires the instruments should be in writing, such as records, public documents, official examinations, deeds of conveyance of land; wills, other than nuncupative, promises required to be in writing by the statute of frauds, and the like, for in all these cases the writing must be produced if in the power of the party. And, again, parol proof cannot be substituted for the written evidence of any contract which the parties have put in writing.⁷ Nor can oral evidence be substituted for any writing the existence of which is disputed, and which is material, either to the issue between the parties or to the credit of witnesses, and is not a mere memorandum of some other fact.⁸

Another exception to the rule arises from considerations of public convenience; for example, proof that an individual has acted notoriously as a public officer is *prima facie* evidence of his public character without producing his commission or appointment.⁹ But if the office is of a private nature, proof of the appointment of the agent must be made.¹⁰

3059. *Secondary evidence* is that species of proof which is admissible on the loss of primary evidence, and which becomes, by that event, the best evidence.

The rule that secondary evidence shall not be given when the primary can be had is grounded upon a reasonable suspicion that the substitution of inferior for better evidence arises from sinister motives, and an apprehension that the best evidence, if produced, would alter the case to the prejudice of the party. Besides, the secondary evidence is more liable to errors or mistakes than the primary; the copy of a written paper may be incorrect and differ from the original.

When primary evidence cannot be had, then secondary evidence will be admitted, because then it is the best. But before such evidence can be allowed, it must be clearly made to appear that the superior evidence is not to be had.¹¹ The person who possesses it must be applied to, whether he be a stranger or the opposite party; in the case of a stranger, a *subpoena duces tecum* and attachment when proper must be taken out and served; and in the case of a party, notice to produce such primary evidence must be proved before the secondary evidence will be admitted.¹²

When the original cannot be had, after due proof of its execution, the contents

⁶ 4 Esp. 213. See *Rex v. Holy Trinity*, 7 Barnew. & C. 611; 1 Campb. 439; 3 Barnew. & Ald. 566. So the existence of a written clearance does not exclude parol evidence of the destination of a ship. *Hadden v. People*, 25 N. Y. 373.

Where the fact to be proved is the existence of a paper and not its contents, this may be shown by parol. *Gilbert v. Duncan*, 5 Dutch. N. J. 133; *Morrison v. Myers*, 11 Iowa, 538; *Smith v. Richards*, 29 Conn. 232.

⁷ *Rex v. Holy Trinity*, 7 Barnew. & C. 611; *Dennett v. Crocker*, 8 Me. 239; *Spiers v. Wilson*, 4 Cranch, 398.

⁸ 1 Greenleaf, Ev. § 88; 1 Phillips, Ev. 422; *Vincent v. Cole*, 1 Mood. & M. 258.

⁹ *United States v. Reyburn*, 6 Pet. 352; *Milnor v. Tillotson*, 7 Pet. 100; *Jacob v. U. S.* 1 Brock. C. C. 520. Thus parol evidence is admissible in the absence of any record to show that town officers were duly sworn. *Hathaway v. Addison*, 48 Me. 440.

¹⁰ *Short v. Lee*, 1 Jac. & W. Ch. 464.

¹¹ See *Ford v. Walsworth*, 19 Wend. N. Y. 334; *Flinn v. McGonigle*, 9 Watts & S. Penn. 75; *Woodsworth v. Barker*, 1 Hill, N. Y. 172; *Harris v. Doe*, 4 Blackf. Ind. 369; *Doe v. McCaleb*, 3 Miss. 756; *Bouldin v. Massie*, 7 Wheat. 122; *Guerin v. Hunt*, 6 Minn. 375. It is not necessary to prove the loss of the primary evidence beyond the possibility of a doubt, but only to a moral certainty. *United States v. Sutter*, 21 How. 170. In regard to lost writings it is sufficient to show that all the search reasonably practicable has been made without success. *Holbrook v. School Trustees*, 28 Ill. 187; *Hatch v. Carpenter*, 9 Gray, Mass. 271; *Blackstone v. White*, 41 Penn. St. 330; *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492; *Moore v. Beattie*, 33 Vt. 219.

¹² *Patton v. Tybout*, 7 Serg. & R. Penn. 116; *Myer v. Barker*, 6 Binn. Penn. 228; *Drum v. Simpson*, 6 Binn. Penn. 478; *Reading R. R. v. Johnson*, 7 Watts & S. Penn. 317; *Barker v. Barker*, 14 Wisc. 131.

should be proved by a counterpart, if there be one, for that is the next best evidence; and it seems that no evidence of a mere copy is admissible until proof has been given that the counterpart cannot be produced.¹³ If there be no counterpart, a copy may be proved by any witness who knows that it is a copy from having compared it with the original.¹⁴ If there be no copy, the party may produce an abstract, or give even parol evidence of a deed.¹⁵

But it has been decided that there are no degrees in secondary evidence; and when a party has laid a foundation for such evidence, he may prove the contents of a deed by parol, though it appear an attested copy is in existence.¹⁶

The rule adopted in the United States generally is that secondary evidence cannot be introduced if it is shown that other more satisfactory evidence, although secondary, exists and could have been produced.¹⁷ Thus parol evidence of the contents of a written paper is inadmissible if a written copy exists.

3060. This rule rejecting secondary evidence is subject to some exceptions, of which the following are the principal:

Records of a judicial court and public books or registers may be proved by an examined copy;¹⁸ the reason of this is that those books cannot be removed from place to place because they might be wanted at two places at the same time, and because, being public, a fraud or error in the copy might be easily detected. But this exception does not extend to depositions, or affidavits, or an answer to a bill in chancery, when the party is indicted for perjury; nor perhaps to cases where the party denies his hand writing to a bond or recognizance, unless the copy has been made evidence by a special law.¹⁹

It is not in general necessary to prove the written appointment of public officers; proof of their acting as such is, *prima facie*, sufficient between third parties.²⁰

When the evidence is the result of voluminous facts, or of the inspection of many books and papers, the examination of which could not be conveniently made in court, the rule is so far relaxed that secondary evidence will be admitted; as, if there be one invariable mode of drawing bills of exchange between the parties, this may be proved by witnesses who know the facts without producing the bills.²¹

Inscriptions on walls, fixed tables, mural monuments, gravestones, which cannot conveniently be produced in court, may be proved by secondary evidence.²²

In the examination of a witness on his *voir dire*, and in preliminary examinations of the same nature, if the witness discloses the existence of a written instrument affecting his competency, he may also be interrogated as to its contents;

¹³ *King v. Castleton*, 6 Term, 236.

¹⁴ *Buller, Nisi P.* 254.

¹⁵ *King v. Metherringham*, 6 Term, 556; 10 Mod. 8.

¹⁶ *Brown v. Woodman*, 6 Carr. & P. 206; 8 *id.* 389.

¹⁷ *Conger v. Converse*, 9 Iowa, 554; *United States v. Britton*, 2 Mas. C. C. 468. Thus upon proof of the loss of an execution the execution docket must be produced as the next best evidence. *Ellis v. Huff*, 29 Ill. 449.

¹⁸ When the record has been lost or destroyed its contents may be proved by secondary evidence. *Graham v. O'Fallow*, 3 Mo. 507. In the United States, generally, a certified copy of public records made by an officer whose duty it is to keep them is sufficient. *United States v. Percheman*, 7 Pet. 51; *Warner v. Hardy*, 6 Md. 525.

¹⁹ See *Rex v. Howard*, 1 Mood. & R. 189; *Buller Nisi P.* 226; 1 *Starkie, Ev.* 189; 1 *Greenleaf, Ev.* § 91.

²⁰ *Cabot v. Given*, 45 Me. 44.

²¹ 1 *Greenleaf, Ev.* § 93; 1 *Phillipps, Ev.* 433. The court may at their discretion allow abstracts of voluminous books and accounts, to be prepared *ex parte* and submitted to the jury, the opposite party having an opportunity to examine them. *Boston R. R. v. Dana*, 1 *Gray, Mass.* 83.

²² *Meyer v. Sefton*, 2 *Stark.* 274.

the rule in this case is that if the objection arises on the voir dire, it may be removed on the voir dire.²³

3061. *Positive evidence* is that which, if believed, establishes the truth or falsehood of a fact in issue, and does not arise from any presumption. Evidence is direct and positive when the very facts in dispute are communicated by those who have the actual knowledge of them by means of their senses.²⁴ In these cases the *factum probandum* is attested by those who speak from their own actual personal knowledge of its existence, and the credit which we give it rests on our faith in human testimony, sanctioned by experience. We have only to fear that the witness wishes to deceive, or that he has been deceived. When the evidence is not direct and positive, there is danger that we may not clearly perceive the connection between the facts proved and the facts in controversy.

3062. *Circumstantial evidence* is the proof of collateral facts, and differs from direct or positive proof in this, that it never proves directly the fact in question. A fact which is not positively known is presumed or inferred from one or more other facts or circumstances which are known. Sometimes circumstances are so powerful that it is impossible to resist them, and then such circumstantial evidence is said to be certain; at other times such circumstantial evidence is not so conclusive; it is then said to be uncertain, or merely probable. Of the first kind is a case where a body is found dead, being that of a person of mature age, with a recent mortal wound, and the mark of a bloody left hand upon the left arm; the conclusion that he once lived, and that another person was present at or about the time the wound was inflicted, may be considered certain; but whether the death was caused by suicide or murder, and whether the mark of the bloody hand was that of a murderer or of a friend who came to his relief, or to prevent the crime, is a conclusion which does not necessarily follow from the facts proved. It is certain that the bloody mark was not made by the deceased, because no man can make such a mark.²⁵ Another case of the certainty of circumstances, which renders the most positive testimony of a witness incredible, may be mentioned. A man is found dead; a witness swears he saw him shoot himself with a pistol which the deceased held in his hand; upon an examination the ball is extracted from the body, and found to be too large to enter into the pistol; in such case the witness ought not to be credited.²⁶

3063. Presumptions are the consequences of a known fact to make known the truth of an uncertain fact, the proof of which is sought.²⁷ For example, if a question arise as to the right to an estate between the possessor and a stranger, as to which is the owner, the law presumes it belongs to the possessor, and he will be maintained in his possession until the other proves his right; for it is not common that a person shall take possession without right, nor that the owner should allow himself to be deprived of his possession.

Presumptions, which are sometimes confounded with circumstantial evidence, are however different; circumstantial evidence is the means employed to come to the knowledge of one or more facts to establish the existence of another; a presumption is an inference as to the existence of one fact from the existence of some other fact founded on a previous experience of their connection.²⁸

To constitute such a presumption, a previous experience of the connection between the known and inferred facts is essential; this connection must be of such a nature that as soon as the evidence of one is established, admitted, or

²³ Phillipps & Am. Ev. 149; 1 Phillipps, Ev. 154; 1 Greenleaf, Ev. § 94.

²⁴ 1 Phillipps, Ev. 116; 1 Stark. 19.

²⁵ 14 How. St. Tr. 1324.

²⁶ Starkie, Ev. 505.

²⁷ 1 Domat, Lois Civiles, liv. 3, t. 6, s. 4, n. 1.

²⁸ 3 Starkie, Ev. 1234; 1 Phillipps, Ev. 116; Gilbert, Ev. 142; Pothier, Obl. n. 840.

assumed, the inference as to the existence of the other immediately arises, independently of any reasoning upon the subject. Presumptions are either legal and artificial, or natural.

3064. *Presumptions of law* consist of those rules which in certain cases either forbid or dispense with any further inquiry. These presumptions derive their force either from the first principles of justice, the laws of nature, or the experience and conduct of human affairs, and the connection usually found to exist between certain things. These presumptions are divided into two kinds, namely, conclusive, or which cannot be disputed, and inconclusive, or which are disputable.²⁹

3065. *Conclusive, imperative, or absolute presumptions of law* are rules determining the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the case is otherwise.

Abstractly considered, a presumption is the inference drawn of the resemblance between certain facts and probabilities, and reason would require that such presumption should yield to positive proof; and that if the means of demonstrating truth are at hand, it would be shutting our eyes and becoming wilfully blind to refuse to receive the light which would establish it against a presumption of law. If we reflect with attention, we will perceive that it would be neither reasonable nor possible, without opposing the very intent of the law and going contrary to its wisdom, to admit evidence against presumptions which are its very foundation. This will be rendered manifest by an example: the incapacity of an infant to contract is a rule founded on the general presumption that minors have not yet arrived at that age when the intellectual and moral faculties of man are entirely developed, and which produces that maturity of reason and that prudence which are required to make a contract without temerity. That capacity, however, is not the same with every one. Temperament, climate, education, make it vary to infinity. Nature has not pointed out any certain signs; yet, without suffering greater inconvenience, the determination when each individual should be considered capable of entering into contracts could not have been left open as to each individual so as to enable a jury to decide that question in every case. If such were the law, there would be required as many judgments as there are men.

The law has fixed the age, but it has not been fixed arbitrarily. After many observations, made during a long space of time, as to the period when the greater part of men acquire the faculties which they have at maturity, *ex eo quod plerumque fit*, the law has presumed that this age is twenty-one years; it has fixed the presumption as on a fact which was known and which is generally true, before which time infants are not capable of making contracts against their interests. This is a general rule applying to all men.

Now could a plaintiff who sued an infant to enforce the performance of a contract he had made against his interest, ask to prove that the presumption of law which the infant invokes is not applicable to him, as he was, when the contract was made, a very shrewd young man, wanting only one day of being of full age, and that the presumption was contrary to truth? Certainly not, for that would be to make the provisions of the law subordinate to the decision of the court and jury, whose duty it is to observe and not judge the law. The rule is universal in its application. Leibnitz, for example, that universal genius, who at the age of twenty years had written an excellent work on the best mode of teaching and learning jurisprudence, and who, treading in the steps of Bacon, had dared to point out the *desiderata* of that science, that is, in what it

²⁹ 1 Domat, Lois Civiles, liv. 3, t. 6, s. 4, n. 2.

was deficient—the great Leibnitz would not have been an exception to this legal presumption, although it might have been demonstrated that as to him it was evidently false, and that at twenty his reason was very superior to that of most people at thirty.

3066. Among the numerous cases where the presumption of law is conclusive may be mentioned the following:

When the legislature has so declared; thus, by the statute of limitations when a debt has been created by simple contract, and it has not been distinctly recognized or acknowledged within six years as a subsisting obligation, no action can be maintained upon it; the law conclusively presumes it to have been paid.

The rules of the common law, established and declared through the medium of judicial tribunals, have equal validity. The uninterrupted enjoyment of an incorporeal hereditament for a period beyond the memory of man is a conclusive presumption of a prior grant of that which has been so enjoyed; if you permit me to have a right of way over your land, and I enjoy it not only uninterruptedly, but exclusively, and adversely to your rights, for a sufficient length of time, this is a conclusive presumption of title in me.³⁰

Conclusive presumptions are made in favor of judicial proceedings; thus, the records of a court of justice are presumed to have been correctly made, and they are said to import absolute verity; *res judicata pro veritate accipitur*.³¹ And those facts without which a verdict could not have been found will be presumed to have been proved, though they were not expressly and distinctly alleged upon the record, provided that it contains general terms to comprehend them by a fair intendment.³²

It is conclusively presumed that a sane man intends to do what will be the probable consequences of his acts; the deliberate publication of slanderous words which the publisher knows to be false, or which he does not know to be true, raises a conclusive presumption of malice.³³

Ancient deeds and wills more than thirty years old, if unblemished and unaltered, are said to prove themselves; the subscribing witnesses are presumed to be dead.³⁴ But in the case of deeds possession must have accompanied them.³⁵

An estoppel is such a presumption of law that a party bound by it cannot disprove it.³⁶

A conclusive presumption of legitimacy arises where a man and a woman are

³⁰ Tyler v. Wilkinson, 4 Mas. C. C. 397; Hill v. Crosby, 2 Pick. Mass. 466; Strickler v. Todd, 10 Serg. & R. Penn. 63, 69; Best, Pres. 103, note (m); Rooker v. Perkins, 14 Wis. 79. The length of time requisite to cause a presumption of the grant of an easement is in general the same as the period of limitation of the right of bringing a writ of entry. This is in general twenty years. Anything less is not even *prima facie* evidence of a grant. 2 Washburn, Real Pro. 48.

³¹ Dig. 50, 17, 207; Reed v. Jackson, 1 East, 355.

³² Jackson v. Pesked, 1 M. & S. 234. Similar to this is the rule *omnia præsumentur rite esse acta*, that is, that proceedings not of record, but quasi judicial, as the acts of justices of the peace, municipal bodies, executors, are legal and authorized and accompanied with the proper formalities. Randall v. Bowden, 48 Me. 37; Webber v. Gottschalk, 15 La. Ann. 376; Carlisle v. Gaar, 18 Ind. 177; Outlaw v. Davis, 27 Ill. 467; Rowan v. Lamb, 4 Greene, Iowa, 468; Nelson v. People, 23 N. Y. 293; Tharp v. Commonwealth, 3 Metc. Ky. 411.

³³ Weckerly v. Geyer, 11 Serg. & R. Penn. 39; Fisher v. Clement, 10 Barnew. & C. 472; Bowdell v. Osgood, 3 Pick. Mass. 379; Hare v. Wilson, 9 Barnew. & C. 643. So if one strikes another with a deadly weapon, so that he dies, he is conclusively presumed to have intended his death; and if no other facts appear, he is presumed to have done it with malice. Commonwealth v. York, 9 Metc. Mass. 93. But see State v. McDonnell, 32 Vt. 491.

³⁴ Tr. per. Pais, 370; Winn v. Patterson, 9 Pet. 674; Bank of U. S. v. Dandridge, 12 Wheat. 70.

³⁵ Plowd. 6; Bank of Middlebury v. Rutland, 33 Vt. 414.

³⁶ 1 Greenleaf, Ev. § 22. The maker of a deed is estopped to deny any thing stated

married and cohabit together; the children of the wife will be considered as legitimate, and proof of the mother's irregularities will not destroy the presumption: *pater is est quem nuptiæ demonstrant*. But this presumption may be rebutted by showing circumstances which render it impossible that the husband should be the father,³⁷ as impotency and the like.

It is a legal presumption that certain persons cannot commit certain crimes; in this class is an infant under the age of seven years, who cannot commit a larceny; a male infant under fourteen cannot commit a rape; a wife while in the company of her husband cannot commit a felony: it is presumed she acts by his coercion.

3067. *Inconclusive presumptions* are those which may be overcome by opposing proof. These, like the former, are the result of the general experience of mankind, that there is connection between certain facts and things, the one being usually the companion or the effect of the other. Of this class of presumptions the following are a few of the numerous examples:

The law presumes that he who has possession of personal property is the owner of it; but possession of personal property, lately stolen, is *prima facie* evidence of guilty possession, and if unexplained is taken as conclusive.

In like manner, possession of a bill of exchange by the acceptor, of a promissory note by the maker, will be a presumption that they have been paid;³⁸ a deed found in the possession of the grantee, having on its face the appearance of a regular execution, will be presumed to have been delivered by the grantor.³⁹

Every man is presumed innocent until the contrary is made to appear, and the rule is so strong that when guilt cannot be established without proving a negative, that must be done, though in general the burden of proof devolves upon the party who makes an affirmative averment; for example, where the plaintiff complained that the defendant who had chartered his ship had put on board articles highly inflammable and dangerous, without giving notice to the master or others in charge of the ship, whereby the vessel was burnt, he was held bound to prove this negative averment.⁴⁰ In some cases the presumption of innocence is sufficient to overthrow another presumption; as, where, twelve months after her husband's death, a woman married again, it was rightly presumed that the husband was dead at the time of the wife's marriage, although the presumption of his death, in consequence of absence, does not arise till a much later period.⁴¹

But there is an exception to the rule respecting the presumption of innocence; when a libel has been sold in a book store by a servant in the ordinary course of his employment, the bookseller, or master, will be presumed to have authorized it, and it will be a guilty publication by him, though an authority to commit a breach of the law is not presumed. This exception is founded on public policy, lest irresponsible persons should be put forward, and the principal and real offender escape.

Another exception to the presumption of evidence arises from the presumption of guilt, by the misconduct of the party, in his destroying evidence which

therein which has operated upon the other party as the inducement to accept such deed; for instance, he is estopped to deny the recitals in the deed. A covenant of warranty estops the warrantor to set up a title acquired afterward. *Foss v. Strachan*, 42 N. H. 40; *Williams v. Swetland*, 10 Iowa, 51; *Nunnally v. White*, 3 Metc. Ky. 584.

³⁷ *Commonwealth v. Shepherd*, 6 Binn. Penn. 283.

³⁸ *Carrol v. Bowie*, 7 Gill, Md. 34.

³⁹ *Ward v. Lewis*, 4 Pick. Mass. 518; *Lawrence v. Minturn*, 17 How. 100.

⁴⁰ *Williams v. E. Ind. Co.*, 3 East, 192; *Buller, Nisi P.* 298. See *Rex v. Hawkins*, 10 East, 211; *Powell v. Milburn*, 3 Wils. 355; *Rodwell v. Redge*, 1 Carr. & P. 220.

⁴¹ See *Bouvier, Law Dict. Death*.

he ought to produce, or to which the opposite party is entitled; as, if a party should obtain papers from a witness after the latter has been required to produce them under a *subpcena duces tecum*, and refuse to produce them.⁴² But a mere withholding of papers by a party is not a presumption of guilt.⁴³

A legal presumption of payment of a debt due by specialty arises when it has been unclaimed and without recognition for twenty years in the absence of any explanatory evidence. But this presumption does not, in general, attach until the completion of the twenty years,⁴⁴ but in some cases this presumption of payment has been made after eighteen years, but these cases are probably exceptions to the general rule.⁴⁵ This presumption is rebutted by showing that interest has been regularly paid,⁴⁶ that the obligor has admitted it had not been paid,⁴⁷ or other circumstances to rebut the presumption.

It is presumed that certain things continue as they are until the contrary appears. When the existence of a person, personal relation, or a state of things is once established by proof, the law presumes that the person, relation, or state of things continues to exist as before, until the contrary is shown, or until a contrary presumption is raised from the nature of the subject. A party once living will not be presumed to be dead until the presumption of death arises, namely, when he has attained one hundred years,⁴⁸ or until he has been absent for seven years, without being heard from, when the presumption of life ceases, and the burden of proof is thrown on the other side.⁴⁹

The relation of partnership, or other similar relations, are presumed to continue until a presumption arises of their dissolution.⁵⁰

Seisin once proved is supposed to continue until disseisin is shown.⁵¹

The opinions of individuals are presumed to continue the same; and the state of mind, whether sane or insane, once established, is presumed to continue until the contrary appears. In all these cases he who asserts there has been a change, is bound to prove it.⁵²

When a man makes a payment to another it is presumed to be for a debt due to the receiver, and when he alleges that the payment was made by error he must prove it, for no man is deemed so imprudent as to pay a debt he does not owe. But if he to whom the money was paid denies having received it, and it is proved he did receive it, he will then be required to show that it was given in payment.⁵³

When a letter is used in evidence several facts are to be proved; first, that it was written by the party by whom it purports to be, second, that it was sent, third, that it was received by the party to whom it is addressed. A post mark is *prima facie* evidence that it was sent.⁵⁴ Proof that it was sent causes a presumption that it was received;⁵⁵ but this presumption is not conclusive.⁵⁶

⁴² Leeds v. Cook, 4 Esp. 256.

⁴³ Hanson v. Eustace, 2 How. 653.

⁴⁴ Oswald v. Leigh, 1 Term, 270.

⁴⁵ Rex v. Stephens, 1 Burr. 434; Clark v. Hopkins, 7 Johns. N. Y. 556.

⁴⁶ Nixon v. Bynum, 1 Bail. So. C. 148.

⁴⁷ 2 Harr. Del. 124; Mathews, Pres. c. 19, 20; Best, Pres. part 1, c. 2, 3.

⁴⁸ 9 Mart. La. 257.

⁴⁹ Hopewell v. De Pinna, 2 Campb. 113; Loring v. Steinman, 11 Metc. Mass. 204; Innis v. Campbell, 1 Rawle, Penn. 373; Winship v. Conner, 42 N. H. 341; Rice v. Lumley, 10 Ohio, St. 596.

⁵⁰ Eames v. Eames, 41 N. H. 177. So of marriage. Erskine v. Davis, 25 Ill. 251.

⁵¹ Brown v. King, 5 Metc. Mass. 173.

⁵² 1 Greenleaf, Ev. § 42; Perkins v. Perkins, 39 N. H. 163; Lilly v. Waggoner, 27 Ill. 395.

⁵³ 1 Domat, Lois Civiles, liv. 3, t. 6, s. 4, n. 10.

⁵⁴ New Haven Bank v. Mitchell, 15 Conn. 206.

⁵⁵ Commonwealth v. Jeffries, 7 All. Mass. 548.

⁵⁶ Greenfield Bank v. Crafts, 4 All. Mass. 447; Loud v. Merrill, 45 Me. 516.

When a contract is to be governed by foreign laws, in the absence of other proof such laws are presumed to be the same as the laws of the state in which the suit is brought.⁵⁷ But this presumption will not prevail if it makes the contract illegal.⁵⁸

3068. *Natural presumptions or presumptions of fact* depend upon their own form and efficacy in generating belief or conviction on the mind, as derived from those connections which are pointed out by experience; they are independent of any artificial connections, and differ from mere presumptions of law in this essential respect, that the latter depend on and are a branch of the particular system of jurisprudence to which they belong; but mere natural presumptions are derived wholly by means of the common experience of mankind, without the aid or control of any particular rule of law, but simply from the course of nature and the habits of society.

These presumptions fall within the exclusive province of the jury, who are to pass on the facts; in this they are aided by the advice and instructions of the court.

3069. *Hearsay* is that kind of knowledge which the witness states he has received or heard from others. It relates to that which is written as well as to what is spoken; it does not derive its value solely from the credit given to the witness himself, but rests also in part on the veracity or competency of some other person. This kind of evidence is not competent to establish any specific fact which from its nature is susceptible of proof by witnesses who speak of their own knowledge.⁵⁹

Difficulties frequently arise in discriminating whether the evidence offered is original or hearsay evidence. What has been written or said by a third person is not necessarily hearsay evidence when proved by a witness as having been so said or written. On the contrary, the very point in controversy is not unfrequently whether such things were written or spoken, and not whether they were true; and in other cases such language or statements, whether written or spoken, may be the natural and inseparable concomitants of the principal fact in dispute. In such cases it is obvious that the writings or words are not within the meaning of hearsay, but are original and independent facts, admissible in proof of the issue.⁶⁰ Whenever the fact that such a communication was made, and not its truth or falsity, is the matter in controversy, the evidence to establish it will be considered as original. Upon this principle evidence of general reputation, reputed ownership, public rumor, general notoriety, and the like, though composed of the speech of a person not under oath, is original evidence, and not hearsay, the subject of inquiry being the concurrence of many voices to the same fact.⁶¹

3070. There is a species of evidence which, although generally classed under the head of hearsay evidence, is original evidence; it is used not as a medium of proof to establish a distinct fact, but as being in itself a part of the transaction in question, when it is a part of the *res gestæ*, or the subject matter of inquiry, or things done. Upon an inquiry as to the state of mind, sentiments, or dispositions of a person at any particular period, his declarations and conversa-

⁵⁷ *Sharp v. Sharp*, 35 Ala. N. S. 574; *Locke v. Huling*, 24 Tex. 311; *Rape v. Heaton*, 9 Wisc. 328; *Atkinson v. Atkinson*, 15 La. Ann. 491; *Hickman v. Alpaugh*, 21 Cal. 225; *Crake v. Crake*, 18 Ind. 156; *Cooper v. Reaney*, 4 Minn. 528.

⁵⁸ *Smith v. Whitaker*, 23 Ill. 367.

⁵⁹ *Mima Queen v. Hepburn*, 7 Cranch, 290.

⁶⁰ 1 Greenleaf, Ev. § 100.

⁶¹ See *Bouvier, Law Dict. Character*; *Foulkes v. Sellway*, 3 Esp. 236; *Du Bost v. Beresford*, 2 Campb. 512; *Oliver v. Bartlett*, 1 Brod. & B. 269; *Carpenter v. Leonard*, 3 All. Mass. 32; *King v. Woodbridge*, 34 Vt. 565.

tions are admissible as part of the *res gestæ*.⁶² So on an indictment for a rape; what the girl said so recently after the fact as to exclude the possibility of practicing on her has been held to be admissible evidence as a part of the transaction.⁶³

The first requisite to constitute declarations a part of the *res gestæ* is that they must be made at the time of the act done.⁶⁴ They must also be so connected with it as to illustrate its character and constitute one transaction with it.⁶⁵ Declarations made by one in possession of property qualifying or explaining his title, if made in good faith, are admissible as part of the *res gestæ*, their effect being governed by other rules of evidence.⁶⁶ The same principles apply to conspirators: the fact of conspiracy being first established, the declarations of one conspirator in carrying out the object of the conspiracy are admissible against all the others.⁶⁷ Declarations of partners⁶⁸ and agents⁶⁹ come under the same rule, and are admissible as original evidence when they constitute part of the *res gestæ*.

307L. Although generally classed as hearsay, yet, if properly considered, the evidence usually given in cases of *pedigree* will be found to be original evidence. The question is the descent or parentage of the individual; and in order to ascertain the fact it is important to know how he was treated and acknowledged by those who were interested in him or sustained toward him any relation of kindred or affinity. This may be shown by proving the declarations of deceased persons who were related by blood or marriage to the person, and therefore interested in the succession in question; the declarations of all other persons are excluded.⁷⁰ General repute in the family, proved by a living member of it, is evidence of pedigree.⁷¹

Pedigree is the state of a family as far as regards the relationship of the different members, their births, marriages, and deaths, and the time when these events happened. These facts may be proved not only by living witnesses who heard of them from other members of the family, but also by the proof of written documents where the facts are stated. Thus, an entry by a deceased parent or other relative made in a family Bible or missal, or any other book, or document, or paper, stating the fact and date of the birth, marriage, or death of a child or other relative, is considered as the declaration of such parent or relative in a matter of pedigree.⁷²

⁶² *Barthelemy v. The People*, 2 Hill, N. Y. 248. On the trial of Lord George Norton for treason, the cry of the mob, who accompanied the prisoner on his enterprise, was received in evidence as forming a part of the *res gestæ*, and showing the character of the principal fact. 21 How. St. Tr. 542.

⁶³ East, P. C. 414.

⁶⁴ *Faner v. Turner*, 1 Iowa, 53; *Scraggs v. State*, 16 Miss. 722; *Noyes v. Ward*, 19 Conn. 250; *Small v. Gilman*, 48 Me. 506.

⁶⁵ *Elkins v. Hamilton*, 20 Vt. 627; *State v. Shellidy*, 8 Iowa, 477; *Commonwealth v. Harwood*, 4 Gray Mass. 41.

⁶⁶ *Bartlett v. Emerson*, 7 Gray, Mass. 174; *Potts v. Everhart*, 26 Penn. St. 493; *Pomeroy v. Bailey*, 43 N. H. 118; *Beedy v. Macomber*, 47 Me. 451; *Currier v. Gale*, 14 Gray, Mass. 504. But the admissions of a vendor made after the sale are not competent to defeat the title. *Cohn v. Mulford*, 15 Cal. 50; *Myers v. Kinzie*, 26 Ill. 36; *Derby v. Gallup*, 5 Minn. 119.

⁶⁷ *Commonwealth v. Crowninshield*, 10 Pick. Mass. 497; *Lee v. Lamprey*, 43 N. H. 13; *Preston v. Bowers*, 13 Ohio, St. 1.

⁶⁸ *Coit v. Tracy*, 8 Conn. 268; *Mamlock v. White*, 20 Cal. 598.

⁶⁹ *The Enterprise*, 2 Curt. C. C. 317; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 336; *Austin v. Chittenden*, 33 Vt. 553.

⁷⁰ *Whitelock v. Baker*, 13 Ves. Ch. 514; *Jewell v. Jewell*, 1 How. 231; 17 Pet. 213; *Cowen & Hill's note to 1 Phil. Ev.* 240.

⁷¹ *Doe v. Griffin*, 15 East, 293.

⁷² 1 *Phillipps*, Ev. 186; 1 *Starkie*, Ev. 55; *The Berkley Peerage Case*, 4 Campb. 401; *Watson v. Brewster*, 1 Penn. St. 381; *Douglass v. Sanderson*, 2 Dall. 116; *Craufurd v. Blackburn*, 17 Md. 49.

Inscriptions on tombstones, engravings on rings, inscriptions on family portraits, are of the same nature and admissible to prove the same facts.⁷³

To the rule that hearsay evidence is inadmissible there are some exceptions, which may be classified as follows: those which relate to matters of public interest; those relating to ancient possession; declarations made by parties against their interest; dying declarations; and the testimony of witnesses who become disqualified.

3072. To the first class may be referred all *matters of a general or public interest.*

By the term public is meant the whole body politic, or all the citizens of the state, and in this sense it is here to be taken, though sometimes it evidently means, when used in a restricted sense, only the inhabitants of a particular place; as, when speaking of the people of New York we say the public. When speaking of the public and general interest, the terms are frequently used synonymously, meaning a multitude of persons.⁷⁴ In regard to the admission of hearsay testimony, a distinction has been made between them. The term public is applied to all the citizens of the state; the term general signifies a less, though a large portion of the community.

All persons are presumed to be conversant with public matters, on the same principle that every man is presumed to be conversant with his own affairs, and what is said by people generally about their common rights may be presumed to be true; evidence of common reputation is, therefore, received as regards public facts; as, for example, a claim to a highway, on the ground that all have an interest in the truth, and the consequent probability that they are true.⁷⁵ But when the fact in question does not concern the members of the community, hearsay from such persons, wholly unconnected with the place and business, would be inadmissible.⁷⁶

To be admitted these declarations must relate to ancient rights, and they must have been made by persons supposed to be dead.⁷⁷ They must also have been made before any controversy arose touching the matter to which they relate, or *ante litem motam*, for otherwise they might have been manufactured for the occasion.⁷⁸ To avoid the mischiefs which would result from the admission of such after-made declarations, all *ex parte* declarations, even if made upon oath at a subsequent date to the beginning of the controversy, cannot be admitted.⁷⁹

This reputation or hearsay, which is admitted on the ground of public interest, is evidence as well against a public right as in its favor.⁸⁰

3073. When the matters in controversy do not affect any public or general interest, hearsay evidence is not in general admissible; but an exception to this rule obtains in *cases of ancient possession*, for then ancient documents in support of it are good evidence.⁸¹

Such documents are admitted without absolute proof that they constitute part of the *res gestæ*, for the proof of the transaction comes from the documents. But being generally the only evidence attainable, they are admitted subject to certain qualifications.

⁷³ *Eastman v. Martin*, 19 N. H. 152.

⁷⁴ *Weeks v. Sparks*, 1 M. & S. 690.

⁷⁵ 1 Starkie, Ev. 195; 1 Greenleaf, Ev. § 128; *Price v. Currell*, 6 Mees. & W. Exch. 234.

⁷⁶ *Crease v. Barrett*, 1 Crompt. M. & R. Exch. 929; *Rogers v. Wood*, 2 Barnew. & Ad. 245; *Weeks v. Sparks*, 1 M. & S. 679.

⁷⁷ *Davis v. Fuller*, 12 Vt. 178.

⁷⁸ By *lis mota* we are to understand the commencement of the controversy and not the commencement of the suit. *Butler v. Mountgarret*, 7 Hou. L. Cas. 633.

⁷⁹ *The Berkley Peerage case*, 4 Campb. 401.

⁸⁰ *Drinkwater v. Porter*, 7 Carr. & P. 181; *Rex v. Sutton*, 3 Nev. & P. 569.

⁸¹ The proof of such documents with actual possession is evidence of what is called an immemorial possession. 9 Toullier, Dr. Civ. Fr. n. 254.

The genuineness of the documents must be established, *prima facie*, by showing that they come from the proper custody, that is, from the place where or from the care of the persons by whom such documents would naturally be kept.⁸²

Where the nature of the case admits, proof should be given of some act done harmonizing with the documents; as, an entering into and enjoyment of possession under an ancient deed. If more than thirty years old, the deed proves itself.

3074. Another exception to rejecting hearsay evidence is allowed in the case of *declarations* and entries made in books by persons since deceased, and *against* the *interest* of the persons making them at the time they were made. This evidence is received because it is extremely improbable that it should be false, for men are not apt to say or do any thing against their interest, particularly as such declarations cannot be received in evidence during the lifetime of the declarant.⁸³

This rule is most frequently exemplified in entries in books of account; as, entries of the receipt of money by persons charged with the duty of receiving it. And the rule has been followed in some cases even where the entry was the only proof of the charge, and the whole taken together was not strictly against interest.

3075. When a man has received a wound or other injury which proves mortal, and he believes he must die, is in immediate danger of dying, and afterward does die in consequence of such injury, the statements which he makes as to the manner in which he received such injury, and by whom it was committed, are called his *dying declarations*. The solemnity of his situation, when every hope of this world is gone and every inducement or motive to falsehood is silenced, when the mind is induced, by the considerations of a future life, to speak the truth,—all these considerations together have been considered equivalent to the party's oath in a court of justice.⁸⁴

Though formerly it was contended that such dying declarations were receivable in all cases, both civil and criminal, yet the rule is now firmly established that they can be received only in cases of homicide, where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations.⁸⁵

⁸² United States v. Castro, 24 How. 346.

⁸³ 1 Greenleaf, Ev. § 148.

⁸⁴ Rex v. Woodcock, 2 Leach, Cr. Cas. 556; Drummond's Case, 1 Leach, Cr. Cas. 378. The following lines, descriptive of the feelings and sentiments of such a man, have been put in the mouth of one who is about making dying declarations:

Have I not hideous death before my view,
Retaining but a quantity of life,
Which bleeds away, even as a form of wax
Resolveth from his figure 'gainst the fire?
What in the world should make me now deceive
Since I must lose the use of all deceit?
Why then should I be false, since it is true
That I must die here, and live hence by truth?

To render such declarations admissible they must be made with a consciousness and belief in impending death; and such being the case, it is immaterial if the death does not take place at once. The declarations have been admitted when made eleven and seventeen days before death. Commonwealth v. Cooper, 5 All. Mass. 495; People v. Lee, 17 Cal. 76; People v. Ybarra, 17 Cal. 166; State v. Gillick, 7 Iowa, 287; Kilpatrick v. Commonwealth, 31 Penn. St. 198; Thompson v. State, 24 Ga. 297.

⁸⁵ Rex v. Mead, 2 Barnw. & C. 605; Rex v. Hutchinson, 2 *id.* 608, n; Wilson v. Boerem, 15 Johns. N. Y. 286. The dying declarations of a murdered person are admissible, and do not conflict with the constitutional provision that every person accused of crime shall have the right to be confronted with the witnesses against him. Commonwealth v. Carey, 12 Cush. Mass. 246; Burrell v. State, 18 Tex. 713; People v. Glenn, 10 Cal. 32; State v. Nash, 7 Iowa, 347.

The declarations are only admissible in so far as they relate to the circumstances of the death, and would be competent evidence if he were alive.⁸⁶

The circumstances under which the declarations were made are first to be shown, and it is then for the court to decide as to the admissibility of the evidence.⁸⁷ If the declarations were reduced to writing and signed by the deceased, the writing must be produced or accounted for before evidence of its contents or parol evidence of the declarations can be introduced.⁸⁸

3076. When a witness has been examined on a former trial between the same parties, and the same point arises in issue in a second action, and *the witness has since died, is absent, or has become disqualified*, the testimony of such deceased witness may be proved; a witness will be allowed to prove what the first testified, but such testimony, of course, is not conclusive, for it is open to all objections to which it would be if the first were present, and testified to the same facts a second time.⁸⁹

The former trial need not be for the same cause of action, nor between the same nominal parties. It is sufficient if the same point was at issue,⁹⁰ and the contest was really between the same parties or their privies, so that the party against whom the testimony is produced or his privies had an opportunity at the former trial to cross examine.⁹¹

As to the things which must be proved, it may be remarked that although formerly the rule was much more strict, yet now it is sufficient if the witness is able to state the substance of what the first witness testified.⁹²

When the witness has acquired an interest, since he gave his former testimony, in the subject-matter about which he is called to testify, and his interest is on the side of the party calling him, he is not competent till he is released; nor can a subscribing witness be examined if his interest was created by the party calling him.⁹³

A witness cannot, by his act, by the subsequent voluntary creation of an interest, without the concurrence of the party, deprive him of the benefit of his testimony.⁹⁴ But this rule is subject to a qualification: if the interest has been acquired for a fraudulent purpose, or to deprive the party of the testimony, or by a wager, it will not disqualify him; on the contrary, when it has been fairly acquired, either by contract or by operation of law, it will be a bar.⁹⁵

If the witness who has acquired a disqualifying interest has previously made a deposition in the cause, the deposition may be read in chancery, as if he were since deceased; and it may also be read at law on the trial of an issue out of chancery. Whether it can be read in other trials at law seems not certain.⁹⁶

⁸⁶ *State v. Nash*, 10 Iowa, 81; *Mose v. State*, 35 Ala. N. S. 42. Where the prisoner poisoned three persons at the same time, the declarations of one were held admissible in his trial for the murder of another. *State v. Terrell*, 12 Rich. So. C. 321.

⁸⁷ *State v. Burns*, 33 Mo. 483; *State v. Howard*, 32 Vt. 380.

⁸⁸ *State v. Tweedy*, 11 Iowa, 350; *People v. Glenn*, 10 Cal. 32; *Collier v. State*, 20 Ark. 36.

⁸⁹ *Crary v. Sprague*, 12 Wend. N. Y. 41; *Wright v. Tatham*, 2 Ad. & E. 3; *Covanhovan v. Hart*, 21 Penn. St. 495; *Long v. Davis*, 18 Ala. N. S. 801; *Wright v. Cumpsty*, 41 Penn. St. 102; *Miller v. Chrisman*, 25 Ill. 269.

⁹⁰ *Clealand v. Huey*, 18 Ala. N. S. 343.

⁹¹ *Philadelphia R. R. v. Howard*, 13 How. 307; *Lane v. Brainerd*, 30 Conn. 565.

⁹² *Cornell v. Green*, 10 Serg. & R. Penn. 14, 16; *Chess v. Chess*, 17 *id.* 409; Hill's notes to 1 Phil. Ev. 231; 1 Greenleaf, Ev. § 165; *Warren v. Nichols*, 6 Metc. Mass. 261; *Trammell v. Hemphill*, 27 Ga. 525.

⁹³ *Hovell v. Stephenson*, 5 Bingh. 493; *Bennet v. Robinson*, 7 Ala. 227; *Schall v. Miller*, 5 Whart. Penn. 156. In many of the states interest is now no disqualification of a witness, but the jury have a right to consider it as affecting his credibility.

⁹⁴ 1 Starkie, Ev. 118; *Long v. Baillie*, 4 Serg. & R. Penn. 222.

⁹⁵ *Forrester v. Pigou*, 3 Campb. 380; *Phelps v. Riley*, 6 Conn. 266. See *Burgess v. Lane*, 3 Me. 165.

⁹⁶ 1 Greenleaf, Ev. § 168; *Gresley*, Ev. 267.

3077. *Admissions* are declarations which a party by himself, or those who act under his authority, makes of the existence of certain facts. The term admission is usually applied to civil transactions, and to matters of fact in criminal cases where there is no criminal intent; the term confessions, which is sometimes used as being synonymous, is generally considered as an admission of guilt. Though they are different in these respects, and for that reason they will be treated of separately, yet in both cases the rules of evidence are the same.

The admissibility of evidence of this description will be considered, first, with respect to the nature, time, and manner of the admission; and, second, in relation to the parties to be affected by it.

3078. To render an admission competent evidence it must be made by a party to the record or by one identified in interest with him. As regards admissions by the party himself, no doubt can arise unless he is merely a nominal party whose name is used for the benefit of the real party in interest; as, the admissions of an assignor of a chose in action whose name is used for the benefit of the assignee. Such admissions cannot be set up against the assignee.⁹⁷

The admissions of the real party in interest may be used against a nominal party; as, for instance, the admissions of a *cestui que trust* against the trustee, of the ship owners against the master in an action for freight, of a silent partner against the other partners.⁹⁸ The party to the record is bound by the admissions of his privies. Thus, the declarations of an ancestor in relation to the ownership of property claimed by his heirs are competent evidence against them if made against his interest, and when he had all the rights in regard to the property which his heirs have.⁹⁹

3079. The principal distinction of admissions as to their *form* is whether they are in writing or not in writing.

Admissions in writing are releases and other instruments given by a party with a view to make them evidence of the facts therein contained; these, when pleaded, operate in general by way of estoppel, for the party is not only estopped from disputing the deed itself, but every fact which it recites.¹⁰⁰

Judicial admissions are generally made in writing in court by the attorney of the party; they appear upon the record as in the pleadings, and are generally conclusive upon the party, they being made for the purpose of being used as a substitute for the regular legal evidence of the fact on the trial, or in a case stated for the opinion of the court.

Oral admissions are those which are made by speaking, and not reduced to writing. Such admissions ought to be received with great caution, as they are subject to many misrepresentations and mistakes, and in all cases the whole admission must be taken together.¹⁰¹ When admitted, they are competent evidence only of those facts which may be established by parol evidence; they cannot be received to contradict documentary proof or supply the place of existing evidence by matter of record.¹⁰²

Implied admissions are those which are the consequences of the acts of the parties. When a party assumes a character, language, and course of conduct,

⁹⁷ *Mandeville v. Welch*, 5 Wheat. 277; *Head v. Shaver*, 9 Ala. n. s. 791; *Butler v. Millett*, 47 Me. 492; *Wing v. Bishop*, 3 All. Mass. 456.

⁹⁸ *Weed v. Kellogg*, 6 McLean, C. C. 44; *Robinson v. Hutchinson*, 31 Vt. 443.

⁹⁹ *Hurlburt v. Wheeler*, 40 N. H. 73; *Osgood v. Coates*, 1 All. Mass. 77; *Keener v. Kauffman*, 16 Md. 296.

¹⁰⁰ *Starkie*, Ev. part 4, p. 31; *Comyn*, Dig. *Estoppel*, B, 5; *Buller*, Nisi P. 298.

¹⁰¹ *Smith v. Blandy*, Ry. & M. 257.

¹⁰² *Scott v. Clare*, 3 Campb. 236; 1 Bingh. 73. Oral admissions are competent evidence to show the contents of a written instrument. *Loomis v. Wadham*, 8 Gray, Mass. 557.

he may be fairly presumed to admit the situation which is usual in such cases. When the existence of domestic, social, or official relation is in issue, the recognition of such relation by the person making it is proof that such relation exists; as, where a man assumed to act as a magistrate, this is an admission of his appointment or title to the office so far as to render him liable for misconduct or neglect in such office.¹⁰³ Admissions are implied from the conduct of a party; as, where documents are suppressed, their contents are deemed unfavorable to the party suppressing them.¹⁰⁴ Making out a bill in the name of an individual for goods sold is an admission they were sold to him.¹⁰⁵ Asking time for the payment of a note or bill is an admission of the holder's title and of the signature of the party who asks the favor. Admissions may also be implied from the acquiescence of the party, but to have the effect of an admission acquiescence must exhibit some act of the mind and amount to conduct in the party; as, where an account has been presented and it is not objected to within a reasonable time, it will be presumed to be correct.¹⁰⁶ Possession of documents or constant access to them may afford evidence that the facts contained in them are true.¹⁰⁷ But the possession of an unanswered letter is not of itself evidence of acquiescence as to its contents.¹⁰⁸

3080. Having ascertained the form, the next object of consideration will relate to the *time and circumstances of the admission*. Facts admitted in the course of a treaty for the settlement of a controversy and offers or propositions of settlement between litigating parties, expressly stated to be made without prejudice, are excluded on the ground of public policy,¹⁰⁹ because if it were not for this salutary rule it would be impossible to negotiate a settlement with any hope of success. And an offer to buy one's peace by offering to pay a certain sum of money for a release is not an admission of any obligation.¹¹⁰

But an offer to settle a claim or a suit by payment is an admission, unless it is made expressly as a compromise. Thus, a tender of money, unexplained, admits indebtedness.¹¹¹

When the admission has been obtained by duress, or imposition, or fraud, it cannot be received; but in civil cases admissions are receivable in evidence, provided the compulsion under which they have been given is legal, and the party has not been imposed upon.¹¹²

3081. The effect of an admission will be different as it is intended to operate upon a single party; when it is made by one, and it is sought to make it apply to several; and when it is made by one person, and it is desired to be proved against another.

3082. When there is but one party to be affected by the admission, the rule is very simple; he, or some one authorized by him, must have made the admission. But the admissions of a party who is not in fact interested, as, where he sues for the use of another, are not allowed to disparage the title of his innocent vendee or assignee.¹¹³

3083. When there are several parties to be affected, and the admission has been made by one of them only, as, where there are several parties on the same

¹⁰³ *Rex v. Borrett*, 6 Carr. & P. 124; *Rex v. Gardner*, 2 Campb. 513; *Trowbridge v. Baker*, 1 Cow. N. Y. 251

¹⁰⁴ *James v. Bion*, 2 Sim. & S. Ch. 600, 606. ¹⁰⁵ *Storr v. Scott*, 6 Carr. & P. 241.

¹⁰⁶ *Sherman v. Sherman*, 2 Vern. Ch. 276; *Willis v. Jernegan*, 2 Atk. Ch. 252; *Freeland v. Heron*, 7 Cranch, 147.

¹⁰⁷ *Ragget v. Musgrave*, 2 Carr. & P. 556. ¹⁰⁸ *Fairlie v. Benton*, 3 Carr. & P. 103.

¹⁰⁹ *Corry v. Bretton*, 4 Carr. & P. 462; *Healy v. Thatcher*, 8 *id.* 388; *Jardine v. Sheridan*, 2 Carr. & K. 24; *Ferry v. Taylor*, 33 Mo. 323; *State Bank v. Dutton*, 11 Wisc. 371; *Reynolds v. Manning*, 15 Md. 510.

¹¹⁰ *Prussed v. Knowles*, 5 Miss. 90.

¹¹¹ *Woodward v. Cutter*, 33 Vt. 49.

¹¹² *Collett v. Ld. Keith*, 4 Esp. 212.

¹¹³ *Mandeville v. Welch*, 5 Wheat. 277.

side on a record, the admissions of one of them are not allowed to affect the others who happen to be joined with him, unless there is some joint interest, or privity in design between them, although such admissions, in proper cases, may be received against him who made them.¹¹⁴ But when the parties have a joint interest, as in the case of partners, an admission made by one is, in general, evidence against all.¹¹⁵ A mere community of interest, when the interest is not joint, is not sufficient; as, in the case of executors, the admissions of one do not bind the other.¹¹⁶

3084. Admissions made by third persons, strangers to the suit, are sometimes receivable in evidence. This happens when the issue is substantially upon the mutual rights of such persons at a particular time; in this case the evidence is admitted in the same way as if it was between the parties themselves. Other instances, when the admission of third persons may be allowed, occur when the party has referred expressly to such third persons for information in regard to an uncertain matter in dispute; or to an interpreter, whose statements of what the party says are treated as identical with what the party says himself. The admissions of the wife bind the husband only when he has authorized them, and their relation alone is not sufficient.¹¹⁷ The admissions of an attorney of record bind his client in all matters relating to the progress and trial of the cause. As to the effect of admissions of the principal as evidence against the surety upon his collateral obligation, it may be remarked that to be binding they must be made during the transaction of the business for which the surety was bound, so as to become a part of the *res gestæ*. The admissions of a person are evidence against all who are privy to him in estate or by blood. Admissions made by the assignor of a personal contract or chattel will bind the assignee when made while the assignor remained the sole proprietor,¹¹⁸ but when made after he had no longer any interest in the thing assigned, the right of the assignee, holding by a good title, is not to be cut down by the acknowledgment of the holder that he had no title.¹¹⁹

The admissions of an agent bind his principal only when they are within the scope of his authority,¹²⁰ and are made at the time of the act done for the principal.¹²¹ Of course the declarations of an agent cannot be used to prove his agency.¹²²

3084, a. In considering *the effect of admissions*, it is to be observed that the whole is to be taken together, and any part which is in favor of the party making the declaration is to be considered as well as the part which bears against him, but the jury may attach different weight to the different parts.¹²³ Parol admissions are admissible only to prove such facts as could be established by parol evidence. Admissions are conclusive only against the party making them or his privies; when used against third parties they are only evidence for the consideration of the jury.

Estoppels are not encouraged, and parol admissions do not estop the party

¹¹⁴ *Dan et al. v. Brown*, 4 Cow. N. Y. 483.

¹¹⁵ *Purham v. Laynal*, 8 Bingh. 309; *Mamlock v. White*, 20 Cal. 598.

¹¹⁶ *Forsyth v. Ganson*, 5 Wend. N. Y. 558; *Hammon v. Huntley*, 4 Cow. N. Y. 493.

¹¹⁷ *Benford v. Sanner*, 40 Penn. St. 9. ¹¹⁸ *Beedy v. Macomber*, 47 Me. 451.

¹¹⁹ *Burrough v. White*, 4 Barnew. & C. 325; *Woolway v. Rowe*, 1 Ad. & E. 114; *Tyler v. Mather*, 9 Gray, Mass. 177; *Horrigan v. Wright*, 4 All. Mass. 514.

¹²⁰ *Hatch v. Squires*, 11 Mich. 185; *Sencerbox v. McGrade*, 6 Minn. 484; *Page v. Parker*, 40 N. H. 47.

¹²¹ *Craig v. Gilbreth*, 47 Me. 416; *Austin v. Chittenden*, 33 Vt. 353; *Caldwell v. Garner*, 31 Mo. 131.

¹²² *Woodbury v. Larned*, 5 Minn. 339.

¹²³ *Yarborough v. Moss*, 9 Ala. N. S. 382; *Garey v. Nicholson*, 24 Wend. N. Y. 350; *Reynolds v. Manning*, 15 Md. 510.

making them, but he may show them to be false.¹²⁴ But if the party to whom the admissions are made has acted upon them, then they become conclusive in his favor.¹²⁵

3085. The rules which govern *confessions* in criminal cases are, in general, the same as those which regulate admissions in civil cases. But it must be observed that no confession made by a third person or an agent can have any force against the accused, unless where several are acting together, and the acts of one are considered the acts of all; as, in the cases of riot, conspiracy, and the like, each is deemed as assenting or commanding what is done by any other in furtherance of the common object.¹²⁶ But when the crime has been completed, and the criminals no longer act together, the declarations of one of them then made do not affect the others.

The evidence of admissions of guilt ought to be received with great caution, as instances of such confessions have been found to have been fatally incorrect. Confessions are direct confessions of guilt, or they are indirect confessions.

3086. A *direct deliberate confession* of guilt, when voluntarily made, is considered as the best evidence that can be produced, and as such it is generally satisfactory. These confessions are either judicial or extra judicial.

A judicial confession is one made before a magistrate, or in court, in the due course of legal proceedings. When voluntarily made, without any illegal influence, they are deserving of credit. A preliminary examination taken in writing by a magistrate lawfully authorized, pursuant to a statute, or the plea of guilty made in open court to an indictment, are sufficient to found a conviction upon them.

Extra judicial confessions are those made by the accused elsewhere than in court or before a magistrate, whether such expressions be express or implied.

The prisoner's confession is not sufficient for his conviction unless the crime is proved independently to have been committed by some one.¹²⁷

All confessions must be voluntary, for if they have been made under any threat or promise, they are not to be relied upon. A confession forced from the mind by the flattery of hope, or the torture of fear, comes in such questionable shape when it is to be considered as evidence of guilt that no credit ought to be given to it.¹²⁸

To exclude the confession the inducement under which it was made must be some fear of personal injury or hope of personal benefit of a temporal nature.¹²⁹ If the inducements are held out by one having authority over the prisoner, the confession will not be deemed voluntary, and will be rejected.¹³⁰

But when the inducements are held out by a third party having no authority over the prisoner, it is a mooted question whether it is admissible.¹³¹

The rule seems to be that confessions should be excluded in all cases where the circumstances indicate that the accused may have been induced by powerful

¹²⁴ *Husbrook v. Strawser*, 14 Wisc. 403; *Ray v. Bell*, 24 Ill. 444.

¹²⁵ *Kinney v. Farnsworth*, 17 Conn. 355; *Tompkins v. Phillips*, 12 Ga. 52.

¹²⁶ *United States v. Gooding*, 12 Wheat. 469; *Commonwealth v. Eberle*, 3 Serg. & R. Penn. 9; *Wilbur v. Strickland*, 1 Rawle, Penn. 458; *Reitenback v. Reitenback*, 1 *id.* 362.

¹²⁷ *Brown v. State*, 32 Miss. 433; *Bergen v. People*, 17 Ill. 426; *State v. Laliyer*, 4 Minn. 368.

¹²⁸ *Warwickshall's Case*, 1 Leach, Cr. Cas. 299; *Knapp's Case*, 10 Pick. Mass. 489.

¹²⁹ *State v. Grant*, 22 Me. 171; *Commonwealth v. Morey*, 5 Cush. Mass. 461; *Fife v. Commonwealth*, 29 Penn. St. 429; *State v. York*, 37 N. H. 175.

¹³⁰ *Commonwealth v. Taylor*, 5 Cush. Mass. 606.

¹³¹ That such confessions are admissible. *Commonwealth v. Morey*, 1 Gray, Mass. 461; *State v. Simon*, 15 La. Ann. 568; *Shifflet's Case*, 14 Gratt. Va. 652. *Contra*, *State v. Walker*, 34 Vt. 296; *People v. Smith*, 15 Cal. 408; *Cain v. State*, 18 Tex. 387; *Jordan v. State*, 32 Miss. 382.

motives of hope or fear to admit facts without regard to their truth, in order to obtain the promised relief or avoid the threatened danger. Whether the inducements have had this effect, or have tended to it, must depend on the particular circumstances of each case.¹³²

It is not necessary that a confession should be the spontaneous act of the accused. It may be drawn out by diligent questioning, by the spiritual exhortations of a clergyman, or by any means, however reprehensible in themselves, which do not tend to produce an untrue confession by acting on the hopes or fears of the prisoner.¹³³

If improper inducements have been used, but have wholly ceased to act when the confession is made, it is admissible.¹³⁴

3087. *Indirect confessions* of guilt are those which in civil cases are usually termed implied admissions. A confession may be confirmed by circumstances which in themselves furnish matter of evidence, but coupled with the confession confirm and strengthen it, though it would otherwise be inadmissible. Thus, if in consequence of a confession extorted by hope or fear, the property stolen or the instrument of the crime is discovered, it is competent to connect this with the confession, and show that the discovery was made in consequence of the information furnished by the accused, for such confirmation tends to preclude the possibility of falsehood in the confession, for which it would be inadmissible if standing alone.¹³⁵

3088. In the discussion of the nature of evidence, our next inquiry will be to consider when it is relevant and when it is irrelevant. *Relevant* evidence is that which is applicable to the issue and ought to be received; evidence is *irrelevant* when it is not so, and it ought to be excluded.

When facts are to be decided by the court without the aid of a jury, it is seldom useful to raise the question whether evidence is relevant or not, because before it is passed upon it must be known, and it must be read or heard by the judge in order to decide upon its nature and quality. But in trials by jury the presiding judge is required to determine all questions on the admissibility of evidence to the jury. When the admission depends on other questions of fact, such as whether the offered witness is interested, these preliminary questions of fact are in the first instance to be tried by the judge; and when the question is mixed, consisting of law and fact so intimately blended as not to be easily susceptible of separate decision, it is then submitted to the jury.

3089. *The object of evidence* is next to be considered. It is to ascertain the truth or falsehood of the allegations made by the parties in their pleadings. It has been discovered by experience that this is done most certainly by the adoption of the following rules, which are now binding as law: the substance of the issue must be proved, the evidence must be confined to the issue, and the affirmative of the issue must be proved.

3090. It is a general rule, both in criminal and civil cases, that the evidence shall be confined to the point in issue, and that it is sufficient if the substance of the issue be proved.

As to the manner of supporting the issue a distinction is made between allegations of matter of substance and the allegation of matters of essential description. The former may be substantially proved, and that will be sufficient, but the latter must be proved with more strictness.¹³⁶

¹³² *State v. Wentworth*, 37 N. H. 196; *Fouts v. State*, 8 Ohio, St. 98.

¹³³ *Rutherford v. Commonwealth*, 2 Metc. Ky. 387; *State v. Freeman*, 12 Ind. 100.

¹³⁴ *State v. Fisher*, 6 Jones, No. C. 478; *Lynes v. State*, 36 Miss. 617.

¹³⁵ *People v. Ah. Ki.* 20 Cal. 177; *Sarah v. State*, 28 Ga. 576; *Jane v. Commonwealth*, 2 Metc. Ky. 30.

¹³⁶ *Glassford*, Ev. 309; 1 *Greenleaf*, Ev. § 56.

When the allegations of time, place, quantity, quality, and value are descriptive, they must be strictly proved; but when they are not descriptive of the identity of the subject of the action, they are immaterial, and need not be proved strictly as alleged. For example, in trespass to the person the material fact is the assault and battery; the time and place, not being material, need not be proved as alleged; but in an action on a bill of exchange the date alleged, being descriptive, must be proved.¹³⁷

The party upon whom the burden of proof rests is required to prove the substance of the issue; a failure to prove it must therefore be fatal, for he has not sustained his cause; and when there is a departure by proving a different agreement, then is that fault known as a variance, which in a general sense is a disagreement or a difference between two parts of the same legal proceeding which ought to agree together, and in the sense in which it is used it is a disagreement between the allegation and the proof in some matter which in point of law is essential to the charge or claim. The following example will sufficiently point out the nature of such variance: In an action where the plaintiff declared in covenant for not repairing pursuant to a covenant in a lease, and stated the covenant as a covenant "to repair when and as need should require," and issue was joined on a traverse of the deed, alleged, the plaintiff at the trial produced the deed in proof, and it appeared that the covenant was "to repair when and as need should require, and at furthest after notice," the latter words having been omitted in the declaration. This was held to be a variance because the additional words were material and qualified the effect of the contract.¹³⁸ This, it will be observed, is a matter of substance; when the variance is to matter of form, it is not regarded.

3091. As the parties came into court to settle a matter of difference between them, it is but just that they should confine the proofs to the matter in issue, for the party upon the other side does not come prepared to answer any thing else. But to this general rule, that evidence must be confined to the issue, there are several exceptions, among which are the following:

In general, evidence of collateral facts is not admissible, but when such fact is material to the issue joined between the parties, it may be given in evidence; as, for example, in order to prove that the acceptor of a bill knew the payee to be a fictitious person, or that the drawer had general authority from him to draw bills with the names of a fictitious payee, evidence may be given to show that he had accepted similar bills before they could from their date have arrived from the place of date.¹³⁹

Although when special damage sustained by the plaintiff is not stated in the declaration, it is not one of the points in issue, and evidence of it cannot be received, yet a damage which is the necessary result of the defendant's breach of contract may be proved, notwithstanding it is not in the declaration.¹⁴⁰

When evidence incidentally applies to another person or thing not included in the transaction in question, and with regard to whom or to which it is inadmissible, yet if it bear upon the point in issue it will be received.¹⁴¹

3092. The general rule which governs in the production of evidence is, that the obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue.¹⁴²

There may be in many cases several distinct issues, upon some of which the

¹³⁷ Glassford, Ev. 309.

¹³⁸ Horsefall v. Tester, 7 Taunt. 385. See 1 Greenleaf, Ev. § 66.

¹³⁹ Gibson v. Hunter, 2 H. Blackst. 288.

¹⁴⁰ Ward v. Wood, 11 Price, Exch. 19.

¹⁴¹ 1 Phillipps, Ev. 158; Willis v. Bernard, 8 Bingh. 376.

¹⁴² Warren v. Chickasaw, 13 Iowa, 588; Stevenson v. Marony, 29 Ill. 532.

burden of proof rests on one party and in some on the other party. At the outset the burden rests upon the plaintiff, who is obliged to show affirmatively some cause of action. But if the defendant sets up some affirmative justification, then the plaintiff may rest his case, having proved sufficient facts to establish his ground of action, and the burden shifts to the defendant to establish the justification set up.¹⁴³ Or the defendant may in his pleadings admit the whole ground of action set up in the plaintiff's declaration, and plead other matters as a defence; as, for instance, where the defendant admits that he owes the plaintiff the whole sum claimed, and pleads a larger sum due to him in set-off. In this case the burden of proof is on the defendant.¹⁴⁴ Under the old system of pleading and practice the party having the burden of proof was entitled to open and close the case, but this is now modified in some states.

In criminal cases, as in civil cases where the general issue is pleaded, the burden of proof never shifts. The government must prove beyond a reasonable doubt all the material facts and ingredients which are required to constitute a crime.¹⁴⁵

3093. To the general rule there are some exceptions, among which are the following :

When a presumption of law arises in favor of the party who alleges the affirmative, the rule ceases to operate, and the negative must be proved; as, when the issue is on the legitimacy of a child, it is incumbent on the party who alleges the illegitimacy to prove it, provided the parents have never been separated by divorce, and have lived in lawful wedlock; or where a person once living is alleged to be dead, and he is not so old that the presumption of his death would arise, his death must be proved.¹⁴⁶

When the plaintiff grounds his right of action upon a negative allegation, and where this negative is an essential element of his case; as where he sues for having been prosecuted maliciously, without probable cause, the plaintiff must show the want of probable cause by some affirmative proof, though the proposition be in negative terms.¹⁴⁷

When the subject matter of a negative averment lies peculiarly within the knowledge of the opposite party, the averment is taken as true, unless disproved by that party.¹⁴⁸

When the negative allegation involves a charge of criminal neglect of duty, whether official or otherwise, or fraud, or the wrongful violation of actual lawful possession of property, the party making the allegation must prove it; for in these cases the law raises a presumption of innocence and quiet possession.¹⁴⁹

In equity, when a bill is filed praying that a contract may be annulled on the ground that it was made with the defendant, who stood in a fiduciary relation to the plaintiff, the burden of proving its fairness is cast on the defendant.¹⁵⁰

¹⁴³ *Clapp v. Thomas*, 5 All. Mass. 158; *Quimby v. Morrill*, 47 Me. 470; *Caulfield v. Sanders*, 17 Cal. 569.

¹⁴⁴ *Page v. Osgood*, 2 Gray, Mass. 260.

¹⁴⁵ *Commonwealth v. McKie*, 1 Gray, Mass. 61.

¹⁴⁶ 2 *Selwyn*, Nisi P. 513; *Morris v. Davies*, 3 Carr. & P. 513; *Wilson v. Hodges*, 2 East, 313; *Ripley v. Babcock*, 13 Wisc. 425.

¹⁴⁷ *Ulmer v. Leland*, 2 Me. 134; *Gibson v. Waterhouse*, 4 Me. 226; 1 *Campb.* 199; 9 *East*, 361; *Horan v. Weiler*, 41 Penn. St. 470.

¹⁴⁸ *Rex v. Turner*, 5 M. & S. 206; *Smith v. Jeffries*, 9 Price, Exch. 257; *Commonwealth v. Kemball*, 7 Metc. Mass. 304; *Rugely v. Gill*, 15 La. Ann. 509; *Solomon v. Dreschler*, 4 Minn. 278.

¹⁴⁹ *United States v. Galacar*, 1 Sprague, Dist. Ct. 545.

¹⁵⁰ *Cane v. Lord Allen*, 2 Dow, Parl. Cas. 289; *Gibson v. Jeyes*, 6 Ves. Ch. 278; *Montesquieu v. Sandys*, 18 Ves. Ch. 313; *Bellew v. Russell*, 1 Ball & B. Ch. Ir. 104.

CHAPTER XI.

INSTRUMENTS OF EVIDENCE.

- 3095-3119. Records and public documents.
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- 3139-3143. Shop books and other mercantile books.
 - 3140. The requisites of an original entry.
 - 3141. The proof of an original entry.
 - 3142. The effect of an original entry when proved.

3094. *The instruments used in evidence* are written or unwritten. In the first class are records and public documents, private writings, and books of ac-

count. The last class or oral evidence includes the testimony given, *viva voce*, either in open court or before a magistrate by deposition.

3095. In considering *records and public documents*, it will be proper to inquire into their nature, the manner of proving them, and their effect, and the nature and proof of foreign laws and records.

3096. Among the most certain instruments for ascertaining facts may be mentioned records and public documents made evidence by the legislative enactment. A *record* is a written memorial made by a public officer authorized by law to perform that function, and intended to serve as evidence of something written, said, or done.¹ Records may be divided into those which relate to the proceedings of the legislature, the courts, and other public documents.

3097. The constitutions of the Union and of the several states, and the legislative acts of the congress of the United States and of the several states of the Union, are records of the highest kind, and the printed journals of congress have been so considered. These acts are general and public or private, as we observed when treating of the nature of laws.

3098. The courts will judicially take notice of the political constitution and form of government of their own country; and *public statutes*, which are supposed to exist in the memories of all, need no proof; but for certainty of recollection, which, notwithstanding the presumption of law, no man can retain, constant reference is had to the records themselves, or to the copy of them contained in a book printed by public authority. Printed copies of public documents transmitted to congress by the President of the United States and printed by the printer to congress are evidence of such documents.²

3099. *Private statutes*, resolutions, and other private acts are to be proved according to the provisions of the common law, either by means of a copy proved on oath to have been examined by the roll itself, or by an exemplification under the great seal. But in several of the states the printed copies of the laws and resolves of the legislature, published by its authority, are held competent evidence, and it is sufficient *prima facie* that the book purports to have been so printed.³ Sometimes a clause is introduced into a statute that it shall be taken notice of as if it were a public act; its mode of proof in that case is the same as of a public statute.⁴

3100. *Judicial records* include verdicts and judgments, and they will be examined with reference to the parties to the suit, to the matter directly in issue, and to a decision upon the merits.

3101. Those persons who institute actions for the recovery of their rights and those against whom they are instituted are the *parties* to the actions. The term parties, as has already been explained, includes all persons who are directly

¹ As to what is included in a record, see the following cases: The trial list is not a part of the record, *Moore v. Kline*, 1 Penn. 129; nor is a bond for costs, *Montgomery v. Carpenter*, 5 Ark. 264; nor a writing sued on, *Williams v. Duffey*, 7 Humphr. Tenn. 255; *Clark v. Gibson*, 2 Ark. 109, unless made so by oyer or otherwise. See *Pelham v. State Bank*, 4 Ark. 202; nor is an affidavit made to supply a part of the record which has been lost, *Troy v. Reilly*, 4 Ill. 119, 259; nor are papers presented to a court, and acted upon merely as matters of evidence, *Kirby v. Wood*, 16 Me. 81; nor the registry of a mechanic's lien, *Davis v. Church*, 1 Watts & S. Penn. 240; nor is the state of demand, in the court for the trial of small causes, in New Jersey, *Vandyke v. Bastedo*, 3 Green, N. J. 224. See also *Davidson v. Murphy*, 13 Conn. 213; *Hodges v. Ashurst*, 2 Ala. N. S. 101; *Davidson v. Slocum*, 18 Pick. Mass. 464; *Officers v. Fisk*, 8 Miss. 403; *Ex parte Bishop*, 4 Mo. 219; *Lenox v. Pike*, 2 Ark. 14; *Updergraff v. Parry*, 4 Penn. St. 291; *McLendon v. Jones*, 8 Ala. N. S. 298; *United States v. Gamble*, 10 Mo. 457; *Child v. Risk*, 1 Morr. Iowa, 439.

² *Radcliff v. U. States Ins. Co.*, 7 Johns. N. Y. 38; 1 Phillipps, Ev. 318.

³ *Biddis v. James*, 6 Binn. Penn. 321; *Young v. Bank of Alexandria*, 4 Cranch, 388.

⁴ *Beaumont v. Mountain*, 10 Bingh. 404; *Woodward v. Cotton*, 1 Crompt. M. & R. Exch. 44, 47.

interested in the subject matter in issue who have a right to make defence, control the proceedings, or appeal from the judgment. Strangers are persons who do not possess those rights.⁵

When a judgment has been rendered between the parties, they are bound by it; and to give full effect to the principle by which the parties are held bound by it all persons who are represented by the parties, and claim under them, or are privy to them, are equally concluded by the same proceedings.

3102. By *privity* is meant the mutual or successive relationship to the rights of property, and privies are classified according to the manner of this relationship. They are privies in estate, as, donor and donee, lessor and lessee, and joint tenants; privies in blood, as, heir and ancestor, and coparceners; privies in representation, as, testator and executor, administrator and intestate; privies in law, as, where the law without privity of blood or estate casts land upon another as by escheat. But all these kinds of privity are reduced to three, namely, privity in estate, privity in blood, and privity in law. The reason why persons standing in this relation to the litigating party are bound by the proceedings to which he is a party is that they are identified with him in interest, and whenever this identity exists, all are alike concluded. Privies are therefore estopped from litigating that which is conclusive upon him with whom they are in privity.⁶ The rule with regard to privies is that its operation must be mutual upon both parties; both litigants must be concluded, or the proceedings cannot be set up as conclusive for either.⁷

3103. There are several *exceptions to the rule*, which requires the identity of the parties in order to make the record evidence. The principal are the following:

There is an exception to the rule in cases usually termed proceedings *in rem*, which includes not only judgments of condemnation of property as forfeited, or as prize in the admiralty, but also decisions of other courts directly upon the personal *status*, state, or relations of the party, such as marriage, divorce, bastardy, settlement, and the like. Judgments of this kind are binding and conclusive, not only upon the parties actually litigating in the cause, but upon all others; because in most cases of this kind every one who can be affected by such judgment has a right to appear and assert his own rights by becoming a party to the proceedings.⁸

Verdicts and judgments upon subjects of a public nature, such as customs and the like, are evidence between persons who are not parties to the proceedings; because in most or all of such cases evidence of reputation is admissible.⁹

When a judgment is to prove a collateral fact, it may be admitted, although the parties are not the same. Of this there are numerous examples: thus, in order to prove the legal infamy of a witness, the record of his conviction may be shown; the record is evidence to let in proof of what was sworn to at the trial, or to show that a suit was determined, and the like. A further instance to illustrate the difference between the admissibility of a judgment as a fact, and as evidence of ulterior facts, may be mentioned the case where a judgment has been rendered against a sheriff for the misconduct of his deputy, it is evidence against the latter of the fact that the sheriff has been compelled to pay

⁵ *Duchess of Kingston's Case*, 20 How. St. Tr. 538, n.

⁶ *Carver v. Jackson*, 4 Pet. 85; *Case v. Reeve*, 14 Johns. N. Y. 81.

⁷ *Wood v. Davis*, 7 Cranch, 271; *Davis v. Wood*, 1 Wheat. 6; 1 Starkie, Ev. 214.

⁸ 1 Starkie, Ev. 27, 28; 1 Greenleaf, Ev. § 525; 1 Phillipps, Ev. 328. A decree of divorce is conclusive of the fact that the parties are divorced, but as affecting the rights of third parties does not conclusively establish the facts for which the divorce was granted. *Burlen v. Shannon*, 3 Gray, Mass. 387.

⁹ 1 Phillipps, Ev. 327, 328.

the amount awarded, and for the cause alleged; but it is not evidence of the fact upon which it was founded, namely, the misconduct of the deputy, unless he was notified of the suit, and was required to defend it.¹⁰

A judgment may be used in favor of a stranger against one of the parties, to prove the existence of certain facts, or solemn declarations of judicial declarations of the party contained in the record. But, in such case, it is not conclusive as establishing the fact, but it is to be considered as the deliberate admission of the party. Example: in the case of libel by a wife for a divorce on the ground of cruelty, the record of the conviction of the husband for an assault and battery upon her, founded upon his plea of guilty, is admissible to prove the judicial admission of the fact.¹¹

3104. A distinction must be remembered between a verdict and a judgment. A verdict is sometimes admissible in evidence to prove the finding of some matter of reputation, or custom, or particular right. But although in this case the verdict and not the judgment is the material thing to be shown, yet unless a judgment has been rendered upon it, it is not admissible, because it may have been set aside by granting a new trial, or the judgment upon it may have been arrested. As a judgment is not entered on a verdict upon an issue out of chancery, such a verdict may be given in evidence without a judgment.¹²

3105. To make a judgment conclusive upon the parties, it is required that it should have been rendered upon the matter directly in issue, and not on a thing incidentally brought in controversy during the trial. A record can be conclusive only on matters actually tried; on things material and traversable; for, if they were not so, they would not be brought into judgment.¹³ The general rule is clearly laid down, and may now be considered a rule of law, founded not less upon adjudged cases than it is upon reason: first, that the judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar; or, as evidence, conclusive between the same parties, upon the same matter, directly in question in another court. Second, that the judgment of a court of exclusive jurisdiction directly upon the point is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose.¹⁴

3106. To render a judgment conclusive between the parties, the matter in issue must have been *decided upon the merits*; for if the plaintiff discontinue his action, or become nonsuit, or for any other cause there has been no judgment of the court upon the matter in issue, the proceedings are not conclusive. And if the declaration was so essentially defective that it would have been adjudged bad on demurrer, or if the trial went off for a technical defect, or because the debt was not due when the action was commenced, or because the court had not jurisdiction, or the plaintiff was temporarily disabled to sue, the judgment will be no bar to a future action.¹⁵

¹⁰ Tyler v. Ulmer, 12 Mass. 166; see Kip v. Bingham, 6 Johns. N. Y. 158; Griffin v. Brown, 2 Pick. Mass. 304; Key v. Dent, 14 Md. 86; Burkhalter v. Ector, 25 Ga. 55.

¹¹ Bradley v. Bradley, 11 Me. 367; Woodruff v. Woodruff, *id.* 475.

¹² Buller, Nisi P. 234; Donaldson v. Jude, 2 Bibb, Ky. 60; see Delvan v. Worke, 3 Hawks, No. C. 36; State v. Grayton, 3 *id.* 187; Murphey v. Guion's Ex'rs, 1 Car. Law Rep. 94; Ragan v. Kennedy, 1 Overt. Tenn. 94; Shaeffer v. Kreitzer, 6 Binn. Penn. 430; Felter v. Moliner, 2 Johns. N. Y. 181.

¹³ A judgment is conclusive evidence of the facts which the jury must necessarily have found to warrant a verdict. Town v. Lamphere, 34 Vt. 365.

¹⁴ Per De Grey, C. J. in Duchess of Kingston's Case, 20 How. St. Tr. 538; Harvey v. Richards, 2 Gall. C. C. 299; Hidsham v. Dulleban, 4 Watts, Penn. 183, per Gibson, C. J.; Pearce v. Gray, 2 Younge & C. 322.

¹⁵ Sweigart v. Berk, 8 Serg. & R. Penn. 305; Wood v. Jackson, 8 Wend. N. Y. 9; Hughes

3107. *Other public documents* are very numerous, but the principle of their admission in evidence is generally the same; it is that being made by public authority by men appointed for the purpose, they are presumed to be true. And because they are located in particular places and cannot be removed without public inconvenience, certified copies or examined copies are allowed to be given in evidence; and, in general, the originals cannot be demanded. To this there is an exception; when the hand writing is required to be proved, as in the case of an indictment for perjury, in an answer in chancery, or of making depositions, or where a man has become bound of record to perform an act, the original must be produced.

Among the documents which are made evidence may be mentioned the journals of either branch of the legislature, official registers kept by authority of law, such as books of assessments of public taxes,¹⁶ books of the post-office and customs, prison registers,¹⁷ enrollment of deeds, the registers of births and marriages made pursuant to the laws of any of the United States,¹⁸ the registry of vessels at the custom-house,¹⁹ the books which contain the official proceedings of corporations and matters concerning their property if the public in general are interested in it,²⁰ and the records of city councils and other municipal bodies.²¹

Wills are proved in the United States before courts or jurisdictions specially established by the legislatures of the respective states, or by their constitutions. These are variously denominated probate courts, surrogates' courts, orphans' courts, registers' courts, etc. The usual mode of proving a will is by calling the attesting witnesses, or, where there are none and the law allows it, other witnesses, to prove the hand writing of the testator, and when it is known, to show how he executed the paper purporting to be a will. This is generally done upon notice to the heir at law or other persons having an interest in the estate. At common law the effect of this mode of probate is conclusive until reversed as to personal property, but not as to real;²² though in most of the states of the Union the effect is the same on the real that it is on the personal property. A court of common law will not take notice of a will as a title to personal property until it has thus been proved, and letters testamentary, which is a grant of authority by the officer appointed by law to the executor named in the will to execute the same.

Letters of administration are an instrument in writing under the seal of the court which takes the probate of wills, and a decree that such letters shall be and have been granted to certain persons entered in the book of records of the court. The letter of administration is in the nature of an exemplification of this record, and is received without other proof. It authorizes the grantee, called the administrator, to collect, manage, settle, and administer the personal estate of the intestate, and, until repealed by lawful authority, the administrator is vested with all the power which the intestate had in the personal estate which

v. Blake, 1 Mas. C. C. 515; *Lane v. Harrison*, Munf. Va. 573; *Dixon v. Sinclair*, 4 Vt. 354; *N. Eng. Bank v. Lewis*, 8 Pick. Mass. 113; *Estill v. Taul*, 2 Yerg. Tenn. 467; *Jay v. Carthage*, 48 Me. 353; *Gerrish v. Pratt*, 6 Minn. 53.

¹⁶ *Doe v. Seaton*, 2 Ad. & E. 171; *Doe v. Cartwright*, 2 Ad. & E. 182; *Ry. & M.* 62; *Rockendorff v. Taylor*, 4 Pet. 349.

¹⁷ *State v. Thomas*, 3 Bos. & P. 188; *United States v. Johns*, 4 Dall. 412.

¹⁸ *Jackson v. King*, 5 Cow. N. Y. 237; *Richmond v. Patterson*, 3 Ohio, 368; *Sumner v. Sebeck*, 3 Me. 223; *Jacock v. Gilliam*, 3 Murph. No. C. 47; *Milford v. Worcester*, 7 Mass. 48.

¹⁹ *United States v. Johns*, 4 Dall. 412.

²⁰ *Owings v. Speed*, 5 Wheat. 420; *Warriner v. Giles*, 2 Strange, 954, n. 1.

²¹ *Taylor v. Henry*, 2 Pick. Mass. 401; *Bishop v. Cone*, 3 N. H. 513.

²² See 2 Greenleaf, Ev. § 672; *Bouvier, Law Dict. Letters Testamentary.*

he owned on the day of his death. Letters of administration are never granted when the deceased left a will, except when the will is annexed to them.

Writs may be proved by the production of the originals with the officers' returns thereon as well as by copies.²³

3108. Records are *proved* by the mere production of the record, without more, or by copy.

The records of the court in which a suit is pending prove themselves by their mere production.²⁴

3109. As a record is located in a particular place and it cannot be removed, the *record itself* can be produced only when the cause is in the same court whose record it is, or when it is subject to the proceedings of another court.

The judgments of inferior courts may be proved by producing from the proper custody the book containing the original record.²⁵ The short minutes of the magistrate on his docket are admissible when, as is usually the case in these courts, no extended record is made up.²⁶

3110. *Copies of records* are of three kinds: exemplifications, copies made by an authorized officer, and sworn copies.

3111. An *exemplification* is a perfect copy of a record so far as relates to the matter in question and certified as to its correctness, first, under the great seal, or, secondly, under the seal of the particular court where the record remains.²⁷ The term exemplification in its strict legal sense ought to be understood as synonymous with *inspeximus*, and as importing something beyond the ordinary certified copy under seal.²⁸ When produced it is usually admitted, even upon an issue of *nul tiel record*, as sufficient evidence.²⁹

3112. *Copies of a record* made by an authorized officer, *certified under the seal of the court*, are in general received as evidence. It is not in such case required to prove the seal, for the courts recognize without proof the seal of state, and the seals of the superior courts of justice, and of all courts established by public statutes.³⁰ In this country the courts do not seem to make any distinction between an exemplification and a certified copy under seal. But the certificate must be of the whole record, and not of a mere extract;³¹ and when the certificate is that it is a copy of the record, it will be presumed to be of the whole record.³²

An *office copy* of a record is a copy authenticated by an officer intrusted for that purpose; it is admitted in evidence upon the credit of the officer without proof that it has been actually examined.³³ In the same court and in the same cause, an office copy is equivalent to the record, but in another court in another

²³ Day v. Moore, 13 Gray, Mass. 522.

²⁴ Prescott v. Fisher, 22 Ill. 390; Harrison v. Kramer, 3 Iowa, 543. lett, 47 Me. 396.

²⁵ Odiorne v. Bacon, 6 Cush. Mass. 185; Miller v. Hale, 26 Penn. St. 432; State v. Bart-

²⁶ McGrath v. Seagrave, 2 All. Mass. 443; Townsend v. Way, 5 All. Mass. 426.

²⁷ Buller, Nisi P. 227; 1 Gilbert, Ev. by Lofft, 19; 3 Inst. 173; 1 Phillipps, Ev. 384, 385; 1 Greenleaf, Ev. § 501.

²⁸ Page's Case, 5 Coke, 54.

²⁹ Vail v. Smith, 4 Cow. N. Y. 71; Pepon v. Jenkins, 2 Johns. Cas. N. Y. 118.

³⁰ Den v. Vreelandt, 2 Halst. N. J. 555; Chase v. Hathaway, 14 Mass. 222.

³¹ Edmiston v. Schwartz, 13 Serg. & R. Penn. 135; Ingham v. Crary, 1 Penn. 389; but see Rex v. Bellamy, Ry. & M. 174; Thompson v. Chauveau, 6 Mart. n. s. La. 458.

³² Voris v. Smith, 13 Serg. & R. Penn. 334. In several of the states, the form of these certificates is regulated by statute. See Vance v. Reardon, 2 Nott & M'C. So. C. 299; Thompson v. Chauveau, 6 Mart. n. s. La. 458; Commonwealth v. Phillipps, 11 Pick. Mass. 28; Barry v. Rhea, 1 Overt. Tenn. 345; Burton v. Pettibone, 5 Yerg. Tenn. 443. A certificate that it appears to the officer that a judgment has been entered, etc., is insufficient. Wilcox v. Ray, 1 Hayw. No. C. 410. This form of certificate is technically called a constat. Coke, Litt. 225; Page's Case, 5 Coke, 54. See McGuire v. Sayward, 22 Me. 230.

³³ 2 Phillipps, Ev. 131; Buller, Nisi. P. 229.

cause, the copy must be proved; unless in those cases where it is made the duty of the officer to furnish copies; in this last case they are admitted in all courts under the same jurisdiction. It may be stated generally that in the United States an officer having legal custody of the public records is, *ex officio*, competent to certify copies of their contents.

3113. An *examined copy* is one made by a witness who has compared the copy with the original. This comparison may be made by the witness himself, or by the witness and another person reading and comparing the two; but it is not necessary that the persons examining should exchange the papers, and read them both ways.³⁴ Proof by parol that such a copy was so made, and its production in court accompanied with further evidence that the record from which the copy was taken was found in the proper place of deposit, or in the hands of the officer in whose custody the records are kept, is sufficient evidence of the record.

3114. When the *record is lost and it is ancient*, its existence and contents may sometimes be presumed; whether ancient or not, when it is proved to be lost, it may be supplied by secondary evidence.

3115. When the record of a judgment has been established in either of the modes above mentioned, it is conclusive between the parties and their privies, upon the same matter directly in question in any other suit. It is a general principle that such decision is binding and conclusive upon all other courts of concurrent power. This principle pervades not only our own, but all other systems of jurisprudence, and has become a rule of universal law founded on the soundest policy. It is the maxim that when once a thing has been adjudged, it shall be considered thereafter for ever settled. *Res judicata*, say the civilians, *facit ex albo nigrum, ex nigro album, ex curvo rectum, ex recto curvum*.³⁵

3116. In order to give to a judgment the force of the *res judicata*, there must be a concurrence of the four conditions following, namely:

Identity in the thing sued for.

Identity in the cause of action; for example, I have claimed a right of way over Blackacre, and a final judgment has been rendered against me because I could not establish such a right of way: afterward I purchase Blackacre, and as owner I bring a suit for its recovery; the first decision shall not bar my claim, when I sue as owner of the land, and not for an easement over it, as I did in the first suit, which I claimed as a right appurtenant to my land Whiteacre.

Identity or privity of parties and of persons to the action; this is a consequence of the rule of natural justice, *ne inauditus condemnetur*, that no man shall be condemned unheard.

Identity of the quality in the persons for and against whom the claim is made; for example, an action by Peter to recover a horse, and a final judgment against him, is no bar to an action by Peter, administrator of Paul, to recover the same horse.

The constitution of the United States, and the amendments to it, declare that no fact, once tried by a jury, shall be otherwise re-examinable in any court of the United States than according to the rules of the common law.³⁶

Much discussion has taken place respecting the effect of a former recovery when different actions in tort have been brought successively in relation to the

³⁴ *Lynde v. Judd*, 3 Day, Conn. 499; *Hill v. Packard*, 5 Wend. N. Y. 387; *Winn v. Patterson*, 9 Pet. 663; *Fyson v. Kemp*, 6 Carr. & P. 71.

³⁵ 2 Kaimes, Eq. 367; 10 Toullier, Dr. Civ. Fr. n. 65, *et seq.*

³⁶ *Parsons v. Bedford*, 3 Pet. 433.

same chattel; for example, where an action of trespass is brought, and the defendant sets up a title to the chattel, and the issue is found for him, and the plaintiff afterward brings an action of trover for the same chattel, he is clearly barred, because the title to it was settled in the first action.³⁷ In the like manner, a judgment in trover for the defendant, upon the merits, is a bar to an action for money had and received, for money arising from the sale of the same goods.³⁸ But whether a judgment obtained by the plaintiff in trespass without satisfaction is a bar to an action of trover for the same chattel is a point upon which different opinions have been entertained.³⁹

3117. The proof of a record by copy establishes the fact that such a record exists, and such other facts as the record is competent evidence to prove. Thus the copy of the record of a deed proves that the deed is recorded, and consequently that subsequent purchasers have notice of it. But the original deed is nevertheless the best evidence to prove the conveyance, and must be produced if in existence. The record is itself only secondary evidence for this purpose.⁴⁰ But if the original deed is lost, the record is evidence to prove its execution. Those records which record facts and not merely copies of papers are competent evidence to prove the facts which they record.

3118. Courts do not take judicial notice of *foreign laws*, they must be proved as facts;⁴¹ and when such laws come in question, the party who seeks advantage of them is required to produce an authenticated copy, for it is presumed all civilized governments will allow their officers to give authentic copies of their laws when requested. Before the party can offer any inferior evidence, he must prove such request and refusal; on its being shown that such a refusal has been made, other evidence of the existence of the law may be given.⁴²

If an exemplification under the seal of the foreign state cannot be had, such laws must be verified by some high authority which the law respects not less than an oath, or by an oath or affirmation. Such a law may be proved to be a true copy by a witness who has compared and examined it with the original, or by a certificate of an officer properly authorized by law to give a copy, which certificate must itself be duly authenticated.⁴³

When our government has promulgated a foreign law or ordinance of a public nature as authentic, this is held to be sufficient evidence of its existence.⁴⁴

Foreign unwritten laws, usages, and customs must of necessity be proved by parol evidence. The usual course is to make such proof by the testimony of competent witnesses, instructed in the laws, customs, and usages, under oath or affirmation;⁴⁵ this will be sufficient unless the law was a written one, and when it is alleged that it is so, such allegation must be proved by the person making it.⁴⁶

The several states of the Union, in all matters not surrendered to the general government by the national constitution, are considered as foreign to each other, they being each sovereign and independent. Strictly, then, their laws and public documents, when wanted in another state, must be proved as foreign

³⁷ *Putt v. Roster*, 2 Mod. 218; *Putt v. Rawstern*, 3 Mod. 1.

³⁸ *Kitchen v. Campbell*, 3 Wils. 304; 2 W. Blackst. 827.

³⁹ 1 Greenleaf, Ev. § 533, and the cases cited in the note.

⁴⁰ *Morton v. Webster*, 2 All. Mass. 352; *Ord v. McKee*, 5 Cal. 515.

⁴¹ *Palfrey v. Portland R. R.*, 4 All. Mass. 55.

⁴² *Church v. Hubbart*, 2 Cranch, 237.

⁴³ *Church v. Hubbart*, 2 Cranch, 237; *Consequa v. Willings*, 1 Pet. C. C. 225; *Lincoln v. Battelle*, 6 Wend. N. Y. 182; *Raynham v. Canton*, 8 Pick. Mass. 296.

⁴⁴ *Talbot v. Seaman*, 1 Cranch, 37; *Radcliffe v. U. S. Ins. Co.*, 7 Johns. N. Y. 38.

⁴⁵ *Church v. Hubbart*, 2 Cranch, 237.

⁴⁶ *Dougherty v. Snyder*, 15 Serg. & R. Penn. 87; 2 La. 154.

laws, and accordingly in some of them such proof has been required.⁴⁷ But in some other states the courts have relaxed the rule, and they and the courts of the national government have considered that the connection, intercourse, and constitutional ties which bind the several states together require some relaxation of the strictness of this rule, and they have accordingly held a printed volume, purporting on its face to contain the laws of a sister state, to be admissible as *prima facie* evidence to prove the statute laws of that state.⁴⁸

The relations which reciprocally exist between the national government on the one side and the several states of the Union composing the United States on the other, are not considered as foreign; but as domestic. For this reason the courts of the general government take judicial notice of all the public laws of the several states whenever they are called upon to consider and apply them; and the courts of the respective states in like manner take judicial notice of all public acts of congress, including those which relate to the District of Columbia, exclusively, without any formal proof.⁴⁹ Those statutes which do not relate to the public, but are strictly private, must be proved in the usual way.⁵⁰

3119. *Foreign judgments* are of two classes:

First. Judgments rendered by the courts of a foreign state or nation. A judgment rendered out of the United States or their territories by a court *de jure*, or even a court *de facto*,⁵¹ in a matter within its jurisdiction, when the parties litigant have been notified and have had an opportunity of being heard, either establishing a demand against the defendant or discharging him from it, is binding and of full force.

The modes of authenticating such foreign judgments are either by an exemplification of a copy under the great seal of a state, or by a copy proved to be a true copy by a witness who has compared it with the original, or by a certificate of an officer properly authorized by law to give a copy. In this last case the certificate itself must be duly authenticated.⁵²

Second. Judgments rendered in one of the United States or of the territories of the Union.

Although the several states composing the United States for many purposes cannot be considered in the light of foreign states to each other, yet they are so in all things not surrendered to the national government by the constitution;⁵³ but still their mutual relations are rather those of domestic independence than of foreign alienation. The constitution has wisely provided that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and that congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."⁵⁴

By virtue of this constitutional authority congress has passed several laws regulating the manner in which the laws of the states, records, and public documents shall be proved.

⁴⁷ *Brackett v. Norton*, 4 Conn. 517; *Hampstead v. Reed*, 6 Conn. 480; *Packard v. Hill*, 2 Wend. N. Y. 411.

⁴⁸ *Biddis v. James*, 6 Binn. Penn. 321; *Ashley v. Root*, 4 All. Mass. 504; *Crake v. Crake*, 18 Ind. 156. In many of the states this provision is made by statute.

⁴⁹ *Young v. Bank of Alexandria*, 4 Cranch, 384; *Owings v. Hall*, 9 Pet. 607; *Papin v. Ryan*, 32 Mo. 21.

⁵⁰ *Leland v. Wilkinson*, 6 Pet. 317.

⁵¹ *Bank of North America v. McCall*, 4 Binn. Penn. 371.

⁵² *Church v. Hubbard*, 2 Cranch, 237; *Sir Yeaton v. Fry*, 5 Cranch, 335; *Gardere v. Col. Ins. Co.*, 7 Johns. N. Y. 514; *Thompson v. Stewart*, 3 Conn. 171.

⁵³ *Mills v. Durgee*, 7 Cranch, 481; *Hampton v. McConnell*, 3 Wheat. 234.

⁵⁴ U. S. Const. art. 4, s. 1.

The first act passed upon this subject⁵⁵ enacts "that the acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto; that the records and judicial proceedings of the courts⁵⁶ of any state shall be proved or admitted in any other court within the United States by the attestation of the clerk⁵⁷ and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken."

As this act provided for only one kind of records, and did not apply to the territories, it was found necessary to enact another,⁵⁸ which extends to "exemplifications of office books" and to the territories. It enacts "that, from and after the passage of this act, all records and exemplifications of office books, which are or may be kept in any public office of any state not appertaining to a court, shall be proved or admitted in any other court or office in any other state by the attestation of the keeper of the said records or books, and the seal of his office thereto annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is or may be kept; or of the governor, the secretary of state, the chancellor or the keeper of the great seal of the state, that the said attestation is in due form, and by the proper officer; and the said certificate, if given by the presiding justice of a court, shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or if the said certificate be given by the governor, the secretary of state, the chancellor or keeper of the great seal, it shall be under the great seal of the state in which the said certificate is made. And the said records and exemplifications, authenticated as aforesaid, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the state from whence the same are or shall be taken."

"That all the provisions of this act, and the act to which this is a supplement, shall apply as well to the public acts, records, office books, judicial proceedings, courts, and offices of the respective territories of the United States, and countries subject to the jurisdiction of the United States, as to the public acts, records, office books, judicial proceedings, courts and offices of the several states."

Although no prudent practitioner will depart from the mode pointed out by the acts of congress, yet it seems that this method of authentication is not exclusive of any other which the states may deem proper to adopt.⁵⁹

⁵⁵ Act of Congr. May 26, 1790; 1 Stat. 122.

⁵⁶ This act and the provision in the constitution are held not to apply to the judgments of justices of the peace. *Thomas v. Robinson*, 3 Wend. N. Y. 267; *Silver Lake Bank v. Harding*, 5 Ohio, 545; but see *Brown v. Edson*, 23 Vt. 435.

⁵⁷ The certificate of a deputy clerk in the absence of the clerk is not sufficient. *Morris v. Patchin*, 24 N. Y. 394.

⁵⁸ Act of Congr. March 27, 1804; 2 Stat. 298.

⁵⁹ *Kean v. Rice*, 12 Serg. & R. Penn. 203. As to the kind of cases to which these acts of congress extend, it has been observed that they "do not extend to judgments in criminal cases, so as to render a witness incompetent in one state who has been convicted of an infamous crime in another. The judicial proceedings, referred to in these acts, are also generally understood to be the proceedings of courts of general jurisdiction, and not those which are merely of municipal authority; for it is required that the copy of the record

3120. *Private writings* form a very numerous class; they are those which have been made between private individuals, and relating to their private affairs. Included in this class are deeds, bonds, bills, notes, letters of attorney, invoices, letters between the parties or their correspondence, and many others. As to their effects as evidence, they are governed by principles which apply to them all. They are to be considered as to their production, their proof, their effect.

3121. Such writings are in the hands of the party offering them, in the hands of the opposite party, in the hands of a stranger, or lost.

3122. *When a paper* wanted as evidence *is in the hands of the party* who desires to use it, it is at once produced; and no secondary proof of its contents can be given until it has been proved to have been lost, if it be proved that it once existed.

3123. *When the instrument of writing is in the possession of the adverse party,* and there is no duplicate, the courts of common law may make an order for the inspection of such writing; but this power is scantily used in the United States, unless given by statute. When, however, the action is *ex contractu*, and there is but one instrument between the parties, which is in the possession or power of the defendant, to which the plaintiff is an actual party, or a party in interest, and of which he has been refused an inspection upon request, and the production of which is necessary to enable him to declare against the defendant, the court⁶⁰ may grant him a rule to produce the document, or give him a copy for that purpose.⁶¹ And such order may also be obtained in some other special cases.⁶² In all cases when an application for such a rule is made, the party applying must make an affidavit of the circumstances on which his application is founded.

Another mode of compelling the production of such an instrument is by filing a bill in chancery, but this subject will be considered in another place.⁶³

3124. The most usual course pursued when a writing is in the possession of the adverse party is to give him or his attorney *notice to produce* the original. The object of this notice is to enable the party who gives it to offer secondary evidence of the paper, should it not be produced under the notice.⁶⁴ This notice may be considered as to its form, by and to whom it should be given, when it should be served, and its effects.

In general, a notice to produce papers ought to be in writing, and state the title of the cause in which it is proposed to use the paper or instrument re-

shall be certified by the clerk of the court, and that there shall also be a certificate of the judge, chief justice, or presiding magistrate, that the attestation of the clerk is in due form. This, it is said, is founded on the supposition that the court, whose proceedings are to be thus authenticated, is so constituted as to admit of such officers; the law having wisely left the records of magistrates, who may be vested with limited judicial authority, varying in its objects and extent in every state, to be governed by the laws of the state into which they may be introduced for the purpose of being carried into effect. Accordingly, it has been held that the judgments of justices of the peace were not within the meaning of these constitutional and statutory provisions. But the proceedings of courts of chancery, and of probate, as well as of the courts of common law, may be proved in the manner directed by the statute." 1 Greenleaf, Ev. § 505.

⁶⁰ It is said that such order cannot be granted by a judge at chambers. *Willis v. Bailey*, 19 Johns. N. Y. 268.

⁶¹ 3 Chitty, Gen. Pr. 433; *Wallis v. Murray*, 4 Cow. N. Y. 399; *Utica Bank v. Hilliard*, 6 Cow. N. Y. 62.

⁶² *Brush v. Gibbon*, 3 Cow. N. Y. 18, n. (a).

⁶³ See, as to the rules in equity to compel the production of books, 1 Baldw. C. C. 388; 1 Vern. Ch. 408, 425.

⁶⁴ *Reid v. Colcock*, 1 Nott & M'C. So. C. 592.

quired;⁶⁵ it seems, however, it may be by parol.⁶⁶ It must describe with sufficient certainty the papers or instruments called for, and must not be too general, and by that means uncertain.

The notice must be given by the party to the cause who desires to prove it, or by his attorney, to the opposite party or his attorney.⁶⁷

It must be served a reasonable time before trial, so as to afford an opportunity to the party to search for and produce the instrument in question.⁶⁸ But when a paper is in court, a notice to produce it, given at the time of the trial, is sufficient.⁶⁹

When a notice to produce an instrument or paper has been proved, and it is also proved that such instrument or paper was at the time of the notice in the hands of the party or his privy, the party who gave the notice should call for its production in court on the trial; the proper time for calling for it is not until the party who requires it has entered upon his case. If upon such request he refuses or neglects to produce it, the party having given the notice and made such proof will be entitled to give secondary evidence of such paper or instrument thus withheld. The production of such papers upon notice does not make them evidence in the cause unless the party calling for them inspects them so as to become acquainted with their contents. In such cases in England the paper so examined becomes evidence for both parties; in the United States the rule is not uniform.⁷⁰

3125. To this general rule, that notice must be given to the opposite party to produce papers, there are several exceptions:

When from the nature of the proceedings the party in possession of the instrument has notice that he is charged with the possession of it, as in the case of trover for a bond,⁷¹ or when such writing is matter of defence and the adverse party must have understood that it would necessarily come in question, notice to produce it will be dispensed with.⁷²

When the party in possession has obtained the instrument by fraud, no notice is requisite to entitle the other party to give secondary evidence.⁷³

When the instrument to be proved and that to be produced are duplicate originals; for then the original being in the hands of the other party, it is in his power to contradict the duplicate original by producing the other if they vary.⁷⁴

When the instrument to be proved is itself a notice, such as a notice to quit,

⁶⁵ *Graham v. Dyster*, 2 Stark. 19.

⁶⁶ *Smith v. Young*, 1 Campb. 440; contra, *Cummings v. McKinney*, 5 Ill. 57.

⁶⁷ 2 Term, 203, n; *Brown v. Littlefield*, 7 Wend. N. Y. 454; *Lagow v. Patterson*, 1 Blackf. Ind. 327.

⁶⁸ 1 Mood. & M. 96, 335, n; *Choteau v. Raitt*, 20 Ohio, 132. If the paper is shown to be in a place so remote that it could not be produced between the time of giving the notice and the trial, evidence of its contents is inadmissible. *Morrison v. Whiteside*, 17 Md. 452; *Bushnell v. Bishop Hill Colony*, 28 Ill. 204.

⁶⁹ *Anon. Anth.* N. Y. 199; *Board of Justices v. Fennimore*, Coxe, N. J. 242.

⁷⁰ *Withers v. Gillespy*, 7 Serg. & R. Penn. 14; *Jordan v. Wilkins*, 2 Wash. C. C. 482, 484, n; *Randall v. Ches. & Del. Canal Co.*, 1 Harr. Del. 233; 1 Paine & Duer, Pr. 484. See the valuable notes to 1 Phillipps, Ev. 441, by Cowen & Hill, note 841. The English rule is affirmed in *Clark v. Fletcher*, 1 All. Mass. 53; *Anderson v. Root*, 16 Miss. 362; *Penobscot Co. v. Lamson*, 16 Me. 224; and denied in *Austin v. Thompson*, 45 N. H.

⁷¹ *Hart v. Robinett*, 5 Mo. 11; *Hammond v. Hopping*, 13 Wend. N. Y. 505; *Harden v. Kritsinger*, 17 Johns. N. Y. 393; *McClellan v. Hertzog*, 6 Serg. & R. Penn. 154; *Rose v. Lewis*, 10 Mich. 483; *State v. Mayberry*, 48 Me. 218; *Silvers v. Junction R. R.*, 17 Ind. 142.

⁷² *Keller v. Savage*, 20 Me. 199.

⁷³ *Gray v. Kernahan*, 2 Const. So. C. 65. See 7 Wend. N. Y. 198; *Davis v. Spooner*, 3 Pick. Mass. 284.

⁷⁴ *Jory v. Orchard*, 2 Bos. & P. 39.

or notice of the dishonor of a bill of exchange,⁷⁵ notice to produce the original is not necessary.

3126. It is enacted by the judiciary act of the United States "that all the courts of the United States shall have power, in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power which contain evidence pertinent to the issue in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order to produce books or writings, it shall be lawful for the courts respectively, on motion, to give the like judgment for the defendant, as in cases of non-suit; and if the defendant fail to comply with such order to produce books or writings, it shall be lawful for the courts respectively, on motion as aforesaid, to give judgment against him or her by default."⁷⁶

The proper course to pursue under this act is to move the court for an order on the opposite party to produce such books or papers.

This motion may be made before trial upon notice, and then the party moving having made out a *prima facie* case showing the existence of the paper and its materiality, the court will enter an order *nisi* to produce the paper at the trial or show cause against it. The materiality of the paper will be finally decided at the trial.⁷⁷

3127. *When the papers or writings wanted in evidence are in the hands of a third person,* a different course must be adopted to procure their production. This is done by taking out a *subpoena duces tecum*, which is a writ commanding the witness to appear in court at a time certain, and to bring with him the paper or instrument required. This writ, like the *subpoena ad testificandum*, when properly served on the witness, will be enforced by attachment against the person of the witness, and he may be punished, as in other cases, for contempt.⁷⁸

3128. *When a paper has been lost,* proof of the loss must be made by the party who had it in possession before he can give secondary evidence of its contents. It is difficult to say what degree of diligence in the search is necessary, as each case depends upon its own circumstances; this is left to the wise discretion of the court, and not to the decision of the jury.⁷⁹

If the instrument was executed in duplicate or triplicate, the loss of all the parts must be proved to let in secondary evidence. If the party relying on a paper has voluntarily destroyed it, he cannot give evidence of its contents unless he first introduce evidence to rebut the presumption of fraud on his part in so destroying it.⁸⁰

3129. The simple production of the instrument does not make it evidence. If it appears to have been altered it is incumbent on the party offering it to explain this appearance,⁸¹ because, unless it is accounted for it will cast a suspicion

⁷⁵ 1 Greenleaf, Ev. § 561; *Quinley v. Atkins*, 9 Gray, Mass. 370.

⁷⁶ Act of Congr. Sept. 24, 1789, § 30; 1 Stat. 88.

⁷⁷ *Iasigi v. Brown*, 1 Curt. C. C. 401; *Dunham v. Riley*, 4 Wash. C. C. 126.

⁷⁸ The witness is bound to produce the paper, whether it be material or not, for of that the court alone is able to judge. *Doe v. Kelly*, 4. Dowl. 273. But see *Rex v. Ld. John Russel*, 7 Dowl. 693.

⁷⁹ *Page v. Page*, 15 Pick. Mass. 368; see *Short v. Unag*, 3 Watts & S. Penn. 45; *Parks v. Dunklee*, 3 *id.* 291; *Rex v. Morton*, 4 M. & S. 48. It must be shown that the paper is not in the hands of any of the persons who there is reason to suppose may have had it. *Hammond v. Ludden*, 47 Me. 447.

⁸⁰ *Joannes v. Bennett*, 5 All. Mass. 169; *Bagley v. McMickle*, 9 Cal. 430; *Tobin v. Shaw*, 45 Me. 331.

⁸¹ *Boothby v. Stanley*, 34 Me. 115; *Davis v. Carlisle*, 6 Ala. n. s. 707; *Humphreys v. Guillow*, 13 N. H. 385.

upon it which will render it an unfit instrument of evidence, until it has been removed. Where the alteration is noticed in the attestation clause, or in some other parts of the instrument, as having been made before its execution, it will be sufficient; or if it appears in the same hand writing and ink as the body of the instrument; or if it be against the interests of the party deriving title under it; as, if a bond be altered from a greater to a less sum.⁸² When nothing appears on the subject, it is not settled whether the alterations will be presumed to have been made before or after the execution of the instrument.⁸³

When a material alteration has been made in the instrument by the party to be benefitted by it, it will vitiate the deed; and even an immaterial alteration, if made fraudulently, will have the same effect.⁸⁴ By alteration is meant an act done upon the instrument by which its meaning is changed.

The act of a mere stranger will not have this nullifying effect on the instrument when done without the consent of the parties, for this is a mere act of spoliation or mutilation of the instrument, which does not change its legal operation, so long as the original remains legible, and, if it be a deed, any traces of the seal can be discovered. If by such spoliation the paper is totally destroyed, secondary evidence of its contents may be given.

3130. *When the instrument is produced, freed from all suspicion, it must be proved by the subscribing witnesses, where there are any, or at least by one of them, if living and competent. A subscribing witness, sometimes called an attesting witness, is one who, upon being required by the parties to an instrument, signs his name to it to prove it, and for the purpose of identification. The witness must be desired by the parties to attest it, for unless this be done he will not be an attesting witness, although he may have seen the parties execute it.⁸⁵ It is not, however, necessary that he should have seen the party write or subscribe his name, for if he is called immediately afterward, and the party acknowledges his signature to him, and requests him to attest it, this will be deemed part of the transaction, and therefore a sufficient attestation.⁸⁶ In general, the attesting witness must prove its execution, and it is only when he cannot be procured, after every lawful effort has been made to secure his attendance, that evidence of his hand writing will be received.⁸⁷*

3131. *The principal exceptions to this rule, that the attesting witnesses to an instrument must be produced, are the following:*

When the instrument is thirty years old it is said to prove itself, the witnesses being presumed to be dead, and other proof being supposed to be beyond reach of the party. In such case, the instrument to be free from suspicion must come from the proper custody, or have been acted upon, or, in the case of a deed of land, have accompanied the possession, so as to afford corroborative proof of its genuineness.⁸⁸

⁸² *Coulson v. Walton*, 9 Pet. 789; *Bailey v. Taylor*, 11 Conn. 531.

⁸³ *Gooch v. Bryant*, 13 Me. 386; *Pullen v. Hutchinson*, 24 Me. 249; *Bailey v. Taylor*, 11 Conn. 531; *Trowel v. Castle*, 1 Kebl. 22; *Fitzgerald v. Fauconberg*, Fitzg. 207; *Morris v. Vanderen*, 1 Dall. 67; *Prevost v. Gratz*, 1 Pet. C. C. 364; *Bacon*, Abr. *Evidence*, F, *Helfinger v. Shultz*, 16 Serg. & R. Penn. 47; *Jackson v. Osborn*, 2 Wend. N. Y. 555; *M'Micken v. Beauchamp*, 2 La. 290.

⁸⁴ *Howe v. Peabody*, 2 Gray, Mass. 556; *Taylor v. Johnson*, 17 Ga. 521.

⁸⁵ *McGraw v. Gentry*, 3 Campb. 232.

⁸⁶ *Hollenback v. Fleming*, 6 Hill, N. Y. 303; *Cusson v. Skinner*, 11 Mees. & W. Exch. 168.

⁸⁷ *Jones v. Phelps*, 5 Mich. 218; *Brigham v. Palmer*, 3 All. Mass. 450. Proof of the hand writing may be received when the attesting witness lives out of the state. *Carpenter v. Featherston*, 15 La. Ann. 235.

⁸⁸ *Plowd.* 6, 7; *Tr. per Pays*, 370; 1 *Greenleaf*, Ev. §§ 21, 142, 570; 2 *Pothier*, Obl. by *Evans*, 149; 1 *Phillipps*, Ev. 477; *Cowen & Hill's Notes to 1 Phillipps*, Ev. 477, note 904; *Roscoe*, Civ. Ev. 70; *Mathews*, Pres. 271.

It is not necessary to prove the instrument by the attesting witnesses when it is produced by the adverse party, pursuant to notice, and he claims an abiding or permanent interest under it, because then the party producing it cannot call for proof, for by claiming an interest under it he has admitted its execution.⁸⁹

Another exception to the rule is allowed when the witnesses are incompetent at the time of their being offered, or when, owing to physical or legal obstacles, the party cannot adduce them; thus, when the witness is dead or is presumed to be so;⁹⁰ or cannot be found after diligent inquiry;⁹¹ or is out of the jurisdiction of the court;⁹² or is insane;⁹³ or has been convicted of an infamous crime;⁹⁴ or has become the adverse party, or otherwise become interested, without the agency of the party requiring his testimony; or was incapacitated at the time of signing, unknown to the party; as, where the witness was the wife of the obligor unknown to the obligee.⁹⁵ If the witness has become blind, still he must be called, because he is able to testify to the other parts of the *res gestæ* at the time of signing.⁹⁶

In regard to conveyances, in this country the rule is that the party claiming title must produce and prove the execution of the original deed under which he immediately claims. But as the grantor does not usually deliver to the grantee the former deeds, the claimant of the land is not presumed to have them in his possession. He may therefore read in evidence certified copies from the registry of deeds of such former deeds which he is not presumed to have in his possession, and need not prove their execution; they will be presumed to be genuine.⁹⁷ And it is said that if the original of such a deed is produced, its execution need not be proved in the first instance.⁹⁸

Office bonds, or such as are required by law to be taken in trust for all persons concerned, in the name of some public functionary, from officers, guardians, executors, and administrators, and such other persons who hold or are to get possession of money for others, and to be preserved in the public offices where they are registered for their protection. These bonds and their sufficiency, in general, require the approbation of some public officer before the party can enter into the duties of his appointment. It has been held that the execution of such bonds taken from the public repository need not be proved, and that, to make them evidence, it is only requisite to prove the identity of the obligor with the party in the action.⁹⁹

Another exception to the rule is the case of letters received in reply to others proved to have been sent to the party; as, where a letter was addressed to the defendant at his place of residence by an attorney, and sent by the post, to which the attorney received an answer purporting to be from the defendant; such letter thus received was admitted in evidence without proof of his hand writing.¹⁰⁰

⁸⁹ *Pearce v. Hooper*, 3 Taunt. 60; 1 Phillipps, Ev. 483; *Gardner v. Grove*, 10 Serg. & R. Penn. 137.

⁹⁰ *Mott v. Doughty*, 1 Johns. Cas. N. Y. 230; *Dudley v. Sumner*, 5 Mass. 463.

⁹¹ *Whittemore v. Brooks*, 1 Me. 57.

⁹² *Dudley v. Sumner*, 5 Mass. 444; *Cooke v. Woodrow*, 5 Cranch, 13.

⁹³ *Currie v. Child*, 3 Campb. 283.

⁹⁴ *Jones v. Mason*, 2 Strange, 283.

⁹⁵ *Melius v. Brickell*, 1 Hayw. No. C. 19.

⁹⁶ *Cronk v. Frith*, 9 Carr. & P. 197.

⁹⁷ *Scanlan v. Wright*, 13 Pick. Mass. 523; *Woodman v. Coolbroth*, 7 Me. 181; *Loomis v. Bedel*, 11 N. H. 74.

⁹⁸ *Knox v. Silloway*, 10 Me. 201.

⁹⁹ *Kello v. Maget*, 1 Dev. & B. No. Co. 414; *Boyd v. Commonwealth*, 36 Penn. St. 355. But see *Biddis v. James*, 6 Binn. Penn. 321.

¹⁰⁰ *Overton v. Wilson*, 2 Carr. & K. 1.

The recital of one instrument in another will frequently render the proof of its execution unnecessary.¹⁰¹

When the question arises on a collateral issue whether a paper was executed, the contents of which are not involved in the main question, its execution may be proved as an independent fact without producing it.¹⁰²

3132. When the instrument is produced, and the attesting witnesses cannot be found, the course then is to prove the *hand writing* of the witnesses, or, at least, of one of them; when this is done, it is in general sufficient to admit the instrument to be read, but this must be accompanied with proof of the identity of the party sued as the person who appears to have executed the instrument.¹⁰³ The paper has been allowed to be read, in some instances, by proving the hand writing of the person by whom it was executed, on proof of the identity of the person;¹⁰⁴ but it seems, in another case, such proof was not allowed, except where the party could not prove the hand writing of the witness.¹⁰⁵

3133. When no one has seen the party execute the instrument, to establish it recourse must be had to the proof of the party's hand writing. Every man's hand is different from the hands of others, and the characters which he forms in writing differ from similar characters formed by others; this is called his *hand writing*. The hand writing of a person is usually as distinguishable from others as his face differs from those of other men; and when it is proved by a person who knows it, in general it may be relied upon; still, owing to the imperfection of men's judgments, mistakes may easily be made.

In all cases of this kind, where the witness did not see the party write the document, his knowledge must be derived from a comparison of hands. The testimony of the witness is the belief which, upon comparing the writing in question with the recollection of the party's writing in his mind derived from some previous knowledge, he entertains of their similitude. The witness declares his belief in regard to the writing in question; and he may be asked what are the reasons he has for such belief.

3134. There are several modes of acquiring this knowledge of the hand writing of another.

The first is from having seen him write. The proper mode of interrogating the witness is to ask if he knows the hand writing, and next what are the sources of his knowledge, whether he has seen him write, whether frequently or otherwise.¹⁰⁶ When he has seen him write frequently, more credit will be likely to be given to him by the jury than if he had seen him write only once, and then only his name; still such evidence, although very light, may be sufficient;¹⁰⁷ and even a mark, which is so much more easily imitated, has been allowed to be proved by a person who had seen the party affix it to other writing upon several occasions.¹⁰⁸ This kind of evidence may be perfectly satisfactory, or it may leave the mind in great doubt; like probable evidence, it admits of every possible degree, from the lowest presumption to the highest moral certainty.

Another mode of acquiring a knowledge of a party's hand writing is from having seen letters¹⁰⁹ or other documents purporting to be his hand writing, and

¹⁰¹ See notes to 1 Phillipps, Ev. 89, by Cowen & Hill, note 168.

¹⁰² Shoenberger v. Hackman, 37 Penn. St. 87.

¹⁰³ Whitelock v. Musgrove, 1 Crompt. & M. Exch. 511; Roden v. Ryde, 4 Q. B. 626.

¹⁰⁴ Valentine v. Piper, 22 Pick. Mass. 90.

¹⁰⁵ Jackson v. Waldron, 11 Wend. N. Y. 178.

¹⁰⁶ See Slaymaker v. Wilson, 1 Penn. 216; Moody v. Rowell, 17 Pick. Mass. 490.

¹⁰⁷ Garrells v. Alexander, 4 Esp. 37; Lewis v. Sapio, 1 Mood, & M. 39. But see Powell v. Ford, 2 Stark. 164.

¹⁰⁸ George v. Surrey, 1 Mood, & M. 516.

¹⁰⁹ Chaffee v. Taylor, 3 All. Mass. 598.

having afterward personally communicated with him respecting them; or acted upon them as genuine, with the consent or approbation of such party; or by such adoption of them by him in the ordinary transactions of life as would induce a reasonable presumption that they were genuine.¹¹⁰ Further evidence will of course be required to be given, *abunde*, of the identity of the party if the witness is not personally acquainted with him.

A third mode has been proposed by first satisfying the witness by some evidence or information other than the means above mentioned that certain papers are genuine, and then desiring him to study them, and, having fixed an exemplar in his mind, he should give an opinion as to whether the paper in question was the party's hand writing. On this point the court were equally divided, and it seems very questionable whether such evidence ought to be received, because if it be proper, documents irrelevant to the issue must be introduced.¹¹¹ Whether papers irrelevant to the record can be admitted for the sole purpose of creating a standard of comparison of hand writing does not appear to be settled.¹¹²

3135. We have already considered the nature of secondary evidence and when it ought to be admitted. In case an original writing has been lost, or if in the possession of the opposite party after notice, it has not been produced, in general secondary evidence of its existence will be received.

3136. When a private writing has been proved, it is to receive such a construction as its words will naturally bear. It must be presumed that when the parties reduced their agreement to writing and used such terms as import a legal obligation, without any uncertainty as to the object or intent of such engagement, they meant the whole contract should be there stated, and that no *colloquium* or *pourparlers* between the parties, and that no declarations or conversation at the time it was completed or before, which would contradict, add to, or alter the written agreement should be proved, because they had been abandoned, and therefore no evidence will be allowed for that purpose.¹¹³ But this rule, that a party is not allowed to give parol evidence to contradict, add to, or alter a written agreement, is confined to the exclusion of evidence of the language of the party, and not to the circumstances in which he was placed, nor to collateral facts.

The rule applies to simple written instruments as well as to specialties or contracts under seal. The words are to be understood in their general ordinary sense, but in suits between the parties to the instrument it may be shown by

¹¹⁰ *Amherst Bank v. Root*, 2 Metc. Mass. 521.

¹¹¹ *Doe v. Sackermore*, 5 Ad. & E. 703, 734.

¹¹² In a note to § 581, in the first volume of his excellent work on Evidence, Professor Greenleaf says, "In New York, Virginia, and North Carolina, the English rule is adopted, and such testimony is rejected. *Jackson v. Phillips*, 9 Cow. N. Y. 94, 112; *Titford v. Knott*, 2 Johns. Cas. N. Y. 210; *Rowt v. Kile*, 1 Leigh, Va. 216; *The State v. Allen*, 1 Hawks, No. C. 6. In Massachusetts, Maine, and Connecticut, it seems to have become the settled practice to admit any papers to the jury, whether relevant to the issue or not, for the purpose of comparison of the hand writing. *Homer v. Wallis*, 11 Mass. 309; *Moody v. Rowell*, 17 Pick. Mass. 490; *Richardson v. Newcomb*, 21 Pick. Mass. 315; *Hammond's Case*, 2 Me. 33; *Lyon v. Lyman*, 9 Conn. 55. In New Hampshire and South Carolina, the admissibility of such papers has been limited to cases where other proof of hand writing is already in the cause, for the purpose of turning the scale in doubtful cases. *Myers v. Toscan*, 3 N. H. 47; *The State v. Carr*, 5 N. H. 367; *Boman v. Plunkett*, 3 M'Cord, So. C. 518; *Duncan v. Beard*, 2 Nott & M'C. So. C. 401. In Pennsylvania, the admission has been limited to papers conceded to be genuine. *McCorkle v. Binns*, 5 Binn. Penn. 340; *Lancaster v. Whitehill*, 10 Serg. & R. Penn. 110.

¹¹³ *Fitch v. Woodruff Iron Works*, 29 Conn. 82; *Jungerman v. Bovee*, 19 Cal. 354; *Howard v. Thomas*, 12 Ohio, St. 201; *Downie v. White*, 12 Wisc. 176; *Rennell v. Kimball*, 5 All. Mass. 356; *Forbes v. Waller*, 25 N. Y. 430; *Oiler v. Bodkey*, 17 Ind. 600; *Robinson v. Magarity*, 28 Ill. 423; *Morrison v. Lovejoy*, 6 Minn. 319.

evidence of the circumstances or by experts that a different special meaning was given to the terms used.¹¹⁴ The recital of the date in a deed is only presumptive evidence of the actual date of execution, and may be rebutted by proof.¹¹⁵

3137. The courts find but little difficulty in construing written contracts and other written documents when they are expressed in clear and distinct terms, and in such case they will not admit parol evidence to contradict, alter, or add to the written document; owing to ignorance or the imperfection of language there are, however, too often clauses in written contracts and wills that may bear several meanings. In these cases it is said there is *ambiguity*.¹¹⁶

There are two sorts of ambiguities of words: *ambiguitas latens* and *ambiguitas patens*.

The first occurs when the deed or instrument is sufficiently certain and free from ambiguity, but the ambiguity is produced by something extrinsic, or some collateral matter out of the instrument. For example, if a man devise his property to his cousin Peter, and he has two cousins of that name, in such case parol evidence will be received to explain the ambiguity. Here it is to be observed the ambiguity arises out of the paper itself; it is latent or concealed, and for this reason it may be explained by parol.

A patent ambiguity occurs when a clause in a deed or other instrument is so defectively expressed that a court of law, which has to put a construction on the instrument, is unable to collect the intention of the party. In such case evidence of his declarations cannot be admitted to explain his intention, and the clause will be void for uncertainty.¹¹⁷ But it is to be remembered that an instrument is not to be considered ambiguous because an ignorant or uninformed person is unable to interpret it; and when words of art or science are used, the judge, in order to understand the writing, must know those terms. It is for this reason, among others, that all the lights afforded by the collateral facts and circumstances are allowed to shine upon the case, and that they may be proved by parol.¹¹⁸

But though the rule, that no parol evidence can be given to contradict, add to, or alter a writing, be firmly established, yet it must be understood with this qualification, that such evidence may be adduced to show fraud or mistake;¹¹⁹ and courts of equity constantly admit evidence to contradict or vary a writing, when it is founded on a mistake of material facts, and it would be unconscionable or unjust to enforce it against either party, according to its expressed terms.

3138. The rule which forbids parol evidence to be given to contradict, add to, or alter a writing, applies only to agreements made anterior to the writing. New and distinct agreements upon a new consideration may be made to change such written contract, and therefore they may be proved without infringing the rule; as, where a man agreed in writing to build a house for another, and after-

¹¹⁴ Peisch v. Dickson, 1 Mas. C. C. 11; Stone v. Hubbard, 7 Cush. Mass. 595; Myers v. Walker, 24 Ill. 133.

¹¹⁵ Banning v. Edes, 6 Minn. 402; Partridge v. Swazey, 46 Me. 414.

¹¹⁶ See, as to ambiguity, Bacon, Max. 23; 1 Phillipps, Ev. 410 to 420; 3 Starkie, Ev. 1021; Sugden, Ven. 113; Dig. 22, 1, 4; Dig. 45, 1, 8; Dig. 50, 17, 67.

¹¹⁷ McNair v. Toles, 5 Minn. 435. In Pennsylvania this doctrine is somewhat qualified. Dinkle v. Marshall, 3 Binn. Penn. 587.

¹¹⁸ See 1 Greenleaf, Ev. § 298; Wigram, Wills, p. 174, n. 200, 201; Smith v. Clayton, 5 Dutch. N. J. 357.

¹¹⁹ Doe v. Allen, 8 Term, 147; Pierson v. McCahill, 21 Cal. 122; Lull v. Cass, 43 N. H. 62. Thus one may show that he signed an agreement with an understanding that it was not to be binding until signed by others who have not signed. Holmes v. Crossett, 33 Vt. 116. But see Black v. Shreve, 2 Beasl. N. J. 455.

ward, finding he would be a loser, he refused to go on unless his employer would agree to give him a further sum, which he promised to do by parol, and he then went on. The builder was allowed to recover in assumpsit upon the last contract.¹²⁰

It is also held that where an oral contract is made and afterward reduced in part to writing, the oral contract is not all merged in the writing, but may be shown by parol evidence.¹²¹ And evidence is admissible to prove agreements as to matters collateral to and not included in the written agreement.¹²² Under this head come the cases which hold that parol evidence is admissible to show a deed absolute on its face to be in fact a mortgage.¹²³

A receipt is only *prima facie* evidence of payment, but where it also contains a contract, it is conclusive as to the contract, though not as to the payment or receipt.¹²⁴ A familiar instance of this is found in bills of lading.¹²⁵

3139. Though a *shop book*, which contains an account of the daily transactions of a merchant or mechanic, or other person, of the sale of goods, or of work and labor done for him, is made without the concurrence of the party to be charged, yet when the entries have been properly made, in a proper book, at the right time, they are received in evidence to prove the sale and delivery of goods, and the performance of work and labor.

None but an original entry so made will be received in evidence. Let us now examine the requisites of such entry; the manner of proving it; and its effect when proved.

3140. To make a *valid original entry* it must possess the following qualities:

It must be made in a proper book. In general, the books in which the first entries are made, belonging to a merchant, tradesman, or other person,¹²⁶ in which are charged goods sold and delivered, or work and labor done, are received in evidence, though made by the party himself, when such entries are proved by the suppletory oath of the person who made them, or, in his unavoidable absence, by proof of his hand writing. This evidence, when the books are proved by the party himself, is received as part of the *res gestæ*, the entry being a contemporaneous act with the transaction.

To be received in evidence the book must be a book of original entries, kept by the plaintiff himself, to register his affairs, and must have the appearance of fairness, for upon being inspected by the court if it do not appear to be a register of the daily business of the party, and to have been honestly made, it will be excluded. If it appear to have been fraudulently altered in any material part, it will not be admitted, or if so altered without fraud, such alteration must be

¹²⁰ *Monroe v. Perkins*, 9 Pick. Mass. 298. See *Lattimore v. Harsen*, 14 Johns. N. Y. 330. Any oral agreement may of course be discharged orally, and evidence of such facts is admissible. And a condition in a deed may be waived by parol. *Leathe v. Bullard*, 8 Gray, Mass. 545; *Lawrence v. Dole*, 11 Vt. 549. Where a contract is required by the statute of frauds to be in writing, it would seem to be incompetent to show a new agreement varying its terms without writing. *Adler v. Friedman*, 16 Cal. 138.

¹²¹ *Crane v. Elizabeth Ass.* 5 Dutch. N. J. 302; *Winn v. Chamberlin*, 32 Vt. 318.

¹²² *Keough v. McNitt*, 6 Minn. 513; *Kieth v. Kerr*, 17 Ind. 284; *McKee v. Boswell*, 33 Mo. 567.

¹²³ *Plato v. Roe*, 14 Wisc. 453; *Roberts v. McMahan*, 4 Greene, Iowa, 34; *Johnson v. Sherman*, 15 Cal. 287; *Howard v. Odell*, 1 All. Mass. 85.

¹²⁴ *Dale v. Evans*, 14 Ind. 288; *Brown v. Brooks*, 7 Jones, No. C. 93; *Sencerbox v. McGrade*, 6 Minn. 484.

¹²⁵ *Tuskar*, 1 Sprague, Dist. Ct. 71.

¹²⁶ In some states the books thus admitted in evidence are restricted to those of shopkeepers, mechanics, and tradesmen; those of other persons, such as planters, scribes, schoolmasters, etc., not being allowed. *Geter v. Martin*, 2 Bay, So. C. 173; *Pelzer v. Cranston*, 2 McCord, So. C. 328; *Boyd v. Ladson*, 4 *id.* 76.

explained.¹²⁷ If the books appear to be fairly made, it is immaterial whether they are made in the form of a journal, day book, or ledger.¹²⁸

There are many books which are not books of original entries, and consequently cannot be received in evidence, although entries charging persons with goods sold and delivered to them, or for work and labor performed at their request; a few of these will be enumerated. A book made by transcribing entries made on a slate by a journeyman, the transcript being made sometimes on the same evening, at other times not until nearly two weeks after the work was done, was considered as not a book of original entries;¹²⁹ and unconnected scraps of paper, containing entries of sales by an agent on account of his principal, and appearing on their face to be irregularly kept, are not to be considered as a book of original entries.¹³⁰

The entry must have been made in proper time, and in the course of business, and with an intention of making a charge for goods sold and work done; and they ought not to be made after the lapse of one day.¹³¹ A charge made at the time when the goods were ordered and before delivery in a book which was kept for that purpose, is not sufficient, although when the goods were delivered there was a mark made to indicate such delivery.¹³² There is one class of entries which derive all their force from the circumstance alone that they were made by the party making them against his own interest, and it is immaterial as to the time when they were made; as, where a man's clerk charges himself in the books of his employer with goods or money received by him on account of his wages.

An entry must be made in an intelligible manner, and not in figures or hieroglyphics which are understood by the seller only;¹³³ and it must not be made in a gross amount, but as goods are delivered or the work is done; charges made in the gross of "one hundred days' work," or "for medicine and attendance," or "thirteen dollars for medicine and attendance on one of the general's daughters," were, therefore, rejected.¹³⁴ An entry of goods without carrying out any price proves, at most, only a sale, and the jury cannot, without other evidence, fix any price.¹³⁵ The charges should be specific, and denote the particular work or service charged, as it arises daily, and the quantity, number, weight, or other distinct designation of the materials or articles sold or furnished, and the price or value should be attached to each item.¹³⁶

The entry must be made by a person having authority to make it, for if made by a stranger, it would not be evidence of any sale and delivery, or of

¹²⁷ *Churchman v. Smith*, 6 Whart. Penn. 106; *Caldwell v. McDermit*, 17 Cal. 464.

¹²⁸ *Rodman v. Hoops*, 1 Dall. 85; *Thomas v. Dyott*, 1 Nott & McC. So. C. 106; *Cogswell v. Dolliver*, 2 Mass. 217; *Swing v. Sparks*, 2 Halst. N. J. 59; *Gale v. Norris*, 2 McLean, C. C. 469; *Wells v. Hatch*, 43 N. H. 246. The loss of the original entry book being proved, the ledger, together with copies of papers containing advertisements, are competent to sustain a bill for advertising. *Caulfield v. Sanders*, 17 Cal. 569.

¹²⁹ *Ogden v. Miller*, 1 Browne, Penn. 147. The book is a book of original entry if the items are transcribed from the slate within a reasonable time. *Barker v. Haskell*, 9 Cush. Mass. 218; *Landis v. Turner*, 14 Cal. 573. The same rule applies if the entries are made by one person and transcribed by another. *Kent v. Garvin*, 1 Gray, Mass. 148; *Hall v. Glidden*, 39 Me. 445.

¹³⁰ *Thompson v. McKelvey*, 13 Serg. & R. Penn. 126. See 2 Whart. Penn. 33; *Prince v. Smith*, 4 Mass. 455; *Lynch v. Hugo*, 1 Bay, So. C. 33; *Wilson v. Wilson*, 1 Halst. N. J. 94; *Bell v. McLean*, 3 Vt. 185.

¹³¹ *Waller v. Bollman*, 8 Watts, Penn. 545.

¹³² *Rhoads v. Gaul*, 4 Rawle, Penn. 404.

¹³³ *Rhoads v. Gaul*, 4 Rawle, Penn. 404.

¹³⁴ *Lynch v. Petrie*, 1 Nott & McC. So. C. 130; *Hughes v. Hampton*, 2 Const. So. C. 476.

¹³⁵ *Hagaman v. Case*, 1 South, N. J. 370.

¹³⁶ 2 Bail. So. C. 449; *Lynch v. Petrie*, 1 Nott & McC. So. C. 130.

work done,¹³⁷ and it must be made when the party making it is authorized, with an intent to charge the person against whom it is made.¹³⁸

The entries made by the party himself are admissible at common law only from the necessity of the case, and will not be allowed if other evidence can be had to prove the delivery of the goods.¹³⁹ The statutes of most of the states now allowing the parties to testify in all civil cases, such entries are subject to the same rules as those made by a clerk.¹⁴⁰

3141. When the entries have been made by a clerk or other authorized person from the report of others, this kind of evidence is in the nature of hearsay; for when the clerk swears he made the entry at the time it bears date, he only establishes the fact that he made a record of what another told him, and that the book contains the statement of what was then told him. But when the entry was made by the person who sold and delivered the goods, or performed the work, whether as a principal or an agent, then the evidence assumes another character; it is a memorandum of a fact actually known to him, which he has not heard from others. Then the entry acquires a value from this circumstance, that it was contemporaneous with the principal fact done, forming a link in the chain of events, and being a part of the *res gestæ*.

When the entry has been made by a clerk or other authorized agent, the proof of such entry must be made by the clerk or agent himself, if he can be procured, but if he be dead¹⁴¹ or insane,¹⁴² his hand writing may be proved by any one acquainted with it.¹⁴³ But the plaintiff is not competent in such case to prove the hand writing of his deceased clerk.¹⁴⁴

When the entry has been made by the plaintiff himself, he can in general prove the fact, although he is a party on record, contrary to the general rule that an interested person cannot be examined as a witness. This rule has been adopted with some limitations in perhaps most of the states of the Union.¹⁴⁵ Though not in accordance with the ancient common law of England, this rule, which was adopted from the necessity of the case, as in the early settlement of America many persons could not keep clerks, is in conformity¹⁴⁶ with other

¹³⁷ Rhoads v. Gaul, 4 Rawle, Penn. 404.

¹³⁸ Waller v. Bollman, 8 Watts, Penn. 545. See Curran v. Crawford, 4 Serg. & R. Penn. 3, 5; Ingraham v. Bockius, 9 Serg. & R. Penn. 285; Cook v. Ashmead, 2 Miles, Penn. 268.

¹³⁹ Dodson v. Sears, 25 Ill. 513; Landis v. Turner, 14 Cal. 573; Jackson v. Evans, 8 Mich. 476.

¹⁴⁰ Swain v. Cheney, 41 N. H. 232.

¹⁴¹ His absence beyond the jurisdiction of the court, or beyond the reach of process, is not enough. Kennedy v. Fairman, 1 Hayw. No. C. 458; Whitfield v. Walk, 2 Hayw. No. C. 24; Wilbur v. Selden, 6 Cow. N. Y. 162. But in some cases the permanent absence of the clerk from the state has been holden sufficient to let in proof of his hand writing. Elms v. Chevis, 2 M'Cord, So. C. 350; Tunno v. Rogers, 1 Bay, So. C. 480.

¹⁴² Union Bank v. Knapp, 3 Pick. Mass. 96.

¹⁴³ Hay v. Kramer, 2 Watts & S. Penn. 137.

¹⁴⁴ 1 Browne, Penn. App. liii.

¹⁴⁵ The practice of receiving such evidence is said by a learned judge to be "founded on a moral necessity. The whole commercial world," he says, "has in substance the same thing. The principles of it, I believe, were introduced into this country from Holland by the first settlers of New England. Its origin doubtless was in commercial transactions, but its use became necessary between man and man in the common intercourses of life." Per Brainard, J., in Beach v. Mills, 5 Conn. 496. In some of the states the rule has been established by a species of necessity and the decisions of the courts; in others, this kind of evidence is regulated by statutes, but their provisions vary very much in their details. See 1 Phillipps, Ev. 266, and note by Cowen & Hill, number 491; 1 Greenleaf, Ev. § 118, note 1.

¹⁴⁶ By the Roman law, a merchant's or tradesman's books of accounts, regularly and fairly kept in the usual manner, were deemed presumptive evidence, and with the supplementary oath of the party, full proof of his claim. 1 Greenleaf, Ev. § 119. By the law of France, the books of merchants and tradesmen are required to be kept regularly, and written from day to day, without any blank, and seen and approved, (*paraphés et visés*),

systems of jurisprudence. When the plaintiff who made the entries is dead evidence of his hand writing will be received.¹⁴⁷

In all cases the charge must be proved to be an original entry, and not a mere transcript from another book; but when there is a mark showing that the entry has been posted into another book, commonly called the ledger, that must also be produced.

3142. The book of original entries, when proved by the suppletory oath or affirmation of the person who made the entry, or by proof of his hand writing as above mentioned, is *prima facie* evidence of the sale and delivery of goods or of work and labor done,¹⁴⁸ for the books and the suppletory oath are not conclusive; the testimony is still to be weighed by the jury, like any other in the cause, and the witness who makes such suppletory oath is subject to have his reputation for truth assailed equally with any other witness.¹⁴⁹ This is confined to personal property; a charge of a sale, or use, or occupation of real estate would have no effect.¹⁵⁰ The goods may have been sold and delivered to the defendant himself or to his agent under an express or implied authority to buy them, and therefore necessary goods supplied to a man's wife or children are properly charged.

Although fully proved by the suppletory oath of the person who made the entry, such book is not evidence in many cases from the nature of the thing charged.¹⁵¹ For example, a charge of money lent or cash paid,¹⁵² the time a vessel lay at plaintiff's wharf,¹⁵³ the delivery of goods to be sold on commission,¹⁵⁴ commissions on the sale of a vessel,¹⁵⁵ a delivery of goods under a special agreement,¹⁵⁶ delivery of goods to a third person; but where the delivery of goods to such a person is proved to have been made by order of the buyer, by competent evidence *aliunde*, the delivery itself may be proved by the books and suppletory oath of the plaintiff in any case where the delivery to the defendant in person might be so proved.¹⁵⁷

3143. Many entries made in proper books in the ordinary course of business are admitted in evidence upon the ground that they are contemporaneous with the transaction they record. The letter book of a merchant, party in the cause, has been admitted as *prima facie* evidence of the contents of a letter addressed by him to the other party after notice to produce the original, for merchants

at least once a year, by certain designated officers. When a merchant's or tradesman's books are so kept, and he is a man of probity, they are admitted as semi-proof, presumptive evidence, and, with his suppletory oath, as full proof of his claim. Code de Com. art. 8 to 13. In Scotland, merchants' books, when properly kept, may be received in evidence with the "oath in supplement," as full proof; but a course of dealing, or other pregnant circumstances, must first be shown by proof *aliunde*. Tait, Ev. 273-277; 1 Bell, Comm. 331, 5th ed.; Glassford, Evidence, 550.

¹⁴⁷ McLellan v. Crofton, 6 Me. 307; Odell v. Culbert, 9 Watts & S. Penn. 66; Bently v. Hollandbach, Wright, Ohio, 169; Prince v. Smith, 4 Mass. 455.

¹⁴⁸ 1 Swift, Ev. 84; Case v. Porter, 8 Johns. N. Y. 211; Vosburg v. Thayer, 12 Johns. N. Y. 261; Ducoign v. Schreppel, 1 Yeates, Penn. 347; Wilmer v. Israel, 1 Browne, Penn. 257; Charlton v. Lecory, Mart. No. C. 26.

¹⁴⁹ Kitchen v. Tyron, 2 Murph. No. C. 314; Elder v. Warfield, 7 Harr. & J. Md. 391.

¹⁵⁰ Beach v. Mills, 5 Conn. 493. See Dunn v. Whitney, 10 Me. 9; Newton v. Higgins, 2 Vt. 366.

¹⁵¹ In some states, as in Maine and Massachusetts, the amount is restricted to forty shillings, or other small sums. Dunn v. Whitney, 10 Me. 9; Burns v. Fay, 14 Pick. Mass. 8.

¹⁵² Maine v. Harper, 4 All. Mass. 115; Rich v. Eldredge, 42 N. H. 153.

¹⁵³ Wilmer v. Israel, 1 Browne, Penn. 257.

¹⁵⁴ Murphy v. Cress, 2 Whart. Penn. 33.

¹⁵⁵ Winson v. Dillaway, 4 Metc. Mass. 221.

¹⁵⁶ Nickle v. Baldwin, 4 Watts & S. Penn. 290. But see Swain v. Cheney, 41 N. H. 232.

¹⁵⁷ Mitchel v. Belknap, 23 Me. 475.

usually keep such a book.¹⁵⁸ Contemporaneous entries made by third persons in their own books in the ordinary course of business, the matter being within the peculiar knowledge of the party making the entry, and there being no apparent motive to pervert the fact, are generally received as original evidence, though the person who made them has no recollection of the fact at the time of testifying, provided he swears that he should not have made it if it were not true.¹⁵⁹

Thus in a criminal indictment the charge in the gas company's books against the defendant is competent to prove that he kept the nuisance for which he was indicted.¹⁶⁰

¹⁵⁸ *Pritt v. Fairclough*, 3 Campb. 305; *Hagedom v. Reid*, 3 Campb. 377. See *Sturge v. Buchanan*, 2 Perr. & D. 573.

¹⁵⁹ *Bunker v. Shed*, 8 Metc. Mass. 150; *Briggs v. Rafferty*, 14 Gray, Mass. 525. Contra, *Barnes v. Simmons*, 27 Ill. 512.

¹⁶⁰ *State v. Mace*, 6 R. I. 85.

CHAPTER XII.

WITNESSES.

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3144. The fourth class of instruments of evidence are witnesses. A *witness* is one who, being sworn or affirmed according to law, deposes as to his knowledge of facts in issue between the parties in a cause.

The testimony of witnesses can never have the effect of a demonstration, be-

cause it is not impossible; indeed, it frequently happens that they are mistaken, or wish themselves to deceive. There can, therefore, result no other certainty from their testimony than what arises from analogy. When in the calm of the passions we listen only to the voice of reason and the impulse of nature, we feel in ourselves a great repugnance to betray the truth to the prejudice of another, and we have observed that honest, intelligent, and disinterested persons never combine to deceive others by a falsehood. We conclude, then, by analogy, with a sort of moral certainty, that a fact attested by several witnesses worthy of credit is true. This proof derives its whole force from a double presumption. We presume, in the first place, on the good sense of the witnesses that they have not been mistaken; and, secondly, we presume on their probity that they wish not to deceive. To be certain that they have not been deceived and that they do not wish to mislead, we must ascertain as far as possible the nature and the quality of the facts proved, the quality and the person of the witness, and the testimony itself by comparing it with the deposition of other witnesses or with known facts.

This head will be divided into three sub-divisions: the means used to obtain the attendance of witnesses, the character of the witness, and the number of witnesses required by law.

3145. Witnesses may be procured to attend and testify in a case merely by being notified to attend, and if they attend in court, they may be examined, although no process requiring their attendance has been taken out and served on them.¹ But the practice of relying upon witnesses without serving a *subpoena* upon them is very dangerous, because, if they do not attend, their absence will be no legal cause for putting off the trial or continuing the cause.

The courts of common law have the inherent power to call for all legal proof required to establish the facts in issue between the parties; and they, consequently, possess the authority to summon and compel the attendance of witnesses to come before them and testify as to their knowledge respecting such facts. The process usually employed for this purpose is the writ of *subpoena ad testificandum*. This writ is directed to the witness, commanding him to appear at court to testify what he knows in the cause therein described, pending in the court out of which it issues, under a penalty mentioned in the writ. When the witness is required to produce papers to be read in evidence, a clause is inserted in the writ commanding him to bring them with him into court, and then the writ is called a *subpoena duces tecum*.² In such case the paper should be particularly described, for a direction to produce all letters, papers, and documents touching the matter in dispute can hardly be relied upon.³

The writ of *subpoena* is sufficient to secure the attendance of the witness for one session or term of the court; but if the cause be made a *remanet*,⁴ that is, it is postponed by adjournment to another term or session, the witness must be subpoenaed anew.

With regard to the service of the *subpoena*, although regulated by statute and rules of courts in the several states, which vary materially in their details, yet it may be observed that it must be served long enough before the time appointed to allow the witness a sufficient time conveniently to come from his residence to court;⁵ and in order to ground a motion for an attachment for the contempt

¹ *De Benneville v. De Benneville*, 1 Binn. Penn. 46; 3 Yeates, Penn. 558.

² 3 Chitty, Gen. Pr. 830, n.; *Amey v. Long*, 9 East, 473. A witness may be compelled to produce his private books if required by lawful authority. *Burnham v. Morissey*, 14 Gray, Mass. 226.

³ See *Fence v. Lucy*, Ry. & M. 341.

⁴ *Lee*, Dict. of Pr. *Trial*, vii.; 1 Sellon, Pr. 434; 1 Phillipps, Ev. 4; 1 Greenleaf, Ev. § 309; 2 Tidd, Pr. 855; *Bouv. Law Dict. Remanet*.

⁵ 1 Phillipps, Ev. 4.

of the witness for non-attendance, the *subpœna* must be served on the witness personally.

It is the general practice in the United States to pay witnesses for their attendance on the trial; this compensation is fixed by the local statutes, and, like all matters of this kind, varies in the different states of the Union.⁶ It is sufficient, in some states, to tender to the witness his fees for travel from his home to the place of trial, and one day's attendance, in order to compel him to appear under the *subpœna*; and in others the tender must include, besides, his fees for returning; whether he is bound to attend from day to day without being paid his fees does not appear to be uniformly settled, but it seems he cannot be compelled to submit to an examination without such payment.⁷

In criminal cases the fees need not be tendered to the witness when he is summoned by the government. The accused in all such cases is entitled to have compulsory process for compelling the attendance of witnesses,⁸ though prepayment of fees is still requisite, unless, as sometimes in capital cases, the state pays the witness fees for the prisoner.

3146. When the witness has been duly summoned, and his fees have been paid to him, or lawfully tendered, or the payment or tender has been waived, and he wilfully neglects to appear, he is guilty of a contempt of the process of the court, and may be punished by *attachment*, which is a writ in the name of the people, the commonwealth, the United States, or other denomination which represents the government, against the witness, directed to the sheriff or other officer, lawfully authorized to serve the same, commanding him to bring the witness before the court.⁹ The witness is not deemed in contempt until proof has been made that the *subpœna* was served on him, and that his absence has been with intent to disobey the *subpœna*, and that his fees were paid or tendered to him, or that he waived their payment. But even in such case, unless a palpable contempt be shown, a rule to show cause is granted in the first instance.¹⁰ If the witness is in attendance in court by virtue of the *subpœna*, and he refuses to be sworn or affirmed, he is, of course, guilty of a contempt of the court, which is a wilful disregard of its authority, and he may be punished for it by fine or imprisonment, or both.

Witnesses who are summoned as experts in a particular science or art are not bound to attend, and an attachment will not issue against them.¹¹ And they are entitled to demand proper compensation for their time.

3147. But there are many circumstances which will excuse a witness for not attending, and which will cure this apparent contempt.

When the witness was imprisoned, whether lawfully or unlawfully, it is evident he could not attend, and upon this being shown he will be discharged from the attachment.

When the witness has become insane, or has been disabled by some accident from attending, he is not guilty of contempt.

When he is in the military or naval service of the United States, or of any state, and is not at liberty to attend without leave of his superior officer, and

⁶ The cost of travel beyond the limits of the state cannot be taxed as costs. *White v. Judd*, 1 Metc. Mass. 293; *Howland v. Lennox*, 4 Johns. N. Y. 311; contra *Albany v. Derby*, 30 Vt. 718.

⁷ *Paine & Duer*, Pr. 497; *Bliss v. Brainard*, 42 N. H. 255. In New Jersey the witness is not bound to attend unless his fees are tendered at the time of service of the *subpœna*. *Ogden v. Gibbons*, 2 South. N. J. 518.

⁸ U. S. Const. Amend. 6.

⁹ *Graham*, Pr. 555.

¹⁰ *Anon. Salk*. 84; *Concklin*, Pract. 265.

¹¹ In the matter of *Roelker*, 1 Sprague, Dist. Ct. 276.

he cannot obtain the officer's permission, he is in no fault, and consequently not in contempt.

3148. In the case of a prisoner or a soldier who is wanted as a witness, the usual, and indeed the only proper process to secure the attendance of such witness is the writ of *habeas corpus ad testificandum*; this is a writ or process directed to the person having the witness in charge, commanding him to bring him before the court in order that he may testify.¹² This writ is grantable at discretion on motion in open court, or by a judge at chambers who has a general authority to issue writs of *habeas corpus*. In civil cases the application is made upon affidavit, stating the nature of the suit and the materiality of the testimony, as the party is advised by counsel and verily believes, together with the fact of the restraint, and the circumstances which justify the issuing of the writ. When the witness is in lawful custody, the writ is served by leaving it with the person who detains the witness, and if he is unlawfully imprisoned, with the person who so holds him; but if he is in the military or naval service, the writ is left with the officer immediately in command, to be served, obeyed, and returned like any other writ of *habeas corpus*.¹³

3149. In general, the court which issues a *subpoena* cannot give it any force beyond its territorial jurisdiction; but the courts of the United States sitting in any district are authorized by statute to send *subpoenas* for witnesses into any other districts, provided that, in civil causes, the witness does not live at a greater distance than one hundred miles from the place of trial.¹⁴

A *subpoena* extends a protecting influence over the witness when it has been served upon him; like a party attending court in a cause, he is protected from arrest while going to the place of trial, while attending there for the purpose of giving evidence in the cause, and while returning home, *eundo, morando et redeundo*; this protection also extends to a witness who comes, *bona fide*, to attend without being summoned.¹⁵ The arrest of a witness, after he has been summoned, for the purpose of preventing him from attending court, is a contempt of court, and punishable as such. And it is a contempt to serve him even with a summons, if it be done in the immediate or constructive presence of the court upon which he is attending, and the service will be set aside.¹⁶ But this freedom from arrest is a personal privilege which, in general, a party can waive;¹⁷ when, however, the privilege is not merely as a favor to the witness, but it is created by public policy, it cannot be waived; an ambassador, who has been arrested, does not waive his privilege by submitting to the arrest.¹⁸

This privilege is extended to witnesses attending before any legal tribunal which has power to compel their attendance.¹⁹

3150. When the witness resides abroad, out of the jurisdiction of the court, and refuses to attend, or is sick and unable to attend, or in some states by statute when he resides more than a certain distance from the place of trial, his

¹² 3 Blackstone, Comm. 130. This writ cannot be issued by the magistrates authorized to take depositions under the 30th section of the judiciary act. *Ex parte Barnes*, 1 Sprague, Dist. Ct. 133.

¹³ 2 Phillipps, Ev. 374; 2 Tidd, Pr. 809; Concklin, Pr. 264; 1 Greenleaf, Ev. § 312.

¹⁴ Act of Congr. March 2, 1793, § 6; 1 Stat. 335. In some of the states the courts are authorized to issue their subpoenas to persons any where in the state.

¹⁵ Coughlin, Petitioner, Mass. Supreme Court Nov. 1866; *Meekens v. Smith*, 1 H. Blackst. 636; *Hurst's Case*, 4 Dall. 387. *Norris v. Beach*, 2 Johns. N. Y. 294; *Randall v. Gurney*, 3 Barnew. & Ald. 252. In New Jersey, the witness is not protected from arrest unless he is attending court under a subpoena. *Rogers v. Bullock*, 2 Penn. N. J. 516.

¹⁶ *Ex parte Edme*, 9 Serg. & R. Penn. 147.

¹⁷ *Bours v. Tuckerman*, 7 Johns. N. Y. 538; *Huntingdon v. Schultz*, Harp. So. C. 452.

¹⁸ *United States v. Benner*, Baldw. C. C. 240.

¹⁹ *Wood v. Neale*, 5 Gray, Mass. 538.

testimony can be obtained in civil cases by taking his *deposition* before a judge, or other magistrate, or a commissioner duly appointed by order of the court where the cause is pending; and when the commissioner is not a judge or magistrate, he should himself be first sworn or affirmed.

By a *deposition* is meant the testimony of a witness reduced to writing, in due form of law, taken by virtue of a commission or other lawful authority of a competent tribunal. This mode of taking testimony in a foreign country has always been common with courts of admiralty; now it is considered to be within the inherent powers of all courts of justice. When the testimony of a witness who is in a foreign jurisdiction is required, the court in which the suit is pending may send to the court within whose jurisdiction the witness may be a writ, usually termed a *letter rogatory*, or a *commission sub mutua vicissitudinis obtentu, ac in juris subsidium*, so called from these words, which, when the proceedings were in Latin, it contained.

The letter rogatory informs the court abroad of the pendency of the cause and the name of the foreign witnesses, and the foreign court is requested to cause their depositions to be taken in due course of law for the furtherance of justice, offering on the part of the tribunal making the request to do the like for the other in a similar case. Interrogatories filed by the parties on each side, to which the answers of the witnesses are desired, usually accompany such letter. The commission is executed by the judge or commissioner who receives it; and the original answers, duly signed and sworn to by the deponent and properly authenticated, covered by an envelope and sealed, are returned with the commission to the court from which it issued.²⁰

There are provisions which have existed in the statutes of the several states from a very early period to authorize the taking of depositions to be used in civil actions in the courts of law in all cases where the personal attendance of the witness could not be had at the trial by reason of sickness or other inability to attend, and depositions are taken constantly of ancient, absent, and going witnesses.

Depositions are taken *de bene esse*, and cannot be used in evidence if the reason for taking them has ceased; as, for instance, if the witness has recovered from his sickness, or is in court and can be examined.²¹ And if the party at whose instance it is taken declines to use it, it may be read in evidence by the other party.²²

It is in general held necessary that the certificate of the magistrate should state the reason of taking the deposition,²³ and the reasons which prevent the attendance of the witness will be presumed to continue.²⁴

In regard to the objections to questions the practice is varying. In some states the objection must be taken at the taking of the deposition; in others it is sufficient to take the objection when the deposition is read in evidence. In the absence of any other provision, it may be laid down that objections to the form of questions must be taken at the time of taking the deposition; objections to the substance may be taken at the trial.²⁵

²⁰ For forms and style of depositions, see *Gresley*, Eq. Ev. 77; 1 *Greenleaf*, Ev. § 320, n. 1.

²¹ *Dunn v. Dunn*, 11 Mich. 284; *Livermore v. Eddy*, 33 Mo. 547; *Livesey v. Bennett*, 14 Gray, Mass. 130; *Thayer v. Gallup*, 13 Wisc. 539; *Haupt v. Henninger*, 37 Penn. St. 138; *Hazlett v. Gambold*, 15 Ind. 303; *Hayward v. Barron*, 38 N. H. 366.

²² *Wheeler v. Smith*, 13 Iowa, 564; *McClintock v. Curd*, 32 Mo. 411.

²³ *Robbins v. Lincoln*, 12 Wisc. 1.

²⁴ *Nevan v. Roup*, 8 Iowa, 207.

²⁵ *Mumma v. McKee*, 10 Iowa, 107; *Tarleton v. Bringier*, 15 La. Ann. 419; *Alverson v. Bell*, 13 Iowa, 308; *Page v. Parker*, 40 N. H. 47; *Gould v. Hawkes*, 1 All. Mass. 170; *Dutro v. Walter*, 31 Mo. 516; *Horseman v. Todhunter*, 12 Iowa, 230.

3151. The testimony of witnesses may also be secured in anticipation of a controversy before any action is commenced; this proceeding is generally authorized by the state laws, and these depositions of witnesses *in perpetuam rei memoriam* are taken whenever a person who cannot bring a suit anticipates that an action may be brought against him and that there is danger he may lose the testimony of his witnesses; he thus perpetuates their testimony. Proceedings in these cases must be had before the courts or magistrates who are authorized by the local statute to act therein. Notice of the proceedings must be given to all persons known to have an interest in the matter to which the testimony is to relate; the names of the persons thus notified must be mentioned by the officer in the certificate or caption appended to the deposition, and the deposition must be filed among the records of the court *in perpetuam rei memoriam*. The effect of a deposition of this kind is that its contents will be received in evidence if the witness cannot be had on the trial, but it will affect only the parties who had an opportunity to cross-examine and those in privity with them.

3152. By the judiciary act of the United States and its supplements,²⁶ depositions may be taken. Its provisions are as follows: When the testimony of any person shall be necessary in any civil cause depending in any district in any court of the United States,²⁷ who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid before the time of trial, or is ancient, or very infirm, the deposition of such person may be taken, *de bene esse*, before any justice or judge of any of the courts of the United States, or commissioner appointed by the circuit courts,²⁸ or clerk of the circuit or district court,²⁹ or notary public,³⁰ or before any chancellor, justice, or judge of a supreme or superior court, mayor, or chief magistrate of a city, or judge of a county court or court of common pleas of any of the United States, not being of counsel or attorney to either of the parties, or interested in the event of the cause; provided that a notification from the magistrate before whom the deposition is to be taken to the adverse party to be present at the taking of the same, and to put interrogatories, if he think fit, be first made out and served on the adverse party or his attorney, as either may be nearest, if either is within one hundred miles of the place of such caption, allowing time for their attendance after being notified, not less than at the rate of one day, Sundays exclusive, for every twenty miles travel. And in causes of admiralty and maritime jurisdiction, or other causes of seizure, when a libel shall be filed in which an adverse party is not named, and depositions of persons, circumstanced as aforesaid, shall be taken before a claim be put in, the like notification as aforesaid shall be given to the person having the agency or possession of the property libelled at the time of the capture or seizure of the same, if known to the libellant. And every person deposing as aforesaid shall be carefully examined and cautioned, and sworn or affirmed to testify the whole truth, and shall subscribe the testimony by him or her given after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition or by the deponent in his presence. And the deposition so taken shall be retained by such magistrate until he deliver the same with his own hand into the court for which they are taken, or shall, together with a certificate of the reasons as aforesaid of their being taken, and of the notice, if any given, to the adverse party, be by him,

²⁶ Act of Congr. September 24, 1789, s. 30; 1 Stat. 88.

²⁷ This does not apply to the Supreme Court. *The Argo*, 2 Wheat. 287.

²⁸ Act of March 1, 1817; 3 Stat. 350.

²⁹ Act of February 26, 1853; 10 Stat. 163.

³⁰ Act of July 29, 1854; 10 Stat. 315.

the said magistrate, sealed up and directed to such court, and remain under his seal until opened in court. And any person may be compelled to appear and depose as aforesaid in the same manner as to appear and testify in court. And in the trial of any cause of admiralty or maritime jurisdiction in a district court, the decree in which may be appealed from, if either party shall suggest to and satisfy the court that probably it will not be in his power to produce the witnesses there testifying before the circuit court, should an appeal be had, and shall move that their testimony shall be taken down in writing, it shall be so done by the clerk of the court. And if an appeal be had, such testimony may be used on the trial of the same, if it shall appear to the satisfaction of the court which shall try the appeal that the witnesses are then dead, or gone out of the United States, or to a greater distance than as aforesaid from the place where the court is sitting; or that, by reason of age, sickness, bodily infirmity, or imprisonment, they are unable to travel or appear at court, but not otherwise. And unless the same shall be made to appear on the trial of any cause with respect to witnesses whose depositions may have been taken therein, such depositions shall not be admitted or used in the cause. *Provided*, That nothing herein shall be construed to prevent any court of the United States from granting a *dedimus potestatem* to take depositions according to common usage when it may be necessary to prevent a failure or delay of justice, which power they shall severally possess; nor to extend to depositions taken *in perpetuam rei memoriam*, which, if they relate to matters that may be cognizable in any court of the United States, a circuit court, on application thereto made as a court of equity, may, according to the usages in chancery, direct to be taken.

And by another statute³¹ authority is given to the clerk of any court of the United States, within whose jurisdiction a witness resides or where he is found, to issue a subpoena to compel the attendance of such witness, and a neglect of the witness to attend may be punished by the court whose clerk has issued the subpoena as for a contempt. And when papers are wanted by the parties litigant, the judge of the court within whose jurisdiction they are may issue a subpoena duces tecum, and enforce obedience by punishment as for a contempt.³²

When the depositions have been thus taken, they may be used at the trial by either party, whether the witness was or was not cross-examined,³³ when it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or is more than one hundred miles from the place of trial, or that by reason of age, sickness, or bodily infirmity, or imprisonment, he is unable to appear in court to give his testimony.

3153. Having considered the means used to obtain the attendance of witnesses, let us next consider the character which they ought to bear to entitle them to credit and the nature of the testimony they give.

In default of written evidence, men must have recourse to *viva voce* or parol testimony, which is the statement of living witnesses as to the facts in dispute. In general, this kind of evidence is sufficient to establish all the facts necessary to support an issue, unless in those cases where the law has wisely provided that such testimony should be in writing. These last cases are provided for in the statutes for the prevention of frauds and perjuries.

It is true there is no necessary connection between the truth of the facts to which a witness bears testimony and the testimony itself. Who can affirm that a thing is true because it has been testified to be so by a witness? The witness may have been mistaken, or he may desire to deceive. The testimony

³¹ Act of Congr. January 24, 1827; 4 Stat. 197.

³² For the form and style of depositions, see Gresley, Eq. Ev. 77.

³³ *Dwight v. Linton*, 3 Rob. La. 57.

of men, then, may deceive us, and sometimes it does so. We are, nevertheless, obliged to have recourse to it, because we can know those things which pass not within us only from our senses, by the testimony of men, or by analogy, that is, by the induction which we make from a known fact, that another which is unknown is true.

When we are called upon to rely on the testimony of another in order to form a judgment as to certain facts, our belief is founded on a double presumption. We presume on the good sense and intelligence of the witnesses that they have not been mistaken nor deceived; we presume on their probity that they do not want to deceive us.

In order to confide in the testimony of men and to give credit to what they say, we must therefore ascertain :

That the witness has not been mistaken, and that he has not been deceived.

That he does not wish to deceive.

To be assured of this as much as possible, it is requisite to consider three things in relation to parol evidence: the quality of the facts to be proved, the quality and persons of the witnesses, and the testimony of itself as compared with other known facts.

3154. *The facts to be proved* are either possible or impossible, ordinary and probable, or extraordinary and improbable, recent or ancient; they may have passed or happened afar off or near us; they may be particular or public, permanent or transitory, clear and simple, or complicated; finally, they are almost always accompanied by circumstances which influence us more or less as to the judgment we are to adopt respecting them. All these things must be carefully examined in order to form a judgment of the merits of the testimony, or of the degree of confidence to which it is entitled.

If the fact is impossible, the witness who would attest it is not worthy of credit. Reason, and all the authors who have treated of the matter, teach us that the possibility of the fact attested is the first, the most indispensable circumstance to induce us to have confidence in it. If, for example, a witness should swear he saw a man shoot himself by discharging in his head the contents of a pistol which he held in his hand, and that he thus killed himself, and upon an examination it should be found that the ball was so large that it could not enter into the barrel of the pistol, it is evident, in such case, that however respectable the witness might be, however intelligent, and however positive, still he ought not to be believed;³⁴ or, if one should swear and testify that another has been guilty of the impossible crime of witchcraft.

When the facts are not of themselves impossible, there may still be an impossibility created by time and circumstances; at least they may show such an impossibility that it would be absurd to give any confidence to a witness who would testify as to them.

It is not necessary that facts should be impossible to destroy all confidence in the testimony of the witnesses; their improbability may be such as to render their belief impossible; but the degrees of probability are so difficult to ascertain, their shades so hard to find out, they vary in so many ways, and this difference is derived from so many causes, that it is impossible to give rules on this important point; even examples might give but an uncertain, a feeble, or perhaps a deceitful light.

3155. The time and the place where the facts have happened may have much influence on the faith which ought to be given to the testimony of the witnesses. When the facts are recent, if they have happened where the witnesses are examined or in its neighborhood, the testimony of the witnesses deserves more

³⁴ 1 Starkie, Ev. 505.

confidence; because they would feel a greater indisposition to disguise the truth when they knew they could be contradicted by ocular witnesses, than they would be if they could not be so contradicted. This salutary influence diminishes in proportion to the length of time since the happening of the facts, and in the proportion of the distances when they took place. Besides, the memory of men is the less to be relied upon when the facts are of an ancient date. How then can we confide in it when, in an addition to this frailty or want of memory, the witness has an interest in disguising the truth?

3156. Whatever may be the facts in other respects, they are transitory or permanent. *Permanent facts* are those which continue to exist, and of which we may be assured at any time; as, where a man describes that a contract was made or a murder committed in a particular room of a house, and that one of the contracting parties or the murderer entered by one of two doors on the south side of the room; here the fact that there are two southern doors is a permanent fact; whether the party entered by that door is a transitory fact. The facility with which the truth may be ascertained as to their testimony makes the witnesses more cautious and circumspect, and induces others to place more reliance on what they say.

Transitory facts, on the contrary, which have existed but one instant, are to be credited with more caution, because, not being capable of being tested by themselves, we must exclusively rely upon the report of others; the shorter their duration the more liable has the witness been to be mistaken and the more readily may he have been deceived.

3157. Facts happen either in public or in private. When facts happen publicly and can be testified to by many persons, the witness is more circumspect in giving his testimony, with all the circumstances attending it, because his testimony might be criticised by his neighbors. There must be strong motives indeed to induce a man in such a situation to betray the truth. On the contrary, when the facts are represented as having happened in secret, or only before the witness, he is freed from all human restraint; he may with impunity alter, disguise, or conceal the truth without fear of contradiction.

3158. Let us next examine the precautions required to assure us, as far as possible, that the witness has neither been mistaken nor desirous to deceive us; that he knows the truth and does not wish to disguise it.

The most important consideration is doubtless to be certain he knows the facts; but the facts are not capable of demonstration, and are known only through the senses. It is then impossible to know a fact without having been present when it happened and having seen it, for a man may be present without seeing what has happened; and, in order to testify to it properly, he must have given attention to the circumstances and fixed them in his memory. This is what is presumed of a witness who has been present at a transaction; for when he has merely heard of it from another, his testimony is mere hearsay, which we have seen is deserving of no weight except in special cases.

No one will deny that the sense of hearing is infinitely more deceptive than that of sight; for, although there are facts which are more properly observed and known by hearing, as in cases of slander, seditious cries, and the like, yet it is very easy for the most honest witness, who is guided by the sense of hearing alone, to be mistaken in his judgment as to the author of such slander.

The experience of ages proves how little confidence ought to be placed in testimony of a fact the knowledge of which is acquired alone by hearing.

It is certain that when a witness has acquired his knowledge of facts by more senses than one, he is entitled to more confidence than if he had acquired them by hearing alone. If, therefore, the witness has only heard the voice of the slanderer without seeing him, he may easily be mistaken. The voice of a man,

his accent, are liable to many alterations and variations, according to the passions which agitate him; according to his health, whether it is good or bad; according to the circumstance of the fact that he was at a greater or less distance from the scene of action, and according to the nature of the obstacles which prevent us from seeing him whose voice we think we hear, it is very easy to be mistaken. But the testimony of such witness acquires much force by other circumstances; if, for example, after hearing the voice of one whom he takes to be Peter, he repairs to the place whence the sounds issued and he there sees Peter, it is clear his testimony deserves much greater consideration.

Hearsay, we have seen, is not, in general, deserving of credit or confidence; this seems to be the received opinion of civilians, canonists, and common lawyers, who in this respect perfectly agree with reason. The civilians divide witnesses into two classes. First, those who depose of their own knowledge, *ex scientiâ*, who have acquired the knowledge of a fact by their own senses, by sight or hearing; this is the kind of testimony which the law requires. The second class of witnesses consists of those who depose upon the faith of others, *testes de credulitate*, who depose as to their belief because they have heard the fact reported by others. They are generally unworthy of credit.

A witness is called to testify what he knows, not what he believes.³⁵ To know and to believe are very different things; belief is founded upon probable conjectures, knowledge is based upon that certainty which we acquire by our senses or by reason. He who has neither seen nor heard the facts can only believe them; he cannot know them.

One of the surest means to induce a belief that the witness has a sufficient knowledge of the facts is a detail of the circumstances, for little or no reliance can be placed on the bare assertion that such a fact is so. This dryness in his deposition naturally induces a belief that he has not given a sufficient attention to the facts, or that he wants memory, or that he desires to conceal some important circumstances. A full detail of circumstances generally proves that the testimony is true when they naturally agree with it, or that it is false when they are not in unison with it.

The manner in which a witness deposes inspires confidence or distrust; if his testimony is not conceived in affirmative terms, as where he says, It may be, it seems to me, if I remember, if I am not mistaken, and the like, he will not be credited as if he were firmly, and without any real or apparent prejudice, to state distinctly that the facts are in a particular way.³⁶ These dubitative formulæ, and all similar manner of speaking, which exclude certainty, weaken, and may even destroy, the confidence which might otherwise be bestowed on the testimony of the witness who uses them. Such testimony is not the less discredited because the witness says he believes the statement which he makes. In general, it is not what he believes, but what he knows of his certain knowledge, which is asked of the witness.

He not only ought to know the facts about which he deposes, but he ought also to give the reason of his knowledge: *Debet reddere rationem scientiæ suæ*; otherwise no reliance can be placed on his testimony. It is not sufficient that the witness gives a reason for what he says; that reason ought to have the appearance of truth. He must tell what he has seen, and not the consequences which he draws from them.

But it is not sufficient to be assured as much as possible of the knowledge of

³⁵ In some cases, a witness may give an opinion, or state his belief. See beyond, 3212.

³⁶ If the witness manifests any bias, his testimony will be suspected, though perhaps it may not be entirely rejected. *Newton v. Pope*, 1 Cow. N. Y. 109; *Cook v. Miller*, 6 Watts, Penn. 507.

the witness, that he knows the facts and that he has not been mistaken; we must also be certain of his veracity, that is, that he does not wish to deceive or betray the truth, nor conceal or disguise it. It is in this particularly that uncertainty consists in parol evidence; and on this point, though in general they answer a good purpose, the precautions which reason points out, and the rules which the law has adopted, have still been found in many cases insufficient, and not very certain in their practical operation; so that in fact the most positive testimony is nothing but a probability.

Too much care cannot be taken to ensure the veracity of the witnesses; hence the law requires that they shall testify under oath or affirmation to tell the truth, the whole truth, and nothing but the truth. For although the law requires of a witness who comes to testify in a court of justice that he shall tell the truth, and although his tacit promise to do so be as obligatory upon him as if he made an express promise, yet his oath is not the less required. It considers it proper to recall to men their duties when they are called upon to perform them, and requires a person to promise to tell the truth at the moment he is about to be examined as a witness.

It seldom happens that men wish to deceive without some motive or some moral defect; we, therefore, may well believe from analogy that the witness will tell the truth, unless he is seduced from his duty by some sinister motive, or the want of some moral ability. To obviate this, the law has wisely excluded from examination all persons who are incompetent, though they may be credible. A distinction is made between competency and credibility. By the former is meant the legal ability of a witness to be heard as such in the trial of a cause; by the latter is understood the state of one who is worthy of belief.

3159. *Incompetent witnesses* are persons who want understanding, have an interest in the matter in dispute, cannot be admitted without violating the policy of the law, have no religious belief, or have become infamous.

3160. As the delivery of testimony is an act of the mind, it is clear that *persons who want understanding* cannot be examined as witnesses; a witness is to depose to facts he knows, and if he has no understanding he cannot know them. There are two classes of persons who want understanding.

3161. *Infants.* A child is presumed incapable of being examined as a witness until he has attained his fourteenth year, and he cannot be examined as a witness until his capacity is shown, which may be by an examination in court.³⁷ Doubtless many children under that age are capable of testifying in such a manner that reliance may be placed on their testimony, but still it will be received with caution. When the witness is over fourteen, he may be sworn without a previous examination.³⁸

3162. *Idiots and lunatics.* It will be remembered that we defined idiocy to be a condition of mind in which the reflective powers are either entirely wanting, or are manifested to the least possible extent. This state, it is evident, excludes the idea that an idiot understands what he has seen, or that he can convey such knowledge to others. He is *non compos mentis*, which is the generic name for all persons of unsound mind; it includes all species of madness, whether such madness arises from sickness, idiocy, lunacy, or drunkenness. All persons *non compos mentis* are therefore incompetent as witnesses. And a

³⁷ The admission of the testimony of children under fourteen years is a matter of frequent occurrence; it has been admitted even at the age of five years. The point to be ascertained is whether the infant is conscious of the binding obligation of an oath, and this is done by an examination in the discretion of the court. *Commonwealth v. Hutchinson*, 10 Mass. 225; *Van Pelt v. Van Pelt*, 2 Penn. 657; *State v. Leblanc*, Const. So. C. 354.

³⁸ *Den v. Vanclève*, 2 South. N. J. 589, 652.

person intoxicated is incapable of telling a straight story on which reliance can be placed, notwithstanding the maxim *in vino veritas*.³⁹

3163. It seldom happens that a man desires to deceive when he is examined as a witness; we may, then, reason from analogy that a witness called to testify to facts in a court of justice will tell the truth unless he has an interest to betray it. But the same analogy which induces us to give a man credit for truth when he has no interest is a reason to believe he will not adhere to it when his interest is against it. This judgment, founded on a simple analogy, has nothing in it on which we can rely as certain. Because a man who has an interest has falsified the truth, it is no reason that another should do the same thing. But in a doubtful case we must look at probabilities and presumptions; when the witness is in a condition which renders him suspected, we can have no reliance in him. When known motives raise reasonable suspicions against him, he is excluded.⁴⁰

The interest which excludes a person from being a witness may be considered with regard to the thing or subject in dispute, the quantity of the interest, the quality of the interest, when the interest must exist, and how an interested witness may be rendered competent.

3164. The bias or interest which excludes a person from being examined as a witness must relate to the *thing* or subject in dispute. To be disqualified on this ground the witness must gain or lose by the event of the cause, or the verdict must be lawful evidence for or against him in another suit, or the record must be an instrument of evidence for or against him;⁴¹ but an interest in the question does not disqualify the witness.⁴²

3165. *The magnitude of the interest* is altogether immaterial; even a liability for the most trifling costs will create a sufficient disqualification.⁴³

3166. With regard to its *quality*, the interest must be legal, as contradistinguished from mere prejudice or bias arising from relationship, friendship, or any of the numerous motives by which a witness may be supposed to be influenced.⁴⁴ It must also be a present, certain, vested interest, and not uncertain and contingent.⁴⁵ Whether a person who believes himself interested when he is not, is a competent witness, is a doubtful question.⁴⁶

³⁹ See Ray, Med. Jur. c. 22, §§ 300-311.

⁴⁰ The tendency of the legislation in this country is to admit the testimony of all persons, interested or not, and many of the states allow the parties to the suit and all parties interested to testify, leaving their evidence to be weighed by the jury. In some states the accused in a criminal proceeding is allowed to testify if he wishes. The rules stated in the text are to be limited to those where no change has been made by statute.

⁴¹ *Evans v. Eaton*, 7 Wheat. 356; *Evans v. Hettick*, 7 Wheat. 453; *Ness v. Van Swearingen*, 7 Serg. & R. Penn. 192; *Shirk v. Vanneman*, 3 Yeates, Penn. 196; *Gould v. James*, 6 Cow. N. Y. 369; *Henarie v. Maxwell*, 5 Halst. N. J. 297; *McGee v. Eastis*, 9 Ala. 426; *Wadham v. Turnpike Co.*, 10 Conn. 416; *Page v. Weeks*, 13 Mass. 199.

⁴² *Lewis v. Manley*, 2 Yeates, Penn. 200; *Ely v. Forward*, 7 Mass. 25; *Bass v. Peevey*, 22 Tex. 295. As for instance where the witness would be relieved from a liability to the plaintiff, if he should obtain judgment, and the judgment should be satisfied. *Lockwood v. Canfield*, 20 Cal. 126. So where an agent is sued for not paying over to his principal, a debtor is competent to testify that he paid the agent, for he is in no way bound by the judgment. *Edwards v. McKinnon*, 25 Ga. 337.

⁴³ *Beach v. Swift*, 2 Conn. 269; *Scott v. McLellan*, 2 Me. 199; *Lowrey v. Summers*, 7 Halst. N. J. 240; *Bennett v. Dowling*, 22 Tex. 660.

⁴⁴ *Leach*, 154; 2 Hawk. c. 46, s. 25.

⁴⁵ *Ely v. Forward*, 7 Mass. 25; *Bean v. Bean*, 12 Mass. 20; *Lewis v. Manley*, 2 Yeates, Penn. 200. A mere expectation is not a sufficient interest to disqualify. *Coghill v. Borning*, 15 Cal. 213. But see *Gilkinson v. Scotland*, 14 La. Ann. 417.

⁴⁶ The following cases are against the competency of the witness, namely: *Plumb v. Whiting*, 4 Mass. 518; *Moore v. Hitchcock*, 4 Wend. N. Y. 292; *Sentney v. Overton*, 4 Bibb. Ky. 445; *McVeagh v. Goods*, 4 Dall. 62. The cases in favor of competency are *Long v. Bailie*, 4 Serg. & R. Penn. 222; *Hanis v. Barkley*, 4 Harp. So. C. 62; *State v.*

3167. To disqualify a witness the interest must *exist* at the time of the examination. The general rule seems to be that where a person is entitled to the testimony of another, the latter shall not be rendered incompetent to testify where he has acquired such interest by the fraudulent act of the adverse party for the purpose of preventing his testimony or by any act of wantonness; but this would not prevent a witness in the regular course of trade from buying a claim or otherwise dealing without fraud, and if then he became interested, he could not be examined while he remained so.⁴⁷ If the witness had been examined, and his deposition was taken before he acquired the interest, his subsequent acquisition of it would not prevent the reading of his deposition in chancery or on a trial at law of an issue out of chancery.⁴⁸ It does not appear whether the rule applies with equal force with regard to reading, in trials at law, depositions of witnesses who afterward become interested.⁴⁹

3168. The *incompetency* arising from interest may be *removed* in various ways: first, by payment, for then the witness has no further interest;⁵⁰ second, the objection to incompetency may be removed by an extinguishment of that interest by a release, executed either by the witness when he would receive an advantage by his testimony, or by those who have a claim upon him, when his testimony would release him from his liability: and in this case he cannot refuse the release; third, although the witness may have an interest, if his interest is equally strong on the other side, he will be competent, for his interest is then said to be balanced. The witness is then reduced to a state of neutrality by an equipoise of interest, and the objection to his testimony ceases.⁵¹

3169. In some instances the law admits the testimony of one interested from the extreme necessity of the case; but these are *exceptions to the general rule* that interest renders a man incompetent. These exceptions are:

When a witness in a criminal case is entitled to a reward upon conviction of the offender. Although the witness may be entitled to a reward from the government upon conviction of the offender; or to a restoration of the property stolen, as its owner; or to a portion of a fine, or penalty inflicted, still he is competent. This is allowed upon the ground of public policy and to promote the public interest. The very statute which confers this benefit on the witness, who but for that statute would have been a witness, virtually continues his competency.⁵² When the reward is offered by a private person, the witness is still competent on the ground that the public have an interest in his testimony, which cannot be taken away by the act of a private individual.⁵³

When the witness would fall within the provisions of the rule, and would be excluded on the ground of interest, but he is made competent by statute. This frequently happens in relation to cases of petty convictions, when the

Clark, 2 Tyl. Vt. 278; Fernsler v. Carlin, 3 Serg. & R. Penn. 130; Cassiday v. McKensie, 4 Watts & S. Penn. 282; McCabe v. Hand, 18 Cal. 496.

⁴⁷ Forrester v. Pigou, 3 Campb. 381; 1 Greenleaf, Ev. §§ 167, 168; Long v. Baillie, 4 Serg. & R. Penn. 222.

⁴⁸ Gresley, Ev. 267. See Grosse v. Tracy, 2 Vern. Ch. 698; Glyn v. Bank of England, 2 Ves. Ch. 42; Union Bank v. Knapp, 3 Pick. Mass. 108; 1 Smith, Ch. Pract. 344; Andrews v. Palmer, 1 Ves. & B. Ch. 21.

⁴⁹ Chess v. Chess, 17 Serg. & R. Penn. 412. See Wolfinger v. Fortman, 6 Penn. St. 294; Irwin v. Reed, 4 Yeates, Penn. 512.

⁵⁰ Starkie, Ev. part 4, p. 757.

⁵¹ Cameron v. Paul, 6 Penn. St. 322; Ludlow v. The Union Insurance Company, 2 Serg. & R. Penn. 119; Muchmore v. Jeffers, 25 Ill. 199; Kingsbury v. Buchanan, 11 Iowa, 387; Talbot v. Talbot, 23 N. Y. 17.

⁵² Gilbert, Ev. 114; 1 Gilbert, Ev. Lloft, ed. 245; Rex v. Williams, 9 Barnew. & C. 549; 1 Phillipps, Ev. 92; United States v. Wilson, Baldw. C. C. 78.

⁵³ Rex v. Williams, 9 Barnew. & C. 549.

informer is a competent witness by the provisions of the act inflicting the penalty.

Agents, carriers, factors, brokers, and other servants, when offered as witnesses, are competent, notwithstanding their interest, to prove the making of contracts, the receipt or payment of money, the receipt or delivery of goods, and other acts within the scope of their employment;⁵⁴ and an agent can even prove his own authority if it be by parol.⁵⁵ But this privilege is confined to cases in the usual and ordinary course of business.

A witness may be competent although interested, if his interest has been subsequently acquired by the fraudulent act of the opposite party.

3170. It is against *the policy of the law* that persons holding certain relations with others should be examined as witnesses. These are husband and wife, parties to suits, attorneys, confessors, medical persons, jurors, slaves, and parties to negotiable instruments.

3171. Husband and wife. A party on the record is not a competent witness at common law; so neither is the husband or wife of the party competent to give evidence for or against the husband or wife.⁵⁶ This rule is confined to this relation, no other is excluded; a father and son, brothers and sisters, and the like, may be witnesses for each other, when not otherwise disqualified. The reason for excluding husband and wife from the witness box, and depriving them of the right to give evidence for or against each other, is founded partly on their identity of interest, and partly on a principle of public policy which deems it necessary to guard the security and confidence of private life, even at the risk of an occasional failure of justice. They cannot be witnesses for each other, because their interests are absolutely the same; they are not witnesses against each other, because it is against the policy of marriage.⁵⁷ This is the rule when either is a party in a civil suit or action; but there is a distinction between these cases and cases where neither is a party.

Where one of them, not being a party to the action, still is interested in its results, there is a distinction between giving evidence for or against each other. It is an invariable rule that neither is a witness for the other who is interested favorably in the result; and where the husband is disqualified by his interest, the wife is also incompetent. On the other hand, where the interest of the husband, consisting in a civil liability, would not have protected him from examination, it seems that the wife must also answer, although the effect may be to subject her husband to an action. This case differs materially from those where the husband himself could not have been examined, either because he was a party or because he would criminate himself.⁵⁸ The party to whom the testimony of the wife is essential has a legal interest in her evidence; and as he

⁵⁴ *Barker v. Macrae*, 3 Campb. 144; *Scott v. Wells*, 6 Watts & S. Penn. 357; *Shepher v. Palmer*, 6 Conn. 95; *Hunter v. Leathley*, 10 Barnew. & C. 858; *Mutual Ins. Co. v. Deale*, 18 Md. 26; *Mills v. Beard*, 19 Cal. 158; *Struthers v. Kendall*, 41 Penn. St. 214; *Garland v. Scott*, 15 La. Ann. 143.

⁵⁵ *Lowber v. Shaw*, 5 Mas. C. C. 242; *McGunnagle v. Thornton*, 10 Serg. & R. Penn. 251.

⁵⁶ Coke, Litt. 6, b.

⁵⁷ Coke, Litt. 6, b; *Stein v. Bowman*, 13 Pet. 223; *Davis v. Dinwoody*, 4 Term, 678; *Snyder v. Snyder*, 6 Binn. Penn. 488; *Corse v. Patterson*, 6 Harr. & J. Md. 153; *Dwelly v. Dwelly*, 46 Me. 377. If the husband is a party jointly with others, the wife is not competent to testify for the other parties. *Tomlinson v. Lynch*, 32 Mo. 160; *Perrin v. Johnson*, 16 Ind. 72.

⁵⁸ 1 Greenleaf, Ev. § 341. And conversely the testimony of the wife has been admitted, where she acted as the husband's agent and kept his books, to prove the entry, the husband adding his suppletory oath as to the truth of the charges. *Littlefield v. Rice*, 10 Metc. Mass. 287. Such evidence is admissible in Vermont by statute. Sess. Laws Vt. 1858, 23. *Eastabrooks v. Prentiss*, 34 Vt. 457. In the same way, in regard to lost baggage, the wife is competent to testify as to the contents. *Illinois R. R. v. Taylor*, 24 Ill. 323.

might insist on examining the husband, it would, it seems, be straining the rule too far to deprive him of the benefit of the wife's testimony. In an action for goods sold and delivered, it has been held that a third person could prove that the credit was given not to the defendant, but to the husband of the witness.⁵⁹

When neither of them is a party to the suit, nor interested in the general result, the husband or wife is, it seems, competent to prove any fact; for in collateral proceedings, when their interests are not immediately affected, they may testify, notwithstanding their evidence may tend to criminate or contradict the other, or may subject the other to a legal claim. The reason of this admission of evidence in such cases is that the verdict in the action in which such witness testifies cannot be used in an action against the other spouse; nor can such collateral proceedings, in a criminal case, affect the husband, although the testimony of the wife may criminate him, because such proceedings are *res inter alios acta*.⁶⁰

3172. The rule that the husband and wife shall not be compelled to testify against each other relates only to lawful marriages, or at least to such as are innocent in the eye of the law. A kept mistress is certainly not privileged, and she is a competent witness against the man by whom she is kept.⁶¹ But cohabitation, and acknowledgment by each other as husband and wife, are, in general, conclusive between the parties in all cases where the fact or incident of marriage, such as legitimacy or inheritance, are directly in controversy.⁶²

As to the time when the relation of husband and wife commenced, it makes no difference; the principle of exclusion operate whenever the interest of either of them is directly concerned, and where a party married the witness of the other party, after she had been summoned to testify in court, she could not be examined.⁶³

3173. When the relation has ceased to exist, the surviving husband or wife cannot be examined; when the representatives of the deceased spouse are parties to the suit, the survivor cannot be examined as a witness. The rule was established to secure domestic happiness, by sealing the mouths of the spouses in relation to confidential communications between them.⁶⁴ But, as in the case of communications made to an attorney, when the wife derives the information from other sources, she is no longer protected, notwithstanding they relate to transactions with her husband.⁶⁵

Where a married woman was injured by a defect in a highway, and her husband died before suit brought, she was held to be a competent witness.⁶⁶

3174. The rule that the husband and wife shall not be examined for or against each other extends to criminal as well as to civil cases. But it is subject to various exceptions.

When her testimony is requisite to secure her from injuries from her husband; as, when she would otherwise be exposed to personal injuries, without any remedy; indeed, whenever an injury is committed by husband or wife against

⁵⁹ *Williams v. Johnson*, 1 Strange, 504; Buller, Nisi P. 287.

⁶⁰ *Rex v. Bathwick*, 2 Barnew. & Ad. 639; *Rex v. All Saints*, 6 Maule & S. 194; *Henman v. Dickenson*, 5 Bingham, 183.

⁶¹ *Batthews v. Galindo*, 4 Bingham, 410.

⁶² *Campbell v. Twemlow*, 1 Price, Exch. 81.

⁶³ *Pedley v. Wellesley*, 3 Carr. & P. 558.

⁶⁴ *Stein v. Bowman*, 13 Pet. 223; *Monroe v. Twistleton*, Peake, Ev. App. lxxxvii.; *Aveson v. Kinnaird*, 6 East, 192. In Iowa the evidence of the wife is excluded only in regard to communications made to each other during the continuance of the marriage relation. Iowa, Rev. Laws, 1860, sec. 3984; *Romans v. Hay*, 12 Iowa, 270.

⁶⁵ *Welles v. Tucker*, 3 Binn. Penn. 366; *Coffin v. Jones*, 13 Pick. Mass. 445; *Williams v. Baldwin*, 7 Vt. 506; *Walker v. Sanborn*, 46 Me. 470.

⁶⁶ *Winship v. Enfield*, 42 N. H. 197.

the other, the injured party is admissible as a witness,⁶⁷ on the ground of necessity.

On the same ground of necessity a wife is admitted as a witness to testify to secret facts which none but herself could know; as, in the case of an appeal against an order of filiation, in the case of a married woman, she was held competent to prove her criminal connection with the defendant, though the husband was interested in the event,⁶⁸ but she cannot prove the non-access of her husband.⁶⁹

In cases of high treason the question does not appear to be well settled whether a wife is compellable or is competent to testify against her husband.⁷⁰

The dying declarations of either are admissible when the party is charged with the murder of the deceased.⁷¹

3175. Party to a suit. A party to a suit cannot in general be examined as a witness. This rule has been established by reason and common sense before it was sanctioned by the courts: *nullus idoneus testis in re sua*.⁷² It is subject to the following exceptions:

By the common law there are few instances in which the party's oath *in litem* will be admitted. This is allowed in those cases where the courts administer justice according to the course of the Roman law. The oath *in litem* is admitted in two classes of cases: first, when it has been proved that the party against whom it is offered has been guilty of some fraud, or of some other tortious act of intermeddling with the complainant's goods, and no other evidence can be had of the amount of the damages;⁷³ and, secondly, when, on grounds of public policy, it is essential to the purposes of justice. Example, under the first head, is the case of a bailiff who, in the service of an execution, discovered a sum of money hidden in a wall, took it away and embezzled it, and greatly injured the goods of the defendant; in an action brought against him by the person injured, the plaintiff was allowed to swear as to the damages he had sustained.⁷⁴ So, where a shipmaster received a trunk of goods on board of his vessel, and fraudulently broke it open and rifled it of its contents, on proof being made, *aliunde*, of the delivery of the trunk the plaintiff was allowed to

⁶⁷ 1 East, P. C. 455; 2 Hawkins, P. C. ch. 46, § 77; 2 Lew. Cr. Cas. 287; 2 Yeates, Penn. 114; Commonwealth v. Murphy, 4 All. Mass. 491.

⁶⁸ Commonwealth v. Shepherd, 6 Binn. Penn. 283; Rex v. Reading, Cas. temp. Hardw. 79; Rex v. Luffe, 8 East, 193.

⁶⁹ Cope v. Cope, 1 Mood. & R. 260; Goodright v. Moss, Cowp. 594; Bouvier, Law Dict. Access; Chamberlain v. People, 23 N. Y. 85.

⁷⁰ 2 Russell, Crimes, 607; Buller, Nisi P. 286; 2 Starkie, Ev. 404; 1 Greenleaf, Ev. § 345.

⁷¹ Pennsylvania v. Stoops, Add. Penn. 381; People v. Green, 1 Den. N. Y. 614.

⁷² Dig. 22, 5, 9. Members of public municipal corporations, as towns, have in many cases been held to be substantially parties to suits by or against the corporations, and as such incompetent to testify. This incompetency is in general removed by statute. The stockholders of private corporations are not parties to the record, and are not incompetent on that ground, though they may be on the ground of interest.

⁷³ Tait, Ev. 280; 1 Greenleaf, Ev. § 348. According to the Roman law, this oath was deferred by the judge to the plaintiff, in relation to the value of the thing which was the subject of the suit, whenever the defendant, contrary to the order of the judge, or by fraud, did not restore the thing sued for on the demand of the plaintiff, or fraudulently prevented its restoration. Thus it was a contravention of the order of the judge and the fraud of the party which gave rise to this oath. Dig. lib. 12, t. 3, l. 3 et 5, § 4; Code lib. 5, t. 53. This oath was principally used in *bona fide* actions, as in the case of loan, called *commodatum*, deposit, the action for the restitution of dowry, the action by a pupil for the restitution of the things belonging to the pupillage, in arbitrary actions, real and personal. Dig. lib. 6, t. 1, l. 68; and lib. 12, t. 3, l. 5. The plaintiff was allowed to estimate the thing in question, under his oath, at such price as he deemed right, subject, however, to some restrictions imposed upon him by the judge. Dig. 12, 3, 4. In case of theft, the oath of estimation was that the thing was worth a certain sum when stolen. Dig. 12, 3, 9.

⁷⁴ Childrens v. Saxby, 1 Vern. Ch. 207.

prove its contents;⁷⁵ and, in imitation of the Roman law, a bailor, though plaintiff, was admitted as competent to prove the contents of a trunk lost by the negligence of the bailee.⁷⁶ The grounds upon which this evidence is admitted are precisely the same as those of the Roman law, the fraud or wrong of the defendant and the necessity of the case.⁷⁷

When the facts, from their nature, are likely to be known only to the party. Before he is admitted to testify as to them, a foundation must, however, be first laid for the party's oath, by proving the other facts of the case down to the time to which the party is to speak; as, when a written instrument of evidence is lost, it must first be proved, aliundè, that such instrument existed, after which, if it was lost out of the custody of the party, his oath will be admitted to prove its loss and the circumstances attending it.⁷⁸ And in collateral matters which do not involve the matter in controversy, but which are auxiliary to the trial, and such matters as are addressed to the court on preliminary questions, as affidavits of the materiality of a witness, of diligent search being made for him or for a paper, of the death of a subscribing witness, and the like.

There is another class of cases in which, on ground of public necessity or expediency, the oath *in litem* is allowed; as, where a statute can receive no execution unless a party who is interested be admitted as a witness.⁷⁹

In equity the answer of the defendant to a bill filed by the complainant, so far as it is strictly responsive to the bill, is evidence in his favor as well as against him.

When the situation of one of the parties has changed since the commencement of the suit, as, where there were several persons in the same suit and some of the defendants have been discharged by *nolle prosequi*, or changed by default, or by verdict. In contracts, when one of several defendants has suffered judgment by default, he may be examined by the plaintiff against the others.⁸⁰ And if the defence in such case goes merely to the personal discharge of the party pleading it, and not to that of the others, the plaintiff may enter a *nolle prosequi* as to him, and then, being no longer a party on record, he may be examined as a witness, if otherwise competent; as, where one of the defendants pleads bankruptcy and a *nolle prosequi* is entered.⁸¹ When the action is founded on a tort, the liability of the defendants is joint; and as there is no contribution among wrong doers, witnesses are not to be excluded because the plaintiff has joined them with other defendants; and if the suit as to any of them is determined, he has no longer any interest in the event of the suit, and he is competent for the others when his testimony cannot directly make for himself. When a witness has been joined with the others as defendant for the purpose of excluding his testimony, the court will direct the jury to find a separate verdict in his favor where there is no evidence in the cause against him, for in that case he appears to have been joined through the fraud and artifice of the plaintiffs, and the acquittal in such case may take place in the course of the cause and before the other defendants have closed their defence.

3176. Attorneys. To enable parties to actions to consult legal advisers with

⁷⁵ *Herman v. Drinkwater*, 1 Me. 27.

⁷⁶ *Clark v. Spence*, 10 Watts, Penn. 335; *David v. Moore*, 2 Watts & S. Penn. 220. See *Sneider v. Geiss*, 1 Yeates, Penn. 34; *Bingham v. Rogers*, 6 Watts & S. Penn. 495; *East India Co. v. Evans*, 1 Vern. Ch. 308.

⁷⁷ See the reasoning of Rogers, J., in *Cook v. Spence*, 10 Watts, Penn. 336, 337.

⁷⁸ *Riggs v. Taylor*, 9 Wheat. 486; *Taylor v. Riggs*, 1 Pet. 591. Note 122 of Cowen and Hill's notes to 1 Phillipps, Ev. 69.

⁷⁹ *United States v. Murphey*, 16 Pet. 203.

⁸⁰ *Pipe v. Steel*, 2 Q. B. 733

⁸¹ 1 Saund. 207, a.

safety it is an established rule that the confidential counsellor, solicitor, or attorney of the party cannot be compelled to disclose communications made to him as such, nor give up papers delivered to him, nor letters sent to him, nor entries he has made in that capacity. In order that a communication may be protected it must have been made to some person who possessed the character of counsel, attorney, or solicitor, acting for the time being as the legal adviser of the party; and this privilege extends to all the necessary organs of communication between the attorney and the client, and for this reason an interpreter and an agent are considered as standing in the situation of the attorney himself.⁸² The purpose of the professional advice must be where the party seeks aid upon the subject of his rights or liabilities. There may have been no suit begun or contemplated, expected or apprehended.⁸³

The privilege of secrecy extends only to the parties and their necessary agents and assistants. It includes communications made to the attorney's clerk in the course of his employment as such,⁸⁴ but does not prevent disclosure by a third party who accidentally overhears the communication.⁸⁵ The person privileged must be actually an attorney,⁸⁶ and he must be consulted and employed as such.⁸⁷ The privilege does not depend on the fact that the communications are intended to be confidential, but on the fact that they are made on account of the professional relation.⁸⁸ Communications actually made to an attorney but having no connection with that relation are not privileged.⁸⁹

3177. Some cases have been mentioned as exceptions to the rule that a legal adviser cannot disclose what has been confidentially communicated to him, but if they are properly considered, they will be found not to come within the rule. The following are examples of those cases:

When the attorney is himself a party to the transaction, and especially if he were party to a fraud, for in that case he would not acquire his knowledge professionally.

When the communication was made before the attorney was employed as such or after his employment had ceased.⁹⁰

Where, though consulted as a friend because he was an attorney, yet he refused to act as such, and was therefore consulted only as a friend.⁹¹

Where the matter communicated was not in its nature private and could not be considered as a confidential disclosure; as, where the defendant gave instruction to his attorney what to plead.⁹²

When the thing had no reference to the professional employment, though disclosed while the relation of attorney and client subsisted.⁹³

When the attorney becomes an attesting witness, and thereby assumes another

⁸² *Andrews v. Solomon*, 1 Pet. C. C. 356; *Jackson v. French*, 3 Wend. N. Y. 337; *Parker v. Carter*, 4 Munf. Va. 273; *Parkins v. Hawkshaw*, 2 Stark. 239. See a well written article in 17 Am. Jur. 304, where the author combats with much force this received doctrine of the law.

⁸³ *Greenough v. Gaskell*, 1 Mylne & K. Ch. 102.

⁸⁴ *Sibley v. Waffle*, 16 N. Y. 180; *Landsberger v. Gorham*, 5 Cal. 450.

⁸⁵ *Hoy v. Morris*, 13 Gray, Mass. 519; *Goddard v. Gardner*, 28 Conn. 172.

⁸⁶ *Sample v. Frost*, 10 Iowa, 266.

⁸⁷ *Smith v. Fell*, 2 Curt. C. C. 667; *Allen v. Harrison*, 30 Vt. 219; *Sargent v. Hampden*, 38 Me. 581.

⁸⁸ *Barnes v. Harris*, 7 Cush. Mass. 576.

⁸⁹ *Daniel v. Daniel*, 39 Penn. St. 191.

⁹⁰ *Cuts v. Pickering*, 1 Vent. 197; *Vaillant v. Dodemead*, 2 Atk. Ch. 524; *Cobden v. Kendrick*, 4 Term, 431; *Jackson v. McVay*, 18 Johns. N. Y. 330; *Yordan v. Hess*, 13 Johns. N. Y. 494.

⁹¹ *Wilson v. Rastall*, 4 Term, 753; *Hoffman v. Smith*, 1 Caines, N. Y. 157.

⁹² *Cormier v. Richard*, 7 Mart. La. N. s. 179.

⁹³ *Du Barre, etc. Peake*, 97; *Riggs v. Denniston*, 3 Johns. Cas. N. Y. 198.

character for the occasion, then he is bound to give testimony as any other subscribing witness.⁹⁴

3178. Confessors. As a general rule, communications by a person accused of crime for the purpose of unburdening his conscience, made to a confessor, are not protected and must be disclosed.⁹⁵

3179. Medical persons. By the common law those persons who have acquired knowledge of facts in families in consequence of their being employed in their profession are not protected from testifying, but in some states this protection is extended to them.⁹⁶

3180. Jurors. Grand jurors cannot be examined in usual cases as to what they have learned in that capacity. This privilege does not extend beyond the votes given by them in any case, the evidence delivered by the witnesses to them, and this is with a qualification mentioned below, and the communications of the jurors with each other.⁹⁷ But they may be required to state whether a particular person testified before the grand jury.⁹⁸ The duration of the secrecy appears not to be definitely settled, but this injunction is to remain as long as the circumstances of each case and the public good require. In a case, for example, where a witness swears to a fact in open court, on the trial, directly in opposition to what he swore before the grand jury, there can be no doubt that the injunction of secrecy, as far as regards this evidence, would be at an end, and the grand juror might be sworn and examined as to what the witness testified in the grand jury room, in order that the witness might be prosecuted for perjury.⁹⁹

Traverse jurors are excluded on the same ground of public policy, when offered to prove misbehavior in the jury in regard to the verdict.¹⁰⁰

3181. Slaves. It is said that a slave could not be a witness at common law, because of the unbounded influence his master had over him.¹⁰¹ By statutory provisions in all our southern states slaves were excluded; in some, all Indians, and even free negroes were incompetent whenever the rights of a white man are involved.¹⁰²

⁹⁴ *Mackensie v. Yeo*, 2 Curt. Eccl. 866.

⁹⁵ In New York, Missouri, Wisconsin, Michigan, and Iowa, such communications are protected by statute. N. Y. 2 Rev. St. 406, § 72; Mo. Rev. St. 1845, ch. 186, § 19; Wisc. Rev. St. 1849, ch. 98, § 75; Mich. Rev. St. 1846, ch. 102, § 85; Iowa, code 1851, art. 2393.

⁹⁶ *Duchess of Kingston's Case*, 11 Hargr. St. Tr. 243; 20 How. St. Tr. 613; 3 Carr. & P. 518; *Rex v. Gibbons*, 1 Carr. & P. 97. By statute in New York and Missouri, "no person duly authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon." This statute being passed for the benefit of the patient, he may waive its advantages. *Johnson v. Johnson*, 14 Wend. N. Y. 637. See *Hewit v. Prime*, 21 Wend. N. Y. 79, as to the extent of the protection. The French Code Pénal, art. 378, punishes medical persons who reveal secrets confided to them as such, except in cases where the law requires them to denounce criminals. Similar statutes have been enacted in Wisconsin, Michigan, and Iowa.

⁹⁷ *Sykes v. Dunbar*, 2 Selwyn, Nisi P. 815; *Huidekoper v. Cotton*, 3 Watts, Penn. 56.

⁹⁸ *Freeman v. Arkell*, 1 Carr. & P. 135, 137, n. (c).

⁹⁹ 2 Russell, Cr. 616; *Low's Case*, 4 Me. 439. But see contra *Imlay v. Rogers*, 2 Halst. N. J. 347; 1 Carr. & K. 519. See beyond, 3219.

¹⁰⁰ *Vaise v. Dalaval*, 1 Term, 11; *Little v. Larrabee*, 2 Me. 37, 41, note, and the cases there cited. This rule is limited to the exclusion of evidence tending to show misbehavior on the part of the jurymen. *Boston R. R. v. Dana*, 1 Gray, Mass. 83. The court may in its discretion require them to testify as to other facts which may impeach the verdict. Thus the foreman has been called to testify to words spoken to him by an outsider calculated to influence his verdict. *Nichols v. Shaw*, Mass. Sup. Ct. Boston Advertiser, March 2, 1869. But this is rarely exercised, and then with great caution. *Dorr v. Fenn*, 12 Pick. Mass. 525.

¹⁰¹ 4 Dall. 145, n. (1). But see 1 Hargr. St. Tr. 113; *Macnally*, Ev. 156.

¹⁰² See 1 M'Cord, So. C. 43; 7 T. B. Monr. Ky. 91; 5 Litt. Ky. 171; 3 Harr. & J. Md. 97.

3182. *A party to a negotiable instrument*, it has been held, is not allowed to give evidence to invalidate it so as to show it to have been originally void; because no one who alleges his own turpitude ought to be heard: *Nemo allegans suam turpitudinem, est audiendus*.¹⁰³ But this rule has been doubted, and the decisions in the several states of the Union are not uniform.¹⁰⁴

3183. The next class of persons incompetent to testify consists of those who, having no religious sentiment, cannot be bound by an oath, which we will presently see is an appeal to God, as the judge of the actions of men, and which necessarily presupposes his existence and power to reward him who avers the truth, or punish the hypocrite who, under the pretence of telling the truth, states a falsehood.

3184. *An oath* is a declaration or promise made according to law before a competent authority, to tell the truth; or it is the act of one who, when lawfully required to tell the truth, takes God to witness that what he says is true. It is a religious act by which the party promises to man, and invokes God, not

¹⁰³ This maxim does not invariably hold out to be true. A witness is competent to testify that his former oath was corruptly false. *Rex v. Teal*, 11 East, 309; *Rands v. Thomas*, 5 Maule & S. 244.

¹⁰⁴ Professor Greenleaf, in his unrivalled treatise on the Law of Evidence, has collected most of the cases in a note to § 385, in these words: "The rule, that the indorser of a negotiable security, negotiated before it was due, is not admissible as a witness to prove it originally void when in the hands of an innocent indorsee, is sustained by the Supreme Court of the United States, in *The Bank of the United States v. Dunn*, 6 Pet. 51, 57, explained and confirmed in *The Bank of the Metropolis v. Jones*, 8 Pet. 12, and in the *United States v. Leffler*, 11 Pet. 86, 94, 95; *Scott v. Lloyd*, 12 Pet. 149; *Taylor v. Luther*, 2 Sumn. C. C. 235, per Story, J. It is also adopted in Massachusetts, *Churchill v. Suter*, 4 Mass. 156; *Fox v. Whitney*, 16 Mass. 118; *Packard v. Richardson*, 17 Mass. 122. See also the late case of *Thayer v. Crossman*, 1 Metc. Mass. 416, in which the decisions are reviewed and the rule clearly stated and vindicated by Shaw, C. J. And in New Hampshire, *Bryant v. Ritterbush*, 2 N. H. 212; *Haddock v. Wilmarth*, 5 N. H. 187. And in Maine, *Deering v. Sawtell*, 4 Me. 191; *Chandler v. Morton*, 5 Me. 374. And in Pennsylvania, *O'Brien v. Davis*, 6 Watts, Penn. 498; *Harrisburg Bank v. Foster*, 8 Watts, Penn. 304, 309. In Louisiana, the rule was stated and conceded by Porter, J., in *Shamburg v. Commagere*, 10 Mart. La. 18; and was again stated, but an opinion withheld, by Martin, J., in *Cox v. Williams*, 5 Mart. N. s. La. 139. In Vermont, the case of *Jordaine v. Lashbrooke* was followed in *Nicols v. Holgate*, 2 Aik. Vt. 138; but the decision is said to have been subsequently disapproved by all the judges, in *Chandler v. Mason*, 2 Vt. 198, and the rule in *Walton v. Shelley* approved. In Ohio, the indorser was admitted to prove facts subsequent to the indorsement, the court expressing no opinion upon the general rule, though it was relied upon by the opposing counsel. *Stone v. Vance*, 6 Ohio, 246. In Mississippi, the witness was admitted for the same purpose, and the rule in *Walton v. Shelley* was approved. *Drake v. Henly*, 1 Miss. 541. In Illinois, the indorser has been admitted, where, in taking the note, he acted as the agent of the indorsee, to whom he immediately transferred it, without any notice of the rule. *Webster v. Vickers*, 3 Ill. 295. But the rule of exclusion has been rejected, and the general doctrine of *Jordaine v. Lashbrooke* followed in New York. *Stafford v. Rice*, 5 Cow. N. Y. 23; *Bank of Utica v. Hillard*, Ib. 153; *Williams v. Walbridge*, 3 Wend. N. Y. 415. And in Virginia, *Taylor v. Beck*, 3 Rand. Va. 316. And in Connecticut, *Townsend v. Bush*, 1 Conn. 260. And in South Carolina, *Knight v. Packard*, 3 M'Cord, So. C. 71. And in Tennessee, *Stump v. Napier*, 2 Yerg. Tenn. 35. In Maryland, it was rejected by three judges against two, in *Ringgold v. Tyson*, 3 Harr. & J. Md. 172. It was also rejected in New Jersey, in *Freeman v. Brittin*, 2 Harrison, 192. And in North Carolina, *Guy v. Hall*, 3 Murph. No. C. 151. And in Georgia, *Slack v. Moss*, Dudl. Ga. 161. And in Alabama, *Todd v. Stafford*, 2 Ala. 199; *Griffing v. Harris*, 18 Ala. 226. In Kentucky, in the case of *Gorham v. Carrol*, 3 Litt. Ky. 221, where the indorser was admitted as a witness, it is to be observed that the note was indorsed without recourse to him, and thereby marked with suspicion; and that the general rule was not considered. See further, 2 Starkie, Evid. 179, note (A); 1 Phillipps, & Am. Evid. p. 44; Cowen's note 78, and Suppt.; Bayley, Bills, p. 586, note (b). (Phillips and Sewall's ed.) But each of these decisions against the rule in *Walton v. Shelley* was made long before that rule was recognized and adopted by the Supreme Court of the United States, except that in New Jersey, in which, however, the fact that the point had been settled in the highest national tribunal does not appear to have been adverted to."

only to witness the truth and sincerity of his promise, but also to avenge his imposture or violated faith, or in other words to punish him for his perjury, if he shall be guilty of it.¹⁰⁵ In an oath two things may be observed: an invocation, by which we take as witness the God of truth who knows all things; and the imprecation, by which we ask him, as just and almighty, to avenge our perjury.¹⁰⁶ This imprecation is either express or implied: "as you shall answer to God at the great day," is in the express form; while it is implied in the usual formula, "so help you God."¹⁰⁷

The oath is the means adopted by the most civilized nations to ensure the engagement of the witness that he will tell the truth, and to confirm his testimony. It is an institution established as a precaution against the inconstancy or unfaithfulness of men, and to add, by the fear of divine punishment, to the other assurances which he from whom it is required cannot give, or which it would be unjust to ask of him.

The binding authority of an oath can exist only when the witness believes sincerely in a Supreme Being who is "the rewarder of truth and avenger of falsehood."¹⁰⁸ As to the degree of religious faith required, it is now settled that when the witness believes in a God who will reward or punish even in this world, he is competent.¹⁰⁹ A want of this belief renders him incompetent.

Every man is presumed to believe in God, and he who opposes a witness on the ground of his unbelief is bound to prove it. No man can be questioned as to his belief, and if he chooses not to disclose it, it cannot be inquired into; but when he divulges it, the fact that he has done so may be proved like any other fact. A witness' belief may, therefore, be proved by showing his previous declarations and avowed opinions; and when he has avowed himself to be an infidel,¹¹⁰ he may show a reform of his conduct and change of his opinions since the declarations proved; when the declaration has been made for a considerable space of time, slight proof will suffice to show a change of opinion.¹¹¹

¹⁰⁵ 1 Starkie, Ev. 80; 1 Phillipps, Ev. 21; 1 Greenleaf, Ev. § 368; 10 Toullier, n. 343; Puffendorf, book 4, c. 2, s. 4; Grotius, book 2, c. 3, s. 1; Rutherford, Inst. book 1, c. 14, s. 1; Merlin, Répert. *Convention*; Dalloz, Dict. *Serment*; Dur. Dr. Tr. n. 592, 593.

¹⁰⁶ *Omichund v. Baker*, 1 Atk. Ch. 48; Bentham, 1 Rat. of Jud. Ev. 366, has, in very forcible language, combated the propriety of this part of an oath. He says, "The supposition of its efficacy is absurd in principle. It ascribes to man a power over his Maker; it places the Almighty in the station of a sheriff's officer; it places him under the command of every justice of the peace. It supposes him to stand engaged, no matter how, but absolutely engaged, to inflict on every individual by whom the ceremony, after having been performed, has been profaned, a punishment, no matter what, which, but for the ceremony and the profanation, he would not have inflicted." He condemns, as impious, the exercise or use of this power. He further says, p. 371, note, "The power which leaves Omnipotence no alternative is a power which any and every individual in the state, who is rash enough and foolish enough, may exercise at any time, and any number of times, at pleasure, on so simple a condition as that of getting a justice of the peace to join in the performance of the instantaneous ceremony."

¹⁰⁷ The form of the several kinds of oaths will be found in another place.

¹⁰⁸ *Omichund v. Baker*, 1 Atk. Ch. 48.

¹⁰⁹ *Omichund v. Baker*, Willes, 545; 1 Atk. Ch. 21; *Wakefield v. Ross*, 5 Mas. C. C. 18; 4 Phillipps, Ev. by Cowen & Hill, p. 1503.

¹¹⁰ As to who is to be considered an infidel, see Bouvier, Law Dict. *Infidel*.

¹¹¹ *Jackson ex dem. Tuttle v. Gridley*, 18 Johns. N. Y. 103; *Wakefield v. Ross*, 5 Mas. C. C. 16; *Norton v. Ladd*, 4 N. H. 444; *Easterday v. Kilburn*, 1 Wright, Ohio, 345; *Attwood v. Wilton*, 7 Conn. 66; *Curtis v. Strong*, 4 Day, Conn. 51. In many of the states no religious belief is now necessary to render a witness competent; the fact that he is an atheist goes only to his credibility. This is the case in Massachusetts, Michigan, Maine, Wisconsin, Missouri, and California. *People v. Jenness*, 5 Mich. 305; *Fuller v. Fuller*, 17 Cal. 605. And with some limitations in New Hampshire, Connecticut, and New York.

3185. The fifth class of those who are incompetent as witnesses consists of *infamous persons*. By infamy is understood the state which is produced by the conviction of crime, and the loss of honor, which renders the infamous person incompetent as a witness. Infamy will be considered in regard to the crimes or punishments which incapacitate a witness; the proof of the guilt; the removal of the infamy; and its effect.

3186. When a man is convicted of an offence which is inconsistent with the common principles of honesty and humanity, the law considers his oath as of no weight, and excludes his testimony, as of too doubtful and suspicious a nature to be admitted into a court of justice, to deprive another of life, liberty, or property.¹¹² *The crimes which render a person incompetent*, when he has been lawfully convicted of them, are treason,¹¹³ felony, and all offences founded in fraud, which come within the notion of the *crimen falsi* of the Roman law,¹¹³ as perjury and subornation of perjury;¹¹⁴ suppression of testimony by bribery, or conspiracy to procure the absence of a witness;¹¹⁵ conspiracy to accuse one of a crime, or to defraud him of his property; forgery;¹¹⁶ barratry;¹¹⁷ piracy;¹¹⁸ swindling and cheating.¹¹⁹ It is the crime and not the punishment which renders the offender unworthy of credit.¹²⁰

3187. Every man is presumed innocent until he is proved guilty. In order to incapacitate the witness he must have been legally found guilty before a court of competent jurisdiction, and a judgment must have been pronounced against him; the finding of a jury is insufficient, because it may be arrested or set aside. The judgment, and that only, can be received as the legal and conclusive evidence of the party's guilt for the purpose of rendering him incompetent to testify.¹²¹

According to the foreign jurists, the judgment of an infamous crime, passed by a foreign tribunal, is sufficient to disqualify a witness, because, as they maintain, the state or condition of a person in the place of his domicile accompanies him every where.¹²² But it has been held that a conviction and sentence for a

¹¹² Gilbert, Ev. by Lofft, 256; Buller, Nisi P. 291; 1 Phillipps, Ev. 23.

¹¹³ Leach, 496. The extent of the *crimen falsi* is nowhere laid down with precision in the common law. It includes all the offences mentioned in the text, and perhaps more. 1 Dods. Adm. 191. In the Roman law, from which the term has been borrowed, it included every species of fraud and deceit. Code, 9, 22; Dig. 48, 10; Heinneccius, Pand. pars vii. §§ 214-218; Merlin, Répert. *Faux*. Toullier says, "Le faux, disent les criminalistes, s'entend de trois manières: dans le sens le plus étendu, c'est l'altération de la vérité, avec ou sans mauvaise intention; il est à peu près synonyme de mesonge; dans un sens moins étendu, c'est l'altération de la vérité, accompagnée de dol, *mutatio veritatis cum dolo facta*; enfin, dans le sens étroit, ou plutôt légal du mot, quand il s'agit de savoir si le faux est un crime, le faux est l'altération frauduleuse de la vérité, dans les cas déterminés, et punis par la loi." Tom. 9, n. 188. The common law has not used the term in this extensive sense when applying it to the qualification of witnesses, because convictions for many offences belonging to the *crimen falsi* of the Roman law have not this effect. Greenleaf, Ev. § 373.

¹¹⁴ Coke, Litt. 6, b.

¹¹⁵ Bushell v. Barrett, Ry. & M. 434; Clancey's Case, Fort. 208.

¹¹⁶ Rex v. Davis, 5 Mod. 74.

¹¹⁷ Rex v. Ford, 2 Salk. 690.

¹¹⁸ 2 Rolle, Abr. 886.

¹¹⁹ Fort. 209.

¹²⁰ 1 Phillipps, Ev. 25. But if the statute declares a crime infamous, this will render the criminal incompetent to testify. Phillips & A. Ev. 18; 1 Phillipps, Ev. 18; 1 Gilbert, Ev. by Lofft, 256. Among the crimes which have been held not to render a man infamous are petty larceny, Shay v. People, 22 N. Y. 317; adultery, Little v. Gibson, 39 N. H. 505; conspiracy to defraud creditors, Bickel v. Fasig, 33 Penn. St. 463; prostitution, Smithwick v. Evans, 24 Ga. 461; State v. Randolph, 24 Conn. 363.

¹²¹ Rex v. Castel Carcinion, 8 East, 77; The People v. Whipple, 9 Cow. N. Y. 707; Dawley v. State, 4 Ind. 128. In Delaware, a person convicted of felony is incompetent before judgment. State v. Anderson, 5 Harr. Del. 493.

¹²² Story, Confl. Laws, § 620, and the authorities there cited; Fœlix, Traité de Droit Intern. privé, § 31; Merlin, Répert. *Loi*, § 6, n. 6.

felony in one of the United States did not render the convict incompetent as a witness in the courts of another state, though it might be shown to discredit him.¹²³

3188. *The removal of the disability* may be effected in two ways: first, by pardon, and, second, by a reversal of the judgment of conviction.

The effect of the pardon is to restore the witness to competency, when the disability is a consequence of the judgment, according to the principles of the common law; but when the disability is annexed by the express words of a statute, a pardon will not have this curative effect.¹²⁴ The pardon must be proved by producing the charter under the great seal.

The party convicted will, of course, be restored to competency by the reversal of the judgment, and when the record of the conviction has been produced, the reversal must be shown by the production of the record of reversal.

3189. The disability thus created is different as it operates upon the witness or upon third persons.

Its effect upon the witness is not such as to deprive him of making an affidavit necessary for his exculpation or defence, for the law will not leave him entirely remediless; but he cannot be heard as a complainant.¹²⁵

In regard to third persons, his testimony is universally excluded; and if he had attested any instrument previous to his conviction, his hand writing must be proved as if he were dead.¹²⁶

3190. As a general rule, one witness is sufficient to establish a fact, but to this there are exceptions both in civil and criminal cases.

In cases of treason, though the crime was considered as sufficiently proved by one witness, yet, owing perhaps to the duty of allegiance which is due by every one to the government, which was considered as equal to the testimony of one witness, and probably to protect the accused from being too lightly convicted in times of excitement by the testimony of one witness, two witnesses became necessary by the provision of a statute¹²⁷ the principles of which have been incorporated in the constitution of the United States in these words: "No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."¹²⁸

In order to prove the crime of perjury formerly two witnesses were requisite, because otherwise there would be oath against oath, that of the prisoner on the one side and of the witness on the other. In modern times this rule has been relaxed, but still there must be evidence besides the oath of the prosecutor or his witness to balance the weight of that of the prisoner and the presumption of his innocence; this may be shown by circumstances, which, if they are not tantamount to another witness, have the effect of destroying the oath of the prisoner so as to let the testimony of the witness who has been examined against him have its full weight without any contradiction.¹²⁹

Upon the same principle that two witnesses, or one witness and sufficient circumstances to destroy the oath of the prisoner, are required in cases of perjury, two witnesses, or circumstances requisite to balance the oath of a respondent, are

¹²³ Commonwealth v. Green, 17 Mass. 515; The State v. Candler, 3 Hawks, No. C. 393. But see State v. Ridgley, 2 Harr. & M'H. Md. 120; Cole's lessee v. Cole, 1 Harr. & J. Md. 572; Kirschner v. State, 9 Wisc. 140.

¹²⁴ 2 Hargr. Jur. Arg. 221, *et seq.*; 2 Russell, Cr. 595, 11 Am. Jur. 360; Foreman v. Baldwin, 24 Ill. 298.

¹²⁵ Rex v. Gardiner, 2 Burr. 1117; Walker v. Kearney, 2 Strange, 1148; 2 Salk. 461. *See c*

¹²⁶ Jones v. Mason, 2 Strange, 833. *234*

¹²⁷ 5 & 6 Ed. VI, c. 11, more distinctly enacted by stat. 7 W. III, c. 3, s. 2.

¹²⁸ U. S. Const. art. 3, § 3.

¹²⁹ Woodbeck v. Killer, 6 Cow. N. Y. 118; Champney's Case, 2 Lew. Cr. Cas. 258.

required to disprove an answer in chancery when the answer is positively, clearly, and precisely responsive to any matter stated in the bill. By calling on the defendant to answer an allegation which he makes, the plaintiff admits the answer to be evidence, and before he can be entitled to a decree he must remove the effect of such answer and prove the fact by another witness.¹³⁰

When a usage of trade is to be proved, one witness will rarely be sufficient. A usage must be shown to be notorious, and consequently within the knowledge of many who might be called to testify. The testimony of one witness as to the usage contradicted by another would certainly fail to prove a well-known usage, though it might prove the practice of this particular witness. In this case, as a witness can only testify to what he knows, the jury are authorized to find against the usage.¹³¹

¹³⁰ Gresley, Ev. 4; 1 Greenleaf, Ev. § 260.

¹³¹ Wood v. Hickok, 2 Wend. N. Y. 501; Parrott v. Thacher, 9 Pick. Mass. 426.

CHAPTER XIII.

EFFECT OF EVIDENCE, AND THE MANNER OF GIVING IT.

- 3191-3194. The effect of evidence.
 - 3192. Foreign judgments.
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3191. In the examination of *the effect of evidence* it will be necessary to inquire into the effect of foreign judgment, foreign laws, and parol evidence.

3192. In treating of *foreign judgments* a distinction is to be made between judgments *in rem* and judgments *in personam*. A foreign judgment is not conclusive in bar of a suit, but may be conclusive as evidence. Whether it is *in rem* or *in personam*, it is necessary to establish in the first instance that the court pronouncing the judgment had lawful jurisdiction in the premises.¹ Judgments *in rem* in regard to land and other immovable property pronounced by the courts of the country in which the land is situated are conclusive as to all matters of title upon all persons. The same principle applies to other judgments *in rem* where the court had jurisdiction by possession of the subject matter, as cases in admiralty, whether of prize, forfeiture, salvage, or other similar cases.² But it will not have this effect if it appears that the judgment has been obtained by fraud or without proper notice to the parties interested in the

¹ There is no presumption of jurisdiction in favor of foreign judgments, *Coit v. Haven*, 30 Conn. 190; but this rule is variously modified when considering the judgment of the courts of one of the United States. It is held that a record of a judgment properly authenticated according to the law of congress (before, **3119**) is *prima facie* evidence of jurisdiction, where the parties resided in the state where the judgment was rendered. *Buffum v. Stimpson*, 5 All. Mass. 591; *Sim v. Frank*, 25 Ill. 125.

² *Rose v. Himely*, 4 Cranch, 241; *Gelston v. Hoyt*, 3 Wheat. 246.

subject.³ Similar rules are applied to judgments against property of foreigners in the hands of residents by the process of foreign attachment, garnishment, or trustee process. If in these cases the court has jurisdiction over the person and property, the judgment is conclusive upon both; but if it has jurisdiction only over the property, it will be conclusive as to the title, but not on the party.⁴ Marriages, and judgments confirming and annulling marriages, are conclusive, if they do not conflict with any provisions of the laws of the country where they are used in evidence.

As regards foreign judgments *in personam*, all the cases agree that they are *prima facie* evidence of the facts decided. Some cases hold them to be conclusive evidence,⁵ but the weight of opinion is that they may be impeached and rebutted. How far they may be impeached is an open question. Fraud, want of jurisdiction, and want of notice to the parties may be shown without doubt.

3193. The effect of *foreign laws*, when proved, is properly referable to the court; the object of proof of foreign laws is to enable the court to instruct the jury what is, in point of law, the result of foreign laws to be applied to matters in controversy before them. The court is, therefore, to decide what is the proper evidence of the laws of a foreign country; and when the evidence is given as to those laws, the court is to judge of their application to the matter in issue.⁶

3194. The effect of *parol evidence* is left wholly to the consideration of the jury in cases of jury trial, and of the court in other cases. When treating of the character of the witnesses⁷ we were necessarily led to the consideration of the facts and circumstances which were calculated to give effect to their testimony, or to detract from it.

3195. Having discussed the nature, the object, the instruments, and the effect of the evidence, which are the subject of the first branch of our inquiries respecting evidence, we will next consider the manner of giving evidence in court in the course of a trial before a jury, and thus carry on the proceedings in the cause until we shall have arrived at the end.

3196. The party entitled to begin, (which, to prevent confusion, we will here suppose to be the plaintiff,) after having opened his case to the jury in the manner already pointed out, is now to proceed to give his evidence, which is called evidence in chief. This evidence should strictly follow and support the allegations and opening of the plaintiff, and it must be confined to such matters as the pleadings and opening warrant, for sometimes a departure from this rule will be highly inconvenient, if not fatal. Suppose, for example, that two assaults have been committed, one in January and the other in February, and the counsel opens as to one assault only, and he proves his cause of action to have been an assault in January, he cannot abandon that and afterward prove another committed in February, unless the pleadings and openings extend to both;⁸ because, after proving even in part one cause of action, the plaintiff cannot abandon it and proceed to prove another.

³ *Bradstreet v. Neptune Ins. Co.*, 3 Sumn. C. C. 600. "If a seizure is made, and condemnation passed without allegation of any specific cause and without any public notice, the sentence is not so much a judicial sentence as an arbitrary sovereign edict. It has none of the elements of a judicial proceeding, and deserves not the respect of any foreign nation." By Story, J.

⁴ *Gunn v. Howell*, 35 Ala. N. S. 144.

⁵ *Duvall v. Fearson*, 18 Md. 502; *Jones v. Jamison*, 15 La. Ann. 35; *Milne v. Van Buskirk*, 9 Iowa, 558.

⁶ Story, *Conf. Laws*, § 638.

⁷ Before, **3158**.

⁸ *Stante v. Prickett*, 1 Campb. 473.

3197. In laying the evidence before the jury it is usual to adduce, first, formal proofs; second, documentary evidence; third, examination of witnesses under interrogatories; and, fourth, the parol evidence of living witnesses. But it is not possible to lay down any positive rule on the subject, as this course must vary according to circumstances. The order of proof is entirely within the wise discretion of the counsel.⁹ It is a rule that when a witness has once left the box the party cannot recall him to any point he may have omitted, unless by leave of the judge, which is seldom refused.

3198. When the plaintiff calls a witness, before he can examine him he must be sworn or affirmed. This is done by the clerk of the court, or by some officer lawfully authorized for the purpose. *The form of the oath* is various, to suit the religious opinions of the several witnesses and bind their consciences.

3199. The most usual form of an oath is that upon the Gospel.¹⁰ In this case the witness lays his right hand upon the Gospel, and the clerk then asks, or repeats, "You do swear that the evidence you shall give in this case, wherein Peter is plaintiff and Paul defendant, shall be the truth, the whole truth, and nothing but the truth, so help you God," and the witness then gives his assent and kisses the book. The beginning of this oath is made by the witness taking hold of the book, after being required by the officer so to do, and ends with the words "so help you God." The form of this oath may be traced to the Roman law,¹¹ and the kissing of the book is said to be an imitation of

⁹ The order is sometimes material, as some of the evidence may be admissible only after other preliminary proof. But the court may allow evidence to be put in *de bene esse*, that is, on condition that it shall be shown to be material and connected with the case by evidence to be afterward adduced. This is entirely in the discretion of the court. *Liverpool Wharf v. Prescott*, 4 All. Mass. 22; see *Goings v. Chapman*, 18 Ind. 194; *Lynd v. Picket*, 7 Minn. 184; *Rutledge v. Evans*, 11 Iowa, 287; *United States v. Flowery*, 1 Sprague, Dist. Ct. 109; *Tilton v. Tilton*, 41 N. H. 479.

¹⁰ To trace the history of oaths would be instructive, and show the inefficiency of any system which has been adopted to keep men from betraying the truth. It is said that Discord invented oaths. In the investigation of facts, it was found that some persons who related what they said they knew had made false statements; to prevent a recurrence of this inconvenience, it was thought that men should make a promise to tell the truth; to make this more binding on their consciences, they were required to make such declaration in the presence of what they thought most dear; this was called an oath. The Persians, who were followed by the Greeks and Romans, swore by the sun; the Scythians by air and their scimitars; the Greeks and Romans also swore by their gods, especially *Fides* and *Fidius*; they also swore by their Genii; their women, by Juno; their laborers, by Ceres; Vestals, by Vesta, etc. In the Middle Age, oaths were taken upon the missal and the cross, with the hands placed upon the altar; upon the book and cross, at the door of the church; upon the ring or knocker of the church; *coram altare, i. e.* with one hand upon the altar, the other prepared for the oath; with the head inclined upon the altar, and this oath was considered as of great sanctity; the Gospels were touched upon the altar, and touched by the hand. *Inspectis Sacrosanctis, i. e.* in their sight, not touched like bishops and priests, who were not allowed to swear, *super sacra. Sub testamento Dei*, the Gospel being placed upon their heads. Upon the relics and tombs of the saints, which oath they sometimes required upon many relics which they touched. In the place called *Sanctum*, the cross being placed upon the head, a formula common to religious persons if accused of any crimes. The above oaths were called *Juramenta Corporalia*, because the Gospel, cross, or relics being touched, they were made with the hand elevated or extended, that they might be distinguished from oaths which were made by an instrument, that is, by writing, for such oaths had equal validity. Many oaths were borrowed from the heathens, as oaths upon the head of a beast, or idols; upon arms, the usual oath of Northern nations; upon bracelets; upon the arms, the hair, or the eyes of a mistress; by confirmation or joining hands; by laying hold of the hem of a garment; upon the sepulchre of a debtor. Jews swore by holding a chain fastened to the door of their synagogue. Matthew Paris says, that priests took oaths with their hand upon the bosom, and laymen by touching the book, as now. See Puffendorff, lib. 4, c. 2; Fosbroke, *Encycl. of Antiquities*, verbo Oaths, vol. i. 432.

¹¹ Nov. 8, c. 3; Nov. 74, c. 5; Nov. 124, c. 1.

the priests kissing the ritual, as a sign of reverence, before reading it to the people.¹²

3200. Another form is by the witness holding up his right hand while the officer repeats to him, "You do swear by Almighty God, the Searcher of hearts, that," etc., and adds, "and this as you shall answer to God at the great day," to which the witness assents.

In New England, the oath is usually administered by holding up the right hand without using the Bible.

3201. In another form of attestation, commonly called an affirmation, the officer repeats, "You do solemnly, sincerely, and truly declare and affirm, that," etc., to this the witness assents. In the United States, generally, all witnesses who declare themselves conscientiously scrupulous against taking an oath are permitted to make a solemn affirmation, and this in all cases, as well criminal as civil.

3202. When an *objection to a witness* is believed to exist, as where he is supposed to have an interest in the matter in issue, it is usual to make it known to the court before he is sworn generally in the cause, which is termed being sworn in chief, and cause him to be sworn specially to make true answers, or on his *voir dire*. Formerly the rule was that the objection must be made before the witness was sworn in chief, but now it may be made at any time during the trial.¹³ In a case of this kind, where the witness is supposed to be interested, the party objecting to him may pursue one of two courses: first, examine him on his *voir dire* as to his interest; or, secondly, prove such interest by another witness.

Voir dire is a phrase in old French which signifies to speak truly; when a witness is examined on his *voir dire*, he is sworn or affirmed in a particular way in this formula: "You do swear (or solemnly, sincerely, and truly declare and affirm) that you will true answers make touching the matter now before the court." The party objecting, having asked that the witness should be sworn on his *voir dire*, has made him his witness for that purpose, and he is bound by the answers of the witness. He has a right to begin the examination, and the other side may cross-examine him. When the answers of the witness disclose an interest, he is rejected, however insignificant such interest may be; otherwise, he is then sworn in chief, if he has not already been so.

But the objecting party may not be willing to trust the witness on his exam-

¹² Rees, *Cycl. Oath*. In a book, entitled "The Oath a Divine Ordinance," by D. X. Junkin, A. M., of New Jersey, is given the following account of the custom of kissing the book when the witness is sworn. He says: "It is, perhaps, not possible to determine when the custom of kissing the book was first introduced. In Polydore Virgil's work, 'De rerum inventoribus,' lib. 4, c. 12, he says—as we translate him—'Amongst us (Christians) the apostles would swear—'God is my witness'—but far the most usual mode of taking a solemn oath is by the Gospel, (*per Evangelium*,) which the Emperor Justinian instituted, (as is made certain by his book entitled "Concerning the Most Holy Bishops.") Afterward it came into use as at present, that he who swears the most solemn oath before the magistrates, shall either touch with his hand, or shall kiss the book of the Gospels, saying, "So help me God and these holy Gospels"—because even as the Gospels, the fountain of our religion, ought on no account to be violated, so a solemn oath should on no condition be broken." It would seem that when this author wrote, in 1499, it was not customary to touch the Gospel with the right hand, and also to kiss it—*aut dextra manu tangat, aut osculetur*—either to touch or to kiss it. The ceremony had been in use long before 1499—*in usu venit*. See Oughton, *Ordo Juridicorum*, tit. lxxx.; Consett, *Courts*, Part 3, sec. 3, § 3.

¹³ If the adverse party knows the incompetency of a witness, he must object before his examination, and at any rate as soon as he discovers the incompetency. Any incompetency discovered during the trial, and properly objected, excludes the evidence already given by the witness. *State v. Damery*, 48 Me. 327. But the objection cannot be made after trial. *Rees v. Livingston*, 41 Penn. St. 113; *Gardner v. Gooch*, 48 Me. 487.

ination on his *voir dire*, and he may prove the interest either by another witness or by some other legal testimony.¹⁴ He has not, however, the choice of both; having examined the witness on his *voir dire*, he cannot contradict him by other evidence.¹⁵ If the evidence offered *aliunde* to prove the interest has been rejected as inadmissible, the party may then resort to the witness and examine him on his *voir dire*.¹⁶ If on his *voir dire* the witness says he does not know, or leaves it doubtful whether he is interested or not, his interest may be shown by other evidence.¹⁷

Whether the witness shall be admitted or not is in every case determined by the court alone, that being its province, and the jury have nothing to do as to the competency of the evidence; they are merely to judge of its credibility. When the question of interest is to be determined upon evidence *aliunde*, and it depends upon the decision of intricate questions of fact, the judge, in his discretion, may take the opinion of the jury upon them.¹⁸

The party objecting to the admission of evidence must state the grounds of objection; the degree of particularity required in stating the objection will depend on the facts of each case. It has been held that a general objection without stating the grounds may be overruled without error;¹⁹ and it is well established that any objections which might be obviated by changing the form of the question must be particularly stated.²⁰ A general objection to evidence is properly overruled if any part of it is competent.²¹

3203. When the witness has been rejected on account of interest, he may be restored to his competency by a proper release. When the interest or right is vested in the witness himself, he may divest himself of it by a release; when it consists of a liability over to the party calling him, or to another person, it may be released by the person to whom he is liable.²²

As to the time of giving the release, it must at the latest moment be during the trial, before the testimony is closed, or it will be too late; if, however, the trial is not over, the court will permit the witness to be re-examined after he is released, and in that case it may be sufficient to ask him if the testimony he has already given is true.²³

¹⁴ Pratte v. Coffman, 33 Mo. 71; Harrel v. State, 1 Head, Tenn. 125.

¹⁵ Diversy v. Will, 28 Ill. 216. This is said not to be fully settled by the authorities. Stebbins v. Sackett, 5 Conn. 258. But the question of competency is a collateral question; and the rule is that when a witness is asked a question on a collateral point, his answer is final, and cannot be contradicted; that is, it cannot be impeached by any collateral evidence. Harris v. Tippet, 2 Campb. 637; Philada. & Trenton Co. v. Stimpson, 14 Pet. 448; Odiorne v. Winkley, 2 Gall. C. C. 53; Harris v. Wilson, 7 Wend. N. Y. 57. When in the course of the trial it turns out in proof that the witness has an interest, his testimony may be stricken out. Brockbank v. Anderson, 7 Mann. & G. 295.

¹⁶ Main v. Newson, Anth. N. Y. 13.

¹⁷ Shannon v. Commonwealth, 8 Serg. & R. Penn. 444; Galbraith v. Galbraith, 6 Watts, Penn. 112.

¹⁸ Phillipps & A. Ev. 2, note (1); Rich v. Eldredge, 42 N. H. 153.

¹⁹ Denny v. Northwestern University, 16 Ind. 220; Rosenheim v. America Insurance Co., 33 Mo. 230.

²⁰ Dunning v. Rankin, 19 Cal. 640; Clauser v. Stone, 29 Ill. 114.

²¹ Morrison v. Whiteside, 17 Md. 452; Myers v. People, 26 Ill. 173; State v. Wadsworth, 30 Conn. 55; Bonner v. Home Ins. Co., 13 Wisc. 677.

²² A release must be under seal to restore the competency of a witness. Dennett v. Lamson, 30 Me. 223; Governor v. Daly, 14 Ala. n. s. 469; contra, Dunham v. Branch, 5 Cush. Mass. 558; Boland v. Greenville R. R., 12 Rich. So. C. 368. It is immaterial that the release is given for the express purpose of rendering the witness competent. Robbins v. Butler, 24 Ill. 387.

²³ Wake v. Lock, 5 Carr. & P. 454; Doty v. Wilson, 14 Johns. N. Y. 378; Tallman v. Dutcher, 7 Wend. N. Y. 180; National Ins. Co. v. Crane, 16 Md. 260. But a release after a deposition is taken will not render the deposition admissible. Kimball v. Gearhart, 12 Cal. 27.

The release must be given by a person having the right, or by one duly authorized in his behalf. When a person is authorized by another to act for him in relation to certain things, he must confine himself within his power; a release by a *prochein ami*, by an attorney of record, or by a guardian *ad litem*, is not sufficient for want of authority.²⁴ When there are several joint obligees or joint creditors, the release of one is in general sufficient.²⁵ A release by an infant, not being absolutely void, cannot be objected to by a stranger.²⁶ It is not necessary that the release should be delivered to the releasee; it may be left in court for the use of the party,²⁷ or delivered to another person for him; he must, however, know that it was so delivered at the time he gives his testimony.²⁸

But the witness may be rendered competent by a variety of other acts, which amount to a discharge of the obligation.²⁹ *

3204. If the witness produced be liable to another objection, that of being infamous, the party who makes the allegation must prove it by the production of the record of his conviction. And if the disability has been removed, it must be established by the production of the record of reversal; or if the witness has been pardoned, by producing the pardon under the great seal.

After hearing all the testimony for and against the admission of a witness, the judge decides that he shall or shall not be heard; if his decision is in favor of the hearing, the opposite party has a right to a bill of exceptions, the nature of which will be fully explained hereafter;³⁰ if against his admission, then the party offering him may except. But from the decision of the judge there is no appeal in the course of the trial; the remedy is by a motion for a new trial, or by suing out a writ of error.

3205. After all the objections to a witness have been settled by the judge, and the witness is to be heard as a competent witness, he is first examined by the party producing him. This is called a *direct examination*, or an *examination in chief*, to distinguish it from the examination of the opposite party, which is called a cross-examination.

It is proper here to remark that on the application of either party the judge may, for the purpose of promoting the ends of justice, in his discretion make an order that the witnesses shall be examined out of the hearing of each other.³¹

The examinations are conducted orally in open court, under the regulation of the judge, and in presence of the parties, their counsel, and all other persons who choose to attend court, unless they are witnesses and have been excluded. The counsel who has a right to the examination is entitled to conduct it as he pleases, if he does not violate the rules which have been established, and which will presently be discussed. In doing so he will be careful to abstain from a rude, overbearing manner, and pursue a dignified course toward the witness. Not unfrequently is a witness made an opponent by the manner in which he is questioned; and his feelings being once excited, he, perhaps unintentionally, supports the cause of the other side. Even where a witness is perverse and disposed to give a wrong coloring to the facts, a firm and dignified manner on the part of counsel will have a better effect toward the jury, in showing them the prevaricating character of the witness, than an overbearing and petulant

²⁴ Walker v. Ferrin, 4 Vt. 523; Fraser v. Marsh, 2 Stark. 41; Murray v. House, 11 Johns. N. Y. 464.

²⁵ Coke, Litt. 232, a; Perlberg v. Gorham, 10 Cal. 120.

²⁶ Walker v. Ferrin, 4 Vt. 523; Rogers v. Berry, 10 Johns. N. Y. 132.

²⁷ Peaceable v. Keep, 1 Yeates, Penn. 576.

²⁸ Seymour v. Strong, 4 Hill, N. Y. 225.

²⁹ 1 Greenleaf, Ev. § 430.

³⁰ Beyond, 3232.

³¹ Rex v. Cook, 13 How. St. Tr. 348; 2 Phillipps, Ev. 395; 1 Greenleaf, Ev. § 342; The State v. Sparrow, 3 Murph. No. C. 487; 1 Phillipps, Ev. 268, and note by Cowen and Hill.

mode of examination. Besides, the witness will himself be subdued by such a prudent course on the part of the counsel, and become ashamed to show any partiality.

Although much must necessarily be left to the discretion of the judge in the examination of witnesses, on account of the difficulty of making stringent rules which shall govern in all cases, still, some general rules have been adopted to facilitate the examination, and to attain the ends of justice.

3206. It may be safely stated, as a general rule, that no *impertinent* or *useless question* should be asked, because what does not belong to the case, if no other harm arises from it, wastes the time of the court and confuses the jury, by drawing their attention to other matter than that which they are impanelled to try.

3207. As a general rule, the counsel who examines a witness in chief has no right to ask a *leading question*, that is, such a question as puts into the witness' mouth the answer he is expected to give. In that case the examiner is said to lead the witness to the answer. When the witnesses for either party are under examination in chief, the counsel on the other side ought carefully to watch that no leading question be put, and if there be even an inception of an irregular question, the answer to which might be prejudicial, he should instantly interrupt the counsel, because by waiting till the leading question has been stated the mischief may be complete, and when the question is put in another form the witness will answer it as it was first stated.

The counsel cannot put a question based upon the supposition of facts not proved.³²

3208. But this rule against leading questions under an examination in chief is not without exceptions; sometimes the ends of justice require that it should be relaxed. Among such instances are the following:

When it evidently appears that the witness wishes to conceal the truth, and to favor the opposite party.³³

When, from the nature of the case, the mind of the witness cannot be directed to the subject of inquiry without a particular specification of it; as, where he is called to contradict another as to the contents of a particular letter, which is lost, and cannot without suggestion recollect the contents, the particular passage may be suggested to him.³⁴

When a witness is called to contradict another, who stated that such and such expressions were used or such and such things were said, it is the usual practice to ask whether those particular expressions were used, or those things were said, for the witness could not probably answer, if the question were put to him in the general form, by merely inquiring what was said.³⁵

In all cases it is much in the discretion of the court whether leading questions shall be put, and they are never forbidden when justice requires them.³⁶ The permitting or refusing a leading question cannot be assigned for error.³⁷

3209. The witness must testify only to such facts as are at the time within his knowledge and recollection. He cannot therefore read a paper containing a statement of facts as his testimony, if he then has no recollection of those facts, because if the paper is proper to be submitted to the jury, they ought to have it as evidence, and not what the witness says. But the witness has in all cases

³² *People v. Graham*, 21 Cal. 261; *Carpenter v. Ambrosion*, 20 Ill. 170.

³³ 1 Starkie, Ev. 149.

³⁴ *Courteen v. Torese*, 1 Campb. 43. See 1 Greenleaf, Ev. § 435.

³⁵ 1 Starkie, Ev. 152; 1 Greenleaf, Ev. § 435.

³⁶ *Severance v. Carr*, 43 N. H. 65; *Green v. Gould*, 3 All. Mass. 465; *Walker v. Duns-
pough*, 20 N. Y. 170.

³⁷ *Moody v. Rowell*, 17 Pick. Mass. 498.

a right to look at the paper to refresh and assist his memory, and may even be compelled to do so if the writing is present in court.³⁸ The writing may have been made by himself or others; it may be an original or a copy; if it will assist the memory of the witness, he may use it; he must, however, speak not from what is written in the paper, but from his recollection.

When the writing has been made by another, has never before been seen by the witness, and he cannot recollect the facts independently, he is not allowed to use it, as it is not so much a means of refreshing his memory as of suggesting evidence.³⁹

3210. Professor Greenleaf has very properly classified the cases in which writings are permitted to be used for this purpose.⁴⁰ These classes are:

When the writing is used only for the purpose of assisting the memory of the witness; in this case, the witness speaks of his own knowledge, and whether the paper is in court or not is immaterial, except that if it be not produced, the other side may take advantage of that circumstance and press it upon the jury.⁴¹

When the witness recollects having seen the paper before, and though he cannot on his examination say he has an independent recollection of the facts mentioned in it, yet he remembered that at the time he saw it he knew the contents to be correct.⁴² In this case the writing must be produced in court in order to enable the opposite party to cross-examine, and that the witness' memory shall be refreshed as to every part.

When the writing in question is not recognized by the witness, nor awakens in his memory any recollection of any thing contained in it, but, knowing it to be genuine, he is so convinced on that ground that he can positively swear to the fact; as, where a paper is produced attested by the witness, and he says he has no recollection of the attestation, but he is certain that the signature to it is his own, and that he never subscribed his name as an attesting witness without first having the paper acknowledged before him by the parties, this is a sufficient proof of the attestation of the deed.⁴³

3211. Though the witness must depose to such facts only as are within his knowledge, yet he is not required to give the *very words* used in a conversation, or to speak with such expressions of certainty as to exclude all doubt in his mind. When he has a strong impression of the fact, though it does not amount to absolute certainty, his testimony is admissible, and must be weighed by the jury.⁴⁴ And in some cases the *belief* of a witness will be received in evidence; thus, a witness may testify as to his belief of the identity of a person in question, or that the hand writing in question is or is not that of a certain person, provided he has had an opportunity of knowing the hand writing of such person; and if he testifies falsely as to his belief, as, where he testifies that he believes the hand writing is that of Paul, when he knows it is that of Peter, he is guilty of perjury.⁴⁵

So the value of a chattel for whose conversion damages are sought can only

³⁸ Reed v. Boardman, 20 Pick. Mass. 441.

³⁹ Davis v. Allen, 9 Gray, Mass. 322; Green v. Caulk, 16 Md. 556.

⁴⁰ 1 Greenleaf, Ev. § 437.

⁴¹ Hamilton v. Rice, 15 Tex. 382.

⁴² Coffin v. Vincent, 12 Cush. Mass. 98.

⁴³ Maugham v. Hubbard, 8 Barnew. & C. 16; Russell v. Coffin, 8 Pick. Mass. 143; 1 Phillipps, Ev. by Cowen & Hill, 475, note, 899; Martin v. Good, 14 Md. 398.

⁴⁴ Clark v. Regelow, 16 Me. 246.

⁴⁵ Rex v. Pedley, Leach, Cr. Cas. 365. See Thompson v. White, 4 Serg. & R. Penn. 137; 1 Starkie, Ev. 41; 2 Powell, Mortg. 555; 2 Hawk. c. 46, s. 167. As to the difference between belief and knowledge, see before, **3158**.

be proved by the opinion and belief of witnesses conversant with such articles.⁴⁶

3212. In general, the *opinion* of the witness is not evidence, for he must speak of facts; but when matters of skill or judgment are involved, a person competent particularly to understand such matters may be asked his opinion, and it will be evidence. It is the constant practice to examine on questions of science, skill, and trade, or others of the same kind, persons of known experience, who, for this reason, are sometimes called *experts*. These testify not only as to facts, but also give their opinions, which are properly received in evidence. It is for this reason the opinions of medical men are constantly admitted as to the cause of disease, or of death, or the consequences of wounds, and as to the sane or insane state of a person's mind, as collected from a number of circumstances; but medical or other scientific men cannot give their opinions as to the merits of the cause, but only their opinions upon the facts proved.⁴⁷

The testimony of experts is inadmissible to prove facts which lie within the knowledge of all persons of ordinary intelligence,⁴⁸ but they may be called upon to express an opinion as to facts which are incapable of direct proof, and can only be inferred from apparent symptoms, the connection between which and the facts in question is known only to persons of peculiar skill. Such, for instance, is the question of sanity, of the causes of death, and the various questions upon which medical experts are called. So where the probability of a future occurrence is in question, it is evident that the witness can only testify as to his belief, founded upon a peculiar acquaintance with the object. Such, for instance, would be the increase in value likely to accrue to adjacent land from laying out a street, or the sufficiency of a dam to resist freshets.⁴⁹

3213. A witness should not be asked, and if asked, he need not answer, any question which has a tendency to render him liable to any kind of punishment or to a criminal charge, or subject him to a forfeiture of his estate, or have a direct tendency to degrade his character.

3214. It is exceedingly clear that a witness is not compellable to criminate himself, and whether he has answered the question in part or not at all, he will be protected by the court;⁵⁰ still, he may answer if he chooses; and in such a case the party who put the question will be bound by the answer, because the court cannot try such collateral facts, and the parties and the witness do not come prepared for its full investigation.⁵¹ But where the answer will only subject him to a civil liability or pecuniary loss, or charge him with a debt, he is

⁴⁶ Ohio R. R. v. Irwin, 27 Ill. 178.

⁴⁷ 1 Greenleaf, Ev. § 440; 1 Phillipps, Ev. 290; Wogan v. Small, 11 Serg. & R. Penn. 141.

⁴⁸ Hovey v. Sawyer, 5 All. Mass. 554; Derby v. Gallup, 5 Minn. 119.

⁴⁹ Webber v. Eastern R. R., 2 Metc. Mass. 147; Porter v. Poquonnoc Co., 17 Conn. 249.

⁵⁰ If the witness voluntarily and with full knowledge states part of a transaction in which he is criminally implicated, he is compellable to state the whole. Coburn v. Odell, 29 N. H. 540; Norfolk v. Gaylord, 28 Conn. 309; Foster v. Pierce, 11 Cush. Mass. 437; but otherwise if he merely states the part inadvertently.

⁵¹ 1 Phillipps, Ev. 284. See Rex v. Rudge, 2 Peake, 282. It is the privilege of the witness alone to refuse to answer; if he chooses to do so, neither party can object. Commonwealth v. Shaw, 4 Cush. Mass. 594; People v. Mather, 4 Wend. N. Y. 229; Newcomb v. State, 37 Miss. 383.

The witness is to judge whether the answer will criminate him, for he alone can know the facts, and is not compellable to divulge them. And he may use his privilege where the question is manifestly one of a series the answers to some of which will criminate him, or where the cross-examination founded on his answer would have that effect. Printz v. Cheeney, 11 Iowa, 469; French v. Venneman, 14 Ind. 282.

bound to answer.⁵² A party interested in the cause cannot be compelled to answer, though not named on the record.⁵³

3215. When the answer will subject the witness to a forfeiture of his property he will be protected, as he is when his answer will expose him to a criminal prosecution or penalty.⁵⁴

3216. No man is bound to degrade his own character; he is, therefore, not bound to answer a question when the answer has a direct tendency to degrade his character. This rule applies only to those cases where the inquiry is not relevant to the nature of the issue; for if it be relevant, it must be answered, however strongly it may reflect on the character of the witness.⁵⁵

3217. A witness should not be asked, and he cannot be compelled, if asked, to disclose state secrets, or official communications between the heads of departments of state and their subordinate officers, or matter which is indecent or offensive to public morals, or injurious to the feelings and interests of third persons, the parties having themselves no interest except what they have themselves created.

3218. State secrets are those things which are known only to some of the officers of the government, or of some branch of it. Those are matters which concern the administration of penal justice, or those which concern the administration of the government. The principle of public safety is the same in both cases, and the rule of exclusion is applied no further than the attainment of that object requires; for example, in criminal trials the names of the persons employed in the discovery of crime are not permitted to be disclosed any further than is requisite to a fair trial of the question of the prisoner's innocence or guilt.⁵⁶

3219. For the same reason, the public good, communications between the heads of departments of state and their subordinate officers are protected from disclosure; thus, communications between a provincial governor and his attorney general on the state of the colony and the conduct of its officers;⁵⁷ the President of the United States and the governors of the different states cannot be coerced to produce correspondence or official papers, or to disclose information communicated to them in their official capacity when in their opinion the disclosure would be injurious to the public interest;⁵⁸ when such original evidence cannot be admitted, secondary evidence of the same facts will not be received.⁵⁹ It has already been stated that grand jurors cannot be examined when their answers would be injurious to the public interest as to what passed in the grand jury room.⁶⁰

3220. When the public good requires it, the mere indecency of disclosures does not suffice to exclude them, for this reason, on an indictment for a rape, or when the sex of a person claiming an estate tail comes in question, the inquiry as to it is allowed, and the witness may be compelled to testify. But when the evidence is not necessary for the administration of public justice, but the questions have been raised by the parties themselves out of mere wantonness or sport, or in disregard of the rights of others, such questions cannot be answered;

⁵² *Baird v. Cochran*, 4 Serg. & R. Penn. 397; *Ness v. Van Swearingen*, 7 Serg. & R. Penn. 192; *Bull v. Loveland*, 10 Pick. Mass. 9; *Conover v. Bell*, 6 T. B. Monr. Ky. 157.

⁵³ *Mauran v. Lamb*, 7 Cow. N. Y. 174; *Rex v. Woburn*, 10 East, 395.

⁵⁴ *Bull v. Loveland*, 10 Pick. Mass. 9.

⁵⁵ 1 Phillipps, Ev. 279, and *Cowen & Hill's Notes*, note 521; 1 *Greenleaf*, Ev. 454, 455.

⁵⁶ *Rex v. Hardy*, 24 St. Tr. 753, 811.

⁵⁷ *Wyat v. Gore*, Holt, N. P. 299; *Cook v. Maxwell*, 2 Stark. 183; *Anderson v. Hamilton*, 2 Ball & B. Ch. Ir. 156, note.

⁵⁸ 1 *Burr's Tr.* 186, 187; *Gray v. Pentland*, 2 Serg. & R. Penn. 23.

⁵⁹ *Gray v. Pentland*, 2 Serg. & R. Penn. 23, 31; *Yoter v. Sanora*, 8 Watts, Penn. 156.

⁶⁰ See before, 3180.

as, where the parties laid a wager as to the sex of an individual,⁶¹ or whether an unmarried woman had a child.⁶²

3221. After the party who called a witness has closed his examination in chief, he is handed over to the counsel of the other side to be cross-examined; but if he has simply been sworn inadvertently, and not examined by the party who called him, the other party cannot examine him as if he had been so examined, but he may examine him as his own witness in chief.⁶³

Every party has a right to cross-examine a witness produced and examined by his antagonist, in order to test whether the witness possesses the knowledge of the things he testifies; and if, upon examination, it is found that the witness had the means and ability to ascertain the facts about which he testified, then his memory, his motives, every thing, may be scrutinized by the cross-examination.

The object of the cross-examination is to sift the evidence and try the credibility of the witness who has been called and has given evidence in chief. It is one of the principal tests which the law has devised for the ascertainment of truth, and it is certainly one of the most efficacious. By this means the situation of the witness with regard to the parties and the subject of litigation, his interest, his motives, his inclinations, and his prejudices, his means of obtaining a correct knowledge of the facts respecting which he testifies, the manner in which he used those means, his powers of discerning the facts in the first instance, and his capacity of retaining them and describing them, are fully investigated and ascertained. However artful he may be, the witness will seldom be able to elude the keen perception of an intelligent court and jury, unless, indeed, his story is founded on truth; when false, he will be liable to detection at every step.⁶⁴

Under a cross-examination the counsel may put any question at all relevant to the cause he may think fit,⁶⁵ and in a manner however leading; but this is allowed because the witness is presumed to be favorable to the other side, and the rule already mentioned, as to the right of putting leading questions under an examination in chief, equally extends to a witness under cross-examination; when it appears that the person is not a witness of the truth, but evidently endeavoring to conceal it from the counsel who is examining him, whether for or against the plaintiff, the most leading questions are permitted. But this right of putting leading questions appears to be somewhat qualified, for when a witness betrays an anxiety to serve the party against whom he was called and examined in chief, a direct leading question will not be permitted in cross-examination.⁶⁶ This rests very much in the discretion of the judge and the conduct and manner of the witness.

⁶¹ *Da Costa v. Jones*, Cowp. 729.

⁶² *Ditchburn v. Goldsmith*, 4 Campb. 152.

⁶³ 3 *Chitty*, Gen. Pr. 897.

⁶⁴ *Starkie*, Ev. 96; 1 *Phillipps*, Ev. 227; *Fort*, 2, 4; *Vaugh.* 143; *Bacon*, Abr. *Evidence*, E.

⁶⁵ It is an open question whether the cross-examination can be extended to the whole case, or must be confined to the matters stated in the examination in chief and matters affecting the credibility of the witness. The Supreme Court of the United States have established the latter as the rule; and if the party wishes to examine the witness farther, he must make him his own witness and call him again at the proper stage. *Philadelphia R. R. v. Stimpson*, 14 Pet. 448. So held also in *Wilhelmi v. Leonard*, 13 Iowa, 330; *Campau v. Dewey*, 9 Mich. 381; *Beaulieu v. Parsons*, 2 Minn. 37; *Brown v. State*, 28 Ga. 199; *Patton v. Hamilton*, 12 Ind. 256; *Ray v. Bell*, 24 Ill. 444.

The other rule is held in Massachusetts and Vermont, where a witness called merely as attesting witness to prove the execution of a deed may be cross-examined as to the whole case. *Linsley v. Lovely*, 26 Vt. 123; *Beal v. Nichols*, 2 Gray, Mass. 262.

⁶⁶ 1 *Starkie*, Ev. 162, n. (c).

A witness cannot be asked under a cross-examination any thing as to a collateral fact for the purpose of afterward impeaching his testimony by other witnesses who may contradict him.⁶⁷ But with regard to any material fact in issue, a question may be asked of a witness for the purpose of contradicting him.

Much discretion is required in making a cross-examination; the witness will probably look upon the counsel for the party who cross-examines him with much distrust; the first effort of the counsel ought, therefore, to be to gain his confidence by acting toward him with perfect justice, and by appearing to consider him, as most witnesses are, disposed to tell the truth. It is only when he shows a perverse determination to conceal the truth that a searching cross-examination ought to take place. There is a great risk in the cross-examination, for if unfavorable evidence be elicited by such examination, it will be taken most strongly against the party so cross-examining.⁶⁸

After the witness has been cross-examined, the party who examined him in chief has a right to re-examine him to the same matter. He may ask all questions proper to draw forth an explanation of the sense and meaning of the expressions used by him on his cross-examination when they are doubtful, and also the reasons why he used them. This evidence ought properly to be confined to the cross-examination, and it should not extend to any new matter.

3222. The party may call as many witnesses as he pleases, and submit each one to an examination and cross-examination. If any one of his witnesses should turn out differently from what he expected, and instead of testifying for him his evidence should be in favor of the other party, it is a disputed point whether he can be impeached by him; it seems but reasonable, however, that when a party has called a witness and given him credit that he should not afterward be allowed to impeach the credit which he has given him. He may, however, establish by other witnesses the same point denied by a witness he had himself called.⁶⁹

3223. When records are given in evidence, they should be properly authenticated, and papers should be proved by the subscribing witnesses, when there are any; and when there are none, the hand writing of the parties should be proved. They should all be read, or it should be agreed that they be considered in evidence.

After all the evidence of the plaintiff has been given, the plaintiff closes his case.

3224. At this time is to be considered whether the plaintiff has made out a case or not; if, in the opinion of the court, the plaintiff should not have proved a sufficient case to entitle him to a verdict, if the case were then submitted to the jury, and all his evidence admitted to be true, then it would be useless to proceed further in the case, as in point of law he cannot by any possibility recover, and therefore the plaintiff is non-suited. If, on the other hand, the plaintiff has made a *prima facie* case, then the court hears the testimony on the other side, which, in the case which has been supposed, would be for the defendant.

3225. In order to let the court and jury understand his case, the counsel for the defendant now opens his defence. The general course which he pursues is much like that adopted by the plaintiff in opening his case. He points out

⁶⁷ Combs v. Winchester, 39 N. H. 1.

⁶⁸ See Wright v. Littler, Burr. 1244; 1 W. Blackst. 346.

⁶⁹ Alexander v. Gibson, 2 Campb. 556; Ewer v. Ambrose, 3 Barnew. & C. 746; Hall v. Houghton, 37 Me. 411; Seavy v. Dearborn, 19 N. H. 351; Brown v. Wood, 19 Miss. 475; Brolley v. Lapham, 13 Gray, Mass. 294; Champ v. Commonwealth, 2 Metc. Ky. 17.

in what the case of the plaintiff is defective, if, in fact, it is not well founded; but, if well founded, he shows how the defendant has been discharged, either by the acts of the plaintiff, by acts of law, or on any other account, briefly stating all the facts and circumstances which have this effect, and the manner in which they will be proved.

3226. The witnesses for the defendant are to be examined by him as those of the plaintiff were for him, and they are subject to the general rules of examination. The party calling a witness, when he examines him, is bound to examine him in chief, and is not allowed to pursue the examination in any other way. The witness is turned over to the plaintiff for cross-examination, and, after such cross-examination, the defendant may again examine him as to the cross-examination, or as to any fact which it may have elicited.

The defendant gives in all his evidence, oral and documentary, as the plaintiff did to support his case, and having done so, he closes.

3227. If the defendant has given testimony in his defence respecting any new matter, the plaintiff has a right to give new evidence, which is called *rebutting evidence*. This kind of evidence is allowed to explain, repel, counteract, or disprove facts given in evidence on the other side;⁷⁰ it may be by proving facts directly opposite to those sworn to, or by circumstances which are sufficient to rebut the most positive testimony.⁷¹

If the defendant has impeached the character of the plaintiff's witnesses, evidence in support of their character may be introduced in rebutter.

3228. Every witness is liable to be impeached by the adverse party as to his character for truth. By *impeachment of a witness* is meant an allegation, supported by proof, that a witness who has been examined is unworthy of credit. Till impeached, every man's character is presumed to be good, and he who alleges it is not good must, of course, be able to support his allegation by evidence. A witness' testimony may be impeached in three ways: by disproving by other witnesses facts stated by him, by general evidence of his want of character for truth and veracity, and by showing his self-contradiction.

3229. A witness' testimony may be impeached by *disproving the facts stated by him*, by the testimony of other witnesses; as, for example, if Titus, the witness, were to prove that the defendant had a conversation with the plaintiff, in the presence of Peter and Paul, and that both Peter and Paul made remarks to him at the time as to what then passed; and Peter and Paul should testify that they were not present at such conversation, and that they never remarked any thing to him upon the subject; it is clear, if they were worthy of credit, that Titus could not be believed.

3230. Evidence may be given, generally, affecting a witness' credit as a man of veracity. It is his *character* which is attacked, not particular instances of his conduct. The examination of a witness whose testimony attacks the general character of another must be confined to his general reputation, and not be permitted to go into any particular facts. Every man of good reputa-

⁷⁰ *Scott v. Woodward*, 2 M'Cord, So. C. 161. In Massachusetts the order of proof is entirely within the discretion of the court, and the plaintiff may, if allowed, after the close of the defence introduce evidence which does not tend to rebut any new matter shown in defence, and its admission cannot be excepted to. *Ray v. Smith*, 9 Gray, Mass. 141. And in general the court have discretion to allow evidence after the case is closed. *Wheeler v. Smith*, 13 Iowa, 564; *Baze v. Arper*, 6 Minn. 220; *Hopkinton v. Waite*, 6 R. I. 374; *Montag v. Linn*, 23 Ill. 551; *Dozier v. Jerman*, 30 Mo. 216. If new matter is introduced in rebutter, not properly rebutting evidence, the defendant must be allowed to answer it. *Kent v. Lincoln*, 32 Vt. 591.

⁷¹ *Nelson v. United States*, Pet. C. C. 235.

tion is supposed capable at all times of supporting it by proof; but he cannot be expected to come into court to prove every part of his conduct during a long life without any notice that it would be attacked.

The regular mode is to inquire of the witness under examination whether he knows the general character or reputation of the witness to be impeached as to *truth and veracity*,⁷² and if he knows it, what is his reputation. The additional question is put whether the witness would believe him upon oath.⁷³ In answer to such evidence the other party may cross-examine the impeaching witnesses as to their modes of knowledge and the grounds of their opinions; or, he may attack their general character, and by fresh evidence support the character of his own witness.⁷⁴

In order to know the character of another and his general reputation a man must be generally acquainted with those who know him, and the inquiry respecting him must be made where he is best known. A stranger going there making inquiry at the request of the party who impeaches the witness is not a person who knows the reputation.⁷⁵

3231. A third mode of impeaching a witness is to show that he has made statements out of court contrary to those made under oath on the trial. In these cases, however, this objection is confined to such matters as are relevant to the issue; for in matters that are not so his answer is conclusive, the court not having the power to try such immaterial statements and the parties not coming there prepared for such a contest.⁷⁶ Before the witness is contradicted, fairness and justice require that in the case of oral statements he should first be asked as to the time, place, and person involved in the supposed contradiction; because, if the question be put to him generally whether he said so and so, or whether he always told the same story, he may not recollect; and if his attention be called particularly to the time and place when and where the conversation took place, and the person with whom he had it, he may remember the circumstances and explain it.⁷⁷

⁷² A doubt has been raised, whether the inquiry ought to be confined to the witness' character for truth and veracity, or whether the question ought to be as to the general character of the witness impeached. In Kentucky, *Hume v. Scott*, 3 A. K. Marsh. Ky. 261; North Carolina, *The State v. Boswell*, 2 Dev. No. C. 209; in South Carolina, Anon. 1 Hill, So. C. 251, the rule seems to be that the inquiry extends to the whole character of the person impeached. The general rule, however, in the other states, is to inquire as to his character for truth and veracity. It may be laid down as a general rule that the question must first be asked as to the witness' character for truth and veracity. And the better opinion would seem to be that subsequent questions as to his general character must be such as are adapted to illustrate the answer to the first question. *Teese v. Huntingdon*, 23 How. 2; *Pierce v. Newton*, 13 Gray, Mass. 528.

⁷³ The question, whether the witness under examination would believe the former witness, is frequently asked. This has been objected to for several reasons: first, that the witness, in giving his opinion, takes from the jury the right of forming an opinion for themselves; secondly, that it permits the introduction and indulgence of personal and party hostility in courts of justice. *Phillips v. Kingfield*, 19 Me. 375, 379. But, besides, the fact whether the witness would or would not believe the one whom it is sought to impeach must depend entirely on what he would say; if he testified to a probable story or to a known fact, he must be believed; and if the most correct man testified to what is impossible, as that he saw a man shoot himself with a pistol which he held in his hand, and upon examination of the ball found in his body it was too large to enter into the pistol, he ought not to be believed.

⁷⁴ 2 *Phillipps*, Ev. 432; 1 *Starkie*, Ev. 182; 1 *Greenleaf*, Ev. § 461.

⁷⁵ *Douglass v. Tousey*, 2 Wend. N. Y. 352; *Boynton v. Kellog*, 3 Mass. 192; *Wike v. Lightener*, 11 Serg. & R. Penn. 198; *Kimmel v. Kimmel*, 3 Serg. & R. Penn. 337.

⁷⁶ *Blakey v. Blakey*, 33 Ala. N. S. 611.

⁷⁷ *The Queen's Case*, 2 Brod. & B. 313; *Angus v. Smith*, 1 Mood. & M. 473; 1 *Starkie*, Ev. 484; 1 *Greenleaf*, Ev. § 462, and the notes; *Notes to Phillipps*, Ev. by Cowen & Hill, note 533 to 1 Phil. 308; *Valton v. National Ass. Co.*, 20 N. Y. 32; *State v. Davis*, 29 Mo. 391; *Ketchingman v. State*, 6 Wisc. 426.

A witness may also be contradicted by writings and facts. He may therefore be asked if he wrote a certain letter; but in this case, when the letter can be had, it ought to be handed to him, and he ought to be asked if he wrote it. If he acknowledges it, then the contents are evidence to contradict him, if the contents do in fact contradict what he has stated; if he denies it, then his hand writing may be proved by another witness for the purpose of impeaching his credit.⁷⁸

When evidence is given of contrary statements made by a witness of a particular fact to impeach his veracity, his general character for truth is in some degree put in issue, and he may therefore support by general evidence that he is a man of strict integrity and that he has a scrupulous regard for truth.⁷⁹

Having now treated of the rules of evidence generally and of their application in the trial of a cause, our next inquiries will lead us to the consideration of the several matters which occur in the course of a trial.

⁷⁸ Phillipps & A. Ev. 932; *The Queen's Case*, 2 Brod. & B. 292.

⁷⁹ Phillipps & A. Ev. 944; *Burrell v. State*, 18 Tex. 713; but see *Chapman v. Cooley*, 12 Rich. So. C. 654; *Vance v. Vance*, 2 Metc. Ky. 581.

CHAPTER XIV.

PROCEEDINGS BEFORE VERDICT, AND VERDICT.

- 3232-3237. Bills of exceptions.
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- 3267-3270. The requisites of a verdict.
 - 3268. The conformity of a verdict with the issue.
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3232. We have seen that when evidence is offered, either written or oral, and there is any objection to its being received, the matter is referred to the court, and, after a full and fair examination, the judge's decision is in favor of its admission or against it. Frequently, indeed almost always, the case turns upon the correctness of this judgment; for if the evidence is admitted, the verdict will probably be in favor of the party offering it, and if rejected, it will be against him. This is always the case when the evidence is of vital importance to the action. Such power, unless subject to revision, would, in the hands of a fallible, a corrupt, an ignorant, or an arbitrary judge, be fraught with very dangerous consequences. Again, in his charge or directions to the jury, the judge is required to state to them the rules of law which are to guide them in

making up their verdict, and they are bound to take the law to be as he states it to them; if, through ignorance or corruption, the judge should misstate the law and the jury find their verdict accordingly, the party against whom this misstatement had been made would be without a remedy if the law had not provided one to correct these evils. This is effected by a bill of exceptions.¹

The *bill of exceptions* is the statement in writing of the objection made by a party in a cause to the decision of the court on a point of law, which is clearly stated therein, and which, in confirmation of its accuracy, is signed and sealed by the judge or court who made the decision. The object of the bill of exceptions is to put the question of law on record for the information of the court of error having cognizance of such cause.

The bill of exceptions is authorized by an English statute,² the principles of which have been adopted in all the states of the Union. It is thereby enacted that "when one impleaded before any of the justices alleges an exception praying they will allow it, and if they will not, if he that alleges the exception writes the same and requires that the justices will put their seals, the justices shall do so, and if one will not, another shall; and if, upon complaint made of the justice, the king cause the record to come before him, and the exception be not found in the roll, and the plaintiff show the written exception with the seal of the justices thereto put, the justice shall be commanded to appear at a certain day either to confess or deny his seal, and if he cannot deny his seal, they shall proceed to judgment according to the exception, as it ought to be allowed or disallowed. The statute extends to both plaintiff and defendant.

The object of a bill of exceptions is to put upon the record all the facts touching the decisions of the court respecting questions of law which do not appear upon the record and which arise in the course of the trial, so that when the case is afterward removed to an appellate court by a writ of error,³ the bill of exceptions may be taken into consideration and there finally decided, by which the decision of the court below will be affirmed or reversed.⁴

In the discussion of this subject it will be proper to inquire into the cases in which a bill of exceptions may be had, the time of making the exception, when the bill must be signed, the form of the bill, and its effect.

3233. In general, *a bill of exceptions can be had only in a civil case.*⁵ When in the course of trial of a cause the judge, either in his charge to the jury or in deciding an interlocutory question, mistakes the law, or is supposed by the counsel on either side to have mistaken the law, the counsel against whom the decision is made may tender an exception to his opinion and require him to seal a bill of exceptions;⁶ and exception may be taken even when the judge re-

¹ See *Gibson v. Hunter*, 2 H. Blackst. 87; *Bulkley v. Butler*, 2 Barnew. & C. 434; *Appleton v. Sweetapple*, 3 Dougl. 137.

² St. of Westm. 2, 13 Ed. I, c. 31.

³ The nature of this writ will be explained hereafter.

⁴ See the whole course of proceeding on a bill of exceptions minutely stated in 3 Burr. 1692; *Walton v. United States*, 9 Wheat. 651; 4 Pet. 102; and *Brown v. Clark*, 4 How. 4.

⁵ At common law, exceptions do not lie in criminal cases. *People v. Holbrook*, 13 Johns. N. Y. 90; *United States v. Gibert*, 2 Sumn. C. C. 19; *Ex parte Barker*, 7 Cow. N. Y. 143; and if sealed by the court below, will not be regarded in the court above. *Middleton v. Commonwealth*, 2 Watts, Penn. 285. Nor are exceptions to the proceedings of the sessions allowable in settlement cases. *Newton v. Gloucester*, 1 Halst. N. J. 405. But by statute they are allowed in criminal cases in several states. *Commonwealth v. Hicker-son*, 2 Va. Cas. 60, and note; *Hooker v. State*, 4 Ohio, 348; *Commonwealth v. Stephens*, 14 Pick. Mass. 370; *State v. Mayberry*, 48 Me. 218; *People v. McKinney*, 10 Mich. 54; *People v. Lee*, 14 Cal. 510. In New York, by statute, exceptions may be taken in criminal cases, but they do not delay the execution of the judgment. *Graham*, Pract. 768, note.

⁶ 3 Sharswood, Blackst. Comm. 372.

fuses to charge the jury when required as to a particular point of law,⁷ but not when the judge neglects to do so, he not being required.⁸ Nor will an exception lie to an opinion wholly abstract or out of the case so as not to affect it, though such charge may be erroneous; and if a bill be signed in such case, the court of error will not act upon it.⁹ An exception does not lie where there is a right of appeal,¹⁰ nor when the alleged error appears on record,¹¹ nor to instructions on the facts,¹² nor for refusing to permit a witness to be re-examined as to what he had testified after a cause has been submitted to the jury, this being a matter of discretion in the court,¹³ nor for exercising a mere discretionary power.¹⁴

3234. When evidence is ruled adversely to a party it is usual to take an exception to the judge's opinion, and that is the proper time to do it; though it is unnecessary to stop the progress of the trial to allow time to prepare the bill of exceptions at the time; the judge merely makes a note that the exception has been taken, and the cause proceeds to the end; and when more than one exception is taken, the same proceeding takes place. It not unfrequently happens that exceptions are taken on both sides, of course not to the same decision.¹⁵

Sometimes the exception is not to the decision on a point of evidence offered, but to the opinion of the judge, either in general to his charge to the jury or to the answer which he has given on a point of law submitted to him for his decision by the counsel. Exceptions of this kind must be made, according to some decisions, before the jury have withdrawn;¹⁶ but according to others, if the exception be made after the jury have returned into court with their verdict, but before it is delivered, it is in time.¹⁷

In some cases exceptions can be taken to the pleadings, but they must be taken at the trial in order that the adverse party may have an opportunity to amend.¹⁸

3235. The bill of exceptions must be signed by the judge who tried the cause.¹⁹ In general, *the bill must be signed at the term of the trial, and not at a subsequent term;*²⁰ but the practice does not appear to be uniform.²¹

The bill ought to be signed upon notice of the time and place when and

Douglass *v.* McAllister, 3 Cranch, 300; Smith *v.* Carrington, 4 Cranch, 62; Fletcher *v.* Howard, 2 Aik. Vt. 115.

⁸ Ex parte Baily, 2 Cow. N. Y. 479; Pennock *v.* Dialogue, 2 Pet. 15; Gardner *v.* Gooch, 48 Me. 487.

⁹ Clarke *v.* Dutcher, 9 Cow. N. Y. 674; Hughes *v.* Parker, 10 Ala. 139; McDougal *v.* Fleming, 4 Ohio, 79; Hamilton *v.* Russell, 1 Cranch, 318; Sawyer *v.* Phaley, 33 Vt. 69.

¹⁰ Rathbone *v.* Rathbone, 4 Pick. Mass. 93; Piper *v.* Willard, 10 *id.* 34; 9 Mass. 228.

¹¹ Macker *v.* Thomas, 7 Wheat, 532.

¹² Brooke *v.* Young, 3 Rand. Va. 106; Gilbert *v.* Woodbury, 22 Me. 246.

¹³ Law *v.* Merrills, 6 Wend. N. Y. 277.

¹⁴ Clapp *v.* Balch, 3 Me. 219; Reynard *v.* Brecknell, 4 Pick. Mass. 302.

¹⁵ Liggett *v.* Bank of Pennsylvania, 7 Serg. & R. Penn. 219; Stewart *v.* Huntingdon Bank, 11 *id.* 267; Pool *v.* Fleeger, 11 Pet. 185; Powers *v.* Wright, 1 Ala. 66.

¹⁶ Life and Fire *v.* Mechanics' Ins. Co., 7 Wend. N. Y. 34; Cutler *v.* Welsh, 43 N. H. 497.

¹⁷ Jones *v.* Ins. Co. of N. A., 1 Binn. Penn. 38; 4 Dall. 249; Morris *v.* Buckley, 8 Serg. & R. Penn. 211; Lanuze *v.* Barker, 10 Johns. N. Y. 312; Doe *v.* Kennedy, 5 T. B. Monr. Ky. 177; Dock *v.* Hart, 7 Watts & S. Penn. 172.

¹⁸ Wall *v.* Provident Institution, 3 All. Mass. 96; Morrill *v.* Derby, 34 Vt. 440; Googinns *v.* Gilmore, 47 Me. 91.

¹⁹ Law *v.* Johnson, 8 Cow. N. Y. 746; Fellows *v.* Tait, 14 Wisc. 156.

²⁰ Sikes *v.* Random, 6 Johns. N. Y. 279; Shipherd *v.* White, 3 Cow. N. Y. 32; Agnew *v.* Campbell, 3 Harr. N. J. 291; Pomroy *v.* Selmes, 8 Miss. 727; 1 Watts & S. Penn. 480; Kline *v.* Wynne, 10 Ohio, St. 223.

²¹ Nisbitt *v.* Dallam, 7 Gill & J. Md. 494; Howard *v.* Burke, 14 Ind. 35.

where it is to be done;²² this is required for the purpose of accuracy, for the signing of the bill by the judges is conclusive upon the parties.²³

If the judge should refuse to sign the bill, according to the requirements of the statute, he may be compelled by a writ of *mandamus* issued against him by the superior court, commanding him to seal it, if the fact alleged be truly stated. To this writ he must make a return; if by his return he admits the facts to be truly stated, and he still refuses to sign the bill, he will be attached for contempt;²⁴ if, on the contrary, his return is that they are not truly stated, when in fact they are so, an action will lie against him for making a false return.²⁵

3236. *A bill of exceptions must be in a proper form*, that is, it must truly state the case in which it was taken, the evidence offered and admitted or overruled, distinctly, or the point of law ruled about which the exception has been taken, and the decision of the court below.²⁶ It must appear by the bill of exceptions that the court erred to the prejudice of the party excepting,²⁷ that the error complained of was material,²⁸ and such error must be set forth distinctly.²⁹ It must be stated as made during the term at which the exception was taken, for in contemplation of law it is supposed the bill was signed when the exception was taken, though, as we have observed, it is in fact not signed until afterward.³⁰ When the exception is taken, the party excepting is presumed in contemplation of law to tender to the judge a bill of exceptions. The bill should contain a certificate that the facts stated in it occurred on the trial, and it must be by the judge who tried the cause.³¹

3237. The bill of exceptions, being part of the record, is evidence between the parties as to the facts therein stated, and they cannot be disputed.³² When it states that certain facts appeared, it is to be taken that they were undisputed or conceded by both parties.³³ No notice can be taken of exceptions or objections not appearing on the bill. And a bill signed by a judge who did not try the cause, or about a matter which is not the subject of such a bill, will not be regarded by the appellate court.

3238. After a party has given all the evidence he has in support of his cause, and the opposite party disputes its legal sufficiency or its admissibility in point of law, he may *demur to the evidence*; this may be by the party plaintiff or defendant, but he must take the negative side of the issue. This is not unlike a demurrer in pleading. The demurrer in pleading is the taking of the facts pleaded from the consideration of the jury, to be decided as a question

²² 3 Cow. N. Y. 766; Buller, Nisi P. 316.

²³ Bingham v. Cabbot, 3 Dall. 38.

²⁴ Bristol v. Phillips, 4 Ill. 287. In this case the judge refused to sign the bill of exceptions, and also to obey a *mandamus* from the supreme court to sign the bill, and he was attached for contempt, whereupon he resigned his office. A motion was then made that the bill be taken and considered as true, and be allowed the same effect as though signed and sealed, the correctness of the bill not being denied. This motion upon full consideration was granted.

²⁵ 3 Blackstone, Comm. 372.

²⁶ A bill of exceptions must not be so framed as to refer the credit of the witnesses to the court above. Carrington v. Bennett, 1 Leigh, Va. 340; Ewing v. Ewing, 2 Leigh, Va. 340.

²⁷ Holmes v. Gayle, 1 Ala. n. s. 517; Stone v. Stone, 1 Ala. n. s. 582; State v. Williams, 6 R. I. 207.

²⁸ Stephens v. State, 14 Ohio, 386; Watson v. Brown, 14 Ohio, 473.

²⁹ Hare v. Harrington, Wright, Ohio, 290. A general exception to the judge's charge not stating the particulars objected to is not sustainable. Reynolds v. Boston R. R., 43 N. H. 580.

³⁰ Patterson v. Phillips, 2 Miss. 572.

³¹ Law v. Jackson, 8 Cow. N. Y. 746.

³² Bingham v. Cabbot, 3 Dall. 38.

³³ Beach v. Packard, 10 Vt. 96.

of law by the court. The demurrer to evidence is essentially a demurrer to the facts shown in evidence, the consideration of which, by this proceeding, is taken from the jury, and the whole matter in controversy is a question of law to be passed upon by the court.³⁴

The principal rules regulating demurrers to evidence are the following :

3239. The party³⁵ demurring to evidence is required not only to *confess the existence* of the evidence offered, but *admit the fact* intended to be proved by it: a confession of the truth of the evidence is not in all cases necessarily a confession of the fact intended to be proved by it. As a demurrer to evidence is intended to raise a question of law on the facts of the case, the facts must be admitted before such a question can arise. The demurrer, when properly tendered, admits the facts shown by the evidence, but denies their sufficiency in law to maintain the issue in favor of the adverse party.³⁶ Before the party demurring can require the opposite party to join in demurrer, he is required to make certain admissions, which will be considered in the discussion of these rules.

Upon a demurrer to evidence the court is to consider all the demurrant's evidence in conflict with the demurree's as withdrawn, and all the facts proved, which the demurree's evidence tends to prove under the most favorable construction and all reasonable inferences therefrom;³⁷ and must give judgment against the demurrant, if the jury could legally have done so upon the evidence.³⁸ But the demurrer does not admit facts which the evidence does not tend to prove.³⁹

3240. *The relevancy of the evidence* to the issue is the only question which is raised by a demurrer to evidence, that is, the sole question of law; whether what is given in evidence is or is not sufficient to prove the point is a question of fact which must be admitted. Evidence is always relevant to the issue which, in any degree, it conduces to prove; but then it must be relevant to the whole issue, for if it be so to part only, it is clear it could not warrant a finding of the issue by the jury in favor of the party exhibiting the evidence. The party demurring must be cautious, therefore, that the evidence, if relevant at all, be not so to the whole issue.⁴⁰

3241. *The demurrer must be to the whole of the evidence;* because the whole of it may be sufficient to maintain the issue when a part would not, and therefore the defendant cannot demur to the plaintiff's evidence until he has gone through the whole.⁴¹

3242. *A demurrer may be had to any kind of evidence,* whether it is written or parol, direct or circumstantial. The manner of framing the demurrer, and of making the necessary admissions upon the record, is regulated by the nature of the evidence to which the demurrer applies.⁴²

³⁴ Coke, Litt. 72; Bacon, Abr. *Pleas*, N, 7. But see *Fowle v. Common Council*, 11 Wheat. 320. For a form of demurrer to evidence, see 4 Chitty, Gen. Pr. 16.

³⁵ The demurrer to evidence can be taken only by the party who takes the burden of the proof, or affirmative of the issue, upon him. A party holding the negative of the issue cannot demur to evidence, after introducing repellant testimony, and compel his adversary to join in the demurrer. *Hart v. Colloway*, 2 Bibb, Ky. 460.

³⁶ Coke, Litt. 72.

³⁷ *Horner v. Speed*, 2 Patt. & H. Va. 616; *Jones v. Ireland*, 4 Iowa, 63; *Stanchfield v. Palmer*, 4 Greene, Iowa, 23; *Tucker v. Bitting*, 32 Penn. St. 428.

³⁸ *Shaw v. White*, 28 Ala. N. s. 637; *Armstrong v. Armstrong*, 29 Ala. N. s. 538; *Bates v. Bates*, 33 Ala. N. s. 102. Thus a demurrer is bad if the jury could have awarded nominal damages. *Patterson v. Blakeney*, 33 Ala. N. s. 338.

³⁹ *Bradbury v. Reed*, 23 Tex. 258.

⁴⁰ *Gibson v. Hunter*, 2 H. Blackst. 205. *United States Bank v. Smith*, 11 Wheat. 172; *Gates v. Nobles*, 1 Root, Conn. 344; *Humphrey v. West*, 3 Rand. Va. 516.

⁴¹ *Proprietary v. Ralston*, 1 Dall. 18.

⁴² *Gibson v. Hunter*, 2 H. Blackst. 206, 209.

3243. When all the evidence in support of the affirmative of the issue is written, there can be no doubt it may be demurred to; as, where, on the general issue, the plaintiff exhibits a bond as evidence of the claim which is the subject of the suit, or a conveyance or record, as evidence of the title of the land demanded, for in such case there can be no variance in the statement of it.⁴³

3244. Formerly, it was supposed that no demurrer could be had to parol evidence, because no tenor can be predicated on it, and, therefore, there was a danger of variance in stating it upon the record. But in modern times, though it is said that a demurrer to evidence is considered an antiquated, unusual, and inconvenient practice,⁴⁴ it is not doubted that evidence of any kind, exhibited in support of the issue, may be demurred to under the restrictions prescribed in the five rules following; so that if these conditions are complied with by the party demurring, the opposite party must join in the demurrer, or waive the evidence.

When both parties voluntarily join in a demurrer to evidence, and the demurrer is properly framed, and with the necessary admissions stated upon record, the court must give judgment, although all the evidence exhibited in support of the issue may rest in parol.

When the fact itself is admitted on record, which it is the object of the evidence to prove; in such case the party exhibiting the evidence must join in the demurrer, or waive the evidence;⁴⁵ as if, in trover against a bailee, the only evidence exhibited of a conversion is to prove the mere negligence on the part of the defendant in keeping the goods; the defendant, by admitting upon record the fact of negligence in keeping, may demur, and oblige the plaintiff to waive the evidence or to join in the demurrer. This confession the defendant might safely make, because mere negligence never constitutes conversion in trover.

When parol evidence, exhibited in support of the issue, is certain and direct, that is, explicit, absolute, and without any qualification, the adverse party, by entering the evidence upon the record, together with an admission that it is true, may demur, and compel the party exhibiting it to join in the demurrer, or waive the evidence; because in this case the admission of the evidence is the admission of the fact affirmed by it.⁴⁶

When the evidence offered is not positive and determinate, the adverse party cannot demur to it without stating it upon the record as certain and determinate, and admitting it in that form to be true.⁴⁷

When the evidence is circumstantial, the party who demurs to it must distinctly admit upon the record every fact, and every conclusion, in favor of the opposite party, which the evidence tends to prove.⁴⁸

3245. When the party demurring to evidence of any kind does not make the admissions required in the particular case upon the record, and, nevertheless, the opposite party joins in the demurrer, there is nothing on which the

⁴³ Bacon, *Abr. Pleas*, N, 7; Coke, *Litt.* 72, a.

⁴⁴ *The State v. Loper*, 16 Me. 293.

⁴⁵ *Brandon v. Huntsville Bank*, 2 Ala. 320; *Alexander v. Fitzpatrick*, 13 *id.* 405.

⁴⁶ *Shields v. Arnold*, 1 Blackf. Ind. 109; *Burton v. Brashear*, 3 A. K. Marsh. Ky. 276. But see *Forbes v. Perrie*, 1 Harr. & J. Md. 109.

⁴⁷ *Gibson v. Hunter*, 2 H. Blackst. 207, 208.

⁴⁸ *Feay v. Decamp*, 15 Serg. & R. Penn. 227; *Pawling v. United States*, 4 Cranch, 219; *United States v. Williams, Ware*, Dist. Ct. 175; *Jacob v. United States*, 1 Brock. C. C. 520; *United States Bank v. Smith*, 11 Wheat. 320; *Jackson v. United States*, 5 Mas. C. C. 425; *Lowry v. Mountjoy*, 6 Call, Va. 65; *Thornton v. Bank of Washington*, 3 Pet. 40; *Vaughan v. Easton*, 4 Yeates, Penn. 54; *Copeland v. New England Ins. Co.*, 22 Pick. Mass. 135; *Clopton v. Morris*, 6 Leigh, Va. 278.

court can give a judgment on the demurrer; and accordingly, in such case the court must award a *venire de novo*, referring the facts to another jury for trial.⁴⁹

3246. On a demurrer to evidence, and joinder in demurrer, when both are properly framed, it is usual immediately to discharge the jury, as there is no question of fact to be tried by them; and if the plaintiff prevails on the demurrer, there may be a writ of inquiry of damages, which is to be executed afterward. Still, before they are dismissed the jury may be required to assess the damages provisionally;⁵⁰ and in such case, if the demurrer be determined in favor of the plaintiff, he will be entitled to judgment for the damages thus provisionally assessed.

In modern practice demurrers to evidence are rare, though they sometimes occur; the practice of taking a special verdict, the nature of which will be explained hereafter, is found more convenient.⁵¹

3247. In the course of a long trial, particularly when there are many points raised and numerous witnesses examined, it is difficult, even with the best trained and disciplined minds, so to arrange the evidence which has been delivered that it shall apply with fairness to the pleadings on both sides; to sift what is not applicable, and reject it; to determine what is collateral, and let it bear only a proper weight; to consider what is doubtful, and distinguish it from what is certain; what is worthy of credit from what is deserving of none; these, and many other points, must be considered by the jury. It is the duty of counsel on both sides so to arrange and explain all this that the jury can fully understand the evidence and the questions which on their oaths they are to decide; and the counsel should also state the questions of law which are involved in the case, submitting the law, however, to the direction of the court.

Counsel are sworn or affirmed to be true to the court and to the client, but they are not bound nor required by law to press the claims of a plaintiff or the defence of a defendant, *per fas et nefas*. They are the ministers of justice, and she can never require that while ministering at her altar they shall lend their powerful aid to promote iniquity.

To perform the obligations which counsel have undertaken they must cultivate their talents until by assiduity they produce a manly eloquence. To a certain extent eloquence is indispensable to the advocate to enable him to represent fully and fairly the case of his client. This eloquence ought to be simple, vehement, and pathetic, and entirely adapted for action and for the combat; it must not, therefore, be too much ornamented, too flowery, too brilliant, or too pompous, nor a mere parade to catch the approval of the bystanders.

He who undertakes the profession of an advocate ought to sustain and establish it by reason and all things calculated to adorn it, but mainly by a profound study of jurisprudence and a thorough understanding of literature. A happy genius, whose speech is embellished by the graces produced by the belles-lettres and an enlightened knowledge of the law, not only makes a just application of them, but on proper occasions touches the heart and elevates the understanding.

The shortest, and at the same time the most certain, means of attaining this power is to make a particular and constant study of the law, with a just discernment, which is to serve him as a rule and a guide.

⁴⁹ The facts must be found and admitted on the record, for the party demurring cannot withdraw a question of fact from the jury and submit it to the judge. *Jones v. Ireland*, 4 Iowa, 63.

⁵⁰ 1 Lilly, Abr. 441; *Fowler v. Maccomb*, 2 Root, Conn. 388; *Hampton v. Windham*, 2 Root, Conn. 199.

⁵¹ See beyond, 3264.

It is said, perhaps truly, that eloquence is a natural gift, but probably all men possess it, though not in equal degrees. Nature makes men eloquent when roused by great interests and vehement passions. Whenever we are greatly excited, we view things differently from other men. A man thus excited makes rapid comparisons, and employs similes, tropes, and metaphors; without observing it, he animates every thing, and conveys to those who listen to him a kind of enthusiasm. As this gift of eloquence is given to all, it only requires cultivation to make it bear profitable fruit. Much may be accomplished by this means; and a continued exercise, with a perfect knowledge of the case and of the law, will to a great extent supply any supposed natural deficiency.

Probity is the foundation of the advocate's eloquence; without this he will find himself always suspected, and, not having the confidence of the judges and jury, the best reasons he advances will be looked upon with distrust and fail to have the weight they deserve.

To his natural talents, his application and knowledge must be joined great purity of language, elegance of style, a richness of brilliant and flowery expressions, a beautiful and noble elevation of thought and sentiment, and a guarded vivacity of imagination. The advocate must possess the art to paint objects so as to render them sensible and palpable, as it were, and with the aid of figures, introduced with skill, to animate his speech, sustain it, and give it a degree of elevation. He must remember that without neglecting his exordium, which should be the object of his care and calculated to gain the favorable attention of his hearers, he should in his peroration, or the end of his speech, throw the whole force of his reasoning with dexterity and art, and end with some agreeable figure by which he takes leave of his audience, remembering, with Lord Bacon, that *melior est finis orationis quam principium*.⁵²

Premising that the advocate possesses those natural and acquired advantages which have been mentioned, and a well-earned character for honor and probity, still he must observe some rules which are indispensable, among which may be mentioned the following:

The first is to have perfect order and distinctness in all he says, and to commence by giving correct ideas of the affair in question; he should next explain all the circumstances, and afterward he must go directly to the point of law of the case.

The advocate should use skilfully and with energy the principal means which are calculated to influence his hearers without passing over entirely in silence others which, in his opinion, may have less weight, as it is difficult to tell what reasons may convince the judges, some being satisfied by one, and others by another argument or motive.

There should always be a just proportion in the quality and length of the speech to the subject. It is ridiculous to use all the elegance of language which ought to be employed in defending the life and honor of a prominent citizen in a case concerning only a trifling pecuniary matter; and it is no less absurd to make as long a speech where but a single question of fact or law is involved, as would be made when the case was extremely intricate and required much explanation.

The wise advocate ought to state the facts as they are, without any disguise whatever. A prudent lawyer will never attempt to make a speech to enlighten his auditors as to facts without having previously examined them, and knowing all the reasons for and against the cause of his client; he will then be able to give full force to those in his favor, and destroy those of his adversary, without however violating the truth or gratuitously wounding the reputation of the

⁵² De Augmentis Scientiarum, lib. 8, c. 2, part 10.

adverse party. The means he ought to employ are drawn from principles of law and from reason. When he cites a decision he ought to be careful to state it as it is; he ought not merely to show that such a decision has been made, but also the reason, and the principle upon which it has been so adjudged.

As the matters in the temple of justice ought always to be seriously discussed, and as they are always of importance to the parties, a wise advocate will abstain from all pleasantries and jests, too often insipid, which may excite a laugh, but frequently at the expense of their author.

It is a rule, which cannot be too rigidly observed, that a speech should not be filled with useless circumlocutions, for they are injurious, they draw the attention from the real points of the case, and weaken the argument, and even when the advocate has a bad cause, the introduction of extraneous circumstances will have a tendency to prejudice wise judges against him, as it is easily shown that they could not have been introduced for a legitimate purpose.

But a perfect arrangement of thoughts and words is not sufficient to make an eloquent discourse; there is a beauty in the position of the body and the gesture, and agreeableness in the modulations of the voice, which, joined to a clear, firm and distinct pronunciation, are required to make an eloquent speech. In fact, the eloquence of gesture, of the face, and the proper modulation of the voice, are not less necessary than the words uttered by the speaker, and not seldom make as much impression as the words themselves. It must, however, be remembered that, to have any effect, these must be natural and without affectation; for although an immovable orator, without grace, chills his auditors, yet he is not more defective than he who assumes a theatrical air, and by his misplaced gestures and his affected manners leaves upon the minds of his hearers nothing solid or convincing about his case, and only an unfavorable opinion as to himself. The first puts you to sleep; the last prevents you, by his speech, from thinking of what you came into court to hear.⁵³

3248. The counsel of the party who has the right to begin, which we sup-

⁵³ The foregoing rules are condensed in the following lines :

“Be brief, be pointed; let your matter stand
 Lucid in order, solid, and at hand;
 Spend not your words on trifles, but condense;
 Strike with the mass of thoughts, not drops of sense;
 Press to the close with vigor once begun,
 And leave, (how hard the task!) leave off when done;
 Who draws a labor'd length of reasoning out
 Puts straw in lines for winds to whirl about;
 Who draws a tedious tale of learning o'er,
 Counts but the sands on ocean's boundless shore;
 Victory in law is gain'd as battles fought,
 Not by the numbers, but the forces brought.
 What boots success in skirmish or in fray,
 If rout and ruin following, close the day?
 What worth a hundred posts maintain'd with skill,
 If these all held, the foe is victor still?
 He who would win his cause with power must frame
 Points of support, and look with steady aim;
 Attack the weak, defend the strong with art,
 Strike but few blows, but strike them to the heart;
 All scatter'd fires but end in smoke and noise
 The scorn of men, the idle play of boys.
 Keep, then, this first great precept ever near:
 Short be your speech, your matter strong and clear,
 Earnest your manner, warm and rich your style,
 Severe in taste, yet full of grace the while;
 So may you reach the loftiest heights of fame,
 And leave, when life is past, a deathless name.”

pose is the plaintiff, now argues his case to the jury. It is essential to the due administration of justice that the counsel should be privileged and protected in the energetic discharge of his professional duty; that, when commenting with just severity, when the case requires it, upon the conduct of the parties or of witnesses, he may use strong epithets, however derogatory of the opponent or his attorney, or other agents employed in bringing or defending the action; for if he were liable to an action for uttering such language, whether true or not, it would cramp, if not destroy, the energy of counsel, which is considered so essential to society.⁵⁴ Respectable and sensible counsel, however, will always refrain from the indulgence of any unjust severity, both on their own personal account and because browbeating a witness or other person, or abusing a party, will injuriously affect their case in the eyes of a respectable court and jury.

The counsel should, first, distinctly state the full extent of the plaintiff's claim and the circumstances under which it is made; second, he should show how it is supported by the evidence; third, the legal grounds and authorities in favor of the claim.

3249. The grounds on which it is founded, and the statement of the claim, must be made out so clearly that they shall make an impression on the minds of the jury; for unless these are distinctly shown, the jurors will have an imperfect or confused idea of the subject.

3250. Too much care cannot be taken to classify and arrange, in a natural order, all the facts which have been detailed in evidence, and to show how they bear on the case. In general, a few of the principal facts are sufficient to maintain the issue on the part of the plaintiff; these should be prominently set forth and pressed upon the attention of the jury; others, which are collateral, may be observed upon, but they must be considered only as collateral; and those which have inadvertently been introduced by the other side, which have no relation to the true merits of the case, should be exposed in their nakedness.

It will be the duty of counsel, too, at this stage of the cause, to examine the character of the witnesses, the manner in which they gave their evidence, and other circumstances which are calculated to gain them credence or to deprive their testimony of any confidence.

When the defendant has given any evidence, it is proper to examine his defence, and to show that it is not supported by the facts, or that it is not warranted by the pleadings, or that the evidence of the plaintiff has effectually rebutted all such defence, or any other facts which the evidence warrants.

3251. It is the duty of the counsel, also, to state all the points of law on which he intends to rely, and to refer to the authorities which support them. In some cases it is proper to read such authorities, and press them on the consideration of the court and jury.

3252. *The speech of the defendant's counsel* ought to show clearly what is the defence of the defendant, whether it acknowledges the cause of action of the plaintiff and shows some matter in discharge, or whether it denies that the plaintiff had any cause of action; the particulars of the defence should be distinctly stated, and all the circumstances attending it.

3253. Next should be an examination of the evidence on both sides, and

⁵⁴ In Louisiana it is enacted, "that no client or other person shall be held to be liable or responsible for any slanderous or libellous words uttered by his attorney at law, but attorneys at law shall be liable and responsible themselves for any slanderous or libellous words by them uttered, any law to the contrary notwithstanding." Act of March 25, 1828, section 23.

those facts which show that the plaintiff never had a cause of action, or, if he had one, that it had been discharged, should be pressed upon the consideration of the jury. The arguments of the counsel for the plaintiff, not well founded, should be attacked and exposed; and if any important fact has been omitted by him in commenting upon the evidence, it should be pointed out to the jury.

3254. The points of law made by the plaintiff should be examined, and if found futile or not applicable to the case, should be explained and authorities cited to show what is the law of the case.

3255. In strictness, *the reply of the plaintiff's counsel* must be confined to such new matters and arguments as have been advanced by the counsel for the defendant. He cannot, therefore, again go into an examination of the whole case and travel over the same ground which he formerly occupied. The principal business of the reply is to refute such unjust arguments as may have been pressed by the opposite counsel, and to show, when the truth will justify such course, that however plausible such arguments may be, they are not founded in law nor in fact.

3256. After the counsel on both sides have finished their addresses to the jury, the judge proceeds to *sum up*, as it is called, or *charge the jury*.

Before this is done, however, sometimes the counsel on both sides, or on one side only, present to the judge a statement of the points on which they request him to charge the jury. These points are brief statements of what the counsel conceive is the law of the case. In the course of his charge the judge gives an answer to the several questions to which the points give rise.

In summing up, as in every other part of his conduct, impartiality is the first duty of a judge. He must not only be impartial, but he must pay a blind obedience to the law, whether it be good or bad. He is bound to declare what the law is, and not to make it; he is not an arbitrator, but an interpreter of the law.

When we consider that the jury in general are unlearned in the law, unaccustomed to examine cases with all their intricacies—that they may have been perplexed as well as enlightened by the speeches of the counsel—we will perceive that the accuracy of the summing up of the judge is of the utmost importance. To enable the jury to come to a just conclusion it is incumbent on the judge correctly to state the law of the case, as well as the evidence, and the bearing of the latter. He may also direct the jury to find a verdict in a particular way, if they believe the evidence adduced by one of the parties or the testimony on a particular point.

The learned judge in general concisely states the precise issue between the parties. He explains the substance of the plaintiff's claims and the grounds of defence. He then, to a certain extent, details the evidence which has been given in the cause, sometimes reading certain parts from his notes. It is usual for him to consider the evidence of the plaintiff in the first place, and whether he has given such proof of his claim as may warrant the jury to find a verdict in his favor, if the defendant had given no evidence; next, he examines the evidence of the defendant, and points out where it affects the evidence of the plaintiff. In case the testimony given by the plaintiff can be reconciled with the apparent contradictory evidence of the defendant, he shows how that may be done; but when this is impossible, he leaves it to the jury to decide which is entitled to credit. In the course of this examination he comments occasionally on the nature of the evidence and the circumstances which attach a credit to it, or which render it doubtful or incredible.

When any question of law happens to be mixed up with a question of fact, he states the rule of law according to which the jury are to decide, and informs

them that as to the law they are bound to take it from the court; as to the facts, they are the sole judges, and must decide them upon the credibility of the evidence and witnesses; at the same time he may observe upon the manner and conduct of each so as to assist the jury to come to a correct conclusion. A just judge will state what the law is in clear, distinct, and unmistakable terms, without any attempt to qualify his opinion in any way. The jury are to be guided by his decision as to the law, and they and the parties have a right to have it clearly explained. He will leave the facts to the consideration of the jury, without any effort to take them from that body, who are alone lawfully authorized to pass upon them.

In case points of law have been submitted to him by the counsel on either side, he will decide them, and give clear and distinct answers to each without any evasion, and direct the jury what is the law as to the points submitted to him.

He will also direct the jury as to the form of the verdict which they ought to find.

3257. We have seen that exceptions have been taken in the course of the trial whenever a cause for taking them arose; so an *exception* must be taken to the charge of the court as soon as it has been delivered. This is to be done in a respectful manner; for it is of the utmost importance to the parties, the counsel, and all others concerned to support the dignity of the judge. If by any inadvertence the learned judge has omitted to state any material explanation of the law which it was his duty to explain, or neglected to answer any or all of the points submitted to him, these should be suggested; or if he has misstated the evidence to the jury, an opportunity to set that matter right ought to be given to him by calling his attention to it.

When an exception is taken to the charge of the court, the judge should state in the bill of exceptions the words used, without any attempt to qualify them in any way whatever. What he said to the jury has had its effect, and if any qualification is given to it so that the court above have not the exact expression used, he may do great injustice to the party against whom a verdict has been found. A just, a noble, and impartial mind will disdain to carry a point at the expense of justice.

3258. After the judge has delivered his charge, the jury are required to *consider their verdict*. For this purpose they have a right to withdraw from the bar or jury-box, and retire in charge of an officer to a private room, there to deliberate on their verdict. They are not allowed to take with them any documents, without the leave of the court, for it is evident that if the documents should be all on one side, as, where depositions are taken to support the plaintiff's claim, and none upon the other, or his testimony has all been given *viva voce*, in open court, the parties would not stand upon equal ground.⁵⁵

If, after having retired from the court, the jury cannot agree upon their verdict, and the court or judge is fully satisfied that they cannot agree, after having made many efforts to do so, the judge may in his discretion discharge them from the further consideration of the case. In England this has the effect of putting the parties out of court without any judgment, and of course each has to bear his own costs, and the plaintiff is allowed to bring a new suit for the same cause of action. If, in the new action, he should recover, he will not be entitled to the costs of the first.⁵⁶ In Indiana, when a jury in a civil cause was impanelled, heard a part of the evidence, and the jurors dispersed,

⁵⁵ See *Wright v. Rogers*, 2 Penn. N. J. 547.

⁵⁶ *Vallance v. Evans*, 3 Tyrwh. Exch. 865; *Sealy v. Powis*, 3 Dowl. 372; 1 Am. Lead. Cas. 118; *Everett v. Youells*, 3 Barnew. & Ad. 349; *Bonsor v. Clement*, 6 Carr. & P. 230.

by consent, and next day one of the jurors failed to appear, whereupon the jury was dismissed, and a new jury impanelled, the proceedings were held not to be erroneous.⁵⁷

The jury may also be dismissed by withdrawing a juror, that is, requesting one of the jurors to leave the jury-box, by which means the proceedings in the suit are at an end, and each party must pay his own costs. This is usually done at the suggestion of the judge when there are reasons why the case should not proceed further. But the plaintiff may bring a new suit for the same cause of action.

3259. It may be remembered that the jurors were sworn "to try the issue joined between the parties, and a true verdict give according to the evidence." The issue is the question or matter in controversy between the parties, as appears upon the pleadings on record; and the term evidence means the proofs adduced by the parties before the jury in open court; consequently no verdict can be founded upon any other knowledge, and still less upon any hearsay information acquired by a juror out of court. If a juror has any knowledge of the facts, he ought to be examined like any other witness, in order to give the party against whom his knowledge would operate an opportunity to contradict or explain what operates on the juror's mind.

The verdict should be in positive terms, one way or the other, and not in any doubtful mode of expression; but when it is a special verdict, it may be in the alternative.

The law requires that the verdict shall be unanimous; the verdict of any number less than the whole twelve cannot be received, except by consent.⁵⁸

When the jury have agreed upon their verdict, they come into court, and after being placed in the jury-box, their names are called by the clerk of the court to ascertain whether they are all present. The clerk then asks them, "Gentlemen of the jury, are you agreed upon your verdict?" Upon their assenting, he asks, "How say you, do you find for the plaintiff or the defendant?" The foreman of the jury then answers either "We find for the plaintiff," if in an action of debt or assumpsit, so many dollars, debts or damages, and costs; or if for the defendant, "We find for the defendant." The clerk then makes an entry of the finding, and addressing the jury, says, "Gentlemen of the jury, hearken unto your verdict, as the court have recorded it, you say you find," and then repeats their finding, to which they all assent.

But after the jury have come in, at any time before the verdict has been delivered and recorded, either party has a right to ask that the jury shall be polled; that is, that each juror shall be asked separately what is his verdict.⁵⁹ If, upon being so polled, one should dissent from his fellows, the verdict cannot be received, because the jurors are not unanimous. In such case, or indeed in any other, when the jury are in doubt, they may ask additional instructions from the court as to the law, or they may recall any witness about whose testimony there is some disagreement among the jurors.⁶⁰ They retire again, and further deliberate upon their verdict, and the same form of receiving it is pursued which was adopted in the first instance.

3260. A *verdict* is the unanimous decision made by a jury and reported to the court on the matters lawfully submitted to the jurors in the course of the trial of a cause.

⁵⁷ *Harris v. Doe*, 4 Blackf. Ind. 369.

⁵⁸ *Campbell v. Wooldredge*, Ga. Dec. part 2, p. 132.

⁵⁹ *Johnson v. Howe*, 7 Ill. 342; *Rigg v. Cook*, 9 Ill. 336. It is held that polling the jury is in the discretion of the court. *Beale v. Hall*, 22 Ga. 431; *Blum v. Pate*, 20 Cal. 69.

⁶⁰ *Blackley v. Sheldon*, 7 Johns. N. Y. 32.

In England at common law they have four kinds of verdicts in civil cases: privy verdicts, public verdicts, general verdicts, and special verdicts.

3261. A *privy verdict* is one delivered privily to a judge out of court. A verdict of this kind is delivered to the judge after the jury have agreed for the convenience of the jury, who, after having given it, separate. This verdict is of no force whatever until it is afterward delivered in open court. From its liability to abuse, this practice, it is believed, has seldom if ever obtained in the United States.⁶¹ To relieve the jurors after they have agreed it is not unusual for the counsel to agree that the jury shall seal their verdict and then separate. The sealing of a verdict consists in putting the verdict in writing, and putting it in an envelop, which is sealed. When the court is again in session, the jury come in and give their verdict in all respects as if it had not been sealed, and a juror may dissent from it if since the sealing he has honestly changed his mind.⁶²

3262. A *public verdict* is one delivered in open court; this verdict when received has its full effect, and, unless set aside, is conclusive on the facts, and when a final judgment is rendered upon it bars all future controversies in personal action.

3263. A *general verdict* is one by which the jury pronounce at the same time in the terms of the issue on the fact and the law, either in favor of the plaintiff or defendant.⁶³ The jury may find such a verdict whenever they deem it proper to do so, although the judge may direct them to find specially as to a particular fact on which a legal question may be raised.⁶⁴ The verdict is general when it finds the facts and the law, as, for instance, that a certain sale took place; it is special when it finds certain facts, leaving it to the court to decide whether those facts constitute a sale.⁶⁵

When the verdict is general and some of the counts in the plaintiff's declaration are bad, no judgment can be entered in favor of the plaintiff;⁶⁶ and if a judgment is entered by the court below on the counts which are supposed to be good, the supreme court will reverse it on error.⁶⁷ But the rule that when one of several counts is bad no judgment can be entered on a general verdict does not apply to the case of a general verdict in favor of the defendant when some of his pleas are bad.⁶⁸

3264. A *special verdict* is one by which the facts of the case are put on record and the law is submitted to the judges. The jury have an option, instead of finding the affirmative or negative of the issue, as in a general verdict, to find all the facts disclosed by the evidence before them, and, after setting them forth, to conclude to the following effect: "that they are ignorant, in point of law, on

⁶¹ Goodwin v. Appleton, 22 Me. 453; Dornick v. Richenback, 10 Serg. & R. Penn. 84. See McMurray v. O'Neil, 1 Call. Va. 246; Shamokin Coal Co. v. Milman, 3 Penn. St. 79. A verdict will be set aside if received by the judge out of court, and the jury is then discharged. Tuhe v. Eber, 19 Ind. 126; Kennedy v. Raught, 6 Minn. 235. But the court may adjourn to the chamber of a sick juror to receive the verdict. Litchfield Bank v. Church, 29 Conn. 137.

⁶² Sutliff v. Gilbert, 8 Ohio, 405; Riggs v. Cook, 9 Ill. 336; Beale v. Cunningham, 42 Me. 362; Blum v. Pate, 20 Cal. 69. A sealed verdict becomes part of the record only when delivered in open court. Rees v. Stille, 38 Penn. St. 138.

⁶³ Coke, Litt. 228; Fitzer v. McCannan, 14 Wisc. 63.

⁶⁴ Davizes v. Clark, 3 Ad. & E. 506.

⁶⁵ Chidoteau's heirs v. Dominiguez, 7 Mart. La. 521.

⁶⁶ Wilson v. Gray, 8 Watts, Penn. 37. But judgment may be entered on the good count if both counts relate to the same cause of action. Aldrich v. Lyman, 6 R. I. 98. And it has been held that a general verdict will stand when part of the counts are good. Peoria Ins. Co. v. Whitehill, 25 Ill. 466; Indianapolis R. R. v. Taffe, 11 Ind. 458; State v. Pace, 9 Rich. So. C. 355.

⁶⁷ Harker v. Orr, 8 Watts, Penn. 245.

⁶⁸ Wilson v. Gray, 8 Watts, Penn. 37.

which side they ought upon those facts to find the issue; that if upon the whole matter the court shall be of opinion that the issue is proved for the plaintiff, they find for the plaintiff accordingly and assess the damages at dollars; but if the court are of an opposite opinion, then they find for the defendant." This form of finding is called a special verdict.⁶⁹

A special verdict must find the facts, and not merely the evidence of facts; it is upon the facts the court must pass their judgment what the law is, and they are not required to draw any inference.⁷⁰ If it does not find the material facts in detail, it is deficient;⁷¹ and if defectively stated, it will not be aided by facts appearing elsewhere upon the record.⁷²

3265. In practice the jury have nothing to do with the formal preparation of the special verdict; when it is agreed that a verdict of that kind shall be given, the jury merely declare their opinion as to any fact remaining in doubt, and then the verdict is adjusted without their further interference. It is settled under the direction of the judge by the counsel and attorneys on either side, according to the state of the facts as found by the jury with respect to all particulars on which they have delivered an opinion, and with respect to other particulars, according to the state of the facts which it is agreed that they ought to find upon the evidence before them.⁷³

The special verdict, when its form is thus settled, is, together with the whole proceedings on the trial, then entered on record, and the question of law arising on the facts found is argued before the court in banc, and decided by that court as in case of a demurrer. If either party be dissatisfied with their decision, he may afterward resort to a court of errors.⁷⁴

3266. There is another mode of finding a special verdict; this is when the jury find a verdict generally for the plaintiff, but subject, nevertheless, to the opinion of the judges or the court above on a special case stated by the counsel on both sides with regard to a matter of law.⁷⁵

3267. A verdict must conform to the issue, and be certain.

3268. When there is but one issue, *the verdict must conform to it*, for that is the only thing to be tried and ascertained; and when it does not conform to it, no judgment can be rendered upon it, because the matter to be tried has not been found one way or the other;⁷⁶ and a verdict is equally bad if it find only a part of the issue.⁷⁷ The verdict must also negative all the pleas in the case, when found for the plaintiff.⁷⁸

3269. When there are several issues, the verdict must conform to them all;⁷⁹ but though it is a general rule that the jury must answer all the issues, yet, when it appears that all the questions of the case are settled by the verdict, that will be sufficient, and the verdict will not be set aside, unless the omission

⁶⁹ The jury may, unless otherwise directed, find either a general or special verdict, but upon the request of either party the court must direct a special verdict. *Michigan R. R. v. Bivens*, 13 Ind. 263; *Ruffing v. Tilton*, 12 Ind. 259.

⁷⁰ *Lawrence v. Beaubion*, 2 Bail. So. C. 623; *Brown v. Ralston*, 4 Rand. Va. 504; *Bertrand v. Morrison*, 1 Ill. 175; *Henderson v. Allen*, 1 Hen. & M. Va. 235; *Suydam v. Williamson*, 20 How. 427.

⁷¹ *Hann v. Field*, Litt. Sel. Cas. Ky. 376; *Leach v. Church*, 10 Ohio, St. 148.

⁷² *Lee v. Campbell*, 13 Ala. 198.

⁷³ And having been thus settled cannot be afterward changed. *Dana v. Farrington*, 4 Minn. 433.

⁷⁴ *Stephen*, Pl. 113; 3 *Sharswood*, Blackst. Comm. 377; *Bacon*, Abr. *Verdict*, D, E; 1 *Archbold*, Pract. 189.

⁷⁵ 3 *Sharswood*, Blackst. Comm. 378; *City Bank v. McChesney*, 20 N. Y. 240.

⁷⁶ *Moody v. Keener*, 16 Ala. 218; *Parker v. Moore*, 29 Mo. 218.

⁷⁷ *Patterson v. United States*, 2 Wheat. 221; *Barnett v. Watson*, 1 Wash. C. C. 272.

⁷⁸ *Kilpatrick v. S. W. Rail Road Bank*, 6 Humphr. Tenn. 45.

⁷⁹ *Meighen v. Strong*, 6 Minn. 177; *Ronge v. Dawson*, 9 Wisc. 246.

to find the other issues prejudice the party complaining; ⁸⁰ and where there is a finding on one issue in favor of the plaintiff, and no finding upon the others, the plaintiff may waive the other issues, or consent that a verdict as to them be entered against him. ⁸¹

3270. Another requisite of a verdict is *certainty*, for it is obvious that if there be no certainty in the verdict, the court cannot give judgment: ⁸² thus, upon a libel for a breach of the revenue laws, the verdict found for the libellants, "the vessel, tackle, apparel, and cargo, except that part of the cargo on which the duties have been paid," was held to be too uncertain to give a judgment upon it. ⁸³ And in an action for freight and demurrage a verdict in these words, "we find for the plaintiff, and are of the opinion that the plaintiff has already received, out of property of the defendant, payment in full for the amount of freight to which he is entitled," was set aside for uncertainty. ⁸⁴ But a verdict will not be set aside for uncertainty as to matters not essential to the gist of the action if it find the material matter in issue with sufficient certainty; ⁸⁵ nor is mere surplusage sufficient to vitiate a verdict. ⁸⁶

If it can be ascertained from the verdict given by the jury what their finding is, the court will put it in form; ⁸⁷ as, where they found against some of the defendants only. ⁸⁸ When the amount is not in issue, a general verdict for the plaintiff not specifying the amount is good. ⁸⁹ So a verdict for the plaintiff for "the full amount claimed" is good; ⁹⁰ or for "the amount of the note and interest." ⁹¹

3271. Until the verdict has been formally recorded and the jury have separated, they may *amend their verdict*; as, where the jury, through a misconception of the effect of legal terms, returned a verdict the very reverse of what they intended, the papers were again delivered to them by direction of the presiding judge, before they had separated and left their seats, and the judge explained to them the meaning of those terms, and they corrected their verdict, it was holden that this proceeding was correct. ⁹² But after the jury have been discharged and separated, they cannot be recalled to alter or amend their verdict. ⁹³

The proceedings on trial by jury at *nisi prius* or at bar terminate with the verdict.

⁸⁰ *White v. Bailey*, 4 Conn. 272. A verdict is good where the finding on some of the issues necessarily includes a finding on the others. *White v. Bailey*, 10 Mich. 155; *O'Brien v. Hilburn*, 22 Tex. 616.

⁸¹ *Sutton v. Dana*, 1 Metc. Mass. 383.

⁸² *Stearn v. Barrett*, 1 Mas. C. C. 153; *Cheswell v. Chapman*, 42 N. H. 47; *Day v. Webb*, 28 Conn. 140.

⁸³ *Richards v. Tabb*, 4 Call, Va. 522.

⁸⁴ *Diehl v. Peters*, 1 Serg. & R. Penn. 367.

⁸⁵ *Prejepsco Proprietors v. Nichols*, 10 Me. 256.

⁸⁶ *Patterson v. United States*, 2 Wheat. 221; *Bacon v. Callender*, 6 Mass. 303; *Duane v. Simmons*, 4 Yeates, Penn. 441; *United States v. Stereoscopic Slides*, 1 Sprague, Dist. Ct. 467.

⁸⁷ *Fromme v. Jones*, 13 Iowa, 474; *Chace v. Fall River*, 2 All. Mass. 533; *Jones v. Julian*, 12 Ind. 274.

⁸⁸ *Chase v. Deming*, 42 N. H. 274.

⁸⁹ *Warren v. Smith*, 24 Tex. 484.

⁹⁰ *Newton v. Ker*, 14 La. Ann. 704. Such a verdict is insufficient where the demand is unliquidated. *Harrell v. Babb*, 19 Tex. 148.

⁹¹ *McGregor v. Armill*, 2 Iowa, 30; *Mitchell v. Addison*, 20 Ga. 50.

⁹² *Ward v. Bailey*, 23 Me. 316. See *The State v. Underwood*, 2 Ala. N. S. 744; *Beates v. Retallick*, 23 Penn. St. 288. The court may amend the verdict in matter of form. *Hampton v. Waterston*, 14 La. Ann. 239; *Corbett v. Gilbert*, 24 Ga. 454; *Russell v. Wheeler*, 1 Hempst. C. C. 3; *Truebody v. Jacobson*, 2 Cal. 269. And a verdict for the plaintiff, giving no damages, was amended by adding nominal damages. *Coit v. Waples*, 1 Minn. 134.

⁹³ *Sargeant v. The State*, 11 Ohio, 472; *Walters v. Junkins*, 16 Serg. & R. Penn. 414.

CHAPTER XV.

PROCEEDINGS AFTER VERDICT.

- 3273-3293. New trial.
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3272. After the trial the unsuccessful party may move the court to grant a new trial, or to arrest the judgment, or to give judgment *non obstante veredicto*, or to award a repleader, or to award a *venire facias de novo*.

3273. A *new trial* is a re-examination of an issue in fact before a court and jury, which had been tried at least once before the same court and a jury; or it is "a reinvestigation of the facts and legal rights of the parties upon disputed facts," and either upon the same, or different, or additional evidence before a new jury, and probably, but not necessarily, before a different judge.¹ The origin

¹ 4 Chitty, Gen. Pr. 30.

and practice of granting new trials is concealed in the night of time; formerly they could be obtained only with the greatest difficulties, for it is a good principle of law that the decision of a jury upon an issue in fact is in general irreversible and conclusive.² But by the modern practice they are more liberally granted in furtherance of justice. Still, it has been considered that the "important right of trial by jury requires that new trials should never be granted without solid and substantial reasons; otherwise, the province of jurymen might be often transferred to the judges, and they, instead of the jury, would become the real triers of the facts. A reasonable doubt merely, that justice has not been done, especially in cases where the value and importance of the cause is not great, appears to be too slender for them."³

On the conclusion of a trial it sometimes happens that one of the parties is dissatisfied with the opinion expressed in the course of the trial by the judge who tried the cause, and which produced the result against him, whether it related to the effect or the admissibility of the evidence; or he may think the evidence against him insufficient in law when no adverse opinion has been expressed by the judge, and yet he may not have obtained a special verdict, or demurred to the evidence, or tendered a bill of exceptions. He is in such case at liberty to move the court in banc, or a single judge, in some cases, during the time prescribed by the rules of court, to grant a new trial on the ground of the judge having misdirected the jury, or having admitted or refused evidence contrary to law. He may apply for the same remedy in other cases when justice does not appear to have been done at the first trial; as, where the verdict, though not contrary to evidence or on insufficient ground in point of law, is manifestly wrong in point of direction, as contrary to the weight of evidence, and on that ground disapproved of by the judge who tried the cause; or the new trial may be moved for where new evidence of a material fact has been discovered since the trial which the party did not know, and of course could not produce before the jury; or when the losing party has been taken by surprise, or in cases where the damages given are excessive, or the jury have misconducted themselves, or the parties attempted to bias the jury unlawfully; in these, and all other cases where it appears that injustice has been done, or might have happened, a new trial will be granted. These reasons may be classed as follows: matters which arose before or in the course of the trial, the acts of the prevailing party, the misconduct of the jury, cases where the verdict is improper because it is either against law or against evidence, the discovery of new evidence, because the losing party has been taken by surprise, because the damages are excessive, because the damages are inadequate, because the witness has since been convicted of perjury.

3274. *The matters arising before or in the course of the trial for which a new trial may be granted are want of notice, the irregular impanelling of the jury, the admission of illegal or the rejection of legal evidence, and the misdirection of the judge.*

3275. The most obvious principles of justice require that a man should have a right to defend himself when attacked; that he should be allowed to explain his conduct when it is alleged he has violated the law either by not fulfilling his legal engagements or because he has committed a wrong, tort, or injury to another. Justice, therefore, requires that the defendant should have a sufficient

² Formerly, the law provided one means of appeal from the verdict of a jury in certain cases, by writ of attain; upon this there was a kind of new trial, by twenty-four jurors. This was applicable only in cases where the jury wilfully and knowingly gave a false verdict. This kind of proceeding is abolished even in England, and perhaps was never adopted in the United States.

³ Per Shippen, P. J. in *Cowperthwaite v. Jones*, 2 Dall. 56.

notice of the time and place of trial, and the want of it, unless it has been waived by an appearance and making defence, will in general be sufficient to entitle the defendant to a new trial.⁴ But the insufficiency of the notice must have been calculated reasonably to mislead the defendant.

3276. *The selection of a jury* should be fairly made. If there should be any fraud by any of the officers to whom this service has been confided by law; as, if a clerk in calling the names of the jurors, instead of calling the name of the person drawn should substitute that of a friend of one of the parties in the cause; or, if no unfairness of this kind should occur, a person not qualified, as an infant or an alien, should be put on the jury;⁵ or if a person not regularly summoned and returned should personate another and serve on the jury;⁶ or if a juror who was on a first trial is put on a second trial, and the fact is not known to the party until the second verdict is rendered;⁷ all these are sufficient for granting a new trial.

But a person exempted from service on a jury is not incompetent, and a new trial will not be granted because he serves.⁸

Disqualifications of jurors, whether arising from relationship, bias, or improper influence exerted before trial, must in general be put forward before the jury is impanelled, or they will be waived. If the objection is not made till after trial, some excuse must be shown for the delay.⁹

3277. When, in the hurry of a jury trial, the judge through inadvertence or mistake *admits improper evidence, or rejects that which is legal*, the court will, on a motion for a new trial, grant it, and set aside a verdict which has been obtained through this mistake, and the complaining party will not be sent to a court of error for redress.

The improper admission or exclusion of evidence is as we have seen one of the grounds for a bill of exceptions;¹⁰ and the party may in some cases elect between these two remedies. It may be said in general that any improper evidence which is sufficient for a new trial is ground for exceptions, but the converse is not true. While exceptions lie to the admission of any improper material evidence to the prejudice of the party which is properly objected to, a motion for a new trial is addressed to the discretion of the court, and will not be granted, even though the evidence was objected to at the time, if the court can see plainly from the whole evidence, such as preponderance in favor of the verdict, that a contrary verdict would have been set aside as against evidence.¹¹ But if the evidence is objected to at the time and is so material as to be likely to affect the verdict, the court will grant a new trial instead of forcing the party to carry up the case on exceptions.¹²

⁴ Buller, Nisi P. 327; Attorney General v. Stevens, 3 Price, Exch. 72; 3 Dougl. 402; 1 Wend. N. Y. 22. See Jamieson v. Pomeroy, 9 Penn. St. 230.

⁵ Stainton v. Beadle, 4 Term, 473; Lane v. Goodwin, 47 Me. 593.

⁶ Norman v. Beaumont, Wiles, 484; Barnes, 453. In Pennsylvania, by going on to trial the effect will be cured in both criminal and civil cases. But in Massachusetts a new trial will not be granted, because one of the jurors had not been drawn and returned according to law, if the objection be not made till after verdict, nor in a capital case, because the juror belonged to another county. Armstead v. Hadley, 1 Pick. Mass. 38. A new trial will not be granted in Kentucky because a juror was an alien, though it was unknown to the party and his counsel till after verdict. Presbury v. State, 9 Dan. Ky. 203. Nor in Tennessee, on the ground of the incompetency of the juror. Booby v. State, 4 Yerg. Tenn. 111. And if known at the time of trial, it is no valid objection in Missouri. Lisle v. State, 6 Mo. 426.

⁷ Herndon v. Bradshaw, 4 Bibb, Ky. 45; Craig v. Elliot, 4 Bibb, Ky. 272.

⁸ State v. Forshner, 43 N. H. 89.

⁹ Cannon v. Bullock, 26 Ga. 431; Boetge v. Landa, 22 Tex. 105; Lafayette Co. v. New Albany R. R., 13 Ind. 90.

¹⁰ Before, 3232.
¹¹ Thorndike v. Boston, 1 Metc. Mass. 242; Robbins v. Lincoln, 12 Wisc. 1.

¹² Eddy v. Baldwin, 32 Mo. 369; Lynd v. Pickett, 7 Minn. 184.

But to support the motion the objections must be made at the trial, and a new trial will not be granted for the admission of improper evidence, if the party allowed it without objection.¹³

3278. A new trial will be granted for *any misdirection of the judge*, when such misdirection has caused or is likely to cause injustice and an injury to the party against whom the verdict has been rendered; for when no injustice has been done, and a new trial would be likely to produce the same result, it will not be granted. Such misdirection relates either to matter of law or to matter of fact.

3279. When the judge at the trial misdirects the jury on matter of law material to the issue, whatever may be the nature of the case, the verdict will be set aside, and a new trial granted, if such misdirection or instruction may have influenced their verdict.¹⁴ But an erroneous opinion upon an abstract question of law expressed by the judge in charging the jury, which is not involved in the decision of the case, is not a ground for reversing the judgment or for granting a new trial;¹⁵ nor will a new trial be granted for misdirection where entire justice has been done.¹⁶

A new trial will be granted if it appear that the charge of the presiding judge took from the jury a matter of fact in controversy between the parties;¹⁷ or where the opening and closing of the argument before the jury, which belongs to the defendant and was claimed by him, was assigned to the plaintiff.¹⁸

If the judge refuse or neglect to charge the jury upon a material point when requested by the counsel against whom a verdict has been rendered, if the verdict was so rendered for want of such instruction, a new trial will be granted;¹⁹ but a new trial will not be granted where the judge simply neglected to charge the jury upon a point when his attention was not drawn to it.²⁰

When the issue consists of a mixed question of law and fact and there is a conceded state of facts, the rest is a question of law for the court, and a misdirection in respect to such an issue will avoid the verdict.²¹

3280. Misdirection of facts will in some cases be sufficient to vitiate the proceedings. If, for example, the judge should undertake to dictate to the jury.²² When the judge delivers his opinion to the jury on a matter of fact, it should be delivered as mere opinion which they are at liberty to disregard, and not as instructions binding on them.²³

It may be observed as a general rule that a new trial will not be granted on account of a misdirection either as to law or fact, when injustice has not been done and the verdict has not prejudiced the complaining party.²⁴

¹³ *Hinton v. State*, 24 Tex. 454; *Dozier v. Jernan*, 30 Mo. 216; *United States v. Flowery*, 1 Sprague, Dist. Ct. 109.

¹⁴ *Lane v. Crombie*, 12 Pick. Mass. 177; *Hoyt v. Dimon*, 5 Day, Conn. 479; *Doe v. Paine*, 4 Hawks, No. C. 64; *West v. Anderson*, 9 Conn. 107.

¹⁵ *Reed v. McGrew*, 5 Ohio, 375; *Jordan v. James*, 5 Ohio, 88; *Sherman v. Champlain Co.*, 31 Vt. 162; *Moffitt v. Cressler*, 8 Iowa, 122.

¹⁶ *Johnson v. Blackman*, 11 Conn. 342; *Simpson v. Norton*, 45 Me. 281.

¹⁷ *United States v. Tillotson*, 12 Wheat. 180.

¹⁸ *Davis v. Mason*, 4 Pick. Mass. 156.

¹⁹ *Den v. Sinnickson*, 4 Halst. N. J. 149; *Coleman v. Roberts*, 1 Mo. 97. But the court may refuse to instruct upon a point upon which no evidence was adduced. *Freeman v. Edmunds*, 3 Hawks, No. C. 5.

²⁰ *Alsop v. Swathel*, 7 Conn. 500; *Goodrich v. Eastern R. R.*, 38 N. H. 390.

²¹ *Diover v. Gunton*, 2 Wend. N. Y. 596.

²² See *Hine v. Robbins*, 8 Conn. 342.

²³ *Trotter v. Saunder*, 7 J. J. Marsh. Ky. 321; *Dallam v. Handley*, 2 A. K. Marsh. Ky. 418; 12 Johns. N. Y. 513.

²⁴ *Mansfield v. Wheeler*, 23 Wend. N. Y. 79; *Price v. Evans*, 4 B. Monr. Ky. 386; *Selleck v. Turnpike Co.*, 13 Conn. 453.

If the judge gives any instructions to the jury out of court without the presence of the parties, or visits the jury in their room, the verdict will be set aside.²⁵

3281. *If the prevailing party, his agent, or attorney has been guilty of any act of impropriety* by which the jury have been induced to give a verdict against the other party, this will be sufficient ground for granting a new trial, and in many cases evils arise and injury is sustained by the losing party when it might be very difficult to prove the injury; the courts, therefore, look with jealous eyes over such acts. Still, it is not easy to say what acts will be sufficient to authorize the court to grant a new trial. The following of many examples will suffice to show the nature of these wrongful acts; as, when a paper not before submitted to the court is surreptitiously handed to the jury, being material on the point in issue,²⁶ unless it appears that they have not looked into it.²⁷ So if he have labored the jury, or used improper influence with them, or procured another to do so to induce them to give a verdict in his favor, a new trial will be granted.²⁸ And even when handbills reflecting upon the plaintiff's character were distributed in court and shown to the jury on the day of trial, a verdict against him was set aside upon application and a new trial granted, although the defendant by his affidavit denied all knowledge of the handbills.²⁹ But if the other party is aware of such attempts, it is his duty to apply for their correction, and his neglect so to do when in his power will deprive him of the equity he had to claim a new trial; he must be supposed to have acquiesced in them. When indirect measures have been resorted to in order to prejudice the jury, or tricks practiced,³⁰ or unlawful attempts to suppress or stifle evidence, or thwart the proceedings, or to obtain an unconscionable advantage, or to mislead the court and jury, they will be defeated by granting a new trial.³¹

3282. *The jury* are sworn well and truly to try the issue between the parties, and a true verdict give according to the evidence. Any *misconduct* in violation of their oaths is a sufficient ground for granting a new trial; as, where they found a verdict by a lottery;³² but where each of the jurors set down a sum in a case of tort and the whole were added up together, and to ascertain the average the product was divided by twelve, for which amount the jury found their verdict, it was held there was nothing illegal in this mode of arriving at a verdict, because in torts and other cases where there is no ascertained demand it can seldom happen that jurymen will at once agree upon a precise sum to be given in damages; there will necessarily arise a variety of opinions, and mutual concessions must be expected; a middle sum may in many cases be a good rule; and though it is possible this mode may sometimes be abused by a designing jurymen fixing upon an extravagantly high or low sum, yet, unless such abuse appears, the fraudulent design will not be presumed.³³ It does not appear

²⁵ *Hoberg v. State*, 3 Minn. 262.

²⁶ *Coke*, Litt. 227, b. The mere fact that an improper paper was sent to the jury without the knowledge of the adverse party is not ground for new trial. *Maynard v. Fellows*, 43 N. H. 255; *Shields v. Guffey*, 9 Iowa, 322.

²⁷ *Hakley v. Hastie*, 3 Johns. N. Y. 252.

²⁸ *Knight v. Freeport*, 13 Mass. 218; *Blaine's Lessee v. Chambers*, 1 Serg. & R. Penn. 169.

²⁹ *Coster v. Merest*, 3 Brod. & B. 272.

³⁰ 11 Mod. 141.

³¹ *Graham*, New Tr. 56; 4 Chitty, Gen. Pr. 59; *Barron v. Jackson*, 40 N. H. 365.

³² *Hale v. Cove*, Strange, 642; *Mitchell v. Ehele*, 10 Wend. N. Y. 595.

³³ *Cowperthwait v. Jones*, 2 Dall. 56; *Grinnell v. Phillips*, 1 Mass. 542; *Johnson v. Perry*, 2 Humphr. Tenn. 569; *Harvey v. Jones*, 3 Humphr. Tenn. 157; *Harrison v. McGehee*, 24 Ga. 530; *St. Martin v. Desnoyer*, 1 Minn. 156. But where, beforehand, the jury agreed that the result, whatever it might be, should be the amount of their verdict, a new trial was granted. *Ellege v. Todd*, 1 Humphr. Tenn. 43; *Manix v. Malony*, 7 Iowa, 81.

whether the jury agreed beforehand to be bound by the result; it seems they took this method simply to ascertain whether they could arrive at something like an agreement. Indeed, it would seem from what the presiding judge said, that this method was employed by the jury to "collect the sense of its members."³⁴

If remarks of a character to influence the verdict are addressed to the jury before they have rendered their verdict by third parties, a new trial will be ordered;³⁵ but this will not be done unless there is reason to suppose that the remarks may have some effect.³⁶

The misconduct of the jury cannot be shown by the evidence of any of their number.³⁷

3283. *When a verdict is found directly opposite to the direction or instruction of the judge on a matter of law, it must of necessity be set aside, or the jury, and not the court, would determine the law, which would be destroying the very constitution of a trial by jury, that the judges are to decide the law, and the jury ascertain the facts.*³⁸ But a new trial will not be granted where, in the opinion of the court, substantial justice has been done between the parties, although the law arising from the evidence would have justified a different result.³⁹

Where one part of the verdict is inconsistent with another, it is a nullity, and will be set aside.⁴⁰

3284. *A new trial will be granted when injustice has been done and the verdict is clearly against evidence;*⁴¹ but not where justice has been done, although the verdict be against the weight of evidence, that is, that the proof on the side of the losing party, in such case, is greater than that on the other.⁴² A verdict may be set aside because it is against the weight of the evidence, but in such cases the evidence is not to be weighed in golden scales. In considering such cases, the general rule is that the verdict once found shall stand; the setting aside is an exception, and it ought to be an exception of rare and almost singular occurrence.⁴³ This is especially the case when two juries have determined the same way.⁴⁴

The courts are reluctant to grant a new trial for this cause, as there is danger of usurping the province of the jury to decide questions of fact. A new trial will of course be granted where there is absolutely no evidence to support the

³⁴ *Cowperthwait v. Jones*, 2 Dall. 56.

³⁵ *Cole v. Swan*, 4 Greene, Iowa, 32; *Thrift v. Redman*, 13 Iowa, 25; *State v. Andrews*, 29 Conn. 100.

³⁶ *People v. Boggs*, 20 Cal. 432; *People v. Brannigan*, 21 Cal. 337.

³⁷ *Duhon v. Landry*, 15 La. Ann. 557; *Pratte v. Coffman*, 33 Mo. 71; *McCray v. Stewart*, 16 Ind. 377; *Butt v. Tuthill*, 10 Iowa, 585; *Brown v. State*, 28 Ga. 199. In Iowa, under the code, § 1810, the jurors may show the manner of making up the verdict. *Ruble v. McDonald*, 7 Iowa, 81.

³⁸ *Caffrey v. Groome*, 10 Iowa, 548.

³⁹ *Smith v. Shultz*, 2 Ill. 490. See *Marr v. Johnson*, 9 Yerg. Tenn. 1.

⁴⁰ *Mitchell v. Printup*, 27 Ga. 469.

⁴¹ *Corsies v. Little*, 2 Green, N. J. 373; *Brugh v. Shanks*, 5 Leigh, Va. 598; *Yale v. Yale*, 13 Conn. 185; *Wells v. Waterhouse*, 22 Me. 131; *Hudson v. Williamson*, 3 Brev. So. C. 342; *Jenkins v. Whitehead*, 9 Miss. 157; *Waite v. White*, 5 Ark. 640; *Scott v. Brookway*, 7 Mo. 61; *Cassels v. The State*, 4 Yerg. Tenn. 149; *Wait v. McNeil*, 7 Mass. 261; *Zaleer v. Geiger*, 2 Yeates, Penn. 522; *Emmet v. Robinson*, 2 Yeates, Penn. 514; *Lloyd v. Newell*, 3 Halst. N. J. 296; *United States v. Duval*, Gilp. Dist. Ct. 356.

⁴² *Yarborough v. Abernathy*, 1 Meigs, Tenn. 483; *Pettitt v. Pettitt*, 4 Humphr. Tenn. 19; *Todd v. Boone County*, 8 Mo. 431; *Bank v. King*, 2 Green, N. J. 45; *Stanley v. Whipple*, 2 McLean, C. C. 35; *Harbour v. Reyburn*, 7 Yerg. Tenn. 432; *Kellogg v. Budlong*, 8 Miss. 340.

⁴³ *Hammond v. Wadhams*, 5 Mass. 353.

⁴⁴ *Coffin v. Newburyport Mar. Ins. Co.*, 9 Mass. 436; *Fowler v. Etna Ins. Co.*, 7 Wend. N. Y. 270; *Dorsey v. Dougherty*, 1 A. K. Marsh. Ky. 182.

verdict, in which case a demurrer might have been taken to the evidence.⁴⁵ In some cases the courts have declined to grant a new trial, where the evidence of the prevailing party by itself was sufficient to support the verdict.⁴⁶ But this rule is too narrow, and in fact it is impossible to lay down any general rule. If the jury in making their verdict have clearly rejected evidence which is competent, uncontradicted, and unimpeached, a new trial will be granted.⁴⁷ But if the questions of fact are left doubtful, and specially where the evidence is circumstantial, the court will decline to interfere with the verdict.⁴⁸

The decision of the jury as to the credibility of a witness cannot be reviewed on a motion for a new trial if the evidence was at all conflicting.⁴⁹

3285. *A new trial may be granted for newly discovered evidence, and we will examine successively the nature of this evidence, and the circumstances of its discovery.*

3286. When evidence has been discovered since the trial which might have been produced before the jury, it must be such, to entitle the party to a new trial, as would have been material,⁵⁰ and not merely cumulative, and such as would have changed the verdict if produced, and which induces a belief that injustice has been done.⁵¹ It must appear that such newly discovered evidence is material to the issue, going to the merits; and evidence merely to impeach the character of a witness is not of this nature;⁵² and if the witness who is now offered as newly discovered was incompetent at the time of the trial, and has since become competent, this will not be considered as newly discovered evidence.⁵³

If matters might have been offered in evidence, but were not, this is not the kind of newly discovered evidence which is ground for a new trial.⁵⁴

It must be made to appear by competent affidavits that in truth the matters offered as new evidence are, in fact, material.⁵⁵

The affidavit of the party on information and belief that certain witnesses will give certain testimony is not sufficient;⁵⁶ or his affidavit as to what the new witness swore to at another trial.⁵⁷ If the new evidence will not alter the result, or if taking the whole there is enough to support the verdict, a new trial will be refused.⁵⁸

3287. *The evidence must not only be material, but it must have been discovered since the trial, and the party must also have used due diligence and every reasonable exertion in his power to procure it; for if by using proper means he could have procured it so as to produce it on trial, it will not be considered*

⁴⁵ *Cummins v. Scott*, 20 Cal. 83; *Howard v. Coshov*, 33 Mo. 118; *Laville v. Lucas*, 13 Wisc. 617; *Spicely v. True*, 14 Ind. 437.

⁴⁶ *Rogers v. Lewis*, 19 Ind. 405; *Hall v. Hunter*, 4 Greene, Iowa, 539.

⁴⁷ *Robertson v. Dodge*, 28 Ill. 161.

⁴⁸ *Pulliam v. Ogle*, 27 Ill. 189; *Greenfield Bank v. Crafts*, 4 All. Mass. 447; *Dixon v. Merritt*, 6 Minn. 160; *Cross v. Carey*, 25 Ill. 562.

⁴⁹ *Reboul v. Chalker*, 27 Conn. 114; *Wilson v. Horne*, 37 Miss. 477; *Cummins v. Rice*, 19 Tex. 225; *Bradley v. Geiselman*, 22 Ill. 494.

⁵⁰ *Watts v. Howard*, 7 Metc. Mass. 478; *Kirby v. Waterford*, 14 Vt. 414.

⁵¹ *Mechanics' Fire Ins. Co. v. Nichols*, 1 Harr. Del. 410; *Alsop v. Ins. Co.* 1 Sumn. C. C. 451; *Den v. Geiger*, 4 Halst. N. J. 228; *Pike v. Evans*, 15 Johns. N. Y. 210; *Gardner v. Mitchel*, 6 Pick. Mass. 114; *Reed v. McGrew*, 5 Ohio, 375.

⁵² *McIntire v. Young*, 6 Blackf. Ind. 496; *Harbour v. Rayburn*, 7 Yerg. Tenn. 432; *Martin v. Ehrenfels*, 24 Ill. 187.

⁵³ *Sawyer v. Merrill*, 10 Pick. Mass. 16.

⁵⁴ *Reed v. Moore*, 3 Ired. No. C. 310.

⁵⁵ *Hinds v. Terry*, 1 Miss. 80; *Parker v. Hardy*, 24 Pick. Mass. 246.

⁵⁶ *Keough v. McNitt*, 6 Minn. 513.

⁵⁷ *Eddy v. Caldwell*, 7 Minn. 225.

⁵⁸ *Mead v. Constans*, 5 Minn. 171.

as new evidence, but its non-production will be attributed to his laches or neglect, from the effects of which a court will never relieve a party.⁵⁹

3288. New trials are now granted on the ground of newly discovered evidence, but with the following restrictions :

The testimony or evidence must have been discovered since the trial.

The party must have used due diligence to procure it on the former trial.

It must be shown to be material to the issue.

It must go to the merits of the cause, and not merely impeach the character of a witness.

It must not be merely cumulative.⁶⁰

3289. By *surprise*, in practice, is understood that situation in which a party is placed, without any default of his own, which will be injurious to his interests.⁶¹ The courts always do every thing in their power to relieve a party from the effects of a surprise when he has been diligent in endeavoring to avoid it.

A new trial will be granted to relieve a party from the effects of a surprise ;⁶² as, where a witness had been regularly subpoenaed by the defendant, and attended at the circuit, and was present shortly before the cause was called on, when he absented himself without the knowledge or consent of the defendant or his attorney, his absence was not discovered until after the jury were sworn. For want of this witness the defendant lost his cause. The court granted a new trial because the party was taken by surprise, and because it appeared to the court that the witness, as well as all persons answerable over to the defendant, were insolvent.⁶³ So where an agreement was made between the attorneys that a suit should be dropped, and the case remained on the docket, and was brought to trial ; the verdict was set aside on the ground of surprise.⁶⁴ And where a deed had been in the hands of the attorney on the other side, and notice was given to him to produce it, which he did not do, and on the trial first informed the attorney who had given him the notice that before he received the notice he had delivered the deed to another, a new trial was granted on the ground of surprise.⁶⁵ Another instance of the grant of a new trial may be mentioned, where the party relied upon the same course being taken that had been adopted twice before ; as, where documents had been read without objection on two former trials, and on the third they were excluded in consequence of an objection which had not been anticipated.⁶⁶

To entitle a party to a new trial, the surprise must be such that he had no opportunity to move for a continuance of the cause, and the record must show clearly that such was the fact.⁶⁷ If the party neglected to move for a continu-

⁵⁹ The party moving for a new trial on this ground is held to strict proof of diligence. *Baker v. Joseph*, 16 Cal. 173. In California, newly discovered evidence is no ground for a new trial in a criminal case. *People v. Bernstein*, 18 Cal. 699.

⁶⁰ See, as to these several points, *People v. The Superior Court*, 10 Wend. N. Y. 291 ; *Rowley v. Kinney*, 14 Johns. N. Y. 186 ; *Pike v. Evans*, 15 Johns. N. Y. 132 ; *Guyott v. Butts*, 4 Wend. N. Y. 579 ; *Moore v. Philadelphia Bank*, 5 Serg. & R. Penn. 41 ; *Bond v. Cutler*, 7 Mass. 205 ; *Evans v. Rogers*, 2 Nott & M'C. So. C. 563 ; *Stone v. Clifford*, 5 La. 11 ; *Nichols v. Alsop*, 11 La. 409 ; *Gravier's Curator v. Rapp*, 12 La. 162 ; *Drayton v. Thompson*, 1 Bay, So. C. 263 ; *Jones v. Lollikoffer*, 2 Hawks, No. C. 492 ; *Smith v. Shultz*, 2 Ill. 491 ; *Knox v. Work*, 2 Binn. Penn. 582 ; *Aubel v. Ealer*, 2 Binn. Penn. 582, note ; *Turnbull v. O'Hara*, 4 Yeates, Penn. 446 ; *Waln v. Wilkins*, 4 Yeates, Penn. 461 ; *Goff v. Mulholland*, 33 Mo. 203.

⁶¹ *Rawle v. Skipwith*, 8 Mart. N. s. La. 407.

⁶² *McFarland v. Clark*, 9 Dan. Ky. 134.

⁶³ *Ruggles v. Hall*, 14 Johns. N. Y. 112 ; *Tilden v. Gardinier*, 25 Wend. N. Y. 663.

⁶⁴ *Price v. McIlvaine*, 3 Brev. So. C. 419 ; *Hannah v. Indiana R. R.*, 18 Ind. 431.

⁶⁵ *Jackson v. Warford*, 7 Wend. N. Y. 62.

⁶⁶ *Helm v. Jones*, 9 Dan. Ky. 26.

⁶⁷ *Thompson v. Porter*, 4 Bibb, Ky. 70 ; *Kirtley v. Kirtley*, 1 J. J. Marsh. Ky. 96.

ance, having an opportunity, he must abide the result; he cannot take the chances of a verdict in his favor, and afterward claim the benefit of a new trial.⁶⁸

3290. *A new trial will be granted when the damages found by the jury against a defendant are unreasonably great and not warranted by law, or excessive.* The damages are excessive, first, when they are greater than is demanded by the writ and declaration;⁶⁹ and, secondly, when they are greater than is authorized by some fixed rules and principles of law; as, in cases of actions upon contracts, or for torts done to property, the value of which may be ascertained by evidence.⁷⁰ But in action for torts to the person or reputation of the plaintiff, the damages will not be considered excessive unless they are outrageous. In cases of this kind, where there is no certain measure of damages, the court will not substitute its own sense of what would have been the proper amount of the verdict, and, therefore, will not set aside a verdict for excessive damages, unless there is reason to believe that the jury were actuated by passion, or by some undue influence perverting their judgment.⁷¹

3291. *New trials are rarely granted on account of the inadequacy of damages given by the jury.* When the damages can be appreciated, as, where they are given upon a contract, or for an injury to real or personal estate, and they are so small that that fact raises a presumption that the jury have acted upon a mistake, and the judge who tried the cause is dissatisfied with the verdict, a new trial will be granted,⁷² On the contrary, in action for torts to the person or reputation, the smallness of damages is no ground for a new trial.⁷³

In an action for an injury caused by a dam, the jury found for the plaintiff for a small amount, which finding involved the permanent right of the defendant to maintain the dam, and the court granted a new trial.⁷⁴

3292. Another cause for granting a new trial is *the conviction of perjury of a witness* who testified; but the mere finding of a bill of indictment is not sufficient, though it may induce the court in some instances to stay the proceedings until the indictment has been tried.⁷⁵

⁶⁸ McClure v. King, 15 La. Ann. 220; Grant v. Popejoy, 15 Ind. 311; Kellogg v. Ballard, 10 Wisc. 440.

⁶⁹ Hook v. Turnbull, 6 Call, Va. 85; McIntire v. Clark, 7 Wend. N. Y. 330.

⁷⁰ Coffin v. Coffin, 4 Mass. 41; Commonwealth v. Norfolk, 5 Mass. 435; Dodd v. Pierson, 6 Halst. N. J. 284.

⁷¹ Jacobs v. Bangor, 16 Me. 187. See Whipple v. Cumberland Man. Co., 2 Stor. C. C. 661; Dodd v. Hamilton, 2 Tayl. No. C. 31; Allen v. Craig, 1 Green, N. J. 294; Boyers v. Pratt, 1 Humphr. Tenn. 90; Thompson v. French, 10 Yerg. Tenn. 452; Sumnor v. Wilt, 4 Serg. & R. Penn. 27; Kern v. North, 10 Serg. & R. Penn. 399; Coleman v. Southwick, 9 Johns. N. Y. 45; Southwick v. Stevens, 10 Johns. N. Y. 443; Bacon v. Brown, 4 Bibb, Ky. 91; Ogden v. Gibbons, 2 South. N. J. 518; Harris v. Rupel, 14 Ind. 209; Hinchman v. Whetstone, 23 Ill. 185; St. Martin v. Desnoyer, 1 Minn. 156; Beaulieu v. Parsons, 2 Minn. 37; Stoneseifer v. Sheble, 31 Mo. 243. In Shaw v. Boston R. R., 8 Gray, Mass. 45, there were three trials resulting in successive verdicts for \$15,000, \$18,000, and \$22,250. The court refused to set aside the last. The following verdicts have been held not to be excessive: For fracture of the skull and permanent deformity, caused to a girl six years old, \$7000, Macon R. R. v. Winn, 26 Ga. 250; \$5000 for breach of promise, coupled with seduction, Goodall v. Thurman, 1 Head, Tenn. 209; \$4000 for serious injury from a toll gate carelessly left open, Danville Co. v. Stewart, 2 Metc. Ky. 119; \$4000 for slander, Letton v. Young, 2 Metc. Ky. 558; \$500 for malicious prosecution, Pankett v. Livermore, 5 Iowa, 277.

⁷² Taunton Man. Co. v. Smith, 9 Pick. Mass. 11.

⁷³ Coyler v. Huff, 3 Bibb, Ky. 34; Shoemaker v. Livezey, 2 Browne, Penn. 286. In Virginia, a new trial is authorized by statute in an action of slander when the damages are too small. Rixey v. Ward, 3 Rand. Va. 52.

⁷⁴ Ryerson v. Morris Co., 4 Dutch. N. J. 97.

⁷⁵ Beafield v. Petrie, 3 Dougl. 24; Petrie v. Millies, 3 Dougl. 27. See Harrison v. Harrison, 9 Price, Exch. 89.

3293. The granting of a new trial is a matter within the judicial discretion of the court, and the granting or refusal is not in general a subject of appeal or exception.⁷⁶ It is granted in order to secure justice, and will be refused where substantial justice has been done, although errors may exist.⁷⁷ It will be refused in cases where there is no probability of disturbing the result, however erroneous the court may consider such result; as, where successive juries have rendered the same verdict. It is stated that a third verdict has never been set aside on a motion for a new trial,⁷⁸ and on a motion for a third trial the court denied it "because there ought to be an end of things."⁷⁹ At common law the motion for a new trial was heard before the judge who tried the case, but this has been changed by statute in some states.⁸⁰ It must in general be made at the term at which the case is tried and within a time established by the rules of the court.⁸¹

3294. By *arrest of judgment* is meant the refusal of the court having jurisdiction to enter a judgment upon a verdict, a default, or a demurrer to evidence for some cause apparent upon the record. The judgment of the court, which is a conclusion of law from the facts ascertained and spread out upon the record, must be collected from the whole record; the party who does not from the whole record appear entitled to judgment cannot have it, even though the verdict be found, or a default suffered, or a demurrer to evidence determined in his favor, because, notwithstanding such verdict, default, or demurrer, the whole record may disclose no right of action or no legal defence in his favor. If in such case a verdict be found for the plaintiff upon a declaration radically defective or showing no cause of action, or for the defendant on a plea in bar totally void of substance, judgment must regularly be arrested.⁸²

3295. Before further considering the causes for which a judgment may be arrested, it is proper to state that formerly judgments were constantly arrested for defects or faults merely formal in the pleadings or other parts of the record; but by the various English statutes of amendments and jeofails, which extend from the reign of Edward III to that of Anne, and the principles of which have been generally adopted in this country, this evil has been remedied. Now no judgment can be arrested for a mere formal defect, nor for any substantial defect enumerated in, and specially cured by, some or other of these statutes.

In general, substantial defects are not cured by any of these statutory provisions; still, some of them are cured by verdict or otherwise upon common law principles without the aid of any statute. The cases in which the common law has this healing effect will be the principal subject of our examinations under this head.⁸³

⁷⁶ *Little Miami R. R. v. Allen*, 12 Ohio, St. 428; *Wavel v. Wiles*, 24 N. Y. 635; *Coit v. Waples*, 1 Minn. 134. But see *Matlock v. Todd*, 19 Ind. 130; *Cleveland v. State*, 20 Ind. 444; *Kienne v. Anderson*, 13 Iowa, 565; *Zweia v. Horicon Co.*, 14 Wisc. 356.

⁷⁷ *Chicago R. R. v. Hazzard*, 26 Ill. 373. It will not be granted to enable a party to recover nominal damages. *Gold v. Ives*, 29 Conn. 119.

⁷⁸ But this was done in *Austin v. Talk*, 20 Tex. 164.

⁷⁹ *Clerk v. Udall*, 2 Salk. 649; *Chambers v. Robinson*, 2 Strange, 692; *Shaw v. Boston R. R.*, 8 Gray, Mass. 45; *Wolbrecht v. Baumgarten*, 26 Ill. 291.

⁸⁰ *Wallace v. Columbia*, 48 Me. 436.

⁸¹ *Beals v. Beals*, 20 Ind. 163; *Allen v. Hill*, 16 Cal. 113; *Campbell v. Conover*, 26 Ill. 64.

⁸² A motion in arrest of judgment must be founded entirely on error apparent on the record. *Burnett v. Ballund*, 2 Nott & M'C. So. C. 435; *Hammon v. Candler*, 22 Ga. 281; *United States v. Dickenson*, 1 Hempst. C. C. 1; *Bedell v. Stevens*, 27 N. H. 118; *Case v. State*, 5 Ind. 1. Misconduct of the jury has in some cases been held to be ground for arrest of judgment, but it properly furnishes ground only for a new trial. *Franklin v. State*, 29 Ala. N. S. 14.

⁸³ If the court has no jurisdiction over the subject matter, judgment will be arrested, as

A judgment may be arrested for defects in the pleadings, and for defects in the verdict.

3296. It is an invariable rule that no *defect in the pleadings* which would not have been fatal to them on general demurrer can ever be a sufficient cause for arresting a judgment;⁸⁴ because all such formal defects are aided, except upon special demurrer, assigning them for cause; and consequently all formal defects, on either side, which would not have been fatal on general demurrer, are cured by the adverse party pleading over to issue, or by default, or, indeed, by omitting to demur specially.

But the rule is not universally true, *é converso*, that every defect in the pleadings which would have been fatal on general demurrer is a sufficient ground for arresting judgment after a general verdict. If the pleading of the party for whom such verdict has been found is faulty, in omitting some particular fact or circumstance, without which he ought not to have judgment, but which is implied in, or inferable from, the finding of the facts which are expressly alleged and found, the pleading is aided by the verdict; because the omission is supplied by the finding, and the court presumes that the fact or circumstance was proved to the jury.⁸⁵

When a declaration or other pleading sets forth a good title or ground of action defectively, the imperfection will be cured by a verdict, because to entitle the party to recover, all circumstances necessary in form and substance to complete the title so imperfectly stated must be proved at the trial, and it is but fair to presume that they were proved. But when no cause of action is stated, the omission is not cured by the verdict, because no right of recovery was necessary to be proved, or could be legally proved under such a declaration; there can therefore be no ground to presume that it was proved at the trial. This is the true distinction between such defects in a declaration as are and such as are not cured by the verdict for the plaintiff.⁸⁶ The same criterion ex-

this objection cannot be waived, and the court will notice it at any stage of the case on a mere suggestion.

The tendency of legislation is to allow the verdict to cure all defects in the pleadings, evidence, and trial, unless saved by exception at the proper time. In Massachusetts, a judgment cannot be arrested for any cause existing before verdict, unless the same affects the jurisdiction of the court. Mass. Gen. St. ch. 129, sec. 79. Similar statutes have been enacted in many of the states, and in practice the motion in arrest of judgment is confined to criminal cases. The object of such legislation is to prevent any party from going on without objection with the intention of taking advantage of informalities if the verdict goes against him. For causes arising after verdict, of course a motion in arrest of judgment is the earliest method of raising the objection. If the judgment is improperly rendered, the court, during the same term, may generally open or reverse the judgment, but their power in this subject is regulated by statutes.

In New York, a decision may upon motion be set aside for irregularity, or declared void as a nullity. *Pitt v. Davison*, 37 Barb. N. Y. 97. In Indiana, a judgment by default may be set aside at the same term upon motion upon affidavit and notice. *Frazier v. Williams*, 18 Ind. 416. So in Wisconsin, where the judgment was entered by mistake. *Reid v. Case*, 14 Wisc. 429. See also *New York Co. v. North Western Co.*, 22 N. Y. 357; *Kemp v. Cook*, 18 Md. 130; *Eldred v. Hazlett*, 38 Penn. St. 16; *Sage v. Matheney*, 14 Ind. 369; *Pitts v. Magie*, 24 Ill. 610; *Spooner v. Leland*, 5 R. I. 348.

⁸⁴ 3 Sharswood, Blackst. Comm. 394.

⁸⁵ *Lane v. Maine M. F. Ins. Co.*, 12 Me. 44; *Kelton v. Bevine*, Cooke, Dist. Ct. 90; *Little v. Thompson*, 2 Me. 228.

⁸⁶ See *Rushton v. Aspinall*, Dougl. 683; *Read v. Chelmsford*, 16 Pick. Mass. 128; *Wheeler v. Train*, 3 Pick. Mass. 255; *Avery v. Tyringham*, 3 Mass. 160; *Moor v. Boswell*, 5 Mass. 306; *United States v. The Virgin*, 1 Pet. C. C. 7; *Farwell v. Smith*, 2 Green, N. J. 133; *Stilson v. Toby*, 2 Mass. 591; *Coleman v. Craysdale*, 3 J. J. Marsh. Ky. 541; *Dickerson v. Hays*, 4 Blackf. Ind. 107; *Stanley v. Whipple*, 2 McLean, C. C. 35; *Gaylord v. Payne*, 4 Conn. 190; *Spencer v. Overton*, 1 Day, Conn. 183; *Fuller v. Hampton*, 5 Conn. 416; *Hendricks v. Seely*, 6 Conn. 176; *Phelps v. Sill*, 1 Day, Conn. 315; *Russell v. Slade*, 12 Conn. 455; *Story v. Barrel*, 2 Conn. 665; *Schlosser v. Brown*, 17 Serg. & R. Penn. 250.

tends, *mutatis mutandis*, to defects in the plea, or in any other parts of the pleadings.

In those cases where the facts are not implied in, or inferable from, those which are alleged and found, they cannot be presumed to have been proved to the jury. If the declaration is wholly defective in substance, as in the instance given by Blackstone of an action of slander for calling the plaintiff a Jew, a verdict will not entitle him to judgment; for the words charged not being actionable, the finding of the jury cannot make them so. The defect in the declaration is not in the statement of the cause of action, but in the alleged cause of action itself. Nothing is implied or can be inferred from the finding which can constitute a right of recovery.⁸⁷

A default does not cure any defects in the declaration which would not have been aided on a general demurrer,⁸⁸ because no fact can be presumed to have been proved where there was no trial and no proof exhibited. For this reason the judgment will be arrested after a default, and it will have the same effect as a general demurrer to the declaration.

Upon the same principle which renders radical defects in a declaration incurable by verdict, all the other material defective pleadings on either side will not be cured by the verdict. If, therefore, the plea disclose no legal defence, a verdict in favor of the defendant will not make the plea good; and if the declaration is sufficient, a judgment may be arrested on the plaintiff's motion.⁸⁹

A judgment may also be arrested for some radical defect in the issue. This is the case when the issue is immaterial, so that the court cannot discover, from the finding upon it, for which party judgment ought to be given.⁹⁰ Thus, if in an action against husband and wife, for a wrong committed by her alone, they plead that they are not guilty, and the verdict is for them, the judgment may be arrested,⁹¹ because the verdict determines nothing from which the court can discover how judgment ought to be given, since the matter put in issue is not that which the declaration charges. The complaint is not that the husband and wife are guilty of the wrong, but only that the wife is so, and the verdict does not show, separately, whether she is or is not guilty; but only that both the defendants are not so.

3297. Judgment may be arrested also for *defects in the verdict*.⁹² This takes place when the verdict varies substantially from the issue; as, where it varies from the issue by finding something foreign to it, in such case the court can give no judgment.⁹³

A verdict is equally defective when it finds only a part of the matter in issue, omitting to find either way another material part, because it is the duty of the jury to find the whole issue, so that the court may give judgment upon all the material facts put in issue by the pleadings. A verdict finding the whole substance of the issue is good, although it be silent as to what is immaterial, inasmuch as the latter can have no effect upon the merits of the controversy.⁹⁴

⁸⁷ *Jaccard v. Anderson*, 32 Mo. 188.

⁸⁸ *Stennel v. Hogg*, 1 Saund. 228, a, b, c, note (1).

⁸⁹ 3 Sharswood, Blackst. Comm. 395.

⁹⁰ Comyn, Dig. *Pleader*, R, 18; 2 Saund. 319, a, b (n. 6); Bacon, Abr. *Pleas*, M, 1. Judgment was arrested upon a general verdict for the plaintiff, when the declaration contained two counts and issue was joined on one only. *Peabody v. Kinsley*, 40 N. H. 416.

⁹¹ *Coxe v. Cropwell*, Croke, Jac. 5; Lawes, Pl. 170.

⁹² Bacon, Abr. *Verdict*, M.

⁹³ Bacon, Abr. *Verdict*, O; *Moody v. Keener*, 16 Ala. 218; *Vines v. Brownrigg*, 2 Dev. No. C. 537; *Young v. Wickliffe*, 7 Dan. Ky. 447. If the verdict is inconsistent and repugnant, judgment will be arrested. *Potter v. Hiscox*, 30 Conn. 508.

⁹⁴ *White v. Bailey*, 14 Conn. 272. See *Patterson v. United States*, 2 Wheat. 221; *Barnett v. Watson*, 1 Wash. Va. 272.

A verdict which finds the whole issue, or the substance of it, is not vitiated by finding more; in this case the surplusage will be rejected: *utile per inutile non vitiatur*.⁹⁵

When considering the nature of a general verdict it was stated that where there were several counts in a declaration, some good and some bad, and the jury found a general verdict for the plaintiff, with entire damages, that is, without discriminating in the assessment of the damages between the different counts, the judgment may be arrested, for it is impossible for the court, judging as it must from the record alone, to discover on which count the damages were assessed, or what proportion of them may have been assessed on the one or the other.⁹⁶

In such cases, when entire damages are found for the plaintiff, and it appears from the notes of the judge before whom the trial was had that no part of the evidence exhibited to the jury applied to the bad counts, the verdict may be amended by order of the court so as to apply to the good count only; and after the amendment the court will give judgment on the amended verdict, which will then find only on the good count, and on that count only.⁹⁷

The above rule, that judgment will be arrested when the verdict is general and one of several counts is bad, applies only to civil cases; if, therefore, an indictment contains several counts, of which one is good and the others are defective, on a general verdict of guilty the court will award the punishment on the good count only. Still this rule is not inconsistent with the principle which prevails in civil cases, because in criminal cases no damages are assessed, nor is it the province of the jury to decide upon the punishment incurred by the offence, this being solely the duty of the court.

It is in the power of the jury to find damages separately upon each of the counts when some are good and others defective; when they do so, the court will arrest the judgment on the bad counts only, and give judgment for the plaintiff for the damages assessed on those which are good.⁹⁸

3298. *A judgment non obstante veredicto*, or a judgment notwithstanding the verdict, is one rendered for the plaintiff without regard to the verdict obtained by the defendant, the nature of which was considered when we were discussing the subject of pleading. This judgment is sometimes called a judgment as upon confession. In some cases it is expedient for the plaintiff to take such a judgment, even though the verdict be in his own favor; for where the plea itself being substantially bad in law, and in confession and avoidance, involves a confession of the plaintiff's declaration, and shows that he was entitled to maintain his action; such judgment is, therefore, a judgment as upon confession, and safer than a judgment upon the verdict, which would be erroneous.⁹⁹

3299. *A repleader* is awarded when an immaterial issue has been formed not proper to decide the action. This was considered while we were treating of pleading, so as to require no further examination in this place.

3300. *A venire facias de novo* is a new writ awarded when by reason of some irregularity or defect in the proceedings on the first venire, or the trial, the proper effect of that writ has been frustrated, or the verdict become void in law; as, for example, when the jury have been improperly chosen, or the verdict they

⁹⁵ *Patterson v. United States*, 2 Wheat. 221; *Bacon v. Callender*, 6 Mass. 303; *Hunter v. Commonwealth*, 2 Serg. & R. Penn. 298; *Leineweaver v. Stoeber*, 17 Serg. & R. Penn. 297.

⁹⁶ *Walker v. Sargeant*, 11 Vt. 327; *Barnes v. Hurd*, 11 Mass. 59. In Connecticut, judgment will not be arrested if any of the counts are good. *Hoag v. Hatch*, 23 Conn. 585.

⁹⁷ *Haselton v. Weare*, 8 Vt. 484.

⁹⁸ *Hancock v. Haywood*, 3 Term, 433, 435.

⁹⁹ *Stephen*, Pl. 118. A defendant cannot move for a judgment *non obstante veredicto*. *Smith v. Smith*, 4 Wend. N. Y. 468; *Bradshaw v. Hedge*, 10 Iowa. 402. But see *Martindale v. Price*, 14 Ind. 405.

have rendered is uncertain, ambiguous, or defective.¹⁰⁰ The object of the new writ is of course to obtain a new trial, and accordingly this proceeding is in substance the same as a motion for a new trial. When, however, the unsuccessful party objects to the verdict in respect to some irregularity or error in the practical course of the proceeding rather than on the merits, the form of the application is a motion for a *venire de novo*, and not for a new trial; this is, however, seldom adopted, as by a motion for a new trial the same end is attained.

When the proceedings have been reversed on error, as will be hereafter explained, upon some irregularity or error committed by the court in the course of the proceedings, a *venire facias de novo* is awarded; but this writ is never granted when the cause of reversal is a defect in the plaintiff's right to recover.

3301. Having examined all the preliminary proceedings which can suspend a judgment and disposed of them, if there is no legal obstacle the next thing to be done is to pronounce judgment. In relation to *the judgment*, let us consider the form of judgments, their kinds, judgments for plaintiffs, judgments for defendants, judgments rendered before an issue is formed, and where judgments are to be given.

3302. A *judgment* is the decision or sentence of the law given by a court of justice or other competent tribunal as the result of proceedings instituted therein for the redress of an injury. The language of the judgment is not, therefore, that "it is decreed" or "resolved" by the court; but "it is considered" (*consideratum est per curiam*) that the plaintiff recover his debt, damages, possession, and the like, or that the defendant do go quit. This implies that the judgment is not so much the decision of the court as the sentence of the law, pronounced and decreed by the court after due deliberation and inquiry.

To be valid a judicial judgment must be given by a competent judge or court, at a time and place appointed by law and in the form it requires. A judgment would be null if the judge had not jurisdiction of the matter; or, having such jurisdiction, he exercised it when there was no court held or out of his district; or if he rendered judgment before the cause was prepared for a hearing.

3303. Considered as to the nature of the action, the plea, and the issue, judgments in civil cases are of four kinds, namely:

When the facts are admitted between the parties, but the law is disputed, as in case of judgment upon demurrer.

When the law is admitted, but the facts are disputed, as in case of judgment upon a verdict.

When both the law and the facts are admitted by confession, as by *cognovit actionem*; this is a written confession by the defendant of the justice of the plaintiff's claim, subscribed, but not sealed, and authorizing the plaintiff or his attorney to sign judgment and issue execution against the defendant, usually in a sum named. It is different from a warrant of attorney, which is an authority to confess judgment, given before the commencement of any action, and is under seal. The law and the facts may be confessed by the plaintiff as being against him, as in the case of a *nolle prosequi*, which is an entry on the record by which the plaintiff declares he will proceed no further.

By default of either party in the course of legal proceedings, as in the case of *nihil dicit*; that is, when the defendant fails to put in a plea or answer to the plaintiff's declaration by the day assigned; or *non sum informatus*, when the defendant omits to plead or instruct his attorney so to do after proper notice; or in cases of judgment by *non pros*, non-suit, or, as in the case of non-suit, when the plaintiff fails to follow up his proceedings.

¹⁰⁰ See beyond, 3359; *Potter v. Hiscox*, 30 Conn. 508.

3304. When considered as to their effects, judgments are of two kinds, namely:

An interlocutory judgment is one given in the course of a cause before final judgment. When the action sounds in damages, and the issue is an issue in law, or when in fact not tried by a jury, is decided in favor of the plaintiff, then the judgment is that the plaintiff ought to recover his damages without specifying their amount, for as there has been no trial in the case by the jury, the amount of damages is not yet ascertained; the judgment is then said to be interlocutory. So, in like manner a judgment rendered by default is a judgment of the same kind.

The judgment by default is interlocutory in assumpsit, covenant, trespass, case, and replevin, when the sole object of the action is damages; but in debt, damages not being the principal object of the action, upon a default the plaintiff usually signs judgment in the first instance.

To ascertain damages after an interlocutory judgment a writ of inquiry is issued, in cases sounding in damages, according to the technical phrase, that is, when the object of the action is to recover damages only, and not brought for the specific recovery of lands, goods, or sums of money. This writ is directed to the sheriff of the county where the effects are alleged by the pleadings to have occurred, commanding him to inquire, "by the oaths and affirmations of twelve lawful men of his county," into the amount of damages sustained by the plaintiff, and to return the inquisition, when made, to the court.

The finding of the sheriff and jury under such a proceeding is called an inquisition, and upon the return of it a final judgment may be rendered.

When the action is founded on a promissory note, bond, or any other contract in writing by which the amount due may be easily computed, it is the practice in some courts to refer to the clerk or prothonotary the assessment of damages, and in such case no writ of inquiry is issued.

There is one species of interlocutory judgment which establishes nothing but the inadequacy of the defence set up; this is the judgment for the plaintiff on demurrer to a plea in abatement, by which it appears that the defendant has mistaken the law on a point which does not affect the merits of the case; and it being but reasonable that he should offer, if he can, a further defence, that judgment is that he do answer over, in technical language, judgment of *respondent ouster*.¹⁰¹

A final judgment is one which puts an end to the suit. When the issue is one of fact, and it is tried by a jury, the jury at the time they try the issue assess the damages; then the judgment is final in the first instance, that is, that the plaintiff do recover the amount of the damages assessed. And when damages have been assessed by virtue of a writ of inquiry, after an interlocutory judgment, the judgment is final that the plaintiff recover the amount of damages so assessed.¹⁰²

When the issue is one of law, as in case of demurrer, the judgment rendered is in the nature of the pleadings demurred to. Thus, the judgment on demurrer to a plea in abatement, if for the defendant, is that the writ be quashed, and if for the plaintiff, that defendant answer over, so that the judgment corresponds to that of the prayer of judgment in the demurrer.

For this reason, when a demurrer is joined on any of the pleadings in chief, as on the declaration, plea in bar, or other pleading which goes to the action, the judgment is final;¹⁰³ if for the plaintiff, it is *quod recuperet*; if for the de-

¹⁰¹ Stephen, Pl. 126; Bacon, Abr. *Pleas*, N, 4; 2 Archbold, Pract. 3.

¹⁰² Stephen, Pl. 127, 128.

¹⁰³ In Mississippi, the judgment on a demurrer overruling a plea should be *respondent ouster*; if the judgment be final, it will be reversed. *Randolph v. Singleton*, 20 Miss. 439.

fendant, it is that he go without day, *quod eat sine die*. The effect of a judgment on demurrer to any of the pleadings which go to the action for either party is the same as it would have been on an issue in fact, joined upon the same pleadings and found in favor of the same party.¹⁰⁴ If the defendant demurs to the declaration, but concludes in abatement, (as, by praying that the writ be quashed,) the plaintiff may join in the demurrer as in bar, by praying that his debt, or damages, be adjudged to him; and if his declaration be good, he shall have judgment *quod recuperet*, because by the demurrer the declaration is confessed.¹⁰⁵ Such a judgment is also conclusive by way of estoppel, as if it had been obtained on a verdict; and the facts thus established can never afterward be contested between the same parties or their privies.

But when the action sounds in damages, as in covenant, case for a tort, trover, trespass, and the like, on demurrer, the judgment for the plaintiff is only interlocutory, and it is necessary before final judgment that the damages should be assessed by a jury.¹⁰⁶

On the other hand, if, on demurrer to the declaration, to the plea in bar, or other pleading in chief, judgment is rendered for the defendant, it is final. The plaintiff can never afterward maintain against the same defendants, or those who were in privity with him, any similar or concurrent action for the same cause, that is, upon the same grounds as were disclosed in the first declaration, because the judgment upon such a demurrer determines the merits of the cause, and a final judgment, deciding the right in controversy, puts an end to the dispute.

But to have this binding operation the judgment on demurrer must have decided the merits of the action, for if the plaintiff fails in his first action from the omission of an essential allegation in his declaration, which allegation is supplied in the second, the judgment of the first will be no bar to the second, although both actions were brought to enforce the same right, because in this case, as disclosed in the second declaration, the merits of the cause were not decided in the first.

And so if the declaration is adjudged ill on demurrer because the action was misconceived, as where assumpsit is brought, where debt is the only remedy, or trespass, where the proper action is trover, the judgment on demurrer is no bar to a proper action afterward brought for the same cause; for, in such case, the merits could not have been determined in the first action.

3305. Much of the matter affecting *judgments for the plaintiff* has been already disposed of while discussing the nature of interlocutory and final judgments. When the judgment is on a dilatory plea, it is *respondeat ouster*. When on an issue in fact, it differs according to the form of action; in account, it is *quod computet*; when in case, or when the action sounds in damages, it is that the plaintiff do recover a certain sum of money for his damages, *quod recuperet*; in debt, that he recover his debt, and in general, nominal damages; when in detinue, that he recover the goods or the value thereof. These several judgments will be more fully considered when we come to treat of the several kinds of actions.

3306. When the *judgment is for the defendant*, if the issue, whether of fact or law, arise on a dilatory plea, the judgment is that the writ be quashed, *quod breve cassetur*, upon such pleas as are in abatement of the writ, that the pleading remain without day, until the objection be removed, upon such pleas as are in suspension only.

¹⁰⁴ Bauer v. Roth, 4 Rawle, Penn. 83.

¹⁰⁵ Lawes, Pl. 172; Comyn, Dig. *Pleader*, Q, 3.

¹⁰⁶ Logan v. Jennings, 4 Rawle, Penn. 335.

If the issue arises upon a declaration or peremptory plea, the judgment, in general, is that the plaintiff take nothing by his writ, and that the defendant go thereof without day, which is called a judgment of *nil capiat per breve*.

3307. For the purpose of not interrupting the course of proceedings of the action, judgments have hitherto been supposed to be awarded only upon the decision of an issue; but there are many cases where a judgment may be given before the formation of an issue, which will now demand our attention. These judgments thus given before issue is joined are given because of the fault or neglect of one of the parties in failing to pursue his litigation, and this happens either with an intention of abandoning the claim or defence, or in consequence of a neglect to follow up within the period which the practice of the court prescribes the proceedings already commenced. When this occurs the adverse party becomes victor in the suit, as well as when an issue has been joined, and it is decided in his favor by the entry of a judgment. These judgments are in favor of the plaintiff or of the defendant.

3308. *Judgments for the plaintiff* are of various kinds. If in a real action the defendant holds out against the process of the court which has been issued against him after it has been served, judgment is given for default of appearance;¹⁰⁷ and if in actions real, personal, or mixed, after appearance he neither pleads nor demurs when required by the rules of court, or, if after issue he fails to maintain his pleadings till issue joined by rejoinder, rebutter, etc., judgment will be given against him for want of a plea, which is called judgment by *nil dicit*.

Sometimes, instead of a plea, the defendant's attorney enters upon the record that he is not informed of any answer to be given to the action; judgment is then given against the defendant, and in this case is called a judgment by *non sum informatus*, this being the entry made upon the record.

Instead of a plea when the defendant has no defence, he may choose to confess the action; or after pleading, he may at any time before trial both confess the action and withdraw his plea and other allegations; and the judgment against him in these two cases is called a judgment by confession, or by confession *relictâ verificatione*.

3309. Judgment may also be rendered against the plaintiff before issue joined in any class of actions for not declaring, replying, or sur-rejoining, etc., or for not entering the issue agreeably to the rules of court; judgments in these cases are *judgments of non pros*.¹⁰⁸

The plaintiff may, if he chooses, at any stage of the action after appearance and before judgment, declare that he "will not further prosecute his suit;" or, that he "withdraws his suit;" or, when a plea in abatement has been entered, he may pray that his writ "be quashed that he may sue out a better one," there is then given judgment against him in the first case, of *nolle prosequi*; in the second, of *retraxit*; and in the third, of *cassetur breve*.

Another mode of rendering judgment for the defendant is to *non-suit* the plaintiff. A judgment of non-suit is given against a plaintiff when he is unable to prove his case, or when he neglects or refuses to proceed to trial of a cause after it has been put at issue without determining such issue.

3310. A non-suit is either voluntary or involuntary.

A voluntary non-suit is an abandonment of his cause by a plaintiff and an agreement that a judgment for costs be entered against him.¹⁰⁹

¹⁰⁷ Booth, 19, 73; 2 Saund. 45. Under the statutes of several of the states judgment by default may be given if the defendant fails within a certain time to file an affidavit of defence. *Moore v. Fields*, 42 Penn. St. 467.

¹⁰⁸ From *non prosequitur*.

¹⁰⁹ As a non-suit does not decide the merits of the action, nor prevent another action for

An involuntary non-suit takes place when the plaintiff, on being called when his case is before the court for trial, neglects to appear, or when he has given no evidence upon which a jury could find a verdict; in such case no verdict is given, but judgment of non-suit is rendered against the plaintiff.¹¹⁰

After issue has been joined, if the plaintiff neglects to bring such issue on to be tried in due time as required by the course and practice of the court in the particular case, judgment will be given against him for this default, and this is called a judgment as in case of non-suit.

3311. The judgment must be given by the judges of the court, and it was formerly pronounced in open court; but although it is still supposed to be so, this practice has been so generally relaxed that now, except in the case of an issue at law, there is no actual delivery of judgment in court or elsewhere. When the cause is in such a state that by the practice of the court the plaintiff or defendant is entitled to judgment, he obtains the signature or allowance of the proper officer of the court, expressing, generally, that judgment is given in his favor; and this is called signing judgment.

the same cause, it may often be advantageous to the plaintiff to suffer a voluntary non-suit. He may do so at any stage of the trial before the case is finally submitted to the jury, but not after verdict. *Brown v. Harter*, 16 Cal. 76; *Chadwick v. Miller*, 6 Iowa, 34; *Clarke v. Wall*, 5 Fla. 476; *Long v. Thwing*, 9 Ind. 179; *Bogert v. Chrystie*, 4 Zab. N. J. 57; *Templeton v. Wolf*, 19 Mo. 101. In Illinois, the plaintiff may become non-suit so long as any material issue, as the assessment of damages, remains undetermined. *Adams v. Shepard*, 24 Ill. 464.

¹¹⁰ In all the states judgment by non-suit may be entered if the plaintiff does not appear when called. But in regard to involuntary non-suits after he has introduced evidence, the practice varies. In most of the states, as stated in the text, it will be ordered if the plaintiff's evidence is not sufficient to warrant a verdict. *Beaulieu v. Portland*, 48 Me. 291; *Dean v. Fuller*, 40 Penn. St. 474; *Gardinier v. Otis*, 13 Wisc. 460; *Renwick v. LaGrange Bank*, 29 Ga. 200.

It has been held that a non-suit may be ordered where the uncontradicted evidence of the defendant completely overthrows the plaintiff's case. *Lomer v. Meeker*, 25 N. Y. 361. But this is doubtful. *Pillsbury v. Pillsbury*, 20 N. H. 90. In some states the court cannot order a non-suit if the plaintiff has introduced any evidence. *Byrd v. Blessing*, 11 Ohio, St. 362; *Castle v. Bullard*, 23 How. 172; *Williams v. Port*, 9 Ind. 551; *Hill v. Rucker*, 14 Ark. 706.

CHAPTER XVI.

PROCEEDINGS IN THE NATURE OF APPEALS.

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3312. The judgments obtained in the manner above described, however regular their form, may nevertheless be erroneous, or the plaintiff or successful party may have done some act which would render it unjust that they should be executed. The law has given a power either to the same court where the judgment was obtained, or to a superior court, to revise the proceedings. These modes of reversion are principally five. They are: by *audita querela*, by writ of error, by *certiorari*, by review, and by false judgment.

3313. The object of issuing a *writ of audita querela* is to be relieved from a judgment or execution because of some injustice of the party who obtained it which could not have been pleaded in bar to the action.¹ It is a remedial process, which bears solely on the wrongful acts of the opposite party, and not upon the erroneous judgments or acts of the court. In its form an *audita querela* is a regular suit in which the parties may plead, take issue on the merits; and on a judgment upon such suit, a writ of error may be brought.² In this proceeding there must be proper parties, the writ must be allowed, there must be proper cases on which it lies, there must be pleadings, and a judgment.

3314. All *parties* aggrieved have a right to this writ, and the parties to the judgment and execution sought to be vacated, or their legal representatives, must be made parties to such writ.³ And where judgment against two is fraudulent as to one, both must join in bringing an *audita querela* to vacate it, notwithstanding one of the defendants was party to the fraud.⁴ It lies also for bail when judgment is obtained against them by *scire facias* to answer the debt of their principal, and it happens afterward that the original judgment against the principal is reversed; for here the bail, after the judgment had against them, have no opportunity to plead this special matter, and they are therefore entitled to redress by *audita querela*.⁵

3315. An *audita querela* is of common right and *ex debito justitiæ*, and need not be moved for,⁶ but the *supersedeas* upon it must be moved for, and it will or will not be granted according to the circumstances of the case.⁷ The *audita querela* must issue out of the court where the record is.⁸

3316. An *audita querela* is in the nature of an equitable suit, in which the equitable rights of the parties will be considered. It bears on the wrongful

¹ This writ is but little used, because in modern practice it is usual to grant the same relief on motion which might be obtained by *audita querela*. *Baker v. Judges of Ulster*, 4 Johns. N. Y. 191; *Harper v. Kean*, 11 Serg. & R. Penn. 290; *Witherow v. Keller*, 11 Serg. & R. Penn. 274. In Virginia, *Smock v. Dade*, 5 Rand. Va. 639. In South Carolina, *Longworth v. Screven*, 2 Hill, So. C. 298; and Tennessee, *Marsh v. Haywood*, 6 Humphr. Tenn. 210, the remedy by *audita querela* is obsolete. In Massachusetts and Vermont, it is regulated by statute. *Stanisford v. Barry*, 1 Aik. Vt. 321; *Lovejoy v. Webber*, 10 Mass. 101; *Brackett v. Winslow*, 17 Mass. 153.

² *Brooks v. Hunt*, 17 Johns. N. Y. 484.

³ *Gleason v. Peck*, 12 Vt. 56; *Herrick v. Orange Bank*, 27 Vt. 584.

⁴ *Titlemore v. Wainwright*, 16 Vt. 173; see *Melton v. Howard*, 8 Miss. 103; *Dane*, Abr. c. 186, a. 1. It cannot be brought jointly by a defendant and trustee in trustee process, to set aside the several judgments obtained against them, the grounds of complaint being wholly distinct. *Johnson v. Plimpton*, 30 Vt. 420.

⁵ *Rolle*, Abr. 308.

⁶ *Nathan v. Giles*, 5 Taunt. 558; 1 Marsh. 226.

⁷ *Waddington v. Vredenburg*, 2 Johns. Cas. N. Y. 227; *Comyn*, Dig. *Audita Querela*, E, 3 and 5.

⁸ *Fitzherbert*, Nat. Brev. 105, B.

acts of the opposite party, and not on the erroneous judgments and acts of the court; it will not lie, therefore, where the cause of complaint is a proper subject for a writ of error,⁹ although the remedy by error may have been taken away by statute.¹⁰

The party must have been injured, or be in danger of injury, in order to maintain this action.¹¹ It lies to relieve a defendant against whom a judgment has been recovered, and who is, therefore, in execution, or danger of execution, although he has a right to be discharged by matter which has happened since the judgment; as, if the plaintiff has given the defendant a general release, or the latter has paid the debt to the former without obtaining satisfaction to be entered upon the record.¹² It lies also where the matter of defence arose before judgment, and the defendant had no opportunity to plead it for want of notice, or, having notice, was deprived of the opportunity by the fraud or collusion of the other party.¹³ In these, and the like cases, where the defendant is entitled to a discharge, and if he could have pleaded such matter, either at the beginning of the suit or *puis darrein continuance*, the judgment would have been rendered on the other side, an *audita querela* lies to give him that relief to which in equity the complaining party is entitled.

3317. In this writ, like a *scire facias*, the whole of the case is spread out; it is like a declaration, and it answers that purpose.¹⁴ A declaration, however, may be filed, and then it should recite the whole record of the recovery, and show a sufficient *gravamen*, or cause of complaint.¹⁵

The proper plea to such an action is not guilty.¹⁶

3318. The judgment is for damages against the party who is guilty of the wrong, and to redress the grievance of which the plaintiff complains.¹⁷ On a verdict found for the complainant, the court cannot give a judgment for the defendant *non obstante veredicto*,¹⁸ nor can there be a motion in arrest of judgment.¹⁹

3319. When, in the course of the trial, an error has been committed as to a matter of law, which is not cured by the statutes of amendments and jeofails nor by the common law, such error may be cured or removed by a *writ of error* after a final judgment has been pronounced. In England, a writ of error, like an original writ, is sued out of chancery, directed to the judges of the court in

⁹ Weeks v. Lawrence, 1 Vt. 433; School Dist. v. Rood, 27 Vt. 214.

¹⁰ Dodge v. Hubbell, 1 Vt. 491; Tuttle v. Burlington, Brayt. Vt. 27.

¹¹ Bryant v. Johnson, 24 Me. 304.

¹² Parker v. Jones, 5 Jones, Eq. No. C. 276; Glover v. Chase, 27 Vt. 533. *Audita querela* is the proper remedy to set aside a levy of execution on real estate when the officer has made a false return of the appraisal. Hopkins v. Hayward, 34 Vt. 474; or to set aside a judgment from which an appeal was improperly refused. Edwards v. Osgood, 33 Vt. 224; or to obtain relief from an execution issued for too large an amount by a mistake of the clerk. Stone v. Chamberlain, 7 Gray, Mass. 206.

¹³ Johnson v. Harvey, 4 Mass. 485; Smock v. Dade, 5 Rand. Va. 639; Wardell v. Eden, 2 Johns. Cas. N. Y. 258. But for any matter which might have been pleaded, the writ does not lie, as where the defendant neglects to plead his discharge in insolvency. Faxon v. Baxter, 11 Cush. Mass. 35; see Griswold v. Rutland, 23 Vt. 324.

¹⁴ Dane, Abr. c. 186, a, 1, § 3.

¹⁵ Comyn, Dig. *Audita Querela*, E, 6; Dane, Abr. c. 186, a, 1, § 20; Oakes v. School District, 33 Vt. 156.

¹⁶ Little v. Good, 1 Aik. Vt. 363; Lovejoy v. Webber, 10 Mass. 103.

¹⁷ 1 Aik. 363; 10 Mass. 103; Brackett v. Winslow, 17 Mass. 159; Dane, Abr. c. 186, a, 1, § 20.

¹⁸ French v. Steele, 14 Vt. 579.

¹⁹ See Nathan v. Giles, 5 Taunt. 558. The writ of *audita querela* is now rarely used, as the relief sought by it may under the statutes of the different states be granted on motion. Chambers v. Neal, 13 B. Monr. Ky. 256; Job v. Walker, 3 Md. 129. The writ is not in use in Alabama. Dunlap v. Clements, 18 Ala. 778.

which such judgment was given, and commanding them, in some cases, themselves to examine the record; in others, to send it to another court of appellate jurisdiction, to be examined, in order that some alleged error may be corrected.

In this country, the constitutions of the several states vest in the supreme courts or courts of errors of each state respectively the supervisory power to revise the judgments of inferior courts. Writs of error issue out of such courts, directed to the inferior courts, commanding them to send the record into the supreme or superior court, to be there examined and decided upon according to law and justice.

A writ of error can be brought only on a final judgment, although the errors assigned may be such as have occurred at any stage.²⁰ The refusing leave to amend, refusing to allow the plaintiff to dismiss, sustaining a demurrer, and an order for a new trial are not final judgments on which error can be brought.²¹ And matters occurring since judgment are not grounds for error, as the irregular issuing of an execution.²²

The object of a writ of error is to reverse a wrongful judgment; it is brought by the party complaining of the judgment, whether he be plaintiff in the action or plaintiff below, or whether he be defendant in such action or defendant below. The party complaining of the alleged error is called plaintiff in error, and the opposite party defendant in error.

There are two kinds of writs of error: the one, as has been intimated, by which the judges are authorized to correct any error of fact which ought not to have been committed, called a writ of error *coram nobis*; ²³ and the writ of error which requires the inferior court to send the record into the superior court to be examined.

3320. In general, there is no method of revising an error in the determination of facts but by a new trial, because the finding of the jury is conclusive; and although a matter should exist which was not brought into issue; as, for example, if the defendant omitted to plead a release, which he might have pleaded, this is no error in the proceeding, it is only a mistake of the defendant. But there are some facts which affect the validity and regularity of the proceeding itself, and to remedy these errors the party in interest may sue out the *writ of error coram nobis*, so called because the record and process upon which it is founded are stated in the writ to remain "before us," that is, in the court in which the error remains, for this writ always lies in the same court where the record is. The death of one of the parties at the commencement of the suit; the appearance of an infant in a personal action, by an attorney, and not by guardian; the coverture of either party at the commencement of the suit, when her husband is not joined with her, are instances of this kind.²⁴ Again it has been decided that if the plaintiff in error die pending the writ, and the supreme court, notwithstanding, reverses the judgment, the defendant in error may bring error *coram nobis* there, upon this judgment of reversal, and assign the death of the plaintiff to the former writ as error.²⁵ Such facts as

²⁰ Wallace v. Middlebrook, 28 Conn. 464; Cathcart v. Commonwealth, 37 Penn. St. 108.

²¹ Crawford v. New Jersey Co., 4 Dutch. N. J. 479; Newman v. Dick, 23 Ill. 338; Robinson v. Morgan, 32 Mo. 428; Beatty v. Hatcher, 13 Ohio, St. 115; Doswell v. De la Lanza, 20 How. 29.

²² Lovell v. Kelley, 48 Me. 263.

²³ It is doubtful whether the writ *coram nobis* exists in Wisconsin. Second Bank v. Upman, 14 Wisc. 28.

²⁴ 1 Saund. 101; 1 Archbold, Pract. 212; Stephen, Pl. 140; Day v. Hamburg, 1 Browne, Penn. 75; Hurst v. Fisher, 1 Watts & S. Penn. 441; Kemp v. Cook, 18 Md. 130.

²⁵ Rolle, Abr. 747. See Beall v. Powell, 4 Ga. 525.

these, whenever discovered and alleged, are errors in fact, and sufficient to reverse the judgment upon writ of error. To such cases the writ of error *coram nobis* applies, "because the error in fact is not the error of the judges, and reversing it is not reversing their own judgment." And for this reason, when the judgment is given on the verdict of a jury finding the facts for the plaintiff in error, it is not that the former judgment be reversed, but that it be recalled and revoked.²⁶

3321. The second species is called simply a *writ of error*, and this is by far more common. Its object is to correct an error in law, committed in the proceedings, which is not amendable nor cured at common law, nor by any statute of amendment or jeofails.²⁷ In form, it is a suit between the same parties, sometimes reversed as to the one who complains and the other who defends, as when the defendant below becomes plaintiff in error; but in fact it is a question between the law and the judgment; it is not the original action between the parties which is judged, though the decision affects their rights only; it is the correctness or incorrectness of the judgment, and that alone, which is passed upon in a court of errors. It is the judgment which is to be judged.²⁸

A writ of error is in the nature of a suit or action when it is to restore the party who obtains it to the possession of any thing which is withheld from him, not when its operation is entirely defensive, and it is considered as a new action. There must, therefore, be proper parties, a proper writ, bail given, a return to the writ of error, an assignment of errors, pleas in error, an issue, and judgment in error.

3322. *The parties* to a writ are the plaintiffs in error, who may have been plaintiffs or defendants below; they may have been several, or there may have been only one; and there may be one or more defendants.

3323. The writ of error to reverse a judgment may be sued by a single person having the legal right, by his privies, by bail, by remainder-men and reversioners, by vendee of land sold *pendente lite*, in case of death, in case of marriage, in case of infancy, and by several persons.

3324. A writ of error in a civil action to reverse a judgment should be brought by the person for or against whom it has been given, as the measure may originate with one or the other. As a general rule, no person can bring a writ of error who is not a party or privy to the record, or who is not prejudiced by it; and that he is such must appear on record, and a want of such showing cannot be supplied by proof.²⁹

3325. *Privies* in blood, as the heir is to the ancestor, privies in representation, as the executor or administrator to the testator or intestate, and privies in estate, as the relation of donor and donee, lessor and lessee, may bring error when they are prejudiced by a judgment.³⁰ A terre tenant may, therefore, sue out a writ of error in his own name, without joining the legal parties.³¹ And where there are several persons privy to a judgment, each having a distinct

²⁶ *Fellows v. Griffin*, 9 S. & M. 362.

²⁷ *Gregg v. Bethea*, 15 Ala. 9.

²⁸ The writ of error is a proceeding at common law, and lies only to courts of law. It lies to courts of special jurisdiction, as probate courts, to revise proceedings which are according to the course of the common law. *Fitzgerald v. Commonwealth*, 5 All. Mass. 509; *Baptist Union v. Peck*, 9 Mich. 445. It is allowed in equity under the rules of practice of some states. *Clark v. Larkin*, 9 Iowa, 391.

²⁹ *Townsend v. Davis*, 1 Ga. 495. See *Clayton v. Beedle*, 1 Barb. N. Y. 11; *Hylton v. Brown*, 1 Wash. C. C. 343; *Steel v. Bridenbach*, 7 Watts & S. Penn. 150; *Watson v. Willard*, 9 Penn. St. 89. A writ of error will not be granted when not prayed for by the party himself, but by his friends without his authority. *Ex parte Dorr*, 3 How. 103.

³⁰ *Bacon, Abr. Error*, B; *Porter v. Rummeny*, 10 Mass. 64, 69.

³¹ *Finney v. Crawford*, 2 Watts, Penn. 294.

and several interest, each is distinctly entitled to a writ of error, and to maintain it by himself, and this notwithstanding a release by any other having like privity in the same judgment by a distinct title.³²

The assignee in insolvency may bring error to reverse a judgment rendered against his insolvent.³³

3326. Formerly *bail* were allowed to bring a writ of error on a judgment against their principal,³⁴ but now the rule is different.³⁵ The bail cannot reverse the judgment against their principal nor the principal that against the bail, nor can they join in a writ of error.³⁶ The reason assigned for this is that they are distinct judgments which affect different persons.³⁷

3327. No writ of error lay at common law by the *remainder-man or reversioner* to reverse an erroneous judgment or recovery against the tenant in possession until he became entitled to the land, except when he had been made a party to the record. But by statute³⁸ authority was given to the reversioner to sue in error without waiting for that event; by equity this provision has been extended to the remainder-man. When there are more remainders than one, the next in succession to the recoveree has alone a right to sue.³⁹

3328. On a suit to recover land, if the tenant in possession sell it *pendente lite*, and he aliens it, the alienee cannot have error on the judgment afterward given because he is not a party nor a privy to it; the vendor himself may have error after judgment, although at the time he had no interest, and if he shall be restored, the alienee may enter upon him.⁴⁰

3329. When there was but one party plaintiff or defendant, and judgment has been given against him and then he dies, the writ of error to reverse it must be brought by his personal representative, provided it affects the personal fund, as in case of judgment for debt or damages. When it charges only the inheritance, with which the personal representative has nothing to do, as judgments in real actions, the writ of error is to be sued by the heir at law.⁴¹ When the action is of a mixed nature, charging both the inheritance and the personal estate, as do judgments in mixed actions, the heir and executor may bring error jointly.

3330. When a personal judgment has been rendered erroneously against two, and one dies, the survivor may bring error without joining the executor or administrator of the deceased; and in such case the writ ought to aver the death of the party in order to account for the variance.⁴²

3331. A writ of error abates by the death of one of the plaintiffs in error before errors assigned.⁴³

3332. If an erroneous judgment be recovered against a single woman, who afterward marries, the writ of error should be brought by herself and her husband jointly.⁴⁴ If such judgment is obtained against a married woman as a feme sole, the writ must be sued by the husband and wife jointly; and where in such case another person was sued jointly with the wife, and a joint judgment was rendered against them as joint trespassers, the other person ought to be joined in such writ of error, and the judgment being entire, if reversed, must be reversed as to both.⁴⁵

³² Porter v. Rummeny, 10 Mass. 64.; Shirley v. Lunenburg, 11 Mass. 379.

³³ Johnson v. Thaxter, 12 Gray, Mass. 198.

³⁴ Hooker v. Robinson, 1 Bulstr. 125.

³⁵ Atherton v. Hole, 1 Lev. 137.

³⁶ Inter Plaw & Richards, Palm. 567; Lancaster v. Keyleigh, Croke, Car. 300, 408, 574.

³⁷ 9 Rich. II, c. 3.

³⁸ 1 Rolle, Abr. 747.

³⁹ Anon. 5 Mod. 396.

⁴⁰ Rolle, Abr. 748; Bacon, Abr. *Error*, B.

⁴¹ Fitzherbert, Nat. Brev. 21, N.

⁴² Brewer v. Turner, Strange, 233.

⁴³ Boas v. Heister, 3 Serg. & R. Penn. 271.

⁴⁴ Haines v. Corlist, 4 Mass. 659.

⁴⁵ Whitmore v. Delano, 6 N. H. 543.

3333. Until an *infant* has acquired a legal capacity by arriving at full age he cannot implead nor be impleaded, because he has no power to appoint an attorney; when he sues, he must therefore sue by his guardian or next friend. A writ of error sued out by him without any such protector is therefore irregular, and will be quashed unless his guardian or next friend be made a party to it;⁴⁶ but when the infant sues in his own name, and there is a joinder in error, his disability will be considered as waived.⁴⁷

3334. When the parties plaintiff in error are living, if there are *several* entitled to institute such proceedings, they should be joined, even though there are some not to be affected by the reversal of the judgment, and it is competent for one to join the others without their consent;⁴⁸ for if there be a joint judgment against several, and a part of them only bring a writ of error to reverse it without alleging the death of the others, the court will quash the writ on motion;⁴⁹ so also when a writ of error was brought in the name of A B "and others," without naming the others, this was held to be a fatal defect.⁵⁰ If any refuse to join in the suit, they may be summoned to the court of errors and there be severed, after which he who sued out the writ may go alone.⁵¹ But when the plaintiffs below are plaintiffs in error, they must all join, because unless they can establish a joint right they cannot recover; the rule in relation to severance applies only to cases where the plaintiffs in error were defendants below.⁵²

The reason given why one of several parties against whom a judgment has been rendered cannot bring a separate writ of error is that a great inconvenience would ensue, for by that means the plaintiff might be delayed from having the benefit of his judgment, though it should be affirmed once or oftener.

It is one of the cardinal principles of justice that every person who is to be directly affected in his interest or rights by the judgment of a court of record is entitled to be named or described in the suit, to have notice of it, and an opportunity of being heard and of defending his rights. If, therefore, a party to a judgment in a real action die, those who on his decease are entitled by descent or devise to the land or estate have a privity by their interest in the principal subject of the judgment, and must all be named in a writ of error to reverse it, and this whether they are tenants of the land or not; and if another than the heir or devisee be tenant of the land, it is the safest course to name him also.⁵³

3335. If judgment be given against two executors, though only one appeared to the action, yet both must join in error to reverse the judgment. They must also so join when there is a general judgment against one and a judgment of assets *quando* against the other.⁵⁴

3336. The writ of error may be sued out against a single party when he alone is the party on record, or who has an interest, against personal representatives or the survivor in case of death, against husband and wife in case of marriage, against several parties when they have obtained a judgment.

⁴⁶ Whitaker v. Patton, 10 Ala. 9.

⁴⁷ McClay v. Norris, 9 Ill. 370; see Moore v. Ewen, 5 Serg. & R. Penn. 373.

⁴⁸ Jameson v. Colburn, 5 Ala. 253; Tombechee Bank v. Freeman, 1 Ala. 285; Fotteral v. Floyd, 6 Serg. & R. Penn. 315.

⁴⁹ Andrews v. Bosworth, 3 Mass. 223; Miller v. Heard, 6 Ark. 73; Deneale v. Stumps' Executors, 8 Pet. 526.

⁵⁰ Beale v. Fox, 4 Ga. 403; see Borden v. State, 8 Ark. 399; Bowle's Heirs v. Rouse, 8 Ill. 408.

⁵¹ Fotteral v. Floyd, 6 Serg. & R. Penn. 315; Shirley v. Lunenburg, 11 Mass. 379; Bradshaw v. Gallagher, 8 Johns. N. Y. 558; Watson v. Whaley, 2 Bibb, Ky. 392. If the writ is prosecuted by a part of the parties, they cannot assign errors affecting only the others. Tibbs v. Allen, 27 Ill. 119.

⁵² Gallaher v. Jackson, 1 Serg. & R. Penn. 492.

⁵³ Porter v. Rummeny, 10 Mass. 64; Satterfield v. Crow, 8 B. Monr. Ky. 553.

⁵⁴ Hammond, Parties, 269.

3337. When the party who has obtained judgment or is to be made defendant in error has sued or been sued alone, of course he must, if living, be made the defendant in error without joining any other person with him, for it is a rule that a stranger cannot be a party to proceedings in error either as plaintiff or defendant.⁵⁵

3338. When an erroneous judgment has been given for only *one party, who dies*, the writ must be sued out against his personal representative when the action is personal; when it is real and the land has descended, it must be against the heir, or where the land has been aliened either by the heir or the ancestor, against the heir, with a *scire facias* or notice to the terre tenant; when the action is mixed, against the heir (when the estate in question is an inheritance) and the personal representative, with a similar *scire facias* to warn the terre tenant.

3339. When there are *several* recoverers, *and one dies*, and the judgment is personal, the writ must be sued against the survivor alone. If the action is real or mixed, it must be against the heirs also, when the estate is an inheritance, with a *scire facias* when requisite.⁵⁶

3340. A *married woman* cannot appear by attorney in any suit, whether brought by or against her; if an erroneous judgment be rendered in favor of a single woman, and before a writ of error has been sued out against her she marries, her husband must be joined in the writ; but if she marries after allowance of the writ, the proceedings will be continued against her alone, for she cannot by her act affect the rights of the plaintiff in error.

3341. When there are *several persons* in whose favor a judgment has been rendered, they must, if living, all be made defendants to the proceedings in error, even where the original suit was real and one has aliened his share of the land.⁵⁷

3342. A writ of error is grantable *ex debito justitiae*, and not *ex mera gratia*, in all cases of trials at common law, except treason and felony.⁵⁸ This writ must be sued out within the time prescribed by the statute of limitations in the state where the action was brought.

The writ is issued out of the court, as required by the constitution, and directed to the judges in whose court the record is which is to be removed, commanding them that if judgment be rendered, then the record and process, and all things touching the same, under their seals distinctly and openly they have before the justices of the court of errors (naming it) on the next return day, together with the writ itself; that the record and process being inspected, they may further cause to be done what of right and according to the laws and customs ought. To this writ there must be an *allocatur*, that is, it must be allowed to be issued by one of the judges of the court out of which it issues, which in civil cases is a matter of course.⁵⁹ The writ is then served upon the judges, or left in the office of their clerk or prothonotary, and in due time it is returned into the supreme court or other court of errors.

3343. No *bail in error* was required at common law, so that the defendant

⁵⁵ *Steel v. Bridenback*, 7 Watts & S. Penn. 150.

⁵⁶ *Bartholomew v. Belfield*, 2 Bulstr. 244; *Doe v. Jones*, 2 Maule & S. 472.

⁵⁷ *Fitzherbert*, Nat. Brev. 18, l.

⁵⁸ *Skipwith v. Hill*, 2 Mass. 35; *Drowne v. Stimpson*, 2 Mass. 441; *Pembroke v. Abington*, 2 Mass. 142.

⁵⁹ The want of an *allocatur* is not a good ground of objection after an appearance entered and the argument has commenced. *Eckert v. Wilson*, 10 Serg. & R. Penn. 44. When a writ was issued without the allowance of the court, and a motion was made to quash it, an allowance, *nunc pro tunc*, was ordered, to bar the statute of limitations. *Ferris v. Douglass*, 20 Wend. N. Y. 626; see *Marsh v. Commonwealth*, 16 Serg. & R. Penn. 319.

by suing out a writ of error could delay the plaintiff without giving any security for the prosecution of the writ, or for the payment of the debt and costs in case the judgment should be affirmed, or the writ of error should be discontinued, or the plaintiff in error should become non-suit.⁶⁰ To remedy this evil, the English courts put some restraints upon the issuing of a writ of *supersedeas*, except when there was a manifest or pregnant error. And by the enactment of several statutes⁶¹ this evil was completely removed. It was thereby provided that "no execution shall be stayed or delayed upon or by any writ of error or *supersedeas* thereupon to be issued for the reversing of any judgment in any action or bill of debt, upon any single bond for debt, or upon any obligation, with the condition for the payment of money only, or upon any action or bill of debt for rent, or upon any contract sued in any of the courts of record," etc., "unless the person or persons in whose name or names such writ of error shall be brought, with two sufficient sureties, such as the court where the judgment was given shall allow of, shall first be bound unto the party for whom the judgment is given, by recognizance to be acknowledged in the same court in double the sum adjudged to be recovered by the former judgment, to prosecute the said writ of error with effect, as also to satisfy and pay if the said judgment be affirmed, or the writ of error non-prossed, all and singular the debts, damages, and costs adjudged upon the former judgment, and all costs and damages to be awarded for the delaying of the execution."

The principles of these statutes have been re-enacted or adopted in perhaps all the states of the Union, in some cases with considerable modifications.⁶²

3344. The judges of the court below *return* the writ of error,⁶³ with the record in the case properly certified under their seal, to the supreme or superior court; and on the back of the writ of error is a statement made that they have done so, which is called the *return*.⁶⁴ In judgment of law, the record itself is removed to the court above from the court below, though, in fact, a transcript only is sent up.⁶⁵

When the record, as returned by the justices of the court below, appears to be incomplete, the parties may suggest a diminution of the record, and pray a writ of *certiorari* to the justice, to certify the whole record.⁶⁶ After the record has thus been completed, it may be amended, quashed, or abated.

Errors dependent on the evidence must be brought up by bills of exceptions or made part of the record stating the evidence, or they will not be considered.⁶⁷

⁶⁰ 2 Tidd, Pract. 1074.

⁶¹ 3 Jac. I, c. 8; 3 Car. I, c. 4, s. 4.

⁶² Iowa, Code, secs. 3091, 3094; Rheem v. Naugatuck Wheel Co., 33 Penn. St. 356; Ela v. Welch, 9 Wisc. 395; Thompson v. Burnett, 6 Jones, No. C. 486. The general rule is that the bond to pay the judgment is a prerequisite to obtaining a *supersedeas* only, but in some states the writ may be dismissed unless a sufficient bond is given to pay the costs. Patrick v. Nelson, 2 Head, Tenn. 507.

⁶³ It is essential that the original writ should be returned by the court below; if not, the writ will be quashed. Rolke v. State, 12 Wisc. 570; Overton v. Cheek, 22 How. 46.

⁶⁴ Tidd, Pract. 1088, 1092. It is the duty of the party to see that the return is filed in the court above. Carne v. Hall, 7 Mich. 159; Reynolds v. Dechaumes, 22 Tex. 116.

⁶⁵ Brown v. Clark, 3 Johns. N. Y. 443. No further proceedings can be had in the court below until the record is returned. Cox v. Henry, 36 Penn. St. 445. If the defendant in error wishes after return made to amend the record in order to obviate the error, he must apply to the court in error by petition to remit the record for amendment. O'Flynn v. Eagle, 7 Mich. 454; 8 Mich. 136.

In Arkansas it seems that such an amendment may be made by the court below, and brought up by *certiorari*. Burton v. Field, 19 Ark. 228. Clerical errors may be amended below and certified to the court above. Jones v. Van Patten, 3 Ind. 107.

⁶⁶ Tidd, Pract. 1109; Bassler v. Neisly, 1 Serg. & R. Penn. 472.

⁶⁷ Guthrie v. Wilson, 40 Penn. St. 430; Kneiffe v. State, 13 Wisc. 568; Starbird v. Eaton, 42 Me. 569; Weed v. Weed, 25 Conn. 594; Johnson v. State, 2 Dutch. N. J. 313; State v. Guyott, 26 Mo. 62.

3345. At common law, great certainty was required in making the writ agree with the record, because no defects could be amended. But by a statute⁶⁸ which has been adopted in principle in perhaps all the states, it is allowed to *amend* writs of error, as a matter of course, when there is any thing to amend by. But when the writ is returnable before judgment is given, this is a fault which cannot be amended.⁶⁹

The United States supreme court have held that they cannot amend the writ, as they have no jurisdiction unless the writ is correct.⁷⁰

3346. After the return of the transcript or record the defendant in error may move to *quash* the writ for any fault not amendable by the above mentioned statute or the practice of the courts under it, but a motion to quash after a plea of *in nullo est erratum* is in general too late;⁷¹ if, however, injustice is likely to be done, the court will of its own motion quash it.⁷² The writ may also be quashed for one judgment and stand good as to the other; as, upon a judgment in *scire facias* against bail the defendant brought a writ of error *tam in redi-tione iudicii quam adjudicatione executionis*, the court quashed the writ as far as it related to the original judgment because the bail had no right to bring error upon the judgment against his principal, and ruled it to stand good *quoad* the judgment against the bail on the *scire facias*.⁷³ A writ of error will also be quashed when final judgment has not been rendered in the court below.⁷⁴

3347. In personal actions at common law when a sole plaintiff in error dies, or if one of several plaintiffs in error dies before errors assigned, *the writ abates*; but the death after the assignment of errors does not abate it.⁷⁵ In some of the states provisions are made by statute for the substitution of the executors or administrators of the plaintiff in error when the cause of action survives. The death of the defendant in error does not abate the writ, and much less the death of one of several such defendants. The marriage of a woman after she has sued out a writ of error abates it, but the marriage of a feme sole defendant in error does not.⁷⁶

The effect of abatement of a writ of error is that the plaintiffs or their representatives may sue out and prosecute a new writ; when it abates by the act or default of the party, the second writ is no *supersedeas*.⁷⁷ But when the case appears to require it, the court will order a *supersedeas* to stay the proceedings pending the second writ of error.⁷⁸

3348. When the writ of error has not been quashed nor abated, and the record has been certified, the plaintiff in error should *assign*, that is, specify the errors of which he complains. If he fail to do so within the time prescribed by the rules and practice of the court, his writ may be nonprossed because he did not follow up his complaint as he was bound to do. Thus, where a case was brought

⁶⁸ 5 Geo. I, c. 13. See *Finney v. Crawford*, 2 Watts, Penn. 294; *Parsons v. Copeland*, 5 Mich. 144.

⁶⁹ Archbold, Pract. 214; 2 Dunlap, Pract. 1142; *Strange*, 807, 891.

⁷⁰ *Hodge v. Williams*, 22 How. 87; *Porter v. Foley*, 21 How. 393. Nor can it be amended in Missouri, the statute 5 Geo. I, c. 13, not having been re-enacted in that state. *Fremon v. Carondelet*, 25 Mo. 62.

⁷¹ *Robinson v. Margarity*, 28 Ill. 423.

⁷² *Downing v. Baldwin*, 1 Serg. & R. Penn. 298; *Van Meter v. Lovis*, 29 Ill. 488.

⁷³ *Burr v. Attwood*, Carth. 447.

⁷⁴ *Spitter v. Ohio*, Wright, Ohio, 106.

⁷⁵ *Green v. Watkins*, 6 Wheat. 260; *Marshall v. Peck*, 1 Dan. Ky. 609; *Boas v. Heister*, 3 Serg. & R. Penn. 271.

⁷⁶ Archbold, Pract. 216.

⁷⁷ Anon. 1 Ventr. 100; *Sherrer v. Grier*, 3 Whart. Penn. 14.

⁷⁸ *Hardeman v. Anderson*, 4 How. 640.

up on a writ of error, but no assignment of errors was filed and no appearance made for either party, the court ordered it to be struck from the docket.⁷⁹

The court is not bound to consider any errors not assigned, but may do so in its discretion, and reverse a judgment for such error.⁸⁰

An assignment of errors is in the nature of a declaration. The assignment need not be very formal; its principal requisite is clearness and certainty. It is either of errors of fact or errors of law.

3349. *Errors of fact* may be assigned of such matters as do not appear upon the record, and of such facts as, if true, prove the judgment to have been erroneous; as, that the defendant below, being under age, appeared by attorney; that a feme plaintiff or defendant was under coverture at the time of commencing the actions; or that the plaintiff or defendant died before verdict or interlocutory judgment. But nothing of which the party could have taken advantage in the court below can be assigned for error in fact.⁸¹ An assignment of errors in fact should conclude with a verification.⁸² In assigning the death of the defendant in error the assignment ought not to conclude in the common way, but by praying a *scire facias ad audiendum errores* against the executor or administrator of the defendant in error.

It is essential that all errors not apparent on the record should be assigned; for although the court may in some instances correct errors of record, although not assigned, it is otherwise with errors outside the record.⁸³

3350. *Errors in law* are common or special.

Common errors are that the declaration is insufficient in law to maintain the action, and that the judgment was given for the plaintiff instead of the defendant, or *vice versa*.

Special errors are those which show particular defects in the record, and which render the judgment erroneous. Of these the plaintiff may assign as many as he pleases; but he can assign nothing for error which contradicts the record, or that was of advantage to the plaintiff in error, or that is aided by appearance, or which was not taken advantage of or excepted to in due time,⁸⁴ or to any matter of form which was not excepted to below and which might have been amended there.⁸⁵

Mistakes of law not apparent on the record may furnish ground for other remedies, by new trial, *audita querela*, or in some states by writ of review, but are not error, and cannot be considered by the court.⁸⁶

3351. After the errors are assigned, the defendant in error is required to plead or demur. This he is bound to do within the time prescribed by law or the rules of the court, and a failure to do so will subject him to a reversal.

3352. *Pleas in error* are common and special.

⁷⁹ *Smith v. Inferior Court*, 4 Ga. 156; see *Hunter v. Langmin*, 1 Ala. 99; *Tolland v. Willington*, 26 Conn. 578; *Henderson v. Halliday*, 10 Ind. 24.

⁸⁰ *Ives v. Finch*, 28 Conn. 112; *Sneed v. Moodie*, 24 Tex. 159; *Davis v. Hines*, 6 Ohio, St. 473.

⁸¹ *Wetmore v. Plant*, 5 Conn. 541.

⁸² *Sheepshanks v. Lucas*, 1 Burr. 410.

⁸³ *Ritchey v. West*, 23 Ill. 385; *St. Anthony Co. v. Vandall*, 1 Minn. 246.

⁸⁴ See *Cook v. Conway*, 3 Dan. Ky. 454; *Cates v. Woolridge*, 1 J. J. Marsh. Ky. 267; *Osborn v. State*, 7 Ohio, 212; *Shirley v. Lunenburg*, 11 Mass. 379; *Hemmenway v. Hicks*, 4 Pick. Mass. 497; *Wetmore v. Plant*, 5 Conn. 541; *Hill v. West*, 4 Yeates, Penn. 385; *Collins v. Rush*, 7 Serg. & R. Penn. 147; *Brown v. Caldwell*, 10 Serg. & R. Penn. 114; *Miliken v. Barr*, 7 Penn. St. 23; *Murray v. Cooper*, 6 Serg. & R. Penn. 126; *Chase v. Hodges*, 2 Penn. St. 48; *Durant v. Palmer*, 5 Dutch. N. J. 544; *Holbrook v. Coney*, 25 Ill. 543; *Webster v. Modlin*, 12 Wisc. 368; *Thomas v. Lawson*, 21 How. 331.

⁸⁵ *In re, Pennsylvania Hall*, 5 Penn. St. 204; *Shoenberger v. Zook*, 34 Penn. St. 24.

⁸⁶ *Peebles v. Rand*, 43 N. H. 337; *Reid v. Case*, 4 Wisc. 429; *People v. Hessing*, 28 Ill. 410; *Cathcart v. Commonwealth*, 37 Penn. St. 108; *New Orleans v. Gaines*, 22 How. 141.

The common plea, or rejoinder, as it is more frequently called, is *in nullo est erratum*, or that there is no error in the record or proceedings. This is in the nature of a demurrer, and at once refers the matter of law arising in the case to the judgment of the court.⁸⁷ This plea in general confesses all the facts pleaded, and where it was assigned for error that the defendant below, an infant, appeared by attorney, the plea *in nullo est erratum* was considered as confessing the fact.⁸⁸ But if an error in fact be assigned that is not assignable, or be ill assigned, *in nullo est erratum* is no confession of it, but shall be taken only for demurrer.⁸⁹ There cannot be an assignment of error in fact and error in law together,⁹⁰ for these are distinct things and require different trials; and if, to such an assignment, the defendant in error pleads *in nullo est erratum*, this is a confession of the error in fact, and the judgment must be reversed, for he should have demurred for duplicity.⁹¹ By pleading *in nullo est erratum*, the defendant in error admits the record to be perfect, the effect of his plea being that in its present state the record is without error, so that after this plea the defendant in error cannot allege diminution or pray a *certiorari*.⁹² But the court may, *ex officio*, award a *certiorari* to prevent injustice.

Special pleas to an assignment of error contain matters in confession and avoidance, as a release of errors, the act of limitations, and the like, to which the plaintiff in error may reply or demur, and proceed to trial or argument. If the plea of a release of error is sustained, the judgment will be affirmed.⁹³

3353. On the *issue* being joined, if it be an issue in fact, according to the English practice, a record of *nisi prius* is made up, and the parties proceed to trial as in common cases; and after verdict the party for whom it is found must move to put the cause in the paper for argument; and then on producing the *postea* the court will give judgment according to the finding. These cases where an issue is formed on matter of fact, by pleadings in error, are extremely rare in this country.

When an issue in law is formed, the case is put on the argument list, and it is argued before the judges of the court of errors, and by them decided, after hearing counsel on both sides. These cases require much consideration, as they often turn on very nice questions of law.

Before the court hear the argument, they require the plaintiff in error to furnish each of the judges with a paper book, which is a book or paper containing an abstract of all the facts and pleadings necessary to the full understanding of the case. This book should also state the points made by plaintiff in error, and also the cases or statutes to be cited in support of the positions of law taken by him.⁹⁴

3354. Courts of error in rendering their *judgments* usually give the reasons

⁸⁷ *Hagget v. Commonwealth*, 3 Metc. Mass. 457.

⁸⁸ *Moore v. McEwen*, 5 Serg. & R. Penn. 373; *Goodwin v. Sanders*, 9 Yerg. Tenn. 91; *Bliss v. Rice*, 9 Johns. N. Y. 159; *Harvey v. Rickett*, 15 Johns. N. Y. 87; *Benner v. Welt*, 45 Me. 483.

⁸⁹ *Tidd, Pract.* 1117; *Bacon, Abr. Error*, K, 2.

⁹⁰ Where the assignment of errors contained errors in fact and errors in law, the court ordered the error in fact to be struck out, and reversed the judgment for the error in law. *Lewis v. Lawson*, 1 Root, Conn. 262.

⁹¹ *Bacon, Abr. Error*, K, 2; *Moody v. Vreeland*, 7 Wend. N. Y. 55.

⁹² *Cheetham v. Tillotson*, 4 Johns. N. Y. 499.

⁹³ *Smucker v. Larimore*, 21 Ill. 267.

⁹⁴ In Pennsylvania, the supreme court has adopted a convenient rule, that each party may furnish a paper book, stating the points made by such party, and also the authority by which they are supported, a copy of which must be furnished to the opposite party. The rules vary in the different states, and in some the court may dismiss the writ unless a paper book is furnished. *Wilcox v. Hathaway*, 12 Wisc. 543; or they will take no notice of errors assigned, but not noticed on the brief. *Bray v. Carpenter*, 20 Ind. 255.

or motives which induce them on one side or the other. The collection of reasons thus delivered by a judge for giving the judgment he is about to pronounce is called his opinion. Such an opinion ought to be a perfect syllogism, the major of which should be the law; the minor, the fact to be decided; and the consequence, the judgment which declares that to be conformable or contrary to law.

The judgment in error, unless the court are equally divided in opinion, is to affirm, or to recall, or to reverse the former judgment, that the plaintiff be barred of his writ of error, or that there be a *venire facias de novo*.

The common judgment for the defendant in error, whether the errors assigned be in fact or in law, is that the former judgment be affirmed. But a judgment may be good in part and erroneous in part; in that case the judgment below will be affirmed as to part and reversed as to the other part; as, where it was reversed for damages and affirmed for costs.⁹⁵ If the judgment below is not divisible, although good in part and bad in part, it must be affirmed or reversed *in toto*; as, where it is entered against two and it is erroneous as to one.⁹⁶

On a demurrer to an assignment of errors, in fact or in law, for duplicity, the judgment, when for the defendant, is *quod affirmetur*. On a plea of release of errors, or the statute of limitations, found for the defendant, the judgment is that the plaintiff be barred of the writ of error.

When the judgment is for the plaintiff in error, for an error in fact, the judgment below is recalled, revoked; when for an error in law, it is reversed, *quod judicium revesetur*.

If the court of error is equally divided, the judgment will be affirmed.⁹⁷

3355. *In cases where there are several dependent judgments*, and the principal one is reversed, the others cannot be supported; as, if the plaintiff recover in debt upon a judgment, if the first be reversed, the second, which is founded upon it, will of course fall to the ground.⁹⁸ But the reversal of the last judgment will not affect the first; as, if judgment be given against executors in an action of debt, and after, on a *scire facias*, judgment is given against them to have execution of their proper goods, and a writ of error be brought upon both judgments, if the first judgment be good and the last erroneous, the last judgment shall be reversed, and the first shall stand.⁹⁹

3356. *When the judgments are independent of each other*, the reversal of one does not affect the other; as, if in an action of account judgment be given *quod computet*, and afterward auditors are appointed, and upon the account judgment is given also against the defendant, with damages and costs, whereupon a writ of error is brought upon both judgments, the last one of which alone is found to be erroneous; in this case the last judgment only shall be reversed, and not the first, which shall stand in full force, for these two are distinct and independent judgments.¹⁰⁰

3357. A distinction is made in giving judgment by the court of error, when

⁹⁵ *Cummings v. Pruden*, 11 Mass. 206; *Wales v. Fowler*, Kirb. Conn. 236; *Dixon v. Pierce*, 1 Root, Conn. 138; *Swearingen v. Pendleton*, 4 Serg. & R. Penn. 396; *Boaz v. Heister*, 6 Serg. & R. Penn. 18; *Barnett v. Barnett*, 16 Serg. & R. Penn. 51.

⁹⁶ *Boaz v. Heister*, 6 Serg. & R. Penn. 18; *Harman v. Brotherson*, 1 Den. N. Y. 537; *Davis v. Campbell*, 1 Ired. No. C. 482; *Gaylord v. Payne*, 4 Conn. 80. By act of assembly in Pennsylvania, the court may in some cases reverse as to one of the defendants and affirm as to the other. *Jamieson v. Pomeroy*, 9 Penn. St. 230.

⁹⁷ *Huncke v. Francis*, 3 Dutch. N. J. 55.

⁹⁸ *Bacon, Abr. Error*, M, 1; *Rolle*, Abr. 777; 8 Coke, 143. See *Hutchinson v. Commonwealth*, 4 Metc. Mass. 359.

⁹⁹ *Bacon, Abr. Error*, M, 1.

¹⁰⁰ *Williams v. White*, Croke, Eliz. 806; *Style*, 290.

the judgment below is reversed, between those cases where the plaintiff below is plaintiff in error, and where the defendant below is plaintiff in error.

In the first case, where the plaintiff below is plaintiff in error, and the judgment is reversed, the court above give such judgment as the court below ought to have given, for the writ of error is to revive the first cause of action, and to recover what ought to have been recovered in the first suit, in which the erroneous judgment was given.¹⁰¹

But if the judgment below be given against the defendant, and he bring a writ of error, upon which that judgment is reversed, the judgment shall be *quod judicium revesetur*, simply that the judgment be reversed, for the writ of error is brought only to be eased and discharged from that judgment.¹⁰²

If a judgment against several defendants below is reversed for error as to a part of them, it is reversed wholly, for it cannot be affirmed as to the others.¹⁰³

3358. If the judgment of the court below has been given upon a case stated or a special verdict, and the court above reverse the judgment, the latter court ought to give the judgment as it ought to have been given in the first place, whether the plaintiff or defendant below be the plaintiff in error.¹⁰⁴

3359. When the judgment of the court below is reversed, a *venire de novo* will be granted in the following cases: first, because the jury were improperly chosen, or there was some irregularity in returning them; secondly, because the jury improperly conducted themselves; thirdly, because they gave general damages upon a declaration containing several counts, one or more of which were defective; fourthly, because the verdict, whether general or special, is imperfect by reason of some ambiguity, or by finding less than the whole matter in issue, or by not assessing damages; or, fifthly, because there has been some other defect or irregularity in the proceedings on the first venire, or the trial, by which the proper effect of that writ has been frustrated, or the verdict has become void in law. When this writ is granted, there must of course be a new trial.¹⁰⁵

3360. *Costs in error* are generally given to the successful party, and the judgment is for the costs. But the regulations of the several states vary considerably upon this subject. In some cases, and under certain circumstances, in some of the states no costs are allowed on reversal; in other cases double costs are given.

In the supreme court of the United States, if no exceptions were raised in the court below, or if no errors are argued, or if the errors are plainly frivolous, the judgment is affirmed with ten per cent. damages.¹⁰⁶

3361. A part of the judgment of the court of errors sometimes is a *writ of restitution*, when an erroneous judgment has been reversed. This writ is issued when property has been taken in execution, and the judgment has been reversed or set aside; this is to compel the plaintiff below, who has been paid the

¹⁰¹ *Garr v. Stokes*, 1 Harr. Del. 403; *Swearingen v. Pendleton*, 4 Serg. & R. Penn. 396.

¹⁰² *Packard v. Matthews*, 9 Gray, Mass. 311. If the judgment by default has been rendered by mistake for too much, the court may reform it. *Morrison v. Dibrell*, 22 Tex. 199.

¹⁰³ *Benner v. Welt*, 45 Me. 483.

¹⁰⁴ *Stephens v. Cowan*, 6 Watts, Penn. 513; *Mosher v. Small*, 5 Penn. St. 221; see *Commonwealth v. Huffey*, 6 Penn. St. 348.

¹⁰⁵ *Miller v. Ralston*, 1 Serg. & R. Penn. 309; *Reed v. Collins*, 5 Serg. & R. Penn. 351. See before, **3300**.

¹⁰⁶ *Kilbourne v. State Savings Inst.*, 22 How. 503; *Sutton v. Bancroft*, 23 How. 320; *Jenkins v. Banning*, 23 How. 455. So also in Texas and Missouri. *Walker v. Burbridge*, 17 Tex. 650; *Suss v. Fuhrman*, 31 Mo. 470.

amount of his erroneous judgment, to restore to the opposite party the property which he has taken in execution, or, if such property has been sold, then to restore to him the price for which the same was sold.¹⁰⁷

If the execution has been satisfied by a levy on land, a writ of restitution will not be awarded, but the plaintiff in error must resort to a writ of entry, especially if the property has been sold subsequent to the levy by the defendant in error to an innocent purchaser for value without notice.¹⁰⁸

3362. After judgment in error has been thus given, the record remains in the court of errors. It is then required that it should be sent below, when it has been affirmed, to be executed; or if it has been reversed and a *venire facias de novo* has been awarded, that the action may be tried again before such court. It is necessary for this purpose that the record be remitted to the court below, and this is effected by means of a *remittitur*, which is an entry on the records of the court above that the record of the case has been returned to the court whence it was removed. A certificate made by the clerk of the supreme or superior court to that effect is also called a *remittitur*. On the return of the record to the court from which it was removed by writ of error, the case will be proceeded in by a *venire facias de novo*, by execution, or by *scire facias* against the bail in error, as the case may be, conformably to the judgment of the supreme court.

3363. A *certiorari* is a writ issued by a supreme or superior court having jurisdiction, directed to the judges or officers of an inferior court, commanding them to return the records of a cause depending before them in a particular case.¹⁰⁹

In general, there are two ways by which a superior court, which has a supervisory power over all inferior jurisdictions, can correct the erroneous proceedings of inferior courts; the first is by writ of error, which is of right, in civil cases, *ex debito justitiæ*, and which lies only after judgment rendered in the inferior court; the second is by *certiorari*, which is granted only at the discretion of the court, and generally lies at any stage of the proceedings in the court below. A question which is not easily settled frequently arises, which of these two remedies ought to be adopted in practice. It may, however, be laid down generally that when the lower court proceeds according to the course of the common law, and the court above can give a right judgment where the inferior court has given a wrong one, then a writ of error is the proper remedy. It is also equally clear that when neither this course of proceeding can be had nor such right judgment given, then the *certiorari* is the proper remedy.

The writ of *certiorari* is issued in two kinds of cases; in one species it accompanies a writ of error, and is issued for the purpose of compelling the production of the whole record when a diminution has been suggested and shown.¹¹⁰ The other kind, which is the only one which will occupy our attention under this section, does not accompany the writ of error, but lies in many cases where a writ of error cannot by law give a right judgment when the lower court gives a wrong one, or in which the proceedings are not according to the course of the common law. In these cases, where the writ of error is not the proper remedy, the *certiorari* is the ground of the proceeding. It is first used to bring up the record and proceedings from the court below; when returned, the court above issues a notice to the party defendant or respondent in the nature of a

¹⁰⁷ Rolle, Abr. 778; Bacon, Abr. *Execution*, Q; Boal's Appeal, 2 Rawle, Penn. 37; Bruere v. Britton, 1 Spenc. N. J. 168; George v. Starrett, 40 N. H. 135.

¹⁰⁸ Horton v. Wilde, 8 Gray, Mass. 425.

¹⁰⁹ Bacon, Abr. *Certiorari*, A; 4 Viner, Abr. 330; Nelson, Abr. *Certiorari*.

¹¹⁰ Trudeau v. New Orleans R. R., 15 La. Ann. 717; Gregory v. Slaughter, 19 Ind. 342; Clark v. Hackett, 1 Black, 77.

summons.¹¹¹ After this the court above proceed to act according to law and justice in the decision of the case.

In the examination of this subject we will consider the mode of obtaining a *certiorari*, how the *certiorari* is to be returned, how far the *certiorari* operates as a *supersedeas*, and when a *procedendo* will be ordered.

3364. The regular *mode of obtaining a certiorari* is in general by motion or petition, and the facts upon which it is granted must be established by the oath or affirmation of the applicant unless such facts appear upon the record.¹¹² As a writ of *certiorari* is clearly not a writ *ex debito justitiæ*, because it lies to the court below in any stage of its proceedings not always on the ground of an error in its judgment, but often merely for the purpose of examining its proceedings in order to see that it has not exceeded its jurisdiction or acted irregularly, on surmise of erroneous proceedings the court above must exercise discretionary power in issuing this writ not accompanying a writ of error, and must therefore not allow it to be issued except when claimed by the government, and except in some cases where this writ, from long usage and for particular reasons, has become a matter of course. In general, security must be given to prosecute the writ of *certiorari* with effect.¹¹³

The writ of *certiorari* will not in general be granted where the party has a remedy by appeal or other proceeding as of right.¹¹⁴ The petition should point out the errors complained of specifically.¹¹⁵

3365. *The certiorari ought to be returned* under the seal of the inferior court, or of the justices to whom it is directed; and if such court have no proper seal, it may be returned under any seal. It must be returned by the person to whom the writ is directed; but a return made by the clerk of the circuit court of the United States to which a *certiorari* was directed was held to be sufficient.¹¹⁶

The return is conclusive as to the facts, and is the only thing to be considered by the court above.¹¹⁷ In some states, however, by statute the proceedings upon a *certiorari* are a trial of the whole matter *de novo*.¹¹⁸

The return should set out the evidence taken below.¹¹⁹

¹¹¹ It has never been the practice in Pennsylvania to serve a copy of the writ of *certiorari* on the attorney of record, as in England; nor is the writ, as is the case in the supreme court of the United States, accompanied with a citation to the party. *Commonwealth v. McAllister*, 1 Watts, Penn. 308.

The writ must be served in Minnesota. *Bunday v. Dunbar*, 5 Minn. 444. The writ of *certiorari* is the proper remedy in cases where the proceeding is not according to the common law, and where no remedy is provided by appeal, exceptions, error, or otherwise. *Mendon v. Commissioners*, 2 All. Mass. 463; *Whitney v. Delegates*, 14 Cal. 479. The granting it is a matter of discretion. *State v. Hudson*, 5 Dutch. N. J. 115; *In re, Lantis*, 9 Mich. 324. When it is asked to review the proceedings of public tribunals, the principal reason for granting it is the want or excess of jurisdiction. *Henshaw v. Supervisors*, 16 Cal. 208.

It does not lie to revise acts simply ministerial in their character, or to correct errors in the treatment of matters properly within the jurisdiction of the tribunal below. *Robinson v. Supervisors*, 16 Cal. 208; *Tallmadge v. Potter*, 12 Wisc. 317.

¹¹² *Finch v. McDowell*, 7 Cow. N. Y. 538; *Kehr v. Gautier*, T. U. P. Charlt. Ga. 279; *Hunter v. Hunter*, *id.* 303; *People v. Onondaga*, 8 Wend. N. Y. 519; *Harrison v. Clapp*, 25 Ill. 575; *Rollison v. Hope*, 18 Tex. 446.

¹¹³ *Johnson v. McKissack*, 20 Tex. 160.

¹¹⁴ *Davis v. Horn*, 4 Greene, Iowa, 94; *Clary v. Hoagland*, 13 Cal. 173.

¹¹⁵ *Chambers v. Lewis*, 9 Iowa, 583; *Hagood v. Grimes*, 24 Tex. 15; *Clifford v. Waldrop*, 23 Ill. 336.

¹¹⁶ *Stewart v. Ingle*, 9 Wheat. 526; see *Lambert v. People*, 7 Cow. N. Y. 103; *Ball v. Van Houten*, 1 South. N. J. 32.

¹¹⁷ *Commissioners v. Supervisors*, 27 Ill. 140; *Mendon v. Worcester*, 5 All. Mass. 13; *Chase v. Miller*, 41 Penn. St. 403; *Hyde v. Nelson*, 11 Mich. 353; *Schroder v. Crary*, 11 Iowa, 555; *Taylor v. Bissell*, 1 Minn. 225.

¹¹⁸ *Commissioners v. Supervisors*, 27 Ill. 140.

¹¹⁹ *Mullins v. People*, 24 N. Y. 399; *Jackson v. People*, 9 Mich. 111.

3366. After the cause has been removed by *certiorari*, there is no record in the court below, and, therefore, that court cannot proceed in the cause in any respect, and all its subsequent acts will be erroneous. If before the delivery of the *certiorari* to the judges of the inferior courts execution had been issued by the court, the judges to whom the *certiorari* was delivered ought immediately to have awarded a *supersedeas* to the sheriff, in order to have stopped the execution. The delivery of such *supersedeas* to the sheriff before he has commenced the execution of the writ renders his subsequent acts wholly void; but if the execution was partially executed before the *supersedeas* was delivered to him, he may afterward go through with it.¹²⁰

3367. If the *certiorari* has been improperly issued by a fraud upon the court, a false allegation, and the like, the courts above will issue a *procedendo* to the court, commissioners, or others below, to proceed in the cause or business. By this writ of *procedendo* the cause is remitted to the court whence the record came, and it commands the inferior court to proceed to the final hearing and determination of the same. It issues not only in the cases above mentioned, but also when it does not appear to the superior court that the suggestion upon which the cause has been removed is sufficiently proved.

3367, a. In some states a remedy for an erroneous judgment is given by statute by a *writ of review*. It lies for matter outside of the record which cannot be reached by writ of error.¹²¹ Thus if the error assigned is want of legal service of process, if the record shows that the requirements of the law were not complied with, the remedy is by writ of error. But if the records show service when in fact there was none, the remedy is by writ of review. The causes for which a writ of review is granted are fixed by statute. To obtain the writ a petition is presented, and the writ is granted sometimes in the discretion of the court, and in some cases of right. When the defendant lives out of the state, and jurisdiction has been obtained by attachment of his property and service of process by advertisement, the writ in general may be sued out within a certain time after judgment. The writ when issued is the commencement of a new suit, in which the whole matter is tried *de novo*, and on the same issue as in the former suit.¹²²

A bond to prosecute the writ to judgment is usually required as a preliminary to issuing the writ or to granting a *supersedeas*.

This writ is in the nature of an equitable remedy, and does not lie to enforce strict legal rights against equity.¹²³

3368. In England there is an additional remedy by a *writ of false judgment* which lies when an erroneous judgment is given, in a court not of record, in which the suitors are judges.¹²⁴ Though this writ is perhaps never used in this country, it is proper in a work like the present to take a brief view of it.

This writ may be sued out of chancery by any one against whom the judgment is given, his heir, executor, or administrator; or by any one who has sustained damages, though the other defendants do not join, as they ought to do, in error. If the writ be brought upon a judgment in the sheriff's court, it is

¹²⁰ *Blanchard v. Myers*, 9 Johns. N. Y. 66; *Patchin v. Mayor of Brooklyn*, 13 Wend. N. Y. 664; *Kingsland v. Gould*, 1 Halst. N. J. 161; *Mairs v. Sparks*, 2 South. N. J. 513; *Gardiner v. Murray*, 4 Yeates, Penn. 560.

¹²¹ *Ely v. Hawkins*, 15 Ind. 230; *Dwinel v. Godfrey*, 44 Me. 65.

¹²² *Johnson v. Atlantic R. R.*, 43 N. H. 410; *Curtis v. Curtis*, 47 Me. 525; *Andrews v. Foster*, 42 N. H. 376.

¹²³ *Yeager's Appeal*, 34 Penn. St. 173; *Russell's Appeal*, 34 Penn. St. 258; *Weld v. Sabin*, 20 N. H. 533.

¹²⁴ *Fitzherbert*, Nat. Brev. 18.

in the nature of a *recordari*; ¹²⁵ or if upon a judgment in another court, it is in the nature of an *accedas ad curiam*. ¹²⁶

Upon the return of the writ, when the whole proceedings are certified, and not before, the plaintiff is required to assign errors. To compel a joinder in error, the plaintiff may have a *scire facias ad audiendum errores*; or he may serve a rule, as on a writ of error. And upon two *scire facias ad audiendum errores* awarded, and *nihils* returned, or *scire feci* and default made, the judgment shall be reversed.

When the parties are once in court, the subsequent proceedings in false judgment are the same as in error.

¹²⁵ See Bouvier, Law Dict. *Recordari Facias Loquelam*.

¹²⁶ Fitzherbert, Nat. Brev. 18; Bouvier, Law Dict. *Accedas ad Curiam*.

CHAPTER XVII.

EXECUTION.

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- 3400. The *levari facias*.
- 3401. The writ of *elegit*.

3369. *An execution* has been called the life of the law, and the object of all the proceedings in an action is to obtain this writ. After a final judgment has been entered by the court, by which the plaintiff is adjudged entitled to a thing in the possession of the defendant, or to a sum of money which is to be paid by the latter to the former, unless the plaintiff's adjudged right be suspended by proceedings in the nature of an appeal, or by his own agreement, he is entitled to sue an execution in order to obtain the fruit of his judgment.

By execution is meant the act of carrying into effect the final judgment of a court or other jurisdiction. The writ which authorizes the officer to carry into effect such judgment, and which is the object to be examined in this chapter, is also called an *execution*.

This chapter will be divided into five heads: of the right to issue an execution; of the form of execution; of the time when an execution should be

issued; of the effect of an execution; and of the several kinds of executions.

3370. As a general rule, *the plaintiff*, or party in whose favor a judgment has been rendered, *may issue an execution* when his judgment is final, unless he has agreed to give a stay of execution, or the law authorizes the losing party to enter security, which has been done, for the purpose of staying such execution for a limited time; and when this has been done and the time has expired, the successful party may issue execution as a matter of course, subject at all times to the control of the court, and liable to be set aside, or modified, as the justice of the case may require.¹

In some cases, however, execution cannot be taken out without leave of court; as, where in actions on a policy of insurance there is a verdict for the plaintiff against one of several underwriters, and the others have entered into a consolidation rule,² and agreed to be bound by it. When a verdict is taken *pro forma* at the trial, for a certain sum, subject to the award of an arbitrator, the sum afterward awarded must be taken as if it had been originally found by the jury, and the plaintiff is entitled to enter up judgment for the amount, without first applying to the court for leave;³ but where a verdict is taken, and judgment entered up for a less sum than is afterward found due by the award, the plaintiff cannot take out execution for the whole sum awarded, but only for the sum recovered by the judgment; for the residue he must proceed by attachment.⁴ On a writ of error *coram nobis*, it seems an execution taken out without leave of court is irregular.⁵

3371. *The execution is founded on the judgment*, and must conform to it in every respect, as to the amount of the judgment and the parties,⁶ unless some of the parties, when there are more than one, are dead; then the execution may recite the death and be issued in favor of or against the survivor.⁷ In Pennsylvania, upon the death of a plaintiff after judgment, his executor may be substituted in his place, and an execution reciting the fact may be issued, without a *scire facias*, to renew the judgment in favor of the executor;⁸ and an execution issued by the executor, without a formal substitution, is voidable and not void; a party may, therefore, justify under it.⁹ In New Jersey, such an execution will be quashed.¹⁰ When the defendant dies after judgment, no execution can be had against his goods without a *scire facias* against his representatives.¹¹

If, however, an execution is issued after the death of the judgment debtor, without a *scire facias*, it is voidable, not void, and third parties cannot take advantage of this fact to invalidate the proceedings under it. As to them, unless it has been avoided by the representatives of the debtor, it is perfectly valid.¹²

¹ See *Commonwealth v. Magee*, 8 Penn. St. 240; *Irwin v. Shoemaker*, 8 Watts & S. Penn. 75; *Harrison v. Soles*, 6 Penn. St. 393; *Carpenter v. Vanscoten*, 20 Ind. 50.

² For the nature and history of this rule see Bouvier, *Law Dict. Consolidation Rule*; 2 Marshall, *Ins.* 701; Parke, *Ins.* xlix.; 3 Chitty, *Gen. Pr.* 644; *Graff v. Musser*, 3 Serg. & R. Penn. 262, 265; *Brown v. Scott*, 1 Dall. 145; *Merrihew v. Taylor*, 1 Browne, Penn. Appx. lxxvii.; *Rumsey v. Wynkoop*, 1 Yeates, Penn. 5; *Towanda Bank v. Ballard*, 7 Watts & S. Penn. 434.

³ 1 East, 401. But see *Barnes*, 58.

⁴ Tidd, *Pract.* 910.

⁵ *Ribout v. Wheeler*, *Say.* 166; *Barnes*, 201; 2 W. Blackst. 1067.

⁶ *Commonwealth v. Fisher*, 2 J. J. Marsh. Ky. 137; *Washington v. Irving*, *Mart. & Y. Tenn.* 45; *Palmer v. Palmer*, 2 Conn. 462; *Douglas v. Whiting*, 28 Ill. 362.

⁷ *Hamilton v. Lyman*, 9 Mass. 14; *Bowdoin v. Jordan*, 9 Mass. 160

⁸ *Darlington v. Speakman*, 9 Watts & S. Penn. 182.

⁹ *Day v. Sharp*, 4 Whart. Penn. 339.

¹⁰ *Harwood v. Murphy*, 1 Green, N. J. 193. See *Davis v. Helm*, 11 Miss. 17.

¹¹ *Wilson v. Kirkland*, 1 Miss. 155; *Hubart v. Williams*, 1 Miss. 175. This is changed in some states by statute, and execution may be issued at once against the personal representatives. *Harteaux v. Eastman*, 6 Wisc. 410; *Fowler v. Burdett*, 20 Tex. 34.

¹² *Harper v. Hill*, 35 Miss. 63.

If no costs are awarded by the judgment, no execution for costs can issue.¹³

If the debtor dies after the execution is delivered to the sheriff, he may proceed to levy and sell.¹⁴

Although the rule is firmly established that when the judgment is joint the process to enforce its payment must also be joint, yet it is said to be more technical than substantial, and the court out of which such process issues will take care that it shall not be used so as to work injustice, and for this reason will protect a surety from an attempted disregard of a release to him by a creditor.¹⁵

3372. By statute of Westm. 2 *an execution may be sued at any time within a year and a day after the judgment is signed in cases where a scire facias is not required, or where execution is not stayed by writ of error, injunction, agreement, or the like; and when it is so stayed, within a year and a day after the removal of the bar. In several of the states the time for issuing an execution has been extended beyond that time by statutory provisions.*

If the writ of execution has been issued within the year, and it has been so executed as not to produce to the party the full benefits of his judgment after it has been returned he may have other writs of execution after the year upon continuing the first writ down to them;¹⁶ the second or other subsequent execution may be of the same kind as the first, or of a different species; a *capias ad satisfaciendum* may, therefore, be issued after a *feri facias*.¹⁷

The second execution of the same nature issued on a judgment is called an *alias*, and all future executions of the same kind are called *pluries* executions, the first of which is called first pluries, the next, second pluries, etc.

3373. *An execution issued by a court having competent jurisdiction is a protection to the officer who is required and authorized to execute it, and whether it be regular or not is of no importance to him except when the officer participates in the irregularity.*¹⁸ This salutary protection is wise, just, and necessary, because the officer has not the authority to impugn the authority of the court, and he cannot, therefore, inquire into the regularity of its proceedings. In this case, however, he must execute it according to its requirements, and he cannot, under color of authority, seize the goods of a stranger.¹⁹ He is protected only while obeying its requirements. If the officer exceeds his rights in levying an execution, as where, having properly seized articles on the writ he improperly sells them, he becomes a trespasser *ab initio*, and is liable to the party injured for his tort as well in the seizing as in the selling. The wrongful act taints the whole proceeding.²⁰

The rule, however, is very different when the court has no jurisdiction of the case, for then the officer is bound to pay no regard to its mandates. This reasonable responsibility the law casts upon him. If a court having jurisdiction in criminal cases only should entertain an action of debt, give a judgment, and issue an execution, the sheriff could lawfully refuse to execute that process; and if he proceeded to execute it, he would be liable as a trespasser, together with

¹³ *Criswell v. Ragsdale*, 18 Tex. 443.

¹⁴ *Dodge v. Mack*, 22 Ill. 93.

¹⁵ *Mortland v. Himes*, 8 Penn. St. 265.

¹⁶ *Coke*, Litt. 290, b.

¹⁷ *Thorpe v. Fowler*, 5 Cow. N. Y. 446.

¹⁸ *Hart v. Dubois*, 20 Wend. N. Y. 236; *Robinson v. Barrows*, 48 Me. 186; *Neith v. Crofut*, 30 Conn. 580; *Taylor v. McKeown*, 12 Rich. So. C. 251.

¹⁹ See *Green v. Morse*, 5 Me. 291; *Foss v. Stewart*, 14 Me. 312; *McMahan v. Green*, 34 Vt. 69; *Parmlee v. Leonard*, 9 Iowa, 131.

²⁰ *Everett v. Herritt*, 48 Me. 537; *Burton v. Calaway*, 20 Ind. 469; *Taylor v. Jones*, 42 N. H. 25.

the judges of the court and the plaintiff, the whole of the proceedings being *coram non iudice*.²¹

Though an irregular execution is a protection to the officer when the court has jurisdiction, it is none to the parties who have sued it out; as, if an execution be issued before a judgment has been entered.²²

The vitality of an execution continues from the time it reaches the sheriff or other lawful officer's hands until the day when it is returnable,²³ unless a *supersedeas* has been issued, and from the moment it is known to the officer the execution has lost all its protective virtue; and if the officer afterward proceed to execute the writ, he will be considered as a trespasser,²⁴ but he will not be liable as such unless he actually knew of the existence of the *supersedeas*.²⁵

3374. Executions may be considered as to their end or as to their object.

3375. *Executions considered as to their end* are either final or not final.

An execution which is used to make the money due on a judgment out of the property of a defendant is called a final execution, because when once executed the object of the judgment has been obtained.

There is another kind which tends to an end, but is not absolutely final, as a *capias ad satisfaciendum*, by virtue of which the body of the defendant is taken to the intent that the plaintiff shall be satisfied his debt, etc.; the imprisonment of the defendant not being absolute, but until he shall satisfy the same, this is called an execution *quousque*.

3376. *Executions considered as to the objects they are to act upon* may be divided into two classes: those which are for the recovery of specific things, and those for the recovery of money.

3377. The principal *executions to recover specific things* are the *habere facias seisinam*, the *habere facias possessionem*, the *retorno habendo*, and the *distringas*.

3378. *The writ of habere facias seisinam*, or writ of seisin, is an execution used in most real actions, by which the sheriff is directed that he cause the demandant to have seisin of the lands which he has recovered. This writ may be taken out at any time within a year and day after judgment. It is executed in nearly the same manner as a *habere facias possessionem*, and for this purpose the officer may break open the outer door of a house to deliver seisin to the demandant.²⁶

3379. *The habere facias possessionem*, or writ of possession, is an execution, used principally after a judgment in ejectment, in order to obtain the possession of the property recovered. The sheriff is commanded by this writ that without delay he cause the plaintiff to have possession of the land in dispute which is therein described; a *fieri facias* or a *capias ad satisfaciendum* for costs may be included in the writ; the duty of the sheriff in the execution and return of that part of the writ is the same as in a common *fieri facias* or *capias ad satisfaciendum*. In the execution of this writ the sheriff is required to deliver a full and actual possession of the premises to the plaintiff. For this purpose he may break an outer or inner door if required, and should he be opposed by force and violence he must raise the *posse comitatus*.²⁷

The writ must be executed at the earliest practicable moment.²⁸

²¹ The case of the Marshalsea, 10 Coke, 76; *Allen v. Greenlee*, 2 Dev. No. C. 370. But see *People v. Warren*, 5 Hill, N. Y. 440.

²² See *Baldwin v. Whittier*, 16 Me. 33; *Young v. Bircher*, 31 Mo. 136; *Mower v. Stickney*, 5 Minn. 397; *Lathrop v. Arnold*, 25 Me. 136.

²³ *Vail v. Lewis*, 4 Johns. N. Y. 450.

²⁴ *Buffandeau v. Edmondson*, 17 Cal. 436.

²⁵ *Payne v. Governor*, 18 Ala. n. s. 320.

²⁶ Comyn, Dig. *Execution*, E; Bacon, Abr. *Habere Facias Possessionem*; *Watson, Sheriff*, 238; *Bingham, Ex.* 115, 252.

²⁷ *Watson, Sheriff*, 60, 215; Bacon, Abr. *Sheriff*, N, 3.

²⁸ *Chapman v. Thornburgh*, 17 Cal. 87.

3380. *The writ of retorno habendo* is an execution in replevin, which recites that the defendant was summoned to appear to answer the plaintiff in a plea, whereof he took the cattle of the said plaintiff, specifying them, and that the said plaintiff afterward made default, wherefore it was then considered that the said plaintiff and his pledges of prosecuting should be in mercy, and that the said defendant should go without day, and that he should have return of the cattle aforesaid. It then commands the sheriff that he should cause to be returned the cattle aforesaid to the said defendant without delay, etc.²⁹ If the identical goods distrained are found in the hands of the tenant undisposed of and unincumbered, they may be taken by the sheriff upon the *retorno habendo*; if not, the sheriff may return an *elongata*, or, as it is called in law-French, *eloigné*, that is, that the goods have been removed out of the reach of the sheriff. When that return is made, the plaintiff may have a writ called a *capias in withernam*, by which the sheriff is commanded to take the defendant's own goods, which may be found in his bailiwick, and keep them safely (not to deliver them to the plaintiff) until such time as the defendant shall submit himself, and allow the distress to be taken. If the sheriff cannot execute the *withernam*, and is consequently obliged to return it *nihil*, there issue an *alias*, and then a *pluries withernam*, and if *nihil* be also returned to these, then follows a *capias* against the body of the defendant.³⁰

3381. *The writ of distringas* is used sometimes to enforce a compliance of what is required of a party by a distress of his goods and chattels. In detinue, when judgment is rendered for the plaintiff, that "the said A B do recover against the said C D the goods and chattels aforesaid, or the sum of dollars, for the value of the same, if the said A B cannot have again his said goods and chattels, together with dollars, his charges and costs;" then there issues a writ of *distringas* which recites the judgment, and then proceeds as follows: "And hereupon the said sheriff is commanded that he distrain the said C D by all his lands and chattels in his bailiwick, so that neither the said C D nor any one by him do lay hands on the same, until the said sheriff shall have another command from our said court in that behalf, and that the said sheriff answer to our said court here for the issues of the same, so that the said C D render to the said A B the goods and chattels aforesaid, or the said sum of dollars for the value of the same; and in what manner the said sheriff shall have executed this the command of our said court he is commanded to make appear, etc."

3382. The principal *executions issued for the purpose of recovering money* are those which issue against the body of the unsuccessful party, and those which may be sued out against his goods, chattels, and land.

3383. *The executions against the body* are the *capias ad satisfaciendum* and the attachment.

3384. A *capias ad satisfaciendum* is a writ issuing out of a court of competent jurisdiction, in a cause where judgment has been rendered, directed to a proper officer of the court, commanding him to take the defendant, and him safely keep, so that he may have his body in court on the return day, to satisfy, *ad satisfaciendum*, the plaintiff.³¹

In point of form, the *capias ad satisfaciendum* must pursue the judgment, be tested on a general test day, unless otherwise provided for by statute, and it

²⁹ 2 Sellon, Pract. 168; Bacon, Abr. *Replevin*, E, 5.

³⁰ See *Woglam v. Cowperthwaite*, 2 Dall. 68; *Frey v. Leeper*, 2 Dall. 131; *Bradyll v. Ball*, 1 Brown, Ch. 427; *Hammond*, Nisi P. 454.

³¹ The use of this writ has been greatly restricted in most of the states of the Union; in some, as in Pennsylvania, it can be issued only for torts, and in cases of fraud or concealment of property, in contracts.

should be sealed with the seal of the court, and signed, like other writs, by its clerk or prothonotary. It must be for the same sum as that for which judgment was given, unless a part of it has been since paid, or levied under a *feri facias*, in which case it issues for the residue. If there are several defendants, it must issue against the whole of them.³² But there are many persons against whom it cannot be issued. In all cases the reason why these persons are privileged is the promotion of the public good, and not as a favor granted to particular persons. These are ambassadors, and other public ministers, and their servants; members of congress and those of the state legislatures are not liable to this process, *eundo, morando, et redeundo*, or going to, remaining at, or returning from the places to which they were called by their public duties. Parties, their attorneys, and witnesses in court, in order to give them that freedom required to attend upon their respective obligations there, are also protected from the operation of this writ, *eundo, morando, et redeundo*.³³ In Pennsylvania, it has been considered that a state of civilization should protect women from the operation of this writ, and an act has been passed forbidding their imprisonment for debts on their contracts, where there is no fraud.

This writ is executed by taking the defendant in custody, and keeping him in close confinement, generally within the public or county prison³⁴ provided for such purposes, from which he is not to be discharged except by due course of law; for if the sheriff permit the prisoner to go at large, it will be an escape, for which he will, in general, become liable for the debt, although the prisoner voluntarily return and surrender himself to prison before the return day.³⁵ But this confinement has been rendered less rigorous than formerly, in many of the states, by allowing certain prison bounds, or jail limits; and in some states the defendant is discharged by giving security to the plaintiff that he will apply for the benefit of the acts for the relief of insolvent debtors.

The effect of the *capias ad satisfaciendum* is to confine the defendant in the custody of the sheriff, or in the county jail, or to such other place appointed by public authority to receive such prisoner.³⁶ The execution is considered, *quoad* him, as a satisfaction of the debt during the confinement of the debtor, but if he die in jail, the plaintiff may have execution of his lands and goods, by virtue of the statute 21 Jac. I, c. 24.³⁷ If the plaintiff consent to discharge the defendant after he has been arrested under a *capias ad satisfaciendum*, though it be on terms which are not afterward complied with, or upon giving fresh security, which afterward becomes ineffectual, the plaintiff cannot resort to the judgment again, or charge the defendant's person in execution; and the discharge of one of several joint debtors extinguishes the judgment as to all the debtors, so that neither can afterward be taken or held in execution.³⁸

³² Clark v. Clement, 6 Term, 526.

³³ Broome v. Hurst, 4 Yeates, Penn. 124, n; 4 Dall. 387; Parker v. Hotchkiss, 1 Wall. Jr. C. C. 268.

³⁴ Jacobs v. Tolman, 8 Mass. 161.

³⁵ 13 Johns. N. Y. 366; Dowdal v. Hamer, 2 Watts, Penn. 63; 8 Johns. N. Y. 98; Shewell v. Fell, 3 Yeates, Penn. 17; 4 Yeates, Penn. 47; Wheeler v. Hambright, 9 Serg. & R. Penn. 390. A distinction is made as to the responsibility of the sheriff, between cases where the action is in debt and where an action on the case has been brought. In the former, if the jury find for the plaintiff, they must find for the whole debt and costs; but in the latter, the jury may find such damages as they think proper. Duncan v. Klinefelter, 5 Watts, Penn. 141; 4 Yeates, Penn. 17, 47.

³⁶ Jacobs v. Tolman, 8 Mass. 161.

³⁷ Sharpe v. Speckenagle, 3 Serg. & R. Penn. 465; Cooper v. Bigalow, 1 Cow. N. Y. 56; Freeman v. Rushton, 4 Dall. 214. See Hamilton v. Bredeman, 12 Rich. So. C. 464.

³⁸ Ransom v. Keyes, 9 Cow. N. Y. 128; Yates v. Van Rensselaer, 5 Johns. N. Y. 364; Masters v. Edwards, 1 Caines, N. Y. 515; Bailey v. Kimbal, 1 N. Chipm. Vt. 151; McLean v. Whiting, 8 Johns. N. Y. 339. In South Carolina, the act of 1815 alters the common

The usual returns to a writ of *capias ad satisfaciendum* are that the sheriff has taken the defendant, whose body he has ready, formerly made in Latin *cepi corpus*; or that the defendant is not to be found in his bailiwick, *non est inventus*. On the latter return the plaintiff may sue out an *alias capias* into the same, or a *testatum* in a different county; or at his choice he may have any other writ of execution suitable to the case, as, for example, a *feri facias*.

In case of an escape or a rescue, though the sheriff be liable, because he ought to have taken the *posse comitatus*, still the plaintiff is not bound to look to the sheriff, because the latter may be insolvent; the plaintiff may, therefore, sue out another execution, for the defendant will not be allowed to take advantage of his own wrong.

3385. An *attachment* is a writ commanding the sheriff to arrest a particular person who has been guilty of a contempt of court, and to bring the offender before the court. It issues whenever a party has been ordered by a rule of court to perform a certain act, and he has omitted to perform it; as, where he has been ruled to pay costs or to perform an award. On the service of the attachment, the party is taken into custody, and is confined in prison until he afterward obtains his discharge in due course of law.

3386. The executions against goods, chattels, and land are the *feri facias*, the *venditioni exponas*, the *levari facias*, and the *elegit*.

3387. The most common of all writs of execution is the *feri facias*.³⁹ This writ is so called, because, when writs were in Latin, the words directed to the sheriff were *quod feri facias de bonis et catallis*, etc., that you cause to be made of the goods and chattels, etc.⁴⁰ The foundation of this writ is a judgment for debt or damages, and the party who has recovered such judgment is generally entitled to it, unless the plaintiff is delayed by a stay of execution, which the law allows in certain cases after the rendition of the judgment, or by his own agreement with the defendant, or by proceedings in error.

This subject will be examined with regard to the form of the writ, its effect, the manner of executing it, what goods may be seized and sold under it, the effect of seizure of personal property, the seizure and sale of land under an execution, and the return.

3388. The writ of *feri facias* is issued in the name of the government, and directed to the sheriff, (in the United States court to the marshal,) commanding him that of the goods and chattels (and where the lands are made liable for payment of debts, of the lands and tenements) of the defendant, therein named, in his bailiwick, he causes to be levied as well a certain debt of dollars, which the plaintiff, (naming him,) in the court of , (naming it,) recovered against him, as dollars, like money, which to the said plaintiff were adjudged for his damages, which he had by the detention of the said debt, and that he (the sheriff) have the money before the judges of the said court, on a day certain, (being the return day therein mentioned,) to render to the said plaintiff his debt and damages, aforesaid, whereof the said defendant is convict. It must be tested in the name of the officer, as directed by the constitution or laws: as, "Witness, A B, chief justice, etc., the day of Anno Domini, one thousand eight hundred and fifty one." It must be signed by

law, so that a plaintiff may discharge a defendant in custody under a *capias ad satisfaciendum*, for a time, with his consent, without impairing his rights, and he may retake him in execution. *Eggart v. Barnestine*, 3 M'Cord, So. C. 162. In Louisiana, when the parties agree to a temporary discharge, the defendant may be retaken. *Abat v. Whitman*, 7 Mart. N. s. La. 163; *Martin v. Ashcroft*, 8 Mart. N. s. La. 315.

³⁹ For the history of this writ, see 2 Reeves, Hist. Eng. Law, 187; Bacon, Abr. *Execution*, E, 4.

⁴⁰ Coke, Litt. 290, b.

the clerk or prothonotary of the court, and sealed with its seal.⁴¹ The amount of the debt and costs must be indorsed on the writ.

The execution, being founded on the judgment, must of course follow and be warranted by it;⁴² hence, when there is more than one plaintiff or defendant, it must be in the name of all the plaintiffs against all the defendants, if living.

When it is against an executor or administrator for a liability of the testator or intestate, it must conform to the judgment and be only against the goods and chattels, or other property, of the deceased, unless the defendant has made himself personally liable by his own false pleadings, or by waste, in which case the judgment is *de bonis testatoris si, et si non de bonis propriis*, and the *feri facias* must conform to it.⁴³

3389. At common law the writ bound the goods of the defendant, or party against whom it was issued, from the teste day, by which must be understood that the writ bound the property against the party himself and all claiming by assignment from or by representation under him,⁴⁴ so that a sale by the defendant of his goods to a *bona fide* purchaser did not protect them from the *feri facias* tested before, although not issued or delivered to the sheriff till after the sale.⁴⁵ To remedy this manifest injustice the statute of frauds⁴⁶ was passed, the principles of which have been adopted, in this respect, in perhaps all the states. It enacts "that no writ of *feri facias*, or other writ of execution, shall bind the property of the goods of the party against whom such writ of execution is sued forth but from the time such writ shall be delivered to the sheriff, or under sheriff, or coroner, to be executed; and for the better manifestation of the said time the sheriffs, their deputies or agents, shall, upon the receipt of any such writ, (without fee for doing the same,) indorse upon the back thereof the day of the month and year whereon he or they received the same."⁴⁷

When issued against a person who had died between the teste day and return day of the writ, it had, by the relation back to the teste, the binding operation upon his personal property that the executor was not entitled to it for the general payment of his debts.⁴⁸ In the United States the statutes for the equal distribution of intestates' estates have, perhaps, everywhere prevented this unjust preference.

Though the goods are bound from the time the execution comes into the sheriff's hands, the property in such goods is not altered, but continues in the defendant till execution executed.⁴⁹

Another of its effects is the protection which it gives to the officer while acting according to its exigencies. Being the delegated agent of the court, if the court has jurisdiction to issue the *feri facias*, the sheriff or officer to whom it is directed and who is bound to execute it, and all his deputies acting under it, are protected; but when the court has no jurisdiction and the judges are them-

⁴¹ An execution issued without a seal, from a court having and using a seal, is void, and of course all proceedings under it are void also. *Beal v. King*, 6 Ohio, 11. But if it be sealed, although it is not signed by the clerk, it is valid.

⁴² 2 Saund. 72, h, k; Bingham, Executions, 186.

⁴³ Bacon, Abr. *Execution*, C, 4; *Swearingen v. Pendleton*, 4 Serg. & R. Penn. 394; *Todd v. Todd's Executors*, 1 Serg. & R. Penn. 453; Comyn, Dig. *Pleader*, 2, D, 15.

⁴⁴ *Payne v. Drewe*, 4 East, 538.

⁴⁵ *Croke, Eliz.* 174; *Baskerville v. Brocket*, Croke, Jac. 451.

⁴⁶ 29 Car. II, c. 3, s. 16.

⁴⁷ *State v. Blundin*, 32 Mo. 387; *Russell v. Lawton*, 14 Wisc. 202; *Gott v. Williams*, 29 Mo. 461.

⁴⁸ *Den v. Hilman*, 2 Halst. N. J. 180.

⁴⁹ *Folsom v. Chesley*, 2 N. H. 432; *Churchill v. Warren*, 2 N. H. 298; *Bates v. Moore*, 2 Bail. So. C. 614.

selves trespassers, the officer is subject to an action of trespass as if he had no writ.⁵⁰

3390. The sheriff has a right to enter into the premises of the defendant to search for his goods, if he can do so without breaking an outer door of the house;⁵¹ nor can a window be broken for that purpose.⁵² He may enter the house if it be open, and being once lawfully entered, he may break open an inner door or chest without even a request to open it, though in general it is more prudent to make such request, for the purpose of seizing the goods of the defendant. He may break an outer door of a barn⁵³ or of a store not connected with the dwelling-house, and forming no part of the curtilage.⁵⁴ The sheriff is also authorized to enter the house of a stranger for the purpose of executing his writ, provided the defendant's goods are there; but his entry will be justifiable only on the event of the goods being there, for if he should be mistaken in this respect he will be a trespasser.⁵⁵ But though authorized to enter a stranger's house, he cannot, of course, break open an outer door.

When the goods are found the officer may seize them, and the taking of a part of them in the name of the whole is a good seizure of all.⁵⁶ The seizure is complete as soon as the goods are in the power of the officer,⁵⁷ and although the sheriff may return that he levied on personal property, if it was not in his view nor taken into custody, it is no levy as to subsequent judgment creditors.⁵⁸ Still, the indorsement on a *feri facias* of levy on goods which the sheriff had levied upon by virtue of a former execution will be considered a good levy under the second or last execution, because the goods so levied upon are considered as in his custody, and of course within his power.⁵⁹ To render the levy perfect the articles seized should be designated in the execution, or in a schedule annexed,⁶⁰ and the sheriff should take possession within a reasonable time in such a manner as to apprise everybody of the fact of his having taken them in execution.⁶¹ But if the defendant dispense with an actual seizure for his own benefit, the levy as to him will be valid.⁶²

The *feri facias* may be executed at any time before and on the return day,⁶³ but not on Sunday where it is forbidden by statute.

If there is reasonable doubt whether goods indicated are the property of the debtor, or if they are claimed by a third party as his, the sheriff may demand a bond of indemnity from the creditor before he seizes them.⁶⁴

Where the debtor is a joint owner of a chattel the sheriff may seize the whole, though he can sell only the debtor's undivided interest.⁶⁵

The officer is required to levy on sufficient property to satisfy the execution, and in doing this he must exercise a reasonable discretion and make allowance

⁵⁰ *Barker's widow v. Braham*, 3 Wils. 376.

⁵² *Cooke's Case*, W. Jones, 429.

⁵⁴ *Hagerty v. Wilbee*, 16 Johns. N. Y. 237.

⁵⁶ *Lewis v. Smith*, 2 Serg. & R. Penn. 142.

⁵⁷ *Wood v. Vanarsdale*, 3 Rawle, Penn. 401; *Bullitt v. Winston*, 1 Munf. Va. 269; *Lloyde v. Wykoff*, 6 Halst. N. J. 218. Actual manual possession is not necessary. *Very v. Watkins*, 23 How. 469.

⁵⁸ *Lowry v. Coulter*, 9 Penn. St. 349.

⁵⁹ *Watmough v. Francis*, 7 Penn. St. 206.

⁶⁰ *Barnes v. Billington*, 1 Wash. C. C. 29.

⁶¹ *Wood v. Vanarsdale*, 3 Rawle, Penn. 405; *Lewis v. Smith*, 2 Serg. & R. Penn. 142; 1 Whart. Penn. 116, 337; 1 Wash. C. C. 29.

⁶² *Troville v. Tilford*, 6 Watts, Penn. 468. See, as to what constitutes a sufficient levy, *Burchard v. Reese*, 1 Whart. Penn. 377; *Wood v. Vanarsdale*, 3 Rawle, Penn. 401; *McCormick v. Miller*, 3 Penn. 230.

⁶³ *Chase v. Gilman*, 15 Me. 64; *Devoe v. Elliott*, 2 Caines, N. Y. 243.

⁶⁴ *Smith v. Cicotte*, 11 Mich. 383.

⁶⁵ *Bernard v. Hovious*, 17 Cal. 541; *Caldwell v. Auger*, 4 Minn. 217.

for the probable depreciation of the property at a forced sale, together with all charges.⁶⁶ The officer may levy on any property of the debtor that he sees fit,⁶⁷ unless there are statute provisions requiring him to take property designated by the debtor, if it is sufficient. The officer must use reasonable diligence to find goods of the debtor to levy on, and is justified in returning *nulla bona* if he cannot find anything. Whether reasonable diligence has been used will be a question of fact for the jury.⁶⁸

3391. In general, the sheriff may seize and sell all those articles which he can find belonging to the plaintiff and which are *choses in possession*, except such as are exempted by the common law or by statute. The common law was very niggardly of these exceptions; it allowed only the necessary wearing apparel, and it was once holden that if a defendant had two gowns, the sheriff might sell one of them.⁶⁹ In modern times, with perhaps a prodigal liberality, a considerable amount of property, both real and personal, is exempted from executions by the statutes of several of the states. It is not the time nor the place here to consider whether such laws are most for the benefit or injury of the poor and honest man.⁷⁰

When the defendant's goods are pawned, or demised or letten for years, or they have been distrained, or in any other way are subject to a lien in the hands of a third person, the sheriff can only seize and sell the right of the defendant in such goods, subject to the rights of such third person.

In general, *choses in action* cannot be taken in execution;⁷¹ but in some of the states power is given to the sheriff under a peculiar process authorized by statute to attach the rights of the defendant to such *choses in action*; as, where a debt is due by a third person to the defendant, the defendant's rights may be attached, and the third person is made a garnishee.

After having seized the defendant's goods, the sheriff should keep them in his possession till they are sold; for if they are left in the possession of the defendant, it will in general be considered a badge of fraud,⁷² and another judgment and execution creditor may seize them, and the first levy will be invalid.⁷³ And if the first levy be made merely to keep off other creditors, this being against the policy of the law, it will not protect them from another execution,⁷⁴ and a direction to "stay proceedings" destroys the lien as it respects other creditors and enables them to gain a preference.⁷⁵ Indeed, any act which shows that the plaintiff has not a continuing mind to cause the writ to be executed will, as between himself and third persons, or other creditors of the defendant, discharge the property levied upon from his lien.⁷⁶ The lien will also be lost by taking a replevin bond.⁷⁷

⁶⁶ Griffin v. Ganaway, 8 Ala. N. S. 625. ⁶⁷ Woodward v. Hopkins, 2 Gray, Mass. 210.

⁶⁸ Barnes v. Thompson, 2 Swan, Tenn. 313; Russell v. Lawton, 14 Wisc. 202.

⁶⁹ Comb. 356.

⁷⁰ In most of the states, the homestead of the judgment debtor, not exceeding a certain quantity or value, is exempt from execution. The quantity varies from forty to two hundred acres, and the value from five hundred to five thousand dollars.

⁷¹ Rhoads v. Magonigal, 3 Penn. St. 39; Crandall v. Blen, 13 Cal. 15.

⁷² In Pennsylvania, it is not the practice to remove goods levied upon; and the lien of personal property is generally held to continue, though the goods are left in the hands of the defendant, unless fraud is proved. Swift v. Hartman, cited 2 Yeates, Penn. 435; Levy v. Wallis, 4 Dall. 167; Chandler v. Phillips, 4 Dall. 213. But see Cowden v. Brady, 8 Serg. & R. Penn. 510.

⁷³ Lewis v. Smith, 2 Serg. & R. Penn. 142.

⁷⁴ Corlies v. Stanbridge, 5 Rawle, Penn. 286.

⁷⁵ Hickman v. Caldwell, 4 Rawle, Penn. 280; Commonwealth v. Strembeck, 3 Rawle, Penn. 341.

⁷⁶ Howell v. Atkyn, 2 Rawle, Penn. 282; Weir v. Hale, 3 Watts & S. Penn. 285; Mentz v. Hammon, 5 Whart. Penn. 150.

⁷⁷ Harrison v. Wilson, 2 A. K. Marsh. Ky. 547.

3392. The next step to be taken by the sheriff is to advertise the goods levied upon for sale at public auction, for this is the only lawful way of disposing of them; he cannot keep them himself and pay the plaintiff's debt, nor deliver them to the plaintiff in satisfaction of his execution; the plaintiff may, however, buy them as any other person at their value.⁷⁸

The sheriff must use a reasonable discretion in the sale of the goods; it seems that if a very inadequate price be offered for them, he should not sell them, but ought to return that they remain in his hands unsold for want of buyers, which is the proper return when he has had no bid. The *feri facias* being then out of his hands, he must wait until he shall be authorized to sell them by another writ, a *venditioni exponas*, the nature of which will hereafter be explained; and under this writ he will be obliged to sell at any price he can get.⁷⁹

The sale by the sheriff passes only the title which the judgment debtor had in the goods at the time the lien attached;⁸⁰ it does not divest the title of other parties or paramount liens.⁸¹

If the sheriff neglects to advertise and sell the property within the time prescribed by statute, he loses his lien upon it.⁸²

3393. Although the seizure of personal property does not change or alter the title to it, and it remains in the defendant, as has already been observed, yet it has the effect of releasing the lands of the debtor with regard to third persons. If, therefore, a judgment creditor who has the first lien on the lands of his debtor issue an execution and levy on the personal property of the defendant sufficient to satisfy his execution, he cannot afterward abandon that levy and claim to be paid out of the proceeds of the land.⁸³

3394. By the common law, *lands* were not liable to be sold for the payment of debts; it was against the policy of the feudal law to take the landed estates out of the hands of the aristocracy, and the same rule yet prevails in England. There the remedy given to a judgment creditor is a sequestration of the profits of the land by writ of *levari facias*, or the possession of one-half of the land by writ of *elegit*, or, in certain cases, of the whole of it, by extent. In these cases the creditors hold the land until, out of the profits or rents, their claims are fully satisfied. Probably to protect British creditors a statute was passed by the British parliament,⁸⁴ making lands and hereditaments within the English colonies chargeable with the debts, and subject to execution as personal estate. The practice of selling real estate under execution having thus commenced, it has been firmly established by various acts of the state legislatures in most of the states of the Union, under certain checks and salutary regulations, to prevent abuse and unnecessary sacrifices.

One of the most prominent and prevalent of these regulations is to require the creditor to resort in the first instance to the personal estate as the proper and primary fund, and to the real estate only after the personal property shall have been exhausted, and found insufficient to satisfy the claim.⁸⁵

Another restraint is to require that the estate shall be appraised, and if an

⁷⁸ Bacon, Abr. *Execution*, C, 4. But the sheriff cannot. *Robinson v. Clark*, 7 Jones, No. C. 562.

⁷⁹ *Keightley v. Birch*, 3 Campb. 521; *Young v. Smith*, 23 Tex. 598.

⁸⁰ *Boggs v. Hargrave*, 16 Cal. 559.

⁸¹ *Gazelle*, 1 Sprague, Dist. Ct. 378.

⁸² *Plaisted v. Hoar*, 45 Me. 380.

⁸³ *Hunt v. Breeding*, 12 Serg. & R. Penn. 37; *Taylor's Appeal*, 1 Penn. St. 393; *Duncan v. Harris*, 17 Serg. & R. Penn. 436.

⁸⁴ 5 Geo. II, c. 7, A. D. 1732.

⁸⁵ This is the case in Delaware, Illinois, Indiana, Kentucky, Michigan, Mississippi, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Oregon, Minnesota, Alabama, Louisiana, and South Carolina. There are some restrictions in the other states, but the tendency of legislation is to give no special privileges to the real estate.

inquest, to be held by the sheriff, shall be of opinion that the profits, rents, and issues will be sufficient in a number of years, provided for by the statute, to pay all the liens upon it, then it shall not be sold, but it shall be delivered to the plaintiff, that out of the rents, issues, and profits, he may be paid the amount of his execution. This is the case in Pennsylvania and Delaware, and the lands are extended by the writ of *liberari facias*, and possession is given to the creditor, as practiced upon the *elegit* in England; but if the lands are not extended, that is, if the rents, issues, and profits will not be sufficient in those states to pay the liens or incumbrances in seven years, then they are condemned, and are to be sold without redemption. In other states, before a sale can take place, the lands must be valued, and, at the sale, must bring a certain proportion of such valuation; in some states, if the creditor will not take them at two-thirds of the appraised value, there is a delay upon giving additional security. In other states, a part of the defendant's land is absolutely protected from sale for the presumed benefit of himself and family. In Virginia, lands cannot be sold on execution; the English process of *elegit* and extent are there used.

As a further bar to the sale of landed estates, in some of the American commonwealths a right of redemption is given to the defendant, provided it be exercised within a specified time.⁸⁶

It is a rule in some states that the lands of the defendant are bound by a judgment from the time of rendition, but this is far from being universal; in Louisiana, they bind from the time they are registered with the recorder of mortgages;⁸⁷ in Kentucky, lands are bound only from the time the execution reaches the sheriff's hand.⁸⁸

The lien created by the judgment continues only for a limited time, so as to operate against subsequent incumbrancers and *bonâ fide* purchasers, according to the statutes of the respective states.

Real estate held in reversion and remainder is liable to be sold like an estate in possession, and an equity of redemption may likewise be the subject of a levy.

3395. The usual mode of making a levy is to describe the land which has been seized under the execution by metes and bounds, as in a deed of conveyance; as they cannot be sold, in some of the states, under the *feri facias*, because an inquest must be held by the sheriff to ascertain whether the land can, from its profits, rents, and issues, satisfy the debt within a certain time, the writ of *feri facias* is returned to the court, with a levy and the proceedings of the inquest, and these things remain until the sheriff is authorized by a new writ, called a *venditioni exponas*, to sell the land levied upon.

Under this writ, or under the *feri facias*, where lands may be sold without any other writ, the lands seized are advertised by the sheriff the time required

⁸⁶ See Kent, Comm. Lect. 66. It has been deemed unnecessary to detail the various provisions of the statutes of the several states, not only because such details would be useless, as the reader must rely upon the statutes themselves, but because their provisions are subject to constant changes.

⁸⁷ *Hana v. His Creditors*, 13 Mart. La. 32.

⁸⁸ *Bank U. S. v. Tyler*, 4 Pet. 366; *Million v. Riley*, 1 Dan. Ky. 360. In Kansas and Ohio, judgments are liens on the real estate from the first day of the term in which the judgments are rendered, except judgments by confession and judgments rendered at the same term at which the action is commenced. In several states the lien begins from the docketing of the judgment, and when the lands lie in another county, from the date of filing a copy of the judgment in the clerk's office in that county. In the New England states there is no lien by judgment, but the attachment lien on real estate attached on mesne process continues from thirty days to five months after judgment to allow it to be seized on execution. See 1 Washburn, Real Prop. 2d ed. 487, note; *Vanseiver v. Bryan*, 2 Beasl. N. J. 434; *Sheldon v. Arnold*, 17 Ind. 165; *Durham v. Heaton*, 28 Ill. 265; *Denegre v. Haun*, 13 Iowa, 240; *Van Camp v. Peerenboom*, 14 Wisc. 65.

by the local statutes, and they are sold at the time and place appointed, by public auction or outcry, to the highest and best bidder. The writ is then returned to court with a statement of what has been done, and the sale is subject to the approval of the court; or for any material misdescription of the property, or any act of the sheriff, or of the inquest, not warranted by law, which may have been prejudicial to any of the parties, the plaintiff, defendant, or purchaser, it may be set aside; and then a new sale is ordered by an *alias venditioni exponas*, which sale is also subject to this salutary supervision.

If the sale is affirmed, the sheriff then makes a deed to the purchaser, which conveys to him all the title which the defendant had in the land, and no more. To complete his title, the purchaser should procure the deed to be registered in the proper office.⁸⁹

3396. On the return day of the *feri facias*, the sheriff ought to make his return of what he has done under the writ; and should he neglect to do so, he may be called upon by rule to make such a return within a specified time, and if he do not then return it, or offer a lawful excuse for not so doing, the court will grant an attachment against him; but in some cases, where there is just cause for it, the court will enlarge the time within which he should make his return.

If the sheriff fails to make return of the execution, all his acts done under it are wrongful, and he will be liable to the debtor as a trespasser,⁹⁰ and the creditor may recover from the sheriff the damages he has suffered by the failure to return. This is presumed to be the amount due on the execution, but the sheriff may show that the debtor had no property subject to execution, and no damages have been suffered.⁹¹ If the sheriff finds no property, he must not return *nulla bona* before the return day.⁹² The failure of the sheriff to return the writ after a sale does not affect the title of the purchaser.⁹³

3397. The returns commonly made to a *feri facias* are the following.

When the sheriff has not found any goods belonging to the defendant on which he could levy, he returns that fact in the common formula, *nulla bona*.

He returns *feri feci* when he caused to be made out of the defendant's goods the whole or a part of the money, which he has ready to be paid to the plaintiff.

That he has taken the goods of the defendant to a certain amount, which remain in his hands for want of buyers. In this case he should be careful to specify what goods he has levied upon, for a general levy may render him responsible for the whole debt.

When he has levied upon land, he should so return and state what lands he has seized, by metes and bounds, so that when they are sold by him he may make a definite deed for the same. He should also return what further proceedings, if any, have taken place since the levy.

3398. These several returns will be separately considered.

When the sheriff returns *nulla bona* to a *feri facias*, that the defendant has no goods within his bailiwick, the plaintiff may sue out an *alias fieri facias*, and after that, when required, as if the same return be made to the *alias*, a pluries into the same county, or he may have a *testatum fieri facias* into a dif-

⁸⁹ In the New England states, with the exception of Rhode Island, the sheriff's official return of the proceeding under the execution constitutes the title of the purchaser, as does the sheriff's return of the inquisition of the *elegit* in England, and no deed is executed, for the title rests upon matter of record. 4 Kent, Com. 434, 4th ed.

⁹⁰ *Williams v. Babbitt*, 14 Gray, Mass. 141.

⁹¹ *Ledyard v. Jones*, 7 N. Y. 550; *Bowman v. Cornell*, 39 Barb. N. Y. 69.

⁹² *Chalmers v. Moore*, 22 Ill. 359.

⁹³ *Cloud v. El Dorado*, 12 Cal. 128.

ferent county, suggesting that the defendant has goods there; but the *testatum* cannot go into another state, because the laws under which it issues do not extend there. Instead of these, or any of these writs, the plaintiff may, on the return of *nulla bona* to a *feri facias*, issue a *capias ad satisfaciendum*, where such writ is not forbidden by act of assembly.

When the sheriff returns *feri feci*, he becomes liable to the plaintiff for the money he has made on the writ, and the plaintiff may compel him to pay it, either by a rule of court, or by action of debt founded on his return. If a part of the money be levied, and so the sheriff has returned, the plaintiff may have a *feri facias* or *capias ad satisfaciendum* for the residue; but in general the first execution must be returned before a second can issue, because the second is founded on the return of the first, and usually it recites the first execution and the return.

The sheriff is not bound to collect and pay over the amount of the execution before the return day of the writ.⁹⁴ But if he has collected it, he must pay it over to the creditor upon demand at any time.⁹⁵

3399. *A venditioni exponas* is a writ, as has already been intimated, by which the sheriff is commanded to sell goods and chattels, and in some cases lands, which he has taken in execution by virtue of a *feri facias*, and which remain in his hands unsold. The object of this writ, as it regards personal property, is to force the sheriff to sell when he has returned a levy unsold for want of buyers, and to bring him into contempt for not selling; ⁹⁶ he cannot, therefore, again return "not sold for want of buyers."⁹⁷ Should he make such a return, however, according to the English practice an attachment will not be granted against him.⁹⁸ The proper way of proceeding, then, if the sheriff do not pay over the money on or before the return of the *venditioni*, is to sue out a *distringas* against him, directed to the coroner; and if he do not sell the goods and pay over the money before the return of that writ, he shall forfeit issues, that is, the goods and the profits of the lands of the defendant against whom the *distringas* has been issued, and which have been taken by virtue of such writ to the amount of the debt.⁹⁹

If the debtor die after levy of a *feri facias* on lands, a writ of *venditioni exponas* cannot issue thereon without a *scire facias* against his personal representatives.¹⁰⁰

3400. *The writ of levari facias* is used for various purposes in England, against ecclesiastics, and, in certain cases, in favor of the crown. It is also used to recover a plaintiff's debt; it commands the sheriff to levy such debt on the lands and goods of the defendant, in virtue of which he may seize his goods, and receive the rents and profits of his lands till satisfaction be made to the plaintiff.¹⁰¹

In Pennsylvania this writ is used to sell lands mortgaged, after a judgment has been obtained by the mortgagee, or his assignee, against the mortgagor under a peculiar proceeding authorized by statute.

3401. *The writ of elegit* is but little used in the United States, because lands may be sold for the payment of debts. It is not entirely unknown in Virginia.¹⁰²

⁹⁴ *State v. Mann*, 13 Ired. No. C. 444.

⁹⁵ *Nelms v. Williams*, 18 Ala. N. S. 650; *Rogers v. Sumner*, 16 Pick. Mass. 387.

⁹⁶ *Frisch v. Miller*, 5 Penn. St. 310.

⁹⁷ *Graham*, Pract. 359; *Comyn*, Dig. *Execution*, C, 8; 2 Saund. 47, 1; 2 Chitt. 390; Cowp. 406.

⁹⁸ *Leader v. Danvers*, 1 Bos. & P. 358.

⁹⁹ 2 Saund. 47, n.

¹⁰⁰ *Wood v. Colwell*, 34 Penn. St. 92. But see *Burdett v. Chandler*, 22 Tex. 14.

¹⁰¹ 3 Blackstone, Comm. 417; 11 Viner, Abr. 14.

¹⁰² 4 Kent, Comm. 434, 4th ed.

By the statute of Westm. 2, c. 18,¹⁰³ “where a debt is recovered or acknowledged in the king’s court, or damages awarded, it shall be in the election of him that sueth to have a *feri facias* to the sheriff to levy the debt upon the lands and chattels of the debtor, or that the sheriff shall deliver to him all the chattels of the debtor, (saving his oxen and beasts of his plough,) and one-half of the land until the debt be levied upon a reasonable price or extent.” From the election given to the plaintiff by this statute, and from the entry of the award of this execution on the roll, “*quod elegit sibi executionem*,” etc., this writ derives its name.

On the receipt of this writ, the sheriff holds an inquest to ascertain the value of the lands and goods he has seized, and then they are delivered to the plaintiff, who retains them until the whole debt and damages have been paid and satisfied; during that time the plaintiff is called tenant by *elegit*.¹⁰⁴

The writ of *elegit* must be returned. If lands have been extended under it, the inquisition must also be returned and filed; and when chattels have been appraised and delivered to the plaintiff, the sheriff should return on the writ that he delivered the goods at a reasonable price fixed by the jury.

Should the tenant by *elegit* hold over after his debt is fully satisfied, the defendant may recover his land from him, either by an action of ejectment, or by *scire facias ad computandum, et rehabendam terram*. This, however, is not the preferable remedy. It is a more general and a more advisable mode, for the recovery of the lands from the tenant by *elegit*, to proceed by bill in equity. If the lands are recovered back by an action at law, the plaintiff in that action will not be entitled to any but the extended value, which is generally very low, and much below the real value. But in equity the tenant by *elegit* will be compelled to account not for the extended value merely, but for the actual profits of the lands while in his possession.

3402. Here end our investigations respecting an action. It will be recollected that it was considered who should be the parties to the action, by what means they should be brought into court, the statement of the plaintiff’s claim in his declaration, the defence or plea, the replication, and other pleadings, until the parties came to an issue of law and of fact, and how such issues must be tried; the evidence and the proceedings in the course of the trial; the argument of counsel and the summing up of the judge; the verdict, judgment, and all the proceedings in the nature of appeals; and finally the execution and satisfaction of the plaintiff when he was right, or his defeat and being obliged to pay the costs when wrong. The whole is a beautiful, logical, and systematic arrangement; and, however it may sometimes be perverted to promote injustice by chicanery and fraud, these being imperfections to which all human institutions are liable, it is still admirably calculated to attain substantial justice. It is true that many technical rules might by judicious hands be pruned, and by that means additional vigor would be given to the institution; yet, with all its imperfections, the mode of attaining justice by an action at law is one of the best contrivances that can be devised by so imperfect a being as man.

¹⁰³ 13 Edw. I.

¹⁰⁴ Coke, Litt. 289; Watson, Sheriff, 206; Bacon, Abr. *Execution*, C, 2; 1 Archbold, Pract. 272.

CHAPTER XVIII.

ACCOUNT RENDER.

- 3403. The different forms of personal actions.
- 3404. Actions arising *ex contractu*.
- 3405. The action of account render.
- 3406. The parties in actions of account.
- 3407. For what cause account render will lie.
- 3408-3411. The declaration.
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- 3415-3419. The proceedings before the auditors.
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- 3417. The hearing.
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- 3420-3422. The final judgment.
- 3421. Judgment for the plaintiff.
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3403. *Personal actions* are most commonly divided into two species: first, those which arise upon contracts; and, secondly, those which are given for the redress of wrongs, torts, or injuries. They will therefore be considered in the following order: first, actions arising *ex contractu*; second, actions arising *ex delicto*; third, mixed actions; and, fourth, *scire facias*.

3404. *Actions arising ex contractu* are account, assumpsit, covenant, debt, and detinue, each of which will be separately considered.

3405. *The action of account*, or more properly *account render*, is not common, because in those states where there is a court of chancery the object is much more readily obtained by a bill in equity,¹ and because the plaintiff has a more efficacious mode of proving his claim, having, in addition to the usual proofs, the responsive oath of the defendant; but still its proceedings and this form of remedy are said in some cases to be more efficacious and prompt than a suit in chancery. Courts of equity, however, have assumed jurisdiction in cases of account concurrent with courts of law on the ground that they afford a more easy and more complete remedy than courts of law.²

In considering the action of account it will be necessary to take a view of

¹ For the remedy in matters of account in equity, see beyond, **3931**.

² 13 Ves. Ch. 276. The action of account is of course abolished in those states which have abolished the distinctions between law and equity. See note end of chapter VIII. In some, where this distinction still remains, this action is specifically abolished. Mass. Rev. Stat. Ch. 118, § 43; Gen. St. Ch. 129; and in most of the states it is rarely used. To supply its place the courts have power under the various statutes to appoint auditors in all matters of complicated accounts, or the plaintiff may resort to the more complete remedy in equity. In California no action at law can be referred without the consent of parties. *Grim v. Norris*, 19 Cal. 140.

the parties, the cause for which it will lie, the declaration, the pleas and issue, the evidence, the judgment *quod computet*, the proceedings before auditors, the final judgment, and the proceedings in error.

3406. It is a general rule that *parties* who have an interest in the case must all join and be joined, because it being founded on contract no recovery can be had by any person except those who have the right, nor against any one who, though liable, is so only with other persons. But it is not always easy to say whether all the parties who have a right have such an interest as will entitle them to bring the action; as, where two persons are tenants in common of goods and one bails them to a stranger to render him an account, he alone shall have the action. On the contrary, if both the tenants in common bail the goods, they must join in the action.³

So, on the other hand, all persons who are jointly liable must be made defendants, but care must be taken not to include as joint defendants persons who are not jointly responsible; for example, where there are three or more partners and one sues two of them in account where each is responsible only for himself, the plaintiff must fail, because if he were to succeed he might make one of the defendants, who had received only his share of the partnership fund, liable for the acts of his co-defendant unless there was a joint liability.⁴

At common law account could be maintained only against a guardian in socage, a bailiff or receiver, or by one in favor of trade and commerce, naming himself merchant, against another naming him merchant, and for the executors of a merchant; the reason assigned for this is that there was a privity, and the law presumed them consensual of each other's disbursements, receipts, and acquittances.⁵

By statute, an action of account is given to executors,⁶ to executors of executors,⁷ to administrators,⁸ and by another statute⁹ actions may be brought against the executors and administrators of every guardian, bailiff or receiver, and by one joint tenant, tenant in common, his executors and administrators, against the other as bailiff for receiving more than his share, and against his executors and administrators.¹⁰

Before the passage of this last statute, if one joint tenant, or tenant in common, received all the profits, the other could not maintain his action unless he actually had appointed him his bailiff or receiver.¹¹

It has been held that joint partners in mercantile adventures may have account render against each other;¹² but where two or more purchased a tract of land together under an agreement that it should be resold and the profit divided, even if the transaction had been a technical partnership, which is doubtful, yet it was ruled that as there was but one item to settle between the parties,

³ Brooke, *Abr. Accompt*, pl. 32; Viner, *Abr. Account*, E, pl. 14.

⁴ Whelen *v.* Watmough, 15 Serg. & R. Penn. 153; McFadden *v.* Sallada, 6 Penn. St. 283.

⁵ Bacon, *Abr. Accompt*, A. Account render is the only action at law that can be brought against a guardian, as such, except an action on his bond. Green *v.* Johnson, 3 Gill & J. Md. 388.

⁶ 13 Edw. I, c. 23.

⁷ 25 Edw. III, st. 5, c. 5.

⁸ 31 Edw. III, c. 11.

⁹ 4 Anne, c. 16, s. 27.

¹⁰ Irvine *v.* Hamlin, 10 Serg. & R. Penn. 220.

¹¹ Coke, Litt. 172, a, 186, a, and 200, b; McAdam *v.* Orr, 4 Watts & S. Penn. 550.

¹² Griffith *v.* Willing, 3 Binn. Penn. 317; Irvine *v.* Hanlin, 10 Serg. & R. Penn. 220; Whelen *v.* Watmough, 15 Serg. & R. Penn. 153. It cannot be brought by one partner against all the others where the firm consists of more than two, as there is no joint liability of the other partners to account to one. Appleby *v.* Brown, 24 N. Y. 143; Duryea *v.* Whitcomb, 31 Vt. 395; Portsmouth *v.* Donaldson, 32 Penn. St. 202.

assumpsit might be maintained against him who had received the proceeds of the re-sale; and it was not necessary to bring an action of account render.¹³

Account render lies by the *cestui que trust* against his trustee to enforce the payment of the trust fund;¹⁴ by a landlord against his tenant, where, by the terms of the lease, the latter was to deliver an account to the former, for a proportion of the profits; for example, for the tolls of a mill;¹⁵ by a client against his attorney at law, to obtain an account of moneys received by the defendant.¹⁶

A bailiff is one appointed by the owner of lands and other property to collect the rents and profits of the same, and to make the best of them by his management for the benefit of the owner; he is entitled to a reasonable compensation for his trouble and care, and may be made accountable by an action of account for the profits which he has made, or could have made by proper care. A receiver is one who receives money on account of another, for which he has agreed either expressly or by implication to account to him; at common law the receiver is allowed only such charges and expenses as are agreed upon by the parties.¹⁷ The distinction between bailiffs and receivers, however proper in other cases, does not apply to partners in trade, for one partner, though charged as receiver, is entitled to every just allowance against the other.¹⁸

This action cannot be maintained against a minor as bailiff or receiver, because he is not able to make a binding contract; nor by an apprentice, as such, for, when acting in that capacity in the ordinary business of his master, he is only performing the business of his master as the master would have done;¹⁹ but though he is not chargeable for the ordinary receipts of his master's trade, yet if he receive money not in such ordinary trade, he is liable as any other person; in that case, however, he must be charged as receiver or bailiff.²⁰ It does not lie against a disseisor or wrong-doer, because there is no contract, express or implied, between such a person and the plaintiff; nor by one executor against the other, because the possession by one is possession by the other.

The question whether the parties are sufficient must be settled before the reference, and the objection that the defendant is not the bailiff of the plaintiff cannot be raised before the auditors.²¹

3407. This action can be maintained only *when there has been an express or implied contract* between the parties on which the action is founded,²² and the amount due is uncertain and unliquidated. It is not requisite that the contract should be express; an implied contract is sufficient; and where the defendant has been guilty of a tort, when he has received the property or money of the plaintiff, he is liable to this action, if the plaintiff waives the tort.²³

Whenever the account between the parties has been stated, and a balance found to be due, assumpsit is the proper remedy; but when the accountant was

¹³ *Brubacker v. Robinson*, 3 Penn. 295.

¹⁴ *Bredin v. Deven*, 2 Watts, Penn. 95; *Dennison v. Goehring*, 7 Penn. St. 175.

¹⁵ *Long v. Fitzsimmons*, 1 Watts & S. Penn. 530.

¹⁶ *Bredin v. Kingland*, 4 Watts, Penn. 420.

¹⁷ 1 Dane, Abr. c. 8, § 4.

¹⁸ *James v. Browne*, 1 Dall. 340.

¹⁹ *Earl of Devonshire's Case*, 11 Coke, 89, b. See *Evans v. Birch*, 3 Campb. 10.

²⁰ 2 Inst. 379, 380. The action lies against a woman as receiver, though she was a *feme covert* at the time of receiving the fund. *Green v. Johnson*, 3 Gill & J. Md. 388; *Smith v. Woods*, 3 Vt. 485.

²¹ *Day v. Lockwood*, 24 Conn. 185; *Baxter v. Thompson*, 26 Vt. 559.

²² *King of France v. Morris*, cited 3 Yeates, Penn. 251. In Connecticut this action lies whenever a person has received money for the use of another; especially if it be received by a third, to be delivered over. *Mumford v. Avery*, Kirb. Conn. 163.

²³ *Dane*, Abr. c. 8, a. 2, § 10; *Sherman v. Ballou*, 8 Cow. N. Y. 304; *Stanard v. Whittlesey*, 9 Conn. 556.

a bailiff, account is a concurrent remedy with assumpsit where there has been an express promise.²⁴

The plaintiff may in some cases have covenant or account at his election; as, where one acknowledged by deed that he had received one thousand dollars from another, to be adventured in trade in the West Indies, and promised to account; the remedy for the non-compliance of this agreement may be an action of covenant on the deed, or an action of account, at the election of the creditor.²⁵

Account render is not a proper remedy to recover a thing certain; as, if Peter deliver to Paul one hundred dollars to trade with, he shall not have an action of account for the one hundred dollars, but simply for the profits made out of it;²⁶ nor to recover rent reserved on a lease;²⁷ nor mesne profits;²⁸ nor where one takes security, on the delivery of goods or money, for their return, for in such case the receiver cannot be said to be possessed of the goods or money, to render an account of the profits; besides, when a person makes such a special contract, his remedy is restricted to it.²⁹

3408. Having seen who may bring an action of account render, and against whom it may be maintained, and for what causes it will lie, let us suppose the parties to be in court; the next step to be taken is the filing of a declaration by the plaintiff.³⁰

3409. *The declaration* is an application of the writ with the addition of a formal commencement and conclusion, and showing, when against a receiver, by whose hands the defendant received the money; for it is but reasonable that he should have this information, in order that he may meet the charge.³¹ Though this rule may sometimes prove inconvenient to the plaintiff, because he may not know from whom the defendant received the money, yet the evil would be much greater to leave the defendant ignorant of what he was called upon to answer. To obviate the difficulty is simply to charge the defendant as bailiff where the money he has received was from goods intrusted to him. A declaration, charging the defendant as bailiff and receiver, is proper when the defendant is such in law and in fact, and has the property without any interest in it himself. But the rule is different in actions of account render between tenants in common under the statutes of Anne, as well as in actions between partners; in such cases it is necessary to aver that the money was received for the common benefit of the plaintiff and defendant,³² and that the defendant had received more than his share of the profits.³³

3410. It is not necessary to be particular as to time; when the declaration charged that the defendant was receiver between 1658 and 1673, without any certain time, it was held sufficient; and a blank in the declaration for the time during which the defendant acted as bailiff is cured by a verdict.³⁴ It is not

²⁴ Bacon, Abr. *Accompt*, D; *Wetmore v. Woodbridge*, Kirb. Conn. 164.

²⁵ Bacon, Abr. *Accompt*, D.

²⁶ Brooke, Abr. *Accompt*, 35. But see *Mumford v. Avery*, Kirb. Conn. 163.

²⁷ Rolle, Abr. 116.

²⁸ *Harker v. Whitaker*, 5 Watts, Penn. 474.

²⁹ Dane, Abr. c. 8, a. 2, § 6.

³⁰ For forms of declarations in account render, see Read, Am. Pleader's Assistant, 1 to 6; *Impey*, Pract. 153; 1 *Wentworth*, Pl.; 1 *Mallory*, Mod. Entr. *Account*.

³¹ Dane, Abr. c. 8, a. 1, § 4; *Walker v. Holyday*, 1 Com. 272; see *Moore v. Wilson*, 2 N. Chipm. Vt. 91; *May v. Williams*, 3 Vt. 239.

³² *McFadden v. Sallada*, 6 Penn. St. 283; see *James v. Browne*, 1 Dall. 339; *Jordan v. Wilkins*, 2 Wash. C. C. 482; *Coke*, Litt. 172, a; *Wells v. Some*, Croke, Car. 240; *Comyn*, Dig. *Accompt*, E, 2.

³³ *Sturton v. Richardson*, 13 Mees. & W. Exch. 17; *Irvine v. Hamlin*, 10 Serg. & R. Penn. 221.

³⁴ See *Wright v. Guy*, 10 Serg. & R. Penn. 227.

necessary that the *quantum* of money should be accurately stated; the object of the action is to ascertain it.

3411. The declaration should lay the damages as in other cases. But the rule, that the plaintiff shall not recover damages for more than he has declared for, is not applicable to account render; the plaintiff may, therefore, have a judgment for the arrearages for a greater amount than the damages laid in his declaration;³⁵ and when the plaintiff lays in his declaration the value of the chattels, and also damages, he obtains judgment, when entitled to it, for the value, and also for damages, distinguishing each.

3412. In this action there is no general issue. The defendant may plead that he never was bailiff or guardian, or receiver in fact,³⁶ but when sued as tenant in common, under the statute of Anne, if the declaration be properly framed, a plea that the defendant is not bailiff, nor receiver, would be insufficient;³⁷ in such case, if the defendant means to deny the plaintiff's claim, he should traverse the tenancy in common. The defendant may also plead that he has fully accounted, either to the plaintiff or before auditors; or a release; arbitrament; bond given in satisfaction; or that the money was delivered to him for a specific purpose, which has been accomplished. But other matters which admit that the defendant was once liable, and might be made accountable, cannot in general be pleaded in bar to the action, but must be pleaded before the auditors;³⁸ to this rule, however, there are exceptions, for when the defendant admits he was once accountable he may still plead a release, *plene computavit*, and the statute of limitations.

It is said that the defendant is not bound to plead at all in this action; he may admit upon record that he is willing to account, and, instead of a plea, he may come into court and say to the judges, "I am willing to account with the plaintiff, and pray that auditors may be assigned to take an account between me and the plaintiff;" and such accounting, without resistance to the plaintiff's claim by pleading, will save the defendant from being mulcted in damages, for which he would have been liable if he had so unjustly resisted the plaintiff's claim.³⁹

When a plea has been pleaded, and the issue is joined on this or any subsequent pleadings to which the parties may conduct the cause, the simple question to be decided is, whether the defendant ought to account or not. The cause is then placed on the trial list, and in due time comes to be tried by a jury.

3413. It is a general rule that *the evidence* must, in every case, support the plaintiff's allegations to entitle him to recover, for when the plaintiff makes a material allegation, he is required to support it by proof. In this action he must give evidence of privity, either of contract, express or implied, or by law. When the defendant is charged as guardian, bailiff, or receiver, or tenant in common, or joint tenant, or partner, it must be proved that he acted in the specific character charged, for if it be necessary to charge him in such character, it is also required to prove that he acted as such. We have seen that the measure of the liability of defendants is not the same, tenants in common and joint tenants being answerable for what they have actually received, without deducting costs and expenses for their trouble, and receivers being charged in

³⁵ Gratz v. Phillips, 5 Binn. Penn. 564.

³⁶ The usual form is *ne unques bailiff*, etc. This may be pleaded together with *plene computavit*, and in this case the latter plea does not admit the liability of the defendant to account. Whelen v. Watmough, 15 Serg. & R. Penn. 158.

³⁷ Wheeler v. Horne, Willes, 208.

³⁸ Bacon, Abr. *Accompt*, E; Comyn, Dig. *Accompt*, E, 4, 5, 6; Godfrey v. Saunders, 3 Wils. 73.

³⁹ Gratz v. Phillips, 5 Binn. Penn. 568.

the same manner, but allowed costs and expenses in special cases, in favor of trade;⁴⁰ and guardians and bailiffs are generally held to account for what they might, with proper diligence, have received, deducting reasonable costs and expenses.⁴¹

The property or right in the money demanded, or goods bailed, must be precisely stated, and proved to be in the plaintiff, as laid, it being a material allegation; if, therefore, the declaration claims as for money of the plaintiff, and the evidence is of money belonging to the plaintiff and another, as partners, the allegation in the declaration is not supported.⁴²

Where there are several defendants, they must be proved to be jointly and not severally liable, else one might be made answerable for the default of the other.⁴³

As a special demand is not required to be made before action brought, it is not necessary to aver it in the declaration, nor to prove it on the trial.⁴⁴

Under the plea of *plene computavit* the defendant must show that he has accounted with the plaintiff, and that an ascertained balance has been agreed upon.⁴⁵ But to this there is an exception in those cases where the law presumes that there has been an account; as, where the demand is against a servant for the proceeds of daily small sales, of which it is not the course to take written vouchers; in this case it will be presumed that the defendant has accounted; but this presumption may be rebutted by the plaintiff proving that this course of dealing has not been adhered to, and that the defendant has not accounted.⁴⁶

3414. When the jury find against the defendant, a *judgment* is rendered upon this verdict that the defendant do account, *quod computet*.⁴⁷ This is but an interlocutory judgment, and its only effect is to compel the defendant to account before auditors, to be appointed by the court. It does not conclude the defendant as to the dates, or sums mentioned in the declaration; it is the duty of the auditor to make proper charges, and to allow proper credits, without regard to the verdict.⁴⁸ A writ of error does not lie upon this judgment.⁴⁹

If the jury return a verdict for the defendant, the judgment will of course be given for him, unless for some legal cause the verdict be set aside. In this case when the defendant has pleaded in bar, and the bar is adjudged good, the plaintiff may have a writ of error; for this judgment is final till reversed.⁵⁰

3415. As to *the proceedings before the auditors*, let us consider the appearance of the parties, the hearing before auditors, the report of the auditors, and the power of the court over auditors.

3416. When the parties *appear* before the auditors, the case goes immediately to a hearing. Should the defendant neglect to appear before the auditors upon proper notice, the course is to obtain a certificate from them stating such neglect or refusal, and provided with this the plaintiff may apply to the court

⁴⁰ This, as before observed, does not apply to the case of partners in trade. *James v. Browne*, 1 Dall. 340.

⁴¹ *Jourdan v. Wilkins*, 2 Wash. C. C. 482; *Irvine v. Hamlin*, 10 Serg. & R. Penn. 221; *Griffith v. Willing*, 3 Binn. Penn. 317; *Sargent v. Parsons*, 12 Mass. 149.

⁴² *Jourdan v. Wilkins*, 2 Wash. C. C. 482.

⁴³ *Whelen v. Watmough*, 15 Serg. & R. Penn. 158.

⁴⁴ *Sturges v. Bush*, 6 Day, Conn. 452.

⁴⁵ *Baxter v. Hosier*, 5 Bingham. N. C. 288.

⁴⁶ *Evans v. Birch*, 3 Campbell. 10.

⁴⁷ See the form of this judgment in *Godfrey v. Saunders*, 3 Wils. 88.

⁴⁸ *Newbold v. Sims*, 2 Serg. & R. Penn. 317; *James v. Browne*, 1 Dall. 339; *Sturges v. Bush*, 5 Day, Conn. 452.

⁴⁹ *Beitler v. Ziegler*, 1 Penn. 135; *Metcalf's Case*, 11 Coke, 38.

⁵⁰ 1 Viner, *Abr. Account*, U, pl. 22.

for a *capias ad computandum*. By virtue of this writ the defendant may be taken in custody, when he must put in bail to answer the condemnation.⁵¹

3417. *The auditors sit as a court* having the power to hear all questions of law and fact which are presented to them;⁵² and if the matters offered by the defendant in discharge of the plaintiff's demands are disputed by the plaintiff, he may either demur or take issue before the auditors.⁵³ As the proceedings before them are in the nature of a new action, the first thing to be done is to ascertain what facts are put in issue. The plaintiff does not file a new declaration, but the defendant may plead new matter in discharge which he could not have before pleaded. In pleading before the auditors the following rules are to be observed:

Whatever might have been pleaded in bar to the action cannot be pleaded as a discharge before the auditors.⁵⁴

Except in the case of a release or *plene computavit*, if the party is once chargeable and accountable, he cannot plead in bar, but must plead before auditors; these exceptions are because a release and having fully accounted are total extinctions of the right of action of which the court is to judge; and even in these two cases they must be pleaded specially, and cannot be given in evidence on *ne unques receiver*.

Nothing can be pleaded before auditors which contradicts what has been formerly pleaded and found by the verdict, because, if this were allowed, there might be two contradictory verdicts which would perplex the court, or two similar verdicts which would be nugatory.⁵⁵

If the matters offered by the defendant in discharge of the plaintiff's demands are disputed by the plaintiff, he may either demur or take issue before the auditors. When there are more points in dispute than one, there may be a demurrer or an issue on each, and they are to be certified by the auditors to the court, and then the matters of law are decided by the court and the matters of fact by the jury. After this has been all finally settled, the result is returned to the auditors, who settle the account accordingly.⁵⁶

If on the trial of the issue the plaintiff makes default, he shall be nonsuited; but he is not without remedy, for he may have a just claim, and the default may have been unavoidable. He may bring a *scire facias ad computandum*.⁵⁷

In the examination of the case the auditors are authorized to take all articles of account between the parties incurred since the commencement of the suit, and the whole is to be brought down to the time when they make an end of the account.⁵⁸ But after a judgment *quod computet*, rendered against a receiver upon confession, if the auditors certify issues to be tried, the plaintiff upon trial of such issues cannot give evidence of moneys received by the defendants during any other period than that described in the declaration, for the defendant confessed no more.⁵⁹

3418. The very object of appointing auditors is to procure an account showing a balance in favor of one of the parties.⁶⁰ They are, therefore, required to

⁵¹ *Kepple v. Kepple*, 3 Yeates, Penn. 83, 84.

⁵² *Parker v. Avery*, Kirb. Conn. 353; *Wood v. Barney*, 2 Vt. 369.

⁵³ *Crousillat v. McCall*, 5 Binn. Penn. 438.

⁵⁴ *Godfrey v. Saunders*, 3 Wils. 113.

⁵⁵ *Godfrey v. Saunders*, 3 Wils. 314; *Spear v. Newell*, 2 Paine, C. C. 267.

⁵⁶ *Crousillat v. McCall*, 5 Binn. Penn. 433, 438.

⁵⁷ *Wheaton's Selwyn*, Nisi P. 5.

⁵⁸ *Robinson v. Bland*, 2 Burr. 1086; *Couscher v. Tulam*, 4 Wash. C. C. 442.

⁵⁹ *Sweigart v. Lowmarter*, 14 Serg. & R. Penn. 200.

⁶⁰ *Finney v. Harbeson*, 4 Yeates, Penn. 514.

make out an account showing the state of indebtedness on either side; but if they file such an account, it is not objectionable that they report that "the plaintiff has no legal demand at present against the defendant."⁶¹ But a report stating simply that the defendant "has fully accounted" is bad.⁶²

3419. *The auditors are subject to the supervisory power of the court, who may correct abuses or any improper conduct of the auditors. If, therefore, either party has cause of complaint against the auditors, there is no mode of redress but by complaint to the court; and when there is just cause of complaint, the court are bound to give redress; thus, if either party offer to join an issue, and the auditors refuse permission, or if the auditors conduct themselves with any manner of impropriety, to the injury of either party, redress may be had by application to the court.*⁶³

3420. *The final judgment is in favor of the plaintiff or of the defendant. In both cases it depends upon the report of the auditors; for when this is clear of fraud, and has been made according to law, it is, like the verdict of a jury, the foundation on which the judgment rests.*

3421. *When the report certifies that the defendant has refused to account, judgment is entered that the plaintiff recover according to the value mentioned in his declaration, and there will be a similar result where he gives an imperfect account. In these cases the judgment is for the whole amount of the claim, and there is no occasion for a writ of injury to ascertain the value.*⁶⁴

*If the report contain an account and a balance in favor of the plaintiff, the final judgment is that the plaintiff recover against the defendant so much as the defendant is found in arrear.*⁶⁵

3422. *If the report of auditors be in favor of the defendant, it seems doubtful whether a judgment can be entered for him on the report.*⁶⁶ But he may bring an action of debt against the plaintiff for the sum in which he was found to be a creditor.⁶⁷

3423. *It is a general rule that a writ of error lies on the final judgment of a court of law. The final judgment in account render may therefore be tested by proceedings in error. If found erroneous, it may be reversed, but such reversal shall not affect the first judgment if that be not incorrect. And if the second judgment be reversed, a *capias ad computandum* may issue to compel the defendant to account again.*⁶⁸ But as the last judgment stands on the first, if such first judgment be reversed, the second must follow the same fate.⁶⁹

⁶¹ *Couscher v. Tulam*, 4 Wash. C. C. 442.

⁶² *Spencer v. Usher*, 2 Day, Conn. 116. As under the state laws auditors may be appointed in many actions besides the action of account render, we may state here some of the rules in reference to the report. It has been said in several cases that the report is conclusive as to facts. *Bacon v. Vaughn*, 34 Vt. 73; *White's Appeal*, 36 Penn. St. 134; *Whitehead v. Perie*, 15 Tex. 7; *Colgrove v. Rockwell*, 24 Conn. 584. It may well be doubted, however, whether any such power can be given under the constitutional provisions as to trial by jury. The extent of the decisions in this direction is that when the reference is by agreement, the report may be conclusive, both parties having waived a jury. But when the reference is made under a statute or rule of court without an express agreement, the report is at most *prima facie* evidence of the facts found. *Stone v. Aldrich*, 43 N. H. 52; *Leathe v. Bullard*, 8 Gray, Mass. 545. It may be read in evidence by either party, or by order of the court, and may be contradicted by evidence adduced by the party reading it. *Lull v. Cass*, 43 N. H. 62; *Clark v. Fletcher*, 1 All. Mass. 53.

⁶³ *Crousillat v. McCall*, 5 Binn. Penn. 438.

⁶⁴ *Croke, Eliz.* 806.

⁶⁵ *Godfrey v. Saunders*, 3 Wils. 94. The late Chief Justice Tilghman, in the case of *Gratz v. Phillips*, 5 Binn. Penn. 567, gives very sound reasons why the judgment in actions of account may be for greater damages than are laid in the declaration. His opinion well deserves a careful perusal.

⁶⁶ *Crousillat v. McCall*, 5 Binn. Penn. 438.

⁶⁷ *McCall v. Crousillat*, 3 Serg. & R. Penn. 7.

⁶⁸ *Croke, Eliz.* 806, pl. 7.

⁶⁹ *Viner, Abr. Account*, pl. 22.

CHAPTER XIX.

ASSUMPSIT.

- 3424. Definition.
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 - 3431. When a contract is presumed in law.
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 - 3435. The declaration in assumpsit.
 - 3436. When the declaration must be general and when special.
- 3437-3441. The evidence in assumpsit.
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 - 3438. Effect of unlawful contracts.
 - 3439. Privity of contract required.
 - 3440. The plaintiff can recover only on the title declared on.
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 - 3442. The judgment in assumpsit.

3424. The second kind of actions arising on contracts is *the action of assumpsit*, in more common use than any other. 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, a circumstance which distinguishes this remedy from others. It 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; within the meaning of the provisions of the statute of Westminster, it may be termed an action on the case, but now, when the case simply is mentioned, it signifies an action for the redress of a tort, and is in form *ex delicto*.¹

The action of assumpsit lies for money had and received to the plaintiff's use; for money paid for the use of the defendant; for money lent; for money due on an account stated, called an *insimul computassent*; for goods sold and delivered; for work performed; for the use and occupation of the plaintiff's premises; and for many other cases.

The action may be for a sum certain and stated in the declaration, or for a sum to be governed by the proof; in the case of goods sold for their value or *quantum valebant*, in the case of work done, the value of the services *quantum meruit*.

¹ See Hammond, Nisi P. 4 to 23; 1 Viner, Abr. 270; Brooke, Abr. *Action Sur le Case*; Comyn, Dig. *Action upon the Case upon Assumpsit*; Bacon, Abr. *Assumpsit*; 3 Reeve, Hist. Eng. Law; 1 Chitty, Pl. 88; Browne, Actions, 318; Lawes, Pl. in Assumpsit.

3425. *Assumpsit* lies to recover damages for the breach of all contracts not under seal, whether written or not written; the difference between written and unwritten contracts is not in the nature of the undertaking, but in the mode of proof. In regard to express contracts, little can be said. The question of performance or non-performance, and amount of damages, must be determined by the particular circumstances of each contract.

In many cases the plaintiff may recover outside of his special contract where this has been waived or rescinded; in this case he must declare generally instead of specially on the contract, as more fully explained hereafter. Thus, if without fraud the plaintiff fails to fulfil the terms of his contract, still he may recover the value of the part performance, if it has been accepted by the other party with a full knowledge of the breach.² So if something additional is done, this may be recovered by proof of an additional contract in regard to it.³ But no additional or new implied contract can be set up as long as a special contract exists, covering the identical subject matter.⁴ And if the contract is entire, a plaintiff who has broken it cannot recover the value of his part performance, unless his breach has been acquiesced in by the other party.⁵

If the entire performance of a special contract is prevented by one party, the other party, who has partly performed it, may sue either to recover damages for the breach or in *assumpsit* for the value of his part performance.⁶

3426. *Assumpsit* does not lie where the plaintiff has a security of a higher nature, for in such case he must found his action upon it, and his remedy is by debt covenant or other form suitable to the case. Thus *assumpsit* does not lie where there is an express contract under seal,⁷ or upon a judgment, though rendered in another state.⁸ It lies on an implied promise to discharge a legal obligation created by statute, unless some other remedy is expressly given.⁹

3427. In some cases where an express contract under seal has been made, *assumpsit* may be the proper remedy. This happens when the specialty has been superseded by a parol agreement rescinding the agreement under seal. And the parol agreement may be implied as well as express. Such an agreement may be implied where both parties have consented to a variation in the manner of performance. *Assumpsit* may be maintained upon a parol agreement for a new consideration to pay a debt or perform an agreement under seal. But if there is no new consideration, the agreement is *nudum pactum*, and cannot support an action.¹⁰

3428. In many cases the law raises a *presumption of fact* of the existence of an agreement from the acts done or suffered by the defendant. Thus, if money is lent, a promise to repay is presumed, or if the defendant occupies the plaintiff's land, a promise to pay rent is presumed. In some cases, however, no promise is presumed; thus, the law implies no promise to pay for services rendered by members of a family to each other,¹¹ and no such contract will be implied unless the defendant has voluntarily done or suffered the acts from which a contract is sought to be implied. The plaintiff cannot make the defendant

² *Bee Printing Co. v. Hichborn*, 4 All. Mass. 63; *Kelley v. Bradford*, 33 Vt. 35; *Dutro v. Walter*, 31 Mo. 516; *Dermott v. Jones*, 23 How. 220.

³ *Duncan v. Commissioners*, 19 Ind. 154.

⁴ *Walker v. Brown*, 28 Ill. 378; *Lacroix v. Tourmillion*, 15 La. Ann. 69.

⁵ *Hansell v. Erickson*, 28 Ill. 257; *Henson v. Hampton*, 32 Mo. 408.

⁶ *Chamberlin v. Scott*, 33 Vt. 80; *Dibol v. Minott*, 9 Iowa, 403; *Mackubin v. Clarkson*, 5 Minn. 247; *Webster v. Wade*, 19 Cal. 291; *Sherman v. Champlain Co.*, 31 Vt. 162.

⁷ *Baird v. Blagrove*, 1 Wash. C. C. 170; *Knowlton v. Tilton*, 38 N. H. 257.

⁸ *Andrews v. Montgomery*, 19 Johns. N. Y. 162.

⁹ *Hillsborough v. Londonderry*, 43 N. H. 451.

¹⁰ *Codman v. Jenkins*, 14 Mass. 93.

¹¹ *Updike v. Titus*, 2 Beasl. N. J. 151; *Davison v. Davison*, 2 Beasl. N. J. 246.

his debtor against his will, and any thing he may do for the defendant without his knowledge gives him no claim for compensation, though it may be beneficial to him,¹² and when one claims compensation for services the defendant may show that such services are customarily rendered without compensation.¹³

3429. But *this presumption of fact is not conclusive*, and may be rebutted by circumstances showing the impossibility of the existence of any agreement or promise on the part of the defendant. Though assumpsit lies in general against one who uses and occupies the land of the plaintiff, it cannot be maintained against one who enters upon the land claiming a title to it adverse to that of the plaintiff.¹⁴ Such a claim made *bona fide* negatives the existence of any contract. The title to the land being the matter in dispute, the proper remedy is trespass or ejectment. But if the defendant occupies the premises by permission of the owner, a promise to pay rent will be implied from slight circumstances; and rent may be due, though the occupation was for some purpose not implying the payment of rent, if such purpose is not accomplished. Thus, if the defendant occupies land under an agreement to purchase, but finally abandons the agreement and surrenders the land, assumpsit for use and occupation may be maintained.¹⁵ If an agreement for the use and occupation of land is void by reason of being made on Sunday, assumpsit will lie on the agreement implied from the actual use and occupation.¹⁶

3430. A *purchaser of goods* is of course presumed to be liable to pay for them at the price fixed by the contract, if there is one, otherwise, at their value, and assumpsit is the proper remedy. If a purchaser orders goods and only a part is sent, or if goods different from those ordered are sent, he is not obliged to receive them; but if he accepts them, the law implies a promise to pay for them independently of any express contract.¹⁷ And the same obligation is imposed upon one who, though an utter stranger to any contract of purchase, receives and uses property of another.¹⁸ But to perfect this obligation it is necessary that the goods should be delivered and have come into the possession of the defendant. And in the absence of any contract it is necessary that the defendant should have taken possession of the goods as his own. The law will not enable the plaintiff by sending his property to a stranger unasked to impose upon him an obligation to pay for the goods or to be at the trouble and expense of returning them.

The count for goods sold and delivered is to be used only where there has been an actual delivery; if the transaction is incomplete, the plaintiff must declare specially on the contract.¹⁹

3431. In many cases *the law raises the presumption* of a promise where, in fact, no promise exists. This is done where a legal obligation rests upon the defendant to pay the plaintiff, or to perform the agreement sued upon. Thus, for instance, where a husband wrongfully turns his wife out of doors, or a father wrongfully discards his children, and gives notice that he will not be responsible for any thing which may be furnished them, still the money may be recovered of him in an action of assumpsit, when necessaries, in the technical

¹² *Zottman v. San Francisco*, 20 Cal. 96; *Webb v. Cole*, 20 N. H. 490.

¹³ *Fraylor v. Sonora Co.*, 17 Cal. 594.

¹⁴ *Kittredge v. Peaslee*, 3 All. Mas. 235; *Folsom v. Carli*, 6 Minn. 420; *Phelps v. Conant*, 30 Vt. 277.

¹⁵ *Patterson v. Stoddard*, 47 Me. 355; *Watson v. Brainard*, 33 Vt. 88; contra *Stacy v. Vermont R. R.*, 32 Vt. 551.

¹⁶ *Stebbins v. Peck*, 8 Gray, Mass. 553.

¹⁷ *Downs v. Marsh*, 29 Conn. 409.

¹⁸ *Hill v. Davis*, 3 N. H. 384; *Floyd v. Wiley*, 1 Mo. 430.

¹⁹ *Perdicaris v. Trenton Co.*, 5 Dutch. N. J. 367.

sense of the word, have been furnished them. This presumption is conclusive and cannot be rebutted, as it arises entirely from the legal obligation and not at all from the probability of a promise.

3432. *Assumpsit for money had and received* to the plaintiff's use has its origin in the principles of equity. It has been stated that this action lies where the defendant has money which in equity and good conscience belongs to another.²⁰ It is the proper remedy in many cases where the contract, if any exists, is made between the defendant and a third party, or is made upon a consideration moving from a third party. Thus if A deliver money to B upon an agreement by B to pay it over to C, C may bring this action against B. There is in this case no privity of contract between the plaintiff and defendant, and the payment by A to B does not necessarily deprive C of any remedy against A. And if money belonging to the plaintiff, and which he is entitled to sue for and recover, is in the hands of a third person, whether his possession is in its inception tortious or not, if such third person deliver it to the defendant, an action for money had and received is properly brought. It matters not whether such delivery to the defendant be merely voluntary or arises from any obligation.

The plaintiff may bring this action to recover money paid to the defendant on account of fraud or duress,²¹ or from a mistake of fact.²² But no action lies if the plaintiff has voluntarily paid an illegal demand, knowing it to be illegal. Thus, where a tax is illegally assessed upon the defendant and paid by him, if he pays it voluntarily and without any compulsion, he has no remedy.²³ But if he pays it for the release of his person or property, or under circumstances which show compulsion, he may recover it.²⁴ A protest is evidence of compulsion, and may by statute be conclusive.²⁵

3433. In many cases where the defendant has converted the property of the plaintiff to his own use, the latter may *wave the tort*, and sue in *assumpsit* instead of *trover*. But this cannot be done in every case, but must rest on some benefit received by the defendant. Tort caused by mere wantonness or malicious mischief from which no benefit accrues to any one cannot be thus waived. But the privilege may be exercised where the defendant has sold the property, converted and received the money,²⁶ or has altered the character of the property so that the parties cannot be replaced *in statu quo*.²⁷

Upon this point the authorities are, however, somewhat conflicting. It is settled that where the goods converted have been sold, and the money received by the wrong-doer, the tort may be waived, and in this case the proper remedy is *assumpsit* for money had and received.²⁸ And it is equally well settled that an action for goods sold will not lie if the wrong-doer has derived no benefit except from the use of the chattel which still exists in specie.²⁹ If fungible chattels, as hay or corn, are converted and the wrong-doer is benefitted by their consumption, it would seem that the tort cannot be waived, and the action of *assumpsit* does not lie.³⁰ But if the defendant has altered the character of

²⁰ *Lockwood v. Kelsea*, 41 N. H. 185; *Moore v. Mandlebaum*, 8 Mich. 433.

²¹ *Hinsdill v. White*, 34 Vt. 558.

²² *Shaw v. Mussey*, 48 Me. 247; *Rheel v. Hicks*, 25 N. Y. 289.

²³ *Irving v. St. Louis*, 33 Mo. 575; *Society v. Providence*, 6 R. I. 235.

²⁴ *Commissioners v. Parker*, 7 Minn. 267; *Bradford v. Chicago*, 25 Ill. 411.

²⁵ *Falkner v. Hunt*, 16 Cal. 167.

²⁶ *Budd v. Hiler*, 3 Dutch. N. J. 43; *Hutton v. Wetherald*, 5 Harr. Del. 38.

²⁷ *Smith v. Smith*, 43 N. H. 536; *Jones v. Gregg*, 17 Ind. 84; *Halleck v. Mixer*, 16 Cal. 574.

²⁸ *Jones v. Hoar*, 19 Pick. Mass. 218.

²⁹ *Brown v. Holbrook*, 4 Gray, Mass. 102; but see *Fratt v. Clark*, 12 Cal. 89.

³⁰ *Balch v. Patten*, 45 Me. 41.

the chattels, as, by manufacturing raw materials a sale may be implied and an action for goods sold maintained.³¹

Where a person has been unlawfully imprisoned, he may waive the tort and sue the keeper who has derived benefit from his labor.³²

If the plaintiff waives the tort, he must waive the whole of it, and if his property is wrongfully sold by one assuming to act as his agent, a suit in assumpsit against the purchasers ratifies the authority of the agent.³³

3434. The action of *assumpsit for money paid* lies where the plaintiff at the request of the defendant has paid money to a third person for the defendant's use. It is immaterial in this case whether the defendant has derived any benefit from the payment. The consideration is the loss to the plaintiff at the instance of the defendant. It is essential that it should be done at the request of the defendant; the plaintiff cannot, by paying the defendant's debts, force the latter to accept him as a creditor.³⁴ Or the action may be supported where the payment was made without request if the defendant was liable to pay it, and there was some privity or joint obligation so that the money was paid by the plaintiff for a reasonable cause.³⁵

3435. There are two kinds of *declarations in assumpsit*; they may be on a special or a general assumpsit. A declaration is special when the plaintiff declares upon the original contract, setting out the particular language or its effect, whatever be the subject matter; or when he declares upon a promissory note, bill of exchange, policy of insurance, and the like. It is general when the plaintiff, instead of setting out the particular language or effect of the original contract, declares as for a debt arising out of the execution of the contract where that constitutes a debt; or upon the promise raised or implied by law upon the execution of the contract when no stipulated amount is to be paid on its execution, in which case the law implies that so much is to be paid as is reasonably due.

When, therefore, the plaintiff declares in assumpsit upon the original contract in either of the above instances, the declaration is said to be in special assumpsit because the original contract is specially stated. But when, instead of declaring on the contract as it was originally made, or may be supposed to have been made, the plaintiff declares upon the promises raised or implied by law upon the execution of such contract, the declaration is said to be in general assumpsit, which is either *indebitatus assumpsit*, when the plaintiff generally states that the defendant being indebted to him in a certain specific sum for what was done under the contract, promised to pay that sum to the plaintiff;³⁶ or upon a

³¹ *Gilmore v. Wilbur*, 12 Pick. Mass. 120.

³² *Patterson v. Prior*, 18 Ind. 440; *Patterson v. Crawford*, 12 Ind. 241.

³³ *Brigham v. Palmer*, 3 All. Mass. 450.

³⁴ *Bancroft v. Abbott*, 3 All. Mass. 524; *Hamilton v. Starkweather*, 28 Conn. 138.

³⁵ *Bailey v. Bussing*, 28 Conn. 455; *Phipps v. Nye*, 34 Miss. 330.

³⁶ There is a striking resemblance between the *pactum constituta pecuniæ* of the civilians and our *indebitatus assumpsit*. This contract, in the civil law, was an agreement by which a person appointed to his creditor a certain day or a certain time, at which he promised to pay; or it may be defined, simply, an agreement by which a debtor promises his creditor to pay him. By this pact an obligation arises which does not destroy the former contract, by which the debtor was already bound, but which is accessory to it; and by this multiplicity of obligations the right of the creditor is strengthened. Pothier, *Obl.* part 2, c. 6, s. 9. The *pactum constituta pecuniæ* was a promise to pay a subsisting debt, whether natural or civil, made in such a manner as not to extinguish the preceding debt. It was introduced by the prætor to obviate formal difficulties. The action of *indebitatus assumpsit* is brought upon a promise for the payment of a debt, and by such promise the right of action on the original is not extinguished nor varied. It is not subject to the wager of law and other technical difficulties to which the action of debt was once liable. 4 Coke, 91 to 95; 1 Viner, Abr. 270; Brooke, Abr. *Action Sur le Case*, pl. 7, 69, 72. See before, **2853**.

quantum meruit or *quantum valebant*, as they are called, stating generally that in consideration of what was done under the contract the defendant promised to pay the plaintiff what he deserved, or what it was worth, and that he deserved, or it was worth, so much.

The right to declare generally does not always include the right to plead a *quantum meruit* or a *quantum valebant*. If the express contract has ceased to have virtue by reason of part performance being accepted for the whole, or by a breach of the defendant, still the stipulations as to the time and amount of payment may be independent of the others, and will still govern so far as they are applicable. Thus, if one purchases goods agreeing to pay at a future day and to give his note therefor, a failure on his part to give his note leaves him liable to pay at the day agreed on, but not before.³⁷

Where an employee for a fixed time at a fixed rate continues to work after the time, the rate is presumed to be the same.³⁸

3436. Whether the declaration shall be on the special contract or whether it shall be general depends upon the circumstances of each case. The cases will generally come within the following rules:

While the contract continues executory the plaintiff must declare specially;³⁹ but when it has been executed on his part, and nothing remains but the payment of the price in money by the defendant, which is nothing more than the law would imply against him, the plaintiff may declare generally, using the common counts, or he may declare upon the original contract at his election.⁴⁰ If, by the special agreement which was performed, the plaintiff was to be paid in specific articles and not in money, the declaration must be special;⁴¹ and if it was in money and a term of credit was allowed, the action, though on the common counts, must not be brought until the term has expired.⁴² When the plaintiff has been prevented from completing his contract by the defendant, the declaration must be special on the contract because the whole has not been performed, and to enable him to bring general assumpsit the plaintiff must have fully completed his agreement.⁴³

When a contract has been abandoned by mutual consent after being partially performed, or is rescinded, or it becomes extinct by some act on the part of the defendant, the plaintiff may resort to the common counts alone for remuneration for what he has done under the special agreement; but the fact of the defendant's hindering the plaintiff from completing his contract is not sufficient, for as we have just stated in such case the plaintiff must declare specially upon the agreement. The contract must be considered as at an end.⁴⁴

When what was done by the plaintiff was performed under a special agreement, but not in the stipulated time or manner, and yet it was beneficial to the

³⁷ *Hall v. Hunter*, 4 Greene, Iowa, 539; *Kalkman v. Baylis*, 17 Cal. 291; *Thayer v. Ballou*, 32 Vt. 234.

³⁸ *Ranch v. Albright*, 36 Penn. St. 367.

³⁹ *Kelly v. Foster*, 2 Binn. Penn. 4; *Arnold v. Paxton*, 6 J. J. Marsh. Ky. 505; *White v. Woodruff*, 1 Root, Conn. 309; *Russell v. South Britain Society*, 9 Conn. 508; *Cast v. Roff*, 26 Ill. 462.

⁴⁰ *Perkins v. Hart*, 11 Wheat. 237; *Snyder v. Castor*, 4 Yeates, Penn. 353; *Miles v. Moody*, 3 Serg. & R. Penn. 211; *Gordon v. Martin*, Fitzg. 303; *Baker v. Corey*, 10 Pick. Mass. 496; *Pitkin v. Frink*, 8 Metc. Mass. 16; *Brown v. Perry*, 14 Ind. 32; *Eggleston v. Buck*, 24 Ill. 262.

⁴¹ *Cochran v. Tatum*, 3 T. B. Monr. Ky. 305.

⁴² *Robson v. Godfrey*, 1 Stark. 220.

⁴³ *Algeo v. Algeo*, 10 Serg. & R. Penn. 235; *Donaldson v. Fuller*, 3 Serg. & R. Penn. 505; but see *Perkins v. Hart*, 11 Wheat. 237.

⁴⁴ *Mead v. Degolyer*, 16 Wend. N. Y. 632; *Linningdale v. Livingston*, 10 Johns. N. Y. 36; *Raymond v. Bernard*, 12 Johns. N. Y. 274; *Hollingshead v. Mactier*, 13 Wend. N. Y. 276.

defendant and accepted by him, the plaintiff cannot recover upon the contract from which he has departed; his remedy is upon the common counts for the value of what the plaintiff has performed, and which has been of benefit to the defendant;⁴⁵ and if the contract has been fully completed and something additional has been done, as, if a house be built upon a plan as per a written agreement, and additions are put to it, the declaration for a breach must be special as far as the agreement goes and general for the residue.⁴⁶

The rules relating to the form of a declaration, on a special and on a general assumpsit, have been so fully considered as to render any further remarks upon them in this place altogether unnecessary.

3437. A *request* by the defendant must be alleged in the declaration and proved on the trial in the actions upon the common counts. A past or executed consideration must be laid to have been done upon the request of the defendant, for otherwise it would not appear that the service, or what was done by the plaintiff, was not a voluntary courtesy;⁴⁷ and labor and service performed for one without his request or privity, however beneficial or meritorious, as in saving his property from fire, afford no ground of action;⁴⁸ and so, if the plaintiff put work upon the house of the defendant without his consent,⁴⁹ or if a workman employed to do a particular job adds extra work without consulting his employer⁵⁰ he cannot recover, for no man can be compelled to become another's debtor. But if the person for whom the service has been rendered, knowing of the work, tacitly assent to it, it will be evidence from which a request may be inferred, and in this case, or where he promised to pay, he will be bound, and the action may be sustained.⁵¹ But this implication of law will be avoided by showing that the work was done on the credit of another person.⁵²

A previous request may be inferred, as has already been mentioned, contrary to the fact; as, where a husband wrongfully turns his wife out of doors, and she obtains credit for necessaries, the husband will be liable as if he had made a request.⁵³ And when the defendant has been guilty of a trespass, as, by taking the property of the plaintiff and selling it, an action will lie for the money, the plaintiff waiving the tort, and a request need not be proved.⁵⁴

3438. To entitle the plaintiff to recover it must appear that the contract is not *unlawful*. If the plaintiff to establish his contract must show such facts as make the contract unlawful, he cannot recover; but if he can establish his contract without showing such acts, he may recover; as, when a man lends money to another to enable the borrower to lay a wager, with which the lender had no connection whatever; because the borrower might have applied it to any other use if he had chosen.

⁴⁵ *Streeter v. Hurlock*, 1 Bingham, 34; *Jewel v. Schroeppel*, 4 Cowen, N. Y. 564; *Taft v. Montague*, 14 Mass. 282; *Hayward v. Leonard*, 7 Pickens, Mass. 181; *Smith v. Proprietors*, 8 Pickens, Mass. 178; *Wadleigh v. Sutton*, 6 N. H. 15; *Morford v. Ambrose*, 3 J. J. Marsh. Ky. 690; *Newman v. McGregor*, 5 Ohio, 351; *Dubois v. Read*, 1 Const. So. C. 472.

⁴⁶ *Pepper v. Burland*, Peake, 103; *Dunn v. Body*, 1 Stark. 175; *Robson v. Godfrey*, 1 Stark. 220; *Dubois v. Delaware and Hudson Canal Co.*, 1 Wend. N. Y. 285; *Wright v. Wright*, 1 Litt. Ky. 181; *McCormick v. Connolly*, 2 Bay, So. C. 401.

⁴⁷ *Balcam v. Craggin*, 5 Pickens, Mass. 295; *Parker v. Crane*, 6 Wend. N. Y. 647; *Goldsby v. Robinson*, 1 Blackf. Ind. 247. In Pennsylvania, a verdict cures this defect. *Stoever v. Stoever*, 9 Serg. & R. Penn. 434; *Greeves v. McAllister*, 2 Binn. Penn. 591.

⁴⁸ *Bartholomew v. Jackson*, 20 Johns. N. Y. 28.

⁴⁹ *Caldwell v. Eneas*, 2 Const. So. C. 348.

⁵⁰ *Hart v. Norton*, 1 M'Cord, So. C. 22.

⁵² *Farmington Academy v. Allen*, 14 Mass. 176.

⁵³ *Walker v. Simpson*, 7 Watts & S. Penn. 83; *Robinson v. Gosnold*, 6 Mod. 171; *Van Walkinburg v. Watson*, 13 Johns. N. Y. 480.

⁵⁴ *Hambly v. Trott*, Cowp. 372.

⁵¹ *James v. Bixley*, 11 Mass. 37.

If the contract is executed and the parties are in *pari delicto*, the law will not help either of them, and the plaintiff upon his own showing will be non-suited. But in such case, if the contract is shown to be wholly executory, and not carried into effect, and money has been advanced by the plaintiff, he may recover it under the money counts. And where the parties are not in *pari delicto* the innocent plaintiff may recover in the same way, the money having been obtained from him by some wrong or unlawful advantage.

3439. An entire stranger to the consideration, it is evident, has no right to recover; the plaintiff must therefore prove a *privity* between himself and the defendant. But in case of single contracts, if one person make a promise to another for the benefit of a third person, the latter may maintain the action, and it seems also that it may be maintained by the other party.⁵⁵

Under a contract for labor the employer is not liable to sub-employees employed by the other party to the contract.⁵⁶

3440. The plaintiff can recover only in the right in which he has claimed to be entitled by his declaration; if he sues in a particular capacity, as executor, assignee of a bankrupt, surviving partner, and the like, he must prove that he is invested with such a character.

3441. When there are several plaintiffs, it must be proved that the contract was made with them all, because if all the promisees do not join, the plaintiff may be non-suited; and if too many persons bring the suit, and some of them have no right, it is clear they cannot recover, and some failing, they must all be defeated.

Though the plaintiff is thus required to show that all who sue are entitled to recover, yet, under the general issue, he is not required to prove that the contract was made with all the defendants, because the non-joinder of defendants can, in general, be taken advantage of only by plea in abatement. But he must prove all the defendants whom he has sued on a joint contract to be liable or he will fail.⁵⁷

3442. *The judgment in assumpsit* is either in favor of the plaintiff or defendant; when in favor of the plaintiff, it is that he recover a specified sum assessed by a jury, or on reference to the clerk or other officer of the court; when for the defendant, it is for costs.

⁵⁵ 1 Chitty, Pl. 5; *Kreutz v. Livingston*, 15 Cal. 344.

⁵⁶ *Wells v. Williams*, 39 Barb. N. Y. 567.

⁵⁷ *Govitt v. Radnidge*, 3 East, 62, 70; *Porter v. Harris*, 1 Lev. 63; *Max v. Roberts*, 4 Bos. & P. 454; 1 Chitty, Pl. 32.

CHAPTER XX.

COVENANT.

- 3443. Definition.
- 3444-3446. On what claims covenant lies.
 - 3444. When it is a concurrent remedy with debt.
 - 3445. When it is the peculiar remedy.
 - 3446. When it cannot be maintained.
- 3447. The declaration.
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- 3449-3452. The evidence.
 - 3449. Proof of the deed.
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 - 3451. Proof of the breach.
 - 3452. What constitutes a breach of particular covenants.
- 3453. The judgment and damages.

3443. In the next place we will treat of a third kind of action, arising *ex contractu*. This is *the action of covenant* instituted for the recovery of damages for the breach of a covenant, or promise made in writing and under seal, for by the common law this action cannot be sustained on an instrument not sealed by the party or his attorney duly authorized.¹

It is proper here to point out a distinction between this action and the actions of *assumpsit* or *debt*. It is true covenant is brought for the recovery of damages, like *assumpsit*, but the latter is not in general sustainable where the contract was originally under seal, or where a deed has been taken in satisfaction of a parol agreement; and though *debt* may be sustained upon a simple contract, a specialty, a record, or a statute, yet it lies only for a sum of money *in numero*, and not where the damages are unliquidated and incapable of being reduced to a certainty by an averment.

In treating of this action we shall consider successively on what kind of claim or obligation this action may be sustained, the form of the declaration, the pleas and issue, the evidence, and the judgment.

3444. It lies in all cases where there is a breach of a covenant, whether such covenant be contained in an indenture, or deed-poll, or any other writing under seal; whether it be express or implied by law from the terms of the deed, or for the performance of something *in futuro*, or that something has been done;² it may be not only for something which is past or something future, but also for something *in presenti*, as, that the covenantor has a good title, and in this

¹ *Davis v. Judd*, 6 Wisc. 85; *Gale v. Nixon*, 6 Cow. N. Y. 445; *Ludlum v. Wood*, 1 Penn. 55; *Tribble v. Oldham*, 5 J. J. Marsh. Ky. 137; *Bilderback v. Pouner*, 2 Halst. N. J. 64. In Kentucky, by the statute of 1812, all writings thereafter executed without seal stipulating for the payment of money or property, or for the performance of any other act, duty or duties, shall be placed upon the same footing with sealed writings containing the like stipulations, and to all intents and purposes shall have the same force and effect, and the same species of action may be founded on them, as if sealed. *Hanley v. Rankins*, 4 T. B. Monr. Ky. 556; *Hughes v. Parks*, 4 Bibb, Ky. 60.

² Comyn, Dig. *Covenant*, A.

case when he has not such title the covenant is broken as soon as signed and delivered; as a general rule, however, covenant will not lie on a contract *in presenti*, as on a covenant to stand seised, or that a certain horse shall thenceforth be the property of another.³

Covenant is sometimes a concurrent remedy with debt, and in some cases it is a peculiar remedy.

It is *concurrent with debt* on a direct contract under seal for the payment of a stipulated sum of money, either by way of penalty or otherwise;⁴ it lies on a penal bond, but the breach assigned must be the non-payment of the penalty,⁵ and not of the condition of the bond, separated from the penal or obligatory part;⁶ covenant is also a proper remedy for the breach of a contract under seal for the payment of a certain sum of money to be discharged in good current bank notes.⁷ It is the only remedy when the liability is created by an agreement under seal; but when the law creates the liability, independently of the covenant, an action on the case may also be maintained.⁸

3445. *Covenant is the peculiar remedy* where the obligation under seal is not direct, but collateral merely, and where the damages are unliquidated and debt will not lie; thus, where several covenantors bind themselves, or some one of them, to pay a certain sum of money, debt cannot be maintained against one of them only.⁹ So where money is secured by an instrument under seal, to be paid by instalments, and they are not all due, no action but covenant will lie unless there be a penalty which becomes due on the payment of any one instalment, in which case debt will lie for the penalty.¹⁰ And when part of an entire sum due on a sealed instrument is payable by instalments at fixed periods and the residue in specific articles on demand, covenant will lie for the instalments, though there has been no legal demand of the specific articles.¹¹

After a lessee has assigned his lease and the lessor has accepted rent from the assignee, debt cannot be maintained against the lessee for any future rent; covenant is his only remedy.¹²

Covenant lies only between the parties privy to the contract. A personal covenant cannot be set up in a suit by or against the assignee of the covenantor or covenantee.¹³ But if the covenant runs with the land, the action may be brought by any assignee of the covenantee's title.

3446. Having considered the cases where covenant may and where it must be brought, let us now, on the other hand, examine those in which it cannot be maintained. In general, it cannot be supported unless the contract is under seal; when it is by parol, the plaintiff must proceed by *assumpsit*, debt, or other suitable action. Covenant cannot be supported on a lease executed by the lessor only, though the lessee enters and enjoys the possession;¹⁴ but it will lie, although the covenantee did not sign the indenture in which he is named as a party.¹⁵ This action cannot be maintained by one partner against another

³ *Sharrington v. Strotton*, Plowd. 308.

⁴ *Bassett v. Jordan*, 2 Ala. 352.

⁵ *United States v. Brown*, Paine, C. C. 422.

⁶ *Huddle v. Worthington*, 1 Ohio, 423.

⁷ *Jackson v. Waddill*, 2 Ala. 579; *Scott v. Conover*, 1 Halst. N. J. 222.

⁸ *Luckey v. Rowzee*, 1 Marsh. 295.

⁹ *Harrison v. Matthews*, 2 Dowl. N. S. Bail, 318.

¹⁰ *Dean of Windsor v. Gover*, 2 Saund. 303, note b; *Comyn, Dig. Action, F*; but if the sums payable at different times be independent sums, and not instalments of a larger sum, debt lies as well as covenant.

¹¹ *Stevens v. Chamberlain*, 1 Vt. 25.

¹² *Thursby v. Plant*, 1 Saund. 241.

¹³ *Lyon v. Parker*, 45 Me. 474.

¹⁴ *Trustees v. Spencer*, 7 Ohio, 151.

¹⁵ *Lucke v. Lucke*, Lutw. 305; *Comyn, Dig. Covenant, A, 1*.

on the articles of partnership, though under seal, to compel the payment of the balance due to the partnership from one of the partners, the proper remedy being an action of account or a bill in chancery.¹⁶

When the contract is under seal, and, afterward, it is varied in its terms, in a material part, by a parol agreement, such substituted contract must be the subject of an action of assumpsit, and not of covenant.¹⁷ But a parol agreement by one party to a covenant to waive the performance of part of the agreement by the other party is not such an alteration of the contract as will render necessary a change in the form of the action.¹⁸

3447. *The declaration* must state that the contract was under seal, and it should not only state such a contract, but its delivery must also be alleged;¹⁹ and it should also make a profert of it, or show some excuse for the omission.²⁰ It is not, in general, necessary to state the consideration of the defendant's covenant, for the seal is of itself evidence of consideration; but when the performance of the consideration constituted a condition precedent, then such performance must be averred,²¹ or the plaintiff must aver that he was prevented by the other party.²²

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 its legal effect, though it is more usual to declare in the words of the deed; and implied covenants may be set forth in the declaration in the same manner as if they were expressed in the instrument.²³

The breach may be assigned in the negative words of the covenant where such general assignment amounts to a breach; but enough must be placed upon the record to show that the covenant has been broken, and that the plaintiff has a cause of action.²⁴ A breach may also be assigned according to the substance, though not according to the letter of the covenant.²⁵ It may be in the alternative, or there may be several breaches in the same declaration; and if one be well assigned, the declaration cannot be held ill on general demurrer.²⁶

The action being brought to recover damages for the non-performance or breach of a covenant under seal, they must be laid in the declaration sufficiently high to cover the real amount.

3448. Strictly speaking, there is no *general issue* in an action of covenant, for *non est factum* merely denies the deed, and only puts in issue the fact of its

¹⁶ *Niven v. Spickerman*, 12 Johns. N. Y. 401.

¹⁷ *Vicary v. Moore*, 2 Watts, Penn. 456; *Heard v. Wadham*, 1 East, 630; *Littler v. Holland*, 3 Term, 590; *Ellmaker v. Franklin Fire Ins. Co.*, 6 Watts & S. Penn. 443; *Vicary v. Moore*, 2 Watts, Penn. 451.

¹⁸ *McCombs v. McKennan*, 2 Watts & S. Penn. 216.

¹⁹ *Perkins v. Reeds*, 8 Miss. 33.

²⁰ *Read v. Brookman*, 3 Term, 151.

²¹ *Goodwin v. Lynn*, 4 Wash. C. C. 714; *Keatly v. McLaugherty*, 4 Mo. 221; *Knox v. Rinehart*, 9 Serg. & R. Penn. 45; *Harrison v. Taylor*, 3 A. K. Marsh. Ky. 168; *Gardiner v. Corson*, 15 Mass. 503; *West v. Emmons*, 5 Johns. N. Y. 179.

²² *Fannin v. Beauford*, 1 Bay, So. C. 237; *Clandennen v. Paulsel*, 3 Mo. 230.

²³ *Grannis v. Clark*, 8 Cow. N. Y. 36; *Barney v. Keith*, 4 Wend. N. Y. 502. It has been held in Pennsylvania that where a mistake has been made in drawing articles of covenant, the plaintiff might declare upon the articles as they should have been drawn, according to the mutual agreement of the parties, with proper averments, showing the mistake in the original. *Gower v. Sterner*, 2 Whart. Penn. 75. The practice of merely setting out the deed as part of the pleading is bad. *McC Campbell v. Vastine*, 10 Iowa, 538.

²⁴ *Randel v. Chesapeake Co.*, 1 Harr. Del. 151; *Camp v. Douglas*, 10 Iowa, 586.

²⁵ *Potter v. Bacon*, 2 Wend. N. Y. 583.

²⁶ *Comyn, Dig. Pleader*, 2, V, 2, 3; *McCoy v. Hill*, 2 Litt. Ky. 374. See *Thome v. Haley*, 1 Dan. Ky. 268.

sealing and execution,²⁷ and when pleaded, simply admits all material averments in the declaration.²⁸

Of the special pleas the following are the most common:

Non infregit conventionem merely denies that the defendant has broken the covenants, but does not deny the deed; it is not, therefore, the general issue, still it is a plea in bar.²⁹ But when the breach is in the negative, then the plea of *non infregit conventionem* is bad, because, both the breach and the plea being in the negative, there can be no issue.³⁰

Omnia performavit is a good plea in bar where all the covenants are in the affirmative.³¹

Covenants performed is pleaded in some states. In Pennsylvania, it admits the execution of the instrument, and supersedes the necessity of other proof, but it does not admit that the opposite party had performed his agreement.³² In Alabama, on the contrary, a plea of covenants performed does not admit the deed; the plaintiff is required to prove his cause of action as if no such plea had been filed.³³ In Illinois, the plea of covenants performed, if not sustained, admits the plaintiff's right to recover only nominal damages.³⁴

The defendant may plead any other matter specially, as infancy, a release, duress, gaming, and the like, which cannot be given in evidence unless pleaded; the defendant must answer all the breaches laid in the declaration; and if he pleads to the whole action a plea which is good as to one breach only, such plea is bad on demurrer.³⁵

3449. As in this action there is no general issue which traverses the whole declaration, the plaintiff is not required to prove the whole; that is, he is not required to prove what is admitted by the plea. *The evidence* is, therefore, confined to the particular issue raised by the special plea.

When the deed is not put in issue by the plea of *non est factum*, the defendant, at common law, admits so much of the deed as is spread upon the record; if other parts of the deed are required to support the plaintiff's case, he must prove them in the usual way.³⁶ When the defendant has pleaded *non est factum* the plaintiff must, of course, prove the allegations contained in his declaration, and prove the formal execution of the instrument on which he has declared. This is done by the production of the deed, and proving by the attesting witnesses, when they can be had, that it was signed, sealed, and delivered by the obligor; and if any suspicion should arise from any alterations or erasures made in it, these must be removed before the deed can be read in evidence.³⁷

To prove the signing and sealing it is not requisite that the witnesses should

²⁷ In Ohio, under a statute, *non est factum* is a plea of the general issue in covenant, to which a notice of set-off may be appended. *Granger v. Granger*, 6 Ohio, 41.

²⁸ *McNeish v. Stewart*, 7 Cow. N. Y. 474; *Thomas v. Woods*, 4 Cow. N. Y. 173; *Cooper v. Watson*, 10 Wend. N. Y. 202; *Norman v. Wells*, 17 Wend. N. Y. 136.

²⁹ *Phelps v. Sawyer*, 1 Aik. Vt. 150; *Bendor v. Fromberger*, 4 Dall. 436; *Roosevelt v. Fulton*, 7 Cow. N. Y. 71.

³⁰ Bacon, Abr. *Covenant*, L.

³¹ *Bailey v. Rogers*, 1 Me. 189.

³² *Neave v. Jenkins*, 2 Yeates, Penn. 107; *Roth v. Miller*, 15 Serg. & R. Penn. 105. So in Tennessee, evidence in avoidance of the deed cannot be admitted under a plea of covenants performed. *Kincaid v. Brittain*, 5 Sneed, Tenn. 119.

³³ *Bryant v. Simpson*, 4 Ala. 339.

³⁴ *Reed v. Hobbs*, 3 Ill. 297.

³⁵ *Brackenbridge v. Lee*, 3 Bibb, Ky. 330; *Muldrow v. McClelland*, 1 Litt. Ky. 5.

³⁶ *Williams v. Sill*, 2 Campb. 519.

³⁷ Whether interlineations and erasures in a deed were made before or after its execution is a question of fact for the jury; and when the alteration is against the interest of the party claiming under it, the presumption is that it was made before or at the time of its execution. *Heffelfinger v. Shutz*, 16 Serg. & R. Penn. 44. See, as to the effect of alteration of instruments, *Van Amringe v. Morton*, 4 Whart. Penn. 382; *Arrison v. Harmstead*, 2 Penn. St. 191; *Whithers v. Atkinson*, 1 Watts, Penn. 236; Bacon, Abr. *Evidence*, F.

have seen either done by the covenantor; it is sufficient if he showed it to them, signed and sealed, and requested them to subscribe it as witnesses.³⁸ When there are several obligors or grantors, it is sufficient if there is but one piece of wax with several impressions, or when there is but one seal, it is sufficient; for the covenantors or grantors following the first will be presumed to have adopted his seal.³⁹

Evidence must also be given of the delivery of the deed. This is done by showing that the grantor or obligor parted with the dominion over it with an intent that it should pass to the grantee or obligee; it may be proved, like most facts *in pays*, by direct evidence or by circumstances.⁴⁰ In general, if a deed be found in the hands of the grantee, it will be presumed to have been delivered;⁴¹ on the contrary, if found in the hands of the grantor or obligor, no delivery will be presumed.⁴²

The registry of a deed at the request of the grantor for the use of the grantee and the assent of the latter to the same is evidence of delivery.⁴³ The act of recording a deed is not conclusive evidence of delivery,⁴⁴ and consequently it may be rebutted.⁴⁵

Whether the deed was signed, sealed, and delivered by the grantor or obligor is a question of fact for the jury; under the issue of *non est factum*, therefore, the defendant may prove that the deed was delivered and still remains as an escrow,⁴⁶ or that it was void from the beginning; for example, that it is a forgery, or it was obtained by fraud, or executed while the defendant was insane or intoxicated; or that it became void by subsequent acts, as by being materially altered or canceled by tearing off the seal; or that the deed was delivered to a stranger for the use of the plaintiff and that he refused it;⁴⁷ or that it was never delivered at all.⁴⁸

3450. When covenants performed have been pleaded, the burden of proof lies on the defendant, for whenever the plea is in avoidance of the deed the defendant has the *onus probandi* cast upon him.⁴⁹ Under the plea of "covenants performed, with leave to give the special matter in evidence," the defendant may in Pennsylvania give evidence of any matter he might have pleaded and which in law can protect him, and this without notice of special matter unless called for.⁵⁰ But under the plea of covenants performed the defendant cannot avail himself of the difficulty of performing his covenants in excuse.⁵¹

3451. The plaintiff must also *prove the breach* as laid in the declaration, and it is no excuse to the defendant that he has been unable to perform his covenant if before the time of performance he disabled himself from so doing;⁵² as, where a brewer covenanted to deliver grains from his brew-house, and before

³⁸ *Munns v. Dupon*, 3 Wash. C. C. 42.

³⁹ *Bowman v. Robb*, 6 Penn. St. 302. See 9 Am. Jur. 290, 297.

⁴⁰ 2 *Greenleaf*, Ev. § 297; *Long v. Ramsay*, 2 Serg. & R. Penn. 72; *Brown v. Bank of Chambersburg*, 3 Penn. St. 187.

⁴¹ *Dunn v. Games*, 1 McLean, C. C. 321; *Green v. Yarnall*, 6 Mo. 326.

⁴² *Hatch v. Haskins*, 17 Me. 391.

⁴³ *Hedge v. Drew*, 12 Pick. Mass. 141.

⁴⁴ *Maynard v. Maynard*, 10 Mass. 456; *Harrison v. Phillips' Academy*, 12 Mass. 456.

⁴⁵ *Gilbert v. North Am. Ins. Co.*, 23 Wend. N. Y. 43.

⁴⁶ *Wheelwright v. Wheelwright*, 2 Mass. 447. See *Blight v. Schenck*, 10 Penn. St. 285; *Union Bank v. Ridgely*, 1 Harr. & G. Md. 324.

⁴⁷ *Read v. Robinson*, 6 Watts & S. Penn. 329.

⁴⁸ *Roberts v. Jackson*, 1 Wend. N. Y. 478; *Gardner v. Collins*, 3 Mas. C. C. 90.

⁴⁹ He has therefore the right to open and close. *Norris v. Ins. Co. of N. Amer.*, 3 Yeates, Penn. 84; *Scott v. Hull*, 8 Conn. 296.

⁵⁰ *Webster v. Warren*, 2 Wash. C. C. 456; *Rangler v. Morton*, 4 Watts, Penn. 265; *Bender v. Fromberger*, 4 Dall. 439.

⁵¹ *Stone v. Dennis*, 12 Ala. 231.

⁵² *Heard v. Bowers*, 23 Pick. Mass. 455; *Hopkins v. Young*, 11 Mass. 302.

the time of delivery rendered them unfit for use by mixing hops with them,⁵³ or where he covenanted to deliver a horse and then poisoned him:⁵⁴ the covenant must be proved to be substantially broken; if, for example, the covenantor bind himself to keep the trees of an orchard whole and undefaced, reasonable use and wear only excepted, the cutting down of trees past bearing was held to be no breach, because the preservation of the trees for fruit was of the substance of the contract.⁵⁵

3452. A few examples will be given to show what is a sufficient *breach of covenants*. The covenants which are thus broken are:

Covenants against incumbrances. Proof by any competent evidence that incumbrances existed at the time of signing the covenant is evidence of a breach.⁵⁶ As to what shall be considered an incumbrance it has been held that a public highway passing over the land,⁵⁷ a private right of way,⁵⁸ a lien by judgment,⁵⁹ or any mortgage the covenantee was not bound to pay,⁶⁰ a pre-existing right to take water from the land, are each an incumbrance and a breach of covenant against incumbrances.⁶¹

Covenant of seisin. Evidence that the covenantor was not seised in fact will be proof of a breach; but if the covenantor was seised in fact, though by wrong, it is sufficient to support his covenant.⁶²

Covenant of warranty. Evidence of an actual ouster or eviction by one having a lawful title is sufficient proof of the breach of this covenant; and it is not necessary that this should be with force. A judgment in ejectment, when the covenantor has had notice of the action, and was requested to defend it, is also evidence of the breach of this covenant.⁶³ No tortious act of a stranger, by which the covenantee is put out of possession, will be a breach of the warranty.

If the legal owner of the land seek to recover it, it is not necessary that the covenantee should resist until judgment and actual ouster. If he gives notice to the covenantor to defend the suit, and the latter allows it to go by default, he is concluded by the judgment and cannot plead *non infregit*. If, however, the covenantor is not notified, the judgment being *inter alias partes*, he may show in defence that the judgment was erroneous and not founded on a valid title.

Covenant for quiet enjoyment. To prove a breach of this covenant it is in general necessary to show an actual ouster, by reason of some adverse right existing at the time of making the covenant, and not one subsequently acquired.⁶⁴

⁵³ Griffith v. Goodhand, T. Raym. 464.

⁵⁴ Skinn. 40; Bacon, Abr. *Covenant*, H.

⁵⁵ 2 Starkie, Ev. 148.

⁵⁶ Tuft v. Adams, 8 Pick. Mass. 547; Funk v. Voneida, 11 Serg. & R. Penn. 109; Bean v. Mayo, 5 Me. 94; Bacon Abr. *Covenant*, H.

⁵⁷ Kellogg v. Ingersoll, 2 Mass. 97; Hubbard v. Norton, 10 Conn. 431; Pritchard v. Atkinson, 3 N. H. 335.

⁵⁸ Harlow v. Thomas, 15 Pick. Mass. 68.

⁵⁹ Jenkins v. Hopkins, 8 Pick. Mass. 346.

⁶⁰ Funk v. Voneida, 11 Serg. & R. Penn. 109; Tuft v. Adams, 8 Pick. Mass. 547; Stewart v. Drake, 4 Halst. N. J. 139.

⁶¹ Judevine v. Pennock, 15 Vt. 683; Ragan v. Gaither, 11 Gill & J. Md. 472; Cullum v. Branch Bank, 4 Ala. N. S. 21; Herrick v. Moore, 19 Me. 313; Bacon, Abr. *Covenant*, H.

⁶² Marston v. Hobbs, 2 Mass. 433. Thus a covenant of seisin is satisfied if the grantor is in possession of the land under a claim of right, though such possession as against the rightful owner is merely tortious, not amounting to a technical disseisin. Slater v. Rawson, 6 Metc. Mass. 439; Watts v. Parker, 27 Ill. 224.

⁶³ Hamilton v. Cutts, 4 Mass. 349; Collingwood v. Irwin, 3 Watts, Penn. 306. See Clark v. McAnulty, 3 Serg. & R. Penn. 364; Emerson v. Proprietors of Minot, 1 Mass. 464; Flowers v. Foreman, 23 How. 132.

⁶⁴ Ellis v. Welch, 6 Mass. 246; Hurd v. Fletcher, 1 Dougl. 43; Evans v. Vaughan, 4 Barnew. & C. 261.

Any tortious entry by the covenantor himself claiming title will be a breach of this covenant.⁶⁵

Covenant against assigning a lease and under-letting. To constitute a breach of this covenant the assignment of the lessee, or his under-letting, must be voluntary; for if the term be sold by a sheriff by virtue of an execution, or by assignees in bankruptcy, or by an executor, it is no breach of the covenant, unless the assignment is effected by the fraud of the lessee; as, where he confessed a fraudulent judgment with the intent that the creditor should seize the term in execution. Proof must, therefore, be made that the defendant has voluntarily transferred the premises, or evidence of some unlawful act of the defendant by which the assignment has been effected.

When the plaintiff sues as assignee of the covenantee, he must allege and prove the conveyances, or the title by which he claims. When he claims as assignee of a covenant real, he must show himself grantee of the land by a regular conveyance from a person having the right and the legal capacity to convey, and that the breach has occurred since such conveyance.⁶⁶

When the defendant is sued as assignee of the original covenantor, and the issue is on the assignment, the plaintiff may either prove an actual assignment or give evidence of facts from which it may be inferred; for example, possession of the premises leased or payment of rent to the plaintiff. In his defence the defendant may show he holds as under-tenant, and not as assignee; or that he is an assignee of only a part of the premises; or, if the state of pleadings admit it, he may show that before the breach he had assigned to another person; for after the assignee of the original covenantor has himself assigned to another, he is no longer liable for any breaches that may occur.

3453. When *the judgment* is for the plaintiff, it is that he recover a named sum for his damages, which he has sustained by reason of the breach of covenant, with full costs of suit. The judgment for the defendant is that he recover his costs by him in this behalf expended.

The general rule of damages is the damage caused by the breach at the time. Thus a covenant of seisin being broken instantly, the damages are the amount of purchase money and interest, being apportioned *pro rata* if the seisin fail as to part of the premises.⁶⁷ For a breach of the covenant against incumbrances the actual damage is given, to be assessed by a jury.⁶⁸ If the incumbrance is a mortgage, the covenantee can recover what he fairly and actually pays to remove the incumbrance;⁶⁹ but until he pays the debt, or the mortgage is enforced against the land, and while the covenantor still remains liable for the mortgage debt, the damages are merely nominal.⁷⁰ As to the covenant of warranty, there is a great discrepancy between the decisions in the different states. In some, the damages are the purchase money with interest;⁷¹ in others, the value of the land at the time of eviction.⁷²

⁶⁵ Sedgwick v. Hollenback, 7 Johns. N. Y. 376; Seldon v. Senate, 13 East, 72.

⁶⁶ Chase v. Weston, 12 N. H. 413; Roach v. Wadham, 6 East, 289; Milnes v. Branch, 5 M. & S. 411. See, as to what are covenants real, 2 Greenleaf, Ev. § 240.

⁶⁷ Brandt v. Foster, 5 Iowa, 295; Beaupland v. McKeen, 28 Penn. St. 124; Phillips v. Reichert, 17 Ind. 120.

⁶⁸ Batchelder v. Sturgis, 3 Cush. Mass. 201; Weatherbee v. Bennett, 2 All. Mass. 438.

⁶⁹ Bailey v. Scott, 13 Wisc. 618; Grant v. Tallman, 20 N. Y. 191.

⁷⁰ Funk v. Voneida, 11 Serg. & R. Penn. 112; Brady v. Spurck, 27 Ill. 478; Griggs v. Detroit Co., 10 Mich. 116.

⁷¹ See Rawle, Cov. 314; Burton v. Reeds, 20 Ind. 87; Major v. Dunnavant, 25 Ill. 262; Foster v. Thompson, 41 N. H. 373; Wade v. Comstock, 11 Ohio, St. 71.

⁷² This rule is adopted in Maine, Vermont, Connecticut, Massachusetts, and S. Carolina.

CHAPTER XXI.

DEBT AND DETINUE.

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3454. The fourth kind of action arising *ex contractu* is the *action of debt*, so called because in legal consideration it is for the recovery of a debt *eo nomine* and *in numero*; and though damages are generally 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. The subject will be considered with reference to the kind of claim or obligation on which this action may be maintained, the form of the declaration, the plea, the evidence, and the judgment.¹

3455. *Debt lies for a sum of money certain* due by the defendant to the plaintiff, whether it has been rendered certain by contract between the parties, or by judgment, or by statute, as when a remedy is given for a penalty or for the escape of a judgment debtor. Debts or obligations for which this action may be sustained at common law may be classed under four general heads: judgments obtained in a court of record on a suit, specialties acknowledged to be entered of record as a recognizance, specialties indented or not indented, and contracts without specialty, either express or implied.²

3456. This action lies upon the *judgment* of a superior or inferior court of record, whether such judgment be rendered within the state, in a sister state, or

¹ The action of debt was at common law supplanted to a great extent by assumpsit and covenant. It is now abolished in those states which have adopted new codes of practice, and in the others is rarely used. It is used to a limited extent in Illinois, Maine, Connecticut, South Carolina, Pennsylvania, New Jersey, Tennessee, Alabama, Vermont, and perhaps some other states.

² *Republica v. Lacaze*, 2 Dall. 123; 1 Yeates, Penn, 70.

a foreign country;³ but in such case the defendant must have had notice and an opportunity of defending himself.⁴ In Alabama it was held that debt might be maintained on a judgment valid in the state where rendered, though not founded on personal service.⁵

At common law debt was the only remedy after a year and a day had elapsed after a judgment had been rendered, though a *scire facias* is now sustainable.

Debt cannot be maintained after the judgment has been satisfied, either by an actual payment or by construction of law; where, therefore, the defendant has been taken in execution on a judgment and discharged by the plaintiff, no action can be supported on the judgment.⁶

In some of the states debt may be maintained on the decree of a court of equity in another state for the payment of money,⁷ but in other states the general doctrine is that an action of debt cannot be sustained on a decree of a court of chancery.⁸

And the action does not lie on a foreign judgment or decree for the performance of any other acts than the payment of money.⁹

3457. Debt lies also on a *specialty acknowledged to be entered of record*; as, upon a recognizance of bail, on a recognizance to the commonwealth, and on recognizance to a state in a criminal proceeding.¹⁰

3458. Debt may be maintained on *specialties*, whether indented or not, or any contract under seal, to recover money due on the same; as, on single bonds, on charter parties, on policies of insurance under seal, and on bonds conditioned for the payment of money, or for the performance of any other act, by or against the parties to such specialties and their personal representatives.¹¹

3459. Debt lies upon *contracts without specialty*, either express or implied; it is a more extensive remedy for the recovery of money than assumpsit or covenant, for it lies to recover money due on legal liabilities, as, for money lent, paid, had, and received, or due on an account stated;¹² for work or labor, or for the price of goods, and a *quantum valebant* thereon;¹³ or upon simple contracts, express or implied, whether oral or written, whenever the demand for a sum is certain, or it is capable of being reduced to a certainty.¹⁴

³ *McIntire v. Caruth*, 1 Const. So. C. 457; *Headley v. Roby*, 6 Ohio, 527; *Carter v. Crews*, 11 Ala. 81; *Jordan v. Robinson*, 15 Me. 167.

⁴ *Darrach v. Wilson*, 2 Miles, Penn. 116; *Kilburn v. Woodworth*, 5 Johns. N. Y. 37. It lies on a judgment against a trustee. *Chandler v. Warren*, 30 Vt. 510. Whether it lies on a judgment against an executor *quære*. *Olmsted v. Clark*, 30 Conn. 108.

⁵ *Hunt v. Mayfield*, 3 Ala. 124.

⁶ *Vigers v. Aldrich*, 4 Burr. 2482; *Tanner v. Hague*, 7 Term, 420; *Ponoher v. Holley*, 3 Wend. N. Y. 184. The action does not lie on a judgment which has been vacated by an appeal. *Atkins v. Wyman*, 45 Me. 399.

⁷ *Evans v. Tatem*, 9 Serg. & R. Penn. 252; *McKim v. Odom*, 12 Me. 94; *Williams v. Preston*, 3 J. J. Marsh. Ky. 600; *Drakely v. Rook*, 2 Root, Conn. 138; *Green v. Folley*, 6 Ala. 441; *Thrall v. Waller*, 13 Vt. 231.

⁸ *Elliott v. Ray*, 2 Blackf. Ind. 31; *Van Buskirk v. Mulock*, 3 Harr. Del. 184.

⁹ *Warren v. McCarthy*, 25 Ill. 95.

¹⁰ *State v. Folsom*, 26 Me. 209; *Commonwealth v. Green*, 12 Mass. 1; *McMillan v. Whitaker*, 11 Rich. So. C. 523; *Dowlin v. Standifer*, 1 Hempst. C. C. 290.

¹¹ Comyn, Dig. *Dett*, A, 4.

¹² Comyn, Dig. *Dett*, A.

¹³ Comyn, Dig. *Dett*, B; *United States v. Colt*, 1 Pet. C. C. 149; *Dillingham v. Skein*, 1 Hempst. C. C. 181.

¹⁴ *Collins v. Johnson*, 1 Hempst. C. C. 279; *Buller, Nisi P.* 167. When the obligation is to pay in something else than money, the decisions do not appear to be uniform whether debt can or cannot be maintained. In Kentucky, debt does not lie on an obligation "for eighty dollars, to be discharged in bricks." *Mattox v. Craig*, 2 Bibb, Ky. 584. In Alabama, debt lies on a specialty for a sum certain, with privilege to the obligor to discharge the same "in cotton." *Bradford v. Stewart*, 1 Ala. 44. It will lie on a note payable in "Louisiana funds," *Hudspeth v. Gray*, 5 Ark. 157; or "in Philadelphia funds," *January v. Henry*, 2 T. B. Monr. Ky. 58; 3 *id.* 8; or "in North Carolina bank notes," *Deberry v.*

Debt lies by a remote indorsee against the first indorser of a promissory note,¹⁵ and on a policy of insurance under seal renewed by a parol indorsement in the name of the assignee of the original assured.¹⁶

3460. This action is the *peculiar remedy in some cases*; as, against a devisee of land for a breach of the covenant by the devisor.¹⁷ It may also be sustained against a lessee for an apportionment of rent where he has been evicted from a part of the premises by a third person, though in such case covenant may be maintained against the assignee of the lessee.¹⁸

3461. On *statutes*, either at the suit of a common informer or of the party grieved, debt is frequently the proper remedy. In some cases it is given to the party by the express words of a statute, as, for an escape out of execution.¹⁹ When a penal statute expressly gives the whole or a part of the penalty to a common informer and enables him to sue for the same, debt may be sustained,²⁰ and he need not declare *qui tami* unless where a penalty is given for a contempt;²¹ and in general, where a statute prohibits the doing of an act under a penalty and does not prescribe any mode of recovery, an action of debt lies.²² A tax cannot be recovered by an action of debt.²³

3462. *Debt* also lies in the *detinet* for goods between the contracting parties; this action is instituted for the recovery of goods, as a horse, a ship, and the like; the writ must be in the *detinet*, for it cannot be said that a man owes a horse or a ship, but only that he detains them from the plaintiff.²⁴ This action differs from detinue, because it is not essential in this action, as in detinue, that the property in any specific goods should be vested in the plaintiff at the time of the action brought;²⁵ and debts in the *debet* and *detinet* may be maintained on an instrument by which the defendant is bound to pay a sum of money lent, which might have been discharged on or before the day of payment in articles of merchandise.²⁶ The action must be in the *detinet* when it is brought by or against an executor or administrator, for there is no duty owing by or to them; when they are plaintiffs, the debt is detained from them; when defendants, they detain, but do not owe the debt;²⁷ but it is said where the heir is sued on a bond of the ancestor by which he is bound, he should be charged in the *debet* and *detinet*.²⁸

3463. To maintain an action of debt *the demand must be for a sum certain*, or for a pecuniary claim which may be readily reduced to a certainty. But it cannot be sustained on an agreement to pay money by instalment, before all the

Darnell, 5 Yerg. Tenn. 451; or "in current bank notes," Young v. Scott, 5 Ala. N. S. 475; Wilson v. Hickson, 1 Blackf. Ind. 230; Osborn v. Fulton, 1 Blackf. Ind. 234; Scott v. Conover, 1 Halst. N. J. 222; Campbell v. Weister, 1 Litt. Ky. 30; Watson v. McNairy, 1 Bibb, Ky. 356. But see Wilburn v. Grier, 6 Ark. 255.

¹⁵ Loose v. Loose, 36 Penn. St. 538.

¹⁶ Franklin F. Ins. Co. v. Massey, 33 Penn. St. 221.

¹⁷ Wilson v. Knubley, 7 East, 12.

¹⁸ Stevenson v. Lambard, 2 East, 579.

¹⁹ Porter v. Sayward, 7 Mass. 337.

²⁰ Comyn, Dig. *Debt*, E, 1 and 2; Cato v. Gill, Coxe, N. J. 11; Crane v. —, Coxe, N. J. 53.

²¹ Pinkney v. East Hundred, 2 Saund. 374, n. 1 and 2; Croucher v. Collins, 1 Saund. 136, n. 1.

²² Kelly v. Davis, 1 Head, Tenn. 71; Meaher v. Chattanooga, 1 Head, Tenn. 74.

²³ Camden v. Allen, 2 Dutch. N. J. 398.

²⁴ 3 Blackstone, Comm. 153; 11 Viner, Abr. 321; Bacon, Abr. *Debt*, F; 1 Lilly, Reg. 543; Dane, Abr. *Debt*; Thompson v. Musser, 1 Dall. 458.

²⁵ Dy. 24, b.

²⁶ Young v. Hawkins, 4 Yerg. Tenn. 171; Comyn, Dig. *Debt*, A, 5; Bacon, Abr. *Debt*, F. See Taylor v. Meek, 4 Blackf. Ind. 388.

²⁷ Bacon, Abr. *Debt*, F.

²⁸ Waller v. Ellis, 2 Munf. Va. 88.

instalments are due, unless when the debt is secured by a penalty;²⁹ if, however, there are separate debts due by the same agreement, an action of debt will lie for the non-payment of either of them; and it also lies for the annual interest of money payable on a bond when the principal is not due.³⁰

It does not lie on an obligation to pay a sum in county orders of such sizes as the promisor may be able to furnish;³¹ or on an obligation to pay a specified sum in four equal annual payments in iron at five cents a pound, and castings at four cents a pound.³²

3464. *The declaration* is to be framed on different principles, as it is on a simple contract, or on a specialty, or record. When on a simple contract, it must show the consideration on which the contract was founded precisely as in *assumpsit*; and should state either a legal liability or an express agreement,³³ though not a promise to pay the debt,³⁴ the words agreed to pay should be used.³⁵

When the action is founded on a specialty or record no consideration need be shown, unless the performance of the consideration constitutes a condition precedent, when the performance must be averred.³⁶

When the action is founded on a deed, it must be declared upon, except in the case of debt for rent.³⁷ In debt for rent due by indenture, the action is founded on the fact of the occupation of the premises, and the pernaney of the profits, the lease being alleged only by way of inducement.

3465. *The breach*, or cause of action complained of, must proceed only for the non-payment of money previously alleged to be payable; and such breach is nearly similar, whether the action in debt be on simple contract, specialty, record, or statute. It must obviously be governed by the nature of the stipulation. It ought to be assigned in the words of the contract either negatively or affirmatively, or words which are co-extensive with its import and effect.³⁸ When the contract is in the disjunctive, as on a promise to deliver a horse on a particular day, or to pay a sum of money, the breach ought to be assigned that the defendant did not do the one nor the other.³⁹

If the debt is due on demand, a demand must be averred, but its omission is cured by verdict.⁴⁰

3466. *Damages* should also be laid in the declaration; as in this action they are merely nominal, and not, as in *assumpsit* or covenant, the principal object of the suit, they are generally laid in a small sum, as one hundred dollars; and in actions by a common informer, as he is not entitled to damages, none should be inserted.⁴¹

3467. *The general issue* to debt on simple contract, or on statutes, or where the deed is only matter of inducement, is *nihil debet*;⁴² in debt for rent by the lessor against the assignee of the lessee, this plea of *nihil debet* puts in issue the whole declaration.⁴³ *Nihil debet* is not a good plea to an action of debt founded on a specialty;⁴⁴ nor is such plea valid to an action of debt founded on a re-

²⁹ *Fontaine v. Aresta*, 2 McLean, C. C. 127; *Rudder v. Price*, 1 H. Blackst. 554; *Dean v. Gover*, 2 Saund. 303, n. 6; *Blakemore v. Wood*, 3 Sneed, Tenn. 470.

³⁰ *Sparks v. Garrigues*, 1 Binn. Penn. 152.

³¹ *Mix v. Nettleton*, 29 Ill. 245.

³² *Nesbit v. Ware*, 30 Ala. N. S. 68. See *Crockett v. Moore*, 3 Sneed, Tenn. 145.

³³ *Tompkins v. Corwin*, 9 Cow. N. Y. 255.

³⁴ *Emery v. Fell*, 2 Term, 28, 30.

³⁵ *Metcalf v. Robinson*, 2 McLean, C. C. 363.

³⁶ *Whitney v. Spencer*, 4 Cow. N. Y. 39; *Nash v. Nash*, 16 Ill. 79.

³⁷ *Atty v. Parrish*, 4 Bos. & P. 104.

³⁸ Comyn, Dig. *Pleader*, C, 45 to 49.

³⁹ *Wright v. Johnson*, 1 Sid. 440.

⁴⁰ *Lusk v. Cassell*, 25 Ill. 209.

⁴¹ *Frederic v. Lookup*, 4 Burr, 2021.

⁴² *Stilson v. Toby*, 2 Mass. 521; *Burnham v. Webster*, 5 Mass. 266; *Bullis v. Giddens*, 8 Johns. N. Y. 82.

⁴³ *Dartmouth College v. Clough*, 8 N. H. 22.

⁴⁴ *Boynton v. Reynolds*, 3 Mo. 79.

cognizance of bail;⁴⁵ nor on a judgment of a court of record whose records import absolute verity;⁴⁶ nor on a foreign judgment;⁴⁷ nor to an action of debt on a decree of a court of equity of a sister state; nor can *nul tiel record* be pleaded to such suit, because a decree of a court of chancery is not a record; and when the defendant means to deny the existence of such a decree, he must frame a plea to meet the averment of the decree in the declaration, and such plea must conclude to the country.⁴⁸

To an action of debt founded on a record the proper plea is *nul tiel record*; this denies the existence of the record, and on its production judgment is entered for plaintiff, or, if it be not produced, for the defendant, for in this case the trial is by the court upon inspection.

The plea of *non est factum* is the proper plea to deny the existence of the contract when the action is founded on a specialty.⁴⁹

In an action on a bond containing a condition to pay on a certain day, the defendant may plead payment on the day, *solvit ad diem*; for in effect this is a plea of performance of the condition, and payment before a breach of the condition is a good discharge without an acquittance.

When it is intended to take advantage of the legal presumption of payment of a specialty after a lapse of twenty years, the defendant ought to plead, *solvit post diem*, that he paid the debt after it became due. This is necessary, because if the plea be *solvit ad diem*, and it should appear that any interest was paid after the money became due, such subsequent payment would raise the strongest presumption that the debt was not paid on the day appointed. For the bond might be so old that the last payment was made more than twenty years before, and the debt would be presumed to have been discharged since that time, still the plea would be falsified by proving that interest has been paid after the day appointed.⁵⁰

Most other matters which afford a defence to an action of debt must be pleaded specially.

3468. As a general rule, when the defendant has pleaded *nihil debet* to an action of debt on a simple contract, or for an escape, or for a penalty given by statute, the plaintiff is required to prove every material fact alleged in his declaration, for this plea traverses the plaintiff's right to recover; and under it the defendant may give in evidence any matter tending to deny the existence of any debt, such as a release, satisfaction, delivery of goods, and the like, for the plea alleges that the defendant does not owe anything to the plaintiff. But the statute of limitations cannot be given in evidence under the plea of *nihil debet*; it must be specially pleaded in order that the plaintiff may reply such matters as may avoid the operation of the statute or take the case out of its provisions. If when the action is founded on a specialty the defendant plead *nihil debet*, and the plaintiff instead of demurring take issue upon that plea, he will be obliged to prove the whole of his case and admit the opposite party into a general defence.⁵¹

3469. Under a plea of *nul tiel record* the only question at issue is the exist-

⁴⁵ Bullis v. Giddens, 8 Johns. N. Y. 82; Niblo v. Clark, 3 Wend. N. Y. 24.

⁴⁶ Wheaton v. Fellows, 23 Wend. N. Y. 375.

⁴⁷ Mills v. Duryee, 7 Cranch, 481; Curtis v. Gibbs, 1 Penn. 399; Chips v. Yancey, 1 Ill. 2; Clark v. Day, 2 Leigh, Va. 172; St. Albans v. Bush, 4 Vt. 58; Larming v. Shute, 2 South. N. J. 778; Jacquette v. Hugunon, 2 McLean, C. C. 129. In Kentucky, on the contrary, it has been held that *nihil debet* may be pleaded to a foreign judgment. Williams v. Preston, 3 J. J. Marsh. Ky. 600.

⁴⁸ Evans v. Tatem, 9 Serg. & R. Penn. 252.

⁴⁹ Warran v. Consett, 2 Ld. Raym. 1500; Russell v. Hamilton, 3 Ill. 56.

⁵⁰ Moreland v. Bennett, 1 Strange, 652; Buller, Nisi P. 174.

⁵¹ Rawlins v. Danvers, 5 Esp. 39.

ence of the record;⁵² but if the action be founded on a judgment rendered in another state, and the defendant has pleaded that he had no notice of the proceedings, he may show that fact, and in that case the plaintiff may reply that the defendant appeared and took defence, and this, if true, will be a complete answer to his plea.⁵³

3470. The plea of *non est factum* only puts in issue the making of the deed; under this plea to an action on a bond the defendant cannot give in evidence anything arising under the condition of the bond.⁵⁴ When the action is brought against one obligor alone, who pleads *non est factum*, the plaintiff may maintain his action although on the production of the bond there appears to be a joint obligor;⁵⁵ but if the action is against the obligor alone as jointly and severally bound, the plaintiff cannot under this plea give in evidence a joint, and not a several bond of the defendant and the other person mentioned, though it agrees in date and amount with the bond described in the declaration,⁵⁶ for in this case the variance is fatal.⁵⁷

3471. If the defendant rely on the lapse of time under the plea of *solvit ad diem* or *solvit post diem*, and it appear that twenty years have elapsed since the money was due, unless there has been a payment of interest or part of the principal after the plea of *solvit ad diem*, as already explained, it will be a presumption of payment so as to entitle the defendant to a verdict; indeed, a less period of time will have the same effect if there are corroborating circumstances to raise such presumption.⁵⁸ But this presumption is very easily rebutted by showing that interest has been regularly paid; that the obligor has admitted the debt has not been paid, or other circumstances to induce a belief that the money is still due. But the proof of facts which show that the obligor was poor and not likely to be able to pay the debt is not sufficient.

3472. As the law presumes every man innocent until his guilt has been proved according to its requirements, in debt on a penal statute for a criminal omission of duty, whether official or otherwise, the plaintiff is required to prove his allegation, although negative in its character. But if the charge is that the defendant did an act without being licensed or authorized, the burden of proof lies on the defendant, because such matter lies particularly within his own knowledge.⁵⁹ The defendant in such action may, under the general issue, show any proviso in the penal statute exempting him from the penalty; and he may avail himself of such proviso whether contained in that or any other statute.⁶⁰ Under this issue he may also take advantage of any variance between the allegation and the proof on the part of the plaintiff; and where proof of a contract is essential in a penal action, the same proof is required as in an action on a contract.⁶¹

3473. When the plaintiff sues in debt for an escape, he must prove the judgment by a copy of the record; the delivery of the writ of execution to the officer, the arrest of the debtor, and the escape. The process may be proved by its production, or when it has been returned, by a certified or examined

⁵² *Bennett v. Morley*, 10 Ohio, 100; *Stevens v. Fisher*, 30 Vt. 200.

⁵³ *Wright v. Weisinger*, 13 Miss. 210.

⁵⁴ *Rice v. Thompson*, 2 Bail. So. C. 339.

⁵⁵ *Welpdale's Case*, 5 Coke, 119; *Cabell v. Vaughan*, 1 Saund. 291.

⁵⁶ *Postmaster General v. Ridgway*, Gilp. Dist. Ct. 135.

⁵⁷ See *Bean v. Parker*, 17 Mass. 605; *Rockefeller v. Hoysradt*, 2 Hill, N. Y. 616; *Boyden v. Hastings*, 17 Pick. Mass. 200.

⁵⁸ 2 Phillipps, Ev. 171; 2 Greenleaf, Ev. § 290.

⁵⁹ 1 Greenleaf, Ev. § 79.

⁶⁰ *Rex v. Inhabitants of St. George*, 3 Campb. 222; 2 Greenleaf, Ev. § 285; 1 Phillipps, Ev. 318; 2 Phillipps, Ev. 165.

⁶¹ *Parrish v. Burwood*, 5 Esp. 33; *Everett v. Tindall*, 5 Esp. 169; *Partridge v. Coates*, 1 Ry. & M. 153; 1 Carr. & P. 534.

copy. The return to the writ is conclusive on the defendant when made by him. When the process has not been returned, notice should be given to the defendant to produce it, and on his failure to do so secondary evidence of it may be given.⁶² The escape, if voluntary, may be proved by the party escaping; the reason assigned for his admission is that an escape is a thing of secrecy, a private transaction between the prisoner and the jailer; but on general principles, he appears to be competent, for he neither loses nor gains by the event of the immediate suit.⁶³

3474. The plaintiff is of course required to prove the breaches assigned in his declaration.

3475. *The judgment in debt*, when in favor of the plaintiff, is final at common law.⁶⁴ It is in all cases that the plaintiff recover his debt, and, in general, nominal damages for the detention thereof; but when a judgment in debt is entered for a special sum, it will not be reversed because the word "debt" is omitted.⁶⁵ When it appears that the judgment is not entered for a debt, but for damages, this is evidently an error, because it is for a thing which was not the object of the suit;⁶⁶ if, however, the judgment in debt be entered for an aggregate sum, equal to the debt and damages, the court will not set it aside upon that ground.⁶⁷

In cases under the statute 8 and 9 W. III, c. 11, the judgment for the plaintiff is that the plaintiff have execution for the damages sustained by the breach of a bond conditioned for the performance of covenants.

In general, judgment for the plaintiff is given for costs, except in some penal and other particular actions.

When the judgment is for the defendant, it is that he recovers the costs.

3476. The fifth form of action *ex contractu*, which will now be the subject of consideration, is that of *detinue*; it is but seldom used, having been superseded by other actions.⁶⁸ Though this action is commonly classed among actions arising upon contract, because it is an action for the recovery of a personal chattel in specie which has been delivered to the defendant, and is unlawfully detained by him, yet it might be classed with actions not arising on contracts, because it may be brought to recover a chattel which the defendant has found, and unlawfully detains. This action may be considered with reference to the thing to be recovered, the plaintiff's interest in it, the injury, the pleadings, the evidence, and the judgment.

3477. This action lies to recover *specific chattels*, known and distinguished from all others, and their identity must be ascertainable by some certain means; thus it lies for a particular horse or cow, or money in a bag, which may be identified; but it cannot be brought for a sum of money or corn not identified nor distinguishable from other corn or money.⁶⁹

⁶² 2 Phillipps, Ev. 377; 2 Greenleaf, Ev. § 288.

⁶³ 2 Phillipps, Ev. 398, 399; Hunter v. King, 4 Barnew. & Ald. 210.

⁶⁴ 1 Chitty, Pl. 108; Williams v. McFall, 2 Serg. & R. Penn. 280. But it is said judgment in debt is not always final, for when it is for use and occupation, or for foreign money, or on a penal bond, an inquisition is necessary to ascertain the rent, or to fix the amount of damages at the impetration of the writ. O'Neal v. O'Neal, 4 Watts & S. Penn. 130.

⁶⁵ Tindall v. Tindall, 3 Harr. Del. 437.

⁶⁶ Guild v. Johnson, 2 Ill. 405; Heyl v. Stapp, 4 Ill. 95; Chapman v. Wright, 20 Ill. 120.

⁶⁷ Sandford v. Richardson, 1 Ala. n. s. 182. The judgment should show how much is for debt and how much for damages. Pulliam v. Pencenneau, 23 Ill. 93; Bowman v. Bartley, 21 Ill. 30.

⁶⁸ The use of the action of detinue has been of late years in this country almost entirely confined to actions for the recovery of slaves, and it is apprehended that, from the abolition of slavery, it will become extinct.

⁶⁹ 3 Blackstone, Comm. 152.

3478. To entitle him to recover, the plaintiff must have a *property in the chattel* which is the object of the suit.

An absolute or general property in the goods, and a right to immediate possession, will entitle a plaintiff to recover, although he never had the possession.⁷⁰ But if the plaintiff have not the right to immediate possession of the goods, and his interest be in reversion, he cannot support detinue;⁷¹ the remainder-man may, however, maintain detinue for goods or slaves, after the decease of one having a life estate in them, against the defendant who held them in possession under a claim of title, without a demand.⁷² A person who has only a special property as bailee, and the like, may support this action, when he delivered the goods to the defendant, or they were taken out of the custody of such bailee.⁷³ It will lie also in favor of trustees.⁷⁴ As this action is to recover the chattel sued for, it follows that the plaintiff must be entitled to it, for if he have a right to only a part of it, he cannot maintain this action.⁷⁵

3479. The gist of this action is *the wrongful detainer*, and not the original unlawful taking.⁷⁶ It lies against any person who has the actual possession of the chattel and who has acquired it by lawful means, as either by bailment, delivery, or finding;⁷⁷ and if the defendant had possession, but parted with it before the suing out of the writ, he is still liable,⁷⁸ although he has restored the possession to the owner before the suit.⁷⁹ Though it has been the general opinion that detinue would not lie where there was a tortious taking upon the fallacious ground that by the trespass the title of the plaintiff was divested,⁸⁰ it has been held that such taking does not divest the title of the plaintiff, and that detinue lies whether the property came into the possession of the defendant rightfully or wrongfully;⁸¹ in such case the plaintiff may waive the tortious taking and maintain this action.⁸²

Detinue cannot be supported against a person who never had possession of the goods; as, on a bailment to a testator where the executor never possessed the goods, detinue will not lie against the latter;⁸³ nor can it be maintained against a bailee if before the demand he lose them by accident.⁸⁴

3480. As the identical goods are to be recovered in specie, more certainty is requisite in *the declaration* in the description of the chattels than in an action of trover or replevin.⁸⁵ It is sufficient to declare in detinue for a negro woman by name without describing her complexion, her age, and the like; or for a cow, without describing her color; or for a certain number of knives and forks, without any particular description;⁸⁶ and it is not necessary to state the date of the deed.⁸⁷

⁷⁰ McDonnell v. Hall, 2 Bibb, Ky. 610; Haynes v. Crutchfield, 7 Ala. N. S. 189; Berry v. Hale, 2 Miss. 315; Lynch v. Thomas, 3 Leigh, Va. 682; Wilbraham v. Snow, 2 Saund. 47. a, n.

⁷¹ Harper v. Gordon, 7 Term, 9.

⁷² Miles v. Allen, 6 Ired. No. C. 88.

⁷³ Brooke, Abr. *Detinue*; Wilbraham v. Snow, 2 Saund. 47, b, c, d; Ramsay v. Bancroft, 2 Mo. 151; Boyle v. Townes, 9 Leigh, Va. 158.

⁷⁴ Murphy v. Moore, 4 Ired. No. C. 118; Stoker v. Yerby, 11 Ala. N. S. 322.

⁷⁵ Bell v. Hogan, 2 Ala. 536; Miller v. Eatman, 11 Ala. N. S. 609.

⁷⁶ Charles v. Elliot, 4 Dev. & B. No. C. 468; Melton v. McDonald, 2 Mo. 45.

⁷⁷ 3 Blackstone, Comm. 152; Bacon, Abr. *Detinue*, A; Kettle v. Bromsall, Willes, 118; Dame v. Dame, 43 N. H. 37.

⁷⁸ Pool v. Adkisson, 1 Dan. Ky. 110; Haley v. Rowan, 5 Yerg. Tenn. 301; Kershaw v. Baykin, 1 Brev. So. C. 301.

⁷⁹ Merritt v. Warmouth, 1 Hayw. No. C. 12; Merritt v. Merritt, Martin, 18.

⁸⁰ 1 Chitty, Pl. 119.

⁸¹ Pierce v. Hill, 18 Ala. 151; Oakfield v. Bullitt, 1 Mo. 749.

⁸² Owings v. Frier, 2 A. K. Marsh. Ky. 268.

⁸³ Isaack v. Clark, 2 Bulstr. 308.

⁸⁴ Brooke, Abr. *Detinue*, pl. 1, 33, 40.

⁸⁵ Taylor v. Wells, 2 Saund. 74, a, b; Coke, Litt. 286.

⁸⁶ Haynes v. Crutchfield, 7 Ala. N. S. 189.

⁸⁷ Alcorn v. Westbrook, 1 Wils. 116.

In the case of a special bailment it is proper to declare at least in one count on the bailment and to lay a special request;⁸⁸ in other cases it is sufficient to declare upon the supposed finding, for this allegation is not traversable.⁸⁹ The declaration must always contain an averment that the property belongs to the plaintiff.⁹⁰

3481. *The plea of non detinet* is the general issue; but special pleas may be pleaded. A defendant was allowed to plead, *puis darrein continuance*, the death of the slave who was the object of the action;⁹¹ and if goods were pawned to the defendant he must plead this matter specially, that the goods were pawned to him for money remaining unpaid.

3482. To entitle himself to a verdict the plaintiff must prove that he has a property in the goods,⁹² that the defendant had the possession of them, that the goods were of some value, and that they are the same claimed in point of identity.⁹³

When the plaintiff seeks to recover damages for the detention previous to the suit, he must prove a demand before bringing his action,⁹⁴ but a demand is not necessary where the defendant had the possession and claimed title to it before bringing suit.⁹⁵

Under the general issue the defendant may give in evidence a gift from the plaintiff, or any other evidence which proves that the defendant does not detain the plaintiff's goods,⁹⁶ and the statute of limitations need not be specially pleaded; evidence to sustain the plea of the act of limitations, it seems, may be given under the plea of *non detinet*.⁹⁷

3483. *The verdict and judgment* in this action must be such that a specific remedy may be had for the recovery of the goods detained or a satisfaction in value for each parcel in case they or either of them cannot be returned; when, therefore, the action is for several chattels, the jury ought in their verdict to assess the value of each separately;⁹⁸ but where there are two kinds of property, each composed of several individuals, each kind may be assessed in a gross sum.⁹⁹ If the jury neglect to find the value, the omission cannot be supplied by a writ of inquiry.¹⁰⁰

3484. The judgment is in 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 full costs of suit.¹⁰¹

⁸⁸ *Kettle v. Bromsall*, Willes, 120.

⁸⁹ *Mills v. Graham*, 4 Bos. & P. 140; *Mortimer v. Brumfield*, 3 Munf. Va. 122; *Irwin v. Wells*, 1 Mo. 9; *Anon.* 2 Hayw. No. C. 136; *Tunstal v. McClelland*, 1 Bibb, Ky. 186; *Cole v. Cole*, 4 Bibb, Ky. 340; *Jones v. Henry*, 3 Litt. Ky. 46; *Dunn v. Davis*, 12 Ala. N. S. 135.

⁹⁰ *Kent v. Armistead*, 4 Munf. Va. 72; *Price v. Israel*, 3 Bibb, Ky. 516.

⁹¹ *Bethea v. McLennon*, 1 Ired. No. C. 523.

⁹² *Barnley v. Lambert*, 1 Wash. Va. 308.

⁹³ 3 Blackstone Comm. 152; *Felt v. Williams*, 2 Ill. 206.

⁹⁴ *Vaughn v. Wood*, 5 Ala. N. S. 304; *Brock v. Headen*, 13 Ala. N. S. 370.

⁹⁵ *Jones v. Green*, 4 Dev. & B. No. C. 354.

⁹⁶ *Turner v. Allison*, 3 Dan. Ky. 422; *Smith v. Towne*, 4 Munf. Va. 191; *Stratton v. Minnis*, 2 Munf. Va. 329; *Dazier v. Joyce*, 17 Ala. 303; *McCurry v. Hooper*, 12 Ala. N. S. 823. See *Brown v. Brown*, 13 Ala. N. S. 208.

⁹⁷ *Morrow v. Hatfield*, 6 Humphr. Tenn. 108; *Elam v. Bass*, 4 Munf. Va. 301.

⁹⁸ *Smith v. Wiggins*, 4 Ala. 221; *Cummings v. Tindall*, 8 Ala. 357; *Carraway v. Niece*, 1 Miss. 538; *Haynes v. Crutchfield*, 7 Ala. N. S. 189; *Baker v. Beasley*, 4 Yerg. Tenn. 570; *Buckner v. Higgin*, 3 T. B. Monr. Ky. 59; *Mulliken v. Greer*, 5 Mo. 489; *Thomas v. Tanner*, 6 T. B. Monr. Ky. 52.

⁹⁹ *Haynes v. Crutchfield*, 7 Ala. N. S. 189.

¹⁰⁰ *Cheney's Case*, 10 Coke, 119, b; *Bell v. Pharr*, 7 Ala. N. S. 807; *Stirling v. Garritee*, 18 Md. 468.

¹⁰¹ *Brown v. Brown*, 5 Ala. N. S. 508.

CHAPTER XXII.

ACTION ON THE CASE.

- 3485. Actions arising *ex delicto*.
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- 3487. The nature of this action.
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- 3513. The judgment in case.

3485. Having fully considered the remedies which the law affords, in courts of law, on contracts, the next object of our inquiries will be the nature and kinds of actions which have been provided to redress wrongs and injuries, independent of contract. The actions which fall under this class are case, trover, replevin, and trespass.

3486. An action on the case, or, more technically, an action of *trespass upon the case*, lies where a party sues for damages, for any wrong or cause of complaint to which neither covenant nor trespass will apply.¹ In its most comprehensive signification, case includes assumpsit as well as an action in form *ex delicto*; but when simply mentioned, it is usually understood to mean an action in form *ex delicto*.

This action originated as follows: At the most remote periods of the English law, as far as we have any accounts, specific forms of action were used; these forms were compiled into a book styled *The Register of Writs*, or *Registrum Brevium*. In this book is to be found a form in which to express every injury remediable by writ of trespass, properly so called, and in which writ the

¹ Stephen, Pl. 15; Hammond, Nisi P. 1; 3 Wooddesson, Lect. 167; Griffin v. Farwell, 20 Vt. 151.

words *vi et armis et contra pacem* were universally inserted. These *formulæ*, framed with wisdom and matured by experience, were considered as immutable, unless by authority of parliament.² They were resorted to upon all occasions, and one or another was adopted suitable to the claim or demand of the plaintiff; the courts, with a jealous care, would not allow any alteration to be made in these forms. These writs, thus gathered together, were termed *brevia formata*. They were adapted to those causes of complaint that most frequently occurred.

In process of time, when other grievances arose, or existing evils, which till then had been overlooked or endured, became so intolerable as to require a remedy to reform them, the sufferers made application at the chancery for an original on which to ground their suit. The clerks, not feeling themselves authorized to grant new writs, which indeed would have exceeded their authority, refused to grant them, and the legislature was required to interfere.

To remedy this evil the twenty-fourth chapter of the statute of Westminster the second was passed. It provides that "whenever from thenceforth in one case a writ shall be found in chancery, and in a like case falling under the same right, and requiring a like remedy, no precedent of a writ can be produced, the clerks in chancery shall agree in forming a new one, and if they cannot agree, it shall be adjourned to the next parliament, when a writ shall be framed by consent of the learned in the law, lest it should happen for the future that the court of our lord the king be deficient in doing justice to the suitors."

These provisions have been characterized as only declaratory of the common law, whose perfection could not endure the reproach that an evil should exist without a corresponding remedy. The very passage of the act, however, proves that just as the position may be in theory, in practice it was not then admitted.³

This action, then, originates in the power given by the statute of Westminster 2 to the clerks of chancery to frame new writs in *consimili casu* with writs already known. Under this power they constructed many writs for different injuries, which were considered in *consimili casu* with, that is, to bear a strong analogy to, trespass. The new writs invented for cases supposed to bear such analogy have accordingly received the appellation of writs of trespass on the case, (*brevia de transgressione super casum*,) as being founded on the particular circumstances of the case, thus requiring a remedy, and to distinguish them from the old writ of trespass; and the injuries themselves, which are the subjects of such writs, are not called trespasses, but bear the general names of torts, wrongs, or grievances.

Whether it was the intention of the framers of the statute of Westminster second to give to new writs which might be framed under its provisions the same effect as the old writs, and they were to be placed on the same footing with the *brevia formata*, and like them serve as precedents in all future occasions, or whether they were to be revised, and cast anew into other moulds, which further experience might evince to be more convenient, is perhaps doubtful; certain it is that the latter doctrine prevailed.⁴

The writs of trespass on the case, though invented thus, *pro ne nata*, in va-

² Bracton, lib. 5, c. 17, s. 2.

³ Blackstone, the learned commentator of the English law, and the willing apologist of all its imperfections, in speaking of this statute says: "So that the wise and equitable provision of the statute of Westm. 2, 13 Ed. I, c. 24, for framing new writs when wanted, is almost rendered useless by the very great perfection of the ancient forms. And, indeed, I know not whether it is a greater credit to our laws to have such a provision contained in them or not to have occasion, or at least very rarely, to use it." 3 Blackstone, Comm. 184.

⁴ Litt. 341.

rious forms according to the nature of the different wrongs which respectively called them forth, began, nevertheless, to be viewed as constituting collectively a new individual form of action; and this new genus took its place by the name of trespass on the case, among the more ancient actions of debt, covenant, replevin, trespass, etc.

3487. The action of trespass on the case differs from the action of trespass *vi et armis*, and though the distinction is somewhat subtle, still it is clear and well defined.⁵ The criterion to distinguish the one from the other is this: Trespass *vi et armis* lies for an injury committed with force, and by the immediate act of the defendant, directly applied, or *vis proxima*. The action of trespass on the case lies when the injury arises from the remote consequences of an act, and is not the effect of immediate force.

When the proximate cause of the injury is but a continuation of the original force, or *vis impressa*, the effect is immediate, and the appropriate remedy is an action of trespass *vi et armis*; but when the original force, or *vis impressa*, has ceased to act before the injury commenced, then there is no force and the effect is mediate, and the proper remedy is trespass on the case. Thus, if the defendant threw a log in the street and it fell on plaintiff and broke his arm, trespass would be the proper remedy; if, on the contrary, the plaintiff did not pass in the street till after night, and the log which had thus been thrown there still remained, and the plaintiff stumbled over it and broke his arm, the remedy would be trespass on the case. In the first case the injury was committed with force and by the immediate and direct act of the defendant; in the last no force was used, and the injury was not immediate, but consequential.⁶

The intent of the wrong-doer is not material, and does not affect the form of the action; for example, the act of sending up a balloon is legal, yet if in alighting the aeronaut should injure the plaintiff's garden, trespass *vi et armis* would be the proper remedy.⁷

Having given this short account of the origin and nature of the action of trespass on the case, our next inquiry will be to ascertain in what cases this action lies, the form and nature of the pleadings, what evidence may be given by the parties, and the nature of the judgment.

3488. Such action may be maintained for injuries to the absolute rights of persons, to the relative rights of persons, to personal property, to real property, and on penal statutes.

3489. Case may be maintained for any *injury to the absolute rights* of persons when such injury is not direct, immediate, and with force, but consequential; thus it lies to recover damages for an injury committed against the plaintiff individually for a nuisance, as an obstruction of a highway or public navigation;⁸ for an injury done by a mischievous animal when the owner had notice

⁵ In Tennessee, case and trespass are concurrent remedies in all cases where the latter will lie. Tenn. St. 1850, c. 141; *Luttrell v. Hazen*, 3 Sneed, Tenn. 20. In Maine, Wisconsin, Delaware, and Virginia, the distinction between these two actions is abolished. Me. Rev. St. ch. 82, sec. 13; *Welch v. Whittemore*, 25 Me. 86; Wisc. Rev. St. ch. 88, sec. 43; *Schultz v. Frank*, 1 Wisc. 352.

⁶ *Legaux v. Feasor*, 1 Yeates, Penn. 586; *Cotteral v. Cummings*, 6 Serg. & R. Penn. 348; *Berry v. Hamil*, 12 Serg. & R. Penn. 210; *Spencer v. Campbell*, 9 Watts & S. Penn. 32; *Cole v. Fisher*, 11 Mass. 137; *Waldron v. Hopper*, Coxe, N. J. 339; *Carsten v. Murray*, Harp. So. C. 113; *Clay v. Sweet*, 1 A. K. Marsh. Ky. 194; *Winslow v. Beall*, 6 Call, Va. 44; *Barnard v. Poor*, 21 Pick. Mass. 378; *Maull v. Wilson*, 2 Harr. Del. 443; *Adams v. Hemmenway*, 1 Mass. 145.

⁷ *Guille v. Swan*, 19 Johns. N. Y. 381. See, as to intent, *Keith v. Howard*, 24 Pick. Mass. 292; *Gates v. Neall*, 23 Pick. Mass. 308; *Gates v. Miles*, 3 Conn. 64; *Case v. Mark*, 2 Ohio, 169.

⁸ *Marriott v. Stanley*, 1 Scott, N. R. 392; 1 Mann. & G. 568; *Lancaster Canal Co. v. Parnaby*, 3 Perr. & D. 162.

of his dangerous propensity.⁹ In the western states it is said that the common law rule requiring every man to keep his cattle at home is not in force because not applicable, and it is the duty of each land owner to fence his land if he wishes to keep cattle out.¹⁰ Case is the proper remedy for injuries caused by the unauthorized acts or carelessness of the defendant's agents or servants.¹¹

3490. When the *injury is committed under color of process* a distinction must be made between regular and irregular process. By regular process is meant that which is lawfully issued by a court or magistrate having competent jurisdiction; irregular process is that which has been unlawfully issued, and for which reason it will be set aside by the court. When the process is regular and the defendant has been damnified, as in the case of a malicious arrest, his remedy against the person who sued it out and set it in motion is by an action on the case, and not trespass;¹² but although the officer may be liable when a regular execution is unlawfully executed, the plaintiff is not liable in an action on the case for a tort committed by the sheriff in executing the writ unless he joined in the unlawful act.¹³ When it is irregular and wholly void, the proper remedy is by an action of trespass, not only against the plaintiff, but against the officer or court under whose authority it was issued; the officer who executed it will, however, be justified if the court had jurisdiction.¹⁴

3491. Case is the proper remedy for a *vexatious suit, malicious prosecution, or wanton arrest*, made by a prosecutor in a criminal proceeding or a plaintiff in a civil suit without probable cause, by a regular process or proceeding which the facts did not warrant, as appears by the result.¹⁵ The suit need not be altogether without foundation; if the part which is groundless has subjected the plaintiff to an inconvenience to which he would not have been exposed had the valid cause of complaint alone been insisted on; for example, if the defendant has been arrested and bail demanded for a larger amount than was due, if done for the purpose of vexation.¹⁶ But it must be remembered that no action lies merely for bringing a groundless civil suit, if unattended by the seizure of the person of the party or of his property, for as to any expense he may be put to, this, in contemplation of law, has been fully compensated to him by the costs adjudged.¹⁷

A conspiracy to vex and harass a person by having him subjected to an inquisition of lunacy without any probable cause is actionable.¹⁸ This action may lie for improperly suing out an injunction through malice and without probable cause,¹⁹ but in general the remedy is on the injunction bond.²⁰

⁹ Buller, Nisi P. 77; Domat, Lois Civ. liv. 2, t. 8, s. 2; La. Civ. Code, art. 2301; Jones v. Parry, 2 Esp. 482; Sarch v. Blackburn, 4 Carr. & P. 297; Mood. & M. 505; Smith v. Pelah, 2 Strange, 1264; Stumps v. Kelley, 22 Ill. 140.

¹⁰ Wagner v. Bissell, 3 Iowa, 396.

¹¹ Illinois R. R. v. Reedy, 17 Ill. 580.

¹² Swift v. Chamberlain, 3 Conn. 537; Shaw v. Reed, 16 Mass. 450; Shaver v. White, 6 Munf. Va. 113; Kimball v. Molony, 3 N. H. 376; Lovier v. Gilpin, 6 Dan. Ky. 321; Warfield v. Walter, 11 Gill & J. Md. 80; Smith v. Story, 4 Humphr. Tenn. 169.

¹³ Princeton Bank v. Gilson, 1 Spenc. N. J. 138.

¹⁴ Kennedy v. Terrell, Hard. Ky. 490; McCool v. McCluney, 8 Ad. & E. 449; 15 East, 615, note (c); Vail v. Lewis, 4 Johns. N. Y. 450; Cooper v. Halbert, 2 M'Mull. So. C. 419.

¹⁵ Winebiddle v. Porterfield, 9 Penn. St. 137. To support case for a malicious prosecution there must be both malice and want of probable cause. Ray v. Law, 1 Pet. C. C. 210; McCullough v. Grishobber, 4 Watts & S. Penn. 201; Muns v. Dupont, 3 Wash. C. C. 31; Travis v. Smith, 1 Penn. St. 234; Weinberger v. Shelly, 6 Watts & S. Penn. 336; Cleck v. Haines, 2 Rand. Va. 440. See Hays v. Younglove, 7 B. Monr. Ky. 545; Wilmarth v. Mountford, 4 Wash. C. C. 79; Kerr v. Workman, Add. Penn. 270.

¹⁶ Ray v. Law, 1 Pet. C. C. 210; Herman v. Brookerhoof, 8 Watts, Penn. 241. See Sommer v. Wilt, 4 Serg. & R. Penn. 19.

¹⁷ Murray v. Wilson, 1 Wils. 316; Sinclair v. Eldred, 4 Taunt. 7.

¹⁸ Davenport v. Lynch, 6 Jones, No. C. 545.

¹⁹ Robinson v. Kellum, 6 Cal. 399.

²⁰ Gorton v. Brown, 27 Ill. 489.

3492. This is the appropriate form of action, too, for injuries to the absolute rights of persons *when the right affected was not tangible*, and consequently would not be affected by force, as reputation and health, the injuries to which are always remedied by action on the case, as libels and slanders.

The act causing the injury may be done with force; thus the disturbance of an easement for which an action on the case lies may be caused by an act for which the owner of the fee could bring trespass.

3493. Case is not confined to injuries merely *ex delicto*; it is a concurrent remedy for many breaches of contract, not simply for the payment of money, whether the breach were by non-feasance, misfeasance, or malfeasance; thus, case lies against surgeons, physicians, and apothecaries, for negligence or want of skill, and it is immaterial by whom the defendant was retained;²¹ it lies also 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.²² It is a proper remedy against bailees for neglect in the care of goods.²³

3494. It may be maintained against persons who by law are obliged to perform certain duties, and who refuse to fulfil them; as, common carriers who refuse to take a passenger, having room; or an innkeeper who refuses to receive a guest when he has sufficient accommodations, and the traveller tenders a reasonable reward for the accommodations required.²⁴ But the guest has no right to select a particular room in the inn, nor capriciously to ask for unreasonable accommodations.²⁵

3495. For *injuries to the relative rights* the action on the case is the appropriate remedy; when they are not with force, but consequential, this action lies. These rights exist in the husband for injuries done to the wife; the father, for wrongs to the child; the master, for torts committed against the apprentice; and a guardian, for an offence or injury against his ward, but not *vice versa*. The wife can maintain no action for an injury to the husband; or the child, the apprentice, and the ward for a wrong committed to the father, the master, or the guardian respectively.

The husband may sustain an action on the case for criminal conversation with the wife, though trespass may also be maintained; case is the appropriate remedy for harboring a wife, an apprentice, or a ward.

A parent cannot maintain a suit, in the capacity of parent, for the seduction of his daughter; an action on the case²⁶ lies against the seducer, though not directly nor ostensibly for the seduction, but for the consequent inability of the daughter to perform those services for which she was accountable to her master, or to her parent, who, for this purpose, is obliged to assume that less endearing relation; and if it cannot be proved she filled that office, the action cannot be sustained.²⁷ It follows, therefore, that if the daughter was of full age at the time of the seduction and impregnation, and the father was not entitled to her services, and actually she was not in his service, the father can maintain no ac-

²¹ Gladwell *v.* Steggall, 8 Scott, 60; 7 Carr. & P. 81; Peck *v.* Martin, 17 Ind. 115; Caldwell *v.* Farrell, 28 Ill. 438; West *v.* Martin, 31 Mo. 375.

²² Mast *v.* Goodson, 3 Wils. 348.

²³ Govett *v.* Radnige, 3 East, 62, 70.

²⁴ Tell *v.* Knight, 8 Mees. & W. Exch. 269; Rex *v.* Jones, 7 Carr. & P. 213.

²⁵ Tell *v.* Knight, 8 Mees. & W. Exch. 269.

²⁶ In Clough *v.* Tenney, 5 Me. 446, it was held that case was the only remedy for a father, where the injury was done in the house of another. When the offence has been committed in the plaintiff's house, trespass lies, and the seduction is an aggravation. In Parker *v.* Elliott, 6 Munf. Va. 587, it is said that for the seduction of a wife or daughter case or trespass may be brought at the choice of the plaintiff. See M'Clure *v.* Miller, 4 Hawks, No. C. 138, note; Gilm. Va. 33; Van Vactor *v.* McKillip, 7 Blackf. Ind. 578.

²⁷ South *v.* Denniston, 2 Watts, Penn. 474; Wilson *v.* Sproul, 3 Penn. 49.

tion for the seduction. But if, at the time of the seduction and impregnation, the daughter was under the age of twenty-one years, though she was then living at another place, the father may maintain this action, provided he was then entitled to her services.²⁸ The gist of the action in these cases is the loss of services, and the plaintiff sues *per quod servitium amisit*. As this action is for the recovery of damages, if none have been sustained, the action will not lie; where, therefore, the plaintiff has connived at the misconduct of the defendant with his daughter, no action lies.²⁹

For a consequential injury done to his minor child a parent may maintain case; as, where the defendant compelled the minor to mount an unruly horse, in consequence of which his leg was broken, and the father was put to expense.³⁰ And for the abduction of a child an action on the case is the proper remedy, because, as in seduction, the parent here assumes the character of a master, and sues *per quod servitium amisit*.³¹ It is the proper remedy for an injury caused to a child employed in a factory by machinery carelessly left exposed when it should have been covered.³²

3496. The remedy to redress *injuries to personal property*, not committed with force and not immediate, or where the plaintiff's right to such property is not in possession, but in reversion, is by an action on the case. The instances in which an action on the case can be maintained are very numerous; to go through them all would occupy much space, and it would be necessary to go into details not within the plan of this work. A few instances will be mentioned which will give an idea of the whole.

This action lies for negligence in navigating ships;³³ but when both parties are guilty of negligence, and the mischief done was the result of the combined neglect of both parties, both are in *statu quo*, and neither can recover any compensation from the other.³⁴ The rule seems to be this, that although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if, by ordinary care, he might have avoided them, he is the author of his own wrong.³⁵

When the act which has caused the injury is immediate, the party injured may elect to regard the negligence as the cause of the action, and declare in case, or to look upon the act itself as the injury, and declare in trespass;³⁶ as, for negligence in driving carriages, or riding horses, or in conducting a railway train,³⁷ whereby the plaintiff or his property is injured. So it lies for negligence, by which sparks and igneous matter flew from the engine and destroyed by fire a

²⁸ Hornketh v. Barr, 3 Serg. & R. Penn. 36.

²⁹ Hollis v. Wells, 5 Penn. Law Journ. 30.

³⁰ Wilt v. Vickers, 8 Watts, Penn. 227. See Durden v. Barnett, 7 Ala. n. s. 169.

³¹ Moritz v. Garnhart, 7 Watts, Penn. 303; Jones v. Tiver, 4 Litt. Ky. 25.

³² Hayden v. Smithville Co., 29 Conn. 548.

³³ Leame v. Bray, 3 East, 599; Ogle v. Barnes, 8 Term, 188; 1 Perr. & D. 103. See Parker v. Adams, 12 Metc. Mass. 415; Gates v. Miles, 3 Conn. 64; Case v. Mark, 2 Ohio, 169.

³⁴ Vernal v. Gardner, 3 Tyrwh. Exch. 85; Sills v. Brown, 9 Carr. & P. 605; Monroe v. Leach, 7 Metc. Mass. 274. But, in such cases, there is a remedy in the admiralty, where the damages will be apportioned. Hay v. Le Neve, 2 Shaw, Hou. L. Sc. 401, 405.

³⁵ Bridge v. G. J. Railway Co., 3 Mees. & W. Exch. 248. See Butterfield v. Forrester, 11 East, 60; Smith v. Dobson, 3 Scott, n. r. 336; 3 Mann. & G. 59; Raison v. Mitchell, 9 Carr. & P. 613; Turley v. Thomas, 8 Carr. & P. 103; Hawkins v. Cooper, 8 Carr. & P. 473.

³⁶ Blin v. Campbell, 14 Johns. N. Y. 432; Dalton v. Favour, 3 N. H. 465; McAllister v. Hammond, 6 Cow. N. Y. 342; Baldrige v. Allen, 2 Ired. No. C. 206; Chaffin v. Wilcox, 18 Vt. 605; Schuer v. Veeder, 7 Blackf. Ind. 342. As, where an officer sells goods which are exempt from execution. Van Dresor v. King, 34 Penn. St. 201.

³⁷ Bridge v. G. J. Railway, 3 Mees. & W. Exch. 244.

stack of beans ;³⁸ or for carelessly and negligently kindling a fire on the defendant's own land, whereby the property of the plaintiff on the adjacent land was burnt ;³⁹ or by carelessly carrying fire by which the plaintiff's stack-yard was destroyed ; but not for accidental or wilful burning.⁴⁰

Case will not lie for mere non-feasance where the undertaking was gratuitous only ; but if the party promising have commenced upon his undertaking, case will lie for any malfeasance or neglect in the performance of it.⁴¹ But where an officer is bound to perform a duty, as, a sheriff, case will lie against him for non-feasance.⁴² So it lies against a city for neglect of the city council to collect an assessment to pay for the plaintiff's land taken for a street.⁴³ So where one rightfully passes over a road obstructed by movable bars which he neglects to replace, he is liable in case for injury arising from such neglect.⁴⁴ Or where one of two adjacent owners neglects to build his share of a division fence as required by statute.⁴⁵

Case is the proper remedy for injuries caused by a fraud or deceit which are done without force ; as, for making a fraudulent return by a sheriff to a writ of attachment, even when the writ is void,⁴⁶ to recover the price of a horse which had been paid for in counterfeit money ;⁴⁷ for selling a blind horse for a sound price, though the purchaser examined the horse, if the blindness could not be discovered at first view ;⁴⁸ for not informing a purchaser of lands of an outstanding incumbrance upon it ;⁴⁹ for falsely representing the credit and circumstances of another, by reason of which credit is given to such a person and a loss occurs, and in such case it is not necessary that there should have been an intent on the part of the party making such representations to defraud him to whom they were made ;⁵⁰ and if there is a design to defraud the public generally, any one suffering injury from it may maintain this action ;⁵¹ for falsely representing to a buyer a metal to be copper knowing it to be a composition, and an injury accrues to the purchaser.⁵² Case lies against a justice of the peace for concealing from a party the time when he gave judgment so as to prevent an appeal ;⁵³ and case is also the proper remedy against an officer for a breach of duty, whether intentional and malicious or not.⁵⁴ It lies against a sheriff for neglecting to arrest a defendant against whom he has a writ when he has an opportunity, but in such case the plaintiff must allege and prove special damages ;⁵⁵ and this action lies when the sheriff arrests a person maliciously on a writ, after he knows that such a person is privileged.⁵⁶

It lies for a careless and wanton act by which a consequential damage is sustained ; as, by the careless discharge of a gun, by which the owner or bailee is injured, if there was no intention or reasonable ground of apprehension on

³⁸ *Aldridge v. G. W. Railway*, 1 Dowl. N. S. Bail, 247 ; *Scott*, N. R. 150.

³⁹ *Barnard v. Poor*, 21 Pick. Mass. 378 ; *Roberson v. Kirby*, 7 Jones, No. C. 477

⁴⁰ *Maull v. Wilson*, 2 Harr. Del. 443. ⁴¹ *Hyde v. Moffit*, 16 Vt. 271.

⁴² *Abbott v. Kimball*, 19 Vt. 551 ; *Sheppard v. Shelton*, 34 Ala. N. S. 652.

⁴³ *Clayburgh v. Chicago*, 25 Ill. 535. ⁴⁴ *Hinks v. Hinks*, 46 Me. 423.

⁴⁵ *Saxton v. Bacon*, 31 Vt. 240.

⁴⁶ *Humphrey v. Case*, 8 Conn. 102.

⁴⁷ *Lane v. Hogan*, 5 Yerg. Tenn. 290.

⁴⁸ *Hughes v. Robinson*, 1 T. B. Monr. Ky. 215. See *McLane v. Fullerton*, 4 Yeates, Penn. 522.

⁴⁹ *Morgan v. Patrick*, 7 Ala. N. S. 185 ; *Ward v. Wiman*, 17 Wend. N. Y. 193.

⁵⁰ *Boyd v. Browne*, 6 Penn. St. 310. ⁵¹ *Bartholomew v. Bentley*, 15 Ohio, 659.

⁵² *Cornelius v. Molloy*, 7 Penn. St. 293. See *Stiles v. White*, 11 Metc. Mass. 356 ; *Oldham v. Bentley*, 6 B. Monr. Ky. 428.

⁵³ *Neighbor v. Trimmer*, 1 Harr. Del. 58.

⁵⁴ *Keith v. Howard*, 24 Pick. Mass. 292 ; *Gates v. Neal*, 23 Pick. Mass. 308 ; *Spear v. Cummings*, 23 Pick. Mass. 224.

⁵⁵ *Williams v. Mostyn*, 7 Dowl. 38 ; 4 Mees. & W. Exch. 145.

⁵⁶ *Boit v. Maguay*, 7 Jur. 127.

the part of the defendant of causing the fright; when there is such intention, trespass is the proper remedy;⁵⁷ so trespass is the lawful remedy for an injury sustained, in consequence of the defendant beating a drum in the highway, and the horse becoming frightened and running away.⁵⁸ Case, and not trespass, is the proper action by the owner of a vessel against one who discharges a musket ball at the vessel and wounds the master, by which the intended voyage is defeated and the owner of the vessel is subjected to loss.⁵⁹

When the injury is committed by an agent or servant in the course of his employment, whether it be with force and immediate or without force and consequential, the action against the principal or the master must be trespass on the case when he is liable, unless it be done by his express command, and in that case trespass will lie against both; and when there has been no command of the master or principal, trespass may be brought against the agent or servant when the injury is committed with force.⁶⁰ So if a defendant cause an injury with his dog, trespass is the remedy; if the dog cause the injury of his own accord in the absence of his owner, and he is known to him to be vicious, the remedy is case.⁶¹

3497. This action is a concurrent remedy with assumpsit in many cases on breach of a parol contract, either express or implied. It is concurrent with assumpsit for the breach of a warranty,⁶² though assumpsit is sometimes preferred, because a count for money had and received may be joined to recover back the consideration. Case lies also against bailees for neglect, and cases of this kind are extremely numerous; against attorneys for any gross negligence or ignorance in their professional capacity.

Case is the only remedy for an injury to reversionary personal property;⁶³ as, for an injury done to the plaintiff's cattle by the horse of the defendant,⁶⁴ or where a slave has been hired out the owner may sue a third party in case for an injury affecting his reversionary interest.⁶⁵ In these cases trover and trespass will not lie, because, to support these actions the plaintiff must prove that he was in possession,⁶⁶ or in case of trover, that he had the right of possession.

3498. *Injuries to real property* are to real property corporeal, and to real property incorporeal.

3499. *Injuries to real property corporeal* are either to the possession or to the reversion.

The injury to the possession takes place when the party in possession is injured by an act which is not the immediate cause of the loss, but the loss arises from it, and is consequential; as, for placing a water spout near the plaintiff's land, so that the water, when it rained, ran upon it; or for causing the water, which did not flow that way naturally, to run upon the plaintiff's land;⁶⁷ or for digging so carelessly and negligently on his own ground as to cause the neighbor's house to fall.⁶⁸

⁵⁷ *Cole v. Fisher*, 11 Mass. 137.

⁵⁸ *Loubz v. Hafner*, 1 Dev. No. C. 185.

⁵⁹ *Adams v. Hemmenway*, 1 Mass. 145.

⁶⁰ *Barnes v. Hurd*, 11 Mass. 57; *Johnson v. Castleman*, 2 Dan. Ky. 378; *Campbell v. Phelps*, 17 Mass. 246; *Broughton v. Wallon*, 8 Wend. N. Y. 474; *Havens v. Hartford R. R.*, 28 Conn. 69.

⁶¹ *Dilts v. Kinney*, 3 Green, N. J. 130.

⁶² *Stuart v. Wilkins*, Dougl. 21; *Williamson v. Allison*, 2 East, 446. See *Kiddell v. Burnard*, 9 Mees. & W. Exch. 668; *Levy v. Langridge*, 4 Mees. & W. Exch. 337, in error.

⁶³ *McGowan v. Chappen*, 2 Murph. No. C. 61; *Hilliard v. Dortch*, 3 Hawks, No. C. 246.

⁶⁴ *Wales v. Ford*, 3 Halst. N. J. 267.

⁶⁵ *Hawkins v. Phythian*, 8 B. Monr. Ky. 515.

⁶⁶ *Gordon v. Harper*, 7 Term, 9.

⁶⁷ 1 *Chitty*, Pl. 126, 141; *Shaw v. Etheridge*, 7 Jones, No. C. 225.

⁶⁸ *Sheve v. Stokes*, 8 B. Monr. Ky. 453. When the party-wall has been built, and the adjoining owner is desirous of having a deeper foundation, he has a right to undermine such wall, using due care and diligence to prevent any injury to his neighbors; and having

This action lies for obstructing the light and air, when the plaintiff has the right acquired by grant or prescription, by the erection of a building opposite to his window on the adjoining land.⁶⁹ It may be brought by the tenant in possession, or by the person entitled to the immediate reversion, though the form of the declaration is not the same. It lies also for other nuisances to houses and lands; as, for not repairing a privy near the plaintiff's house; for not emptying a cesspool or sewer;⁷⁰ for obstructing the entrance to a house;⁷¹ for making noises and annoying the plaintiff in the occupation of his house,⁷² by which the plaintiff has received an injury. For these and the like nuisances, and their consequent injuries, the party in possession may maintain an action on his possessory interest, and the reversioner on his reversionary rights.⁷³

This action, in some cases, is a concurrent remedy with covenant when an injury has been committed on real estate. The reversioner or remainder-man, whether in fee or merely for years, may support an action on the case, in the nature of waste against either his tenant or a stranger, for commissive waste to his reversion;⁷⁴ although there may be a covenant in a lease not to do waste.⁷⁵ The reason why the reversioner must bring case instead of trespass is that he has not the possession, and that is required to maintain trespass. Thus case is the proper remedy for the reversioner against a third person for cutting trees on land of the tenant for life;⁷⁶ or for a mortgagee not in possession.⁷⁷

If stone is quarried from the bed of a turnpike road and placed temporarily on the adjacent land, the reversioner in fee of the land on which the road is built must bring case, and the tenant of the adjacent land may bring trespass.⁷⁸ Case may be maintained by the owner of the fee against a tenant at will for acts prejudicial to the inheritance.⁷⁹

When the action is brought by the reversioner, he must allege and prove a damage done to him, that is, some damage of a permanent character.⁸⁰ And for the same act the tenant and reversioner have each a separate remedy, one in trespass and the other in case, for the particular injury done to each.⁸¹

3500. For the reason just mentioned, that to support trespass possession must be proved, that action cannot be supported against a defendant for an *injury to an incorporeal right*, and besides, no injury can be committed with force against property which is not corporeal. The proper remedy to redress injuries against incorporeal property is an action on the case.⁸² Thus it lies for obstructions made on a road after the title of the plaintiff became vested,⁸³ or for using a private way by one who had no right;⁸⁴ or for depriving the plaintiff of the use of a well on defendant's land which he had a right to use;⁸⁵ or for not

done so, he is not answerable for any consequential damages which may ensue. *Panton v. Holland*, 17 Johns. N. Y. 92; *Thurston v. Hancock*, 12 Mass. 220; *Runnels v. Bullen*, 2 N. H. 534; Bouvier, Law Dict. *Party-Wall*.

⁶⁹ 2 Chitty, Pl. 378; Bouvier, Law. Dict. *Ancient Lights*.

⁷⁰ 1 Ld. Raym. 187, 1399, Strange, 634.

⁷¹ *British Plate Manufacturers v. Meredith*, 4 Term, 794.

⁷² 2 Bingham, N. C. 134.

⁷³ Comyn, Dig. *Nuisance*, B.

⁷⁴ *Greene v. Cole*, 2 Saund. 252, d, note.

⁷⁵ *Kinlyside v. Thornton*, 2 W. Blackst. 1111.

⁷⁶ *Lane v. Thompson*, 43 N. H. 320.

⁷⁷ *Manning v. Monaghan*, 23 N. Y. 539. But see *Goulet v. Asseler*, 22 N. Y. 225.

⁷⁸ *Kelly v. Donahoe*, 2 Metc. Ky. 482.

⁷⁹ *Files v. Magoon*, 41 Me. 104.

⁸⁰ *Tinsman v. R. R. Co.*, 1 Dutch. N. J. 255; *Noyes v. Stillman*, 24 Conn. 15.

⁸¹ *George v. Fisk*, 32 N. H. 32.

⁸² *Wetmore v. Robinson*, 2 Conn. 529; *Wilson v. Wilson*, 2 Vern. Ch. 68; *Marshall v. White*, Harp. So. C. 122.

⁸³ *Wright v. Freeman*, 5 Harr. & J. Md. 467; *Osborne v. Butcher*, 2 Dutch. N. J. 308.

⁸⁴ *Lambert v. Hoke*, 14 Johns. N. Y. 383; *Williams v. Esling*, 4 Penn. St. 486.

⁸⁵ *Shafer v. Smith*, 7 Harr. & J. Md. 67.

repairing a private way which defendant is bound to keep in repair. And the action lies although the land to which the easement is appurtenant is in the possession of the plaintiff's tenant.⁸⁶

3501. When a *statute* gives an express remedy by action on the case, of course that is the proper form of action; sometimes, however, a statute prohibits an injury to an individual, or enacts that he shall recover a penalty or damages for such injury without giving any particular form of remedy. This action may be supported in such cases.⁸⁷

3502. The principal rules relating to a *declaration* in an action in form *ex delicto* have been considered in another place. It is only requisite here to observe that in an action on the case the declaration ought not to state the injury to have been committed *vi et armis*,⁸⁸ nor conclude *contra pacem*, these being appropriate terms for an action of trespass. The form of the declaration depends much on the particular circumstances on which the action is founded. These must be clearly stated.⁸⁹

One of two reversioners may sue alone for injury done to the reversion and recover a moiety of the damages, unless the non-joinder of the other is pleaded in abatement.⁹⁰

3503. *The plea* is usually the general issue of not guilty.

3504. *The evidence* is in favor of the plaintiff to support his case, or for the defendant in order to maintain his defence.

3505. *The evidence of the plaintiff* in cases of this kind must be sufficient to support the several averments in the declaration; but although the plaintiff must thus support his declaration, he is not required to prove any more of it than is necessary to constitute a good cause of action.⁹¹ For example, although the declaration may charge malice and negligence on the defendant in digging the foundation of his house below that of the plaintiff's, whereby the plaintiff suffered damages, yet proof of negligence alone will be sufficient to maintain his action.⁹² And in an action against an innkeeper or a carrier for the negligent keeping of goods in his care, whereby they were lost, proof of the loss will be considered as presumptive evidence of negligence on the part of such carrier or innkeeper, or his servants.⁹³

3506. In cases of *criminal conversation* with the plaintiff's wife it is not necessary to prove the direct fact of adultery, although it is charged in the declaration. Evidence of circumstances that lead to a fair inference as a necessary conclusion that the crime has taken place is sufficient; but the circumstances which are to lead to this conclusion must be such as would induce the guarded discretion of a just man to the conclusion; for it must not lead a rash and intemperate judgment moving upon appearances that are equally capable of two

⁸⁶ Okeson v. Patterson, 29 Penn. St. 22.

⁸⁷ Comyn, Dig. *Action upon Statute*, A, F; *Pleader*, 2 S, 1 to 30.

⁸⁸ The words "with force and arms" will be rejected as surplusage where the declaration shows that case is the proper action, and, in other respects, the declaration is in case, though the action may be denominated trespass. *Marshall v. White*, Harp. So. C. 122.

⁸⁹ *Bridge Co. v. Williams*, 9 Dan. Ky. 403; *Taylor v. Day*, 16 Vt. 566; *Gates v. Miles*, 3 Conn. 64. When the plaintiff denominates his action case, and the averments in the declaration show a trespass, the declaration is bad on demurrer, and, even after verdict, judgment will be arrested, or if given, a writ of error will lie. *Barnes v. Hurd*, 11 Mass. 57; *Waldron v. Hopper*, Coxe, N. J. 339; *Case v. Mark*, 2 Ohio, 169; *Taylor v. Rainbow*, 2 Hen. & M. Va. 423; *Wickliffe v. Sanders*, 6 T. B. Monr. Ky. 299; *Vail v. Lewis*, 4 Johns. N. Y. 459; *Warren v. Fisher*, 1 Penn. 240; *Hall v. Phillips*, 1 Penn. 367; *Horner v. Parker*, 2 Penn. 648; *Agry v. Young*, 11 Mass. 229.

⁹⁰ *Putney v. Lapham*, 10 Cush. Mass. 232.

⁹¹ *Hutchinson v. Granger*, 13 Vt. 386.

⁹² *Panton v. Holland*, 17 Johns. N. Y. 92.

⁹³ *Story*, Bailm, §§ 472, 529; 2 *Greenleaf*, Ev. § 219.

interpretations.⁹⁴ Evidence of general cohabitation will render the proof of particular facts unnecessary.⁹⁵

To support an action against the defendant for adultery with the plaintiff's wife the plaintiff must prove the existence of his marriage with the woman,⁹⁶ for general reputation is not sufficient, and also proof of acts of adultery or of such circumstances which lead to that conclusion. This being proved, the plaintiff has made out a *prima facie* case to entitle himself to damages. In order to aggravate the damages he may in this action give evidence showing the state of happiness in which he and his wife lived previously to the act which is the subject of his complaint, and the relation or situation which the defendant bore toward him, and all the circumstances attendant upon the intercourse which existed between them, and, as part of the *res gestæ*, the conversations and letters of the wife, but these letters must have been written before any attempt at adulterous intercourse with the defendant; and this rule is established to prevent collusion between the husband and wife.⁹⁷

3507. To maintain an action for a *malicious prosecution* the plaintiff must establish four points, namely :

That he has been prosecuted by the defendant, either criminally or in a civil suit. It is immaterial that the plaintiff was prosecuted by an insufficient process, or before a court not having jurisdiction of the matter ; because a bad indictment may serve all the purposes of malice as well as a good one ; and the injury to the party is the same where an irregular process issued as if it had been regular and before a court having jurisdiction. The fact of prosecution must be proved by a duly authenticated copy of the record and proceedings, and, in a criminal case, that the defendant was the prosecutor.⁹⁸

The plaintiff must show that the prosecution is at an end. This is generally proved by the record ; but in some cases it may be proved without producing the record. In the case of a civil suit, its termination may be shown by proof, a rule to discontinue on payment of costs, and that the costs were taxed and paid.⁹⁹ In a criminal prosecution, it must appear that the plaintiff was acquitted of the charge, either by a trial or by being discharged by the court without a trial.¹⁰⁰

There must be a want of probable cause, for, however malicious and unfounded the prosecution may have been, this action will not lie when there are apparent grounds of suspicion that the party has committed a crime or misde-

⁹⁴ *Loveden v. Loveden*, 2 Hagg. Cons. 2, 3.

⁹⁵ *Cadogan v. Cadogan*, 2 Hagg. Cons. 4, note.

⁹⁶ *Kibby v. Rucker*, 1 A. K. Marsh. Ky. 391; *Forney v. Hallacher*, 8 Serg. & R. Penn. 159.

⁹⁷ *Wilson v. Webster*, 7 Carr. & P. 198.

⁹⁸ Where a magistrate issues a warrant of arrest upon insufficient grounds, he is liable to an action for false imprisonment, and the complainant is liable in case if his motives were malicious. *Comfort v. Fulton*, 39 Barb. N. Y. 56. But the complainant is not liable if he merely states his cause to the magistrate, who thereupon issues process not justified by the facts as stated. *Von Latham v. Libby*, 38 Barb. N. Y. 339. It should be noticed that in this country the complainant stands in a different relation from the prosecutor in England.

⁹⁹ *Bristow v. Haywood*, 4 Campb. 213; *French v. Kirk*, 1 Esp. 80; *Wood v. Laycock*, 3 Metc. Ky. 192.

¹⁰⁰ *Smith v. Shackelford*, 1 Nott & M'C. So. C. 36; *Goddard v. Smith*, 1 Salk. 21; *Steel v. Williams*, 18 Ind. 161. The action may lie if no indictment is found by the grand jury, or if it is *coram non iudice*, or be quashed. *Stancliff v. Palmeto*, 18 Ind. 321; *Schoonover v. Myers*, 28 Ill. 308.

If the plaintiff has been convicted, but the judgment is arrested and the plaintiff discharged, the action does not lie. Nothing short of an acquittal will answer where the prosecution has progressed to a trial by a jury. *Kirkpatrick v. Kirkpatrick*, 39 Penn. St. 288.

meanor, and that the prosecution was undertaken from public motives ;¹⁰¹ or in a civil suit, if there is reason to infer that the party was actuated by an honest and reasonable conviction of the justice of his suit, although upon trial the defendant may in either case be acquitted. It is not necessary that the whole proceedings should be groundless ; if part be so, the party will be liable ; as, where a plaintiff had a good cause of action for a small sum, and he demands bail for a sum four times as large, there the proceedings are malicious and without probable cause.¹⁰² Though the averment of want of probable cause is negative in its form and character, yet, in general, it must be proved by some affirmative evidence, unless the defendant by his pleadings dispenses with this proof. The acquittal or discharge by the magistrate alone is not sufficient to show want of probable cause.¹⁰³

The plaintiff must show he has sustained damages, and he may prove what losses he has sustained and to what indemnity he is entitled in consequence of the injurious act of the defendant.¹⁰⁴

3508. When there are *several plaintiffs* they must prove a joint cause of action, such as a slander of both in their joint trade or employment, or an injury to their joint property, and the like, or they will be non-suited.¹⁰⁵

As in actions founded in tort a recovery can be had against either or a part only of the defendants, because all wrongs are several, it is not necessary to prove them all guilty ; the plaintiff will recover against those whom he proves to have been guilty.¹⁰⁶

3509. Many matters may be given in *evidence by the defendant* under the plea of the general issue which will defeat the right of the plaintiff to recover. Under this plea the defendant may prove any facts which show that in equity and good conscience the plaintiff ought not to recover, and that he never had a good cause of action ;¹⁰⁷ or he may show matters *ex post facto* which are his discharge ; as, a release, a former recovery, or satisfaction.¹⁰⁸ To this general rule of what may be given in evidence there are the following exceptions :

The statute of limitations must be specially pleaded ; this is required in justice to the plaintiff to enable him to rebut it if he can.

A justification in slander, by alleging the truth of the words used, must be specially pleaded for the same reason, for unless this is done all the plaintiff is required to do is to prove the uttering of the words in the presence of persons who understood them.

The retaking a prisoner on fresh pursuit must also be specially pleaded.¹⁰⁹

3510. The plaintiff must prove that the relation of master and servant, or principal and agent, existed when the act complained of was committed by the agent or servant of the defendant ; this is frequently very difficult to prove, particularly when sub-contractors have been employed.¹¹⁰

3511. The defendant, in an action for criminal conversation with the plain-

¹⁰¹ *Ulmer v. Leland*, 1 Me. 135.

¹⁰² *Reed v. Taylor*, 4 Taunt. 616 ; *Prince v. Thompson*, 6 Pick. Mass. 193 ; *Stone v. Crocker*, 24 Pick. Mass. 81.

¹⁰³ *Thorp v. Balliett*, 25 Ill. 339.

¹⁰⁴ *Hadden v. Mills*, 4 Carr. & P. 486 ; *Thompson v. Mussey*, 3 Me. 305 ; *Sandback v. Thomas*, 1 Stark. 306. In a suit for malicious arrest on a void writ, the plaintiff cannot claim damages from the interruption to his business caused by his remaining in the limits of the county under bail, as the bail bond is void. *Fuller v. Bowker*, 11 Mich. 204.

¹⁰⁵ *Coryton v. Lithebye*, 2 Saund. 116, a, note.

¹⁰⁶ *Coryton v. Lithebye*, 2 Saund. 115.

¹⁰⁷ *Bird v. Randall*, 3 Burr. 1353 ; *Jones v. Allen*, 1 Head, Tenn. 626.

¹⁰⁸ *Stephen*, Pl. 182, 183 ; *Hammond*, Nisi P. 70, 71.

¹⁰⁹ *1 Chitty*, Pl. 433, 434.

¹¹⁰ *1 Story*, Ag. § 454, a ; *Milligan v. Wedge*, 12 Ad. & E. 737 ; *Duncan v. Findlater*, 6 Clark & F. Hou. L. 894.

tiff's wife, may show in bar of the action that the husband and wife were divorced *à vinculo*, or that the plaintiff connived at the criminal intercourse, or suffered her to live openly and publicly as a prostitute,¹¹¹ or that he had voluntarily separated from his wife.¹¹² He may show in mitigation of damages the previous bad character and conduct of the wife for chastity; and these may be general or particular instances of unchastity. He may also prove that she made the first advances,¹¹³ the husband's unlawful connections with other women,¹¹⁴ his gross negligence with respect to the defendant, and any other acts which manifest a culpable indifference on the part of the husband.

By bringing this action the husband puts the general character of the wife in issue, but he cannot support it unless it is attacked; she is, in this respect, like any other whose character is in issue.

3512. When charged with a malicious prosecution, the defendant may disprove the charge of malice, or show the existence of probable cause for the prosecution.

3513. *The judgment* for the plaintiff is that he recover a sum of money, ascertained by a jury, for his damages sustained by the commission of the grievances complained of, and full costs of suit; but when the judgment was entered for dollars debt instead of damages, it was held to be valid.¹¹⁵

3514. The judgment for the defendant is that he recover his costs from the plaintiff.

¹¹¹ Sanborn *v.* Neilson, 4 N. H. 501.

¹¹³ Elsam *v.* Fawcett, 2 Esp. 562.

¹¹⁵ White *v.* McCall, Coxe, N. J. 93.

¹¹² Fry *v.* Derstler, 2 Yeates, Penn. 278.

¹¹⁴ Bromley *v.* Wallace, 4 Esp. 237.

CHAPTER XXIII.

TROVER.

- 3515. The origin and nature of this action.
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- 3549. Proof of the plaintiff's right of possession.
- 3550. Proof of a conversion.
- 3551. Evidence for the defendant.
- 3552. The verdict.
- 3553. The judgment.

3515. The action of trover and conversion owes its origin to the statute of Westminster the second; it was formerly an action of trespass on the case for the recovery of damages against a person who had found goods and refused to deliver them on demand to the owner and converted them to his own use. It still belongs to the genus of actions on the case, but it has acquired a new and separate name, being the species known as trover and conversion.

Trover is a concurrent remedy with trespass in general when there has been a wrongful taking, but the converse does not hold, for trover is frequently a proper remedy when trespass is not; as, for example, when goods are lent or delivered to another to keep and he refuses to return them on demand, trespass cannot be maintained because there was no unlawful taking, but trover may be.¹

¹ Put *v. Rawsterne*, T. Raym. 472; *Lechmere v. Toplady*, 2 Ventr. 170; *Wilbraham v. Snow*, 2 Saund. 47, k, l.

Again, in other cases trespass may be proper when trover cannot be sustained; as, where the ferryman wrongfully put the horses of a passenger out of a boat without farther intent concerning them, it may be a trespass, but it is not a conversion, for he did not interfere with the owner's dominion over the property nor alter its condition. If he had made any farther disposition of them inconsistent with the owner's right, it would have been a conversion.² Whenever trespass *de bonis asportatis* lies, trover will lie.³ Trover lies also when there was no unlawful taking or entry, as in the case of finding, but to support trespass the taking or entry must have been unlawful.

Although, as in detinue, trover is brought in relation to a chattel, yet it differs from that action in this, that in detinue the suit is brought to recover the chattel itself, while in trover it is instituted to recover damages for the loss sustained by the plaintiff in consequence of the conversion of the chattel by the defendant.⁴ Again, in detinue at common law the defendant was allowed to wage his law, which he could not do in trover, and this circumstance alone brought this action into more general use.

3516. The action of trover and conversion, or, as it is more simply called, the action of trover, is a remedy given by law to recover personal property wrongfully converted by another to his own use. It is called trover from the French *trouver*, which signifies to find, but as it may be brought for any chattel converted by the defendant to his own use, in its form trover is a mere fiction. The form supposes the defendant might have come lawfully by the possession of the chattel, and if he did not, yet, by bringing this action, the plaintiff waives the trespass; no damages are recovered for the act of taking, all must be for converting. This is the tort or *maleficium*, and to entitle the plaintiff to recover two things are necessary: first, property in the plaintiff; second, a wrongful conversion by the defendant.⁵ This subject will be considered with reference to the thing converted, the plaintiff's right, the nature of the injury, the pleadings, the evidence, and the verdict and judgment.

3517. *The property* which is the subject of an action of trover must be a personal chattel,⁶ but what is to be so considered is the question. This action will lie for manure lying upon the ground and not incorporated with the soil;⁷ and though the ordinary manure of a farm is a part of the freehold, yet the carrying it off to other premises is a severing, so that for a subsequent sale by the wrong-doer trover will lie;⁸ for after severance from the freehold, as in the case of trees,⁹ if the property severed be taken away, or if coals in a pit be afterward thrown out, trover may be supported.¹⁰ Trover lies for title

² Fouldes v. Willoughby, 8 Mees. & W. Exch. 540.

³ Prescott v. Wright, 6 Mass. 20; Pierce v. Benjamin, 14 Pick. Mass. 356; Glenn v. Garrison, 2 Harr. Del. 1.

⁴ Norris v. Beckley, 2 Const. So. C. 228.

⁵ Glaze v. McMillan, 16 Ala. 279; Taylor v. Howell, 4 Blackf. Ind. 217; Hall v. Amos, 5 T. B. Monr. Ky. 89.

⁶ Mather v. Trinity Church, 3 Serg. & R. Penn. 512, 513; Fleming v. Bevan, 2 Penn. St. 408. To maintain trover there must be either, 1, an unlawful taking of personal property from the owner without his consent; 2, an assumption of ownership of such property; 3, an illegal use or abuse of it; or, 4, proof of demand and refusal. Kennet v. Robinson, 2 J. Marsh. Ky. 84; Glaze v. McMillan, 16 Ala. 279; St. John v. O'Connell, 18 Ala. 466.

⁷ Pinkham v. Gear, 3 N. H. 484.

⁸ Stone v. Proctor, 2 N. Chipm. Vt. 116.

⁹ See Sanderson v. Haverstick, 8 Penn. St. 294.

¹⁰ Comyn, Dig. *Biens*, H; Bacon, Abr. *Trover*, B. Where the defendant enters upon the land of the plaintiff and severs crops or coal from the realty, the injury is in the first place a trespass. But the property in the corn, coal, etc., still remains in the plaintiff, and if the defendant carries them off, the plaintiff may waive the trespass and sue in trover. Nelson v. Burt, 15 Mass. 204; Forsyth v. Wells, 41 Penn. St. 291; Sampson v. Hammond, 4 Cal. 184; Riddle v. Driver, 12 Ala. 590.

deeds,¹¹ for a negotiable instrument, certificates of stock, a promissory note,¹² a note which has been paid and left in the hands of the holder by mistake,¹³ or bank notes sealed in a letter,¹⁴ or the copy of an account.¹⁵ It may be supported for a copy of a record which is private property, and may therefore be converted,¹⁶ though in general it will not lie for a record which is public property;¹⁷ trover may be sustained for animals *feræ naturæ* reclaimed;¹⁸ as, wild geese which have strayed away without regaining their natural liberty.¹⁹ It is the proper remedy, in general, for the conversion of any sort of personal property which is specific in its nature and which can be described in the declaration; thus it will not lie for money had and received generally, because it is an attempt to convert an action of *assumpsit* into an action of tort,²⁰ yet it lies for coin described as such, though not in a bag or otherwise distinguishable from other coin, because the thing itself is not to be recovered in this action, but damages for the conversion.²¹

3518. But certain property cannot be recovered in trover owing to its being in the custody of the law, as when it has been seized by virtue of some valid legal process,²² nor when the title to the property can be settled only by a peculiar jurisdiction; as, for example, property taken on the high seas and claimed as lawful prize, because in such cases the courts of admiralty have exclusive jurisdiction.²³ Nor will it lie where the property bailed has been lost by the bailee, or stolen from him, or destroyed by accident, or from negligence; for such torts case is the proper remedy.²⁴

But an officer seizing property on a void process is liable in trover; the only question that can arise is as to the validity of the process. The validity of the judgment upon which the process is founded is immaterial as affecting the officer.²⁵

If a mortgagee of chattels with a right to take possession and sell upon default of payment do so after the death of the mortgagor, he is liable in trover to the administrator, for upon the death the chattels, being in possession of the mortgagor, pass into the custody of the law.²⁶

A lessee who puts a building on the leased premises with the privilege of removal at the end of the term may maintain trover against his lessor, if he prevents him from removing it. *Dame v. Dame*, 38 N. H. 429; *Adams v. Goddard*, 48 Me. 212.

¹¹ *Weiser v. Seisinger*, 2 Yeates, Penn. 537; *Towle v. Lovet*, 6 Mass. 394.

¹² *Comparet v. Burr*, 5 Blackf. Ind. 419; *Todd v. Crookshanks*, 3 Johns. N. Y. 432; *Kingman v. Pierce*, 17 Mass. 247; *Day v. Whitney*, 1 Pick. Mass. 503; *Jarvis v. Rogers*, 15 Mass. 389; *Sewall v. The Lancaster Bank*, 17 Serg. & R. Penn. 285; *Winger v. Banning*, 7 Minn. 274.

¹³ *Pierce v. Gilson*, 9 Vt. 216; See *Bisherer v. Swisher*, 2 Penn. 748; *Stone v. Clough*, 41 N. H. 290.

¹⁴ *Moody v. Keener*, 16 Ala. 218.

¹⁵ *Fullam v. Cummings*, 16 Vt. 697.

¹⁶ *Jones v. Winckworth*, Hardr. 111.

¹⁷ 1 Chitty, Pl. 150. But it seems that an action of trover or replevin may be maintained in Massachusetts for the recovery of parish records. *Sawyer v. Baldwin*, 11 Pick. Mass. 492; *Stebbins v. Jennings*, 10 Pick. Mass. 172.

¹⁸ Hughes, Abr. *Action upon the Case of Trover and Conversion*, pl. 3.

¹⁹ *Amory v. Flynn*, 10 Johns. N. Y. 102.

²⁰ *Orton v. Butler*, 5 Barnew. & Ald. 652.

²¹ Bacon, Abr. *Trover*, D; Viner, Abr. *Action of Trover*, E. See *Pettit v. Bouju*, 1 Mo. 64; *Graves v. Dudley*, 20 N. Y. 76.

²² *Jenner v. Joliffe*, 9 Johns. N. Y. 381; *Pettigru v. Sanders*, 2 Bail. So. C. 549; but see *Hall v. Moore*, Add. Penn. 376.

²³ *Maissonnaire v. Keating*, 2 Gall. C. C. 325; but see *Miller v. The Resolution*, 2 Dall. 1.

²⁴ *Hawkins v. Hoffman*, 6 Hill, N. Y. 586; *Packard v. Getman*, 4 Wend. N. Y. 613; *Johnson v. Stradder*, 3 Mo. 359; *Moses v. Norris*, 4 N. H. 304.

²⁵ Before, 3373. *Martin v. England*, 5 Yerg. Tenn. 313; *Thompson v. Rose*, 16 Conn. 71; *McFarland v. Farmer*, 42 N. H. 386.

²⁶ *Kater v. Steinruck*, 40 Penn. St. 501.

A public officer who improperly takes goods under color of his office is liable in trover; as, a postmaster who refuses to deliver a letter, or a collector of customs who unlawfully detains goods.²⁷

3519. To entitle the plaintiff to recover in this action, at the time of the conversion he must have had a property in the chattel, either general or special,²⁸ and also actual possession or right of immediate possession.²⁹ The rights of the plaintiff consist in having a general or absolute property, a special property, a bare possession, a right to immediate and exclusive possession.

3520. The person who has the *absolute or general property* of a personal chattel may support this action, although he has never had actual possession, because the general property in personal chattels creates a constructive possession; that is, the right to the chattel draws to it the possession.³⁰ Thus, when the general owner bailed the goods, as to a carrier,³¹ or lent them to a party, the bailee has no special property or interest in them against the general owner; it follows that the latter is entitled to immediate possession, and he may therefore maintain trover against a stranger.³² Again, a remainder-man who never had possession of the chattel may bring trover for plate pledged by the party who had the life interest in such plate, which by his death has become vested absolutely in the remainder-man, even though the pawnee was not aware that the pawner was only a tenant for life.³³

When the goods have been delivered on a void agreement or the contract has been rescinded, the former owner may maintain trover against the other contracting party, because no property in the goods passes to the vendee or bailee; and so, when property is parted with by duress of imprisonment or duress *per minas*, the transaction is void, and trover lies for the property without a demand.³⁴

It is a general rule that a sale of stolen goods made by the thief does not pass any title to the vendee, but on account of public policy the owner is not allowed at common law to bring a civil action for the recovery of his property until after he has prosecuted the thief, and though his right is not destroyed, it is suspended;³⁵ but if the goods be pawned to another, the pawnee acquires no title, and trover may be maintained against him. And if the goods have been sent to an auctioneer to sell, an action of trover may be maintained against him, although he sold them innocently, not knowing that they were stolen.³⁶

3521. A person having a *special property* in goods or personal chattels may bring trover against a stranger who takes them out of his possession, as a borrower, a hirer, a factor, consignee, pawnee, or other bailee, or a sheriff, or trustee, or agister of cattle, or any other person responsible to his principal.³⁷ But a mere servant cannot support this action because his possession is that of his

²⁷ Fiedler v. Maxwell, 2 Blatchf. C. C. 552.

²⁸ Yoner v. Neidig, 1 Yeates, Penn. 19; Hastler v. Skull, 1 Tayl. No. C. 152.

²⁹ Mather v. Trinity Church, 3 Serg. & R. Penn. 312; Fleming v. Bevan, 2 Penn. St. 408.

³⁰ Wilbraham v. Snow, 2 Saund, 47, a, note 1; Bacon, Abr. Trover, C; Winger v. Banning, 7 Minn. 274.

³¹ Wilbraham v. Snow, 2 Saund. 47, b.

³² Wilbraham v. Snow, 2 Saund. 47, b.

³³ Hoare v. Parker, 2 Term, 376.

³⁴ Foshay v. Ferguson, 5 Hill, N. Y. 154.

³⁵ Hutchinson v. Bank of Wheeling, 41 Penn. St. 42. In some of the states the right is given to an owner by statute to bring a civil action before he prosecutes the thief. Trover will lie although the defendant may be acquitted of the felonious taking of the goods. Crosby v. Leng, 12 East, 409.

³⁶ Hoffman v. Carow, 22 Wend. N. Y. 285.

³⁷ Wilbraham v. Snow, 2 Saund. 47, b; Stirling v. Vaughan, 11 East, 626; Coleson v. Blanton, 3 Hayw. Tenn. 152; Betts v. Mouser, Wright, Ch. Ohio, 744; Polley v. Lenox Iron Works, 4 All. Mass. 329.

master, and he has, therefore, no special property;³⁸ nor can a party who has a mere right of custody maintain this action. Thus, parish officers cannot recover in trover from an ex-warden the books kept by him while in office; the remedy is by *mandamus*.³⁹

Though, in general, a bailee or other person having only a special property in the chattels must have had possession before he can maintain trover, yet it seems that one having only the right of possession may support it. Thus, it has been held that the indorsee of a bill of lading indorsed to him without value, and for the express purpose of stopping goods *in transitu*, may maintain trover against a wharfinger who converted them.⁴⁰

The rights of one who has a special property in the goods may be adverse to the general owner; as, if the party having a special interest deliver a chattel to the general owner for a particular purpose, he may, on the refusal of the owner to return it, the purpose being satisfied, maintain trover.⁴¹

3522. A man who has the *bare possession* alone, and loses it by the act of a wrong-doer, is entitled to this action against the latter, because possession is *prima facie* evidence of property; but such possession does not hold good against the true owner, because as soon as he appears the rights of the mere possessor cease. A finder of a chattel may maintain trover against a stranger who wrongfully detains it from him.⁴² And for the same reason a lessee, in the enjoyment under the lease as against a wrong-doer, may maintain trover against a stranger without proving the title of the lessor, relying upon his own possession.⁴³

It has been held that one who is wrongfully in possession of land, under a claim of right, may maintain trover against the rightful owner for turpentine gathered by the claimant off the land, and taken by the owner.⁴⁴ A fraudulent title, though coupled with possession, will not support the action.⁴⁵

3523. Although the plaintiff may have a property in the thing which is the subject of the action, if he have not *the right to immediate possession*, he cannot maintain trover; for example, a reversioner cannot maintain this action; his remedy is by an action on the case. Upon the same principle, the purchaser of a chattel, although by the sale he acquires a right to it, yet does not become entitled to the possession until he has paid the price, and until such time he cannot maintain trover.⁴⁶ Nor can a *cestui que trust* maintain this action, while the legal right or title is in another.⁴⁷

3524. The plaintiff must have not only the right to immediate possession, but the *exclusive right of possession* to the chattels claimed. He must therefore have a right to the specific chattel for which he brings this action. If, therefore, a man buy goods undivided from the bulk, as one hundred bushels of wheat, to be measured out of a heap of one thousand bushels, he cannot maintain this action for any specific wheat, because it cannot be told which was his

³⁸ Bloss *v.* Holman, Ow. 52.

³⁹ Addison *v.* Round, 6 Nev. & M. 422.

⁴⁰ Waring *v.* Cox, 1 Campb. 369; Wilbraham *v.* Snow, 2 Saund. 47, d. A mortgagee of goods not in possession cannot maintain trover against a creditor of the mortgagor levying on them. Goulet *v.* Asseler, 22 N. Y. 225; but see Chadwick *v.* Lamb, 29 Barb. N. Y. 518.

⁴¹ 2 Taunt. 268.

⁴² Amory *v.* Delamire, 1 Strange, 505; Wilbraham *v.* Snow, 2 Saund. 47, d; Clark *v.* Malory, 3 Harr. Del. 68; Cook *v.* Patterson, 35 Ala. N. S. 102.

⁴³ Taylor *v.* Parry, 1 Scott, N. R. 576; 1 Mann. & G. 604.

⁴⁴ Branch *v.* Campbell, 7 Jones, No. C. 378.

⁴⁵ Mulligan *v.* Bailey, 28 Ga. 507; Hartshorn *v.* Williams, 31 Ala. N. S. 149.

⁴⁶ Woodcock *v.* Farrell, 1 Metc. Ky. 437.

⁴⁷ Laspeyre *v.* McFarland, 2 Tayl. No. C. 187; Kier *v.* Peterson, 41 Penn. St. 457; Howard *v.* Snelling, 28 Ga. 469.

until it has been measured and set aside;⁴⁸ or in the case of a manufactured article, if it be not specifically appropriated to the vendee, he has no such property as will support trover.⁴⁹

For a similar reason a tenant in common, or joint tenant, cannot maintain trover against his co-tenant while he remains in possession of the goods, though he denies the use of them to the other, because the possession of the one is the possession of the other.⁵⁰

But if the thing in common be destroyed or sold by one tenant in common, this will amount to a severance of the joint interest, and trover lies.⁵¹

3525. *The injury* called a conversion consists, in the sense it is used in relation to trover, either in the appropriation of the personal property in question to the party's own use and benefit, or in its destruction, or in exercising dominion over it, in exclusion of the rights of the owner or lawful possessor, or in withholding the possession from him under a claim of title inconsistent with his own.⁵² The fact of conversion may be shown in three ways: by proof of the wrongful taking of the goods of another, the wrongful assumption of the property in them, and the right of disposing of them, and the wrongful detention of them after demand.

It may be laid down as a general rule that no demand is necessary where the taking is unlawful, or where the acts of the defendant have rendered a demand useless; as, where he has used up the property or parted with it by sale.⁵³

3526. *The wrongful taking* of the goods of another, who has the right of immediate possession, with intent to apply them to the use of the taker, or of some other person than the owner, or which has the effect of destroying or altering their nature, is a conversion.⁵⁴ But if there is no intent to interfere with the owner's dominion, or to change the condition of the property so taken, the trespass will not be considered a conversion; thus the mere turning horses out of a ferry-boat wrongfully is not a conversion of them.⁵⁵ Drawing a portion of liquor out of a barrel, and filling it up with water, is a conversion of the whole, because it changes its nature.⁵⁶

One who buys goods of a person having no title, is guilty of a conversion if he takes them after notice of the true owner, and no demand is necessary;⁵⁷

⁴⁸ *Zagury v. Furnell*, 2 Campb. 240.

⁴⁹ *Abington v. Lapscombe*, 1 Gale & D. 230.

⁵⁰ *White v. Osborn*, 21 Wend. N. Y. 72; *Hyde v. Stone*, 7 Wend. N. Y. 354; *Herrin v. Heaton*, 13 Me. 193; *Weld v. Oliver*, 21 Pick. Mass. 559; *Newlin v. Colt*, 6 Hill, N. Y. 461; 2 Saund. 47, f and g; *Fennings v. Grenville*, 1 Taunt. 241; *Heath v. Hubbard*, 4 East, 121; *Carr v. Dodge*, 40 N. H. 403; *Williams v. Nolen*, 34 Ala. n. s. 167.

⁵¹ *White v. Brooks*, 43 N. H. 402; *Boyle v. Levings*, 28 Ill. 314.

⁵² *Shipwick v. Blanchard*, 6 Term, 299, *arguendo*; *Foulkes v. Willoughby*, 8 Mees. & W. Exch. 540, 546, 551; *Hutchinson v. Bobo*, 1 Bail. So. C. 546; *Reid v. Colcock*, 1 Nott & M'C. So. C. 592; *Reynolds v. Schuler*, 5 Cow. N. Y. 323.

⁵³ *Dudley v. Sawyer*, 41 N. H. 326.

⁵⁴ 2 Saund. 47, g; *Thurston v. Blanchard*, 22 Pick. Mass. 18; *Durell v. Mosher*, 8 Johns. N. Y. 445; *Shipwick v. Blanchard*, 6 Term, 299; *Davis v. Waleb*, 1 M'Cord, So. C. 213; *Jones v. Duncan*, 1 M'Cord, So. C. 428; *Farrington v. Payne*, 15 Johns. N. Y. 431; *Woodbury v. Long*, 8 Pick. Mass. 543.

⁵⁵ *Foulkes v. Willoughby*, 8 Mees. & W. Exch. 540; *Plumer v. Brown*, 8 Metc. Mass. 578. According to these decisions, the ancient rule of law laid down in 1 Chitty, Pl. 152; Bacon, Abr. *Trover*, A; 2 Wms. Saund. 47, note (o); and the works of other writers, that "whenever trespass for taking goods will lie, trover will also lie," cannot be supported.

⁵⁶ 1 Strange, 576; *Dench v. Walker*, 14 Mass. 500; see *Young v. Mason*, 8 Pick. Mass. 551.

⁵⁷ *Scriver v. Masten*, 11 Cal. 303; *Paige v. O'Neal*, 12 Cal. 483; *Thrall v. Lathrop*, 30 Vt. 307.

only a *bona fide* purchaser without notice is protected from the effects of a conversion in purchasing in such case.⁵⁸

3527. The taking need not be actual; it is equally a conversion when it is constructive; as, when a party assumes to dispose of, or exercise a dominion over, personal property, to the exclusion and defiance of the plaintiff's right; ⁵⁹ for example, the act of unlawfully levying upon and selling stills, without taking actual possession, will amount to a conversion on the part of a constable; ⁶⁰ or the act of unlawfully distraining on the coals of plaintiff, in the coal-house of another man, and selling them without removing them, will have the same effect; ⁶¹ and if a person find a raft of timber on a sand bar in a navigable river, high and dry, and take possession of it, assume to dispose of it, hire a person to assist him in removing a part, and sell that person his interest in the remainder, reserving to himself the portion removed, it is a conversion of the whole.⁶²

3528. There are many cases where the taking of the property of another is justifiable or excusable, and then the act of taking alone will not be a conversion; as, the throwing of goods into the sea by the master to save the ship.

Though the tortious act may have been a conversion, yet if, with a full knowledge of the circumstances, the owner of the property ratifies the act, or in any way becomes a party to the tort, he thereby abandons all right to bring an action of trover.⁶³

The plaintiff loses his right of action if he takes a bond to pay for the chattel upon a final determination of property, and has only his remedy on the bond.⁶⁴

3529. As in the case of wrongful taking, a *wrongful assumption of the property* and the right of disposing of the goods may be a conversion in itself, and render a demand unnecessary.⁶⁵ Thus, if a mortgagor of personal property, or any one claiming under him, sell the entire property as owner, in exclusion of the rights of the mortgagee, such a sale is a conversion, and the mortgagee may maintain trover; ⁶⁶ or where a carrier by mistake delivered goods to a wrong person, it was held that trover might be supported, though it would have been otherwise had they been lost by accident.⁶⁷

The misuse of a personal thing delivered lawfully to the defendant is a conversion which will enable the owner immediately to maintain trover; ⁶⁸ as, where a hired slave was put to an employment to which the bailee had no right to put him, and he was lost, this was considered such a wrongful conversion by the bailee as rendered him liable to this action; ⁶⁹ and driving a hired horse a greater distance than is agreed, or in a different direction, will be considered a

⁵⁸ Gage *v.* Epperson, 2 Head, Tenn. 669; Wooster *v.* Sherwood, 25 N. Y. 278.

⁵⁹ Bristol *v.* Burt, 7 Johns. N. Y. 254; Murray *v.* Burling, 10 Johns. N. Y. 172; Reynolds *v.* Shuler, 5 Cow. N. Y. 323; Webber *v.* Davis, 44 Me. 147; Gilman *v.* Hill, 36 N. H. 311.

⁶⁰ Burke *v.* Baxter, 3 Mo. 207.

⁶¹ Reynolds *v.* Shuler, 5 Cow. N. Y. 323.

⁶² Gentry *v.* Madden, 3 Ark. 127.

⁶³ Hawes *v.* Parkman, 20 Pick. Mass. 90.

⁶⁴ Briggs Iron Co. *v.* North Adams Iron Co., 12 Cush. Mass. 114.

⁶⁵ Maguyer *v.* Hawthorn, 2 Harr. Del. 71; Murray *v.* Burling, 10 Johns. N. Y. 172; Liptrot *v.* Holmes, 1 Ga. 381; Powell *v.* Olds, 9 Ala. n. s. 861; Ainsworth *v.* Partillo, 13 Ala. n. s. 460; Ripley *v.* Dolbier, 18 Me. 382; Jacoby *v.* Laussat, 6 Serg. & R. Penn. 305; Adams *v.* Goddard, 48 Me. 212; Farrand *v.* Hurlbut, 7 Minn. 477; Morton *v.* Gloster, 46 Me. 520.

⁶⁶ White *v.* Phelps, 12 N. H. 382.

⁶⁷ Youl *v.* Harbottle, Peake, 49; see Bullard *v.* Young, 4 Ala. 46.

⁶⁸ Ripley *v.* Dolbier, 18 Me. 382.

⁶⁹ Spencer *v.* Pilcher, 8 Leigh, Va. 565; see Horsely *v.* Branch, 1 Humphr. Tenn. 199.

conversion.⁷⁰ These decisions seem correct upon principle, because by misusing such property the defendant assumes a right over it inconsistent with the general rights of the owner, and therefore converts the owner's property, to that extent at least.

In the case of mixture or intermingling of goods, a demand must be made and a refusal to deliver them, or the plaintiff must fail. The reason assigned for this is that, *prima facie*, all the goods belong to the same person.⁷¹

But unless there has been some lawful assumption of property, trover cannot in general be maintained for a mere non-feasance;⁷² and, therefore, if a bailee by negligence lose goods intrusted to him, the proper remedy is assumpsit or case.⁷³ If the bailee deliver to the wrong person, he is liable in trover.⁷⁴

Where the defendant takes the chattel by assignment from one who has no title, the owner may maintain trover;⁷⁵ but the action cannot be maintained unless the defendant has assumed dominion over the chattel after notice of the plaintiff's title.⁷⁶ But where the defendant makes no claim of title, but receives the chattel from a wrongful holder, as, for example, from a thief as a mere depository, it is not a conversion if he redeliver it to the thief, though he knows it to be stolen, the owner not having demanded it.⁷⁷

3530. Hitherto we have been considering those acts of the wrong-doers which amount to a conversion of the property without any demand being made of them, or any refusal on their part to deliver it to its owner. The *unlawful detention* of such property *after a demand* made by the owner or his agent of the wrong-doer to deliver such property will be the next subject. In its examination it will be proper to inquire what is a wrongful detention and what is a demand and refusal.

3531. By a *wrongful detention* of goods is meant the act of a person who has the goods of another, whether his possession be wrongful or otherwise, and holds them from the owner without lawful authority; such a wrongful detention of goods amounts to a conversion. Thus, where the possession is unlawful; as, where the wrong-doer has taken the goods of another unlawfully and appropriated them to his own use, this is a wrongful detention; or, if the possession is legal, as where a party who had a particular right to the goods for a time, after the expiration of such time refuses to return them upon proper demand to the owner, this is a wrongful detention, which is evidence of a conversion.⁷⁸ But before the holder or possessor of the goods can be put in the wrong by making a demand of him to deliver them, care must be taken that his particular right has expired or been extinguished; a demand of a horse from a hirer before the time for which he had been hired has expired will not make him guilty of a conversion; and where the possessor has a lien upon the goods for a debt due to him, the amount must be paid or tendered to him before a demand, and refusal will create a wrongful detention.⁷⁹ When the possessor refuses to deliver

⁷⁰ *Whelock v. Wheelwright*, 5 Mass. 104; *Homer v. Thwing*, 3 Pick. Mass. 492; see *Hart v. Skinner*, 16 Vt. 138; *Graves v. Smith*, 14 Wisc. 5; *Haas v. Damon*, 9 Iowa, 589; *Crocker v. Gullifer*, 44 Me. 491.

⁷¹ *Bond v. Ward*, 7 Mass. 123, 127; see *Wengate v. Smith*, 20 Me. 287; *Cutter v. Fanning*, 2 Iowa, 580.

⁷² *McCombie v. Davies*, 6 East, 540.

⁷³ *Wilbraham v. Snow*, 2 Saund, 47, c.

⁷⁴ *Alabama R. R. v. Kidd*, 35 Ala. N. S. 209.

⁷⁵ *Courtis v. Cane*, 32 Vt. 232; *Deering v. Austin*, 34 Vt. 330; *Rawson v. Tuel*, 47 Me. 506; *Carpenter v. Hale*, 8 Gray, Mass. 157; *Gilmore v. Newton*, 9 All. Mass. 170.

⁷⁶ *Parker v. Middlebrook*, 24 Conn. 207; *Burnside v. Twitchell*, 43 N. H. 390.

⁷⁷ *Loring v. Mulcahy*, 3 All. Mass. 575.

⁷⁸ *Wilbraham v. Snow*, 2 Saund. 47, p; *Miller v. Grove*, 18 Md. 242.

⁷⁹ *Jones v. Tarleton*, 9 Mees. & W. Exch. 675.

the goods, not on account of his lien, but on other grounds, he is estopped from setting up his lien as a defence for a wrongful detention.

3532. In general, a *demand* is a request by an individual having a right to another to do a particular thing. Such demands may be express or implied. In cases where the taking of goods was lawful, in order to make their subsequent detention illegal it is necessary to prove some assumption of right adverse to the owner's claim, before trover can be supported for their recovery. When the conversion is direct, as, by an illegal taking, or a wrongful assumption of property, or a misuse of the chattel, we have seen the conversion is complete without a demand; but to maintain trover for an indirect conversion a demand is in general indispensable, because the defendant being lawfully in possession of the goods, there is no conversion before he assumes a property in them; a refusal to deliver them to the owner, therefore, shows on his part in fact an assumption of property in the goods and is evidence of the prior conversion.⁸⁰ The most usual way is to make an express demand by a person having a lawful right so to do upon the person who holds such goods to deliver them to the owner; this is absolutely necessary when the chattels have not been illegally taken away, or there has not been a wrongful assumption of right to the goods, and in all cases it is advisable. To render the defendant liable there must be a demand in proper form; it must be made by one lawfully authorized; upon a person who has the goods in his possession; there must be a refusal; and the demand and refusal must take place before the right of action accrues.

3533. When the demand is to be made, it ought to be in such form as will leave no reasonable doubt upon the mind of the person on whom it is made as to what is demanded. The demand may be oral or in writing, and if it be made in both ways, and one is valid and the other defective, the demand will be sufficient.⁸¹ In order to secure sufficient evidence of the demand, it is better to make it in writing; such an instrument should give a formal notice of the owner's right of property and possession, and make a formal demand of delivery of such possession to the owner; it should particularly describe the articles claimed, for if there is a mistake in this respect, the plaintiff may be defeated in his action; as, where the plaintiff demanded "fixtures" alone, and the goods sued for were fixtures and also other goods, the demand was held insufficient except as to the fixtures.⁸² The demand must also be an absolute demand, for one which is qualified is insufficient; thus, where the owner of a gun delivered it to Peter for a particular purpose and Peter wrongfully delivered it to Paul, from whom it got into the defendant's possession, Peter gave notice that the gun was his and added, "I hereby demand the same of you, and require you to deliver it up in the same plight it was when it was delivered to you." Defendant said, in answer, that the gun had burst, and that he would rather pay ten times the value than repair it; it was held that such demand and refusal did not amount to a conversion.⁸³

So a demand in these words, "I shall have to take them away from you, if I cannot get my money any other way," is not sufficient.⁸⁴

3534. The demand may be made by the owner himself, or by his agent duly authorized. As the possessor is entitled to perfect security against another demand, he has a right to have sufficient evidence of the agent's authority when the demand is made by him; and if, on the demand being made by one who

⁸⁰ *Wilton v. Girdlestone*, 5 *Barnew. & Ald.* 587; *Wilbraham v. Snow*, 2 *Saund.* 47, e.

⁸¹ *Smith v. Young*, 1 *Campb.* 440.

⁸² *Colegrave v. Dios Santos*, 2 *Barnew. & C.* 76.

⁸³ *Rushworth v. Taylor*, Q. B. 21, *Law J. Rep.* 80.

⁸⁴ *Monnot v. Ibert*, 33 *Barb. N. Y.* 24.

claims to act as agent, the party refuses, *bona fide*, to deliver the property, on the ground that he is not satisfied as to the agent's authority, the demand will be insufficient.⁸⁵ For this reason, as well as because a written demand can be better proved, it is better to make the demand in writing, and authorize the party in possession to deliver the goods to the agent.

As no one has a right to make a demand except the owner or one authorized by him, it follows that the demand must be made by or on behalf of the owner entitled to the goods at the time of the demand made; if, therefore, the bailor sell the goods during the time of bailment, the purchaser, and not the bailor, is the party, after the sale, to demand the goods of the bailee, and, on refusal, to bring trover.

When two persons are jointly entitled to the possession of the chattel, a demand of one is not sufficient without the authority of the other; as, if two persons, jointly interested in the chattel, deposit it with the defendant, one cannot demand the possession of it alone; but unless the bailee receive it on the joint account, a demand by the party depositing it is sufficient, notwithstanding any agreement between such person and another, unknown to the bailee, that the latter should hold it on joint account; and the reason appears to be that the bailee was not answerable to such unknown person, under such circumstances.⁸⁶

3535. The demand ought to be made, if possible, of the person who holds the goods in his own right personally; but when that cannot be done, then a notice of the ownership of the goods, and a demand to deliver them, should be delivered at the party's house in writing;⁸⁷ but it may be doubted whether this would be sufficient, unless followed by an absolute and general refusal to deliver up the goods; particularly where there is no obligation on the party to incur the trouble or expense of removing, or carrying, or sending the goods from his house to that of the claimant, as where he had found them.⁸⁸

It is immaterial whether the person of whom the goods are demanded has them in his actual possession or not if they are under his control; as, if they are in the hands of his servants, and he has a controlling power over them, the demand will be sufficient; if, on the other hand, the demand is made of a servant, who refuses to deliver them, in consequence of the commands of his master, the conversion will be that of the latter; as, where the agent of the state prison refused, by the direction and command of one of the inspectors, to deliver the goods to the plaintiff, the conversion was held to be that of the inspector, and trover might be maintained against him.⁸⁹

3536. To be evidence of a conversion, *the refusal* must be absolute and unqualified; when the refusal to deliver property is absolute, unconditional, and unqualified, it is equivalent to a conversion;⁹⁰ but the qualifications and conditions must be reasonable, and founded in fact, or, at least, appear so at the time; for example, when a party *bona fide* claims a lien, or refuses to deliver them, not being satisfied, for just reasons, that the claimant is the owner, or has authority to receive them,⁹¹ or the bailor asks time for a just cause,⁹² or the refusal may be considered only as the result of a reasonable hesitation, in a doubt-

⁸⁵ *Mills v. Ball*, 2 Bos. & P. 464, note *a*; see *West v. Tupper*, 1 Bail. So. C. 193; *Watt v. Potter*, 2 Mas. C. C. 77; but where there is no request to see the authority, and the refusal to deliver the property turns upon other and distinct grounds, the demand will be good. 2 Mas. C. C. 77. See *Beckley v. Howard*, 2 Brev. So. C. 94; *Spence v. Mitchell*, 9 Ala. N. S. 744.

⁸⁶ *May v. Harvey*, 13 East, 197.

⁸⁸ *Gibbs v. Stead*, 8 Barnw. & C. 528.

⁹⁰ *Dent v. Chiles*, 9 Ala. 383.

⁹¹ *Mills v. Ball*, 2 Bos. & P. 464; *Clarke v. Chamberlain*, 2 Mees. & W. Exch. 78.

⁹² *Dowd v. Wadsworth*, 2 Dev. No. C. 130.

⁸⁷ *Logan v. Houlditch*, 1 Esp. 22.

⁸⁹ *Shotwell v. Few*, 7 Johns. N. Y. 302.

ful matter;⁹³ in these cases it will, in general, be left to the jury to decide whether the qualifications or conditions of the refusal were reasonable.⁹⁴ But a qualified refusal to deliver goods, on the ground that the defendant had received a notice of a demand from a third party, is evidence of a conversion; for the setting up the *jus tertii*, or keeping the goods to maintain the title of a third party, is to deprive the owner of his goods and denying his title, and, therefore, it is a conversion.⁹⁵

3537. The refusal is generally express, but it may be implied. When it is the duty of the defendant to return the chattel to the rightful owner, as, where he borrowed a horse from the plaintiff, and agreed to return him, a request in writing, left at his house in the presence of one of his family, to return the horse, will be considered as a sufficient demand, and his neglect to return him within a reasonable time thereafter will be evidence of a refusal and of a conversion.⁹⁶

The refusal should be made by a principal or by his authority; a refusal by an agent is not evidence of a conversion by the principal, unless the agent had a special authority to refuse,⁹⁷ or unless, from circumstances, it can be presumed such authority had been given, or the matter was within the scope of the agent's authority.⁹⁸

3538. A refusal may be justified or excused, and then it will not be a conversion; as, where the property has been attached by the creditor of the owner before the demand, a refusal to deliver it would be justified;⁹⁹ but such an attachment after a refusal, and a subsequent sale to pay the debt of the plaintiff, would be no justification, although it might be a mitigation of the damages, because, at the time of the refusal, the conversion was complete.¹⁰⁰ The refusal may be excused where the party had it not in his power to deliver the property; as, where a party said he would not deliver up the deed, because it was in the hands of his attorney, who had a lien upon it.¹⁰¹

3539. As to its effects, the refusal is presumptive evidence of a conversion, which may be rebutted.¹⁰² It may be shown that the goods were not in the power of the party,¹⁰³ or that they were delivered to the plaintiff or his agent before the demand and refusal; or that the defendant has a lien unsatisfied; or that the person who demanded did not show any authority from the plaintiff when required; or, as in the case of a common carrier, that the goods were lost, and therefore there was no conversion;¹⁰⁴ or that the goods had been attached by lawful process; as, the property of the plaintiff in the hands of the defendant.

When one ground for the refusal is given, the defendant can take advantage of no other; as, where the defendant has a lien, which would be a sufficient ground, he refuses upon other grounds, he waives the lien, and on the failure of the other ground he cannot resort to it;¹⁰⁵ or where a mortgagee of a chattel takes possession, claiming to do so under a sale from the mortgagor, he is liable in trover if he fails to prove the sale.¹⁰⁶

⁹³ *Robinson v. Burleigh*, 5 N. H. 225.

⁹⁴ *Vaughan v. Watt*, 6 Mees. & W. Exch. 492; *Dent v. Chiles*, 9 Ala. 383.

⁹⁵ *Atkinson v. Marshall*, Exch. 21 L. J. R. 117; *Gaunce v. Spanton*, 7 Mann. & G. 903.

⁹⁶ *Gow*, 69; 7 Carr. & P. 339.

⁹⁷ *Holt*, 383.

⁹⁸ *Jones v. Hart*, 2 Salk. 441; *Catteral v. Kenyon*, 2 Gale & D. 545; 2 Saund, 47, g.

⁹⁹ 2 Crompt. M. & R. Exch. 495.

¹⁰⁰ *Irish v. Cloyer*, 8 Vt. 33, 110.

¹⁰¹ *Smith v. Young*, 1 Campb. 439.

¹⁰² *Thompson v. Rose*, 16 Conn. 71; *Lockwood v. Bull*, 1 Cow. N. Y. 322; 2 Saund. 47, e.

¹⁰³ *Smith v. Young*, 1 Campb. 439.

¹⁰⁴ 2 Saund. 47, f.

¹⁰⁵ 1 Campb. 410, note; *Clarke v. Chamberlain*, 2 Mees. & W. Exch. 78; *Wilson v. Anderson*, 1 Barnew. & Ad. 450; *West v. Tupper*, 1 Bail. So. C. 193.

¹⁰⁶ *Clark v. Rideout*, 39 N. H. 238.

3540. In considering *the declaration* it will be proper to inquire what are the requisites of a declaration in trover, and what defects in it are cured by a verdict in favor of the plaintiff.

3541. *The requisites of a declaration* are, the statement of the cause of action; the proper averments; and the claim for damages.

3542. The declaration should state that the plaintiff was lawfully possessed of certain goods and chattels, which he should describe as particularly as possible, avoiding repetition and unnecessary description of details, as of his own property, of a certain value which should be mentioned, and that being so possessed, he, on a certain day, which should be specified, casually lost the said goods and chattels out of his possession, and that afterward, on the day and year aforesaid, at the county aforesaid, they came to the possession of the defendant by finding.

The certainty in the description of the thing lost must be such as to identify it, but certainty to a common intent is all that is required.¹⁰⁷ Where the property was described as "a black mare of the value of one hundred dollars;"¹⁰⁸ or that "the plaintiff being owner, and in possession of a pair of oxen of the value of one hundred dollars, lost the same, and that the same were found by the defendant;"¹⁰⁹ or "old iron;"¹¹⁰ or "fifty pieces or ends of deal boards;"¹¹¹ in all these cases the description was held to be sufficiently certain. But where the description is so general that the articles cannot be identified, it is bad for uncertainty; the following are examples: where the goods were described as "one hundred articles of furniture, and one hundred articles of wearing apparel," without further description;¹¹² or "two sheaves of corn," without stating the kind;¹¹³ or of "some fish," without stating the quality or number of fish.¹¹⁴ In these cases the description was deemed too loose and uncertain to identify the property, though in some of them the defects might be cured by verdict.

In the description of promissory notes, bills of exchange, bonds, and the like, they should be so stated that they may be readily identified; but the plaintiff is not required to state their dates or time of payment, because he has them not in his possession;¹¹⁵ nor is he required to recite any part of the instrument.¹¹⁶

The price or value of the thing lost ought to be stated in the declaration; yet, if it should be omitted, it will not be fatal.¹¹⁷ The defect can be reached only by special demurrer.¹¹⁸

A time should also be mentioned, but provided it is before action brought, it is immaterial.¹¹⁹

¹⁰⁷ *Vanhauken v. Wickam*, 2 South. N. J. 509; *Taylor v. Morgan*, 3 Watts, Penn. 333.

¹⁰⁸ *Hedley v. Fullen*, 1 Blackf. Ind. 51.

¹⁰⁹ *Vanhauken v. Wickam*, 2 South. N. J. 509.

¹¹⁰ *Talbot v. Spears*, Willes, 70.

¹¹¹ *Knight v. Baker*, 11 Mod. 66; *Haslegrave v. Thompson*, Strange, 810. The practice of annexing a schedule of the things lost to the declaration has been disapproved of as being improper. *Kinder v. Shaw*, 2 Mass. 398; *Rider v. Robbins*, 13 Mass. 284.

¹¹² *Bacon*, Abr. *Trover*, F.

¹¹³ *Anon. Style*, 25.

¹¹⁴ *Playter's Case*, 5 Coke 34.

¹¹⁵ *Bank of New Brunswick v. Neillson*, 3 Green, N. J. 337; *Wilson v. Chambers*, Croke, Jac. 262.

¹¹⁶ *Pierson v. Townsend*, 2 Hill, N. Y. 550.

¹¹⁷ *Pearpoint v. Henry*, 2 Wash. Va. 192. It is said, in an old authority, that if an action of trover be brought for a living chattel, it must be stated in the declaration to be of a certain price; and if for a dead chattel, of a certain value. *Wood v. Smith*, Croke, Jac. 130; but elsewhere it is said there is no difference in these terms in a declaration. *Fitzherbert*, Nat. Brev. 88. See before, 2873, note.

¹¹⁸ *Fry v. Baxter*, 10 Mo. 302.

¹¹⁹ *Glenn v. Garrison*, 2 Harr. Del. 1; *Tesmond v. Johnson*, Croke, Jac. 428.

It is not necessary in trover to lay the venue at the place where the conversion was, but some place should be alleged.¹²⁰

The finding should be stated, but the omission of these words is not material after verdict; and the finding is not traversable;¹²¹ and to state that the goods came to the possession of the defendant "by finding or otherwise" will not vitiate the declaration.¹²²

3543. *The averment* should be that the defendant well knowing that the said goods and chattels were the property of the plaintiff, and of right to belong and appertain to him, but contriving, and fraudulently intending, craftily and subtly, to deceive and defraud the plaintiff in this behalf, has not yet delivered the said goods and chattels to the said plaintiff, although often requested so to do, but has hitherto refused and still refuses so to do; and afterward, at a certain time mentioned, in the said county, converted and disposed of the said goods and chattels to his the defendant's own use.¹²³ Thus, in an action styled an action of trespass, where the declaration charged "that the defendant took in his possession certain goods and chattels, the property of the plaintiff, that he refused, and still refuses, to deliver them to the plaintiff, though requested, and has converted them to his own use," is a sufficient averment, and sets out a case of trover.¹²⁴ It must be averred that the plaintiff is entitled to possession.¹²⁵

3544. The declaration should lay the *damages* in such sufficient sum as to cover the value of the article, and such other injury as the plaintiff may have sustained.

Damages must be alleged or the judgment cannot be supported;¹²⁶ alleging "to the great damage" is enough without stating the amount.¹²⁷

3545. In general, all merely formal defects in a declaration are cured by verdict, when in favor of the plaintiff; these must be taken advantage of by special demurrer. It is for this reason that, although possession and the right of property should be in the plaintiff, it has been held that this defect was cured by the verdict for the plaintiff;¹²⁸ and where a declaration, good in other respects, misstated the name of the defendant for that of the plaintiff, it was held that the mistake could be taken advantage of only by special demurrer; and if there was a judgment by default, a special demurrer would not be allowed, except on the condition of pleading issuably.¹²⁹

3546. It is usual in trover to plead the general issue of not guilty, under which many matters in discharge may be given in evidence. But it is necessary to plead the statute of limitations and a release. The defendant may, however, plead specially any thing which admits the property in the plaintiff, and the conversion, but justifies the latter.¹³⁰ He may also plead a former recovery of damages given in an action of trespass for the same trespass or conversion.¹³¹

In general, a plea amounting to the general issue in trover is bad; as, a plea that the goods were sold pursuant to the order of the plaintiff;¹³² or a plea al-

¹²⁰ Bacon, Abr. *Trover*, F, 1.

¹²¹ 1 Chitty, Pl. 156.

¹²² *Peters v. Johnson*, 1 Ala. 100.

¹²³ Stephen, Pl. 48.

¹²⁴ *Glenn v. Garrison*, 2 Harr. Del. 1.

¹²⁵ *Dearman v. Dearman*, 5 Ala. N. S. 202; see *Davis v. Davis*, 6 Blackf. Ind. 394.

¹²⁶ *Sterling v. Garritte*, 18 Md. 468.

¹²⁷ *Mattingly v. Darwin*, 23 Ill. 618.

¹²⁸ *Good v. Harnish*, 13 Serg. & R. Penn. 99.

¹²⁹ *McLure v. Vernon*, 2 Hill, So. C. 420.

¹³⁰ *Hurst v. Cook*, 19 Wend. N. Y. 463; *Coffin v. Anderson*, 4 Blackf. Ind. 395.

¹³¹ *Sanders v. Egerton*, 2 Brev. So. C. 45.

¹³² *Kennedy v. Strong*, 10 Johns. N. Y. 289.

leging property in the plaintiff, and that the goods were taken as a distress for rent.¹³³

3547. Two principal points must be proved by the plaintiff in order to sustain this action: property in himself and a right of possession at the time of the conversion, and a conversion by the defendant of the thing sued for before action brought.

3548. The plaintiff is required to show either a general and absolute or a special property in himself; the latter, when the party is entitled to possession, is sufficient to recover even against the owner himself.¹³⁴

When the plaintiff claims title under a sale made to him, he must show that the sale was completed before the conversion and that he was entitled to possession; for if his right was liable to be defeated by stoppage *in transitu*, and the right of the seller was exercised, the buyer cannot recover the property sold in an action of trover.

When an article is to be manufactured, as, for example, a ship, upon a special contract, and the price is to be paid in certain portions or instalments as the work progresses, the payment of the instalments as they fall due vests the property of the ship in the buyer;¹³⁵ but if the contract is general, without any express stipulations for advances, payments on account will not thus vest the property in the party who makes them.¹³⁶

The possession, acquired *bona fide* and for a valuable consideration, of a bank note, bill of exchange, or promissory note when indorsed in blank or payable to the holder, or a government bond, payable to the holder, or other negotiable security so payable or indorsed, is sufficient evidence of title without showing any title in the person from whom he received it.¹³⁷

The property sued for must of course be identified, for without this the plaintiff cannot show his title to it. Where the plaintiff declared for a bond, it was held he might call the obligor to prove its contents.¹³⁸

3549. After having proved his property in the chattel which is the subject of the action, the plaintiff must show his right to present possession and that he had such a right at the time of the conversion. If the plaintiff has only a special property, he must in general give evidence of actual possession,¹³⁹ for possession in trover is *prima facie* evidence of ownership;¹⁴⁰ and when the defendant has color of title, the plaintiff must not only show possession in himself, but a title to the property.¹⁴¹ When the plaintiff has a general property in the goods, the law annexes the possession.¹⁴²

3550. The plaintiff must also show that there has been a conversion of the goods by which he sustained an injury, for he cannot recover any damages if the chattel was of no value.¹⁴³ What will amount to a conversion has already been sufficiently considered.

¹³³ *Briggs v. Brown*, 3 Hill, N. Y. 87.

¹³⁴ *Roberts v. Wyatt*, 2 Taunt. 268; *Spoor v. Holland*, 8 Wend. N. Y. 445.

¹³⁵ *Woods v. Russell*, 5 Barnew. & Ald. 942, 946; see *Johnson v. Hunt*, 11 Wend. N. Y. 137.

¹³⁶ See *Mucklow v. Mangles*, 1 Taunt. 318; *Bishop v. Crawshay*, 3 Barnew. & C. 416; *Goode v. Langley*, 7 Barnew. & C. 26.

¹³⁷ 2 Greenleaf, Ev. § 639; *Story, Bills*, § 415; *Story, Notes*, §§ 193-197; 2 Phillipps, Ev. 222.

¹³⁸ *Smith v. Robertson*, 4 Harr. & J. Md. 30.

¹³⁹ *Coxe v. Harden*, 4 East, 211; *Dennie v. Harris*, 9 Pick. Mass. 361; *Hotchkiss v. McVickar*, 12 Johns. N. Y. 407; *Sheldon v. Soper*, 14 Johns. N. Y. 352.

¹⁴⁰ *Jones v. Sinclair*, 2 N. H. 319; *Derby v. Gallup*, 5 Minn. 119. But it is not conclusive. *Stephenson v. Little*, 10 Mich. 433.

¹⁴¹ *Fightmaster v. Beasley*, 7 J. J. Marsh. Ky. 410.

¹⁴² 2 Saund. 47, a, note (1).

¹⁴³ *Miller v. Reigne*, 2 Hill, So. C. 592.

3551. Under the general issue of not guilty the defendant may, in general, show by any competent evidence that the title of the goods was in himself either absolutely as general owner, or joint owner with the plaintiff, or specially as bailee; or that he had a right to retain on account of his lien;¹⁴⁴ or that he took the goods for a just cause, as, for rent in arrear;¹⁴⁵ or he may disprove the plaintiff's title by showing title in a stranger;¹⁴⁶ but he cannot set up the interest of such third person without showing a title of some kind in himself.¹⁴⁷ He may prove facts showing a license, or a subsequent ratification, or any other facts which support his special plea.

3552. *The verdict* is rendered for the damages which the plaintiff has sustained in consequence of the conversion of his goods by the defendant. As a general rule, damages are allowed for the value of the property at the time of the conversion, with interest.¹⁴⁸ But a difficulty arises in ascertaining what is the property which has been converted, whether it is what was actually taken from the plaintiff or that article improved by the work and industry of the defendant. It is a general rule that a wrong-doer can never benefit by his own wrong; and as it would be extremely difficult to ascertain the value of the original property without his labor, the whole shall be considered as the property of the plaintiff, and he will be entitled to damages accordingly; as, where the defendant took logs of the plaintiff and converted them into boards, the plaintiff may recover the value of the boards, and the verdict should be for that amount.¹⁴⁹ Where other losses besides the value of the property have been sustained, the plaintiff is entitled to recover damages for such injury, and the verdict should, therefore, include an amount sufficient to indemnify him; as, where the defendant converted a slave, the verdict should be for the value of the slave and for his labor.¹⁵⁰ The defendant cannot, however, recover damages for a greater injury than he has sustained; thus, where the plaintiff had a life estate in a slave, he can recover only the value of the life interest.¹⁵¹

The plaintiff cannot recover for the loss of anticipated profits which he might have made but for the conversion by the defendant.¹⁵²

When the subject is a written security, the verdict should be for the amount of the principal and the interest due upon it.¹⁵³ If trover is brought for promissory notes signed by third parties, the jury are entitled to consider the circumstances affecting the solvency of the maker, and to estimate the market-

¹⁴⁴ Buller, Nisi P. 45; Skinner v. Upshaw, 2 Ld. Raym. 752.

¹⁴⁵ Wallace v. King, 1 H. Blackst. 13; Kline v. Husted, 3 Caines, N. Y. 275.

¹⁴⁶ Schermerhorn v. Van Volkenburgh, 11 Johns. N. Y. 529; Rotan v. Fletcher, 15 Johns. N. Y. 207.

¹⁴⁷ Duncan v. Spear, 11 Wend. N. Y. 54.

¹⁴⁸ Matthews v. Menedger, 2 McLean, C. C. 145; Ewart v. Kerr, 2 McMull. So. C. 141; Buford v. Fannen, 1 Bay, So. C. 273; McConnell v. Linton, 4 Watts, Penn. 357; Harger v. McMains, 4 Watts, Penn. 418; Robinson v. Barrows, 48 Me. 186; Stirling v. Garritee, 18 Md. 468; State v. Smith, 31 Mo. 566.

¹⁴⁹ Greenfield Bank v. Leavitt, 17 Pick. Mass. 3; Baker v. Wheeler, 8 Wend. N. Y. 505; see Kid v. Mitchell, 1 Nott & M'C. So. C. 334. Where C at New Orleans converted flour sent to him to be forwarded to B at Boston, the value of the flour at Boston was the measure of damages. Farwell v. Price, 30 Mo. 587.

¹⁵⁰ Banks v. Hatton, 1 Nott & M'C. So. C. 221; see Jamson v. Hendricks, 2 Blackf. Ind. 94. So where the conversion consists in mining coal on the plaintiff's land, the injury to the land is a part of the damages. Forsyth v. Wells, 41 Penn. St. 291.

¹⁵¹ Strong v. Strong, 6 Ala. N. s. 345; Parish v. Wheeler, 22 N. Y. 494. If the plaintiff has recovered his property he can recover the expense of recovery. Ford v. Williams, 24 N. Y. 359; Perkins v. Freeman, 26 Ill. 477.

¹⁵² Selden v. Cashman, 20 Cal. 56; Callaway Co. v. Clark, 32 Mo. 305; Butler v. Collins, 12 Cal. 457.

¹⁵³ Roming v. Roming, 2 Rawle, Penn. 241; Mercer v. Jones, 3 Campb. 477. So held in the case of a policy of life insurance. Watson v. McLean, 1 Ell. B. & E. 75.

able value of the notes, but notes signed by the defendant, or which he is liable to pay, must be estimated at their full value.¹⁵⁴

The defendant may prove, in mitigation of damages, that the plaintiff has himself recovered the property, or it has been restored to him and accepted; the verdict should be for the actual injury occasioned by the conversion, including the expenses of recovery.¹⁵⁵ But if the taking was wrongful, and an action of trover for the recovery of the property be commenced, the defendant cannot, in mitigation of damages, tender the property so taken to the plaintiff, and compel him to take it;¹⁵⁶ nor will such a tender avail the defendant where the property has been essentially injured after an action brought.¹⁵⁷

3553. *The judgment* in trover, when the verdict is for the plaintiff, is that he recover his damages and costs; its effect is to change the title of the property, so as to make it liable for the payment of the defendant's debts after satisfaction has been made,¹⁵⁸ and the defendant's title refers back to the time of the conversion.¹⁵⁹ The property is not changed by the default of the defendant, but by the recovery of the judgment against him, and the subsequent satisfaction.¹⁶⁰

3554. When the verdict is for the defendant, the judgment is that he recover his costs.

¹⁵⁴ *Robbins v. Packard*, 31 Vt. 570; *Craig v. McHenry*, 35 Penn. St. 120.

¹⁵⁵ *Greenfield Bank v. Leavitt*, 17 Pick. Mass. 3; *Yale v. Saunders*, 16 Vt. 243; *Hepburn v. Sewell*, 5 Harr. & J. Md. 212; *Pierce v. Benjamin*, 14 Pick. Mass. 356, 361; *Rutland R. R. v. Bank of Middlebury*, 32 Vt. 639; *Hibbard v. Stewart*, 1 Hilt. N. Y. 207.

¹⁵⁶ *Green v. Sperry*, 16 Vt. 390.

¹⁵⁷ *Hart v. Skinner*, 16 Vt. 138.

¹⁵⁸ *Rogers v. Moore*, 1 Rice, So. C. 60; *Chartram v. Smith*, 1 Rice, So. C. 229; *Robertson v. Montgomery*, 1 Rice, So. C. 87; *Osterhout v. Roberts*, 8 Cow. N. Y. 43; *Morris v. Berkley*, 2 Const. So. C. 228; *Hepburn v. Sewell*, 5 Harr. & J. Md. 211.

¹⁵⁹ *Hepburn v. Sewell*, 5 Harr. & J. Md. 211; *Stirling v. Garritee*, 18 Md. 468.

¹⁶⁰ *Carlisle v. Burley*, 3 Me. 250.

CHAPTER XXIV.

REPLEVIN.

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3555. *Replevin* is the name of an action brought for the recovery in specie of a personal chattel which has been unlawfully taken and detained from the owner's possession, together with damages for the detention.¹

The invention of this action is ascribed to Glanvil, chief justice under Henry II.² In its origin it was confined to the single instance of taking a distress, and this circumstance probably gave to this action its character of locality, though its remedial operation has since been extended, and it has now become

¹ Hammond, Nisi P. 372; Replevin, or replevy, in Latin *replegiare*, signifies to take back the pledge. This was so called, because, at common law, a person distrained upon applied to the sheriff or his officers, and by their means had the distress returned into his own possession, upon giving security to try the right of taking it in a suit at law, and if that should be determined against him, to return the chattel and goods into the hands of the distrainor. 3 Blackstone, Comm. 13; Coke, Litt. 145, b.

² Mirrour, c. 2, s. 6; Glanville, lib. 4, c. 5, Beames' Translation, p. 87.

the appropriate form of suit for every dispossession or personalty, whether the seizure was made in the name of a distress, or otherwise.

There were, at common law, two actions for the recovery of specific personal property, detinue and replevin. The former was limited to cases where the taking was lawful, but the detention unlawful, or to cases where the plaintiff waived the unlawful taking by bringing the action. The latter applied only to cases where the original taking was tortious as well as the detention. In modern practice this action is regulated almost entirely by statutes, and is of different extent in the different states. In a few it is limited to a few specified cases of unlawful taking;³ in most of the states it applies to all cases of unlawful taking;⁴ and in many, no distinction is made between detinue and replevin, but the same form of action, designated either as replevin or as an action to recover personal property, is used for the purpose of recovering any specific personal property held under a claim of adverse title, whether the taking be lawful or unlawful.⁵

3556. At common law the first proceeding was the issuing of the writ, but in some states it is requisite that this should be preceded by other steps. Under the codes which follow the New York practice, an affidavit must be made that the plaintiff is the owner of the property sought to be replevied, or the action is commenced by filing a declaration, petition, or complaint under oath.⁶ This proceeding is, however, an innovation.

Either before the issuing of the writ or before it is served the plaintiff in replevin is required to give a bond.

The value of the property is fixed by agreement or by appraisal under the statutes, and the bond is conditioned to return the property or its value if the plaintiff does not prevail in the suit. The bond stands in the place of the property, and it is incumbent on the sheriff to see that the security is good before he delivers the property to the plaintiff, for he is responsible at common law for the sufficiency of the sureties.⁷ If no bond is given, the suit will be dismissed.

3557. *The writ* commands the sheriff that, justly and without delay, he cause to be replevied the cattle or goods claimed, which should be particularly specified and described, for a want of such specification or description will render the writ voidable, and it may be quashed;⁸ and when it does not include all the property, the defect cannot be cured by enlarging the description in the declaration.⁹ It should be made returnable at the next term of the court, and not permit a term to intervene before the return day.¹⁰ But the time and manner of issuing this writ are regulated by the provisions of the statutes of the several states, which must of course be observed.¹¹

³ In Connecticut, Virginia, Georgia, and Alabama it lies only in cases of attachment or distress. *Watson v. Watson*, 9 Conn. 140; in Mississippi only for distress, *Wheelock v. Cozzens*, 7 Miss. 279.

⁴ *Harwood v. Smethurst*, 5 Dutch. N. J. 195; *Dame v. Dame*, 43 N. H. 37. It is limited to unlawful taking in New Jersey, Illinois, and South Carolina.

⁵ This is the case in Arkansas, California, Delaware, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, and Wisconsin.

⁶ See *Newell v. Newell*, 34 Miss. 385; *Stephens v. Scott*, 13 Ind. 515; *Hoover v. Rhoads*, 6 Iowa, 505; *Whister v. Roberts*, 19 Ill. 274.

⁷ *Pearce v. Humphreys*, 14 Serg. & R. Penn. 23; *Oxley v. Commonwealth*, 1 Dall. 349.

⁸ *Snedecker v. Quick*, 6 Halst. N. J. 179; *Magee v. Siggerson*, 4 Blackf. Ind. 70.

⁹ *Sanderson v. Marks*, 1 Harr. & G. Md. 252; but see *Finehout v. Crane*, 4 Hill, N. Y. 537.

¹⁰ *Gayward v. Doolittle*, 6 Cow. N. Y. 602.

¹¹ In some of the states, before issuing the writ, the plaintiff must make affidavit of the truth of the facts which authorize its issue. 2 Rev. Stat. of New York, 523, § 7; *Millikin*

3558. By virtue of the writ the sheriff proceeds to take possession of the property described therein, and delivers it to the plaintiff. In Pennsylvania and Delaware, if the defendant claims property in the goods described in the writ, he has a right to retain them by giving a property bond, the condition of which is that he will return the goods if, upon trial, they shall be adjudged to belong to the plaintiff.¹² In such case the sheriff makes a return according to the facts, and when he replevies the goods and delivers them to the plaintiff, as well as when the defendant claims property, he returns that he has summoned him to appear in court.

In New York and Arkansas, also, similar provisions exist for the redelivery of the property to the defendant, but in the other states it is at once delivered to the plaintiff.

3559. If the officer cannot find the goods, he returns *elongata* or *eloigned*, that the goods have been removed out of his jurisdiction.

Upon this return, at common law, the plaintiff may sue out a *capias in withernam*, by which the sheriff is commanded to take the defendant's own goods which may be found in his bailiwick, and keep them safely and deliver them to the plaintiff, until such time as the defendant chooses to submit himself, and allow the distress and the whole of it to be replevied; and he is thereby further commanded that he do return to the court in what manner he shall have executed the writ. This and various other proceedings in English practice are but little known or used in the United States, the action of replevin being regulated by statutes.

3560. Replevin lies in general for any specific personal property capable of separation and identification, and which possesses *indicia* or earmarks by which it may be distinguished from all other property of the same description. Though replevin does not lie for money as such, yet it may be maintained for money in a bag, and taken from the plaintiff in that state.¹³ It does not lie for an undivided share of property.¹⁴ It lies for promissory notes.¹⁵

Chattels, real, cannot be recovered in replevin, and such at common law were title deeds. But it seems that now title deeds can properly be recovered in this action.¹⁶

Articles properly belonging to the realty, but tortiously severed therefrom, may be recovered,¹⁷ as, wood and timber cut down in waste of the premises.¹⁸ But replevin does not lie where, as part of the same act, one disseises the owner of land, and cuts and removes the crops.¹⁹

3561. As the principal object of this action is to obtain the possession of the chattel, the plaintiff must have the right of possession in order to maintain it. The right of possession may arise from a general or special property in the chattel. The general owner may maintain this action, though he never had possession, because the ownership draws to it the right of possession in the absence of other claims.

There are some cases where the general owner has not the right of possession

v. Selye, 6 Hill, N. Y. 623. In Illinois the plaintiff, or some one for him, must make affidavit that "the plaintiff in such action is the owner of the property," etc. *Frink v. Flanagan*, 6 Ill. 35.

¹² *Fisher v. Whoolery*, 25 Penn. St. 197.

¹³ *Wilson v. Duchet*, 2 Mod. 61.

¹⁴ *Low v. Martin*, 11 Ill. 286.

¹⁵ *Graff v. Shannon*, 7 Iowa, 508.

¹⁶ *Wilson v. Rybolt*, 17 Ind. 391.

¹⁷ *Congregational Society v. Fleming*, 11 Iowa, 533; *Laffin v. Griffiths*, 35 Barb. N. Y. 58.

¹⁸ *Waterman v. Matteson*, 4 R. I. 539.

¹⁹ *De Mott v. Hagerman*, 8 Cow. N. Y. 220.

against the holder, and in this case the writ does not lie; as, where the goods are in the possession of a factor who has a lien for advances.²⁰

In general, any one having the right of possession may replevy the chattel,²¹ and the judgment depends upon the facts existing and the rights vested at the commencement of the action.²² A mortgagee not in possession, but with a right to possession at any time at his discretion, may maintain the suit.²³

Mere possession on the part of the plaintiff, coupled with a right against every one except third parties, with whom the defendant has no privity, is sufficient to support the action.²⁴

3562. If the property is held jointly by several parties, they must all join in the action, and one of several tenants in common or joint owners cannot recover possession of the chattel in replevin. This has been held where the chattel is taken on attachment or execution against one part owner. The other part owner may have a remedy in trespass or case, but he cannot in such event recover in replevin.²⁵ And *a fortiori* one tenant in common cannot maintain replevin against his co-tenant, because they are equally entitled to the possession.²⁶

3563. Originally, this action was confined to cases of unlawful distress, but is now generally extended to all cases of unlawful taking. It is the appropriate remedy for the owner of chattels which have been taken on attachment or execution as being the property of another.²⁷ But the action does not lie in favor of the defendant against whom the attachment or execution runs.²⁸ In some states, the action to recover personal property, which takes the place of replevin, lies against the sheriff to recover property which is by statute exempt from execution.²⁹ Property in possession of a sheriff, by virtue of a writ of replevin, cannot be taken from him by another writ of replevin.³⁰

In those states where this remedy is used to recover property unlawfully detained, if the original taking by the defendant was lawful, the detainer does not become unlawful until demand and refusal, or other acts sufficient to constitute a conversion.³¹

3564. *The pleadings* in replevin differ from the pleadings in every other action; they consist of the declaration, the pleas, the replications, and subsequent pleadings.³²

²⁰ *Wood v. Orser*, 25 N. Y. 348; see *Bassett v. Armstrong*, 6 Mich. 397.

²¹ *Moorman v. Quick*, 20 Ind. 67; *District No. 5 v. Lord*, 44 Me. 374.

²² *Currier v. Ford*, 26 Ill. 488; *Alden v. Carver*, 13 Iowa, 253; *Loomis v. Youle*, 1 Minn. 175; *Belden v. Laing*, 8 Mich. 500.

²³ *Frisbee v. Langworthy*, 11 Wisc. 375.

²⁴ *Johnson v. Carnley*, 10 N. Y. 570.

²⁵ *Kimball v. Thompson*, 4 Cush. Mass. 441; *Reinheimer v. Hemingway*, 35 Penn. St. 432.

²⁶ *Barnes v. Bartlett*, 15 Pick. Mass. 71; *Prentice v. Ladd*, 12 Conn. 331; *Azel v. Betz*, 2 E. D. Smith, N. Y. 188; *Noble v. Epperly*, 6 Ind. 414.

²⁷ *Lewis v. Buck*, 7 Minn. 104; *Gimble v. Ackley*, 12 Iowa, 27; *Bassett v. Armstrong*, 6 Mich. 397; *Rodman v. Kelly*, 13 Ind. 377.

²⁸ *Perry v. Richardson*, 9 Gray, Mass. 216; *Musgrave v. Hall*, 40 Me. 498; *Melcher v. Lamprey*, 20 N. H. 403; *Deshler v. Dodge*, 16 How. 622.

²⁹ *Wilson v. Stripe*, 4 Greene, Iowa, 551; *Elliot v. Whitmore*, 5 Mich. 532.

³⁰ *Sanborn v. Leavitt*, 43 N. H. 473; *Dearmon v. Blackburn*, 1 Sneed, Tenn. 390.

³¹ *Conner v. Comstock*, 17 Ind. 90; *Stanchfield v. Palmer*, 4 Greene, Iowa, 23; *Stratton v. Allen*, 7 Minn. 502; *Newman v. Jenne*, 47 Me. 520; *Newell v. Newell*, 34 Miss. 585.

³² In the action of replevin, the names of the pleadings differ from the names in other actions. When the defendant pleads some matter confessing the taking, but showing a lawful title or excuse, such pleading is not (as it would be in other actions) called a plea in bar, but an avowry or a cognizance. The answer to the avowry or cognizance is called a plea in bar; then follows the replication, rejoinder, etc., the ordinary name of each pleading being thus postponed by one step.

3565. *The venue* in replevin, at common law, is local; the declaration must, therefore, disclose the place where the chattel was taken, and the jury should come from the county in which the cause of action is alleged to have arisen; it ought to state a place certain, within the village or town;³³ but in Pennsylvania, it has been held sufficient to allege the taking to be within the county;³⁴ the omission in this respect is cured by verdict.³⁵

In many of the states the action is now transitory, and in these it is generally sufficient, and, in fact, proper to allege the taking in the county, and it is often not requisite to allege any place of taking.³⁶

3566. The declaration is of two descriptions; the plaintiff either declares that the chattels taken are "yet detained," which is termed "counting in the *detinet*;" or he affirms that they "were detained until replevied by the sheriff," which is expressed shortly thus, "detained until," etc., which is called declaring in the *detinuit*.³⁷

When the chattels taken are in their nature distinguishable from all others of a similar kind, the same particularity in describing them which is sufficient in an action of trover will also be sufficient in replevin. But if they do not possess the property of being distinguishable from all others of the same kind or sort, it must be shown in the declaration what *indicia* or earmarks are peculiar to them.

It is to be remarked that when the replevin is in the *detinuit*, the plaintiff should not count for more nor less than the identical chattels replevied; for when he declares for a greater number, the defendant will be entitled, if he avows for the whole and succeeds, to have judgment *de retorno habendo*, for the entire number; and in case he declares for less than the quantity or number replevied, the defendant will, *quoad* the number omitted, be entitled to the same judgment, notwithstanding he had no right to take them.³⁸

When the replevin is in the *detinet*, the value of the chattels must be stated in the declaration and proved on the trial, because if the plaintiff succeeds, the judgment must be that he recover the goods or their value; on the contrary, if the replevin is in the *detinuit*, the value need not be shown, because in this case the plaintiff has the goods already, and, of course, he cannot recover their value, but only damages for the unlawful taking.³⁹

3567. It must appear by the declaration that the plaintiff is proprietor of the chattels; and an allegation that they are his goods is a sufficient averment of his title; but the allegation that he is entitled to the possession is insufficient; it is necessary he should show a general or special property in them.⁴⁰ The declaration should also show that the goods were in his possession at the time they were taken.⁴¹

3568. Formerly, it was presumed that this action was instituted to decide the title to real property; it was then necessary that the defendant should be informed to what spot in particular the plaintiff intended to assert his claim, in order that the defendant might have an opportunity of contesting its validity. For this purpose the plaintiff was obliged to name in the writ the place

³³ Gardner *v.* Humphreys, 10 Johns. N. Y. 53.

³⁴ Mock *v.* Folkrod, 1 Browne, Penn. 60.

³⁵ Gardner *v.* Humphreys, 10 Johns. N. Y. 53.

³⁶ See before, 2830, n.

³⁷ Potter *v.* North, 1 Saund. 347, b, n. (2).

³⁸ See Root *v.* Woodruff, 6 Hill, N. Y. 418.

³⁹ Potter *v.* North, 1 Saund. 347, b, n. (2); Fitzherbert, Nat. Brev. 69 (L); Buller, Nisi P. 52.

⁴⁰ Pattison *v.* Adams, 7 Hill, N. Y. 126; Rowland *v.* Mann, 6 Ired. No. C. 38; Heath *v.* Conway, 1 Bibb, Ky. 398; Smith *v.* Hancock, 4 Bibb, Ky. 222; Loomis *v.* Youle, 1 Minn. 175; but see Cassell *v.* Western Co., 12 Iowa, 47.

⁴¹ Bond *v.* Mitchell, 3 Barb. N. Y. 304; Redman *v.* Hendricks, 1 Sandf. N. Y. 32.

where the chattel was taken.⁴² Although it is not now assumed that the action is brought to determine whether or not the plaintiff has the right of possession of the *locus in quo*, it is nevertheless possible that it may have been commenced with that view; the form is, therefore, still preserved. But as it frequently happens that it is out of the plaintiff's power to ascertain in what place the chattel was first taken, the plaintiff may aver that it was seized in any place where it has been discovered in the possession of the defendant.⁴³

3569. When several chattels have been taken at different places within the same county, the plaintiff may charge the defendant with the whole in one count. In such case, the better form seems to be to show what portion of goods was taken in one place and what in another, to enable the court to give the proper judgment in the event of the defendant avowing for a different cause in each place, and succeeding in his avowry, though it is said he may declare generally for taking twenty oxen in A and B.

3570. The declaration should also allege damages, for an omission in this respect will be fatal.⁴⁴

3571. *The pleas* in replevin are pleas in abatement, the general issue, and special pleas.

3572. *A plea in abatement* does not deny, and therefore, till something further is disclosed, admits the plaintiff's right to detain the chattels; consequently, a return to the defendant cannot be awarded under it. When the defendant has a right to a return, he ought, in addition to the plea in abatement, to avow.⁴⁵ This is a double plea, and at common law it would have been objectionable were it not admissible from necessity, for without it complete justice could not be done; and as the plaintiff has occasioned the duplicity, he cannot complain.⁴⁶ This is the only stage in the case when the defendant can take advantage of the non-joinder of a co-plaintiff in the suit.

3573. *The general issue* is formed by pleading *non cepit*. In its form it may answer the taking alone and not reply to the detention, because if the defendant did not seize the chattels, replevin is not the appropriate form of suit. This plea controverts all material averments in the declaration excepting that which affirms that the goods are the property of the plaintiff.⁴⁷ But the defendant cannot have a return of the goods under this plea;⁴⁸ and therefore, if he wants a return, he must plead that he took the goods in some other place, describing it, and traverse the place laid in the declaration. This is done by the entry of *cepit in alio loco*.⁴⁹ The defendant can only plead *non cepit* or *cepit in alio loco* in case he never had the cattle at all in the place mentioned in the declaration; for if the plaintiff prove that the defendant had the cattle mentioned in the declaration in that place, he will be entitled to a verdict notwithstanding the original taking was in another place.⁵⁰ In order to have a return the defendant must avow or make cognizance, stating the cause for which he distrained.⁵¹

⁴² Potter v. North, 1 Saund. 347, n. (1).

⁴³ Walton v. Kersop, 2 Wils. 354; Abercrombie v. Parkhurst, 2 Bos. & P. 481; Potter v. North, 1 Saund. 347, n. (1); Buller, Nisi P. 54.

⁴⁴ Faget v. Brayton, 2 Harr. & J. Md. 350.

⁴⁵ Lawes, Pl. 78.

⁴⁶ Hammond, Nisi P. 463.

⁴⁷ Trotter v. Taylor, 5 Blackf. Ind. 431; Wilson v. Royston, 2 Ark. 315; Vickery v. Sherburne, 20 Me. 34; Galusha v. Butterfield, 3 Ill. 227; McKinley v. McGregor, 3 Whart. Penn. 370; Hill v. Miller, 5 Serg. & R. Penn. 357; Williams v. Smith, 10 Serg. & R. Penn. 202.

⁴⁸ Simpson v. McFarland, 18 Pick. Mass. 427; Whitwell v. Wells, 24 Pick. Mass. 25; Douglass v. Garrett, 5 Wisc. 85.

⁴⁹ Williams v. Welsh, 5 Wend. N. Y. 290.

⁵⁰ Walton v. Kersop, 2 Wils. N. Y. 354; Potter v. North, 1 Saund. 347, n. (1).

⁵¹ Potter v. North, 1 Saund. 347, n. (1).

When the declaration is for the unlawful detainer of goods, *non cepit* is not a good plea; the general issue in such case is *non detinet*.⁵²

3574. *Special pleas* in replevin may be classified as follows: avowries and cognizances, pleas to the property, pleas in justification, and pleas in excuse and discharge.

3575. *Avowries and cognizances* are substantially the same; they differ from each other mainly in name and form. When the defendant justifies and claims a return of the goods and chattels or damages in his own right or that of his wife he begins his pleading by averring that he "well avows the taking of the goods," and then proceeds to state upon what ground and by what right he took them; as, for rent due, damage done by the plaintiff's cattle, and the like. But when he justifies as bailiff or servant of another, and in the right of the latter, he begins by saying that he "well acknowledges the taking," and then proceeds as in the former case. In the case first stated the defence is called an avowry; in the latter, a cognizance.⁵³

Avowries and cognizances partake as much of the nature of a count or declaration as of a plea in bar; for at the same time that they entitle the defendant to a return of the cattle, goods, or chattels distrained, or the amount of them in damages, with costs, if the action of replevin be determined in his favor, they import a justification of the taking of the distress, either in the defendant's own right or in the right of another, and so protect or defend him from the claim or charge brought against him by the plaintiff.

It is for this reason that the defendant in replevin is said to be both actor and defendant. As defendant he may plead in abatement to the plaintiff's writ, and that were vain if he could not have a return of the things distrained; he is allowed, therefore, after his plea in abatement, to make avowry and cognizance *pro retorno habendo*, as it is called. As actor he claims a right to distrain, and therefore ought to make title to the distress against the plaintiff in replevin who claims property in it.

The criterion when the defendant should or should not make avowry or cognizance is this: when the defendant claims property in himself, he shall have a return on establishing his plea without making avowry or cognizance, because his plea destroys the title of the plaintiff. The title of the plaintiff is equally invalidated when he pleads property in a stranger, and therefore there shall be a return without avowry or cognizance, because, at the time of the distress the defendant had the possession which, if his plea be true, was illegally taken from him by the plaintiff in making the replevin when he had no right. On the contrary, in all pleas that do not show property to be out of the plaintiff, there must be an avowry or cognizance made.

The statute of 4 Anne, c. 16, s. 4, allows the defendant or tenant in any action or suit, or the plaintiff in replevin, with leave of court, to plead as many several matters thereto as he may think necessary. Therefore, not only may the defendant in replevin, as such, make several avowries or cognizances, but the plaintiff may also, by leave of court, plead as many pleas in bar thereto as he may think proper.

Many rules may be found in the elementary books respecting the forms of avowries and cognizances, but as they are governed in general by the same rules as in other cases, it will scarcely be necessary here to state them in detail.⁵⁴ Considered as declarations, avowries are subject to the same general rules as

⁵² *Walpole v. Smith*, 4 Blackf. Ind. 304.

⁵³ *Potter v. North*, 1 Saund, 347, c. n. (4); Comyn, Dig. *Pleader*, 3, K, 13, 14; Stephen, Pl. 218, note; Lawes, Pl. 83.

⁵⁴ See Hammond, Nisi P. 465, *et seq.*; Lawes, Pl. 77 to 87; Comyn, Dig. *Pleader*, 3, K, 13, 14; Bacon, Abr. *Replevin*, K; Dane, Abr. Index, *Replevin*.

declarations in personal actions ; as special pleas in bar, they must possess the same properties which belong to such pleas.

3576. *Pleas denying the plaintiff's property* are obviously pleas in bar, and not in abatement, for they show that the plaintiff has no right to have the chattel restored to him, which is the primary object of the suit.⁵⁵ If the defendant has pleaded property in a stranger, he will be entitled, upon proof, to have the goods returned to him.⁵⁶ When it is pleaded that the property is in a stranger, the plea should not only allege that the goods and chattels mentioned in the declaration were not the property of the plaintiff, but should also state whose they were ;⁵⁷ and when the defendant pleads property in himself, he must still traverse the plaintiff's title.⁵⁸

3577. As matters of defence, *pleas in justification* are similar to avowries, though they differ in form in this, that they disclose the accident which precludes the defendant from having the chattel returned to him ; they commence with an *actio non*, and conclude with praying judgment of the plaintiff's suit.

The following is an instance of a plea of justification : If two are defendants in replevin, the one having taken the chattels as servant of the other, though the principal plead *non cepit*, this will not preclude the servant from justifying in right of his master, and by that means exonerate himself from the charge of damages, for the master's plea is not conclusive that he neither did nor could authorize the taking ; this, however, is a justification, and not an avowry, for the bailiff is, in any case, to have a return only in his master's right, and the latter has abandoned his claim by not insisting on it.

A defendant may also plead in justification when he was authorized by statute to take the chattel ; thus, to an action of replevin for a horse, the defendant pleaded that he took him up as an estray, by virtue of the statute, at his residence, etc., and advertised him as required by law, and that the plaintiff brought the action before ten days had expired, etc. The plea was held good.⁵⁹

3578. *Pleas in excuse and in discharge* of the action of replevin are, both in form and substance, precisely similar to pleas of a like description in trespass.

3579. At common law, *the replication* to a plea in abatement could only take notice of the plea itself, and not of the avowry which is made in addition to it, because, if he replied to both, it might have been objected to on the ground of duplicity ;⁶⁰ and if he replied to the avowry only, he would have admitted the falsity of his writ. One of the objects of the statute of Anne, above mentioned, was to remove the only ground of exception to the practice of answering both the plea and the avowry.

The reply to the avowry is either a plea in abatement or in bar, according to its subject matter. The plea in abatement admits the claim to be well founded, and consequently that the avowant is entitled to a return, but contends that the right has not been insisted on in its appropriate form. The plaintiff's reply to the avowry is considered as a plea in bar, or a plea to the action of the avowry,

⁵⁵ *Rogers v. Arnold*, 12 Wend. N. Y. 30 ; *Martin v. Ray*, 1 Blackf. Ind. 291 ; *Harrison v. McIntosh*, 1 Johns. N. Y. 380 ; *Ingraham v. Mead*, 1 Hill, N. Y. 353 ; *Chambers v. Hunt*, 3 Harr. Del. 339.

⁵⁶ *Ingraham v. Mead*, 1 Hill, N. Y. 353 ; *Phillips v. Townsend*, 4 Mo. 101.

⁵⁷ *Anstice v. Holmes*, 3 Den. N. Y. 244. A plea that the property was not in the plaintiff is informal, but sufficient, and admits proof of property in the defendant or in a stranger. *Dermott v. Wallach*, 1 Black, 96. Where the defendant pleads that he took the goods on execution as the property of A, he cannot show title in B, with whose property he had no right to meddle. *McChing v. Bergfeld*, 4 Minn. 148.

⁵⁸ *Pringle v. Phillips*, 1 Sandf. N. Y. 292.

⁵⁹ *Barnes v. Tannehill*, 7 Blackf. Ind. 604.

⁶⁰ In Ohio, the plaintiff may put in a double replication in a case of replevin. *Cotter v. Doty*, 5 Ohio, 393.

because it opposes the defendant's claim to have the chattel returned ; it is also a replication, because it maintains the demand in the writ.

When the defendant has pleaded *cepit in alio loco* the plaintiff may reply, if the facts warrant it, that the *locus in quo* is known as well by the name given to it in the declaration as by that assigned to it by the defendant, or he may take issue on the plea.

A general replication *de injuria* cannot be replied in replevin, but the opposite party must take advantage of the error by special demurrer.⁶¹

3580. Much of what might have been introduced under the head of *evidence* has been anticipated in considering other parts of this subject.

The general issue *non cepit* admits the plaintiff's title, and of course he need not prove it, but he is required to prove that the defendant had the goods in the place mentioned in the declaration, for the action being local, the place is traversable ; but as the wrongful taking is continued in every place in which the goods are afterward detained, proof that they were, at any time after the taking, in that place, is sufficient.⁶²

When, in addition to the plea of *non cepit*, the defendant also pleads property, either in himself or a stranger, the *onus probandi* is cast upon him.⁶³

In those cases where the plaintiff pleads *non demisit* or *non tenuit* to an avowry for rent in arrear, the defendant must prove the demise, because, on the existence of that his title to recover depends, and the demise proved must be precisely the same stated in the avowry ;⁶⁴ an agreement for a demise is not sufficient.

Rien in arrear, which is the proper plea where the defendant alleges that he has paid up his rent, admits the demise as laid in the avowry, and puts in issue the fact that nothing is due.⁶⁵ The avowant must recover if he can prove that any rent is due, though he may not prove that all is due which he has alleged.⁶⁶ The plaintiff may prove that he has paid the rent to one who had a superior title, as a ground landlord, or for taxes. The time at which the rent was payable, and the amount due, must be proved as laid in the avowry for rent in arrear.⁶⁷

3581. *The judgment* is either for the plaintiff, or for the defendant.

3582. The judgment for the plaintiff varies according to circumstances.

When the replevin is in the *detinuit*, the judgment is that he recover the damages assessed by the jury for the taking and unjust detention, or for the latter only, when the former was justifiable, together with costs.

But if the replevin is in the *detinet*, the verdict should be, in addition to the above, for the value of the chattels, when still detained, not in a gross sum, but of each separate article, because the defendant may restore some of them, but not the whole, in which case the plaintiff may recover the value of the remainder.⁶⁸

3583. In the same manner, the judgment in favor of the defendant varies according to the pleadings.

⁶¹ *Hopkins v. Hopkins*, 10 Johns. N. Y. 369.

⁶² *Potter v. North*, 1 Saund. 347, a, note (1).

⁶³ *Comyn*, Dig. *Pleader*, K, 12; *Clemson v. Davidson*, 5 Binn. Penn. 399; *Seibert v. McHenry*, 6 Watts, Penn. 301.

⁶⁴ *Dunk v. Hunter*, 5 Barnew. & Ald. 322.

⁶⁵ *Williams v. Smith*, 10 Serg. & R. Penn. 203.

⁶⁶ *Bloomer v. Juhel*, 8 Wend. N. Y. 448; *Hill v. Wright*, 2 Esp. 669; see *Weidel v. Roseberry*, 13 Serg. & R. Penn. 178.

⁶⁷ *Waltman v. Allison*, 10 Penn. St. 464. See the reasoning of Coulter, J., as to what may be recovered, under an avowry.

⁶⁸ In many states the usual judgment where the property remains in the possession of the defendant is for a delivery or for damages at the election of the plaintiff. *Pratt v. Donovan*, 10 Wisc. 378; *Pope v. Jenkins*, 30 Mo. 528.

If the replevin is abated, the judgment is that the writ abate, and when, with his plea in abatement, the defendant has avowed, as before mentioned, that he have a return of the chattels.

When the plaintiff is non-suited, the judgment for the defendant, at common law, is that the chattel be restored to him;⁶⁹ unless the defendant has pleaded, and it appears from the matter he has himself disclosed, that he has no right to retain the goods; as, where he shows a defective title, excuses the act, or otherwise makes it plain that he has no title, for the court can make no intendment in his favor contrary to his own acknowledgment; the fact must be taken as admitted, and, according to that, he has no right to a return.

Some alterations in the common law judgment upon a non-suit in replevin have been made by statute. The 21 H. VIII, c. 19, s. 3, gives damages and costs to the defendant in cases of non-suit. And by 17 Car. II, c. 7, s. 1, when a non-suit takes place before issue joined, a writ of inquiry may be issued to ascertain "the sum in arrear at the time of distress taken, and the value of the goods or chattels distrained." And in case the plaintiff shall be non-suited after cognizance or avowry made, and issue joined, or if the verdict shall be against the plaintiff, then the jury, at the prayer of the defendant, shall find the value of the goods, and the avowant or cognizor shall thereupon have judgment for such arrearages, or so much thereof as the goods amount to, together with costs.⁷⁰

The plaintiff will not be entitled to judgment when there are two defendants, and the defence of one shows that the plaintiff has sustained no injury, or that he is not entitled to a restoration of the chattel; this bars his suit *quoad* the other, even though the latter has admitted the claim. Thus, where one defendant pleads *non cepit*, which is found against him, and the other makes an avowry, which is decided in his favor, the plaintiff can have no judgment against either, because the right appears to be in the avowant.

If the avowant succeeds upon the merits, on the trial of his case, the judgment at common law was to have return irreplevisable.⁷¹ The statute of 7 Hen. VIII, c. 4, s. 3, in addition gives costs.⁷²

When the judgment is given upon demurrer for the avowant, or him that makes cognizance, for any rent the court may by virtue of 17 Car. II, c. 7, s. 2, award a writ of inquiry,⁷³ and upon its return, judgment shall be given for the avowant, or him that makes cognizance, for the arrears alleged in such avowry or cognizance to be behind, if the goods or cattle distrained shall amount to that value; and in case they do not amount to that value, then for so much as the goods or cattle distrained shall amount unto, together with full costs of suit.

In some states an alternative judgment for the defendant is given for a return

⁶⁹ *Smith v. Winston*, 10 Mo. 299; *Chadwick v. Miller*, 6 Iowa, 34.

⁷⁰ See *Howard v. Johnson*, 1 Ashm. Penn. 58.

⁷¹ In New Hampshire, judgment for defendant in replevin must be for the value of the chattels replevied and damages, and not for a return of them. *Bell v. Bartlett*, 7 N. H. 178; *Messer v. Bailey*, 30 N. H. 9. In some cases a return will not be ordered, where upon the face of the pleadings or from the evidence given it is apparent that the right of possession which the defendant had at the beginning of the suit exists no longer. Where the defendant's title was only as an attaching officer, the mere fact of the dissolution of the attachment does not prevent judgment for a return. *Dawson v. Wetherbee*, 2 All. Mass. 461.

In many of the states now an alternative judgment is entered for a return or for damages, and the defendant may recover his damages in the replevin suit or may sue on the bond. *Hall v. Smith*, 10 Iowa, 45; *Dilworth v. McKelvy*, 30 Mo. 149. In the absence of other proof, interest on the value is the measure of damages. *Graves v. Sittig*, 5 Wisc. 519.

⁷² See *Easton v. Worthington*, 5 Serg. & R. Penn. 132.

⁷³ *Gibbs v. Bartlett*, 2 Watts & S. Penn. 29.

or for damages, and if no return is made, the damages are recovered on an execution in the replevin suit. But the practice at common law which is followed in many states is to award a writ of return, and if this is not or cannot be executed, the defendant is left to his remedy on the bond. The penalty in this is double the value of the property, which is usually fixed by appraisal under statutes. This appraisal is, however, merely to guide the sheriff in fixing the amount of the bond, and is not conclusive on the defendant;⁷⁴ but being made at the instance of the plaintiff is conclusive on him. The value which the defendant is entitled to recover is the value at the time of return ordered, and demand made, limited, of course, by the penalty of the bond. The measure of damages in a suit on the bond is, in the first place, the value of the goods and the damages and costs awarded in the replevin suit, and, secondly, interest on their value from the time the goods should have been returned, and interest on the damages, and costs from the time of judgment in the replevin suit.⁷⁵ The judgment in the replevin suit is conclusive on the sureties to the bond.

3584. At common law, when the plaintiff in replevin was non-suited, he might sue out a new replevin, which necessarily superseded the execution of the judgment rendered on the non-suit in favor of the defendant *pro retorno habendo*, if it had not been enforced, or, if executed, the chattels were again taken under the new writ and restored to the plaintiff; and thus he might have suffered non pros of the second, third, or any number of suits of replevin, and so by neglecting to follow his suit he might have annoyed the plaintiff continually. To remedy this evil the statute of Westminster second, 13 Edw. I, c. 2, was passed. This statute allows a second writ to be issued upon security being given to the sheriff, "and if he that replevied make default again, or for any other cause return of the distress be awarded, being now twice replevied, the distress shall remain irreprevisable; but if the distress be taken of new and for a new cause, the process above said shall be observed in the same new distress." The writ given by this statute is termed a writ of second deliverance. It is founded on the record of the former suit.⁷⁶

The action of replevin is regulated by the statutes of the different states; these legislative acts contain special provisions so as to prevent the oppressions which it was the object of the statute of Westminster second to remedy.

⁷⁴ *Kafer v. Harlow*, 5 All. Mass. 348.

⁷⁵ *Walls v. Johnson*, 16 Ind. 374.

⁷⁶ 2 Inst. 341.

CHAPTER XXV.

TRESPASS.

- 3585. Definition.
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3585. *The action of trespass* is instituted for the recovery of damages for such injurious acts, and such only, as have been committed with violence, *vi et armis*, to the person, property, or the relative rights of the plaintiff.

It differs from trespass on the case in the fact that that lies for indirect and

consequential injuries not committed *vi et armis*. Trover lies only when the defendant takes personal property and keeps it in his possession, and the bringing of the action waives any unlawfulness in the taking. Trespass will lie for an unlawful taking, but the unlawful keeping then forms no part of the injury, and the action does not lie for an unlawful detention merely.

Trespass to real estate consists in an injury to the possessor not amounting to an ouster or disseisin. Nuisance, like case, is an indirect and consequential injury not committed *vi et armis*. Waste is an injury to the reversion and not to the possession. Ejectment is also a remedy for one not in possession.

3586. *The injuries for which trespass may be sustained* will be considered with reference to the nature of the injury, to the manner of committing the injury, to injuries to the person, to injuries to real property, to personal property, and to the relative rights.

3587. Much difficulty exists in applying the rule which distinguishes the causes for which an action of trespass may be brought from those where case may be maintained.¹ To determine whether a wrong is a trespass or forcible injury, due regard must be had to the nature of the right affected. A wrong with force can be committed only against the absolute rights of personal liberty and security, and to those of property corporeal. Injuries to health and reputation and to property incorporeal cannot be redressed by an action of trespass, because the subject matter to which they relate exists in either case only in idea, and is not to be seen and handled, and therefore not subject to any injury by force.

Trespass may be maintained for an injury to the relative rights occasioned by force; as, for beating or wounding a wife or servant, by which the husband, master, or servant has sustained a loss, though the injury or loss of service were consequential and not immediate; as, for criminal conversation, or seducing away a wife or servant, or for debauching a female servant, for in these cases force is implied, because the wife and servant are considered incapable of giving their consent. In these cases, however, it is more correct to declare in case unless some other trespass has been committed at the same time by the defendant, as, an illegal entry into the plaintiff's house, and then it is advisable to bring trespass and join the two causes in the same action.

To enable the party injured to maintain trespass the wrong must have been the immediate consequence of the acts injurious to the plaintiff, for if the damage sustained is a remote consequence of the act, the injury is to be redressed by an action on the case.²

An injurious effect or consequence alone is said to be immediate which is produced by the primary original cause, without the intervention of any secondary agency: thus, if Paul strike Peter, the injury is immediate, because nothing is interposed between the cause and its effects. But when a secondary cause intervenes, whether it is incited by its own free impulse or compelled to exert it by the influence of the first, the injury has been occasioned by secondary means. Where a man sets a trap in the highway which injures another is an example of the first kind; and the second is illustrated by the case where Peter sets in

¹ In many of those states which still retain the common law names of the forms of actions, the distinction between trespass on the case and trespass has been abolished, and it is enacted that a declaration good for either shall be good for both. This is the case in Maine, Delaware, Virginia, and West Virginia. Me. Rev. St. 1857, ch. 82, sec. 13; Del. Rev. St. 1852; Va. Rev. Code, 1849. In other states the distinction is abolished, and either action is known only as an action of tort. Mass. Gen. St. 1859, ch. 129, sec. 1; Ga. Code, ed. of 1867, § 3196. Under the New York practice, all actions of tort or contract are designated as civil actions. See before, **3031**, note.

² *Cotteral v. Cummins*, 5 Serg. & R. Penn. 343. *Winslow v. Beall*, 6 Call, Va. 44.

motion an agent of destruction, a squib, which is cast toward Paul, who, in danger of being hurt, throws it toward James, and it bursts and does him an injury.³ Various other instances of secondary causes might be adduced; as, where a dam is put across a stream of a river, by means of which the water is forced to overflow its banks, and it injures the neighboring estate, or where the defendant shot the captain of a vessel just ready to sail whereby the voyage was delayed to the injury of the owners.⁴ In these cases the injury is so remote that trespass cannot be sustained, but case is the proper remedy for the consequential wrong.

But there is much difference between a secondary cause or agent and a mere instrument intervening between the original cause and the effect. If Peter thrusts Paul against James to the injury of the latter, the wrong is immediate, because the force which occasioned the inconvenience to his person is that of Peter himself, and Paul is the mere channel by which the *vis impressa* is communicated. This differs materially from the case of the throwing of the squib already mentioned; there Paul, though wholly innocent, is nevertheless the immediate cause or occasion effecting the mischief to James. For this reason, if an action of trespass be brought against him for the supposed injury, he must plead specially the matter in excuse, acknowledging that he himself committed the trespass, and showing that it was involuntary and inevitable; whereas, in the case where Peter thrust Paul against James, if sued in trespass, Paul may plead the general issue, for he was the mere instrument in the hands of Peter.

3588. This action is brought for the recovery of damages; to maintain it, then, some injury must have been committed by the defendant against the plaintiff, for unless some temporal damage has been done, and has actually resulted, or is likely to ensue, no action lies; for example, in contemplation of law, a man's land extends upward to the skies; now suppose a man were to cross it in a balloon, he must break the ideal fence which the law has put around every man's land, and yet, as no damage would ensue from the act, no action of trespass could be maintained against the aeronaut, because he did no injury, and none could result from his act; but if an injury has been done, the degree is wholly immaterial, nor will distinct proof be required upon every occasion that an inconvenience has been sustained, because, in many instances, it is impossible to adduce any evidence of the injury. When one man strikes another it is impossible to say what pain or inconvenience the latter has suffered, and, to insure his safety, the law presumes an inconvenience has resulted to him, and a detriment has followed.⁵

³ *Scott v. Shepherd*, 3 Wils. 403. See *Beckwith v. Shordike*, 4 Burr. 2092; *Davis v. Saunders*, 2 Chitt. 639.

⁴ *Adams v. Hemmenway*, 1 Mass. 145. It is held in Maine that the plaintiff can maintain trespass for an injury to his hay, caused by the overflow of water from a dam built by defendant, but this depends on the statutes. *Reynolds v. Chandler River Co.*, 43 Me. 513.

⁵ *Bullock v. Babcock*, 3 Wend. N. Y. 391; *United States v. Ortega*, 4 Wash. C. C. 534; *Dinkins v. Debruhl*, 2 Nott & M'C. So. C. 85. It is difficult to conceive of a case where the infringement of a right does not cause at least nominal damages, and this often cited case of the balloon is almost a solitary instance. But if it is correct to say that no action lies for such an act, the correct explanation seems to be that the ownership which the land owner has to the air is merely the right to occupy it by building, and when so occupied to be protected in its use; but, until such occupation, the public have a free right of navigation in the air, paying a due regard to the public safety. Recently, in England, a land owner sought an injunction against a balloon, which was frequently sent up from an adjoining lot, to which it remained attached by a rope, but passed or remained over the plaintiff's land, and by the great weight of the car and contents threatened damage to the plaintiff. The decision was in favor of the injunction, but as the case is not reported it is impossible to say whether the acts were held to constitute a trespass or a nuisance; the latter is the correct view, according to the rule given above.

When this detriment or injury resulted necessarily from the acts of the defendant, the damages sustained by the plaintiff are termed general damages, and it is not requisite that he should prove what loss he has sustained, for the proof of the injurious act is sufficient, and if none greater are proved, the law will in such cases give nominal damages. But in some cases the plaintiff actually suffers loss which is not necessarily a consequence of the act complained of, and therefore not implied by law; damages of this kind are denominated special damages. These must be strictly proved.

The detriment or inconvenience sustained must be the necessary consequence of the defendant's misconduct, and not the effect of the negligence of the plaintiff, or produced by the wrongful act of another.⁶

There may be not only acts or wrongs which are evidence of general or special damages, but also which are matters in aggravation of damages, which indicate the *animus* or intention by which the defendant was influenced at the time of committing the trespass; these may be shown in order to aggravate the damages.

In some cases the injury committed is to the feelings of the plaintiff, when in fact he has received no temporal or pecuniary loss or damage; here the law, being founded on general principles, can give no remedy; as, where the defendant seduced the daughter of the plaintiff, who was not his servant. But although such injury is not of itself sufficient to support an action, yet, if the defendant entered the house of the plaintiff to commit the injury, an action may be brought for the wrongful entry, and the plaintiff may allege the seduction as matter of aggravation, and in this way recover damages for the injury done to his feelings.⁷ In this case, the plaintiff does in fact, though not in law, recover for the seduction of his daughter.

But although a detriment has occurred, yet no damage or injury has been sustained by the plaintiff, when the act of the defendant can be justified or excused; as, where the defendant acted in obedience to an authority in law or in fact, or in defence of his absolute or relative rights. And when an injury has taken place which could neither be justified nor excused, it may still be subject to a mitigation of damages; as, where a reasonable cause of suspicion that the plaintiff had committed a felony exists, it may be shown, in mitigation of damages, in an action for false imprisonment,⁸ for when a party is placed under suspicious circumstances, though sometimes it may be only his misfortune, yet it is generally his fault, and the law very properly casts a part, at least, of the ill consequences upon himself. The defendant, in an action for the seduction of a wife or daughter, may, in mitigation of damages, give evidence of facts which show that the consequence resulted in part from the improper, negligent, or imprudent conduct of the plaintiff himself.⁹

These matters in aggravation or mitigation of damages are facts and circumstances which may be proved to increase or diminish the extent of the injury itself; the tort remains, and the circumstances thus proved ought to be those only which belong to the act complained of. The plaintiff is entitled to receive, and the defendant is liable to pay, damages only to the extent of the injury.¹⁰

3589. The injury for which an action of trespass will lie may be committed by the defendant himself, by one under his command, or by his cattle; without process, or under color of legal proceedings.

⁶ *Flower v. Adam*, 2 Taunt. 314. See *Vicars v. Wilcox*, 8 East, 1; *Morris v. Langdale*, 2 Bos. & P. 284.

⁷ See *Stephen*, Pl. 257.

⁸ *Chinn v. Morris*, Ry. & M. 424.

⁹ *Buller*, Nisi P. 27, 296; *Selwyn*, Nisi P. 25; 2 *Greenleaf*, Ev. § 56.

¹⁰ 2 *Greenleaf*, Ev. § 267. See *Bridge v. Grand Junction Railway Co.*, 3 Mees. & W. Exch. 244; *New Haven Steamboat Co. v. Vanderbilt*, 16 Conn. 420.

3590. The individual who commits the unlawful act which has caused the injury is, in general, personally responsible for the consequences, and when several have joined they are all responsible as principals, for in trespass there are no accessories; he who commands or requests another to commit a trespass is himself a principal if the other complies, upon the principle, *qui facit per alium facit per se*. In such case they are both liable, and may be sued jointly or severally by the party injured; the agent, because the authority of the principal cannot justify the wrongful act; the person who directs the act to be done is responsible, according to the maxim, *respondeat superior*.¹¹

Not only may he who commands the commission of a wrong, by which an injury results to another, be held responsible, but also he who after its commission sanctions it, either expressly or by implication. By the common law, "he that receiveth a trespasser, and agreeth to a trespass after it be done, is no trespasser, unless the trespass was done to his use, or for his benefit, and then his agreement subsequent amounteth to a commandment; for, in that case, *omnis ratihabitio retro trahitur, et mandato œquiparatur*."¹² This rule, in relation to the ratification or adoption of the acts of a trespasser, is subject to some exceptions. An infant and a feme covert, having no legal power to consent, will not be considered trespassers by any subsequent assent.

The general responsibility of the master for the torts of the agent has already been considered.¹³ Where a trespass committed by a servant arises from his unlawful manner of executing the master's instructions, the master is, in general, held liable. Thus, a railroad corporation is liable if a conductor unlawfully eject a passenger from the cars, or if in ejecting him for lawful cause he uses excessive force.¹⁴

3591. The owner of animals is responsible for an injury committed by them through his fault or neglect. But a distinction must be observed, not only because the owner will or will not be liable under the circumstances, but also on account of the form of the action brought to redress the injury. When the animals are not necessarily inclined to do mischief, as dogs, horses, and cows, and the owner has no knowledge of any evil propensity, he will not be liable, unless he has been guilty of some fault, or purposely caused the damage.¹⁵ If he has knowledge of such evil propensity, which is called the *scienter*, he is responsible.¹⁶ If, on the contrary, the animals are *feræ naturæ*, of a wild nature, or known to be mischievous or dangerous, as a bear, a lion, or a wolf, or a dog known to bite, and the owner lets them go at large, and any mischief ensue, the owner is liable in trespass for the injury; for the law in such cases presumes the defendant knew of this mischievous propensity.¹⁷ The owner is bound to confine animals *mansuetæ naturæ*, or those of a domestic nature, which have a propensity to rove, as cows, sheep, horses, and the like, and if they escape and

¹¹ 4 Inst. 114; *Sands v. Child*, 3 Lev. 352; *Jones v. Hart*, 1 Ld. Raym. 738; *Britton v. Cole*, 1 Salk. 408; *Laugher v. Pointer*, 5 Barnw. & C. 559; *Perkins v. Smith*, 1 Wils. 328; *Stephens v. Elwall*, 4 M. & S. 259; Comyn, Dig. *Trespass*, C, 1. Where an officer called a stranger to assist him in the execution of a process, and the process did not justify the officer, the person assisting him was held liable as a trespasser. *Elder v. Morrison*, 10 Wend. N. Y. 128. But see *Oystead v. Shed*, 13 Mass. 524; *Hooker v. Smith*, 19 Vt. 151; *Payne v. Green*, 18 Miss. 507.

¹² 4 Coke, Inst. 317. See *Nicoll v. Glennie*, 1 M. & S. 590; *Peddell v. Rutter*, 8 Carr. & P. 337.

¹³ Before, 1337.

¹⁴ *Moore v. Fitchburg R. R.*, 4 Gray, Mass. 465; *Hewett v. Swift*, 3 All. Mass. 420.

¹⁵ *Gardner v. Rowland*, 2 Ired. No. C. 247; *Dolph v. Ferris*, 7 Watts & S. Penn. 367; *Angus v. Radin*, 2 South. N. J. 815.

¹⁶ Bouvier, Law Dict. *Scienter*.

¹⁷ *Leame v. Bray*, 3 East, 595; Bacon, Abr. *Action on the Case*, F.

commit a trespass on the land of another, unless through a defect of fences, which the latter is bound to repair, the owner is liable to an action of trespass.¹⁸

In many of the newly settled states the practice is to allow cattle to graze at will, and it is the duty of the land owner to fence them out, not of the cattle owner to fence them in.¹⁹

3592. In most cases the injury is committed without any color of process, either under a pretence of right or in open violation of that of the plaintiff. The defendant, in such cases, has no excuse, and is liable to an action of trespass, when the injury is immediate and with force, to the corporeal property of the plaintiff in possession.

3593. When the *injury* has been *committed under color of process*, in some cases it can and sometimes it cannot be justified; and the process will shield some persons, and will not give any protection to others.

In the absence of fraud, a judgment of a competent court, having jurisdiction, is a complete justification to all persons acting under it, or any proceedings lawfully founded upon it by authority of such court. The plaintiff, his attorney, and the ministerial officer, are fully justified. If fraud has been practiced in obtaining the judgment, trespass may be maintained against the person who has been guilty of it;²⁰ thus, where a justice of the peace, being the owner of a promissory note payable to A or bearer, instituted a suit upon it in the name of B, as bearer, against the maker, returnable before himself, rendered judgment by default, issued execution upon it, and caused the defendant to be arrested and imprisoned, knowing at the time he was the owner, and acting therein to collect his own debt, he was held liable in trespass for such arrest and imprisonment.²¹ It is a maxim, founded in common sense, that a man cannot at the same time be a judge and a party: *Nemo iudex in causa propria*.²² In case of an excess of jurisdiction, trespass may be supported for any thing done under such proceedings.²³

When the court has no jurisdiction over the subject matter, this form of action is the proper remedy against all parties who have been guilty of a trespass while acting under its judgment or subsequent proceedings.²⁴ But the officer who executes the writ will be protected, unless it appears upon its face that the court has no jurisdiction.²⁵ Where an inferior court has jurisdiction over the subject matter, but is bound to adopt certain forms in its proceedings, from which it deviates, the proceedings are rendered *coram non iudice*, and, therefore, void; for an injury committed under them, where trespass would lie if there had been no such proceedings, trespass is the proper remedy.²⁶

When the court has jurisdiction but the proceeding is defective, as being irregular, it is nevertheless a judgment to all intents and purposes, until set aside by the court, who inadvertently, and through the fraud of the plaintiff, pro-

¹⁸ *Dolph v. Ferris*, 7 Watts & S. Penn. 367; *Angus v. Radin*, 2 South. N. J. 815; *Gardner v. Rowland*, 2 Ired. No. C. 247. In this respect the civil law agrees with our own. Domat, Lois Civ. liv. 2, t. 8, s. 2.

¹⁹ See *Vicksburg R. R. v. Patton*, 31 Miss. 156; *Gorman v. Pacific R. R.*, 26 Mo. 441; *Cleveland R. R. v. Elliott*, 4 Ohio, St. 474.

²⁰ *Johnston v. Sutton*, 1 Term, 538.

²¹ *Dyer v. Smith*, 12 Conn. 384.

²² *Duval*, Le Droit dans ses Maximes, 15; *Sigourney v. Sibley*, 21 Pick. Mass. 101.

²³ *Blood v. Sayre*, 17 Vt. 609.

²⁴ *Allen v. Greenlee*, 2 Dev. No. C. 370; *Allen v. Gray*, 11 Conn. 95; *Kennedy v. Terrill*, Hard. Ky. 490; *Rembert v. Kelly*, Harp. So. C. 65; *Poulk v. Slocum*, 3 Black. Ind. 421; *Williams v. Brace*, 5 Conn. 190; *Stephens v. Wilkins*, 6 Penn. St. 260.

²⁵ *Grumon v. Raymond*, 1 Conn. 40; *Churchill v. Churchill*, 12 Vt. 661; *Young v. Wise*, 7 Wisc. 128.

²⁶ Those acts are said to be *coram non iudice* when the court has no jurisdiction, either over the person, the cause, or the process. *Grumon v. Raymond*, 1 Conn. 40.

nounced it;²⁷ for a record is of so high a nature that it cannot be impeached in a collateral proceeding, but when set aside, the case is then as if no judgment had ever existed, and the consequences are the same.²⁸ An erroneous judgment is the fault of the court and not of the party; and inasmuch as the judges will be protected in their acts done under it, notwithstanding it is afterward reversed, so will the plaintiff in the suit, and all who assist him.²⁹

When the process has been misapplied trespass will lie, as, where the officer having a *feri facias* against Peter takes and levies upon the property of Paul,³⁰ or, if there be a misnomer in the process, though executed on the person or goods of the party against whom it was in fact issued; for upon the face of the proceedings it appears there was no authority,³¹ unless, indeed, the defendant himself has occasioned the mistake.³² But where an officer acts according to the exigency of his process in making an arrest, he is not a trespasser, although the party arrested is privileged from arrest.³³

Trespass can be maintained against a sheriff and his officers for abusing the regular process of the court if the conduct of the officer was in the first instance illegal, and an immediate injury to the person, personal, or real property ensue; as, if the officer arrest the defendant out of his bailiwick or after the return day of the writ,³⁴ or if he break open an outer door without first making a demand to have it opened,³⁵ or if the process be served by a person not lawfully authorized.³⁶ Whenever the process is regular and the conduct of the officer in the first instance is lawful, but his subsequent conduct becomes unlawful by the abuse of his authority, he thereby becomes a trespasser *ab initio*;³⁷ as, if he sell an article he has seized before the time prescribed by law;³⁸ or if he levy upon property and advertise it for sale, and neglect to sell it upon the execution;³⁹ or having a writ against one defendant, he sell the entire property in goods owned by two jointly;⁴⁰ or where he sells after knowing the judgment to be satisfied.⁴¹ A slight mistake in executing process, such as any person of ordinary care might make, showing no wrongful intent on the part of the officer and causing no injury, is not such an abuse as to make him a trespasser *ab initio*.⁴² And in some cases mere acts of non-feasance will make him a trespasser *ab initio*; as, where he neglects to discharge a party out of custody when he ought to do so,

²⁷ Egerton v. Hart, 8 Vt. 208; Warburton v. Aken, 1 McLean, C. C. 460; La Grange v. Ward, 11 Ohio, 257; Sweiggart v. Harber, 5 Ill. 364; Haner's Appeal, 5 Watts & S. Penn. 473.

²⁸ White v. Albertson, 3 Dev. No. C. 241; Williams v. Woodhouse, 3 Dev. No. C. 257; Obert v. Hammel, 3 Harr. Del. 73; Banister v. Higginson, 15 Me. 73.

²⁹ Phillips v. Hiron, Strange, 509; Neth v. Crofut, 30 Conn. 580; Brainard v. Head, 15 La. Ann. 489; Sheldon v. Stryker, 34 Barb. N. Y. 116; Lancaster v. Lane, 19 Ill. 242.

³⁰ Sanderson v. Baker, 3 Wils. 309; McMahan v. Green, 34 Vt. 69; Nagle v. Mullison, 34 Penn. St. 48; Markley v. Rand, 12 Cal. 275; Trieber v. Blocher, 12 Md. 1.

³¹ Cole v. Hindson, 6 Term, 234.

³² Price v. Harwood, 3 Campb. 108; Trull v. Howland, 10 Cush. Mass. 109.

³³ Chase v. Fish, 16 Me. 132; Carle v. Delesdenier, 13 Me. 363; Wilmarth v. Burt, 7 Metc. Mass. 257; Woods v. Davis, 34 N. H. 328.

³⁴ Parrot v. Mumford, 2 Esp. 585; Parmlee v. Leonard, 9 Iowa, 131.

³⁵ Douglass v. The State, 6 Yerg. Tenn. 525; Swain v. Mizner, 8 Gray, Mass. 182.

³⁶ Bebee v. Steel, 2 Vt. 314; Johnson v. Stone, 40 N. H. 197; Barley v. Tipton, 29 Mo. 206.

³⁷ Bacon, Abr. *Trespass*, B; Everett v. Herrin, 48 Me. 537; Burton v. Calaway, 20 Ind. 469.

³⁸ Smith v. Gates, 21 Pick. Mass. 55; Ross v. Philbrick, 39 Me. 29.

³⁹ Bond v. Wilder, 16 Vt. 393.

⁴⁰ Waddell v. Cook, 2 Hill, N. Y. 47; Melville v. Brown, 15 Mass. 82; Edgar v. Caldwell, 1 Morr. Iowa, 434; Frisbee v. Langworthy, 11 Wisc. 375.

⁴¹ Kuhn v. North, 10 Serg. & R. Penn. 399; Breck v. Blanchard, 20 N. H. 323.

⁴² Dwinnels v. Boynton, 3 All. Mass. 310; Taylor v. Jones, 42 N. H. 25; Fullam v. Stearns, 30 Vt. 443.

as where he retains him for fees not due,⁴³ or where he neglects to return the process into court according to its requirements.⁴⁴ But in general, case, and not trespass, is the proper remedy for mere non-feasance.

When an arrest is made without warrant by a ministerial officer on the information he has received from others, and the information turns out to be unfounded, he is liable to an action of trespass, for he stands in the same situation as if he had received no such information;⁴⁵ and when an officer proceeds without warrant and without foundation upon his own apprehension, though there was probable cause, trespass is the form of action; though, if there was probable cause, this may be shown in evidence in mitigation of damages; and it was held that under the general issue the defendant might for the same purpose prove what were the contents of the plaintiff's trunk for the purpose of showing that he was addicted to burglary.⁴⁶

No officer authorized to execute a writ or warrant is liable in trespass for executing such process, however malicious his conduct may be, because, being authorized to execute the writ, the law will protect him in the performance of that duty; and if he is guilty of any malicious conduct, he may be punished by being mulcted in damages in action on the case.⁴⁷

3594. For an *injury* done to the person immediately and with force, trespass is the only remedy; as, for an assault and battery, wounding, or false imprisonment.

3595. In another place the nature of assaults, batteries, woundings, mayhems, and all other injuries to the person, committed with force, has been fully considered;⁴⁸ for any of these the plaintiff may maintain an action of trespass.

3596. *The damage* consequent upon an assault consists in the inconvenience produced by the fear which the act impresses upon the plaintiff's mind, and such impression can only arise when the attempt to injure is coupled with a present ability; the plaintiff must be placed within reach of the offensive means, or he has not been injured. Thus, if the assault consists in lifting up one's fist in a threatening manner, the plaintiff must stand within reach of the blow; if pointing a gun at him, the plaintiff must be within its range.⁴⁹

3597. A battery, however slight it may be, causes a damage for which an action of trespass may be maintained, for it may be assumed that pain has followed the touch, and, unless it can be excused or justified, the plaintiff will be entitled to damages.⁵⁰

In estimating the damages, a wide discretion must necessarily be left to the jury, and most of the elements are incapable of accurate pecuniary valuation. But the principal elements which are to be considered by the jury are the bodily pain and suffering of the plaintiff; the loss of time and labor, from the time of the assault until recovery from its effects; expenses of medical and surgical attendance; any permanent loss of health; and incapacity on the part of the plaintiff to pursue his usual occupation.⁵¹ It seems that mental suffering from the indignity of an assault may also be taken into consideration.

Although, as a general rule, exemplary or vindictive damages cannot be re-

⁴³ *Smith v. Gibson*, 1 Wils. 153.

⁴⁴ *Williams v. Ives*, 25 Conn. 568.

⁴⁵ *Stonehouse v. Elliot*, 6 Term, 316.

⁴⁶ *Russell v. Shuster*, 8 Watts & S. Penn. 308.

⁴⁷ *People v. Warren*, 5 Hill, N. Y. 440; *Hart v. Dubois*, 20 Wend. N. Y. 236; *Parker v. Smith*, 6 Ill. 411; *Ludington v. Peck*, 2 Conn. 700; *Beaty v. Perkins*, 6 Wend. N. Y. 382; *Fortner v. Flamagan*, 12 Ala. 257; *Smith v. Miles*, 1 Hempst. C. C. 34.

⁴⁸ Before, 2210 to 2234.

⁴⁹ *Comyn, Dig. Battery, C*; *Morton v. Swoppee*, 3 Carr. & P. 373.

⁵⁰ 1 *Hawkins*, P. C. 263; *Hawe v. Planner*, 1 Saund. 14; *Jennings v. Fundeburg*, 4 M'Cord, So. C. 161; *Cole v. Turner*, 6 Mod. 149.

⁵¹ See *Donnell v. Sandford*, 11 La. Ann. 445; *Cochran v. Ammon*, 16 Ill. 316.

covered, yet they have sometimes been allowed in cases of great personal injury, done wantonly or maliciously.⁵² But it is well settled that in the absence of malice, only the actual damage sustained can be recovered.⁵³

3598. Trespass is the proper remedy for the several acts of breaking through an inclosure, and coming into contact with any corporeal hereditament, of which another is the owner or in possession, and by which a damage has ensued. This form of action is known technically as trespass *quare clausum fregit*.

This subject will be examined with reference to the nature of the property affected; the plaintiff's right or title in the same; and the nature of the injury.

3599. The real property affected must in general be something tangible and fixed; as, a house, a room, an out-house or other building, or land; land, however, in its most extensive signification, includes all of these. There is an ideal or imaginary fence which encircles every man's estate, reaching in extent *a superficie terræ usque ad cælum*, when he is the owner of the surface, and downward as far as his property descends; this right entitles him to a compensation in damages for the injury he sustains by the act of another passing through the boundary; this injurious act is denominated a breach of the inclosure.

The owner of the vesture of land, *vesturæ terræ*, or *herbagii pasturæ*,⁵⁴ has a right to exclude others from entering upon the superficies of the soil.⁵⁵

To ascertain whether the right of the plaintiff has been invaded by an intrusion of his real property, consider whether the owner of an estate may encircle it with a visible fence; if so, his right is complete, and the law raises an imaginary fence, where he had a right to put a substantial visible one. It is for this reason that if a man enters into the house of another, the door being open, he is said to break into it.⁵⁶

3600. As the public in general have only the easement or use of a highway, the soil remains in the owner of the land, and the owner of the soil may therefore maintain trespass against one who deposits fence rails on the highway;⁵⁷ for it is a breach of his close, the term close being technical, and signifying the interest in the soil, and not merely an inclosure in the common acceptation of the term.⁵⁸

So the owner of the fee in a way may bring trespass where one builds windows projecting over the way, or places a shaft for machinery under it.⁵⁹

3601. The action of trespass to real estate is local; the property injured must, therefore, be situate within the territorial jurisdiction of the court where the suit is brought, so that trespass cannot be maintained in one state for a trespass in entering a house located in another.⁶⁰

3602. The property affected must be corporeal, that is, such as is subject and palpable to the senses, and not such as is incorporeal, consisting of easements, rights of way, and the like. An action of trespass for an injury to a way, public or private, by which the plaintiff has sustained damages, cannot be main-

⁵² *Pike v. Dilling*, 48 Me. 439; *Brown v. Chadsey*, 39 Barb. N. Y. 253; *Foote v. Nichols*, 28 Ill. 486; *Frink v. Coe*, 4 Greene, Iowa, 555; *Dorsey v. Manlove*, 14 Cal. 553; *Nagle v. Mullison*, 34 Penn. St. 48.

⁵³ *Heil v. Glanding*, 42 Penn. St. 493; *Carter v. Tufts*, 15 La. Ann. 16.

⁵⁴ By vesture of land is meant all things, except trees, which grow upon its surface, or which, as the term imports, clothe it externally.

⁵⁵ *Coke*, Litt. 4, b.

⁵⁶ 11 Hen. IV, Trin. 16, p. 75.

⁵⁷ *Lewis v. Jones*, 1 Penn. St. 336; *Robbins v. Borman*, 1 Pick. Mass. 122; *Perley v. Chandler*, 6 Mass. 454; *Adams v. Emerson*, 6 Pick. Mass. 57; *Hunt v. Rich*, 38 Me. 195.

⁵⁸ *Doct. & Stud. dial.* 1, c. 8, p. 30; *Stammers v. Dixon*, 7 East, 207.

⁵⁹ *Codman v. Evans*, 5 All. Mass. 308; *Estee v. Baker*, 48 Me. 495. Trespass is the proper remedy where the defendant conveyed to the plaintiff, reserving a right of way, and afterward built a house in the way. *Hays v. Askew*, 7 Jones, No. C. 272.

⁶⁰ *Doulson v. Matthews*, 4 Term, 503.

tained, the proper remedy is case.⁶¹ Case is also the proper remedy for any disturbance of an easement.

3603. A pew, although tangible, is not such corporeal property in possession for which trespass will lie, and, therefore, the owners of a church or meeting house may pull it down, and by that means destroy the pew.⁶²

3604. To maintain trespass for a tortious entry upon real estate, the plaintiff must have a title accompanied by actual possession, or simply the actual possession; and this property or right need not be to the fee; or it may be a property in trees, or vesture of the land, independently of the ownership in the soil. So it may also be in any portion of the vesture, as in the herbage, or the like; and the estate therein may, as in the land itself, be absolute, or only for a limited period. Each of these may be holden by a different tenure, and they are to be accounted as separate and distinct from one another.⁶³

A trespass is not injurious to the right, but only to the possession; no one can, therefore, consider himself aggrieved by a trespass who was not in possession of the property injured at the time,⁶⁴ and had not a right to that possession.⁶⁵ But a constructive possession is sufficient for that purpose.⁶⁶

The proprietor of land cannot maintain an action of trespass unless he has first possessed himself of the soil by entry upon it, and it is immaterial whether he became proprietor by purchase or by operation of law. His entry, when once made, has a retrospective effect, and he is considered to have been in possession from the moment his title accrued; in the case of an heir, from the death of the ancestor; a devisee, from the decease of the devisor; a personal representative, from the demise of the testator or intestate; and a purchaser, from the conclusion of the contract.⁶⁷

When the possession, once acquired, has been interrupted for a time, it must be regained before the owner of the land can punish a trespass committed after his right of repossession accrued. If, for example, Peter lease to Paul land for years, and after the determination of the term, before Peter re-enters, John, a stranger, enters, and subverts the soil, Peter cannot demand a reparation for his injury before he repossesses himself of the property; but, having done so, the same relation back which obtains in the former cases has also place in this, so that, after Peter's re-entry, he is considered as having been in possession from the moment when the term expired.

The entry may be made upon a part of the land, in the name of the whole,⁶⁸

⁶¹ Comyn, Dig. *Action on the Case, Disturbance*, A, 2.

⁶² *Daniel v. Wood*, 1 Pick. Mass. 102; *Stocks v. Booth*, 1 Term, 430.

⁶³ *Stammers v. Dixon*, 7 East, 200. A grantor who has in his deed reserved the trees may maintain trespass against his grantee for cutting and carrying them away. *Goodwin v. Hubbard*, 47 Me. 595. See also *Haskin v. Record*, 32 Vt. 575.

⁶⁴ *Bedlingfield v. Onslow*, 2 Lev. 209; *Richardson v. Palmer*, 38 N. H. 212. A servant, put in the occupation of a cottage, with less wages on that account, does not occupy it as a tenant, but the master may consider himself in possession. *Bertie v. Beaumont*, 16 East, 33.

⁶⁵ *Addleman v. Way*, 4 Yeates, Penn. 218; *Torrence v. Irwin*, 2 Yeates, Penn. 210; *Chatham v. Brainerd*, 11 Conn. 60; *Truss v. Old*, 6 Rand. Va. 556; *Begelow v. Lehr*, 4 Watts, Penn. 337; *Shepard v. Pratt*, 15 Pick. Mass. 32; *Beggs v. Thompson*, 2 Ohio, 95; *Rockwell v. Jones*, 21 Ill. 279; *Zell v. Ream*, 31 Penn. St. 304.

⁶⁶ *Davis v. Clancy*, 3 M'Cord, So. C. 422; *Bulkley v. Dorbeare*, 7 Conn. 233; *Terpenning v. Gallup*, 8 Iowa, 74; *Safford v. Basto*, 4 Mich. 406.

⁶⁷ In New Hampshire, an heir, a devisee, or grantee, may bring trespass without first making an entry. *Dexter v. Sullivan*, 34 N. H. 478; *Warren v. Cochran*, 29 N. H. 379. A purchaser who allows his vendor to remain in possession on sufferance merely may bring trespass against a third party. *Chesley v. Brockaway*, 34 Vt. 550. It is held in Massachusetts that a mortgagee not in possession may maintain trespass against one who removes a building from the premises. *Cole v. Stewart*, 11 Cush. Mass. 181.

⁶⁸ So a party who has possession of a farm may maintain trespass for an injury to the inclosed woodland attached to it. *Penn v. Preston*, 2 Rawle, Penn. 14.

either in person or by attorney. If a stranger of his own accord, without any authority from the owner, enters to the owner's use, who afterward recognizes the act, this makes the stranger attorney *ab initio*.⁶⁹ And if one of several joint tenants, or tenants in common, enters, they being jointly entitled to the possession, his entry inures to the benefit of all.⁷⁰

With regard to the nature of the possession, it is to be observed that a mere possession is sufficient against any party who cannot show a better title, or, as it is generally expressed, against a mere wrong-doer.⁷¹ For example, a female servant has such possession of her bed-room as will entitle her to maintain trespass against a person who wrongfully forces himself into it while she is in bed;⁷² and so a carpenter has sufficient possession to maintain trespass for an injury with force of premises which he possesses for the purpose of repairing them.⁷³ It is no defence to an action of trespass *quare clausum fregit* brought by the plaintiff in possession to show that the title of the premises is in a stranger, unless the defendant also show an authority from the stranger to do the act complained of.⁷⁴

But though a tenant at will or sufferance may maintain trespass against a wrong-doer, he cannot support this action against his landlord, because an entry by the latter determines the tenancy.⁷⁵

One who has a mere incorporeal right cannot maintain trespass for its invasion; as a party having a right of common of pasture cannot support trespass *quare clausum fregit* for treading down the grass growing upon the land upon which he has such right of common, for although he has a right to take the grass by the mouth of his commonable cattle, still he is not considered in possession of the land.⁷⁶

A reversioner or remainder-man, who has no right to possession, cannot maintain trespass for a wrong done to the estate; their remedy, when the reversionary interest or the remainder has been injured, is an action on the case.⁷⁷

The purchaser of a growing crop has sufficient possession to maintain trespass against a stranger who enters and cuts it.⁷⁸

3605. The injury to real property for which trespass can be supported, we have seen, must have been committed with force actual or implied, and must have been immediate. Though the act of breaking into the inclosure of the proprietor is, in general, injurious to him, still it may take place without causing him any damage, and in that case he cannot recover any compensation.⁷⁹ It will be recollected that the owner of the superficies is entitled upward *a superficie terræ usque ad cælum*, and that his property is inclosed with an imag-

⁶⁹ Croke, Eliz. 561.

⁷⁰ *Smith v. Dale*, Hob. 120.

⁷¹ *Catterlin v. Douglass*, 17 Ind. 213; *Albin v. Lord*, 39 N. H. 196; *Rogan v. Perry*, 6 Wisc. 194.

⁷² *Lewis v. Ponsford*, 8 Carr. & P. 687.

⁷³ *Hall v. Davis*, 2 Carr. & P. 33. See *Graham v. Peat*, 1 East, 246.

⁷⁴ *Finch v. Alston*, 6 Ala. 83; *Barstow v. Sprague*, 40 N. H. 27; *Weimer v. Lowery*, 11 Cal. 104; *Wilson v. Hinsley*, 13 Md. 64.

⁷⁵ Comyn, Dig. *Trespass*, B, 2; *Starr v. Jackson*, 11 Mass. 520; *Hingham v. Sprague*, 15 Pick. Mass. 102; *Mason v. Holt*, 1 All. Mass. 45. A landlord who has entered to determine a tenancy at will may maintain trespass for a subsequent entry by the tenant. *Mussey v. Scott*, 32 Vt. 82.

⁷⁶ Brooke, Abr. *Trespass*, pl. 174; Bacon, Abr. *Trespass*, C, 3.

⁷⁷ *Lienow v. Ritchie*, 8 Pick. Mass. 235; *Taylor v. Townsend*, 8 Mass. 411, 415; *Cannon v. Hatcher*, 1. Hill, So. C. 260; *Shattuck v. Gragg*, 23 Pick. Mass. 104.

⁷⁸ *Dolloff v. Danforth*, 43 N. H. 219.

⁷⁹ Every trespass on real estate is an injury, and whether damage be caused or not, yet the plaintiff is entitled to a verdict and to nominal damages at least. *Attwood v. Fricot*, 17 Cal. 37; *Champion v. Vincent*, 20 Tex. 811.

inary fence, of course extending upward *usque ad coelum*. The breaking of this imaginary line is a trespass; but if it be broken without causing any damage to the owner, as, where a man flies a kite across the land of another, at a considerable height from the surface, no action lies. But to prove that it is a trespass, it is only necessary to consider that if the line should break, and the instrument fall upon the land, the owner would not be justified in entering upon it to carry it away, as he would be if the kite had been placed there without any fault of his own.⁸⁰

It is perfectly immaterial whether the wrong-doer intended to commit a trespass or not, except that if it be clearly shown he did not intend to commit the injury, the jury will take this matter into consideration in assessing the damages; but he will be liable to make compensation for the injury he has caused.⁸¹ The injury may be committed without going on the plaintiff's land, as when the defendant shoots game on the land while standing on the public highway; in such case the entry of the shot is considered as his entry,⁸² though, in general, when the injury is committed off the plaintiff's land, the remedy is case.

3606. It frequently happens that the entry is lawful, and therefore no action could be had against the person who made it; but by his subsequent acts, which are unlawful, he becomes a trespasser *ab initio*, for the law will not permit that a man whom it has armed with authority shall, under pretence of enforcing its requirements, commit a wrong.⁸³ Thus, if a landlord enter to determine a lease at will, which is a lawful act, and he had the right so to enter, and afterward unlawfully made a search there for stolen goods, he will be a trespasser *ab initio*.⁸⁴ But the abuse of a license given to the defendant by the plaintiff to enter his land will not make him a trespasser *ab initio*.⁸⁵

3607. The action of trespass is the proper remedy for *injuries to personal property*, which may be committed by the several acts of unlawfully striking, chasing, if alive, and carrying away to the damage of the plaintiff, a personal chattel of which he is in possession.⁸⁶ Where the injury consists in causing damage to the property, the action is trespass *vi et armis*; where the defendant has taken possession and detains the property, the action is trespass *de bonis asportatis*. This will be considered with reference to the nature of the thing affected, the plaintiff's right to it, and the nature of the injury.

3608. Trespass lies for taking or injuring all inanimate personal property of which possession may be had, and all animals of a domestic or tame nature, as horses, cattle, dogs, cats, and the like, and all animals of marketable value, such as parrots and monkeys; and it is the proper remedy also for taking or injuring animals *feræ naturæ* when reclaimed, or their bodies when dead; the taking and injuring may be done either by striking, or chasing, if alive, and carrying away the chattel. Although the thing of which the plaintiff has been deprived is only susceptible of a qualified property, as are all animals *feræ*

⁸⁰ Hammond, Nisi P. 164, 165, 168; 2 Rolle, Abr. 567, L, pl. 1.

⁸¹ Luttrell v. Hazen, 3 Sneed, Tenn. 20; Pearson v. Inlow, 20 Mo. 322.

⁸² Keble v. Hickringill, 11 Mod. 74, 130.

⁸³ Gilson v. Fisk, 8 N. H. 404; Bradley v. Davis, 14 Me. 44; Jarrett v. Gwathmey, 5 Blackf. Ind. 237; Sackrider v. McDonald, 10 Johns. N. Y. 253.

⁸⁴ Faulkner v. Alderson, Gilm. Va. 221.

⁸⁵ Cushing v. Adams, 18 Pick. Mass. 110, 114; Allen v. Crofoot, 5 Wend. N. Y. 506; Wendell v. Johnson, 8 N. H. 220; Stone v. Knapp, 29 Vt. 501; Humnewell v. Hobart, 42 Me. 565. But see Kissecker v. Monn, 36 Penn. St. 313. Where one entered upon land under an agreement to purchase it, but refused to fulfil his agreement, but cut and carried off timber, it was held that he became a trespasser *ab initio*. Lyford v. Putman, 35 N. H. 563.

⁸⁶ Wright v. Ramscot, 1 Saund. 84, n. 2, 3; Fitzherbert, Nat. Brev. 86; Brooke, Abr. *Trespass*, pl. 407.

naturæ, still the plaintiff may maintain this action; for though under these circumstances a suit by which the value of the chattel is sought to be recovered, such as detinue and trover, cannot be supported, yet trespass may, for the very reason that the value of the property injured is not necessarily demanded in this action; the plaintiff may recover a compensation for the act of dispossessing him.

Where the technical forms of actions are retained, it is sometimes important in this action to observe the distinctions between real and personal estate. Where real estate is entered upon, the proper remedy is trespass *quare clausum*, and injuries committed by the same act upon chattels on the premises are merely matters of aggravation.⁸⁷ But trespass *de bonis asportatis* lies also for carrying off fixtures or portions of a building temporarily dis severed therefrom.⁸⁸

3609. It is not requisite that the plaintiff should have any other title to the property than possession, because it is for an injury to his possession that the compensation is given him. When the injury was committed he must have had an actual or constructive possession, and also a general or qualified property.⁸⁹

This property may be either where the party is general owner and entitled to immediate possession; the qualified owner coupled with an interest, and also entitled to immediate possession; a bailee with a naked authority simply; or it may arise from actual possession without the consent of the owner, or even against his consent.

3610. It is a rule or maxim of law that absolute property in personalty *prima facie* draws to it the possession;⁹⁰ if a man, therefore, is the absolute proprietor of a chattel and also entitled to possession, notwithstanding it is out of his custody, yet, in contemplation of law, he is actually possessed; as, when the owner has parted with his possession to a carrier or a servant, giving him only a bare authority to carry or keep, not coupled with an interest in the thing.⁹¹ Assignees under a voluntary assignment who are entitled to the possession of personal property may therefore maintain trespass for it;⁹² and so may executors or administrators for an injury to property committed after the death of the testator or intestate, and before probate or granting letters of administration.⁹³

But if the general owner of property part with his possession, and the bailee at the time the injury was committed have a right exclusively to use the thing, the inference of possession is rebutted and the owner has only a right of possession in reversion, in that case he cannot maintain trespass;⁹⁴ the bailee may

⁸⁷ *Sturgis v. Warren*, 11 Vt. 433; *Reed v. Peoria R. R.*, 18 Ill. 403.

⁸⁸ *Wadleigh v. Janvrin*, 41 N. H. 503.

⁸⁹ *Mather v. Trinity Church*, 3 Serg. & R. Penn. 512; *King v. Humphreys*, 10 Penn. St. 217; *Brainard v. Barton*, 5 Vt. 97; *Parsons v. Dickinson*, 11 Pick. Mass. 382; *Daniels v. Pond*, 21 Pick. Mass. 367; *Clark v. Carleton*, 1 N. H. 110; *Daniel v. Holland*, 4 J. J. Marsh. Ky. 18; *Putman v. Wyley*, 8 Johns. N. Y. 432; *Hoyt v. Gelston*, 13 Johns. N. Y. 141.

⁹⁰ *Burser v. Martin*, Croke, Jac. 46; *Wilbraham v. Snow*, 2 Saund. 47, a, b, d.

⁹¹ *Walker v. Wilkinson*, 35 Ala. n. s. 725; *Gauche v. Mayer*, 27 Ill. 134. The general owner may bring trespass when he is entitled to possession at the time of the injury; as, where he has entrusted the chattel to a bailee "until called for," although he has not "called for" it. *Staples v. Smith*, 48 Me. 470. Where a trespasser cuts trees upon the land of a tenant for life they become the absolute property of the reversioner, and he may bring trespass. *Lane v. Thompson*, 43 N. H. 320. And see *Strong v. Adams*, 30 Vt. 221.

⁹² *Hower v. Geesaman*, 17 Serg. & R. Penn. 251.

⁹³ *Wilbraham v. Snow*, 2 Saund. 47, a, b, d.

⁹⁴ *Soper v. Sumner*, 5 Vt. 274; *Hart v. Hyde*, 5 Vt. 328; *Putgam v. Wiley*, 8 Johns. N. Y. 432; *McFarland v. Smith*, 1 Miss. 172; *Wilson v. Martin*, 40 N. H. 88; *Gay v. Smith*, 33 N. H. 171; *Hammond v. Plimpton*, 30 Vt. 333.

support that action, and the general owner may have an action of trespass on the case for the injury done to his reversionary interest.

If the general owner has made a conditional sale and the property is delivered to the vendee, the vendor cannot bring trespass for an injury done before the time stipulated for the payment, as the vendee has the possession coupled with an interest.⁹⁵

Trespass will not lie by a general owner against a bailee for mere abuse of the chattel; though if the bailee destroy the thing and the injury be with force, trespass will lie.

3611. In general, *the special owner* must have reduced the chattel to his custody before he can maintain trespass for a forcible injury done to it, unless he is a factor or consignee of goods who has an interest in respect of his commissions; this is because the injury is done to his interest.⁹⁶

When the qualified owner has reduced the chattel to his custody and it is afterward forcibly injured, while his right continues he may maintain trespass against the wrong-doer, even against the general owner himself.

When a chattel has been sold, but no delivery has been made, the vendee is constructively in possession and may maintain trespass for any injury done to it.⁹⁷

Where trespass is brought by one having a special interest in or a lien upon the property against a mere wrong-doer, the plaintiff is entitled to recover the same damages as the general owner, if in possession, would be entitled to for the same trespass,⁹⁸ being liable to account over to the general owner for all damages recovered more than the compensation for the injury to his special interest. But where the trespass is committed by the general owner, only the loss inflicted upon the special interest can be recovered.⁹⁹ In some cases of trespass the defendant is allowed to prove in mitigation of damages that the property has come into possession of the general owner.¹⁰⁰

3612. A *bailee* who has the possession coupled with an interest and a right to the possession for a definite time has exclusively the right to maintain trespass. This applies to cases of hiring¹⁰¹ and pledges for a time certain.¹⁰² A bailee who has a lien and a right of possession until his lien is removed may maintain the action, but this right is not exclusive of the general owner. Thus carriers, factors, pledgees. A mere depositor without hire and without a lien may maintain the action against all except the general owner and those claiming under him. So also may a gratuitous borrower.

3613. A *possessor without the consent of the owner* may have obtained his possession by legal means, although it may even be against the owner's desire, such as the finder of an article which has been lost; till the owner is discovered the finder has the sole right to it, and he may maintain trespass against any one but the owner.¹⁰³ But the possessor may have obtained the possession unlawfully, and in that case he can also support this action against any but the legal owner, and the defendant cannot, as in trover, show property in a stranger.¹⁰⁴

⁹⁵ *Hurd v. Fleming*, 34 Vt. 169.

⁹⁶ *George v. Claggett*, 7 Term, 359; *Buller*, Nisi P. 38.

⁹⁷ *Parsons v. Dickinson*, 11 Pick. Mass. 352.

⁹⁸ *Carpenter v. Cummings*, 40 N. H. 158; *Alt v. Weidenberg*, 6 Bosw. N. Y. 176. But see *Outcalt v. Darling*, 1 Dutch. N. J. 443.

⁹⁹ *Nightingale v. Scannell*, 18 Cal. 315; *Goulet v. Asseler*, 22 N. Y. 225.

¹⁰⁰ *Criner v. Pike*, 2 Head, Tenn. 398.

¹⁰¹ *Hickock v. Buck*, 22 Vt. 149.

¹⁰² *Howe v. Keeler*, 27 Conn. 538.

¹⁰³ *Wilbraham v. Snow*, 2 Saund. 47, d; *Hendricks v. Decker*, 35 Barb. N. Y. 298; *Boston v. Neat*, 12 Mo. 125.

¹⁰⁴ *Aiken v. Buck*, 1 Wend. N. Y. 466. See *Schermerhorn v. Van Volkenburg*, 11 Johns. N. Y. 529; *Rotan v. Fletcher*, 15 Johns. N. Y. 207; *Craig v. Gilbreth*, 47 Me. 416.

3614. To entitle the plaintiff to compensation in damages, there must have been an *injury* to the property. Though general damages will be presumed for a battery to the person, and upon proof of the fact he will be entitled to a verdict, because it is impossible to prove what have been his sufferings, the rule is different with regard to personal property; it is not every unlawful touching of such property which will entitle the plaintiff to recover; when he alleges that he has sustained a loss by such an act, he must in general show what special damages he has sustained. Thus, the mere battery of a horse, not accompanied with special damages, is not sufficient to maintain an action of trespass; ¹⁰⁵ the chattel injured must have been lessened in value, or else no compensation is due.

A mere levy upon property without removing, or in any other way interfering with it, is a trespass and sufficient to maintain an action. ¹⁰⁶

3615. Taking goods from the owner's possession is injurious, for he is by such act deprived of their use and enjoyment, so that, although they may have been returned to the owner in the same condition in which they were when taken, yet he may have trespass for the act of dispossessing him. ¹⁰⁷

The taking need not be forcible, but consists in removing them from the possession and control of the owner, either by an actual physical taking, or by acts which are inconsistent with the owner's possession. ¹⁰⁸

3616. Trespass is in general a concurrent remedy with trover for most illegal takings, ¹⁰⁹ though in some cases the latter action cannot be maintained; as, when there is no intent to interfere with the dominion of the plaintiff, or to change the condition of the property so taken. ¹¹⁰ 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 the plaintiff's horse, or for mixing water with his wine. ¹¹¹

3617. The intent with which the injury has been committed is altogether immaterial. If the injury were without justifiable cause or purpose, the defendant will be liable, though it were done accidentally or by mistake; ¹¹² as, if a sheriff by mistake should seize the goods of a wrong person on an execution; or if the defendant unintentionally, but with some negligence, run down a ship or a carriage; ¹¹³ or when the owner of a balloon accidentally descend with it into the plaintiff's garden. ¹¹⁴

3618. Trespass may also be supported, in some instances, for injuries committed to personal property while in the lawful possession of the wrong-doer; as, where he has been guilty of an abuse which renders him a trespasser *ab initio*. A distinction here must be observed; an abuse of an authority given by the law will in general render the wrong-doer a trespasser *ab initio*, but an abuse of an authority in fact, as a license given by the plaintiff, will not make him such a trespasser. ¹¹⁵ When the authority given is a license in fact, the remedy is case, and not trespass. ¹¹⁶

¹⁰⁵ Slater *v.* Swan, 2 Strange, 872. But see Barnes, 452.

¹⁰⁶ Stevens *v.* Somerindyke, 4 E. D. Smith, N. Y. 418.

¹⁰⁷ Bacon, Abr. *Trespass*, E; Brown, Actions at Law, *406; Price *v.* Helyar, 4 Bingh. 597; Ford *v.* Williams, 24 N. Y. 359.

¹⁰⁸ Holmes *v.* Doane, 3 Gray, Mass. 328. ¹⁰⁹ Rackham *v.* Jessup, 3 Wils. 336.

¹¹⁰ Foulkes *v.* Willoughby, 8 Mees. & W. Exch. 540; Plumer *v.* Brown, 8 Metc. Mass. 578.

¹¹¹ 3 Sharswood, Blackst. Comm. 153; Fitzherbert, Nat. Brev. 88.

¹¹² Dexter *v.* Cole, 6 Wisc. 319.

¹¹³ Covell *v.* Laming, 1 Campb. 497; Higginson *v.* York, 5 Mass. 341; Hayden *v.* Shed, 11 Mass. 500.

¹¹⁴ Guille *v.* Swan, 19 Johns. N. Y. 381.

¹¹⁵ The Six Carpenters' Case, 8 Coke, 145; Shorland *v.* Govett, 5 Barnew. & C. 485; Bradley *v.* Davis, 14 Me. 44; Jarrett *v.* Gwathmey, 5 Blackf. Ind. 237.

¹¹⁶ Cushing *v.* Adams, 18 Pick. Mass. 110.

3619. *Trespass to the relative rights* consists in the several acts of committing adultery with another man's wife, seducing his servant, of offering a personal violence, or threatening to commit one to his wife or servant, by which the party injured has sustained damage. This subject will be considered with reference to the nature of the plaintiff's right, the nature of the injury, and the damages he has sustained.

3620. To maintain trespass against a wrong-doer, the plaintiff must be aggrieved and suffer a loss; when he sues for criminal conversation with his wife, it is clear he can have sustained no injury, unless the relation of husband and wife subsist between them *de jure*; but for all other injuries to her he is entitled to redress if the relation subsist *de facto* only.¹¹⁷

3621. When an action of trespass is brought against another for the seduction or injury of his servant, he must prove that she is such, and unless he can establish this point he cannot recover, for then he has not been injured. The relation of servant to the plaintiff is indispensable to support this action. The proof of it may be by evidence of an express or implied contract of service; the slightest act is sufficient; as, the circumstance of her having milked the plaintiff's cows.¹¹⁸

In these cases force is implied, the wife and servant being incapacitated by law to give their consent. It is for this reason that trespass lies, but unless in addition to the seduction the defendant has also committed a trespass by unlawfully entering the plaintiff's house, it is more usual and more correct to bring an action on the case.

3622. *The injury* must consist of the seduction, or of a personal violence, or threatening to commit one, to his wife or his servant. The fact that a wife is so *de facto* only, for example, that she has been received as the plaintiff's wife in the family, is sufficient to establish the relation between them, and entitle him to a compensation for the injurious consequences of violence or menace to her person. In such case, to entitle the husband to damages she must have been actually incapacitated from discharging her relative duties, and distinct proof must be adduced to this point; with respect to any personal sufferings which the wife may have endured, the husband not being a sharer in them, they do not entitle him to claim a compensation. If damages are to be recovered for them, the wife should be joined in the action.

But in many cases the injury to the master results in the loss of services, because the servant has been incapacitated to render them in consequence of the defendant's wrongful act; although the injury is not immediate, still an action of trespass may be sustained. An injury to an apprentice or to a servant, whether hired by the day or by the piece, if a loss to the master is the consequence, will subject the wrong-doer to an action of trespass by the master.¹¹⁹

3623. The injuries to a man's relative rights are those which relate to him as husband and as master. As husband, his rights are injured by the adultery of his wife. This crime renders the woman more or less unfit to discharge her relative duties, and so the interests of her husband are deteriorated by their non-performance. This has been fully explained in another place, to which the reader is referred.¹²⁰

3624. As master, he is entitled to demand a reparation for the consequences of personal violence offered to his servant for any loss he may have sustained.

¹¹⁷ *Morris v. Miller*, 4 Burr. 2057; *Birt v. Barlow*, Dougl. 171.

¹¹⁸ See *Moran v. Dawes*, 4 Cow. N. Y. 412; *Bennett v. Alcott*, 2 Term, 166; *Mauder v. Venn*, 1 Mood. & M. 323.

¹¹⁹ See *Hart v. Aldridge*, Cowp. 54. And see also before, 2296.

¹²⁰ Before, 2283.

For the seduction of his female servant, if the master has not sustained a loss of service, he cannot claim a pecuniary satisfaction from the seducer; for unless the physical powers of the servant have been so weakened and impaired as to prevent the performance of the duties of her office, either altogether or up to their full extent, the master is not injured; and as the law now stands, the master could not perhaps recover where there was a simple act of fornication unattended by pregnancy.

The amount of damages which the law gives to the master in case of seduction is the value of the service lost; but the jury may, and usually do, take into consideration the injury to his feelings and the like, and increase the damages in proportion to the aggravating circumstances.

3625. *The pleadings* consist of the declaration, the plea in abatement, the general issue, special pleas, and the replication.

3626. Many matters which relate to *the declaration* in trespass have been treated of when we considered the general nature of a declaration, and then much was anticipated of what might have been examined under this article.¹²¹

The declaration contains a concise and clear statement of the injury complained of, whether to the person, real property, personal property, or to the relative rights of the plaintiff, and should allege the injury to have been committed *vi et armis*.¹²²

It must allege the plaintiff's possession, actual or constructive, at the time of the trespass or acquired since,¹²³ but the close need not be described either by name or boundaries.¹²⁴

3627. When the plaintiff complains of several trespasses as having been committed at distinct periods, the plaintiff, that he may recover for all, should declare according to the truth of the case; therefore, when he names only one day or period of time in his count as the time when the wrong was done, he will not be allowed to give evidence of injuries suffered at several days and times;¹²⁵ it is for this reason the common averment, "*diversis diebus et temporibus*," is inserted. The particular times need not be inserted; it is sufficient if the declaration specifies two days, the first and the last day the plaintiff assumes when the trespass was committed, and leave the intervening days at large.

But when several distinct acts of violence have been offered to the person or property of another upon one and the same occasion, they all together constitute but one injury, and must be redressed, if at all, in one action; and a recovery of damages for any portion of the grievance will bar a future action brought to obtain satisfaction for the residue. For example, when the defendant makes a wrongful entry on plaintiff's land, tramples upon the grass and turns up the soil, here the acts of breaking the inclosure, treading down the herbage, and subverting the ground are distinct acts of trespass, but having been committed upon the same occasion, to the same subject matter, must be redressed together in one action.¹²⁶ Again, if several blows are given, though each constituted a battery, if given at the same time they constitute but one cause of action, and cannot be treated as distinct injuries.

3628. There is, however, an exception to this rule. When a tenant has been disseised, he may recover in an action damages for breaking through his inclosure, and, after he has regained his possession, he may, in a second action,

¹²¹ Before, 1002.

¹²² The omission of these words must be taken advantage of on special demurrer. *Higgins v. Hayward*, 5 Vt. 73.

¹²³ *Cowenhoven v. Brooklyn*, 38 Barb. N. Y. 9.

¹²⁴ *Noyes v. Colby*, 29 N. H. 143.

¹²⁵ *Fontleroy v. Almyr*, Ld. Raym. 240. See *Rucker v. McNeely*, 4 Blackf. Ind. 179.

¹²⁶ *Cheswell v. Chapman*, 42 N. H. 47.

recover compensation for the trespasses done to his tenements in the interim between the ouster and the re-entry.¹²⁷

3629. When the same acts of trespass have been continued for an uninterrupted period, the declaration should lay it with a *continuando*; as, if Peter turns up the ground, and treads upon the herbage of Paul for three days together; here Paul would recover damages as well for the subsequent acts of treading down the grass and subverting the soil, as for the first; he must, therefore, complain of such subsequent trespasses in his action brought to recover a compensation for the former, and this he does by averring that Peter on such a day trampled upon the herbage and turned up the ground, "continuing the said trespasses for three days following;" though this averment, strictly construed, may seem to import a continuation of the very identical act of trespass, yet it has received another interpretation; it may also be taken to denote a repetition of the same kind and description of injury.¹²⁸

But to be averred under a *continuando*, a trespass must be of the same kind; it cannot be averred, for example, when the injury consists in killing and carrying away an animal, because there remains nothing to which a similar injury may again be offered; for any trespass committed after the first must be a new trespass to something else.¹²⁹

There is a difference between a *continuando* and the averment *diversis diebus et temporibus*, on divers days and times. In the former, the injuries complained of have been committed upon one and the same occasion; in the latter, the acts complained of, though of the same kind, are distinct and unconnected.¹³⁰

3630. If it is intended to recover damages for an abuse of an authority in law, by which the defendant has become a trespasser *ab initio*, the previous trespasses must be stated in the declaration; for, unless the claim is made there it cannot be added by the subsequent pleadings. It is true that this matter might be replied to a defence of justification, for the purpose of cutting down the defence, but it would give no title to recover if not stated in the declaration.

3631. The allegation "*et alia enormia ei intulit*" is introduced to enable the plaintiff to give in evidence such matters as aggravate the trespass to some extent. Matters of aggravation should, however, be set forth in the count, to enable the defendant to meet them in evidence, or the plaintiff will not be allowed to prove them on the trial, unless decency required that they should be omitted.

This allegation is not, however, material to the right of action, and disproving the matters of aggravation does not defeat the plaintiff.¹³¹ And as the plaintiff's right to recover depends on the original trespass, he cannot recover for the matters of aggravation unless he proves the wrongful entry.¹³²

3632. The plaintiff must lay an amount of damages sufficient to compensate him for his losses. If special damages have been the consequence of the trespass, they must be particularly set forth with the same minuteness of detail as the cause of action in general, for this is equally a part of the complaint,¹³³ unless the nature of the case renders such detail impossible, and then less certainty

¹²⁷ Arden v. Kermit, Anth. N. Y. 83.

¹²⁸ Gould, Plead. ch. 3, § 86; Bacon, Abr. *Trespass*, 2; 3 Sharswood, Blackst. Comm. 212; Manchester v. Vale, 1 Saund. 24, n. (1); Saunders v. Palmer, 1 M'Cord, So. C. 165; Folger v. Fields, 12 Cush. Mass. 93; Benson v. Swift, 2 Mass. 50; Pierce v. Pickens, 16 Mass. 470.

¹²⁹ Gould, Pl. ch. 3, § 88.

¹³⁰ Hammond, Nisi P. 91; Gould, Pl. ch. 3, §§ 93, 94, 95.

¹³¹ Phelps v. Morse, 9 Gray, Mass. 207; Halsey v. Matthews, 3 Ind. 404.

¹³² Reed v. Peoria R. R., 18 Ill. 403.

¹³³ Hunt v. Jones, Croke, Jac. 499.

in describing the inconvenience will be required, and so much as the subject matter admits of will suffice for *lex non cogit ad impossibilia*.¹³⁴

3633. When another writ of trespass for the same cause is pending between the same parties, or, it seems, a co-trespasser,¹³⁵ the fact may be pleaded in *abatement*. But it must appear it is for the same cause of action, and this cannot be known until the plaintiff has declared.

3634. It is a general rule that all who have participated in the inconvenience resulting from the trespass, should be made complainants in the suit brought to redress it. Its object is to relieve the defendant from a multiplicity of actions, so that he can only object to the non-joinder of the other parties, aggrieved by plea in *abatement*; this right he may waive if he chooses, and then he will be liable to each one of the parties injured for his share of the compensation to be recovered in damages.

3635. If the wife sues or is sued alone, the objection to the irregularity ought to be made by plea in *abatement*.¹³⁶ And in an action by husband and wife, if the defendant intends to controvert the fact of their marriage, he must do it at this stage of the proceedings, for he cannot do so under the general issue.¹³⁷

3636. *The general issue* is not guilty of the trespasses alleged by the plaintiff, and it must conclude to the country.

When the general issue is pleaded, the plaintiff is required to establish the several allegations contained in his count, and under this plea, therefore, their existence may be controverted by the defendant. But when the defendant pleads matter in justification or excuse and alleges that in law he is not liable, he cannot show this under the issue of not guilty, because that simply denies the commission of a trespass which the defences of justification or excuse admit. Besides, to constitute a trespass, some damage must have actually resulted, or must be likely to ensue, and consequently the defendant is at liberty under the general issue to dispute this fact. If, for example, the plaintiff has declared for a battery, the defendant may show that he gently touched him for the purpose of engaging attention, and leave it to the jury to say what inconvenience has happened or is likely to befall him. Again, when the trespass is in its nature a local injury, or is made so by statute, the locality of the suit is essential to the plaintiff's case; the defendant will succeed, therefore, unless the plaintiff can establish that the cause of action arose within the particular district or county laid in the declaration.

3637. *Special pleas in bar*, as we have already seen,¹³⁸ are those which confess that the facts alleged in the declaration are true, and disclose some circumstances which show that in law no injury has been sustained, or that the right of action is discharged.¹³⁹

When the matter of the plea is not in law an answer to the entire declaration, a prefatory recital of those trespasses to which it applies must be made in the outset; but otherwise, such introduction is not requisite.¹⁴⁰

The plaintiff is not required to confine himself to any particular time on which to charge that the offence was committed; he may select any day he thinks proper, and the plea must not vary from it unless the nature of the defence requires that it should be truly stated.¹⁴¹

¹³⁴ Tresham's Case, 9 Coke, 110; Hartley v. Herring, 8 Term, 130.

¹³⁵ Rawlinson v. Oriett, Carth. 96.

¹³⁶ Milner v. Milnes, 3 Term, 627.

¹³⁷ Dickenson v. Davis, Strange, 480.

¹³⁸ Before, 2923.

¹³⁹ The reader is referred to n. 2923 for a more full exposition of the law relating to special pleas.

¹⁴⁰ Vincent v. Preston, 12 Mod. 602. See Parker v. Parker, 17 Pick. Mass. 236.

¹⁴¹ Purset v. Hutchings, Croke, Eliz. 312.

For the same reason, when the trespass is transitory in its nature, the plaintiff may lay the offence to have happened in any county he pleases, and therefore, unless it is essential to the defence that the place where it really took place should be disclosed, the plea must accord with the declaration in this respect.¹⁴²

In general, no plea is required to matters in aggravation, because when the plea, if true, destroys the claim of the plaintiff to recover at all, it necessarily avoids all matters laid in aggravation of the principal charge.

In an action of trespass *quare clausum fregit* the defendant may deny the plaintiff's title by pleading, *liberum tenementum*, that he himself holds the freehold, and consequently, cannot be guilty of entering it.¹⁴³

The defendant may also plead a license to enter the premises either in law or in fact.

3638. A special plea which amounts to the general issue is defective; for this reason care must be taken that the matter of the special plea be such as shows and confesses that a trespass has been committed; otherwise, it will amount to the general issue.¹⁴⁴

When there are several defendants, they may join in pleading these matters, which are a defence to all alike, or they may sever. If the subject matter of their respective defences, however, is peculiar to each individually, they must of necessity sever in their pleas.

But the defendants must be careful not to join in a plea the matter of which is a good defence for one of them but not for the other, for such plea is bad altogether. Being an entire plea, it cannot be separated into parts, and being defective in part, it is so in all. If, for example, the sheriff, his bailiff, and the plaintiff in an original suit are jointly sued in trespass and they jointly pleaded a plea of justification under a void writ, it will be bad, because, although the sheriff and his bailiff might be justified under it, the original plaintiff could not be, and so the plea would be bad as to all.¹⁴⁵

Special pleas are classified into those which are in justification, in excuse, or in discharge. These have already been fully considered.¹⁴⁶

3639. When the defence is local, varying from and traversing the venue in the declaration, and all other places beside the one named in the plea, the plaintiff may either tender an issue upon the traverse or pass it by and answer the matter of the defence.¹⁴⁷

If the defendant has justified by his plea under an authority in law, the plaintiff may reply that he has abused such authority, and thereby become a trespasser *ab initio*. This form of replying is sometimes termed a replication in the nature of a new assignment.

The replication *de injuriâ sua propriâ absque tali causa* denies the whole plea, and puts in issue, and compels the defendant to prove, every material allegation in his plea. In form, it is that the defendant committed the trespass or grievances of his own wrong without the cause by him in his plea alleged. The word without is adopted in all formal traverses, and is negative, here signifying and not for, as is evident from the language of the ancient entries, which is "*et nemy pur tiel cause.*"¹⁴⁸

3640. *The evidence* is to be considered in two divisions, first, the evidence for the plaintiff, second, the evidence for the defendant.

¹⁴² *Errington v. Thompson*, Ld. Raym. 183.

¹⁴³ He may plead the freehold either in himself or in another with whom he is in privity. *Jones v. Water Co.*, 18 Ga. 539.

¹⁴⁴ *Brown v. Archer*, 1 Hill, N. Y. 266; *Abel v. Abel*, 1 Root, Conn. 549.

¹⁴⁵ *Phillips v. Biron*, Strange, 509; *Smith v. Boucher*, Strange, 993; *Middleton v. Price*, Strange, 1184.

¹⁴⁶ Before, 2923.

¹⁴⁷ *Serle v. Darford*, Ld. Raym. 120.

¹⁴⁸ The reader is referred, for a full explanation of the replication *de injuriâ*, to n. 2977.

3641. *The evidence in favor of the plaintiff* relates to the right of the plaintiff, the injury committed by the defendant, and the damage done.

3642. The invasion of the plaintiff's right of possession is sufficient to support this action; though the right of property may and frequently does become a subject of controversy, still the gist of the action is the injury done to the plaintiff's possession.

The possession of the plaintiff, which may be thus invaded, is actual or constructive; and it is rightful or *de facto*. Upon proof of an injury done to his possession, when the possessor does not hold for another, he may maintain his action.

3643. The general owner has not only a constructive possession when the property is in the care and custody of his servant, agent, or overseer, or in the hands of a bailee for custody, carriage, or any case, as borrower, depositary, or mandatary, when the bailee has no vested interest, and then he may sue in trespass; but he has also a constructive possession as against his bailee or tenant, who having a special property in the chattel has violated his trust by destroying that which was confided to him. Thus, where a bailee of a horse kills him, or if a joint tenant or tenant in common destroy the joint property, or if a tenant at will cuts down trees, the interest of the wrong-doer is thereby determined, and proof of these facts will be sufficient to entitle the plaintiff to recover.

3644. But one not having a right of possession, but being entitled merely to a reversionary interest, cannot maintain trespass, as we have seen; but for the injury which he has sustained he may have an action on the case.

3645. With regard to fences and hedges, and other erections on the boundaries of an estate, on a question of trespass between two proprietors, the plaintiff, to support his action, must prove them to be his, and if he built them at his own expense upon his own land, they are his; but if built equally upon the land of both, though at their joint expense, each is the owner in severalty of the part standing on his own land.¹⁴⁹ When there is no proof as to who is the owner of a partition fence, it is presumed to be common property of both.¹⁵⁰

3646. However great may have been the injury to the plaintiff, he cannot recover unless he can prove that it has been committed by the defendant. Positive proof that he committed the injury will be sufficient to make him liable, unless he had a lawful justification or excuse. He will be chargeable also if it be proved that the wrong was done by his command, or that he subsequently sanctioned it, or took advantage of it for his own benefit, or participated with others in the acts, or by inciting others to it.¹⁵¹

Any one who assists or participates in a trespass is liable alone or with the others for the whole damage, and a corporation and its servant may be sued jointly for an injury caused by the latter in carrying out his instructions.¹⁵²

It must be proved that the act was done with force, directly applied, for without this there was not such an injury for which trespass will lie.

3647. Although the act complained of may have been committed with force to the person, personal, or real property of the defendant, yet if it caused no damage, the plaintiff cannot recover. We have already mentioned the following cases: where the defendant proved that he gently touched the plaintiff to draw his attention; where he committed a battery on his horse which was not

¹⁴⁹ *Matts v. Hawkins*, 5 Taunt. 20.

¹⁵⁰ *Cubit v. Porter*, 8 Barnw. & C. 257, and note. See *Vowles v. Miller*, 3 Taunt. 138; *Archbold*, Nisi P. 328; 2 *Greenleaf*, Ev. § 617.

¹⁵¹ *Petrie v. Lamont*, 1 Carr. & M. 93.

¹⁵² *Hewett v. Swift*, 3 All. Mass. 420; *Wallace v. Miller*, 15 La. Ann. 449.

followed by any damage; and where he flew a kite over his fields, without otherwise entering the plaintiff's close. In these cases trespass cannot be maintained.

When the plaintiff is in possession of personal property, he may in general recover for the whole damage. But a tenant in common of real estate can recover only for the damage done to his interest.¹⁵³

A landlord and tenant may both maintain actions at the same time, and the tenant recovers for the injury to his possession and the interruption of his profits, and the landlord for the permanent injury to the estate.¹⁵⁴

3648. Under the general issue of not guilty the defendant may prove that he did not take the goods, or that the plaintiff had no property in them, or that he did not enter the plaintiff's close, or that the freehold and immediate right was and still is in himself, or in one under whom he claims title. He may also prove under this issue that he made a distress for rent, when it was made on the premises; but if it were made elsewhere, or for any cause but rent in arrear, no evidence of it can be admitted, except under a special plea.¹⁵⁵ Matters in justification, or excuse, or in discharge of the action, we have seen, must be specially pleaded, and cannot be given in evidence under the general issue; but matters in mitigation of the wrong and damages may be given in evidence under this issue.¹⁵⁶ Thus, in an action of trespass for false imprisonment, against an individual who was a police officer when the general issue was pleaded, evidence of reasonable suspicion of the plaintiff's having been guilty of felony was received in reduction of damages;¹⁵⁷ and in a similar case evidence was allowed to be given of the contents of the plaintiff's trunk, for the purpose of showing that he was addicted to burglary; but it was held that the plaintiff's character could not be given in evidence under the general issue.¹⁵⁸

3649. Under the plea of *liberum tenementum* the defendant must prove that he has a title to the premises. This may be done either by documentary evidence or by proof of actual adverse possession for twenty years. The plea admits the possession to have been in the plaintiff, as described in the declaration, and that the defendant committed the acts complained of. If the defendant succeeds in establishing a title to part of the close, he will succeed, though he does not prove a title to the whole.¹⁵⁹

3650. Under the plea of license, the defendant may prove a license in law or in fact, express or implied. If he can prove that he entered to serve a legal process, the doors being open,¹⁶⁰ or to distrain for rent, or to do any of the numerous acts which justify an entry on the land of another, he will be justified.¹⁶¹ And it makes no difference if the license was given by mistake.¹⁶²

3651. We have seen that the replication *de injuriâ sua, absque tali causa*, puts in issue the whole of the plea of the defendant; the whole plea being thus traversed under this replication, the plaintiff may adduce any evidence disproving the facts alleged in the plea; but he cannot go into evidence of new matter,

¹⁵³ Jackson v. Todd, 1 Dutch. N. J. 121.

¹⁵⁴ George v. Fisk, 32 N. H. 32.

¹⁵⁵ 1 Chitty, Pl. 493, 494; Furneaux v. Fotherly, 4 Campb. 136.

¹⁵⁶ 3 Stephen, Nisi P. 2642.

¹⁵⁷ Chinn v. Morris, 1 Ry. & M. 424; and see Viner, Abr. *Evidence*, 16; Watson v. Christie, 2 Bos. & P. 225; Beckwith v. Philby, 6 Barnew. & C. 635; Samuel v. Payne, Dougl. 359; Mure v. Kaye, 4 Taunt. 34.

¹⁵⁸ Russell v. Shuster, 8 Watts & S. Penn. 308.

¹⁵⁹ Smith v. Royston, 8 Mees. & W. Exch. 381; Richards v. Peake, 2 Barnew. & C. 918.

¹⁶⁰ Chipman v. Bates, 15 Vt. 51.

¹⁶¹ Before, 2370.

¹⁶² Shaw v. Mussey, 48 Me. 247.

which shows that the defendant's allegation, though true, does not justify the trespass.¹⁶³

3652. When the verdict has been rendered for the plaintiff in trespass, the judgment is, that he recover his damages assessed by the jury, and costs. The rule in assessing the damages is to include not only the principal transaction, but all its attendant circumstances and its natural and injurious results.¹⁶⁴ The effect of such judgment, when it is rendered for seizing personal property and retaining it, are the damages given for the value and the tortious taking, and changes the title to it, so that the trespasser becomes the owner.¹⁶⁵

When chattels which are used in trade or commerce are illegally seized, the loss of probable profits from their sale or use cannot be recovered.¹⁶⁶ But the plaintiff may have damages for the peculiar value to him; as, where, by a trespass, the plaintiff loses a lease which was of peculiar value, on account of business opportunities.¹⁶⁷ Where the property is taken without malice, under a claim of title, the damages are its value at the time of taking, with interest from that time.¹⁶⁸

3653. The judgment for the defendant is for costs. A judgment in trespass is conclusive only on the facts necessarily involved. It may decide either that the trespass was not committed or that the plaintiff was not in possession; it decides nothing as to the right of property, and cannot be pleaded in actions involving the right of property, as real actions or trover.¹⁶⁹

¹⁶³ *Sayre v. Rochford*, 2 W. Blackst. 1165; *King v. Phippard*, Carth. 280; *Warral v. Clare*, 2 Campb. 629.

¹⁶⁴ *Barnum v. Vandusen*, 16 Conn. 200; *Warfield v. Walter*, 11 Gill & J. Md. 80; *Hammatt v. Russ*, 16 Me. 171.

¹⁶⁵ *Fox v. Northern Liberties*, 3 Watts & S. Penn. 103.

¹⁶⁶ *Selden v. Cashman*, 20 Cal. 56; *Callaway Co. v. Clark*, 32 Mo. 305.

¹⁶⁷ *Allison v. Chandler*, 11 Mich. 542; *Snively v. Fahnestock*, 18 Md. 391.

¹⁶⁸ *Oviatt v. Pond*, 29 Conn. 479; *State v. Smith*, 31 Mo. 566.

¹⁶⁹ *Sabins v. McGhee*, 36 Penn. St. 453; *Hargus v. Goodman*, 12 Ind. 629.

CHAPTER XXVI.

MIXED ACTIONS.

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3654. *Mixed actions* are such as appertain in some degree to both real and personal actions, and therefore are properly reducible to neither of them, being brought for the specific recovery of lands, tenements, or hereditaments, and for the damages for injuries sustained in respect of such property.¹ These are principally ejectment and waste.

¹ Stephen, Plead. 3; Coke, Litt. 284, b; Comyn, Dig. *Actions*, D, 4.

3655. When the person entitled to the possession of real estate is deprived of his possession and is prevented from occupying it, his remedy is by an *action of ejectment*. Although this remedy as existing at common law has now become obsolete, a brief history of its origin will be useful. It was at first invented to supply a remedy for a tenant for years who was ejected from his term, and for which ouster he had no complete remedy until the reign of Edward III. In its form it was an action of trespass, and is properly called trespass in ejectment, and was brought by the tenant to recover damages for an unlawful intrusion on the land. In this action at first damages alone were recovered, but in course of time a writ of possession was awarded as part of the judgment, and finally this writ was the principal object, and the damages became nominal. As the tenant for years, the plaintiff, was obliged in order to recover to prove the title of the lessor under whom he held the land, the suit decided such title collaterally. As real actions were cumbersome, the action of ejectment was then adopted by the owner of the freehold to recover his possession, and to accomplish this he entered upon the land and then made a lease of it to some person who brought a suit in ejectment against the occupant for ousting him. It was necessary for the freeholder to make an entry before giving the lease, as a lease by one out of possession constituted the crime of maintenance. At first, an actual entry was made and a lease given on the land, and the lessee remained in possession until actually ousted by the tenant holding and claiming possession. But during the time of the commonwealth a string of fictions was invented by Chief Justice Rolle, and the action of ejectment assumed the form in which it remained until its final abolition.²

3656. When any person claims to have a right of entry into lands held by another, he proceeds by ejectment as follows: A nominal plaintiff is selected to bring the action, who is usually a fictitious person, though Blackstone says that he should be real. This plaintiff is usually John Doe or Jackson, and in his declaration he states that the party claiming the land (who is the real plaintiff in interest) demised to Doe the premises in question for a term of years, and that in pursuance of such demise or lease Doe entered upon the premises and was possessed thereof, and that William Stiles by force and arms ejected him therefrom, and for this trespass he brings his action. The action at this stage is entitled, Doe, on the demise of Smith, (the real plaintiff,) against Stiles. But Stiles, who is known as the casual ejector, is another man of straw called in to complete the imaginary history, and he immediately notifies the tenant in possession that he does not intend to defend the suit, and he advises the tenant to do so. If the tenant does not heed this advice, he is defaulted, and to avoid this contingency he applies to the court for permission to become defendant in the place of Stiles. But as no lease was ever made, and Doe never entered upon the land, and Stiles never ejected him, some difficulty might arise if the plaintiff were compelled to prove all these facts. A rule of court is therefore made, allowing the tenant to become defendant on condition that he shall admit the lease, entry, and ouster, and insist upon his title only. This rule is known as the consent rule. The suit then becomes, Doe, on the demise of Smith, against Brown, (the tenant,) and the only question to be tried is whether Smith or Brown is entitled to the possession.³

The plaintiff is known as the demandant. The tenant who defended the suit in ejectment was the person in possession, and might be a tenant for years or the owner of the freehold. If holding under a lease, the owner of the fee would

² 3 Sharswood, Blackst. Comm. 200; 1 Washburn, Real Prop. 290; Bouvier, Law Dict. *Ejectment*.

³ Walker, American Law, 512; Adams, Ejectm. 233, 234.

not be entitled to possession and would not be a party to the suit, although his title would be the substantial question at issue, and judgment for the plaintiff might be rendered by collusion with the tenant. Various statutes have therefore been passed to protect the landlord.

3657. Such is the action properly known as ejectment, but which is now obsolete. It was abolished in England by the Common Law Procedure Act in 1852; in many of the states it never existed, and in most of the others it has been abolished. It is used in the United States circuit courts in the states where it existed at the time of the organization of those courts. In all the states the fictions formerly in use have been swept away, and the action is simple and direct. In many the term ejectment is not in use, but the action is known as an action to recover real estate. But the wrong to be redressed and the object to be attained are substantially the same, and under the head of ejectment we shall consider actions which are brought to recover the possession of land.

3658. Ejectment is in general sustainable only 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 the possession. It cannot, therefore, be sustained for the recovery of property which in legal consideration is not tangible; as, for example, a rent or other incorporeal hereditament, or a water course, or the mere privilege of landing in common with other citizens of a town.⁴ It does not lie for the interruption of an easement; as, the obstruction of a right of way, a right of flowage or drainage, whether such interruption be by the owner of the servient estate or by a stranger. But on the other hand the owner of the servient estate may bring the action against a stranger; thus, the owner of the soil over which a highway is laid may have ejectment against one who appropriates the land to his own use.⁵ It is held in Pennsylvania and California that one who has the right of mining on the land may maintain ejectment against an intruder.⁶

3659. Ejectment is a mere possessory action, and the right of property is immaterial. It may be brought by any one who has the right to enter upon the land at the time of bringing the action, either as tenant in fee simple, or fee tail, for life or for years, and whether he claims in his own right or in right of his wife, or as guardian, heir at law, devisee, executor, administrator, assignee of a bankrupt, or insolvent.⁷

The plaintiff must have the legal title to the land, and cannot succeed if his title is merely equitable.⁸ And he cannot rely upon any title acquired after the commencement of the action.⁹

The owner of the fee cannot maintain the action where he has not the right of present possession; as, where he has leased the premises to another whose term has not yet expired.¹⁰

3660. It is a general rule that the plaintiff must recover upon the strength

⁴ *Black v. Hepburne*, 2 Yeates, Penn. 321; *Jackson v. Buel*, 9 Johns. N. Y. 298; *Jackson v. May*, 16 Johns. N. Y. 184; *Bear v. Snyder*, 11 Wend. N. Y. 592; *Stackpole v. Healy*, 16 Mass. 35; *Rees v. Lawless*, 6 Litt. Ky. 184; *Judd v. Leonard*, 1 N. Chipm. Vt. 204.

⁵ *Wright v. Carter*, 3 Dutch. N. J. 76; *Brown v. Galley*, Hill & D. N. Y. 308.

⁶ *Turner v. Reynolds*, 23 Penn. St. 199; *Pennsylvania Co. v. Owens*, 15 Cal. 135.

⁷ *Smith v. Lorillard*, 10 Johns. N. Y. 338.

⁸ *Thompson v. Lyon*, 33 Mo. 319; *Clagett v. Kilbourne*, 1 Black, 346; *Gillett v. Trenganza*, 13 Wisc. 472; *Smith v. McCann*, 24 How. 398; *Fenn v. Holme*, 21 How. 481. In some states the action is equitable. *Deitzler v. Mishler*, 37 Penn. St. 82. See beyond, **3674.**

⁹ *McCool v. Smith*, 1 Black, 459; *Schrack v. Zubler*, 34 Penn. St. 38.

¹⁰ *Strother v. Lucas*, 12 Pet. 410; *Batterton v. Yoakum*, 17 Ill. 288.

of his own title, and he cannot found his claim on the weakness of that of his adversary.

The party in possession of land has a good title against all the world, except the legal owner, and the plaintiff will fail unless he shows possession or a right of possession anterior in time to that of the defendant.¹¹ He cannot call upon the latter to show his title, but must prove his own. What is sufficient evidence of possession is often a difficult question, but is here immaterial, as the possession of the defendant is essential to the plaintiff's case.

The demandant may sometimes maintain ejectment without showing any title other than mere possession. If he was, in fact, in possession of the premises under a claim of right before the tenant became possessed, this will entitle him to recover, unless the tenant can show a title running back of the demandant's possession, or some subsequent title acquired from the demandant.¹² In this case the presumption that the tenant's possession is lawful is overpowered by the contrary presumption that the demandant's right still continues. He is presumed to be still the owner, and cannot be required to show that he has not parted with the title. This prior possession of the demandant must have been open, uninterrupted, continued for a sufficient length of time, and under a claim of title.¹³

It follows from this that although the demandant's title may be invalid, still the tenant cannot show in defence that the legal title is in a stranger between whom and the tenant no privity exists.¹⁴

3661. *The injury* or wrong for which ejectment lies must be such an actual dispossession of the plaintiff as amounts to an ouster, which has been defined before.¹⁵ An injury to land which amounts merely to a trespass or nuisance is not sufficient;¹⁶ for there must be a withholding under a claim of title paramount to that of the plaintiff. Nor will the action lie unless the defendant is actually in possession when the suit is brought.¹⁷ The action does not lie where the defendant claims merely an easement in the land.¹⁸

The mere recording of a deed is held to be a claim of right amounting to an ouster, so that the grantee may be made defendant in ejectment.¹⁹

3662. In the common law action of ejectment, it was necessary, as we have seen, to allege a lease, entry, and ouster. These, being imaginary occurrences, were not governed by any obligations of truth, but were subject to certain rules to prevent too glaring an inconsistency. The lease alleged must be such a one as would be good and consistent with the demandant's title. The time of the lease should be stated, and was so far material that the demandant's right to recover was governed by his right at the time of the alleged lease, instead of, as now, at the time of beginning the action. It should also appear to have been before the time of the alleged ouster; but as the latter is always laid under a *videlicet*, the exact date becomes immaterial, and will be rejected if repugnant.

It is not necessary to state when the plaintiff entered upon the land, but

¹¹ *Young v. Chamberlain*, 15 La. Ann. 454; *Seabury v. Field*, 1 McAll. C. C. 1; *Boylan v. Meecker*, 4 Dutch. N. J. 274.

¹² *Keane v. Cannovan*, 21 Cal. 291; *Schultz v. Arnot*, 33 Mo. 172; *Clute v. Voris*, 31 Barb. N. Y. 511.

¹³ *Hutton v. Schumaker*, 21 Cal. 453.

¹⁴ *Williams v. Swetland*, 10 Iowa, 51; *Zeringue v. Williams*, 15 La. Ann. 76; *Piercy v. Sabine*, 10 Cal. 22; *Burr v. Spencer*, 26 Conn. 159; but see *Townsend v. Downer*, 32 Vt. 183; *Sutton v. McLeod*, 29 Ga. 589.

¹⁵ Before, **2352**.

¹⁶ *Aiken v. Benedict*, 39 Barb. N. Y. 400.

¹⁷ *Klink v. Cohen*, 13 Cal. 623; *People v. New York*, 28 Barb. N. Y. 240; *Atwell v. McLure*, 4 Jones, No. C. 371; *Kribbs v. Downing*, 25 Penn. St. 399.

¹⁸ *Wilklow v. Lane*, 37 Barb. N. Y. 244; *Child v. Chappell*, 9 N. Y. 246.

¹⁹ *Hill v. Kricke*, 11 Wisc. 442.

merely that he entered by virtue of the lease. The time of the ouster should be alleged, but is immaterial.

3663. In the actions now used for the recovery of real estate, the pleading is governed by the same rules as in other cases. There is no necessity for alleging imaginary or immaterial facts, but the material facts, the title of the plaintiff, the wrongful possession of the defendant, and a proper description of the premises must be set forth with sufficient clearness and precision. The description should be such that the jury can identify the property claimed with the evidence.²⁰

3664. *The general issue* in ejectment is not guilty. As by the consent rule the defendant must admit lease, entry, and ouster, it seldom happens that he can plead any other plea.

An actual ouster is required to enable one tenant in common to maintain the action against his co-tenant, but this is admitted by the consent rule, and if the defendant relies on the want of an actual ouster, he must ask for a special rule to admit lease and entry only.²¹

3665. Persons claiming a joint estate in the premises must all be joined as plaintiffs. But where the estate has been severed they could not join. Tenants in common having separate rights could not join, and such is now the law in some states; but in most of the states they may sue together to recover the common estate.²² If one joint tenant asserts an exclusive right to the whole, this is an ouster, for which his co-tenant may bring ejectment.²³ In the same way a tenant in common may sue his co-tenant for an actual ouster.²⁴ In both of these cases stronger evidence of disseisin is required than in the case of a stranger; as against a stranger, one tenant suing alone is entitled to recover possession of the whole.²⁵

3666. When the title of the plaintiff to the premises is controverted under the general issue, he is required to establish the following facts: that he had the legal estate in the disputed lands at the time of the demise laid in the declaration; that such legal estate was then accompanied by a right of entry;²⁶ and that the defendant, or those claiming under him, were in possession of the premises at the time when the declaration in ejectment was delivered.²⁷

The evidence required is different as the parties are or are not privy to each other; in the first case much less evidence is required than in the second.

3667. *When a privity exists between the parties* to ejectment, the claimant, instead of proving his title, should show the existence and termination of the privity; for a privity will not be presumed to exist without proof, but being proved, the presumption is in favor of its continuance. Thus, if the defendant be let into possession pending a negotiation for a purchase or a lease, proof

²⁰ *Munson v. Munson*, 30 Conn. 425; *Clement v. Youngman*, 40 Penn. St. 341.

²¹ *Van Bibber v. Frazier*, 17 Md. 436; see *Brown v. Combs*, 5 Dutch. N. J. 36.

²² *Craig v. Taylor*, 6 B. Monr. Ky. 457; *Touchard v. Keyes*, 21 Cal. 202.

²³ *Carpenter v. Thayer*, 15 Vt. 552.

²⁴ *Van Bibber v. Frazier*, 17 Md. 436.

²⁵ *Clark v. Huber*, 20 Cal. 196; but see *Gray v. Givens*, 26 Mo. 291.

²⁶ Under the common law a man might have the legal estate without having the right of entry. For instance, if one was disseised, he had a right of entry while the disseisor was living and in possession; but if the disseisor died and his heir entered and became seised, the heir was then in by an apparent right, and the law would not allow the owner to disturb this apparent right by entry without process of law, but he was driven to his remedy by writ of right. The right of entry was said to be tolled by descent cast. Some other similar cases existed, but they have now all been swept away, and the owner may now, at least for the purpose of bringing ejectment, be said to have a right of entry, whenever he is by law entitled to the possession of the estate.

²⁷ *Adams, Ejectm. c. 10, p. 247*; 2 *Greenleaf, Ev. § 304*; *Bailey v. Fairplay*, 6 Binn. Penn. 454.

must be given of the circumstances under which he was let into possession, and also of the breaking off of the negotiation before the day of the demise in the ejectment, or of the issuing of the writ where the fiction has been abolished;²⁸ and, in some cases, he must prove a previous demand.²⁹

The reason why proof of the plaintiff's title will not be necessary when a privity has subsisted between the parties, is because a defendant is not allowed to dispute the original title of him by whom he was admitted into possession,³⁰ although he may show such title has expired.³¹ When the relation of landlord and tenant has once been established, the defendant and those under whom he claims are estopped from disputing the plaintiff's title; for the succeeding tenants are as much affected by the acts and admissions of their predecessors, in regard to the title, as if they were their own.³² But the rule, that the tenant and those claiming under him cannot controvert the title of the lessor, is founded on the presumption of the lease having been obtained without fraud, force, or illegal behavior on the part of the lessor; therefore, where a lessor threatened to turn the lessee off by force of arms if he did not take a lease, it was held that the lessee might contest the landlord's title.³³ And the acceptance of a lease for a small part of a tract of land will not estop the lessee from controverting the lessor's title to the remainder of the tract.³⁴

But although the defendant, who stands in such privity to the plaintiff, cannot dispute the title of the latter, yet he may show that it has expired,³⁵ or that the plaintiff has sold his interest in the premises,³⁶ or that it has been sold by virtue of some competent judgment or decree by authority of law.³⁷

The privity is established by express proof of a contract between the parties, or by implication, as the payment of rent, which is always *prima facie* evidence of the title of the landlord, and is conclusive against the party paying, and all others claiming under and in privity with him.³⁸

When the parties claim under the same third person, the plaintiff is not bound to trace back his title beyond the common source of their right, and is not required to prove the title of such third person;³⁹ when, in fact, another person has title, the defendant is required under these circumstances to show it.⁴⁰

3668. But *when there is no privity*, the plaintiff must establish a legal, and

²⁸ *Wright v. Moore*, 21 Wend. N. Y. 230; *Hogeboom v. Hall*, 24 Wend. N. Y. 146. In the case of an agreement to purchase, the defendant cannot rely on the presumption of payment arising from lapse of time. *Brady v. Begun*, 36 Barb. N. Y. 533.

²⁹ *Den v. Westbrook*, 3 Green, N. J. 371; *Dennis v. Warder*, 3 B. Monr. Ky. 173; *Stackhouse v. Doe*, 5 Blackf. Ind. 570; *Jackson v. Moncrief*, 5 Wend. N. Y. 26; *Jackson v. Niven*, 10 Johns. N. Y. 335.

³⁰ *Driver v. Laurence*, W. Blackst. 1259.

³¹ *England d. Syburn, v. Slade*, 4 Term, 682.

³² *Taylor v. Needham*, 2 Taunt. 278; *Doe v. Mills*, 2 Ad. & E. 17; *Doe v. Lewis*, 5 Ad. & E. 577; *Galloway v. Ogle*, 2 Binn. Penn. 468; *Cooper v. Smith*, 8 Watts, Penn. 536; *Graham v. Moore*, 4 Serg. & R. Penn. 467; *Jackson v. Harsen*, 7 Cow. N. Y. 323; *Young v. Chamberlin*, 15 La. Ann. 454.

³³ *Hamilton v. Marsden*, 6 Binn. Penn. 45; *Miller v. McBrier*, 14 Serg. & R. Penn. 382; *Hockenburgh v. Snyder*, 2 Watts & S. Penn. 249.

³⁴ *Pederick v. Searle*, 5 Serg. & R. Penn. 236.

³⁵ *Neave v. Moss*, 1 Bingh. 360; 8 J. B. Moore, 389; *Doe v. Whitroe*, 1 Dowl. & R. 1; *Brook v. Briggs*, 2 Bingh. N. C. 572; see *Rugan v. Phillips*, 4 Yeates, Penn. 382; *Zeigler v. Fisher*, 4 Penn. St. 365.

³⁶ *Doe v. Watson*, 2 Stark. 230.

³⁷ *Camp v. Camp*, 5 Conn. 291; *Jackson v. Davis*, 5 Cow. N. Y. 123.

³⁸ *Doe v. Pegge*, 1 Term, 758, 759, n.; *Hall v. Butler*, 10 Ad. & E. 204.

³⁹ *Riddle v. Murphy*, 7 Serg. & R. Penn. 230; *Johnstone v. Scott*, 11 Mich. 232; *Conger v. Converse*, 9 Iowa, 554.

⁴⁰ *Riddle v. Murphy*, 7 Serg. & R. Penn. 230.

not merely an equitable title; depending upon the strength of his own, and not upon the weakness of that of his adversary. This rule, however, will not avail a defendant who has fraudulently induced a plaintiff to purchase a bad title;⁴¹ nor can a defendant require of the plaintiff a better title than a naked possession when he has wrongfully put him out of possession.⁴² If he can, the defendant must show a better title in order to support his action.⁴³

The title to be established, when no privity exists between the parties, relates to the rights of the heir at law, a devisee, or a personal representative or guardian.

3669. When the plaintiff claims title as *heir at law*, he must prove that the ancestor from whom he derives his title was the person last seised of the actual freehold and inheritance; that is, that had last actual possession of the lands in fee simple, and that he, the claimant, is his heir.

The seisin may be proved, in the first instance, by showing that the ancestor was either in the actual possession of the premises at the time of his death, or in the receipt of the rent from the tenant; for possession is presumptive evidence of a seisin in fee, until the contrary has been proved.⁴⁴ This presumption may, of course, be rebutted, and, for this reason, the plaintiff should be prepared with other evidence of his ancestor's title.

When the plaintiff claims as lineal heir, he is required to produce this proof; when he claims as collateral heir, he must prove the descent to himself, and the person last seised, from some common ancestor, together with the extinction of all those lines of descent which would claim before him and defeat his right. He must, therefore, prove all the marriages, births, and deaths necessary to complete his title and the identity of the persons. This is done by the usual mode of proving pedigrees.⁴⁵

3670. When the plaintiff claims as *devisee* of a freehold, he must prove the seisin and death of the devisor, and that his will, devising him the estate, has been properly executed according to the requirement of the law. The proof is to be made by the production of the attesting witnesses, when it has been attested by them, if they can be procured; if not, by proving their hand writing; when it has not been attested, it must be proved as other writing. But in case of a will thirty years old, it may be read without further proof on account of the difficulty of proving it, as the witnesses may all be dead; and the age of the will in these cases is to be reckoned from the date of the will, and not from the death of the testator.⁴⁶

The seisin of the testator may be proved as the seisin of an ancestor.

When the lessor of the plaintiff, or the plaintiff where the fictions in ejectment have been abolished, claims as legatee of a term of years, he must give in evidence the probate of the will, and also prove the assent of the executor to the legacy, for this is essential to his title. This assent may be proved by the express agreement of the executor or implied from his acts; as, where he permits the legatee to receive the rents and apply them to his own use, and once given, this assent cannot be revoked.⁴⁷ The plaintiff must also prove the title

⁴¹ Lane v. Reynard, 2 Serg. & R. Penn. 65.

⁴² Woods v. Lane, 2 Serg. & R. Penn. 53; Jackson v. Harder, 4 Johns. N. Y. 202; Jackson v. Hazen, 2 Johns. N. Y. 22; Law v. Wilson, 2 Root, Conn. 102; Campbell v. Roberts, 3 A. K. Marsh. Ky. 623; Ludlow v. Barr, 3 Ohio, 388.

⁴³ Woods v. Lane, 2 Serg. & R. Penn. 53.

⁴⁴ Smith v. Lorillard, 10 Johns. N. Y. 338; Doe v. Butler, 3 Wend. N. Y. 149; Jackson v. McCall, 10 Johns. N. Y. 377; Buller, Nisi P. 103.

⁴⁵ Adams, Ej. 254; 2 Greenleaf, Ev. §§ 309, 311.

⁴⁶ Adams, Ej. 259; 2 Greenleaf, Ev. § 310; Jackson v. Blasham, 3 Johns. N. Y. 292; Jackson v. Christman, 4 Wend. N. Y. 277; Doe v. Walley, 3 Barnew. & C. 22; McKenire v. Fraser, 9 Ves. Ch. 5.

⁴⁷ Adams, Ej. 271; 1 Roper, Leg. 250; 2 Greenleaf, Ev. § 314.

of his testator, and show that he had a chattel and not a freehold in the premises; for when a party dies in possession, he is presumed to be seised of the fee until the contrary be shown. The production of the lease in a case of this kind is the most satisfactory, but it may be proved by any solemn admission of the defendant.⁴⁸

3671. When an ejectment is brought by a *personal representative* to recover a chattel real, he must prove the probate of the will, or the grant of letters of administration, or the book of the proper office where they are entered. In addition, he must prove the testator or intestate's title.

3672. When the plaintiff claims as *guardian*, he is required to prove not only the title of the ward and his minority at the time of the demise laid in the declaration, but also the appointment by virtue of which he claims, the deed or will, when he acts under these instruments, or the letters or certificate of a competent tribunal appointing him guardian.⁴⁹

3673. The plaintiff is bound to prove the identity of the lands and the *possession* of them by the defendant;⁵⁰ this can be done without difficulty when a privity exists between the parties by proof of the payment of rent, or by the acknowledgment of the defendant that he is tenant, or by any other competent evidence of the fact, for this is a mere fact, provable, like any other, by parol evidence. When there is no privity, the general mode of proof is by reading the deeds or wills under which the lessor or plaintiff claims, and showing that the names and abutments of lands in the defendant's possession agree with the premises described in these instruments. The oral declarations of the defendant may also be given in evidence to prove his possession;⁵¹ and the fact that he was in possession at the time of commencing the suit raises a presumption that he held in hostility to the plaintiff.⁵² The question of possession is wholly one of fact for the jury.⁵³

3674. The principle already stated, that the plaintiff must recover on the strength of his own title, and not on the weakness of that of his adversary, is so firmly established that but little can be said about the evidence required to be produced by the defendant. The lessor of the plaintiff or the plaintiff himself must establish a clear and substantial possessory title to the premises in question. The defendant's evidence is altogether confined to falsifying, contradicting, or explaining his adversary's proofs or rebutting the presumption which may arise out of them. It entirely depends on the nature of the proofs advanced by his adversary, and need not extend beyond the rebuttal of them.

Thus, when the lessor or plaintiff claims as heir, the defendant may show a devise by the ancestor to a stranger, or that the claimant is a bastard, or any other circumstance which will invalidate his title. When the claimant claims as devisee the defendant may prove that the will was obtained by fraud, or not duly executed, or that the testator was a lunatic, or any other fact which will destroy the validity of the supposed will. And on whatever right the claimant may rest his case the defendant may establish facts and circumstances, if he can, to destroy the apparent right of the claimant.

As we have before stated, the action must be decided by the legal title, and accordingly an equitable title cannot be shown in defence.⁵⁴ But the laws of

⁴⁸ Doe v. Steel, 3 Campb. 115.

⁴⁹ Adams, Ej. 274; 2 Greenleaf, Ev. § 315; 2 Phillipps, Ev. 303.

⁵⁰ Albertson v. Reding, 2 Murph. No. C. 283; see Den v. Snowhill, 1 Green, N. J. 23; Pickett v. Doe, 13 Miss. 470; Mordicai v. Oliver, 3 Hawks, No. C. 479.

⁵¹ Banyer v. Empire, 5 Hill, N. Y. 48; Mordicai v. Oliver, 3 Hawks, No. C. 479.

⁵² Sharp v. Ingraham, 4 Hill, N. Y. 116.

⁵³ Gage v. Smith, 27 Conn. 70.

⁵⁴ Stewart v. Hoag, 12 Ohio, 623; Abbott v. Chase, 13 Iowa, 453.

some of the states have altered this rule, and in them an equitable title in the tenant is sufficient to defeat the demandant's claim.⁵⁵

3675. The defendant may also prove that however regular the paper title of the lessor or plaintiff may be, he has a superior title, which has been gained by adverse possession for the space of twenty years;⁵⁶ that is, the enjoyment of land, or such estate as lies in grant, under such circumstances as indicate that such enjoyment has been commenced and continued under an assertion of right on the part of the possessor.⁵⁷

When the possession has been adverse for twenty years, of which the jury are to judge from the circumstances, the law raises a presumption of a grant.⁵⁸ But this presumption arises only when the use or occupation would have been unlawful.⁵⁹

This adverse possession may be either actual or constructive. It is actual when the defendant has himself been in the enjoyment of the land; it is constructive where a deed, or some other writing, sufficient in form to carry the title to the lands, where in fact a title exists, is set up to bar a recovery in an action of ejectment; and privity of contract, blood, or estate, must exist between the consecutive possessors of land to establish a continuity of constructive adverse possession.⁶⁰

3676. The principal requisite of a *verdict* in ejectment, when for the complainant, is that it find the facts laid in the declaration with certainty; for when the jury find an uncertain thing, the court cannot render a judgment, and if a judgment were rendered, it could not be executed; as, a verdict for "one hundred and fifty acres," without designating the part found, is void for uncertainty.⁶¹

⁵⁵ *Bartlett v. Judd*, 21 N. Y. 200; *Meador v. Parsons*, 19 Cal. 294; *McClane v. White*, 5 Minn. 178.

⁵⁶ In Pennsylvania twenty-one years are required. *Hawk v. Senseman*, 6 Serg. & R. Penn. 21. In most of the states statutes have been passed regulating the time when an adverse possession will give title; some requiring more, and others less than twenty years.

⁵⁷ *Waggoner v. Hastings*, 5 Penn. St. 300; *Overfield v. Christie*, 7 Serg. & R. Penn. 177; *Moore v. Small*, 9 Penn. St. 196.

⁵⁸ *Angell, Wat. Courses*, 85 *et seq.*

⁵⁹ The following rules, by which it may be ascertained that a possession is not adverse, are taken from *Bouvier, Law Dict. Adverse Possession*:

When both parties claim under the same title; as, if a man seised of certain land in fee have issue two sons and die seised, and one of the sons enter by abatement into the land, the statute of limitations will not operate against the other son; for when the abator entered into the land of his father, before entry made by his brother, the law intends that he entered claiming as heir to his father, by which title the other son also claims. *Coke, Litt. s. 396.*

When the possession of the one party is consistent with the title of the other; as, where the rents of a trust estate were received by a *cestui que trust* for more than twenty years after the creation of the trust, without any interference of the trustee, such possession being consistent with and secured to the *cestui que trust* by the terms of the deed, the receipt was held not to be adverse to the title of the trustee. 8 East, 248.

When, in contemplation of law, the claimant has never been out of possession; as, where Paul devised lands to John and his heirs, and died, and John died, and afterward the heirs of John and a stranger entered, and took the profits for twenty years; upon ejectment brought by the devisee of the heir of John against the stranger, it was held that the perception of the rents and profits by the stranger was not adverse to the devisee's title; for when two men are in possession, the law adjudges it to be the possession of him who has the right. *Ld. Raym. 329.*

When the occupier has acknowledged the claimant's titles; as, if a lease be granted for a term, and, after paying the rent for the land during such term, the tenant hold for twenty years without paying rent, his possession will not be adverse. See *Roe v. Ferrars*, 2 Bos. & P. 542; 8 Barnew. & C. 717.

⁶⁰ *Simpson v. Downing*, 23 Wend. N. Y. 316.

⁶¹ *Stewart v. Speer*, 5 Watts, Penn. 79; see *Burdick v. Norris*, 2 Watts, Penn. 28; *Stewart*

The verdict may be for less, but never for more, than the land claimed in the declaration.⁶² But if the jury should find a verdict for too much, the plaintiff may enter a *remittitur* to avoid a new trial.⁶³

When the verdict is for the defendant, a new trial is seldom granted, because all the parties then remain in the situation they were previously to the commencement of the action, and, therefore, the claimant may bring a new ejectment, without being subject to additional difficulties. But this is not the case when the verdict is against the defendant, because the possession then is changed. The defendant in the first ejectment becomes the plaintiff's lessor in the second, and is obliged to give evidence of his own title, instead of merely rebutting the claim set up by his opponent; and as this is a point of material consequence to him, "the courts rather lean to new trials on behalf of defendants in ejectments, especially on the footing of surprise."⁶⁴

3677. The party who has obtained a verdict is of course entitled to the *judgment* of the court, unless for some legal cause it has been set aside. By the judgment, when in his favor, the lessor of the plaintiff, or the plaintiff himself, where the fiction in this action has been abolished, obtains possession of the lands recovered by the verdict, but he does not acquire any other title to them than he had before.⁶⁵ When, therefore, he has a freehold interest in them, he is in as a freeholder; when he has a chattel interest, he is in as a termor; and when he has no title at all, he is in as a trespasser, and liable to account to the legal owner, without any re-entry on his part.⁶⁶ The verdict, or the judgment, is no evidence in a subsequent action, even between the same parties.⁶⁷

Although the claimant has but a mere possession given to him by the judgment, yet he becomes seised according to his title, if he have more than a chattel interest in the land. This is the effect of a fiction. It is a rule of law that when a man having title to an estate comes into possession of it by lawful means, he shall be in possession according to his title; now, when possession is given to him by the sheriff, the possession and the title are said to unite, and the lessor of the plaintiff holds the lands in this case, as in every other where he obtains peaceable possession, according to the nature of his interest in them.⁶⁸

The judgment being grounded on the verdict, it ought not to be entered for more land or for different parcels than the defendant was found guilty of by the verdict,⁶⁹ though a misprision or mistake, in this respect, made by the clerk, which causes a variance, is not fatal, but may be amended by the court.⁷⁰

v. Martin, 2 Watts, Penn. 200; *Gregory v. Jacksons*, 6 Munf. Va. 25; *O'Keson v. Silverthorn*, 7 Watts & S. Penn. 246; *Harrisburg v. Crangle*, 3 Watts & S. Penn. 460; *Clay v. White*, 1 Munf. Va. 162; *Munger v. Grinnell*, 9 Mich. 544; *Hunt v. McFarland*, 38 Penn. St. 69.

⁶² *Scott v. Bealle*, 1 A. K. Marsh. Ky. 69; *Van Alstyne v. Spraker*, 13 Wend. N. Y. 578; *Harrison v. Stevens*, 12 Wend. N. Y. 170; *Todd v. McGee*, 2 Bibb, Ky. 350; *Patton v. Cooper, Cooke*, Dist. Ct. 133.

⁶³ *McAllister v. Mullanphy*, 3 Mo. 38.

⁶⁴ Per Lord Mansfield, in *Clymer v. Littler*, 1 W. Blackst. 345, 348. This is of course true only of the common law ejectment. The modern actions are conclusive on the parties as to the questions involved. In New York by statute a new trial is allowed as of right if applied for within three years. *Chatauqua Bank v. White*, 23 N. Y. 347.

⁶⁵ But see *Parkes v. Moore*, 13 Vt. 183.

⁶⁶ *Coleman v. Doe*, 3 Ill. 251.

⁶⁷ *Clerke v. Rowell*, 1 Mod. 10. This is owing to the fictitious parties; in modern practice the judgment is conclusive on the parties and their privies. *Hanson v. Armstrong*, 22 Ill. 442; *Peterman v. Huling*, 31 Penn. St. 432; *Dean v. Dazey*, 5 Harr. Del. 440.

⁶⁸ *Adams, Ejectm.* 294.

⁶⁹ *Obert v. Hammel*, 3 Harr. Del. 73; *Marmaduke v. Tennant*, 4 B. Monr. Ky. 210.

⁷⁰ *Mason v. Fox, Croke*, Jac. 631.

3678. The action of *trespass for mesne profits*, although a separate action, has always been considered as connected with the action of ejectment, and treated as such. It is an action brought, after a recovery in ejectment, to recover the value of the profits which the defendant has received while he unlawfully held the possession of the premises for which the ejectment was brought, this being the damages the defendant has sustained, and which, in this action, he seeks to recover.⁷¹ We shall consider successively for what causes this action may be brought, the pleadings therein, the evidence, the verdict, and judgment.

3679. In the action of ejectment, the right of possession being the subject of controversy, the damages given are in general merely nominal.⁷² To recover damages, the lessor of the plaintiff, or the plaintiff himself, where the fictions in ejectment have been abolished, is allowed to recover such damages in an action for mesne profits, although he may have recovered damages in the ejectment.⁷³

The plaintiff in the action of ejectment, when brought under the statutes, or the lessor of the plaintiff, at common law, being the person concerned in interest, is the proper person to bring the action for mesne profits, though the action may also be sustained in the name of the nominal lessee. When brought by the former, he may, upon proofs, recover the rents and profits received by the defendant anterior to the time of the demise in ejectment, which cannot be done when the action is brought by the nominal plaintiff, and, for this reason, this course is preferable.⁷⁴

The right to recover for mesne profits necessarily follows a successful termination of the ejectment in favor of the plaintiff.⁷⁵ The amount to be recovered is the value of the mesne profits, after deducting the value of permanent improvements the defendant may have made on the estate.⁷⁶ It has been held that the plaintiff may not only recover such profits, but is also entitled to be reimbursed in such amount as he has in good faith been compelled to pay in obtaining, by legal means, the restoration of the property withheld by the defendant tortiously.⁷⁷

3680. In this action, *the declaration* must expressly state the different parcels of land from which the profits arose, or the defendant may plead a common bar. The time when the defendant broke and entered into the premises and ejected the plaintiff, the length of time during which he ejected him, and the value of the mesne profits of which he deprived him, must also be correctly stated; for if the declaration do not contain these statements, it will be bad on special demurrer.⁷⁸

⁷¹ In most of the states the mesne profits are now recovered in the same action as the land. *Garner v. Jones*, 34 Miss. 505.

⁷² In Pennsylvania, the plaintiff in ejectment may recover for mesne profits upon giving notice that he means to proceed for them. *Battim v. Bigelow*, Pet. C. C. 291. In such case, the damages must be claimed in the declaration, or they cannot be recovered. *Bayard v. Inglis*, 5 Watts & S. Penn. 465.

⁷³ *Van Allen v. Rogers*, 1 Johns. Cas. N. Y. 281.

⁷⁴ *Buller*, Nisi P. 87.

⁷⁵ *Benson v. Matsdorf*, 2 Johns. N. Y. 369; *Murphy v. Guion*, 2 Hayw. No. C. 145.

⁷⁶ *Jackson v. Loomis*, 4 Cow. N. Y. 168; *Hylton v. Brown*, 2 Wash. C. C. 165; *Cawdor v. Lewis*, 1 Younge & C. Exch. 427; *Russell v. Blake*, 2 Pick. Mass. 505; *Myers v. Sanders*, 8 Dan. Ky. 65; *Morrison v. Robinson*, 31 Penn. St. 456. The value of the improvements can only be allowed by way of set-off to the mesne profits, and cannot exceed them. *Yount v. Howell*, 14 Cal. 465.

⁷⁷ *Doe v. Perkins*, 8 B. Monr. Ky. 198. In New York, the damages done by the withholding may be recovered in the ejectment suit, but permanent injuries to the estate must be recovered in a separate and subsequent suit. *Hotchkiss v. Auburn R. R.*, 36 Barb. N. Y. 600.

⁷⁸ See *Higgins v. Highfield*, 13 East, 407.

The statement of the damages in the declaration may include the costs of the ejectment, whether the judgment be against the casual ejector, or against the tenant or landlord.⁷⁹

3681. *The general issue* is not guilty. The defendant may also plead not guilty within six years before the commencement of the action, when the plaintiff claims the mesne profits for a longer period than six years before action brought.⁸⁰ The defendant cannot plead, as a matter of defence, what would have been a bar to the action of ejectment.⁸¹

3682. To entitle himself to recover, *the plaintiff must prove* his possessory title, the wrongful entry of the defendant, the duration of time during which he occupied the premises, the value of the mesne profits, and other damages to which he is entitled.

3683. The plaintiff may prove his possessory title when the action is between the parties to the prior action of ejectment, and the plaintiff proceeds only for profits accruing subsequent to the alleged date of the demise, by the record of the judgment, which in that case is conclusive evidence of the plaintiff's title and of the defendant's entry and possession from the day of the demise laid in the declaration.⁸² If, on the contrary, the plaintiff seeks to recover profits antecedent to the time of the demise laid in the declaration, or brings his action against a precedent occupier, the record in the ejectment cannot be given in evidence, but the plaintiff must prove his title to the premises from whence the profits arose, for without such proof there is no evidence that he is entitled to them.⁸³

3684. The plaintiff is also required to prove the duration of the occupancy by the defendant, or by his tenant, when he is the landlord; this is proved like any other matter *in pays*.

3685. He must also prove the value of the mesne profits, that is, the yearly value of the premises during the time of the tortious occupation; the costs of the ejectment; and, provided the plaintiff has specially alleged such claim in his declaration, he may give evidence to the jury of any injury done to the premises in consequence of the misconduct of the defendant.⁸⁴

3686. *The defendant* may rebut any of the facts which have been adduced by the plaintiff to make him liable when such evidence is not conclusive upon him; for example, he may give evidence to contradict that of the plaintiff where the latter alleges that he was in possession of the premises before the time of the demise in the declaration, and show that in point of fact he had not occupied the premises before that time.⁸⁵ The defendant may also show that pending the time laid in the declaration he gave up the possession to the plaintiff, and he will not be liable after that time.⁸⁶

3687. The jury are not confined in their *verdict* to the mere rent of the premises, although the action be brought to recover the rents and profits of the es-

⁷⁹ Adams, Ej. 332.

⁸⁰ Buller, Nisi P. 88.

⁸¹ Baron v. Abeel, 3 Johns. N. Y. 481; Jackson v. Randall, 11 Johns. N. Y. 405.

⁸² Adams, Ej. 334; Van Allen v. Rogers, 1 Johns. Cas. N. Y. 281; Chiral v. Reinicker, 11 Wheat. 280; Lion v. Burtis, 5 Cow. N. Y. 408; Aslin v. Parkin, 2 Burr. 668; Dodwell v. Gibbs, 2 Carr. & P. 615; Posterns v. Posterns, 3 Watts & S. Penn. 182; Den v. McShane, 1 Green, N. J. 35; Poston v. Jones, 2 Dev. & B. No. C. 294; Whittington v. Christian, 2 Rand. Va. 353.

⁸³ Buller, Nisi P. 87; Aslin v. Parkin, 2 Burr. 665; Jackson v. Randall, 11 Johns. N. Y. 405; West v. Hughes, 1 Harr. & J. Md. 574.

⁸⁴ Adams, Ej. 337; Huston v. Wickersham, 2 Watts & S. Penn. 308; Coach v. Gerry, 3 Harr. Del. 423; Doe v. Perkins, 8 B. Monr. Ky. 198.

⁸⁵ Vance v. Inhabitants of Cong. Township, 7 Blackf. Ind. 241.

⁸⁶ Mitchell v. Freedley, 10 Penn. St. 198.

tate; they may give extra damages if they think proper, such as the circumstances of the case may require.⁸⁷ The plaintiff in ejectment recovers the mesne profits down to the time of the verdict.⁸⁸

3688. *The judgment follows the verdict, and generally carries costs.*

3689. It has been stated that waste is a spoil or destruction in houses, gardens, trees, and other corporeal hereditaments, to the disherison of him who has the reversion or remainder in fee simple or fee tail.⁸⁹ To redress this injury there are two remedies: the first, by an *action of waste*, which is a mixed action, by which the plaintiff recovers the place wasted, and also damages for the injury; the second, by an action on the case for the recovery of damages only.

In modern practice the remedy usually adopted is an action on the case; still, the old action of waste lies in some of the United States, but in others the only remedy is by an action on the case or an injunction.⁹⁰

3690. By the 13 Edw. I, c. 22, the action of waste is given to one tenant in common against another. These words have been construed to include as well joint tenants as tenants in common, for both of them hold in communi.⁹¹ And by a subsequent statute,⁹² an action of waste is given to the heir for waste done in the time of his ancestor as well as for waste done in his own time. A purchaser is considered as coming within the purview of this statute, although it speaks of those who were inheritors.⁹³

The plaintiff must have the next immediate estate of inheritance in remainder or reversion,⁹⁴ for a contingent interest is not sufficient.⁹⁵

3691. The statute of Gloucester⁹⁶ enacts that a man from henceforth shall have a writ of waste in the chancery against him that holds by the law of England, or otherwise, for the term of life, or for the term of years, or a woman in dower.⁹⁷

When waste was committed by an assignee of a tenant in dower, or by the curtesy, the action, if brought by the heir of the husband or wife, must be against the original tenant, because the assignee is considered only as his bailiff or servant. In case, however, where the reversioner has also assigned his inheritance, and the assignee of the tenant has attorned, the latter is considered as the tenant, and the assignee of the reversioner, the landlord, so that the assignee of the tenant is alone liable for waste done by himself.

When the waste has been committed by a stranger, still the lessee will be liable for waste, for it is his duty to prevent waste by the stranger, and he may recover in trespass against him.⁹⁸ It seems to be the policy of the law to make the lessee liable for waste, whenever he could or ought to have prevented it. If any lessee for life or years commits waste, and afterward assigns his whole estate, the action of waste lies against the original tenant, and the place wasted may be recovered from the assignee, though he is not a party to the suit, the title of his assignor having been forfeited previous to the assignment.⁹⁹

⁸⁷ Goodtitle *v.* Tombs, 3 Wils. 118; *Contra* Hanna *v.* Phillips, 1 Grant, Cas. Penn. 253; Holmes *v.* Davis, 19 N. Y. 488.

⁸⁸ Dawson *v.* McGill, 4 Whart. Penn. 230.

⁸⁹ Before, 2397.

⁹⁰ See Shult *v.* Baker, 12 Serg. & R. Penn. 273; Sackett *v.* Sackett, 8 Pick. Mass. 369; Findlay *v.* Smith, 6 Munf. Va. 134; Bright *v.* Wilson, 1 Cam. & N. No. C. 21; Shepherd *v.* Shepherd, 2 Hayw. No. C. 382; Carver *v.* Miller, 4 Mass. 559; Randall *v.* Cleaveland, 6 Conn. 328.

⁹¹ Bacon, Abr. *Waste*, G.

⁹² 1 Inst. 53, b, 356; 2 Rolle, Abr. 825.

⁹³ Mayo *v.* Feaster, 2 M'Cord, Eq. So. C. 142.

⁹⁴ 6 Edw. I, c. 5.

⁹⁵ Bacon, Abr. *Waste*, H, 1.

⁹⁶ 20 Edw. I, Stat. 2.

⁹⁷ 1 Inst. 52, 53.

⁹⁸ See Bacon, Abr. *Waste*, H.

⁹⁹ 2 Greenleaf, Ev. § 652.

3692. The material averments in *the declaration* are that the plaintiff has a title to the inheritance; this must be averred as fully and correctly as in a writ of entry on intrusion; the demise of the tenant, if there be one, or such other complete title as he may possess; the quality, quantity, and amount of the waste, and the place in which it was committed; as, whether in the whole premises, or in a distinct part of them; and whether it was done *sparsim*; as, by cutting trees in different parts of a wood; or totally; as, by prostrating an entire building.¹⁰⁰

It is also necessary to aver the kind of tenure by which the defendant holds or held; when the defendant holds, the averment may be in the *tenet*, "which he, said Peter, holds," or, when he is no longer in possession, in the *tenuit*, "which he held," and this has a reference to the time when the waste was done, and not when the action was brought. This averment is necessary, because, in the former case, the plaintiff will recover the place wasted, namely, that part of the premises in which the waste was exclusively done, if it were done in one part only, together with treble damages. In the latter case, on the contrary, the tenancy being at an end, the plaintiff will only recover his damages.¹⁰¹

3693. *The general issue* in this action is that the defendant "did not make any waste, sale, or destruction in the messuages and premises aforesaid, as the plaintiff in his writ and declaration hath supposed." But whether this puts in issue the whole declaration seems doubtful. It is, therefore, proper to plead any matter in discharge specially.¹⁰²

3694. It is enacted by the statute already cited¹⁰³ that he which shall be attainted of waste shall lose the thing which he hath wasted, and moreover, shall recompense thrice so much as the waste shall be taxed at.¹⁰⁴ The plaintiff may recover the place wasted, not only when the injury has been total, as the destruction of a building, but also when the waste has been done to separate parts of the inheritance; as, where trees growing *sparsim* in a close are cut; in an action of waste, all the close shall be recovered.¹⁰⁵

3695. This action has been superseded by the more convenient action upon the case in the nature of waste.¹⁰⁶

¹⁰⁰ 2 Greenleaf, Ev. § 652.

¹⁰¹ Bacon, Abr. *Waste*, K, 1 and 2.

¹⁰² Jackson, Real Actions, 339; *Greene v. Cole*, 2 Saund. 238, note (5).

¹⁰³ Statute of Gloucester, 6 Edw. I, c. 5.

¹⁰⁴ The statute of Gloucester, 6 Edw. I, c. 5, is in force in Massachusetts so far as to give the action for the recovery of the place wasted, and treble damages, from the tenant for life; except in respect to tenants in dower, respecting whom the law has been altered by the statute. *Sackett v. Sackett*, 8 Pick. Mass. 309.

¹⁰⁵ Anon. Brownl. 240; Coke, Litt. 54, a; Bacon, Abr. *Waste*, M.

¹⁰⁶ Before, 2413.

CHAPTER XXVII.

SCIRE FACIAS.

- 3697. Definition.
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- 3699. Out of what court the writ must issue.
- 3700-3716. When a *scire facias* is the proper remedy.
- 3701-3714. *Scire facias* on judgments.
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 - 3715. *Scire facias* on recognizances.
 - 3716. *Scire facias* on other records.
 - 3717. The pleadings.
 - 3719. The evidence.
 - 3721. The trial.
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3696. After having considered the nature and requisites of personal actions arising *ex contractu* and those arising *ex delicto*, and of the mixed actions of ejectment and waste, the next object which will deserve our attention will be the action of *scire facias*; and this will complete the view which it was necessary to take of actions at law.¹

3697. A *scire facias* is the name of a writ founded on some record, and requiring the defendant to show cause why the plaintiff should not have the advantage of such record, or when it is issued to repeal letters patent, why the record should not be annulled and vacated.²

The *scire facias* is sometimes called a new action and sometimes a continuation of the former action. It is considered in the nature of an action because the defendant may plead to it;³ it is an original action when it is issued on a recognizance, or to repeal a patent, and the like, there being no action on which it can then be founded; but when brought to revive a judgment after a year and a day after its rendition, or upon the death or marriage of the parties, it is a continuance of the action;⁴ where, therefore, an interlocutory judgment was obtained against a testator, and pending that action the testator's attorney

¹ See generally, Bacon, Abr. *Scire Facias*, *Execution*, H; 11 Viner, Abr. 1; 19 Viner, Abr. 280; Comyn, Dig. *Pleader*, 3, L; Dane, Abr. Ch. 190; Tidd, Pr. 982.

² Graham, Pract. 649; 2 Tidd, Pr. 982; 2 Sellon, Pract. 187; 2 Archbold, Pract. 76; Bacon, Abr. *Scire Facias*, *in pr.*; Comyn, Dig. *Pleader* 3, L.

³ Coke, Litt. 290; Potter v. Titcomb, 13 Me. 36; Andress v. The State, 3 Blackf. Ind. 110; Pickett v. Pickett, 2 Miss. 267; Blacknell v. The State, 3 Ark. 320; see Ryder v. Glover, 4 Ill. 547; Bentley v. Sevier, 1 Hempst. C. C. 249.

⁴ Dane, Abr. Ch. 190, § 8.

agreed that no writ of error should be brought, and after his death, a *scire facias* was brought against his executors, the court held they could not bring a writ of error, because they were bound by the agreement of the testator's attorney, as the *scire facias* was not a new action, but only a continuance of the old one.⁵

Our inquiries in this chapter will relate to the form of the writ; out of what court the *scire facias* must issue; when it is a proper remedy; the pleadings; the evidence; the trial and judgment.

3698. As the *scire facias* in many cases stands in the place of a declaration, it must contain such recitals and state such facts as will authorize the court to give a judgment upon it;⁶ a *scire facias* to revive a judgment must, therefore, state that although a judgment was given for the plaintiff, yet execution of the debt and damages still remains to be made, and commands to the sheriff to make known to the defendant that he be in court at the return day, to show cause why the plaintiff ought not to have execution against him for the debt and damages according to the form and effect of the recovery; this writ must pursue the judgment; if a joint judgment be obtained against two, the *scire facias* must be against both; when there is a material variance in setting out the judgment, it will be fatal on *nul tiel record*.

When the writ is issued on a recognizance, it must state a cause of action with as much precision as a declaration; therefore the condition of the recognizance must be set forth, and a breach must be shown.⁷ It is fatally defective if it omit to aver that the recognizance was acknowledged before an officer properly authorized to take it.⁸

3699. The writ must issue out of the court in which the record has been made, if the record remains there,⁹ or if it has been removed, out of the court where the record is,¹⁰ for no other, in general, has jurisdiction, unless specially authorized by statute;¹¹ but in some cases a *scire facias* is issued upon certain records which are not entered in the court whence the writ issues; in these cases the statute law authorizes the issuing of the writ. For example, a *scire facias* on a municipal claim is an original, not a judicial writ, and does not necessarily issue from the court in which the claim is filed.¹²

A *scire facias* on a recognizance cannot be issued by the court to which a cause has been appealed, but must issue from the court below.¹³

3700. In real actions, when land was recovered, and a year and a day elapsed before execution was taken out, the demandant might, after that time, have taken out a *scire facias* to revive the judgment, because the judgment being particular *quoad* the land, with a certain description, the law required that the execution of that judgment should be entered upon the roll, that it might be seen whether execution was delivered of the same thing of which judgment was given; and, therefore, if there was no execution appearing on the roll, a

⁵ Wright v. Nutt, 1 Term, 388.

⁶ McVickars v. Ludlow, 2 Ohio, 246; Toulmin v. Bennett, 7 Ala. 220; Prather v. Munro, 11 Gill & J. Md. 261.

⁷ Hicks v. The State, 3 Ark. 313.

⁸ Madison v. Commonwealth, 2 A. K. Marsh. Ky. 131.

⁹ Comyn, Dig. Pleader, 3, L, 3; State v. Kinne, 39 N. H. 129; State v. Brown, 41 Me. 535.

¹⁰ Tidd, Pract. 1007; Osgood v. Thurston, 23 Pick. Mass. 110; Tindall v. Carson, 1 Harr. Del. 94, see Baron v. Pagles, 6 Ala. N. S. 422; Heath v. Tyson, Wright, Ohio, 442. As, for instance, where the record has been removed by certiorari. Register v. Layman, 5 Harr. Del. 349.

¹¹ Treasurer v. Erwin, Brayt. Vt. 218; Vallance v. Sawyer, 4 Me. 62; Carlton v. Young, 1 Aik. Vt. 332; Boylan v. Anderson, 2 Penn. 529; Wilson v. Tiernan, 3 Mo. 577.

¹² Schenley v. Commonwealth, 36 Penn. St. 29.

¹³ Jones v. McLaurine, 7 Jones, No. C. 392.

scire facias issued to show cause why execution should not be awarded.¹⁴ But there was another reason why a *scire facias* should issue in a real action, because if an execution was not sued out within a year, no other advantage could be taken of the judgment, as an action of debt could not be maintained on it.¹⁵

But the case was different when the plaintiff had obtained judgment in a personal action, and had lain by for a year and a day, and during that time had taken no process of execution; in that case he was compelled to sue again upon his judgment, (in England by a new original writ,) and no *scire facias* could issue, because there was not a judgment for any particular thing in the personal action with which, as in a real action, the execution could be compared. After a reasonable time, that is, a year and a day, the judgment was presumed to be executed, and no *scire facias* was allowed the plaintiff, calling upon the defendant to show cause why he should not have execution. If the judgment was not satisfied, the plaintiff's only remedy was an action upon his judgment, and then the defendant was required to prove how it was discharged.¹⁶

This inconvenience was remedied by statute,¹⁷ which gave to the plaintiff in a personal action a *scire facias* to revive the judgment, when he had omitted to sue execution within a year and a day after judgment was obtained.¹⁸

A *scire facias* on a personal action may be had on judgments, on recognizance, and on other records.

3701. A *scire facias* on a judgment may be between the original parties, or between other parties who have acquired the rights of the plaintiff, or become subject to the liabilities of the defendant.

In some of the states the proceedings by *scire facias* are entirely superseded by statutory proceedings.¹⁹ In others a *scire facias* remains as a concurrent remedy with other statutory modes of reviving judgments.²⁰

3702. As between the original parties, a *scire facias* may be brought in the following cases: 1, when the judgment has been rendered more than a year and a day, and it remains unexecuted; 2, when it is given on a covenant and annuity, or in debt on bond conditioned for the payment of an annuity, or of money by instalments, or for the performance of covenants, and damages arise, or money becomes payable on the same security after the judgment; 3, where the debt and damages are to be levied of future effects, or in the case of an executor *de bonis propriis*.

3703. We have just seen by what authority the *scire facias* in personal actions may be issued. The judgment on which it is founded is generally more than a year and a day old, computing the time from the day of signing the judgment by calendar months, and not by terms; for until the judgment has obtained that age an execution may be issued. And if once a *feri facias* or *capias ad satisfaciendum* be sued out within the year and day, and not executed, a new writ of execution may be taken out afterward, without a *scire facias*, provided the first writ be returned, and continuance entered from the time of issuing it.²¹

The time during which an execution may be issued is to be computed when there is a *cesset executio* from the day when the stay of execution expires; the reason is that the indulgence which the plaintiff has voluntarily given to the

¹⁴ Bacon, Abr. *Execution*, H.

¹⁶ Bacon, Abr. *Execution*, H.

¹⁷ Stat. Westm. 2, (13 Edw. I.) Stat. 1, c. 45.

¹⁸ Bacon, Abr. *Execution*, H.

¹⁹ Hughes v. Shreve, 3 Metc. Ky. 547; Humiston v. Smith, 21 Cal. 129.

²⁰ McGlassen v. Wright, 10 Iowa, 591.

²¹ Coke, Litt. 290; Lewis v. Smith, 2 Serg. & R. Penn. 142; see Pennock v. Hart, 8 Serg. & R. Penn. 377; Dunlap v. Spear, 3 Binn. Penn. 169.

defendant, or which the law has granted him, ought not to be turned to the prejudice of the plaintiff. If he do not take out his execution, however, within the year after the *cesset executio* is determined, he must sue out a *scire facias*.

3704. For a similar reason, when the defendant has sued out a writ of error by which the plaintiff has been delayed and prevented from taking out execution within the year, and the plaintiff in error has been non-suited, or the judgment has been affirmed, or the writ of error has been abated or discontinued, the defendant in error may proceed to execution after the year without a *scire facias*, because the writ was a *supersedeas* to the execution and the defendant in error was compelled to await until its determination. And the same reason operates where the defendant has delayed the plaintiff by injunction.

3705. If before the expiration of the year the plaintiff has sued out a *scire facias* to revive the judgment, he cannot afterward issue an execution until judgment has been rendered on the *scire facias*.²² And if, after having obtained judgment on the *scire facias*, he neglect to issue an execution within a year after the rendition of such judgment, he must issue a second *scire facias* before such execution can issue.

3706. In some of the states of the Union the time during which an execution may be issued is extended by statute much beyond one year.²³

3707. In debt on bond, conditioned for the payment of money by instalments, where judgment is rendered for the penalty and the proceedings are stayed on the payment of the instalment then due, and a stay of execution is given till the others become due, it is not requisite that a *scire facias* should be taken out if execution has been sued out within a year after each default.

When a judgment is entered in an action of debt on a bond, or on any penal sum for the non-performance of covenants or agreements in any indenture, deed, or writing contained, it is provided by the statute 8 and 9 W. III, c. 11, s. 8, that it shall remain a security to answer such damages as shall or may be sustained for further breach of any covenant or covenants in the same indenture, deed, or writing contained; and the statute further directs that the plaintiff may have a *scire facias* upon the said judgment against the said defendant, or against his heir, terre tenants, executors, or administrators, suggesting other breaches of the said covenants or agreements, and to summon him or them respectively to show cause why execution should not be awarded upon the said judgment, upon which there shall be the like proceeding as in action of debt upon said bond or obligation for assessing damages upon trial of issues upon such breaches or injury thereof upon a writ to be awarded as therein directed; and that upon payment and satisfaction of such future damages, costs, and charges, all the said proceedings on the said judgments are again to be stayed, and so *toties quoties*, and the defendant, his body, lands, and goods shall be discharged out of execution.

Upon somewhat similar principles in the trustee and garnishee process, a judgment is rendered against the garnishee or trustee for the whole amount, and a *scire facias* then issues to ascertain the amount with which the garnishee is properly chargeable.

3708. Sometimes a judgment is rendered, and there is no property in the hands of the defendant which can be reached, but assets may afterward come into his hands; in such case, for the purpose of obtaining the fruit of his judgment the plaintiff is driven to his action. A familiar example will illustrate this. When an executor or administrator is sued for a debt of the deceased

²² Rolle, Abr. 900.

²³ In Maine a *scire facias* is not required until the execution has been returned and recorded. *Grosvenor v. Chesley*, 48 Me. 369.

person he represents and he pleads *plene administravit*, that he has fully administered, and the plaintiff admits or confesses his plea, he has a right to take judgment for his debt, damages, and costs, to be levied as to the whole or in part of the goods of the testator or intestate which shall afterward come to the hands of the defendant to be administered; this is called a judgment of assets *quando acciderint*.²⁴

By the plea of *plene administravit* the defendant confesses the debt; the plaintiff may therefore take judgment, but he cannot have execution until the defendant have goods of the deceased, when he may sue out a *scire facias* or bring an action of debt suggesting a *devastavit*. By taking the judgment of assets *quando acciderint* the plaintiff admits that the defendant has fully administered to that time, and therefore the plaintiff will not be allowed to give evidence of effects come to defendant's hands before the judgment. For this reason the *scire facias* on a judgment of assets *quando acciderint* must only pray execution of such assets as have come to the defendant's hands since the former judgment, and if it pray judgments of assets generally, it cannot be supported.²⁵

3709. It is a general rule that where a *new person* is to be benefited or charged by the execution of a judgment, there ought to be a *scire facias* to make him a party to a judgment; and when the execution is not beneficial nor chargeable to a person who was not a party to a judgment, a *scire facias* is unnecessary. These changes take place in the cases of marriage, bankruptcy, and death. These will be considered separately.²⁶

3710. When a *feme sole* obtains a judgment, or there is a judgment against her, and she afterward marries before execution, there must be a *scire facias* for or against husband and wife in order to execute the judgment.

3711. When the husband and wife obtain a judgment for the proper debt of the wife, and afterward the wife dies before execution, the husband alone may have a *scire facias* without taking administration, for by the judgment the debt is altered; it survives to him and becomes his own.

3712. On the other hand, if a judgment be obtained against a *feme sole* and she marry, and then the plaintiff sue out a *scire facias* against the husband and wife, and have a judgment *quod habeat executionem* against both, and afterward the wife die, the plaintiff may sue out a *scire facias* and have execution against the husband.

3713. In general, *the assignees of bankrupts and insolvents* are entitled to all the choses in action of the bankrupt or insolvent, and the legal title to all judgments rendered in their favor is transferred to them. In order to take advantage of such judgments as may have been rendered in favor of the bankrupt or insolvent, the assignee, not being an original party, must issue a *scire facias* and obtain a judgment in his favor.

3714. *When the plaintiff dies* after final judgment, or is adjudged civilly dead²⁷ before they can have execution, his personal representatives must sue out a writ of *scire facias* against the defendant to entitle themselves to the fruit of the judgment. If, on the contrary, the *defendant dies* after such judgment, a *scire facias* must be sued out against his personal representatives.²⁸

²⁴ Buller, Nisi P. 169; Bacon, Abr. *Executor*, M. See Comyn, Dig. *Pleader*, 2, D, 9; 11 Viner, Abr. 379.

²⁵ *Mara v. Quin*, 6 Term; *McDowell v. Branham*, 2 Nott & M'C. So. C. 572; *Bentley v. Bentley*, 7 Cow. N. Y. 701; *Wallace v. Barlow*, 3 Bibb, Ky. 169; see *Shaw v. McCameron*, 11 Serg. & R. Penn. 252.

²⁶ On a judgment in ejectment, a grantee of the original defendant may be brought in as a defendant in the *scire facias*. *Von Puhl v. Rucker*, 6 Iowa, 187.

²⁷ *Troup v. Wood*, 4 Johns. Ch. N. Y. 228.

²⁸ *Wheatly v. Lane*, 1 Saund. 219, e, f; *Jefferson v. Morton*, 2 Saund. 6; *Underhill v.*

When there are two or more defendants, and one of them dies after judgment, the *scire facias* to revive the judgment must be against the survivor alone.²⁹ But where there are two or more plaintiffs or defendants in a personal action, and one or more of them dies after judgment, execution may be had for or against the survivors without a *scire facias*.

Various statutes have been passed regulating the practice with regard to the death of either of the parties between the rendition of the verdict and judgment, and between an interlocutory and final judgment, the details relating to which do not come within the plan of this work, and, besides, they are greatly modified by statute in the different states.³⁰

3715. A *recognizance*, we may remember, was defined to be an obligation of record, with a condition to do a particular act.³¹ These are either at common law or authorized by particular statutes; they may be in favor of the government, that is, the United States or of a particular state, or they may be acknowledged in favor of private citizens. Of the former kind are recognizances to keep the peace, to appear to testify in a criminal case, and the like; the latter, or those in favor of citizens, are recognizances of bail and other similar obligations.

In these cases, before the party can have execution for damages in consequence of a breach of the condition, he must sue out a *scire facias* even within the year, because the law presumes that the debt might have been paid, and therefore will not suffer the debtor to be molested unless it appear that he has not performed the condition.

In a suit on a recognizance the plaintiff must not only show that the recognizance was entered into, but also a breach of the condition, before he can recover.³²

If the condition of a recognizance in a criminal proceeding has been broken by the defendant not appearing for trial, it is no defence to a *scire facias* that he is then present and ready for trial.³³ A *scire facias* cannot be issued upon a recognizance taken out of court or by a judge in chambers until it has been certified and filed and become a part of the record.³⁴

3716. A *scire facias* may be brought on some records not judicial. Under the patent law of 1793, now repealed by the act of 1836, it lay to repeal a patent improperly granted.³⁵ It also lies in behalf of the government to vacate an act of incorporation which has been unlawfully obtained, or when the exercise of the powers granted has been abused. But for this it is rarely used, the writ of *quo warranto* being the common remedy.

In the New England States, *scire facias* lies upon a judgment against a trustee in a trustee process, to show cause why execution should not issue.

In Massachusetts and New Hampshire, a writ sued out by a foreign plaintiff

Devereux, 2 Saund. 72, o; Carnes v. Crandall, 10 Iowa, 377; Peaslee v. Kelley, 38 N. H. 372. The heirs and administrator may be joined, but the judgment must be first against the personal property, and failing this, against the real estate. Graves v. Skeels, 6 Ind. 107.

²⁹ Tidd, Pract. 1029; Vredenburgh v. Snyder, 6 Iowa, 39. In Texas the writ must be brought against the survivor and the representatives of the deceased. Austin v. Reynolds, 13 Tex. 544.

³⁰ See Stat. 17, Car. II, c. 8; Stat. 8 and 9 W. III, c. 11, s. 6.

³¹ Dillingham v. United States, 2 Wash. C. C. 422; see State v. Smith, 2 Me. 62; Van Antwerp v. Newman, 4 Cow. N. Y. 82.

³² Frost v. Reynolds, 2 Dan. Ky. 94.

³³ Barton v. State, 24 Tex. 250; State v. Burnham, 44 Me. 278; Devine v. State, 5 Sneed, Tenn. 623; State v. Schmidt, 13 La. Ann. 267; Warren v. State, 19 Ark. 214.

³⁴ Raysor v. People, 27 Ill. 190; People v. Shaver, 4 Park. Cr. Cas. N. Y. 45.

³⁵ Stearns v. Barrett, 1 Mas. C. C. 153; Wood, Ex parte, 9 Wheat. 604; Delano v. Scott, Gilp. Dist. Ct. 493; Thompson v. Haight, N. Y. Dist. Ct. 1822; 1 U. S. Law. Journ. 85.

is indorsed by a resident, who thereby becomes liable for costs, and a *scire facias* lies against the indorser, if the judgment against the plaintiff is unsatisfied.³⁶ In some states, as Pennsylvania and Illinois, a *scire facias* is given by statute on the record of a mortgage on which a judgment is rendered, and the mortgaged premises are sold.³⁷

3717. In general, the writ of *scire facias* supplies the place of a declaration, but still the plaintiff may file a declaration. In this case it must recite the *scire facias* and the proceedings which have been had under it, and the cause of action.³⁸

3718. To a *scire facias* on a recognizance or judgment the defendant may plead in abatement or in bar, as in other actions.

To a *scire facias* against the bail in the action the defendant may plead *nul tiel record* of the recognizance, or of the recovery against the principal; or payment by or a release to the principal or bail; or that the principal has surrendered himself, or was rendered by his bail, before the return of the *capias ad satisfaciendum*; and he may also plead, in discharge of his liability, that there was no *capias ad satisfaciendum* sued out and returned against the principal.

When the *scire facias* is brought on a judgment, the defendant may plead *nul tiel record* of the recovery; payment, or a release; or that the debt and damages were levied on a *feri facias*; or that his person was taken in execution on a *capias ad satisfaciendum*; ³⁹ but this plea will be defective if it do not show how he was discharged.⁴⁰ He may also plead in bar that a *scire facias* has already issued on the judgment, and that a new judgment has been rendered upon it.⁴¹

It is a universal rule that the defendant cannot plead any matter to the *scire facias* on a judgment, which he might have pleaded in the original action.⁴²

3719. When the defendant pleads *nul tiel record*, the burden of proving the record is thrown upon the plaintiff, and in this case he is required to show the record described in the writ of *scire facias*, or in the declaration.⁴³ It must be such as is declared upon or described in the writ, for if there be a variance, although it may be in favor of the plaintiff, that is, where the amount of the judgment produced is greater than the amount claimed, still the variance will be fatal, for it is not such a record as is described; ⁴⁴ and a variance of six cents is equally fatal as if it was of a larger sum.⁴⁵

On *nul tiel record* being pleaded to a recognizance, the plaintiff must prove a

³⁶ Davis v. Whithead, 1 All. Mass. 276; Woodward v. Peabody, 39 N. H. 189.

³⁷ Stevens v. North Pennsylvania Co., 35 Penn. St. 265.

³⁸ Tidd, Pract. 1042. The plaintiff in a *scire facias* may dispense with a declaration; but in case of such election, he must set out in the writ all that would be essential in a declaration to authorize a recovery. Toulmin v. Bennett, 7 Ala. 220; see also Gedney v. Commonwealth, 14 Gratt. Va. 318; Conner v. People, 20 Ill. 381; Davis v. Dorr, 30 Vt. 97.

³⁹ Booth v. Campbell, 15 Md. 569.

⁴⁰ Ballard v. Averitt, 1 Tayl. No. C. 69.

⁴¹ Custer v. Dettner, 3 Watts & S. Penn. 28.

⁴² Dickson v. Wilkinson, 3 How. 57; Sigourney v. Stockwell, 4 Metc. Mass. 518; Hubbard v. Manning, Kirb. Conn. 256; U. S. v. Thompson, Gilp. Dist. Ct. 614; McFarland v. Irwin, 8 Johns. N. Y. 77; Cardesa v. Humes, 5 Serg. & R. Penn. 65; Riley v. McCord, 24 Mo. 265; Bell v. Williams, 4 Sneed, Tenn. 196. It is held in Arkansas that want of jurisdiction apparent on the face of the record may be shown under a plea of *nul tiel record*. Kimball v. Merrick, 20 Ark. 12.

⁴³ Campbell v. Carey, 5 Harr. Del. 427.

⁴⁴ Eichelberger v. Smyser, 8 Watts, Penn. 181; Porter v. Brisbane, 1 Brev. So. C. 456; Giles v. Shaw, 1 Ill. 169.

⁴⁵ Bibbins v. Noxon, 4 Wend. N. Y. 207; Bailes v. State, 20 Tex. 498; State v. Wooley, 25 Ga. 235.

recognizance, properly acknowledged or taken before a competent officer,⁴⁶ by authority of law, and that it is matter of record.⁴⁷ He must also show a breach of it, for otherwise the defendant will not be liable; and a variance between the recognizance described in the writ or declaration will be fatal.⁴⁸

Where a recognizance by two is several and not joint, a joint *scire facias* is bad.⁴⁹

3720. Under the plea of payment, the defendant may prove any facts of such payment to the plaintiff himself or to his authorized agent,⁵⁰ and the mode of making it may be by the actual payment of the cash, by giving another or higher security, where the parties agree that it shall be taken as payment; by the acceptance of the bill or note of a third person, unless such note may have been taken as a collateral security; or by the receipt of goods instead of money.⁵¹ But, in general, matter amounting to a discharge or legal payment of a recognizance cannot be given in evidence under the plea of payment; such matter should be specially pleaded.⁵²

3721. *The trial*, when the issue is on the record, is by inspection of the record, and such issue is not referred to a jury; it is for this reason that the plea of *nul tiel record* must not conclude to the country. Upon the production of the alleged record, the judges inspect it, and upon finding it regular in all respects, give judgment for the plaintiff; if, on the contrary, it does not correspond with the description of it in the *scire facias* or the declaration, and there is a material variance between them, then, as the plaintiff has not supported the issue on the record by proof, the judgment is given for the defendant.

When there are several pleas, some concluding to the country, and also a plea of *nul tiel record*, the former must be tried by a jury, and the latter by the court. If it appears that the parties went to trial generally, and a judgment was rendered for the plaintiff, the supreme court will presume that the issues were respectively decided by the proper tribunal.⁵³

3722. *The judgment* on a *scire facias* on a judgment should be that "the plaintiff have execution of the debt or damages, etc., in the *scire facias* mentioned."⁵⁴

A *scire facias* on a recognizance taken in a criminal proceeding is a civil action, and if the defendant prevails, he is entitled to costs.⁵⁵

⁴⁶ Long v. State, 3 Blackf. Ind. 344; Andress v. State, 3 Blackf. Ind. 108.

⁴⁷ Bridge v. Ford, 4 Mass. 641; Albee v. Ward, 8 Mass. 79; Green v. Dana, 13 Mass. 493.

⁴⁸ Dangerfield v. The State, 5 Miss. 658.

⁴⁹ Parish v. State, 14 Md. 238; Davidson v. State, 20 Tex. 649; but see Gedney v. Commonwealth, 14 Gratt. Va. 318.

⁵⁰ 2 Greenleaf, Ev. § 518.

⁵¹ 2 Greenleaf, Ev. §§ 519-526.

⁵² Heirs v. The State, 1 Harr. Del. 190.

⁵³ Baxter v. Graham, 5 Watts, Penn. 418.

⁵⁴ Denegre v. Haun, 13 Iowa, 240; Murray v. Baker, 5 B. Monr. Ky. 172; Tindall v. Carson, 1 Harr. Del. 94. See, as to the form of entering a judgment on the *scire facias* in Pennsylvania, under the act of 1798, Meason's Estate, 5 Watts, Penn. 464; Bredin v. Agnew, 8 Penn. St. 233; Fries v. Watson, 5 Serg. & R. Penn. 222. Where the original judgment is for A B "for use" of C D, judgment on the *scire facias* may be for the extent of C D's interest. Peterson v. Lothrop, 34 Penn. St. 223.

⁵⁵ Commonwealth v. Stebbins, 4 Gray, Mass. 25.

FIFTH BOOK.

OF EQUITY.

CHAPTER I.

THE NATURE AND PRINCIPLES OF EQUITY.

3724. The nature of equity.

3725. General rules in equity.

3726-3737. Maxims in equity.

3723. In the preceding books we have considered the nature of legal rights, and the redress for the injury to those rights; in the present will be examined the nature of equitable rights and equitable remedies. These two systems of rights and remedies, though very different, form but one grand system for the administration of justice. In some countries legal and equitable remedies are administered by the same tribunal, and in some of the American states justice is administered in this manner; while in others the two jurisdictions are kept entirely separate. In all, however, the principles of equity are the same, in whatever way they may be administered. This book will treat, first, of the nature and principles of equity, and, secondly, of the remedies and proceedings in equity.

3724. There is a kind of equity which is founded in natural justice, in honesty and right, and which arises *ex æquo et bono*; this is called *natural equity*. It corresponds precisely with the definition of justice or natural law, which is a constant and perpetual will to give to every man what is his. This kind of equity embraces so wide a range that human tribunals have never attempted to enforce it. Every code of laws has left many matters of natural justice or equity wholly unprovided for, from the difficulty of framing general rules to apply to them, from the almost impossibility of enforcing a compliance with its requirements, and from the doubtful nature of the policy of attempting to give a legal sanction to duties of imperfect obligation, such as charity, gratitude, or kindness.

Differing altogether from this, there is another kind, called civil equity.¹ This

¹ Doctor Ayliffe, in his *Pandects of the Civil Law*, Book 1, title 7, pp. 37, 38, says: "Now, equity is two-fold, viz., natural and civil. I call that by the name of natural equity which depends on, and is supported by, natural reason; and that I call civil equity which is deduced from, and governed by, such civil maxims as are adapted to the state of any commonwealth, whether it be Roman or any other whatsoever. Civil and natural equity do sometimes clash and interfere with each other, and civil equity prevails over the other, as in *usucapions*, and the like. Some have divided equity into a written and an unwritten equity; but this division I shall not meddle with in this place, having taken notice of it elsewhere. Equity not only corrects a law which savors of iniquity, or when the law in such a particular case commands an act which is founded upon iniquity; but also when it commands a thing which is too difficult and hard to be fulfilled; as when it commands fasting, and sickness would ensue to the person that thus fasts in compliance with the law; for in each case the law is or may be peccant, by commanding an evil, or a thing immod-

is deduced from and governed by such civil maxims as are adopted by any particular state or community. This alone will form the subject of this book.

Civil equity may be taken in two senses in jurisprudence. It is, in the first place, that rule of right which determines the decisions of a judge, when he has to follow the strict rule to which he is obliged to conform by the requirements of the law; and, secondly, which is its true technical meaning, it is justice exercised not according to the rigor of the law, but softened and moderated so as to attain the views of the legislator;² it is to correct the law when it is defective by reason of its universality.³

Law is nothing without equity, and equity is everything, even without law. Those who perceive what is just and what is unjust only through the eyes of the law, never see it as well as those who behold it with the eyes of equity. Law may be looked upon in some manner as an assistance for those who have a weak perception of right and wrong, in the same way that optical glasses are useful to those who are shortsighted, or whose visual organs are deficient. Equity, in its true and genuine meaning, is the soul and spirit of the law; positive law is construed and rational law is made by it.⁴

When in certain cases the law is clear, it would be doing iniquity to depart from it under the pretext of tempering and modifying its dispositions by particular principles of greater equity; otherwise, the law, established to give to all men an invariable rule for their conduct, would have nothing certain, and the citizens would in vain attempt to repose under the shadow of its dispositions.

Equity is not an arbitrary opinion of the judge; it is subject to *certain and fixed rules*; for, unless it be directed by science, it becomes uncertain and unknown, and in such case the magistrate must tremble while sitting in the temple of justice. His mind will wander in pursuit of a phantom of equity purely imaginary. Frequently, what appears just to one man seems unjust to another,

erately severe. Therefore in both these cases the judge ought to pass by the words of the law, and to follow the intention of the legislator, which is not presumed to be unjust or cruel. Equity has place not only in affirmative, but also in negative precepts. As, for example, there is a general prohibition in the laws of England that it shall not be lawful for any one to enter into another's freehold, without leave of the owner, or without authority of law; yet this exception lies in equity from the said prohibition, according to reason, viz.: if a man drives beasts on the highway, and they happen to get into his neighbor's corn, and he, to bring the said beasts out again, that they do not any hurt, goes into the ground and fetches them out, he may, in this case, justify his entry into the ground by law. Again, notwithstanding the statute of Edward the Third, whereby it is ordained, that no man shall upon pain of imprisonment give any alms unto any sturdy beggar that is well able to labor; yet, if a man meets with a sturdy beggar in very cold weather, and so lightly appareled that if he has not clothes given him he must probably perish with cold, and he gives him clothes to save his life, he shall be excused."

² Fonblanque, Eq. B. 1, c. 1, s. 3: "Equity, as it stands for the whole of natural justice, is more excellent than any human institution; neither are positive laws, even in matters seemingly indifferent, any further binding than they are agreeable to the law of God and nature. But the precepts of the natural law, when enforced by the laws of man, are so far from losing any thing of their former excellence that they thence receive an additional strength and sanction; yet as the rules of the municipal law are finite, and the subject of it infinite, there will often fall out cases which cannot be determined by them; for there can be no finite rule of an infinite matter perfect. So that there will be a necessity of having recourse to the natural principles, that what was wanting to the finite may be supplied out of that which is infinite. And this is properly what is called equity, in opposition to strict law, and seems to bear something of the same proportion to it in the moral as art does to nature in the material world. For, as the universal laws of matter would, in many instances, prove hurtful to particulars, if art were not to interpose, and direct them aright; so the general precepts of the municipal law would oftentime not be able to attain their end, if equity did not come in aid of them."

³ 1 Woodesson, Lect. 198; Taylor, Civ. Law, 91; Dig. 50, 17, 85 et 90; Code, 3, 1, 8.

⁴ 3 Sharswood, Blackst. Comm. 329.

and yet both act in good faith; each sustains the side he has adopted apparently with arms of equal power, which renders it extremely difficult to decide to whom the victory should be awarded. But equity, like truth, is but a unit; it must manifest itself by its own power, and it is never better seen than through the medium of the law. There it is made manifest, and it may be adopted without fear of a mistake, because the law must be considered as the wisdom and foresight of the legislator, and he is presumed to have studied equity and embodied it in his work.

To classify our inquiries we will consider, first, the general rules and maxims in equity; second, the assistant jurisdiction of courts of equity; third, the concurrent jurisdiction of courts of equity; fourth, the exclusive jurisdiction of such courts.

3725. Before we proceed to inquire in what cases courts of equity exercise jurisdiction, it will be proper to take a short view of the nature of equity and the maxims by which it is governed.

Courts of equity are bound by the laws as much as courts of law; the difference is this: when the law is clear and beyond a doubt, both must obey it and enforce its mandates, but the legislator cannot foresee all cases which may arise; in cases of this kind many that happen may fall, if not within the letter, within the spirit of the law. These cases, thus out of the letter, are often said to be within the equity of the statute, and cases within the letter are frequently out of the equity. Equity in cases of this kind is nothing but a sound interpretation of the law. Both courts of law and courts of equity are, however, bound by the same rules of interpretation.

A court of equity is bound by rules and precedents, from which it will not depart, although the reason of some of them may not be quite clear. It is true, such a court has a discretion, but that discretion is a science, and not an arbitrary act; it is governed by rules of law and equity, which are not to oppose, but each in its turn is subservient to the other, and courts of equity are bound by precedents equally with courts of law.⁵

Formerly, no doubt, the administration of equity in England was arbitrary, and the boundaries of the jurisdiction of courts of equity were not strongly marked; what Selden said of them was perhaps true: "For law we have a measure, and know what to trust to; equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one, as if they should make a standard for the measure, the chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot; another, a short foot; a third, an indifferent foot. It is the same thing with the chancellor's conscience."⁶

In modern times, however, courts of equity have no more discretionary power to depart from principles than courts of law. They decide new cases as they arise by the principles on which former cases have been decided, and may thus illustrate or enlarge those principles. But the principles are as fixed and certain as the principles on which courts of common law proceed.⁷

The principal difference between these courts consists in the different modes of administering justice, in the mode of proof, the mode of trial, and the mode of relief. This will more fully appear when we come to treat of the form of the remedies in equity in the latter part of this book.

3726. Maxims are rules or principles of law universally admitted as being just and consonant with reason. They are something like axioms in geome-

⁵ Rook's Case, 5 Coke, 99, b; 3 Sharswood, Blackst. Comm. 432.

⁶ Selden, Table Talk, *Equity*; 3 Sharswood, Blackst. Comm. 432, note *y*.

⁷ Bond *v.* Hopkins, 1 Schoales & L. Ch. Ir. 428.

try.⁸ Many maxims are merely the statement, in short and pithy sentences, of principles which claim the assent of mankind. These existed before the law, for, it has been well observed, nations have been found without laws, none without maxims.⁹ Such maxims may be considered as fragments of the natural law which was promulgated at the beginning of the world. Of this kind are *omne majus continet in se minus*,¹⁰ *De non apparentibus et non existentibus eadem est ratio*, and the like. Other maxims derive their effect from the law, and have been adopted after the experience of ages; most of the examples we shall give in this chapter are of this kind. Sometimes the law arises from the maxim, and the latter assumes the office of the former; hence the necessity of understanding them thoroughly.¹¹ "After having inspired the law, maxims remain and watch over it and in its midst, somewhat like a lamp in the midst of the sanctuary, enlightening the points where the law applies and showing those where it does not."

3727. The first is that *he who will have equity done to him must do equity to the same person.* An illustration of this maxim will be found in the case of a plaintiff who has borrowed money upon usurious interest and comes as complainant in equity, claiming to have the instrument given to secure the debt delivered up upon that ground; the court will require him to return the money he borrowed with lawful interest before a decree can be made in his favor; but should the lender come into equity to compel the performance of the agreement, his bill will be dismissed as being in violation of a statute, and the defendant, who asks nothing, shall not be compelled to return the money.¹²

3728. For the same reason, *he who has committed iniquity shall not have equity.*¹³ It would be manifestly unjust to permit a man who has committed iniquity toward the defendant to come into chancery to compel him to do equity to him. Thus, in cases of illegal contracts, where the plaintiff has put his property in the hands of another for the purpose of defrauding his creditors, and he seeks a remedy in equity to be restored, his claim will be dismissed upon the ground that he has done iniquity; for, *in pari delicto melior est conditio possidentis* is a maxim which applies in equity as well as at law.¹⁴

3729. It is a maxim that *equality is equity.*¹⁵ In the settlement of cases for contribution between co-contractors and sureties, in cases of abatement of lega-

⁸ 1 Sharswood, Blackst. Comm. 68; Coke, Litt. 11, 67. Duval, in *Le Droit dans ses Maximes*, Ch. 8, p. 65, gives a very animated description of the use of maxims. He says, "La Maxime, partout présente, offre à la fois des points d'appui à la mémoire, des conseils aux législateurs, des secours à la loi, des flambeaux aux jurisconsultes, des argumens au barreau, des motifs aux juges. Elle sert en même temps la science et la pratique, la loi et ses applications. *Ex regula*, dit Décius, dans son langage hardi, *non secus atque à tripode respondemus*. Du haut de la règle, comme d'un trépied sacré, nous rendons des oracles de droit et d'équité. La loi ne règle que quelques points; la maxime règne dans tout le droit. *Regula est deciduum totius juris*." The maxim, everywhere present, offers at the same time points of support to the memory, counsel to legislators, aids to the law, light to lawyers, arguments at the bar, motives to the judges. It serves at the same time science and practice, the law and its applications. *Ex regula*, says Decius in his bold language, *non secus atque à tripode respondemus*. From the height of the rule, as from a sacred tripod, we dispense the oracles of law and equity. The law regulates only some points; maxims reign over all the law. *Regula est deciduum totius juris*.

⁹ Duval, *Le Droit dans ses Maximes*, 9.

¹⁰ Dig. 50, 17, 110.

¹¹ Dig. 50, 17, 1.

¹² See Francis, Max., Max. 1; *Bouser v. Colby*, 1 Hare, Ch. 143; *Hanson v. Keating*, 4 *id.* 4; *Secrest v. McKenna*, 1 Strobb. Eq. So. C. 356.

¹³ Francis, Max., Max. 2; *Mason v. Gardiner*, 4 Brown, Ch. 437; *Sturgis v. Champneys*, 5 Mylne & C. Ch. 97, *et seq.*

¹⁴ *Armstrong v. Toler*, 11 Wheat. 258; *Hannay v. Eve*, 3 Cranch, 244; *Broom*, Max. 325; *Holman v. Johnson*, Cowp. 341.

¹⁵ Francis, Max., Max. 3.

cies where the assets are insufficient, in cases of apportionment of incumbrances among different purchasers and claimants, and in cases where equitable assets are to be marshalled for distribution, this maxim applies.

3730. *Equity suffers not a right without a remedy. Ubi jus ibi remedium.* This maxim, though generally is not universally true. For example, where a judgment has been rendered at law, under all the circumstances of the case equity will not interfere, notwithstanding an accident or unavoidable necessity. "There are instances in which a court of equity gives a remedy where the law gives none, but when a particular remedy is given by law, and the remedy is bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it and extend it further than the law allows."¹⁶

3731. That *where there is equal equity the law must prevail* is a maxim which is generally true, for in such case the defendant has an equal claim with the plaintiff to the protection of a court of equity for his title, and the court will not interpose on either side. *In æquali jure melior est conditio possidentis.*¹⁷

3732. It is also a maxim, *qui prior est in tempore, potior est in jure.* When the equities are in other respects equal, the party who has a precedency in time will in those cases gain the advantage.¹⁸ But when the equities are unequal, then the preference will be given to the superior equity.¹⁹

3733. *Equity looks upon that as done which ought to be done.* Equity will therefore treat the subject as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been, not as the parties may have executed them.²⁰

3734. It is a maxim that *the fund which has received the benefit should make satisfaction.* When a debt is due, secured by bond and mortgage, the personal estate is the debtor in the first place and the land is the security. On the death of the debtor intestate, the personal estate goes to his personal representative and the land descends to the heir; the personal estate having received the benefit, it must therefore make the satisfaction.

3735. Upon a similar principle, it is a maxim that *satisfaction should be made to that fund which has sustained the loss.* Where lands are appointed or conveyed to pay debts, the heir is entitled to have the land after the debts are paid.

3736. One of the most common and general maxims in equity is that equity follows the law, *æquitas sequitur legem.* Whenever the rules of law are in terms applicable, courts of equity will adopt and follow them; or when such rules are not directly applicable in cases of an equitable nature, equity will adopt and follow the analogies furnished by the rules of law.²¹

3737. It is a maxim that *equity acts upon the person.* In cases of injunction the party is enjoined to do or not to do a particular thing. If the injunction is not obeyed, the defendant will be attached and imprisoned. At law the courts have no jurisdiction respecting disputes about land unless such estate be within their jurisdiction, because the actions are local; in equity, on the contrary, where the courts have jurisdiction over the person, they have jurisdiction, although the lands may be in another country.²²

¹⁶ Per Lord Talbot, *Heard v. Sanford*, Cas. temp. Talb. 174.

¹⁷ Mitford, Eq. Pl. 215; Jeremy, Eq. Jur. 285; 1 Maddock, Ch. Pr. 170; 2 Fonblanque, Eq. B. 3, c. 3, s. 1; Story, Eq. Pl. § 604; 1 Story, Eq. Jur. § 57; Dig. 50, 17, 128.

¹⁸ Dig. 50, 17, 98.

¹⁹ Jeremy, Eq. Jur. 285.

²⁰ 1 Fonblanque, Eq. B. 1, Ch. 6, s. 9, note; *Craig v. Leslie*, 3 Wheat. 563.

²¹ 1 Story, Eq. Jur. § 64; 3 Woodesson, Lect. 479, 482.

²² *Penn v. Baltimore*, 1 Ves. sen. Ch. 444; *Earl of Athol*, 1 Chanc. Cas. 221.

CHAPTER II.

ASSISTANT JURISDICTION OF EQUITY.

- 3739-3745. Bills of discovery.
- 3740-3743. By and against whom a discovery may be had.
 - 3741. The plaintiff's title.
 - 3742. The defendant's liability.
 - 3743. The right of the plaintiff against the defendant.
 - 3744. The nature of the discovery.
- 3746-3752. Eliciting evidence from third persons.
 - 3747. The examination of witnesses *de bene esse*.
- 3749-3752. The perpetuation of testimony.
 - 3750. The form of the bill.
 - 3751. The interest of the parties.
 - 3752. The subject matter of future litigation.

3738. The jurisdiction of courts of equity is considered under three points of view: first, when it comes in aid of a court of law, and it is then called assistant jurisdiction; second, when courts of law and courts of equity have both jurisdiction, when it is denominated concurrent jurisdiction; and, third, when it affords the only remedy of the party aggrieved, in which case it has exclusive jurisdiction.

The assistant jurisdiction of courts of equity is exercised to enable courts of law to do more complete justice. At law, it frequently happens that a party has rights which cannot be established in consequence of the forms used and rules adopted, although these have a general tendency to secure justice. When in consequence of these rules the party is likely to be defeated of his rights, he may in some cases apply to a court of equity for assistance to enable the courts of law to do complete justice. This is done by bill of discovery, or by eliciting testimony from third persons.

3739. It not unfrequently happens, when an action is brought, that justice may be defeated for want of a knowledge of facts which exist, but which are exclusively within the knowledge of the parties, and which cannot be obtained, because it is a rule at law that the parties in such case cannot be examined. Equity then interferes, and the plaintiff may file a *bill of discovery*, so called because it prays for the discovery of facts within the knowledge of the person against whom it is exhibited, or of deeds, writings, or other things in his custody or power.¹ In one sense, every bill, except a bill of certiorari, may in

¹ Hinde, Pr. 20; Blake, Ch. Pr. 37; Jeremy, Eq. Jur. 257; 2 Story, Eq. Jur. § 1480; Mitford, Eq. Pl. 52; Cooper, Eq. Pl. 58. Mr. Story, in his definition, adds the limitation that this proceeding must be, in order to maintain the right of the party asking it, in a suit or other proceeding in another court. While this limitation expresses its customary use, it is not essential, since the bill may be brought in aid of a proceeding in equity. *Montague v. Dudman*, 2 Ves. Ch. 398. Or even as preliminary to a bill for relief, in order to ascertain the proper defendants. *Angell v. Angell*, 1 Sim. & S. Ch. 83; *Moodaly v. Moreton*, 2 Dick. Ch. 652. Though such a use is but rare, since a prayer for discovery may be, and generally is, embraced in a bill for relief, and the facility with which amendments are granted to include proper defendants and omit those improperly included in an equity suit, renders such a preliminary bill unnecessary, except in rare cases.

truth be said to be a bill of discovery, for every bill usually seeks a disclosure of circumstances relative to the case; but that commonly and emphatically distinguished by this appellation is a bill for the discovery of facts resting in the knowledge of the defendant, or of deeds or other writings or things in his custody and power. The sole object of this bill being a particular discovery, when that is obtained by the answer, there can be no further proceedings upon it.²

There is a marked difference between a bill of discovery and a bill to perpetuate testimony, which will be considered in the next chapter. The former cannot be brought in many cases where the latter may. A bill of discovery cannot be brought where a penalty or a forfeiture of a public nature is involved; and in cases which involve a penalty or a forfeiture of a private nature, it cannot be maintained unless the party entitled to the benefit of the penalty or forfeiture waives it. With regard to a bill to perpetuate testimony, no such objection exists.³

We will consider, first, by and against whom the discovery may be had; second, the nature of the discovery.

3740. The plaintiff must have a legal title to the subject matter which is the object of the discovery; the defendant must have an interest in it, and the plaintiff must have a legal claim upon the defendant in respect to such subject matter as will form a fair action at law.

3741. The plaintiff must show upon the face of the bill that he has a *title* to the discovery which he seeks, or an interest in the subject matter to which the discovery is attached, capable of being established and vindicated in some other court;⁴ unless the plaintiff's title be expressly admitted by the defendant, or impliedly confessed by him; as, by his adopting a mode of defence which is held to be a tacit acknowledgment of the fact, or, in some instances, by his answering it without denying it.⁵ A mere stranger, therefore, cannot maintain a bill for discovery of the title of another person.⁶

3742. The plaintiff must also show that the defendant has *some interest* in the matter in dispute, for if he be a mere witness, he cannot be made to answer such a bill, because he can be compelled to give testimony in court.⁷ But if a person originally disinterested should become implicated in a transaction by his fraud or practice, he will be held liable for costs, and to that extent interested.⁸ A corporation furnishes a partial exception to the general rule that where the defendant has no interest he need not answer and make the discovery; because the answer given by a corporation is under the corporate seal, and not upon oath,⁹ and the discovery must be made by some officer under oath¹⁰ who may have no personal interest.

² In England, and in most of the states of the United States, the objects sought to be accomplished by a bill of discovery can now, through statutory provisions, be attained by proceedings under direction of the court having jurisdiction of the case. The rules and principles of equity may, however, it is apprehended, be still resorted to with advantage, as indicating the principles by which such courts would probably be guided in affording this assistance to parties before it.

³ *Earl of Suffolk v. Green*, 1 Atk. Ch. 450.

⁴ *Brown v. Dudbridge*, 3 Brown, Ch. 321; *Brownsword v. Edwards*, 2 Ves. Ch. 243.

⁵ *Mountford v. Taylor*, 6 Ves. Ch. 788; *Marsden v. Panshall*, 1 Vern. Ch. 407.

⁶ See *Rondeau v. Waytt*, 3 Brown, Ch. 154; *Cooper*, Eq. Pl. 58; *Mitford*, Eq. Pl. 189; *Jeremy*, Eq. Jur. 258; *Haskell v. Haskell*, 3 Cush. Mass. 540; *Shaftsbury v. Arrowsmith*, 4 Ves. Ch. 71.

⁷ *Heyes v. Exeter College, Oxford*, 12 Ves. Ch. 343.

⁸ See *Dummer v. Chippenham*, 14 Ves. Ch. 254.

⁹ *Anon.* 1 Vern. Ch. 117; *Wych v. Meal*, 3 P. Will. Ch. 310.

¹⁰ *Fenton v. Hughes*, 7 Ves. Ch. 288; *Dummer v. Chippenham*, 14 *id.* 254; *Glasscott v. Copper Miners' Company*, 11 Sim. Ch. 305.

3743. Not only must the plaintiff have a right and the defendant be liable, but the plaintiff must have a right *against* the defendant. A discovery will not be compelled for the mere gratification of curiosity, but only in aid of some proceeding.¹¹ And although both the plaintiff and defendant may have an interest in the subject to which the discovery required is supposed to relate, yet when there is no privity between them, a discovery will not be enforced.¹²

Commonly, the application for a discovery is made in aid of an action really pending, in which case a bill will lie for a defendant at law for the purpose of defence,¹³ as well as on the part of the plaintiff to support and substantiate his case.¹⁴ But it is not indispensably necessary that the action should have been commenced; for where there is a *prima facie* ground for such proceeding, the court will compel a discovery in aid of an action to be brought thereupon,¹⁵ except in the case of a common informer, who must first bring an action, for until then he has no right.¹⁶

3744. Whenever the plaintiff can show a title to the subject matter in himself, and also an interest in the defendant, and an apparent legal right against the latter concerning it, which cannot be enforced without the aid of a discovery, a court of equity will compel it.

3745. But to this general rule there are many exceptions, among which may be mentioned the following:

The discovery must not be of a nature to endanger the defendant's title; for it does not follow that because a person is unable to substantiate every particular in the deduction of his title, which may be necessary to relieve it from doubt or defect, he may not possess the best title, and be in fact the owner. A plaintiff has a right to a discovery of what appertains to or is necessary for his own title; and he has no right to pry into that of his adversary.¹⁷

It must not be immaterial or unnecessary, for in this case it will not be enforced, as there could be no reason for compelling the defendant to make it.¹⁸

It must be of such a nature that, if made, it will not subject the defendant to pains, penalties, or forfeitures; because a court of equity will aid only in cases of civil, and not of a criminal nature, no man being bound to accuse himself.¹⁹

The discovery must not be for the attainment of an object which is illegal or *contra bonos mores*.²⁰

A bill of discovery will not be entertained to assist another court, when the latter is of itself competent to grant relief.²¹

A discovery will not be compelled when it is against the policy of the law, in consequence of the particular relations of the parties. A bill filed against

¹¹ *Kardale v. Watkins*, 5 Madd. Ch. 18.

¹² Story, Eq. Pl. § 571.

¹³ *Bishop of London v. Flytche*, 1 Brown, Ch. 96; *Andrews v. Berry*, 3 Anstr. Exch. 634.

¹⁴ *Finch v. Finch*, 2 Ves. Ch. 491, 492.

¹⁵ *Moodly v. Moreton*, 1 Brown, Ch. 469.

¹⁶ *See Mynd v. Francis*, 1 Anstr. Exch. 5.

¹⁷ *Cooper*, Eq. Pl. 97; *Hare*, Discov. 183 to 194; *Wigram*, Discov. 21, 111, 147.

¹⁸ *Finch v. Finch*, 2 Ves. Ch. 491; *Anon*, 2 *id.* 451; *Kensington v. Mansell*, 13 *id.* 240; *Macauley v. Shackell*, 1 Bligh, Hou. L. n. s. 120; *Thomas v. Tyler*, 3 *Younge & C. Ch.* 255.

¹⁹ *Cooper*, Eq. Pl. 191; *Jeremy*, Eq. Jur. 265; 2 *Story*, Eq. Jur. § 1494; *United States v. Bank of Virginia*, 1 Pet. 100; *Horsburg v. Baker*, 1 *id.* 232; *Claridge v. Hoare*, 14 Ves. Ch. 64; *Glynn v. Houston*, 1 Keen, Ch. 329.

This exception does not apply where there is fraud, which does not subject the defendant to a criminal action, though he may have incurred a penalty; as, for example, under a bond for good conduct. *Janson v. Solarte*, 2 *Younge & C. Ch.* 132; *Green v. Weaver*, 1 Sim. Ch. 404; *Mitchell v. Koecker*, 11 *Beav. Rolls*, 380.

²⁰ *Cousins v. Smith*, 13 Ves. Ch. 542.

²¹ *Gelston v. Hoyt*, 1 Johns. Ch. N. Y. 547. But see *March v. Davison*, 9 Paige, Ch. N. Y. 580.

a married woman to compel her to disclose facts which may charge her husband will be dismissed.²² Nor can a bill of discovery be sustained against one who has derived his information in the confidence reposed in him as counsel, solicitor, attorney, or arbitrator, whose secret is the privilege of the client.²³

Nor will such a discovery be compelled by or against persons who are not parties at law.²⁴

3746. We have considered the mode of obtaining the assistance of a court of equity to obtain the facts from the parties in order to found a judgment; we shall now examine the subject of the means of obtaining testimony from those who are not parties.

It not unfrequently happens that persons who can testify cannot be present at the time of trial, and thus their testimony would be lost if it could not be taken before that period, and justice be defeated. There are two modes of securing such evidence; the first, by filing a bill praying that the testimony of the witnesses be taken *de bene esse*, and the other, praying that the testimony may be taken *in perpetuam rei memoriam*. There is considerable difference between the two cases. The court gives aid of the former kind generally when the party seeking it is plaintiff or defendant in an action pending or intended; and of the latter kind when the party applying for it is in possession, but anticipates litigation and an aggression upon his enjoyment at a future time, when his adversary shall have gained sufficient advantage by delay, or where he is out of possession and has no present right to bring an action, or is prevented by the opposite party, as by injunction, from bringing such action.²⁵ In the first case, or when the testimony is taken *de bene esse*, it cannot be read at law unless it has been proved that the witness is unable personally to attend; but such is not the rule when the testimony has been perpetuated.²⁶ There are two classes of cases where this testimony may be taken: first, when a suit or action has been brought, and then the witnesses are examined *de bene esse*; and, second, before any action has been commenced, when a bill is filed to perpetuate the testimony.

3747. When a witness resides abroad, out of the jurisdiction, and refuses to attend, the court of chancery has always exercised the power of issuing a commission to the judge of some foreign jurisdiction where a witness resides, requesting that in furtherance of justice he will, by the proper and usual process of his court, cause certain witnesses to appear before him, or some other competent person by him for that purpose to be appointed, at a particular time and place, to take the depositions of such witnesses.²⁷

3748. When the witness is aged, as of the age of seventy years and upward, the court of chancery will issue a commission, of course, to take the deposition of the witness.²⁸

²² Cooper, Eq. Pl. 196; *Le Texier v. Margrave of Anspach*, 5 Ves. Ch. 322, 15 *id.* 159.

²³ *Greenough v. Gaskell*, 1 Mylne & K. Ch. 100; *Preston v. Carr*, 1 Younge & J. Exch. 175; *Hare, Discov.* 174; *Story, Eq. Pl.* §§ 599, 600.

²⁴ *Glyn v. Soares*, 3 Mylne & K. Ch. 450, 469; *Story, Eq. Pl.* § 569.

²⁵ *Duke of Dorset v. Girdler*, Prec. Chanc. 531; *Angell v. Angell*, 1 Sim. & S. Ch. 89.

²⁶ — *v.* —, 2 Ves. sen. Ch. 496, 498; *Morrison v. Arnold*, 19 Ves. Ch. 671.

²⁷ In the United States, the common law courts are generally authorized to issue commissions to take depositions in civil cases. 1 *Greenleaf, Ev.* § 321.

²⁸ The witness must be of an age to render it probable that he will die before trial, when his deposition is to be taken *de bene esse*, since, as was very justly remarked by Sir John Leach, the circumstance that witnesses are aged and infirm should be rather a reason for the action being immediately brought, to give the better chance of their living till the trial, than a reason for permitting the action to be indefinitely delayed at the pleasure of the plaintiff. *Angell v. Angell*, 1 Sim. & S. Ch. 83; *Rowe v. —*, 13 Ves. Ch. 261; *Prichard v. Gee*, 5 Madd. Ch. 364.

Depositions under these commissions are taken *de bene esse*; that is, they shall be deemed to be well taken for the present, or until an exception or other avoidance, that is, conditionally, and in that meaning the phrase is usually accepted. If the witness can be had on trial, he must be produced.²⁹

3749. There are several classes of cases where there is danger of losing the testimony of witnesses; first, where a party is out of possession and whose right of possession has not yet accrued, and therefore he cannot bring suit; and, secondly, where the party is in possession and he anticipates proceedings against him upon a present apparent right, but the power of commencing suit lies in his adversary, who postpones or may delay the attempt of investigation until the party in possession shall have lost the means of defence by the death of his witnesses. In these cases a court of chancery interferes by taking the proper means of securing the evidence of the witnesses by having it reduced to writing and properly made of record, which is called the *perpetuation of the testimony*. This is by a bill setting forth the nature of the interest of the parties and the subject of future litigation; to this bill the defendant may set up his defence. These will be separately examined.

3750. The bill must name the parties having an interest, and state particularly the matter touching which the plaintiff is desirous to acquire evidence, so that the interrogatories on both sides may be directed to the true merits of the controversy.³⁰ It should show that the plaintiff has some interest in the subject matter, which may be endangered if the testimony in support of it should be lost;³¹ it must also state that the defendant has, or pretends to have, or that he claims an interest to contest the title of the plaintiff in the subject matter of the proposed testimony.³² The bill must also show some necessity or ground for perpetuating the evidence; as, that the facts to which the testimony of the witnesses proposed to be examined relates cannot be immediately investigated in a court of law; or, if they can be investigated, the sole right of bringing an action belongs exclusively to the other party; or some other cause which shows clearly that the plaintiff cannot otherwise secure his testimony which is in danger of being lost.³³ Such a bill must also show the right in which it is brought, and it should be described with reasonable certainty, so as to point the proper interrogatories on both sides; for example, when the bill is brought to perpetuate the testimony of witnesses touching a right of way, the bill should state the *termini* of the way and the *per et trans* as exactly as in a declaration.³⁴ And when the bill seeks to perpetuate the testimony of witnesses to a will, it should set forth the whole will.³⁵ The bill should pray leave to examine witnesses touching the matter stated, to the end that their testimony may be taken and perpetuated, and it should also pray for a *subpoena*. But care must be taken to confine the prayer to the object of the bill, and not to pray for relief, or that the defendant may abide such order and decree as the court may make, which would make it a bill praying relief, and for that cause demurrable.³⁶

²⁹ See 1 Greenleaf, Ev. § 320.

³⁰ Bartlet v. Hawker, Madd. Ch. 157; Cooper, Eq. Pl. 53; Mitford, Eq. Pl. 52; Story, Eq. Pl. § 300.

³¹ Cooper, Eq. Pl. 52; 2 Story, Eq. Jur. § 1511; Mason v. Goodburne, Cas. temp. Finch, 391.

³² Mitford, Eq. Pl. 53; Cooper, Eq. Pl. 56; 1 Montague, Eq. Pl. 271; Dursley v. Fitzhardinge, 6 Ves. Ch. 260.

³³ Story, Eq. Pl. § 303; Mitford, Eq. Pl. 52, 148, and note (y).

³⁴ Gell v. Hayward, 1 Vern. Ch. 312; Cooper, Eq. Pl. 56; Welford, Eq. Pl. 145.

³⁵ Wyatt, Pract. Reg. 74; Story, Eq. Pl. § 305; Welford, Eq. Pl. 145.

³⁶ Story, Eq. Pl. § 306; Cooper, Eq. Pl. 52; Vaughan v. Fitzgerald, 1 Schoales & L. Ch. Ir. 316.

3751. To entitle the plaintiff to a bill to perpetuate testimony, he must show that he has an interest in the subject matter in dispute, but the amount of his interest, if actually a present interest, however small in value and however distant the possibility of possession, and whether it be vested or contingent, is altogether unimportant.³⁷ But a mere expectation is not sufficient, and, therefore, the next of kin or heir apparent of a person living, although the latter be a lunatic, has not such an interest as will support such a bill.³⁸

3752. The property respecting which the testimony of witnesses may be perpetuated may consist of hereditaments, corporeal or incorporeal. With respect to personal demands, it is not easy to say in what cases a bill to perpetuate testimony will be sustained.³⁹

³⁷ *Dursley v. Fitzhardinge*, 6 Ves. Ch. 260; *Allan v. Allan*, 15 Ves. Ch. 13.

³⁸ *Dursley v. Fitzhardinge*, 6 Ves. Ch. 260; *Sackvill v. Ayleworth*, 1 Vern. Ch. 105.

³⁹ *Earl of Suffolk v. Green*, 1 Atk. Ch. 450.

CHAPTER III.

PECULIAR REMEDIES IN EQUITY.

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3753. The *concurrent* jurisdiction of courts of equity is that which is exercised on subjects over which courts of law have also a jurisdiction.

Courts of equity are enabled to secure substantial justice between the parties, in cases where they will interfere, more completely than courts of law, either from their peculiar forms of procedure, from the greater adaptability of their rules to special circumstances existing in particular cases, from the greater variety of remedies furnished, or from the manner of enforcing compliance with their requirements.

At law the only remedy furnished between individuals is by way of pecuniary damages for breach of obligations, or for wrongs committed. Such a remedy is obviously inadequate to the damage in many cases. In many cases, also, courts of law will not interfere, because the party complaining is himself in some degree in fault. Nor do courts of law exercise any preventive or anticipative jurisdiction. Legal process does not prevent the commission of wrongs, but only attempts to enforce compensation for their commission. Compliance with obligations is not secured; compensation in money is rendered for non-compliance.

In many cases of wrong done or threatened, and of refusal to fulfil obligations, equity will interfere to secure justice on account of the inadequacy of the remedy at law for that purpose.

It will be convenient to consider successively the mode of investigating facts by equitable tribunals, the peculiar modes of preventing injustice, the jurisdiction in cases of fraud, accident, and mistake, that for enforcing a fulfilment of obligations, that in various cases of account, that in dower, and that in partition.

3754. *The modes of investigating facts* practiced by equitable tribunals are reference to a master, and directing issues and trial by jury in a court of law.

3755. When a court of equity feels itself incompetent to grant complete relief without some preliminary information, a reference is made to a master who has power to procure such information for the purpose of satisfying the conscience of the court.

The matters which are usually submitted to a master consist of matters of account, which it may be necessary to examine and settle in the progress of a cause, the investigation of claims upon property in suit, to admit those which are equitable and to reject others, examination of the title to estates, and to settle conveyances, making sale of property, and inquiring into the propriety of granting leases, felling timber, or making repairs, the propriety of appointing new trustees of property, guardians of infants, and committees of idiots and lunatics.¹

3756. To facilitate inquiries and to render them more effectual, the master is generally authorized to examine witnesses and even the parties in the cause upon interrogatories. The parties who have an interest have a right to have a notice of the time and place of examination; and it seems to be a general rule that all persons interested, either in the estate or fund in question, are entitled to attend before the master on all those proceedings which may affect their interests or increase or diminish their proportion in the fund; thus, all parties entitled to a distributive share of a residue have a right to attend on those proceedings which tend to increase or diminish the residuary fund.²

After having heard the parties, their proofs, and allegations, the master makes his report, which is his certificate to the court how the facts or matters referred to him are or do, upon an examination, appear to him, or of something

¹ Jeremy, Eq. Jur. 294.

² 2 Daniell, Chanc. Pract. 801.

of which it was his duty to inform the court.³ To this report exceptions may be filed, and if well founded, the report will be set aside; on the contrary, if they are not sufficiently valid, the report will be confirmed, and the court will found a final decree upon it.⁴

3757. When questions of legal or equitable title, of law, or of fact, arise in the course of proceedings in equity, and they are of great importance, the court will not undertake to determine them, but will direct a trial at law, and upon the result of that trial will in general found its decree.⁵ As no jury can be summoned to attend a court of equity, the matter directed to be tried at law is tried in another court. The point which thus occurs may be the proper subject of a trial, or it may be a mere question of law or fact. In the former instance the court of equity, with the consent of all the parties, will direct, and when there is no such acquiescence, will sometimes allow an opportunity for such an action to be brought to try the question at law; in the latter case it will direct a feigned issue,⁶ the nature of which has already been considered.⁷ In the case of an issue upon a point of law, it is brought before the common law judges on a demurrer; and if speed be required, a *consilium*, that is, a special day, will be appointed for the purpose of hearing the argument.⁸

There is one class of cases which the courts of equity will never decide without a decision first being had at law. This is the case of a will of real estate; when disputed, it must be ascertained whether it is the will of the testator or not by a trial under a feigned issue.⁹

3758. There are certain equitable means of relief which may be considered as peculiarly preventive of wrong in their nature, which it seems proper to consider in immediate connection. These are injunctions, bills *quia timet*, bills of peace, bills of interpleader.

3759. An *injunction* is a judicial process requiring a party to do or to refrain from doing a particular thing therein specified, according to the exigency of the process. In strictness the term is applicable to a writ requiring the performance or refraining from some particular act, which writ is granted in proper cases upon a particular request therefor by bill. But in many cases a requirement is made by the court in the form of an order in the nature of an injunction; and as the court will enforce a compliance with these orders in the same manner as with a writ of injunction, the distinction is not ordinarily observed in practice, but all such orders are spoken of as injunctions.¹⁰

Injunctions must be specially prayed for in the bill, and even when asked for, the question of granting or refusing is one of judicial discretion. The grant is not limited to cases of concurrent jurisdiction. It may be granted as well in cases of auxiliary or exclusive jurisdiction.¹¹

3760. This writ is evidently borrowed from the Roman law. The *interdict* in that system of jurisprudence bears a striking resemblance to an injunction.

³ Pract. Reg. 377.

⁴ See, as to references to a master, 2 Daniell, Chanc. Pract. 789-963; Jeremy, Eq. Jur. 293.

⁵ 2 Story, Eq. Jur. § 1478; 3 Sharswood, Blackst. Comm. 452.

⁶ Jeremy, Eq. Jur. 295.

⁸ Jeremy, Eq. Jur. 296.

⁹ In perhaps all the states of the Union provision is made by statute for the trial of disputed wills.

In some of the states provision has been made also by which a jury may be summoned and their interposition demanded in a court of equity for the determination of questions of fact. In this respect, as in many others, the combination of the legal and equitable jurisdiction in one court diminishes the disadvantages of two systems of relief.

¹⁰ Eden. Inj. 290; 2 Story, Eq. Jur. § 801.

¹¹ Story, Eq. Plead. § 41.

⁷ Before, 3014.

Interdicts were certain forms by which the prætor ordered or forbade certain things to be done, particularly in what related to contests, or the possession or quasi-possession of something.¹²

In their most general division they were prohibitory, or forbidding the party to do certain things; restitutory, or commanding him to restore certain things; or exhibitory, which commanded him to produce the thing. The object of some was to acquire the possession to the complainant; that of others, to maintain him in the possession he had; and that of the third kind, to put him into the possession which he had lost. They were also temporary or perpetual.

These interdicts related to the person,¹³ to real corporeal property and to servitudes or easements,¹⁴ and to personal property.

3761. As to their *object*, injunctions are of two kinds; the one is a *remedial writ* and the other is a *judicial writ*. As to the *time* during which they are to operate, injunctions are temporary or perpetual.

The distinction between remedial and judicial writs is of little importance, and is not much regarded.

3762. A *remedial injunction* is in the nature of a prohibition, directed to and controlling the party; it is granted when the party is doing or is about to do an act against equity and good conscience, or to pursue a litigious or vexatious course. In these cases the court will not leave the party to feel the mischief or inconvenience of the wrong and afterward look for redress, but will interpose its authority to prevent the unjustifiable proceedings.

This kind of injunction may relate to a stay of proceedings in courts of law or in some other court; or it may be unconnected with legal proceedings; as, to restrain the indorsement or negotiation of bills of exchange or promissory notes, or the sale of land, or the sailing of a ship, the alienation of a specific chattel, or the transfer of stock; to prevent the wasting of assets pending litigation; to prevent a trustee from assigning the legal estate; to restrain waste to houses and to mines, timber, and other parts of an inheritance; to prevent the infringement of patents or the violation of copy rights; to suppress public or private nuisances. It may by the various modes of interpleader restrain vexatious and multifarious suits, quit possession before the hearing, or stop the progress of vexatious litigation. These are a few of the many purposes for which this writ is used. The object of this particular writ is to prevent injuries.

3763. Injunctions to restrain suits at law are either common or special.

An injunction is *common* when it prays to stay proceedings at law, and will be granted of course; as, upon an attachment for want of an appearance or of an answer; or upon a *dedimus* obtained by the defendant to obtain his answer in the country; or upon his praying for time to answer, and in similar cases.¹⁵

A *special injunction* is obtained only on motion and petition, with notice to the other party, and is applied for sometimes on affidavit before answer, but more frequently upon the merits disclosed in the defendant's answer. Injunctions before answer are granted in cases of waste, and other injuries of so urgent a nature that mischief would ensue to the plaintiff were he to wait until the answer should be put in; but the court will not grant an injunction during the pendency of a demurrer to the bill, for until that be decided it does not appear whether or not the court has jurisdiction of the cause. The injunction granted at this stage of the suit is temporary only, and is to continue until answer or

¹² Justinian, Inst. 4, 15.

¹³ The interdict *de homine libero exhibendo*, which was in the nature of a writ of *habeas corpus*, was an injunction commanding a person who held another in confinement to bring him before the prætor. Dig. 43, 29, 1 et 3, § 1. See before, 211, note.

¹⁴ Dig. 43, 21, 1.

¹⁵ Newland, Pract. 92; Eden, Inj. 95; James v. Downes, 18 Ves. Ch. 523.

further order, and no longer; the injunction obtained upon the merits confessed in the answer continues generally till the hearing of the cause.

3764. The object of the *judicial* writ of *injunction* is to enforce a decree, and it is in the nature of an execution, containing a direction to yield up, to quit, or to continue possession of houses and land, followed by a writ to the sheriff commanding him to deliver the possession.

3765. An injunction is sometimes granted before answer to continue till an answer is put in, or after the answer, and to last until the hearing; injunctions of this kind, which may be removed upon the happening of a future event and which are not perpetual, are called *temporary* injunctions.

3766. A *perpetual* injunction is one which is final, and enjoins the party from doing certain things at any future time. This is granted when the court is of opinion at the hearing that the plaintiff has established a case which entitles him to an injunction, or if a bill praying for an injunction is taken *pro confesso*.¹⁶

Although it is not easy to say in what cases a perpetual injunction will be granted, yet, it may be stated as a general rule that it will be granted only in those cases where the defendant has no equitable or legal right. The cases in which an injunction will be granted are so very numerous that a statement of them all would be entering into greater detail than would be warranted by the plan of this work. A few of them will be noticed as instances when the power will be exercised.

3767. A perpetual injunction will be granted upon the sentence of a foreign court, when such sentence is conclusive; as, where an action was brought against a person who had accepted a bill of exchange drawn upon him at Leghorn, and according to the law there, a suit having been instituted against him, the acceptance had been vacated.¹⁷

3768. Such an injunction will be granted to restrain proceedings on a satisfied judgment;¹⁸ for the same reason that the plaintiff has no just claim a perpetual injunction is granted to restrain a plaintiff who has a void judgment,¹⁹ or to stay proceedings at law on a judgment bond obtained by fraud,²⁰ or where the defendant at law could not avail himself of a defence from accident unmixed with any default.²¹

3769. When there have been repeated trials at law upon mere legal titles, perpetual injunctions have been granted to restrain repeated and vexatious litigation.²²

3770. Perpetual injunctions will be granted to prevent a multiplicity of suits; in a case where eight actions were instituted for the same cause, the chancellor, Lord Ellesmere, stayed them all by injunction, saying that it was barratry.

These examples are sufficient to show the nature of the cases where perpetual injunctions will be granted. Others will readily occur to the reader, and many more will be suggested when we come to consider the causes for which injunctions will be granted.

¹⁶ Gilbert, For. Rom. 194; Harrison, Chanc. Pract. 551; Knight v. Adamson, 2 Freem. Ch. 106.

¹⁷ Burrows v. Jemineau, Sel. Ch. Cas. 69, 2 Strange, 733.

¹⁸ Binkerhoof v. Lansing, 4 Johns. Ch. N. Y. 69.

¹⁹ Caruthers v. Hartsfield, 3 Yerg. Tenn. 366.

²⁰ Kruson v. Kruson, 1 Bibb, Ky. 184.

²¹ Marine Ins. Co. v. Hodgson, 7 Cranch. 332; Truly v. Wanzer, 4 How. 142; Ocean Ins. Co. v. Field, 2 Stor. C. C. 59; Emerson v. Udall, 13 Vt. 477. But any neglect will forfeit the claim. Smith v. Lowry, 1 Johns. Ch. N. Y. 320; Trevor v. McKay, 15 Ga. 550; Powell v. Stewart, 17 Ala. N. S. 719; Sample v. Barnes, 14 How. 70.

²² Mitford, Eq. Pl. 116; Earl of Bath v. Sherwin, Prec. Chanc. 261; Gilb. Eq. 2; 1 Brown, Parl. Cas. 266; Barefoot v. Fry, Bunb. Exch. 158.

3771. All parties who reside within the jurisdiction of the court are the subjects of an injunction, because the proceeding is *in personam*, and it is not material that the proceedings to be stayed have been instituted in another country. It is true that the courts of one country have no jurisdiction to regulate the proceedings of the courts of another country, because each is independent of the other; but the courts having jurisdiction over all persons and things within their own limits, they may act *in personam* upon those parties, and direct them by injunction to proceed no further in such suit. Without regard to the situation of the subject matter of the dispute, a court of equity will consider the equities between the parties, and decree *in personam* as to those equities and enforce obedience to their decrees by process *in personam*.²³ Such a court will relieve in cases of contracts and other matters respecting lands in foreign countries when the parties are within their jurisdiction.²⁴

3772. In the United States, owing to the peculiar constitutional jurisdiction of the federal courts, they do not possess power to grant injunctions against proceedings in actions instituted in the state courts, nor can the state courts grant injunctions against proceedings in the federal courts.²⁵ The latter may grant injunctions against suitors in the courts of the United States, and the state courts against those who have instituted proceedings in them; and each may do complete justice without exercising the powers usually inherent in a court of equity to compel persons within its jurisdiction to obey its mandates by a writ of injunction when the proceeding is in a foreign court.

3773. As a general rule, it may be stated that a court of equity has no jurisdiction to grant an injunction to prevent a crime,²⁶ excepting to restrain a libel upon an infant, because he is under the protection of the court,²⁷ and excepting such cases of public nuisances as are more particularly injurious to particular individuals in the neighborhood, and also constitute private injuries.²⁸

3774. The cases where an injunction will lie for a direct *injury to the absolute rights of persons* are not numerous. An injunction may be obtained to prevent a libel on the ground of copy right or to protect an infant, but it will not be granted on the ground that the libel is a crime.

But the court of chancery is more liberal in the grant of injunctions for injuries to the relative rights of persons; as, between husband and wife, parent and child, and guardian and ward. It is particularly desirable in those cases to apply to that court for an immediate injunction. An injunction has been granted to a parent to prevent the marriage of his son, aged eighteen, and restraining communication with him until further orders.²⁹

²³ *Eden, Inj.* 176; *Archer v. Preston*, 1 Eq. Cas. Abr. 133; *Penn v. Lord Baltimore*, 1 Ves. Ch. 444; *Beckford v. Kemble*, 1 Sim. & S. Ch. 7; *Harrison v. Gurney*, 2 Jac. & W. Ch. 562; *Mead v. Merritt*, 2 Paige, Ch. N. Y. 404; *Mitchell v. Bunch*, 2 Paige, Ch. N. Y. 606; *Massie v. Watts*, 6 Cranch, 148. In this respect the interdict of the Roman law corresponds with the injunction, that both are personal in their effects. *Dig.* 43, 1, 1, § 3 et 4.

²⁴ *Eden, Inj.* 176; 2 Story, Eq. Jur. § 899; beyond, **3790**.

²⁵ *Diggs v. Wolcott*, 4 Cranch, 179; *McKim v. Voorhees*, 7 Cranch, 279; *English v. Miller*, 2 Rich. Eq. So. C. 320. And see *Bicknell v. Field*, 8 Paige, Ch. N. Y. 440; *Sutton v. Fowler*, 9 *id.* 280; *Morris v. Remington*, 1 Pars. Eq. Penn. 387; *Blount v. Blount*, 1 Hawks, Tenn. 365; *Waterhouse v. Stansfield*, 9 Hare, Ch. 234; *Dehon v. Foster*, 4 All. Mass. 545, 7 *id.* 57.

²⁶ *Holderstaffe v. Saunders*, 6 Mod. 12; *Lord Montague v. Dudman*, 2 Ves. sen. Ch. 396; 1 *Maddock, Chanc. Pract.* 126, note (l); *Eden, Inj.* 66; *Attorney Gen. v. Utica Ins. Co.*, 2 Johns. Ch. N. Y. 378.

²⁷ *Gee v. Pritchard*, 2 Swanst. Ch. 413.

²⁸ *Mayor of London v. Bolt*, 2 Ves. Ch. 129; *Attorney Gen. v. Cleaver*, 18 Ves. Ch. 211.

²⁹ 1 *Maddock, Chanc. Pract.* 348; *Pearce v. Crutchfield*, 14 Ves. Ch. 206; *Sherwood v. Sanderson*, 19 Ves. Ch. 282. But the infant must be a ward of chancery. 2 *Atk. Ch.* 535. He becomes such, however, by filing a bill as on his behalf. 1 *Maddock, Chanc. Pract.* 332.

3775. It has already been stated in general terms for what *injuries to personal property* injunctions will be granted. It will now be proper to consider for what particular cause they will be decreed. These are, to prevent a partner from fraudulently issuing bills or circulating them, to prevent attorneys from disclosing secrets, to prevent the circulation of a note or bill, to order deeds or other instruments to be delivered up, to prevent breaches of a contract, to prevent improper sale of property or payment of a debt, to prevent waste of personal property, to restrain the sailing of a ship, to forbid the infringement of copy rights and patents, to stay proceedings in a court of law.³⁰

3776. When there is just ground to believe that a *partner* is about unjustly and fraudulently to make, issue, or circulate bills or notes, or to enter into contracts in the name of the firm, or that he will receive or misapply the assets, then, upon a bill being filed charging these matters, and a proper affidavit being made, an injunction to prevent the same may be immediately obtained.³¹

3777. *Attorneys and agents* may be restrained by injunction from issuing, circulating, or misapplying bills or notes to the injury of their principals;³² and if the retainer of an attorney has been determined on account of his misconduct, an injunction may be obtained to restrain him from communicating to others the confidential secrets he learned in his official intercourse with his client.³³ But he will not be restrained from giving testimony respecting such matter, this being left to the court before whom he is called as a witness. An agent will also be enjoined from disclosing secrets he has learned in the course of his official employment.³⁴ And where a party had obtained a knowledge of certain recipes and remedies in confidence, he was restrained by injunction from communicating them and vending them, on the ground that he had obtained the knowledge of preparing them by a breach of trust.³⁵

3778. When a bill or note has been obtained fraudulently, or upon an illegal transaction, as at play, upon a bill filed charging these facts, supported by an affidavit, an injunction *to prevent the negotiating* or parting with the bill or note will be granted immediately upon filing the bill, and even before the service of the subpoena to appear;³⁶ or if a note be given by one immediately on his coming of age for extravagant supplies made to him during his infancy, the negotiation may be restrained by injunction and relief afforded.³⁷

³⁰ These examples by no means cover all the cases in which injunctions, temporary or permanent, will be granted. In fact it may be laid down as a general rule that where a great or irreparable injury is being done or threatened, a court of equity will always grant an injunction to a party showing a probable right which will be so affected. *Attorney General v. Nichol*, 16 Ves. Ch. 342; *Nutbrown v. Thornton*, 10 *id.* 163; *Mohawk, etc., Rail Road v. Artcher*, 6 Paige, Ch. N. Y. 83; *Atkins v. Chilson*, 7 Metc. Mass. 398.

³¹ *Story*, Partn. § 259; *Collyer*, Partn. 234; *Hood v. Aston*, 1 Russ. Ch. 416; 1 *Story*, Eq. Jur. § 669; 1 *Maddock*, Chanc. Pract. 160. And see further, as to the extent to which equity will go in restraining a partner from misconduct in relation to the partnership property, *Sadler v. Lee*, 6 Beav. Rolls, 324; *Bagshaw v. Parker*, 10 *id.* 532; *Anderson v. Anderson*, 25 *id.* 190; *Marshall v. Watson*, 25 *id.* 501; *Kirby v. Carr*, 3 Younge & C. Exch. 184.

³² *Osborn v. Bank of United States*, 9 Wheat. 844; *Chedworth v. Edwards*, 8 Ves. Ch. 46; *Thompson v. Smith*, 1 Madd. Ch. 395. In a similar manner the transfer of other negotiable property, as bonds, shares in corporate stocks, etc., may be enjoined. See *Ximenes v. Franco*, 1 Dick. Ch. 149; *Stead v. Clay*, 1 Sim. Ch. 294.

³³ *Bear v. Ward*, 1 Jac. Ch. 77; 1 *Maddock*, Chanc. Pract. 160; *Cholmondeley v. Clinton*, 19 Ves. Ch. 261, Coop. Ch. 89.

³⁴ *Evitt v. Price*, 1 Sim. Ch. 483; *Yoral v. Winyard*, 1 Jac. & W. Ch. 394; *Williams v. Williams*, 3 Mer. Ch. 157.

³⁵ *Yoral v. Winyard*, 1 Jac. & W. Ch. 394. But see *Williams v. Williams*, 3 Mer. Ch. 157.

³⁶ *Newman v. Franco*, 2 Anstr. Exch. 519; — *v. Blackwood*, 3 Anstr. Exch. 851; 1 *Fonblanque*, Eq. 43; 1 *Maddock*, Chanc. Pract. 154; *Lloyd v. Gordon*, 2 Swanst. Ch. 180.

³⁷ *Brook v. Galby*, 2 Atk. Ch. 34.

3779. A court of equity will order a party to *deliver up* any deed or instrument which is void at law or by statute, or when it has been satisfied.³⁸ The reason of this is that leaving the deed or instrument in the hands of its possessor would enable him at a future time, when the evidence of their invalidity had been lost, to set them up or to cast a cloud upon a title.³⁹ But no such order or interference by chancery will be made when the party affected by the deed or instrument has the power to revoke it.⁴⁰

3780. In some instances a court of equity will prevent the completion of the *breach of a contract by commission* by an injunction; and an injunction will sometimes be granted to prevent its breach, by an act of *omission*, by decreeing a specific performance. But equity will not interfere when an adequate remedy may be had at law. When, however, the breach of *personal* contract is of considerable importance, and it would be productive of very considerable continuing or permanent loss, which could not be adequately compensated at law, then equity will interfere.⁴¹ For example, where an author sold his copy right in a work, and covenanted not to publish any other to its prejudice, he was restrained by injunction from so doing.⁴²

3781. When the contract relates to *real property*, and the breach might be permanently injurious, an injunction may be obtained; as, when a lease contains a covenant to leave a certain amount of stock at the expiration of the lease, there may be an injunction to compel the observance, and such a remedy may be had also to prevent the pulling down of buildings and removing materials.⁴³

3782. An injunction to prevent the improper sale of property, or the payment of a debt the right of which is in dispute, when it is threatened, or a sale is about to be precipitately made, may be obtained *ex parte*.⁴⁴

3783. A bill may be filed, and an injunction obtained, to prevent an executor or administrator from wasting, and sometimes from suing for or receiving assets; and if persons are about to pay money to an insolvent executor, the court will restrain him from receiving it, and when the debtor colludes with him, he may be made a party to the bill.⁴⁵

3784. When a vessel is owned by several persons, and a majority of the part owners are desirous of employing her upon a particular voyage or adventure, they have a right to do so, upon giving security in the admiralty, by stipulation to the minority, if required, to bring back and restore the ship to them, or, in case of her loss, to pay them the value of their respective shares.⁴⁶ If

³⁸ See *Mayor v. Lawton*, 1 Ves. & B. Ch. Ir. 244; *St. John v. St. John*, 11 Ves. Ch. 535; 1 Maddock, Chanc. Pract. 225 to 233.

³⁹ *St. John v. St. John*, 11 Ves. Ch. 535; *Mayor v. Lawton*, 1 Ves. & B. Ch. Ir. 244.

⁴⁰ *Coleman v. Sorrel*, 1 Ves. sen. Ch. 50; *Bromley v. Bromley*, 7 Ves. Ch. 28. See beyond, **3920**. The remedy of an injunction in this case is simply the means of enforcing compliance with the decree of the court.

⁴¹ Maddock, Chanc. Pract. 403; Newland, Contr. 93; 1 Chitty, Gen. Pract. 712.

⁴² *Barfield v. Nicholson*, 2 Sim. & S. Ch. 1. See *Morris v. Colman*, 18 Ves. Ch. 437; *Clarke v. Price*, 2 Wils. Ch. 157; *Martin v. Nutkin*, 2 P. Will. Ch. 266. And in many other cases where the injury done would be irreparable a temporary injunction will be granted. See *Soltan v. Deheld*, 9 Eng. L. & Eq. 104; *Sanquirico v. Benedetti*, 1 Barb. N. Y. 315; *Lumley v. Wagner*, 1 De Gex, M. & G. Ch. 604; *Rolfe v. Rolfe*, 15 Sim. Ch. 88; and the instructive section and note in Judge Redfield's edition of Story's Equity Jurisprudence, where the doctrine of the earlier cases is doubted, especially in cases where the negative part of the contract is not the main part, and where, from good reason, performance of the positive part will not be enforced.

⁴³ *Nutbrown v. Thornton*, 10 Ves. Ch. 161; *Mayor of London v. Hedger*, 18 Ves. Ch. 355. See beyond, **3797-3802**.

⁴⁴ 1 Chitty, Gen. Pract. 715.

⁴⁵ *Ullerson v. Mann*, 4 Brown, Ch. 277; *Elmslie v. Macaulay*, 3 Brown, Ch. 624.

⁴⁶ *Abbott*, Shipp. 70; 3 Kent, Comm. 151, 4th ed.; 2 Brown, Civ. Law, 131; *Molloy*, B. 2, c. 1, § 3; *Story*, Partn. § 489.

this be not done, an injunction may be obtained to restrain the *sailing of the ship* until such security be given to the part owners.⁴⁷

3785. The *patent* laws authorize the proper courts "to grant injunctions according to the course and principles of courts of equity, to prevent the violation of the rights of any inventor, as secured to him by any law of the United States."⁴⁸ This remedy is necessary for the complete protection of the rights of the patentee, who would be very poorly protected if he had only his action for damages against infringers.

The courts of the United States grant injunctions only upon previous notice to the adverse party of the time and place of moving for the same. It is sometimes requisite that the plaintiff should establish his claim at law before the courts of equity will grant an injunction, but this in the United States is only exceptional, and the injunction will issue without a previous trial at law, unless there are strong reasons to the contrary. If the injunction is asked for before the final hearing, the plaintiff must establish his rights by proper affidavits, and must make a *prima facie* case. Among the points here considered by the court is the age of the patent. A preliminary injunction will not be granted for a newly issued patent. It is very material to show that the patentee has exercised his rights for a considerable time without being disturbed.⁴⁹

It will aid the application for a preliminary injunction if the patentee has successfully prosecuted other parties for an infringement.

If the plaintiff shows both long possession of the patent and successful suits against other persons, the injunction will issue, although the defendant may throw some doubt on the validity of the invention.

3786. Where a perpetual injunction is asked for upon the final hearing, the question assumes a totally different aspect. A court of equity is better constituted than a court of law to decide the questions involved, and will decide at this hearing as to the validity of the patent, the title of the plaintiff, and the fact of infringement. If these are clearly established, the injunction will issue, and it matters not whether the patent be new or old, whether other suits have been gained or not.⁵⁰ The court may at their discretion order the questions of fact to be established by a jury, but this is now rarely done.

Where an injunction is refused, the defendant is usually ordered to keep an account of profits.⁵¹

It is proper to remark that in regard to granting an injunction, the courts, in addition to considering the strict legal rights of the plaintiff, will attend to equitable considerations which, without injuring the plaintiff's claim for damages, will render an injunction improper. Thus if the patentee acquiesces for a series of years without objection in the known public use by others of his objection, an injunction will be refused on the ground of laches.⁵²

3787. An injunction will be granted by the courts of the United States to restrain the piracy of a *copy right*, and the principles in relation to this are very similar to those laid down on the subject of patents. Where the facts are doubtful, the court may order a trial at law to establish them.⁵³ But the usual plan is to refer the matter to a master, with instructions to report the extent of

⁴⁷ 1 Chitty, Gen. Pract. 717; 2 Story, Eq. Jur. § 957; *Haley v. Goodson*, 2 Mer. Ch. 77; *Christie v. Craig*, 2 *id.* 137. But see *Castelli v. Cook*, 13 Jur. 675.

⁴⁸ Act of July 4, 1836, ch. 357, sec. 17.

⁴⁹ *Orr v. Littlefield*, 1 Woodb. & M. C. C. 13; *Ogle v. Edge*, 4 Wash. C. C. 584.

⁵⁰ *Goodyear v. Day*, 2 Wall. C. C. 283.

⁵¹ *Foster v. Moore*, 1 Curt. C. C. 279.

⁵² *Wyeth v. Stone*, 1 Stor. C. C. 273.

⁵³ *Jollie v. Jaques*, 1 Blatchf. C. C. 622; *Blunt v. Patten*, 2 Paine, C. C. 403; *Miller v. McElroy*, 1 Am. Law Reg. 205.

the infringement, if any.⁵⁴ But the title and the infringement being established, the court will always enjoin,⁵⁵ even if it will prevent the issue of a whole work, only a small part of which is covered by the injunction.⁵⁶

3788. The species of property which the writer of letters and of *unpublished manuscript* has in his productions has been already considered.⁵⁷ An injunction restraining their publication is the only adequate remedy for a breach of this right. The court will always interfere to enjoin a third party who has obtained possession of the manuscript.⁵⁸ As against the receiver the courts will interfere where he violates the rights of the writer, and this being a case where damages afford no adequate remedy, the remedy by injunction must be regarded as co-extensive with the rights of the parties.

3789. An injunction will be granted to restrain any one from using the *trade mark* of another for the purpose of misrepresenting the articles he sells. There must be a clear legal right to the trade mark, or the courts will not interfere. In some cases a fraudulent intent has been held requisite to be shown, but this is not the general rule.⁵⁹

3790. When a plaintiff at law is proceeding against equity and conscience, an injunction will be granted to restrain him from further pursuing his legal remedy. He may be enjoined at any stage of his action.⁶⁰ If the application be made in time, the injunction will restrain him from going to trial; if after verdict, it will stay the judgment; if after judgment, it will stay the execution. If an execution has been issued and the money has been made, the money will be stayed in the hands of the sheriff; or if after a part has been made, any further proceeding will be enjoined.⁶¹

The injunction does not interfere with the court at law, nor prevent it in any manner from carrying out its judgment, or exercising in the fullest manner its jurisdiction. The writ is directed against the plaintiff, and the party against whom it is issued is alone liable to be punished for contempt in disobeying it. It is granted, not because the court of law has not jurisdiction, or that it will not lawfully exercise it, but because of certain equitable circumstances, of which the court of equity granting the process has cognizance, and it is against conscience that the party enjoined should further proceed in the cause.⁶²

3791. The cases for which an injunction will be granted to stay proceedings at law are very numerous, the principal of which are to give relief in cases of accident, mistake, or fraud. An instance or two under each of these heads will illustrate the nature of these cases.

⁵⁴ *Story's Exrs. v. Derby*, 4 McLean, C. C. 160.

⁵⁵ *Pierpont v. Fowle*, 2 Woodb. & M. C. C. 35; *Little v. Gould*, 2 Blatchf. C. C. 181.

⁵⁶ *Emerson v. Davies*, 3 Stor. C. C. 796.

⁵⁷ Before, 509-514.

⁵⁸ *Bartlett v. Crittenden*, 4 McLean, C. C. 301.

⁵⁹ *Howe v. Learing*, 19 How. Pr. N. Y. 25; *Brooklyn W. L. Co. v. Masury*, 25 Barb. N. Y. 418; *Clark v. Clark*, 25 Barb. N. Y. 79; *Peterson v. Humphrey*, 4 Abb. Pr. 395; *Merrimack Mfg. Co. v. Garner*, 4 Ed. Smith, N. Y. 390.

⁶⁰ 2 Swanst. Ch. 418, 426, 427.

⁶¹ *Albritton v. Bird*, R. M. Charl. Ga. 93. See *Lyles v. Hatton*, 6 Gill & J. Md. 122; *Bell v. Cunningham*, 1 Sumn. C. C. 89; *Grant v. Lathrop*, 23 N. H. 67; *Kenyon v. Clarke*, 2 R. I. 67; *Fletcher v. Warren*, 18 Vt. 45; *Emerson v. Udall*, 13 *id.* 477; *Tyser v. Lutterloh*, 4 Jones, Eq. No. C. 247; *Truly v. Wanzer*, 4 How. 132. Fraud in obtaining the judgment is said to be the only ground for obtaining an injunction in this country. *Carrington v. Hollabird*, 19 Conn. 84; *Burton v. Wiley*, 26 Vt. 430; (*Redfield J.*)

⁶² *Jeremy*, Eq. Jur. 338; 2 *Story*, Eq. Jur. § 875; *Eden*, Inj. 14. And see *Morris v. Chambers*, 7 Jur. 59, 689; *Ridgway v. Sneyd*, 1 Kay, Ch. 627; *Bowles v. Orr*, 1 Younge & C. Ch. 464; *Portarlington v. Scully*, 3 Mylne & K. Ch. 104; *Mead v. Merritt*, 2 Paige, Ch. N. Y. 404; *Dehon v. Foster*, 4 All. Mass. 540; 7 *id.* 57; *Massie v. Watts*, 6 Cranch, 158; *Briggs v. French*, 1 Sumn. C. C. 504.

There are many cases where courts at law relieve from *accidents*; as, the loss of deeds, mistakes in receipts and accounts, wrong payments, death, which renders it impossible to perform a condition literally, and a multitude of other contingencies. And many cannot be redressed even in a court of equity; as, if by accident a recovery is ill suffered, a contingent remainder destroyed, or a power of leasing omitted in a final settlement, equity can grant no relief.⁶³ Upon the ground of accident, an administrator who had committed a *devastavit* at law, by paying legacies, was relieved against a bond which had unexpectedly started up, the assets having been originally sufficient, but the greater part of them, which consisted of houses, having been consumed by the great fire of London.⁶⁴ In a case of this kind, where the administrator was not in fault in the least, justice would require that the plaintiff should be enjoined.

When, owing to a *mistake*, a party loses an advantage at law, and he afterward can establish the fact in equity, the court will grant an injunction to prevent the injustice which the mistake has occasioned; as, where a party is sued upon a bond, after having paid it in full, and in consequence of being unable to find the receipt for the money the plaintiff obtains a judgment, but afterward the receipt is unexpectedly found. In this case, at law there is no remedy, but equity will give relief, upon a proper bill being filed, supported by proof, by granting a perpetual injunction.⁶⁵

An injunction will be granted for *fraud*, because fraud vitiates every thing. If, for example, a judgment should be obtained at law by the fraud of the plaintiff for a larger sum than is justly due to him, upon a mutual agreement of the parties that afterward a certain set-off should be allowed and deducted from the amount of the judgment, there would be no remedy at law because the set-off ought to have been made before the judgment was rendered; but upon a proper bill being filed and proof made, a court of equity would give relief by granting an injunction to the extent of the set-off.

3792. But there are cases where a court of equity will restrain the parties from proceeding at law where there has been neither accident, fraud, nor mistake, when the court acts upon grounds of a purely equitable and conscientious nature. The case of *marshalling securities* is of this kind. A court of equity will for this purpose control the rights and proceedings of creditors and others at law by an injunction. It is a rule that where one creditor has his debt secured upon two funds, and another only upon one fund, the latter has a right to restrain the former from proceeding against that fund which is alone liable for his debt, and compel him to resort to the other fund.⁶⁶

3793. The cases where a court will grant injunctions to stay proceedings at law are very numerous, and are almost infinite in the nature of their circumstances. In all such cases where by accident, mistake, fraud, or otherwise, a party has an unfair advantage in proceeding in a court of law, which must of necessity make such a court the unwilling instrument of injustice, a court of equity will grant an injunction to stay the unconscionable proceedings of the plaintiff at law.

3794. Not only will courts of equity grant an injunction to stay proceedings at law, but when the party is proceeding at law and in equity at the same time for the same matter, chancery will compel him to make an election of the suit

⁶³ 3 Sharswood, Blackst. Comm. 431.

⁶⁴ Croft v. Lindsay, 1 Freem. 1. See Crosse v. Smith, 7 East, 246.

⁶⁵ Gainborough v. Gifford, 2 P. Will. Ch. 424.

⁶⁶ Dorr v. Shaw, 4 Johns. Ch. N. Y. 17; Lanoy v. The Duke of Athol, 2 Atk. Ch. 446; Aldrich v. Cooper, 8 Ves. Ch. 388; Wright v. Nutt, 1 H. Blackst. 136; Folliott v. Ogden, 1 H. Blackst. 123; 3 Term, 726, 1 Brown, Parl. Cas. 111; Ingalls v. Morgan, 10 N. Y. 178; Reilly v. Mayer, 1 Beasl. N. J. 55; Applegate v. Mason, 13 Ind. 75.

in which he will proceed and will stay proceedings in the other court.⁶⁷ An exception to this rule has been made in the case of a mortgagee, who has a right to proceed on his mortgage in equity and upon his bond at law at the same time.⁶⁸

3795. The plaintiff will also be enjoined and restrained from proceeding at law where the court of equity has made a decree for the same matter, even without a bill being filed by the defendant for that purpose, it being a contempt to proceed at law after the subject of the cause has been attached in a court of equity.⁶⁹

3796. An injunction will be granted to prevent an irreparable trespass, waste, nuisances, and purpresture, and to compel the performance of lawful acts in a lawful manner.

3797. A court of equity will grant an injunction to prevent a party from committing *wasteful trespasses and irreparable damages*; as, when a person either forcibly or wrongfully gets into and retains possession of land or other tenements, and is digging mines or committing other permanent injury.⁷⁰ So, too, where a railroad company was authorized by an act of the legislature, after certain acts were done by the company, to enter upon the lands of individuals and appropriate such parts of the same as might be necessary for the road, and before performing those acts according to law the agents of the company entered on the lands of the complainant, and commenced making the railroad through the same, the court granted an injunction restraining the company from further proceeding.⁷¹

3798. One of the most useful concurrent remedies by a court of equity is the injunction to *prevent waste*. The remedy at common law was by obtaining a writ of prohibition from the court of chancery, which was considered as the foundation of a suit between the party suffering the waste and the party committing it, and, after various proceedings and the case was put at issue, if on trial the defendant was found guilty, the plaintiff recovered single damages for the waste committed.⁷² This proceeding originally could be instituted only against tenant in dower, tenant by the curtesy, and guardian in chivalry. It was extended by several statutes⁷³ to farmers, tenants for life, tenants for years, and some others. This remedy was very ineffectual. By the statute of Westminster second the writ of prohibition was taken away, and the writ of summons was substituted in its place.

By another statute⁷⁴ a new remedy was given in the writ of waste or estrepement pending the suit. This writ lay after judgment obtained in a real action, before possession was delivered by the sheriff to prevent the tenant from committing waste in the lands recovered.⁷⁵ This remedy by estrepement was applicable only to real actions, and when the mixed action of ejectment became the usual mode of trying title to lands, the writ of estrepement did not apply.

In this state of the case, where there was no effectual remedy to protect the

⁶⁷ *Vaughan v. Welch*, Mosel. Ch. 210; *Anon.* Mosel. Ch. 304; *Mosher v. Reed*, 2 Ball & B. Ch. Ir. 318, *Schoole v. Sall*, 1 Schoales & L. Ch. Ir. 176; *Rogers v. Vosburg*, 4 Johns. Ch. N. Y. 84; *Rees v. Parkinson*, 2 Anstr. Exch. 497.

⁶⁸ *Schoole v. Sall*, 1 Schoales & L. Ch. Ir. 176; *Eden, Inj.* 59.

⁶⁹ *Mosher v. Reed*, 1 Ball & B. Ch. Ir. 318. See *Bill v. Body*, Car. Ch. 70.

⁷⁰ *Livingston v. Livingston*, 6 Johns. Ch. N. Y. 497; *Thomas v. Oakley*, 18 Ves. Ch. 184; *Field v. Beaumont*, 1 Swanst. Ch. 208; *Norway v. Rowe*, 19 Ves. Ch. 147.

⁷¹ *Bonaparte v. Camden and Amboy R. R. Co.*, Baldw. C. C. 231.

⁷² *Jefferson v. Bishop of Durham*, 1 Bos. & P. 120.

⁷³ Stat. of Marl. c. 24; Stat. of Gloucest. c. 5.

⁷⁴ Stat. of Gloucest. c. 13. See before, **3691**.

⁷⁵ *Jeremy, Eq. Jur.* 327; *Cooper, Eq. Pl.* 147, 148; *Eden, Inj.* 198; 2 *Story, Eq. Jur.* §§ 909, 910, 911. This writ is given by act of assembly in Pennsylvania.

land from waste, courts of equity, acting upon the principle of preserving the property *pendente lite*, supplied the defect, as they do in other cases, by the effective writ of injunction.⁷⁶ Nor did they limit their protection to cases of this sort, but extended relief on the mere ground of the common law rights of the parties.

An injunction will lie not only to restrain the commission of legal waste, voluntary or permissive, but also to prevent equitable waste, or such acts as at law would not be esteemed, under the circumstances of the case, to be waste, but which in the view of a court of equity are so considered from their manifest injury to the inheritance, although not inconsistent with the legal right of the party committing them.⁷⁷ The following example will illustrate this: A tenant for life without impeachment of waste may pull down houses, or do other waste wantonly and maliciously, and there is no remedy at law; in equity, on the contrary, this will be considered as waste, for which an injunction will lie. This power is exercised *pro bono publico* to restrain extravagant or humorous waste.⁷⁸

3799. As in the cases of injunctions for irreparable trespasses and waste, this writ may be obtained *to prevent a nuisance* on a like necessity and for a similar purpose. Nuisances are public and private; they may both be remedied by injunction, regulated, however, by different rules, which will be explained.

3800. An injunction will not be granted for every *private* nuisance. The injury caused by it must be such that, from its nature, it is not susceptible of being adequately compensated by damages, to be recovered by an action at law, or such that, from its continuance or permanent mischief, it occasions a constantly recurring grievance, which cannot be otherwise prevented, to warrant an injunction.⁷⁹ Nor will this writ be granted where the injury is caused by the exercise of his just rights by the defendant; as, when a party is making an improvement on his own premises which may endanger the house of his neighbor.⁸⁰

Although this remedy will not be granted for the mere diminution of the value of property by the nuisance, without irreparable mischief, it is the proper remedy when the injury is irreparable; as, where the loss of health, or trade, or the permanent ruin of property, may be the consequence.⁸¹ The case of building so as to stop or close up or materially darken the windows of another, who has acquired a clear right, either by contract or by ancient possession,⁸² from which a contract may be presumed, and which have acquired the character of ancient windows or lights, is one for which a court of equity will grant an injunction to stay the party until the trial of the right. But in a case of this kind the court will not on motion make an order to pull down what has been done,⁸³ nor interfere, if the damage be not very material, or it can be adequately compensated

⁷⁶ Cooper, Eq. Pl. 146, 147; Eden, Inj. 198.

⁷⁷ 2 Story, Eq. Jur. § 915.

⁷⁸ Eden, Inj. 215; Abraham or Abrahall v. Bubb, 2 Eq. Cas. Abr. 757, 2 Freem. Ch. 53; Aston v. Aston, 1 Ves. Ch. 265; 1 Fonblanque, Eq. B. 1. c. 1, § 5, note (p); Vane v. Lord Barnard, Prec. Chanc. 454; Gilb. Eq. 127; 1 Eq. Cas. Abr. 399, 1 Salk. 161, 2 Vern. Ch. 738; Clement v. Wheeler, 25 N. H. 369.

⁷⁹ Broadbent v. Imperial Gas Co., 7 De G. M. & G. Ch. 436; Attorney General v. Nichol, 16 Ves. Ch. 342; Mohawk Rail Road Co. v. Artcher, 6 Paige, Ch. N. Y. 83; Dana v. Valentine, 5 Metc. Mass. 8, 118.

⁸⁰ Lasala v. Holbrook, 4 Paige, Ch. N. Y. 169.

⁸¹ Howard v. Lee, 3 Sandf. N. Y. 281; Pack v. Elder, 3 *id.* 126; Davidson v. Isham, 1 Stockt. Ch. N. J. 186.

⁸² See as to the nature of an *ancient window* or ancient lights, before, 1619-1623; Commonwealth v. Rush, 14 Penn. St. 186; Wells v. Chapman, 13 Barb. N. Y. 173; Coker v. Bridge, 10 Ga. 330.

⁸³ Ryder v. Bentham, 2 Ves. Ch. 533.

by a pecuniary compensation;⁸⁴ and if the party injured has delayed applying for relief a considerable time, as three years, an injunction will not be granted before a trial at law.⁸⁵

Injunctions will be granted for numerous acts injurious to the plaintiff, when the remedy at law is inadequate, or there is none at law for injuries by private nuisance; as, for obstruction of water courses, the diversions of streams from mills, the pulling down of the banks of rivers or creeks, by which the adjacent lands become liable to inundation, and for similar wrongs.⁸⁶

3801. Courts of equity will also grant injunctions to prevent public nuisances when an individual is actually injured, or is likely to suffer an irreparable wrong;⁸⁷ as, where a defendant had taken several old houses, which were empty, as temporary warehouses for stowing sugar, in which he was depositing such quantities of sugar, that two of the houses had actually fallen and others were in the most imminent danger, Lord Roslyn granted an injunction upon petition and affidavit.⁸⁸ Though in a very clear case the court would interfere to restrain the carrying on of a noxious trade, destructive of the health and comfort of the neighborhood,⁸⁹ yet there are many manufactories which have not been considered injurious and for which an injunction will not be granted before trial.

Obstruction to public rivers or to ports will be enjoined, and the injunction may be continued until after trial of an indictment for the creation of the nuisance.

3802. *Purpresture*, or more properly *pourpresture*, derived from the French *pourpris*, an inclosure, is used by Lord Coke in the last sense, namely, "a close or inclosure, that is, when one encroacheth and makes that several to himself which ought to be common to many."⁹⁰ As the term is now understood in England, it signifies an encroachment upon the king, either upon part of the demesne lands, or in the highways, rivers, harbors, or streets.⁹¹

There are two remedies for an injury by *purpresture*, namely, by information of intrusion at common law, or by information at the suit of the attorney general in equity. In the case of a judgment upon an information of intrusion, the erection complained of, whether it were a nuisance or not, was

⁸⁴ Attorney General *v.* Nichol, 16 Ves. Ch. 333; *Morris v. Lessees Berkley*, 2 Ves. Ch. 453; *Fishmongers' Co. v. East. Ind. Co.*, Dick. Ch. 164; *Falls Village Co. v. Tibbetts*, 31 Conn. 165; *Rhode Island Bank v. Hawkins*, 6 R. I. 198.

⁸⁵ *Weller v. Smeaton*, 1 Cox, Ch. 102.

⁸⁶ Comyn, Dig. *Action on the Case for Nuisance*; *Eden, Inj.* 268-276; *Gardner v. Newburgh*, 2 Johns. Ch. N. Y. 162; *Van Bergen v. Van Bergen*, 3 Johns. Ch. N. Y. 282; *Fisk v. Wilber*, 7 Barb. N. Y. 395; *Burden v. Stein*, 27 Ala. N. S. 104; *Frink v. Lawrence*, 20 Conn. 117; *Tuolumne Water Co. v. Chapman*, 8 Cal. 392.

⁸⁷ *Wingfold v. Crenstan*, 4 Hen. & M. Va. 174; *Corning v. Lowerre*, 6 Johns. Ch. N. Y. 439; *Catlin v. Valentine*, 9 Paige, Ch. N. Y. 575; *Lamborn v. Covington Co.*, 2 Md. Ch. Dec. 409; *Spencer v. London, etc., R.*, 8 Sim. Ch. 193; *Sampson v. Smith*, 8 *id.* 272; *Attorney General v. Forbes*, 2 Mylne & C. Ch. 129.

⁸⁸ *Mayor of London v. Bolt*, 5 Ves. Ch. 129.

⁸⁹ *Eden, Inj.* 262; 1 *Chitty, Gen. Pract.* 730; *Howard v. Lee*, 3 Sandf. N. Y. 281; *Peck v. Elder*, 3 *id.* 120; *Davidson v. Isham*, 1 Stockt. Ch. N. J. 186.

⁹⁰ Coke, 2 Inst. 38; Coke, Litt. 277, b; *Glanville*, by Beames, B. 9, c. 11, p. 238, note 2. The word *purpresture* seems to have been understood by the old English lawyers in three senses: first, as committed against the king by a subject; second, as committed by a tenant against the lord of whom he held his fee; and, third, as committed by one neighbor against another. *Spelman, Gloss.*; *Manwood, Forest Laws*, 167, 176. This word has the same meaning in some of the ancient customs of France. *Ferriere, Dictionnaire de Droit; Denisart*; 1 *Howard, Coutumes Anglo-Normandes*, 387. See before, **2386**.

⁹¹ *Eden, Inj.* 259; *Story, Eq. Jur.* § 922; *Commonwealth v. Wright*, 3 Am. Jur. 185; *Commissioners v. Long*, 1 Pars. Cas. Eq. Penn. 143; *Watertown v. Cowen*, 4 Paige, Ch. N. Y. 510; *Attorney General v. Cohoes Co.*, 6 *id.* 133; *Attorney General v. Forbes*, 2 Mylne & C. Ch. 143; *Attorney General v. Johnson*, 2 Wils. Ch. 101.

abated; but upon a decree upon an information in equity, if it appeared to be a purpresture, without being at the same time a nuisance, the court might direct an inquiry whether it was beneficial to the crown to abate the purpresture or to suffer the erections to remain to be arrented.⁹² But if the purpresture were also a public nuisance, it could not be allowed to remain, because the crown could not sanction a nuisance.⁹³

3803. When the parties have a legal right to perform some act in relation to real property of an individual, and they are about to execute their powers in a manner that would probably be injurious, or more extensively than is necessary, and the individual can suggest a preferable course of proceeding, a court of equity will enforce the latter by injunction.⁹⁴

3804. The writ of injunction is addressed to the party defendant, and it commands him to do or not to do a particular thing. The breach of this command is a contempt of court, for which the defendant may be attached in his person, and committed to prison. The fact that there is a breach must be shown by affidavit.⁹⁵

For the purpose of effectuating their decrees, courts of equity now in many cases interfere by injunctions in the nature of a judicial writ or execution for possession; as, for example, by injunctions to yield up, deliver quiet, or continue possession, followed up by *writ of assistance*,⁹⁶ which is in the nature of an execution commanding the sheriff to deliver possession of the land agreeably to the provisions of the decree.⁹⁷

3805. The next remedy in equity to prevent injustice is the *bill quia timet*, which, as its name imports, is filed because the complainant fears some future mischief. Bills of this kind are so called in analogy to certain writs of the common law now seldom used.

There were six writs at common law which could have been maintained *quia timet* before any molestation, distress, or impleading. These were,

A writ of mesne which a man could have before he was distrained. A *Warrantia chartæ*, before he was impleaded. A *Monstraverunt*, before any distress or vexation. An *Audita querela*, before an execution sued. A *Curia claudenda*, before any default of inclosure. A *Ne unjste vexes*, before any distress or molestation.⁹⁸

A bill *quia timet* is in the nature of a writ of prevention to accomplish some object of precautionary justice. Bills of this sort are usually filed to prevent wrongs and anticipated mischiefs, and not merely to redress them when done. This may be with regard to the complainant's equitable or legal right to some personal chattel to which he will be entitled. But it must be remembered that, in regard to equitable property, the jurisdiction attaches equally to cases where there is a present right of enjoyment, and to cases where the right of enjoyment is future or contingent.⁹⁹ At law, the relief afforded almost universally regards the right of possession. One having merely a present right of future enjoyment may, in many instances, notwithstanding the powers of the courts of law, be damnified by the destruction or injury of the property in the mean time, and when his title of possession accrues may be unable to render it avail-

⁹² Attorney General *v.* Richards, 2 Anstr. Exch. 606.

⁹³ Eden, Inj. 260.

⁹⁴ Coats *v.* Clarence Railway Company, 1 Turn. & Myl. 181.

⁹⁵ 2 Maddock, Chanc. Pract. 224, 225; Shoemaker *v.* Gillet, 3 Johns. Ch. N. Y. 311; Rutherford *v.* Metcalf, 5 Hayw. Tenn. 60. As to what will be a breach of the common injunction, see Eden, Inj. 96.

⁹⁶ Eden, Inj. 425; 1 Chitty, Gen. Pract. 701; 2 Story, Eq. Jur. § 959.

⁹⁷ 2 Maddock, Chanc. Pract. 469, 470.

⁹⁸ Coke, Litt. 100, a.

⁹⁹ Jeremy, Eq. Jur. 356.

able, or even to obtain a compensation for the loss which may be sustained by him. It is for the purpose of remedying this evil that equity will interfere to secure property when it is of a perishable nature. The aid which courts of equity give in these cases must depend upon the circumstances of each.

When the plaintiff has established his title to the future enjoyment, or it is admitted, the courts of equity will grant relief in several ways: by the appointment of a receiver of rent or other income, by an order to pay a pecuniary fund into court, by ordering the defendant to give security, and sometimes by the writ of injunction.

3806. For the purpose of securing the property in dispute when it is of the nature already mentioned, after a bill *quia timet* has been filed, the court will in some cases appoint a receiver. A *receiver* is a person appointed by the court, authorized to receive the rents and profits of land, or the profits or produce of other property in dispute.

3807. Courts of equity exercise a sound discretion in the appointment of a receiver.¹⁰⁰ This is made upon principles of justice for the benefit of all parties concerned. As this power is discretionary, it is not easy to point out its limits, or how far it will be exercised. The object of the court in making the appointment is to secure the property for its appropriate uses and ends, and to preserve it from being dissipated when it is in danger of being converted to other purposes or diminished or lost. In cases of this kind it will take the fund into its own hands, or secure its due management by its own officers. This will be done in numerous cases, of which the following are examples:

3808. When there is an *equitable property*, a receiver may be appointed to secure it from danger, whether the right of enjoyment be present, or it be future or contingent; as, where the property is in the hands of a trustee for a particular purpose, and it is about to be diverted to some other, the court will appoint a receiver, or if the fund be pecuniary, direct it to be paid into court, or require security for its preservation and appropriation.¹⁰¹ And executors and administrators will for this purpose be considered trustees.¹⁰²

3809. A receiver will be appointed when there are conflicting legal and equitable debts upon the estate, in order to secure the property for the use of all the claimants who shall establish a right, and a receiver will also be appointed when the estate is held by a party under a title obtained by fraud, actual or constructive.¹⁰³

3810. When there are numerous incumbrancers of an estate, the court will not appoint a receiver to receive the rents and profits, so as to take them out of the possession of the first incumbrancer when he is in possession of the estate or entitled to the possession, unless he does such acts as manifest an abandonment of his right.¹⁰⁴ When a receiver is appointed under these circumstances, the court will take care to do complete equity among all the incumbrancers.

3811. When the tenants of a particular estate for life or in tail neglect to keep down the interest due upon incumbrances on the estates so held, a court of equity will appoint a receiver for the purpose of procuring funds to keep down such interest, for otherwise the remainder-man would be compelled to pay such interest out of his interest in the land.

3812. When a partnership is dissolved by one or more of the partners who have a power so to dissolve it, and there is no provision in the articles of asso-

¹⁰⁰ *Verplank v. Caines*, 1 Johns. Ch. N. Y. 57.

¹⁰¹ *Jeremy*, Eq. Jur. 248, 254. See *Haggarty v. Pitman*, 1 Paige, Ch. N. Y. 298.

¹⁰² 1 *Fonblanque*, Eq. B. 1, c. 1, s. 8, note (y).

¹⁰³ *Stittwell v. Williams*, 6 Madd. Ch. 48; *Stittwell v. Wilkins*, Jac. Ch. 280.

¹⁰⁴ *Thomas v. Brigstocke*, 4 Russ. Ch. 64; *Jeremy*, Eq. Jur. 250; *Bryant v. Cormick*, 1 Cox, Ch. 422; *Norway v. Rowe*, 19 Ves. Ch. 153.

ciation or the agreement for a dissolution, providing for the settlement of the affairs of the firm, and the partners cannot agree, the appointment of a receiver is a matter of course.¹⁰⁵

3813. It is a maxim that equality is equity. The appointment of a receiver is therefore made for the benefit and on behalf of all the parties in interest, and not for the benefit of one plaintiff or one defendant only.¹⁰⁶ Where a receiver has been appointed to receive the assets of a partnership, the court will direct him to apply the partnership funds to the payment of all the debts of the firm rateably, without giving any preference to the favorite creditors of either partner.¹⁰⁷ But when among a class there are some who have prior legal rights or equities, these will be protected.¹⁰⁸

3814. By his appointment, a receiver becomes an officer of the court.¹⁰⁹ He is invested with the *power* to receive the rents and profits of the real estate; if there are tenants in possession of the premises, they are compellable to attorn, and the court thus becomes, *pro hoc vice*, the landlord.¹¹⁰ In general, the receiver is entitled to the possession of the premises, but his possession does not affect the rights of third persons when they are ultimately established. He is considered as holding for the true owner.

3815. When he is in possession, he has but little discretion allowed him in the performance of his duties; and in bringing and defending suits and performing most acts, he should consult and receive the sanction of the court.¹¹¹ Before he enters into the performance of the duties of his appointment, he will be required to give bond with surety under direction of the court.¹¹²

3816. The receiver is bound to act in good faith and with a proper degree of diligence; and if property is lost through his fault or neglect, he may be made liable for it. When the property is lost or injured by any negligence or dishonest execution of the trust, he is liable in damages, but he is not of course responsible because there has been without his fault any embezzlement or theft. He is bound to such ordinary diligence as belongs to a prudent and honest discharge of his duties, and such as is required from all persons who receive compensation for their services.¹¹³

3817. Another remedy under a bill *quia timet* is to require the payment of money into court, upon this principle, that he who is entitled to the money is entitled to have it secured. To authorize the court to apply this remedy, the plaintiff must have an interest in the fund.

In some cases, the court will require money to be paid into court, without any ground being laid to show that the party holding it has been guilty of abuse, or that the fund is in danger; in such case it is only requisite to show that the plaintiff is solely entitled, or has such an interest jointly with others as to justify him, on behalf of himself and his companions, to have the fund secured.¹¹⁴ Thus, in the case of bills brought by creditors, or legatees, or distributees, against an executor or administrator for a settlement of the estate, if, by his answer, the executor or administrator admits assets in his hands, and

¹⁰⁵ *Law v. Ford*, 2 Paige, Ch. N. Y. 310; *Martin v. Van Shaik*, 4 Paige, Ch. N. Y. 479; *Henn v. Walsh*, 2 Edw. Ch. N. Y. 129.

¹⁰⁶ *Davis v. Marlborough*, 1 Swanst. Ch. 83; 2 Swanst. Ch. 125.

¹⁰⁷ *Law v. Ford*, 2 Paige, Ch. N. Y. 310.

¹⁰⁸ *Jeremy*, Eq. Jur. 249, 250; 1 Swanst. Ch. 83; *Davis v. Marlborough*, 2 Swanst. Ch. 125.

¹⁰⁹ See *Angel v. Smith*, 9 Ves. Ch. 335; *Hutchinson v. Lord Massarene*, 2 Ball & B. Ch. Ir. 55; *Skip v. Harwood*, 3 Atk. Ch. 564.

¹¹⁰ *Angel v. Smith*, 9 Ves. Ch. 335; *Jeremy*, Eq. Jur. 249.

¹¹¹ *Jeremy*, Eq. Jur. 252, 253.

¹¹² 2 Maddock, Chanc. Pract. 240.

¹¹³ *Story*, Bailm. § 621.

¹¹⁴ *Freeman v. Fairlie*, 3 Mer. Ch. 29; *Cruikshanks v. Roberts*, 6 Madd. Ch. 104; *Orok v. Binney*, 1 Jac. Ch. 523; *Rothwell v. Rothwell*, 2 Sim. & S. Ch. 217.

the court takes upon itself the settlement of the estate, it will direct the money to be paid into court.¹¹⁵

3818. Property is sometimes so situated that the party ultimately entitled to it may be in danger of losing it, unless security is given for its preservation. A party has a right to call for the interference of the court when he has an equitable property in the thing to be secured, whether his right of enjoyment be present, future, or contingent. When his property is merely legal, with a present right of enjoyment, the remedies at law are, in general, sufficient to protect such rights; but when the enjoyment is to be future or contingent, the party entitled is frequently without an adequate remedy at law for the injury which, in the mean time, he may be subject to bear, by the loss, destruction, or deterioration of the property in the hands of the person entitled to present possession.¹¹⁶ A familiar example is the case where personal property is given by will to one for life, and afterward to another; formerly the latter, or his personal representatives, might in all cases have obtained a decree to compel the former to secure the same to him after his death;¹¹⁷ but in modern times, in ordinary cases, when property consists of specific chattels, the defendant is not required to give security unless there is a well-founded apprehension of danger of their loss;¹¹⁸ in such case he who has the life estate is required merely to make out, sign, and deliver to the plaintiff, or put in possession of the court, an inventory of such property.¹¹⁹

3819. When a proper case is made out in a bill *quia timet*, supported by proof, the court will compel the party to perform its decree by injunction.

3820. We come now to consider the third kind of peculiar remedies to prevent injustice; this is commenced by a *bill of peace*. These bills, as their name imports, are used to prevent repeated and reiterated litigation.¹²⁰

The object of bringing a bill of peace is to establish and perpetuate a right which the plaintiff claims, and which from its nature may be controverted by different persons, at different times, and by different actions; or where separate attempts have already been unsuccessfully made to overthrow the same right, and justice requires that the party should be quieted in his right when it has been sufficiently established, or if it should be established satisfactorily under the direction of the court.¹²¹

3821. There are several classes of cases where these bills are the proper remedy.

¹¹⁵ *Blake v. Blake*, 2 Schoales & L. Ch. Ir. 26; *Yare v. Harrison*, 2 Cox, Ch. 377; *Strange v. Harris*, 3 Brown, Ch. 365.

¹¹⁶ *Jeremy*, Eq. Jur. 349, 350; *Clark v. Clark*, 8 Paige, Ch. N. Y. 152.

¹¹⁷ See *Bracken v. Bentley*, 1 Chanc. 110.

¹¹⁸ *Foley v. Burnell*, 1 Brown, Ch. 279. It seems the courts in Pennsylvania cannot demand security in such cases. *Lippincott v. Warder*, 14 Serg. & R. Penn. 118; *Bitzer v. Hahn*, 14 *id.* 238. Unless, perhaps, in very special cases. *Kinnard v. Kinnard*, 5 Watts, Penn. 109. But this is now regulated by the act of assembly of 1834. *Brinton's estate*, 7 Watts, Penn. 203. See *McDougal v. Armstrong*, 6 Humphr. Tenn. 428; *Bowling v. Bowling*, 6 B. Monr. Ky. 31.

¹¹⁹ *Leeke v. Bennett*, 1 Atk. Ch. 470; *Bill v. Kinnaston*, 2 Atk. Ch. 82; 1 Story, Eq. Jur. §§ 603, 604.

¹²⁰ The learned Story, in his Commentaries on Equity Jurisprudence, vol. ii, § 852, says: "These bills sometimes bear a resemblance to *bills quia timet*, which latter seem to have been founded upon analogy to certain proceeding at common law, *quia timet*. Bills *quia timet*, however, are quite distinguishable from the former in several respects, and are always used as a preventive process, before a suit is actually instituted; whereas, bills of peace, though sometimes brought before suit is instituted to try the right, are more generally brought after the right has been established at law."

¹²¹ *Jeremy*, Eq. Jur. 344; 1 Maddock, Chanc. Pract. 166; 1 Harrison, Chanc. Pract. 104; *Blake*, Chanc. Pract. 84; 2 Story, Eq. Jur. § 853; *Alexander v. Pendleton*, 8 Cranch, 462, 468; *Eldrige v. Hill*, 2 Johns. Ch. N. Y. 281.

When there is one general right to be established against a great number of persons; as, where one person claims or defends against many, or where many claim or defend a right against one. Chancery in such cases interferes for the purpose of avoiding a multiplicity of suits; but as the plaintiff's claim is founded upon a legal right, that must first be tried at law in an individual case, and a verdict obtained by the plaintiff in order to induce a court of equity to grant a perpetual injunction, and this being ascertained, the courts of equity will call all the parties before them and make a final decree binding upon all the parties.¹²² An example to illustrate this may be found in the case of a party who has possession and claims a right of fishery for a considerable distance on a river, and the riparian owners set up several adverse rights, he may have a bill of peace against them all for the purpose of quieting his right and establishing his possession.¹²³

The second class in which bills of peace may be brought is when the plaintiff has, after repeated trials, established his right at law. When the disuse of real actions which were final became general, and ejectments became common, as this last action was not final, it was usual to bring one action after another, and by that means harass the defendant. To remedy this evil, after the right had been repeatedly tried in ejectment and the result had been the same, the courts of equity, upon a bill of peace being filed, would grant a perpetual injunction.¹²⁴

3822. Bills of interpleader form the fourth or last class of peculiar remedies administered by courts of equity. A *bill of interpleader* may be defined to be one by which the complainant claims no relief against either of the plaintiffs or defendants, but desires to pay the money or deliver the property to the one to whom it justly, legally, or equitably belongs, and that he may be protected from the danger of loss or damage from the claim of both or either of them.¹²⁵

It is a remedy concurrent with the interpleader at law, and is formed in some measure upon it, but it is extended in equity to cases in which it is not afforded at law. At law, parties are made to interplead only in favor of a defendant who is sued in two different actions; as, upon a bailment of goods to such defendant, in respect of which the plaintiff in one action brings detinue and the plaintiff in the other action brings trover, but the bailment must have been made by consent of both claimants.¹²⁶ In equity, where two or more persons claim the same thing by different titles, and another person is in danger of injury from ignorance of the real title to the subject in dispute, courts of equity will assume a jurisdiction to protect him. The bill exhibited for this purpose is termed a bill of interpleader; its object is to compel the claimants to interplead, so that the court may adjudge to whom the property belongs and the plaintiff may be indemnified. The courts of equity extend the remedy beyond that given at law, and let it embrace all cases to which in conscience it ought to extend; and having the means of bringing all parties before them and investigating their respective claims, they will give to the parties that measure of justice which they ought severally to attain, when they have legal claims, as if by circuity of action they were to proceed at law.¹²⁷

¹²² Jeremy, Eq. Jur. 343. See also *Poor v. Clark*, 2 Atk. Ch. 515; *Corporation v. Wilson*, 13 Ves. Ch. 279; *Norfolk v. Myers*, 4 Madd. Ch. 50.

¹²³ *Mayor of York v. Pilkinton*, 1 Atk. Ch. 382.

¹²⁴ *Earl of Bath v. Sherwin*, 4 Brown, Parl. Cas. 373; *Prec. Chanc.* 261. See *Dalton v. Dalton*, Sel. Ch. Cas. 13; *Huntingdon v. Nicoll*, 3 Johns. N. Y. 566; *Leighton v. Leighton*, 1 P. Will. Ch. 671; *Jeremy, Eq. Jur.* 346.

¹²⁵ *Bedell v. Hoffman*, 2 Paige, Ch. N. Y. 199.

¹²⁶ 2 D'Anvers, Abr. 779, 782; 3 Reeves, Hist. Eng. Com. Law, 448.

¹²⁷ *Jeremy, Eq. Jur.* 346, 347; *Mitford, Eq. Plead.* 125. See 2 Story, Eq. Jur. §§ 800 to 824.

3823. Bills of interpleader are in general brought by agents, auctioneers, factors, and the like, who have no interest in the matter in controversy, and where they have no adequate remedy to defend themselves at law from the vexatious suits of different claimants. The object of this bill is to discharge the plaintiff from paying what he owes more than once, and for the purpose of ascertaining who is the true creditor or person entitled to the subject matter in dispute. If the party praying for an interpleader himself claims an interest in the subject matter as well as the other parties, the bill will not be entertained, for then he has other appropriate remedies.¹²⁸

But this must be understood with this qualification, that the party applying for an interpleader must have no interest in the matter in dispute, yet he may have an interest connected with it; a bill in the nature of a bill of interpleader will lie where he has some interest distinct from that of the contending claimants. For example, if a mortgagor wishes to redeem the mortgaged estate, and there are conflicting claims of different persons as to the title to the mortgage money, he may bring them before the court to ascertain their rights, for the purpose of having a decree of redemption and be made safe in his payment. In such case, it is true, the plaintiff seeks relief for himself, but he has no interest in the matter in dispute between the several claimants.¹²⁹

3824. A bill of interpleader will only lie where the claims are legal, or where at least one is of that nature; and in such case it is not necessary that a suit or action should have been commenced upon it, a claim being a sufficient ground for such an application, although it is requisite that the plaintiff should admit the right in each party to institute proceedings against him.¹³⁰

¹²⁸ *Angel v. Hadden*, 15 Ves. Ch. 244; *Langston v. Boylston*, 2 *id.* 108; *Cornish v. Tanner*, 1 Younge & J. Exch. 333; *Atkinson v. Mauks*, 1 Cow. N. Y. 691; *Moore v. Usher*, 7 Sim. Ch. 383; *Bedell v. Hoffman*, 2 Paige, Ch. N. Y. 200; *Marvin v. Ellwood*, 11 *id.* 365; *Lincoln v. Rutland, etc.*, R. R., 24 Vt. 639. The practice of interpleader in equity has been compared to the *intervention* of the civil law. *Gilb. For. Rom.* 47. There is this marked difference between them: the party to an interpleader, who claims to be relieved from vexatious litigation, and from liability to pay the debt or perform his obligation more than once, in consequence of the uncertainty of the rights of the several claimants, differs materially from the *tertius inter veniens*, or intervener of the civil law, who is one claiming an interest in the subject matter or thing in dispute, and claims to act with the plaintiff, and to be joined with him, and to recover the matter in dispute, because he has an interest in it; or to join the defendant, and with him to oppose the claim of the plaintiff, which it is his interest to defeat. *Domat, Lois Civiles*, tome 2, liv. 4, tit. 3; *Poth. Procédure Civile*, prèm. partie, c. 2, s 6, § 3. See *Eden, Inj.* 394, note (a); 2 *Story, Eq. Jur.* § 806, note 1; *Merlin, Repert, Intervention*; *Code of Pract. of Louisiana*, art. 389; *Brown v. Saul*, 4 Mart. N. s. La. 437; *Gasquet v. Johnson*, 1 La. 431; *Thompson v. Chauveaux*, 7 Mart. N. s. La. 334; *Dalloz, Dict. de Jur.*

¹²⁹ See *Bedell v. Hoffman*, 2 Paige, Ch. N. Y. 199; *Mitchell v. Hayne*, 2 Sim. & S. Ch. 63; *Goodrick v. Shotbolt*, *Prec. Chanc.* 333; *Jeremy, Eq. Jur.* 348.

¹³⁰ *Morgan v. Marsack*, 2 Mer. Ch. 110; *Stevenson v. Anderson*, 2 Ves. & B. Ch. Ir. 407; *Langston v. Boylston*, 2 Ves. Ch. 107.

CHAPTER IV.

THE GENERAL REMEDIES.

- 3826-3830. Accidents.
- 3827-3829. When courts of equity will relieve from accidents.
 - 3828. Relief from the accidental loss of proof of title.
 - 3829. Relief from accidents not affecting the proof of plaintiff's title.
 - 3830. When courts of equity will not relieve from accidents.
- 3831-3837. Mistakes.
 - 3832. Mistakes in matters of law.
 - 3834. Mistakes in matters of fact.
- 3838-3878. Fraud.
 - 3839. Classification of frauds.
- 3840-3852. Actual frauds.
- 3841-3844. *Suggestio falsi* or misrepresentation.
 - 3842. The representation must have been material.
 - 3843. The representation must have been false.
 - 3844. The party deceived must have had a right to rely upon the representation.
 - 3845. *Suppressio veri* or concealment of the truth.
- 3850-3852. Frauds arising from other causes.
 - 3851. Frauds arising from the incapacity of the parties.
 - 3852. Unconscionable bargains.
- 3853-3878. Constructive frauds.
- 3854-3861. Contracts against public policy.
 - 3855. Contracts founded on immoral consideration.
 - 3858. Contracts in violation of public trust.
 - 3859. Contracts in restraint of trade.
 - 3860. Contracts in restraint of marriage.
 - 3861. Contracts to influence persons in authority.
- 3862-3869. Contracts in violation of trusts and fiduciary relations.
 - 3863. Frauds between parent and child.
 - 3864. Frauds between guardian and ward.
 - 3865. Frauds between trustee and *cestui que* trust.
 - 3866. Frauds between client and attorney.
 - 3868. Frauds between principal and agent.
 - 3869. Frauds between creditor and surety.
- 3870-3878. Frauds against third persons.
 - 3871. Catching bargains.
 - 3875. Bargains with sailors for their wages.
 - 3876. Agreements to delay or defraud creditors.
 - 3877. Purchase with notice of prior title.

3825. In the preceding chapter having considered the peculiar means employed by courts of equity, first, to secure justice, and, secondly, to prevent injustice, we naturally come to the general causes for relief which are not peculiar to courts of equity, but are recognized in courts of law as requiring interposition to secure justice. These relate to accidents, mistakes, frauds, and to certain remedies peculiarly appropriate in equity and inappropriate at law.

3826. In the course of human affairs accidents are constantly happening, and the courts are required to supply a remedy to relieve those who may be subject to them as far as it is in their power. Many of these accidents are remedied in the courts of law; as, the loss of deeds, mistakes in receipts and accounts, wrong payments, death, which makes it impossible to perform conditions literally, and a multitude of other contingencies.¹ Courts of equity, having more extensive powers, and a more enlarged jurisdiction, relieve from accidents in many cases where the courts of law cannot afford an adequate remedy. Possessing these means of investigation, when a court of equity can satisfy itself that natural justice requires its interference, it will, in some instances, exert its means of distributing equity where subsequent accident would render the application of the rules of law injurious or oppressive. It will perform this equitable task by dispensing with the observance of formalities, or by presuming that they have been complied with, and then give redress, or relieve the party from responsibility or loss, as justice and equity require.

But there are some accidents which are not relievable even in courts of equity, as if by accident a recovery be ill suffered, a devise ill executed, a contingent remainder destroyed, or a power of leasing omitted in a family settlement.²

The general meaning of the term *accident* is the happening of an event without the concurrence of the will of the person by whose agency it is caused, or the happening of an event without any human agency. The burning of a house in consequence of a fire being made for the ordinary purpose of cooking or of warming the house is an accident of the first kind; the burning of a house by lightning is an accident of the second kind.³ The term accident in chancery practice has a different meaning; it signifies such unforeseen events, misfortunes, losses, acts, or omissions, as are not the result of any negligence or misconduct of the party.⁴ We shall consider the cases of accident where relief will be granted, and, subsequently, those where it will not be granted.

3827. The cases where courts of equity will relieve from accidents may be divided into two classes; included in the first are those cases in which a party seeking the establishment of a legal right is unable to produce evidence of his title, and, in the second, those in which by a mere casualty, not affecting the proof of the plaintiff's title, he would unquestionably be subjected to injury.

3828. The jurisdiction of courts of law and courts of equity being concurrent, the latter courts will entertain jurisdiction only, first, when a court of law cannot grant suitable relief; and, secondly, when the party has a conscientious or equitable title of relief, both must concur in a given case, for otherwise a court of equity cannot grant the relief.

Formerly, courts of law did not interfere to grant relief in many cases where now such relief may be obtained at law. At that time courts of equity interfered to prevent injustice, and although the courts of law, with more liberality, now afford relief in such cases, yet courts of equity, having once obtained jurisdiction, now retain it as a concurrent remedy with the courts of law, it being considered that the latter courts are not competent, by their own act, to oust or repeal a jurisdiction already rightfully attached in equity.⁵

¹ 3 Blackstone, Comm. 431.

³ 1 Story, Eq. Jur. § 78.

⁵ Mitford, Eq. Plead. 104-106; 1 Fonblanque, Eq. B. 1, c. 1, s. 3, note (*f*); Cooper, Eq. Plead. 129; Jeremy, Eq. Jur. 359, 360; 1 Story, Eq. Jur. § 80; Ex parte Greenway, 6 Ves. Ch. 812; East India Co. v. Boddam, 9 Ves. Ch. 466; Ludlow v. Simmond, 2 Caines, Cas. N. Y. 1; King v. Baldwin, 17 Johns. N. Y. 384. This jurisdiction attaches in such cases not merely on account of a defect of proof in law, but also because the equitable forms of relief by annexation of conditions, etc., are capable of securing more perfect justice between the parties. See Hansard v. Robinson, 7 Barnew. & C. 90; Fales v. Russell, 16 Pick. Mass. 315; Almy v. Reed, 10 Cush. Mass. 427; Smith v. Rockwell, 2 Hill, N. Y. 482.

² 3 Sharswood, Blackst. Comm. 431.

⁴ 1 Fonblanque, Eq. 374, 375, note.

When an action is brought upon a deed in a court of law, it is requisite that profert should be made of it in the declaration, unless it can be proved that the same is lost, or that it is in the hands of the opposite party, or that it has been destroyed by him.⁶ In chancery, on the contrary, it is held that in a case in which a profert of a deed would be required at law, if the party who claims upon it will make an affidavit of its loss, and that he knows not where it is, unless it be in the custody of the defendant, he will be assisted by its compelling a discovery of its execution from the defendant, and giving him relief also, if it shall appear that, in case the plaintiff could have made a profert at law, he would then have been entitled to a remedy. This affidavit is not required as evidence of the loss, but as an assurance of the propriety of the court exercising a jurisdiction.⁷

Formerly these remarks would have applied to the case of bonds or other instruments under seal, and a want of profert of the instrument would have been a fatal defect; but in modern times the rule has changed; the courts of law now entertain jurisdiction, and dispense with a profert, if the loss by time or accident be stated in the declaration.⁸ This instance is one in which the courts of equity now entertain jurisdiction, because they once possessed it when courts of law would give no relief,⁹ though now the latter courts will give relief for the accident.¹⁰

The reasons for interfering in the case of a lost bond never applied to that of a promissory note or unsealed security, because no supposed inability to recover at law exists in the case of the loss of such note or unsealed agreement as exists for want of a profert of a bond at law. No profert being required, and no oyer allowed at law of such note or security, a recovery can be had there upon mere proof of loss.¹¹

3829. Courts of equity will relieve from another class of accidents, which, though not affecting the proof of the plaintiff's title, are nevertheless very injurious to him. From many of these accidents a court of equity will grant both discovery and relief. Of this numerous class a few examples will be cited.

One of the earliest exercises of the jurisdiction of the court was to relieve from the forfeiture of a bond, or of a mortgage, when it was not paid at the day appointed for payment, on the ground that it was unjust for the creditor to avail himself of the penalty when an offer of full indemnity was tendered.

Equity will relieve when an inequitable loss or injury will otherwise fall upon the plaintiff from circumstances beyond his control, or from his own acts done in good faith and in the performance of a supposed duty without negligence.¹²

⁶ *Read v. Brookman*, 3 Term, 151.

⁷ *Bromley v. Holland*, 7 Ves. Ch. 19; *Ex parte Greenway*, 6 Ves. Ch. 812; 1 Story, Eq. Jur. § 82; *East India Co. v. Boddam*, 9 Ves. Ch. 466.

⁸ *Read v. Brookman*, 3 Term, 151; *Totty v. Nesbitt*, 3 Term, 153, note.

⁹ *Kemp v. Pryor*, 7 Ves. Ch. 249; *Mayne v. Griswold*, 3 Sandf. N. Y. 478; *Lawrence v. Lawrence*, 42 N. H. 109.

¹⁰ *Jeremy*, Eq. Jur. 361.

¹¹ *Glynn v. Bank of England*, 2 Ves. Ch. 38, 41; but see *Hansard v. Robinson*, 7 Barnew. & C. 90, where the proper remedy in such case is said to be in equity, and this upon the ground that the maker of the note has a right to require it to be delivered up, at least where it has been indorsed, and to require indemnity. See also *Thayer v. King*, 15 Ohio, 242; *Lazell v. Lazell*, 12 Vt. 443; *Hopkins v. Adams*, 20 *id.* 407.

¹² This may happen where executors make payments under certain circumstances. *Edwards v. Freeman*, 2 P. Will. Ch. 447; *Johnson v. Johnson*, 3 Bos. & P. 162; *Crosse v. Smith*, 7 East, 246; *Croft's Executors v. Lyndsey*, 2 Freem. Ch. 1; or where a large premium is given to teach an apprentice, and the master becomes bankrupt. *Hale v. Webb*, 2 Brown, Ch. 78; and in case of a fund becoming insufficient to raise an annuity provided

In the execution of mere powers, a court of equity will grant relief on account of accident as well as mistake, when, in consequence of the accident, there is a defective execution of powers. The exercise of this jurisdiction will take place, unless there be some countervailing equity to prevent it, for the relief of purchasers, a wife, a child, or a charity.¹³ But equity will not aid defects which are of the very essence or substance of the power; if, for example, the power be executed without the consent of the parties who are required to it to give it validity, or if it be required to be executed by will, and it is executed by a deed, the defect cannot, in either case, be relieved from in equity.

3830. In the cases we have been considering under the two preceding heads, it must have been perceived that they all proceed upon the same common ground, that there is no adequate or complete remedy at law under all the circumstances, that the party has rights which ought to be protected and enforced, and for want of such protection he would sustain injury, loss, or detriment, which it would be against equity to make him bear. But there is another class of accidents for which no relief will be granted by a court of equity. A few of these will now demand our attention.

Courts of equity will not relieve a party where he has entered into a positive contract or obligation, and he has been prevented from fulfilling it by accident, or he has been in default, or he has been prevented by accident from deriving the full benefit of the contract on his own side.¹⁴ Take, for example, the case of a lessee; when he covenants to keep the demised estate in repair, he will not be relieved in equity from his covenant because the premises have been destroyed or injured by an inevitable accident, or by the public enemies, or by any other overwhelming force, because, by his contract, he might have provided for the contingency. The same rule applies in like cases where there is an express covenant, without exception, to pay the rent during the term; in such cases the tenant must pay the rent; each loses what he holds in the estate when the property is destroyed by fire, or such accident, the landlord his estate, the tenant the rent, the rule *res perit domino* being applicable in such cases.¹⁵

A party will not be relieved in equity upon the ground of accident, when the accident has arisen from his own gross negligence or fault.¹⁶

When an accident happens, and both parties stand equally innocent, or when they have equal equities, courts of chancery will not interfere to grant relief to either.¹⁷

Equity will not relieve from an accident where the party has not a clear vested right, but his claim rests in mere expectancy, and is not a matter of trust; for example, where a person intending to make a will is prevented from doing so by accident, the intended legatees can have no relief.¹⁸

3831. The subject of mistakes from which courts of equity, in the exercise of the administration of general remedies, in concurrence with courts of law, will relieve, will now claim our attention. By *mistake* is understood an error committed in relation to some matter of fact or of law, affecting the rights of

for by will. *Davies v. Waltier*, 1 Sim. & S. Ch. 463; *May v. Bennett*, 1 Russ. Ch. 370; and see *Hatchett v. Pattie*, 6 Madd. Ch. 4.

¹³ *Chance, Powers*, art. 2830; *Schenck v. Ellingwood*, 3 Edw. Ch. N. Y. 175; *Dennison v. Goehring*, 7 Penn. St. 175.

¹⁴ *Brecknock Canal Co. v. Pritchard*, 6 Term, 750; *Bullock v. Dommitt*, 6 *id.* 650; *Paradine v. Jane*, Al. 27; *Holtzapel v. Baker*, 18 Ves. Ch. 115.

¹⁵ 1 Story, Eq. Jur. § 102; *Doe v. Sandham*, 1 Term, 705.

¹⁶ *Marine Ins. Co. v. Hodgson*, 7 Cranch, 336.

¹⁷ *Blundell v. Brettaugh*, 17 Ves. Ch. 232, 240; *Comyn, Dig. Chancery*, 3, F, 6, 7, 8.

¹⁸ *Whiton v. Russell*, 1 Atk. Ch. 448.

the parties to the contract. Mistakes are either in matters of law or in matters of fact.

3832. The law presumes every one to be acquainted with its provisions, and will not allow any man to plead ignorance thereof, *ignorantia legis neminem excusat*. This maxim has as much force in equity as it has at law. Ignorance of law consists in the want of knowledge of those laws which it is our duty to understand, and which every one is presumed to know; and a man, therefore, is not in general excused, when fully informed of the facts, for errors of law he has committed in making his contracts, if otherwise competent.¹⁹ If there are any exceptions to this rule, they are not numerous, and they will be found, when fully examined, to have something peculiar in their character, and to rest upon particular facts peculiar in each case.²⁰

A very common example of a mistake in law may be found in the case of an obligee who releases one of two joint obligors, under a mistaken idea that the other would remain bound to him. In such case the obligee will not be relieved in equity on the mere ground of mistake of the law; for there is nothing inequitable in the co-obligor, who is not formally released, availing himself of his legal rights, nor in the other obligor insisting upon his release, if they both acted *bona fide*; indeed it would be against equity to compel one of two joint obligors to pay the whole debt without having any recourse for contribution against the other; and a release to one of them would have that effect if the other alone remained bound.²¹

The same rule, that mistakes of law will not be relieved from in equity, generally applies where both parties to a contract commit the mistake, both acting in good faith, when not liable to other objections;²² thus, where a clause containing a power of redemption, in a deed granting an annuity, after it had been agreed to, was deliberately excluded by the parties, because, being mistaken on the law, they believed it would have rendered the contract usurious, the court refused relief. The reason for this is obvious: the parties had deliber-

¹⁹ 1 Fonblanque, Eq. B. 1, c. 2, s. 7, note (v); Doct. & Stud. Dial. 2, c. 46; Lyon v. Richmond, 2 Johns. Ch. N. Y. 51; Shotwell v. Murray, 1 Johns. Ch. N. Y. 512; Storrs v. Barker, 6 Johns. Ch. N. Y. 169; East v. Thornbury, 3 P. Will. Ch. 127; Hunt v. Rousmaniere, 8 Wheat. 174; Stone v. Hall, 17 Ala. N. S. 561; Proctor v. Thrall, 22 Vt. 262; Lyon v. Saunders, 23 Miss. 124; Shafer v. Davis, 13 Ill. 395.

²⁰ Hunt v. Rousmaniere, 1 Pet. 15, 8 Wheat. 211; 1 Story, Eq. Jur. § 137.

²¹ Comyn, Dig. *Chancery*, 3, F, 8; Hunt v. Rousmaniere, 1 Pet. 17; Lyon v. Richmond, 2 Johns. Ch. N. Y. 51; Battle v. Griffin, 4 Pick. Mass. 64; McNaughten v. Partridge, 11 Ohio, St. 223; Sale v. Dishman, 3 Leigh. Va. 548; Hoosack v. Rogers, 8 Paige, Ch. N. Y. 229.

²² In one case, which cannot be reconciled with the authorities generally, it was laid down that the maxim of law *ignorantia juris non excusat* was to be considered as applying to crimes in which the public had a concern, and not to civil cases. Lansdowne v. Lansdowne, Mosel. Ch. 364. See a well-written article in 23 Am. Jurist, 146 to 166, and 371 to 412, as to the misapplication of the maxim *ignorantia juris non excusat*, in preventing the recovery by an action of assumpsit for money had and received, which had been paid by mistake in consequence of ignorance of law. Indeed, there are some cases, where it has been considered very doubtful whether relief in equity ought not to be granted, where the parties acted under a mistake of law. Clifton v. Cockburn, 3 Mylne & K. Ch. 76; McCarthy v. Decaix, 2 Russ. & M. Ch. 614; see also, Eden, Inj. 22, note (c); Dig. 22, 6; Code, 1, 16; Haven v. Foster, 9 Pick. Mass. 112. Judge Redfield, in his edition of Story's jurisprudence, lays down the rule that an admitted or clearly established misapprehension of law furnishes the basis for equitable relief except where the law is doubtful, or where no marked injustice is permitted by allowing the contract to stand, or where other rights have intervened so that the parties cannot be placed *in statu quo*, and claims that this rule is not inconsistent with the best considered cases. Story, Eq. Jur. §§ 138, a, 138, k. See also, McDaniels v. Bank of Rutland, 29 Vt. 230; McNaughten v. Partridge, 11 Ohio, St. 223; Larkins v. Biddle, 21 Ala. N. S. 252; Green v. Morris, etc., R. R., Beasl. Ch. N. J. 165; Newell v. Stiles, 21 Ga. 118.

ately agreed upon one contract, and excluded that provision, and the court could not make another by restoring it.²³

There is a class of cases sometimes considered as an exception to the general rule, that equity will not relieve for mere mistake of law. These relate to the misconception or ignorance of title under which the parties acted. If the ignorance of title was ignorance of a fact, then the rule does not apply; if not, then those cases will be found to be not clear mistakes upon a point of law, but it will be seen that the circumstances establish some imposition, undue influence or confidence, the fact of mental imbecility, or some similar matter which shows that there was some surprise from which courts of equity relieve.

3833. By *surprise* is meant the act by which a party who is entering into a contract is taken unawares, by which sudden confusion or perplexity is created, which renders it proper for a court of equity to relieve the party so surprised. In some cases by *surprise* is meant a species of fraud.²⁴

It not unfrequently happens that cases of surprise are mixed up with law. From the effects of contracts made under such circumstances, courts of equity will relieve, because the agreements or acts are unadvised, improvident, and without due deliberation; it being a rule with those courts to protect those who are unable to protect themselves, and of whom some undue advantage has been taken.²⁵ In these cases it is not for the mistake in law, but for the circumstances which have caused the error that the contract is set aside. The reason for setting aside a contract when both parties have been taken by surprise is still stronger, because neither party gave a valid consent.

3834. We have just seen that every one is presumed to know the law, and that ignorance of it is no excuse, *ignorantia legis non excusat*. The rule is not the same with regard to facts; no man, however well-informed, can possibly know all facts, and, therefore, the law does not presume him acquainted with all matters of fact, and an ignorance of them will not be charged upon him as culpable ignorance. But the ignorance must be involuntary, as that which is either invincible and cannot by any exertion or by using a due degree of care and attention be overcome; for it is a maxim that the law aids those who are vigilant, and not those who slumber over their rights, *vigilantibus non dormientibus jura subveniunt*. This maxim is consonant with common sense, and is probably ingrafted into all the systems of law of civilized nations.²⁶

But it is not the ignorance of every kind of facts that will so far vitiate a contract on the ground of mistake that a court of equity will grant relief. The facts respecting which the mistake is made must be *essential* as elements of the agreement. For example, if A were to buy a tract of land of B, and it was found afterward that B had no title to it, A would be relieved in equity from the payment of the purchase money; but if both the parties believed the land well fitted for one particular kind of agriculture, and owing to the nature of the soil it was found not to be adapted to it, no fraud being apparent, or if the tract was sold

²³ *Irnham v. Child*, 1 Brown, Ch. 92; *Marquis of Townsend v. Stangroom*, 6 Ves. Ch. 332. See *Mildmay v. Hungerford*, 2 Vern. Ch. 243; *Hunt v. Rousmaniere*, 8 Wheat. 174, 1 Pet. 1, 2 Mas. C. C. 244; *Storrs v. Barker*, 6 Johns. Ch. N. Y. 169; *Pusey v. Desbouverie*, 3 P. Will. Ch. 315; *United States Bank v. Daniel*, 12 Pet. 32; *Shotwell v. Murray*, 1 Johns. Ch. N. Y. 512.

²⁴ See *Twining v. Morrice*, 2 Brown, Ch. 326; *Willan v. Willan*, 16 Ves. Ch. 81; *Earl of Bath and Montague's Case*, 3 Chanc. Cas. 56.

²⁵ *Willan v. Willan*, 16 Ves. Ch. 81; *Evans v. Llewellen*, 1 Cox, Ch. 333, 2 Brown, Ch. 150; *Stewart v. Stewart*, 6 Clark & F. Hou. L. 911; *Pickering v. Pickering*, 2 Beav. Rolls, 31; *Heacock v. Fly*, 14 Penn. St. 541; *Union Bank v. Geary*, 5 Pet. 98; *Wheeler v. Smith*, 9 How. 55.

²⁶ *Domat*, liv. 1, tit. 18, § 1; *Doct. & Stud. Dial.* 2, c. 47; 1 *Fonblanque*, Eq. B. 1, c. 2, § 7, note (v); *Ayliffe*, Pand. 116; *Merlin Répert. Ignorance*.

containing a certain number of acres, say four hundred acres, and it fell short six or eight acres, relief would not be granted in equity. In the first case, the fact is an essential one; in the second, it is unessential.²⁷

3835. On the contrary, when the mistake falls on some essential fact, the knowledge of which would have prevented the parties from entering into the contract, courts of equity will often relieve, even when there is *no fraud* and the parties are both perfectly innocent; as, if A and B, being in Philadelphia, the former sell to the latter his house situate in Cincinnati, both parties believing the house to be in the same condition as it was when they last saw it together, and at the time of the sale it had been burned down or swept away by a flood, the purchaser would be relieved, although both parties were innocent of any fraud.²⁸ As illustrative of this rule the following case may be mentioned: A purchased of B a tract of land on the banks of the Ohio river; B represented it and believed it to contain a coal mine; A paid for it four thousand four hundred dollars, and covenanted to pay to the vendor an annuity of one thousand dollars for twenty years, which annuity was to cease if, after the mine was faithfully worked by A, it should not yield a certain quantity of coal; the land was conveyed to the buyer. It turned out there was no such mine as was represented by B. On a bill filed by the purchaser a perpetual injunction was granted to restrain B from proceeding at law to recover the annuity, although it did not appear that the latter had been guilty of any fraud.²⁹

The unknown fact must not only be essential, but it must be such as could not by reasonable diligence be ascertained when the party has been put upon inquiry.³⁰

When the fact is known to one party, and he is bound to communicate it to the other, and he fails to do so, the party grieved will generally be relieved on the ground of surprise, because there has been an unconscionable advantage taken of the party by the concealment of the facts.³¹ But the obligation must not be a mere duty, but a legal obligation, and bring the case within the definition of surprise or fraud.³²

When both parties have the same opportunities of knowing the facts, and each is presumed to exercise his own judgment, skill, and diligence in regard to all extrinsic circumstances, in the absence of all fraud, the courts of equity will not relieve from the consequences of a mistake.³³

3836. Mistakes are frequently made in *agreements reduced to writing*. Sometimes the written agreement contains less than the parties intended, sometimes more; sometimes the intent is not expressed in the terms intended by the par-

²⁷ See *Mason v. Pearson*, 2 Johns. N. Y. 37; *Bingham v. Bingham*, 1 Ves. Ch. 126; *Smith v. Evans*, 6 Binn. Penn. 102; *McLelland v. Cheswell*, 13 Serg. & R. Penn. 143, 14 Serg. & R. Penn. 296; *Large v. Penn.* 6 Serg. & R. Penn. 488; *Farmers' & Mechanics' Bank v. Galbraith*, 10 Penn. St. 490; 1 *Fonblanque*, Eq. B. 1, c. 2, s. 7; *Roosevelt v. Fulton*, 2 Cow. N. Y. 129.

²⁸ See *Hitchcock v. Geddings*, 4 Price, Exch. 135; *McCormick v. Garnett*, 5 De Gex, M. & G. Ch. 278; *Colyer v. Clay*, 7 Beav. Rolls, 188; *Raynham v. Canton*, 3 Pick. Mass. 293; *Bailey v. James*, 11 Gratt. Va. 468; *Best v. Stow*, 2 Sandf. Ch. N. Y. 298; *Quesnel v. Woodlief*, 2 Hen. & M. Va. 173; *Ketchum v. Stout*, 20 Ohio, St. 455; *Stall v. Hart*, 9 Gill, Md. 446; *Morris Canal Co. v. Emmett*, 9 Paige, Ch. N. Y. 168.

²⁹ *Roosevelt v. Fulton*, 2 Cow. N. Y. 129.

³⁰ 1 *Fonblanque*, Eq. B. 1, Ch. 3, § 3; *Dig.* 22, 6, 9, 2; *Penny v. Martin*, 4 Johns. Ch. N. Y. 566; *Butman v. Hussey*, 30 Me. 266; *Schroëpell v. Shaw*, 3 N. Y. 451; *Wason v. Waring*, 15 Beav. Rolls, 151.

³¹ *Jeremy*, Eq. Jur. 366, 387; *East India Co. v. Donald*, 9 Ves. Ch. 275; *Dwinan v. Providence R. R.*, 5 R. I. 130; *Wright v. Goff*, 22 Beav. Rolls, 207.

³² *Earl of Bath & Montague's Case*, 3 Chanc. Cas. 56.

³³ *Laidlaw v. Organ*, 2 Wheat. 178; *Etting v. Bank of United States*, 11 Wheat. 59; *McAninch v. Laughlin*, 13 Penn. St. 371.

ties. To let such an agreement stand would be doing injustice. Courts of equity, in these cases, when the mistake is clearly made out by proof, will reform the contract so as to make it conformable to the intent of the parties;³⁴ for as a general rule the agreements of the parties, when reduced to writing, are to be considered binding upon them.³⁵

3837. In another class of cases courts of equity will relieve from mistakes. When there has been a *defective attempt to execute a power*, equity will in general interpose and supply the defect, particularly in favor of parties for whom the person intrusted with the execution of the power is under a moral or legal obligation to provide by the execution of the power, such as a *bona fide* purchaser for a valuable consideration, a creditor, a wife, and a legitimate child; but as a court of equity is bound to do justice to all, it will not interfere when there are counter equities in other persons.³⁶ A distinction must be observed between a defective execution and a non-execution of a power; in the former case relief is frequently granted, in the latter, never, when such a power is distinguishable from a trust.³⁷

In all cases when equity will interfere for a defective execution of a power, there must be a clear mistake or a clear omission manifest from the structure and scope of the will.³⁸

3838. The third class of cases where a court of equity will, in the administration of general remedies, in concurrence with courts of law grant relief, are those of frauds. The courts of law afford a very effectual remedy in many cases by declaring contracts and wills of real estate to be absolutely null and void. But there are many cases where those courts cannot afford any adequate remedies, and in these cases courts of equity will relieve the parties injured by such frauds.

It is extremely difficult to define fraud or to set up any rule by which it may be distinguished, because every new rule may be made the origin of a new evasion; it would be limited only by setting bounds to human ingenuity.³⁹

Fraud has, however, been defined to be any trick or artifice employed by one person to induce another to fall into an error, or to detain him in it, so that he may make an agreement contrary to his interest. The fraud consists either, first, in a misrepresentation, or, secondly, in the concealment of a material fact. It has been defined, in other words, to be any cunning, deception, or artifice, used to circumvent, cheat, or deceive another: *Dolum malum esse omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum adhibitam.*⁴⁰ But fraud, in the sense in which it is understood in a

³⁴ *Shelburn v. Inchiquin*, 1 Brown, Ch. 341; *Lyman v. U. S. Ins. Co.*, 2 Johns. Ch. N. Y. 630; *Graves v. Boston Mar. Ins. Co.*, 2 Cranch, 442; *Gillespie v. Moon*, 2 Johns. Ch. N. Y. 585; *Canedy v. Marcy*, 13 Gray, Mass. 373; *Sawyer v. Hovey*, 3 All. Mass. 331; *Brown v. Lamphear*, 35 Vt. 252; *Daniell v. Mitchell*, 1 Stor. C. C. 172; *Wooden v. Haviland*, 18 Conn. 101; *Clapton v. Martin*, 11 Ala. n. s. 187. But the proof must be full and clearly conclusive. *Durant v. Bacot*, 2 Beasl. Ch. N. J. 201; *Sawyer v. Hovey*, 3 All. Mass. 331; *Allen v. Brown*, 6 R. I. 386; *Hall v. Clagett*, 2 Md. Ch. Dec. 153.

³⁵ 1 Story, Eq. Jur. § 152 to 168. And see *Thompsonville Scale Co. v. Osgood*, 26 Conn. 16; *Betts v. Gunn*, 31 Ala. n. s. 219; *Sawyer v. Hovey*, 3 All. Mass. 331; *Andrew v. Spurr*, 8 *id.* 412; *Bailey v. James*, 11 Gratt. Va. 468.

³⁶ 1 Fonblanque, Eq. B. 1, c. 1, § 7, note (v); *Holmes v. Coghill*, 7 Ves. Ch. 506; *Comyn, Dig. Chancery*, 4 H 1, 4 H 4, 4 H 6; *Jeremy, Eq. Jur.* 372; *Sinclair v. Jackson*, 8 Cow. N. Y. 543; *Barr v. Hatch*, 3 Ohio, 529; *Hume v. Rundell*, 6 Madd. Ch. 331.

³⁷ 1 Fonblanque, Eq. B. 1, c. 1, § 7, note (v).

³⁸ *Del Mare v. Rebello*, 3 Brown, Ch. 446; *Mellish v. Mellish*, 4 Ves. Ch. 49; *Holmes v. Constance*, 12 Ves. Ch. 279; *Milner v. Milner*, 1 Ves. Ch. 206.

³⁹ 1 Fonblanque, Eq. B. 1, c. 2, § 12; 1 Maddock, Ch. Pract. 89; *Jeremy, Eq. Jur.* 383; 2 Sch. & Lef. 666.

⁴⁰ *Dig.* 4, 3, 1, 2; *Pothier, Obl.* n. 28.

court of equity, includes not only all the class of positive frauds such as the definition includes, but many others. In equity all acts, omissions, and concealments, which involve a breach of legal or equitable obligation or duty, trust or confidence, justly reposed, and which are injurious to another, or by which an undue and unconscionable advantage is taken of another, are considered fraudulent.⁴¹

3839. The frauds for which a court of equity will grant relief have been classified as follows:

Fraud, which is *dolus malus*, may be actual, arising from the facts and circumstances of imposition, which is the plainest case.

It may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other, which are inequitable and unconscionable bargains, and of such even the common law has taken notice.⁴²

A third kind of fraud is that which may be presumed from the circumstances and conditions of the parties contracting; and this goes further than the rule of law, which is, that it must be proved, not presumed; but it is wisely established in the court of chancery that it will be presumed from circumstances, to prevent surreptitious advantages of the weakness or necessity of another, which knowingly to do is equally against conscience, as to take advantage of his ignorance; a person is equally unable to judge for himself in one case as the other.

A fourth kind of fraud may be collected or inferred, in the consideration of a court of equity, from the nature and circumstances of the transaction, as being an imposition and deceit on the other persons not parties to the fraudulent agreement.⁴³ Of this last class are marriage-brokers contracts, when parents and others may be deceived; compositions with creditors, where, unknown to the others, one procures a promise from the debtor, or his friends, to be paid in full, contrary to the agreement of composition.

Fraud is, then, actual or constructive.

3840. Actual fraud is an *intentional artifice* employed by one person to induce another to fall into or remain in an error, and make a bargain contrary to his own interest. When a man enters into a contract with another from supposing certain facts to be true, which are either misrepresented or concealed, it is clear he would not have entered into it had he known the truth; and when the opposite party has been guilty of this fraudulent misrepresentation or concealment, justice requires that the latter should not receive any advantage from his own wrongful act. In such case the contract is not absolutely void,⁴⁴ because though the consent of the party has been obtained by surprise, yet still there is a consent, and a court of equity will forbid its execution to prevent injustice. This kind of injury and wrong may arise in a variety of ways.

3841. Misrepresentation is the statement made by one party to a contract to the other, that an essential matter relating to it is in fact in a particular way, when it is not so; it is the suggestion of a falsehood, *suggestio falsi*. To induce a court of equity to rescind a contract on the ground of misrepresentation,

⁴¹ *Chesterfield v. Janssen*, 2 Ves. sen. Ch. 155, 156.

⁴² Lord Hardwicke cites *James v. Morgan*, 1 Lev. 3.

⁴³ *Chesterfield v. Janssen*, 2 Ves. sen. Ch. 155, 156.

⁴⁴ The rigor of the common law would admit no averment by a man against his own deed. But in equity, when there is a *suppressio veri* or *suggestio falsi*, the release, or other deed, shall be avoided. 1 Fonblanque, Eq. B. 1, c. 2, s. 8.

the representation must have been essential or material and false, and the opposite party must have had a right to rely upon it.

3842. It is not the misrepresentation of every thing which will vitiate a contract otherwise fair. To authorize a court of equity to rescind a contract on the ground of misrepresentation, it is not only necessary to establish the fact that a misrepresentation was made, but also that it relates to some *matter of substance*, or important to the interests of the other party, and that it has actually misled him.⁴⁵

This may be illustrated by the following examples: If a person owning a piece of real property should represent it to another as containing a mine, which constituted its principal value, and the purchaser, relying on the statement of the seller, buy it, and the representation prove utterly false, the contract for the sale, or the sale itself if completed, might be avoided for a fraud, because the representation of the mine would be considered as fraudulent.⁴⁶ But should the seller represent a tract of land as containing one hundred acres of meadow, when, in fact, it contained only ninety-nine and three-quarters, if the difference would not have essentially affected the purchaser in his estimate of the value, or otherwise, this immateriality could not have affected the contract, and equity would not set it aside.⁴⁷

Not only must there have been a material misrepresentation, but the party must have been *misled* by it; for if he knew what was represented not to be true, he acted with his eyes open, and therefore was not influenced by it. There may have been great indiscretion on his part, but he cannot complain of fraud or surprise, which, in fact, did not exist. And even if he was not aware that the representation was false, if he was not misled to his *prejudice* or *injury*, by which he lost a legal right, a court of equity will not set aside the contract. To entitle the complainant to relief there must be an injury and damage coupled together in equity as well as at law.⁴⁸

3843. The representation which vitiates a contract in equity must have been material, and must have misled the other party to enter into the contract to his damage and injury. But this is not the only ingredient required; it must have been false. It is immaterial, however, whether the party representing the fact knew it to be false, or whether he made the assertion without knowing whether it were true or false. If the representation were made without a knowledge of its truth, it is the same as if made knowingly against the truth, and whatever may have been the intention of him who made it, even when made by mistake, it had the effect of taking the other party by surprise and of operating upon him as an imposition.⁴⁹

⁴⁵ 1 Fonblanque, Eq. B. 1, c. 2, s. 8; Neville v. Wilkinson, 1 Brown, Ch. 546; Turner v. Harvey, Jac. Ch. 178; Atwood v. Small, 6 Clark & F. Hou. L. 732; Hough v. Richardson, 2 Stor. C. C. 659. Every man must be held responsible for an act of misrepresentation upon which any one acts, and so acting suffers loss or injury, provided that it appears that the misrepresentation was made with the direct intent that it should be so acted on and in the manner which occasions the injury or loss, and where such injury or loss is the direct and immediate consequence of the representation so made. 1 Story, Eq. Jur. § 190, b; Barry v. Crosky, 2 Johns. & H. Ch. 21; Collins v. Cove, 6 Hurlst. & N. Exch. 131.

⁴⁶ Roosevelt v. Fulton, 2 Cow. N. Y. 129; see Lownder v. Lane, 2 Cox, Ch. 363; Philmore v. Hood, 6 Scott, 827; Best v. Stow, 2 Sandf. Ch. N. Y. 298; Stebbins v. Eddy, 4 Mas. C. C. 414; Morris Canal Co. v. Emmett, 9 Paige, Ch. N. Y. 168.

⁴⁷ Jennings v. Broughton, 5 De Gex, M. & G. Ch. 126; Winch v. Winchester, 1 Ves. & B. Ir. Ch. 375; Eliot v. Bean, 9 Ala. N. S. 772; Winston v. Gwathmey, 8 B. Monr. Ky. 19.

⁴⁸ Bacon v. Bronson, 7 Johns. Ch. N. Y. 201; Fellows v. Gwydyr, 1 Sim. Ch. 63.

⁴⁹ Pearson v. Morgan, 2 Brown, Ch. 389; Wright v. Snowe, 2 De Gex & S. 321; Smith v. Mitchell, 6 Ga. 458; Taymon v. Mitchell, 1 Md. Ch. Dec. 496; Hammatt v. Emerson, 2 Me. 308; Carpenter v. American Ins. Co., 1 Stor. C. C. 57; Doggett v. Emerson, 3 id. 733; Mason v. Crosby, 1 Woodb. & M. C. C. 352.

3844. Another ingredient to avoid a contract in equity on account of a wilful fraudulent misrepresentation is that the other party must have a right to put reliance upon it. For example, if a man wanting to buy an article should say to the seller that he did not believe it to be worth more than one hundred dollars because it was damaged, and that he has resolved to give no more, when in fact it could be proved that five minutes before he said the article was worth two hundred dollars and that it was not damaged, and on this representation the seller sold it to him, and in truth it was worth two hundred dollars, and it was sound, no relief could be had either at law or in equity. Courts do not aid parties who will not use their own senses and discretion in such matters.⁵⁰

Again, if a party on a treaty for the purchase of an article should represent to the seller that his partners had limited him as to the price he should give, when that was not the fact, and the seller sold it one-third less than the partners had authorized the buyer to pay for it, he could not recover the difference either at law or in equity.⁵¹

Nor ought the recommendation of puffers of goods or the commendations of the qualities of property offered for sale to be relied upon, for such false representations are not considered as legal or equitable frauds, however immoral they may be: *simplex commendatio non obligat*.⁵²

3845. An unlawful concealment of the truth, or *suppressio veri*, when from it an injury arises to the opposite party, is a just cause for setting aside a contract in equity. But the concealment must be under such circumstances, to render it unlawful, that the party concealing is bound to disclose the fact to the other. For however immoral it may be to take advantage of knowledge, which, if communicated to the opposite party, would have induced him not to deal as he did, yet there are many cases where a man may lawfully do so without vitiating the contract entered into in ignorance of such facts. There are many duties which are imperfect and which human laws cannot enforce, although the dictates of humanity, conscience, and morality require their performance; but there are some cases where equity will not aid a party by a decree for a specific performance, where a purchase is made with a superior knowledge, which has been concealed from the opposite party. It is a rule in equity that all the material facts should be known to both parties, and if one of them has concealed such facts from the other, he will not be aided when he comes to ask for assistance in a court of equity.⁵³

The following case will illustrate the rule that the concealment of a fact does not of itself vitiate a contract. If A, knowing of a mine on the land of B of which the latter is ignorant, should, without disclosing the fact, buy it for a price which the estate would be worth without the mine, the contract would be good, because the buyer is not bound to disclose the fact.

But when a party is bound to disclose the facts, and he either does not make them known or does any act to prevent the opposite party from acquiring a knowledge of them, the concealment is fraudulent, and a court of equity will grant relief by making a decree to rescind the contract or to enjoin the party who has been guilty of the concealment from prosecuting any claim under it.

⁵⁰ See *Laidlaw v. Organ*, 2 Wheat. 178; *Shæffer v. Slade*, 7 Blackf. Ind. 178; *Davis v. Meeker*, 5 Johns. N. Y. 354; *Juzan v. Toulmin*, 9 Ala. N. S. 662; *Spalding v. Hedges*, 2 Penn. St. 240.

⁵¹ *Vernon v. Keys*, 12 East, 637.

⁵² But see, for the limitations of this doctrine, *Tomlinson v. Savage*, 6 Ired. Eq. No. C. 430; *Latham v. Morrow*, 6 B. Monr. Ky. 630; *National F. Ins. Co. v. Loomis*, 11 Paige, Ch. N. Y. 431; *Veazie v. Williams*, 3 Stor. C. C. 623.

⁵³ *Parker v. Grant*, 1 Johns. Ch. N. Y. 630; *Ellard v. Llandaff*, 1 Ball & B. Ch. Ir. 250; *Jeremy, Eq. Jur.* 388. See *Verplanck, Contracts, passim*.

3846. There are certain intrinsic circumstances which form the very ingredient of the contract, such as belong to its nature, character, condition, title, and the like. These are of the essence of the contract; as, that a horse you are selling is alive, that a house in a distant town which you sell to another is not burned down. If, knowing the fact that at the time of the sale the horse was dead or the house destroyed by fire, the seller should conceal such important fact, the sale could be avoided.⁵⁴

3847. On the other hand, there are certain other circumstances which are extrinsic in their nature, and are accidentally connected with the subject matter of the contract, or bear upon and may enhance or diminish its value or price; such as facts relating to peace or war, the rise and fall of goods, the increase or diminution of duties and imposts, and the like. In these cases the rule of the common law is *caveat emptor*; the purchaser is bound to look to these matters, and he has no right to rely upon the seller for any information whatever, and courts of equity as well courts of law observe this rule. It is founded, however, upon a doubtful morality, and is contrary to that of the Roman or civil law, which requires a more perfect good faith.⁵⁵

There are some contracts in the common law where the more equitable rule of the civil law has been adopted, where the parties are bound to disclose all the facts, intrinsic or extrinsic, which may operate on the minds of the contracting parties; cases of insurance are of this kind. If the insured does not disclose all the material facts within his knowledge which may affect the contract, and which the opposite party is entitled to know, the policy may be avoided.⁵⁶

3848. In case a man takes a guaranty from a surety, and conceals from him facts which go to increase his risk, and suffers him to enter into a contract under such ignorance and false impressions as to the real state of the facts, such a concealment will amount to a fraud, because by the common law the party is bound to make such disclosure, and his silence is equivalent to an affirmation that the facts are not so.⁵⁷

3849. When the parties stand in a fiduciary relation to each other, the utmost degree of good faith is required in making contracts with each other; and the misrepresentation or concealment of any material fact will induce courts of equity to pronounce such transactions void, and to make a decree restoring the parties to their original rights as far as it can be done.

3850. Having examined those cases where actual fraud takes place in consequence of misrepresentation, or the *suggestio falsi*, and of concealment, or the *suppressio veri*, our next object will be to consider cases which arise in consequence of the incapacity of the parties, and those which are manifest and are perceived from the nature and subject of the bargain.

3851. Though every one is allowed to dispose of his property as he pleases when he has the free use of his understanding, and in this respect courts of equity have no right to interfere, yet when from the state of mind or other par-

⁵⁴ *Hitchcock v. Geddings*, 4 Price, Exch. 135; *Arnot v. Briscoe*, 1 Ves. Ch. 95; *Pothier, De Vente*, 4, 240; *Pillage v. Armitage*, 12 Ves. Ch. 78.

⁵⁵ And see Judge Redfield's examination of this subject in his edition of *Story's Equity Jurisprudence*, and the cases of *Allen v. Addington*, 11 Wend. N. Y. 374; *Paddock v. Strobbridge*, 29 Vt. 470; *Dolman v. Noakes*, 22 Beav. Rolls, 402; *Haywood v. Cope*, 25 *id.* 140.

⁵⁶ 1 *Marshall, Ins.* 468; *Vasse v. Ball*, 2 Dall. 270; *Vale v. Phoenix Ins. Co.*, 1 Wash. C. C. 283; *Biass v. Union Ins. Co.*, 1 Wash. C. C. 506; *Susquehanna Ins. Co. v. Perrine*, 7 *Watts & S. Penn.* 348.

⁵⁷ *Pidlock v. Bishop*, 3 *Barnew. & C.* 605; *Martin v. Morgan*, 1 *Brod. & B.* 289; *Etting v. Bank of the U. S.*, 11 *Wheat.* 59; *North British Ins. Co. v. Lloyd*, 10 *Exch.* 523; *Carew's Case*, 7 *De Gex, M. & G. Ch.* 43; *Hamilton v. Watson*, 12 *Clark & F. Hou. L.* 119; *Evans v. Kneeland*, 9 *Ala. N. S.* 42; *Franklin Bank v. Cooper*, 36 *Me.* 195.

ticular circumstance in which the party is placed he is induced to act contrary to his own interest or that of his representatives, he will be protected from those who thus have circumvented him. When examining the capacities of persons to enter into contracts, we considered what frauds would vitiate agreements entered into by parties to them in consequence of their incapacity on account of lunacy, idiocy, weakness of intellect, or because, having wills, they were under the power of others. In all such cases, when such incapable persons have been overreached, equity will set aside the contract on the ground of fraud.⁵⁸

3852. By *unconscionable bargains* are meant those contracts which no man in his senses, not under delusion, would make on the one hand, and which no honest and fair man would accept on the other.⁵⁹

A bargain will not be considered unconscionable for the mere inadequacy of price or any other inequality in the bargain, because, whether the price is inadequate depends upon numerous circumstances, which cannot be considered by the courts without setting afloat all contracts and rendering every thing uncertain.⁶⁰ But the inadequacy may be so unconscionable as to shock the conscience, and be evidence sufficient to demonstrate some gross imposition or undue and unfair influence, which may be considered a fraud.⁶¹ Still, there are cases in which equity will not relieve even where there has been gross inadequacy, unless the parties can be placed *in statu quo*. In cases of marriage settlements, for example, the courts cannot unmarry the parties, and therefore they will not interfere.⁶²

3853. After having examined the effects of actual frauds upon contracts and the acts of parties, we come next to consider *constructive frauds*, or those contracts or acts which, though not originating in evil design, or contrivance to perpetuate fraud or injury upon other persons, yet, by their necessary tendency to deceive and mislead them, or to violate public or private confidence, or to impair or injure public interests, are deemed equally reprehensible, in a legal and equitable point of view, as actual frauds, and, therefore, prohibited by law, as within the same reason and mischief as contracts and acts done *malo animo*, with a premeditated intention to commit a wrong.⁶³

This subject will be treated under three separate divisions: of frauds against public policy, frauds in violation of trusts and fiduciary relations, frauds against third persons.

3854. *Contracts against public policy* are quite numerous, and are so denominated because they are considered as subversive of or injurious to public interests, on account of their being contrary to some general public policy of the law. They may be thus classified: contracts founded upon corrupt considerations or moral turpitude; contracts in violation of a public trust; contracts in restraint of trade; contracts in restraint of marriage; contracts to influence persons in authority.

⁵⁸ Jeremy, Eq. Jur. 390, 395; 1 Story, Eq. Jur. §§ 221-242; *Denton v. Donner*, 23 Beav. Rolls, 291; *Waring v. Waring*, 6 Moore, Priv. Conn. 341; *Ball v. Mannin*, 3 Bligh, n. s. 1; *Somes v. Skinner*, 16 Mass. 348; *Lang v. Whidden*, 2 N. H. 435; *Webster v. Woodford*, 3 Day, Conn. 90; *Cooley v. Rankin*, 11 Miss. 642; *Hunt v. Moore*, 2 Penn. St. 105.

⁵⁹ *Chesterfield v. Janssen*, 2 Ves. Ch. 155; 1 Fonblanque, Eq. B. 1, c. 2, § 9, note (e).

⁶⁰ *Griffith v. Spratley*, 1 Cox, Ch. 383; 1 Maddock, Chanc. Pract. 267; 1 Story, Eq. Jur. § 245; *Warner v. Daniels*, 1 Woodb. & M. C. C. 110; *Erwin v. Parham*, 12 How. 197.

⁶¹ *Griffith v. Spratley*, 1 Cox, Ch. 383; *Gartside v. Isherwood*, 1 Brown, Ch. 558; 1 Maddock, Chanc. Pract. 267; *Coles v. Trecothick*, 9 Ves. Ch. 246; see *Clarkson v. Hanway*, 2 P. Will. Ch. 203; *Gibson v. Jeyes*, 6 Ves. Ch. 273; *Hamet v. Dundass*, 4 Penn. St. 178; *Osgood v. Franklin*, 2 Johns. Ch. N. Y. 1, 23; *Howard v. Edgell*, 17 Vt. 9; *Deaderick v. Watkins*, 8 Humphr. Tenn. 510.

⁶² 1 Maddock, Chanc. Pract. 271.

⁶³ 1 Story, Eq. Jur. § 258.

3855. Though courts of equity cannot undertake to enforce imperfect obligations which are of a moral character only, yet, when the law enjoins the discharge of certain duties, or forbids the performance of certain acts, any agreement not to perform what is enjoined, or to do what is forbidden, is considered as unlawful, and an agreement made upon such corrupt consideration or moral turpitude cannot be enforced in equity. All agreements, bonds, or other securities, given as the price of future illicit intercourse,⁶⁴ or for the commission of a crime, or the violation of a public law, or for the omission of a duty enjoined by law, are, therefore, deemed to be unlawful, and cannot be enforced in a court of law or equity.

3856. Numerous examples might be given of such contracts, which neither courts of law nor courts of equity will enforce. When a bond was given to the obligee as an indemnity for a note entered into by him, for the purpose of inducing the prosecutor of an indictment for perjury to withhold his evidence, it was held at law that he could not recover, for the courts would look beyond the form of the contract and expose the transaction in its true light. Courts of equity will set aside agreements and acts in fraud of the policy of the law; as, if a conveyance be made to a person under a secret trust for himself, for the purpose of defeating creditors, or to prevent a forfeiture for felony or treason, the conveyance will be set aside in favor of the government or of the creditors, but not in favor of the grantor, it being a rule in equity that when two persons are equally guilty, the condition of the defendant or possessor is the better: *in pari delicto potior est conditio defendentis et possidentis*.

3857. It is a rule in equity that when two persons are equally guilty in making a contract in violation of law, neither shall be heard in equity, or have relief there. The court will leave them where it finds them, and, in that situation, the condition of the possessor or defendant is to be preferred.⁶⁵ But a contract is not considered as in violation of law, or *turpis contractus*, which is to repair an injury done; as, where a bond is given to a woman for *past* cohabitation, though it may be avoided if it is for future illicit cohabitation, or a *præmium pudicitiae*; this, it is true, may be avoided by creditors of the obligor, or as a voluntary bond, but not on account of its illegality between the parties.⁶⁶

There are cases however where, although both parties are in the wrong, they may not stand as equally in the wrong; they may be *in delicto*, but not *in pari delicto*, for there are very different degrees of guilt. The courts of equity may, therefore, grant relief to one of the parties who is *in delicto*, and refuse it to the other; and sometimes this is done for the purpose of supporting the public interests or public policy.⁶⁷ Where contracts are declared void, as being against the statutes of usury, if the usurer or lender of money seeks to enforce the contract, equity will grant him no assistance, because the contract is void or voidable; on the contrary, if the borrower seeks for relief against the usurious contract it will be granted to him upon condition that he will pay the defendant what is really due him, *bona fide*, deducting the usurious interest; and if the plaintiff do not make such offer in his bill, the defendant may demur to it, and for this reason his bill will be dismissed.

3858. Contracts made in violation of public trust and confidence or of rules of law made in furtherance of the administration of public justice are void; an

⁶⁴ *Collins v. Blantern*, 2 Wils. 341; *Sherman v. Barrett*, 1 M'Mull, Eq. So. C. 147.

⁶⁵ *Harrington v. Bigelow*, 11 Paige, Ch. N. Y. 349; *Logan v. Gigley*, 11 Ga. 246; *Jones v. Gowan*, 7 Ired. Eq. No. C. 21; *Weakly v. Warkins*, 7 Humphr. Tenn. 356.

⁶⁶ *Turner v. Vaughan*, 2 Wils. 339; *Hill v. Spencer*, Ambl. Ch. 641; *Shenk v. Mingle*, 13 Serg. & R. Penn. 29; *Maurer v. Mitchell*, 9 Watts & S. Penn. 69.

⁶⁷ *W—— v. B——*, 32 Beav. Rolls, 574; *Osborne v. Williams*, 18 Ves. Ch. 379; *Phalen v. Clark*, 19 Conn. 421; *Pinckston v. Brown*, 3 Jones, Eq. No. C. 494.

agreement made in consideration of suppressing a public prosecution for some criminal charge has a manifest tendency to subvert public justice;⁶⁸ so a promissory note given to the payee in consideration that he would withdraw his opposition to the discharge of the maker as an insolvent debtor is contrary to the policy of the law, and void.⁶⁹ And upon the same principle, as being opposed to public policy, are contracts having a tendency to encourage champerty,⁷⁰ or wagers contrary to sound morals or injurious to the feelings or interests of third persons.⁷¹ So an agreement made with a commissioner appointed to take testimony and bound to secrecy by the nature of his appointment, to pay him for disclosing the testimony taken, is void.⁷²

3859. It is the policy of law that trade should be encouraged as much as possible, and every restraint upon it having the effect of shackling its operations is void as being against public policy. An agreement that a man shall not trade at all is void, but an agreement that he shall not trade in a particular place may be enforced. The reason for this distinction is this: in the former case, the public would lose the advantages of the talents and the productive industry of the trader, as he could not be employed anywhere;⁷³ but in the latter case, although he would not give his active industry in one place, he would bestow it in another, and the public would still receive the benefit of his talents and industry. If a man were to buy the stock in trade of another and the goodwill of his stand in Philadelphia, he might lawfully require of the seller a covenant that he would not follow the same business in that city, leaving him at liberty to pursue it elsewhere.⁷⁴

3860. Marriage is the very foundation of society, and therefore all unlawful restraints upon it will be declared void in equity.⁷⁵ An agreement made by a person that he will never marry, or that he will marry none but a particular person, is void, unless in the latter case that person has made a reciprocal engagement to marry him. When there is a mutual agreement between a man and a woman that they will marry each other, the contract is lawful, although each is restrained from marrying any other, because, as far as society is concerned, no injury can arise; it is of no consequence to the public whether Paul marry Sarah or Mary, but it is considered detrimental if he be restrained from marrying any one.⁷⁶

The question arises most frequently in cases where bequests or devises are made upon condition in restraint of marriage or limitation over upon that

⁶⁸ *Johnson v. Ogilby*, 3 P. Will. Ch. 276, and note (1); *Newland, Contr.* 158; *Shaw v. Reed*, 30 Me. 105.

⁶⁹ *Baker v. Matlack*, 1 Ashm. Penn. 68.

⁷⁰ *Power v. Knowler*, 2 Atk. Ch. 224.

⁷¹ *Phillips v. Ives*, 1 Rawle, Penn. 36; *Gilbert v. Sykes*, 15 East, 150; *Shirley v. Sankey*, 2 Bos. & P. 130; *Ramboll v. Soojumnull*, 6 Moore, Priv. Conn. 300.

⁷² *Cooth v. Jackson*, 6 Ves. Ch. 12, 31; see also *Dawkins v. Gill*, 10 Ala. N. S. 206; *Odi-neal v. Barry*, 24 Miss. 9; *Ferris v. Adams*, 23 Vt. 136.

⁷³ *Stanton v. Allen*, 5 Den. N. Y. 434; *Nobles v. Bates*, 7 Cow. N. Y. 207; *Lawrence v. Kidder*, 10 Barb. N. Y. 653; *Alger v. Thacher*, 19 Pick. Mass. 51; *Pierce v. Fuller*, 8 Mass. 223.

⁷⁴ *Mitchell v. Reynolds*, 1 P. Will. Ch. 181; *Nobles v. Bates*, 7 Cow. N. Y. 207. See *Pierce v. Fuller*, 8 Mass. 223; *Perkins v. Lyman*, 9 Mass. 522; *Stearns v. Barrett*, 1 Pick. Mass. 460; *Palmer v. Stebbins*, 3 Pick. Mass. 188; *Pyke v. Thomas*, 4 Bibb, Ky. 486; *Pierce v. Woodward*, 6 Pick. Mass. 206; *Lange v. Work*, 2 Ohio, St. 519; and see also *Bryson v. Whithead*, 1 Sim. & S. Ch. 74; *Benwell v. Jones*, 24 Beav. Rolls, 307; *Vickery v. Welch*, 19 Pick. Mass. 523.

⁷⁵ *Key v. Bradshaw*, 2 Vern. Ch. 102; *Scott v. Tyler*, 2 Brown, Ch. 487; *Rishton v. Cobb*, 9 Sim. Ch. 615; *Morley v. Rennoldson*, 2 Hare, Ch. 570; *Scott v. Tyler*, 2 Dick. Ch. 121.

⁷⁶ 1 *Fonblanque*, Eq. B. 1, c. 4, s. 10; *Lowe v. Peers*, 4 Burr. 2225; *Cork v. Richards*, 10 Ves. Ch. 429; *Woodhouse v. Shipley*, 2 Atk. Ch. 595; *Maddox v. Maddox*, 11 Gratt. Va. 804; *Waters v. Tazewell*, 9 Md. 191.

event. Such conditions, if merely restrictive as in respect of time, person, or place, are allowable.⁷⁷ But this only applies to *bona fide* and reasonable restrictions, and not to such as amount to a prohibition of marriage.⁷⁸ And where there is no limitation over, there is a strong disposition to regard such conditions as merely *in terrorem*, and void.⁷⁹

3861. Persons in authority are required to exercise their power for the public good; every attempt to influence them unduly is against public policy, and a contract with another to use such undue influence is void. All contracts made for the buying, or selling, or procuring public offices, or for procuring a pardon for a convict, or for the passage of a law through the legislature, are void.⁸⁰ It is evident that all such contracts have a tendency to injure the public interests, and are calculated to fill our offices with the weak, the cunning, and the profligate, to procure pardons for unrepenting convicts, and to cause the enactment of laws destructive of the public good. These contracts will be declared null by a court of equity on the ground that they are opposed to public policy.⁸¹

3862. The second class of constructive frauds includes acts in violation of trusts and the fiduciary relation of the parties. In many instances, owing to their position, agents, attorneys, guardians, trustees, parents, children, and many others who stand in relations of confidence with others, may take advantage of those with whom they stand in this relation; a rule has, therefore, been established that courts of equity will grant relief in such cases where, but for the relation which subsisted at the time of the transaction, they would not have interfered. They afford relief in such cases upon motives of general public policy. But courts of equity will interfere only where confidence has been reposed, and that confidence has been abused.⁸²

The cases which fall within this rule may be classed into those which refer to parents and children; guardian and ward; trustee and *cestui que trust*; client and attorney; principal and agent; principal and surety.

3863. When contracts have been made between a parent and child, by which the latter has made conveyances or contracts against his interest, courts of equity will often set them aside, upon the ground that the just confidence and influence which a parent has over a child has been perverted.⁸³

The influence which a parent has naturally and very properly over a child is considered as a reason for regarding very scrupulously contracts whereby a child parts with property without any sufficient consideration, and where it appears

⁷⁷ *Scott v. Tyler*, 2 Dick. Ch. 119; *Scott v. Tyler*, 2 Brown, Ch. 431; *Clarke v. Parker*, 19 Ves. Ch. 1; *Phillips v. Medbury*, 7 Conn. 568; *Commonwealth v. Stauffer*, 10 Penn. St. 350.

⁷⁸ *Dickson, in re* 1 Eng. L. & Eq. 149; *Pringle v. Dunkley*, 22 Miss. 16; *Hughes v. Boyd*, 2 Sneed, Tenn. 512; *Collier v. Slaughter*, 20 Ala. n. s. 263; *McCullough's App.* 12 Penn. St. 197; *Holmes v. Field*, 12 Ill. 424.

⁷⁹ *Collier v. Slaughter*, 20 Ala. n. s. 263; *Hoopes v. Dundas*, 10 Penn. St. 75; *Parsons v. Winslow*, 6 Mass. 169.

⁸⁰ *Clippinger v. Hepbaugh*, 5 Watts & S. Penn. 315; *Filson's Trustees v. Himes*, 5 Penn. St. 452; *Hatzfield v. Gulden*, 7 Watts, Penn. 152. See *Boynton v. Hubbard*, 7 Mass. 119.

⁸¹ *Pingry v. Watkins*, 1 Aik. Vt. 264; *Marshall v. Baltimore, etc.*, R. R., 16 How. 314; *Smith v. Applegate*, 3 Zab. N. J. 352; *Wood v. McCann*, 6 Dan. Ky. 366; *Formby v. Prior*, 15 Ga. 258. See *Redfield Railw.* §§ 9-16, notes and cases cited.

⁸² *Gartside v. Isherwood*, 1 Brown, Ch. 560; *Osmond v. Fitzroy*, 3 P. Will. Ch. 129, note; *Goddard v. Carlisle*, 9 Price, Exch. 169; *Blandy v. Kimber*, 24 Beav. Rolls, 148; *Gallatiana v. Cunningham*, 8 Cow. N. Y. 361; *Taylor v. Taylor*, 8 How. 200; *Boney v. Hollingsworth*, 23 Ala. n. s. 698.

⁸³ 1 *Maddock*, Chanc. Pract. 309; *Deaton v. Monroe*, 4 Jones, Eq. No. C. 39; *Pyle v. Cravens*, 4 Litt. Ky. 17.

that any undue influence has been used to procure such contracts, they will be set aside,⁸⁴ unless the rights of third parties have intervened.⁸⁵

Where, however, the arrangement is for the settlement of family matters, if the settlement itself be just and reasonable, and not for the personal benefit of the father, courts will support it.⁸⁶

In a case where a son was tenant in tail and the father tenant for life, and the son agreed to something for the benefit of younger children, and afterward he complained that he had been induced to do this by parental authority, the court refused to set aside the agreement, though it could not be denied there was something of the sort.⁸⁷ Even when there has been some improper conduct on the part of the father, the application for relief must be made in a reasonable time, for a long delay and acquiescence on the part of the child will deprive him of the remedy to which he might otherwise be entitled.⁸⁸

The same principles apply to contracts between other members of the family.⁸⁹

3864. The guardian, standing in *loco parentis*, is presumed to have the same kind of influence over his ward that a parent has over a child. Indeed, there is a greater reason for jealousy, for the guardian cannot be supposed to have those natural feelings which restrain the father from imposing upon his child.

During the guardianship the acts of the guardian are under the constant supervision of the court, and any contracts made by him in relation to the property of his ward will not be binding upon the latter, if they are to his disadvantage; and during that period the relative situation of the parties renders them generally unable to deal with each other.⁹⁰

But the superintending protection of courts of equity goes farther: it protects the ward from all bargains which the guardian may have obtained from him by surprise, after he became of age; and if the intermediate period be short, the contract will be declared void, unless it has been made under circumstances which show, in the clearest manner, that such contract has been made with full and mature deliberation, in the absence of all fraud and surprise, because the ward may be easily imposed upon by flattery or harshness.⁹¹

3865. The rules which govern in the case of guardians are in full force with regard to trustees, and contracts between them and the *cestui que trust*, which would not be good between a guardian and his ward, will be invalid; a trustee can never partake of the bounty of the party for whom he acts, except under circumstances which would render valid similar acts between guardian and ward. In general, a trustee cannot purchase of his *cestui que trust*, but when there is a distinct and clear contract, which will bear a jealous and scrupulous examination of all the circumstances attending it, by which the *cestui que trust*

⁸⁴ *Hawes v. Wyatt*, 3 Brown, Ch. 156; *Baker v. Tucker*, 2 Eng. L. & Eq. 1; *Baker v. Bradley*, 7 De Gex, M. & G. Ch. 597; *Slocum v. Marshall*, 2 Wash. C. C. 397; *Jenkins v. Pye*, 12 Pet. 241.

⁸⁵ *Caspell v. Dubois*, 4 Barb. N. Y. 393; *Brice v. Brice*, 5 *id.* 533; *Whalen v. Whalen*, 2 Cow. N. Y. 537.

⁸⁶ *Hartopp v. Hartopp*, 21 Beav. Rolls, 259. Consult also *Hoghton v. Hoghton*, 15 Beav. Rolls, 278; *Bury v. Oppenheim*, 26 *id.* 594; *Wallace v. Wallace*, 2 Drur. & Warr, 452, and Redfield's edition of Story's Eq. Jur.

⁸⁷ *Cory v. Cory*, 1 Ves. Ch. 19.

⁸⁸ 1 Maddock, Chanc. Pract. 310.

⁸⁹ *Sears v. Shafer*, 7 N. Y. 268; and see *Hewitt v. Crane*, 2 Halst. Ch. N. J. 159; *Archer v. Hudson*, 7 Beav. Rolls, 551; *Maitland v. Irving*, 15 Sim. Ch. 437; *Maitland v. Backhouse*, 16 *id.* 68.

⁹⁰ *Dawson v. Massey*, 1 Ball & B. Ir. Ch. 226; *Bostwick v. Atkins*, 3 N. Y. 53; *Blackmore v. Shelby*, 8 Humphr. Tenn. 439.

⁹¹ *Wright v. Pond*, 13 Ves. Ch. 136; *Wood v. Donnes*, 18 *id.* 126; *Revett v. Harvey*, 1 Sim. & S. Ch. 502; *Aylward v. Kearney*, 2 Ball & B. Ir. Ch. 463; *Wedderburn v. Wedderburn*, 4 Mylne & C. Ch. 41.

intended that the trustee should buy, and there had been neither fraud, concealment on the part of the trustee, nor advantage taken by him in consequence of the knowledge he had acquired as trustee, it will not be disturbed by a court of equity, for men have a right to do what they please with their own property. If, on the contrary, there has been any overreaching, inadequacy of price, or inequality in the bargain, the contract will be set aside.⁹²

Nor can a trustee buy an estate, although sold at auction, which he sells for the benefit of the *cestui que trust*, and in these cases he will be considered still as a trustee, although he may have acted in good faith, and remain accountable for the estate, at the choice of the *cestui que trust*, as if no sale had been made.⁹³

Not only technical trustees, but other persons standing in similar situations, as assignees, solicitors of a bankrupt or insolvent estate, executors, or administrators, will be restrained from buying the property they represent, and all purchases made by them may be set aside on this account.⁹⁴

In these, and all other cases, where confidence is reposed, and one party, in consequence of such confidence, has it in his power to sacrifice the interests he is bound to protect, he will not be allowed to take advantage of such contracts, and the court will set them all aside.⁹⁵

3866. In consequence of the advantage and imposition which it is in the power of an attorney to take of his client, a court of equity will sometimes interpose and set aside a contract, which between other persons would be unimpeachable. Although it is not necessary to establish fraud or imposition upon the client to authorize the court to set aside the contract, yet it is not necessarily void throughout, *ipso facto*; in these cases the burden of establishing the fairness and equity of the transaction is thrown upon the attorney, and unless this be shown, the contract may be invalidated.⁹⁶

3867. A distinction has been made between the cases of attorney and client, and of trustee and *cestui que trust*, which should not be forgotten. When a contract has been made between an attorney and his client while the connection subsisted, it may be set aside unless he can show the transaction to have been perfectly fair. The law requires him to do no more; it simply throws upon him the *onus* of proving that no unjust or unfair advantage has been taken of the client, and when this is proved, the agreement must stand. With regard to a contract between a trustee and *cestui que trust*, on the contrary, the fairness of the transaction is altogether immaterial. It is not sufficient to show that no advantage has been taken; the contract will stand or be set aside at the option of the *cestui que trust*.⁹⁷

⁹² *Gibson v. Jeyes*, 6 Ves. Ch. 277; *Coles v. Trecothick*, 9 Ves. Ch. 246; *Fox v. Mackreth*, 2 Brown, Ch. 400; *Prevost v. Gratz*, 1 Pet. C. C. 367; *Poillon v. Martin*, 1 Sandf. N. Y. 569; *Dobson v. Racey*, 3 *id.* 61; *Julian v. Reynolds*, 8 Ala. n. s. 680; *McKinley v. Irvine*, 13 *id.* 681; *Marshall v. Stevens*, 8 Humphr. Tenn. 159; *Beeson v. Beeson*, 9 Penn. St. 279; *Pratt v. Thornton*, 28 Me. 335; *Farnam v. Brooks*, 9 Pick. Mass. 212.

⁹³ *Ex parte Bennett*, 10 Ves. Ch. 381; *Moore v. Royal*, 12 *id.* 355; *Hamilton v. Wright*, 6 Clark & F. Hou. L. 111, 133; *Prevost v. Gratz*, 1 Pet. C. C. 367, 6 Wheat. 481; *Michaud v. Girod*, 4 How. 503; *Davoue v. Fanning*, 2 Johns. Ch. N. Y. 252; *Van Epps v. Van Epps*, 9 Paige, Ch. N. Y. 237; *Harrison v. Monk*, 10 Ala. n. s. 185.

⁹⁴ *Cram v. Mitchell*, 1 Sandf. Ch. N. Y. 251; *Harrison v. Monk*, 10 Ala. n. s. 185; *Green v. Sargent*, 23 Vt. 466.

⁹⁵ *Jeremy*, Eq. Jur. 395; *Bank of U. S. v. Etting*, 11 Wheat. 59.

⁹⁶ *Gibson v. Jeyes*, 6 Ves. Ch. 278; *Bellew v. Russell*, 1 Ball & B. Ch. Ir. 104; *Harris v. Tremenheere*, 15 Ves. Ch. 34; *Wood v. Downes*, 18 Ves. Ch. 120; *Hunter v. Atkyns*, 3 Mylne & K. Ch. 113; *Carter v. Palman*, 8 Clark & F. Hou. L. 657, 706; *Corley v. Lord Stafford*, 1 De Gex & J. Ch. 258; *Howell v. Ransom*, 11 Paige, Ch. N. Y. 538; *Evans v. Ellis*, 5 Den. N. Y. 640.

⁹⁷ *Cane v. Lord Allen*, 2 Dow. Parl. Cas. 289; *Brown v. Bulkeley*, 1 McCart. Ch. N. J. 451. See *Billing v. Southee*, 10 Eng. L. & Eq. 37; *Gibson v. Russell*, 2 Younge & C. Ch. 104; *Pratt v. Barker*, 1 Sim. Ch. 1, for cases involving other confidential relations.

3868. There are not many relations in social life where one man depends upon the judgment and integrity of another more than in the connection which subsists between principal and agent. Courts of equity, therefore, look upon contracts made between these parties with the same jealous care with which they watch the contracts made between other persons standing in a fiduciary situation. Secret agreements, by which agents become sellers or buyers of property which they are to buy or sell for their principals, and by which they are to derive any benefit unknown to the principal, will be declared void, as being opposed to justice and sound policy. If an agent, employed to purchase a piece of land for another, buys it for himself, the courts of equity will turn him into a trustee for his principal.⁹⁸

In the bargains openly made between them respecting the property which is the object of the agency the utmost good faith is required. The agent must disclose all facts within his knowledge which might in any degree influence the judgment of his principal as to the price or value; for when he does not, the parties do not deal upon equal terms and the agent obtains an unjust advantage, for which the contract will be set aside.⁹⁹

Indeed, any unreasonable gifts from the principal, or advantages obtained by the agent when procured by an abuse of confidence, will be set aside.¹⁰⁰

3869. In entering into the contract of suretyship, the surety has a right to rely with entire and full confidence on the representations of all the material facts upon the statements of the creditor, and any statements made to him, either by the creditor himself or by the debtor, with his knowledge, which are material and false, will avoid his contract. The creditor is bound in all things to act in good faith, not only in making the contract, but in all subsequent transactions with the debtor; he is also bound to act with good faith toward the surety.¹⁰¹

3870. Whenever the contracts of individuals operate substantially upon the rights and interests of third persons, or unconscientiously compromise the rights and injuriously affect the interests of the parties themselves, they will be considered as fraudulent, and for these reasons a court of equity will set them aside. Fraud assumes every shape, so that it is extremely difficult to classify those cases which affect third persons. This third kind of constructive frauds will be examined as they relate to catching bargains, to bargains with sailors for their wages, to agreements to delay or defraud creditors, to contracts where a person purchases with full notice of the legal or equitable title of another.

3871. The first kind of constructive frauds against the rights of third persons is a *catching bargain*. This is an agreement made with an heir expectant for the purchase of his expectancy at an inadequate price. A sale of an expectancy is considered fraudulent as regards third persons, and if such a right subsisted, it would be destructive of parental or quasi-parental authority. Such a contract may be clear of actual fraud, but it is always tinged with constructive fraud, as being an imposition on persons not parties to it.

To support such contract the purchaser is called upon to establish, not merely that there is no fraud, but that a full and adequate consideration has been paid,

⁹⁸ *Lees v. Nuttall*, 1 Russ. & M. Ch. 58; *Benson v. Heathom*, 1 Younge & C. Ch. 326; *Green v. Winter*, 1 Johns. Ch. N. Y. 27; *Church v. Marine Ins. Co.*, 1 Mas. C. C. 341; *Barker v. Marine Ins. Co.*, 2 *id.* 369; *Torrey v. Bank of New Orleans*, 9 Paige, Ch. N. Y. 649; *Ringo v. Binns*, 10 Pet. 269.

⁹⁹ *Farnam v. Brooks*, 9 Pick. Mass. 212.

¹⁰⁰ *Crowe v. Ballard*, 3 Brown, Ch. 120; *Massey v. Davies*, 2 Ves. Ch. 318; *Church v. Mar. Ins. Co.*, 1 Mas. C. C. 341; *Barker v. Mar. Ins. Co.*, 2 Mas. C. C. 369.

¹⁰¹ This matter has been fully considered under the head of suretyship, before, 1410, *et seq.*

for a mere inadequacy of price is alone, in cases of this kind, a sufficient ground to set aside such a contract.¹⁰²

3872. The same rule applies to the case of a reversioner or remainder-man, who has an estate, but no right of present enjoyment, and who, through necessity, or from mere giddiness and improvidence, sells his rights much below an adequate price. In cases of sale by such reversioners or remainder-men, or other persons similarly situated, the courts of equity assume that the party is defenceless, exposed to the demand of the opposite party, under the pressure of necessity; also, that there is an actual or implied fraud upon the parent or other ancestor, who is misled, in consequence of his ignorance, and induced to repose with a false confidence in the disposition of his property.¹⁰³

3873. To constitute this constructive fraud there must be, first, ignorance of the transaction by the parent or person standing *in loco parentis*; and, secondly, the contract must have been made under some pressing necessity.

When the transaction has been made fully known to the parent or other person standing *in loco parentis*, the contract will not be fraudulent, and *a fortiori*; it will be good when, knowing it, he approves of it;¹⁰⁴ or,

The contract must have been made under a pressure of necessity, because the pressure and distress of the party dealing is the true ground of the court's interference. It is not requisite that both ignorance on the part of the ancestor and pressure should exist at the same time; to entitle the party to relief, the presence of one of them forms an essential ingredient in a case to give rise to a just presumption of constructive fraud.¹⁰⁵

3874. There is another species of contracts made with heirs expectant, secured by an instrument called a *post obit bond*. A *post obit bond* is a written agreement, by which the obligor binds himself to pay a sum of money which is lent to him, with greater interest than the rate fixed by law, to be paid upon the death of a person from whom he has some expectation.¹⁰⁶

Equity will, in general, relieve from these unequal contracts, not only because they are unfair with regard to the parties, but also because they are fraudulent toward the ancestor, by disappointing his intentions. But as it is a rule that he who seeks equity must do equity, relief will be granted to such an obligor only upon equitable terms.¹⁰⁷

3875. It is known that sailors, that is, common mariners, in the mercantile or naval service, are extravagant and heedless, and apt to part with their rights to receive wages and prize money without sufficient reflection. Courts of equity, therefore, watch with a jealous care over their interests, and consider them in the same light that young heirs and expectants are looked upon. Contracts

¹⁰² 1 Maddock, Chanc. Pract. 117, 118; Peacock v. Evans, 16 Ves. Ch. 512; Gowland v. De Faria, 17 Ves. Ch. 20; Chesterfield v. Janssen, 2 Ves. Ch. 149.

¹⁰³ Shelly v. Nash, 3 Madd. Ch. 232; 1 Fonblanque, Eq. B. 1, c. 2, § 12, note (k); Jeremy, Eq. Jur. 398, 399.

¹⁰⁴ King v. Hamlet, 2 Mylne & K. Ch. 473; Fitch v. Fitch, 8 Pick. Mass. 480; Trull v. Eastman, 3 Metc. Mass. 123.

¹⁰⁵ Postmore v. Taylor, 4 Sim. Ch. 182; Davis v. Marlborough, 2 Swanst. Ch. 139. It is highly probable the rules adopted by courts of equity in cases of this kind are borrowed from the Roman law. A decree called Macedonian, from Macedo, a noted usurer at Rome, was made by the senate, which forbid the loan upon a ruinous interest, as had been the case under that usurer. Before the passage of this decree, a loan was frequently made to children who were under paternal power, upon condition that they should pay exorbitant interest. This decree deprived the usurer of any action for such a loan. Dig. 14, 6, 1 to 7; Inst. 4, 7, 7; Code 4, 28; see Domat, Lois Civ. liv. 1, t. 6, s. 4; Fonblanque, Eq. B. 1, c. 2, § 12, note (l); Chesterfield v. Janssen, 2 Ves. sen. Ch. 158. But if the father, or person standing *in loco parentis*, consented to the loan, it might be recovered. Inst. 4, 7, 8.

¹⁰⁶ Chesterfield v. Janssen, 2 Ves. sen. Ch. 157. Boynton v. Hubbard, 7 Mass. 119.

¹⁰⁷ Fonblanque, Eq. B. 1, c. 2, § 13, note (p).

made by them for the transfer of their wages and prize money will be set aside, whenever any inequality appears in the bargain, or any undue advantage has been taken of them.¹⁰⁸

3876. A third class of constructive frauds against the rights, duties, or interests of third persons, includes those agreements and contracts of parties which tend to delay, deceive, or defraud creditors. Courts of equity will relieve in all such cases, as being fraudulent, and within statutes passed in different reigns,¹⁰⁹ the principles of which have been re-enacted or adopted in this country. The effect of these statutes having been considered when we were treating of contracts, it will not be requisite to do any thing further than to refer to what was then said.¹¹⁰

3877. There is a fourth class of constructive frauds, which consists of cases where a party buys with full notice that another has a legal or equitable title to the same property. By this means he becomes a *particeps criminis* with the fraudulent grantor, and, both at law and in equity, he will be postponed in the assertion of his rights to the true owner. In such cases courts of equity will treat the purchaser as a trustee for the person whom he intended to defraud. If, for example, a mortgagee, with a notice of a trust, should get a conveyance from a trustee, in order to protect his mortgage, he would be considered a trustee, and made responsible as such.¹¹¹

In the sale of land, the recording of the deed is sufficient notice to all the world.¹¹² The object of the recording acts is to prevent impositions upon purchasers and mortgagees through prior secret conveyances and incumbrances, and those who would be affected by them are notified by the registry. If a party, having obtained a mortgage or a conveyance, neglect to put it upon record, he is, for his neglect, postponed to another who has procured his to be registered.

3878. The notice which affects a man's contracts may be *actual* or express, by which the knowledge is brought home to him directly. It may also be *constructive*, that is, there may exist facts from which the presumption of notice arises with such force that the contrary cannot be proved, or even controverted.¹¹³ As a general rule, whatever facts have a reasonable certainty as to time, place, circumstances, and persons, are considered as sufficient notice in equity, and the person knowing those facts is bound to inquire into all other circumstances of which they are evidence, by which he may be affected in his interest; for example, notice of a lease is notice of its contents; notice that an estate which a man has purchased is in the possession of tenants, is notice that they have some rights of which he ought to inquire.¹¹⁴ But vague rumors and mere suspicions will not be sufficient notice; still, it is very difficult to say what extent of information will be such a notice as will affect a party.

¹⁰⁸ Jeremy, Eq. Jur. 401; 1 Story, Eq. Jur. § 332; *How v. Weldon*, 2 Ves. Ch. 516, 518; 3 P. Will. Ch. 131, Cox's note (1); *The Juliana*, 2 Hagg. Adm. 504.

¹⁰⁹ 50 Edw. III, c. 6; 3 Henry VII, c. 4; 13 Eliz. c. 5; 27 Eliz. c. 4.

¹¹⁰ Before, 2014.

¹¹¹ *Fonblanque*, Eq. B. 2, c. 6, s. 2; *Saunders v. Dehew*, 2 Vern. Ch. 271.

¹¹² *Parkhurst v. Alexander*, 1 Johns. Ch. N. Y. 394; see *Wilt v. Franklin*, 1 Binn. Penn. 522.

¹¹³ *Plum v. Fluitt*, 2 Anstr. Exch. 438.

¹¹⁴ *Fonblanque*, Eq. B. 2, c. 6, § 3, note (m); *Smith v. Low*, 1 Atk. Ch. 490; *Mertins v. Jolliffe*, Ambl. Ch. 313; *Meux v. Maltby*, 2 Swanst. Ch. 281; *Chesterman v. Gardner*, 5 Johns. Ch. N. Y. 29; *Daniels v. Davidson*, 16 Ves. Ch. 249; *Baynard v. Morris*, 3 Gill, Md. 468; *Dane v. Page*, 2 Green, Ch. N. J. 143.

CHAPTER V.

PECULIAR EQUITABLE RELIEF.

- 3880-3915. The specific performance of agreements.
- 3881-3889. The nature of the contract.
 - 3882. The form of the contract.
 - 3884. The fairness of the contract.
 - 3885. The certainty of the contract.
 - 3886. The consideration of the contract.
 - 3887. The lawfulness of the contract.
 - 3888. The possibility of the contract.
 - 3889. Certain contracts against public policy not enforced.
- 3890-3900. The subject matter of the contract.
 - 3891. Contracts relating to personal property.
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 - 3899. Contracts relating to real property.
- 3901-3907. In whose favor specific performance will be decreed.
 - 3902. When specific performance is sought by an original party.
 - 3907. When specific performance is sought by a stranger to the contract.
- 3908-3910. Against whom a specific performance will be decreed.
 - 3909. When a specific performance will be decreed against an original party.
 - 3910. When a specific performance will be decreed against a stranger.
- 3911-3915. When a specific performance will be refused.
 - 3912. When there is no equity.
 - 3913. When there is an adequate remedy at law.
 - 3914. When the plaintiff is in default.
 - 3915. When the plaintiff has been guilty of laches.
 - 3916. Relief against forfeitures and penalties.
- 3920-3926. The cancellation and delivery of instruments.
 - 3921. In cases of fraud.
 - 3926. Where there has been no fraud.
 - 3927. The confusion of boundaries.

3879. Having shown the concurrent jurisdiction of courts of equity with the courts of law, in relation to accidents, mistakes, and frauds, which are the causes why courts of equity interfere, in the present chapter will be considered certain kinds of relief peculiar to equity. In a court of law, when a contract has been broken, the remedy is to recover damages for the non-performance; in equity the courts will decree a specific performance. For the recovery of chattels, detinue and replevin may be had at law; in equity a specific delivery of the chattels will be awarded. In some cases of forfeiture equity will give a remedy when there is none at law; and in many cases when courts of law cannot bestow an adequate remedy, courts of equity will afford one.

The matters of this chapter will be distributed into those which relate to the specific performance of agreements; to the relief against forfeitures and penalties; to the cancellation and delivery of instruments; to the confusion of boundaries.

3880. The remedy at law for the breach of a contract is, in general, by

giving damages to the party injured commensurate with the loss he has sustained.

In many cases, however, it is obvious that compensation of a pecuniary nature must be entirely inadequate to the damages sustained. Hence courts of equity resorted to the enforcement of the contract in the manner agreed upon, by decree and the attendant process, upon filing a bill and making out a sufficient case. Originally, equity interfered only after the complainant had established his rights by an action at law.¹ In time, however, relief came to be granted *without sending the parties to law*, whenever a case clearly requiring the interposition of equity was made out; and it is now the established course to grant relief, by a decree for specific performance in equity, in favor of a party who establishes an equitable right thereto, whenever the remedy at law is inadequate, either from the nature of the contract or from the character of the subject matter, if the specific execution is possible and can be beneficially accomplished.²

The exercise of jurisdiction is not confined to cases where the remedy at law is inadequate; relief is granted in some cases where there is no remedy at law. For example, where a vendee has entered and made improvements upon land under an oral contract of purchase, a conveyance will, in general, be decreed, although there be no remedy at law.³ So also where a person has obtained possession of personal property, or the title to real property, under circumstances showing a trust, a specific execution of the trust will be enforced.⁴

The inadequacy of the remedy at law is the ground for equitable relief in all cases. In some cases, as in contracts for the purchase of land, this inadequacy is always considered to exist from the nature of the subject matter; in others, as in contracts relating to personal property, it may or may not exist, according to the particular circumstances of the case. Thus, a contract to deliver public stocks, which have an established and easily ascertainable value, and may be readily procured at any time, is not, in general, a subject of specific performance, while a contract for the sale of stock of a particular corporation, which has or may have a special worth to the purchaser, may be decreed to be specifically performed.

Of course the grant of this kind of relief is subject to the general rules of equitable interference in other respects.

3881. *The nature of the contract* must be such that the party claiming rights under it is entitled to equitable relief. A fair and certain contract, upon a substantial consideration, for the performance of a lawful and possible act, must be established.

The question of granting or refusing specific performance is addressed to the sound judicial discretion of the court; but where the case comes within the established rules, it is as much a matter of course in a court of equity to decree specific performance as it is to give damages in a court of law.⁵

There are cases where a party might recover damages at law in which this form of relief would not be granted; as, for instance, where a contract is founded upon a good merely as distinguished from a valuable consideration.⁶

¹ *Dodley v. Kinnersley*, Ambl. Ch. 406; *Hollis v. Edwards*, 1 Vern. Ch. 159, 11 Ves. Ch. 592; *Wiseman v. Roper*, 2 Freem. Ch. 217.

² *McClane v. White*, 5 Minn. 178.

³ *Jacobs v. Peterborough R. R. Co.*, 8 Cush. Mass. 225; *Eaton v. Whitaker*, 18 Conn. 222; *Tilton v. Tilton*, 9 N. H. 386; *Malins v. Brown*, 4 N. Y. 403; beyond, **3883**.

⁴ 1 Story, Eq. Jur. §§ 98, *et seq.*

⁵ *White v. Damon*, 7 Ves. Ch. 35; *Hall v. Warren*, 9 *id.* 608; *Buckle v. Mitchell*, 18 *id.* 111; *Revel v. Hussey*, 2 Ball. & B. Ir. Ch. 288.

⁶ *Groves v. Groves*, 3 Younge & J. 163; *Hervy v. Andland*, 14 Sim. Ch. 531; *White's Appeal*, 36 Penn. St. 134; *Morris v. Lewis*, 33 Ala. N. s. 53; *Tomlinson v. York*, 20 Tex. 694; *Holland v. Hansley*, 4 Iowa, 222; *Cox v. Sprigg*, 6 Md. 274; *Ormsby v. Hunton*, 3 Bibb, Ky. 298.

3882. Requirements, as to the form of the contract which are by law made essential to its validity, must be complied with to obtain relief in equity. Equity cannot dispense with essential matters any more than law. But the form of the contract will not have any effect in entitling a party to such relief where, if it were in a different form, he would not be entitled to it. For example, a contract under seal stands in this respect on no better ground than one not under seal.

3883. An exception exists to the general rule that equity cannot dispense with forms essential in law in certain cases, arising under the provisions of the statute of frauds, which require contracts to be in writing and signed by the party to be charged.

Where an oral agreement for the sale and purchase of lands has been made, and there has been a part performance of the contract, equity will intervene, and compel the conveyance of the lands at the suit of the purchaser. The reason for granting this relief is that it is considered a fraud, on the part of the party benefitted by the partial execution, to refuse to perform his part of the agreement. In general, it may be stated that the acts of part performance must be such that the party performing them cannot be restored to his former condition, or such that their value cannot be fairly made the subject of pecuniary estimation. Possession taken with the assent of the vendor, especially if improvements have been made, is uniformly held sufficient.⁷ The possession by a lessee under the vendee is sufficient; and the possession of one of several tracts is sufficient. Personal services, of a character which do not admit of pecuniary computation, are held sufficient.⁸

The possession must not be under an independent title.⁹

Acts merely preliminary or ancillary to an agreement, even though attended with expense, are not sufficient.¹⁰ Mere payment of the purchase money gives no right to equitable relief, as the money can be recovered at law, but it gives weight to other acts.¹¹

It has been considered that where a man, in consequence of a parol promise made by another to him, that he would perform an intended act, omits to make certain provisions, gifts, or arrangements for other persons, and the promissor afterward refuses to comply with his promise, he is guilty of a fraud, to prevent which a court of equity will decree a specific performance of such promise.¹² For example, where a testator gave an annuity to his nephew, and was about to alter his will, and charge it on his land, but was prevented from doing so by his brother, who was his executor and devisee of the real estate, who promised that he would pay the annuity, but after the death of the testator refused; on a bill filed by the nephew, the brother was compelled to a specific

⁷ *Pain v. Coombs*, 1 De Gex & J. Ch. 34; *Savage v. Foster*, 9 Mod. 37; *Blunt v. Tomlin*, 27 Ill. 93; *Neatherly v. Ripley*, 21 Tex. 434; *Arguello v. Edinger*, 10 Cal. 150; *Bomier v. Caldwell*, 8 Mich. 463; *Ham v. Goodrich*, 33 N. H. 32; *Rankin v. Simpson*, 19 Penn. St. 471; *Townsend v. Ward*, 27 Conn. 610; *Williston v. Williston*, 41 Barb. N. Y. 635.

⁸ *Watson v. Mahan*, 20 Ind. 223; *Davidson v. Davidson*, 2 Beasl. Ch. N. J. 246; *Kellums v. Richardson*, 21 Ark. 137; *McCray v. McCray*, 30 Barb. N. Y. 633.

⁹ *Savage v. Carroll*, 1 Ball & B. Ir. Ch. 265; *O'Reilly v. Thompson*, 2 Cox. Ch. 271; *East India Co. v. Nuthumbadoo Verasawmy Moodelly*, 7 Moore, Priv. Council. 482.

¹⁰ *Pembroke v. Thorpe*, 3 Swanst. Ch. 437, n; *Cole v. White*, 1 Brown, Ch. 409; *Redding v. Wilkes*, 3 *id.* 400; *Cooke v. Toombs*, 2 Anstr. 420; *Hawkins v. Holmes*, 1 P. Will. Ch. 770.

¹¹ *Clinan v. Cooke*, 1 Schoales & L. Ir. Ch. 22; *Watt v. Evans*, 4 Younge & C. Exch. 579; *Swihart v. Cline*, 19 Ind. 264; *Smith v. Finch*, 8 Wisc. 245; *Malins v. Brown*, 4 N. Y. 403; *Stark v. Wilder*, 36 Vt. 752; *Ramsay v. Liston*, 25 Ill. 114; *Parker v. Wells*, 6 Whart. Penn. 153.

¹² 3 Woodeson, Lect. 436.

performance.¹³ For the same reason that it would be a fraud, a specific performance was decreed when a testator in England was prevented from altering his will so as to direct the timber on his estate to be felled to make provision for younger children, because his son, who was his heir, objected to it, as it would deface the estate, and promised that he would answer for the value of it to his brothers and sisters, and after the testator's death refused.¹⁴

When the agreement intended by the parties to be reduced to writing according to the statute has not been so reduced in consequence of *the fraud of the opposite party*, if it can be substantially proved, it will be enforced in equity by a decree for a specific performance. It is very evident that if the fraudulent party could interpose the statute of frauds to defeat the plaintiff, the statute would in such case be the very means to produce that which its enactment was intended to defeat and suppress.¹⁵ For example, if one agreement in writing was prepared and read, and another should be fraudulently and secretly brought in and executed in the place of the former, and the fact could be clearly proved, in this and the like case equity would relieve.¹⁶

3884. The contract must be fair and reasonable, and not one of hardship or inequality; in this respect equity is more exacting than law, and many contracts which would be binding at law would be refused specific performance in equity on this ground.¹⁷ So, too, where the act is injurious to the public or to third parties,¹⁸ or the party seeking relief has been guilty of misconduct in reference to a contract originally fair, equitable relief by decree for specific performance will, in general, be refused.¹⁹

3885. The contract must be certain and concluded, and the rights of the parties absolutely fixed;²⁰ nothing must be left for future arrangement between the

¹³ *Oldham v. Litchfield*, 2 Vern. Ch. 506, 2 Freem. 284; *Chamberlain v. Chamberlain*, 2 Freem. Ch. 34; *Reech v. Kennigate*, Ambl. Ch. 67; 1 Ves. Ch. 123; *Mestaer v. Gillespie*, 11 Ves. Ch. 638; *Chamberlain v. Agar*, 2 Ves. & B. Ch. Ir. 262; 2 Spence, Eq. Jur. 279, note (a).

¹⁴ *Dullon v. Poole*, 2 Lev. 211, cited in 2 Freem. Ch. 285.

¹⁵ *Montacute v. Maxwell*, 1 P. Will. Ch. 618, 1 Eq. Cas. Abr. 19.

¹⁶ 1 Fonblanque, Eq. B. 1, c. 3, § 11 (o).

¹⁷ *Harnett v. Yielding*, 2 Schoales & L. Ir. Ch. 554; *O'Rourke v. Percival*, 2 Ball & B. Ir. Ch. 68; *Harkness v. Remington*, 7 R. L. 154; *Fremont v. Stone*, 42 Barb. N. Y. 169; *Rogers v. Mitchell*, 41 N. H. 154; *Lear v. Choteau*, 23 Ill. 39; *Huntington v. Rogers*, 9 Ohio, St. 511; *Andrews v. Andrews*, 28 Ala. n. s. 472; *Reed v. Rodman*, 5 Ind. 409; *Gasque v. Small*, 2 Strobb. Eq. So. C. 72; *Jackson v. Ashton*, 11 Pet. 229. As equitable relief is granted in such cases only to prevent some peculiar hardship or injustice, there is an evident propriety in requiring the party invoking its assistance to purge himself from the slightest inequity on his part. The rule is an application of the fundamental maxim that he who seeks equity must himself do equity.

¹⁸ *Stockton v. Madderburn*, 3 Kay & J. Ch. 93; *Fremont v. Stone*, 42 Barb. N. Y. 169; *Dial v. Hair*, 18 Ala. n. s. 798; *Bank, etc., v. Miles*, 1 Walk. Ch. Mich. 99; *Hannay v. Eve*, 3 Cranch, 242.

¹⁹ *Evans v. Kittrell*, 33 Ala. n. s. 449; *Cabe v. Dixon*, 4 Jones, Eq. No. C. 436; *Stoutenburgh v. Tompkins*, 1 Stockt. Ch. N. J. 332; *Canterbury Co. v. Ensworth*, 22 Conn. 608; *Huber v. Brooke*, 11 Serg. & R. Penn. 238.

²⁰ *Wheeler v. Trotter*, 3 Swanst. Ch. 74, n; *McLaughlin v. Piatti*, 27 Cal. 451; *Bull v. Bull*, 4 Wisc. 54; *Stoddart v. Tuck*, 5 Md. 18; *Robinson v. Kettletas*, 4 Edw. Ch. N. Y. 67; *Griffith v. Frederic Bank*, 6 Gill & J. Md. 424; *Walton v. Coneson*, 1 McLean, C. C. 120; *Kendall v. Almy*, 2 Sumn. C. C. 278; *Carr v. Duval*, 14 Pet. 77. A common class of questions under this head arises as to the sufficiency of the description in contracts to convey real estate. The description must be sufficient to identify the property. *Hanmer v. McEldonney*, 46 Penn. St. 334; *Day v. Griffith*, 15 Iowa, 104; *Johnson v. Craig*, 21 Ark. 533; *Capps v. Holt*, 5 Jones, Eq. No. C. 153; *Jordan v. Fay*, 40 Me. 130; *Mallony v. Mallony*, 1 Busb. Eq. No. C. 80. But extrinsic evidence is resorted to more fully than would be allowable at law in making title under a conveyance. See *Torr v. Torr*, 20 Ind. 118; *Baldwin v. Winslow*, 2 Minn. 213; *Newson v. Davis*, 27 Tex. 493; *Simmons v. Sperrill*, 3 Jones, Eq. No. C. 9; *Connell v. Mulligan*, 21 Miss. 388; *Robeson v. Hornbaker*, 2 Green, Ch. N. J. 60; *Somerville v. Tinman*, 4 Harr. & M'H. Md. 43.

parties.²¹ A contract of the precise character alleged in the bill must be fully established by competent proof.²²

This is especially true of oral contracts to convey lands where part performance is relied on to take the contracts out of the statute of frauds.²³

Certainty is also required *in written contracts*; for if they are not certain in themselves so as to enable the court to arrive at a clear result of what the terms are, they will not be specifically enforced. First, because it would be inequitable to carry a contract into effect when the court is left uncertain, and can only gather the intentions of the parties from mere conjectures;²⁴ secondly, if the terms be supplied, it must be by parol evidence, and in general this is not admissible, either at law or in equity, to explain, contradict, or vary a written agreement.²⁵

When a contract is evidenced *partly by writing and partly by parol*, the writing is the higher evidence and controls the parol evidence.²⁶

3886. There must be a valuable consideration as distinguished from a good or meritorious consideration merely. A court of equity will not decree a specific performance against a mere volunteer.²⁷ Thus a unilateral contract, like a refusal bond without valuable consideration paid, will not be enforced.²⁸ But acts performed in reliance upon such a bond in good faith, whereby the obligee has been put in a worse condition, will give ground for equitable relief.²⁹ A reciprocal undertaking, of which performance has been made, or in some cases even tendered, is sufficient consideration; but if the contract is executory, there must be mutuality.³⁰ And so where in consequence of an undertaking a party has been deprived of some benefit which he would have received from the promisee but for undertaking, he may obtain this relief in some cases.³¹ Marriage is deemed a valuable consideration,³² but not natural affection arising from relationship, even between parents and children.³³ The consideration must be lawful, especially where it is executory,³⁴ though a contract in consideration of illicit cohabitation previous to making the contract has been en-

²¹ McKibben v. Brown, 1 McCart. N. J. 13; Baker v. Glass, 6 Munf. Va. 212; Norfleet v. Southall, 3 Murph. No. C. 149.

²² Neville v. Merchants' Ins. Co., 19 Ohio, 452; Parkhurst v. Van Cortlandt, 1 Johns. Ch. N. Y. 283; Clinan v. Cooke, 1 Schoales & L. Ir. Ch. 22.

²³ Miller v. Cotton, 5 Ga. 341; Calvert v. Nichols, 8 B. Monr. Ky. 264; Colson v. Thompson, 2 Wheat. 236.

²⁴ Colson v. Thompson, 2 Wheat. 336; Lindsay v. Lynch, 2 Schoales & L. Ch. Ir. 7; Harnett v. Yielding, 2 Schoales & L. Ch. Ir. 555.

²⁵ Greenleaf, Ev. § 275; 2 Phillipps, Ev. 350; 2 Starkie, Ev. 544.

²⁶ Parkhurst v. Van Cortlandt, 1 Johns. Ch. N. Y. 283, 14 Johns. N. Y. 15.

²⁷ Banker v. Marsh, 3 A. K. Marsh, Ky. 436.

²⁸ Groves v. Groves, 3 Younge & J. 163; Houghton v. Lees, 1 Jur. N. s. 862; Ord v. Johnson, 1 id. 1063; Smith v. Wood, 12 Wisc. 382; Wright v. Weeks, 3 Bosw. N. Y. 372; Geigu v. Green, 4 Gill, Md. 472; Darlington v. McCooles, 1 Leigh, Va. 36.

²⁹ Hatton v. Gray, 5 Viner, Abr. 525; Western v. Russell, 3 Ves. & B. Ir. Ch. 192; Flight v. Bolland, 4 Russ. Ch. 298; Moore v. Pierson, 6 Clarke, Iowa, 279; McCray v. McCray, 30 Barb. N. Y. 633; Maddox v. Rowe, 23 Ga. 431; Atkinson v. Jackson, 8 Ind. 31; France v. France, 4 Halst. Ch. N. J. 650.

³⁰ Wells v. Smith, 7 Paige, Ch. N. Y. 22; Duval v. Myers, 2 Md. Ch. Dec. 401; Brown v. Cahill, 4 McLean, C. C. 19; Hawley v. Sheldon, Harr. Ch. Del. 420; Hitcheson v. McNutt, 1 Ohio, 14; Moore v. Fitz Randolph, 6 Leigh, Va. 175; Old Colony R. R. Co. v. Evans, 6 Gray, Mass. 25; Ives v. Hazard, 4 R. I. 14.

³¹ Haines v. Haines, 6 Md. 435; before, 3883.

³² Cartledge v. Cutliff, 29 Ga. 758; Anonymous, 34 Ala. N. s. 430.

³³ Holloway v. Headington, 8 Sim. Ch. 324; Jeffreys v. Jeffreys, 1 Craig & P. Ch. 138; Groves v. Groves, 3 Younge & J. 163; White's Appeal, 36 Penn. St. 134; Morris v. Lewis, 33 Ala. N. s. 53; Tomlinson v. York, 20 Tex. 694; Holland v. Hursley, 4 Iowa, 222; Cox v. Sprigg, 6 Md. 274; Ormsby v. Hunton, 3 Bibb, Ky. 298.

³⁴ Priest v. Parrot, 2 Ves, Sen. 160.

forced.³⁵ Cases of imperfect obligation, however strong, furnish no ground for equitable relief.³⁶

In the requirement of a valuable consideration equity does not ignore the legal sufficiency of such a consideration, but considers it insufficient to entitle the party to this peculiar form of relief in addition to the legal remedy.³⁷

3887. Courts of equity cannot enforce a contract which is unlawful. A decree for specific performance of a contract, entered into in fraud of the laws and policy of the country, can never be obtained, for in such case it is not necessary that the objections should be set up by the defendant; the court will *ex officio* set it up as soon as the fraud appears, or it is manifest that the contract is against public policy.³⁸

3888. When the contract is to do an impossible thing, the court will not do so useless a thing as to decree a specific performance of what it is impossible to do.³⁹ But if the agreement itself were possible, and it contained a condition which was impossible, the condition only would be void, and the agreement would, upon principle, be enforced.⁴⁰

When the impossibility of performance has arisen from some act of the defendant subsequent to the making the contract, if the disability was not known by the plaintiff when he brought his bill, other relief will be granted,⁴¹ but if he knew or had no good reason to suppose himself entitled to such relief, the bill will be dismissed.⁴²

3889. Specific performance of a contract to convey lands will not be enforced against a husband whose wife refuses to join in release of dower, it being considered against the policy of the law to coerce the wife in a matter where she should be free to act, and being a violation of the rule in equity not to command an impossibility or punish its non-performance if she refuses.⁴³ But it will be enforced against the husband as to his interest with compensation for the interest which the wife refuses to convey.⁴⁴

3890. The subject matter of contracts upon which specific performance will

³⁵ *Annandale v. Harris*, 2 P. Will. Ch. 432, 3 Brown, Parl. Cas. 445.

³⁶ 1 Madd. Ch. 564.

³⁷ *Allen v. Davison*, 16 Ind. 416; *Catlett v. Bacon*, 33 Miss. 269; *Dodd v. Seymour*, 21 Conn. 476. See *Rerick v. Kern*, 14 Serg. & R. Penn. 267; *Jones v. Jones*, 6 Conn. 111.

³⁸ *Evans v. Richardson*, 3 Me. Ch. 470; *Thompson v. Thompson*, 7 Ves. Ch. 473; *McGarthy v. Goad*, 1 Ball & B. Ch. Ir. 389; *Stockton v. Wadderburn*, 3 Kay & J. Ch. 93; *Fremont v. Stone*, 42 Barb. N. Y. 169; *Dial v. Hair*, 18 Ala. n. s. 798; *Bank of Michigan v. Niles*, 1 Walk. Ch. Mich. 99; *Hannay v. Eve*, 3 Cranch. 242.

³⁹ See *Buxton v. Lister*, 1 Atk. Ch. 383; *Adderley v. Dixon*, 1 Sim. & S. Ch. 607; *Shields v. Trammell*, 19 Ark. 61; *Brueggman v. Jurgerson*, 24 Mo. 87; *Woodward v. Harris*, 12 Barb. N. Y. 439; *Fitzpatrick v. Fitzpatrick*, 3 Ala. n. s. 40.

⁴⁰ *Coke*, Litt. 206, a.

⁴¹ *Bennett v. Abrams*, 41 Barb. N. Y. 319; *Barlow v. Scott*, 24 N. Y. 40; *Smith v. Larin*, 8 Wisc. 265; *Chapman v. Mad River, etc., Co.*, 6 Ohio, St. 119; *Rockwell v. Lawrence*, 2 Halst. Ch. N. J. 190; *Aday v. Echols*, 18 Ala. n. s. 353. See *Yost v. Devault*, 9 Iowa, 60; *Currie v. Cowles*, 6 Bosw. N. Y. 452; *Harrison v. Deramus*, 33 Ala. n. s. 463; *Boyle v. Laird*, 2 Wisc. 431; *Lewis v. Yale*, 4 Fla. 418.

⁴² *Maw v. Topham*, 19 Beav. Rolls, 576; *Hill v. Fiske*, 38 Me. 520; *McQueen v. Chouteau*, 20 Mo. 572; *Hatch v. Cobb*, 4 Johns. Ch. N. Y. 559; *Wiswall v. McGowan*, 1 Hoffm. Ch. N. Y. 125.

⁴³ *Outram v. Round*, 4 Viner, Abr. 203; *Frederick v. Coxwell*, 3 Younge & J. 514; *Emery v. Wase*, 8 Ves. 514; *Davis v. Jones*, 4 Bos. & P. 267; *Richmond v. Robinson*, 12 Mich. 193; *Yost v. Devault*, 9 Iowa, 60; *Weller v. Weyand*, 2 Grant, Cas. Penn. 103; *Hanna v. Phillips*, 1 *id.* 253; *Clark v. Reins*, 12 Gratt. Va. 98; *Weed v. Terry*, 2 Dougl. Mich. 344; *Watts v. Kinney*, 3 Leigh, Va. 272.

⁴⁴ *Park v. Johnson*, 4 All. Mass. 259; *Wright v. Young*, 6 Wisc. 127; *Young v. Paul*, 2 Stockt. N. J. Ch. 401; *Wingate v. Hamilton*, 7 Ind. 73; *Springle v. Shields*, 17 Ala. n. s. 295. See *Troutman v. Gowing*, 16 Iowa, 415; *Campbell v. Digges*, 4 Harr. & M'H. Md. 12.

be decreed, relates either to personal property, personal acts, or real property, each of which will be examined separately.

3891. The ground upon which courts of equity exercise their jurisdiction in relation to making decrees for specific performance is that at law no complete or adequate remedy can be had, and it is to prevent a failure of justice that equity interferes. The reason for granting this relief does not apply to real estate any more than to personal property.

As a general rule, however, the relief obtainable at law by damages for the breach is considered adequate in a contract relating to personal property, since the value can be exactly estimated, and with the money paid other property of a like character can be purchased.⁴⁵

But whenever from the peculiar circumstances of the case it appears that pecuniary damages will not furnish an adequate remedy, a specific performance will be decreed.

3892. Thus, where the article has of itself a special value, as, a curiosity like an ancient altar-piece, china jars of a peculiar kind, family pictures, or heirlooms, a decree may be obtained for performance in specie.⁴⁶ For a like reason contracts for the sale of railroad and other corporate stocks will be specifically enforced.⁴⁷

3893. A contract was made for the sale of one hundred tons of iron, to be paid for by instalments in a certain number of years; on a bill being filed, a specific performance was decreed.⁴⁸ It is manifest that damages would be no adequate remedy in such case, because the profits depended upon future events which could not be correctly estimated, and the calculation must therefore be made upon conjecture.

In the case of a sale of a considerable quantity of timber for ship building on account of its vicinity, or where it was the only timber of the kind accessible, if the buyer could not have a specific performance, complete justice could scarcely be done to him; or if the seller had sold the timber for the purpose of clearing his land, in order to apply it to a course of husbandry, complete justice could not be done without a specific performance.⁴⁹

And for the same reason this relief was granted where there was an agreement to deliver five thousand loads of clay per annum, at a specified price, for a term of years;⁵⁰ an agreement for the division of a coal mine;⁵¹ a sheriff's sale of a large amount of promissory notes for a small consideration;⁵² a contract to plant and cultivate peach trees on shares;⁵³ a contract to sell a ship.⁵⁴

3894. Where the contract relates not alone to the sale or enjoyment of personal chattels, but principally to personal acts, courts of equity will sometimes interfere and compel the specific performance of such agreements, upon

⁴⁵ *Adderly v. Dixon*, 1 Sim. & S. Ch. 607; *Harnett v. Yielding*, 2 Schoales & L. Ir. Ch. 553; *Dean v. Izard*, 1 Vern. Ch. 159; *Pooley v. Budd*, 7 Eng. L. & Eq. 228; *Babier v. Babier*, 24 Me. 42.

⁴⁶ *Pusey v. Pusey*, 1 Vern. Ch. 273; *Duke of Somerset v. Cookson*, 3 P. Will. Ch. 390; *Saville v. Tancred*, 1 Ves. Ch. 101; *Fells v. Reed*, 3 *id.* 70; *Lloyd v. Loaring*, 6 *id.* 773; *Nutbrown v. Thornton*, 10 *id.* 163; *Arundell v. Phipps*, 10 *id.* 140; *Falke v. Gray*, 5 Jur. n. s. 645.

⁴⁷ *Duncuft v. Albrecht*, 12 Sim. Ch. 189; *Colt v. Netterville*, 2 *id.* 304; *Cheale v. Kenward*, 3 De Gex & J. 27; *Treasurer v. Commercial Co.*, 23 Cal. 390; *Leach v. Fobes*, 11 Gray, Mass. 506; *Todd v. Taft*, 7 All. Mass. 371.

⁴⁸ *Taylor v. Neville*, cited in 3 Atk. Ch. 384. See *Adderly v. Dixon*, 1 Sim. & S. Ch. 607.

⁴⁹ *Buxton v. Lister*, 3 Atk. Ch. 384; *Adderly v. Dixon*, 1 Sim. & S. Ch. 607.

⁵⁰ *Furman v. Clark*, 3 Stockt. Ch. N. J. 306.

⁵¹ *Young v. Frost*, 1 Md. 177.

⁵² *Erwin v. Parham*, 12 How. 197.

⁵³ *Robbins v. McKnight*, 1 Halst. Ch. N. J. 642.

⁵⁴ *Clark v. Flint*, 22 Pick. Mass. 231.

the ground that no adequate remedy can be had at law. The following cases will exemplify the rule:

3895. A specific performance will be decreed to fulfil the covenant for a lease, or to renew a lease;⁵⁵ or to keep the banks of a river in repair;⁵⁶ or to settle the boundaries between two estates.⁵⁷

3896. Covenants to build or to repair a building will not, in general, be enforced by a decree for a specific performance, though the opinions and judgments on this subject are not in perfect unison.⁵⁸

3897. When a party has agreed not to do a thing, he will be required to keep his agreement; for example, where a man covenants not to build upon a contiguous estate; not to build houses of a different height from those adjoining his property; not to erect any noisome or injurious manufacturing establishment adjacent to that of the covenantee; not to cut down timber trees which are ornamental or useful to the mansion of the covenantee; not to carry on trade or business in the same street with the plaintiff; and a variety of similar instances, the covenantor will be enjoined for a violation or attempted violation of such covenants.

3898. There is a class of cases where the contract is to perform personal services, in which it has been held that a specific performance will not be enforced, inasmuch as the performance cannot be beneficially supervised by the court. Such are contracts to sing or act in public;⁵⁹ not to make a secret medicine;⁶⁰ not to sell water from a well;⁶¹ to work a quarry;⁶² to work mines;⁶³ to operate railroads.⁶⁴ It may be doubted, however, whether in some of these cases courts of equity would now afford relief by injunction.

3899. The most numerous class of cases where courts of equity will decree a specific performance relate to land. For the non-performance of contracts respecting personal property a ready remedy may, in general, be obtained by an action at law for damages; if a man buy goods or merchandise of a particular description, common and usual in the market, the money he recovers for his damages will enable him to purchase other property of the same kind. On the contrary, when a man purchases a farm, or a dwelling house in a city, he cannot replace it if the seller refuses to comply with his agreement. The locality, the construction of the house, the soil of the farm, its vicinity to a town or to friends, the accommodations of the land, and numerous other circumstances, give them a value which cannot be compensated in damages, because with the money the plaintiff could not attain the advantages he had purchased. It is for this reason that bills praying for a specific performance of contracts relating to land are generally entertained; and for those respecting chattels are limited to special circumstances, as we have just seen.

3900. In conclusion, it is only requisite to observe that equity acts upon the person, and generally not upon things; *æquitas agit in personam*. It is not, therefore, necessary that the estate relating to which the decree for a specific

⁵⁵ Newland, Contr. 95; Tritton v. Foote, 2 Brown, Ch. 636, 2 Cox, Ch. 174.

⁵⁶ Bryson v. Whitehead, 1 Sim. & S. Ch. 74.

⁵⁷ Newland, Contr. 109; Penn. Baltimore, 1 Ves. sen. Ch. 444.

⁵⁸ 1 Story, Eq. Jur. §§ 725-728; Jeremy, Eq. Jur. 442.

⁵⁹ Kemble v. Kean, 6 Sim. Ch. 333; Kimberley v. Jennings, 6 *id.* 340; Baldwin v. Society, 9 *id.* 393; Clarke v. Price, 2 J. Wils. 157. See Lumley v. Wagner, 1 De Gex M. & G. Ch. 604; Sanquirico v. Beneditti, 1 Barb. N. Y. 315; Hamblin v. Dinneford, 2 Edw. Ch. N. Y. 529.

⁶⁰ Newberry v. James, 2 Mer. Ch. 446; Williams v. Williams, 3 *id.* 157.

⁶¹ Collins v. Plumb, 16 Ves. 454; and see Rayner v. Stone, 2 Ed. Ch. 128.

⁶² Booth v. Pollard, 4 Younge & C. Exch. 61.

⁶³ Gervais v. Edwards, 2 Drur. & Warr. 80.

⁶⁴ South Wales R. R. Co. v. Wythes, 1 Kay & J. Ch. 86; Port Clinton R. R. Co. v. Cleveland R. R. Co., 13 Ohio, n. s. 544.

performance is made should be within the jurisdiction of the court. The primary decree is *in personam*, and not *in rem*, so that if the person be within the jurisdiction the incapacity to enforce a decree *in rem* will not prevent the court from entertaining suits.⁶⁵ When the land lies within the jurisdiction of the court, if, after a decree *in personam*, the defendant remains obstinate, the court will put the successful party in possession of the land.⁶⁶

3901. In considering in whose favor a specific performance will be decreed, it will be convenient to take a view, first, of those cases where a specific performance is sought by the original party; second, where it is sought by a stranger.

3902. To entitle himself to a specific performance, a party must show that he has been in *no default* in not having performed the agreement on his part, and such performance will not be compelled unless the case is clear of all imputation of deception; for unless the party seeking it is free from all blame or misrepresentation, even as to a small part of the subject only, he will be entitled to no relief in equity.⁶⁷

But although the plaintiff may not have strictly complied with the terms of his agreement, if the non-compliance does not go to the *essence of the contract*, notwithstanding courts of equity do not approve of laches, relief will be granted; and therefore, where a man has performed a valuable part of his contract, and he is in no default for not performing the residue, he is entitled to a specific execution of the other part, or at least to recover back what he has paid.⁶⁸

3903. A distinction which reconciles cases which otherwise seem to clash has been suggested by Chief Baron Gilbert, namely, that when the plaintiff can be put in *statu quo* as to all that part of the agreement which he has performed, he stands in a different position from those cases in which he cannot be put in *statu quo*. When it is possible, equity will not enforce the agreement if the plaintiff cannot completely perform the whole of his part of it; but if the plaintiff has performed so much of it that he cannot be placed in *statu quo*, equity will, notwithstanding his incapacity of performing the remainder by a subsequent accident, compel the other to perform his part of the agreement.⁶⁹

3904. Sometimes equity will interfere where the terms of the agreement have not been strictly complied with, if there has not been gross negligence in the party, and it is conscientious that the agreement should be performed. In such cases, if *compensation* can be made for the injury occasioned for the non-compliance with the strict terms, equity will interfere and decree a specific performance.⁷⁰

3905. The most usual case of non-compliance strictly with the requirements of a contract is that which relates to the *time* when it ought to have been performed. In general, time is not deemed of the essence of a contract to convey real estate,⁷¹ though this rule is more restricted than formerly in its application.⁷²

⁶⁵ Penn *v.* Baltimore, 1 Ves. sen. Ch. 444, 447, 454; Archer *v.* Preston, 1 Vern. Ch. 77, and Raithby's note.

⁶⁶ Earl of Arglasse *v.* Muschamp, 1 Vern. Ch. 135; Earl of Kildare *v.* Eustache, 1 Vern. Ch. 431; Newland, Contr. 305; 1 Fonblanque, Eq. B. 1, c. 1, § 5, note (g).

⁶⁷ Cadman *v.* Horner, 18 Ves. Ch. 11.

⁶⁸ 1 Fonblanque, Eq. B. 1, c. 6, § 3.

⁶⁹ Earl of Feversham *v.* Watson, Cas. temp. Finch, 445, 2 Freem. 35; Meredith *v.* Wynn, Prec. Chanc. 312; Gilbert, Lex Pretoria, 240; Newland, Contr. 249.

⁷⁰ Davis *v.* Hone, 2 Schoales & L. Ch. Ir. 347; Jeremy, Eq. Jur. 460, 461; 2 Story, Eq. Jur. § 775.

⁷¹ Parkin *v.* Thorold, 2 Sim. Ch. n. s. 1, 16 Beav. 59; Pincke *v.* Curteis, 4 Brown, Ch. 329; Reed *v.* Jones, 8 Wisc. 392; Jones *v.* Robbins, 29 Me. 51; Erving *v.* Beauchamp, 6 B. Monr. Ky. 422; Stretch *v.* Schack, 23 Ind. 77.

⁷² Miles *v.* Van Voorheis, 20 N. Y. 412; Young *v.* Daniel, 2 Clarke, Iowa, 117; Boston, etc., R. R. *v.* Bartlett, 10 Gray, Mass. 384; Ives *v.* Armstrong, 5 R. I. 567; Mann *v.* Dun, 2 Ohio, St. 187; Goodell *v.* Field, 15 Vt. 448.

And where there has been unreasonable delay,⁷³ or the position of the parties has changed materially,⁷⁴ or the value of the property has altered much,⁷⁵ the party in fault cannot require performance. And time may be made of the essence of the contract by original agreement,⁷⁶ or by notice,⁷⁷ or may be so from the particular circumstances of the contract,⁷⁸ which render it evidently material to one or the other of the parties.

3906. When the plaintiff has been disabled by circumstances which he could not reasonably control from a strict compliance, or he comes, shortly after he ought to have performed his contract, to ask for a specific performance, his non-compliance will be no objection to his relief if he is in condition to perform his part of the agreement, and has manifested a steady readiness, promptitude, and desire to fulfil his engagement.⁷⁹

3907. It is a general rule that strangers in blood and strangers to the contract cannot ask for a specific performance of an agreement; but many exceptions have been made to it, and of late the courts have laid hold of any circumstances to distinguish the cases out of it, still preserving the general rule. Thus, where there was any consideration the court will support it,⁸⁰ or because an action might be brought in the names of the trustees, though then clearly the persons claiming were not within the consideration.⁸¹

Though the parties to the contract may at their pleasure abandon it and mutually release each other from its performance, still, when one of them has contracted for something in favor of a collateral and that has not been released, it is a question whether he in whose favor it was made may not claim a specific performance, especially when to secure the interests of all the contemplated objects there is a covenant with trustees that the act shall be done which, if enforced, would inure to the benefit of all persons who are the objects of the covenant, and who may therefore be considered in the light of *cestuis que trust*.⁸²

With greater reason may a stipulation in an agreement be enforced by a stranger, when in consequence of the expectations held out to him under the

⁷³ *Moore v. Blake*, 1 Ball & B. Ch. Ir. 62; *Fordyce v. Ford*, 4 Brown, Ch. 494; *Lechmere v. Brazier*, 2 Jac. & W. Ch. 287; *Williams v. Williams*, 17 Beav. Rolls, 213; *Eads v. Williams*, 4 De Gex M. & G. Ch. 691.

⁷⁴ *Eaton v. Lyon*, 3 Ves. Ch. 690; *Du Bois v. Baum*, 46 Penn. St. 537; *Brashier v. Gratz*, 6 Wheat. 528; *Garnett v. Macon*, 2 Brock. Va. 185.

⁷⁵ *Boston, etc., R. R. v. Bartlett*, 10 Gray, Mass. 384; *Green v. Covillaud*, 10 Cal. 317; *Garnett v. Macon*, 6 Call. Va. 308; *McKay v. Carrington*, 1 McLean, C. C. 50; *Pillow v. Pillow*, 3 Humphr. Tenn. 644.

⁷⁶ *Benson v. Lamb*, 9 Beav. Rolls, 502; *Nokes v. Kilmorey*, 1 De Gex & S. Ch. 444; *Fuller v. Hovey*, 2 All. Mass. 324; *Steele v. Briggs*, 22 Ill. 643; *Thompson v. Dalles*, 5 Rich. Eq. So. C. 370; *Hatch v. Cobb*, 4 Johns. Ch. N. Y. 559.

⁷⁷ *Newman v. Rogers*, 4 Brown, Ch. 391; *Carter v. Ely*, 7 Sim. Ch. 211; *Hipwell v. Knight*, 1 Younge & Ch. Exch. 416.

⁷⁸ *Walker v. Jeffreys*, 1 Hare, Ch. 341; *Wright v. Howard*, 1 Sim. & S. Ch. 190; *Doloret v. Rothschild*, 1 *id.* 590; *Pollard v. Clayton*, 1 Kay & J. 462; *Eads v. Williams*, 4 De Gex M. & G. 673; *Younger v. Welch*, 22 Tex. 419; *Mitchell v. Wilson*, 4 Edw. Ch. N. Y. 697.

⁷⁹ *Newland, Contr.* 242; *Morgan v. Morgan*, 2 Wheat. 290; *Taylor v. Longworth*, 14 Pet. 172; *Ashmore v. Evans*, 3 Stockt. Ch. N. J. 151; *Milward v. Thanet*, 5 Ves. 720; *Lennon v. Napper*, 2 Schoales & L. Ir. Ch. 682; *Bateman v. Murray*, 4 Brown, Ch. 417.

⁸⁰ *Osgood v. Strode*, 2 P. Will. Ch. 245. See *Stephens v. Trueman*, 1 Ves. sen. Ch. 73, 74; *Nunn v. Wilsmore*, 8 Term, 529.

⁸¹ *Stephens v. Trueman*, 1 Ves. sen. 74. See *Vernon v. Vernon*, 2 P. Will. Ch. 599.

⁸² It has lately been held that where there are a series of limitations, some of which are in favor of persons who are parties to the contract or the consideration, and others in favor of strangers to both, and any one of the parties who is within the consideration files a bill to have the articles carried into execution, the court will not carry into effect those provisions which are in favor of the parties to the contract or consideration, and stop there, but it will carry them into execution *in toto*, whatever it might do if a stranger sought to have the contract enforced. *Davenport v. Bishop*, 2 Younge & C. Ch. 456, 1 Phill. Ch. 698.

contract, his condition in life has been changed, to the knowledge and by the instrumentality of the parties; not so much, however, by virtue of the original efficacy of the contract between the stranger and the contracting parties, as because the stranger would suffer a positive injury if the contract were not performed, so that a direct equity arises as between the two contracting parties and the stranger by reason of their acts in regard to him.⁸³

Courts of equity are ever anxious to preserve the peace of families; for this reason an agreement entered into for that purpose will be supported and enforced at the instance of any one of the persons who are to take a benefit under the arrangement and those claiming under him, though the party seeking to enforce it may not have contributed any portion of the consideration.⁸⁴

A distinction has been made between agreements relating to marriage and other agreements. Common agreements are considered as entire, and if either of the parties fail in the performance of the contract, it cannot at the instance of such party be decreed in specie; but in *marriage agreements* it is otherwise, for though either the relations of the husband or wife should fail in the performance of their part, yet children may compel a performance. If, for instance, the mother's father agreed to give a portion, and the husband's father agreed to make a settlement, though the mother's father should fail to give the portion, yet the children may compel a settlement; for in such case the children are considered as purchasers, and entitled to all the benefit of the uses under the settlement, notwithstanding there has been a failure on the other side.⁸⁵

3908. On a proper case for interference being made out, a performance will be enforced against a party, or in many cases against a person who has acquired his estate or interest in the subject matter.

3909. In resisting a bill for a specific performance of a contract, it requires less strength in the case than is necessary to entitle the plaintiff to a decree, and, therefore, the plaintiff will fail if the defendant can cast a doubt upon his right, or show that it would be inequitable to grant him a decree. For example, the defendant may show that by fraud, mistake, or accident, material terms have been omitted in the written agreement, or that there has been a variation by parol, or that there has been a parol discharge of a written contract.⁸⁶

The purchaser, as well as the vendor, may ask for a specific performance, under circumstances where the latter is incapable of making a complete title to the property sold, or where there has been a substantial misdescription of it in important particulars, or the terms, as to the time of execution, have not been complied with by the vendor agreeably to his contract. The vendor being in the wrong in all these cases, to let him take advantage of such mistakes or neglect would be to give him a benefit for doing an injury. To prevent this, courts of equity permit a purchaser to have an election to proceed with the purchase *pro tanto*, or to abandon it altogether. In such cases the purchaser may, in general, demand a specific performance, as far as the contract can be performed, and a compensation, by an abatement of the purchase money, for any deficiency in the title of the estate, or in the quality, quantity, description, or other matter relating to it.⁸⁷

⁸³ See *Hill v. Gomme*, 1 Beav. Rolls, 540, 5 Mylne & C. Ch. 255; *Colyear v. Mulgrave*, 2 Keen, Rolls, 98; before, 3886.

⁸⁴ *Stapleton v. Stapleton*, 1 Atk. Ch. 10.

⁸⁵ *Harvey v. Ashley*, 3 Atk. Ch. 610; *Perkins v. Thornton*, Ambl. Ch. 502.

⁸⁶ 1 Fonblanque, Eq. B. 1, c. 6, § 2, note (e); 3 Wooderson, Lect. 428; *Jeremy*, Eq. Jur. 432.

⁸⁷ *Tod v. Gee*, 17 Ves. Ch. 278; *Patton v. Rogers*, 1 Ves. & B. Ch. Ir. 351; *Waters v.*
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3910. When a man contracts with another for land, and the purchaser agrees to pay the purchase money, and the vendor to convey the title, at law the estate remains vested in the seller until he has divested himself by the conveyance of his title, and the buyer remains the owner of the money; but in equity the seller is considered a trustee of the land for the purchaser, and the purchaser a trustee of the money for the seller. If the purchaser dies, the land descends to his heirs, or, before his death, he may sell it; if, on the contrary, the vendor dies, his executors will be entitled to the purchase money. If the vendor should sell to another who had notice of the sale, he would become a trustee for the purchaser. A bill for a specific performance might be maintained against such second purchaser.⁸⁸ In case of the death of the vendor, his heir, on whom the legal title had descended, might be decreed to make a specific performance; on the other side, if the buyer should die, his executors might be compelled to execute the contract. The purchase money is treated as the personal estate of the vendor, and the land as the real estate of the purchaser.⁸⁹

As a general rule, it may be observed that where a specific execution of a contract respecting lands will be decreed between the parties, it will be decreed between the parties claiming under them, who stand in privity of estate, or representation, or title, unless there are equities which control and prevent a decree.⁹⁰

3911. Having considered upon what contracts a specific performance may be decreed, and the subject matter of such contracts, and examined by whom and against whom a decree may be obtained, it remains to be ascertained in what cases courts of equity will refuse to interfere. These cases may be classified into those where there is no equity, where there is an adequate remedy at law, where the plaintiff is in default, where the plaintiff is guilty of laches.

3912. It is a maxim that *he who has committed iniquity shall not have equity*. The defendant may therefore resist a bill for a specific performance by showing that under the circumstances the plaintiff is not entitled to the prayer of his bill. Proof that there has been an omission or mistake in the agreement; or fraud, or surprise, or concealment; misrepresentation, whether intentional or not, patent or latent; or any unfairness, as where the defendant was made drunk at the time of the contract, or became intoxicated without the agency of the plaintiff; or where the contract is itself unconscionable or unreasonable; proof of either of these facts will defeat the plaintiff.

This want of equity in the plaintiff may be shown by parol evidence, although in general such evidence is not competent to explain, add to, or vary a written agreement except in cases of fraud; yet it is admissible on the part of a defendant to a bill for a specific performance to show circumstances *dehors* and independent of the writing which render it inequitable, and when so shown, courts of equity will grant no relief.⁹¹

Travis, 9 Johns. N. Y. 465; Luckett v. Williamson, 31 Mo. 54; Bell v. Thompson, 33 Ala. N. S. 633; Collins v. Smith, 1 Head, Tenn. 251; Wright v. Young, 6 Wisc. 127; Harbers v. Gadsden, 6 Rich. Eq. So. C. 284; Ketchum v. Stout, 20 Ohio, 453; Wilson v. Bumfield, 8 Blackf. Ind. 146.

⁸⁸ See Bubb's Case, 2 Freem. Ch. 38; 7 Ves. Ch. 345.

⁸⁹ Newland, Contr. 48, 109; Fonblanque, Eq. B. 1, ch. 6, § 9, notes; 3 Woodesson, Lect. 466; 2 Story, Eq. Jur. § 790; Champion v. Brown, 6 Johns. Ch. N. Y. 402.

⁹⁰ Jeremy, Eq. Jur. 445; Fonblanque, Eq. B. 1, c. 1, § 7, note (x); Ex parte Pye, 18 Ves. Ch. 149; Spence v. Hogg, 1 Colly. Ch. 225; Hersey v. Giblett, 18 Beav. 174; St. Paul Division v. Brown, 9 Minn. 157; Smoot v. Rea, 19 Md. 398; Moore v. Burrows, 34 Barb. N. Y. 173; Travers v. Crane, 15 Cal. 12; Dement v. Bonham, 26 Ill. 158; McKee v. Bailly, 11 Gratt. Va. 340; Buchanan v. Upshaw, 1 How. 56; Newton v. Swazey, 8 N. H. 9; New Barbadoes, etc., v. Vreeland, 3 Green, Ch. N. J. 157.

⁹¹ Davis v. Symonds, 1 Cox, Ch. 402. See Stokes v. Moore, 1 Cox, Ch. 221; Ramsbottom v. Gosden, 1 Ves. & B. Ch. Ir. 165.

If the parties have so dealt with each other in making the contract that the object of one party is defeated while the other party is at liberty to do as he pleases in relation to the contract, or if the property has so altered that the restrictions or conditions of it are no longer applicable to the state of things, it is evident that it would be against equity that a specific execution should be decreed. In such case the parties will be allowed to seek their remedy at law.⁹² So too where the injury to the defendant of an enforcement of the contract would be much greater than the benefit to the plaintiff, specific performance will be refused;⁹³ and it must appear that the act to be performed is one over the performance of which the court can exercise a supervision.⁹⁴ For equity will never interfere where its jurisdiction cannot be beneficially exercised.⁹⁵

3913. It has already been mentioned that where there was no adequate remedy at law, courts of equity assumed jurisdiction to prevent a failure of justice. On the other hand, when there is a full, complete, and adequate remedy at law, courts of equity seldom if ever interfere; as, when the contract is for the sale of stocks or goods which have a regular price in the market, and can be purchased with the money which would be given for the breach of a contract as damages.

3914. When the plaintiff is in default, as, when he has not fulfilled his part of the agreement which he was bound to perform, and he comes to ask for a specific performance, he will in general be refused relief. Sometimes, however, equity will interfere where the plaintiff can make compensation, and the inability of strict performance of his agreement has not arisen in consequence of his gross negligence.⁹⁶

In order to obtain such interference, however, it must be made to appear that the defendant will get substantially all he contracted for,⁹⁷ and that the compensation to be rendered is entirely adequate to the defect.⁹⁸ Where the defect is a contingent charge, the better opinion is that relief in equity with compensation should be refused.⁹⁹

3915. The negligence of a party in bringing suit, or doing some other act required of him in order to entitle himself to relief, is called *laches*. When the plaintiff has neglected for a long time to file a bill for a specific performance, that will be a strong ground for refusing relief, for such party, if not prevented by circumstances beyond his control,¹⁰⁰ cannot claim relief unless he has shown

⁹² Hall v. Warren, 9 Ves. Ch. 608; Greenway v. Adams, 12 Ves. 395.

⁹³ Gould v. Kemp, 2 Mylne & K. 308; Costigan v. Hastler, 2 Schoales & L. Ch. Ir. 160; Gale v. Archer, 42 Barb. N. Y. 320; Society, etc., v. Butler, 1 Beasl. Ch. N. J. 498; Casey v. Holmes, 10 Ala. N. S. 776; Sears v. Boston, 16 Pick. Mass. 357; Henderson v. Hays, 2 Watts, Penn. 148.

⁹⁴ Morris v. Remington, 1 Pars. Eq. Penn. 387; Blount v. Blount, 1 Hawks, Tenn. 365; Waterhouse v. Stansfield, 9 Hare, Ch. 234. See 3898, 3889.

⁹⁵ Brown v. Tighe, 2 Clarke & F. Hou. L. 396; McKibben v. Brown, 1 McCart. N. J. 13; Hammer v. McEldowney, 46 Penn. St. 334; Hudson v. Layton, 5 Harr. Del. 74; Allen v. Simons, 1 Curt. C. C. 122; Western R. R. Co. v. Babcock, 6 Metc. Mass. 346; Sheffield Gas Co. v. Harrison, 17 Beav. Rolls, 294.

⁹⁶ 1 Story, Eq. Jur. § 775; Jeremy, Eq. Jur. 460; 13 Ves. Ch. 77; 1 Fonblanque, Eq. B. 1, c. 6, § 2, note (e).

⁹⁷ Bowyer v. Bright, 13 Price, Exch. 698; Kutchbull v. Grueber, 3 Mer. 124; Piers v. Lambert, 7 Beav. Rolls, 546; Perkins v. Ede, 16 id. 193; Cunningham v. Sharp, 11 Humphr. Tenn. 116; Jackson v. Ligon, 3 Leigh, Va. 161.

⁹⁸ Campbell v. Ingelby, 21 Beav. Rolls, 567; Page v. Brown, 2 id. 836; Prother v. Smith, 6 Rich. Eq. So. C. 324; Evans v. Kingsbury, 2 Rand. Va. 120.

⁹⁹ Paton v. Brebner, 1 Bligh, 66; Aylett v. Ashton, 1 Mylne & C. Ch. 105; Ridgway v. Gray, 1 Macn. & G. 109; Ely v. Perrine, 1 Green, Ch. N. J. 396. See Jones v. Carland, 2 Jones, Eq. No. C. 502; Linn v. Barkey, 7 Ind. 69.

¹⁰⁰ In cases not within the positive enactment of the statute of limitations, courts of equity will consider the absence of the claimant while serving in the army a reasonable excuse for the delay. Mullens v. Townsend, 2 Dow. Rep. N. S. 430.

himself "ready, desirous, prompt, and eager."¹⁰¹ But a party resting and remaining in possession, passive and contented upon an *equitable* title, without clothing himself with the legal title, has never been considered to be guilty of such laches as to preclude relief, or the right to enforce a specific performance of an express or implied contract to convey the *legal* title.¹⁰²

3916. The second class of remedies which are peculiarly appropriate in equity and inappropriate at law, relates to the relief which courts of equity grant against forfeitures and penalties.

In strictness, when a forfeiture or penalty has taken place, at law there is no remedy, and the party is liable to the forfeiture or the penalty, and, in general, he cannot be relieved; though courts of law, following in the footsteps of a court of equity, grant relief in some cases; as, where the condition of a bond for the payment of a sum of money has been broken, the courts of law will not permit the obligee to recover more than the amount due by the condition, together with interest from the time of the breach.

But there are many cases where at law there is no remedy when there has been a forfeiture; then the courts enforce, literally, that species of redress which has been provided; a course which, were there no power to prevent it, would frequently be productive of great hardship. A court of equity regarding the substance of the transaction, and having the means of exercising such an authority as will relieve against the forfeiture or penalty, will sanction the performance of the contract, if it can be done with perfect justice to the parties, and relieve the obligor from the forfeiture or penalty he has incurred.¹⁰³

3917. The origin of the doctrine of granting this relief arose, probably, in those cases where the forfeiture was in consequence of the non-payment of money at a specified time; but it has since been extended to other cases with great advantage. For example, where a lessee covenanted to pay rent, with a proviso for re-entry on non-payment, equity will relieve the tenant upon his satisfying the amount and all expenses consequent upon the neglect.¹⁰⁴

A penal clause in a contract supposes two agreements, one of which is the primitive or principal, and the other conditional or accessory. In general, when a penal clause is inserted in an agreement merely to secure the enjoyment of a collateral object, the latter is considered the principal, and the clause a *penalty* only as accessory to the contract; this being to secure the principal agreement, is relievable against, provided justice can be done to the creditor.¹⁰⁵ In general, the test is whether compensation can be made or not. When it cannot, courts of equity will not interfere; when it can be made, relief will be granted; as, for instance, if the penalty is to secure the payment of money upon payment of the principal and interest. In some cases where the penalty is to secure the performance of some collateral undertaking, courts of equity will

¹⁰¹ *Milward v. Earl Thanet*, 5 Ves. Ch. 720; *Alley v. Deschamps*, 13 Ves. Ch. 228; *Moore v. Blake*, 1 Ball & B. Ch. Ir. 68.

¹⁰² *Crofton v. Ormsley*, 2 Schoales & L. Ch. Ir. 604.

¹⁰³ It may be proper to note here, as confirmatory of the view that the ground of equitable relief in these cases is the effectuating the principal intention of the parties, the fact that equity will afford relief, extending beyond the amount of a penalty stipulated for, in proper cases; as, where by unfounded and protracted litigation the obligor in a bond has prevented the obligee from reasonably obtaining his legal right, interest will be allowed beyond the amount of the bond. *East India Co. v. Champion*, 11 Bligh, 159; *Clark v. Lord Abingdon*, 11 Ves. Ch. 106; *Grant v. Grant*, 3 Sim. Ch. 340; *Hale v. Thomas*, 1 Vern. Ch. 349. The penalty is regarded merely as a means selected by the parties for securing the performance of the agreement, and equity will substitute its own means of enforcement when these appear better adapted to secure justice.

¹⁰⁴ *Sanders v. Pope*, 12 Ves. Ch. 289; *Hill v. Barclay*, 18 Ves. Ch. 60; *Bowser v. Colby*, 1 Hare, Ch. 109; *Harris v. Troup*, 8 Paige, Ch. N. Y. 423.

¹⁰⁵ *Slooman v. Walter*, 1 Brown, Ch. 419; *Skinner v. Dayton*, 2 Johns. Ch. N. Y. 535.

retain the bill, and direct an issue of *quantum damnificatus*, to be tried in a court of law, where the amount of damages will be ascertained by a trial before a jury; and when such damages have thus been ascertained, the court will grant relief upon their payment.¹⁰⁶

The grounds upon which courts of equity grant relief against penalties, is that by the agreement the obligee became bound to pay the amount actually owing, and if he obtains his money, or his damages, he gets all that he expected or that justice requires.¹⁰⁷

3918. There is considerable difficulty in some cases in determining whether a stipulation is intended as a penalty or as liquidated damages, though the distinction is an important one. Liquidated damages is the fixed amount which the party to an agreement promises to pay to the other in case he shall not fulfil the primary or principal engagement into which he has entered by the same agreement. The amount must be the just and appropriate amount of the damages sustained by the act or omission. As the parties have a right to fix their own measure of damages in such cases, courts of equity will not interfere, because, then the parties standing upon equal ground, and no undue advantage being taken by the one of the other, they are bound to fulfil their engagements. But if, in fact, there is a penal clause disguised under the name of liquidated damages, equity will interfere.¹⁰⁸

3919. A distinction seems to be made in courts of equity between *penalties* and *forfeitures*. A party will always be relieved from a penalty if compensation can be made, because it is deemed as a mere security; but, although compensation can be made, relief will not always be given against a forfeiture. In cases of forfeiture for the breach of any covenant other than a covenant to pay rent, relief will not be granted in equity, unless upon the ground of accident, fraud, mistake, or surprise, even when the breach is capable of compensation.¹⁰⁹ When no just compensation can be decreed for the breach, courts of equity will not interfere in cases of forfeiture for the breach of covenants and conditions.¹¹⁰

There are cases where courts of equity refuse to relieve from forfeitures on the ground of public policy. An example of this may be found in the case of non-compliance by stockholders with the terms of payment of their instalments of stock at the time prescribed, by which their shares become forfeited.¹¹¹

3920. Another class of cases, where the remedy is peculiarly applicable in equity and wholly inadequate at law, consists in those where the courts decree the *recission*, *cancellation*, or *delivery* of deeds, agreements, or other securities. In this branch of equity jurisdiction the courts exercise a sound discretion whether they will make a final decree, and will grant only what is reasonable

¹⁰⁶ Jeremy, Jur. 447.

¹⁰⁷ Fonblanque, Eq. B. 1, c. 6, § 4, note (b); Peashy v. Somerset, 1 Strange, 447; Skinner v. Drayton, 2 Johns. Ch. N. Y. 535.

¹⁰⁸ Skinner v. White, 17 Johns. N. Y. 369; Skinner v. Dayton, 2 Johns. Ch. N. Y. 535; Lowe v. Peers, 4 Burr. 22; 2 Pothier, Obl. by Evans, 85; Fonblanque, Eq. B. 1, c. 3, § 3, notes.

¹⁰⁹ Eden, Inj. 22; Hill v. Barclay, 16 Ves. Ch. 403, 18 Ves. Ch. 58; Eaton v. Lyon, 3 Ves. Ch. 692.

¹¹⁰ Comyn, Dig. *Chancery*, 2 Q, 3, 8, 10; Wafer v. Mochatto, 1 Salk. 156; Dunklee v. Adams, 20 Vt. 415; Wells v. Smith, 2 Edw. Ch. N. Y. 226; Rolfe v. Harris, 2 Price, Exch. 206, n; City of London v. Mitford, 14 Ves. 58. While the doctrine has been thus broadly stated in some cases, it is not quite certain that this is the established American or English doctrine. See the learned note of Judge Redfield to Story, Eq. Jur. § 1326, a; and the cases Lanfair v. Lanfair, 18 Pick. Mass. 299; Henry v. Tupper, 29 Vt. 371; Dunklee v. Adams, 20 Vt. 415; Cox v. Higsford, 2 Vern. Ch. 664; Sanders v. Pope, 12 Ves. Ch. 282.

¹¹¹ Sparks v. Liverpool Water Works, 13 Ves. Ch. 433; Prendergast v. Turton, 1 Younge & C. Ch. 98.

and proper under all the circumstances.¹¹² The cases in which the court will exercise its power may be classed into those where there has been a fraud committed in making the instrument, and those where there has been no fraud.

3921. When there has been fraud, actual or constructive, in the making of an agreement, the injured party has in general a right to apply to a court of equity to cancel the instrument and to order it to be delivered up. This is obviously a piece of preventive or protective justice. Equity will not allow, as the law does, injustice to be done, and after the blow has been struck and the wrong committed, step in and repair it by granting damages which are frequently totally inadequate, but comes forward at once to prevent the wrong by preventing the fraudulent party from reaping any benefit from his wrongful act. But in all cases the complainant must come into chancery with clean hands; when, therefore, he stands *in pari delicto*, that is, where he has been equally guilty of fraud with the party against whom he complains, he will be entitled to no relief; *in pari delicto, melior est conditio defendentis*.¹¹³

3922. When an agreement or other instrument is declared void by statute, and also when it is so upon principle, or when it is merely voidable, courts will sometimes impose terms, for their object is to do equitable justice; as, in the case of usury, when the debtor applies to have the instrument cancelled equity will impose terms by requiring him to pay the money actually due with lawful interest.¹¹⁴

3923. The cases of fraud are extremely numerous, for the ingenuity of mankind in this respect is almost unlimited, so that it is scarcely possible to enumerate them all. Even when the instrument is not void by positive law, but merely voidable, a court of equity will grant relief in the following cases:

When there is an actual fraud in the defendant, in which the plaintiff has not participated.¹¹⁵

When there is a constructive fraud against public policy, in which the plaintiff has had no participation.¹¹⁶

When there has been a fraud against public policy, in which both parties participated; but public policy would be defeated by letting the contract stand.¹¹⁷

When there is a constructive fraud by both parties, but they are not *in pari delicto*, the plaintiff being more in fault than the defendant.¹¹⁸

¹¹² *Goring v. Nash*, 3 Atk. Ch. 188; *Cooke v. Clayton*, 18 Ves. Ch. 12. See *Savage v. Brocksopp*, 18 Ves. Ch. 335; *Buckle v. Mitchill*, 18 Ves. Ch. 111; *Revell v. Hussey*, 2 Brod. & B. 288.

¹¹³ This jurisdiction has been well called preventive, since it is exercised for the purpose of preventing the injustice which it is considered may arise in the future, when, by lapse of time and the failing recollection or death of witnesses, there is reason to apprehend that a party may be deprived of the means of making a successful defence to an unjust claim. *Petit v. Shepherd*, 5 Paige, Ch. N. Y. 493; *Reed v. Bank of Newburgh*, 1 *id.* 215. See also *Burt v. Cassety*, 12 Ala. N. S. 64; *Boyce's Executors v. Grundy*, 3 Pet. 210; *Clark v. Malpas*, 31 Beav. Rolls, 80; *Sharp v. Leach*, 31 Beav. Rolls, 491.

¹¹⁴ *Jeremy*, Eq. Jur. 484; 2 Swanst. Ch. 139, note; *Barnardiston v. Lingood*, 2 Atk. Ch. 133; *Lawley v. Hooper*, 3 Atk. Ch. 278; *Groyne v. Heaton*, 1 Brown, Ch. 1; *Whitehead v. Peck*, 1 Ga. 140; *Ballinger v. Edwards*, 4 Ired. Eq. No. C. 449.

¹¹⁵ *Goddard v. Carlisle*, 9 Price, Exch. 169; *Gallatiana v. Cunningham*, 8 Cow. N. Y. 361; *Taylor v. Taylor*, 8 How. 200.

¹¹⁶ *Gardner v. Morse*, 25 Me. 140; *Brisbane v. Adams*, 3 N. Y. 130; *Ferris v. Adams*, 23 Vt. 136.

¹¹⁷ *Earl of Milltoun v. Stewart*, 3 Mylne & C. Ch. 18; *Wynne v. Callandar*, 1 Russ. Ch. 293. See *Quarrier v. Colston*, 1 Phill. Ch. 147; *St. John v. St. John*, 11 Ves. Ch. 535; *Browning v. Morris*, Cowp. 790; 6 Ga. 404; *Weakley v. Warkins*, 7 Humphr. Tenn. 456.

¹¹⁸ *Fanning v. Dunham*, 5 Johns. Ch. N. Y. 136; *Pinkston v. Brown*, 3 Jones, Eq. No. C. 494; *Phalen v. Clark*, 19 Conn. 421; *Chesterfield v. Jaussen*, 2 Ves. Ch. 156; *Osborne v. Williams*, 18 *id.* 379; *Browning v. Morris*, Cowp. 790.

3924. When the instrument is actually void at law, it will be decreed to be delivered up, even when it has been forged; a trial at law will not be required to establish the forgery.¹¹⁹

3925. With regard to the *nature of the instrument*, it is proper to observe that a *will* cannot be set aside in chancery on the ground of fraud. In such case there must be an issue to try its validity, which must be decided at law. This, perhaps, may be considered as an exception to the general concurrent jurisdiction of a court of equity to grant relief in cases of fraud.¹²⁰

In case of other instruments than wills, it is immaterial whether they create or destroy a right. Equity will, therefore, prevent a *release*, which has been fraudulently or improperly obtained, from being used as a defence in an action at law.¹²¹

3926. Courts of equity have not only power to order deeds and other instruments to be delivered up when they are fraudulent, or against public policy, but they exercise a jurisdiction in compelling the delivering up of such instruments, although they are *altogether unexceptionable*, when a person holds them who is not entitled to them, and the plaintiff has a right to them.¹²² But the title to the possession of such instruments depends on the validity of the title of the property to which they relate, and when the claimant is not in possession of the property, and the evidence to it does not depend on the written instrument, or when it is in his power, a trial to establish his right must be first had at law, before a court of equity will order the deed or instrument to be delivered up.¹²³ When his title is not disputed, a decree will be made in his favor.

This rule applies to the delivery of other instruments, and securities, such as bonds, and negotiable securities, which being transferred to a *bona fide* holder without notice, might furnish the latter with a foundation for a suit as well as to deeds.¹²⁴

Courts of equity will proceed still further, and decree the delivering up of a deed or other instrument which was *valid in its origin, but has become functus officio* in consequence of a subsequent event, as payment, satisfaction, or other extinguishment. Though a deed of this kind may be perfectly useless, yet, as it may cast a doubt upon the complainant's title, it will be ordered to be delivered up.¹²⁵

In making a decree for the delivering up or cancellation of deeds or other instruments upon either of the grounds mentioned above, a court of equity will be careful to impose such qualifications and terms as will secure justice to the defendant.¹²⁶

3927. The usual disputes arising from a confusion of boundaries may be settled generally by an action at law. But courts of equity will entertain a

¹¹⁹ *Peake v. Highfield*, 1 Russ. Ch. 559. And see *Bromley v. Holland*, 7 Ves. Ch. 16; *Williams v. Flight*, 5 Beav. Rolls, 41; *Piersoll v. Elliot*, 6 Pet. 95; *Hamilton v. Cummings*, 1 Johns. Ch. N. Y. 520; *Reed v. Bank of Newburgh*, 1 Paige, Ch. N. Y. 216.

¹²⁰ *Jeremy*, Eq. Jur. 488.

¹²¹ *Mitford*, Eq. Pl. 118.

¹²² *Brown v. Brown*, 1 Dick. Ch. 62; *Gilson v. Jugo*, 6 Hare, Ch. 112; *Armitage v. Wadsworth*, 1 Madd. Ch. 192.

¹²³ *Armitage v. Wadsworth*, 1 Madd. Ch. 192. See *Papillon v. Voice*, 2 P. Will. Ch. 471; *Newman v. Milner*, 2 Ves. Ch. 483.

¹²⁴ *Lloyd v. Gruden*, 2 Swanst. Ch. 180; *King v. Hamlet*, 4 Sim. Ch. 223; *Osborn v. Bank of United States*, 9 Wheat. 845. See *Hodgson v. Murray*, 2 Sim. Ch. 515.

¹²⁵ *Flower v. Marten*, 2 Mylne & C. Ch. 474; *Banks v. Evans*, 18 Miss. 35; *Pierce v. Lamson*, 5 All. Mass. 60; *Sipthorpe v. Moran*, 3 Atk. Ch. 579; *Richards v. Lymes*, 1 Bligh, N. s. 537; *Callaghan v. Callaghan*, 8 Clark & F. Hou. L. 374.

¹²⁶ *Towers v. Davys*, 1 Vern. Ch. 479; *Head v. Egerton*, 3 P. Will. Ch. 280; *Mill v. Cotten*, 5 Ga. 341.

bill for the settlement of boundaries, when the rights of one of the parties may be established upon equitable grounds.

The history of this branch of equitable jurisdiction is not well known, and the power is rarely exercised, and only in cases where in addition to the fact of a controverted boundary some special equity is superinduced.¹²⁷

These grounds are various, the principal of which are the following :

When the confusion has arisen by the *fraud* of the defendant, that alone will constitute a sufficient ground for the interference of the court.¹²⁸

When the defendant is *obliged to preserve and protect the boundaries*, and by his negligence or misconduct the confusion has arisen, and without assistance they cannot be found.¹²⁹ This fact, together with a statement of the relation of the parties, must appear in the bill.

When, by exercising this jurisdiction in equity, a multiplicity of suits will be prevented.¹³⁰

3928. Sometimes there is another class of cases arising from confusion or entanglement of other rights, when courts of equity will afford a remedy, without which the mischief would otherwise be irremediable. For example, where rent is chargeable on lands, and the remedy by distress has, in consequence of the confusion of boundaries, become impracticable, a bill in equity for the ascertainment of the boundaries will be entertained.¹³¹

¹²⁷ See Story, Eq. Jur. §§ 610-619; 2 White & T. Lead. Eq. Cas. 318, and notes; Wake v. Conyers, 1 Ed. Ch. 334; Speer v. Crawter, 2 Mer. Ch. 410; Lethulier v. Castlemain, 1 Dick. Ch. 46; Waring v. Hotham, 1 Brown, Ch. 40; Haskell v. Allen, 23 Me. 448; Stewart v. Coulter, 4 Rand. Va. 74; Hale v. Darter, 5 Humphr. Tenn. 79; Topp v. Williams, 7 id. 569; Wolcott v. Robbins, 26 Conn. 236.

¹²⁸ Rouse v. Barker, 3 Brown, Ch. 180; Speer v. Crawter, 2 Mer. Ch. 418; Grierson v. Eyre, 9 Ves. Ch. 345; Attorney General v. Fullerton, 2 Ves. & B. Ir. Ch. 263; Willis v. Parkinson, 2 Mer. Ch. 506.

¹²⁹ Miller v. Warmington, 1 Jac. & W. Ch. 472; Attorney General v. Fullerton, 2 Ves. Ch. 263; Willis v. Parkinson, 2 Mer. Ch. 506; Duke of Leeds v. Strafford, 1 Ves. Ch. 186; Speer v. Crawter, 17 Ves. Ch. 216.

¹³⁰ Wake v. Conyers, 1 Cox, Ch. 360; 1 Ed. Ch. 331; Bouverie v. Prentice, 1 Brown, Ch. 200; Marquis of Bute v. Glamorganshire Co., 1 Phill. Ch. 681; Bayley v. Edwards, 3 Swanst. Ch. 703; Tulloch v. Hartley, 1 Younge & C. Ch. 114.

¹³¹ Duke of Leeds v. New Radnor, 2 Brown, Ch. 338; 2 Brown, Ch. 200; Duke of Leeds v. Powell 1 Ves. Ch. 171; Attorney General v. Stephens, 35 Eng. L. & Eq. 390.

CHAPTER VI.

REMEDIES IN PARTICULAR CASES.

3930-3942. Account.

3931. The jurisdiction in matters of account.

3938. Bills praying account against agents.

3939. Bills praying for contribution.

3941. Bills praying for apportionment.

3942. Various cases.

3943. Dower.

3944. Partition.

3929. The cases for equitable relief treated of in this chapter may be classed into those which relate to accounts, dower, partitions.

3930. This subject of accounts will be considered by taking a view, first, of the jurisdiction of courts of equity in matters of account; second, of bills against agents; third, of bills praying for contribution; fourth, of bills praying for an apportionment; fifth, of other cases of a miscellaneous nature.

3931. In treating of the different forms of actions, we considered pretty thoroughly the remedy afforded by an action of account at common law.¹ The proceedings in such action are somewhat inconvenient and difficult, and the remedy in equity is more generally adopted.²

The assumption of jurisdiction by courts of equity in cases of accounts arose in consequence of the inadequacy of the remedy at law. Equity has means which are not possessed at law to compel the accountant to a discovery of books and papers on oath;³ and in order to effectuate justice the defendant may have a decree if the balance shall be in his favor, for in these cases both parties are actors when the cause is before the court upon the merits.⁴

In addition to these considerations it will be remembered also that equity, through the intervention of a master, furnishes a more ready and satisfactory means of investigating accounts which in most cases are composed of a large number of particulars. This advantage, it is true, has in some jurisdictions been made available to law courts by reference, under statutory provisions, to auditors with powers similar to those of masters, yet in jurisdictions where full equity powers are possessed by the courts, this is an important consideration. The flexibility of the proceedings in equity and their adaptation to the conditions of the particular case, and the greater opportunity of joining as parties those

¹ See before, **3405 to 3423.**

² Bacon, *Abr. Account*; 3 Sharswood, *Blackst. Comm.* 164.

³ Blackstone thinks that "for want of this discovery at law, courts of equity have acquired a concurrent jurisdiction with every other court in matters of account." 3 *Comm.* 437. It is a general rule that where a court of equity has jurisdiction for discovery, and the discovery is effectual, it may grant full relief; for when it has legitimately acquired jurisdiction over a cause, for the purpose of discovery, to prevent a multiplicity of suits it will also entertain a suit for relief. *Armstrong v. Gilchrist*, 2 *Johns. Cas. N. Y.* 424; *Rathbone v. Warren*, 10 *Johns. N. Y.* 587; *Lynch v. Sumrall*, 1 *A. K. Marsh. Ky.* 469; *Handly v. Fitzhugh*, 1 *A. K. Marsh. Ky.* 25; *Cave v. Trabue*, 2 *Bibb, Ky.* 445.

⁴ *Done's Case*, 1 *P. Will. Ch.* 263; 1 *Story, Eq. Jur.* § 522.

who are interested in the result has also tended to increase the efficiency of the equitable jurisdiction in these matters of mutual accounts.⁵

It would seem to be necessary to give jurisdiction in equity that there should be a right to a discovery from the defendant and a prayer therefor in the bill, or else a complicated account or mutual accounts or the existence of a fiduciary relation between the parties.⁶

The bill for an account must upon its face show a sufficient title or right in the plaintiff, and a liability in the defendant to have an account, and pray that the defendant may render an account.

3932. To this bill the defendant may set up a variety of defences; such as that he never was liable, that he has been released by the plaintiff, that an account has been stated between the parties, that an account has been settled, and lapse of time.

3933. When the claimant founds his claim on a contract, the defendant may deny that such contract ever existed.

3934. A release, whether under seal or not, is conclusive against a bill for an account. But in order to have this conclusive effect, the release must have been given upon a sufficient consideration.⁷

3935. When an account has been stated in writing, in which the balance is set forth and acknowledged, it is in general a sufficient ground for refusing to compel a general account.⁸ In this case it is a rule that if the account has been delivered, and the party to whom it is delivered expressly accept the same, or keep it so long as to induce a belief that he has accepted it without making any objection to its accuracy, he ought to be bound by his conduct.⁹ An account has been considered as accepted in the instance of merchants at home when no objection has been made within two or three posts.¹⁰ Between merchants in different countries, when an account has been transferred from one to the other and no objection has been made, after several opportunities of writing have occurred, it is considered as an acquiescence in the correctness of the account transmitted, and it will be treated as a settled account.¹¹

3936. *Prima facie* a settled account will be binding upon the parties, and a court of equity will not allow it to be unravelled because the vouchers may have been delivered up and discharged. In such case, the utmost allowance

⁵ Some of the advantages of the equitable procedure are attained in some jurisdictions by reference to an auditor under rule of court, who proceeds much in the same manner of a master in chancery to the examination of accounts, with power to summon witnesses and require the production of books and papers.

⁶ *Darthey v. Clemens*, 6 Beav. Rolls, 165; *Mackenzie v. Johnston*, 4 Madd. Ch. 374; *Massey v. Banner*, 4 Madd. Ch. 416; *Pendleton v. Wambersie*, 4 Cranch, 73; see Story, Eq. Jur. Redfield's ed. § 454, *et seq.* and notes.

⁷ *Roche v. Morgell*, 2 Schoales & L. Ch. Ir. 726; *Middleditch v. Sharland*, 5 Ves. Ch. 87.

⁸ *Taylor v. Haylin*, 2 Brown, Ch. 310. The rule is laid down by Judge Story that where there has been an account stated, that may be set up by way of plea as a bar to all discovery and relief, unless some matter is shown which calls for the interposition of a court of equity. Story, Eq. Jur. § 523; see *Chambers v. Goldwin*, 9 Ves. Ch. 265; *Taylor v. Haylin*, 3 Brown, Ch. 310; *Perkins v. Hart*, 11 Wheat. 237. Such would be matters of fraud or undue advantage taken of the relations between the parties, and where the parties occupy a fiduciary relation, a very slight cause will be sufficient to induce the court to reopen the account. *Newman v. Payne*, 2 Ves. Ch. 199; *Todd v. Wilson*, 9 Beav. Rolls, 486; *Kennedy v. Brown*, 13 C. B. N. S. 677.

⁹ *Willis v. Jernegan*, 2 Atk. Ch. 252; *Burk v. Brown*, 2 Atk. Ch. 397; *Irving v. Young*, 1 Sim. & S. Ch. 333; *Murray v. Toland*, 3 Johns. Ch. N. Y. 569; *Freeland v. Heron*, 7 Cranch, 147.

¹⁰ *Sherman v. Sherman*, 2 Vern. Ch. 276; 1 Eq. Cas. Abr. 12, pl. 10; *Irving v. Young*, 1 Sim. & S. Ch. 333; see *Phillips v. Tapper*, 2 Penn. St. 323.

¹¹ *Tickel v. Short*, 2 Ves. Ch. 239; *Willis v. Jernegan*, 2 Atk. Ch. 252; *Freeland v. Heron*, 7 Cranch, 147; *Murray v. Toland*, 3 Johns. Ch. N. Y. 575; *Jeremy*, Eq. Jur. 547.

which will be granted to the complainant will be to surcharge and falsify, unless there has been fraud on the part of the defendant.¹²

The terms *surcharge* and *falsify* are used in contradistinction to each other in courts of equity. A surcharge is appropriately applied to the balance of the whole account, and supposes credits to have been omitted which ought to have been allowed; a falsification applies to some items in the debits, and supposes that the item is wholly false or in some part erroneous.¹³

3937. Another defence is *lapse of time*. When the demand is of a legal nature, and courts of law and equity have a concurrent jurisdiction, the latter, like the former, will allow the full operation of the statutes of limitations. But when the demand is not of a legal nature and it is strictly equitable, or in cases when the bar of the statute is inapplicable, courts of equity have established another rule, sometimes founded upon the analogies of the law, when such analogies exist, and at other times upon its own doctrine not to encourage stale demands and laches of the claimant. For this reason, after a considerable lapse of time, these courts will not interfere because of the difficulty of doing entire justice, in consequence of the original transaction having become uncertain by the probable loss of the evidence, and because public policy requires that the titles to property and the security of the possessor should not be lightly disturbed.¹⁴ These remarks do not wholly apply to cases where the complainant has a justifiable excuse for the delay, for if in such case evidence has been lost, it is not by his fault or neglect, and it would be unfair to deprive him of the right of investigating an account when he had been prevented from doing so by circumstances beyond his control.¹⁵

3938. In treating on the subject of agency, we have considered the various duties of agents toward their principals, so that here we have need for only a limited examination of the subject. The relation of principal and agent seems to comprise all cases in which one person is authorized to act for another; but no

¹² *Pitt v. Cholmondeley*, 2 Ves. sen. Ch. 565, 566; *Vernon v. Vawdry*, 2 Atk. Ch. 119; *Chambers v. Goldwin*, 8 Ves. Ch. 266; *Drew v. Power*, 1 Schoales & L. Ch. Ir. 192.

¹³ *Pitt v. Cholmondeley*, 2 Ves. sen. Ch. 565, 566. In this case Lord Hardwicke has stated the reasons for allowing the surcharge and falsification of accounts in the following clear and explicit terms: "Some general observations are to be made by way of *postulatum*. I am not now upon a question arising on an open general account, but merely upon a liberty given to the plaintiff to surcharge and falsify. The *onus probandi* is always on the party having that liberty; for the court takes it as a stated account, and establishes it; but if any of the parties show an omission, for which a credit ought to be, that is a surcharge; or if any thing be inserted, that is a wrong charge, he is at liberty to show it, and that is a falsification; but that must be by proof on his side; and that makes a great difference between the general cases of an open account, and where only to surcharge and falsify, for such must be made out. Now this is not only after great length of time, but also after a number of accounts settled between the parties, which adds considerable strength on the part of the defendant; because after such variety of accounts stated, and so often under consideration, it must be a strong case laid before the court to falsify. Another thing material in all these cases is, that this is a liberty to surcharge and falsify these several stated accounts between persons of great ability and capacity and great experience in that way. It is not like a liberty to surcharge and falsify an account (which the court often does) stated between guardian and ward, just after the ward has come of age, or between persons, one of whom is conusant of the subject matter of the account, the other not, or not in such a degree; in which the court will take it with a latitude, and make that the ingredient; here the parties were on a par, great and equal skill and knowledge on both sides, and, therefore, the court expects clear evidence before they will make any variation."

¹⁴ *Mooers v. White*, 6 Johns. Ch. N. Y. 360; *Lewis v. Baird*, 3 McLean, C. C. 83; *Robinson v. Hook*, 4 Mas. C. C. 139; *Sherwood v. Sutton*, 5 *id.* 143; *Willison v. Watkins*, 3 Pet. 44; *Piatt v. Vattier*, 9 Pet. 405; *Creath v. Sims*, 5 How. 192.

¹⁵ *Lopdell v. Creagh*, 1 Bligh, Hou. L. N. s. 255; *Russell v. Green*, 10 Conn. 269. See *Jeremy, Eq. Jur.* 549.

one can be called to an account unless he has had the control or management of property belonging to the principal.

When an agent has so had the control or management of such property, he is bound to keep a regular account of his transactions,¹⁶ and to be always ready to settle them.¹⁷

In these cases, as in others of account, however, the mere relation of principal and agent does not justify bringing a bill for account; there must be either some complication of accounts, of receipts, and disbursements,¹⁸ or some necessity for the discovery of facts peculiarly within the knowledge or control of the defendant.¹⁹

Courts of equity assume jurisdiction in cases of accounts against agents, on the ground that courts of law cannot do complete justice, because they have no means of compelling the production of the books of account and vouchers,²⁰ as the courts of equity have, by means of a bill of discovery;²¹ these latter courts, having thus got possession of the cause, will proceed to administer the proper relief to prevent a multiplicity of suits.

There are many cases of implied agencies where the parties may be called to an account by a bill in chancery. This is the case between tenants in common, between part owners of goods or of ships, between the owners of ships and the masters, and between joint tenants. In all these cases a bill of discovery may be filed to ascertain the amount of property the defendant has received and the profits which he has made.²²

When, in the course of an agency, the agent is guilty of a fraud in relation to property, and then dies, the courts of law have no jurisdiction if it be a case where the tort dies with the person; but courts of equity will consider the loss sustained as a debt due by his estate.²³

3939. For the purpose of doing justice to all the parties, courts of equity assume jurisdiction over matters of account in cases of contribution. The payment which is made by one person to another to indemnify him for having paid more than his share of a liability for which they were jointly bound, is called *contribution*.²⁴

3940. There are many cases of contribution in which the jurisdiction of courts of equity will be exercised for the purpose of justice. A few will here be enumerated.

When there is a deficiency of assets for the payment of debts and legacies,

¹⁶ *Middleditch v. Sharland*, 5 Ves. Ch. 91; *White v. Lady Lincoln*, 8 Ves. Ch. 369.

¹⁷ *Law v. E. I. Company*, 4 Ves. Ch. 834; *Macdonald v. Macdonald*, 1 Bligh, Hou. L. 315; *Pearce v. Green*, 1 Jac. & W. Ch. 135, 140; *Ormond v. Hutchinson*, 13 Ves. Ch. 53.

¹⁸ *Barry v. Stevens*, 31 Beav. Rolls, 238; *Smith v. Leveaux*, 1 Hurlst. & M. Ch. 123; *Hemings v. Pugh*, 4 Giff. Ch. 456; *Post v. Kimberly*, 9 Johns. Ch. N. Y. 493.

¹⁹ *Dinwiddie v. Bailey*, 6 Ves. Ch. 136; *Moses v. Lewis*, 12 Price, Exch. 502; *Frietas v. Don Santos*, 1 Younge & J. 574; *Coquillard v. Suydam*, 8 Blackf. Ind. 24.

²⁰ In some of the states the courts of law can compel the production of books of a party upon the application by the opposite party, by virtue of statutory provisions.

²¹ *East India Co. v. Henchman*, 1 Ves. Ch. 289; *Mackenzie v. Johnson*, 4 Madd. Ch. 374; *Pearce v. Green*, 1 Jac. & W. Ch. 135; *Ludlow v. Simond*, 2 Caines, Cas. N. Y. 1, 38, 52.

²² *Doddington v. Hallett*, 1 Ves. Ch. 497; *Ex parte Young*, 2 Ves. & B. Ir. Ch. 242; *Strelly v. Winson*, 1 Vern. Ch. 297; *Pulteney v. Warren*, 6 Ves. Ch. 73; *Benson v. Heathorn*, 1 Younge & C. Ch. 326; *Clarke v. Tipping*, 9 Beav. Rolls, 284; *Field v. Craig*, 8 All. Mass. 357.

²³ *Lord Hardwicke v. Vernon*, 4 Ves. Ch. 418. It must be remembered that where a party has committed an injury or a tort, by which his estate has been *benefited*, and then dies, the tort may be waived, and an action for money had and received may be maintained against his personal representatives. *Hambly v. Trott*, Cowp. 374. In equity it is immaterial whether his estate has been benefited or not; if his fraud has caused a loss to the principal, his estate is responsible. *Lord Hardwicke v. Vernon*, 4 Ves. Ch. 411, 418.

²⁴ See *Lawrence v. Cornell*, 4 Johns. Ch. N. Y. 545. See before, 1433, 1434.

and one of the legatees has been paid more than his proportion, he may be compelled, after all the debts have been ascertained, to refund and contribute in favor of the unpaid debts; and he is required to do this with a view to an equalization of burdens, either at the instance of creditors, legatees, or the executor himself.²⁵

When land is charged with the payment of a legacy, or an estate with the portion of a posthumous child, every part of the land is bound to make contribution.²⁶

Partners may also be compelled to contribution when one of them has paid more than his share of the partnership debts, and when, upon the winding up of the affairs of the firm, there appears to be a balance in his favor.²⁷

When there are part owners of property, tenants in common, joint tenants, or other persons holding property together, and some of them advance more money than their shares for expenses or other purposes touching such property, those who are in advance are entitled to contribution from the others in order to an equalization.²⁸

When one of several sureties has paid the whole debt for which they were jointly bound, he has a right to contribution from the others.

The ground of relief is found in equitable considerations, and exists independently of any implied contract which furnishes the ground for the remedy at law.²⁹ The ordinary advantages of equitable remedies over the legal, in case of numerous parties with confused and conflicting interests, obtain in cases under the present head,³⁰ and where one surety is insolvent, he will be disregarded in apportioning the contributory shares in equity;³¹ or in case of the death of a surety, his representative must contribute;³² and where there are distinct heads of suretyship with different penalties, contributory shares will be proportioned to the penalties, at least in some cases.³³

Contribution takes place in another case. When, in order to save a ship, part of the goods on board are thrown into the sea, then there must be an apportionment of the loss among the ship's freight and the goods which have been saved, to indemnify the owner of those lost in a just proportion; this contribution is called *general average*.³⁴ If, in a case of this kind, the unfortunate owner of the goods cast overboard had no remedy but an action at law, he would be compelled to sue each owner of other goods separately for his contri-

²⁵ Jeremy, Eq. Jur. 364, 518; 1 Story, Eq. Jur. § 503; Noel v. Robinson, 1 Vern. Ch. 94; Walcott v. Hall, 2 Brown, Ch. 305; Davis v. Davis, 1 Dick. Ch. 32; Jewson v. Grant, 3 Swanst. Ch. 659; Averall v. Wade, Lloyd & G. Ir. Ch. 264, and note. Statutory provisions exist to the same effect in several of the states, giving the executor a remedy at law.

²⁶ Armistead v. Dangerfield, 3 Munf. Va. 29; Stevens v. Cooper, 1 Johns. Ch. N. Y. 425.

²⁷ 2 Story, Eq. Jur. § 504; see Waring v. Cam, 1 Pars. Eq. Cas. Penn. 516, 523; Wright v. Hunter, 1 East, 20; 5 Ves. Ch. 792; Sells v. Hubbell, 2 Johns. Ch. N. Y. 397; Niven v. Spickerman, 12 Johns. N. Y. 401; Dunham v. Gillis, 8 Mass. 462.

²⁸ Rogers v. Mackenzie, 4 Ves. Ch. 752; Lingard v. Bramly, 1 Ves. & B. Ir. Ch. 114.

²⁹ White & T. Lead Cas. Eq. 60, n.; Stirling v. Forrester, 3 Bligh, Hou. L. 490; Campbell v. Messier, 4 Johns. Ch. N. Y. 334; Norton v. Coons, 7 N. Y. 33; see Taylor v. Savage, 12 Mass. 98.

³⁰ Craythorne v. Swinburne, 14 Ves. Ch. 159; Coope v. Tuynam, 1 Turn. & R. Ch. 426; Hyde v. Tracey, 2 Day, Conn. 422; Ransom v. Keyes, 9 Cow. N. Y. 128; Taylor v. Savage, 12 Mass. 98; Cutter v. Emery, 37 N. H. 567.

³¹ Cowell v. Edwards, 2 Bos. & P. 268; Deering v. Winchelsea, 1 Cox, Ch. 318. That this is now the doctrine at law, see Mills v. Hyde, 19 Vt. 59; Henderson v. McDuffee, 5 N. H. 38; Jones v. Blanton, 6 Ired. Eq. No. C. 116.

³² Primrose v. Bromley, 1 Atk. Ch. 89.

³³ Deering v. Winchelsea, 1 Cox, Ch. 318; Coope v. Tuynam, 1 Turn. & R. Ch. 426; Story, Eq. Jur. Redfield, ed., § 497, a. See also before, 1432-1434.

³⁴ Marshall, Ins. B. 1, c. 12, s. 7; Abbott, Shipp. 342; Bouvier, Law Dict. *Average*.

bution, because one decision would not be conclusive on the others. The amount to be recovered would have to depend in every case on the value of all the interests to be affected, which could scarcely be estimated alike by different juries; besides, some of the parties liable to contribution might be insolvent, and not able to contribute any thing to the general loss.³⁵

There are cases where the owners of an estate will be required to make contribution; as, where a judgment has been rendered against a man, and it is binding on a tract of land, afterward the owner divides it into four parts, and sells a part to each of four persons, if one of them, to save his own land, pays the whole debt, he will be entitled to contribution from the others.³⁶

In all these cases a writ of contribution would lie at the common law, or in virtue of the statute of Marlebridge, but the remedy would be very imperfect. On the contrary, a court of equity, having the capacity to bring all the parties before it, and to refer the matter to a master, to take an account, and adjust the whole apportionment at once, grants a sure, safe, commodious and expeditious remedy.

3941. When treating of divisible and indivisible agreements,³⁷ we may remember that it was stated that when a debt is due and payable by one person to another, although susceptible of division by its nature, it must be executed between the parties as if it could not be divided. In other words, when the contract is entire it cannot, in general, be apportioned. *Annua nec debitum judex non separat ipsum* is an applicable maxim in such cases.

Though courts of equity will not, in general, apportion an entire contract, yet, when equitable circumstances connected with the case give it another aspect, they will grant relief, and redress the wrong which would arise from a strict legal construction; for example, when an apprentice gave a fee to his master to teach him his business, and after a considerable time had elapsed he was discharged from the indentures of apprenticeship in consequence of the misconduct of the master, it was decreed that the indenture should be given up and part of the apprentice fee paid back.³⁸

In another place the rule with regard to the apportionment of rents among the different owners of the fee, and for various spaces of time, has been considered.³⁹ This will abridge our further examination of the subject.

There are many cases where the liabilities will be apportioned among the owners of an estate, and equity will entertain a bill for that purpose. Take, for example, the case of a mortgage over different parcels of land, afterward sold to different persons, each holding in fee in severalty the portion he has purchased. In this case, each is bound to contribute to the common burden in the proportion which his land bears to the whole, which is subject to the mortgage.⁴⁰ A court of equity in this case, having the power to call all the parties before it, can alone render ample justice.

³⁵ *Hallet v. Buisfield*, 18 Ves. Ch. 190; *Cope v. Doherty*, 4 Kay & J. Ch. 367.

³⁶ *Harbert's Case*, 3 Coke, 12.

³⁷ Before, **694, 698**.

³⁸ *Lockley v. Eldridge*, Cas. temp. Finch, 128; *Savin v. Bowdin*, Cas. temp. Finch, 396; see *Hale v. Webb*, 2 Brown, Ch. 80; *Thurman v. Abell*, 2 Vern. Ch. 64, but this is decided on a different principle.

³⁹ Before, **697**.

⁴⁰ *Harbert's Case*, 3 Coke, 12, 14; *Harris v. Ingledew*, 3 P. Will. Ch. 98; *Cheeseborough v. Millard*, 1 Johns. Ch. N. Y. 409; *Stevens v. Cooper*, 1 Johns. N. Y. 425; *Skeel v. Spraker*, 8 Paige, Ch. N. Y. 182.

A question of some importance has arisen in such a case as this, where the subsequent purchasers or incumbancers have taken at different times as to the proportion of the burden chargeable upon each part of the estate. In some jurisdictions it is held that as between the purchasers they are to be charged in the reverse order of the time of purchase, the last purchased first to its full value, and so on. *Cowden's Estate*, 1 Penn. St. 267;

A court of equity alone has the capacity to do complete justice where different persons have an interest in an estate under mortgage; as, for instance, tenants for life or in tail, remainder-men, tenants in dower, tenants by the curtesy, or for a term of years. When the mortgage is to be redeemed or paid, they must contribute in certain proportions, and the interest must also be kept down in the same proportion. The remedy at law would be very imperfect, because all the persons having an interest could not be made parties to the action. In equity, on the contrary, the court can call all the parties before it and administer exact justice to them all.⁴¹

3942. In cases of *liens or pledges*, it is not unfrequently necessary to have an account in order to ascertain what are the rights of the owner and of the creditor; these can be adjusted by a court of equity.

Other cases involving accounts arise either from *privity of contract*, or relation, or from adverse or conflicting interests; such are accounts between landlord and tenant, where there have been receipts and expenditures for a great length of time.

In the case of *waste*, where the wrong-doer has made a profit, he may be called to an account in equity; as, where a tenant had opened new mines and made a profit out of them and a discovery was required, a court of equity could compel the wrong-doer to make an account.

Upon an examination of these cases, it will be found that the court generally assumes jurisdiction on some equitable ground, such as fraud, accident, or mistake; or the want of a discovery; or because there is some impediment at law, and for this reason justice cannot be obtained there; or that there exists some constructive trust; or that the interference of the court is required to prevent a multiplicity of suits; these being the *grounds* upon which courts of equity assume a jurisdiction.

3943. Dower may be recovered in courts of law, and in the United States great facilities have been given for its recovery, so that recourse is seldom had to courts of equity; besides, the simplicity of our titles enables courts of law in general to do complete justice. Courts of equity, however, have concurrent jurisdiction, particularly when a bill of discovery is required in order to obtain a just account of the rents and profits of the estate; as, when the title-deeds of dowable lands are kept from the widow.

In some cases, indeed, the remedy at law is very imperfect. For example, when the widow dies after judgment and before the damages are assessed, her personal representatives lose their damages;⁴² and if the tenant dies during the same period, she cannot recover. On the contrary, if at the time of filing a bill the plaintiff's legal right to damages is not gone, the court will decree an account of the rents and profits to their respective representatives.⁴³

Holden *v.* Pike, 24 Me. 427; Wikoff *v.* Davis, 3 Green, Ch. N. J. 24; Bradley *v.* George, 2 All. Mass. 392; George *v.* Kent, 7 *id.* 16; Gaskill *v.* Line, 2 Beasl. Ch. N. J. 400; Schuyser, *v.* Teller, 9 Paige, Ch. N. Y. 173; Green *v.* Ramage, 18 Ohio, St. 428; Lyman *v.* Lyman, 32 Vt. 79; Carter *v.* Neal, 24 Ga. 346; and this appears to be the sounder doctrine. It has, however, been held that the incumbrance should be borne rateably according to the values of the estates. Barnes *v.* Rackster, 1 Younge & C. Ch. 401; Brigden *v.* Bignold, 2 *id.* 377; Averall *v.* Wade, Lloyd & G. Ir. Ch. 252; Dickey *v.* Thompson, 8 B. Monr. Ky. 312; Life Ins. Co. *v.* Cutter, 3 Sandf. N. Y. 176.

⁴¹ 1 Story, Eq. Jur. §§ 485, 487, 488; 1 Powell, Mortg. 311; White *v.* White, 4 Ves. Ch. 33; Allan *v.* Backhouse, 2 Ves. & B. Ch. Ir. 70; Penryn *v.* Hughes, 5 Ves. Ch. 107; 1 Fonblanque, Eq. B. 1, c. 5, § 9, and note. A tenant for life of an equity of redemption is bound to pay the interest on a mortgage of the premises, although he cannot be required to pay the principal. Saville *v.* Saville, 2 Atk. Ch. 463; Shrewsbury *v.* Shrewsbury, 1 Ves. Ch. 233.

⁴² See White *v.* Parnter, 1 Knapp, Priv. Coun. 226.

⁴³ Park, Dower, 330, 339; Jeremy, Eq. Jur. 306; 1 Story, Eq. Jur. § 624; Curtis *v.* Curtis, 2 Brown, Ch. 632.

3944. The third remedy in particular cases, where courts of law and courts of equity have concurrent jurisdiction, is *partition*. The latter courts interfere only because the remedy at law is inadequate and imperfect; and, without the aid of a court of equity to promote a discovery, or to remove some obstruction at law to the right of recovery, or to grant some other equitable redress, justice could not be done;⁴⁴ or to prevent a multiplicity of suits.⁴⁵

Another reason why a court of equity should interfere is that such a court, with a view of making a more convenient and perfect partition of the premises, may decree a pecuniary compensation, in order to equalize them, to one of the parties for *owelty* of partition.⁴⁶ At law there is no authority to give owelty, the jury being required to make partition of the premises between the parties, regard being had to their true value.⁴⁷

⁴⁴ *Agar v. Fairfax*, 17 Ves. Ch. 551; *Mitford*, Eq. Pl. 110; *Jeremy*, Eq. Jur. 303; 1 *Fonblanque*, Eq. B. 1, c. 1, § 3, note (*f*).

⁴⁵ *Mitford*, Eq. Pl. 110, n.

⁴⁶ *Coke*, Litt. 169, a; 1 *Whart. Penn.* 292; 1 *Watts*, Penn. 265; *Hughes*, Abr. *Partition & Partner*, § 2, n. 8; *Calmody v. Calmody*, 2 Ves. Ch. 570; *Wilkin v. Wilkin*, 1 *Johns. Ch. N. Y.* 116.

⁴⁷ *Coke*, Litt. 167, b.

CHAPTER VII.

THE EXCLUSIVE JURISDICTION OF COURTS OF EQUITY.

- 3946-3971. Trusts.
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 - 3947. General assignments.
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3945. We come next to treat of the great head of equitable jurisdiction, in which the courts of equity neither act as assistants to courts of law nor have merely a concurrent jurisdiction with them. In the cases to be considered under this title they have *exclusive* jurisdiction, no other court being able to grant relief or to redress the injury. The principal subjects usually treated of under this head relate to trusts, election and satisfaction, charities, infants, married women, idiots, lunatics, and persons *non compos mentis*, the writ of *supplicavit*, the writ of *ne exeat regno*.

3946. In the view which we took of equitable estates,¹ we bestowed some considerations on the creation and nature of trusts which it will not be necessary here to repeat. Our present observations will be confined to the management of the trust property, so far as a court of equity can direct it, and the remedies for breaches of trust.

In this examination we shall treat successively of assignments, marriage settlements, mortgages, wills, the execution of implied trusts, foreign trusts,

3947. A *general assignment* for the benefit of creditors is a transfer of all a debtor's property to an assignee, in trust for the payment of the assignor's debts. This is generally done by deed, under the regulations of the statute law in the place where it is made; when the assignment has been accepted by the assignee, he becomes a trustee for the creditors, and chancery will compel the execution of the trust for their benefit.²

It is not necessary that the creditors should be technical parties thereto to entitle them to the benefit of the trust.³ It is sufficient if they have notice and assent, and such assent will be presumed if there are no stipulations against their interest.⁴

Questions under such assignments are much less frequent than formerly, in consequence of the existence of a bankrupt law, and prior to that in consequence of the existence of insolvent laws in many of the states.⁵

3948. All kinds of property will pass by such an assignment, for although a *chose in action* is not assignable at law, yet it may be assigned in equity. Courts of equity will consequently give effect to assignments and trusts, and possibilities of trusts, and contingent interests, whether real or personal estates, and of *choses in action*. In all these cases the assignment will be considered as amounting to a declaration of trust, and an agreement to permit the assignee

¹ Before, 1888.

² *Moses v. Murgatroyd*, 1 Johns. Ch. N. Y. 119; *New England Bank v. Lewis*, 4 Pick. Mass. 518; *Robertson v. Sublett*, 6 Humphr. Tenn. 313; *Pearson v. Rockhill*, 4 B. Monr. Ky. 296; *Montelius v. Wright*, Wright, Ch. Ohio, 61.

³ *Simmonds v. Pallas*, 2 Jones & L. Ir. Ch. 489; *Lane v. Husband*, 14 Sim. Ch. 656; *New England Bank v. Lewis*, 8 Pick. Mass. 113; *Halsey v. Whitney*, 4 Mas. C. C. 206; *Brashear v. West*, 7 Pet. 608.

⁴ *Egberts v. Woods*, 3 Paige, Ch. N. Y. 517; *Marbury v. Brooks*, 11 Wheat. 78; *Wilt v. Franklin*, 1 Binn. Penn. 502; and see *Merrill v. Inglesby*, 28 Vt. 150; *Todd v. Bucknam*, 11 Me. 41; *Fall River Iron Works v. Croade*, 15 Pick. Mass. 11.

⁵ See the cases of *Stickney v. Crane*, 35 Vt. 89; *Fairchild v. Hunt*, 1 McCart. Ch. N. J. 367, for important considerations as to general validity.

to use the name of the assignor in order to recover the debt, or to reduce the property into possession.⁶

The assignment may be enforced, or it may be impeached in a court of equity. When a creditor seeks the benefit of the assignment, he must either make the other creditors parties, or file a bill on behalf of others who may choose to come in, as well as of himself; but when his object is to set aside the assignment, he files a bill in his own name against the assignor and the assignee alone, without making the other creditors parties.⁷

3949. Most of the principles which regulate general assignments in trust will apply with equal force to particular or special assignments, to one person in trust for another. These assignments are frequently so made that they do not give the *cestui que trust* any legal right to enforce them, and recourse must be had to a court of equity.

Take, for example, a case which frequently occurs, that of a debtor remitting a bill to one of his creditors, with direction to pay to several others a portion of the money arising from the bill. In such case, the receipt of the bill or the collection of the money will not be an appropriation of it to the use of the creditors so as to enable them to maintain an action at law for its recovery, unless there has been an agreement, express or implied, to pay it.⁸

In equity, on the contrary, a trust would in such case be created in favor of the equitable assignee on the fund, and would constitute an equitable lien upon it.

But in order to entitle a creditor to claim such money in equity he must have had notice of the transaction and assented to it, for till this is done, the debtor may revoke his authority, and the creditors will have no lien on the fund.⁹ If, instead of a bill, merchandise had been sent, the debtor might have withdrawn it and applied it to some other use at any time before the knowledge and acceptance of the creditor for whom it was intended. The true test in such cases to ascertain whether the creditor is or is not entitled to the money or merchandise, is to consider who should have borne the loss if it had been destroyed. Undoubtedly until the creditor's knowledge and assent the loss must have been supported by the debtor, for the property was then his own; after such assent, the creditor would have been entitled to it, and if it had been lost, he must have suffered the damage, according to the maxim *res perit domino*.¹⁰

When the assignment of a *chose in action* is tainted with fraud, as, where it is accompanied by champerty and maintenance, courts of equity will not lend their aid for its recovery.¹¹ By *champerty* is meant a bargain with a plaintiff or a defendant, *campum partire*, to divide the land or other thing sued for between them, if they prevail at law, the champertor agreeing to carry on the suit at his own expense.¹² It differs from *maintenance* in this, that in the latter the

⁶ *Buck v. Swasey*, 35 Me. 52; *Trull v. Eastman*, 3 Metc. Mass. 121; *Calkins v. Lockwood*, 17 Conn. 154; *Mitchell v. Winslow*, 2 Stor. C. C. 630.

⁷ *Wakeman v. Grover*, 4 Paige, Ch. N. Y. 24.

⁸ *De Bernales v. Fuller*, 14 East, 590, n; see *Mandeville v. Welch*, 5 Wheat. 277; *Tiernan v. Jackson*, 5 Pet. 597; *Yates v. Bell*, 3 Barnew. & Ald. 64; *Williams v. Everett*, 14 East, 582; *Bacon v. Husband*, 4 Barnew. & Ald. 611.

⁹ *Scott v. Porcher*, 3 Mer. Ch. 662; see *Acton v. Woodward*, 3 Mylne & K. Ch. 492.

¹⁰ *Tiernan v. Jackson*, 5 Pet. 598; *Williams v. Everett*, 14 East, 582.

¹¹ *Arden v. Patterson*, 5 Johns. Ch. N. Y. 44; *Strachan v. Brander*, 1 Ed. Ch. 308; *Burke v. Green*, 2 Ball & B. Ch. Ir. 517; *Wood v. Griffith*, 1 Swanst. Ch. 55; *Wood v. Downes*, 18 Ves. Ch. 125; *Hartley v. Russell*, 2 Sim. & S. Ch. 244; *Merritt v. Lambert*, 10 Paige, Ch. N. Y. 352; *Lathrop v. Amherst Bank*, 9 Metc. Mass. 489; *Elliott v. McClelland*, 17 Ala. N. S. 206; *Thompson v. Warren*, 8 B. Monr. Ky. 488.

¹² *Williams v. Protheroe*, 3 Younge & J. Exch. 129; *Thalhimer v. Brinkerhoof*, 20 Johns. N. Y. 386; 3 Cow. N. Y. 623; *Thurston v. Percival*, 1 Pick. Mass. 416.

person assisting the suitor receives no part of the benefit, while in the former he receives one-half, or other proportion, of the thing sued for.¹³

3950. When a trustee has power to sell and assign property held in trust and the purchaser has notice of the trust, he is generally bound, unless a different provision has been made in the instrument creating the trust, to see to the *application of the purchase money* and that the trust is executed by the trustee. But this rule applies only to cases when the trust is of a defined and limited nature, as that the purchase money shall be laid out for the payment of a portion or of a mortgage; for if the trust is of a general and unlimited kind, as to pay all the debts of a testator, the rule does not apply.¹⁴

It will be readily perceived that when *personal estate* is directed to be sold by a testator, or when it is sold without a direction, for the payment of the testator's debts, the purchaser will not be liable to see to the application of the purchase money; if this were otherwise, purchasers would be greatly embarrassed and the estate much injured by such a rule.

With regard to *real estate*, when there is a devise for the payment of debts generally the rule applies as in the case of personalty, for the same reason, the general nature of the trust and the difficulty of seeing to the application of the purchase money.¹⁵ But when the trust is for the payment of debts ascertained and mentioned in a schedule, or for the payment of legacies, the purchaser is bound to see to the application of the purchase money.¹⁶

3951. A marriage settlement is an agreement made by the parties in contemplation of marriage in relation to their estate or some part of it, by which it is tied up and declared to be for the uses therein mentioned.¹⁷ But a distinction must be observed between a settlement made before marriage and marriage articles only for a settlement; when a settlement is made after marriage in pursuance of articles made before, it will be controlled by the articles.¹⁸

In the construction of these instruments, the rule is, that with regard to marriage settlements when the trusts are accurately created and defined by the parties, and consequently may be said to be *executed*, courts of equity construe them in the same way as legal estates of the same kind would be construed at law if the same terms had been used.¹⁹ But when no settlement has been executed, and there are only articles for a settlement which are merely *executory*, the courts of equity when called upon to execute them will regard the end and legal operation of the words in which the articles or trusts are expressed,²⁰ always construing them according to the presumed intent most beneficially for the issue of the marriage. They will require that the limitations in the marriage settlement shall be what are denominated in strict settlement.²¹

¹³ 4 Sharswood, Blackst. Comm. 135.

¹⁴ 1 Maddock, Chanc. Pract. 443, 609; 1 Powell, Mortg. 214, 250; Shaw v. Boner, 11 Keen, Ch. 559; Elliot v. Merryman, 1 Barn. Ch. 78; St. Mary's Church v. Stockton, 4 Halst. Ch. N. J. 520; Duffy v. Calvert, 6 Gill, Md. 487; Gardner v. Gardner, 3 Mas. C. C. 178.

¹⁵ Coke, Litt. 290, b, Butler's note (1), § 12; 2 Fonblanque, Eq. B. 3, c. 6, § 2, notes (k) and (b); 2 Story, Eq. Jur. § 1130; Ball v. Harris, 4 Mylne & C. 269; Gardner v. Gardner, 3 Mas. C. C. 178; Goodrich v. Proctor, 1 Gray, Mass. 567; Wormley v. Wormley, 8 Wheat. 421; Canbury v. Duval, 10 Penn. St. 267; Hauser v. Shore, 5 Ired. Eq. No. C. 357.

¹⁶ Sugden, Vend. 518; 1 Maddock, Chanc. Pract. 609; Watkins v. Cheek, 2 Sim. & S. Ch. 199; Grant v. Hook, 13 Serg. & R. Penn. 259; Andrews v. Sparhawk, 13 Pick. Mass. 393.

¹⁷ Rice, Eq. So. C. 315.

¹⁸ Stubbs v. Whiting, 1 Rand. Va. 322.

¹⁹ 1 Fonblanque, Eq. B. 1, c. 6, § 7.

²⁰ 1 Fonblanque, Eq. B. 1, c. 6, § 7, note (n), and § 8, note (s).

²¹ By strict settlement is meant the limitation of the estate to the parents for life, with remainders to the first and other sons, etc., in fee tail, and not to the parents in fee tail. When the settlement is applicable to daughters, then they are to take in the same way. 2 Story, Eq. Jur. § 983.

Marriage settlements, as used in England, are of rare occurrence in this country. And equity will execute such settlements at the suit of persons within the limits of the direct operation of the settlement, as children by the proposed marriage when it will not at the instance of volunteers, as distant relations, etc.²²

3952. When treating of estates upon condition we considered the form, the nature, and the different kinds of mortgages, the rights of the mortgagor and of the mortgagee, and the requisites of such instruments; little remains to be added in this place.²³

By a strict construction of the mortgage at law, if the money due by the condition was not paid at the day, the estate was forfeited and the mortgagor had no remedy. This was such manifest injustice that courts of equity, acting upon their general principles and in imitation of the Roman law,²⁴ soon began to interpose to prevent such flagrant injustice, and treated a mortgage as a security for money borrowed and the estate forfeited at law as a trust, and that the mortgagor had an *equity of redemption* which he could enforce against the mortgagee as any other trust, by offering, within a reasonable time, to pay the debt and all just charges, and redeem his estate.²⁵ This right of the mortgagor is so perfect that it cannot be defeated, even by an express agreement contained in the mortgage; as, if the mortgagor agreed that if the money should not be paid by a particular day, the estate should be irredeemable.²⁶

3953. Having already examined the nature of wills and testaments, and by whom they may be made and their effects, our inquiries will now be confined to the consideration of *express trusts* of real or personal property created by last will and testament. These trusts, in whatever manner they arise, or for what objects soever they may be created, are within the jurisdiction of courts of equity.

In the construction of trusts created by will, courts are called upon to decide of their effect when there is no trustee appointed, when the trustee refuses to execute the trust, when the persons who are to take, or the property given, are uncertain.

3954. It not unfrequently happens that a testator creates trusts by his will without designating any trustee who is to execute them; and sometimes there is such an imperfect designation of the trustee that it is doubtful who is the proper party. In such cases the courts of equity will themselves undertake through their officers to execute the trust, it being a rule in equity that a trust shall never fail for the want of a proper trustee. In such cases, when real estate is the object of the trust, the *heir at law* will be considered as the trustee, and if personal estate be its object, the *personal representative* will be so treated.²⁷

When executors are named in the will, and there is a mere naked authority to sell, if no one is designated as the trustee, and executors are named in the testament, they will be deemed, by implication, to be the proper parties to sell; because when lands are directed to be sold, they are treated as money; and as executors are liable to pay the debts, and, if lands were money, would be the

²² *Neves v. Scott*, 9 How. 197; *Dennison v. Goehring*, 7 Penn. St. 175; *King v. Whitely*, 10 Paige, Ch. N. Y. 465; *Minturn v. Seymour*, 4 Johns. Ch. N. Y. 500.

²³ See before, 1819 to 1826.

²⁴ Pothier, Pand. lib. 20, t. 5; 1 Domat, lib. 3, t. 1, § 3, art. 1.

²⁵ 2 Fonblanque, Eq. B. 3, c. 1, § 13, note (c).

²⁶ 2 Fonblanque, Eq. B. 2, c. 3, § 4, note (e), and B. 2, c. 3, § 5; Coke, Litt. 204, b, Butler's note; Comyn, Dig. *Chancery*, 4, A, 1 and 2; *Holdridge v. Gillespie*, 2 Johns. Ch. N. Y. 33.

²⁷ See *White v. White*, 1 Brown, Ch. 12; *Pit v. Pelham*, 1 Chanc. Cas. 288.

proper parties to receive it for that purpose, it is considered in equity that the testator intended that the parties who are finally to execute the trust are the proper parties to sell the land to carry out the intention of the testator.²⁸

3955. When a person has been appointed a trustee by the last will of the testator, he may accept the trust or reject it, for it is a rule that powers are never imperative; it is always at the election of the party to whom they are given to act under it or not. At law, when a power is given, coupled with a trust, and the party to whom it is given refuses to act or dies, the trust is gone for ever. In equity, on the contrary, the courts will compel the trustees to execute the powers, because coupled with a trust, although they could not compel them to execute a mere naked power unconnected with any trust.²⁹ In case of their death, the trust is held to survive, and its execution may be enforced by a decree when a proper bill has been filed by the parties in interest.³⁰

3956. In the administration or distribution of assets, it is sometimes difficult to say who are the parties entitled to take, and to point out the exact limitations of their respective interests. In such cases courts of equity exercise a beneficial jurisdiction, by which the cross equities and the conflicting claims of the various claimants are settled and equitably adjusted. This is done by a reference to a master, upon whose report a decree is made.

3957. Although recommendatory or precatory words used by a testator, of themselves, seem to leave it as a matter of discretion to the devisee to act as he may deem proper, giving him a discretion, as when a testator gives an estate to a devisee, and adds that he hopes, recommends, has a confidence, a wish or desire that the devisee shall do certain things for the benefit of another person, yet courts of equity have construed such precatory or recommendatory expressions as creating a trust.³¹

But this construction will not prevail where either the objects to be benefited are imperfectly described,³² or the amount of property to which the trust should attach is not sufficiently defined.³³

3958. The reader will remember that it has already been stated³⁴ that an implied trust is one which, without being expressed, is deducible from the nature of the transaction as a matter of interest, or which is superinduced upon the transaction by operation of law as a matter of equity, without any intention of the parties.³⁵ These implied trusts may therefore be divided into those which arise from the presumed intention of the parties, and those which arise by operation of law.³⁶

3959. Many cases of implied trusts have already been considered,³⁷ so that our labors here will be much reduced. Our inquiries will now be confined to cases of resulting trusts, equitable liens, and cases where property is purchased subject to a charge.

3960. A resulting or constructive trust is one which arises in a case where it

²⁸ *Peter v. Beverly*, 10 Pet. 532; *Jackson v. Ferris*, 15 Johns. N. Y. 346.

²⁹ *Tollett v. Tollett*, 2 P. Will. Ch. 490.

³⁰ *Brown v. Higgs*, 8 Ves. Ch. 570; *Richardson v. Chapman*, 5 Brown, Parl. Cas. 400; see *Commonwealth v. Barnitz*, 9 Watts, Penn. 252; *Coke, Litt.* 113, a, note (2), by Hargrave.

³¹ *Dashwood v. Peyton*, 18 Ves. Ch. 41; *Paul v. Compton*, 8 Ves. Ch. 380; *Bacon, Abr. Legacies*, B.

³² *Harland v. Trigg*, 1 Brown, Ch. 142; *Tibbits v. Tibbits*, 19 Ves. Ch. 664; *Cary v. Cary*, 2 Schoales & L. Ch. Ir. 189.

³³ *Meredith v. Heneage*, 1 Sim. Ch. 542, 556; *Morice v. Bishop of Durham*, 10 Ves. Ch. 536. See *Lewin, Trust.* 77; 2 *Story, Eq. Jur.* §§ 1070, 1071.

³⁴ Before, 1897.

³⁵ *Bacon, Abr. Uses and Trusts*, part 1, C, Bouvier, ed.

³⁶ *Elliott v. Armstrong*, 2 Blackf. Ind. 198.

³⁷ Before, 1897.

would be contrary to the principles of equity that he in whom the property becomes vested should hold it otherwise than as a trustee for the party who originally created it. Suppose, for example, A should deliver property to B, to be paid or delivered to C. In such case B would be a trustee for C, although there might be no agreement on the subject. But until C has become a party to it, if the trust has been without consideration, it is revocable by A, and then the original trust is gone and there is an implied resulting trust in favor of A.³⁸

The cases of resulting trusts are very numerous, and cannot be here examined in detail. As a general rule, it may be stated that where the whole of the estate is conveyed or devised, but for particular objects and purposes, or on particular trusts, if the objects, purposes, or trusts fail and do not take effect by any accident, or if they are all accomplished and do not exhaust the whole property, there arises a resulting trust for the grantor, or deviser, or his heirs.³⁹ So where a man buys land in the name of another and pays the consideration, the grantee will in general be considered a trustee for the party paying the money,⁴⁰ although to this general rule there are many exceptions.

3961. But there are circumstances which, when fully established by evidence, will rebut the presumption of a resulting trust; when, for example, a parent purchases in the name of a son, the purchase will be deemed *prima facie* intended as an *advancement*, because a parent is under a moral obligation to provide for his children.⁴¹ Upon the same principles, when a parent takes securities in the name of a child, they will be considered as an advancement⁴² unless the contrary be fully established by proof. And as he is alike bound to provide for his wife, securities taken in her name will be considered as a provision for her.⁴³

3962. A lien in its most extensive signification includes every case in which real or personal property is charged with the payment of any debt or duty, every such charge being denominated a lien on the property. In a more limited sense it is defined to be a right of detaining the property of another until some claim against the owner is satisfied. A lien is not either a *jus in re* nor a *jus ad rem*; that is, not a property in the thing itself, nor does it constitute a right of action for the thing; it is simply a charge upon it. For this reason it is not attachable as personal property, nor as a chose in action of the person who is entitled to it.⁴⁴

Liens at law generally arise either from express contract, or the usages of trade, or the manner of dealing between the parties,⁴⁵ and, with some exceptions, are in general lost when they consist in the possession of the thing by the loss of the possession;⁴⁶ for example, the lien on goods for freight, the lien for repairs of goods, and lien on goods for the balance of accounts, are all extinguished by a voluntary surrender of the thing to which they are attached.⁴⁷ But when

³⁸ Priddy v. Rose, 3 Mer. Ch. 102; Linton v. Hyde, 2 Madd. Ch. 9; Dearle v. Lovering, 3 Russ. Ch. 1; Page v. Broom, 4 Russ. Ch. 6.

³⁹ 2 Fonblanque, Eq. B. 2, c. 5, § 1, note (a); Jeremy, Eq. Jur. 13, 130; 2 Story, Eq. Jur. § 1200.

⁴⁰ Steere v. Steere, 5 Johns. Ch. N. Y. 1; Powell v. Monson, 3 Mas. C. C. 362; Peabody v. Tarbell, 2 Cush. Mass. 232.

⁴¹ Dyer v. Dyer, 2 Cox, Ch. 93; Comyn, Dig. *Chancery*, 4, W, 4; Jeremy, Eq. Jur. 89 to 92; Bacon, Abr. *Uses and Trusts*, D.

⁴² Rider v. Kidder, 10 Ves. Ch. 366; Ebrand v. Dancer, 2 Chanc. Cas. 26; Lloyd v. Read, 1 P. Will. Ch. 607.

⁴³ 1 Fonblanque, Eq. B. 2, c. 5, § 3; Dyer v. Dyer, 2 Cox, Ch. 92; Jeremy, Eq. Jur. 92.

⁴⁴ Meany v. Head, 1 Mas. C. C. 319.

⁴⁵ Jarvis v. Rogers, 15 Mass. 389.

⁴⁶ In the case of seamen's wages and bottomry bonds, it is not necessary to retain the possession of a thing in order to continue the lien.

⁴⁷ Abbott, Shipp. 171.

the possession is not requisite to support the lien, its surrender will not destroy it; as, for example, if a tenant of a farm should have a judgment against his landlord, the surrender of the estate after the lease expired would not affect the lien of the judgment.

3963. Liens are divided into legal and equitable. The former are those which may be enforced in a court of law; the latter are valid only in a court of equity. Our observations under this head will be confined to equitable trusts. These liens arise from constructive trusts, and are wholly independent of the possession of the thing to which they are attached; as, a charge or incumbrance. The lien which the vendor of real estate has on the estate sold for the *purchase money* remaining unpaid is a familiar example of an equitable lien.⁴⁸ It exists not only against the vendee himself and his heirs, and other privies in estate, but also against all subsequent purchasers having notice that the purchase money remains unpaid.⁴⁹ The vendee, his heirs, and all other persons who have such notice, are considered to the extent of the lien as trustees for the vendor, upon the ground that having gotten the estate of another they cannot, in conscience, keep it without the payment of the consideration money.⁵⁰

But a distinction must be observed between the cases of a volunteer and purchasers under him with notice, or having an equitable title only, and a purchaser under a conveyance of the legal estate, made *bona fide* without notice, for a valuable consideration which has been paid. In the former case the purchaser becomes a trustee, and, as such, responsible for the unpaid purchase money; in the latter the lien of the vendor is gone.⁵¹

When the vendee has sold the estate to a *bona fide* purchaser without notice, and the consideration money has not been paid by the latter, the original vendor, being unpaid, may proceed against the estate for his lien, or against the consideration money in the hands of such purchaser for satisfaction, because, in such case, the latter, not having paid his money, takes it *cum onere*, to the extent of the consideration money which remains unpaid, it being a rule in equity that where trust money can be traced, it shall be applied to the purposes of the trust.⁵²

An assignee, under a general assignment for the benefit of creditors generally, will be considered as a volunteer, and not a purchaser for a valuable consideration, and, therefore, bound to pay the purchase money remaining unpaid out of the property assigned; on the contrary, an assignment made to particular creditors, for their security or satisfaction, when they have no notice that the purchase money remains unpaid, will be considered as any other *bona fide* purchaser without notice.⁵³

In general, the lien of the vendor is presumed to exist for the unpaid purchase money, and it lies upon the purchaser to show it has been discharged,⁵⁴

⁴⁸ Mathews, Pres. 392.

⁴⁹ Mackreth v. Symmons, 15 Ves. Ch. 329; Bayley v. Greenleaf, 7 Wheat. 46; Garson v. Green, 1 Johns. Ch. N. Y. 308; Champion v. Brown, 6 Johns. Ch. N. Y. 402; 1 Fonblanque, Eq. B. 1, c. 3, § 3, note (e); Ross v. Whitson, 6 Yerg. Tenn. 50; Eubank v. Poston, 5 T. B. Monr. Ky. 287; White v. Casanave, 1 Harr. & J. Md. 106; Ghiselin v. Ferguson, 4 Harr. & J. Md. 522; Graves v. McCall, 1 Call, Va. 414; Hundley v. Lyons, 5 Munf. Va. 342; Wynne v. Alston, Dev. Eq. No. C. 163; Voorhis v. Instone, 4 Bibb, Ky. 342; Gallo-way v. Hamilton, 1 Dan. Ky. 576; Watson v. Wells, 5 Conn. 468.

⁵⁰ See Mackreth v. Symmons, 15 Ves. Ch. 340, 347.

⁵¹ Champion v. Brown, 6 Johns. Ch. N. Y. 402; Boon v. Barnes, 23 Miss. 136.

⁵² See Lench v. Lench, 10 Ves. Ch. 511; Ex parte Morgan, 12 Ves. Ch. 6; Irvine v. Campbell, 6 Binn. Penn. 118; Wood v. Bank of Kentucky, 5 T. B. Monr. Ky. 195; Eubank v. Poston, 5 T. B. Monr. Ky. 287.

⁴⁸ Bayley v. Greenleaf, 7 Wheat. 56; Mitford v. Mitford, 9 Ves. Ch. 100.

⁵⁴ Mackreth v. Symmons, 15 Ves. Ch. 342; Garson v. Green, 1 Johns. Ch. N. Y. 308; Hughes v. Kearney, 1 Schoales & L. Ch. Ir. 135.

this may be done by proving that separate securities have been taken by the vendor for the purchase money.⁵⁵

3964. Sometimes a lien is created for the money expended in *repairs and improvements* of an estate, either real or personal; as, where they have been made on joint property for a joint benefit.

3965. With regard to *real estate* it may be stated that at common law when there are two tenants in common, or joint tenants of a house or mill, and it happens to fall into decay, and one of them is willing to repair and the other is not, he who is willing to repair may sue out a writ *de reparatione facienda*, because the owners are bound *pro bono publico* to maintain houses and mills which are for the habitation of man.⁵⁶ In equity, money laid out, *bona fide*, for repairs and improvements, constitutes a lien upon the land, when expended by one tenant in common, or a joint tenant, for the benefit of both.⁵⁷

At law there is no remedy in these cases, unless there has been an express or implied agreement upon which the action may be founded; but in equity, on the contrary, the remedy has been extended to all cases where the party making the repairs and improvements acted *bona fide* and innocently, and there has been a substantial benefit conferred on the owner, so that, *ex æquo et bono*, he ought to pay for such benefit.⁵⁸

3966. Liens for repairs to *personal property* do not generally exist where the property is not in the possession of the creditor, but it seems a lien exists for repairs done to foreign ships, in favor of material men and artificers, and if paid by the master of the ship, he is substituted with regard to such claims to the rights of artificers and material men.⁵⁹

3967. When property is bought subject to a charge or debt, and the debtor makes himself personally liable by his own express contract or covenant for it, the lien is continued by implication, and the real estate is treated as the primary debtor, and the purchaser is a surety. In a case of this kind, when the purchaser dies, as between his heirs, devisees, or distributees, the debt is to be paid out of the real estate, and if it should be collected on the bond or personal obligation, out of the personal estate, the party entitled to the personal assets will be substituted in the place of the creditor, and be entitled to payment out of the real estate.⁶⁰

3968. The next object to occupy our attention will be implied or constructive trusts, which arise without any intention on the part of the trustee, but which are binding upon his conscience by operation of law.

3969. The law raises a trust where money has been paid to another by mistake, and where the receiver cannot in conscience keep it; he is then considered as a trustee for him from whom he received it. It is material in these cases to distinguish between a mistake of law and a mistake of fact. If A pay

⁵⁵ *Brown v. Gilman*, 4 Wheat. 255, 290; *Weelbom v. Williams*, 8 Ga. 258; *Green v. Der-noss*, 10 Humphr. Tenn. 371; *Dixon v. Dixon*, 1 Md. Ch. Dec. 220.

⁵⁶ Coke, Litt. 200, b; Bacon, Abr. *Joint Tenants*, L; Fitzherbert, Nat. Brev. 127, a; see *Loring v. Bacon*, 4 Mass. 576; *Doane v. Badger*, 12 *id.* 65; *Converse v. Ferre*, 11 *id.* 326.

⁵⁷ 2 *Fonblanque*, Eq. B. 2, c. 4, § 2, note (g); *Lake v. Gibson*, 3 P. Will. Ch. 158.

⁵⁸ *Town v. Needham*, 3 Paige, Ch. N. Y. 545; *Hibbert v. Cooke*, 1 Sim. & S. Ch. 552; see *Graham v. Graham*, 6 T. B. Monr. Ky. 562; *Robinson v. Ridley*, 6 Madd. Ch. 2; *Green v. Biddle*, 8 Wheat. 1; *Shine v. Gough*, 1 Ball & B. Ch. Ir. 444.

⁵⁹ *The Aurora*, 1 Wheat. 185; *The General Smith*, 4 Wheat. 438; *The St. Jago de Cuba*, 9 Wheat. 409.

⁶⁰ *Lechmere v. Charleton*, 15 Ves. Ch. 197; *McLearn v. McClellan*, 10 Pet. 625; *Craig v. Leslie*, 3 Wheat. 582; *Hewes v. Dehon*, 3 Gray, Mass. 305; *Cumberland v. Codrington*, 3 Johns. Ch. N. Y. 229, 257; *Halsey v. Reed*, 9 Paige, Ch. N. Y. 446; *Dover v. Gregory*, 10 Sim. Ch. 393; and see *Hoff's Appeal*, 24 Penn. St. 200; *Mitchell v. Mitchell*, 3 Md. Ch. Dec. 71; *Thompson v. Thompson*, 4 Ohio, St. 333.

to B a sum of money which he believed he owed him, and, in fact, A's agent had before that time paid B's agent, this is a mistake of fact, and B becomes a trustee for that money for the use of A; but if A had paid the same money to B, supposing that the statute of limitation was no bar, when, in truth, it barred the debt, this is a mistake of law, and, as B was justly entitled to be paid, the money cannot be recovered from him;⁶¹ for, having received only what belonged to him, he is not bound in conscience to return it.⁶²

3970. It is a rule of very universal application that whenever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be liable in its new form to the rights of the original owner, or of the *cestui que trust*.

When property which is the object of a trust is sold or transferred by the trustee to another, with notice of the trust, the purchaser will hold it subject to the trust as it was in the hands of the original trustee.⁶³ And when trust property has been changed, it will not be divested of the trust, but if it can be traced, that, or the property which represent it, will continue subject to the trust, because an abuse of a trust can never give a right.⁶⁴ For the same reason the trustee is liable for all profits and interest he has made out of the property held by him in trust.⁶⁵

3971. The trusts which have been the subject of our inquiries have all been of domestic origin and to be executed in this country. There are others which attach to trust property situate in a foreign country, or are to be executed there.

It has already been observed that courts of equity are not confined in their jurisdiction to the subject matter which is to be affected by the decree. The decree of such a court acts primarily *in personam*. When the parties are within their jurisdiction or within their process, these courts will take cognizance of the case and afford full relief, although the property may be in a foreign country, unless in cases where the court cannot, in the nature of things, afford the relief asked; as, to grant partition of lands in a foreign country.⁶⁶

In cases of fraud, trust, or contract, courts of equity will exercise a jurisdiction wherever the person may be found, although lands which are the subject matter in dispute may be in another jurisdiction, and they may be affected by the decree.⁶⁷

3972. By the term election, as used in equity, is meant the obligation on a

⁶¹ 2 Fonblanque, Eq. B. 2, c. 1, note (b); Ripley v. Gelston, 9 Johns. N. Y. 201; Morris v. Tarrin, 1 Dall. 148; Bogart v. Nevins, 6 Serg. & R. Penn. 369; Irvine v. Hanlin, 10 Serg. & R. Penn. 219; Espy v. Allison, 9 Watts, Penn. 462; Mann's Appeal, 1 Penn. St. 24; Hinkle v. Eichelberger, 2 Penn. St. 484.

⁶² Courts of law will entertain an action of assumpsit, for money had and received, when the money has been paid under such circumstances that the receiver cannot, *ex æquo et bono*, retain it.

⁶³ Adair v. Shaw, 1 Schoales & L. Ch. Ir. 243, 262; Harford v. Lloyd, 20 Beav. Rolls, 310; Hope v. Liddell, 21 id. 183; Hennessy v. Bray, 33 id. 96; Taylor v. Plumer, 3 Maule & S. 574; Oliver v. Piatt, 3 How. 333; Murray v. Lylburn, 2 Johns. Ch. N. Y. 441.

⁶⁴ Hassel v. Smithers, 12 Ves. Ch. 119; Taylor v. Plumer, 3 Maule & S. 574; Murray v. Lylburn, 2 Johns. Ch. N. Y. 441; Comyn, Dig. *Chancery*, 4, W, 29; Thompson v. Perkins, 3 Mas. C. C. 252; Oliver v. Piatt, 3 How. 333; Whitwell v. Warner, 20 Vt. 425; Giddings v. Eastman, 5 Paige, Ch. N. Y. 561; Murray v. Lylburn, 2 Johns. Ch. N. Y. 441; Frith v. Cartland, 2 Hurlst. & M. Ch. 417; Docker v. Somes, 2 Mylne & K. Ch. 655; Harford v. Lloyd, 20 Beav. Rolls, 310.

⁶⁵ Murray v. Lylburn, 2 Johns. Ch. N. Y. 441; Murray v. Ballou, 1 Johns. Ch. N. Y. 581.

⁶⁶ Kildare v. Eustace, 2 Chanc. Cas. 188; Cartwright v. Pettus, 2 Chanc. Cas. 214; Mitchell v. Bunch, 2 Paige, Ch. N. Y. 606; Massie v. Watts, 6 Cranch, 160; Foster v. Debon, 7 All. Mass. 57.

⁶⁷ Massie v. Watts, 6 Cranch, 160.

party to choose between two alternative rights or claims, in cases where he is entitled to one, but not to both. As, for example, in the case of two bequests to one devisee in a will, where from the contract it is apparent that the second gift is designed to be effectual only in the event of his declining the first, and the substance of the gifts combined is an *option*.

The foundation of the doctrine is the intention of the author of the instrument; as the intention extends to the whole disposition, it is frustrated by the failure of any part. This doctrine of election, with many other doctrines of the courts of equity, appears to be derived from the civil law.⁶⁸ In that system of law this doctrine seems to have been confined to wills, and it was first applied to such cases in English jurisprudence.⁶⁹

3973. Courts of equity have adopted the principle that a person shall not be permitted to claim under any instrument, whether it be a deed or will, without giving full effect to it in every respect, so far as such person is concerned. This doctrine is particularly called into exercise when a testator gives what does not belong to him, but to some other person, and gives to that person some estate of his own, by virtue of which gift a condition is implied, either that the legatee shall part with his own estate or shall not take the bounty.

In a case of this kind, equity will not allow the first legatee to insist upon that by which he would deprive another legatee under the same will of the benefit to which he would be entitled if the first legatee permitted the whole will to operate, and therefore compels him to make his election between his rights, independently of the will, and the benefit under it. The principle of equity does not give to the disappointed legatee the right to detain the thing itself, but gives a right of compensation out of something else.⁷⁰

3974. To impose upon a party claiming under a will the obligation of making an election, the intention of the testator must be expressed, or clearly implied, in the will itself, in two respects: first, to dispose of that which is not his own; and, secondly, that the person taking the benefit under the will should take under the condition of giving effect to it.

Other cases of election might be put. A testator may bequeath property to his wife in satisfaction of her dower; wherever this appears, either by express words or by implication, it creates a case of election. But a simple gift of a legacy to a wife will not deprive her of her dower, and unless the intention to the contrary is clear, she will be entitled to both.⁷¹

Again, where the testator gives one of several things; as, one of my horses; or where he mentions two things and bequeaths one of them; as, my house in the city of Philadelphia, or five thousand dollars, at his choice.

3975. This doctrine of election applies only to *volunteers*, it does not bind *creditors*; they may take the benefit of a legacy for payment of debts, and also enforce their legal claims for the balance remaining unpaid, upon other funds disposed of by will.⁷²

3976. As the very term election imports a choice, the party who is to make it has a right to take sufficient time to *obtain information*, and, if need be, to a bill of discovery for that purpose. In general, he is not bound to make an

⁶⁸ Inst. 2, 20, 4, 24, 1; Dig. 30, 39, 7; Pothier, Pand. lib. 30, t. 1, n. 125; Domat, liv. 4, t. 2, § 3, arts. 3, 4, et 5.

⁶⁹ Dillon v. Parker, 1 Swanst. Ch. 397, note; Birmingham v. Kirwan, 2 Schoales & L. Ir. Ch. 449; Usticke v. Peters, 4 Kay & J. Ch. 437; McElfest v. Schley, 2 Gill, Md. 182; Preston v. Jones, 9 Penn. St. 456.

⁷⁰ 2 Roper, Leg. Ch. 23, s. 1, p. 378.

⁷¹ Birmingham v. Kirwan, 2 Schoales & L. Ch. Ir. 452; 3 Woodesson, Lect. 493; Holditch v. Holditch, 2 Younge & C. Ch. 18; Roberts v. Smith, 1 Sim. & S. Ch. 513; Fuller v. Yeates, 8 Paige, Ch. N. Y. 325.

⁷² Kidney v. Coussmaker, 12 Ves. Ch. 153.

election until all the circumstances are known, and the state, condition, and value of the funds are clearly ascertained, for till then he can make no discriminating choice, and a choice made in ignorance of such facts is not conclusive upon him.⁷³

3977. An election may be made by express acts or by implication; in general, the cases must be decided by the circumstances attending them, rather than upon any rule; but long acquiescence is always evidence of a choice.⁷⁴

The court will not presume a disclaimer of the bequest where it is not manifestly to the disadvantage of the devisee, but will where it is so.⁷⁵

3978. In equity *satisfaction*⁷⁶ is defined to be the donation of a thing, with the intention, express or implied, that such donation is to be an extinguishment of some existing right or claim in the donee. By satisfaction the testator does not intend to fulfil the contract, but he substitutes one thing for another, which is at least equivalent to it.⁷⁷

This, like the doctrine of election and many others, was known and used by the civilians, and has been transplanted, much to the ornament and usefulness of our system of equity jurisprudence.⁷⁸

Satisfaction may be express or implied. When a testator gives a legacy and declares that it shall be considered as a payment, settlement, or satisfaction of a debt or duty he owes, it is *express*, and the legatee will not be entitled to it and also the debt or duty.

But most cases of satisfaction are *implied*, it being presumed that the legacy is given for the purpose of liquidating or satisfying the obligation of the testator; for where a person indebted to another bequeaths to his creditor a legacy equal to or exceeding the amount of the debt which is not noticed in the will, courts of equity, in the absence of any intimation of a contrary intention, have adopted the rule that the testator shall be presumed to have meant the legacy as a satisfaction of the debt.

When a testator, being indebted, bequeaths a legacy to his creditor *simpliciter*, and of the same nature as the debt, and not coming within any of the exceptions mentioned below, it has in general been held to be a satisfaction of the debt when the legacy is equal to or exceeds the amount of the debt.⁷⁹

3979. To this general rule of implied satisfaction there are many exceptions,⁸⁰ the principal of which are the following:

⁷³ *Dillon v. Parker*, 1 Swanst. Ch. 381, note (a). And it must be shown that the party was cognizant of his rights. *Thurston v. Clifton*, 21 Beav. Rolls, 447; *Edwards v. Morgan*, 13 Price, Exch. 782.

⁷⁴ *Dillon v. Parker*, 1 Swanst. Ch. 359, 381. As to the manner of making an election, when there is a disability on account of minority or coverture, see Mr. Swanston's note (c) to *Gratton v. Howard*, 1 Swanst. Ch. 413. And see for the effect of various circumstances, as change of situation, lapse of time, disability, etc., *Brice v. Brice*, 2 Moll. 21; *Stratford v. Powell*, 1 Ball & B. Ir. Ch. 1; *Frank v. Frank*, 3 Mylne & C. Ch. 1; *Thynne v. Glengall*, 2 Hou. L. Cas. 131; *Addison v. Bowie*, 2 Bland. Ch. Md. 606.

⁷⁵ *Harris v. Watkins*, 2 Kay & J. Ch. 473; *Grosvenor v. Durston*, 25 Beav. Rolls, 97; *Anderson v. Abbott*, 23 *id.* 457.

⁷⁶ See generally as to satisfaction, *Fonblanque*, Eq. 333; *Yelv.* 11, note; *Suppl. to Ves. Ch.* 204, 308, 311, 342, 348; 8 *Comyn*, Dig. Appendix, *Satisfaction*; *Roberts*, *Frauds*, 46, n. 15; 2 *Story*, Eq. Jur. Ch. 30; *Roper*, Leg. Ch. 17; *Stallman*, *Election and Satisfaction*; *Mathews*, *Pres. Ch.* 6; 1 *Roper*, *Husb. & W.* 501 to 511; 2 *Roper*, *Husb. & W.* 53-63.

⁷⁷ *Goldsmith v. Goldsmith*, 1 Swanst. Ch. 219.

⁷⁸ *Dig.* 30, 1, 84, 6; *Dig.* 30, 1, 123.

⁷⁹ *Prec. Chanc.* 240.

⁸⁰ The courts of equity lay hold of slight circumstances to escape from the general rule and create exceptions to it. In the case of *Mathews v. Mathews*, 2 *Ves. sen. Ch.* 636, Sir Thomas Clark, master of the rolls, gives the subject an examination well worthy of perusal.

When the legacy is of *less value* than the debt, it shall not be deemed a part payment or satisfaction.⁸¹

When the debt and legacy are of equal amount and there is a difference in *the times of payment*, so that the legacy may not be equally beneficial to the legatee as the debt.⁸²

When the legacy and the debt are of a *different nature*, either with reference to the subjects themselves or with respect to the interest given.⁸³

When the provision by the will is given for a *particular purpose*, such purpose will prevent the testamentary gift from being construed a satisfaction of the debt, because it is given *diverso intuitu*.⁸⁴

When the debt is contracted *subsequently* to the making of the will, because the testator could not intend to satisfy a debt which he did not owe at the time of making his will.⁸⁵

When the legacy is *uncertain and contingent*.⁸⁶

When the *debt itself is contingent*, as when it arises from a running account between the testator and legatee,⁸⁷ or it is a negotiable bill of exchange.⁸⁸

When there is an express direction in the will for the payment of *debts and legacies*, the court will infer from the circumstances that the testator intended that both the debt owing from him to the legatee and the legacy should be paid.⁸⁹

3980. Another important subject in which courts of equity have exclusive jurisdiction is that of *charities*, which are a species of trusts.⁹⁰

Charity, in its widest sense, denotes all the good affections which men ought to bear toward each other;⁹¹ in its most restricted, which is the popular sense, it signifies relief to the poor. These species of charity are mere moral duties which cannot be enforced by the law.⁹² But the term charity is not employed in either of these senses in law; its signification is derived chiefly from the statute of 43 Eliz. c. 4. Those purposes are considered charitable which are enumerated in the act, or which by analogy are deemed within its spirit and intendment.⁹³ Lord Chancellor Camden describes a charity to be a gift to a general public use, which extends to the rich as well as to the poor.⁹⁴

In the discussion of this subject it will be proper to inquire into the history of charities, the jurisdiction of courts of equity in cases of charities, the form and construction of the gift, and void charities.

3981. The use of charities probably owes its origin to the Roman law. The

⁸¹ *Graham v. Graham*, 1 Ves. sen. Ch. 262.

⁸² *Atkinson v. Webb*, Prec. Chanc. 236; *Goldsmid v. Goldsmid*, 1 Swanst. Ch. 219; *Nicholls v. Judson*, 2 Atk. Ch. 300; *Clark v. Sewell*, 3 Atk. Ch. 96; *Haynes v. Mico*, 1 Brown, Ch. 129; 1 McClel. & Y. Exch. R. 41.

⁸³ *Forsight v. Grant*, 1 Ves. Ch. 298; *Richardson v. Elphinstone*, 2 Ves. Ch. 463; *Eastwood v. Vinke*, 2 P. Will. Ch. 614.

⁸⁴ *Mathews v. Mathews*, 2 Ves. sen. Ch. 635; see *Foster v. Evans*, 6 Sim. Ch. 15.

⁸⁵ *Cransmer's Case*, 2 Salk. 508; *Thomas v. Bennet*, 2 P. Will. Ch. 343.

⁸⁶ *Nichols v. Judson*, 2 Atk. Ch. 300.

⁸⁷ *Rawlins v. Powell*, 1 P. Will. Ch. 296.

⁸⁸ *Carr v. Eastbrook*, 3 Ves. Ch. 361.

⁸⁹ *Chancey's Case*, 1 P. Will. Ch. 408; *Field v. Mostin*, Dick. Ch. 543.

⁹⁰ As to charities generally, see *Boyle, Charities*; *Shelford, Mortm.* 59; 2 *Story, Eq. Jur. Ch.* 31; Appendix to 4 *Wheat.* 1 to 23; 2 *Maddock, Chanc. Pract.* 60; 2 *Roper, on Leg. Ch.* 19; 2 *Hovenden, on Frauds, Ch.* 26; *Jeremy, Eq. Jur.* 236; *Bacon, Abr. Charitable Uses and Mortmain*; 1 *Spence, Eq. Jur. Ch.* 11; *Duke, Charities.*

⁹¹ 1 *Epistle to Cor.* c. xiii.

⁹² *Kames, Eq.* 17.

⁹³ *Shelford, Mortm.* 59; *Morice v. Bishop of Durham*, 9 Ves. Ch. 399, 10 Ves. Ch. 522; *Cox v. Basset*, 3 Ves. Ch. 155; *Attorney General v. Bower*, 3 Ves. Ch. 714; *Moggridge v. Thackwell*, 7 Ves. Ch. 36; *Brown v. Yeall*, 7 Ves. Ch. 59, note (a).

⁹⁴ *Ambl. Ch.* 651; *Boyle, Char.* 51; *Bouvier, Law Dict. Charities.*

emperor Constantine, after his conversion to Christianity, greatly encouraged them. The usual rapacity of the clergy soon introduced such great abuses that it was found necessary to restrain them, and accordingly, in the time of Valentinian, certain mortmain laws were passed by which this permission to bequeath so lavishly to the church was withdrawn.

The history of uses in England is not easily traced anterior to the time of Elizabeth. It is probable that when charitable uses not superstitious were established at law in analogy to other cases of trusts, the court of chancery immediately held the feoffees to such uses accountable in equity for the due execution of them, and in order to regulate them, the statute of 43 Elizabeth was passed.

In the preamble of the statute are enumerated the uses which are considered charitable; these are gifts, devises, and bequests for the relief of aged, impotent, and poor people, for the maintenance of sick and maimed soldiers and mariners, for schools of learning, free schools, and scholars of universities, for repairs of bridges, ports, havens, causeways, churches, sea banks, and highways, for the education and preferment of orphans, for or toward the relief, stock, or maintenance for houses of correction, for marriages of poor maids, for the support, aid, and help of young tradesmen, handicraftsmen, and persons decayed, for the relief and redemption of prisoners or captives, or for aid or ease of any poor inhabitants, concerning payment of fifteenths, setting out of soldiers, and other taxes.

Since the passage of this statute, which is emphatically called the statute of charitable uses, no bequest is deemed within the authority of chancery, and capable of being established and regulated by it, except bequests for those purposes which that statute enumerates as charitable, or which, by analogy, are deemed within its spirit and intendment.

Though gifts for superstitious uses will not be supported, yet others which are useful, although they are not within the letter of the statute, are deemed charitable within the equity of its provisions.⁹⁵ In imitation of the Romans, the English were obliged to pass statutes of mortmain to prevent the abuse of giving charities,⁹⁶ the principal of which is the statute of 9 Geo. II, c. 36. This has not been generally adopted in the United States, though some of the provisions of the older statutes of mortmain have been adopted in some of the states of the Union.

3982. Since the enactment of the statute of 43 Elizabeth, courts of chancery have had express jurisdiction. After reciting the gifts for charitable uses which it legalizes, and that they had not been employed according to the charitable intent of the givers and founders, by reason of frauds, breaches of trusts, and negligence in those that should pay, deliver or employ the same, the statute proceeds to enact that it shall be lawful for the lord chancellor, or lord keeper, to award commissions under the great seal to the bishop of every diocese, and other proper persons, to inquire by the oaths of a jury, and by other lawful ways and means, of all gifts, limitations, assignments, and appointments aforesaid, of lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, or stocks of money, and of the abuses, breaches of trusts, negligences, misemployments, not employing, concealing, defrauding, misconverting, and misgovernment in respect of such property given, limited, assigned, or appointed, or hereafter to be given, etc., to or for any of the charitable or godly uses therein rehearsed; and upon inquiry had, to set down such orders, judgments, and decrees, etc., as the lands, etc., may be duly and faithfully employed

⁹⁵ Duke, Char. 105.

⁹⁶ 2 Roper, Leg. 101; 2 Sharswood, Blackst. Comm. 272. As to the etymology and meaning of mortmain, see Bouvier, Law Dict. *Mortmain*.

for the charitable uses and intents before rehearsed for which they are given; orders, etc., not being contrary to the orders of the founders, shall stand firm and good, and shall be executed accordingly, until the same shall be altered by the lord chancellor, etc., upon complaint by the party grieved.⁹⁷

The statute next makes provisions directing that certain cases shall be excepted from its operation, and how orders shall be made by the chancellor, etc., and how they shall be executed; and how and when such orders may be re-examined, and final orders and decrees shall be made.⁹⁸

The ample powers given to the court of chancery by this statute were exercised to their full extent, and the court assumed to do by original bill in the first instance what it could do upon a commission. When the trust was for a definite object, and the trustee living, the court had jurisdiction by its ordinary authority to compel its execution by bill, independently of the statute, for over all trusts the court has jurisdiction.⁹⁹

3983. In order to create a charity, the gift must be within the scope of the 43 Elizabeth, and it must be definite and certain. A distinction must be observed between gifts in favor of individuals, however charitable the motive, and gifts for charitable purposes, in the sense of our definition, or between those which have been named respectively *public* and *private* trusts.¹⁰⁰ In the latter case, an intended bounty which wants certainty in the designation of the person necessarily fails, for there is no one on whom the gift is to be bestowed. But when the gift is general, as for the poor of a particular place or district, objects may readily be found; so a perfect private trust, from its very nature, may be varied or even annulled by the persons who are its sole objects. When

⁹⁷ The statute of 43 Eliz. c. 4, is in force in Kentucky, *Gass v. Wilhite*, 2 Dan. Ky. 170; and North Carolina, *Griffin v. Graham*, 1 Hawks, No. C. 96; it is not in force in Maryland, *Dashiell v. Attorney General*, 5 Harr. & J. Md. 392; nor in Virginia, *Gallego v. Attorney General*, 3 Leigh, Va. 450. See 4 Wheat. 1; 3 Pet. 481. In Massachusetts and Pennsylvania, the principles adopted in the English courts of chancery, respecting charitable uses, under the 43 Eliz., have been adopted as the common law of those states. *Going v. Emery*, 16 Pick. Mass. 107; 4 Dane, Abr. 6; *Whitman v. Lex*, 17 Serg. & R. Penn. 88; *Mayor v. Elliot*, 3 Rawle, Penn. 170; *McGirr v. Aaron*, 1 Penn. 49; *Beall v. Fox*, 4 Ga. 404; *Miller v. Chittenden*, 2 Iowa, 316; *Carter v. Balfour*, 19 Ala. n. s. 814; *Dickson v. Montgomery*, 1 Swan, Tenn. 348; *Williams v. Williams*, 9 N. Y. 525; *Fountain v. Ravenel*, 17 How. 369. In delivering the opinion of the court in the case of *Wheeler v. Smith*, 9 How. 78, McLean, Justice, says, "Charitable bequests, from their nature, receive almost universal commendation. But when we look into the history of charities in England, and see the gross abuses which have grown out of their administration, notwithstanding the enlarged powers of the courts, aided by the prerogative of the sovereign and the legislation of parliament, doubts may be entertained whether they have, upon the whole, advanced the public good. When this country achieved its independence, the prerogatives of the crown devolved upon the people of the states; and this power still remains with them except so far as they have delegated a portion of it to the federal government. The sovereign will be made known to us by legislative enactment. And to this we must look in our judicial action, instead of the prerogatives of the crown. The state, as a sovereign, is *parens patriæ*."

"The common law, it is said, we brought with us from the mother country, and which we claim as a most valuable heritage. This is admitted, but not to the extent sometimes urged. The common law in all its diversities has not been adopted by any one of the states. In some it has been modified by statute, in others by usage. And from this it appears that what may be the common law of one state is not necessarily the common law of any other. We must ascertain the common law of each state by its general policy, the usages sanctioned by the courts, and its statutes. And there is no subject of judicial action which requires the exercise of this discrimination more than the administration of charities. No branch of jurisprudence is more dependent than this upon the forms and principles of the common law." See also *Perin v. Carey*, 24 How. 465; *Magie v. Dutch Church*, 2 Beasl. Ch. N. J. 77; *Attorney General v. Trinity Church*, 9 All. Mass. 422.

⁹⁸ See Statute, 43 Eliz. c. 4.

⁹⁹ See 2 Fonblanque, Eq. B. 2, pt. 2, c. 1, § 2, note (d).

¹⁰⁰ *Attorney General v. Aspinwall*, 2 Mylne & C. Ch. 618.

the trust is intended to be permanent, it cannot be subject to the will or caprice of those who, for the time being, may be its objects; so the rules against perpetuities cannot apply to charitable or public trusts, which, from their very nature, are generally intended to be perpetual.¹⁰¹

It is a general rule that when the trust is not ascertained, or when it is general and indefinite, or it is of a mere private nature, or not within the scope of the statute, it is utterly void, and the property passes to the next of kin.¹⁰²

3984. Courts of equity have always looked upon charities with a favorable eye, and such bequests have been more liberally construed than in the case of gifts to individuals. If, for example, a testator should give his property to such person as he should name to be his executor, and he should appoint no executor, in this case, as to individuals, the testator must be held to die intestate, and the next of kin will take. In cases of charity courts of equity will supply the place of an executor, and carry the bequest into effect, although, in the case of individuals, it must have failed.¹⁰³

But the courts have gone still farther, and have held that when the bequest indicates a charitable intention, and the object to which it is to be applied is against public policy, the court will lay hold of the positive intention and execute it for the purposes of charity agreeably to law, instead of defeating it altogether, or enforcing a thing to be done against the policy of the law.¹⁰⁴

3985. Another rule has been adopted in equity, that when a bequest is uncertain as to the persons, or whether the persons who are to take are *in esse* or not, or whether the legatee is capable or incapable of taking, or whether the bequest can be carried into execution or not, the courts will sustain the legacy on the doctrine of *cy près*.¹⁰⁵

These words, *cy près*, are old French, and signify *as near as*. When a devise is attempted which cannot be carried out, the courts do not declare the charitable bequest to be utterly void, but expound the will in such a manner as to carry the intention of the testator into effect, as near as the rules which prevent its being literally fulfilled will permit; this is called a construction *cy près*.¹⁰⁶

Numerous examples of such construction may be found in the books;¹⁰⁷ as, if a devise be made to an existing corporation by a misnomer which makes it void at law, it will be held good in equity.¹⁰⁸ When a charity is so given that

¹⁰¹ *White v. White*, 7 Ves. Ch. 433.

¹⁰² See *Ommaney v. Butcher*, 1 Turn. & R. Ch. 260; *Baptist Assoc. v. Hart*, 4 Wheat. 1; *McCord v. O'Chiltree*, 8 Blackf. Ind. 22.

¹⁰³ *Mills v. Farmer*, 1 Mer. Ch. 55, 96; *Moggridge v. Thackwell*, 7 Ves. Ch. 36. See *Attorney General v. Hickman*, 2 Eq. Cas. Abr.; *White v. White*, 1 Brown, Ch. 12. And in such a case the court will compel the heir to act till another be appointed by the court. *Burr v. Smith*, 7 Vt. 241; *Bartlett v. Nye*, 4 Metc. Mass. 378; *McCartee v. Orphan Society*, 9 Cow. N. Y. 484; *Potter v. Chapin*, 6 Paige, Ch. N. Y. 649.

¹⁰⁴ *Duke, Uses, Bridgman*, ed. 466; *De Costa v. Depas*, 1 Vern. Ch. 248; 7 Ves. Ch. 36, 75; *Casey v. Abbot*, 7 Ves. Ch. 490.

¹⁰⁵ *Duke, Char. Uses, Bridgman*, ed. 355; *Baptist Assoc. v. Hart*, 4 Wheat. 1; 3 Pet. App. 481.

¹⁰⁶ *Cruise, Dig. t. 38, c. 9, s. 34*; 2 Story, Eq. Jur. § 1169; *Jeremy, Eq. Jur.* 245. See, as to performance of conditions *cy près*, 1 Roper, Legacies, 514.

¹⁰⁷ See *Mills v. Farmer*, 1 Mer. Ch. 55; *Attorney General v. Combe*, 2 Chanc. Cas. 13; *Rivett's Case*, F. Moore, 890; *Attorney General v. Bowyer*, 3 Ves. Ch. 714; *West v. Knight*, 1 Chanc. Cas. 135; *White v. White*, 1 Brown, Ch. 12; *Attorney General v. Platt*, Cas. temp. Finch, 221; *Attorney General v. Peacock*, Cas. temp. Finch, 245; *Attorney General v. Syderfin*, 1 Vern. Ch. 224; *Clifford v. Francis*, 1 Freem. Ch. 330; *Bacon, Abr. Charitable Uses and Mortuaries*, E; *Duke, Char. Uses*, 33, 115; *Comyn, Dig. Chancery*, 2, N, 2; *Highmore, Mortm.* 204.

¹⁰⁸ *Anon.* 1 Chanc. Cas. 267.

there can be no objects, the court, under the doctrine of carrying the execution *cy près*, will order a new scheme to execute it.¹⁰⁹

Formerly, this doctrine of *cy près* was carried to such extravagant length that the court of chancery made a man's will, instead of permitting that to stand which he had himself declared to be such. But in modern times a more just and reasonable interpretation is given to such dispositions; the general intention will be carried into effect, if not in form, in substance. The court will not decree the execution of the trust of a charity in a manner different from that intended, unless it is apparent that intention cannot be carried out literally. When that is the case, the court will adopt another mode consistent with the general intention, so as to execute it in substance according to the will of the testator. And, to prevent the defeat of a charity, the court will dispose of the revenue by a new scheme, by virtue of the principle of *cy près*, as near as may be, consistently with the testator's will.

3986. In general, charitable bequests ought to be certain as to the persons or objects to which they are applied; but an uncertainty as to them will not render them void, for when the testator has manifested a general intention to give to charity, the failure of the particular mode by which the charity is to be effected will not destroy it, and if there are surplus funds, they will, upon the same principle, be applied to other purposes similar to those for which the principal fund was given. These rules go upon the intention of the testator, which courts of equity endeavor to effectuate.¹¹⁰

3987. But when the testator had but one particular object in view, and that fails, the legacy is void, and the next of kin will take, because in such case there is no general charitable intention.¹¹¹

3988. A charitable bequest may be avoided and the charity will fail for uncertainty on two grounds.

When the *amount* to be given is uncertain; for example, where the bequest contemplated the surplus which was to remain after a prior gift, void by the statute of mortmain, and as that gift was void it left the whole *corpus* of the fund unaffected by the prior gift, of course there could not be any *surplus* in strictness, and, there being no means of ascertaining how much the residue would have been, the charitable bequest was void.¹¹²

When the *purpose* of charity, expressed by the testator, is uncertain and indefinite; as, where the testator directed that the proceeds of certain trust moneys should, from time to time for ever, be applied by his trustees "in the purchasing of such books as, by proper dispositions of them under the following directions, may have the tendency to promote the interests of virtue and religion, and the happiness of mankind, the same to be disposed of in Great Britain, or any other part of the British dominions; this charitable design to be executed by, and under the direction or superintendence of, such persons, and under such rules and regulations, as by any decree or order of the high court of chancery shall from time to time be directed in that behalf." This bequest was determined to be too indefinite to be executed by the court, and of course the next of kin became entitled to it.¹¹³

¹⁰⁹ Attorney General *v.* Oglander, 3 Brown, Ch. 160; see Attorney General *v.* City of London, 3 Brown, Ch. 171; 1 Ves. Ch. 243.

¹¹⁰ See Attorney General *v.* Earl of Winchelsea, 3 Brown, Ch. 373; Mills *v.* Farmer, 1 Mer. Ch. 65; Attorney General *v.* Hurst, 2 Cox, Ch. 364, 365.

¹¹¹ Jeremy, Eq. Jur. 245; 2 Story, Eq. Jur. § 1182.

¹¹² Chapman *v.* Brown, 6 Ves. Ch. 404.

¹¹³ Browne *v.* Yeale, cited in note to 7 Ves. Ch. 50. See Morice *v.* Bishop of Durham, 9 Ves. Ch. 399, 10 Ves. Ch. 522; Moggridge *v.* Thackwell, 7 Ves. Ch. 36; James *v.* Allen, 3 Mer. Ch. 17; Ommaney *v.* Butcher, 1 Turn. Ch. 260; Vezey *v.* Jamson, 1 Sim. & S. Ch. 69.

3989. By the English law a *superstitious use* is described to be when lands, tenements, rents, goods, or chattels are given, secured, or appointed for and toward the maintenance of a priest or chaplain to say mass; for the maintenance of a priest or other man to pray for the soul of any dead man in such a church or elsewhere; to have or maintain perpetual obits, lamps, torches, etc., to be used at certain times to help to save the souls of men out of purgatory; these and such like uses are declared to be superstitious, to which the king, by force of several statutes, is authorized to direct and appoint all such uses to such purposes as are truly charitable.¹¹⁴

In the United States, where all religious opinions are free and the right to exercise them is secured to the people, a bequest to support a Catholic priest, and perhaps certain other uses forbidden in England, would not in this country be considered as superstitious uses.¹¹⁵ It is not easy to see how there can be a *superstitious use* in this country, at least in the acceptation of the British courts.¹¹⁶

In England gifts and bequests to superstitious uses are not held to be void, but the chancellor directs their application to some charitable purposes which are lawful under the idea that the main object of the testator was charity, and if his gift be applied to charitable uses, his intention has been followed.

3990. The next subject of examination under this head of exclusive jurisdiction is that which is exercised for the protection of infants and of their property.

It is perhaps not very certain upon what principle courts of equity have assumed jurisdiction over infants, nor is the speculative examination of the origin of such power of much consequence. In every civilized state the law must protect those who are unable to protect themselves, and where courts of chancery exist, this power is vested in them, or in courts possessing equitable powers. In some of the states of the Union, the power of appointing and removing guardians for infants and of taking care of their property is confided in special jurisdictions, vested with ample powers for the purpose, but differing greatly in their details.

Courts of equity exercise a power of appointing and removing guardians for infants and providing for their maintenance.

3991. When treating of persons¹¹⁷ we considered the various kinds of guardians, their rights and duties; it will not here be required that we should examine that subject. It will be sufficient to say that when an infant who has property has no guardian, or none who is capable of acting, and there is no other tribunal vested with this jurisdiction, a court of equity will appoint a guardian to take care of the person and estate of the infant.

Not only will a court of equity appoint guardians, but remove them, for the protection of the infant or of his property whenever such guardians have been guilty of misconduct, and this whether they have been appointed by its own authority or by the courts of common law, or even testamentary or statute guardians, whenever sufficient cause can be shown for such a purpose.¹¹⁸ This is upon the principle that a guardian is considered as a delegated trustee, and as

¹¹⁴ Bacon, *Abr. Charitable Uses and Mortmain*, D; Duke, *Char. Uses*, 105; Smart *v. Spurrier*, 6 Ves. Ch. 567; Adams *v. Lambert*, 4 Coke, 104.

¹¹⁵ See Magill *v. Brown*, Zane's Case, Pamph.; McGirr *v. Aaron*, 1 Penn. 49; Beaver *v. Filson*, 8 Penn. St. 327; Witman *v. Lex*, 17 Serg. & R. Penn. 388; Methodist Church *v. Remington*, 1 Watts, Penn. 224.

¹¹⁶ Methodist Church *v. Remington*, 1 Watts, Penn. 224.

¹¹⁷ Before, 339.

¹¹⁸ Matter of Nicoll, 1 Johns. Ch. N. Y. 25; Kettletas *v. Gardner*, 1 Paige, Ch. N. Y. 488; Disbrow *v. Henshaw*, 8 Cow. N. Y. 350.

such answerable in a court of equity for any abuse, or danger of abuse, of his trust. When the guardian has only been mistaken, or his conduct is less reprehensible than the commission of a wilful wrong, the court will regulate and direct his conduct in regard to the custody and maintenance of the ward.¹¹⁹

In its provident care for the benefit of infants a court of equity will not only remove guardians for improper conduct, but will assist them, when required, to obtain the custody of the ward, and compel the latter to submit to the lawful authority of the guardian.¹²⁰

3992. Though the law, following nature, has vested the parents with a power and authority over their children, upon the presumption that the children will be properly taken care of and brought up as useful members of society, yet when this presumption is rebutted, and it is found that they are guilty of gross ill treatment or cruelty toward their infant children, the latter will be taken out of their custody and placed under the care of persons who shall act as guardians. If, for example, a father should be in constant habits of drunkenness and blasphemy, or of low and gross debauchery, or guilty of such other conduct as tends to the corruption and contamination of his children, or should he otherwise act injuriously toward their interest or their property, the court of chancery will deprive him of this power which he has so shamefully abused, and vest it in more worthy hands.¹²¹

3993. In many instances an infant who stands in the condition of a ward in chancery will receive protection to which he would not be entitled if he were in another situation. An infant may be a ward of chancery by express appointment of a guardian, or by implication. Properly considered, a *ward of chancery* is a person who is under a guardian appointed by the court of chancery;¹²² but whenever there is a suit instituted in that court relative to the person or property of an infant, although he is not under any express general guardian appointed by the court, he is treated as a ward of the court, and as being under its special cognizance, care, and protection.¹²³

A ward of chancery being under the care and protection of the court, not only his person, but his property, is subject to its control. Every act done without direction of the court is considered a violation of its authority, and the party offending may be punished for a contempt, and compelled to submit to such orders by imprisonment as in other cases of contempt.¹²⁴

3994. When the matter is not vested by statute in other tribunals, a court of equity will, upon petition, without any formal proceedings by bill, settle a due maintenance upon the infant, whether he be a ward of the court or not.

It is usual in considering the amount to be fixed for the maintenance of an infant to take into view all the circumstances of the case, and in all things to do what is most for the benefit of the infant. In common cases the courts

¹¹⁹ Jeremy, Eq. Jur. 217; Foster v. Denny, 2 Chanc. Cas. 237; Spencer v. Earl of Chesterfield, Ambl. Ch. 146; O'Keefe v. Casey, 1 Schoales & L. Ch. Ir. 106; Duke of Beaufort v. Bertie, Dick. Ch. 791, 1 P. Will. Ch. 703; De Manneville v. De Manneville, 10 Ves. Ch. 65.

¹²⁰ Ex parte Hopkins, 3 P. Will. Ch. 152, Cox's note; Real v. Mellish, 2 Swanst. Ch. 533, 537, note.

¹²¹ Ex parte Mountfort, 15 Ves. Ch. 445, 446; Jeremy, Eq. Jur. 217, 218; 2 Story, Eq. Jur. § 1341; Wellesley v. Wellesley, 2 Bligh, Hou. L. N. s. 124; 2 Russ. Ch. 1, 20; Wood v. Wood, 3 Ala. N. s. 756.

¹²² 2 Fonblanque, Eq. B. 2, part 2, c. 2, § 1, note (b).

¹²³ Wellesley v. Wellesley, 3 Bligh, Hou. L. N. s. 137; Wright v. Nayler, 5 Madd. Ch. 77; Hughes v. Science, Ambl. Ch. 302, note.

¹²⁴ 2 Fonblanque, Eq. B. 2, part 2, c. 2, § 1, notes (b) and (c).

confine the expenses within the limits of the income;¹²⁵ but when the estate is small, and more means are necessary for the maintenance and support of the ward, the court will sometimes allow the capital to be broken upon; but without the sanction of the court, a trustee will not be permitted to use any of the capital for that purpose.¹²⁶

When the father of the infant is living, he is bound to support his child if of sufficient ability; but if he be not able to support his child according to his situation and prospects in life, and the child has a separate estate, a court of equity will, for his benefit, allow a sufficient sum for his maintenance and education.¹²⁷

3995. The courts of equity, considering a married woman as having some capacity, treat her differently from what she is treated at law. The object of this head will be to examine her condition during the coverture, her right to make contracts with her husband, how she may acquire separate estate, her right to alimony and maintenance.

3996. By the common law the husband and wife are treated for most purposes as one person. The legal existence of the wife is merged during the coverture into that of her husband, so that she is, in general, unable to enter into contracts with him, or, without his consent, with any other person;¹²⁸ she cannot sue or be sued without being joined with him.

In courts of equity, on the contrary, the husband and wife, although they are recognized as they are treated at common law in relation to their legal rights, are yet considered, as they are by the civil law, as having separate estates, being able to make separate contracts, creating separate debts, and suffering separate injuries. In equity, the wife may be sued by her husband, or she may sue him, as we shall see when we come to consider who may sue and be sued in equity.

3997. When the husband and wife make a contract before marriage, it is generally extinguished, both at law and in equity, by their subsequent union. But when, by articles entered into, or a settlement executed before marriage which is to acquire its force and effect by the marriage, by which the wife is to have a certain provision in lieu of her fortune, the husband virtually becomes a purchaser of the wife's fortune, and she becomes entitled to her provision, although there may be no intervention of trustees, and such contract will be enforced in equity.¹²⁹ And where the wife, before the marriage, gave a bond to her intended husband, that in case a marriage took effect, she would convey to him her estate in fee, the parties having subsequently married, this contract was enforced in equity.¹³⁰ It may be laid down as a rule that when the agree-

¹²⁵ *Teague v. Dendy*, 2 M'Cord. Eq. So. C. 211; *Sweet v. Sweet*, Speers, Eq. So. C. 309; *Long v. Norcom*, 2 Ired. Eq. No. C. 354.

¹²⁶ 2 Fonblanque, Eq. B. 2, part 2, c. 2, § 1, note (d); *Ex parte Green*, 1 Jac. & W. Ch. 253; *McDowell v. Caldwell*, 2 M'Cord, Eq. So. C. 58; *Heyward v. Cuthbert*, 4 Des. Eq. So. C. 445; *matter of Bostwick*, 4 Johns. Ch. N. Y. 100; *Cudworth v. Thompson*, 3 Des. Eq. So. C. 258; *Hanson v. Chapman*, 3 Bland, Ch. Md. 198.

¹²⁷ *Jeremy*, Eq. Jur. 221, 222; *Barry v. Barry*, 1 Moll. Ch. Ir. 210; *Simon v. Barber*, Taml. Rolls, 22. See *Edgeworth v. Edgeworth*, 1 Beat. 328; *Cudworth v. Thompson*, 3 Des. Eq. So. C. 258; *In the matter of Kane*, 2 Barb. Ch. N. Y. 375.

¹²⁸ See before, 275, *et seq.* By statute she is allowed to convey her real estate, or her dower in that of her husband, when she joins him in the deed, and it is acknowledged, as may be required by law. Even by the common law her very being is not absolutely extinct; she may act as attorney for her husband, and, with his consent, for others; she may swear articles of peace against him; she may also, with his consent, act as executrix. See 2 Story, Eq. Jur. § 1367, note.

¹²⁹ *Garforth v. Bradley*, 2 Ves. sen. Ch. 675, 677.

¹³⁰ *Carmel v. Buckle*, 2 P. Will. Ch. 243. See 2 Ed. Ch. 252; *Rippon v. Dawding*, Ambl. Ch. 566; *Rivers v. Rivers*, 3 Des. Eq. So. C. 190.

ment is such that it cannot create a debt or raise a demand during the coverture, the marriage shall not extinguish the agreement.¹³¹

3998. A contract made between husband and wife cannot be enforced at law, but post nuptial contracts, as between themselves, are in general obligatory in equity.¹³² If, for example, for a sufficient legal or equitable reason, a man contract with his wife that she should separately possess and enjoy property bequeathed to her, the contract would be enforced in equity; as, where the husband used the separate property of the wife, it was held this was a sufficient consideration for a deed by him to her.¹³³ So, on the other hand, if the wife, having a separate estate, should enter *bona fide* into a contract with her husband to make him a certain allowance out of the income of such separate estate, it would be enforced in equity, though void at law.¹³⁴

Indeed, not only will the express contracts between husband and wife, when made *bona fide*, be enforced in equity, but the wife may become the creditor of her husband without any such express agreement; as, when the wife unites with her husband to pledge her separate estate to pay his debts or to relieve his necessities, in equity the transaction will be treated according to the intent of the parties and she will be deemed a creditor, or, if so agreed upon in the first place, as a surety for him.¹³⁵

3999. In treating of *the separate estate of the wife* we must ascertain what is the wife's separate estate, how a married woman acquires separate property, how far the wife's separate property can be bound during the coverture, what is the wife's equity to have a settlement out of her own property, and what right a married woman has to dispose of her separate estate.

4000. By the term *separate estate* is meant that property which belongs to a married woman, and over which her husband has no right in equity. This may consist of lands or personal chattels.¹³⁶

There is one kind of property to which a *feme covert* is entitled, known by the name of *paraphernalia*. This term is derived from the Greek, and transplanted from the civil law into our own;¹³⁷ it is personal property which a married woman uses personally during her husband's life, consisting generally of her clothing, jewels, and ornaments suitable to her condition in life, and which she is entitled to retain after his death.¹³⁸

4001. During the lifetime of her husband a woman has only a qualified right to her paraphernalia. If such articles were given to her by her husband, they will not be treated as an absolute gift to her and as her separate property; for if they were, she might dispose of them at any time, and he could under no circumstances appropriate them to his own use. In this case a distinction is made between those which are articles of necessity and those which are mere

¹³¹ *Smith v. Stafford*, Hob. 216; *Clark v. Thompson*, Croke, Jac. 571; *Tylley v. Pierce*, Croke, Car. 376; *Lady d'Arcy's Case*, 1 Chanc. Cas. 21; *Pridgeon's Case*, 1 Chanc. Cas. 117.

¹³² *Fonblanque*, Eq. B. 1, c. 2, § 6, note (n); *Livingston v. Livingston*, 2 Johns. Ch. N. Y. 539.

¹³³ *Lessee of Hill v. West*, 8 Ohio, 223. See *Garlick v. Strong*, 3 Paige, Ch. N. Y. 440; *Sweat v. Hall*, 8 Vt. 187; *Dibble v. Hutton*, 1 Day, Conn. 21.

¹³⁴ *More v. Freeman*, Bunb. Exch. 205.

¹³⁵ *Fonblanque*, Eq. B. 1, c. 2, § 6, note (n); *Roper, Husband and Wife*, 143. See *James v. Fisk*, 17 Miss. 144; *Naimcewicz v. Gahn*, 3 Paige, Ch. N. Y. 614.

¹³⁶ *Firemen's Ins. Co. v. Bay*, 4 Barb. N. Y. 407. Such estate is not liable at common law for her debts contracted before marriage; and the only ground on which it can be reached in equity is that of appointment; that is, where she has done some act after marriage, indicating an intention to charge her property. *Vanderheyden v. Mallory*, 1 N. Y. 452.

¹³⁷ Dig. 23, 3, 9, 3; Cod. 5, 14, 8; *Domat*, lib. 1, t. 9, § 4.

¹³⁸ 2 *Sharswood*, Blackst. Comm. 435; *Comyn*, Dig. *Baron and Feme*, F, 3.

ornaments; the former are hers absolutely, while the latter are subject to the payment of his debts, and even liable to his disposition.¹³⁹ But if such articles were given to her by her father or other relative, or even by a stranger, either before or during the coverture, they will be considered her separate property, and if received with the husband's consent, he has no right to dispose of them, nor can his creditors take them for his debts.¹⁴⁰

4002. Formerly, a married woman could not take and enjoy any estate, whether personal or real, separately and independently of her husband; and though this rule has been somewhat relaxed, yet at common law a wife is much restricted in this respect. In equity, on the contrary, a married woman has the capacity to take both real and personal property to her separate use.¹⁴¹

The power to hold property to her separate use is frequently created by ante-nuptial agreements, which will be upheld in courts of equity. But this authority may be given in a variety of ways when the intention of the parties is clear, and no technical words are necessary to create such separate estate.¹⁴²

It was formerly supposed that trustees were indispensable in order to create a separate estate; and though it is highly proper that trustees should hold the legal estate for her, yet according to the modern practice and decisions, it is not indispensably requisite that they should interpose; for whenever real or personal property is given, or devised, or settled upon a married woman, either before or after marriage, for her exclusive and separate use without the intervention of trustees, the intention of the parties will be carried out in equity, and for this purpose the husband will be turned into a trustee for her,¹⁴³ or she will be regarded as a feme sole.¹⁴⁴

Not only under ante-nuptial agreements will she be able to hold separate property, but also a contract during the matrimonial connection made between him and her alone will be sufficient to entitle her to such separate property, and it will be enforced as if made with a stranger. Whether the separate estate be derived from the husband himself or from a stranger, he will, in either case, be treated as a trustee.¹⁴⁵

In cases of this kind, in order to create a separate estate, the intention must clearly appear,¹⁴⁶ for unless this intention is manifest, she will not have such separate estate as to exclude the marital rights of the husband.¹⁴⁷

4003. A married woman may also acquire a separate property by becoming a sole dealer and trader, by permission of her husband, even without deed; in this case she becomes entitled to all her earnings as her separate estate.¹⁴⁸ And

¹³⁹ Bacon, Abr. *Executors*, H; Rolle, Abr. 911. See *Graham v. Londonderry*, 3 Atk. Ch. 392; *Ridout v. Earl of Plymouth*, 2 Atk. Ch. 104; in the matter of *Grant*, 2 Stor. C. C. 312.

¹⁴⁰ 2 Roper, *Husb. and Wife*, 143; *Graham v. Londonderry*, 3 Atk. Ch. 393; in the matter of *Grant*, 2 Stor. C. C. 312.

¹⁴¹ Fonblanque, Eq. B. 1, c. 2, § 6, note (n).

¹⁴² *Ballard v. Taylor*, 4 Des. Eq. So. C. 550; *Griffith v. Griffith*, 5 B. Monr. Ky. 113; *Trenton Banking Company v. Woodruff*, 1 Green, Ch. N. J. 117; *Stewart v. Kissam*, 2 Barb. N. Y. 493; *Taylor v. Stone*, 21 Miss. 653.

¹⁴³ 2 Story, Eq. Jur. § 1380. See *Franklin v. Creyon*, Harp. Eq. So. C. 243; 5 B. Monr. Ky. 113. See *Guardian of Elms v. Hughes*, 3 Des. Eq. So. C. 158; *Porter v. Bank of Rutland*, 19 Vt. 410; *Blanchard v. Blood*, 2 Barb. N. Y. 352; *Ellis v. Woods*, 9 Rich. So. C. Eq. 19.

¹⁴⁴ *Firemen's Ins. Co. v. Bay*, 4 Barb. N. Y. 407.

¹⁴⁵ Fonblanque, Eq. B. 1, c. 2, § 6, note (n); 2 Story, Eq. Jur. § 1380.

¹⁴⁶ *Franklin v. Creyon*, Harp. Eq. So. C. 243; *Darley v. Darley*, 3 Atk. Ch. 399; *Wagstaff v. Smith*, 9 Ves. Ch. 520; *Tyler v. Lake*, 2 Russ. & M. Ch. 183; *Johnes v. Lockhart*, 3 Brown, Ch. 383, note; *Adamson v. Armitage*, Coop. Ch. 283, 19 Ves. Ch. 416; *Pritchard v. Ames*, 1 Turn. & R. Ch. 222; *Stanton v. Hall*, 2 Russ. & M. Ch. 175.

¹⁴⁷ *Tyler v. Lake*, 2 Russ. & M. Ch. 183; *Kensington v. Dolland*, 2 Mylne & K. Ch. 184; *Willes v. Sayers*, 4 Madd. Ch. 409; *Roberts v. Spicer*, 5 Madd. Ch. 491.

¹⁴⁸ *Magrath v. Robertson*, 1 Des. Eq. So. C. 445.

if a husband should desert his wife, and by the aid of her friends she should be enabled to carry on a separate trade, her earnings in such trade will be protected in equity from the claims of his creditors;¹⁴⁹ or if by virtue of antenuptial agreement, she should carry on business on her sole and separate account, her profits will be treated as her private property.¹⁵⁰

4004. In general, the wife cannot bind her person or property generally. She is allowed to bind her separate property, because as to that she is considered as a *feme sole*; but as to her general property, she is treated as a married woman, and in that capacity incapable of binding it, and subject to all the disabilities of that condition.

The intention of the wife must be clear that she intends to charge her separate property, for otherwise any contract she may make will not be enforced in equity, at least during her life. But when such is her intention, manifested by her acts, such estate will be charged, not in consequence of her contract, but upon the principle of an appointment; having the absolute power of disposing of the whole, she may dispose of a part, and her agreement to charge such estate will be considered an appointment *pro tanto*.¹⁵¹

4005. At common law, by the marriage, the wife is considered as giving absolutely all her personal estate, whether in possession or in action, to which she is actually or beneficially entitled or possessed of at that time, in her own right, or to which she may be entitled during coverture, to her husband. But, before the husband can have an absolute right to her choses in action, he must reduce them to possession; and, unless he does so during the coverture, on his death they survive to her, and, when she dies first, he can recover them only as her administrator.

4006. In relation to her chattels real, either in possession or which she may acquire during coverture, the husband has a qualified right; he may alienate them during coverture, and by that means deprive her of them for ever; or he may retain them till the death of one of them. When he dies first, they survive to her; when she dies first, he will be entitled to them.

4007. In some cases the husband cannot acquire the absolute title to the wife's personal property without the aid of a court of equity; in such case she is entitled to have settled upon her and her children a suitable provision out of her personal estate; this is called the *wife's equity*.¹⁵²

4008. The principal cases when the courts of equity interpose to secure the wife her equity are the following:

When the husband seeks the *aid of a court of equity*; the court requires in such case that he who seeks equity shall do equity; and, therefore, if the husband has not already made a settlement upon his wife and children, he will be required to do so before any assistance will be given him. Indeed, the court will go farther, for where an allowance has been made to the wife out of a settled estate, and that against the claim of creditors, on a new accession of fortune

¹⁴⁹ Cecil v. Juxon, 1 Atk. Ch. 278; Lamphir v. Creed, 8 Ves. Ch. 599; 2 Roper, Husb. and Wife, 173.

¹⁵⁰ 2 Roper, Husb. and Wife, 171.

¹⁵¹ Field v. Sowle, 4 Russ. Ch. 112; Stuart v. Kirkwall, 3 Madd. Ch. 387; Greatley v. Noble, 3 Madd. Ch. 94. See Roper, Husband and Wife, 243, 244; Clancy, Marr. Wom. 345.

¹⁵² Shelford, Mar. and Div. 605; 1 Meigs, Tenn. 551; Udall v. Kenney, 3 Cow. N. Y. 590; Kenney v. Udall, 5 Johns. Ch. N. Y. 446; Howard v. Moffat, 2 Johns. Ch. N. Y. 206; Glen v. Fisher, 6 Johns. Ch. N. Y. 33. See Ex parte Beresford, 1 Des. Eq. So. C. 263; Greenland v. Brown, 1 Des. Eq. So. C. 196; Bethune v. Beresford, 1 Des. Eq. So. C. 174; Clancy, Mar. Wom. 465; Murray v. Lord Elibank, 13 Ves. Ch. 6; Johnson v. Johnson, 1 Jac. & W. Ch. 459; Steinmetz v. Hathin, 1 Glyn & J. Bank. 64; Bennett v. Dillingham, 2 Dan. Ky. 437; Andrews v. Jones, 10 Ala. n. s. 400; Stevenson v. Brown, 3 Green, Ch. N. J. 503; Davis v. Newton, 6 Metc. Mass. 537; Vanduzer v. Vanduzer, 6 Paige, Ch. N. Y. 366.

during the coverture, they will decree a still further allowance, though the husband's creditors may be in danger of not being fully paid.¹⁵³

When the husband makes an *assignment of her equitable interest*, and the assignee cannot obtain it without coming into chancery, he will stand in no better position than the husband who assigned it; it is a general rule that the assignee of a chose in action or other equitable interest takes it subject to all equities to which they were liable in the hands of the assignor, whether such assignment be special for the benefit of the assignee, or general for the payment due to creditors. Assignees, therefore, take the property assigned, subject to the wife's right of survivorship, and if the husband should die before such assigned property has been reduced by them to possession, she will be entitled to it.¹⁵⁴

An assignment of her *reversionary interest*, even with her consent, will not in general deprive her of her right to it in case of survivorship. The reason assigned for this is that the assignment cannot, from the nature of the thing, amount to a reduction of possession of such interest, and her consent during coverture is not binding upon her.¹⁵⁵

When she seeks similar relief, *as plaintiff*, against her husband or his assignee in regard to her equitable interest,¹⁵⁶ the rule is now established that whenever she is entitled to this equity for a settlement out of her separate equitable interests against her husband or his assignees, she may enforce it by bringing suit and filing a bill by her next friend.¹⁵⁷

4009. The wife's equity may be waived or lost in numerous ways, among which are the following:

When *she has had an ample settlement* made upon her, she cannot of course ask for another, and therefore the court will not in such case interfere in her favor; but when the settlement is inadequate, unless it be made under an express contract before marriage, her equity will remain, and, as mentioned before, where there has been an increase of her fortune during the coverture, a further allowance will be made.¹⁵⁸

Although the wife's equity is for the benefit of herself and children, yet it is altogether *personal to her*, and if she die, the husband will be entitled to recover her equitable rights, through the aid of a court of equity, without making any provision for the children.¹⁵⁹

By giving her *consent* in open court pending such proceedings, and before a decree has been made, the wife may waive her rights; but when she is a ward of the court and marries without its authority, she cannot, by giving her assent, entitle the husband to the fund.¹⁶⁰

A wife may lose her equity by her own *misconduct*; as, when she lives apart from her husband in adultery, for by such misconduct she loses all right to the

¹⁵³ *Ex parte Beresford*, 1 Des. Eq. So. C. 263.

¹⁵⁴ *Durr v. Bowyer*, 2 M'Cord, Eq. So. C. 368; *Elliott v. Waring*, 5 T. B. Monr. Ky. 340; *Mumford v. Murray*, 1 Paige, Ch. N. Y. 620; *Van Epps v. Van Dusen*, 4 Paige, Ch. N. Y. 64; *Clancy, Mar. Wom.* 124; *Bell v. Bell*, 1 Ga. 637.

¹⁵⁵ *Stamper v. Barker*, 5 Madd. Ch. 157; *Hornsby v. Lee*, 2 Madd. Ch. 16; *Donne v. Hart*, 2 Russ. & M. Ch. 360.

¹⁵⁶ See *Fry v. Fry*, 7 Paige, Ch. N. Y. 461. In this case the husband had obtained a conveyance of his wife's estate by undue means and unconscionable advantage of her ignorance of her rights, and confidence in his representations; on a bill filed in chancery the court set aside the conveyance.

¹⁵⁷ *Clancy, Mar. Wom.* 471; 1 Roper, *Husb. and Wife*, 260.

¹⁵⁸ *Ex parte Beresford*, 1 Des. Eq. So. C. 263; *Elliott v. Waring*, 5 T. B. Monr. Ky. 340; *Westbrook v. Comstock*, Walk. Ch. Mich. 314.

¹⁵⁹ *Clancy, Mar. Wom.* 532; 1 Roper, *Husb. and Wife*, 263; 1 Fonblanque, *Eq. B.* 1, c. 2, § 6, note (k); *Johnson v. Johnson*, 1 Jac. & W. Ch. 479. See *Bell v. Bell*, 1 Ga. 637.

¹⁶⁰ 1 Roper, *Husb. and Wife*. 264, 267.

protection of the court; but on the other hand, as she is not a charge on her husband, he will not be entitled to her equitable rights.¹⁶¹

4010. When her separate estate is vested in trustees for her use, she cannot dispose of it otherwise than according to the trust, for by that her rights are limited and established. When it is secured to her by some *ante-nuptial* agreement, she will, in general, unless there is an express or implied stipulation to the contrary, have full power in equity to dispose of the same, whether real or personal, by any proper instrument in her lifetime, or by her last will, in the same manner and to the same extent as if she were a *feme sole*.¹⁶²

The rights of a married woman to dispose of her separate estate are different if she has acquired it by virtue of a *post-nuptial* agreement with her husband; it can then affect only the rights of her husband. This will authorize her to dispose of her separate personal property, because her husband only has the right to prevent it; but with regard to her real estate, her heirs have an interest in it, of which they cannot be deprived by the act of her husband. The only mode of disposing of it is by a conveyance made in her lifetime by a deed acknowledged as is provided by the law of the state where the lands are located.

4011. We have seen that by the marriage at common law the whole of the personal property of the wife becomes vested in the husband, so that she must depend upon him for her living and support. When she is deprived of this maintenance by the unjustifiable acts of her husband, equity requires that she should have some relief; as, when he totally abandons her, or forces her by his cruelty to leave his house and to seek an asylum elsewhere.

Though perhaps courts of equity, in general, have no jurisdiction to allow alimony out of the husband's estate,¹⁶³ yet, if the wife has any equitable property within the jurisdiction of the court, in a case of desertion or ill treatment of the wife by the husband, or when he is unable or unwilling to maintain her, the court will decree a suitable maintenance out of such equitable funds.¹⁶⁴

4012. This right of alimony may be lost for several reasons, of which the following cases are examples:

When the wife has been guilty of adultery, which has not been condoned, prior to the acts of cruel treatment by the husband.¹⁶⁵

When she has a competent maintenance of her own, independently of him.

When the separation from her husband is voluntary, and it has not been caused by cruelty or ill treatment, or when he is ready and willing, *bona fide*, and perfectly able, to maintain her, and without good cause she refuses to return to him; because it is against the policy of the law to encourage these separations.¹⁶⁶

¹⁶¹ 1 Roper, *Husb. and Wife*, 276; Clancy, *Mar. Wom.* 586; 2 Story, *Eq. Jur.* § 1419.

¹⁶² Jeremy, *Eq. Jur.* 208; 1 Fonblanque, *Eq. B.* 1, c. 2, § 6, note (q); 2 Roper, *Husb. and Wife*, 177.

¹⁶³ In Virginia, the court of chancery has jurisdiction in all cases of alimony. *Purcell v. Purcell*, 4 Hen. & M. Va. 507. In Pennsylvania, and perhaps some other states, jurisdiction is given, in cases of desertion and ill treatment or cruelty, to certain tribunals, by statute.

¹⁶⁴ *Nicholls v. Danvers*, 2 Vern. Ch. 671, Raithby's note. See *Jelineau v. Jelineau*, 2 Des. Eq. So. C. 45; *Denton v. Denton*, 1 Johns. Ch. N. Y. 364; *Mix v. Mix*, 1 Johns. Ch. N. Y. 108; *Anon.* 1 Hayw. No. C. 347.

¹⁶⁵ *Bedell v. Bedell*, 1 Johns. Ch. N. Y. 604; *Watkyns v. Watkyns*, 2 Atk. Ch. 96; *Carr v. Eastbrook*, 4 Ves. Ch. 146.

¹⁶⁶ In speaking of the distinctions which have been established in equity as to the effect of a deed of separation between husband and wife, the learned Judge Story, in his *Equity Jurisprudence*, § 1428, says: "In the first place, a deed of separation does not relieve the wife from any of the ordinary disabilities of coverture. *Marshall v. Rutter*, 8 Term, 545. In the next place, a deed of separation entered into by the husband and wife alone, with-

4013. When treating of persons, we had occasion to consider the remedy which the law allowed in cases of *idiocy* and *lunacy*; ¹⁶⁷ it will now be requisite only to state what powers courts of equity exercise in such cases. ¹⁶⁸

An idiot or lunatic is less capable of taking care of himself and of his estate than an infant, and requires the provident superintending care of the law in a greater degree. For this reason the court of chancery in England may be properly deemed to have had originally, as the general delegate of the crown, as *parens patrie*, the right not only to protect infants, but also to have the custody of idiots and lunatics when they had no other guardian. This jurisdiction has been extended in that country from time to time by various statutes.

In the United States, where courts of chancery have been established, they generally possess, in this respect, the same jurisdiction as the English courts.

As to the form of the proceedings, it is unnecessary to add to what has already occupied our attention in another place. ¹⁶⁹

4014. The remedies which we have discussed, over which courts of chancery have exclusive jurisdiction, depend upon the subject matter of the controversy; there are others which relate to the nature of the remedy, some of which we have considered when treating of assistant jurisdiction; as, bills of discovery, and bills to perpetuate testimony. There are two others which will next be considered in order; these are the writ of *supplicavit* and the writ of *ne exeat regno*.

out the intervention of trustees, is utterly void. *Legard v. Johnson*, 3 Ves. Ch. 352; *Westmeath v. Salisbury*, 5 Bligh, Hou. L. N. s. 375. In the next place, a deed for an immediate separation, with the intervention of trustees, will not be enforced, so far as it regards any covenant for separation, but only so far as maintenance is covenanted for by the husband, and the trustees covenant to exonerate him from any debts contracted therefor. *Legard v. Johnson*, 3 Ves. Ch. 359, 360; 2 Roper, Husb. and Wife, ch. 22, § 2, p. 270, and note; *Id.* 287; *Westmeath v. Westmeath*, Jac. Ch. 126; *Worrall v. Jacob*, 3 Mer. Ch. 267; *Jee v. Thurlow*, 2 Barnew. & C. 547; *Elworthy v. Bird*, 2 Sim. & S. Ch. 372; *Rodney v. Chambers*, 2 East, 283; *Westmeath v. Salisbury*, 5 Bligh, Hou. L. N. s. 339, 375. A covenant on the part of the trustees to indemnify the husband against the maintenance of the wife, will be a legal foundation for a covenant on his part to furnish a specific maintenance for her when there is a general trust deed between the parties. *Westmeath v. Salisbury*, 5 Bligh, Hou. L. N. s. 375; *Id.* 356. In the next place, if a deed of separation contains a covenant, purporting to preclude the parties from any future suit for the restitution of conjugal rights, the covenant will be utterly void. *Ibid.* In the next place, a deed containing a covenant with trustees for a future separation of the husband and wife, and for her maintenance consequent thereon, will be utterly void. *Durant v. Titley*, 7 Price, Exch. 577; *Hindley v. Westmeath*, 6 Barnew. & C. 200; *Westmeath v. Salisbury*, 5 Bligh, Hou. L. N. s. 339; *St. John v. St. John*, 11 Ves. Ch. 526. In the next place, even in case of a deed for an immediate separation, if the parties come together again, there is an end to it, with respect to any future as well as to the past separation. *Fletcher v. Fletcher*, 2 Cox, Ch. 99; 3 Brown, Ch. 619; *Bateman v. Ross*, 1 Dow, Parl. Cas. 235; *Westmeath v. Salisbury*, 5 Bligh, Hou. L. N. s. 375, 395; *St. John v. St. John*, 11 Ves. Ch. 537; 2 Roper, Husb. and Wife, ch. 22, § 1, p. 273, note; *Id.* § 5, p. 316; Clancy, Married Women, B. 4, ch. 4, p. 405, 413 to 417; 1 Fonblanque, Eq. B. 1, ch. 2, § 6, note (*n.* 2). Whether a covenant for a separate maintenance would now be enforced against the husband, in case of an immediate separation, after the husband was willing to receive his wife again and cohabit with her, and there was no reason to suppose it to be otherwise than a *bona fide* effort at reconciliation, is perhaps questionable. See, on this point, the authorities collected and commented on by Mr. Clancy. Clancy, Married Women, B. 4, ch. 4, p. 405 to 420. Mr. Clancy thinks that where the separation is intended to be temporary, it would not be enforced; where it is intended to be permanent, it would. See also 2 Roper, Husb. and Wife, ch. 22, § 5, p. 313 to 316; *Id.* 320 to 322. But see the judgment in *Westmeath v. Salisbury*, 5 Bligh, Hou. L. N. s. 339 to 421."

¹⁶⁷ Before, 363-393.

¹⁶⁸ In some of the states of the Union, special jurisdiction is given by statute to courts of law in cases of lunacy and idiocy.

¹⁶⁹ Before, 378.

The first is in the nature of process at common law, requiring the defendant to find surety of the peace, upon articles filed for the purpose by the plaintiff. It is sometimes used upon the complaint of a wife against her husband. In such case it is usual for her to file a bill of complaint stating her grievances, and the danger she is in of being injured, in which she prays the protection, which bill is called *articles of peace*. It must always be made on oath.¹⁷⁰ When the court obtains jurisdiction over the parties in such a case, the power of granting a maintenance and alimony to the wife is incident to it, when the wife is compelled to live apart from him on account of his misconduct.

4015. A *supplicavit* may be had upon complaint and oath made of the party when any suitor of the court is abused and stands in danger of life, or is threatened with death by another suitor. By virtue of this writ the contemner is taken into custody and must give bail to the sheriff; he may move the court to discharge the writ of *supplicavit*, when the court will hear affidavits on both sides; but the truth of the articles cannot, in this preliminary investigation, be contradicted, either by affidavit or otherwise; but the defendant may either except to their insufficiency, or tender affidavits in reduction of the amount of the bail.¹⁷¹

4016. The writ of *ne exeat regno*¹⁷² originated probably for the purpose of preventing a subject of the king of England from quitting the kingdom, when the king desired to have the control of his person. It was not unfrequently used in political cases. In the course of time it was used by the court of chancery in private cases for the purpose of securing the defendant when sued in that court upon an equitable right, so that it was in fact nothing more than a means of procuring *equitable bail*.¹⁷³

The writ of *ne exeat regno*, or, as it is sometimes called, *ne exeat regnum*, or with us *ne exeat republica*,¹⁷⁴ is one issued by a court of chancery,¹⁷⁵ directed to the sheriff, reciting that the defendant in the case is indebted or liable to the complainant upon an equitable right, and that he designs going quickly into parts without the kingdom, to the damage of the complainant, and then commanding him to cause the defendant to give bail in a certain sum that he will not quit the kingdom without leave of the court, and for want of bail that he, the sheriff, do commit the defendant to prison.¹⁷⁶

The subject will be examined by considering against whom the writ of *ne exeat* may be issued, for what claims, what amount of bail will be demanded, when it may be issued.

4017. This is a writ of right, and not, as in England, a prerogative writ; in a proper case it may be issued against a foreigner, or a citizen of the state, or a citizen of another state.¹⁷⁷

¹⁷⁰ See the form of Articles of Peace in 1 Chitty, Pract. Pr. 679; 12 Ad. & E. 599.

¹⁷¹ 13 East, 171. See Bacon, Abr. *Surety of the Peace*, E. See 1 Chitty, Pract. 683; Gilbert, For. Rom. 202; 2 Story, Eq. Jur. § 1477. See *Codd v. Codd*, 2 Johns. Ch. N. Y. 141.

¹⁷² See generally Beames, *Ne Exeat Regno*; Bacon, Abr. *Prerogative*, C; 1 Sharswood, Blackst. Comm. 138; Blake, Chanc. Pract.; Maddock, Chanc. Pract.; 1 Smith, Chanc. Pract. 576; Story, Eq. Jur. §§ 1464 to 1475.

¹⁷³ *Dunham v. Jackson*, 1 Paige, Ch. N. Y. 629. *Mitchell v. Bunch*, 2 Paige, Ch. N. Y. 606; *Johnson v. Glendenin*, 5 Gill & J. Md. 463.

¹⁷⁴ *Porter v. Spencer*, 2 Johns. N. Y. 169.

¹⁷⁵ The district courts of the United States have no authority to issue the writ of *ne exeat*. *Gernon v. Boccarine*, 2 Wash. C. C. 130.

¹⁷⁶ See a form of the writ in Beames, *Ne Exeat*, 18, 19; *Rice v. Hale*, 5 Cush. Mass. 338. And see generally, *Bushwell v. Bushwell*, 15 Barb. N. Y. 399; *McGee v. McGee*, 8 Ga. 295; *Lehman v. Logan*, 7 Ired. Eq. No. C. 296; *Brown v. Haff*, 5 Paige, Ch. N. Y. 235.

¹⁷⁷ *Gibert v. Colt*, Hopk. Ch. N. Y. 496; *Mitchell v. Bunch*, 2 Paige, Ch. N. Y. 606; *Woodward v. Shatzell*, 3 Johns. Ch. N. Y. 412.

On the same principle which has been adopted in the courts of law, that a defendant cannot be held to bail twice for the same cause of action, it has been decided that a writ of *ne exeat* was not properly issued against the defendant, who had been held to bail in an action at law.¹⁷⁸

4018. The claim of the plaintiff upon which this writ can be issued must be:

For a precise amount of debt positively due, and the demand must be of a pecuniary nature. But where the claim is of such a nature that it is impossible to say what is the exact amount actually due, as in the case of an account, it is sufficient if the plaintiff swear positively to a debt or balance due him from the defendant; he is not required to swear to a certainty as to the amount.¹⁷⁹

For an equitable demand, for which the plaintiff cannot sue at law, except in cases of accounts, and when the court has concurrent jurisdiction with the courts of law. The writ will not lie in a case where the demand is of a general unliquidated nature, or in the nature of damages.¹⁸⁰ The equitable debt need not have been created between the parties; it will be sufficient if it be fixed and certain; as, where the plaintiff is the assignee of a chose in action.

The defendant must be about to quit the country, and this fact must be proved by affidavits as positive as those required to hold to bail at law.¹⁸¹

When the demand is strictly legal the writ cannot be issued, because the court has no jurisdiction. And whenever the writ of *ne exeat* is claimed, the plaintiff's equity must appear on the face of the bill.

4019. Not only will a writ of *ne exeat* lie on an equitable claim, but in some other cases, which may be considered as exceptions to the rule.

This writ may be had in the case of alimony decreed to a wife, when the husband is about to leave the country.¹⁸²

It may be obtained in the case of an account on which a balance is admitted by the defendant, but a larger claim is insisted on by the creditor.¹⁸³

4020. A bill showing a proper case must be filed, and it must pray for the writ of *ne exeat*. When it is allowed, the court fixes the amount of the bail or security to be given; in doing so, a due regard is had to the security of the plaintiff; at the same time, the court will take care that the defendant shall not be oppressed. A sum is fixed usually sufficiently large to cover the existing debt, and a reasonable amount of future interest, having regard to the probable duration of the suit.¹⁸⁴

4021. The mode of obtaining a writ of *ne exeat* is by filing a bill containing a prayer for the writ. But, if after a bill filed, the plaintiff has just reason to believe the defendant will go abroad, he may move to amend his bill, and pray a *ne exeat*.¹⁸⁵ The writ may be obtained at any stage of the suit.¹⁸⁶

This writ is usually granted by the court of chancery, or by the chancellor when such an officer exists. It is provided by act of congress¹⁸⁷ that "writs of *ne exeat* may be granted by any judge of the supreme court of the United States

¹⁷⁸ Jones v. Sampson, 8 Ves. Ch. 594.

¹⁷⁹ Thorne v. Halsey, 7 Johns. Ch. N. Y. 180. See Williams v. Williams, 2 Green, Ch. N. J. 130.

¹⁸⁰ Smedberg v. Mark, 6 Johns. Ch. N. Y. 138; De Rivafinelli v. Corsetti, 4 Paige, Ch. N. Y. 464; Mattocks v. Tremaine, 3 Johns. Ch. N. Y. 75.

¹⁸¹ Rhodes v. Cousins, 6 Rand. Va. 188; Lucas v. Hickman, 3 Ala. 11.

¹⁸² Read v. Read, 1 Chanc. Cas. 115; Shaftoe v. Shaftoe, 7 Ves. Ch. 71.

¹⁸³ Beames, Eq. 30-34.

¹⁸⁴ Gibert v. Colt, 1 Hopk. Ch. N. Y. 496, 501.

¹⁸⁵ 2 Maddock, Chanc. Pract. 227.

¹⁸⁶ Dunham v. Jackson, 1 Paige, Ch. N. Y. 629.

¹⁸⁷ Act of 2d March, 1793, ch. 22, § 5.

in cases where they may be granted by the supreme or a circuit court. But no writ of *ne exeat* shall be granted unless a suit in equity be commenced, and satisfactory proof shall be made to the court or judge granting the same that the defendant designs quickly to depart from the United States."

4022. Having taken a rapid view of the nature and principles of equity by examining its general rules and maxims, and having considered the cases in which aid will be given by courts of equity, classified into those, first, in which those courts will exercise jurisdiction in aid of courts of law, which is called *assistant jurisdiction*; second, those cases where, having a more specific, certain, and better remedy, they will exercise their authority when courts of law afford but an imperfect remedy: this is denominated their *concurrent jurisdiction*; and, third, when there is no remedy at law, but an effective one can be had in equity, which is their *exclusive jurisdiction*,—our next consideration will be to ascertain and point out in a succinct manner the forms and proceedings in equity.

CHAPTER VIII.

THE PARTIES TO A SUIT IN EQUITY.

- 4024. Importance of proper selection of parties.
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4023. After considering in the first part of this book the principles and rules of equity, the assistant, concurrent, and exclusive jurisdiction of courts of chancery, it will be proper in this second part to take a short view of the remaining subjects connected with equity. In this examination we shall consider consecutively the parties to a suit in equity, bills in equity, proceedings between filing the bill and the defence, the defence, the replications and their consequences, the incidents to pleading in general, and the proceedings after pleadings.

4024. Before instituting a suit in equity it is of great importance to consider who ought to be made plaintiffs or who should answer as defendants, for a fault committed in the selection of parties may prove fatal, and will always cause inconvenience. Some persons are qualified and others wholly unqualified to be parties to suits in equity; and of those qualified some ought to bring the suit, and others ought to join or not join with them; and some persons ought to be made defendants, and others cannot be joined with them. We shall examine the rules which apply in determining, first, the persons qualified and disqualified as parties; second, the proper parties to a bill.

4025. In general, all *persons sui juris* can sue and be sued in chancery, unless they are subject to an absolute or temporary disqualification, which will be presently considered. There is no distinction among such persons; all, whatever be their condition, from the highest to the lowest, may sue and be sued in equity as they may sue and be sued at law.

4026. The *government*, or, as the style is in England, the crown, may sue in a court of equity not only strictly on its own behalf, for its own peculiar rights and interests, but also on behalf of the rights and interests of those who partake of its prerogatives or claim its peculiar protection.¹ In these cases the suit is instituted by the proper public officer, to whom that duty is entrusted by law, and this is usually the attorney general.² When the attorney general sues on behalf of the government for a claim due to the state, the public officer sues in his own official name, without joining that of any other person. On the contrary, when he sues for the benefit of a person who partakes of its prerogative, or is under its peculiar protection, or the subject matter is *publici juris*, then the suit is brought in the name of the attorney general, who sues at the relation of some other person who is named as *relator* in the bill; the person thus made a party has no control over the proceedings, and is responsible for costs.³

It must be remembered that, although the government may sue, it is not liable to be sued. But to this general rule there is an exception; in some cases one of the states of the Union may file a bill in the supreme court of the United States against another state.⁴

4027. Bodies corporate may sue by themselves alone, and in their own names exhibit a bill of complaint in a court of equity.⁵ On the other hand, they may be sued, and the officers or servants of a corporation may be made parties for the purpose of eliciting from them a discovery upon oath of the matters charged in the bill.⁶

¹ Cooper, Eq. Pl. 21, 22; Story, Eq. Pl. § 49; 1 Daniell, Chanc. Pract. 3.

² Montagu, Eq. Pl. 34; Cooper, Eq. Pl. 21, 101; 1 Daniell, Chanc. Pract. 3.

³ Story, Eq. Pl. § 8; 1 Daniell, Chanc. Pract. 3, 7.

⁴ Fowler v. Lindsay, 3 Dall. 411; New Jersey v. New York, 5 Pet. 284; Rhode Island v. Massachusetts, 12 *id.* 657; Missouri v. Iowa, 7 How. 660.

⁵ Mitford, Eq. Pl. Jeremy, ed. 24.

⁶ Anon. 1 Vern. Ch. 117; Wych v. Meal, 3 P. Will. Ch. 310; Moodaley v. Morton, 1 Brown, Ch. 469.

Sometimes corporations are included as defendants in a bill when they have no interest in the matter in question, but stand merely as managers of public stocks, the management of which has been intrusted to them by different acts of the legislature. Such corporations may be made parties to a suit relating to any public stock standing in their books for the purpose of compelling or authorizing such companies to suffer a transfer of such stock to be made in their books, and also praying an injunction against their permitting such transfer.⁷

4028. The incapacity to sue in equity is either absolute—that is, while it continues it wholly disables the party to sue—or partial, or such as disables the party from suing without the assistance of another.

4029. The principal, if not the only, absolute disability is the case of *alienage*, but a distinction must be observed between alien friends and alien enemies. An alien friend is not incapacitated from suing, but an alien enemy, in general, is incapable to bring a suit in equity while he remains an enemy. The reason for this distinction is very apparent. When an alien comes into the country he comes under the express or implied agreement of the government, while he acknowledges its authority and bears toward it a temporary allegiance, to be protected in his person or his rights. This protection would be but illusory if he had not the right to sue; on the contrary, an alien enemy, who sets himself against the government by adhering to the public enemies, is not under the protection of the courts of the government he would wish to destroy.⁸

An exception to this general rule, that an alien enemy cannot sue, may possibly exist in a case where an alien enemy is sued, and it is required *in his defence* that he should file a bill of discovery. If the law allows him to be sued, it would seem but simple justice to allow him to defend himself. But if the bill of discovery was to be used abroad, then the objection would lie with as much force to a bill of discovery as to an original suit.⁹

An alien enemy is disabled to sue only while the war continues, for after peace has been made his right to sue returns; it was only suspended by the state of hostility between his government and our own.¹⁰

Although an alien friend may sue, it must be understood that his right must be limited in this, that he has a right to the subject matter of the suit. In some of the states of the Union he cannot hold land; he is then incapable to bring a suit for the recovery of land, or on any demand of a mixed nature partly real and partly personal.¹¹

4030. A *foreign sovereign*, acknowledged by our government to be such, and not at war with this country, may sue in our courts when he has a just right.¹² Indeed, the constitution of the United States gives jurisdiction to the courts of the United States, where foreign states are parties.¹³ The Cherokee nation of Indians not being independent, and acknowledged as such by our government, in the sense in which the words *foreign state* are used in the constitution, cannot maintain an action in the courts of the United States.¹⁴ But

⁷ Temple v. Bank of England, 6 Ves. Ch. 770.

⁸ Daubigny v. Davallon, 2 Anstr. Exch. 467; Mumford v. Mumford, 1 Gall. C. C. 366.

⁹ See Daubigny v. Davallon, 2 Anstr. Exch. 467; Albrecht v. Sussman, 2 Ves. & B. Ch. Ir. 324.

¹⁰ Coke, Litt. 120; Cooper, Eq. Pl. 25.

¹¹ Coke, Litt. 120.

¹² King of Spain v. Machado, 4 Russ. Ch. 238; Hullet v. King of Spain, 1 Dow, Parl. Cas. 169; 2 Bligh, Hou. L. n. s. 51; Columbian Government v. Rothschild, 1 Sim. Ch. 94. See The Nabob of Carnatic v. The East India Company, 1 Ves. Ch. 371; 3 Brown, Ch. 292; City of Berne v. Bank of England, 9 Ves. Ch. 347; Dolder v. Bank of England, 10 Ves. Ch. 352.

¹³ King of Spain v. Oliver, 2 Wash. C. C. 429.

¹⁴ Cherokee Nation v. The State of Georgia, 5 Pet. 1.

this right of a foreign state or government exists only during a state of peace; by war, this right is of course suspended.

4031. A *foreign corporation*, either private or municipal, when not belonging to a public enemy, may sue in equity, and it is usual to maintain suit when brought by such corporations.¹⁵ A corporation belonging to a public enemy is incapable of suing.

4032. *Partial incapacity*, it has been observed, disables the party to sue without the assistance of another. This is the case in relation to infants, to married women, and to idiots and lunatics.

4033. *Infants* are disabled from bringing suits, because they are generally incapable of judging whether it is for their advantage that such suits should be instituted, and, also, because they cannot bind themselves and become responsible for costs. But still their rights are protected. When an infant has a right, and a guardian has been appointed by competent authority to take care of his person and property, a suit may be brought in the name of the infant by his guardian, who must be named in the bill, not as his guardian, but as his next friend,¹⁶ and who, in consequence, becomes responsible for costs. When no such guardian has been appointed, any person who will undertake to bring the suit in the name of the infant, and assumes to be *his next friend*, or, as the technical phrase is, his *prochein ami*, may bring suit; in such case he must be named in the bill as such, and by that means he will be responsible for costs.¹⁷ It is not necessary, in a case of this kind, that the infant should be consulted; the suit may be brought without his knowledge. Indeed, a bill has been filed, and an injunction granted, to stay waste at the suit of an infant *in ventre sa mere*.¹⁸ But when there is reason to apprehend that the next friend has acted from improper motives, upon a proper application the court will refer the matter to a master, with directions to ascertain whether such suit is for the benefit of the infant, and if the master reports it is not for his benefit, of which the court are satisfied, the proceedings will be stayed.¹⁹ As the infant need not be consulted, there may be two suits brought by two different persons, who are each acting as next friend to the infant. In such case, the court will direct an inquiry to be made to ascertain which of the two suits is more for the benefit of the infant, and, upon that appearing, will stay the proceedings on the other.²⁰

4034. Before commencing a suit in the capacity of next friend, the party ought to reflect whether he and his wife are witnesses to sustain the bill, for, if either of them can be a witness, he ought to procure some other person to act as *prochein ami*, because the next friend, being liable for costs, cannot be examined. If, however, he should discover, after the suit has been brought, that he is a witness, the court will permit him to substitute a responsible person in his place.²¹

¹⁵ *Society v. Wheeler*, 2 Gall. C. C. 105; *Society v. New Haven*, 8 Wheat. 464; *Silver Lake Bank v. North*, 4 Johns. Ch. N. Y. 370.

¹⁶ It seems doubtful whether an infant can sue in chancery by his guardian; but he must defend by guardian, either a general guardian or one appointed *ad litem*. See 1 Sharswood, Blackst. Comm. 464; Coke, 2d Inst. 261; Wyatt, Pract. Reg. Ch. 212; *Chandler v. Vilett*, 2 Saund. 117, f.; *Story*, Eq. Pl. § 58, note; *Bradley v. Amidom*, 10 Paige, Ch. N. Y. 235; *Mitford*, Eq. Pl. 29.

¹⁷ It has been held, however, in this country that in courts of law the *prochein ami*, or next friend, is not liable for costs. *Crandall v. Slaid*, 11 Metc. Mass. 288; *Brown v. Hull*, 16 Vt. 673.

¹⁸ *Luttrel's Case*, cited Prec. Chanc. 50.

¹⁹ *Fulton v. Roosevelt*, 1 Paige, Ch. N. Y. 178.

²⁰ *Cooper*, Eq. Pl. 28, 29; *Mitford*, Eq. Pl. 25, 27; 1 *Daniell*, Chanc. Pract. 95.

²¹ *Mitford*, Eq. Pl. 26.

4035. When the suit has been commenced during infancy, and the infant becomes of age, and afterward he carries on the suit, by so doing he adopts the cause, relieves his next friend from all responsibility for costs, and becomes liable himself.²²

4036. A married woman being under the protection of her husband, and her separate existence being for most purposes suspended, a suit respecting her rights is usually instituted by them jointly, and when it is so brought, it is considered the suit of the husband alone, so that the decree made in such suit is not binding upon the wife in any future litigation; ²³ and for this reason it is said that if after her husband's death she proceed with the suit, she shall not be liable for the anterior costs.²⁴

4037. But to this general rule, that the husband must be joined in all suits instituted in chancery on the rights of the wife, or against her, there are several exceptions, among which may be mentioned the following:

When the husband is *civiliter mortuus*, the wife is looked upon as restored to her rights and capacity as a *feme sole*, and may sue alone.²⁵

When a married woman claims a right in opposition to the rights claimed by her husband, the husband being the person, or one of the persons, to be complained of, the complaint cannot be made by him. The wife, being under the disability of coverture, cannot sue alone, and yet cannot sue under the protection of her husband; she is obliged to seek other protection, and that the law affords her by enabling her to procure a next friend, who is also named in the bill,²⁶ who may file the bill in her name. Unlike the case of an infant, the next friend of a married woman cannot bring a suit without her consent, but, like the case of an infant, he will be responsible for costs.²⁷

On the other hand, the husband may sue the wife in equity for the purpose of enforcing his own marital rights against her property, however those rights may have arisen.²⁸ In such case she may, by leave of court, defend a suit separately from her husband without the protection of another;²⁹ not only when she claims in opposition to her husband or lives separately from him, but when he disapproves of the defence she wishes to make, she may obtain an order to defend the suit separately.³⁰ Indeed, when the husband is plaintiff in a suit and makes his wife a defendant, he treats her as a *feme sole*, and she may therefore answer and defend separately without an order of the court for the purpose.³¹

4038. The care of *lunatics* is vested in courts of equity in those states where these courts exercise the same jurisdiction as does the court of chancery in England. In other states this guardianship is vested in their several courts, which by act of assembly are authorized to have a general superintendence.

When the rights of a lunatic, or person *non compos mentis*, are to be secured by a suit in chancery, the bill is brought by their committee or guardian, and when they are sued, they are defended by the same persons. This is generally regulated in detail by the local statutes.

²² Cooper, Eq. Pl. 29; Mitford, Eq. Pl. 25-27.

²³ Grant v. Van Schoonhoven, 9 Paige, Ch. N. Y. 255. See 8 Sim. Ch. 551.

²⁴ Cooper, Eq. Pl. 29.

²⁵ Cooper, Eq. Pl. 30, 31; Matter of Deming, 10 Johns. N. Y. 242.

²⁶ Griffith v. Hood, 2 Ves. Ch. 452. See Troup v. Wood, 4 Johns. Ch. N. Y. 228.

²⁷ Mitford, Eq. Pl. 28; Griffith v. Hood, 2 Ves. Ch. 452; Cooper, Eq. Pl. 30; 1 Newland, Chanc. Pract. 53.

²⁸ Carnel v. Buckle, 2 P. Will. Ch. 243; Acton v. Pearce, 2 Vern. Ch. 480; Ex parte Strangeways, 3 Atk. Ch. 478; 1 Fonblanque, Eq. B. 1, c. 2, § 6, note (n).

²⁹ Viner, Abr. *Baron and Feme*, I, a, 20.

³⁰ Mitford, Eq. Pl. 95; Cooper, Eq. Pl. 30, 31.

³¹ Ex parte Strangeways, 3 Atk. Ch. 478.

In the absence of statutory regulations, and according to the settled practice in the English courts as adopted in this country, when a bill is filed for the benefit of a lunatic, the committee must be joined with the lunatic or the bill must be filed in the name of the lunatic by his committee. It is not proper for the committee to bring the suit in his own name, merely describing himself as the committee of the lunatic.³²

4039. Having considered in the preceding sections who may sue or be sued in equity, let us next consider who are the proper and necessary *parties to a bill*; a matter of great importance, for if proper parties are wanting, inconvenience and delay, at least, if not defeat, will in some cases be the result.

It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, to make the performance of the order of the court perfectly safe to those who are compelled to obey it and to prevent future litigation.³³ For this purpose, with some exceptions which will be noticed, all persons materially interested in the subject ought to be parties to the suit, plaintiffs or defendants, however numerous they may be.³⁴

The natural course to be pursued in the examination of this rule is to consider, first, what persons whose rights are concurrent with those of the party instituting the suit ought to be joined with him; second, what persons are interested in resisting the plaintiff's claim; third, the joinder of parties who have no interest in the suit; fourth, the objections for want of proper parties.

4040. As a general rule, all parties who have an interest in the subject matter of the suit must join as *plaintiffs*, but for various causes there are some exceptions to the rule.³⁵ This subject will be divided by considering, first, the general rule; second, the exceptions.

4041. In proceedings in the courts of law, we may remember, no persons are required, or indeed can be plaintiffs other than those who have a direct and immediate interest in the subject matter of the action, and whose interests are strictly legal. All other persons, who have only an equitable or remote interest, cannot be joined, and if they are joined, the fault will be fatal; for example, at law the heir and the executor cannot be joined, although each may have an interest in the matter in controversy. In equity, on the contrary, they may join, and not unfrequently they must both be made parties.³⁶

It may be laid down as a general rule that those persons are necessary parties, when no decree can be made respecting the subject matter of litigation until they are before the court, either as plaintiffs or defendants; or where the defendants, already before the court, have such an interest in having them made parties, as to authorize those defendants to object to proceeding without them.³⁷ Still it is not easy to say what is the nature of that interest, nor how far it is liable to be affected by the decree.³⁸

³² *Gorham v. Gorham*, 3 Barb. Ch. N. Y. 24.

³³ *Mitford*, Eq. Pl. 144; *Cooper*, Eq. Pl. 33; *Story*, Eq. Pl. § 72; *Knight v. Knight*, 3 P. Will. Ch. 333.

³⁴ *Hickock v. Scribner*, 3 Johns. Cas. N. Y. 311; *Joy v. Wirtz*, 1 Wash. C. C. 517; *Caldwell v. Taggart*, 4 Pet. 190; *Wendell v. Van Rensselaer*, 1 Johns. Ch. N. Y. 349; *Calvert, Parties*, 10; *West v. Randall*, 2 Mas. C. C. 190.

³⁵ *Pierce v. Faunce*, 47 Me. 507; *Birdsong v. Birdsong*, 2 Head, Tenn. 289.

³⁶ *Knight v. Knight*, 3 P. Will. Ch. 333, Cox's note, A.

³⁷ *Bailey v. Inglee*, 2 Paige, Ch. N. Y. 279; 1 *Daniell*, Chanc. Pract. 284, 285; *West v. Randall*, 2 Mas. C. C. 181; *Caldwell v. Taggart*, 3 Pet. 190; *Trescott v. Smith*, 1 M'Cord, Eq. So. C. 301; *Wendell v. Van Rensselaer*, 1 Johns. Ch. N. Y. 340; *Duncan v. Mizner*, 4 J. J. Marsh. Ky. 447; *Crocker v. Higgins*, 7 Conn. 342; *Boughton v. Allen*, 11 Paige, Ch. N. Y. 321.

³⁸ See *Story*, Eq. Pl. § 136, *et seq.*, for the details on this subject. See also 1 *Daniell*, Chanc. Pract. 284.

The cases which fall under this general rule, that all the parties must, when practicable, be brought before the court, may be classed into the following: those relating to a trust estate, where the property has been assigned, when the interest is joint, those relating to legacies, to accounts, to administration, to mortgages, and those in which the government is a party.

4042. Upon this principle, that all parties having an interest must join, when a plaintiff, who has only the equitable right, brings a suit, it is necessary that the party having *the legal estate should join*, for if he were not, his legal right would not be barred by the decree.³⁹

For the same reason it is that in all suits by persons claiming under a trust, *the trustee*, or other person in whom the legal estate is vested, is required to be a party to the proceeding.⁴⁰ And this rule, which requires the person who holds the legal estate to be brought before the court in suits relating to trust property, applies equally to all cases where the legal right to sue for the thing demanded is outstanding in a different party from the one claiming the beneficial interest; for example, where a bill is filed for the specific performance of a covenant under hand and seal of one for the benefit of another, the covenantor must be a party to a bill by the person for whose benefit the covenant was intended against the covenantor.⁴¹

A distinction must be observed, in the cases of a contract made by an agent, between a contract under seal and one not under seal. In the latter it is not requisite that the agent should be made a party to a bill, because even at law the principal can interpose and supersede the right of his agent by claiming to have the contract performed to himself, although made in the name of the agent.⁴²

4043. When there is more than one trustee, and a suit is required to enforce a trust or to set it aside, all the trustees should be made parties; for the same reason, when there are several *cestuis que trust*, if either is to be made party they ought all to be joined in a suit respecting their common interest; for if this rule should not be observed, there must be several suits to enforce the rights of each.⁴³

But in suits for the removal of a trustee, it is not necessary that all the *cestuis que trust* should join as complainants.⁴⁴

4044. In case of the death of any of the trustees, the survivor or survivors must be made parties; and if all the trustees are dead, and the estate be one of inheritance, the heir, or other representative of the realty of the survivor, should be made a party. But when the trust is of a term, or other chattel interest, which does not descend to the heir, the personal representative of the survivor is to be made a party. And if the trustee has assigned his trust, the assignee must be made a party in his stead,⁴⁵ unless he, the trustee, has committed a breach of trust, when he may be joined.⁴⁶

4045. But there are several exceptions to this general rule, the principal of which are the following:

When the *cestui que trust* has a separate interest, as an aliquot part of the

³⁹ 1 Daniell, Chanc. Pract. 286.

⁴⁰ Williams v. Williams, 4 Madd. Ch. 186. But a trustee need not be made a party after he has fully executed the trust, and the property has been delivered to the person authorized to receive it. Swan v. Ligan, 1 M'Cord, Eq. So. C. 231.

⁴¹ Cooke v. Cooke, 2 Vern. Ch. 36.

⁴² Before, 1328; Lyon v. Tevis, 8 Iowa, 79.

⁴³ Hamm v. Stevens, 1 Vern. Ch. 110; Lowe v. Morgan, 1 Brown, Ch. 368; *In re Chertsey Market*, 1 Price, Exch. 261. But see Fleming v. Gilmer, 35 Ala. N. S. 62.

⁴⁴ Goucelier v. Foset, 4 Minn. 13.

⁴⁵ Cooper, Eq. Pl. 34; 2 Brown, Ch. 225.

⁴⁶ Bromley v. Holland, 7 Ves. Ch. 3; Coop. Ch. 19.

trust property, and the others have no common interest in the object of the bill, the others need not be made parties.⁴⁷

A general breach of trust by all the trustees renders them so far responsible jointly and severally that the *cestui que trust* may bring his suit against them all or either of them at his election.⁴⁸

In cases where the bill is so framed that it seeks an account of only so much of the trust fund as has come to the hands of a particular trustee, he may be sued alone, and the others are not properly made parties.⁴⁹

4046. When the subject matter of the suit has been *assigned*, as in the case of a *chose in action*, the assignor if living, or, if dead, his personal representatives should be a party; because a *chose in action* is not assignable at law, and it is considered good only in equity; the recovery in equity by the assignee would, therefore, be no answer to an action at law by the assignor, in whom the legal right to sue still remains, and who might exercise it to the prejudice of the party liable. The court of equity, in order not to do justice by halves, requires that he should be made a party, in order to make a final decree to bind all the parties.⁵⁰

In regard to the assignment of other subjects of property, it is not clear that the rule is so general. It is laid down by Judge Story as the rule that where the assignment is absolute and unconditional, leaving no equitable interest in the assignor, and the extent and validity of the assignment is not doubted or denied, and there is no remaining liability in the assignor to be affected by the decree, it is not necessary to make the latter a party.⁵¹

4047. In cases of *joint claims and joint interests*, it is a rule that all parties must join in bringing a suit in chancery. One joint tenant or tenant in common cannot sue alone in respect to any thing touching their common rights and interests.⁵² And this rule, that all who have a joint interest must be made parties, applies equally whether the subject matter of the suit be real or personal property. Thus, where a legacy is given to two jointly, one cannot sue for it alone, as in the case of a gift of a ship or a horse; though, when the legacies are several, each may sue for his own.⁵³

4048. When persons claim *under titles inconsistent with that of the plaintiff*, they should not be made parties to a suit, even though they are in a situation to molest the defendant, in the event of the plaintiff being unsuccessful in establishing his claim, and the rule is applicable to prohibit their being made parties as co-plaintiffs or as defendants.⁵⁴

4049. The general rule, that all parties in interest must be joined in a bill, applies to the case of *legacies* when it appears by the bill that there is a deficiency of assets, and also in the case where several legacies are given, which are to be increased or diminished according to the state of the funds.⁵⁵ But we

⁴⁷ *Smith v. Snow*, 3 Madd. Ch. 10.

⁴⁸ *Walker v. Symonds*, 3 Swanst. Ch. 75.

⁴⁹ *Fleming v. Gilmer*, 35 Ala. N. S. 62.

⁵⁰ *Brace v. Harrington*, 2 Atk. Ch. 235; *Ray v. Fenwick*, 3 Brown, Ch. 25; *Cathcart v. Lewis*, 1 Ves. Ch. 463. See *Lewis v. Outon's Admr.*, 3 B. Monr. Ky. 453; *Kelly v. Israel*, 11 Paige, Ch. N. Y. 147; *Mumford v. Sprague*, 14 Paige, Ch. N. Y. 438; *Dixon v. Buell*, 21 Ill. 203.

⁵¹ *Story*, Eq. Plead. § 153; *Brace v. Harrington*, 2 Atk. Ch. 235; *Blake v. Jones*, 3 Anstr. Exch. 651; *Trecothick v. Austin*, 4 Mas. C. C. 41; *Miller v. Bean*, 3 Paige, Ch. N. Y. 467; *Day v. Cummings*, 19 Vt. 496.

⁵² *Cooper*, Eq. Pl. 35; 1 *Daniell*, Chanc. Pract. 298; *Story*, Eq. Pl. § 159; *Broughton v. Allen*, 11 Paige, Ch. N. Y. 321.

⁵³ *Haycock v. Haycock*, 2 Chanc. Cas. 124; 1 *Daniell*, Chanc. Pract. 303.

⁵⁴ *Attorney General v. Tarrington*, Hardr. 219; *Lord Cholmondeley v. Lord Clinton*, 2 Jac. & W. Ch. 135.

⁵⁵ *Brown v. Ricketts*, 3 Johns. Ch. N. Y. 553. See *Davone v. Fanning*, 4 Johns. Ch. N. Y. 199; *Cromer v. Pinckney*, 3 Barb. Ch. N. Y. 466; *Pritchard v. Hicks*, 1 Paige, Ch. N.

shall see that under the rule relating to numerousness one of the legatees may bring a suit in certain cases in his own name for himself and his co-legatees.

When legacies are charged on the real estate in the hands of the heir, and a bill is filed to recover the amount so charged, all legatees who are entitled to the benefit of the charge must be made parties in their own names, because they have a common interest in the fund.⁵⁶ And the same rule applies when by a will the testator makes the executors trustees to sell real estate, and out of the produce, after discharging debts, to pay certain sums to certain legatees, which sums are also charged on the personal assets in case of deficiency of the fund arising from the real estate; in such case, when one of the legatees files his bill to obtain his share of the proceeds, all the other legatees must be made parties.⁵⁷

4050. When a bill for an *account* is filed, all the persons on either side having an interest in it must be made parties; as, when an account is sought between partners, all the partners must be made parties to the suit, either as plaintiffs or defendants.⁵⁸

It is not indispensable that the parties plaintiff should claim in the same right; if they are interested in the account, though claiming under different rights, they should all be joined. For example, heirs and personal representatives, mortgagors and mortgagees, legatees and distributees, and the like. The reason of this is that the accountant shall not be obliged to make and settle more than one account.⁵⁹

The rule that all persons interested in the account should be made parties does not apply to cases where it appears that some of the parties have been accounted with and paid. Thus, in the case of a bill by a *cestui que trust* on coming of age for his share of the fund, a decree will be made without requiring the other *cestuis que trust*, who have come of age before and have received their shares, to be made parties to the bill.⁶⁰

4051. Whenever the property, which is the subject in dispute, would vest in the personal representatives of a deceased person, such personal representatives must be made parties to the proceedings, because the personal representatives in all cases represent the estate of the deceased, and are entitled to sue in equity as well as at law without making the residuary legatees or any of the other persons interested in it parties to the suit.⁶¹

4052. The next subject of consideration will be the cases of *mortgagors and mortgagees* and their assignees, who may have a concurrent interest with the plaintiff. These are either parties to redeem or parties to foreclose a mortgage. When we come to the examination of the parties who are interested in resisting the claim, the proper parties to be made defendants in such cases will then be considered.⁶²

4053. When the mortgagor and mortgagee are both living, and the former brings a bill to redeem, of course he alone is the proper party in the suit, if there has been no assignment and the rights of the parties remain as at first, because no other person has or can have an interest.

Y. 270; *Atwood v. Hawkins*, Finch, Ch. 113; *West v. Randall*, 2 Mas. C. C. 181; *Sherrit v. Birch*, 3 Brown, Ch. 229; *Parsons v. Neville*, 3 Brown, Ch. 365; *Peacock v. Monk*, 1 Ves. sen. Ch. 127; *Anon.* 1 Ves. Ch. 29; *Cockburn v. Thompson*, 16 Ves. Ch. 321; 1 Daniell, Chanc. Pract. 308.

⁵⁶ *Hallett v. Hallett*, 2 Paige, Ch. N. Y. 15.

⁵⁷ *Faithful v. Hunt*, 3 Anstr. Exch. 751; 1 Daniell, Chanc. Pract. 349, 350.

⁵⁸ *Ireton v. Lewis*, Cas. temp. Finch, 96; *Moffat v. Farquharson*, 2 Brown, Ch. 838; *Evans v. Stokes*, 1 Keen, Rolls, 24; 1 Daniell, Chanc. Pract. 308; *Story*, Eq. Pl. § 218.

⁵⁹ *Story*, Eq. Pl. § 219.

⁶⁰ 1 Daniell, Chanc. Pract. 310.

⁶¹ *Jones v. Goodchild*, 3 P. Will. Ch. 33.

⁶² See bevond. 4074.

If, on the contrary, the mortgagor be dead, those who represent him as heirs or devisees are proper parties to a bill to redeem when the mortgage is in fee, for they alone have an interest in the land. If the mortgage be for a term of years only, then the heir has no interest and the personal representatives of the mortgagor alone have a right to redeem, and for this purpose should alone be made parties.⁶³

A person entitled to a part only of the mortgage money cannot foreclose the mortgage without making the other persons in interest parties; so neither can a mortgagor redeem the mortgaged estate without making all those who have an equal right to redeem with himself parties to the suit. For this reason, where two estates are mortgaged to the same person for securing the same sum of money, and afterward the equity of redemption of one estate becomes vested in a third person, the owner of one cannot redeem his part separately.⁶⁴

When the mortgagor has assigned his estate or the equity of redemption, subject to the mortgage which the assignee has undertaken to pay, the mortgagor no longer having any interest, the assignee may alone maintain a suit to redeem. But if the mortgagor in making his assignment has undertaken to pay off the mortgage, he must be made a party to a bill to redeem, because he is primarily liable to discharge the debt. All persons who have an interest as assignees of course must join in a bill to redeem.⁶⁵

In general, indeed, all persons who have a right to the estate or claim by privity under the mortgagor have a right to redeem.⁶⁶

It was formerly said that a *cestui que trust* must be joined with the trustee in a bill to redeem, but this does not appear to be necessary in modern practice.⁶⁷

4054. The same principle which requires the participation of all persons who have an interest in the equity of redemption in the case of bills to redeem a mortgage makes it necessary that a mortgagee, who seeks to foreclose the mortgage, should bring before the court all persons who have an interest in the mortgage under himself; if, therefore, there are several derivative mortgagees, they must all be made parties to a bill of foreclosure.⁶⁸

When the parties remain the same as they were when the mortgage was created, the only party entitled to foreclose the mortgage is the mortgagee, as he alone has an interest in it. If there are two joint mortgagees, and one sues for foreclosure, the other refusing to join, but being a party, the plaintiff will be entitled to the common decree for foreclosure of the whole.⁶⁹ But if the mortgagee has assigned the mortgage absolutely, the assignee may bring a suit upon it without joining the assignor;⁷⁰ and in case it has been assigned in parts, all the assignees must join, for one of them cannot sue and have a partial foreclosure.⁷¹

As a mortgage is personal property, if the mortgagee dies, his personal representatives are alone authorized to bring a bill for foreclosure.⁷²

Where the mortgage is the property of the wife, neither the husband nor his heirs or representatives should be made plaintiffs in a bill to foreclose.⁷³

⁶³ But see *Enos v. Sutherland*, 11 Mich. 538, as to the necessity of joining heirs in a bill brought by an administrator to redeem real estate mortgaged by the deceased.

⁶⁴ *Cholmondeley v. Clinton*, 2 Jac. & W. Ch. 3, 124; 1 Daniell, Chanc. Pract. 304; Story, Eq. Pl. § 182; *Polk v. Lord Clinton*, 12 Ves. Ch. 48, 61.

⁶⁵ *Palmer v. Carlisle*, 1 Sim. & S. Ch. 423.

⁶⁶ Story, Eq. Pl. §§ 184, 185.

⁶⁷ *Bryden v. Partridge*, 2 Gray, Mass. 190.

⁶⁸ *Hobart v. Abbot*, 2 P. Will. Ch. 643; Cooper, Eq. Pl. 37; Story, Eq. Pl. § 199; 1 Daniell, Chanc. Pract. 307; Spence, Eq. Jur. 673.

⁶⁹ *Davenport v. James*, 12 Jur. 827.

⁷⁰ *Lewis v. Nangle*, 2 Ves. Ch. 231; Ambl. Ch. 150.

⁷¹ *Palmer v. Carlisle*, 1 Sim. & S. Ch. 423. See *Montgomerie v. Marquis of Bath*, 3 Ves. Ch. 560; *Lowe v. Morgan*, 1 Brown, Ch. 368; *Stokes v. Clendon*, 3 Swanst. Ch. 150.

⁷² *Freaker v. Horsley*, 2 Freem. 180.

⁷³ *Bartlett v. Boyd*, 34 Vt. 256.

4055. When *the government* is interested in the subject matter of the suit, it is essential that the attorney general, or some other officer designated by law, should be made a party, either as plaintiff or as defendant, to protect or assert the rights of the public; thus, in cases of public charities, the attorney general must be made a party to the suit, because the government, as *parens patrie*, superintends the administration of all charities, and in cases of this kind acts by a proper and known officer.

4056. To the rule that all parties having an interest must be joined in a suit in chancery, various *exceptions* have been made. These exceptions are all governed by the same principle. It is the object of the rule to accomplish the purposes of justice between the parties; the courts will not, therefore, permit it to be applied to defeat justice, if they can dispose of the case upon its merits without prejudice to the rights or interests of other persons who are not parties, or when the circumstances render the application of the rule impracticable or impossible.⁷⁴ But lest, in its endeavors to do justice, the court should run the hazard of doing injustice to other parties not before it, whose claims are equally meritorious, if complete justice between the parties before the court cannot be done without other parties being made, whose rights and interests would be prejudiced by the decree, the proceedings will be stayed, though those other parties cannot be brought into court.⁷⁵

The cases which are exceptions to the general rule may be classed as follows: when the parties are omitted on account of their numbers, and when it is impracticable to make all persons who have an interest parties to the suit.

4057. It is frequently almost impossible to join all those who have an interest as plaintiffs in a suit in equity, on account of the delays and inconveniences which would obstruct or probably defeat the purposes of justice. For this reason, if the court can make a decree without injury to the persons or parties before the court, the others will be dispensed with; but if no decree can be so made without all the persons in interest being made parties, the courts of equity will not proceed.⁷⁶

When the parties are too numerous to be all included in the bill, it should be so stated in it, and the bill must be filed not only in behalf of the plaintiff, but also in behalf of all other persons interested who are not named as parties, so that they may come in under the decree, and take the benefit of it; or, if against them, show it to be erroneous, or entitle themselves to a rehearing.⁷⁷

The cases in which all the parties in interest will not be required to join may be classed into those where the question is one of common or general interest, where one may sue or defend for the whole, where the parties form a voluntary association for public or private purposes, and those who sue represent the whole, or where the parties are very numerous, though they have or may have separate interests.

4058. The rule that all parties must join when they have an interest in the subject matter in controversy does not apply to cases which are of a *general interest*; for example, a suit may be brought by a few of the crew of a privateer against the prize agents for an account of the prize money, when they sue for themselves and the rest of the crew, who had signed the articles, and had not received their share of the prize money.⁷⁸

⁷⁴ Hallett v. Hallett, 2 Paige, Ch. N. Y. 15; West v. Randall, 2 Mas. C. C. 190; Elmen-dorff v. Taylor, 10 Wheat. 152; Cockburn v. Thomson, 16 Ves. Ch. 321.

⁷⁵ Joy v. Wirtz, 1 Wash. C. C. 517; Marshall v. Beverley, 5 Wheat. 313.

⁷⁶ Evans v. Stokes, 1 Keen, Rolls, 32; West v. Randall, 2 Mas. C. C. 193; Cooper, Eq. Pl. 39.

⁷⁷ West v. Randall, 2 Mas. C. C. 193.

⁷⁸ Good v. Blewitt, 12 Ves. Ch. 397; Leigh v. Thomas, 2 Ves. Ch. 312; West v. Randall, 2 Mas. C. C. 193; 1 Daniell, Chanc. Pract. 332; Story, Eq. Pl. § 98.

4059. Another case of exception to the general rule is that of creditors of a deceased debtor, who may be joined in a suit to administer the assets, although it is not necessary they should be so joined as plaintiffs, because one or more of them may bring suit and file a bill, on their own behalf and on behalf of the other creditors upon the same estate, for an account and application of the estate of the deceased debtor; in which case, the decree being made applicable to all the creditors, the others may come in under it and obtain satisfaction for their demands, as well as the plaintiffs in the suit; and if they decline to do so, they will be excluded from the benefit of the decree, and will yet be considered bound by acts done under its authority.⁷⁹

The same principle applies when the demand is against the real as well as the personal assets;⁸⁰ when the creditors or incumbrancers are numerous, one or more may bring suit in behalf of himself and the others, in order to prevent inconvenience and to save expenses; and the same liberal principle has been extended to the case of creditors under a trust deed for the payment of debts.⁸¹

This course is often pursued where a bill is brought by some of the holders of bonds issued by a railroad company, in behalf of themselves and other bond holders, who may wish to come in and join with them to enforce rights under a mortgage given to secure the payment of the bonds.

4060. By analogy to the case of creditors, a legatee is permitted to sue on behalf of himself and the other legatees, in order to procure a settlement of the accounts of the administration and a payment of all the legatees.⁸²

For the same reason, when the bill seeks to apply personal estate among the next of kin, or among persons claiming as legatees under a general description, and it may be uncertain who are the persons answering that description, bills have been admitted by one claimant on behalf of himself and others equally interested.⁸³

4061. In cases where the parties have formed a voluntary *association*, those who sue or defend may be fairly presumed to represent the rights and interests of the whole;⁸⁴ the impracticability and inconvenience of joining the whole as parties have induced courts of equity to relax the rule, and to allow some of the parties to sue in behalf of themselves and all the others, when there is a substantial representation of all the interests before the court.⁸⁵ As, for example, where some of the partners in a very numerous company, consisting of five hundred or more, filed a bill for themselves and the other partners to rescind a contract entered into in behalf of the partnership, where it was manifest from the circumstances of the case that it would be for the benefit of all the partners that the contract should be rescinded, and an objection was made for want of parties, it was held by the court that the suit was properly brought.⁸⁶

4062. One of the principal grounds on which the courts rest for allowing

⁷⁹ Leigh v. Thomas, 2 Ves. Ch. 312, 313; Story, Eq. Pl. § 99; 1 Daniell, Chanc. Pract. 329; Hendricks v. Robinson, 2 Johns. Ch. N. Y. 283; Brown v. Ricketts, 3 Johns. Ch. N. Y. 556.

⁸⁰ Leigh v. Thomas, 2 Ves. Ch. 313.

⁸¹ Mitford, Eq. Pl. Jeremy, ed. 167 176; 1 Daniell, Chanc. Pract. 330.

⁸² 1 Daniell, Chanc. Pract. 331.

⁸³ Weld v. Bonham, 2 Sim. & S. Ch. 91, 138.

⁸⁴ Montagu, Eq. Pl. 58.

⁸⁵ Cooper, Eq. Pl. 40; West v. Randall, 2 Mas. C. C. 194; Chancey v. May, Prec. Chanc. 592; Hickens v. Congreve, 4 Russ. Ch. 562; Cockburn v. Thompson, 16 Ves. Ch. 328; Lloyd v. Loring, 6 Ves. Ch. 773; Attorney General v. Heelis, 2 Sim. & S. Ch. 67; Gray v. Chaplin, 2 Sim. & S. Ch. 267; Bromley v. Smith, 1 Sim. Ch. 8; Jones v. Garcia del Rio, 1 Turn. & R. Ch. 300.

⁸⁶ Small v. Atwood, 1 Younge, Exch, 407, 458. See Walburn v. Ingleby, 1 Mylne & K. Ch. 76.

some of the persons in interest to bring a suit in their own behalf and for their companions, is that it is apparent that all parties stand, or are supposed to stand, in the same situation, and have one common right, or one common interest; and that the suit so brought must be for the common benefit of all, and cannot be to the injury of any.⁸⁷

4063. There is a class where, on account of *the great number of parties*, and because it would be almost impracticable to bring them all before the court, the joinder of all will, on this account, be dispensed with; ⁸⁸ for example, where all the inhabitants of a district had a right of common under a trust, a suit brought by one, on behalf of himself and all the other inhabitants, was held to be well brought.⁸⁹

4064. Another exception to the rule is founded on the utter impossibility of including all persons who have an interest parties to the suit; as, for example, where one of several of the next of kin of an intestate, entitled to distribution, does not know and cannot ascertain where the other distributees are, he may sue for his distributive share without making the other distributees parties; but in such case this want of knowledge must be charged in the bill. In such case the master will be directed by the decree to inquire and state to the court who are all the next of kin of the intestate, and they may come in under the decree.⁹⁰

4065. Having considered who are to be made parties as plaintiffs in a suit in equity, let us next examine who are to be made *defendants*. This subject will be divided into two parts, of persons immediately interested in resisting the plaintiff's claim, and of persons consequentially so interested.

4066. The cases which fall under the general rule, in which all persons who have an immediate interest ought to be defendants, may be classed into those of parties defendants relating to trusts, of persons jointly liable, against whom a bill for an account should be brought, those who are parties to mortgages.

4067. In all cases of *trusts* the trustee and *cestui que trust* must in general be made defendants or plaintiffs; the former because he holds the legal estate, the latter because he is entitled to the equitable right. Whenever the trustee and *cestui que trust* have an interest in defending the suit, or the decree may ultimately affect their rights, they must be joined as parties; and when they have no such interest, they need not be made parties.⁹¹ But this rule is subject to an exception; where the party is in the situation of a mere naked trustee, without any estate vested in him, it is not in general necessary to make him a party. For example, a broker or agent signing a contract in his own name for the purchase or sale of property is not considered a necessary party to a bill for specific performance of such contract against the principal.⁹²

When, however, the trustee may be made responsible ultimately, he must be made a party; ⁹³ but this refers to cases only where the bill prays for relief, for it is not necessary that all trustees or other persons should be made parties as to bills of discovery.⁹⁴

However numerous the trustees or *cestuis que trust* may be, when it is proper

⁸⁷ Long v. Yonge, 2 Sim. Ch. 369; Hickens v. Congreve, 4 Russ. Ch. 565.

⁸⁸ 1 Montagu, Eq. Pl. 57; Cooper, Eq. Pl. 41; Mitford, Eq. Pl. Jeremy, ed. 170; Story, Eq. Pl. § 121.

⁸⁹ Anon. 1 Chanc. Cas. 269.

⁹⁰ Cooper, Eq. Pl. 39, 40, 41.

⁹¹ See Franco v. Franco, 3 Ves. Ch. 75; Seylard v. Harris, 1 Eq. Cas. Abr. 74; Swan v. Ligan, 1 M'Cord, Eq. So. C. 231; Piatt v. Oliver, 2 McLean, C. C. 211.

⁹² Cooper, Eq. Pl. 42; Willink v. Morris Canal, 3 Green, Ch. N. J. 377.

⁹³ Sturge v. Starr, 2 Mylne & K. Ch. 195; Harrison v. Pryn, Barn. 324.

⁹⁴ Trescott v. Smith, 1 M'Cord, Eq. So. C. 301.

that any of them should be made parties, they should all be joined—that is, if one of several trustees must be made a party, all the trustees must be joined, and if one of several *cestuis que trust* is to be made a defendant, all must be so made.⁹⁵

4068. But there is an exception to this rule; if there are several trustees, all implicated in a common breach of trust, for which the *cestui que trust* seeks relief in equity, he may bring his suit against them all, or against either of them, at his election, for in such case the injury or tort may be treated as several as well as joint.⁹⁶

Another exception depends upon the frame of the particular bill. It may in some instances be filed against one of several trustees, without joining the others; as, where it is so framed as to seek an account of so much of the trust fund as has come to the hands of a particular trustee. In this case he may be sued alone.⁹⁷

4069. All persons who are liable to a common charge or a common debt must in general be made parties defendants, not only for ascertaining and contesting the right or title of the plaintiff, but, should he succeed, to make each liable for contribution.⁹⁸ A few cases will exemplify this rule.

4070. Where a bill was filed by the captain of a ship against the survivor of two partners, who were joint owners of the ship, for an account and satisfaction of his demand, it was held that the suit was defective because the representatives of the other partner, who might be interested in the account, were not before the court, although at law the rule was different, for there the survivor and the representatives of the deceased could not be joined.⁹⁹ The fact that the surviving partner had bought the share of the deceased partner in the ship makes no difference, as the proceeding is not *in rem*, the rule in such case being that on a demand against a partnership firm all the persons constituting the firm must be before the court; and if any of them are dead, the representatives of the deceased partner must be made parties.¹⁰⁰

4071. For a similar reason, a bill for the payment of money due upon a bond must be against all the obligors; therefore, in a suit against the executor of an obligor to discover assets, all the obligors must be made parties, that the charge may be equal.¹⁰¹

4072. When debts are charged on land by a will in aid of the personal assets, and proceedings are commenced to enforce the right against the land by a sale or otherwise, the heirs or devisees who are to be affected by the decree must be made parties as well as the personal representatives.¹⁰²

These instances will perhaps be sufficient to show the application of the rule. Numerous others might be mentioned, together with the qualifications to which they are subject, but such details are not within the plan of this work.¹⁰³

⁹⁵ *In re Chertsey Market*, 1 Price, Exch. 261; *Minn v. Stant*, 12 Beav. Rolls, 190. And see, for limitations of the doctrine, *Adair v. New River Co.*, 11 Ves. Ch. 429; *Richardson v. Larpent*, 3 Younge & C. Ch. 507; *Wood v. Dummer*, 3 Mas. C. C. 308.

⁹⁶ *Walker v. Symonds*, 3 Swanst. Ch. 75.

⁹⁷ *Selyard v. Harris*, 1 Eq. Cas. Abr. 74; *Routh v. Kinder*, 3 Swanst. Ch. 144, n.; 1 Daniell, Chanc. Pract. 339, 340; *Beasley v. Kenyon*, 3 Beav. Rolls, 544; *Fleming v. Gilmer*, 35 Ala. N. S. 62.

⁹⁸ *Jackson v. Rawlins*, 2 Vern. Ch. 195.

⁹⁹ *Pierson v. Robinson*, 3 Swanst. Ch. 139, n.; *Weymouth v. Boyer*, 1 Ves. Ch. 416.

¹⁰⁰ See *Wilkinson v. Henderson*, 1 Mylne & K. Ch. 582; *Holland v. Pryor*, 1 Mylne & K. Ch. 237.

¹⁰¹ *Blois v. Blois*, 3 Ventr. 348; *Anon.* 2 Freem. 127; *Maddox v. Jackson*, 3 Atk. Ch. 406; *Cockburn v. Thompson*, 16 Ves. Ch. 326; *Angerstein v. Clarke*, 2 Dick. Ch. 738; 3 Swanst. Ch. 147; *Story*, Eq. Pl. § 169; 1 Daniell, Chanc. Pract. 302.

¹⁰² *Berry v. Askham*, 2 Vern. Ch. 26.

¹⁰³ See *Coppard v. Page*, 1 Forr. Exch. 1; 2 Younge & C. Exch. 68; *Perrot v. Bryant*, 2

4073. When an *account* is sought against several persons, either as partners or because they are jointly liable to account, they must all be made parties to the suit; so, if two executors or other personal representatives are bound to render an account, the suit should be brought against both of them.¹⁰⁴

4074. Having already considered who are to be made plaintiffs to a bill either to redeem or to foreclose a mortgage, under the present article our attention will be confined to the examination of the persons who must be made defendants, first, to a bill to redeem; second, to a bill to foreclose.

4075. As a general rule, it may be stated that all persons should be made defendants to a bill to redeem whose rights may be affected by the decrees. As between the original parties to the contract, when the mortgagee has not parted with any interest he had in the mortgage, and he is living, the mortgagee is the only party defendant.

In case of the death of the mortgagee when the mortgage is in fee, the legal title vests in the heir at law or a devisee; the person in whom the legal estate has become vested must be made a party, because, having the legal title, he is bound by the decree; and the personal representative of the mortgagee must also be made a party, on the ground that he is entitled to the purchase money when paid, as it is to be returned to the fund out of which it came, namely, the personal estate.¹⁰⁵

But if the mortgage is of a term of years, created by the owner of the fee, the heir is not entitled to it; it being merely a chattel real, the personal representative only is the proper party, because he alone has an interest in it, unless it has been disposed of in favor of a third person, who in such case must be made a party to the suit.¹⁰⁶

4076. Who ought to be the parties defendant when a mortgage has been absolutely assigned depends upon this circumstance, whether it was assigned without the authority or the privity of the mortgagor or not.

In the first case, where the mortgage has been assigned without such authority or privity, it is not requisite, in a bill brought to redeem, to make any other person than the last assignee a party to the bill. The fact that there were mesne assignments will make no difference, because the last assignee stands in the place of the original mortgagee.¹⁰⁷

When the assignment has been made with the authority or privity of the mortgagor, the intermediate assignees must be made parties when they have any interests which are to be protected.

Other cases have occurred where other than the original parties have an interest on which the decree must operate, and when, therefore, they must be joined in the suit.¹⁰⁸

4077. It has already been observed several times that all parties who have an interest in the suit and will be bound by the decree must be made parties,

Younge & C. Exch. 61; Cranborne *v.* Crisp, Cas. temp. Finch, 105; Collins *v.* Griffith, 2 P. Will. Ch. 313; 1 Daniell, Chanc. Pract. 362, 363; Story, Eq. Pl. §§ 159 to 169.

¹⁰⁴ Cowslad *v.* Cely, Prec. Chanc. 83; Scurry *v.* Morse, 9 Mod. 89; Moffat *v.* Farquharson, 2 Brown, Ch. 338.

¹⁰⁵ Cooper, Eq. Pl. 37; 1 Daniell, Chanc. Pract. 381; Story, Eq. Pl. § 188.

¹⁰⁶ Cooper, Eq. Pl. 37; Osbourn *v.* Fallows, 1 Russ. & M. Ch. 741.

¹⁰⁷ Winchester *v.* Beavor, 3 Ves. Ch. 315; Hill *v.* Adams, 2 Atk. Ch. 39; Lennon *v.* Porter, 2 Gray, Mass. 473; Hosford *v.* Nichols, 1 Paige, Ch. N. Y. 220; Whitney *v.* McKinney, 7 Johns. Ch. N. Y. 144.

¹⁰⁸ See Anon. 2 Freem. 59; Cholmondeley *v.* Clinton, 2 Jac. & W. Ch. 134; Whistler *v.* Webb, Bunb. Exch. 53; Hobart *v.* Abbott, 2 P. Will. Ch. 643; Norrish *v.* Marshall, 5 Madd. Ch. 475.

plaintiffs, or defendants; all persons who have an interest in the equity of redemption must be made parties to a bill of foreclosure.¹⁰⁹

A *bill of foreclosure* is a proceeding in chancery by which the mortgagor's right of redemption of the mortgaged premises is barred and foreclosed for ever. This takes place when the mortgagor has forfeited his estate by the non-payment of the money due on the mortgage at the time appointed, but still retains the equity of redemption; in such case the mortgagee files a bill calling on the mortgagor in a court of equity to redeem his estate presently, or, in default thereof, to be for ever foreclosed and barred from any right of redemption.¹¹⁰

When the equity of redemption belongs to different persons as heirs, devisees, or as having charges upon it as legatees, they should all be made defendants; and, in general, all incumbrancers who have an interest in the redemption of the land should be made defendants. It is immaterial whether such incumbrancers are prior or subsequent to the time of the mortgage under which the bill is filed. If they are not parties, they are not bound; if they were prior incumbrancers, their rights are paramount; if subsequent, they cannot be bound by the decree without any opportunity on their part to protect them, as they might have done if they had been made parties to the bill.¹¹¹

In the case of an absolute assignment of the equity of redemption by the mortgagor so that he has no further interest in it, the assignee only need be made a party to the bill to foreclose, for no one else can be affected by the decree.¹¹²

The heirs and representatives of a deceased husband are not to be made defendants to a bill to foreclose a mortgage on property of the wife.¹¹³

4078. To prevent a multiplicity of suits, in some cases the courts require *parties* who may be *consequentially liable* to or affected by the decree, to be made parties in the first instance, so that their liabilities may be adjudicated upon and settled by one proceeding. It is necessary to make these persons defendants to a suit, not because their right may be affected by the decree, but because, in the event of the success of the plaintiff in his object against the principal defendant, that defendant will thereby acquire a right either to call upon them to reimburse him the whole or part of his demand, or to do some act reinstating him in the condition he would have been in but for the success of the plaintiff. Many cases of this kind have been anticipated in other parts of

¹⁰⁹ See *Hallock v. Smith*, 4 Johns. Ch. N. Y. 649; *Palk v. Clinton*, 12 Ves. Ch. 58; 2 Spence, Eq. Jur. 695.

¹¹⁰ Sometimes a bill is filed praying for the sale of the mortgaged premises, and the mortgagee obtains a decree for the sale of the land, under direction of an officer of the court, in which case the proceeds are applied to the discharge of incumbrances according to their priority. This practice has been adopted in Indiana, Kentucky, Maryland, South Carolina, Tennessee, and Virginia. 4 Kent, Comm. 180. See *Mills v. Dennis*, 3 Johns. Ch. N. Y. 367. In Pennsylvania, a *scire facias* is issued upon the recorded mortgage, a judgment is obtained, and the land is sold under it, for the benefit of the mortgagee and other incumbrancers, and the surplus of the proceeds is paid over to the mortgagor.

¹¹¹ *Finley v. Bank of United States*, 11 Wheat. 304; *Rose v. Page*, 2 Sim. Ch. 471; *Haines v. Beach*, 3 Johns. Ch. N. Y. 459; *Draper v. Earl of Clarendon*, 2 Vern. Ch. 518; *Calvert, Parties in Eq.* 128; *Story, Eq. Pl.* § 193; *Murdock v. Ford*, 17 Ind. 52; *Stone v. Locke*, 46 Me. 445; *Proctor v. Baker*, 15 Ind. 178. The widow of the deceased owner of the equity must be a party. *Burton v. Dies*, 21 Cal. 87. As must the wife who has released her dower by the mortgage. *Cary v. Wheeler*, 14 Wisc. 281; *Leonard v. Villars*, 23 Ill. 377.

As to the rule where advances have been made by different parties under a mortgage to secure such advances, see *Tyler v. Yreka Co.*, 14 Cal. 212; *Wall v. May*, 30 Mo. 494; *Harlan v. Harlan*, 14 Ind. 439; *Rankin v. Major*, 9 Iowa, 297.

¹¹² *Gifford v. Hart*, 1 Schoales & L. Ch. Ir. 386; *Gower v. Howe*, 20 Ind. 396; *Johnson v. Morrell*, 13 Iowa, 300; *Babbitt v. Bowen*, 32 Vt. 437.

¹¹³ *Somerset v. Cammon*, 3 Stockt. Ch. N. J. 382. See *Wolf v. Banning*, 3 Minn. 202.

this work; those which are now to be considered may be classed as follows: cases of joint obligors and sureties, cases when real and personal representatives must be made parties, cases when a party is entitled to indemnification from a third person, in which case the latter must be made a party.

4079. It is upon this principle that the courts proceed in the case of sureties of joint obligors in a bond, by requiring all those who are bound, or their personal representatives, to be before the court, in order to avoid the multiplicity of suits which would be occasioned if one or more were to be sued without the others, and left to seek a contribution from their co-sureties, or the obligors in other proceedings.¹¹⁴

4080. In the case where a specialty creditor sues to recover his demand out of the real estate of the deceased, the courts require for the same reason that the personal as well as the real representatives should be brought before the court, because the personal estate is the primary fund for the payment of debts, and ought to be applied in ease of the land;¹¹⁵ the heir, therefore, has a right to insist that it shall be exhausted for this purpose before the realty is charged; so that if a decree were made in the first instance against the heir, he would be entitled to file a bill against the personal representative to reimburse himself. For this reason the court requires both to appear, that by decreeing the executor to pay the debt, in the first instance, as far as he has assets, a multiplicity of suits may be avoided.¹¹⁶

For the same reason, if a vendor were to file a bill against the heir, the latter would have a right to insist that the personal representatives should be brought before the court, because the purchase money, which is the object of the suit, is, in the first instance, payable out of the personal assets. But, where the personal representative cannot be made liable for the money, he need not be made a party.¹¹⁷

And even third persons may be proper parties to a bill against the representatives where they are liable to account for assets in their possession.¹¹⁸

4081. The following cases are examples of the kind where a third person who is bound to indemnify must be made a party. In a suit brought by A against B, the latter, in his answer, insisted that he was entitled to be reimbursed by C what he might be decreed to pay the plaintiff, and, therefore, that C was a necessary party; at the time of the hearing, the court directed the cause to stand over, with liberty to the plaintiff to amend by making C a defendant.¹¹⁹

Another case, ruled upon the same principle, was that of an heir at law who brought a suit against a widow, and by his bill prayed that she might be compelled to abide her election, and to take a legacy in lieu of dower; in this case it was held that the personal representative was a necessary party, because, in the event of the plaintiff's succeeding, she was entitled to satisfaction for her legacy out of the personal assets, and the plaintiff had leave to amend by making the executor a party.¹²⁰

¹¹⁴ See *Maddox v. Jackson*, 3 Atk. Ch. 416; 1 Daniell, Chanc. Pract. 362; *Roversy v. Grayson*, 3 Swanst. Ch. 145, note; *Bland v. Winter*, 1 Sim. & S. Ch. 146; *Young v. Lyons*, 8 Gill, Md. 162; *New England Bank v. Newport Steam Factory*, 6 R. I. 154.

¹¹⁵ *Galton v. Hancock*, 2 Atk. Ch. 434.

¹¹⁶ *Knight v. Knight*, 3 P. Will. Ch. 333.

¹¹⁷ See *Astley v. Fountain*, Cas. temp. Finch, 4; *Green v. Poole*, 5 Brown, Parl. Cas. 504; *Smith v. Hibbard*, 2 Dick. Ch. 730; *Townsend v. Champernowne*, 9 Price, Exch. 130.

¹¹⁸ *Long v. Majestre*, 1 Johns. Ch. N. Y. 305; *Pearse v. Hewitt*, 7 Sim. Ch. 471; *Sherland v. Mildon*, 5 Hare, Ch. 469. See *Harrison v. Righter*, 3 Stockt. Ch. N. J. 389.

¹¹⁹ *Greenwood v. Atkinson*, 5 Sim. Ch. 419.

¹²⁰ *Lesquire v. Lesquire*, Cas. temp. Finch, 134. And for various other cases, where third persons have been held to be properly joined on account of a secondary responsibility,

4082. Although it is not easy to say who are the necessary parties to a suit, and it is doubtful, until the decision of the cause, what interests may be affected by that decision,¹²¹ yet it is a rule that no one should be made a party to a suit against whom, if brought to a hearing, there could be no decree.¹²²

This subject will be divided by considering, first, what is a joinder of parties who have no interest, second, the effect of such a joinder.

4083. Persons who have no interest are agents, auctioneers, stewards, solicitors, attorneys, witnesses, and the like, persons whose interests are only consequential, those who are not in privity with the parties, nominal or formal parties, and claimants by paramount title.

4084. Persons who have *no interest in the thing sued for* can have no right to recover, and therefore ought not to be joined as parties; and if such persons have been joined, this is fatal to the proceedings.¹²³ For the same reason, persons having adverse or conflicting interests in the subject of litigation ought not to be joined as complainants in the suit.¹²⁴

On the other hand, when persons have been connected with the transaction in some capacity which gives them no title to the subject matter of the suit, they cannot in general be made defendants; as, for example, an auctioneer who has sold an estate, the sale being the matter in controversy; an attorney who has negotiated an annuity, when the bill prays to set aside the contract; an arbitrator to a suit, when the bill is to enforce or set aside the award; a steward or receiver of rents or profits in a suit between the vendor and vendee, when a bill is filed for a specific performance. In all these cases these agents should not be joined, and if they are, and it appears upon the bill that they have no interest, it will be ground for demurrer.¹²⁵

4085. But it must be remembered that in cases of this kind, when there is any charge of fraud in the transaction in which these parties have been participants, and such fraud is charged in the bill, they may be made parties defendant; for, at least, they may be made responsible for costs in consequence of their fraud.¹²⁶

4086. A mere *witness* ought not for the same reason to be made a party to a bill, although the plaintiff might deem his answer more satisfactory than his examination, because he has no interest in the cause, and no decree can be made against him; besides, his answer would not be evidence against his co-defendant.¹²⁷ The injustice of harassing him with such a suit, and putting him unjustly to the trouble and expense of defending himself, is a sufficient reason why he should not be made a party.¹²⁸

liability, or interest in the result of the bill, see *People v. Law*, 34 Barb. N. Y. 494; *Buchoz v. Lecom*, 9 Mich. 234; *Camp v. McGillicuddy*, 10 Iowa, 204.

¹²¹ Mitford, Eq. Pl. Jeremy, ed. 179.

¹²² *Wych v. Meal*, 3 P. Will. Ch. 311, n.

¹²³ See *Beatty v. Judy*, 1 Dan. Ky. 103; *Brumley v. Westchester Co.*, 1 Johns. Ch. N. Y. 366.

¹²⁴ *Alston v. Jones*, 3 Barb. Ch. N. Y. 397. See Mitford, Eq. Pl. Jeremy, ed. 185, 187; *Cooper*, Eq. Pl. 189, 190; *Welford*, Eq. Pl. 282; *King of Spain v. Machado*, 4 Russ. Ch. 244.

¹²⁵ *Cooper*, Eq. Pl. 42; 1 Daniell, Chanc. Pract. 394, 397, 399; *Story*, Eq. Pl. § 231; *Welford*, Eq. Pl. 283; *Coe v. Beckwith*, 31 Barb. N. Y. 339; *Lyon v. Tevis*, 8 Iowa, 79.

¹²⁶ Mitford, Eq. Pl. Jeremy, ed. 160.

¹²⁷ *Twells v. Costen*, 1 Pars. Eq. Cas. Penn. 373, 378. The reason why the answer of a co-defendant is not evidence against a defendant is, that the latter ought not to be compromised by what may be said in the answer, because he had no opportunity to cross-examine him, and it would be unjust to let his answer be evidence, when he responds merely to the interrogatories of their common adversary. *Plumer v. May*, 1 Ves. sen. Ch. 426; *Dinely v. Dinely*, 2 Atk. Ch. 394; *Cookson v. Ellison*, 2 Brown, Ch. 252; *Fenton v. Hughes*, 7 Ves. Ch. 287; *Howe v. Best*, 5 Madd. Ch. 19.

¹²⁸ 1 Daniell, Chanc. Pract. 397; *Cookson v. Ellison*, 2 Brown, Ch. 252; Mitford, Eq. Pl. Jeremy, ed. 188; *Twells v. Costen*, 1 Pars. Eq. Cas. Penn. 373.

4087. But to this rule there is an exception which is somewhat anomalous; it is, nevertheless, fully established. It cannot be better stated than in the words of King, P. J.¹²⁹ "To this rule there is one established exception," he says, "cases of corporations, where chief officers may be made parties to a discovery, although no decree is sought or could be had against them. The reason of this exception, which has been considered as a stretch of the authority of the court to prevent a failure of justice, seems to have sprung from the fact that a corporation could only answer under its common seal, and therefore could not be indicted for perjury, however falsely it might answer; and from the idea that though the answer of the officers could not be read in evidence against the corporation, it might be of use in directing the plaintiff how to draw his interrogatories to obtain a better answer."¹³⁰

4088. We have already seen that when a party has a mere consequential interest, it is not requisite he should be made a defendant; for example, where a bill is filed by a creditor for the payment of his debt out of the assets of his deceased debtor, whether the plaintiff sues for himself alone or for himself and on behalf of all others.¹³¹ This subject has already been fully considered.

4089. When there has been no contract between the plaintiff and another person, and there is no *privity*, it is evident the latter ought not to be made a defendant, although he may have in his hands what may be eventually liable for the claim, because his liability, if any, is to another person. For example, when a creditor brings a suit against an executor for the payment of his debt out of the assets, a debtor of the estate cannot, in general, be joined as a defendant, because he is liable solely to the executor.¹³² But if it appear that there is collusion between the executor and the debtor, the latter may be made a defendant upon that ground, for a court of equity has jurisdiction on the ground of fraud.

4090. Nominal parties are those from whom no account, payment, convenience, or other direct relief is sought, not being an infant.¹³³

In general, the joinder of mere *nominal parties* will not be required, and if such persons cannot be made parties, they will be dispensed with, and the want of them will not arrest the proceedings.¹³⁴

4091. When a suit is brought for the recovery of a subject matter which is due the defendant, if a third person has a claim upon it by a paramount title, he ought not to be made a defendant, for if he has a prior title or incumbrance, he cannot be affected by the decree; for example, when a bill is filed to carry into effect the trusts of a will, a person who claims a title or incumbrance prior to the will, or to the testator, ought not to be made a party, because his title being paramount to that of the testator, he cannot be affected by such a bill.¹³⁵

4092. When the objection of a want of interest applies, it is as fatal when applicable to one of several plaintiffs as it is when applicable to one of several

¹²⁹ Twells v. Costen, 1 Pars. Eq. Cas. Penn. 379.

¹³⁰ See Wych v. Meal, 3 P. Will. Ch. 312; Fenton v. Hughes, 7 Ves. Ch. 289; Dummer v. Chippenhorn, 14 Ves. Ch. 524; Gibbons v. Waterloo Bridge, 5 Price, Exch. 491; Story, Eq. Pl. § 235; Wright v. Dame, 1 Metc. Mass. 237.

¹³¹ Mitford, Eq. Pl. Jeremy, ed. 170. See also Page v. Olcott, 28 Vt. 465.

¹³² Utterson v. Mair, 2 Ves. Ch. 95; Gedge v. Traill, 1 Russ. & M. Ch. 281. See Frye v. Bank of Illinois, 11 Ill. 367.

¹³³ Rules for the courts of equity of the U. S., Rule 54. See Skiles v. Suitzer, 11 Ill. 533.

¹³⁴ Wormley v. Wormley, 8 Wheat. 451; Butler v. Pendegrift, 2 Brown, Parl. Cas. 170; Lang v. Brown, 29 Ga. 368.

¹³⁵ Devonsher v. Newenham, 2 Schoales & L. Ch. Ir. 210; Pelham v. Gregory, 1 Ed. Ch. 518; 5 Brown, Parl. Cas. 435; 1 Daniell, Chanc. Pract. 359; Chapman v. West, 17 N. Y. 125.

defendants. In the former case it is fatal to the whole suit ; in the latter, when taken in due time, it is fatal against the defendant improperly joined.¹³⁶

4093. Having examined to some extent the rules with reference to making persons parties to a suit in equity, and shown who ought to be joined, and the effect of joining those who have no interest, let us now take a passing notice of the manner of curing the defects of having made improper parties, when such faults can be cured.

When the want of necessary parties appears upon the face of the bill, the defendant may demur. If, however, the defect be of vital importance, with regard to the character of the bill and the nature of the relief prayed for, the defendant is not forced to demur, but may insist upon the defect at the hearing.¹³⁷ When the defect is not apparent on the bill, it may be objected to by plea or answer.¹³⁸

But if, instead of too few persons having been made parties to the bill, the defect is, on the contrary, that persons have been joined who had no interest in the suit, and such defect appears on the face of the bill, the party improperly joined may demur, or at the hearing may rely upon it as a ground of defence as to himself. When the defect is not apparent on the face of the bill, the party improperly joined may rely on the objection by plea or answer.

A demurrer for want of parties must show who are the proper parties, not indeed by name, for that might be impossible, but in such a manner as to point out to the plaintiff the objections to his bill, and enable him to amend by adding proper parties.¹³⁹ In case of demurrer for want of parties, an amendment has been permitted, even when the demurrer has been allowed.¹⁴⁰

¹³⁶ Story, Eq. Pl. § 232; *Makepeace v. Hawthorn*, 4 Russ. Ch. 244; 1 Daniell, Chanc. Pract. 399; 1 Welford, Eq. Pl. 25.

¹³⁷ Cooper, Eq. Pl. 33, 185; Mitford, Eq. Pl. Jeremy, ed. 180; *Postlewait v. Hawes*, 3 Iowa, 365. Even in this case, however, it is said to be the better practice not to dismiss the bill, but to order the cause to stand over with leave to bring in the proper parties. *West v. Randall*, 2 Mas. C. C. 181; *Ferguson v. Fisk*, 28 Conn. 501; Story, Eq. Pl. Redfield ed. § 235, note; *Postlewait v. Hawes*, 3 Iowa, 365; *Webster v. French*, 11 Ill. 254.

¹³⁸ Cooper, Eq. Pl. 289; Mitford, Eq. Pl. Jeremy, ed. 280; *Page v. Olcott*, 28 Vt. 465.

¹³⁹ Mitford, Eq. Pl. 146; *Attorney General v. Jackson*, 11 Ves. Ch. 369; Welford, Eq. Pl. 267, 319.

¹⁴⁰ Mitford, Eq. Pl. 146; 1 Daniell, Chanc. Pract. 385.

CHAPTER IX.

BILLS IN EQUITY.

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4094. As to the origin of these bills, it will not be required, in a work of this kind, to go into long details of their history; it will perhaps be sufficient to state that they have by degrees been reduced to a perfect system, though at first they were extremely simple, being a mere petition to the king, which was referred by him to his chancellor. In the course of time this petition was addressed to the chancellor himself; and afterward it assumed a regular and uniform frame. In it was stated the cause of complaint, and this was followed by a prayer to the court to grant suitable relief. Like every other thing human, by degrees the bill was improved to what we now find it.

Bills in equity were doubtless borrowed from the civil and canon law, and the latter was in many respects copied from the former. The early English chancellors were generally ecclesiastics, accustomed to the jurisprudence of those two systems, and naturally introduced into the English law many of the principles and maxims which they had learned, and which are founded for the most part in common sense and sound reason.

Equity pleading, which is the formal mode of alleging that on the record which would be the support or defence of the party on evidence,¹ has become a science of considerable refinement, and of many nice distinctions, so that it requires much time, diligence, and attention, fully to master the subject. It will be the object of this title of the work to develop the principles of equity pleading, without, however, going into minute details.

In this chapter we shall consider, first, the several kinds of bills, and, second, the frame of bills, or the analysis, or several parts of a bill.

¹ Read *v.* Brookman, 3 Term, 159. See Bouvier, *Law Dict. Pleading*.

4095. When considered as to their kinds, bills may be classified into original bills, bills not original, bills in the nature of original bills, bills which derive their names from the object the complainant has in view.²

4096. An *original bill* is one which relates to some matter not before litigated in the court by the same persons and standing in the same interests. It is one which first brings before the court the matter which is in litigation, and not as assistant to any other proceeding.³ These bills may pray relief against an injury sustained, or only seek assistance of the court to enable the plaintiff to defend himself against a possible injury, or to support or defend a suit in a court of ordinary jurisdiction. Original bills are, therefore, classed into those which pray for relief, and those which do not ask for relief.

4097. An *original bill praying relief* is one by which the plaintiff prays the court to secure him some right to which he is entitled, or to relieve him from some injury to which he is liable or for which he suffers unjustly. These bills are of three kinds.

4098. A bill praying a decree or order *touching some right* claimed by the person exhibiting it, in opposition to some right claimed by the person against whom the bill is exhibited. In the most general sense, all bills may be said to pray for relief, all seek the aid of the court to remedy some existing or apprehended wrong or injury. But, in the sense used in courts of equity, bills only are deemed bills for relief, which seek from the court in that very suit a decision upon the whole merits of the case set forth by the plaintiff, and a decree which shall ascertain and declare his present rights or redress his present wrongs. Other bills, merely asking the aid of a court of equity against possible future injury, or to support or defend a suit in another court of ordinary jurisdiction, are deemed bills not for relief.⁴ The nature and frame of a bill praying relief will be fully considered further on.

4099. A bill of *interpleader* is one by which the complainant claims no relief against either the plaintiff or defendant, but offers to pay the money or deliver the property in dispute to the one to whom it justly, legally, or equitably belongs, and prays that he may be protected and relieved from the claim of either of them. The plaintiff does not pray a decree of the court touching the rights of the parties in the original suit, but simply for his own safety, so that he shall not be compelled to pay the debt he owes or perform his obligation twice.⁵

When examining the assistant jurisdiction of the courts of equity this subject was fully examined, so that here it will not be necessary further to consider it.⁶

4100. A bill of *certiorari* is one which prays for a writ of *certiorari* to remove a suit from an inferior to a superior court of equity,⁷ on account of some

² It is proper here to observe, in the words of Judge Story, that "a very large portion of the following remarks, as to these different kinds of bills, is borrowed from Lord Redesdale's Treatise, with little more than an occasional verbal alteration. I have not the presumption to suppose that upon so complicated a subject I could add any thing to the remarks of this great master of equity, upon whose works the highest eulogy was pronounced by Lord Eldon, in *Lloyd v. Johnes*, 9 Ves. Ch. 541." Other works and the books of Reports have been consulted, but little can be added to so perfect a work as that of Mr. Mitford, afterward Lord Redesdale. All the text writers upon this subject, who have published their works since that of Lord Redesdale was given to the profession, have made the same free use of his lordship's labors.

³ Mitford, Eq. Pl. Jeremy, ed. 33.

⁴ Mitford, Eq. Pl. Jeremy, ed. 33, 34; Story, Eq. Pl. § 17.

⁵ *Bedell v. Hoffman*, 2 Paige, Ch. N. Y. 199. See *Gibson v. Goldthwaite*, 7 Ala. N. S. 281; *Griggs v. Thompson*, 1 Ga. Dec. 146; *Hayes v. Johnson*, 4 Ala. N. S. 267.

⁶ See before, 3822.

⁷ Mitford, Eq. Pl. Jeremy, ed. 34; Cooper, Eq. Pl. 43.

alleged incompetency of the inferior court, or because of injustice in its proceedings. In its form this bill first states the proceedings in the inferior court, next its incompetency, by suggesting that the cause is out of its jurisdiction, or that the witnesses or the defendant live out of its jurisdiction, and cannot, in consequence of their age, infirmity, or the distance of the place, follow the suit there, or that from some cause equal justice is not likely to be done there, and it then prays a writ of *certiorari*, to certify and remove the record to the superior court. This kind of bill is seldom used in the United States.

4101. *An original bill, not praying relief*, is one which is brought to ascertain facts, or to secure the evidence of them. In these cases, of course, no relief is asked, the sole object being the discovery of the existence of facts known to the defendant, and which the plaintiff seeks to discover from him, so that the same shall be used as evidence against him; or, in another case, he seeks to perpetuate the knowledge of facts and prevent the evidence from being lost. Bills not praying relief are of two kinds.

4102. Every bill praying for relief is, in one sense, a bill of discovery, because the plaintiff asks the defendant to answer upon oath or affirmation as to all matters charged in the bill, and seeks from him a discovery of all such matters. But a bill of discovery, in its technical sense, is a bill for the discovery of facts resting in the knowledge of the defendant, or of deeds or writings, or other things in his custody or power, and seeking no relief in consequence of the discovery, though it may pray for the stay of proceedings at law till the discovery is made.

Having fully examined the subject of discovery, by whom, against whom, and for what cause a bill may be filed, when considering the assistant jurisdiction of courts of equity, the reader is referred for further examination to that place.⁸

4103. When considering the assistant jurisdiction of courts of equity, it will be remembered we examined the nature of bills for the examination of witnesses *de bene esse*, and bills to perpetuate testimony. It will not be requisite to repeat that matter here.⁹

4104. *Bills not original* are those which are brought after some other bill has already been filed between the parties relating to the subject matter of the suit; they of course always presuppose the existence of some other bill.

Sometimes there is an imperfection in the frame of a bill, which, till remedied, is a bar to the plaintiff's recovery. It may frequently be removed by amendment, but sometimes it remains undiscovered while the proceedings are in such a state that an amendment can be permitted by the practice of the court; for after some event has occurred affecting the rights or interests of the parties, no amendment can be allowed. This is particularly the case where, after the court has decided upon the suit as framed, it appears to be necessary to bring some other matter before the court to obtain the full effect of the decision; so, when some other point appears necessary to be made, or some additional remedy is requisite, in order to do justice between parties.¹⁰

But when a suit is perfect in its institution, it may, by some event subsequent to the filing of the bill, become defective, so that no proceeding can be had upon it, either as to the whole or as to some part, with effect; or it may become abated either as to the whole or as to a part of the bill. The first is the case where, although the parties to the suit remain before the court, some event subsequent to its institution has either made such a change in the interests of those

⁸ Before, 3739-3745.

⁹ Before, 3746-3752.

¹⁰ Mitford, Eq. Pl. Jeremy, ed. 56. See *Jones v. Jones*, 3 Atk. Ch. 110; *Goodwin v. Goodwin*, 3 Atk. Ch. 370.

parties, or given to some other person such an interest in the matters in litigation that the proceedings as they stand cannot have their full effect. The other is the case when, by some subsequent event, there is no person before the court by whom or against whom the suit, in whole or in part, can be prosecuted.¹¹

Though it does not appear to be accurately ascertained in what cases a suit becomes defective without being absolutely abated, and in what cases it abates as well as becomes defective, yet it seems that if by any means any interest of a party to the suit in the matter in litigation becomes vested in another, the proceedings are rendered defective in proportion as that interest affects the suit; so that although the parties to the suit may remain as before, yet the end of the suit cannot be obtained.¹² And if such a change of interest is occasioned by, or is the consequence of, the death of a party whose interest is not determined by his death, or the marriage of a female plaintiff, the proceedings become likewise abated or discontinued in whole or in part; for, as far as the interest of the party extends, there is no longer any person before the court by or against whom the suit may be prosecuted; and a married woman is incapable by herself of prosecuting the suit.¹³

An assignment by act of law, as, by bankruptcy or insolvency, is so far analogous to the case of death and marriage that the assignee in whom an interest does or may rest must be made a party.¹⁴

Generally speaking, an assignment *pendente lite* has no effect upon the suit, since the purchaser will be held to take subject to all the equities.¹⁵ But where an equitable interest held by part of the plaintiffs was mortgaged, it was held that the assignees were necessarily to be made parties.¹⁶ And it seems that an assignment between filing the bill and serving subpoena is not an assignment *pendente lite*.¹⁷ But an assignee *pendente lite* is a proper party defendant at the election of the plaintiff.¹⁸

There are various methods of obtaining the benefit of a suit which has become defective or abated by any event subsequent to its institution, and the rules of practice are not the same in different jurisdictions. In all cases, however, it is clear that if any property or right in litigation vested in a plaintiff is transmitted to another, the person to whom it is transmitted is entitled to supply the defects of the suit, if become merely defective, and to continue it, or at least to have the benefit of it, if abated.¹⁹ It is also clear that if any prop-

¹¹ Mitford, Eq. Pl. Jeremy, ed. 56.

¹² Hoxie v. Carr, 1 Sumn. C. C. 173, 177; Mole v. Smith, 1 Jac. & W. Ch. 665; Indiana Co. v. Bates, 14 Ind. 8; McConnell v. Smith, 23 Ill. 611; Glenn v. Webb, 17 Md. 250; Heard v. March, 12 Cush. Mass. 580; Anshuty's Appeal, 34 Penn. St. 375.

¹³ Mitford, Eq. Pl. Jeremy, ed. 57. See numerous instances cited by Lord Redesdale, in his admirable Treatise on Equity Pleading. Mitford, Eq. Pl. Jeremy, ed. 57-60; Quackenbush v. Leonard, 10 Paige, Ch. N. Y. 131. When a female defendant marries, the suit does not thereby become abated; in such case it is only necessary to obtain an order that the suit proceed against her by her new name, in conjunction with her husband, who is also to be named in the subsequent proceedings.

¹⁴ Story, Eq. Plead. Redfield ed. 158, a; Lowry v. Morrison, 11 Paige, Ch. N. Y. 327; Sedgewick v. Cleaveland, 7 Paige, Ch. N. Y. 290. See Coe v. Whitbeck, 11 Paige, Ch. N. Y. 42.

¹⁵ Eades v. Harris, 1 Younge & C. Ch. 230; Winchester v. Payne, 11 Ves. Ch. 194; Hoxie v. Carr, 1 Sumn. C. C. 173; Greenwich Bank v. Loomis, 2 Sandf. Ch. N. Y. 70; Murray v. Ballou, 1 Johns. Ch. N. Y. 577; Steele v. Taylor, 1 Minn. 274.

¹⁶ Solomon v. Solomon, 13 Sim. Ch. 516. But see Eades v. Harris, 1 Younge & C. Ch. 230; Johnson v. Thomas, 11 Beav. Rolls, 502.

¹⁷ Powell v. Wright, 7 Beav. Rolls, 444.

¹⁸ Humber v. Shore, 3 Hare, Ch. 119; Echliiff v. Baldwin, 16 Ves. Ch. 257; Bank v. Seton, 1 Pet. 310.

¹⁹ Deas v. Thorne, 3 Johns. N. Y. 543; Carter v. Mills, 30 Mo. 432; Ridgely v. Bond, 18 Md. 433; Heard v. March, 12 Cush. Mass. 580; Postlewait v. Hawes, 3 Iowa, 365; Hungerford v. Cushing, 8 Wisc. 332. See McConnell v. Smith, 23 Ill. 611.

erty or right before vested in the defendant becomes transmitted to another, the plaintiff is entitled to render the suit perfect, if defective, or to continue it, if abated, against the person to whom that property or right is transmitted.²⁰

The means of supplying the defects of a suit, continuing it if abated, or obtaining the benefit of it, are by supplement bill, by bill of revivor, or by bill of revivor and supplement.

4105. A *supplemental bill*, as has already been observed, is one occasioned by some defect in a suit already instituted, whereby the parties cannot obtain complete justice, to which otherwise they would have been entitled under the case stated in their bill.²¹ It is a continuation of the original bill, and will sustain the original bill by the allegation of facts which did not exist until after the original bill was filed.²²

Generally, a mistake in the bill should be corrected by an amendment merely.²³ But after the parties are at issue, and witnesses have been examined, amendments will not, in general, be allowed,²⁴ yet the defect may not have been known or not understood till that time. In this case, as well as where matter has happened since the filing of the bill, a supplemental bill should be filed.²⁵ Where the suit has actually abated, the bill, though commonly called a supplemental bill, is more properly a bill in the nature of a bill of revivor.

The filing of a supplemental bill is not in all cases a matter of course.²⁶ Leave must be obtained, and this is especially true when the bill seeks to change the structure of the original bill, and introduce a new and different case.²⁷ In such a case the bill rather constitutes a supplemental suit than a continuation of the former suit. A supplemental bill cannot be filed after the dismissal of the original bill.²⁸ It is proper to consider in what case such a bill may be filed, and its frame and particular requisites.

4106. The cases in which a supplemental bill may be filed are numerous,

²⁰ Webster v. Hitchcock, 11 Mich. 56.

²¹ See Mitford, Eq. Pl. Jeremy, ed. 61; 3 Daniell, Chanc. Pract. 150; Cooper, Eq. Pl. 73; Story, Eq. Pl. § 332; 1 Smith, Ch. Pr. 525.

²² Greenwood v. Atkinson, 4 Sim. Ch. 628; Catton v. Carlisle, 5 Madd. Ch. 427; Hill v. Hill, 10 Ala. N. S. 527; Chouteau v. Rice, 1 Minn. 106.

²³ Strickland v. Strickland, 12 Sim. Ch. 253; Stafford v. Howlet, 1 Paige, Ch. N. Y. 200.

²⁴ Mills v. Campbell, 2 Younge & C. Ch. 298; Barnett v. Grafton, 8 Sim. Ch. 72; Green v. Tanner, 8 Metc. Mass. 411; Kittredge v. The Claremont Bank, 3 Stor. C. C. 590. It is provided substantially as follows, by the Rules of the United States Supreme Court, that amendments to the bill may be made as a matter of course in any matter whatsoever before copy taken out of clerk's office, and in small matters, afterward; such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. After copy taken out the plaintiff must furnish a copy of amendments, or of the whole bill if amendments are numerous. After answer, plea, or demurrer put in, he must obtain leave of court to amend, which may be without notice, and subject to payment of costs in discretion of the court. After replication filed he may amend only upon petition, or motion and order of court after notice, and upon proof that amendment is not offered for vexation or delay, is material, and could not have been introduced sooner with reasonable diligence, and upon terms imposed by the judge for pleading the cause. Equity Rules U. S. Sup. Court, 28, 29. And the general American practice is substantially in accordance with these rules. See beyond, **4388**; Maillot v. Mailier, 15 La. Ann. 40; Winn v. Albert, 2 Md. Ch. Dec. 42.

²⁵ Rowe v. Wood, 1 Jac. & W. Ch. 339; Wray v. Hutchinson, 2 Mylne & K. Ch. 235; Crompton v. Woombwell, 4 Sim. Ch. 628; Veazie v. Williams, 3 Stor. C. C. 54; Dodge v. Dodge, 29 N. H. 177.

²⁶ Turner v. Berry, 8 Ill. 541; Barnico v. Trenton Ins. Co., 2 Beasl. Ch. N. J. 154; Woodruff v. Burgh, 2 Halst. Ch. N. J. 465; Winn v. Albert, 2 Md. Ch. Dec. 42. See Rogers v. Solomons, 17 Ga. 598.

²⁷ Jones v. Jones, 3 Atk. Ch. 110; Colclough v. Evans, 4 Sim. Ch. 76; Turner v. Berry, 8 Ill. 541.

²⁸ Burke v. Smith, 15 Ill. 158.

and may in general be reduced to classes. The principal of these are the following:

When the imperfection of a suit arises from a defect in the original bill, or in some of the proceedings upon it, and not from any event subsequent to the institution of the suit, it may be added to by a supplemental bill merely.²⁹ Thus a supplemental bill may be filed to obtain a further discovery from the defendant, to put a new matter in issue,³⁰ or to add parties,³¹ where the proceedings are in such state that the original bill cannot be amended for the purpose. And this may be done as well after as before decree, but whenever the same end may be obtained by amendment, the court will not permit a supplemental bill to be filed.³²

When any new events or new matters have occurred since the filing of the bill, they may in general be introduced by a supplemental bill, for then the bill cannot be amended in these respects. The events and matters which can thus be introduced must, however, be confined to such as refer to and support the rights and interests already mentioned in the bill.³³

When, after the court has decided upon the suit as framed, it appears necessary to bring some other matter before the court to obtain the full effect of the decision; or before a decision has been obtained, but after the parties are at issue upon the points in the original bill, and witnesses have been examined, (in which case an amendment is not in general permitted,) some other point appears necessary to be made, or some additional remedy is found requisite;³⁴ these may be supplied by a supplemental bill.

In like manner such a bill may be filed when a party necessary to the proceedings has been omitted, and cannot be admitted by an amendment.³⁵

When the interest of a plaintiff, suing *in autre droit*, entirely determines by death or otherwise, and some other person thereupon becomes entitled to the same property under the same title, as in the case of new assignees under a commission of bankruptcy, upon the death or removal of former assignees,³⁶ or in the case of an executor or administrator, upon the determination of an administration *durante minori ætate*, or *pendente lite*, the suit may likewise be added to and continued by supplemental bill. In these cases, it will be observed, there has been no change of interest which can affect the question between the parties, but only a change of the person in whose name the suit may be prosecuted.³⁷

If a sole plaintiff, suing in his own right, is deprived of his whole interest in the matters in question by an event subsequent to the institution of a suit, as in the case of bankruptcy or insolvency, and the plaintiff's whole interest is assigned to another, the plaintiff has no longer any interest for which he can prosecute his suit; the assignees must claim by an original bill in the nature of supplemental bill.³⁸

²⁹ *Humphreys v. Humphreys*, 3 P. Will. Ch. 349; *Brown v. Higdon*, 1 Atk. Ch. 291; *Sanders v. Frost*, 5 Pick. Mass. 275; *Chandler v. Pettit*, 1 Paige, Ch. N. Y. 168; *Stafford v. Howlett*, 1 Paige, Ch. N. Y. 200; *Manchester v. Matthewson*, 2 R. I. 416.

³⁰ *Eastman v. Batchelder*, 36 N. H. 141.

³¹ *Parkhurst v. Kinsman*, 2 Blatchf. C. C. 72.

³² *Stafford v. Howlett*, 1 Paige, Ch. N. Y. 200; *Chandler v. Price*, 1 Paige, Ch. N. Y. 168; *Mitford*, Eq. Pl. Jeremy, ed. 62.

³³ *Story*, Eq. Pl. § 336; *Mitford*, Eq. Pl. Jeremy, ed. 63.

³⁴ *Cooper*, Eq. Plead. 74; *O'Hara v. Shepherd*, 3 Md. Ch. Dec. 306; *Jones v. Jones*, 3 Atk. Ch. 310; *Goodwin v. Goodwin*, 3 Atk. Ch. 370; *Lee v. Lee*, 17 Eng. L. & Eq. 265, 19 *id.* 244.

³⁵ *Mitford*, Eq. Pl. Jeremy, ed. 61.

³⁶ *Anon.* 1 Atk. Ch. 88, 571; *Winn v. Albert*, 2 Md. Ch. Dec. 42.

³⁷ *Mitford*, Eq. Pl. Jeremy, ed. 64.

³⁸ See *Harrison v. Ridley*, Com. 589.

When, by any event, the whole interest of a defendant is entirely determined, and the same interest is vested in another by a title not derived from a former party, as on the determination of an estate tail and the vesting of a subsequent remainder in possession, the benefit of the suit against the person becoming entitled by the event described must be obtained by original bill in the nature of a supplemental bill. But a distinction must be observed. If the interest of a defendant is not determined, and only becomes vested in another by an event subsequent to the institution of a suit, as in the case of alienation by deed or devise, bankruptcy or insolvency, the defect in the suit may be supplied by supplemental bill, whether the suit has become defective merely, or abated as well as become defective.³⁹ In these cases the new party comes before the court exactly in the same plight and condition as the former party, is bound by his acts, and may be subject to all the costs of the proceedings from the beginning.⁴⁰

In all these cases, if the suit has become abated as well as defective, the bill is commonly termed a supplemental bill in the nature of a bill of revivor, as it has the effect of a bill of revivor, continuing the suit.⁴¹

4107. Having ascertained in what case it is proper to file a supplemental bill, let us in the next place consider the frame of such a bill. A supplemental bill must state the original bill and the proceedings thereon; and if the supplemental bill is occasioned by an event subsequent to the original bill, it must state that event and the consequent alteration with regard to the parties; and, in general, the supplemental bill must pray that all the defendants may appear and answer to the charges it contains. For if the supplemental bill is not for a discovery merely, the cause must be heard upon the supplemental bill at the same time that it is heard upon the original bill, if the cause has not been before heard; and if the cause has been before heard, it must be further heard upon the supplemental matter. If, indeed, the alteration or acquisition of interest happens to a defendant, or a person necessary to be made a defendant, the supplemental bill may be exhibited by the plaintiff in the original suit against such person alone, and may pray a decree upon the particular supplemental matter alleged against that person only, unless, which is frequently the case, the interests of the other defendants may be affected by that decree. Where a supplemental bill is merely for the purpose of bringing formal parties before the court as defendants, the parties defendant to the original bill need not in general be made parties to the supplemental bill.⁴²

4108. A *bill of revivor* is one which is brought for the continuance of an original bill, when, for some reason, it is suspended so that the parties to it cannot proceed in the suit.⁴³ Let us inquire in the first place in what case such a bill is allowed and required; secondly, by and against whom a bill of revivor may be brought; and, thirdly, as to the frame of a bill of revivor.

4109. This is the proper remedy whenever the suit abates by the death of one of the parties, and the interest of the party whose death has caused the abatement is transmitted to another, whom the law ascertains as the heir at law, the executor or administrator, so that the title cannot be disputed, at least in the court of chancery, but the person in whom the title is vested is alone to be ascertained; the suit may be continued by a bill of revivor merely.⁴⁴

³⁹ See *Phillips v. Clark*, 7 Sim. Ch. 231; *Griggs v. Detroit Co.*, 10 Mich. 117.

⁴⁰ *Mitford, Eq. Pl. Jeremy*, ed. 68.

⁴¹ *Mitford, Eq. Pl. Jeremy*, ed. 68.

⁴² *Mitford, Eq. Pl. Jeremy*, ed. 75, 76; *Cooper, Eq. Pl.* 83, 84; *Rignall v. Atkins*, 6 Madd. Ch. 369.

⁴³ See *Story, Eq. Pl.* § 354; *Mitford, Eq. Pl. Jeremy*, ed. 68, 76; 3 *Daniell, Chanc. Pract.* 197; *Cooper, Eq. Pl.* 63; 1 *Smith, Ch. Pr.* 511.

⁴⁴ *Mitford, Eq. Pl. Jeremy*, ed. 68; *Ridgeley v. Bond*, 18 Md. 433; *Heard v. March*, 12 Cush.

4110. The suit abates also by the marriage of a female plaintiff; when this takes place and there is no act done to affect the rights of the parties but the marriage, no title can be disputed; the person of the husband is the sole fact to be ascertained, and, therefore, this suit may, in this case also, be continued by bill of revivor merely.⁴⁵ But upon the marriage of a female defendant the suit does not abate, though her husband ought to be named in the subsequent proceedings.⁴⁶

4111. When there is an original bill and a cross bill thereto, and an abatement takes place, there must in general be a bill of revivor in each cause; but if the bills relate to an account and there is a decree for an account, the two causes thereby become so consolidated that one bill of revivor, praying for a revivor of the whole, will revive both causes.⁴⁷ For the same reason, where a bill, cross bill, and bill in the nature of a supplemental bill of revivor between the same parties and on the same subject, all abated by the death of one of the parties in a partition suit, it was held that all the proceedings might be revived by one bill of revivor.⁴⁸

4112. The reader must remember that the term abatement is not understood in equity in the same sense it is used at law. In the common law it means an entire overthrow of the action, so that it is quashed and ended. In equity an abatement signifies only a present suspension of all proceedings in the suit, because there are no proper parties capable of proceeding therein. At law, a suit when abated is absolutely dead; in equity, it is merely suspended until revived.⁴⁹

4113. The suit may be revived by the plaintiff or his representatives, or those who claim in privity with him, and in some cases the defendant may bring a bill of revivor.

4114. When there is but one single plaintiff and one defendant, and the latter dies, the suit must be revived by the plaintiff against the representatives of the deceased.⁵⁰ When the plaintiff dies, the suit must be revived by the representatives of the plaintiff;⁵¹ and the same rule obtains when a bill is brought by a creditor in behalf of himself and all other creditors, and he dies, the suit may be revived by his personal representatives, and in case the latter do not choose to revive it, then any creditor, or at least any one who has proved his debt under a decree before the master, may by a supplemental bill continue the cause and proceed in it for the benefit of all the creditors.⁵²

In a case where there are several plaintiffs or several defendants, all having

Mass. 580; *Cook v. Toumbs*, 36 Miss. 85; *Tyler v. Nelson*, 14 Gratt. Va. 214. But a bill of revivor to bring in a posthumous heir cannot be filed after a decree. *McConnel v. Smith*, 23 Ill. 611.

⁴⁵ *Mitford*, Eq. Pl. Jeremy, ed. 69.

⁴⁶ *Quackenbush v. Leonard*, 10 Paige, Ch. N. Y. 131, 133.

⁴⁷ *Cooper*, Eq. Pl. 88; *Hinde*, Chanc. Pract. 51.

⁴⁸ *Wilde v. Jenkins*, 4 Paige, Ch. N. Y. 481, 500.

⁴⁹ *Story*, Eq. Pl. § 20, note, § 354; *Hoxie v. Carr*, 1 Sumn. C. C. 173. See *Hawley v. Barnett*, 4 Paige, Ch. N. Y. 163; 3 *Daniell*, Chanc. Pract. 223.

⁵⁰ *Ridgeley v. Bond*, 18 Md. 433; *Heard v. March*, 12 Cush. Mass. 580; *Cook v. Toumbs*, 36 Miss. 85; *Tyler v. Nelson*, 14 Gratt. Va. 214. Or against the widow and heirs. *Glenn v. Hebb*, 17 Md. 260.

In Massachusetts, the representative may be brought in by bill of revivor, though no service had been made on his testator, the respondent. *Heard v. March*, 12 Cush. Mass. 580.

⁵¹ In some of the states, a substitution of the representatives may be made upon petition, by virtue of statutory provisions.

⁵² In the matter of the Receiver of the City Bank of Buffalo, 10 Paige, Ch. N. Y. 378; *Mitford*, Eq. Pl. Jeremy, ed. 79, note; *Dixon v. Wyatt*, 4 Madd. Ch. 393; *Burney v. Morgan*, 1 Sim. & S. Ch. 358.

an interest which survives, the death of one of them makes an abatement only as to himself, and the suit is continued as to the rest who are living.⁵³ When, however, any thing is required to be done by or against the interests of the party who is dead, his proper representative must be brought into court by a bill of revivor. In case some of the plaintiffs entitled to a bill of revivor refuse to join, they may be made defendants.⁵⁴

4115. In some cases, when the defendant has an interest in the revival of a suit, he may himself bring a bill of revivor.⁵⁵ As a general rule, after a decree a defendant is allowed to file a bill of revivor if the plaintiff or those standing in his right neglect to do it, because the rights of the parties are then ascertained, both the plaintiff and defendant being entitled to the benefit of the decree, and both having a right to prosecute it. But it must be remembered that a defendant cannot bring such a bill unless he can derive some benefit from the proceeding.⁵⁶ The bill of revivor in this case merely substantiates the suit and brings before the court the parties necessary to the execution of the decree, and to be the object of its operations, rather than litigates the claims made by the several parties in the original pleadings, except so far as they remain undecided.⁵⁷

4116. A bill of revivor must state the original bill, the proceedings thereon, and the abatement; it must also show a title to revive, and charge that the cause ought to be revived, and stand in the same condition with regard to the parties in the bill of revivor as it was with respect to the parties in the original bill at the time the abatement happened; and it must pray that the suit be revived accordingly. It may also be necessary to pray that the defendant may answer the bill of revivor; as, in the case of a requisite admission of assets by the representative of a deceased party. In this case, if the defendant does admit assets, the cause may proceed against him upon an order of revival merely; but if he does not make that admission, the cause must be heard for the purpose of obtaining the necessary accounts of the estate of the deceased party to answer the demands made against it by the suit; and the prayer of the bill, therefore, in such case usually is, not only that the suit may be revived, but also that in case the defendant shall not admit assets to answer the purpose of the suit, those accounts may be taken, and so far the bill is in the nature of an original bill.⁵⁸

If a defendant to an original bill dies before putting in an answer, or after an answer to which exceptions have been taken, or after an amendment of the bill to which no answer may have been given, the bill of revivor, though requiring itself no answer, must pray that the person against whom it seeks to revive the suit may answer the original bill, or so much of it as the exceptions taken to the answer of the former defendant extended to, or to the amendment remaining unanswered.⁵⁹

4117. *A bill of revivor and supplement* is a compound of a supplemental bill and a bill of revivor, and not only continues the suit which has abated by the death of the plaintiff, or the marriage of a female plaintiff, but supplies any

⁵³ *Hammond v. St. John*, 4 Yerg. Tenn. 107.

⁵⁴ *Finch v. Lord Winchelsea*, 1 Eq. Cas. Abr. 2, pl. 7; *Nicoll v. Roosevelt*, 3 Johns. Ch. N. Y. 60.

⁵⁵ *Peer v. Cookerow*, 2 Beasl. Ch. N. J. 136.

⁵⁶ *Story*, Eq. Pl. § 372; *Cooper*, Eq. Pl. 68; *Mitford*, Eq. Pl. Jeremy, ed. 79.

⁵⁷ See *Finch v. Lord Winchelsea*, 1 Eq. Cas. Abr. 2.

⁵⁸ *Mitford*, Eq. Pl. Jeremy, ed. 76; *Judge Story*, Eq. Pl. § 374, and *Mr. Cooper*, Eq. Pl. 70, have copied this passage from *Lord Redesdale's Treatise*, making a slight verbal alteration.

⁵⁹ *Mitford*, Eq. Pl. Jeremy, ed. 76, 77; *Cooper*, Eq. Pl. 70, 71.

defects in the original bill arising from subsequent events, so as to entitle the party to relief upon the whole merits of the case.⁶⁰

4118. When the suit becomes abated, or by any act besides the event by which the abatement happens the rights of the parties are affected, as by a settlement or a devise, under certain circumstances, though a bill of revivor only may continue the suit, so as to enable the parties to prosecute it, yet, to bring before the court the whole matter for its consideration, the parties must, by supplemental bill, added to and made a part of the bill of revivor, show the settlement or devise, or other act, by which their rights are affected. And, in the same manner, if any other event which occasions an abatement is accompanied or followed by any matter necessary to be stated to the court, either to show the right of the parties or to obtain the full benefit of the suit, beyond what is merely necessary to show by and against whom the cause is to be revived, the matter must be set forth by way of supplemental bill, added to the bill of revivor.⁶¹

4119. A bill of revivor and supplement is merely a compound of those two species of bills, and, in its separate parts, must be framed and proceeded upon in the same manner.⁶²

4120. *Bills in the nature of original bills* are of a mixed nature; they are not strictly original bills, because they always relate to some other bill already filed, and though occasioned by or seeking the benefit of a former bill, or of a decision made upon it, or attempting to obtain the reversal of a decision, are not considered a continuance of the former bill; they are in fact in the nature of an original bill. These bills are brought for the purpose of cross litigation. They consist of cross bills; bills of review; bills in the nature of bills of review; bills to impeach a decree for fraud; bills to carry decrees into execution; bills to avoid the operation of a decree; original bills in the nature of bills of revivor; and supplemental bills in the nature of original bills.

4121. A *cross bill*⁶³ is one brought by a defendant against a plaintiff, or other party, in a former bill depending, touching the matter in question in that bill.⁶⁴ A bill of this kind is usually brought to obtain either a necessary discovery or full relief to all parties.

Like many other proceedings, particularly in equity, this bill owes its origin manifestly to the Roman law; from that system of jurisprudence it was transplanted into the canon law, and from the latter borrowed by the English courts of equity. By the Roman and canon laws, when the *reus*, or defendant, was brought in to answer, he was said to be convened, which the canonists called *conventio*, because the plaintiff and defendant met to contest; and, as the defendant might have demands against the plaintiff, he would exhibit a bill against him which was called *reconventio*.⁶⁵

⁶⁰ Mitford, Eq. Pl. Jeremy, ed. 70, 80; Story, Eq. Pl. § 387; 3 Daniell, Chanc. Pract. 150; Cooper, Eq. Pl. 84.

⁶¹ Mitford, Eq. Pl. 71; Ross v. Hatfield, 1 Green, Ch. N. J. 363, 366; Garrett v. Noble, 6 Sim. Ch. 504; Webster v. Hitchcock, 11 Mich. 56; Eastman v. Batchelder, 36 N. H. 141.

⁶² See Bampton v. Birchall, 5 Beav. Rolls, 330.

⁶³ See Mitford, Eq. Pl. Jeremy, ed. 80; Story, Eq. Pl. § 389; Cooper, Eq. Pl. 85; 1 Smith, Ch. Pr. 459; Welford, Eq. Pl. 223; 1 Montagu, Eq. Pl. 327.

⁶⁴ Mitford, Eq. Pl. 80, 81.

⁶⁵ Bouvier, Law Dict. *Reconvention*; Voet, de Judiciis, n. 78. In Louisiana, to entitle a defendant to institute a demand in reconvention, it is requisite that such demand, though different from the main action, be nevertheless necessarily connected with it, and incidental to the same. La. Code, art. 375; 11 La. 309; 7 Mart. n. s. La. 282; 4 Mart. n. s. La. 439; 8 Mart. n. s. La. 516. See further, as to the origin of the cross bill, White v. Buloid, 2 Paige, Ch. N. Y. 164; Gilbert, For. Rom. 45, 47; 2 Browne, Civ. Law, 348; Code, 7, 45, 14; Dig. 2, 1, 11; Nov. 96, c. 2; Story, Eq. Pl. § 402.

A cross bill may be considered with regard to the cases in which it may be brought, the time when it may be brought, and the frame of the bill.

4122. A bill of this kind is usually brought either to obtain the necessary discovery of facts in aid of the defence to the original bill, or to obtain full relief to all parties touching the matters of the original bill.

A cross bill for discovery is required because the plaintiff cannot be examined as a witness in his own suit, and when his testimony is wanted by the defendant as to any material facts, it must be obtained by means of a cross bill.⁶⁶

A cross bill for relief is wanted particularly when any question arises between two defendants to a bill, and the court cannot make a complete decree without a cross bill, or cross bills, to bring every matter in dispute completely before the court, to be litigated by the proper parties, and upon proofs. In this case, it becomes necessary for some one of the defendants to the original bill to file a bill against the plaintiff and other defendants in that bill, or some of them, to bring the litigated point properly before the court.⁶⁷

4123. The proper time for filing a cross bill, when such bill is necessary, is at the time of putting in the answer to the original bill, and before issue is joined by the filing of a replication to such answer.⁶⁸ It must be brought before publication is passed on the first bill,⁶⁹ and not after, except the plaintiff in the cross bill go to the hearing on the depositions already published; because of the danger of perjury and subornation of perjury, if the parties should, after publication of the former depositions, examine witnesses *de novo* to the same matter before examined into.⁷⁰

4124. But a cross bill may be filed to answer the purpose of a plea *puis darrein continuance* at common law. For example, when, pending a suit, and after replication and issue joined, the defendant having obtained a release, he attempted to prove it *viva voce* at the hearing, it was determined that the release not being in issue in the cause, the court could not try the facts, or direct a trial at law for that purpose, and that a new bill must be filed to put the release in issue.⁷¹

4125. Sometimes, on the hearing of a cause, it appears that the suit already instituted is insufficient to bring before the court all matters necessary to enable it fully to decide upon the rights of all the parties. This most commonly happens when persons in opposite interests are co-defendants, so that the court cannot determine their opposite interests upon the bill already filed, and the determination of their interests is yet necessary to a complete decree upon the subject matter of the suit. In such a case if, upon the hearing of the cause, the difficulty appears, and a cross bill has not been filed to remove it, the court will direct a bill to be filed in order to bring all the rights of the parties fully before the court for its decision; and will reserve the directions or declarations, which it may be necessary to give or make touching the matter not fully in litigation under the former bill, until this new bill has been brought to a hearing.⁷²

⁶⁶ The rules of equity prevent a defendant from examining a plaintiff. *Mayor of Colchester v. —*, 1 P. Will. Ch. 595.

⁶⁷ *Mitford, Eq. Pl. Jeremy*, ed. 81; *Wright v. Miller*, 1 Sandf. Ch. N. Y. 108; *Andrews v. Hobson*, 23 Ala. N. S. 219. A cross bill filed for discovery will not be retained for relief, unless a case is made out independently of the discovery asked for. *Young v. Colt*, 2 Blatchf. C. C. 373.

⁶⁸ *Irving v. De Kay*, 10 Paige, Ch. N. Y. 319; 3 Barb. N. Y. 151.

⁶⁹ *Talbott v. McGee*, 4 T. B. Monr. Ky. 379; *Pattison v. Hull*, 9 Cow. N. Y. 747; *Carnochan v. Christie*, 11 Wheat. 446.

⁷⁰ *Field v. Schieffelin*, 7 Johns. Ch. N. Y. 250. See *White v. Buloid*, 2 Paige, Ch. N. Y. 164; *Gouverneur v. Elmendorf*, 4 Johns. Ch. N. Y. 327.

⁷¹ *Hayne v. Hayne*, 3 Swanst. Ch. 472. See *Bailey v. Ryder*, 10 N. Y. 363.

⁷² *Mitford, Eq. Pl. Jeremy*, ed. 82, 83; *Roberts v. Peavey*, 29 N. H. 392.

4126. A cross bill should state the original bill, and the proceedings thereon, and the rights of the parties exhibiting the bill, which are necessary to be made the subject of cross litigation, and the grounds on which the claims of the plaintiff in the original bill are resisted, if that is the object of the new bill. But a cross bill being considered as a defence, or as a proceeding to procure a complete determination of matter already in litigation in the court, the plaintiff is not, at least as against the plaintiff in the original suit, obliged to show any ground of equity to support the jurisdiction of the court.⁷³

4127. A *bill of review* is one whose object is to procure an examination and reversal of a decree made upon a former bill, which decree has been signed and enrolled. It is a proceeding in the nature of a writ of error at common law.⁷⁴ A bill of review may be considered with regard to the cases when it is proper, the time when it must be brought, the frame of the bill, and the occasion for a supplemental bill in the nature of a bill of review.

4128. A bill of review is the proper remedy only in two cases: first, for an error in law, apparent in the body of the decree, without further examination of matters of fact; and, secondly, for some new matter which has arisen since the decree, and not any new proof which might have been used when the decree was made.⁷⁵

4129. The error in law for which a bill of review may be filed must be apparent upon the record, upon the face of the decree itself; it is not sufficient that the appellate court might reverse upon the whole case.⁷⁶ For example, when a decree is made absolute against a person, who upon the face of it appears to be an infant. A bill of this nature may be brought without leave of court.⁷⁷

In England errors in law must appear upon the face of the decree, and the court will not look further into the record; there the decree is made with much care, and it embodies a statement of the material facts on which it proceeds; and if the error does not appear upon its face, no bill of review can be maintained for an error in law. In the courts of the United States, on the contrary, the decrees are usually made in general terms, without any such statement of facts. In England the decree embodies the substance of the bill and pleadings; here it refers merely to such pleadings and proceedings, without embodying them. It is evident, therefore, that there must be a difference between our practice and the English.⁷⁸ Here, for the purpose of examining errors of law, the bill, answer, and other proceedings are as much a part of the record before the court as the decree itself, for it is only by an examination of such proceedings that the correctness of the decree can be ascertained.⁷⁹

4130. Before a bill of review can be brought, the decree must first be obeyed and performed; as, if it be for land, the possession must be given up; if for money, the money must be paid; if for evidences, the evidences must be brought

⁷³ Mitford, Eq. Pl. Jeremy, ed. 81, 82; *Doble v. Potman*, Hardr. 160.

⁷⁴ *Griggs v. Gear*, 8 Ill. 2; *Rohn v. Dunbar*, 13 Ohio, St. 572.

⁷⁵ Bacon's Ord. n. 1. See *Quarrier v. Carter*, 4 Hen. & M. Va. 242; *Gullett v. Housh*, 7 Blackf. Ind. 52; *Respass v. McClenahan*, 2 A. K. Marsh. Ky. 579; *Hollingsworth v. McDonald*, 2 Harr. & J. Md. 230; *Winchester v. Winchester*, 1 Head, Tenn. 460; *Holman v. Riddle*, 8 Ohio, St. 384; *Foy v. Foy*, 25 Miss. 207. In some states bills of review cannot be brought. *Seguin v. Maverick*, 24 Tex. 526.

⁷⁶ *P. & M. Bank v. Dundas*, 10 Ala. N. S. 661.

⁷⁷ *Webb v. Pell*, 1 Paige, Ch. N. Y. 564; *Edmonson v. Moseby's heirs*, 4 J. J. Marsh. Ky. 500; *Bleight v. McIlvoy*, 4 T. B. Monr. Ky. 145; see *Urquhart v. Urquhart*, 13 Sim. Ch. 623; *Denson v. Denson*, 33 Miss. 560.

⁷⁸ It seems that bills of review will lie in South Carolina for the same cause that they are allowed in England. *Haskell v. Rooul*, 1 M'Cord, Eq. So. C. 29.

⁷⁹ *Dexter v. Arnold*, 5 Mas. C. C. 311; *Ludlow v. Kidd*, 4 Hayw. Tenn. 381; *Saum v. Stingley*, 3 Iowa, 514.

in ; and so in other cases.⁸⁰ But to this rule there are some exceptions, which are intended to prevent injustice and to relieve the party against whom the decree has been made from some hardships, the principal of which are :

That where the act to be done extinguishes the party's rights at common law, as making of assurances or releases, acknowledging satisfaction, cancelling bonds or evidences, and the like, the parts decreed are to be spared until the bill of review be determined ; but such sparing is to be warranted by a public order made in court.⁸¹

Another exception is when a sum of money has been ordered to be paid and the party is too poor to pay it, he may have a bill of review without paying it.⁸²

4131. A bill of review can be brought only by the parties and their privies in representation, such as heirs, executors, and administrators.⁸³ A party who has no interest in the question intended to be presented by a bill of review, and who cannot be benefited by the reversal or modification of the former decree, cannot bring a bill of review, as that would be entirely nugatory.⁸⁴ Nor can any one have a bill of review, although he may have an interest in the cause, if not aggrieved by the particular errors assigned in the decree, however injuriously the decree may affect the rights of third persons.⁸⁵

4132. It is not for every error appearing upon the face of the decree that a bill of review will be allowed. Any error in figures, as in miscasting, may be explained and reconciled by an order without a review ; and by the term *miscasting* is not to be understood any pretended miscasting or misvaluing, but only error in auditing and numbering.⁸⁶

Nor can any error in matter of form only, though apparent on the face of a decree, be considered as sufficient ground for reversing a decree ; and matter in abatement has also been treated as not capable of being shown for error to reverse a decree.⁸⁷

4133. Lord Bacon's ordinance, which has been the constant rule in chancery, directs that " no decree shall be reversed, altered, or explained once under the great seal but upon bill of review ; and no bill of review shall be admitted except it contain either error in law appearing in the body of the decree without further examination of matters of fact, or some new matter which hath arisen in time after the decree, and not any new proof which might have been used when the decree was made. Nevertheless, upon new proof that is come to light after the decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special license of the court, and not otherwise."⁸⁸

A bill of review may therefore be brought upon discovery of new matter, as a release, or a receipt since discovered ; but the constant construction which has

⁸⁰ Lord Bacon's Ord. n. 3; *Livingston v. Hubbs*, 3 Johns. Ch. N. Y. 124; *Wiser v. Blackley*, 3 Johns. Ch. N. Y. 488. It has been held that placing the amount of a decree in equity in the hands of a master in bank notes, is such a substantial compliance with the order of the court as will save the party from an imputed neglect or contempt, and authorize the filing of a bill of review. *Taylor v. Pearson*, 2 Hawks, No. C. 298.

⁸¹ Lord Bacon, Ord. n. 4.

⁸² Cooper, Eq. Pl. 90; 1 Vern. Ch. 117, 264.

⁸³ *Kennedy v. Ball*, Litt. Sel. Cas. Ky. 125.

⁸⁴ *Webb v. Pell*, 3 Paige, Ch. N. Y. 368.

⁸⁵ *Thomas v. Harvie*, 10 Wheat. 146.

⁸⁶ Lord Bacon, Ord. n. 2; *Young v. Henderson*, 2 Hayw. No. C. 189.

⁸⁷ *Jones v. Kendrick*, 5 Brown, Parl. Cas. 244; *Slingsby v. Hale*, 1 Chanc. Cas. 122.

⁸⁸ Lord Bacon's Ord. n. 1. When the bill of review is to reverse the decree for an error in law, it may in general be filed without leave of the court; if it is on the ground of newly discovered facts, leave of court must be obtained. In Virginia no bill of review can be filed, in either case, without leave of court. *Elzey v. Lane*, 2 Hen. & M. Va. 591, note; *Quarrier v. Carter*, 4 Hen. & M. Va. 242.

been put on this part of Lord Bacon's rule is that the new matter must have come to the knowledge of the party after publication passed. As a bill of review for such a cause cannot be filed without leave of court, it is requisite that the facts on which the application is made should appear by affidavit.⁸⁹

4134. The affidavit must distinctly and positively show two facts, without which no bill of review can be obtained on the ground of newly-discovered matter.

In the first place, the matter must appear to be relevant and material, and such as, if known, might probably have produced a different determination. It must be new matter, to prove what was before in issue, and not to prove a title not before in issue; not to make a new case, but to establish an old one.⁹⁰

It must appear, secondly, that the new matter has come to the knowledge of the party after the time when it could have been used in the cause at the original hearing; that is, the new matter must have been discovered after publication has passed.⁹¹

The new matter must not only have been discovered since publication, but it must be such as the party by the use of reasonable diligence could not have known; for the law in all cases requires a party to attend to his rights, and he will not in general be relieved from the effects of his own negligence or supineness: *vigilantibus non dormientibus jura subveniunt*.⁹²

Thus, a bill of review will not lie where the decree was taken *pro confesso*, or in the absence of the party applying for the bill.⁹³

It has been questioned whether the discovery of new matter not in issue in the cause in which a decree has been made could be the ground of a bill of review, and whether the new matter on which bills of review have been founded has not always been new matter to be used in evidence to prove matter in issue in some manner in the original bill.⁹⁴ It has, however, been established, that matter discovered after a decree has been made, though not capable of being used as evidence of any thing which was previously in issue in the cause, but constituting an entirely new issue, may be the subject of a bill of review, or of a supplemental bill in the nature of a bill of review.⁹⁵

4135. Notwithstanding it may have been established that the facts are material, and they have been discovered since publication, and they could not have been obtained by due diligence at any time before, yet it is in the discretion of the court whether to grant or refuse a bill of review; looking at all the circumstances, the court will not grant it when it may be productive of injury to innocent persons, or when the original bill contains no equity,⁹⁶ or when for any other cause it is unadvisable.⁹⁷

⁸⁹ *Simpson v. Watts*, 6 Rich. Eq. So. C. 364.

⁹⁰ *Cooper*, Eq. Pl. 91; *Story*, Eq. Pl. § 413; *Dexter v. Arnold*, 5 Mas. C. C. 312; *Mitford*, Eq. Pl. Jeremy, ed. 85; *Quick v. Lilly*, 2 Green, Ch. N. J. 255.

⁹¹ *Mitford*, Eq. Pl. Jeremy, ed. 84, 85; *Dexter v. Arnold*, 5 Mas. C. C. 312; *Story*, Eq. Pl. § 413; *Cooper*, Eq. Pl. 90; *Livingston v. Hubbs*, 3 Johns. Ch. N. Y. 124; *Talbott v. Todd*, 5 Dan. Ky. 197; *McCracken v. Finley*, 1 Bibb, Ky. 455; *Griggs v. Gear*, 8 Ill. 2; *McDaniel v. James*, 23 Ill. 407; *Stevens v. Dewey*, 28 Vt. 638; *Niday v. Harvey*, 9 Gratt. Va. 454; *Hughes v. Jones*, 2 Md. Ch. Dec. 289. See *Ex parte Vandermissen*, 5 Rich. Eq. So. C. 519.

⁹² *Dexter v. Arnold*, 5 Mas. C. C. 312; *Livingston v. Hubbs*, 3 Johns. Ch. N. Y. 124; *Pendleton v. Fay*, 3 Paige, Ch. N. Y. 304; *Gullet v. Housh*, 7 Blackf. Ind. 52; *McCracken v. Finley*, 1 Bibb, Ky. 455.

⁹³ *Micken v. Perin*, 22 How. 282; *Townsend v. Smith*, 1 Beasl. Ch. N. J. 350.

⁹⁴ *Mitford*, Eq. Pl. Jeremy, ed. 85.

⁹⁵ *Partridge v. Osborne*, 5 Russ. Ch. 195.

⁹⁶ *Todd v. Lackey*, 1 Litt. Ky. 271.

⁹⁷ *Thomas v. Harvie*, 10 Wheat. 146; *Wood v. Mann*, 2 Sumn. C. C. 316; *Ord v. Noel*, 6 Madd. Ch. 127.

4136. Although bills of review are not within the statute of limitations, yet a court of equity of the United States, in analogy to the provisions of the judiciary act concerning appeals, will not allow a bill of review to be filed after five years, when the bill of review is to correct errors apparent upon the decree.⁹⁸

There can be no doubt that lapse of time would be a good bar to a bill of review upon newly discovered facts and evidence, if not brought within the time limited for writs of error.⁹⁹ But it may be questioned whether any bill of review will lie after a lapse of that period from the time of making the decree, although the bill of review is brought within the prescribed period after the discovery of the new facts and evidence. As the courts have a discretion in these cases, they always take these circumstances of time into consideration to form their judgment as to the propriety of granting or refusing a bill of review.¹⁰⁰

4137. In a bill of this nature it is necessary to state the former bill and the proceedings thereon;¹⁰¹ the decree, and the point upon which the party exhibiting the bill of review conceives himself aggrieved by it, and the ground of law or new matter discovered upon which he seeks to impeach it; and when the decree is impeached upon the latter ground, it seems necessary to state in the bill the leave obtained to file it and the fact of the discovery. It has been doubted whether, after leave given to file the bill, that fact is traversable; but this doubt may be questioned, if the defendant to the bill of review can offer evidence that the matter alleged in the bill of review was within the knowledge of the party who might have taken the benefit of it in the original cause.¹⁰²

The bill may pray simply that the decree may be reviewed and reversed in the point complained of, if it has not been carried into execution. When it has been carried into execution, the bill may also pray the further decree of the court to put the party complaining of the former decree into the situation in which he would have been if that decree had not been executed. If the bill is brought to review the reversal of a former decree, it may pray that the original decree may stand; and when the original has become abated, this bill may also be made a bill of revivor.¹⁰³ A supplemental bill may likewise be added if any event has happened which requires it; and in such case the bill may partake of the compound character of a bill of review, of revivor, and of supplement, and be maintainable if it present facts which go to the merits of the original decree.¹⁰⁴ A supplemental bill must be added to the bill of review, particularly when any person not a party to the original suit becomes interested in the subject; he must be made a party to the bill of review by way of supplement.¹⁰⁵

4138. A distinction has been made as to the remedy between the cases of a decree signed and enrolled and one which is not so signed and enrolled. In the English courts of equity the enrollment of the decree is essential to what is

⁹⁸ *Thomas v. Harvie*, 10 Wheat. 146.

⁹⁹ *Bucknor v. Forker*, 7 Dan. Ky. 51; *Mitchell v. Berry*, 1 Metc. Ky. 602; *Creath v. Smith*, 20 Mo. 113.

¹⁰⁰ See *Thomas v. Harvie*, 10 Wheat. 146, 151; *Mitford*, Eq. Pl. Jeremy, ed. 88. Exceptions which will prevent the statute from running as to rights of action will also be allowed in case of bills of review, for example, coverture. *Trimble v. Longworth*, 13 Ohio, St. 431.

¹⁰¹ *Turner v. Berry*, 8 Ill. 541; *Dougherty v. Morgan*, 6 T. B. Monr. Ky. 153; *Groce v. Field*, 13 Ga. 24.

¹⁰² Upon the petition for leave to file a bill of review, the court allowed the adverse party to file counter affidavits. *Dexter v. Arnold*, 5 Mas. C. C. 308, 309.

¹⁰³ See *Wilkinson v. Parish*, 3 Paige, Ch. N. Y. 653.

¹⁰⁴ *Whiting v. Bank of United States*, 13 Pet. 6, 13.

¹⁰⁵ *Sands v. Thorowgood*, Hardr. 104; *Mitford*, Eq. Pl. Jeremy, ed. 89, 90.

called, by way of pre-eminence, a bill of review; for when the decree is not enrolled, then a bill in the nature of a bill of review is the appropriate remedy. Though in most of the state courts of equity and in the courts of the United States all decrees in equity as well as judgments at law are matter of record and deemed to be enrolled, as of the term of the court at which they are passed, whether actually enrolled or not, so that in those courts a bill of review is the ordinary and appropriate proceeding; yet the distinction is maintained in some other courts, and when the bill has not been actually signed and enrolled, the proper remedy is by a species of *supplemental bill in the nature of a bill of review* when any new matter has been discovered since the decree.¹⁰⁶

As a decree not signed and enrolled may be altered upon a rehearing without the assistance of a bill of review, if sufficient matter to reverse it appears upon the former proceedings, the investigation of the decree must be brought on by a petition of rehearing; and the nature of a supplemental bill in the nature of a bill of review is to supply the defect which occasioned the decree in the former bill.

It is necessary to obtain the leave of the court to bring a supplemental bill of this nature, and the same affidavit is required for this purpose as is necessary to obtain leave to bring a bill of review on discovery of new matter.

4139. In its frame, this bill resembles a bill of revivor, except that, instead of praying that the former decree may be reviewed and reversed, it prays that the cause of action may be heard with respect to the new matter made the subject of the supplemental bill, at the same time that it is reheard upon the original bill, and that the plaintiff may have such relief as the nature of the case made by the supplemental bill requires.¹⁰⁷

4140. When a bill is made against a person who had no interest at all in the matter of dispute, or had not such an interest as was sufficient to render the decree against him binding upon some person claiming the same or a similar interest, relief may be obtained against an error in the decree, by a *bill in the nature of a bill of review*. For example, when a decree is made against a tenant for life only, a remainder-man in tail or in fee cannot defeat the proceedings against the tenant for life, but by a bill showing error in the decree, the incompetency of the tenant for life to sustain the suit, and the accruer of his own interest, and thereupon praying that the proceedings in the original cause may be reviewed, and, for that purpose, that the other party may appear and answer to this new bill, and the rights of the parties may be properly ascertained.¹⁰⁸

As a bill of this nature does not seek to alter a decree made against the plaintiff himself, or against any person under whom he claims, it may be filed without leave of the court.¹⁰⁹

4141. *A bill to impeach a decree for fraud* is an original bill in the nature of a bill of review. It is a general rule that fraud vitiates every thing, as well judgments at law as decrees of courts of equity, contracts, and all kinds of engagements. Fraud taints every thing it touches. If a decree has been obtained by fraud, it may be impeached by this sort of bill, which may be filed without leave of court. The fraud used in obtaining the decree being the principal point in issue, it must necessarily be established by proof before the propriety of the decree can be investigated. And where a decree has been so

¹⁰⁶ See *Wiser v. Blachley*, 2 Johns. Ch. N. Y. 488; *Haskell v. Rooul*, 1 M'Cord, Eq. So. C. 29; *Hollingsworth v. McDonald*, 1 Harr. & J. Md. 230.

¹⁰⁷ *Mitford, Eq. Pl. Jeremy*, ed. 92.

¹⁰⁸ *Hepburn v. Dunlop*, 1 Wheat. 179, 195.

¹⁰⁹ *Osborne v. Usher*, 6 Brown, Parl. Cas. 20, Toml. ed.; *Mitford, Eq. Pl. Jeremy*, ed. 92.

obtained, the court will restore the parties to their former situation, whatever their rights may be.¹¹⁰

Besides the cases of direct fraud in obtaining a decree, cases where fraud is implied will be treated as fraudulent, and the parties may be relieved by this sort of a bill. And it has been said that where an improper decree has been made against an infant without actual fraud, it ought to be impeached by original bill.¹¹¹ When a decree has been made by consent, and the consent has been fraudulently obtained, the party aggrieved can only be relieved by original bill.

4142. A bill to impeach a decree for fraud must state the decree and the proceedings which led to it, with the circumstances of fraud on which it is impeached.¹¹² The prayer must necessarily be varied according to the nature of the fraud used, and the extent of its operation in obtaining an improper decision of the court.¹¹³

4143. The necessity of a *bill to carry a decree into execution* generally arises when persons who have obtained a decree have neglected to proceed under it, in consequence of which their rights have become embarrassed by subsequent events, and it is necessary to have a decree of the court to settle and ascertain them. Sometimes such a bill is exhibited by a person who was not a party, and does not claim under any party to the original decree, but claims in a similar interest, or is unable to obtain the determination of his own rights till the decree is carried into execution; or it may be brought by or against a person claiming as assignee of a party to the decree. The court, in these cases, in general, only enforces and does not vary the decree; but, under certain circumstances, it has sometimes considered the directions, and varied them in case of a mistake.¹¹⁴ And it has even, in special circumstances, refused to enforce the decree, though in other cases it seems to have been considered that the law of the decree ought not to be examined on a bill to carry it into execution.¹¹⁵

Such a bill may also be brought to carry into execution the judgment of an inferior court of equity, if the jurisdiction of the court is not equal to the purpose.

4144. A bill to carry a decree into execution is, generally, partly an original bill, and partly a bill in the nature of an original bill, though not strictly original, and sometimes it is likewise a bill of revivor, or a supplemental bill, or both. The form of the bill is varied accordingly.

4145. The operation of a decree signed and enrolled has been suspended on special circumstances, or avoided by matter subsequent to the decree, upon a new bill for that purpose. An example of this is given in the English law. During the troubles after the death of Charles I, upon a decree for a foreclosure in the case of non-payment of principal, interest, and costs due on a mortgage, the mortgagor at the time of payment being forced to leave the kingdom to avoid the consequence of his engagement with the royal party, and having requested the mortgagee to sell the estate to the best advantage and pay himself, which the mortgagee appeared to have acquiesced in; the court, upon a new bill, enlarged the time for performance of the decree, upon the ground of the inevitable necessity which prevented the mortgagor from complying with

¹¹⁰ *Birne v. Hartpole*, 5 Brown, Parl. Cas. 197, Toml. ed.

¹¹¹ See *Massie v. Matthew*, 12 Ohio, 351.

¹¹² *Pendleton v. Galloway*, 9 Ohio, 178.

¹¹³ *Mitford*, Eq. Pl. Jeremy, ed. 94.

¹¹⁴ *Este v. Strong*, 2 Ohio, 418.

¹¹⁵ *Mitford*, Eq. Pl. Jeremy, ed. 95, 96. See *Attorney General v. Day*, 1 Ves. sen. Ch. 218.

the strict terms of it, and also made a new decree on the ground of the matter subsequent to the former decree.¹¹⁶

4146. *A bill in the nature of a bill of revivor* is one which is filed, when the death of a party whose interest is not determined by his death is attended with such transmission of his interest that the title to it, as well as the person entitled, may be litigated in the court of chancery; as, in the case of a devise of real estate, the suit is not permitted to be continued by a simple bill of revivor. An original bill, upon which the title may be litigated, must be filed, and this bill will have the effect of a bill of revivor, that if the title of the representative, by the act of the deceased party, is established, the same benefit may be had of the proceedings upon the former bill, as if the suit had been continued by bill of revivor.¹¹⁷

4147. The bill is said to be original merely for want of that privity of title between the party to the former and the party to the latter bill, though claiming the same interest, as would have permitted the continuance of the suit by a bill of revivor. Therefore, when the validity of the alleged transmission of interest is established, the party to the new bill shall be equally bound by and have advantage of the proceedings on the original bill, as if there had been such privity between him and the party to the original claiming the same interest; and the suit is considered as pending from the filing of the original bill, so as to save the statute of limitations, to have the advantage of compelling the defendant to answer before an answer can be compelled to a cross bill, and every other advantage which would have attended the institution of the suit by the original bill, if it could have been continued by bill of revivor merely.¹¹⁸

4148. An original bill in the nature of a bill of revivor must state the original bill, the proceedings upon it, the abatement, and the manner in which the interest of the party has been transmitted; and it must charge the validity of the transmission and state the rights which have accrued by it.¹¹⁹

4149. A distinction has been made between a supplemental bill and a *supplemental bill in the nature of an original bill*, which is said to be founded rather upon formal technical rules than upon any substantial difference. Indeed, the books usually confound them together. The most prominent distinction between them seems to be that a supplemental bill is applicable to cases only where the same parties or the same interest remain before the court; whereas, a supplemental bill, in the nature of an original bill, is properly applicable when new parties with new interests arising from events which have happened since the commencement of the suit are brought before the court.¹²⁰

This bill, though partaking of the nature of a supplemental bill, is not an addition to the general bill, which, in its consequences, may draw to itself the advantage of the proceeding of the former bill.¹²¹

4150. A supplemental bill in the nature of an original bill must state the original bill, the proceedings upon it, the event which has determined the interest of the party by or against whom the former bill was exhibited, and the manner in which the property has become vested in the person become entitled. It must show the ground upon which the court ought to grant the benefit of

¹¹⁶ *Cocker v. Bevis*, 1 Chanc. Cas. 61.

¹¹⁷ 1 Vern. Ch. 427, 2 Vern. Ch. 548, 2 Vern. Ch. 672.

¹¹⁸ *Child v. Frederick*, 1 P. Will. Ch. 266; Mitford, Eq. Pl. Jeremy, ed. 97, 98.

¹¹⁹ Mitford, Eq. Pl. Jeremy, ed. 97.

¹²⁰ Story, Eq. Pl. §§ 345 to 353, and the cases there cited.

¹²¹ Mitford, Eq. Pl. Jeremy, ed. 99.

the former suit, to or against the person so become entitled; and pray the decree of the court adapted to the case of the plaintiff in the new bill.¹²²

4151. There are numerous *bills which derive their names from the object which the complainant has in view*. These, although classed together, are nevertheless those which might be placed under some of the heads which have been considered. The principal of these are bills of foreclosure, bills of information, bill to marshal assets, bill for a new trial, bills of peace, bills *quia timet*.

4152. A *bill of foreclosure* is one filed by a mortgagee against the mortgagor for the purpose of barring the mortgagor's equity of redemption, or his right to redeem the mortgaged premises, so that he shall be for ever foreclosed.

This bill may be filed when the mortgagor has forfeited his estate by non-payment of the money due on the mortgage at the time appointed, but still retains the equity of redemption. This bill calls upon the mortgagor to redeem his estate presently, or in default thereof, to be for ever closed and barred from any right of redemption.¹²³

4153. A *bill of information*, or simply an information, is a proceeding to institute a suit in chancery on behalf of the state or government, or those who partake of its prerogative, or whose rights are under its peculiar protection as the objects of a public charity. It is commenced by information in the name of the attorney general, and differs from other bills little more than in name. If the information immediately concerns the rights of the state, it is generally exhibited without a relator; if it does not immediately concern those rights, it is conducted at the instance and under the immediate direction of some person whose name is inserted in the information, and is termed a relator; the officers of the state in such or the like cases are not further concerned than as they are instructed or advised by those whose rights the state is called upon to protect and establish.¹²⁴

4154. It sometimes happens that the relator has an interest in the matter in dispute in connection with the government, of the injury to which interest he has a right to complain. In this case, his personal complaint being joined to and incorporated with the information given to the court by the officer of the government, they form together an information and bill, and are so termed.¹²⁵

4155. A *bill to marshal assets* is one filed in favor of simple contract creditors, and of devisees, legatees, or heirs, but not in favor of next of kin, to prevent specialty creditors who have a claim upon the personal and real estate of a deceased person from exhausting the personal estate to their injury, or of being substituted in their place.¹²⁶

4156. A *bill for a new trial* is a bill filed in a court of equity, praying for an injunction after judgment at law, when there is any fact which renders it against conscience to execute such judgment, and of which the injured party could not avail himself in a court of law, or, if he could so have availed himself, he was prevented by fraud or accident, unmixed with any fault of himself or his agent.¹²⁷ A bill of this kind is called a bill for a new trial.¹²⁸ These

¹²² Mitford, Eq. Pl. Jeremy, ed. 99.

¹²³ See Story, Eq. Pl. § 199; 1 Maddock, Chanc. Pract. 528.

¹²⁴ Blake, Ch. Pr. 50. See Harrison, Ch. Pr. 151; Cooper, Eq. Pl. 101; Mitford, Eq. Pl. Jeremy, ed. 22, 23; Story, Eq. Pl. § 8.

¹²⁵ See Attorney General v. Oglender, 1 Ves. Ch. 247; Attorney General v. Brown, 1 Swanst. Ch. 265; Attorney General v. Heelis, 2 Sim. & S. Ch. 67; Attorney General v. East India Co., 11 Sim. Ch. 380.

¹²⁶ 1 Maddock, Ch. Pr. 615; Jeremy, Eq. Jur. 528, 529.

¹²⁷ See Dodge v. Strong, 2 Johns. Ch. N. Y. 228.

¹²⁸ Mitford, Eq. Pl. Jeremy, ed. 131; Story, Eq. Pl. § 887.

bills are not favored; indeed, of late years they have been much discountenanced.¹²⁹

4157. A *bill of peace* is one which is filed by a person who has a right which may be controverted by various persons at different times and by different actions; in such case, to prevent a multiplicity of suits, the court will direct an issue to determine the right when a bill of this kind has been filed, and ultimately grant an injunction.¹³⁰ This subject having been fully considered when we examined the exclusive jurisdiction of courts of equity, it will not be requisite here further to extend our inquiries.¹³¹

4158. A *bill quia timet* is one which is filed when a person is entitled to property of a personal nature after another's death, because he fears it may be destroyed by the present possessor; or when he is apprehensive of being subjected to a future inconvenience, probable or even possible to happen, or be occasioned by the neglect, inadvertence, or culpability of another.¹³²

Upon a proper case being made out, the court will in one case secure for the use of the party the property to secure which is the object of the bill, by compelling the person in possession of it to guarantee the same by a proper security, entered into for that purpose, against any subsequent disposition or wilful destruction; and in the other they will quiet the party's apprehension of future inconvenience by removing the causes which lead to it.¹³³

The rules which relate to bills *quia timet* engaged our attention when we considered the peculiar remedies of courts of equity, so that here no further examination will be required.¹³⁴

4159. In substance, the bill in a suit in equity answers to the declaration in an action at common law to the libel or *libellus articulus* of the civil and canon law, a libel in the admiralty, or an allegation in the spiritual courts.

The form of a bill in equity has been greatly changed, as has already been observed, from what it was in its origin. It now consists of nine parts, which will be separately examined; and afterward will be considered the necessity of the several parts of such a bill and its other requisites.

4160. The first part of the bill is the *address* of the instrument to the court from which the plaintiff seeks relief. This address of course contains the appropriate and technical description of the court; as, "To the Judges of the Circuit Court of the United States for the District of New Jersey."

4161. The *introduction* is contained in the second part. It consists of the names of the parties complainants and their descriptions, in which their abode is particularly required to be set forth, that the court and the parties defendants to the bill may know where to resort to compel obedience to the orders or process of the court, and particularly for payment of any costs which may be awarded against the plaintiffs, or to punish them for any improper conduct in the course of the suit. The omission to state this, if it would not be ground for demurrer,¹³⁵ might subject the plaintiff to give security for costs.

This part of the bill should also show in what character the plaintiff sues, whether in his own right or *autre droit*, and such other description as is required

¹²⁹ Mitford, Eq. Pl. Jeremy, ed. 131.

¹³⁰ 1 Maddock, Ch. Pr. 166; 1 Harrison, Ch. Pr. 104; Blake, Ch. Pr. 48; Jeremy, Eq. Jur. 343; 2 Story, Eq. Jur. §§ 852 to 860.

¹³¹ See before, 3820.

¹³² See Lewen v. Stone, 3 Ala. N. S. 485; Randolph v. Kinney, 3 Rand. Va. 394; Redd v. Wood, 2 Ga. Dec. 174; Pebles v. Estill, 7 J. J. Marsh. Ky. 408; Green v. Hankinson, Walk. Ch. Mich. 487.

¹³³ 1 Harrison, Ch. Pr. 107; 1 Maddock, Ch. Pr. 218; Blake, Ch. Pr. 37, 47; 2 Story, Eq. Jur. §§ 825-851.

¹³⁴ See before, 3805.

¹³⁵ 1 Daniell, Chanc. Pract. 463; Howe v. Harvey, 8 Paige, Ch. N. Y. 73.

to give the court jurisdiction. For example, when a suit is in the circuit court of the United States, the plaintiff must allege that he is a citizen of a particular state; as, "A B of Trenton, and a citizen of the state of New Jersey, brings this, his bill, against C D of New York, and a citizen of the state of New York. And thereupon your orator¹³⁶ complains and says that," etc.¹³⁷

The names and description of the defendants may be stated in this part of the bill as above, or they may be named and described in the next part. The object of describing them is to know where and to whom the court and parties may resort to compel obedience to any order or process of the court.¹³⁸

4162. The third part contains the case of the plaintiff, and is commonly called the *stating part* of the bill. It is a narrative of the facts and circumstances of the plaintiff's case, and of the wrong and grievance of which he complains, and the names of the persons by whom done and against whom he seeks redress.¹³⁹

The facts which must be stated in this part of the bill may be considered with regard to those which relate to the title of the plaintiff to recover, the certainty with which they must be stated, the materiality of the plaintiff's statement, the multifariousness of the statement, the splitting of a cause of action, and the statement of the jurisdiction of the court.

4163. It is in general requisite that the plaintiff's equity should appear in this part,¹⁴⁰ and that he should show a title in himself for the thing he claims; for unless every fact essential to the plaintiff's title to maintain the suit be stated in the bill, the defect will be fatal, because no facts are at issue except those charged in the bill, and of course no evidence can be given of them. The defendant has come to answer those matters only which are charged, and on those only can the court pronounce, because its decree must be *secundum allegata et probata*.¹⁴¹

4164. The bill must state with accuracy and clearness the right, title, and claim of the plaintiff, and with the same certainty the injury or grievance of which he complains and the relief which he asks. The other material facts should be briefly and plainly alleged, with necessary and convenient certainty of the essential circumstances, time, and place, and all other incidents.¹⁴²

General certainty is sufficient in pleadings in equity. For example, in a bill for the specific performance of a contract, if it be alleged to be in writing, it is not indispensable to allege it to be signed by the party, because it will be presumed to be so signed.¹⁴³

It is a general rule, which is founded in justice and common sense, that whatever is essential to establish the rights of the plaintiff, and is necessarily within his knowledge, must be alleged positively and with precision,¹⁴⁴ and it is not a

¹³⁶ The plaintiff entitles himself your orator, or oratrix, according to the sex.

¹³⁷ Rules of Practice for the Courts of Equity of the United States, Rule 20.

¹³⁸ No one is considered a party defendant to a bill in chancery, except such as is described and known as such, and against whom a subpoena is prayed. *Carey v. Hillhouse*, 5 Ga. 251. See 2 Johns. Ch. N. Y. 245; 2 Paige, Ch. N. Y. 449, 450; 1 Marsh. Ky. 594.

¹³⁹ Barton, Suit in Eq. 27; Mitford, Eq. Pl. § 43; Story, Eq. Pl. § 27; Cooper, Eq. Pl. 9; 1 Daniell, Chanc. Pract. 465.

¹⁴⁰ Flint v. Field, 2 Anstr. Exch. 543.

¹⁴¹ Cooper, Eq. Pl. 5, 7; Story, Eq. Pl. §§ 28, 257; Barque Chusan, 2 Stor. C. C. 469; Boon v. Chiles, 10 Pet. 177; Parsons v. Heston, 3 Stockt. Ch. N. J. 155; Classen v. Lafrenz, 4 Greene, Iowa, 224; Chaffin v. Kimball, 23 Ill. 36; Bailey v. Ryder, 10 N. Y. 363.

¹⁴² Mitford, Eq. Pl. Jeremy, ed. 41, 42; Barton, Suit in Eq. 31, note 2; Story, Eq. Pl. § 241.

¹⁴³ Cozine v. Graham, 2 Paige, Ch. N. Y. 177; Dunn v. Calcraft, 1 Sim. & S. Ch. 543; Dennis v. Dennis, 15 Md. 73; Harrison v. Kramer, 3 Iowa, 543; Patterson, etc., Co. v. Jersey City, 1 Stockt. Ch. N. J. 434.

¹⁴⁴ Mitford, Eq. Pl. Jeremy, ed. 41, 42; Story, Eq. Pl. § 255; 1 Daniell, Chanc. Pract. 604

sufficient averment of such a fact in a bill to state that the plaintiff "is so informed;" as, where a bill charges the defendant as assignee of a lease, it is not sufficient to state in the bill that the plaintiff has been informed by his steward that the defendant is such an assignee.¹⁴⁵

But there are often cases in which the complainant is entitled to relief in a state of facts which he cannot know of his own knowledge, but where he can act only upon information. In such a case the bill must allege in substance that the orator is informed and actually believes that the facts are as stated, or that upon information and belief the orator alleges the facts.¹⁴⁶

On the other hand, the claims of the defendant may be stated in general terms; and if a matter essential to the determination of the plaintiff's claim is charged to rest in the knowledge of the defendant, or must of necessity be within his knowledge, and is consequently the subject of a part of the discovery sought by the bill, the precise allegation is not required.¹⁴⁷

With regard to the allegation of *time*, when it is material it must be alleged with such degree of accuracy as may prevent any possibility of doubt as to the period intended.¹⁴⁸

4165. Although all material facts should be alleged, yet care must be taken not to overload the bill with redundant and superfluous allegations, or unnecessary statements, or scandalous or impertinent matter. Prolivity is a fault which ought to be carefully avoided.

4166. Care must be taken to avoid the statement of any impertinence or scandal in the bill, for if the bill be scandalous or impertinent, it may on motion be referred to a master, who will inquire into the fact, and if the matter objected to be found to bear such character, it will be struck out at the cost of the party pleading it. The courts cannot permit their records to be made the vehicles of scandal, and the opposite party is not bound to answer what is altogether irrelevant or impertinent.¹⁴⁹ But a few unnecessary words in a bill or answer will not be deemed impertinent, unless they will lead to the introduction of improper evidence by putting in issue matters which are foreign to the cause; or when such words will embarrass the defendant in making his answer.¹⁵⁰

4167. By impertinent matter is meant that which is altogether irrelevant to the case, what does not appertain or belong to it; *id est, quod ad rem non pertinet*.¹⁵¹ Scandalous matter is a false and malicious statement of facts not relevant to the cause. But nothing which is positively relevant, however harsh or gross the charge may be, can be considered scandalous.¹⁵² For example, in a bill impeaching the validity of a will on the ground of undue influence over the testator, exercised by a woman who takes under such will, an allegation that prior to the date of such will she engaged in a criminal connection with

465; *Duckworth v. Duckworth*, 35 Ala. N. S. 70; *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420; *Green v. Covillaud*, 10 Cal. 317.

¹⁴⁵ *Lord Uxbridge v. Staveland*, 1 Ves. sen. Ch. 56.

¹⁴⁶ *Wells v. Bridgeport Co.*, 30 Conn. 316; *Nix v. Winton*, 35 Ala. N. S. 309.

¹⁴⁷ *Mitford, Eq. Pl. Jeremy*, ed. 42; *Cooper, Eq. Pl. 6*; *Baring v. Nash*, 1 Ves. & B. Ch. Ir. 551.

¹⁴⁸ 1 *Daniell, Chanc. Pract.* 477.

¹⁴⁹ *Lowe v. Williams*, 2 Sim. & S. Ch. 574; *Richards v. Attorney General*, 12 Clark & F. Hou. L. 30.

¹⁵⁰ *Hawley v. Wolverton*, 5 Paige, Ch. N. Y. 522.

¹⁵¹ See *Gresley, Ev. Ch. 3*, s. 1, p. 229; *Wagstaff v. Bryan*, 1 Russ. & M. Ch. 30; *Everett v. Prythergeh*, 12 Sim. Ch. 365; *Tench v. Cheese*, 1 Beav. Rolls, 571; *Langdon v. Goddard*, 3 Stor. C. C. 13; *Hood v. Inman*, 4 Johns. Ch. N. Y. 437.

¹⁵² *Cooper, Eq. Pl. 19*; *Mitford, Eq. Pl. Jeremy*, ed. 48; *Story, Eq. Pl. § 269*; *Fenhoullet v. Passavant*, 2 Ves. Ch. 24; *St. John v. St. John*, 11 Ves. Ch. 526; *Coffin v. Cooper*, 6 Ves. Ch. 514; *Ex parte Simpson*, 15 Ves. Ch. 477; *Goodrich v. Rodney*, 1 Minn. 195.

him, and openly cohabited with him as if she had been his wife, is not scandalous nor impertinent.¹⁵³

4168. There is a difference between matter merely impertinent and that which is scandalous; matter may be impertinent without being scandalous, but to be scandalous it must be impertinent. A bill cannot by the general practice be referred for impertinence after the defendant has answered, or submitted to answer, but it may be referred for scandal at any time, and even upon the application of a stranger to the suit, for he has the right to prevent the records of the court being made the vehicle of spreading slanders there against himself.¹⁵⁴

The reason assigned for making a difference as to the time when the objection may be made between matters of scandal and impertinent matter is this, that mere impertinence is not in itself prejudicial to any one, it is a mere superfluity which may be waived; but scandal may do great and permanent injury to the persons whom it affects, by making the records of the courts the means of perpetuating libelous and malignant slanders. Besides, the court is bound to suppress such indecencies as may stain unjustly the reputation and wound the feelings of the parties, their relatives, or other persons.¹⁵⁵

4169. Multifariousness in pleading is a fault which should be avoided, for if a bill be multifarious, it may be demurred to or dismissed by the court of its own accord.¹⁵⁶ By multifariousness in a bill is understood the improperly joining in one bill distinct matters, and thereby confounding them; as, for example, uniting in one bill several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of distinct natures against several defendants in the same bill.¹⁵⁷

But to render a bill multifarious, the matters must be not only separate and distinct, but each of a character entitling the complainant to separate equitable relief.¹⁵⁸ It is not multifarious if it set up one sufficient ground for relief, and another on which no relief can be had. Nor is it rendered multifarious by asking for two or more methods of relief against the injury complained of.¹⁵⁹

In case of multifariousness the defendant should demur to the defective part and answer the other, or object to the former on the hearing.

This multifariousness, which is exceptionable in pleading, may be by stating different matters in the same bill against one defendant, or by stating a claim against several defendants who are not jointly liable.¹⁶⁰

4170. In order to prevent confusion in the pleadings and its decrees, a court of equity will anxiously discountenance this multifariousness. The following case will illustrate this doctrine: suppose an estate should be sold in lots to different persons; the purchasers could not join in exhibiting a bill against the vendor for a specific performance, for each party's case would be distinct, and

¹⁵³ Anon. 1 Mylne & C. Ch. 78.

¹⁵⁴ Cooper, Eq. Pl. 19.

¹⁵⁵ Ex parte Simpson, 15 Ves. Ch. 477.

¹⁵⁶ Mitford, Eq. Pl. Jeremy, ed. 181 and note.

¹⁵⁷ Cooper, Eq. Pl. 182; Mitford, Eq. Pl. Jeremy, ed. 181; Decamp v. Decamp, 1 Green, Ch. N. J. 294, 296; Benson v. Hadfield, 5 Beav. Rolls, 546; Attorney General v. Craddock, 8 Sim. Ch. 487; Bignold v. Audland, 11 Sim. Ch. 24; Plumbe v. Plumbe, 1 Younge & C. Exch. 345; Sheckwell v. Macauley, 2 Sim. & S. Ch. 79; Brown v. Douglass, 11 Sim. Ch. 283; Brown v. Weatherby, 12 Sim. Ch. 6.

¹⁵⁸ McCabe v. Bellows, 1 All. Mass. 269; Cauley v. Lawson, 5 Jones, Eq. No. C. 132; McRae v. Singleton, 35 Ala. N. S. 297.

¹⁵⁹ Wells v. Bridgeport Co., 30 Conn. 316; Rockwell v. Morgan, 2 Beasl. Ch. N. J. 384; Atkinson v. Atkinson, 15 La. Ann. 491; McCabe v. Bellows, 1 All. Mass. 259; Page v. Webster, 8 Mich. 263. See Gardner v. Ogden, 22 N. Y. 327.

¹⁶⁰ Emaus v. Emaus, 2 Beasl. Ch. N. J. 205.

would depend upon its own peculiar circumstances, and therefore there should be a distinct bill upon each contract; on the other hand, the vendor in the like case would not be allowed to file one bill for a specific performance against all the purchasers of the estate for the same reason.¹⁶¹

Not only will multifariousness be a fault when matters which ought not to be brought in the same bill are so brought, and for joining defendants, against whom there is no common liability; but the rule applies equally when plaintiffs unite in a bill where they have no common right; as, if two plaintiffs should, in one bill, bring a joint demand, and a several demand, against the same defendant, the bill would be defective for multifariousness, and for this reason liable to a demurrer.¹⁶²

Sometimes when a bill contains two distinct subject matters, wholly disconnected with each other, the court has jurisdiction over one of them and not over the other. In such case it will treat the bill as single with respect to the matter over which it has jurisdiction as if it constituted the sole object of the bill.¹⁶³

But to this general principle there are several exceptions, which rest upon the fact that although the plaintiffs may have several interests, yet they have a common interest touching the matter of the suit or are consequentially interested.¹⁶⁴

4171. We have just seen that multifariousness by mixing up several things which ought to be kept separate is a fault in pleading. A fault not less objectionable is that of an undue splitting up of a single cause of action, the consequence of which is to multiply subjects of litigation. The rule which forbids the commission of this fault is founded not only upon the principle that courts of equity will in all cases do complete justice and not administer it by halves, but also on the ground that its violation would allow a multiplicity of suits which would be oppressive and unreasonable. A bill for a part of an account, therefore, will not be allowed, and the plaintiff must bring a suit for the whole or none.¹⁶⁵

4172. We have seen that the plaintiff must show his title or right to sue, the liability of the defendant to be sued, and that he must ask the assistance of the court. He is required also to state in his bill that the court has jurisdiction, and that his case is one to which it ought to be applied. When this is not done, the defendant may demur.¹⁶⁶

4173. *The confederating part* of the bill contains a general charge that the defendant, "combining and confederating with divers persons at the present unknown to the plaintiff, but whose names, when discovered, the plaintiff craves

¹⁶¹ Cooper, Eq. Pl. 182; Brookes v. Lord Whitworth, 1 Madd. Ch. 86; Rayner v. Julian, 2 Dick. Ch. 677. See, for cases of defect in pleading for multifariousness, Salvidge v. Hyde, Jac. Ch. 151, 5 Madd. Ch. 138; Attorney General v. Merchant Tailors' Co., 1 Mylne & K. Ch. 189; Whaley v. Dawson, 2 Schoales & L. Ch. Ir. 367; Binkerhoff v. Brown, 6 Johns. Ch. N. Y. 139; Fellows v. Fellows, 4 Cow. N. Y. 682; Hunton v. Platt, 11 Mich. 264, a case of a bill to quiet title; Forniquet v. Forstall, 34 Miss. 87, bill to set aside a collusive sale.

¹⁶² Harrison v. Hogg, 2 Ves. Ch. 323; Cooper, Eq. Pl. 183. See Coleman v. Barnes, 5 All. Mass. 374; De Leon v. Higuera, 15 Cal. 483.

¹⁶³ Varick v. Smith, 5 Paige, Ch. N. Y. 160; Kyne v. Moore, 1 Sim. & S. Ch. 61; Varick v. Attorney General, 5 Paige, Ch. N. Y. 187.

¹⁶⁴ Mitford, Eq. Pl. Jeremy, ed. 171; Cooper, Eq. Pl. 40, 184; Fitch v. Creighton, 24 How. 159; Coleman v. Barnes, 5 All. Mass. 374; Walkup v. Zehring, 13 Iowa, 306; Mitchell v. Bank of St. Paul, 7 Minn. 252; Morton v. Weil, 33 Barb. N. Y. 30. See also Phillips v. Allen, 5 All. Mass. 85.

There is a class of cases where relief is sought against stockholders and officers of insolvent corporations, in which separate bills must in general be brought by creditors and against the separate classes liable. See Cambridge, etc., v. Somerville Co., 14 Gray, Mass. 193; New England Bank v. Newport Factory, 6 R. I. 154.

¹⁶⁵ Cooper, Eq. Pl. 184; Story, Eq. Pl. § 287. See Purefoy v. Purefoy, 1 Vern. Ch. 29; Mitford, Eq. Pl. Jeremy, ed. 183.

¹⁶⁶ Mitford, Eq. Pl. Jeremy, ed. 141.

to be at liberty to insert in his bill, with apt and proper matter and words to charge and make them parties defendants to the bill," refuses to do that justice to the plaintiff which he requires or to which he is entitled.

Although usually inserted in a bill, this charge is not necessary, and it may be, and frequently is, omitted without any inconvenience or danger; for it is now settled that a general charge of unlawful combination cannot be compelled, and a charge of lawful combination ought to be specified to render it material.¹⁶⁷

But the plaintiff may in some cases charge a confederacy, and when this is intended to be relied on as a ground of jurisdiction, the combination must be specially set out.¹⁶⁸

4174. Formerly the plaintiff's case was stated in the bill very concisely, and if any matter was introduced into the defendant's plea or answer which it was requisite should be put in issue on his part by additional facts in avoidance of such new matter, such new fact was placed upon the record by means of a special replication. This caused inconvenience and delay, and greatly lengthened the pleadings. To obviate this, and to enable the plaintiff to state his case and to bring forward the matter to be alleged in reply to the defence at the same time, and that without making any admission on the part of the plaintiff of the truth of the defendant's case, led to the practice in use. Now when the plaintiff is aware at the time of filing his bill of any defence which may be made to it, and he has any matter to allege which may avoid the effect of such defence, it is usual to insert after the charge of confederacy an allegation that the defendants pretend or set up such and such allegations by way of defence, and then to aver the matter used to avoid the charge. This is usually called the *charging part* of the bill.¹⁶⁹ The following example will illustrate this: If a bill is filed on an equitable ground by an heir who apprehends that his ancestor has made a will, he may state his title as heir, and, alleging the will by way of pretense of the defendant's claiming under it, make it a part of the case without admitting it.

The charging part of the bill is often omitted, and though usually inserted, it is not indispensable in any case.¹⁷⁰

4175. The *jurisdiction clause* was introduced in the bill for the purpose of showing that the court had jurisdiction of the case, by a general statement that the acts complained of are contrary to equity and tend to the injury of the complainant, and that he has no remedy, or not a complete remedy, without the assistance of the court; but this averment must be supported by the cause shown in the bill, from which it must be apparent that the court has jurisdiction.

But this clause does not give the court jurisdiction. When the case made by the bill is within the jurisdiction, the court will sustain it, though the clause be omitted; when, on the contrary, the case stated in the bill is not of equitable

¹⁶⁷ See Lord Howard *v.* Bell, Hob. 91; Cooper, Eq. Pl. 10, 11; 1 Daniell, Chanc. Pract. 483; Mitford, Eq. Pl. Jeremy, ed. 41. It is still usual to include such a clause in the bill. In the courts of the United States, "the plaintiff in his bill shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff." Rules of Courts, Rule 21.

¹⁶⁸ Mitford, Eq. Pl. Jeremy, ed. 41. See Singleton *v.* Scott, 11 Iowa, 589, as to the degree of particularity which must be observed in such a charge.

¹⁶⁹ Mitford, Eq. Pl. Jeremy, ed. 43; Barton, Suit in Eq. 27; 3 Woodesson, Lect. 368; 1 Daniell, Chanc. Pract. 484. See Flint *v.* Field, 2 Anstr. Exch. 543.

¹⁷⁰ Rules of Pr. of Courts of U. S., Rule 21; Partridge *v.* Haycraft, 11 Ves. Ch. 575. See Gregory *v.* Molesworth, 3 Atk. Ch. 626.

jurisdiction, the bill will be dismissed, notwithstanding such an averment. The omission of this clause, therefore, will not render the bill defective.¹⁷¹

4176. Having stated the facts requisite to maintain his suit, the plaintiff in his bill next prays that the party against whom he complains may answer all the matters contained in the former parts of his bill, not only according to his positive knowledge of the facts stated, but also according to his remembrance, to the information he may have received, and the belief he is enabled to form on the subject. The principal object of the answer is to procure from the defendant proof of the matters necessary to support the cause of the plaintiff; and he is required either to admit or to deny all the pertinent facts set forth in the bill, with their attending circumstances, or to deny having any knowledge or information on the subject, or any recollection of it, and also to declare himself unable to form any belief concerning it.¹⁷² This the defendant should do without being particularly interrogated upon the subject. But as experience has proved that the substance of the matters stated and charged in the bill may be frequently evaded by answering according to the letter only, it has become the practice to add to the general requisition that the defendant should answer the contents of the bill, a repetition by way of interrogatories of the matters most essential to be answered, adding to the inquiry after each fact an inquiry of the several circumstances which may be attendant upon it and the variations to which it may be subject, with a view to prevent evasion and to compel a full answer.¹⁷³ Another object of the interrogatories is to bring the facts to which they relate to the mind and recollection of the defendant, for without such intimation he might conscientiously answer, and inadvertently, without any intention at evasion, omit to state the information required. This is commonly called the interrogating part of the bill.

With regard to the form and substance of the interrogatories, it is proper to observe that they must be founded on something in the prior part of the bill, for if there be nothing there to warrant the interrogatory, the defendant is not compellable to answer. But a variety of questions may be founded on a single charge.¹⁷⁴

4177. The *prayer for relief*, which is the eighth part of the bill, is of two kinds, namely, a prayer for general relief, and a prayer for specific relief.

4178. The plaintiff usually makes a prayer for specific relief, and states accurately the matters he prays to be decreed, and to which he thinks himself entitled to under all the circumstances. When special orders and provisional

¹⁷¹ Mitford, Eq. Pl. Jeremy, ed. 44; Cooper, Eq. Pl. 10; Barton, Suit in Eq. 36; 1 Montagu, Eq. Pl. 78; 1 Daniell, Chanc. Pract. 485; Story, Eq. Pl. § 34; Rules of Courts U. S., Rule 21.

¹⁷² Kittredge v. Claremont Bank, 1 Woodb. & M. C. C. 246; Mitford, Eq. Pl. Jeremy, ed. 44. See Brooks v. Byam, 1 Stor. C. C. 296.

¹⁷³ Mitford, Eq. Pl. Jeremy, ed. 44. By the fortieth rule of the Rules of Practice for Courts of Equity of the United States, it was provided that a defendant should not be required to answer any statement or charge in a bill, unless specially interrogated thereto. By the ninety-third rule, however, it is provided that the fortieth rule is repealed and annulled, and that thereafter it shall not be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desire to do so to obtain a discovery.

¹⁷⁴ Mitford, Eq. Pl. Jeremy, ed. 45; Jerrard v. Sanders, 4 Brown, Ch. 322, Eden, ed. By the seventy-first rule of the Rules of Practice for the Courts of Equity of the United States, it is required that "the last interrogatory to take the testimony now commonly in use shall in the future be altered, and stated in substance thus: 'Do you know, or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.'"

processes are required, founded on peculiar circumstances, such as writs of injunction, writs of *ne exeat regno*, orders to transfer funds, or to preserve property pending litigation, they are usually made the subject of special prayer. In general, these things will not be granted under a general prayer, because the defendant might, by his answer, make a different case under the general prayer from what he would make if the bill prayed specially for the thing which was thus to be decreed.¹⁷⁵

4179. He then concludes his bill with a prayer for general relief. This can never be omitted with safety, because if the plaintiff should mistake the relief to which he thinks himself entitled by his special prayer, he may be relieved when he shows a right under his prayer for general relief, but such relief must be consistent with the special relief prayed for;¹⁷⁶ "as to this point the rule is that if the bill contains charges, putting facts in issue that are material, the plaintiff is entitled to the relief which those facts will sustain under the general prayer, but he cannot desert special relief prayed, and under the general prayer ask relief of another description, unless the facts and circumstances charged by the bill will, consistently with the rules of the court, maintain that relief."¹⁷⁷

To entitle a plaintiff to a decree under the general prayer different from that specifically prayed, the allegations relied upon must not only be such as to afford a ground for the relief sought, but they must have been introduced into the bill for the purpose of showing a claim to relief, and not for the mere purpose of corroborating the plaintiff's right to the specific relief prayed; otherwise the court would take the defendant by surprise, which is contrary to its principles.¹⁷⁸

4180. When it is doubtful with the plaintiff, or those who advise him, whether he is entitled to the special relief he wishes to pray for, it is not unusual so to frame the prayer that if one species of relief sought is denied, another may be granted. Bills with a prayer of this description, framed in the alternative, are called bills with a double aspect.¹⁷⁹

But in such case the plaintiff must sue in the same capacity, and not in two distinct characters. Nor can the plaintiff allege two inconsistent states of fact, and ask relief in the alternative, but he may state the facts and ask relief according to the conclusion of law which the court may draw from them, although this may be presented in two or more alternatives.¹⁸⁰

4181. Next after the prayer for relief follows the *prayer for process*, to compel the defendants to appear, answer the bill, and abide the determination of

¹⁷⁵ *Savoy v. Dyer*, Ambl. Ch. 70, and note; *Moore v. Hudson*, 6 Madd. Ch. 218. It is provided in the twenty-third rule of the Rules of Practice for Courts of Equity of the United States, that if an injunction or a writ of *ne exeat regno*, or any other special order pending the suit is asked for in the prayer for relief, that shall be sufficient without repeating the same in the prayer for process.

¹⁷⁶ *Soden v. Soden*, cited in *Hiern v. Mill*, 13 Ves. Ch. 119; *Grimes v. French*, 2 Atk. Ch. 141; *Mitford*, Eq. Pl. Jeremy, ed. 38; *Hollis v. Carr*, 2 Mod. 86; 3 Woodesson, Lect. 372; *Cooper*, Eq. Pl. 14; 1 *Daniell*, Chanc. Pract. 490; *Hobson v. McArthur*, 16 Pet. 182, 195; *English v. Foxall*, 2 Pet. 595; *Colton v. Ross*, 2 Paige, Ch. N. Y. 396; *Pleasants v. Glasscock*, 1 Smedes & M. Ch. Miss. 18, 24; *Foster v. Cook*, 1 Hawks, No. C. 509.

¹⁷⁷ *Hiern v. Mill*, 13 Ves. Ch. 119; *Potter v. Marvin*, 4 Minn. 525; *McCulloch v. Dodge*, 6 R. I. 346; *Espiniola v. Blasco*, 15 La. Ann. 426; *Casaday v. Woodbury*, 13 Iowa, 113; *Hill v. Beach*, 1 Beasl. Ch. N. J. 31; *Denison v. League*, 16 Tex. 399.

¹⁷⁸ *Stevens v. Guppy*, 3 Russ. Ch. 171; 1 *Daniell*, Chanc. Pract. 492, 493.

¹⁷⁹ *Mitford*, Eq. Pl. Jeremy, ed. 39; *Bennet v. Wade*, 2 Atk. Ch. 325; 1 *Daniell*, Chanc. Pract. 496; *Barton*, Suit in Eq. 41; *Cooper*, Eq. Pl. 14.

¹⁸⁰ *Judge Redfield in Story*, Eq. Pl. § 42, a, 42, b; *Rawlings v. Lambert*, 1 Johns. & H. Ch. 458; *Evan v. Avon*, 29 Beav. Rolls, 144; *Redmond v. Dana*, 3 Bosw. N. Y. 615; *New York Co. v. North Western Co.*, 23 N. Y. 357.

the court on the subject. Particular attention must be given to this part of the bill, and all persons who are intended to be made parties must here be named as such, for it is a rule that none are parties, though named in the bill, against whom process is not prayed.¹⁸¹

4182. The most ordinary process prayed for is the writ of subpoena, which requires the defendant to appear and answer the bill on a certain day, named in the writ, under a certain penalty; and when the attorney general is made defendant to a bill, instead of praying process against him, prays that he may answer to it upon being attended with a copy.¹⁸² When a corporation aggregate is defendant, the process of subpoena is the same as in ordinary cases; but sometimes the bill prays that in case of their default to appear and answer the bill, the writ of *distringas* may issue to compel the corporators to do so.

The writ of subpoena to compel an appearance to a suit in equity was introduced into the court of chancery by Bishop Waltham, who was chancellor in the reign of Richard II.¹⁸³

4183. For the purpose of preserving property in dispute pending a suit, or to prevent evasion of justice, the court either makes a special order on the subject, or issues a provisional writ; as the writ of injunction to restrain the defendant from proceeding at the common law against the plaintiff, or from committing waste, or doing an injurious act; the writ of *ne exeat regno* to restrain the defendant from avoiding the plaintiff's demand by quitting the state; and other writs of a similar nature. When a bill seeks to obtain a special order of the court, or a provisional writ, for any of these purposes, it is usual to insert, immediately before the prayer of process, a prayer for the order or particular writ which the case requires; and from this the bill is then commonly named an injunction bill, or a bill for a writ of *ne exeat regno*.¹⁸⁴ Sometimes the writ of injunction is sought not as a provisional remedy merely, but a continued protection to the rights of the plaintiff, and the prayer of the bill must then be framed accordingly.

4184. The formal parts of a bill which have just been examined are those of an original bill as it is usually framed. Some of them are not essential, and may, as has been observed, be inserted or omitted in the discretion of the person preparing it; and in the United States courts they may be omitted by the authority of a rule of court.¹⁸⁵

The indiscriminate use of these parts of a bill in all cases has been considered a common reproach to practitioners in this line, because every bill contains the same story three times told.¹⁸⁶ In the hurry of business it may be difficult

¹⁸¹ Cary v. Hillhouse, 5 Ga. 251; Cooper, Eq. Pl. 16; Fawkes v. Pratt, 1 P. Will. Ch. 593; Brasher v. Van Cortlandt, 2 Johns. Ch. N. Y. 245; 1 Smith, Ch. Pr. 45; Mitford, Eq. Pl. Jeremy, ed. 164.

¹⁸² In the case of a subpoena between one of the states of the Union and another, the writ is directed to be served severally on the governor of the defendant state and its attorney general. The state of New Jersey v. The People of the state of New York, 3 Pet. 461.

¹⁸³ 1 Spence, Eq. Jur. 369, note (d); Barton, Suit in Eq. 7, 61, note; 3 Reeves, Hist. of Law, 192.

¹⁸⁴ In some of the states it is not indispensable that this process should be prayed for in the bill. See Story, Eq. Pl. § 44, note 2, 4th ed.; 1 Daniell, Chanc. Pract. 503.

An approved form of prayer for process in which a special writ is prayed is as follows: After asking in the prayer for relief for the special relief required, "May it please your Honors to grant unto your orator not only a writ of injunction, or writ of *ne exeat regno*, conformably to the prayer of this bill, but also a writ of subpoena directed to the said defendants, commanding them by a certain day and under a certain penalty to be and appear in this honorable court, then and there to answer the premises, and to stand to and abide such order and decree as may be made against them."

¹⁸⁵ Rules of Practice of the United States courts, Rule 21.

¹⁸⁶ See Macnamara v. Sweetman, 1 Hog. Rolls, Ir. 29.

to avoid giving ground for the reproach ; but in a bill prepared with attention, the parts will be found to be perfectly distinct, and to have their separate and necessary operation.¹⁸⁷

4185. In general, the facts contained in a bill must be verified by an affidavit attached to it as to their truth, and, in some cases, the omission of an affidavit will be good ground of demurrer.¹⁸⁸

4186. For the purpose of avoiding the introduction in a bill of matter criminal, impertinent, or scandalous, it is required that every bill shall be signed by counsel ; and if it contain such matter, it may be expunged, and the counsel ordered to pay the costs to the party aggrieved ; but nothing relevant is considered as scandalous.¹⁸⁹

¹⁸⁷ Mitford, Eq. Pl. Jeremy, ed. 47.

¹⁸⁸ 1 Daniell, Chanc. Pract. 503 ; *Banninger v. Andrews*, 5 Jones, Eq. No. C. 348 ; *Collins v. Barksdale*, 23 Ga. 602 ; See *Hilton v. Lothrop*, 46 Me. 297.

¹⁸⁹ Mitford, Eq. Pl. Jeremy, ed. 48 ; *Anon*, 1 Mylne & C. Ch. 78 ; See before, **4167**.

CHAPTER X.

PROCEEDINGS BETWEEN THE FILING OF THE BILL AND THE DEFENCE.

- 4188. Filing the bill.
- 4189. The writ of subpœna.
- 4190. The service of the writ.
- 4193. The defendant's appearance.
- 4194-4200. The process of contempt.
- 4197. The writ of attachment.
- 4200. Sequestration.
- 4201. Taking bills *pro confesso*.

4187. Having considered the several kinds of bills, the cases in which they may be filed, and the several frames or forms of such bills, the next matter to occupy our attention will be the proceedings between the filing the bill and the defence. These relate to the filing of the bill and the subpœna, the process to compel obedience to it, and bills taken *pro confesso*.

4188. After a bill has been prepared according to the rules stated in the foregoing chapter, and affidavit has been made to the truth of the facts it contains, when such an affidavit is required, it should be signed by counsel and taken to the office of the clerk of the court, who will issue a writ of subpœna as a matter of course. This is a prerequisite; the bill must be filed before a subpœna can issue. In this matter the proceedings differ from an action at law, where the writ of summons, *capias*, or attachment issues in the first instance, and a declaration corresponding with the bill in chancery is afterward filed. By the rules of courts of the United States it is directed that no process of subpœna shall issue from the clerk's office in any suit in equity until the bill is filed in the office.¹

4189. When the bill is filed, the clerk issues the process of subpœna, of course, upon the application of the plaintiff or his attorney; this process is usually returnable on the next rule day.

A writ of subpœna to appear and answer, unlike other writs in its *form*, is addressed to the defendant instead of being addressed to the sheriff or marshal, and commands him that within a certain time he cause an appearance to be entered for him in the court to a bill therein described, filed against him, and that he do answer concerning such things as shall then and there be alleged against him, and that he shall observe what the said court shall direct in this behalf upon pain of an attachment against his person, and such other process as the court shall award.² At the bottom of the writ is placed a memorandum

¹ Rule 11.

² 2 Smith, Chanc. Pract. 487; 1 Daniell, Chanc. Pract. 556; 2 Maddock, Chanc. Pract. 196. The act regulating processes in the courts of the United States provides that the forms and modes of proceeding in the courts of equity, and in those of admiralty and maritime jurisdiction, shall be according to the principles, rules, and usages which belong to courts of equity and courts of admiralty, respectively, as contradistinguished from courts of common law, subject, however, to alterations by the courts. This act has been gen-

that the defendant is to enter an appearance at the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken pro confesso.³

4190. Although the writ is not directed to the sheriff in the state courts, or the marshal when issuing from one of the courts of the United States, the writ must nevertheless be served by that officer or his deputy. The mode required by the rules of courts of the United States is by a delivery of a copy thereof by the officer serving the same to the defendant personally, or, in case of husband and wife, to the husband personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant, with some free white person, who is a member or resident in the family.⁴

Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff is entitled to another subpoena, *toties quoties*, against such defendant, if he shall require it, until the service is made.⁵

4191. The service is ordinary and extraordinary.

The first or *ordinary* service takes place by serving the writ personally, or by leaving it at his dwelling house in the presence of a member of his family. When the service is not personal on the defendant, it must be made at the dwelling house of the defendant; and the service at a counting house or at a solicitor's office is not a good service unless the defendant is constantly in the habit of sleeping there.⁶

The *extraordinary* service of a subpoena takes place when other means of serving the writ are resorted to. This kind of service must in general be warranted by a previous order of the court upon cause shown, though sometimes, when an extraordinary service has been effected, the court have considered it to be good; thus, where the officer who served the subpoena deposed that he hung the same upon defendant's door, and within half an hour after he saw him abroad with a writ in his hand, which he supposed to be the subpoena, an attachment was awarded and the defendant committed for his non-appearance;⁷ and it has been held a good service, if a person keeps the door of his house shut and refuses to open it, to leave the writ hanging upon the door, or to put it into the house under the door, or within the windows. But none of these are good services unless it can be proved that the subpoena afterward came to the defendant's hands, or he was in the house at the time and had notice of it.⁸

When an extraordinary service is necessary, it is, however, the safest course for the plaintiff to apply in the first instance to the court by motion, supported by an affidavit stating the circumstances, for an order that the particular mode of service required shall be a good service. Orders of this nature have been granted where infants have been secreted or kept out of the way, so that they could not be personally served.⁹ Where the defendant is a prisoner at large,

erally considered to adopt the principles of the court of chancery in England. *Vattier v. Hinde*, 7 Pet. 252.

³ Rules of Courts of U. S., Courts of Equity, Rule 12; 2 Smith, Chanc. Pract. 487; 1 Daniell, Chanc. Pract. 557.

⁴ Rule 13. 1 Daniell, Chanc. Pract. 563; 2 Maddock, Chanc. Pract. 200; 1 Smith, Chanc. Pract. 115.

⁵ Rule 14.

⁶ 1 Smith, Chanc. Pract. 115; 1 Daniell, Chanc. Pract. 564; 2 Maddock, Chanc. Pract. 199.

⁷ *Rickers v. Stileman*, 1 Car. Ch. 57.

⁸ *How v. Maddock*, Car. Ch. 104, 115.

⁹ *Smith v. Marshall*, 1 Atk. Ch. 70; *Thomson v. Jones*, 8 Ves. Ch. 141; *Baker v. Holmes*, 1 Dick. Ch. 18, 77; 1 Daniell, Chanc. Pract. 566. In some of the states, the *subpoena* may be served by advertising in the public newspapers, when the parties cannot be found within the jurisdiction of the court. This may be done by virtue of statutory provisions.

the court have directed the service of a subpoena upon the turnkey; though, if he had been a close prisoner, such order would have been unnecessary and the service would have been good.¹⁰ A service has been directed to be made by sending a copy of the writ under cover to the person to whom he had directed his letters to be sent.¹¹ Though in general, when there are several partners defendants, the writ must be served on each of them;¹² yet, when one of the partners is abroad, out of the jurisdiction of the court, a subpoena has been directed to be served on the partner who was present.¹³

4192. The service of a subpoena upon an aggregate corporation must be made upon such officer as by law may be served with process, or, it is said, upon some one of the members.¹⁴

4193. Upon the return of the subpoena, as served and executed upon any defendant, the clerk enters the suit upon the docket of the court, as pending in the court, and the defendant is required by the return day of the writ, if he has been served with process in proper time, according to the rules of the court or the provisions of the law, to enter his appearance. The appearance of the defendant is a formal entry, to the effect that the party appears, made at the request of the defendant or his solicitor by the clerk of the court.¹⁵

It is not required that the subpoena should be served on the defendant to entitle him to enter an appearance; he may appear voluntarily to a bill, and, after such appearance, have it referred for impertinence,¹⁶ or plead an answer; and he does not lose his costs by such voluntary appearance.¹⁷

An infant must appear by his guardian,¹⁸ a married woman by her husband, and an idiot by his committee.

According to the English law, the defendant must enter an actual appearance; in this country, at least in some of the states of the Union, the party is considered in court on the return of the sheriff that he has served the subpoena on the defendant, which saves much trouble, and renders the writ of attachment and sequestration unnecessary.

4194. By the English law, when a defendant who has been duly served with a subpoena neglects or refuses to appear within the time required by law, or the rules of the court, he is said to be in contempt. He is also declared to be in contempt if, having appeared, he refuses to answer or to obey any decree or order which may be made by the court touching the suit.

Contempts of this nature are styled ordinary contempts, or contempts of process. They are so called to distinguish them from extraordinary contempts, which are not a mere disobedience of process, but a resistance of the officer who serves the subpoena, or abusive, scandalous words respecting the court, which render the guilty party liable to attachment and imprisonment.¹⁹

The *ordinary contempts*, to which our observations in this place will be confined, relate to the transactions between party and party; the offender, in such cases, may purge his contempt by doing whatever the act is, the non-perform-

¹⁰ Anon. Mosel. Ch. 237.

¹¹ Hunt v. Lever, 5 Ves. Ch. 147, a.

¹² Rice v. Doniphan, 4 B. Monr. Ky. 123.

¹³ Coles v. Gurney, 1 Madd. Ch. 187.

¹⁴ Hinde, Chanc. Pract. 87; 1 Daniell, Chanc. Pract. 564.

¹⁵ See Livingston v. Gibbons, 4 Johns. Ch. N. Y. 94.

¹⁶ Fell v. Master of Christ's College, 2 Brown, Ch. 279; Shelton v. Tiffin, 6 How. 163, 186.

¹⁷ Bowhee v. Grills, 1 Dick. Ch. 38.

¹⁸ Irons v. Crist, 3 A. K. Marsh. Ky. 143; Bradwell v. Weeks, 1 Johns. Ch. N. Y. 325.

¹⁹ 1 Daniell, Chanc. Pract. 568, 569. In some of the United States, nothing can be considered a contempt, unless it happens in the presence of the court, or it be in disobedience of its mandates.

ance of which has brought him into contempt, and paying to the other party whatever costs may have been occasioned by his conduct.

4195. Before proceeding to the examination of the remedy against natural persons for a contempt of the *subpœna*, it will be necessary to say a few words as to the manner of compelling the appearance of a corporation aggregate. For this purpose a writ of *distringas* is the first process. This is a writ directed to the sheriff, commanding him to distrain the lands, goods, and chattels of the corporation, so that they may not possess them till the court shall make other order to the contrary, and that in the mean time he, the sheriff, do answer to the court for what he so distrains. Under this writ, a nominal distress is made, and the writ is returned; if this prove insufficient, an alias *distringas* issues, under which a greater distress is made, and the writ is returned; if the corporation still remains disobedient, a pluries *distringas* issues. If this last writ fails of its effect, upon being returned by the sheriff a commission of sequestration may be obtained against the corporation. When a sequestration has been made, it cannot be discharged until the corporation shall have performed what they are enjoined to do, and paid the costs of the several *distringases* and of the sequestration. Upon the performance of all this the sequestration may be discharged upon motion.

After the sequestration has been issued against a corporation, and before it has been discharged, the plaintiff may, at his choice, set down the cause to be heard, and have the bill taken *pro confesso* against the corporation, in the same way as can be done by an ordinary person.²⁰

4196. The usual processes to compel the appearance of a corporation sole, or of a natural person, are the writ of attachment, and the process of sequestration.

4197. In those states where the English practice has been adopted in this respect, the first process against an individual for not appearing or not answering according to the exigency of the writ of *subpœna* is an attachment. In such case the defendant is in contempt, because he has disobeyed the order of the court commanding him to appear; and, like every other person in contempt, either in courts of law or courts of equity, is liable to an attachment.

4198. The word *attachment* is said to be derived from the French word *attacher*, which signifies to bind, to tie. The writ of attachment is addressed to the sheriff or other proper officer, commanding him to attach the defendant, so that he may have him before the court to answer touching the contempt with which he is charged, as well as such other matters as shall be then and there laid to his charge. An attachment is said to differ from an arrest in this, that by an arrest is meant the seizing of the person of another by lawful authority for the purpose of taking him before a superior officer to be disposed of forthwith; on the contrary, an attachment signifies the taking of a person and presenting him in court at the day assigned. In modern usage, however, the distinction is but little observed.

4199. To this writ of attachment the sheriff is required to make a return. When the defendant is not found within his bailiwick, he returns this fact. This is called a *non est inventus*, and upon this return further proceedings are grounded. If, on the contrary, the defendant has been found, the sheriff returns, "I have attached the within named A B, as within I am commanded." This is denominated a return of *cepi corpus*, which, when once returned, puts an end to all the ordinary process to compel an appearance.

4200. After an attachment for not appearing, by the English practice a

²⁰ 1 Daniell, Chanc. Pract. 190. See *Cursen v. The African Company*, 1 Vern. Ch. 132 *Salmon v. The Hamborough Company*, 1 Chanc. Cas. 206.

writ of attachment with proclamations issues for the purpose of proceeding against the plaintiff to outlawry; the sheriff is required to make proclamations, and if the defendant does not come in under the proclamations, he is declared an outlaw. Then a commission of rebellion issues, and if he still continues to disobey, he is considered as a rebel and contemner of the laws. The next process under the English system is a sequestration. The process of *sequestration* is a writ or commission directed to the sheriff, or, which is more usual, to four persons of the plaintiff's own nomination, empowering them to enter upon and sequester the estate, real and personal, of the defendant, and to keep the rents, issues, and profits thereof, or pay the same in such manner and to such persons as the court may appoint until the defendant has appeared, or perform what he has been enjoined to do, and for not doing of which he is in contempt.²¹

All these processes, which in England must be sued out, become unnecessary by our practice, where the defendant is considered in court as soon as the writ of subpoena has been served upon him.

4201. After an appearance has been entered, or, by the rules of court or statutory provision, it is dispensed with, if the defendant does not demur, plead to, or answer a bill agreeably to the rules of court, or within the time required by law, the bill will be taken as admitted. In order to render its process effectual, the court in such case will treat the defendant's contumacy as an admission of the plaintiff's case by taking the bill pro confesso. In this case the bill may be proceeded in *ex parte*, and the matter of the bill may be decreed by the court if the same can be done without an answer and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, may sue the process of attachment against the defendant to compel an answer.²²

When the bill has been taken pro confesso, the defendant may in some cases be relieved by making an early application to the court and showing a reasonable cause, in which case the proceeding will be set aside and the time for answering enlarged.²³

²¹ By the statutes 5 Geo. II, c. 25, repealed and re-enacted by the 11 Geo. IV, and 1 Wm. IV, c. 36, some provisions were made to remedy the inconveniences which had been felt before.

²² See Rules of U. S. Courts, Rule 18.

²³ Rules of U. S. Courts, Rule 19.

CHAPTER XI.

DEFENCE, DISCLAIMERS, AND DEMURRERS IN EQUITY.

- 4202. Defence.
- 4203-4212. The nature of the defence.
- 4205. Dilatory defences.
- 4210-4212. Peremptory defences.
- 4211. Where the plaintiff never had an interest.
- 4212. When the plaintiff's right has determined.
- 4213. The mode of defence.
- 4215. Disclaimers.
- 4219-4273. Demurrers.
- 4222-4256. Demurrers to original bills.
- 4223-4245. Demurrers to bills praying relief.
- 4224-4230. Demurrers to the jurisdiction.
- 4225. Because the subject is not cognizable in any court.
- 4228. Because the subject is not cognizable in a court of equity.
- 4229. Because some other court possesses jurisdiction.
- 4231. Demurrers to the person.
- 4234-4245. Demurrers to the matter of the bill.
- 4235-4241. Demurrers to the substance of the bill.
- 4242-4245. Demurrers to the frame of the bill.
- 4243. For defect of form.
- 4244. On account of multifariousness.
- 4245. For want of proper parties.
- 4246-4256. Demurrers to original bills not praying relief.
- 4247-4250. Demurrer to a discovery on account of jurisdiction.
- 4248. The claim must be of a civil nature.
- 4249. When discovery will be compelled in aid of another jurisdiction.
- 4250. When the action is against public policy.
- 4251. Demurrer to a discovery when the plaintiff has no interest in the suit.
- 4252. Demurrer to a discovery when the defendant has no interest in the suit.
- 4253. Demurrers to bills of discovery when there is no privity between the parties.
- 4254. The immateriality of the discovery.
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- 4257-4268. Demurrers to bills not original.
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- 4262. Demurrers to supplemental bills.
- 4263. Demurrers to bills of revivor and supplement.
- 4264. Demurrers to cross bills.
- 4265. Demurrers to bills of review.
- 4266. Demurrers to bills to carry a decree into execution.
- 4267. Demurrers to bills to suspend the operation of a decree.
- 4268. Demurrers to bills to set aside a decree for fraud.

4269-4272. The form of demurrers.

4273. The effect of demurrers.

4202. Having ascertained the rules which ought to be observed in the frame of a bill, the manner in which it ought to be filed, the nature of the subpoena, and what is an appearance, and the consequence of neglecting or refusing to appear, our next object will be an inquiry into the nature and necessity of the defence.

4203. By *defence* is meant the denial of the truth or validity of the complaint of the plaintiff. It is in general an assertion that the plaintiff has no ground for his suit. No right can be justly decided, or controversy settled, without hearing both parties, and the very subpoena is issued to require the defendant to set up his defence, and show just cause, if he can, why the plaintiff's claim should not be allowed. When a suit has been instituted against him, the defendant may therefore disclaim all right to the matter in dispute, or he may insist upon his right and defend it. Defence, then, may be considered as to its nature or the facts of which it consists, and as to the mode of stating such facts.

4204. A defence in equity, as at law, may be *dilatory*, which, without impeaching the cause of complaint, will suspend the suit until some obstacle to the plaintiff's recovery has been removed, or, *peremptory* or *permanent*, which goes to the foundation of the suit, and when established is a complete bar to the plaintiff's claim.

4205. Dilatory defences are of various kinds. Though not favored by the courts, still they are valid to suspend the proceedings when well founded. The principal of these are the following:

4206. Defences to the *jurisdiction*, which do not dispute the rights of the plaintiff in the subject of the suit, but rest simply upon the fact that the court in which the suit is instituted is not the proper court to take cognizance of those rights. When this want of jurisdiction is apparent upon the face of the bill; as, where in the courts of the United States the plaintiff and defendants are citizens of the same state, and the courts have no jurisdiction unless they are citizens of different states; the defendant may demur to the jurisdiction of the court.

4207. Another ground of defence is to the *person of the plaintiff*. In this case the defendant does not deny the validity of the rights which are claimed, nor that the court has jurisdiction, but simply that the plaintiff is disabled to sue by reason of some personal disability, either, first, absolutely, which extends to the whole bill, or *sub modo*; or, secondly, that he is not the person he pretends to be, or does not sustain the character he assumes; as, for example, when a person sues alone in a case when he has no right so to sue, as in the case of an infant, a married woman, or a lunatic. If, in such case, the objection is apparent on the face of the record, the defendant may successfully demur.

4208. A third dilatory defence to the *form of the proceedings* is that the suit is irregularly brought or defective in its appropriate allegations and parties. If, for example, a bill which is not a bill of review, nor in the nature of a bill of review, is brought to vary a decree not impeached for fraud, and the defect of course appears upon the proceedings, demurrer lies.¹

4209. Another dilatory defence is the *pendency of another suit* between the parties for the same cause of action.²

¹ Mitford, Eq. Pl. Jeremy, ed. 206.

² 1 Montagu Eq. Pl. 88, 89.

4210. The *peremptory* or *permanent defences* are of two kinds, namely, those which insist that the plaintiff never had the right to institute the suit, and those which insist that the original right, if any, is extinguished or determined.

4211. These cases of demurrer on the ground that the plaintiff never had any interest are of four kinds:

When the plaintiff has not a superior right to that of the defendant; as, where a bill is filed to set aside a deed of trust by a person who claims to be executor of the grantor, or where the defendant is a purchaser for a valuable consideration without notice.

When the defendant has no interest, in which case he disclaims all right.

When the plaintiff has not a right, because he has no interest; as, where to entitle himself he must have complied with a provision of a statute, and he has failed to do so; for example, where a party sues on a contract within the statute of frauds, when the provisions of that statute have been disregarded.

Where there is no privity between the plaintiff and defendant, or any other right to maintain the suit.

4212. Sometimes a right may have existed, but by acts of the parties or by operation of law it may have become void or determined. These cases are the following:

When the parties themselves have altered the contract, or done some act by which the right to recover upon it has been determined. This may be by express agreement, as by an account stated or a release; or by implication, as by the statute of limitations.

When there has been a decision of the matters in dispute between the same parties; as, in the case of a judgment of a court or tribunal of competent jurisdiction, an award of arbitrators lawfully appointed, or a decree of a court of equity, or of one which exercises equitable jurisdiction.

4213. Having considered the nature of a defence, let us next examine the mode in which it is to be made. The modes of defence are of five sorts, namely:

By disclaimer, which seeks at once to terminate the suit by the defendant's disclaiming all right in the matter sought by the bill.

By demurrer, by which the defendant demands the judgment of the court, whether, in consequence of the alleged defects in the bill, he is bound to answer the bill or not.

By plea, which shows some cause why the suit should be dismissed, delayed, or barred.

By answer, which either, first, controverts the case stated in the bill, confesses, and avoids it; or, secondly, admitting the case stated in the bill, submits to the judgment of the court upon it; or, thirdly, relies upon a new case, or new matter stated in the answer, or upon both.³

By a compound defence, or the union of two or more of these simple modes.⁴

4214. In some cases the defence can be made only by demurrer, then that must be adopted; in others, no mode is open but a plea; and in others, the answer is the proper defence. In many cases, however, the same matter may be insisted on as a defence either by demurrer, plea, or answer. Sometimes a defendant may demur to one part of the bill, plead to another, answer to another, and disclaim to another;⁵ but all these defences must clearly refer to separate and distinct parts of the bill. For the defendant cannot plead to that part to

³ Mitford, Eq. Pl. Jeremy, ed. 106.

⁴ See, as to these several modes of defence, Mitford, Eq. Pl. Jeremy, ed. 12, 13, 14; Story, Eq. Pl. §§ 435 to 438; Welford, Eq. Pl. 252.

⁵ Robertson v. Bingley, 1 M'Cord, Eq. So. C. 352.

which he has demurred; neither can he answer to any part to which he has either demurred or pleaded, the demurrer demanding the judgment of the court whether he shall make any answer, and the plea whether he shall make any other answer than what is contained in the plea. Nor can the defendant by answer claim what by disclaimer he has declared he had no right to. A plea or answer will, therefore, overrule a demurrer, and an answer a plea; and if a disclaimer and answer are inconsistent, the matter will be taken most strongly against the defendant upon the disclaimer.⁶

In the following sections will be considered separately the cases where a defence may be made by demurrer, plea, or answer.

4215. A *disclaimer* in chancery pleading is the renunciation of the defendant to all claims to the subject matter of the demand made by the plaintiff's bill. A disclaimer is distinct in substance from an answer, though sometimes confounded with it, but it seldom can be put in without an answer; for if the defendant had been made a party by mistake, having had an interest which he has parted with, the plaintiff may require an answer sufficient to ascertain whether that is the fact or not.⁷

4216. In form a disclaimer alone seems to be simply an assertion that the defendant disclaims all right and title to the matter in demand, and in some instances, from the nature of the case, this may perhaps be sufficient. The forms given in the books of practice, however, are of an answer and disclaimer.

4217. The disclaimer puts an end to all the pleadings, and the plaintiff ought not to reply.

4218. When the defendant disclaims, the court will in general dismiss the bill with costs; but this is not universally the case.⁸

4219. A *demurrer* in equity pleading is an allegation of a defendant, which, admitting the matters of fact alleged in the bill to be true, shows that as they are therein set forth they are insufficient for the plaintiff to proceed upon or to oblige the defendant to answer; or that for some reason apparent on the face of the bill, or by the omission of some matter which ought to be contained therein, or for want of some circumstance which ought to be attendant thereon, the defendant ought not to be compelled to answer. It therefore demands judgment of the court whether the defendant shall be compelled to make answer to the plaintiff's bill, or to some certain part thereof. Or a demurrer, from the Latin *moratur* or *demoratur in lege*, or the old French *demorrer*, to wait or stay in pleading, signifies, according to its etymology, that the objecting party will not proceed with the pleading because no sufficient statement has been made on the other side in support of the suit, but will wait the judgment of the court whether he is bound to answer.⁹

4220. A demurrer differs from a plea in this, that the former is an objection to matter apparent upon the bill itself, either from what is contained in it or from a defect of its frame; whereas a plea is the objection to the plaintiff's recovery, because of some fact *dehors*, and which does not, of course, appear upon the face of the bill. The causes of a demurrer are, therefore, upon matter in the bill, or upon the omission of matter which ought to be therein or attendant upon it, and not upon foreign matter alleged by the defendant.¹⁰

⁶ Mitford, Eq. Pl. Jeremy, ed. 319, 320; Story, Eq. Pl. § 439; Beauchamp v. Gibbs, 1 Bibb, Ky. 481.

⁷ Mitford, Eq. Pl. Jeremy, ed. 318, 319; Glassington v. Thwaites, 2 Russ. Ch. 458; Ellsworth v. Curtis, 10 Paige, Ch. N. Y. 105, 107; see Graham v. Coape, 3 Mylne & C. Ch. 638.

⁸ Mitford, Eq. Pl. Jeremy, ed. 319.

⁹ Coke, Litt. 71, b; Stephen, Pl. 61; Story, Eq. Pl. § 440; Mitford, Eq. Pl. 107, 108; Cooper, Eq. Pl. 110.

¹⁰ Alderson v. Biggars, 4 Hen. & M. Va. 473; Harris v. Thomas, 1 Hen. & M. Va. 18; Mitchell v. Lennox, 2 Paige, Ch. N. Y. 280; Smets v. Williams, 4 Paige, Ch. N. Y. 364.

4221. The principal ends of a demurrer are to avoid a discovery which may be prejudicial to the defendant, to cover a defective title, or to prevent unnecessary expense. If no one of these ends is obtained, there is little use for a demurrer.¹¹

Bills have already been considered under three general heads: original bills, bills not original, and bills in the nature of original bills; the several bills ranged under the second and third heads being consequences of bills treated of under the first head. The defence which may be made to original bills in its variety comprehends the several defences which may be made to every other kind of bill, except such as arise from the peculiar form and object of each kind. In treating of demurrers, therefore, it will be convenient to consider demurrers to original bills, demurrers to bills not original, and the effect of demurrers.

4222. In considering *demurrers to original bills* many of the rules which apply to demurrers will be mentioned and explained, and this will greatly abridge our labors when we come to consider the rules which apply to demurrers in other cases.

In treating of original bills, they have been divided into those praying relief and into those not praying relief, and it will be recollected that both require a discovery from the party against whom they are exhibited.

Demurrers to the original bills may be considered under two heads, namely: demurrers to bills praying relief, and demurrers to original bills not praying relief.

4223. *Demurrers to original bills praying relief* frequently include demurrers to discovery, though sometimes they do not. They are divisible into three classes: to the jurisdiction, to the person of the plaintiff, and to the matter of the bill.

4224. A *demurrer*¹² to the jurisdiction may lie, because the subject is not cognizable by any municipal court of justice, because the subject is not within the jurisdiction of a court of equity, and because some other court possesses jurisdiction.

4225. Some matters of a political nature are so entirely fit for negotiation or treaty by the executive department of the government, that courts of justice cannot undertake to redress wrongs which have been committed in relation to them. A political treaty made between two independent nations relating to national affairs cannot be enforced in the courts of law or equity. But a distinction must be made between a treaty of this nature and one which provides for the assertion of private rights, or for objects which may properly be redressed in courts of justice, and which have no connection with or involve the rights of sovereignty.

4226. As an example of the first kind, where the courts have no jurisdiction, may be mentioned the case of the treaty between the United States and France,¹³ by which the latter granted the territory of Louisiana to the United States, in which is contained a stipulation for the admission of the territory and its inhabitants into the Union as an independent state. The violation of this provision, if it had happened, certainly could not be redressed in any court.

4227. As an instance of the second rule or the exception to the first, the case of the Florida treaty with Spain may be given,¹⁴ by which titles to lands in the territory were expressly confirmed. In this case, one whose rights under the treaty have been violated may enforce those rights in the courts.¹⁵

¹¹ Montagu, Eq. Pl. 108; Story, Eq. Pl. § 447.

¹² As to pleas to the jurisdiction, see beyond, **4301**.

¹³ Treaty of 1803, art. 3.

¹⁴ Treaty of 1819.

¹⁵ See *Conrad v. Banks*, 10 Wheat. 181; *Soulard v. United States*, 4 Pet. 511.

Prize courts, also, will restore captured property at the suit of the party entitled, where the case has been provided for by treaty, although the capture may have been lawful.¹⁶

4228. When considering the jurisdiction of a court of equity in the first part of this book, much was anticipated of what might otherwise properly occupy our attention in this place.¹⁷

In general, when the plaintiff can have a remedy at law, as effectual as the one he seeks in equity, and that remedy is direct, certain, and adequate, a court of equity has no jurisdiction, and, therefore, a demurrer to the jurisdiction will be sustained. If, for example, the sole object of a bill is to decide upon the validity of a will of real estate, no other equity being shown, a general demurrer will lie, because a court of law can do the plaintiff ample justice.¹⁸

For the same reason, when matters of defence are good at law, they give no ground for equitable jurisdiction. Thus, a bill founded on an allegation that a judgment had been obtained against the plaintiff in the bill, for goods for which he was not personally liable, because in the purchase he had acted as an agent of the government, would be liable to a demurrer, because the matter stated in the bill would be a defence at law.¹⁹

But a demurrer lies not only in cases where the plaintiff in the bill has a complete remedy at law; a demurrer will also lie in cases where there is no remedy at law or in equity;²⁰ or where there is no remedy in equity, although there may be one at law.²¹

4229. Demurrers will be sustained where another court has exclusive jurisdiction of the matter complained of in the bill, because then the court of equity has no jurisdiction whatever; as, for example, a court of equity will not entertain a suit respecting the validity of a will of personal estate, because the exclusive cognizance of such case is vested in the probate court, register's court, or other court exercising similar jurisdiction.²²

4230. Under the constitution and laws of the United States, the circuit courts have jurisdiction only between citizens of different states, or between a citizen and an alien, with a few exceptions; when a suit is instituted in any of these courts, it is required not only that the subject-matter of the bill should appear to be within the jurisdiction of the court, but it must appear on the face of the bill that the parties, both plaintiffs and defendants, are competent to sue or be sued in these courts; and if the bill be defective in this respect, the defendant may demur.²³

4231. *Demurrers to the person* either relate to the incapacity of the plaintiff to sue, or to his want of title to the character he assumes as plaintiff. These objections are somewhat analogous to a plea in abatement at common law, and whenever such defect appears upon the face of the bill, advantage of it may be taken by demurrer; on the contrary, when it does not so appear, it is proper to take advantage of it by plea.

4232. When the personal disability of the plaintiff appears on the face of the bill, as where it appears that an infant, or a married woman, or a person *non compos mentis*, exhibits such a bill, and no next friend or committee is named in it, the defendant may demur; but unless the incapacity appears on

¹⁶ *United States v. The Peggy*, 1 Cranch, 103; *United States v. Percheman*, 7 Pet. 51.

¹⁷ Before, Chapter III.

¹⁸ *Jones v. Jones*, 3 Mer. Ch. 161; *Jones v. Frost*, Jac. Ch. 466; 3 Madd. Ch. 1.

¹⁹ *Cooper*, Eq. Pl. 94; *Story*, Eq. Pl. § 481.

²⁰ *Kemp v. Pryor*, 7 Ves. Ch. 237, 250.

²¹ *Cholmondeley v. Clinton*, 1 Turn. & R. Ch. 107; *Hardy v. Reeves*, 4 Ves. Ch. 479.

²² *Mitford*, Eq. Pl. Jeremy, ed. 125, 126.

²³ *Jackson v. Ashton*, 8 Pet. 148.

the face of the bill, the defendant must take advantage of the disability by plea.²⁴

So, too, where it is not sufficiently averred that the plaintiff is a citizen.²⁵

4233. When it appears by the bill that there is a defect of the title of the plaintiff to the character in which he sues, the defendant may demur; as, when the plaintiff sues as administrator under letters of administration granted in a foreign country, for then it appears that under that administration he has no right to sue in our courts; or when persons who are merely partners sue as a corporation.²⁶

4234. Having in the preceding sections considered the cases where a demurrer may be sustained to the jurisdiction of the court, and when it may be maintained on account of the incapacity of the plaintiff, or because there is an apparent defect of title to the character he assumes, let us examine, in the next place, the cases where there may be a successful *demurrer to the matter of the bill*, either as to substance or to form.

4235: Some of the causes of demurrer to an original bill praying relief have already been considered, particularly when we were treating of the proper form and structure of bills, so that here it will not be required to go farther into an examination of this subject than briefly to state for what causes a demurrer will lie to such bill.

4236. A demurrer will lie when it is apparent upon the face of the bill that the plaintiff has no interest in the subject matter of the suit, or any right or title concerning it; as, if a plaintiff should found his right to recover on a contract which, by his own showing, was made without consideration, a demurrer would lie.²⁷ And when there are several plaintiffs, and one or more of them has no interest, and this circumstance appears upon the face of the bill, the defendant may demur.²⁸

So where the plaintiff fails to show a good title to the relief he seeks, a demurrer will lie. As, where in a bill to quiet title, he set out a deed which was unacknowledged and did not allege actual notice.²⁹ But it is held that a bill is not demurrable because the plaintiff does not disclose a written agreement of trust, although the statutes of frauds requires the trust to be in writing.³⁰

4237. Though the plaintiff may have a title to sue, yet, if the defendant is not answerable, he may demur. This may arise from a want of privity between the plaintiff and defendant,³¹ but it is not necessarily confined to such cases, nor, indeed, does the rule apply to all cases where there is a want of privity.³² An unsatisfied legatee has an interest in the estate of his testator, and a right to have it applied to answer his demands in due course of administration, yet he has no right to institute a suit against the debtors to his testator's estate, for the purpose of compelling them to pay their debts in satisfaction of his legacy,³³ for there is no privity between the creditor and the legatee.

²⁴ Story, Eq. Pl. § 496; Mitford, Eq. Pl. Jeremy, ed. 153; Cooper, Eq. Pl. 163.

²⁵ Ketchum v. Driggs, 6 McLean, C. C. 13.

²⁶ Mitford, Eq. Pl. Jeremy, ed. 155; Story, Conf. of Laws, §§ 512, 518; Cooper, Eq. Pl. 164.

²⁷ Cozine v. Graham, 2 Paige, Ch. N. Y. 177; Mitford, Eq. Pl. Jeremy, ed. 154; Story, Eq. Pl. § 503; Cooper, Eq. Pl. 166, 167.

²⁸ Page v. Townsend, 5 Sim. Ch. 395; Delondre v. Shaw, 2 Sim. Ch. 237; The King of Spain v. Machado, 4 Russ. Ch. 225; Clarkson v. De Peyster, 3 Paige, Ch. N. Y. 336; Makepeace v. Haythorne, 4 Russ. Ch. 244; Cholmondeley v. Clinton, 1 Turn. & R. Ch. 116; Little v. Buie, 5 Jones, Eq. No. C. 10; Vaughn v. Lovejoy, 34 Ala. n. s. 437.

²⁹ Brinton v. SeEVERS, 12 Iowa, 389.

³⁰ Cranston v. Smith, 6 R. I. 231; Brodie v. Skelton, 6 Ark. 120.

³¹ Mitford, Eq. Pl. Jeremy, ed. 158.

³² Cooper, Eq. Pl. 174; Story, Eq. Pl. § 513; 1 Montagu, Eq. Pl. 44, 115.

³³ Mitford, Eq. Pl. Jeremy, ed. 158; Cooper, Eq. Pl. 175.

In some cases there is no privity between the parties created by any contract between them, but such privity arises by operation of law. For example, a sale by an agent or factor will create a privity between the purchaser and his principal, upon which a suit may be maintained at law as well as in equity.³⁴

4238. A demurrer may be sustained, if it does not appear upon the face of the bill that the defendant has some interest in the subject of the suit which can make him liable to the plaintiff's demands.³⁵ When, therefore, a mere witness, or an arbitrator, is made a party, he may demur, if that fact appear upon the bill, and there are no other circumstances; but whenever a person has by his conduct so involved himself in a transaction, he may be held liable for costs; in such case, he cannot demur to the bill, if fraudulent or improper conduct be charged, and the costs be prayed against him.³⁶

4239. The defendant may demur when the plaintiff does not show by the bill that he is entitled to the relief for which he prays. There are many grounds of demurrers of this kind; thus, if a creditor of an insolvent debtor should file a bill against another, to deprive him of a priority which he had lawfully obtained without any fraud, a demurrer would be sustained, because there would be no ground to interfere, since all creditors, under such circumstances, stand upon an equality of right.³⁷

So, too, where it appears that the right to a suit is barred by lapse of time, a demurrer will lie.³⁸

4240. When it appears on the face of the bill that the object of the plaintiff is to enforce a penalty or a forfeiture, the defendant may demur, because a court of equity never lends its aid for this purpose, leaving the parties to seek their remedy at law.³⁹

But to this general rule there are some exceptions, among which are the following:

When the plaintiff who seeks a remedy is solely entitled to take advantage of the penalty or forfeiture, and he expressly waives any right to the penalty or forfeiture, the bill may be maintained, because then the plaintiff proceeds upon other grounds.⁴⁰

When a person by his own agreement subjects himself to the payment of a penalty, if he does a particular act, a demurrer to discovery of that act will not hold.⁴¹

The objection to a bill to enforce a penalty or a forfeiture applies with equal force to a particular interrogatory in a bill, otherwise unexceptionable, which may expose the defendant to a penalty or forfeiture.⁴²

It is a rule of law that no man is bound to accuse himself of a crime; a bill which requires the discovery of a crime is therefore within the rule, and may be the subject of a demurrer. But this objection is strictly confined to the point of the discovery sought, and does not affect the jurisdiction of the court to grant relief.⁴³

³⁴ Mitford, Eq. Pl. Jeremy, ed. 159, 160; Cooper, Eq. Pl. 176.

³⁵ Mitford, Eq. Pl. Jeremy, ed. 160; *Plumbe v. Plumbe*, 4 Younge & C. Ch. 345.

³⁶ *Le Texier v. Anspach*, 15 Ves. Ch. 159; *Bowles v. Stewart*, 1 Schoales & L. Ch. Ir. 209.

³⁷ Mitford, Eq. Pl. Jeremy, ed. 163; Story, Eq. Pl. § 505; Cooper, Eq. Pl. 167; *Babb v. Mackey*, 10 Wisc. 371; *Davis v. Hall*, 4 Jones, Eq. No. C. 403.

³⁸ *Sublette v. Kinney*, 9 Cal. 426.

³⁹ *Atwill v. Terrett*, 2 Blatchf. C. C. 39.

⁴⁰ Mitford, Eq. Pl. Jeremy, ed. 195.

⁴¹ *Morse v. Buckworth*, 2 Vern. Ch. 443; *East Ind. Co. v. Neave*, 5 Ves. Ch. 173; Mitford, Eq. Pl. Jeremy, ed. 195, 196; Hare, Disc. 139.

⁴² *Chauncey v. Tabourden*, 2 Atk. Ch. 392; Hare, Disc. 133; Beames, Pl. in Eq. 260; *Parkhurst v. Lowten*, 1 Mer. Ch. 391.

⁴³ Mitford, Eq. Pl. Jeremy, ed. 196; Story, Eq. Pl. § 525.

4241. A demurrer will lie to a bill on the ground of the triviality of the matter in dispute, as being below the dignity of the court. This rule was adopted for the double purpose of preventing a multiplicity of trivial suits and to save the time of the court for more important matters. In England, agreeably to Lord Bacon's ordinances, it is the rule to dismiss a bill when the matter in controversy is below ten pounds in value. In this country the same rule has been adopted, but the amount is not perhaps exactly fixed.⁴⁴

4242. Defects in *the frame of a bill* for which a demurrer will lie are defects in the form, on account of its multifariousness, and the want of proper parties.

4243. The more usual defect insisted upon by way of demurrer is the want of due certainty in the allegations, loose and inartificial structure of the bill, or the omission of some of the prescribed formularies.⁴⁵ Generally, any irregularity in the frame of a bill may be taken advantage of by way of demurrer.⁴⁶

4244. When considering the nature of a bill we took occasion to explain the nature of multifariousness, and gave some examples of that fault.⁴⁷ It is not easy to lay down any rule as to multifariousness which shall be universally applicable, nor to say what constitutes this fault as an abstract proposition. "The result of the principles to be extracted from the cases on this subject," says Judge Story,⁴⁸ "seems to be that where there is a common liability and a common interest, a common liability in the defendants and a common interest in the plaintiffs, different claims of property, at least if the subjects are such as may without convenience be joined, may be united in one and the same suit."⁴⁹

A demurrer for multifariousness, like a demurrer for a misjoinder at law, goes to the whole bill, and if the demurrer is allowed, the bill will be dismissed as to the party who demurs.⁵⁰ Such a bill cannot be made the foundation of partial relief.⁵¹

4245. We have seen, when treating of parties to a bill in equity,⁵² that it is the constant aim of a court of equity to do complete justice by deciding upon and settling all the rights of all persons interested in the subject of the suit, to make the performance of the order of the court safe to those who are compelled to obey it, and to prevent future litigation. Whenever the want of proper parties appears on the face of the bill, there is a good cause of demurrer. Indeed, when the persons are not brought before the court who ought to have been made parties, and no proper decree can be made, the exception may also be insisted upon at the answer and at the hearing.⁵³ But when the parties omitted are merely formal parties, unless the objection be taken by demurrer or by plea, it cannot be made at the hearing; and if the court can do so, it will dispose of the cause upon its merits, without requiring such formal parties to be joined.

⁴⁴ *Vredenburgh v. Johnson*, Hopk. Ch. N. Y. 112; *Moore v. Lyttle*, 4 Johns. Ch. N. Y. 183; *Smetz v. Williams*, 4 Paige, Ch. N. Y. 364; *Carr v. Inglehart*, 3 Ohio, St. 457.

⁴⁵ Story, Eq. Plead. Redfield, ed., § 528; *Flagg v. Mann*, 2 Sumn. C. C. 549; *Browne v. Warner*, 14 Ves. Ch. 156.

⁴⁶ *Norton v. Hixon*, 25 Ill. 439.

⁴⁷ Before, 4169, 4170.

⁴⁸ Story, Eq. Pl. § 533.

⁴⁹ *Campbell v. Mackay*, 1 Mylne & C. Ch. 603, 623; see *Dimmock v. Bixby*, 20 Pick. Mass. 368; *Avery v. Kellogg*, 11 Conn. 562; *Daniel v. Morrison*, 6 Dan. Ky. 186; *Murphy v. Clarke*, 1 Smedes & M. Ch. Miss. 221; *Donaldson v. Posey*, 13 Ala. n. s. 752; *Nelson v. Hill*, 5 How. 127; *Newland v. Rogers*, 3 Barb. Ch. N. Y. 432; *Varrick v. Smith*, 5 Paige, Ch. N. Y. 137; *Mitford, Eq. Pl. Jeremy*, ed. 181; *Cooper, Eq. Pl.* 181.

⁵⁰ *Boyd v. Hoyt*, 5 Paige, Ch. N. Y. 65.

⁵¹ *Gibbs v. Clagett*, 2 Gill & J. Md. 14.

⁵² Before, Chapter VIII.

⁵³ Story, Eq. Pl. § 541; *Mitford, Eq. Pl. Jeremy*, ed. 180.

When the misjoinder of parties is of parties plaintiffs, all the defendants may demur; if of parties defendants, only those can demur who are improperly joined.

If the demurrer is for want of proper parties, it must show who are the proper parties from the facts stated in the bill, not indeed by name, for that might be impossible, but in such manner as to point out to the plaintiff the objection to his bill, and enable him to amend by making proper parties.⁵⁴

4246. Having considered the grounds upon which a demurrer to a bill praying for relief must rest, a demurrer to a bill for a discovery has not been examined further than as it is incidental to relief. It is now proposed to treat of *demurrers to original bills not praying relief*, the principal one of which is the demurrer to a bill of discovery; our attention will now be confined to that alone.

When the bill is for discovery and relief, the defendant has the option to demur to the relief and answer the discovery; but, in general, he cannot reverse this order, demur to the discovery alone and not to the relief, when the discovery is merely incidental to the relief; for that would be to demur, not to the thing required, but to the means by which it was to be obtained.⁵⁵ There are cases, however, in which a defendant may demur to the discovery sought by the bill, although such demurrer will not extend to preclude the plaintiff from having the relief prayed, provided he can establish his right to it by other means than a discovery from the defendant himself. These cases chiefly occur when there is any thing in the situation of the defendant which renders it improper for a court of equity to compel a discovery, either because the discovery may subject the defendant to pains and penalties, or because it may render him liable to some forfeiture, or to something in the nature of a forfeiture.

There are many grounds of demurrer which are common to bills praying for relief, and those not praying for relief.⁵⁶ There are other cases where the grounds of demurrer are peculiarly appropriate to bills of discovery; these will be briefly considered. These are, when the case made by the bill is not such in which a court of equity assumes a jurisdiction to compel a discovery, when the plaintiff has no interest in the subject, or not such interest as entitles him to call on the defendant for a discovery, when the defendant has no interest to entitle the plaintiff to institute a suit against him, even for the purpose of discovery, when there is no privity between the parties, when the discovery, if obtained, cannot be material, when the situation of a defendant renders it improper for him to make a discovery, when the equity of the defendant is equal to that of the plaintiff.

4247. A bill of discovery must show upon its face that the court has jurisdiction. When a bill prays for relief, if the discovery is material to the relief, it is incidental to it, and when the plaintiff shows a title to the relief, he also shows a case in which a court of equity will compel a discovery, unless some circumstance in the situation of the defendant renders it improper. But when the bill is a bill of discovery merely, it is necessary for the plaintiff to show by his bill a case in which a court of equity will assume a jurisdiction for the mere purpose of compelling a discovery. This jurisdiction is also ex-

⁵⁴ Mitford, Eq. Pl. Jeremy, ed. 180; *Pyle v. Price*, 6 Ves. Ch. 780; *Attorney General v. Jackson*, 11 Ves. Ch. 369; 1 Daniell, Chanc. Pract. 385; *Cooper*, Eq. Pl. 187; *Story*, Eq. Pl. § 543.

⁵⁵ *Story*, Eq. Pl. §§ 312, 546.

⁵⁶ Such, for example, as that the subject is not one over which any court has jurisdiction; that the court has not jurisdiction of the case; that the plaintiff has no title, or the defendant is not liable; the plaintiff has no interest in the subject matter; that the object of the bill is to enforce a forfeiture, and the like.

exercised to assist the administration of justice in the prosecution or defence of some other suit, either in the same court or some other court.⁵⁷

When the bill of discovery is brought to aid the prosecution or defence of a suit in another court, it must clearly appear upon the face of the bill that the suit is of such a nature, for such objects, and under such circumstances as will justify the interposition of the court. It must appear that the case is of a civil nature, that when commenced in another court that court has not the power to enforce the remedy sought, that the action is not against public policy.

4248. A court of equity will lend its aid to obtain a discovery only in cases of a purely civil nature; if the discovery sought is of a criminal nature or relating to criminal proceedings, a discovery will not be compelled; and if this appears, a demurrer will lie.⁵⁸ A bill of discovery to aid a mandamus, or a *quo warranto*, or a prohibition, an information, or an indictment, are examples of this kind.⁵⁹

It is not necessary to the validity of an objection that the discovery sought relates to a criminal matter that the facts inquired after should have an immediate tendency to criminate the defendant; he may equally object to disclosing the circumstances, though they have not such an immediate tendency.⁶⁰ "In no stage of the proceedings in this court," says Lord Eldon,⁶¹ "can a party be compelled to answer any question accusing himself or any one in a series of questions that has a tendency to that effect; the rule in these cases being that he is at liberty to protect himself against answering not only the direct question whether he did what was illegal, but also every question fairly appearing to be put with a view of drawing from him an answer containing nothing to affect him, except one link in a chain of proof that is to affect him."

4249. When the suit is pending in another court of ordinary jurisdiction, if it appears that that court itself can compel a discovery, the defendant may demur; for in that case the remedy elsewhere is complete, and the interference of a court of equity is unnecessary and vexatious.⁶² And courts of equity will not enforce a discovery unless the rights of the parties are litigated in the ordinary tribunals. A bill of discovery for the prosecution or defence of a controversy before arbitrators who are judges of the parties' own choosing, will not be supported, and if the facts appear upon its face, the defendant may demur.⁶³

4250. Equity will never aid another court to support an action against public policy; when it appears on the face of the bill that the discovery sought is to support an action against public policy, the defendant may demur. Thus, for example, where an action was brought to recover the expenses of an entertainment given by the plaintiff at the request of the defendant, under an agreement that the former should introduce to him a woman of fortune with a view to marriage, and a discovery was sought in that action for the purpose of enforcing this contract, a demurrer to the bill was allowed, because the contract was against public policy.⁶⁴

4251. A bill must show an interest in the plaintiff in the subject to which the required discovery relates, and such interest as to entitle him to call on the

⁵⁷ Mitford, Eq. Pl. Jeremy, ed. 185, 186.

⁵⁸ Mitford, Eq. Pl. Jeremy, ed. 186.

⁵⁹ Wigram, Disc. 4, 5; *Montague v. Dudman*, 2 Ves. Ch. 298; *Attorney General v. Reynolds*, 1 Eq. Cas. Abr. 601.

⁶⁰ *East India Company v. Campbell*, 1 Ves. Ch. 246.

⁶¹ *Paxton v. Douglass*, 19 Ves. Ch. 225; see *MacCallum v. Turton*, 2 Younge & J. Exch. 183.

⁶² Mitford, Eq. Pl. Jeremy, ed. 186; *Dunn v. Coates*, 1 Atk. Ch. 288.

⁶³ Story, Eq. Jur. § 1495; Story, Eq. Pl. § 554; Hare, Disc. 119.

⁶⁴ *King v. Burr*, 3 Mer. Ch. 693. See *Cooper*, Eq. Pl. 194, 195; *Wallis v. Duke of Portland*, 3 Ves. Ch. 493.

defendant for the discovery. Therefore, where a plaintiff filed a bill for a discovery merely to support an action which he alleged, by his bill, he intended to commence in a court of common law, although by this allegation he brought his case within the jurisdiction of a court of equity to compel a discovery, yet the court being of opinion that the case stated by the bill was not such as would support an action, a demurrer was allowed; for, unless the plaintiff had a right to recover in an action at law, supposing his case to be true, he had no title to the assistance of a court of equity to obtain from the confession of the defendant evidence of the truth of the case;⁶⁵ for the right of a plaintiff in equity to the benefit of the defendant's oath is limited to the discovery of such material facts as relate to the plaintiff's case, and does not extend to a discovery of the manner in which, or of the evidence by means of which, the defendant's case is to be established or to any discovery of the defendant's evidence.⁶⁶

4252. A defendant who has no interest in the suit and who may be examined as a witness cannot be compelled to answer a bill of discovery; for such a bill can only be to gain evidence, and the answer of defendant cannot be read against any other person, not even against another defendant in the same bill.⁶⁷ But although the defendant may have no interest, if the bill states that he has or claims an interest, a demurrer which admits the bill to be true will not be sustained, and he then can avoid it only by a plea or disclaimer.⁶⁸ But to this rule there are some exceptions:

When a corporation is made a defendant, and it is necessary to discover certain entries made in the books of the corporation, their secretary, bookkeeper, or clerk may be made a party, because a corporation does not answer under oath, but simply under seal; and not being liable to a prosecution for perjury, their officers are allowed to be made parties from necessity.⁶⁹ A demurrer, because the bill showed no claim of interest in the defendant, has in such case been overruled.⁷⁰

And where a party has by his conduct so mixed up himself with the transaction as to be chargeable as a party to a fraud, he may be made defendant, and he may be liable for costs.⁷¹

4253. Although both the plaintiff and defendant may have an interest in the subject to which the discovery required is supposed to relate, yet there may not be that privity of title between them which can give the plaintiff a right of discovery.⁷²

4254. The object of a bill of discovery is to enable the court to decide on matters in dispute between the parties; the discovery sought must, therefore, be material, either to the relief prayed by the bill, or to some other suit actually instituted, or capable of being instituted. If, therefore, the plaintiff does not show by his bill such a case as renders the discovery which he seeks material to the relief, if he prays for relief, or does not show a title to sue the defendant in some other court; or that he is actually involved in litigation with the defendant, or liable to be so, and does not show that the discovery which he prays is material to enable him to support or defend a suit, he shows no title to the discovery, and consequently a demurrer will hold. Therefore, where a bill,

⁶⁵ Mitford, Eq. Pl. Jeremy, ed. 187; *Angell v. Draper*, 1 Vern. Ch. 399.

⁶⁶ Wigram, Discov. 90.

⁶⁷ 2 Vern. Ch. 380; *Crane v. Deming*, 7 Day, Conn. 387.

⁶⁸ Mitford, Eq. Pl. Jeremy, ed. 188; Story, Eq. Pl. § 569.

⁶⁹ Anon. 1 Vern. Ch. 117. See *Vermilyea v. The Fulton Bank*, 1 Paige, Ch. N. Y. 37.

⁷⁰ *Wych v. Meal*, 3 P. Will. Ch. 310; *Gibbons v. Waterloo Bridge Co.*, 5 Price, Exch. 491.

⁷¹ *Bennet v. Vade*, 2 Atk. Ch. 324; *Fenwick v. Reed*, 1 Mer. Ch. 11.

⁷² Mitford, Eq. Pl. Jeremy, ed. 189; 2 Daniell, Chanc. Pract. 61, 62.

filed by a mortgagor against a mortgagee to redeem, sought a discovery whether the mortgagee was a trustee, a demurrer to the discovery was allowed; because, as there was no trust declared upon the mortgage, it was not material to the relief prayed whether there was any trust reposed in the defendant or not.⁷³

4255. Sometimes the situation of a defendant may render it improper for a court of equity to compel a discovery, either because the discovery may subject the defendant to pains and penalties, or to some forfeiture, or something in the nature of a forfeiture. This subject has already been sufficiently considered.⁷⁴

A bill of discovery may be resisted by demurrer, when it seeks the discovery of a fact from one whose knowledge of that fact, as it appears on the face of the bill, was derived from confidence reposed in him as counsel, attorney, solicitor, or arbitrator.⁷⁵

4256. A demurrer will lie to a bill of discovery when the defendant has an equal equity with the plaintiff, and is therefore entitled to be protected from a discovery which will endanger, disturb, or destroy his present rights. If the matter appear clearly on the face of the bill, a demurrer will hold, although the defendant is not clothed with a perfect legal title, for the court will not compel a discovery by which the defendant may hazard his title;⁷⁶ as, for example, where one man becomes a purchaser for a valuable consideration without notice of the plaintiff's claim.

4257. In the preceding sections our attention has been confined to the consideration of demurrers to original bills, first, those which pray for relief, and, secondly, those which do not, or bills of discovery. As every other bill is a consequence of an original bill, it will readily be perceived that many causes of demurrer which will apply to an original bill will also apply to every other kind; but still the peculiar form and object of each kind afford distinct causes of demurrer to each.⁷⁷

4258. A bill of revivor, or a bill in the nature of a bill of revivor, must show a right in the plaintiff to revive the suit; if it does not show a sufficient ground for reviving the suit, or any part of it, either by or against the person by or against whom it is brought, the defendant may demur, and thus show cause against the revival. The demurrer to such a bill may be upon three distinct grounds, for want of privity, for want of sufficient interest in the party, or for some imperfection in the frame of the bill.⁷⁸

4259. A bill of revivor is brought when the original bill has abated by the death of one of the parties, and his interest becomes vested in his representatives. The interest in the personalty vests by death in the executor or administrator, and in the realty in the heir. In these cases the privity is cast on them by the law. The bill of revivor must therefore show the title by which the plaintiff claims; when an executor or administrator brings the bill, he shows a sufficient title and privity by showing his appointment as such. But should an administrator de bonis non, by a pure bill of revivor, attempt to revive a decree obtained by a former administrator, a demurrer would lie, because there is no privity between an administrator de bonis non and the former administrator who obtained the decree; the administrator de bonis non holds purely as the representative of the intestate, and paramount to the former administrator.⁷⁹

⁷³ *Harvey v. Morris*, Cas. temp. Finch, 214; Mitford, Eq. Pl. Jeremy, ed. 192; 2 Daniell, Chanc. Pract. 55.

⁷⁴ Before, 4240.

⁷⁵ Mitford, Eq. Pl. Jeremy, ed. 288; Story, Eq. Pl. § 599; 2 Daniell, Chanc. Pract. 56, 57.

⁷⁶ Mitford, Eq. Pl. Jeremy, ed. 199, 274, 288; 2 Daniell, Chanc. Pract. 55; Story, Eq. Pl. § 603.

⁷⁷ Mitford, Eq. Pl. Jeremy, ed. 201.

⁷⁸ Cooper, Eq. Pl. 210.

⁷⁹ Cooper, Eq. Pl. 210.

There are cases where the privity is acquired by act of the parties ; as, where a transfer or conveyance of a man's right is made to another, and then the assignor dies ; in such case the bill of revivor will not lie by such person ; the proper remedy is by a bill in the nature of a bill of revivor.

In both these cases, if the appropriate bill is not brought by the parties seeking to revive, a demurrer will lie.⁸⁰

4260. A bill of revivor will not lie unless the plaintiff has some interest in the revival, and when he has no such interest, the defendant may demur. Where the defendant has no other interest in the prosecution of the suit than to dissolve an injunction and proceed at law, a bill of revivor cannot be sustained by him, and a demurrer to such a bill has been held good.⁸¹ A demurrer will also hold to a bill of revivor brought singly for costs, when they have not been taxed before the abatement happened ; but if the costs were then taxed, a bill of revivor may be maintained.⁸²

4261. If the bill of revivor is imperfect in its frame, the defendant may demur, as where there is a want of proper parties ; as, if there is a suit by tenants in common, and one of them dies, the representatives of the deceased tenant in common cannot exhibit a bill of revivor without making the surviving tenant in common a party to the bill of revivor, either as a co-plaintiff or a defendant.⁸³

A demurrer will also be supported when it appears on the face of the bill that material facts are not stated ; as, where a person seeking to revive as administrator does not state that he has taken out letters of administration, for then he shows no title to revive ; or when the plaintiff, a widow, suing as executrix of her husband, did not charge that she had proved her husband's will.⁸⁴

4262. A *demurrer to a supplemental bill*, or to a bill in the nature of a supplemental bill, may be filed whenever it appears upon the face of the bill that the plaintiff had no right to that species of bill, either from want of title or from mistake in pleading.⁸⁵

As it is a general rule that the court will not permit a supplemental bill to be filed but upon new matter, because the same end can generally be answered by amendment of the original bill, if a supplemental bill is brought upon matter arising before the filing of the original bill, when the suit is in that stage of the proceedings in which an amendment will be allowed, the defendant may demur.⁸⁶

If a bill is brought as a supplemental bill upon matters arising subsequent to the time of filing the original bill against a person who claims no interest arising out of the matters in litigation by the former bill, the defendant to the bill thus brought as a supplemental bill may also demur, especially if the bill prays that he may answer the matters charged in the former bill. These, however, are grounds of demurrer arising rather from the plaintiff's having mistaken his remedy than from his being without one.⁸⁷

4263. As *bills of revivor and supplement* are liable to the same objections as may be made to the two species of bills of which they partake, it will be un-

⁸⁰ Story, Eq. Pl. § 618.

⁸¹ Horwood v. Schmedes, 12 Ves. Ch. 311 ; Cooper, Eq. Pl. 212.

⁸² Mitford, Eq. Pl. Jeremy, ed. 202.

⁸³ Fellowes v. Williamson, 11 Ves. Ch. 306, 313.

⁸⁴ Humphreys v. Ingledon, 1 P. Will. Ch. 753 ; 1 Dick. Ch. 38.

⁸⁵ Cooper, Eq. Pl. 212.

⁸⁶ Baldwin v. Macknown, 3 Atk. Ch. 817.

⁸⁷ Mitford, Eq. Pl. Jeremy, ed. 202, 203 ; Osborne v. Baker, 2 Madd. Ch. 387 ; Baldwin v. Mackown, 3 Atk. Ch. 817 ; Stafford v. Howlett, 1 Paige, Ch. N. Y. 200.

necessary here to repeat the grounds of demurrer which may be made to these bills.⁸⁸

4264. A *cross bill* having nothing in its nature different from an original bill with respect to which demurrers in general have been considered, except that it is occasioned by a former bill, there seems to be no cause of demurrer to such bill which will not equally hold to an original bill. As a cross bill is generally considered as a defence, it is not necessary that it should show that the plaintiff has an equity, because, being drawn into court by the plaintiff in the original bill, the party may avail himself of the assistance of the court without being put to show a ground of equity to support its jurisdiction.⁸⁹

When a bill purporting to be a cross bill brings before the court other distinct matters and rights than those contained in the original bill, it is no longer to be deemed a cross bill, but an original suit, and subject to all the rules of an original bill.⁹⁰

A cross bill, filed by special direction of the court for the purpose of obtaining its decree touching some matter not in issue by a former bill, or not in issue between the proper parties, is not liable to demurrer.⁹¹

4265. The constant defence to a *bill of review* for error apparent upon the decree has been said to be by plea of the decree and demurrer against opening the enrollment. There seems, however, no necessity for pleading the decree, if fairly stated in the bill.⁹²

The bill of review for errors apparent upon the face of the record must be brought within the time prescribed for the bringing of writs of error, for it is governed by analogy to the statute of limitations of writs of error at law. In the computation the time is to be counted not from the enrollment of the decree, but from the time of pronouncing it. When this fact appears upon the record, the defendant may demur.⁹³

Bills in the nature of bills of review do not appear subject to any particular cause of demurrer, unless the decree sought to be reversed does not affect the interest of the person filing the bill.⁹⁴

4266. If upon the face of a *bill to carry a decree into execution* the plaintiff appears to have no right to the benefit of the decree, the defendant may demur.⁹⁵ When a decree is erroneous it will not be enforced by the court as a matter of course, particularly if the enforcement of it would be prejudicial to the rights and interests of third persons who ought to have been made parties, but who were not, to the original decree. It is a rule that when a party comes into equity to have the benefit of a former decree, he is bound to show that

⁸⁸ Mitford, Eq. Pl. Jeremy, ed. 206; Cooper, Eq. Pl. 214; Story, Eq. Pl. § 627.

⁸⁹ Doble v. Potman, Hardr. 160; Mitford, Eq. Pl. Jeremy, ed. 203.

⁹⁰ Story, Eq. Pl. § 631. See Galalian v. Erwin, Hopk. Ch. N. Y. 49, 59; 8 Cow. N. Y. 561.

⁹¹ Mitford, Eq. Pl. Jeremy, ed. 203.

⁹² Mitford, Eq. Pl. Jeremy, ed. 203. See Webb v. Pell, 3 Paige, Ch. N. Y. 368.

⁹³ Mitford, Eq. Pl. Jeremy, ed. 204. Mr. Cooper, Eq. Pl. 216, says such objection must be taken by plea, and not by demurrer. Upon this, Judge Story, Eq. Pl. § 635, very justly observes: "It has been said that this objection must be taken by plea to the bill of review, even if it is apparent on the face of the bill that it is brought after the prescribed period; for that, otherwise, the plaintiff would not be enabled to avail himself of the exceptions provided by the statute for cases of disability, such as infancy, coverture, or the like. But there is great reason to doubt the propriety of this doctrine; and the more reasonable doctrine is that a demurrer will lie in such a case; and if such exception exists, it is the duty of the plaintiff to set it forth in his bill of review, in order to repel the objection." See Mitford, Eq. Pl. Jeremy, ed. 205, note (b).

⁹⁴ Mitford, Eq. Pl. Jeremy, ed. 205.

⁹⁵ Mitford, Eq. Pl. Jeremy, ed. 206.

upon its face it was a right decree, for when it is palpably erroneous, it ought not to be carried into execution.⁹⁶

4267. *Demurrers to bills to suspend the operation of a decree* are of very rare occurrence, because the bills themselves are seldom brought. Cases of this kind depend so much upon circumstances of a very peculiar nature that it is impossible to lay down any rules as to demurrers to them.

4268. If a *bill* is filed to *set aside a decree for fraud*, and the circumstances stated in the bill do not amount to a fraud, or if it is alleged that the decree was obtained without making parties to the suit those whose rights are affected by it, and is therefore fraudulent, but it appears on the face of the bill that sufficient parties were before the court to bind all other persons interested, as, a first tenant in tail, or the like, the defendant may demur.⁹⁷

4269. A demurrer in its *form* must express the several causes on which it is founded, and when it does not go to the whole bill it must clearly express the particular parts of the bill to which it applies. When the demurrer is general to the whole bill, and there is any part, either as to the relief or the discovery, to which the defendant ought to put in an answer, it will be generally considered that the demurrer being entire must be overruled; for, as a general rule, a demurrer bad in part is void in toto;⁹⁸ but there are instances of allowing a demurrer in part, and a defendant may put in separate demurrers to separate and distinct parts of a bill, for separate and distinct causes. Because, frequently, the same ground of demurrer will not apply to different parts of a bill, though the whole may be liable to demurrer; and in this case one demurrer may be overruled upon argument and another allowed.⁹⁹

The demurrer must be to facts appearing upon the face of the record, and not upon facts *dehors* the record; these latter must be taken advantage of by plea.¹⁰⁰ Care must be taken not to make the demurrer in its form what is technically called a speaking demurrer, that is, a demurrer which contains an argument in the body of it; as, for instance, when a demurrer says, "in or about the year 1770, which is upward of twenty years before the bill filed."¹⁰¹

4270. When the plaintiff conceives that there is not sufficient cause apparent on the bill to support a demurrer put in to it, or that the demurrer is too extensive, or otherwise improper, he may take the judgment of the court upon it; and if he conceives that by amending his bill he can remove the ground of demurrer, he may do so before the demurrer is argued, on payment of costs, which vary according to the state of proceedings. But after a demurrer to the whole of a bill has been argued and allowed, the bill is out of court, and, therefore, cannot be regularly amended. To avoid this consequence, sometimes, instead of deciding upon the demurrer, the court has given the plaintiff liberty to amend his bill, by paying the costs incurred by the defendant; and this has been frequently done in the case of a demurrer for want of parties.¹⁰² When a

⁹⁶ *Attorney General v. Day*, 1 Ves. Ch. 218; *Mitford, Eq. Pl. Jeremy*, ed. 96; *Story, Eq. Pl.* § 641.

⁹⁷ *Cooper, Eq. Pl.* 217.

⁹⁸ *Verplanck v. Caines*, 1 Johns. Ch. N. Y. 57; *Sikes v. Truitt*, 4 Jones, Eq. No. C. 361; *Fay v. Jones*, 1 Head, Tenn. 442; *Atwill v. Ferrett*, 2 Blatchf. C. C. 39; *Conant v. Warren*, 6 Gray, Mass. 562; *Foster v. Watson*, 16 B. Monr. Ky. 377; but see *Pope v. Stansbury*, 2 Bibb, Ky. 484.

⁹⁹ *Anon. Mosel*, Ch. 301; *Anon.* 9 Ves. Ch. 221; *Little v. Archer*, 1 Hog. Rolls, Ir. 55; *Pope v. Stansbury*, 2 Bibb, Ky. 484; *Mitford, Eq. Pl. Jeremy*, ed. 214, 215.

¹⁰⁰ *Dike v. Greene*, 4 R. I. 285; *Southern L. Ins. Co. v. Lanier*, 5 Fla. 110.

¹⁰¹ *Edsell v. Buchanan*, 2 Ves. Ch. 83; 4 Brown, Ch. 254; 2 Ves. Ch. 245; *Cawthorn v. Charlie*, 3 Sim. & S. Ch. 129; *Davis v. Williams*, 1 Sim. Ch. 8; *Brooks v. Gibbons*, 4 Paige, Ch. N. Y. 374.

¹⁰² See *Mayor of London v. Levy*, 8 Ves. Ch. 378; *Edwards v. Edwards*, 6 Madd. Ch. 255.

demurrer leaves any part of the bill untouched, the whole may be amended, notwithstanding the allowance of the demurrer; for, in that case, the suit continues in court, the want of which circumstance seems to be the reason of a contrary practice where the demurrer to the whole of a bill has been allowed.¹⁰³

4271. If, on argument, the demurrer should be overruled, because the facts do not sufficiently appear on the face of the bill, the defence may be made by plea, stating the facts necessary to bring the case truly before the court. After a demurrer has been overruled a second demurrer will not be allowed, for, in effect, that would be to rehear the case on the first demurrer, as, on an argument of a demurrer, any cause of demurrer, though not shown in that filed, may be alleged at the bar, and if good will support the demurrer.¹⁰⁴

4272. A demurrer is composed of five parts, which will be here briefly considered.

The *title* of the demurrer, which is usually in this form: "The demurrer of A B, (or A B and C D,) to the bill of complaint of E F." If it be accompanied by a plea or by an answer, the form is then changed to correspond; as, "the demurrer and plea," or "the demurrer and answer." When it is to an amended bill, it need not be expressed in the title to be a demurrer to the original and amended bill; a demurrer to the amended bill is sufficient.¹⁰⁵

Although a demurrer confesses the matter of fact stated in the bill to be true, it is still preceded by a general *protestation* against the truth of the matters contained in it, a practice observed probably to avoid conclusion in another suit, or in the suit in which it is put in, should the demurrer be overruled.¹⁰⁶

The *statement* of the cause of demurrer must be clear and explicit; it may be general or special. Demurrers are general when no particular cause is assigned, except the usual formulary that there is no equity in the bill; this will be sufficient when the bill is defective in substance, though in such cases special causes are usually stated.¹⁰⁷ Demurrers are special when the particular defects of the bill, or the objections to it, are pointed out. This is indispensable when the objection is to the defect of the bill in point of form.¹⁰⁸

As to its extent, the demurrer may be to the whole or to a part only of the bill, and the defendant may assign as many causes of demurrer as he pleases. If one of the causes of demurrer assigned be sufficient, the demurrer will be allowed.¹⁰⁹ Even at the hearing of the demurrer, the defendant may orally assign another cause of demurrer, different from or in addition to those assigned upon the record, which, when valid, will support the demurrer, although the causes of demurrer stated in the demurrer itself are held to be invalid. This oral statement of a cause of demurrer at the bar is technically called a demurrer *ore tenus*. This kind of demurrer will never be allowed unless there is a demurrer on record; for if there is only a plea, and that is disallowed, a demurrer *ore tenus* will also be disallowed.¹¹⁰ Whenever such a demurrer is permitted, it must be for some cause which covers the whole extent of the demurrer;

¹⁰³ Mitford, Eq. Pl. Jeremy, ed. 215, 216.

¹⁰⁴ See, as to demurrers *ore tenus*, Pyle v. Price, 6 Ves. Ch. 779, Ves. Ch. 408; Dummer v. Chippenham, 14 Ves. Ch. 245; Attorney General v. Moses, 2 Madd. Ch. 294; Attorney General v. Brown, 1 Swanst. Ch. 288, and note (a); Mitford, Eq. Pl. Jeremy, ed. 217; Cartwright v. Green, 8 Ves. Ch. 405; Story, Eq. Pl. § 464.

¹⁰⁵ Smith v. Bryon, 3 Madd. Ch. 428.

¹⁰⁶ Mitford, Eq. Pl. Jeremy, ed. 212.

¹⁰⁷ For a form of a general demurrer, see Barton, Suit in Eq. 107.

¹⁰⁸ For a form, see Barton, Suit in Eq. 107; 2 Harrison, Chanc. Pract. Newland, ed. 607; Van Heythusen, Eq. Draftsm. 419.

¹⁰⁹ Harrison v. Hogg, 2 Ves. Ch. 323; Jones v. Frost, 3 Madd. Ch. 1; Jac. Ch. 466.

¹¹⁰ 2 Daniell, Chanc. Pract. 73, 74; Cooper, Eq. Pl. 112; Durdant v. Redman, 1 Vern. Ch. 78, and note by Raithby.

and it has been held that the right to put in such demurrer *ore tenus* applies only to those cases where the demurrer is to the whole bill, and not to cases where it is to part only, notwithstanding it is co-extensive with the demurrer to that part.¹¹¹

Having assigned the cause or causes of demurrer, the demurrer then proceeds to demand judgment of the court, whether the defendant ought to be compelled to put in any further or other answer to the bill, or to such parts thereof as is specified as being the subject of the demurrer, and concludes with a prayer that the defendant may be dismissed with his reasonable costs in that behalf sustained.

As the demurrer does not assert any fact, it is not necessary that it should be put in on oath, but, to prevent the abuse of putting in frivolous demurrers, it is required that the demurrer should be signed by counsel.

4273. As a demurrer relies merely upon matter apparent on the face of the bill, so much of the bill as the demurrer extends to is taken for true; thus, if a demurrer is to the whole bill, the whole is taken for true; if it is to any particular discovery, the matter sought to be discovered, and to which the demurrer extends, is taken as stated in the bill; and if the defendant demurs to relief only, the whole case made by the bill to ground the relief prayed is considered as true.¹¹²

¹¹¹ *Shepherd v. Lloyd*, 2 Younge & J. Exch. 490; 2 Daniell, Chanc. Pract. 73; *Story*, Eq. Pl. § 464.

¹¹² *Richards v. Richards*, 9 Gray, Mass. 313; *Tuolumne Water Co. v. Chapman*, 8 Cal. 392; *Commercial Bank v. Buckner*, 20 How. 108; *Paterson R. R. Co. v. Jersey City*, 1 Stockt. Ch. N. J. 434; *Redmond v. Dickerson*, 1 Stockt. Ch. N. J. 507; *Maddox v. White*, 4 Md. 72.

CHAPTER XII.

PLEAS IN EQUITY.

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 - 4330. Pleas of matter of record.
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 4353. Pleas to supplemental bills.
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4274. The subject matter of this chapter is naturally considered under four branches, and these branches will be considered successively and in the following order: first, the general nature of pleas; second, the particular requisites of pleas; third, pleas to original bills; fourth, pleas to bills not original.

4275. When the objection to a bill is apparent upon its face, the proper mode of defence is to demur to it; and this may be either from matter contained in it, or from the defects of its frame, or because the case made out by it is not sufficient in law. But when the objection is not so apparent, but is dehors the bill, the only way to take advantage of it is by plea or answer. A plea is defined to be a special answer showing or relying upon one or more things why the cause should be either dismissed, delayed, or barred.¹ It differs from an answer in the common form in this, that it demands judgment of the court in the first instance, whether the matter urged by it did not debar the plaintiff from his title to that answer which the bill required.²

4276. A plea bears a resemblance to an exception in the civil law; the exception has been thus called as being a species of exclusion, or a bar opposed to the demand which is made against the exceptor, so as to destroy the intention of the plaintiff and to avoid the condemnation. *Exceptio dicta est quasi quædam exclusio, quæ inter opponi actioni cujusque rei solet ad excludendum id quod in intentionem condemnationemve deductum est.*³

4277. The defence proper for a plea is such as reduces the cause, or some part of it, to a single point, and thereby creates a bar to the suit, or to the part to which it applies. It has been observed that the end of the plea is to save to the parties the expense of an examination of witnesses at large, and that therefore it is not every good defence in equity that is good as a plea; for when a defence consists of a variety of circumstances, there is no use of a plea, as the examination must still be large; and the effect of allowing a plea would be that the court would give judgment on the circumstances of the case before they were made out by proof.⁴

The plea must reduce the case or some part of it to a single point. For this reason a plea ought not to contain more defences than one, and a double plea is considered informal, multifarious, and therefore improper; but a variety of

¹ Mitford, Eq. Pl. Jeremy, ed. 219; Lubé, Pl. 238; Cooper, Eq. Pl. 219; Wyatt, Pr. Reg. 324; Story, Eq. Pl. § 649; Carroll v. Waring, 3 Gill & J. Md. 91; Beames, Pl. in Eq. 1; Fremont v. Merced Mining Co., 1 McAll. C. C. 267; Southern L. Ins. Co. v. Larrier, 5 Fla. 110.

² Roche v. Morgell, 2 Schoales & L. Ch. Ir. 721.

³ Dig. 44, 1, 2.

⁴ Mitford, Eq. Pl. Jeremy, ed. 219.

facts may be pleaded in one plea when they are all conducive to a single point.⁵

Pleas in their nature are considered as pure pleas, and pleas not pure or anomalous.

4278. *Pure pleas* are those which rely wholly on some matters dehors the bill; as, for example, pleas of a release or of a settled account. A pure plea in bar, if not in every instance, yet generally, admits all the facts of the bill,⁶ interposing, however, new matter, which, if true, destroys the effect of all the facts stated in the bill.

4279. *Pleas not pure*, or anomalous pleas, are so called in contradistinction to pure pleas; they are sometimes also denominated negative pleas. They consist mainly of denials of the substantial matters set forth in the bill. For example, should a bill admit a release to have been made by the plaintiff or an account to have been settled, and aver that either was procured by fraud, the defendant may plead the release or account settled in bar, negating in his plea the averment of fraud, and supporting the plea by an answer denying all the facts and circumstances charged as matters of fraud in the bill.⁷

4280. *The chief requisites of a pure plea* in equity are that it consist of new matter, that it be single, that it be material, that it be direct and positive, that it aver a complete equitable defence to the case made by the bill, and that it follow the bill.

4281. The first and most important requisite of a pure plea is, generally speaking, that it must bring new matter before the court. A plea in equity must state this new matter not found in the bill, as a special plea at law is required "always to advance some new fact not mentioned in the declaration." Relying upon the new matter it contains as a defence, which displaces the equity of the bill, generally speaking a plea does not deny that equity. In other words, a plea is intended to prevent further proceeding at large by resting on some point founded on matter stated in the plea; and as it rests on that point merely, it admits, for the purposes of the plea, the truth of the facts contained in the bill, so far as they are not controverted by the matter contained in the plea.⁸

A mere denial of facts, although very proper for an answer, is insufficient for a plea; and, therefore, a plea in bar to a bill in equity, merely denying part of the facts stated in the bill, is insufficient.⁹

4282. In general, a plea in bar ought not to contain more defences than one; it must reduce the cause to a single point, constituting a ground why the suit should be dismissed, delayed, or barred.¹⁰ For it has been properly observed that if two matters of defence could be offered by way of plea, any number of defences might be tendered in the same way, which would be productive of all the delay, expense, and inconvenience which pleas in equity are expressly intended to prevent.¹¹ A plea of, first, an accord and compromise of a disputed

⁵ See *Whitebread v. Brockhurst*, 1 Brown, Ch. 404, 415, note by Belt; 2 Ves. & B. Ch. Ir. 154; *London v. Liverpool*, 3 Anstr. Exch. 738. See, as to duplicity in pleading in equity, Story, Eq. Pl. §§ 653 to 657; Cooper, Eq. Pl. 224; Beames, Pl. in Eq. 10.

⁶ A plea of purchase for a valuable consideration, without notice, is, perhaps, to some extent, an exception to the rule.

⁷ Story, Eq. Pl. § 651; Beames, Pl. in Eq. 2-7; *Bayley v. Adams*, 6 Ves. Ch. 594.

⁸ Mitford, Eq. Pl. Jeremy, ed. 14; *Billing v. Flight*, 1 Madd. Ch. 230; *Cozine v. Graham*, 2 Paige, Ch. N. Y. 177; 2 Daniell, Chanc. Pract. 98, 109.

⁹ *Milligan v. Milledge*, 3 Cranch, 220.

¹⁰ *Goodrich v. Pendleton*, 3 Johns. Ch. N. Y. 384; *Chapman v. Turner*, 1 Atk. Ch. 54; *Moreton v. Harrison*, 1 Bland, Ch. Md. 496; *Rhode Island v. Massachusetts*, 14 Pet. 211; *Driver v. Driver*, 6 Ind. 286.

¹¹ Mitford, Eq. Pl. Jeremy, ed. 296, 297.

right, and, secondly, prescription or an unmolested possession from the time of the agreement, is multifarious.¹²

Whether it be in the affirmative or negative, in order to be good a plea must be either an allegation or a denial of some leading fact, or of matters which, taken collectively, make out some general fact, which is a complete defence. But although a defence offered by way of plea should consist of a variety of circumstances, yet if they all tend to a single point, the plea may be good.¹³

The objection is still stronger where two facts are pleaded which are inconsistent with each other.¹⁴

4283. Not only must the plea reduce the cause to a single point on which the plaintiff may take issue, but it must be such an issue as is material to delay, dismiss, or bar the bill; and the issue as to the truth of the plea is to be referred to the state of the facts at the time the plea is filed.¹⁵ If the point tendered by the plea is not material, it cannot in equity, any more than at law, constitute an issue.¹⁶

4284. Every plea in equity should be direct and positive, and not by way of argument, inference, and conclusion, which have a tendency to create unnecessary prolixity and expense. Upon this ground, where there was a charge of constructive notice in a bill, and the defendant in his plea averred that there was not any notice, either constructive or actual, the plea was held bad, because the defendant should have denied the facts charged in the bill from which the constructive notice was deducible.¹⁷

But though, in general, a plea must be positive and direct, yet sometimes a defendant is allowed to aver according to the best of his knowledge and belief; as, that an account is just and true; and in all cases of negative averments, and of averment of facts not within the defendant's immediate knowledge, he can scarcely ever make a positive assertion.¹⁸ Unless, however, the averment is positive, the matter in issue appears to be not the fact itself, but the defendant's belief of it; and the conscience of the defendant is saved by the nature of the oath administered, which is, that so much of the plea as relates to his own acts is true, and that so much as relates to the acts of others he believes to be true.¹⁹

4285. A plea must distinctly aver all the facts necessary to render a plea a complete and equitable defence to the case made by the bill, so far as the plea extends, so that, if he chooses, the plaintiff may take issue upon it. Averments are likewise necessary to exclude intendments, which would otherwise be made against the pleader; and the averments must be sufficient to support the plea.²⁰ This rule is, in its principles, analogous to that prevailing at law, when, as every man is supposed to make the best of his own case, a defendant's plea, when it can be taken into two intents, shall always be construed most strongly against himself: *ambiguitas placitum interpretari debet contra proferentem.*²¹

¹² Rhode Island v. Massachusetts, 14 Pet. 211; see Taylor v. Luther, 2 Sumn. C. C. 230; Didier v. Davison, 10 Paige, Ch. N. Y. 515.

¹³ Mitford, Eq. Pl. Jeremy, ed. 296; Cooper, Eq. Pl. 225; Bogardus v. Trinity Church, 4 Paige, Ch. N. Y. 178.

¹⁴ Cooper, Eq. Pl. 224.

¹⁵ Cook v. Mancius, 4 Johns. Ch. N. Y. 166.

¹⁶ Coke, Litt. 126, a; Morrison v. Turner, 18 Ves. Ch. 175.

¹⁷ Beames, Pl. in Eq. 22.

¹⁸ See Kirkman v. Andrews, 4 Beav. Rolls, 554; Small v. Attwood, 1 Younge & C. Exch. 39.

¹⁹ Mitford, Eq. Pl. Jeremy, ed. 297; Hancock v. Carleton, 6 Gray, Mass. 39; Andrews v. Huckabee, 30 Ala. N. S. 143; Mad. Road Co. v. Wat. Road Co., 5 Wisc. 173.

²⁰ Mitford, Eq. Pl. Jeremy, ed. 298.

²¹ Coke, Litt. 303, b; Beames, Pl. in Eq. 27, 28.

4286. A plea in bar must follow the bill and not evade it; it may be to the whole bill or to a part only. When it is to the whole bill, but it does not extend to, or as it is technically expressed, cover the whole, the plea is bad. When the plea does not go to the whole bill, it must express to what part of the bill the defendant pleads; and, therefore, a general plea to such parts of the bill as are not answered by the defendant is too general, and will be overruled. For the same reason, if parts of the bill to which the plea extends are not clearly and precisely expressed, the plea will be bad; as, if the plea is general, with the exception of matters after mentioned, and it is accompanied by an answer. The court cannot, in this case, judge what the plea covers without looking into the answer, and determining whether it is sufficient or not, before the validity of the plea can be considered.²²

4287. *Pleas not pure*, or anomalous pleas, are so designated because they differ from pure pleas in this, that whereas, pure pleas rely for a defence upon matters altogether dehors the bill, pleas not pure, on the contrary, rest altogether upon matters stated in the record, and upon denials and negations of matters of fact contained in it, which denials and negations, if true, constitute a sufficient defence against further proceedings in the suit, either peremptorily or at least in its present form.²³

In the consideration of this kind of pleas let us inquire into the allegations which the plea must contain or omit; and, secondly, when an answer is required to accompany the plea, and what such answer should contain.

4288. When a bill admits a good bar or defence to exist to the suit, as, where it admits that the plaintiff gave the defendant a release, and then states facts and circumstances in avoidance of such bar or defence, as, where it states that the release was obtained by fraud, the plea as well as the answer should negative those circumstances so set up in avoidance of the bar or defence.²⁴

4289. In general, an *answer* is not required to support a plea, unless fraud or notice, or some other equitable ground of avoiding the bar, is charged in the bill, for when there is no such charge, the plea alone will be sufficient.²⁵ Neither will an answer be required to support a plea when the defendant pleads that he will criminate himself, or expose himself to pains and penalties by the discovery called for.

There must be some specific facts charged in the bill, which are equitable circumstances in favor of the plaintiff's case against the matter pleaded, as fraud or notice of title, in order to require or even to justify an answer to accompany or support the plea.

4290. In those cases where it is necessary, an answer seems to be required in support of the plea on several grounds:

First, with a view to benefit the plaintiff, either in aid of proof or in order to give him an opportunity of obviating the bar to be set up, or, in other words, to enable him to except to the traverse of the facts charged in the bill. If these facts were merely denied by way of averment in the plea, as the plaintiff could not except to such averment, he would be precluded from objecting to the insufficiency of that denial, however general in its terms.

Secondly, with a view beneficial to the defendant, in order to give him an opportunity of excluding intendments, which might otherwise be made against him, because, upon argument of a plea, every fact stated in the

²² Mitford, Eq. Pl. Jeremy, ed. 294. See *Howe v. Duppa*, 1 Ves. & B. Ch. Ir. 514.

²³ Story, Eq. Pl. § 667.

²⁴ Story, Eq. Pl. 680; Mitford, Eq. Pl. 240, 241. See *Spivey v. Frazee*, 7 Ind. 661; *Cox v. Mayor*, 17 Ga. 249.

²⁵ Mitford, Eq. Pl. Jeremy, ed. 298, 299.

bill, and not denied by the answer in support of the plea, must be taken to be true.²⁶

Whenever an answer is required to accompany a plea, the plea should not cover the whole bill; it should cover so much only as does not relate to the discovery of the particular facts to which the plaintiff has a right to require an answer in support of the plea. If it covers such discovery, it will be bad, because the defendant is bound to make that discovery.²⁷

When an answer is necessary, it must be full and clear, or it will not support the plea. But the pleader must be careful not to extend the answer beyond the facts and circumstances which are necessary to be discovered in support of the plea, and are not covered by the plea; for if a plea is coupled with an answer to any part of the bill covered by the plea, and which by the plea the defendant consequently declines to answer, upon argument the plea will be overruled.²⁸

For the same reason a plea will be overruled when it is accompanied by an answer, and the facts charged in the bill are not such as require an answer to accompany the plea, for in such case an answer is impertinent and overrules the plea. An answer extending to any part of the bill covered by the plea is fatal to the plea on the argument.²⁹ The reason of this is that pleas are to be put in *ante litem contestatam*, because they are pleas only why the defendant should not answer; if, therefore, he does answer to any thing to which he may plead, he overrules his plea, for the plea is assigned as a reason why he should not answer; and if he does answer, he waives the objection, and of course his plea.

4291. Much of the matter relating to the form of the plea and answer to support it has been anticipated when considering the cases in which an answer is required to support a plea.

4292. The plea should not cover more ground than to introduce new facts which do not appear upon the face of the bill; but a plea, unlike a demurrer, which cannot be good in part and bad in part, may be pleaded to the whole or only to a part of it, and if it should cover too much, the court will allow it to stand for the part which it properly covers.³⁰

4293. When a plea is pleaded to one part of the bill and an answer is made to another, if one defence is made by the answer and another by the plea, the plea will be ordered to stand for an answer. And if a plea is bad in form only, but good in substance as to the whole or any part of the relief sought by the bill, it will be permitted to stand as a part of the defendant's answer, or the defendant may be permitted to insist upon the same matters in the answer.³¹

4294. In form,³² like a demurrer, the plea is always prefaced by a protestation against any confession or admission of the facts stated in the bill; but the

²⁶ Beames, Pl. in Eq. 34, 35; 2 Schoales & L. Ch. Ir. 727.

²⁷ Portarlington v. Solby, 6 Sim. Ch. 356.

²⁸ Mitford, Eq. Pl. Jeremy, ed. 299; Beames, Pl. in Eq. 36, 38; Bolton v. Gardner, 3 Paige, Ch. N. Y. 273; Ferguson v. O'Hara, 1 Pet. C. C. 493.

²⁹ Dobbyn v. Barker, 5 Brown, Parl. Cas. 573.

³⁰ Beames, Pl. in Eq. 44, 45; French v. Shotwell, 20 Johns. Ch. N. Y. 668, 5 Johns. Ch. N. Y. 555; Kirke v. White, 4 Wash. C. C. 595.

³¹ Souzer v. De Meyer, 2 Paige, Ch. N. Y. 574.

³² Lord Thurlow seems to have entertained the idea that the form of a plea and the substance of it were the same thing. 1 Ves. Ch. 388, and 3 Brown, Ch. 301. It is only necessary to say that the cases are very numerous in which they have been treated as essentially different, and the doctrine of amending pleas seems founded upon their difference; it being as true with respect to a plea in equity, as it is with regard to a plea at law, that there requires in every plea two things, the one, that it be sufficient in matter; the other, that it be deduced and expressed according to the terms of the law. Beames, Eq. Pl. 331.

only use of this seems to be to prevent any conclusion against the defendant in another suit, because for deciding the validity of the plea, so far as it is not contradicted, the bill is admitted to be true. Next follows the extent to which the plea goes; as, whether it is to the whole or a part of the bill, and when it is only to a part, then to what part it is intended to apply. The substance of the plea, or matter relied on, follows next; as, an objection to the jurisdiction of the court, to the person of the plaintiff or defendant, or in bar of the suit, together with the averments requisite to support it. The conclusion of the plea is a repetition that the matters so offered are relied upon, praying the judgment of the court whether the defendant ought to be compelled to make any further or other answer to the bill, or to the part of it to which the plea is offered.³³

An answer accompanying the plea and in support of it is prefaced with an averment that the defendant does not thereby waive his plea, but relies wholly upon it. And when the plea is not to the whole bill, but only to part, the answer begins with the same protestation against a waiver of the plea, and with a declaration that it is intended to be only in answer to the rest of the bill not covered by the plea.³⁴

4295. A plea is filed, like a demurrer, in the proper office. Pleas to the jurisdiction of the court or in disability of the person of the plaintiff, or pleas in bar of any matter of record or of matters recorded, or as of record in the court itself or of any other court, need not be under oath.³⁵ But pleas in bar, consisting of matters in pays, must be upon oath or affirmation of the defendant.³⁶

4296. If the plaintiff conceives a plea to be defective in point of form or substance, he may take the judgment of the court upon its sufficiency. The defendant, on his part, may take the same proceeding. Upon argument of a plea, it may either be allowed simply, or the benefit of it may be saved to the hearing, or it may be ordered to stand for an answer. In the first case the plea is determined to be a full bar to so much of the bill as it covers, if the matter pleaded, with the necessary averments to support it, be true. If, therefore, when a plea is allowed upon argument or without argument, the plaintiff thinks it not true in point of fact, though good in form and substance, he may take issue upon it and proceed to disprove the facts upon which it is endeavored to be supported. For when the plea is upon argument held to be good, or the plaintiff admits it to be so by replying to it, its truth is the only subject of question remaining so far as the plea extends, and nothing but the matters contained in it as to so much of the bill as the plea covers is in issue between the parties. If, therefore, issue is thus taken upon the plea, the defendant must prove the facts it suggests. If he fails in this proof, so that at the hearing of the cause the plea is held to be no bar, and the plea extends to discovery sought by the bill, the plaintiff is not to lose the benefit of that discovery, but the court will order the defendant to be examined on interrogatories to supply the defect. If, on the contrary, the defendant proves the truth of the matters pleaded, the suit is barred as far as the plea extends, even though the plea is not good in point of form or substance. Therefore, where a defendant pleaded a purchase for a valuable consideration, and omitted to deny notice of the plaintiff's title, and the plaintiff replied, it was determined that the plea, although irregular, had been admitted by the replication to be good; and that the fact of the notice not being

³³ Beames, Eq. Pl. 48, 49.

³⁴ Mitford, Eq. Pl. Jeremy, ed. 300, 301; Cooper, Eq. Pl. 234, Story, Eq. Pl. 695; Beames, Eq. Pl. 53.

³⁵ Mitford, Eq. Pl. Jeremy, ed. 301; Carroll v. Waring, 3 Gill & J. Md. 491.

³⁶ Pract. Reg. 325, Wy. ed.; Cooper, Eq. Pl. 21-231; Beames, Eq. Pl. 323; Bassett v. Salisbury Co., 43 N. H. 249.

in issue, the defendant, proving what he had pleaded, was entitled to have the bill dismissed.³⁷

4297. Upon argument, if the benefit of a plea is saved to the hearing, it is considered that so far as it appears to the court it may be a defence; but that there may be matter disclosed by the evidence which would avoid it, supposing the matter pleaded to be strictly true, and the court therefore will not preclude the question.³⁸

4298. Sometimes a plea is ordered to stand for an answer when it is bad in form only, but good in substance as to the whole or any part of the relief sought by the bill.³⁹ When a plea is so ordered to stand for an answer, it is merely determined that it contains matter which may be a defence, or part of a defence, but that it is not a full defence, or it has not been properly supported by the answer, so that the truth of it is doubtful. For if a plea requires an answer to support it, upon argument of the plea the answer may be read to counter-prove the plea; and if the defendant appears not to have sufficiently supported his plea by the answer, the plea must be overruled, or ordered to stand for an answer only.⁴⁰ A plea is usually ordered to stand for an answer when it states matter which may be a defence to the bill, though not perhaps proper for a plea, or when it is informally pleaded.⁴¹ When the plea states nothing which can be a defence, it is merely overruled.⁴² In such case the same may afterward be insisted on by way of answer;⁴³ this rule does not, however, extend to a plea of the statute of limitations.⁴⁴ If the plea is ordered to stand for an answer, it is allowed to be a sufficient answer to so much of the bill as it covers, unless, by the order, liberty is given to except. But that liberty, when given, may be qualified so as to protect the defendant from any particular discovery which he ought not to be compelled to make. When the plea is accompanied by an answer, and is ordered to stand for an answer, without liberty to except, the plaintiff may yet except to the answer, as insufficient to the parts of the bill not covered by the plea.⁴⁵

When defective, pleas in some cases may be amended, but before leave is allowed to make an amendment the defendant must show what the amendment is to be, and how the slip happened.⁴⁶

4299. *Pleas to original bills* are to those praying for relief and to those not praying for relief.

4300. In considering pleas of the first kind it will be proper to classify them into four kinds, namely: pleas to the jurisdiction; pleas to the person; pleas to the frame or form of the bill; and pleas in bar of the bill.

4301. *Pleas to the jurisdiction* will be considered in the same order which we observed in the preceding chapter in relation to demurrers to the jurisdiction.⁴⁷

³⁷ Mitford, Eq. Pl. Jeremy, ed. 301 to 303; Cooper, Eq. Pl. 232; Bogardus v. Trinity Church, 4 Paige, Ch. N. Y. 178; Harris v. Ingledew, 3 P. Will. Ch. 94; see Bassett v. Salisbury Co., 43 N. H. 209; Hancock v. Carleton, 6 Gray, Mass. 39; Beck v. Beck, 36 Miss. 72; Flagg v. Bonnel, 2 Stockt. Ch. N. J. 82.

³⁸ Mitford, Eq. Pl. Jeremy, ed. 303; Cooper, Eq. Pl. 233; Story, Eq. Pl. § 698. See Rowley v. Eccles, 1 Sim. & S. Ch. 511; Hancock v. Carleton, 6 Gray, Mass. 89.

³⁹ Souzer v. De Meyer, 2 Paige, Ch. N. Y. 274.

⁴⁰ See Hildyard v. Cressy, 3 Atk. Ch. 304, (1); Kirby v. Taylor, 6 Johns. Ch. N. Y. 242.

⁴¹ See Moore v. Hart, 1 Vern. Ch. 110; Orcutt v. Orms, 3 Paige, Ch. N. Y. 459; Wood v. Strickland, 2 Ves. & B. Ch. Ir. 150.

⁴² Orcutt v. Orms, 3 Paige, Ch. N. Y. 459.

⁴³ Goodrich v. Pendleton, 4 Johns. Ch. N. Y. 549.

⁴⁴ Carter v. Murray, 7 Johns. Ch. N. Y. 167.

⁴⁵ Mitford, Eq. Pl. Jeremy, ed. 303, 304.

⁴⁶ Cooper, Eq. Pl. 234; Merriwether v. Mellish, 13 Ves. Ch. 435; Newman v. Wallis, 2 Brown, Ch. 143, 147.

⁴⁷ Before, 4224.

Pleas to the jurisdiction in cases of original bills praying relief may be because the subject is not cognizable in any municipal court of justice; because it is not within the jurisdiction of a court of equity; because some other court possesses the jurisdiction.

4302. Much of the matter which otherwise might be properly arranged under the first head has already been examined in another place.⁴⁸ When it appears upon the face of the bill that the subject is not cognizable in any court of justice, the objection must be taken by demurrer. But if the bill should be so framed that the objection would not be apparent upon the face of it, the only way to take advantage of it is by a plea. As this plea would not point out some other court capable of exercising jurisdiction in the case, it would not be a plea in abatement, but a plea in bar.⁴⁹

4303. When the want of jurisdiction appears upon the face of the bill, the proper way to take advantage of it is by demurrer; but when it does not so appear, the objection must be made by plea.⁵⁰ Cases of this kind can seldom appear in practice.

4304. Courts of equity have no jurisdiction when the subject matter is exclusively to be tried and decided by other tribunals; they cannot, therefore, entertain a suit when a court of common law, or a court of admiralty, or any other court has the exclusive jurisdiction of the subject matter. When the objection appears upon the face of the bill, advantage must be taken of it by demurrer; but when it does not so appear, the proper mode of objection to it is by plea.

4305. The courts of the United States, it will be remembered, have no jurisdiction except in certain enumerated cases between citizens. They must reside in different states, and it must appear upon the face of the bill that such is the fact; for if it do not so appear, the defendant may demur or apply to the court to dismiss the bill upon motion. But should it be stated in the bill that the plaintiff is a resident citizen of one state and the defendant is a resident citizen of another state, so that upon the face of the bill the jurisdiction attaches, and the defendant means to contest the alleged citizenship, he must do it by plea to the jurisdiction, because he is not allowed to put the citizenship in issue by a general answer, for such an answer admits the jurisdiction of the court.⁵¹

4306. *Pleas to the person* are entered for the purpose of objecting to the ability of the plaintiff to sue or to the liability of the defendant to be sued. They are therefore of two kinds: pleas to the person of the plaintiff, and pleas to the person of the defendant.

4307. According to the English law, pleas of outlawry, of excommunication, of popish recusancy, and of attainder, are classed under this head; these pleas are not common in England, and generally unknown in the United States. The pleas to the person of the plaintiff may therefore be reduced to the following: pleas of infancy, of coverture, of idiocy and lunacy, of bankruptcy or insolvency, of alienage, of the want of the character in which the party sues.

4308. Whenever it appears upon the face of the bill that it has been brought by an infant, a feme covert, or a lunatic, so found by inquisition, the defendant must take advantage of the objection by demurrer; but whenever the plaintiff labors under either of such disabilities, and the fact does not appear upon the

⁴⁸ Before, **4225**.

⁴⁹ Cooper, Eq. Pl. 238.

⁵⁰ Mitford, Eq. Pl. Jeremy, ed. 222.

⁵¹ Livingston v. Story, 11 Pet. 351, 393; Dodge v. Perkins, 4 Mas. C. C. 435; see Sullivan v. Fulton Steamboat Company, 6 Wheat. 650; Capron v. Van Norden, 2 Cranch, 126; Binham v. Cabot, 3 Dall. 382.

face of the bill, the defendant must plead the fact as a disability in abatement of the suit.⁵²

4309. When the plaintiff is a bankrupt or insolvent, and he sues on a right which has passed to his assignees, if his want of title does not appear upon the face of his bill, the defendant may plead such a matter. This is sometimes classed among the pleas in abatement, but in effect it is a plea in bar so far as the plaintiff is concerned; with regard to others, it is not a bar, and it does not dispute the validity of the right vested in the assignees.⁵³

4310. Alienage may in some cases be pleaded in abatement. This is the case generally when the plaintiff is an alien enemy, whatever may be the subject matter of the suit, and whether he be an alien enemy or not when the suit concerns the recovery of land in those states where aliens are not allowed to hold land.

4311. When a plaintiff sues in a character which he assumes and to which he is not entitled, the defendant may plead in abatement, though this is only a negative plea; as, where a plaintiff falsely entitles himself as executor or administrator. Thus, if a plaintiff sues as administrator, the defendant may plead that he is not administrator, or that the supposed intestate is living.⁵⁴ Numerous other instances might be mentioned. If a woman were to sue for her dower as widow of Peter, the plea of *ne unques accouple* would be a good plea; so if a feme covert should sue alone, her coverture might be pleaded in abatement; or if a plaintiff was dead at the time of the commencement of the suit, this matter might be pleaded in abatement. The reason why these pleas are allowed is that the plaintiff has title to sue in the character he has assumed. But when the reason for the objection is apparent on the face of the bill, advantage may be taken of it by demurrer.

4312. A plea that the defendant is not the person he is alleged to be, or does not sustain the character he is alleged to bear, will be sustained; as, if a defendant is sued as a feme sole when she is under coverture, or as a feme covert when she is sole; when a person is sued as an heir, or executor, or administrator, or as a partner; when the defendant does not bear the character in which he is sued, he may plead the matter in abatement. But it seems to have been considered as more convenient for a defendant under these circumstances to put in an answer alleging the mistake in the bill, and praying the judgment of the court whether he should be compelled further to answer the bill; but this in fact amounts to a plea, though it may not bear that title, and a plea has been considered the proper defence.⁵⁵

4313. For the same reason, when the defendant has not that interest in the subject matter of a suit which can make him liable to the demand of the plaintiff, and the bill alleging that he has or claims an interest avoids a demurrer because upon the face of the bill it appears that he is liable, yet he may plead the matter necessary to show that he has no interest if the case is not such that by a general disclaimer he can satisfy the suit.⁵⁶ Thus, where a mere witness to a will was made a party to a bill brought by the heir at law to discover the circumstances attending the execution, Lord Hardwicke decided that he must make his objection by plea and not by demurrer.⁵⁷ When the fact that such

⁵² Mitford, Eq. Pl. Jeremy, ed. 229, 230; *Wartnaby v. Wartnaby*, 1 Jac. Ch. 377.

⁵³ Beames, Eq. Pl. 121, 122; Mitford, Eq. Pl. Jeremy, ed. 229; Cooper, Eq. Pl. 249; Story, Eq. Pl. § 726.

⁵⁴ Mitford, Eq. Pl. Jeremy, ed. 230; *Ord v. Huddleston*, 2 Dick. Ch. 510; S. C. cited in 1 Cox, Ch. 198.

⁵⁵ Mitford, Eq. Pl. Jeremy, ed. 234, 235; Story, Eq. Pl. § 733.

⁵⁶ See *Turner v. Robinson*, 1 Sim. & S. Ch. 3.

⁵⁷ Mitford, Eq. Pl. Jeremy, ed. 235; Beames, Eq. Pl. 131; *Plummer v. May*, 1 Ves. Ch. 426.

defendant is a mere witness appears on the face of the bill, the defendant may demur.⁵⁸

4314. *Pleas which apply to the relief sought by the original bill* differ from those to the jurisdiction, as they tacitly admit the power of the court to take cognizance of the subject matter of the suit; and they differ from pleas to the person because they admit the plaintiff's ability to sue, and the defendant's liability to be sued, though they object to the suit as framed, and contend that the right ought not to be canvassed on the existing record. They are unlike pleas in bar, because they do not deny the validity of the right which is made the subject of the suit. They seem to bear a strong resemblance to those pleas at law which are to the action of the writ, of which the following are instances: that there is another action pending for the same cause; that the action is prematurely brought; and that the action is misconceived.⁵⁹ These pleas may be classified as follows: plea that another suit is depending in another court of equity for the same matter, between the same parties; plea of want of proper parties; plea of multiplicity of suits; plea of multifariousness.

4315. When a suit seeks relief, the defendant may plead that there is another suit depending in this or another court of equity for the same matter, between the same parties, or those who represent them.⁶⁰ This plea bears a strong analogy to the *exceptio litis pendentis* of the civilians; ⁶¹ it is similar to the plea at common law, that there is another action depending, and it is governed by the same principles.⁶²

4316. A plea of this kind should state the several matters which are essential to its sufficiency, the principal of which are the following:

The plea should set forth with certainty the commencement of the former suit, its general nature, character, and objects, and the relief prayed.⁶³

It should aver truly that the second suit is for the same matter as the first.⁶⁴

It should also aver that there have been proceedings in the suit, such as an appearance, or at least process requiring an appearance.⁶⁵

It should aver that the former suit is still depending; for this seems an essential ingredient to the validity of the plea.⁶⁶

A plea of proceedings in another court must show not only that the subject matter is the same, and the issue is the same, but that the object is the same, and that the court is a court of competent jurisdiction, and that the proceedings therein would be conclusive, so as to bind every other court.⁶⁷

4317. But it is not necessary to the sufficiency of the plea that the former suit should be precisely between the same parties as the latter; for if a man institutes a suit, and afterward sells a part of the same property in question to another, who files an original bill touching the part so purchased by him, a plea of the former suit depending, touching the whole property, will hold.⁶⁸

4318. Nor can a plea of a former suit for the same matter still pending

⁵⁸ Beames, Eq. Pl. 134; *Cookson v. Ellison*, 2 Brown, Ch. 252, and Belt's note.

⁵⁹ Beames, Eq. Pl. 136.

⁶⁰ Ord. Ch. (Ed. Beam.) 26, 176, and notes.

⁶¹ Beames, Eq. Pl. 137; Voet, ad Pand. lib. 44, tit. 1, § 3.

⁶² Beames, Eq. Pl. 137-152; Bouvier, Law Dict. *Lis Pendens*; Mitford, Eq. Pl. Jeremy, ed. 46.

⁶³ *Foster v. Vassall*, 3 Atk. Ch. 589.

⁶⁴ *Devie v. Brownloe*, 2 Dick. Ch. 611; Mitford, Eq. Pl. Jeremy, ed. 246.

⁶⁵ This is analogous to the rule in the civil law, as to what constitutes the pendency of a suit. Voet, ad Pand. lib. 44, t. 1, § 3. In support of the text, see *Moor v. Welsh Copper Company*, 1 Eq. Cas. Abr. 39, p. 14; Cooper, Eq. Pl. 272.

⁶⁶ Mitford, Eq. Pl. Jeremy, ed. 247; Cooper, Eq. Pl. 272; Beames, Eq. Pl. 138.

⁶⁷ *Behrens v. Shiveking*, 1 Mylne & C. Ch. 602.

⁶⁸ *Moor v. Welsh Copper Company*, 1 Eq. Cas. Abr. 39; Mitford, Eq. Pl. Jeremy, ed. 248; Beames, Eq. Pl. 143.

always apply, for when the effect of a second suit cannot be had in the former, this plea will be ineffectual; nor when the second suit is brought by a different person, although for the same matter, as far as concerns the foundation of the demand, is for a different equity; nor where, though the second suit is brought for the same purpose, it is brought in a different right.⁶⁹

4319. Sometimes an action is brought at law and a suit in equity for the same matter, by the same person, against the same defendant, at the same time. In such a case, after answer put in, the defendant may, in general, apply to the court that the plaintiff make his election where he will proceed;⁷⁰ but he cannot plead the pendency of the suit at common law in bar of the suit in equity;⁷¹ and the reason of this is, that the remedy at law is not so extensive as that in equity. When the plaintiff elects to proceed in equity, then he will be enjoined from proceeding at law, and when he elects to proceed at law, then the bill will be dismissed.⁷²

4320. We have seen who are to be made parties to a suit in equity; when it does not appear upon the face of the bill that there is a defect in this respect, the defendant may show it by his plea. A plea of the want of parties goes both to the discovery and relief, where relief is prayed, though the want of parties is no objection to a bill for a discovery merely.⁷³

4321. A court of equity will not allow of a multiplicity of suits; the defendant, therefore, may plead that the plaintiff has split up his cause of action. This is not a plea in bar, because it does not deny the existence of the right made the subject of the suit, but tacitly admits that right; nor is it a plea to the jurisdiction of the court or to the person. It is simply a plea in abatement of the bill as framed.⁷⁴

4322. When there is a joining and confounding distinct matters in one bill, which creates the fault of multifariousness, if the defect is apparent on the face of the bill, it should be taken advantage of by demurrer.⁷⁵ But if the defect do not appear upon the face of the bill, the defendant may take advantage of it by setting it out by a special plea.⁷⁶

And the court may *sud sponte* take notice of such an objection when, in consequence of its existence, it is impossible to do justice between all the parties to the suit.⁷⁷

4323. Having examined the pleas dilatory and declinatory, our attention will next be called to the consideration of *pleas in bar to the relief sought* by an original bill. A plea in bar to relief is commonly described as an allegation of foreign matter, whereby, supposing the bill so far as it is not contradicted by the plea to be true, yet the suit, or the part of it to which the plea extends, is barred,⁷⁸ or it is the statement of some matter by the defendant which shows that the plaintiff is not entitled to the relief he claims. The term bar is a metaphorical expression to designate that an obstacle is interposed to the recovery of the plaintiff. Pleas in bar are in the nature of special pleas in bar at law,

⁶⁹ Beames, Eq. Pl. 144; Mitford, Eq. Pl. Jeremy, ed. 248, 249.

⁷⁰ In some cases, however, he may proceed simultaneously both at law and in equity; as, when the creditor has a bond and mortgage, he may sue at law on a bond, and on the mortgage in equity. *Schoole v. Sall*, 1 Schoales & L. Ch. Ir. 176.

⁷¹ 3 P. Will. Ch. 90.

⁷² Mitford, Eq. Pl. Jeremy, ed. 249, 250; Beames, Eq. Pl. 151.

⁷³ Mitford, Eq. Pl. Jeremy, ed. 280.

⁷⁴ Beames, Eq. Pl. 160.

⁷⁵ Mitford, Eq. Pl. Jeremy, ed. 221; Beames, Pl. in Eq. 162; *Bell v. Woodward*, 42 N. H. 181.

⁷⁶ Beames, Eq. Pl. 161, 162. See before, **4169**.

⁷⁷ *Wales v. Newbould*, 9 Mich. 45; *Chew v. Bank of Baltimore*, 14 Md. 299.

⁷⁸ Mitford, Eq. Pl. Jeremy, ed. 221.

and will in most instances be found strongly analogous to them, though in some cases there is an exception; as, for instance, the plea of purchase for a valuable consideration without notice, and some other pleas of an incongruous nature. The matter thus pleaded is something which does not appear upon the face of the bill. Pleas in bar to relief may be founded on some statute which bars the plaintiff's right, on matter of record, and on matter *in pays*, that is, on matter of fact, not of record.

4324. Pleas in bar to relief, made so by *statute*, separately considered, are those of the statute of limitations, of the statute for preventing of frauds and perjuries, of any other statute, public or private, which creates a bar.

4325. *The statute of limitations* is a good plea in bar to the relief sought by a bill in equity, as it is a good special plea in bar to an action at law; indeed, it will ordinarily bar both the claim of the debt and the discovery when the debt became due.⁷⁹ Although courts of equity are not within the words of the statute of limitations, yet those courts generally adopt it as a positive rule, and, by parity of reason, apply it to cases not within the letter.⁸⁰ When, therefore, the statute would be a bar at law, the same rule is applied in equity in cases of concurrent jurisdiction.⁸¹

It is a general rule that unless the defendant claims the benefit of the statute by plea or answer, he cannot insist upon it in bar of the plaintiff's demand;⁸² but in cases which will allow of the exercise of discretion, the courts will use the statute as a rule to guide that discretion; and they will also sometimes resort to the policy of the ancient law, which in many cases limited the demand of accruing profits to the commencement of the suit.⁸³

In some cases, the statute of limitations will not be allowed in analogy to similar cases at law. It cannot be pleaded when the case falls directly within the exceptions of the statute itself, such as infancy, coverture, insanity, being imprisoned, or out of the jurisdiction or state.

4326. To render the plea of the statute of limitations effectual to bar relief, there are certain averments required in particular cases, which will now claim our attention.

When the bill charges a fraud, and the fraud was not discovered till within six years before filing the bill, the statute is not a good plea, unless the defendant denies the fraud, or avers that the fraud, if any, was discovered six years before filing the bill.⁸⁴

When a particular special promise is charged to avoid the operation of the statute, the defendant must deny the promise charged by the averment in the plea, as well as by an answer in support of the plea.⁸⁵

When the demand is of any thing executory, as a note for the payment of an annuity, or of money at a distant period, or by instalments, the defendant must aver that the cause of action has not accrued within six years, because the

⁷⁹ *Sutton v. Scarborough*, 9 Ves. Ch. 71; *Cork v. Wilcock*, 5 Madd. Ch. 328.

⁸⁰ *Breckenridge v. Churchill*, 3 J. J. Marsh. Ky. 15; *Frame v. Kenney*, 2 A. K. Marsh. Ky. 145; *McDowell v. Heath*, 3 A. K. Marsh. Ky. 223; *Thompson v. Blair*, 3 Murph. No. C. 583; *Hawley v. Cramer*, 4 Cow. N. Y. 718; *Taylor v. Bate*, 4 Dan. Ky. 200.

⁸¹ *Rhode Island v. Massachusetts*, 15 Pet. 233; *Pratt v. Wortham*, 5 Mas. C. C. 112; *Humbert v. Trinity Church*, 24 Wend. N. Y. 587. In cases of concurrent jurisdiction the statute seems to apply directly to courts of equity. Story, Eq. Pl. § 756.

⁸² *Mitchell v. Woodson*, 37 Miss. 557; *Smith v. Richmond*, 19 Cal. 476.

⁸³ See *Pulteney v. Warren*, 6 Ves. Ch. 73; *Pettward v. Prescott*, 7 Ves. Ch. 541.

⁸⁴ *The South Sea Company v. Wymondsell*, 3 P. Will. Ch. 143. See, as to the extent of this rule in actions at law, *Massachusetts Turnpike Company v. Field*, 3 Mass. 201; *Homer v. Fish*, 1 Pick. Mass. 435; *Jones v. Conaway*, 4 Yeates, Penn. 109; *Troup v. Smith*, 20 Johns. N. Y. 47.

⁸⁵ Mitford, Eq. Pl. Jeremy, ed. 271.

statute bars only as to what was actually due six years before the action was brought.⁸⁶

Where, in order to avoid the operation of the statute, fraud is charged, the defendant must answer to the fraud, otherwise the plea of the statute will not avail.⁸⁷ It may be here remarked that the statute of limitations runs only from the time the fraud is discovered; but if the time limited by the statute have expired after the fraud discovered, the statute becomes a bar, whatever the older cases assert to the contrary.⁸⁸

4327. There are numerous cases where the statute of limitations is not a bar, and others where, probably, it would not be considered a bar, the principal of which we will now proceed to notice.

The statute is not a good plea to an "open account,"⁸⁹ and when there are mutual accounts, not merchants' accounts, for any item of which credit has been given within six years, this is evidence of an acknowledgment of there being an open account between the parties, and of a promise to pay the balance, so as to take the case out of the statute of limitations;⁹⁰ but when all the items are on one side, as in an account between a tradesman and his customers, the last item which happens to be within six years does not draw after it those of longer standing.

The statute is no bar to a legal rent charge, either at law or in equity, as the statute only concerns customary rent between landlord and tenant, and does not extend to any rent that commences by grant, or of which the commencement may be shown; but in such case the demand may be excluded by presumption from time and acquiescence.⁹¹

Nor is the statute a bar to an equitable charge or technical trust, at least between the trustee and the *cestui que trust*,⁹² and interest will be decreed after great length of time, if there be not sufficient ground for presuming a release. But this must be understood of trusts purely technical, express, or equitable,⁹³ for implied trusts constitute no exception to the operation of the statute.⁹⁴

It seems that the statute is no bar to a legacy or distributive share of an intestate's estate;⁹⁵ but, acting upon principle, after a lapse of time the court will presume payment.⁹⁶ Presumption of payment founded on lapse of time, however, is matter of evidence, and in most cases not *proprio jure* matter of plea in bar.⁹⁷

When there is no one to represent the deceased debtor, as, where he died intestate, and no administration has been raised, the statute will not be a good plea, because no laches can be imputed to the plaintiff for not suing; but when the defendant had become an executor *de son tort*, by intermeddling with the

⁸⁶ Anon. 3 Atk. Ch. 79; Cooper, Eq. Pl. 252; Gould v. Johnson, Salk. 422.

⁸⁷ Bicknell v. Gough, 3 Atk. Ch. 558.

⁸⁸ Vide Hovenden v. Lord Annesley, 2 Schoales & L. Ch. Ir. 607; Smith v. Clay, Ambl. Ch. 645; Mitchell v. Thompson, 1 McLean, C. C. 104; Humbert v. Trinity Church, 24 Wend. N. Y. 605.

⁸⁹ Cooper, Eq. Pl. 253; Beames, Eq. Pl. 172.

⁹⁰ 6 Term, 189; Coster v. Murray, 5 Johns. Ch. N. Y. 224; Sumpter's adm. v. Morse, 2 Hill, N. Y. 92; see McLin v. McNamara, 1 Ired. Eq. No. C. 75; 2 Dev. & B. No. C. 82.

⁹¹ Collins v. Goodall, 2 Vern. Ch. 235.

⁹² Heath v. Henley, 1 Chanc. Cas. 20; Overstreet v. Bate, 1 J. J. Marsh. Ky. 370; Peigh v. Bell, 1 J. J. Marsh. Ky. 401; Coster v. Murray, 4 Johns. Ch. N. Y. 224; Stephen v. Yandle, 2 Hayw. No. C. 221; Ramsay v. Deas, 2 Des. Eq. So. C. 238; Gist v. Heirs of Cattel, 2 Des. Eq. So. C. 53; Walton v. Coulson, 1 McLean, C. C. 132.

⁹³ Angell, Lim. 136; Porter v. Porter, 3 Humphr. Tenn. 586.

⁹⁴ Joyce v. Gunnels, 2 Rich. Eq. So. C. 259; Raymond v. Simonson, 4 Blackf. Ind. 77.

⁹⁵ Stewart v. Waterhouse, 10 Yerg. Tenn. 94.

⁹⁶ Anon. 2 Freem. Ch. 22.

⁹⁷ Giles v. Baremore, 5 Johns. Ch. N. Y. 545.

estate of the deceased, and he might have been sued as such, the statute would be a good plea.⁹⁸

4328. *The statute for the prevention of frauds and perjuries* may be pleaded in bar of a suit to which the provisions of that act apply.⁹⁹ For example, to a bill for the specific performance of a contract respecting lands, the defendant may plead the statute, and by negative averments insist that there has been no contract in writing signed by the parties. Therefore, where a bill stated a parol agreement for the sale of lands, and that five guineas were paid in part of the purchase money, and the defendant pleaded the statute of frauds, it was allowed;¹⁰⁰ for though payment of a substantial part of the purchase money will take the case out of the statute, on the ground of part performance, yet the payment of a small part, like that stated in the bill, would not.¹⁰¹ So to a parol variation of a contract the statute may be pleaded, if the variation is essential.¹⁰²

This plea of the statute of frauds and perjuries extends to the discovery of the parol agreement as well as to the performance of it, though the defendant may be required, it is said, to admit or deny the parol agreement stated in the bill. This, however, seems unimportant, because if the defendant should by his answer admit the parol agreement, and should insist upon the benefit of the statute, he will be fully entitled to it, notwithstanding such admission.¹⁰³ But an admission of the parol agreement, without insisting upon the statute, will be no bar to the plaintiff's recovery.¹⁰⁴

When in cases of this kind any matter is charged in the bill which may avoid the bar created by the statute, such as acts of part performance or fraud, then the plea ceases to be a pure plea; and that matter must be denied by way of averment in the plea, and must also be denied precisely and particularly in the answer to support the plea.¹⁰⁵

To a bill for the discovery and execution of a trust, the statute of frauds and perjuries may be pleaded, with an averment that there was no declaration of trust in writing. But when circumstances of fraud are alleged in the bill, which, if true, would avoid the bar, the plea as to them ceases to be a pure plea, and the allegation must be met, as in similar cases, by an averment in the plea denying the fraud; and there must also be an answer to support the plea, denying the circumstances of fraud so charged.¹⁰⁶

Whenever the bill sets up a parol trust, the non-performance of which would be a fraud upon the plaintiff, or where a parol trust is a secret trust, alleged to be in fraud of the public policy of the country, a pure plea of the statute will not prevail, for the statute made to prevent frauds will never be allowed to cover fraud. In such cases the plea must contain averments denying the fraud, and also be supported by an answer discovering and denying all the circumstances relied on to establish it.¹⁰⁷

4329. *Any statute* whatever, public or private, which destroys the demand of the plaintiff, may be pleaded; but it must be accompanied with the averments necessary to bring the case of the defendant within such statute, and to avoid any equity set up against the bar created by the statute.¹⁰⁸

⁹⁸ Webster v. Webster, 10 Ves. Ch. 93.

⁹⁹ Mitford, Eq. Pl. Jeremy, ed. 265; Cooper, Eq. Pl. 255.

¹⁰⁰ Main v. Matthews, 4 Ves. Ch. 720.

¹⁰¹ Cooper, Eq. Pl. 256; 2 Story, Eq. Jur. § 760.

¹⁰² Jordan v. Sawkins, 1 Ves. Ch. 402; 3 Brown, Ch. 388; Brodie v. St. Paul, 1 Ves. Ch. 326; Cooper, Eq. Pl. 256.

¹⁰³ Story, Eq. Pl. § 763.

¹⁰⁴ Cooper, Eq. Pl. 256; Mitford, Eq. Pl. Jeremy, ed. 266-268.

¹⁰⁵ Mitford, Eq. Pl. Jeremy, ed. 266, 267; Cooper, Eq. Pl. 256; Story, Eq. Pl. § 764.

¹⁰⁶ Story, Eq. Pl. § 765.

¹⁰⁷ Cooper, Eq. Pl. 257.

¹⁰⁸ Story, Eq. Pl. § 679; Beames, Pl. in Eq. 188; Cooper, Eq. Pl. 259, 260.

4330. Before proceeding to the consideration of *pleas of records* it will be well to remember that all courts are not courts of record. At common law, courts are divided into courts of record and courts not of record; this distinction, however, is purely technical. Among the former may be classed the superior courts of common law; courts of chancery, which exercise only equity jurisdiction, and courts of admiralty, are deemed courts not of record.¹⁰⁹ The proceedings of the former class of courts are considered as matters of record; those of the latter, not strictly as matters of record, but as matters *as* of record; that is, they are deemed to be of the same validity as if they were records.

4331. Pleas of matters of record, technically so called, are chiefly the following:

The defendant in equity may plead a common recovery, duly suffered, with a deed to lead to uses, in bar to a bill asserting a claim under an entail, if the estate limited to the plaintiff, or under which he claims, is destroyed by it.¹¹⁰

A defendant in equity may in general plead in bar the judgment of an ordinary court of common law, when that judgment has finally determined the rights of the parties.¹¹¹ When the record is general, and does not disclose the ground of decision, the bar created by it is as general; but when the record leads to the ground of the decision, it is no further a bar than as to that ground, for that is all that has been decided, and so far, and no farther, it is a bar.¹¹² The plea is good also, not only when it is founded on the same original cause of action, but when it prays to set aside a verdict and judgment, as obtained against conscience, unless it contains some allegations of fact, impeachment of the verdict and judgment, which would avoid it and require an answer.¹¹³

4332. The sentence and judgment of a foreign court, which at common law is deemed a court not of record,¹¹⁴ upon the same matter put in controversy by the bill, may be pleaded in bar, subject to the same objections which might be made to a similar judgment rendered in a domestic tribunal.¹¹⁵

But when there is any charge of fraud, or when other circumstances are shown by the bill as a ground of relief, the judgment cannot be pleaded, for if there was fraud, the judgment is void, and if there are equitable grounds of relief, the court has jurisdiction. In such case the judgment cannot be pleaded by a pure plea in bar of the bill. The plea must, beside setting up the sentence or judgment, proceed by proper averments to deny the fraud, or the equitable circumstances upon which the sentence or judgment is sought to be impeached, and thus put them in issue by the plea. It must also be supported by a full

¹⁰⁹ In the United States, courts of equity are generally, if not universally, considered as courts of record; and the federal courts are all courts of record. Not unfrequently the statute creating a court declares that it shall be considered as a court of record. The act of Congress to establish a uniform rule of naturalization, approved April 14, 1802, enacts that, for the purpose of admitting aliens to become citizens, any court of any individual state, having common law jurisdiction and a seal and a clerk or prothonotary, shall be considered as a district court within the meaning of the act. At common law, any jurisdiction which has the power to fine and imprison is a court of record, and courts not possessing this power are not courts of record. Bacon, Abr. *Fines and Amerciaments*, A.

¹¹⁰ Beames, Pl. in Eq. 201; Cooper, Eq. Pl. 264; Mitford, Eq. Pl. Jeremy, ed. 253.

¹¹¹ Mitford, Eq. Pl. Jeremy, ed. 253, and the cases cited; *Hughes v. Blake*, 6 Wheat. 453; 1 Mas. C. C. 515.

¹¹² *Saunders v. Marshall*, 4 Hen. & M. Va. 458; see *Hawkins v. Defriest*, 4 Munf. Va. 469.

¹¹³ Mitford, Eq. Pl. Jeremy, ed. 255.

¹¹⁴ In the United States the states are considered so far foreign that a judgment obtained in one of them is a foreign judgment in another. But by a provision in the national constitution, the records and judgments of one state are to have full force and credit in all the others.

¹¹⁵ Mitford, Eq. Pl. Jeremy, ed. 256.

answer to the special charges in the bill, as is required in the cases of other anomalous pleas, or those which are not pure.¹¹⁶

4333. Upon the same principle, that a verdict and judgment constitute a good bar, when a court not only possesses jurisdiction over a particular case but that jurisdiction is of a peculiar and exclusive nature, its sentence or decree, *ex directo*, in a matter properly cognizable there, is conclusive whenever the same matter shall come in question collaterally in any other court, whether it be a court of common law or a court of equity. Therefore, a will proved in a probate court, or other court exercising exclusive and competent jurisdiction of the subject, is a good bar, and may be pleaded as such to a bill of persons claiming as next of kin to the deceased, who is alleged in the bill to have died intestate; for the probate of the will is in the nature of a sentence, and is conclusive, at least with regard to the personal estate, as to the title of the executor.¹¹⁷ And, contrary to the general rule, even if fraud in obtaining a will of personal property be charged in a bill, that will be insufficient to impeach the probate or its validity in a court of equity; because if there be fraud in the probate of the will, the probate court has competent jurisdiction, and it alone can take cognizance of it and recall the probate.

4334. But to this may be mentioned an exception. When the fraud practiced does not extend to the whole will, but to some particular clause only, or a fraud has been practiced to obtain the consent of the next of kin to the probate. In such cases the courts of equity will declare the executor as trustee for the next of kin. And, for the same reason, when a fraud has been committed in a will of real estate, where the fraud does not vitiate the whole will, but only affects a particular clause or a particular party, courts of equity will exercise jurisdiction, and relieve against the fraud.¹¹⁸

4335. A decree of a court of equity is, for most purposes, if not for all, equal to a judgment at law, as a bar; and whether it be a decree in the same court or in another court of equity, it is immaterial. To entitle a decree to be pleaded to a new bill for the same matter, it must be a decree signed and enrolled, for the same matter, and substantially between the same parties.¹¹⁹ But until the decree is signed and enrolled it cannot properly be pleaded in bar of another suit, though it may be insisted on, by way of answer, as a good defence.¹²⁰ The decree enrolled cannot be altered except by bill of review, while before it is enrolled it can be altered only upon rehearing.¹²¹

It is not sufficient that the decree has been made and enrolled to entitle it to be pleaded; it must also be in its nature final, or afterward made so by order, or it will not be a bar. Therefore, a decree for an account of principal and interest due on a mortgage, and for a foreclosure in case of non-payment, cannot be pleaded to a bill to redeem unless there is a final order of foreclosure.¹²² Nor can a decree which has been made upon default of the defendant in not appearing at the hearing be pleaded without an order making the decree absolute.¹²³

When the bill charges fraud in obtaining the decree, and seeks to impeach it upon that ground, the plea of the decree, signed and enrolled, must be a plea

¹¹⁶ Mitford, Eq. Pl. Jeremy, ed. 256; Cooper, Eq. Pl. 267; Story, Eq. Pl. § 783.

¹¹⁷ Mitford, Eq. Pl. Jeremy, ed. 257; Cooper, Eq. Pl. 268; Story, Eq. Pl. § 786; Beames, Eq. Pl. 207.

¹¹⁸ Mitford, Eq. Pl. Jeremy, ed. 257; Barnesley v. Powell, 1 Ves. Ch. 284.

¹¹⁹ Beames, Pl. in Eq. 211.

¹²⁰ Mitford, Eq. Pl. Jeremy, ed. 239; Cooper, Eq. Pl. 269; Beames, Eq. Pl. 211; Davoue v. Fanning, 4 Johns. Ch. N. Y. 199.

¹²¹ Mitford, Eq. Pl. Jeremy, ed. 237.

¹²² Senhouse v. Earle, 2 Ves. Ch. 450.

¹²³ Mitford, Eq. Pl. Jeremy, ed. 237.

not pure, and must negative the charges of fraud, and be supported by a full answer denying them.¹²⁴

4336. *Pleas in bar of matters in pays* go sometimes both to the discovery sought and to the relief prayed by the bill, or by some part of it; sometimes only to the discovery or part of the discovery; and sometimes only to the relief or part of the relief.¹²⁵ Pleas of this nature are principally a plea of a stated account, of an award, a release, a plea of purchase for a valuable consideration, the plea of title in the defendant.

4337. A plea of a stated account is a good bar to a bill for an account. It must show that the account was in writing, or, at least, it must set forth the balance, and that the settlement was final. If the bill charges that the plaintiff has no counterpart of the account, a correct copy of it should be annexed by way of schedule to the answer, that if there are any errors upon the face of it, the plaintiff may have an opportunity of pointing them out.¹²⁶ The defendant should also by his plea aver that the account stated is just and true to the best of his knowledge and belief. When error or fraud is charged, it must be denied by the plea as well as by the answer.¹²⁷

4338. An award may be pleaded to a bill to set aside the award and open the account. This plea is not only good to the merits of the case, but also to the discovery sought by the bill. When fraud or partiality is charged against the arbitrators, the charge must not only be denied by way of averment in the plea, but the plea must be supported by an answer showing the arbitrators to have acted fairly, and not to have been corrupt or partial. Whatever other matter may be stated in the bill as a ground for the impeachment of the award must be denied in the same manner.¹²⁸

4339. When a plaintiff, or a person under whom he claims, has released the subject of his demand, the defendant may plead the release in bar of the bill, and this will apply to a bill praying that the release may be set aside.¹²⁹

In a plea of a release, the defendant must set out the consideration upon which the promise was made; a plea of a release cannot therefore extend to a discovery of the consideration, and if that is impeached by the bill, the plea must be assisted by averments covering the grounds on which the consideration is so impeached.¹³⁰

A release, when pleaded to a bill for an account, must be under seal, and ought to be so stated in the plea; though this is the proper mode, it seems it is not indispensable.¹³¹ A release not under seal must be pleaded as an account stated only.

4340. Supposing a plaintiff to have a full title to the relief he prays, and the defendant can set up no defence in bar of that title, yet, if the latter have

¹²⁴ Story, Eq. Pl. § 794.

¹²⁵ Mitford, Eq. Pl. Jeremy, ed. 258.

¹²⁶ Hankey v. Simpson, 3 Atk. Ch. 303.

¹²⁷ Mitford, Eq. Pl. Jeremy, ed. 260.

¹²⁸ Mitford, Eq. Pl. Jeremy, ed. 260, 261. See *Henrick v. Blair*, 1 Johns. Ch. N. Y. 101; *Shepard v. Merrill*, 2 Johns. Ch. N. Y. 276; *Underhill v. Van Cortlandt*, 2 Johns. Ch. N. Y. 339; *Bouck v. Wilber*, 4 Johns. Ch. N. Y. 405; *Toppan v. Heath*, 1 Paige, Ch. N. Y. 293; *Campbell v. Western*, 3 Johns. Ch. N. Y. 124; *Davy's Executors v. Shaw*, 7 Cranch, 171; *Shermer v. Beale*, 1 Wash. Va. 11; *Fitzpatrick v. Smith*, 1 Des. Eq. So. C. 245; *Atwyn v. Perkins*, 2 Des. Eq. So. C. 297; *Pleasants v. Ross*, 1 Wash. Va. 156; *Morris v. Ross*, 2 Hen. & M. Va. 408.

¹²⁹ *Pusey v. Desbouverie*, 3 P. Will. Ch. 315; *Parker v. Alcock*, 1 Younge & J. Exch. 432; *Cooper*, Eq. Pl. 276.

¹³⁰ Mitford, Eq. Pl. Jeremy, ed. 261. See *Allen v. Randolph*, 4 Johns. Ch. N. Y. 693; *Bolton v. Gardner*, 3 Paige, Ch. N. Y. 273; *Fish v. Miller*, 3 Paige, Ch. N. Y. 26; *Roche v. Morgell*, 2 Schoales & L. Ch. Ir. 727.

¹³¹ *Phelps v. Sproule*, 1 Mylne & K. Ch. 231.

an equal claim to the protection of a court of equity to defend his possession, as the plaintiff has to the assistance of the court to assert his rights, the court will not interfere on either side. This is particularly the case when the defendant claims under a mortgage or a purchase for valuable consideration without notice of the plaintiff's title, which may be pleaded in bar of the suit.¹³²

4341. In its form, this plea must aver that the person who conveyed or mortgaged to the defendant was seised of the fee, or pretended to be so seised, and was in possession, if the conveyance purported an immediate transfer of the possession at the time he executed the purchase or mortgage deed. It must aver a conveyance and not articles merely, for if there are articles only, and the defendant is injured, he must sue at law upon the covenants in the articles. It must aver a consideration and the actual payment of it, for a consideration secured to be paid is not sufficient. The plea must also deny notice of the plaintiff's title or claim, previous to the execution of the deeds and payment of the consideration; and the notice so denied must be of the existence of the plaintiff's title, and not merely notice of the existence of the person who would claim under the title; and the defendant must deny the notice, even though it be not charged, and the denial must be made positively and not evasively, and he must deny fully, and in the most precise terms, every circumstance from which notice could be inferred.¹³³

Every plea of this kind seems to admit that the defendant has no legal title. The plea is purely a bar to an equitable and not to a legal claim;¹³⁴ a purchaser for a valuable consideration without notice is so highly favored in equity that it is said a plea will hold to a bill to perpetuate the testimony of witnesses,¹³⁵ though there are few cases in which the court will not give that assistance to the furtherance of justice.

4342. The defendant may plead, as a defence to the plaintiff's bill, his title to the property claimed; in general, this must be a good equitable title, and not that of a mere volunteer, or of a conveyance to him without a valuable consideration. But a volunteer may, in some instances, plead his title against a bill brought against him; for his title may have been aided by other circumstances. This plea of title in the defendant is founded on a long peaceable possession, a will, or a conveyance.

4343. As at law length of time raises a presumption against claims the most solemnly established, so, in equity, a long peaceable possession may be pleaded in bar to the relief.¹³⁶ The policy of the law is to give quiet and repose to titles, and the courts of justice do not countenance laches or long delays on the part of claimants.¹³⁷ Where, therefore, a bill was filed for the payment of a

¹³² Mitford, Eq. Pl. Jeremy, ed. 274; Beames, Pl. in Eq. 241; Story, Eq. Pl. § 805; Cooper, Eq. Pl. 281. Notice to an agent is notice to the principal; when, therefore, a person having notice purchased in the name of another, who had no notice, and knew nothing of the purchase, but afterward approved it, and without notice paid the purchase money, and procured a conveyance, the person first contracting was considered, from the beginning, as the agent of the actual purchaser, and the latter was held affected with the notice. *Jennings v. Moore*, 2 Vern. Ch. 609; S. C. under the name of *Bleakarne v. Jennens*, 2 Brown, Ch. 278, Toml. ed. A purchaser with notice, of a purchaser without notice, may shelter himself under the first purchaser; because his vendor's title was perfect, and he purchased all his rights. *Brandlyn v. Ord*, 1 Atk. Ch. 571; *Lowther v. Carlton*, 2 Atk. Ch. 139; Beames, Eq. Pl. 251.

¹³³ *Wilson v. Hillyer*, Saxt. Ch. N. J. 63; Beames, Eq. Pl. 247.

¹³⁴ *Williams v. Lamb*, 3 Brown, Ch. 264.

¹³⁵ *Bochinall v. Arnold*, 1 Vern. Ch. 354; but see *Ross v. Close*, 5 Brown, Parl. Cas. 562, Tomlin's note; Mitford, Eq. Pl. Jeremy, ed. 279, 280; Beames, Eq. Pl. 251.

¹³⁶ Beames, Eq. Pl. 255.

¹³⁷ *Cholmondeley v. Clinton*, 2 Jac. & W. Ch. 1, 163; *Elmendorf v. Taylor*, 10 Wheat. 152; *Blewitt v. Thomas*, 2 Ves. Ch. 669; Cooper, Eq. Pl. 288.

rent charge, and the defendant pleaded the possession of the premises for twenty-six years, without accounting for or paying over to the plaintiff any part of the rents and profits, the plea was allowed.¹³⁸

4344. To a bill brought upon a ground of equity by an heir at law against a devisee, to turn him out of possession, the devisee may plead his title under the will, and that it was duly executed.¹³⁹ But in cases of this kind, where the bill has also prayed a receiver, a plea extending to that part of the bill has been so far overruled, as it might be necessary for the court in the progress of the cause to appoint a receiver.¹⁴⁰

4345. Upon a bill filed by an heir against a person claiming under a conveyance from the ancestor, the defendant may plead the conveyance in bar of the suit.¹⁴¹ And to a bill brought to set aside a deed for fraud, a plea of a title paramount, under a former conveyance, may be pleaded by the defendant as a bar.¹⁴²

4346. Original bills not praying relief are bills of discovery, strictly so called, which ask no relief. The objections to these bills, which may be taken advantage of by pleas, are nearly the same for which a demurrer, to a bill of discovery, when the objection appears on the face of the bill, will be sustained; the difference is this, that a plea must be pleaded to bring the objection before the court, when the cause of such objection does not appear on the face of the bill; and when it does, the defendant may demur. *The pleas to bills of discovery* are either to the jurisdiction, to the person, to the bill or frame of the bill, or pleas in bar.

4347. When a bill seeks a discovery merely, if the plaintiff's case is not such as entitles a court of equity, in the exercise of its jurisdiction, to compel a discovery in his favor, though he falsely state a different case in his bill, and by that means avoid a demurrer, the defendant may by his plea bring forward the matter necessary to show the precise truth to the court.¹⁴³

4348. Pleas to the person relate to the person of the plaintiff or the person of the defendant.

A plea may be entered that the plaintiff has no right, title, or ability to call on the defendant for a discovery which may involve him in difficulties and expense, or perhaps be prejudicial to him in other cases. Thus, if a person states himself to be heir or administrator of a person dead intestate, and assumes a character which does not belong to him, the defendant may plead that another person is the heir or personal representative, or that the person alleged to be dead is living;¹⁴⁴ or, if the fact be so, he may plead that the plaintiff is an alien enemy, or an infant, or a feme covert, or an idiot, or a lunatic disabled to sue.¹⁴⁵

A defendant may also protect himself by plea, by showing that he has no interest in the subject matter of the bill, when that fact does not appear on the face of that instrument, for if the objection be apparent there, he can protect himself by demurrer. He may plead to the discovery that he is a mere witness, or that he does not sustain the character in which he is sued, such as executor, administrator, heir, partner, or creditor, or that there is a want of privity between the plaintiff and himself to sustain the bill.¹⁴⁶

¹³⁸ Baldwin v. Peach, 1 Younge & C. 453.

¹³⁹ Anon. 3 Atk. Ch. 17.

¹⁴⁰ Mitford, Eq. Pl. Jeremy, ed. 263.

¹⁴¹ Mitford, Eq. Pl. Jeremy, ed. 263.

¹⁴² Howe v. Duppa, 1 Ves. & B. Ch. Ir. 511; Beames, Eq. Pl. 257.

¹⁴³ Mitford, Eq. Pl. Jeremy, ed. 282; Cooper, Eq. Pl. 291.

¹⁴⁴ Mitford, Eq. Pl. Jeremy, ed. 283.

¹⁴⁵ Mitford, Eq. Pl. Jeremy, ed. 232.

¹⁴⁶ Mitford, Eq. Pl. Jeremy, ed. 283; Hare, Disc. 63; Cooper, Eq. Pl. 294; Story, Eq. Pl. § 819; Beames, Eq. Pl. 264.

4349. But a few objections can be taken advantage of by plea as to the frame of the bill; the principal seems to be that the value of the matter in controversy is beneath the dignity of the court;¹⁴⁷ that the parties are not the same in equity as in the suit at law, in aid of which the discovery is sought, if not apparent on the face of the bill; or if the defendant was not a party to the suit at law, because in that case the discovery would be immaterial.¹⁴⁸

4350. We have seen that when the objection appears on the face of the bill of discovery the defendant may demur; but when it does not so appear, advantage of the defect must be taken by plea; thus, for example, a former judgment, a former decree upon the merits, the statute of frauds and perjuries, the statute of limitations, a release, an account stated, or an award may be so pleaded. But in such cases the plea would be applicable only when no circumstances were stated in the bill to avoid the effect of the bar.¹⁴⁹

When the defendant has a perfect title to the premises in himself, he may plead it in bar of any discovery sought by a bill in relation to it.¹⁵⁰

A bill of discovery is filed for the purpose of ascertaining facts; when the discovery sought appears to be a mere question of law, it may be pleaded in bar of a discovery of any facts which might, if the pleadings had terminated in an issue in fact, have been important at the trial.¹⁵¹

The situation of the defendant may sometimes render it improper for a court of equity to compel a discovery. Most of the cases of this nature have already been considered under different heads. In these cases the defendant may plead such matters in bar to a discovery. These pleas are:

That the discovery may subject the defendant to pains or penalties, or a criminal prosecution.

That it will subject him to a forfeiture.

That it will betray confidence reposed in him as counsel, attorney, solicitor, or arbitrator.

That he is a purchaser for a valuable consideration, without notice of the plaintiff's title.¹⁵²

4351. Having considered the nature of pleas to original bills generally, as well in cases where relief is prayed as in those where none is sought, it remains to be ascertained in what cases *pleas* may be put in *when the bill is not original*. It may be observed that the same grounds of pleas will in many cases be valid in these bills, according to their respective nature, as are sufficient in original bills. It is only when the defence is peculiar that it will be here noticed.¹⁵³

4352. When a plea of revivor is brought without sufficient cause to revive the suit against the defendant, and this is not apparent on the bill, the defendant may plead the matter necessary to show that the plaintiff is not entitled to revive the suit against him. Or if the plaintiff is not entitled to revive the suit at all, though a title is stated in the bill, so that the defendant cannot demur, the objection to the plaintiff's title may also be taken by plea.¹⁵⁴

When there is a want of proper parties, and the objection does not appear upon the face of the bill, the defendant may take advantage of it by plea; as, when a suit is brought by tenants in common, and after decree one dies, and

¹⁴⁷ Cooper, Eq. Pl. 193; *Smets v. Williams*, 4 Paige, Ch. N. Y. 364.

¹⁴⁸ Story, Eq. Pl. § 820.

¹⁴⁹ Upon this subject opinions vary. See Beames, Eq. Pl. 282; *Hindman v. Taylor*, 2 Brown, Ch. 7, note by Belt; Mitford, Eq. Pl. Jeremy, ed. 187; Story, Eq. Pl. § 822, n.

¹⁵⁰ *Gait v. Osbaldiston*, 1 Russ. Ch. 158, reversing the same case in 5 Madd. Ch. 428.

¹⁵¹ *Stewart v. Nugent*, 1 Keen, Ch. 201.

¹⁵² Mitford, Eq. Pl. Jeremy, ed. 284; Story, Eq. Pl. § 825; Beames, Eq. Pl. 266-281.

¹⁵³ Mitford, Eq. Pl. Jeremy, ed. 289.

¹⁵⁴ Mitford, Eq. Pl. Jeremy, ed. 289.

the survivor alone brings a bill of revivor, the defendant may plead the non-joinder of the representatives of the deceased.¹⁵⁵

If a person entitled to revive a suit does not proceed in due time, he may be barred by the statute for the limitation of actions, which may be pleaded to a bill of revivor afterward filed.¹⁵⁶

4353. When the plaintiff is not entitled to a supplemental bill, if his defect of title does not appear upon the face of the bill, the defendant may plead the matter, so as to show the objection of the court; as, if a supplemental bill is brought upon matter which arose before the original bill was filed, and this is not apparent on the bill, the defendant may plead that fact.¹⁵⁷

Matter which arose before the original bill was filed may be made the subject of an amendment, but not matter which arose since. If the bill is amended by stating a matter which has arisen subsequent to the filing of the bill, and, consequently, ought to have been the subject of a supplemental bill, advantage of the irregularity may be taken by way of plea, if it does not sufficiently appear upon the face of the bill to found a demurrer; but if the defendant answers, he waives the objection to the irregularity, and cannot make it at the hearing.¹⁵⁸

4354. Cross bills are liable to all the pleas in bar to which original bills are subject, because they differ in nothing from original bills except that they are occasioned by former bills; and they are not liable to any plea which will not hold to the first species of bills. Pleas to the jurisdiction and to the person cannot be pleaded to a cross bill, because by pleading to the original bill the defendant has affirmed the sufficiency of the jurisdiction and of the right of the parties to sue and to be sued, unless the cross bill is exhibited in the name of some person alone, who alone is incapable of instituting a suit; as, an infant, a feme covert, an idiot, or a lunatic.¹⁵⁹

4355. The constant defence to a bill of review for error apparent upon the decree is by plea of the decree. But when any matter beyond the decree, as, a purchase for valuable consideration, or any other matter is offered against opening the enrolment, that must be pleaded. If a demurrer to a bill of review has been allowed, and the order allowing it is enrolled, it is an effectual bar to a new bill of review on the same grounds, and may be pleaded accordingly. To a bill of review of a decree for the payment of money, it has been objected by plea that according to the rule of the court the money decreed ought to have been first paid, but the rule appears to have been dispensed with on security given; and as the bill of review would not stay the process for compelling the payment of the money, it may be doubted whether the objection was properly made.¹⁶⁰

A bill of review upon the discovery of new matter seems to be liable to any plea which would have avoided the effect of that matter, if charged in the original bill.¹⁶¹

Upon a supplemental bill in the nature of a bill of review, of a decree not signed and enrolled, upon the alleged discovery of new matter, it has been said that if the defendant can show the allegation is false, he must do so by plea, and that it is too late to insist upon it by answer; but as the bill must allege the fact of discovery, and that fact must be the ground of the proceeding, it should

¹⁵⁵ Story, Eq. Pl. § 830.

¹⁵⁶ Mitford, Eq. Pl. Jeremy, ed. 290.

¹⁵⁷ See *Lewellen v. Macworth*, 2 Atk. Ch. 40; *Baldwin v. Mackown*, 3 Atk. Ch. 817.

¹⁵⁸ Mitford, Eq. Pl. Jeremy, ed. 290; Cooper, Eq. Pl. 303; Story, Eq. Pl. § 828; Beames, Eq. Pl. 306.

¹⁵⁹ Mitford, Eq. Pl. Jeremy, ed. 291; Beames, Eq. Pl. 310.

¹⁶⁰ Mitford, Eq. Pl. Jeremy, ed. 291, 292.

¹⁶¹ Mitford, Eq. Pl. Jeremy, ed. 292.

seem that it is equally liable to traverse by answer and by evidence as any other fact stated in the bill.¹⁶²

4356. If it is sought to impeach a decree on the ground of fraud, the proper defence seems to be a plea of the decree, accompanied by a denial of the fraud charged.¹⁶³

4357. Any person interested under a decree may bring a bill to carry it into execution. Upon the same principle, any creditor may prosecute a decree for an account. But when the plaintiff, who has filed a bill to carry a decree into execution, happens to have no right or interest, and such fact is not so apparent on the bill as to admit of a demurrer, the defendant may offer the objection by way of a plea.¹⁶⁴

¹⁶² Mitford, Eq. Pl. Jeremy, ed. 293.

¹⁶³ *Wichalse v. Short*, 3 Brown, Parl. Cas. 558, Tomlin, ed.

¹⁶⁴ Mitford, Eq. Pl. Jeremy, ed. 294; Cooper, Eq. Pl. 305; Story, Eq. Pl. § 837.
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CHAPTER XIII.

ANSWERS AND REPLICATIONS IN EQUITY.

- 4358-4383. Answers.
- 4362-4366. The general nature of answers.
- 4367-4378. The form of the answer.
 - 4368. The title of the answer.
 - 4369. The reservations of the answer.
 - 4370. The answer to the charges of the bill.
 - 4373. The denial of combination and a general traverse.
 - 4375. The signature of the defendant to the answer.
 - 4376. The oath of the defendant to the answer.
 - 4378. The signature of counsel to the answer.
 - 4379. The sufficiency of the answer.
 - 4380. Further answers, and answers to amended bills.
 - 4381. The effect of an answer.
- 4384. Replications and their consequences.

4358. Having considered in the preceding chapters the effects of disclaimers, demurrers, and pleas, and shown how far a defendant may protect himself from answering by adopting one or other of these modes of defence, it will now be proper to consider the fourth and last manner of defeating the plaintiff's claim, when unfounded. If the defendant has been unable, either wholly or partially, to defend himself from the charges in the plaintiff's bill by disclaimer, demurrer, or plea, he must answer the whole bill, if he has not disclaimed, demurred, or pleaded to any part of it; and if he has so defended himself as to a part, he must answer that part to which he has not demurred or pleaded.

4359. In general, the plaintiff has a right to be informed by the defendant's answer of the nature of the defence to be set up, and this right is not confined to the points as to which the defendant intends to produce evidence, but he may insist, even when the facts are uncontroverted, upon having notice upon the record, in a precise and unambiguous manner, of the nature of the conclusions to be drawn from them.¹ Besides these reasons, the plaintiff may require the discovery he seeks, either because he cannot prove the facts, or in aid of proof and to avoid expense. When he is not protected by either disclaimer, demurrer, or plea, he is compelled to answer, and this answer must, in general, be full to all the charges in the bill not so covered.

4360. To this general rule there are some exceptions:

He is not bound to answer matters which are purely scandalous, impertinent, immaterial, or irrelevant.²

He is not bound to answer any thing which may subject him to any penalty, forfeiture, or punishment.

He is not bound to answer what would involve a breach of professional confidence.

He is not bound to discover the facts respecting his own title, but merely those which respect the title of the plaintiff.

¹ 2 Daniell, Chanc. Pract. 240.

² Gresley, Ev. 17; Mitford, Eq. Pl. Jeremy, ed. 307.

4361. In most other cases when the defendant answers, he must answer fully. He may, in general, avail himself of, and insist upon, every ground of defence which he could use by way of demurrer, or of plea to the bill; but this is not perhaps universally true.³ If his plea has been overruled, the defendant may, nevertheless, insist upon the same matter by way of answer.⁴

Having taken these general views, let us next consider the rules which regulate the manner of making answers. These relate to the general nature of the answers, their form, their sufficiency and deficiency, further answers, and answers to amended bills, the effect of an answer.

4362. An answer is a defence in writing, made by a defendant, to the charge contained in a bill or information filed in a court of equity by the plaintiff against him. The word answer involves an ambiguity; it is one thing when it applies to a question, another when it meets a charge; the answer in equity includes both senses, and may be divided into an examination and a defence. In that part which consists of an examination, a direct and full answer or reply must in general be given to every question asked. In that part which consists of a defence, the defendant must state his case distinctly, but he is not required to give information respecting the proofs which are to maintain it.⁵

There are many cases in which it is difficult, if not impossible, to set up a full defence except by answer. When a defence, which can be made to a bill, consists of a variety of circumstances, so that it is not proper to be offered by way of a plea, or if it be doubtful whether a plea will hold, the defendant may set forth the whole by way of answer, and pray the same benefit of so much as goes in bar, as if it had been pleaded to the bill. Or if the defendant can offer matter of plea which would be a complete bar, but has no occasion to protect himself from any discovery sought by the bill, and can offer circumstances which he deems favorable to his case, and which he could not offer together with a plea, he may set forth the whole matter in the same manner. Thus, if a purchaser for a valuable consideration, clear of all charges of fraud or notice, can offer additional circumstances in his favor, which he cannot set forth by way of plea, or of answer, to support a plea, as the expending of a considerable sum of money in improvements, with the knowledge of the plaintiff, it may be more prudent to set out the whole by way of answer, than to rely on the single defence by way of plea, unless it is material to prevent a disclosure of any circumstance attending the title; for a defence, which, if insisted on by plea, would protect a defendant from a discovery, will not in general do so if offered by way of answer.⁶

4363. The answer must be *full and perfect* to all the allegations in the bill not covered by demurrer or by plea, subject to the exceptions already mentioned. It must contain facts, and not arguments. It is not sufficient that it contains a general denial of the matters charged, but there must be an answer to the sifting inquiries upon the general subject, for when the defendant answers he must answer fully, and to so much of the bill as it is necessary and material for the defendant to answer; he must speak directly, and without evasion. He must not only answer the several charges literally, but he must confess or traverse the substance of each charge.⁷ Wherever there are particular and precise charges, they must be answered particularly and precisely, and not in a general manner, though the general answer may amount to a full denial of the charges.

³ Story, Eq. Pl. § 847, n.

⁴ Mitford, Eq. Pl. Jeremy, ed. 306.

⁵ Gresley, Eq. Ev. 16; Wigram, Discov. 11; Story, Eq. Pl. § 850; Welford, Eq. Pl. 358.

⁶ Mitford, Eq. Pl. Jeremy, ed. 309, 310; Wigram, Discov. 193, 194.

⁷ Tipping v. Clark, 2 Hare, Ch. 390.

Thus, where a bill required a general account, and at the same time called upon the defendant to set forth whether he had received particular sums of money specified in the bill, with many circumstances respecting the times when, and of whom, and on what accounts such sums had been received, it was determined that setting forth a general account by way of schedule to the answer, and referring to it as containing a full account of all money received by the defendant, was not sufficient, and the plaintiff having excepted to the answer on that account, the exception was allowed, the court being of opinion that the defendant was bound to answer specifically to the specific charges in the bill, and that it was not sufficient for him to say generally that he had in the schedule set forth the sums received by him.⁸

4364. The answer must be full to the *material* charges made in the bill. Whether the charge is material depends mainly upon the fact whether, if the defendant's answer should be in the affirmative, the admission would be of any use to the plaintiff in the cause, either to assist his equity or to advance his claim to relief. If it would, it must be answered, for it is material; if not, it is immaterial, and need not be answered.⁹

4365. In general, when a bill charges a fact as being within the knowledge of the defendant, as if done by himself, the answer must be *positive*, and the defendant must not merely state his remembrance and belief, if it is stated to have happened within six years before. But as to facts which have not happened within his own knowledge, he must answer as to his information and belief, and not to his information merely, without stating any belief either one way or the other; and when he answers in general terms as to a certain fact, that "he has been informed and believes it to be true," without adding a qualification, such as that "he does not know it of his own knowledge to be so, and, therefore, does not admit the same," it will be considered as an admission of the fact.¹⁰

4366. As to *recent facts* within his own knowledge, he must answer positively, and not on his belief, though not so as to the result of a conversation.¹¹ It is not always easy to obviate the difficulties which arise on this subject, though the answer must, in some way or other, meet every statement in the bill, and the defendant is required to speak "to the best of his knowledge, remembrance, information, and belief;" yet there will be partial admissions and denials of every shade and character, some delivered in terms of uncertainty, some mixed up with explanatory or qualifying circumstances.¹²

4367. The answer usually consists of seven parts, which will be separately considered. They relate to the title; the reservations; the charges in the bill; the denial of combination; the signature of the defendant; the oath of the defendant; the signature of counsel.

4368. An answer always begins with its title, stating whose answer it is, whether of a sole defendant or of several defendants, and the names of the plaintiffs in the cause in which it is filed as an answer. Two or more persons may join in the same answer, and when their interests are the same, and they appear by the same solicitor, they ought to do so, unless some good reason exists for answering separately. An answer purporting to be the joint answer of five defendants cannot be sworn to as the answer of three only.

The title of the answer is according to the following formula: "The answer

⁸ Mitford, Eq. Pl. Jeremy, ed. 309, 310; Cooper, Eq. Pl. 313, 314; Story, Eq. Pl. § 852.

⁹ Hirst v. Pierce, 4 Price, Exch. 344; See Bally v. Kenrick, 13 Price, Exch. 291; Jones v. Wiggins, 2 Younge & J. Exch. 385.

¹⁰ Beames, Ord. 28, and the notes there.

¹¹ Cooper, Eq. Pl. 314.

¹² Gresley, Eq. Ev. 20.

of A B, the defendant, to the bill of complaint of C D, complainant." If two or more defendants join in the answer, it is entitled, "The joint and several answer," etc., unless it be the answer of a man and his wife, in which case it is called "The joint answer." The answer of an infant, or other person answering by guardian, or of an idiot, or lunatic, answering by his committee, is so entitled.

An answer misnaming the plaintiff is considered as no answer, and the defendant is not bound by it. If there is an immaterial mistake in the name, the answer may be taken off the file and resworn.¹³

4369. After the title, the answer proceeds to the reservations usually made by the defendant of all advantages which may be taken by exception to the bill, a form which is conjectured to have been intended to prevent a conclusion, that the defendant having admitted to answer the bill, admitted every thing which the answer did not expressly controvert, especially such matter as he might have objected to by demurrer or plea.¹⁴ The probability of this conjecture is strengthened by the fact that the general saving clause is usually left out of the answer of infants, because they are entitled to the benefit of every exception which can be taken to a bill without expressly saving it.¹⁵

According to the civil law, the answer begins, *sub protestatione de nimia generalitate, ineptitudine, obscuritate, multitudine, et indebita specificatione dicti libelli*,¹⁶ in imitation of which the answer in equity claims the right of taking all advantages by exception of "all errors, uncertainties, insufficiencies, and imperfections," in the bill contained.

4370. The answer to the charges in the bill should be full to all the interrogatories, unless they are clearly immaterial; it should also be certain in its allegations as far as practicable. But when the defendant has answered all the circumstances of his own case, and as far as he has any concern in the bill, he will not be required to answer the further matters or circumstances of the bill; yet, if he does answer part of the circumstances, or state part of a conversation, he will be compelled to state the whole.¹⁷

4371. With regard to papers and documents called for by the bill, the plaintiff is not entitled as a matter of right to the discovery and production of any documents and papers called for by the bill, other than those which appertain to his own cause or title made out by the bill. Documents and papers, which wholly and solely respect the defendant's title or defence, he is not compellable by his answer to discover or to produce; for the plaintiff must establish his right by the strength of his own title, and not the weakness of that of his adversary.¹⁸

In a case seeking for the discovery of a correspondence, if the defendant sets forth extracts of letters, and swears that those are the only parts of the correspondence upon that subject, it is sufficient. When such reference is made to extracts from books of accounts, the practice is to have those parts which the defendant swears to be immaterial sealed up.

Though papers specifically referred to, and admitted to be in the defendant's custody, may be inspected by the plaintiff upon an order of the court, which

¹³ Griffiths v. Wood, 11 Ves. Ch. 62.

¹⁴ Mitford, Eq. Pl. Jeremy, ed. 314.

¹⁵ Mitford, Eq. Pl. Jeremy, ed. 314.

¹⁶ Gilbert, For. Rom. 90.

¹⁷ Cooper, Eq. Pl. 315; Cookson v. Ellison, 2 Brown, Ch. 252.

¹⁸ Wigram, Discov. 18, 111-146. Sometimes difficulties arise as to the liability of the defendant to produce such documents and papers for the inspection of the plaintiff. See Hardman v. Ellames, 2 Mylne & K. Ch. 755; Cooper, Eq. Pl. 317; Story, Eq. Pl. § 859; Gresley, Ev. 25-37.

in such case will be granted; yet if an answer admits the execution of an instrument craving leave to refer to it when produced, it is not a sufficient ground to apply to the court for its production.¹⁹

The effect of setting forth the contents of an instrument in an answer, and referring to the instrument for the truth of the statement, is to make the instrument a part of the answer. But the court will not order the production of an instrument which the defendant only mentions as being in his custody, when such instrument destroys the plaintiff's claim; as, for example, a release.²⁰

4372. In answering the charges of the bill, care must be taken not to put in the answer any matter which is scandalous or impertinent; for if the answer is scandalous, the scandal will be expunged by order of the court. But nothing will be deemed scandalous which may have an influence on the decision of the suit, whatever its nature may be.²¹ If the answer goes out of the bill to state some matter not material to the defendant's case, it will be deemed impertinent, and the matter, upon application to the court, will be expunged.²² The test to ascertain whether matter is impertinent is to consider whether in the decision of the suit it can have any influence, either as to the subject matter of the controversy, the particular relief to be given, or as to the cost; when it may have influence in either of these respects, it is not impertinent.²³ Another test has been suggested; it is to consider whether the subject of the allegation could be put in issue, or be given in evidence between the parties.²⁴

4373. When there is a general charge of combination in the bill, the defendant need not answer it, though this is usually done. An answer to a charge of unlawful combination cannot be compelled; and a charge of lawful combination ought to be specific to make it material. But, on the contrary, when a particular combination is charged on a bill, a particular answer must be given, and a general denial will be insufficient.²⁵

4374. It is the usual practice to add, by way of conclusion, a *general traverse*, or denial of all matters in the bill. This practice is said to have obtained when it was usual for the defendant merely to set forth his case, without answering every clause in the bill; and the form, though rather impertinent when the bill has been fully answered, is still continued in practice.²⁶

4375. The answer must be signed by the defendant or defendants putting it in, unless an order has been obtained to put it in without a signature.²⁷ When the answer is put in by guardian or committee, the guardian or committee is alone required to sign it. The object of obtaining the signature of the defendant is to identify the instrument to which he has given the sanction of his oath for the purpose of rendering a conviction of perjury more easy.²⁸

4376. An answer must always be under oath or affirmation, unless the plaintiff chooses to dispense with it; and, in such case, the court will order the answer of the defendant to be taken without oath. By waiving the oath, the complainant relinquishes the right of applying to the court to take the answer off the file, on the ground that it is false.²⁹ Persons who are conscientiously

¹⁹ Story, Eq. Pl. § 860.

²⁰ Cooper, Eq. Pl. 317, 318.

²¹ Cooper, Eq. Pl. 318; Mitford, Eq. Pl. Jeremy, ed. 313.

²² *Alsager v. Johnson*, 4 Ves. Ch. 217; *Norway v. Rowe*, 1 Mer. Ch. 347; *Curtes v. Master*, 11 Paige, Ch. N. Y. 15; *Hood v. Hinman*, 4 Johns. Ch. N. Y. 437; *Woods v. Morrell*, 1 Johns. Ch. N. Y. 103.

²³ *Rensselaer v. Brice*, 4 Paine, C. C. 174.

²⁴ *Woods v. Morrell*, 1 Johns. Ch. N. Y. 103.

²⁵ Mitford, Eq. Pl. Jeremy, ed. 41; 1 Daniell, Chanc. Pract. 483.

²⁶ Mitford, Eq. Pl. Jeremy, ed. 314; 2 Daniell, Chanc. Pract. 268.

²⁷ *Dennison v. Bassford*, 7 Paige, Ch. N. Y. 370.

²⁸ 1 Harrison, Chanc. Pract. Newland, ed. 170.

²⁹ *Dennison v. Bassford*, 7 Paige, Ch. N. Y. 370. See 2 Bland, Ch. Md. 285.

scrupulous against taking an oath may in general be affirmed. A Jew is sworn on the Pentateuch, and generally with his hat on, and other persons according to the forms and ceremonies of their religion. In the case of a defendant who is unacquainted with the English language, an order must be obtained for an interpreter, and the answer being engrossed in the language of the defendant, a translation must be made by the interpreter, and such translation must be annexed. The defendant is then sworn to his answer; the interpreter attending is then sworn to interpret truly, conveys to the defendant the language of the oath, and at the same time he swears to the translation as just and true to the best of his ability.³⁰

The respondent has a right to make answer under oath, although not required by the complainant.³¹

4377. A corporation, when defendant, makes the answer under the common seal of the corporation.³²

4378. An answer must in general be signed by counsel, unless, according to the English practice, it is taken by commissioners in the country, under the authority of a commission issued for the purpose, in which case the signature of the counsel is not required, the commissioners being responsible for the propriety of its contents, as it is supposed to be taken by them from the mouth of the defendant. When it is not signed by counsel, the answer will be taken off the file on the application of the plaintiff.³³

4379. It is not always easy to say when an answer is sufficient and when it is not. If the defendant will simply answer in the terms of the bill, he avoids all difficulty on the subject. But if in doing so he gives an answer, which is not precise, with reference to the matters on which he is so interrogated, and then endeavors to shelter himself under a general denial, coupled with the words "except as aforesaid," or similar expressions, he often makes it difficult to decide whether the answer is sufficient or not. The rule seems to be that whenever the defendant denies the bill to be true, "except as aforesaid," or, "except as appears by the other parts of this answer," if there be not found in the answer a clear and sufficient statement, which, to a reasonable extent, meets the whole case, the answer is deemed to be evasive.³⁴

An answer will be insufficient when the defendant excuses himself from answering; when he has good ground for not answering he must take advantage of it by demurrer or by plea, for it is a general rule of pleading in chancery that a defendant cannot by answer excuse himself from answering; and when he attempts to answer, he must answer all the charges contained in the bill, and all the interrogatories properly founded upon them, as far as they are necessary to enable the complainant to have a complete decree, in case he succeeds in the suit. To this rule, however, there are some exceptions, already noticed, that defendant is not compellable to answer matter which will render him liable to criminal punishment or a forfeiture, or subject him to expose the weakness of his own title, and others, which have been the subject of our inquiries.³⁵

³⁰ Cooper, Eq. Pl. 325, 326; 3 Brown, Ch. 263; 4 Brown, Ch. 90.

³¹ *White v. Hampton*, 9 Iowa, 181.

³² *Supervisors v. Mississippi R. R. Co.*, 21 Ill. 338. To obviate the inconvenience of not having an oath, the plaintiff not unfrequently includes some of the officers of the corporation, or sometimes a mere corporator, as a defendant, for the purpose of obtaining a discovery. *Wright v. Dane*, 1 Metc. Mass. 237.

³³ *Wall v. Stubbs*, 2 Ves. & B. Ch. Ir. 358; Cooper, Eq. Pl. 327; Mitford, Eq. Pl. Jeremy, ed. 315; 2 Daniell, Chanc. Pract. 268; Story, Eq. Pl. § 876.

³⁴ *Tipping v. Clark*, 2 Hare, Ch. 383; see *Stafford v. Brown*, 4 Paige, Ch. N. Y. 88; *Hodgson v. Butterfield*, 2 Sim. & S. Ch. 236; *Bogart v. Henry*, 1 Edw. Ch. N. Y. 7; *Pusey v. Wright*, 31 Penn. St. 387.

³⁵ *Bank of Utica v. Messereau*, 7 Paige, Ch. N. Y. 517.

If a plaintiff conceives an answer to be insufficient to the charges contained in the bill, he may take exceptions to it, stating such parts of the bill as he conceives are not answered, and praying that the defendant may in such respects put in a full answer. These exceptions must be signed by counsel.

If the defendant conceives his answer to be sufficient, or for any other reason does not submit to answer the matters contained in the exceptions, one of the masters of the court is directed to look into the bill, the answer, and the exceptions, and to certify whether the answer is sufficient in the points excepted to or not. If the master reports the answer insufficient in any of the points excepted to, the defendant must answer again to these parts of the bill in which the master conceives the answer to be insufficient, unless, by excepting to the master's report,³⁶ he brings the matter before the court, and there obtains a different judgment.³⁷

When a defendant has insisted on a matter as a reason for not answering, though he does not except to the master's report, yet he is not absolutely precluded from insisting on the same matter in a second answer, and taking the opinion of the court, whether he ought to be compelled to answer further to that point or not.³⁸

Scandal and impertinence in an answer must be disposed of before the reference is made as to the insufficiency of the answer, for such impertinence and scandal are waived by a reference for sufficiency.³⁹

When the defendant pleads or demurs to any part of the discovery sought by the bill, and also answers, if the plaintiff takes exception to the answer before the plea or demurrer has been signed, he admits the plea or demurrer to be good; for, unless he admits it to be good, it is impossible to determine whether the answer is good or not. But if the plea or demurrer is only to the relief prayed by the bill, and not to any part of the discovery, the plaintiff may take exceptions to the answer before the plea or demurrer has been argued.⁴⁰

When the demurrer is accompanied by an answer to any part of the bill, even a denial of combination merely, and the plea or demurrer is overruled, the plaintiff must except to the answer as insufficient.⁴¹ But if a plea or demurrer is filed without an answer, and is overruled, the plaintiff need not take exceptions, and the defendant must answer to the whole bill as if no defence had been made.⁴²

4380. When a further answer is required, it is in every respect similar to, and indeed it is considered as forming part of, the first answer; and an answer to an amended bill is considered as part of the answer to the original bill.⁴³ Therefore, if the defendant in a further answer, or an answer to an amended bill, repeats any thing contained in a former answer, the repetition will be considered as impertinent, unless it varies the defence in point of substance, or is otherwise necessary or expedient; and if, upon a reference to the master, such parts of the answer are reported to be impertinent, they will be struck out as such, with costs, which in strictness are to be paid by the counsel who signed the answer.⁴⁴

³⁶ As to the form and effect of exceptions to a master's report, see *Story v. Livingston*, 13 Pet. 359.

³⁷ *Mitford, Eq. Pl. Jeremy*, ed. 316.

³⁸ *Mitford, Eq. Pl. Jeremy*, ed. 316, 317.

³⁹ *Cooper, Eq. Pl.* 322.

⁴¹ *Cotes v. Turner*, Bunb. Exch. 123.

⁴² *Mitford, Eq. Pl. Jeremy*, ed. 317.

⁴³ See *Slauson v. Englehart*, 34 Barb. N. Y. 198. A supplementary answer cannot be filed after the cause is set down for hearing unless some good reason is shown for the delay. *Smallwood v. Lenior*, 2 Beasl. Ch. N. J. 123.

⁴⁴ *Mitford, Eq. Pl. Jeremy*, ed. 318.

4381. The effect of an answer upon a defendant is, that it is taken to be true, and if false, he may be indicted for perjury; yet there are many cases in which an individual is allowed on application to the court to reform his answer, and, in some instances, to take it off the file; but that can be done only by a special application, satisfying the conscience of the court how it comes that a document which stands in the place of a solemn deposition is now alleged to be founded in mistake.⁴⁵

4382. The facts which he admits by his answer are binding upon the defendant; but when there are several defendants, the answer of one is not in general evidence against the others;⁴⁶ such answer is considered evidence for and against himself only. The reason of this is, that there is no issue between the parties, and there has been no opportunity for cross-examination.⁴⁷ Where, however, a defendant in his answer said his memory was impaired by age, and referred to another person as having been his agent, and as possessing a more perfect knowledge of the matters inquired after than himself, the agent was made a party, and his answer was allowed to be read against the principal.⁴⁸

4383. Formerly, when a material fact was put in issue by the answer, the courts of equity followed the maxim of the civil law, *responsio unius non omnino audiatur*, and required the evidence of two witnesses as the foundation for a decree. But of late years the rule has been referred more closely to the equity on which it is grounded, namely, the equal right to credit which a defendant, when his oath, "positively, clearly, and precisely" given, and consequently subjecting him to the penalties of perjury, is opposed to the oath of a single witness. When this is the case, some corroboration is required; either the testimony of a second witness, or any circumstances which may give a turn to the balance;⁴⁹ because, so far as the answer of the defendant is strictly responsive to the bill, it is admitted as evidence in his favor, as well as against him. The reason is, that the plaintiff, by appealing to the conscience of the defendant, admits that the answer is worthy of credit as to the matter of the inquiry.⁵⁰

But although the answer of the defendant is evidence in his favor as well as against him, this must be understood subject to this qualification, that when the answer of the defendant admits a fact, but insists on matter of avoidance, the complainant need not prove the fact admitted, but the defendant must prove the matter in avoidance.⁵¹

4384. The plea and answer of the defendant are intended to set up a defence for him against the charges of the plaintiff as contained in his bill, or the answer may admit the charges in the bill to be true. In this last case there is no occasion for any altercation between the parties. If, on the contrary, the defendant denies the right of the plaintiff to relief or a discovery, the latter should consider, first, whether the answer is sufficient in point of law or not.

⁴⁵ *East India Company v. Keighley*, 4 Madd. Ch. 27.

⁴⁶ *Hayden v. McIlvain*, 4 Bibb, Ky. 57.

⁴⁷ *Chevet v. Jones*, 6 Madd. Ch. 248; *Morse v. Royal*, 12 Ves. Ch. 355; but see *Perre v. Castro*, 14 Cal. 519.

⁴⁸ *Anon.* 1 P. Will. Ch. 100. See *Wood v. Braddick*, 1 Taunt. 104; *Pritchard v. Draper*, 1 Russ. & M. Ch. 191.

⁴⁹ *Gresley*, Eq. Ev. 4; *Walton v. Hobbs*, 2 Atk. Ch. 19; *Cooke v. Clayworth*, 18 Ves. Ch. 17; *Toole v. Medicott*, 1 Ball & B. Ch. Ir. 402; *Morphett v. Jones*, 1 Swanst. Ch. 172; *Kemeys v. Proctor*, 3 Ves. & B. Ch. Ir. 58; *Biddulph v. St. John*, 2 Schoales & L. Ch. Ir. 532. But two witnesses are not required to overturn the answer of a defendant as to a fact of which he professes ignorance only, and calls for proof, but which might exist and not be known to him. *Young v. Hopkins*, 6 T. B. Monr. Ky. 22; see *Cochran v. Evans*, 1 Harr. Del. 200.

⁵⁰ 2 Story, Eq. Jur. § 1528; *Clark v. Reimsdyk*, 9 Cranch, 166.

⁵¹ *Clark v. White*, 12 Pet. 178.

If insufficient, the objection ought to be made before any replication, because, by replying, the plaintiff admits the sufficiency of the answer, however imperfect it may be; secondly, if the answer is sufficient to defeat the plaintiff, he should ask leave of the court to amend his bill; and to this amended bill the defendant may make such defence as he shall think proper, whether required by the plaintiff to answer it or not.⁵² In some cases, however, the court will allow the plaintiff to withdraw his replication, he paying the costs which have been incurred.

4385. Formerly, replications were either general or special, but in modern times, special replications have been altogether disused,⁵³ and, of course, rejoinders, surrejoinders, etc., have fallen with them. A general replication is a general denial of the truth of the defendant's plea or answer, and of the sufficiency of the matter alleged in it, to bar the plaintiff's suit, and an assertion of the truth and sufficiency of the bill.

4386. The effect of a replication is to put the cause completely at issue. After the cause has come to a hearing, and the pleadings are carefully examined, it is sometimes found that a replication has never been filed; in such case, the court will permit the plaintiff to file a replication *nunc pro tunc*⁵⁴.

⁵² Mitford, Eq. Pl. Jeremy, ed. 323.

⁵³ Mitford, Eq. Pl. Jeremy, ed. 321; Storms v. Storms, 1 Edw. Ch. N. Y. 358; Story, Eq. Pl. § 878. See Babb v. Mackey, 10 Wisc. 371.

⁵⁴ Rodney v. Hare, Mosel. Ch. 396; Mitford, Eq. Pl. Jeremy, ed. 323; Gaskill v. Sine, 2 Beasl. Ch. N. J. 130.

CHAPTER XIV.

INCIDENTS TO PLEADINGS IN GENERAL.

- 4388. When an amendment may be made.
- 4391. Amendments by the plaintiff.
- 4393-4398. Amendments by the defendant.
- 4394. Amendment of demurrer.
- 4395. Amendment of pleas.
- 4396. Amendment of answers.

4387. Having considered the nature of the pleadings used in the equitable jurisdiction of courts of chancery, and the manner in which they are brought to a termination, it will next be requisite to ascertain what will be the effect of any error or mistake which may have occurred in the course of such proceedings. It would be contrary to the nature of equity if a party were to lose his suit in consequence of a mistake made in the course of pleadings; for this reason, matters of form are never allowed to prejudice a party, the real and substantial merits of the cause are always looked to. When an error has been discovered, and it is insisted on, the courts will either permit an amendment of the pleadings, that is, the correction of the error, or wholly overlook it, as being waived by the party making the objection by not excepting to it in a proper time.

4388. As to the *time* when amendments may be made, it may be observed that before their termination the courts will frequently permit the pleadings filed to be altered, for the purpose of effectuating justice, as the interests of the party may require, except in case of answers put in upon oath, in which no change will be allowed for very obvious reasons.¹ After the witnesses have been examined no part of the pleadings can, in general, be altered or added to but under very special circumstances, or in consequence of some subsequent event, except that, if the plaintiff at any time discovers that he has not made proper parties to his bill, he may obtain leave to amend it, for the special purpose of adding the necessary parties.

Though in general, with respect to the original parties and their interests, no amendment will be permitted after the cause is at issue and witnesses have been examined and publication passed, yet a plaintiff has been permitted, under such circumstances, to amend his bill by adding a prayer omitted by mistake. Even upon hearing, the court having the whole case before it, and being embarrassed in its decision by defects in the pleadings, has permitted amendments both to bills and answers under very special circumstances.²

4389. When *new matter* has been discovered by either plaintiff or defendant before a decree deciding on the rights of the parties has been pronounced, a

¹ Amendments to pleadings to which the parties have deliberately made oath are allowed with great caution. *Verplanck v. The Mercantile Insurance Company*, 1 Edw. Ch. N. Y. 46. But in matters of form, or mistakes of dates, or verbal inaccuracies, courts of equity will permit amendments to answers. *Smith v. Babcock*, 3 Sumn. C. C. 410; *Mitford, Eq. Pl. Jeremy*, ed. 328.

² *Mitford, Eq. Pl. Jeremy*, ed. 331; *Davison v. Davison*, 2 Beasl. Ch. N. J. 238.

cross bill has been permitted to bring such matter before the court to answer the purposes of justice instead of allowing an amendment of a bill or answer, where the nature of the matter discovered would admit of its being so brought before the court; and after a decree upon a similar discovery, a bill of review, or a bill in the nature of a bill of review, has been allowed for the same purpose, both these forms of proceeding being in their nature similar to amendments of bills or answers calculated for the same purposes, and generally admitted under similar restrictions.³

Sometimes upon the hearing of the cause it has appeared that matter properly in issue, or at least stated in the proceedings, has not been proved against parties who have admitted it by their answers, although not competent so to do, for the purpose of enabling the court to pronounce a decree. In these cases the court has permitted the proper steps to be taken to obtain the necessary proof, and for this purpose has suffered interrogatories to be exhibited; and where the plaintiff has neglected to file a necessary replication, he has been allowed to supply the defect.⁴

4390. In most of these cases the indulgence given by the court is allowed to the mistakes of the parties, and with a view to save expense. But when injury may arise to others, the indulgence has been more rarely granted; and, so far as the pendency of a suit can affect either parties to it, or strangers, matter brought into a bill by amendment will not have relation to the time of filing the original bill, but the suit will so far be considered as pendent from the time of the amendment, except that where a bill seeks a discovery from a defendant; and having obtained that discovery, the bill is amended by stating the result, it should seem that the suit may, according to the circumstances, be considered as pendent from the filing of the original bill, at least as to that defendant, and perhaps to the other parties, if any, and to strangers also, so far as the original bill may have stated matter which might include, in general terms, the subject of the amendment.⁵

4391. Amending the bill is useful for various purposes: for the correction of mistakes or the suppression of impolitic admissions in the original statement, for adding parties, for inquiring additional facts, or the further investigation of facts which have been partially disclosed, and for putting in issue new matter stated in the answer.⁶

Amendments are allowed to correct errors occasioned by the omission of making proper parties, or where a bill is defective in its prayer for relief, or there has been an omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself,⁷ nor repugnant thereto.⁸ Or if, when the defendant has put in his answer, the plaintiff thereby obtains new light as to the circumstances of his case, he may amend his bill in order to shape his case accordingly.⁹ Imperfections in the frame of the bill may be remedied by amending as often as occasion may require; but the matter introduced by amendment must not be matter which has happened since the filing of the bill, unless the defendant has not put in his answer, in

³ Mitford, Eq. Pl. Jeremy, ed. 331, 332.

⁴ Mitford, Eq. Pl. Jeremy, ed. 329.

⁵ Mitford, Eq. Pl. Jeremy, ed. 329, 330.

⁶ Gresley, Ev. 21, 22.

⁷ *Lyon v. Talmadge*, 1 Johns. Ch. N. Y. 184; see *Dodd v. Astor*, 2 Barb. Ch. N. Y. 395; *Cock v. Evans*, 9 Yerg. Tenn. 287.

⁸ *Verplanck v. The Mercantile Insurance Company*, 1 Edw. Ch. N. Y. 46.

⁹ So too where facts are disclosed upon the examination before a committee which the defendant should have disclosed in his answer, an amendment will be allowed. *Hoyt v. Smith*, 27 Conn. 468.

which case the bill may be amended by adding such supplemental matter.¹⁰ When matter has been discovered after the answer has been filed, which is then called new matter, it cannot be introduced by the amendment, the only way to introduce it is by filing a supplemental bill.¹¹

It is a rule that before issue joined the only way to introduce matter which occurred before the filing of the bill is by way of amendment. It cannot be introduced by way of supplemental bill. The reason assigned for this is, that the original cause is still *in fieri*. After issue joined it is no longer so, and such matter may be introduced by a supplemental bill, which may be filed by leave of court. Such supplemental bill, however, cannot be brought without the leave of the court, because the plaintiff cannot introduce new matter into the same cause after the time for amendment has passed, so as to make a part of it, without permission of the court.¹²

After a plea set down for argument the plaintiff may amend his bill; and though taking exceptions to an answer accompanying a plea is an admission of the plea, yet amending the bill after the plea is not to have the effect of allowing the plea. So at any time before a demurrer is allowed the plaintiff may amend the bill.¹³ If, upon hearing the cause, the plaintiff appears entitled to relief, but the case made out by the bill is insufficient to ground a complete decree, the court will not allow an amendment, but will sometimes give the plaintiff leave to file a supplemental bill, to bring before the court such matter as is necessary, in addition to the case made out by the original bill. If the addition of parties only is wanted, an order is usually made for the cause to stand over, with liberty for the plaintiff to amend his bill by adding the proper parties.¹⁴

4392. Considering infants under its protection, the court will not permit an infant plaintiff to be injured by the manner in which his bill has been framed. Therefore, where a bill on behalf of an infant submitted to pay off a mortgage, and, upon hearing the cause, the court was of opinion that the infant was not bound to pay the mortgage, it was ordered that the bill should be amended by striking out the submission. And when, by the bill, a matter has not been properly put in issue, to the prejudice of the infant, the court has generally ordered the bill to be amended.¹⁵

4393. A defendant may also amend his pleadings, but this is allowed with much more caution than in the case of a plaintiff. These amendments may be allowed with regard to demurrers; to pleas; to answers.

4394. A demurrer cannot, as a plea, be good in part and bad in part, with reference to its extent, or the quantity of the bill covered by it; and if it is too general, it must be overruled; but, in such case, the court will exercise a discretion, when a fair case is made, to give the defendant leave to amend, and to narrow it upon proper terms, which is a guard upon the practice.¹⁶

4395. Although the court will permit pleas to be amended when there has been an evident mistake or slip, and the material ground of defence appears sufficient, yet the court always expects to be told precisely what the amendment is to be, and how the slip happened, before the allowance of the amendments

¹⁰ Cooper, Eq. Pl. 332; Mitford, Eq. Pl. Jeremy, ed. 324; Van Maren *v.* Johnson, 15 Cal. 308; Brookover *v.* Hurst, 1 Metc. Ky. 665.

¹¹ Mitford, Eq. Pl. Jeremy, ed. 326; Stafford *v.* Howlett, 1 Paige, Ch. N. Y. 200; Hammond *v.* Place, Harr. Ch. Mich. 438.

¹² Story, Eq. Pl. § 890.

¹³ Gorham *v.* Wing, 10 Mich. 486.

¹⁴ Cooper, Eq. Pl. 334; Mitford, Eq. Pl. Jeremy, ed. 326, 327; Fulton *v.* Smith, 27 Ga. 413.

¹⁵ Mitford, Eq. Pl. Jeremy, ed. 327; Cooper, Eq. Pl. 335; Story, Eq. Pl. § 892.

¹⁶ Cooper, Eq. Pl. 336.

takes place. But though leave will be given to amend pleas, yet the defendant is usually tied down to a very short time in which to amend. In some cases where the amendment of the plea cannot be made in consequence of its construction, the court have granted the defendant leave to withdraw his plea, and plead *de novo* in a fortnight.¹⁷

When a plea is clearly good in substance, but is considered as objectionable in point of form, as not concluding in bar or otherwise, and not stating some other necessary things, leave will be given to amend.¹⁸

4396. When the defendant has given the sanction of an oath to his defence, the court cannot allow amendments, for obvious reasons, except in small matters not of any substantial importance, unless upon evidence to the court of surprise. The most common case of amending an answer is where, through inadvertency, a defendant has mistaken a fact or a date, then the defendant will be permitted to amend, to prevent his being prosecuted for perjury.¹⁹ In general, however, this indulgence is confined to mere mistake or surprise;²⁰ and the amendment will be allowed or refused in the sound discretion of the court.²¹

An amendment of the bill entitles the plaintiff to amend the plea or answer.²²

4397. A distinction has also been made between the admission of a fact and the admission of a consequence in law or in equity. When, therefore, a defendant, after putting in an answer, discovered a ground or defence to a bill of which he was not before informed, a purchase by the person under whom he claimed, without notice of the plaintiff's title, which could only be used by way of defence, and could not be the ground of a bill of review, the court allowed the answer to be taken off the file, and the new matter to be added, and the answer resworn.²³

4398. When a fact which may be of advantage to a defendant has happened subsequently to his answer, it cannot with propriety be put in issue by amending his answer. If this appears to the court on the hearing, the proper way seems to be to order the cause to stand over till a new bill, in which the fact can be put in issue, be brought to a hearing with the original suit; and a bill for this purpose seems to be in the nature of a plea *puis darrein continuance* at the common law.²⁴

In some cases the defendant is allowed to take advantage of such a state of facts by filing a supplemental answer.²⁵

¹⁷ *Nobkissen v. Hastings*, 2 Ves. Ch. 85.

¹⁸ *Cooper*, Eq. Pl. 236; *Newman v. Wallis*, 2 Brown, Ch. 143, 147; *Brooks v. Miller*, 1 Grant, Cas. Penn. 202.

¹⁹ *Cooper*, Eq. Pl. 337; *Mitford*, Eq. Pl. Jeremy, ed. 328; *Story*, Eq. Pl. § 896.

²⁰ *Mitford*, Eq. Pl. Jeremy, ed. 328.

²¹ *Wiggin v. Dorr*, 3 Sumn. C. C. 410; *Calvert v. Carter*, 18 Md. 73.

²² *Bassett v. Salisbury Co.*, 43 N. H. 249; *Logan v. Tibbott*, 4 Greene, Iowa, 389.

²³ *Patterson v. Slaughter*, Ambl. Ch. 292; *Mitford*, Eq. Pl. Jeremy, ed. 328, 329; *Cooper*, Eq. Pl. 337; *Story*, Eq. Pl. § 897. See *Denton v. Logan*, 3 Metc. Ky. 434.

²⁴ *Mitford*, Eq. Pl. Jeremy, ed. 329.

²⁵ *Matteson v. Curtis*, 14 Wisc. 436.

CHAPTER XV.

THE EVIDENCE IN EQUITY.

- 4399. The proceeding after the pleadings.
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4399. Having explained the various proceedings in a chancery suit, the selection of parties, the several kinds of bills, and the defence which may be set up to the charges of the plaintiff, the whole course of pleadings, and how a cause is brought to an issue, the next object of examination will be the proceedings which follow. These will be considered in two chapters, relating to the evidence; the hearing; and the decrees.

4400. While many of the rules relating to the admissibility, competency, and effect of evidence must be the same in equity as at law, there are yet differences arising from the restricted jurisdiction in equity, the character of the tribunal which is to give the decision, the nature of the relief afforded rendering special inquiries necessary, and other causes which require a special examination here. The subject of evidence at law having been previously considered, it will only be necessary now to attend to the points of difference.

4401. One important difference will be found to arise from the limited jurisdiction in equity as compared with the whole range of jurisdiction at law. In each branch the evidence of course must be directed toward the point in issue. This in equity, in a large majority of instances, involves some matter of fraud, accident, or mistake. At law, however, the issue may relate to almost any matter connected with human affairs; crimes, damages caused by tortious acts or breach of contract, and an infinity of various matters may be involved. Of

course, then, those rules of evidence peculiarly applicable to those excluded classes are of no service in matters in equity.

4402. Evidence in equity is somewhat circumscribed by the nature of the tribunal itself and the distinct character of its proceedings. Matters are frequently brought into a trial at law on which there can be no question in the mind of the judge and the bar as to the proper verdict, yet a great latitude is allowed for the production of evidence which may influence the feelings and prejudices of an inexperienced and irresponsible jury. On the contrary, an equity suit is to be deliberately decided by calm reason alone; it usually contains points of real legal difficulty, and depends upon the close application of principles to the main facts of the case. Consequently, much discursive matter is pruned away from the evidence in equity, and suits are not unfrequently decided upon mutual admissions alone.¹

4403. There is a marked difference between the laxity allowed in certain cases in equity and the strictness insisted upon at law. At law, for instance, a mass of cases and rules may be found under the head of variance; courts of equity, on the contrary, do not readily admit the importance of a mistake or inaccuracy, and will without difficulty allow a flaw to be remedied by amendment.²

4404. Sometimes courts of equity allow a minuteness and an extension when an investigation has been fairly entered upon in equity, which leads into innumerable ramifications. For example, a dispute concerning a trust requires due proof of deeds and wills, and thence may lead to questions of forgery and conspiracy, and trench upon the criminal jurisdiction. In cases of fraud and trusts a court of equity does not confine itself within strict rules, as they do at law, but for the sake of justice and equity will enter into the merits of the case in order to come at fraud, or to know the true and real intention of a trust or use declared under deeds.³

4405. The whole system of evidence in the courts of equity is an engrafting of the rules established amongst English lawyers upon the forms used by the civilians, for the maxim *æquitas sequitur legem* applies with full force to this branch of the law.⁴

4406. We shall next consider in order the three matters of admissions, the burden of proof, or *onus probandi*, and the restriction of the evidence to the matters in issue.

4407. It is a general rule that whatever is necessary to support the case of the plaintiff so as to entitle him to a decree against the defendant, or in the case of the defendant to support his own case, as made by his answer against that of the plaintiff, must be proved, unless it is admitted by the other party. This leads us to consider what admissions will render the production of proof unnecessary.

Admissions are the declarations which a party, by himself or those who act under his authority, make of the existence of certain facts. The admission is simply the testimony which the party admitting bears to the truth of an obligation or of a fact against himself. Admissions are either upon the record or by agreement between the parties.

4408. Admissions upon record are actual, or such as appear in the bill or the answer, or constructive.

4409. Actual admissions are said to be plenary or partial. They are plenary by force of the terms used, not only when the answer runs in this form, "the defendant admits it to be true," but also when he simply asserts, and, generally

¹ Gresley, Ev. 2.

³ *Man v. Ward*, 2 Atk. Ch. 229.
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² Gresley, Ev. 2.

⁴ *Reynish v. Martin*, 3 Atk. Ch. 333.

speaking, when he says "he has been informed, and believes to be true," without adding a qualification, such as, "that he does not know of it of his own knowledge to be so, and, therefore, does not admit the same." Partial admissions are those which are delivered in terms of uncertainty, mixed up, as they frequently are, with explanatory or qualifying circumstances. The admission must be very explicit and unqualified, to dispense with the production of that which constitutes the foundation of the suit.⁵

The plaintiff, of course, cannot read any part of his own bill as evidence in support of his case, unless it is corroborated by the answer; and so much as is so corroborated may be considered as embodied in the answer, and it is, therefore, an admission of its truth.

In those cases, however, in which the cause is set down for a hearing upon the bill and answer, the allegations of each are to be taken as true,⁶ except where they contradict each other; in this case, if the answer be on oath, the averments of the bill which are denied by the answer will not be taken as true.⁷

4410. Though, at law, it is a general rule that a bill in chancery will not be evidence, except to show that such a bill did exist, and that certain facts were in issue between the parties, in order to introduce the answer or the disposition of the witnesses, and that it cannot be admitted to prove any facts either alleged or denied in the bill, yet a different rule prevails in equity, and the bill may be read in evidence by the defendant of any matter therein averred.⁸

This right of the defendant to read the plaintiff's bill as evidence is confined to the bill as it stands on the record; for if it has been amended, the amended bill is the only one upon record.⁹

4411. An answer is evidence of almost irresistible strength against the defendant who files it, or any person claiming under him, for it is a deliberate statement on oath of the truth of all it contains. It is only so far short of being conclusive that it may be proved to have been sworn to under erroneous impressions.¹⁰ The answer of an infant cannot be read against him in another suit; but it may be used against the guardian in a cause which he defends in a different capacity, for it is his admission upon oath.¹¹

When, instead of replying to the defendant's answer, the plaintiff sets down the cause for hearing on bill and answer, the defendant is at liberty to read his answer as evidence in favor of his own case, and the decree is made on the assumption that every fact stated by the defendant is true.¹² If the plaintiff files a replication, he precludes the defendant from reading his answer, except as to costs, and imposes upon him the necessity of proving the statements therein contained by an examination of witnesses.¹³ The answer of the defendant may be read on a question of costs to the extent only of showing that, either from some offer or some statement contained in it, the whole or part of the costs incurred subsequent to the answer were unnecessary.¹⁴

⁵ *Cox v. Allingham*, Jac. Ch. 339.

⁶ *Gaskill v. Sine*, 2 Beasl. Ch. N. J. 130; *Buntain v. Wood*, 29 Ill. 504; *Rogers v. Mitchell*, 41 N. H. 154.

⁷ *Tainter v. Clark*, 5 All. Mass. 66; *Rogers v. Mitchell*, 41 N. H. 154.

⁸ *Ives v. Medcalfe*, 1 Atk. Ch. 63.

⁹ 2 *Daniell*, Chanc. Pract. 398, 399.

¹⁰ *Weider v. Clark*, 27 Ill. 251.

¹¹ *Beasley v. Magrath*, 2 Schoales & L. Ch. Ir. 34. The admissions in the answer of a guardian ad litem do not dispense with the necessity of proof. *Chaffin v. Kimball*, 23 Ill. 36.

¹² *Trout v. Emmons*, 29 Ill. 433.

¹³ See *Culbertson v. Lucky*, 13 Iowa, 12. An answer not sworn to or sworn to when not required is of no force as evidence, but merely puts in issue the allegations of the bill. *Morris v. Hoyt*, 11 Mich. 9; *Wilson v. Holcomb*, 13 Iowa, 110; *Dorn v. Bayer*, 16 Md. 144; *Rainey v. Rainey*, 35 Ala. N. S. 182.

¹⁴ *Smith*, Chanc. Pract. 340; 2 *Daniell*, Chanc. Pract. 404.

4412. With respect to constructive admissions, the most ordinary instance of them is, when a plea has been put in by a defendant, either to the whole or a part of the bill; in that case, the bill, or that part of it which is pleaded to, so far as it is not controverted by the plea, is admitted to be true. When the plaintiff has replied to a plea, he may, therefore, rest with that admission, and need not go into evidence as to that part of his case which the plea is intended to cover, unless the plea is a negative plea, in which case it will be necessary to prove the matter negatived, for the purpose of disproving the plea in the same manner, that he may enter into evidence for the purpose of disproving the matter which has been pleaded affirmatively.

For the same reason, where a special replication is put into an answer, all those parts of the answer which are not denied by the replication are admitted to be true.

4413. There is a great difference between actual and constructive admissions, with respect to the manner in which they are represented to the court; the former are read to substantiate the case of the party reading them, in the same manner as other proofs in the cause; the latter are presented to the court at the outset of the hearing, by the counsel opening the pleadings, for the purpose of showing what are the matters in issue between the parties.¹⁵

4414. Admissions by agreement between the parties are in general made to save expense or to prevent delay. They should be in writing and in explicit terms, without ambiguity, and signed by the parties or their solicitors, the solicitor employed by the party being considered sufficient to bind his principal, as it is inferred that he had authority for that purpose.

The parties of course may admit what they please, but they are not allowed to make admissions which will violate the known principles of law; as, where a husband was willing his wife should be examined as a witness against him in an action for a malicious prosecution.¹⁶

4415. When the facts are not admitted by an actual agreement, nor by implication, they must be proved, and the first question to be considered is, upon whom is the burden of proof, or the *onus probandi*, cast.

It has already been laid down as a general proposition that the point in issue is to be proved by the party who asserts the affirmative, according to the principle of the civil law: *ei incumbit probatio qui dicit, non qui negat*.¹⁷

Thus, in general, it rests upon the complainant to establish by evidence aliunde the truth of the matters alleged in his bill;¹⁸ and even where a decree is asked for, that the bill be taken *pro confesso*, the defendant being in default, the court in its discretion may yet require further evidence.¹⁹

A sworn answer which is responsive to the bill is equivalent to the testimony of a disinterested witness in dispute of the allegations of the bill.²⁰ So far as the answer sets up new matter it must be proved aliunde.²¹

4416. As the party on the other side does not come prepared to answer any thing but what is put in issue, it is a fundamental maxim, in equity, as well as at law, that no proof can be omitted of any matter which is not noticed in the

¹⁵ 2 Daniell, Chanc. Pract. 397.

¹⁶ Barker v. Dixie, Cas. temp. Hard. 264.

¹⁷ Dig. 22, 3, 2; Tait, Ev. 1; 1 Phillipps, Ev. 194; 1 Greenleaf, Ev. § 74; Dranguet v. Prudhomme, 3 La. 83; 2 Daniell, Chanc. Pract. 408. See before, 3092.

¹⁸ Crasse v. Brigham, 3 Stockt. Ch. N. J. 29; Jones v. Jones, 13 Iowa, 276.

¹⁹ Stephens v. Bicknell, 27 Ill. 444; Cook v. Woodbury, 13 Iowa, 21.

²⁰ Rich v. Levy, 16 Md. 74; Culbertson v. Lucky, 13 Iowa, 12; Johnson v. Richardson, 38 N. H. 353; see Cooper v. Tappan, 9 Wisc. 361; Bostick v. Love, 16 Cal. 69.

²¹ White v. Hampton, 10 Iowa, 238. Otherwise if the complainant sets down the matter for a hearing on the bill and answer. Rogers v. Mitchell, 41 N. H. 154.

pleadings. It is for this reason that, in the frame of bills, an introduction of every fact which the plaintiff means to prove is required, and that a defendant must state in his answer every thing of which he intends to avail himself in his defence.²²

4417. But to the rule thus broadly laid down there are certain exceptions. The cases in which these exceptions are principally applicable are those where the character of an individual, or his general behavior, or quality of mind, comes in question; as, when, for example, it is alleged that a man is *non compos*, it is the experience of every day that you may give particular acts of madness in evidence, and not the general evidence only that he is insane. For the same reason where a bill charges that a man is addicted to drinking, and liable to be imposed upon, the plaintiff is not in general confined to prove drunkenness generally, but particular instances are allowed to be given. In like manner where a bill charged that the defendant was a lewd woman, evidence of particular acts of incontinence was allowed to be read.²³ In cases of this nature, however, it is necessary in order to entitle the party to read evidence of particular facts that they should be pointed directly to the charge.²⁴

4418. It is not only a rule that the evidence must be confined to the issue, but that the *substance* of the case made out by the pleadings *must be proved*; that is, all the facts in the pleadings which are necessary to the case of the party alleging them, and which are not the subject of admissions, either in the pleadings or by agreement, must be established by evidence.²⁵

4419. Not only must the substance be proved, but the evidence must be substantially *the same case* as that which the party has stated upon the record; for the court will not allow the party to be taken by surprise by a case proved on the other side, different from that upon the record, as set up by him in his pleadings.

4420. When treating of the evidence which might be given in a suit at law, the subject of *documentary evidence* was so fully examined that it will be unnecessary here to repeat the rules there laid down.²⁶

4421. By *oral testimony* is meant the spoken evidence given by a witness. As to the manner in which it is given in chancery, it is proper to consider the competency of the witnesses, their examination by an examiner, their examination under a commission, of depositions taken under the act of congress, demurrers to interrogatories, proceedings on the return of the evidence.

4422. The first subject has been fully considered in another place.²⁷

4423. Witnesses in chancery are not in general examined as they are at law in open court in the presence of the judges. There are three modes of examining them, namely, by an examiner appointed by the court, or by commission under the seal of the court, or under the act of congress.

When the witnesses reside within the distance prescribed by law or the rules of the court, it is usual to apply to the court to appoint an examiner, who is generally a counsellor or solicitor in the court, who is thereupon authorized to take the depositions of the witnesses for either party.

In general, the witnesses attend voluntarily before the examiner, but should they refuse, they may be compelled by subpoena and attachment for contempt for disobeying it.

Interrogatories in writing are sometimes filed, and these are to be answered

²² 2 Daniell, Chanc. Pract. 411.

²³ Clark v. Periam, 3 Atk. Ch. 333, 340.

²⁴ Clark v. Periam, 3 Atk. Ch. 333; Sidney v. Sidney, 3 P. Will. Ch. 269; see Wheeler v. Trotter, 3 Swanst. Ch. 174, n.

²⁵ 2 Daniell, Chanc. Pract. 415.

²⁶ Before, 3094, *et seq.*

²⁷ Before, 3159, *et seq.*

by the witness, but in some jurisdictions questions are asked of the witnesses by the solicitors or counsel of the parties.

Before the witness is examined, the examiner administers an oath or affirmation to him. In the examination he is not bound by the interrogatories to the letter, but he ought to explain every matter to the witness which arises necessarily upon them. He ought to put the interrogatory to the witness, take down the answer in writing upon paper, concluding the answer to each interrogatory before another is put.²⁸

When all the interrogatories have been gone through, the examiner should carefully read the whole of the deposition to the witness, who, if he be satisfied with it, signs it, or, which is the safer mode, signs each sheet in the presence of the examiner. If he wishes to vary his testimony, or to make any alteration in or addition to it, he must do so before signing the deposition; for after it is complete, there is no reason why he should not sign it before leaving the examiner. So important is the signature of the witness to his deposition that should he die after his examination is completed, and before it is signed, the deposition cannot be made use of.²⁹ It seems, however, that if a witness, having signed his examination in chief, dies before he is cross-examined, his deposition may be read in evidence; the court, however, bearing in mind that the cross-examination had not taken effect, especially if it appeared that the party had lost any material fact which was within the knowledge of the witness, and could not have been proved by other means.³⁰

4424. When a witness resides or is abroad, so that his attendance cannot be procured before the examiner, a commission to take his deposition may be issued. This is done either by leave of court, specially granted, or by virtue of a general rule of the court, or of some legislative act.

Interrogatories are filed in the proper office, and notice is given to the opposite party or his counsel of the same. Within the time prescribed by the rules of the court, cross-interrogatories may be filed. Commissioners may be named by either party, and then the commission issues. This authorizes the commissioners to call before them the witnesses and to take their depositions in writing; and commands them to return the same, together with the interrogatories and the writ, sealed up, generally within the time therein limited; but before they proceed to the examination of witnesses, it directs them severally to administer the oath accompanying the commission to each other, and also to the clerk or clerks employed in transcribing or engrossing the depositions.

The commissioners execute the commission by reducing to writing the several answers to the interrogatories as the witnesses give them, having first administered an oath or affirmation to each witness to make true answers to the said interrogatories, and also to the clerk or clerks employed to take and write down, transcribe, and engross the depositions of all and every the witness and witnesses produced and examined by the commissioners, or any of them named in the commission.³¹

After the commission has been thus executed the commissioners annex the deposition of the witnesses to it, together with a copy of the oath they have taken, and indorse on the commission, "The execution of this commission appears in certain schedules hereto annexed;" this is signed by the commissioners; they next wrap the whole in an envelope, which is sealed, and the names of the commissioners written upon it. It is then addressed to the person designated,

²⁸ 2 Daniell, Chanc. Pract. 483.

²⁹ Copeland v. Stanton, 1 P. Will. Ch. 414.

³⁰ O'Callagan v. Murphy, 2 Schoales & L. Ch. Ir. 158.

³¹ 2 Daniell, Chanc. Pract. 499; 1 Smith, Chanc. Pract. 367.

and is either delivered to a messenger, or put into the post office, to be transmitted by mail.³²

4425. In the courts of the United States, depositions may be taken under the act of congress without giving notice. By the rules of practice for the courts of equity of the United States, it is ordered that in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witnesses, either under a commission or by a new deposition taken under the act of congress, if a court or a judge thereof shall, under all the circumstances, deem it reasonable.³³

4426. By a *demurrer to interrogatories* is understood the reasons which a witness tenders or assigns for not answering a particular question in interrogatories.³⁴ Every witness is bound by the form of the oath administered to him previous to his examination "to make true answers to all such questions as shall be asked of him upon the interrogatories" filed for his examination. If this obligation were to be strictly insisted upon, it might, in many cases, be productive of great injury either upon the witness himself or upon others, by compelling him to disclose matter which it is against the principles by which the courts are usually governed that he should discover. In a court of law, a witness has it in his power immediately to take the opinion of the presiding judge as to his right to withhold an answer to any question which may be put to him; but in courts of equity a witness has no such power, nor can the examiner or commissioner before whom a witness is examined, not being authorized to pronounce a judgment as to the propriety of the question put to the witness; still the witness is not left without a remedy, and a method is provided by which he may submit his objection to answer the various questions proposed to him to the decision of the judge. This is done by a demurrer to interrogatories.³⁵

The word demurrer has not the same meaning as when it is applied to a bill; there is a marked difference. Demurrers to interrogatories differ from demurrers to bills in this, that the former depend upon extrinsic facts, and are supported and opposed by affidavits.³⁶ The witness states on oath his reasons for refusing to answer,³⁷ which are taken down and sworn to by him, with the interrogatories.

4427. There is no particular *form* either for the demurrer or for the affidavits, and only one material restriction, namely, that the witness must not state what would have been the effect of his answer if given, for that would allow evidence to transpire before publication has regularly passed.³⁸

The grounds upon which a witness may protect himself from answering to interrogatories are nearly the same as those which a defendant has a right to insist upon as a reason for not giving the discovery required by the bill. These are principally reduced to two: that he is incompetent to give the evidence demanded of him, as that he is a party interested, or that the information required of him was obtained professionally, or he may state a particular privilege which permits any individual to remain silent, when a direct answer might subject him to penalties.

4428. The ground of objection to an interrogatory because the witness has an

³² 1 Smith, Chanc. Pract. 369, 370.

³³ Rules of the United States Courts, Rule 68.

³⁴ Parkhurst v. Lowten, 2 Swanst. Ch. 194.

³⁵ 2 Daniell, Chanc. Pract. 354, 355.

³⁶ Nightingale v. Dodd, Mosel. Ch. 229; Parkhurst v. Lowten, 3 Madd. Ch. 266.

³⁷ Bowman v. Rodwell, 1 Madd. Ch. 266.

³⁸ Parkhurst v. Lowten, 2 Swanst. Ch. 213.

interest, that is, that the answer to it may lead to a decree against him, is available in those cases where the witness is a party to the suit, or has a direct interest in the subject matter.³⁹

4429. The objection on the ground of *professional confidence* proceeds upon the same principles as are applicable to the case of defendants by which counsel, attorneys, solicitors, and proctors are restricted in their testimony. They are not permitted to disclose any information which they may have obtained in the capacity of professional advisers. They are considered as the same person with their clients, and are entrusted with their secrets.⁴⁰ As a professional man, well acquainted with the facts and pleadings, is or ought to be himself best able to fix the point beyond which his examination cannot properly be extended, the objection is generally brought before the court in the form of a demurrer to interrogatories; but the right to withhold the answer is the privilege not of the witness but of the client; it amounts to a species of incompetency. One of its properties is that it may at any time be waived by the client.

4430. When the right of the witness is a personal privilege, and he chooses to waive it, he may do so, and he will be competent. The objections usually made to answering interrogatories, and which are the grounds of demurrer, are four in number.

4431. No man is bound to criminate himself; he may therefore demur to an interrogatory the answer to which, however remotely connected with the fact, might have a tendency to prove him guilty of a crime or misdemeanor.⁴¹ An instance, showing the great extent to which this principle has been carried, occurred at *nisi prius*. In an action for a libel, in the shape of an extra-judicial affidavit sworn before a magistrate, it was held that the magistrate's clerk was not bound to answer whether, by the defendant's orders, he wrote it out and delivered it to the magistrate, because copying and showing a libel is assisting to publish it.⁴²

4432. Whenever the answer to the interrogatory might subject the witness to a forfeiture of his estate, or any thing in the nature of a forfeiture, he may demur; the rules respecting this ground of protection are very similar to those where the ground of protection is a penalty.⁴³

4433. A man's honor is as valuable as life itself, and the law will not permit it to be unnecessarily assailed, and will protect it. A witness may demur to an interrogatory the answer to which may show disgraceful conduct on his part. The principal question in cases of this kind is what shall be so considered.⁴⁴ Indeed, a case may be found where a demurrer by a witness to answer an interrogatory defamatory of a third person, and not material to the case, was allowed.⁴⁵

4434. Whenever it is against public policy that the witness should disclose his knowledge of facts, he may demur to interrogatories requiring him to testify as to them. Thus, a grand jurymen may demur to a question requiring him to disclose what passed in the jury room; one who possesses secrets of state, the disclosure of which would be prejudicial to the public interest,⁴⁶ may demur.

³⁹ 2 Daniell, Chanc. Pract. 556, 557.

⁴⁰ Gilbert, Ev. 138; Parkhurst v. Lowten, 2 Swanst. Ch. 194, where the cases are collected.

⁴¹ Paxton v. Douglass, 16 Ves. Ch. 242, 19 Ves. Ch. 227.

⁴² Maloney v. Bartley, 3 Campb. 210.

⁴³ Lord Uxbridge v. Staveland, 1 Ves. Ch. 56.

⁴⁴ See Matter of Kip, 1 Paige, Ch. N. Y. 601.

⁴⁵ Parkhurst v. Lowten, 2 Swanst. Ch. 198, n., where is cited Mulgrave v. Lord Dunbar.

⁴⁶ 1 Greenleaf, Ev. § 250; Gresley, Ev. 68. See Gray v. Pentland, 2 Serg. & R. Penn. 23; Goter v. Sanno, 6 Watts, Penn. 150; Law v. Scott, 5 Harr. & J. Md. 438.

4435. After the evidence has been returned either by the report of an examiner or an executed commission, it must pass publication. By this term is understood, in chancery practice, that liberty is given to the officer in whose custody the depositions of witnesses in a cause are lodged, either by the consent of the parties or the rules of the court, to show the depositions openly and to give out copies of them.⁴⁷

4436. The next matter to be considered is, whether there are any such defects in their substance or form, or the manner of taking them, as will induce the court to suppress the depositions. The ground upon which they will be suppressed is either that the interrogatories upon which they have been taken are leading, or that the interrogatories and the depositions taken upon them, or the depositions alone, are scandalous, or else that some fraud or irregularity has occurred in relation to them. A deposition may also be suppressed, because a witness has disclosed some matter which has come to his knowledge as solicitor or attorney of the party applying.⁴⁸

4437. As a general rule, there can be no re-examination of a witness after he has once signed his name to the deposition, and turned his back upon the commissioner or examiner,⁴⁹ for fear of tampering with or inducing him to retract or qualify what he has sworn to. But justice requires in some cases that a second examination of the same witness should take place, and it will be ordered accordingly. Thus, where the depositions have been suppressed for some irregularity in the conduct of the cause, accidental and unintentional, the court will direct the witnesses to be re-examined and cross-examined upon the original interrogatories,⁵⁰ unless the depositions have been suppressed on account of the interrogatories being leading, in which case it must be upon a new set of interrogatories, to be settled by the master.⁵¹ In some cases, too, where the depositions have not been suppressed, the court will make an order after publication for the examination of witnesses, for the purpose of proving some facts which have been omitted to be proved upon the original deposition; as, where the loss of a deed had been omitted to be proved by mistake, upon petition the plaintiff was allowed to exhibit an interrogatory before the examiner for the purpose of proving that the deed was lost.⁵²

⁴⁷ Pract. Reg. 297; Blake, Chanc. Pract. 143; 2 Daniell, Chanc. Pract. 562.

⁴⁸ Sandford v. Remington, 2 Ves. Ch. 189.

⁴⁹ Lord Abergavenny v. Powell, 1 Mer. Ch. 130.

⁵⁰ Perry v. Sylvester, Jac. Ch. 83.

⁵¹ Spence v. Allen, Prec. Chanc. 493; 1 Eq. Cas. Abr. 232; Arundell v. Pitt, Ambl. Ch. 585.

⁵² Cox v. Allingham, Jac. Ch. 137.

CHAPTER XVI.

THE HEARING AND DECREE.

- 4438. The hearing.
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4438. When the case has been fully prepared, it is set down for *hearing*; that is, the cause is put upon a list containing all the causes to be argued or heard, which list is made out for the use of the court. The cases are regularly called, and upon being reached they are argued by counsel or continued. The most usual reasons for applying to continue a cause are the discovery of some defect in the pleading which may render an amendment of the bill necessary.¹

Before the hearing the counsel prepare a paper book, or brief, for the hearing, which contains the title of the cause, a copy of the bill and answer, and such depositions as may have been taken, and such other matters which are spread out upon the record, so as to show all the points of the case.

When the case is called up, the counsel for the plaintiff generally open and close. The judges afterward make their decree, and generally give an opinion and the reasons upon which they found it.

4439. After having heard the arguments of the counsel of the respective parties, and fully considered the facts and the law of the case, the court pronounces its *decree*, which is a sentence or order of the court determining the right of all the parties to the suit, according to equity and good conscience. The decree is pronounced in open court, and entered upon the record.

In the further consideration of decrees it will be convenient to distribute the subject into the following heads: of the several kinds of decrees; of their form; upon whom the decree is binding; how it is enforced.

4440. The several *kinds of decrees* may be reduced to four: decrees *nisi*; decrees taken *pro confesso*; interlocutory decrees; and final decrees.

¹ 2 Daniell, Chanc. Pract. 619.

4441. By the English practice, when the cause is put in the paper of causes for hearing it is called in its rotation, and the bill is opened by the junior counsel for the plaintiff; if the defendant does not then appear by his counsel to open his answer, the court calls upon the plaintiff to prove the service of the subpoena to hear judgment, and upon that being done the plaintiff's counsel pray what decree they are of opinion will be most advantageous to their client, and the court accordingly pronounce the same, superadding thereto a provisional clause, "that the decree is to be binding upon the defendant, unless, being served with process, he shall, within a limited time, show cause to the contrary." This decree, being *sub modo* only, is emphatically called a *decree nisi*, or unless cause is shown.²

In praying a decree of this sort, the counsel ought to be very careful to embrace in it such directions only as he will be able to support in case the defendant appears to show cause, because a decree of this nature is not considered as a judgment of the court, but as an act of the party who obtains it, conceiving what the judgment would be if the other party had appeared, and it is taken at the peril of the party obtaining it, if he cannot support it by his pleadings and proofs.³ In this respect it differs from a decree taken *pro confesso*, which is an act of the court and not of the party.⁴

4442. A *decree* on a bill taken *pro confesso* is one entered by the court when the defendant has made a default in appearing within the time prescribed by the rules of court; by the rules of practice for the courts of equity of the United States,⁵ "in default of appearance at the proper time, the plaintiff may, at his election, enter an order, as of course, in the order book, that the bill be taken *pro confesso*, and thereupon the cause shall be proceeded in *ex parte*, and the matter may be decreed by the court at the next ensuing term thereof accordingly, if the same can be done without an answer and is proper to be decreed." "And such decree shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant."⁶

Unlike the case of a *decree nisi*, when the bill is to be taken *pro confesso*, the court hears the pleadings and itself pronounces the decree, and does not permit the plaintiff to draw it up as it does in ordinary cases where the defendant makes default at the hearing;⁷ and where, upon the hearing, it appears that the plaintiff had no equity, the bill will be dismissed.⁸

But there are some cases where a decree will not be made on a bill taken *pro confesso*, to avoid collusion, and because it is contrary to sound policy. A final decree of divorce *à mensâ et thoro*, therefore, is not made merely upon the bill *pro confesso* in the usual form. The facts of the case must be first ascertained.⁹

4443. An *interlocutory decree* is one made when some material circumstance or fact necessary to be made known to the court is either not stated in the pleadings, or so imperfectly ascertained by them that, by reason of that defect, the court is unable to determine finally between the parties; or when further direction generally is reserved till a future hearing. Such further hearing is termed a hearing upon further directions, or upon the equity reserved.¹⁰

² Gilbert, Ch. 156.

³ Carew v. Johnston, 2 Schoales & L. Ch. Ir. 300; Knight v. Young, 2 Ves. & B. Ch. Ir. 186.

⁴ Geary v. Sheridan, 8 Ves. Ch. 192.

⁵ Rules of the United States Courts, Equity rule 18.

⁶ Rules of the United States Courts, Equity rule 19.

⁷ Geary v. Sheridan, 8 Ves. Ch. 192.

⁸ Molesworth v. Lord Verney, 2 Dick. Ch. 667.

⁹ Barry v. Barry, Hopk. Ch. N. Y. 118.

¹⁰ Seton, Decr. 2.

It very seldom happens that a first decree can be final or conclude the cause; for, if any matter of fact be strongly contested, and there is some doubt, the court is so sensible of the deficiency of trial by written evidence that it will not bind the parties by such trial, but will refer the matter to be tried by a jury. As jurors are never summoned to attend the court of chancery, the fact is usually ordered to be tried at the bar of one of the courts of law upon a feigned issue.¹¹

The necessary consequence of sending a feigned issue to be tried at law is, that no final decree can be made until the feigned issue has been tried. The first decree directing the feigned issue¹² is therefore merely an interlocutory decree, directing the issue and reserving the consideration of the further questions in the cause until after the trial of the issue.

4444. A *final decree* is one which disposes of the whole cause and leaves nothing further to be done;¹³ it does not reserve the consideration of the points of equity arising upon the determination of the legal rights of the parties, or of the further directions upon the master's report, or the costs of the suit, but when made and enrolled, it may be pleaded in bar to any new bill of the same matter. A decree is final, not only when it adjudicates as to the rights of the different parties, but also when it dismisses the plaintiff's bill;¹⁴ for, in such case, the decree may be pleaded in bar to a new suit, unless accompanied with a direction that the dismissal is to be without prejudice to the plaintiff's right to file another bill. Directions of this sort are inserted, where the dismissal is occasioned by some slip or mistake in the pleadings or in the proof.¹⁵

4445. In their *form* it may be observed that decrees consist of three parts: the date and title; the recitals; and the ordering part.

4446. The decree commences with a recital of the day of the month and year when it was pronounced, and the names of the several parties to the cause. Both parties should have the titles in the decree which are given to them in the bill; if, for example, the plaintiff is described as executor in the bill, he must be so named in the decree.

4447. Formerly, the decree contained recitals of the pleadings in the cause, which became a great grievance. Some of the English chancellors endeavored to restrain this prolixity. By the rules of practice for the courts of equity of the United States, it is provided that in drawing up decrees and orders neither the bill nor the answer, nor other pleading, nor any part thereof, nor the report of any master, nor any other prior proceedings, shall be stated or recited in the decree or order.¹⁶

4448. The ordering or mandatory part of the decree contains the specific directions of the court upon the matter before it. It is manifest that these directions must depend upon the nature of the particular case which is the subject of the decree; when the decree is merely interlocutory, it directs an issue, or a case at law, or an inquiry to be made, or an account to be taken by a

¹¹ The nature and use of a feigned issue have been explained. See before, 3014.

¹² This is not, properly speaking, a decree; it is more of the nature of a direction for a preliminary inquiry, and, for this reason, it is termed "an order;" it is in the nature of a "decretal order," but, strictly speaking, it is not a decretal order, which is an order in the nature of a decree, made upon motion or petition. 2 Daniell, Chanc. Pract. 637.

¹³ *Tennant v. Paterson*, 6 Leigh, Va. 196; see *Haskell v. Raoul*, 1 M'Cord, Eq. So. C. 32; *Patterson v. Gaines*, 6 How. 585; *Harvey v. Branson*, 1 Leigh, Va. 108; *Larue v. Larue*, 2 Litt. Ky. 251; *Field v. Ross*, 1 T. B. Monr. Ky. 137; *Weatherford v. James*, 2 Ala. N. S. 170; *Wright v. Miller*, 3 Barb. Ch. N. Y. 382.

¹⁴ *Holmes v. Remsen*, 7 Johns. Ch. N. Y. 286; *Thompson v. Clay*, 3 T. B. Monr. Ky. 361.

¹⁵ 2 Daniell, Chanc. Pract. 638.

¹⁶ Rules of the United States Courts, Equity rule 86.

master ; it usually contains a reservation of the further matters to be decided, and, generally, also the costs of the suit, till after the event of the issue, or of the inquiry or account, shall be known.¹⁷

4449. All the original parties to the suit, and those who are afterward made parties either to the suit or the decree, of full age, compos mentis and sui juris, and their privies, and such as claim under them, by an act done pendente lite, are regularly bound by the decree.¹⁸

4450. When one comes in *pendente lite*, and while the suit is in full prosecution, without any color of allowance or privity of the court, in such case a general decree binds such person ; but if there were any intermission in the suit, or the court were made acquainted with the conveyance, the court will order upon the special matter according to justice and equity.¹⁹

But to render thus a purchaser pendente lite bound by a decree, the decree must put a conclusion to the matter in question. The pendency of the suit is presumed to be known, because all persons, for this purpose, are presumed to know what passes in courts of justice, and the presumption is established to prevent great mischief which otherwise would arise. When it is only a decree to account, that is, still such as affects the purchaser with notice ; but when money is secured upon an estate, and there is a question depending in the court of chancery upon the rights or about that money, but no question relating to the estate upon which it is secured, a purchaser of the estate pending the suit will not be affected with notice by such implication as the law creates by the pendency of a suit.²⁰

4451. It is one of the cardinal principles, both at law and in equity, that no judgment or decree shall be rendered against any one who is not a party to the proceedings, and who has not had an opportunity of being heard, though a court of equity will, in the first instance, decree against the party ultimately responsible, where the parties are before the court at the time of the decree, but not otherwise.²¹

In general, not only parties, but all privies to the parties before the court, are bound by the decree. Therefore, though ordinarily the decree only binds the parties to the suit, he who purchases during the pendency of the suit is bound by the decree which may be made against the person from whom he derives title. An assignee of an equity of redemption, pending the suit for redemption, is bound by the decree.²² For the same reason, a purchaser of an estate charged with debts, pending a suit by creditors, is bound by the decree.²³

It is a rule that a conveyance made pending a suit does not vary the rights of the parties in the suit : *pendente lite nihil innovatur*. Such conveyance gives no better right to the purchaser than the grantor had, and has no effect with reference to any beneficial result against the plaintiff in the suit ; for the litigating parties are not required to take notice of a title acquired under such circumstances.

But the decree does not bind any one who comes in *bonâ fide* by a conveyance from the defendant before the bill exhibited, and where he is not a party, either by bill or order.²⁴

4452. In some of the states, statutes have been passed giving a remedy dif-

¹⁷ 2 Daniell, Chanc. Pract, 667.

¹⁸ Pract. Reg. 125 ; 1 Harrison, Chanc. Pract. 433.

¹⁹ Toth. 45.

²⁰ 3 Atk. Ch. 392.

²¹ Garnet v. Macon, 6 Call, Va. 308 ; Sparhawk v. Buell, 9 Vt. 41.

²² Garth v. Ward, 2 Atk. Ch. 175.

²³ Walker v. Smallwood, Ambl. Ch. 676.

²⁴ See Beames, Ord. 7.

ferent from the one at common law, where the writs used in the law courts have been adapted to enforce *the execution of decrees* in equity.²⁵

At common law, independently of any statute, according to the English practice, the courts of chancery act upon the person and not upon the estate, so that a decree will not bind the right of the defendant in his land. But still those courts possess the power not only to commit the parties for their non-compliance with their decrees, but also will sequester personal estate and land, and by a writ of assistance order the delivery up of the possession of the estate itself.

The modes of enforcing a decree where there is no statutory provision for that purpose, according to the English practice, which may still be pursued in some of the states, are as follows: by writ of execution and attachment, by sequestration, and by writ of assistance.

4453. When a decree or order has been made directing some act to be done by any party on record, its performance may be enforced by the personal service of a writ of execution of the decree or order upon that party; and upon a neglect to comply with it, an attachment will issue against him, for in that case he will be acting in contempt of the court.

There is a marked difference in the effect of a commitment between that process in equity and a commitment under a *capias ad satisfaciendum* at law; the former does not operate as a satisfaction of the decree, and, therefore, the plaintiff may have any other means allowed by law for the purpose of enforcing it. The commitment of the defendant for a contempt in not obeying the decree of the court will be no bar to a sequestration, or any other remedy. On the contrary, at law, the commitment of the defendant under a *capias ad satisfaciendum* is a complete bar at common law against any further proceeding.

4454. When the attachment is returned *non est inventus*, the plaintiff must proceed to a sequestration. If, on the contrary, the defendant has been arrested under the attachment, and committed for the contempt, the party prosecuting the contempt is at liberty to move for a sequestration against him.²⁶

Sequestration in chancery practice is a writ or commission, sometimes directed to the sheriff, but most usually to four or more commissioners of the complainant's own nomination, authorizing them to enter upon the real and personal estate of the defendant, and to take the rents, issues, and profits into their hands, and keep possession of them, or pay the same as the court shall order and direct, until the party who is in contempt shall do what he is enjoined to do, and which is especially mentioned in the writ.²⁷

4455. When the sequestration has not been executed, in consequence of any obstacle lawfully interposed in the way of the commissioners or sheriff, the complainant may have a writ of assistance; or when possession is not given upon an affidavit of the personal service of the writ of execution and demand of possession, and refusal, the plaintiff may then also obtain an order of course for a writ of assistance, which is drawn up in this form, "that a writ of assistance do issue, directed to the sheriff of _____ county, to put the said plaintiff in possession of the premises in question, pursuant to the said decree."

The writ is directed to the sheriff of the county in which the lands lie, and, after reciting the ordering part of the writ of execution, authorizes the sheriff to put the party into possession, and to maintain him there, and commands him,

²⁵ *Coombs v. Jordan*, 3 Bland, Ch. Md. 303; *The Cape Sable Company's Case*, 3 Bland, Ch. Md. 606. See *Norton v. Tallmadge*, 3 Edw. Ch. N. Y. 301; *Hall v. Dana*, 2 Aik. Vt. 381; *Lafin v. Relyea*, 7 Paige, Ch. N. Y. 368; *Coleman v. Cocke*, 6 Rand. Va. 618; *McNair v. Ragland*, 2 Dev. Eq. No. C. 42.

²⁶ See *Dunkley v. Scribner*, 2 Madd. Ch. 443; *Errington v. Ward*, 8 Ves. Ch. 314.

²⁷ 1 *Harrison*, Chanc. Pract. 191; *Newland*, Chanc. Pract. 18; *Blake*, Chanc. Pract. 103; 1 *Smith*, Chanc. Pract. 432; *White v. Gevaerd*, 1 Edw. Ch. N. Y. 336.

on the receipt of the writ, to enter into the premises and eject the defendant therein named, his tenants, etc., from the same, and to put the complainant in possession, and to defend him from time to time, in case any interruption shall be offered to such possession.

A writ of assistance will be granted, after a sequestration, where the possession of the land was in the defendant at the time of the decree, and afterward such possession has been delivered to a third person, though for a personal demand, and oblige the person in possession to come before the court and be examined *pro interesse suo*.²⁸

4456. Having attained the end of our labors, if we take a retrospective view of the subjects which have so long occupied our attention, we shall naturally be struck by the fact that the number of rules and their exceptions of which our code is composed is immense. Without a correct classification, this mass would be a perfect chaos. When properly arranged, these rules are not only easily understood by the diligent student, but can be recollected. He who would study chronology without a division of time would not accomplish much; but by its proper arrangement into periods it is not difficult to place any event which has happened in the course of ages where it ought to be.

To the unlearned and superficial observer, it may appear strange that so many rules should be required for the guidance of men in the common affairs of life. If these rules are so many laws binding on them, it will be asked, why is a code made so complex? is it not unjust to require that all persons should know these numerous provisions, or be punished for an ignorance which is almost unavoidable when they violate any of them? It cannot be denied that some of the requirements of the law are arbitrary, and not easily understood by any but experienced lawyers, yet most of its provisions are founded on that common sense which men generally possess. These rules are a mere amplification of the principles of natural justice. Most of them, both at law and in equity, have their foundation on the sublime gospel command: "All things whatsoever ye would that men should do unto you, do ye even so to them."²⁹ Unless laboring under mania, or some other mental defect, men generally perceive right from wrong.

But in a country where the laws are and must reign supreme, it is of the greatest consequence that they should be certain, and, for this purpose, they must be very numerous. When the balance of justice is put in the hands of so fallible a being as man, he must have a rule by which to exercise his power; to restrain him from doing wrong when his prejudices incite him to it; to keep him within proper bounds in the exercise of his functions; and to support and encourage him when he is in the right. The law is a lamp in the path of the judge to guide him in his difficult course; a barrier to the oppressor; a shield to the innocent; a protection to the weak; and a blessing to all. In a despotic country, where the will of the sovereign or his minions disposes of the lives, the honor, and the property of his subjects, laws are unnecessary. The same power which makes them puts them into execution; there, the code is very simple—the will of a tyrant.

While, like all other human institutions, the law is not perfect, and has many excrescences of which it might be profitably pruned; though it might be greatly simplified by casting away many of the provisions which grew upon it in a dark age; yet it is the greatest monument human wisdom ever erected, and no country can be happy without it; it is the ark of safety, its presence secures order and peace, its absence produces chaos and anarchy: *in societate civili aut lex aut vis valet*.³⁰

²⁸ Bird v. Littlehales, 3 Swanst. Ch. 299, n. (a).

³⁰ Bacon, De Augmentis Scientiarum, lib. viii, c. 3, Aph. 1.

²⁹ Matth. vii 12.

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